DISTRICT COURT, LARIMER COUNTY, COLORADO Larimer County Justice Center 201 La Porte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 494-3500 **Plaintiff: THE CITY OF LOVELAND, a Colorado Municipal Corporation,** **v.** **Defendants: ROGER GOMEZ; JPMORGAN CHASE BANK, N.A.; and FIRST NATIONAL BANK OF OMAHA.**	
Attorneys for Defendant City of Loveland, a Municipal Corporation: Alicia R. Calderón, #32296 Assistant City Attorney Vincent Junglas, #43697 Assistant City Attorney Loveland City Attorney's Office 500 E. Third Street, Suite 330 Loveland, CO 80537 (970) 962-2544 Alicia.Calderon@cityofloveland.org Vincent.Junglas@cityofloveland.org	Case Number: 2016CV30703 Courtroom: 4A

PLAINTIFF CITY OF LOVELAND'S CROSS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW the Plaintiff, the City of Loveland [hereafter "City"], by and through undersigned counsel, hereby moves for summary judgment and responds to Defendant's motion for summary judgment. In support hereof, the City cross motions and responds and in support states the following:

C.R.C.P. 121 § 1-15(8) CERTIFICATION

The undersigned certifies that they have conferred with opposing counsel and has been advised that Defendant Gomez will object to this Motion.

INTRODUCTION

The parties agree that the facts are undisputed, and the Court should issue a ruling entering summary judgment. Each party is seeking a ruling in its favor and relies on the same documents and facts for its arguments. The Defendant, Mr. Gomez, has filed his Motion for Summary Judgment seeking dismissal of the City's claims. Mr. Gomez does not address his Counter Claims in the Motion. The City is responding to the Motion and asking for a ruling for Summary Judgment finding an easement by estoppel or in the alternative by prescription. The City also moves for dismissal of the Counter Claims, and cross motions for summary judgment.

UNDISPUTED FACTS

1. Defendant, hereafter Mr. Gomez, owns a parcel of land described in Exhibit A, attached to Defendant's Motion for Summary Judgment, which is a part of the lot with an address of 3510 West Eisenhower Boulevard, Loveland, Colorado.

2. A twelve inch and a thirty-six inch pipe run through Mr. Gomez' property. The twelve inch pipe since 1936, and the thirty-six inch pipe since 1954. The history of these water lines is undisputed. The City entered into license agreements with the Colorado and Southern Railroad Company for the installation and use of these water lines. These agreements were attached to Defendant's Motion for Summary Judgment as Exhibits B and C.

3. An electrical transmission line runs above the property since the early 1970s, and these lines are clearly visible. Defendant has admitted these are clearly visible in paragraphs 14 and 15 of his Answer to the Complaint.

4. The City owns these utilities, owns the water distribution system and electrical power system, of which these lines are a part.

5. The water pipes and power transmission line have run through this property for more than eighteen years, continuously, since 1936, 1954, and 1970s respectively.

6. The Railroad sold this parcel of land to private owners in 1971, the Millers. (See attached Exhibit 1, Quit Claim Deed).

7. Mr. Gomez purchased the property on or about March 13, 2013. (See Defendant's Motion for Summary Judgment, Undisputed Facts, paragraph 6).

8. Since 1981, the residence, now owned by Mr. Gomez, has received its water service off the twelve inch water line, and repairs were made to this line in 1999 and 2011. (See Exhibit 2, Affidavit of Gary Graham).

9. The Millers owned the parcel of property where the water lines are found from September1971 until 1976, and Mr. Miller lived on the property from 1965 to 1976. His parents were the owners, and he remembers the pipelines as far back as he can remember. (See Exhibit 3, Affidavit of Mr. Miller).

10. Defendant's title documents provide information about the existence of the water lines. Defendant provided these documents to the City. (See Exhibit 4, Title Documents, excerpts from Defendant's disclosures).

11. Defendant has not produced any document to support an assignment or making him a successor in interest in the Railroad Company or any rights or contracts of the Railroad Company.

12. The City has a document assigning the license in question to the City. (See Exhibit 5, Railroad Letter).

13. The City has not paid the Colorado and Southern Railway Company any fees for more than eighteen years, or any other party in privity to or successor in interest to the Railway Company for more than eighteen years. (See Exhibit 6, Affidavit of Kelly Dougherty).

MOTION FOR SUMMARY JUDGMENT

"Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Pulte Home Corp. Inc., v. Countryside Community*, 382 P.3d 821, 826 (Colo. 2016), citing *W. Elk Ranch, L.L.C. v. United States*, 65 P.3d 479, 481 (Colo. 2002).

"The nonmoving party is entitled to any favorable inferences that may reasonably be drawn from the facts, and all doubts must be resolved against the moving party." *Woodward v. Tamarron Ass'n, Inc.*, 155 P.3d 621, 624 (Colo. App. 2007). "Even if it is extremely doubtful that a genuine issue of fact exists, summary judgment is not appropriate." Id

Contract interpretation is a question of law for the court to decide. *Copper Mountain, Inc. v. Industrial Systems, Inc., 208 P.3d 692 (Colo. 2009),* citing *Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310, 1313 (Colo.1984).

ARGUMENT

I. City Has A Prescriptive Easement For Water Lines And Power Lines

The parties do not dispute that the City has maintained continuously without interruption power lines and two water lines through and above Defendant's property for more than eighteen years. The parties do not dispute the obvious existence of the power lines. An easement is an interest in property that confers upon the holder of the easement an enforceable right to use the property of another for a specific purpose. *Clinger v Hartshorn,* 89 P.3d 462 (Colo. App. 2003). An easement may be established in a number of ways, including by prescription. *Wright v. Horse Creek Ranches,* 697 P.2d 384, 387–88 (Colo.1985). …"[u]sing an easement for more than eighteen years entitles the holder to the presumption that the use was adverse." *Weisiger v. Harbour, supra,* 62 P.3d at 1072, 1073.

An easement by prescription is established when the prescriptive use is 1) open or notorious, 2) continued without effective interruption for eighteen years or more, and 3) the use is either adverse or pursuant to an attempted but ineffective grant. *Lobato v Taylor*, 71 P.3d 938, 950 (Colo. 2002). In Colorado, the statutory period for adverse possession is eighteen years. Colo. Rev. Stat. § 38–41–101(1). The parties do not dispute the water lines and power lines have been on the property in question for more than eighteen years. Defendant does not dispute that the power lines have been in plain view, continued without interruption for more than eighteen years, and adverse. The same is true for the water lines, but Defendant focuses on the open or notorious prong of the test and argues the City cannot meet this requirement.

Although the water lines are underground, the predecessors in interest to Defendant have been aware of the water lines. Defendant was made aware or reasonably should have been placed on notice through his own title documents when he purchased the property. The City has performed work on the property on the water lines in 1999 and in 2011. The predecessors in interest who owned the property were aware of the water lines in the 1970s. See Exhibits 2, 3, and 4. Defendant knew or should have known about the water lines, and he admits he was aware of the power lines.

City asserts that the title insurance exceptions presented to Mr. Gomez upon closing, on or about March 20, 2013 conveyed the necessary notoriety as a public easement to impute sufficient notice upon Defendant. The Larimer County Clerk and Recorder indexing system has had two deeds, recorded in 1936, attached to the parcel Mr. Gomez purchased in 2013, regarding a City of Loveland right-of-way for the construction of a pipeline. While the area described in these deeds is just to the west of the subject parcel in the instant matter, their presence as title insurance exceptions and their attachment to the property now owned by Defendant Gomez provided enough information to put an owner on notice, through reasonable diligence, regarding the presence of both the 12' pipeline and 34' pipeline. The title insurance company was able to reasonably presume that a City's water lines running through properties next door probably indicate the water lines continue through Defendant's properties and indicated the water lines as exceptions. Defendant knew or should have known about the water lines when he purchased the property.

Additionally, the City has repaired or maintained the water lines over the years. The City has attached an affidavit and supporting business records to show two instances of work performed on Defendant's property on the water lines. See Exhibit 2. Defendant's predecessors in interest were on notice of the water lines based upon these repairs, and even prior to these dates as a previous resident of the property submits. See Exhibit 3. The aforementioned overt acts are sufficient to show that the City's use of the parcel for the water lines are open and notorious. Prescriptive easement law provides a means for securing title and giving legal recognition to the ownership of the adverse possessor. Open and notorious possession ensures that the record owner has notice, or should have had notice, of the adverse claim. *McIntyre v. Bd. of County Comm'rs*, 86 P.3d 402, 407 (Colo. 2004).

Defendant also seems to argue that because the City installed the water lines under a license with the Railroad Company that the City's use of the land was not adverse. The basis for this argument is that the license may not have terminated. However, this argument is contradicted by evidence, albeit quite a few years after the sale of the property, showing that the Railroad assigned all interests in the license to the City itself. See Exhibit 5. As Defendant notes in his motion, a license is merely a permit or a privilege to do something, contractually. It does not create a property interest and is revocable. *American Coin-Meter of Colorado Springs, Inc. v. Poole,* 503 P.2d 626 (Colo. App. 1972). Since a license did not create a property interest, it could not run with the land, as Defendant seems to assert. A license is basically a contract between two parties. Without an assignment or other conveyance to Defendant, the license is revoked.

By the terms of the Contract documents between the City and the Colorado and Southern Railway Company, the City entered into an agreement for "construction, maintenance, use and operation of a pipe." Exhibit B, Defendant's Motion for Summary Judgment. The City did not just have permission to install but also to use and maintain the water pipeline. The Agreement also contains language that says the license is expressly subject to the agreements set forth, including the condition that the Licensee pay the Railway Company an annual fee of twelve dollars per year. The License Agreement allows the City to construct the water pipe in the right-of-way of the Railway Company. Paragraph 11 of Exhibit B notes that the agreement is effective a period of one year, or until terminated. Paragraph 8 notes that breach by the City of any conditions or covenants in the Agreement would give the right to terminate the agreement. These are contractual agreements, and the 1954 Agreement has similar language about the one year term for the Agreement. The 1954 Contract additionally requires that the City keep and maintain the soil over the pipes thoroughly compacted, with even grade. Exhibit C, Defendant's Motion for Summary Judgment. Both of the agreements with the Railway Company say that the agreement may be terminated if any of the terms, covenants or conditions are not met. Assuming that the annual payment was a term or condition of these agreements, the city has not complied with this conditions for many years, certainly for more than eighteen years. Exhibit 6, Affidavit of Kelly Dougherty. Thus, the City has adversely maintained an easement over and through Defendant's property for two water lines and a power line. Defendant acknowledges this element in the Motion

for Summary Judgment where he writes that the license agreements were revoked in 1971. See Motion for Summary Judgment, page 5. The City agrees that the licenses were revoked in 1971, and the City's use since that time has been adverse.

II. In the Alternative, the City has an Easement By Estoppel

Three elements exist to establish an easement by estoppel, they are "1) the owner of the servient estate permitted another to use that land under circumstances in which it was reasonable to foresee that the user substantially changed position believing that the permission would not be revoked, 2) user substantially changed position in reasonable reliance on that belief, and 3) injustice can only be avoided by establishment of a servitude." *Lobato v. Taylor*, 71 P.3d 938, 950-951 (Colo. 2002).

This Honorable Court may consider the nature of water lines when analyzing the first prong of the *Lobato* test outlined above. Underground water lines typically have a sense of permanence and longevity associated with them and are also constructed in such a way as to create a network of distribution requiring miles and miles of pipeline. The 12' water line is now eighty years old and the 34' water line is sixty-two years old. Given the longevity of these water lines, the nature of underground water lines, and the need to construct a network of water distribution for municipal use, it was reasonable for the City of Loveland to foresee that the permission would not be revoked. Defendant's attempt to "revoke the license" by sending a letter to the City to remove the water lines would harm not just the City, but all users of the City's water distribution system.

The Railway Company gave the City a license to construct and maintain water pipes through the property that now has an address of 3510 W. Eisenhower Boulevard. The City relied on that agreement and substantially changed its position by installing and maintaining the water pipes in question. The Railway Company failed to grant the City an easement, and belatedly attempted to assign the rights to the water lines in a letter in 1989. The water pipes are used as a part of the City's municipal water distribution system, and Defendant is one of many beneficiaries of this water system. Injustice can only be avoided by recognizing and recording an easement for the water lines that have been in operation continuously for more than sixty years. The third prong of the *Lobato* test is grounded in basic principles of equity. Removing these water pipes would cause disruption in delivery of water to an unknown number of homes and businesses.

The City has never had a license agreement with Defendant for the water or power lines. Defendant's demand for payment or removal of the license, as claimed in Defendant's First Counterclaim, would harm many residents of the City and is unjust. The license agreements speak for themselves, and Defendant has provided no evidence or support for assignment or other transfer of those licenses to him. To the contrary, the City is the beneficiary of the attempted assignment of the licenses. See Exhibit 5. The Defendant's first claim should be denied.

Defendant's second counterclaim alleges a taking without compensation. Defendant's own arguments acknowledge and admit that the City paid the Railway Company annual sums pursuant to the license agreements. Defendant's predecessor in interest received the just compensation due, and Defendant is not entitled to any further relief. The City believes it has an easement by estoppel, and respectfully requests that the Court enter judgment in its favor.

RESPONSE TO MOTION FOR SUMMARY JUDGMENT

The City incorporates all arguments made above in this Response and adds the following regarding the claim of easement by acquiescence. Defendant Gomez misapplies *Enke v. City of Greeley*, 504 P.2d 1112 (Colo. App. 1972) by asserting that acquiescence can only occur if the easement was created without any written grant of easement or right-of-way. The Colorado Court of Appeals in In *Upper Eagle Valley Sanitation Dist. v. Carnie*, 634 P.2d 1008 (Colo. App. 1981), examined the decision in *Enke* and stated that "[discussing *Enke*] the prior owners had acquiesced in the construction **and operation of the line**", which suggests that acquiescence as to the regular operation of a water line could be treated the same as the acquiescence in construction of the line. (Emphasis added). Once the subject parcel in the instant matter was sold to "the Miller Family", the Colorado Southern Railroad Company License Agreements would have terminated. Although, it is clear that the successor of the Colorado Southern Railroad Company (Burlington Northern Railway Company) intended to assign the license to the City, they did not do so until 1989, almost two decades after the property had gone from ownership under the Railway Company to "the Miller Family." Thus, there has been acquiescence by all subsequent owners of the property and no license since 1971.

In addition, *Rogers v. Lower Clear Creek Ditch Co.*, 165 P. 248 (1917), the first case in Colorado to discuss the acquisition of an easement by acquiescence, stated in relevant part, "[w]hatever may be the law in other jurisdictions, it is established in this state that where a ditch owner is permitted, without interference, to construct an irrigating ditch over the land of another, and the ditch i(s) put in use, a right of way is thereby acquired and the necessity for condemning, to obtain possession, is obviated." The City asserts that the instant matter is analogous to the *Rogers* decision because the City, once the license agreements City had with the Colorado Southern Railroad Company terminated in 1971, the predecessors in interest of Defendant made no effort to prevent the City from operating both the 12' line and the 34' line, when a reasonable inference may be made that predecessors in interest to Defendant Gomez had notice and knowledge of the water lines. Like an irrigation ditch, municipal water lines once constructed over the land of another, the right of way has been acquired, and there is no need for condemnation. Predecessors in interest to Defendant had some basic knowledge of the water lines and permitted City to operate said lines without interference, which is suggested to be sufficient for purposes of acquiescence given the discussion in the *Upper Eagle Valley Sanitation District.*

CONCLUSION

Defendant, and his predecessors in interest, acquiesced to the use and maintenance of the water lines and power lines. The City has acquired an easement for water and power lines by estoppel or by prescription. The City has no license agreement with Defendant, and Defendant has no evidence of any such agreement. The agreements with the Railway Company speak for themselves, and the City reasonably relied upon them to construct and maintain the water lines. The City respectfully requests judgment be entered in its favor quieting title and granting easements for water lines and electric transmission lines. The City further moves the Court to dismiss Defendant's counterclaims. No evidence has been presented to support a license agreement between Defendant and the City such that Defendant can demand payment. The City reasonably relied upon the licenses with the Railway Company, and Defendant's claim that the City has acquired property without compensation is contradicted by the agreements with the Railway Company. The City paid just compensation to Defendant's predecessor in interest, and no further compensation is due. The City has demonstrated that the easements were acquired by prescription through open and notorious, continuous for more than eighteen years, and adverse possession of the easements in question. In the alternative, the City has been permitted to use the land under circumstances in which it was reasonable to foresee that the City would substantially change position and injustice can only be avoided by establishment of the servitude.

WHEREFORE, the City respectfully requests the Court enter judgment in its favor, deny Defendant's Motion for Summary Judgment, deny Defendant's Counterclaims, and grant such other relief as it deems appropriate.

Respectfully submitted this 7th day of December, 2016

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Plaintiff City of Cross Motion for Summary Judgment and Response to Defendant's Motion for Summary Judgment was served via the method listed below on this 7th day of December, 2016 to the following:

Via ICCES e-Service
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/s/ *Kayla Demmler*
Original signature on file