

1 STATE OF NEW MEXICO  
2 COUNTY OF SANTA FE  
3 FIRST JUDICIAL DISTRICT COURT

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5 No. D-0101-CV-200601758

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7 SANTA FE ESTATES, INC., and  
8 RIDGETOP ROAD, LLC.,

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10 Plaintiffs,

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12 vs.

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14 CONCERNED RESIDENTS OF  
15 SANTA FE NORTH, INC.,

16 Defendants.

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21 TRANSCRIPT OF PROCEEDINGS

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23 On the 25th day of May, 2007, at 10:36 a.m., this matter

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25 came for hearing on SANTA FE ESTATES' MOTION FOR SUMMARY

JUDGMENT;

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27 PLAINTIFFS' MOTION TO VACATE TRIAL SETTING, before the HONORABLE

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JAMES A. HALL, Judge of the First Judicial District, State of New

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Mexico, Division II.

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The Plaintiff, SANTA FE ESTATES, INC., and RIDGETOP ROAD,

22

LLC, appeared by Counsel of Record, MARK F. SHERIDAN, KRISTINA

23

MARTINEZ, Holland & Hart, LLP, Attorneys at Law, Post Office Box

24

2208, Santa Fe, New Mexico 87504-2208.

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1 The Defendant, CONCERNED RESIDENTS OF SANTA FE NORTH, INC.,  
2 appeared by Counsel of Record, RONALD J. VAN AMBERG, Van Amberg,  
3 Rogers, Yepa & Abeita, LLP, Attorneys at Law, Post Office Box  
4 1447, Santa Fe, New Mexico 87504-1447.

5 At which time the following proceedings were had:

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1           THE COURT: District Court's in session. We're  
2 on the record in Santa Fe Estates and Ridgetop Road vs. Concerned  
3 Residents of Santa Fe North, Incorporated; Santa Fe 2006-1758.  
4 Would counsel enter their appearance for the record, please. For  
5 the Plaintiffs?

6           MR. SHERIDAN: Good morning, Your Honor.

7           THE COURT: Good morning.

8           MR. SHERIDAN: Mark Sheridan, from Holland &  
9 Hart, for Santa Fe Estates. With me this morning is Kristina  
10 Martinez, a lawyer in our office; and Santa Fe Estates is  
11 represented here by its client representative, Mr. Bruce Geiss.

12          THE COURT: Okay. Mr. Herdman?

13          MR. HERDMAN: Thank you, Your Honor. Good  
14 morning. Frank Herdman for Ridgetop Road, LLC, and I also have  
15 representatives from Ridgetop Road, LLC, with me today in the  
16 courtroom.

17          THE COURT: Mr. Van Amberg?

18          MR. VAN AMBERG: Yes, Your Honor. Good morning.

19          THE COURT: Good morning.

20 MR. VAN AMBERG: Ronald Van Amberg on behalf of  
21 Concerned Residents.

22 (Excerpt of Court's Observations, Directions, Ruling:)

23 THE COURT: This matter comes before the Court on  
24 Santa Fe Estates' Motion for Summary Judgment. I'm going to  
25 attempt to outline, in some detail, the rationale for my ruling

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1 here on the record. This motion requests summary judgment on two  
2 separate items: One is whether or not Concerned Residents of  
3 Santa Fe North has a right to enforce the covenants. And the  
4 second request is that this Court enter summary judgment that the  
5 buildings shown in the development plan for the Thornburg Office  
6 Complex comply with the covenants in the Amended Declaration. I  
7 choose to address the second issue first.

8 I conclude that there is a question of fact as to  
9 whether or not the proposed buildings satisfy the requirements, at  
10 a minimum, of new/old Santa Fe Pueblo or Spanish style of  
11 architecture. The Defendants, Concerned Residents of Santa Fe  
12 North, have submitted affidavits from experts, stating that the  
13 proposed buildings do not comply, and those affidavits create a  
14 question of fact as to whether the development plan is in  
15 compliance and, therefore, summary judgment's not appropriate.

16 I feel it's important that I identify that ruling,  
17 because there are a couple of things noted in Santa Fe Estates'  
18 motion that purport to support its position on this issue, that I  
19 don't think support its position at all. One is, there's a series

20 of undisputed facts made regarding rulings of this Court in  
21 Santa Fe 2004-387, the administrative appeal. I think it's very  
22 important, on the record here, that that administrative appeal did  
23 not decide the issue as to whether or not the building plans or  
24 proposed buildings satisfy those requirements. Frankly, I'm a bit  
25 surprised by the argument, or surprised to see any reference to

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1 that decision, because reference to that decision misapprehends  
2 the fundamental legal difference between a reviewing court and a  
3 fact-finding court.

4 In that administrative appeal, this Court's only role  
5 was to review the decision of the municipal body and see whether  
6 that decision was supported by substantial evidence. That's a far  
7 different determination than determining, as a fact finder,  
8 whether there is compliance. I didn't hear any witnesses testify.  
9 I didn't get a chance to make any determination regarding  
10 credibility of witnesses. All I did was determine that there was  
11 substantial evidence to support the decision of the City. And,  
12 frankly, I'm surprised that Santa Fe Estates would find that  
13 that's in any way relevant to their Motion for Summary Judgment  
14 that I make a judgment, as a matter of law, that the buildings  
15 comply with the covenants. Two very different concepts involved  
16 there, and I think it's important that I note that on the record.

17 Also, I think it's important for me to note, as it  
18 relates to whether there's compliance with the covenants, that the  
19 Amended Declaration, what Mr. Van Amberg calls Item No. 5, that

20 that additional statement, really, plays no role at all in a  
21 determination as to whether the development plan complies with the  
22 covenants. What Mr. Van Amberg calls No. 5 on the list of  
23 covenants, that is, "It is expressly acknowledged by declarant  
24 that the buildings shown in the development plan for the Thornburg  
25 Office Campus comply with the foregoing covenants."

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1           This particular statement is of no legal consequence  
2 in the issue of whether or not there's compliance. I suppose it  
3 might have some legal consequence if there's some sort of  
4 litigation between Santa Fe Estates and Ridgetop Road, if later a  
5 court determines that they're not in compliance with the  
6 covenants. But it, really, is of no legal consequence. I think,  
7 as Mr. Van Amberg referred in the prior proceedings and, perhaps,  
8 even Judge Garcia, this is, really, a gratuitous statement that  
9 doesn't have any legal effect on those that have the ability to  
10 enforce the covenants.

11           So, as to the second item, the request that I enter  
12 summary judgment concluding that on the undisputed facts the  
13 buildings shown in the development plan comply with the covenants,  
14 I deny that motion because there are disputed questions of fact  
15 that must be resolved. I think it's important that I enter an  
16 order that says that.

17           Mr. Van Amberg, I want you to prepare an order on that  
18 argument, so that it's clear that there is not a finding by this  
19 Court that the development plan complies with the covenants. I'm

20 not familiar with all of the litigation between the parties but,  
21 to the best of my knowledge, there hasn't been a judicial  
22 determination, to date, as to whether there's compliance with the  
23 covenants.

24 Turning now to the second issue, the right to enforce  
25 the covenants. As I thought about this last night, I think there

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1 are, really, two ways that a party, here Concerned Residents of  
2 Santa Fe North, may be able to enforce covenants: One is, the  
3 ability to enforce covenants by, what I would refer to as,  
4 operation of law. This is, sort of, the standard circumstance  
5 where a dominant estate can enforce covenants. Here, it's  
6 undisputed that the Defendant, Concerned Residents of Santa Fe  
7 North, Incorporated, does not own property which could be viewed  
8 as the dominant estate. Therefore, by the standard operation of  
9 law, there's no ability of Concerned Residents of Santa Fe North  
10 to enforce the covenants.

11       And I agree with the arguments of Mr. Sheridan, that  
12 the covenants themselves, looking at them on their face, do not  
13 create covenants in gross. Certainly, there's no express language  
14 in the covenants, themselves, which provides a basis for  
15 concluding that Concerned Residents of Santa Fe North may enforce  
16 the covenants in the absence of owning any property. So the  
17 first, sort of, mechanism, that I would call allowing enforcement  
18 by operation of law, doesn't exist.

19       Before I turn to the second matter, I do want to make

20 one real clear point. Santa Estates undertakes an effort, in the  
21 filing of the covenants, to limit those covenants to the  
22 commercial property. I want it very clear that I make no ruling  
23 on the appropriateness of that effort to limit that to the  
24 commercial property. And I wouldn't want anyone to infer from my  
25 ruling that I have addressed that issue. It's not before me, but

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1 I don't want this record to, even, imply that I agree with  
2 Santa Fe Estates' efforts to limit the covenants only to the  
3 commercial property. So that addresses, sort of, application of  
4 the covenants by operation of law.

5       The second way that there may be enforcement, and this,  
6 really, gets to the crux of the matter, is whether or not there's  
7 an ability to enforce these covenants by way of contractual  
8 agreement. In other words, did Santa Estates and concerned  
9 citizens agree in 1996 that -- Concerned Residents, excuse me --  
10 that Concerned Residents would have the right to enforce the  
11 covenants? I think it is possible, under law, to have a  
12 contractual agreement that allows a party to enforce covenants. I  
13 think, legally, that is possible. I think it's precluded here for  
14 two reasons: One is the argument that Mr. Sheridan makes. Before  
15 these types of restrictive covenants can be enforced, the law  
16 requires a higher level of certainty than in ordinary contractual  
17 agreements, because it involves an interest in property.  
18 Effectively, I think, New Mexico law would be, or has been, that  
19 in order to establish that type of a right, as it relates to

20 property, it must be clear and unambiguous in the agreement

21 between the parties. That does not exist here.

22 I read Judge Garcia's determination that there is an

23 ambiguity in terms of contractual rights to not address the issue

24 of enforcement of the covenants. And I think the law here is that

25 that must be clear and unambiguous. And under any set of facts,

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1 even the testimony presented by the witnesses for Concerned  
2 Residents, at best, there is an ambiguity as to whether the  
3 parties agreed that there would be a right of enforcement. So,  
4 under the general principles of property law, the standard isn't  
5 met.

6       Secondly, and it's always difficult where you have  
7 multiple pieces of litigation and multiple judges involved, but, I  
8 believe, in my entire reading of the proceedings before Judge  
9 Garcia in Santa Fe 2004-348, that Judge Garcia addressed the issue  
10 of whether there was a contractual right to enforce the covenants,  
11 and concluded that there was no contractual right. I have to  
12 admit that I think this issue is somewhat unclear.

13       I think Concerned Residents properly points to  
14 Paragraph 8 of the Final Judgment from Judge Garcia, which reads,  
15 "In entering this judgment, the Court has determined that it is  
16 premature at this time and has not ruled whether Concerned  
17 Residents has any rights to enforce the restrictive covenants that  
18 Santa Fe Estates is required to create and record hereunder." I  
19 agree with Concerned Residents that that's very broad language,

20 and it requires me to look closely behind the record to see what  
21 Judge Garcia intended in that particular paragraph. And from  
22 everything I can see from the record, what was presented to Judge  
23 Garcia in terms of evidence, in terms of Proposed Findings of Fact  
24 and Conclusions of Law, and in terms of statements made by Judge  
25 Garcia at various hearings, including the final presentment

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1 hearing on this order, is that what he was intending to rule upon  
2 was that there did not exist any contractual rights to enforce the  
3 covenants.

4       What, I believe, he reserved under Paragraph 8 of the  
5 Final Judgment was, simply, this issue as to whether or not there  
6 could be enforcement of the covenants under the theory of, what I  
7 call, by operation of law, sort of, the argument of the existence  
8 of a covenant in gross. And I'm addressing that issue here, the  
9 one that I think he reserved, which is that it cannot happen, or  
10 there is not a basis, under the undisputed facts, for a covenant  
11 in gross. I believe that Judge Garcia did address the issue that  
12 there was no contractual agreement creating a right to enforce the  
13 covenants on the part of Concerned Residents.

14       So, I grant the first portion of the motion, and I  
15 conclude, on the undisputed facts, that Concerned Residents has no  
16 right to enforce any of the covenants, conditions or restrictions  
17 in the Amended Declaration. I do so, one, based upon there not  
18 being a clear and unambiguous declaration that that should occur  
19 in connection with the use of property. And, two, I believe that

20 Judge Garcia addressed any other arguments regarding a contractual  
21 right. So, on those two grounds, I believe that the first part of  
22 the Motion for Summary Judgment should be granted. I'm going to  
23 rely on counsel for Santa Fe Estates and/or Ridgetop Road to  
24 prepare that order.

25 I do think it's important that I enter both of those

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1 orders, which means that we still have a claim pending; that is,  
2 the request from the Plaintiffs that I enter a declaration that  
3 the building shown in the development plan comply with the  
4 covenants. I don't know if the Plaintiffs, here, wish to pursue  
5 that claim at trial. But I think it's important that I enter the  
6 order denying their Motion for Summary Judgment and, then, if the  
7 Plaintiffs elect to not litigate that in this particular setting,  
8 I would need to have a document from them dismissing that request  
9 as it relates to declaratory judgment.

10 So, first, are there any questions on those rulings  
11 before I return to, sort of, where we go from here? Any  
12 questions?

13 MR. SHERIDAN: I think I understand, Your Honor.

14 THE COURT: Okay. Mr. Herdman, any questions?

15 MR. HERDMAN: I have none.

16 THE COURT: Mr. Van Amberg, questions?

17 MR. VAN AMBERG: The only question I have, Your  
18 Honor, is whether or not the Court would entertain a substitution  
19 of parties, whether I would file a motion and we would address it

20 at that time?

21 THE COURT: You'll need to file a motion. I

22 hadn't thought about it, frankly. And that may be part of what

23 needs to happen, then, in discussion.

24 It seems to me, before I even address issues regarding

25 vacating the trial date, that I need to know whether the

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1 Plaintiffs intend to pursue the second half of the declaratory  
2 judgment action, whether or not the buildings shown comply with  
3 the covenants.

4 MR. SHERIDAN: Your Honor, I believe that the  
5 second claim is rendered moot by the ruling with respect to the  
6 first, since Concerned Residents is the one who has claimed that,  
7 A, that they have a right to enforce the covenants and, B, that  
8 the Thornburg Office Project violates the covenants. Since they  
9 do not have a right to enforce the covenants, I believe that their  
10 second claim, although unasserted, is rendered moot. I would  
11 think, although, I need to confer with our client as well as  
12 Ridgetop, I think that we would file a Motion to Dismiss. Given  
13 the Court's ruling, it seems to me that dismissal would only apply  
14 with respect to Concerned Residents; not with respect to some  
15 other party that might have standing to bring an action.

16 THE COURT: It's true. It would simply be a  
17 voluntary dismissal.

18 MR. SHERIDAN: Correct.

19 THE COURT: But I think the Plaintiffs are going

20 to have to -- like I said, I want an order entered that says I'm  
21 denying the second half of that Motion for Summary Judgment,  
22 because I want it crystal clear, after what happened in the  
23 representations made regarding the administrative appeal, I want  
24 it crystal clear that that issue has not been decided by the Court  
25 regarding compliance with the covenants. So I think the

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1 appropriate thing would be a voluntary dismissal. I think,  
2 probably, counsel should confer.

3 I'm not sure who you -- well, I have a suspicion who  
4 you might have in mind, or who the general class might be that you  
5 have in mind to substitute. I think you need to present who you  
6 want to substitute in, and then see if there's going to be  
7 objection to your Motion to Substitute, if that's the route you  
8 choose to go. And, if there is, we'll probably have to address  
9 that in a subsequent hearing.

10 Let me ask, given my ruling today and the issues related  
11 to whether there will be a substitution, or whether there will be  
12 a dismissal, is there value in keeping the matter on the July  
13 docket, from your standpoint, Mr. Van Amberg?

14 MR. VAN AMBERG: Well, Your Honor, the concern I  
15 have is that which I expressed. I don't know if the Court read my  
16 response to the motion. And, that is, that Thornburg, apparently,  
17 intends to just move ahead and create such a -- well, create an  
18 option for a court, which is either damages or enormous economic  
19 destruction, at a level that, I think, even Judge Herrera wouldn't

20 tear down. That's --

21 THE COURT: Maybe Judge Herrera wouldn't; I don't  
22 know.

23 MR. VAN AMBERG: I don't know. But you  
24 understand my concern.

25 THE COURT: You've got me. I've ordered

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1 buildings torn down.

2 MR. VAN AMBERG: Okay.

3 THE COURT: It's happened before.

4 MR. VAN AMBERG: All right. Well, that's the  
5 concern, the economic waste that may result. That's my concern is  
6 the economic waste issue.

7 THE COURT: Okay. I think you've properly  
8 indicated on the record that concern and, in spite of that, the  
9 Plaintiffs seek continuance; correct?

10 MR. SHERIDAN: Correct.

11 THE COURT: Yes.

12 MR. HERDMAN: Absolutely, Your Honor. I concur  
13 with Mr. Sheridan's observation, but I believe that this case is  
14 now moot. There is no -- to the extent that there was an adverse  
15 party asserting claims with respect to these covenants, it's been  
16 determined that they do not have such a right and, as a  
17 consequence, there's no longer a controversy. I anticipate, as  
18 with Mr. Sheridan, I will need to confer with my client, but I  
19 fully anticipate that we'll proceed with dismissal of all our

20 pleadings.

21           THE COURT: Here's my view: I think it's  
22 appropriate to grant the motion to continue the trial because  
23 there's deadlines that are coming up, and Pre-Trial Conference,  
24 and I don't think that's a useful exercise for anyone.

25           The way I can see this case going forward is if

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1 Mr. Van Amberg is permitted to substitute parties into the case,  
2 in some fashion, and those parties have the ability to enforce the  
3 covenants, then, we may still have a case to try. Even if those  
4 things occur, I don't think that can happen before July.

5         So, my observation, at this point, is that the motion  
6 to continue should be granted. Let's get the orders in on summary  
7 judgment. Mr. Van Amberg, determine with your clients if there's  
8 going to be a request for substitution. If there is, share that  
9 with counsel to see if they're going to oppose that. If it's  
10 opposed, go ahead and file a motion. In an effort to, sort of,  
11 move things along, you can request a hearing when you file that  
12 motion. So we don't have the delay of packeting up things. I  
13 would try to get it in here as soon as the matter is briefed,  
14 because I think it's in everybody's interest to see if this case  
15 is going to go forward from here or not.

16         Anything else, then, we can address on the record  
17 today?

18             MR. SHERIDAN: There is not, Your Honor.

19             THE COURT: Thank you for your presentations.

20 We'll be in recess. 11:42 a.m.

21 (Note: Court is adjourned: 11:42 a.m.)

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2 STATE OF NEW MEXICO )

) ss.

3 COUNTY OF SANTA FE )

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5 I, LORETTA L. BRANCH, Official Court Reporter for the First

6 Judicial District of New Mexico, hereby certify that I reported,

7 to the best of my ability, the proceedings, D-0101-CV-200601758;

8 that the pages numbered TR-3 through TR-15, inclusive, are a true

9 and correct transcript of my stenographic notes, and were reduced

10 to typewritten transcript through Computer-Aided Transcription;

11 that on the date I reported these proceedings, I was a New Mexico

12 Certified Court Reporter.

13 Dated at Santa Fe, New Mexico, this 28th day of May, 2007.

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LORETTA L. BRANCH  
New Mexico CCR No. 169  
Expires: December 31, 2007

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1                   TRANSCRIPT CORRECTION PAGE

2 Title: Santa Fe Estates, Inc., and Ridgetop Road, LLC., vs.  
3 Concerned Residents of Santa Fe North, Inc.,; D-0101-CV-200601758

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Signature of Attorney

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