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 REPLY	

COMES NOW the Plaintiff, the City of Loveland [hereafter "City"], by and through undersigned counsel, hereby replies to Defendant's Verified Response to Plaintiff's Cross Motion for Summary Judgment and Response to Defendant's Motion for Summary Judgment. In support hereof, the City replies as follows:

Undisputed Easement for Electric Power Lines

The City respectfully requests the entry of judgment granting an easement for the Electric Transmission Power Lines. The City presented evidence of the open, notorious, continuous, exclusive, and adverse existence of the power lines. Defendant presents no arguments or evidence to the contrary in his Response. The City moves for judgment in the City's favor, recognizing the easement for these electric utility lines.

Prescriptive Easement for Water Lines

The issues argued by Defendant focus primarily on Defendant's knowledge or lack of knowledge of the existence of the water lines running through his property. Defendant challenges the open and notorious prong of the adverse possession test. The City attached title documents from Defendant's purchase of the property, to show that he was on notice of a possible right-of-way for water lines. Although he may have verified that there was no recorded easement for the water lines, any reasonable person would understand that a municipal utility water pipe would not end at a neighbor's property. The argument that Defendant reviewed the deeds and confirmed they were not on his property only confirms that he should have been on notice of the existence of the pipes. Additionally, Exhibit 4, makes it clear that the Title Company listed the water pipe line as an exception. Defendant was on constructive notice that there could be a defect in his title, and he was made aware in Exhibit 4 to investigate further. "Inquiry notice imputes knowledge where the circumstances are such that they would have aroused the suspicions of an ordinary purchaser." *Martinez v. Affordable Housing Network, Inc.*, 123 P.3d 1201, 1206 (Colo. 2005).

Defendant then argues that the Affidavit of Mark Miller should be stricken because it is based upon hearsay. Mr. Miller is not quoting any statements made by his father, and there is no statement being offered for its truth. Mr. Miller is recalling his own recollection of the water pipelines and his awareness of them due to overhearing conversations. Mr. Miller resided on the property from 1965 until 1976, but his parents owned the property until approximately 2002. If his parents were aware of the City water pipe lines for that period of time, the adverse possession was already perfected. The water pipe line easement was perfected during their ownership since they were the first to purchase the property from the Railroad Company. The Millers owned the property from 1965 until 2002. They owned the property for approximately 37 years, far more than the necessary 18 years for adverse possession. *See* Exhibit 7.

Whether or not Defendant was personally aware of the water pipe lines, there was no interruption of the use and operation of the water lines and the easement has been continuous. Defendant attempted to interrupt the adverse possession through his letter demanding removal of the lines in 2016, but this was not sufficient to take possession and disrupt the already perfected adverse possession easement. *Ocmulgee Properties, Inc. v. Jeffery,* 53 P.3d 665 (Colo. App. 2001).

Easement by Estoppel

The Railroad Company granted licenses to the City to build and maintain the water pipe lines. The parties agree that the City was permitted to place these underground water lines on the property now belonging to Defendant through this license, and there is no question that the Railroad Company never asked for the lines to be moved. To the contrary, the Railroad Company attempted to assign the interest in the licenses to the City (Exhibit 5). All rights, title, and interest to the original license agreements were granted to the City in 1989, more than eighteen years ago. Defendant argues he has not been paid for the use of his property, but the Railroad Company was paid. His predecessor in interest was paid annually through license fees and paid in 1989 when the interests were assigned to the City.

Furthermore, case law in Colorado supports the City's easement by estoppel. The water pipe lines, like irrigation ditches, were lawfully constructed and maintained as part of an enterprise that serves and benefits the citizens of Loveland and beyond. It benefits Defendant directly, as he is a water user of the municipal water system. Where a socially beneficial infrastructure is built for the public and intended to be permanent, there is no trespass. *Hoery v. United States*, 64 P.3d 214, 220 (Colo. 2003). The City constructed the water pipe lines with lawful authority from the Railroad Company and intended the structure to be permanent. *Sanderson v. Heath Mesa Homeowners Assoc.*, 183 P.3d 679 (Colo. App. 2008). The easement in question benefits the residents of Loveland and injustice can only be avoided by formally establishing the easement. The City has already paid for the easement through the annual fees paid for the licenses to the Railroad Company. The Defendant would be unjustly enriched if he were to be paid for an easement long established for a public benefit.

Easement by Acquiescence

Similar to the prescriptive easement arguments made above, the City presented the affidavit of Mark Miller to demonstrate that former owners were aware of the water lines and did acquiesce. Defendant's reliance on *Upper Eagle Valley Sanitation v. Carnie*, 634 P.2d 1008 (Colo. App. 1981) as requiring actual notice for acquiescence fails to recognize the facts of the case. This case was filed as a condemnation action, and the issue on appeal was whether only a nominal amount should be paid or market value. Only if there is no easement by estoppel or by prescription does this case become applicable. The Court held that market value was the correct valuation for the easement. The Sanitation District was not permitted to argue that it had acquired an easement since the case was filed as a condemnation action. "…petitioner is estopped from asserting that it had already acquired an easement prior to its filing of the present action." *Id.* at 1010. Unlike *Upper Eagle Valley Sanitation*, the City does argue and believes it has an easement for the water lines at issue. The City filed this quiet title action for a declaratory judgment for the utility easements.

The City has demonstrated that the easement was perfected by prescription or acquiescence while the Millers owned the property or in the alternative by estoppel.

WHEREFORE, the City respectfully requests that Judgment enter for the City, that Defendant's Motion for Summary Judgment be denied, along with such other relief the Court deems just and proper.

Respectfully submitted this 21st day of December, 2016.

By: */s/ Alicia Calderón*
Alicia Calderón, #32296
Assistant City Attorney

Attorneys for Plaintiff
Loveland City Attorney's Office

500 East Third Street, Suite 330
Loveland, CO 80537
(970) 962-2540
Alicia.Calderon@cityofloveland.org

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Plaintiff City of Loveland's Reply was served via the method listed below on this 21st day of December, 2016 to the following:

Via ICCES e-Service
Dwight D. Brummet
Dwight D. Brummet, P.C.
PO Box 657
Loveland, CO 80539-0657
Attorney for Defendant Roger Gomez

Via US Mail, first class postage prepaid:
First National Bank of Omaha
1620 Dodge Street
Omaha, NE 68197

JP Morgan Chase Bank, N.A.
c/o The Corporation Company
1675 Broadway, Suite 1200
Denver, CO 80202

/s/ *Kayla Demmler*
Original signature on file