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.

REPLY BRIEF

Honorable Mark A Macaron, District Judge

Ronald J. VanAmberg
VANAMBERG, ROGERS, YEPA,
ABEITA, GOMEZ & WORKS, LLP
347 East Palace Avenue
Post Office Box 1447
Santa Fe, New Mexico 87504-1447
(505) 988-8979
(505) 983-7508 (fax)
rvanamberg@nmlawgroup.com
Counsel for Defendant-Appellant

John P. Hays, Esq.
530B Harkle Road
Santa Fe, New Mexico 87505
jphays@chflaw.com

K. Steven Royce
Arland & Associates, LLC
201 Third St. NW
Albuquerque, NM 87102
SRoyce@thearlandlawfirm.com

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THE ASSOCIATION'S STIPULATION

The Association's position, as reflected in the Decision, is that categorically hens can never be recognized household pets. If they are, the Association argues, this will open the gate to any animal as a pet, which, in turn, will spell the demise of the covenants.

The Association brought this case in 2012 claiming that hens cannot be recognized pets. However, the Association then filed as an uncontroverted material fact an affidavit of a veterinarian which cites to a poll of hen owners, forty-two percent (42%) of whom "maintained hens as pets, companions or hobby animals." This poll recited an actual practice that hens were recognized and maintained as household pets by a significant segment of the population. (RP 536, ¶ 6). The veterinarian continues that ". . . the practice of keeping backyard poultry flocks . . . as hobby animals, has become a significant phenomenon only within the past ten years or so, since the mid-2000s." Thus, at the time of the filing of the complaint against these Defendants, hens as pets had been a significant phenomenon for ten years.[1] The pet covenant language is vague and flexible. (RP 364) Even under the Association's interpretation, if some species of poultry is "recognized" as a household pet (assuming "recognized" is a determining element and requires some

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[1] The web sites of PetCo (search PetCo and chickens), PetSmart (PetSmart and chickens), MyPetChickens.com and Wikipedia (Keeping chickens as pets) reveal the growing nature of his phenomenon.

societal recognition), then that poultry member is allowed by the covenants. By the mid 2000s, as stipulated by the Association, this recognition was wide spread. Nothing indicates that this phenomenon has not continued to the date of the filing of the complaint. There is nothing to suggest that the covenants are stuck in a time warp so that one must travel back to 1970 or 1995 to see how the hen as pets practice was developing. That would spell chaos. Property owners view the covenants at the time of purchase of their property and view the hens as pets phenomenon as it evolved to that point in time. The covenants do not provide that the recognition factor is examined in a particular year or requires recognition by particular persons. Instead, the pet covenant allows for the evolution of the relationship between humans and their fellow creatures instead of just defining a few specific animals as pets. Looking at the covenants at the time of the filing of the complaint is not only a reasonable approach, it is the one that makes sense.

The Restatement of Property (Third), Servitudes §4.1 *cmt.*(d) p. 501 recognizes the dynamic nature of covenants and does not support the contentions of the Association that we travel back to 1972 or 1995 to see what unidentified parties intended.

> Because servitudes are intended to bind successors and, frequently, to last indefinitely, the parties ordinarily are assumed to have intended that the servitude be interpreted dynamically to maintain its utility under changing circumstances.

The Association should be held to its assertion that hens as pets is a current phenomenon, and since the covenant language should be viewed in the context of a dynamic society and "changing circumstances," given the flexibility provided by the pet covenant, pet hens are not prohibited.

ISSUES NOT ADDRESSED BY THE ASSOCIATION

The Association does not discuss the dozen or more cases which hold that ambiguities are resolved in favor of free use. It does not explain why the last word from our Supreme Court in *Hill v. Community of Damien of Molokai,* 1996-NMSC-008, 121 N.M. 33, 911 P.2d 681, relating to covenant interpretation is not the controlling law. The Association does not explain how the preamble to the covenants does not describe a community with a relaxed nature and sufficient flexibility to accommodate hens as pets. The Association does not explain how a *Mark V v. Mellekas,* 1993-NMCA-001, 114 N.M. 778, 845 P.2d 1232 analysis which tries to discern the collective intent of the parties to a contract would work when over the decades there have likely been well in excess of 20,000 parties to this covenant contract, all with their own unique intentions. The Association does not explain how the structure of the covenant language relating to pets does anything but suggest that poultry may qualify as recognized household pets. The Association does not explain how it can conduct a covenant election in an attempt to resolve the long standing community understood ambiguity as to whether hens

can be household pets, while in these proceedings claim there is apparently no ambiguity. The Association does not explain how a bonafide purchaser of property in El Dorado is to be bound by the opinion a home builder, perhaps a developer in the 70s, a veterinarian, a code enforcement officer, some members of the Home Owners Association and whatever the collective homogenous intent might be of every party to the covenants in determining what the pet covenant allows.

COVENANT INTERPRETATION

The Defendants in their Brief in Chief discussed the holdings of more than a dozen cases, culminating in the Supreme Court's *Hill* case, which hold that the default standard for interpreting a covenant is that if after reviewing language and context the covenant is still ambiguous, then free use is the result. To the extent it is suggested that *Agua Fria Save the Open Space Ass'n v. Rowe,* 2011-NMCA-054, 149 N.M. 812, 255 P.3d 390 modifies the Supreme Court's *Hill* case, this is not permitted. As will be discussed subsequently, to reconcile *Agua Fria* with *Hill*, one can only conclude that the "intent" referenced in *Agua Fria* is as stated the Restatement (Third) of Property, Servitudes § 4.1 *cmt.*(d) p. 499, which is that any "intention" is determined through the "servitude's language interpreted in the 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." If after those considerations an ambiguity remains, then the free use conclusion in *Hill* is applied.

The exercise described in the *Mark V case* that one discerns the "object of the parties in making the restriction." 1993-NMCA-001, ¶ 13, is literally impossible in a covenant *use* case. As held in *Aragon v. Brown,* 2003-NMCA-126, ¶ 11, 134, N.M. 459, 78 P.3d 913, restrictive covenants "constitute a *contract* between the subdivisions' property owners as a whole and the individual lot owners" based on the consideration "given and relied upon in the conveyance of land." That makes every former and existing property owner a party to the contract whose intent, under a *Mark V* analysis, must be discovered in order to conclude whether there was a collective meeting of the minds, a fruitless adventure. In accord is *Allen v. Timberlake Ranch Landowners' Association,* 2005-NMCA-115, ¶ 14, 138 N.M. 318, 119 P.3d 743, ("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 making the restrictions.*") Emphasis added.

The Restatement §4.1 *cmt.*(d) p. 499 expresses the problem with a pure *Mark V* exercise:

> Because servitudes are interests in land, subject to the Statute of Frauds and the recording acts, heavy emphasis is placed on the written expression of the parties' intent. The fact that servitudes are intended to bind successors to interests in the land, as well as the contracting parties, and are generally

> intended to last for an indefinite period of time, lends increased importance to the writing because it is often the primary source of information available to a prospective purchaser of the parcels of land involved. 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 servitude's meaning.

Adding to the daunting nature of a *Mark V* exercise, in 1995 the covenants were restated and amended through a covenant election. (RP 364). Accordingly, trying to discern the intent of AMREP employees in the 60s or early 70s is now replaced, if one were to follow the Association's approach, by discerning the intent of each and every voter in the 1995 covenant election process.

Further, nowhere in New Mexico law is it suggested that the intentions of parties to a contract be determined by the opinion of a builder, the opinion of an out-of-state veterinarian, the opinion of an enforcement officer, an inconclusive and failed covenant election in 2012 or the opinions of a temporarily comprised and forever changing association board.

Accordingly, the concept of "intent of the parties" is probably not an appropriate phrase. The word context is probably more appropriate. One is to view the covenants within a context. That context is (i) the specific language of the particular covenant being questioned; (ii) general language of the covenants and (iii) the location and and character of the land to which these covenants apply, all

within the additional context of the present moment in time when the covenants are being examined.

PARTICULAR COVENANT LANGUAGE

The pet covenant (RP 364) provides that "no animals, birds or poultry shall be kept or maintained on any lot, except recognized household pets which may be kept thereon in reasonable number as pets for pleasure and use of the occupants but not for any commercial purpose . . ." This covenant allows any member of these groups to qualify as pets if conditions were met. If, as the Association suggests, poultry can never be a pet, then why this language? See Defendant's Brief in Chief, pp. 3-6.

The Association's main argument relies on the word "recognized." The covenants do not define this term, except that the emphasis is then on "for pleasure and use of the occupants", implying a limited and subjective recognition standard. Nor do they indicate who the recognizers are, how many recognizers there must be and when the analysis of recognition occurs. The lack of any definition indicates ambiguity. See *Sabitini v. Roybal,* 2011-NMCA-086, ¶ 8, 150 N.M. 478, 261 P.3d 1110 ("private garage is ambiguous," as it was "susceptible to two or more meanings."); *Hill v. Community of Damian of Molokai. Supra,* ¶ 9 (the term "family" was considered to be ambiguous) and *Rusanowski v. Gurule*, 1992-

NMCA-94, ¶ 9, 114 N.M. 448, 840 P.2d 595 ("outbuilding" ambiguous because not defined.)

It is clear from the language structure of the covenants that the original developer provided that poultry could be recognized as pets, as the exception "recognized household pets" is closest to the poultry category. Even the Decision (¶ 60, RP 687) admits the community has disagreed about this unclear pet provision for years. The 2012 covenant election demonstrated the split in the community on the covenant meaning, leaving the ambiguity in tact. The covenant language does not even suggest a categorical ban on hens.

The Association's position is that under no circumstances can hens be pets. The Defendants claim that they can be as long as the conditions set out in the covenants are met, and the covenants are not otherwise violated. Now, the issue of "recognized" has been stipulated out of the case with the affidavit of the Association's veterinarian. The Association has not even suggested that the Defendants are in violation of any other covenant provisions.

COVENANT LANGUAGE AS A WHOLE

The covenants as originally filed were a scant of 3½ pages, appropriate for a development located on a former cattle ranch well outside the city limits. (RP 415). The covenants contain a preamble which notes that the area is one 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). The 1996 amended and restated covenants (RP 364) restate the preamble. This language does not in any way suggest a ban on hens as pets.

CHARACTER OF THE LAND

The character of the land and the community has not changed. There is nothing which suggests that hens would not fit easily into the environment. This is not an urban development. This is not a golf course community. As the Association notes in the affidavit of Mark Conkling (RP 530), Eldorado was marketed and developed as a passive solar community, a sustainable concept in complete harmony with having a few hens in the backyard for eggs or just company.

There is nothing in these permitted analyses which point to any conclusion that hens cannot qualify as pets. When viewed as of 2012, when the Association brought its complaint, any ambiguity actually disappears, as hens as pets had been a recognized phenomenon for over a decade and, as noted in footnote 1, continues.

An ambiguity "exists when a word or phrase is susceptible to two or more meanings, and whether ambiguity exists is a question of law. *Sabitini v. Roybal,* 2011-NMCA-086, ¶ 8, 150 N.M. 478, 261 P.3d 1110. At worst, whether hens are permitted is ambiguous, in which case the mandates of the *Hill* case take over.

NOTICE TO PURCHASERS

As the Restatement (Third) of Property, Servitudes § 4.1, *cmt.*(d), p. 500 points out, these covenants are "intended to bind and benefit successors for whom the written record will provide the primary evidence of the Servitude's meaning." The "Statute of Frauds and recording statutes" are implicated. *Id.* See also, *Santa Fe Estates, Inc. v. Concerned Residents of Santa Fe North, Inc.,* 2009-NMCA-033 ¶ 12, 146 N.M. 166, 207 P.3d 1143, citing *Montoya v. Barreras,* 170 NMSC-111, 81 N.M. 749, 751, 473 P.2d 363, 366 ("Restrictions as to the use of land are mutual, reciprocal, equitable easements in the nature of servitudes in favor or owners of others lots . . .") NMSA 1978 § 14-9-1 and 14-9-2 requires that documents affecting title to real estate must be recorded in the office of the County Clerk in order to provide notice of the existence of the contents of the instruments. If a document is not recorded, it does not bind any good faith purchaser. Accordingly, the only notice a purchaser has is of the recorded covenants, the location and character of the property and the current trends in and developments of society. The thoughts of a home builder, a veterinarian, some employee of a developer and the actions or inactions of past Association boards are not binding on any purchaser.

***Buck Hill Falls Company v. Press*, 798 A2d 392 (PA. Super. 2002)**

Buck Hills is the primary case relied upon by the Plaintiff. It is, however, of little assistance. Here, there were two covenants at issue. One provided: "Livestock, Animals, Pets: No livestock, animals or poultry of any kind shall be raised, bred or kept on any existing Residential Property except dogs (which shall be kept on a leash when and if outside the Living Unit) and other household pets . . ." *Id.* ¶ 4. Apparently, the court ruled that the "except dogs" language which was grouped with "and other household pets" was a separate category to consider and did not in any way affect what the court perceived to be a categorical ban on poultry. "The covenant in question prohibits '. . . poultry of any kind . . .' at Kelly's property."; ". . . appellant argues that the Poultry Covenant is clear and unambiguous and since appellee's hens are poultry, they are prohibited. We agree". *Id.* at ¶ 13.

The second covenant which apparently influenced the decision was the prohibition that "no barn, stable, cow-shed, chicken house, pig-pen, detached privy or other out-buildings shall . . . be erected or constructed . . ." *Id.* ¶ 4.

Significantly, the court found that the "phase 'household pet' is somewhat ambiguous". *Id.* ¶ 18. Accordingly, the question was not whether some form of poultry could qualify as a household pet, but whether there was an absolute ban on poultry. That is not our case. The Association admits that the issue is whether hens

can be household pets and in fact admits that they are kept as pets, at least for the last ten or so years.

The grammatical construct in the *Buck Hills* case is the opposite of the Eldorado Covenant. *Buck Hills*' covenant begins with a prohibition against livestock, animals and poultry and then creates a new category of dogs and other household pets that are allowed. This is different from Eldorado. Our covenant begins 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. The word livestock is never used in the Eldorado covenants. Nor is there any prohibition against chicken coops or any outdoor temporary structure such as dog houses. 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".

Significantly, *Buck Hills* has never been cited in another reported case.

ALLOWING HENS WILL DESTROY COVENANTS

The Association, apparently dusting off Chicken Little to deliver the message with new found credibility, contends that if the covenants are read to allow hens, then the covenants are without standards or certainty and will be useless.

However, the Association does have full protections. First, ambiguities do not exist simply because people disagree on the meaning of a covenant. As stated in *Jones v. Schoellkopf*, 2005-NMCA-124 ¶ 12, 122 P.3d 844, 138 N.M. 477:

> Any ambiguity in these provisions is solely the sort of ambiguity that is produced by the bare fact that two people read the provisions differently. We have held that such does not create ambiguity, and instead ambiguity is only created when provisions are reasonably and fairly susceptible to two constructions. See Levenson v. Mobley, 106 N.M. 399, 401, 744 P.2d 174, 176 (1987). The same principle holds true for covenants. See Montoya, 81 N.M. at 750, 473 P.2d at 364 (stating that alleging a restriction is ambiguous does not make it so)

Also, covenants will not be given "an illogical, unnatural, or strained construction." *Hill* ¶ 6. Further, there are other restrictions relating to noise, odors and nuisances which add to the protections. The Santa Fe style is not in jeopardy, as it has been recognized and protected by courts for decades. *Gaskin v. Harris*, 1971 -NMSC- 013, N.M.,82 N.M. 336, 481 P.2d 698; *City of Santa Fe v. Gamble-Skogmo, Inc.*, 1964 -NMSC- 016, 73 N.M. 410, 389 P.2d 13. Any interpretation that a tractor trailer is a recreational vehicle would certainly be strained.

There is nothing strained or illogical about hens as pets. Under the structure of the covenants, they can qualify for the exception to the total ban on pets. They have been widely recognized as pets for more than a decade and, viewing the covenants in terms of the circumstances today, which is when they must be viewed, hens are allowed as pets as long as the specific conditions are met. And it is only hens that we are addressing. It is the Association that seeks to impose a strained and illogical interpretation of the pet covenant by claiming that if hens are allowed so are dangerous zoo animals. That hens will open the flood gate to wild, dangerous, offensive, odorous, noisy animals of all sorts deserves the same respect as the warning about the sky falling.

CONCLUSION

While the legal issues only involve hens, this dispute is much wider in scope. It is about an active group that cannot accept that Eldorado is not a suburb of Chicago or New York or Los Angeles. Instead they insist that the activities of neighbors need to be monitored by code enforcers and controlled by an association board. Resisting a ban on hens is viewed as insurrection. Being sued over hens is viewed by the Defendants and many others as an unwarranted and officious exercise of power that must be resisted or the flood gate will truly open. But the legal issue here is hens. They are not banned by the covenants and have been recognized by their owners, members of communities and an increasing number of

citizens at all material times. If the Association believes that residents of Eldorado do not maintain their hens "in reasonable numbers as pets for pleasure and use of the occupants [and] not for any commercial use or purpose," then they should bring that case. But the categorical ban on hens declared by the Decision should be reversed.

By _____

VanAmberg, Rogers, Yepa,
Abeita, Gomez & Works, LLP
347 East Palace Avenue
Post Office Box 1447
Santa Fe, New Mexico 87504-1447
(505) 988-8979
(505) 983-7508 (fax)
rvanamberg@nmlawgroup.com

CERTIFICATE OF SERVICE

It is hereby certified that on the 8th day of May, 2015, I filed the foregoing was e-mailed and mailed, first class, postage prepaid, to:

John P. Hays, Esq.
530B Harkle Road
Santa Fe, New Mexico 87505
jphays@chflaw.com

K. Steven Royce
Arland & Associates, LLC
201 Third St. NW
Albuquerque, NM 87102
SRoyce@thearlandlawfirm.com

Ronald J. VanAmberg