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

9 JOHN AND MELISSA FRITZ,

10 Plaintiff-Appellants,

11 vs.

CASE NO. 67660

12 WASHOE COUNTY,

13 Defendant-Respondent,
14 _____/

15 **APPELLANT’S REPLY 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 Reply
20 Brief pursuant to Nevada Rule of Appellate Procedure (“NRAP”)
21 28(c), in reply to the September 21, 2015 Answering Brief of
22 Respondent Washoe County.
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John and Melissa Fritz, a married couple – Appellants.

Washoe County, a political subdivision of the State of Nevada – Respondent.

Respectfully submitted this Friday, September 25, 2015.

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1 **I. Washoe County’s Statement of the Issues states that the**
2 **District Court came to conclusions that it did not reach**

3 Washoe County’s Answering Brief describes the issues in his case
4 as follows: (1) Whether the District Court was correct that Washoe
5 County’s involvement in the development of Lancer Estates and
6 Monte Rosa was not inverse condemnation; (2) Whether the District
7 Court was correct that no injury rising to the level of inverse
8 condemnation occurred; and (3) Whether the District Court was
9 correct that the Fritzes lacked standing to bring an inverse
10 condemnation claim. (Answering Brief at page 1 and 2). The District
11 Court’s Order does conclude that inverse condemnation is not a legally
12 viable theory in this case and that by approving the subdivision maps
13 and dedications there was no substantial involvement in the
14 development of Lancer or Monte Rosa through which inverse
15 condemnation liability may apply (Appx. Vol. 1 at 5). However, the
16 District Court did not specifically reach the conclusions that the
17 Fritzes suffered no injury rising to the level of inverse condemnation
18 or that the Fritzes lacked standing to bring an inverse condemnation
19 claim. Notwithstanding, the Fritzes will respond to the arguments
20 made by Washoe County in its Answering Brief below.

21 **II. Washoe County is liable to the Fritzes the inverse**
22 **condemnation of their Property¹**

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26
27 ¹ “Property” or “Subject Property” means the Fritzes property at
28 14400 Bihler Rd., Washoe County APN No. 142-241-63 which is the
 subject of the dispute in this case.

1 Washoe County argues variously that it only approved subdivision
2 maps and accepted dedications of privately built roadways and water-
3 drainage system, that it was not significantly involved in the private
4 developments at issue, and that it did not take any affirmative action
5 directed towards the Fritzes Property. (Answering Brief at page 6)
6 Washoe County also argues that the holding in *County of Clark v. Powers*,
7 96 Nev. 497 (Nev. 1980) should bar the Fritzes claim because Washoe
8 County did not design, engineer, or construct anything that resulted in
9 water being diverted onto the Fritzes Property. (Answering Brief at
10 11)
11

12 The *County of Clark v. Powers* Court held that liability would follow
13 where a county:
14

15 participated actively in the development of these lands,
16 both by its own planning, design, engineering, and construction
17 activities and by its adoption of the similar activities of various
18 private developers as part of the County's master plan for the
19 drainage and flood control of the area. *Id.* at 500.

20 The economic costs incident to the expulsion of surface waters in
21 the transformation of Lancer Estates and Monte Rosa from rural and
22 semirural areas into suburban communities should not be borne solely
23 by the Fritzes. *Id.* at 503.

24 The Fritzes described in detail Washoe County's participation in
25 and adoption of the activities of various private developers during the
26 development of Lancer Estates and Monte Rosa in their Opposition to
27 Washoe County's Motion for Summary Judgment (Appx. Vol. 1 at 99)
28 and in the Channel Study provided by the Fritzes expert Clark Stoner

1 P.E. (Appx. Vol. 1 at 131). Washoe County's position that it had
2 nothing to do with these developments is belied by the facts presented
3 by the Fritzes to the District Court, including but not limited to the
4 following facts, which show that Washoe County's participation in the
5 development of Lancer Estates and Monte Rosa was substantial and
6 went beyond approving subdivision maps and accepting dedication of
7 drainage facilities:
8

9 (1) The document at Appx. Vol. 1 at 150, which is a letter from
10 CFA engineering to the Washoe County Engineering Division
11 responding to issues raised by Washoe County at a meeting
12 regarding the development of Lancer Estates, shows in
13 paragraph 6 that Washoe County permitted Lancer Estates to
14 be developed without detention ponds that could have
15 prevented flooding on the Fritzes' Property that storm flows
16 from Lancer Estates will be directly discharged into Whites
17 Creek, and that "increased runoff caused by this development
18 will not be retained on site;"
19

20 (3) In 1994 Washoe County commissioned a study, the "Cella
21 Bar Study" at Appx. Vol. 2 at 229, which shows that Washoe
22 County was aware of the problems in Whites Creek No. 4
23 because the Cella Bar Study identified Whites Creek No. 4 as a
24 problem area, but chose to allow development to continue at
25 Lancer Estates and Monte Rosa unabated;
26

27 (4) The documents at Appx. Vol. 3 at 456 (which is a letter
28 from Nevada Department of Transportation ("NDOT") to the

1 Washoe County Engineer describing the planned diversion of
2 water across Lancer Estates) and Appx. Vol. 2 at 325 (which is
3 a page of the Hydrology Report for Lancer Estates Unit 10²
4 that shows that Lancer Estates was built in accordance with the
5 agreement between NDOT and Washoe County to divert
6 water) show that Washoe County directed the developers of
7 Lancer Estates to divert water from Mt. Rose highway into
8 Whites Creek No. 4 across the Fritzes Property; and

9
10 (5) The documents at Appx. Vol. 3 at 491 to 508, which are the
11 acceptance of dedication documents for Lancer Estates, shows
12 that Washoe County now owns the drainage facilities in Lancer
13 Estates that convey water from the development across the
14 Fritzes' Property.
15

16 Contrary to Washoe County' arguments, the facts demonstrate
17 that Washoe County took actions related to development of Lancer
18 Estates and Monte Rosa that were directed at the Fritzes Property, as
19 the water that Washoe County ordered the developers of Lancer
20 Estates to divert flows from Mt. Rose Highway through Lancer
21 Estates and across the Fritzes Property is the cause of the damages
22 about which the Fritzes complain. As stated in the affidavit of the
23 Fritzes expert Clark Stoner P.E., (Appx. Vol. 1 at 148) prior to the
24

25
26 ² In its Answering Brief, Washoe County admits that it accepted
27 dedication of the roadways and drainage systems in Lancer Estates
28 Unit 10 after the Fritzes purchased the Property in 2001. (Answering
Brief at page 21).

1 development of Lancer Estates, the predevelopment runoff from the
2 Lancer Estates area entered Whites Creek below the Fritzes Property.
3 Stoner also concluded that the stormdrain system at Monta Rosa ties
4 into the stormdrain system in Lancer Estates, i.e. the ongoing
5 development of Monte Rosa is contributing to the flooding on the
6 Fritzes Property. (Appx. Vol. 1 at 134 fn 14) The Fritzes also
7 presented substantial argument and evidence to the District Court that
8 the development of Lancer Estates and Monte Rosa was carried out in
9 accordance with Washoe County's master plan for drainage and flood
10 control of the area. (Appx. Vol. 1 at 103-110)

12 Washoe County cites *Gutierrez v. County of San Bernardino*, 198 Cal.
13 App. 4th 831 (Cal. App. 4th Dist. 2011) in support of the proposition
14 that if an inverse condemnation claim were based solely on the
15 allegation that the county owned the real property in question liability
16 would not be imposed. (Answering Brief at page 13) The Court in
17 *Gutierrez* found that an action for inverse condemnation lies when
18 there is actual physical injury to real property proximately caused by a
19 public improvement as deliberately designed and constructed whether
20 said physical injury is foreseeable or not. *Id.* at 837. The *Gutierrez*
21 Court concluded that the public improvement in question in that case
22 did not expose the plaintiffs' properties to a risk of flooding that did
23 not otherwise exist, and thus denied the claim for inverse
24 condemnation. *Id.* at 850. The Fritzes case is distinguishable from
25 *Gutierrez* because the Fritzes have put forth the testimony of an expert
26 witness stating that the cause of the increased flooding on the Fritzes
27
28

1 Property is the development of Lancer Estates and Monte Rosa, and
2 other evidence that Washoe County participated substantially in the
3 development of Lancer Estates and Monte Rosa. (Appx. Vol. 1 at 131)
4 At a minimum, a genuine issue of material fact exists as to the cause of
5 the increased flooding under the standard put forth by the *Gutierrez*
6 Court.
7

8 Washoe County also cites *Marilyn Froling Revocable Living Trust v.*
9 *Bloomfield Hills Country Club*, 283 Mich. App. 264 (Mich. Ct. App. 2009)
10 in support of the proposition that if an inverse condemnation claim
11 were based solely on the allegation that a local government approved
12 construction plans, liability would not be imposed. (Answering Brief at
13 page 14) The Fritzes case against Washoe County is also not
14 analogous to the fact pattern in the *Marilyn Froling* matter because the
15 evidence described above and presented to the District Court shows
16 that Washoe County's involvement go beyond the fact that Washoe
17 County approved the building plans for Lancer Estates and Monte
18 Rosa.
19

20 **III. The evidence shows that the damages to the Fritzes**
21 **Property are substantial and continuing**

22 Washoe County argues that pursuant to the holding in *Buzz Stew,*
23 *LLC v. City of N. Las Vegas*, 341 P.3d 646 (Nev. 2015), the flood
24 damages to the Fritzes Property are "relatively minor" and do not
25 constitute a taking. (Answering Brief at page 15-16)
26

27 The Court in *Buzz Stew* determined that because there was no
28 showing of substantial injury that the trial court did not err in

1 determining that a taking had not occurred. *Id.* at 651. *Buzz Stew* does
2 not apply in this case because the Fritzes have made a clear showing of
3 substantial injury to the District Court, supported by: (1) the
4 affidavit of John Fritz (Appx. Vol. 1 at 123), which details the damages
5 to the Fritzes Property and includes pictures of flooding occurring on
6 the Property (Appx. Vol. 1 at 125-129); and (2) the Channel Study and
7 affidavit of Clark Stoner P.E. (Appx. Vol. 1 at 131 and 148) which
8 details that the Fritzes have increasing stormwater discharges across
9 their Property since the development of Lancer Estates and Monte
10 Rosa and that absent corrective measures a flooding event on the
11 Fritzes Property will likely be disastrous. (Appx. Vol. 1 at 147).

12
13 The Channel Study authored by the Fritzes expert Clark Stoner
14 P.E. draws the following conclusion:

15
16 The facts reveal that the cause of flooding on the Subject Parcel
17 is not due to recurring 100-year flood events, but is the result of
18 alterations of the floodplain upland from the Subject Parcel.
19 Washoe County has been aware of the flood hazard crossing
20 the Subject Parcel since 1984, when the County adopted the
21 Flood Hazard Reduction Ordinance. Instead of reducing the
22 flood hazard on the Subject Parcel, development of Lancer
23 Estates included obstructing the floodplain and forcing it north,
24 which has caused repeated flooding on the Subject Parcel and
25 has made the flood hazard more severe. Absent corrective
26 measures, flooding on the Parcel will continue, and when the
27 100-year flood event planned for during design of Sterling
28 Ranch finally occurs, damages to the Subject Parcel will likely
be disastrous. (Appx. Vol. 1 at 142)

Washoe County's assertions that the damages to the Fritzes
Property are "relatively minor" and do not constitute a taking are

1 contradicted by the evidence presented to the District Court by the
2 Fritzes. A taking occurs when property is subjected to intermittent, but
3 inevitable flooding which causes substantial injury, which is exactly
4 what the Fritzes have shown has occurred on their Property. *United*
5 *States v. Cress*, 243 U.S. 316, 328 (1917) and *County of Clark v. Powers*, 96
6 Nev. 497, 502 (Nev. 1980).

7
8 **V. The Fritzes have standing to bring an inverse**
9 **condemnation claim against Washoe County.**

10 Washoe County argues that, pursuant to the holding in *Argier v.*
11 *Nevada Power Co.*, 114 Nev. 137 (Nev. 1998), that property owners lack
12 standing to assert an inverse condemnation claim for actions that
13 occurred before their ownership. (Answering Brief at page 19). In
14 *Argier*, this Court found, in the context of a case where a power
15 company sought to install power lines that a claim for inverse
16 condemnation does not run with the land, but vests at the time the
17 land is entered - i.e. when the power company physically occupied the
18 land to install the power lines. *Id.* at 140:

19
20 We hold that equity mandates vesting occurs when the
21 condemning agency enters into possession of the landowner's
22 property. *Id.* at 141

23 Washoe County's Answering Brief does not address the "entry"
24 standard in the *Argier* case. The taking of the Fritzes Property vested
25 due to a physical invasion of storm waters, not when Washoe County
26 first approved of the building plans for Lancer Estates and Monte
27 Rosa, as can be implied from Washoe County's arguments. (Answering
28

1 Brief at page 21) While Washoe County argues that the Fritzes lack
2 standing to bring a claim for inverse condemnation against Washoe
3 County for any action that occurred before 2001 (Answering Brief at
4 page 19), as argued in the Fritzes Opening Brief at page 12 line 27, and
5 as described in detail in the Channel Study by the Fritzes expert (Appx.
6 Vol. 1 at 131) many of the actions of Washoe County complained of
7 by the Fritzes occurred after they purchased the Property. Thus, by
8 Washoe County's own interpretation of the holding in *Argier*, summary
9 judgment on the entire case should not have been granted by the
10 District Court because many of the actions of Washoe County
11 complained of and that are causing the flooding on the Fritzes
12 Property occurred after they purchased the Property in 2001.
13

14 Washoe County also argues that, pursuant to the finding in
15 *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645 (Nev. 2006), a taking
16 claim accrues when the government entity action underlying the claim
17 occurs. (Answering Brief at 20) The *McCarran Int'l Airport v. Sisolak*
18 case involved a regulatory taking of airspace via an ordinance. *Id.* at
19 650. The *McCarran Int'l Airport v. Sisolak* decision did not upend the
20 ruling in *Argier* that an inverse condemnation claim vests when
21 physical occupation occurs. The *McCarran Int'l Airport v. Sisolak*
22 decision bears little resemblance to the case before this Court as it is
23 related to regulatory takings by the establishment of ordinances that
24 interfere with property rights and not flooding. *Id.* at 670.
25

26 Washoe County argues that the Fritzes have failed to show how
27 and when distinct parts of the development of Lancer Estates and
28

1 Monte Rosa have damaged their Property. (Answering Brief at page
2 21-22) The U.S. Supreme Court has addressed the issue of damages
3 and periods of limitation in an inverse condemnation case where flood
4 damages are continuing and cumulative and the precise moment of
5 taking cannot reasonably be determined because the physical
6 occupation takes place over time, which is clearly the case before the
7 Court. The U.S. Supreme Court concluded that the choice to forgo
8 the condemnation process by the Government should not force a
9 property owner into premature or piecemeal litigation, and that the
10 Court should avoid procedural rigidities:
11

12 The Government could, of course, have taken appropriate
13 proceedings to condemn as early as it chose both land and
14 flowage easements. By such proceedings it could have fixed the
15 time when the property was "taken." The Government chose
16 not to do so. It left the taking to physical events, thereby
17 putting on the owner the onus of determining the decisive
18 moment in the process of acquisition by the United States
19 when the fact of taking could no longer be in controversy.
20 *United States v. Dickinson*, 331 U.S. 745 at 747-748 (U.S. 1947)

21 The *US v. Dickinson* Court further held:

22 When dealing with a problem which arises under such diverse
23 circumstances procedural rigidities should be avoided. All that
24 we are here holding is that when the Government chooses not
25 to condemn land but to bring about a taking by a continuing
26 process of physical events, the owner is not required to resort
27 either to piecemeal or to premature litigation to ascertain the
28 just compensation for what is really "taken." *Id.* at 749.

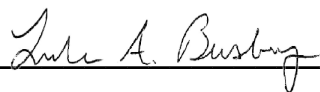
Because the flooding on the Fritzes Property is continuing in
nature, and the fact that the gradual, continuing, and ongoing nature of

1 the development of Lancer Estates and Monte Rosa, determining the
2 exact date on which physical occupation of the Property that
3 amounted to a taking occurred extremely difficult if not impossible
4 because Washoe County left the taking of the Fritzes Property to
5 “physical events.” The primary evidence before the District Court
6 describing these physical events was in the affidavit of John Fritz,
7 which states that since 2002, he was able to easily walk across the
8 Whites Creek No. 4 and that since that time, the creek as increased
9 significantly in size and depth and further erosion and flooding occurs
10 on the Property. (Appx. Vol. 1 at 123) Thus, the facts the District
11 Court had before it describing a physical event that constituted a
12 taking at the Fritzes Property occurred in 2002, after the Property was
13 purchased by the Fritzes.
14
15

16 17 **VIII. CONCLUSION**

18 WHEREFORE, the Fritzes pray that the Court reverse the
19 District Court’s Order granting summary judgment in this matter.

20 Respectfully submitted this Friday, September 25, 2015.
21

22 By: 
23


24 Luke Busby, Esq.
25 Nevada Bar No. 10319
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1 **NRAP 28.2 ATTORNEY'S CERTIFICATE**

2 I hereby certify that this brief complies with the formatting
3 requirements of NRAP 32(a)(4), the typeface requirement of NRAP
4 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this
5 brief has been prepared in a proportionally-spaced typeface using
6 Garamond in 16 point font using Microsoft Word for Mac 2011. I
7 further certify that this brief complies with the page or type volume
8 limitations of NRAP 32(a)(7) because, excluding the parts of the brief
9 exempted by NRAP 32(a)(7)(c), it is proportionately spaced, has a
10 typeface of 14 points or more, and contains 3,284 words.
11

12 Finally, I hereby certify that I have read this brief, and to the
13 best of my knowledge, information, and belief, it is not frivolous or
14 interposed for any improper purpose. I further certify that this brief
15 complies with all applicable NRAP, in particular NRAP 28(e), which
16 requires every assertion in the brief regarding matters in the record to
17 be supported by appropriate references to the page and volume
18 number, if any, of the record on appeal. I understand that I may be
19 subject to sanctions in the event that the accompanying brief is not in
20 conformity with the requirements of the NRAP.
21

22 Respectfully submitted this Friday, September 25, 2015.
23

24
25 By: 
26 Luke Busby, Esq.
27 Nevada Bar No. 10319
28

