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	▲ **COURT USE ONLY** ▲ 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	

RESPONSE TO CITY OF LOVELAND'S PARTIAL MOTION FOR SUMMARY JUDGMENT

Roger Gomez, Defendant, by and through counsel, Kathie Troudt Riley, P.C., responds to the City's motion for partial summary judgment, and states:

STANDARDS FOR SUMMARY JUDGMENT

In the context of a motion for summary judgment, the Court is asked to determine whether there is an issue to be resolved at trial. *Dominguez Reservoir Corp. v. Feil*, 854 P.2d 791, 795 (Colo. 1993).

Justice Boatright, in delivering the opinion in *People in Interest of S.N. v. S.N.,* 329 P.3d 276, 281-281 (2014), included a primer on summary judgment in Colorado. A Court may enter summary judgment prior to trial where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c). Summary judgment is a useful procedural tool to test whether there is an actual basis for relief or defense and if there is none, then a trial is unnecessary because the Court can decide the case strictly as a matter of law. *People in Interest of S.N.,* 329 P.3d at 281 (citations omitted).

Summary judgment is not a substitute for a trial. It is only at trial that the Court can assess the weight of the evidence and the credibility of the witnesses. Summary judgment eliminates a trial on the facts and is thus a "drastic remedy". Where there are genuine issues of material fact, summary judgment is not appropriate. *Id*. (citations omitted).

Summary judgment is only appropriate if the moving party establishes that no disputed material facts exist. Only if the moving party establishes that no disputed material facts exists must the opposing party then demonstrate a controverted factual question. When determining whether summary judgment is appropriate, the trial court must give the nonmoving party all favorable inferences that can be drawn from the record. *Id.* 329 P.3d at 281-282 (citations omitted).

Even if the nonmoving party fails to establish a controverted factual question after the moving party meets its burden, the trial court can still only grant summary judgment in a narrow set of circumstances. To properly grant a motion for summary

judgment, the trial court must find not only that the material facts are undisputed but also that reasonable minds could draw but one inference from them and the moving party is entitled to judgment as a matter of law. *Id*. (citations omitted).

The material allegations of the nonmoving party's pleadings must be accepted as true. All doubts as to the existence of a material fact must be resolved against the moving party. *Schold v. Sawyer*, 944 P.2d 683, 684 (Colo.App. 1997).

In the context of easement cases, the issue of intent is generally a question of fact which can rarely be resolved by means of summary judgment. What is considered a proper use of land by the servient owner is a question of fact, again something that cannot be determined by summary judgment. The question of reasonableness, by definition, involves factual determinations and cannot be resolved by summary judgment. *Id*. 944 P.2d at 684-685.

HISTORICAL BACKGROUND

The power line in question on the subject property was first constructed pursuant to action taken by the City in or about 1969. At a meeting of the City Council in or about March 18, 1969, the Council approved hiring an appraiser to handle the appraisal of property to be taken for the installation. *See*, Resolution appearing prior to the date of March 18, 1969. (Exhibit A). Later that year, the City Manager reported to the City Council that there were three holdouts in negotiating the land to be acquired, so the City Council directed the City Attorney to make one more effort before commencing

condemnation actions. *See,* Resolution appearing prior to the date of July 28, 1969. (Exhibit B).

It is undisputed that the subject property was not one of the properties for which the City commenced a condemnation action. It is also undisputed that, in 1969, the subject property was owned by the Colorado and Southern Railway Company ("Railroad"), known as the Arkins Branch Line.

The City of Loveland routinely negotiated with the Railroad to use land known as the Arkins Branch Line that ran generally along Highway 34 to the Masonville area. *See*, deposition of City employee Gary Graham, pp. 68-70 in which he describes the Arkeins *(sic)* Branch Line. (Exhibit C). As Mr. Graham testified, the City routinely contacts the applicable railroad whenever utility work is undertaken next to a railroad right of way [to gain permission]. Ms. Calderon expressed in discussion related to this case that that the City cannot take any action in a railroad right of way without the railroad granting the City that right.

On or about October 25, 1989, the City contacted the Burlington Northern Railroad Company, the successor to the Colorado and Southern Railway Company, to assign to the City all of its right, title and interest in various "agreements". One of the agreements specified was agreement numbered CS 6892 dated April 9, 1963, for an electric transmission line along the Arkins Branch Line. The Assignment is attached as Exhibit D.

It is evident that the City had some type of permission or right granted by the Railroad in 1963 with respect to the City's installation of power lines on Railroad

property including the subject property. It is undisputed that in 1963, the Railroad was the owner of the subject property. The City, according to the statements in its motion, cannot find any document related to the permission or right granted by the Railroad. (Motion, p. 8)

In 1978, the consulting engineering firm of Black & Veatch provided an electric system study for the City. The purpose of the study was to address the need for a line addition and line upgrade. The study discussed how the lines would be installed, in part, in what was referred to as the existing railroad right of way. *See*, Study, p. 3. (Exhibit E).

On or about March 18, 1980, pursuant to an agreement by and between Platte River Power Authority and the City, the City reflected certain payments to obtain a transmission line right of way. None of those listed were predecessors in title of the subject property. *See*, Exhibit B to the agreement (attached hereto as Exhibit F).

In the analysis for the power line installation, the City intended to make use of the railroad right of way, thereby reducing the number of privately owned properties for which an expense would be associated to obtain the right of way. *See,* Evaluation of alternative sites (Exhibit G).

These documents provided by the City in disclosures demonstrate that the City installed the power lines on the subject property pursuant to some permission obtained from the Railroad to use the railroad right of way for that purpose. It is undisputed that City never disavowed that permission.

It is undisputed that, other than the 1989 assignment obtained by the City after the Railroad sold the subject property, the City has produced no document regarding the character of the right it obtained to install power lines on the Railroad property. There is no evidence as to whether the 1963 agreement was an easement agreement, crossing agreement, or some other type of grant or conveyance.[1] [2]

It is undisputed that the subject property was not one of the properties for which payment was made by the City to obtain a right of way under its condemnation powers.

RELIEF REQUESTED BY THE CITY

The City requests an order granting the City partial summary judgment on its first and second claims declaring that the City has a prescriptive easement for the power lines. The City's prayer for relief in the Amended Complaint as to the power lines is as follows:

> The City further prays for declaratory and equitable relief under C.R.C.P. 57 and C.R.C.P. 105 as follows:
> a) That the City is owner of exclusive utility easements in, over, across, and within the subject property located at 3510 W. Eisenhower Boulevard for above and below ground wires, lines, pipes, poles or other equipment, appurtenances, and structures associated with electric … systems owned and operated by the City.
> b) That Defendant be barred from interfering with, tampering, or encroaching upon any portion of the easements, and that Defendants have no interest or

[1] The result set forth in the Order re: Cross Motions for Summary Judgment that a license is *ipso facto* revoked upon the sale of the property is inapplicable with respect to the power lines, as there is no evidence that the type of grant was a license.

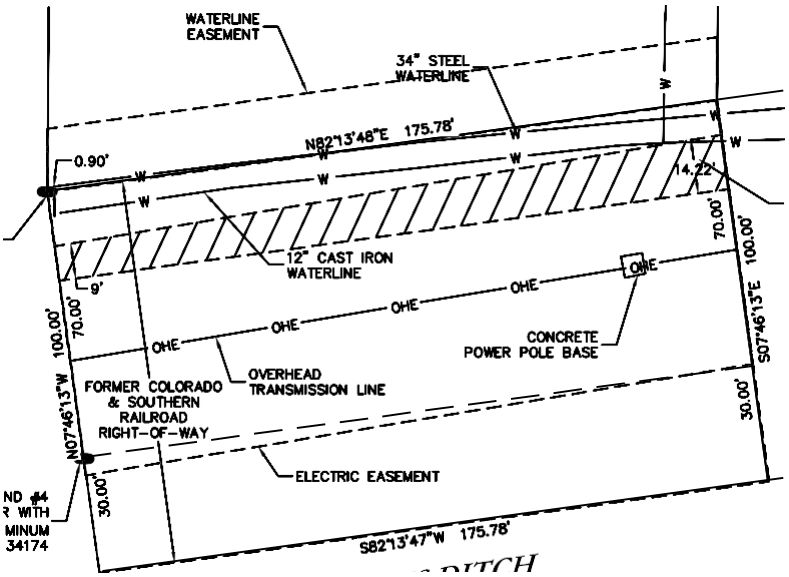
[2] The City cannot now change direction and argue that it is entitled to a prescriptive easement by a use that was an attempted but ineffective grant, because it has no evidence as to what the grant was or how it was created.

claim that will impinge, encroach or otherwise harm or injure the utility easements.

The City, in its amended complaint, alleges that the easement that should be awarded the City by the Court has the following dimensions:

The legal description for the power line easement is as follows:
Commencing at the North Quarter corner of said Section 16 and assuming the North line of said Northwest Quarter as bearing N 89°36’13” W being a Grid Bearing of the Colorado State Plane Coordinate System, North Zone, North American Datum 1983/2011, a distance of 2675.10 feet with all other bearings contained herein relative thereto;
THENCE, along the Northerly line of the said Northwest Quarter N 89°36’13” W a distance of 250.00 feet;
THENCE, departing the Northerly line of the said Northwest Quarter, S 00°23’47” W a distance of 80.00 feet to a point on the Southerly right-of-way line of State Highway 34 as described in
Book 1563, Page 285 of the records of the Larimer County Clerk and Recorder and also being the Northeast corner of that parcel of land as described in the said Gomez Boundary Line Adjustment Survey;
THENCE, continuing S 00°23’47” W along the Easterly line of that said parcel a distance of 460.82;
THENCE, S 07°46’13” E a distance of 9.28 feet to the POINT OF BEGINNING;
THENCE, continuing S 07°46’13” E a distance of 60.03 feet;
THENCE, S 80°31’49” W a distance of 175.86 feet to a point on the Westerly line of that parcel of property described in the said Gomez Boundary Line Adjustment Survey;
THENCE, N 07°46’13” W along said Westerly line a distance of 60.03 feet;
THENCE, N80° 31’49” E a distance of 175.86 feet, more or less, to the POINT OF BEGINNING.

Attached to the City's Amended Complaint is a depiction of desired easement:



LEGAL ARGUMENT

I.

Adverse Possession Does Not Apply Here When the Initial Use Was Permissive

"Where the original entry on land was … by permission or license from the true owner … in the absence of an explicit disclaimer of subservience, be presumed to continue as it began; and there is no presumption arising from mere possession, however long it may continue, that the holding is adverse." *Cox v. Godec*, 107 Colo. 69, 75, 108 P.2d 876, 879 (1941). The disclaimer must be express. The presumption of adversity does not apply when, as here, initial permissive use is established. *LR Smith Investments, LLC v. Butler*, 378 P.3d 743, 748 (Colo.App. 2014). "An adverse claim must be hostile at its inception, because, if the original entry is not openly hostile or adverse, it does not become so, and the [adverse possession] statute does not begin to

run as against a rightful owner until the adverse claimant disavows … a holding by permission." *Town of Silver Plume v. Hudson*, 151 Colo. 394, 398, 380 P.2d 59, 61 (1963).

The City installed the power lines on the railroad right of way with the permission of the railroad. The City's claim for a prescriptive easement is defeated and the City cannot prevail on its motion. The City's motion must be denied.

II.

Under Adverse Possession the City Cannot Obtain the Easement it Desires

Assuming, *arguendo,* that without instilling disputed material facts into its reply further requiring the City's motion to be denied, the City can successfully backtrack to assert that the City either did not have permission of the railroad to install the power lines within the railroad right of way (contradicting its own documents) or that the City disavowed the permission granted by the railroad, the relief requested by the City cannot be obtained via a prescriptive easement.

A prescriptive easement is a <u>non-exclusive</u> right to use the land of another. *LR Smith Investments, LLC*, 378 P.3d at 746. The City wants an exclusive easement with whatever restrictions the City wishes to place upon Mr. Gomez's use of the servient estate and that relief is not available to the City. The only mechanism for the City to obtain an exclusive easement with the restrictions on the servient estate that it desires

is to properly proceed through the process to obtain an easement through the City's condemnation powers.

An easement, regardless of the manner of its creation, does not carry any title to the land over which it is exercised, nor does it serve to dispossess the landowner. The owner of the servient estate enjoys all the rights and benefits of proprietorship consistent with the burden of the easement; while the rights of the owner of the dominant estate are limited to those connected with the use of the easement. When 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. "Consequently, the interests of both parties must be balanced in order to achieve due and reasonable enjoyment of both the easement and the servient estate." *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1234, 1238 (Colo. 1998) (citations omitted).

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 the owner for its intended purpose. Conversely, the owner of the easement may make any use the easement in a manner that does not cause unreasonable damage to the servient estate or unreasonably interfere with the enjoyment of the servient estate. *Lazy Dog* Ranch, 965 P.2d at 1238 (citations omitted). The issue of the proper use of an

easement is a distinct concept from the dimensions of an easement. *Lazy Dog Ranch.,* 965 P.2d at 1239.

The determinations of reasonableness, after consideration of all of the relevant circumstances, are largely questions of fact. *Lazy Dog Ranch,* 965 P.2d at 1241 (citations omitted). Here, as in *Lazy Dog*, determination as to reasonableness of use involves disputed facts, and summary judgment is not proper.

If the City is successful with respect to a decree that it acquired a prescriptive easement across Mr. Gomez's property, the Court must be able to describe the easement with particularity in its decree. *Weisigner v. Harbour*, 62 P.3d 1069, 1072 (Colo.App. 2002) (citations omitted). The dimensions of the easement acquired by a prescriptive easement is a question of fact determined by the presentation of evidence as to the reasonable use. *Goluba v. Griffith*. 830 P.2d 1090, 1091) (Colo.App. 1991).

What is considered reasonable use is a question of fact, something that cannot be determined by summary judgment. The question of reasonableness, by definition, involves factual determinations and cannot be resolved by summary judgment. *Schold,* 944 P.2d at 684-685.

The City cannot obtain an order declaring that it acquired a prescriptive easement for the purposes of operating, repairing, and maintaining power lines (Motion,

p. 3) without that order describing the easement with particularity, including its dimensions and reasonable use.

The City requests the Court to err, and to omit from its analysis, and to omit from a decree, any description of the easement with particularity. Apparently, the City, in the interest of simplifying the issues for trial and conserving resources (Motion, p. 3), wishes to just make its own determinations as to the dimensions of the easement and the reasonable use by the servient estate at a later time, without the presentation of evidence and without the Court weighing that evidence. The request by the City in its motion for an order granting it an easement of unspecified dimensions with unspecified definitions of and restrictions on Mr. Gomez's use of the servient estate and the City's use of the dominant estate cannot be granted.

III.

THE CITY'S MOTION ACCOMPLISHES NOTHING MORE THAN ITS PRIOR MOTION

In the Order re: Cross Motions for Summary Judgment, entered June 23, 2017, the Court made a finding of undisputed fact, "An above-ground power line also runs across Defendant's property, which is plainly visible." In that order, the Court found that the City had not provided evidence that might satisfy the legal requirements for the

requested easements. With this second motion, the City has accomplished nothing more.

IN CONCLUSION

Genuine issues as to material facts exist that must be resolved at trial. The questions raised by this motion cannot be determined by summary judgment.

Mr. Gomez respectfully requests the Court to deny the City's motion for partial summary judgment.

Dated this 8th day of June 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 **RESPONSE TO CITY OF LOVELAND'S PARTIAL MOTION FOR SUMMARY JUDGMENT** upon all parties herein by service through CCE this 8th day of June 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