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BY: *William M. Grace*

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8 Attorney for Defendant William M. Grace
9 (Owner of Assessor's Parcel No. 103-01-002K)

10 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
11 **IN AND FOR THE COUNTY OF YAVAPAI**

12	JOHN B. CUNDIFF and)	
13	BARBARA C. CUNDIFF, his wife,)	
14	<i>et. al.,</i>	)	Action No. P1300-CV2003-0399
15)	
16	Plaintiff,	)	SEPARATE RESPONSE OF
17		)	WILLIAM M. GRACE TO
18	v.	)	APPLICATION BY PRIMARY PLAINTIFFS
19		)	FOR ATTORNEY'S FEES
20	DONALD COX and)	
21	CATHERINE COX, his wife,)	
22		)	Assigned to the Honorable
23	Defendants.	)	Kenton D. Jones
24)	

25 For at least as long as this case has been litigated, the issue it presents to the Court, the question of the likely abandonment of some or all of the various property restrictions (the "Restrictions") within the *Declaration of Restrictions* attached as Exhibit A to the *Complaint* (the "Declaration") for the property described in Section 1 of the *Complaint* ("Coyote Springs Ranch") has hung like a cloud over this enormous landscape that includes 6+ square miles of property located within 8 sections of land falling within a 2 x 5 mile rectangle, and includes 288+ parcels that could ultimately be further downsplitted into as many as 393 parcels at 9+ acres.

1 As this case was presented to the Court by the original Plaintiffs and any Plaintiffs who
2 later clearly joined their ranks (collectively, the "Primary Plaintiffs") and the original
3 Defendants and Defendants who later clearly joined their ranks (collectively, the "Primary
4 Defendants"), the single issue was an all-or-nothing question a complete abandonment of
5 those Restrictions.

6 With the case so presented to the Court, it made the only proper decision that it could...
7 It said it would not throw the beautiful baby with the dirty bathwater.

8 For the question of the assessment of any attorney's fees against Defendant William M.
9 "Matt" Grace ("Matt"), as the sole present owner of Assessor's Parcel No. 103-01-002K, a 10
10 acre parcel located at 8850 East Pronghorn Lane (the "Grace Parcel"), (if not also for other
11 value in the case), the Court must look to whether anyone in this epic struggle ever thoroughly
12 briefed the question of whether the Court could ultimately find a partial abandonment of
13 those Restrictions... and save the beautiful baby, but toss the dirty dishwater.

14 **1. Private Law (Property Restrictions) vs. Public Law (Zoning)**

15 To understand the importance of this question, one first must consider what would
16 happen to the community of Coyote Springs, if the private law, the different Restrictions at
17 issue in the case were deemed abandoned, leaving the public law, the zoning, standing alone.

18 **a. The Beautiful Baby.**

19 If the 9 acre minimum lot size Restriction found in the existing private law, Section 3 of
20 the Declaration, was ultimately ruled as abandoned in this case, the level of protection within
21 Coyote Springs would fall to the 2 acre minimum lot size of the public law, the applicable "R1-
22 2A" residential county zoning. That would have an enormous impact on the rural residential
23 community of Coyote Springs ultimately allowing 4 times as many houses with serious related
24 questions such as a suitable water available supply and the additional burden on the
25 infrastructure, and the inherent change in the very nature of the area.

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1 This is also important because, as a matter of law, meaning without any genuine issue of
2 fact, all evidence readily shows that this Restriction, considered by itself, was never violated to
3 the degree that it could be considered as abandoned.

4 **b. The Dirty Bathwater.**

5 However, if the prohibition against any "trade, business, profession or any other type of
6 commercial or industrial activity" in Section 2 of the Declaration were ultimately ruled as
7 abandoned it would not have a dramatic impact on the character of the Coyote Springs rural
8 residential subdivision and community. The softer types of "commercial" activity that would
9 be allowed by the applicable zoning, as home occupations or through special use permits,
10 would be the sorts of secondary rural activity that is largely be in character with the area.

11 In this case, the evidence at a glance readily shows a existence of widespread violations of
12 this Restriction, which might create a genuine issue of material fact, if they could be ultimately
13 be ruled by the Court as separately abandoned.

14 **2. Position of Matt Grace.**

15 As explained by the Declaration of Matt's counsel, Noel J. Hebets ("**Hebets**"), which
16 attached as **EXHIBIT A**:

17 After Matt was mistakenly included as "Defendant" in this case, he called upon Hebets in
18 August, 2010 to decide what to do. After a reasonable investigation, including reviewing
19 extensive filings in the case, and beginning case law research into the question of *partial*
20 *abandonment* of property restrictions, Hebets informed Matt that he saw the dispute as a
21 something akin to a grudge match lasting several years, where the parties were so badly
22 polarized in their all-or-nothing claims regarding *complete abandonment*, that they were not
23 likely to advocate for the *partial abandonment* of the Restrictions that Hebets felt actually
24 existed, and could be most likely be supported by Arizona law, or an argument for a good faith
25 advancement of that law.

1 Matt then agreed that Hebets should proceed to separately support that position, if
2 necessary, and Hebets thereafter filed his December, 2010 Notice of Appearance for Matt, and
3 then his February 17, 2011 *Motion to Amend Answer of Defendant William M. Grace*, along
4 with his proposed form of *Amended Answer of William M. Grace*, both of which clearly
5 described the need to consider partial abandonment of the Restrictions, meaning
6 abandonment of the commercial activity Restriction in Section 2 of the Declaration, but not the
7 Restriction to 9 acre minimum lot sizes in Section 3.

8 When that motion was granted by the Court, Hebets then filed that Amended Answer,
9 and waited for another 4 months continually tracking the various filings with the Clerk to see if
10 counsel for the Primary Plaintiffs had ultimately served all of the various necessary property
11 owners within Coyote Springs.

12 When counsel for the Primary Plaintiffs finally crossed that line, Hebets in June 2011
13 began substantial work on the deep research necessary to decide whether an Arizona Court
14 could find partial abandonment of the Restrictions, particularly when the unique circumstance
15 if this case dictated that such a finding as the optimal outcome for the entire community and
16 subdivision of Coyote Springs, and concluded that it could, if not should, do so.

17 The email by which he then shared his work product with the counsel for the Primary
18 Defendants, and the reply of that counsel, as well as that substantial work product itself, are
19 attached hereto as **EXHIBITS B, C & D**. As they show, Hebets was suggesting that the
20 Defendants in the case meet to consider pursuing partial abandonment of the Restrictions, and
21 to first use their intent to do so as a basis to pursue settlement along those lines.

22 Despite the fact that a finding of a partial abandonment of the Restrictions in Section 2
23 might effectively allow his clients to be deemed as prevailing parties, counsel for the Primary
24 Defendants initially rejected the work product. Moreover, his primary clients then approached
25 Matt asking him to not pursue partial abandonment any further.

1 This put Matt in a very awkward position. These neighbors had been involved in this case
2 for years, and were some of the original Defendants. Being a good neighbor, he decided to
3 acquiesce to their demands, and instructed Hebets to proceed no further in pursuit of such a
4 finding of partial abandonment of the Restrictions.

5 As time passed and the inevitable outcome finally arrived in the Court's June 14, 2013
6 *Under Advisement Ruling*, Hebets sent an email informing Matt, (then and still out of the state),
7 of the ruling. Matt would have continued without asserting that partial abandonment should
8 be considered, except that he then received from counsel for the Primary Plaintiffs the July 2,
9 2013 *Plaintiffs' Rule 54(g) Motion for Award of Attorney's Fees and Non-Taxable Costs*, to which
10 this Response is directed, without a proposed form of Judgment, and could not obtain from
11 said counsel adequate assurances that Matt would not be unduly penalized by any award of
12 attorney's fees for his separate position and minimal role in the drama.

13 **3. Applicable Law.**

14 At issue for the question of assessing attorney's fees against Matt, particularly
15 considering the factors set forth in the case of *Associated Indemnity Corp. v. Warner*, 143 Ariz.
16 567, 694 P.2d 1181 (1985),¹ is how his inactive presence in the case made any difference
17 whatsoever to the prevailing parties. No one in the case opposed him amending the previous
18 Answer in which he had collectively been joined with other parties denominated Defendants,
19 and he never prosecuted his Amended Complaint or made any other assertive filings.

20
21 ¹ 1. The merits of the claim or defense presented by the unsuccessful party.

22 2. The litigation could have been avoided or settled and the successful party's efforts were
23 completely superfluous in achieving the result.

24 3. Whether assessing fees against the unsuccessful party would cause an extreme hardship on that
25 party.

4. The successful party did not prevail with respect to all of the relief sought.

5. The novelty of the legal question presented, and whether such claim or defense had previously
been adjudicated in this jurisdiction.

1 Any disclosures the Primary Plaintiffs made to Matt were made in general to others. So
2 there were no separate steps taken by them that were a direct result of his presence in the
3 case; instead, all actions in the case were directed at the Primary Defendants. And he did not
4 even appear in the case during the early years, before the Court of Appeals directed that all
5 property owners within Coyote Springs be given a chance to appear in the case.

6 If the Court is now inclined to assess any attorneys fees or costs against Matt, he would
7 ask it to first consider *sua sponte* revising its June 14, 2013 ruling to say that it stands on its
8 determination that the 9 acre minimum lot size Restriction in Section 3 of the Declaration has
9 not been abandoned as a matter of law, and to ask all interested parties in the case wishing to
10 do so to thoroughly brief the issue of whether or not the Court might find a partial
11 *abandonment* of the Restrictions under the applicable Arizona law, so it may properly consider
12 how to handle the question of a possible, if not probable, abandonment of the Restriction
13 against commercial activity in Section 2 of the Declaration, all while it puts all other matters in
14 the case on hold, including any question of an award of attorney's fees to any party.

15 Whatever have been the shortcomings of the actions taken by the parties in this case, the
16 rural residential subdivision and community of Coyote Springs deserves a rightful outcome of
17 this dispute.

18 RESPECTFULLY SUBMITTED this 19th day of July, 2013.
19

20
21 
22
23 Noel J. Hebets, NOEL J. HEBETS, PLC
24 -- Attorney for Defendant William M. Grace
25 (Owner of APN 103-01-002K)

1 The undersigned certifies that, on this 19th day of July, 2103, the original of the foregoing
2 document was mailed to the Clerk of the Court, while: (a) copies were e-mailed to counsel or
3 other parties at the email addresses shown below, and (b) notices of the filing of this
document were mailed to any parties for whom only postal addresses are shown below:

4 (a) Parties receiving copies by email only:

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12 (b) Parties receiving notice of the filing this the forgoing document by US mail with explanation
13 that it will soon be available on at <http://apps.supremecourt.az.gov/docsyav/>, the Clerk's
14 online site for High Profile Cases, and that they will be provided sooner copies of such filings if
15 they provide their email address pursuant to the following order within the Court's June 15,
16 2010 Notice, itself filed with the Clerk on June 17, 2010:

17 **IT IS ORDERED** by June 30, 2010 or at the time of filing an initial pleading or motion
18 with the Court, whichever is sooner, all parties and attorneys appearing in this case **SHALL**
19 designate and maintain an e-mail address with the Clerk of the Court **and** the other parties. The
20 e-mail address will be used to electronically distribute any document, including minute entries
21 and other orders, rulings, and notices described in Rule 125, *Rules of the Supreme Court* by e-
22 mail or electronic link in lieu of distribution of paper versions by regular mail. The e-mail
23 address shall be designated on each document filed. In the event that a party's e-mail address
24 changes, that change shall immediately be brought to the attention of the Clerk of Superior Court
25 and included on subsequent filings and pleadings.

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15 *pro se*

16 by:
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EXHIBIT A

Declaration of Noel J. Hebets, Attorney at Law

Noel J Hebets, being first duly sworn upon oath deposes and says that:

1. I am over 18, and otherwise competent to testify in a court of law.

2. I have been practicing law in Arizona since my admission to the bar in 1977, and have focused nearly all of my work during that time on matters pertinent to the ownership, development and construction of Arizona real estate, with a particular emphasis during the last 23 years on matters pertinent to the development of natural desert and other rural ground, particularly in the unincorporated areas of the counties.

3. I have been the attorney for Defendant William M. "Matt" Grace ("**Matt**") in the case of *Cundiff v. Cox*, Yavapai County Superior Court Cause No. P1300 CV2003-0399, since the Court approved a *Substitution of Counsel* on January 24, 2011.

4. I have known Matt since serving as house counsel for his father, developer WM Grace in the 1980s, and have helped him with various real estate matters over the last several years.

5. In August, 2010, Matt showed me papers indicating he had recently, but mistakenly, been included as a Defendant in the *Cundiff v. Cox* case by the attorney for the original Defendants and Defendants who later joined their ranks (collectively, "**Primary Defendants**").

6. I told him I would look into the case, and let him know whether he should stay in that status; have me appear on his behalf, or take some other step.

7. During September, I researched the case, including sending emails requesting information to counsel for the original Plaintiffs and any Plaintiffs who later joined their ranks (collectively, the "**Primary Plaintiffs**") and then talking with counsel for the Primary Defendants.

8. I then met with Matt again, and told him that it looked to me like the original Plaintiffs and Defendants had been locked in polarized positions, if not a grudge match, for several years seeking to have the property restrictions (the "**Restrictions**") in the *Declaration of Restrictions*

1 (the "Declaration") for the Coyote Springs subdivision ruled as either completely in force, or
2 completely abandoned, and that I felt they may well have been partially abandoned, and
3 offered to appear and file an amended separate answer on his behalf to assert that position.

4 9. He agreed that I should do, which resulted in my then doing the initial work necessary
5 under Rule 11 to include partial abandonment in Matt's Amended Answer, as is evidenced by
6 the following entries from my time sheets:

7	10-12	Begin work on <i>Amended Answer of William M. Grace</i> . Email to Jeffrey Adams re: lack of reported appellate cases, when Jeff Coughlin said there had been 5 appeals to Court of Appeals and 2 to Supreme Court. Create Research folder and subfolders for case law on CC&Rs and Servitudes. Save statute and 3 cases from prior research into CC&Rs folder, and 2 memos and 11 cases from prior research into Servitudes folder. Create New Research subfolder and begin 3 memos therein: (1) copy pertinent case law citations and discussion from Plaintiff's 12-1-2004 MSJ, Defendants' 6-24-2005 MSJs re: both vagueness and ambiguity and agricultural activities, Plaintiff's response to latter; (2) falling from private law protections (CC&Rs) to public law protections (zoning); and (3) <i>Powell v. Washburn</i> .	6.0
14	10-13	Additional work on Matt's Amended Answer.	2.0
15	12-26	Download all significant court filings since last time done (12-13), including Notice and Application described above. Begin Motion to Amend Answer of Defendant William M. Grace. Copy and insert references to Paragraphs 2, 3 17 & 18 of CC&Rs. Build separate research files for statute of limitations and amending pleadings; get copies of applicable cases from prior research, and get updated copy of annotated Rule 15(a). Insert citations to 4 & 6 year statutes of limitations and cases re: same. Additional work to complete Amended Answer.	5.5

20 10. After filing my Notice of Appearance, I then filed my February 17, 2011 *Motion to Amend*
21 *Answer of Defendant William M. Grace*, along with my proposed form of *Amended Answer of*
22 *William M. Grace*, both of which clearly described the need to consider partial abandonment of
23 the Restrictions, meaning abandonment of the commercial activity Restriction in Section 2 of
24 the Declaration, but not the Restriction to 9 acre minimum lot sizes in Section 3.
25

1 11. When that motion was granted by the Court, I then filed that Amended Answer, and
2 waited, for another 4 months, continually tracking the various filings with the Clerk to see if
3 counsel for the Primary Plaintiffs had ultimately served all of the various necessary property
4 owners within Coyote Springs.

5 12. In June 2011, after counsel for the Primary Plaintiffs finally crossed that line, I began
6 substantial work on the deep research necessary to decide whether an Arizona Court could
7 find partial abandonment of the Restrictions, particularly when the unique circumstances of this
8 case dictated that such a finding as the optimal outcome for the entire community and
9 subdivision of Coyote Springs, and concluded that it could, if not should, do so. The following
10 entries from my times sheets indicate my work involved in that effort:

- 11
- 12 6-27 Bring 1995 Scholten-Blackhawk and 1999 Rensel cases, with
13 comparison notes from each from other client's folder, and store in
14 CC&Rs - Research Subfolder. Also go online to Lexis-Nexis to find
15 and download copies of 4 additional cases into the Servitudes
16 Research Subfolder – 1973 Herman, 1949 Solana, 2002 Paxon, and
17 1925 Day. 1.0
- 18 6-28 Capture in new internal memo in New Research subfolder portion of
19 our own 2-17 *Motion to Amend Answer* that discusses the differences
20 in falling from private law (Declaration) to public law (zoning) for
21 both anti-commercial use restrictions and minimum lot size
22 restrictions. Use 10-12-2010 internal summary memo in New
23 Research subfolder with copies of pertinent case law citations and
24 discussion from Plaintiff's 12-1-2004 MSJ, Defendants' 6-24-2005
25 MSJs re: both vagueness and ambiguity and agricultural activities,
Plaintiff's response to latter. Go online to Lexis-Nexis to find and
download copies of all cases cited therein, including: 1996 R&R
Realty, 1974 Grossman, 1979 Duffy, 1983 Pintetop Lakes, 1990
Federoff, 1993 AZ Biltmore, 1993 Chandler Medical Building, 2000
Awhatukee, and 2001 Horton cases. Begin internal research memo to
summarize same. 3.0

1	6-30	Go online to Lexis-Nexis to find and download and save into new Abandonment Research subfolder copies of Arizona cases that deal with waiver or abandonment of restrictions and/or non-waiver provisions therein, and pertinent cases cited therein, including: 1948 O'Malley, 1954 Condos, 1974 Riley, 1976 Carter, 1980 Adams, 1995 Simms, 2003 Garden Lakes (Texas), 2004 Burke, 2008 Venture Out, 2010 College Book Centers, and 2010 Cropley. Begin review of same cases and begin saving pertinent holdings and summary notes on internal research memo of same cases.	3.5
2	7-6	Continue work on internal research memo summarizing holdings of cases that deal with waiver or abandonment of restrictions and/or non-waiver provisions therein.	3.0
3	7-8	Continue work on internal research memo on abandonment vs. non-waiver cases. Begin parallel memo capturing holdings and arguments from same. Build into first two sections of argument memo a summary of pertinent background facts about Coyote Springs Ranch and provisions of the Declaration pertinent to abandonment question. Use Excel spreadsheet to prepare image of Coyote Springs Ranch to show how it includes over 6 sqmi of ground spread over 8 sections framed in a 2 x 10 section block, and incorporate into first section of argument memo. Separate and summarize cases that do not address abandonment vs. non-waiver from cases that do.	4.5
4	7-9	Extensive additional work on both research and argument memos re: abandonment vs. non-waiver. Research and obtain additional background information for the 2004 Burke case from Maricopa County Assessor's and Recorder's website, including recorded plat. Create parallel map from Google map as visualization tool. Build results into argument memo.	7.0
5	7-10	Additional work on both research and argument memos re: abandonment vs. non-waiver to point of completion. Copy body of research memo into initial draft of formal <i>Memorandum in Support of Request for Settlement Conference</i> . Include Introduction section that includes bulk of text on internal memo in New Research subfolder that discusses the differences in falling from private law (Declaration) to public law (zoning) for both anti-commercial use restrictions and minimum lot size restrictions. Initial draft of parallel and shorter <i>Request for Settlement Conference</i> .	4.5
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1	7-12	Revise <i>Memorandum in Support of Request for Settlement Conference</i> to better emphasize the characteristics of the non-waiver clause that would allow evidence supporting the equitable defense of partial abandonment, including both localized and widespread abandonment. Update form of Caption to show new addresses for new pro se parties resulting from both of the 7-5 orders of withdrawal. Build same into approved form of Amended Answer, and prepare same for filing with Clerk of the Court. (2+ hours)	1.0
2			
3	7-13	Minor revisions to major memo regarding 2005 Vales case. TC and email to Karen Wilkes, deputy clerk, re: email addresses for <i>pro se</i> parties in case.	0.6
4			
5	7-14	Mail Amended Answer to Clerk for filing, and email copies of same to other parties with email addresses, as well as updated list of addresses and emails for all parties. Email to Matt Grace providing information re: requested meeting and attaching copies of draft of proposed Settlement Memorandum and 2 related documents.	1.0
6			
7	7-15	Revise Settlement Memo to incorporate settlement related comments with expectation of not filing it with Court. Send drafts of proposed Settlement Memo and Request for Settlement Conference to Jeffrey Adams, attorney for primary defendants, with email asking for his input in 6 areas to better prepare for meeting with Matt Grace.	1.0
8			
9	7-25	Email to Sandra requesting update on chances of meeting with Matt. Save her reply and send Matt email, voice mail and text requesting meeting before he departed for Missouri.	0.0
10			
11	8-4	Review and save email from Jeffrey Adams.	0.0
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16 13. The email by which I then shared my work product with the counsel for the Primary
17 Defendants, and the reply of that counsel, as well as that substantial work product itself, are
18 attached as Exhibits B, C & D to the same Response to which this Declaration is attached. As
19 they show, I was suggesting that the Defendants in the case meet to consider pursuing partial
20 *abandonment* of the Restrictions, and to first use their intent to do so as a basis to pursue
21 settlement along those lines.

22 14. As that same email from Counsel for the Primary Defendants shows, he initially rejected
23 the work product.

24 15. More important, his clients then went to see Matt, and asked that he not pursue partial
25 abandonment of the Restrictions within the Declaration.

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16. This put Matt in a very awkward position. These neighbors had been involved in this case for years, and were some of the original Plaintiffs. Being a good neighbor, he decided to acquiesce to their demands, and instructed me to proceed no further in pursuit of such a finding of partial abandonment of the Restrictions.

17. I then could only watch as time passed and the inevitable outcome finally arrived in the Court's June 14, 2013 *Under Advisement Ruling*, and sent an email informing Matt, who was then and is still out of the state, of what had happened.

18. Matt would have continued without asserting that partial abandonment should be considered, except that I then received from counsel for the Primary Plaintiffs the July 2, 2013 *Plaintiffs' Rule 54(g) Motion for Award of Attorney's Fees and Non-Taxable Costs* without a proposed form of Judgment, and could not obtain from said counsel adequate assurances that Matt would not be unduly penalized by any award of attorney's fees for his separate position and minimal role in the drama.

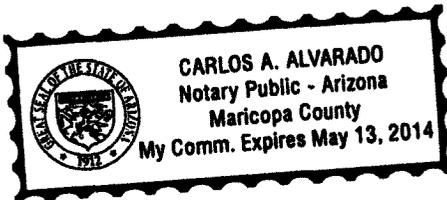
.....
Noel J Hebets

STATE OF ARIZONA)
) ss.
County of Maricopa)

Date of Acknowledgment:
July 19th, 2013

SUBSCRIBED AND SWORN TO before me on the Date of Acknowledgement reflected above by Noel J Hebets, whose identity was proven to me on the basis of satisfactory evidence to be the person who he claimed to be, and acknowledged that he signed the above/attached document.

Affix notary seal here:



.....
Notary Public

EXHIBIT A

EXHIBIT B

From: jradamslaw@aol.com [mailto:jradamslaw@aol.com]
Sent: Thursday, August 04, 2011 8:14 AM
To: noel@noelhebets.com
Subject: Re: Partial Abandonment, Settlement Conference & Settlement Offers

Noel,

I have had an opportunity to review the drafts of what you sent to me and I am still not convinced that the Court can partially abandon singular provisions of a set of restrictive covenants. I am open to discussing the matter further but the Burke and Carefree Foothills cases seem to settle the matter in our view. I also see no particular advantage to be gained by submitting such a substantive memorandum together with a request for a settlement conference. It has been my experience with the judges here in Yavapai County that they do not wish to read lengthy memoranda in connection with a request for a settlement conference. Rather, generally a simple request will be honored. I also am open to a meeting with the party defendants at a location to be chosen by you or me. Let me know.

Jeff

Jeffrey R. Adams, Esq.
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P.O. Box 2522
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-----Original Message-----

From: Noel J. Hebets <noel@noelhebets.com>
To: JRAdamsLaw <JRAdamsLaw@aol.com>
Sent: Fri, Jul 15, 2011 1:15 am
Subject: Partial Abandonment, Settlement Conference & Settlement Offers

Jeff:

First, please remember that I work from home, and often work when my mind is clearest.

So please take no particular note of the fact that outside right it is "high moon" on the night of the full moon; I am not howling at it.

I just pulled something together tonight to the point that I want you to have it in the morning, probably before I drag my lazy ass out of bed, to consider over the weekend.

In my last email to you, I said:

I am nearly finished with a major memo on why I believe the court can find partial abandonment.

It covers the *Burke* case and all other cases in Arizona that discuss abandonment and/or a non-waiver provision.

I intend to use it in conjunction with a request for a settlement conference.

I now attach my latest draft of that memo, in both MS Word and PDF format, and ask you to both:

go through it when you can, (sharing it with your clients if you wish), and

then shoot me back an email with your thoughts about it and any comments to my other points below.

I am meeting with Matt Grace soon to get his agreement on our particular strategy on a number of points, and would like to share your input with him.

MEMO ON ABANDONMENT:

My current thoughts are to not file this long memo, but to send it to all parties along with my request for a settlement conference, and suggest that it be part of what is provided to the settlement conference judge.

Notice how the map on page 29 shows why there is probably only a snowball's chance for a factual finding of an abandonment of the 9 acre minimum lot size restriction.

If the only type of abandonment that the court can find is a complete abandonment of the entire Declaration, that adherence to the 9 acre restriction would strongly work against a finding of complete abandonment.

However, particularly when you consider all the unique features of both Coyote Springs Ranch itself, and the non-waiver provision in the Declaration, I really do believe what I say in the memo about:

Burke not operating as a blanket rule in every case, and

How the non-waiver provision does not block findings of the types of localized or widespread partial abandonment (using my label from towards the end of the memo) of specific Restrictions.

REQUEST FOR SETTLEMENT CONFERENCE:

I also attach a very rough draft of a request for a settlement conference, where I just dumped my thoughts, and would like your feelings about it as well.

STATUS CONFERENCE – COORDINATING DISCLOSURES:

I also want your thoughts on a request for a status conference wherein we ask for some initial rulings on an overall efficient management of disclosures.

Certainly, it is time for them to be exchanged, but it would make a lot of sense for the old timers in the case to electronically share all prior disclosures, and then the newcomers being asked to add what they find is missing in a second waive.

TIMING OF DISCLOSURES & SETTLEMENT CONFERENCE:

However, I would also like to explore whether and how to put any disclosure work off until after the settlement conference.

I really think that we could find a way for the parties in the case, or at least for the Defendants, to informally share their available evidence of abandonment, with an eye towards plotting the results on a real or electronic map, like the one described on pages 24 & 25 of the memo.

If we can do that effectively enough for a settlement conference, then I would prefer to NOT get into heavy disclosure till after that settlement conference.

So this timing question means we may need to move soon, before the new judge or someone else in the case moves us somewhere we don't want to go with other requests.

PARALLEL OFFER OF JUDGMENT:

I also want to send out an offer of judgment, possibly along with the request for a settlement conference.

I may build into it an acceptance date that goes beyond the settlement conference, so people feel they have a chance to truly discuss the settlement offer at the settlement conference.

An important aspect of any workable settlement that includes partial waiver will be a stipulated judgment with a finding in that regard.

So we need to consider the type of minimal factual support that a judge needs to find a knowing waiver by a defendant in a criminal plea agreement.

I think the memo will give him the legal basis, but that brings us back to the question of what evidence we can provide to support the factual findings.

And I again suggest we look at what it would take for the Defendants to build the map I just talked about in the timing section.

INFORMAL MEETING OF DEFENDANTS ONLY?

With all that in mind, I also want your thoughts on whether I should ask Matt to host an informal gathering of all Defendants and their counsel to discuss all of this.

Not saying he will even do that, but I think he just might.

Noel J. Hebets, NOEL J. HEBETS, PLC
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Office (480) 488-4889 Fax: (480) 488-5875 Cell: (602) 361-2482
Email Noel@NoelHebets.com Website: www.NoelHebets.com/

EXHIBIT B

EXHIBIT C

*Memorandum in Support of
Request for Settlement Conference*

1 Noel J. Hebets
State Bar No. 004840
2 NOEL J. HEBETS, PLC
3 127 East 14th Street
Tempe, Arizona 85281
4 Phone: (480) 488-4889 fax: (480) 488-5875
5 Noel@NoelHebets.com
6 Attorney for Defendant William M. Grace
(Owner of Assessor's Parcel No. 103-01-002K)

7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
8 **IN AND FOR THE COUNTY OF YAVAPAI**

9)	
10)	
11	)	Action No. P1300-CV2003-0399
12)	
13	)	MEMORANDUM IN SUPPORT
14	)	OF REQUEST FOR
15	)	SETTLEMENT CONFERENCE
16)	
17	)	Assigned to the Honorable
18	)	Kenton D. Jones

19 Defendant Grace hereby offers the following Memorandum in support of his
20 simultaneous request, filed herewith, for a settlement conference that will allow all parties to
21 explore a global settlement of the case, before they expend the enormous amounts of
22 attorney's fees that are otherwise highly likely, if not certain, to follow in this case, over years
23 that are likely to be deemed by future historians to be our nation's second great depression, if
24 not our worst.
25

1 But the *Yavapai County Zoning Ordinance* (the “**Zoning Ordinance**”) also has significant
2 restrictions against major commercial and industrial activity in this residential 2 acre zoning
3 district. The Zoning Ordinance does allow a fair amount of quasi-commercial activity that is
4 consisted with its rural character: (i) it has agricultural exemptions, (ii) it allows various types of
5 home occupations, and (iii) it also allows other types of quasi-commercial activity subject to
6 the extra controls of a special use permit. Many of the alleged violations of the prohibition
7 against commercial activity in Section 2 of the Declaration would fall within these permissible
8 quasi-commercial activities. So, if the Court finds enforcement of Section 2 has been
9 abandoned by long term and widespread economic activities throughout Coyote Springs
10 Ranch, the level of protections for the parcels within Coyote Springs Ranch would not fall that
11 much, and its existing nature would not really change much, if at all.

12 However, Section 3 of the Declaration has a 9 acre minimum lot size,² while Defendant
13 Grace believes the zoning applicable to all or nearly all of Coyote Springs Ranch is the 2 acre
14 minimum lot size applicable in the “R1-2A” residential two-acre zoning districts. If that is true,
15 and, if the Court finds that enforcement of that 9 acre restriction has been abandoned, the
16 level of protection would fall substantially, as there could be over 4 times as many homes built
17 in the long run, and that would have a huge impact on the character of Coyote Springs Ranch,
18 and the resulting property values and living experiences for the Coyote Springs Parcel Owners.

19 In *Condos v. Home Development Co.*, 77 Ariz. 129, 267 P.2d 1069 (Ariz. 1954), (discussed
20 in greater detail herein), the Arizona Supreme Court expressly recognized that there could be a
21 partial abandonment of some of the deed restrictions in a declaration of CC&Rs without an

22 ² Section 3 of the Declaration states:

23 3. Said property [Coyote Springs Ranch] or any portions thereof shall not be
24 conveyed or subdivided into lots, parcels or tracts containing less than nine (9) gross
25 acres, nor shall improvements be erected or maintained in or upon any lot, parcel
or tract containing less than such nine (9) gross acres.

1 abandonment of others. So there is no question that Arizona case law specifically recognizes
2 the possibility of a partial abandonment of restrictive covenants.

3 Embedded within Section 19 of the Declaration is what the Arizona cases have called a
4 “non-waiver provision”, and which specifically states:

5 “. . . No failure of any other person or party to enforce any of the restrictions, rights,
6 reservations, limitations, covenants or conditions contained herein shall, in any
7 event, be construed or held to be a waiver thereof or consent to any further or
8 succeeding breach or violation thereof. . . .”

8 Defendant Grace and his counsel understand that some counsel in this case have
9 concluded that one or more Arizona cases, particularly, *Burke v. Voicestream Wireless*
10 *Corporation II*, 207 Ariz. 393, 87 P.3d 81 (Ariz. App. 2004), and *College Book Centers, Inc. v.*
11 *Carefree Foothills Homeowners' Association*, 225 Ariz. 533, 241 P.3d 897 (Ariz. App. 2010),
12 support the argument that the non-waiver provision in Section 19 prevents any finding of a
13 partial abandonment of the Restrictions. They believe the following memorandum will
14 adequately prove that it does not do so.

15 If that is the case, it behooves all parties to this case to stop now and seriously discuss a
16 global settlement that includes finding by the Court of such a partial abandonment. This is
17 particularly true when any party’s settlement positions at this time may strongly impact a final
18 discretionary award of attorney’s fees that could ultimately bankrupt any such party.

19 So the primary question to be addressed in this Memorandum is whether frequent,
20 ongoing, or widespread violations of the Restrictions can go beyond the intent and effect of
21 the non-waiver provision, and serve as valid equitable defenses of partial abandonment;
22 particularly since there is a substantial difference between waiver in a number of instances,
23 and waivers that collectively constitute an abandonment by the ownership as a whole, as
24 would be illustrated by a simple but accurate Venn diagram in which a vast portion of the
25 “waivers” bubble would not overlap the “abandonments” bubble.

1 **A. ARIZONA CASES THAT DO NOT ADDRESS NON-WAIVER vs. PARTIAL ABANDONMENT**

2 The following Arizona cases discuss the question of abandonment of various restrictions
3 in deeds or declarations and/or the impact of a non-waiver provision within those restrictions,
4 but, as will be shown, do not address the impact of such a non-waiver provision on the
5 question of a complete or partial abandonment of all or part of the subject restrictions:

6 *O'Malley v. Central Methodist Church*, 67 Ariz. 245, 194 P.2d 444 (Ariz. 1948);
7 *Condos v. Home Development Co.*, 77 Ariz. 129, 267 P.2d 1069 (Ariz. 1954);
8 *Riley v. Stoves*, 22 Ariz.App. 223, 526 P.2d 747 (Ariz. App. 1974);
9 *Carter v. Conroy*, 25 Ariz.App. 434, 544 P.2d 258 (Ariz. App. 1976); and
 Adams v. Lindberg, 125 Ariz. 441, 610 P.2d 75 (Ariz. App. 1980).

10 The case of *O'Malley v. Central Methodist Church*, 67 Ariz. 245, 194 P.2d 444 (Ariz. 1948)
11 dealt with the situation, more common in the past, where there was not a single declaration of
12 CC&Rs covering the entire development, but, instead, all of the deeds used by the developer
13 repeated the what was obviously the same or substantially similar restrictions. So the primary
14 question in *O'Malley* was how to determine which restrictions were enforceable by a person
15 who was not party to the deed in which they were found. The Arizona Supreme found that
16 each of the deeds must not only contain the specific covenants in question, but must
17 collectively manifest a general scheme or plan that make it obvious the covenants we intended
18 for the mutual benefit of all of the lots. Its holding recognized, possibly for the first time in
19 Arizona case law, the possibility of an abandonment of restrictions that would otherwise bind
20 all of the lots in a neighborhood because frequent violations had been permitted:

21 . . . The right of action from this would seem to be dependent as much on the fact
22 of the general scheme as on the covenant -- a very important consideration in a
23 case in which the question arises whether certain threatened acts are in violation of
24 the covenant, if any ambiguity exists as to its scope and meaning. Where the
 restrictions are not universal, or after frequent violations of the restrictions have
 been permitted, then the neighborhood scheme will be considered abandoned.

25 *O'Malley, supra.*, 67 Ariz. 245 at 27, 194 P.2d 444 at 453.

1 In *Condos v. Home Development Co.*, 77 Ariz. 129, 267 P.2d 1069 (Ariz. 1954), the Arizona
2 Supreme Court expressly recognized that there could be a partial abandonment of some of the
3 deed restrictions in a declaration of CC&Rs without an abandonment of others.

4 In *Condos*, the plaintiff had sued to enforce a restriction against the sale of alcohol in a
5 Tucson subdivision, and the defendant argued that there had been an abandonment of the
6 entire declaration from allegedly widespread violations of the declaration.

7 But the *Condos* court:

8 (a) agreed with defendant's argument that there were a number of other deed
9 restrictions in the same declaration that had been violated on a widespread basis, including:
10 concrete block and adobe houses had not been plastered and frame houses had not been
11 painted, when both were required;

12 (b) but it found that other violations alleged to be widespread were not really so, such
13 as: religious services were held within a few homes, were not really the alleged churches; a half
14 dozen roosters and a few chickens for sale in one home was not a number of alleged chicken
15 farms; one residence with a few chairs, stoves, etc., were offered for sale was not a number of
16 alleged second hand stores; and nine outside toilets did exist.

17 In other words, the *Condos* court found that only some of the deed restrictions were
18 arguably abandoned, and held that the abandonment or acquiescence in the violation of one
19 restrictive covenant does not amount to the abandonment of other separate and distinct
20 restrictions material and beneficial to the owners of lots affected by them.

21 While the *Condos* decision does discuss the issue of "waiver or abandonment", it never
22 mentions a non-waiver provision in the subject declaration, which makes it doubtful there even
23 was one. So it does not address the impact of such a non-waiver provision on the question of a
24 complete or partial abandonment of all or part of the declaration.

25

1 In *Riley v. Stoves*, 22 Ariz.App. 223, 526 P.2d 747 (Ariz. App. 1974) the plaintiffs sued to
2 enforce a 21 year old age restriction in the declaration of restrictions for a mobile home
3 subdivision with 39 lots, and the defendants argued that it violated Arizona law and that there
4 were children living in surrounding subdivisions. After determining that the age restriction did
5 not violate Arizona law, the court held that:

6 It is true that where frequent violations of restrictions have been permitted, the
7 restrictions will be considered abandoned and unenforceable. *O'Malley v. Central*
8 *Methodist Church*, 67 Ariz. 245, 194 P.2d 444 (1948). However, it has been held that
9 the use of property surrounding a restricted subdivision is not in and of itself
10 enough to justify a violation of the restriction. *Continental Oil Co. v. Fennemore*, 38
11 Ariz. 277, 299 P. 132 (1931). Equity will enforce the terms of restrictive covenants
12 unless changes in the surrounding areas are so fundamental or radical that the
13 original purposes of the restrictions are defeated and frustrated. *Decker v.*
14 *Hendricks*, 97 Ariz. 36, 396 P.2d 609 (1964). We do not believe the evidence in this
15 case compelled the trial court to make such a finding.

16 *Riley, supra*, 22 Ariz.App. at 229-230, 526 P.2d 753-754. But the *Riley* case did not even speak
17 to a non-waiver provision in the subject declaration; so it too does not address the impact of
18 such a non-waiver provision on the question of a complete or partial abandonment of all or
19 part of the declaration.

20 Similarly, in *Carter v. Conroy*, 25 Ariz.App. 434, 544 P.2d 258 (Ariz. App. 1976), the court
21 held that the appellees could still enforce a restriction in the applicable declaration against
22 permanent trailers, even though some of them had apparently violated other restrictions:

23 Finally, appellants argue that the restriction against trailers should not be enforced
24 because other covenants have been violated. Many owners, including some of the
25 appellees, have erected chain link fences apparently violating a restriction. Also one
house is closer to the property line than permitted. The fact that appellees may
have violated some restrictions themselves does not preclude an injunction. *Riley v.*
Stoves, supra. The Arizona Supreme Court in *Condos v. Home Development Co.*, 77
Ariz. 129, 267 P.2d 1069 (1954) stated that such covenants are separate and
independent. The right to enforce one is not affected by violations of others.

Carter v. Conroy, 25 Ariz.App. 434, at 436; 544 P.2d 258 at 260.

1 This recognition of the separate and independent nature of the restrictive covenant was
2 the basis for defeating an obvious "unclean hands" defense to the plaintiffs' application for an
3 injunction in the *Condos* trial court, meaning the defendants' contention that the plaintiffs
4 could not seek to enforce certain provisions of the declaration, when those defendants
5 themselves were in violation of others. However, the word "abandonment" does not appear in
6 the case, and a partial or complete abandonment of the restrictions was never discussed in the
7 case. So it too does not address the impact of such a non-waiver provision on the question of a
8 complete or partial abandonment of all or part of the declaration.

9 In *Adams v. Lindberg*, 125 Ariz. 441, 610 P.2d 75 (Ariz. App. 1980), the court of appeals
10 upheld an injunction against the construction and use of overhead lights on a tennis court in
11 the subdivision as a clear violation of one of the restrictions in the applicable declaration of
12 CC&Rs, and it also expressly held that violations of other restrictions by the neighbors did not
13 preclude an injunction against the owners because "the declaration of restrictions contains an
14 express non-waiver provision supporting the trial court's finding in that regard." citing *Carter*
15 *v. Conroy*, 25 Ariz.App. 434, 544 P.2d 258 (1976).

16 Again, the word "abandonment" does not appear in the case, and a partial or complete
17 abandonment of the restrictions was never discussed in the case. So it too does not address
18 the impact of such a non-waiver provision on the question of a complete or partial
19 abandonment of all or part of the declaration. Instead, it simply recognizes the basic impact of
20 the non-waiver provision as something that cannot be used on parties seeking to enforce
21 certain provisions of the declaration, when neighboring parcels are in violation of others;
22 (probably asserted as an equitable defense to the application for an injunction).

1 **B. ARIZONA CASES THAT DO ADDRESS NON-WAIVER vs. ABANDONMENT**

2 Two Arizona cases do discuss waiver and abandonment of restrictions in declarations that
3 include a non-waiver provision:

4 *Burke v. Voicestream Wireless Corporation II*, 207 Ariz. 393, 87 P.3d 81 (Ariz. App. 2004);
5 *College Book Centers, Inc. v. Carefree Foothills Homeowners' Association*, 225 Ariz. 533,
6 241 P.3d 897 (Ariz. App. 2010).

7 As will be demonstrated by a detailed discussion of each case, neither supports a holding
8 that an ordinary non-waiver provision in the normal declaration of restrictions for a residential
9 subdivision will always defeat the finding of a partial abandonment of some or all of the
10 property restrictions. And further discussion of the actual non-waiver provision in the Coyote
11 Springs Restrictions shows that it too does not defeat such a finding of partial abandonment.

12 **1. The *Burke* case.**

13 In *Burke v. Voicestream Wireless Corporation II*, 207 Ariz. 393, 87 P.3d 81 (Ariz. App.
14 2004), one of two defendants operated a worship center on three adjacent lots it owned
15 within a Scottsdale residential subdivision, and entered into an agreement with the other
16 defendant, a cell phone company, to erect a 50 foot cellular telephone signal transmission
17 tower on the one of those lots, to be decorated as a bell tower with four crosses and three
18 hanging bells.³

19 ³ While the *Burke* opinion does not provide these details, the public records available on
20 the internet sites of the Maricopa County Recorder and Assessor show that "Desert Estates
21 Unit 4", the subdivision in that case, is a Scottsdale subdivision with 42 residential lots under an
22 acre in size created by the plat recorded on Nov 22, 1960 at MCR Book 92 of Maps, Page 33. It
23 lies on the NE corner of 64th Street and Cactus Road (2 "mile streets" following section lines),
24 surrounded by a number of similar subdivisions, including several numbered as other "Units"
25 of Desert Estates, within the large "Paradise Valley" area of Scottsdale and Phoenix. Of the 3
residential lots used for Defendants' worship center, only the side yard of the southernmost lot
faced the mile street. All 3 lots and the parking lot entrances fronted on the residential street,
and the intention was to build the 50 foot cell tower on the northernmost lot, adjacent to the
plaintiffs' parcel, which would essentially put it in the very center of the subdivision.



**Burke subdivision bounded in yellow with 3 subject parcels bounded in white.
The subject cell tower was built on the northernmost of those 3 parcels.**

The plaintiffs, owners of the lot adjacent to the lot where the cell tower was being constructed, sued for injunctive and other relief claiming the tower violated Section 4 of the declaration of restrictions for the subdivision, which said no structure would be permitted on any of the lots, except for a one-story detached single family residence, a one-story garage for up to 3 cars, and guest or servant quarters for the sole use of non-paying guests or servants of the occupants of the main house.

The trial court denied the requested TRO because construction was nearly finished by the time the action was filed, and thereafter denied the requested injunction because the \$300,000 cost of removing the tower would be disproportionate to the plaintiffs' damages.

1 Then the trial court ruled in the defendants' favor on cross motions for summary
2 judgment with three primary holdings: (1) Section 4 was ambiguous as to whether the
3 "structure" restriction was limited to habitable structures and resolved the ambiguity in favor
4 of the free use of the defendant's property; (2) there was undisputed evidence that Section 4
5 had been violated on numerous occasions and that under those circumstances Section 4 had
6 been abandoned or waived; and (3) the non-waiver provision of the same declaration could
7 not be applied to selectively enforce Section 4 against the defendants because other non-
8 residential structures had been erected without challenge.

9 But the Court of Appeals then reversed all three of those holdings by the trial court.

10 As to the trial court's first holding, on the ambiguity issue, the Court of Appeals first cited
11 a number of Arizona cases to the effect that: (i) words in a restrictive covenant must be given
12 their ordinary meaning, and the use of the words within a restrictive covenant gives strong
13 evidence of the intended meaning; (ii) unambiguous restrictive covenants are generally
14 enforced according to their terms; (iii) restrictions that are not absolutely clear should be
15 interpreted in the ordinary and popular sense, related to circumstances under which they were
16 used, having in mind their purpose and general situation; and (iv) if the language of a
17 restrictive covenant is judged to be ambiguous, it should be construed in favor of the free use
18 of the land. It then reviewed the interpretation of the word "structure" in similar property
19 restrictions in *Horton v. Mitchell*, 200 Ariz. 523, 29 P.3d 870 (App. 2001), where, as with *Burke*
20 restrictions, the word was also used elsewhere in the subject restrictions in a manner that
21 showed it was not limited to habitable structures. It then overruled the ambiguity finding of
22 the trial court saying that *Horton* analysis supported a conclusion that Section 4 of the *Burke*
23 restrictions precluded the construction on each lot of any structure other than a single-family
24 home, garage, and guest house (unless expressly authorized elsewhere in the restrictions, as in
25 the case of stables and corrals authorized under section 15).

1 The Court of Appeals in *Burke* then turned to the abandonment-waiver issue that was
2 involved in the other two primary holdings of the trial court. The defendants had argued that
3 that, even if Section 4 applied to prohibit the tower, the restrictions within it had been waived
4 or abandoned due to acquiescence by the homeowners in previous violations of the
5 restrictions by SWC and other lot owners, including: a two-story barn converted into living
6 quarters on one lot, a 30-foot flagpole on another lot, and church buildings, two other bell
7 towers, a flagpole, and a 38-foot cross on the 3 lots owned by the defendant worship center.⁴

8 The plaintiffs had argued those violations did not amount to a waiver, and that any such
9 waivers did not excuse the subject cell tower because a non-waiver provision in the subject
10 restrictions provided that:

11 ". . . failure to enforce any of the restrictions, rights, reservations, limitations and
12 covenants 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."

13 *Burke, supra*, 207 Ariz. at 397-398, 87 P.3d 85-86.

14 The *Burke* court noted that, in the absence of a non-waiver provision, particular deed
15 restrictions will be considered abandoned and waived, and therefore unenforceable, if
16 frequent violations of those restrictions have been permitted. It then stated:

17 We must decide whether the express non-waiver provision in these Restrictions
18 precludes a finding of waiver. See *Adams v. Lindberg*, 125 Ariz. 441, 442, 610 P.2d
19 75, 76 (App. 1980) (relying in part on the presence of a non-waiver clause in a
20 restrictive covenant to find that the right to enforce a restriction was not waived
21 despite other violations of the restrictions); see also *Simms v. Lakewood Vill. Prop.*
22 *Owners Assoc., Inc.*, 895 S.W.2d 779, 786-87 (Tex. App. 1995) (using the presence of
a non-waiver provision as a factor in finding that a restrictive covenant was not
waived).

23 _____
24 ⁴ All of these erections would be would "structures" that violate Section 4 under the
25 interpretation of that word by the Court of Appeals, but only the two story barn and the
church buildings would be violations under the trial court's interpretation of that word.

1 (emphasis added) *Burke, supra*, 207 Ariz. at 398, 87 P.3d 86⁵

2 ⁵ While the holdings in the *Adams* and *Simms* cases, cited in the foregoing quote, both rely on
3 the impact of an express non-waiver provision in restrictive covenants, the facts of both cases
4 differ substantially from the facts in *Burke* and in the present Coyote Springs Ranch case.

5 As noted earlier in this memorandum, the word "abandonment" does not appear in the *Adams*
6 case, and it never discussed a partial or complete abandonment of the restrictions. So it does
7 not address the impact of such a non-waiver provision on the question of a complete or partial
8 abandonment of all or part of a declaration. Instead, it seems to simply recognize the basic
9 impact of the non-waiver provision as something that cannot be used against plaintiffs seeking
10 to enforce certain provisions of the declaration, even if the plaintiffs' own parcels are in
11 violation of other restrictions; (probably asserted as an equitable defense to the application for
12 an injunction).

13 The *Simms* case is factually and legally distinguishable for a number of reasons:

14 (a) In *Simms* the plaintiff homeowners within a subdivision filed suit against their
15 homeowner's association alleging that assessments were being computed incorrectly because
16 the CC&Rs of the subdivision required assessments against each lot and that some owners
17 whose residences were on two or more lots were only being assessed for one lot. The *Simms*
18 case did not involve various or repeated violations of use restrictions over some period of time.

19 (b) The plaintiffs also asserted that because of numerous violations of the
20 restrictive covenants, they had been abandoned and are void and unenforceable, and the
21 Texas Court of Appeals said it perceived that assertion not to be just an attack on a specific
22 restriction or on the authority of the association but an attempt by the plaintiffs to have the
23 entire set of restrictive covenants declared null and void because of waiver or abandonment.

24 (c) The *Simms* court also noted guidelines from Texas Supreme Court when such an
25 attack was made included favoring enforcement of the restrictions if the benefits of the
original plan could still be realized, and balancing of equities between the owner claiming
abandonment or waiver and the other lot owners who had acquired their lots on the strength
of the restrictions. And it noted and quoted two provisions in the subject covenants that
stated: ". . . any owner [in the subdivision] shall have the right to enforce by a proceeding at law
or in equity, all restrictions, conditions, covenants, . . . imposed by the provisions of this
declaration." and "Failure by declarant [association herein] or by any owner to enforce any
covenant or restriction herein contained shall in no event be deemed a waiver of the right to do
so hereafter." *Simms, supra*, 895 S.W.2d at 786-787. Based on the combined reading of those
two provisions, and the trial court's finding that none of the acts of the association constituted
a waiver or abandonment of the covenants, conditions or restrictions or the general plan or
scheme of the subdivision, the *Simms* court rejected the appellants' claim that failures by the
association to enforce various covenants defeated further enforcement by the association.

1 The *Burke* court placed a heavy emphasis on the fact that the restrictions in that case
2 were drafted to allow enforcement by the individual parcel owners:

3 These Restrictions were drafted to allow enforcement of restrictive covenants by
4 individual homeowners. The non-waiver provision, by its plain language, is intended
5 to prevent a waiver based on prior inaction in enforcing the Restrictions. To hold
6 otherwise would render the non-waiver provision meaningless and violate the
7 expressed intention of the contract among the property owners. See *Apolito v.*
8 *Johnson*, 3 Ariz. App. at 360, 414 P.2d at 444 (commenting on the importance of
9 upholding the "sanctity of written contracts, defining the rights and duties of the
10 contracting parties. . .").

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

15 *Burke, supra*, 207 Ariz. at 398-399, 87 P.3d at 86-87.

16 The Declaration in the present Coyote Springs case likewise intended that individual
17 parcel owners would enforce the Restrictions, and likewise does not include provisions for a
18 property owners association, which might also or instead enforce them. The large size of
19 Coyote Springs Ranch, discussed in Part II A below, supports the same conclusion as *Burke* for
20 the reason behind the Coyote Springs non-waiver provision – that the inaction of a homeowner
21 on one side of the subdivision would not result in a waiver by a homeowner on the other side.

22 However, that reason or purpose does not, in and of itself, rule out the possibility that
23 there could be instances when the non-waiver provision would not apply, particularly as a
24 result of a finding of abandonment. And there are two places where the *Burke* decision makes
25 it obvious that the non-waiver vs. abandonment question must be evaluated on a case-by-case
basis, and not treated as a blanket rule.

First, the underscored sentence in a foregoing quote, repeated here again, indicates
there can be instances when a non-waiver provision does not preclude the finding of waiver:

1 We must decide whether the express non-waiver provision in these Restrictions
2 precludes a finding of waiver. . .

3 (emphasis added) *Burke, supra*, 207 Ariz. at 398, 87 P.3d 86. Indeed, the discussion in Part B of
4 this Memorandum about the exception in the Coyote Springs non-waiver provision for the
5 failure by the plaintiff himself to enforce restrictions, shows one circumstance where a non-
6 waiver provision does not include the finding of waiver.

7 Similarly, other wording of the *Burke* opinion indicates there are instances when non-
8 waiver provisions will not be enforced because of prior violations of restrictions:

9 Even though (the two defendants) presented evidence that the homeowners in
10 Desert Estates have acquiesced in prior violations of section 4, we have not been
11 presented any persuasive reason why the non-waiver provision of the Restrictions
12 should not be enforced in this instance. Unambiguous provisions in restrictive
13 covenants will generally be enforced according to their terms. [citations omitted]

14 (emphasis added) *Burke, supra*.

15 The *Burke* analysis expressly rejected arguments by the defendants that the non-waiver
16 provision was so unreasonable that it should be declared invalid. While the defendants had
17 argued that the restrictions had been waived or abandoned based on the violations discussed
18 above, the *Burke* court also noted that they provided no evidence that the restrictions had
19 been so thoroughly disregarded as to result in the type of complete abandonment of the
20 restrictions set forth in the *Condos* case:

21 The non-waiver provision would be ineffective if a complete abandonment of the
22 entire set of Restrictions has occurred. The test for determining a complete
23 abandonment of deed restrictions -- in contrast to waiver of a particular section of
24 restrictions -- was set forth by our supreme court in *Condos v. Home Development*
25 *Company*, 77 Ariz. 129, 267 P.2d 1069 (1954): "Whether the restrictions imposed
upon the use of lots in this subdivision have been so thoroughly disregarded as to
result in such a change in the area as to destroy the effectiveness of the restrictions,
defeat the purposes for which they were imposed and consequently amount to an
abandonment thereof." *Id.* at 133, 267 P.2d at 1071.

1 No evidence was presented, however, that Desert Estates is no longer a "choice
2 residential district." The violations of section 4 described by Voicestream and SWC
3 have not destroyed the fundamental character of the neighborhood. We conclude,
4 as a matter of law on the record before us, that the non-waiver provision of the
5 Restrictions remains enforceable and the subdivision property owners have not
waived or abandoned enforcement of section 4 even though they or their
predecessors have acquiesced in several prior violations of its provisions.

6 (emphasis added) *Burke, supra*, 207 Ariz. at 399, 87 P.3d at 87.

7 While that discussion clearly shows how the *Burke* court recognized a major difference
8 between "a complete abandonment of deed restrictions -- in contrast to waiver of a particular
9 section of restrictions", neither that language in particular, nor opinion as a whole, specifically
10 holds that there are no situations in which a partial abandonment of property restrictions can
11 be found, notwithstanding a non-waiver provision in those restrictions, or that a non-waiver
12 provision always prevents the finding of a partial abandonment of the restrictions.

13 **2. The *College Book Centers* case.**

14 In *College Book Centers, Inc. v. Carefree Foothills Homeowners' Association*, 225 Ariz. 533,
15 241 P.3d 897 (Ariz. App. 2010), the homeowners' association for a subdivision of 76 residential
16 lots denied the application of the owner of a vacant cul-de-sac lot to build a roadway across his
17 lot to reach and serve 4 parcels he owned outside but adjacent to the subdivision, and it did so
18 because of a provision in the declaration of restrictions prohibiting non-residential structures
19 within the subdivision.

20 Unlike the non-waiver provisions in the Coyote Springs Declaration and the declaration in
21 the *Burke* case, the non-waiver provision in *College Book Centers* specifically included the word
22 "abandonment" as well as the word "waiver":

23 "The failure by an Owner to enforce any restrictions, conditions, covenants or
24 agreements herein contained shall not be deemed a waiver or abandonment of this
Declaration or any provision thereof."

25 (emphasis added) *College Book Centers, supra*, 225 Ariz. at 538, 241 P.3d at 902.

1 While the lot owner in *College Book Centers* specifically conceded that there had not
2 been an abandonment of the restrictions, he claimed the association had waived the right to
3 enforce that restriction by explicitly or implicitly approving two other such roadways within the
4 subdivision; (and the jury agreed with this position).

5 However, the Court of Appeals ruled to the contrary, holding that the two roadways did
6 not constitute a waiver or abandonment of the right of the HOA to enforce the restriction. In
7 the first instance, the developer granted an access easement over one lot, within which a
8 roadway was then built, to serve a five acre parcel upon which only one home had been
9 developed, despite the one-acre zoning. In the second instance, another access easement was
10 granted over 3 adjacent lots then owned by the developer and another party to allow access
11 within those 3 lots, and a roadway was then built within that easement. All 3 lots later came
12 into common ownership, and only one residence was built upon them. Both roadways were
13 built early in the life of the subdivision, and had existed for 20 years by the time of the case.
14 The court held as a matter of law that these two roadways did not constitute the type of
15 “frequent violations” of the restrictions from which a jury might infer a waiver.

16 The *College Book Centers* court also held that, even if the two violations could reasonably
17 be considered frequent, the HOA was entitled to judgment as a matter of law based on the
18 non-waiver provision in the restrictions. However, especially since the non-waiver provision
19 included the words “waiver or abandonment” and the lot owner specifically conceded that
20 abandonment had not occurred, the court’s brief discussion of a complete abandonment in the
21 absence of a non-waiver provision (by parroting its holdings in the *Burke* and *Condos* cases)
22 should not be used to determine the impact of such a non-waiver provision on the question of
23 a complete or partial abandonment of all or part of the subject restrictions.

1 **II. NON-WAIVER vs. ABANDONMENT IN THE COYOTE SPRINGS DECLARATION**

2 **A. PERTINENT BACKGROUND FACTS.**

3 A truly remarkable aspect of the Declaration in this case is how the ground it covers,
4 meaning Coyote Springs Ranch itself, differs so substantially from the much smaller
5 neighborhoods that are the subject of a typical set of CC&Rs, including those involved in the
6 several Arizona cases dealing with a waiver or abandonment, and discussed herein. The
7 enormous size of Coyote Springs Ranch is manifested by its peculiar configuration, the time it
8 takes to travel its length and width, and the large number of large parcels located therein.

9 As illustrated on the next page, the area within Coyote Springs Ranch, and hence, the
10 area covered by the Declaration includes 5 full "sections" of land at one square mile = 640
11 acres each, plus another 730 acres of land spread over another 3 sections, for a grand total of
12 3,930 acres = 6.14 square miles of land spread over 8 sections that lie within an area that is 2
13 miles wide (E-W) and 5 miles long (N-S).

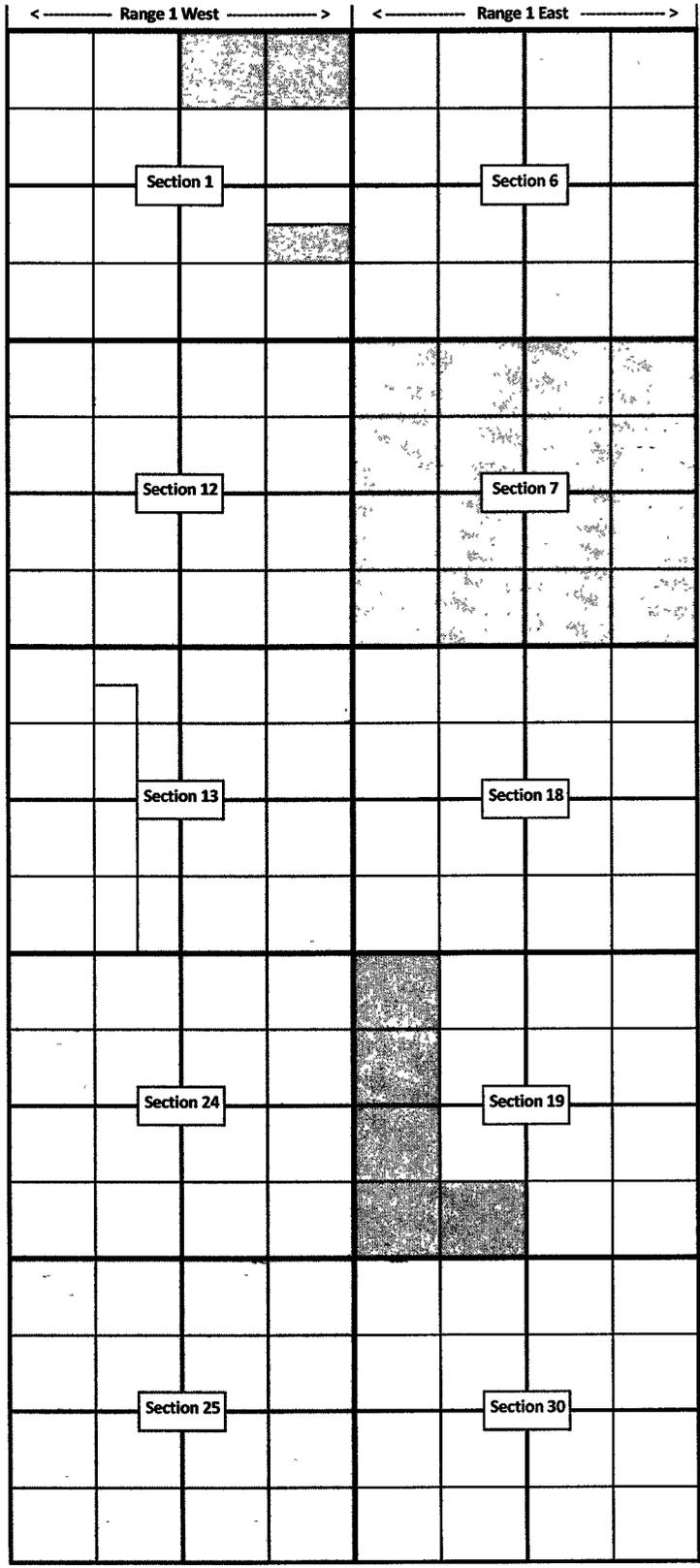
14 It would take over 10 minutes to travel the N-S length of Coyote Springs Ranch at a 30
15 mph speed that would be the fastest safe speed one could argue for, and that ignores the
16 additional time it would take for stopping at major cross streets at least every mile or more
17 along the way. And even traveling E-W across the width of Coyote Springs could take nearly 5
18 minutes at that same speed if those stops are included.

19 If the *Property Owners List* Plaintiffs filed on March 7, 2011 is accurate, there are
20 currently a total of 288 parcels within Coyote Springs Ranch (the "**Coyote Springs Parcels**") that
21 were each assigned a parcel number by the Yavapai County Assessor. And the 3,390 acre size
22 of Coyote Springs Ranch could ultimately allow for 393 square parcels that are each 10 acres in
23 size, meaning 1/8th of a mile on each side, leaving room to dedicate a part of their perimeter
24 for roadways, and still satisfy the 9 acre minimum lot size, as was obviously intended.

25

All parcels subject to the Coyote Springs Ranch CC&Rs lie within these 8 Sections, which are all located in Township 15 North, G&SR, B&M, Yavapai County, AZ:

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1 The second remarkable thing about the Coyote Springs Restrictions is the practical
2 inability of the Coyote Springs Parcel Owners to make any reasonable changes to them,
3 particularly when contrasted against their perpetual nature. Section 17 has a rather typical
4 provision that puts the Restrictions in place until June 1, 1994, and then automatically extends
5 them for periods of 10 years.⁶ However, there is no provision for amending the Restrictions by
6 the approval of less than all of the parcels involved.⁷ So any amendment would require the
7 signatures of all parcels owners, as well as parties holding liens on those parcels, which must be
8 recognized as virtually, if not humanly, impossible. This effectively makes the Restrictions
9 perpetual with no likely or logical way to change them short of some court ruling that they
10 have been partially or completely abandoned, or that otherwise modifies their language.

11 This not only blocks minor revisions of the Restrictions to clarify existing language, it
12 effectively prevents even major revisions that the vast majority of the Coyote Springs Parcel
13 Owners would gladly approve. It likewise deprives the litigants in this case of a comprehensive
14 settlement based on a partial and/or complete abandonment of the Restrictions unless it
15 includes a Court finding to that effect.

16 _____
17 ⁶ Section 17 of the Declaration states:

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

22 ⁷ Even when a declaration has one of the common provisions allowing for an amendment by
23 some percentage of the parcel owners (often 67%), *Scholten v. Blackhawk Partners*, 184 Ariz.
24 326, 909 P.2d 393 (Ariz.App. 1995), holds that such 10 year roll-over language prevents any
25 amendment from taking effect until the end of the then-current 10 year term, unless it is
unanimously executed by all of the parcel owners. Obviously, counsel for such parcel owners
would recommend that any of their lienholders would also have to sign.

1 **B. PROVISIONS THAT IMPACT THE QUESTION OF PARTIAL OR TOTAL ABANDONMENT.**

2 Section 18 of the Declaration says a judicial invalidation of some of the restrictions does
3 not automatically invalidate all of the others.⁸ So its plain language would allow the Court to
4 conclude that enforcement of only some of the Restrictions has been abandoned, if the facts
5 and law, based on a holistic reading of Declaration, does not lead it to another conclusion.

6 The only other provision that would impact the question of abandonment is the non-
7 waiver provision, which is embedded within Section 19 of the Declaration, and states:

8 “. . . No failure of any other person or party to enforce any of the restrictions, rights,
9 reservations, limitations, covenants or conditions contained herein shall, in any
10 event, be construed or held to be a waiver thereof or consent to any further or
succeeding breach or violation thereof. . .”

11 (emphasis added)

12 Those underscored words, are not present in the restrictions discussed in any Arizona
13 cases that discuss such non-waiver provisions, including the *Burke* case, and must be given
14 their ordinary sense and meaning in the context of the Declaration itself. *Duffy v. Sunburst*
15 *Farms E. Mut. Water & Agric. Co.*, 124 Ariz. 413, 604 P.2d 1124 (1979). Read in that light, the
16 only logical sense and meaning of the words “*No failure of any other person or entity to*
17 *enforce*” is a built-in exception that allows a defendant to assert as a defense in an action for
18 enforcement of some of the Restrictions the failure by the plaintiff himself to enforce against
19 parties within the Coyote Springs Ranch, including the defendant himself, the violations by
20 those parties of some of those Restrictions, which may or may not mean the particular
21 Restrictions that are the subject of the lawsuit in which the defendant asserts the defense.

22 _____
23 ⁸ Section 18 of the Declaration states:

24 18. Invalidation of any of the restrictions, covenants or conditions above by
25 judgment or court order shall in no way affect any of the other provisions hereof,
which shall remain in full force and effect.

1 **1. Sample Legal Defense – Statutes of Limitations for Breaches by Defendants.**

2 One obvious example of such an exception to the non-waiver provision is where a
3 defendant has violated one or more of the Restrictions for longer than the 4 or 6 year period of
4 the applicable statute of limitations,⁹ so the plaintiff can no longer enforce those Restrictions
5 against the defendant. In other words, each Defendant in this case can assert the statutes of
6 limitations as a valid legal defense to alleged violations of the Restrictions by that Defendant.

7 **2. Equitable Defenses –**

8 The built-in exception in the non-waiver provision Coyote Springs also allows defendants
9 to assert as a legitimate equitable defenses the failure by the plaintiff himself to enforce given
10 Restrictions against parcel owners other than the defendant, who were or are in violation of
11 those Restrictions, possibly including Restrictions other than those the plaintiff then seeks to
12 enforce against the defendant.

13 Similarly, the defendant could also assert an equitable defense of the failure by the
14 plaintiff himself to enforce given violations of Restrictions by the defendant himself, possibly
15 including the same Restrictions the plaintiff is then seeking to enforce against the defendant.

16 _____
17 ⁹ For claims where the *Complaint* seeks damages for violations of the Coyote Springs
18 Declaration, the 6 year statute of limitations under A.R.S. § 12-548 applies; *Woodward v. Chirco*
Construction Co., Inc., 141 Ariz. 520; 687 P.2d 1275 (Ariz.App. 1984). A.R.S. § 12-548 states:

19 **§ 12-548. Contract in writing for debt; six year limitation**

20 An action for debt where indebtedness is evidenced by or founded upon a contract
21 in writing executed within the state shall be commenced and prosecuted within six
years after the cause of action accrues, and not afterward.

22 For all other claims, such as those simply seeking declaratory judgment, the applicable period is
the 4 year period of A.R.S. § 12-550, which states:

23 **§ 12-550. General limitation**

24 Actions other than for recovery of real property for which no limitation is otherwise
25 prescribed shall be brought within four years after the cause of action accrues, and
not afterward.

1 In other words, the plain wording of the built-in exception to the non-waiver provision
2 allows the defendant to assert and argue as equitable defenses either that: (i) the plaintiff
3 should not be allowed to "cherry pick" the defendant as a sole target for violations of
4 Restrictions that it seeks to enforce only against the defendant, when the plaintiff has not
5 sought, or does not seek, to enforce the same or similar restrictions against other defendants,
6 and/or (ii) the plaintiff should not be allowed to cherry pick Restrictions it seeks to enforce only
7 against the defendant when it has ignored, or is ignoring, the violations of other similar or
8 significant Restrictions by the defendant or others.

9 That means the Defendants in this case can assert as legitimate equitable defenses either
10 that: (i) Plaintiff must seek to enforce the Restrictions in its Complaint against all parties in
11 Coyote Springs Ranch in violation thereof, and/or (ii) Plaintiff must seek to enforce other
12 similar or significant Restrictions against all parties in Coyote Springs Ranch in violation thereof.

13 **3. Impact of Statutes of Limitations on Equitable Defenses.**

14 The obvious exception for the statute of limitations discussed at Part II B 1 above is also
15 important because a significant number of violations of various Restrictions for longer than the
16 applicable 4 or 6 year statutes of limitations may itself be evidence of, or effectively result in,
17 the partial or complete abandonment, of at least the Restrictions so violated, if not the
18 Declaration as a whole. And this could be true whether those violations were by defendants or
19 by parties outside the lawsuit.

20 Again we must recognize that the *Burke and College Book Centers* cases do not say as a
21 blanket rule that partial abandonment of the Coyote Springs Restrictions can never be found
22 because of the non-waiver provision in the Declaration. Instead that question must be decided
23 on a case by case basis, particularly noting, in this case, how partial abandonment can be
24 proven by evaluating how many extensive violations of various Restrictions have run for longer
25 than the applicable statutes of limitations.

1 It would be ludicrous to recognize that the Coyote Springs non-waiver provision allows
2 each Defendant in this case to assert the statutes of limitations as a valid legal defense for his
3 own violations of the Restrictions, and that it also allows all Defendants to assert as valid
4 equitable defenses the Plaintiffs' own failure to enforce given Restrictions against other Coyote
5 Springs Parcel Owners for previous or current violations, including violations that have run past
6 the applicable statutes of limitations for suits by any other Coyote Springs Parcel Owners, but
7 to then use the holdings of the *Burke* and *College Book Centers* to read into that non-waiver
8 provision a limitation that says the Defendants cannot assert those extensive violations by
9 others, unless and until they finally reach the point where Defendants can prove the extent of
10 the violations amount to a complete abandonment of the entire Declaration.

11 This is not only ludicrous in the abstract, it is particularly so when one considers such
12 extensive violations when they are "plotted" on the map of Coyote Springs Ranch, and the
13 possible, if not likely, patterns are then observed over that huge area. Imagine, for a moment,
14 that: (i) the map showing the boundaries of each Coyote Springs Parcel is mounted on a cork
15 board; (ii) then, a pin with a yellow ball is pushed into the center of each parcel with a violation
16 of the Restriction in Section 2 against commercial activity, except that a pin with a single yellow
17 flag is instead used when the violation has lasted longer than the 4 year the statutes of
18 limitations, while a pin with a double yellow flag is used if the violation has lasted longer than
19 the 6 year statute of limitations; (iii) then pins with red balls and flags are used for violations of
20 the minimum lot size Restrictions in Section 3; and (iv) then pins with balls and flags of another
21 color is assigned and used for each of any other significant violations of the Restrictions.

22 At some point, a sheer number of balls and flags of various colors spread over enough of
23 the map would support the factual finding that, despite the non-waiver provision, the
24 Restrictions had been so thoroughly disregarded as to result in the complete abandonment
25 described in the *Condos* case, and recognized as such in *Burke* and *College Book Centers*.

1 But, even if the map, colored balls and pins did not prove such a complete abandonment,
2 they could still prove partial abandonment in a number of different ways:

3 Imagine that, in some significant areas on the map, (such as neighborhoods bounded by
4 dominant roadways), the balls and flags of one color are so heavily clustered as to cover a
5 substantial percentage of the Coyote Springs Parcels in that area. That would support a factual
6 finding of a partial abandonment in those areas of the Restriction to which that color was
7 assigned. Let us refer to this as a "**localized abandonment**" of that Restriction.

8 Similarly, a significant distribution of balls and flags of a single color all over the map and
9 at some overall density would support a finding that there was a complete abandonment over
10 all of Coyote Springs Ranch of the Restriction to which that color was assigned. Let us refer to
11 this as a "**widespread abandonment**" of that Restriction.

12 A number of obvious variations could occur, that would fall short of a complete
13 abandonment of all of the Restrictions. There could be: (1) localized abandonment of only
14 some of the of Restrictions, (2) only localized abandonment of all of the Restrictions, (3)
15 widespread abandonment of some of the Restrictions, and (4) localized abandonment of some
16 Restrictions coupled with widespread abandonment of others, while still any violations of other
17 Restrictions did not fall into either group.

18 Just as the fact finder can and should determine the concentrations and colors of pins
19 that result in a complete abandonment of all of the Restrictions, it can and should determine
20 the concentrations and colors of pins that prove partial abandonment of individual Restrictions
21 in either a localized and/or widespread basis. Reading the Coyote Springs non-waiver provision
22 to allow such findings of partial abandonment, does not gut the provision. Instead, it still
23 allows a plaintiff to enforce a given Restriction despite limited violations that occur in those
24 areas where there is not a sufficient concentration of balls and flags in the color to which the
25 Restriction was assigned to find a partial abandonment of that Restriction.

1 In evaluating the Coyote Springs non-waiver provision, all of the Arizona cases dealing
2 with abandonment of property restrictions should be read in light of whether or not each case
3 specifically addressed abandonment, as opposed to simple waiver, and whether non-waiver
4 provision was involved.¹⁰ Moreover, unlike the non-waiver provisions in *Burke* and in *College*
5 *Book Centers*, the only two cases that considered whether such a provision will trump the
6 finding of abandonment, the Coyote Springs non-waiver provision does include the built-in
7 exception for failures by a plaintiff to enforce some or all of the Restrictions, but it does not
8 include the word "abandonment", which is present in the *College Book Centers* provision.

9
10 ¹⁰ The 1948 *O'Malley* case involved a set of restrictions placed by a developer inside the
11 original deeds for parcels in a neighborhood, instead of in a single declaration, and there was
12 apparently no such non-waiver provision. In the 1954 *Condos* case there does not appear to be
13 a non-waiver provision among the 15 restrictions quoted from the declaration. Likewise, there
14 does not appear to be a non-waiver provision in the declaration in the 1974 *Riley* case, which
15 cited the 1948 *O'Malley* case for the proposition that "*where frequent violations of restrictions*
16 *have been permitted, the restrictions will be considered abandoned and unenforceable*".

17 In the 1980 *Adams* case, we only know that:

18
19 The declaration of restrictions contains an express non-waiver provision supporting
20 the trial court's finding in that regard.

21 In the 2004 *Burke* case, the non-waiver provision is virtually identical to Coyote Springs, except
22 that it lacks the "any other person or party" words:

23
24 The non-waiver provision provides that "failure to enforce any of the restrictions,
25 rights, reservations, limitations and covenants 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."

26 In the 2010 *College Book Center* case, the non-waiver provision includes the words "or
abandonment", which are not present in the non-waiver provision in *Burke* or in this case:

27
28 The CC&Rs further provide that the failure to enforce any provision will not result in
29 subsequent waiver or abandonment of the right to enforce such restriction in the
future.

30
31 (emphasis added)

III. ATTORNEY'S FEES & OFFERS OF JUDGMENT.

1
2 While the Coyote Springs Declaration does not have an attorney's fees provision
3 mandating the award of attorney's fees, an action to enforce a restrictive covenant "arises out
4 of contract" pursuant to A.R.S. § 12-341.01 and attorney's fees are awardable. *Pinetop Lakes*
5 *Association v. Hatch*, 135 Ariz. 196; 659 P.2d 1341 (Ariz. App. 1983)

6 Defendant Grace alerts all parties to his intent to make, either before and/or just after
7 the requested settlement conference, Offers of Judgment to all parties that provide for a court
8 finding of the type of partial abandonment of the Restrictions he has just described. And he
9 would have all parties take note of the potential impact of a rejection of such offers under both
10 A.R.S. § 12-332¹¹ and A.R.S. § 12-341.01 (A).¹²

11 He also notes that he will specifically provide in such offers a mechanism where those
12 parties who have been in the case for years can ask the Court to hold hearings to separately
13 determine whether they are entitled to an award of attorney's fees, while leaving all of the
14 newcomers out of that debate.

15 He suspects that any number of parties to the case will accept, join or mimic those offers.
16

17
18 ¹¹ Specifically that, if the judgment finally obtained by Plaintiffs, including only those taxable
19 costs and attorneys' fees determined by the court as having been reasonably incurred as of the
20 date the offer was made, is equal or less favorable to Plaintiffs than the judgment offered in
21 the offer of judgment, the offeree must pay those reasonable expert witness fees and double
22 the taxable costs, as defined by A.R.S. § 12-332, incurred by the offeror after the making of
23 that offer, and prejudgment interest on any unliquidated claims from the date of that offer.

24 ¹² Specifically that, if the judgment finally obtained by the offeree is equal or less favorable to
25 the offeree than any judgment offered in the offer of judgment to settle any contested action
arising out of a contract, the offeror will be considered the prevailing party from the date of his
offer, and the offeree may be required to pay all or part of his reasonable attorneys' fees
pursuant to A.R.S. § 12-341.01 and the factors set forth in *Schweiger v. China Doll Restaurant,*
Inc., 138 Ariz. 183, 673 P.2d 927 (App. 1983) and *Associated Indemnity Corp. v. Warner*, 143
Ariz. 567, 694 P.2d 1181 (1984).

IV. CONCLUSION

1
2 With proper evidentiary tools, such as the map with colored balls and flags discussed at
3 Part II B 3 above, the fact finder can readily recognize the substantial difference between
4 waivers that are infrequent, isolated, or scattered across the map, and waivers that are so
5 numerous or densely concentrated that they collectively constitute a partial abandonment.

6 The various Coyote Springs Restrictions are separate and independent; *Carter v. Conroy*,
7 25 Ariz.App. 434, 544 P.2d 258 (Ariz. App. 1976). And, as discussed in Part II B above, the plain
8 language of provision in Section 18, which allows a particular Restriction to separately survive
9 despite the failure of others, would allow the Court to conclude that enforcement of only some
10 of the Restrictions has been abandoned, if the facts and law, based on a holistic reading of
11 Declaration, does not lead it to another conclusion.

12 In light of all of foregoing discussion and factors, the only logical and fair conclusion is
13 that evidence of frequent, ongoing, or widespread violations of the Coyote Springs Restrictions
14 can be submitted by the Defendants in the present case as proof of the partial abandonment
15 of particular Restrictions, and in support of valid equitable defenses, without running afoul of
16 the intent and effect of the non-waiver provision in Section 19 of the Declaration.

17 It takes no great leap of faith or logic to realize the distinct possibility that, after the fact
18 finder reviews the evidence of all significant violations of the Restrictions, it will find:

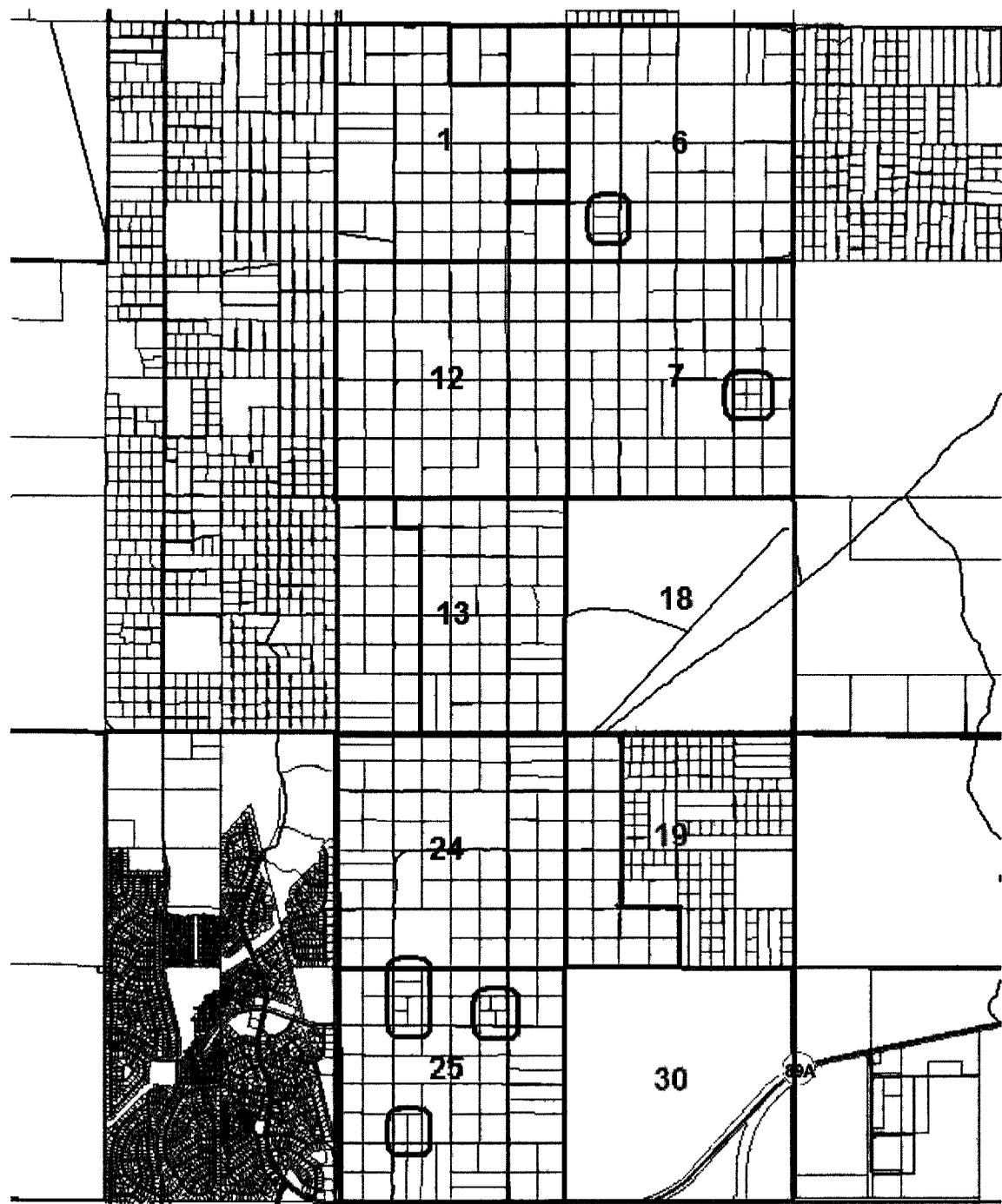
19 (a) substantial violations of the Restriction in Section 2 of the Restrictions against
20 commercial activity within Coyote Springs Ranch that result in either localized or
21 widespread abandonment of that Restriction;

22 (b) but too few violations of the Restriction in Section 3 to a 9 acre minimum lot size
23 to conclude that it has been abandoned on either a local or widespread basis.

24 In fact, the latter conclusion, comes readily from a simple review of the sizes of the
25 various tax parcels within Coyote Springs Ranch that show on the current assessor's map:

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Coyote Springs Ranch



← R1W × R1E →

All 8 Sections of CSR are in T15N, G&SR, B&M.
10 Acre Parcels in 6 Locations were split into
smaller parcels of under 9 acre min. in CC&Rs.

Map printed on: 7.14.2011

1 Defendant Grace feels that the affirmative defenses in his Amended Answer, related to
2 notice and illusory damages, will have a significant impact in this case. First, Arizona's law on
3 actual and constructive notice, both on their own, and in the application of both of the
4 affirmative defenses of the statutes of limitations and a partial or full abandonment of all or
5 part of the Restrictions. Second, the damages claimed by Plaintiffs are to a great extent
6 illusory as such damages were most likely absorbed, if not entirely swallowed, by the fair
7 market value of the parcels they purchased, as reflected in the prices they actually paid.

8 So it would be wise for all parties to stop at this juncture and explore a global settlement
9 that results in the partial abandonment of only those Restrictions that have effectively been
10 substantially violated on either a localized or widespread basis, without years and years of
11 continued litigation and hundreds of thousands of dollars in attorney's fees, not to mention
12 the possibility of an ultimate discretionary award of attorney's fees that further punishes a
13 party in the case, particularly one that rejects a global settlement offer along those lines that is
14 acceptable to most or all of the other parties to the case.

15 Such a settlement is also an optimal solution in that it results in the minimal change to
16 the Declaration for Coyote Springs Ranch, and to its very character, which is especially apropos
17 when one considers what any buyer in recent years has had a right to expect after conducting
18 the minimal due diligence that comes from simply driving around Coyote Springs Ranch, or at
19 least the neighborhood within which that buyer purchased his or her parcel.

20 RESPECTFULLY SUBMITTED this day of July, 2011.
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24 Noel J. Hebets, NOEL J. HEBETS, PLC
25 -- Attorney for Defendant William M. Grace
(Owner of APN 103-01-002K)

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by:

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5 Noel@NoelHebets.com
6 Attorney for Defendant William M. Grace
(Owner of Assessor's Parcel No. 103-01-002K)

7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
8 **IN AND FOR THE COUNTY OF YAVAPAI**

9)	
10)	
11	)	Action No. P1300-CV2003-0399
12)	
13	)	REQUEST FOR
14)	SETTLEMENT CONFERENCE
15)	
16)	
17)	Assigned to the Honorable
18)	Kenton D. Jones

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Believing the case is now at the point where such is proper, Defendant Grace hereby requests that the Court schedule a settlement conference in the reasonably near future, or at least a status conference where all parties may weigh in on such an idea.

Note: In support of this request, and in addition to the brief *Memorandum* contained herein, he has separately provided to all parties in the case a *Memorandum in Support of Request for Settlement Conference* which will not be filed herewith.

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MEMORANDUM

While Plaintiffs' counsel failed to reply to a June 16 email from counsel for Defendant Grace attempting to ascertain the same, Defendant Grace's counsel believes from his review of the record that this case has now finally reached the point where no more answers or other responsive pleadings can be filed in this case without special leave of the Court.

He also notes that the Declaration of Restrictions which is the subject of this case do not provide a provision for the award of attorney's fees to a prevailing party. Therefore, all parties to this case will be subject to ultimate possibility of a discretionary award of attorney's fees under A.R.S. § 12-341.01, (and possibly under A.R.S. § 12-1103(B) for some parties to the case). He also notes the long and complex prior history of this case, and the likely enormous amounts of attorney's fees already expended in association therewith, even before the recent addition of dozens and dozens of additional parties as either defendants, plaintiffs, or possibly in some other status, and the extraordinary amounts of attorney's fees that each and all of the parties are likely to encounter here on, even if the case gets no more complex.

He also realizes that an optimal time to call for an initial settlement conference would normally be soon after all initial disclosures are exchanged, when all parties can better assess the merits of the various claims and defenses by all parties to this case. And he does suggest that the Court soon order some efficient exchange of all prior disclosures among all parties to the case, meaning at least in electronic form, to be followed within a reasonable time by supplemental disclosures from the newer parties to the case.

Defendant Grace is actually willing to attend the settlement conference he is requesting either before such an initial exchange of prior disclosures or before any supplemental disclosures are provided. However, he asks that the Court strongly consider what the responses by the other parties to this request say about the actual timing of such an initial settlement conference, as others may wish for the disclosures to be completed.

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RESPECTFULLY SUBMITTED this ____ day of _____, 2011.

.....
Noel J. Hebets, NOEL J. HEBETS, PLC
-- Attorney for Defendant William M. Grace
(Owner of APN 103-01-002K)

by:

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