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. CV2011-00776

AMICUS CURIAE BRIEF

Richard V. Mack, AZ Bar No. 013313
Rmack@mackazlaw.com
Scott M. Drucker, AZ Bar No. 020964
Sdrucker@mackazlaw.com
MACK DRUCKER & WATSON, P.L.C.
3200 N. Central Avenue, Suite 1200
Phoenix, Arizona 85012
Telephone: (602) 778-9900
Fax: (602) 778-9947
Attorneys for the Arizona Association of REALTORS®

K. Michelle Lind, AZ Bar No. 013300
Michellelind@aaronline.com
Arizona Association of REALTORS®
255 E. Osborn Road, Suite 200
Phoenix, Arizona 85012
Telephone: (602) 248-7787
Fax: (602) 351-2474
General Counsel for the Arizona Association of REALTORS®

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INTRODUCTION: THE ARIZONA ASSOCIATION OF REALTORS®' INTEREST IN THIS LITIGATION

This brief is being filed by the Arizona Association of REALTORS® as *amicus curiae.* The Arizona Association of REALTORS® ("AAR") is the largest trade association in Arizona, representing approximately 38,000 Arizona REALTORS® belonging to 21 local associations. Members are active real estate licensees from all areas of real estate, including residential, commercial, property management, and relocation. The vision and goals of AAR are closely aligned with the National Association of REALTORS® ("NAR"), an entity that maintains in excess of one million members. As a member of NAR, AAR's bylaws and governing documents are in full compliance with the bylaws and policies of NAR, an entity similarly dedicated to helping millions of Americans achieve the dream of home ownership.

To attain its goals, AAR is involved in a variety of aspects of the real estate industry, including the education and legal guidance of real estate professionals, legislative policy-making, the creation and maintenance of professional standards, and the dissemination of real estate-related information to AAR members, as well as to the general public. Through these means, the Association champions not only the rights of its members, but an entire state of homeowners. AAR takes its responsibilities seriously and vigorously seeks to protect the rights of its members

and homeowners against oppressive restraints on alienation, as well as restrictions that undermine society's interest in the free flow of commercial information.

Clearly, the conveyance of information is critical to facilitating the purchase and sale of real property. To acquire any property, prospective purchasers must first know that the property is for sale. Similarly, to realize the greatest purchase price, sellers must inform the largest possible audience that a home is available for purchase. As the United States Supreme Court has recognized, perhaps the most valuable and cost effective manner to communicate this commercial information is through the use of a simple "For Sale" sign placed in the yard of the property to be sold. *See Linmark Assoc., Inc. v. Township of Willingboro.*, 431 U.S. 85, 93, 97 S. Ct. 1614, 1618 (1977).

This state's legislature has codified the import of the "For Sale" sign as a pivotal method of communication, expressly permitting its use, regardless of restrictions imposed by applicable community documents. *See* A.R.S. § 33-1808, A.R.S. § 33-441 and A.R.S. § 33-1261(C). Arizona's public policy unquestionably favors the free flow of commercial information. At issue here is the application of §§ 33-1808 and 33-441 to pre-existing covenants, conditions and restrictions. Specifically, this Court must decide whether the statutes amount to an unconstitutional impairment of a contractual obligation. Because an affirmative conclusion to this inquiry would adversely impact a homeowner's ability to sell a

property for the highest price, as well as a buyer's ability to secure information, a blanket prohibition against the use of "For Sale" signs would substantially impair the goals of AAR, to the detriment of its members as well as home buyers and sellers throughout Arizona. It is consequently imperative that this Court consider the significant and legitimate public benefit underpinning the use of "For Sale" signs in determining the application of legislation that directly impacts not only every single Arizona homeowner, but also the livelihood of its 38,000 Realtors®. See U.S. Census Bureau, 2010 Census Interactive Population Search (2010).

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

The relevant facts are not in dispute. Plaintiffs, Robert and Cecelia Hawk, are the owners of real property located in the Pine Canyon community in Flagstaff, Arizona. (Index of Record "IR" 1). The Pine Canyon subdivision, which is governed by the PC Village Association, Inc. ("PC Village"), is subject to a Declaration of Covenants, Conditions and Restrictions (the "CC&Rs"). (IR 1). These CC&Rs, originally recorded in the Coconino County Public Records in 2002 and amended in 2004, state in part:

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

(IR 10).

On August 16 and August 17, 2011, the Hawks posted on their Pine Canyon property a "For Sale" sign, not exceeding eighteen by twenty-four inches. (IR 1). PC Village removed the "For Sale" sign on both occasions claiming it violated the CC&Rs. (IR 1). On September 15, 2011, the Hawks initiated litigation in the Coconino County Superior Court against PC Village, seeking declaratory and injunctive relief prohibiting PC Village from removing the aforementioned "For

Sale" sign and declaring that the applicable portion of the CC&Rs prohibiting the use of "For Sale" signs in Pine Canyon is "illegal, void and unenforceable." (IR 1). The basis for the Hawks' position is that A.R.S. §§ 33-1808 and 33-441 expressly permit the positing of a "For Sale" sign. (IR 1). The applicable portions of these statutes state:

> **33-441. <u>For sale signs; restrictions unenforceable</u>**
>
> A. A covenant, restriction or condition contained in any deed, contract, security agreement or other instrument affecting the transfer or sale of any interest in real property shall not be applied to prohibit the indoor or outdoor display of a for sale sign and a sign rider by a property owner on that person's property, including a sign that indicates the person is offering the property for sale by owner. The size of a sign offering a property for sale shall be in conformance with the industry standard size sign, which shall not exceed eighteen by twenty-four inches, and the industry standard size sign rider, which shall not exceed six by twenty-four inches.
>
> 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. This section does not apply to timeshare property and timeshare interest as defined in section 33-2202.
>
> **33-1808. <u>Flag display; political signs; caution signs; for sale, rent or lease signs; political activities</u>**
>
> F. Notwithstanding any provision in the community documents, an association shall not prohibit or charge a fee for the use of, placement of or the indoor or outdoor display of a for sale, for rent or for lease sign and a sign rider by an association member on that member's property in any combination, including a sign that indicates the member is offering the property for sale by owner. The size of a sign offering a property for sale, for rent or for lease shall be in conformance with the industry standard size sign, which shall not exceed eighteen by twenty-four inches, and the industry standard size

> sign rider, which shall not exceed six by twenty-four inches. This subsection applies only to a commercially produced sign, and an association may prohibit the use of signs that are not commercially produced. With respect to real estate for sale, for rent or for lease in the planned community, an association shall not prohibit in any way other than as is specifically authorized by this section or otherwise regulate any of the following:
>
> > 1. Temporary open house signs or a member's for sale sign. The association shall not require the use of particular signs indicating an open house or real property for sale and may not further regulate the use of temporary open house or for sale signs that are industry standard size and that are owned or used by the seller or the seller's agent.

Following cross-motions for summary judgment and oral argument on the motions, the trial court issued a signed ruling on March 26, 2012 entering summary judgment in the Hawks' favor and granting their request for declaratory and injunctive relief. (IR 24). By way of the trial court's Under Advisement Ruling, it found: (1) the statutes did not improperly apply retroactively to the CC&Rs because "the legislature can pass laws which affect the rights of parties to contracts for future matters which follow the enacted laws and which are not already in litigation;" (2) "the interpretation and application of the statutes to the CCRs does not constitute a significant impairment of the contractual relationship between the parties;" and (3) even if such a significant impairment existed, "there is a legitimate public purpose behind the legislation which justifies application of the statutes to the CCR's in this case." (IR 24).

On April 23, 2012, PC Village filed a Notice of Appeal (IR 30), which it thereafter amended on June 12, 2012 to incorporate the signed Judgment executed by the trial court on May 24, 2012.

LEGAL ARGUMENT

I. A.R.S. § 33-1808(F) OPERATES PROSPECTIVELY (NOT RETROACTIVELY) TO EVENTS THAT AROSE AFTER ITS ENACTMENT.

Appellant argues that A.R.S. § 33-1808 (F) applies retroactively to the Pine Canyon CC&Rs to unconstitutionally impair a contractual obligation. Appellant does not, because it cannot, sustain its burden of proving such unconstitutionality. *See Hall v. A.N.R. Freight Sys., Inc.*, 149 Ariz. 130, 133, 717 P.2d 434, 437 (1986) (burden of establishing unconstitutionality of statute "rests on the party challenging its validity"); *Phoenix Newspapers, Inc. v. Superior Court*, 180 Ariz. 159, 163, 882 P.2d 1285, 1289 (App. 1993) (statutes are presumed constitutional and courts "attempt to construe statutes in a constitutional manner when possible").

It is settled law in this state that a substantive legal right may be subject to retroactive impairment before it becomes a vested right. *Aranda v. Industrial Com'n of Arizona*, 198 Ariz. 467, 471, 11 P.3d 1006, 1010 (2000); *Hall*, 149 Ariz. at 138, 717 P.2d at 442 ("The rule is that any right conferred by statute may be taken away by statute before it has become vested."). A property right "vests" when "every event has occurred which needs to occur to make the implementation

of the right a certainty." *Aranda*, 198 Ariz. at 471, 11 P.3d at 1010. A vested property right is a right that is "actually assertable as a legal cause of action or defense or is so substantially relied upon that retroactive divestiture would be manifestly unjust." *Hall*, 149 Ariz. at 140, 717 P.2d at 444; *accord San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 200, 972 P.2d 179, 184 (1999). Vested rights are neither contingent nor expectant:

> [Rights] 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 some other event may prevent their vesting.

Aranda, 198 Ariz. at 471-72, 11 P.3d at 1010-11 (quoting *Steinfeld v. Nielsen*, 15 Ariz. 424, 465, 139 P. 879, 895 (1913)).

Moreover, a statute is not retroactive simply because it relates to past events or "antecedent facts." *Hall*, 149 Ariz. at 139, 717 P.2d at 443; *Tower Plaza Inv. Ltd. v. DeWitt*, 109 Ariz. 248, 250, 508 P.2d 324, 326 (1973), *en banc.* The legislature may, in fact, "enact laws that apply to rights vested before the date of the statute[, so long as such] laws…only change the consequences of future events." *San Carlos*, 193 Ariz. at 205, 972 P.2d at 189.

> All other considerations permitting, the legislature may provide, for instance, that a right vested before the statute is effective will be affected by the specified event occurring after the statute is effective. The legislature may not, however, change the legal consequence of events completed before the statute's enactment.

Tower Plaza, 109 Ariz. at 250, 508 P.2d at 326. Legislation may not change the rules governing the consequences of wholly completed past events, but it is not retroactive merely because it draws upon some antecedent fact for its operation.

For purposes of the retroactivity analysis, then, the pivotal inquiry is whether the statute at issue seeks to reach an operative event so wholly executed and complete as of the statute's effective date, as to constitute, on its own, a legally cognizable grounds for a lawsuit. Appellant identifies as the critical operative event, the "purchase of the property to which the CC&Rs were attached." [Opening Brief, p. 11] This event simply does not meet the criteria for a vested right. At the time of the respective purchases by Pine Canyon residents, no right existed to remove an as then nonexistent "For Sale" sign. Any such right was, at best expectant and contingent—expectant because it was dependent upon the law remaining the same, and contingent because it was "only to come into existence on an event or condition [(here, the placement of the sign)] which may not happen." *Aranda*, 198 Ariz. at 471-72, 11 P.3d at 1010-11.

Appellant possessed no right to enforce the CC&Rs until they were purportedly violated. The rights at issue here indisputably vested four years *after* the effective date of A.R.S. § 33-1808, when Appellees posted a "For Sale" sign and Appellant removed it. The purchase by Pine Canyon residents of their properties is merely an antecedent fact to which the legislation relates. Section 33-

1808 of the Arizona Revised Statutes thus operates only prospectively to events that occurred after its enactment.

II. A.R.S. § 33-441 APPLIES TO THE CC&Rs OF PC VILLAGE.

Pursuant to its express terms, A.R.S. § 33-441 broadly applies to covenants, restrictions or conditions "contained in any deed, contract, security agreement or other instrument affecting the transfer or sale of any interest in real property," expressly precluding the prohibition of "For Sale" signs. Significantly, this statute, unlike A.R.S. § 33-1808, does contain language permitting its retroactive application. Foreclosed from a retroactivity argument, Appellant nevertheless insists on the inapplicability of A.R.S. § 33-441, arguing that the CC&Rs are not contained in any deed or instrument affecting the sale of land. Appellant is wrong.

The deed executed by Mr. and Mrs. Hawk states that the conveyance is "subject to…conditions, restrictions, obligations and liabilities as may appear of record." As acknowledged by Appellant in its Opening Brief, "Pine Canyon is subject to CC&Rs originally *recorded* in 2002." The Hawks' deed thus expressly incorporates the properly recorded Pine Canyon CC&Rs, indisputably rendering the CC&Rs within the purview of A.R.S. § 33-441.[1]

[1] Even if the inclusion of the CC&Rs in the Hawks' deed was not determinative of this issue (it is), the CC&Rs clearly fall within the broad language of the statute, which applies to any "other instrument affecting the transfer or sale of any interest in real property." *Cf. Garden Lakes Comm. Ass'n, Inc. v. Madigan*, 204 Ariz. 238, 62 P.3d 983 (App. 2003) (finding architectural guidelines to be the type of

III. NEITHER A.R.S. § 33-1808 NOR A.R.S. § 33-441 CONSTITUTES AN UNCONSTITUTIONAL IMPAIRMENT OF A CONTRACTUAL RELATIONSHIP.

Appellant contends that A.R.S. § 33-1808 and A.R.S. § 33-441 amount to an unconstitutional impairment of a contractual obligation. To overcome the presumption of the constitutionality of a legislative enactment, Appellant must carry the burden of establishing the legislation in question is unconstitutional beyond a reasonable doubt, with any doubts to be resolved in favor of constitutionality. *McClead v. Pima County*, 174 Ariz. 348, 352, 849 P.2d 1378, 1382 (1992); *Hall*, 149 Ariz. at 133, 717 P.2d at 437 (burden of establishing unconstitutionality of statute rests on challenging party); *Phoenix Newspapers, Inc.*, 180 Ariz. at 163, 882 P.2d at 1289 (statutes are presumed constitutional and are construed in constitutional manner whenever possible). Appellant is patently incapable of sustaining this burden.

Although not quite a "dead letter," the seemingly absolute language of the Contract Clause is "not the Draconian provision that its words might seem to imply." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 240, 98 S.Ct. 2716, 2720 (1978); *see also Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428, 54 S.Ct. 231, 236 (1934) (prohibition of Contract Clause is not absolute and not to be read "with literal exactness like a mathematical formula"). Rather, the clause

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document affecting the transfer or sale of an interest in real property since they were enacted by powers created in the CC&Rs).

heeds to the state's "paramount" right "to protect the lives, health, morals, comfort and general welfare of the people" through the exercise of its police power." *Id.* at 241, 98 S.Ct. at 2721; *accord Phelps Dodge Corp. v. Arizona Elec. Power Coop., Inc.*, 207 Ariz. 95, 101, 83 P.3d 573, 597 (App. 2004) ("The State can impair contract obligations in the exercise of its inherent police power to safeguard vital public interests").

When analyzing a challenge to a law based upon the Contract Clause, Arizona courts employ a three-prong analysis, asking:

> 1. Has the state law operated as a substantial impairment of a contractual relationship?
>
> 2. If so, is there a significant and legitimate public purpose behind the legislation?
>
> 3. If a legitimate public purpose has been identified, is the adjustment of the rights and responsibilities of the contracting parties based upon reasonable conditions and of a character appropriate to the public purpose justifying the adoption of the legislation?

McClead, 174 Ariz. at 359, 849 P.2d at 1389, *citing Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12, 103 S.Ct. 697, 704 (1983) . This analysis leads to one inescapable conclusion: Neither A.R.S. § 33-1808 nor A.R.S. § 33-441 amount to an unconstitutional impairment of any contractual obligation.

A. **Neither A.R.S. § 33-1808 nor A.R.S. § 33-441 Substantially Impairs a Contractual Relationship.**

To prevail on a claim under the Contract Clause, Appellant must first satisfy the threshold inquiry by demonstrating that the statutes at issue substantially impair Appellant's contractual rights and obligations. Appellant does not, because it cannot, meet this burden.[2] As a matter of well-established law, state regulation "that restricts a party to gains it reasonably expected from the contract does not…constitute a substantial impairment." *Energy Reserves Group, Inc.*, 459 U.S. at 411, 103 S.Ct. at 704.

The substantial impairment inquiry turns upon the complainant's reasonable expectation of gains from the contract at issue. Where a party has no reasonable expectation that the law would remain the same, no substantial impairment exists. *See In re Dobert*, 192 Ariz. 248, 253, 963 P.2d 327, 332 (App. 1998) (because party lacked reasonable expectation that her beneficiary status would continue, her interest in remaining designated beneficiary was not substantially impaired by statute's revocation provision). Whether the industry affected by the complained-

[2] Significantly, the very obligation identified by Appellant as the basis for its claim, executory in nature with its terms to be performed in the future, is not a vested property interest sufficient to raise question of constitutionality. *S&R Properties v. Maricopa County*, 178 Ariz. 491, 498, 875 P.2d 150, 157 (App. 1993) (protectable property interest must be vested to raise claim of constitutionality); *accord Baker v. Ariz. Dep't of Rev.*, 209 Ariz. 561, 567, 105 P.3d 1180, 1186 (App. 2005); *Tower Plaza Inv. Ltd.*, 109 Ariz. at 253, 508 P.2d 329. Appellant's Contract Clause argument fails for this reason, alone.

of legislation has been regulated in the past is a fundamental question in determining the reasonableness of complainant's expectation that the law as it existed at the time of the contract at issue would not change in the future. *Energy Reserves Group, Inc.*, 459 U.S. at 411, 103 S.Ct. at 704; *see also Robson Ranch Quail Creek LLC v. Pima County*, 215 Ariz. 545, 553, 161 P.3d 588, 596 (App. 2007) (developer "could not have reasonably expected" that method of calculating discount for sewer connection fee would stay the same where fees were set by ordinance and highly regulated by county).

Where, as here, the industry is characterized by "pervasiveness of [] prior regulation," Appellant has, by definition, "no legitimate expectation that regulation would cease." *Baker v. Ariz. Dept. of Rev.*, 209 Ariz. 561, 566, 105 P.3d 1180, 1185 (App. 2005). Where an industry is highly regulated, the parties simply cannot reasonably expect that their private contract will remain unaffected by government directive. Planned communities and homeowner associations are, in fact, creatures of statute, their powers and duties being largely defined by legislation. *See* A.R.S. §§ 33-1802(1), 1803, 1804, 1805, 1807, 1808, 1809, 1810. As stated in a Senate Fact Sheet regarding SB 1062:

> Many aspects of HOAs are directly governed by Arizona statute, such as the Planned Communities statutes… The Planned Communities statutes took effect in 1994 and constitute the first regulations pertaining specifically to the formation and operation of master planned community HOAs. Currently, these statutes address assessment increases, penalties, open meetings, disclosure of

> association records, resale disclosure, penalty and assessment liens, foreclosures, flag and political sign display, vehicle parking and certain affairs of the board of directors.

See Ariz. Sen. Fact Sheet, 2007 Reg. Sess., SB 1062 (February 20, 2007).

The legislature continues to balance the interests of HOAs as a whole against the rights of their respective members. In fact, Section 33-1808, addressing flag display, political signs, caution signs and "for sale" signs, was added in 2002, and has been amended four times (in 2004, 2006, and twice in 2007). *See* LAWS 2002, Ch. 96, § 2; LAWS 2004, Ch. 299, § 1; LAWS 2006, Ch. 75, § 2; LAWS 2007, Ch. 82, § 1; LAWS 2007, Ch. 228, § 2. Most recently, in April 2011, seven bills governing community associations were passed and signed into law by the governor, two of which specifically address the placement of signs.[3] Notably, at the time the November 2002 CC&Rs of PC Village were being drafted, PC Village was on notice, by way of a report published by the Arizona Legislature Homeowner Association Study Committee in 2000, that legislative changes to Arizona's planned community statutes were imminent. *See* Arizona Legislature

[3] The subject bills included: (1) HB2245 which allows persons attending HOA meetings to tape record and videotape portions of the meeting; (2) HB2609 which allows for the placement of signs, including political signs; (3) HB2717 which prohibits an HOA from charging fees for the placement of signs; (4) SB1148 which asserts that the Department of Fire, Building and Life Safety enforces the statutes regulating HOAs; (5) SB1149 which limits the document fees to be charged by an association in the resale of property; (6) SB1326 which allows for front and back yard display of flags; and (7) SB1540 which regulates the dissemination of political flyers.

Homeowner Association Study Committee, Homeowner Association Study Committee 2000 Final Report (2000).[4] Appellant PC Village, operating in an indisputably highly regulated environment, could simply have had no legitimate expectation that the legislature would not regulate "For Sale" signs. The legislature's adoption of SB 1062 did not constitute a substantial impairment of the association's contract with its members.

Further, the express language of the CC&Rs themselves precludes any cogent argument by Appellant of a reasonable expectation that its CC&Rs would not be impacted by future laws. The wording of the very section of the CC&Rs 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*." *See* R. 10, Ex.1 sec. 12.3(c) (emphasis added). The covenant's language thus affirmatively

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[4] In 2000, the President of the Arizona Senate formed a Homeowner Association Study Committee with the stated purpose being:

> To (1) review the effectiveness of current homeowner association laws in ensuring the rights of homeowners are protected; (2) study different types and policies of homeowner associations; (3) examine the role of management companies hired by homeowner associations; (4) discuss potential remedies for disputes involving homeowners and homeowner associations; and (5) submit a report of its findings and recommendations.

See Arizona Legislature Homeowner Association Study Committee, Homeowner Association Study Committee 2000 Final Report (2000). The recommendations of the Committee were consolidated into a report, presented to the legislature and ultimately used to shape future legislation.

acknowledges that laws either in existence or to be enacted will override the prohibition. Moreover, section 18.3 of the CC&Rs provides that if one of its provisions becomes invalid, that provision is to be severed from the CC&Rs and given no force or effect, and the remainder of the declaration "shall be construed as if the invalid part was never included therein…" *See* R. 10 Ex. 1 sec. 18.3. Read together, these sections conclusively dispose of any objectively reasonable expectation on the part of Appellant that the law would cease to evolve, potentially invalidating the very portion of the CC&Rs currently at issue. *See Energy Reserves Group*, 459 U.S. at 416, 103 S.Ct. at 707 (stating that severance provision "could be interpreted to incorporate all future state [] regulation, and thus dispose of the Contract Clause claim" altogether).[5]

B. **There is a Significant and Legitimate Public Policy Behind the Legislation.**

Even if the statutes at issue substantially impaired the parties' obligations under the CC&Rs (they do not), the statutes are nevertheless constitutional as there exists "a significant and legitimate public purpose behind the regulation[s]" and the law's "adjustment of the rights and responsibilities" is "reasonable" and "appropriate to the public purpose justifying the legislation's adoption." *Baker*,

[5] The provision of the CC&Rs at issue is relevant for one more equally determinative and most basic reason. It constitutes such a minor portion of the CC&Rs as a whole that any impairment of it simply cannot meet the standard of "substantial impairment" of the parties' overall contractual obligations.

209 Ariz. at 565, 105 P.3d at 1184, *citing Energy Reserves Group*, 459 U.S. at 411-12, 103 S.Ct. at 704-05. These standards apply because, notwithstanding the Contract Clause, a state "continues to possess authority to safeguard the vital interests of its people." *Baker*, 209 Ariz. at 566, 105 P.3d at 1185.

In making this determination concerning economic and social regulation, "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Energy Reserves Group, Inc.*, 459 U.S. at 412-13, 103 S.Ct. at 705. The Arizona Supreme Court has articulated a strong presumption in favor of the validity of challenged legislation and a heavy burden carried by the complainant:

> The right of contract may be regulated by proper use of the police power of the state. Legislation in aid of this police power carries with it a strong presumption of validity placing the burden of proof upon him who attacks it. It is not the province of the courts to review either the wisdom or practicability of the Amendment, nor does the earnest conflict of opinion on these matters bring it within judicial cognizance. *Such legislation can be annulled by court decision only if it is palpably in excess of legislative power, if it is without any rational basis, and if on no theory could it contribute to the public health, welfare or safety*.

American Fed. of Labor v. American Sash & Door, 67 Ariz. 20, 30-31, 189 P.2d 912, 918 (1948) (emphasis added). Appellant cannot sustain this burden.

If the statutes at issue here at all impair Appellant's contractual interests (they do not), such impairment is prompted by significant and legitimate state interests in both promoting the housing market, which is vital to the economy of

this state, and in assisting property owners in selling their homes, likely their greatest capital asset, especially in a depressed real estate market. The overall economic downturn in Arizona since 2008 is well documented, and the unprecedented number of mortgage foreclosures is also subject to judicial notice by this Court. Financial pressures on today's homeowners are extraordinary to move their properties quickly and as expeditiously as possible in this distressed market.

To an association member who wants to sell his or her residence in a planned community, the need to post a "For Sale" sign cannot be underestimated, either from a practical or emotional standpoint. In fact, according to data published by the National Association of Realtors, in 2011, 77% of all sellers nationwide utilized a yard sign in marketing their homes, and the "For Sale" sign was the single most common method used to market properties listed for sale. *See* Profile of Home Buyers and Sellers (National Association of REALTORS®) 2011, at 101 and 110. "For Sale" signs are not only inexpensive and convenient, they are effective. According to NAR data, 55% of all home buyers last year used a yard sign as a source of information in their housing search. *Id.* at 46.

Methods of advertisement apart from "For Sale" signs are simply no substitute:

> Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed [by their use].

> The options to which sellers realistically are relegated[,] primarily newspaper advertising and listing with real estate agents[,] involve more cost and less autonomy than "For Sale" signs…; are less likely to reach persons not deliberately seeking sales information…; and may be less effective media for communicating the message that is conveyed by a "For Sale" sign in front of the house to be sold. ... The alternatives, then, are far from satisfactory.

Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. at 93, 97 S.Ct. at 1618. Any ban on "For Sale" signs has a necessarily "deleterious effect on residents' ability to convey important information." *City of Ladue v. Gilleo*, 512 U.S. 43, 54, 114 S.Ct. 2038, 2044 (1994) (recognizing yard signs as especially critical "for persons of modest means" and for those who "intend[] to reach neighbors, an audience that [cannot] be reached nearly as well by other means").

Applying the standard set forth in *American Fed. of Labor, supra*, Appellant cannot prove that the laws at issue here are "palpably in excess of legislative power, …without any rational basis, and…on no theory could [they] contribute to the public health, welfare or safety." 67 Ariz. at 30-31, 189 P.2d at 918. To the contrary, the legislature's adjustment of the contractual obligations between the HOA and its members is reasonable and appropriate to the significant and legitimate public purposes behind A.R.S. §§ 33-1808 and 33-441. The homeowners' overriding interest here in effectively marketing their properties

indisputably takes precedence over Appellant's interest in maintaining certain aesthetics.[6]

C. **The Adjustment of the Rights and Responsibilities of the Contracting Parties is Based Upon Reasonable Conditions and of a Character Appropriate to the Public Purpose Justifying the Adoption of the Legislation.**

As to the third factor identified in *McClead*, the implementation of a narrowly tailored "For Sale" sign is certainly an appropriate mechanism to effectuate the legitimate public purpose behind A.R.S. §§ 33-1808 and 33-441. The statutes are narrowly tailored to permit only signage "in conformance with the industry standard size sign, which shall not exceed eighteen by twenty-four inches." *See* A.R.S. §§ 33-1808(F) and 33-441(A). Additionally, the statutes allow only "commercially produced" signs, and expressly authorize the association to "prohibit the use of signs that are not commercially produced." *Id.*

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[6] Notably, the PC Village CC&Rs specifically permit "signs used by Developer or any Related Party in connection with the development or sale of Lots, tracts or Condominium property of the Property." (IR 10). "For Sale" signs are thus permitted in Pine Canyon, provided that the sign is posted by the developer and not the individual homeowner. Appellant fails to explain how a sign used by the developer is not an eyesore, while a virtually identical sign is aesthetically offensive merely by virtue of being posted by a homeowner. Further, Appellant's assertions that the display of "For Sale" signs would negatively impact the aesthetic appearance of Pine Canyon and negatively impact the development economically is pure speculation, rejected by the trial court as being wholly unsupported. (IR 24).

Accordingly, homeowners are not permitted to post in their yard billboards, handmade signage or any sign outside of the industry norm.

In passing A.R.S. §§ 33-1808 and 33-441, the legislature intended to protect the constitutional rights of homeowners and permit a vital form of commercial speech that provides homeowners with a valuable tool in today's distressed real estate market. The simplest and least expensive way to accomplish these objectives is through the allowance of a reasonably sized and professionally manufactured "For Sale" sign. The adjustment of the rights and responsibilities between the homeowners' association and its members is therefore entirely reasonable.

In response to the above, Appellant asserts that: (1) homeowners' associations cannot interfere with an individual's rights because homeowners choose where to purchase; and (2) the trial court's reliance on the *Linmark* decision is misplaced as it improperly treats PC Village as a state actor. Appellant's arguments are unpersuasive.

1. Membership Within a Community Association is Not Necessarily Consensual.

Appellant contends that community associations cannot be deemed to interfere with an individual's constitutional rights because individuals choose of their own volition to live in a planned community. Appellant misses the mark.

Voluntary consent to community associations and their mandatory restrictions is largely fictional in housing markets such as Arizona.

First, the pervasiveness of planned communities in this state significantly limits the availability of comparable housing outside of that governed by homeowners' associations. There are in excess of 9,000 community associations in Arizona and the majority of new housing developments in Arizona are governed by such associations. *See* Community Associations Institute ("CAI") Industry Data (http://www.cai-az.org/Community-Association-Market-&-Facts~32013~10844.htm) (last visited August 31, 2012). The options of a home buyer are therefore considerably restricted. Not everyone seeking to purchase a home has the luxury of narrowing their search to non-HOA communities.

Further, the governing documents of a homeowners' association are not the product of arm's length negotiation between two parties sharing equal bargaining power. Instead, these documents, which run with the land, are created by the developer who initially establishes the association, without contribution from the individuals that will ultimately reside in the community. Homeowners therefore have no say as to the character, scope or extent of the governing documents. Nor is their express consent to (or even actual knowledge of) the terms necessary to bind the homeowners. Rather, implied notice of such restrictions is imputed to the homeowners by virtue of recordation of the CC&Rs at the county clerk's office.

Finally, modification of these restrictions is often procedurally difficult, requiring the consent of a supermajority of community members. Proposed amendments to the CC&Rs of Pine Canyon, in fact, require approval of "two-thirds of all of the Members," as well as approval "by a majority of the Board."

Appellant would have this Court believe that all homeowners within its community willingly contract to allow the community association to abridge their constitutional rights. They do not. Instead, Pine Canyon homeowners are presumably attracted by the community's amenities and location, and have little choice but to bear the restrictions imposed by its association. Fictitious legal notice of the PC Village restrictions through their recordation simply does not import consent by the homeowners to a lesser degree of constitutional protection. Appellant's arguments must fail.

2. Homeowners' Associations Should be Considered State Actors Subject to Judicial Review and Constitutional Restraints.

Undeniably, a state actor may not prohibit "For Sale" signs. *See Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed. 2d 155 (1977)(New Jersey township ordinance prohibiting "For Sale" signs violates First Amendment.) PC Village attempts to distinguish *Linmark* and its progeny by claiming that it is not a "state actor" and therefore the First Amendment does not apply. However, the analysis is not that simple.

There are many scenarios in American Jurisprudence where private entities are deemed to be "state actors" subject to constitutional scrutiny. *See Marsh v. Alabama*, 326 U.S. 501, 66 S. Ct. 276 (1946)(privately owned "company town" was so similar to a municipality that the owner was deemed to be a state actor for First Amendment purposes); *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 121 S.Ct. 924 (2001)(non-profit interscholastic athletic association deemed a state actor owing to the pervasive entwinement of state school officials in the association's structure)*; Petersen v. Talisman Sugar Corp.*, 478 F.2d 73, (5th Cir. 1973)(private owner of migrant labor camp was deemed to be a state actor for constitutional purposes.); *Guttenberg Tax Payers and Rent Payers Association v. Galaxy Towers Condominium*, 297 N.J. Super. 404, 688 A.2d 156 (N.J. 1996)(New Jersey constitution interpreted so as to preclude condominium association from suppressing political speech through flyers and hand bills.)[7]

[7] Additionally, where a homeowner association resorts to the judicial process to enforce restrictive covenants, that conduct can be construed as state action mandating constitutional protection. *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948)(by seeking judicial enforcement of racially offensive deed restrictions, the plaintiffs became state actors such that constitutional protections applied.); *Gerber v. Long Boat Harbour North*, 757 F.Supp. 1339 (M.D. Fl. 1991)(judicial enforcement of deed restrictions is construed as state action and brings private conduct within the scope of the first and fourteenth amendments.)

Community associations exercise a number of powers traditionally associated with local governments.[8] Like traditional governments, homeowners' associations start from the fundamental mandate that, by virtue of residence, homeowners pay mandatory assessments akin to taxes in exchange for services and protection. Community associations regulate both structure and use of property in a manner comparable to zoning, and implement rules and restrictions for the use of common property such as roads, open areas, and recreational facilities. In fact, associations themselves, not the residents collectively, own the common areas within the community, much like the federal government's ownership of national parks. Moreover, community associations have sanctioning power and can impose fines and assessments, suspend voting powers or restrict common facility use privileges, representing quasi-governmental powers that directly affect individual property rights. *See* Robert H. Nelson, The Privatization of Local Government: From Zoning to RCAs, in Residential Community Associations: Private Governments in the Intergovernmental System, note 18, at 13 (Advisory

[8] Legal scholars opine that municipalities have encouraged the formation of community associations in response to reduced funding. Unable to service the needs of its citizens, politicians urge developers to provide resources they are financially struggling to furnish. The homeowners themselves then pay the community association directly for these services, removing the economic burden from the financially strapped municipality. All the while, local government is still able to attract new residents, thereby increasing the city's population and tax base. *See* Sharon L. Bush, Beware the Associations: How Homeowners' Associations Control You and Infringe upon your Inalienable Rights, 30 W. St. U. L. Rev. 1, 2 (Spring 2003).

Commission on Intergovernmental Relations ed., 1989)("Because RCAs [Residential Community Associations] are communities of people that perform public functions, they are necessarily actors in interlocal intergovernmental relations.")

Here, the CC&Rs at issue require PC Village to provide the following functions typically reserved for a municipality:

- The power to adopt, amend or repeal rules and regulations governing the use and/or occupancy of the community and the ability to assess fines and penalties to enforce those rules and regulations. (CC&Rs § 3.1)
- The obligation to keep and maintain financial records and make those available to members. (CC&Rs §§ 3.14 and 3.15)
- The ability to establish and collect various assessments. (CC&Rs § 6)
- Maintenance, repair and replacement of the common areas. (CC&Rs § 10.2)
- Maintenance, repair and replacement of the sewer system servicing the association in addition to charging for this utility service. (CC&Rs § 10.2)
- The power to establish rules, regulations and restrictions as to architectural standards and guidelines. (CC&Rs § 11.3)

- The power to inspect and approve construction in progress. (CC&Rs § 11.7)
- The power to restrict each lot to residential purposes only. (CC&Rs § 12.1)
- The power to regulate signs. (CC&Rs § 12.3)
- The power to restrict animals present in the community. (CC&Rs § 12.4)
- The power to regulate and abate potential nuisances. (CC&Rs § 12.5)
- The power to dictate where boats and motor vehicles can be parked. (CC&Rs § 12.6)
- The power to regulate outdoor lighting. (CC&Rs § 12.7)
- The power to regulate the presence of garbage or trash. (CC&Rs § 12.9)
- The power to restrict fires except in designated areas. (CC&Rs § 12.12)
- The ability to restrict further divisions of the property within the community. (CC&Rs § 12.14)

Through the CC&Rs, PC Village has taken on many of the functions typically reserved for a municipality. Therefore PC Village may be considered a state actor under the *Marsh* company town doctrine. Accordingly, hindering an owner's ability to utilize a "For Sale" sign is prohibited by the First Amendment.

CONCLUSION

For all of the foregoing reasons, AAR respectfully requests that this Court uphold, in all respects, the lower court's decision in this case. This result is mandated by well-settled case law, supported by reasoned public policy and is in the best interest of the millions of homeowners that reside in Arizona, as well as its roughly 38,000 REALTORS®.

RESPECTUFLLY SUBMITTED this **15th** day of November, 2012.

MACK DRUCKER & WATSON, P.L.C.

/s/ Richard V. Mack
Richard V. Mack (AZ State Bar No. 013313)
Scott M. Drucker (AZ State Bar No. 020964)
3200 N. Central Avenue, Suite 1200
Phoenix, Arizona 85012
Attorneys for the Arizona Association of REALTORS®

K. Michelle Lind, (AZ State Bar No. 013300)
Arizona Association of REALTORS®
255 E. Osborn Road, Suite 200
Phoenix, Arizona 85012
General Counsel for the Arizona Association of REALTORS®