FILED
12th JUDICIAL DISTRICT COURT
Lincoln County
8/31/2023 3:42 PM
AUDREY HUKARI
CLERK OF THE COURT
Gloria Lamay

IN THE DISTRICT COURT
TWELFTH JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF LINCOLN

DALE ANTILLA, et. al.,

Plaintiffs,

v.

No. D-1226-CV-2021-00241
Division V

ROPER CONSTRUCTION, INC.

Defendant,

and

JAMES A. MILLER, and SARAH L. and
JOSHUA C. BOTKIN,

Plaintiffs/Counter-Defendants,

v.

ROPER INVESTMENTS, LLC, and
ROPER CONSTRUCTION, INC.

Defendants/Counter-Plaintiffs.

ORDER DENYING PLAINTIFFS/COUNTER-DEFENDANTS' MOTION FOR PRELIMINARY INJUNCTION

THIS MATTER came before the Court for a hearing on Plaintiffs/Counter-Defendants' Motion for Preliminary Injunction commencing on May 10, 2022, and continuing on May 17, 2022, June 3, 2022, June 8, 2022, and May 12, 2023. Plaintiffs/Counter-Defendants (collectively "Miller and the Botkins" or Plaintiffs), appeared through their attorney of record, Hinkle Shanor LLP (Thomas M. Hnasko, Esq. and Julie A Sakura, Esq.). The Defendants/Counter-Plaintiffs ("Roper" or Defendants), appeared through their attorney of record, Montgomery & Andrews, P.A. (Shelly L. Dalrymple, Esq. and Troy S. Lawton, Esq.).

The Court heard testimony from Robert Franklin Reed, Joshua C. Botkin, James A. Miller, Bradley Sohm, Carlos Ituarte-Villareal, Marc Beaty, William Mundy, Vicki Caudill, Mike

Dickerson, and Ryan Roper. The Court also reviewed the deposition of Dave Edler (Pls.' Exhibit 29).

The Court admitted into evidence Plaintiffs' Exhibits[1] **1** (Photo of Area-Parcel Map), **2A-2N** (Deeds), **4-6** (Photos from Botkin Nursery), **7** (Plot Plan -Proposed Batch Plant), **8-9** (Photos from Miller Property), **10** (C.V. of Brad Sohm), **11** (EPA Study), **12** (Federal Energy Regulation Commission Manual), **13** (1973 Study; Abatement of Highway Traffic Noise Report), **14** (FHWA Construction Noise Model), **15** (ANSI/ASA S12.9-2013/Part 3), **16** (Noise Report), **17** (Parcel Map), **18** (FHWA-Roadway Construction Noise Model), **19** (Chart-Change in Perceived Loudness), **20** (Carlos Ituarte Villareal Resume), **21** (Carlos Ituarte Villareal Affidavit with Exhibits), **22** (Marc Beaty- Qualification of the Appraiser), **23** (Email String- Communications with Roper), **24** (Roper Construction, Inc.'s Statement of Intent to Present Rebuttal Technical Testimony), **25** (Modeling Scenarios-NMED Permit), **26** (Air Quality Permit Hearing Transcripts), **27** (Roper's Draft Air Quality Permit), **28** (Alto NM- Revised Noise Impacts 7AM - 4PM), **29** (Dave Elder Video of Deposition Testimony), **30** (Carrizozo Batch Plant Video), **31** (Excerpts of Application-Certification/Notice), **32** (Excerpts of Roper's Application-Written Description of the Routine Operations of the Facility), **33** (Emissions Factor Table), **34** (Photos of Carrizozo Batch Plant), **35** (Deposition of Transcript of Mike Dickerson), **36** (Construction Noise Handbook), **37** (City of Yreka Sousa Ready Mix, LLC Concrete Batch Plant Project Initial Study Migrated Declaration), **38** (Altamont Pass Wind Resources Area Repowering), **39** (Noise Impact Analysis), **40** (Topographical map NSA 1), **41** (Highway Traffic Noise Analysis and Abatement

[1] The Court granted Plaintiffs' Motion to Supplement the Record at a hearing held May 12, 2023. Plaintiffs sought to introduce Exhibit 57, an affidavit from Print Mundy in response to Defendants' Exhibits AZ and BZ related to the sale of Julie Hall's properties.

Policy and Guidance), **42** (Outdoor Sound Propagation), **43** (International Standard), **44** (FTA Transit Noise and Vibration Impact Assessment Manual), **45** (Alto, NM Project Area April 2022), **46** (Roper Construction Photo 2), **47** (Photo Looking Down into the Batch Plant Site), **48** (International Standard), **49** (Kathleen Primm Technical Rebuttal Testimony), **50** (Quick Quack Car Wash- Noise Impact Study), **51** (Noise and Vibration Analysis by Bollard Acoustical Consultants, Inc.), **52** (Soundplan Analysis), **53** (Affidavit of Brad Sohm, PE), **54** (Affidavit of Carlos Ituarte Villarreal), **55** (SWCA Technical Memorandum), **56** (Pictures of Roper's Carrizozo Batch Plant) and **57** (Affidavit of Print Mundy with Exhibits A &B to the affidavit).

The Court also admitted into evidence Defendants' Exhibits[2] **AAA** (Emails), **AAAA** (Roper JEL Plant Schematic), **AZ** (Julie Hall property sold to Nina Michael), **BBB** (Signed Purchase Agreement), **BBBB** (FHWA Report), **BZ** (Julie Hall property sold), **CCC** (Text Message), **CCCC** (Roper Concrete Ticket-FNF Construction), **CZ** (Nina Michael mobile home), **D** (Roper's Current NMED Air Quality Permit Application), **DDD** (Email), **DDDD** (Alto CEP Website), **EEE** (Conveyance Chronology), **EEEE** (Deed Restriction Demonstrative), **F** (Paul Wade Affidavit), **FFF** (Concrete Batch Plant Visual), **FFFF** (Map of NM Land Status), **G** (Damian Luna Affidavit), **GGG** (Email), **GGGG** (Real Estate Listing), **H** (Rick Emmons Affidavit), **HH** (Photos), **HHH** (LCC Meeting Minutes on March 11, 2022), **HHHH** (Declaration of Louis Rose, **I** (Frank Reed Affidavit), **II** (Photos), **III** ("The Truth"), **IIII** (Aerial Map), **J** (1999 Plat), **JJ** (Photo), **JJJ** (Photos), **JJJJ** (Mike Dickerson CV), **KK** (Photos), **KKK** (Email Chronology), **KKKK** (Ituarte-Villareal NMED Hearing Excerpt PP. 191-208, 263-266), **LL** (Photo), **LLLL** (OSHA 1910-.95 Excerpt), **MM** (Botkin OSE Groundwater Permit), **MMM** (Permit Tracking

[2] The Court granted Defendants' Motion for Leave to Supplement the Record at a hearing held May 12, 2023. At that hearing Defendants introduced Exhibits AZ, BZ, CZ and WWWW.

Coversheet), **MMMM** (Santa Fe County Noise Ordinance), **NN** (Photos), **NNN** (Elevation Map), **NNNN** (Socorro County Noise Ordinance), **OO** (Photos), **OOO** (General Construction Permit), **OOOO** (CDC Noise Excerpt), **PP** (LCC Meeting Minutes on June 15, 2021), **PPP** (Ranches of Sonterra Newsletter), **PPPP** (David Elder NMED Hearing Excerpt PP. 222-223, 269), **QQ** (LCC Meeting Minutes on October 19, 2021), **QQQ** (Deposition Transcript of Frank Reed), **QQQQ** (Photos), **RR** (Excerpt of Botkin Testimony at NMED Hearing), **RRR** (Deposition Transcript of Joshua Botkin), **RRRR** (Photo), **SSS** (Aerial Map), **SSSS** (Photo), **TT** (Trulia Listing), **TTT** (Photos), **TTTT** (Joshua Botkin Testimony Regarding Domestic Well Water Use), **UU** (Photos), **UUUU** (CBP .25 Mile to Residential), **VV** (Summit Operations Facebook), **VVV** (FHWA A Handbook), **VVVV** (EPNG Supplemental Information), **WW** (LCC Meeting Minutes on July 20, 2021), **WWWW** (aerial view of lots), **XX** (Text Message on January 19, 2022), **XXXX** (24HR Field Sheet Template MD Acoustics), **YY** (Emails), **YYY** (Second Affidavit of Paul Wade), **YYYY** (Construction Noise Predictive Modeling MD Acoustics), **ZZ** (Emails), and **ZZZ** (FERC Guidance Manual for Environmental Report Preparation), **ZZZZ**[3] (Mike Dickerson Affidavit).

The Court's findings and conclusions of law appear below. Headings are for the convenience of the reader and do not modify any numbered finding or conclusion. Any proposed findings of fact or conclusions of law offered by the parties that are not expressly adopted in this Order have been rejected by the Court.

[3] Both parties refer to Mr. Dickerson's affidavit as Exhibit ZZZZ. This exhibit was not received by the Court as a marked exhibit with the other exhibits and therefore does not appear on any Exhibit Receipts. However, the affidavit was filed into the case. *See* Aff. of Mike Dickerson, Jr. INCE as to SWCA Revised Noise Report, *Antilla et al. v Roper Investments, LLC, et al*, D-1226-CV-202100241, (12th Jud. Dist. Ct. June 17, 2022). To avoid confusion, the Court will refer to the Dickerson Affidavit as Exhibit ZZZZ.

FINDINGS OF FACTS

Parties and Procedural Background

1. Plaintiff James A. "Austin" Miller is a resident of Lincoln County, New Mexico. Miller lives in Alto, New Mexico where he also operates a septic tank manufacturing business named Summit Operations.

2. Plaintiffs Sarah L. and Joshua C. Botkin are residents of Lincoln County, New Mexico. The Botkins own and operate a nursery and landscaping company located in Alto, New Mexico.

3. Defendant Roper Investments, LLC is a domestic limited liability company that owns property in Lincoln County, New Mexico, which is the subject of this litigation.

4. Defendant Roper Construction, Inc. is a domestic corporation that does business in Lincoln County, New Mexico. In addition to providing general construction services, Roper Construction, Inc. owns and operates a concrete batch plant in Carrizozo, New Mexico ("Carrizozo Plant"). Roper Construction, Inc. filed an application with the Air Quality Bureau of the Environmental Protection Division of the New Mexico Environment Department ("NMED") for an air quality permit to operate a concrete batch plant on the land owned by Roper Investments, LLC ("Alto Plant"). Ryan Roper is the owner/operator of Roper Construction, Inc., and the principal of Roper Investments, LLC.

5. On December 16, 2021, Plaintiffs filed their Complaint for Declaratory Judgment and Preliminary and Permanent Injunctive Relief Enforcing Deed Restrictions and for Compensatory and Punitive Damages. The case was originally cause number D-1226-CV-2021-00261.

6. On January 13, 2022, Plaintiffs filed their Motion for Preliminary Injunction and Memorandum in Support.

7. On January 27, 2022, Defendants filed their Answer to Complaint for Declaratory

Judgment and Preliminary and Permanent Injunctive Relief Enforcing Deed Restrictions and for Compensatory and Punitive Damages and Counter-Plaintiff's [sic] Counterclaims for Declaratory Judgment and Permanent Injunctive Relief.

8. Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction was filed January 31, 2022.

9. On March 9, 2022, Plaintiffs submitted their Consolidated Reply in Support of Motion for Preliminary Injunction and Memorandum in Support and Response to Defendants' Counter-Motion for Trial on the Merits to Plaintiffs' Motion for Preliminary Injunction.

10. On March 10, 2022, Plaintiffs filed their Notice of Completion of Briefing.

11. On April 7, 2022, the Court entered an order consolidating this case with *Dale Antilla, et. al. v. Roper Construction, Inc.*, D-1226-CV-2021-00241.

12. The Court held a hearing on Plaintiffs' request for preliminary injunctive relief commencing on May 10, 2022, and continuing on May 17, 2022, June 3, 2022, and June 8, 2022.

13. On May 12, 2023, the Court permitted the parties to supplement the record with additional exhibits.

14. Following the hearings, the New Mexico Environmental Department ("NMED") denied Defendants/Counter-Plaintiffs' application for an Air Quality Construction Permit for the proposed batch plant on June 22, 2022. Notice of Final Decision Den. Air Quality Construction Permit, *Antilla et al. v. Roper Construction, Inc., et al*., D-1226-CV-2021-00241 (12th Jud. Dist. Ct. June 24, 2022).

15. The Environmental Improvement Board ("EIB") reversed the denial of the Defendants/Counter-Plaintiffs' permit application, and the Plaintiffs/Counter-Defendants' Motion

is now ripe for a decision.[4] Notice of Decision in Related Proceeding, *Antilla et al. v. Roper Construction, Inc., et al*., D-1226-CV-2021-00241 (12th Jud. Dist. Ct. Mar. 30, 2023).

16. NMED issued an Air Quality Construction Permit on May 30, 2023 (Permit No. 9295).

17. The Alto Coalition for Environmental Preservation ("Alto CEP") appealed the EIB's decision to the New Mexico Court of Appeals. *See* Notice of Appeal, *Alto Coal. for Envtl. Pres. v. Roper Constr., Inc. et al.*, A-1-CA-41197 (N.M. Ct. App. June 20, 2023).

18. Alto CEP sought a stay of the EIB's decision, but the request for a stay was denied on August 18, 2023. Notice of Decision in Related Proceeding, *Antilla et al. v. Roper Construction, Inc., et al*., D-1226-CV-2021-00241 (12th Jud. Dist. Ct. Aug. 21, 2023).

Chronology of Tract Conveyances from 2011 to 2022

19. In December of 2011, Frank Reed and Ellen Bramblett purchased 13.7 acres of land in Alto, New Mexico as joint tenants. *See* Pls' Ex 2-A, Defs.' EEE.

20. At the time Mr. Reed and Ms. Bramblett purchased the 13.7 acres, there were no deed restrictions of record burdening the purchased land. *Id.*

21. The property was comprised of 13.7 acres abutting New Mexico Highway 220 ("Airport Road"). *See* Pls.' Ex 1.

22. Mr. Reed intended to use part of the land to build a warehouse for his company, Casa Décor. He also planned to build a home near the warehouse where one of his employees would live.[5] He then planned to sell the remaining acreage. Defs.' Ex. QQQ at 25:11-17.

[4] Plaintiffs/Counter-Defendants have indicated they are appealing the EIB's decision, and will be seeking a stay of the reversal from the Court of Appeals. Plfs./Counter-Defs.' Mot. for a TRO Pending Resolution of Mot. for Prelim Inj., ¶¶ 7-8, *Antilla et al. v. Roper Construction, Inc., et al*., D-1226-CV-2021-00241 (12th Jud. Dist. Ct. Apr. 19, 2023).

[5] Mr. Reed built the warehouse and house on what would become Tract 1, now owned by Plaintiff Austin Miller, in 2012 and 2013, respectively. Defs.' Ex. QQQ at 44:8-48:14.

23. On the advice of a surveyor, Mr. Reed devised a plan to circumvent Lincoln County's subdivision ordinance by using the Family Claim of Exemption. *Id.* at 31:8-17; 51:11-63:2. Under the plan, the 13.7 acres would be subdivided into four tracts. Three of the tracts (i.e. Tracts 1, 2 and 3) would be conveyed to one of Mr. Reed's or Ms. Bramblett's children to meet the requirements of the Family Claim of Exemption. The largest tract, Tract 4, would be retained by Mr. Reed and Ms. Bramblett. After the Family Claim of Exemption was completed, the children would transfer ownership of Tracts 1, 2 and 3 back to Mr. Reed and Ms. Bramblett so they could sell them. *Id.*

24. Consistent with their plan, Mr. Reed and Ms. Bramblett subdivided the 13.7 acres into four separate tracts in 2012 under a Family Claim of Exemption. *See* Pls.' Ex. 2-B; Defs.' Ex. EEE.

25. Mr. Reed and Ms. Bramblett recorded the Boundary Survey Replat on June 23, 2012. *Id.*

26. The four tracts were identified on the Boundary Survey Replat as Tract 1, Tract 2, Tract 3, and Tract 4. *Id.*

27. The County of Lincoln approved the subdivision of the original 13.7 acres into four separate tracts under the Family Claim of Exemption on May 22, 2012. *Id.*

28. On October 4, 2013, Mr. Reed and Ms. Bramblett recorded the following deeds, which were executed on August 30, 2013, pursuant to the Family Claim of Exemption Boundary Replat:

a. Quitclaim Deed conveying Tract 1 to Mr. Reed's daughter, Amanda Marie Reed. *See* Pls.' Ex. 2-C; Defs.' Ex. EEE.

b. Quitclaim Deed conveying Tract 2 to Mr. Reed's daughter, Sadie Reed Cartwright. *Id.*

c. Quitclaim Deed conveying Tract 3 to Ms. Bramblett's son, Lance Kuykendall. *Id.*

29. Mr. Reed and Ms. Bramblett retained Tract 4 for themselves.

30. The recorded Boundary Survey Replat and four deeds recorded on October 4, 2013 do not include any deed restrictions for any of the four tracts. *See* Pls.' Ex. 2-B, 2-C.

31. In May of 2014, Mr. Reed and Ms. Bramblett were preparing to sell Tract 3 to Plaintiff Joshua Botkin. Mr. Reed attempted to place deed restrictions on Tracts 1 through 4 to clarify what types of activities would be allowed and what types of activities would be prohibited on the four tracts of land. *See* Defs.' Ex. QQQ at 65:15-67:11.

32. Consistent with their plan to circumvent Lincoln County's subdivision ordinance, the quitclaim deeds placing the purported deed restrictions on each of the four tracts also conveyed Tracts 1, 2 and 3 back to Mr. Reed and Ms. Bramblett as joint tenants. *See* Pls.' Ex. 2-D.

33. The following Quitclaim Deeds were recorded with the County Clerk on May 27, 2014:

a. Amanda Marie Taylor, f/k/a Amanda Marie Reed, joined *pro forma* by her husband, Brandon Taylor, conveyed Tract 1 back to Mr. Reed and Ms. Bramblett as joint tenants. The deed was executed on May 19, 2014. The recorded deed included the purported deed restrictions, which then-owner Amanda Marie Taylor imposed on Tract 1. *Id.*

b. Sadie Reed Cartwright, joined *pro forma* by her husband, Michael Justin Cartwright, conveyed Tract 2 back to Mr. Reed and Ms. Bramblett as joint tenants. The deed was executed on May 21, 2014. The recorded deed included the purported deed restrictions, which then-owner Sadie Reed Cartwright imposed on Tract 2. *Id.*

c. Lance Kuykendall, joined *pro forma* by his wife, Laurel Lee Wolters Kuykendall, conveyed Tract 3 back to Mr. Reed and Ms. Bramblett as joint

tenants. The deed was executed on May 18, 2014. The recorded deed included the purported deed restrictions, which then-owner Lance Kuykendall imposed on Tract 3. *Id.*

d. Mr. Reed and Ms. Bramblett recorded a Quitclaim Deed with the County Clerk deeding Tract 4 back to themselves as joint tenants. The recorded deed included the purported deed restrictions, which Mr. Reed and Ms. Bramblett imposed on Tract 4. The deed was executed on May 23, 2014. *Id.*

34. The Quitclaim Deeds for each of the four tracts were recorded contemporaneously with the Lincoln County Clerk with identical deed restrictions burdening each tract. *Id.*

35. While Mr. Reed orchestrated placing the purported deed restrictions in the quitclaim deeds, there was not a common grantor who imposed the deed restrictions on all four tracts as three of the lots were owned by the Reed/Bramblett children.

36. There is not a declaration or other recorded instrument that indicates that the separately imposed deed restrictions on Tracts 1 through 4 were intended to be a common restriction imposed on all four tracts.

37. However, the inclusion of identical language in all of the deeds, which were recorded contemporaneously to each other, demonstrates the grantors' (i.e Taylor, Cartwright, Kuykendall and Reed/Bramblett) intentions to burden each lot for the benefit of all of the tracts.

38. The deed restrictions were part of a common, general plan of development. The original grantors intended the covenant to run with the land, and they placed the deed restrictions on all four tracts hoping to bind all subsequent owners of the four tracts to the deed restrictions.

39. Despite the intention of the original grantors, the four deeds also made Mr. Reed and Ms. Bramblett the unity owners of Tracts 1, 2, 3 and 4 as joint tenants. Pls.' Ex. 2-D.

40. On May 23, 2014, Mr. Reed and Ms. Bramblett recorded a Warranty Deed with the Lincoln County Clerk conveying Tract 3 to Plaintiffs Joshua C. Botkin and Sarah L. Botkin. This deed was recorded on May 27, 2014. Pls.' Ex. 2-E.

41. The recorded deed transferring Tract 3 to the Botkins occurred after Mr. Reed and Ms. Bramblett became the unity owner of all of the separately restricted Tracts 1 through 4.

42. The Warranty Deed transferring Tract 3 to the Botkins does not include the deed restrictions. The Warranty Deed declares that Tract 3 is subject to "easements, reservations and restrictions of record." Pls.' Ex. 2-E.

43. Mr. Botkin learned about the purported deed restrictions after he identified the property and began negotiations with Mr. Reed to purchase the property.

44. Mr. Reed testified in his deposition that he drafted the purported deed restrictions with the assistance and feedback from Mr. Botkin and Mr. Botkin's real estate agent, Gary Lynch. Defs.' EX QQQ at 47:1-17; 113:25-114:1-6; 194:1-8.

45. Mr. Botkin refuted Mr. Reed's contention that he assisted in drafting the deed restrictions or provided any input regarding what would be included in the purported deed restrictions. Defs.' EX RRR at 20:23-21:5-23:12.

46. Instead, Mr. Botkin testified that he was initially unaware that Tract 3 might be restricted, and that he learned of the purported deed restrictions from Mr. Lynch shortly before closing. *Id*.

47. There is little evidence that the Botkins relied on the purported deed restrictions in purchasing the land. *See* For the Record, May 10, 2022 at 11:38:33 to 11:38:46 ("there were restrictions on there, and that they were, again, they were comforting to me, not that I relied on them. They were comforting to me.").

48. Mr. Botkin testified under oath at the February 9, 2022 NMED that he established three

criteria for the land he wanted to purchase to run his company. Those criteria were: 1) proximity to Highway 48, 2) the land had to be flat, and 3) the land had to be protected by zoning and/or deed restrictions. Defs.' EX RR at 276:13-20.

49. However, Mr. Botkin's testimony at the February 9, 2022 NMED hearing is inconsistent with his testimony at the deposition. Defs.' EX RRR at 20:23-21:5-24:6 (testifying that he purchased the property because it was flat, location near Highway 48 "wasn't a major source of [his] thinking at the time," and that he was generally unaware about the restrictions when he began negotiating the purchase of Tract 3).

50. Instead of relying on the restrictions, Mr. Botkins testimony during the hearing indicates that he was concerned the deed restrictions may affect his intended use for Tract 3. *See* For the Record, May 10, 2022 at 11:21:20 to 11:22:27.

51. After learning about the deed restrictions, Mr. Botkin communicated to Mr. Reed that he intended to operate a landscape company and nursery on Tract 3. Mr. Botkin moved forward with the purchase only after Mr. Reed provided Mr. Botkin assurances that his intended uses would not violate the purported deed restrictions. *Id.*

52. Three months after Tract 3 was conveyed to Plaintiffs Joshua C. Botkin and Sarah L. Botkin, Mr. Reed and Ms. Bramblett conveyed Tract 2 to Salvador and Leonor Martinez. *See* Pls.' Ex. 2-F. Again, the recorded deed transferring Tract 2 to Salvador and Leonor Martinez occurred after Mr. Reed and Ms. Bramblett, as joint tenants, became the unity owner of all of the separately restricted Tracts 1 through 4. The deed transferring Tract 2 to Mr. and Mrs. Martinez does not include the deed restrictions, but declares that Tract 2 is subject to "easements, reservations and restrictions of record." Salvador and Leonor Martinez still own Tract 2, but they are not parties to this lawsuit.

53. On December 31, 2014, Mr. Reed and Ms. Bramblett recorded a Boundary Survey Replat with the Lincoln County Clerk. *See* Pls.' Ex. 2-G. The Boundary Survey Replat divided Tract 4 into two smaller tracts identified as Tract 4A and Tract 4B, with Mr. Reed and Ms. Bramblett retaining ownership of both tracts. *Id.* At the time, Mr. Reed believed that the division of Tract 4 into two smaller tracts would facilitate the sale of those properties.

54. The recorded Boundary Survey Replat recorded on December 31, 2014 does not include any deed restrictions for Tracts 4A or 4B. *Id.*

55. In June 2018, Mr. Reed agreed to sell one (1) additional acre of Tract 4A to Plaintiffs Joshua C. Botkin and Sarah L. Botkin. A Warranty Deed and Boundary Survey Replat were filed with the Lincoln County Clerk identifying the Botkins' enlarged property as Tract 3A and Mr. Reed's smaller property as Tract 4A-1. *See* Pls.' Ex. 2-H. The recorded Boundary Survey Replat and Warranty Deed recorded in June 2018 do not include any deed restrictions. The Warranty Deed does state Tract 3A tract was subject to all restrictions of record. *Id.*

56. On August 30, 2019, Mr. Reed and Ms. Bramblett conveyed Tracts 1, 4A-1 and 4B to the Frank Reed and Ellen Bramblett Trust. *See* Pls.' Ex. 2-I. The Correction Special Warranty Deed conveying Tracts 1, 4A-1 and 4B to the trust include the same deed restrictions that were included on the May 27, 2014 deeds transferring the original four tracts back to Mr. Reed and Ms. Bramblett as joint tenants. *Id.*

57. The Frank Reed and Ellen Bramblett Trust became the unity owner of Tracts 1, 4A-1 and 4B as of August 30, 2019.

58. On the same day, August 30, 2019, Mr. Reed and Ms. Bramblett, as Trustees of the Frank Reed and Ellen Bramblett Trust, executed a Warranty Deed conveying Tract 4A-1 to Glen and Nikki Tomlinson. The Warranty Deed was not recorded with the County Clerk until February 28,

2020. The recorded Warranty Deed transferring Tract 4A-1 to Glen and Nikki Tomlinson does not include any deed restrictions. The deed does declare that Tract 4A-1 is subject to "easements, reservations and restrictions of record." *See* Pls.' Ex. 2-J.

59. On February 18, 2020, Mr. Reed and Ms. Bramblett as Trustees of the Frank Reed and Ellen Bramblett Trust executed a Warranty Deed conveying Tract 4B to Tomel Holdings, LLC. *See* Pls.' Ex. 2-K. The Warranty Deed conveying Tract 4B to Tomel Holdings, LLC was recorded on February 21, 2020. The recorded Warranty Deed transferring Tract 4B to Tomel Holdings, LLC does not include the deed restrictions. The deed does declare that Tract 4B is subject to "easements, reservations and restrictions of record." *Id.*

60. On February 27, 2020, the Tomlinsons conveyed Tract 4A-1 to Tomel Holdings by Warranty Deed, which was recorded on February 28, 2020. The Warranty Deed does not incude any deed restrictions, but declares that Tract 4A-1 is subject to "easements, reservations and restrictions of record." *See* Pls.' Ex. 2-L.

61. In January 2021, Mr. Reed and Ms. Bramblett as Trustees of the Frank Reed and Ellen Bramblett Trust conveyed Tract 1 to Plaintiff Austin Miller. *See* Pls.' Ex. 2-M. The Warranty Deed conveying Tract 1 to Mr. Miller, recorded with the Lincoln County Clerk on January 20, 2021, does not include any deed restrictions, but declares that Tract 1 is subject to "any and all conditions and restrictions, if any." *Id.*

62. Mr. Miller's father, who was also Mr. Miller's real estate agent, told him about the purported deed restrictions after he was under contract but before closing.

63. Mr. Miller also discussed the purported deed restrictions with Mr. Reed.

64. Mr. Miller believes the deed restrictions apply to his property and to the Defendants' properties.

65. However, there is no evidence that Mr. Miller relied on the purported deed restrictions in purchasing the land. *See* For the Record, May 10, 2022 at 1:48:20 to 1:50:01.

66. Only two recorded deeds contain the purported deed restrictions. They are:

a. the May 27, 2014 Quitclaim Deeds executed by Mr. Reed, Ms. Bramblett and their children in which ownership of the original four tracts were conveyed back to Mr. Reed and Ms. Bramblett as joint tenants; and

b. the August 30, 2019 Correction Special Warranty Deed conveying Tracts 1, 4A-1 and 4B from Mr. Reed and Ms. Bramblett as joint tenants to the Frank Reed and Ellen Bramblett Trust.

67. None of the deeds conveying any of the tracts from the unitary owner, whether it be Mr. Reed and Ms. Bramblett as joint tenants, or Mr. Reed and Ms. Bramblett as Trustees of the Frank Reed and Ellen Bramblett Trust, include any deed restrictions.

68. In early 2021, Ryan Roper began negotiations with Tommy Wilson, the Managing Member of Tomel Holdings, and his wife, Melanie Wilson, to purchase Tracts 4A-1 and 4B.

69. Mr. Roper was aware of the purported deed restrictions and made attempts to remove those restrictions in the event the purported deed restrictions were valid.

70. On January 22, 2021, Mr. Roper e-mailed Glenda Allen, Lincoln County's Director of Planning & Project Management, and requested a letter from the county indicating that Tracts 4A-1 and 4B were not subject to any zoning restrictions or to the purported deed restrictions. *See* Defs.' Ex. YY. In his email, Mr. Roper stated that he knew the lots were not restricted, but wanted something from Lincoln County in writing confirming what he believed to be true. *Id.*

71. Ms. Allen responded the same day and confirmed that there were no zoning restrictions affecting Tracts 4A-1 and 4B. Ms. Allen warned that "Tract 4A-1 and Tract 4B may be subject to

limitations and restrictions as recorded [in the Correction Special Warranty Deed]." Ms. Allen also provided Mr. Roper with a copy of the Correction Special Warranty Deed conveying Tracts 1, 4A-1 and 4B from Mr. Reed and Ms. Bramblett as joint tenants to the Frank Reed and Ellen Bramblett Trust. *Id.*

72. After receiving Ms. Allen's response, Mr. Roper sought clarification from Lincoln County Clerk Whitney Whittaker. Mr. Roper inquired whether he could record the deed conveying Tracts 4A-1 and 4B from Tomel Holdings, LLC to Roper Construction without the purported deed restrictions. *Id.*

73. Clerk Whittaker responded that she believed Mr. Roper could record the deed without the purported restrictions, but that she needed to do some research to confirm her belief and she would get back to Mr. Roper about his inquiry. *Id.* No additional emails were admitted into evidence.

74. Mr. Roper attempted to remove the purported deed restrictions through the Real Estate Purchase Agreement he entered into with the Wilsons.

75. On February 9, 2021, Ms. Wilson e-mailed Mr. Roper a proposed Real Estate Purchase Agreement for Mr. Roper's review. *See* Defs.' Ex. ZZ.

76. That same day, February 9, 2021, Mr. Roper sent back an amended Real Estate Purchase Agreement with proposed changes. *Id.* Specifically, Mr. Roper added the following provision as paragraph 34 of the Real Estate Purchase Agreement: "SELLER HEREBY AGREES TO ALLOW THE BUYER TO DELETE SECTION 2(d) ON PAGE 2 ON EXHIBIT "B", LIMITATIONS & RESTRICTIONS, WHEN THE NEW WARRANTY DEED IS RECORDED." *Id.* (capitalization in original).

77. Exhibit "B" was a copy of the Correction Special Warranty Deed conveying Tracts 1, 4A-1 and 4B from Mr. Reed and Ms. Bramblett as joint tenants to the Frank Reed and Ellen Bramblett

Trust. *Id.* Mr. Roper crossed out purported deed restriction 2(D) on the Correction Special Warranty Deed in red, and included the following language: SELLER AGREES TO ALLOW BUYER TO DELETE THE RESTRICTION 2.d. WHEN THE NEW DEED IS RECORDED. *Id.* (capitalization in original).

78. Ms. Wilson approved Mr. Roper's mark ups ("much better") and signed the contract. *Id.*

79. The executed Purchase Agreement contains paragraph 34, which states: "Seller hereby agrees to allow Buyer to delete Section 2(d) on Page 2 of Exhibit "B," Limitations and Restrictions, when the new warranty deed is recorded." Defs.' Ex. BBB.

80. When Mr. Roper first contacted Alliance Abstract Title, LLC, the title company acting as the escrow agent for the closing, Mr. Roper informed the closing officer, Vickie Caudill, that he wanted to change the purported deed restrictions burdening the tracts he was purchasing.

81. On March 4, 2021, Ms. Caudill wrote to Mr. Roper, informing Mr. Roper that she needed to speak with him about what he "said about 'changing some of the restrictions.' "*See* Defs.'Ex. AAA. The next day, March 5, 2021, Ms. Caudill wrote Mr. Roper of the following:

> The restrictions affect the 2 lots you are buying and 3 more to the left. I am sending you a copy of the county map that shows the owners names on each lot. So a document would have to be drawn up stating that you or the seller, if you do not want to close because of this, will have to sign along with the other 3 lot owners. So let me know if you want to close without removing the restriction, or if you do not want to close and have the seller work on this?
> *Id.*

82. Mr. Roper advised Ms. Caudill that he wanted to "go ahead and close." *Id.*

83. On March 10, 2021, a Warranty Deed conveying Tracts 4A-1 and 4B to Roper Investments, LLC was recorded with the Lincoln County Clerk. *See* Pls.' Ex. 2-N. The Warranty Deed does not include any deed restrictions, but declares that Tracts 4A-1 and 4B were subject to all "restrictive covenants, if any." *Id.*

The Purported Deed Restrictions

84. The purported deed restrictions provide in pertinent part:

> AND FURTHER SUBJECT TO the following LIMITATIONS AND RESTRICTIONS
>
> 1 GENERAL RESTRICTIONS All of the property shall be owned, held, encumbered, leased, used, occupied and enjoyed subject to the Declaration and following limitations and restrictions.
>
> 2 USES The Property may be used for any Legal Purpose, save and except the following, which shall not be allowed.
>
> A Salvage, scrap metal, or "junk" operations of any kind,
> B Swine, poultry, or other livestock operations which deal in the commercial feeding, raising or slaughter of animals,
> C Sexually oriented businesses,
> D Any other use which, by it's nature (whether noise, odor, hours of operation, etc.) would be a nuisance to adjoining owners
>
> 3 Improvements All improvements to the property shall be done in a professional and workmanlike manner and any residence on the property shall be constructed on site from the ground up,

See Pls.' Ex. 2D.

85. With respect to Deed Restriction 2(D), Mr. Reed testified that the language was intended to prohibit manufacturing and industrial operations for the protection of the other tract owners from nuisances created by noise, hours of operation, and odors.

86. By its plain language, Deed Restriction 2(D) prohibits owners from making any use of their property that would be a nuisance to the adjoining owners.

87. The purported deed restrictions do not define "adjoining owners."

88. Given that the quitclaims deeds recorded on May 27, 2014 were part of a common, general plan of development, *supra* ¶¶ 35-36, the term "adjoining owners" is reasonably interpreted as including all of the current tract owners of the original four tracts.

89. The restrictive covenants do not provide guidance on what level of noise would violate provision 2d. They state only: "Any other use which, by it's [sic] nature (whether noise, odor,

hours of operation, etc.) would be a nuisance to adjoining owners …" Pls.' Ex. 2-N. Mr. Reed testified he meant: "[i]f it's a noise that is loud, obnoxious, annoying, and it goes on hours in the day …" EX QQQ at 145:1-20.

90. The term "nuisance" is not defined in the purported deed restrictions.

91. The term nuisance is not ambiguous.

92. Nuisance is commonly understood to be an unreasonable interference with another's private use and enjoyment of their property. *See Scott v. Jordan*, 1983-NMCA-022, ¶ 12, 99 N.M. 567, 661 P.2d 59 (*quoting* Restatement (Second) of Torts § 821 D (1979)); *See also Nuisance*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/nuisance#learn-more (last visited Apr. 29, 2022) (defining nuisance as harm, injury, annoying, unpleasant or obnoxious); *see Noise*,MerriamWebster.com, https://www.merriam-webster.com/thesaurus/noise#:~:text=1%20loud%2C%20confused%2C%20and%20usually%20inharmonious%20sound%20the,Avenue%20made%20normal%20conversation%20impossible%20Synonyms%20for%20noise(defining noise as "sound, especially one that is loud or unpleasant or that causes disturbance).

93. Consequently, Deed Restriction 2(D) of the purported deed restrictions does not provide any additional or further protections beyond those provided for under common law private nuisance jurisprudence.

The proposed concrete batch plant

94. The proposed plant is not a Portland cement manufacturing plant, which crushes and grinds raw materials into cement. *See* For the Record, June 3, 2022 at 2:10:12 to 2:10:52.

95. Instead, the proposed plant will batch or mix concrete. *Id.*

96. Concrete is made by mixing three ingredients together: 1) water, 2) cement, and 3) aggregate (rock and sand). *Id.*

97. The proposed plant will be a "transit" mix plant, meaning that the ingredients are mixed in the drum of a concrete mixer truck while the truck drives to the delivery site. *Id.; see also* Defs.' Ex. AAAA.

98. Dave Edler worked in the concrete industry for over 20 years. Pls.' Ex. 29 at 1:50-2:42. Mr. Edler worked for Kienstar, Inc., a large concrete and construction company, in and around St. Louis, in a variety of labor positions and primarily as a driver, from about 1982 to about 2006. Mr. Edler has no recent experience with concrete batch plants. He is not an engineer and has not been involved in the design of a concrete batch plant. *Id.* at 7:16-8:2, 23:2-8, 27:4-14; Defs.' Ex. PPPP, NMED Hrg. Transcript at 222:20-24, 223:2-14. While not an expert, Mr. Edler's deposition testimony was helpful in identifying potential sources of noise in the proposed batch plant.

99. According to Mr. Edler, there are multiple sources of noise at concrete batch plants. The noise sources at the proposed concrete batch plant include multiple back-up alarms throughout the duration of plant operations, the noise made when the aggregate is dumped into the aggregate bins from the metal trucks, the front-end loaders when they scoop up the aggregate into the metal bucket of the loader and then back up to the feed hopper, motor and rollers connected to the feed hopper conveyor, the rock falling into the metal aggregate bins, the operation of the mixer trucks during loading, and the loading of the cement and fly ash which causes a weed-blower like noise. *Id.* at 6:54-15:04. Employees who worked at the concrete batch plant with Mr. Edler regularly wore ear protection. *Id.* at 15:04-15:33.

100. Mr. Edler is not familiar with the actual equipment Defendants purchased for the proposed plant. *Id*. at 24:18-25:5, 25:24-26:3.

101. The proposed plant will have storage bins surrounding the property that will store the aggregate. Defs.' Ex. FFF. These storage bins may help reduce some of the noise generated from

the proposed plant. *See infra* ¶162.

102. Defendants will use a front-end loader to move the aggregate from the storage bins into a feed hopper. The feed hopper discharges the aggregate onto a transfer conveyor belt. The conveyor delivers the aggregate to an overhead, 120-ton aggregate bin. The amount of noise generated by this loading process can vary depending on whether the aggregate bin is empty or not. If the aggregate bin is empty, the loading process will generate more noise as the aggregate hits the metal on loading. If the bin still has some aggregate in it, the falling aggregate will fall on other aggregate reducing the noise generated. Mr. Roper can also take steps to reduce the noise generated by the loading process by rubberizing the bins. *See* For the Record, June 3, 2022 at 3:20:40 to 3:24:21; Defs.' Ex. AAAA.

103. Mr. Roper anticipates batching on average 100 cubic yards of concrete a day. It takes approximately 120-tons of aggregate to generate 100 cubic yards of concrete so Mr. Roper anticipates needing to fill the 120-ton aggregate bin at least once per day. Roper intends on filling the aggregate bin when it is half-full to avoid delays in producing product for customers. The transfer conveyor belt is rated at 550 tons per hour, which means the loading process will take approximately thirteen minutes to load an empty bin. Since Mr. Roper intends on loading the aggregate bin when it is half-full, the aggregate bin will need to be loaded twice daily taking six to seven minutes each time the aggregate bin is loaded. *Id.*

104. Cement and fly ash are stored in a 1,000 BBL (barrels) split silo located on top of the plant. Trucks will deliver dry cement and fly ash to the proposed batch plant site one to two times per week. The dry cement and fly ash are hauled to the batch plant in dry bulk trailers. To load the cement and fly ash into the silo, the delivery truck uses an auxiliary motor to blow the cement and fly ash out of the dry bulk trailer into the split silo. This process takes approximately fifteen

minutes. *See* For the Record, June 3, 2022 at 3:28:14 to 3:29:45; Defs.' Ex. AAAA.

105. When Mr. Roper is ready to batch concrete, a concrete mixer truck backs under the plant. The truck must run on a high idle of approximately 1200 RPMs during the loading process to keep the drum moving. Machines, or batchers, measure/weigh the aggregate, cement, and water. When the weighing process is complete, the aggregate is released from the 12-yard aggregate batcher located on the bottom of the 120-ton aggregate bin down a chute onto another transfer conveyor belt, which loads the aggregate into the drum of the concrete mixer truck. As the aggregate is being loaded into the drum, cement and water are added. The cement moves from the split silo into a cement batcher and then is released into the drum. There is a 500-gallon water reservoir located next to the silo, which releases the water into the drum. The ingredients are then mixed in the drum. It takes approximately five minutes to batch or load a concrete mixer truck. *See* For the Record, June 3, 2022 at 3:24:36 to 3:28:13; Defs.' Ex. AAAA.

106. The proposed batch plant's standard hours of operation will be from Monday through Friday from 7:00am to 3:30pm, occasional Saturdays (approximately once per month) from 7:00am to 12:00pm and closed on Sundays. Defs.' Ex. E, ¶ 7.

107. Mr. Roper anticipates he will average two mixer trucks per hour, per day. That would amount to 80 minutes of loading trucks per day. *See* For the Record, June 3, 2022 at 3:24:36 to 3:28:13.

108. On May 10, 2022, the Court granted summary judgment to Defendants on their Motion for Partial Summary Judgment on Plaintiffs' Allegation that Defendants' Hours of Operation will be 3:00 A.M. to 9:00 P.M. and, by extension, Plaintiffs' allegations of nighttime light pollution.

The area surrounding the proposed batch plant is un-zoned and includes residential, agricultural, commercial and industrial uses

109. The site for the proposed batch plant is located on Highway 220, also known as "Airport

Road," near the turnoff to Highway 48. The property is located in Alto, New Mexico, an unincorporated community in Lincoln County, New Mexico.

110. Highway 48 is the only major arterial road feeding into Ruidoso from the north and consequently supports commercial and industrial traffic.

111. The County of Lincoln does not have any zoning restrictions including in the area of the proposed batch plant.

112. While Plaintiffs describe the area as primarily residential, they themselves run commercial businesses on their properties.

113. Mr. Botkin operates a nursery and landscaping company on his tract where he sells plants and landscaping supplies to the public. Mr. Botkin's property is directly adjacent to Tracts 4A-1 and 4B. There is a greenhouse, tool shed, an office,[6] and public bathrooms located on the property.[7] Defs.' Ex. RRR at 57:10-57:15. The landscaping company uses a skidsteer (CAT), a half-ton and three-quarter ton pickup trucks, and a side-by-side. *Id.* at 61:11-61:25.

114. The landscaping company receives deliveries of water and landscaping materials including rock and other aggregate.

115. The landscaping companies' hours of operation are Monday through Friday, from 8:00am to 4:00pm, and the nursery is open to the public from 9:00am to 4:30pm. *Id.* at 60:17-23.

116. Mr. Botkin also leases a portion of his land to an additional company that operates on Tract

[6] Before constructing the office, Mr. Botkin consulted with Mr. Reed about whether the construction of the office would violate the purported deed restrictions, and Mr. Reed assured him the office would not violate the purported deed restrictions.

[7] At the beginning of litigation, Mr. Botkin also had a 5th wheel trailer parked on the property that he lived in for a period of months. Defs.' EX RRR at 77:13-80:21. This arguably violated the purported deed restrictions, which required any residence on the property to be built on site from the ground up. Mr. Botkin removed the 5th wheel trailer after Mr. Roper raised the issue as part of this litigation. *Id.* at 91:1-10.

3, i.e. Southwest Greens. *Id.* at 63:6-64:11. Southwest Greens sells and installs artificial grass to the public. *Id.* Southwest Greens also operates a skidsteer (John Deere) on the property and stores materials such as artificial turf on the property. *Id.* at 66:2-23.

117. Mr. Miller owns Tract 1 where he lives and where he maintains his office for his septic tank installation business.

118. Mr. Miller has a metal workshop on his property. Pls.' Ex. 8 and 9. Mr. Miller maintains diesel fuel tanks and multiple conex trailers on his property. *Id.*

119. Mr. Miller performs monthly maintenance on his business vehicles and equipment on Tract 1. Accordingly, Tract 1 oftentimes has several large trucks, earth-moving equipment, trailers, a large dumpster, and septic tanks located on the property. Defs.' Ex. UU; Defs.' Ex. RRRR.

120. The properties immediately to the north of the proposed batch plant location (i.e. Tracts 4A-1 and 4B) are empty lots. Pls.' Ex. 1.

121. The properties immediately to the east and west of the proposed batch plant location have been marketed as commercial lots. Defs.' Ex. GGGG(Listing for 133 HWY 220 – "Prime Commercial 5.19 acres on State Hwy 220/Airport Rd. north of Alto."); Defs.' Ex. TT (Listing for 109 Airport Rd. – "2.2 acres with commercial potential.").

122. Many of the Highway 220 and Highway 48 frontage properties within 5 miles are commercial or light industrial. (e.g. Jack Johnson Excavating, Aztec Stucco, R. Minix Construction, Alto Wood Products, which is a sawmill, Double Tree Glass, and Rainmakers and Alto Lakes Country Clubs). Defs.' Ex. QQQ at 31:25-42:10.

123. The properties across Highway 220, identified on Ex. UUUU at page 4 as "Gulfwind Developers, Ltd., are likely to be developed into a big box store such as a Home Depot. *See* For the Record, June 3, 2022 at 2:32:56 to 2:34:20.

124. Accordingly, attempts to characterize the location of the proposed batch plant as residential are misleading. The area consists of a mix of residential, commercial and industrial use (the Court takes judicial notice that Highway 220 is named "Airport Road" because it leads to the Village of Ruidoso's airport, the Sierra Blanca Regional Airport, some 9 miles from the proposed batch plant).

Concrete Batch Plants in Lincoln County, New Mexico

125. Concrete is a necessary building product used for foundations, sidewalks, curbs, gutters, etc. *See* For the Record, June 3, 2022 at 2:11:49 to 2:12:09.

126. Concrete is a perishable product. Once the water and aggregate are added to cement it starts a process known as hydration. The concrete will begin to set immediately upon the ingredients mixing together.

127. Consequently, concrete generally needs to be delivered and poured within 90 minutes of the ingredients (water, aggregate, and cement or fly ash) being put into the mixer truck. This timing is reduced in hot weather. *Id.* at 2:12:30 to 2:13:25.

128. While additives may be used to extend the shelf life of concrete, there are potential problems with these additives, and state agencies, like the New Mexico Department of Transportation, require the delivery and pouring to occur within 90 minutes. *Id.* at 2:18:12 to 2:19:02.

129. Given these time limits, the service area for Defendants' Carrizozo Batch Plant and other concrete companies are limited to those locations where a truck can travel to and pour concrete within 90 minutes of being batched. *Id.* at 2:13:35 to 2:13:25; Defs.' FFFF.

130. While Defendants' Carrizozo Batch Plant can deliver to the Ruidoso/Alto area, transport costs are high ($.50/yard additional charge for each mile) and the logistics are difficult.

131. To deliver concrete to the Ruidoso/Alto area, Defendants' trucks must travel across multiple two-lane highways (from Highway 380 across Highway 37 and up Highway 48). On Highway 37, the trucks must climb Nogal Hill. Additionally, the trucks must ascent Angus Hill on Highway 48. *Id.* at 2:17:30 to 2:18:13.

132. Defendants' trucks travel these roads daily causing traffic delays and creating potential safety hazards to the traveling public. *Id.*

133. Delivering from the proposed Alto Batch Plant would reduce road travel time by up to 85 miles per load (includes time to collect raw product and collect/deliver concrete), which results in less vehicle emissions, less wear and tear on the local roads, and overall safer driving conditions for the public. *Id.* at 2:20:20 to 2:21:13.

134. The new proposed batch plant would allow Defendants to provide concrete services to Mescalero Apache Reservation, Cloudcroft and Mayhill, and areas between Hondo and Roswell, New Mexico. *Id.* at 2:16:00 to 2:16:37.

135. Currently, there is only one concrete batch plant located in Ruidoso, New Mexico (AGGTec owned by Mesa Verde). Defendants' Carrizozo Batch Plant is the only other batch plant currently operating in Lincoln County. *Id.* at 2:21:19 to 2:39:30.

136. A single concrete batch plant in an area causes the cost of concrete to increase based on lack of competitive pricing and additional delivery costs from other plants.

137. There is a need for an additional batch plant in the area as AGGTec has trouble keeping up with demand.

138. The proposed Alto Batch Plant would also possibly lead to more competitive concrete prices for Lincoln County residents.

139. There has been a concrete batch plant in downtown Ruidoso (currently AGGTec, owned

by Mesa Verde) for decades. *Id.* This batch plant is located within a ¼ mile of multiple residences consisting primarily of mobile or manufactured homes along with some 50 site built homes. The Lincoln County Medical Center is also located within a ¼ mile. *Id.*; Defs.' Ex. UUUU.

140. Defendants' Carrizozo Batch Plant is located within a ¼ mile of multiple residences, most of which are mobile or manufactured homes.

141. Historically, there have also been competing concrete batch plants in Capitan and Ruidoso Downs. *Id*.

a. The Capitan batch plant, identified in Ex. UUUU as Whole Nine Yards, LLC but identified by Mr. Roper as Alpine Concrete during his testimony, was located within a ¼ mile of Capitan Municipal Schools and multiple residential properties. *Id.*

b. The Ruidoso Downs batch plant, identified in Ex. UUUU as Beavers Land Co., LLC, was located within a ¼ mile of hundreds of residential properties. *Id.*

Noise Nuisance

142. Noise is unwanted sound. Pls.' Ex. 51 at 3.

143. "Environmental noise may interfere with a broad range of human activities in a way which degrades public health and welfare," including interference with: 1) speech communication in conversation and teaching; 2) telephone communication; 3) listening to television/music/radio; 4) concentration during mental activities such as studying; 5) relaxation, and 6) sleep. Pls.' Ex. 11, at D-1.

144. While interference with listening situations (e.g. speech communication) can be directly quantified in terms of the absolute level of the environmental noise in which activity interference is likely to occur, the amount of noise necessary to interfere with non-listening situations (e.g.

concentration during mental activities) is often dependent on other factors and therefore difficult to quantify. *Id.*

145. Speech communication plays an integral role in human life. *Id.*, at D-2

146. Thus, identifying environmental noise levels that result in speech interference can be helpful in assessing noise nuisance claims both because the level is usually quantifiable and because of the important role speech plays in human life.

147. Congress enacted the Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918 (1972).

148. In enacting the Noise Control Act, Congress found:

a. that inadequately controlled noise presents a growing danger to the health and welfare of the Nation's population, particularly in urban areas;

b. that the major sources of noise include transportation vehicles and equipment, machinery, appliances, and other products in commerce; and

c. that, while primary responsibility for control of noise rests with State and local governments, Federal action is essential to deal with major noise sources in commerce control of which require national uniformity of treatment.

42 U.S.C. §§ 4901(a).

149. Congress delegated the responsibility of researching and prescribing federal standards or regulations respecting noise to the Environmental Protection Agency ("EPA"). 42 U.S.C. §§ 4903(c).

150. In 1974, the EPA published its *Information on Levels of Environmental Noise Requisite to Protect Public Health and Welfare with an Adequate Margin of Safety* ("1974 EPA Noise Study"). Pls.' Ex 11.

151. The 1974 EPA Noise Study was prepared "to provide information on the levels of noise

requisite to protect public health and welfare with an adequate margin of safety." *Id.*, at i.

152. The EPA made statistical determinations "at the lowest level at which harmful effects could occur, and then additional corrections" were applied to provide a margin of safety. The margin of safety was developed through a "conservative approach at each stage of the data analysis." *Id.*, at ii.

153. The noise levels identified in the 1974 EPA Noise Study do not establish a federal noise standard.[8] Indeed, the EPA intentionally used the words "identified level" in its study and refrained from using terms like "goals," "standards," or "recommended levels" because "[n]either Congress nor the [EPA] has reached the conclusion that these identified levels should be adopted by states and localities." *Id.*, at 9.[9]

154. The 1974 EPA Noise Study's "identified levels" did not take into "*consideration…those elements necessary to an actual rule-making*. Those elements not considered in [the 1974 EPA Noise Study] include economic and technological feasibility and attitudes about the desirability of undertaking an activity which produces interference effects." *Id.* at 11 (Emphasis added).

155. The EPA warned that the "statistical generalizations [in the 1974 EPA Noise Study] should

---

[8] While there is no federal noise standard, in February 2017, the Federal Energy Regulatory Commission ("FERC") issued its Guidance Manual for Environmental Report Preparation for Application Filed Under the Natural Gas Act. Pls.' Ex. 12, Defs.' Ex. ZZZ. In the Manual, FERC determined that "[n]ew or modified compressor equipment or LNG equipment should not exceed [the noise levels identified in the 1974 EPA Noise Study] at receptors known as NSAs." *Id.* Plaintiffs' commercial businesses are not NSAs as the term is defined in the Manual, *infra*.

The Occupational Safety and Health Administration ("OSHA"), which oversees noise impacts on workers, have stated that workers should not be exposed to greater than 90 dBA in an 8 hour workday. And according to Mr. Dickerson, the federal Housing and Urban Development agency permits daytime noise levels to 65 dBA.

[9] Both Dr. Carlos Ituarte Villarreal, Ph.D. and Brad Shom, P.E. with SWCA referred to the EPA's identified levels as "recommended levels." *See* Pls.'s Ex. 53, ¶ 3; Pls.' Ex. 54, ¶ 3. This mischaracterization of the 1974 EPA Noise Study's identified levels is rejected by the Court.

not be applied to a particular individual. Moreover, States and localities will approach this information according to their individual needs and situations." *Id.* at ii.

156. Neither the State of New Mexico nor the County of Lincoln have enacted any laws or ordinances regulating noise levels.

157. While the 1974 EPA Noise Study does not identify a federal standard, the study is helpful in understanding noise measurements and levels.

158. "The ear is sensitive to sound *pressure.* Sound waves represent tiny oscillations of pressure in the air just above and just below atmospheric pressure. These pressure oscillations impinge on the ear and 'we hear the sound.' " Ex. 13, 1-3 (Emphasis original).

159. "Sound propagates as a pressure wave; sound is made up of vibrating air particles set into motion by a vibrating solid body or by an oscillating sound source; each air particle in the sound wave oscillates back and forth and strikes its neighboring air particles. Thus, the sound energy is transmitted by this successive transfer of vibration from one particle to the next." Pls.' Ex. 13, 1-6.

160. For noise to be transmitted, the transmission path must support the free propagation of the small vibratory motions that make up the sound.

161. Consequently, atmospheric conditions (e.g., wind speed and direction, temperature, humidity, precipitation) will influence the attenuation of sound.

162. Barriers and/or discontinuities (e.g., existing structures, topography, foliage, ground cover, manmade barriers, etc.) that attenuate the flow of sound may compromise the path.

163. Regardless of the type of impediment, the physical properties of sound are such that, at the point where the line-of-sight between the source and receiver is interrupted by a barrier, a 5 dB reduction in sound occurs. Pls.' Ex. 51.

164. Decibel (dB) is a physical unit commonly used to measure sound levels. Measuring sound directly in terms of pressure would require a very large and awkward range of numbers. To avoid this, the decibel scale was devised.

165. Sound measurement is further refined by using a decibel "A-weighted" sound level (dBA) scale that more closely measures how a person perceives different frequencies of sound. The A-weighting reflects the sensitivity of the ear to low or moderate sound levels.

166. "A complete physical description of a sound must describe its magnitude, its frequency spectrum, and the variations of both of these parameters in time." Pls.' Ex. 11 at 15.

167. Noise in our daily environment fluctuates over time. Some noise levels occur in regular patterns, others are random. Some noise levels are constant while others are sporadic.

168. To account for the variations in sound, the 1974 EPA Noise Study identified the "long-term average sound level, or equivalent sound level (L_{eq})," as the "best measure for the magnitude of environmental noise." Pls.' Ex. 11 at 16.

169. After determining the dB at a particular location, an A-weighted equivalent sound level for a 1-hour period (L_{eq}) is calculated. The L_{eq} represents the value of an equivalent, steady sound level, which in a stated time period and at a stated location, has the same A-weighted sound energy as the time-varying sound. Pls.' Ex. 21.

170. $L_{eq(24)}$ represents the sound energy averaged over an 24-hour period. *Id.* at 19.

171. Noise is more tolerable during the daytime than at nighttime. *Id.* at 18. ("In determining the daily measure of environmental noise, it is important to account for the difference in response of people in residential areas to noises that occur during sleeping hours as compared to waking hours. During nighttime, exterior background noises generally drop in level from daytime values. Further, the activity of most households decreases at night, lowering the internally generated noise

levels. Thus, noise events become more intrusive at night, since the increase in noise levels of the event over background noise is greater than it is during the daytime.").

172. Day-night sound level (L_{dn}) is the L_{eq} plus 10 decibels on the A-weighted scale (dBA) added to nighttime levels to account for people's greater sensitivity to nighttime sound levels (nighttime being defined as between the hours of 10 p.m. and 7 a.m.). *Id.*

173. The 1974 EPA Noise Study identifies an L_{dn} of equal to or less than 55 dBA outdoors in *residential* areas as the maximum levels below which no effects on public health and welfare will occur. *Id.*, Table 1 (Emphasis added).

a. "For outdoor voice communication, the outdoor L_{eq} of 60 dB allows normal conversation at distances up to 2 meters with 95% sentence intelligibility." *Id.* at 31; Table D-1.10

b. However, to account for all other adverse effects on activity interference (e.g. sleep disruption, interference with relaxation, etc.), the EPA applied the 10 dBA nighttime weighting (L_{dn}) and provided for an additional 5 dBA margin of safety reducing the maximum level of 60 dBA down to 55 dBA. *Id.*, at D-56.

174. To put environmental noise levels into context, levels between 50 and 55 dBA are associated with raised voices in a normal conversation. Pls.' Ex. 16, 1.

175. Noise levels during the day in a noisy urban area are frequently as high as 70 to 85 dBA. *Id.*, Figure 1.

[10] Research indicates that interference with speech "is greater for steady noise than for almost all types of environmental noise whose magnitude varies with time." Pls.' Ex. 11, at D-14. Here, the proposed batch plant will not produce a steady noise, *supra*. Given that the proposed batch plant will create environmental noise whose magnitude will vary with time, it is likely that the outdoor L_{eq} that allows normal conversation at distances up to 2 meters with 95% sentence intelligibility is higher than 60 dBA. *Id.*, Table D-2.

176. Noise levels above 110 dBA become intolerable. Pls.' Ex. 16, 1.

177. Noise levels higher than 80 dBA over continuous periods can result in hearing loss. *Id.*

178. Noise levels above 70 dBA tend to be associated with task interference. *Id.*

179. "The human ear's threshold of perception for noise change is considered to be 3 dBA; 6 dBA is clearly noticeable to the human ear and 10 dBA is perceived as a doubling of noise." Pls.' Ex. 12.

180. The 1974 EPA Noise Study recognized that acceptable noise levels would vary depending on the primary activities that are likely to occur in a defined area. Pls.' Ex. 11, at 39-43.

181. Thus, while the 1974 EPA Noise Study identified a L_{dn} of equal to or less than 55 dBA outdoors in *residential* areas as the maximum levels below which no effects on public health and welfare will occur, the 1974 EPA Noise Study did not identify that same level as the maximum levels below which no effects on public health and welfare will occur in commercial and/or industrial areas. *Id.*, at Table 4 (Emphasis added).

182. Given that different types of activities may occur in commercial and industrial areas, the 1974 EPA Noise Study did not identify maximum levels below which there will be no activity interference in these types of areas. *Id.*, at Table 4, Code a.

183. However, the 1974 EPA Noise Study does identify a $L_{eq(24)}$ of 70 dBA as the maximum levels to protect against hearing loss in commercial areas and industrial areas. *Id.*, at Table 4. Furthermore, a $L_{eq(8)}$ of 75 dBA was identified as the maximum levels to protect against hearing loss "so long as the exposure over the remaining 16 hours per day is low enough to result in a negligible contribution to the 24-hour average, i.e. no greater than an L_{eq} of 60 dBA." *Id.*, at Table 4, Code a.

184. Indoor commercial areas routinely exceed a L_{eq} of greater than 55 dBA. The 1974 EPA Noise Study identified the following environmental noise levels inside commercial businesses:

TABLE 2

EQUIVALENT SOUND LEVELS IN DECIBELS
NORMALLY OCCURRING INSIDE VARIOUS PLACES[6]

Space	L_{eq} (+)
Small Store (1-5 clerks)	60
Large Store (more than 5 clerks)	65
Small Office (1-2 desks)	58
Medium Office (3-10 desks)	63
Large Office (more than 10 desks)	67
Miscellaneous Business	63
Residences	
Typical movement of people - no TV or radio	40 - 45
Speech at 10 feet, normal voice	55
TV listening at 10 feet, no other activity	55 - 60
Stereo music	50 - 70

Pls.' Ex. 11, Table 2.

185. While Lincoln County does not have a noise ordinance, Socorro County enacted Ordinance No. 2010-001, which is intended to serve the "health, safety and general welfare of the residents of Socorro County." Defs.' Ex. NNNN. The Ordinance addresses ongoing noise levels rather than transient noises: "no person shall … *carry on* any type of activity…" that makes noise in excess of 80 dBA from 7 AM to 10 PM at the noise source property line. *Id.*, §§ 5.1, 5.1.3 (Emphasis added).

186. Santa Fe County noise ordinance No. 2009-11 defines a "noise sensitive unit" as a structure used for overnight accommodation. Defs.' Ex. MMMM, §2(2). The Ordinance makes it unlawful to exceed 75 dBA (daytime), or 60 dBA (nighttime), measured at 25 feet from the exterior boundary of a noise sensitive unit. *Id.*, §§ 6(1)(b) and 6(2)

Plaintiff's Noise Studies

187. Plaintiffs' law firm retained SWCA Environmental Consultants ("SWCA") to perform an

ambient noise survey to determine the potential noise impact of the proposed batch plant.

188. SWCA is an environmental consulting firm specializing in noise impact analysis, air quality permitting and compliance, and various environmental site investigations.

189. Brad Sohm, P.E. is a Senior Noise Specialist with SWCA who had primary responsibility for the ambient noise survey. Mr. Sohm has performed numerous noise impact studies under the California Environmental Quality Act, for the Federal Energy Regulatory Commission, under the National Environmental Policy Act ("NEPA"), and other numerous state and local noise regulations. Pls.' Ex.10.

190. Carlos Ituarte-Villarreal, Ph.D., is an Air Quality Modeling Specialist/Engineer with SWCA and has performed approximately 25 noise assessments of industrial facilities. Dr. Ituarte-Villarreal was responsible for the implementation of SWCA's noise assessment and assuring quality control and compliance with all applicable industry standards. Pls.' Ex. 21.

191. The survey in this case was performed between December 11, 2021 at 13:19 hours and December 13, 2021 at 13:33 hours. Pls.' Ex. 16.

192. SWCA attempted to determine the existing ambient noise levels[11] at four locations that plaintiffs assert are Noise Sensitive Areas ("NSA") near the proposed batch plant in Alto, New Mexico. The study sought to measure the impact of the batch plant on the current ambient sound level. *Id.* Given that the purpose of the noise assessment is to determine what impact, if any, the proposed batch plant would have on the existing ambient noise levels, an accurate determination of the existing ambient noise levels is critical.

193. The Court rejects the idea that the Plaintiffs' properties, a landscaping company/nursery

[11] SWCA defined ambient sound level "as the composite of noise from all sources near and far, *the normal* or existing level of environmental noise at a given location." Pls. Ex. 21.

and septic tank manufacturing company, are Noise Sensitive Areas. *See* Pls.' Ex 11 ("Examples of NSAs include residences, schools and day-care facilities, hospitals, long-term care facilities, places of worship, and libraries. NSAs may also include campgrounds, parks and wilderness areas valued specifically for their solitude and tranquility"). However, since SWCA identified it as NSA 1 in their modeling, the Court will use that term throughout the findings and conclusions to avoid confusion.

194. SWCA also attempted to determine the existing noise level near the existing batch plant operated by Defendants in Carrizozo, New Mexico. Pls.' Ex. 16.

195. In order to determine the ambient or background noise levels at each NSA, SWCA placed noise receptors at each location to determine existing sound levels. The ambient sound level is defined as the composite of all noise from sources from near or far, or alternatively, the normal or existing level of environmental noise at a given location. Pls.' Ex. 21 ¶ 8

196. The first location, identified as NSA 1, was at the Botkins' nursery, which is located approximately 458 feet to the west of the proposed batch plant. Pls.' Ex. 16.

a. Notably, the nursery was closed during the 29 hours of observation. *Id.*

b. The results of the survey indicated the current A-weighted equivalent noise levels (L_{eq}) at NSA 1 is 46.0 with a L_{dn} of 50.4. *Id.*

c. The reported noise level measured at NSA 1 underreports the actual existing ambient sound level as the nursery was not operating at the time the data was collected. *Id.*

d. Since the existing noise level at the nursery was not accurately measured by SWCA, it has a significant impact on all of the modeling submitted by Plaintiffs for the predicted noise impact of the proposed batch plant. Defs.' Ex. ZZZZ,

¶3b.

i. For example, several of Plaintiffs' proposed findings of fact include percentages of increase in perceived loudness (e.g. Plaintiffs' Proposed Finding of Fact ¶ 66: "the SoundPLAN model still reported an hourly A-weighted equivalent noise level (L_{eq}) of 59.5 dBA at NSA-1 on the Botkin property, *a greater than 200% increase in perceived loudness* and an exceedance of the U.S. EPA guidance.").

ii. A percentage increase is the difference between the final and initial values of some variable quantity, expressed as a percentage of the initial value. In this case, the variable being measured is sound (dBA). By using a lower than actual initial dBA at NSA 1, Plaintiffs and SWCA have artificially increased the percentage of change, or impact, that the proposed batch plant would actually have if permitted to operate.

e. Consequently, the Court rejects all of Plaintiffs and SWCA's predicted change or impact caused by the proposed batch plant whether expressed as a percentage or as an increase in dBA.

197. The second location, identified as NSA 2, was at a residence located approximately 3,271 feet to the north-northeast of the proposed batch plant. Pls.' Ex. 16.

a. The results of the survey indicated the current A-weighted equivalent noise levels (L_{eq}) at NSA 2 is 29.8 with a L_{dn} of 36.2. *Id.*

198. The third location, identified as NSA 3, was at a residence located approximately 3,623 feet to the east-northeast of the proposed batch plant. *Id.*

a. The results of the survey indicated the current A-weighted equivalent noise

levels (L_{eq}) at NSA 3 is 33.4 with a L_{dn} of 39.8. *Id.*

199. The fourth location, identified as NSA 4, was at a residence located approximately 829 feet to the southeast of the proposed batch plant, and is located approximately 230 feet from Airport Road. *Id.*

a. The results of the survey indicated the current A-weighted equivalent noise levels (L_{eq}) at NSA 4 is 45.5 with a L_{dn} of 51.9. *Id.*

200. NSAs 2 through 4 were monitored for twenty minutes and the L_{dn} was calculated with SWCA making assumptions about the L_d monitored levels being representative of the L_n levels. *Id.*

201. The fifth location, identified by SWCA as the "Carrizozo, NM Batch Plant" was measured from a residence located approximately 930 feet to the east of the active batch plant operated by Defendants. *Id.*

a. The results of the survey indicated the current A-weighted equivalent noise levels (L_{eq}) at the residence located near the Carrizozo Batch Plant is 47.6 with a L_{dn} of 52.7. *Id.*

b. Data was collected from 1:19pm on December 11, 2021 to 1:33pm on December 13, 2021. *Id.*

c. The Carrizozo Plant was closed on Saturday, December 11, 2021, and on Sunday, December 12, 2021. However, Monday, December 13, 2021 was one of the busiest days ever for the Carrizozo Batch Plant. During the hours when SWCA was collecting data, the Carrizozo Plant batched 22 loads of concrete from 7:45am to 1:20 pm. The Carrizozo Plant also received deliveries of aggregate (i.e. sand) and cement that day. *See* For the Record, June 3, 2022 at

3:29:46 to 3:33:03; Defs.' Ex. CCCC.

d. Despite being able to collect over 72 hours of valid data, SWCA determined the "data was insufficient to determine the noise levels of the plant, as [the plant] was not observed to be operational for much of the duration of the survey. Additionally, road noise impacted noise levels at the property, making it difficult to determine what noise would be attributable solely to the plant during periods of operation. As a result, this data was not used in this analysis." Pls.' Ex. 16.

e. Interestingly, SWCA used the data collected at NSA 1 despite the nursery being closed, while rejecting the actual data from the Carrizozo Batch Plant due to observing limited operations during the first 48 hours of observation. SWCA apparently did not consider, or was not concerned with, whether the data from the nursery was "insufficient to determine the noise levels" at NSA 1 even though the nursery was not in operation during the time observed.

f. Instead of using the actual data collected, SWCA utilized the FHWA Roadway Construction Noise Model (the "RCNM"). The RCNM model is widely accepted in the noise assessment industry as a model to assess likely or probable noise impacts from proposed industrial facilities that have not yet been constructed. The RCNM is not a sophisticated model, but does provide a rough estimate of the likely noise impact that anticipated construction may have in an area. The U.S. Department of Transportation Federal Highway Administration has developed the FHWA Roadway Construction Noise Model User's Guide for use in the RCNM (the "RCNM User's Guide"). Pls.' Ex. 14. The RCNM

User's Guide includes specific noise values for equipment used at a concrete batch plant, including concrete mixing trucks, front-end loaders, and the concrete batch plant itself. *Id*. According to the RCNM User's Guide, the noise levels for a front-end loader are 79 dBA (at a reference distance of 50 feet), a concrete mixing truck produces noise levels of 79 dBA, and a concrete batch plant produces 83 dBA. Notably, the RCNM User's Guide did not collect any actual noise samples for batch plants and therefore the Guide's predicted 83 dBA for batch plants is not based on any actual measured data.[12]

g. SWCA's explanation as to why the Carrizozo Batch Plant data was excluded from their analysis was not credible especially since SWCA used data from NSA 1 when the nursery was closed.

h. In general, the Court takes no issue with using the RCNM Model as a predictive tool absent actual data. However, SWCA had actual data from Defendants' current batch plant and elected not to use that data and instead used the RCNM model (which includes the predictive 83 dBA for batch plants based on no actual data). It is likely the actual data was excluded because it was not helpful to Plaintiffs, and that the estimated noise level for a concrete plant and the other pieces of equipment from the RCNM User Guide were substituted in its place as those levels were more advantageous to Plaintiffs. This seriously calls into

[12] The predictive dBA levels for front-end loaders was based on 96 actual samples while the predictive dBA level for concrete mixer trucks was based on 30 actual samples. Mr. Dickerson opined that "newer construction equipment (last 5 years) has become significantly quieter since the information released in 2006 (the RCNM default levels)." Defs.' Ex. ZZZZ, ¶ 9d. This means the predicted dBA levels in the RCNM User Guide likely overestimate the actual noise generated from newer models of these types of equipment.

question the validity of any of SWCA's noise survey and analysis.

202. "Since decibels are logarithmic units, sound levels cannot be added by ordinary arithmetic means. For example, if one truck produces a sound level of 90 dB when it passes, two trucks would not produce 180 dB. Actually, two similar trucks, each at 90 dB, would combine to produce 93 dB." Ex. 13, 1-1. Accordingly, the RCNM models runs a linear regression analysis to determine the anticipated noise impact of the proposed batch plant with SWCA imputing the necessary information to run the analysis. This information includes the predicted noise levels from the front-end loader, concrete mixer trucks, and concrete batch plant from the RCNM User Guide, and the anticipated usage factor for each piece of equipment (the anticipated percentage of time each piece of equipment is expected to be operated at full power). The RCNM has a default usage factor of 40%. Once the linear regression analysis is run, SWCA superimposes the anticipated noise impact at each NSA on the background or ambient noise levels measured during the survey to produce the anticipated noise impact of the proposed batch plant.

203. SWCA relied on Defendants' application for the Air Quality Construction Permit that stated the proposed batch plant would use a maximum of ten (10) concrete mixing trucks and one (1) front-end loader. With this information, SWCA incorporated into the noise assessment model the specific published noise data for each piece of equipment, as specified by the RCNM User's Guide. Although Defendants' application for an Air Quality Construction Permit sought approval for the use of 20.3 trucks per hour, SWCA reduced that number, for purpose of the noise assessment, to two trucks per hour, which coincidentally is what Defendants' anticipate using.

204. SWCA entered one front-end loader, two concrete mixer trucks and one batch plant into the RCNM model.

205. SWCA employed the default usage factor of 40% for each of the two mixer trucks, front-

end loader and batch plant. This usage factor is significantly higher than the anticipated usage factor based on Mr. Roper's testimony. By using the default usage factor instead of a more realistic estimated usage factor, SWCA's modeling overestimates the likely noise impact of the proposed batch plant.

a. According to Mr. Roper's testimony, it takes approximately five minutes to load a concrete mixer truck.[13] Based on current demand, Mr. Roper anticipates batching two concrete mixer trucks per hour on average resulting in a total of approximately ten minutes of concrete truck usage per hour, or a usage factor of 16.7%. Compared with the RCNM default usage factor of 40%, which equals twenty-four minutes per hour, the RCNM default usage factor is more than twice than the anticipated usage of concrete mixer trucks.

b. The disparity between the default usage factor and anticipated usage factor with the front-end loader is even more significant. According to Mr. Roper's testimony, he anticipates using the front-end loader approximately thirteen minutes per *day*. The anticipated usage factor for the front-end loader would be 2.7% instead of the RCNM default usage factor of 40%.

c. As noted above, the noise survey at NSA 1 is unreliable since SWCA conducted the survey when the nursery was closed. While the Court recognizes current ambient sound levels should represent actual and not predicted ambient sound levels, if we were to apply SWCA's same methodology to NSA 1 as SWCA is attempting to use for the proposed batch plant, the results of the noise survey would be dramatically different. Under SWCA's methodology of applying the

[13] Mr. Edler agreed that it takes five minutes to load a concrete mixer truck.

default 40% usage factor regardless of the actual usage, we would then use the RCNM User Guide's to determine the predictive dBA levels for each piece of equipment used at NSA 1, which includes at least one skid steer and a ¾ ton pickup truck, and run the linear regression analysis. This would undoubtedly lead to a much higher L_{eq} and corresponding L_{dn} at NSA 1 since we know the usage factor of the skid steer and truck is significantly less than the default 40% usage factor.

d. Modeling the potential noise impact of the batch plant is meaningless if realistic data is not entered into the model.

206. Thus, the RCNM's predictive noise impact overestimates the actual noise impact of the proposed batch plant in two ways:

a. The data used for existing ambient sound level at NSA 1 is lower than the actual ambient sound level during the week as the nursery was not operating at the time SWCA collected the data, and

b. The predicted noise level of the batch plant is exaggerated because SWCA used data from the RCNM User Guide instead of the actual data collected from the Carrizozo Batch Plant, and SWCA used the default 40% usage factor instead of a more realistic usage factor.

207. Based on the undisputed testimony of Mr. Roper that he would not operate the proposed batch plant between the hours of 10:00pm and 7:00am, SWCA reran the RCNM Model, limiting the hours of operation to daytime, which necessarily resulted in a reduction of the L_{dn} value because there would be no nighttime operations. SWCA did not adjust the anticipated usage factor for this analysis and again used the predicted dBAs from the RCNM User's Guide instead of the

actual data collected from the Carrizozo Batch Plant. With the new input to the RCNM limiting operations to daytime hours, the results demonstrated that the proposed concrete batch plant would result in noise levels of 58.3 dBA at NSA 1.

208. The RCNM model automatically applies a 6 dBA drop off rate ("inverse square law") and assumes *no* interference with the transmission path.

209. The RCNM model assumes a straight-line direction between the noise source and receptor; it does not account for any of the attenuating factors except wind speed. The RCNM model does not account for intervening sound barriers.

210. Attenuating factors are not mere technicalities; they are essential elements to reliably predict noise levels.

211. To account for attenuating factors not considered under the RCNM model, SWCA used another model, SoundPLAN Essential (version 5.1)[14] software, to predict the potential noise impact of the proposed batch plant. Pls.' Ex. 54.

212. The SoundPLAN model considers a number of influences, including sound power levels, locations of noise sources, distance between noise sources and receivers, topography of the area, the influence of absorption provided by the ground, shielding from structures or vegetation, and air absorption. Notably, the SoundPLAN model assumes "sound propagation occurs over porous ground or mixed ground, most of which is porous," typically which results in a sound attenuation factor between 0.6 and 1. Plaintiffs' Ex. 54 ¶ 7. The sound attenuation factor is based on the type of ground surface at the source and between the source and the receptor. The more the ground surface resembles "soft ground," the attenuation factor increases to close to 1, and it is assumed

[14] Mr. Dickerson opined that SoundPLAN (version 8.2) is a more sophisticated software that most specialist acoustical engineering firms use for accurate noise modeling. *See* Defs.' Ex. ZZZZ, ¶ 5, n. 1.

that the sound is reduced through absorption before reaching the receptor. Hard surfaces, on the other hand, have a ground factor of 0, which results in no attenuation of the sound before it is perceived at the receiving location. The inverse square law assumes completely reflective surfaces.

213. Plaintiffs assert that the pavement at the proposed batch plant would be considered a hard surface, entitled to an attenuation factor of 0 and would not cause any reduction in sound.

214. The SoundPLAN model assumes a "porous" or soft ground with an attenuation factor between 0.6 and 1, which would cause an underestimation of the actual noise impacts of the proposed concrete batch plant if plaintiff's calculation of the ground factor is accurate.

215. Mike Dickerson, Jr., INCE, a noise expert retained by Defendants, opined that a 0.75 ground factor is more accurate, which would be within the SoundPLAN model's assumption. Defs.' Ex. ZZZZ, n. 8.

216. Importantly, SWCA did not adjust the anticipated usage factor for this analysis and again used the predicted dBAs from the RCNM User's Guide instead of the actual data collected from the Carrizozo Batch Plant.

217. SWCA inputted the terrain conditions at the site, a 10-foot barrier proposed by Defendants, which arguably may not be allowed under the air quality permit regulations, the height and specifications for the plant, the local meteorological data, and related geographical information into the SoundPLAN model.

218. SoundPLAN model estimates noise contours of the overall project in accordance with a variety of standards, primarily using the International Standards Organizations ("ISO") 9613-2:1996, Acoustics, for Noise Propagation Calculations. Many sound propagation losses, such as geometric spreading, ground absorption, and barrier shielding are calculated in accordance with these recognized standards. Plaintiffs' Ex. 54 ¶ 6.

219. The SoundPLAN model still reported an hourly A-weighted equivalent noise level (leq) of 59.5 dBA[15] at NSA-1. Pls.' Ex. 54 ¶¶ 9-10.

220. Mr. Dickerson opined that SWCA failed to "use some of the SoundPLAN Essentials options that would have provided more accurate noise calculations. Instead, SWCA chose default and "worst case" options, with the result that the noise levels reflected in Trial Exhibit 52 are as significantly exaggerated as those in the Original Report." Defs.' Ex. ZZZZ, ¶ 5.

221. "When MD Acoustics added the acoustical spectrum from the [SoundPLAN Essentials] sound library for the equipment listed (e.g., front-end loader, etc) the sound level dropped from 59 dBA to 53.5 at NSA 1." *Id.* ¶5a. This level is below the EPA's identified maximum level of equal to or less than 55 dBA in which no effects on public health and welfare will occur in residential areas.

222. Brad Sohm, P.E., is a chemical engineer with SWCA who had primary responsibility for the implementation of the noise assessment conducted by SWCA. Mr. Sohm has performed numerous noise impact studies under the California Environmental Quality Act, for the Federal Energy Regulatory Commission, under the National Environmental Policy Act, and other state and local noise regulations. He has not previously conducted any studies related to concrete batch plants. Pls.' Ex.10.

223. Dr. Carlos Ituarte-Villarreal has Ph.D. in Environmental Science & Engineering. Dr. Ituarte-Villarreal has performed approximately 25 noise assessments of industrial facilities, none of which involve concrete batch plants. Dr. Ituarte-Villarreal's background is not specific to acoustical engineering and he is not a member of any recognized acoustical organizations. Dr.

[15] SWCA reran the SoundPLAN model to account for other potential sound barriers Mr. Roper testified he was considering implementing and the SoundPLAN model reported a slight decrease – 0.5 dBA – of the noise level at NSA 1.

Ituarte-Villarreal was responsible for the implementation of the noise assessment and assuring quality control and compliance with all applicable industry standards. Pls.' Ex. 21.

224. Mr. Dickerson has a Bachelors of Science in Physics with an emphasis in acoustics. Mr. Dickerson is affiliated with the Institute of Noise Control Engineers (INCE), Acoustical Society of America (ASA), BYU Acoustic Research Group, and the Association of Environmental Planners. Defs.' Ex. JJJJ. According to his testimony, Mr. Dickerson has conducted noise studies on components of concrete batch plants and maintains a library of actual sound samples he or his company have collected, which include equipment used in concrete batch plants. Mr. Dickerson has personally performed about 4,200 noise studies and has been responsible for over 7,000 noise studies produced by MD Acoustics. He and his company specialize in acoustics and utilize a variety of state-of-the art tools in conducting their noise evaluations.

Property Values

225. Marc Beatty is a real estate appraiser who owns NM Appraisal Company. Mr. Beatty is a licensed appraiser who has been conducting appraisals in the Ruidoso area for 16 years. Mr. Beatty has experience determining diminution of value of property resulting from certain uses on adjoining property. Mr. Beatty is not familiar with any studies regarding the diminution of property values caused by a concrete batch plant.

226. Mr. Beatty opined that the proposed concrete batch plant would cause diminution in value to adjoining and nearby properties if constructed. Mr. Beatty could not offer an opinion as to the amount of diminution of values.

227. Print Mundy is a licensed real estate broker with 38 years of experience buying and selling real estate in the Lincoln County area. Mr. Mundy represents a seller who owns land directly adjacent to Tracts 4A-1 and 4B.

228. Mr. Mundy opined that real estate buyers are unwilling to buy very attractive parcels of land once they learn they have to drive past a concrete batch plant to access the property.

229. At the time Mr. Mundy testified, the lots at issue had been for sale for a minimum of two years up to possibly ten years and had not sold, long before Defendants' purchased their lots for the proposed concrete batch plant.

230. Following the hearing, Mr. Mundy sold one of the properties to the north of Defendants' property in October 2022. The land was sold to a personal friend at a price of $23,300 per acre. Mr. Mundy sold two other properties to the east of Defendants' property for $24,000 per acre in November 2022.

231. Defendants' paid $33,500 per acre in February 2020.

232. In the two years since Defendants' purchased their property, the cost per acre in the area has gone down by approximately $10,000 per acre.

233. It is unclear from the evidence before the Court whether the reduction in value is attributable to the proposed batch plant, the location of the properties (e.g. whether the properties have frontage road access), the condition of the land (whether the land is flat) or other market factors.

CONCLUSION OF LAW

1. The Court has jurisdiction over the parties.

2. Venue is proper in Lincoln County.

Subject matter jurisdiction

3. The Declaratory Judgment Act requires the presence of an "actual controversy" before this Court can assume jurisdiction of this declaratory judgment action. *See* NMSA 1978, § 44–6–2 (1975)("In cases of *actual controversy*, district courts within their respective jurisdictions shall

have power to declare rights, status and other legal relations whether or not further relief is or could be claimed.")(Emphasis added).

4. "The prerequisites of 'actual controversy' warranting consideration in a declaratory judgment action are: a controversy involving rights or other legal relations of the parties seeking declaratory relief; a claim of right or other legal interest asserted against one who has an interest in contesting the claim; interests of the parties must be real and adverse; and the issue involved must be ripe for judicial determination." *Sanchez v. City of Santa Fe*, 1971-NMSC-012, ¶ 7, 82 N.M. 322, 481 P.2d 401.

5. There is a controversy involving the enforceability and applicability of the purported deed restrictions that Plaintiffs allege burden the parties' properties, meeting the first prerequisite.

6. Plaintiffs claim a right to prohibit Defendants from operating a proposed batch plant on Defendants' property alleging such use of the property would violate the purported deed restrictions. Defendants have an interest in disputing the claim so that they may operate the proposed batch plant. The second prerequisite of actual controversy has been met.

7. The parties are real and adverse, which meets the third prerequisite.

8. There is a dispute among the parties as to whether this matter is ripe.

9. "[E]ven if a purely legal question is presented for declaratory judgment, it is not justiciable unless it is ripe." *New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 18, 149 N.M. 42, 243 P.3d 746.

10. "The mere possibility or even probability that a person may be adversely affected in the future…fails to satisfy the actual controversy requirement." *Yount v. Millington*, 1993-NMCA-143, ¶ 36, 117 N.M. 95, 869 P.2d 283 (quoting *Dawson v. Department of Transp.,* 480 F.Supp. 351, 352 (W.D.Okla.1979)).

11. The Court of Appeals addressed a similar issue related to ripeness in *E. Navajo Diné Against Uranium Mining v. Martin*, A-1-CA-32447, mem. op (N.M. Ct. App. Jan. 14, 2013)(nonprecedential)("*Navajo*").

12. The plaintiffs in *Navajo* filed a complaint for declaratory judgment and injunctive relief seeking to enjoin Hyrdo Resources, Inc. ("HRI") from discharging chemicals in an underground aquifer into groundwater. *Id.* ¶ 2. HRI was required to obtain a discharge permit from NMED before it could discharge the chemicals. *Id.* The district court dismissed the complaint without prejudice finding the case was not ripe for review. The district court identified three triggering events that would make the litigation ripe: 1) NMED takes final action on HRI's groundwater discharge permit application, 2) HRI begins construction related to the groundwater injection system for its proposed uranium *in situ* leach mining operation, or 3) HRI orders any materials for the construction of a groundwater injection system for its proposed uranium *in situ* leach mining operation. *Id.* ¶ 3. In affirming the district court, the Court of Appeals noted, "even though HRI could theoretically begin discharge operations pursuant to [an older] permit, we are not convinced that Plaintiffs' rights are at risk unless and until HRI actually takes steps to begin construction and NMED takes no steps to prevent HRI's activities." *Id.* ¶ 10.

13. As was the case in *Navajo*, this case was not ripe until NMED took final action on Defendant's Application for an Air Quality Permit, which was issued to Defendants on May 30, 2023. While Alto CEP has appealed the EIB's decision, their request for stay has been denied.

14. Moreover, Defendants have already began preparing the land for the proposed batch plant and will be starting construction soon.

15. This case is now ripe for judicial determination.

16. Accordingly, this Court has subject matter jurisdiction.

Preliminary Injunctions

17. "Injunctions are harsh and drastic remedies, one that should issue only in extreme cases of pressing necessity and only where there is a showing of irreparable injury for which there is no adequate and complete remedy at law." *Padilla v. Lawrence*, 1984-NMCA-064, ¶ 22, 101 N.M. 556.

18. "[W]here injunctive relief is the ultimate relief sought, or where such relief is affirmative—not merely a maintenance of the status quo—the plaintiff 'must satisfy a heightened burden' of proof." *Grisham v. Romero*, 2021-NMSC-009, ¶ 20 (quoting *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004); *see also Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1155 (10th Cir. 2001).

19. In addition to injunctive relief, Plaintiffs seek compensatory and punitive damages. Moreover, the preliminary injunction would not alter the status quo.

20. Accordingly, the Court will not apply a heightened scrutiny to Plaintiffs' request.

21. To obtain a preliminary injunction, a plaintiff must show: (1) the plaintiff will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any damage the injunction might cause the defendant; (3) issuance of the injunction will not be adverse to the public's interest; and (4) there is a substantial likelihood plaintiff will prevail on the merits. *See Nat'l Trust for Historic Pres. v. City of Albuquerque*, 1994-NMCA-057, ¶¶ 18, 21, 117 N.M. 590 (internal quotation omitted); *LaBalbo v. Hymes*, 1993-NMCA-010, ¶ 11, 115 N.M. 314.

22. Interests in real property are unique in character and militate strongly in favor of injunctive relief, a common and appropriate remedy for enforcing a deed restriction. *See Wilcox v. Timberon Protective Ass'n*, 1990-NMCA-137, ¶ 34, 111 N.M. 478 ("However, where the character of the property is intact, legal remedies are inadequate, since damages due to loss of quiet enjoyment are

incalculable."); *see also Cafeteria Operators, LP v. Coronado-Santa Fe Associates, LP, et al.,* 1998-NMCA-005, ¶ 19, 124 N.M. 440 (particularities related to real property are relevant when considering the character of interests to be protected by injunctive relief); *see also Appel v. Presley Companies*, 1991-NMSC-026, ⁋ 4, 111 N.M. 464 ("This court has recognized the importance of enforcing protective covenants where the clear language of the covenants, as well as the surrounding circumstances, indicates an intent to restrict use of the land."); *see also Montoya v. Barreras*, 1970-NMSC-111, ⁋ 12, 81 N.M. 749 (stating that restrictive "covenants constitute valuable property rights of the owners of all lots in the tract").

23. "[B]ecause a preliminary injunction is an extraordinary remedy, the [movant's] right to relief must be clear and unequivocal." *Aposhian v. Barr*, 958 F.3d 969, 978 (10th Cir. 2020) (quoting *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1261 (10th Cir. 2004).

24. "The movant 'must' satisfy his or her burden for each and every one of these prerequisites." *Peterson v. Kunkel*, 492 F. Supp. 3d 1183, 1192–93 (D.N.M. 2020) (citing *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016)).

25. The prerequisites to granting a preliminary injunction "do not establish a balancing test—each [factor] must be satisfied independently, and the strength of one cannot compensate for the weakness of another." *Id.* (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)).

Plaintiffs have failed to demonstrate a substantial likelihood of success on the merits.

26. "Likelihood of success on the merits is the threshold issue; all other factors depend on the Plaintiffs satisfying this requirement." *Id.* at 1193-94.

27. "A 'substantial likelihood' is defined as 'a prima facie case showing a reasonable

probability that [the movant] will ultimately be entitled to the relief sought.' " *Id.* (quoting *Continental Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 781 (10th Cir. 1964)).

The deed restrictions likely do not burden Defendants' land

28. Plaintiffs' seek declaratory judgment of the four Quitclaim Deeds recorded on May 27, 2014, which purportedly placed deed restrictions on each of the original four tracts of land including Defendants' properties, which subsequently became Tracts 4A-1 and 4B.

29. In New Mexico, all deeds, mortgages, and other writings affecting the title to real estate must be recorded in the office of the county clerk of the county in which the real estate affected is situated. *See Amethyst Land Co., Inc. v. Terhune*, 2014-NMSC-015, ¶ 10 (citing NMSA 1978, § 14-9-1 (1991) ("All deeds, mortgages, . . . and other writings affecting the title to real estate shall be recorded in the office of the county clerk of the county . . . in which the real estate affected thereby is situated.")).

30. The purpose of the New Mexico recording statute is to provide a way for an intended purchaser to safely determine the kind of title he is in fact obtaining and to further protect the intended purchaser from claims of interest that are not disclosed by any public record and not ascertainable by due diligence. *See City of Rio Rancho v. Amrep Southwest Inc.*, 2011-NMSC-037, ¶ 39, 150 N.M. 428.

The purported deed restrictions met the three requirements for the establishment of an enforceable covenant running with the land

31. A deed restriction is a type of covenant. A "covenant" is "a formal agreement or promise...to do or not do a particular act." *Black's Law Dictionary*, 443 (10th ed. 2014).

32. "Not all covenants are servitudes…A covenant becomes a servitude if either the benefit or burden runs with land." Restatement (Third) of Property (Servitudes) § 1.3 (2000).

33. "New Mexico case law sets out the following requirements to establish an enforceable

covenant running with the land: '(1) the covenant must touch and concern the land[,] (2) the original covenanting parties must intend the covenant to run [with the land,] and (3) the successor to the burden must have notice of the covenant.' "[16] *Dunning v. Buending*, 2011-NMCA-010, ¶ 11, 149 N.M. 260, 247 P.3d 1145 (quoting *Lex Pro Corp. v. Snyder Enterprises, Inc.*, 1983-NMSC-073, ¶ 7, 100 N.M. 389, 671 P.2d 637).

34. "[T]o touch and concern the land, a covenant must bear upon the use and enjoyment of the land and be of the kind that the owner of an estate or interest in land may make because of his ownership right." *Flying Diamond Oil Corp. v. Newton Sheep Co.*, 776 P.2d 618, 623–24 (Utah 1989)(citing *Eagle Enterprises, Inc. v. Gross,* 39 N.Y.2d 505, 508-510, 349 N.E.2d 816, 819, 384 N.Y.S.2d 717, 720 (1976); 5 R. Powell, ¶ 673[2][a], at 60–41).

35. "Not every covenant binds subsequent owners or users of the land, even though the covenant purports to be a covenant that runs with the land. The effect of the touch-and-concern requirement is to restrict the types of duties and liabilities that can burden future ownership of interests in the land. The touch-and-concern requirement focuses on the nature of the burdens and benefits that a covenant creates. What is essential is that the burdens and benefits created must relate to the land and the ownership of an interest in it; the burdens and benefits created are not the personal duties or rights of the parties to a covenant that exist independently from the ownership of an interest in the land." *Id.* at 623 (citing 5 R. Powell, ¶ 673[2][a], at 60–41; Note, *Covenants Running With the Land: Viable Doctrine or Common–Law Relic?,* 7 Hofstra L.Rev. 139, 142, 158 (1978)).

---

[16] As noted in *Dunning*, the "Restatement [(Third) of Property: Servitudes] appears to have abandoned the first and third requirements…However, because our Supreme Court has not formally rejected the requirements set out in *Lex Pro*," this Court will apply all three requirements.

36. "A burden touches and concerns the land if its performance renders the covenantor's interest in the land less valuable while rendering the covenantee's interest in the land more valuable. *Dunning*, 2011-NMCA-010, ¶ 16. (quoting *Lex Pro Corp.*, 1983-NMSC-073, ¶ 8); *see also* 20 Am. Jur. 2d Covenants, Etc. § 30 ("American courts generally make no distinction between affirmative covenants and negative or restrictive covenants as regards their running with the land. The chief consideration in deciding whether a covenant runs with the land is whether it is so related to the land as to enhance its value and confer a benefit upon it, rather than whether the covenant is of an affirmative or negative nature.").

37. By its express terms, the purported deed restrictions place a burden on Defendants' interest in their property while placing a benefit on Plaintiffs' interest in their property. Defendants' property is burdened by the restriction prohibiting certain lawful uses of their land (e.g. running a commercial livestock operation). Plaintiffs are benefitted by being able to enjoy their property with less noise, an absence of foul odors, or other undesirable activities (e.g. sexually oriented businesses) occurring on their neighboring properties.

38. Moreover, Plaintiffs' right to enforce the purported deed restrictions is not a personal right that exists independently from their ownership of their lands. For example, Mr. Reed, who drafted the purported deed restrictions, is opposed to the concrete batch plant. Despite his opposition, Mr. Reed does not have an individual or personal right to sue Defendants to enforce the purported deed restrictions as he no longer owns any of the tracts. It is Plaintiffs' ownership interests in Tracts 1 and 3A, respectively, that give Plaintiffs the right to sue to enforce the purported deed restrictions.

39. Accordingly, the Plaintiffs have met the first element of establishing an enforceable covenant running with the land in that the purported deed restrictions touch and concern the land.

40. "In modern practice, [to establish a covenant running with the land] the developer normally

files a declaration that sets forth the servitudes that will be imposed to implement the general plan. That declaration normally includes a description of the land covered by the plan, a description of the servitudes binding each lot, and a statement that the servitudes run with the land and run to the benefit of every lot in the plan. The declaration becomes effective to create the reciprocal servitudes for the entire development when the first lot is conveyed subject to its terms." Restatement (Third) of Property (Servitudes) § 2.14 (2000).

41. "Early developers of residential subdivisions often relied on land-use restrictions in the deeds to individual lots, rather than using a declaration of restrictions applicable to the entire subdivision. The deeds usually stated restrictions without stating that the benefit of the restrictions ran to other lots in the subdivision…Under the general-plan doctrine, all lots developed according to a general plan were entitled to the benefit of the servitudes imposed on all the other lots in the plan, regardless of the order in which they were conveyed by the developer. Mechanically, the result was reached by holding that, on conveyance of the first lot subject to restrictions, the developer imposed an implied reciprocal servitude on the remainder of the lots for the benefit of the first lot. Thus, the owner of the first lot held the benefit of a servitude that permitted him to enforce the restrictions against all the other lots. The same theory operated to give each subsequent purchaser rights against all those who purchased later than they did." *Id.*

42. Here, the developers, Mr. Reed, Ms. Bramblett and their children, did not file a declaration setting forth the servitudes they intended to apply to each of the four tracts. Instead, they decided to place the covenants in the deeds recorded on May 27, 2014. The deeds do not include a description of the tracts covered by the deed restrictions, nor do the deeds contain a statement that the deed restrictions would run with the land.

43. "Because the language of the deed does not specify that the covenant is to run with the

land, we look to the circumstances surrounding the transaction and the object of the parties in making the restriction to determine whether that intent can be inferred." *Lex Pro Corp.*, 1983-NMSC-073, ¶ 10 (citing *H.J. Griffith Realty Co. v. Hobbs Houses, Inc.,* 68 N.M. 25, 357 P.2d 677 (1960)).

44. Mr. Reed, on the advice of his surveyor, devised a plan to circumvent Lincoln County's subdivision ordinance by using the Family Claim of Exemption so that he could more easily subdivide the original 13.7 acres into four tracts of land.

45. After he completed subdividing the land, Mr. Reed intended to maintain one of the four tracts for his own use while selling the remaining three tracts. Mr. Reed wanted to insert deed restrictions to prohibit certain uses on all four tracts that he found undesirable. He further thought the restrictions would enhance the value of the four tracts for subsequent owners.

46. As part of his plan to circumvent the arduous subdivision ordinance, Mr. Reed and Ms. Bramblett transferred their interests in three of the tracts to their children (i.e. Tract 1 was deeded to Mr. Reed's daughter, Amanda Marie Reed; Tract 2 was deeded to Mr. Reed's daughter, Sadie Reed Cartwright; and Tract 3 was deeded to Ms. Bramblett's son, Lance Kuykendall).

47. While the Reed and Bramblett children were never meant to maintain the properties and were always intending to deed the properties back to Mr. Reed and Ms. Bramblett after the subdivision was accomplished, the children legally owned Tracts 1 through 3.

48. One cannot place restrictions on land he does not own. *See Pollock v. Ramirez*, 1994-NMCA-011, ¶ 14, 117 N.M. 187 (stating a grantor cannot place restrictions on land he does not own).

49. Since Mr. Reed no longer owned Tracts 1 through 3, he could not unilaterally impose the deed restrictions.

50. Mr. Reed prepared a deed for each of the four tracts transferring ownership back to himself and Ms. Bramblett as joint tenants. In those deeds, he inserted the purported deed restrictions. He then had his children execute the deeds with respect to Tracts 1 through 3, and he and Ms. Bramblett executed the deed with respect to Tract 4.

51. The deeds contain identical language with respect to the purported deed restrictions and evidence the original covenanting parties' general plan of development.

52. Thus, the Plaintiffs have met the second element of establishing an enforceable covenant running with the land in that they have established that original covenanting parties intended the deed restrictions to run with the land.

53. Lastly, Plaintiffs have established that Mr. Roper had actual notice of the deed restrictions prior to purchasing Tracts 4A-1 and 4B.

54. While the evidence does not indicate that Mr. Roper consented to, or agreed to the applicability of, the purported deed restrictions, he clearly was aware the of purported deed restrictions as evidenced by his attempt to remove them unilaterally.

55. The fact that Mr. Roper was aware of the deed restriction on the Tracts 4A-1 and 4B prior to his purchase does not preclude him from arguing that the deed restrictions are invalid.

56. Consequently, the Court concludes that Plaintiffs have established the three factors for the creation of an enforceable covenant running with the land.

Any deed restrictions created were terminated under the doctrine of termination by merger

57. While Plaintiffs established the three elements necessary for the creation of an enforceable covenant, the deed restrictions existed only momentarily and were terminated when ownership of all four tracts reverted back to Mr. Reed and Ms. Bramblett as joint tenants under the doctrine of termination by merger. *See Broadwater Dev., L.L.C. v. Nelson,* 2009 MT 317, ¶ 36, 352 Mont.

401, 219 P.3d 492 (citing Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land* § 3:11, 3–34 & n. 4 (2009); *One Harbor Financial Ltd. v. Hynes Properties,* 884 So.2d 1039, 1044 (Fla. 5th Dist.App.2004)("If the owner of two parcels attempts to create an express easement over one of the parcels in favor of the other, the purported interest is a nullity; at most, the servitude exists only momentarily before merging into the fee.

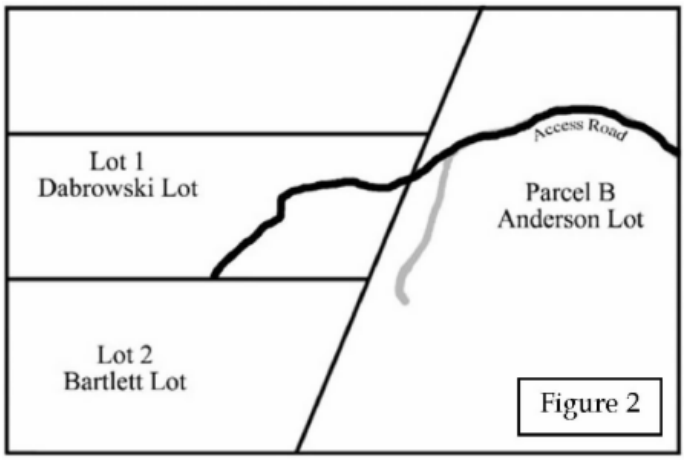
58. New Mexico follows the "doctrine of termination by merger, which provides that once a dominant and servient estate come under common ownership, the easement is extinguished as a matter of law." *Amethyst Land Co. v. Terhune*, 2014-NMSC-015, ¶ 3 n. 1, 326 P.3d 12 (citing *Michelet v. Cole,* 1915-NMSC-044, ¶¶ 4-6, 20 N.M. 357, 149 P. 310; Restatement (Third) of Property: Servitudes § 7.5 (2000) ("A servitude is terminated when all the benefits and burdens come into a single ownership. Transfer of a previously benefit[t]ed or burdened parcel into separate ownership does not revive a servitude terminated under the rule of this section. Revival requires re-creation.")).

59. "The merger doctrine proceeds from a recognition that a person cannot have an easement in his or her own land because all the uses of an easement are fully comprehended in the general right of ownership…Consequently, when the dominant and servient estates become vested in one person, the easement terminates. At that point, the easement no longer serves a purpose and the owner may freely use the servient estate as its owner." *Will v. Gates*, 89 N.Y.2d 778, 784, 680 N.E.2d 1197, 1200 (1997); *see also* Restatement (Third) of Property (Servitudes) § 7.5 (2000). ("A servitude burden is the…obligation not to use land in the burdened party's possession in particular ways…When the burdens and benefits are united in a single person, or group of persons, the servitude ceases to serve any function. Because no one else has an interest in enforcing the servitude, the servitude terminates. The previously burdened property is freed of the servitude.").

60. After ownership of Tracts 1 through 4 reverted back to Mr. Reed and Ms. Bramblett as joint tenants, the benefits and burdens of the deed restrictions were united in a single group of persons and the servitude ceased to serve any function and terminated as a matter of law.

61. The facts in this case are similar to those addressed by the Arizona Court of Appeals in *Dabrowski v. Bartlett*, 246 Ariz. 504, 442 P.3d 811 (Ct. App. 2019).

62. In *Dabrowski*, a landowner (Lewis) owned two parcels of land (Parcel A and Parcel B). Parcel A was subdivided into three lots. *Id.* ¶ 3. Lewis declared an easement permitting ingress and egress over a road that passed through Parcel B to Lot 1 of Parcel A and through Lot 1 of Parcel A to Lot 2 of Parcel A. *Id.*



63. Lots 1 and 2 of Parcel A continued to be owned by a unitary owner, but the lots transferred from Lewis to two other individuals, the last being the defendant in the case, *Bartlett*. *Id.* ¶¶ 7, 18.

64. *Bartlett* conveyed Lot 1 of Parcel A to *Dabrowski's* predecessor in title. In the deed conveying Lot 1 of Parcel A to *Dabrowski's* predecessor in title, *Bartlett* did not declare the easement across Lot 1 of Parcel A to Lot 2 of Parcel A, which he retained for himself.

65. When *Dabrowski* bought Lot 1, *Dabrowski* attempted to prevent *Bartlett* from using the road and filed suit to quiet title to Lot 1. The district court found that the express easement created by Lewis was terminated by merger after Lewis transferred ownership of all of Parcel A to another

party. *Id.* ¶¶ 18-23.

66. *Bartlett* argued that "an express easement is not 'activated' until the parcels are severed, and—as to portion of the easement granting Lot 2 access through Lot 1—the express easement did not merge because the Lots were not commonly owned at any time after [*Bartlett*]…severed the parcels. *Id.* ¶ 20.

67. *Bartlett* was correct that when covenants and servitudes are created under a single ownership developer, the covenants or servitudes do not become activated until one of the parcels subject to the covenants or servitudes is conveyed to a third party. *See* Restatement (Third) of Property (Servitudes) § 2.1 (2000)("So long as all the property covered by the declaration is in a single ownership, no servitude can arise. Only when the developer conveys a parcel subject to the declaration do the servitudes become effective.").

68. However, *Bartlett's* argument was rejected by the Arizona Court of Appeals, which held that even "unactivated easements" are subject to the doctrine of termination by merger. Consequently, they concluded that Lewis's express easement granting the right to ingress and egress through Lot 1 to Lot 2 was terminated by merger. *Id.* ¶¶ 21-23.

69. If the doctrine of termination by merger applies to "unactivated easements" such as those in *Dabrowski*, it certainly applies in this case where the development of the restrictions was not a single-owner developer, but four separate owners who then conveyed their interests in each tract back to a single owner group (i.e. Frank Reed and Ellen Bramblett and joint tenants).

70. The Correction Special Warranty Deed recorded on August 30, 2019 in which Frank Reed and Ellen Bramblett as joint tenants declared the restrictions while also conveying their interest to a different legal entity, the Frank Reed and Ellen Bramblett Trust, is indistinguishable from *Dabrowski*. While the restrictions likely had not been activated at the time of transfer of ownership

since Tracts 1, 4-A1 and 4-B went from one single owner entity to another single owner entity, the restrictions were still subject to the doctrine of termination by merger. Thus, the transfer of the interests in the three tracts to the Trust extinguished any burden the original covenanting parties, Mr. Reed and Ms. Bramblett as joint tenants, attempted to create.

71. Even though the deed conveying Tract 3 to the Botkins was recorded the same day as the four deeds that merged ownership of the four tracts back to Mr. Reed and Ms. Bramblett, that deed failed to declare the restrictions. Merely severing ownership of the tracts and selling them to third parties without re-declaring the restrictions did not revive the deed restrictions. S*ee Pollock v Ramirez*, 1994-NMCA-011, ¶ 18, 117 N.M. 187, 870 P.2d 149 (quoting Restatement of Property § 555 (1944))("*The obligation [concerning the use of land] is not merely suspended by the coming of the benefit and the burden into the hands of one person but is extinguished for all time.* Hence, the later severance of ownership will not cause it to be revived. If it or a like obligation is to exist after the severance, it must be by virtue of a new creation." (Emphasis original).

72. Covenants burden titles as effectively as easements and should be created with the same formalities, whether the covenant is affirmative or negative…The Statute of Frauds expresses a policy that transactions involving interests in land should be in writing, or be evidenced by a writing, and signed…These requirements serve evidentiary, protective, and channeling functions. The written instrument provides reliable evidence of the existence and terms of the conveyance or contract. The signature authenticates the document and indicates that the grantor or promisor intends the writing to be effective, not merely tentative or exploratory. Use of a written instrument tends to give land transactions a distinctive form which is easily recognized and recordable in the public land records." Restatement (Third) of Property (Servitudes) § 2.7 (2000)

73. "Because a servitude is an interest in land subject to the Statute of Frauds, their intent to

re-create the servitude must either be expressed in a written instrument or their actions must fall within one of the recognized exceptions to that requirement. If the circumstances are otherwise appropriate for creation of a servitude by implication, the fact that the servitude previously existed may warrant the inference that the parties intended to re-create it on severance." Restatement (Third) of Property: Servitudes § 7.5 (2000).

There is no exception to the Statute of Frauds

74. "The consequences of failure to comply with the Statute of Frauds…do not apply if the beneficiary of the servitude, in justifiable reliance on the existence of the servitude, has so changed position that injustice can be avoided only by giving effect to the parties' intent to create a servitude." Restatement (Third) of Property (Servitudes) § 2.9 (2000).

75. "Unless otherwise provided by local statute, recording is not necessary to render servitudes enforceable against the original parties and successors with notice." Restatement (Third) of Property (Servitudes) § 2.7 (2000).

76. Defendants, successors in title of Tracts 4A-1 and 4B, with notice of the deed restrictions, would be burdened by the purported deed restrictions if the re-creation of the deed restrictions met the exception to the Statute of Frauds.

77. "The power to dispense with the Statute's requirements to give effect to the intent of the parties should be exercised with caution because of the risk that exceptions will undermine the policies underlying the Statute of Frauds. Two distinct elements enter into the determination whether a court should exercise its power to dispense with the Statute's requirements: first, the extent to which the evidentiary function of the statutory formalities is fulfilled; and second, the extent to which the conduct of the parties provides a basis for substantive relief sufficient to justify overriding the Statute's protective and channeling functions. Satisfaction of the evidentiary

element calls for painstaking examination of the evidence and realistic appraisal of the probabilities on the part of the trier of fact. This is commonly summarized in a standard that calls upon the trier of the facts to be satisfied by clear and convincing evidence. The substantive element requires considering the nature of the grantor-promisor's conduct and the reliance by the grantee-promisee to determine whether the social interest in preventing injustice outweighs the social interests served by requiring that land transactions be in written form." *Id.*

78. A landowner must intend to place restrictions on land he owns. *See, e.g.*, *Pollock*, ¶ 19-20 (there was no indication of an express intent on the part of the landowner that filing the instrument was intended to revive or reestablish the restrictive covenants and the party asserting that the restrictive covenant had been revived had the burden of proof and failed to satisfy that burden).

79. The evidence related to the oral creation of the deed restrictions between Plaintiffs and Mr. Reed is contradictory. Mr. Reed testified in his deposition that he created the deed restrictions with the help of Mr. Botkin and Mr. Botkin's real estate agent, Gary Lynch. Mr. Botkin contradicted this assertion during his deposition testifying that he was initially unaware of the deed restrictions and did not participate in any way in drafting the deed restrictions.

80. Plaintiffs have failed to demonstrate by clear and convincing evidence that both Mr. Reed and the Plaintiffs intended for the deed restrictions to apply to their respective properties. It is clear that Mr. Reed intended to have the deed restrictions apply. However, Plaintiffs desire to have the restrictions apply at the time they purchased their respective property is much less clear. The evidence tends to show Plaintiffs were willing to abide by the deed restrictions, but not that they agreed to have them imposed upon them if there was an option.

81. "Even if the evidence of an oral transaction creating a servitude is clear and convincing, the transaction should not be given effect as a servitude unless there is a sufficient basis to override

the Statute's protective and channeling functions. A change in position by the grantee-promisee in justifiable reliance on the grant or promise establishes the substantive basis for giving effect to the oral transaction. The degree of change required, and the extent to which the grantee must justify reliance on the oral transaction, to provide a court with sufficient basis for overriding the social interest in enforcing the Statute of Frauds depends on the character of the grantor-promisor's conduct." *Id.*

82. "The change in position that justifies dispensing with the statutory requirements to give effect to the oral grant or promise is normally the purchase of land, or investment in improvements on land." *Id.*

83. "A residential lot purchaser's reliance on an oral representation that all other lots in the same subdivision will be subjected to the same restrictions as those imposed on the lot purchased may be justified—particularly if a standard deed form *including the restriction* is offered by the developer." *Id.* (Emphasis added).

84. There is insufficient evidence that Mr. Miller or the Botkins relied on the deed restrictions in making their purchases.

a. Mr. Botkin purchased the property because it was flat. The Court rejects his later assertion that he purchased the property in part based on his reliance of the deed restrictions or zoning laws.

b. Mr. Miller never testified that he relied on the deed restrictions when he purchased his property, and he indicated a desire to conduct activities plaintiffs claim are prohibited by the deed restrictions (i.e. manufacturing septic tanks).

85. Further, the deeds conveying their interests in their respective properties do not contain the purported restrictions.

86. Since the exception to the Statute of Frauds does not apply, and the deed restrictions were terminated by merger, the deed restrictions do not burden Defendants' property and Plaintiffs have failed to establish a likelihood of success on the merits.

The purported deed restrictions provide no greater protection from Defendants' proposed batch plant than common law nuisance would provide them

87. Even if the Court were to determine the deed restrictions did burden Defendants' properties, the deed restrictions do not provide any greater protection than what Plaintiffs are afforded under common law private nuisance principles.

88. Interpretation of the language in a restrictive covenant is a question of law. *Estates at Desert Ridge Trails Homeowners' Ass'n v. Vazquez,* 2013-NMCA-051, ¶¶ 11, 300 P.3d 736.

89. "The bare fact that two parties argue for different interpretations of a provision 'does not create ambiguity…instead ambiguity is only created when provisions are reasonably and fairly susceptible to two constructions.'" *Agua Fria Save the Open Space Ass'n v. Rowe*, 2011-NMCA-054, ¶ 15, 149 N.M. 812, 255 P.3d 390 (quoting *Jones v. Schoellkopf,* 2005–NMCA–124, ¶¶ 8, 12, 138 N.M. 477, 122 P.3d 844); *see also Eldorado Community Improvement Association, Inc. v. Billings*, 2016-NMCA-057, ¶ 8 (ambiguity in a deed restriction or covenant exists when "provisions are reasonably and fairly susceptible to different constructions."); *Sabatini v. Roybal*, 2011-NMCA-086, ¶ 8, 150 N.M. 478 (stating ambiguity exists when a word or phrase is susceptible to two or more meanings).

90. "In construing a [restrictive] 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." *Lawton v. Schwartz*, 2013-NMCA-086, ¶ 12, 308 P.3d 1033 (quoting *Hines Corp. v. City of Albuquerque,* 1980-NMSC-107, ¶ 9, 95 N.M. 311, 621 P.2d 1116).

91. Restrictive covenants are to be interpreted "reasonably, but strictly, so as not to create an illogical, unnatural, or strained meaning." *Id.*

92. Courts are to "give words in the restrictive covenant their ordinary and intended meaning." *Hill v Community of Damien of Molokai*, 1996-NMSC-008, ¶ 6, 121 N.M. 353.

93. Words used in a restrictive covenant may not be enlarged, extended, stretched, or changed by construction. *Wilmoth v. Wilcox*, 734 S.W.2d 656, 657 (Tex. 1987).

94. The term nuisance is not reasonably and fairly susceptible to two constructions. The term has a common meaning and is generally understood to mean an unreasonable interference with another's private use and enjoyment of their property.

95. Plaintiffs offered Mr. Reed's testimony regarding what he intended to prohibit when he included the nuisance language in purported deed restriction 2(D), presumably relying on *Agua Fria Save The Open Space Ass'n*, 2011-NMCA-054, ¶ 21 (holding that "extrinsic evidence is admissible to explain or clarify, but not to vary or contradict, a restrictive covenant's terms.").

96. Mr. Reed testified he intended to prohibit certain commercial and all industrial uses when he included the nuisance language in purported Deed Restriction 2(D).

97. However, the Court of Appeals limited the application of *Agua Fria* to specific instances in which a developer, who induces people to purchase land based on the purchasers' reliance of restrictive covenants, later attempts to extinguish those restrictive covenants. *See Eldorado Cmty. Imp. Ass'n, Inc.*, 2016-NMCA-057, ¶ 23 ("The *Agua Fria* opinion's broad swath of contract interpretation of ambiguous restrictive covenants could not have purposely been intended to apply to restricted land use. The extinguishment provision in the saving clause did not and was not intended to place any additional restrictions on the use of land. *Agua Fria* is therefore significantly distinguishable. To that end, we firmly side with a view that the meaning of ambiguous restrictive

use provisions should be tested under the *Hill* qualifiers and not under contract interpretation rules.").

98. As the prohibition of uses that constitute a "nuisance" is a restrictive use provision of the purported deed restrictions, *Agua Fria* is not applicable to this case, and *El Dorado* and *Hill* are to be applied.

99. Consequently, if there was an ambiguity in purported Deed Restriction 2(D), then the result would not be to interpret the nuisance language as more restrictive as advocated by Plaintiffs. Instead, under *Hill* and *El Dorado,* any ambiguity would be resolved in favor of the free use of the property and against the restriction. *See Hill*, 1996-NMSC-008, ¶ 6.

100. Here, the Court finds the terms are not ambiguous. However, the terms also do not provided any greater protection than what Plaintiffs would have under private common law nuisance jurisprudence.

Anticipatory Nuisance

101. Since Plaintiffs have failed to establish that Defendants' proposed use would be a nuisance in fact, they have failed to establish that they have a substantial likelihood of success on the merits.

102. "The general rule is that anticipatory nuisance is a valid cause of action. 'One distinguishing feature of equitable relief is that it may be granted upon the threat of harm which has not yet occurred. The defendant may be restrained from entering upon an activity where it is highly probable that it will lead to a nuisance, although if the possibility is merely uncertain or contingent he may be left to his remedy of damages until after the nuisance has occurred.' " *State ex rel. Vill. of Los Ranchos de Albuquerque v. City of Albuquerque*, 1994-NMSC-126, ¶ 58, 119 N.M. 150, 889 P.2d 185 (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 89, at 640–41 (5th ed. 1984)); *see also Phillips v. Allingham*, 1934-NMSC-047, ¶ 14, 38 N.M.

361, 33 P.2d 910 (quoting 7 A.L.R. 763.)("It is well settled that a court of equity may enjoin a threatened or anticipated nuisance, public or private, where it clearly appears that a nuisance will necessarily result from the contemplated act or thing which it is sought to enjoin.").

103. "The general rule is limited by the requirement that the anticipated nuisance must be proven so as to make any argument that it is not a nuisance highly improbable. *Id.* (citing 6A Eugene McQuillin, *The Law of Municipal Corporations* § 24.61, at 186 (3d ed. 1990); *Gonzalez v. Whitaker*, 1982 NMCA 050, ¶ 20 (*Phillips* stands for the proposition that an anticipatory preliminary injunction is not appropriate where the apprehended dangers "were doubtful, eventual or contingent, rather than a necessary result or highly probable."); *accord, Citizens for Alternatives to Radioactive Dumping v. CAST Transportation, Inc*., 2004 WL 7333806 at *21 (DNM 2004) (applying New Mexico law)..

104. "Where it is sought to enjoin an anticipated nuisance, it must be shown (a) that the proposed…use to be made of property will be a nuisance per se; (b) or that, while it may not amount to a nuisance per se, under the circumstances of the case a nuisance must necessarily result from the contemplated act or thing…The injury must be actually threatened, not merely anticipated; it must be practically certain, not merely probable. It must further be shown that the threatened injury will be an irreparable one which cannot be compensated by damages in an action at law. *A mere decrease in the value of complainant's property is not alone sufficient*." *Phillips*, 1934-NMSC-047, ¶ 17 (Emphasis added).

Plaintiffs have failed to establish that the proposed batch plant will be a nuisance

105. "A nuisance per se is generally defined as an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings, while a nuisance in fact is commonly defined as an act, occupation, or structure not a nuisance per se, but

one which may become a nuisance by reason of circumstances, location, or surroundings." *Scott v. Jordan*, 1983-NMCA-022, ¶ 11, 99 N.M. 567, 661 P.2d 59 (quoting *Koeber v. Apex-Albuq. Phoenix Express,* 72 N.M. 4, 380 P.2d 14, 3 A.L.R.3d 1368 (1963)).

106. The proposed batch plant is not a nuisance per se.

107. Consequently, the Plaintiffs were required to show that the operation of the batch plant at the proposed location would almost certainly constitute a nuisance in fact.

108. "A private nuisance has been defined as a non-trespassory invasion of another's interest in the private use and enjoyment of land." *Padilla v. Lawrence*, 1984-NMCA-064, ¶ 9, 101 N.M. 556, 685 P.2d 964.

109. To establish a private nuisance, Plaintiffs must show that the invasion must either be: 1) intentional and unreasonable, or 2) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities. Restatement (Second) of Torts § 822 (1979)

110. "To be 'intentional,' an invasion of another's interest in the use and enjoyment of land…need not be inspired by malice or ill will on the actor's part toward the other." An invasion is intentional if the actor knowingly causes the invasion "in the pursuit of a laudable enterprise without any desire to cause harm." Restatement (Second) of Torts § 825 (1979).

111. Defendant's actions in operating a batch plant would be intentional.

112. However, nuisance liability for intentional conduct also requires that the conduct be unreasonable. *See Restatement (Second) of Torts* § 822(a) (1979).

113. Plaintiffs have encouraged the Court to adopt the 1974 EPA Noise Study identified L_{eq} level of equal to or less than 55 dBA as the maximum outdoor noise level in which Defendants should be permitted to operate.

114. The Plaintiffs' proposal is problematic for a number of reasons.

115. First, the 1974 EPA's identified level applies to *residential* areas.

116. There is no evidence that a L_{eq} level of 55 dBA is the appropriate level to apply to commercial properties such as Plaintiffs' properties.

117. It is questionable whether the Botkins' nursery would be able to meet this level during the summer months when the nursery is open given that SWCA measured their ambient noise level at a L_{eq} of 46.0 during a weekend in December when the nursery was closed.

118. Regardless of whether Plaintiffs themselves could meet the requested maximum L_{eq} level of 55 dBA level, recognizing that commercial and industrial areas would naturally have higher noise levels than residential areas, the 1974 EPA Noise Study did not identify the L_{eq} level of 55 dBA for commercial or industrial areas.

119. Instead, the 1974 EPA Noise Study identifies a $L_{eq(24)}$ of 70 dBA as the maximum levels at or below which should protect against hearing loss in commercial and industrial areas. Furthermore, a $L_{eq(8)}$ of 75 dBA was identified as the maximum levels to protect against hearing loss "so long as the exposure over the remaining 16 hours per day is low enough to result in a negligible contribution to the 24-hour average, i.e. no greater than an L_{eq} of 60 dBA."

120. Thus, imposing the requested maximum L_{eq} 55 dBA level in a commercial and light industrial area where the proposed batch plant will be located is not supported by the evidence. The evidence supports setting a maximum L_{eq} of 70 dBA and none of the modeling suggests the proposed batch plant will produce anywhere near that level of sound.

121. Additionally, the requested maximum L_{eq} level of 55 dBA is the maximum levels below which *no* effects on public health and welfare will occur. In other words, it is the level in which there will be no interference with the peaceful use and enjoyment of Plaintiffs' properties including

speech interruption.

122. Nuisance law does not prohibit *all* interference with one's peaceful enjoyment of his or her land. It prohibits the unreasonable interference with a person's peaceful enjoyment of his or her land.

123. "[A]n intentional invasion is unreasonable if the gravity of the harm outweighs the utility of the actor's conduct." *Padilla*, 1984-NMCA-064, ¶ 11.

124. "The unreasonableness of an intentional invasion is determined from an objective point of view. The question is not whether the plaintiff or the defendant would regard the invasion as unreasonable, but whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable. Consideration must be given not only to the interests of the person harmed but also for the interests of the actor and to the interests of the community as a whole. Determining unreasonableness is essentially a weighing process, involving a comparative evaluation of conflicting interests in various situations according to objective legal standards." Restatement (Second) of Torts § 826 (1979).

125. "There are suitable and unsuitable places for carrying on all lawful activities and *sound public policy* demands that people carry them on in suitable places so as to avoid as much of the conflict between incompatible interests as possible. *Zoning laws and regulations are pertinent and often controlling in determining whether an activity is suitable in a particular locality*." Restatement (Second) of Torts § 831 (1979)(Emphasis added).

126. "For the purpose of promoting health, safety, morals or the general welfare, a county or municipality is a zoning authority and may regulate and restrict within its jurisdiction the…location and use of buildings, structures and land for trade, industry, residence or other purposes." NMSA 1978, 3-21-1(A)(5)(2019).

127. To carry out the purposes of Sections 3-21-1 through 3-21-14 NMSA 1978…a county zoning authority may adopt a zoning ordinance applicable to all or any portion of the territory within the county that is not within the zoning jurisdiction of a municipality. NMSA 1978, § 3-21-2 (A)(2003).

128. Moreover, "in the absence of a county zoning ordinance, a qualified elector may file a petition, signed by the qualified electors of the county equal in number to not less than twenty-five percent of the votes cast for the office of governor at the last preceding general election, seeking the adoption of a zoning ordinance by the county zoning authority. Within one year of the filing of the petition seeking the adoption of a county zoning ordinance, the board of county commissioners shall adopt a county zoning ordinance." NMSA 1978, § 3-21-2 (D).

129. Despite the authority to adopt a zoning ordinance, neither the Board of County Commissioners of Lincoln County nor its citizens have elected to do so. This is not a failure to act, but a conscious choice of the people of Lincoln County to reject zoning ordinances.

130. Likewise, both the State of New Mexico and the Board of County Commissioners of Lincoln County have decided not to enact maximum noise laws or ordinances.[17]

131. Congress recognized that "primary responsibility for control of noise rests with State and local governments." 42 USCA § 4901(a)(3).

132. In recognition of state and local authorities' unique position to determine the needs of their respective communities, neither Congress nor the EPA have ever set any guidelines or recommended noise levels. Instead, the EPA chose to use the words "identified level" in their 1974 Noise Study instead of using the words "goals," "standards," or "recommended levels" because

[17] New Mexico counties that have adopted noise nuisance ordinances have set the maximum levels of daytime noise above 75 or 80 dBA. Defs.' Ex. MMMM and Ex. NNNN.

"[n]either Congress nor the [EPA] has reached the conclusion that these identified levels should be adopted by states and localities."

133. This is a recognition that noise ordinances and laws have practical consequences and that these levels cannot be determined in a vacuum. Other factors to be considered "include economic and technological feasibility and attitudes about the desirability of undertaking an activity which produces interference effects." Pls.' Ex. 11.

134. Adopting a maximum level of 55 dBA may be the appropriate public policy decision for the people of Lincoln County, but it is not the role of the judiciary to make public policy decisions. *See Arizona v. Mayorkas*, 598 U.S. ___ (2023)("The concentration of power in the hands of so few may be efficient and sometimes popular. But it does not tend toward sound government. However wise one person or his [or her] advisors may be, that is no substitute for the wisdom of the whole of the American people that can be tapped in the legislative process. Decisions produced by those who indulge no criticism are rarely as good as those produced after robust and uncensored debate. Decisions announced on the fly are rarely as wise as those that come after careful deliberation. Decisions made by a few often yield unintended consequences that may be avoided when more are consulted.").

135. The Court's role is to determine whether the proposed batch plant would constitute a nuisance, which involves a weighing of the gravity of the harm against the utility of the conduct.

136. "In determining the gravity of harm, the suggested factors include the extent and character of the harm involved, the social value that the law attaches to the type of use or enjoyment invaded, the suitability of the particular use or enjoyment to the character of the locality, and the burden on the person harmed of avoiding the harm. *Padilla*, 1984-NMCA-064, ¶ 12 n.1 (citing *Restatement* § 827).

137. Plaintiffs claim that the proposed batch plant's noise[18] will unreasonably interfere with their commercial enterprises.

138. Plaintiffs have failed to establish that the extent of the anticipated interference is significant. SWCA's noise impact studies overestimate the actual noise impact of the proposed batch plant by inaccurately capturing the actual ambient sound level at the Botkins' property while exaggerating the predicted noise level of the batch plant by using inflated usage factors among other issues.

139. While society places a high value on uninterrupted speech at any location, the social value that the law attaches to the use or enjoyment of commercial or mixed-use areas, such as where the proposed batch plant will be located, is not the same as it would be for a purely residential area. The 1974 EPA Noise Study explicitly recognizes this by identifying the maximum L_{eq} level of at or below 55 dBA for outdoor noise in a residential areas while rejecting the same level for commercial and industrial areas.

140. The proposed batch plant will be located on Airport Road near the turnoff to Highway 48. Highway 48 is the only major arterial road feeding into Ruidoso from the north and consequently supports commercial and industrial traffic. Plaintiffs operate commercial properties where they operate heavy equipment and receive deliveries from commercial vehicles. There are several commercial and light industrial properties within five miles of the proposed site. The Spencer

[18] Both Mr. Miller and the Botkins raised the issue of the proposed batch plant depleting their groundwater. This concern has been resolved given that Defendants will not be using groundwater for the operations of the proposed batch plant but, rather, will be purchasing water (as Mr. Botkin does) for the proposed batch plant. The Plaintiffs also raise concerns about potential air pollution from the proposed batch plant. The NMED issued Defendants an air quality permit and the Defendants will be subject to monitoring by NMED to ensure compliance with all laws and regulations, which also resolves this concern. Lastly, given that Defendants will not be operating at night, Plaintiffs light pollution claim was resolved on summary judgment.

Theater for the Performing Arts draws large traffic to the area, and the municipal airport is nearby. While the Court recognizes there are many luxury residential properties in the area, the Court cannot conclude that the proposed batch plant would be unsuitable given the overall character of the locality.

141. As to the burden placed on Plaintiffs to avoid the harm caused by Defendants, Plaintiffs have established that the operation of the proposed batch plant may at times require them to use raised voices to avoid speech interference during outdoor conversations.[19]

142. "In determining the utility of conduct, the suggested factors include the social value that the law attaches to the primary purpose of the conduct, the suitability of the conduct to the character of the locality, and the impracticability of preventing or avoiding the invasion." *Id.* ¶ 12 n.2 (citing *Restatement* § 828).

143. Concrete is a primary building product used for nearly all types of construction projects including residential construction.

144. There is an increase demand for concrete throughout the county so the social value of affordable, available concrete is significant.

145. Alto area residents are major consumers of concrete in Lincoln County.

146. There are currently only two batch plants operating in the county (i.e. Defendants' current batch plant in Carrizozo and AGGTec's batch plant in Ruidoso).

147. The current batch plants cannot meet the needs of the community, and an additional plant is needed to meet the demand.

148. Given that concrete is a perishable product, the new batch plant needs to be located close

[19] Plaintiffs have also presented some evidence that adjoining and nearby properties may suffer from a diminution in value of their properties. However, diminution in value is not alone sufficient to merit injunctive relief. *Phillips*, 1934-NMSC-047, ¶ 17.

enough to the demand area that the concrete can be delivered in the 90-minute window before it begins to set.

149. It is impractical to avoid some interference at or around the Alto area while still meeting the community's demands.

150. Plaintiffs have failed to establish that the gravity of the harm is greater than the utility of the conduct. Consequently, they have failed to establish that the proposed batch plant will be a nuisance in fact.

151. Thus even assuming the deed restrictions do burden Defendants' properties, Plaintiffs have failed to establish a substantial likelihood of success on the merits and their request for a preliminary injunction should be denied.

Plaintiffs have failed to show they would suffer an irreparable injury if Defendants are not enjoined.

152. Plaintiffs must also show that they will suffer an irreparable injury unless the injunction is granted. *See Nat'l Tr. for Historic Pres. v. City of Albuquerque*, 1994-NMCA-057, ¶ 21, 117 N.M. 590.

153. "An irreparable injury is an injury which cannot be compensated or for which compensation cannot be measured by any certain pecuniary standard." *State ex rel. State Highway & Transp. Dept. of N.M. v. City of Sunland Park*, 2000-NMCA-044, ¶ 19, 129 N.M. 151. (quoting *Parkem Indus. Servs., Inc. v. Garton,* 619 S.W.2d 428, 430 (Tex.Civ.App.1981))(internal quotations omitted).

154. The injury must be actual and substantial and not a mere possibility of harm. *Id.*

155. "The applicant has the [] burden of showing a right to the specific injunctive relief sought because of irreparable injury that will result if the injunction is not granted. *There must exist a probable right and a probable danger*." *Crowther v. Seaborg*, 415 F.2d 437, 439 (10th Cir. 1969)

(cited favorably in 11A Fed. Prac. & Proc. Civ. § 2948.3 n.4 (3d ed.))(Emphasis added).

156. Defendants have failed to establish the purported deed restrictions burden Defendants' properties.

157. Despite this failure, had Defendants established that the batch plant would be a nuisance in fact, they would have been able to meet their burden with respect to irreparable injury. However, the evidence presented failed to establish the proposed batch plant will constitute a nuisance.

158. Moreover, diminution of property value, if proven, is an injury which can be compensated and for which there is an adequate remedy at law. *See e.g., Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980) (where the Court denied preliminary injunctive relief based on claims of lost revenue and diminution of property value because each was a monetary damage that could be remedied by a damages award).

159. Since Plaintiffs have failed to establish they would suffer an irreparable injury unless the injunction is granted, the request for a preliminary injunction should be denied.

Enjoining Defendants would have an adverse impact on the public's interest

160. Plaintiffs must show that issuance of this injunction will not be adverse to the public's interest. *See Nat'l Trust for Historic Pres. v. City of Albuquerque*, 1994-NMCA-057, ¶ 21, 117 N.M. 590.

161. Alto area residents are some of the largest consumers of concrete in Lincoln County. As there currently is not a batch plant in the immediate area, the concrete must be brought in from other communities to meet that need.

162. Historically, batch plants have been located in less affluent residential areas in Carrizozo, Capitan, Ruidoso Downs, and Ruidoso. The batch plants in Ruidoso Downs and Capitan have closed due in part to the logistics of delivering concrete to the locations where there is the highest

demand (i.e. Alto/Ruidoso area). The two operating batch plants have struggled to meet the needs of the community including in the Alto area.

163. Plaintiffs have provided no evidence to contradict Mr. Roper's testimony that another batch plant is needed in the area.

164. While issuance of an injunction may appease the personal desire of the Plaintiffs, they have failed to present any evidence that issuing the injunction would not be adverse to the public's interest.

165. Issuance of an injunction precluding Defendants from operating the additional proposed batch plant would have significant adverse impacts on the public's interest by preventing the public from obtaining competitively priced concrete during a time of increased demand for the product.

166. Moreover, to deliver concrete to the Ruidoso/Alto area, Defendants' mixer trucks must travel across multiple two-lane highways (from Highway 380 across Highway 37 and up Highway 48). On Highway 37, the trucks must climb Nogal Hill. Additionally, the trucks must ascent Angus Hill on Highway 48. In addition to preventing this wear and tear to the state and county roads, the proposed batch plant will benefit the community by reducing vehicle emissions and will provide safer road conditions.

167. Entering an injunction preventing the additional batch plant from operating would be adverse to the public's interest, and therefore, Plaintiffs' request for a preliminary injunction should be denied.

Plaintiffs have failed to establish that the threatened injury outweighs any damage an injunction would cause to Defendants.

168. Plaintiffs must show that the threatened injury to plaintiffs outweighs any damage that the injunction might cause the defendant. *See Nat'l Tr. for Historic Pres. v. City of Albuquerque*, 1994-NMCA-057, ¶ 21, 117 N.M. 590.

169. Plaintiffs must do more than allege they may suffer harm. *See State ex rel. State Highway & Transp. Dept. of N.M. v. City of Sunland Park*, 2000-NMCA-044, ¶ 19, 129 N.M. 151 ("The injury must be actual and substantial and not a mere possibility of harm.").

170. New Mexico courts will not issue an injunction "where the claimed injury is doubtful, speculative, or contingent." *City of Albuquerque v. State ex rel. Village of Los Ranchos de Albuquerque*, 1991 NMCA 915, ¶ 8 (citing *Phillips*); *Milligan v. General Oil Co., Inc.,* 738 S.W.2d 404, 406 (Ark. 1987) (applying *Phillips*).

171. A preliminary injunction is not warranted when extraordinary expense and injury to defendant would result. *Bidi Vapor, LLC v. Vaperz LLC*, 543 F. Supp. 3d 619, 633 (N.D. Ill. 2021) (internal cite and quotes omitted).

172. In determining whether to grant injunctive relief, a trial court must consider a number of factors and balance the equities and hardships. *Insure New Mexico, LLC v. McGonigle*, 2000-NMCA-018, ¶ 6, 128 N.M. 611 (internal cite and quotes omitted).

173. Defendants have a significant financial investment in the proposed batch plant. Defendants purchased Tracts 4A-1 and 4B, purchased the concrete batch plant equipment, and paid for the NMED air quality permit technical and administrative requirements. Defendants are currently paying storage costs for the purchased concrete batch plant equipment. As Mr. Roper testified, he has "a lot of assets sitting on the ground." Defendants will lose hundreds of thousands of dollars in lost revenue and lost business opportunities, and outlaid expenses, while not being able to construct and operate the approved facility if an injunction issues.

174. Given there are no other suitable properties available from which to operate a concrete batch plant to service Lincoln County demand, Defendants' substantial investments in the proposed batch plant would potentially be lost if not permitted to operate.

175. Plaintiffs' evidence of diminution of property value is speculative and insufficient to establish that any such injury would outweigh Defendants' injury if an injunction were issued.

176. Likewise, Plaintiffs evidence regarding potential speech interference outdoors in a commercial area do not outweigh the Defendant's injury if the injunction issues.

177. Accordingly, Plaintiffs request for preliminary injunction should be denied as they have failed to demonstrate that the threatened injury they will suffer will outweigh the damages Defendants would incur if the request for preliminary injunction is granted.

ORDER

IT IS THEREFORE ORDERED that the Plaintiffs/Counter-Defendants' Motion for Preliminary Injunction should be, and is hereby, **DENIED**.

JOHN P. SUGG
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 31, 2023, a true and correct copy of the foregoing was served by Odyssey on the following parties:

Hinkle Shanor LLP
Thomas M. Hnasko
Counsel for Plaintiffs

Montgomery & Andrews, P.A.
Shelly L. Dalrymple
Counsel for Defendants

Rachel Skinner
Rachel Skinner, TCAA