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**SUPERIOR COURT OF THE STATE OF ARIZONA**  
**COUNTY OF COCONINO**

ROBERT R. HAWK and CECELIA J.  
HAWK, husband and wife,

Plaintiffs,

v.

PC VILLAGE ASSOCIATION, INC., an  
Arizona corporation,

Defendant.

NO. CV2011-00775

**1) RESPONSE TO PLAINTIFFS'  
MOTION FOR SUMMARY  
JUDGMENT**

**2) DEFENDANT'S CROSS  
MOTION FOR SUMMARY  
JUDGMENT ON THE BASIS  
THAT THE STATUTES, IF  
APPLIED, ARE  
UNCONSTITUTIONAL**

(Assigned to the Honorable Mark R.  
Moran)

Defendant PC Village Association, Inc., (hereinafter "PC Village"), by and through its undersigned counsel, hereby responds to Plaintiffs' Motion for Summary Judgment and files its Cross Motion for Summary Judgment.

PC Village does assert that the covenants, conditions and restrictions ("CC&Rs") to which Plaintiffs refer prohibit them from posting a "for sale" sign on their property within Pine Canyon. (Pl's. Mot. for Summ. J. 5:4, DSOF ¶¶ 1-3.) However, PC Village disputes Plaintiffs' assertion that A.R.S. § 33-1808 and A.R.S. § 33-441 nullify Section 12.3 of the CC&Rs prohibiting the display of "for sale" signs, as neither statute applies to the CC&Rs at issue. A.R.S. § 33-1808 does not apply retroactively the CC&Rs,

1 as it lacks explicit language to that effect. Also, A.R.S. § 33-441 expressly limits its  
2 application to instruments of conveyance. Even if this Court determines that the statutes  
3 do apply, the statutes would amount to an unconstitutional impairment of contract.

#### 4 **I. FACTS**

5 Pine Canyon is subject to CC&Rs originally recorded in 2002. (DSOF ¶ 4.)  
6 Section 12.3 of these CC&Rs prohibits the display of "for sale" signs on property within  
7 the community. (DSOF ¶ 4.) Pine Canyon residents purchased property within the  
8 community with an expectation that they would not have to view "for sale" signs, which  
9 they consider an eyesore that will adversely impact property values. (DSOF ¶¶ 8-10.)  
10 Since then, the legislature has passed A.R.S. § 33-1808 and A.R.S. § 33-441, statutes that  
11 Plaintiffs believe allow them to post a "for sale" sign on their lot, despite what the CC&Rs  
12 say. (DSOF ¶¶ 5, 6.) A case and controversy exists as to whether or not Plaintiffs are  
13 entitled to post a "for sale" sign on their lot within Pine Canyon. (DSOF ¶ 7.)

#### 14 **II. MEMORANDUM OF POINTS AND AUTHORITIES**

##### 15 **A. A.R.S. § 33-1808 does not apply to the PC Village CC&Rs because it** 16 **contains no explicit retroactive provision.**

17 This statute does not alter the contractual requirements set forth in the PC  
18 Village CC&Rs. According to A.R.S. § 1-244, "[n]o statute is retroactive unless  
19 expressly declared therein." Express language concerning retroactive application is a  
20 necessary condition to retroactive application. Furthermore, arguments regarding  
21 legislative intent are insufficient to satisfy the express language requirement of A.R.S. §  
22 1-244. *See St. Joseph's Hospital and Medical Center v. Superior Court of Arizona*, 164  
23 Ariz. 454, 457, 739 P.2d 1121, 1124 (Ariz. App. 1990) (holding that "express language"  
24 means language contained in the statute, and not inferences drawn from legislative  
25 histories). This is true even if the legislative history clearly and unambiguously indicates  
26 that the legislature intended a statute to apply retroactively. *Id.* at 456, 793 P.2d at 1123  
27 (citing *Cheney v. Arizona Superior Court*, 144 Ariz. 446, 449, 698 P.2d 691, 694 (1985)).  
28 The court further stated that, "[w]e do not believe there is room for qualification. The

1 term 'express language' in the context of A.R.S. § 1-244 means language contained in the  
2 statute and not inferences drawn from legislative histories." *St. Joseph's*, 164 Ariz. at  
3 456-57, 739 P.2d at 1123-24, *see also State v. Sweet*, 143 Ariz. 266, 693 P.2d 921 (1985),  
4 *State v. Fallon*, 151 Ariz. 188 (Ariz. Ct. App. 1986).

5 In this case, nothing in A.R.S. § 33-1808 indicates that it applies  
6 retroactively. The CC&Rs in question were enacted prior to the passage of A.R.S. § 33-  
7 1808, and a mere reference to community documents in A.R.S. § 33-1808(F) does not  
8 meet the express language requirement articulated in A.R.S. § 1-244. Likewise, Plaintiffs'  
9 references to legislative history do not change this outcome. As in *St. Joseph's*, there is no  
10 room for qualification.

11 **B. A.R.S. § 33-441 does not apply to these CC&Rs because they are not**  
12 **contained in a deed or instrument affecting the sale of land.**

13 By its own terms, A.R.S. § 33-441 strictly limits itself to instruments  
14 involved in the transfer or sale of land. When interpreting a statute, a court will aim to  
15 fulfill the intent of the legislature that wrote it. *State v. Hayden*, 210 Ariz. 522, 523-24 ¶  
16 7, 115 P.3d 116, 117 (2005) (quoting *Bilke v. State*, 2-6 Ariz. 462, 464 ¶ 11, 80 P.3d 269,  
17 271 (2003)). To do so, a court will first look to the language of the statute and interpret it  
18 to give effect to each word of the statute, "*such that 'no clause, sentence or word is*  
19 *rendered superfluous, void, contradictory or insignificant.'*" *Id.* (emphasis added).  
20 Furthermore, "to discern legislative intent, 'we construe the statute as a whole, and  
21 consider its context, language, subject matter, historical background, effects and  
22 consequences, and its spirit and purpose.'" *Hayden*, 210 Ariz. at 523-34, 115 P.3d at 117  
23 (quoting *People's Choice TV Corp. v. City of Tucson*, 202 Ariz. 401, 403 ¶ 7, 46 P.3d 412,  
24 414 (2002)).

25 Section A of the statute limits its application to instruments of conveyance.  
26 The statute states that it applies to covenants, restrictions or conditions "contained in any  
27 deed, contract, security agreement or other instrument affecting the transfer or sale of any  
28 interest in real property." A.R.S. § 33-441(A). The CC&Rs that Plaintiffs seek to unravel

1 were not contained in any such instrument. (DSOF ¶ 3.) Plaintiffs would have this Court  
2 expand this statute's application to incorporate not only instruments of conveyance, but  
3 previously and separately recorded covenants conditions and restrictions not contained in  
4 any instruments used to convey property. But such an interpretation renders meaningless  
5 the qualifying phrase, "contained in any deed, contract, security agreement or other  
6 instrument affecting the transfer or sale of any interest in real property." A.R.S. § 33-  
7 441(A). If the legislature had intended to generally disallow any and all CC&Rs  
8 prohibiting "for sale" signs, it could have explicitly done so. Here, the legislature did  
9 include qualifying language. As stated in *Hayden supra*, a court should give meaning to  
10 all provisions of a statute when applying it. Plaintiffs' broad reading would render this  
11 qualifying language meaningless.

12 The statute's placement within the larger statutory scheme also weighs  
13 against such a broad reading. As *Hayden* also articulated, a court should interpret the  
14 statute as a whole. Here, the legislature elected to confine this provision to Chapter Four  
15 of the Property Title, labeled "Conveyances and Deeds," further demonstrating its limited  
16 applicability to instruments of conveyance. Furthermore, this statute does not even  
17 govern the warranty deed in question. The statute states that it does not apply "to a  
18 covenant, restriction or condition . . . that does not prohibit or restrict the display of a for  
19 sale sign or a sign rider on the real property." A.R.S. § 33-441(C). The warranty deed  
20 conveying the property at issue to Plaintiffs contains no CC&R restricting the display of  
21 "for sale" signs. (DSOF ¶ 1.) This statute does not apply to the present controversy.

### 22 **III. DEFENDANT'S CROSS CLAIM FOR SUMMARY JUDGMENT**

#### 23 **A. If either A.R.S. § 33-1808 or A.R.S. § 33-441 applies to the CC&Rs,** 24 **such legislation is a substantial impairment of a contractual** 25 **relationship without a significant and legitimate public purpose.**

26 If the legislature intended for either of the above-mentioned statutes to apply  
27 to the PC Village CC&Rs, the applicable statute is an unconstitutional impairment of a  
28 contractual obligation. Disputes regarding covenants, conditions and restrictions affecting  
property arise out of contract. *Pinetop Lakes Ass'n v. Hatch*, 135 Ariz. 196, 198, 659 P.2d

1 1341, 1343 (Ariz. Ct. App. 1983). The Arizona Constitution states that "[n]o bill of  
2 attainder, ex-post-facto law, or law impairing the obligation of a contract, shall ever be  
3 enacted." A.R.S. Const. Art. II, § 25, *see also* USCS Const. Art. I, § 10, Cl 1. To  
4 determine whether a statute violates the contract clause, Arizona has adopted the  
5 impairment of contracts test as enunciated by the U.S. Supreme Court. *McClead v. Pima*  
6 *County*, 174 Ariz. 348, 359 (Ariz. Ct. App. 1992) (citing *Fund Manager, Pub. Safety*  
7 *Personnel Retirement Sys. v. Phoenix Police Dep't Pub. Safety Personnel Retirement Sys.*  
8 *Bd.*, 151 Ariz. 487, 491 (Ariz. Ct. App. 1986)). A court will ask:

9 1. Has the state law operated as a substantial impairment of a  
10 contractual relationship?

11 2. If so, is there a significant and legitimate public purpose  
12 behind the legislation?

13 3. If a legitimate public purpose has been identified, is the  
14 adjustment of the rights and responsibilities of the contracting  
15 parties based upon reasonable conditions and of a character  
16 appropriate to the public purpose justifying the adoption of the  
17 legislation?

18 *Id.* By definition, a contract is impaired when a party is deprived of the benefit of his  
19 contract by law. *Tower Plaza Inv. v. De Witt*, 109 Ariz. 248, 252 (1973). While "[t]otal  
20 destruction of contractual expectations is not necessary for a finding of substantial  
21 impairment, . . . state regulation that restricts a party to gains it reasonably expected from  
22 the contract does not necessarily constitute a substantial impairment." *Robson Ranch*  
23 *Quail Creek, LLC v. Pima County*, 215 Ariz. 545, 552 (Ariz. Ct. App. 2007) (citing  
24 *Energy Reserves Group v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983)). When  
25 determining whether a law substantially impairs a contract, the reasonable expectations of  
26 the complaining party play an important role. *Dobert*, 192 Ariz. at 253.

27 The statutes, if applied, would amount to a substantial contractual  
28 impairment. First, the aesthetic appearance of Pine Canyon is something that residents of  
Pine Canyon took into consideration before purchasing property in the subdivision.  
(DSOF ¶¶ 8-10.) These residents purchased property with the expectation that they would  
not be subject to the eyesore of "for sale" signs. The impact of "for sale" signs is indeed a

1 substantial impairment of this contractual obligation, as such an alteration would reach  
2 beyond a single sign. It would allow all residents to display "for sale" signs. This would  
3 not only impact the community's aesthetic appearance, it would affect the Pine Canyon  
4 community economically. Not only will the eyesore of "for sale" signs adversely affect  
5 property values, the appearance of multiple "for sale" signs will give prospective  
6 purchasers the impression that Pine Canyon is not a desirable place to live. This will  
7 cause those purchasers to offer less for the property that is for sale, and depressed sale  
8 prices will negatively impact the value of properties that are not on the market. (DSOF ¶  
9 10.)

10 Furthermore, there is no significant or legitimate public purpose behind this  
11 legislation. Arizona courts have found that some legislative action regarding CC&Rs  
12 addresses an important public purpose. In *Westwood Homeowners Ass'n v. Tenhoff*, for  
13 example, the court found that the public policy in favor of developing residential facilities  
14 for the mentally disabled took precedence over the countervailing policy of freedom of  
15 contract. 155 Ariz. 229, 231, 236, 745 P.2d 976, 978, 983 (Ariz. Ct. App. 1987).  
16 However, the court further reasoned that "[t]he importance . . . of integrating society's  
17 disadvantaged human beings can hardly be analogized to placement of airconditioning  
18 units and trailers on residential lots." *Id.* (referencing *Tucson-North Town Home*  
19 *Apartments Homeowners Ass'n v. Robb*, 123 Ariz. 4, 596 P.2d 1176 (Ariz. Ct. App. 1979),  
20 *Pinetop Lakes Ass'n supra*).

21 The present dispute before this Court more closely resembles a dispute over  
22 the placement of airconditioning units and trailers, rather than the substantial public policy  
23 interest in supporting residents with mental disabilities. Here, the overriding interest at  
24 issue is the freedom of contract between private individuals. As the attached affidavits  
25 indicate, residents of Pine Canyon took these aesthetic conditions into consideration prior  
26 to purchasing their properties, both for their aesthetic and economic value. (DSOF ¶¶ 8-  
27 10.) Such a bargained-for condition may be attributed to all residents of Pine Canyon, as  
28 the CC&Rs are recorded, giving purchasers constructive notice of the provisions. (DSOF

1 ¶ 3.) Unraveling the sign provision in the CC&Rs would be an unjustifiable impairment  
2 of a contractual obligation.

3 **IV. CONCLUSION**

4 Section 12.3 of the CC&Rs prohibits Plaintiffs from posting a "for sale" sign  
5 within their lot in Pine Canyon. The statutes that Plaintiffs cite do not change this  
6 outcome. A.R.S. § 33-1808 lacks the expressly retroactive language necessary for it to  
7 apply to CC&Rs recorded prior to the legislation. A.R.S. § 33-441 limits its application to  
8 instruments of conveyance and does not apply to CC&Rs recorded separately. Even if  
9 these statutes do apply, unraveling this "for sale" sign provision would amount to an  
10 unconstitutional impairment of contract. PC Village respectfully requests that this Court  
11 find in its favor and dismiss Plaintiffs' above-captioned action with prejudice.

12 DATED this 29<sup>th</sup> day of December, 2011.

13 JONES, SKELTON & HOCHULI, P.L.C.

14  
15 By 

16 Edward G. Hochuli

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1 ORIGINAL of the foregoing mailed via federal  
2 express for filing this 29<sup>th</sup> day of December, 2011 to:

3 Clerk of the Court  
4 Civil Filings  
5 Coconino County Superior Court  
6 200 N. San Francisco St. (Courthouse)  
7 Flagstaff AZ. 86001

8 **COPY** of the foregoing mailed  
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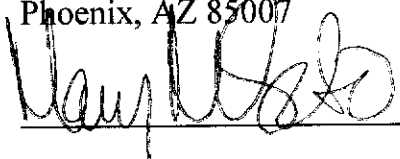
10 Tevis Reich  
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15 *Courtesy Copies* mailed this 29<sup>th</sup> day of  
16 December, 2011, to:

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