

DISTRICT COURT, LARIMER COUNTY, COLORADO  
Court Address: 201 LaPorte Avenue, Suite 100  
Fort Collins, CO 80521

**Plaintiff:**

CITY OF LOVELAND, a Colorado Municipal  
Corporation

v.

**Defendant:**

ROGER GOMEZ

Kathie Troutd Riley  
Kathie Troutd Riley, P.C.  
2903 Aspen Drive, Unit D  
Loveland, CO 80538  
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Case Number:

**2016CV30703**

Div.:4A Ctrm:

**DEFENDANT ROGER GOMEZ'S FIRST AMENDED COUNTERCLAIMS AND  
DEMAND FOR JURY OF FREEHOLDERS**

Defendant, Roger Gomez, as his first amended counterclaims, avers as follows:

1. City of Loveland, Plaintiff ("City"), is a home rule corporation with the address of 500 E. Third Street, Loveland, Colorado.

2. Roger Gomez, Defendant ("Defendant"), owns the real property with the street address of 3510 West Eisenhower Boulevard, Loveland, Colorado ("Subject Property").

3. Upon information and belief, the City and The Colorado and Southern Railway Company ("Railroad") entered into license agreements on May 1, 1936, and October 15, 1954, by which the City was authorized to construct, maintain, use and operate specified water mains within the right of way owned by the Railroad ("Railroad Right of Way") with said water mains presence and use co-existing on the Railroad Right of Way with the existing tracks of the Arkins Branch and any future tracks or structures the Railroad may install. The 1954 license specified that the City's use of the

Railroad Right of Way shall not interfere with the present or future use of the Railroad Right of Way.

4. Pursuant to the 1936 license agreement, the City installed a 12-inch water main.

5. Pursuant to the 1954 license agreement, the City installed a 34-inch water main. The location for the City's installation of said 34-inch water main was specified and depicted on the Railroad's print as referenced in and attached to the license agreement. The specified location for installation pursuant to the license agreement was within the Railroad Right of Way.

6. In 1971, the Railroad sold the Railroad Right of Way to private ownership and the Railroad Right of Way is now part of the Subject Property owned by Defendant.

7. The license agreements were never recorded, and no recorded documents indicate the presence of water mains on the Subject Property.

8. The water mains on the Subject Property are entirely underground with no above-ground structures located on the Subject Property.

9. In 2013, Defendant purchased the Subject Property. Thereafter, Defendant accomplished rezoning of the Subject Property through the Larimer County processes to commercial zoning with the plan of constructing enclosed storage units.

10. At the time of his purchase and rezoning of the Subject Property, Defendant was unaware of the presence of the water mains on the Subject Property. It was not until Defendant's development plans were underway and the City was requested to locate utilities that Defendant was informed of the presence of water mains.

#### FIRST COUNTERCLAIM (Enforcement of the License Agreements)

11. Defendant incorporates herein by reference paragraphs 1 through 10 above.

12. Pursuant to said license agreements, the City was to pay the Railroad a rental sum per year.

13. Upon information and belief, the City failed to pay the annual rental sum.

14. Pursuant to the said license agreement:

... in case of ... the breach by the [City] of any of the conditions, agreements or covenants herein contained, the [Railroad] shall have the right to terminate this agreement at any time by giving thirty (30) day's notice in writing to the [City] of its intention to so terminate the same, and at the expiration of said thirty (30) days' notice the privileges and licenses herein described shall terminate and be at an end ...

15. Defendant, as a successor in title to the license agreements, provided the requisite notice to the City terminating the license agreements and seeking removal of the water mains, as specified in the license agreements.

16. The City failed or refused to make the rental payments, failed or refused to remove the water mains, and instead commenced this litigation.

WHEREFORE, Defendant requests relief requiring the City to remove the water mains pursuant to the terms and conditions of the license agreements. Defendant further requests the Court for an award of his costs, expert witness fees, and attorney fees, and for such other and further relief the Court deems just and proper.

**SECOND COUNTERCLAIM**  
(Inverse Condemnation)

17. Defendant incorporates herein by reference paragraphs 1 through 16 above.

18. On or about December 14, 2017, the City retained King Surveyors to locate the water mains and the easements the City desires to acquire on the Subject Property.

19. The survey revealed that the 34-inch water main was installed by the City +/- 3.75 feet south of the northernmost boundary of the Railroad Right of Way on the east, with the separation between the 34-inch water main and the northernmost boundary of the Railroad Right of Way progressively decreasing until the 34-inch water main ultimately crossed over the northernmost boundary of the Railroad Right of Way and entirely onto private land not subject to the Railroad Right of Way. On the west of the Subject Property, the 34-inch water main is +/- one (1) foot north of the Railroad Right of Way, entirely on Defendant's land upon which the City had no authority to install the water main.

20. The City wishes to acquire an exclusive easement for the water mains, measured as 15 feet north of the 34-inch water main and 12.5 feet south of the 12-inch water main.

21. The easement the City wishes to acquire north of the 34-inch water main falls almost entirely outside the boundary of the Railroad Right of Way.

22. Further, the City wishes to acquire an exclusive easement of 60 feet in width south of the water mains on the Subject Property for an overhead power line.

23. The City wishes to restrict Defendant's use and enjoyment, and any subsequent purchaser's use and enjoyment, of the Subject Property within the areas specified in paragraphs 20 through 22 above as follows: (a) no structures may be constructed within the area encompassed by the desired easements; (b) only movable items such as vehicles and trailers may be parked in the area encompassed by the desired easements; (c) the use of the area encompassed by the desired easements is limited to that of a driveway or parking area, with no more substantial surface than asphalt.

24. As a result of the easements the City wishes to acquire and the use restrictions the City wishes to impose, the City has diminished the value of the Subject Property and has rendered the affected area virtually unusable, depriving Defendant of the use and enjoyment of the Subject Property and causing loss of income to Defendant from the planned commercial activities on the Subject Property.

25. The City, a governmental entity possessing the power of eminent domain, refused to exercise its power of eminent domain to acquire and/or damage the Subject Property for public use.

26. The City's acquisition and/or damage of the Subject Property for public use is without payment of just compensation in violation of § 37-86-104, C.R.S. and Const. Colo. Art II, § 14 and Art XVI, § 7.

27. The City's acquisition and/or damage of the Subject Property for public use is without instituting proceedings pursuant to §§ 38-1-101 through 122, C.R.S.

WHEREFORE, Defendant requests an award of just compensation to be determined by a jury of freeholders, an award of attorney fees pursuant to § 38-1-122, C.R.S, an award of costs including the appraisal pursuant to § 38-1-121, C.R.S., and for such other and further relief the Court deems just and proper.

DEMAND FOR JURY OF FREEHOLDERS

Pursuant to § 38-1-106, C.R.S., Defendant demands a jury of six (6) freeholders to determine the compensation as provided in Title 38, Articles 1 through 7.

Dated this 23<sup>rd</sup> day of January 2018.

Respectfully submitted,

KATHIE TROUDT RILEY, P.C.

*(Duly signed original on file at the offices of  
Kathie Troudt Riley, P.C.)*

By /S/ Kathie Troudt Riley

Kathie Troudt Riley, 15941

Attorney for Defendant

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **DEFENDANT ROGER GOMEZ'S FIRST AMENDED COUNTERCLAIMS AND DEMAND FOR JURY OF FREEHOLDERS** upon all parties herein by service through ICCES this 23<sup>rd</sup> day of January 2018, as follows:

Alicia R. Calderon  
Derek Turner  
Loveland City Attorney's Office  
500 E. 3<sup>rd</sup> Street, Suite 300  
Loveland, CO 80537

*(Duly signed original on file at the offices of  
Kathie Troudt Riley, P.C.)*  
By /S/ Kathie Troudt Riley  
Kathie Troudt Riley, 15941