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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:
DECLARATION VAGUENESS AND
AMBIGUITY**

(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: Declaration Vagueness and Ambiguity on the basis that the
24 Declaration of Restrictions that was recorded on June 13, 2004 in the Official Records of Yavapai
25 County, Arizona at Book 416, Page 680 ("**Declaration**") is vague and ambiguous and, therefore,
26 cannot be enforced against these Defendants. Therefore, Defendants are entitled to judgment as a
27 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 Motion for

1 Summary Judgment Re: Declaration Vagueness and Ambiguity filed contemporaneously herewith,
2 and the record on file.

3
4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. Legal Standards Governing The Enforcement of Restrictive Covenants.**

6 This case centers around the issue of whether the Declaration is enforceable against the
7 Defendants. The general rule governing restrictive covenants is that they run with the title to the land
8 they burden. See Pinetop Lakes Ass'n v. Hatch, 135 Ariz. 196, 659 P.2d 1341 (Ct. App. 1983).
9 Further, restrictive covenants generally will be enforced according to their terms. See Duffy v.
10 Sunburst Farms East Mut. Water & Agr. Co., Inc., 124 Ariz. 413, 417, 604 P.2d 1124 (1979).
11 However, "any ambiguity in terms of the restrictive covenant or intent of the parties will be resolved
12 against the restriction." Id. Importantly, "[r]estrictive covenants are to be strictly construed against
13 persons seeking to enforce them and any ambiguities or doubts as to their effect should be resolved
14 in favor of the free use and enjoyment of the property and against restrictions." Id. quoting Grossman
15 v. Hatley, 21 Ariz.App. 581, 522 P.2d 46 (1974). As explained below, paragraph 2 of the
16 Declaration is vague and ambiguous. Therefore, under the standards articulated above, paragraph 2
17 of the Declaration cannot be enforced against Defendants or any other Coyote Springs property
18 owner.
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22 **II. Paragraph 2 of the Declaration Is Vague and Ambiguous.**

23 Paragraph 2 of the Declaration states:

24
25 No trade, business, profession or any other type of commercial or
26 industrial activity shall be initiated or maintained within said property
27 or any portion thereof.
28

1 See SSOF, ¶ 1. At first blush, the foregoing provision appears to be clear. However, it is anything
2 but clear.

3
4 The terms “trade”, “business”, and “profession”, and the phrase “commercial or industrial
5 activity”, are not defined in the Declaration. See SSOF, ¶ 2. Nor does the Declaration describe the
6 types of activities that fall within the scope of the terms “trade”, “business”, and “profession”, and
7 the phrase “commercial or industrial activity”. See SSOF, ¶ 3. Paragraph 2 of the Declaration also
8 does not include agricultural activities in the activities that are prohibited. See SSOF, ¶ 4.
9

10 The vagueness and ambiguity of paragraph 2 of the Declaration became abundantly clear
11 during Plaintiffs’ depositions. During their depositions, each Plaintiff provided a different
12 interpretation of paragraph 2 of the Declaration; and each Plaintiff had their own perception of what
13 activities and conduct on property in Coyote Springs would constitute a violation of paragraph 2 of
14 the Declaration and those that would not. See SSOF, ¶ 5. In fact, Plaintiffs had a substantial amount
15 of difficulty providing any sort of definition of what constitutes a business or commercial activity
16 despite the fact that they each have conducted their own businesses for, in some cases, several
17 decades. See SSOF, ¶ 6. Not surprisingly however, while Plaintiffs could not agree upon whether
18 various activities currently ongoing in Coyote Springs fall within the scope of prohibited activities
19 under paragraph 2 of the Declaration, they were in agreement that what Defendants are doing does,
20 which is not much different than the “I don’t know what it is but I know it when I see it” standard
21 many have used for defining pornography. See SSOF, ¶ 7. Plaintiffs’ own inability to agree upon
22 what is allowed and what is prohibited by paragraph 2 of the Declaration is clear and incontrovertible
23 evidence that paragraph 2 of the Declaration is vague and ambiguous.
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1 However, we are not left to the Plaintiffs' deposition testimony alone to realize that paragraph
2 2 of the Declaration is vague, ambiguous and unclear. Adding to the confusion over types of
3 activities prohibited by paragraph 2 of the Declaration are the statements of Robert Conlin, the former
4 owner of all of Coyote Springs and author of the Declaration, in his affidavit already submitted to this
5 Court by Plaintiffs in connection with their Motions for Summary Judgment. See SSO, ¶ 8.
6 Therein, Mr. Conlin attests that the Declaration was not intended to preclude home-based business
7 offices and advertising the same to the public in Coyote Springs. Id. However, a review of paragraph
8 2 of the Declaration reveals that it contains no such exception. Id. Nevertheless, if this Court is
9 willing to accept Mr. Conlin's interpretation, which is contrary to the written language Mr. Conlin
10 employed, it is clear that paragraph 2 of the Declaration is unclear and subject to differing
11 interpretations and understandings. As a result, paragraph 2 of the Declaration is patently
12 ambiguous. Consequently, paragraph 2 of the Declaration must be strictly construed ***against the***
13 ***Plaintiffs***, the persons seeking to enforce the Declaration, and the Declaration's ambiguities and
14 doubts as to its effect should be resolved ***in favor of the free use and enjoyment of the Defendants'***
15 ***property and against the Declaration.*** See Duffy at 417 (emphasis added). In other words,
16 judgment as a matter of law should be granted to Defendants and they should be permitted to
17 continue their current use their property.
18

19 **III. Conclusion.**

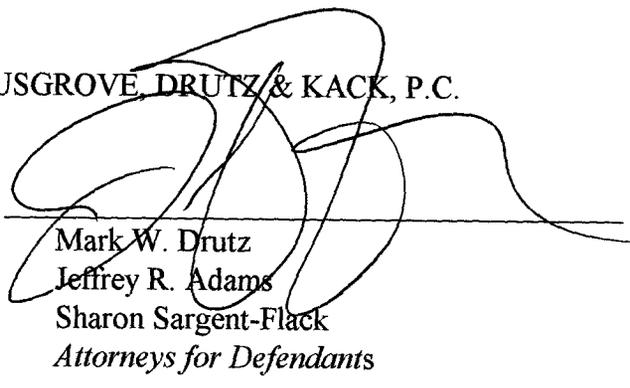
20 Judgment as a matter of law should be granted to Defendants and they should be permitted
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DATED this 27 day of June, 2005.

MUSGROVE, DRUTZ & KACK, P.C.

By



Mark W. Drutz
Jeffrey R. Adams
Sharon Sargent-Flack
Attorneys for Defendants

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

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

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