

<p>DISTRICT COURT, LARIMER COUNTY, COLORADO Larimer County Justice Center 201 La Porte Avenue Suite 100 Fort Collins, CO 80521 970-494-3500</p>	<p>DATE FILED: May 15, 2017 3:21 PM FILING ID: 175BEE02BEDE6 CASE NUMBER: 2016CV31096</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Plaintiff: CITY OF FORT COLLINS, a Colorado municipal corporation; and Poudre Fire Authority, a Colorado public entity,</p> <p>v.</p> <p>Defendant: KEITH GILMARTIN, an individual.</p>	<p>Case No.: 16CV31096 Div.: Ctrm: 3C</p>
<p>Kelley B. Duke, #35168 Benjamin J. Larson, #42540 IRELAND STAPLETON PRYOR & PASCOE, PC 717 17th St., Suite 2800 Denver, Colorado 80202 Telephone: (303) 623-2700 Fax No.: (303) 623-2062 E-mail: kduke@irelandstapleton.com blarson@irelandstapleton.com SPECIAL COUNSEL FOR THE CITY OF FORT COLLINS; ATTORNEYS FOR Poudre Fire Authority</p>	
<p style="text-align: center;">PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO C.R.C.P. 56(a)</p>	

Plaintiffs the City of Fort Collins, a Colorado municipal corporation (the "City"), and the Poudre Fire Authority, a Colorado public entity (the "Authority", collectively, "Plaintiffs") by and through their undersigned counsel, IRELAND STAPLETON PRYOR & PASCOE, PC, move for partial summary judgment on their Third Claim for Relief for Declaratory Judgment pursuant to C.R.C.P. 56(a), stating as follows:

CERTIFICATE OF COMPLIANCE WITH C.R.C.P. 121 § 1-15(8)

Pursuant to C.R.C.P. 121 § 1-15(8), undersigned counsel certifies that Mr. Larson conferred with Defendant Keith Gilmartin regarding this Motion and the relief requested herein. Mr. Gilmartin opposes this Motion.

I. INTRODUCTION

In 1991, the City paid Mr. Gilmartin and his parents \$4,669.00 for an easement across the Gilmartins' property. The plain language of the deed of easement establishes that the easement, which was granted to the City and includes the right to install "public improvements" such as a "street," is a public easement that extended the existing public street through the Gilmartin property to the Authority's training center. The deed of easement contains no limitations on its use as a public street. Plaintiffs therefore move for partial summary judgment on their Third Claim for Relief for Declaratory Judgment, seeking an Order from this Court declaring, as a matter of law, that the easement is a public easement that may be used in any manner the City may authorize for a public street.

II. STATEMENT OF UNDISPUTED FACTS

1. The City is a municipal corporation organized under the laws of the State of Colorado. Fort Collins Charter Art. I, § 1.¹

2. The Authority is a public entity formed in 1981 by an Intergovernmental Agreement between the City and the Poudre Valley Fire Protection District to provide fire and emergency services to the citizens and their property within Plaintiffs' jurisdictional boundaries.

Exhibit A, July 15, 2014 Amended and Restated Intergovernmental Agreement Establishing

¹ Available at:
https://www.municode.com/library/co/fort_collins/codes/municipal_code?nodeId=FOCOCH.

Poudre Fire Authority, § 1.2 ("2014 IGA"); *see also* Amended Answer and Counterclaim to Complaint ("Answer") ¶ 1 at p. 2. Plaintiffs' 1981 Intergovernmental Agreement was subsequently amended to its current form in the 2014 IGA. *See* Ex. A.

3. Mr. Gilmartin is an individual who resides at 3316 West Vine Drive, Fort Collins, Colorado 80521 ("Gilmartin Property"). Answer ¶ 2.

4. The Authority operates a Training Center located at 3400 West Vine Drive in Fort Collins, Colorado ("Training Center"). **Exhibit B**, Affidavit of Thomas DeMint ("DeMint Affidavit") ¶ 3.

5. On January 15, 1991, Mr. Gilmartin and his parents, in exchange for the sum of \$4,669.00, granted, sold, and conveyed to the City and its successors and assigns a public easement (the "Easement") described as follows:

a perpetual easement and right-of-way to install, operate, maintain, repair, reconstruct, replace, inspect and remove, at any time and from time to time public improvements (including without limitation, street, utilities, sidewalk and drainage), together with a right-of-way for access on, along, through and under the [Gilmartin Property].

Exhibit C, January 15, 1991 Deed of Easement ("Deed of Easement"); Answer ¶ 7.

6. Pursuant to the 2014 IGA and an October 12, 2016 Intergovernmental Agreement entered into by and between the City and the Authority ("Delegation of Duties"), the Authority has the power, duty, and responsibility to maintain, operate, manage, control, and assert all rights under and pursuant to the Easement. **Exhibit D**, Delegation of Duties ¶ 1.

7. The Deed of Easement contains no limitations on the City's or its assigns' use of the Easement. *See id.*

8. West Vine Drive is a public thoroughfare where it dead ends on the Gilmartin Property. Ex. B, DeMint Aff. ¶ 4. The Easement extends West Vine Drive through the Gilmartin Property to the Training Center. *Id.*; see also **Exhibit E**, Satellite Image of the Training Center (and an approximation of the Easement and the Gilmartin Property).

9. In or about 1995, pursuant to the express language in the Deed of Easement, West Vine Drive was extended by installing a paved street on the Easement from West Vine Drive to the Training Center. Ex. B, DeMint Aff. ¶ 6. The public has been able to, and has accessed, the Easement from West Vine Drive for several years. Ex. B, DeMint Aff. ¶ 6.

10. Like other public thoroughfares, the City (through the Authority) maintains the Easement, including the paved roadway portion of the easement. Ex. B, DeMint Aff. ¶ 7. The Authority also collects trash and mows the grassy area of the Easement to either side of the paved road. *Id.* Speed limit signs have also been posted, indicating that drivers should not exceed 25 miles per hour within the Easement. *Id.*

11. From when the Easement was granted in 1991 through approximately 2010, Plaintiffs enjoyed use of the Easement without interference by Mr. Gilmartin or his parents. Ex. B, DeMint Aff. ¶ 8. However, beginning in approximately 2010, Mr. Gilmartin has substantially interfered with Plaintiffs' peaceful use and enjoyment of the Easement.² *Id.*

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where the record before the court—pleadings, depositions, answers to interrogatories, admissions on file, and any affidavits submitted with the

² This fact is set forth to provide context. The facts concerning Mr. Gilmartin's past interference are not material to the relief sought herein, but instead concern Plaintiffs' remaining claims for Trespass and Public Nuisance.

motions—demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Franklin Bank, N.A. v. Bowling*, 74 P.3d 308, 311 (Colo. 2003). In response to Plaintiffs' motion, Mr. Gilmartin cannot rely on argument alone—he must raise a genuine issue of material fact by affidavit or otherwise. C.R.C.P. 56(e); *Brown v. Teitelbaum*, 830 P.2d 1081, 1084-85 (Colo. App. 1991). "A material fact is one that will affect the outcome of the case." *Sinclair Transp. Co. v. Sandberg*, 350 P.3d 924, 928 (internal citations and quotations omitted). "In addition to concerning a material fact, the issue in dispute must be 'genuine.'" *Id.* Therefore, "the evidence presented in opposition to such a motion must be sufficient to demonstrate that a reasonable jury could return a verdict for the non-moving party." *Id.*

IV. ARGUMENT

To ascertain the extent of an expressly created easement, courts examine the instrument conveying that right to determine the parties' intent. *Allen v. Nickerson*, 155 P.3d 595, 600 (Colo. App. 2006) (citing *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229 (Colo. 1998)). Summary judgment is appropriate where an unambiguous deed is construed using the plain language of the document. *Id.* (granting summary judgment finding creation of easement where the plain meaning of the document was clear and unambiguous). Extrinsic evidence may not be used "to contradict the language of the written instrument; rather, extrinsic evidence is used to explain and give context to the language." *Id.* (quoting *Lazy Dog Ranch*, 965 P.2d at 1237).

Here, it cannot be disputed that the Deed of Easement expressly grants an Easement to the City and its assigns across the Gilmartin Property. Ex. C, Deed of Easement (titled, "Deed of

Easement"). Mr. Gilmartin admits the Deed of Easement granted the city a perpetual easement. Answer ¶ 7.

The issue with respect to Plaintiffs' Third Claim for Relief for Declaratory Judgment is whether the Deed of Easement conferred a public easement for use by the public as authorized by the City. When an easement is accepted by a local government and is then used by the public, it becomes a roadway and open to use by members of the public. *Turnbaugh v. Chapman*, 68 P.3d 570, 573 (Colo. App. 2003). "Once a roadway is accepted by a local government and used by the public, its status as a roadway continues until vacation or abandonment." *Id.*

Here, Mr. Gilmartin and his parents conveyed the Easement to the City, which is a local government. Statement of Undisputed Facts ("SUF") ¶¶ 1 and 5. The Deed of Easement expressly authorizes the City to "install, operate, maintain, repair, reconstruct, replace, inspect and remove, at any time and from time to time public improvements (including without limitation, street, utilities, sidewalk and drainage)." SUF ¶ 5 (emphasis added). The Deed of Easement contains no limitations on the public improvements the City can install or how those public improvements can be used. *See* SUF ¶ 7. Consequently, construing the plain language of the Deed of Easement, Mr. Gilmartin unambiguously conveyed to the City an easement for a public street across the Gilmartin Property.

While the Court need not look at extrinsic evidence to grant the relief requested, such evidence unequivocally supports the conclusion that the Deed of Easement conveyed an easement and right of way for a public street across the Gilmartin Property. First, the physical location of the Easement is such that it extends West Vine Drive, a public thoroughfare, to the Training Center. SUF ¶ 8. The City, through the Authority, paved the Easement from the end of

West Vine Drive to the Training Center. SUF ¶ 9. The City, through the Authority, has installed speed limit signs and maintains the Easement, including the paved roadway portion of the Easement. SUF ¶ 10. The public has accessed the Easement for several years. SUF ¶ 9. Because the public has used the Easement as a street, its use as a public street continues until the Easement is vacated or abandoned. *Turnbaugh*, 68 P.3d at 573.

V. CONCLUSION

WHEREFORE, upon the foregoing arguments and authorities, Plaintiffs respectfully requests that the Court enter an Order granting partial summary judgment in favor of Plaintiffs and against Mr. Gilmartin on Plaintiffs' Third Claim for Relief for Declaratory Judgment, determining that (1) the Easement is a public easement for use by the public as authorized by the City; (2) that Plaintiffs and their respective directors, officers, employees, volunteers, agents, guests, and invitees may use the Easement free from interference from Mr. Gilmartin for all uses that a public roadway may be used as authorized by the City, including but not limited to, ingress to and egress from the Training Center and parking vehicles within the Easement; and (3) any further interference by Mr. Gilmartin with Plaintiffs' rights under the Deed of Easement will constitute trespass and private nuisance.

Respectfully submitted this 15th day of May, 2017.

IRELAND STAPLETON PRYOR & PASCOE, PC

Signed original on file at the office of
Ireland Stapleton Pryor & Pascoe, PC

/s/ Kelley B. Duke

Kelley B. Duke, #35168

Benjamin J. Larson, #42540

Special Counsel for the City of Fort Collins

Attorneys for Poudre Fire Authority

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2017, a true and correct copy of the foregoing **PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO C.R.C.P. 56(a)** was served via U.S. Postal Service, first class mail, postage prepaid and addressed as follows:

Keith Gilmartin
3316 W. Vine Drive
Fort Collins, CO 80521

And served via email to:
keithgil2@gmail.com

*SIGNED ORIGINAL ON FILE AT THE OFFICE OF
IRELAND STAPLETON PRYOR & PASCOE, PC*

/s/ Barbara Biondillo _____
Barbara Biondillo