IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN AND MELISSA FRITZ,

Appellants,

vs.

WASHOE COUNTY,

Respondent.
_____/

Case No. 67660

ON APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

ANSWERING BRIEF OF RESPONDENT WASHOE COUNTY

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1. Statement of the Issues

In resolving this appeal, the Court need address only three straightforward issues–all else being peripheral.

1. **Substantial Involvement**. Under Nevada law, a government entity's involvement in private development that injures another's property must be substantial to constitute inverse condemnation. Washoe County's only involvement with private development that allegedly caused storm water to flood the Fritzes' property was approving subdivision maps and accepting dedication of privately constructed roadways and storm drainage systems. Was the district court correct that Washoe County's involvement was not inverse condemnation?

2. **Substantial Injury**. Nevada law requires plaintiffs in an inverse condemnation action involving surface-water drainage to show substantial injury to their land. Mr. Fritz testified that, after his land allegedly flooded, he was able to clean up any damage, no structures were permanently injured, some personal property was lost, and a creek's flow increased. Was the district court correct that no injury rising to the level of inverse condemnation occurred?

3. **Standing**. In Nevada, an inverse condemnation claim belongs to the person who owned the property at the time it was inversely condemned. The Fritzes claim Washoe County inversely condemned their property by approving maps and accepting roadway and drainage-system dedications for several nearby subdivisions. The vast majority of those events occurred years before the Fritzes purchased their property. Was the district court correct that the Fritzes lacked standing to bring an inverse condemnation claim?

The district court understandably granted summary judgment on each issue. But, upholding the district court's conclusion on any one of those issues is sufficient to affirm its summary judgment. Although this Court is to review summary judgments and questions of whether inverse condemnation occurred *de novo*, the facts are as undisputed now as they were below and we believe that the Court will find the record clear and the disposition straightforward.

2. Statement of the Case

The Fritzes purchased property at 14400 Bihler Road, Washoe County, in 2001. 1 JA at 50. Shortly after their purchase, the Fritzes obtained permits from Washoe County to build a house with two adjoining garages on the property. *Id.* at 123. Over a decade later, in 2013, Plaintiffs initiated this action, alleging causes of action for trespass, nuisance, and inverse condemnation against Washoe County. Thereafter, the Fritzes filed three amended complaints and added multiple parties. The bulk of the claims and parties were dismissed by the district court or voluntarily dismissed by the Fritzes.

Washoe County filed a motion, under NRCP 12(b)(5), to dismiss the Fritzes' Second Amended Complaint for failing to state a claim on which relief

could be granted. The district court granted the motion in part and denied it in part. The district court granted Washoe County's Motion as to the nuisance and trespass claims but denied Washoe County's Motion as to the Fritzes' claim for inverse condemnation.

The Fritzes subsequently filed a motion for leave to file a Third Amended Complaint to respond to issues raised by Washoe County's motion to dismiss. The district court granted the Fritzes' motion and they filed a third amended complaint asserting only a claim for inverse condemnation against Washoe County. *Id.* at 7-16.

After discovery closed, Washoe County moved the district court for summary judgment on the Fritzes' third amended complaint. *Id.* at 33-48. The district court ultimately granted summary judgment to Washoe County, deeming meritorious each independent ground Washoe County provided for granting summary judgment. *Id.* at 1-6. This appeal followed.

3. Statement of Facts

Between 1984 and 1999, Washoe County approved maps for each phase of a privately developed 11-phase subdivision called Lancer Estates. *Id.* at 51-94. For each phase, Washoe County subsequently accepted dedication of privately constructed roadways and storm water drainage systems. 3 JA at 491-508. In 2001, years after Washoe County approved all of the maps and accepted all but two of the dedications, the Fritzes purchased property downstream from Lancer Estates. 1 JA at 50. A few months later, Washoe County accepted the two remaining dedications. 3 JA at 506-07. Meanwhile,

The Fritzes built a home and garages on their property and leased it to various tenants. 1 JA at 123.

A few years after the Fritzes purchased their property, Washoe County approved maps for two phases of Monte Rosa Estates, a privately developed subdivision near Lancer Estates. *Id.* at 95-98. Washoe County rejected the dedication of any Monte Rosa Estate roadways or drainage systems. *Id.*

According to the Fritzes, the storm water runoff from Lancer and Monte Rosa Estates has increased the flow of Whites Creek 4, a creek that runs across a back corner of their property. Appellants' Opening Brief (AOB) at 6. The Fritzes claim that the increased size and depth of Whites Creek 4 floods their property during some large rainstorms. *Id.* at 6-7. Mr. Fritz has been able to repair any damage the flooding caused to the land and, according to him, the flooding has not permanently damaged any structures on his property. 3 JA at 531-32. He even continues leasing the property to a tenant. *Id.* at 526-30. Also, Mr. Fritz claims he can no longer walk across Whites Creek 4 because of its increased flow. AOB at 7.

Nevertheless, the Fritzes filed this action against Washoe County for inverse condemnation. The Fritzes alleged that the County's approval of the subdivision maps and accepting the roadway and drainage system dedications–years before the Fritzes purchased their land, in most cases–constitutes a permanent physical invasion of their property. 1 JA at 7-16; AOB at 12-14. Washoe County moved for summary judgment on numerous grounds. 1 JA at 33-48. Among them were the following: that approving

subdivision maps and accepting roadway and drainage system dedications is not the substantial involvement in private development necessary for inverse condemnation; that the Fritzes did not suffer any substantial injury necessary for inverse condemnation; that the events the Fritzes relied on for their inverse condemnation claim occurred, in almost every instance, years before the Fritzes purchased the property; and that the Fritzes allegations conflate damages recoverable for nuisance with those recoverable under inverse condemnation. *Id.* The district court ultimately granted the County summary judgment, concluding as follows:

> By approving the subdivision maps and dedications there was no substantial involvement in the development of Lancer and Monte Rosa through which inverse condemnation liability may apply. The Court has also considered Defendant Washoe County's remaining arguments and finds them to be meritorious.

Id. at 5.

This appeal followed.

4. Summary of Argument

Nevada law is clear: an inverse condemnation claim based on government involvement in private development requires that the government entity's involvement and the landowner's consequent injury be substantial. In Nevada, substantial involvement in private development is actively participating in planning, designing, engineering, and constructing the development–*i.e.*, taking affirmative action directed toward the purportedly injured landowner. Washoe County had no such involvement in the private

developments that the Fritzes claim injured their property. The County only approved subdivision maps and accepted dedications of certain privately built roadways and water-drainage systems. It was not significantly involved in the private development and it did not take any affirmative action directed toward the Fritzes' property.

Nor can the Fritzes show that they were substantially injured. Substantial injury is the permanent loss of property or, at least, loss of its use. A brief interference with property or damage to property is not inverse condemnation—although it may be compensable through other claims, such as nuisance, that are not at issue in this case. Mr. Fritiz's own deposition testimony that he was able to clean up any property damage and that he continues to lease his property to tenants belies that a permanent loss of property occurred or that it effectively was taken from him.

Besides, the vast majority of events and documents that the Fritzes claim inversely condemned their property, occurred years before the Fritzes purchased the land. Because an inverse condemnation claim belongs to the property's owner at the time the property was inversely condemned, the Fritzes lack standing to bring their inverse condemnation claim. They bought the property subject to all of things that, over a decade later, they claim inversely condemned it. Thus, the lack of substantial involvement by the County in developing the private property the Fritzes claim injured their land, the lack of substantial injury to the Fritzes land, and the Fritzes lack of standing to pursue an inverse condemnation claim are each an independent

basis on which this Court should affirm the district court's summary judgment.

5. Argument

5.1 Standard of Review

This Court reviews a district court summary judgment *de novo*. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Likewise, the question whether a government entity has inversely condemned private property is a legal question that this Court reviews *de novo*. *McCarran International Airport v. Sisolak*, 122 Nev. 645, 661, 137 P.3d 1110, 1121 (2006).

5.2 Washoe County approving maps and accepting roadway and drainage-system dedications for privately constructed subdivisions is not the significant level of involvement with private development that Nevada law requires for inverse condemnation.

5.2.1 A government entity's involvement in private development must be significant for it to be inverse condemnation.

The Constitution of the State of Nevada provides that "[p]rivate property shall not be taken for public use without just compensation having first been given." Nev. Const. art. 1, s. 8; *see Tacchino v. State Dept. of Highways*, 89 Nev. 150, 508 P.2d 1212 (1973). When a government entity takes private property for public benefit without paying for it, the property owner institutes an inverse condemnation action to recover the property's value. *State, Dept. of Transp. V. Cowan*, 120 Nev. 851, 854, 103 P.3d 1, 3 (2004) ("Inverse condemnation is an 'action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been

attempted by the taking agency.'" (quoting *Thornburg v. Port of Portland*, 233 Or. 178, 376 P.2d 100, 101 n.1 (Or. 1962))). "A taking can arise when the government regulates or physically appropriates an individual's private property." *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 647, 173 P.3d 734, 740 (2007).

The Fritzes claim that Washoe County took their property without paying for it through involvement in developing Lancer and Monte Rosa Estates. AOB at 14-16. Those nearby developments, the Fritzes argue, caused storm waters to flood their property and destroy or impair the property's usefulness. But, for a government entity's involvement in private development to constitute inverse condemnation, its involvement must be substantial. *Clark County v. Powers*, 96 Nev. 497, 505, 611 P.2d 1072, 1077 (1980) (noting that "a government entity's substantial involvement in the development of private lands which unreasonably injures the property of others is actionable"). The Fritzes have failed to show that Washoe County was substantially involved with the private developments they claim flooded their property.

5.2.3 The Fritzes' evidence does not show that Washoe County was substantially involved with developing Lancer and Monte Rosa Estates.

Simply, the allegations and evidence do not connect Washoe County to the Fritzes' property. The evidence shows only that the County performed its functions of approving the subdivision maps for Lancer and Monte Rosa Estates and accepting some roadway and storm-water drainage system dedications. There is certainly no evidence that either the County or any of its

officials took any affirmative action against the Fritzes land. There are no allegations or evidence that the County is somehow the owner of an interest in property. The Fritzes have neither alleged nor have they presented any evidence of any direct action taken by Washoe County, other than subdivision-map approval and dedication acceptance, which would establish a causal connection to the damage to the Fritzes property.

The Fritzes attempt to connect Washoe County to the alleged flooding on their property through a number of events and documents, but none of them show that Washoe County caused any flooding or otherwise directed any action toward the Fritzes' property. The Fritzes refer to the following:

- Washoe County adopting a Flood Hazard Reduction Ordinance in 1984
- FEMA's 1984 Flood Insurance Rate Map designates the southernmost Whites Creek 4 channel a flood hazard area
- FEMA's 2009 Flood Insurance Rate Map shows that the Whites Creek 4 channel grew wider
- Washoe County commissioned a Preliminary Basin Management study, published in 1994, which identified some Lancer Estates subdivisions that Whites Creek 4 passes through and the Fritzes' future property as having flooding potential during a flood event that has a one percent chance of occurring in any year
- A 1990 letter from CFA Engineering shows detention pond was considered for but not implemented in Lancer Estates
- A July 3, 2008 letter shows Washoe County is a member of the National Flood Insurance Program
- A June 13, 1996 letter in which the Nevada Department of Transportation requests Washoe County's help with a drainage problem on Mount Rose Highway

- A 1999 Hydrology Report prepared by Odyssey Engineering Incorporated, which analyzes storm drain facilities in a Lancer Estates subdivision

AOB at 8-11.

None of those events or documents shows Washoe County directing any action toward the Fritzes' property. Nor do they show that Washoe County in any way flooded the Fritzes' property. Indeed, except for FEMA's 2009 Flood Insurance Rate Map and the 2008 letter showing Washoe County is a member of the National Flood Insurance Program–neither of which affects the Fritzes' property–all of those documents and events occurred years before the Fritzes bought the land. *Id.* That is, the Fritzes bought their land subject to any impact of each of those items on their land. As will be discussed, this precludes the Fritzes' inverse condemnation claim. In sum, the Fritzes have neither alleged nor presented any evidence that Washoe County substantially participated in planning, approving, constructing, or operating a public project or improvement that proximately caused injury to their property.

The Fritzes try to analogize this case to the Court's decision in *Clark County v. Powers*, 96 Nev. 497, 611 P.2d. 1072 (1980). But Washoe County's conduct and lack of involvement in developing Lancer and Monte Rosa Estates contrasts with Clark County's extensive involvement described in *Powers*.

In *Powers*, Clark County filled, leveled, graded, compacted and paved land at an intersection. 96 Nev. at 500-01, 611 P.2d at 1074. Clark County also elevated a street and other surrounding land, constructed drainage facilities, and specifically designed the road to divert and channel waters onto the properties in question. *Id.*

Additionally, Clark County entered onto one of the properties without authorization and constructed a concrete and rock berm. *Id.*

Clark County's significant involvement with the project in *Powers* is distinct from the County's administrative involvement with Lancer and Monte Rosa Estates. Washoe County did not design, engineer, or construct anything that resulted in water being diverted onto the Fritzes' property. Likewise, Washoe County did not enter onto their property and perform any construction. The County did not construct anything at all. The only actions that Washoe County is accused of performing that affect the Fritzes' land are tangential. It approved the subdivision maps of the Lancer and Monte Rosa Estates subdivisions, requiring that those subdivisions comply with statute, local building codes, and Nevada's master planning system. *See generally* NRS 278.360, 278.372 (setting forth requirement for final subdivision maps). Further, the County accepted dedications of the privately constructed roadways and drainage systems for most subdivision phases. *See* NRS 278.390 (providing that a government entity can accept or reject the dedication of roadways and drainage systems when the final subdivision map is recorded). These activities were not directed at the Fritzes property and did not result in its "taking."

Based on the Fritzes' theory of liability, every local or state government that requires compliance with state statute and building code is intimately and substantially involved in all developments within its boundaries. This interpretation would create seemingly endless liability for local governments for approval of building projects and, consequently, would thwart approval of

development and increase costs of development exponentially. As a policy matter, this Court would be adopting a dangerous precedent were it to allow such a theory of liability.

5.2.4 Nevada law that only substantial government involvement in private development may give rise to inverse condemnation is consistent with the law of other jurisdictions.

Other jurisdictions addressing this issue agree: government-entity involvement in private development must be substantial to be the basis of an inverse condemnation claim. Cases that have addressed this issue generally prohibit imposing liability on municipalities for approving a subdivision map and accepting dedications of roadways and drainage systems.

In *Ullery v. Contra Costa County*, Contra Costa County was sued by a downstream property owner in inverse condemnation for damage to private property due to water drainage on the allegation that the county's sole affirmative action was issuance of permits and approval of subdivision maps. 248 Cal. Rptr. 727, 728-29 (Ct. App. 1988). The plaintiff in *Ullery* sought damages for landslides allegedly caused by erosion from within an intermittent stream which provided storm drainage for its source, a 40-acre natural watershed. *Id.* The plaintiffs alleged that the county's approval of private subdivisions was the cause of damage to private property due to drainage of storm water from the subdivisions into a natural water course. *Id.* at 731-32. Under these circumstances, the court in *Ullery* decided as follows:

> [I]nverse condemnation liability will not lie for damage to private property allegedly caused by private development approved or

> authorized by the public entity, where the [public entity's] sole affirmative action was the issuance of permits and approval of the subdivision map.

Id. at 731. (Internal quotations omitted.)

Nevertheless, the Fritzes argue that *Ullery*, and the California Court of Appeal decisions in *Yox v. City of Whittier*, 227 Cal. Rptr. 311, 315 (Ct. App. 1986), *Ellison v. City of San Buenaventura*, 131 Cal. Rptr. 433, 436-37 (Ct. App. 1976), and *Sheffet v. County of Los Angeles*, 84 Cal. Rptr. 11, 20 (Ct. App. 1970), conclude that a government entity accepting dedication, and thereby ownership, of privately constructed roadways and drainage systems is a sufficient basis for inverse condemnation. But the Fritzes' reliance on those cases is misplaced. The Fritzes ignore the more recent California Court of Appeal decision in *Gutierrez v. County of San Bernardino*, 130 Cal. Rptr. 3d 482 (Ct. App. 2011).

In *Gutierrez* the California Court of Appeal clarified that government ownership alone is an insufficient basis for an inverse condemnation claim. In *Gutierrez* an action in inverse condemnation was brought against the County of San Bernardino. The alleged takings occurred during rainstorms in December 2003 and October 2004. *Gutierrez v. County of San Bernardino*, 130 Cal. Rptr. 3d 482, 485 (Ct. App. 2011). The plaintiffs alleged that on both occasions, their properties were inundated with water, dirt, and debris flowing from a mountainous area north of their properties. *Id.* The *Gutierrez* court stated that, "to state a cause of action for inverse condemnation, the plaintiff must allege the defendant substantially participated in the planning, approval, construction, or operation of a public

project or improvement which proximately caused injury to plaintiffs' property." *Id.* at 489. The *Gutierrez* court determined that the plaintiffs' inverse condemnation action was based on the sole allegation that the county owned the real property in question. *Id.* The court rejected inverse condemnation liability on the sole fact of ownership. *Id. Gutierrez* is consistent with this Court's rule in *Powers* requiring substantial involvement in private development for an inverse condemnation claim. *Ullery*, *Yox*, *Sheffet*, and *Ellison*–to the extent they conclude that ownership through dedication acceptances is sufficient involvement–are not.

Likewise, the Michigan Court of Appeals concluded that a municipality's involvement in private development must be significant for the involvement to be the basis of an inverse condemnation claim. In Michigan, a landowner filed suit against several defendants including the City of Bloomfield Hills. *Marilyn Froling Revokable Living Trust v. Bloomfield Hills Country Club*, 769 N.W.2d 234 (Mich. Ct. App. 2009). Against the city, the plaintiffs alleged a claim for inverse condemnation asserting that the city had taken actions in the form of approval of construction plans, which had the effect of increasing the flow of water onto the plaintiffs' property. *Id.* at 241.

At the trial court, the city's motion was granted as to the inverse condemnation claim based on the city's approval of the Kiriluks' (a co-defendant) construction plans stating that, "the Froling Trust's (plaintiff) claim must fail because it has not alleged any affirmative action by the city directly aimed at the Frolings' property." *Id.* at 241. In other words, the act of approving the construction plans and later issuing an occupancy permit was insufficient to state

an action in inverse condemnation. The Court of Appeals affirmed the dismissal stating that plaintiff's claim based on the approval of construction plans, was insufficient to establish that the city had taken the plaintiff's property; it failed to establish a causal connection between the government's action and the alleged damages. *Id.* at 253. Similar to the Court's conclusion in *Powers* and the California Court of Appeal's decision in *Gutierrez*, the *Bloomfield Hills* Court noted that for an inverse condemnation claim based on government-entity involvement in private development, the involvement must be substantial: "the plaintiff . . . must establish that the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property." *Id.* at 252. Here, the Fritzes point to no such action, and they cannot.

5.3 Because Nevada law requires substantial, permanent injury to private property for an inverse condemnation claim, the minor and temporary flood damage to the Fritzes' property, which Mr. Fritz was able to clean up on his own, does not constitute inverse condemnation but, at the most, a nuisance.

"Nevada law requires a plaintiff in a takings action involving the drainage of surface waters to show both a physical invasion of flood waters and resulting substantial injury." *Buzz Stew, LLC v. City of N. Las Vegas*, 131 Nev. ___, 341 P.3d 646, 650 (2015); *see also Powers*, 497 Nev. at 501 n.3, 504, 611 P.2d at 1075 n.3, 1076 (1980) ("It has long been established that a taking occurs where real estate is actually invaded by superinduced additions of water . . . so as to effectually destroy or impair its usefulness, . . . and the result is no different when the property is subjected to intermittent, but inevitable flooding which cause substantial injury." (internal quotations and citations omitted)); *cf. Bloomfield Hills*, 769 N.W.2d at 294

("A taking for purposes of inverse condemnation means that governmental action has permanently deprived the property owner of any possession or use of the property"). The Fritzes have shown neither. They have evidence only of a relatively minor damage to their property. Damage to property does not constitute a taking, however. *See Sloat v. Turner*, 93 Nev. 263, 268, 563 P.2d 86, 89 (1977)("The Constitution of the State of Nevada provides for compensation based solely on a taking by the state of private property, not for damage thereto.")

In *Buzz Stew, LLC v. City of N. Las Vegas*, the Nevada Supreme Court rejected an argument similar to the Fritzes' contention. 341 P.3d 646. The plaintiffs in *Buzz Stew* asserted a takings claim based upon the "eventual construction of a drainage system on the property or by [a] prior water invasion." *Id.* at 648. In regard to the physical invasion and substantial injury to the plaintiffs' property, the Nevada Supreme Court recognized:

> Although Buzz Stew presented evidence that during a 100-year flood event water may pool on one corner of the property, the evidence did not demonstrate that any pooling had occurred while Buzz Stew owned the property or that Buzz Stew suffered any substantial injury from any water diversion.

Id.

The *Powers* case further illustrates the "substantial injury" component of the takings analysis. In *Powers*, the district court found that Clark County "had taken the Powers' parcel in its entirety; the property no longer had a practical use other than as a flood channel." *Powers*, 497 Nev. at 501, 611 P.2d at 1075. The district court also found that the ".247 acres of [another plaintiff's] parcel, used by the County to

construct a concrete berm, had been taken, and awarded just compensation." *Id.* at 502, 611 P.2d at 1075. In this case, the Fritzes have not shown a physical invasion of flood waters or substantial injury.

During his deposition, Mr. Fritz testified that he was able to clean up whatever damage any flooding caused to his property. 3 JA at 531-32. There was no injury to walls or the floor of his garage which he claims was flooded. *Id.* The only injury was an alleged $3,000 to $4,000 of personal property that was ruined due to the flooding in 2005. *Id.*

The only other injury that the Fritzes' assert is that in 2002, "John Fritz was able to easily walk across Whites Creek No. 4' but since that time it "has increased significantly in size and depth." AOB at 7. The alleged erosion of Whites Creek No. 4 has not substantially injured the Fritzes' land. The property still has practical use, as it continues to be rented and occupied. The Fritzes have rented out their property from 2002 through the present. Indeed, Mr. Fritz testified that he and his wife have received monthly rental rates between $800 and $1,300 for the property. 3 JA at 526-30. Mr. Fritz's own testimony belies any claim that Washoe County permanently deprived the Fritzes of their property.

The Fritzes' attempt to recover for minor and temporary injury through inverse condemnation reveals that, at its heart, this lawsuit is an attempt to bootstrap a nuisance claim into an inverse condemnation action. In so doing, the Fritzes mischaracterize Nevada takings jurisprudence. The Fritzes cannot succeed on any theory of tort liability for any injury or perceived injury that has occurred on their property.

A nuisance is "[a]nything which is injurious to health, or indecent and offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." NRS 40.140(1)(a). Plaintiffs entire claim is based upon alleged flooding that has occurred or may occur on their property due to the actions of Washoe County. No evidence exists that a taking has occurred or that any taking was for the benefit of the public.

In this regard, the *Powers* case is helpful once again. The *Powers* decision was based upon theories of nuisance, trespass, and inverse condemnation. "[T]he trial court, employing the reasonable use rule as applied to drainage of surface waters, concluded that [Clark County] had unreasonably injured respondents' lands; the court made an appropriate award of damages based on nuisance and trespass claims." *Powers* 96 Nev. at 501, 611 P.2d at 1075. Of critical importance to the current case, the plaintiffs in *Powers* were compensated for injury to their property based upon the tort theories of nuisance and trespass. *Id.* Both of those causes of action were dismissed in this case. The inverse condemnation damages were only available for the parcel potions that were deemed to no longer have any practical use. *Id.* The Fritzes have not suffered any permanent or intermittent physical invasion of water that injured their property so substantially it constituted a taking of it.

5.4 Under Nevada law that an inverse condemnation claim accrues when the underlying government action occurs and belongs to the property owner at that time, the Fritzes lack standing to assert an inverse condemnation claim because they bought their property years after most of the events they claim inversely condemned their land.

5.4.1 An inverse condemnation claim belongs to the person who owned the property when it was inversely condemned.

The Fritzes lack standing to bring a claim for inverse condemnation against Washoe County for any action that occurred before 2001. From the outset of this dispute, the Fritzes have made nebulous assertions that Washoe County has acted in some manner that has caused flooding to occur on their property and that these actions constitute a taking by inverse condemnation.

Under well settled Nevada law, a takings belongs to the person who owned the property at the time the taking occurred. *See Argier v. Nevada Power Co.*, 114 Nev. 137, 139, 952 P.2d 1390, 1391 (1998). Property owners lack standing to assert a claim for a taking by inverse condemnation for actions that occurred before their ownership.

In *Argier*, the Nevada Supreme Court held that a claim for just compensation for the taking of property does not run with the land, but remains a personal claim of the person who was the owner at the time of the taking. *Id.* The Nevada Supreme Court stated that:

> If a parcel of land is sold after a portion of it has been taken or after it has been injuriously affected by the construction of some authorized public work, the right to compensation, constitutional or statutory, does not run with the land but remains a personal claim in the hands of the vendor, unless it has been assigned by special assignment or by a provision in the deed.

Id. at 138-39, 952 P.2d at 1391 (quoting 3 Julius Sackman, Nichols on Eminent Domain § 5.02 [3] (1997)). The Court explained that when "the government interferes with a person's possession of his/her property, the owner loses an interest in that property." *Id.* at 140, 952 P.2d at 1392. "The award of just compensation is a substitute for that lost interest in the property. When the owner sells what remains of her property, she does not also sell the right to compensation. If she did, the original owner would suffer a loss and the purchaser would receive a windfall." *Id.* This holding is consistent with other jurisdictions which have considered this issue. *See, e.g.*, *Toles v. United States*, 371 F.2d 784 (10th Cir.1967); *Enke v. City of Greeley*, 31 Colo.App. 337, 504 P.2d 1112 (1972); *Majestic Heights Co. v. Board of County Comm'rs.*, 173 Colo. 178, 476 P.2d 745 (1970); *City of Albuquerque v. Chapman*, 77 N.M. 86, 419 P.2d 460 (1960).

5.4.2 An inverse condemnation claim arises when the government act that inversely condemned the property occurred.

To determine when any inverse condemnation claim accrued, this Court looks to when the government-entity action underlying the claim occurred. In *McCarran International Airport v. Sisolak*, 122 Nev. 645, 137 P.3d 1110 (2006), the plaintiff brought an inverse condemnation action against Clark County and McCarran International Airport, arguing that Ordinance 1221 and Ordinance 1599 effectuated a per se regulatory taking of the airspace above his property, in violation of the United States and Nevada Constitutions. *Id.* at 654, 137 P.3d at 1116. On appeal, the Nevada Supreme Court concluded that the ordinances effectuated a per se regulatory taking because they "authorize[d] the permanent physical

invasion of … airspace" by aircraft and "compel[led] landowner acquiescence" to that invasion. *Id.* at 666, 137 P.3d at 1124. The Supreme Court of Nevada in *Sisolak* held that the taking occurred on the date that Ordinance 1221 was adopted and not upon the actual physical invasion of the airspace. *Id.* Under *Sisolak*, the enactment of Ordinance 1221 in itself effectuated the taking. Put differently, a takings claim accrues when the government-entity action underlying the claim occurs. Thus, any taking here occurred before 2001.

It is undisputed, however, that the Fritzes did not purchase the subject parcel until 2001. The vast majority of the Washoe County's actions asserted in the Third Amended Complaint, occurred before the Fritzes purchased the property. The evidence shows that the Court approved the Lancer Estates subdivision maps between 1984 and 1999. Thus, all of the subdivision approvals occurred years before the Fritzes purchased their land. Further, the County accepted all but two of the dedication of roadways and drainage systems by 1999. The final two dedications, for Lancer Estates Phases 9 and 10, were accepted only months after the Fritzes purchased their property. The Fritzes have failed to show how the roadways and drainage systems for Phases 9 and 10 harmed their property. Instead, they have argued in terms only of indistinct damage from the collective developments Lancer Estate and Monte Rosa Estate developments.

With respect to the Monte Rosa Estates subdivision maps, which the County approved after the Fritzes purchased their property, as discussed above, subdivision-map approval in and of itself is an insufficient basis for inverse condemnation. And, the County rejected the dedication of the roadways and

drainage systems. Further, similar to the two dedication acceptances that occurred after the Fritzes purchased their property, the Fritzes fail to argue how Monte Rosa Estate Phases 1 and 2 specifically injured their property, separately from the Lancer Estates subdivisions approved long before the Fritzes purchased their property.

Therefore, when the Fritzes purchased their property in 2001 they did so subject to any existing developments and regulations that pre-dated that purchase. Here, the vast majority of events on which the Fritzes base their inverse condemnation claim occurred before they purchased their property. The Fritzes cannot now sue for an inverse condemnation that allegedly occurred before they owned the property. Moreover, the Fritzes fail to show how the two dedication acceptance and map approvals that occurred after they bought the property specifically harmed their land. Plus, as discussed, regardless when the map approvals and dedication acceptances occurred, they are, in and of themselves, an insufficient basis for inverse condemnation.

The Fritzes are asking this Court to deviate from its precedent and allow condemnation cases to proceed years or decades after a government entity makes a routine administrative decision. Such a deviation will place government entities under an enduring and mushrooming threat of liability with each decision it makes. This the Court should not do.

6. Conclusion

In essence, the Fritzes are trying to take advantage of a problem that they created. Water runs downhill. The Fritzes are the ones who purchased property

and built a home downstream from private development. Indeed, years before the Fritzes bought the land, it was identified as a flooding problem area. The Fritzes' own evidence shows this. Yet, they purchased the land anyway. And now–over a decade after they bought the land–as a result of predictable intermittent flooding and some insignificant damage, they ask this Court to hold the County liable for inverse condemnation. But the County did not take any action directed at the Fritzes' land. And the County did not cause any flooding on or injury to the Fritzes' property. Moreover, virtually everything the Fritzes list to argue otherwise occurred years before they bought the property. Any inverse condemnation claim belongs to the owners back then. Thus, the only element of an inverse condemnation present in this case is that the Fritzes have an interest in property–there has been no taking, there has been no injury, there is no standing. This Court should dispatch this matter expeditiously.

Dated this 18th day of September, 2015.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP32(a)(4), the typeface requirement of NRAP32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using California FB in 14 point font. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionateley spaced, has a typeface of 14 points or more, and contains 5845 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the page and volume number, if any, of the record on appeal. I understand that I may be subject to sanctions in the event that the

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 18th day of September, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on September 18, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows: Luke A. Busby, Esq.

Dated this 18th day of September, 2015.

/s/ Tina Galli
Tina Galli