

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

No. CV-98-0003210

CITY OF ALBUQUERQUE, a municipal corporation,
Petitioner,

vs.

BACA FOURTH POWER, LP, a New Mexico partnership; RONALD E. JOHNSON and MARY C. JOHNSON, husband and wife; P.J. MURPHY and MARILYN MURPHY, husband and wife; CHARLES W. WILLIAMS; STEVEN P. JACKSON; COUNTY OF BERNALILLO; TAXATION AND REVENUE DEPARTMENT FOR THE STATE OF NEW MEXICO; AND ANY AND ALL UNKNOWN CLAIMANTS OF THE PROPERTY INVOLVED,
Defendants.

AND

No. CV-98-0003213

CITY OF ALBUQUERQUE, a municipal corporation,
Petitioner,

vs.

RONALD E. JOHNSON and MARY C. JOHNSON, husband and wife; P.J. MURPHY a/k/a PATRICK MURPHY and MARILYN MURPHY, husband and wife; CHARLES W. WILLIAMS; STEVEN P. JACKSON; COUNTY OF BERNALILLO; TAXATION AND REVENUE DEPARTMENT FOR THE STATE OF NEW MEXICO; and ANY AND ALL UNKNOWN CLAIMANTS OF THE PROPERTY INVOLVED,
Defendants.

AND

No. CV-98-0003214

CITY OF ALBUQUERQUE, a municipal corporation,
Petitioner,

vs.

INVESTMENT COMPANY OF THE SOUTHWEST, INC., a New Mexico corporation; CHARLES R. BRIGGS, and LAURA BRIGGS, his wife; JOHN ALCOTT, a single man; JAMES E. VALDEZ and BARBARA L. VALDEZ, his wife; LOS CERRITOS LTD., a New Mexico partnership; PATRICIA A. EICHENBERG; LANGDON HARRISON; JAMES H. FOLEY and MARTHA M. FOLEY, husband and wife; COUNTY OF BERNALILLO; TAXATION AND REVENUE DEPARTMENT FOR THE STATE OF NEW MEXICO; and ANY AND ALL UNKNOWN CLAIMANTS OF THE PROPERTY INVOLVED,
Defendants.

and

FOUR HILLS ASSOCIATES, HERB MARCHMAN, TRUSTEE OF THE BURROUGHS LIQUIDATING TRUST, AND LAND INVESTMENT, INC. and HINKLE HOMES, INC.,
Counter-Claimants/Intervenors.

INTRODUCTION

This complex case is a culmination of decades of actions by the City and landowners to the east of Four Hills. In 1979, the City purchased a large parcel of land immediately east of the Four Hills Neighborhood and created the Manzano Open Space.¹

On April 7, 1998, the City filed this lawsuit to condemn the eighty (80) acres of property directly to the east of the open space in order to use the eighty (80) acres as additional open space. The individuals to the east of the eighty (80) acres whose access and development plans could be affected intervened in the condemnation action, claiming that they had access rights through the Manzano Open Space and through the land the City now sought to condemn.² Those rights had not yet been judicially established. The Intervenor also claimed that the City's condemnation of the property to the west was a condemnation of their access rights and an inverse condemnation of their property to which they were entitled to damages.

The City denied that it was inversely condemning the Intervenor's property because it denied that the Intervenor had any access rights from the west. The liability phase of the Intervenor's trial was bifurcated from the damages phase. The liability phase proceeded to trial on whether the Intervenor had access and, if so, the nature and extent of the access, and whether the city improperly denied access and violated the owners' constitutional rights. The evidence was clear that the Intervenor were entitled to some access. The nature and extent of the access was less clear. On June 22, 2001, this Court ruled that the Intervenor did, indeed, have access through the property the City sought to condemn. While Intervenor sought a fifty (50) foot easement by necessity, the court found that the access was only a twenty (20) foot prescriptive easement. After the Court's decision, the City then began to discuss the possibility of abandoning the condemnation of Intervenor's access rights.³ In other words, although the City still sought to condemn the eighty (80) acres, the City would not condemn the Intervenor's twenty (20) foot prescriptive easement through the condemned land. This would mean that the Intervenor and the public would be permitted access through the Manzano Open Space and the condemned eighty (80) acres.

On February 1, 2002, the City abandoned condemnation of Intervenor's access rights.⁴ The damages phase proceeded on December 9, 2002. The issues before the Court were the amount of damages incurred by the Intervenor due to the City's temporary taking of Intervenor's access rights and the City's abandonment of the condemnation. For the most part, the Intervenor failed to prove damages as a result of the temporary taking

¹ The Manzano Open Space is within section 35. The eastern boundary of the Manzano Open Space is the western boundary of Section 36. The eighty (80) acres to the east of the Manzano Open Space is within Section 36. A map of the area is attached as Exhibit A.

² The Intervenor are Four Hills Associates, Hinkle Homes, Burroughs Trust, and the Land Investment Company. Jackson and Williams were defendants in the condemnation action. The City condemned the access rights Jackson and Williams had across the eighty(80) acres. Although Jackson and Williams were not technically Intervenor, their interests were aligned with the Intervenor, particularly during the liability phase of the trial.

³ A condemnor is to be accorded sufficient flexibility to respond to new developments and may limit the extent of the condemnation for the purpose of mitigating damages. Allowing a condemnor to withdraw its right, either partially or fully, to take property "is in keeping with sound public policy to avoid unnecessary expenditure of public funds." County of Bernalillo v. Morris, 117 N.M. 398, 402, 872 P.2d 371, 375 (Ct. App. 1994)

⁴ The City also modified its position with respect to the Jackson and Williams property. Initially, the City sought to condemn just the fifty (50) foot access Jackson and Williams had across the condemned property. After the Court's ruling, the City decided to condemn all but the twenty-foot prescriptive easement across the Jackson and Williams property.

because development was, and remains, speculative.⁵ However, the Intervenor did prove entitlement to reasonable attorneys' fees and costs incurred as a result of the City's abandonment of access rights. The City contended that fees were not justified because it was necessary for the Intervenor to have a ruling on the nature and extent of the easement and that no development could take place until the nature and extent of their access rights were determined. At the trial, however, the City denied that the Intervenor were entitled to *any* access to their land. Had the City determined before trial that it would not condemn the Intervenor's access, but would merely dispute the extent of the access, the Intervenor's attorneys' fees would have been significantly less, and the trial would have been shortened. If the City had elected before the trial not to condemn Intervenor's access rights, whatever the Court determined them to be, the many days of litigating whether any access existed would have been unnecessary. Therefore, the Intervenor will be awarded those fees and costs reasonably associated with litigating whether they had any access rights to their land.

FINDINGS OF FACT

I. Jurisdiction.

1. The City of Albuquerque ("City") is a New Mexico municipal corporation located within Bernalillo County, New Mexico.
2. The land that is the subject of this action is located in Section 35 and Section 36, T10N, R4E, N.M.P.M., Bernalillo County, New Mexico.
3. Four Hills Associates is a New Mexico general partnership with its principal place of business in Bernalillo County, New Mexico and the owner of Lot 3 of the NE1/4 SW1/4 of Section 36, T10N, R4E, N.M.P.M., containing 63.08 acres, more or less; and of Lot 4 of Section 36, T10N, R4E, N.M.P.M., containing 50.61 acres, more or less.
4. Herb Marchman, Trustee of the Burroughs Liquidating Trust ("Burroughs"), is the owner of SW1/4 SE1/4 of Section 36, T10N, R4E, N.M.P.M., containing 40 acres, more or less.
5. Land Investment Company ("Land Investment") is a New Mexico limited partnership with its principal place of business in Bernalillo County, New Mexico and the owner of Lot 2 of the NW1/4SE1/4 of Section 36, T10N, R4E, N.M.P.M., containing between 49.5 acres and 55.35 acres.
6. Hinkle Homes, Inc. ("Hinkle Homes") is a New Mexico corporation with its principal place of business in Bernalillo County, New Mexico, which on April 7, 1998 had a contractual option to purchase an undivided one-half interest in the Land Investment land.

II. Procedural History.

7. The City filed this condemnation action on April 7, 1998 pursuant to the Special Alternative Condemnation Procedure, NMSA 1978, Sections 42-2-1 et seq. (1959), to acquire by eminent domain:
 - (i) the NW1/4SW1/4 of Section 36, containing 40 acres, more or less, which was owned by Investment Company of the Southwest ("Investment Company of the Southwest Parcel");
 - (ii) the NW1/2SW1/4 of Section 36, containing 20 acres, more or less, which was owned by Baca Fourth Power, LP ("Baca Parcel");
 - (iii) the E1/2SW1/4 of Section 36, containing 20 acres, more or less, which was owned by Ronald E. Johnson and Mary C. Johnson ("Johnson parcel")⁶ and
 - (iv) the access easement rights ("Jackson/Williams Easement") which Steven Jackson and Charles W. Williams ("Jackson and Williams") acquired over and

⁵ The City's expert concedes that, as a result of the temporary taking, Burroughs Trust was damaged in the amount of \$18,215.00.

⁶ The Investment Company of the Southwest Parcel, the Johnson Parcel, and the Baca Parcel are sometimes collectively referred to as the "80 acres".

across the condemned land pursuant to a judgment entered in *Charles W. Williams, et al. v. Ronald E. Johnson, et al.*, Second Judicial District Court, No. CV96-04853.

8. The City filed a Notice of Lis Pendens in the Baca and Johnson Condemnations on May 21, 1998 in Book 9810, Pages 1553 and 1554 of the records of Bernalillo County, New Mexico.

9. The 80 acres is unimproved and undeveloped land that lies east of and adjacent to the City's Manzano Open Space, which is located in the SE1/4 of Section 35.

10. The Jackson/Williams easement is fifty (50) feet wide and is appurtenant to the Jackson/Williams land, which is described as the SE1/4SW1/4 of Section 36.

11. The Court granted the City a right of permanent entry to the Condemned Land of Baca and Johnson and the Jackson/Williams Easement by Order of Permanent Entry entered on July 15, 1998.

12. Burroughs Trust, Four Hills Associates, Land Investment, and Hinkle Homes (collectively, "Intervenors") intervened in this action, alleging that the Intervenors individually had access rights within Sections 35 and 36 to and from their respective land based on easements by necessity, prescription, implied dedication, 43 U.S.C. § 932, and plat dedication of streets; that the City took the Intervenors' access rights by exercise of its power of eminent domain; and that the City violated the civil rights of the Intervenors under 42 U.S.C. § 1983.

13. During the liability phase of the trial, held March 7-16, 2001, the Court heard evidence on whether the Intervenors have access rights into and within Sections 36, the nature and extent of the access, whether the City took the Intervenors' access by eminent domain, and whether the City violated the Intervenors' civil rights.

14. On June 22, 2001 the Court entered a letter ruling which determined:

- (a) that an easement by necessity arose between Section 35 and Section 36 in 1898, and a public right of way by implied dedication was established as a result of a 1972 plat which dedicated a roadway through the Manzano Open Space which was to become known as Stagecoach/LaCabra. A public prescriptive easement would have arisen at that time but for the easement by necessity which would defeat the element of adversity.
- (b) With respect to easements within Section 36, Jackson/Williams had a valid fifty (50) foot easement across the Baca and Johnson parcels due to the judgment entered in CV96-4863;
- (c) Intervenors proved that a twenty (20) foot public prescriptive easement existed across the condemned parcels and the remaining tracts within Section 36. An easement by necessity, quasi-easement, or easement implied for common use would have arisen at the time the State transferred lots in Section 36 to the Intervenors or to the Intervenors' predecessors in interest (in 1958) but for the existence of the public prescriptive easement. The public prescriptive easement was twenty (20) feet wide; and,
- (d) The Intervenors failed to prove their Civil Rights' claims.

15. On July 25, 2001, the City filed a Motion for Leave to Mitigate Damages and to Amend Petition. The City sought to abandon that part of the condemnation case that took Intervenors' and Jackson/Williams' access rights. An order was entered granting the City's Motion "to the extent that the City shall have the right to dismiss the condemnation action with respect to the Intervenors and Jackson/Williams' access rights. However, in the event of such a dismissal, said parties shall have a right to seek recovery of attorneys' fees, costs, and lack of access damages, if any." (Order, October 22, 2001, ¶1)

16. Subsequent to that ruling the City began to discuss the possibility of condemning the Jackson/Williams' property in its entirety, as opposed to only Jackson/Williams' access rights, which would necessarily include condemnation of the fifty (50) foot access Jackson/Williams had previously acquired across the Baca and Johnson property in CV96-4863, as well as the fifty (50) foot access across the Jackson/Williams property, both of which had been assigned to Four Hills Associates and Burroughs Trust. The Intervenors argued that the City's proposed condemnation of the Jackson/Williams property was impermissible because of those assignments and agreements.

17. The Court ruled that Jackson/Williams has a fifty (50) foot easement across the Johnson and Baca parcels, “connecting their property to the easterly end of the Stagecoach/La Cabra right-of-way. The Intervenor, at a minimum, have a twenty(20) foot public prescriptive easement across the Jackson/Williams tract. Issues with respect to the width of the easement, claims of a specific grant of easement by Jackson/Williams and other such issues shall be addressed by separate motions filed by the parties.” (Order, October 22, 2001, ¶ 3(b))

18. These separate issues were addressed at a hearing on November 13, 2001. Additionally, the Intervenor asked the Court to determine that the twenty (20) foot easement did not preclude necessary additional easements to construct a twenty-foot roadway.

19. On January 10, 2002 the Court ruled that the Jackson/Williams assignment agreement was ineffective.

20. The Court also ruled the Intervenor may temporarily expand the roadway to perform necessary repairs and maintenance.

21. On February 1, 2002, the City dismissed the condemnation action as to the access rights of Jackson/Williams and Intervenor over the public prescriptive easement established by the Court.

22. From March 3-7, 2002, the Court heard the condemnation trial regarding the eighty (80) acres known as the Baca, Johnson and Investment Company of the Southwest parcels.

23. The Court determined that the fair market value of the Baca parcel was \$43,000 per acre; the fair market value of the Johnson parcel was \$43,000 per acre; and the fair market value of the Investment Company of the Southwest parcel was \$36,310 per acre. Judgment was entered on July 11, 2002. No appeal was taken from those determinations.

24. In April of 2002, the City purchased the Jackson/Williams parcel for \$1,350,000.00.

25. In December, 2002, the Court held the damages phase of the Intervenor’s trial. The issues were whether the Intervenor were damaged by the City’s temporary taking of their access rights and whether the Intervenor were entitled to attorneys’ fees due to the City’s abandonment of its condemnation of Intervenor’s access rights.

III. History of Section 35 and 36.

A. Description of the land from 1898 severance until 1958

26. The Territory of New Mexico acquired all of Section 36 from the United States in 1850 pursuant to the Organic Act, Chap. 49, Sec. 15, 9 Stat. 446 (1850). The United States retained Section 35. The United States confirmed the grant as Section 26 to the State of New Mexico in 1910, pursuant to the Enabling Act, Chap. 310, Sec. 6, 36 Stat. 557 (1910).

27. An old wagon trail or dirt road has existed in Section 35 since the 1930’s, extending from old Route 66 in a southeasterly direction across what is now the Four Hills Village Subdivision, through the Manzano Open Space, following the alignment of the platted right-of-way Stagecoach Road and La Cabra Drive, and into Section 36. A 1935 aerial and overlay shows a road scar from Highway 66 into the Southwest corner of Section 36.

28. The road extended from the end of Stagecoach/La Cabra, through the Baca and Johnson parcels and the Jackson/Williams land, into and ending within the Burroughs Trust land.

29. The old wagon trail varied in width from fifteen (15) to twenty (20) feet.

30. Other trails within Section 36, of up to twenty (20) feet in width, have existed since the 1930’s, branching off of the old wagon trail and proceeding north into the Four Hills Associates’ land and northeast into the Land Investment land.

31. The location of the old wagon trail and other dirt roads are shown and depicted in red and blue on Exhibit 158.

32. In 1958, the State of New Mexico publicly auctioned the parcels within Section 36. At the time of the 1958 Auction, the Burroughs Trust land, the Four Hills Associates land and the Land Investment land was accessible by four wheel drive vehicles, motorcycles, and all- terrain vehicles via the old wagon trail and other dirt roads depicted in red and blue on Exhibit 158.

33. All of the trails and dirt roads shown in red and blue on Exhibit 158 had been used by the public, in an open, notorious and adverse manner for a period of more than ten (10) years prior to the 1958 auction.

B. Description of land from State Of New Mexico Sale Of Section 36 in 1958 until 1972.

34. All of the land parcels located within Section 36, including the parcels described herein, were held in common ownership by the State of New Mexico in 1958.

35. In 1958, the State of New Mexico sold all of the land in Section 36 by public auction (“1958 Auction”).

36. The position of the Commissioner of Public Lands conveyed to the purchasers of the land at the public auction was that the property purchasers would have a legal right of access by way of necessity.

37. At the time of the 1958 Auction, the State of New Mexico did not provide or specify the location of access to Section 36, and it was not apparent where access to Section 36 would be located.

38. Four Hills Associates purchased its property in Section 36 in 1968; Land Investment purchased its property in Section 36 in 1963; and Burroughs Trust purchased its property in Section 36 in 1978. Each of these owners purchased their properties from a purchaser who had bought the land at the 1958 Auction.

C. Description of land from 1972 until April 7, 1998

39. A subdivision plat for the Eleventh Installment of the Four Hills Village Subdivision was filed on January 14, 1972 in Book D4, Folio 181 of the records of Bernalillo County, New Mexico. It dedicated extensions of Stagecoach Road S.E. and La Cabra Drive S.E. (collectively, “Stagecoach/La Cabra”) through what was to become the Manzano Open Space to the western boundary of Section 36.

40. In 1979, the City entered into an installment contract to purchase tracts of unimproved and undeveloped land, to be known as the Manzano Open Space, for permanent open space located within the SE1/4 of Section 35, directly east of Four Hills Village.

41. The Four Hills Diversion Channel and an earthen berm, approximately five (5) feet high, lie along the west boundary of the Manzano Open Space and serve to divert storm water flowing from Section 36 away from Four Hills Village. The City constructed the eastern berm to comply with requirements imposed by the Albuquerque Metropolitan Arroyo Flood Control Authority.

42. In 1979, Stagecoach/La Cabra were dead-ended at the west boundary of the Manzano Open Space by barricades and “road closed signs” which the City erected at the intersection of Stagecoach Road and the berm.

43. In or about 1984, the City received title to the southern portion of the Manzano Open Space where Stagecoach/La Cabra are located and installed gates at the east and west boundaries of the Manzano Open Space and at the west boundary of the Manzano Open Space.

44. The City installed the gates to protect the Manzano Open Space from trash dumping, off-road vehicles, vandals, drunks, and revelers.

45. The west gate of the Manzano Open Space had a keyed lock.

46. The City either gave the Intervenor keys or gave them the opportunity to obtain keys to the keyed lock on the west gate of the Manzano Open Space.

47. The fencing and gating of Stagecoach/La Cabra in the Manzano Open Space did not deprive the Intervenor of reasonable access to their land in Section 36.

48. The Four Hills Homeowners’ Association attempted to vacate the platted portion of Stagecoach and La Cabra in 1980 and 1992. The City denied all applications to vacate Stagecoach/La Cabra in the Manzano Open Space.

49. In 1988, Tinley and Murphy,⁷ as owners of the eighty (80) acres, sued the City in Murphy et al. vs. City of Albuquerque, Bernalillo County District Court, CV-88-04585 (“Murphy/Tinley Lawsuit”).

50. The Murphy/Tinley Lawsuit was settled by the Stipulated Settlement of the parties which was adopted by the District Court on December 4, 1989 and which provides in pertinent part that (a) Stagecoach/La Cabra within the Manzano Open Space were dedicated to the use of the public forever as public streets and will

⁷ Murphy was the predecessor-in-interest to Baca and Johnson.

remain a dedicated public road open to the use of the public; (b) the City will be allowed to leave the existing barricades in place on Stagecoach Road at the west boundary of the Manzano Open Space until Tinley begins construction of a drainage structure and road across the Four Hills Diversion Channel and the berm, at which time the existing barricades will be removed and replaced with construction barricades; and (c) Murphy and/or Tinley will not agree to the extension of public or private access through Stagecoach/La Cabra to any property outside the boundaries of the Tinley and Murphy land.⁸

51. On December 15, 1997, in CV 96-4863, the owners of the Jackson/Williams parcel obtained a judgment granting them a fifty(50) foot wide easement across the Baca and Johnson parcels.

52. Between 1958 and April 7, 1998, no landowner within Section 36, other than Tinley and Murphy and Jackson and Williams, filed any judicial or administrative proceeding or otherwise established access rights to and within Section 36.

53. By Easement Agreement dated December 12, 1997, and acquired in CV96-4863, Jackson and Williams granted to Four Hills Associates an easement across the Jackson/Williams land and across the Johnson/Baca tracts. The Four Hills Associates Easement agreement was executed by Jackson and Williams on December 12, 1997 and by Four Hills Associates on September 9, 1998, and recorded in the Bernalillo County Clerk's office on September 18, 1998.

54. By Easement Agreement dated May 28, 1999, Jackson and Williams granted to Burroughs Trust an easement ("Burroughs Easement") across the Jackson/Williams land and across the Condemned Land. The Burroughs' Easement was executed by Burroughs Trust on July 6, 1999 and by Jackson and Williams on July 21, 1999 and recorded in the Bernalillo County Clerk's office on July 27, 1999.

55. In both the Burroughs' Easement and the Four Hills Associates' Easement, Jackson and Williams purported to assign to Four Hills and Burroughs Trust the non-exclusive right to use the fifty (50) foot Jackson/Williams' Easement across the Condemned Land.

56. The Burroughs' Easement and the Four Hills Associates' Easement were filed of record after April 7, 1998, the date of valuation in this case, and after the City filed its Notice of Lis Pendens of record.

57. The fifty (50) foot easement assignment to Burroughs and Four Hills Associates changed the extent of the easement due to potential development contemplated by Burroughs and Four Hills Associates.

58. The Burroughs' Easement and Four Hills Associates' Easement changed the extent of the easement without consent of the servient estate owner, and such change was not foreseeable or contemplated at the time the easement was created.

D. April 7, 1998 through the liability phase of the trial.

59. The City did not take dominion and control of the Condemned Land and the Jackson/Williams' Easement until April 7, 1998.

60. As of April 7, 1998, the access rights of Four Hills Associates, Land Investment and Burroughs Trust had not been judicially established, and the nature and extent of the access was uncertain.

61. As of April 7, 1998, the only judicially established access rights were the rights adjudicated in the Jackson/Williams lawsuit and the Tinley/Murphy lawsuit.

62. As of April 7, 1998, there was no alternate access to the Four Hills Associates land, the Burroughs Trust land and the Land Investment land from the north of Section 36 over land owned by Hinkle Homes, commonly known as Desert Mountain Estates, or over land owned by others.

63. As of April 7, 1998, the only access to the Intervenors' land was the twenty (20) foot public prescriptive easement.

64. On June 22, 2001, this Court ruled that an easement by necessity arose between Section 35 and Section 36 in 1898, and a public right of way by implied dedication was established as a result of the filed 1972 plat.

⁸ Intervenors did not seek to intervene in that case.

65. The Court further ruled that the Intervenor established the existence of a twenty (20) foot public prescriptive easement across the condemned parcels and remaining tracts within Section 36. But for the existence of the public prescriptive easement, an easement by necessity would have been established in 1958.

E. Post-Liability Phase

66. On February 2, 2002, in response to the Court's determination that a twenty (20) foot public prescriptive easement exists over the condemned parcels and remaining tracts within Section 36 and that the City had taken the twenty (20) foot public prescriptive easement by inverse condemnation, the City abandoned its condemnation as to the twenty (20) foot wide public prescriptive easement.

67. The Intervenor sought damages for the temporary inverse condemnation.

IV . Damages for Temporary Inverse Condemnation.

68. Intervenor is entitled to the market rate of return on the difference in the fair market value of the property without the restrictions and the fair market value with the restriction from April 7, 1998 to February 1, 2002, which is that period of time during which the restriction took place.

A. Development Uncertainties

69. The Four Hills Associates land, the Burroughs Trust land and the Land Investment land are located within Bernalillo County and outside the boundaries of the City of Albuquerque and any other municipality.

70. The subdivision of the Burroughs Trust land, the Four Hills Associates land and the Land Investment land was at all material times under the primary jurisdiction of the County of Bernalillo.

71. The Burroughs Trust land, Four Hills Associates land and Land Investment land were at all material times subject to the terms, conditions and restrictions of the Bernalillo County zoning and subdivision ordinances.

72. As of April 7, 1998, neither the Burroughs Trust land, the Four Hills Associates land, nor the Land Investment land had sufficient primary access from the west or the north to be developed for residential subdivisions purposes.

73. As of April 7, 1998, the development costs of the Burroughs Trust land, the Four Hills land, and the Land Investment land were unknown and speculative.

74. During the liability phase, Intervenor testified that there were *no* agreements among them to provide access to their land north of Section 36 and that they had no access to their land north of Section 36.

75. Contrary to their testimony in the liability phase, in the damages phase, Intervenor and their experts testified that agreements among the Intervenor to provide access to their land north of Section 36 existed for years prior to April 7, 1998. This testimony was not credible.

76. In making its liability determinations, the Court relied on the testimony offered by the Intervenor during the liability phase in ruling that there was no reasonable access to the Intervenor's land from the north of Section 36. As of April 7, 1998, Burroughs Trust, Hinkle Homes and Land Investment had only discussed the possibility of providing access for the Burroughs Trust land to the north by an easement over the Land Investment land and Desert Mountain Estates which was owned by Hinkle Homes.

77. As of April 7, 1998, according to the testimony during the liability phase, the likelihood of obtaining access to the north by Burroughs Trust, Land Investment, and Four Hills Associates, such that their land could be developed as residential subdivisions, was uncertain and speculative.

78. On September 26, 2001, Burroughs Trust, Land Investment, and Hinkle Homes entered into an Agreement wherein Land Investment and Hinkle Homes agreed to grant Burroughs Trust easements for access to the north over the Land Investment land and Desert Mountain Estates.

79. Until an application for a subdivision approval is filed and reviewed by Bernalillo County, it is speculative or uncertain what access requirements would be approved.

80. It is unknown whether Bernalillo County will require the Burroughs Trust land, the Four Hills land or the Land Investment land, or the combined land, to have two (2) points of access in order to approve a residential subdivision of the land.

81. Bernalillo County may or may not require emergency access in addition to primary access as a condition to the development of land in Section 36.

82. It is unknown if the Intervenor will be able to construct a twenty(20) foot wide roadway within the twenty (20) foot wide public prescriptive easement since permanent slopes outside the twenty foot easement may be required.

83. If Intervenor are not able to construct a twenty foot wide roadway within the twenty foot wide public prescriptive easement across the former Johnson and Baca properties, then the twenty foot public prescriptive easement may not be suitable as secondary or emergency access to support a subdivision.

84. Bernalillo County may or may not allow a stand-alone development of a parcel of land in Section 36.

85. Bernalillo County may or may not require an evaluation of the impact of the development of all property in Section 36 in order to determine the conditions of development of any single parcel of land in Section 36.

86. Bernalillo County may or may not require the widening of Silver Hills road, a public road to the north within Desert Mountain Estates, to provide access to land in Section 36 as a condition of development of land in Section 36.

87. The period of time to obtain development rights for land in Section 36 is uncertain.

88. The terrain between the Burroughs Trust land and the access roads within Desert Mountain Estates to the north is steep and rocky.

89. The construction of a road from Desert Mountain Estates, through the Land Investment land to the Burroughs Trust land may not meet current Bernalillo County road and street standards.

90. The construction of a road that meets the road and street standards of Bernalillo County from the Burroughs Trust land, over the Land Investment land to the roads within Desert Mountain Estates, without a variance is uncertain.

91. The acquisition of a variance from the Bernalillo County road and street standards is dependent on the exercise of discretion by Bernalillo County officials.

92. The quantity of rock that must be blasted and excavated in order to build a road from the Land Investment land to the Burroughs Trust land is uncertain.

93. It may not be financially feasible to construct a fifty (50) foot wide road from the Burroughs Trust land, over the Land Investment land to the roads within Desert Mountain Estates.

94. The location of the southern boundary of Section 36 in relation to the northern boundary of Kirtland Air Force Base is uncertain.

95. The location of the southern boundary of Section 36 must be determined before subdivision plats of Intervenor's land can be approved.

B. Use of Intervenor's land.

96. None of the land in Section 36 is of the kind normally rented to third parties, either on a long-term or short-term basis.

97. None of the land owned by Four Hills Associates, Land Investment and Burroughs Trust was being put to productive use as of April 7, 1998 and none of the land was generating any income or return from productive use.

C. Option Agreements.

(1) Investment Company of the Southwest's Option to purchase Four Hills Associates land

98. The Four Hills Associates land was, as of April 7, 1998, subject to an option to purchase in favor of Investment Company of the Southwest for the sum of \$1,620,082.50 or \$14,250.00 per acre.

99. The option purchase price for the Four Hills Associates land was determined in part by the uncertainty of access.

100. Pursuant to the Option Agreement with Investment Company of the Southwest, Four Hills Associates had received \$70,000.00 in option money as of April 7, 1998.

101. The Option Agreement for purchase of the land at \$14,250.00 per acre between Four Hills Associates and Investment Company of the Southwest was, by its terms, to expire on March 31, 1998 but was extended after the filing of this condemnation action.

102. Investment Company of the Southwest exercised its option to purchase the Four Hills Associates land on December 31, 1999.

103. Investment Company of the Southwest and Four Hills Associates entered into the agreement pursuant to the option for the sale and purchase for the Four Hills Associates.

(2) Hinkle Homes' options to purchase Four Hills Associates land and Land Investment Company Land

104. On January 1, 1994, Hinkle Homes acquired an option to purchase the Four Hills Associates land for a purchase price of \$12,500.00 per acre.

105. Hinkle Homes voluntarily elected not to exercise that option to purchase the Four Hills Associates land.

106. As of April 27, 1995, the Land Investment land was subject to an option in favor of Hinkle Homes to purchase an undivided fifty percent (50%) in the Land Investment land pursuant to an Option Agreement effective as of April 27, 1995, amended by the First Amendment to Option Agreement, dated May 18, 1998, and by the Second Amendment to Option Agreement, dated September 15, 2000.

107. Hinkle Homes paid Land Investment for the option.

108. As of April 7, 1998, Hinkle Homes had not exercised its option to purchase the Land Investment land.

109. Hinkle Homes owned no interest in the Land Investment land as of April 7, 1998.

110. On September 15, 2000, Hinkle Homes exercised the option to purchase the Land Investment land.

111. As of the date of the damages phase, Hinkle Homes and Land Investment had not closed the purchase and sale of the Land Investment land.

D. Valuation of the land in the before and after condition.

112. The current fair market value of each of the Burroughs Trust land, the Four Hills land, and the Land Investment land is determined by valuing the land in its "as is" condition, as of April 7, 1998, both before and after the taking of the twenty (20) foot public prescriptive easements by inverse condemnation.

113. The "as is" condition of the Burroughs Trust land, as of April 7, 1998, before the filing of this condemnation action, did not include market recognition or recognition in fact of any access rights other than the twenty (20) foot public prescriptive easements.

114. The "as is" condition of the Four Hills Associates land as of April 7, 1998, before the filing of the condemnation action would include recognition that the only practical access to the land is from the north and that access to the north would have to be obtained through negotiations with property owners to the north or that the Intervenors' land would have to be consolidated with property to the north in order to be developable.

115. Fair market value as of the date of valuation is based upon the "highest and best use" of each of the Burroughs Trust land, the Four Hills Associates land and the Land Investment land, which includes those current uses of the property and those uses, if any, for which the property is suitable and adaptable in the near or immediate future.

116. The highest and best use of each of the Burroughs Trust land, the Four Hills Associates land, and the Land Investment land is determined as of April 7, 1998.

117. None of Intervenors' land had a highest and best use for immediate residential subdivision as of April 7, 1998 or in the immediate future.

118. The Burroughs Trust land, Four Hills Associates Land and Land Investment Company Land were not immediately or in the near future developable as a residential subdivision as of April 7, 1998.

119. The highest and best use of the Burroughs Trust land as of April 7, 1998 was for assembly with other land for residential subdivision in the future or for a sale as open space.

120. The highest and best use of the Four Hills Associates land as of April 7, 1998 was for assembly with other land for residential subdivision in the future.

121. The highest and best use of the Land Investment land as of April 7, 1998 was for assembly with other land for residential subdivision in the future.

122. The real estate market, in the form of an informed buyer, not under any compulsion to purchase, would not, as of April 7, 1998, purchase the Intervenor's land for a purchase price equal to the value of the land based on the highest and best use of the land for immediate residential subdivision.

123. There was no market, as of April 7, 1998, for the rent of the Burroughs Trust land, the Four Hills land or the Land Investment land.

E. Impact Of Denial Of Temporary Use Of Public Prescriptive Easements.

124. The temporary taking by the City, if any, of the twenty (20) foot public prescriptive easements over the Condemned Land had no adverse effect on the values of the Burroughs Trust land, the Land Investment land or the Four Hills Associates land.

125. The temporary taking of the twenty (20) foot public prescriptive easements did not delay or prohibit the development of the Burroughs Trust land, the Four Hills land or the Land Investment land.

126. The temporary taking of the twenty (20) foot public prescriptive easements did not change the highest and best use of the Burroughs Trust land, the Four Hills land or the Land Investment land.

127. Without any access, the Burroughs Trust land was immediately suitable for open space or for assembly with other adjacent land.

128. Intervenor's appraisers have assumed that all the uncertain subdivision requirements and development conditions of the Intervenor's land are certain.

129. Intervenor's appraisers assumed that the Intervenor's land enjoyed sufficient access for residential subdivision development even though the land may in fact not enjoy sufficient access.

130. The City's appraiser appraised the Intervenor's land based on access via the twenty (20) foot public prescriptive easements.

131. Intervenor's appraisers have determined the before-condemnation value of the Intervenor's land in other than the "as is" condition of the land and have determined a possible future value of the land, not the current value as of April 7, 1998.

132. During the damages phase, appraiser Travis Engelage testified that based upon his conversation with Herb Marchman, he understood there was legal access from the Burroughs property to the north because he understood that there was an oral agreement between Mr. Marchman and Mr. Hinkle prior to April 7, 1998 which provided for access to the north.

133. The land identified by Intervenor's appraisers as comparable land, for the purposes of determining fair market value based upon the comparable sales method, is not comparable to the land in Section 36.

134. The land identified by the City's appraiser as comparable land, for the purposes of determining fair market value based upon the comparable sales method, is comparable to the Burroughs Trust land, the Four Hills land and the Land Investment land.

135. Because of the uncertainties of access rights and County requirements, the fair market value determined by using the subdivision method, which included estimates of development costs and absorption time, did not accurately reflect the value of the property in this case.

136. Determination of the fair market value of the Burroughs Trust land, Four Hills Associates land, and the Land Investment land in both the before and after condition based on the subdivision method is rejected.

137. The fair market value of the Burroughs Trust land, as of April 7, 1998, before the taking of the twenty (20) foot public prescriptive easements, was \$9,600.00 per acre, or a total of \$375,000.00.

138. The fair market value of the Burroughs Trust, as of April 7, 1998, after the taking of the twenty (20) foot public prescriptive easements, was \$5,680.00 per acre, or a total of \$225,000.00 because of market recognition that Burroughs Trust's primary access would be from the east, and the potential for assembly with other properties would be less than the other properties.

139. Burroughs Trust's damages are computed by multiplying the amount of \$150,000.00, which is the difference between the value of the Burroughs Trust land before the taking and the value after the taking, by

3.2% per annum, which is a reasonable rate of return, for the forty six (46) months period of the temporary taking, yielding damages in the amount of \$18,515.00.

140. The fair market value of the Four Hills land on April 7, 1998, before the taking of the twenty (20) foot public prescriptive easements, was \$1,565,130.00.

141. The fair market value of the Four Hills land on April 7, 1998, after the taking of the twenty (20) foot public prescriptive easements, was \$1,565,130.00.

142. The fair market value of the Land Investment land on April 7, 1998, before the taking of the twenty (20) foot public prescriptive easements, was \$850,000.00.

143. The fair market value of the Land Investment land on April 7, 1998, after the taking of the twenty (20) foot public prescriptive easements, was \$850,000.00.

F. Attorneys' Fees and Costs.

144. Intervenors are entitled to attorneys' fees and costs incurred to establish the existence of access, which were incurred through February 1, 2002.

145. Intervenors could not have anticipated a need to separate fees and costs incurred to establish access from fees and costs to establish the extent of the access.

146. The fees incurred to establish the extent of access are inextricably intertwined with the nature of the access.

147. The trial Court, after considering the evidence, may estimate the amount of time an attorney expended on a case.

148. In light of the guidelines set forth in Rule 16-105 NMRA (2000), the evidence submitted allows a reasonable estimate of attorneys' fees incurred in establishing the existence of access.

149. Approximately twenty percent of the testimony and evidence submitted by Intervenors in the liability portion of this trial was related to their unsuccessful Section 1983 claim and ten percent of the testimony and evidence related to the extent of the easement. Seventy percent of the testimony and evidence concerned the historical usage of the property, which was relevant to whether access existed, an argument later abandoned by the City.

150. Between April 7, 1998 and February 1, 2002, Four Hills Associates incurred attorneys' fees and gross receipts tax of \$147,872.43.

151. Between April 7, 1998 and February 1, 2002, Four Hills Associates incurred costs allowable by law⁹ in the amount of \$25,253.86.

152. Four Hill Associates is entitled to 70% of fees and costs incurred between April 7, 1998 and February 1, 2002, or \$121,188.40.

153. Between April 7, 1998 and February 1, 2002, Burroughs Trust incurred attorneys' fees and gross receipts tax in the amount of \$120,708.84,

154. Between April 7, 1998 and February 1, 2002, Burroughs Trust incurred costs allowable by law¹⁰ of \$25,578.29.

155. Burroughs Trust did not pursue a Civil Rights Claim and is, therefore, entitled to 90% of its fees and costs between April 7, 1998 and February 1, 2002, or \$131,658.41.

156. Between April 7, 1998 and February 1, 2002, Land Investment Company, Inc. and Hinkle Homes incurred attorneys' fees and gross receipts tax in the amount of \$170,474.09.

157. Between April 7, 1998 and February 1, 2002, Land Investment Company, Inc. and Hinkle Homes incurred costs allowable by law of \$27,880.16.

⁹ Photocopying, parking, and courier costs are not recoverable by law and have been excluded from the total.

¹⁰ Mediation fees and miscellaneous expenses are not recoverable and have been excluded from the total.

158. Land Investment Company, Inc. and Hinkle Homes are entitled to 70% of their fees and costs incurred between April 7, 1998 and February 1, 2002 or \$138,847.97.

CONCLUSIONS OF LAW

I. Jurisdiction.

1. The Court has jurisdiction of the parties and the subject matter of this action.

II. Access.

A. Access Into Section 36.

2. An easement by necessity arose at the time of severance in 1898, and such easement provided access into Section 36 from Section 35.
3. A public prescriptive easement would have arisen after that date but for the existence of the easement by necessity, which would defeat the element of adversity.
4. The filing of the 1972 Plat for the Four Hill Village Eleventh Installment constituted an express or implied dedication of Stagecoach/La Cabra within the Manzano Open Space.
5. A public right of way for Stagecoach/La Cabra was created by the filing of the 1972 Four Hills Village Eleventh Installment Plat.

B. Access Within Section 36

6. In 1958, when the State of New Mexico auctioned the land in Section 36, a twenty (20) foot wide public prescriptive easement existed within Section 35 from old Route 66, over the Manzano Open Space along the right-of-way of Stagecoach Road and La Cabra Drive, into Section 36.
7. In 1958, when the State of New Mexico auctioned the land in Section 36, the old wagon road and other roads within Section 36, as shown and designated in red and blue on Exhibit 158, were public prescriptive easements, twenty (20) feet in width.
8. In 1958, when the State of New Mexico auctioned the land in Section 36, the twenty (20) foot public prescriptive easement into and across Section 36 to all properties within Section 36, provided access from Intervenors' land to public roads.
9. The location of the public prescriptive easements within section 36 are shown and designated in red and blue on Exhibit 158.
10. The twenty (20) foot prescriptive easement within Section 36 includes a temporary constructed easement on each side of the twenty (20) feet reasonably necessary for construction of the roadway within the twenty (20) foot easement.
11. At the time the twenty (20) foot public prescriptive easements arose, no burdens other than the twenty (20) foot wide public prescriptive right of ingress and egress were contemplated or foreseeable by the public use of the easements.
12. The existence of the twenty (20) foot public prescriptive easements, precludes any easements by necessity over Section 35 and Section 36.
13. No easement by necessity arose within Section 36 as a result of the 1958 Auction, and none existed over the Condemned Lands as of April 7, 1998.
14. No public or private easement, other than the twenty (20) foot public prescriptive easements over the roads shown and designated in red and blue on Exhibit 158, existed over the Condemned Land as of the 1958 Auction.

C. Jackson/Williams' Grants of Easement.

15. The 50 foot wide Jackson/Williams Easement that Jackson/Williams acquired over the Condemned Land in the Jackson/Williams Lawsuit is an easement appurtenant to the Jackson/Williams' land.
16. The purported assignments by Jackson/Williams of the Jackson/Williams Easement to Four Hills in the Four Hills Easement and to Burroughs Trust in the Burroughs Easement are invalid and void.

D. Access North Of Section 36.

17. Burroughs Trust, Land Investment, and Hinkle Homes successfully asserted during the liability phase that there was no access to the north of Section 36. No agreements existed among these parties prior to September 21, 2001 to provide access to the north for their land.

18. The only access to the Burroughs Trust land, the Four Hills land, and the Land Investment land, as of April 7, 1998, was the twenty (20) foot prescriptive easements shown and designated in red and blue on Exhibit 158.

III. Title 43 U.S.C. Section 1983.

19. The actions of the City in selecting the Condemned Land for acquisition as open space did not deprive Intervenor's of any constitutional rights under the Constitution of the United States.

20. The actions of the City prior to selecting the Condemned Land for acquisition as open space did not deprive Intervenor's of any constitutional rights under the Constitution of the United States.

21. The City is not liable to Four Hills Associates, Land Investment, or Hinkle Homes for damages under 42 U.S.C. Section 1983.

IV. The City Condemned The Intervenor's' Access.

A. Temporary Taking.

22. The taking of the Intervenor's' access was temporary and began on April 7, 1998 as a result of the filing of the City's condemnation action and the entry of the Permanent Order of Entry and ended on February 1, 2002, the date of abandonment.

23. No taking of the Intervenor's' rights of access by inverse condemnation occurred before April 7, 1998.

24. The inverse condemnation of the Intervenor's' rights of access was abandoned by the City on February 1, 2002.

25. As a result of the City's abandonment of the condemnation of the twenty (20) foot public prescriptive easements, the inverse condemnation of the right of access over the twenty (20) foot public easements became a temporary taking of the Intervenor's' right of access over the twenty (20) foot public prescriptive easements.

26. The temporary taking of the Intervenor's' rights of access was for the period between April 7, 1998 through February 2, 2002.

27. Burroughs suffered damages in the amount of \$18,215 and attorneys' fees and costs to prove the existence of access. No other Intervenor suffered damages as a result of the temporary taking except for attorneys' fees and costs to prove the access.

28. Hinkle Homes, as the holder of an option to purchase the Land Investment land, owned no legal interest in the Land Investment land because no sale occurred until the option was exercised.

29. Hinkle Homes as an optionee has no compensable interest other than a share in any award of damages or expenses made to Land Investment.

B. Damages for Temporary Taking.

30. The Intervenor's are only entitled to recover damages actually suffered or incurred, if any, arising from the temporary loss of use of the twenty (20) foot public prescriptive easements and an award of expenses incurred to defend the abandoned inverse condemnation as is necessary to do equity.

31. The applicable measure of damages for the temporary taking of Intervenor's' access is the rate of return on comparable property to that of the Intervenor's' land, multiplied by the difference between the value of the Intervenor's' land before the taking and after the taking, for the duration of the taking.

32. In determining damages for a taking of property by condemnation, the uses made of the property at the time of the taking and also the highest and best uses for which the property may have been suitable and adaptable in the immediate future must be considered.

33. As of April 7, 1998, because of the development uncertainties, the highest and best use of the Intervenor's' land was not for immediate subdivision.

34. Injury to business, inconvenience, disruption, lost aesthetic value, increased development costs, or lost profits and delay in realizing lost business profits are usually subsumed into the before and after rule.

35. Even if injury to business, inconvenience, disruptions, lost aesthetic value, increased development costs, lost business profits, and delay in realizing lost business profits were found to be an appropriate measure of damages, Intervenor failed to prove entitlement to these damages because development was speculative, uncertain, and immediate subdivision or subdivision in the near future as its highest and best use was not proven.

36. Intervenor is not entitled to recover loss of rent damages.

37. Intervenor is not entitled to the fair market rental on the fair market value of their lands from 1984.

38. Land Investment and Hinkle Homes are not entitled to loss of market value to the Land Investment land due to the alleged increased cost to build an access roadway because of the decrease in the number of property owners that would have shared in the cost of the roadway, which allegedly resulted from the City's condemnation of the Condemned Land and its purchase of the Jackson/Williams land.

39. Hinkle Homes is not entitled to recover damages for loss of its option to purchase the Four Hills Associates land.

40. Four Hills Associates is not entitled to compensation for any claim that prior to the City's filing of this condemnation it agreed to a price less than it believed to be the fair market value of its property.

41. Land Investment, Four Hills, and Burroughs are not entitled to any loss in market value of the Burroughs Trust land due to its loss of the ability to negotiate access with the owners of the Condemned Land which allegedly resulted from the City's condemnation of the Condemned Land.

42. The temporary denial of use of the twenty (20) foot public prescriptive easements over the Manzano Open Space did not impact the use or development of the Intervenor's land.

43. The temporary denial of use of the twenty (20) foot public prescriptive easements over the Manzano Open Space did not affect the value of the Land Investment land or the Four Hills Associates land.

44. There is no difference in the residual value of the Land Investment land "before and after" the inverse condemnation of the twenty (20) foot public prescriptive easements.

45. There is no difference in the residual value of the Four Hills Associates land "before and after" the inverse condemnation of the twenty (20) foot public prescriptive easements.

46. Four Hills Associates and Land Investment did not suffer actual damages from the temporary taking of the twenty (20) foot public prescriptive easements.

47. The temporary taking of the twenty (20) foot public prescriptive easements damaged the Burroughs Trust land for forty-six (46) months, in the total amount of \$18,515.00.

C. Damages For Abandonment.

48. Intervenor is entitled to attorneys' fees for establishing their access over the Manzano Open Space and the Condemned Land. Intervenor is not entitled to attorneys' fees for establishing the extent of that access or for unsuccessfully pursuing claims under 42 U.S.C. Section 1983.

49. Attorneys' fees incurred by Intervenor from February 1, 2002 through the final judgment were incurred to prove damages under NMSA 1978, Section 42A-1-29 (1983) for the temporary taking by inverse condemnation of the twenty (20) foot public prescriptive easements and are not recoverable.

50. Judgment shall be entered against the City of Albuquerque and in favor of Four Hills Associates for attorneys' fees and costs in the amount of \$121,188.40.

51. Judgment shall be entered against the City of Albuquerque and in favor of Burroughs Trust for attorneys' fees and costs in the amount of \$131,658.41.

52. Judgment shall be entered against the City of Albuquerque and in favor of Land Investment Company and Hinkle Homes in the amount of \$138,847.97.

53. The City is entitled to a judgment dismissing all other claims of the Intervenor.

54. Within fifteen days after filing of the final judgment, any party with a good faith basis may file with the clerk a motion to argue that it is the prevailing party and is entitled to the award of costs incurred after February 1, 2002. Any party objecting to such award may file objections within ten (10) days.

WENDY E. YORK
DISTRICT JUDGE

Copies mailed:

Mark Hirsch
Robert Waldman
Bill Chappell
Catherine Davis
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