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

REPLY BRIEF

J. Gary Linder, Bar #020552
Lori L. Voepel, Bar #015342
JONES, SKELTON & HOCHULI, P.L.C.
2901 North Central Avenue, Suite 800
Phoenix, Arizona 85012
(602) 263-1700
glinder@jshfirm.com
lvoepel@jshfirm.com

Attorneys for Defendant/Appellant
PC Village Association, Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES & CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

RULES

LEGAL ARGUMENT

I. THE "OPERATIVE EVENTS" FOR RETROACTIVITY PURPOSES UNDER A.R.S. § 33-1808 WERE THE RECORDING AND AMENDMENT OF THE CC&RS AND THE PURCHASE OF PROPERTY IN PINE CANYON.

A. PC Village's Right to Enforce the CC&Rs and the Residents' Right to Expect Such Enforcement Were Vested Interests by the Time A.R.S. § 33-1808 became effective.

Appellees do not dispute that these CC&Rs were part of an enforceable contract. (R. 20 at 13). It is also undisputed that the CC&Rs, which were recorded in 2002 and amended in 2004, "run with the land and are binding upon the property and all parties having any title right or interest in the property." (R. 1 at 1). Nor can it reasonably be disputed that when the Hawks (and every other Pine Canyon resident) purchased property in this planned community, they held a reasonable expectation that the terms of their contracts–including the pre-existing CC&Rs--would be enforced. *See Powell v. Washburn*, 211 Ariz. 553, 557-58, 125 P.3d 373, 377-78 (2006) (citing *Wallace v. St. Clair*, 127 S.E.2d 742, 751 (W.Va. 1962) ("Covenants ... are designed to be *for the benefit of every lot or parcel of land* in the area affected by the restriction. Each lot or parcel is not merely burdened by a restriction but it is also clothed with the benefit which is enforceable against every other lot or parcel.").

It is likewise beyond dispute that PC Village could immediately enforce the terms of the CC&Rs as to all Pine Canyon property owners. Indeed, it had a

responsibility to enforce them because "the failure of an association to take appropriate action to enforce restrictive covenants may subject it to liability." *Coll. Book Centers, Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533, 541, 241 P.3d 897, 905 (App. 2010); *see also In Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 201, ¶ 25, 165 P.3d 173, 179 (App.2007) (adopting Restatement (Third) of Property: Servitudes § 6.13, and holding that the duty of an association is to "treat members fairly" and to "act reasonably in the exercise of its discretionary powers including rulemaking, enforcement, and design-control powers.").

The ability to immediately enforce the CC&Rs as to all Pine Canyon residents[1] gave rise to a vested right on behalf of PC Village and its residents upon the recording/amendment of the CC&Rs and the purchase of property within Pine Canyon subject to the CC&Rs. That is because rights are vested "when the right to enjoyment, present or prospective, has become the property of some particular person ... as a present interest." *Steinfeld v. Nielsen*, 15 Ariz. 424, 465, 139 P. 879, 896 (1913) ("[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.'"). Here, every property owner in Pine Canyon

[1] Even before the purchase of the first parcel by an individual Pine Canyon resident, the CC&Rs were effective and immediately enforceable as to the developer in whose name the parcels were initially recorded.

had a pre-existing vested right to expect that PC Village would (and will continue to) enforce all provisions of the CC&Rs, including the right to enjoyment of life in a community free of "for sale" signs.

Because the CC&Rs "run with the land and [are] binding upon the property and all parties having ***or acquiring*** any right, title or interest in or to the property," both the contractual benefits and burdens under the CC&Rs *and* the pre-existing vested right the Hawks' predecessors had to enjoyment of living in a "for sale" sign-free community, all "inure[d] to the benefit of" the Hawks as purchasers of the property. (R. 18, Ex. B, p. 2). And, indeed, like all Pine Canyon residents, the Hawks benefitted from the right to enjoyment of living in a community unfettered by "for sale" signs throughout their tenure. Not once before they decided to sell their property did they ever claim that they or any other resident in Pine Canyon could properly erect a for sale sign. Clearly, living in a community free of such signage and other undesirable conditions is what the Hawks opted for (and subsequently enjoyed) when they purchased property in Pine Canyon. Now, notwithstanding having benefitted over the years from living in a planned community, they want to act in their own self-interest and disregard the rights of others remaining in the community by violating the very covenants they have expected numerous other residents to follow to the "t." That is not how CC&Rs operate. "Covenants ... are designed

to be for the benefit of *every lot or parcel of land* in the area affected by the restriction." *Wallace*, 127 S.E.2d at 751 (emphasis added). "Each lot or parcel is not merely burdened by a restriction but it is also clothed with the benefit *which is enforceable against every other lot or parcel*." *Id.* (emphasis added). The inequitable scenario under the Hawks' interpretation illustrates the correctness of PC Village's position that the rights at issue vested when the CC&Rs were recorded/amended and the property in Pine Canyon was purchased subject to the CC&Rs. Every one of the remaining residents in Pine Canyon have a right to reciprocal enforcement of the "for sale" sign provision as to the Hawks.

B. Appellees' Position That the "Operative Events" Were the Placement and Removal of the "For Sale" Sign Is Based Upon Misapplication of a Tort-Based Standard.

Appellees assert that neither party had a vested right in enforcing or invalidating the CC&Rs until the "operative events" occurred, which they define as their placement of the "for sale" sign and PC Village's removal of it, which gave either party the right to sue. They reach this faulty conclusion by applying the wrong retroactivity standard relating to tort-based claims, rather than contract-based claims. The standard they adopt is that a statutory change is only retroactive when it affects "cases already in litigation," citing *Hall v. A.N.R. Freight Sys., Inc*., 149 Ariz. 130, 140-41, 717 P.2d 434, 444-45 (1986).

Although this is certainly a correct statement of law, it has no applicability here, as the "cases in litigation" standard only applies to statutes that change substantive rights, such as affirmative defenses, for tort-based claims.

In *Hall*, for example, the statute changed the defense of contributory negligence, which the court held did not vest until a lawsuit has been filed. That is because "contributory negligence is an affirmative defense which may not be asserted until the plaintiff has filed his lawsuit." *Id.* (citing Rule 8(d), Ariz.R.Civ.P., 16 A.R.S.; Ariz. Const. art. 18, § 5; *Cheney v. Arizona Superior Court for Maricopa County*, 144 Ariz. 446, 698 P.2d 691, 693 (1985) (comparative negligence statute)). Changes in statutes affecting affirmative defenses cannot be applied retroactively because "[w]hen 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." *Hall*, 149 at 140, 717 P.2d at 440. *See also Allen v. Fisher*, 118 Ariz. 95, 96, 574 P.2d 1314, 1315 (App.1978) (A.R.S. § 12–569, abolishing the collateral source rule, could not be applied retroactively to an action pending when it became effective); *Gulf Homes, Inc. v. Gonzales*, 139 Ariz. 1, 5, 676 P.2d 635, 639 (App. 1983) (1980 amendment to the Retail Sales Act could not apply to a lawsuit filed in 1976); *Bouldin v. Turek*, 125 Ariz. 77, 78, 607 P.2d 954, 955 (1979) (A.R.S. § 12–341.01, providing for an award of attorney's fees to the

successful party in contract actions, could not apply retroactively to suits commenced before its effective date).

The tort-based "cases already in litigation" standard has no applicability in this context, which involves the issue of when rights vest for parties to a contract. Thus, the Hawks' argument that there were no pre-existing vested rights because there was "no action pending for conduct occurring prior to the effective date" of A.R.S. § 33-1803 makes no sense. Nor does their position that no one had any vested rights under the CC&Rs until after the Hawks felt they had a right to sue PC Village for removal of their sign. The Hawks' position and application of a tort-based standard results in a fiction suggesting that someone's contractual rights don't vest until such time that a breach occurs. This is plainly erroneous. Contractual rights vest immediately upon the signing of a contract, because the parties to a contract have an immediate right to enjoyment of the benefits under the contract. Because the Hawks' entire argument regarding vesting is based upon a faulty premise, it must be rejected.

C. Appellees' Attempt to Equate Statutes Criminalizing Certain Contracts to this Statutory Change Is Also Non-Sensical.

Appellees next claim that under PC Village's argument, the consequences of making alcohol illegal during the prohibition era could have been avoided by simply having a "contract" beforehand, and that the illegalization of the new drug "spice" could be avoided by sellers and

purchasers simply having a contract in place before criminal statutes are passed. This misconstrues Appellant's position and confuses the retroactive applicability of a civil statute with the effect of statutes criminalizing certain forms of behavior upon which contracts may have been based. Legislative prohibitions on the sale and purchase of alcohol or illicit drugs are ***criminal*** statutes, which necessarily trump the enforceability of any pre-existing civil contracts. *See generally* Restatement (Second) of Contracts § 178 (1981) ("a promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."). Thus, Appellees' arguments in this vein also miss the mark.

D. The Primary Cases Appellee Relies On All Support PC Village.

Appellees claim that *Hall, Tower Plaza, Aranda* and *Anderson* support their position. For the reasons above, *Hall* is largely inapposite because it involved a statute that changed an affirmative defense, which could not properly be retroactively applied to pending lawsuits. To the extent it is helpful, it supports PC Village because unlike the statutory change from contributory to comparative fault at issue in *Hall* (which merely reduced a defendants' share of liability), the retroactive application of the statutes here

completely eliminates PC Village's ability to regulate the placement of "for sale" signs despite the pre-existing CC&Rs that residents of Pine Canyon relied upon when purchasing property.

As shown in the Opening Brief, *Tower Plaza* is also distinct. *Tower Plaza Inv. Ltd. v. DeWitt*, 109 Ariz. 248, 250, 508 P.2d 324, 326 (1973). It addressed whether an excise tax could apply retroactively to landlords who had entered into written leases before passage of the tax. As Appellees' acknowledge, the Supreme Court found that because the tax was on the landlords, not the transactions out of which they acquire their receipts or income (the leases), the new tax could be applied *prospectively* to gross receipts received by landlords after the statute's effective date. *Id.* at 250-51, 508 P.2d at 326-27. The issue here, however, is not prospective application of 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.

The third and fourth cases cited by Appellees' further illustrates this point. *See Aranda v. Industrial Comm'n*., 109 Ariz. 467, 11 P.3d 1006 (2000); *Anderson v. Industrial Comm'n*, 205 Ariz. 411, 72 P.3d 341 (App. 2003). Both addressed whether disability benefit recipients could properly be subjected to a statute that rendered incarcerated individuals ineligible for such benefits. In *Aranda*, the benefit recipient was already incarcerated when the new law was

passed, and the Supreme Court determined it could not be applied retroactively to divest inmates of benefits they had already been receiving. It distinguished *Tower Plaza*, stating that the 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 in fact the "operative events which result in vesting" the award. *Id.* at 472, 11 P.3d at 1011. Later, in *Anderson*, this Court determined that the statute could be applied to a different benefit recipient because he did not commit his crime until after the new law was enacted, so he could have avoided the consequences of the new law by not committing a crime. 205 Ariz. at 413, 72 P.3d at 343.

Appellees assert that these cases highlight a "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." First, these cases highlight no such thing. They merely clarify that where pre-existing rights will be adversely affected by a new law, the holders of those rights must have had an opportunity to avoid its consequences. Here, the property owners in Pine Canyon, all of whom had an immediate right to expect enforcement of the signage prohibition, had no prior opportunity to purchase property elsewhere in order to avoid the consequences of A.R.S. § 33-1808. Thus, their rights were already vested at the

time the new law went into effect. And because the rights and obligations under the CC&Rs run with the land, they were *attached to and ran with* the Hawks' property when they purchased it from their predecessors.[2]

Second, *Aranda* and *Anderson* do not support Appellees' argument that the "operative events" here were not entirely completed because PC Village had no right or ability to enforce the CC&Rs until the sign was posted (and the Hawks had no ability to sue for the sign's removal). Again, this fiction results from misapplication of a standard applicable to tort-based claims. Moreover, the "right" at issue is not that which flows from application of the statute itself; it is the pre-existing right to live in a planned community free from "for sale" signs. To say that PC Village had no right to enforce the CC&Rs until the Hawks posted a "for sale" sign is equally non-sensical. PC Village had both the ability and the responsibility to enforce *all* provisions of the CC&Rs as to *all* residents long before the Hawks decided to violate one particular provision. In sum, the *Aranda* and *Anderson* cases teach that none of the residents of Pine Canyon can properly be statutorily divested of their right to live in a community free from such signage where the CC&Rs at issue were attached to all property

[2] Thus, it doesn't matter that the Hawks purchased their property after the passage of A.R.S. § 33-1808. The right to enjoyment of living in a "sign free" community was already vested as to their predecessors, and the burdens and benefits included in the CC&Rs ran with the property and inured to the Hawks once the property was transferred.

purchased by those residents. Nor can PC Village be retroactively divested of its right and responsibility to enforce this provision as to *all* of its residents.

E. The Trial Court's Interpretation and Application of A.R.S. § 33-1808(F) Is Erroneous and Requires Reversal.

In sum, Appellees' argument, which was adopted by the trial court, is based on a mis-application of the standard applicable to statutes affecting tort-based claims, which cannot be retroactively applied once a lawsuit has been filed. The rights here are contract-based, which became vested immediately upon formation of the contract, namely, the CC&Rs. The rights of PC Village and its residents were not "contingent" until and unless someone sued for a breach of that contract. These contract rights (including Section 12.3) were vested, immediately enforceable rights that ran with the property purchased by all Pine Canyon residents, which have been continually enforced since the adoption of the CC&Rs.

There is no question that the Hawks purchased their property in Pine Canyon with an understanding and the expectation that *all* provisions of the CC&Rs would be enforced. And, like all other property owners in Pine Canyon, they have benefitted from their enforcement, including the "for sale" sign provision. Now, notwithstanding having reaped those benefits for years, they want to avoid the burden they share with all other residents by erecting a "for sale" sign on their lawn. It is axiomatic that CC&Rs involve benefits and

burdens, which are *reciprocal* and enforceable *against every other lot or parcel*. *Powell*, 211 Ariz. at 557-58, 125 P.3d at 377-78; *Wallace,* 127 S.E.2d at 751. This is consistent with the burden and benefit exchange contained in any contract. *See Carroll v. Lee*, 148 Ariz. 10, 12, 712 P.2d 923, 925 (1986) ("The sine qua non of any contract is the exchange of promises. From this exchange flows the obligation of one party to another."); *Duncan v. Nowell*, 27 Ariz. 451, 456, 233 P. 582, 583 (1925) ("The rule of law is that one who seeks to take advantage of a contract made for his benefit by another must take it subject to all legal defenses and inherent equities arising out of the contract as between the parties thereto, *and must bear the burdens thereof*.").

In short, the Hawks cannot receive the benefits from enforcement of the CC&Rs during their residency, then turn around now that they want to move and disregard their concomitant burdens by depriving all of the remaining Pine Canyon residents of their continued right to live in a "for sale" sign-free community. And the Court should not allow them to do so. The trial court committed clear error in adopting Appellees' faulty logic and interpretation of the applicable cases on retroactivity, and its ruling granting summary judgment against PC Village should be reversed.

II. THE TRIAL COURT ALSO ERRONEOUSLY INTERPRETED A.R.S. § 33-441 AS APPLICABLE TO THESE CC&RS.[3]

Appellees first assert A.R.S. § 33-441 is applicable by claiming the phrase "or other instrument *affecting the transfer or sale of any interest* in real property" means "any instrument that *affects an interest* in real property." The central tenant of statutory construction is that the "best indicator of the meaning of a statute is its plain language." *Powers v. Carpenter*, 203 Ariz. 116, 118, ¶9, 51 P.3d 338, 340 (2002). This Court must give meaning to *all* provisions of a statute and should interpret it so 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). Appellees' interpretation renders the clause "the transfer or sale of" meaningless and void.

Moreover, as set forth in the Opening Brief, A.R.S. § 33-441 expressly states that it applies only 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." (emphasis added). These CC&Rs were not "contained in" any such instrument, and the trial court's reading expands

[3] Though arguably irrelevant in view of the retroactivity clause in this statute, the Hawks mistakenly claim that A.R.S. § 33-441 was enacted before they purchased their property on August 25, 2009. (AB at 6). The enactment date is not when those statutes became effective. *Bland v. Jordan*, 79 Ariz. 384, 291 P.2d 205 (1955) (effective date for acts not containing emergency clauses or specific effective date provisions is the 91st day after adjournment *sine die*). A.R.S. § 33-441 was not effective until September 30, 2009.

the statute's reach beyond instruments of conveyance to previously and separately recorded covenants, conditions and restrictions not contained in any instruments used to convey property. This interpretation renders void and meaningless the clause "contained in any deed, contract, security agreement or other instrument …" If the legislature had intended the statute to cover CC&Rs (as one form of instrument or contract), it would have stated it covered "CC&Rs *and* CC&Rs contained in any deed, contract", etc.

Additionally, as the legislative history makes clear, these revisions were made specifically to Title 33, Chapter 4, which "covers conveyances and deeds in Arizona." AZ H.R.B Summ., 2009 Reg. Sess. S.B. 1148, Arizona House Bill Summary (History note); AZ S.F. Sheet, 2009 Reg. Sess., S.B. 1148, Arizona Senate Fact Sheet (Purpose note: "stipulates, with certain exceptions, that *an instrument of conveyance of real property* may not contain any restrictions on the display of for sale signs or sing riders by the property owner."). Appellees' position that A.R.S. § 33-441 applies to all covenants, restrictions and conditions (regardless of whether they are "contained in" a deed or other instrument of conveyance) is not credible in light of the plain language of the statute, its location in Title 33, Chapter 4, and the legislative history.

Appellees next contend that the deed conveying the property to the Hawks does contain the CC&Rs at issue because it makes the conveyance

"subject to" taxes, assessments, reservations in patents, and all easements, rights of way, encumbrances, liens, "conditions," "restrictions," obligations and liabilities as "may appear of record." First, a plain reading of A.R.S. § 33-441(A) and the legislative history demonstrates that the legislature was specifically targeting "for-sale" sign restrictions inserted directly into a deed or separate contract or instrument affecting the transfer or sale of property. *See* AZ H.R.B Summ., 2009 Reg. Sess. S.B. 1148, Arizona House Bill Summary (explaining the bill provides that any covenant, restriction or condition contained in an instrument of conveyance "cannot prohibit the indoor or outdoor display of a for sale sign and a sign rider by a property owner on their property, including a sign that indicates the person is offering the property for sale by owner."). There is no restriction prohibiting indoor or outdoor displays of for sale signs and a sign rider "contained in" the Hawks' deed.

Second, it is evident that the "subject to" provision in the deed is general in nature and is simply meant to place the purchaser (here, the Hawks) on notice that the property they are purchasing is subject to certain obligations they as purchasers will be responsible for--including taxes, assessments, easements, rights of way, encumbrances, liens, conditions and restrictions. It is not a restriction specifically informing the purchaser that they will be unable to post "for sale" signs in Pine Canyon.

Apparently, because § 33-1808, which specifically prohibits "for sale" sign exclusions *in CC&Rs,* was *not* made retroactively applicable, Appellees are trying to make an "end run" around that statute by attempting to make the CC&R provision "fit" within § 33-441, which pertains only to restrictions or conditions ***contained in*** deeds, contracts, and other instruments affecting the transfer or sale of land. This the Court cannot properly allow them to do.

Finally, even if the Court were to find that the "subject to" clause in the Hawks' deed brings it within the scope of § 33-441, it is not fatal to Appellant's position. It would merely mean that PC Village cannot rely upon the clause *in the deed* to support its position. PC Village has always relied directly upon the enforceability of the actual CC&Rs--not the clause in the Hawks' deed--in arguing that they are bound to comply with the "for sale" sign provision. Nothing in § 33-441 invalidates the actual CC&Rs.

III. IF EITHER STATUTE INVALIDATES SECTION 12.3 OF THESE CC&RS, IT WOULD RESULT IN A SUBSTANTIAL IMPAIRMENT OF A CONTRACTUAL RELATIONSHIP WITHOUT A SIGNIFICANT, LEGITIMATE PUBLIC PURPOSE.

As shown above, neither A.R.S. § 33-1808 nor § 33-441 apply here. However, if the Court were to find that either or both statutes directly invalidate Section 12.3 of the CC&Rs (as opposed to just the clause in the deed), it would be an unconstitutional impairment of contract. Appellees agree that *McClead v. Pima County*, 174 Ariz. 348, 359, 849 P.2d 1378, 1389 (App. 1992), sets forth

the correct test for determining whether a statute violates the Contracts Clause. They claim, however, that there was no vested contractual interest to be "impaired." As set forth above, Appellees' claim that no rights vested until there was a breach of this contract via their placement of a "for sale" sign is based upon a faulty premise unsupported by Arizona law. PC Village's right (and its residents' right) to enforce the CC&Rs vested immediately upon formation of that enforceable contract. Their authority did not depend on any "contingent event." *State v. Estes Corp*., 27 Ariz. App. 686, 688, 558 P.2d 714, 716 (App. 1976).

A. The Parties to the CC&Rs Have a Reasonable Expectation That Other Parties to the Contract Will Abide by its Terms.

In asserting that application of one of these statutes would not result in a substantial impairment, Appellees' argument goes like this: homeowners associations are highly regulated entities, which are creatures of statute. Thus, no party to CC&Rs could ever have a reasonable expectation that its terms will be enforced. Not true. Where rights are vested, even parties to a contract in a highly regulated enterprise have a reasonable expectation that those rights will not be impaired by state action. *See Aranda*, 198 Ariz. at 471-72, 11 P.3d at 1010-11 (new law regarding eligibility for workers compensation benefits could not constitutionally be applied retroactively to divest inmates of benefits they had already been receiving). Moreover, the statutes referenced by Appellees

that have limited an association's ability to manage the outward appearance of its community were enacted after the CC&Rs in this case were executed and have no bearing on whether the legislature can properly divest parties to such contracts to particular rights they had a reasonable expectation would be enforced.[4]

As for Appellees' severability clause argument, although Section 18 of the CC&Rs references possible amendments to codes and/or statutes, its inclusion does not mean such amendments always "trump" provisions in the CC&Rs. *See Powell*, 211 Ariz. at 559-60, 125 P.3d at 379-80 (although a particular section of the CC&Rs referenced possible amendments to the county zoning ordinances, that clause must be read in conjunction with the CC&Rs in their entirety; thus, an amendment to the zoning ordinances permitting RVs to be used as single family residences in a manufactured home subdivision did not serve the CC&Rs' intent to have the Airpark development possess a particular appearance and quality). Additionally, this is a "standard form" severability clause contained in the "General Provisions" section of the CC&Rs, which is clearly intended to simply place residents on notice that their property is subject

[4] *See* A.R.S. § 33-1809 (mandated that associations allow residents to park public service vehicles on streets, which was enacted in 2003); 2003 Ariz. ALS 99, 1 (regulations allowing children to occupy residential roadways, which were enacted in 2007); 2007 Ariz. ALS 82, 1 (mandated that residents be permitted to install solar energy devices, which was enacted in 2007).

to various laws, restrictions, taxes, assessments, etc. Its inclusion says nothing about whether Pine Canyon residents had a reasonable expectation that the "for sale" sign provision would be enforced, and does not support a reasonable inference that the parties expected state modification of that particular signage provision.

Finally, Appellees' reliance on *Energy Reserves Group Inc. v. Kansas Power & Light Co*., 459 U.S. 400, 403-04 (1983), is misplaced. That case involved a utility contract setting a price for natural gas, a commodity upon which the state placed strict price controls. The contract contained clauses called "indefinite price escalators," which allowed the contract price to increase if a governmental authority fixed a natural gas price above the price specified in the contract. Here, there is no indication that the CC&R provision addressing "for sale" signs was enacted in response to extensive government regulation, or that the residents of PC Village lacked an expectation that the contractual terms would be enforced. With only limited exception, rules regarding a community's appearance have remained within an association's purview. Thus, the parties to this contract had (and have) an objectively reasonable expectation that the contract's terms, including the "for sale" sign provision, would remain in effect. And numerous Pine Canyon residents purchased their property in

reliance on its ongoing enforceability, from the formation of the first contract through the present time.

Finally, Appellees claim that the portion of the CC&Rs affected is so small that it could not possibly be a substantial impairment. Nonsense. It is an undisputed fact that these residents placed a premium on the aesthetic appearance of Pine Canyon when purchasing property there. (R. 18 at ¶¶ 8-10).[5] As noted in the Opening Brief, the scope of the impairment is not just the Hawks' "for sale" sign, as the impact would reach far beyond that single sign. Permitting the Hawks to post a sign will inevitably lead to the posting of "for sale" signs by other residents, which would substantially impact the community's aesthetic appearance and potentially affect property values by giving prospective purchasers the impression that Pine Canyon is not a desirable place to live. This is a substantial impairment under *McClead*.

B. Neither Ground Listed by the Trial Court Constitutes a Significant and Legitimate Public Purpose Sufficient to Outweigh this Substantial Impairment of Contract.

As both parties have discussed, the trial court claimed two legitimate purposes exist pursuant to *McClead*. Neither of these purposes justify the

[5] PC Village attached affidavits from residents as an exhibit to its statement of facts stating that they had a reasonable expectation of enjoying life in a community free from the "eyesore" of "for sale" signs. The trial court accepted as true those portions of the residents' affidavits. (R. 24 at 2).

substantial impairment of contract suffered by the residents of Pine Canyon as a whole, and the trial court erred in finding that they do.

1. The Trial Court Erred in Finding That Assisting Pine Canyon Residents to Sell Their Homes Through "For Sale" Signs is a Substantial Legitimate Public Purpose.

Both Appellees and the trial court claim that one legitimate purpose is the need to "assist" these home owners in selling their homes at the least expense possible by permitting the posting of "for-sale" signs. Pine Canyon is indisputably a luxury community with high-end homes on large lots. These are second homes for many of the residents. Appellees' rationale that "a home purchase is typically the largest purchase or sale a person ever makes" simply does not apply to most, if not all, of the residents of Pine Canyon. Nor is placing a "for sale" sign on these lots even an effective form of advertising for this community, given the gated, private nature of Pine Canyon and the type of residents who typically purchase homes there. As noted in the Opening Brief, disallowing "for sale" signs still leaves the Hawks with the ability to list the property with a realtor, who would place the property photos and information on the Internet and actively search for buyers. And if they don't want to use a realtor, the Hawks can easily place the information and photos of the property on the Internet. Even Pine Canyon's website has a section for listing available properties, including photos, prices and detailed information about the property.

*See*http://www.pinecanyon.net/Default.aspx?p=DynamicModule&pageid=343901&ssid=248657&vnf=1. The "need," if any, to assist residents of Pine Canyon in selling their homes by permitting them to place a "for sale" sign that will likely not even be seen by most of their prospective home buyers is minimal at best. It is therefore not a substantial, legitimate public purpose.

2. The Trial Court Clearly Erred in Finding Commercial Free Speech as a Substantial Legitimate Public Purpose, as PC Village is Not a State Actor.

As set forth in the Opening Brief, it was clear error for the trial court to find commercial free speech as a legitimate public purpose. First, the residents of Pine Canyon *willingly* gave up their right to place "for sale" signs as one form of advertising in exchange for the benefit of living in a community free from such "eyesores." (R. 18 at ¶¶ 8-10). The undisputed evidence is that these residents knowingly weighed the aesthetic and economic advantages of living in such a community when they purchased their homes and chose to forego their ability to exercise that particular form of speech. (Id.). Appellees' assertion that these residents have "no choice" but to comply with an association's "regime" when they purchase property in a community like Pine Canyon is extremely paternalistic and based on nothing but speculation and stereotypes. To say people have no choice but to "give in" to associations' rules ignores that there are a multitude of properties available outside of

communities governed by homeowners' associations, including properties in very elite neighborhoods. Pine Canyon residents knew they were voluntarily limiting the scope of their right to use "for sale" signs as a form of advertising if and when they sold their property, and did so for the benefits they received in return. (Id.).

Second, and most importantly, the trial court's ruling ignores that the First Amendment only protects individuals from *state action* that intrudes upon free speech, including commercial. There was no intrusion by a state actor here, so the case relied upon by Appellees and the trial court is inapplicable. *See Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (*ordinance by municipality* stripping away the right to post "for sale" signs in an effort to maintain integrated neighborhoods unconstitutionally infringed upon the property owners' right to free speech).

Apparently now recognizing the trial court's error in this regard, Appellees attempt for the first time on appeal to equate a homeowners association with a state actor by arguing the applicability of the "under color of state law" doctrine. (AB at 35-37). As Appellees so readily point out in responding to an argument raised on another issue by Appellant, the failure to raise an argument in the trial court waives the issue for appeal. (AB at 41) (citing *Kimicata v. McGee,* 230 Ariz. 6, ¶ 11, 279 P.3d 631, 633 (App. 2012); *In*

re Marriage of Pownall, 197 Ariz. 577, 583, 5 P.3d 911, 917 (App. 2000)). Nor did the trial court base its finding of commercial speech as a legitimate public purpose on the "under color of state law" doctrine. The potential applicability of this doctrine is therefore not properly before the Court, and pages 35-37 of the Answering Brief should disregarded in its entirety.

C. The Character of This Contract Modification Is Not Appropriate to the Public Purposes Identified by the Trial Court Because the Contract is Itself a Product of a Real Estate Transaction.

First, Appellees' arguments under this factor are circular. They assert that the adjustment of contractual rights is "diminimus" [sic] because, they argue, these are not vested rights. As set forth in Argument I, the rights held by the residents of Pine Canyon and PC Village vested immediately upon formation of these contracts because the CC&Rs were immediately enforceable as to ***all*** Pine Canyon residents. A constitutional analysis under the contract clause assumes the vested nature of these contract rights. Appellees also make the circular argument that "a contract always gives deference to the law,"[6] so there is no impairment of contractual rights here. If that were true, there would

[6] The case Appellees' cite does not support their position, as it addressed the ability of an HOA to use a CC&R to trump a pre-existing law. *See Cypress on Sunland Homeowners Ass'n v. Orlandini*, 227 Ariz. 288, 298-99, 257 P.3d 1168, 1178-79 (App. 2011) (rejecting the HOA's "implausible interpretation" of a CC&R provision as giving a first deed of trust priority over an assessment lien notwithstanding a state statute deeming deeds of trust to be the same as mortgages for purposes of defining security instruments).

never be a need to conduct a constitutional analysis under the Contracts Clause, as the state could ***always*** change the contractual rights of private parties without any constitutional concerns or recourse for individuals.

Second, as set forth in the Opening Brief and below, the "for sale" sign provision in this contract is itself a product of a real estate transaction into which every resident of Pine Canyon voluntarily entered. These residents place a very high value on the aesthetic and economic benefits they receive from living in a gated community regulated by the contractual terms of a homeowners association. And they have a vested right *to continue* living in such a community. Stripping away these contractual rights so that one minor burden can be removed from the Hawks, notwithstanding the Hawks *having already benefitted from* the same "for sale" sign provision, is not a contract modification appropriate to the public purpose of "assisting" homeowners in selling their property. That is especially the case where, as shown above, other far more effective and better-suited means exist for the Hawks (and others) to advertise their home within this exclusive gated community, including directly on the Pine Canyon website.

Third, as already noted, the commercial speech interest is simply not a legitimate public purpose in this context. The "for sale" sign restriction is not imposed upon these residents by a state actor, but through a private contract

they knowingly and willingly entered so they could reside in the aesthetically pleasing community such restrictions enable them to enjoy. Rather than a governmental entity stripping away a pre-existing right to post a "for sale" sign such as in *Linmark*, the contract modification imposed by these state statutes strip away these residents' pre-existing contractual right to live in a community *free from* such signs. This is one of the very rights these residents bargained for when purchasing their property in Pine Canyon. This contract modification imposed by the state is therefore clearly not appropriate to the non-applicable public purpose of protecting these residents' commercial speech.

In sum, even if the Court agrees that A.R.S. § 33-1808(F) and/or § 33-441 invalidate the "for sale" sign provision in Section 12.3 of the CC&Rs, the impairment to the contractual rights of PC Village and Pine Canyon residents would far outweigh the public purposes identified by the trial court, one of which is not even applicable in this non-governmental context. The character of this contractual modification is therefore not appropriate to the public purpose of assisting the Hawks in selling their property, especially where they have benefitted for years from the very same CC&R provision they now seek to avoid. Reversal and remand by this Court is required.

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING THE FULL AMOUNT OF APPELLEES' ATTORNEYS FEES.

A. Standard of Review.

Appellees first inaccurately claim that Appellant did not mention the standard of review in its Opening Brief. Appellant cited the exact case cited by Appellees, *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 569, 155 P.3d 1090, 1093 (App. 2007), for the proposition that the awarding of attorneys' fees is discretionary with the court. (OB at 25). Appellant also argued throughout that section that the trial court abused its discretion by awarding the full amount of requested fees.

B. The Trial Court Abused Its Discretion in Awarding the Full Amount of Appellees' Attorneys Fees.

Appellees claim they were entitled to an award of all their attorneys' fees because: (a) the fees were comparable to those Appellant incurred in defending the action; (b) the issues were novel; and (c) their block billed time was sufficiently detailed. Appellees also say the Court can't consider the trial court's award of fees for time billed by administrative and legal assistants because the issue was not raised below.

Although a trial court has discretion in awarding fees, the fee award must be reasonable under the factors listed in *Schweiger v. China Doll Restaurant,* 138 Ariz. 183, 187 673 P.2d 927, 931 (App. 1983). The time actually spent on the case *by opposing counsel* is not a factor under *China Doll*, and it should not

be considered. Nor would it make sense, as the total time spent on a case by opposing counsel is not necessarily reflective of the amount of fees they would actually seek in an attorney fee award (could they have done so). This evidence and argument was therefore irrelevant and prejudicial.

The fact that the issues in this litigation are novel cuts both ways. Generally, requiring the losing party in such cases to pay ***all*** of the attorneys fees for the other side "chills" future efforts to clarify legal ambiguities and discourages future litigants with tenable claims from litigating legitimate contract issues for fear of incurring liability for substantial amounts of additional legal fees. Such a result is not favored in the law and should be considered by the court when awarding fees. *Fulton Homes*, 214 Ariz. at 569, 155 P.3d at 1093. The trial court failed entirely to consider this chilling effect when it awarded Appellees' full amount of fees.

Finally, notwithstanding Appellees' claims to the contrary, block billing does not meet the requirement of *China Doll* that an attorney must set forth the time spent in providing the service. 138 Ariz. at 188, 673 P.2d at 921. Broad summaries of the work done and time incurred are clearly insufficient. *Id.*

As to whether the trial judge erred in awarding attorneys fees for administrative work performed by legal assistants (for whom no explanation was provided as to their training and qualifications), Appellant concedes this

argument was not raised below. But in light of the Court's ability to consider an attorney's ethical obligations regarding billing, *see* E.R. 1.5, Arizona Supreme Court Rule 42, this portion of the billing can and should be considered in determining whether the total fee was reasonable.

CONCLUSION

For the reasons above and in the Opening Brief, Defendant/Appellant PC Village respectfully requests the Court to vacate the trial court's orders and judgment in the Hawk's favor, and to remand for further proceedings.

DATED this 6th day of November, 2012.

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

By /s/ Lori L. Voepel

J. Gary Linder
Lori L. Voepel
2901 North Central Avenue, Suite 800
Phoenix, Arizona 85012

Attorneys for Defendant/Appellant
PC Village Association, Inc.

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 **6,943** 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).

November 6, 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 6th day of November, 2012, she caused the original and six copies of the foregoing REPLY BRIEF to be electronically filed through AZ TurboCourt with the Clerk of the Court and that she caused two copies of the foregoing brief to be deposited in the United States Mail, postage prepaid, to:

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

/s/ Lori L. Voepel
Lori L. Voepel

2994055.1