IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. 29,510

CITY OF RIO RANCHO,

Plaintiff-Counterdefendant/Appellant,

vs.

CLOUDVIEW ESTATES, LLC,

Defendant-Counterclaimant/Appellee.

ANSWER BRIEF

Appeal from the County of Sandoval
Chief Judge Louis P. McDonald

FOSTER, RIEDER & JACKSON, P.C.
J. Douglas Foster
Travis G. Jackson
Attorneys for Cloudview Estates
P.O. Box 1607
Albuquerque, NM 87103-1607
Telephone: (505) 767-0577

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT REGARDING RECORD PROPER iv

STATEMENT OF COMPLIANCE v

SUMMARY OF PROCEEDINGS 1

ARGUMENT 8

I. **The trial court correctly concluded that the City has "taken" Cloudview's property.** 10

A. **Cloudview owns fee title to Parcel F, subject only to a "drainage easement".** 11

B. **Cloudview is also a bona fide purchaser for value, which cut off any interest of the City greater than a "drainage easement."** 16

C. **The City has deprived Cloudview of all beneficial use of the property.** 26

D. **The City has engaged in a "permanent physical occupation" of Parcel F.** 35

II. **The trial court correctly concluded that the City's administrative decision was unsupported by substantial evidence and not in accordance with law.** 37

CONCLUSION 44

TABLE OF AUTHORITIES

New Mexico Cases

Anaya v. New Mexico State Personnel Bd., 107 N.M. 622, 762 P.2d 909 (Ct. App. 1988).....40
Aragon & McCoy v. Albuquerque National Bank, 99 N.M. 420, 424, 659 P.2d 306, 310 (1983).....29, 31, 32
Bracken v. Yates Petroleum Corp., 107 N.M. 463, 466, 760 P.2d 155, 158 (1988).....43
Cloudview Estates v. City of Rio Rancho, et al., No.05-01283 MV/JPL (D.N.M.).....41
Dunne v. Petterman, 52 N.M. 284, 288, 197 P.2d 618, 620 (1948).....19
Estate of Gutierrez by Haney v. Albuquerque Police Dept., 104 N.M. 111, 717 P.2d 87 (Ct. App. 1986).....43
Gallup Westside Dev. v. City of Gallup, 2004-NMCA-010.....20
Garver v. PNM, 77 N.M. 262, 421 P.2d 788 (1966).....8
Gathman-Matotan Architects and Planners, Inc. v. State, Dept. of Finance and Admin., Property Control Div., 109 N.M. 492, 495, 787 P.2d 411, 414 (1990).....42
Gore v. Cone, 60 N.M. 29, 37, 287 P.2d 229, 234 (1955).....18
Hunt v. Ellis, 27 N.M. 397, 201 P. 1064 (1921).....18, 19
In re Crowder, 225 B.R. 794, 797 (D.N.M. 1998).....12
Kennedy v. Bond, 80 N.M. 734, 460 P.2d 809 (1969).....13
Kikta v. Hughes, 108 N.M. 61, 766 P.2d 321 (Ct. App. 1988).....13
King v. Lujan, 98 N.M. 179, 646 P.2d 1243 (1982).....44
Luevano v. Maestas, 117 N.M. 580, 874 P.2d 788 (Ct. App. 1994).....13
Maso v. Tax & Rev. Dep't, 135 N.M. 152, 85 P.3d 276 (Ct. App. 2004).....38
Miller v. City of Alb., 89 N.M. 503, 505, 554 P.2d 665, 667 (1976).....29, 32
PDR Development Corp. v. City of Santa Fe, 120 N.M. 224, 900 P.2d 973 (Ct. App. 1995).....29
Perkins v. Department of Human Services, 106 N.M. 651, 748 P.2d 24 (1987).....40
Sawyer v. Barton, 55 N.M. 479, 236 P.2d 77 (1951).....18
Smyers v. City of Albuquerque, 140 N.M. 198, 141 P.3d 542 (Ct. App. 2006).....40
State v. City of Sunland Park, 129 N.M. 151, 3 P.3d 128 (Ct. App. 2000).....38
Townsend v. State ex rel. State Highway Dept., 117 N.M. 302, 871 P.2d 958 (1994).....8
Twin Forks Ranch v. Brooks, 1998-NMCA-129.....20

Cases from Other Jurisdictions

Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141 (1980).....32
American Fed. Sav. & Loan v. Orenstein, 265 N.W.2d 111, 112 (Mich. App. 1978).....20
Annicelli v. Town of Kingstown, 463 A.2d 133, 140 (R.I. 1983).....35
Dodd v. Hood River Cty., 855 P.2d 608, 611 (Ore. 1993).....32
Gleason v. Taub, 180 S.W.3d 711, 713 (Tex. App. 2005).....13
Goldlawr, Inc. v. Heiman, 369 U.S. 463, 467, 82 S.Ct. 913, 916, 8 L.Ed.2d 39 (1962).....43
Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 295-296, 101 S.Ct. 2352, 2370 (1981).....33
Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 495, 107 S.Ct. 1232, 1247 (1987).....33

Lingle v. Chevron USA, Inc., 544 U.S. 528, 538, 125 S.Ct. 2074, 2081 (2005) 33
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).....33, 36
Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 2893 (1992)..28, 29, 30, 32, 34, 35
M&J Coal Co. v. U.S., 47 F.3d 1148, 1152, n. 5 (Fed. Cir. 1995).....32
Morris Cty. Land Improvement Co. v. Township of Parsippany, 193 A.2d 232, 240 (N.J. 1963)34
Nollan v. California Coastal Comm'n, 483 U.S. 825, 834, 107 S.Ct. 3141, 3147 (1987) 32, 36
O'Kane v. Walker, 561 F.2d 207, 211 (10th Cir. 1977).....18
Palazollo v. Rhode Island, 533 U.S. 606, 121 S.Ct. 2448 (2001) 33
Penn Central v. City of New York, 438 U.S. 104, 138, 98 S.Ct. 2646, 2666 (1978).....31
Peterson v. Barron, 401 S.W.2d 680, 686 (Tex. App. 1966).....14
State v. Johnson, 265 A.2d 711, 716 (Me. 1970) 35
Steel v. Cape Corp., 677 A.2d 634 (Md. App. 1996) 34
Twain Harte Associates, Ltd. v. County of Tuolumne, 217 Cal.App.3d 71, 84-85 (Ct. App. 1990) 35

New Mexico Statutes

NMSA § 14-9-1 12
NMSA § 14-9-3 12
NMSA § 3-21-9 41
NMSA § 39-3-1.1 41
NMSA 3-21-9 41

New Mexico Rules

NMRA 1-074 .....1, 38, 40
NMRA 12-213(A)(3).....2
NMRA 12-213(F)(3) v

Rio Rancho Ordinances

Subdivision Ordinance §155.23.....24
Subdivision Ordinance No. 6.....24

Federal Statutes

42 U.S.C. § 1983.....41

Federal Rules

Federal Rule of Appellate Procedure 4(a)(1)(A) 42

Other Authorities

Restatement (Third) of Property: Servitudes, § 1.2 (2000) 12

STATEMENT REGARDING RECORD PROPER

There are three parts to the "Record Proper" in this case. Pages 1-659 (cited herein as "RP"), also constitute the Record Proper in a related appeal, no. 28,709. Pages 660-1327 (cited herein as "Supp. RP") are additional papers relating to this appeal. An additional "supplement" was also added to the record by order dated November 20, 2009, but these do not have record page numbers. A number of hearing transcripts constitute the Transcript of Proceedings in this case. These are cited as "Tr. (date)." Finally, there is an "administrative" record in this case as well, consisting of pages 1-206, and a supplemental record consisting of pages 1-78. These are cited as "Admin. ROA" and "Supp. admin. ROA," respectively.

STATEMENT OF COMPLIANCE

The body of this Answer Brief contains 10,870 words in Times New Roman typeface and therefore complies with NMRA 12-213(F)(3). *See* Rule 12-213(A)(1)(c), (F)(3), and (G).

SUMMARY OF PROCEEDINGS

This case involves an undeveloped tract of land ("Parcel F") in Rio Rancho, purchased by defendant-appellee Cloudview Estates LLC ("Cloudview") in 2004. In 2005, the Planning & Zoning Board ("PZB") of the City of Rio Rancho ("the City") gave preliminary approval to Cloudview's plan for a residential development on Parcel F, which was already zoned R-1 ("residential"). The City later reversed the PZB and declared Parcel F to be "open space" not subject to any development. The City also filed suit against both Cloudview and Amrep, the original owner of Parcel F, seeking a declaratory judgment that the City owned the property "in fee," or that the property was "undevelopable open space in perpetuity." Cloudview counterclaimed for "inverse condemnation" and also brought an administrative appeal under NMRA 1-074 challenging the City's action. The trial court granted Cloudview's summary judgment as to liability on the inverse condemnation claim, finding a "taking" of Cloudview's property without just compensation (leaving damages to be determined), granted summary judgment to Cloudview on the City's declaratory judgment and in favor of Cloudview on the City's cross-motion, and also reversed the City's administrative decision as being contrary to law and unsupported by substantial evidence. The City filed this appeal, having previously appealed the summary judgment also granted to Amrep by separate Order (appeal no. 28,709).

The City's Brief in Chief omits the following facts relevant to the issues presented for review (*see* NMRA 12-213(A)(3)). None of the City's evidence that Parcel F was "intended" to be open space when Vista Hills West Unit 1 ("VHWU1"), the residential subdivision containing Parcel F, was created in 1985, or of alleged representations by Amrep to property owners in the area that Parcel F was and would remain open space, is found in Sandoval County's real property records. The "Final Plat" of VHWU1 was recorded in 1985 and shows Amrep as owner of the property, and that Amrep granted the City a "drainage easement" on Parcel F at that time. RP 296; Admin. ROA 23; Supp. admin. ROA 1. All of the property in VHWU1 was zoned "residential," and remains so today. Supp. admin. ROA 11, 68. In March 2004, Amrep conveyed Parcel F to a purchaser by warranty deed. RP 460; Supp. admin. ROA 2. On November 12, 2004, Cloudview purchased Parcel F, also by warranty deed. RP 477; Supp. RP 1082; Supp. admin. ROA 4. Cloudview obtained title insurance on Parcel F in the amount of $275,000, and the policy warranted "fee title" to Cloudview. RP 480.

Just prior to purchasing Parcel F, Cloudview met with the City's Development Review Committee ("DRC") to discuss its plan to develop a 30-home subdivision on Parcel F. Supp. admin. ROA 7. "DRC Minutes" confirm that no major obstacles to development were identified by the City and that "the

area is currently platted as a drainage easement and will have to be vacated to permit the subdivision to proceed." *Id.*

After purchasing the property on November 12, Cloudview submitted to the City a complete subdivision package, and then a revised package, including construction plans, a proposed plat, a grading and drainage plan, and a drainage report. Supp. Admin. ROA 36, 38, 50-54. Cloudview asked that the existing drainage easement (which covered the entire property) be vacated and replaced with a smaller drainage easement that included two retention ponds on newly-designated Tracts A-C. ("The purpose of this plat is to vacate the drainage easement designation on Parcel F to create Cloudview Estates Subdivision.") Admin. ROA 64.

On December 8, 2004, the City's Director of Cultural Enrichment researched the ownership of Parcel F, and determined that Amrep, not the City, had owned Parcel F before it was acquired by Cloudview. ("It was learned that the area was in private ownership.") Admin. ROA 62. ("Upon researching ownership, it was learned that Amrep, Inc. owned the plat.") Supp. Admin. ROA 8.

On January 11, 2005, the City's Development Services Department recommended approval of Cloudview's preliminary plat and development plan, noting that "in the past, this site had been considered for a park until the City discovered that the land was still in Amrep's ownership." Supp. admin. ROA at 9-

13. The Department made findings that Cloudview's proposed subdivision: a) conformed with the City's Subdivision Ordinance; b) conformed with the City's Zoning Ordinance; c) conformed with the City's Vision 2020-ICP land use plan; and d) had been approved by the City's Department of Public Infrastructure, Department of Public Safety, and Cultural Enrichment Department. *Id.*

On February 8, 2005, the PZB approved the preliminary plat and development plan, subject to revising it "to clarify that the drainage easement [containing the retention ponds] would remain in private ownership with access available to the City if necessary for additional maintenance." Supp. admin. ROA at 14-15. Prior to PZB approval, residents in the area of the proposed subdivision opposed approval of the subdivision, and the PZB was aware of the resident's objections before approving Cloudview's application. Supp. admin ROA 28 ("Staff has received several e-mails and letters protesting this subdivision").

Objecting neighbors appealed the PZB's approval of the preliminary plat and development plan. On June 14, 2005, the City Attorney issued a memo regarding the "Cloudview Estates Plat Approval Appeal." Admin. ROA 78. The City Attorney noted that "the technical staff apparently does not view retention of the parcel as necessary for drainage requirements" (emphasis added). The City Attorney recommended that Cloudview's application be remanded to the PZB, because "the P&Z was apparently informed no easement was ever dedicated to the

City. [H]ad the P&Z Board been presented with these facts, it could have reasonably concluded that [Parcel F], even if not needed for drainage purposes, was reserved for open space at the time of the original plat . . . ." *Id.*

The City Attorney further advised that "some courts have found that where use of property is exclusive to a grantee without any right of reversion (as here, where the entire parcel is encumbered as a drainage easement and quite possibly as open space), fee simple or ownership title has been conveyed." Admin. ROA 79. The City Attorney did not provide any case citations to support this conclusion.

The City Council remanded the matter to the PZB. On July 1, 2005, Cloudview filed an application for approval of preliminary plat and vacation of the drainage easement on Parcel F, under consolidated case numbers. Admin. ROA 66. In presenting the matter to the PZB, City staff admitted that "when the Board originally reviewed [and approved] the application [for approval of preliminary plat], it was based on the merits of Cloudview Estates alone and restricted to requirements and conditions associated with subdivision regulations that pertained to Parcel F alone." Admin. ROA 72. City staff acknowledged that Parcel F "serves no drainage purposes." *Id.* City staff did "not disagree that the property has been under private ownership and was not dedicated to the City." *Id.* Despite that, City staff recommended against vacation of the drainage easement, because the City's drainage easement "by implication . . . granted a right to use of the

property as open space" to the surrounding neighbors and the City. Admin ROA 72-73. The PZB then denied Cloudview's application to vacate the drainage easement, making findings that the City Council later adopted verbatim. Admin. ROA 75-77. The PZB never rescinded, however, its prior approval of the preliminary plat. Instead, it deemed it "mute" [sic] in light of its decision on the drainage easement. Admin. ROA 74.

Cloudview appealed the PZB decision to the City Council. In an "Agenda Briefing Memorandum" prepared by City staff, and approved by the City Attorney's office, the City Council was advised that Parcel F "was intended to be open space." Admin. ROA 1. The memorandum further stated that "labeling of the parcel as a drainage easement was for a purpose other than drainage" and that "the intended use of the property was open space." Admin. ROA 2. The City Council was told that the "drainage easement gave the City control over the property as open space without express title to the land," and that Cloudview's "ownership of the property and the fact that the property 'can be' developed is irrelevant." Admin. ROA 2, 4. "It is apparent that Parcel F . . . served no drainage purpose at all despite being labeled drainage easement." Admin. ROA 6. Staff and the City Attorney advised the City Council to ignore the fact that the drainage easement "could be" vacated because it was not needed for drainage, and instead focus on whether it "should" be vacated or kept as "open space." "Whether the

easement 'should' be vacated is the ultimate question before the Governing Body." Admin. ROA 7.

On November 9, 2005, the City Council voted unanimously to deny Cloudview's application for vacation of drainage easement on the grounds previously stated by the PZB, including that "AMREP and the City intended Parcel F . . . be used as open space." Admin. ROA 199. The City specifically found that "designation of land as a drainage easement was a convenient method to obtain public control and use over open space land." *Id.* at 200. "[D]espite the label of drainage easement, the purpose of the easement on Parcel F is for open space." *Id.* at 201. The City denied the application for vacation of drainage easement because, *inter alia*, "the protection of Parcel F as open space provides a valued public use ... that should be continued." *Id.*

After litigation initiated by Cloudview in federal court was dismissed without prejudice on ripeness grounds, the City filed a complaint in the court below against both Amrep and Cloudview on October 2, 2006, seeking a declaratory judgment that the City acquired fee title to Parcel F. The City asked the Court to find that "the open space 'drainage easement' designation . . . vested fee title in the City . . . ." Complaint at ¶ 29 (RP 2-11). The City asserted that "Parcel F was dedicated by Amrep to the City for public use as an open space" and that, as a result of "Amrep's putative transfer of title to Parcel F" to the City, "the

City either owns parcel F in fee . . . or a permanent easement on Parcel F exists in favor of the City . . . ." Complaint at ¶¶ 40, 42, 47. "[A]n irrevocable implied dedication of Parcel F [from Amrep to the City] as open space exists." Complaint at ¶ 38. The City alleged that "the criteria for vacating drainage easements under the City's development code do not apply to the drainage easement on Parcel F because Parcel F was intended to be and is open space . . . ." Complaint at ¶ 31.

Cloudview counterclaimed for an "inverse condemnation" of Parcel F, and also appealed the City's decision to deny vacation of the drainage easement. After the trial court ruled in favor of both Amrep and Cloudview on all issues, the City appealed (appeal no. 28,709 with respect to Amrep and no. 29,510 with respect to Cloudview).

ARGUMENT

The controlling issue on this appeal is the district court's ruling that the City has "taken" Cloudview's property, entitling Cloudview to summary judgment on its claim for "inverse condemnation." When a "taking" occurs, the property owner's sole remedy under New Mexico law is to recover just compensation under New Mexico's inverse condemnation statute, NMSA § 42A-1-29. *Garver v. PNM*, 77 N.M. 262, 421 P.2d 788 (1966); *Townsend v. State ex rel. State Highway Dept.*, 117 N.M. 302, 871 P.2d 958 (1994). Since the trial court correctly ruled in Cloudview's favor on the inverse condemnation claim, the City's erroneous

administrative decision with respect to vacating the drainage easement is ultimately moot.

Prior to granting Cloudview summary judgment on the inverse condemnation claim, the trial court also correctly ruled that the City does not (1) "own" Parcel F; or (2) have an "easement for open space in perpetuity;" or (3) have any interest in Parcel F greater than a "drainage easement." This ruling is a predicate for the ruling on inverse condemnation. If the City actually owned the fee interest in Parcel F, as it alleged, or even a true "open space easement," it could not have "taken" the property from Cloudview when it declared it to be "open space" in November 2005.

In addition, however, the trial court determined that the City's denial of Cloudview's application to vacate the drainage easement was contrary to law and not supported by substantial evidence. This ruling, although also correct, is independent of the ruling on inverse condemnation. The City has "taken" Cloudview's property by engaging in a "permanent physical occupation" of the property, and by depriving Cloudview of all "beneficial use" of the property, whether or not the City's denial of the specific application to vacate the drainage easement may have otherwise been proper. Likewise, the City's administrative decision was unsupported by substantial evidence and not in accordance with law, whether or not the City has "taken" Cloudview's property. As will be explained

further, the potential distinction lies in whether the City's decision deprived Cloudview of "substantially all" beneficial economic use of the property or only "some" such use (by, for example, limiting Cloudview's proposed subdivision to five homes instead of 30). However, because the City's action was in fact a complete and permanent "taking," Cloudview's sole remedy, as previously stated, is to recover "just compensation," so no additional relief is appropriate for the City's erroneous administrative decision.

Since the trial court's summary judgment ruling on the ownership of Parcel F (RP 571 with respect to Amrep and RP 574 with respect to Cloudview), and its later summary judgment ruling on inverse condemnation (Supp. RP 1191) are so intertwined, they are both addressed in Section I of this brief. The trial court's ruling on the administrative appeal is addressed separately in Section II.

I. The trial court correctly concluded that the City has "taken" Cloudview's property.

Cloudview's position, and the trial court's ruling, are simple, straightforward, and supported by multiple, explicit United States Supreme Court and New Mexico Supreme Court rulings. First, Cloudview owns "fee simple" title to Parcel F, subject only to the City's "drainage easement." Such title carries with it the right to "exclude others" from the property, and the right to make economic "beneficial use" of the property, subject to the City's rights under the "drainage

easement" it holds. Second, the City has deprived Cloudview of "all beneficial use" of the property, and eliminated Cloudview's right to exclude others, by declaring Parcel F to be "open space." That is a "per se taking" of Cloudview's property as a matter of law, without regard to the public interest served by the taking.

A. Cloudview owns fee title to Parcel F, subject only to a "drainage easement".

Cloudview acquired fee title to Parcel F by "warranty deed" on November 12, 2004. Supp. RP 1082. Cloudview obtained title insurance warranting its "fee simple" title. RP 480. Parcel F was already zoned R-1, "Single Family Residential," which expressly permitted residential development. Supp. Admin. ROA 11, 68. Cloudview's title was "subject to ... restrictions and reservations of easements and rights of way of record." Supp. RP 1082.

At the time Cloudview acquired the property, the City held a "drainage easement" on the property, pursuant to a grant of easement in the Final Plat of the subdivision recorded in the real estate records of Sandoval County on October 18, 1985. Supp. RP 1074. It is undisputed that no instrument was recorded in the public records from 1985 to Cloudview's acquisition in November 2004 that gave notice of any claim by the City to anything more than a "drainage easement."

As a fundamental principle of real estate law, interests in real property must be "recorded" in a county's real estate records in order to be binding on subsequent purchasers. "All deeds . . . . and other writings affecting the title to real estate shall be recorded in the office of the county clerk . . . ." NMSA § 14-9-1. "No deed or other instrument in writing not recorded" in accordance with § 14-9-1 shall affect the rights of any purchaser "in good faith . . . without knowledge of the existence of such unrecorded instruments." NMSA § 14-9-3. The statute "protects purchasers from being bound by unrecorded instruments. Parties who fail to record their conveyancing documents are at risk that their interest may be terminated by a bona fide purchaser for value." *In re Crowder,* 225 B.R. 794, 797 (D.N.M. 1998), applying New Mexico law. Since nothing but an easement to the City was reflected in the official real estate records, an easement is all the City obtained and ever owned.

By definition, an "easement" is different from a "fee" and creates a "nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement." Restatement (Third) of Property: Servitudes, § 1.2 (2000) (emphasis added). The "transferor" of an easement (here Amrep) "retains the right to make all uses of the land that do not unreasonably interfere with exercise of the rights granted by the servitude. For example, the transferor of an easement for an underground pipeline

retains the right to enter and make any use of the area covered by the easement that does not unreasonably interfere with use of the easement for pipeline purposes." *Id.*, Comment d, *see also, Gleason v. Taub*, 180 S.W.3d 711, 713 (Tex. App. 2005) ("the granting of a public utility easement to the use and benefit of the public on a plat by the owner of a subdivision creates an easement in favor of the city, for the benefit of the public, with fee remaining in the owners and their successors in title").

New Mexico follows these basic principles of property law. *Luevano v. Maestas*, 117 N.M. 580, 874 P.2d 788 (Ct. App. 1994 ("the interest created by an easement is a right of use, measured by the nature and purpose of the grant, and, so far as is consistent therewith, the owner of the fee may make any reasonable use desired of the land in which the easement exists")(emphasis added); *Kikta v. Hughes*, 108 N.M. 61, 63, 766 P.2d 321, 323 (Ct. App. 1988) ("the owner of the dominant estate cannot change the extent of the easement or subject the servient estate to an additional burden not contemplated by the grant of easement") (emphasis added); *Kennedy v. Bond*, 80 N.M. 734, 736-37, 460 P.2d 809, 811-12 (1969)("an easement is distinguished from a fee, and constitutes a liberty, privilege, right, or advantage which one has in the land of another . . . The rights of one holding an easement in the land of another are measured by the nature and purpose of the easement; and, so far as consistent therewith, the owner of the fee

may make any reasonable use desired of the land in which the easement exists")(emphasis added).

A "drainage easement" is, therefore, a right by the holder of the easement to use the fee owner's property for drainage purposes. *See, Peterson v. Barron,* 401 S.W.2d 680, 686 (Tex. App. 1966), construing a "drainage and utility easement" owned by the City on private property.

> The words 'drainage' and 'utility' facilities are of common and easily understandable meaning and usage, especially when used in connection with the rights of cities and other municipal corporations. Utility facilities cover many services such as light, gas, telephone and sewerage lines. The ordinary connotation of the word 'drainage' means the carrying away of water and other liquids either in closed or open conduits.

(Emphasis added.)

These uniform statements of law, universally accepted, flatly contradict the unsupported opinion of the City Attorney (admin. ROA 79) that, based on the "drainage easement" obtained in 1985, the City had "exclusive use" of Parcel F, or that "fee simple or ownership title has been conveyed." Instead, the drainage easement only allowed the City to use Parcel F for "the carrying away of water and other liquids either in closed or open conduits," but it left fee ownership (and all rights not inconsistent with the City's limited rights) in Amrep.

The City's admission that Parcel F was not actually needed for a drainage easement or used for drainage purposes is perhaps relevant to the impropriety of the City's actions thereafter, but irrelevant to the nature of the City's interest. The City does not contend that a "mutual mistake" caused it and Amrep to designate a "drainage" easement when the real intent was to designate an "open space" easement. The City instead contends that, as opined by the City Attorney, in 1985 it magically obtained "fee title" to Parcel F, instead of a drainage easement, or else that the "drainage" easement was really an easement for "undevelopable open space in perpetuity." The trial court disagreed, based in part on the legal definition of a "drainage easement," in part on the lack of any recorded instrument to support the City's claim to more than that, and in part on the ample evidence that the City consciously chose to receive a "drainage easement" instead of "open space" so as to avoid the cost to the City of maintaining the open space. The trial court correctly concluded that "the only property interest held by the City" in Parcel F is a "drainage easement." That ruling is directly at issue in appeal no. 28,709 and is relevant here because the trial court reiterated that ruling in the proceedings below with respect to Cloudview. RP 575.

Cloudview will not here merely repeat the arguments made by Amrep in that appeal, but Cloudview does incorporate them by reference. Cloudview also incorporates its arguments made below in response to the City's cross-motion for

summary judgment. RP 551-560. This Court should affirm in appeal no. 28,709 the trial court's ruling that the City acquired only a "drainage easement," and likewise affirm in this appeal the trial court's reiteration of that ruling with respect to Cloudview. As the trial court stated during a hearing on March 13, 2009:

> I mean, I saw all of the law on easements and all of the law on conveyances in the motions for summary judgment. I'm having a hard time remembering all of it, but it seems to me that you have to at least follow the law that's handed down, the common law that's handed down over the years on what is a conveyance and what is an easement. And that was the gist of the arguments for the summary judgment.
>
> And my ruling – I recall my ruling and my ruling was that the City knew the difference or they wouldn't have asked for the change in designation. And so the City chose not to take the property. They may have wanted it as open space, but they chose not to take it that way, and they chose to take it as an easement.

Tr. 3/13/09, p. 42, ll. 1-14.

In short, when Cloudview acquired fee title in 2004, Parcel F was not and never had been City-owned or controlled "open space."

B. Cloudview is also a bona fide purchaser for value, which cut off any interest of the City greater than a "drainage easement."

In addition to ruling that Cloudview's fee title to Parcel F is subject only to a "drainage easement," the trial court also determined that Cloudview was a "bona fide purchaser for value" with respect to the claim by the City to an interest greater

than that. RP 574-575. Thus, regardless of what interest the City may have actually obtained from Amrep in 1985 (and regardless of the outcome of appeal no. 28,709), Cloudview was not bound by interests not reflected in the recorded instruments. Cloudview's fee title, therefore, cuts off any interest in the City greater than the drainage easement reflected in the recorded Final Plat. The trial court was absolutely correct in reaching that conclusion on the basis of facts that are undisputed.

The City contends that Cloudview had "actual, constructive and/or inquiry notice" of "the prohibition against residential development resulting from the public use easement and the circumstances surrounding the easement which rendered its vacation by the City problematic at best." Brief in Chief at 22-23. Whatever the City is attempting to say here, it is a *non sequitur* with respect to Cloudview's status as a bona fide purchaser. Even if Cloudview had notice that vacation of the City's "drainage" easement "would be problematic at best" (it did not), Cloudview was still a bona fide purchaser. The "problematic" vacation of a drainage easement does not equal notice of a "prohibition against residential development," especially for property already zoned to allow residential development, and certainly does not imply that a drainage easement is "open space for public use in perpetuity," which is what the City claims to have.

Cloudview purchased Parcel F "without knowledge" of any facts to suggest the City owned or would later contend it owned the property, or otherwise claim it as "open space for public use in perpetuity." RP 460-461, 489-491. "Knowledge" in this context means that "where facts are brought to the knowledge of the intending purchaser of such nature that in the exercise of ordinary care he ought to inquire, but does not, his failure so to do amounts to gross or culpable negligence, and he will be charged with knowledge of all facts which the inquiry, pursued with reasonable diligence, would have revealed." *O'Kane v. Walker,* 561 F.2d 207, 211 (10th Cir. 1977), quoting *Gore v. Cone,* 60 N.M. 29, 37, 287 P.2d 229, 234 (1955).

The factual circumstances where a "duty of inquiry" arises are quite limited. Where a deed conveys to a purchaser an interest in conflict with the interest described in the public records, there is a duty to make further inquiry. *Sawyer v. Barton,* 55 N.M. 479, 236 P.2d 77 (1951). Here, of course, the real estate records showed that Cloudview's grantor owned the full "fee simple title" to Parcel F, and the title insurance policy obtained by Cloudview confirmed that.

Similarly, if someone other than the seller of the property has possession at the time of sale, a duty of inquiry can arise. *Hunt v. Ellis*, 27 N.M. 397, 201 P. 1064 (1921). Even then, however, the nature of the possession by another must be such as to cast doubt on the ownership of the seller. *Id.* Here there was no "possession" of Parcel F by the City, at least none sufficient to create a duty of

inquiry.[1] The alleged "use" of the property as open space by neighborhood residents (relied upon by the City in appeal no. 28,709) was completely consistent with fee title owned by Cloudview's predecessor, subject to a "drainage easement." While the City has failed to specifically describe the nature of the "use" by residents, it presumably included activities like "walking the family dog" and "playing catch with the kids." Such "use" of long-vacant property is completely consistent with the title reflected in the public records and did not give Cloudview notice of any greater claim by the City. Furthermore, under *Hunt*, when the nature of the possession (here "use") is the same both before and after the transfer of title, no duty of inquiry arises. 201 P. at 1066.

None of the cases cited by the City support its position here, and several of them support Cloudview's position. As explained above, *Hunt* holds only that sometimes a duty of inquiry arises when someone other than the seller has physical possession of the property, which was not the case here. *Dunne v. Petterman*, 52 N.M. 284, 288, 197 P.2d 618, 620 (1948), holds only that a duty of inquiry arises when evidence of alteration appears on "the face of the instrument involved in the transaction." The same principle applied in *American Fed. Sav. & Loan v.*

[1] It is undisputed, for example, that the City did not fence the property, maintain it, put up signage, or do anything at all to give notice that the City claimed anything other than a "drainage easement."

Orenstein, 265 N.W.2d 111, 112 (Mich. App. 1978)("obvious" ambiguity in instrument created duty of inquiry). There was nothing whatsoever in the deed to Cloudview, "the instrument involved in the transaction," to create a duty of inquiry. Nor was there anything in the recorded Final Plat that granted the "drainage easement" to create an ambiguity or conflict, or otherwise raise a duty of inquiry.[2]

Based on the above authorities, and many, many others, there was nothing the least bit "suspicious" about the title to Parcel F that should have caused Cloudview to investigate further.[3] Cloudview knew only that there was a "drainage easement" on the property, and Cloudview confirmed that in a meeting with the City before Cloudview acquired title. Cloudview met with representatives of the City in October 2004 to inquire about the status of the "drainage easement" on Parcel F and was assured by those representatives that "the vacation of the easement could happen as part of the platting of the project." RP 490. Nothing whatsoever was said about "open space" or any "prohibition against residential development." Indeed, the meeting was convened specifically to discuss

---

[2] Neither *Gallup Westside Dev. v. City of Gallup*, 2004-NMCA-010, nor *Twin Forks Ranch v. Brooks*, 1998-NMCA-129, involved a bona fide purchaser issue or a "duty of inquiry" in any context, and they have no relevance to this case.

[3] The City's assertion that there was a "defect" in the record fee simple title to Parcel F (brief in chief at 22) is completely unsupported by any facts and simply incorrect.

Cloudview's proposal for residential development, and Cloudview was encouraged by the City to proceed.

In a perverse twist, the City actually faults Cloudview for meeting with current employees of the City, instead of "persons with historical knowledge of the drainage easement designation." Brief in Chief at 24. The City asserts, in effect, that in 2004 Cloudview should have searched out individuals who worked for the City in 1985 to inquire whether property zoned for residential development and subject only to a "drainage easement" shown on the recorded Final Plat was really available for residential development and subject to just a drainage easement, or was instead something else entirely, like perhaps "open space for public use in perpetuity" that "prohibited residential development" instead of permitting it. This contention is absurd and, if accepted, would effectively repeal the recording statutes that expressly authorize buyers to rely on documents recorded in the public records to determine the status of title to real property in New Mexico. In this case, the "public record" reflected that Cloudview was acquiring fee title to property zoned for residential development, subject to a "drainage easement" in favor of the City. Cloudview's inquiry directly to City officials charged with regulating development confirmed there was a "drainage easement" and that the property could be developed for residential purposes. As a matter of law, Cloudview was required to go no further, and it was a bona fide purchaser.

The City contends that Cloudview "would have discovered" the following if it had made further inquiry: 1) a Drainage Management Plan showing Parcel F as open space; 2) a "preliminary" plat showing parcel F as open space; 3) that "drainage easement" really means "open space" according to a former City employee; and 4) that the failure to "identify" Parcel F as "developable" in the 1985 plat precluded its subsequent development by Cloudview. Brief in Chief at 26-27. Each of these contentions is either legally irrelevant and/or flatly wrong factually.

Neither the "Drainage Management Plan" nor the "Preliminary Plat" was ever recorded in the public records. Under the recording statutes, a purchaser is not obligated, as a matter of law, to search for and review unrecorded documents. The City recorded only the Final Plat that showed Parcel F as subject to a "drainage easement." Cloudview was entitled to rely on that and had no duty to search out unrecorded and unknown documents that might show something different. Neither the Drainage Management Plan nor the Preliminary Plat are relevant to Cloudview's status as a bona fide purchaser.[4]

The City also contends that further inquiry of Michael Springfield, the City's former director of the Development Department, would have revealed that the

[4] In addition, the "Preliminary" Plat was superceded by the "Final" Plat, as the very names make clear. Had both plats been recorded in the public records, then perhaps the alleged discrepancy between them would have created a duty to make further inquiry. That is not what occurred, and the alleged discrepancy is irrelevant

"drainage easement" designation was in reality a proxy for "open space for public use." First, Cloudview had no obligation to seek out Mr. Springfield; Cloudview was entitled to rely on the public record. Second, all Mr. Springfield could really say was that the City, not Amrep, sometimes considered "drainage easements" to be "open space." The City has consistently mischaracterized his testimony on this point.

After he described his bizarre theory that "open space" should be described as a "drainage easement" to prevent Amrep from taking a "credit" against its open space obligation under some settlement agreement, Mr. Springfield was asked by Amrep's counsel: "But what I'm understanding you to say, you don't have that recollection with regard to this particular plat [of Parcel F]? You just have that recollection kind of in general?" Mr. Springfield answered: "Correct." RP 337. Thus, the City cannot tie its theory to the property involved in this case.

More importantly, the City cannot show that anyone other than the City was aware that "drainage easement" was supposed to be a "surrogate" for "fee" or "open space in perpetuity." Indeed, Mr. Springfield readily acknowledged that this was only an "internal City understanding."

> Q. You talked about your use of the term DE as some kind of holding designation. Was that understanding ever communicated to Amrep at any time? Or was that an internal City understanding?

> A. Internal City understanding. I cannot recall if ever there was a discussion like that that went back to Amrep.
> Q. So it's possible that Mr. Holmes may have had one understanding on what the DE was and the City could have another understanding?
> A. Correct. That's normal with developer-City relationships.

RP 423. The City's "internal understanding" was not binding on Amrep in 1985, let alone on Cloudview 19 years later.

Finally, the City asserts that further inquiry by Cloudview would have revealed that "Amrep was required to identify all developable land when it submitted the VHWU1 preliminary plat" in 1985. Brief in Chief at 27. This assertion is untrue.

The City relies on language in both the 1985 "Subdivision Ordinance No. 6," and in the current Subdivision Ordinance §155.23, that a "preliminary plat shall include all land owned or controlled by the subdivider, which is or may be subject to subdivision or development ...." Admin. ROA 32, 38 (emphasis added). The City claims to interpret that language to mean that the preliminary plat must "identify" all developable" land, and points out that the plat did not "identify" Parcel F as "developable." There are several responses to this fallacious argument.

First, the Ordinances do not say what the City claims they say. A preliminary plat is only required to "include," not "identify," land that "may be," not "currently is," subject to development (or subdivision). The VHWU 1

preliminary plat clearly "included" Parcel F; that parcel is plainly shown on the plat. Admin. ROA 16. The plat, therefore, met the stated requirements of the Ordinance, then and now. As for whether Parcel F was "developable" in 1985, that was irrelevant in 1985, and is irrelevant now. The Ordinance only required "inclusion" of land that "may be" developable. That language obviously contemplates a change in "developability" over time; what is not developable now "may be developable" in the future. That is the plain and common sense meaning of the Ordinances, notwithstanding the City's tortured, after-the-fact interpretation to the contrary.

Second, neither the Ordinances, nor any statute, nor any case law interpreting either of those provide or imply that the failure to meet the requirements of the Ordinances regarding inclusion of developable land results in such land becoming "undevelopable." Again, the City reads into the Ordinances something that is just not there. For both of the above reasons, the alleged failure of the preliminary plats to "identify Parcel F as developable land" is a completely false issue.

In summary, the weakness of the City's position can perhaps best be illustrated by imagining that Amrep had actually conveyed fee title in Parcel F to the City in 1985, but the City never recorded the deed. In that scenario, there would be no doubt about either the "intent" of both Amrep and the City, or the

extent of the City's rights in Parcel F. Those rights would have been complete and total. However, by failing to record its deed, the City would have been vulnerable to having those rights cut off just as completely by a bona fide purchaser, like Cloudview, who was entitled under the law to rely on the public real estate records to determine whether someone else "owned" Parcel F. That's precisely what happened, even assuming that the City really did obtain "something more" than a drainage easement from Amrep in 1985.

Cloudview was in fact a bona fide purchaser for value, as the trial court found. Therefore, however this Court ultimately rules on the issues as between the City and Amrep in appeal no. 28,709, Cloudview's BFP status cuts off any claim by the City to an interest greater than a "drainage easement."

C. The City has deprived Cloudview of all beneficial use of the property.

Contrary to the City's repeated characterization, Cloudview's inverse condemnation claim is not that the City merely denied Cloudview's application to vacate the drainage easement, or that the City refused to permit Cloudview's proposed 30-home subdivision to proceed. That may be the issue regarding Cloudview's administrative appeal, but it is not the issue regarding the inverse condemnation claim. Cloudview instead asserts, and the facts are undisputed, that

the City has prohibited any beneficial use of Parcel F by declaring it to be "open space."

In November 2005, the City could have simply denied Cloudview's application to vacate the drainage easement on Parcel F, leaving Cloudview with the sole remedy of appealing the City's "administrative decision" to determine whether it was "unsupported by substantial evidence, or otherwise not in accordance with law." The City, however, did far more than just refuse to vacate a drainage easement. It declared that: 1) "Amrep and the City intended Parcel F ... be used as open space;" 2) "the requirement for open space was made a condition of Vista Hills West, Unit 1 plat approval;" 3) "Parcel F has, and/or continues to have, a role in the provision of the City's natural resource or open space areas;" 4) "at this time [1985], designation of land as a drainage easement was a convenient method to obtain public control and use over open space land;" 5) "despite the label of drainage easement, the purpose of the easement on Parcel F is for open space;" 6) "the protection of Parcel F as open space provides a valued public use ... that should be continued." Supp. RP 1168-1171.

The City has never disputed Cloudview's contention that Parcel F's status as "open space" precludes Cloudview from enjoying any "beneficial use" of the property whatsoever.[5] As shown below, "beneficial use" means "economically" beneficial use. This deprivation of any beneficial use is conclusive that a "taking" has occurred as a matter of law.

The U.S. Supreme Court has identified "two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint" (emphasis added). *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 2893 (1992). In other words, it does not matter what the public interest is in these two categories of regulatory action; such action is "compensable" regardless.

[5] In its motion for partial summary judgment on the inverse condemnation claim, Cloudview asserted as an undisputed fact that "the city's declaration that Parcel F should be retained for public use as open space deprived Cloudview of any beneficial use of its property." Undisputed Material Fact no. 6 (Supp. RP 1070). The City responded that "the City admits that residential development of Parcel F is incompatible with the City's public use easement in response to Cloudview's SOF 6." Supp. RP (unnumbered, added pursuant to Court of Appeals Order filed 11/20/09). The City did not, however, assert that any beneficial use of the property (whether residential or otherwise) is available to Cloudview, in that response or at any time in any of the proceedings below or on this appeal. Both parties recognize that, if Parcel F is City "open space," it cannot be used by Cloudview for anything.

The first category is when the government physically invades the property (discussed in section D below). "The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land (emphasis added). (citations omitted) As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests *or denies an owner economically viable use of his land'* (emphasis in original). The cases say, repeatedly and unmistakably, that '[t]he test to be applied in considering [a] facial [takings] challenge is fairly straightforward. A statute regulating the uses that can be made of property *effects a taking if it 'denies an owner economically viable use of his land'*" (emphasis in original). *Lucas*, 505 U.S. at 1015-16, 112 S.Ct. at 2893-94.

New Mexico law is the same, with one more liberal (for the property owner) twist. "If the governmental regulation deprives the owner of all beneficial use of his property," the action rises to the level of an unconstitutional "taking." *Miller v. City of Alb.,* 89 N.M. 503, 505, 554 P.2d 665, 667 (1976); *Aragon & McCoy v. Albuquerque National Bank*, 99 N.M. 420, 424, 659 P.2d 306, 310 (1983); *Estate of Sanchez v. Cty. of Bernalillo,* 120 N.M. 395, 397, 902 P.2d 550, 552 (1995)(this "continues to be the rule in this jurisdiction"); *PDR Development Corp. v. City of Santa Fe,* 120 N.M. 224, 900 P.2d 973 (Ct. App. 1995)("a taking results when the

zoning change deprives the property owner of all beneficial use of the property"). The twist is that "all" beneficial use in this context means all "or substantially all." *Estate of Sanchez, supra.*

In its Brief in Chief, the City continues the mistake it has made throughout these proceedings; it asserts that Cloudview has no "taking" claim, because Cloudview had no "right to develop" Parcel F or "right to vacation of the drainage easement." The City misses the point. Under its inverse condemnation claim, Cloudview does not claim a "right to vacation of the drainage easement," or even a specific "right to develop" Parcel F.[6] But Cloudview does claim a constitutional right, using the words of the Supreme Court in *Lucas*, to some "economically beneficial or productive use" or "economically viable use" of its land. By mere ownership of Parcel F, Cloudview has that right as a matter of law.[7] Just as rendering the plaintiff's property "valueless" in *Lucas* constituted a taking, rendering Parcel F valueless to Cloudview constitutes a taking here.

This case would be entirely different if the City had merely reduced the size of Cloudview's proposed project, for example, by approving only ten homes in the

---

[6] The cases cited by the City, holding that owners do not have a "property right to re-zone the owner's property" (*Braun*), or a "vested right in an existing zoning classification" (*Albuquerque Commons*), or vested rights in an agreement that is expressly "conditional" (*Gallup Westside*), or holding that rights "completely dependent upon regulatory licensing" are not property rights (*Rick's Amusement*), or that the "expectancy of renewal" of a month-to-month tenancy is not a protected property interest (*Gray*), are irrelevant to this case, since Cloudview does not make any such claims.

[7] "The 'interest in land' that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law." *Lucas,* 505 U.S. at 1016, 112 S.Ct. at 2894, n.7. Cloudview likewise owns a fee interest in Parcel F.

subdivision instead of the planned thirty homes, or had increased the expense of the project to Cloudview by requiring more expensive infrastructure like streets, drainage, or landscaping. In such a case, the reduction in value to Cloudview might still be unsupported by substantial evidence or contrary to law, but it would not be a compensable "taking," because it would not eliminate all or substantially all economically or productive use. Such a case would be like Aragon, where the developer complained that the City reduced its condominium project from 252 units to 141. 99 N.M. at 422, 659 P.2d at 308. "Although Aragon may not reap the profit it could have made had the entire project been developed, it certainly did not lose all beneficial use of the property. Thus, we hold that no taking or inverse condemnation occurred." 99 N.M. at 424, 659 P.2d at 310 (emphasis added). Here, Cloudview has indeed lost all beneficial use of the property by the City's declaration that it is "open space." Cloudview cannot use its property for anything.

The cases relied on by the City are similarly dependent on the fact that some beneficial use remained to the owner after the governmental action was taken. In *Penn Central v. City of New York*, 438 U.S. 104, 138, 98 S.Ct. 2646, 2666 (1978), there was no "taking," because New York's regulation still "permit[ted] reasonable beneficial use" of the property. In *M&J Coal Co. v. U.S.*, 47 F.3d 1148, 1152, n. 5 (Fed. Cir. 1995), the plaintiff sought lost profits due to increased mining regulation but admitted to having "ultimately profited from its mining operations to the extent

of $692,086.41." The court noted that the deprivation of all economically beneficial use found in *Lucas* was "not true in the present case." 47 F.3d at 1153. In *Dodd v. Hood River Cty.*, 855 P.2d 608, 611 (Ore. 1993), there was no "taking," because the Oregon regulation, while prohibiting the construction of a "dwelling" on forest land, still permitted the owner to "produce a net profit if properly managed for timber production."

In contrast, the principle stated in *Lucas*, *Miller*, *Aragon*, and *Estate of Sanchez*, that a "taking" occurs when the government action deprives the owner of all economically beneficial value, has been stated by the courts frequently. The *Lucas* Court itself noted at least four of the "numerous occasions" when it had previously stated that principle. *Lucas*, 505 U.S. at 1015, 112 S.Ct. at 2893, citing with approval *Agins v. City of Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141 (1980)(city limitation of five houses on five acres was not a taking, because "although the ordinances limit development, they neither prevent the best use of appellants' land ... nor extinguish a fundamental attribute of ownership"); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, 107 S.Ct. 3141, 3147 (1987)("we have long recognized that land-use regulation does not effect a taking if it" does not "den[y] an owner economically viable use of his land"); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495, 107 S.Ct. 1232, 1247 (1987)("a statute regulating the uses that can be made of property effects a taking if it 'denies

an owner economically viable use of his land'..."); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 295-296, 101 S.Ct. 2352, 2370 (1981)("a statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land' ...."). The Supreme Court reiterated the rule stated in *Lucas* and its predecessors nine years later in *Palazollo v. Rhode Island,* 533 U.S. 606, 121 S.Ct. 2448 (2001)("a regulation which 'denies all economically beneficial or productive use of land' will require compensation under the Takings Clause").

More recently, the Supreme Court reiterated its "per se" rule on regulatory takings in 2005, six months before the City took Cloudview's property by declaring it to be "open space." *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 538, 125 S.Ct. 2074, 2081 (2005).

> Our precedents stake out two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of her property-however minor-it must provide just compensation. See *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking). A second categorical rule applies to regulations that completely deprive an owner of "*all* economically beneficial us[e]" of her property. Lucas, 505 U.S., at 1019, 112 S.Ct. 2886.

The principle that a deprivation of all beneficial use constitutes a "taking" has often been applied in the specific context of "open space" or its equivalent. The Supreme Court of New Jersey held that "preservation of the land as open space for the benefits which would accrue to the local public from an undeveloped use" was an unconstitutional "taking," because it was "confiscatory." *Morris Cty. Land Improvement Co. v. Township of Parsippany*, 193 A.2d 232, 240 (N.J. 1963).

> While the issue of regulation as against taking is always a matter of degree, there can be no question but that the line has been crossed where the purpose and practical effect of the regulation is to appropriate private property for a flood water detention basin or open space. These are laudable public purposes and we do not doubt the high-mindedness of their motivation. But such factors cannot cure basic unconstitutionality.

Id. at 242.

Similarly, in *Steel v. Cape Corp.*, 677 A.2d 634 (Md. App. 1996), the court found an unconstitutional "taking" when the county refused to re-zone private property from open space to residential.

> We hold that none of the uses permitted in the OS [open space] classification afford to appellee any viable economic use of the subject property that would avoid the impermissible taking of appellee's property without just compensation. In summary, the statutory scheme, which may or may not be constitutional when applied to the types of property to which the zoning classification was intended to apply, permits, in this specific classification aberration, no economically viable use. It is an unconstitutional regulatory taking.

Id. at 650. *See also, Twain Harte Associates, Ltd. v. County of Tuolumne*, 217 Cal.App.3d 71, 84-85 (Ct. App. 1990)(re-zoning to "open space" would constitute a taking, if it denied "all economically feasible use of the property"); *Annicelli v. Town of Kingstown*, 463 A.2d 133, 140 (R.I. 1983)(ordinance protecting "barrier beach" was a taking because "all reasonable or beneficial use of ... property has been rendered an impossibility"); *State v. Johnson*, 265 A.2d 711, 716 (Me. 1970)(protection of "wetlands" that leaves owner with "commercially valueless land" is a taking).

In sum, it is undisputed that Parcel F no longer has any value to Cloudview, because Cloudview cannot use the property for any economically beneficial use.

D. The City has engaged in a "permanent physical occupation" of Parcel F.

As described in the United States Supreme Court cases cited above, the other circumstance in which a "per se taking" of property occurs is when the owner suffers a "physical invasion" of his property. "No matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation" in such cases. *Lucas*, 505 U.S. at 1015, 112 S.Ct. at 2893. "Where governmental action results in 'a permanent physical occupation' of the property, by the government itself or by others, [citation omitted] our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action

achieves an important public benefit or has only minimal economic impact on the owner." *Nollan*, 483 U.S. 831, 107 S.Ct. 3146 (emphasis added), citing *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S 419, 433, 102 S.Ct. 3164, 3175 (1982).

The rationale for this stems from the fact that a physical occupation takes away the property owner's right to exclude others from entering his property. "We have repeatedly held that, as to property reserved by its owner for private use, 'the right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Nollan*, 483 U.S. 831, 107 S.Ct. 3145. Furthermore, such a "permanent physical occupation" has occurred "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Nollan*, 483 U.S. 832, 107 S.Ct. 3146.

By declaring Parcel F to be "open space [which] provides a valued public use ... that should be continued," the City has decreed that the public has a "continuous right to pass to and fro," in violation of Cloudview's right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." As with the elimination of all beneficial use, this is a

per se taking of Cloudview's property that requires the payment of just compensation.

II. The trial court correctly concluded that the City's administrative decision was unsupported by substantial evidence and not in accordance with law.

The City originally approved (through its PZB) Cloudview's proposed subdivision "on the merits" (admin. ROA 72), and nothing about the "merits" of the proposal ever changed. The City knew that Parcel F was "under private ownership and was not dedicated to the City." *Id.* The City knew that the drainage easement on Parcel F was not needed for drainage purposes. Admin. ROA 78. Yet the City denied Cloudview's application to vacate that drainage easement and proceed with the project, because the City concluded that Parcel F was "intended to be open space." Based on that supposed "intent," the City accepted the contention of its Staff that Cloudview's "ownership of the property and the fact that the property can be developed is irrelevant." Admin. ROA 2.

In contrast, the trial court correctly concluded that ownership of the property is relevant. The trial court decided that, having approved Cloudview's project "on the merits," the City could not then disapprove it solely on the basis of some publicly-undisclosed "intent" back in 1985. The trial court correctly found that such a reason for disapproving Cloudview's project was not a sufficient reason, because it was unsupported by substantial evidence and contrary to law. As

explained in Cloudview's briefs below, the practical effect of singling out Cloudview's property, already zoned as "residential," for use as "open space," was to "downzone" the property. Whether or not the City's action was "technically" downzoning, or something else, that action was contrary to law under the same principles that apply to downzoning.

The City's complaint that the trial court "improperly" acted as a factfinder (brief in chief at 17-18) is incorrect. Although this was in part an administrative appeal under NMRA 1-074, that "appellate" jurisdiction did not limit the trial court's "original" jurisdiction to decide other issues as well. *State v. City of Sunland Park*, 129 N.M. 151, 3 P.3d 128 (Ct. App. 2000); *Maso v. Tax & Rev. Dep't*, 135 N.M. 152, 85 P.3d 276 (Ct. App. 2004). Cloudview moved for summary judgment on all counts of the City's complaint (which was separate and distinct from Cloudview's administrative appeal), each of which asserted in one way or another that the City owned Parcel F, or at least owned an easement for "undevelopable open space in perpetuity." The trial court correctly concluded that the material facts on this issue were undisputed, that Cloudview was a bona fide purchaser, and that, as between the City and Cloudview, the City owned only a "drainage easement." RP 574-575. There was nothing "improper" about the trial court's "factfinding" in that regard; that is a trial court's job when presented with undisputed facts.

To the extent the City is contending that the trial court was legally or factually wrong in its determination about Cloudview's BFP status, that issue is addressed at length above. To the extent the City maintains that only the City, acting as "factfinder" in the administrative proceeding, could address the BFP issue, that is plainly wrong, for the reasons just stated related to a court's concurrent appellate and original jurisdiction.

The City does contend that the trial court considered evidence that was not before the City when it made its administrative decision. That is simply untrue, and became an issue based solely on the City's unsuccessful effort to limit the administrative record by cherry-picking from the actual file only those portions of the record the City wanted the trial court to see. The trial court rejected that attempt and required the City to include in the record everything that had been submitted to the City during the entire administrative proceeding. Supp. RP 912, 1052, 1132. Now the City complains that "none of the documents in the supplemental record were considered by the Governing Body when it made the decision from which Cloudview appeals." Brief in Chief at 29. However, the City offers no factual support for that assertion; no one really knows what the Governing Body "considered" when it made its decision. More importantly, whether or not the City actually "considered" all the evidence before it, as it was required to do, is not determinative of what the trial court could consider in ruling

on the administrative appeal. What matters is what was actually contained in the "record."

The City failed to file with the trial court a complete "record" from the administrative proceeding below, as required by law. NMRA 1-074(H) (". . . the agency shall file with the clerk of the district court the record on appeal . . . [which] shall consist of . . . a copy of all papers and pleadings filed in the proceedings of the agency")(emphasis added). Cloudview moved to supplement the record with the remaining "papers and pleadings filed in the proceedings of the agency." The trial court ordered the City to do so. The "whole record" must be considered by the trial court in addressing the administrative appeal. *Smyers v. City of Albuquerque*, 140 N.M. 198, 141 P.3d 542 (Ct. App. 2006); *Anaya v. New Mexico State Personnel Bd.*, 107 N.M. 622, 762 P.2d 909 (Ct. App. 1988) (explaining that the court "independently examines the entire administrative record"); *Perkins v. Department of Human Services*, 106 N.M. 651, 748 P.2d 24 (1987).

Finally, the City contends that Cloudview's administrative appeal was untimely. Cloudview timely appealed the City's decision by seeking judicial review within 30 days, as required. Under New Mexico law, "a person aggrieved by a final decision [of a zoning authority] may appeal the decision to district court by filing in district court a notice of appeal within thirty days of the date of filing

of the final decision." NMSA § 39-3-1.1; NMSA § 3-21-9. It is undisputed that Cloudview appealed the City's decision within 30 days.

The City's decision was issued on November 10, 2005. Twenty-eight (28) days later, on December 8, 2005, Cloudview appealed the decision in federal district court pursuant to NMSA §§ 3-21-9 and 39-3-1.1. *See Cloudview Estates v. City of Rio Rancho, et al.*, No.05-01283 MV/JPL (D.N.M.) (Complaint at 1, 7). Cloudview also filed constitutional claims against the City pursuant to 42 U.S.C. § 1983 on due process and equal protection grounds.

Nearly a year later, on October 6, 2006, the federal court dismissed Cloudview's federal constitutional claims without prejudice on grounds that they were not ripe for determination in federal court until Cloudview pursued its state law remedies in state court. The federal court elected against retaining supplemental jurisdiction over Cloudview's appeal of the City's decision. *See* Memorandum Opinion and Order (RP at 81-92) ("The Court finds no compelling reason to exercise supplemental jurisdiction over Plaintiff's state law claim."). On October 23, 2006, Cloudview filed its answer to the City's October 2, 2006, declaratory judgment action, and again sought judicial review of the City's decision.

The City moved to dismiss Cloudview's appeal as untimely, arguing as it does here, that Cloudview was required to refile its appeal within two (2) days of

the federal court's order. The trial court ruled that Cloudview was not dilatory, and that the time for filing Cloudview's appeal was tolled during the federal proceeding. *See* Transcript of 4/9/07 at 25-28. The trial court reasoned, *inter alia*, that pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A), Cloudview had 30 days to appeal the federal court's ruling, during which time the federal district court retained jurisdiction to reconsider or take other action. The trial court ruled that any limitations period was tolled, and that the result sought by the City was simply not fair.

> They filed their notice of appeal within the time period set up by the rules to appeal to the Tenth Circuit to ask the Judge in federal court to reconsider her decision. And so I think, in all fairness, they should be given that 30 days. That's the reason I'm giving them 30 days, not the one day that you allege in your pleadings.

Tr. 4/9/07 at 28.

"New Mexico has adopted an 'equitable' or nonstatutory tolling principle alongside the statutory tolling provisions in NMSA 1978, Sections 37-1-14, 37-1-9 and 37-1-12." *Gathman-Matotan Architects and Planners, Inc. v. State, Dept. of Finance and Admin., Property Control Div.*, 109 N.M. 492, 495, 787 P.2d 411, 414 (1990). "When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure." *Bracken v.*

Yates Petroleum Corp., 107 N.M. 463, 466, 760 P.2d 155, 158 (1988) (quoting *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 467, 82 S.Ct. 913, 916, 8 L.Ed.2d 39 (1962). In *Bracken*, the court overruled *Gutierrez* – the case primarily relied upon by the City. "[T]he Court in *Bracken* clearly applied the principle that . . . the filing of an action later dismissed without prejudice for reasons such as . . . a federal court's discretionary refusal to entertain pendent jurisdiction tolls the statute of limitations applicable to the claim." *Gathman*, 109 N.M. at 494, 787 P.2d at 413. It is undisputed that Cloudview filed a timely appeal in federal court. Under *Bracken*, any statute of limitations was tolled during that proceeding. Cloudview refiled that appeal in state court while the federal court still retained jurisdiction, and therefore its appeal was timely.

The Court should otherwise apply the doctrine of equitable tolling. The "core requirements" of equitable tolling are: (1) timely notice to defendant in filing the first claim; (2) lack of prejudice to defendant in gathering evidence to defend against the second claim; and, (3) good faith and reasonable conduct by the plaintiff in filing the second claim. *Estate of Gutierrez by Haney v. Albuquerque Police Dept.*, 104 N.M. 111, 717 P.2d 87 (Ct. App. 1986). All of those requirements are satisfied here. Unlike *Guitierrez*, Cloudview did not have a hearing on the merits of its federal claims against the City in federal district court, but rather all of its claim were dismissed at the outset without prejudice on grounds

of ripeness. And unlike *King v. Lujan*, 98 N.M. 179, 646 P.2d 1243 (1982), this is not a case where Cloudview's initial claim was dismissed for failure to prosecute. Strictly applying a 30 day limitations period in the way proposed by the City would unfairly deny plaintiff's day in court on a timely filed appeal.

CONCLUSION

For the reasons stated above, Cloudview respectfully requests that the trial court's rulings be affirmed in all respects.

FOSTER, RIEDER & JACKSON, P.C.

By: _____

J. Douglas Foster
Travis G. Jackson
Attorneys for Cloudview Estates
P.O. Box 1607
Albuquerque, NM 87103-1607
Telephone: (505) 767-0577

I hereby certify that a true
and correct copy of the foregoing
pleading was mailed to

Randy S. Bartell, Esq.
Montgomery & Andrews, PA
P. O. Box 2307
Santa Fe, NM 87504-2307

this 31st day of December, 2009.

FOSTER, RIEDER & JACKSON, P.C.

By: _____
J. Douglas Foster