

<p>DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO Court Address: 201 LaPorte Avenue Fort Collins, CO 80521-2761 Phone Number: (970) 494-3500</p>	
<p>CITY OF LOVELAND, a Colorado Municipal Corporation, Plaintiff.</p> <p>v.</p> <p>ROGER GOMEZ, Defendant.</p>	<p>▲ FOR COURT USE ONLY ▲</p>
<p>Attorneys for Plaintiff City of Loveland, a Municipal Corporation: Alicia R. Calderón, #32296 Assistant City Attorney Derek Turner, #44091 Assistant City Attorney Loveland City Attorney's Office 500 E. Third Street, Suite 300 Loveland, CO 80537 (970) 962-2544 alicia.calderon@cityofloveland.org derek.turner@cityofloveland.org</p>	<p>Case Number: 16CV 30703 Courtroom: 4A</p>
<p>REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT</p>	

COMES NOW Plaintiff, City of Loveland (the “City”), by and through undersigned counsel, and submits its Reply in Support of its Motion For Partial Summary Judgment (“Motion”)¹, and states as follows:

¹ The City’s Motion was captioned with a typographical error as “City of Loveland’s Partial Motion for Summary Judgment,” rather than the intended “City of Loveland’s Motion for Partial Summary Judgment.” The City submits this notice of errata and corrects the caption in this reply.

The City's Motion seeks summary judgment for a prescriptive easement to operate, maintain, and repair existing electric transmission lines ("Power Lines") located on the property of Defendant, Roger Gomez. Those lines have existed in their location since no later than 1970 and were upgraded in 1979 to their existing construction: large, high voltage transmission lines mounted more than fifty feet above the surface of the ground on 110-foot high steel poles with a concrete base. *See Motion at 4; Affidavit of Brieana Reed-Harmel, Exhibit 7 to Motion.* The City's Motion neither requested this Court's determination as to the specific area of the easement claimed by the City, nor on the reasonable use of the servient and dominant estates. Those issues will be determined at trial. Rather, the City's Motion simply sought a ruling that the City has satisfied the necessary elements to quiet title for a prescriptive easement for the Power Lines. The Court's findings would simplify the issues at trial.

Roger Gomez's Response to City of Loveland's Motion for Partial Summary Judgment ("Response") challenges the City's requested relief only on the element of whether or not the possession was adverse, indicating an admission or acceptance that the other elements have been met. Mr. Gomez speculates that a license agreement described in a 1989 assignment allowed the City to construct the power lines on land owned by the Colorado & Southern Railway Company ("Railroad") included this easement area. However, that license actually concerns a power line crossing through downtown Loveland, rather than the subject property. Mr. Gomez points to no evidence that shows that the City had permission of the railroad to construct, operate, maintain, and repair the Power lines, and claims that general statements about the City's history of working with the Railroad, and a license agreement for a different section of power lines, is sufficient to rebut the presumption of adversity that arises from the City's establishment of more than eighteen

years of open and notorious use. *See LR Smith Investments, LLC v. Butler*, 378 P.3d 743, 747 (Colo. App. 2014). This Court should find that Mr. Gomez’s Response fails to present any evidence to rebut the presumption of adversity and merely alleges permissive use, with no evidentiary support. *See id.* at 748. Because Mr. Gomez fails to rebut the presumption, the City can satisfy the element of adversity as a matter of law.

The remainder of Mr. Gomez’s Response ignores the limited scope of the relief sought by the City’s Motion. Instead, the arguments on pages 6-8 and 9-11 of the Response are primarily aimed at issues of fact on which the City deliberately did not request rulings—the specific scope of the City’s easement and the reasonable usage of the servient estate given the existence of an easement. Those issues are irrelevant to the relief requested by the City’s Motion and the City does not dispute that the scope and use of the dominant and servient estates must be the subject of the trial to the Court. However, a ruling by this Court that the City has satisfied the elements of prescription for an easement for the Power Lines will considerably simplify the presentation of evidence in this case, and will reserve for trial only those disputed issues of fact and law related to the scope and use of the easement the City has perfected through more than forty-five years of continuous occupation and use of the property.

I. Defendant’s Response highlights the lack of any evidence of permission from the landowners for the City’s installation, operation, and maintenance of the Power Lines

Mr. Gomez’s Response challenges only one element of the test for a prescriptive easement, which requires that the use of the servient estate must be adverse and not by permission. *See Weisiger v. Harbor*, 62 P.3d 1069, 1071 (Colo. App. 2002). Eighteen years of open and notorious possession and use of land establishes, as a matter of law, a presumption that such use was adverse.

Id. “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 at 747. To rebut the presumption of adversity, the landowner must establish the initial use as permissive. *Id.* at 748 (emphasis added).

The Response fails to establish the City’s initial use as permissive. The Response claims that the City must have had some permission to construct the Power Lines on land owned by the Colorado and Southern Railroad, and points to a document referenced in Exhibit D of Mr. Gomez’s Response, an Assignment of Leases and Permits from the Burlington Northern Railroad Company of various agreements related to the abandoned “Arkins Branch Line.” That April 9, 1963 agreement for an “Electric Transmission Line” (attached hereto as Exhibit 1) is irrelevant to this case and the City’s claims for a Power Line easement on Mr. Gomez’s property. The agreement authorizes the City to construct, maintain and use an electric transmission line on the railroad’s right of way from “the west line of Grant Avenue, and thence running in a northwesterly direction crossing the main track of the Arkins Branch at Mile Post 61.28, along the south side of West 8th Street.” *See* Electric Transmission Line License, April 9, 1963, Exhibit 1. That description places the area of that license to a section of the track far to the east of Mr. Gomez’s property and within the downtown core of the City of Loveland. This document, and the Burlington Northern assignment of previous Arkins Branch line licenses, in no way establishes the City’s permissive construction of the Power Lines on Mr. Gomez’s property. Neither Mr. Gomez nor the City can point to any evidence indicating that the City had the permission of the railroad to construct the line. Neither party has found a license agreement for this property or this section of the power line, and neither party has provided in discovery any evidence of the Railroad’s permission or

disclosed any witnesses or factual evidence that could reasonably support a finding that the initial use was permissive.

The Response then highlights the undisputed fact that the City commenced condemnation actions to acquire nearby land for the Power Lines—but failed to do so for Mr. Gomez’s land that was then owned by the Railroad during the initial construction of the Power Line and then sold by quitclaim deed to the Millers in 1971. The Response highlights payments made to landowners for the Power Lines’ right of way as described in the 1980 agreement with Platte River Power Authority (“Platte River”—but points out that “[n]one of those listed were predecessors in title of the subject property.” Response at 5. Further, at the time of that study, the Millers, not the Railroad, owned the land in question. The Millers owned the land at the time the City upgraded the Power Lines to their existing structures (including 110-foot high steel towers) and undoubtedly used large heavy equipment for installation. Therefore, the documents and facts described in Mr. Gomez’s Response fail to establish, or even suggest, that the City obtained permission to install the Power lines on the land of the railroad in 1969-1970. The Response does not allege any facts or evidence concerning the Millers’ ownership of land. The silence of the Railroad (from its ownership of the land during 1969-1971) and the Millers (from their ownership during 1971-2002) does not demonstrate permissive use or rebut the presumption of adversity that must arise through the establishment of the multi-decade period of open and continuous use of the land. See *LR Smith Investments*, 378 P.3d at 747 (adversity can be established through acquiescence or silence of the owner). To the extent that Mr. Gomez’s numerous predecessors in title during the forty-plus years from 1969 to 2013 silently acquiesced to the City’s operation, maintenance and repair of the enormous and immobile Power Line structures in no way establishes permission or rebuts the

presumption from the decades of continuous use that such use was adverse. *See id.* This is a question of law, and the City seeks a ruling that all elements for adverse possession have been met.

As stated at page 6 of the Response, “the City has produced no document regarding the character of the right it obtained to install power lines on the Railroad property”—because no document, according to City files, exists in the first place. Mr. Gomez’s Response fails to rebut the presumption of adversity that must arise from the City’s forty-five years of use of the land for electric transmission lines. This Court should find that the City’s forty-five years of occupation of the property, without payment, license, or any suggestion of permission from either the railroad or the Millers satisfy the element of adversity for a prescriptive easement.

II. The City’s Relief Requested is for Partial Summary Judgment with respect to the elements of a prescriptive easement for the Power Lines – not the specific metes and bounds of the easement or Mr. Gomez’s reasonable use of his servient estate

The Response quotes and refers to the City’s survey in its Amended Complaint for the claimed area of the easement. Nowhere in the City’s Motion did the City request the Court issue a ruling determining the metes and bounds of the claimed prescriptive power line easement. Although the survey describes the easement area claimed, the City will present evidence at trial regarding the use of the easement area requiring such an area. The Motion presented undisputed evidence that the City satisfies the elements of prescriptive easement and requested this Court’s determination that the City has acquired an easement by prescription for the obvious physical structures on Mr. Gomez’s property that transmit electricity for the benefit of tens of thousands of Northern Colorado residents and businesses. Contrary to Mr. Gomez’s statements in the Response, nowhere in the City’s Motion did the City request the Court’s specific determination of the boundaries of the easement, or the restrictions and reasonable uses Mr. Gomez should be permitted

to make on the land he owns that is burdened by the easement. However, the scope of the trial will be significantly narrowed if this Court rules that the City has satisfied the elements for a prescriptive easement for the Power Lines.

Pages 9-12 of the Response therefore present argument on issues not at issue in the City's Motion. The City agrees with Mr. Gomez's discussion of the law of reasonable use of an easement and that the issue of what constitutes a reasonable use of Mr. Gomez's servient estate will be the subject of trial in this case. The City's Motion does not request this Court's summary judgment on this issue.

III. This Court should declare that the City owns a prescriptive easement for the Power Lines, thereby simplifying the evidence and issues for trial

A ruling on the City's Motion will save the litigants the time and expense of trial time on those limited issues briefed in the Motion. *See Abrahamsen v. Mtn. States Telephone & Telegraph Co.*, 494 P.2d 1287, 1288 (Colo. 1972). Mr. Gomez's Response essentially admits the City can prove the first two elements for a prescriptive easement for the Power Lines (open and notorious, and continuous use for at least eighteen years), thereby establishing the presumption of adversity. Mr. Gomez's Response fails to rebut the presumption of adversity that arises from the City's forty-five-plus years of continuous operation of the Power Lines on the property, and fails to establish that the Power Lines were constructed with the permission of the Railroad. This Court's determination that the City has satisfied the elements and owns a prescriptive easement for the Power Lines will conserve the parties' resources at trial and allow the parties to focus during the Court's limited trial time on the disputed issues of material facts remaining.

WHEREFORE, the City requests this Court enter an order finding that the City has established the elements to be declared the owner of a prescriptive easement to operate, maintain, and repair Power Lines on Mr. Gomez's property.

Dated this 22nd day of June, 2018.

CITY OF LOVELAND
Original signature on file
By: /s/ Alicia R. Calderón
Alicia R. Calderón, #32296
Assistant City Attorney

By: /s/ Derek Turner
Derek Turner, #44091
Assistant City Attorney

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Derek.Turner@cityofloveland.org

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing **Reply in Support of Motion for Partial Summary Judgment** was served by Colorado Courts e-Service on this 22nd day of June, 2018 to the following:

Kathie Troutt Riley
Kathie Troutt Riley, P.C.
2903 Aspen Drive, Unit D
Loveland, CO 80538
Attorney for Defendant Roger Gomez

/s/ Lana Scott
Original signature on file

ELECTRIC TRANSMISSION LINE LICENSE

THIS AGREEMENT, Made this..... 9th day of..... April..... 19. 63....., between
THE COLORADO AND SOUTHERN RAILWAY COMPANY..... hereinafter called the "COMPANY,"
party of the first part, and..... CITY OF LOVELAND, a municipal corporation of the State of Colorado,
hereinafter called the "LICENSEE" (whether one or more), part..... Y..... of the second part, WITNESSETH:

1. In consideration of the covenants, promises and agreements of the Licensee hereinafter set forth, and the faithful performance thereof, the Company grants to the Licensee, upon and subject to the terms and conditions hereinafter set forth, license and permission to construct, maintain, use and operate an electric transmission line, consisting of poles or metal towers supporting..... 7..... wires, single and 3..... phase, 60..... cycle, carrying..... 110/220/2400..... volts, across or along the right of way or station grounds of the Company at or near the station of..... Loveland, Colorado....., at and in the following described location:

Said Electric Transmission Line and telephone cable enters the Railway Company's right of way at a point opposite Mile Post 60.99 of the Arkins Branch, being the west line of Grant Avenue, and thence running in a northwesterly direction crossing the main track of the Arkins Branch at Mile Post 61.28 along the south side of West 8th Street, and leaves the said right of way at a point opposite Mile Post 61.32, all in Loveland, Colorado,

(Wherever in this agreement the words "Electric Transmission Line" appear, they shall also be construed to mean "Transmission Lines and Telephone Cable")

which location is shown by red line or lines on the plat numbered..... 32063..... hereto attached and made a part hereof. Said transmission line, with all towers, poles, wires and appurtenances thereto, insofar as they relate to said transmission line upon said right of way or station grounds, is hereinafter called the "Transmission Line."

2. Before the Licensee undertakes to construct the Transmission Line over the Company's property, and before reconstructing, altering or repairing the same at any time thereafter, the Licensee shall give forty-eight hours' written notice of its intention so to do to the Company's Superintendent of Telegraph.

3. In addition to complying on..... its..... part with all terms and conditions in this agreement set forth, the Licensee shall pay to the Company..... \$57.00..... upon execution of this agreement,..... \$25.00..... of which being an initial and only charge, and..... \$32.00..... effective 4-9-63, and annually thereafter, for for the rights hereby granted location of poles and down guys. (13 poles @ \$2.00-\$26.00; 4 down guys @ \$1.50-\$6.00 = \$32.00.)

4. The Transmission Line shall be constructed and at all times maintained in strict accordance with current specifications recommended by the Bureau of Standards in its National Electrical Safety Code and in accordance with specifications from time to time recommended by the Association of American Railroads for overhead crossings of Electric Light and Power Lines, except where by statute or order of competent public authority a different type of construction or a different degree of maintenance is required, in which case such construction and maintenance shall be in strict accordance with such statute or order; provided, however, all materials and workmanship employed in the construction and maintenance of the Transmission Line shall be subject to the approval of the duly authorized representative of the Company; and the Transmission Line shall be so constructed, and at all times so maintained, that all wires thereof, carrying 300 volts or more, shall have a minimum vertical clearance of thirty (30) feet over the top of all rails of the Company's railroads crossed thereby, anything to the contrary contained in said Code and specifications notwithstanding.

5. The space around poles or towers of the Transmission Line, on or near the Company's property, shall be kept free from underbrush, grass and inflammable substance and material, by the Licensee.

6. In constructing, repairing, renewing or changing the Transmission Line, the Licensee shall perform and conduct the work with care and diligence, so that no damage shall occur to the property of the Company, and so that there will be no interference with the operation of its railroad. The Licensee shall restore the premises of the Company to as good condition as they were before said work was done; all of which shall be at the sole cost and expense of the Licensee. If the Company shall, in any instance, determine that it is necessary for its own protection against danger of damage arising during such work, it shall have the right, but shall not be required, to employ watchmen or other means for its protection; and if it shall do so, the expense thereof shall be paid by the Licensee.

7. The Company reserves and shall have the right to add to or change at its pleasure, from time to time, the number, character, location and grade of any of its tracks, wires, electrical conductors, structures or facilities at said location, and the Licensee shall, at its sole cost and expense, within thirty (30) days after receipt of written notice from the Company so to do, adjust the Transmission Line thereto as the Company may direct, and if the Licensee shall fail to so adjust the Transmission Line, the Company may, at its election, either terminate this license and wholly remove the Transmission Line, or make such adjustments itself at the expense of the Licensee.

8. The Licensee shall indemnify and save harmless the Company, and any telegraph or telephone company maintaining wires along the right of way of the Company, and also any other Company or person having property or doing work or being present on the right of way or station grounds of the Company with the Company's consent, from all claims, demands, suits and expenses, including attorney's fees, on account of loss, damage, injury to or death of any person or persons whomsoever, or of or to any property whatsoever, arising from or growing out of, in whole or in part, the construction, maintenance, repair, renewal, existence, presence or use of the Transmission Line.

9. Notwithstanding the grant of the license and permission herein contained, the Company reserves and shall have the right to permit any other person, firm, company or corporation hereafter to make any use of its rights of way or station grounds whatsoever that the Company may see fit, provided such use will not interfere substantially with the use, operation or maintenance of the Transmission Line.

10. The Licensee accept the provisions of this contract, and will occupy the premises of the Company, subject to and in recognition of all rights of any telegraph or telephone company or other licensees maintaining wires or other property on or along said right of way or station grounds under agreement with the Company made prior to the date of this contract, or made subsequent to the date of this contract and subject to the provisions of the foregoing paragraph 9; and will neither do any act nor omit to do any act that will be a violation of the agreement between the Company and such telegraph or telephone company or such other licensee.

11. If Licensee shall at any time fail or refuse to comply with or carry out on its part any of the terms and conditions herein contained, and such failure or refusal shall continue for a period of sixty (60) days after written demand for such performance or compliance shall have been made upon the Licensee by the Company, which written demand shall specify the particulars in which there is such failure or refusal to comply, the Company may, at its election, without further notice, forthwith revoke this License; and in case of such election, or upon any termination hereof, the Licensee shall, upon request, forthwith remove the Transmission line and restore the Company's premises to the condition in which they were prior to the construction of the Transmission Line. In case the Licensee shall fail to make such removal or restoration within sixty (60) days the Company may proceed with such work, and the Licensee shall promptly repay to the Company the cost thereof. No waiver by the Company of any default or defaults or the right to terminate this license will be deemed or held to be a waiver of the right to terminate the same for any subsequent default or defaults, but notwithstanding such waiver, the Company may terminate this license on any subsequent default or defaults which may occur; nor shall any termination hereof release the Licensee from any liability or obligation (whether of indemnity or otherwise) which may have attached or accrued previous to or which may be accruing at the time of such termination.

12. That the Licensee shall at all times, at its own expense, maintain the most effective system and use the best known and most effective methods to protect the lines, wires, trains, property, passengers, employees, freight and service of the Company, and of any Licensee of the Company whose permission to use the Company's premises antedates the permission herein granted the Licensee, from interference and physical hazard, and if necessary in order to prevent such interference or hazard, the Licensee shall, at its own expense, transpose its circuits or make such changes in the construction or location of the Transmission Line as may be specified by the Company.

13. If the Licensee moves or disturbs any of the property of the Company, then said Licensee agrees to restore said property in as good condition as it was before said property was disturbed by the said Licensee; and it is further expressly agreed and understood in this connection that said Licensee agrees to indemnify and save harmless the Company from all injuries and damages caused by the Licensee disturbing, removing or interfering with the property of the Company, and agrees to pay the Company for any and all damages that the Company may sustain or have to pay, including court costs and attorney's fees, growing out of the moving or interfering with any property of the Company.

14. Any notice to be given by the Company to the Licensee hereunder shall be deemed to be properly served if the same be delivered to an executive officer of the Licensee, or if deposited in the Post Office, postpaid, addressed to the Licensee at Loveland, Colorado.

15. In the event the Licensee herein embraces two or more persons or corporations, all the covenants and agreements of the Licensee herein shall be the joint and several covenants and agreements of such persons or corporations.

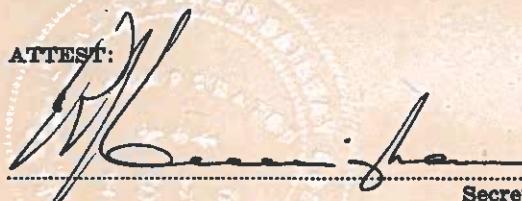
16. This agreement shall take effect on the date hereof and, unless terminated as above provided, shall continue in force for a period of One (1) Year, and thereafter until terminated by either party's giving to the other six (6) months' notice in writing, of an intention to terminate the same; and this agreement shall terminate upon the expiration of such notice; and on such termination, all rights and privileges of the Licensee shall absolutely cease, except the right of removal of its property from the premises of the Company. No termination hereof shall effect the rights and liabilities, if any, of the parties then or theretofore accrued under this agreement.

17. This agreement shall bind and inure to the benefit of the parties hereto, their successors and assigns or heirs, executors and administrators; but the Licensee shall not sublet or lease said premises nor assign this contract without the written consent of the Company. In case Licensee does assign, sublet or lease, or attempts to assign, sublet or lease said premises or this contract, or if there shall be an assignment by operation of law, without the written consent of the Company, the Company shall have the option and right to cancel this said license and contract immediately and to require Licensee to remove the Transmission Line.

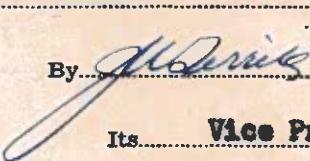
18. If any article or provision of this license and contract shall be held void or illegal, the same shall not be held to invalidate in any manner or way, any other provision or provisions, or article or articles, or part thereof, of this license and contract.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed on the day and year first above written.

ATTEST:

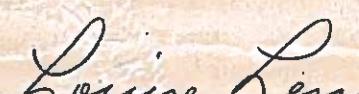

W. H. Martin
Secretary.

THE COLORADO AND SOUTHERN RAILWAY COMPANY

By 

Its Vice President

ATTEST:


Louise Hess
City Clerk

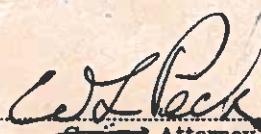
CITY OF LOVELAND

Licensee.

By 

Its Mayor

Approved as to form:

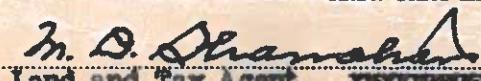

C. D. Beck
General Attorney.

Recommended:


W. H. Martin
Superintendent, ~~Telegraph & Signal~~
Communications & Signals

E. A. Graham
Asst. Chief Engineer.

Date 19


M. D. Sharable
Land and Tax Agent

Date 19

Date 19