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SUPERIOR COURT OF ARIZONA
COCONINO COUNTY

ROBERT R. HAWK and CECELIA J. HAWK, husband and wife, Plaintiffs/Counter Defendant, vs. PC VILLAGE ASSOCIATION INC., an Arizona Corporation, Defendant/Counter Plaintiff.	Case No.: CV 2011-00775 **REPLY TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** **-and-** **RESPONSE TO DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT** (the Honorable Mark Moran)

Both parties have moved for summary judgment. Both parties agree that there are no genuine issues of material fact precluding summary judgment in favor of one party or the other. The sole issue to be resolved is whether the duly enacted statutes control over existing CC&R's. For the reasons set forth below, summary judgment in favor of the Plaintiffs should be granted.

PLAINTIFFS' SUPPLEMENTAL STATEMENT OF FACTS

1. On August 16, 2011 Plaintiff Robert Hawk caused a for sale sign to be placed on the lot he owns in Pine Canyon Subdivision ("Pine Canyon"). *See,* Affidavit, Ex. 4.

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2. The President of the Pine Canyon Village Association Inc. ("PC HOA"), Warren Smith, wrote Plaintiff and confirmed that the 'for sale' sign was posted on Plaintiffs' lot on August 16, 2011. Ex. 5; *See also,* Ex. 4.

3. The letter further confirms that PC HOA personnel caused the sign to be removed. Ex. 5; *See also,* Ex. 4.

4. On August 17, 2011 Plaintiff Robert Hawk caused a second for sale sign to be placed on his lot in Pine Canyon. *See,* Ex. 4.

5. The President of PC HOA again wrote Plaintiff and confirmed that a "second 'for sale' sign was posted on [the] property" on August 17, 2011. Ex. 6; *See also,* Ex. 4.

6. The letter again confirms that PC HOA personnel caused the second sign to be removed. Ex. 6; *See also,* Ex. 4.

7. The present lawsuit was initiated on September 15, 2011 (judicial notice requested).

PLAINTIFFS' RESPONSE TO DEFENDANT'S STATEMENT OF FACTS SUPPORTING ITS RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

1. Agreed.
2. Agreed.
3. Agreed.
4. Agreed.
5. Agreed.
6. Agreed.
7. Agreed.

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8. Irrelevant. Not a material fact that would preclude summary judgment.

9. Irrelevant. Plaintiffs affirmatively allege that any expectation that any member of the HOA might have is not objectively *reasonable* and is not based on a vested interest or right as discussed in this brief.

10. Objection – irrelevant and speculative. The belief that a 'for sale' sign would negatively impact property values is irrelevant and speculative and is not based on any reasonable or competent evidence.

MEMORANDUM OF LAW

A. A.R.S. § 33-1808(F) is not retroactive but rather, is applied prospectively.

Defendant asserts that there is no express language, as required by A.R.S. § 1-244 denoting the Legislature's intent to make A.R.S. § 33-1808(F) retroactive. Plaintiffs concede that retroactive language is absent. However, this argument misconstrues the nature of retroactive legislation. Given the facts before us, and the nature of retroactive legislation, the statute cannot be considered to be retroactive because the acts[1] here occurred *after* the legislation was passed. Accordingly, the statute is applied prospectively.

The fact that this lawsuit necessarily involves the antecedent recording of the CC&R's does not make the application of the statute retroactive. The undisputed facts are that the CC&R's were recorded in 2002 and amended in 2004. *See, Def.'s Stmt. of*

[1] The term "acts," as used in this brief refer to the Plaintiff's act of posting the two 'for sale' signs and the Defendant's subsequent removal of those 'for sale' signs. Both acts occurred in August, 2011.

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Facts ("DSOF") ¶ *4.* The statute at issue was first enacted in 2007. *DSOF,* ¶ *5.* The act of Plaintiff posting the 'for sale' sign occurred four years later, in August, 2011. *See, Pl.'s Supp. Stmt. of Facts ("PSSOF").* Likewise, the Defendant's removal of those signs also occurred four years later in August, 2011. *See, Pl.'s Supp. Stmt. of Facts ("PSSOF").* This lawsuit was filed on September 15, 2011. *See, Pl.'s Supp. Stmt. of Facts ("PSSOF").*

Our Arizona Supreme Court has held: "This Court, like the Court of Appeals, has consistently defined statutory changes as retroactive *only* when they affect cases already in litigation." *Hall v. A.N.R. Freight System, Inc.,* 149 Ariz. 130, 139, 717 P.2d 434, 443 (1986). *Emphasis added.* It is beyond debate that this case was not in litigation when the Legislature enacted the statute in 2007. The court further stated:

> In Arizona it is conclusively settled that laws are not retroactive simply because they relate to past events. We have stated previously that, in Arizona, statutes dealing with civil matters may not be applied retroactively in the absence of a specific provision to that effect. A.R.S. § 1–244. No such prohibition, however, applies to laws that operate on pre-existing conditions, *and such laws are not retrospective by their mere relation to antecedent conditions.*
>
> *Hall* 149 Ariz. at 139, 717 P.2d at 443.
> *Emphasis in original.*

"It is a general principle that a statute is not retroactive in application simply because it may relate to antecedent facts." *Tower Plaza Inv. Ltd. V. DeWitt,* 109 Ariz. 248, 250, 508 P.2d 324, 326 (1973) *en banc.* "Giving effect to laws that change the consequences of future acts allows the government the ability to change and manage public policy." *Anderson v. Indus. Comm. of AZ, 205 Ariz. 411, 413, ¶ 11, 72 P.3d 341,*

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343 (App. 2003) citing, Zuther v. State, 199 Ariz. 104, 110, ¶ 21, 14 P.3d 295, 301 (2000). "The Legislature may certainly enact laws that apply to rights vested before the date of the statute[;] [s]uch laws, however, may only change the legal consequences of *future* events." *San Carlos Apache Tribe v. Superior Court,* 193 Ariz. 195, 205, 972 P.2d 179, 189 (1999)(emphasis in original) *en banc; citing Tower* 109 Ariz. 248, 508 P.2d 324. "If the rule were otherwise, our continually changing landscape of ideas and laws would instead resemble a petrified forest populated by the outmoded concepts of the past." *Hall,* 149 Ariz. at 139, 717 P.2d at 443.

Here, the legislature enacted A.R.S. §33-1808(F) in 2007. The event of Plaintiff posting the 'for sale' signs and Defendant subsequently removing them occurred in 2011. Thus, they were future acts occurring four years after the effective date of the legislation. Prospective matters which follow enacted laws and which are not already in litigation are not retroactive. The recording of the CC&R's is an antecedent event. Although it preceded the enactment of A.R.S. § 33-1808(F) it did not impair any vested rights and is *not* retroactive.

a. <u>What is a vested right and when do rights "vest"?</u>

The simple answer here is that a right vests when a lawsuit is filed or when all events have occurred so that a lawsuit *could* be filed. Further explanation is likely necessary.

The legislature may change the consequences of future acts effecting unvested rights. *See, Anderson v. Indus. Comm. of AZ,* 205 Ariz. 411, 413, ¶ 11, 72 P.3d 341, 343

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(App. 2003); *Hall v. A.N.R. Freight System, Inc.,* 149 Ariz. 130, 139, 717 P.2d 434, 443 (1986); *Tower Plaza Inv. Ltd. V. DeWitt*, 109 Ariz. 248, 250, 508 P.2d 324, 326 (1973). Accordingly, the paramount question here is whether the right to enforce section 12.3 of the CC&R's was a vested right prior to the enactment of A.R.S. 33-1808(F). If not, then it is subject to modification by the legislature. There are three significant lines of cases on this issue; all of which are from the Arizona Supreme Court and two of which are *en banc.*

1. Hall v. A.N.R. Freight System, Inc.

In 1986 our Supreme Court explained what a vested right is, and when it vests. In *Hall,* the court dealt with newly enacted legislation allowing comparative negligence to be asserted as a defense. *Hall v. A.N.R. Freight System, Inc.,* 149 Ariz. 130, 717 P.2d 434, (1986). The question addressed by the court was whether the new law applied to events which occurred in the past and before the enactment and effective date of the statute. The court stated:

> The rule that legislation may not retroactively disturb vested rights is simple enough; the difficulty arises in defining a vested right, and determining when a right actually vests.
> * * *
> Rights are vested, in contradistinction of being expectant or contingent. They are vested, when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. *They are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent when they are only to come into existence on an event or condition which may not happen or be performed until such other event may prevent their vesting.*

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> *We believe that a right vests only when it is actually assertable as a legal cause of action or defense* or is so substantially relied upon that retroactive divestiture would be manifestly unjust. The defense of contributory negligence, while a substantive right, does not vest until a lawsuit has been filed. Prior to that time it is merely an inchoate right which cannot be asserted "until the happening of some future event."
> * * *
> When a lawsuit is commenced the defendant gains "an immediate fixed right" to assert any substantive defense, which may not thereafter be prejudiced by the state. Until then, however, assertion of contributory negligence is contingent upon an event or condition which may not happen and thus cannot be characterized as a vested right.
>
> *Hall v. A.N.R. Freight System, Inc.,* 149 Ariz. 130, 139, 717 P.2d 434, 443 (1986) *En Banc.*

Here, any rights conferred by the CC&R's were merely expectant or contingent. They were not vested rights. As stated in *Hall,* a right becomes vested when it actually becomes assertable as a legal cause of action or defense. In this case, there would have had to have been a violation of the CC&R's prior to the new legislation for a right to vest. In other words, the Plaintiff would have had to post a 'for sale' sign then triggering the right for Defendant to file a cause of action. Without a violation, there is no vested right.

2. <u>Aranda v. Indus. Comm. in contrast with Anderson v. Indus. Comm.</u>

Expanding on this issue, fourteen years later, the Arizona Supreme Court again addressed when substantive rights become vested. In *Aranda* the court addressed the issue in the context of newly enacted legislation suspending the payment of disability benefits. *Aranda v. Indus. Comm. of AZ,* 198 Ariz. 467, 471-2, 11 P.3d 1006, 1010-11 (2000). *En banc.* The new legislation said that if a recipient of disability benefits

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commits a crime and is incarcerated then his disability benefits are suspended. *Id.* As a result, the case focuses on whether the plaintiff, who had a disability award prior to the new law, and was incarcerated at the time, had a vested right to continue receiving benefits. *Id.* Sitting *en banc,* the Arizona Supreme Court found that he did have a vested right and stated:

> "[A] substantive legal right may be subject to retroactive impairment before it becomes a vested right. But, once the right is vested, legislation may not interfere by retroactively altering the law that applies to completed events. The conclusion that a particular legal right is substantive, in contrast to procedural, does not mean that it can never be modified or abolished by the legislature. The rule is that any right conferred by statute may be taken away by statute before it has become vested. The core issue before us, therefore, is whether an earlier established right is a vested right and whether the right would be affected or altered retrospectively by [the new law].
>
> The Legislature may certainly enact laws that apply to rights vested before the date of the statute. Such laws, however, may only change the legal consequences of *future* events. But we are not dealing here with future events. The claimants must have the opportunity to avert the loss of benefits. The last moment this would be possible, in the context of conviction and incarceration, is the date of the criminal offense. That is the last moment that claimants may choose to alter their behavior to avoid the application of [the new law].
>
> *Aranda v. Indus. Comm. of AZ,* 198 Ariz. 467, 471, ¶16 11 P.3d 1006, 1010 (2000). *En banc. Citations omitted.*

Aranda makes it clear that the plaintiff, a disability recipient, *could not have* avoided the consequence of the new legislation since the crime was committed before the enactment of the new legislation and therefore, the plaintiff had a vested right preventing the suspension of his disability benefits. *Id.* On the other hand, dealing with the same

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enacted law the Court of Appeals found that another disability recipient *did not* have vested rights. *See, Anderson v. Indus. Comm. of AZ,* 205 Ariz. 411, 413, ¶ 11, 72 P.3d 341, 343 (App. 2003.). The only difference is that in *Anderson,* the plaintiff committed his crime and was incarcerated after the enactment of the new legislation; his award however was still prior to the new law. *Id.* The court stated:

> Petitioner's situation is different [than *Aranda*]. The change in the statute did not itself affect Petitioner's benefits. It was only when he was incarcerated following conviction of a crime that his benefits were suspended. Although Petitioner was entitled to receive benefits at the time [the new law] was enacted, he maintained his statutory right to benefits only so long as he was not convicted of a crime and incarcerated.
> * * *
> Petitioner had more than three years' notice that a criminal conviction would result in suspension of benefits while he is incarcerated. Unlike the aggrieved parties in *Aranda* and *Mejia,* Petitioner could have averted the suspension of his workers' compensation benefits by refraining from criminal conduct.
>
> *Anderson v. Indus. Comm. of AZ,* 205 Ariz. at 411, ¶ 5, 72 P.3d at 341

In comparing these two cases it highlights the bright line rule that the acts and events must be entirely completed before the enactment of the new legislation to have a vested right. *Aranda* emphasizes that someone who was *already* incarcerated did not have the opportunity to undo their act – and thus, their rights were vested. On the other hand, the voluntary criminal act in *Anderson* occurred *after* the enactment of the new legislation and thus, *Anderson* had the last clear opportunity to avoid the *consequences* of the new law by avoiding his criminal act. *Anderson* further highlights that the law which mandated the suspension of his benefits had been in effect for three years, and that this

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was ample notice and opportunity for *Anderson* to avoid his voluntary criminal act resulting in the application of the new law. Together, these cases signify that in order for a right to vest, "every event has occurred which needs to occur to make the implementation of the right a certainty." *Aranda* 198 Ariz. at 471 ¶ 20 11. P.3d at 1010. "It leav[es] nothing to contingency or to some future event." *Id.*

In this case, the Court should ask: were the acts complete and the 'for sale' signs posted before A.R.S. § 33-1808(F) was enacted so as to bestow upon Defendant a "vested right" to file a lawsuit and enforce section 12.3 of the CC&R's? The answer is no. Because there was no act which constituted a violation of 12.3 of the CC&R's (i.e. posting a for sale sign) no right was vested. The event of posting the 'for sale' sign never occurred until *after* A.R.S. § 33-1808(F) was enacted. In fact, it was four years after the legislation was enacted. Accordingly, this case is more similar to *Anderson.*

3. Tower Plaza Inv. Ltd. V. DeWitt

Tower Plaza Inv. Ltd. V. DeWitt, 109 Ariz. 248, 250, 508 P.2d 324, 326 (1973) is the third significant case on this issue. In Tower, a transaction privilege tax was enacted that taxed the rent collected in connection with leased property. *Id.* It was argued that the new law could not be applied to completed transactions and that this included leases which were consummated prior to the effective date of the new legislation. *Id.* Notably, there were leases which extended for many years into the future and the new tax meant that landlords would have to pay a transaction tax which was not contemplated at the time of entering into the original leases. *Id.* The Court found the leases to be an antecedent fact and found that the statute was applied prospectively and that it did not

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affect any vested property rights. "The statute functioned prospectively to tax income *after* the effective date because the receipt of rentals was the taxable event, not the signing of the lease contract." *Aranda,* 198 Ariz. 467, 472, ¶ 24, 11 P.3d 1006, 1011. The Court stated:

> The effect of appellants' argument is that persons by making contracts extending into the future may prevent the exercise of the police power by the state. The agreements in the record extend year after year unless terminated by thirty days' notice at the end of an annual period. It must be remembered that a statute is not retrospective from the mere fact that it relates to antecedent facts.
> * * *
> Petitioner argues that assessment of any tax on the basis of these purchases impairs petitioner's rights under existing valid contracts, and is retrospective, discriminatory, and unconstitutional.
>
> This contention must fail. The personal property involved was purchased by petitioner subsequent to the passage of the statute. And it is the purchase (or use) itself, not the signing of construction contracts ultimately necessitating the purchase, which is the taxable event. It is irrelevant in the present connection that the construction contracts were made prior to the date of the Act: a statute is not necessarily objectionable as being retroactive if antecedent facts affect its operation.
> * * *
> The Arizona act does not seek to reach transactions completed before its enactment, for the contractual provisions of these leases require performance extending far into the future.
>
> *Tower Plaza Inv. Ltd. V. DeWitt*, 109 Ariz. 248, 250-52, 508 P.2d 324, 326-28 (1973)

In *Tower,* it is the acts themselves that give rise to the claim that determines if there has been a deprivation of vested rights. In this case, the legislation here is not depriving any party of a benefit conferred by contract because no 'acts' occurred prior to the enactment of the statute. No party is deprived of a benefit because no benefit existed

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when the legislation was enacted. Accordingly, there were no vested rights at the time A.R.S. 33-1808(F) became effective.

In sum, a vested right is not contingent and requires no further event or future act to be enforceable. It is a right that can be immediately enforced by asserting a claim (or a defense) in the form of a lawsuit. If a future event or act is required to give rise to the ability to initiate a lawsuit then the right is not vested. In this case, the recording of the CC&R's is merely an antecedent event to the statute at hand. All acts and events complained of occurred prospectively and four years after the new legislation was enacted.

Here, the vesting occurs upon the act of posting the 'for sale' signs and the Defendant's subsequent removal of them. In order to have a vested right in section 12.3 of the CC&R's there must have been an act that creates a viable claim. Nothing can be left to contingency or some future event. In this case, where there was no infraction – no act – neither party had a claim against the other before the new law. Since Defendant had no claim it lacked any vested right in the CC&R's which were subsequently abrogated by A.R.S. § 33-1808(F). Accordingly, where the acts that instigated the claims here occurred after the statute's effective date, the enactment of A.R.S. § 33-1808(F) did not affect any vested rights.

B. <u>A.R.S. § 33-441 Applies to the CC&R's at Issue.</u>

This is a matter of statutory interpretation and the clear unambiguous language of the statute should control. "If the language of a statute is clear and unambiguous, we must give it effect without resorting to any rules of statutory construction." *State v.*

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Johnson, 171 Ariz. 39, 41, 827 P.2d 1134, 1136 (App.1992). The statute at issue begins with:

> **33-441. For sale signs; restrictions unenforceable**
>
> **A.** A covenant, restriction or condition contained in any deed, contract, security agreement or other instrument affecting the transfer or sale of any interest in real property shall not be applied to prohibit the indoor or outdoor display of a for sale sign…

Defendant makes the argument that this statute applies solely to conveying instruments. Even if this were true, the conveying instrument incorporates by reference the CC&R's. A deed is always subject to conditions of record – this includes the CC&R's at issue. The deed at issue expressly states that the conveyance is:

> SUBJECT TO: Current taxes and other assessments, reservations in patents and all easements, rights of way, encumbrances, liens, conditions, restrictions, obligations and liabilities as may appear of record. *See, Warranty Deed at Ex. A, DSOF.*

Both parties agree that the CC&R's were recorded in the public records. As such, the deed expressly incorporates the recorded CC&R's. As a result, the CC&R's are expressly incorporated in and contained in the deed.

Additionally, the statute clearly states that a covenant, restriction or condition contained in any "contract" is prohibited and unenforceable if it restricts the display of a for sale sign. In their brief, Defendant correctly acknowledges that CC&R's are contracts. *See pg. 4:26-28 of Def.'s Cross Mot. Sum. Judgmt., citing Pinetop Lakes Ass'n v. Hatch,* 135 Ariz. 196, 659 P.2d 1341 (App. 1983); *See also, Garden Lakes Comm. Ass'n, Inc. v. Madigan,* 204 Ariz. 238, 62 P..3d 983 (App. 2003)("The Declaration

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constitutes a contract between the subdivision's property owners as a whole and the individual lot owners."). Moreover, it is not a coincidence that the statute refers to covenants, restrictions and conditions since the acronym CC&R's stand for "covenants, conditions and restrictions" and this phrase is the most common phrase used to describe the governing documents and declarations of a planned community. *See generally,* A.R.S. §§ 33-1801 *et seq.,* and 33-1201 *et. seq. See also the CC&R's at issue are titled: "Declaration of Covenants Conditions and Restrictions."* Even if somehow the CC&R's were not included in one of the foregoing terms, it is certainly included in the catch all phrase - "or other instruments". Thus, the question becomes whether the CC&R's are a document that "affect" the transfer or sale of an interest in real property.

There can be little argument that the conveying deed itself "affects" an interest in real property. Even without the deed, the CC&R's also "affect" an interest in real property. "Generally, a covenant or restriction runs with the land in equity if four elements are met: (1) there is an enforceable promise between the original parties; (2) the promise touches and concerns the land; (3) the parties intended to bind their successors; and (4) the successors have notice of the restriction." *Federoff v. Pioneer Title & Trust of AZ,* 166 Ariz. 383, 387, 803 P.2d 104, 018 (1990)." These elements are met here. *See section 19 of the CC&R's at Ex. 1.* As a result, every transfer and every successor is subject to the pre-recorded CC&R's. *Duffy v. Sunburst Farms East Mut. Water & Agric. Co.,* 124 Ariz. 413, 416, 604 P.2d 1124, 1127 (1979)("By accepting deeds [the purchaser] became bound by the restrictions set forth in the Declaration which made conveyance subject to such restrictions."). The CC&R's create benefits and burdens for the transferee

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and their successors and each are bound by the CC&R's which run with the land in perpetuity. As a result, the CC&R's – a contract – affect the transfer or sale of an interest in property.

Our Court of Appeals has previously determined this very issue. In *Garden Lakes Comm. Ass'n, Inc. v. Madigan,* 204 Ariz. 238, 62 P.3d 983 (App. 2003) the court dealt with the identical statute except with reference to solar panels. That statute stated:

> **A.** Any covenant, restriction or condition contained in any deed, contract, security agreement or other instrument affecting the transfer or sale of, or any interest in, real property which effectively prohibits the installation or use of a solar energy device as defined in § 44-1761 is void and unenforceable.
>
> A.R.S. § 33-439(A).

In *Garden Lakes,* the CC&R's allowed for the creation of architectural guidelines. Enacted guidelines established criteria that were found to "effectively prohibit" solar panels. *Id.* The Court of Appeals upheld the trial court's decision which "concluded that, based on A.R.S. § 33- 439(A), the Association was not entitled to an injunction enforcing the guidelines regarding solar energy devices." *Garden Lakes* 204 Ariz. at 240, 62 P.3d 985. In reaching this conclusion the Court implicitly found that the guidelines were the type of document *affecting* the transfer or sale of an interest in real property since they were enacted through the CC&R's. It was concluded that "[t]he Arizona legislature has carved out an exception to the enforceability **of these contracts**, however, for restrictions that "effectively prohibit" the installation or use of solar energy devices. A.R.S. § 33–439(A). *Emphasis added.* If guidelines which are one-step removed from the CC&R's

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such as the ones in this case are found to be a document *affecting* an interest in property, then certainly the CC&R's themselves have the same result.

A.R.S. 33-441 is not as narrowly construed as Defendant argues. This statute applies more broadly and applies to more than simply documents of conveyance. It includes contracts which encompass, by definition, CC&R's, and declarations such as the ones at issue which indisputably affect an interest in real property.

C. Neither A.R.S. 33-1808 nor A.R.S. § 33-441 constitute an unconstitutional impairment of a contractual relationship.

"Issues involving statutory interpretation and constitutional claims are questions of law." *Ramirez v. Health Partners of Southern Arizona,* 193 Ariz. 325, 327-8, ¶ 6, 972 P.2d 658, 660-1 (App. 1999). "In the case of a constitutional challenge, the burden of establishing that [the] statute is unconstitutional rests on the party challenging its validity." *Hall v. A.N.R. Freight Sys., Inc.,* 149 Ariz. 130, 133, 717 P.2d 434, 437 (1986). "We presume that statutes are constitutional and attempt to construe statutes in a constitutional manner when possible." *Phoenix Newspapers, Inc. v. Superior Ct.,* 180 Ariz. 159, 163, 882 P.2d 1285, 1289 (App.1993).

The two statutes at issue here both prohibit the enactment or enforcement of a restriction that prohibits the display of a 'for sale' sign by a property owner. Defendant's argument that these statutes are an unconstitutional impairment, infringing on the contract clause of the Arizona or U.S. Constitution, is without merit. Although the legislation affects the authority of various HOAs, the legislation does not rise to the level of an unconstitutional impairment.

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The Legislature intended that these statutes apply to HOA's currently in existence as well as those that come into existence after the enactment of each statute. A.R.S. § 33-441 has the retroactive language making this clear. On the other hand, the introductory language of A.R.S. § 33-1808(F) provides that the law is enacted "[n]otwithstanding any provision in the community documents." This language makes it clear that the Legislature was aware that some HOAs had restrictions on 'for sale' signs and that the Legislature intended to limit the authority of associations in this regard, regardless of what the CC&R's stated.

As a matter of law, substantive rights may be abrogated by the legislature, if they are not vested; thus, a protectable property interest must be vested to raise the claim of unconstitutionality. *S & R Properties v. Maricopa County,* 178 Ariz. 491, 498, 875 P.2d 150, 157 (App.1993); *Baker v. Ariz. Dep't of Rev.,* 209 Ariz. 561, 567, ¶ 25, 105 P.3d 1180, 1186 (App.2005). Having previously discussed that Defendant lacked any vested contractual interest, it is unnecessary to explore the issue further.

Assuming arguendo that the Defendant had a *vested* contractual interest, "no constitutional violation would occur unless the impairment was substantial." *Baker v. Ariz. Dept. of Rev.*, 209 Ariz. 56, 565 ¶ 16, 105 P.3d 1180, 1184 (App. 2005). The courts have determined that prohibitions such as this must be weighed "because, notwithstanding the Contract Clause, a state continues to possess authority to safeguard the vital interests of its people." *Id.* at 566, 1185. Again, assuming there is a vested contractual right, Defendant correctly identifies the three prong test to determine if there is an unconstitutional infringement on that right.

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1. **Has the law operated as a substantial impairment of a contractual relationship?**

Assuming there is a vested right, in considering if there is substantial impairment of a contract, the courts will consider the reasonable expectations of the parties. *Matter of Estate of Dobert,* 192 Ariz. 248, 253, 963 P.2d 327, 332 (App. 1988). "[S]tate regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment." *Energy Reserves Grp.,* 459 U.S. at 411 (1983). The courts will look to whether the industry affected by the legislation has been regulated in the past to determine the weight of the "reasonableness of an expectation" that there will be no change to the law in the future. *Energy Reserves Grp v. Kansas Power & Light Co.,* 459 U.S. 400, 411-412 (1983). *See, Robson Ranch Quail Creek LLC v. Pima County,* 215 Ariz. 545, 161 P.3d 588 (App. 2007)(Developer "could not have *reasonably expected* that the method of calculating the discount [for a sewer connection fee] would necessarily stay the same" especially where such fees were set by ordinance and highly regulated by the county.) *See also, Dobert,* 192 Ariz. at 253, 963 P.2d at 332 (contingent beneficiary of a trust lacked a *reasonable expectation* that her beneficiary status would continue); *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.,* 470 U.S. 451, 465–66, 105 S.Ct. 1441, 84 L.Ed.2d 432 (1985)("the pervasiveness of the prior regulation in this alternative fuel area suggests continuing regulation in the future and absent some affirmative indication to the contrary, the regulated party had *no legitimate expectation* that regulation would cease.) *See, Veix v. Sixth Ward Bldg. & Loan Ass'n,* 310 U.S. 32, 38, 60 S.Ct. 792, 794-795, 84 L.Ed. 1061 (1940)("When he

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purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic").

There is little dispute that both the real-estate industry and particularly, HOAs are highly regulated. Indeed, HOAs are creatures of statute. *See,* A.R.S. § 33-1801 *et. seq.* The Arizona Legislature has regulated the creation of HOAs and has limited their authority and power in many respects[2]. *Id.* The legislature empowers the creation and existence of an HOA through this body of law. In fact, the authority and power to create CC&R's, including the ones at issue, is a power that is entirely conferred by this body of law and could in theory, be taken away. *See* A.R.S. § 33-1802. "The rule is that any right conferred by statute may be taken away by statute before it has become vested." *Aranda v. Indus. Comm. of AZ,* 198 Ariz. 467, 471-2, 11 P.3d 1006, 1010-11 (2000). Accordingly, the Legislature was within its power to modify the body of law it created in the first place and regulate an HOA that is already subject to existing regulation. Thus, the question becomes whether the Defendant had a vested right and if so, whether that vested right was substantially impaired.

The Legislature is constantly balancing the interests of HOAs as a whole against the rights of individual homeowners. It is a highly regulated area of law that is constantly changing. As a result, the Defendant here lacked any *reasonable expectation* that the

[2] For Example, A.R.S. § 33-1803 sets forth the procedure for collecting assessments and limits late penalties to $15 or 10%. A.R.S. § 1808(B) prohibits an HOA from forbidding the display of flags. A.R.S. § 1808(E) prevents an HOA from forbidding children from playing on the residential roadways. A.R.S. § 33-1809 prevents an HOA from prohibiting a resident from parking their vehicle on the street when it is a public service vehicle meeting certain criteria. A.R.S. 33-1816 prohibits an HOA from forbidding solar energy devices.

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future law would not change, and with it, affect the non-vested rights in previously recorded CC&Rs.

The CC&R's also note that if a provision within becomes invalid that it is to be severed from the CC&R's. *See section 18.3 of the CC&R's, Plaintiff's Ex. 1.* This language acknowledges that the law evolves and changes. It further acknowledges that when certain portions of the CC&R's become invalid, those portions will be severed from the governing document. "This [] provision could be interpreted to incorporate all future state [] regulation, and thus dispose of the Contract Clause claim" altogether. *Energy Reserves* 459 U.S. 415. More importantly though, it demonstrates that Defendant lacked an objectively *reasonable expectation* that the law would not evolve and change and with it, invalidate certain portions of the CC&R's. Any expectation that Defendant or any members of the HOA may have had cannot, as a matter of law, be deemed reasonable.

2. **If the law does substantially impair a contract, does it nevertheless have a significant and legitimate public purpose – and if so, is the adjustment reasonable to further the public purpose?**

> To determine whether the State has properly exercised this police power, our courts employ a three-part inquiry. A court initially determines whether the law substantially impairs a contractual relationship. If so, the State must identify a significant and legitimate public purpose to justify the law. Finally, if such a purpose exists, the State must show that the adjustment of the parties' contractual obligations is reasonable and appropriate to the public purpose justifying adoption of the law.
>
> *Phelps Dodge Corp. v. Ariz. Elec. Power Co-op., Inc.*, 207 Ariz. 95, 119, ¶ 101, , 83 P.3d 573, 597 (App. 2004) *citing Energy*

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Reserves Grp v. Kansas Power & Light Co., 459 U.S. 400, 411-412 (1983).

Assuming arguendo, that Defendant had a vested contractual right and the enactment of A.R.S. 33-1808(F) created a substantial impairment of that right, "it would not offend the constitution if the adjustment of the rights and responsibilities of the contracting parties was upon reasonable conditions and appropriate to the public purpose." *Baker,* 209 Ariz. at 566, ¶ 20, 105 P.3d at 1185. "[R]emedying broad or general social or economic problem is a sufficient public purpose." *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978). The "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Energy Reserves Grp v. Kansas Power & Light Co.,* 459 U.S. 400, 411-412 (1983).

As noted above, the Legislature balances interests of individual homeowners against the power of the HOA. The housing market is vital to the economy of this state. Moreover, with the current state of the depressed real estate market the public policy considerations, now, more than ever, present a legitimate interest for homeowners to be able to advertise their home as being for sale. Some of these interests are discussed in the similar U.S. Supreme Court case cited in the originating brief. *See, Linmark Assoc., Inc., v. Willingboro Tp.*, 431 U.S. 85, 97 S.Ct. 1614 (1977)(noting that there is a strong public policy for the display of a for sale sign and that alternatives are less effective and more costly than the message conveyed by a 'for sale' sign in front of the house to be sold).

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The legislation here supports and balances each parties' interests and allows communication of the fact that homes in the HOA are for sale. Therefore, even though Plaintiff maintains that no rights are vested and substantial impairment has not occurred, even if it *did,* this is a significant and legitimate public purpose that justifies an adjustment of the rights and responsibilities to those affected by the CC&R's.

D. <u>Although unlikely, if the statutes at issue were somehow determined to be an unconstitutional impairment on a contractual relationship, that determination must be weighed in contrast to the homeowner's constitutionally protected right of commercial speech.</u>

Defendant speculates that the display of for sale signs would impact the HOAs aesthetic appearance and negatively affect it economically. They argue the signs would further depress the property values in an already depressed real estate market. They further argue that the signs would give the impression that the HOA is not a desirable place to live. Despite the mere speculation of these unsupported statements, our U.S. Supreme Court has already determined that regardless of whether or not such factors might be true, they are not sufficient enough to defeat the constitutional right to freedom of speech. A 'for sale' sign is a recognized form of constitutionally protected free speech. *Linmark Assoc., Inc., v. Willingboro Tp.*, 431 U.S. 85, 97 S.Ct. 1614 (1977). Speaking to some of the same concerns raised by Defendant, the U.S. Supreme Court responded: "If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information

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to act 'irrationally.'" *Id.* at 96, 1620. In other words, the irrational inferences such as those suggested by Defendant that may or may not result from the display of a 'for sale' sign are insufficient to overcome the constitutionally protected right to commercial free speech. In the words of Judge Blackmun, delivered from our U.S. Supreme Court:

> In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does "no more than propose a commercial transaction," and other varieties.
>
> *Virginia St. Bd. Of Pharmacy v. VA Citizens Consumer Council Inc.*, 425 U.S. 748, 772, 96 S.Ct. 1817, 1831 (1976).

The posting of a 'for sale' sign is one of the types of protected speech.

CONCLUSION

The facts here are not in dispute and the parties are in agreement that summary judgment should be granted as there are no genuine issues of material fact. The statutes at issue (A.R.S. 33-1808(F) and 33-441) both authorize a homeowner to display a for sale sign and prohibit governing documents from regulating a homeowner to the contrary. The statutes are not applied retrospectively. All acts were completed well after the enactment and effective date of each statute.

Any rights provided for by virtue of section 12.3 of the CC&R's were merely contingent and were unvested. For a vesting to occur it required the posting of a sign. This is a contingent event because it is an event that may or may not happen in the future. Unvested contractual rights cannot be impaired and therefore cannot be considered

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unconstitutional. Even if the Defendant did have vested rights, they lacked a *reasonable expectation* that their rights would not be impaired or that the law would not change. This is because HOAs are highly regulated creatures of statute and the very documents that empower and enable an HOA to control and regulate aspects of the association, come from a divestiture of power provided by the legislature. Accordingly, since HOAs are so highly regulated the Defendant's lacked any objective *reasonable expectation* that the existing law would not change or the rights modified.

Even if the new statutes did substantially impair vested contract rights, there is a legitimate public purpose behind the legislation and the adjustment or rights in the new statutes are appropriate to further the public purpose.

WHEREFORE, Plaintiffs respectfully request that this Court enter summary judgment in favor of Plaintiffs and find that A.R.S. § 33-1808(F) and § 33-414 permits Plaintiffs to post a 'for sale' sign and rider, of the size designated by statute, on the property which Plaintiffs own in Pine Canyon. Plaintiffs further request declaratory relief finding that section 12.3 of the CC&R's, as they relate to for sale signs, are illegal, void and unenforceable. Plaintiffs further request an injunction prohibiting Defendant from removing a compliant 'for sale' sign and rider from Plaintiffs' lot. Finally, Plaintiffs request an award of their attorney's fees and costs.

Respectfully submitted this 25th day of January, 2012.

Tevis Reich

TEVIS REICH
6 East Dale Avenue
Flagstaff, Arizona 86001

A copy of the foregoing
mailed and emailed this
12 day of January, 2012 to:

Edward G. Hochuli
J. Gary Linder
Jones, Skelton & Hochuli, P.L.C.
2901 N. Central Ave., Suite 800
Phoenix, AZ 85012
ehochuli@jshfirm.com
glinder@jshfirm.com

By: [signature]

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Attorney for Plaintiffs/Counter Defendants

SUPERIOR COURT OF ARIZONA
COCONINO COUNTY

ROBERT R. HAWK and CECELIA J. HAWK, husband and wife, Plaintiffs/Counter Defendant, vs. PC VILLAGE ASSOCIAITON INC., an Arizona Corporation, Defendant/Counter Plaintiff.	Case No.: CV 2011-00775 **AFFIDAVIT OF ROBERT HAWK** (the Honorable Mark Moran)

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Flagstaff, Arizona 86001

ROBERT HAWK, being duly sworn, upon oath, deposes and says as follows:

1. I am over the age of 18, and make this Affidavit in support of the pending Motion for Summary Judgment and Defendants' Cross Motion for Summary Judgment. The statements made herein are based upon my own personal knowledge.

2. My wife, Cecelia Hawk, and I are the owners of Lot 197 of the Estates at Pine Canyon Unit Two as shown on the plat thereof, recorded in Case 9, Maps 28, 28A and 28B, records of Coconino County Arizona (the "Property"). This is the Property at issue in this action.

3. On August 16, 2011 I caused a 'for sale' sign to be placed on my Property.

4. I personally observed the 'for sale' sign being posted on my Property on this day.

5. The for sale sign was subsequently removed from my Property by personnel form PC Village Association Inc., ("PC HOA") that same day.

6. The following day, August 17, 2011 I again caused a second 'for sale' sign to be posted on my Property.

7. When posting this second for sale sign I took a picture of the hole where the previous 'for sale' sign (posted on August 16, 2011) was removed from. I also took a picture of the second for sale sign being posted. The pictures show that both 'for sale' signs were posted on my Property as indicated by the sign in the background indicating that it is on lot 197 which is my lot. *See Ex. A hereto.*

8. I went by my Property a couple days after August 17, 2011 and verified that the 'for sale' sign had been removed.

9. Thereafter, I received a letter in the mail from the PC HOA President, Warren Smith. The letter acknowledges that PC HOA personnel caused the sign to be removed from my Property. He confirmed that the 'for sale' sign was posted on my Property and that the date of its posting was August 16, 2011. Mr. Smith claimed the posting of the for sale sign to be a violation of the CC&R's. A true and correct copy of this letter is at Exhibit 5 of Plaintiff's Supplemental Statement of Facts filed in conjunction with the Reply to the Motion for Summary Judgment and Response to Defendant's Cross Motion for Summary Judgment. *See,* Ex. 5. I subsequently received a second letter in the mail from the PC HOA President, Warren Smith. The letter acknowledges that PC HOA personnel caused the second sign to be removed. He confirmed that the 'for sale' sign was posted on my Property and that the date of its posting was August 17, 2011. Mr. Smith again claimed the posting of the for sale sign to be a violation of the CC&R's. A true and correct copy of this letter is at Exhibit 6 of Plaintiff's Supplemental Statement of Facts filed in conjunction with the Reply to the Motion for Summary Judgment and Response to Defendant's Cross Motion for Summary Judgment. *See,* Ex. 6.

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STATE OF Arizona)

COUNTY OF Pima County)

DATED this 19 day of January 2012.

Robert Hawk

ROBERT HAWK
AFFIANT

SUBSCRIBED and SWORN TO before me this 20 day of January 2012.

Dolores A. Bravo

NOTARY PUBLIC

My Commission Expires:

DOLORES A. BRAVO
NOTARY PUBLIC - ARIZONA
PIMA COUNTY
My Commission Expires
June 16, 2013

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197


197

PC Village Association, Inc.
1201 E. John Wesley Powell Blvd., Flagstaff, AZ 86001 928-779-5700

August 17, 2011

Robert and Cis Hawk
PMB 704 519 I-30
Rockwall, TX 75087

RE: Lot 197, Pine Canyon, Flagstaff, AZ – COURTESY NOTICE

Dear Mr. and Mrs. Hawk,

This letter is a Courtesy Notice that a violation of the PC Village CCRs occurred yesterday, August 16, 2011, when a 'for sale' sign was posted on your property. By purchasing your lot at Pine Canyon, you took title expressly subject to the CCRs and are contractually obligated to comply with them.

Please see CCR Section 12.3, Signs. This section prohibits the signage and the Association wishes to advise that a repeat of this violation will result in additional violation notices with monetary fines attached.

ACTION TO RESOLVE VIOLATION:

PC Village personnel have removed the offending sign.

In order to avoid future notices and monetary fines, you must discontinue placing 'for sale' signs on your property or on the common areas of the Association.

You have the right to appeal this notice as outlined in A.R.S. §33-1803. If you wish to appeal this notice, you will need to send a certified letter to the Association advising it of your desire to appeal; such letter must be sent within 10 business days from the date of this letter. Your appeal should be sent to our property management company at the following address: PC Village Association, Inc., c/o HOAMCO, P.O. Box 30520, Flagstaff, AZ 86003.

We understand that certain people within the real estate profession are attempting to read recent legislative changes to A.R.S. §33-1808 to apply to pre-existing contractual relationships between homeowners and the communities in which they live. Such, however, is simply not the case. The legislature expressly did not make the recent changes to A.R.S. §33-1808 retroactive.

It is the sincere hope of the Association that this type of violation will not occur again and we ask for your cooperation in this regard. If you have any questions, please feel free to contact me.

Sincerely,

Warren W. Smith
President

cc: Board of Directors
HOAMCO

PC Village Association, Inc.
1201 E. John Wesley Powell Blvd., Flagstaff, AZ 86001 928-779-5700

August 18, 2011

Robert and Cis Hawk
PMB 704 519 I-30
Rockwall, TX 75087

RE: Lot 197, Pine Canyon, Flagstaff, AZ

Dear Mr. and Mrs. Hawk,

Another violation of the PC Village CCRs occurred yesterday, August 17, 2011, when a second 'for sale' sign was posted on your property after Association personnel had removed the first one (as explained in my letter to you of yesterday).

Since your mailing address is out of state and since you obviously had not received my letter to you of yesterday when the second sign was installed, we are considering this second violation in conjunction with the first and are not currently imposing a fine based on the second posting of a 'for sale' sign although we certainly could have.

We trust that your posting a 'for sale' sign only to have the Association remove it will not be a daily or a repeated occurrence. Any subsequent posting will result in additional violation notices with monetary fines attached.

As I advised you in my correspondence of yesterday, you have the right to appeal this notice as outlined in A.R.S. §33-1803. If you wish to appeal this notice, you will need to send a certified letter to the Association advising it of your desire to appeal; such letter must be sent within 10 business days from the date of this letter. Your appeal should be sent to our property management company at the following address: PC Village Association, Inc., c/o HOAMCO, P.O. Box 30520, Flagstaff, AZ 86003.

It is the sincere hope of the Association that this type of violation will not occur again and we ask for your cooperation in this regard. If you have any questions, please feel free to contact me.

Sincerely,

Warren W. Smith
President

cc: Board of Directors
HOAMCO

COCONINO COUNTY SUPERIOR COURT

Date: 1/26/2012
Time: 8:14 AM
Pages: 1

EDMS Barcode Cover Page

Category

CV

Case Number

S0300CV201100775

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Sequence

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