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. CV2011-00776 No.

APPELLANT'S RESPONSE TO AMICUS CURIAE BRIEF

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INTRODUCTION

As noted in Appellant's Objection, the brief submitted by the Arizona Association of Realtors (AAR) largely duplicates the arguments made by Appellees in their Answering Brief. In addition to making the same three central arguments as the Hawks, virtually all of the sub-arguments (A, B, etc.) are the same in both briefs. Most importantly, the *content* of the arguments is virtually the same, not just the titles. As a result, most of the arguments in this Response Brief are similar to those contained in Appellant's Reply Brief, with the exception of a few additional points.

LEGAL ARGUMENT

I. THE TRIAL COURT'S RETROACTIVE APPLICATION OF A.R.S. § 33-1808 WAS IMPROPER BECAUSE PC VILLAGE'S CONTRACTUAL RIGHTS VESTED AT THE RECORDING AND AMENDMENT OF THE CC&RS AND THE PURCHASE OF PROPERTY IN PINE CANYON BY RESIDENTS.

AAR correctly recognizes that once a right is vested, "legislation may not interfere by retroactively altering the law that applies to completed events." *Aranda v. Indus. Comm'n. of Ariz.*, 109 Ariz. 467, 471, ¶ 16, 11 P.3d 1006, 1010 (2000). AAR is also correct that a "property right 'vests' when every event has occurred which needs to occur to make the implementation of the right a certainty." *Id.* ¶ 18. AAR misses the mark, however, in its analysis of when the rights in question here became vested. As PC Village has already

explained in its Opening and Reply Briefs, this issue boils down to a few basic syllogisms.

At issue is PC Village's right to enforce the "for sale" sign provision of the CC&Rs. It is beyond dispute that the CC&Rs are a contract. *Ahwatukee Custom Estates Management Ass'n, Inc. v. Turner*, 196 Ariz. 631, 634, ¶ 5, 2 P.3d 1276, 1279 (App. 2000) (recognizing that CC&Rs are a contract). Thus, PC Village's right to enforce the "for sale" sign provision of the CC&Rs derives from contract.

It is also beyond dispute that contractual rights vest upon execution of the contract. *Ward v. Chevron U. S. A. Inc.*, 123 Ariz. 208, 209, 598 P.2d 1027, 1028 (App. 1979) ("The rights and obligations of the parties vested on the date the agreements were executed."). In *Ward*, for example, the court held that the law in question was not retroactively applied because it became effective two years after contract formation, which "would burden the contracts with new obligations that did not exist at the time they were executed." *Id.*; *accord Nickerson v. Green Valley Recreation, Inc.*, 228 Ariz. 309, 316, ¶ 13, 265 P.3d 1108, 1115 (App. 2011) (recognizing that retroactive application of statute is improper where it "would affect the parties' substantive rights as established when the covenants were created"); *cf. Verma v. Stuhr*, 223 Ariz. 144, 152, ¶ 32, 221 P.3d 23, 31 (App. 2009) ("[w]hen the statute is in place at the time the

contract is executed, it does not violate the Constitution"). Thus, PC Village's enforcement rights were clearly vested upon execution of the contract with Pine Canyon residents.[1] And subsequently enacted legislation may not retroactively apply to interfere with those rights.

AAR wrongly argues that PC Village's contractual right to enforce the CC&Rs was merely "expectant" or "contingent" until presented with a violation. As PC Village explained in its Reply Brief, AAR is confusing the notion of accrual (i.e., when a party may assert a cause of action in tort) with the vesting of rights under a contract. Correcting this confusion shows that the recording of the CC&Rs and the purchase of property by residents in Pine Canyon were more than "antecedent facts" to which the statute relates, but are in fact the "operative events which result in vesting" the contractual rights. *See Aranda*, 109 Ariz. at 472, 11 P.3d at 1011. Moreover, 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

[1] As noted in Appellant's Reply Brief, 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.

community, all "inure[d] to the benefit of" the Hawks as purchasers of the property. (R. 18, Ex. B, p. 2). Like all Pine Canyon residents, the Hawks benefitted throughout their tenure from the right to enjoyment of living in a community unfettered by "for sale" signs.

Because PC Village's enforcement rights were vested, subsequently enacted legislation may not retroactively interfere with them. *See Aranda*, 109 Ariz. at 471, ¶ 16, 11 P.3d at 1010. The trial court's retroactive application of A.R.S. § 33-1808 to interfere with PC Village's contractual rights was therefore improper.

II. THE TRIAL COURT IMPROPERLY CONSTRUED A.R.S. § 33-441 AS APPLYING TO THESE CC&RS, WHICH ARE NOT AN INSTRUMENT AFFECTING THE "TRANSFER OR SALE" OF PROPERTY.

AAR contends that this Court should construe A.R.S. § 33-441 as applying to the CC&Rs here. Such a construction would conflict not only with the plain language of the statute, but also with well-established property law.

First, the plain language of the statute shows that its application is limited to instruments affecting the "transfer or sale" of property—it does not include instruments that merely affect the ownership and usage of property. In matters of statutory construction, courts use "the language of the statute itself" as the polestar, giving meaning to "each word, phrase, clause and sentence . . . so that no part will be void, inert, redundant or trivial." *Yavapai-Apache Nation v.*

Fabritz-Whitney, 227 Ariz. 499, 504, ¶ 20, 260 P.3d 299, 304 (App. 2011). Here, the phrase "transfer or sale" signifies a document that is transactional in nature. And its predicate phrase "or other" indicates that all of the preceding items listed must be similar in character to fall within the meaning of the statute. This construction does not include instruments that merely *affect ownership and usage of property*, such as the CC&Rs in this case.

Indeed, if the legislature wanted to include <u>*all*</u> instruments affecting real property, it knew how to do so. *See, e.g.,* A.R.S. § 33-411(A) ("No instrument affecting real property gives notice of its contents to subsequent purchasers or encumbrance holders for valuable consideration without notice, unless recorded. . . ."). Rather, this statute's history shows that the legislature intended A.R.S. § 33-441 to apply only to "an instrument of <u>*conveyance*</u> of real property." *See* Arizona State Senate, Senate Fact Sheet for S.B. 1148, 49th Leg., 1st Reg. Sess. (June 15, 2009). Because the legislature intended to limit A.R.S. § 33-441's application to transactional instruments that convey property, this Court should decline AAR's invitation to give the statute a more expansive construction by including in its scope all documents *affecting* an interest in property. Such a broad construction would defy the statute's plain language by rendering the phrase "transfer or sale" meaningless. And it would impermissibly render § 33-1808(F)'s reference to "community documents"

superfluous by sweeping them into the meaning of § 33-441. *See Yavapai-Apache Nation*, 227 Ariz. at 504, ¶ 20, 260 P.3d at 304 ("statute should be construed in conjunction with other statutes that relate to the same subject or purpose"). Because the CC&Rs in this case are not an instrument of conveyance, they do not fall within the plain meaning of A.R.S. § 33-441.

Second, AAR argues that the deed's "subject to" clause assimilates the CC&Rs into the deed, bringing them within the meaning of § 33-441. Well-established property law shows this to be untrue. Whereas the Hawks were on constructive notice of the CC&Rs by way of the recording act, the deed's "subject to" clause merely placed the Hawks on actual notice. *Compare Federoff v. Pioneer Title & Trust Co. of Ariz.*, 166 Ariz. 383, 387, 803 P.2d 104, 108 (1990) (successor in interest is charged with constructive notice of properly recorded covenant), *with id.* at 387–86, 803 P.2d at 108–07 (references to use restrictions included in conveyance documents provide actual notice). AAR acknowledges this point in its brief, saying, "implied notice of such restrictions is imputed to the homeowners by virtue of recordation of the CC&Rs." [Amicus at 23.] Because the CC&Rs are enforceable separately from the deed, they are not a part of the deed. *See Federoff*, 166 Ariz. at 389, 803 P.2d at 110 ("fact that [CC&Rs] are not listed in subsequent grantees' deeds is not fatal to their enforcement"). Accordingly, the CC&Rs do not fall

within the scope of A.R.S. § 33-441 by virtue of the deed's "subject to" language.

Notably, the "subject to" clause also references "taxes," but AAR surely does not mean to argue that this is what makes tax requirements enforceable on the property owner. Rather, by purchasing the property, the Hawks simply entered the class of persons subject to certain requirements, such as property taxes and the CC&Rs. In sum, the CC&Rs in this case do not fall within the meaning of A.R.S. § 33-441(A) because they are not "contained in any deed, contract, security agreement or other instrument affecting the transfer or sale of any interest in real property."[2]

III. RETROACTIVE APPLICATION OF THESE "FOR SALE" SIGN LAWS WOULD RESULT IN AN UNCONSTITUTIONAL IMPAIRMENT OF CONTRACT.

If the Court finds that A.R.S. §§ 33-1808 and/or 33-441 retroactively invalidate Section 12.3 of the CC&Rs, applying those statutes would work an unconstitutional impairment of contract. All parties agree on the tripartite analysis this question entails in Arizona. *See Fund Manager v. City of Phoenix*

[2] AAR cites *Garden Lakes Community Ass'n, Inc. v. Madigan*, 204 Ariz. 238, 62 P.3d 983 (App. 2003), for the proposition that "architectural guidelines" are a type of document affecting the transfer or sale of real property. To the contrary, nowhere in that case was this issue raised. Nor did the court reach such a holding. Rather, the parties merely *assumed* that the guidelines in question (unlike the CC&Rs here) were part of the deed. *Id.* at 241, ¶ 13, 62 P.3d at 986.

Police Dep't Pub. Safety Personnel Retirement Sys. Bd., 151 Ariz. 487, 491, 728 P.2d 1237, 1241 (App. 1986) (citing *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411–12 (1983)). But AAR inaccurately touts certain "inescapable conclusions" that purportedly flow from this analysis. All three prongs show an unconstitutional impairment of contract.

A. Retroactive Application Of The "For Sale" Sign Laws Would Substantially Impair These Vested Contract Rights.

AAR argues there is no substantial impairment because PC Village cannot show a reasonable expectation that the CC&Rs would remain enforceable. It first claims that PC Village's contractual enforcement right is merely executory. [Amicus at 13 n.2.] As discussed above, this was a *vested contract* right—not one that was merely executory.

AAR next argues that PC Village had no reasonable expectation that the CC&Rs would remain enforceable because it is part of a highly regulated industry. Essentially, AAR argues that as highly regulated entities, HOAs are incapable of having a reasonable expectation that their contracts will remain enforceable. To the contrary, where rights are vested, even parties to a contract in a highly regulated industry have a reasonable expectation that those rights will not be impaired by state action. *See, e.g., Aranda*, 198 Ariz. at 472–73, ¶ 27, 11 P.3d at 1011–12 (new law regarding eligibility for workers compensation benefits could not be applied retroactively to divest inmates of benefits they had

already been receiving). The fact that HOAs may be highly regulated, standing alone, is insufficient to defeat PC Village's reasonable expectation that the CC&Rs would remain enforceable.

Moreover, despite the "highly regulated" nature of HOAs generally, here there was nothing to indicate that the legislature might seek to specifically regulate an HOA's ability to manage aesthetics. All of the regulations cited by AAR that are even remotely related to aesthetics were not enacted until *after* the CC&Rs in this case were executed. [Amicus at 14–15.] And none of the five purposes for the AAR-cited "Homeowner Association Study Committee 2000 Final Report" had anything to do with aesthetics. [Amicus at 16 n.4.] So, contrary to AAR's assertion, there was nothing to place PC Village (or its residents) "on notice" that this might be the subject of future regulation.

Finally, AAR argues that the plain language of the CC&Rs shows that PC Village had no reasonable expectation as to their continued enforceability. AAR cites Section 12.3(b) of the CC&Rs, which states, "[n]o sign of any kind shall be visible . . . except: . . . (b) signs required by legal proceedings, *or the prohibition of which is precluded by law*." [R. 1 at 1 (emphasis added).] Contrary to AAR's reading, this section was only meant to acknowledge that the "law in force *at that time* formed a part of [the] contract." *See Ward*, 123 Ariz. at 209, 598 P.2d at 1028 (emphasis added). It does not show that PC

Village expected *subsequently enacted* legislation to "override" any part of the CC&Rs. Likewise, the CC&Rs' severance clause was only meant to apply to provisions actually determined to be invalid based upon then-existing law.[3] Moreover, as shown above and in the primary briefs, PC Village's enforcement right cannot be deemed invalid because doing so would work an unconstitutional impairment of contract. Thus, no severance of the provision at issue occurred or was anticipated.

AAR also briefly claims that Section 12.3 "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.'" [Amicus at 17 n.5.] To the contrary, it is an undisputed fact that Pine Canyon residents placed a premium on the aesthetic appearance of that community when purchasing property there. [R. 18 at ¶¶ 8-10.][4] As noted in the Opening and Reply Briefs, the scope of the

[3] AAR cites *Energy Reserves Group, Inc.*, 459 U.S. at 416, for the notion that the presence of a severance clause (which is present in nearly every contract) could always be interpreted to dispose of a Contract Clause claim. [Amicus at 17.] By skipping over key words in that case, AAR fails to appreciate that *Energy Reserves Group, Inc.* specifically involved **state price regulations**, which the Court recognized as the subject of frequent legislative changes. *Id.* ("Price regulation existed and was foreseeable as the type of law that would alter contract obligations."). That is not the type of regulation at issue here.

[4] In the trial court, PC Village presented numerous (undisputed) affidavits from residents verifying that they had a reasonable expectation of enjoying life

impairment is not just the Hawks' "for sale" sign, because the impact would reach far beyond that single sign. Were that not the case, AAR would not be appearing as amicus curiae in this appeal. Everyone involved in this litigation knows full well that permitting the Hawks to post a sign will inevitably lead to the posting of "for sale" signs by other residents if and when they decide to leave.[5] This would substantially impact the community's aesthetic appearance, undermine the right of enjoyment of all remaining residents, and potentially affect property values by giving prospective purchasers the impression that it is an undesirable place to live.

In short, PC Village and the residents of Pine Canyon had reasonable expectations that the CC&Rs would remain enforceable, and residents purchased their property in reliance on their enforceability. Invalidating Section 12.3 of the CC&Rs works a substantial and unconstitutional impairment of contract.

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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.]

[5] And the littering of this community with "for sale" signs may prompt some residents to do just that.

B. No Public Policy Interest Justifies A Retroactive Application Of The "For Sale" Sign Laws To Substantially Impair Contractual Rights.

AAR relies on *American Federation of Labor v. American Sash & Door Co.,* 67 Ariz. 20, 189 P.2d 912 (1948), as the standard for whether the underlying policy interests at work here justify a retroactive impairment of contract. That case, which upheld the "right to work" amendment to the Arizona Constitution, notably pre-dates the U.S. Supreme Court's decision in *Energy Reserves Group, Inc.*, and is thus inapposite. By failing to appreciate this, AAR misstates the standard applied in Contract Clause cases.

The *American Federation of Labor* Court upheld the challenged law for the sole reason that it was supported by a rational basis. *Id.* at 40, 189 P.2d at 925. Today, the question is not whether there is merely a rational basis for state laws challenged under the Contract Clause. The question is whether the underlying policy interest is significant enough to justify a retroactive application that would substantially impair pre-existing contract rights. Modern jurisprudence on this issue shows that courts must *balance* these two interests. *See, e.g., Robson Ranch Quail Creek, LLC v. Pima Cnty.*, 215 Ariz. 545, 553, ¶ 35, 161 P.3d 588, 596 (App. 2007) (finding no substantial impairment and declining to address "whether any impairment would be justified by a valid exercise of the County's police power"). Moreover, the "right to work"

amendment at issue in *American Federation of Labor* differs significantly from the "for sale" sign laws at issue here. The "right to work" amendment affected every employment contract in the state, without exception. Here, retroactive application of the "for sale" sign laws would only reach those HOA communities with pre-existing "for sale" sign restrictions and the residents who have *freely chosen to live* in those communities. So although *American Federation of Labor* fails to articulate the appropriate standard for modern Contract Clause cases, it can still be read to show that the balance there tipped in favor of the constitutional amendment at issue. Conversely, the operative policy interests in this case are far less significant and are outweighed by the substantial impairment that would occur to the contract rights of PC Village and numerous remaining Pine Canyon residents.

AAR argues that the impairment here is justified by "state interests in both promoting the housing market . . . and in assisting property owners in selling their homes." [Amicus at 18–19.] However legitimate these interests may be in the abstract, they do not justify a retroactive impairment of contract rights in this case. For its argument, AAR cites statistics showing that in 2011, 77% of home sellers used "for sale" signs and 55% of home buyers relied on "for sale" signs in their search. [Amicus at 19.] These extrinsic statistics were not before the trial court and it would be inappropriate for this Court to rely on

them here. But assuming AAR succeeds in using them to justify a *prospective* application of the "for sale" sign laws, it fails to explain how a *retroactive* application will serve those interests.[6] Given that this is a matter of first impression, it is likely that restricting the use of "for sale" signs has not been a pervasive issue throughout the state, and is clearly limited to residents living in select planned communities. So precluding retroactive application of the "for sale" sign laws to communities with pre-existing "for sale" sign restrictions would at most have a *de minimus* effect on Arizona's housing market. By contrast, retroactive impairment of PC Village's contract rights would adversely affect an entire community's pre-existing interest in maintaining a sign-free environment. Thus, nothing indicates that the identified policy interests underlying this legislation are significant enough to justify the substantial impairment of contract that will occur if these laws are retroactively applied.

Finally, AAR argues that PC Village "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." [Amicus at 21

[6] AAR also cites two first amendment cases that recognized the importance of "for sale" signs in the context of a commercial speech analysis. [Amicus at 20.] But as explained in PC Village's Opening and Reply Briefs, because the issue here (i.e., impairment of contract) is wholly different from the question whether the state may constitutionally restrict commercial speech under the first amendment, those cases are inapposite.

n.6.] What AAR fails to grasp is that the notion of objective aesthetics is not at issue here. The issue is whether subsequently enacted legislation may retroactively operate to impair a contract that establishes the parties' agreed-upon notion of aesthetics. That is, the CC&Rs represent an agreement as to what is aesthetically pleasing or displeasing *according to the residents who have chosen to live in Pine Canyon*.

Moreover, to retroactively invalidate the "for sale" sign provision in the CC&Rs allows the Hawks to have their proverbial cake "and eat it too." Like every other Pine Canyon resident, the Hawks enjoyed the agreement's benefits during the time they lived in the community. They only seek to avoid its burdens now that they wish to move and the agreement no longer serves them. This is fundamentally unfair to the remaining residents and to PC Village.

This Court should find that retroactive application of these statutes is unconstitutional because there is no public policy interest that justifies a retroactive and substantial impairment of contract.

C. Retroactive Application Of The "For Sale" Sign Laws Is An Unreasonable Means Of Effectuating The Identified Policy Interest.

Assuming the Court reaches this prong of the analysis, it should find that retroactive application of these "for sale" sign laws is an unreasonable means of effectuating any identified policy interest. AAR argues that applying the "for

sale" sign laws retroactively is reasonable because: (1) homeowners have limited choices when it comes to purchasing in non-HOA communities, and (2) HOAs should be considered state actors subject to first amendment restrictions. These arguments fall far short of showing that a retroactive application of the "for sale" sign laws is reasonable.

First, even a limited choice is still a choice. Challenging the fact that homeowners have choices in deciding where to live, AAR again relies on statistics, but without providing any useful context. AAR states, "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." [Amicus at 23.] In addition to the fact that the Court cannot consider this extraneous evidence, these purported facts are unhelpful here because they do nothing to show whether all such associations have a similar "for sale" sign restriction in place, which is the crux of this matter. That is, despite the prevalence of HOAs, homeowners still have choices in deciding where to live -- whether it is between HOA and non-HOA communities, or between HOA communities that do or do not have "for sale" sign restrictions. That there is a substantial number of HOA communities in Arizona does not diminish the significance of these choices. Moreover, given the elite status of the Pine Canyon community and the

affluence of its members in particular, it should be presumed that *all* of these Pine Canyon residents – including the Hawks -- had such choices.

Second, it is a rare occasion that courts will treat an HOA as a state actor. This is not one of them. Not only is there no evidence of government entwinement, every case that AAR cites for the notion that PC Village should be treated a state actor is distinguishable. First, *Marsh v. Alabama,* 326 U.S. 501 (1946), is clearly distinct on its facts. There, an *entire town* was privately-owned and managed: "In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation." *Id.* at 503. Conversely, this case concerns only a *single subdivision* that is easily identified as different in character from the community at large based on its gated and private nature.

Finally, AAR misconstrues the significance of *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948). That historic case found state action in judicial enforcement of racially offensive covenants that on their face *served to exclude a sector of the population* from joining a particular community *on the basis of race*. In contrast, judicial enforcement of facially <u>neutral</u> covenants is not state action for purposes of the first amendment. *See, e.g., Golden Gateway Ctr. v. Golden Gateway Tenants Assn.*, 26 Cal. 4th 1013, 1034, 111 Cal. Rptr. 2d 336, 352

(2001) (property owner sought judicial enforcement of a neutral lease provision banning leaflets). This is especially true where, as here, all parties to the CC&Rs voluntarily agreed to and accepted the benefits of their terms. To hold otherwise would effectively eviscerate the state action requirement because private property owners can only enforce their bargained-for contract rights through court actions.

In short, given that the residents of Pine Canyon had a choice to voluntarily accept the terms of the "for sale" sign restriction in the governing CC&Rs, retroactively applying the "for sale" sign laws is an unreasonable means of effectuating any identified policy interest underlying the statutes.

CONCLUSION

For the reasons stated above and in the Opening and Reply Briefs, Appellant PC Village respectfully requests the Court to vacate the trial court's orders and judgment in the Hawks' favor, and to remand for further proceedings.

DATED this 17th day of December, 2012.

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

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(b)(2), Arizona Rules of Civil Appellate Procedure, I certify that the attached Response to Amicus Curiae Brief

X Uses proportionately spaced type of 14 points or more, is double-spaced using a roman font and contains 4,250 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).

December 17, 2012
Date

/s/ Jonathan P. Barnes
Signing Attorney

CERTIFICATE OF SERVICE

Jonathan P. Barnes, Jr., being first duly sworn, upon oath states that on the 17th day of December, 2012, he caused the original of the foregoing APPELLANT'S RESPONSE TO AMICUS CURIAE BRIEF to be electronically filed through AZ TurboCourt and that he caused two copies of the foregoing to be deposited in the United States Mail, postage prepaid, to:

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