IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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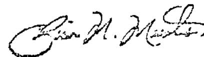

CITY OF RIO RANCHO,

Plaintiff-Appellant,

v.

No. 28,709

AMREP SOUTHWEST, INC.,

Defendant-Appellee,

and

CLOUDVIEW ESTATES, LLC,

Defendant.

REPLY BRIEF

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 4,382 words, as calculated by WordPerfect 12, and therefore complies with Rule 12-213(F)(3) NMRA. *See* Rule 12-213(A)(1)(c), (G).

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Defendant-Appellee Amrep Southwest Inc. ("Amrep") "maintains that the City has an easement over Parcel F exactly as stated on the Plat." Amrep's "Response Brief" (hereinafter "AB") at 4. The plat, however, is ambiguous and Amrep's position is directly contrary to the intent of Amrep and Plaintiff-Appellant City of Rio Rancho ("City") at the time of the conveyance.

The final plat identifies the entire ten acres of Parcel F as "drainage easement." RP 296, 298. The topography of Parcel F precludes its use for drainage. BIC 5. The term "drainage easement" must therefore be a placeholder for some other use. *See* RP 344. On or about the time of conveyance, Amrep identified the use for which the term "drainage easement" would serve as placeholder—"green area for park sites." RP 354; *see also* RP 263, 533. Later, in commenting on the City's proposed parks ordinance, Amrep expressly recognized the practice of using areas designated for drainage "for open or park space as a development norm." RP 344. At that time, Amrep requested that the City evaluate parcels with extremes in slope, such as Parcel F, to determine their suitability for park land. RP 343. Otherwise, Amrep was concerned that it "could end up with parcels of land which do not qualify, sitting unused forever." RP 343.

Amrep's statements confirm Amrep's expressed intent to provide the City with open space in perpetuity when Amrep requested and received approval for

development of Vista Hills West Unit 1 ("VHWU1"). Amrep admitted it intended and assumed that the City would rely on Amrep's representations that 40 acres would be left as "open or park space." *See RP* 344, 354; RP 357 at 23:10-18. Accordingly, Amrep did not identify Parcel F as land to be developed in the future. *See* BIC 5, RP 382 at 76:14-77:8. Rather, Amrep identified Parcel F as a drainage easement in order to preserve its use as open space, consistent with trade practice at the time, and to alleviate the City's concerns in regard to Amrep's accounting for its open space obligations. *See* BIC 4, 22; RP 344. For Amrep to now argue that it never intended the term "drainage easement" to convey anything other than "exactly as stated on the plat" is to effectively admit it committed fraud in the inducement when it requested the City's approval of VHWU1.

According to Amrep's Response Brief, Amrep has the right to ignore the promises it admittedly made to the City and residents of VHWU1, which the City and VHWU1 residents relied upon. *See* BIC 5-6, 14-15. Amrep sold Parcel F knowing or having reason to know that it would be put to purposes directly contrary to the intent of the parties at the time the subdivision was approved. *See* BIC 6, 25-27. Moreover, under Amrep's position, Amrep gave the City absolutely nothing when it conveyed the "drainage easement" over the entirety of Parcel F, because Parcel F undisputedly has no drainage control function, yet Amrep got

approval for development of VHWU1.

Amrep's position in this case is consistent with the misconduct described in *Heit v. Amrep Corporation*, 82 F.R.D. 130, 132 (S.D.N.Y. 1979), which resulted in the consent decree requiring Amrep to donate 400 acres for public use. Indeed, when Amrep submitted the VHWU1 plat for approval, Amrep wanted to satisfy the *Heit* consent decree by counting Parcel F, which was to be dedicated for open space as part of VHWU1 platting approval. RP 337 at 49:11-50:10. The City's objections to Amrep's "double-counting" resulted in the use of "drainage easement" as a placeholder for Amrep's obligation to provide open space in VHWU1. *Id.*; RP 332.

In its Response Brief, Amrep attempts to justify the breach of its obligations to the City by misconstruing New Mexico's existing law, by mischaracterizing or dismissing the relevant facts, and by elevating form over substance. The City respectfully requests the Court to reverse the district court's grant of summary judgment and remand with instructions to enter summary judgment in the City's favor, pursuant to NMSA 1978, § 3-20-11 (1978). In the alternative, the City requests the Court remand for resolution of the disputed facts.

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

Amrep blatantly misstates New Mexico law. *See* AB 10. Notably, the four-

corners standard from *Clark v. Sideris*, 99 N.M. 209, 213, 656 P.2d 872 (1982) was abandoned by our Supreme Court in *C.R. Anthony Co. v. Loretto Mall Partners*, 112 N.M. 504, 508, 817 P.2d 238, 242 (1991), as recognized in *Mark V., Inc. v. Mellekas*, 114 N.M. 778, 781, 845 P.2d 1232, 1235 (1993). Instead, New Mexico "follow[s] the modern trend and adopt[s] the contextual approach to contract interpretation, in recognition of 'the difficulty of ascribing meaning and content to terms and expressions in the absence of contextual understanding.'" *Id.* (quoting *C.R. Anthony*, 112 N.M. at 508, 817 P.2d at 242). The *Mark V* Court reasoned that "[e]ven though words seem on their face to have only a single possible meaning, other meanings often appear when the circumstances are disclosed." 114 N.M. at 781, 845 P.2d at 1235 (quoting Restatement (Second) of Contracts § 214(c) cmt. b (1979)). The Court emphasized that "ambiguity or lack thereof often cannot properly be discerned" until the court has fully examined the circumstances surrounding the formation of the agreement. *Id.* Thus, under New Mexico law, "even if the language of the contract appears to be clear and unambiguous, a court may hear evidence of the circumstances surrounding the making of the contract and of any relevant usage of trade, course of dealing, and course of performance, in order to decide whether the meaning of a term or expression contained in the agreement is actually unclear." *Id.* (internal quotation

marks and citation omitted); *cf. Ponder v. State Farm Mut. Auto Ins. Co.*, 2000-NMSC-033, ¶ 15, 129 N.M. 698, 12 P.3d 960.

B. The parties intended Parcel F to remain as open space for perpetuity.

Amrep's mistaken view of the facts ignores clear evidence indicating that the parties intended Parcel F to remain as open space in perpetuity for public use. For example, Amrep cites the deposition testimony of Michael Springfield to assert "that the Final Plat was not intended to [convey] the parcels shown thereon to the City." AB 11. The subject of the testimony cited by Amrep was not the VHWU1 final plat, however, but rather the replatting of Parcel H in 1987. RP 335 at 33:23-34:6. Mr. Springfield testified his understanding was that in 1987, the City thought Amrep owned Parcel H. Mr. Springfield further testified that his understanding *today* is, in Amrep's words, "[t]hat Amrep owns each of these parcels." RP 335 at 33:23-34:6. Mr. Springfield's understandings of the circumstances in 1987 and today do not evidence the City's or Amrep's intent at the time of plat approval in 1985. As to the intent of the City in 1985, Mr. Springfield testified that the City wanted to have these parcels for open space. RP 337 at 49:11-50:3. Notably, once Amrep discontinued its attempts to double-count the properties it conveyed in satisfaction of its open space/public use obligations, the City allowed Amrep to use dedication language for open space in

subsequent plat approvals. *See* RP 334 at 30:23-32:1; RP 300.

In 1985, however, Amrep informed the City that Amrep intended to count the dedication of Parcel F towards its obligations under the *Heit* consent decree. *Id.*; BIC 4. Because the City objected to Amrep's double-counting, the City instructed Amrep not to use dedication language, but instead to indicate a drainage easement exists over the entirety of Parcel F to preserve its use as open space for perpetuity. RP 337 at 49:11-50:3. In light of Amrep's representations to the City at the time of VHWU1 plat approval, it is clear that Amrep intended to convey an interest in Parcel F to the City for use as open space in perpetuity. BIC 13-15. To the extent varying testimony may be construed otherwise, these questions of fact should be reserved for the jury. *State v. Sena*, 2008-NMSC-053, ¶ 11, 144 N.M. 821, 192 P.3d 1198.

Further, Amrep cites the testimony of Art Corsie to assert that the City did not intend to acquire Parcel F. *See* AB 11. Amrep's reliance on the Corsie testimony is misplaced at best. Amrep cites to Mr. Corsie's response to the following question: "Q. It's the testimony in this case, by Dan Holmes and others, that this plat does not dedicate Tract F. Do you agree with that? A. Yes." The undisputed facts reveal the fallacies in Amrep's reliance on this testimony: (1) Mr. Corsie was not involved in the platting approval of VHWU1 and therefore

has no personal knowledge of the City's intent at that time, RP 283 at 20:1-3, RP 285 at 61:6-8, and (2) Mr. Corsie was instructed to limit his examination of the plat to the language in the dedication statement in the upper right hand corner of Sheet 1 of the VHWU1 final plat, contrary to principles of plat construction. *See* 11A Eugene McQuillin, The Law of Municipal Corporations § 33.26, at 374-75 (3d ed. 2000); BIC 9; RP 283 at 21:10-12.

Moreover, in other testimony, Mr. Corsie testified to facts indicating Amrep intended to convey Parcel F to the City. Mr. Corsie acknowledged that the City kept an inventory of property Amrep conveyed as open space, which listed Parcel F. RP 429 at 50:5-18; *see also* RP 284 at 28:4-9. Mr. Corsie further testified that "Amrep would typically reiterate that [the City] did not own a parcel if [the City] didn't own it" and that, to his knowledge, Amrep did not object to Parcel F on the City's inventory. RP 50:11-51:1.

Amrep also cites to the depositions of Mr. Springfield and Mr. Corsie to assert that "[b]oth of the City's employees with control over this plat stated . . . that the City did not want the dedication of Parcel F for maintenance and liability reasons." AB 11. Amrep contends that the testimony of Mr. Springfield and Mr. Corsie "is testimony of what they intended the language of the Final Plat to mean." AB 18. Again, Amrep's reliance on their testimony is misplaced at best. First,

neither employee had "control" over the VHWU1 plat. *See* RP 283 at 20:1-6; RP 537 at 8:1-11:20. Indeed, Mr. Corsie was not employed by the City when the VHWU1 plat was approved. RP 283 at 20:1-6. Second, neither employee stated that the City did not want Parcel F to be dedicated for maintenance and liability reasons. Rather, each employee "agreed" with Amrep's counsel that general issues with maintenance and a lack of resources existed. RP 290 at 28:19-29:13; RP 284 at 30:25-31:13. Notably, Mr. Springfield testified that he did not recall discussing maintenance concerns with regard to the VHWU1 plat. RP 334 at 28:22-29:24.

Amrep's reliance on the history of Parcels E and H is likewise unavailing. *See* AB 12. The nature and history of these parcels are not comparable to Parcel F. Parcel E was replatted to slightly adjust the rear lot lines for two property owners, and the bulk of the five and a half acre parcel remained open space. RP 306. Parcel H is much smaller than Parcel F and was therefore not desirable for public use as open space. RP 305. Moreover, Amrep's argument ignores the doctrines of implied dedication and acceptance and adverse possession that apply to Parcel F, as discussed in detail in the Brief-in-Chief. BIC 19-34. These doctrines apply to Parcel F based on the unique history of Parcel F, which includes Amrep's representations to the City and to VHWU1 residents and the resulting twenty years

of public use as open space. *See* BIC 28, 34.

Similarly, the two-paragraph memorandum by Ed Chismar of the City's Cultural Enrichment Department provides no support for Amrep's position. AB 12-13. Amrep appears to acknowledge that this memorandum is not binding or legally significant. *See id.* However, Amrep claims that it supports a hidden agenda of sorts, hidden "so well that [the City's] own management-level staff did not know about." *Id.* The reality is that the memorandum, created almost twenty years after plat approval, was not based on an in-depth review, and this resulted in an inaccurate portrayal of complex circumstances. *See* RP 295.

Amrep's argument regarding maintenance of Parcel F epitomizes its misrepresentations of the evidence. AB 13. *None* of the record citations support Amrep's assertion that the City "demand[ed] on numerous occasions that Amrep maintain Parcel F by addressing weeds, erosion control, and other issues on Parcel F." *See* RP 284 at 30:25-31:13 (discussing the City's general concern about a lack of resources to maintain properties); RP 288 at 86:7-24 (discussing Amrep employee's general "recollection" that the City did not want the VHWU1 parcels "because they couldn't take care of them"); RP 290 at 29:3-8 (recalling "a general issue with maintenance at this time period"); RP 292 at 25:9-13 (discussing Amrep employee's observation that, generally, when Amrep presented a preliminary plat

showing open space or park sites, "sometimes the city rejected it, didn't want that back in those days, particularly because they were new and didn't want to have to maintain them"). Amrep cites to *no evidence* that supports its assertion. *See* RP 284, 288, 290, 292. Rather, the evidence supports the City's position that on occasion, Amrep was asked to clean up situations that arose on Parcel F as a result of Amrep's building activities in the area. BIC 35.

Amrep's argument regarding the relevance of the preliminary plat is also without merit. Amrep contends that the preliminary plat is not "legally effective." AB 14. Amrep cites no authority for this proposition. General principles of subdivision platting require the final plat to be consistent with the approved preliminary plat and the required drainage management plan. *See, e.g.*, *City of Bowie v. Prince George's County*, 863 A.2d 976, 991 (Md. Ct. App. 2004). Impermissible inconsistencies would exist between the final plat and the preliminary plat and drainage management plan, if designation of Parcel F as a drainage easement changed the nature of Parcel F's intended use, which was designated as open space on the preliminary plat as well as the drainage management plan. *See* RP 358, 500, 533-34.

Moreover, the "legal effect" of a preliminary plat has no application to the City's use of the preliminary plat as evidence of Amrep's intent that Parcel F be

treated as open space. To the extent a question of law may exist regarding the binding effect of a preliminary plat, the legal question has no bearing on the disputed facts regarding the parties' intent. *See Yarger v. Timberon Water & Sanitation Dist.*, 2002-NMCA-055, ¶ 7, 132 N.M. 270, 46 P.3d 1270.

Further, contrary to Amrep's assertions, the oral statements of Amrep's representatives and the City's inventories are material to the disputed facts surrounding the parties' intent and thus warrant reversal of the district court's grant of summary judgment. *Cf. Hydro Resources Corp. v. Gray*, 2007-NMSC-061, ¶¶ 14, 47, 143 N.M. 142, 173 P.3d 749 (noting that the parties did not contend a genuine issue of material fact existed as to the intent of the parties and therefore remand was inappropriate); BIC 5-6; AB 14-15.

Amrep asserts that the inventory of parks and open space is irrelevant because the witnesses do not recognize or recall this list. AB 15. Notably, however, Amrep does not claim that the list is inadmissible as unreliable; nor does it deny its existence, debate its accuracy, or claim that it never received such a list. *Id.* As indicated in the record, at least one list was provided to Amrep's attorney at the time, who did not object. RP 342 at 51:3-18. The inventories and Amrep's conduct regarding the same are therefore relevant to the parties' intent. Rule 11-401 NMRA.

Finally, Amrep's contention that the City harbored a "secret intention" is unsupported by the record. AB 15-16. From the beginning, Amrep and the City intended for the City to acquire the right to preserve Parcel F for use as open space. *See, e.g.*, RP 337 at 49:11-24. However, when Amrep stated it would use Parcel F to satisfy its obligations under the *Heit* settlement, the City requested Amrep use the term "drainage easement" as a placeholder for open space on the VHWU1 final plate, in order to preclude Amrep's double-counting. *Id.*; RP 332. Further, in response to discovery requests, Amrep produced a City inventory listing Parcel F as a property that had been dedicated to the city by plat. RP 375. Thus, evidence in the record indicates that Amrep was well aware of the City's intentions at the time of conveyance. Indeed, any "secret intent" in this case lies with Amrep, who now claims it intended solely to convey a useless drainage easement, despite its representations otherwise.

C. The statute of frauds does not apply to the facts of this case.

While New Mexico courts have not addressed the issue, other jurisdiction have recognized that the statute of frauds does not apply to dedications. *Alden Coal Co. v. Challis*, 65 N.E. 665, 666 (Ill. 1902) ("The statute of frauds does not apply to the dedication of ground to the public."); *see also Harding v. Jasper*, 14 Cal. 642, 647 (1860) ("[Dedication] is not affected by the Statute of Frauds.");

accord Mann v. Bergmann, 67 N.E. 814, 815 (Ill. 1903); *cf. Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co.*, 77 N.M. 730, 735, 427 P.2d 249 (1967) (citing *Mann*). This position is consistent with the doctrine of dedication in New Mexico. *Compare Alden Coal*, 65 N.E. at 666 ("[Dedication] may be evidenced by acts and declarations and without any writing."), *with City of Carlsbad v. Neal*, 56 N.M. 465, 472, 245 P.2d 384 (1954) (recognizing that dedication "may be manifested in a hundred different ways").

Moreover, as discussed in the Brief-in-Chief, the cases Amrep cites do not preclude dedication of Parcel F under the circumstances presented. BIC 17-19; *cf.* AB 17.

D. The court erred in granting summary judgment as to implied dedication.

Amrep recites the same arguments addressed above in support of its assertion that summary judgment was proper with respect to implied dedication. The City relies on the arguments set forth *supra* and in its Brief-in-Chief to respond to Section E of the Response Brief.

Of special note, however, is Amrep's assertion that the City's reliance on allegations from its Complaint is insufficient as a matter of law to oppose summary judgment. AB 20. The City's argument in the Brief-in-Chief is framed

in light of Amrep's Motion for Partial Summary Judgment. RP 274. Amrep asserted therein that "the Plaintiff's allegations fail to demonstrate the basic requirements of common law dedication." *Id.* The City responded by identifying the allegations sufficient to demonstrate dedication. BIC 21-22. The City further supported its response with record citations sufficient to establish a genuine issue of fact and thereby rebut Amrep's arguable prima facie case. BIC 23-24; *see Peck v. Title USA Ins. Corp.*, 108 N.M. 30, 32, 766 P.2d 290, 292 (1988).

Finally, the City does not request this Court to rely on evidence that was not presented to the court below. Rather, the City's discussion of evidence that is not in the record before this Court at this time is intended to alert the Court to the lower court's abbreviated attention to the implied dedication claim. The fact that the City did not have the opportunity to present all of its pertinent evidence highlights the error in the district court's grant of summary judgment. *See Mark V*, 114 N.M. at 782, 845 P.2d at 1236 (stating that factual issues regarding intent must be resolved by the jury "with the benefit of a full evidentiary hearing").

In sum, the district court erred in granting summary judgment in favor of Amrep. The reasoning in *Harding* clearly sets forth the error in the court's ruling: "Dedication . . . is a conclusion of fact, to be drawn by the jury from the circumstances of each particular case; the whole question, as against the owner of

the soil, being, whether there is sufficient evidence of an intention on his part to dedicate the land to the public use . . . ." 14 Cal. at 648; *see also City of Carlsbad*, 56 N.M. at 472, 245 P.2d 384.

E. The court erred in granting summary judgment as to adverse possession.

With respect to color of title, the City relies on its Brief-in-Chief. *See* BIC 29-30. With respect to actual and visible appropriation, Amrep contends that open or notorious public use cannot satisfy the standard for adverse possession. AB 25. To the contrary, at least one adverse possession case expressly refers to whether "the acts of dominion exercised[,] constitute open . . . possession." *Stull v. Bd. of Trustees*, 61 N.M. 135, 136, 296 P.2d 474 (1956). To argue that Justice Minzner's discussion of open or notorious in *Algermissen v. Sutin*, 2003-NMSC-001, ¶¶ 18-19, 133 N.M. 50, 6 P.3d 176, is inapplicable to the instant case merely elevates form over substance. Indeed, Amrep claimed below that the City "fails to allege facts sufficient to show that it openly and notoriously possessed Parcel." RP 278. To now argue that cases construing open and notorious do not apply borders on the disingenuous.

Amrep further suggests that the City must construct improvements on Parcel F to satisfy the actual and visible element. AB 25. Amrep's position is contrary to

New Mexico law. "[T]o constitute an adverse possession there need not be a fence, building, or other improvement made[.]" *Stull*, 61 N.M. at 137, 296 P.2d 474. Whether possession is sufficient to satisfy the "actual and visible" requirement is a question for the factfinder. *Id.* at 136-37; *see also* BIC 30-35.

F. The court erred in dismissing Amrep from the City's declaratory judgment claim regarding the easement.

As noted by Amrep, the district court's summary dismissal of the City's declaratory judgment claim as to Amrep (Count II) resulted from a ruling with respect to co-defendant Cloudview Estates, LLC ("Cloudview"). AB 26-27. On appeal, Amrep blames the City for failing to appeal the findings made by the district court with respect to Cloudview. AB 27-28. However, the court's ruling with respect to Cloudview was not a final appealable judgment, because claims remained pending below. Rule 12-201 NMRA; *Tres Ladrones, Inc. v. Fitch*, 1999-NMCA-076, ¶ 10, 127 N.M. 437, 982 P.2d 488. Amrep's assertion illustrates the complex circumstances of this lawsuit, which, due to the posture of this appeal, have not been set forth fully before this Court. Notably, proposed orders with interlocutory language have been filed by both parties remaining below. *See* Cloudview's Motion for Entry of Order, *City of Rio Rancho v. Amrep Southwest, Inc.*, No. D-1329-CV-200601197 (Apr. 1, 2009); Cloudview's Motion

for Entry of Order, *City of Rio Rancho*, No. D-1329-CV-200601197 (Apr. 3, 2009); *see also* NMSA 1978, § 39-3-4(A) (1999); Rule 12-203 NMRA. After the order has been issued by the district court, the City will file an application for interlocutory appeal (in accordance with the court's express rulings) and a motion requesting consolidation with the instant case. At that time, the Court will have before it the entire record, which, in light of the interwoven issues facing all of the parties, will offer a more complete picture of the issues.

G. Under the circumstances of this case, fee title to Parcel F vested in the City by operation of § 3-20-11.

Amrep misinterprets the City's argument based on § 3-20-11. Amrep's contention that every plat with a drainage easement would convey fee title pursuant to § 3-20-11 is unjustified hyperbole. AB 28-29. The City's position is that under these special circumstances, fee title to Parcel F, and Parcel F only, was conveyed by the VHWU1 final plat. BIC 39-40. Both cases cited by the City in its Brief-in-Chief provide helpful guidance in addressing this issue of first impression. *Id. Lovelace v. Hightower*, 50 N.M. 50, 54, 168 P.2d 864 (1946) makes clear that the terms "grant" and "dedicate" are of the same effect. *Wheeler v. Monroe*, 86 N.M. 296, 523 P.2d 540 (1974) makes clear that specific language is not required to effect a conveyance of fee title by plat. *Id.* at 297 ("[N]o

dedicatory language is needed since [the predecessor statutes to § 3-20-11] provide for automatic dedication upon the acknowledgment and the recording of the plat.").

Importantly, the court in *Wheeler* held that all places designated or described as for public use on a plat accepted by the city clerk shall become "the property of the municipality in fee simple, unless the dedication contains conditional language or a reservation in the grantor of a present or future interest." *Id.* The court explained that conditional language must clearly indicate "that an interest is given or granted as a determinable fee or on condition subsequent." *Id.* at 298. The VHWU1 final plat contains no such conditional language, and therefore Amrep retained no right to convey Parcel F to another party for purposes contrary to the City's purposes. *See* RP 296.

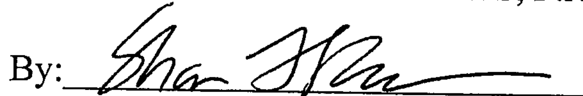
In conclusion, more than twenty years ago Amrep represented to the City and to VHWU1 residents that Parcel F would remain open space in perpetuity. The City and VHWU1 residents have relied on Amrep's representations since that time. Amrep breached its obligations by selling Parcel F to a third party for purposes contrary to the City and VHWU1 interests. *See id.* at 484-85. Similar to the circumstances in *Cree Meadows, Inc. v. Palmer*, 68 N.M. 479, 484, 362 P.2d 1007 (1961), it makes very little difference upon which theory the City is provided

the relief to which it is entitled. *See also Luevano v. Maestas*, 117 N.M. 580, 587, 874 P.2d 788, 795 (Ct. App. 1994) (discussing the various theories by which the public may acquire a right).

The City therefore requests that the Court reverse the grant of summary judgment entered below in Amrep's favor. The City further requests that the Court remand to the district court for entry of summary judgment in favor of the City, based on § 3-20-11. In the alternative to granting the City summary judgment, the City requests the Court remand for trial on the disputed facts.

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 27th day of April, 2009:

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By: ______________________ for
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