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IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN AND MELISSA FRITZ, Plaintiff-Appellant(s), Vs. WASHOE COUNTY, Defendant-Respondent. _____/	CASE No. 67660

APPELLANT'S ANSWER TO PETITION FOR REHEARING

COMES NOW Appellant(s), JOHN AND MELISSA FRITZ, a married couple (hereinafter "the Fritzes") by and through the undersigned counsel, and hereby file the following Answer to Petition for Rehearing in response to Respondent WASHOE COUNTY's

August 22, 2016 Petition for Rehearing (hereinafter "Petition"), filed pursuant to Nevada Rule of Appellate Procedure ("NRAP") 40 seeking rehearing of the Court's August 4, 2016 Opinion (hereinafter "Opinion") in this case.

As shown below, for each issue raised in the Petition, there is nothing new that is presented to this Court. Washoe County is simply attempting to reargue the issues already raised. *Ducksworth v. State*, 114 Nev. 951, at 953 (1998).

There is no error in this Court's statement of California law from *Ullery* – Washoe County misreads *Gutierrez*

Washoe County argues that the Court adopted an incorrect statement of California law as to when a government entity is liable in inverse-condemnation (Petition at 1). Washoe County also argues that accepting dedications falls far short of an affirmative act directed towards the Fritzes' property under *Gutierrez v. County of San Bernardino*, 198 Cal. App. 4th 831 (Cal. App. 4th Dist. 2011) and cannot be a basis for concluding the County was substantially involved in private development (Petition at 5).

The *Gutierrez* decision was discussed in the Opening Brief at 22, in Washoe County's Answering Brief at 13-15, and in the Reply Brief at 8.

Washoe County's argument that *Gutierrez* "corrected" the finding in *Ullery v. County of Contra Costa,* 202 Cal. App. 3d 562 (Cal. App. 1st Dist. 1988) relied upon by this Court is erroneous. The *Gutierrez* Court analyzed the language in *Ullrey* that could be read to support the assertion that mere ownership of property is sufficient to support the finding that such ownership is a "public improvement." *Gutierrez* at Fn. 5. The issue in *Gutierrez* was whether unimproved raw land that has not been deliberately acted upon by the County was a "public improvement" for purposes of inverse condemnation. *Id.* at 841. Clearly, this case does not involve unimproved raw land. It involves public improvements, i.e. streets and storm drainage systems in Lancer Estates and Monte Rosa.

In adopting the rule in *Ullery*, this Court concluded that without a local government acceptance of a dedication, subdivision map approval alone is not enough to give rise to establish inverse condemnation liability. (Opinion at 8-9) This rule from *Ullery* was never "corrected"

by *Gutierrez*. To the contrary, the *Gutierrez* Court found that even in the absence of acceptance of dedications, inverse condemnation liability can be shown where a local government does something less than accepting dedications, i.e. where the local government exercises "dominion and control" over a public improvement. *Gutierrez* at Fn. 5. This ruling is consistent with the well-established rule in California that inverse condemnation liability is imposed on a public entity which has approved and accepted, for a public purpose, work performed by a subdivider or private owner of property. *Yox v. City of Whittier*, 182 Cal. App. 3d 347, 353 (Cal. App. 2d Dist. 1986) citing *Sheffet v. County of Los Angeles*, 3 Cal.App.3d 720 (1970).

Washoe County seeks to have this Court read the ruling in *Gutierrez* to mean that a local government can accept dedication of a public improvement without exercising "dominion or control" over that public improvement, despite the fact that title to property dedicated or accepted for streets and easements passes when the final map is recorded. *See* NRS 278.390. This conclusion is unreasonable and is a result of misreading of *Gutierrez*.

This Court did not overlook any requirement in Nevada law as to when the taking occurred – it correctly ruled that the District Court never addressed the issue

Washoe County argues that this Court overlooked the requirement in Nevada law that an inverse condemnation claimant must own the condemned property at the time when the government action engendering inverse condemnation occurred (Petition at 1). Washoe County also argues that the Court misapprehended the threshold issue of standing to challenge government action that occurred before the ownership because the Fritzes did not have a valid interest in the property affected by the government action before they bought the property in 2001 (Petition at 5).

The issue of when the taking occurred was discussed in Washoe County's Answering Brief at 19, and in the Reply Brief at 11.

This Court's Opinion specifically found that the District Court made no findings with regard to when the taking occurred. (Opinion at 4). Washoe County points out that the District Court did state that it considered Washoe County's arguments and found them meritorious.

Pursuant to Nevada Rule of Civil Procedure 56(c), the District Court was required to set forth the undisputed material facts and legal determinations on which the Court granted summary judgment, which it did not do on this issue.

Further, Washoe County argues that the alleged government action that gives rise to this Court's remand for factual findings is primarily the 1996 NDOT letter (Appx. Vol. 3 at 456) (Petition at 6). This Court never used the word "primarily" to describe the 1996 NDOT letter, but specifically noted in the Opinion that it is "one such document" presented by the Fritzes (Opinion at 3). The 1996 NDOT letter was part of a long series of events and actions by Washoe County that resulted in the flooding of the Fritzes property, the taking of which "vested" when the flooding began to occur on the Fritzes property as a result of the developments. *Argier v. Nevada Power Co.*, 114 Nev. 137, 142 (Nev. 1998). As argued in the Fritzes Opening Brief at page 12 line 27, and as described in detail in the Channel Study by the Fritzes' expert (Appx. Vol. 1 at 131), many of the actions of Washoe County complained of by the Fritzes occurred after they purchased the

Property in 2001 and John Fritz has observed flooding since 2002 (Appx. Vol. 1 at 123).

This Court did not misapprehend the meaning of the 1996 NDOT Letter

Washoe County argues that this Court misapprehended the 1996 NDOT letter showing that Washoe County directed the developers of Lancer Estates to divert water across the Frites property (Petition at 2). Nowhere in the Court's Opinion does it state that the 1996 NDOT letter was the sole basis upon which the Court concluded that that genuine issues of material fact exist as to whether Washoe County's actions constituted substantial involvement (Opinion at 9). Washoe County's argument is based on the false premise that the scope of Washoe County's involvement in the development of Lancer Estates and Monte Rosa was limited to the 1996 NDOT letter.

The 1996 NDOT letter was discussed in the Opening Brief at 11, in Washoe County's Answering Brief at 9, and in the Reply Brief at 6.

Washoe County also argues that this Court mischaracterizes the 1996 NDOT letter because the letter is "mere planning" (Petition at 8).

The letter by its terms is not mere planning because it directed the diversion of water that would have gone around the Fritzes property through the Fritzes property, not the evaluation of plans submitted by the developer. The 1996 NDOT letter is just one piece of the puzzle of evidence in this case that shows that Washoe County's involvement in the developments was substantial, despite its claims to the contrary.

Washoe County's Petition also states that, "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." (Petition at 6) As shown in (Appx. Vol. 1 at 1), the first complaint in this case was filed on April 4, 2013, which is approximately twelve years after the Fritzes purchased the property in 2001 (See 2001 Deed to Fritz at Appx. Vol 1 at 18). Assumedly, Washoe County meant that the lawsuit was filed seventeen years after the 1996 NDOT letter.

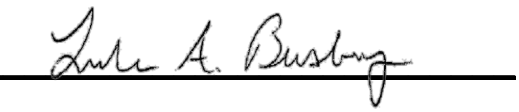
CONCLUSION

Washoe County states that the Court's decision is that "mere planning" might suffice for inverse condemnation liability. (Petition at 10). This is despite the fact that this Court's Opinion specifically states

that claims based on mere planning are outside the scope of the substantial involvement required to impose liability for inverse condemnation, citing *Sproul Homes of Nev. v. State, Dep't of Highways*, 96 Nev. 441, 443, 611 P.2d 620, 621 (1980) (Opinion at 7). Washoe County's caution to this Court in its conclusion is unfounded because Washoe County simply misreads what this Court concluded in its Opinion, i.e. that genuine issues of material fact exist in this case as to whether Washoe County's actions constituted substantial involvement.

WHEREFORE, the Fritzes pray that this Court deny Washoe County's Petition for Rehearing.

Respectfully submitted this Thursday, August 25, 2016

By: 

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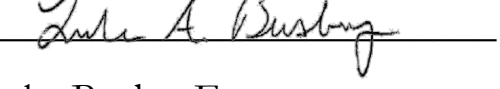
NRAP 28.2 ATTORNEY'S CERTIFICATE

I hereby certify that this Answer complies with the formatting requirements of NRAP 32(a)(4), the typeface requirement 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 Garamond in 16-point font using Google Docs. I further certify that this Answer 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 proportionately spaced, has a typeface of 14 points or more, and contains 1706 words.

Finally, I hereby certify that I have read this Answer, 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 Answer complies with all applicable NRAP, in particular NRAP 28(e), which requires every assertion in the Answer 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 accompanying Answer is not in conformity with the requirements of the NRAP.

Respectfully submitted this Thursday, August 25, 2016

By: 

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CERTIFICATE OF SERVICE

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

Washoe County DA's Office
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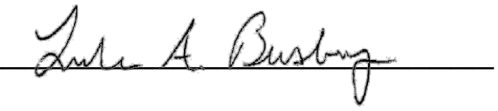
By: 

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