IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN AND MELISSA FRITZ,

Petitioner,

v.

WASHOE COUNTY,

Respondents,

_____/

Case No. 67660

PETITION FOR REHEARING

For the following three reasons, respondent Washoe County petitions this Court, under NRAP 40, to rehear its decision reversing summary judgment in this matter:

1. **Dominion and control.** The Court adopted an incorrect statement of California law—that a government entity accepting dedication of privately constructed improvements deems those improvements a public use, supporting inverse-condemnation liability. That language and the California case this Court took it from misstate the law. The California rule is that a government entity's inverse-condemnation liability turns on the entity's dominion and control exercised over the private improvements, not on whether it accepted any dedication.

2. **Standing.** The Court overlooked that Nevada law requires a putative inverse condemnation claimant to have owned the property when the government action engendering inverse condemnation occurred. Consequently, the Court determined that a 1996 letter from the Nevada Department of Transportation to Washoe County might constitute government action that brought about inverse condemnation. But, whether the 1996

correspondence brought about a taking is inapposite, because the Fritzes did not own the property at the time.

3. **Mere planning.** The Court misapprehended the 1996 NDOT letter. According to the Court, the correspondence, which did nothing more than discuss plans for conveying certain water flow, might have brought about a taking. But under Nevada law, such project planning is an insufficient ground for a taking. Thus, the correspondence cannot be a basis for inverse condemnation.

Now, because the Court adopted an incorrect statement of law, local governments are potentially liable for merely accepting road or drainage dedications. And, for the first time, by the Court overlooking the timing and misapprehending the import of NDOT's 1996 letter, Nevada's local governments are liable to homeowners for acts or even mere planning that occurred years or decades before the homeowners purchased their property. The Court's decision exponentially increases local government liability for private development. That outcome is, of course, the Court's prerogative. But that decision rests on shaky ground because it is based on a misstatement of law, as well as overlooked and misapprehended material facts; under NRAP 40, this warrants rehearing.

Standard of Review

Under NRAP 40(c), rehearing is warranted when this Court has "overlooked . . . a . . . decision directly controlling a dispositive issue in the case" or "overlooked or misapprehended a material fact in the record . . . ." This Court's opinion satisfies both criteria.

Argument

1. The Court adopted an incorrect statement of California inverse-condemnation law, overlooking the controlling California caselaw on the high degree of government involvement in private development required for inverse condemnation.

The Court's decision adopted a purported statement of law from the California Court of Appeal's decision in *Ullery v. Contra Costa County*. 248 Cal. Rptr. 727 (Ct. App. 1988). In its decision, this Court noted that the *Ullery* court concluded that without the county's acceptance of certain dedications, its approval of subdivision maps alone was insufficient for inverse condemnation liability. *Fritz v. Washoe County*, 132 Nev. Adv. Opn. 57 (April 4, 2016). This Court then determined that "*Ullery* draws a distinction between merely approving subdivision maps and taking other action, including accepting dedications. The former [approving subdivision maps] on its own, does not convert the private development into a public use that gives rise to inverse condemnation liability. We adopt this rule from *Ullery*." *Id.* Thus, based on *Ullery*, this Court decided that, while subdivision map approval was not an independent basis for inverse condemnation liability, other actions, such as "formally accept[ing] dedications," are sufficient. *Id.* Indeed, after adopting the supposed rule from *Ullery*, the Court went on to note that Washoe County did more than approve subdivision maps—it formally accepted dedications of the streets in the developments, rendering the

Fritzes inverse condemnation claim actionable. *Id.* But that rule from *Ullery* that the Court adopted misstates California inverse-condemnation law.

Indeed, the California Court of Appeal's subsequent decision in *Gutierrez v. County of San Bernardino*, 130 Cal. Rptr. 3d 482 (Ct. App. 2011), makes this point. *Gutierrez* clarified *Ullery*'s imprecise language, stating that the denial of liability in *Ullery* "did not turn on the fact that the improvements were not dedicated to and accepted by the government entity, but rather on the fact that the entity did not exercise dominion and control over the improvements." *Gutierrez v. County of San Bernardino*, 130 Cal. Rptr. 3d 482, 489 n.5 (Ct. App. 2011). Washoe County's brief noted the *Gutierrez* court's clarification. Respondent's Answering Brief ("RAB") at 13-14. In its answering brief the County pointed out that *Gutierrez* clarified *Ullery*'s wrong statement, noting that mere property ownership, such as arises by accepting dedication, is insufficient for inverse condemnation. *Id.* That is, substantial involvement with private development that might deem it a public use requires more than merely owning the improvement through accepting the private developer's dedication of it. *Id.* Rather, the government entity must exercise dominion and control over it. Or, as stated in *Marilyn Froling Revocable Living Trust v. Bloomfield Hills Country Club*, the entity must take affirmative acts aimed at the claimant's property. 769 N.W.2d 234, 252 (Mich. Ct. App. 2009), *see also Gutierrez*,

130 Cal. Rptr. 3d at 489 (recognizing that an inverse-condemnation claimant must show affirmative actions by the government entity to further a public project which proximately caused injury to the claimant's property). Accepting dedications falls far short of an affirmative act directed towards the Fritzes' property and, under *Gutierrez*, which corrected *Ullery*, cannot be a basis for concluding the County was substantially involved in private development. In short, this Court's opinion adopted a wrong standard, and the Court should reconsider it.

2. The Court misapprehended that standing to challenge government action through inverse condemnation requires a property interest at the time of the challenged action—a property interest the Fritzes lacked.

Under Nevada law, "[a]n individual must have a property interest in order to support a takings claim." *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 658, 137 P.3d 1110, 1119 (2006). Accordingly, the court must first determine "whether the plaintiff possesses a valid interest in the property affected by the governmental action, that is, whether the plaintiff possessed a stick in the bundle of property rights, before proceeding to determine whether the governmental action at issue constituted a taking." *Id.* (internal citations and quotations omitted).

The Fritzes did not have a "valid interest in the property affected by the government action" before they bought the property in 2001. *Id.* at 658. Thus, the

Court's opinion misapprehended the threshold issue of standing to challenge government action that occurred before the ownership.

As the Court observed, the district court's summary judgment did not explicitly address the 1996 NDOT letter or any other government actions that occurred before 2001. *Fritz v. Washoe County*, 132 Nev. Adv. Opn. 57 (April 4, 2016). But, the district court categorically stated that it considered all of Washoe County's arguments and determined each one was "meritorious." 1 Joint Appendix ("JA") at 5. This includes Washoe County's argument that the Fritzes did not have standing to challenge the government actions that occurred before their ownership of the parcel. *Id.* at 2; 39-41.

The alleged government action that gives rise to this Court's remand for factual findings is primarily the 1996 NDOT letter. *Fritz v. Washoe County*, 132 Nev. Adv. Opn. 57 (April 4, 2016). As the Court recognized, the Fritzes purchased the property in question in 2001; five years after the 1996 NDOT letter was written and seventeen years before this lawsuit was filed. *Id.* Thus, as a matter of law, the Fritzes did not have a valid property interest at the time of that government action and lack standing to sue for any government action that occurred before that ownership. *McCarran Int'l Airport*, 122 Nev. at 658, 137 P.3d at 1119.

Likewise, the Fritzes did not have a valid property interest at the time the County approved the subdivision maps for Lancer Estates and Monte Rosa or

when the County accepted all but two of the related dedications (which, as discussed, are an insufficient basis for inverse condemnation liability in any event). Allowing the Fritzes to challenge government action that occurred long before they owned the property is expanding taking jurisprudence much further than it has ever previously been extended.[1]

The decision in *Argier v. Nevada Power Co.*, 114 Nev. 137, 139, 952 P.2d 1390, 1391 (1998) is instructive. Therein, the Court cited with approval 3 Julius Sackman, Nichols on Eminent Domain § 5.02 [3] (1997) and stated as follows: "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 . . . ." *Argier*, 114 Nev. at 139. Thus, the Fritzes cannot challenge government action that occurred before they purchased their property.

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[1]This extension, moreover, creates an inverse-condemnation cloaked end-run around the fundamental principle that one cannot recover for a nuisance he moved to. (Blackstone 1766: 402-403)("If my neighbour makes a tan-yard, so as to annoy and render less salubrious the air of my house or gardens, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and must continue"). The Fritzes bought their property and built their home long after the government action allegedly affecting their property occurred. Imposing inverse-condemnation liability on Washoe County because the Fritzes bought their property and built their home next to a creek that floods sporadically is inequitable.

This Court's Opinion, as a threshold matter, did not reach an important standing issue. The Fritzes' ability to challenge government action which occurred before they owned the property is of critical importance and necessitates rehearing under NRAP 40.

3. The Court misapprehended that the 1996 NDOT letter shows exactly the type of "mere planning" that this Court's precedent declared falls outside the scope of substantial involvement necessary for inverse condemnation.

The Court's Opinion recognizes its long-established position that "mere planning is outside the scope of substantial involvement" sufficient to establish an inverse condemnation claim, citing *Sproul Homes of Nevada. v. State, Departmentt of Highways*. 96 Nev. 441, 443, 611 P.2d 620, 621 (1980). Yet, the Court concludes that the mere planning discussions in a 1996 letter from NDOT to Washoe County might constitute substantial involvement in support of the Fritzes' inverse condemnation claim. *Fritz v. Washoe County*, 132 Nev. Adv. Opn. 57 (April 4, 2016). In so doing, the Court mischaracterizes NDOT's 1996 letter.

In the June 13, 1996 letter, NDOT references planning discussions regarding conveying certain water and requests that Washoe County direct the developer to convey water consistent with that plan. 3 JA at 456. That's it. Indeed, the plans to convey water in the 1996 letter are much less significant than the plans at issue in *Sproul Homes of Nevada* to run an expressway through the claimant's property—plans that this Court deemed insufficient to support an inverse condemnation

action. *Id.* at 442-43, 611 P.2d at 620-21. NDOT's 1996 letter doesn't show any affirmative act directed at the Fritzes' property or that the County otherwise exercised any dominion or control over private development that affected the Fritzes' property—especially because the Fritzes didn't own it at the time. It discusses only project plans with respect to water flows. NDOT's letter to Washoe County therefore cannot be the basis for imposing inverse condemnation liability on the County.

And, although a 1999 hydrology report appears to note that the private developer complied with that plan, the report only notes what was decided between Washoe County and NDOT; it certainly does not show any affirmative act by the County. 2 JA at 325 ("In 1993 it was decided between NDOT and Washoe County that [certain water flows] would be conveyed northerly through the Lancer Estates property.") Needless to mention, of course, is that the letter, hydrology report, and any influence the County might have had on the developer's actions, all occurred years before the Fritzes owned the land. The 1996 letter thus fails as a basis for inverse condemnation liability on at least two grounds. And, other than this letter, all that the Court points to for the County's possible substantial involvement in private development is accepting dedications, which is only a basis for inverse condemnation liability under language misstating inverse condemnation law.

Conclusion

The *Sproul* Court recognized, quoting another California decision, that if mere planning was a sufficient basis for inverse condemnation liability, it was "no hyperbole" to conclude that community planning would "grind to a halt" and Nevada's state courts would be "inundated with futile litigation." *Sproul Homes of Nev.*, 96 Nev. at 444, 611 P.2d at 622 (quoting *Selby Realty Co. v. City of San Buenaventura*, 514 P.2d 111, 117-18 (Cal. 1973)). Likewise, it is no hyperbole to conclude that this Court's opinion—that not only indicated that mere planning might suffice for inverse-condemnation liability after all, but also signaled that accepting roadway and drainage dedications brings about inverse-condemnation liability, and allows a person who didn't own property at the time it was allegedly inversely condemned to nonetheless bring an inverse-condemnation claim—will have no less significant impacts. The effects of this Court's opinion are particularly troubling given their bases in the wrong legal standard and overlooked and misapprehended material facts. The Court should grant this petition for rehearing.

Dated this 22nd day of August, 2016.

CHRISTOPHER J. HICKS
Washoe County District Attorney

By /s/ Stephan Hollandsworth
STEPHAN HOLLANDSWORTH
Deputy District Attorney

ATTORNEYS FOR WASHOE COUNTY

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for rehearing complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in California FB 14 font.

2. I further certify that this petition for rehearing complies with the page or type-volume limitations of NRAP 40 or 40A because it does not exceed 4,667 words. This petition contains 2,259 words.

Dated this 22nd day of August, 2016.

CHRISTOPHER J. HICKS
Washoe County District Attorney

By /s/ Stephan Hollandsworth
STEPHAN HOLLANDSWORTH
Deputy District Attorney
P.O. Box 11130
Reno, NV 89520-0027
(775) 337-5700

ATTORNEYS FOR WASHOE COUNTY

CERTIFICATE OF SERVICE

Pursuant to NRAP 5(b), I certify that I am an employee of the Office of the District Attorney of Washoe County, over the age of 21 years, and not a party to nor interested in the within action. I certify that on this date, the foregoing was electronically filed with the Supreme Court of the State of Nevada by using the ECF System. Electronic service of the foregoing document shall be made in accordance with the Court's service list as follows:

Luke A. Busby, Esq.

Dated this 22nd day August, 2016.

/s/ C. Mendoza
C. Mendoza