

<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: June 7, 2017 3:37 PM FILING ID: 159EB0947D704 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' REPLY IN SUPPORT OF 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, respectfully submit this Reply in Support of their May 15, 2017 Motion for Partial Summary Judgment Pursuant to C.R.C.P. 56(a) ("Motion"), stating as follows:

ARGUMENT

1. Mr. Gilmartin's Response Fails to Create Any Genuine Issues of Material Fact.

In his Response, Mr. Gilmartin did not present any evidence establishing a genuine issue of the material fact concerning whether the Easement is a public easement for use by the general public as authorized by the City. The facts Mr. Gilmartin disputes generally concern whether (1) the easement extends West Vine Drive as a thoroughfare rather than as a cul-de-sac or some other form of public street (Response at 3, ¶¶ 1, 2), which is not a material fact, and (2) whether Defendant has interfered with Plaintiffs' use of the Easement (Response at 3, ¶¶ 3, 4), which is not at issue in this Motion.¹

Moreover, many of the "disputes" in Mr. Gilmartin's brief stem from him simply saying he disputes a particular fact. *See, e.g.*, Response at 3, ¶¶ 2, 4; at 5, ¶ 4(a); at 6, ¶ 6; at 7, ¶ 8. However, Mr. Gilmartin cannot rely on argument alone—he must raise a genuine issue of material fact by affidavit or otherwise. *Brown v. Teitelbaum*, 830 P.2d 1081, 1084-85 (Colo. App. 1991).

Regardless, whether by evidence or unsupported argument, Mr. Gilmartin does not dispute any of the following material facts: (1) that, in 1991 and in exchange for \$4,669.00, he and his parents granted the Easement to the City and its assigns (Motion ¶ 5; Answer ¶ 7); (2) that the Deed of Easement says what it says (Motion ¶ 5); (3) that the Easement extends West Vine Drive (whether it be called a thoroughfare, a road, a street, or cul-de-sac) to the Training

¹ Plaintiffs are not moving on their claims for past incidents of trespass or public nuisance by Mr. Gilmartin. Those claims may become moot depending on this Court's Order on the Motion.

Center (Motion ¶ 9); and (4) that the public has had access to and has used the Easement for several years (Motion ¶ 9).²

In fact, several of the exhibits Mr. Gilmartin attaches to his Response lend further support to the material facts set forth in Plaintiffs' Motion. For example, the June 2016 letter from the City to Mr. Gilmartin at Exhibit 1 of the Response, states, in pertinent part, as follows:

The easement deed is very broadly worded. It gives the City an easement and right-of-way to install public improvements, including street improvements, and for access on, along, through and under all of the easement property (not just the paved portion.)

The City has treated this easement and right-of-way as it generally would similar property interests, and in this location the City has not prevented the public from freely using the street improvements or easement area. So, neither [the Authority] nor any other member of the public has needed further permission from the City to use the easement for typical street purposes.

To be very clear, the City has no objection to [the Authority] or members of the public using the easement for parking or turning vehicles around. These uses are consistent with the use of other public street improvements, and the City's expected use of the improvements and the easement area.

Response, Ex. 1 at 1. This explanation and recitation of the historical facts from the City, which Mr. Gilmartin does not dispute, exactly tracks the undisputed facts set forth in the Motion.

Mr. Gilmartin also highlights a portion of a 1990 Lease between Colorado State University and the Authority, whereby the Authority leased from the university the property on which the Training Center sits. The excerpt reads, in pertinent part, as follows:

² Mr. Gilmartin alleges for the first time that CSU acquired a parcel of Mr. Gilmartin's property by court order, a sliver of which falls within the Easement conveyed by the Deed of Easement. Response at 4, ¶ 2. To the extent that CSU now owns a sliver of the burdened property, then any declaration by this Court can simply apply to that portion of burdened property owned by Mr. Gilmartin. Mr. Gilmartin is the only servient property owner with whom Plaintiffs have had any issue.

12. Access to the lease premises shall be by extension west of the current roadway, being west Vine Drive [i.e., the Easement]. . . . This lease is specifically made conditional upon [the Authority] being authorized and allowed to utilize said access, as no access to the leased premises across the University property is or shall be authorized hereby.

Response, Ex. 10 at 3. This excerpt confirms two things. First, that the Easement extends West Vine Drive through to the Training Center. Second, that the Authority has no other access to the Training Center other than by the Easement.

Additionally, in trying to dispute the immaterial fact that he has interfered with the Easement in the past, Mr. Gilmartin concedes the material fact that the Easement has been used as a "public street":

Plaintiff's contention that the "easement is a "public street" [*sic*] in conjunction with a close examination of Plaintiffs' submissions listed in the AMENDED COMPLAINT provide 'prima fascia' [*sic*] evidence that Defendant's action are congruous with behavior for "on a public street" within the context of the specific event.

Response at 3-4, ¶ 4 (underlined emphasis added).

2. Mr. Gilmartin Cannot Cite Any Authority Disputing that the Easement Is a Public Easement.

As set forth in the Motion and based on the basic facts that Mr. Gilmartin has not disputed, the Easement became a roadway open to use by members of the public when it was accepted by the City (a local government) and was then used by the public. *Turnbaugh v. Chapman*, 68 P.3d 570, 573 (Colo. App. 2003). Mr. Gilmartin has not cited any applicable authority contradicting *Turnbaugh* and even admits that the Easement has been used as a "public street." Response at 3-4, ¶ 4.

Mr. Gilmartin's chief complaint in his Response appears to be that the Deed of Easement did not convey to the City and its successors and assigns "public use," but is merely an

ingress/egress easement for use by the City only and should be considered a "cul de sac" instead of a "thoroughfare". However, what the roadway is formally called (thoroughfare versus a cul-de-sac) is of no consequence, because the only issue is whether the roadway was accepted by a public entity and open to use to by members of the general public, all of which is undisputed.

Here, the plain language of the Deed of Easement permits the City and its assigns to build a public street on the Easement, which is what happened in 1995. Motion at ¶ 9; Response, Ex. 11, Gilmartin Affidavit ¶ 7. The public has since had access to the Easement for several years. Plaintiffs do not seek to expand the scope of the Easement or change its express terms. They merely seek an order confirming that the Easement is the equivalent of a public street available for public use as authorized by the City.

CONCLUSION

WHEREFORE, 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) that portion of the Easement to which Mr. Gilmartin was the servient estate holder as of the commencement of this action (the "Gilmartin 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 Gilmartin 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.

An Amended Proposed Order is being filed herewith for the Court's convenience.

Respectfully submitted this 7th day of June, 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 7th day of June, 2017, a true and correct copy of the foregoing **PLAINTIFFS' REPLY IN SUPPORT OF 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/ Hannah Pick

Hannah Pick