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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 ASSOCIATION INC., an Arizona Corporation, Defendant/Counter Plaintiff.	Case No.: CV 2011-00775 **REPLY TO PLAINTIFF'S AFFIDAVIT OF ATTORNEY'S FEES AND STATEMENT OF COSTS** (the Honorable Mark Moran)

Defendant asserts that Plaintiff's fees should not be awarded or reduced because 1) awarding fees in this case would have a "chilling" effect of resolving future ambiguities in the law and 2) the fees requested are unreasonable. Both of these arguments should be rejected.

If The Court Is Really Considering A Reduction, An Evidentiary Hearing Should Be Held To Determine The Reasonableness Of Plaintiff's Fees

Plaintiffs believe that the fees requested are reasonable as a matter of law and that an evidentiary hearing is unnecessary. However, if the court is inclined to consider Defendants "reasonableness" argument, an evidentiary hearing should be set.

Both parties here acknowledge the concepts litigated were "novel" and lacked binding legal precedent. On this basis alone, the fees should be deemed reasonable as a matter of law because it justifies the time spent in dealing with the issues and areas of the law that lacked a

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clear answer. However, if the court is inclined to accept the Defendant's argument that the fees requested by Plaintiffs are unreasonable, an evidentiary hearing should be held. "We hold that when an objection is made to the fees, unless it appears as a matter of law that they are reasonable, the trial court must have an evidentiary hearing on the factors bearing on the reasonableness of the fee. *Ohliger v. Carondelet St. Mary's Hosp. & Health Centr.,* 173 Ariz. 597, 598, 845 P.2d 523, 524 (App. 1992). An evidentiary hearing should be held if there are any factual disputes over the elements that comprise the fee award. *Church of Scientology v. United States Postal Serv.*, 700 F.2d 486, 494 (9th Cir. 1983).

Defendant's argument that they asserted a "good faith" position is mitigated by some other factors that the Court is unaware of which could be presented at an evidentiary hearing, if necessary. First, on several occasions, counsel for Defendant acknowledged to the undersigned the weakness of his client's position and his encouragement and advice for the Defendant to resolve this matter without litigating it. However, the defense of this matter was paid for by an insurance company based on an insurance policy issued to the HOA. As such, because Defendant was not incurring any out-of-pocket expenses the board of directors authorized defense counsel to put forth any and all reasonable opposition in hopes that the Plaintiffs would be discouraged or would not pursue the matter because of the associated costs. After all, with the insurance company footing the bill for the legal fees the Defendant had nothing to lose.

Also, while there is no binding precedent for this litigated issue Defendant was aware of negative collateral precedent and authority(*See, Exhibit A hereto).* These opinions, which Defendant was aware of, put Defendant in a position of realizing the potential weakness of their legal position.

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Truth be told, the Defendant's legal maneuvering here is really more of a political play. The regular legal counsel for Defendant is an attorney from Tucson named Larry Rollin. Mr. Rollin had significant control over the decisions made by the Defendant in this case and is seen by the board of directors as a person in a position of trust and confidence. More importantly, Mr. Rollin had his own agenda with this case because he stringently opposes the statutes at issue and in fact, currently has his own lawsuit against the State where he trying to invalidate these statutes. *(See, Exhibit B hereto).* As such, Mr. Rollin, having the blank-check from the insurance company and the ear of the board for the HOA sought to try steer the litigation in a position that was helpful to his own position. These factors undoubtedly contributed to the cost of litigation, prevented settlement and demonstrate why Plaintiffs' fees are *reasonable*.

As such, if the Court does not find that the fees requested are reasonable as a matter of law, Plaintiffs' would request an evidentiary hearing to establish these matters.

Factors Considered by the Court

Defendant cites 7 factors set forth by *Fulton Homes* and argues that Plaintiffs' fees should be substantially reduced. Most of the 7 factors set forth by *Fulton* were addressed in the Plaintiffs' affidavit and above. Of those 7 factors, the Defendant argues only 2 of them to support their claim that the fees should be reduced. "The [*Fulton Homes*] court did not state that any one particular factor was necessarily determinative of whether fees should be awarded, and the trial court should consider all the relevant factors in exercising its discretion." *Wilcox v. Waldman*, 154 Ariz. 532, 538, 744 P.2d 444, 450 (App. 1987).

The 2 factors argued by Defendant are the novelty of the legal issues (which was addressed above) and the chilling effect Defendant alleges will occur in resolving similar disputes. First, the existence of a "good faith dispute" does not by itself rise to the level for

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reducing or negating a fee request nor does it automatically create a chilling effect because it is something new. If it did, then nearly every dispute before the courts could be argued to fall under such a broad category since most disputes are asserted in "good faith."

Second, if it did create a "chilling effect, which Plaintiffs contend is unlikely, it is only one of the *Fulton* factors with all the other *Fulton* factors being in favor of Plaintiff. A chilling effect however, is unlikely because there will always be disputes over the interpretation and application of statutory and contract language. There will always be declaratory relief actions. It is unlikely though that a litigant would decide to pursue or not to pursue a particular action solely because of the "potential" risk of an adverse fee award. More likely, there are other factors which *also* play in the decision. Such considerations likely include of the strength of the case, the merits of the claim, the importance of the issue, the cost to prosecute or defend the matter all of which are weighted against the potential risk of an adverse fee award. Such considerations implicitly include the inherent *risk* of an adverse fee award which is the very reason for the policy considerations discussed below. Such policy considerations however, are the very reason for a fee-shifting statute like A.R.S. § 12-34101.

Lastly, policy considerations are in favor of awarding Plaintiffs their *entire* reasonable fee here. "The award of reasonable attorney fees pursuant to subsection A should be made to mitigate the burden of the expense of litigation to establish a just claim or a just defense." A.R.S. § 12-341.01(B). The "Legislature intended that risk of paying the opposing party's attorneys' fees would encourage more careful analysis prior to filing [or defending a] suit." *Chaurisa v. General Motors Corp.*, 212 Ariz. 18, 29, 126 P.3d 165, 176 (App. 2006). Defendant knew or should have known the unlikely chance of success in this matter. *See, Ex. A.* One of the factors that lead to this conclusion is the Defendant's awareness of the precedent (albeit

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unbinding) as set forth in Exhibit A. This should have caused a more careful analysis of Defendant's decision to defend the matter and pursue a counterclaim. It should have also encouraged defendant to more carefully consider the Plaintiffs' offers for settlement which, if accepted, would have yielded the same result but with each party agreeing to bear their own attorney's fees and costs. Importantly, Defendant elected to not even respond to this point regarding settlement and by doing so, at least implicitly acquiesces[1] to this issue which should be given *some* weight by this court. In the end, an award of Plaintiffs' fees promotes the policy considerations and *would not* create a chilling effect and as such, Plaintiffs should be awarded all the fees and costs requested.

Billing Practices

Defendant criticizes the Plaintiffs' billing practices and the time spent in connection with particular tasks. Plaintiff complains of "block-billing" and asserts the general objection that too much time was spent on the reply. "Once a party establishes entitlement to fees and meets the minimum requirements in an application and affidavit … the burden shifts to the party opposing the fee award to demonstrate the impropriety or unreasonableness of the requested fees." *State ex rel. Corbin v. Tocco,* 173 Ariz. 587, 594, 845 P.2d 513, 520 (App.1992). "[A]n opposing party does not meet his burden merely by asserting broad challenges to the application." *Id.* "It is not enough for an opposing party simply to state, for example, that the hours claimed are excessive and the rates submitted too high." *Id.*

The general objection is exactly what Defendant has asserted here and what *Corbin v. Tocco* prohibits. Defendant generally asserts that the time spent on the reply "far exceeds the amount of time a reasonable attorney would have expended." *See Response;* 2:22. These types

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[1] *See generally,* Rule 7.1(b), A.R.C.P.

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of general objections do not satisfy the Defendant's burden to demonstrate the fees requested are unreasonable or unwarranted. Accordingly, they should be rejected.

Likewise, the claim that Plaintiffs engaged in block-billing and failed to meet the *China Doll* standard is without merit. "Block-billing," meaning a single time entry summarizing numerous things done without allocating the time within the block for each particular task is not itself, improper. Moreover, it is not the applicable standard for considering whether the task is compensable. The specificity of the time and activities need only be in "sufficient detail that a neutral judge can make a fair evaluation of the time expended, the nature and need for the service, and [for] reasonable fees to be allowed." *Metro Data Sys., Inc. v. Durango Sys., Inc.*, 597 F.Supp. 244, 245 (D.Ariz.1984). "The affidavit of counsel should indicate the type of legal services provided, the date the service was provided, the attorney providing the service ... and the time spent in providing the service." *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 188, 673 P.2d 927, 932 (App.1983). "[F]or the court to make a determination that the hours claimed are justified, the fee application must be in sufficient detail to enable the court to assess the reasonableness of the time incurred." *Id.* Nothing requires that related tasks be broken up into individual entries.

The time entries in the Plaintiffs' fee affidavit meet the *China Doll* criteria. They contain sufficient detail to justify the fees requested and Plaintiffs are confident, that upon the Court's review of these entries, they will justify themselves.

WHEREFORE, Plaintiffs request that this court award Plaintiffs their attorney's fees and costs in full as supported by the affidavit and the supplemental affidavit totaling:

ORIGINAL AFFIDAVIT	$ 19,476.50
SUPPLEMENTAL AFFIDAVIT	$ 1,216.50
COSTS	$ 296.00
TOTAL	**$ 20,989.00**

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Respectfully submitted this 20th day of April, 2012.

Tevis Reich

A copy of the foregoing
mailed ~~and emailed~~ this
20 day of April, 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
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By: _____

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ARIZONA STATE SENATE
SENATE MAJORITY STAFF

Facsimile Cover Sheet

Date: Sept 11, 2007

To: Tom Farley

Fax Number: 602-351-2474

Number of pages, including cover sheet: 4

FROM:

___Wendy **Baldo**

_X_Brian **Townsend**

___Victor **Riches**

___Javan **Mesnard**

___Amy **Bjelland**

___Michael **Hunter**

Majority Staff Assistants

___Monica Hess
___Gina Jenkins

COMMENTS:

Here is the Leg Council opinion. Let me know if you need anything else. Thanks. BT.

If you have problems with this transmission, call (602) 926-5418.

Fax No. (602) 926-3039
Arizona State Senate
1700 West Washington
Phoenix, AZ 85007

ARIZONA LEGISLATIVE COUNCIL

MEMO

September 10, 2007

TO: President Tim Bee

FROM: Kenneth C. Behringer
General Counsel

RE: For Sale Signs; Homeowners' Associations (R-48-47)

QUESTION

Do the changes to the powers of condominium and planned community homeowners' associations (HOAs) in Laws 2007, chapter 228 (Chapter 228) apply to associations in existence at the time the changes go into effect?

ANSWER

The changes prescribed in Chapter 228 apply to all planned community HOAs, to any condominium HOA that was formed on or after January 1, 1986 and to condominium HOAs formed before that date that do not have anything in the condominium documents that conflict with Chapter 228.

DISCUSSION

Chapter 228 amended Arizona Revised Statutes (A.R.S.) sections 33-1261 (relating to condominium HOAs) and 33-1808 (relating to planned community HOAs). The amendments provide that an HOA may not prohibit a homeowner from displaying a for sale sign in or on the homeowner's property, if the sign meets specified size limitations. These changes will take effect on the general effective date for this past regular session, which is September 19, 2007.

The Legislature intended that these changes apply to HOAs currently in existence as well as those that come into existence later. The introductory language to both changes provides that the changes are made "[n]otwithstanding any provision in the [association's] 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 the associations in regard to these limitations.

These new provisions must be read in conjunction with the current statutes. The planned community law provides that the chapter that includes A.R.S. section 33-1808 applies to all planned communities. A.R.S. section 33-1801. The chapter on condominiums applies to all condominium associations formed on or after January 1, 1986. A.R.S. section 33-1201. It also applies to condominium associations formed before January 1, 1986 to the extent that the chapter "does not conflict with the declarations, articles or bylaws of the condominium." A.R.S. section 33-1201, subsection B.

Had the Legislature intended to grandfather in current HOAs, it would have used language similar to that in A.R.S. section 33-1201, subsection B. Chapter 228 did not make any similar exception for associations existing on the effective date of the chapter.

Because the clear intent of the Legislature was to apply the limitations to all HOAs in existence on or after the effective date of the act, the only way this could not occur is if there exists some constitutional prohibition on the Legislature enacting these limitations. One argument might be that this is improper retroactive legislation because it affects associations that already prohibit for sale signs. This argument misconstrues the nature of retroactive legislation, however. A law is not retroactive merely because it relates to past events or antecedent conditions. *Hall v. A.N.R. Freight System, Inc.*, 149 Ariz. 130 (1986). The legislation does not affect the validity of any for sale sign prohibition in effect and enforced against a homeowner before the effective date of Chapter 228. The limitations on enacting or enforcing these sign prohibitions only apply on and after September 19, 2007.

It might also be argued that the association governing documents are a contract between the association and the homeowners', and Chapter 228 impairs this contract in violation of Constitution of Arizona article II, section 25 and the Contracts Clause of the United States Constitution article I, section 10, clause 1. Although the legislation affects the authority of HOAs, the legislation does not rise to the level of an unconstitutional impairment of a contract.

Although the language of the contract clauses is absolute, the courts have determined that these prohibitions must be weighed after consideration of the inherent police power of the state to safeguard the vital interests of the people. *Baker v. Ariz. Dept. of Revenue*, 209 Ariz. 561 (Ariz. App. 2005). In determining whether legislation violates the Contracts Clause, the United States Supreme Court has indicated that the following three factors must be considered:

1. Whether the law has, in fact, operated as a substantial impairment of a contractual relationship.
2. If the law does substantially impair a contract, does it nevertheless have a significant and legitimate public purpose.
3. Is the adjustment of the rights of the contracting parties based on reasonable conditions and of a character appropriate to the public purpose. *Energy Reserves Group v.. Kansas Power & Light Co.*, 459 U.S. 400, 411-412 (1983).

The Court noted in *Energy Reserves*, that the courts customarily defer to legislative judgment as to the necessity and reasonableness of a particular measure. *Id.* at 412-413.

In determining 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 (Ariz. App. 1998). Therefore, the courts will look at whether the industry affected by the legislation has been regulated in the past, to determine if the reasonableness of an expectation that there will be no change in the law. *Energy Reserves*, 459 U.S. at 411. In this case, such an expectation is unreasonable. The HOAs are creatures of statute. Their powers and duties are defined by statute. The Legislature is constantly balancing the interest of the associations as a whole against the rights of individual homeowners. Therefore, the legislation did not substantially impair a vested right of any party.

Even if the legislation were considered a substantial impairment, the act furthers significant and legitimate state interests. As noted above, the legislation balances the interests of individual homeowners against the power of the HOA. The housing market is also vital to the economy of the state. The legislation supports this market by allowing communication of the fact that homes in HOAs are for sale.

CONCLUSIONS

The clear language of Chapter 228 applies its limitations to existing condominium and planned community associations. Pursuant to current statute, the changes are applicable to all planned communities, to all condominiums formed on or after January 1, 1986 and to condominiums formed before this date that currently do not have provisions in their governing documents that are contrary to Chapter 228.

cc: Brian Townsend

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. STEPHEN C. VILLARREAL **CASE NO. C20081841**

DATE: December 12, 2008

THE STONE CANYON COMMUNITY ASSOCIATION, INC., an Arizona non-for-profit corporation; and STONE CANYON, LLC, an Arizona limited liability company,

Plaintiffs,

v.

NIKKI MEHALIC-HALLE; VICTORIA LOCATELLI; BARBARA BARDACH; LENDINGTREE, LLC, a foreign limited liability company; et al.,

Defendants.

RULING

IN CHAMBERS RULING RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT:

Factual and Procedural Background

Defendants are Arizona licensed real estate agents or brokers. Plaintiff Association is a nonprofit property owners association for a master-planned community known as "The Stone Canyon Club." Plaintiff Stone Canyon, LLC, is the developer of The Stone Canyon Club. The Stone Canyon Club is part of a larger master-planned community known as Rancho Vistoso in the Tucson area.

All the property within The Stone Canyon Club is subject to both a Rancho Vistoso master declaration and a Declaration of Covenants, Conditions and Restrictions for The Stone Canyon Club ("the Stone Canyon CC&Rs"). The Stone Canyon CC&Rs provide that, in the event of a conflict between the Stone Canyon CC&R's and the master declaration, the master declaration shall control. The master

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Judicial Law Clerk

declaration expressly allows "for sale" signs to be placed on parcels. However, the Stone Canyon CC&Rs state that no "for sale" or "for rent" sign may be posted on any lot.

In February and March 2008, Defendants erected "for sale" signs on various lots within The Stone Canyon Club. Plaintiffs removed the "for sale" signs erected by Defendants and later brought this action.

In its complaint, the Association alleges that Defendants intentionally interfered with the relationship between Association members and the Association by making "various statements and representations to lot owners within the Association to the effect that the prohibition in the Stone Canyon CC&Rs of 'for sale' signs is unenforceable." The complaint further alleges that Defendants interfered with the relationship between Association members and the Association by sending an email to their clients discussing the import of A.R.S. § 33-1808(F). The Association also seeks an order permanently enjoining Defendants from interfering with the contractual relationship between it and its members.

Plaintiffs filed their complaint on March 18, 2008. On September 5, 2008, Defendants filed a motion for summary judgment. Plaintiffs oppose the motion and filed a cross-motion for summary judgment on October 6, 2008. Defendants oppose the cross-motion. This court has read and reviewed the motions, responses, replies, and all additional documents, and heard oral argument on the matter on December 1, 2008.

Standard of Review on Motion for Summary Judgment

In reviewing a motion for summary judgment, the court determines de novo whether any genuine issues of material fact exist. Center Bay v. City of Tempe, 214 Ariz. 353, ¶ 14, 153 P.3d 374, 377 (App. 2007), citing Eller Media Co. v. City of Tucson, 198 Ariz. 127, ¶ 4, 7 P.3d 136, 139 (App. 2000). The court views the facts and inferences drawn from those facts in the light most favorable to the non-moving party. Prince v. City of Apache Junction, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996); see also Angus Medical Co. v. Digital Equip Corp., 173 Ariz. 159, 840 P.2d 1024 (App. 1992). Granting a motion for

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summary judgment is proper when reasonable minds cannot differ on the evidence or any inferences that could be drawn from it. Orme School v. Reeves, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

Legal Analysis

The Rancho Vistoso Master Declaration controls

There is no genuine issue of material fact concerning whether the Association CC&Rs prohibit "for sale" signs. The Stone Canyon CC&Rs clearly prohibit "for sale" signs. However, the Stone Canyon CC&Rs expressly provide: "In the event of any conflict between this Village Declaration and the Rancho Vistoso Declaration, the Rancho Vistoso Declaration shall control." There is a clear conflict between the Stone Canyon CC&Rs and the Declaration because the CC&Rs expressly prohibit "for sale" signs, whereas the Declaration expressly permits "for sale" signs. Therefore, the Declaration controls, and the Association cannot prohibit "for sale" signs. Defendants are entitled to summary judgment.

Retroactivity of A.R.S. § 33-1808(F)

A.R.S. § 33-1808(F) allows "for sale" signs in The Stone Canyon Club. § 33-1808(F) provides: "Notwithstanding any provision in the community documents, an association shall not prohibit the indoor or outdoor display of a for sale sign and a sign rider by an association member on that member's property..." Plaintiffs and Defendants agree that § 33-1808(F) does not apply retroactively. However, Plaintiffs argue that application of § 33-1808(F) to preexisting CC&Rs would have a retroactive effect due to its impairment of vested substantive rights. Plaintiffs cite a California case, Citizens for Covenant Compliance v. Anderson, 906 P.2d 1314 (Cal. 1995), for the proposition that rights created by CC&Rs are vested substantive rights. They argue that the Association and its members have a right to rely on a legal obligation substantiated by the execution and recordation of the Stone Canyon CC&Rs. The reciprocal rights and obligations of the CC&Rs, Plaintiffs argue, became "vested" when they were recorded and executed, some eight years before the 2007 adoption of the amended § 33-1808(F). Plaintiffs conclude

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that because the application of the amendment retroactively would alter vested rights, the amendment only applies to covenants created after the effective date of the amendment.

In contrast, Defendants argue that the right to enforce the "for sale" sign prohibition against Defendants could not have vested prior to the legislature's adoption of § 33-1808(F) because Defendants' clients had not yet posted any "for sale" signs in the Stone Canyon Club. They argue that § 33-1808(F) operates prospectively because the acts out of which Plaintiffs' claims arise are not events completed prior to the effective date of the statute. The posting of the "for sale" signs at issue in this case, and Plaintiffs' removal of those signs, occurred after the effective date of § 33-1808(F). Thus, Defendants conclude that the application of § 33-1808(F) to prohibit Plaintiffs from interfering with the Stone Canyon Club members posting "for sale" signs in the future cannot be the retroactive effect of legislation. Defendants cite Tower Plaza Inv. Ltd. v. DeWitt, in which the Arizona Supreme Court held that "a statute is not retroactive in application merely because it may relate to antecedent facts." 109 Ariz. 248, 250, 508 P.2d 324, 326 (1973); *see also,* Anderson v. Industrial Comm'n of Ariz., 205 Ariz. 411, 413, 72 P.3d 341, 343 (App. 2003) (where the acts that resulted in application of the statute occurred after the statute's effective date, the right is not vested and the legislature may change the consequences of future acts).

The Court agrees with Defendants that the recording of the Stone Canyon CC&Rs is an antecedent fact and that the effect of the statute – to prohibit the Association from enforcing the CC&Rs' "for sale" sign prohibition – occurs with respect to the posting of signs after the effective date of § 33-1808(F). Because the acts out of which Plaintiffs' claims arose were completed after the effective date of the statute, the statute operates to prohibit Plaintiffs from prohibiting the posting of "for sale" signs by Association members after the effective date of the statute. Therefore, there is no genuine issue of material fact, and Defendants are entitled to summary judgment.

Tortious interference with contract

Contractual relationships are not protected from all interference, but only from "wrongful"

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interference. The only interference that is tortious is that which occurs by "unlawful means or by lawful means where there is a lack of sufficient justification." State Farm Mut. Ins. Co. v. St. Joseph's Hosp., 107 Ariz. 498, 502, 489 P.2d 837, 841 (1971). Further, truthful information and honest advice within the scope of a request for the advice do not constitute wrongful conduct sufficient to support a claim for interference. *Restatement (Second) of Torts* § 772; Liebe v. City Fin. Co., 295 N.W.2d 16, 18 (Wis. App. 1980) (truthful statements which caused a contract to be terminated do not give rise to a claim for interference with contract); Havsy v. Flynn, 945 P.2d 221, 223 (Wash. App. 1977) (advice may give rise to interference with contract only if given dishonestly or in bad faith). The Court, having found that A.R.S. § 33-1808(F) prohibits the Association from prohibiting the use of "for sale" signs by Association members, finds that Defendants provided truthful and honest advice when they informed their clients about the ramifications of § 33-1808(F). Therefore, Defendants did not wrongfully interfere with the contractual relationship between the Association and its members, and Plaintiffs are not entitled to summary judgment.

Accordingly, pursuant to Rule 56, Ariz. R. Civ. P.,

IT IS ORDERED:

1. Defendants' motion for summary judgment is hereby GRANTED.
2. Plaintiffs' cross-motion for summary judgment is hereby DENIED.

Defendants are directed to submit an appropriate form of judgment and a statement of costs within 30 days of the date of this ruling.

HON. STEPHEN C. VILLARREAL

Staci Vierthaler
Judicial Law Clerk

cc: Clerk of Court – Under Advisement Clerk
Ronald M. Lehman, Esq./Lyle D. Aldridge, Esq./Richard A. Brown, Esq. – GABROY, ROLLMAN & BOSSE, P.C.
Jeanna Chandler Nash, Esq./Thomas A. Langan, Esq. – UDALL LAW FIRM, LLP

Staci Vierthaler
Judicial Law Clerk

From: Warren Smith
To: Tevis@Treichlaw.com
Subject: FW: Letter from Hawk Lot 197 Lawyer
Date: Tuesday, September 06, 2011 3:09:17 PM
Attachments: sb_for_sale.pdf
2664.pdf

Dear Mr. Reich,

Our rights to prohibit signs are grandfathered and are not affected by the new law. Our lawyer is the drafter of the attached article and plaintiff in the attached lawsuit, which state the support for our position. You can find the signs at the maintenance facility on the east side of the project. If you have any further comment or question, please contact Mr. Rollin. His office is 520-623-4353

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Pacific Coast Builders
Gold Nugget Award 2007
Best Private/Public Recreational Facility

#4 Best in the State of Arizona
Golf Digest 2007-2008

S.B. 1062 — FOR SALE SIGNS

by Lawrence S. Rollin
Elizabeth Wolnick contributed to this article

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This article is written in response to articles and publications on HOA For Sale Signs (SB 1062) prepared by representatives of the Arizona Association of Realtors.

The articles and publications from the Arizona Association of Realtors are legally incorrect and otherwise deceptive as to the issue of retroactivity of the new law. The Arizona Association of Realtors wasted a lot of time, effort and money on this new law project if retroactivity was a goal. It is only the Arizona Association of Realtors who wanted this statute passed. The residential real estate market has functioned well since Arizona became a state without the need for this law.

The legislature did not state that the law is to supersede existing CC&Rs. The amendment does not expressly state that the law is to be retroactive. Although, the legislature uses the terminology "[n]otwithstanding any provision in the community documents," this language does not specify whether existing or future, or both, community regulations are subject to the amendment. In addition, Arizona law does not define the term "community documents" as it is used in this context. Furthermore, the statute prior to the amendment includes the following note as to a prior amendment to the statute: "Section 33-1808 as amended by this act applies retroactively to, from, and after July 3, 2004." A similar note is not attached to the 2007 amendment to Section 33-1808.

Under statutory law and public policy doctrine, the amendment cannot be applied retroactively. Arizona statues and caselaw strongly support the proposition that "no statute is retroactive unless expressly declared therein." §1-244; e.g. *Garcia v. Browning*, 214 Ariz. 250, ¶ 7, 151 P.3d 533, 535 (2007); *Stanley v. Stanley*, 112 Ariz. 282, 541 P.2d 382 (1975). Furthermore, the Arizona Supreme Court acknowledges that the legislature is aware of the necessary process for making a law retroactive, should that be the intent. *Garcia*, 214 Ariz. at ¶8, 151 P.3d at 535. Legislative history and external sources should not be consulted when determining the retroactively of a statute. *Id.* at ¶11, 151 P.3d at 535-536. Legislative history does not satisfy the statutory requirement that retroactively be expressly stated within the newly enacted law. *Id.* at ¶11 n2. 151 P.3d at 536 n2.

Under a statutory analysis, the amendment to Section 33-1808 should not effect the pre-existing CC&Rs of any community. The amendment does not contain the required express language that the law is to be applied retroactively. See S.B. 1062. The generic language at the beginning of the amendment does not state that it is to be interpreted with the intent to make the law retroactive. Any statutory notes or legislative history with regard to the amendment should also be ineffective in establishing retroactivity. *Garcia*, at ¶11, 151 P.3d at 535-536.

There is a strong public policy in Arizona of enforcing the private restrictive covenants of landowners. *Westwood Homeowners Ass'n v. Tenhoff*, 155 Ariz. 229, 236 745 P.2d 976, 983 (App. 1987)(rev. denied 1989). Until recently, the courts have also maintained the opposing view that restrictive covenants are not favored because they are viewed as a restraint on the free alienability of land. *Id.* However, in *Powell v. Washburn*, the Arizona Supreme Court clarified that an ambiguous restrictive covenant should be interpreted to give effect to the intent of the contracting parties and to fulfill the

purpose for which it was intended. 211 Ariz. 553, ¶13, 125 P.3d 373, 377 (2006). Thus, when interpreting a restrictive covenant, Arizona courts will no longer defer to the principle of free alienability. *See Id.*

The court should give full effect to the clear intent of preexisting CC&Rs. Although there may be an argument that there is a separate public policy protecting a homeowner's right to engage in trade, when two recognized public policies are in opposition, the court will compare the state interests each policy advances. *Westwood*, 155 Ariz. at 236, 745 P.2d at 983. Private gated communities are the majority, if not all, of the communities affected by this law. There is no open public access to these communities. Accordingly, there will be little harm to a homeowner who wishes to place a for sale sign since the general public will not see it. As to other homeowners, they invested in their home with the expectation of not seeing for sale signs up and down their streets.

Westwood is very similar to the issue at hand. In *Westwood*, a community had a restrictive covenant prohibiting, inter alia, group homes for the sick or disabled. *Id.* at 230, 745 P.2d at 977. The covenant had been in force since 1959. *Id.* In 1978, Arizona adopted the Developmental Disabilities Act which supported the deinstitutionalization of the developmentally disabled and favored the type of group home at issue in *Westwood*. *Id.* at 231, 745 P.2d at 978. Without discussing statutory retroactivity, the court determined that the public policy interest in supporting the disabled superseded the public policy of enforcing this restrictive covenant. *Id.* at 234, 725 P.2d at 981.

Although the *Westwood* court favored superseding the pre-existing covenant, further language in the holding is persuasive in favor of the private communities which prohibit for sale signs. The homeowners' association in Westwood tried to combat the defense's public policy argument by advancing their own public policy argument with regard to the state's deference to restrictive covenants. *Id.* at 236, 745 P.2d at 983. For support, the homeowners' association cited *Tucson-North Home Apartments Homeowners' Association v. Robb*. *Id.* (citing 123 Ariz. 4, 596 P.2d 1176 (App. 1979)). In *Robb*, the homeowners' association successfully enforced a restrictive covenant which prohibited window-unit coolers. 123 Ariz. at 4, 596 P.2d at 1176. The court in *Westwood* distinguished *Robb* noting that window-coolers were not the equivalent of promoting equal rights for the disabled. *Westwood*, 155 Ariz. at 236, 745 P.2d at 983. In light of these two cases, private gated communities are more easily likened to Robb than to Westwood, and therefore the policy of enforcing preexisting restrictive covenants should triumph.

The foregoing analysis does not include the State Constitutional prohibition to retroactivity or the amendment itself. Article 2, Section 25 expressly states that "No bill of attainder, ex-post-facto law, or law impairing the obligation of a contract, shall ever be enacted." Since the CC&Rs are also contractual in nature, the amendment should be found as unconstitutional, and caselaw analysis is not even necessary. Either way, there should be no retroactivity.

As a final note, the amendment applies to associations only. It never mentions the members or the declarant or that it applies thereto. Under typical CC&Rs, not only does the association have the right to enforce, but the declarant and each member usually have such right. The statute does not prohibit the declarant or any member from enforcing not only pre-existing prohibitions, but also future prohibitions. Only an association is prohibited from enforcing future prohibitions under the language of the amendment. Even if a court disagrees with the foregoing analysis and retroactivity does apply, the statute never mentions the declarant or the members. They are free to enforce at will.

Note from the authors of the legislative update article (Summer 2007): *We would like to clarify that Mr. Rollin is mistaken that it "was only the Arizona Association of Realtors® who wanted this statute passed." SB 1062 was introduced by Senator Tibshraeny on behalf of a constituent living in a gated homeowner's association. Additionally, we respectfully disagree with Mr. Rollin's legal analysis regarding the issue of retroactivity, as does Legislative Counsel.*

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Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

LAWRENCE S. ROLLIN, a single man,

Plaintiff,

vs.

STATE OF ARIZONA, a body politic,

Defendant.

Case No.:

C20111118

COMPLAINT
(Declaratory Judgment)

(Not Assigned)

Christopher P. Staring

Plaintiff Lawrence S. Rollin ("Rollin") for his Complaint against the State of Arizona (the "State") alleges as follows:

1. Rollin is a citizen of the State of Arizona and resides in Pima County, Arizona, in the Fairfield Sabino Canyon Bonita Ridge subdivision ("Fairfield Sabino"). Fairfield Sabino is a gated residential community.

2. The State of Arizona is a body politic of the United States of America.

3. In 2010, the Arizona Legislature passed and enacted into law House Bill 2345, amending A.R.S. §§33-1261 and 33-1808 (collectively "A.R.S. §33-1808").

4. The amendments to A.R.S. §33-1808 directly affect planned communities, such as Fairfield Sabino.

5. Fairfield Sabino is subject to the Second Amended and Restated Declarations of Covenants, Conditions, Restrictions and Easements for Bonita Ridge(known and marketed as Fairfield Sabino Canyon) ("Fairfield Sabino CC&Rs") (Exhibit "1"), which were recorded on August 31, 1998, prior to the enactment of A.R.S. §33-1808.

6. A.R.S. §33-1808 did not become effective until July 28, 2010.

7. A.R.S. §33-1808 purports to affect planned community documents, such as the Fairfield Sabino CC&Rs, and provides, amongst other things, that:

> F. [A]n association shall not prohibit the indoor or outdoor display of a for sale sign . . . [A]n association shall not prohibit or otherwise regulate any of the following:
>
> 1. Temporary open house signs or a unit owner's for sale sign. The association shall not require the use of particular signs indicating an open house or real property for sale and may not further regulate the use of temporary open house or for sale signs that are industry standard size and that are owned or used by the seller or the seller's agent.
>
> 2. Open house hours. The association may not limit the hours for an open house for real estate that is for sale in the planned community, except that the association may prohibit an open house being held before 8:00 a.m. or after 6:00 p.m. and may prohibit open house signs on the common areas of the planned community.
>
> 3. An owner's or an owner's agent's for lease sign unless an association's documents prohibit or restrict leasing of a member's property. An association shall not further regulate a for lease sign or require the use of a particular for lease sign other than the for lease sign shall not be any larger than the industry standard size sign of eighteen by twenty-four inches on or in the member's property. If leasing of a member's property is not prohibited or restricted, the association may prohibit open house leasing being held before 8:00 a.m. or after 6:00 p.m.

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A.R.S. §33-1808(F).

8. The Fairfield Sabino CC&Rs constitute a contract between Rollin, the remaining homeowners in the Fairfield Sabino subdivision, the homeowners association referred to in the Fairfield Sabino CC&Rs (the "Homeowners Association") and the "Declarant" thereunder.

9. A.R.S. §33-1808 purports to be retroactive thus on its face affecting the Fairfield Sabino CC&Rs.

10. The Fairfield Sabino CC&Rs, at §10.8, provide:

> No sign of any nature whatsoever, whether permanent or temporary, shall be permitted on any Lot except that one temporary construction sign may be erected per Lot during the development thereof . . . .The Association shall have the right to adopt rules and regulations governing the placement of "For Sale" or "Open House" signs upon each Lot and, without limitation, may require that such signs be limited in size, placed only in window areas, and erected only when a home is actually open for inspection pursuant to a generally advertized publication.

11. The Fairfield Sabino CC&Rs do permit leasing (*see* §10.10) and thus A.R.S. §33-1808 rule would apply to leased lots.

12. Pursuant to the Fairfield Sabino CC&Rs, the Homeowners Association did enact design guidelines as permitted by the Fairfield Sabino CC&Rs (Exhibit "2").

13. Those guidelines, which were effective January 15, 2008, allow for very specific and limited for sale signs that are no more than 18" x 24" with a beige background and installed on a raw 4x4x4 post with a maximum height of 36" with one sign per property.

14. Open house signs are limited to two (2) days per week and only when the home is actually open for inspection.

15. No signs for any type are allowed outside the front gate.

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16. A.R.S. §33-1808 as currently enacted by the Arizona Legislature purports to vitiate the Fairfield Sabino CC&Rs and the sign restrictions.

17. The Arizona Constitution, in art. 2, §25, provides:

> No bill of attainder, ex-post-facto law, or law impairing the obligation of a contract, shall ever be enacted.

18. Similarly, the United States Constitution provides in art. I, §10, Cl. 1:

> No state shall . . . pass any bill of attainder, ex-post-facto law, or law impairing the obligation of contracts.

19. A.R.S. §33-1808 constitutes a substantial impairment of Rollin's contractual rights in that part of the bargained for exchange in Fairfield Sabino was the limitations on advertising such as "for sale," "open house" or "for lease" signs, which in turn negatively impair the value of the homes within the community.

20. The State of Arizona and the Arizona Legislature have no significant or legitimate public purpose interest in A.R.S. §33-1808 and the law does not remedy a broad or general social or economic problem.

21. There is no socially significant purpose in allowing homeowners or real estate brokers to have signs at all and much less to have use of their standard signs (as opposed to signs dictated by the CC&Rs and guidelines of a planned community), especially in a gated community.

COUNT ONE

(Declaratory Judgment)

22. Rollin incorporates and realleges each and every previous allegation as though fully set forth herein.

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23. Pursuant to A.R.S. §12-1832, any person who, interested under a contract or other writing constituting a contract, whose rights, status or other legal relations are affected by a statute, may have the question of validity determined by the Court.

24. A.R.S. §33-1808 adversely and improperly affects Rollin's contractual rights and Rollin seeks a determination that the statute is unconstitutional and unenforceable as it relates to its restrictions on planned community CC&Rs, recorded prior to the effective date of the statute and, in particular as it applies to the Fairfield Sabino CC&Rs.

25. There have been, due to A.R.S. §33-1808, signs being displayed within the Fairfield Sabino community that are volative of Fairfield Sabino CC&Rs and design guidelines. Others have threatened to violate the same.

26. Rollin, as a homeowner in Fairfield Sabino, has a contractual right to enforce the Fairfield Sabino CC&Rs.

WHEREFORE, Rollin prays for relief in his favor and against the State of Arizona as follows:

A. A declaration that A.R.S. §33-1808's sign provisions have no affect on the Sabino Fairfield CC&Rs and cannot retroactively affect the preexisting CC&Rs and properly enacted Fairfield Homeowner Association's design guidelines that predate the effective date of A.R.S. §13-1808.

B. Costs and attorneys' fees; and

C. Such other and further relief as the Court deems just and proper.

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DATED this 10th day of February 2011.

McNAMARA, GOLDSMITH &
MACDONALD, P.C.

By: _____
Eugene N. Goldsmith
Attorney for Plaintiff

ORIGINAL of the foregoing filed this 10th day of February 2011 with the Clerk of the Pima County Superior Court

_____

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July 7, 2011

Robert C. Holl
4939 N. Bonita Ridge Ave.
Tucson, AZ 85750

Re: Violation of the Fairfield Sabino Canyon Covenants, Conditions and Restrictions ("CC&Rs")

Dear Mr. Holl:

In addition to being an attorney, I am a member of the Fairfield Sabino Canyon Homeowners Association and a lot owner in the subdivision. Pursuant to the CC&Rs, in addition to the association, each individual member and lot owner has a right to enforce the provisions of the CC&Rs. By letter to you dated June 13, 2011, the management company for the subdivision provided you with a notice of violation for permitting a realtor sign and post to be located in your front yard. You were given ten days to remove the sign and post. Although the sign has been removed, the post remains.

Unless the sign post is immediately removed from your front yard, I will sue you to force your compliance with the CC&Rs (removal of the post.) I will obtain a judgment against you which will require you to remove the post. I will also be awarded all of my attorney's fees in connection with pursuing this matter. Once I receive a judgment against you, I will have it recorded against your property and then force the sale of your house to recover the costs' portion of my judgment.

The question for you is whether it is really worth it for you to lose your house over this matter. It is worth it to me to protect and enforce my rights and preserve the architectural harmony in the subdivision. Although some might believe that our statutes prohibit an association from taking action, there is no statute whatsoever which impacts my individual member right to take the same action that the association may take in connection with this matter.

Sincerely,

UDALL LAW FIRM, LLP

Lawrence S. Rollin

LSR/km
cc: Board of Directors of Fairfield Sabino Canyon Homeowners Association

COCONINO COUNTY SUPERIOR COURT

Date: 4/23/2012
Time: 8:42 AM
Pages: 1

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