IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

ELDORADO COMMUNITY IMPROVEMENT ASSOCIATION, INC.,

Plaintiff/Appellee,

v.

SUSAN BILLINGS, DAVID BORTON, DEVRA BORTON, and ERIC WILSON,

Defendants/Appellants.

DOCKET NO. 33,850

APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT
SANTA FE COUNTY CASE NO. D-101-CV-2012-03577

THE HONORABLE MARK A. MACARON, DISTRICT JUDGE

APPELLEE'S ANSWER BRIEF

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APPELLEE ELDORADO COMMUNITY IMPROVEMENT ASSOCIATION, INC., a New Mexico non-profit corporation ("Association" or the "ECIA"), by and through its attorneys of record, Cassutt, Hays & Friedman, P.A., and pursuant to New Mexico Rule of Appellate Procedure 12-213(B), does hereby file its Answer Brief to the Brief-in-Chief of Appellants/Defendants ("Appellants") in this matter as follows:

SUMMARY OF THE PROCEEDINGS

I. Nature Of The Case.

This matter concerns a declaratory judgment action brought by the ECIA, as the homeowners association for the Eldorado at Santa Fe Subdivision, for a judicial determination that Appellants' poultry (chicken hens) are not "recognized household pets" within the meaning of Eldorado's Amended and Restated Covenants, and therefore may not be kept or maintained on the lots in the Subdivision. The central issue in the case involves the integrity of the restrictive covenants for Eldorado, and four decades of covenant interpretation and enforcement (which Appellants seek to overturn) that poultry and other domestic livestock are not permitted in the Subdivision.

In its ruling on the parties' respective Motions for Summary Judgment, the District Court determined that chickens historically have not been, and are not currently considered to be, "recognized household pets" by the ECIA, the Eldorado community or by society at large. The District Court further found that

interpreting the covenant provision to include chickens would defeat the intent and purpose of the covenants and lead to an illogical outcome. The District Court rejected the Appellants' strained interpretation of the covenants that it is each individual household which determines whether a specific type of animal is a "recognized" household pet, finding that it would completely undermine the "general scheme or plan" for the Eldorado Subdivision in general and the covenant provision regarding pets in particular. The District Court therefore ordered the Appellants to remove their chickens from their respective properties in Eldorado. Appellants have now appealed this ruling of the District Court.

II. Course Of The Proceedings.

The ECIA filed its Complaint for Declaratory Judgment, Breach and Enforcement of Covenants on December 26, 2012. Record Proper ("RP") 1. A First Amended Complaint was filed on January 23, 2013; Appellants filed their Answer and Counterclaim for Breach of the Covenant of Good Faith and Fair Dealing, Breach of Fiduciary Duty and Punitive Damages on January 31, 2013. RP 48, 74. The ECIA filed its Answer to the Counterclaim on March 15, 2013. RP 86. The ECIA filed a Second Amended Complaint on September 10, 2013, to which Appellants filed their Answer on October 9, 2013. RP 174, 217.

On September 30, 2013, the ECIA filed a Motion for Summary Judgment on Appellants' Counterclaim. RP 184. A hearing on the Motion was held on November 15, 2013, and the District Court entered its Judgment granting the

ECIA's Motion and dismissing Appellants' Counterclaim on January 3, 2014. RP 215, 345. Appellants are not appealing the District Court's decision dismissing their counterclaim. Brief-in-Chief at p. 1, fn. 1.

Appellants then filed their Motion for Summary Judgment on the ECIA's Complaint on January 16, 2014, and the ECIA filed its cross-Motion for Summary Judgment on January 24, 2014. RP 346, 378. The District Court held a lengthy hearing on the Motions on February 28, 2014. Transcript of Proceedings. The District Court then issued its Letter Decision on April 4, 2014 (filed on April 18, 2014) and filed its Order and Final Judgment on April 30, 2014, which granted the ECIA's Motion and denied the Appellants' Motion. RP 679, 691.

Appellants then filed their Notice of Appeal on May 28, 2014 to bring this matter before this Court. RP 706.

III. Disposition Of The Case In The District Court.

The District Court's ruling on the parties' respective Motions for Summary Judgment is set forth in its detailed and thorough Letter Decision. District Court Letter Decision ("Letter Decision") RP 679- 690. The Court first considered, as a matter of law, whether the covenant language in Article II, Section 11 regarding "recognized household pets" is ambiguous. Letter Decision at ¶¶19, 20 – 23, & 28, RP 682-683. "In determining whether a term or expression to which the parties have agreed is unclear, a court may hear evidence of the circumstances surrounding the making of the contract and of any relevant usage of trade or course

of dealing or course of conduct," as well as evidence of the parties' intent. Letter Decision at ¶¶23 & 28, RP 683. The Court found that the terms "recognized household pet" "are not clear on their face," in part because "a substantial number of homeowners and persons associated with the Eldorado Subdivision have disagreed for years about the meaning of the covenant language at issue." Letter Decision at ¶60, RP 687.

The District Court then proceeded to resolve the ambiguity as an "issue of ultimate fact" based on the undisputed material facts in the summary judgment record. Letter Decision at ¶¶2, 29 & 79, RP 680, 683 & 690. The Court reviewed at length the legal standards for interpreting an ambiguous restrictive covenant. Letter Decision at ¶¶22, 24 – 28 & 30-32, RP 683-684. The Court stated that:

> Restrictive covenants must be considered reasonably, though strictly and an illogical, unnatural, or strained construction must be avoided. We will not read restrictions on the use and enjoyment of the land into the covenant by implication and we must give words in the restrictive covenant their ordinary and intended meaning. In construing a protective covenant, a court is to give effect to the intention of the parties as shown by the language of the whole instrument, considered with the circumstances surrounding the transaction, and the object of the parties is making the restrictions.
>
> . . .
>
> The Supreme Court has held that ambiguous or unclear language in a restrictive covenant must be resolved "in favor of the free enjoyment of the property and against restrictions." At the same time the Supreme Court has instructed that the rule of strict construction must be subordinate to the intention of the parties as reflected by the language of the whole instrument, the circumstances surrounding the transaction, and the purpose animating the restrictions.
>
> . . .
>
> The general rule that ambiguities concerning restrictive covenants

> should be resolved in favor of the free enjoinment and against restrictions, but this rule cannot be applied to defeat the obvious purpose of the restrictions. The intent of the parties govern.

Letter Decision at ¶¶24 – 26 (citations omitted), RP 684.

Applying these rules of construction to the undisputed material facts, the District Court determined that "chickens and roosters are not 'recognized household pets' under the Covenants and may not be kept or maintained on any lot in the Subdivision." Letter Decision at ¶¶77 & 80, RP 689-690. The Court based its conclusion on the following in particular:

- Historically, chickens have not been considered recognized household pets by the ECIA and they [the ECIA] have historically taken enforcement action against individual owners who have had chickens on their property. There is not historic evidence that chickens or other livestock have been accepted by the ECIA as allowable in the Eldorado subdivision. Letter Decision at ¶¶62 & 64; see also ¶¶42, 47 & 48, RP 685-686, 688.

- The covenant election while not binding for changing covenant, because neither of the proposed versions received over 50% of the vote, is significant in indicating that the majority of the voting homeowners in Eldorado Subdivision voted not to include chickens within the meaning of "household pets" under the covenant language. Letter Decision at ¶65; see also ¶¶54 – 56, RP 686-688.

- At the time the 1972 covenants and 1995 Amended Covenant were implemented chickens were not considered to be household pets and could not have been intended within the meaning of "recognized household pets." The Plaintiff's expert witness has presented affidavit evidence that chickens are not considered pets by the majority of persons who own chickens. Further, backyard livestock (including poultry) is a recent occurrence in general during the past ten years. This significantly indicates that in broader society chickens are not recognized as household pets by most. Letter Decision at ¶61; see also ¶¶49 -53, RP 686, 688.

Finally, the District Court rejected the Appellants' position that "all animals, birds and poultry are permitted by the covenants *if the household (of the individual owner) recognizes such animals, birds and poultry at their pets. . . .*", and that Appellants therefore could keep their chickens because they "recognize" them as pets. Letter Decision at ¶14 & 15 (emphasis added), RP 682. The Court found that Appellant's interpretation of the Covenants is "inconsistent with the uniformity contemplated by the covenants," "would create an illogical result" and "render the covenant meaningless." Letter Decision at ¶¶69 & 74, RP 688-689. The District Court stated that:

> Construing the covenant to allow individual owners complete freedom to designate any creature they want as a household pet would frustrate the purposes of the covenants and create a dangerous precedent leaving other property owners without any recourse (unless it was a nuisance under the covenants). It would allow individual owners to do whatever they want and the effect would be to completely disable the pet covenant and render it meaningless.
> ...
> Defendants' interpretation would create an illogical result and render the covenant meaningless. It would be unreasonable to conclude that individual lot owners have the unbridled unilateral right to keep any animal, bird or poultry they desired in or on their property simply by stating that such is recognized by the household as their pet. This interpretation would open the door to an unlimited multitude of different kinds of creatures being kept inside and outside of homes at the Community of El Dorado at Santa Fe without regulation or control under the covenants (except nuisances) leaving the other homeowners without recourse.

Letter Decision at ¶¶71 & 74; see also ¶¶57, 68 – 70, 72, 73, RP 688-689.

The Court concluded that "Defendants' interpretation is inconsistent with the

intent and purposes of the covenants when analyzed under the modern rule of construction and results in foreseeable illogical results when analyzed under the general rule of construction." Letter Decision at ¶76, RP 689.

Based on the foregoing careful factual and legal analysis, the District Court granted the ECIA's Motion for Summary Judgment, enjoined Appellants from continuing to breach the Covenants and required them to remove their chickens from their respective properties (subsequently stayed pending this appeal). Letter Decision at ¶¶79 – 81, RP 690.

IV. Factual Summary.

The ECIA is a New Mexico nonprofit corporation organized and doing business under the laws of the State of New Mexico, and is the homeowners' association for the Eldorado at Santa Fe Subdivision located in Santa Fe County, New Mexico. As a non-profit corporation, the ECIA is governed by its Board of Directors. The ECIA is not a municipality or other governmental or quasi-governmental entity. Letter Decision, ¶¶3 & 4, RP 681; ECIA's Undisputed Material Fact A, RP 381.

The ECIA is charged with enforcing the Amended and Restated Protective Covenants and Building Restrictions for Eldorado at Santa Fe, which are recorded in the records of Santa Fe County, New Mexico, for the benefit and protection of all Eldorado residents. Letter Decision, ¶5, RP 681, ECIA's Undisputed Material Fact B, RP 381. The original developer of Eldorado at Santa Fe in 1972 adopted

and recorded Protective Covenants and Building Restrictions for Eldorado at Santa Fe as a general scheme or plan for the development of the Subdivision. Letter Decision, ¶6, RP 681; ECIA's Undisputed Material Fact F, RP 382, 415, 531. The Amended and Restated Covenants were adopted by a vote of the majority of the owners of the lots in the Subdivision in 1995. Letter Decision, ¶7, RP 681; ECIA's Undisputed Material Fact G, RP 382, 531-532.

Article II, Section 11 of the Amended and Restated Covenants provides in relevant part that:

> Section 11. Household Pets. No animals, birds or poultry shall be kept or maintained on any lot, except recognized household pets which may be kept thereon in reasonable numbers as pets for the pleasure and use of the occupants but not for any commercial use or purpose.

Letter Decision, ¶8, RP 681; ECIA's Undisputed Material Fact E, RP 382, 410. This language of Article II, Section 11 of the 1995 Amended and Restated Covenants is identical to the language in paragraph 8 of the 1972 original Covenants. Letter Decision, ¶9, RP 681; ECIA's Undisputed Material Fact H, RP 382, 410, 416.

The Appellants are each owners of residential property in the Eldorado at Santa Fe Subdivision, and each of these residential properties is subject to the Covenants. The Appellants each own chickens that are kept on their respective properties. Letter Decision, ¶¶10 & 11, RP 681; ECIA's Undisputed Material Fact C & D, RP 381-382. Although Appellants argue that these chickens are their

"pets," they have not placed any facts in the summary judgment record which actually support that contention. See, e.g., Defendant's Undisputed Material Fact No. 2, RP 348.

The original Covenants' plain language indicate that they were restrictive in nature and intended a controlled environment. "El Dorado At Santa Fe, Inc. for the mutual benefit and enjoyment of purchasers of lots... desires to place thereon certain protective covenants, building restrictions and conditions as to the use and occupancy thereof." Letter Decision, ¶34, RP 684 & Exhibit B to Affidavit of William Donohue, RP 415. The Subdivision was designed in the 1970s by the original developer as a middle and upper-middle class, residential subdivision. Starting in the late 1970s, the Subdivision was marketed by the early builders of homes in the development as a passive solar community. Letter Decision, ¶35 RP 684; ECIA's Undisputed Material Fact I, RP 348.

As Eldorado developed a reputation as a solar community in the late 1970s and 1980s, it was not the intention of Mark Conkling (Manager of the Eldorado Community Improvement Association, Inc., member of Architectural Committee, member of the Board of Directors and builder of over 300 homes at Eldorado between 1978 and 1995), nor did he observe it to be the intention of any other homebuilder active there, that Eldorado would be or would become a rural agricultural community in which domestic livestock could be kept. During Mr. Conkling's seventeen year involvement with Eldorado, and particularly during his

time on the ECIA Architectural Committee, it was his understanding and belief that the interpretation in the community was that the term "recognized household pets" in the covenants allowed traditional pets such as dogs and cats that were kept in or about the residence or "household". Letter Decision, ¶36 & 37, RP 684; ECIA's Undisputed Material Fact I & J, RP 382-383, 530-531.

The ECIA has historically enforced the covenants to exclude chickens. Each enforcement case was resolved with the removal of the chickens. The enforcement actions against the Appellants here are part of that on-going enforcement action. During his tenure since 1996 as Facilities Manager and as General Manager of the ECIA, William Donohue was not aware of any complaints or violations concerning chickens which did not result in enforcement action. The ECIA's historical interpretation of the term "recognized household pets" in the Subdivision has been that poultry (including chicken hens) are not recognized household pets and are not permitted under the Covenants. There was no evidence presented that ECIA has ever recognized chickens as household pets. Letter Decision, ¶¶42 & 47, RP 685-686; RP 401 & 532.

In 2013, the ECIA conducted an election to amend the covenants for a variety of reasons, including to "clarify whether or not homeowners can have chickens on their property." On October 1, 2012, by a vote of 55.4% to 44.6%[1], the

1 999 votes for the Amendment and 805 votes against. RP 404. Appellants' attempt to include those homeowners who did not vote, in an attempt to dilute the negative import of the vote for the Appellants' position, is simply disingenuous. See Brief-in-Chief at p. 4.

homeowner members of ECIA rejected a covenant amendment that would have specifically included chickens under the Articles II Section 11definition of "household pets." The evidence indicates that the majority of voting homeowners at the Subdivision do not believe that chickens are recognized household pets, Letter Decision, ¶¶ 54, 55 & 56, RP 686-687; ECIA's Undisputed Material Fact O, RP 384, 402-404.

Chicken hens are categorized for veterinary and governmental regulatory purposes as "livestock and poultry" and are typically referred to as "agricultural animals. " Poultry have not historically been considered "household pets" and traditional household pets such as dogs and cats are not regulated as agricultural animals. Letter Decision, ¶49, RP 686; ECIA's Undisputed Material Fact K, RP 383, 535. The Santa Fe County, New Mexico Animal Control Ordinance, including both the 1991 Ordinance that is currently in effect, and the proposed 2013 amendments, each define chickens and other poultry as domestic livestock. Letter Decision, ¶50, RP 686; ECIA's Undisputed Material Fact L, RP 383, 535-536, 561 & 564.

The practice of maintaining backyard poultry has become a significant phenomenon only since the mid-2000s, and, when permitted, has been accomplished by amendments to municipal or county zoning ordinances to allow poultry to be kept in areas where farm animals or agricultural uses are otherwise prohibited. These zoning ordinances may require a special permit and typically

place limits on the number and type of poultry that can be kept, and otherwise regulate the use. These zoning amendments have not simply reclassified backyard poultry as permissible "household pets". Letter Decision, ¶51, RP 686; ECIA's Undisputed Material Fact M, RP 383, 536. Scientific surveys of the owners of backyard poultry have shown that an 86% majority of owners maintain the chickens as a source of food, meat or eggs for the owners, while only a 42% minority of the owners maintain the chickens as pets, companions, or hobby animals. Chickens have not historically been considered as household pets and the majority of chicken owners do not consider their chickens as pets. Letter Decision, ¶¶52 & 53, RP 686; ECIA's Undisputed Material Fact N, RP 383-384, 536.

[Additional information regarding the factual and procedural background of this matter which may be of use to the Court (but which are not "undisputed material facts" necessary to the issues presented for review) can be found at RP 384 – 387. Each of these additional facts is properly supported as required by NMRA 2015, Rule 1-056(D)]

LEGAL ANALYSIS

I. Standard of Review.

The ECIA and Appellants agreed that the material facts in this case are undisputed and that the District Court should enter a decision as a matter of law on the parties' Motions for summary judgment. District Court Decision at ¶2, RP 680; statement of Ronald Van Amberg, Appellant's Counsel, at February 28, 2014

hearing on Motions for summary judgment. ("I agree with Mr. Hays that we think this case can be resolved on the basis of summary judgment and that we agree that having four days of testimony about what different people think about this ambiguity about the pet covenant will not further enlighten proceedings before this Court"). Transcript of Proceedings p. 14, lines 12-16. Appellant's Brief-in-Chief also does not argue that there are disputed material facts which require a trial on the merits. See pp. 25 -27.[2] Rather, Appellants challenge the District Court's application of the law to the undisputed material facts in this case and the District Court's legal conclusions. This is reviewed "de novo" by the Court of Appeals. Ponder v. State Farm Mut. Auto Ins. Co., 2000-NMSC-033, ¶7; 129 N.M. 698; 12 P.3d. 960 (S. Ct. 2000).

II. The Eldorado Covenant Language.

The language of Article II, Section 11 of the Covenants begins with a blanket prohibition:

"No animals, birds or poultry shall be kept or maintained on any lot"

And then continues with a limited exception to that blanket prohibition:

"except recognized household pets"

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2 To the extent that Appellant's Brief-in-Chief may imply that there are disputed facts, the facts submitted by Appellants in the summary judgment motion were considered by the District Court in its Letter Decision, but did not affect the District Court's Decision. See, e.g., Letter Decision at ¶¶42 - 48. See also Cessna Fin. Corp. v. Mesilla Flying Service, 1998-NMSC-169, ¶12, 81 N.M. 10, 462 P.2d 144 (1969)(bare contention that an issue of fact exists is not sufficient to defeat a summary judgment motion, there must be evidence that would justify a trial on the merits).

And a further restriction:

> "which may be kept thereon in reasonable numbers as pets for the pleasure and use of the occupants but not for any commercial use or purpose."

Therefore, in order for an animal to be permitted on a lot in the Subdivision in the first instance, it must be **three things**: a *"pet"* a *"household pet"* and *"recognized household pet."* Appellants tend to ignore the "recognized" part of the formula and instead focus on their individual, subjective treatment of the chickens. See discussion under Section VI below.

III. The District Court Applied The Correct Legal Standard In Interpreting The Eldorado Covenants.

There had long been two strains of legal thought in interpreting the language of restrictive covenants in New Mexico. One line of authority held that "ambiguous or unclear language in a restrictive covenant must be resolved in favor of the free enjoyment of property and against restrictions." See Agua Fria Save The Open Space Association v. Rowe, 2011 NMCA-054, ¶18, 119 N.M. 812, 255 P.3d 390. The other line of authority held that "strict construction must be subordinate to the intention of the parties as reflected by the language of the whole instrument, the circumstances surrounding the transaction, and the purpose animating the restrictions." Id. In a detailed and well-thought out decision, this Court in the Agua Fria case reconciled these two lines of authority and adopted the modern standard: that the intent of the parties controls the interpretation of

restrictive covenants under New Mexico law. Id. at ¶24.

The Agua Fria Court first noted that restrictive covenants "constitute a contract between the subdivision's property owners as a whole and individual lot owners", and are "valuable property rights which run with the land." Id. at ¶19; see also Aragon vs. Brown, 2003-NMCA-126, ¶11, 134 N.M. 459, 78 P.3d 913. The Court further noted that, historically, "restrictive covenants have been used to assure uniformity of development and use of a residential area to give owners . . . some degree of environmental stability." The Court also discussed the rejection by our Supreme Court of the "plain meaning" or "four-corners" standard of contract interpretation, stating that "contextual understanding is necessary to construe restrictive covenants in a manner consistent with the intent and expectation of the parties." Id. at ¶20. The Court held that "pursuant to *C.R. Anthony* and its progeny, the Courts are not obligated to apply a rule of strict construction in determining whether the language of a restrictive covenant is ambiguous, or in resolving a factual dispute regarding the restrictive covenants' meaning" Id. at ¶¶20 & 21. Restrictive covenants are therefore to be read using the modern rules of contract interpretation set out by our Supreme Court in the C.R. Anthony and Mark V. vs. Mellekas cases. Id.

Finally, the Court found that its holding was consistent with the Restatement (Third) of Property: Servitudes §4.1, to the effect that a "servitude should be interpreted to give effect to the intention of the parties ascertained from the

language used in the instrument, or the circumstances surrounding the creation of the servitude and to carry out the purpose for which it was created." Id. The Restatement, like the Court of Appeals' holding in Agua Fria, rejects the "often expressed view that servitudes should be narrowly construed to favor the free use of land" in recognition of the fact that "servitudes are widely used in modern land development and ordinarily play a valuable role in utilization of land resources." Id. at ¶23; Servitudes ¶4.1 "Interpretation of Servitudes" and Comment (a). In interpreting expressly created servitudes, the expressed intention of the parties is of primary importance. Servitudes §4.1, Comment (d). The New Mexico Courts have recognized this Restatement as persuasive authority. Aragon vs. Brown, 2003-NMCA-126, ¶10.

The Court of Appeals' holding in Agua Fria, that the central issue is the intent of the parties in making the restriction, is consistent with appellate precedent in New Mexico. See Montoya vs. Barreras, 81 N.M. 749, 751, 473 P.2d 363 (1970)(effect to be given to be given to the intention of the parties); Hines Corp. vs. City of Albuquerque, 95 N.M. 311, 313, 621 P.2d 1116 (1980)(same); Sharts vs. Walters, 107 N.M. 414, 419-20, 759 P.2d 201 (Ct. App. 1988)("the intent of the parties and the object of the restrictions govern"). It is also in line with the majority rule in other states, which have rejected the rule of strict construction. Agua Fria, 2011-NMCA-054, ¶24.

Appellants' position that if a Covenant provision is ambiguous, it is

unenforceable, (since any ambiguity is automatically resolved in favor of the "free use of property") is not the law. See, e.g., Brief-in-Chief at p. 21. "The meaning to be assigned to an unclear term is a question of fact," to be resolved by the Court as a finder of fact, either based on undisputed material facts presented in a motion for summary judgment or by a full evidentiary hearing at trial. Mark V, 1993-NMSC-001, ¶13. The trier of fact must construe the meaning of the ambiguous provision at the time of its adoption, and may consider extrinsic evidence of the language and conduct of the parties and the circumstances surrounding the agreement, as well as oral evidence of the parties' intent, to determine that meaning. Agua Fria, 2011-NMCA-054 at ¶25, *citing* C.R. Anthony Co. v. Loretto Mall Partners, 112 N.M. 504, 817 P.2d 238 (S. Ct. 1991); Mark V, 1993-NMSC-001 at ¶13. Appellants' equation of "ambiguous = unenforceable" skips the critical step: the finding of the facts regarding the ambiguous provision and the application of the correct legal standards to those facts.[3]

IV. The District Court Correctly Applied The Legal Standard To The Undisputed Material Facts.

In its Letter Decision, the District Court here did apply the relevant legal

3 Appellant's discussion of the recording statute, NMSA 1978, Section 14-9-1, appears to be a variant of the ambiguous=enforceable argument. Under such an approach, Covenant provisions requiring that all structures be in the "Architectural Style of Santa Fe" (Article II, Section 5(d)) or that recreational vehicles "shall be obscured by screening in a reasonable manner" (Article II, Section 13) would be unenforceable since they require interpretation. The Eldorado at Santa Fe Covenants are of record, as is the existence of the ECIA, and any potential homeowner who has a question about a particular provision of the Covenant need only contact the Association for information. Since this argument was not raised before the District Court, the ECIA asks this Court to take judicial notice of the resources available at its website, Eldoradosf.org, including the existence of a full-time covenants compliance officer.

factors to the undisputed material facts in this case:

- "the circumstances surrounding the making of the contract" and the "object of the parties in making the restriction." Mark V. vs. Mellekas, 1993-NMCA-001, ¶¶11 & 13, 114 N.M. 778, 845 P.2d 1232; Hines, 95 N.M. at 313.

Here, the Covenants were adopted by the original developer in 1972, and amended in 1995 by a vote of the homeowners, to create a general scheme of plan for Eldorado. Letter Decision ¶¶34, 35 & 38. RP 684, 382, 531-532. The language in the Covenants regarding "recognized household pets" is the same in both the original 1972 declaration and the 1995 amended and restated covenants. Letter Decision, ¶9, RP 681, 410, 416. The Subdivision was designed in the early 1970s as a residential, middle-class and upper-middle class, residential subdivision. Letter Decision, ¶35 RP 684, 382-383, 531. Starting in the late 1970s, the early builders of homes in Eldorado began to market it as a passive solar community. Id.

The Affidavit testimony of Mark Conkling, who was intimately involved as the builder of over 300 homes in Eldorado starting in 1978 (shortly after the original covenants were adopted) and as General Manager, Architectural Committee Member, and Board of Directors Member from 1987 to 1995 (when control of the Association passed from the developer to the homeowners, and the amended and restated covenants were adopted), is that Eldorado was not a rural, agricultural project in which all sorts of domestic livestock were allowed. Letter Decision, ¶36, RP 684, 531. As Dr. Pabilonia's Affidavit testimony establishes,

the phenomenon of "backyard poultry" has become significant only in the early 2000s, and therefore could not have been part of the parties' intentions regarding pet provision of the Covenants either in 1972 or 1995. Letter Decision, ¶¶ 51 & 53, RP 686, 536.

- "the course of dealing, and course of performance". Mark V. at ¶¶11 & 13.

The Covenants have been interpreted, implemented and enforced from the outset to the present day to prohibit chickens as recognized household pets. During Mr. Conkling's seventeen year tenure with the Association (from 1978 to 1995), his understanding and interpretation of the Covenants was that the term "recognized household pets" "allowed traditional pets such as dogs and cats that were kept in or about the residence or 'household.'" Letter Decision, ¶37, RP 684, 383, 532. The Affidavit testimony of William Donohue (Facilities Manager and then General Manager of the ECIA starting in 1996 until 2014), was that all complaints or violations concerning chickens resulted in enforcement action by the ECIA. Letter Decision, ¶42, RP 685, 401. No evidence was presented that the ECIA has ever recognized chickens as household pets. Letter Decision, ¶47, RP 685. The ECIA's historical position that chickens are not "recognized household pets" under the Covenants is consistent with its current position in this matter. Letter Decision, ¶48, RP 686.

- "any relevant usage of trade". Id.

As set forth in the Affidavit testimony of Dr. Pabilonia, chickens have not traditionally been considered "pets," but rather agricultural animals. Letter Decision, ¶49, RP 686, 383, 535. Traditional household pets (such as dogs and cats), are not regulated as agricultural animals. Id. Unlike dogs, cats and similar animals, poultry are classified as "domestic livestock" under the Santa Fe County Animal Control Ordinance. Letter Decision, ¶50, RP 686, 383, 535-536. Scientific surveys have shown that only a minority (42%) of individual poultry owners keep their chickens as pets, while a majority (86%) maintain their chickens as a source of food, meat or eggs. Letter Decision, ¶52, RP 686, 383-384, 536. This is consistent with the clear (not hidden) views of the Eldorado community (as expressed by majority of the homeowners who voted in an open and democratic expression of the community's sentiment) that chickens are not recognized household pets. Letter Decision, ¶54 – 56, RP 686-687, 384, 404.

All of the evidence before the District Court in the summary judgment record supports the District Court's sound conclusion that chickens are not recognized household pets: the intentions of the original developers in creating the Subdivision in 1972, the subsequent development of the Subdivision from the 1970s to the present day, the historic and current course of enforcement of the covenants regarding chickens, the reaffirmation of the original pet covenant language by the homeowners in 1995, the categorization of chickens as "agricultural animals" by veterinary science and government regulators, the

treatment of chickens as a source of food by a clear majority of the owners of "backyard" flocks (as well as the recent nature of this phenomenon), and perhaps most importantly, the clearly expressed will of the Eldorado homeowners against including "chickens as pets" in this community.

V. Even Under The Legal Standard Argued By Appellants, A Chicken Is Not A Recognized Household Pet.

Even applying the more restrictive, traditional analysis argued by Appellants, the District Court correctly decided as a matter of law that that chickens are not "recognized household pets" within the meaning of Eldorado's Covenants:

- "Restrictive covenants must be considered reasonably, though strictly"
- "An illogical, unnatural or strained construction must be avoided" and
- "We must give words in the restrictive covenant their ordinary and intended meaning."

Montoya, 81 N.M. at 750; Hill v. Cmty. of Damien of Molokai, 1996-NMSC-008, ¶6, 121 N.M. 353, 911 P.2d. 681. Simply stated, a chicken is not a "recognized household pet" within the common, every day understanding of those words, and Appellants have not presented any evidence that they are. Instead, they are "agricultural animals" that are not allowed under the Covenants. Appellant's unreasonable, illogical, unnatural and strained construction would "defeat the obvious purpose of the covenants." Sharts, 107 N.M. at 419-20.

In Buck Hill Falls Company vs. Clifford Press, 791 A.2d 392 (Pa. Super.

2009), the Pennsylvania Court applied this standard and reached the same result.

The restrictive covenant at issue was very similar to Eldorado's:

> No livestock, animals or poultry of any kind shall be raised, bred or kept on any Existing Residential Property except dogs . . . and other household pets which may be kept provided they are not raised, bred, kept or maintained for commercial purposes.

Id. at 395, ¶4. The Court stated that:

> In determining whether the covenants prohibit Appellees from maintaining chickens on their property we must consider the express language of the covenant [citation omitted]. . . [i]n construing a restrictive covenant, we must ascertain the intention of the parties by examining the language of the covenant in light of the subject matter thereof. . . .

Id. at ¶15.

The Court first found that chickens were clearly "poultry": "the words 'poultry and 'chicken' are often interchangeable in everyday use and in case law".

Id. at 397, ¶16. The Court then concluded that:

> From its plain meaning, we find that the poultry provision contained in the restrictive covenant is quite clear, and was meant to prohibit . . . community members from maintaining chickens of any kind for any reason. . . .. Appellants are in violation of the restrictive covenant prohibiting poultry on their property.

Id. The Court went on to reject the argument that "since Appellee's children treat the chickens as pets, then they are 'household pets' for the purposes of the covenant":

> While the phrase "household pet" is somewhat ambiguous, nevertheless the language prohibiting poultry makes it clear that chickens were not intended to be included in the covenant's meaning

> of the phrase "household pet." Keeping in mind the rules of construction that require us to examine the language of the covenant in light of the subject matter surrounding it, we conclude that the trial court erred in finding that Appellee's chickens are household pets.

Id. ¶17. Of course, the ECIA Covenants contain the additional requirement of *recognized* "household pets," which as discussed above, chickens are not, either within the Eldorado Community or within broader society.

VI. Appellant's Position Would Completely Undo The Covenants.

It is critical to note that Appellants have never claimed – either to the District Court or in this appeal – that chickens are recognized household pets either within the Eldorado community or within broader society. As discussed above, the only evidence in the summary judgment record is the position of the Eldorado community (as most recently reflected in the covenant amendment vote) and the views of boarder society (as presented by the ECIA's expert witness) that chickens are not recognized household pets.

Instead, the Appellants seek to completely alter the playing field, by substituting each household's individual, subjective judgment for that of the community at large. The Appellants claim that **any animal** which an individual household in Eldorado *"recognizes"* as a "pet" may be kept on that property in the Subdivision. Under the Appellant's theory, all types of domestic livestock and agricultural animals, not just poultry, would be permitted under the Covenants. As the District Court correctly noted, such an interpretation of the Covenants would

vacate the general scheme or plan for the Eldorado community that is the entire basis of the Covenants. Importantly, Appellant's have not cited any case law whatsoever that supports their "individualistic" view of covenant interpretation.

The original developer of Eldorado at Santa Fe adopted and recorded the original Covenants in 1972 as a general scheme or plan for development of the Subdivision. Those Covenants were amended and restated for the same purpose a vote of the entire community in 1995. The central purpose of covenants is "to assure *uniformity of development and use of a residential area* to give the owners of lots within such an area some degree of environmental stability." Montoya, 81 N.M. at 751 (emphasis added). The public policy of New Mexico:

> [I]s to uphold the valuable property right of *all the lot owners* to establish standards they deem appropriate, the concomitant right of *all lot owners* to rely on those standards, and the reciprocal obligation to comply with those standards when one acquires a lot with notice, actual or constructive, of the standards.

Aragon vs. Brown, 2003-NMCA-126, ¶12 (emphasis added).

Appellants, having failed to convince the Eldorado community to adopt a covenant amendment to allow chickens in a democratic election, would now have the Court by judicial order go much, much further, and void any "general scheme or plan" as to what animals are allowed in the Eldorado community. As the District Court correctly pointed out:

> Carrying the defendants' interpretation to a logical conclusion means no animal, bird, and poultry can be excluded from Eldorado if the individual owners designate such as their "household pet". (unless it is

> a nuisance under the covenants) inside or outside their homes on the property regardless of the effect on the other owners.
> ...
> This interpretation would mean that individual owners have complete uncontrolled discretion to have any kind of animal, bird or poultry in and on their property at the Subdivision.
> ...
> The Defendant's interpretation is inconsistent with the uniformity contemplated by the covenants as stated therein and inconsistent with the restrictive covenant purposes recognized by law.

Letter Decision, ¶¶57 & 69.

Such a drastic re-imagining of the Covenants has major implications for not only the "Household Pet" provision, but other Covenant provisions as well. For example, why then couldn't each individual household decide what "Architectural Styles of Santa Fe" are permitted in building construction? (Covenant Article II, Section 5(d)). An "Earthship" structure made out of recycled materials? Or what constitutes an allowable "Recreational Vehicle" – a semi tractor trailer? (Covenant Article II, Section 13). Appellants in one fell swoop seek to vacate the "general scheme or plan" that has been in place for the development and regulation of Eldorado for over forty years, and to substitute their individual judgments in its place. However, such a dramatic change can only be accomplished by a majority of the community amending the Covenants, not by the simple will of four homeowners.[4]

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4 At one point in the litigation, the owners of seven properties in Eldorado who kept chickens were defendants in this matter. RP 174. All but three properties (owned by the four Appellants) have removed their chickens. There are 2,776 residential property in the Eldorado Subdivision. RP 384.

CONCLUSION

This lawsuit is not about whether keeping poultry is a good idea or a bad idea, or even if the Appellants consider their chickens to be pets. As Appellants' have stated, almost any animal can be treated as a "pet." Rather, it is about whether the existing Eldorado Covenants allow poultry in the Subdivision, which the Covenants only do if chickens are "recognized household pets" under some objective measure of the term. As discussed above, the District Court applied the correct legal standard to the undisputed material facts in this case and conclusively determined that they are not.

This lawsuit is further about the bigger issue of the integrity of the Eldorado covenants as a whole. The three Appellants seek to impose, through the judicial process, their singular, subjective interpretation of the covenants on a community of 2,776 homes which has rejected their view in a democratic, community vote. Appellants seek to overturn four decades of covenant enforcement and interpretation in Eldorado by replacing the community-wide standard with a case-by-case, individual determination of what is a "recognized household pet" (and by unavoidable extension, for other provisions of the covenants as well). The proper means for doing so, however, is by amending the Covenants through the electoral process, not through the Courts in this litigation.

The ECIA therefore respectfully request this Court deny Appellants' appeal in its entirety and to affirm the District Court's April 30, 2014 final order and

judgment in this matter. RP 691.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Appellee's Answer Brief to be sent via U.S. Mail, first class and postage prepaid, on April 15, 2015 as follows:

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