IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

CITY OF RIO RANCHO,

Plaintiff-Appellant,

v.

Ct. App. No. 29,510

CLOUDVIEW ESTATES, LLC,

Defendant-Appellee.

BRIEF IN CHIEF

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

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STATEMENT REGARDING RECORD PROPER

In this case, the district court clerk provided the Court with a "Supplemental Record Proper," which does not include pleadings filed prior to August 19, 2008. The Supplemental Record Proper is a supplement to the Record Proper previously provided to this Court in a related case, *City of Rio Rancho v. Amrep Southwest, Inc.*, Ct. App. No. 28,709. The Record Proper and Supplemental Record Proper are bates-numbered sequentially as a whole. For the Court's convenience, references to each will be indicated as RP [page number] and SRP [page number].

STATEMENT OF COMPLIANCE

The body of this brief-in-chief contains 10,983 words and therefore complies with Rule 12-213(F)(3) NMRA. *See* Rule 12-213(A)(1)(c), (G).

TABLE OF AUTHORITIES

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OTHER AUTHORITIES

Plaintiff-Appellant City of Rio Rancho ("City") hereby submits its Brief in Chief, pursuant to the Court's Order granting the City's Application for Interlocutory Appeal and Rule 12-213 NMRA. Four orders are the subject of this appeal:

1. Order denying the City's motion to dismiss the appeal of the City's Decision, entered April 16, 2007 ("April 2007 Order"), RP 191;
2. Order granting partial summary judgment to Defendant-Appellee Cloudview Estates, LLC ("Cloudview"), entered May 9, 2008 ("May 2008 Order"), RP 574;
3. Order to supplement the administrative record, entered Jan. 9, 2008 ("January 2008 Order"), SRP 1132; and
4. Order reversing the City's Decision and granting summary judgment to Cloudview on its claim for inverse condemnation, entered April 30, 2009 ("April 2009 Order"), SRP 1191.

I. RELATED CASE PENDING BEFORE THIS COURT

City of Rio Rancho v. Amrep Southwest, Inc., Ct. App. No. 28,709 (*City v. Amrep*) arises from the same action. Therein, the City appeals the district court's order entered April 29, 2008 ("April 2008 Order") granting summary judgment on all claims in favor of co-defendant below, Amrep Southwest, Inc. ("Amrep") and denying summary judgment as to the City's Count I. RP 571.

II. SUMMARY OF PROCEEDINGS

A. Nature of the Case

This case concerns a public easement that covers the entirety of a ten-acre parcel of land known as "Parcel F." Cloudview filed an application to vacate the easement, nominally designated as a "drainage easement," which the City denied. Acting in its appellate capacity, the district court reversed the City's Decision. Acting in its original jurisdiction, the court granted summary judgment in favor of Cloudview on all of the City's claims and found against the City as to liability on Cloudview's claim for inverse condemnation. The court erred as a matter of law and because material facts are disputed.

B. Course of Proceedings and Disposition Below

1. Administrative Proceedings Before the City

On November 18, 2004, Cloudview submitted a preliminary plat request to the City's Planning and Zoning Board ("PZB"), requesting approval of a subdivision development of 30 houses. ROA 71. This request was approved by the PZB on February 8, 2005, by a vote of 4-3. ROA 2, 71, 192. Neighboring property owners appealed to the City's Governing Body. ROA 2. The Governing Body remanded the matter to the PZB to address vacation of the easement, in light of relevant background material that was not before the PZB in its previous decision. ROA 2, 71, 203 at 33:28-34:00, 35:15-40:00.

On remand, the PZB denied Cloudview's application to vacate the easement. ROA 74, 75-77. Cloudview appealed to the Governing Body. ROA 10. After considering evidence and argument from Cloudview and City staff and public comments from landowners in the existing subdivision surrounding Cloudview's proposed development, the Governing Body denied Cloudview's application. ROA 201, 205 (Disc 1 at 42:51-1:35:38). *See generally* ROA. The Governing Body issued its final decision ("City's Decision") on November 10, 2005. *See* ROA 199-202.

2. Judicial Proceedings

On December 8, 2005, Cloudview filed a complaint against the City in federal district court, asserting various constitutional claims and requesting review of the City's Decision. *See Cloudview Estates, LLC v. City of Rio Rancho*, Civ. No. 05-01283 MV/WPL (D.N.M.); RP 114. The federal court dismissed Cloudview's complaint without prejudice on October 5, 2006. RP 92.

On October 2, 2006, the City filed the complaint in the instant case. RP 1-11. Cloudview asserted a counterclaim, requesting review of the City's Decision pursuant to NMSA 1978, §39-3-1.1 (1999) and NMSA 1978, §3-21-9 (1999) and asserting in pertinent part a claim for inverse condemnation. RP 30, 36. The City filed a partial motion to dismiss *inter alia* Cloudview's appeal of the City's

Decision, based in part on lack of timeliness. RP 78-106. In the April 2007 Order, the court denied the City's motion with respect to timeliness. RP 191-92.

Thereafter, Amrep filed a motion for partial summary judgment, the City filed a cross-motion for summary judgment, and Cloudview filed a motion for summary judgment. RP 269, 321, 329, 457. In the April 2008 Order, the court granted Amrep's motion for partial summary judgment, dismissing all claims as to Amrep, and denying the City's cross-motion for summary judgment. RP 571-72. The April 2008 Order is the subject of appeal in *City v. Amrep*. In the May 2008 Order, the court granted summary judgment in favor of Cloudview on Counts I, III, IV, V, and VI of the City's Complaint. RP 574-75. With respect to Count II, the court granted summary judgment in Cloudview's favor, "but only to the extent that Count II alleges any interest in the subject property beyond a 'drainage easement.'" RP 575.

On November 10, 2008, Cloudview filed its statement of appellate issues and a motion to supplement the administrative record. SRP 912, 920. Also, on December 18, 2008, Cloudview filed a motion for partial summary judgment as to liability on its counterclaim for inverse condemnation. SRP 1068-69. In the January 2009 Order, the court ordered the City to supplement the administrative record. RP 1132-33. In the April 2009 Order, the court reversed the City's

Decision and granted summary judgment in favor of Cloudview as to liability on its inverse condemnation claim. SRP 1191-93.

C. Summary of Facts

1. Material Facts Before the City

The following facts were before the City. Parcel F is located within the Vista Hills West Unit 1 ("VHWU1") subdivision, which Amrep began developing in 1985. ROA 17, 20, 184. In 1985, the City's land use ordinance provided that the preliminary plat shall identify all developable land adjoining the land proposed to be subdivided. ROA 32. The current City ordinance provides the same. ROA 38.

Amrep did not identify Parcel F as developable land. ROA 16; *see* ROA 200, FOF 6. Rather, Amrep stated that specific areas with difficult topography, which include Parcel F, were "left in their natural state in areas set aside as open space." ROA 18, 23, 25; *see* ROA 200, FOF 12. Amrep identified Parcel F as open space in its subdivision application and in the VHWU1 preliminary plat. ROA 3, 16; *see* ROA 200, FOF 12. Amrep also identified Parcel F as open space in the approved Drainage Management Plan. ROA 200, FOF 12. Amrep further stated that the proposed VHWU1 subdivision included "40 acres of green area for park sites." ROA 20, 194. Based on these representations, the PZB approved the preliminary plat unanimously. ROA 3, 20.

Amrep also represented to purchasers of property in VHWU1 that Parcel F would remain open space. *See, e.g.*, ROA 81; *infra* at 34; *see also* ROA 201, FOF 15. The City and VHWU1 lot purchasers, as well as successor residents, have relied on Amrep's representations for almost twenty years. *See* ROA 81-183. For example, the City has carried Parcel F on its inventory of park land since the final plat for VHWU1 was approved. *See, e.g.*, ROA 5, 49, 54; *see also* ROA 201, FOF 15. The City's 2005 Parks & Recreation Master Plan referred to the VHWU1 parcels designated "drainage easement" as connector trails and open space. ROA 78-79; *see* ROA 56-63; ROA 201, FOF 15.

On the final VHWU1 plat, Parcel F was designated as a "drainage easement" and granted to the City in the "DEDICATION." ROA 23, 25. Parcel F, which is an elevated area of the subdivision, has never had any drainage control function and is not needed for drainage control purposes. *See* ROA 194. Parcel F was re-labeled "drainage," instead of "open space," because of a previous dispute with Amrep regarding dedication of public lands under a settlement agreement and other pending subdivision approvals. ROA 29-30; *see Heit v. Amrep Corp.*, 82 F.R.D. 130, 132 (S.D.N.Y. 1979). The grant of drainage easements on the final plat, including Parcel F, concerns the same land as the forty acres of "green areas for park sites" that Amrep identified as open space in the preliminary plat and promised to set aside when it was seeking approval of VHWU1. ROA 16, 23, 25,

28. At that time, it was customary to refer to "[a]ll land areas other than home lots, public right-of-way, and utility easements . . . as "Drainage/Open Space parcels," in order to identify undevelopable property. ROA 29; *see* ROA 200, FOF 8.

In 1987, Amrep requested a replat of Parcel H in VHWU1. ROA 47-48. Parcel H consisted of 0.778 acre and was designated a drainage easement in the final VHWU1 plat. *Id.* In the application for replat, Amrep identified the use of Parcel H as "open space." *Id.* The City approved the replat for two lots, thereby vacating the easement. *Id.*

In 2004, Amrep conveyed Parcel F to an intermediary party ("the Mares group"), who thereafter conveyed Parcel F to Cloudview for purposes of residential development. ROA 166, 190. At that time, Cloudview knew that an easement held by the City existed over the entirety of Parcel F and that any development of Parcel F required vacation of the easement by the City. ROA 194; *see also* ROA 190.

2. The City's Findings

In addition to the findings indicated above, the City made *inter alia* the following findings: Amrep and the City intended Parcel F to be used as open space, and the requirement for open space was a condition for plat approval of VHWU1. ROA 199, FOF 4. If Parcel F was not included in the 40 acres of green area for park sites promised by Amrep, Amrep would have failed to satisfy a condition of

the VHWU1 plat approval. ROA 200, FOF 11. Parcel F had and continues to have a role in satisfying the purpose of subdivision regulation set forth in ordinance §155.04, by providing natural resource or open space areas for the public. ROA 199, FOF 5; *see* ROA 36. Parcel F was not identified by Amrep as developable property, notwithstanding the requirements in the subdivision ordinance in effect when VHWU1 was approved and in the current ordinance. ROA 199-200, FOF 6; *see* ROA 32, 38. Development of Parcel F would be contrary to the City's planning principles manifested in the ordinances in effect now and at the time the VHWU1 plat was approved. ROA 200, FOF 7; *see also* ROA 200-201.

3. Additional Evidence in the District Court

From the beginning, the property currently identified as Parcel F was designated for use as a park or "open space." RP 356-57. When the preliminary plat was submitted for approval, Amrep intended the City to rely on Amrep's representation that Parcel F would remain open space. *Id.* At the time the VHWU1 plat was approved, drainage areas "were utilized for open or park space as a development norm." RP 344; RP 331-32.

Amrep knew the City had relied on Amrep's representations that Parcel F was intended to be open space in perpetuity, as Amrep possessed copies of the City's inventories of park land but never objected to the City's inclusion of Parcel

F in those inventories. *See* RP 372-76 (documents received from Amrep in discovery); *see also* RP 342 at 49:24-51:18; RP 425 at 26:11-29:22.

The deeds that conveyed Parcel F from Amrep to the Mares group and from the Mares group to Cloudview were subject to all easements of record. RP 475, 477. Amrep, the Mares group, and Cloudview knew that an easement held by the City existed over the entirety of Parcel F and that any development of Parcel F required vacation of the easement by the City. RP 526 at 13:17-25; RP 528 at 20:20-25; RP 535; *see also* ROA 194, ROA Supp Rec 7, RP 477.

Additional material facts are cited below when relevant.

III. STANDARD OF REVIEW

A. Administrative Appeal

This Court reviews the district court's appellate actions under an administrative standard of review. *Lewis v. City of Santa Fe*, 2005-NMCA-032, ¶ 6, 137 N.M. 152, 108 P.3d 558. The Court conducts "the same review . . . as the district court sitting in its appellate capacity, while at the same time determining whether the district court erred in the first appeal." *Id.* (internal quotation marks and citation omitted). The City's Decision should be affirmed unless Cloudview establishes that the City did not act in accordance with law; that the City acted fraudulently, arbitrarily or capriciously; or that the final decision was unsupported

by substantial evidence. §39-3-1.1(C); Rule 1-074(Q) NMRA; *Selmeczki v. N.M. Dep't of Corrections*, 2006-NMCA-024, ¶ 13, 139 N.M. 122, 129 P.3d 158.

This Court and the district court must evaluate whether the whole record supports the administrative decision, and not whether a different result could have been reached. *N.M. State Bd. of Psychologist Examiners v. Land,* 2003-NMCA-034, ¶ 5, 133 N.M. 362, 62 P.3d 1244. An appellate court "must view the evidence in the light most favorable to the decision of the agency and must defer to the agency's factual determinations if supported by substantial evidence." *Id.* A court cannot substitute its judgment for that of the decisionmaking body, nor reweigh the evidence. *Id.*; *accord N. M. Indus. Energy Consumers v. N.M. Pub. Reg. Comm'n*, 2007-NMSC-053, ¶¶ 13, 24, 142 N.M. 533, 168 P. 3d 105. The court should defer to the decisionmaker's interpretation of its own regulations, when the issue implicates the determination of a fundamental policy within the scope of the decisionmaker's function. *County of Bernalillo v. N.M. Pub. Reg'n Comm'n*, 2000-NMSC-035, ¶ 10, 129 N.M. 787, 14 P.3d 525; *Land*, 2003-NMCA-034, ¶ 5.

When acting in its appellate role, the district court does not engage in factfinding. *Cadena v. Bernalillo County Bd. of County Comm'rs*, 2006-NMCA-036, ¶ 18, 139 N.M. 300, 131 P.3d 687. If additional factfinding is necessary, the case must be remanded to the agency for further taking of evidence and factfinding. *See id.* ¶¶ 18-19.

B. Summary Judgment

Summary judgment is reviewed de novo. *Stennis v. City of Santa Fe,* 2008-NMSC-008, ¶ 12, 143 N.M. 320, 176 P.3d 309. The facts are viewed in the light most favorable to the non-moving party and to a trial on the merits; judgment should not be granted when issues of material fact remain or when equally logical though conflicting inferences can be drawn from the basic facts. *Transamerica Ins. Co. v. Sydow*, 107 N.M. 104, 105, 753 P.2d 350, 351 (1988); *Silverman v. Progressive Broad., Inc.*, 1998-NMCA-107, ¶ 24, 125 N.M. 500, 964 P.2d 61; *Twin Forks Ranch v. Brooks*, 120 N.M. 832, 835, 907 P.2d 1013, 1016 (Ct. App. 1995); *see* Rule 1-056 NMRA.

The non-moving party need not convince the trial court that evidence supports all the elements of its case, but rather need only show that one or more factual issues appear to be disputed. *Bartlett v. Mirabal*, 2000-NMCA-036, ¶ 17, 128 N.M. 830, 999 P.2d 1062. A fact is disputed when "the evidence is capable of an equally reasonable but opposite inference." *Twin Forks*, 120 N.M. at 836, 907 P.2d at 1017; *see also Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co.*, 77 N.M. 730, 732, 427 P.2d 249 (1967). "Where reasonable minds could differ," summary judgment is not proper. *Twin Forks*, 120 N.M. at 836, 907 P.2d at 1017.

IV. PRESERVATION

The City preserved the issues herein in briefing and hearings below. The City's arguments were raised in Counterdefendants' Partial Motion to Dismiss and Memorandum in Support, RP 78, 99; TR 04/09/07; Plaintiff's Response to Defendant Cloudview's Motion for Summary Judgment and Cross-Motion, RP 511; TR 04/09/08; TR 05/09/08; Plaintiff's Response to Motion to Supplement Record, Exhibit A to the City's Motion to Supplement Record Proper (filed in this Court on October 26, 2009); TR 01/08/09; Plaintiff's Response to Cloudview's Statement of Appellate Issues, SRP 1022, TR 03/13/09; and Response of Plaintiff/Counterdefendant City of Rio Rancho in Opposition to Motion for Partial Summary Judgment on Inverse Condemnation Claim, Exhibit A to the City's Second Motion to Supplement Record Proper (filed in this Court on November 2, 2009); TR 03/13/09.[1]

[1] Plaintiff's Response to Cloudview's Statement of Appellate Issues and Response to Cloudview's Motion for Summary Judgment on Inverse Condemnation Claim were inadvertently faxed to the judge's chambers, instead of the district court clerk's office, and are therefore not in the Record Proper. To rectify this omission, the City filed motions to supplement the record proper in this Court pursuant to Rule 12-209(C) NMRA, as noted above. Cloudview does not dispute that the City's issues were preserved. Response in Opposition to Appellant's Motions to Supplement Record Proper at 4 (filed Nov. 10, 2009).

V. ARGUMENT

The district court erred in (1) reversing the City's Decision, (2) granting summary judgment to Cloudview on its counterclaim for inverse condemnation, and (3) granting summary judgment to Cloudview on all of the City's claims.

In reversing the City's Decision, the court erred for three reasons. First, the court lacked jurisdiction because Cloudview's request for review of the City's Decision was untimely. Second, the court improperly reweighed the evidence, finding facts that should have been reserved for the factfinder, and substituted its own decision for that of the City. Third, Cloudview provided no legal authority to the City, or to the district court, that requires the City to vacate a public easement nominally labeled as "drainage" merely because it is not used to control surface waters.

In granting summary judgment on Cloudview's inverse condemnation claim, the court erred because its ruling rested on the improper reversal of the City's Decision and because Cloudview had no property interest of which it was deprived. In the alternative, the court erred because disputed questions of fact exist which should have been reserved for the jury.

In granting summary judgment to Cloudview on the City's claims, the court erred in relying on its improper findings and on its prior rulings with regard to Amrep, as explained in the City's briefs in *City v. Amrep*. The court erred as a

matter of law and because crucial questions of fact must be resolved by the factfinder.

A. The district court erred in reversing the City's Decision.

In reversing the City's Decision, the court erred because (1) Cloudview's notice of appeal was untimely; (2) the court improperly reweighed the evidence before the City, made findings of fact based on evidence submitted in the original jurisdiction proceedings, and thereafter relied on those findings to reverse the City's Decision; and (3) the City's Decision was not arbitrary and capricious, but rather reasoned and deliberate, in accordance with law, and supported by substantial evidence.

1. Cloudview's appeal of the City's Decision was untimely.

Cloudview's notice of appeal was not filed in state district court until October 23, 2006, almost one year after the City's Decision was entered on November 10, 2005. Because Cloudview's notice of appeal was untimely, the district court lacked jurisdiction to review the City's Decision.

Cloudview sought review of the City's Decision under §39-3-1.1(C), which provides that a notice of appeal shall be filed in state district court within 30 days of the date the final decision is filed. *See also* Rule 1-074(E) NMRA; *Paule v. Santa Fe County Bd. of County Commissioners,* 2005-NMSC-021, ¶ 11, 138 N.M. 82, 117 P.3d 240. When an appeal is not filed within the statutory period, the

district court lacks subject matter jurisdiction to proceed. *Serna v. Bd. of County Comm'rs,* 88 N.M. 282, 283-84, 540 P.2d 212, 213-14 (1975).

In this case, the City's Decision was issued November 10, 2005. ROA 199-202. Cloudview filed a complaint in federal court on December 8, 2005, requesting *inter alia* review of the City's Decision. *See Cloudview Estates*, No. 05-01283 MV/WPL (D.N.M.) (Complaint at 1, 7). The federal court dismissed Cloudview's action in federal court on October 6, 2006. RP 92. Cloudview filed its counterclaim in the instant case on October 23, 2006, requesting review of the City's Decision, *nearly one year* after the City issued the final decision. RP 27, 36.

Cloudview argued below, and the district court apparently agreed, that its time for appeal was tolled by operation of NMSA 1978, §37-1-14 (1880). RP 113-14. The district court ignored express statutory language and clear precedent to the contrary.

NMSA 1978, §37-1-17 (1880) makes it clear that §37-1-14 does not apply: "None of the preceding provisions of this chapter shall apply to any action or suit which, by any particular statute of this state, is limited to be commenced within a different time[.]" As explained in *Estate of Gutierrez by Haney v. Albuquerque Police Dept.,* 104 N.M. 111, 114, 717 P.2d 87, 90 (Ct.App. 1986), *overruled on other grounds by Bracken v. Yates Petroleum Corp.,* 107 N.M. 463, 760 P.2d 155 (1988), §37-1-17 "indicates that the preceding statute upon which plaintiff relies,

§37-1-14, has no applicability when a specific statute creates a different time within which to file suit, or provides a specific limitation period."

Cloudview sought review of the City's Decision under §39-3-1.1(C), which provides a limitation period distinct from the limitation periods in the provisions preceding §37-1-17. RP 36. Thus, the tolling period provided by §37-1-14 does not apply to Cloudview's request for review of the City's Decision. *See Gathman-Matotan Architects and Planners, Inc. v. Dept. of Finance and Admin.*, 109 N.M. 492, 493-44, 787 P.2d 411, 412-13 (1990); *Gutierrez*, 104 N.M. at 114, 717 P.2d at 90.

In *Bracken*, our Supreme Court established that a limitations period is tolled while the first case is pending. 107 N.M. at 466, 760 P.2d at 158. Assuming for purposes of argument only that this principle applies here, Cloudview's appeal is still untimely. Section 39-3-1.1 provides 30 days to appeal. The City's Decision was issued on November 10, 2005. Cloudview filed its notice of appeal in federal court 28 days later. RP 159. Assuming the federal action tolled the limitation period, Cloudview had two days after dismissal, until October 8, 2006, to file its request for review of the City's Decision. §39-3-1.1. However, Cloudview's request for review was not filed until seventeen days after the federal court's decision was entered. RP 92. Thus, even if Cloudview's time for appeal was

tolled while the federal lawsuit was pending, Cloudview's appeal is untimely. The district court lacked jurisdiction to review the City's Decision.

2. The district court improperly reversed the City's Decision based on the court's own findings.

In reversing the City's Decision, the district court improperly relied on its findings in the May 2008 Order. *See, e.g.*, TR 03/13/09 at 41:9-42:14; RP 574-75; *see also* SRP 931-32, 1015-20; 1092-94.

In the May 2008 Order, the court made three findings:

1. that Cloudview had no knowledge or constructive notice of any claim by the City to any interest in the subject property greater tha[n] a "drainage easement;"

2. that Cloudview was a "bona fide purchaser for value" of the subject property with respect to any claim by the City to any interest greater tha[n] a "drainage easement;" and

3. that the only property interest held by the City in the subject property is a "drainage easement." RP 574-75.

Based on these findings, the Court found that the City's Decision was contrary to law and not supported by substantial evidence. SRP 1191. The court erred by acting as factfinder. Moreover, the court's findings are not supported by substantial evidence.

a. The district court erred by acting as factfinder.

Questions of fact are for the factfinder. *Pollock v. Ramirez*, 117 N.M. 187, 191-92, 870 P.2d 149, 153-54 (Ct. App. 1994). In this case, the district court did

not sit as factfinder. With respect to the City's Decision, the City acts as factfinder. If additional factfinding is necessary, the case must be remanded to the agency for further taking of evidence and factfinding. *See Cadena*, 2006-NMCA-036, ¶¶ 18-19. With respect to the court's original jurisdiction in this case, the jury acts as factfinder. *Ryan v. N.M. State Hwy. & Transp. Dep't*, 1998-NMCA-116, ¶ 12, 125 N.M. 588, 964 P.2d 149 (noting that factual questions are for the jury).

The court's error is highlighted by the fact that its rulings and findings were made more than two years after the City's Decision, and at least one finding was directly contrary to that made by the City. *Compare* RP 574-75, ¶ 3 *with* ROA 199, ¶ 4. Thus, the court erred in reweighing the evidence before the City and in considering evidence and argument that were not before the City when it reached its decision. *Pickett Ranch, LLC v. Curry*, 2006-NMCA-082, ¶ 3, 140 N.M. 49, 139 P.3d 209; *Land*, 2003-NMCA-034, ¶ 5.

In its Statement of Appellate Issues, Cloudview argued that the court "has already determined that the subject property is not and has never been open space" and that this "ruling is the law of the case . . . mak[ing] the City's decision invalid by definition." SRP 921; *see also* SRP 931. Cloudview is wrong, and the court erred in reversing the City's Decision in reliance on the same.

Under the doctrine of law of the case, "a decision by an *appeals court* on an *issue of law* made in one stage of a lawsuit becomes binding on *subsequent* trial

courts as well as *subsequent* appeals courts during the court of that litigation." *State ex rel. King v. UU Bar Ranch, Ltd. P'ship*, 2009-NMSC-010, ¶ 21, 145 N.M. 769, 208 P.3d 816 (emphasis added). To the extent that a question is "purely factual," the law of the case does not apply. *Id.* Moreover, where an appellate court has not ruled on an issue of law and remanded the case back to district court, the doctrine of law of the case has no applicability. *See id.*

b. The court's findings are not supported by the record.

Even if the court had acted properly in making these findings, which the City vigorously denies, the May 2008 Order should be reversed because the record does not support the court's findings. Rather, evidence in the record establishes as a matter of law that the nature and extent of the easement is to provide open space for public use in perpetuity, as intended by Amrep and the City in 1985. Further, evidence in the record establishes that Cloudview had notice of the nature and extent of the easement and thus Cloudview was not a bona fide purchaser. In the alternative, these questions of fact remain disputed and must be resolved by the appropriate factfinder.

i. The nature and extent of the easement is not limited to drainage.

The district court found that "the only property interest held by the City in the subject property is a 'drainage easement.'" RP 574-75. The court erred as a matter of law because it did not consider the intent of Amrep and the City as to the

nature and extent of the easement. Rather, based on the "law on easements," the district court concluded that the nature and extent of the easement was limited to its nominal designation on the final plat and that therefore the City was required to vacate the easement because no use for drainage existed. TR 03/13/09 at 37:13-22, 42:1-7.

The court relied on the principle that an easement can only burden that part of the property that serves the purpose of the easement. TR 03/13/09 at 35:20-36:5, 38:10-13. On this basis, the court concluded that the easement had to be vacated or terminated, or compensation paid, because the parties agreed that Parcel F could not be used for drainage. TR 03/13/09 at 27:11-16, 37:16-22. The court erred, however, in determining that the easement had to be terminated under the facts of this case.

The cessation of purpose doctrine governs the termination of an easement when the intended purpose is no longer served. *Olson v. H & B Props., Inc.*, 118 N.M. 495, 498, 882 P.2d 536, 539 (1994); Jon W. Bruce & James W. Ely, Jr., The Law of Easements and Licenses in Land, §10:8 (2009). This doctrine "is based upon the assumption that the parties intended the easement to terminate upon cessation of its purpose." *Olson*, 118 N.M. at 498, 882 P.2d at 539. Accordingly, in applying the cessation of purpose doctrine, the court must first determine the

particular purpose the parties intended in creating the easement. *Id.*; *accord Sitterly v. Matthews*, 2000-NMCA-037, ¶ 23, 129 N.M. 134, 2 P.3d 871.

The intended purpose of an easement is construed according to the intent of the parties by examining the language of the granting instrument and considering "any concomitant circumstances which have a legitimate tendency to disclose the intention of the parties." *Olson*, 118 N.M. at 498, 992 P.2d at 539; Bruce & Ely, §10:8, at 10-18 (stating that courts "tend to favor the grantee with a broad interpretation" of the parties' intent). When the facts are disputed, intent of the parties must be determined by the factfinder. *See Bloom v. Hendricks*, 111 N.M. 250, 253, 804 P.2d 1069 (1991).

Once the factfinder has determined the intended purpose of the easement, the factfinder considers whether that purpose continues to exist. *Sitterly*, 2000-NMCA-037, ¶ 22. If the parties' intended purpose no longer exists, the court *may* terminate the easement. *Olson*, 118 N.M. at 498, 882 P.2d at 539. However, "[e]ven when it is clear that the primary purpose for an easement no longer exists, the servitude may not be terminated under the doctrine if it continues to serve a collateral or secondary purpose." Bruce & Ely, §10:8 at 10-18 to 10-19. A court may also revise the granting instrument to satisfy the intended purpose of the easement. *Olson*, 118 N.M. at 499, 882 P.2d at 540.

The court did not attempt to determine the intended purpose of the easement. Rather, the court assumed that the only purpose of the easement was drainage—a purpose which all parties agreed was never intended. *See* RP 575, ¶ 3; TR 03/13/09 at 37:16-22; ROA 194. Implicit in the district court' assumption is the conclusion that the 1985 dedication was a useless act from its inception. In so concluding, the court disregarded the City's finding that Amrep and the City intended Parcel F to be used as open space. ROA 199-20, ¶¶ 4, 8-12; *see Sitterly*, 2000-NMCA-037, ¶ 22. Because the court failed to consider the intent of the parties, the court erred in determining that the City should have vacated the easement.

ii. Cloudview is not a bona fide purchaser because it had constructive notice of the nature and extent of the easement.

The court erred in finding that Cloudview did not have constructive notice that the City's interest in Parcel F was more than a "drainage easement" and in finding that Cloudview was therefore a bona fide purchaser "with respect to any claim by the City to any interest greater tha[n] a 'drainage easement.'" *See* RP 574-75. Cloudview is not a bona fide purchaser because it had constructive notice of the defect in fee simple title to Parcel F. The record establishes that Cloudview had actual, constructive and/or inquiry notice of the prohibition against residential development resulting from the public use easement and of the circumstances

surrounding the easement which rendered its vacation by the City problematic at best.

A person has constructive notice when (1) he has knowledge of facts that would lead an ordinarily prudent person to investigate further and (2) a reasonably diligent investigation would lead to knowledge of the requisite facts. *Dunne v. Petterman*, 52 N.M. 284, 287-88, 197 P.2d 618, 621-22 (1948); *Hunt v. Ellis*, 27 N.M. 397, 401, 201 P. 1064 (1921). In the application of this rule, each case is governed by the circumstances. *Hunt*, 27 N.M. at 401, 201 P. 1064. In our circumstances, Cloudview had knowledge of facts that would have led an ordinarily prudent person to investigate the history and reasons for designating a drainage easement over the entirety of Parcel F. A reasonably diligent investigation would have revealed that Parcel F was not developable, due to the nature and extent of the easement.

Cloudview knew that a drainage easement existed over the entirety of Parcel F, ROA 194, RP 526 at 13:16-25, that the topography precluded its use as such, ROA 194; RP 527 at 17:3-8; RP 528 at 21:8-15; RP 529 at 22:1-18; RP 530 at 42:11-13, that the drainage easement would have to be vacated before the City would permit the subdivision to proceed, ROA 192, 194; RP 528 at 20:20-25; that the City required Cloudview to cite all previous drainage studies and reports in its new drainage report for the area, RP 491; and that Cloudview's inquiry with the

City resulted in an indefinite answer because no person at the place of inquiry had any knowledge as to the history of Parcel F's designation as a drainage easement. RP 528 at 21:16-23, RP 529 at 25:6-13.

Cloudview's knowledge arises from one of its members, Martin Garcia, whose professional experience includes the development and review process for subdivisions. RP 526 at 10:2-12. Mr. Garcia's experience also includes consulting and feasibility studies for private developers. RP 526 at 10:18-12:2. Armed with the foregoing knowledge, an ordinarily prudent person of Mr. Garcia's experience would have diligently pursued further investigation, which would have revealed the nature and extent of the easement. *See Dunne*, 52 N.M. at 287-88, 197 P.2d at 621-22; *Hunt*, 27 N.M. at 401, 201 P. 1064.

An ordinarily prudent person would have undertaken an inquiry into the City's records of VHWU1, interviewed persons with historical knowledge of the drainage easement designation, and investigated and pursued the process of vacating the easement *prior to purchase*. Yet, Cloudview's only inquiry with the City yielded no answers regarding the reason Parcel F was designated a drainage easement. RP 528 at 21:16-23, RP 529 at 25:10-13. At that time, Mr. Garcia was merely told by staff who had no knowledge as to the history of Parcel F that the "easement *could* be vacated" and, according to Mr. Garcia, "that's all [Cloudview] really needed." RP 529 at 23:3-15, RP 529 at 25:6-13. Thus, Cloudview

purchased Parcel F and pursued development of the thirty-home subdivision, despite a drainage easement covering all ten acres, based on Mr. Garcia's impression from his meeting with the City staff that "the vacation would happen" when the final plat came out and that the "drainage easement would go away" when the plat was recorded. RP 528 at 20:20-21:7.

Due diligence is not served, however, by informally meeting with City employees who do not know the property at issue and who are merely aware that, generally, an easement could be vacated. Due diligence does not rest with reliance on brief, general representations made by City employees prior to beginning the formal process of applying for a permit to build a subdivision. *Gallup Westside Dev't, LLC v. City of Gallup*, 2004-NMCA-010, ¶ 19, 135 N.M. 30, 84 P.3d 78. An ordinarily prudent person with Mr. Garcia's knowledge would have investigated further before purchasing a property on which it planned to construct thirty homes. *See* RP 461, ¶ 7; *see also Twin Forks*, 1998-NMCA-129, ¶ 21 ("[T]he time to inquire as to the value of the property being sold is prior to sale, not after the bargain is struck."); *Am. Fed. Savings & Loan Assoc. v. Orenstein*, 265 N.W.2d 111, 112 (Mich. Ct. App. 1978) (stating that a purchaser of real estate has a duty to take notice of any adverse rights or equities of third parties when he has the means of discovery and he is put on inquiry); *accord Morse v. Howard Park Corp.*, 272 N.Y.S.2d 16, 22 (N.Y. Sup. Ct. 1966).

Moreover, prior to "purchasing" Parcel F, Cloudview failed to consult the City's development code as to the process for vacating the easement. RP 529 at 23:16-20; *see Holiday Mgmt. Co. v. City of Santa Fe*, 83 N.M. 95, 98, 488 P.2d 730 (1971); ROA 42-44. Further, Cloudview failed to fully investigate Amrep's and the City's reason for setting aside the entirety of Parcel F as a "drainage easement" when the topography precluded its use as such. Cloudview did not speak with any engineers or developers with previous experience in working with the City on subdivision applications and permitting. RP 529 at 24:1-6. Cloudview did not inquire with Cinfran Engineering, the company that produced the final plat. RP 529 at 24:13-20.

Cloudview knew the importance of investigating the designation of the entirety of Parcel F as a drainage easement. Indeed, Cloudview specifically conditioned its offer to purchase Parcel F on "[r]emoval of the designated drainage easement." RP 535. Yet Cloudview apparently waived this condition in its haste to acquire Parcel F.

Had Cloudview pursued a reasonably diligent inquiry, however, it would have discovered the following:

(1) Cloudview would have learned from the Drainage Management Plan for VHWU1 that Parcel F was intended to be open space. *See* RP 533.

(2) Cloudview would have learned from the preliminary plat for VHWU1 that Parcel F was intended to be open space. *See* RP 358.

(3) Cloudview would have learned from the former Director of the City's Development Department, Michael Springfield, that Parcel F was designated a drainage easement to satisfy the developer's obligation to convey open space for public use. *See* RP 331.

(4) Cloudview would have learned from the City's development code that Amrep was required to identify all developable land when it submitted the VHWU1 preliminary plat and that vacation of the drainage easement could be denied by the City if the interests of the contiguous landowners and others owning land within VHWU1 would thereby be adversely affected. ROA 32, 38, 42-44.

Clearly, Cloudview knew facts that would have led an ordinarily prudent person exercising reasonable due diligence to discover the nature and extent of the easement. Cloudview had actual notice that it was not entitled to build on Parcel F because of the easement and constructive, if not actual, notice that it was not entitled to vacation of the easement. Because Cloudview had notice of this defect in title to Parcel F, Cloudview is not a bona fide purchaser. The district court erred in determining otherwise.

c. The court erred by relying on evidence and argument that was not before the City.

An appellate court's review of an administrative decision is limited to the record before the final decision maker when it made the decision that is appealed. *Martinez v. State Eng'r Office*, 2000-NMCA-074, ¶ 48, 129 N.M. 413, 9 P.3d 657. Rule 1-074(H)(2) provides that the record on appeal shall consist of "all papers, pleadings, and exhibits filed in the proceedings of the agency, entered into or made a part of the proceedings of the agency, or actually presented to the agency in conjunction with the hearing." In addition, Rule 1-074(K)(2) requires the appellant in an administrative appeal before the district court to cite to the record showing how the issues were preserved in the proceedings before the agency. *See also Pickett Ranch, LLC*, 2006-NMCA-082, ¶ 3. The record on appeal may be supplemented or modified only "[i]f anything material . . . is omitted from the record on appeal *by error or accident.*" Rule 1-074(I) (emphasis added).

This Court has squarely addressed the issue:

> [I]n administrative appeals the district court is a reviewing court, not a fact-finder, and therefore may consider only evidence presented to the Board in the first instance. . . . Rule 1-074(I) cannot be read so broadly as to allow the addition of material in the record that was never presented to the Board in the first instance. . . . Therefore, only material that was in fact presented below but was mistakenly or inadvertently omitted from the record may be included in a supplemental record.

Martinez, 2000-NMCA-074, ¶¶ 48.

As is evident in the administrative record proper, the City fully complied with Rule 1-074 and *Martinez* when it filed the certified Record on Appeal on September 26, 2008. ROA 1-206; SRP 701. Cloudview identified no papers, pleadings, or exhibits that were before the City when it reached its decision, which were omitted in error or by accident. *See generally* SRP 912-18. Rather, Cloudview requested the court to supplement the record to include almost 80 pages of deeds, minutes, memoranda, letters, emails, and corporate documents, among other things. *See, e.g.*, ROA Supp Rec 2, 7, 31, 38, 39, 42. None of the documents in the supplemental record were considered by the Governing Body when it made the decision from which Cloudview appeals.

In addition, Cloudview requested the court to "incorporate the briefing, transcripts of hearings, and orders" with respect to Cloudview's claims brought in the court's original jurisdiction. SRP 928-29, 931, 1015-20. These requests, granted by the district court, clearly go beyond the scope of the record on appeal, as defined by Rule 1-074 and *Martinez*. The court therefore erred in granting Cloudview's motion to supplement the administrative record and in thereafter conflating its appellate review of the City's Decision with Cloudview's other claims. *See* SRP 1132-33; *see, e.g.*, TR 03/13/09 at 36:13-37:23, 41:1-8; SRP 928-29.

The district court's broad interpretation of what constitutes the record swallowed the rule and allowed the court to usurp the role of the administrative decisionmaker. Supplementing the record as requested by Cloudview put the court in the position of acting as factfinder and considering issues that were not before the decisionmaking body, contrary to fundamental principles of administrative review. *See Zamora v. Village of Ruidoso Downs*, 120 N.M. 778, 783, 907 P.2d 182, 187 (1995); *Howell v. Marto Elec.*, 2006-NMCA-154, ¶ 12, 140 N.M. 737, 148 P.3d 823; *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 119 N.M. 29, 41, 888 P.2d 475, 487 (Ct. App. 1994).

d. The City's Decision was reasoned, supported by substantial evidence, and made in accordance with law.

The district court reversed the City's Decision based on the court's determinations that the decision was contrary to law and unsupported by substantial evidence. The district court erred. The record demonstrates that the City carefully considered all of the facts and circumstances, arguments, and applicable law before reaching its final decision.

i. The City's Decision was not arbitrary or capricious.

The City's Decision is not arbitrary and capricious unless it is unreasonable or without a rational basis when viewed in light of the whole record. *Rio Grande Chap. of Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806; *Mutz v. Mun. Boundary Comm'n*, 101 N.M. 694, 702, 688 P.2d

12, 20 (1984). When reviewing for arbitrary and capricious action, the district court does not retry the case, admit new evidence, or substitute its judgment for that of the municipal authority. *Rio Grande Chap.*, 2003-NMSC-005, ¶ 17. Rather, the court reviews "the whole record to ascertain whether there has been unreasoned action without proper consideration or disregard of the facts and circumstances." *Paule*, 2005-NMSC-021, ¶ 30 (internal quotation marks and citation omitted). In this case, the administrative record establishes that the City's Decision is reasonable and is rationally based on careful consideration of the facts and law.

The City found that when Parcel F was labeled as a drainage easement in 1985, Parcel F was land that could not be developed. ROA 200, FOF 8. The City further found that the VHWU1 plat was expressly conditioned on Amrep's dedication of 40 acres for open space and that the parcels designated as drainage easements were included within the 40 acres. ROA 200, FOF 9-10. In addition, the City found that Amrep and the City intended Parcel F to be used as open space, that Amrep represented that land having difficult topography within VHWU1 would be set aside for open space, that Amrep's salespersons told the buyers of adjacent lots the property would remain open space or be used as a park, and that Parcel F was listed in the City's recreational inventory as either open space, connectors, or park trails. ROA 199-201, FOF 4, 12, first and second 15.

In considering the foregoing facts, the City expressly relied on the long-established inclusiveness requirement that all developable property within a subdivision be identified at the time of platting. ROA 199-201, FOF 5-6, 16; *see* ROA 32, §10(A); ROA 38, §155.23(A). The City also relied on ordinance §155.04, which provides that one purpose of subdivision regulation is the preservation of "public open spaces." ROA 36. The City concluded that vacating the easement and allowing development of Parcel F would violate the City's planning principles now and at the time the VHWU1 plat was approved in 1985. ROA 200, FOF 7. The City's deliberations were in accordance with §155.29, which provides for consideration of the adverse effect on persons owning land within the subdivision. *See* ROA 43, §155.29(B)(3). Thus, the City's Decision was not arbitrary or capricious, but rather a reasoned decision with a rational basis in the facts and law.

ii. The City's Decision is supported by substantial evidence.

Cloudview appears to challenge only the City's findings that pertain to the intent of Amrep and the City at the time the VHWU1 final plat was approved. *See* SRP 921, 930; *see also* Rule 1-074(K)(2)-(3) (stating that an appellant in the district court must set forth a specific attack on any finding and the substance of the evidence bearing upon the proposition, or a contention that the finding is not supported by substantial evidence shall be deemed waived); *cf.* ROA 199-201,

FOF 4-5, 10,14. *See generally* SRP 920-934. As explained below, however, substantial evidence supports the City's findings. *See Zia Natural Gas Co. v. N.M. Public Utils. Comm'n*, 2000-NMSC-011, ¶ 4, 128 N.M. 728, 998 P.2d 564 (stating the evidence is viewed in the light most favorable to the commission's decision).

In support of these findings, the City considered the following: VHWU1 preliminary plat, ROA at 3, 16 (identifying Parcel F as "open space"); 1985 letter from Dan Holmes, Cinfran Engineering, to Loring Spitler, City of Rio Rancho, ROA 17-18 (stating that "certain areas with difficult topography have been left in their natural state in areas set aside as open space"); 1985 letter from Charles M. Easterling, City Engineer, to Loring Spitler, City of Rio Rancho, ROA 19 (commenting that the open space parcels were of concern); minutes from the PZB meetings in 1985, ROA 20, 22 (indicating that the VHWU1 plat was approved based on Amrep's representations that 40 acres of open space would be provided); VHWU1 final plat, ROA 23-26 (identifying as drainage easements the same 40 acres identified as open space in the preliminary plat); affidavit of Michael Springfield, ROA 30 (stating that the drainage designation on Parcel F was intended to satisfy Amrep's obligation to convey open space); VHWU1 covenants filed of record, ROA 152-53 (providing that the easements *inter alia* shall run with the land and be binding on all parties unless a majority of the owners of VHWU1 lots vote to change such restrictions); subdivision regulations existing when

Cloudview applied for the vacation, ROA 36, 38; subdivision regulations existing when the plat for VHWU1 was approved, ROA 32 (requiring all developable land to be so labeled); documentation regarding a replat of Parcel H, ROA 47-48 (identifying the use of Parcel H in 1987 as open space); and City land inventories, ROA 49, 54, 59 (including Parcel F). *See generally* ROA 3-5, 205 (Disc 1 at 1:35:38-1:42:19 (deliberating before the final decision).

In addition, the City considered statements by homeowners that Amrep representatives assured them Parcel F would remain open space. *See, e.g.*, ROA 81-90, 135, 143, 147-48, 171, 174, 175, 177, 205 (Disc 1 at 52:39, 56:52, 1:01:45, 1:03:09, 1:08:00). Several homeowners also stated that they paid a premium for lots adjacent to Parcel F, based on Amrep's representations. *See, e.g.*, ROA 138-39, 176, 205 (Disc 1 at 59:13, 1:09:51).

The City also considered the evidence and arguments presented by Cloudview. *See* ROA 184-85, 186-89, 190-91, 192-95, 205 (Disc 1 at 42:51, 1:33:38); *see also* ROA 71-73. Therein, Cloudview offered no evidence, at either the PZB or Governing Body hearings, that contradicted the City's finding regarding the nature and extent of the easement. *See also* ROA 71-74, 75-77. Considering the record as a whole, substantial evidence exists to support the City's findings regarding the intent of Amrep and the City to convey an easement for open space in 1985. *See Santa Fe Expl'n Co. v. Oil Conservation Comm'n*, 114

N.M. 103, 108-09, 835 P.2d 819, 824-25 (1992) ("Substantial evidence is relevant evidence that a reasonable mind would accept as sufficient to support a conclusion.").

iii. The City's Decision is in accordance with law.

The City's Decision is in accordance with law because the City did not unlawfully or unreasonably misapply or misinterpret the law. *See Archuleta v. Santa Fe Police Dep't, ex rel. City of Santa Fe*, 2005-NMSC-006, ¶ 18, 137 N.M. 161, 108 P.3d 1019. The court "may take into account the nature of the agency and the scope of its power to determine fundamental policy." *Id.* In the instant case, the City reasonably applied the pertinent law and, in doing so, acted within the scope of its power to determine fundamental policy on planning and zoning. *See County of Bernalillo*, 2000-NMSC-035, ¶ 10.

In making its decision, the City expressly relied on ordinances §155.04 (requiring adequate public open spaces), §155.23 (requiring a preliminary plat to include all developable land), and No. 6 in effect at the time VHWU1 was developed. ROA 199-200, FOF 5-6; *see* ROA 32, 36, 38. The City did not misapply or misinterpret its ordinances that require a preliminary plat to include all developable land, in order to serve the purposes of planning and zoning regulation. Rather, consistent with its ordinances, the City considered the propriety of vacating the easement on Parcel F and determined that vacating the easement would not

comply with the language and intent of the original conditions placed on approval of the plat for VHWU1 or with the City's land use ordinances. ROA 201, FOF 17 and "Therefore" clause. The City reasonably determined that Parcel F should be protected as open space, as promised by Amrep, because it provides a valued public use that should be continued. *See id.*; *see also* ROA 36 (§155.04). Thus, the City reasonably applied the relevant law to the facts—the representations of Amrep, the public use of Parcel F, and the interests of adjacent landowners—when it denied Cloudview's application to vacate the easement. See ROA 199-201.

The City's Decision is also consistent with provisions that require notice to the owner of all adjacent lots when a public right-of way, such as a drainage easement, is proposed to be vacated. ROA 43, §155.29(B)(2)(a)-(b); *see also id.* §155.29(B)(3) (referring to rights-of-way for drainage). In considering the vacation of such right-of-way, the City must determine if the vacation will adversely affect the interests of adjacent landowners. ROA 43, §155.29(2)(c); *see also* NMSA 1978, §3-20-12 (1973) (same); *Sprague v. City of Las Vegas*, 101 N.M. 185, 186-87, 679 P.2d 1283, 1284-85 (1984) (applying §3-20-12 to vacation of the city's interest in land dedicated to the city for use as a driveway and parking area). In sum, the record establishes that the City acted in accordance with law when it denied Cloudview's application to vacate the easement.

e. The district court erred in ruling in favor of Cloudview based on downzoning principles.

It appears the court may have reasoned that the City "downzoned" Parcel F by determining that the parties intended to provide an easement for open space instead of an easement for drainage. *See* TR 1/13/09 at 25:7-27:18. To the extent the court's ruling relied on downzoning, the court erred. With respect to the administrative appeal, Cloudview failed to preserve its downzoning argument before the City. Even if Cloudview's downzoning argument was preserved, which the City vigorously denies, this argument should be rejected because downzoning does not apply to the facts of this case. Finally, even if a "change" occurred, which the City denies, Cloudview received the right to which it is entitled—a quasi-judicial hearing, and thus reversal of the City's Decision cannot be sustained based on downzoning.

i. Cloudview's downzoning argument was not preserved before the City.

Cloudview raised its downzoning argument for the first time in its Statement of Appellate Issues. See SRP 932-34. This argument was never presented to the City. *See* Rule 1-074(K)(2). The issue, therefore, was not properly before the district court in its review of the City's Decision. *See id.*; *Pickett Ranch*, 2006-NMCA-082, ¶ 3.

Cloudview's failure to preserve is highlighted by its reliance on three ordinances that are not in the administrative record. *See* SRP 933. As a result of Cloudview's failure to preserve, the court relied on an ordinance that was neither in the administrative record nor in existence in 1985 when the easement was conveyed. *See Coe v. City of Albuquerque*, 81 N.M. 361, 364, 467 P.2d 27, 30 (1970) (stating that a court cannot take judicial notice of an ordinance); TR 03/13/09 at 39:20-23; *cf.* ROA 34-46. The court therefore erred in relying on this unspecified ordinance to reverse the City's Decision.

ii. The City's Decision was not a downzoning.

Downzoning occurs when (1) a local government initiates a change in use (2) that is more restrictive. *Albuquerque Commons P'ship v. City Council of Albuquerque*, 2008-NMSC-025, ¶¶ 24-35, 144 N.M. 99, 184 P.3d 411. Neither factor is satisfied in this case.

***A.* The City did not initiate a change in existing use.**

A downzoning occurs when a change is initiated "by someone other than the landowner—most often the municipality itself." *Id.* ¶ 24. In this case, however, Cloudview initiated the potential change, by requesting the City to vacate the easement. Thus, downzoning does not apply. Rather, under the circumstances, Cloudview had the burden to establish that vacating the easement is justified, by demonstrating "a change in the community or a mistake in the original zoning" or

some other equally valid and significant reason. *Id.* ¶¶ 29, 34; *see also* FOF 17, ROA 7.

This requirement exists because the surrounding landowners have a right to rely on the existing classification of Parcel F. *See Miller v. City of Albuquerque*, 89 N.M. 503, 506, 554 P.2d 665, 668 (1976); *see also* ROA 6-7. Cloudview failed, however, to justify upsetting the existing use of Parcel F, which the City and the surrounding property owners have relied on for almost twenty years. *Davis v. City of Albuquerque*, 98 N.M. 319, 321, 648 P.2d 777, 779 (1982).

B. The City's Decision did not change the existing use.

Downzoning occurs when restrictions on property use are expanded, such that the use is limited in a manner greater than the existing use. *Albuquerque Commons*, 2008-NMSC-025, ¶ 24. In other words, there must be a *change* limiting the existing use. *See id.* ¶ 1.

In the district court, Cloudview relied on ordinance §154.29(A), which established "open space" as a zoning classification, to argue that the City effectively rezoned Parcel F from "R-1" to "OS." SRP 933. However, §154.29 did not exist in 1985.[2] ROA 200, FOF 10. Rather, the City planned for open space in reliance on the inclusiveness ordinance, which requires the identification of all developable land in the preliminary plat. ROA 200, FOF 8; *see* ROA 32, 38.

[2] Moreover, §154.29 is not in the record. *Supra* at 38.

Thus, in 1985, if the preliminary plat did not identify the land as developable, a developer was not allowed to develop the property, even if the property was in an area zoned for development. Accordingly, use of Parcel F for residential development was not permitted before Cloudview acquired the property, even though it was zoned R-1. The City's action therefore did not result in any *change* in property use to which Cloudview was entitled. *Cf. Albuquerque Commons*, 2008-NMSC-025, ¶ 4, 6-7, 42 (noting that the city enacted amendments to the zoning plan *after* the petitioner acquired its interest in the property and *after* it submitted its plan for development).

iii. The City accorded Cloudview its full due process rights.

Even if a change in the existing use was under consideration, Cloudview received the right to which it is entitled—adequate due process in a quasi-judicial proceeding. *See id.* ¶¶ 31-35. Cloudview was indisputably afforded ample opportunity before the City to address the issues in writing and at hearing and does not contend to the contrary. The City has therefore acted in accordance with law, and downzoning cannot be the basis for reversal of the City's Decision.

Finally, applying zoning principles in the instant case mixes apples and oranges. The instant case is not a zoning case, but rather an easement case. Downzoning principles therefore do not apply.

B. The district court erred in granting summary judgment on Cloudview's inverse condemnation claim.

The district court determined that the City's Decision resulted in a taking that entitled Cloudview to recover just compensation. RP 1191-92. The court reasoned that "by refusing to vacate a portion of the easement, [the City] has essentially taken the property." TR 03/13/09 at 60:2-5. The court therefore granted summary judgment to Cloudview on its inverse condemnation claim.

To the extent that the court's ruling rested on its reversal of the City's Decision or the court's improper findings, the court erred for all of the reasons previously discussed herein. The district court further erred in concluding that the City's action resulted in a taking, because Cloudview did not have a right to develop Parcel F prior to the City's Decision.

1. Cloudview did not have the property right that was allegedly taken.

To sustain a claim for inverse condemnation, Cloudview must establish that the right to develop Parcel F was "part of [its] title to begin with." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992). As explained by our Supreme Court in *Walker v. United States*, 2007-NMSC-038, ¶ 6, 142 N.M. 45, 162 P.3d 882, a plaintiff's alleged property interest must be a stick in the bundle of rights that the plaintiff acquired. *Accord M & J Coal Co. v. United States*, 47 F.3d 1148, 1153-54 (Fed. Cir. 1995). In light of the undisputed facts, Cloudview cannot establish that

it had the property right to develop Parcel F under the title Cloudview allegedly acquired.

The general rule is that compensation is not required when the property owner is prohibited from using the land for purposes proscribed by law at the time the owner took title to the property. *Lucas*, 505 U.S. at 1027; Michael C. Blumm & Lucus Ritchie, Lucas*'s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 Harv. Envtl. L. Rev. 321, 326 (2005); *cf. Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (asking whether a taking occurred when the statute admittedly destroyed *previously existing rights* of property and contract).

In other words, a party cannot be deprived of a property right that it never had. *See Albuquerque Commons P'ship v. City Council of Albuquerque*, 2009-NMCA-065, ¶ 24, 146 N.M. 568, 212 P.3d 1122 (on remand) (distinguishing the plaintiff in that case, which sought to maintain an already existing benefit, from cases in which the plaintiffs sought to obtain an as yet non-existent benefit such as approval of a plat), *cert. denied*, 2009-NMCERT-006, 146 N.M. 733, 215 P.3d 42, *petition for cert. filed*, No. 09-564 (U.S. Nov. 5, 2009); *Braun v. Ann Arbor Charter Tp.*, 519 F.3d 564, 572 (6th Cir. 2008) (holding that the plaintiff was not deprived of a property right because state law did not recognize, as a property right, the right to have the local government rezone the owner's property); *Rick's*

Amusement, Inc. v. State, 570 S.E.2d 155, 158 (S.C. 2001) (stating that "[i]f the property interest is inherent in the plaintiff's ownership rights, then the Court determines whether a compensatory taking has occurred"). By denying vacation of the easement, the City merely declined to give Cloudview a right that Cloudview previously did not have. Under these facts, inverse condemnation does not apply.

Cloudview's position rests on the assumption that it has a right to vacation of the drainage easement. A property owner does not, however, have a vested right in vacation of an easement as a matter of course. *See Albuquerque Commons*, 2008-NMSC-025, ¶ 25 (acknowledging that a property owner does not have a vested right in an existing zoning classification); *Gallup Westside Dev't*, 2004-NMCA-010, ¶¶ 12-14 (holding that the developer did not have a vested right when approval of the final plat was conditional); *see also supra* at 19-22. Cloudview has cited no case, statute, or ordinance that establishes otherwise.

2. Cloudview's investment-backed expectations are not reasonable.

Mere expectancies, "based not on any legal right but only on the hopes and speculations of the party asserting the expectation, are not an interest in land sufficient to" constitute a taking. *See State ex rel. State Hwy. Comm'n v. Gray*, 81 N.M. 399, 402, 467 P.2d 725, 729 (1970). Federal and state takings law expressly recognizes this principle. The United States Supreme Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124-25 (1978), recognized

that takings claims should be dismissed when the challenged government action, while causing economic harm, does not interfere with a property interest "sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." The test is whether the deprivation is contrary to reasonable, investment-backed expectations. *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring opinion); *accord Penn Cent.*, 438 U.S. at 124.

"To be reasonable, investment-backed expectations must take into account the current state of the law, as well as the government's power to change the law." *Dodd v. Hood River County*, 855 P.2d 608, 616 (Or. 1993). In *Dodd*, the court held that the petitioners' expectations were not reasonable. *Id.* The court reasoned that the petitioners could not reasonably expect they had an absolute right to build a dwelling on their land where the land was already zoned for forest use and the petitioners had constructive notice of pending limitations on building. *Id.*; *see also M & J Coal Co.*, 47 F.3d at 1152 (affirming the trial court's determination that the plaintiffs' "reasonable expectations concerning its rights were limited by [a] pre-existing prohibition").

Like the petitioners in *Dodd*, when Cloudview acquired its alleged interest in Parcel F, it could not have reasonably expected that it had a right to build because Cloudview knew of the pre-existing restriction on building. Cloudview also had

constructive, if not actual, notice that the easement served other purposes. *Supra* at 22-27. In addition, Cloudview is charged with knowledge of the applicable ordinances. *See Holiday Mgmt.*, 83 N.M. at 98, 488 P.2d at 733; ROA 36-44, 187-88. Therefore, Cloudview's investment-backed expectations are not reasonable.

Cloudview also relied on its "downzoning" argument in support of its motion for summary judgment on the inverse condemnation claim. RP 1070. As explained above, the City's Decision did not result in downzoning because the City did not initiate the alleged change in use and because a change in use did not occur. *See supra* at 37-40.

In sum, the court erred in granting summary judgment on Cloudview's inverse condemnation claim because the City's Decision was proper and because Cloudview did not have a protected property right. In the alternative, the reasonableness of Cloudview's investment-backed expectations is a question of fact for the jury.

C. The court erred in granting summary judgment to Cloudview on the City's claims.

The district court granted summary judgment in favor of Cloudview on all of the City's claims. *See* SRP 574-75, 1191-92. The court erred as a matter of law and because disputed questions of fact remain.

The court's rulings on the City's claims rested on the findings made in the May 2008 Order and on its rulings in the April 2008 Order on Amrep's motion for

summary. As explained above, the findings were improperly made and based on disputed facts that should have been reserved for the factfinder. *Supra* at 17-19. Moreover, the findings are not supported by substantial evidence. *Supra* at 19-27. Finally, as explained in the City's briefs in *City v. Amrep*, the court erred in granting summary judgment to Amrep in the April 2008 Order. The court's rulings in the instant case, which are based on the April 2008 rulings, have no basis in law or fact.

VI. CONCLUSION

The City's Decision should be affirmed. The Decision was a reasoned and proper application of the law to the facts found by the City, and the City's findings were supported by substantial evidence. Cloudview has failed to establish otherwise. Moreover, because the City's Decision was proper, Cloudview's independent claims have no merit. Cloudview had no right to develop Parcel F when Cloudview allegedly acquired title and no right to vacation of the easement. Any investment-backed expectations Cloudview may have had were therefore unreasonable. The district court thus erred in ruling in Cloudview's favor.

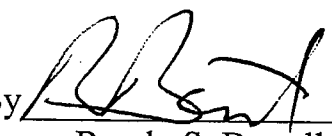
It is important to note that the purpose of the pertinent regulations is to plan development. The City approved VHWU1 in accordance with its regulations, based on Amrep's representation that Parcel F would not be developed. In order to plan for future growth and to fulfill its municipal duties, the City must be able to

rely on its regulations and on the representations of parties acting within the scope of these regulations, when it considers subsequent applications concerning previous approvals. If it were otherwise, planning and zoning regulation could not serve its intended purpose. While Cloudview may have "done no wrong" and yet suffered injury, its remedy does not lie with the City.

The City therefore requests the Court to reverse the district court's rulings and to affirm the City's Decision accordingly. The City further requests that this Court declare that the nature and extent of the easement was and is, as found by the City, open space in perpetuity. In the alternative, the City requests the Court to remand for trial on disputed questions of fact. In the second alternative, the City requests that this case be remanded to the City for reconsideration of Cloudview's application to vacate the easement.

Respectfully submitted,

MONTGOMERY & ANDREWS, P.A.

By 

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the following this 13th day of November, 2009:

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By