IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

CITY OF RIO RANCHO,

Plaintiff-Appellant,

v.

No. 28,709

AMREP SOUTHWEST, INC.,

Defendant-Appellee,

and

CLOUDVIEW ESTATES, LLC,

Defendant.

BRIEF-IN-CHIEF

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

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Statement of Compliance: The body of this brief-in-chief contains 9,739 words and therefore complies with Rule 12-213(F)(3) NMRA. *See* Rule 12-213(A)(1)(c), (G).

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I. SUMMARY OF PROCEEDINGS AND FACTS

A. Introduction

This case concerns several claims related to a ten-acre parcel of land known as "Parcel F." The district court granted summary judgment on all claims in favor of Defendant-Appellee Amrep Southwest, Inc. ("Amrep") and denied summary judgment as to Plaintiff-Appellant City of Rio Rancho ("City"). The court erred as a matter of law and because material facts are disputed. The court's order should therefore be vacated.

In 1985, Amrep developed the Vista Hills West Unit 1 subdivision ("VHWU1"), which is situated within the City limits. To obtain City approval of the subdivision plat for VHWU1, Amrep was required to identify on the plat all land that would be developed. On the preliminary plat for VHWU1, Amrep identified a number of parcels of varying size as "open space," including Parcel F. When Amrep's representative presented the preliminary plat for VHWU1 to the City's Planning and Zoning Commission ("P&Z"), Amrep confirmed that the open space parcels identified on the plat would not be developed and would be set aside as "green area for park sites," i.e. open space. Amrep also represented to purchasers of VHWU1 lots that Parcel F would remain open space in perpetuity. Both the City and the landowners relied on these representations.

Almost twenty years later, Amrep "conveyed" Parcel F to a group of investors, which, in turn, intended to develop Parcel F into single family dwellings, a use contrary to Parcel F's use as open space. Under the circumstances, Amrep was not entitled to convey Parcel F to another party for any purpose contrary to the open space use which Amrep had represented to the City and VHWU1 landowners would be Parcel F's use in perpetuity.

The court's order should therefore be vacated, and the City's Cross-Motion for Summary Judgment ("Cross-Motion") should be granted because fee title vested in the City by operation of NMSA 1978, § 3-20-11 (1973). In the alternative, the order should be vacated, and this case remanded for trial to resolve the disputed material facts among all parties concerned. *See* Rule 1-019 NMRA.

B. Course of Proceedings and Disposition Below

The City appeals the district court's Order Granting Partial Summary Judgment ("Order") in favor of Amrep, entered April 29, 2008. RP 570-71. In its motion below, Amrep requested partial summary judgment on the counts in the City's Complaint that are based on fee title. RP 269-70, 279-80. Amrep did not request summary judgment with respect to the City's claims based on an easement. RP 270. The district court, however, dismissed with prejudice all claims asserted by the City against Amrep. RP 570-71. The court also denied the City's Cross-

Motion for Summary Judgment ("Cross-Motion"). Notice of Appeal was timely filed on May 29, 2008.

The Order is a final order and judgment as to Amrep, pursuant to Rule 1-054(B)(2) NMRA. The case is still pending below with respect to defendant Cloudview Estates, LLC ("Cloudview"), which is not a party to this appeal.

C. Relevant Facts

Parcel F is located in the VHWU1 subdivision of the City. RP 296, 298. Amrep first designated Parcel F in its preliminary plat for VHWU1, wherein "All parcels 'A' thru 'J'" were identified as "open space." RP 263. Amrep also designated Parcel F as "open space" in the VHWU1 drainage management plan filed with the City. RP 533.

When Amrep presented the preliminary plat to the P&Z for approval, Amrep's agent assured the P&Z that the plat provided for "40 acres of green area for park sites," which included Parcel F. RP 354, 356-57; *see* RP 263; *see also* RP 296 ("SUBDIVISION DATA") (noting that the "PARCEL ACRES" equaled 40.643 acres). Because Amrep did not reserve any right to change that use, the clear implication was that Parcel F would retain its open space or park site character in perpetuity. *See* RP 354 (noting that the parks and recreation director present at the meeting expressed her approval of the park sites and endorsed the

application). Based on these representations, the P&Z approved Amrep's preliminary application for development of VHWU1. RP 354. The 40 acres designated as "open space" on the preliminary plat are the same 40 acres designated as "D.E." or "drainage easement" on the final plat filed October 18, 1985. *Compare* RP 263 *with* RP 296.[1]

When Amrep applied for City approval of the VHWU1 subdivision, an ongoing dispute existed over Amrep's obligation to convey 400 acres for public use in satisfaction of a settlement agreement in another case. *See Heit v. Amrep Corp.*, 82 F.R.D. 130, 132 (S.D.N.Y. 1979); RP 284 at 22:16-23; RP 290 at 30:23-31:24. The City was concerned the "green area for park sites" land that Amrep promised for approval of VHWU1 would be used to satisfy Amrep's unrelated obligations under the *Heit* settlement agreement. RP 332. Because of this concern, the dedication of open space on the preliminary plat was replaced with the grant of drainage easements on the final plat. RP 298, 332; *see also* RP 265-

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[1]The preliminary plat included Parcels A-J, all of which are identified as "open space." *See* RP 263. Parcels A-H are included in the final 1985 plat of VHWU1 and are described as a total of 40.643 acres. *See* RP 296. Lots I and J were not included in the final VHWU1 plat and were therefore not used to satisfy Amrep's obligation to provide 40 acres of open space for approval of VHUW1. *Compare* RP 263 *with* RP 296. Lots I and J are northeast of Parcel F and can be found on the preliminary plat adjacent to the areas marked "Future Development." RP 263. Lots I and J are much smaller than Parcel F; each was replatted as part of Vista Hills West Unit 3 in 1988. *Compare* RP 263 *with* RP 296 *and* RP 300.

67. The grant of drainage easements concerns the same land as the "green areas for park sites" that Amrep had promised to set aside when it was seeking approval of VHWU1. RP 296, 332.

It is undisputed that at the time, drainage areas "were utilized for open or park space as a development norm." RP 344 (Letter from James Wall, Amrep Vice President, to Mayor Grover Nash, City of of Rio Rancho (Aug. 19, 1987)); RP 331-32. Further, it is undisputed that 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* RP 331-32, RP 490 at 17:2-9, RP 527 at 16:25-17:8. Moreover, at that time, the City's land use ordinance required a developer to identify all land, "which is or may be suitable for or susceptible to subdivision or development," in the preliminary subdivision plat. RP 331, 532. Parcel F was never identified as developable land. *See* RP 263, 296, 298, 331-32, 354.

Amrep also represented to the purchasers of VHWU1 lots that Parcel F would never be developed. *See, e.g.*, RP 360, 363-64, 368, 501 at first ¶ 15. For almost twenty years, VHWU1 lot purchasers and successor residents, as well as the City, have relied on Amrep's representations that Parcel F would be open space. For example, the City has carried Parcel F on its inventory of park land since 1989, shortly after the final plat for VHWU1 was approved. *See, e.g.*, RP

375, 380; 501 at second ¶ 15. *See generally* RP 377-80. Amrep possessed copies of the City's inventories of park land, but Amrep 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.

In 2004, Amrep executed a deed allegedly conveying Parcel F to an intermediary entity ("the Mares group"), who thereafter executed a deed allegedly conveying Parcel F to Cloudview, for purposes of residential development. RP 475, 477. These deeds conveyed Parcel F subject to all easements of record. RP 475, 477. Amrep and Cloudview, as well as the Mares group, 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* RP 477. Cloudview applied for vacation of the easement, which was denied. RP 501.

Cloudview filed a complaint against the City in federal court, which was dismissed without prejudice. *See Cloudview Estates, LLC v. City of Rio Rancho*, Civ. No. 05-01283 MV/WPL, Memo. Op. & Order, at 3 (D.N.M. Oct. 6, 2006). Thereafter, the City filed its Complaint for Declaratory Judgment, Constructive Trust, Quiet Title and Adverse Possession against Amrep and Cloudview in state

court. RP 1-11.

Additional material facts are cited below when relevant to the discussion.

II. STANDARD OF REVIEW

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, 953 P.2d 61; *Twin Forks Ranch v. Brooks*, 120 N.M 832, 835, 907 P.2d 1013, 1016 (Ct. App. 1995).

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.

III. ARGUMENT

The district court erred in granting summary judgment and dismissing all of the City's claims against Amrep. The court based its dismissal of all counts on its determination that the final plat was unambiguous and that the City therefore did not have fee title to Parcel F. *See* TR 94:19-95:25. The court's decision was erroneous because, as a matter of law, the plat is ambiguous and intent of the parties is a disputed material fact.

Further, Amrep made no other argument to the district court that supports summary judgment under the facts of this case. The court misapplied the law in concluding that fee title did not vest in the City pursuant to § 3-20-11 (Count I). Facts material to the City's claims for declaratory judgment as to permanent easement (Count II), implied dedication (Count III), and adverse possession (Count VI) are disputed.[2] Summary judgment is therefore improper for these claims.

The court also erred in denying the City's Cross-Motion. As a matter of law, fee title vested in the City by operation of § 3-20-11. The City's Cross-Motion should therefore be granted.

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[2]Counts IV and V lie only against defendant Cloudview.

The following arguments were preserved for review in the Plaintiff's Response to Defendant Amrep's Motion for Partial Summary Judgment and Cross-Motion for Summary Judgment, RP 321-30, the Reply of Plaintiff-Counterdefendant City of Rio Rancho in Support of Cross-Motion for Summary Judgment, RP 433-37, and in the hearing held on April 9, 2008. TR 04/09/08.

A. The court erred in concluding the plat was unambiguous.

The court misapplied the law when it determined the final plat was unambiguous. As a matter of law, the plat is ambiguous and therefore a jury must determine the intent of the parties. *See Trujillo v. CS Cattle Co.*, 109 N.M. 705, 709, 790 P.2d 502, 506 (1990) (stating that ambiguity is a matter of law, which is reviewed de novo); *Young v. Thomas*, 93 N.M. 677, 679, 604 P.2d 370, 372 (1979) ("The mere fact that we have to speculate demonstrates the ambiguity of the agreement."); *Marrujo v. Sanderson*, 2008-NMCA-112, ¶ 6, 144 N.M. 730, 191 P.3d 588 (stating that intent is a question of fact for the jury).

A plat must be construed as a whole, including the outlines as well as the words. *See* 11A Eugene McQuillin, The Law of Municipal Corporations § 33.26, at 374-75 (3d ed. 2000). The general rule is that the grantor's intent should be ascertained from the language employed in the plat, viewed in light of the surrounding circumstances. *Camino Sin Pasada Neighborhood Ass'n v.*

Rockstroh, 119 N.M. 212, 214, 889 P.2d 247, 249 (1994); *Valencia v. Lundgren*, 2000-NMCA-045, ¶ 13, 129 N.M. 57, 1 P.3d 975; *see Cree Meadows, Inc. v. Palmer*, 68 N.M. 479, 483, 362 P.2d 1007 (1961) (examining "the original restrictive instrument, the plat, and the circumstances" to determine the intent of the parties); *Burnham v. City of Farmington*, 1998-NMCA-056, ¶¶ 10, 14, 125 N.M. 129, 957 P.2d 11 ("We construe a deed to give effect to the intent of the grantor."); 11A McQuillin § 33.02, at 311, 313 ("[I]ntent on the part of the landowner to transfer the property is critical to a finding of dedication."). Extrinsic evidence is admissible if the court concludes that the plat is ambiguous. *State ex rel. State Highway Comm'n v. Briggs*, 73 N.M. 170, 172, 386 P.2d 258, 260 (1963). Moreover, "[e]xtrinsic evidence is admissible to establish that the deed did not express the true agreement of the parties, even if the inconsistency cannot be detected on the face of the deed and becomes clear only in light of surrounding circumstances." *Twin Forks*, 120 N.M at 835, 907 P.2d at 1016.

In the instant case, construing the plat as a whole requires considering the language of the dedication together with the designation of a drainage easement over the *entirety* of Parcel F, a ten-acre parcel of land that can serve no drainage function. Determining Amrep's intent in view of the surrounding circumstances requires, *inter alia*, examination of the VHWU1 approval process, the oral

representations of Amrep, and the actions and nonactions of the parties. The court erred as a matter of law because it failed to construe the final plat as a whole and because it failed to consider all of the surrounding circumstances.

The court's oral ruling reflects the basis for its decision. *See State v. Bonilla*, 2000-NMSC-037, ¶ 9, 130 N.M. 1, 15 P.3d 491; *Ledbetter v. Webb*, 103 N.M. 597, 604, 711 P.2d 874, 881 (1985). *See generally* TR 94:19-95:25. The court stated

> I think the preliminary plat clearly showed that the City understands the difference between a designation as open space or conveyance to the City of Rio Rancho and an easement. And from the time there was a preliminary plat to the time of the final plat, the plat changed so that an easement was created.

TR. 94:20-23, 94:23-25. Thus, the court concluded that the final plat unambiguously conveyed only an easement, and was "not a conveyance of property." TR 95:1-10. On this basis, the court dismissed all claims against Amrep and denied the City's Cross-Motion. TR 95:4-25; RP 571-72.

The district court's reasoning is not readily apparent, but it appears that the court, to the exclusion of all other surrounding circumstances and extrinsic evidence, compared the language of the preliminary plat and the final plat, and determined that the City, as grantee, did not intend fee title to be conveyed. The court's reasoning is contrary to the precedent discussed above for at least three

reasons.

First, it appears the court's conclusion regarding ambiguity rested on its determination of the City's intent as a matter of law. However, as noted above, intent is a question reserved for the factfinder. Second, the court did not even consider the grantor's intent, a crucial if not dispositive factor in construction of the plat. *See Valencia*, 2000-NMCA-045, ¶ 13. Third, the court 's determination rested on limited consideration of extrinsic evidence---the preliminary plat---to the exclusion of all other surrounding circumstances and extrinsic evidence. Such a limited review is an improper basis for summary judgment. *See Twin Forks*, 120 N.M at 835, 907 P.2d at 1016 (noting "[t]he court's determination rested on the clear language of the deed to the exclusion of extrinsic evidence introduced to establish a contrary intent" and reversing summary judgment because a reasonable inference of contrary intent could be drawn from the extrinsic evidence).

Examination of the surrounding circumstances requires consideration of the dispute between Amrep and the City with regard to the *Heit* settlement, the preliminary plat approved by the P&Z, the requirement of the City's development ordinance in effect in 1985 that all developable land be identified on the preliminary plat, the representations that Amrep made to the City and to the purchasers of Amrep lots, and the nonactions of Amrep during the twenty years

prior to its decision to sell Parcel F for development. 11A McQuillin § 33.26, at 375-76 ("In construing a plat, the court may consider representations made by those making the plat as well as their subsequent conduct."). The court, however, did not consider the foregoing when it concluded that the plat was unambiguous. *See* TR 94:19-95:25; RP 571-72. Proper consideration of the surrounding circumstances and extrinsic evidence in this case clearly leads to the conclusion that the final plat is ambiguous. *Cf. Twin Forks*, 120 N.M at, 835, 907 P.2d at 1016. As a result, questions of intent arise, which must be reserved for the jury. The court therefore erred in granting summary judgment.

B. The intent of the parties is a disputed material fact precluding summary judgment.

A disputed question of material fact remains with regard to the intent of the parties, and therefore summary judgment is not proper. *See Marrujo*, 2008-NMCA-112, ¶ 6. The City offered the following evidence of intent below: Amrep designated Parcel F as open space in its preliminary plat and in its drainage management plan for VHWU1. RP 263, 533. When Amrep presented the preliminary plat for VHWU1 to the P&Z for approval, Amrep's agent assured the P&Z that the plat provided for "40 acres of green area for park sites," which included Parcel F. RP 354, 356-57; *see* RP 263; *see also* RP 296

("SUBDIVISION DATA") (noting that the "PARCEL ACRES" equaled 40.643 acres). The clear implication was that Parcel F would retain its open space or park site character in perpetuity. *See* RP 354 (noting that the parks and recreation director present at the meeting expressed her approval of the park sites and endorsed the application). Based on these representations, the P&Z approved Amrep's preliminary application for development of VHWU1. RP 354. The 40 acres designated as "open space" on the preliminary plat are the same 40 acres designated as "D.E." or "drainage easement" on the final plat filed October 18, 1985. *Compare* RP 263 *with* RP 296.

Moreover, it is undisputed that Parcel F has never had any drainage control function because it is an elevated area which does not receive drainage from other lands, RP 331-32, RP 490 at 17:2-9, RP 527 at 16:25-17:8; and that at the time the final plat was filed, areas designated as drainage "were utilized for open or park space as a development norm." RP 344 (Letter, James Wall, Amrep Vice President, to Mayor Grover Nash, City of of Rio Rancho (Aug. 19, 1987); RP 331-32. In addition, despite being notified in writing, Amrep never objected to the City's inclusion of Parcel F in its park inventory beginning in 1989. *See* RP 372-76 (documents received from Amrep in discovery; Parcel F referenced on bottom of list at RP 375); *see also* RP 425 at 26:11-29:22. Further, in 1985, the City's

land use ordinance required Amrep to identify all developable land in the preliminary plat, RP 331, 532, yet Amrep never identified Parcel F as developable land. *See* RP 263, 296, 298, 331-32, 353. Rather, Amrep represented to the City, as well as purchasers of VHWU1 lots, that Parcel F would never be developed. *See, e.g.*, RP 354, 360, 363-64, 368, 501 at first ¶ 15.

Finally, Amrep's representative, Dan Holmes, stated that in his experience,"a parcel is a piece of property that would be dedicated to the City. A tract is a piece of property that would not be dedicated to the City." RP 382 at 76:14-23. Mr. Holmes further stated that if Amrep intended to seek approval for development of a piece of property in the future and that property is included within a plat seeking development of other pieces of property, Amrep would label the property for future development as a "tract[]" until such time that it was looked at further, and then it would be split into parcels, tracts, roads, [and] lots." RP 382 at 77:4-8.

Based on the foregoing evidence, a jury could find that Amrep intended to convey a property interest in Parcel F that precluded development by Amrep or any successor-in-interest. Because this material fact is disputed, the court erred in granting summary judgement to Amrep.

C. Amrep's remaining arguments below do not support the court's grant of summary judgment.

In its motion for partial summary judgment, Amrep raised a variety of arguments in opposition to the individual claims raised in the City's Complaint. *See generally* RP 272-79. In light of its summary ruling, the court did not address Amrep's remaining contentions below. The City submits the following arguments with respect to those contentions, in order to demonstrate that Amrep is not entitled to summary judgment for any alternative reason.

1. The Statute of Frauds is satisfied by the final plat.

Amrep's argument based on the statute of frauds is a red herring. The parties do not dispute that the final plat is a writing sufficient to satisfy the statute of frauds. *See* RP 412-13; *see, e.g.*, *Pitek v. McGuire*, 51 N.M. 364, 370-71, 184 P.2d 647 (1947) (discussing the statute of frauds). Rather, the parties dispute the extent of the property interest conveyed in that writing. *See* RP 412-13. The question is therefore not one pertaining to the statute of frauds, but rather to the ambiguity of the writing and the extrinsic evidence necessary to resolve the ambiguity. These issues are discussed above. *See supra* at 9-15. Thus, the statute of frauds is not applicable to the facts of this case, and Amrep's argument based on the same cannot support the court's grant of summary judgment in favor of

Amrep.

Amrep relied on *State ex rel. State Highway Commission v. Briggs*, 73 N.M. 170, 172, 386 P.2d 258, 260 (1963), and *Santa Fe County Bd. of County Commissioners v. Town of Edgewood*, 2004-NMCA-111, ¶ 12, 136 N.M. 301, 97 P.3d 633, to argue that the plat does not satisfy the statute of frauds. RP 273. Neither case supports Amrep's position.

Briggs does not address the statute of frauds. *Briggs* therefore cannot stand for the proposition that the statute of frauds is not satisfied. In *Briggs*, our Supreme Court held that the plat did not designate the parking area as an area set aside for public use, as required by the dedication statutes, NMSA 1953, §§ 14-2-4, 14-2-5.[3] *Briggs*, 73 N.M. at 172, 386 P.2d 258. In reaching this conclusion, the court held that the lower court's admission of extrinsic evidence was proper for the purpose of determining the intent of the dedicators. *Id.* *Briggs* therefore does not support Amrep's position. To the contrary, *Briggs* illustrates that the district court in our case erred in failing to consider extrinsic evidence of Amrep's intent when it promised the City 40 acres of open space for approval of VHWU1 and identified the 40 acres of open space as "drainage easement" on the final plat.

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[3] Section 3-20-11 is the successor statute to NMSA 1953, §§ 14-2-4 and 14-2-5.

Moreover, the facts in *Briggs* are distinguishable. *Briggs* involved designation of a parking area—a use that is not necessarily public. However, a drainage easement expressly granted to the City is indisputably a grant of a property interest for public use. *See Trigg v. Allemand*, 95 N.M. 128, 134, 619 P.2d 573, 579 (Ct. App. 1980) (referring to public use as use "for the common good of all").

Likewise, *Santa Fe County Board* provides no support for Amrep's statute of frauds argument. Amrep relies on *Santa Fe County Board* to argue that a party cannot hold an easement on its own fee land. RP 273; *see Santa Fe County Bd.*, 2004-NMCA-111, ¶ 12 (reasoning that a county does not become an owner of property, for purposes of standing to appeal a city's annexation, by virtue of its use interest in the property). Amrep misses the point. As the facts illustrate, Amrep intended to convey 40 acres of open space, including Parcel F, to the City to satisfy Amrep's obligation to provide open space for approval of VHWU1. *See supra* at 13-15. Amrep represented to the City and to the purchasers of Amrep lots that Parcel F would remain open space in perpetuity, and the City and landowners relied on these representations. *Supra* at 13-14. Under these circumstances, fee title vested in the City by operation of § 3-2-11, as explained *supra* at 39-40, superceding and the drainage easement. *See Michelet v. Cole*, 20 N.M. 357, 361-

62, 149 P. 310 (1915) (stating that an easement would cease when the easement owner became vested with title to the servient estate); *see also Santa Fe County Board*, 2004-NMCA-111, ¶ 12 (citing *Michelet*). Therefore, *Santa Fe County Board* provides no support for Amrep's position.

Moreover, Amrep's reliance on deposition testimony regarding dedication by plat is unavailing. *See* RP 273-74. Whether title was vested in the City pursuant to § 3-20-11 is a question of law, and the witnesses' opinions as to this legal issue are irrelevant and inadmissible. *State v. Clifford*, 117 N.M. 508, 513, 873 P.2d 254, 259 (1994) ("[O]pinion testimony that seeks to state a legal conclusion is inadmissible.").

2. The court erred as a matter of law when it dismissed Count III—implied dedication and acceptance.

The court did not directly address the issue of implied dedication and acceptance, raised in Count III of the City's Complaint. RP 571-72; TR 94:19-95:25 , 99:17-20; *see* RP 7-8. Rather, the court concluded that the dedication claim should be dismissed, based on the court's determination that the language of the plat unambiguously granted the City a drainage easement and not fee title. TR 94:19-95:16. Even assuming the plat did not convey fee title to the City, which the City vigorously denies, the City's claim for implied dedication and acceptance

still survives. The City's Complaint did not request a determination that the implied dedication and acceptance conveyed fee title to the City.

"[A] common law dedication does not affect the title to the fee." 11A McQuillin § 33.03, at 318 (stating a common law dedication "leaves the legal title in the original owner"); *see Santa Fe County Bd.*, 2004-NMCA-111, ¶ 13 (noting the fee does not pass by common law dedication). Accordingly, and contrary to Amrep's assertion below, the City's Complaint requests "a determination that . . . an irrevocable implied dedication of Parcel F as open space exists." RP 7-8, ¶¶ 35- 38; *cf.* RP 274 (stating that the City claimed in Count III "that it is entitled to fee ownership . . . because of the doctrine of implied dedication"). Therefore, the court erred as a matter of law when it dismissed the City's implied dedication and acceptance claim based on its conclusion that the City did not have fee title. As discussed below, disputed questions of fact regarding dedication and acceptance preclude summary judgment.

3. The City alleged facts sufficient to show implied dedication and acceptance of Parcel F as open space in perpetuity.

In Count III of its Complaint, the City requested a declaratory judgment as to implied dedication and acceptance of Parcel F. RP 7-8. In its motion for partial summary judgment, Amrep argued that the City failed to allege facts sufficient to

show dedication and acceptance. RP 274. Amrep is wrong.

Dedication "may be manifested in a hundred different ways." *City of Carlsbad v. Neal*, 56 N.M. 465, 472, 245 P.2d 384 (1952). An offer or intent to dedicate "may arise from an oral declaration or be implied from the acts of the owner" or may be manifested by acquiescence in public use. *Luevano v. Maestas*, 117 N.M. 580, 586, 874 P.2d 788, 794 (Ct. App. 1994); *Lovelace v. Hightower*, 50 N.M. 50, 54, 168 P.2d 864 (1946) (quoting with approval *Corning v. Aldo*, 55 P.2d 1093, 1095 (Wash. 1936)); 11A McQuillin § 33.02, at 311. As stated in a prominent treatise,

> The real issue involved is whether an intention on the part of the owner to dedicate land to a public use appears from the facts in the particular case. The term "intention," as used in the context of this rule, is not to be taken in the sense of an actual intent. A common-law dedication may be found, even in the absence of any intent on the part of the landowner to dedicate, based on the theory of estoppel and that the owner must be held to intend the reasonable and necessary consequences of his or her acts. In other words, the acts of the owner must either be such as to show an intent to dedicate, or such as to estop him or her from denying that intent.

11A McQuillin § 33.29, at 385-86. In other words, "the intent may be actual or presumed." *Id.* at 386.

The City alleged the following pertinent facts: Amrep represented to the City that Parcel F would be open space in perpetuity to satisfy Amrep's obligation

to provide open space for VHWU1 approval, both orally and on the preliminary plat, RP 3-4, ¶¶ 5-6, 14; Amrep did not identify Parcel F as developable land, and such identification was required by ordinance, RP 4, ¶¶ 10-11; Parcel F was designated a "drainage easement" as a surrogate to distinguish new subdivision open space from open space dedicated by Amrep to the City pursuant to the *Heit* settlement agreement, RP 3, ¶ 7; Amrep knew Parcel F could serve no drainage function, RP 4, ¶ 12; the City relied on Amrep's representations, RP 4, ¶ 15; if Parcel F and the other "drainage easement" parcels were redesignated as developable land, no open space would be left to satisfy the City's open space requirement, RP 5, ¶ 16; Amrep left Parcel F vacant and undeveloped for almost twenty years after final approval of the VHWU1 plat, RP 5, 7, ¶¶ 18, 35; the areas platted for home sites were developed and sold in accordance with the plat, RP 7, ¶ 36; and Amrep never put the City or nearby residents on notice that Amrep believed Parcel F was not open space that would never be developed, RP 7, ¶ 37. Clearly, the foregoing allegations are sufficient to support a jury's determination that Amrep intended to dedicate Parcel F as open space in perpetuity. *See Luevano*, 117 N.M. at 587, 874 P.2d 795 (recognizing that dedication is a question of fact); *Bartlett*, 2000-NMCA-036, ¶ 32 ("[D]etermining whether evidence is sufficient to establish by a preponderance or by clear and convincing is the domain

of the factfinder."). *See generally* 11A McQuillin § 33.30, at 387-400 ("How intent shown").

Moreover, as discussed above, the City has offered sufficient evidence to support a finding that Amrep intended to dedicate Parcel F to the City for use as open space in perpetuity by means of the drainage easement expressly granted to the City in the dedication statement. *See supra* at 13-15. For example, in providing comment on the City's proposed parks ordinance in 1987, a mere two years after the approval of the VHWU1 plat, the vice president of Amrep expressly acknowledged the practice of utilizing areas identified as "drainage" for open or park space: "Drainage areas have been utilized for open or park space as a development norm on a national basis. I would suggest that we utilize these drainage areas on the same basis." RP 343-44 & ¶ 7. This strong statement of Amrep's intent that Parcel F be utilized as open space is consistent with the representations made to the P&Z in 1985 by Amrep's representative, who admitted that he intended the P&Z to rely on his representation that VHWU1 would contain 40 acres of open space. RP 357, at 23:10-18. As discussed previously, those 40 acres included Parcel F. *See supra* at 3-5; *see also* RP 322; RP 332, ¶ 4; RP 338-39 at 58:20-60:20; RP 342 at 48:1-49:23.

Moreover, intent may be presumed based on evidence of long-time public

use without objection from the owner. *Luevano*, 117 N.M. at 586, 874 P.2d 794; 11A McQuillin § 33.30, at 393. While the court's unexpected and premature dismissal of this claim foreclosed the City's opportunity to fully set forth its evidence with regard to implied dedication and acceptance, long-time public use without objection from Amrep can be inferred from evidence in the record. Affidavits of three parties who purchased VHWU1 lots from Amrep illustrate the landowners' use of Parcel F as open space. RP 360-71. In addition, the City's list of "Properties Which Have Been Dedicated to the City by Plats," which was produced by Amrep in discovery, describes Parcel F as having been dedicated to the city by plat for use as open space. RP 375. Amrep has offered no evidence of objection to twenty years of public use on Parcel F, even when presented with the City's claim to title in its recreational inventory. *Cf.* RP 427 at 48:23-50:24.

The foregoing evidence---Amrep's declarations, Amrep's actions and nonactions, the circumstances surrounding approval of VHWU1, and the twenty years of public use---is more than sufficient to support a finding that Amrep intended to dedicate Parcel F to the City for use as open space in perpetuity.

Similarly, the facts recited above are sufficient to support a jury's determination that Amrep's dedication was accepted. *See Williams v. Town of Silver City*, 84 N.M. 279, 282, 502 P.2d 304 (Ct. App. 1972) (recognizing that

acceptance is a question of fact). Like dedication, acceptance "may be manifested in a hundred different ways." *City of Carlsbad*, 56 N.M. at 472, 245 P.2d 384; *Lovelace*, 50 N.M. at 54-55, 168 P.2d 864 ("The time of user [sic] is competent evidence on the question of acceptance or non-acceptance by the public, but so is the amount and character of user [sic], or any other evidence tending to prove or disprove acceptance."); 11A McQuillin § 33.03, at 316-17.

Importantly, the City did not have the opportunity to set forth all of its relevant evidence, because the district court unexpectedly and prematurely dismissed claims for which Amrep did not request summary judgment and because the court *sua sponte* dismissed *all* of the City's claims on an improper theory. If the court had provided the City the opportunity to which it was entitled, the City would have offered the following evidence: Historically, including prior to the VHWU1 1985 plat, Parcel F has been reserved as park or open space. When Amrep promised to devote Parcel F to open space use in 1985 it did not reserve the right to put Parcel F to another use. Since the 1985 plat was filed, for almost twenty years, the public continuously used Parcel F as open space, and Amrep has acquiesced in such use. Between the time the VHWU1 plat was approved in 1985 and 2004, Amrep did not engage in any negotiations to sell Parcel F, attempt to market Parcel F, try to improve Parcel F, or put Parcel F to any particular use.

Indeed, Amrep never considered development of Parcel F until approached by the Mares group in 2004, when Amrep's vice president of sales personally considered the feasibility of Amrep developing Parcel F and determined that it would be risky and expensive, "considering it had a drainage easement on it" and "considering the roughness of the land."

Other evidence will establish that when Amrep sold Parcel F to the Mares group, Amrep knew the Mares group intended to develop Parcel F and knew a drainage easement existed over the entirety of Parcel F, which would preclude development; that Amrep did not inform the Mares group of the existing easement, but left investigation and due diligence to the purchaser; that Amrep knew or should have known residential development of Parcel F was contrary to the purposes Amrep intended for Parcel F when it filed the VHWU1 final plat; and that Amrep knew or should have known vacation of the easement would therefore be denied. *See* NMSA 1978, § 3-20-12(B) (1973) ("In approving the vacation or partial vacation of a plat, the planning authority of the municipality shall consider if the vacation or partial vacation of a plat will adversely affect the interests or rights of persons in contiguous territory or within the subdivision being vacated.").

Additional evidence will chronicle the corporate amnesia Amrep developed when approached by parties interested in another undeveloped parcel that had

been dedicated to the City by Amrep. In addition to Parcel F, Amrep erroneously "sold" Parcel D of Vista Hills West Unit 3 to a different Mares group. Amrep carried Parcel D in its database as "unsold" even though Parcel D was dedicated to the City as open space. Amrep repaired its error with regard to Parcel D by returning the money paid by the second Mares group, yet Amrep refuses to right its wrong with respect to Parcel F.

In addition, evidence will be offered showing that Amrep did not pay taxes on Parcel F from 2000 until 2004, when it contacted the county to prorate the property tax for purposes of sale to the Mares group and that Amrep cannot establish it ever paid taxes on Parcel F prior to the prospective sale in 2004.

Clearly, the foregoing facts are more than sufficient to establish implied dedication and acceptance. Amrep's argument and reliance on deposition testimony below merely highlight the questions of fact that exist regarding acceptance and dedication. *See* RP 275. These disputed material facts are reserved for the jury, and therefore summary judgment is improper. *Rendleman* v. *Heinley*, 2007-NMCA-009, ¶ 10, 140 N.M. 912, 149 P.3d 1009; *Bartlett*, 2000-NMCA-036, ¶ 32; *see McGarry v. Scott*, 2003-NMSC-016, 134 N.M. 32, 72 P.3d 608 (stating that implied acceptance should be used as a shield to prevent others from denying the public use or access (internal quotation marks and brackets

omitted)); *cf. Luevano*, 117 N.M. at 587, 874 P.2d 788, 795, (stating that the underlying theory of implied dedication "is the protection afforded adjoining land owners in the establishment of a public easement by prescription when one landowner sits idly by for ten or more years and grants persons free use of a roadway over his land").

Finally, Amrep's arguments regarding the replats of Parcels E and H do not support summary judgment. *See* RP 275-76. Though the doctrine of implied dedication and acceptance applies to all of the parcels Amrep granted to the City in the VHWU1 plat, the City could and did, in the cases of Parcels E and H, agree to waive the public use on which implied dedication rests. In the case of Parcel F, Amrep never applied to the City to have the public use encompassed by the easement removed. Amrep simply purported to transfer Parcel F to the Mares group without obtaining a waiver of the public use purpose signified by the express grant of easement to the City.

In sum, the trial court erred in applying the law. An implied dedication

> is regarded not as transferring a right, but as operating to preclude the owner from resuming his right of private property, or indeed any use inconsistent with the public use. The ground of the estoppel is that to reclaim the land would be a violation of good faith to the public and to those who have acquired private property with a view to the enjoyment of the use contemplated by the dedication.

Tibert v. City of Minto, 679 N.W.2d 440, 445 (N.D. 2004). Because the court failed to consider the law of implied dedication, the court erred in granting summary judgment.

Moreover, disputed questions of material facts remain. The general rule is that doubts are resolved against the donor and, within reasonable limits, a dedication is construed to benefit the public instead of the donor. 11A McQuillin § 33.26, at 376 ("This rule has been applied in many decisions."). Under New Mexico law, and viewing the facts and inferences in the light most favorable to the City, summary judgment was not proper.

4. The City's claim for adverse possession concerns material disputed facts that must be resolved by the jury.

The district court did not directly address the City's claim for adverse possession. It appears the court concluded color of title did not exist based on the court's determination that the plat unambiguously gave the City only a drainage easement, and not fee title. RP 571-72; TR 94:19-95:25, 99:17-20. To the extent the court may have implicitly determined that color of title did not exist, the court is in error.

As discussed above, the plat is ambiguous as a matter of law. *See supra* at 9-13. The intent of the parties must therefore be determined, and intent is a

question of fact for the jury. *See supra* at 13-15. Viewing all of the surrounding circumstances and considering the extrinsic evidence, the plat establishes color of title sufficient to satisfy the statute. *See In re Estate of Duran*, 2003-NMSC-008, ¶¶ 10, 20, 133 N.M. 553, 66 P.3d 326 (stating that a void deed is sufficient to establish color of title because a claimant would have no need to rely on adverse possession if the deed effectively created or transferred title); *Williams v. Howell*, 108 N.M. 225, 227, 770 P.2d 870, 872 (1989) (stating that extrinsic evidence is admissible to cure any deficiency in a document establishing color of title).

"The doctrine of adverse possession . . . protects those who honestly enter and hold possession of land in the full belief that it is their own." *Williams*, 108 N.M at 227, 770 P.2d at 872 (holding the court properly ruled on and permitted the introduction of extrinsic evidence when it was required to determine what the parties intended to convey). As discussed above, the City and the VHWU1 landowners believed that Parcel F had been dedicated to the City as open space, based on Amrep's representations of the same and its conveyance of a drainage easement over the entirety of Parcel F. *See supra* at 3-5.

Amrep also argued below that the City failed to allege sufficient facts to show that it openly and notoriously possessed Parcel F. RP 278. Again, Amrep's arguments merely highlight the material disputed facts that must go to the jury.

The facts discussed throughout this brief support a determination that the City's claim of right and the public use by VHWU1 residents was open and notorious.

Our Supreme Court clarified the "open or notorious" requirement in *Algermissen v. Sutin*, 2003-NMSC-001, ¶¶ 18-19, 133 N.M. 50, 6 P.3d 176. "The use must simply be either open *or* notorious." *Id.* ¶ 19 (emphasis added). Speaking for the Court, Justice Minzner observed that open or notorious use is merely evidence of the adverse possession elements of knowledge and imputed knowledge. *Id.* ¶ 18. Justice Minzner explained:

> Imputed knowledge is synonymous with constructive notice, a phrase that means that the use of the property must have been so obvious that the landowners should have known about it, had they been reasonably diligent.
>
> . . . . The use must simply be either open or notorious. To be open, the use must be visible or apparent. To be notorious, the claiman"s use of the property must be either actually known to the owner or widely known in the neighborhood.

Id. ¶¶ 18-19.

In our case, public use of Parcel F as open space was "open." If Amrep had been reasonably diligent, it would have known that VHWU1 residents used Parcel F as open space, in a visible and apparent manner. Moreover, public use of Parcel F as open space was "notorious." Public use of Parcel F as open space was actually known to Amrep and widely known in the neighborhood. *See, e.g.*, RP

360-61, ¶¶ 3-7; RP 363-65, ¶¶ 5-9; RP 368-69, ¶¶ 3-8.

In *Luevano*, the Court of Appeals addressed the "notorious" requirement, albeit as "reputation," with regard to public use of a road. *See Luevano*, 117 N.M. at 585-86, 874 P.2d at 793-94. The court quoted *Trigg v. Allemand*, 95 N.M. 128, 132, 619 P.2d 573, 577 (Ct. App. 1980), as a basis for its determination that evidence of the road's reputation as public gave rise to material issues of fact:

> Frequency of use or number of users is unimportant, it being enough if use of the road in question was free and common to all who had occasion to use it as a public highway. Once a road is found to be open to the public and free and common to all citizens, they [sic] should be open for all uses reasonably foreseeable.

Luevano, 117 N.M. at 585-86, 874 P.2d at 793-94. (noting that *Trigg* emphasizes the character of use rather than amount of use). Like the facts in *Luevano* and *Trigg*, the public use of Parcel F as open space, which is adverse to residential development of the same, "was free and common to all who had occasion to use it." *Luevano*, 117 N.M. at 585-86, 874 P.2d at 793-94; *see also Trigg*, 95 N.M. at 132, 619 P.2d at 577 (stating that proof of an unexplained open or notorious use for the prescriptive period raises a presumption of adverse use under a claim of right).

Amrep argued below that the City's inclusion of Parcel F in its recreational inventory is not sufficient to put a reasonable landowner on notice. RP 279.

Amrep ignores, however, the fact that a recreational inventory, which stated that Parcel F was dedicated to the City by plat, was produced by Amrep in response to discovery requests. RP 375. Clearly, if Amrep had acted with due diligence and examined the documents provided to it by the City, Amrep would have been on notice since at least 1989 that the City claimed possession of Parcel F. *See Weldon v. Heron*, 78 N.M. 427, 428, 432 P.2d 392, 393 (1967) ("[T]here may be adverse possession where possession is with forbearance of the owner who knew of such possession and failed to prohibit it."); *cf. Algermissen*, 2003-NMSC-001, ¶¶ 7, 20-22 (asking "whether, even if the [defendants] had been diligent, knowledge should not be imputed to them" and concluding, based on the evidence and the court's findings after a four day bench trial, the "trial court could have rationally concluded that knowledge should not have been imputed").

Morever, as discussed above, given the opportunity to which it is entitled, the City will offer additional evidence at trial establishing the public's continuous and uninterrupted use of Parcel F as open space, which use is adverse to development of Parcel F, *for almost twenty years*. *See Algermissen*, 2003-NMSC-001, ¶ 23 (discussing the continuous and uninterrupted elements). "'Adverse possession' is defined to be an actual and visible appropriation of land, commenced and continued under a color of title and claim of right inconsistent

with and hostile to the claim of another[.]" NMSA 1978, § 37-1-22 (1973). The public's use of Parcel F is hostile to Amrep's claim that it had a right to convey Parcel F to another party for purposes of development. *See Algermissen*, 2003-NMSC-001, ¶ 11 ("Adversity is a general concept that simply means a person holds an interest "opposed or contrary to that of someone else." (quoting *Black's Law Dictionary* 54 (7th ed. 1999)). Because the City has offered facts sufficient to satisfy both elements challenged by Amrep below, summary judgment was improper. *See Bartlett*, 2000-NMCA-036, ¶ 17, ("The nonmoving party need not . . . convince the trial court that the nonmoving party has evidence to support all the elements of his case.").

Moreover, as discussed above, Amrep's assertions regarding replats to other parcels do not relate to the public use of Parcel F for almost twenty years. *See* RP 279; *see also supra* at 28. The replatted parcels were smaller and not suited for the same use as Parcel F. They do not relate to notice on the part of Amrep in regard to public use of, or the City's claim of right to, Parcel F. As recognized by the City's employee when the preliminary plat was approved, the City intended specifically to reserve the larger parcels that were more suitable as open spaces for park sites, including Parcel F. RP 338 at 57:6-23; RP 354.

Similarly, Amrep's contentions regarding maintenance of Parcel F by

Amrep do not support Amrep's position. *See* RP 279. The City admits that it has occasionally called Amrep to clean up Parcel F in regard to drainage issues resulting from Amrep's building activities within VHWU1. However, Amrep has offered no evidence that Amrep performed any kind of maintenance on Parcel F for problems that were not caused by Amrep's building activities. *See* RP 352 at 17:10-20; *see generally* RP 350-53. Amrep's representative states that he doesn't "remember doing anything in the past seven years out there." RP 353 at 19:3-4. Indeed, Amrep admits that it does not actively maintain Parcel F or any other property in VHWU1. RP 353 at 19:3-11. Amrep further admits that when called to clean up, it determines first "whose fault it was." RP 350 at 9:18-23; RP 353 at 21:15-23. Amrep could not speak specifically about maintenance activities with respect to Parcel F. *See generally* RP 349-53. Generally, however, Amrep stated that it cleans up upon request when "it's something that, you know, blew sand from one of our projects or something." RP 350 at 9:23-10:2; *see also id.* at 14:4-9 (stating that the biggest cause of "going out there and doing something" is sand blowing and that Amrep may put sand fences up when they are working in a construction area when it is "adjacent to a piece of property that's vacant *that we own or not*" (emphasis added)).

5. The City's action for quiet title lies against Cloudview.

The City concedes that its claim to quiet title (Count V) is not appropriate as to Amrep, but not for the reasons argued by Amrep below. *See* RP 9-10, ¶¶ 46-51; *cf.* RP 277. The City's position is that NMSA 1978, § 42-6-1 (1951) provides for an action against parties who have or claim a *present* interest in Parcel F. Because Amrep does not claim to have a present interest in Parcel F, the City's quiet title action does not lie against Amrep. *See Corman v. Cree*, 100 F.2d 486, 487 (10th Cir. 1938) (holding that dismissal of the quiet title suit against the co-defendant wife was not proper because, although the wife denied any claim to the land, she had a "present vested interest" under New Mexico community property laws); 65 Am. Jur. 2d § 68, at 51 (2d ed. 2001) ("Predecessors in title who claim no interest in the property are neither necessary nor proper parties to an action to quiet title."). Notably, the City did not allege a claim against Amrep resting in quiet title in its Complaint. RP 9-10, ¶¶ 46-51.

D. The court erred in dismissing the City's claims based on easement.

In Count II of its Complaint, the City requests declaratory judgment as to a permanent easement on Parcel F. RP 6-7, ¶¶ 30-33. The City asked the court to determine that applying a drainage easement on Parcel F as part of the VHWU1 approval process created a permanent easement over all of Parcel F, rendering it undevelopable open space in perpetuity. RP 7, ¶ 33. In other words, the scope of

the easement created by Amrep during the VHWU1 approval process precluded Amrep from selling the property for a purpose contrary to the intended use of the easement.

As discussed above, Amrep did not request summary judgment with respect to the City's claims based on the easement. *See* RP 270. Rather, the court *sua sponte* granted summary judgment for Amrep on all counts. RP 571-72; TR 94:20-95:25 , 99:17-20. For this reason, the parties did not have the opportunity to brief or argue the scope of the easement below and the obligations of Amrep pursuant to the same. Review of the relevant law reveals that the court erred in dismissing Count II.

In New Mexico, development of property contrary to the developer's historical representations is precluded when the developer has induced owners to purchase property by representing that property is reserved for a particular use and purchasers have relied on that representation. *See Knight v. City of Albuquerque*, 110 N.M. 265, 266, 794 P.2d 739, 740 (Ct. App. 1990). "[A] developer will not be allowed to induce purchasers to buy property by purporting to include open space such as parks or golf courses in a subdivision plat, only to subsequently change the uses of those open space areas." *Id.* (holding that summary judgment in favor of the purchasers was proper).

The rationale supporting our Supreme Court's ruling in *Ute Park Summer Homes Association v. Maxwell Land Grant Co.*, 77 N.M. 730, 732, 427 P.2d 249 (1967) applies here. "[A] grantor, who induces purchasers, by use of a plat, to believe that streets, squares, courts, parks, or other open areas shown on the plat will be kept open for their use and benefit, and the purchasers have acted upon such inducement, is required by common honesty to do that which he represented he would do." *Ute Park*, 77 N.M. at 735, 427 P.2d 249. Similarly, the Supreme Court's rationale in *Cree Meadows* sheds light on Amrep's obligations. There, the Court declined to extend provisions in the covenants that would allow restrictions on the golf course to be extinguished. The court reasoned that to believe the developers so intended "would presume bad faith between the dedicators and every person who purchased a lot with reference to the plat." *Cree Meadow*, 68 N.M. at 483, 362 P.2d 1007.

Like the purchasers in *Ute Park* and *Cree Meadows*, the purchasers in VHWU1, as well as the City, relied on Amrep's representations that Parcel F would remain as open space. To conclude that Amrep should be dismissed from this lawsuit on all counts effectively allows Amrep, a developer, to avoid the constraints of *Knight*, *Ute Park*, and *Cree Meadows*. The court's Order should therefore be vacated, and the case remanded for trial on Count II.

E. Under the circumstances of this case, fee title vested in the City by operation of § 3-20-11, and the City is therefore entitled to summary judgment.

The district court denied the City's Cross-Motion for Summary Judgment. RP 571. As explained below, however, the City acquired fee title as a matter of law under § 3-20-11 when Amrep conveyed the "drainage easement" for public use over the entirety of Parcel F as part of its effort to satisfy Amrep's promise to provide open space within VHWU1. The district court therefore erred when it denied the City's Cross-Motion.

Section 3-20-11 provides as follows:

> The endorsement and filing of a plat is a dedication of the land designated on the plat for public use. Such land is public property. Fee vests in the municipality if the dedicated land lies within the boundaries of a municipality.

The facts of our case satisfy each element of § 3-20-11. In the final plat, endorsed and filed, Amrep expressly granted to the City a drainage easement over all of Parcel F for public use, to satisfy Amrep's obligation to provide open space in perpetuity for VHWU1. RP 296, 298, 332; *supra* at 13-15; *see Trigg*, 95 N.M. at 134, 619 P.2d at 579 (referring to public use as use "for the common good of all"). The terms "grant" and "dedicate" are synonymous. *See Lovelace*, 50 N.M. at 54, 168 P.2d 864. The City is a municipality for the purposes of § 3-20-11. *See* RP

296. Parcel F lies within the boundaries of the City. *See* RP 296. Parcel F is public property, and thus fee title vested in the City. § 3-20-11; *see Wheeler v. Monroe*, 86 N.M. 296, 297-98, 523 P.2d 540, 541-42 (1974) (construing the predecessor statutes to § 3-20-11; stating that "no dedicatory language is needed since both statutes provide for automatic dedication upon the acknowledgment and the recording of the plat"; holding that dedication in fee occurs when there is no right of reentry or reverter language in the dedication); *cf. Lovelace*, 50 N.M. at 54, 168 P.2d 864 (stating that the statutory grant of a right of way for construction of highways was an offer to dedicate).

The City is therefore entitled to summary judgment, declaring that fee title to Parcel F vested in the City under § 3-20-11 when the final plat was endorsed and filed.

IV. CONCLUSION

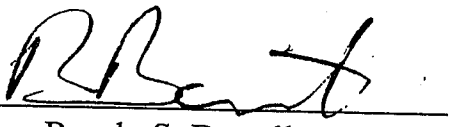
For all of the foregoing reasons, the court erred in granting summary judgment in favor of Amrep and dismissing all of the City's claims. The theory under which relief may be granted under these circumstances is immaterial. *Id* (noting various theories that may be applicable under these circumstances, including implied grant, implied covenant, easement, or estoppel); *see also Cree Meadow*, 68 N.M. at 484-85, 362 P.2d 1007 (1961) (stating that "the . . . golf

course is a place equivalent to a park or other open area, and the right to have the same continue in existence as it was at the time of dedication and after sales were made is a valuable one and must be protected by the courts"). In the circumstances of this case, relief may be granted by operation of § 3-20-11.

The City therefore requests the Court reverse the Order entered below and grant the City's Cross-Motion. At a minimum the Court should remand for trial the disputed questions of fact which are material to the City's claims.

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 2nd day of February, 2009:

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By _____