

DISTRICT COURT, LARIMER COUNTY, COLORADO Court Address: 201 LaPorte Ave. Fort Collins, CO 80521	DATE FILED: September 7, 2018 3:17 PM CASE NUMBER: 2016CV30703
<hr/> <b>Plaintiff:</b> CITY OF LOVELAND, a Colorado Municipal Corporation, <b>v.</b> <b>Defendant:</b> ROGER GOMEZ	<hr/> <p style="text-align: center;"><b>▲ COURT USE ▲</b></p> <hr/> Case No: 2016CV30703  Courtroom: 4A
<b>FINAL ORDER AND JUDGMENT</b>	

A court trial was held August 13-14, 2018, between Plaintiff, City of Loveland, and Defendant, Roger Gomez.

Plaintiff seeks 1) quiet title for a water line by prescriptive easement, or, alternatively, by an implied easement by estoppel; 2) a declaratory order establishing the scope of the easement as to both the water lines and power lines; and 3) a declaratory order that Defendant Gomez and any successors may not interfere with Plaintiff's use of the easement area by constructing permanent structures or otherwise interfere with the Plaintiff's use, maintenance, operation, repair, or replacement of the water or power lines.

Defendant Gomez seeks 1) relief for *per se* taking of the power lines by the Plaintiff; 2) relief for the taking of the water line by the Plaintiff; 3) find in favor of Defendant for his counterclaim for inverse condemnation; and 4) requests a jury trial in order to determine just compensation.

The Court hereby finds and orders as follows:

### I. Facts and Procedural History

Defendant is the current owner of 3508 West Eisenhower Boulevard in Loveland, Colorado (“the Property”). It is undisputed that both the water lines and the power lines existed on the Property prior to the Defendant’s ownership.

In 1936 Plaintiff entered into a license agreement with Colorado and Southern Railway Company (the “Railway”) in order to construct and maintain a water line measuring 12 inches along the Railway’s right of way. In 1954, Plaintiff entered into another license for a 34-inch water line to run roughly parallel to the 12-inch water line along the Railway’s right of way. At the time, the Railway’s right of way ran adjacent to the Property. In 1966 John and Peggy Miller (the “Millers”), predecessors in interest to Defendant, purchased the Property. In 1971 the Railway sold the parcel of land where the water lines were installed to the Millers by quitclaim deed. The Millers owned the land until they sold the two parcels as one in 2002 under the address of 3508 W. Eisenhower Boulevard. The Millers owned the property for 36 years.

While in possession of the Property, the Millers were aware that Plaintiff performed routine maintenance on the water line because they allowed the workers direct access through the front of the Property. Twice per year, Plaintiff would enter through the Property to maintain the water lines. In the early 1990s, the service line that provided water to the house underwent a 3-day repair by Plaintiff. Plaintiff never asked permission to maintain, repair, or access the water line, and Miller never objected to the presence of the water line on his property.

Plaintiff completed construction on a power line along the Railway parcel in 1981. No testimony was presented to the Court indicating that Plaintiff asked permission from Miller or that Miller objected to the construction of the power line. The Millers sold the Property in 2002.

Defendant Gomez purchased the Property as one parcel in 2013. Defendant bought the Property where both power lines and a water ditch were visible on the Property. Additionally, title documents produced at the time of sale indicated an “over and across” easement. Although vague, the “over and

across” easement indicates that the city has a blanket easement for water lines in the north half of section 16, which crosses the Property. The “over and across” easement existed at the time Defendant purchased the Property and is recorded.

Defendant did not request a survey of the Property prior to purchase and performed his own record search. Though not clearly marked with outside markers, the water line closely follows the old railroad line, as well as the power line. The power lines and the water lines are located in the same general area at the southern end of the Property. Defendant observed the power lines on the property but did not research the setbacks required by the state of Colorado for construction beneath the power lines. No further inquiry was made until Defendant began plans to construct a storage facility business on the Property.

Defendant had notice of the water line before beginning construction on his business. Stephen Adams, city manager for City of Loveland, met with Defendant and informed him of Plaintiff’s license agreement between the Railway the City of Loveland which gave Plaintiff permission to install the water lines in 1936 and 1954.

Plaintiff now seeks quiet title by prescriptive easement for the water lines.

## **II. Water Line Easement**

### **A. Easement by Prescription**

The Court finds by preponderance of the evidence that the Plaintiff has a prescriptive easement perfected by adverse possession to the water lines because the Plaintiff’s use was open and notorious, continuous for the statutory period of 18 years, and adverse to the owners’ use of land. Lobato v. Taylor, 71 P.3d 938 (Colo. 2002).

The license between Plaintiff and the Railway terminated when Miller purchased the tract of land in 1971, and it was at this time that the statutory period began to run. Although the easement was not recorded, two licenses between Plaintiff and the Railway were filed prior to Miller’s purchase of the

property. Additionally, the open and notorious element is satisfied because the Millers were aware of the existence of the water line, since the city performed routine maintenance and larger repairs.

The final element, whether the use is adverse to the property owner, is satisfied when the dominant estate exists without express consent. The servient property owner is prohibited from obstructing the easement holder's right to use and enjoyment. Here, Plaintiff's use was adverse to the Miller's rights as property owners because there was no express permission to have the water lines on the Property. The Court agrees that a conflict is not necessary for easement by prescription so long as the possession of the easement is hostile to the use of the property right, which can be fulfilled by possession alone.

Therefore, the Court finds that Plaintiff has quiet title to the easement by adverse possession because Plaintiff has openly and continuously maintained waterlines beginning in 1971 for the statutory period of 18 years adverse to the Miller's property rights. Thus, the prescriptive easement was perfected in 1989 while the Millers still owned the property.

#### B. Implied Easement by Estoppel

In addition to the Plaintiff's easement by prescription, the Court also finds by preponderance of the evidence that an implied easement by estoppel exists for the water lines.

Generally, a court may imply easement by estoppel when 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) the 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 (Colo. 2002).

The Court finds that the conditions are met for an implied easement by estoppel because it was reasonably foreseeable that the Plaintiff would rely on the continued use of the water line, Plaintiff did in fact rely on the use of the water line to supply water to the City of Loveland, and if the Court were to deny the servitude, the result would be unjust.

### C. Inverse Condemnation

By granting Plaintiff quiet title through easement by prescription, the Court finds that the Defendant's claim for inverse condemnation fails. Additionally, pursuant to caselaw, no claim for inverse condemnation may be brought when there is an easement by prescription that has already been perfected against a predecessor in interest.

Inverse Condemnation must be shown through the taking or damaging of property for public purpose and without just compensation by a governmental or public entity. Jorgenson v. City of Aurora, 767 P.2d 756, 758 (Colo. App. 1988). Case law is well established that an action for inverse condemnation or taking belong to the party at the time of the trespass and does not pass to subsequent landowners. Upper Eagle Valley Sanitation Dist. v. Carnie, 634 P.2d 1008 (Colo. App. 1981). Furthermore, a claim for inverse condemnation is barred as recovery where the property has been adversely held for the statutory period. Enke v. City of Greeley, 504 P.2d 1112 (Colo. App. 1972).

Here, the Court finds that the water line and power line easements were created before the Defendant bought the Property. Defendant Gomez purchased the property with an opportunity to conduct an inquiry into any easements already in existence on the property. The Court has previously held that there existed an easement for the power line, which was plainly visible to Defendant upon first inspection.

However, whether Defendant knew or should have known of the water lines is irrelevant to a claim for inverse condemnation. The water lines were

present, in operation by Plaintiff, and an easement existed when Defendant purchased the property. Absent a clear assignment to the subsequent purchaser, a governmental taking cannot pass from the Millers as predecessors in interest because the trespass does not run with the land. Defendant has no recourse against a trespass that occurred decades before he purchased the Property.

Therefore, Defendant's claim for Inverse Condemnation is DISMISSED.

### **III. Power Line Easement**

#### **A. Prescriptive Easement**

On August 6, 2018, in response to Plaintiff's Motion for Summary Judgment, the Court found that the Plaintiff had established the required elements of a prescriptive easement to operate, maintain, and repair power lines on the Property. The Court granted Plaintiff's motion because the Court found that there was no genuine issue of material fact as to Plaintiff's claim for relief. Therefore, the Court finds that there is a prescriptive easement for the power lines.

### **IV. Scope of Easements**

The owner of the servient estate may make any use of the burdened property that does not unreasonably interfere with the enjoyment of the easement for its intended purpose.

#### **A. Water Line Easement**

The Court was presented with credible evidence from Plaintiff as to the scope of the easement required for safety in order to maintain, operate, repair or replace the water line. The Court was not presented with evidence contradicting the reasonableness of the scope of the easement presented by Plaintiff.

Therefore, the Court finds that the width of the water line easement area to be 38 feet by 175.86 feet, the entire length as is runs along the property.

### B. Power Line Easement

The Court was presented with credible evidence from Plaintiff as to the scope of the easement required for safety in order to maintain, operate, repair or replace the power line. The Court was not presented with evidence contradicting the reasonableness of the scope of the easement presented by Plaintiff.

Therefore, the Court finds that the width of the power line easement area to be 75 feet by 175.86 feet, the entire length as is runs along the property.

### C. Declaratory Order

The Court recognizes the city's easement as to both the water and the power lines and orders that Defendant and his successors may not interfere with the City's use and enjoyment of the easement area. Defendant is prohibited from building any permanent structure or any activity that would interfere with Plaintiff's use, maintenance, operation, repair or replacement of the water lines or power lines.

The Court finds that neither the easement for the water line nor the power line dispossesses Defendant of his property. The interest of both Plaintiff and Defendant are balanced in order to achieve reasonable enjoyment. It is unreasonable to allow Defendant to use his property in a way that could cause a danger to his property or to maintenance workers who must make repairs on the water or power lines.

## **V. Conclusion**

The Court finds that Plaintiff has a prescriptive easement to the water lines perfected in 1989.

The Court finds that the scope of the easement for the water line is 38 feet by 175.86 feet and the scope of the easement for the power line is 75 feet by 175.86 feet. Both easements run 175.86 feet the length of the Property.

The Court ORDERS that Defendant and his successors may not interfere with Plaintiff's use and maintenance of the easement area. Defendant is prohibited from building any permanent structure or any activity that would interfere with Plaintiff's use, maintenance, operation, repair or replacement of the water lines or power lines.

The Court finds that there is no claim for Inverse Condemnation as to the water line or power line, therefore, that claim is dismissed.

DATED: September 7, 2018

**BY THE COURT:**

A handwritten signature in black ink, reading "C. Michelle Brinegar", written over a horizontal line.

C. Michelle Brinegar  
District Court Judge