

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	<div style="text-align: center;">▲ COURT USE ONLY ▲</div> <hr/> Case Number: 2016CV30703 Div.: 4A Ctrm:
Kathie Troudt Riley Kathie Troudt Riley, P.C. 2903 Aspen Drive, Unit D Loveland, CO 80538 Phone Number: (970) 663-6316 FAX Number: (970) 663-6239 E-mail: ktr@kathielaw.com Atty. Reg. #: 15941	
DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO AMEND COUNTERCLAIMS AND EXCLUSION FROM C.R.C.P. 16.1	

Defendant, Roger Gomez ("Mr. Gomez"), by and through counsel, Kathie Troudt Riley, P.C., replies to the response filed by Plaintiff (the "City") to Defendant's motion seeking leave of the Court to amend his Counterclaims pursuant to C.R.C.P. 15(a) and exclusion from C.R.C.P. 16.1, and states:

1. It appears that the City's response is primarily directed at Mr. Gomez's request for exclusion from C.R.C.P. 16.1. The City wishes to bind Mr. Gomez to the damages cap in the Rule. Under the Rule, no matter the valuation that might be made by the jury of freeholders, the maximum award is limited to \$100,000.00, including any attorney fees and punitive damages, but excluding interest and costs.

2. Rule 16.1(l) reads:

(l) Changed circumstances. In a case governed by the Rules, any time prior to trial, upon a specific showing of substantially changed circumstances sufficient to render the application of Simplified Procedure under this Rule unfair and a showing of good cause for the timing of the motion to terminate, the court shall terminate application of this Rule and enter such orders as area appropriate under the circumstances.

3. Rule 16.1(l) has been referred to as the ultimate escape hatch for those cases that appear at the outset to be appropriate for Simplified Procedure, but which later turn out to not be appropriate for such handling. Rule 16.1(l) allows a party to seek to exempt the case from Simplified Procedure, even after the 35-day deadline for automatic exclusion under Rule 16.1(d). Application of Rule 16.1(l) is not intended to benefit a party who just happened to change his or her mind or decides to take a deposition that the other party will not agree to voluntarily. The party must make a “specific showing” of facts establishing “substantially changed circumstances” and that such changed circumstances “render application of Simplified Procedure unfair”. Good cause must also be shown for the timing of the motion to terminate application of Rule 16.1. The Civil Rules Committee wanted to leave a way to avoid injustice in more extreme cases. Richard P. Holme, *Back to the Future – New Rule 16.1: Simplified Procedure for Civil Cases Up to \$100,000*, The Colorado Lawyer, Vol. 33, No. 5 (May 2004), p. 25.

4. The City’s arguments are based upon the fiction that the City’s easement claims have not changed.

5. In the Complaint, the City alleged that the utility easement at issue “lies along the what was formally known as the Colorado and Southern Railway Company’s Arkins Branch”. The legal description set forth in the Complaint specifically references the northernmost portion of the utility easement at issue being the northerly Right of Way line for the Railroad. The Complaint specifically states that the property being used for the water utility and thus the easement at issue was that for which the City obtained authority pursuant to the license agreements with the Railroad in May of 1936 and October of 1954. The legal description cited by the City in the Complaint pertaining to the easement at issue is that of the Railroad Right of Way transferred by quitclaim deed to private ownership in 1971.

6. The City, in its cross motion for summary judgment and response to Mr. Gomez’ motion for summary judgment, again states that the location of the easement at issue is the property for which the City obtained authority pursuant to the license agreements with the Railroad in May of 1936 and October of 1954. The City specifies that the legal description for the easement at issue is that of the Railroad Right of Way transferred by quitclaim deed to private ownership in 1971.

7. As the Court found in undisputed facts in the Order re: Cross Motions for Summary Judgment, the water lines were purportedly installed in the Railroad Right of Way.

8. Until the judicial settlement conferences, Mr. Gomez had no reason to believe that the City wished to acquire his property for an easement north of the old Railroad Right of Way. Based upon information and belief, prior to the judicial settlement conferences, the City had no belief that it wished to acquire property for an easement north of the old Railroad Right of Way because, although it brought this suit in July of 2016, and has prosecuted the suit for over 1 and ½ years, the City had never surveyed the actual location of its water mains on Mr. Gomez's property or surveyed the actual location of the easement it wanted the Court to award the City.

9. In December 2017, when the City finally surveyed the actual location of its water mains on Mr. Gomez's property, the City's demands suddenly changed.¹ The City now wants to acquire property north of the old Railroad Right of Way.

10. The survey conducted on or about December 14, 2017, 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.

11. The survey further revealed, and counsel for the City has stated, that it is the City's intent to acquire an easement fifteen (15) feet north of the 34-inch waterline. This easement would fall almost entirely on Mr. Gomez's land outside of the Railroad Right of Way.

12. Until December 28, 2017, when counsel met and undersigned counsel was provided a copy of the survey map, Defendant was unaware that the 34-inch water main was located in part on his land outside of the old Railroad Right of Way or that the City wished to acquire additional land north of the old Railroad Right of Way. A copy of the surveyor's scale drawing was attached to Mr. Gomez's motion.

¹ In its motion to amend the complaint, the City acknowledges that when the survey was done, the City "discovered" that the easement area it wishes to acquire lies to the north, outside of the legal description it has previously pled, specifically, north of the old Railroad Right of Way.

13. The City trivializes the taking of Mr. Gomez's land 15 feet north of the old Railroad Right of Way as a little "shift" in the legal description of the easement it has asked the Court to award the City.

14. Until the judicial settlement conferences, the City failed to specify in its pleading and motions exactly what restrictions it wished to impose upon Mr. Gomez's and his successors' use and enjoyment of the property.

15. The City asserts that Mr. Gomez is not entitled to just compensation and damages or, if he is, the amount could not exceed \$100,000.00 (including attorney fees). The City makes this statement without having obtained a competent appraisal and without proper notice to Mr. Gomez that because the estimated value of the taking is \$5000.00 or more, that Mr. Gomez is entitled to an appraisal at the City's expense. A competent appraisal values the land actually taken as well as any damages to the remainder of the property not being acquired. It is based upon highest and best use, the possibility of future uses and costs to cure negative impacts. M. Patrick Wilson, *Eminent Domain Law in Colorado – Part II: Just Compensation*, The Colorado Lawyer, Vol. 35, No. 11 (November 2006), pp. 47-57.

16. The property in question is zoned commercial and located on the major thoroughfare of West Eisenhower (Highway 34) in Loveland. The highest and best use will be the most advantageous use to which the property reasonably may be applied. *Id.*

17. Contrary to the City's arguments, determination of just compensation is not as simple as someone's best guess as to what might a 15-foot strip of land might be purchased for.

18. In addition to compensation and damages, pursuant to § 38-1-122, C.R.S., Mr. Gomez may be entitled to an award of attorney fees from the City.

19. Justice and fairness would not be served by permitting Defendant to amend his counterclaims to fully address the newly discovered issues with respect to inverse condemnation yet not permitting him to exempt this matter from C.R.C.P. 16.1 so that he can seek the full measure of compensation, damages and attorney fees to which he would be entitled under the Colorado Constitution and Colorado statutes.

Dated this 5th day of February 2018.

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'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT' MOTION TO AMEND COUNTERCLAIMS AND EXCLUSION FROM C.R.C.P. 16.1** upon all parties herein by service through ICCES this 5th day of February 2018, as follows:

Alicia R. Calderon
Derek Turner
Loveland City Attorney's Office
500 E. 3rd 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