

<p>DISTRICT COURT, LARIMER COUNTY, COLORADO Larimer County Justice Center 201 La Porte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 494-3500</p> <hr/>	
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**Plaintiff: THE CITY OF LOVELAND, a Colorado
Municipal Corporation,**

v.

Defendant: ROGER GOMEZ.

<p>Attorneys for Defendant City of Loveland, a Municipal Corporation: Alicia R. Calderón, #32296 Assistant City Attorney Derek L. Turner, #44091 Assistant City Attorney Loveland City Attorney's Office 500 E. Third Street, Suite 330 Loveland, CO 80537 (970) 962-2544 Alicia.Calderon@cityofloveland.org Derek.Turner@cityofloveland.org</p>	<p>Case Number: 2016CV30703 Courtroom: 4A</p>
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**PLAINTIFF CITY OF LOVELAND'S PARTIAL MOTION
FOR SUMMARY JUDGMENT**

Plaintiff, the City of Loveland ("City"), by and through undersigned counsel, hereby moves for partial summary judgment. In support hereof the City states the following:

C.R.C.P. 121 § 1-15(8) CERTIFICATION

The undersigned certify that they conferred with counsel for Defendant, Roger Gomez.

Counsel for Mr. Gomez indicated that he would oppose the relief sought by this Motion.

I. Introduction

This case involves the City's operation of two municipal utilities – water and electricity – through two water pipelines and overhead electric transmission lines (“Power Lines”) located on property now owned by Mr. Gomez at the address 3510 West Eisenhower Boulevard (the “Property”). The City seeks to quiet title for utility easements under theories of adverse possession and easement by estoppel. Mr. Gomez claims that the City's occupation of his property with its water and power lines is a taking of his Property for which the City should pay compensation.

This motion only concerns the overhead electric transmission lines mounted on steel poles with concrete bases that traverse the Property generally parallel to the southernmost property boundary, as shown and labeled as “Overhead Electric Transmission Line” on the Improvement Survey Plat, Intermill Land Surveying, Inc., (signed Aug. 26, 2004, Larimer County Rec. No. 2004-0101562) (attached as **Exhibit 1**) (hereinafter “2004 Survey Plat”). The 2004 Survey Plat of the Property also describes the location of a single steel pole with a concrete base located on the eastern half of the Property. *See Exhibit 1.* The City claims a utility easement for the Power Lines described on the survey drawing by King Surveyors attached as **Exhibit 2**, “Electric Lines Exhibit,” Jan. 12, 2018. The area comprises approximately 0.242 acres.

The parties previously briefed competing cross-motions for summary judgment. On June 23, 2017, this Court issued its *Order re: Cross Motions for Summary Judgment* (“Order”) where this Court (1) made findings of undisputed fact with respect to the history of the Property, (2) granted summary judgment in favor of the City and against Mr. Gomez on Mr. Gomez's first counterclaim for breach of license agreements, (3) found that disputed issues of material fact remained regarding the City's claims for easements for the water lines, and (4) rejected the City's

request for an easement for the power lines. *See Order at 3-5.*

Since this Court's Order in 2017, the parties have conducted discovery, including depositions of Mr. Gomez and a City employee, and the matter is set for trial. The parties have amended their complaint and counterclaims. The relief requested in this Motion concerns only the Power Lines and an order on this Motion will considerably simplify the issues for trial and conserve the parties' and the Court's resources.

The City requests an order granting the City partial summary judgment on its first and second claims for relief with respect to an easement for the Power Lines, and declaring that the City has acquired a prescriptive easement for the purposes of operating, repairing, and maintaining the existing electric transmission lines located on the Property.

II. Undisputed facts

1. From the 1930s until September 15, 1971, the Colorado and Southern Railway Company (the "Railroad") owned title to a parcel of land described on Exhibit 2 as the "Former Colorado & Southern Railroad Right-of-Way" (hereinafter referred to as the "Railroad Parcel"). *See Electric Lines Survey, Exhibit 2; Quitclaim Deed, September 15, 1971 (Larimer Cnty. Rec. No. 361720) (attached as Exhibit 3).*
2. The City's West Substation and a 115 kilovolt (kV) electric transmission line was constructed along the former Railroad right of way and through the Railroad Parcel beginning 1969 until completed sometime in 1970. *See Loveland 115KV Transmission Line Plan and Profile, R.W. Beck and Assocs., June 5, 1969 (attached as Exhibit 4).*
3. In 1971, the Railroad sold its property by quitclaim deed to the owners of the parcel of land immediately to the north of the Railroad parcel, John and Peggy Miller. *See Order at 3, ¶ 5; Quitclaim Deed, Exhibit 3.*
4. John and Peggy Miller purchased the lot known as 3508 W. Eisenhower located immediately to the north of the Railroad Parcel, in 1966. *See Deed, W.S. Parrish, Jr. & Lela H. Parrish to John E. Miller and Peggy J. Miller, Mar. 18, 1966 (Larimer Cnty. Rec. No. 912867) (attached as Exhibit 5).*

5. The 1971 quitclaim deed from the Railroad to the Millers was recorded in 1980. *See* Quitclaim Deed, Exhibit 3.
6. In 1979, the City replaced the single circuit 115 kV transmission line with a new double circuit 115 kV transmission line and upgraded the wood poles to steel poles. *See* City of Loveland, Colorado 115 KV Transmission Line, Black & Veatch Consulting Engineers Project No. 8028 (attached as **Exhibit 6**).
7. The Power Lines that exist today on Mr. Gomez's property were therefore installed in 1979. *See* Affidavit of Brieana Reed-Harmel, May 17, 2018, ¶5-6 (attached as **Exhibit 7**).
8. The existing Power Lines are approximately fifty feet above the surface of the ground on Mr. Gomez's property and extend nine feet wide on either side of the steel transmission pole. *See* Reed-Harmel Affidavit, Exhibit 7, at ¶10.
9. The steel pole on Mr. Gomez's property is approximately 110 feet tall and was constructed with a concrete base approximately 4.65 feet by 4.65 feet in size. *See* Reed-Harmel Affidavit, Exhibit 7, at ¶11. ¶
10. From 1971 until 2002, John and Peggy Miller owned the Railroad Parcel on which the Power Lines are located. *See* Warranty Deed, John E. Miller and Peggy J. Miller and Revocable Living Trust to Thomas E. Coalson II and Janis L. Coalson, July 1, 2002 (Larimer Cnty. Rec. No. 2002072509) (attached as **Exhibit 8**).
11. In 2004, Intermill Land Surveying, Inc. performed a survey of the property known as 3508 W. Eisenhower Blvd for Fritz and Jill Holly, whereby the resulting Improvement Survey Plat marked and noted the existence and location of the "Overhead Electric Transmission Line" and a small circle marked the location on the Railroad Parcel of a "Transmission Pole." *See* 2004 Improvement Survey Plat, Exhibit 1.
12. Mr. Gomez purchased the property in April 2013. *See* Policy of Title Insurance, Fidelity National Title Company, for Roger Gomez at 3508 W. Eisenhower Blvd, April 20, 2013, (attached as **Exhibit 9**) ("Gomez Title Insurance Policy").
13. Mr. Gomez's title insurance policy included in the exceptions to the title insurance policy "all matters as disclosed on the Improvement Survey Plat recorded October 18, 2004 at Reception No. 2004-0101562"). *See* Gomez Title Insurance Policy, Exhibit 9, at Schedule B ¶ 13.
14. Mr. Gomez walked around the property a few times prior to purchasing the property and visibly noticed the Power Lines running above the property and the transmission pole.

Deposition Transcript of Roger Gomez (excerpt, highlighting added), Dec. 4, 20917, at p.10 ll 1-8; p.11 ll 5-7, p.20 l 25 to p. 21 ll 1-14, (attached as **Exhibit 10**).

15. Mr. Gomez admits that the Power Lines are obvious and in plain view. *See* Defendant's Responses to Plaintiff City of Loveland's First Set of Written Discovery Requests to Defendant Roger Gomez (excerpt), Case No. 16CV30703 (Oct. 12, 2017) at 1-2, (attached as **Exhibit 11**).

III. Standard of Review

The court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." C.R.C.P. 56(c). "The nonmoving party is entitled to any favorable inferences that may reasonably be drawn from the facts, and all doubts must be resolved against the moving party."

Woodward v. Tamarron Ass'n, Inc., 155 P.3d 621, 624 (Colo. App. 2007).

IV. Argument – The City Should be Declared to Owner of a Prescriptive Easement for the Power Lines

An easement is an interest in property that confers upon the holder of the easement an enforceable right to use the property of another for a specific purpose. *Wright v. Horse Creek Ranches*, 697 P.2d 384, 387–88 (Colo.1985). "An easement may be established in a number of ways, including by prescription." *Id.*

An easement by prescription may be acquired in Colorado when a use of another's land is

- (1) open or notorious,
- (2) continuous without interruption for eighteen years, and
- (3) adverse or pursuant to an attempted but ineffective grant.

See Weisiger v. Harbor, 62 P.3d 1069, 1071 (Colo. App. 2002) (citing *Lobato v. Taylor*, 71 P.3d 938 (Colo. 2002)). A claimant of a prescriptive easement must establish these elements by a preponderance of the evidence. *See Trask v. Nozisko*, 134 P.3d 544, 549 (Colo. 2006). By this

Motion, the City seeks a ruling from this Court declaring the City owns a prescriptive easement to operate, maintain, and repair the Power Lines across, through, and above the Subject Property.

The Power Lines were constructed on land owned by the Railroad and soon sold by quitclaim deed to a neighboring property owner, the Millers, and has been open, notorious, continuously in operation, and adverse to the Millers and all subsequent owners of the property—including Mr. Gomez—from the date of its construction in 1969 until the date of the City’s Complaint in 2016. For more than forty-five years, citizens of Loveland and its surrounding area have benefited from the reliable transmission of electric power to their homes and businesses through the Power Lines. This Court should find that the necessary elements of adverse possession of an easement have been established by a preponderance of the evidence, and declare that the City of Loveland owns an easement on the Subject Parcel for the purpose of operating, maintaining, and repairing the Power Lines.

1. The City’s Power Lines are Open or Notorious

First, the City must establish that the Power Lines are open and notorious, which means that the use is “sufficiently obvious to apprise the owner of the servient estate . . . that another is making use of the burdened land so that the owner may object. However, actual knowledge by the owner need not be proved.” *Weisiger*, 62 P.3d at 1073.

Mr. Gomez admits in his answer to discovery and deposition the Power Lines are open and notorious. The City originally constructed the line to connect its new West Substation to the electric grid circuit which has been in continuous use since at least late 1969. *See* Affidavit of Reed-Harmel, Exhibit 7. Since no later than their initial construction in 1969, the Power Lines

have existed as open and notorious above-ground, overheard electric transmission lines. This Court should find the first element for adverse possession of the easement satisfied.

2. The City and its Agents Have Operated the Power Lines Continuously for More Than Forty-Five Years

Second, the use must be continuous and without effective interruption. *See Weisiger*, 62 P.3d at 1073.

From no later than 1970, the City, and its agents, including regional electric provider Platte River Power Authority, have operated and maintained the Power Lines across the subject property. *See Reed-Harmel Affidavit*, Exhibit 7, at ¶7. These lines are a critical piece of the City's electric infrastructure providing constant and reliable electric generation made available on demand through the electric grid. The Power Lines have served the City of Loveland and the regional electric network on a consistent and continuous basis from the year of their installation. *See id.* at ¶7-8. Therefore, this Court should find the second element for adverse possession of the easement satisfied.

3. The City's Construction and Maintenance of the Power Lines was Adverse and Not By Permission

Third, the use of the servient estate must be adverse and not by permission. *See Weisiger*, 62 P.3d at 1071. Possession and use of an easement for more than eighteen years gives rise to a presumption that the use of land was adverse. *Id.* "The landowner must then present evidence to overcome the presumption, such as by showing that the use was permissive. If the landowner fails to do so and the other elements of a prescriptive easement are met, the trial court must determine that a prescriptive easement exists." *LR Smith Investments, LLC v. Butler*, 2014 COA 170, ¶15; 378 P.3d 743, 747 (internal citations omitted). The Court "determines

whether possession is hostile through reasonable deductions from the acts and declarations of the parties.” *Schuler v. Oldervik*, 143 P.3d 1197, 1203 (Colo. App. 2006). The silence of acquiescence of a property owner “with respect to a claimant’s use of the property does not constitute permission to use the property and thus does not overcome the presumption of adversity.” *LR Smith Investments*, 2014 COA 170 at ¶16; 143 P.3d at 747.

Here, the City’s multi-decade period of possession and continuous use of the Power Lines across the Subject Parcel must give rise to a presumption that the City’s use of the land was adverse to its record owners. This presumption can only be rebutted with evidence that the City’s use of land for the Power Lines was by permission. The Railroad sold by quitclaim deed the Railroad Parcel to the neighboring landowners, the Millers, in 1971, two years after the City had installed the Power Lines. The Millers owned the lot to the north since 1966, and, because of the open and notorious nature of power line construction, had notice of the City’s construction of the Power Lines on the land they purchased from the Railroad. Even if the City had the permission of the Railroad to construct the line (and the City has found no evidence in support of that hypothetical), that permission ceased upon the sale of the property to the Millers in 1971. As this Court has ruled previously, “licenses are considered revoked ipso facto by the licensor’s conveyance of the land.” Order, at 4. The City has found no license from the Railroad or other document granting permission from the Railroad or the Millers, and the City’s Power Lines and pole must be presumed adverse. Furthermore, the City upgraded the power line to their existing appearance in 1979 while the Millers owned the property. The Millers failed to take any action to stop the work or ask to remove the Power Lines.

The City's open and notorious use and occupancy of the property—even after it was no longer owned by the Railroad—was clearly adverse and without permission, thereby satisfying the third element of the test for adverse possession of the easement. At the very least, the City's decades of open, notorious, and continuous use of the Power Lines gives rise to a presumption that the City's use is adverse, shifting the burden to Mr. Gomez to overcome the presumption.

See Weisiger, 62 P.3d at 1071.

The City has demonstrated with undisputed evidence the three elements necessary to prove that it possesses by prescription an easement for the Power Lines across and through Mr. Gomez's property as the exist today and as they are described on the 2004 Improvement Survey Plat, Exhibit 1. This Court should issue an Order finding that the City has satisfied such elements and declaring the City the owner of a prescriptive easement for the Power Lines as depicted on the Property in the 2004 Improvement Survey Plat.

CONCLUSION

The City has demonstrated the three elements of adverse possession of an easement for the Power Lines by a preponderance of the evidence. This Court should grant the City's Motion for Partial Summary Judgment with respect to the City's claims for a prescriptive easement for the Power Lines, and declare that the City has acquired an easement by prescription for the Power Lines that exist on Mr. Gomez's property.

Respectfully submitted this 18th day of May, 2018

By: /s/ Derek L. Turner
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Motion for Partial Summary Judgment was served via the method listed below on this 18th day of May, 2018 to the following:

Via ICCES e-Service
Kathie Troutd Riley
Kathie Troutd Riley, P.C.
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Attorney for Defendant Roger Gomez

/s/ *Kayla Demmler*
Original signature on file