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Electronically Filed
Jun 29 2015 04:40 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

8 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

9 JOHN AND MELISSA FRITZ,

10 Plaintiff-Appellants,

CASE NO. 67660

11 vs.

12 WASHOE COUNTY,

13 Defendant-Respondent,
14 _____/

15 **APPELLANT'S OPENING BRIEF**

16
17 COMES NOW the Appellant(s), JOHN AND MELISSA FRITZ,
18 a married couple (hereinafter "the Fritzes") by and through the
19 undersigned counsel, and hereby file the following Appellant's Opening
20 Brief pursuant to Nevada Rule of Appellate Procedure ("NRAP") 28,
21 seeking that the Court reverse the Order on Summary Judgment ("District
22 Court's Order") (Appx. Vol. 1 at 1) issued in Docket No. CV13-00756 by
23 the Second Judicial District Court dated March 19, 2015 in favor of
24 Respondent Washoe County, a political subdivision of the State of
25 Nevada.
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John and Melissa Fritz, a married couple – Appellants.

Attorney of record for John and Melissa Fritz

By: Luke A. Busby

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I. JURISDICTIONAL STATEMENT

1 2. The Supreme Court of the State of Nevada and the Nevada Court
2 of Appeals have jurisdiction over this matter pursuant to Article 6 Section
3 4 of the Nevada Constitution and Nevada Revised Statutes (“NRS”) 2.090.
4 This appeal is timely as the Notice of Appeal (Appx. Vol 3 at 536) in this
5 matter was filed on March 24, 2015 within 30 days of the District
6 Court’s Order (Appx. Vol. 1 at page 1) granting Washoe County’s Motion
7 for Summary Judgment issued on March 19, 2015 pursuant to NRAP
8 4(a)(1). This appeal is from a final order, i.e. the District Court’s Order.

II. ROUTING STATEMENT

11 2. The Fritzes submit that pursuant to NRAP 17(b) this matter
12 should be routed to the Nevada Court of Appeals.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

15 3. The fundamental issue on appeal is whether Washoe County's
16 activities and involvement in the development of land upstream of the
17 Fritzes property, which the Fritzes allege is causing flooding on their
18 Property, constitutes a taking of the Fritzes’ Property for public use in
19 violation of the Nevada Constitution and the US Constitution. The
20 specific issues on appeal are whether the District Court erred by granting
21 summary judgment where: (1) the facts presented by the Fritzes were
22 sufficient to sustain an inverse condemnation claim; (2) the District Court
23 misinterpreted the law on inverse condemnation in Nevada and from
24 other jurisdictions; and (3) the District Court found that that the Fritzes
25 did not produce case law that supports a finding that a taking did occur.

IV. STATEMENT OF THE CASE

4. The Fritzes Third Amended Complaint requested an order from the District Court requiring Washoe County to compensate Plaintiffs for the taking and condemnation of their property at 14400 Bihler Rd., Washoe County APN No. 142-241-63 (hereinafter “the Property” or “Subject Property”) (Appx. Vol. 1 at 7).

5. The Fritzes Third Amended Complaint alleged that since approximately 1984, Washoe County substantially participated in the planning and development of and has approved the building plans for housing developments located within Washoe County commonly known as Lancer Estates and Monte Rosa, and that the development Lancer Estates and Monte Rosa by Washoe County and various third parties has caused alteration, diversion, channeling, and acceleration of rain, nuisance, and flood waters onto the Fritzes’ Property by substantially increasing the amount of water and accelerating the flow of that water across the natural drainage commonly known as Whites Creek No. 4, which crosses the Fritzes’ Property (Appx. Vol. 1 at 8-10).

6. The Fritzes alleged that water from Lancer Estates and Monte Rosa drains onto the Fritzes’ Property and is causing substantial and ongoing damage to the Property including but not limited to the cutting of a large ditch on the corner of the Fritzes property, flooding of buildings on the Fritzes property, and sheet flooding over a large area of the Property during storm events (Appx. Vol. 1 at 11).

7. On February 2, 2015, Washoe County filed a Motion for Summary Judgment (hereinafter “Motion”) (Appx. Vol. 1 at 33). On February 13,

1 2015 the Fritzes filed an Opposition to the Motion (Appx. Vol. 1 at 99).
2 On February 24, 2015, Washoe County filed a Reply thereto (Appx. Vol. 3
3 at 508). On March 19, 2015 the Court issued an Order granting Washoe
4 County's Motion (Appx. Vol. 1 at 1).

5 **V. STATEMENT OF THE FACTS**

6
7 8. In the Opposition to Washoe County's Motion (Appx. Vol. 1 at
8 100), John Fritz submitted the following facts to the Court in his Affidavit,
9 which was attached to the Fritzes' Opposition to Washoe County's
10 Motion (Appx. Vol. 1 at 123):

11 (a) That in 2001 John Fritz along with his wife Melissa
12 Fritz, purchased 14400 Bihler Rd.

13 (b) That John Fritz built a home with two adjoining garage
structures at 14400 Bihler Rd.

14 (c) That in 2002, John Fritz was able to easily walk across
15 Whites Creek No. 4, which runs over the south end of
16 14400 Bihler Rd. Since that time, Whites Creek No. 4 has
17 increased significantly in size and depth. There is currently
18 an approximately six foot deep and approximately twenty
19 foot wide cut in Whites Creek No. 4 at the south end of
14400 Bihler Rd.

20 (d) That since 2002, upon any significant rain event the
21 south end of 14400 Bihler Rd. further erodes and/or
flooding occurs on the property.

22 (e) That in December in 2008, John Fritz applied for a
23 grading permit from Washoe County to build a ditch to
control flooding at 14400 Bihler Rd;

24 (f) That year upon year the flooding and erosion at 14400
25 Bihler Rd. gets worse;

26 (g) That John and Melissa Fritz had plans to further
27 develop 14400 Bihler Rd. but has been unable to do so
because of the continual flooding; and

28 (h) On August 9, 2014, Mr. Fritz took the photographs

1 attached to his affidavit marked as Washoe v. Fritz First
2 Supp. 0001-0005, which show flooding at and around 14400
3 Bihler Rd. (Appx. Vol. 1 at 123-129):

4 9. In the Opposition to Washoe County's Motion, the Fritzes' Expert
5 Witness (Appx. Vol. 1 at 101), Mr. Clark Stoner P.E., prepared a report at
6 Appx. Vol. 1 at 131, and executed an Affidavit at Appx. Vol. 1 at 147 in
7 which Mr. Stoner authenticated his report and attested to the following
8 facts:
9

10 (a) In August of 1984, Washoe County adopted Ordinance
11 No. 616, the Flood Hazard Reduction Ordinance, adopting
12 all, or most, of the provisions of the Federal Emergency
13 Management Agency's (FEMA) "Flood Insurance Study for
14 Washoe County, Nevada, Unincorporated Areas," dated
15 February 1, 1984.

16 (b) The southernmost channel of Whites Creek, the
17 channel upland from and crossing the Subject Parcel, was
18 determined to be a "Flood Hazard Area," according to
19 FEMA's 1984 Flood Insurance Rate Map (FIRM).

20 (c) Prior to 1984, there had been no development near the
21 southernmost channel of Whites Creek and the Subject
22 parcel. In the area now occupied by Lancer Estates, aerial
23 photographs show that pre-development runoff from the
24 Lancer Estates area entered the southernmost channel of
25 Whites Creek several hundred feet downhill and east of the
26 Subject Parcel.

27 (d) The limits of the FEMA floodplain boundary for the
28 southernmost channel of Whites Creek would remain
basically unchanged from its original 1984 location through
the 1990s and early 2000s. In 2009, FEMA issued a new
FIRM, which showed that the floodplain along the
southernmost channel of Whites Creek grew wider and the
majority of the floodplain was located further north.

(e) Later phases of Lancer Estates, Units 3 through 10,

1 were approved and constructed between 1991 and 2001.
2 Development plans for Lancer Estates Units 3, 4 and 5
3 indicate that the overall strategy for drainage control within
4 Lancer Estates was to intercept runoff from, and grade over,
5 the long pre-existing drainage rivulets crossing the
6 development, and convey the drainage underground north
7 into the southernmost channel of Whites Creek, upland
8 from the Subject Parcel.

9 (f) Responding to active and future development occurring
10 in the area of lower Whites Creek, Washoe County
11 commissioned a Preliminary Basin Management Study,
12 which was published in August 1994, to identify flood
13 hazards and to “develop interim policies for new
14 development and infrastructure improvements within the
15 watershed.”

16 (g) Among several “problem areas” noted in the
17 Preliminary Basin Management Study as having flooding
18 potential, included were those developed Lancer Estates
19 parcels for which Whites Creek Channel #4 passed through.

20 (h) Sometime between 2007 and July 2010, an asphalt
21 concrete parking lot was constructed at Whites Creek
22 County Park.

23 (i) That the storm drain system of Monte Rosa ties into
24 the storm drain system at Lancer Estates.

25 (j) As the result of the upland developments and
26 questionable stormwater control philosophy, dating back to
27 the mid-1980s, Whites Creek Channel #4 has continued to
28 experience increasing stormwater discharges.

(k) The cause of flooding on the Subject Parcel is not due
to recurring 100-year flood events, but is the result of
alterations of the floodplain upland from the Subject Parcel.
Washoe County has been aware of the flood hazard crossing
the Subject Parcel since 1984, when the County adopted the
Flood Hazard Reduction Ordinance. Instead of reducing the
flood hazard on the Subject Parcel, development of Lancer
Estates included obstructing the floodplain and forcing it
north, which has caused repeated flooding on the Subject

1 Parcel and has made the flood hazard more severe. Absent
2 corrective measures, flooding on the Parcel will continue,
3 and when the 100-year flood event planned for during
4 design of Sterling Ranch finally occurs, damages to the
Subject Parcel will likely be disastrous. (Appx. Vol. 1 at 147)

5
6 10. In the Opposition to Washoe County's Motion, the Fritzes also
7 presented numerous documents detailing Washoe County's involvement
8 in the development of Lancer Estates and Monte Rosa beginning at Appx.
9 Vol 1. at 102 which are detailed in part in the paragraphs below.

10 11. Appx. Vol. 1 at 150 is a 1990 letter from CFA Engineering
11 addressed to the Washoe County Engineering Division that makes clear
12 that at one time the plans for Lancer Estates included a detention pond
13 for floodwaters from Lancer Estates that could have prevented the
14 flooding on the Fritzes' Property, but that in discussions with Washoe
15 County the plans for such detention ponds were disregarded.
16

17 12. Appx. Vol. 1 at 151 is a July 3, 2008 letter from Washoe County's
18 Department of Public Works, Washoe County is a member in and
19 participates in the National Flood Insurance Program, ("NFIP") indicating
20 that by virtue of its membership in the NFIP, Washoe County is required
21 to manage floodplains within Washoe County in ways that meet or exceed
22 standards set by the Federal Emergency Management Agency. This
23 document indicates that Washoe County manages the activities of
24 developers in Washoe County related to floodplain management.
25

26 13. Appx. Vol. 2 at 229 is a Preliminary Whites Creek Basin
27 Management Study ("Cella Bar Study") prepared by Cella Bar Associates,
28 which was commissioned by Washoe County to study the hydrology of

1 the Whites Creek area. At Appx. Vol. 2 250, the Cella Bar Study states,
2 “Lancers Estates - Some of the residential lots backing up adjacent to the
3 south of Channel #4 have a potential for flooding during a 100-year
4 event” and indicates that this section is a “problem area.” This “problem
5 area” includes the Fritzes’ Property. Thus, Washoe County has been
6 aware for some time that the developments at Lancer Estates and Monte
7 Rosa had the potential to cause flooding at the Fritzes’ Property.
8

9 14. Appx. Vol. 3 at 456 is a letter dated June 13, 1996, from the
10 Nevada Department of Transportation to Washoe County, which shows
11 that Washoe County agreed to divert water from Mr. Rose Highway
12 through Lancer Estates into Whites Creek Channel #4. This letter shows
13 that Washoe County had control over activities related to flooding while
14 Lancer Estates was being developed and was directing the actions of the
15 developers to the detriment of the Fritzes’ Property. It also shows that
16 Washoe County directed the developers of Lancer Estates to divert water
17 from Mt. Rose Highway that would have gone around the Fritzes’
18 Property across the Fritzes’ Property.
19

20 15. Appx. Vol. 2 at 318 is the hydrology report from Lancer Estates
21 Units 10, which shows that Washoe County was directing the developers
22 of Lancer Estates to handle the hydrology of the subdivisions in
23 accordance with the decision indicated in the letter from NDOT to
24 Washoe County cited above at Appx. Vol. 3 at 456, and thereby taking
25 water that would have otherwise drained down Mt. Rose Highway around
26 the Fritzes’ Property and diverting it to Whites Creek Channel #4 and
27 across the Fritzes’ Property.
28

1 16. Appx. Vol. 3 at 458 to 489 shows that Washoe County has
2 approved the final maps for Lancer Estates and Monte Rosa. Each of the
3 final maps contains the following language, or language that is substantially
4 similar in the section labeled “Owner’s Certificate:”
5

6 This is to certify the undersigned, Lancer Ltd., a Joint
7 Venture, is the owner of the tract of land represented on this
8 plat, and has consented to the preparation and recordation
9 of this plat and that the same is executed in compliance with
10 and subject to the provisions of NRS Chapter 278 and 116,
11 and that the streets as shown, and all appurtenances thereto,
12 are hereby dedicated and set apart to be used as public
13 thoroughfares forever; hereby dedicates a water distribution
14 system, sanitary sewer facilities and associated appurtenances
15 to Washoe County; and hereby grant to all public utilities
16 and the County of Washoe, permanent easements shown on
17 this plat for the construction and maintenance of drainage
and utility systems, together with the right of access thereto
forever. The owner and assignees agree to the use of
residential water meters. (Appx. Vol. 3 at 462)

18 Each of the final maps in Appx. Vol. 3 at 458 to 489 also contains
19 the following language or language that is substantially similar, in
20 the section labeled “County Commissioners’ Approval:”
21

22 The offer of dedication of streets, water and sanitary sewer
23 facilities are rejected at this time by the Board of County
24 Commissioners with the offer to remain open in accordance
25 with the provisions of NRS Chapter 278.390. Appx. Vol. 3
26 at 464

27 17. Exhibit 21 of the Fritzes Opposition to Washoe County’s Motion
28 reveals that although Washoe County accepted dedication of the streets

1 for Lancer Estates units 1 through 8 and 11 before the Plaintiffs
2 purchased the Property, acceptance for units 9 and 10 of Lancer Estates
3 occurred on October 16, 2001 (Appx. Vol. 3 at 506-507), and thus took
4 place after the purchase of the Property by the Fritzes in August of 2001.
5 Exhibit 20 to the Fritzes Opposition to Washoe County's Motion also
6 shows that the final map for Monte Rosa Unit 1 was recorded on
7 December 13, 2005, (Appx. Vol. 3 at 481) and the final map for Monte
8 Rosa Unit 2 was recorded on November 30, 2007 (See Appx. Vol. 3 at
9 485). Washoe County may accept dedication of the public improvements
10 within Monte Rosa at its option after construction of Monte Rosa has
11 been completed. As indicated in the Affidavit and Report from Clark
12 Stoner P.E. the drainage system for Monte Rosa ties into the drainage
13 system for Lancer Estates (Appx. Vol. 1 at 147) Thus, water from Monte
14 Rosa that would have drained down Mt. Rose Highway around the Fritzes'
15 Property was diverted to cross the Fritzes' Property.

16
17
18 18. As demonstrated in the documents in Appx. Vol. 3 at 491 to 508,
19 subsequent to the development of Lancer Estates, Washoe County has
20 accepted dedication of "the streets" in all of the Lancer Estates
21 developments 1-11. "The streets" as used in the documents accepting
22 dedication is a term of art that includes the storm drainage system, as
23 Washoe County maintains the drainage system within Washoe County's
24 right-of-way and drainage easements were accepted by Washoe County.
25 This fact is made clear by language in the final maps in Appx. Vol. 3 at 458
26 to 489 that state that drainage facilities outside of the dedicated right-of-
27 way granted to Washoe County are the responsibility of homeowners. By
28

1 implication, the drainage facilities by and under the roads within the right-
2 of-way are owned and maintained by Washoe County.

3 19. Washoe County indisputably owns and/or maintains the means by
4 which water is collected in Lancer Estates and is then conveyed
5 downstream across the Plaintiff's Property via Whites Creek Channel #4,
6 and has for some time. Further, pursuant to NRS 278.390, because
7 Washoe County has approved and recorded final maps for Lancer Estates
8 and Monte Rosa, title to the streets and drainage easements in Lancer
9 Estates and Monte Rosa has also passed to Washoe County (Appx. Vol. 3
10 at 458-489).
11

12 **VI. SUMMARY OF THE ARGUMENT**

13 20. The Fritzes will argue below that the District Court erred when it
14 granted summary judgment to Washoe County in this matter because the
15 facts support a finding under existing law that a taking occurred in this
16 case. The record before the District Court indicated that Washoe County
17 was substantially involved in the development of Lancer Estates and
18 Monte Rosa, and that the development of Lancer Estates and Monte Rosa
19 is the cause of the flooding that the Fritzes are experiencing on the
20 Property.
21

22 **VII. ARGUMENT**

23 **a. Standard of Review**

24 21. Pursuant to NRCP 56(c), an order granting summary judgment is
25 proper only when there are no genuine issues of material fact for trial and
26 the moving party is entitled to judgment as a matter of law. When
27 reviewing a motion for summary judgment, the evidence and all
28

1 reasonable inferences drawn from the evidence, must be viewed in a light
2 most favorable to the non-moving party. *Allstate Ins. Co. v. Fackett*, 125
3 Nev. 132, 137 (Nev. 2009) Appellate review of an order granting summary
4 judgment is de novo without deference to the findings of the trial court.
5 *Id.* at 137.

6 **b. Relevant Takings Law**

7
8 22. Pursuant to Article 1, Section 8(6) of the Nevada Constitution, a
9 landowner's property may not be taken for public use without just
10 compensation. Whether a taking has occurred is a question of law that is
11 reviewed de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 341 P.3d 646,
12 649 (Nev. 2015). A taking occurs where real estate is actually invaded by
13 superinduced additions of water so as to effectually destroy or impair its
14 usefulness. *Pumpelly v. Green Bay Company*, 80 U.S. (13 Wall.) 166, 181
15 (1871). A taking also occurs when property is subjected to intermittent,
16 but inevitable flooding which causes substantial injury, *United States v. Cress*,
17 243 U.S. 316, 328 (1917) and *County of Clark v. Powers*, 96 Nev. 497, 502
18 (Nev. 1980). The *Clark v. Powers* Court further found that the economic
19 costs incident to the expulsion of surface waters in the transformation of
20 rural and semirural areas into urban and suburban communities should not
21 be borne solely by adjoining landowners. Landowners, developers, and
22 local officials must take into account the full costs of development to the
23 community prior to the implementation of their plans. *Id.* at 503.

24
25
26 23. A governmental entity's substantial involvement in the
27 development of private lands that unreasonably injures the property of
28 others is actionable in inverse condemnation. *Id.* at 505.

1 24. Title to streets and easements within subdivisions transfers to a
2 local government when a final map is recorded. NRS 278.390 states in
3 pertinent part:

4 Title to property *dedicated or accepted* for streets and
5 easements *passes when the final map is recorded*. If at the
6 time the final map is approved any streets are rejected, the
7 offer of dedication shall be deemed to remain open and the
8 governing body or planning commission may by resolution
9 at any later date, and without further action by the
10 subdivider, rescind its action and accept and open the streets
for public use. [*Emphasis added*].

11 **c. The facts presented by the Fritzes were sufficient to sustain an**
12 **inverse condemnation claim**

13 25. The District Court's Order concluded that the facts in this case are
14 distinguishable from the facts in *County of Clark v. Powers*, 96 Nev. 497, 502
15 (Nev. 1980) because in *Clark County v. Powers* the county actively
16 participated in the construction and leveling of streets and intersections
17 and in the Fritzes case Washoe County did not design or construct
18 anything resulting in water being diverted onto the Plaintiff's Property
19 (Appx. Vol. 1 at 4 line 12).
20

21 26. As outlined in the Statement of Facts provided above, Washoe
22 County's involvement in the development of Lancer Estates and Monte
23 Rosa was substantial: (1) Appx. Vol. 1 at 150 shows that Washoe County
24 permitted Lancer Estates to be developed without detention ponds that
25 could have prevented flooding on the Fritzes' Property; (2) Appx. Vol. 1
26 at 151 shoes that Washoe County controls the activities of developers to
27 control flooding; (3) The Cella Bar Study at Appx. Vol. 2 at 229 shows
28

1 that Washoe County was aware of the problems in Whites Creek No. 4
2 but chose to allow development to continue at Lancer Estates and Monte
3 Rosa unabated; (4) Appx. Vol. 3 at 456 and Appx. Vol. 2 at 318 show that
4 Washoe County directed the developers of Lancer Estates to divert water
5 from Mt. Rose highway across the Fritzes' Property; and Appx. Vol. 3 at
6 491 to 508 shows that Washoe County now owns the drainage facilities in
7 Lancer Estates that convey water from the development to the Fritzes'
8 Property. These documents show that Washoe County's involvement in
9 the development of the Lancer Estates and Monte Rosa has been
10 substantial.
11

12 **d. The District Court misinterpreted the law on inverse**
13 **condemnation in Nevada and from other jurisdictions**

14 **1) *Clark County v. Powers***

15
16 27. The District Court's Order found that there is no case law in
17 Nevada addressing whether the act of approving a subdivision is legally
18 sufficient to form the basis for an inverse condemnation claim. (Appx.
19 Vol. 1 at 3 line 2). To be clear, the Fritzes allegations in the Third
20 Amended Complaint are not limited to the sole allegation that by
21 "approving a subdivision" Washoe County should be liable for flooding
22 on the Fritzes' Property (Appx. Vol. 1 at 7). As the Statement of Facts
23 describe, the record shows that Washoe County's involvement in the
24 development of Lancer Estates and Monte Rosa is not limited to approval
25 of the subdivision maps.
26

27 28. Contrary to the conclusion in the District Court's Order, the
28 finding in *County of Clark v. Powers*, 96 Nev. 497, 502 (Nev. 1980) apply

1 here. The facts described in *Clark County v. Powers* are similar to the facts
2 presented in this case as shown above, i.e. where the development of land
3 resulted in the alteration, diversion, channeling, and acceleration of rain
4 and floodwaters onto the plaintiff's property. The *Clark County v. Powers*
5 Court found that Clark County was liable in inverse condemnation because
6 Clark County participated actively in the development of the land, both by
7 its own planning, design, engineering, and construction activities and by its
8 adoption of the similar activities of various private developers as part of
9 the Clark County's master plan for the drainage and flood control of the
10 area. *Id.* at 500. The evidence in the Statement of Facts above
11 demonstrates the same, i.e. Washoe County participated actively by
12 directing how the floodwaters from Lancer Estates and Monte Rosa
13 would flow into Whites Creek Channel #4 and across the Fritzes'
14 Property.
15
16

17 2) *Ullery v. County of Contra Costa*

18 29. The District Court's Order also found that *Ullery v. County of Contra*
19 *Costa*, 202 Cal. App. 3d 562, 570 (Cal. App. 1st Dist. 1988) supports the
20 proposition that inverse condemnation liability will not lie for damage to
21 private property allegedly caused by private development approved or
22 authorized by the public entity, where the sole affirmative action was the
23 issuance of permits and approval of the subdivision map (Appx. Vol. 1 at
24 3). As the record detailed above shows, Washoe County did much more
25 than just issue permits and approve maps in the development of Lancer
26 Estates and Monte Rosa. Specifically, this argument is inapplicable to the
27 case before the Court as: (1) Washoe County's involvement in the
28

1 development of Lancer Estates and Monte Rosa was substantial as shown
2 by the facts above, i.e. it did more and has done more than just approve
3 the final subdivision maps, (2) Washoe County has accepted dedication of
4 the facilities in Lancer Estates as shown in Appx. Vol. 3 at 491 to 508, and
5 (3) because there is a direct causal connection between the building of
6 Lancer Estates and Monte Rosa and the damage suffered by the Plaintiffs,
7 as described in the Affidavit of Fritzes expert Clark Stoner.
8

9 30. Washoe County permitted and required the developers to use the
10 Fritzes' Property for the very public use, as a floodway, for the stormwater
11 from Lancer Estates and Monte Rosa. As the *Ullery v. County of Contra*
12 *Costa Court* further found:

13 The public use or improvement need not be the sole cause
14 of the property damage. Liability in inverse condemnation
15 may be shown where the public improvement was a
16 substantial concurring cause of the damage. *Ullery v. County of*
17 *Contra Costa*, 202 Cal. App. 3d 562, 572 (Cal. App. 1st Dist.
18 1988).

19 31. The streets and drainage systems in Lancer Estates are public
20 improvements. The Court in *Yox v. City of Whittier*, 182 Cal. App. 3d 347
21 (Cal. App. 2d Dist. 1986) found that utilities and drainage systems, when
22 accepted and approved by a municipality become public improvements
23 and part of its system of public works. *Id.* at 354. The *Yox* Court further
24 stated the following in analyzing *Sheffet v. County of Los Angeles*, 3
25 Cal.App.3d 720 (1970):

26 In *Sheffet*, the court held that the county was not shielded
27 from liability for damages from overflow of surface water
28 from public streets onto plaintiff's property where the public

1 entity had approved the plans for the adjacent subdivision,
2 including its drainage system, and had accepted the streets of
3 the subdivision. *Sheffert stands for "[the] well-established*
4 *rule [imposing] inverse condemnation liability on a*
5 *public entity which has approved and accepted, for a*
6 *public purpose, work performed by a subdivider or*
7 *private owner of property."* *Yox v. City of Whittier*, 182 Cal.
App. 3d 347, 353 (Cal. App. 2d Dist. 1986). [*Emphasis*
8 *added*]

9 32. Appx. Vol. 3 at 458 to 489 and Appx. Vol. 3 at 491 to 508 clearly
10 show that Washoe County approved and accepted, for public use, the
11 public improvements in Lancer Estates.

12 3) *Elllison v. City of San Buenaventura*

13 33. The District Court's Order also found that *Elllison v. City of San*
14 *Buenaventura*, 60 Cal. App. 3d 453 (Cal. App. 2d Dist. 1976) found that
15 where a city plays no part in private development, that inverse
16 condemnation is not a viable theory of recovery (Appx. Vol. 1 at 3 line
17 24). *Elllison v. City of San Buenaventura* in inapplicable to the case at hand
18 because the premise that Washoe County played no part in the
19 development of Lancer Estates and Monte Rosa is inconsistent with the
20 record before the District Court. The *Elllison v. City of San Buenaventura*
21 contains the following analysis, which supports the theory that Washoe
22 County is liable to the Fritzes in inverse condemnation by concluding that
23 such liability is created by accepting dedication of streets for public use, as
24 Washoe County has done for Lancer Estates (Appx. Vol. 3 at 491 to 508):
25

26 Plaintiff's only authority for the proposition that a public
27 entity may be held liable for injury caused by a private
28 development for which it has issued a permit is *Sheffert v.*

1 *County of Los Angeles*, 3 Cal.App.3d 720 [84 Cal.Rptr. 11]. In
2 *Sheffet*, however, the public entity approved subdivision plans
3 by a developer which included two streets to be dedicated to
4 public use. The public entity did not construct the streets,
5 but it later accepted them for public use, and as a
6 consequence it thereafter became liable as principal for
7 damages caused by improper construction and installation of
8 insufficient drainage on the two streets by its agent in fact,
9 the developer. *Ellison v. City of San Buenaventura*, 60 Cal. App.
10 3d 453, 459 (Cal. App. 2d Dist. 1976)

11 **e. The District Court erred by finding that the Fritzes did not**
12 **produce case law that supports a finding that a taking did occur**

13 34. The District Court's Order concluded that the Fritzes did not
14 produce any case law or statutes that support the position that Washoe
15 County's approval of subdivision maps and acceptance of dedications
16 constitute substantial involvement in the development of Lancer Estates
17 and Monte Rosa (Appx. Vol. 1 at 4). In the Opposition to Washoe
18 County's Motion, the Fritzes cited the facts listed in the Statement of
19 Facts above and cited several cases that support the position that Washoe
20 County's involvement in the development of Lancer Estates and Monte
21 Rosa was sufficiently substantial to impose liability based on a theory of
22 inverse condemnation, including the following:

23 a) *County of Clark v. Powers*, 96 Nev. 497, 503 (Nev. 1980), which held
24 that that Clark County was liable in inverse condemnation because
25 Clark County participated actively in the development of the land,
26 both by its own planning, design, engineering, and construction
27 activities and by its adoption of the similar activities of various private
28

1 developers as part of the Clark County's master plan for the drainage
2 and flood control of the area. (Appx. At Vol. 1 at 117)

3 b) *Ullery v. County of Contra Costa*, 202 Cal. App. 3d 562, 570 (Cal. App.
4 1st Dist. 1988), which held that Liability in inverse condemnation may
5 be shown where the public improvement was a substantial concurring
6 cause of the damage. *Id.* at 572. (Appx. Vol. 1 at 116)

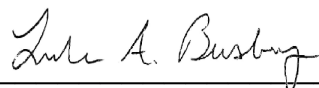
7 c) *Gutierrez v. County of San Bernardino*, 198 Cal. App. 4th 831 (Cal. App.
8 4th Dist. 2011), which held that an action for inverse condemnation
9 lies when there is actual physical injury to real property proximately
10 caused by a public improvement as deliberately designed and
11 constructed whether said physical injury is foreseeable or not. *Id.* at
12 837 (Appx. Vol. 1 at 116).

13 d) *Yox v. City of Whittier*, 182 Cal. App. 3d 347 (Cal. App. 2d Dist.
14 1986), which held that (quoting *Sheffet v. County of Los Angeles*, 3
15 Cal.App.3d 720 (1970)) it is a well-established rule that inverse
16 condemnation liability will be imposed on a public entity which has
17 approved and accepted, for a public purpose, work performed by a
18 subdivider or private owner of property (Appx. Vol. 1 at 113).

21 **VIII. CONCLUSION**

22 WHEREFORE, the Fritzes pray that the Court reverse the
23 District Court's Order granting summary judgment in this matter.

24 Respectfully submitted this Monday, June 29, 2015.

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26 By: 

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I have on this day served the foregoing
3 document upon the following parties by U.S. Mail and/or Electronic
4 Service and/or hand delivery to:
5

6 Washoe County DA's Office
7 Attn: Michael Large, Esq.
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9 P.O. Box 11130
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11 Respectfully submitted this Monday, June 29, 2015.
12

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