ARIZONA COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ROBERT R. HAWK and CECILIA J. HAWK, Plaintiffs/Counter Defendants/Appellees, vs. PC VILLAGE ASSOCIATION, INC. Defendant/Counter Plaintiff/Appellant.	)	Case No. 1 CA-CV 12-0362 Coconino County Superior Court No. CV 2011-00775

APPELLEES ANSWERING BRIEF

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STATEMENT OF THE CASE

Appellees Robert and Cecelia Hawk ("Hawk") do not dispute the statement of the case provided by Appellant. The Hawks do take exception to Appellant's claim that the trial court applied the statutes at issue "retroactively." As discussed herein, the statutes were not applied retroactively and that *is* the exact issue on appeal.

STATEMENT OF FACTS

The Hawks agree with the Statement of Facts presented by the Appellant. The Hawks supplement and present the following additional facts.

The CC&R's were originally recorded in 2002 and amended in 2004. (R. 10 ¶4; R. 18 ¶4). A.R.S. § 33-1808(F) was first enacted in 2007. (R. 18 ¶5. & R. 20). A.R.S. § 33-441 was enacted in 2009. (R. 18 ¶ 6 & R. 20). The Hawks purchased the property on August 25, 2009 after these statutes were enacted. (R. 18, Ex. A) The Hawks posted a size-conforming "for sale" sign on their property on August 16, 2011 and again on August 17, 2011and both signs were removed at the direction of Appellant. (R. 1 ¶ 9-13; R.20).

In addition to section 12.3 of the CC&R's (which is cited by Appellant) Section 18.3 is also relevant and in pertinent part states:

> 18.3 Severability
>
> If any provision of this Village Declaration, the Articles, Bylaws, Village Association Rules or Design Guidelines, or any Section, clause sentence

> phrase or work of the application thereof in any circumstance, is held invalid, the validity of the remainder of this Village Declaration, the Articles, Bylaws, Village Association Rules or Design Guidelines, and of the application of any such provision Section, sentence clause, phrase or word in any other circumstances, shall not be affected thereby, and the remainder of this Village Declaration, the Articles, Bylaws, Village Association Rules or Design Guidelines, and the remainder of this Village Declaration, the Articles, Bylaws, Village Association Rules or Design Guidelines shall be construed as if the invalid part was never included therein or herein. (R. 10 Ex. 1).

Re: Award of Attorney's Fees:

On May 24, 2012 the Court conducted an evidentiary hearing regarding the Hawks' application and request for attorney's fees. (R. 33 and 39). At that hearing the court admitted into evidence, without objection by Appellees, the billing statements from *Appellants* law firm which billed more for the defense of the case than what the Hawks were requesting. (R. 39 & 40). *See also,* May 24, 2012 Transcript filed herein on June 14, 2012 (Tr. 5/24/12 pgs. 1-13). A portion of the transcript from that hearing is as follows:

> **MR. REICH:** What I would like to do is present to the Court what's been marked as Plaintiff's Exhibit Number 1.
>
> *** * ***
>
> This is in preparation for this hearing this is Mr. Linder's law firm's time and billing for this particular case. And, really, the purpose of this is to show during the time through March 30th Mr. Linder's firm billed $22,700 for the defense of this case. We requested up to that point in our original plea [sic – (fee)] application $19,000. I think this – that establishes really what the two law firms billing at their various rates that the amounts here are certainly reasonable. Mr. Linder's fees exceeded what we were requesting as the prevailing party in this particular case. And I would note that the time spent by the attorney's here are comparable. … And the purpose of this is to demonstrate

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really that our $19,000 in fees are certainly reasonable in the aspect that they charged and billed their client $22,700 in fees. …

THE COURT: All right. Mr. Linder, have you had a chance to look at – I assume you have your own billing for this case. That's what Mr. Reich wants me to take a look at on this exhibit he submitted.

MR. LINDER: Oh, yes, your Honor. I'm the one who produced those billings to him pursuant to subpoena.

THE COURT: All right. So you don't have an objection to admitting that and I can review it?

MR. LINDER: I do not.

*** * ***

THE COURT: … I read the application. I reviewed each part of the application, each line item of the application. To me it seemed totally reasonable what Mr. Reich spent as far as his time and effort. This is a novel issue, so it's not like you could, you know, crank out a motion for summary judgment in an hour or do legal research which would be mere preparation because you've already litigated this issue. So I respect the fact that it was a novel issue on both sides and you had to prepare probably more so than you normally would.

Also realizing that this is the type of thing that goes up on appeal and making a record is very important. So the original application for attorney's fees is approved. I do find that it is reasonable. I find that under all of the factors necessary for the Court to consider and weigh the work by counsel that it satisfies the test of China Doll.

Secondly, the first supplemental application for attorney's fees is also granted. I think that's also directly related to the work done by Mr. Reich and it is also reasonable.

* * *

So the original application and the first supplemental are granted in toto as being reasonable. The second one, only those parts granted by the court will be allowed as reasonable attorney's fees.

(Tr. 5/24/12 pgs. 9-13)

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LEGAL ARGUMENT

I. *Standard of Review*

The Hawks agree that the standard of review for the matters of statutory interpretation and the granting of summary judgment is *de novo*. The standard of review for reviewing the award of attorney's fees is not mentioned by Appellant. For that matter, the standard of review is an abuse of discretion standard. "The trial court's decision on the amount of fees to award is reviewed under the abuse of discretion standard." *Modular Mining Sys. Inc. v. Jigsaw Tech. Inc.*, 221 Ariz. 515, ¶ 21, 212 P.3d 853, 859 (App.2009), *quoting Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, ¶ 12, 6 P.3d 315, 318 (App.2000). "[I]f there is any reasonable basis for the exercise of such discretion, [the court's] judgment will not be disturbed." *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 569, ¶ 9, 155 P.3d 1090, 1093 (App.2007). "We will affirm an award with a reasonable basis even if the trial court gives no reasons for its decision regarding whether to award fees." *Id.*

II. *A.R.S. § 33-1808 was not retroactively applied. Rather, it was prospectively applied with the operative events occurring four years after the legislation was enacted.*

Appellant's argument that A.R.S. § 33-1808 was applied retroactively is a distraction from the real issue. Appellees concede that the statute does not have express retroactive language. Appellant's argument misconstrues the nature of

retroactive legislation. As discussed more thoroughly below, for the statute to be considered retroactively applied it would have to impair a "vested" right. In this case, the operative events triggering the statute occurred four years *after* the legislation was passed. Because these acts[1] occurred four years after the statute was enacted, the trial court applied the statute prospectively, affecting only the antecedent recording of the CC&R's. At best Appellant had only expectant or contingent rights that were not vested because they were abrogated four years earlier by the enactment of A.R.S. § 33-1808.

A. *A statute is NOT retroactive merely because it affects or relates to past events.*

The Arizona Supreme Court has stated: "This Court, like the Court of Appeals, has consistently defined statutory changes as retroactive *only* when they affect cases already in litigation." *Hall v. A.N.R. Freight System, Inc.*, 149 Ariz. 130, 139, 717 P.2d 434, 443 (1986). *Emphasis added.* It is not disputed that this case was not in litigation when the Legislature enacted A.R.S. § 33-1808 in 2007.

> In Arizona it is conclusively settled that laws are not retroactive simply because they relate to past events. We have stated previously that, in Arizona, statutes dealing with civil matters may not be applied retroactively in the absence of a specific provision to that effect. A.R.S. § 1–244. No such prohibition, however, applies to laws that operate on pre-existing

1 The term "acts," or "operative events" as used in this brief refer to the Hawks act of posting the two 'for sale' signs and the Appellant's subsequent removal of those 'for sale' signs. These acts occurred in August, 2011.

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> conditions, *and such laws are not retrospective by their mere relation to antecedent conditions.*
>
> *Hall,* 149 Ariz. at 139, 717 P.2d at 443. Emphasis in original.

"It is a general principle that a statute is not retroactive in application simply because it may relate to antecedent facts." *Tower Plaza Inv. Ltd. V. DeWitt*, 109 Ariz. 248, 250, 508 P.2d 324, 326 (1973) *en banc.* "Giving effect to laws that change the consequences of future acts allows the government the ability to change and manage public policy." *Anderson v. Indus. Comm. of AZ, 205 Ariz. 411, 413, ¶ 11, 72 P.3d 341, 343 (App. 2003) citing, Zuther v. State,* 199 Ariz. 104, 110, ¶ 21, 14 P.3d 295, 301 (2000). "The Legislature may certainly enact laws that apply to rights vested before the date of the statute[;] [s]uch laws, however, may only change the legal consequences of *future* events." *San Carlos Apache Tribe v. Superior Court ex. Rel. County of Maricopa,* 193 Ariz. 195, 205, 972 P.2d 179, 189 (1999)(emphasis in original) *en banc; citing Tower* 109 Ariz. 248, 508 P.2d 324. "If the rule were otherwise, our continually changing landscape of ideas and laws would instead resemble a petrified forest populated by the outmoded concepts of the past." *Hall,* 149 Ariz. at 139, 717 P.2d at 443.

A.R.S. §33-1808(F) was enacted in 2007. When the new law was enacted the unvested rights relating to section 12.3 of the CC&R's were abrogated. Granted, if there was an action pending for conduct occurring prior to the effective

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date that would be a vested right. But that is not the case here. The Appellees posted two 'for sale' signs and Appellant subsequently removed them in 2011. This was four years after A.R.S. § 33-1808 was enacted. The enactment of this law four years beforehand abrogated Appellant's continued reliance on section 12.3 of the CC&R's. It also put Appellant on notice that this section of the CC&R's was invalid going forward. Therefore, A.R.S § 33-1808(F) *cannot* be considered retroactive in its application to these operative events.

The recording of the CC&R's is an antecedent event. Although the CC&R's pre-date the enactment of A.R.S. § 33-1808(F) it did not impair any vested rights. Appellant's argument is misplaced in that it essentially argues that contractual rights can be preserved forever if the contract pre-dates the legislation. This argument is unsound. For example, under Appellant's argument, the consequences of making alcohol illegal during the 'prohibition' era could have been avoided by simply having a contract beforehand. On a more modern equivalent, this would be tantamount to contracting *now* for the prospective purchase, sale and distribution of the drug known as 'spice'[2] which is rapidly being made illegal throughout our country. Entering into contracts such as these now would not prohibit the enforcement of *future* laws regulating *future* acts. As pointed out in *Hall,* if this

2 "Spice," also known as K2 is a synthetic marijuana that is rapidly being made illegal throughout the U.S. but, is not illegal yet.

could be done our laws would simply never grow or evolve and they would default to whatever rights have been negotiated and contracted for. This is the reason for the analysis of determining if contractual rights have "vested."

B. *The Legislature may change the consequences of future acts affecting "unvested" rights.*

Neither party here had a vested right in enforcing or invalidating the CC&R's until the operative 'acts' occurred. It is the operative 'acts' which give rise to the ability to assert their respective legal claims. Because the operative acts occurred four years later, applying the statute is not a retroactive application. The legislature may change the consequences of future acts affecting unvested rights. *See, Anderson v. Indus. Comm. of AZ,* 205 Ariz. 411, 413, ¶ 11, 72 P.3d 341, 343 (App. 2003); *Hall v. A.N.R. Freight System, Inc.*, 149 Ariz. 130, 139, 717 P.2d 434, 443 (1986); *Tower Plaza Inv. Ltd. V. DeWitt*, 109 Ariz. 248, 250, 508 P.2d 324, 326 (1973).

Tower Plaza Inv. Ltd. V. DeWitt, 109 Ariz. 248, 250, 508 P.2d 324, 326 (1973) is probably the leading case and the starting point when dealing with retroactivity and vested rights issues in Arizona. It is relied upon by the trial court and briefly discussed in Appellant's opening brief. In Tower, a transaction privilege tax was enacted that taxed the rent collected in connection with leased property. *Id.* It was argued that the new law could not be applied to leases which were consummated prior to the effective date of the new legislation. *Id.* Notably,

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the leases at issue, some of which were for 50 years, extended far into the future (like the CC&R's here) and the new law meant that landlords would have to pay a tax which was not contemplated at the time of entering into the original leases. *Id.* The Court found the leases to be an antecedent fact and found that the statute was applied prospectively and that applying the new law did not affect any vested rights. *Id.*

> The effect of appellants' argument is that persons by making contracts extending into the future may prevent the exercise of the police power by the state. The agreements in the record extend year after year unless terminated by thirty days' notice at the end of an annual period. It must be remembered that a statute is not retrospective from the mere fact that it relates to antecedent facts.
> * * *
> In the instant case, it is the receipt of rentals by the taxpayer, not the leases out of which the rentals arise, which is the taxable.
> * * *
> The Arizona act does not seek to reach transactions completed before its enactment, for the contractual provisions of these leases require performance extending far into the future.
>
> *Tower Plaza Inv. Ltd. V. DeWitt*, 109 Ariz. 248, 250-52, 508 P.2d 324, 326-28 (1973)

"The statute [in Tower] 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 v. Indus. Comm. of AZ*, 198 Ariz. 467, 472, ¶ 24, 11 P.3d 1006, 1011 (2000). In *Tower*, the 'operative event' was the payment of the

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rent which triggered the application of the statute creating the taxable event. Like the 'payment of rent' being the operative event in *Tower,* the operative event in this case is the removal of the "for sale" sign which occurred four years after A.R.S. § 33-1808 was enacted. The recordation of the CC&R's, like the executed leases in *Tower,* were merely an antecedent event.

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

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

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

In this case, any rights conferred by the CC&R's were expectant or contingent, at best. They were dependent on the continued existence of the law – that it wouldn't change to prohibit "for sale" signs. It is contingent in that it is dependent on the posting or removal of a "for sale" sign. Without the operative event of posting the signs Appellants had no basis to assert there was a violation of the CC&R's. Without the Appellant's removal of the "for sale" signs, Appellees lacked the basis to assert the claim that A.R.S. § 33-1808 controlled. As clarified by *Hall*, a right only becomes vested when it actually becomes assertable as a legal cause of action or defense. This is the main reason that Appellant's argument that the Hawks' purchase of the property is the 'operative event' fails. The act of purchasing the property does not give anybody the right to sue nor does it create a

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cause of action.[3] In this case, the 'acts' would have to occur *before* either party could assert their respective claim against the other. Because the operative 'acts' were four years later, it cannot be found that application of the statute is retroactive.

Expanding on this issue the Arizona Supreme Court again addressed when substantive rights become vested. *Aranda v. Indus. Comm. of AZ,* 198 Ariz. 467, 471-2, 11 P.3d 1006, 1010-11 (2000) discussed the concept in the context of newly enacted legislation suspending the payment of disability benefits. The new legislation said that if a disability benefit recipient commits a crime and is incarcerated then his disability benefits are suspended. *Id.* As a result, the case focuses on whether the plaintiff, who had a disability award prior to the new law, and was incarcerated at the time of the new law, had a vested right to continue receiving benefits. *Id.* Sitting *en banc*, the Arizona Supreme Court found that he did have a vested right and stated:

> "[A] substantive legal right may be subject to retroactive impairment before it becomes a vested right. But, once the right is vested, legislation may not interfere by retroactively altering the law that applies to completed events. The conclusion that a particular legal right is substantive, in contrast to procedural, does not mean that it can never be modified or abolished by the

[3] It is also noted that the Hawks purchased the property <u>*after*</u> A.R.S. § 33-1808 was enacted and after it had abrogated the portion of the CC&R's at issue. To this extent, the Appellant's claim that the Hawks agreed to give up these rights or never had them in the first place is disputed.

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> legislature. The rule is that any right conferred by statute may be taken away by statute before it has become vested. The core issue before us, therefore, is whether an earlier established right is a vested right and whether the right would be affected or altered retrospectively by [the new law].
>
> The Legislature may certainly enact laws that apply to rights vested before the date of the statute. Such laws, however, may only change the legal consequences of *future* events. But we are not dealing here with future events. The claimants must have the opportunity to avert the loss of benefits. The last moment this would be possible, in the context of conviction and incarceration, is the date of the criminal offense. That is the last moment that claimants may choose to alter their behavior to avoid the application of [the new law].
>
> *Aranda v. Indus. Comm. of AZ,* 198 Ariz. 467, 471, ¶16 11 P.3d 1006, 1010 (2000). *En banc. Citations omitted.*

Aranda makes it clear that the disability recipient *could not have* avoided the consequence of having his benefits suspended since his crime was already committed and he was incarcerated before the enactment of the new legislation. Therefore, in *Aranda,* the plaintiff had a vested right of preventing the suspension of his disability benefits. *Id.* On the other hand, dealing with the same enacted law the Court of Appeals found that another disability recipient *did not* have vested rights because his crime was committed after the new law was enacted. *See, Anderson v. Indus. Comm. of AZ,* 205 Ariz. 411, 72 P.3d 341, (App. 2003.). In *Anderson,* the disability award (like the CC&R's here) was effective prior to the new law. *Id.* The court stated:

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> Petitioner's situation is different [than *Aranda*]. The change in the statute did not itself affect Petitioner's benefits. It was only when he was incarcerated following conviction of a crime that his benefits were suspended. Although Petitioner was entitled to receive benefits at the time [the new law] was enacted, he maintained his statutory right to benefits only so long as he was not convicted of a crime and incarcerated.
> * * *
> Petitioner had more than three years' notice that a criminal conviction would result in suspension of benefits while he is incarcerated. Unlike the aggrieved parties in *Aranda* and *Mejia*, Petitioner could have averted the suspension of his workers' compensation benefits by refraining from criminal conduct.
>
> *Anderson v. Indus. Comm. of AZ,* 205 Ariz. at 413, ¶ 10 & ¶ 12, 72 P.3d at 343(2003)

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

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demonstrate that in order for a right to vest, "every event has occurred which needs to occur to make the implementation of the right a certainty." *Aranda* 198 Ariz. at 471, ¶ 20, 11 P.3d at 1010. "It leav[es] nothing to contingency or to some future event." *Id*.

The point argued by Appellant is that they had no opportunity to avoid the consequences of the new law. What Appellant is really arguing is that they had no opportunity to avoid compliance with the new law. This would be like *Anderson* arguing that he should not be subject to the new law simply because he obtained a disability award beforehand. The relationship to past events does not automatically make the law retroactive. It is the operative events giving rise to the ability to file a lawsuit that vests rights.

The four years between the law and the operative events is the key here. Like the court stated in *Anderson*, - every event must occur, which needs to, in order to make the enforcement of the right a certainty. In this case, the Appellant had no right or ability to try and enforce the CC&R's until the sign was posted. Likewise, the Hawks had no right to enforce the statute until the sign was removed. These 'acts' are the operative events giving each party the last clear opportunity to avoid the consequences of the new law.

In sum, a vested right is not contingent and requires no further event or future act to be actionable. It is a right that can be immediately enforced by

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asserting a claim (or a defense) in the form of a lawsuit. If a future event or act is required to give rise to the ability to initiate a lawsuit, then the right is not vested. In this case, all acts and events complained of occurred four years after the new legislation was enacted.

III. *A.R.S. § 33-441 applies to **ANY** instrument affecting the transfer or sale of **ANY** interest in real property and the CC&R's are property included.*

This is a matter of statutory interpretation. The express language of A.R.S. § 33-441(A) is drafted in a broad manner and refers to 'any' document within certain specifically mentioned categories and goes on to use the 'catch all' phrase – any "other instrument affecting the transfer or sale of *any* interest in real property." *Id.* The parties agree that this statute *does* contain express retroactivity language distinguishing it from A.R.S. § 33-1808. *See*, A.R.S. § 33-441(B). The clear intent behind the statute here is to make the identified prohibition applicable to any instrument that "affects" an interest in real property. The statute at issue begins with:

> **33-441. For sale signs; restrictions unenforceable**
>
> **A.** A covenant, restriction or condition contained in any deed, contract, security agreement or other instrument affecting the transfer or sale of any interest in real property shall not be applied to prohibit the indoor or outdoor display of a for sale sign…
>
> **B.** This section applies to any covenant, restriction or condition without regard to the date the covenant, restriction or condition was created, signed or recorded.

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"If the language of a statute is clear and unambiguous, we must give it effect without resorting to any rules of statutory construction." *State v. Johnson,* 171 Ariz. 39, 41, 827 P.2d 1134, 1136 (App.1992). Appellant makes the argument that this statute applies solely to conveying instruments and relies on the words - "contained in." The express language of A.R.S. § 33-441(B), which does not mention conveying instruments, neutralizes this argument without further debate. For arguments sake though, even if Appellant's argument had merit, the deed here expressly incorporates the CC&R's. (R. 18, Ex. A) The deed states that the conveyance is:

> SUBJECT TO: Current taxes and other assessments, reservations in patents and all easements, rights of way, encumbrances, liens, conditions, restrictions, obligations and liabilities as may appear of record. *See*, (R. 18, Ex. A)

An incorporation by reference from the deed is sufficient to meet the intent of the restriction being 'contained in' the deed. The restriction at issue is also 'contained in' the CC&R's which is a "contract" affecting the transfer or sale of an interest in the property. The statute applies to "a covenant, restriction or condition contained in any …contract." Neither party disputes that the CC&R's here are a contract. *See, R.16, pg. 4:26-28; R. 20 pg. 13-14. See also, Pinetop Lakes Ass'n v. Hatch,* 135 Ariz. 196, 659 P.2d 1341 (App. 1983); *See also, Garden Lakes Comm. Ass'n, Inc. v. Madigan,* 204 Ariz. 238, 62 P.3d 983 (App. 2003)("The Declaration constitutes a contract between the subdivision's property owners as a

whole and the individual lot owners.") Because any owner takes property subject to recorded CC&R's, there is no debate that the CC&R's are a contract affecting the transfer or sale of an interest in the property.

Finally, the statute refers to covenants, restrictions and conditions as being contained in an instrument affecting an interest in property. Since the acronym CC&R's commonly stands for "covenants, conditions and restrictions" this is not a coincidence. CC&R's which are subject to any instrument conveying an interest in property were undoubtedly the target of this legislation.

Even if somehow the CC&R's were not intended to be included in one of these documents, they are certainly included in the catch all phrase - "or other instruments." The question once again becomes whether the CC&R's, which contains the prohibited restriction, is a document "affecting" the transfer or sale of an interest in real property. There is not an argument that the CC&R's meet this criterion since they run with the land.[4] *See, Duffy v. Sunburst Farms East Mut. Water & Agric. Co.*, 124 Ariz. 413, 416, 604 P.2d 1124, 1127 (1979)("By accepting deeds [the purchaser] became bound by the restrictions set forth in the Declaration which made conveyance subject to such restrictions.") Since, the

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4 "Generally, a covenant or restriction runs with the land in equity if four elements are met: (1) there is an enforceable promise between the original parties; (2) the promise touches and concerns the land; (3) the parties intended to bind their successors; and (4) the successors have notice of the restriction." *Federoff v. Pioneer Title & Trust of AZ*, 166 Ariz. 383, 387, 803 P.2d 104, 018 (1990).

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CC&R's create benefits and burdens and prescribe the use and prohibited use of the property there is little debate that they *affect* the transfer or sale of an interest in property.

CC&R's have in the past been found to be an instrument affecting the property it burdens. In *Garden Lakes Comm. Ass'n, Inc. v. Madigan*, 204 Ariz. 238, 62 P.3d 983 (App. 2003) the court dealt with the identical statute as the one here except with reference to solar panels. That statute read:

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

In *Garden Lakes*, the CC&R's allowed for the creation of architectural guidelines which were created to "effectively prohibit" solar panels. *Id.* at 240, 985. The Court of Appeals upheld the trial court's decision which "concluded that, based on A.R.S. § 33-439(A), the Association was not entitled to an injunction enforcing the guidelines regarding solar energy devices." *Garden Lakes* 204 Ariz. at 240, 62 P.3d 985. In reaching this conclusion the Court implicitly found that the guidelines were the type of document *affecting* the transfer or sale of an interest in real property and that they were "contained in" the CC&R's a document included in the statute. "The Arizona legislature has carved out an exception to the

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enforceability **of these contracts**, however, for restrictions that "effectively prohibit" the installation or use of solar energy devices." *Id.* at 241, 986. *Emphasis added.* If architectural guidelines which are one-step removed from the CC&R's are found to be a document "contained in" a "contract" and "*affecting"* an interest in property, then certainly the CC&R's themselves have the same result.

In sum, § A.R.S. 33-441 is not as narrowly construed as Appellant argues. The intent of the statute is to preclude the sign prohibition in any instrument which the property is subject to – not just instruments of conveyance. This includes deeds and the CC&R's which the property is subject to and which "contain" the prohibited restriction.

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

"In the case of a constitutional challenge, the burden of establishing that [the] statute is unconstitutional rests on the party challenging its validity." *Hall v. A.N.R. Freight Sys., Inc.*, 149 Ariz. 130, 133, 717 P.2d 434, 437 (1986). "We presume that statutes are constitutional and attempt to construe statutes in a constitutional manner when possible." *Phoenix Newspapers, Inc. v. Superior Ct.*, 180 Ariz. 159, 163, 882 P.2d 1285, 1289 (App.1993).

Although the legislation affects the authority of various HOAs, the legislation does not rise to the level of an unconstitutional impairment. The Legislature intended that these statutes apply to HOA's currently in existence as

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

As a matter of law, substantive rights may be abrogated by the legislature, if they are not vested; thus, a protectable property interest must be vested to raise the claim of unconstitutionality. *S & R Properties v. Maricopa County*, 178 Ariz. 491, 498, 875 P.2d 150, 157 (App.1993); *Baker v. Ariz. Dep't of Rev.*, 209 Ariz. 561, 567, ¶ 25, 105 P.3d 1180, 1186 (App.2005). Contrary to the argument made by Appellant – the mere existence of a contract does create "vested" rights. Where terms of a contract are to be performed or occur in the future they are considered "executory." In the context of the unperformed obligations of the leases in Tower, the court noted that rights were not vested stated:

> "In this respect it should be emphasized that the leases are not fully executed in the sense of performance of all the covenants. The terms of the contract are executory in that performance will be taking place for many years to come."
>
> *Tower Plaza Inv. Ltd. V. DeWitt*, 109 Ariz. 248, 253, 508 P.2d 324, 329 (1973) *en banc*.

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Since Appellant lacked any vested contractual interest, it is unlikely that the analysis should continue any further. Assuming arguendo that the Appellant had a *vested* contractual interest, "no constitutional violation would occur unless the impairment was substantial." *Baker v. Ariz. Dept. of Rev.*, 209 Ariz. 56, 565 ¶ 16, 105 P.3d 1180, 1184 (App. 2005). The courts have determined that prohibitions such as this must be weighed "because, notwithstanding the Contract Clause, a state continues to possess authority to safeguard the vital interests of its people." *Id.* at 566, 1185. If this analysis is performed, Appellant correctly identifies the three prong test to determine if there is an unconstitutional infringement. *See, pg. 14 of Opening Brief citing McClead v. Pima County*, 174 Ariz. 348, 359, 849 P.2d 1378, 1389 (App. 1992).

A. <u>Factor 1 - has the law operated as a substantial impairment of a contractual relationship?</u>

Assuming there is a vested right, in considering if there is substantial impairment of a contract, the courts will consider the reasonable expectations of the parties. *Matter of Estate of Dobert,* 192 Ariz. 248, 253, 963 P.2d 327, 332 (App. 1988). "[S]tate regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment." *Energy Reserves Grp v. Kansas Power & Light Co.*, 459 U.S. 400, 411-412 (1983). The courts will look to whether the industry affected by the legislation has been regulated in the past to determine the weight of the

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"reasonableness of an expectation" that there will be no change to the law in the future. *Energy Reserves Grp.,* 459 U.S. at 411; *See also, Robson Ranch Quail Creek LLC v. Pima County,* 215 Ariz. 545, 161 P.3d 588 (App. 2007)(Developer "could not have *reasonably expected* that the method of calculating the discount [for a sewer connection fee] would necessarily stay the same" especially where such fees were set by ordinance and highly regulated by the county.) *See also, Matter of Estate of Dobert,* 192 Ariz. 248, 253, 963 P.2d 327, 332 (App. 1988). (contingent beneficiary of a trust lacked a *reasonable expectation* that her beneficiary status would continue); *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465–66, 105 S.Ct. 1441, 84 L.Ed.2d 432 (1985)("the pervasiveness of the prior regulation in this alternative fuel area suggests continuing regulation in the future and absent some affirmative indication to the contrary, the regulated party had *no legitimate expectation* that regulation would cease.) *See, Veix v. Sixth Ward Bldg. & Loan Ass'n,* 310 U.S. 32, 38, 60 S.Ct. 792, 794-795, 84 L.Ed. 1061 (1940)("When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic").

Both the real-estate industry and particularly, HOAs as Planned Communities are highly regulated. Indeed, HOAs are creatures of statute. *See,* A.R.S. § 33-1801 *et. seq.* The Arizona Legislature has regulated the creation of

HOAs and has limited their authority and power in many respects[5]. *Id.* The legislature empowers the creation and existence of an HOA through this body of law. In fact, the authority and power to create CC&R's, including the ones at issue, is a power that is entirely conferred by this body of law and could in theory, be taken away. *See* A.R.S. § 33-1802. "The rule is that any right conferred by statute may be taken away by statute before it has become vested." *Aranda v. Indus. Comm. of AZ,* 198 Ariz. 467, 471-2, 11 P.3d 1006, 1010-11 (2000). Accordingly, the Legislature was within its power to modify the body of law it created in the first place and regulate an HOA that is already subject to existing and extensive regulation. Thus, the question reverts back to whether the Appellant had a vested right and if so, whether that vested right was substantially impaired.

The Legislature is constantly balancing the interests of HOAs as a whole against the rights of individual homeowners. It is a highly regulated area of law that is constantly changing. As a result, and because of its regulation like in the cases noted above, the Appellant here lacked any *reasonable expectation* that the

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

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law would not change or be modified. As a result, any actual impairment to the expectations of the contract were minimal.

Also, the express language of the CC&R's at issue further diminish any *reasonable expectation* that Appellants now assert. The express language in the very section of the CC&R's at issue states that "[n]o sign [shall be permitted] except (b) signs required by legal proceedings or **the prohibition of which is precluded by law."** R. 10, Ex. 1 sec. 12.3(c). Thus, the very language of the covenant at issue recognizes that laws either in existence or to be enacted will override the prohibition. Further, section 18.3 of the CC&R's provides that if a provision within becomes invalid that it is to be severed from the CC&R's and given no force or effect. *See section 18.3 of the CC&R's,* R. 10 Ex. 1 sec. 18.3. The language in these two sections acknowledges that the law evolves and changes and diminishes the reasonable expectation argued by Appellant. In *Energy Reserves* 459 U.S. 415 the U.S. Supreme court, interpreting a provision nearly identical to the one in section 18.3 stated "[t]his [] provision could be interpreted to incorporate all future state [] regulation, and thus dispose of the Contract Clause claim" altogether. Together, these two provisions implicitly and explicitly acknowledge that when certain portions of the CC&R's become invalid or are prohibited by law that those portions are unenforceable and that they will be severed from the governing document. This demonstrates that Appellant lacked an

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objectively *reasonable expectation* that the law would not evolve or change and with it, invalidate certain portions of the CC&R's including the one at issue.

Finally, the pertinent portion of the CC&R's affected here consist of such a small portion of the CC&R's as a whole that the impairment, if any, cannot be substantial. Any expectation that Appellant or any members of the HOA may have had cannot, as a matter of law, be deemed reasonable and as a result, there cannot be a substantial impairment of the contract.

B. <u>Factor 2 - If the law does substantially impair a contract, does it nevertheless have a significant and legitimate public purpose – and if so, is the adjustment reasonable to further the public purpose?</u>

> To determine whether the State has properly exercised this police power, our courts employ a three-part inquiry. A court initially determines whether the law substantially impairs a contractual relationship. If so, the State must identify a significant and legitimate public purpose to justify the law. Finally, if such a purpose exists, the State must show that the adjustment of the parties' contractual obligations is reasonable and appropriate to the public purpose justifying adoption of the law.
>
> *Phelps Dodge Corp. v. Ariz. Elec. Power Co-op., Inc.*, 207 Ariz. 95, 119, ¶ 101, , 83 P.3d 573, 597 (App. 2004) *citing Energy Reserves Grp v. Kansas Power & Light Co.*, 459 U.S. 400, 411-412 (1983).

Assuming arguendo, that Defendant had a vested contractual right <u>and</u> the enactment of A.R.S. 33-1808(F) created a substantial impairment of that right, "it would not offend the constitution if the adjustment of the

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rights and responsibilities of the contracting parties was upon reasonable conditions and appropriate to the public purpose." *Baker*, 209 Ariz. at 566, ¶ 20, 105 P.3d at 1185. "[R]emedying broad or general social or economic problem is a sufficient public purpose." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978). The "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Energy Reserves Grp v. Kansas Power & Light Co.*, 459 U.S. 400, 411-412 (1983).

There were two public purposes argued before the trial court, both of which the trial court adopted. First, is the public purpose that a property owner should be able to freely market and advertise his property through one of the oldest and most basic methods of posting a "for sale" sign in the yard. Second, is the public purpose that a "for sale" sign is a form of commercial free speech.

i. *Public Purpose #1 – "For sale" signs serve a practical purpose by allowing an owner to freely market and advertising property for sale.*

The Legislature balances the interests of individual homeowners against the power of the HOA. "The enforcement of restrictive covenants through an injunction is not a matter of right, but is governed by equitable principles." *Ahwatukee Custom Estates Mgmt. Ass'n v. Turner*, 196 Ariz. 631, 635, ¶ 9, 2 P.3d 1276, 1280 (App.2000) (citation omitted). "Equitable considerations include the

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relative **hardships** and injustice; **the public interest**; misconduct of the parties, if any; delay on the part of the plaintiff; and the adequacy of other remedies." *Id. Emphasis added.* As to the equitable considerations of hardships and the public interest when enforcing CC&R's, the legislature considered that the housing market is vital to the economy of the residents of this state and that a home purchase is typically the largest purchase or sale a person ever makes. Coupled with the well-known depressed real estate market and the public interest considerations of allowing an owner the ability to broadly advertise and post his property for sale at the least expense possible, the legislature identified this as a legitimate interest for property owners.

Appellant argues that homeowners "choose" where to live and that they "willingly" contract to give up certain rights in connection with their selection of a home. In reality, homeowners associations ("HOAs") are not democratic and membership is not necessarily "consensual." Virtually all HOAs in Arizona were created by a developer who initially establishes the HOA's servitude regime. As a result, the only "choice" a prospective homebuyer has is essentially limited to the decision of whether or not to purchase the property in the HOA (with no input into the nature, scope, or extent of the restrictions applying thereto). Once established, HOAs often operate in a manner that is undemocratic (e.g. on a "one house-one vote" rather than a "one person-one-vote") and often times, are unresponsive to

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resident's concerns and needs. Oppressive HOA restrictions, guidelines, and standards, once enacted, are often exceedingly difficult to modify and leave limited power to the residents to bring about a change. The Arizona Legislature has acknowledged these problems, at least in relation to posting "for sale" signs, and has enacted A.R.S. § 33-1808 and § 33-441 to balance the powers between property owners and HOAs.

The Court should consider that at least one purpose and reason for the legislation was that it served a public interest in assisting property owners, in unreasonably restive HOAs, in meeting the objective of selling their property by allowing a "for sale" sign to be posted. Even though Appellant offers alternatives to a sign, they are not comparable to the oldest, least costly and most effective method of publicly announcing a home is for sale by posting a sign in the front yard. The legislature recognized this as a legitimate public purpose.

ii. *Public Purpose #2 – Commercial Free Speech*

The second public purpose is the property owner's right to commercial free speech. This is derived from *Linmark Assoc., Inc., v. Willingboro Tp.*, 431 U.S. 85, 97 S.Ct. 1614 (1977) which was cited in both party's trial briefs and which identified that there is a strong public policy for the display of 'for sale' signs. *Linmark,* advancing the notion of commercial free speech, noted that the alternatives to a "for sale" sign are less effective and more costly than the message

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conveyed by a simple 'for sale' sign posted in the front yard. Appellant argues that this public policy is inapplicable because unlike the municipal actor in *Linmark,* the Appellant is not a 'state actor.' Even if Appellant were correct in this regard, the principle and reasoning behind the concept of free speech still falls within the public interest analysis above. Beyond this, the Appellant's contention that it is not a state actor is not entirely accurate.

"Action taken by a private individual may be 'under color of state law' where there is 'significant' state involvement in the action." *Howerton v. Babica*, 708 F.2d 380, 382 (9th Cir. 1983). This is not the first time that a Court has considered an HOA to be a state actor when the restrictive covenant at issue conflicts with the law. In the leading case of *Shelley v. Kraemer,* 334 U.S. 1, 68 S.Ct. 836 (1948) an African-American purchased real property that was subject to a covenant that restricted the ownership and occupancy of the property to persons of the "Caucasian race." *Id.* at 5. Kraemer, a co-covenantor, brought suit against Shelley, seeking enforcement of the covenant. *Id.* The court found that by utilizing the court system to attempt to enforce the restrictive covenant which was contrary to the law that it was deemed a state action. *Id.* The court stated:

> [W]e we are called upon to consider whether enforcement by state courts of the restrictive agreements in these cases may be deemed to be the acts of those States; and, if so, whether that action has denied these petitioners the equal protection of the laws which the Amendment was intended to insure.

> We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.
> * * *
> The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.
>
> We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. *Id. at 19-21; 844-845*

At its heart, *Shelley* stands for the proposition that private associations, whose power is derived by statute, cannot enforce regulations through the court that would be unconstitutional or unenforceable if adopted by a local government.

In applying the principles and holding in *Shelley*, the Middle District Court of Florida found that judicial enforcement of a homeowners' association restricting the display of the American flag was an improper restriction of free speech rights constituting state action. *See, Gerber v. Longboat Harbour North Condominium, Inc.*, 757 F. Supp. 1339 (M.D. Fla. 1991). *Gerber* stated: "by applying the principles enumerated in *Shelly*, [] this court found and continues to find that judicial enforcement of private agreements contained in a declaration of condominium **constitutes state action and brings the heretofore private**

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conduct within the scope of the Fourteenth Amendment, through which the First Amendment guarantee of free speech is made applicable to the states." *Id.* at 1341. In another case, a condominium association in New Jersey regulated door to door solicitation and distribution of political matters. *Guttenberg Taxpayers and Rentpayers Assoc., v. Galaxy Towers Condo. Assoc.*, 688 A.2d 156 (N.J. 1996. In reaching its conclusion that court found that "[u]nder the New Jersey Constitution, the exercise of free speech is protected against unreasonably restrictive or oppressive conduct on the part of the private entities." *Id. at 408.*

A.R.S.§ 33-1808 prohibits restrictions in any CC&R which prohibits the display of the American Flag (A.R.S. § 33-1808(A)(1)), prohibits the display of political signs (A.R.S. § 33-1808(C)) or prohibits someone from engaging in door to door political activity (A.R.S. § 33-1808(G)). The public purpose clearly identified by the legislature in this regard is to follow the rationale of *Shelly, Gerber* and *Guttenberg* and protect the free speech of residents within associations that may unjustly attempt to restrict it.

The legislation here supports and balances each party's interests and allows communication of the fact that homes in the HOA are for sale. This outweighs the only interest advanced by Appellant of maintaining a certain aesthetic appearance. Notably – the trial court sustained Appellees' objection to the claim that the posting of "for sale" signs would create the appearance that the neighborhood was

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an undesirable place to live, or that it would negatively impact real estate prices. (R. 18, ¶10 pg. 2; R. 20, ¶10, pg. 3 (*Appellee's Obj to SOF #10*); R. 24, pg. 2-3). There was simply no basis for this unsupported and disputed fact.

C. <u>Factor 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.</u>

Appellant speculates that the display of "for sale" signs would negatively impact the HOAs aesthetic appearance and affect it economically. They further argue that the signs would give the impression that the HOA is not a desirable place to live. These assertions are based on mere speculation, are unsupported and were rejected by the court as not being supported with any evidence (R. 24, pg. 2-3). Even if they were not rejected, the irrational inferences argued are still insufficient in contrast to the frustrations that would be created by preventing a property owner from being able to post and advertise his property. Indeed, this is the significant public purpose identified and the reason for the law in the first place.

The diminimus adjustment of contractual rights (which are not vested), is appropriate to achieve the public purpose. As pointed out in the beginning of this brief, individuals have no legal right to enter into prospective contracts for purchasing or distributing the soon-to-be illegal drug 'Spice' so that the law can be

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avoided. More importantly, a contract always gives deference to the law. "A valid statute is automatically part of any contract affected by it, even if the statute is not specifically mentioned in the contract." *Cypress on Sunland Homeowners Ass'n v. Orlandini*, 227 Ariz. 288, 299 ¶38, 257 P.3d 1168, 1179). And since the law is automatically a part of any valid contract, the application of A.R.S. § 33-1808(F) and § 33-441, in conjunction with the application of section 12.3(c) and 18.3 of the CC&R's, does not impair any contractual rights.

V. *The Trial Court's Award of Attorney's Fees was Proper.*

The trial court conducted an evidentiary hearing regarding the reasonableness of the fees requested by the Hawks. (R. 39.) At the hearing it admitted into evidence and considered the billing statement for the fees charged by Appellant's counsel incurred in connection with the defense of the case. In comparing the two, Appellant's counsel had charged $22,700 compared to the fees requested by the Hawks only being $19,000 for the same time-frame. Tr. 5/24/12 pgs. 9-12. Where the trial court has conducted an evidentiary hearing on the reasonableness of fees, an appellate court will uphold the award. *Boltz & Odegaard v. Hohn,* 148 Ariz. 361, 366, 714 P.2d 854, 859 (App.1985). As such, the award should be upheld here since the trial court properly exercised its discretion and considered evidence and the parties' arguments in connection with the reasonableness of the fees claimed and awarded.

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Appellant's argument that the court failed to consider the necessary factors in *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 155 P.3d 1090, (App.2007) in awarding the fees is also contrary to the record. The Court discussed on the record the novelty of the issues litigated. *See,* Tr. 5/24/12. Each individual factor from *Fulton* was briefed and read by the court. (R. 27: pgs. 3-5; R.26). When rendering the ruling, the judge stated: "I find that under all of the factors necessary for the Court to consider and weigh the work by counsel that it satisfies the test of China Doll." Tr. 5/24/12 pg. 12:4-6. Accordingly, the award should not be disturbed.

Appellant argues that the fees awarded were improperly block billed. The standard for considering whether the task is compensable is to determine whether the entry is in "sufficient detail that a neutral judge can make a fair evaluation of the time expended, the nature and need for the service, [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. This issue was also briefed (R. 27 pgs. 5-6) and dismissed by the court with the finding that the China Doll standard was satisfied.

Lastly, Appellant argues that some tasks were administrative and not compensable and that there was no evidence as to the experience and skill of the legal assistants. These arguments were not previously presented to the trial court. Appellant's objection to the fees sought in this case consisted of a document that was barely over 2 pages. (R. 26). "Because a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects before error may be raised on appeal, absent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal." *Kimicata v. McGee*, 230 Ariz. 6, ¶11, 279 P.3d 631, 633 (App. 2012) *citing In re Marriage of Pownall*, 197 Ariz. 577, 583, ¶ 27, 5 P.3d 911, 917 (App. 2000) (husband waived argument superior court improperly failed to make findings of fact regarding award of attorneys' fees because he did not raise the issue with the superior court).

An award of attorney's fees is upheld if it is supported by *any* reasonable basis for the exercise of the court's discretion. *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 569, ¶ 9, 155 P.3d 1090, 1093 (App.2007). The record supports the exercise of the court's discretion here. Accordingly, the Hawks request that the award of attorney's fees be upheld entirely.

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VI. CONCLUSION

For the reasons stated herein, the Hawks request that the Trial Court's ruling be affirmed. Appellees further request an award of attorney's fees incurred on appeal.

RESPECTFULLY SUBMITTED September 28, 2012.

/s/ *Tevis Reich*
Tevis Reich
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REQUEST FOR ATTORNEY FEES

The Hawks, as Appellees, request an award of attorney fees incurred in this appeal. This request is based on A.R.S. § 12-341.01 because this action arises from a contract – namely the CC&R's.

RESPECTFULLY SUBMITTED September 28, 2012.

/s/ *Tevis Reich*
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Attorney for Appellee

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CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14(b), I certify that the attached brief uses proportionately spaced type font of 14 points or more and is double spaced and does not exceed 40 pages, excluding those sections of the brief that are not counted.

/s/ *Tevis Reich*
Tevis Reich

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CERTIFICATE OF MAILING

I hereby certify that on September 28, 2012 I caused the original of the foregoing brief to be electronically filed through AZ TurboCourt and on the same day caused to be delivered two copies of the foregoing by United States Mail, postage prepaid, addressed to:

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