



1     **II.     MEMORANDUM OF POINTS AND AUTHORITIES**

2             **A.     PC Village's rights were vested because it held an immediate, fixed**  
3                     **right to enforce the CC&Rs.**

4             PC Village's right to enforce the CC&Rs vested upon formation of an  
5     enforceable contract. Plaintiffs already acknowledge that the CC&Rs in question were  
6     part of an enforceable contract. (Pl.'s Resp. 13:20.) Plaintiffs also concede that A.R.S. §  
7     33-1808(F) contains no retroactive language, (Pl.'s Resp. 3:13.), instead arguing that the  
8     "for sale" sign prohibition did not vest until a "for sale" sign was posted. (Pl.'s Reply  
9     12:12.) They again assert this position when addressing unconstitutional impairments of a  
10    contractual relationship. (Pl.'s Resp. 17:10.) This is wrong.

11                     *Rights are vested, in contradistinction of being expectant or*  
12                     *contingent. They are vested, when the right to enjoyment,*  
13                     *present or prospective, has become the property of some*  
14                     *particular person or persons as a present interest. They are*  
15                     *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.*

16     Hall v. A.N.R. Freight Sys., 149 Ariz. 130, 140, 717 P.2d 434, 444 (Ariz. 1986) (emphasis  
17     added) (quoting *Steinfeld v. Neilsen*, 15 Ariz. 424, 465, 139 P.879, 896 (1913)). This  
18     *Steinfeld* language is further explained in *Estes* when the court states that "[a] 'vested right'  
19     is an immediate fixed right to present or future enjoyment where the interest does not  
20     depend upon a period or an event that is uncertain." *State v. Estes Corp.*, 27 Ariz. App.  
21     686, 688, 558 P.2d 714, 716 (Ariz. Ct. App. 1976) (citing *Steinfeld v. Nielsen*, 15 Ariz.  
22     424, 139 P. 879 (1914)).

23             In this case, the "for sale" sign obligations were immediate. They prohibited  
24     the display of such signs, and their authority did not depend upon a contingent event.  
25     Plaintiffs are arguing that this contractual right did not vest until they actually breached  
26     the contract. (Pl.'s Reply 3:16.) By this logic, no contractual right could ever vest until a  
27     party to that contract committed a breach.

1           The cases that Plaintiffs reference differ substantially from the  
2 circumstances in this case, as they address rights conferred by statutes later altered, rather  
3 than modifications of contract terms. (Pl.'s Reply 6:9-12:22.) For example, *Hall v. A.N.R.*  
4 *Freight System, Inc.* addressed the right to assert a comparative negligence defense, which  
5 is part of a statutory tort scheme. 149 Ariz. 130, 137, 717 P.2d 434, 441 (Ariz. 1986).  
6 *Aranda v. Indus. Comm'n* evaluated the vesting of rights to disability benefits, also  
7 granted by the legislature. 198 Ariz. 467, 469, 11P.3d 1006, 1008 (Ariz. 2000). Finally,  
8 *Tower Plaza Inv. v. De Witt* determined whether the legislature had the power to tax  
9 property after the parties had already entered into leases, some 50 years long. 109 Ariz.  
10 248, 249, 508 P.2d 324, 325 (Ariz. 1973). The Court in *Tower Plaza* even noted that "to  
11 have a constitutionally protected impairment, the law must act on the contract itself as  
12 distinguished from the property which is the subject of the contract." *Id.* at 252, 508 P.2d  
13 324 at 328 (citing *Clement National Bank v. Vermont*, 231 U.S. 120, 34 S.Ct. 31 (1913)).  
14 None of the cases that Plaintiffs cite address a modification of *contractual* rights. None of  
15 them address the vesting of *contractual* rights. PC Village held the right to enforce the  
16 CC&Rs upon contract formation, and its right to enforce vested immediately.

17           **B. When parties enter into a contract, they have a reasonable expectation**  
18           **that other parties to that contract will abide by its terms.**

19           PC Village residents had a reasonable expectation that others would abide  
20 by the standards set forth in the CC&Rs, thereby creating and maintaining a pleasant place  
21 to live. Section 12 of the CC&Rs is extensive. It mandates that properties be used for  
22 residential use, ensures that insurance is maintained, prevents nuisances, regulates motor  
23 vehicle placement, and even light intensity. (Section 12 of Pl.'s Ex. 1.) This is a planned  
24 community. To state that residents purchasing property here lacked a reasonable  
25 expectation that the CC&Rs would be enforced is simply inaccurate.

26           Plaintiffs reference several statutes in an attempt to show that residents  
27 lacked a reasonable expectation that the legislature would respect the CC&Rs to which the  
28 community agreed. (Pl.'s Resp. 19:5.) However, most of these statutes limiting an

1 association's ability to manage the outward appearance of a community were enacted *after*  
2 the CC&Rs were executed in 2002. For example, A.R.S. § 33-1809 mandating that  
3 associations allow residents to park certain public service vehicles on streets was enacted  
4 in 2003. 2003 Ariz. ALS 99,1. Likewise, regulations allowing children to occupy  
5 residential roadways were enacted in 2007. 2007 Ariz. ALS 82, 1. A.R.S. The statute  
6 mandating that residents be permitted to install solar energy devices was also enacted in  
7 2007, and still grants associations authority to adopt reasonable rules regarding the  
8 placement of those devices. 2007 Ariz. ALS 288,1. Even the flag statute that Plaintiffs  
9 reference allowed only the American flag when first signed just months before the  
10 CC&Rs went into effect, and to this day allows an association to adopt reasonable rules  
11 and regulations regarding placement and manner of its display. 2002 Ariz. ALS 96, 1.

12 Plaintiffs attempt to use a standard form severability clause to prove there  
13 was an expectation that a state statute could modify the CC&Rs. (Pl.'s Reply 20:3.) This  
14 language is contained in CC&R Section 18, titled "General Provisions," and does not  
15 indicate that parties to the contract expected state modification. Quite the contrary, this  
16 section serves to ensure that the bulk of the CC&R provisions remain intact in the event  
17 that any section is held to be invalid. It maintains the contract "[i]f any . . . Section,  
18 clause, sentence, phrase or word, or the application thereof in any circumstance, is held  
19 invalid . . ." (Section 18.3 of Pl.'s Ex. 1.)

20 Plaintiffs also misapply the reasoning in *Energy Reserves*. That case  
21 involved a utility contract setting a price for natural gas, a commodity upon which the  
22 state placed strict price controls. *Energy Reserves Group, Inc. v. Kansas Power & Light*  
23 *Co.*, 459 U.S. 400, 403-04, 103 S.Ct. 697, 700-01 (1983). The contract contained clauses  
24 called "indefinite price escalators," allowing the contract price to increase if a  
25 governmental authority fixed a natural gas price above the price specified in the contract.  
26 *Id.* In this case, there is no indication that the CC&R provision addressing "for sale" signs  
27 was enacted in response to extensive government regulation, or that the residents of PC  
28 Village lacked an expectation that the contractual terms would be enforced. The CC&Rs

1 in this case do not resemble the price setting contract addressed in *Energy Reserves*. With  
2 only limited exception, rules regarding a community's appearance have remained within  
3 an association's purview. The parties to this contract had a reasonable expectation that the  
4 contract's terms, including the "for sale" sign provision, would remain in effect.

5 C. **The character of this contract modification is not appropriate to the**  
6 **public purpose that Plaintiffs propose because this contract is itself the**  
7 **product of a real estate transaction.**

8 Plaintiffs suggest that a significant public purpose supports the legislature's  
9 action because allowing CC&Rs to prohibit "for sale" signs may act as a barrier to real  
10 estate transactions. (Pl.'s Resp. 21:17.) But the "for sale" sign provision is itself a product  
11 of a real estate transaction, and represents a contractual obligation between private parties.  
12 This community creates a haven for those who seek to purchase homes in a more stable  
13 area, and provides assurances that home prices within the community will not be as  
14 volatile as those elsewhere. As stated before, both the aesthetic and economic advantages  
15 of this arrangement helped persuade many residents to purchase property within the  
16 community. (Def.'s Resp. to Pl.'s Mot. for Summ. J. 2:7.)

17 Plaintiffs' discussion of commercial free speech and *Linmark* is also  
18 misplaced. The Court in *Linmark* addressed a case in which a municipality, a state actor,  
19 stripped away the right to post "for sale" signs in an effort to avoid perceived white flight  
20 and maintain integrated neighborhoods. *Linmark Associates, Inc. v. Township of*  
21 *Willingboro*, 431 U.S. 85, 97 S. Ct. 1614 (1977). In this case, Plaintiffs never held the  
22 right to post a "for sale" sign. Rather than removing a right, the state would bestow a new  
23 right where none existed before. Furthermore, *Linmark* addressed an ordinance passed by  
24 a government entity, rather than terms in a private contract. *Id.* at 86, 97 S. Ct. at 1615.  
25 Constitutional rights protect against government infringement, and neither of the parties in  
26 this case are government actors. As Arizona has already recognized, there must first be a  
27 state action before the U.S. Constitution may be invoked. *See Hart v. Seven Resorts*, 190  
28 Ariz. 272, 276-77, 947 P.2d 846, 850-51 (Ariz. Ct. App. 1997) (noting that there is a  
crucial distinction between private acts and government intrusions or state action).


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**III. CONCLUSION**

Purchasing real property is one of the largest investments most people make. Individual choice regarding the character of the community in which a person chooses to live deserves respect. If the statutes in question apply to these CC&Rs as Plaintiffs contend, it would amount to an unconstitutional impairment of contractual rights. These rights were immediately vested upon formation of a valid contract, as PC Village possessed an immediate, fixed right to enforce the terms of the CC&Rs. Residents in this community also held a reasonable expectation that the terms of their contracts would be enforced, and that they would be able to enjoy a community free from eyesores. Finally, because the "for sale" sign provision is itself the product of a contract, the character of the contract modification is not appropriate to the public policy that Plaintiffs propose. Defendant respectfully requests that this Court dismiss Plaintiffs' Complaint with prejudice.

DATED this 2<sup>nd</sup> day of February, 2012.

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1 ORIGINAL of the foregoing mailed for filing  
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3 Clerk of the Court  
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5 Coconino County Superior Court  
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7 Flagstaff AZ. 86001

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