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6 **IN THE SUPERIOR COURT OF ARIZONA**

7 **COUNTY OF YAVAPAI**

8

9 **JOHN B. CUNDIFF** and **BARBARA C. )**  
**CUNDIFF**, husband and wife; **BECKY NASH,** )  
10 a married woman dealing with her separate )  
property; **KENNETH PAGE** and **KATHRYN )**  
11 **PAGE**, as Trustee of the Kenneth Page and )  
Kathryn Page Trust, )

12 Plaintiffs, )

13 vs. )

14 **DONALD COX** and **CATHERINE COX,** )  
husband and wife, )

15 Defendants. )  
16 \_\_\_\_\_ )

Case No. **CV 2003-0399**

Division 1

**PLAINTIFFS' RESPONSE  
TO DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT**

**RE: AGRICULTURAL ACTIVITIES**

17 Plaintiffs, John and Barbara Cundiff, Becky Nash, and, Kenneth and Kathryn Page, by and  
18 through undersigned counsel, hereby respond to Defendants Cox's motion for summary judgment re:  
19 agricultural activities. Defendants apparently take the position that the prohibition against non-  
20 residential use of land contained in the record Declaration of Restrictions is clear enough for this Court  
21 to enter a finding that, as a matter of law, Defendants' alleged agricultural use of the land is not  
22 proscribed by the restriction.

23 Ironically, Defendants' motion actually establishes that Defendants are using the land for  
24 business purposes: the growth and storage of inventory for their nursery. The best evidence comes  
25 from Defendants themselves: their admitted operation of a retail and wholesale nursery business, and  
26 their use of their Coyote Springs Ranch land to store and raise inventory that is ultimately transported  
to either location for re-sale. The land's inextricable use in connection and promotion of Defendants'

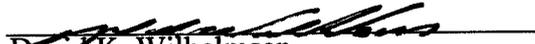
1 business enterprise can neither be ignored nor defeated by their self-contradictory arguments that their  
2 conduct does not fall under the clear language of restrictive covenant. As a result, Defendants' motion  
3 clearly establish that there is no genuine issue of material fact that, as a matter of law, Defendants are  
4 using the subject land for business purposes in violation of the recorded declaration.

5 This response is supported by the following memorandum of points and authorities,  
6 controverting statement of facts filed together with this response, as well as the entire record in this  
7 proceeding.

8 RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of July, 2005.

9 FAVOUR MOORE & WILHELMSSEN, P.A.

10  
11 By:

12   
13 David K. Wilhelmsen  
Marguerite Kirk

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **I. THE PLAIN MEANING OF THE RESTRICTIVE COVENANT**

16 **PROHIBITS BUSINESS OPERATIONS IN COYOTE SPRINGS RANCH**

17 The June 13, 1974 recorded Declaration of Restrictions for Coyote Springs Ranch, which  
18 admittedly applies to Defendants' land (*Plaintiffs' Controverting Statement of Facts*, "CSOF" at ¶2),  
19 states:

20 1. Each and every parcel of the above-described premises shall be known and  
21 described as residential parcels; that is to say, mobile, modular or permanent dwellings  
22 may be erected and maintained upon said premises, subject to limitations with respect  
thereto as hereinbelow set forth.

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

24 *CSOF at ¶1*. Covenants and restrictions "constitute a contract between the subdivision's property  
25 owners as a whole and individual lot owners." *Arizona Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447,  
26 448, 868 P.2d 1030, 1031 (App. 1983). Contract interpretation involves questions of law, not

1 questions of fact. *Id.*

2 [T]he cardinal rule in construing restrictive covenants is that the intention of the parties  
3 to the instrument is paramount. To determine this intent, [the court] construe[s] the  
4 document as a whole. While it is true that courts should not give a covenant a broader  
5 than intended application, ***it is well settled that a covenant should not be read in such  
6 a way that defeats the plain and obvious meaning of the restriction.***

7 *Id. at 449-50, 868 P.2d at 1032-33 (internal citations omitted; emphasis added).* In this case, the first  
8 covenant expressly provides that “each and every parcel” in the sub-division “shall be known and  
9 described as residential....” The restrictive covenant immediately following re-enforces this plain  
10 intent by prohibiting all “trade, business, profession or any other type of commercial or industrial  
11 activity” from the sub-division. Therefore, construing the recorded restrictions as a whole, “the plain  
12 and obvious meaning of the restriction” is that business, trade, industrial or other non-residential  
13 activities on land in Coyote Springs Ranch is prohibited.

14 Defendant Catherine Cox admitted during her deposition that the restrictive covenant at issue  
15 applied to the land she and her husband own. *CSOF at ¶2*. Her contention was that the restrictive  
16 covenants had been abandoned (*CSOF at ¶3*), therefore allowing her to continue to use the land in  
17 connection with her business. In their motion for summary judgment, Defendants now urge that the  
18 restrictive covenant against use of the land for business, trade, commercial or industrial activity does  
19 not include agricultural activities. *Motion for summary judgment re: agricultural activities, at p.2*.  
20 It is at this point in their argument that Defendants’ own logic collapses.

21 ““The controlling rule of contract interpretation requires that the ordinary meaning of language  
22 be given to words where circumstances do not show a different meaning is applicable.”*Horton v.*  
23 *Mitchell, 200 Ariz. 523, 527, 29 P.3d 870, 874 (App. Div. 1 2001) quoting Chandler Med. Bldg.*  
24 *Partners v. Chandler Dental Group, 175 Ariz. 273, 277, 855 P.2d 787, 791 (App. 1993).* The plain  
25 and ordinary meaning of a word may be found in the dictionary definition. *Id. at 527-28, 29 P.3d at*  
26 *874-75.* Defendants correctly point to the dictionary definition of “business” as “one’s work,  
27 occupation, or profession,” and the term “commercial” as “of or connected with commerce or trade.”  
28 *Motion for summary judgment re: agricultural activities, p.3 quoting from Webster’s New World*

1 *Dictionary.*<sup>1</sup> The obvious import is that activities connected to or promoting one's business is  
2 "business." This position has been adopted by the U.S. Supreme Court when faced with defining  
3 "business" under the tax code.

4 In *Commissioner of Internal Revenue v. Groetzinger*, 480 U.S. 23, 107 S.Ct. 890, 94 L.Ed.2d  
5 25 (1987), the United States Supreme Court stated:

6 We accept the fact that ***to be engaged in a trade or business, the taxpayer must be***  
7 ***involved in the activity with continuity and regularity and that the taxpayer's***  
8 ***primary purpose for engaging in the activity must be for income or profit.*** A  
sporadic activity, a hobby, or an amusement diversion does not qualify.

9 *Id.* at 35, 107 S.Ct. at 987 (*emphasis added*). The Supreme Court's definition of "trade or business"  
10 embodies the clear, plain and obvious meaning of the terms, such that this definition extends beyond  
11 the context of the facts before the Court. In this case, Defendant Catherine Cox admitted during her  
12 deposition that she, her husband, and their two sons were in partnership (*CSOF* at ¶4), the purpose  
13 of the partnership was the operation of a nursery (*CSOF* at ¶4), and that they employ people who work  
14 at the Coyote Springs Ranch property (*CSOF* at ¶4), which is used to grow inventory that was later  
15 sold at either their retail or wholesale nursery stores (*CSOF* at ¶4). Defendants' use of the Coyote  
16 Springs Ranch property to grow their inventory is profit-motivated. *CSOF* at ¶5.

17 Further, prior to purchase of the Coyote Springs Ranch property, Defendant Catherine Cox  
18 testified that they were specifically looking for acreage to fill "a need for more property for Prescott  
19 Valley Growers," their nursery business. *CSOF* at ¶6. Indeed, in documents disclosed by Defendants,  
20 several improvements made to the property they later claim on their business tax returns filed under  
21 penalty of perjury are used "100%" for business purposes. *CSOF* at ¶7. At least one bill disclosed by

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22 <sup>1</sup> Defendants have adopted the implausible position that because no money exchanges hands  
23 on their subject property, their conduct of raising, storing or otherwise maintaining inventory for their  
24 nursery stores is not a "business" activity under the restrictive covenants. *Motion for summary*  
25 *judgment re: agricultural activities* at p.4; and, see *Deposition of Catherine Cox*, at p.20, lines 14-17  
26 (attached as Exhibit 2 to *CSOF*). Defendants' somewhat bizarre definition of business (that money  
must exchange hands on the property) adopted during their deposition led Defendant Catherine Cox  
to claim that the Salvation Army is a "business." *Deposition of Catherine Cox*, at p.117 at lines 8-21.

1 Defendants relating to an improvement on their Coyote Springs Ranch property unequivocally  
2 matches a section 179 business deduction for property used in their nursery business. *CSOF at ¶7,*  
3 *Exhibit 6.*

4 Defendants' attempt to bolster their argument that their agricultural use of the property is not  
5 a business by pointing to their agricultural-use exemption is self-defeating. *Motion for summary*  
6 *judgment re: agricultural activities at p.4.* Yavapai County Agricultural Guidelines set forth the  
7 criteria for a landowner seeking a agricultural-use exemption for property. *CSOF at ¶8.* The  
8 Guidelines expressly provide: "There must be a reasonable expectation of operating profit ...from the  
9 agricultural use of the property." *CSOF at ¶8.*

10 Defendants' argument that simply because business was not defined in the Declaration and  
11 there is no exclusion of agricultural activities listed in the restrictive covenants means that they are  
12 not in violation of the covenant defeats the purpose and intent of the recorded Declaration. The  
13 restrictive covenants make clear that the sub-division is to be residential and rural, as evidenced by  
14 the provision requiring that no parcel contain "less than nine (9) gross acres..." (*CSOF at Exhibit 1,*  
15 *¶3*). In a similar case, the Arizona appellate court held that a covenant "prohibiting the parking of a  
16 'trailer, camper, boat, or similar equipment'" on property applied to a "large customized bus." *Arizona*  
17 *Biltmore Estates Ass'n, 177 Ariz. at 448, 868 P.2d at 1031.* The Court of Appeals determined that  
18 the large customized bus fell within the prohibition even though the covenant did not expressly  
19 preclude "large customized buses." *Id. at 449-50, 868 P.2d at 1032-33.* The Court's conclusion was  
20 reached from an analysis of the intent of the covenants and restrictions based upon the a review of the  
21 recorded covenants, and application of the plain meaning rule to the recorded covenant at issue.

22 The analysis employed by the appellate court in *Arizona Biltmore Estates* applies with equal  
23 force to the present case. The plain and obvious meaning of "business or trade" is an activity engaged  
24 in for purposes of realizing a profit or income. *Groetzing, supra.* Here, Defendants' business is a  
25 nursery, evidenced by their own testimony and income tax returns filed under penalty of perjury. The  
26 fact that Defendants engage in an agricultural activity, and have so claimed to engage in it for a profit

1 as documented by their agricultural-use exemption, establishes that Defendants' conduct on their land  
2 is a business. Defendants strain credibility and commonsense by arguing that merely because no  
3 money exchanges hands for their product located at the subject property means the property is not used  
4 as a business. Defendants' incredible definition of "business," requiring the exchange of money,  
5 contradicts the position they have taken on their tax returns, filed under penalty of perjury: that with  
6 respect to at least one improvement made on the land, the improvement was utilized "100%" for  
7 business purposes. Moreover, taking Defendants' argument to its logical conclusion would mean that  
8 any storage of inventory or any warehouse used by any business was not for business purposes merely  
9 because the public was not afforded access to the warehouse or no money exchanged hands.  
10 Similarly, Defendants' argument leads to the illogical and counter-intuitive conclusion the growth of  
11 crops for later harvest and sale of the grain for money would not be a "business" because the purchaser  
12 did not go to the land where the crop was grown to buy the grain.

## 13 II. CONCLUSION

14 Every indicia of a business is present in Defendants' use of their land in Coyote Springs  
15 Ranch: purchase of land for use in their business; storage and growth of inventory; employment of  
16 employees; profit-motivation; tax exemption dependent upon profit motive; and, claimed federal tax  
17 business deductions for improvements made to the subject property. As a matter of law, land used  
18 to grow inventory (whether trees or crops) where that inventory is later re-sold in the wholesale or  
19 retail markets, and the person who owns the land where the inventory is located or grown derives  
20 income from the endeavor and is not engaged in a hobby, is land used for a business purpose. There  
21 is no genuine issue of fact that Defendants operate a partnership with their sons, and the business the  
22 partners engage in is the operation of a nursery. Prior to purchase of the subject property, Defendants  
23 were specifically looking for property that could be used in connection with their nursery business.  
24 There is further no issue of fact that Defendants admittedly use their property in Coyote Springs Ranch  
25 to store or grow inventory that is later re-sold at wholesale or retail. The purpose of the inventory is  
26 to generate a profit, and Defendants have employees maintaining their inventory on the subject

1 property. Defendants' agricultural-use exemption is premised on their meeting the criteria that the  
2 land is used to generate an "operating profit." Defendants have made repeated prior statements to the  
3 federal government under penalty of perjury that certain improvements they have made to the subject  
4 property are used solely for business purposes. That Defendants may characterize their business as  
5 "agricultural" does not change the fact that their use of the land is for a business purpose, and in  
6 violation of the recorded Declaration of Restrictions.

7 Therefore, upon this basis, Plaintiffs request that this Court deny Defendants' motion for  
8 summary judgment.

9 DATED this 18<sup>th</sup> day of July, 2005.

10 FAVOUR MOORE & WILHELMSSEN, P.A.

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12  
13 By:

  
David K. Wilhelmsen  
Marguerite Kirk

14  
15 Original of the foregoing  
16 filed this 18<sup>th</sup> day of July,  
2005, with:

17 Clerk, Superior Court of Arizona  
18 Yavapai County  
120 S. Cortez St.  
19 Prescott, Arizona 86302

20 A copy hand-delivered this  
18<sup>th</sup> day of July, 2005, to:

21 Honorable David L. Mackey  
22 Division One  
Superior Court of Arizona  
23 Yavapai County  
120 S. Cortez St.  
24 Prescott, Arizona 86302

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and, a copy hand-delivered this  
18<sup>th</sup> day of July, 2005, to:

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