ANGEL FIRE
RESORT

September 16, 2020

Walcott, Henry & Winston, P.C.
Attn: Donald Walcott, Esq.
150 Washington Avenue, Suite 207
Santa Fe, NM 87501

Re: Association of Angel Fire Property Owners

Mr. Walcott:

We are in receipt of your September 8, 2020, letter, and acknowledge your representation of a faction of the Board of Directors of the Association of Angel Fire Property Owners ("AAFPO"). We would also like to acknowledge the successful and productive relationship Angel Fire Resort Operations, LLC ("AFRO") has had with AAFPO, predecessor Boards, executive directors and previous counsel since the reorganization of the Resort some twenty-five years ago, to which AAFPO and AFRO were both party. While the untenable position of the current Board is regrettable, we look forward to reviving the established relationship that has existed.

We have reviewed your arguments concerning constitution of the Board and the capability of the faction you represent to act on behalf of the membership, and respectfully remain unconvinced. These arguments misinterpret AAFPO's Bylaws, the necessity of a quorum to transact business, including without limitation, filling director vacancies, as well as the priority of bylaws where they establish provisions alternative to statute as allowed by statute.

The AAFPO Bylaws establish procedure for filling Board vacancies. Established New Mexico law holds "by-laws...constitute the contract between the member and the association, and govern and limit the rights and liabilities of the member and the association." *Rueb v. Rehder*, 24 N.M. 534, 174 P. 992, 1918 NMSC 112, ¶ 5, (NM 1918). New Mexico courts view bylaws pursuant to contract law "...as a harmonious whole, give meaning to every provision, and accord each part of the contract its significance in light of other provisions." Citation omitted. *Tunis v. Country Club Estates Homeowners Ass'ns, Inc.,* No. A-1-CA-35931, ¶18, unreported (N.M. App. 2019). While *Tunis* is designated "unreported," the interpretive standard referenced by the Court of Appeals is confirmed by reported New Mexico precedent.

Substituting a less stringent statutory scheme to fill Director vacancies with less than the required quorum of five circumvents AAFPO's Bylaws. According N.M.S.A. 1978 § 53-8-19 (1975) such weight ignores the vacancy procedure and quorum requirement of the Bylaws at Art. VI, Sec. 1 and Art. VII, Sec. 3, and without justification renders these sections meaningless. There exists no express language in the Bylaws permitting such a piecemeal approach. If you have found New Mexico case law elevating the application of N.M.S.A. 1978 § 53-8-19 as you suggest, please provide citations.

The Bylaws supersede N.M.S.A. 1978 § 53-8-19 A; Art. VI, Sec. 5 provides for filling vacancies. N.M.S.A 1978 § 53-8-19 A sets forth the method for filling a director vacancy "…**unless** …the bylaws provide that a vacancy or directorship so created shall be filled in some other manner, in which case such provision shall control." Emphasis added. The Bylaws expressly create an alternative method and do not carry forward the "...less than a quorum" provision of the statute. The Bylaws do not provide for the suspension of the quorum requirement to conduct the business of filling vacancies. Had the drafters intended Art. VI, Sec. 5 apply with no quorum, language mirroring the statute was easily included. The absence of such language is no reason to imply its existence.

New Mexico courts "...will not read language into a contract that is not there, but neither will we construe any clause so as to render it meaningless...courts cannot reform a contract to add terms not agreed upon by the parties...." Citations omitted. *Heimann v. Kinder-Morgan CO2 Co.,* L.P., 144 P.3d 111, 115, 140 N.M. 552, 2006 NMCA 127, ¶ 10, (N.M. App. 2006). *Writ quashed*, 161 P.3d 260, (N.M. 2007). The existence of the "...less than a quorum" standard in the statutory scheme and its absence in the Bylaws is significant; the inference should be that by creating a specific provision the Bylaws eliminated filling a board vacancy from the "...less than a quorum" statutory allowance. N.M.S.A 1978 § 53-8-19 A, enacted in 1975, was in existence at the time the AAFPO Bylaws were adopted in 1996, so the option to fill a director vacancy according to the statutory standard was clear, yet not chosen.

Unambiguous contractual terms that "do not violate public policy, statutory, or constitutional provisions" are not subject to being enlarged by statutory or regulator authority. *Aragon v. Brown*, 2003 NMCA 126, 78 P.3d 913, 134 N.M. 459, 2003 NMCA 126, (N.M. App. 2003). In *Aragon*, the trial court allowed manufactured housing that complied with Housing and Urban Development ("HUD") standards despite restrictive covenants for the subdivision requiring the housing meet New Mexico Construction Industry Division ("CID") standards. *Aragon*, NMCA, ¶ 8. The trial court over-ruled the subdivision's covenant expressly excluding manufactured homes on the basis of "public policy." The Court of Appeals reversed, holding the covenant did not violate public policy, focusing on whether the restrictive covenants violated the regulation or not. The Court of Appeals held:

> "The net effect of the trial court's decision is that not only are homes built to CID standards allowed in the Subdivision, homes built to HUD standards are also allowed, in violation of the covenants. This is not permissible."

Aragon, NMCA ¶ 16. Accordingly, the test is whether Art. VI, Sec. 5 violates the provisions of N.M.S.A 1978 § 53-8-19 A. If it does not, the interpretative question turns solely on contractual grounds. At present we are unaware of any New Mexico cases where contractual language has been judicially reformed to rescue an internal conflict existing with respect to its terms and conditions.

In comparison to the language of N.M.S.A 1978 § 53-8-19 A, the only reasonable interpretation of the express language of Art. VI, Sec. 5 of the Bylaws requires a quorum to fill a vacancy. The plain language of the section should not be twisted to give it an alternative meaning.

In point of fact, New Mexico courts "cannot reform a contract to add terms not agreed upon by the parties." *Heimann.* The ambiguity, unfortunately, has become apparent in light of the disarray in which the Board currently finds itself. Determination of whether ambiguous terms exist in a contract ultimately is a question of law to be decided prior to interpreting a contract. *Mark V, Inc. v. Mellekas,* 114 N.M. 778, 781, 845 P.2d 1232, 1235, 1993 NMSC 1, (N.M. 1993). If a court finds ambiguity, then the unclear terms are treated as an issue of fact and assigned to the trier of fact to be determined. *Supra*. The *Mark V* matter does set forth the requisite legal standards to make a determination with regard to any question of ambiguity.

Finally, we believe that your interpretation of Art. VII, Sec. 3 of the AAFPO Bylaws is misguided, attempts an interpretation that ignores the terms N.M.S.A. 1978 § 53-8-20 A (1975), and renders the requirement of nine (9) Directors at Art. VI, Sec. 1 meaningless. You state Art. VI, Sec. 1, "does not alter the statutory definition of a quorum," referring to N.M.S.A. 1978 § 53-8-20 A (1975). To that extent, we agree. The statute reads "[a] majority of the number of directors fixed by the bylaws…shall constitute a quorum for the transaction of business…." Art. VI, Sec. 1. sets the number of directors at nine and Art. VII, Sec. 3 is in accord with the statutory standard inasmuch as the reference to "a majority of the number of directors...shall constitute a quorum for the transaction of business" in that section is taken verbatim from the pertinent language of N.M.S.A. 1978 § 53-8-20 A. In other words, if someone relying on the Bylaws can pick and choose when the quorum requirement of Art. VII, Sec. 3 applies, severing it from the requirement of nine Directors set in Art. VI, Sec.1 as you argue, then the designation of nine Directors and the verbatim adoption the pertinent language from of N.M.S.A. 1978 § 53-8-20 A would mean nothing. Instead, the statutory language providing "[a] majority of the number of directors fixed by the bylaws…shall constitute a quorum for the transaction of business..." should control here. The AAFPO Bylaws do not provide an exception to the N.M.S.A. 1978 § 53-8-20 A standard. Therefore, an interpretation allowing for a quorum of less than a majority of nine *would* violate the statutory mandate set forth at N.M.S.A. 1978 § 53-8-20 A.

Regrettably, this entire matter continues to be influenced by the behavior of the factional interest you represent, causing dissolution of the Board and resignation of five of its duly-elected representatives. The Resort remains concerned about the express language of the Amended Joint Plan (the "Plan"), and how to fulfill its obligations with an AAFPO Board of Directors that failed to maintain its ability to lawfully conduct business. We are deeply concerned with the intent of members of the faction you represent casting the relationship between AAFPO and the Resort in a false light. AAFPO and the Resort have enjoyed an excellent relationship for the past 23 years. We have worked through issues and managed to carry out the clear intent of the Plan to cooperate and coordinate with each other for the benefit of the members. This relationship has been the keystone of the success of the Plan. I am hoping we can continue the historical relationship and work through any issues that concern either party.

Best regards,

ANGEL FIRE RESORT OPERATIONS, LLC

Daniel Rakes
Executive General Counsel

Cc: *John Kitts, CEO*
Mark Seiter, CFO
Mark Manley, General Counsel