S.B. 1062 — FOR SALE SIGNS

by Lawrence S. Rollin
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This article is written in response to articles and publications on HOA For Sale Signs (SB 1062) prepared by representatives of the Arizona Association of Realtors.

The articles and publications from the Arizona Association of Realtors are legally incorrect and otherwise deceptive as to the issue of retroactivity of the new law. The Arizona Association of Realtors wasted a lot of time, effort and money on this new law project if retroactivity was a goal. It is only the Arizona Association of Realtors who wanted this statute passed. The residential real estate market has functioned well since Arizona became a state without the need for this law.

The legislature did not state that the law is to supersede existing CC&Rs. The amendment does not expressly state that the law is to be retroactive. Although, the legislature uses the terminology "[n]otwithstanding any provision in the community documents," this language does not specify whether existing or future, or both, community regulations are subject to the amendment. In addition, Arizona law does not define the term "community documents" as it is used in this context. Furthermore, the statute prior to the amendment includes the following note as to a prior amendment to the statute: "Section 33-1808 as amended by this act applies retroactively to, from, and after July 3, 2004." A similar note is not attached to the 2007 amendment to Section 33-1808.

Under statutory law and public policy doctrine, the amendment cannot be applied retroactively. Arizona statues and caselaw strongly support the proposition that "no statute is retroactive unless expressly declared therein." §1-244; e.g. *Garcia v. Browning*, 214 Ariz. 250, ¶ 7, 151 P.3d 533, 535 (2007); *Stanley v. Stanley*, 112 Ariz. 282, 541 P.2d 382 (1975). Furthermore, the Arizona Supreme Court acknowledges that the legislature is aware of the necessary process for making a law retroactive, should that be the intent. *Garcia*, 214 Ariz. at ¶8, 151 P.3d at 535. Legislative history and external sources should not be consulted when determining the retroactively of a statute. *Id.* at ¶11, 151 P.3d at 535-536. Legislative history does not satisfy the statutory requirement that retroactively be expressly stated within the newly enacted law. *Id.* at ¶11 n2. 151 P.3d at 536 n2.

Under a statutory analysis, the amendment to Section 33-1808 should not effect the pre-existing CC&Rs of any community. The amendment does not contain the required express language that the law is to be applied retroactively. See S.B. 1062. The generic language at the beginning of the amendment does not state that it is to be interpreted with the intent to make the law retroactive. Any statutory notes or legislative history with regard to the amendment should also be ineffective in establishing retroactivity. *Garcia*, at ¶11, 151 P.3d at 535-536.

There is a strong public policy in Arizona of enforcing the private restrictive covenants of landowners. *Westwood Homeowners Ass'n v. Tenhoff*, 155 Ariz. 229, 236 745 P.2d 976, 983 (App. 1987)(rev. denied 1989). Until recently, the courts have also maintained the opposing view that restrictive covenants are not favored because they are viewed as a restraint on the free alienability of land. *Id.* However, in *Powell v. Washburn*, the Arizona Supreme Court clarified that an ambiguous restrictive covenant should be interpreted to give effect to the intent of the contracting parties and to fulfill the

purpose for which it was intended. 211 Ariz. 553, ¶13, 125 P.3d 373. 377 (2006). Thus, when interpreting a restrictive covenant, Arizona courts will no longer defer to the principle of free alienability. *See Id.*

The court should give full effect to the clear intent of preexisting CC&Rs. Although there may be an argument that there is a separate public policy protecting a homeowner's right to engage in trade, when two recognized public policies are in opposition, the court will compare the state interests each policy advances. *Westwood*, 155 Ariz. at 236, 745 P.2d at 983. Private gated communities are the majority, if not all, of the communities affected by this law. There is no open public access to these communities. Accordingly, there will be little harm to a homeowner who wishes to place a for sale sign since the general public will not see it. As to other homeowners, they invested in their home with the expectation of not seeing for sale signs up and down their streets.

Westwood is very similar to the issue at hand. In *Westwood*, a community had a restrictive covenant prohibiting, inter alia, group homes for the sick or disabled. *Id.* at 230, 745 P.2d at 977. The covenant had been in force since 1959. *Id.* In 1978, Arizona adopted the Developmental Disabilities Act which supported the deinstitutionalization of the developmentally disabled and favored the type of group home at issue in *Westwood*. *Id.* at 231, 745 P.2d at 978. Without discussing statutory retroactivity, the court determined that the public policy interest in supporting the disabled superseded the public policy of enforcing this restrictive covenant. *Id.* at 234, 725 P.2d at 981.

Although the *Westwood* court favored superseding the pre-existing covenant, further language in the holding is persuasive in favor of the private communities which prohibit for sale signs. The homeowners' association in Westwood tried to combat the defense's public policy argument by advancing their own public policy argument with regard to the state's deference to restrictive covenants. *Id.* at 236, 745 P.2d at 983. For support, the homeowners' association cited *Tucson-North Home Apartments Homeowners' Association v. Robb*. *Id.* (citing 123 Ariz. 4, 596 P.2d 1176 (App. 1979)). In *Robb*, the homeowners' association successfully enforced a restrictive covenant which prohibited window-unit coolers. 123 Ariz. at 4, 596 P.2d at 1176. The court in *Westwood* distinguished *Robb* noting that window-coolers were not the equivalent of promoting equal rights for the disabled. *Westwood*, 155 Ariz. at 236, 745 P.2d at 983. In light of these two cases, private gated communities are more easily likened to Robb than to Westwood, and therefore the policy of enforcing preexisting restrictive covenants should triumph.

The foregoing analysis does not include the State Constitutional prohibition to retroactivity or the amendment itself. Article 2, Section 25 expressly states that "No bill of attainder, ex-post-facto law, or law impairing the obligation of a contract, shall ever be enacted." Since the CC&Rs are also contractual in nature, the amendment should be found as unconstitutional, and caselaw analysis is not even necessary. Either way, there should be no retroactivity.

As a final note, the amendment applies to associations only. It never mentions the members or the declarant or that it applies thereto. Under typical CC&Rs, not only does the association have the right to enforce, but the declarant and each member usually have such right. The statute does not prohibit the declarant or any member from enforcing not only pre-existing prohibitions, but also future prohibitions. Only an association is prohibited from enforcing future prohibitions under the language of the amendment. Even if a court disagrees with the foregoing analysis and retroactivity does apply, the statute never mentions the declarant or the members. They are free to enforce at will.

Note from the authors of the legislative update article (Summer 2007): *We would like to clarify that Mr. Rollin is mistaken that it "was only the Arizona Association of Realtors® who wanted this statute passed." SB 1062 was introduced by Senator Tibshraeny on behalf of a constituent living in a gated homeowner's association. Additionally, we respectfully disagree with Mr. Rollin's legal analysis regarding the issue of retroactivity, as does Legislative Counsel.*