Edward G. Hochuli, Bar #004566
J. Gary Linder, Bar #020522
Jonathan Confer, Bar #028918
Lori L. Voepel, Bar #015342
JONES, SKELTON & HOCHULI, P.L.C.
2901 North Central Avenue, Suite 800
Phoenix, Arizona 85012
Telephone: (602) 263-1719
Fax: (602) 200-7812
ehochuli@jshfirm.com
minuteentries@jshfirm.com

Attorneys for Defendant *PC Village Association, Inc.*

SUPERIOR COURT OF THE STATE OF ARIZONA

COUNTY OF COCONINO

ROBERT R. HAWK and CECELIA J. HAWK, husband and wife, Plaintiffs, v. PC VILLAGE ASSOCIATION, INC., an Arizona corporation, Defendant.	NO. CV2011-00775 **RULE 62(C) MOTION TO SUSPEND ENFORCEMENT OF COURT'S MARCH 26, 2012 RULING PENDING APPEAL** (Assigned to the Honorable Mark Moran)

Defendant PC Village Association, Inc., through undersigned counsel, moves this Court for an order suspending enforcement of its March 26, 2012 ruling enjoining Defendant from removing any "For Sale" sign Plaintiffs Robert and Cecilia Hawk post on their property, pending appeal from that ruling (and any judgment relating to that ruling). *See* Rule 62(c), Ariz. R. Civ. P. Unless the Court's ruling granting Plaintiffs' injunction is suspended pending appeal, the issue of whether the "For Sale" sign can properly be maintained on their property will be rendered moot. For this reason and those set forth below, Defendant respectfully requests the Court to issue an order suspending enforcement of its March 26, 2012 ruling and any associated judgment relating to the sign.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

As this Court is aware, Plaintiffs' primary claim in this case is that they should be able to place and maintain a "For Sale" sign on their property located in the Pine Canyon Subdivision. Defendants contend that Plaintiffs are prohibited from placing such a sign on their property pursuant to a Declaration of Covenants Conditions and Restrictions recorded at instrument number 3171314, as amended by a First Amendment to Declaration of Covenants Conditions and Restrictions at instrument number 3261475 (collectively "CC&Rs"). The Court ruled on March 26, 2012 that A.R.S. §§ 33-1808(F) and 33-414 permit Plaintiffs to post a "For Sale" sign and rider on their property, and that Defendant is therefore enjoined from removing a "For Sale" sign from Plaintiffs' property that conforms with reasonable regulations related to its sign and number. (See Order, Exhibit 1).

On April 23, 2012, Defendant filed a Notice of Appeal from the Court's March 26, 2012 ruling. (See NOA, Exhibit 2). This Court has properly maintained jurisdiction over the yet unresolved attorney fee application, which is pending before the Court. This Court is also the proper judicial body from which a suspension of the injunction pending appeal should be obtained pursuant to Rule 62(c), Ariz. R. Civ. P.

II. LAW AND ARGUMENT.

Pursuant to Rule 62(c), Ariz. R. Civ. P.:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

This rule provides the Court with the authority to suspend enforcement of the injunction pending Defendant's appeal. Without such an order suspending enforcement, the central relief Defendant seeks on appeal would essentially be rendered meaningless. Defendant

has a right to appeal the Court's order, and any subsequent judgment from that order, and the status quo should be maintained while Defendant exercises that right.

Moreover, although Rule 62(c) does not expressly require Defendant to meet the traditional equitable criteria for granting preliminary injunctive relief pending appeal,[1] it seems clear that, on balance, Defendant's interest in not having the sign posted while it exercises its right to appeal outweighs Plaintiffs' interest in immediately posting their sign. See *Ariz. Ass'n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, 12 (App. 2009) (court will apply as "sliding scale" under which moving party may establish either: "1) probable success on the merits and the possibility of irreparable injury;" or 2) the presence of serious questions and [that] "the balance of hardships tip[s] sharply in favor of the moving party.").

Under the first sliding scale approach, Defendant has already established a reasonable basis for believing that the development will fail or suffer economically if the additional "For Sale" signs cause home values to drop. If this occurs, it would indeed be an irreparable injury. Under the second approach, there are "serious questions" regarding the retroactivity and constitutionality of the statutes at issue. Furthermore, the balance of hardships appears to tip sharply in Defendant's favor because while it is unlikely that the "For Sale" sign will have a substantial impact on Plaintiffs' ability to sell their home, failing to suspend enforcement of the ruling would mean that numerous others who are selling their homes will also be able to post "For Sale" signs, threatening the value of the homes throughout the development while Defendant exercises its right to appeal.

III. CONCLUSION.

Temporarily suspending enforcement of this Court's March 26, 2012 injunctive ruling pursuant to Rule 62(c), Ariz. R. Civ. P., is necessary to maintain the

[1] The traditional test criteria are: (1) a strong likelihood of success on the merits, (2) the possibility of irreparable harm to the plaintiff if relief is not granted, (3) a balance of hardships favoring the plaintiff and (4) public policy favoring a grant of the injunction. *Ariz. Ass'n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, 12 (App. 2009) (citing *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990)).

status quo and to ensure that Defendants can exercise their right to appeal this Court's ruling without risking that the issue will become moot and/or that irreparable harm will result from the placement of the "For Sale" sign by Plaintiffs and possibly by other property owners. For these reasons, Defendant respectfully requests the Court to issue an order suspending enforcement of the March 26, 2012 ruling, and of any associated judgment relating to the sign, pending resolution of Defendants' appeal in the Arizona Court of Appeals, Division One.

DATED this 23rd day of May, 2012.

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

By _____

Edward G. Hochuli
J. Gary Linder
Lori L. Voepel
2901 North Central Avenue, Suite 800
Phoenix, Arizona 85012
Attorneys for Defendant PC Village Association, Inc.

ORIGINAL of the foregoing sent via Federal Express for filing this 23rd day of May, 2012, to:

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Civil Filings
Coconino County Superior Court
200 N. San Francisco St. (Courthouse)
Flagstaff AZ. 86001

COPY of the foregoing mailed this 23rd day of May, 2012, to:

Tevis Reich
Attorney at Law
6 East Dale Avenue
Flagstaff, Arizona 86001
Attorney for *Plaintiffs*

EXHIBIT "A"

A

CD

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCONINO

Mark R. Moran, Presiding Judge
Division 3
Date: March 26, 2012

Carla D. Baber, Judicial Assistant

ROBERT R. HAWK and CECELIA J. HAWK, husband and wife, Plaintiffs/Counter Defendants, vs. PC VILLAGE ASSOCIATION INC., an Arizona Corporation, Defendant/Counter Plaintiff.	**RECEIVED** MAR 30 2012 **JGL** **Case No. CV2011-00775** **UNDER-ADVISEMENT RULING**

Re: Plaintiff's Motion for Summary Judgment/Defendant's Cross Motion to Declare Statute Unconstitutional

I. STATEMENT OF FACTS

The facts are largely undisputed. Plaintiffs purchased Lot 197 in the Pine Canyon Subdivision (Pine Canyon) in Flagstaff, Arizona in 2009. The Defendant P.C. Village Association, Inc. (PCV) is the homeowner's association (HOA) for Pine Canyon. Pine Canyon is subject to a Declaration of Covenants Conditions and Restrictions (CCR's). The original CCR's were recorded in 2002, and the amended version in 2004. The property is subject to the CCR's, and they run with the land and are binding on the property and all parties having any right, title or interest in the property. [Plaintiff's MSJ, Exhibit 1, pg. 2].

Plaintiff's put a "For Sale" sign on their property on August 16 and again on August 17, 2011. The Defendant caused the signs to be removed and informed Plaintiffs that posting a "for sale" sign was a violation of the CCR's. Section 12.3 of the CCR's states:

> "No sign of any kind shall be Visible from Neighboring Property without the approval of the Village Association or the Design Review Committee, except: (a) signs used by Developer or any Related Party in connection with the development or sale of Lots, Tracts or Condominium Property of the Property; (b) signs required by legal proceedings, or the prohibition of which is precluded by law; or, (c) signs required for traffic control and regulation of Common Areas, No "For Sale" or "For Rent" sign may be posted on any Lot, Tract or Condominium Property."

Each of the parties filed a statement of facts in support of their motion. The Court accepts as true the statement of facts for purposes of the motion for summary judgment, with the exception of Defendant's SOF #10.

II. LEGAL ISSUE

Did the passage of A.R.S.§§ 33-441 and 33-1808(F) make null and void section 12.3 of the CCR's which prohibits owners from posting "For Sale" signs on their property?

Is section 12.3 of the CCR's a violation of the property owner's constitutional right to commercial speech?

III. LAW

The applicable statutes are A.R.S. §§ 33-441 and 33-1808(F).

A.R.S. § 33-441. For sale signs; restrictions unenforceable

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 and a sign rider by a property owner on that person's property, including a sign that indicates the person is offering the property for sale by owner. The size of a sign offering a property for sale shall be in conformance with the industry standard size sign, which shall not exceed eighteen by twenty-four inches, and the industry standard size sign rider, which shall not exceed six by twenty-four inches.

A.R.S. § 33-1808(F) states in part:

Notwithstanding any provision in the community documents, an association shall not prohibit or charge any fee for the use of, the placement of or the indoor or outdoor display of a for sale sign and a sign rider by an association member on that member's property including a sign that indicates the member is offering the property for sale by owner. The size of a sign offering a property for sale shall be in conformance with the industry standard size sign rider which shall not exceed six by twenty-four inches. With respect to real estate for sale or lease in the planned community, an association shall not prohibit or otherwise regulate in any way other than specifically authorize by this section any of the following:

1. Temporary open house signs or a member'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.

The applicable Rule of Civil Procedure is Rule 56:

> The granting of summary judgment is appropriate where, "the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." **Orme School v. Reeves, 166 Ariz. 301, 309, 802 P.2d 1000 (1990).**

IV. DISCUSSION

The Plaintiffs contend that the ban on "For Sale" signs in the CCR's violates A.R.S. §§ 33-441 and 33-1808 and their constitutional right to commercial speech. The Defendant argued that the CCR's were adopted and binding on the property owners and their successors in Pine Canyon prior to the enactment of A.R.S. §§ 33-341 and 33-1808, and that the Legislature did not provide that the statutes were retroactive. In the alternative, the Defendant argued that the statutes were unconstitutional because they were an impairment of a contract.

Although disputed by the Plaintiffs, the Court accepts as true for purposes of this motion that some of the residents in Pine Canyon find posted "For Sale" signs to be an eyesore. (Defendant Statement of Facts, #8 and #10). To the extent that Defendant alleges through affidavits that the posting of "For Sale" signs would have a negative impact on the property values of the neighboring properties, the Court does not accept this fact as true because there was no evidence to support this assertion. (Defendant's SOF, #10).

The Court also accepts as true the facts set forth in the affidavit attached to Plaintiff's Reply (Exhibit 4).

(A) The CCR's

The CCR's in section 12.3 restrict the posting of "For Sale" signs on the properties in Pine Canyon. Section 12.3(b) contains an exception to this general prohibition. It allows, "signs required by legal proceedings, or the prohibition of which is precluded by law."

A.R.S. §§ 33-341 and 33-1808(F) clearly preclude any restriction on a property owner's right to post a "For Sale" sign on their property, within reasonable guidelines for size and number. The legislative history of the statutes attached as exhibits to Plaintiff's motion clearly states that it was the intent of the legislature to prevent HOA's from limiting a homeowner's right to commercial speech and the ability to market their property. Furthermore, the history to SB1148 specifically states that the law will apply to a, "covenant, restriction or condition in any deed, contract, security agreement or other instrument affecting the sale or transfer of any interest in property..." It is

uncontroverted that the CCR's in question were part of the Plaintiff's purchase contract for the property and run with the property. Therefore SB 1148 is applicable to the CCR's which were part of the Plaintiff's purchase of their property in Pine Canyon. The same is true for SB 1062. The plain meaning of the language in A.R.S. § 33-341 and A.R.S. § 33-1808(F) nullified and voided that part of the CCR's in section 12.3 which banned "For Sale" signs.

The CCR's in question specifically state that if a part of their provisions are precluded by law, that portion (in this case the prohibition of posting a "For Sale" sign) becomes null and void. (Plaintiff's Exhibit 1, Section 18.3) In the present case, that portion of the CCR's precluded by law had no binding or legal effect on Plaintiffs. The Court also finds that the intent of the Legislature in passing SB 1148 was to specifically make the law applicable to any existing covenant, restriction or condition contained in any deed, contract, security agreement or other instrument affecting the sale or transfer of any interest in real property, and that this includes the CCR's in question in this case. This conclusion is supported by the plain reading of the legislative history (Plaintiff's Exhibit 3).

The Plaintiffs argued that A.R.S. § 33-1808(F) was not retroactive but should be applied prospectively. It was uncontroverted that the statute was passed after the CCR's were recorded, and prior to the purchase of the property by the Plaintiffs and their attempted sale of the property.

Arizona courts have held that the Legislature can pass laws which affect the rights of parties to contracts for future matters which follow the enacted laws and which are not already in litigation. [see: *Tower Plaza Inv. Ltd. V. DeWitt*, 109 Ariz. 248, 250, 508 P.2d 324, 326 (1973)]. In that case, a transaction privilege tax that taxed the rent collected on leased property was applied to long-term leases that had been entered into prior to the passage of the tax; The plaintiffs, the landlords of the property, maintained that the tax could not be applied to leases already in effect prior to the passage of the tax. They argued, as did the Defendant in this case, that the assessment of any tax on the basis of these purchases, "impairs petitioner's rights under existing valid contracts, and is retrospective, discriminatory, and unconstitutional." Id. The holding in the *Tower Plaza* case demonstrates that the legislature may pass new law that affects existing valid contracts without running afoul of the Constitution.

The court noted that to adopt the position of the landlords would create the anomaly whereby private parties could avoid the exercise of police power by the state by entering into long-term contracts. The court held that the new tax was applicable to contracts or leases which were entered into antecedent to the passage of the tax stating, "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." Id.

(B) Impairment of Contracts Test and Public Policy

The Contract Clause of the United States Constitution prohibits states from passing laws impairing the obligation of contracts. U.S. Const. art. I, section 10; see also Ariz. Const. art. II, section 25. *Robson Ranch Quail Creek, LLC v. Pima County*, 215 Ariz. 545, 551, 161 P.3d 588, 594 (App.2007). When analyzing a challenge to a law based on the Contract Clause, we ask whether the law substantially impairs a contractual relationship. Id. If the law, "constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation." Id. at 552. [citing: *Energy Reserves Group, Inc. v. Kan. Power & Light Co.,* 459 U.S. 400, 411, 103 S.Ct. 697, 704, 74 L.Ed.2d 569 (1983).

The Defendant set forth in its papers the impairment of contracts test for the Court to apply to determine whether the statutes in question substantially impaired the contract in this case. The three part test is:

1) Has the state law operated as a substantial impairment of a contractual relationship?
2) If so, is there a significant and legitimate public purpose behind the legislation?
3) If a legitimate public purpose has been identified, is the adjustment of the rights and responsibilities of the contracting parties based upon reasonable conditions and of a character appropriate to the public purpose justifying the adoption of the legislation? *McClead v. Pima County*, 174 Ariz. 348, 359 (App. 1992).

In this case, the Defendant has the burden of proving that the statutes in question operated as a substantial impairment of their contractual relationship with the property owners in Pine Canyon. *Hall v. A.N.R. Freight Sys., Inc.* 149 Ariz. 130, 133, 717 P.2d 434, 437 (1986). As the Defendant cited in his papers, a contract is impaired when a party is deprived of the benefit of his contract by law. *Tower Plaza Inv* at p. 252. Total destruction of the contractual expectations is not necessary for a finding of substantial impairment. However, the prohibition in the statute does not rise to the level of a constitutional impairment unless, "the impairment was substantial." *Baker v. Ariz. Dept. of Revenue*, 209 Ariz. 56, 105 P.3d 1180, 1184 (App. 2005).

In the *Robson* case cited above, the dispute was between the developer and the County when the County decided to raise the fees on sewer hookups. The developer cited an agreement with the County from an earlier stage of the development when it argued that the new fee operated as a substantial impairment. The agreement however, did not contain a provision that the prior connection fee structure would always exceed the cost of construction, therefore the court concluded that there was no reasonable expectation on the part of the developer that the fee would never change. The court concluded that the amended ordinance changing the fee structure did not substantially impair the developer's rights under the original 1998 contract.

In the present case, the contract of the parties does not contain a provision that the rights and obligations of the parties would never change. To the contrary, both section 12.3 and 18.3 expressly provide for the contingency that the law may change and the contract could be affected. The parties did not have a reasonable expectation that homeowners in Pine Canyon would always be prohibited from displaying "For Sale" signs. As the Plaintiff's argued in their papers, HOA's have traditionally be subjected to regulation by the legislature. Other prohibitions contained in CCR's in the past have been declared contrary to the rights of homeowners and have been repealed by statute. The current situation should be no surprise to the Defendant or other property owners. Finally, the parties would not be deprived of the benefit of the contract by finding section 12.3 null and void. The HOA can still regulate the signs, and the property owners will still have the same rights to enjoy their property.

The Court concludes that the interpretation and application of the statutes to the CCR's does not constitute a significant impairment of the contractual relationship between the parties. Even assuming, *arguendo*, that it was a significant impairment of a contractual right, an analysis of steps 2 and 3 of the test demonstrates that there is a legitimate public purpose behind the legislation which justifies application of the statutes to the CCR's in this case. The statutes insure that every homeowner has the right to commercial speech in selling their property. The HOA retains the right and has the ability to reasonably regulate that speech, but they cannot muzzle it. The statutes serve a practical purpose in assisting a homeowner in a terrible real estate market to sell their property should they wish to do so. This is consistent with the basic rights that are the foundations of property ownership.

Finally, this result is consistent with the public policy goals and considerations of the laws and the rights of the present and future property owners in Pine Canyon. Granted some property owners may consider the posting of "For Sale" signs an eyesore. The argument that the posting of a "For Sale" sign may have a negative economic impact on property owners within Pine Canyon is speculation. This aesthetic concern is outweighed by a property owner's right to the commercial speech and to the unencumbered transferability of his property. For Sale signs have always been an important part of these rights. They serve multiple purposes beyond merely advertising the availability of a property. They can also be an interactive arm of the owner in promoting the property for sale. A person driving by a home may be able to get important information and access photographs of the interior of a property without ever leaving their car. This right was clearly described by the United States Supreme Court in their decision *Linmark Assoc., Inc. v. Wliingboro Tp.*, 413 U.S. 85, 97 S.Ct. 1614, (1977).

V. CONCLUSION

Pursuant to Rule 56, the Court finds that there is no genuine issue of material fact and that Plaintiffs should be granted summary judgment as a matter of law.

Therefore, **IT IS ORDERED** that the provision in the CCR's section 12.3 which prohibits the posting of "For Sale" signs on the subject property is declared illegal, null and void.

FURTHER ORDERED that the Court finds that A.R.S. §§ 33-1808(F) and 33-414 permit Plaintiffs to post a "For Sale" sign and rider on their property, and Defendant is enjoined from removing a "For Sale" sign posted on Plaintiff's property which conforms to reasonable regulations related to its sign and number.

The Court grants the Plaintiffs their reasonable costs and attorney's fees pursuant to A.R.S. § 12-341.01(A).

Hon. Mark R. Moran

cc: Tevis Reich, c/o courthouse box
Jonathan Confer/J. Gary Linder, 2901 N. Central Ave., Suite 800, Phoenix, AZ 85012

EXHIBIT "B"

Edward G. Hochuli, Bar #004566
J. Gary Linder, Bar #020522
Jonathan Confer, Bar #028918
Lori L. Voepel, Bar #015342
JONES, SKELTON & HOCHULI, P.L.C.
2901 North Central Avenue, Suite 800
Phoenix, Arizona 85012
Telephone: (602) 263-1719
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ehochuli@jshfirm.com
minuteentries@jshfirm.com

Attorneys for Defendant *PC Village Association, Inc.*

SUPERIOR COURT OF THE STATE OF ARIZONA

COUNTY OF COCONINO

ROBERT R. HAWK and CECELIA J. HAWK, husband and wife, Plaintiffs, v. PC VILLAGE ASSOCIATION, INC., an Arizona corporation, Defendant.	NO. CV2011-00775 **NOTICE OF APPEAL** (Assigned to the Honorable Mark R. Moran)

NOTICE IS GIVEN that Defendant PC Village Association, Inc. appeals to the Arizona Court of Appeals, Division One, from the court's signed March 26, 2012 Order – Advisement Ruling, and from all interim rulings and any final Judgment awarding fees entered in this case.

DATED this 20th day of April, 2012.

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

By _____

Edward G. Hochuli
J. Gary Linder
Jonathan D. Confer
Lori L. Voepel
2901 North Central Avenue, Suite 800
Phoenix, Arizona 85012
Attorneys for Defendant *PC Village Association, Inc.*

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Tevis Reich
Attorney at Law
6 East Dale Avenue
Flagstaff, Arizona 86001
Attorney for *Plaintiffs*

_____

COCONINO COUNTY SUPERIOR COURT

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