IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ELDORADO COMMUNITY IMPROVEMENT ASSOCIATION, INC.,

Plaintiff/Appellee,

No. **No. D-101-CV-2012-03577**
Court of Appeals No. 33850

v.

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

Defendants/Appellant.

BRIEF IN CHIEF

Honorable Mark A Macaron, District Judge

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SUMMARY OF PROCEEDINGS

The Defendants are all residents of the Eldorado at Santa Fe Subdivision located in a rural area about eight miles east of Santa Fe. For years they have maintained a small number of hens as pets. Some of the hens lay eggs, some no longer can. The Eldorado Community Improvement Association ("Association"), after receiving pressure from certain residents, concluded that the Eldorado covenants ("Covenants") did not permit chickens as pets and sued the Defendants to have their chickens removed. The Defendants resisted and contended that the Covenants permitted chickens as pets, provided they were considered and treated as household pets, were of a reasonable number, were not used for commercial purposes, were for personal pleasure and did not create a nuisance for the neighbors or neighborhood – and therefore met all requirements for household pets in the Covenants.

Both sides filed motions for summary judgment addressing the merits of the complaint. [1] (RP 378 and 346). The District Court entered a decision and judgment ("Decision") (RP 679) and ruled that the time worn standard of free use of property in the face of covenant ambiguity would not apply. Instead, any Covenant ambiguity would be resolved by reference to a limited polling of the community,

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[1] Plaintiff filed a motion for summary judgment seeking to dismiss Defendant's damages counterclaim and prevailed (RP 184). This is not an issue in this appeal.

the opinion of the current Association Board, the surmised intent of the original developer in 1972, perhaps the surmised intent of voters in a 1995 covenant election, the opinion of a Colorado veterinarian and the opinion of a home builder.

SUMMARY OF FACTS

This case arises from an action brought by the Association to enjoin the Defendants from maintaining a small number of chickens in their backyards. All of the chickens are considered by the Defendants as being pets and members of the households. The Association contended that this activity violated §11 of the Covenants which relates to "household pets". The Complaint alleged that under no circumstance could chickens be kept within Eldorado. (RP 1-5).

The Defendants admit that they cannot maintain roosters, as they are a nuisance because of their noise.

The original Covenants, a sparse three and one-half (3½) pages, were imposed in 1972 by Eldorado at Santa Fe, Inc., a subsidiary of AmRep New York. (RP 415). No one identified who drafted the Covenants, under what circumstances or under what considerations. In any event, the Covenants were restated and amended in 1995 through an Eldorado subdivision election process. (RP 364). Accordingly, what AmRep New York was thinking in 1972, to the extent that controls covenant interpretations, became moot in 1995 when the Covenants were enacted anew.

The current 1995 Eldorado Subdivision Covenants (RP 364) provide at §11:

> 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. It is forbidden to permit dogs to run at large in Eldorado. At all times, dogs must be kept, restrained and controlled by their owners in the manner described in the Santa Fe County Animal Control Ordinance. A maximum of two horses may be kept on any lot which has an area in excess of three acres and which has been properly designated, pursuant to these covenants, as a horse area on any recorded subdivision map or by majority vote of the Board of Directors. A stable for such horses may be erected upon such lot.

The first sentence of this covenant §11 had been part of the Covenants since 1972. (RP 415). The second sentence was added with the 1995 Covenant election.

The context of these Covenants includes that the Eldorado subdivision is in a rural environment eight miles east of Santa Fe with lot sizes of one acre on up. (RP 415, 364). The Covenants speak to the fact that this is not a tightly controlled urban environment. Instead, as stated in the preamble, this is an area with "natural beauty" within "an attractive rural setting for residential neighborhoods" with a "unique natural character" with covenants that encourage "individual expression consistent with the historical traditions of the region." (RP 415, 364).

In 2011-2012, certain Eldorado residents decided that hens were no longer welcomed in the subdivision and pressure was put on the Association to ban them. (RP 422 *et. seq.*). The Association, confounded by the ambiguous covenant language of ¶ 11 (RP 376) and the different opinions that people had as to its effect

on chickens, tried to resolve the ambiguity by holding a covenant amendment election which presented two proposed alternative amendments, either one of which would have replaced the original ambiguous covenant with a different covenant with clear meaning with regards to hens. (RP 376-377). One allowed chickens and one did not. The ballot provided: "The two competing amendments are designed to clarify whether or not homeowners can have chickens on their property.") *Id.* Fifty percent (50%) plus one of all property owners must vote in favor of a covenant amendment for it to be enacted. Neither of the proposed amendments met that standard. The results were: Of the 2777 ballots mailed to members, 999 (35.07%) voted for the no chicken amendment and 805 (29.99%) voted for the pet hens allowed amendment. 35.04% of the members did not vote. (RP 428) Thus 64.03% of the members either wanted chickens or did not care enough to mark and return a ballot. Left in place then was the original and acknowledged ambiguity concerning hens. None of this, however, has any bearing on covenant interpretations. Covenants are interpreted as a matter of law using the standards, addressed *infra,* set by the New Mexico Supreme Court – not by ad hoc inconclusive opinion polls.

The Defendants contended that the required ambiguity resolution was in favor of free use and the maintenance of chickens or hens, which would then be subject to limitations and conditions in §11. (RP 364). The Covenants allow all

creatures to qualify as household pets. No specific creature is denied this opportunity. This leaves the pet allowance criteria with substantial flexibility, allowing the residents the freedom of "individual expression consistent with the historical traditions of the region." (RP 364).

The Covenants apply to "animals, birds or poultry" as a single group. They do not specify what animals, birds or poultry may or may not be kept as pets (except by the explicit mention of horses and dogs). Thus, no particular creature is prohibited because of its species and no particular creature is allowed, except dogs and horses which have specific restrictions which apply to them. The language continues: "... shall be kept or maintained on any lot". The Covenant does not say "within any residence", nor is the word "therein" used. The Covenants clearly contemplated keeping certain pets out of doors.

Next, the Covenants provide for the exceptions to the initial prohibitions. These exceptions apply equally to the grouping of "animals, birds and poultry", indicating clearly that poultry, or any other animal or bird, can qualify as pets if they meet certain conditions. First, these should be "recognized household pets". By whom they should be recognized and at what time the recognition assessment should be made is never defined. The word "recognized" is entirely unclear, since the term has no reference to any agency of recognition, such as a person, institution or other entity. The Covenants appear to provide flexibility in determining whether

the "recognized household pet" requirement is met, but then other conditions apply in determining whether the recognized pet is allowed. A household is a group of persons residing together in a residential setting. Under the Covenants, recognized household pets could be interpreted to be those pets recognized by the household. A reasonable interpretation would be that the household identifies what its pets are. This is made additionally clear because the "exception" applies equally (or actually more specifically) to poultry. If poultry could not be household pets, then there would be a blanket prohibition of poultry with no possibility of exceptions. In fact following some rules of construction discussed later it could be argued that *only* poultry can qualify as pets, as the word "poultry" is closest to the pet exception modifier. Since at least some poultry is contemplated as being pets, what poultry is more domesticated than hens?

The controlling consideration should not be the type of creature involved, but whether these "animals, birds or poultry", once part of a household, can comply with the covenant requirements of "reasonable numbers"; being "for the pleasure and use of the occupants" and involving no commercial use. Finally, if the Covenants intend to ban specific creatures, or only allow certain creatures, it would be a simple matter to so state.

In ruling in the summary judgment proceedings, the Decision did not apply our Supreme Court case law which establishes that ambiguities are resolved in

favor of free use, unless this results in an absurdity. Instead, the Decision sought to uncover the intent of the developer in 1972, perhaps the intent of the covenant amendment voters in 1995 and relied on the opinions of others who volunteered to give them. Little if any attention was paid to the Covenant language, the rural environment involved and the liberal language of the Covenant preamble. (RP 679 *et. seq.*). The Decision concluded that hens as pets did not enjoy their current popularity in 1972. Therefore, the developer meant to ban them. However, assuming the Covenant interpretation rises and falls on the hidden and speculated intent of the developer in 1972, an equally reasonable conclusion would be that by not excluding any species of animal from the exceptions, the developer provided flexible and evolving parameters and gave no thought to individual creatures. Further, the Covenants were restated and amended in 1995, superseding the 1972 covenants, thus rendering any reliance on the developer's hidden intent entirely irrelevant. Instead, if discovering the hidden intent of the creator is the goal, the Court was then left with discovering the hidden intent of each of the voters in the Covenant election, an impossible task as voter opinions are likely as varied and conflicting as the number of participating voters. As will be addressed further, hidden intents should have no bearing upon the meaning of covenants since covenants are filed of record without any hint as to anyone's hidden intents. The only access buyers have is to the covenants in their written form and it is based

upon this that buyers make the important decisions of whether to buy property and what uses might be made of it.

The Decision then concluded that the community failed covenant amendment election results in 2012 could be viewed as a community poll and used to resolve the ambiguity. Also, the view of the Association Board, which view is subject to constant change as Board composition changes, could, according to the Decision, serve the same function. Accordingly, the reasoning went, since the Board and a small percentage of residents in Eldorado expressed an opinion that they did not want chickens, that would resolve the ambiguity. The Decision also relied on the affidavit of a home builder who opined that livestock should not be allowed, but who was never a party to the Covenants, was not around in 1972 and was not involved in the enactment of the 1995 Covenants. The Decision also relied on the affidavit of a veterinarian who opined that the current trend of keeping hens as pets[2] did not become significant until the mid 2000s and that only forty-five percent (45%) of those she polled at some point kept chickens as pets. Therefore, the Decision concluded, a majority of the nation likely would not recognize chickens as pets.

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[2] It is difficult to understand how this helps the Plaintiff, as the veterinarian admits that chickens are now popular as pets, and since the nature of chickens has not changed over the centuries, their capacity for being a pet has similarly always existed.

STANDARD OF REVIEW

The Standards of Review are essentially the same for all of the points identified below. They relate to summary judgments and covenant interpretations.

Montgomery v. Lomos Altos, Inc., 2007-NMSC-002, ¶ 16, 141 N.M. 21, 150 P.3d 971 ("An appeal from the grant of a motion for summary judgment presents a question of law and is reviewed de novo."); *Self v. United Parcel Serv., Inc.,* 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582 ("Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.")

COVENANT INTERPRETATION

Sabitini v. Roybal, 2011-NMCA-086, ¶ 8, 150 N.M. 478, 261 P.3d 1110, provides that "[a]mbiguity exists when a word or phrase is susceptible to two or more meanings and whether ambiguity exists is a question of law. See also *Lawton v. Schwartz, supra,* ¶ 21.

Estates at Desert Ridge Trails Homeowners' Association v. Vazquez 2013-NMCA-051, ¶ 11, 300 P.3d 736, ruled as a matter of law that a challenged use did not violate restrictive covenants. The Court also ruled that "[i]nterpretation of language in a restrictive covenant is a *question of law* that we review de novo. *Heltman v. Catanach*, 2010-NMCA-016, ¶ 5, 148 N.M. 67, 229 P.3d 1239."

Sabitini v. Roybal, *supra* at. ¶¶ 6-7, provides: "Whether a district court has correctly construed a restrictive covenant is a question of law which we review *de novo*. See, *Smart v. Carpenter*, 2006-NMCA-056, ¶¶ 6-7, 139 N.M. 524, 134 P.3d 811.7." The court also held: "Failure to apply the rules of construction is an error of law" *Id.* ¶ 7.

POINT I

The Covenants are Ambiguous

As set out in the Summary of Facts, the Covenants are ambiguous in several aspects. First, no specific animal or poultry is prohibited from being a pet. The Covenants spell out the parameters for recognized pets and as long as hens meet the conditions, there is no exclusion. The pet exception modifies poultry and under strict application of the last antecedent doctrine, the argument could be made that *only* poultry can be pets, although Defendants are not contending that the modifying exception does not also apply to animals and birds. (*Hale v. Basin Motor Co.*, 1990-NMSA-068, ¶ 9, 110 N.M. 314, 795 P.2d 1006, stating the doctrine of the last antecedent as "[r]elative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote.")

The Covenants are also ambiguous as to who recognizes the pets. Is this done through community polls, veterinarians, national trends, an Association

Board at a given moment, or a home builder? Or is this done by the household that develops the relationship with the creature? Why would the pet exception clearly apply to poultry, but no member of the poultry family could ever qualify as a pet? At what moment in history does one attempt to do the recognizing – 1972 when the original covenants were filed, 1995 when restated covenants were filed, when someone buys a lot, when a hen is purchased? Even the veterinarian admits that at least as of ten years ago chickens became popular as pets. (RP 428).

A covenant ambiguity exists when it is fairly susceptible of different constructions. *Wilcox v. Timberon Protective Association*, 1990-NMCA-137, 111 N.M. 478, 484, 806 P.2d 1068, 1013 (Ct. App.1990); *Agua Fria Save the Open Space Association, v. Rowe* 2011-NMCA-054, ¶ 11, 149 N.M. 812, 255 P.3d 390; *Lawton v. Schwartz,* 2013 -NMCA- 086, ¶ 21, 308 P.3d 1033; *Jones v. Schoellkopf*, 2005-NMCA-124 ¶ 12, 122 P.3d 844, 138 N.M. 477; *Levenson v. Mobley*, 1987-NMSC-102, 106 N.M. 399, 401, 744 P.2d 174, 176 (1987). Clearly, an ambiguity exists in the case at bar as a matter of law and in reality, as this debate has been reverberating through the Eldorado community for years. The question is how the ambiguity is to be resolved.

The Covenants begin with a prohibition against all "animals, birds or poultry" and then allows for any of those, if they are recognized household pets on the lots, not for commercial use and not a nuisance. So instead of categorically

prohibiting animals, birds or poultry, they are all allowed if they meet certain conditions.

The Eldorado covenant provision contains the exception for recognized household pets, and this applies directly to "animals, birds or poultry". There is no more categorical ban on poultry than there is on animals or other birds. In fact the word "poultry" is structurally the closest category of living creature to the modifying clause "except recognized household pets". It would make no sense in sentence structure to say that "except recognized household pets" jumps over the word "poultry" and only modifies the word "animals" or "birds".

POINT II

The Decision Applied An Incorrect Standard In Interpreting Covenants

The Decision failed to give the Covenant language and the relevant context the proper weight and effectively dismissed the required covenant interpretation standards in favor of random opinions and speculation concerning the intent of an unknown covenant drafter in 1972. Instead of analyzing the specific Covenant language, the Covenant language as a whole and considering the location and environment of the Eldorado subdivision, the Decision resolved the acknowledged ambiguity by trying to discern the intent of an unknown covenant drafter in 1972, even though the Covenants were freshly re-imposed in 1995. The trial court then tried to buttress its conclusion by anointing a limited and failed low turnout

covenant amendment election as a community poll and giving interpretive weight to the random opinions of a veterinarian, a covenant enforcer, a homebuilder and a regularly changing Association Board. Apparently under the standards suggested by the Decision, covenant interpretations can change with every new poll, a different veterinarian consultant or every newly constituted Association Board, throwing property owners and potential property buyers into a sea of uncertainty.

The Supreme Court has established the method for covenant interpretation which avoids the type of chaos suggested by the current Decision, and it does not employ the method described in the Decision. *Sabitini v. Roybal, supra*, involved a Plaintiff who sought to tear down the defendant's garage for being too large to meet the covenant definition of a garage. The Court of Appeals *as a matter of law* (*Id.* ¶ 7) reversed the district court and interpreted the covenants in favor of free use. No suggestion was made that one should discover the intent of the covenant drafter or the majority opinion of neighborhood property owners. Instead:

1. The "Court has a duty to enforce the express intention as set forth in the covenants when they are unambiguous." *Id.* ¶ 7.

2. When the express intentions are ambiguous, then rules of construction for interpreting restrictive covenants are applied. *Id.* ¶ 7.

In *Sabitini* the Court determined that "private garage is ambiguous," as it was "susceptible to two or more meanings". The Court noted that in *Hill v.*

Community of Damian of Molokai, 1996-NMSC-008, 121 N.M. 353, 911 P.2d 861 even the term "family" was considered to be ambiguous. *Id.* ¶ 9. Similarly, the court noted that in *Rusanowski v. Gurule*, 1992-NMCA-94,114 N.M. 448, 840 P.2d 595 that court determined that "outbuilding" was also ambiguous because it was not defined. *Id.* ¶ 9. The court then concluded that private garage "was ambiguous specifically because the covenants did not 'define the term'". *Id.* ¶ 11. The *Sabitini* Court then applied the process mandated by *Hill v. Community of Damien of Molokai, supra,* the latest Supreme Court opinion on the matter:

1. Words must be given their ordinary and intended meaning.

2. Courts "construe the language strictly in favor of the free enjoyment of property and against restrictions". *Id.* ¶ 3.

3. Restrictions should not be construed "strictly as to create an illogical, unnatural or strained construction"; and,

4. Courts "will not read restrictions into covenants by implications." *Id.*

Agua Fria Save the Open Space Association v. Rowe, 2011-NMCA-054, 149 N.M. 812, 255 P.3d 390 is a Court of Appeals case which addressed whether the successors in interest to a developer successfully extinguished restrictive covenants on a "country club tract". The Court of Appeals fully recognized that "restrictive covenants must be considered reasonably, though strictly, and illogical, or unnatural or strained construction must be avoided", citing *Montoya v. Barreras,*

1970-NMSC-111, 81 N.M. 749, 750, 473 P.2d 363, 364 (1970). *Id.* ¶ 16. The *Agua Fria* court also recognized, as it must, the controlling holding in the Supreme Court case of *Hill v. Community of Damien of Molokai, supra,* at ¶ 16, that a court "will not read restrictions on the use and enjoyment of the land into the covenant by implication", also citing *Hines Corp. v. City of Albuquerque,* 1980-NMSC-107, 95 N.M. 311, 313, 621 P.2d 1116, 1118 (1980) that in construing covenants "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 in making the restrictions". (¶ 16).

The *Agua Fria* court continued and recognized at ¶ 18 that under the *Hill* case ambiguous language in a covenant must be resolved "in favor of the free enjoyment of the property and against restrictions". Reference was also made to *Sharts v. Walters,* 1999-NMCA-094, 107 N.M. 414, 419-420, 759 P.2d 201, 205-206 (Ct.App. 1988) that ambiguities are resolved "in favor of free enjoyment", but the rule cannot "be applied to defeat the obvious purpose of the restrictions." (¶ 18). The court then relied upon *C.R. Anthony, Co., v. Loretto Mall Partners,* 1991-NMSC-070, 112 N.M. 504, 817 P.2d 238 (1991) and *Mark V, Inc., v. Mellekas,* 1993-NMSC-001, 114 N.M. 778, 845 P.2d 1232 (1993) for the proposition that if 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." (¶ 20).

However, applying a *Mark V* analysis is difficult to reconcile with the "free use" resolution mandated by *Damien of Molokai*, unless the distinction is that a *Mark V* analysis is used when the covenant provision being analyzed does not involve a use issue, and therefore "free use" would not resolve the issue, such as in *Agua Fria* which involved the "applicability of the extinguishment provision to the Country Club Tract" (¶ 25) [3] The *Agua Fria* court finally concluded that "... the intent of the parties controls the interpretation of restrictive covenants under New Mexico law." (¶ 24). However, that just begs the question. Is intent derived by reading the language of the covenants within a context that is clear and puts the public on notice, as was done in *Montoya* and *Sharts*? That is the Supreme Court sanctioned method. If ambiguity still exists, then the default provision must apply. Using a *Mark V* approach which actually allows for the modification of *unambiguous* covenant language is an impossible task and does not protect the integrity of covenants, but leaves property owners at the mercy of the *intent* of some unknown person or persons during some undefined period of time. Again, does one go back to 1973 and try to determine the intent of the AmRep (Eldorado

[3] Defendants struggle with the concept of applying a *Mark V* approach to *any* covenant interpretation exercise, as *Mark V* tries to get to the intent of the contracting parties. When imposing covenants, there are no contracting parties there is only a developer or some agent who prepares and records the documents. The "parties" do not exist until after the covenants are filed and people start buying lots and then become "parties". Their intent can only be to agree to what it is they read in the recorded covenant. And how many differing and varying intents are then developed?

at Santa Fe) associate who prepared the covenants? How about the voters who created re-stated and amended covenants decades later? How about each lot purchaser who agrees to buy a lot and then becomes a party to the covenants? When a use issue is involved, free use is the default result in the face of an ambiguity.

The *Agua Fria* case cannot be read as in any way modifying the holdings of the Supreme Court case in *Damien of Molokai.* While surrounding circumstances and intent are certainly components of covenant interpretations, *Agua Fria* does not and cannot alter the classic covenant interpretation approach. Further, even after *Agua Fria* the Court of Appeals cases return to the time honored process.

Sabitini v. Roybal, 2011-NMCA-086, 150 N.M. 478, 261 P.3d 1110, discussed above, holds true to the traditional covenant analysis standards.

Estates at Desert Ridge Trails Homeowners' Association v. Vazquez 2013-NMCA-051, 300 P.3d 736, ruled again as a matter of law that a challenged use did not violate restrictive covenants. First the Court ruled that "[i]nterpretation of language in a restrictive covenant is a *question of law* that we review *de novo. Heltman v. Catanach*, 2010-NMCA-016, ¶ 5, 148 N.M. 67, 229 P.3d 1239." *Id.* ¶ 11.

> "In interpreting a restrictive covenant, we look to certain general rules of construction: First, when the language of a restrictive covenant is unclear or is subject to ambiguity, then the covenant will be resolved in favor of the free enjoyment of the property and against the restriction. Second,

> restrictions on land use will not be read into covenants by implication lest the free alienability of property be frustrated. Third, restrictive covenants must be considered reasonably, though strictly, so that illogical, unnatural or strained construction will not be affected. [F]ourth, words in a restrictive covenant must be given their ordinary and intended meaning." *Id.* ¶ 11.

Further confirming this, the Court stated that "when the language of a restrictive covenant is unclear ... the covenant will be resolved in favor of the free enjoyment of the property and against the restriction ... [and] restrictions on land use will not be read into [the] covenants by implication lest the free alienability of property be frustrated. In sum, we emphasize again what we said in DeVaney: If a restrictive covenant is to preclude short-term rentals it must be stated with sufficient specificity in the covenant." *Id.* ¶ 20.

Lawton v. Schwartz, 2013-NMCA-086, 308 P.3d 1033, involved an interpretation of covenants as to when covenant amendments could be made. It did not involve the application of covenants to particular uses or activities. Instead of employing the analysis standards reconfirmed in *Vazquez* several months earlier and *Sabitini*, the Court jumped to a *Mark V, Inc. v. Mellekas* analysis and remanded the case to take evidence as to intent involved in the various covenants and their amendments. Significantly, *Vazquez* was referenced at various times. Understandably the covenant interpretation standards restated in *Vazquez* were not utilized in *Lawton* because this was not a use or activity challenge case. Resolving the ambiguity in favor of free use would not resolve the issue in that case.

Court of Appeals cases prior to *Agua Fria* are in accord.

Aragon v. Brown, 2003-NMCA-126, ¶ 14, 134 N.M. 459, 78 P.3d 913 held: "The covenants make the distinction between state and federal standards material. Why the landowners made the distinction they did is irrelevant. *Wilcox* specifically states, '[t]he secret, unexpressed intentions of the developer [in adopting covenants] are not admissible to interpret the meaning of a covenant running with the land. 111 N.M. at 484, 806 P.2d at 1074.'"

Jones v. Schoellkopf, 2005-NMCA-124 ¶ 12, 122 P.3d 844, 138 N.M. 477 recognized that if the Defendant could establish that the covenant that was sought to be enforced was ambiguous, then he would benefit from how covenant ambiguities are resolved. However, the court found no ambiguity. *Pollock v. Ramirez,* 1994-NMCA-011, 117 N.M. 187, 870 P.2d 149 (Ct.App. 1994) held: "Nothing in the amendments to the declaration of covenants indicates an express intent on the part of Norco that the filing of the instrument was intended to revive or reestablish the covenants drafted by the Kings. *Wilcox v. Timberon Protective Ass'n*, 111 N.M. 478, 483, 806 P.2d 1068, 1073 (Ct. App. 1990). (When instrument is ambiguous, it will be resolved in favor of free enjoyment of property and against the restriction), cert. denied, 111 N.M. 529, 807 P.2d 227 (1991)".

As referenced previously, *Hill v. Community of Damien of Molokai, supra*, ¶ 6 ruled unequivocally that in challenges to use and activities, ambiguous covenants

are resolved in favor of free use. This is the last mandate from our Supreme Court on covenant interpretation, and it is quite clear.

Angel Fire Resort Operations, L.L.C. v. Corda, 2005-NMCA-084, ¶ 17,116 P.3d 841, 138 N.M. 50 is in accord. *Baker v. Aday*, 1999-NMCA-123, ¶ 7, 128 N.M. 250, 991 P.2d 994 held: "In giving particularized and legal force to this manifest intent, we construe the language strictly "in favor of the free enjoyment of the property and against restrictions, *Heath v. Parker*, 93 N.M. 680, 681, 604 P.2d 818, 819 (1980), but not so strictly as 'to create an illogical, unnatural, or strained construction,' *Hill v. Community of Damien of Molokai*, 1996-NMSC-008, ¶ 6, 121 N.M. 353, 911 P.2d 861. Furthermore, we will not read restrictions into covenants by implication. See *Id.*"

Finally, while the "expressed intention of the parties is of primary importance," this "expressed intention" is ascertained from the "servitude's language interpreted in light of all circumstances ... [which includes] the location and character of the properties ... the use made of the properties before and after creation... [and] the character of the surrounding area". *Third Restatement of the Law, Property Servitudes* ¶ 4.1 *cmt.* (*d*) P. 499, relied upon by *Agua Fria*. See also *Allen v. Timberlake Ranch Landowners Association* 2005-NMCA-115, ¶ 14, 119 P.3d 743, 138 N.M. 318, ("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 in making the restrictions.") As the *Restatement cmt. (d)* explains: "searching for a particular meaning adopted by the creating parties is generally inappropriate because the creating parties intended to bind and benefit successors for whom the written record will provide the primary evidence of the servitudes meaning".

The Decision suggests that "free use" means that those who seek to enforce covenants increase the free use of their property by restricting permitted uses on their neighbor's property. This turns the "free use" concept on its ear and has never been suggested by any reported case.

In sum, an ambiguity exists if a covenant is reasonably susceptible to more than one interpretation. This is determined as a matter of law. If there is an ambiguity, then at least in use/activity cases, it is resolved in favor of free use, unless this results in an unnatural or strained result in light of the covenant language and the covenants' obvious intent. In the case at bar there is nothing absurd about allowing hens to qualify for the Covenants' "exception" modifier which appears directly after the word "poultry". Indeed, it is undeniable that hens are pets for a number of families. This is recognized by the Plaintiff's veterinarian. That the extent of hens' popularity as pets has increased over the years has no

bearing on the nature of chickens, it merely means that the word gradually spreads that these feathered friends can be nice additions to a family.

POINT III

Purchasers Should Be Allowed To Rely On The Record

The Decision's approach resolves the Covenants' ambiguities by relying on events entirely undiscoverable by a prospective purchaser in Eldorado who only has available for review the recorded Covenant documents. A prospective purchaser of property in Eldorado could not likely discover the results of a failed Covenant election, the opinions of a particular Association Board, the hidden intent of an unknown Covenant drafter in 1972 or the intent of voters in a 1995 covenant election. Instead, a purchaser in Eldorado is aware of the Covenant language, the rural nature of the subdivision, the allowance of horses on some lots and the large size of lots. A bona fide purchaser cannot be bound by events which are not part of the recorded records.

NMSA 1978 Section 14-9-1, require that documents of any sort "affecting the title to real estate shall be recorded in the office of the county clerk..." This is to provide the public with notice "of the existence and contents of instruments so recorded..." (Section 14-9-2, *supra*) If a document is not recorded, then it does not bind any good faith purchaser. (Section 14-9-3, *supra*). Restrictive covenants constitute valuable "property rights which run with the land" (*Montoya,* 81 N.M. at

751, 473 P.2d at 365) (*Leigh v. Village* of *Los Lunas,* 2005-NMCA-025, ¶ 11, 137 N.M. 119, 108 P.3d 525 (covenants "... 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.") *Restatement (Third) of Property Servitude* § 4.1 *cmt.* (*a*).

Since covenants run with the land, they affect the title to the land. To the extent that the covenants are modified by hidden intents or the opinions of boards or random third parties, if those modifications are not part of the record, by statute they are not binding upon any bona fide purchasers for value. See, *Amethyst Land Co., Inc v. Terhune,* 2014-NMSC-015, ¶ 18, 326 P.3d 12. ("Desert Sunrise was a bona fide purchaser: it did not have notice-either actual, constructive, or inquiry-of the existence of the Extinguishment Agreement because the Terhunes had not recorded the Extinguishment Agreement at the time Desert Sunrise purchased the 22 acre parcel."); *Ruybalid v. Segura*, 1988-NMSC-084, 1988-NMSC-084, 107 N.M. 660, 665, 763 P.2d 369, 374 (Ct.App. 1988). ("The supreme court has held that reformation will not affect the rights of a bona fide purchaser or any encumbrancer of land without notice or knowledge of the claimed mistake in the title.") There is no suggestion that the Defendants were other than bone fide purchasers. As such, they are only bound by the Covenants as they were recorded – not all of these considerations recited in the Decision and found no where in the recorded record.

Dunning v. Buending, 2011-NMCA-010, ¶11, 149 N.M. 260, 247 P.3d 1145, provides:

> See Restatement (Third) of Property: Servitudes § 1.4, cmt. a (noting that "[t]he notice requirement of equity was never significant in American law because constructive notice given by a recorded instrument met the requirement, and the recording acts protected bona fide purchasers without notice.)
>
> Instead, as we have explained, the covenant will be enforceable if the covenant touches and concerns the land, if the original parties intended the covenant to run with the land, and if the successor to the burden is on notice of the covenant.

Head v. Gray, 938 So.2d 1084, 1090 (La.App. 2006) provides:

> Such an interpretation by a third party viewing the public records and reading these Covenants is reasonable, whether or not it is the only interpretation that can be understood for Restriction #8. It thus becomes the interpretation the law mandates for the most free and unrestrained use of the immovable.

Drenter v. Duitz, 883 N.E.2d 1194, 1203 (Ind.App. 2008) provides:

> Further, enforcement of the non-waiver clause in the multiparty context allows prospective purchasers of property to rely on recorded restrictions and covenants...

In the case at bar, all a potential purchaser or existing owner has to try to ascertain the prohibited use of property is the recorded Covenants. If they are ambiguous then, as the New Mexico Supreme Court declares, the burden placed on the drafter to make clear what the restrictions are on the uses of property is not met and the ambiguity is resolved in favor of free use.

POINT IV

Conflicting Affidavits Do Not Address Material Facts

The Decision confirmed that "'recognized household pets' are not defined in the covenants and are not clear on their face." Instead of resolving the ambiguity by using the Supreme Court's mandated methodology, the Decision relied on an affidavit of a Colorado veterinarian which concluded that a majority of persons responding to an inquiry fifty-five percent (55%) did not keep their chickens as pets, and the currently active hens as pets phenomenon was not established until ten years ago or so. Also, the Decision relied upon affidavits relating to past Association Boards' responses to chickens and the opinion of a home builder that the Covenants did not intend to allow livestock operations. Affidavits filed by the Defendants conflicted with these affidavits. However, debating about what someone thought in 1972 or voters thought in 1995 or when there was a sudden epiphany and the relationship between hens and humans dramatically changed is far afield from the appropriate inquiries. What does the Covenant language say? Is it ambiguous? Could it support a reasonable interpretation that "recognized household pets" is a flexible and evolving category that is defined by the reality of the relationship between the owner and the creature, subject to conditions and restrictions that protect the interests of neighbors and the neighborhood? Covenants are viewed within their context: the language, the language of the

balance of the Covenants and the properties to which they apply. Haphazard opinions of pollsters, home builders, veterinarians and Association Boards do not come into the mix. Ambiguity is determined as a matter of law. The resolution of the ambiguity is resolved in favor of free use. Whether a free use application produces a strained and illogical result is also resolved as a matter of law. The Decision concluded that allowing chickens produces an illogical result and would open the door to other creatures as pets. That is precisely what the Covenants allow. The pet exception applies to every variety of creature. Resolving the ambiguity through community polls, national polls, Association Board opinions, and veterinarians, all of which opinions may clash at any given time, is a recipe for chaos, not uniformity. Under the Covenants, households have the burden of establishing that their claimed pet is truly part of their household and then other conditions apply to assure community protection.

The resolution of the Covenant ambiguities does not involve these affidavits.

Romero v. Philip Morris Inc., 2010-NMSC-035, ¶ 11, 148 N.M. 713, 242 P.3d 280 provides:

> In addition to requiring reasonable inferences, New Mexico law requires that the alleged facts at issue be material to survive summary judgment. To determine which facts are material, the court must "look to the substantive law governing the dispute," Farmington Police Officers Ass'n v. City of Farmington, 2006-NMCA-077, ¶ 17, 139 N.M. 750, 137 P.3d 1204. The inquiry's focus should be on whether, under substantive law, the fact is "necessary to give rise to a claim." Eoff v. Forrest, 109 N.M. 695, 702, 789 P.2d 1262, 1269 (1990); see

also Martin v. Franklin Capital Corp., 2008-NMCA-152, ¶ 6, 145 N.M. 179, 195 P.3d 24 ("An issue of fact is 'material' if the existence (or non-existence) of the fact is of consequence under the substantive rules of law governing the parties' dispute."); Parker v. E.I. Du Pont de Nemours & Co., 121 N.M. 120, 124, 909 P.2d 1, 5 (Ct. App. 1995) ("A fact is material for the purpose of determining whether a motion for summary judgment is meritorious if it will affect the outcome of the case."). In this case, substantive federal antitrust law is the filter through which we must determine whether genuine issues of material fact exist. See § 57-1-15.

Arguments Raised Below

All of the arguments raised in this Brief in Chief were made during the summary judgment proceedings and submitted pleadings. (Tr. 4 – 40; RP 346, 578 and 636).

CONCLUSION

The District Court erred as a matter of law in interpreting the covenants at issue and resolving their ambiguity. The Defendants' motion for summary judgment should be granted as a matter of law.

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CERTIFICATE OF SERVICE

It is hereby certified that on the 19th day of March, 2015, a copy of the foregoing was mailed, First-Class, postage-prepaid to:

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