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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
**IN AND FOR THE COUNTY OF MOHAVE**

**NANCY KNIGHT,**  
  
**Plaintiff,**

**Case No. B8015CV2018 04003**

**vs.**

**GLEN LUDWIG and PEARL LUDWIG,**  
**Trustees of THE LUDWIG FAMILY**  
**TRUST; FAIRWAY CONSTRUCTORS,**  
**INC.;**  
**MEHDI AZARMI; JAMES B. ROBERTS**  
**and DONNA M. ROBERTS, husband and**  
**wife; JOHN DOES 1-10; JANE DOES 1-**  
**10; ABC CORPORATIONS 1-10; AND**  
**XYZ PARTNERSHIPS 1-10.**

**PLAINTIFF’S BRIEF**  
**REGARDING COMPLIANCE**  
**WITH RULE 19**

**Defendants.**

Pursuant to this Court’s Scheduling Order dated August 31, 2021, Plaintiff hereby submits her Brief Regarding compliance with Rule 19.

**I. Factual Background**

This case concerns Plaintiff’s claims that Defendants have violated certain provisions of the Covenants, Conditions, and Restrictions for Desert Lakes Golf Course and

1 Estates Tract 4076-B in Fort Mohave, Arizona (hereinafter referred to as "CC&Rs"). Defendants  
2 assert, among other things, an affirmative defense that the CC&Rs have been abandoned. The  
3 parties agree that A.R.C.P Rule 19 is an issue that must be considered by this Court in order to  
4 proceed with this litigation.

5 **II. Arguments of Law**

6 **A. Before this Court can rule that the CC&Rs have been abandoned,**  
7 **Rule 19 requires that all of the property owners in Tract 4076-B be**  
8 **joined in this lawsuit**

9 Rule 19 provides as follows:

10 **(a) Persons Required to Be Joined if Feasible.**

11 (1) *A Person Required to Be Made a Party.* A person who is  
12 subject to service of process and whose joinder will not  
13 deprive the court of subject-matter jurisdiction must be joined  
14 as a party if:

15 (A) in that person's absence, the court cannot accord complete  
16 relief among existing parties.

17 The parties to this lawsuit represent less than two percent (2%) of the property  
18 owners in Tract 4076-B. The CC&Rs in this case contain a number of restrictions  
19 concerning the construction of residences in Tract 4076-B, what owners of properties can  
20 post on their vacant lots before construction and what owners can build on their lots  
21 during and after initial construction. One court in Arizona stated:

22 "Restrictions as to the use of land are mutual, reciprocal,  
23 equitable easements in the nature of servitudes in favor of  
24 owners of other lots within the restricted area, and constitute  
25 property rights which run with the land. Where the covenants  
manifest a general plan of restriction to residential purposes,  
such covenants constitute valuable property rights of the  
owners of all lots in the tract."

1 *La Esperanza Townhome Ass'n, Inc. v. Title Sec. Agency of Arizona*, 689 P.2d 178,  
2 181,142 Ariz. 235, 238 (Ariz. App. 1984) (quoting *Montoya v. Barreras*, 473 P. 2d 363,  
3 365 (N.M. 1970)). A ruling in this case that the restrictions have been abandoned and are  
4 no longer enforceable against the Defendants' properties would affect the property rights  
5 of all other owners subject to the CC&Rs. In other words, the absence of 98% of the  
6 owners in Tract-B in this lawsuit means, according to Rule 19(a)(1)(A), that this Court  
7 "cannot accord complete relief among existing parties"; the necessary parties (the  
8 remaining owners in Tract 4076-B) must be joined.  
9

10  
11 **B. The CC&Rs cannot be completely abandoned as to the existing Defendants only**

12 Absent an express non-waiver provision, deed restrictions may be considered  
13 abandoned or waived "if frequent violations of those restrictions have been permitted."  
14 *Coll. Book Ctrs. Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533, 538-  
15 539, 241 P.3d 897, 902-903 (Ariz. App. 2010) (quoting *Burke v. Voicestream Wireless*  
16 *Corp. II*, 207 Ariz. 393, 398, ¶ 21, 87 P.3d 81, 86 (App. 2004)). However, when a  
17 Declaration contains a non-waiver provision, restrictions remain enforceable, despite  
18 prior violations, as long as the violations do not constitute a "complete abandonment"  
19 of the Declaration. *Id.* at 539, ¶ 18, 241 P.3d at 903 (quoting *Burke*, 207 Ariz. at 399, ¶  
20 26, 87 P.3d at 87). Deed restrictions are considered completely abandoned when "the  
21 restrictions imposed upon the use of lots in [a] subdivision have been so thoroughly  
22 disregarded as to result in such a change in the area as to destroy the effectiveness of  
23 the restrictions [and] defeat the purposes for which they were imposed."  
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1 *Condos v. Home Dev. Co.*, 77 Ariz. 129, 133, 267 P.2d 1069, 1071 (1954), *quoted in*  
2 *Coll. Book Ctrs.*, 225 Ariz. at 539, ¶ 18, 241 P.3d at 903.

3 Paragraph 20 of the CC&Rs for Tract 4076-B provides the authority for Plaintiff  
4 in this case to enforce the CC&Rs. It also contains a non-waiver provision:  
5

6  
7 20. If there shall be a violation or threatened or  
8 attempted violation of any of the foregoing covenants, conditions  
9 or restrictions it shall be lawful for Declarant, its successors  
10 or assigns, the corporation whose members are the lot owners or  
11 any person or persons owning real property located within the  
12 subdivision to prosecute proceedings at law or in equity against  
13 all persons violating or attempting to or threatening to violate  
14 any such covenants, restrictions or conditions and prevent such  
15 violating party from so doing or to recover damages or other dues  
16 for such violations. In addition to any other relief obtained  
17 from a court of competent jurisdiction, the prevailing party may  
18 recover a reasonable attorney fee as set by the court. No  
19 failure of the Trustee or any other person or party to enforce  
20 any of the restrictions, covenants or conditions contained herein  
21 shall, in any event, be construed or held to be a waiver thereof  
22 or consent to any further or succeeding breach or violation  
23 thereof. The violation of any of the restrictions, covenants or  
24 conditions as set forth herein, or any one or more of them, shall  
25 not affect the lien of any mortgage or deed of trust now on  
record, or which may hereafter be placed on record.

18 Defendants seek to be relieved of the burden of the CC&Rs. Essentially, they are  
19 asserting that this Court should rule that the CC&Rs have been abandoned as to them  
20 only. A complete abandonment of the CC&Rs cannot exist when the alleged  
21 abandonment only affects a small percentage of the owners. As stated in *La Esperanza*,  
22 above, at 238 “Restrictions as to the use of land are mutual, reciprocal, equitable  
23 easements in the nature of servitudes in favor of owners of other lots within the restricted  
24 area, and constitute property rights which run with the land.”  
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1                   **C. Defendants asserted the affirmative defense of abandonment;**  
2                   **they bear the burden of proving abandonment**

3                   An affirmative defense must be plead and proved by the defendant. *Lakin Cattle*  
4 *Co. v. Engelthaler*, 101 Ariz. 282, 284, 419 P.2d 66, 68 (Ariz. 1966) (quoting, *New York*  
5 *Life Insurance Co. v. Rogers*, 9 Cir., 126 F.2d 784. “[T]he record shows appellees plead  
6 the alleged prior judgment (though not with specificity), but they must prove it was *res*  
7 *judicata*”. *Williams v. Hall*, 30 Ariz. 581, 249 P. 755 (Ariz. 1926). Defendants have plead  
8 the affirmative defense of abandonment to Plaintiffs claims of CC&R violations.  
9 Pleading an affirmative defense does not mean that such a defense prevails; the  
10 Defendants must carry the burden of proving the defense. If Defendants prove  
11 abandonment without all of the Tract 4076-B owners having been joined, 98% of the  
12 owners will lose valuable property rights which run with their land without having the  
13 opportunity to assert their rights.  
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16                   **III. CONCLUSION**

17                   Plaintiff alleges in this case that Defendants have violated certain provisions of the  
18 CC&Rs. Defendants have asserted by way of an affirmative defense to Plaintiff’s claims,  
19 that the CC&Rs have been abandoned. Defendants bear the burden of proving  
20 abandonment as defined in the *Condos* case above. The CC&Rs cannot be completely  
21 abandoned as to only the Defendants in this case because the CC&Rs constitute valuable  
22 property rights of the owners of all lots in Tract 4076-B. According to Rule 19(a)(1)(A),  
23 this Court “cannot accord complete relief among existing parties”; the necessary parties  
24 (the remaining owners in Tract 4076-B) must be joined.  
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1 DATED this 20th day of October, 2021.

2 **J. JEFFREY COUGHLIN PLLC**

3  
4 By: /s/ J. Jeffrey Coughlin  
5 *Attorney for Plaintiff*

6 ORIGINAL of the foregoing efiled via eFileAZ  
7 this 20th day of October 2021 to:

8 Clerk  
9 MOHAVE COUNTY SUPERIOR COURT

10 Copy emailed this 20th day of  
11 October, 2021 to:

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