

**IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE**

ROBERT R. HAWK and CECILIA J.  
HAWK,

Plaintiffs/Appellees,

vs.

PC VILLAGE ASSOCIATION, INC.,

Defendant/Appellant.

No. 1 CA-CV 12-0362

Coconino County Superior Court  
No. CV2911-00776

**OPENING BRIEF**

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## **STATEMENT OF THE CASE**

At issue in this case is the trial court's retroactive application of two state statutes, which effectively nullifies Defendant PC Village Association, Inc.'s (PC Village's) covenants, conditions and restrictions (CC&Rs) relating to the posting of "for sale" signs by Pine Canyon residents. Plaintiffs Robert and Cecilia Hawk (the Hawks) are Pine Canyon residents who posted a "for sale" sign, which PC Village had them remove pursuant to Section 12.3 of the CC&Rs. (Record "R" 1). The Hawks filed a complaint seeking declaratory and injunctive relief from the removal order. (R. 1).

The parties filed cross-motions for summary judgment for which oral argument was held on February 28, 2012. (R. 10, 16, 20, 22). On March 26, the trial court granted summary judgment in the Hawks' favor and issued a signed ruling granting declaratory and injunctive relief. (R. 24). On April 23, PC Village filed a notice of appeal from that ruling. (R. 30). The Hawks then sought attorneys fees and costs totaling \$21,820.00, which the trial court granted in its entirety, and it entered judgment on May 24, 2012. (R. 25, 28, 35, 37). That same date, the court denied PC Village's Rule 62(c) motion to suspend enforcement of the injunction pending appeal. (R. 39). PC Village filed an amended notice of appeal from the final judgment on June 13, 2012. (R. 41). This Court has jurisdiction pursuant to A.R.S. § 12-2101 (A)(1), (5)(b).

## STATEMENT OF FACTS

Pine Canyon is a community in Flagstaff, Arizona, which is governed by PC Village Homeowner's Association. (R. 1 at 1). Pine Canyon is subject to CC&Rs originally recorded in 2002, and amended in 2004. (R. 1 at 1, R. 16, R. 18 ¶ 4). The CC&Rs run with the land and are binding on the property and all parties having any title right or interest in the property. (R. 1 at 1). Section 12.3 of the CC&Rs prohibits the display of "for sale" signs on property within the community. (Id.). It 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.

Based upon this clear provision, Pine Canyon residents purchased property within the community with an expectation that they would not have to view "for sale" signs, which many residents consider to be an eyesore. (R. 1 at 3, R. 16, R. 18 ¶¶ 8, 10).

The Hawks purchased Lot 197 in Pine Canyon in 2009. (R. 1 at 1). On August 16 and August 17, Plaintiffs placed a "for sale" sign on their property.

(Id.). PC Village caused the signs to be removed and advised Plaintiffs that Section 12.3 of the CC&Rs prohibited the placing of “for sale” signs. (Id.)

The Hawks subsequently filed a complaint for declaratory and injunctive relief. (R. 1). They asserted that A.R.S. §§ 33-1808 and 33-441 permit them to post a “for sale” sign on their lot notwithstanding the CC&Rs and even though the statutes were passed after the CC&Rs were recorded. (R. 1). PC Village argued that Section 33-1808 is inapplicable because it contains no express retroactivity clause, and that Section 13-441 is strictly limited to instruments involved in the transfer or sale of land. (R. 16 at 3). Alternatively, it argued that if either statute applies retroactively to the CC&Rs, their application results in a substantial impairment of a contractual obligation.

The parties filed cross-motions for summary judgment. (R. 10, 16, 20, 22). Following oral argument on February 28, 2012, the trial court issued a signed ruling on March 26, 2012 entering summary judgment in the Hawks’ favor and granting declaratory and injunctive relief. (R. 24). The trial court subsequently awarded over \$21,000 in attorneys fees and costs and entered final judgment. (R. 37). It also denied PC Village’s Rule 62(c) motion to suspend the enforcement of the injunction pending appeal. (R. 39).

On April 23, PC Village filed a notice of appeal from the March 26 ruling, which it thereafter amended to incorporate the judgment on May 24, 2012. (R 30, 41).

## **ISSUES PRESENTED FOR REVIEW**

1. Was the trial court's application of A.R.S. § 33-1808 to nullify Section 12.3 of the pre-existing Pine Canyon CC&Rs improper where the statute contains no express retroactivity provision?
2. Did the trial court erroneously interpret A.R.S. § 33-441 as applying to these CC&Rs where they are not contained in a deed or instrument affecting the sale of land?
3. Alternatively, if either statute applies, did the trial court erroneously refuse to find their application resulted in a substantial impairment of a contractual relationship without a significant and legitimate public purpose?
4. Did the trial court clearly abuse its discretion in awarding the full amount of attorneys fees and costs requested by Plaintiffs?

## **LEGAL ARGUMENT**

### **I. STANDARD OF REVIEW.**

Because this case involves a matter of statutory interpretation, this Court applies a *de novo* standard of review. *City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, 547, 105 P.3d 1163, 1166 (2005) (citing *Canon School Dist. No. 50 v. W.E.S. Constr. Co.*, 177 Ariz. 526, 529, 869 P.2d 500, 503 (1994)). This Court also reviews *de novo* “a grant of summary judgment determining the constitutionality of legislation[.]” *Ariz. Farm Bureau Fed’n v. Brewer*, 226 Ariz. 16, 19, ¶ 6, 243 P.3d 619, 622 (App. 2010); *Rumery v. Baier*, 228 Ariz. 463, 466-467, 268 P.3d 1120, 1123 (App. 2011).

### **II. THE TRIAL COURT’S APPLICATION OF A.R.S. § 33-1808 TO NULLIFY A PRE-EXISTING SECTION OF THE PINE CANYON CC&RS WAS IMPROPER WHERE THE STATUTE CONTAINS NO EXPRESS RETROACTIVITY PROVISION.**

According to A.R.S. § 1-244, “[n]o statute is retroactive unless expressly declared therein.”<sup>1</sup> Thus, to be applied retroactively, a statute must contain an express retroactivity provision. Retroactive application cannot be based solely upon an argument regarding legislative intent. *See St. Joseph's Hospital and*

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<sup>1</sup> The only exception recognized by Arizona courts is that where statutory enactments “are procedural only, and do not alter or affect earlier established substantive rights,” they may be applied retroactively even in the absence of an express retroactivity clause. *City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, 547-548, 105 P.3d 1163, 1166-67 (2005); *Aranda v. Indus. Comm’n*, 198 Ariz. 467, 470 P11, 11 P.3d 1006, 1009 (2000).

*Medical Center v. Superior Court of Arizona*, 164 Ariz. 454, 457, 739 P.2d 1121, 1124 (App. 1990) (“express language” means language contained in the statute, not inferences drawn from legislative histories). This is true even if the legislative history clearly and unambiguously indicates that the legislature intended a statute to apply retroactively. *Id.* at 456, 739 P.2d at 1123 (citing *Cheney v. Arizona Superior Court*, 144 Ariz. 446, 449, 698 P.2d 691, 694 (1985)). In *St. Joseph’s*, the court emphasized, “[w]e do not believe there is room for qualification. The term ‘express language’ in the context of A.R.S. § 1-244 means language contained in the statute and not inferences drawn from legislative histories.” 164 Ariz. at 456-57, 739 P.2d at 1123-24. *See also State v. Sweet*, 143 Ariz. 266, 693 P.2d 921 (1985); *State v. Fallon*, 151 Ariz. 188, 726 P.2d 604 (App. 1986).

In this case, nothing in A.R.S. § 33-1808 indicates that it applies retroactively. Subsection F states that:

F. Notwithstanding any provision in the community documents, an association shall not prohibit or charge a fee for the use of, placement of or the indoor or outdoor display of a for sale, for rent or for lease sign and a sign rider by an association member on that member's property in any combination, 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, for rent or for lease 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. This subsection applies only to a commercially produced sign, and an association may prohibit the use of signs that are not commercially produced. With respect to real estate for sale, for rent or for lease in the planned community, an association shall not prohibit in any way other than as is specifically authorized by this section or otherwise regulate 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.

As the trial court found, it is uncontroverted that the CC&Rs for the Pine Canyon area were enacted long before the passage of A.R.S. § 33-1808. (R. 24 at 4). It is also undisputed that the CC&Rs in question were part of the Hawks' purchase contract for the property and run with the property. (R. 24 at 4). And all agree that no express retroactivity language is contained in the statute.

The Hawks nevertheless argued below that a *prospective* application nullifies and voids the part of the CC&Rs banning "for sale" signs, based on the language: "Notwithstanding any provision in the community documents ... an association shall not prohibit the ... display of a for sale sign." (R. 10 at 6). Plaintiffs further argued that even if the language in § 33-1808 was ambiguous,

the legislative history states that its purpose is to “prohibit[] various real estate instruments from preventing the display of a for sale sign and rider.” (Id at 7).

First, the term “notwithstanding any provision in the community documents” does not equate to an express retroactivity clause or evidence in any way that it is to be applied retroactively. “Notwithstanding any provision in the community documents” merely means that the statute will override any ban on “for sale” signs set forth in community documents prepared *after the statute’s effective date*. Second, cases governing retroactivity make clear that legislative history cannot be used to make a statute retroactive in the absence of an express clause. *See St. Joseph’s*, 164 Ariz. at 456, 793 P.2d at 1123; *Cheney*, 144 Ariz. at 449, 698 P.2d at 694.

The trial court incorrectly determined that the statute’s prospective application nullified the previously enacted CC&Rs. It reasoned that in Arizona, the legislature can pass laws affecting the rights of parties to contracts for future matters which follow the enacted laws and which are not already in litigation. (R. 24 at 4). The only case it cited for its decision on this issue was *Tower Plaza Inv. Ltd. v. DeWitt*, 109 Ariz. 248, 250, 508 P.2d 324, 326 (1973).

*Tower Plaza* addressed the legislature’s ability to impose what was, in effect, an excise tax for the privilege of doing business, onto landlords who had entered into written leases prior to passage of the tax. Because the incidence of

the tax was upon the landlords, not upon the transactions out of which they acquire their gross receipts or income (the leases), the law could be applied prospectively to gross receipts received by landlords after the statute's enactment. *Tower Plaza*, 109 Ariz. at 250-51, 508 P.2d at 326-27. The primary distinction between *Tower Plaza* and this case is that, there, the act did “not seek to reach transactions completed before its enactment ...” *Id.* at 252, 508 P.2d at 328. It sought “to tax [the landlords’] occupation measured by that portion of [the landlords’] gross income from rentals under the leases accruing during the taxable year and not from receipts or income realized before the passage of the act.” *Id.* Here, the issue is not taxable income from a lease, but rather a condition of the purchase contract that runs with the property, nullification of which clearly requires retroactive application.

One of the cases cited by the Hawks in the trial court actually illuminates this distinction in PC Village's favor. In *Aranda v. Industrial Comm'n*, 198 Ariz. 467, 11 P.3d 1006 (2000), the court addressed whether a new statute making incarcerated persons ineligible for workers compensation benefits could properly be applied retroactively to divest inmates who had already been receiving benefits. The court discussed *Tower Plaza*, noting that there, “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. at 472, 11 P.3d at 1011. It found that any analogy to *Tower Plaza* fails because taxation of income “differs in both kind and purpose” from a suspension of workers’ compensation benefits, and because a claimant’s injury and compensation award are not mere “antecedent facts” to which the statute “relates” but are instead the “operative events which result in vesting” the award. *Id.*

Likewise, the “for sale” sign prohibition contained in the CC&Rs at issue attached to all property purchased by residents of Pine Canyon prior to the effective date of § 33-1808(F). The purchase of the property to which the CC&Rs were attached is the “operative event” which resulted in vesting of the right to live in a community free from eyesores such as “for sale” signs. Those purchases are not merely “antecedent facts” to which the statute relates. Thus, a prospective application of § 33-1808(F) cannot, in the absence of an express retroactivity clause, render the CC&Rs at issue “null and void.” The trial court erred in ruling to the contrary and in entering summary judgment for Plaintiffs.

**III. THE TRIAL COURT ERRONEOUSLY INTERPRETED A.R.S. § 33-441 AS APPLYING TO THESE CC&RS WHERE THEY ARE NOT CONTAINED IN A DEED OR INSTRUMENT AFFECTING THE SALE OF LAND.**

A.R.S. § 33-441 states as follows:

- 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 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 court should give meaning to all provisions of a statute and should interpret it “such that no clause, sentence or word is rendered superfluous, void, contradictory or insignificant.” *State v. Hayden*, 210 Ariz. 522, 523-24 ¶ 7, 115 P.3d 116, 117 (2005). By its own terms, A.R.S. § 33-441 strictly limits itself to instruments involved in the transfer or sale of land. The statute states that it applies to covenants, restrictions or conditions “contained in any deed, contract, security agreement or other instrument affecting the transfer or sale of any interest in real property.” A.R.S. § 33-441(A). The CC&Rs at issue were not contained in any such instrument. (R. 18 at ¶ 3). The trial court’s reading expands the reach of this statute beyond instruments of conveyance to previously and separately recorded covenants, conditions and restrictions not contained in any instruments used to convey property. Such an interpretation renders meaningless the phrase, “contained in any deed, contract, security agreement or other instrument affecting the transfer or sale of any interest in real property.” If the legislature had intended to generally disallow any and all

CC&Rs prohibiting “for sale” signs, it could have expressly done so. The trial court’s broad reading renders the qualifying language meaningless. Moreover, the statute’s placement within the larger statutory scheme weighs against the trial court’s broad reading. The legislature elected to confine this provision to Chapter Four of the Property Title, labeled “Conveyances and Deeds,” which further demonstrates its limited applicability to instruments of conveyance.

This statute does not even govern the warranty deed in question. A.R.S. § 33-441(C) states it does not apply “to a covenant, restriction or condition . . . that does not prohibit or restrict the display of a for sale sign or a sign rider on the real property.” The warranty deed conveying the property to the Hawks contains no CC&R restricting the display of “for sale” signs. (R. 18 at ¶ 1.)

The trial court clearly erred in finding section 33-441 applicable to the CC&Rs at issue. Notably, the trial court did not even address PC Village’s argument that by its terms, § 33-441 is inapplicable here.

**IV. IF EITHER STATUTE APPLIES, THE TRIAL COURT ERRED IN REFUSING TO FIND THEIR APPLICATION RESULTED IN A SUBSTANTIAL IMPAIRMENT OF A CONTRACTUAL RELATIONSHIP WITHOUT A SIGNIFICANT AND LEGITIMATE PUBLIC PURPOSE.**

If the Court finds that either or both of the foregoing statutes apply retroactively to the Pine Canyon CC&Rs, it amounts to an unconstitutional impairment of a contractual obligation. Disputes regarding covenants,

conditions and restrictions affecting property arise out of contract. *Pinetop Lakes Ass'n v. Hatch*, 135 Ariz. 196, 198, 659 P.2d 1341, 1343 (App. 1983). The Arizona Constitution states that “[n]o bill of attainder, ex-post-facto law, or law impairing the obligation of a contract, shall ever be enacted.” Ariz. Const. Art. II, § 25; *see also* United States Const. Art. I, § 10, Cl. 1. Arizona courts follow the impairment of contracts test articulated by the U.S. Supreme Court in determining whether a particular statute violates the Contracts Clause. *McClead v. Pima County*, 174 Ariz. 348, 359, 849 P.2d 1378, 1389 (App. 1992). This entails a three part test in which the court must ask the following: (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?; and (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?” *Id.*

By definition, a contract is impaired when a party is deprived of the benefit of his contract by law. *Tower Plaza*, 109 Ariz. at 252, 508 P.2d at 328. “Although total destruction of contractual expectations is not necessary for a finding of substantial impairment, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a

substantial impairment.” *Robson Ranch Quail Creek, LLC v. Pima County*, 215 Ariz. 545, 552, 161 P.3d 588, 595 (App. 2007) (citing *Energy Reserves Group v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983)). “The reasonable expectations of the complaining party to the contract play an important role in deciding whether a law substantially impairs that contract.” *Id.*

**A. These State Statutes Operate as a Substantial Impairment of a Contractual Relationship.**

The statutes, as applied by the trial court, amount to a substantial contractual impairment. First, the aesthetic appearance of Pine Canyon is something that its residents clearly took into consideration before purchasing property in the subdivision. (R. 18 at ¶¶ 8-10). Pine Canyon residents purchased property with the reasonable expectation that their community would be free from the eyesore of “for sale” signs. (*Id.*). The impact of “for sale” signs is a substantial impairment of this contractual obligation, as such an alteration would reach well beyond the Hawks’ single sign. Multiple residents could potentially display “for sale” signs, which would not only impact the community’s aesthetic appearance, but would also potentially affect the Pine Canyon community economically. In addition to potentially affecting property values, the appearance of multiple “for sale” signs will give prospective purchasers the impression that Pine Canyon is not a desirable place to live.

This would likely cause purchasers to offer less for property, and depressed sale prices will negatively impact the value of properties that are not on the market.

Second, unlike the other cases cited by the Hawks and/or trial court below, the retroactive application of §§ 33-1808(F) and § 33-441 fully nullifies the “for sale” sign prohibition in the CC&Rs. The degree of this contractual impairment is therefore clearly substantial. In contrast to *Tower Plaza*, where excise taxes were imposed on landlords for income from rentals received after the act’s passage, as even the trial court recognized, applying A.R.S. § 33-1808(F) retroactively to these purchase contracts signed prior to the law’s effective date renders “**null and void**” the CC&R pertaining to “for sale” signs that was part of the Hawks’ purchase contract for the property and that runs with the property. (R. 24 at 4). Thus, the substantial impairment here (rendering the CC&R null and void) cannot remotely be compared with imposition of an excise tax on landlords in *Tower Plaza*, which did not directly interfere with their leases.

Nor is the impairment in this case comparable to that at issue in *Robson Ranch*, 215 Ariz. at 551, 161 P.3d at 594. As noted by the trial court, the dispute between the developer and the County in *Robson Ranch* was based upon the County raising sewer hookup fees. The developer pointed to a prior “agreement” with the County earlier in the development in claiming the fee

increase constituted a substantial impairment. The court determined that because there was no provision in the agreement that the prior connection fee structure would always exceed the cost of construction, there was no reasonable expectation on the developer's part that the fee would never change. *Id.* Here, the trial court compared the agreement in *Robson Ranch* to these contracts, which also do not contain a provision that the rights and obligations of the parties would never change. (R. 24 at 6). *Robson Ranch* is clearly distinct, however, as an increase in sewer hook up fees in no way resembles the complete nullification of a CC&R provision relied upon by Pine Canyon residents (including the Hawks) when they purchased their homes.<sup>2</sup>

The Hawks relied upon two other cases in arguing there was no impairment of a substantial right here. The first, *Hall v. ANR Freight System, Inc.*, 149 Ariz. 130, 717 P.2d 434 (1986), involved the legislature's passage of the comparative fault statute, which replaced the prior contributory negligence scheme under which any fault of the plaintiff could act as an absolute bar to recovery. As the court observed, contributory and comparative negligence "operate in tandem." *Hall*, 149 Ariz. at 136, 717 P.2d at 440. Application of

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<sup>2</sup> The trial court's conclusion that the parties would not be deprived of any benefit by finding Section 12.3 null and void is also nonsensical. For one, the property owners will not have the "same rights to enjoy their property" when part of the benefit they bargained for was the right to be free from eyesores like "for sale" signs in their neighbors' yards.

the law did not cause defendants to lose the ability to assert a defense of contribution; it merely changed from a defense that could result in an absolute bar to recovery to one that could result in a reduction of the defendant's share of liability, both of which require resolution by a jury. *Id.* Thus, it is also distinct from this case, where retroactive application of the statute completely eliminates the ability of PC Village to regulate the placement of "for sale" signs despite the pre-existence of the CC&Rs banning such signs, which residents of Pine Canyon relied upon when purchasing property in that subdivision.

The second case cited by the Hawks below is *Aranda v. Industrial Comm'n*, 198 Ariz. 467, 11 P.3d 1006 (2000), which, if anything, supports PC Village's position. *Aranda* addressed whether a new statute making incarcerated persons ineligible for workers compensation benefits could properly be applied retroactively to divest inmates who had already been receiving benefits. It determined that because vesting of workers compensation benefits occurs upon finalization of the award, the legislature could not retrospectively divest the claimants whose benefits had, in fact, already vested. *Id.* Although it noted that the legislature may enact laws that apply to rights vested before the statute's effective date, the court emphasized that this was not a "future event." *Id.* The claimants, it held, must have the opportunity to avert the loss of benefits by avoiding criminal behavior that might result in their

incarceration. *Id.* Similarly, current and future Pine Canyon residents whose rights will be affected by the statutes must have the opportunity to choose to reside somewhere else. Those who already own property in Pine Canyon have *already purchased* their property in reliance on the CC&Rs.

Importantly, none of the foregoing cases cited by the Hawks and/or trial court address a *modification or elimination of contractual rights*. PC Village held the right to enforce the CC&Rs upon contract formation, and its right to enforce vested immediately.<sup>3</sup> Even the Court in *Tower Plaza* noted that “to have a constitutionally protected impairment, the law must act on the contract itself as distinguished from the property which is the subject of the contract.” *Id.* at 252, 508 P.2d 324 at 328 (citing *Clement National Bank v. Vermont*, 231 U.S. 120 (1913)). That is precisely the type of impairment of contract that occurred here.

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<sup>3</sup> See *State v. Estes Corp.*, 27 Ariz. App. 686, 688, 558 P.2d 714, 716 (App. 1976) (“A ‘vested right’ is an immediate fixed right to present or future enjoyment where the interest does not depend upon a period or an event that is uncertain.”); see also *Hall*, 149 Ariz. at 140, 717 P.2d at 444; *Steinfeld v. Neilsen*, 15 Ariz. 424, 465, 139 P.879, 896 (1913). Here, the “for sale” sign obligations under CC&R section 12.3 were immediate. They immediately prohibited Pine Valley residents from displaying such signs, and their authority did not depend upon a contingent event.

**B. There is No Significant And Legitimate Public Purpose Behind the Legislation.**

As to the second factor, Arizona courts have found that sometimes, legislative action regarding CC&Rs can address an important public purpose. For example, in *Westwood Homeowners Ass'n v. Tenhoff*, the court found that the public policy in favor of developing residential facilities for the mentally disabled took precedence over the countervailing policy of freedom of contract. 155 Ariz. 229, 231, 236, 745 P.2d 976, 978, 983 (App. 1987). The court drew a contrast, however, with a prior case involving a much less significant public purpose, *Tucson-North Town Home Apartments Homeowners Ass'n v. Robb*, 123 Ariz. 4, 596 P.2d 1176 (App. 1979), observing that “[t]he importance ... of integrating society's disadvantaged human beings can hardly be analogized to placement of air-conditioning units and trailers on residential lots.” *Id.*

The impairment in this case much more closely resembles the dispute in *Robb* over the placement of air-conditioning units and trailers than it does the substantial public policy interest in supporting residents with mental disabilities at issue in *Westwood*. Here, the overriding interest is the freedom of contract between private individuals. As the affidavits presented to the trial court established, Pine Canyon residents took aesthetic conditions into consideration when purchasing their properties. (R. 18 at ¶¶ 8-10). This included the guarantee that no other residents could place “for sale” signs in their yards.

(Id.). This interest may be inferred to all residents of Pine Canyon, as the CC&Rs are recorded, giving purchasers constructive notice of the provisions. (R. 18 at ¶ 3).

The trial court here claimed that there are two legitimate public purposes justifying application of the statutes to the CC&Rs here, neither of which it supported with authority. First, it found that the statutes insure “every homeowner has the right to commercial speech in selling their property.” Second, it found that the statutes “serve a practical purpose” in assisting homeowners to sell their property, which it claims is “consistent with the basic rights that are the foundations of property ownership.” (R. 24 at 6). With all due respect, the trial court’s findings appear to be based upon nothing more than a bias against homeowners associations. Homeowners Associations do not “interfere” with individual rights. Rather, homeowners *choose* where to purchase their property, and those who choose to live in a planned community governed by a homeowners’ association do so for very specific reasons, primarily relating to their desire to live in a community that maintains a certain level of aesthetic quality. They *willingly* contract to give up certain rights to do whatever they wish with their property, including the right to place signs in their yards. Every person who purchased property in Pine Canyon knew that they were voluntarily limiting the scope of their right to commercial speech by

agreeing to not place “for sale” signs as a form of advertising if and when they chose to sell their property. And every person who remains in Pine Canyon fully expects their co-residents to abide by those agreements. The trial court’s complete dismissal of the interests of numerous other Pine Valley residents, combined with its emphasis on the rights of “homeowners” generally, ignores the very substantial interests at issue in this case.

Moreover, the trial court’s ruling ignores the fact that the First Amendment protects individuals from intrusions of free speech by *state actors*. Without state action, there is no violation of a persons’ right to free speech, commercial or otherwise. *See Hart v. Seven Resorts*, 190 Ariz. 272, 276-77, 947 P.2d 846, 850-51 (App. 1997) (noting that there is a crucial distinction between private acts and government intrusions or state action). *These homeowners voluntarily chose to limit their own commercial speech when they decided to reside in Pine Valley*, and their private contracts with PC Village to that effect do not rise to the level of “state action.”

In sum, the Hawks, as residents of Pine Valley, *agreed* to give up their full panoply of commercial free speech rights in order to live in a community with an increased aesthetic value. The trial court clearly erred in ignoring this reality and in allowing the Hawks to re-claim those voluntarily relinquished rights by taking advantage of a new statute that substantially impairs the

contractual rights of every other resident of Pine Valley who chooses to remain in the community. Those residents have a reasonable expectation that their community will not be bombarded with “for sale” signs by residents who decide they want to sell their property and who no longer want to be bound by the very contractual obligations that previously benefitted them as residents of Pine Valley. The trial court’s ruling ignores those reasonable expectations, as well as the right and responsibility of PC Village to enforce their CC&Rs in order to continue providing their community with the aesthetic quality its residents have a contractual right to enjoy.

**C. The Character Of This Contract Modification Is Not Appropriate To The Public Purpose Identified By the Trial Court Because The Contract Is Itself The Product Of A Real Estate Transaction.**

As to the third factor, the trial court suggested that nullification of the “for sale” sign prohibition 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.” (R. 24 at 6). It also suggested that any aesthetic concern of the remaining current (and future) property owners is “outweighed by a property owner’s right to the commercial speech and to the unencumbered transferability of his property.” (Id.). The court then went onto discuss the “importance” of “for sale” signs, including that they “serve multiple purposes beyond merely advertising the availability of a property ....” (Id.).

Again, the trial court's analysis improperly treats PC Village as a "state actor" in requiring it to not "interfere" with the Hawks' "right" to exercise a form of commercial speech they *voluntarily relinquished* when they purchased property in Pine Canyon. The trial court's ruling also continues to reflect an apparent bias against homeowners associations generally, which discounts entirely the significant interests of homeowners who purposefully contract to live in a community free from such signage. Although the Hawks currently have an interest in conducting a real estate transaction to sell their home, the "for sale" sign prohibition in the Pine Canyon CC&Rs is itself the product of a real estate transaction, and represents a contractual obligation between private parties, including the Hawks. This community creates a haven for those who seek to purchase homes in a more stable area and provides assurances that home prices within the community will not be as volatile as those elsewhere. Both the aesthetic and economic advantages of this arrangement helped persuade many residents to purchase property within the community, and to voluntarily give up certain rights that other homeowners enjoy, including the unfettered right to place "for sale" signs on their lawns as a form of commercial speech.

The Hawks never held the right to post a "for sale" sign on their property in Pine Canyon. They have therefore not "lost" the right to commercial speech; they had already voluntarily relinquished their right to exercise their

commercial speech in that particular form.<sup>4</sup> The trial court's application of the statutes grants the Hawks a new right where none previously existed, at the significant expense of the rights of numerous other residents of Pine Valley who expect their fellow residents to honor their contractual obligations and to play by the rules. The trial court's ruling is erroneous and should be vacated.

**V. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING THE FULL AMOUNT OF PLAINTIFFS' REQUESTED ATTORNEYS' FEES.**

Even if this Court ends up affirming the entry of summary judgment for the Hawks, it should vacate the award of attorneys fees because the trial court abused its discretion in awarding the full amount of fees requested by Plaintiffs' counsel. The awarding of attorneys' fees to a successful party in a contested action is discretionary with the court. *Fulton Homes Corporation v. BBP Concrete*, 214 Ariz. 566, 155 P.3d 1090 (2007). Here, important policy considerations clearly weighed in favor of substantially reducing the \$21,820.00 that Plaintiffs demanded.

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<sup>4</sup> Indeed, there are other (and arguably more effective) ways in which the Hawks can exercise their right to commercial speech. These include listing the property with a realtor and placing the property photo and information on the Internet. Contrary to the trial court's view, people today rarely buy homes by simply driving around neighborhoods to see which homes are for sale. Most people in modern America find homes they are interested in purchasing by doing searches on the Internet and by calling (or having their realtor call) the real estate agents or owners associated with the listings they want to see.

In exercising its discretion in awarding attorneys' fees, the court should consider, among other things, "the merits of the unsuccessful party's claim," "the novelty of the legal question presented," and "whether an award to the prevailing party would discourage other parties with tenable claims from litigating legitimate contract issues for fear of incurring liability for substantial amounts of attorneys' fees." *Id.* None of these factors were apparently considered by the trial court, and all of them weigh in favor of a fee award substantially less than what the Hawks' attorney demanded. First, PC Village's interpretations of the statutes in question clearly have merit, as demonstrated in this brief. Second, as the trial court found and Plaintiffs' counsel admitted, the legal issues in this case arose from new legislation that lacked any "on point" legal precedent. The issues addressed were novel legal concepts. Finally, forcing PC Village to pay all of the Hawks' legal fees in addition to their own will likely chill future efforts to clarify legal ambiguities and will discourage future litigants with tenable claims from litigating legitimate contract issues for fear of incurring liability for substantial amounts of attorneys' fees. The trial court abused its discretion in requiring PC Village to bear the entire cost of litigating these novel issues.

The trial court also abused its discretion because the amount of fees sought by the Hawks was clearly excessive. Factors to consider in determining

the amount of a fee award include: (1) the qualities of the advocate, including his or her ability, training, education, experience, professional standing, and skill; (2) the character of the work to be done, including its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed, and the prominence and character of the parties where they affect the importance of the litigation; (3) the hourly rate charged; (4) the work actually performed by the lawyer, including the skill, time, and attention given to the work; and (5) the result, which includes whether the attorney was successful and what benefits were derived. *Schweiger v. China Doll Restaurant*, 138 Ariz. 183, 187, 673 P.2d 927, 931 (App. 1983).

Here, many of the fees sought by the Hawks were unreasonable. For example, Plaintiffs' attorney spent a total of 36 hours, or \$7,200, on his reply in support of his motion for summary judgment and response to PC Village's cross claim. Given the legal questions at issue, this exceeds the amount of time a reasonable attorney would have expended on similar work.

Furthermore, many of the fees the Hawks demanded were listed as "block-billed" amounts in excess of three hours. Such amounts total 36.3 hours, or \$7,260. Some block entries exceed six hours. Those "block billed" entries do not meet the requirements set forth in *China Doll*, which requires an attorney to set forth "the time spent in providing the service." 138 Ariz. at 188,

673 P.2d at 932. As the *China Doll* court stated, “[i]t is insufficient to provide the court with broad summaries of the work done and time incurred.” *Id.*

Finally, some of the fees submitted by Plaintiffs involved purely administrative functions that were not performed by an attorney and did not apparently require an attorney’s involvement. These include preparing facsimiles, preparing e-mails, “proofing” documents, transcribing dictation, and “finalizing” various documents and making copies. (See R. 25, Ex. 1 [entries by NG and CS]; R. 28, Ex. 1 [entries by NG]; R. 35, Ex. 1 [entries by NG]). The two individuals who performed these various tasks for which attorneys fees were sought (and awarded) are listed merely as “legal assistants.” (R. 25 at 2; R. 28 at 2; R. 35 at 2). There is no indication these assistants are paralegals or associate attorneys, and the descriptions of most of their work indicates they are not. Moreover, the affidavit sets forth none of their “qualities” such as “ability, training, education, experience, professional standing, and skill” as required by *China Doll*. Awarding attorneys’ fees for any of their time spent on various tasks (whether administrative or substantive) was a clear abuse of discretion.

In sum, the amount of the award should have both taken into account the additional *Fulton Homes* factors discussed above and in PC Village’s Opposition to Plaintiffs’ Affidavit of Attorneys Fees and Costs. Moreover, the trial court abused its discretion by not reducing the amount of fees requested in

accordance with the guidelines set forth in *China Doll*. For these reasons (and assuming the Court affirms the underlying rulings), PC Village respectfully requests the Court to vacate the award and to remand with instructions to apply all relevant factors from the *Fulton Homes* and *China Doll* cases.

## CONCLUSION

For the reasons set forth above, Defendant/Appellant PC Village respectfully requests the Court to vacate the trial court's orders and judgment in the Hawks' favor. If the Court affirms the entry of summary judgment for the Hawks, PC Village at a minimum requests the Court to vacate the award of attorneys fees and costs and to remand this case with instructions to reconsider the award in light of *Fulton Homes* and *China Doll*.

DATED this 15<sup>th</sup> day of August, 2012.

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

By /s/ Lori L. Voepel \_\_\_\_\_

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 14(b), Arizona Rules of Civil Appellate Procedure, I certify that the attached brief

  X   Uses proportionately spaced type of 14 points or more, is double-spaced using a roman font and contains 6,688 words or

       Uses monospaced type of no more than 10.5 characters per inch and

       Does not exceed 40 pages (opening and answering briefs) or 20 pages (reply briefs).

August 15, 2012  
Date

/s/ Lori L. Voepel  
Lori L. Voepel

**CERTIFICATE OF SERVICE**

Lori L. Voepel, being first duly sworn, upon oath states that on the 15<sup>th</sup> day of August, 2012, she caused the original of the foregoing OPENING BRIEF to be electronically filed through AZ TurboCourt and that she caused two copies of the foregoing to be deposited in the United States Mail, postage prepaid, to:

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\_\_\_\_\_  
/s/ Lori L. Voepel