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BY: MButton

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8 Attorneys for Defendants

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

11 JOHN B. CUNDIFF and BARBARA C.  
12 CUNDIFF, husband and wife; BECKY  
13 NASH, a married woman dealing with her  
14 separate property; KENNETH PAGE and  
15 KATHRYN PAGE, as Trustee of the Kenneth  
16 Page and Catherine Page Trust,

17 Plaintiffs,

18 v.

19 DONALD COX and CATHERINE COX,  
20 husband and wife,

21 Defendants.

Case No. CV 2003-0399

Division No. 1

**DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT RE:  
AGRICULTURAL ACTIVITIES**

*(Oral Argument Requested)*

(Assigned to the Honorable David L.  
Mackey)

22 Pursuant to Rule 56, Ariz. R. Civ. P., Defendants Donald and Catherine Cox submit their  
23 Motion for Summary Judgment Re: Agricultural Activities on the basis that the Declaration of  
24 Restrictions that was recorded on June 13, 2004 in the Official Records of Yavapai County, Arizona  
25 at Book 416, Page 680 ("**Declaration**") does not prohibit agricultural activities, which is the only  
26 activity occurring on the Defendants' property. Therefore, Defendants are entitled to judgment as  
27 a matter of law. This Motion for Summary Judgment is fully supported by the accompanying  
28 Memorandum of Points and Authorities, the Separate Statement of Facts in Support of the

✓ Div 1

1 Defendants' Motion for Summary Judgment Re: Agricultural Activities ("FSOF") filed  
2 contemporaneously herewith, and the record on file.

3  
4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. Legal Argument.**

6 The rule governing restrictive covenants is that they will be enforced according to their terms.

7  
8 See Duffy v. Sunburst Farms East Mut. Water & Agr. Co., Inc., 124 Ariz. 413, 417, 604 P.2d 1124  
9 (1979). "The words in a restrictive covenant must be given their ordinary meaning." Id. at 416.

10 Based on the foregoing law, if a particular activity or use of property governed by restrictive  
11 covenants is not expressly prohibited, it will be deemed permissible.

12 Paragraph 2 of the Declaration states:

13  
14 No trade, business, profession or any other type of commercial or  
15 industrial activity shall be initiated or maintained within said property  
or any portion thereof.

16 See FSOF, ¶ 1. The terms "trade", "business", and "profession", and the phrase "commercial or  
17 industrial activity", are not defined in the Declaration. See FSOF, ¶ 2. Nor does the Declaration  
18 describe the types of activities that fall within the scope of the terms "trade", "business", and  
19 "profession", and the phrase "commercial or industrial activity". See FSOF, ¶ 3. Paragraph 2 of the  
20 Declaration also ***does not*** include agricultural activities in the activities that are prohibited. See  
21 FSOF, ¶ 4. Consequently, the terms "trade", "business", and "profession", and the phrase  
22 "commercial or industrial activity" in paragraph 2 of the Declaration must be given their ordinary  
23 meaning. Duffy at 416 citing Riley v. Stoves, 22 Ariz.App. 223, 526 P.2d 747 (1974).  
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25  
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1 According to the Webster's New World Dictionary, the term "business" is defined as follows:

2 1 one's work, occupation, or profession 2 a special task, duty or  
3 function 3 rightful concern or responsibility [no one's business but his  
4 own] 4 a matter, affair, activity, etc [the business of packing for a trip]  
5 5 the buying and selling of commodities and services; commerce; trade  
6 6 a commercial or industrial establishment; store, factory, etc. 7 the  
7 trade or patronage of customers 8 commercial practice or policy 9 a  
6 bit of action in a drama, as pouring a drink, intended to establish  
7 character, take up a pause in dialogue, etc.

8 Webster's New World Dictionary at 189 (3<sup>rd</sup> College Ed. 1988). The term "commercial" is defined  
9 as:

10 1 of or connected with commerce or trade 2 of or having to do with  
11 stores, office buildings, etc. [commercial property] 3 of a lower grade,  
12 or for use in large quantities in industry [commercial sulfuric acid] 4  
13 a) made, done, or operating primarily for profit b) designed to have  
14 wide popular appeal 5 offering training in business skills, methods, etc.  
6 Radio TV paid for by sponsors

15 Id. at 280. The term "commerce" is defined as:

16 1 the buying and selling of goods, esp. when done on a large scale  
17 between cities, states or countries; trade 2 social intercourse 3 [Rare]  
18 sexual intercourse

19 Id.

20 Applying the foregoing definitions to the Defendants' activities on their property reveal that they  
21 have not violated paragraph 2 of the Declaration.<sup>1</sup> Defendants' use of their property is limited to  
22 living there and growing trees. See FSOF, ¶ 5. They transact no business on their property and no  
23 money exchanges hands. Id. There is no buying or selling of goods or services on their property.  
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27 <sup>1</sup>Defendants' agricultural activities also do not fall within the definitions of "trade",  
28 "profession" or "industrial activity".

1 Defendants have constructed no commercial buildings on their property and they conduct no  
2 industrial operations thereon. Id.

3  
4 At its simplest, Defendants' use of their property is agricultural only. This conclusion is  
5 supported by the undisputed fact that Yavapai County has characterized Defendants' use of their  
6 property as agricultural and has granted them an agricultural exemption for assessment purposes. See  
7 FSOF, ¶ 6. The term "agriculture" is defined in Webster's Dictionary as "the science and art of  
8 farming; work of cultivating the soil, producing crops, and raising livestock". Id. at 26. Such a  
9 definition is not included within the definitions of the terms "trade", "business", and "profession", or  
10 the phrase "commercial or industrial activity".  
11

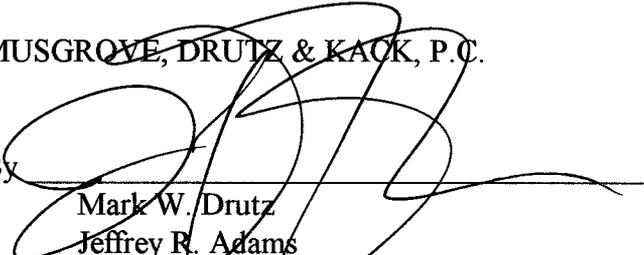
12  
13 Clearly, Defendants' use of their property for agricultural purposes is not prohibited, either  
14 expressly or impliedly, by paragraph 2 of the Declaration. Therefore, Defendants are entitled, as a  
15 matter of law, to continue the agricultural use of their property. Summary judgment in favor of  
16 Defendants on this issue, therefore, is warranted.

17  
18 **II. Conclusion.**

19 Defendants are entitled, as a matter of law, to continue the agricultural use of their property.  
20 Summary judgment should be granted in their favor accordingly.

21 DATED this 24 day of June, 2005.

22  
23 MUSGROVE, DRUTZ & KACK, P.C.

24  
25 By 

26 Mark W. Drutz

27 Jeffrey R. Adams

28 Sharon Sargent-Flack

*Attorneys for Defendants*

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COPY of the foregoing hand-delivered  
this 27 day of June, 2005 to:

Honorable David L. Mackey  
Yavapai County Superior Court  
Division 1  
Yavapai County Courthouse  
Prescott, Arizona 86301

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