DISTRICT COURT, COUNTY OF LARIMER, ST OF COLORADO Court Address: 201 LaPorte Avenue Fort Collins, CO 80521-2761 Phone Number: (970) 494-3500	
CITY OF LOVELAND, a Colorado Municipal Corporation, Plaintiff. v. ROGER GOMEZ, Defendant.	▲ FOR COURT USE ONLY
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CITY OF LOVELAND'S CLOSING ARGUMENT	

COMES NOW, Plaintiff, the City of Loveland ("City") by and through undersigned counsel, and files this closing argument.

I. RELIEF REQUESTED

The City's evidence has shown the City perfected a prescriptive easement for two water lines many years ago during the thirty-one years of Miller ownership, who

owned the entire parcel from 1971 to 2002. The City seeks to quiet title for the water lines' easement area. The testimony presented has demonstrated by a preponderance of the evidence the City's use of the easement to access, operate, maintain, repair and replace both water lines, and the area required for those uses.

The City seeks a declaratory order that Mr. Gomez and his successors may not interfere with the City's use and enjoyment of the easement area. The City's evidence demonstrated that permanent structures will interfere with the City's use of the easement. Accordingly, any activities that would interfere with access, maintenance, operation, repair or replacement of the water lines should be prohibited.

The City also seeks a declaratory order for the prescriptive power line easement, finding that the City has demonstrated by a preponderance of the evidence, that it possesses a minimum 60-foot wide prescriptive easement to access, operate, maintain, and repair the power lines. The City requests that the Order reflect that Mr. Gomez may not interfere with the City's power line easement. The testimony has shown that permanent structures within the easement area will interfere with the safe operation and maintenance of the power lines and power pole, and therefore should be prohibited. Mr. Gomez's current outdoor storage of vehicles, boats and RVs does not conflict with the easements because, as the testimony established, as long as a vehicle has wheels it can be moved to allow for repair and maintenance operations.

PRESCRIPTIVE EASEMENT FOR WATER LINES

For the water lines, the City seeks approximately 38 feet by 175.86 feet. This width is to allow for repairs and maintenance on the water lines, to allow large equipment to access the water lines and to excavate a hole large enough to dig around and under a water line. The City seeks a declaratory order that Mr. Gomez cannot interfere with the lines or build any permanent structure that would constrain the City's ability to access, maintain, or repair the water lines. To repair the 34 inch water line, an almost 3 foot line, the City needs to excavate a hole at least 12

feet wide. (12+3) The pipes are at least 10 feet apart. (10) The 12 inch line is one feet in width. (1) If that line ever needs excavated for repairs, the City needs 12 feet at least. (12) (12+3+10+1+12 = 38) There is no dispute the length of the easement area going east to west is 175.86 as shown on the City's survey. (Stipulated Exhibits 53 and 54)

EASEMENT AREA FOR POWER UTILITY LINES

The approximate width needed for the power lines easement area is at least 60 feet, and for a transmission power line, such as this, 75 feet is preferred for safety reasons. The minimum requirement for national electrical standards is 24 feet from any point of the line or pole and 24 feet from any phase to the ground. In high wind, the conductors blow out 7-10 feet. The longest arms holding the line are 9 feet on each side. To protect the property owner and the line, 75 feet for 115 kV is the safety standard and 60 feet would be the minimum. The easement area east to west is undisputed and 175.86 feet. (Stipulated Exhibits 55 and 56 reflect an easement area under the power lines of 60 feet by 175.86 feet.)

II. SUMMARY OF FACTS

STIPULATED FACTS

The City installed the 12 and 34 inch water lines pursuant to license agreements with the Colorado and Southern Railway Company. (Exhibits 17 and 18) The Railway Company sold a parcel of land to John and Peggy Miller via quitclaim deed in 1971. (Exhibit 93) John and Peggy Miller (hereafter the "Millers") purchased 3508 W. Eisenhower Boulevard in 1966 (Exhibit 92), and this property abutted the parcel purchased from the Railway Company in 1971. The Millers owned the two parcels until 2002. All owners between 2002 and 2013 purchased the land (the 1971 Railway parcel and adjacent 3508 W Eisenhower) as one parcel, including Mr. Gomez. Roger Gomez purchased the entire property, both parcels, in 2013. (Exhibit 91) Mr. Gomez is a successor in title to the Millers.

WITNESS TESTIMONY

Gary Graham testified about the City's uninterrupted, adverse, open and notorious use of the water line easement:

- Since 1984 when he began working for the City, the City has continuously and openly maintained the 12 inch and 34 inch water line.
- At least twice per year, the City would enter through the Miller property to maintain the water lines.
- Mr. Miller knew that the City operated water lines buried on his property.
- The City would flush the water lines once per year.
- The City would release air at least once per year.
- The 34 inch water line distributes water to other large water lines, with connections to two 16 inch and two 24 inch lines.
- Mr. Graham testified to photographs of the property from 1989 and 1990. They showed the water line easement area mowed, with a fence to the north, and a gate through which he would enter with City work crews to access the water lines. (Exhibits 20-23)
- The Millers permitted the City to drive through their property, entering from Eisenhower, crossing the pasture, and opening and closing two gates to access the water lines.
- In the early 1990s, the service line connection providing water to the house "went bad".
- It was a 3 day project to repair the service line and connect it to the 12 inch water main.
- Mr. Miller was there at times throughout the three day period of the repair.
- When City staff arrived to maintain the lines, even if Mr. Miller wasn't around, City staff would go through his two gates to the back of the property and access the water lines and perform the maintenance.
- The City took a bulldozer, backhoe, dump truck, utility trucks and other equipment down through the Miller property to perform maintenance and repair.
- In 2011 when the City performed a repair on the property, the City used the backhoe to move vehicles parked over the water line.
- If the City needs to repair the 34 inch line, the hole would have to be at least 10-12 feet wide to be able to dig all the way around the line and drop in a trench box, plus the 3 foot water line itself, making it 15 feet.
- After the Millers left, the City "lost its access to the lines" through the driveway of the property. The City sought permission only to drive through the Miller property to access the water lines.
- The City never asked permission, and Mr. Miller never objected, to the water lines in the ground.

Andy Tenbraak testified and confirmed the City's open and notorious use of the water line easements.

- Mr. Tenbraak worked for the water department since 1990 and was part of the crew that maintained the water lines, with at least twice yearly visits to flush the line and to let air out of the lines.
- Mr. Tenbraak also went out to the property to paint the marker posts.
- Mr. Tenbraak testified that the utility truck is about 24 feet long and 8 feet wide with a City logo on the side.
- He testified that they brought a backhoe that is about 8 feet wide and 23 feet long.
- Mr. Tenbraak testified that the City staff would go on back to do their maintenance, even if Mr. Miller was not home.
- Mr. Tenbraak testified that the City sought permission from later landowners to access the lines through the driveway on the old Miller property, but had been unable to obtain that permission. The City thereafter accessed the water lines through a different route from Namaqua Road.
- Mr. Tenbraak also testified that the City never asked Mr. Miller for permission to have the lines in the ground.
- Mr. Tenbraak testified that his supervisor showed them where lines were and trained them to do the annual maintenance, as the supervisor had done prior to Mr. Tenbraak's employment.

Mark Miller testified about the open and notorious nature of the water lines and knowledge of the water lines' presence on the property.

- Mr. Miller lived on the property known as 3508 W. Eisenhower with his parents, John and Peggy Miller, from 1966-1973.
- His parents purchased the abutting railroad parcel in 1971 for $300 dollars, which was not very much for that land.
- Mr. Miller knew the water lines were at the southern end of the property within the former railroad parcel.
- Mr. Miller helped his father build the fence around the property and to the north of the railroad parcel when he was age 13-15, making it 1968-1970.
- When his parents bought the railroad parcel in 1971, the railroad right-of-way was built up, and his father leveled the property, as depicted in the photograph from 1989.
- From the railroad tracks to the fence, Mr. Miller estimated it was 75-100 feet.
- The Millers owned the entire parcel from 1971 to 2002.
- His father never asked the City to get rid of the water lines.

Melissa Morin testified about the prescriptive easement obtained through many years of use and how she informed Mr. Gomez of a 12 inch and 34 inch water line at every stage of the development review process.

- Ms. Morin told Mr. Gomez about the water lines.
- She provided Mr. Gomez with maps showing the location of the water lines.

- Ms. Morin researched the property ownership and discovered the railroad license agreements and that the Millers bought the railroad parcel of land in 1971.
- The Millers owned the entire lot, both parcels from 1971 until 2002.
- At each stage of the county administrative processes to rezone and change the boundary line, Ms. Morin noted that the water lines existed, asserted the water line easements, and noted their location on the southern portion of the property.
- In order to annex, Mr. Gomez wanted the City to pay for connection to the City's sewer system.
- In order to recognize and record easements, Mr. Gomez wanted the City to pay the costs of a water tap.
- Although the City obtains written easement agreements for new development today, the City does not always pay money for them, and the burden to obtain them is upon the developer.
- The railroad companies will not grant easements and only enter into license agreements for any use within its right-of-way.

Darrell Wofford testified he located the lines, in the same location each time, marking the ground with blue paint.

- He located the lines, which is done using equipment that connects one piece at the air vac to send a signal to a receiver. The locator moves across the surface of the ground along the line noting where signal strength is strongest.
- Mr. Wofford testified that he used blue paint to mark the water lines, and he marked it in the same location both times in 2016 and 2017.
- Mr. Gomez was present the first time Mr. Wofford marked the water lines with blue paint in 2016.
- Mr. Wofford was confident in his markings based on the strength of the signal.

Tanner Randall testified as an expert in water utility and water distribution systems and explained the City's reliance on the water lines and importance of these lines.

- Mr. Randall said the City's water utility services 26,500 residences or commercial buildings.
- He testified the 12 inch water line was installed sometime in 1936-1937.
- Mr. Randall noted the 34 inch line was installed around 1962, as phase two of the water line installation from the water treatment plant to the City.
- At a peak flow period, 59% of the City is receiving its water from the 34 inch line. On average, 45% of the City's water is passing through this line. (Exhibit 74, Figures 1-4 and Chart on Bates Page No. 1073)

Stephen Adams, Water and Power Director until 2015, testified that he met with Mr. Gomez to explain the importance of the water and power lines.

- Mr. Adams is currently City Manager for the City of Loveland.
- Mr. Adams met with Mr. Gomez July 28, 2015, February 8, 2016, and April 5, 2016.

- Mr. Adams has seen the vehicles stored on the property and Mr. Gomez's use of the property, including leased space in the outbuildings.
- Mr. Adams testified that he shared the railroad license agreements with Mr. Gomez, and those agreements explained how the City obtained permission to install the water lines.
- Mr. Adams explained the importance of the water lines for distribution and the importance of the lines to the community.
- Mr. Adams testified that he believed the City had a prescriptive easement and wrote a letter to Mr. Gomez asserting this on April 5, 2016. (Exhibit 40)
- Mr. Adams received an email June 23, 2016 from Mr. Gomez titled "NOTICE TO VACATE" giving the City thirty and sixty days to remove the water lines and giving Platte River Power Authority sixty days to remove the power transmission lines. (Exhibit 41, Bates number pp. 659-660)

Brieana Reed-Harmel testified as an expert in electric utility systems and electric utility operations, specifically explaining the transmission power pole, wires, and electricity being transmitted.

- Ms. Reed-Harmel explained that the power line pole on the property is 110 feet tall, and the widest arms holding the lines are 9 feet side on each side.
- The pole is 1 ½-2 feet wide. Two feet plus the arms, which are 9 feet on each side, means the arms and pole at their widest is 20 feet in width.
- The City's typical easement for a transmission line is 75 feet in width.
- The National Electric Standard Codes requires 24 feet clearance from any point and to the sides, for safety reasons.
- A transmission line carries 115 Kilovolts of electricity (115,000 thousand volts), while a standard home voltage is 220 volts.
- Permanent structures inhibit access to the lines and create safety concerns due to the nature and risk of the extremely high voltage. Nonpermanent structures, such as parking lots and roadways can be placed in the easement area.
- The final construction of the pole is dated 1981.
- Equipment used to mount a transmission pole would include a bulldozer, excavating machine, and trailer trucks with pieces of the pole, which are put together at the site.

Gary Whittenberg testified about maintenance required for transmission lines and the size of equipment used.

- Mr. Whittenberg explained that the power lines require maintenance at least every five years.
- The power lines across Mr. Gomez's property are in well maintained condition.
- Trimming vegetation beneath and around power lines is critical to prevent faults. A fault is where a tree or other vegetation touches a line and causes an outage.

- At least every 5 years the hardware must be tightened and maintained using a large bucket truck.
- Platter River Power Authority inspects the lines at least twice per year.
- Equipment needed to access the lines include bucket trucks, 8-9 feet in width and 45 feet in length.
- Platte River has to use Mr. Gomez' driveway to access the power pole for hardware maintenance and vegetation trimming.
- A typical transmission line easement for 115 kV is 75-80 feet wide. Otherwise the line creates a risk to the property owner and the line.
- The National Electric Standard Codes requires twenty-four feet from the lowest phase to the ground.
- In high wind, the conductors (lines) blow out 7-10 feet. The arms are 9 feet, so they could blow close to twenty feet on each side.
- A permanent structure underneath the power lines, built on a foundation and not moveable, can present a safety hazard and may interfere with maintenance. Anything with wheels would be moveable.
- In 2015, when at the property, there were some vehicles parked under the power line.

Robert George Persichitti testified that he has done surveying for many years and that he found an "over and across" easement that covered a portion of section sixteen, across the Gomez property.

- Mr. Persichitti found there was one legal description but two parcels, which the county would recognize as one parcel.
- His field crews locate anything visible above ground, and the person requesting the survey has to request locates for underground utilities to include them within the course of the survey.
- A title exception described an "over and across" easement allowing the City of Loveland to install a water line anywhere in the north half of section 16, which is bounded on the north by Eisenhower Boulevard and the southern side would be one mile south of that.
- This over and across easement crosses the Gomez property, is recorded, and indicates a blanket easement for water lines.
- If the property owner requested an underground utility locate and they are marked, then those utilities will be noted in a survey.
- His staff set the 2004 boundary markers and monuments, as these had not been placed before. His staff could not locate a boundary marker for the former railroad parcel.
- Without boundary markers, a lay person could not determine the location of legally described boundary lines.
- There is also no recorded easement for the ditch.

Roger Gomez testified he purchased the property as one parcel, 3508 W. Eisenhower Boulevard.

- Mr. Gomez earns monthly income from storage of vehicles within the easement area over the water lines and under the power lines.
- Mr. Gomez did not request a survey prior to purchasing the property.
- Mr. Gomez receives his water service from the City of Loveland and pays a bill each month to the City.

Karin Madson testified Mr. Gomez contacted her when he was inquiring about property status options and uses for the property.

- Ms. Madson explained that desiring to conduct a certain business within the county does not mean you can do the activity.
- Mr. Gomez has completed a boundary line adjustment and a rezoning of the property.
- Mr. Gomez has not finalized his rezoning for the planned development at his property.
- Mr. Gomez currently has an open code compliance case that addresses his outdoor storage business and someone living in an RV on the property.

III. SUMMARY OF THE LAW: PRESCRIPTIVE EASEMENT

The City set forth applicable law in its Trial Brief filed August 6, 2018 and would draw the Court's attention to the legal authority for each element of a prescriptive easement: 1) Open or Notorious, 2) Continuous for 18 years, and 3) Adverse. (*See* Trial Brief, pp. 4-7). *Lobato v. Taylor*, 71 P.3d 938, (Colo. 2002). An easement is a right conferred by grant, prescription or necessity authorizing one to do or maintain something on the land of another which may burden the landowner and benefit the holder of the right. *Id.* at 945. An implied easement can be created by prescription or estoppel. *Id.* at 950. The Colorado Supreme Court has determined that adverse use can create an easement under Colorado's adverse possession statute. *Matoush v. Lovingood*, 177 P.3d 1262, 1269 (Colo. 2008).

Adverse use need not be established by a hostile or antagonistic act and thus, if all other elements are met, an easement may be acquired through the acquiescence or silence of a property owner. *LR Smith Investments, LLC v. Butler,* 378 P.3d 743, 747 (Colo. App. 2014). Whether use is adverse is a questions of fact. *Id.* The "adverse" element is presumed if the easement has been used for more than 18 years. *Simon by Simon v. Pettit*, 651 P.2d 418 (Colo. App. 1982), citing *Mahnke v. Coughenour*, 170 Colo. 61, 458 P.2d 747 (1969). "The owner's acquiescence is not permission and does not defeat adverse possession." *Westpac Aspen Investments, LLC v. Residences at*

Little Nell, 284 P.3d 131, 135 (Colo. App. 2011). Without consent, the use is adverse. *Trask v. Nozisko*, 134 P.3d 544 (Colo. App. 2006). If all other elements are met, an easement may be acquired through the acquiescence or silence of a property owner. *LR Smith Investments, LLC v. Butler,* 378 P.3d 743, 747 (Colo. App. 2014). Open, exclusive, adverse, and peaceable possession and use can give title as complete as if acquired by purchase or condemnation. *Haines v. Marshall*, 67 Colo. 28, 185 P. 651 (Colo. 1919).

A. PRESCRIPTIVE EASEMENT: APPLICATION OF LAW TO THE FACTS

Mr. Graham and Mr. Tenbraak testified to the open, notorious, continuous use of the water line easement area. For decades, City staff accessed the water lines by driving through the Miller property from the north to the south, opening and closing fence gates. The Millers knew of the existence of the water lines, and their son, Mark Miller, was aware of the water lines. The evidence clearly established the water line maintenance was open, notorious, and continuous, for more than eighteen years. Mr. Randall explained the significant amount of water that flows through the pipes today and that the City has used this infrastructure to provide water to City customers continuously.

Mr. Miller was present in the early 1990s when City staff spent three days connecting the water service line to the home from the City's twelve inch water line. Owners of the property called in a water leak that was repaired in 2011 and would not have had water in the home until the leak was repaired. Knowing the water lines were there, no owner demanded removal. The Millers, and certainly the owners in 2011, were aware of the water lines, and acquiesced as to the City's use of the land as an easement for those lines. Large equipment, including trucks, dump trucks, and backhoes, were used to conduct repairs and perform maintenance on the line. The Millers did not give permission for the water lines, but rather, acquiesced as to their existence and the easement for their operation and maintenance. The Millers allowed and gave permission for City staff to access the easement area by driving through their property, but since new ownership, the City has lost this driveway access. The only permission requested and granted has been to access the easement area, not to

have the water lines in the ground or to use the easement area to operate, maintain, and repair the lines.

From 1971 until 2013 when Mr. Gomez bought the property, the railroad parcel and large adjoining northern parcel have been treated as one parcel and bought and sold as one. Whether the thirty-four inch water line encroached upon the northern parcel or not is not relevant because the entire parcel has been under common ownership. The City has met all elements for an easement by prescription and is entitled to the presumption of "adverse" since the easement area has been used for more than eighteen years. Just as in the *Haines* case, the City's open, exclusive, adverse and peaceable possession and use gave title as if purchased or acquired by condemnation.

IV. SUMMARY OF LAW: SCOPE OF EASEMENTS

In general, the extent of an easement created by prescription is fixed by the use through which it was created. *Wright v. Horse Creek Ranches*, 697 P.2d 384, 387–88 (Colo.1985) (quoting Restatement of Property § 477 (1944)). The City set forth the law for scope of an easement on pages eight and nine of its Trial Brief. The owner of the servient estate enjoys all the rights and benefits of ownership consistent with the burden of the easement. *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229 (Colo. 1998). Where an easement is non-exclusive in nature, both the holder of the easement and the owner of the land burdened by the easement have rights to use the property and the interests of both must be balanced in order for both to achieve reasonable enjoyment. *Id.* at 1238. 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 by its owner for its intended purpose. *Id.*

A. SCOPE OF EASEMENTS: APPLICATION OF LAW TO THE FACTS

The City demonstrated at trial many decades of use of the property now owned by Mr. Gomez to operate its water lines to serve tens of thousands of City residents, and decades of open and notorious maintenance and repair of the water lines. Based

on the basic nature of an easement, the owner of the servient estate (here, Mr. Gomez) can do anything he wants with his property so long as he does not unreasonably interfere with the superior right of the easement holder.

The City's testimony established that constructing permanent buildings on foundations within the easement area needed and used by the City to access, operate, maintain, repair, and replace the water lines will necessarily interfere with the purposes of the easement. To fix leaks that can affect water service for tens of thousands of City residents, the City must be able to quickly mobilize heavy equipment and excavate alongside the large pipes. To perform maintenance, prevent fires, and maintain nationally-recognized safety standards, no permanent buildings may encroach within the area required by the City to operate, maintain, and repair the power lines.

The owner of the servient estate may not take any action that interferes with the use of the easement area. Any action, such as locating any permanent or non-moveable structure would interfere with the ability to repair and maintain the water and power lines. The testimony established that the City's requested restriction against permanent buildings is not some kind of additional taking, as suggested by Mr. Gomez at trial. Rather, those restrictions embody the very definition of an easement: a right to do or maintain something on the land of another without interference. *Lazy Dog Ranch*, 965 P.2d at 1234; see also *Wright*, 697 P.2d at 387–88.

V. SUMMARY OF THE LAW: IMPLIED EASEMENT BY ESTOPPEL

The City requests that the Court review pages seven and eight of the trial brief for the law on an implied easement by estoppel, prior use, or acquiescence. Generally, a court can imply an easement by estoppel when the 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 at 950-951.

A. IMPLIED EASEMENT BY ESTOPPEL: APPLICATION OF THE LAW TO THE FACTS

The City established the importance of the water lines through several witnesses: Mr. Graham, Mr. Randall, Mr. Adams. Mr. Randall explained that the existing infrastructure is taken into account when planning for the future. The thirty-four inch water line serves over half the City on an average day. The original owner of the land, the railroad company, granted the City licenses to install a 12 inch and 34 inch water line within its right-of-way. The City relied upon those licenses and built the water lines and other infrastructure to move the water from the water treatment plant to its customers. It was reasonable to expect the City would rely on the license agreements to change its position and build a citywide water distribution system relying on those water mains. The City changed its position and today has large water lines connected to the thirty-four inch line distributing water throughout the southern and western portion of the City. The twelve inch line serves approximately thirty customers. Injustice can only be avoided by establishing an easement for the water lines.

VI. SUMMARY OF LAW: <u>NOTICE AND STANDING</u>

The owner is not required to have actual knowledge of another's use of his or her land to establish an easement. *Weisiger v. Harbour*, 62 P.3d 1069 (Colo. App. 2002). In Massachusetts, the property owners' knowledge of their electrical services provided sufficient notice to know that the property must contain underground utility lines. *Dunning v. Larsen*, 2015 WL 5920263 (Mass. Land. Ct. 2015).

The right to compensation is a personal right which belongs to the owner at the time of the taking. *Upper Eagle Valley Sanitation Dist. v. Carnie*, 634 P.2d 1008, 1009 (Colo. App. 1981). Directly on point, the *Enke* case addresses a twenty inch water line buried on the land of a farmer who agreed to its construction. A subsequent landowner sought to compel the City of Greeley to initiate condemnation proceedings. The Court held that the right to compensation does not devolve to subsequent landowners just by virtue of purchasing the land. *Enke v. City of Greeley*, 31 Colo.

App. 337, 504 P.2d 1112 (Colo. App. 1972). The Court of Appeals in *Enke* relied on a Supreme Court decision from 1917 where it was first decided that the right to compensation for value of land taken and damages to the residue occasioned by the taking is a personal one belonging to the owner and does not pass without clear assignment. *Rogers v. Lower Clear Creek Ditch*, 63 Colo. 216, 165 P. 248 (Colo. 1917).

A. NOTICE AND STANDING: APPLICATION OF LAW TO THE FACTS

The evidence established that Mr. Gomez knew he received his water from the City of Loveland. Mr. Gomez received water bills from the City. Mr. Gomez did not have a survey conducted prior to purchasing the property. However, Mr. Gomez lacks standing to raise compensation, as he presented no evidence that a right to compensation for the easements was passed by deed to his ownership. The evidence established that the Millers knew of the existence of the water lines. The Millers were the first private landowners of the railroad parcel. The Millers were the ones who had standing to request compensation. That right was not assigned and did not pass to subsequent landowners.

Regardless, Mr. Gomez is not due compensation and his notice or lack of notice is not an issue in deciding whether or not a prescriptive easement exists. Lastly, as Mr. Persichitti testified, there is an existing broad easement for a water line that covers the entire Gomez parcel, which was identified in title documents. Mr. Gomez was made aware of this recorded document and failed to conduct a survey, including underground locates, to identify the location of the water lines.

The City installed the water lines pursuant to license agreements with the railroad that terminated upon the sale to private owners, as the Court has already found. The Millers acquiesced to the presence of the lines and did not seek compensation. The Millers sold the property to the Coalsons, who conveyed to the Hollys—neither of whom claimed compensation for a taking. If any taking has occurred, any compensation was owed to the Millers and cannot be recovered from the City by Mr. Gomez.

VII. SUMMARY OF THE LAW: TAKING COUNTERCLAIM

The City draws the Court's attention to pages nine through eleven of the Trial Brief. As stated above, there is no taking. Mr. Gomez lacks standing to raise this issue. A claim for inverse condemnation accrues when a government begins using property with the knowledge of its owner. *See Bad Boys of Cripple Creek Mining Co., Inc. v City of Cripple Creek*, 996 P.2d 792, 796 (Colo. App. 2000). "As is clear from its test, adverse possession is a statute of limitation which bars an action for recovery of property which has been adversely held by another for more than eighteen years." *Gerner v. Sullivan*, 768 P.2d 701, 705 (Colo. 1989). Actions for inverse condemnation or taking belong to the party owning the property at the time of the trespass or taking and absent an express assignment does not pass to subsequent landowners. *Majestic Heights Co. v. Board of County Comm'rs*, 476 P.2d 745, 748 (Colo. 1970).

A. TAKING COUNTERCLAIM: APPLICATION OF LAW TO THE FACTS

The Millers acquiesced in the operation and maintenance of the water lines (and power lines) on their land, so any subsequent landowners lack standing to obtain compensation for a condemnation of the same land that the City has used for many years. There is no taking in this case because the City's evidence has demonstrated a prescriptive easement. Mr. Gomez points out that the thirty-four inch pipe lays outside of the former railroad right-of-way parcel of land, and the City only knew of this fact recently when surveyed. As Mr. Persichitti testified, until his company set the markers for the boundaries of the railroad parcel, no one could have known where that boundary lay. However, the City has certainly known where the pipe lay. City staff have maintained that pipe and used an air vac just a few feet west of the Gomez property to let out air. The pipe has not changed its position.

Mr. Gomez sought to change his boundary line and rezone. Through this process, he moved the railroad parcel boundary line. Prior to 2004, no one knew exactly where the railroad boundary line lay as testified by Mr. Persichitti. The only difference now that the City has surveyed the water lines is that the parties know where the former boundary line for the railroad parcel is located in relation to the water lines, a

boundary line that has since been moved to the north. The water lines have not moved. The entire parcel has been under common ownership since 1971. Even today, Mr. Gomez owns both parcels. Knowing the exact location of the water lines on a survey does not change the City's use, maintenance and operation of the water lines in their existing location. There is no new taking. The Millers deliberately built a fence that was at least 75 feet north of the railroad right-of-way, as Mark Miller testified. The Millers acquiesced to the easement area and never interfered with the water lines.

Mr. Gomez argues that the *Upper Eagle* case is on point, but the facts of *Upper Eagle* are distinguishable. In that case, the sewer line was misplaced and installed outside of a recorded easement area, recorded on a plat. In this case, there is no recorded easement and there was no mistake. Here, the City had no easement for the water lines, and the license agreement from the railroad was terminated when the Millers purchased the land—meaning whether the lines were located within their railroad-approved location became irrelevant upon license termination. Unlike the landowner in *Upper Eagle*, the Millers knew of the water lines on their land. Whether the lines were located in the specific location approved by the railroad is irrelevant. Since 1971, the land has been owned as one parcel. There was no recording of an easement to establish the easement area, so it has been established by its use. Further, the quasi-governmental district in *Upper Eagle* was estopped from claiming it had already perfected an easement under the previous owner because the district **initiated a condemnation action first**—and therefore, the governmental entity was "in no position . . . to claim that it is entitled to a clear title to the easement" without compensating the new owner. *Id.* (Van Cise, J. specially concurring). The City never contemplated a condemnation action, always believing it had a prescriptive easement. Therefore, *Enke* should control, and the City is entitled to a clear title to the easements.

WHEREFORE, the City requests the Court enter an order to quiet title for a prescriptive water line easement, or in the alternative to an implied easement by

estoppel for water lines. The City also requests the Court enter a declaratory order establishing the width of the water line easement area to be 38 feet by 175.86 feet and the power line easement to be 75 feet by 175.86 feet. Finally, the City requests a declaratory order that Mr. Gomez and his successors may not interfere with the City's use and enjoyment of the easement area, including a prohibition against building any permanent structures or any activity that would interfere with the City's use, maintenance, operation, repair or replacement of the water lines or power lines.

Respectfully submitted this 24th day of August, 2018.

CITY OF LOVELAND

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing **CITY OF LOVELAND'S CLOSING ARGUMENT** was served by Colorado Courts e-Service on this 24th day of August, 2018 to the following:

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