LAW OFFICES OF
MARTIN & LUTZ, P.C.
2110 NORTH MAIN STREET

REPLY TO (MAILING ADDRESS) P.O. DRAWER 1837
LAS CRUCES, NEW MEXICO 88004-1837

AREA CODE 575
526-2449

FAX 526-0946

WILLIAM L. LUTZ
DAVID P. LUTZ

R. WILSON MARTIN
OCTOBER 4, 1928 - MARCH 12, 2015

June 20, 2018

Ginger Dickson

Via email: gingerldickson@gmail.com

Re: Restrictive Covenants

Dear Mrs. Dickson,

I was asked to render an opinion concerning in the language in Article 8, Paragraph 2 of the Declaration of Protective Covenants, Conditions, and Restrictions of the Coronado Ridge Subdivision, concerning amendments. This provision provides that all provisions may be amended by a vote of two-thirds of the votes cast by members of the Coronado Ridge Neighborhood Association at an annual or special meeting, except for the provisions dealing with design controls, the annual assessments, and maintenance and repair of common areas, which shall not be altered. In connection with this review, I reviewed the following Covenants:

1. The Declaration of Protective Covenants and Restrictions of Coronado Ridge Subdivision, recorded on July 23, 2003 in Book 443, pages 1732-1761 of the records of Dona Ana County.

2. An addendum thereto, recorded on February 26, 2004 in Book 501, page 1816-1817 of the records of Dona Ana County.

3. Amendments to the Declaration of Protective Covenants and Restrictions of Coronado Ridge Subdivision recorded on January 9, 2009 as Instrument No. 0900518 in the Office of the County Clerk of Dona Ana County.

4. Amendments to the Declaration of Protective Covenants and Restrictions of Coronado Ridge Subdivision recorded on January 24, 2011 as Instrument No. 1102543 in the Office of the County Clerk of Dona Ana County.

5. Amendments to the Declaration of Protective Covenants and Restrictions of Coronado Ridge Subdivision recorded on April 8, 2014 as Instrument No. 1407084 in the Office of the County Clerk of Dona Ana County.

6. Amendments to the Declaration of Protective Covenants and Restrictions of Coronado Ridge Subdivision recorded on March 5, 2018 as Instrument No. 1805483 in the Office of the County Clerk of Dona Ana County.

If I have missed any amendments please let me know.

In interpreting restrictive covenants, if they are unambiguous, the Courts enforces them as written. If the expressed intention is ambiguous, the Court applies rules of construction for restrictive covenants. If ambiguous, the Court gives the words in the restrictive covenant their ordinary meaning. The language is construed strictly in favor of free enjoyment of the property and against restrictions, but not so strictly as to create an illogical, unnatural or constrained construction. Finally, the Courts will not read restrictions into the covenants by implication, as a general rule, see, Sabatini Vs. Roybal, 2011-NMCA-086, 150 N.M. 478, 261 P. 3d 1110.

One issue I was asked to look at was the 2011 Amendments to Article IV permitted. The question appears to be whether the prohibition against amendment applies only to the "Design Controls," which were contained in an Appendix to the Covenants, or whether it also applies to Article IV titled "Design Control."

Beginning in the Amended Covenants, filed January 24, 2011, there were substantial changes in the language in Article 4 concerning "Design Control". This would appear to be consistent with the intention of the covenants as the original Article IV provided that the declarant would appoint persons to serve on the design committee. The amendment provided that the right to appoint members of the design committee would be transferred to the Board of the Neighborhood Association. It would appear also that these changes were carried forward into the most recent amendment in 2018.

The original language in Article IV concerning "Design Control" contemplated a design control committee appointed by the developer. It would appear to me that it was never the intention that this right of appointment would be perpetual. Therefore, it appears that it would be a reasonable interpretation that that Article IV could be amended, but the "Design Controls" appended to the Covenants, could not be. It would also make sense in that the developer and homeowners wished to have a harmonious development with similar architectural styles throughout the development. To allow the amendment of the Appendix would defeat this goal. It would appear from reviewing the covenants that this is consistent with subsequent amendments and that the "Design Controls" appended to the covenants do not appear to have

been changed. While there were substantial changes in 2011 to Article 4, several things would be consistent with revising it in that there was a fee to be charged, which would be consistent that it was no longer the developer, and there were variances that were permitted. There were also a number of other changes in this article. The right to amend Article IV would make sense since it would be illogical that the Homeowners Association could not take over management of the design committee and that the developer would always control the committee.

Another reason why this would be the proper interpretation of the Covenants is the passage of the Homeowner Association Act in 2013, Section 47-16-1 et seq. NMSA 1978. Article IV as written in the 2003 Covenants is contrary to this Act, specifically Section 47-16-8. This Act with certain exceptions, which are not applicable to this issue, applies to existing Homeowner Associations. Thus, if the Covenants have not been amended in 2011, they would be contrary to state law.

In reaching the above opinion, the ultimate test would be testimony as to what the intention was at the time that the original covenants were done in 2003. It would be worthwhile to visit with Mr. Moscato and determine if that was, in fact, his intention that the "Design Controls" appended to the covenants could not be amended, but the other provisions within the main covenants relating to "Design Control" could be amended. I could not imagine he would take a contrary position. He would not want to be involved forever.

The second issue I was asked to look at is the language in amended Article IV which give a right of appeal of variance decision of an approval of variance and in fact requires the Board approve make final approval of a grant of a variance. On the other hand, there the decision of design committee is final if the committee denies the variance. That decision may not be overturned by the Board. While this procedure is not contrary to law the Board may wish to consider whether giving a right of appeal to the Board in both situations would be advisable. One important issue on deciding variances is to be consistent. Having the same right of review would help accomplish this goal. One thing that looks bad in Court is when decisions are inconsistent on the same issue. Also, reciprocal rights of appeal would be more consistent with usual court procedures in civil cases that both parties have appeal rights.

One other issue in reviewing these that concern me somewhat is the real estate description of the property in the 2011-2018 amendments. The original covenants in 2003 appended only Phase 1, yet in defining the lots, it described 135 individually-numbered lots. Phases 2 and 3 were added in the 2004 filing. Subsequent amendments do not appear to include a real estate description but do appear to use the definition of a lot to be 127 lots. It would appear that the three phases of Coronado Ridge Subdivision contain 127 numbered lots. There were also some areas that were numbered with letters that do not appear to be residential building lots.

The next time you amend the articles, it might be appropriate to clarify that by attaching copies of the plats for Phases 1, 2, and 3 or a proper real estate description. There appear to be

some possible amendments to Phase 3, and you might want to think about whether or not you want to include the amended plats also. My concern is based on the fact that the general rule is that covenants are only effective as to those parties who acquired the land afterward and are without constructive notice. Recording of the covenants would be constructive notice. While I think it is clear that it includes all 127 lots in the Coronado Ridge Subdivision, this does leave open somebody to try to claim there is ambiguity. I think a reasonable court would resolve the matter with the ambiguity that the intention of the parties was to include all three phases of Coronado Ridge Subdivision, as covered by the covenants.

If this does not answer your questions or you have further questions or concerns regarding this letter, I would be glad to visit with you further.

Sincerely,

MARTIN & LUTZ, P.C.

By:_____
William L. Lutz

WLL/ldd