

The slip opinion is the first version of an opinion released by the Chief Clerk of the Supreme Court. Once an opinion is selected for publication by the Court, it is assigned a vendor-neutral citation by the Chief Clerk for compliance with Rule 23-112 NMRA, authenticated and formally published. The slip opinion may contain deviations from the formal authenticated opinion.

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: _____

3 Filing Date: September 21, 2022

4 **No. A-1-CA-38797**

5 **THE ACEQUIA COMPOUND OWNERS’**
6 **ASSOCIATION, INC.,**

7 Plaintiff-Appellee,

8 v.

9 **ORCHARD METAL CAPITAL CORP.,**

10 Defendant-Appellant.

11 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

12 **Francis J. Mathew, District Judge**

13 Katz Herdman MacGillivray & Fullerton PC

14 Frank T. Herdman

15 Brecken N. Larson

16 Santa Fe, NM

17 for Appellee

18 Holland & Hart LLP

19 Larry J. Montañó

20 Julia Broggi

21 Santa Fe, NM

22 for Appellant

1 **OPINION**

2 **WRAY, Judge.**

3 {1} Defendant Orchard Metal Capital Corporation (OMC) appeals the district
4 court’s entry of partial summary judgment and an injunction in favor of Plaintiff the
5 Acequia Compound Association (the Association), as well as the dismissal without
6 prejudice of the Association’s remaining claim. We affirm.

7 **BACKGROUND**

8 {2} The Association is a condominium association that is responsible for the
9 administration, management, operation, and control of the common elements of the
10 Acequia Compound Condominium (Condominium Property). The Condominium
11 Property is located at the southern end of a public street, Halona Street, in Santa Fe,
12 New Mexico. An easement (Condominium Property Easement) runs along the west
13 side of the Condominium Property, connecting Halona Street to both the
14 Condominium Property to the east and several other abutting properties to the west,
15 including property owned at one time by the New Mexico Association of Counties
16 (NMAC), located at 613 Old Santa Fe Trail. The language of the original
17 Condominium Property Easement granted a “non-exclusive access-egress and
18 underground utility easement twenty feet in width along the west boundary of the
19 property of grantor [the Association]” and asserted that the “easement granted herein

1 shall run with the land [and] serve only the following described property, hereinafter
2 the dominant estate,” which was defined as 613 Old Santa Fe Trail.

3 {3} Defendant OMC owns property at 621 Old Santa Fe Trail, immediately to the
4 south of 613 Old Santa Fe Trail. The Condominium Property and OMC property do
5 not abut; 613 Old Santa Fe Trail is located to the north of the OMC property and the
6 Condominium Property is located directly to the east of 613 Old Santa Fe Trail.
7 NMAC, the owner of 613 Old Santa Fe Trail at the time, granted OMC an easement
8 (the Wedge Easement) for OMC to use the southeastern wedge of 613 Old Santa Fe
9 Trail in return for a one-time fee of \$5,000 and payment of maintenance costs. *See*
10 Appendix A. This southeastern wedge of 613 Old Santa Fe Trail abuts (1) the
11 western edge of the Condominium Property Easement, and (2) the northern edge of
12 OMC’s property at 621 Old Santa Fe Trail. The Wedge Easement connects
13 Defendant OMC’s property at 621 Old Santa Fe Trail to the Condominium Property
14 Easement, giving Defendant OMC access to Halona Street.¹ The Wedge Easement
15 was subsequently amended to ensure that

16 [OMC] acknowledges and represents that [NMAC] has made no
17 representations or warranties whatsoever regarding the access from the
18 [Wedge Easement] beyond the boundary line of [613 Old Santa Fe

¹Appendix A includes an image that depicts the long rectangular property, 613 Old Santa Fe Trail, outlined in black in the middle of the page, and the Condominium Property Easement highlighted in light grayscale to the far right. The property at 621 Old Santa Fe Trail is located directly to the south of 613 Old Santa Fe Trail and the Wedge Easement is in darker grayscale to the left of the Condominium Property Easement.

1 Trail] to the public portion of Halona Street or the “Halona Road
2 extension”² referenced in paragraph 3 of the April 10, 2013 Easement
3 Agreement.

4 After obtaining the Wedge Easement, Defendant OMC removed a portion of a fence
5 at the northeastern corner of its property, 621 Old Santa Fe Trail. The removal of the
6 fence allowed OMC’s president to enter and exit OMC’s property by traveling across
7 613 Old Santa Fe Trail, using the Wedge Easement to access the Condominium
8 Property Easement and travel to Halona Street.

9 {4} The Association filed a complaint for trespass and injunctive relief against
10 Defendant OMC, alleging that OMC was trespassing and causing or permitting
11 others to trespass on the Condominium Property. The Association quickly moved
12 for partial summary judgment on the issue of OMC’s trespass and sought an
13 injunction to prevent OMC from trespassing and to require OMC to erect a fence to
14 prevent others from trespassing. OMC filed a motion to strike the affidavit of the
15 Association’s president and alleged that she lacked personal knowledge about the
16 number of vehicles entering the Condominium Property Easement going to or from
17 OMC’s property. In response to the Association’s motion for summary judgment,
18 Defendant OMC contended that by granting the Wedge Easement, NMAC had
19 authorized OMC to use the Condominium Property Easement, which was next to
20 NMAC’s property at 613 Old Santa Fe Trail. After hearing argument, the district

²The record does not indicate to what the “Halona Road extension” refers.

1 court determined that OMC had failed to rebut the Association’s evidence that
2 established OMC’s trespass. Although the district court enjoined OMC and its
3 employees and agents from trespassing, the district court declined to require the
4 construction of a fence or other permanent barrier. As a practical matter, the district
5 court noted that the case would go forward “at least . . . for the purpose of the
6 establishment of the appropriate remedy as it relates to the gap in the fence.” In the
7 order granting partial summary judgment, the district court ordered that

8 1. [OMC], including [OMC]’s employees and agents (which
9 includes its president, David Lamb), is permanently enjoined and
10 prohibited from using the [Condominium Property] Easement across
11 [the Association’s] property.

12 2. [The Association’s] request for an injunction requiring
13 [OMC] to install a permanent barrier on the northern boundary of the
14 [OMC] Property is not granted at this time but the request for such relief
15 is reserved and may be raised by motion or at trial at a later date.

16 {5} Following entry of the district court’s order, the Association filed a second
17 summary judgment motion and argued again that the district court should require
18 OMC to erect a fence or other permanent barrier. Attached to this motion was
19 another affidavit from the Association’s president, as well as multiple video
20 recordings purporting to depict traffic moving across the Condominium Property
21 Easement to and from OMC’s property (621 Old Santa Fe Trail). OMC again moved
22 to strike the affidavit. At the hearing, the district court agreed that certain paragraphs
23 of the affidavit were speculative and argumentative and additionally declined to

1 consider the video recordings. Following the district court’s ruling, the Association
2 withdrew its summary judgment motion and moved to dismiss without prejudice its
3 remaining claim related to the permanent barrier. OMC opposed the motion and
4 argued that the dismissal should be with prejudice. During the hearing, the district
5 court asked OMC if the Association could refile a lawsuit if the trespass continued,
6 regardless of whether the present case was dismissed with or without prejudice.
7 OMC responded that it was positioned to defend against the current claims and that
8 to dismiss without prejudice would be unfair. OMC acknowledged that the district
9 court had the discretion to dismiss with or without prejudice but maintained that it
10 would only be “fair to OMC to dismiss it with prejudice at this stage in the
11 litigation.” The district court ruled that OMC had failed to demonstrate that any
12 prejudice would result from dismissal without prejudice and granted the
13 Association’s motion to dismiss without prejudice. This appeal followed.

14 **DISCUSSION**

15 {6} OMC argues that the district court improperly granted partial summary
16 judgment to the Association and wrongly dismissed the Association’s remaining
17 claim without prejudice. We review grants of summary judgment de novo. *City of*
18 *Rio Rancho v. Amrep Sw. Inc.*, 2011-NMSC-037, ¶ 14, 150 N.M. 428, 260 P.3d 414.
19 Whether to dismiss claims with or without prejudice is within the district court’s
20 discretion, and we review that decision for abuse of discretion. *Trinosky v.*

1 *Johnstone*, 2011-NMCA-045, ¶¶ 18, 20, 149 N.M. 605, 252 P.3d 829. We consider
2 each argument in turn.

3 **I. The District Court Properly Granted Summary Judgment**

4 {7} The district court properly grants summary judgment if “there are no genuine
5 issues of material fact and the movant is entitled to judgment as a matter of law.”

6 *City of Rio Rancho*, 2011-NMSC-037, ¶ 14 (internal quotation marks and citation
7 omitted). OMC offers several arguments to support its position that the district court

8 improperly granted summary judgment on the Association’s trespass claim. To put
9 the Association’s trespass claim in context, we briefly explain the connection

10 between trespass and easements. “The gist of an action of trespass to real property
11 is in tort for the alleged injury to the right of possession.” *Pacheco v. Martinez*, 1981-

12 NMCA-116, ¶ 14, 97 N.M. 37, 636 P.2d 308. New Mexico law explains that “[a]n
13 easement creates a nonpossessory right to enter and use land in the possession of

14 another and obligates the possessor not to interfere with the uses authorized by the
15 easement.” *City of Rio Rancho*, 2011-NMSC-037, ¶ 33 (quoting Restatement (Third)

16 of Prop.: Servitudes § 1.2(1) (2000)). A trespass claimant, like the Association, must
17 prove that the defendant had no right to enter and use the land. But if an easement

18 grants the right to enter and use land, use of that land in accordance with the
19 easement causes no injury to the right of possession, and no action for trespass exists.

1 {8} In the present case, to make a prima facie case for summary judgment, the
2 Association had to demonstrate that the undisputed material facts established that
3 OMC had no right to enter and use the Condominium Property Easement. *See City*
4 *of Rio Rancho*, 2011-NMSC-037, ¶ 14 (“The party moving for summary judgment
5 has the initial burden of establishing a prima facie case for summary judgment by
6 presenting such evidence as is sufficient in law to raise a presumption of fact or
7 establish the fact in question unless rebutted.” (internal quotation marks and citation
8 omitted)). In its response, OMC primarily contends that as a matter of law, OMC
9 “may use the [Condominium Property Easement] for ingress/egress [across 613 Old
10 Santa Fe Trail] by virtue of the [Wedge] Easement.” The Association responds that
11 the undisputed facts show that the Wedge Easement, “permitting OMC to cross over
12 a tiny portion of 613 Old Santa Fe Trail, cannot, as a matter of law,” create a right
13 for OMC to use the Condominium Property Easement. We agree with the
14 Association and explain.

15 {9} An easement that is “created to benefit a dominant estate cannot be expanded,
16 changed, or modified without the express consent of the servient estate.” *Mayer v.*
17 *Smith*, 2015-NMCA-060, ¶ 29, 350 P.3d 1191 (omission, internal quotation marks,
18 and citation omitted). An easement can be either appurtenant or in gross. *See*
19 *Luevano v. Group One*, 1989-NMCA-061, ¶ 9, 108 N.M. 774, 779 P.2d 552. An
20 appurtenant easement is generally granted to an adjoining property owner for the

1 benefit of the adjoining property. *See Skeen v. Boyles*, 2009-NMCA-080, ¶ 23, 146
2 N.M. 627, 213 P.3d 531. In the present case, the parties do not dispute that the
3 Condominium Property Easement is an easement appurtenant to the property at 613
4 Old Santa Fe Trail, granted for the benefit of that property. The dominant estate for
5 purposes of the Condominium Property Easement is 613 Old Santa Fe Trail, and the
6 servient estate is the Condominium Property. “The owner of the dominant estate
7 cannot change the extent of the easement or subject the servient estate to an
8 additional burden not contemplated by the grant of easement.” *Kikta v. Hughes*,
9 1988-NMCA-105, ¶ 14, 108 N.M. 61, 766 P.2d 321.

10 {10} Along these lines, “[a]n easement can be used only in connection with the
11 estate to which it is appurtenant.” 28A C.J.S. *Easements* § 226 (2022); *see Weeks v.*
12 *Wolf Creek Indus.*, 941 So. 2d 263, 269 (Ala. 2006) (“To be sure, if the grant is for the
13 benefit of some particular land it can[]not be used to accommodate some other tract
14 of land adjoining or lying beyond.” (alteration, internal quotation marks, and citation
15 omitted)); *Zeh v. Karker*, 351 N.Y.S.2d 478, 479 (N.Y. App. Div. 1974) (“It is well
16 settled that a right of way granted in connection with one parcel may not be used for
17 the benefit of any land other than that to which it was made appurtenant when it was
18 granted.”); Restatement (Third) of Prop.: Servitudes § 4.11 (2000) (“Unless the
19 terms of the servitude . . . provide otherwise, an appurtenant easement or profit may
20 not be used for the benefit of property other than the dominant estate.”). When the

1 holder of a dominant estate also owns a separate estate, which is not appurtenant to
2 the easement, the holder of the dominant estate generally cannot use the easement to
3 reach that separate estate, absent some right granted by the easement. *See Jordan v.*
4 *Rash*, 745 S.W.2d 549, 553 (Tex. App. 1988) (“Unless the wording of an easement
5 creates a more extended right of use, the grantee cannot use it to benefit other
6 premises owned by him or others.”); *Lichteig v. Churinetz*, 519 A.2d 99, 102 (Conn.
7 App. Ct. 1986) (“An easement cannot be used for the benefit of land other than the
8 dominant estate.”); *Cleve v. Nairin*, 264 S.W. 741, 742 (Ky. Ct. App. 1924) (“There
9 is no dissent from the rule that an easement for the benefit of a particular piece of
10 land cannot be enlarged and extended to other parcels of land, whether adjoining or
11 distinct tracts to which the right is not attached.”). In the present case, OMC claims
12 the right to use the Condominium Property Easement based on (1) the language of
13 the Condominium Property Easement, and (2) cases from other jurisdictions holding
14 that dominant easement holders can permit use of the servient property under some
15 circumstances.

16 {11} Beginning with the language of the easement, OMC argues that the
17 Condominium Property Easement does not limit use of the easement “for a specific
18 purpose or a specific number of people or vehicles,” and its purpose “is expressly
19 stated as ‘non-exclusive access-egress.’” We agree with OMC that “the purpose of
20 the access would include access in order to use the easement in a manner that is

1 reasonably necessary for the full enjoyment” of the Condominium Property
2 Easement by the dominant estate (613 Old Santa Fe Trail). *See City of Rio Rancho*,
3 2011-NMSC-037, ¶ 33. We disagree, however, that generally an easement permits
4 all uses that it fails to specifically limit or prohibit, and here, the Condominium
5 Property Easement is not silent. The language of the Condominium Property
6 Easement not only does not give the dominant estate (613 Old Santa Fe Trail) the
7 right to allow third parties to use the easement to benefit other premises, it explicitly
8 states that it “shall serve only” the dominant estate (613 Old Santa Fe Trail). Thus,
9 the language of the Condominium Property Easement does not grant “a more
10 extended right of use” in order to benefit premises other than the dominant estate
11 (613 Old Santa Fe Trail). *See Jordan*, 745 S.W.2d at 553; *see, e.g., Dethlefsen v.*
12 *Weddle*, 2012-NMCA-077, ¶ 12, 284 P.3d 452 (“[T]he written language of an
13 easement should be conclusive.”).

14 {12} Defendant OMC cites authorities in which the dominant estate was permitted
15 to allow third parties to use an easement in order to benefit the dominant estate. *See*
16 *Weeks*, 941 So. 2d at 267, 269, 271-72; *Fruth Farms, Ltd. v. Vill. of Holgate*, 442 F.
17 Supp. 2d 470, 474-75, 477 (N.D. Ohio 2006); *Cellco P’ship v. Shelby Cnty.*, 172 S.W.3d
18 574, 581, 584, 597 (Tenn. Ct. App. 2005); *Gowen v. Cote*, 875 S.W.2d 637, 639-42
19 (Mo. Ct. App. 1994). These cases address the use of the easement either by guests or
20 invitees to a dominant estate or for the enjoyment of new developments on the

1 dominant property. OMC seeks to extend these cases to permit the dominant estate
2 to grant others access to the easement across the servient estate in order to reach a
3 different property. OMC argues that the dominant estate (613 Old Santa Fe Trail)
4 benefits from OMC’s use, because OMC agreed to pay \$5,000 and expenses for the
5 Wedge Easement. As we explain, extending these cases as OMC suggests—fee
6 notwithstanding—disregards the general rule that easements cannot be used to
7 benefit property that is not appurtenant to the easement. *See* 28A C.J.S. *Easements*
8 § 226. Two cases illustrate the distinction between this general rule and the cases on
9 which OMC relies.

10 {13} OMC has repeatedly cited *Arcidi v. Town of Rye*, 846 A.2d 535 (N.H. 2004). In
11 *Arcidi*, the dominant easement owner, identified as VPI, had an easement to use the
12 plaintiff’s property to access VPI’s property (access easement). *Id.* at 697, 699. VPI
13 additionally gave the town an easement to build a pump station on VPI’s property
14 (pump station easement). *Id.* at 697. The plaintiff argued that the town had no right to
15 use the access easement, and the *Arcidi* court held that “VPI, as the dominant estate
16 holder, may authorize others, such as the town, to use the appurtenant easement over
17 the plaintiff’s property[, and t]hus, the town has the right to use the [appurtenant]
18 easement over the plaintiff’s property because VPI has permitted it to do so.” *Id.* at
19 698, 701. The *Arcidi* court applied this legal principle because the factual
20 circumstances supported it; the third party, the town, used the easement over the

1 plaintiff's property in order to access its development, which was on the dominant
2 estate. In the present case, OMC used the Condominium Property Easement to cross
3 the dominant estate (613 Old Santa Fe Trail) to access a different property (621 Old
4 Santa Fe Trail).

5 {14} Occupying the other, more relevant sphere is *Southwick v. Planning Board of*
6 *Plymouth*, in which a town held an easement over private roads that were
7 appurtenant to a lot owned by the town. 839 N.E.2d 351, 353, 355 (Mass. App. Ct.
8 2005). The lot owned by the town abutted another parcel that was landlocked with
9 no right to access the private roads. *Id.* at 352-53. A developer intending to build a
10 subdivision on the landlocked parcel obtained a separate easement from the town to
11 access the lot owned by the town, but access to the proposed subdivision would have
12 also required use of the town's appurtenant easement over the private roads. *Id.* at
13 353-54. The proposed subdivision developer relied on the minimal burden it claimed
14 would be placed on the easement by extending its use for the benefit of two
15 additional lots. *Id.* at 354. The *Southwick* court concluded that the developer's
16 argument confused "the question of *overburdening* an easement by frequency, type
17 or intensity of use" with "the question of which land may enjoy the benefit of an
18 appurtenant easement." *Id.* (emphasis added). The *Southwick* court explained that
19 the proposed subdivision developer had "demonstrated no legal right to use any
20 portion" of the town's road easement. *Id.* at 355 n.13.

1 {15} The present case more closely resembles *Southwick* than *Arcidi*. The *Arcidi*
2 court and the courts in the other cases cited by OMC considered whether a dominant
3 easement owner could allow others to use the easement to access the dominant
4 easement owner's property. In the present case, however, the dominant easement
5 owner (613 Old Santa Fe Trail) has allowed OMC to cross the Condominium
6 Property Easement to access property that is not the dominant estate or appurtenant
7 to the Condominium Property Easement. This scenario is similar to *Southwick*, in
8 which the town permitted the proposed subdivision developer to use the town's
9 easement over the private roads, together with a separate easement over the town's
10 property, to reach the landlocked subdivision property. The separate easement over
11 the town's property did not give the developer the right to use the private road
12 easement, which had been granted to the town by the servient estate solely to access
13 the town's property. Just as the developer in *Southwick* could not use the private road
14 easement because the landlocked property was not appurtenant to the private road
15 easement, OMC has no right to use the Condominium Property Easement—
16 notwithstanding the Wedge Easement—to reach 621 Old Santa Fe Trail, because
17 621 Old Santa Fe Trail is not appurtenant to the Condominium Property Easement.
18 Because, as a matter of law, OMC had no right to use the Condominium Property
19 Easement in order to reach 621 Old Santa Fe Trail, we reject OMC's primary basis
20 for challenging the district court's grant of summary judgment.

1 {16} OMC additionally contends that disputed material facts demonstrated that
2 OMC’s use of the Condominium Property Easement was reasonable and challenges
3 (1) the quality of the evidence submitted by the Association to support summary
4 judgment; (2) the Association’s failure to address OMC’s affirmative defenses
5 relating to the impact of the Wedge Easement, failure to join the owners of 613 Old
6 Santa Fe Trail, and the acts or omissions of other parties; and (3) OMC’s request to
7 conduct additional discovery. Each of these arguments is based on the relevance of
8 additional disputed facts or a need for more evidence. Our analysis of the
9 Association’s trespass claim, however, relies entirely on OMC’s undisputed use of
10 the Condominium Property Easement and concludes OMC had no legal right to do
11 so. No additional facts or evidence are relevant. OMC had no legal right to use the
12 easement, and the district court properly granted summary judgment on the
13 Association’s trespass claim. We therefore affirm the district court.

14 **II. The District Court Did Not Abuse Its Discretion in Dismissing the**
15 **Association’s Remaining Claim Without Prejudice**

16 {17} OMC additionally argues that the district court abused its discretion to grant
17 the Association’s motion to dismiss the remaining claim without prejudice. “An
18 abuse of discretion will be found when the district court’s decision is clearly
19 untenable or contrary to logic and reason” or when the district court “exercises its
20 discretion based on a misunderstanding of the law.” *Trinosky*, 2011-NMCA-045,
21 ¶ 23 (alteration, internal quotation marks, and citations omitted). OMC contends that

1 “[t]he district court abused its discretion by granting [the Association’s] motion to
2 dismiss without prejudice because it is ‘clearly untenable’ and ‘contrary to logic and
3 reason.’” Specifically, OMC argues that “[t]he equities in this case favor[ed]
4 dismissal with prejudice,” because (1) the Association could not produce evidence
5 to support its claim to force OMC to build a barrier; (2) OMC had already expended
6 significant time and money in its defense; (3) the Association hoped to refile before
7 a more favorable judge; and (4) the Association identified no equities supporting
8 dismissal without prejudice. OMC’s arguments do not suggest that the district court
9 misapprehended the law, so we consider only whether the decision to dismiss
10 without prejudice was contrary to logic and reason.

11 {18} Rule 1-041(A)(2) NMRA permits the district court to dismiss an action “on
12 motion of the plaintiff . . . upon such terms and conditions as the court deems
13 proper.” According to the rule, “[u]nless otherwise specified in the order, a dismissal
14 under this paragraph is without prejudice.” *Id.* The district court indicated at the
15 hearing that it saw no prejudice to OMC in granting the Association’s motion,
16 because regardless of whether the claim was dismissed with or without prejudice,
17 the Association could refile a trespass claim if trespass by third parties was ongoing.
18 The district court’s ruling was permissible under Rule 1-041(A)(2) and not contrary
19 to logic and reason. We therefore affirm the grant of the Association’s motion to
20 dismiss the remaining claim without prejudice.

1 **CONCLUSION**

2 {19} For the reasons stated herein, we affirm the district court.

3 {20} **IT IS SO ORDERED.**

4
5

KATHERINE A. WRAY, Judge

6 **WE CONCUR:**

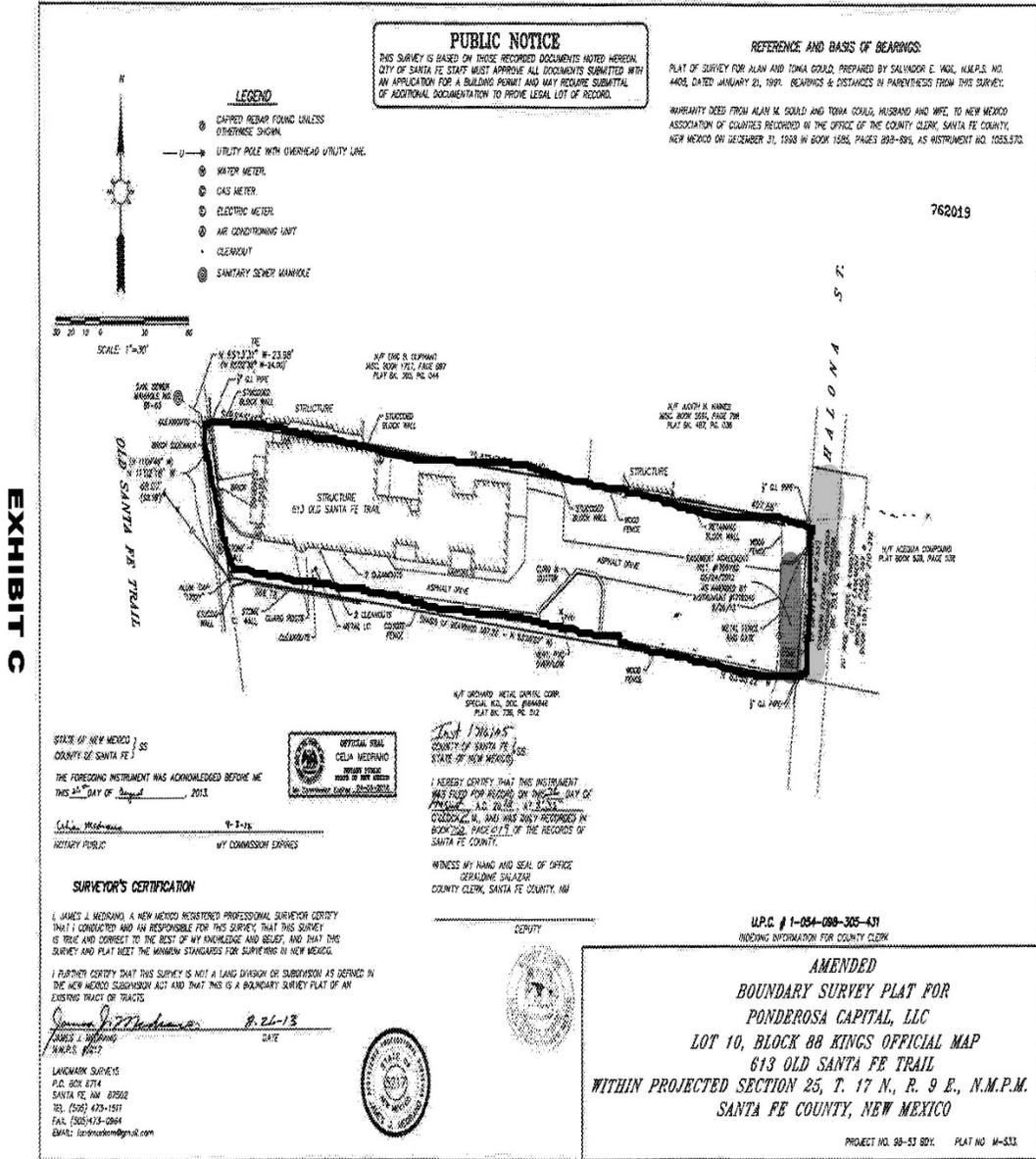
7

SHAMMARA H. HENDERSON, Judge

9

10 **JANE B. YOHALEM, Judge**

APPENDIX A



RP- Page 71

Land Records Corp. SFTC AB11195 SF 1716105.001