IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

CITY OF RIO RANCHO,

Plaintiff - Appellant,

-vs- No. 28,709

AMREP SOUTHWEST INC.,

Defendant - Appellee.

And

CLOUDVIEW ESTATES, LLC,

Defendant.

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
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Appeal from the Thirteenth Judicial District Court
Sandoval County, New Mexico

The Honorable Louis P. MacDonald, Chief Judge

RESPONSE BRIEF

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I. SUMMARY OF PROCEEDINGS:

A. Nature of the Case:

This lawsuit concerns the ownership of a parcel of land known as "Parcel F" within the Vista Hills West Unit 1 subdivision (the "Subdivision") in Rio Rancho, New Mexico. The Appellee AMREP Southwest Inc. ("Amrep") originally owned and subdivided all the land within the Subdivison. The Subdivision was approved by the Appellant City of Rio Rancho (the "City") and recorded over twenty years ago during 1985. The City is now claiming that it is the owner of Parcel F even though there is no recorded instrument indicating any conveyance to the City. In fact, all of the witnesses, without exception, agree that Parcel F was never conveyed to the City.

The City's Complaint in this case contains six counts. Five of the counts in the Complaint allege various legal theories regarding City ownership. One of the counts in the Complaint, Count II, alleges that the City holds an easement over Parcel F. In response to a Motion for Partial Summary Judgment by Amrep, the district court granted summary judgment on all the ownership counts. Amrep's Motion did not request summary judgment with regard to the easement. The district court ruled, and Amrep does not dispute, that the City does hold an easement over Parcel F. In sum, the undisputed facts and the applicable New Mexico law clearly show that the City has no ownership interest in Parcel F, but solely an easement over the parcel. Therefore, the district court properly granted partial summary judgment in this case.

B. Summary of the Facts:

The Appellant is a municipal entity located in Sandoval County, New Mexico. Record Proper ("RP") at 2. The Appellee is a New Mexico corporation with its principal place of business in Sandoval County, New Mexico. RP at 2. The Subdivision is in Rio Rancho, New Mexico and is located just west of New Mexico Highway 528 between Northern Boulevard and Sundt Avenue. See, Vista Hills Preliminary Plat, RP at 263 - 267. The Subdivision is one part of a larger development known as Vista Hills. See, Vista Hills Preliminary Plat, RP at 263 – 267. The entire Vista Hills development is in excess of 400 acres of land. See, Vista Hills Preliminary Plat, RP at 263 – 267. The Subdivision contains approximately 190 acres of land and is one of several subdivisions within the Vista Hills development. See, Vista Hills Preliminary Plat, RP at 263 – 267. In 1985, Amrep platted the Subdivision. See, Vista Hills Unit 1 Final Plat (the "Final Plat"), RP at 296 – 306. One of the parcels of land created in 1985 by the Subdivision plat was known as Parcel F (hereinafter "Parcel F"). See, Final Plat, RP at 296 – 306. Parcel F is approximately ten acres in size. RP at 2.

In Rio Rancho, each subdivision plat must go through two hearings, a preliminary plat hearing and a final plat hearing. RP at 287 p.83:14-84:18; RP at 423 p. 71:1-17. Often, changes to the plat occur between the preliminary plat hearing and

the final plat hearing. RP at 287 p.83:14-84:18; RP at 423 p. 71:1-17. Although the Vista Hills development preliminary plat contained certain notations regarding open space and certain discussions regarding open space occurred at the preliminary plat hearing (which solely for the purpose of its Motion for Partial Summary Judgment, Amrep does not dispute), in addition to many other differences, the Final Plat did not contain these notations. See, Vista Hills Preliminary Plat and the Unit 1 Final Plat, RP at 263 -267. The changes between preliminary plat and final plat were made at the request of the City for various legal, financial and liability reasons. RP at 284 p. 31:6-13; RP at 288 p. 86:7-24; RP at 290 p. 29:3-8; RP 292 p. 25:9-13. The recorded Final Plat of the Subdivision (the "Final Plat") does not have contain any dedication language whatsoever related to Parcel F. See Final Plat, RP at 263 – 267; RP at 281. The Final Plat does not contain any reference to "open space" related to Parcel F. See Final Plat, RP at 263 – 267; RP at 281. However, Parcel F is encumbered by a clear and express drainage easement granted by the plat. See Final Plat, RP at 263 – 267; RP at 281.

In March 2004, Amrep sold Parcel F to a third-party purchaser who is not a party to this lawsuit. RP at 475. In November 2004, that purchaser resold Parcel F to Cloudview Estates, LLC ("Cluodview"). RP at 477. Cloudview is the current owner of Parcel F and is also a defendant in this lawsuit. RP at 2.

In October 2006, over twenty (20) years after the approval and recordation of the Final Plat for the Subdivision, the City filed the Complaint in this case essentially requesting the Court to transform the drainage easement granted by the Final Plat into fee title in the City. RP at 2. Amrep opposes this transformation of an easement into fee title and maintains that the City has an easement over Parcel F exactly as stated on the Plat.

C. Course of the Proceedings and Disposition Below:

On October 6, 2006, the City filed this lawsuit in the district court. RP at 2. For slightly more than a year the parties engaged in discovery. During discovery, the parties propounded various written interrogatories and requests for production as well as taking numerous depositions of opposing witnesses. On October 12, 2007, Amrep filed a Motion for Partial Summary Judgment as to Counts I, III, IV, V (as to fee title) and VI of the Plaintiff's Complaint. RP at 269-307. In essence, Amrep agreed with the City that an easement encumbered Parcel F, but denied that the City held fee title to Parcel F. In conjunction with Amrep's Motion, on January 23, 2008, Cloudview filed a Motion for Partial Summary Judgment on various counts of the City's Complaint. RP at 457-507. On November 13, 2007, the City responded to Amrep's Motion and filed as a part of its response a Cross-Motion for Summary Judgment. RP at 321-382.

On April 9, 2008, the district court conducted a hearing on Amrep's Motion for

Partial Summary Judgment, on Cloudview's Motion for Partial Summary Judgment and on the City's Cross-Motion for Summary Judgment. At the end of the hearing, the district court granted Amrep's Motion and denied the City's Cross-Motion and granted Cloudview's Motion in part and denied it in part. Transcript of Proceedings ("TP") at 95:1-96:7. The district court's Order Granting Partial Summary Judgment was entered on April 29, 2008. RP at 571.

II. STANDARD OF REVIEW:

Summary judgment should be granted when the moving party is entitled to a judgment as a matter of law upon clear and undisputed facts. ***Great Western Construction Company v. N.C. Ribble Company***, 77 N.M. 725, 427 P.2d 246 (1967). Summary judgment is a question of law and is reviewed de novo. ***Palmer v. St. Joseph Healthcare P.S.O., Inc.***, 2003-NMCA-118, 134 N.M. 405, 77 P.3d 560. Summary judgment is proper where there is no evidence raising a reasonable doubt that a genuine issue of material fact exists. ***Cates v. Regents of the N.M. Inst. of Mining & Tech.***, 1998-NMSC-002, ¶ 9, 124 N.M. 633, 954 P.2d 65. However, mere arguments and contentions of material issues of fact do not create a genuine issue of factual dispute. ***Aktiengesellschaft der Harlander Buamwollspinnerie Und Zwirn-Fabrik v. Lawrence Walker Cotton Co.***, 60 N.M. 154, 288 P.2d 691 (1955). Further, disputed facts do not preclude summary judgment if the facts are not material or if

there are sufficient undisputed facts to support summary judgment. ***Oschwald v. Christie***, 95 N.M 251, 620 P.2d 1276 (1980).

In addition, whether an ambiguity exists in a document is a question of law reviewed de novo. ***Trujillo v. CS Cattle Co.***, 109 N.M. 705, 709, 790 P.2d 502, 506 (1990). Because ambiguity is a pure question of law, the district court's decision regarding ambiguity is not reviewed in the light most favorable to the party opposing summary judgment. ***New Mexico Banquest Investors Corp. v. Peter Corp.***, 2007-NMCA-065, 141 N.M 632, 159 P.3d 117.

III. ARGUMENT:

A. Introduction:

The district court's grant of partial summary judgment in this case was correct and should be affirmed. Furthermore, the plat at issue in this case is clearly unambiguous. The City's attempt to transform the unambiguous grant of easement on the Final Plat into a dedication of fee title both is opposed to New Mexico law and without merit. Furthermore, the district court's decision denying the City's Cross-Motion was also correct and should be affirmed. The City's reliance on NMSA § 3-20-11 (1978) is wholly misplaced and incorrect as a matter of law. Therefore, the City does not have fee title to Parcel F and Amrep's Motion was properly granted.

B. **<u>The District Court properly concluded that the Plat was unambiguous.</u>**

In its appeal the City hinges its entire argument on the claim that the Final Plat is ambiguous. However, not only is the Final Plat unambiguous, but the City admits throughout the record in this case that the Final Plat only conveys an easement. The City's real argument is not whether the Plat conveys anything other than an easement, but rather what the extent of the easement is. The City continually tries to obfuscate the fact that an easement is not fee title. Amrep does not deny that Parcel F is encumbered by a drainage easement as stated on the Final Plat. Amrep simply denies that the City has any fee interest in the Parcel F. The Plat clearly and unambiguously demonstrates this.

The determination of ambiguity is a matter of law to be decided by the court. ***Trujillo v. CS Cattle Co.***, 109 N.M. 705, 709, 790 P.2d 502, 506 (1990). Where the language of a document is clear and unambiguous, the court must give effect to the language of the document. ***Brooks v. Tanner***, 101 N.M. 203, 207, 680 P2d 343 (1984); ***Boylin v. United Western Minerals Co.***, 72 N.M. 242, 246, 382 P.2d 717, 720 (1963). Where the language of a document is not ambiguous, it is conclusive. ***Davies v. Boyd***, 73 N.M. 85, 87-88, 385 P.2d 950, 951 (1963). Parol evidence is inadmissible to show a grantor's intent that would vary from the terms of an unambiguous deed.

Lanehart v. Rabb, 63 N.M. 359, 320 P2d 374 (1957) ***overruled on other grounds Ortega, Snead, Dixon & Hanna v. Gennitti***, 93 N.M. 135, 597 P2d 745 (1979). A contract will be found ambiguous only if it is reasonably susceptible to different constructions. ***Id.*** Absent a finding of ambiguity, provisions of a contract need only be applied, rather than construed or interpreted. ***McKinney v. Davies***, 84 N.M. 352, 353, 503 P. 2d 332, 333 (1972). Merely because the parties differ on the proper construction does not establish an ambiguity. ***Vickers v. North American Land Developers, Inc.***, 94 N.M. 65, 607 P.2d 603 (1980). Furthermore, parol evidence is not admissible to alter or vary unambiguous language in a document or for the purpose of rendering an otherwise clear contract provision ambiguous. ***Clark v. Sideris***, 99 N.M. 209, 213, 656 P.2d 872, 876 (1982).

In this case, the dedication statement on the Plat at issue is clear and unambiguous. It states that:

> " ...the Owners of the Property do hereby dedicate all thoroughfares shown hereon to the City of Rio Rancho, New Mexico, and do herby grant easements shown on the plat..."

See, Plat of Vista Hills West Unit 1 attached to Amrep's Motion as Exhibit 1, RP at 296-306. This language clearly dedicates the streets in the subdivision and nothing else. There is absolutely no language on the Plat dedicating Parcel F. However, the record shows that where the City desired the dedication of a Parcel, it placed clear

language into the dedication language of that plat. In the plat of Vista Hills West Unit 3 (an adjacent subdivision within the Vista Hills development approved shortly after the Unit 1 Subdivision), the dedication statement reads:

> "....the Owners of the Property do hereby dedicate all public thoroughfares and Parcels "A" through "D" as open space which are shown hereon to the City of Rio Rancho, New Mexico, and do hereby grant easements shown on the plat....."

See, Vista Hills West Unit 3 Plat attached to Amrep's Motion as Exhibit 8, RP at 296-306. The dedication language used in the Vista Hills West Unit 3 plat is in clear contrast to the dedication language used in the Unit 1 Final Plat. The dedication language used in the Unit 1 Final Plat is clear and unambiguous. No dedication of Parcel F occurred. Amrep granted only a drainage easement over Parcel F.

Because the dedication language on the Final Plat is clear and unambiguous, the Court should not look beyond the language of the Final Plat. The language of the Final Plat should be given effect. This language defeats the City's claim that it has fee title to the Parcel F. Other than the Final Plat, there is no recorded document upon which the City can rely for a conveyance of Parcel F to the City. Although the City cites various cases to argue that the Court should rely on parol evidence to change the clear language of the Plat, this argument is futile. Where the language of a document is clear, the Court should not go beyond the language of the document to determine the

intent of the parties. ***Brooks v. Tanner***, 101 N.M. 203, 207, 680 P2d 343 (1984); ***Boylin v. United Western Minerals Co.***, 72 N.M. 242, 246, 382 P.2d 717, 720 (1963); ***Davies v. Boyd***, 73 N.M. 85, 87-88, 385 P.2d 950, 951 (1963).

In this case, the City is using the surrounding circumstances to create an ambiguity. The City states in its Brief-in-Chief that "Proper consideration of the extrinsic evidence in this case clearly leads to the conclusion that the final plat is ambiguous." See, Appellant's Brief in Chief at 13. However, this reasoning is exactly contrary to New Mexico law. Under New Mexico law, the court must first determine as a matter of law from the language of the document itself whether the document is ambiguous. Only if the court first determines that the plat language is ambiguous does the court then look at extrinsic evidence regarding the intent of the parties. ***Vickers v. North American Land Developers, Inc.***, 94 N.M. 65, 607 P.2d 603 (1980); ***Clark v. Sideris***, 99 N.M. 209, 213, 656 P.2d 872, 876 (1982). The City turns this law on its head and argues that the court should first look at the surrounding circumstances to determine if the language is ambiguous. This is contrary to New Mexico law. The ruling of the district court should be affirmed.

C. Even Assuming *Arguendo* that the Court should review the Surrounding Circumstances, Summary Judgment Was Proper.

It is Amrep's position that the Final Plat is unambiguous and that the court

should not consider extrinsic evidence of the intent of the parties as stated above. However, even assuming *arguendo* that the court may consider extrinsic evidence, the material facts not in dispute prove that both the City and Amrep intended to convey a drainage easement and not fee title by the Final Plat.

All the deposition testimony in this case indicates that the City did not want or intend to accept a donation of Parcel F (and the other parcels similarly situated and contained in Vista Hills West Unit 1). Michael Springfield, the City's Director of Development at the time of the Final Plat and the City official then in charge of subdivisions, stated in his deposition that the Final Plat was not intended to the parcels shown thereon to the City. RP at 335, p. 33:23 – 34:6. Art Corsie, the City's next Director of Development after Mr. Springfield also stated in his deposition that the Vista Hills West Unit 1 plat did not dedicate Parcel F to the City. RP at 283, p. 21:17-20. Both of the City's employees with control over this plat stated in their depositions that the City did not want the dedication of Parcel F for maintenance and liability reasons. RP at 284, p. 30:25-31:13; RP at 290, p. 28:4-21. The City employees' testimony is corroborated by the testimony of the Amrep engineers, Mr. Holmes and Mr. Cox. RP at 288, p. 86:7-24; RP at 292, p. 25:9-13. Clearly, the City never intended any dedication of Parcel F.

In fact, the City's actions show the opposite. The City always intended that

Amrep retain both the rights and obligations of ownership of this land. In 1987, only two years after Parcel F was platted in Vista Hills West Unit I, Amrep replatted Parcel H of this same Subdivision into two lots to allow for their commercial sale. RP at 296-306. If the parcels had in fact been dedicated to the City, Amrep would not have been the owner entitled to replat the property. Furthermore, Amrep would not have been able to then sell the lots if it did not in fact own the property. If there had been an offer and acceptance of dedication of the parcels created by the Subdivision, the City would not have allowed this replat and sale. Even if the City had decided to make a special exception for this Parcel H and remove it from the dedication, if a dedication had actually occurred, reconveyance to Amrep would have been necessary. Instead, in 1987 two years after the Subdivision was platted, the City did nothing to indicate that it owned the parcels within this subdivision. Again, in 1995, Amrep replatted Parcel E of this subdivision with two adjacent landowners, reducing the area of Parcel E by increasing the property size of the adjacent lots. RP at 296-306. Amrep signed this replat as the owner of Parcel E. The City again approved this plat acknowledging Amrep's ownership of the parcels in the Subdivision. RP at 396-306. The City now argues that in 2006 it knows more about the intent of the parties than it did in 1987 and 1995 when it agreed that Amrep owned the parcels created by the Final Plat.

Furthermore, the City's Director of Cultural Enrichment researched the

ownership of Parcel F in 2004, intending to develop it as a park if the City owned it. The Director concluded that Amrep was the owner of the property. RP at 295. The City does not dispute this material fact. Instead, the City merely attempts to distance itself from the written statements of its own Director of Parks and Recreation. RP at 323. The City's disclaimer that the Park Director's memorandum was not reviewed by legal counsel is irrelevant. The point of this memorandum is that the City hid its currently alleged understanding about drainage easements and its claim to Parcel F so well that its own management-level staff did not know about it.

Moreover, the City further proved that Amrep owned Parcel F by demanding on numerous occasions that Amrep maintain Parcel F by addressing weeds, erosion control, and other issues on Parcel F. RP at 284 p. 31:6-13; RP at 288 p. 86:7-24; RP at 290 p. 29:3-8; RP 292 p. 25:9-13. The City attempts to make a distinction between whether it called on Amrep "numerous" times or only "on occasion" to do maintenance on its property. RP at 322-323. This distinction, although inaccurate, is immaterial. It is undisputed that the City over a period of many years, at least "on occasion," contacted Amrep and told it that it owned Parcel F and needed to maintain it. RP at 284, 288, 290, 292, 322-323. The City's response is a distinction without a difference. It does not amount to a disputed fact.

In attempting to create a disputed material fact, the City often points to the

preliminary plat and discussions surrounding it. However, the City wholly mistakes the purpose and effect of a preliminary plat. A preliminary plat is just what its name implies. It is preliminary. A comparison of the preliminary plat and the final plat clearly shows multiple changes were made between preliminary and final plat. The final plat is the effective legal document. Neither Amrep nor the City can later argue that the preliminary plat is legally effective. RP at 340, p. 74:21-75:1. If preliminary plats were binding on either party, there would be no certainty whatsoever in title matters. At the end of all of the requests and comments of City staff, when the final plat was accepted, it did not dedicate the parcels to the City. See, Final Plat at RP 296-306. This final plat is the legally effective document. The discussions at the preliminary plat hearing are not relevant in light of the changes made to the plat at the City's request prior to final plat approval. As described above, the plat changed between preliminary and final and the dedication was not made on the Final Plat. Any and all facts related to the preliminary plat are immaterial to the actual dedication in the Final Plat.

The City also alleges certain oral representations made by Amrep sales agents after the recordation of the Final Plat as evidence of intent. However, any alleged oral statements between Amrep sales agents and its purchasers of homes are immaterial to the City's allegations in this suit. If Parcel F was not dedicated by the plat, statements

by Amrep sales agents cannot change the title of Parcel F. The City does not prove any required element of any claim at issue in its Complaint by alleging misrepresentation by Amrep sales agents. These third party affidavits are simply immaterial to the claims at issue.

Finally, the City alleges that a City inventory created years after the Final Plat is evidence of intent. However, the "inventory" created by the City is irrelevant to the City's claims, particularly when none of the witnesses in this case, Amrep agents and City employees alike, recognize or recall this list. RP at 422, p. 62:24-63:5; RP at 425 p. 28:25-29:16; RP at 427 p. 49:1-5; RP at 429, p. 49:8-9. Moreover, Parcel F is included in the cited park plan as a "Drainage Easement," not as "Dedicated Open Space." RP at 380.

Interestingly, there is no evidence to indicate, and the City has never even contended, that the plain language on the Final Plat was anything but the parties' intended language for this document. Rather, the City's argument is that the City ordered Amrep to use the words "drainage easement" to describe Parcel F, but in fact intended "drainage easement" to mean something other than its plain meaning for purposes of the Final Plat. While this logic is shaky at best, the evidence in this case shows that this understanding was limited to a small number of City staff and was not shared with Amrep. RP at 295, 423, p. 70:14-20. This secret intention cannot be used

to alter the plain meaning of the Final Plat. The parties' agreement is that expressed by their written document, express language to which they both agreed, and the City's undisclosed or secret intention cannot be considered part of the agreement. ***Higgins v. Cauhape***, 33 N.M. 11, 261 P. 813 (1927).

In sum, the extrinsic evidence which is in the appellate record in this case actually shows that it was the intent of the parties not to dedicate the fee estate in Parcel F to the City. The evidence is clear that for various reasons, the City desired Amrep to retain fee title and for the City to hold solely a drainage easement. Although the City may now desire to transform the easement into fee title, New Mexico law does not allow such sleight-of-hand.

D. The City's Claims regarding fee title are defeated by the Statute of Frauds.

In its Brief-in-Chief, the City argues that the statute of frauds is inapplicable to this case. In essence, the City argues that the Final Plat satisfies the writing requirement of the statute of frauds. However, the City's argument fails because the Final Plat, although a writing, does not contain the essential elements (conveyance of fee title) of the City's alleged agreement between the parties.

The conveyance of real property is subject to statute of frauds. ***Gonzales v. Gonzales***, 867 P.2d 1220, 116 N.M. 383 (Ct. App. 1993). The statute of frauds

requires that any conveyance be memorialized in a writing sufficient to show the essential elements. ***Pitek v. McGuire***, 51 N.M. 364, 371, 184 P.2d 647, 651 (1947). In its Brief-in-Chief, the City suggests that the Final Plat is the writing satisfying the statute of frauds. However, the writing does not dedicate Parcel F to the Plaintiff. RP at 281, 296-306. Merely describing the property for a purpose that is a potential public use, such as "parking lot" or "drainage easement" is not sufficiently explicit to show dedication. ***See, State ex rel. State Highway Commission v. Briggs***, 73 N.M. 170, 386 P.2d 258 (1963). Because the plat does not contain any dedication or conveyance of Parcel F, the Final Plat does not contain the essential elements of the City's alleged oral agreement. Therefore, the Final Plat is not a writing sufficient to satisfy the statute of frauds.

Moreover, the description of Parcel F in the plat as a "drainage easement" is wholly inconsistent and precludes any conclusion of fee ownership. Holding an interest in an easement does not grant any fee simple ownership to a property, and in fact prevents it because it because a party cannot hold an easement on his own fee land. ***Santa Fe County Board of County Commissioners v. Town of Edgewood***, 2004-NMCA-111, 136 N.M. 301. The designation of Parcel F as a "drainage easement" refutes any possibility that fee title was conveyed or dedicated on the plat.

Furthermore, Michael Springfield, the City's then Director of Development and

the City official then in charge of subdivisions, stated in his deposition that the plat did not dedicate Parcel F to the City. RP at 335, p. 33:23-34:6. Art Corsie, the City's next Director of Development after Mr. Springfield also stated in his deposition that the Vista Hills West Unit 1 plat did not dedicate Parcel F to the City. RP at 21. The testimony of Mr. Corsie and Mr. Springfield is specifically supported by the testimony of Mr. Holmes, the engineer engaged by Amrep to complete the plat. RP at 288, p. 86:20-24. Although in its Brief-in-Chief the City attempts to discredit its own witnesses and argues that the testimony of its then director of development and his successor is not admissible, this undisputed testimony clearly shows that neither the City's then employees nor Amrep intended the Final Plat to be a conveyance of a fee interest. This testimony is not their legal opinion, it is testimony of what they intended the language of the Final Plat to mean. Although Amrep believes that the Final Plat is wholly unambiguous and the court should not review extrinsic evidence as to the intent of the parties, even if extrinsic evidence is reviewed regarding the intent of the parties, the testimony of the witnesses (both the City's witnesses and Amrep's witnesses) is that the Plat was not intended to convey fee title. Therefore, the Final Plat does not satisfy the statute of frauds and the City's claims with regard to fee title fail for this reason as well.

Because the alleged dedication and conveyance of Parcel F is not supported by a

writing and is specifically refuted by the language of the plat and the testimony of the City's own officers, Count I of Plaintiff's Complaint should be dismissed with prejudice. In order to satisfy the statute of frauds, there must be a writing subsequently made stating each of the essential elements of the alleged contract. ***Pitek v. McGuire***, 51 N.M. 364, 371, 184 P.2d 647 (1947). In this case, the City claims that the Final Plat is the writing which satisfies the statute of frauds. However, nowhere on the Final Plat does it state that anything other than that an easement is being granted. Amrep does not dispute the grant of the easement. However, the City is claiming that the Final Plat is a conveyance of the fee interest in Parcel F. This essential element of the alleged agreement is not anywhere on the Final Plat. Therefore, the Final Plat does not satisfy the statute of frauds because it does not contain the essential elements of the oral contract alleged by the City. In fact, the Final Plat directly contradicts the agreement alleged by the City.

E. The District Court Correctly Granted Summary Judgment with regard to Implied Dedication.

The City's claim for implied dedication fails to demonstrate the basic requirements of common law dedication: offer by the landowner and acceptance by the municipality. ***Watson v. City of Albuquerque***, 76 N.M. 566, 417 P.2d 54 (1966). It is the City's burden to show these elements by unequivocal, clear and convincing

evidence. ***Clayton v. Colorado & S.R. Co.***, 30 N.M. 280, 232 P. 521 (1924).

To demonstrate an intent on Amrep's behalf, the City relies primarily on allegations from its Complaint instead of evidence in the record proper, which is insufficient as a matter of law to oppose summary judgment. ***Aktiengesellschaft der Harlander Buamwollspinnerie Und Zwirn-Fabrik v. Lawrence Walker Cotton Co.***, 60 N.M. 154, 288 P.2d 691 (1955). Because the recorded Final Plat of Parcel F does not contain any dedication of Parcel F and is completely devoid of any intent to dedicate Parcel F in fee, the City alleges that the preliminary plat of the Vista Hills area indicates Amrep's intent to donate, because certain parcels thereon, including Parcel F, are listed as open space. On its face, a preliminary plat is a poor indication of the parties' final intention when compared to the fully approved and signed final plat – and it is evident that the district court agreed with this common sense. TR at 94:20-25. The City's own director at the time agrees that the preliminary plat and statements and not binding if they are changed on the final plat. RP at 340, p. 74:21-75:1. Moreover, describing the intended use of the property, even if this use potentially serves the public, such as "parking lot," does <u>not</u> show a clear, unambiguous intent to dedicate the property. See ***State ex rel. State Highway Commission v. Briggs***, 73 N.M. 170, 386 P.2d 258 (1963). In the same way, describing a parcel as "open space" does not clearly and irrevocably indicate an intent to permanently dedicate the property. Amrep and the

City knew how to unambiguously dedicate parcels in a plat, as shown in an adjacent Vista Hills Subdivision, Vista Hills West Unit 3, approved shortly after the Unit 1 plat. See Vista Hills West Unit 3 Plat attached to Amrep's Motion as Exhibit 8, RP at 296-306. They clearly did not dedicate any parcels in the Vista Hills West Unit 1 subdivision.

Even more unmistakably, there was no acceptance on the City's behalf. In fact, the uncontroverted facts show a clear intent not to accept Parcel F or the other parcels on the Vista Hills West Unit 1 plat. An intent not to accept property may be shown in a variety of ways. 11A Eugene McQuillan, The Law of Municipal Corporations (3d ed. 2000) §33.53, p.470. To accomplish common law dedication, acceptance is necessary to show that the municipality has unequivocally accepted both the benefits and the burdens of the property being dedicated. McQuillan §33.45 p. 440. The City's own employees testified that the City did not want Parcel F for maintenance and liability reasons, which testimony was corroborated by Amrep's engineers. RP 284 at 31:6-13; 288 at 86:7-21; 290 at 29:3-8; 292 at 25:9-13.

A municipality that acquiesces in the possession of dedicated land by the grantor or a third party may be precluded from insisting that an offer has been accepted. McQuillan §33.53, p. 472. In this case, the City not only acquiesced to Amrep's possession of the property, it actually insisted that Amrep possess and maintain the

property by cleaning and weeding it, fencing it with cable, and otherwise addressing erosion control and drainage issues. RP at 283 at 20:16-21:9; 285 at 62:18-63:6; 294 at 18:2-6. It is a well settled issue of law that a party enjoying dedicated property cannot compel the original owner to maintain it for the user's convenience. ***McGarry v. Scott***, 2003-NMSC-016, 134 N.M. 32, 72 P.3d 608. By compelling Amrep to maintain Amrep's property, the City unequivocally demonstrated that it did not accept the rights and liabilities of any alleged dedication.

The City also acquiesced to Amrep's possession of the property by allowing multiple replats of similarly-situated parcels on the Vista Hills West Unit 1 plat. First, Parcel H was replatted into two lots for commercial sale in 1987. RP at 296-306, Replat of Parcel H. Then, in 1995, Amrep replatted Parcel E, reducing the area of the parcel in favor of adjacent landowners. RP at 296-306, Replat of Parcel E. The City now claims in its Brief-in-Chief that the City "waived" the public use in these cases to allow the replats. However, the City identifies nothing in the plats or the record to indicate a waiver was necessary or occurred – this is merely a belated argument of counsel. Such arguments cannot be considered by an appellate court. ***Graham v. Cocherell***, 105 N.M. 401, 733 P.2d 370 (1987). The replats occurred without comment or controversy as to ownership and public rights because in 1987 and 1995 the City was not making any claim of ownership with respect to these parcels or Parcel

F.

Finally, the City contends that it did not have the opportunity to set forth all of its relevant evidence regarding implied dedication. This allegation is false. Amrep's Motion for Summary Judgment with respect to implied dedication is based on the City's failure to show by clear and convincing evidence either an intent to dedicate or an intent to accept a dedication. RP at 274-276. These are the essential elements of an implied dedication. ***Watson v. City of Albuquerque***, 76 N.M. 566, 417 P.2d 54 (1966). The City had an opportunity in its Response to respond to these arguments and present any relevant evidence or disputed facts regarding an offer and acceptance. RP at 326-327. It failed to raise a genuine issue of material fact. The City attempts to show in its Brief-in-Chief that there was a misunderstanding regarding the legal effect of dedication on the title the property. However, this is a red herring. The arguments to the district court were based on the required elements of the cause of action, and where these elements are not met, the legal effect on title is irrelevant. The City had an opportunity to set forth its relevant evidence regarding offer and acceptance. Any facts the City did not preserve or establish in the record cannot be added on appeal. ***Westland Development Co. v. Saavedra***, 80 N.M. 615, 459 P.2d 141 (1969). Summary judgment is appropriate because the City has failed to establish the required elements of an implied dedication.

F. <u>The District Court Correctly Granted Summary Judgment with regard to Adverse Possession.</u>

The City concedes that adverse possession is not its strongest argument. TR at 49:17-18. The district court properly dismissed this count because (i) the City does not have color of title; and (ii) the undisputed material facts do not show open and notorious possession by the City.

The City maintains that the Final Plat of the Vista Hills West Unit 1 subdivision provides color of title for purposes of adverse possession. As discussed above, the plat is unambiguous and grants only a drainage easement, not any purported conveyance of a fee interest. The City claims that ***Williams v. Howell***, 108 N.M. 225, 770 P.2d 870 (1989) holds that extrinsic evidence is "admissible to cure **<u>any</u>** deficiency in a document establishing color of title." See, Brief-in-Chief p. 30 (emphasis added). Based on this interpretation of case law, the City proposes to use extrinsic evidence to establish that the plat, which does not in any way purport to transfer title of the Property to the City, may be redrafted by the Court to show color of title. However, ***Williams*** only addresses the sufficiency of the legal description in the deed that established color of title. ***Williams*** does not purport to extend its holding to other aspects of a deed, and certainly does not propose that a deed or other instrument of conveyance is unnecessary. The City's contention is circular and would remove the

essential requirement that a plaintiff prove color of title. This is contrary to established case law. See, ***Weldon v. Heron***, 78 N.M 427, 432 P.2d 392 (1967). Color of title by its nature requires that the instrument on its face conveys or purports to convey property. ***Currier v. Gonzales***, 78 N.M. 541, 434 P.2d 66 (1967). Extrinsic evidence cannot be used to cure the lack of any conveyance language without emasculating the requirement for color of title altogether, and the City has cited no case law authority for its proposition that the admission of this evidence is proper.

The City also fails to allege facts sufficient to show that it made an actual and visible appropriation of Parcel F. The City cites ***Algermissen v. Sutin***, 2003-NMSC-001, 133 N.M. 50, 6 P.3d 176 to attempt to show that it openly and notoriously possessed the property. However, ***Algermissen*** deals exclusively with prescriptive easements, a creature of common law, and not adverse possession, whose elements are clearly defined by statute to require actual and visible appropriation. NMSA § 37-1-22 (1978) (emphasis added). Keeping a property on a list somewhere falls far short of an actual and visible appropriation of land. The City contends that the City and the neighbors "in a visible and apparent manner" used Parcel F as open space. These concepts contradict one another and defeat a claim for adverse possession. Essentially, the City is claiming that because the neighbors did not construct improvements on Amrep's property, but enjoyed the very lack of development thereon, they acquired

visible possession of the property. This is absurd and counter to the history and concept of adverse possession. The City cites no authority for the proposition that property can even be adversely possessed as open space.

Moreover, the City's actions with respect to Parcel F would have assured a reasonable owner that the City was not in fact claiming an adverse interest in the land. As discussed above, the City demanded that Amrep maintain Parcel F, asserting that Amrep owned the parcel and was responsible for its maintenance. RP at 283 at 20:16-21:9; 285 at 62:18-63:6; 294 at 18:2-6. The City's Director of Cultural Enrichment researched Parcel F in 2004, with the idea of developing the parcel into a park for the neighborhood, but abandoned these plans when he concluded that Amrep was the owner of the property and not the City. RP at 295.

The City is unable to show either color of title or visible appropriation of the property. Without these essential elements, the claim for adverse possession fails as a matter of law.

G. The District Court did not dismiss the Easement Count and Amrep does not dispute that a Drainage Easement exists over Parcel F.

Amrep agrees that its Motion for Summary Judgment did not address Count II of the City's Complaint, which is a claim for declaratory judgment regarding an easement on the Property. However, Defendant Cloudview Estates, LLC also submitted a

Motion for Summary Judgment to the district court ("Cloudview's Motion for Summary Judgment") which was heard during the same court hearing. RP at 457-474. Amrep replied to Cloudview's Motion for Summary Judgment, concurred, and also stated that granting Cloudview's Motion would necessarily moot claims against Amrep. Upon hearing Cloudview's Motion for Summary Judgment, the district court did not grant the entire motion, but the district court did specifically find that Cloudview was a bona fide purchaser of Parcel F and was entitled to rely upon only those documents recorded in the County records regarding Parcel F. TR at 96:1-3. Based on this ruling, Amrep is merely a "nominal party." TR at 99:17-24. Count II of the City's Complaint was not dismissed, but it is clear that Amrep is not an interested party to this dispute.

Because the City did not appeal the findings the district court made with respect to Cloudview's Motion for Summary Judgment, this issue is not properly before the Court in this appeal. The City attempts to add additional facts and allegations that are not supported by the record proper. The City had an opportunity to respond to the Cloudview's Motion for Summary Judgment and prepare a record of evidence demonstrating material facts. RP at 511-524. Neither the issue of Cloudview being a bona fide purchaser nor the extra allegations the City seeks to bring before the Court may be considered in this appeal. ***Graham v. Cocherell***, 105 N.M. 401, 733 P.2d 370

(1987); ***State ex rel. State Highway Commission v. Sherman***, 82 N.M. 316, 481 P.2d 104 (1971) ("It is [the] duty of a litigant seeking review to see that a record is properly prepared and completed for review of any questions by an appellate court, as such questions for review are established only by the record, and any fact not so established is not before an appellate court"); ***Westland Development Co. v. Saavedra***, 80 N.M. 615, 459 P.2d 141 (1969).

H. NMSA § 3-20-11 does not vest fee title in the City and the District Court Correctly denied Summary Judgment with respect to the City's Cross-Motion.

The City argues that NMSA § 3-20-11 (1978) vests fee title to Parcel F in the City. The City's argument is wholly misplaced. Section 3-20-11 does not purport to change an easement into fee title as the City seems to argue. The sole purpose of this statutory section is to confirm that if a landowner dedicates fee title to a municipality pursuant to a plat, then the plat acts as the conveyancing instrument. See, NMSA § 3-20-11 (1978). This statutory section simply confirms that the plat, in essence, acts as the deed between the parties. However, in no way whatsoever does Section 3-20-11 state or intend that a grant of an easement become transformed into a dedication of the fee interest in the land. Not only does the statute not state or intend this, but the outcome of such an argument would be ridiculous. Almost every plat which is approved by a municipality contains a public drainage or a public utility easement on

it. These easements often run along the front or sides of a parcel. Sometimes they even cover an entire parcel as in the present case. The City has never claimed that it now owns in fee the front five or ten feet of every lot in the City pursuant to Section 3-20-11. The City has not claimed this because it is patently wrong. Furthermore, the very reason the City asked for a drainage easement rather than a dedication shows that the City understands that an easement does not create fee title. The City asked for an easement because it did not want the maintenance or liability responsibilities the flow from fee ownership. RP 284 at 31:6-13; 288 at 86:7-13; 290 at 29:3-8; 292 at 25:9-13. Clearly, the City understood that it was not taking fee title to Parcel F, but only an easement. Section 3-20-11 does not transmute the easement into a fee interest.

The City cites two cases in support of its claim. Neither of these cases provides any support whatsoever. The first case cited by the City is ***Lovelace v. Hightower***, 50 N.M. 50, 168 P.2d 864 (1946). This case concerns whether a highway was created by public use over land that was unappropriated public domain. The case does not discuss Section 3-20-11 at all. Further, neither party in the ***Lovelace*** case argued that an easement is transformed into a fee interest by Section 30-20-11. The ***Lovelace*** case is wholly inapplicable to the argument being made.

The second case cited by the City is ***Wheeler v. Monroe***, 86 N.M. 296, 523 P.2d 540 (1974). Although this case does discuss the effect of Section 3-20-11, it supports

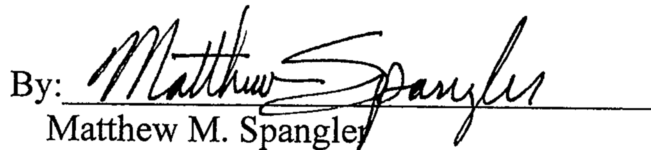
Amrep's position, not the City's position. In this case, the plaintiffs argued that a fee dedication terminated upon the termination of the public use for which the park was dedicated. In essence, the plaintiffs conceded that a fee interest had been dedicated, but argued that it was a determinable fee interest not a fee simple interest. The Court in ***Wheeler*** ruled that the plaintiffs could not argue that the fee interest was determinable because the plat did not contain language stating that it was determinable. ***Wheeler v. Monroe***, 86 N.M. 296, 298, 523 P.2d 540 (1974). In essence, the court determined that the plain language of the plat controlled the extent of the interest dedicated. This is exactly Amrep's argument in this case. The plain language of the plat states that a drainage easement is being granted. Just as the ***Wheeler*** plaintiffs could not change a fee simple interest into a fee simple determinable interest contrary to the language of the plat, the City in our case cannot transform the easement grant shown on the Final Plat into a dedication of a fee simple interest. Section 3-20-11 does not transform every grant into a fee simple grant. This statutory section simply confirms that a dedication to a municipality by plat conveys the property interest stated on the plat without the necessity of preparing a separate deed. Section 3-20-11 does not transform an easement into a fee title. The City's argument regarding Section 3-20-11 is wholly without merit.

IV. CONCLUSION:

For all the reasons identified hereinabove, the Appellee requests this Court to affirm the district court's Order Granting Partial Summary Judgment in this case and for such other and further relief as this Court deems just and proper.

Respectfully submitted,

LASTRAPES, SPANGLER & PACHECO, P.A.

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this Brief in Chief was served by first class mail this 27th day of March, 2009 to the following:

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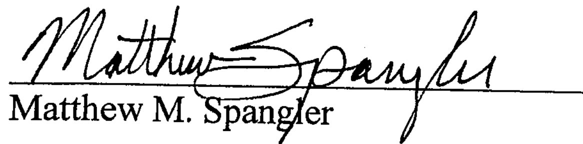

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