IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN AND MELISSA FRITZ,

Petitioner,

v.

WASHOE COUNTY,

Respondents.
_____/

Case No. 67660

PETITION FOR EN BANC RECONSIDERATION

This petition for en banc reconsideration of the *Fritz v. Washoe County* opinion, which reversed summary judgment in an inverse-condemnation case, presents this Court with two issues:

- **Direct and physical involvement.** Before *Fritz v. Washoe County*, only a government-entity's direct and physical involvement with private development that injured another's property could be the basis for inverse condemnation. Now, inverse condemnation requires nothing more than a local government accepting dedication of a privately constructed road—an administrative act that accompanies virtually all private development. Given the unbounded liability this creates for local governments, should this Court reconsider the panel's decision en banc?

- **Standing.** Normally, Nevada law requires a putative inverse-condemnation claimant to have owned the property when the government action engendering inverse condemnation occurred. But *Fritz v. Washoe County* signals that events that occurred years before homeowners purchased their property can be grounds for inverse condemnation. Given this anomalous holding, should the en banc Court reconsider the panel's decision?

Holding a local government liable for the actions of a party who developed, constructed, and then dedicated a road is contrary to the public policy of this state. Indeed, the word "road" in the preceding sentence can be interchanged with the term "park," "drainage system," or "school." Yet, *Fritz* imposes such liability on local governments. *Fritz* concludes that a local government by merely accepting a developer's dedication of roads and drainage systems privately developed for a subdivision is grounds for inverse condemnation. The holding exponentially increases local government liability for private development throughout Nevada because accepting roadway and drainage dedications is concomitant with virtually all private development. *Fritz*'s statewide impact on private development and local governments presents an issue worthy of this Court's en banc reconsideration under NRAP 40A.

Further, *Fritz* indicates that a property owner has a viable inverse-condemnation claim even when the private development affecting the property was designed, constructed, and dedicated before the property owner owned the property. This holding is contrary to well-settled inverse-condemnation law recognizing that an inverse-condemnation claim belongs to the person who owned the property at the time of the activity that allegedly condemned it. This conclusion, therefore, also raises an issue that warrants this Court's en banc reconsideration of *Fritz*.

Background

Between 1984 and 1999, Washoe County approved maps for each phase of a privately developed 11-phase subdivision called Lancer Estates. 1 Joint Appendix ("JA") at 51-94. For each phase, Washoe County 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. Later, Washoe County accepted the two remaining dedications. 3 JA at 506-07.

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. 1 JA 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 claimed that the increased size and depth of Whites Creek 4 floods their property during some large rainstorms. *Id.* at 6-7.

Consequently, in 2013, over a decade after purchasing their land, the Fritzes filed this action against Washoe County for inverse condemnation.[1] 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—constituted a permanent and physical invasion of their property. 1 JA at 7-16; AOB at 12-14. Washoe County moved for summary judgment on numerous grounds, including that approving subdivision maps and accepting roadway and drainage system dedications is not the substantial involvement in private development Nevada law requires for inverse condemnation and that the events the Fritzes relied on for their inverse-condemnation claim occurred, in almost every instance, years before the Fritzes purchased the property. 1 JA at 33-48. The district court ultimately granted the County summary judgment. *Id.* at 5.

On appeal, a panel of this Court reversed the summary judgment. The Court concluded that genuine issues of material fact remained in light of its holding that accepting dedications constitutes substantial involvement in private development that might engender inverse condemnation. *See Fritz v. Washoe County*, 132 Nev. Adv.

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[1]Initially, the Fritzes asserted causes of action for trespass, nuisance, and inverse condemnation against Washoe County. Subsequently, the Fritzes filed a handful of amended complaints and added multiple parties, including developers and engineering firms. Over time, the district court or the Fritzes, voluntarily, dismissed the bulk of the claims and parties. Ultimately, the district court granted the Fritzes leave to file a third amended complaint asserting only a claim for inverse condemnation against Washoe County.

Opn. 57 (August 4, 2016) at 9. The Court also concluded that genuine issues of material fact remained regarding when the inverse condemnation arose, signaling that an inverse-condemnation claimant need not actually own the property when the government action that allegedly condemned the land occurred—contrary to Nevada law. *Id.* at 4. The panel summarily denied the County's petition to rehear its decision. Thus, this petition for en banc reconsideration follows.

Standard of Review

Under NRAP 40A(a), en banc reconsideration of a panel decision is warranted when "the proceeding involves a substantial precedential, constitutional[,] or public policy issue" or "reconsideration by the full court is necessary to secure or maintain uniformity of decision of the Supreme Court." The panel's opinion in *Fritz* presents both bases, which will be addressed in turn.

Argument

1. When this Court decided in *Fritz* that a local government can be liable for private development it didn't participate in and injury it didn't at least proximately cause, the Court increased local-government liability throughout Nevada while contravening the state's public policy.

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)). Here, the Fritzes instituted an inverse-condemnation action, claiming that Washoe County took their property when it accepted a developer's dedication of the roadways and drainage systems it built for a private subdivision. That subdivision, the Fritzes argue, directs storm water onto their land.

To reverse the district court's summary judgment, *Fritz* 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). *Fritz*, 132 Nev. Adv. Opn. at 8-9. In *Fritz*, this Court recognized the *Ullery* court's apparent conclusion that, without a county's acceptance of certain dedications, its approval of subdivision maps alone was insufficient for inverse condemnation liability. *Id.* at 8. 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.* at 8-9. Thus, based on *Ullery*, this Court decided that, while subdivision map approval was not a basis for inverse condemnation

liability, "formally accept[ing] dedications," was.[2] *Id.* at 9. 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.* at 9.

Fritz's conclusion that accepting privately constructed roadway and drainage-system dedications is enough for inverse condemnation will significantly impact development throughout Nevada. Local governments accept roadway and drainage dedications as part of virtually all private development. Indeed, local governments accept the dedication of all sorts of privately designed and constructed improvements—parks, sewers, and schools, to name a few. As it pertains to roadways and drainage systems, this administrative act is meant to place privately constructed roads on local government records and allows local governments to maintain consistent road and drainage-system conditions, rather than leaving it to each road's and drainage system's developer. If merely accepting

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[2]As the County noted in its rehearing petition, the rule from *Ullery* that this Court adopted misstates California inverse-condemnation law. The California Court of Appeal's subsequent decision in *Gutierrez v. County of San Bernardino*, 130 Cal. Rptr. 3d 482 (Ct. App. 2011), clarified *Ullery*, 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).

dedications, apart from any direct and physical involvement with the private construction, makes local governments responsible for the developer's design flaws, Nevada's local governments are left to act as insurance companies for any parcels affected by flaws in private development. In essence, municipalities become the insurers of private development throughout the state. In response, cash-strapped local governments will stop accepting dedications or the costs associated with the increased liability will have to be passed on to the local government's citizens through a fee or tax.

This is why, historically, for a government entity's involvement in private development to constitute inverse condemnation, its involvement had to 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"). *Fritz*, despite its ultimate determination, properly characterized substantial involvement as direct and physical involvement with private development. 132 Nev. Adv. Opn. at 7; *cf. Gutierrez v. County of San Bernardino*, 130 Cal. Rptr. 3d 482, 489 (Ct. App. 2011) (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); *Marilyn Froling Revokable Living Trust v. Bloomfield Hills Country Club*, 769 N.W.2d 234, 252 (Mich. Ct. App.

2009) (stating that an inverse-condemnation plaintiff "must establish that the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property," requiring that "the form, intensity, and deliberateness of the governmental actions toward the injured party's property . . . be examined.") Accepting dedications falls far short of substantial involvement aimed towards the Fritzes' property—regardless whether that requires any physical engagement—and, therefore, cannot be a basis for concluding the County was substantially involved in private development. This Court's opinion adopted an imprudent standard, and the en banc Court should reconsider it.

2. *Fritz* avoids well-settled Nevada law that standing to challenge government action through inverse condemnation requires a property interest at the time of the challenged government 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, 137 P.3d at

1119. Thus, *Fritz* misapprehended the threshold issue of standing to challenge government action that occurred before the ownership.

As the Court recognized, the Fritzes purchased the property in question in 2001. *Fritz*, 132 Nev. Adv. Opn. at 2. 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). 1 JA at 95-98; 3 JA at 491-508. Allowing the Fritzes to challenge government action that occurred long before they owned the property is contrary to Nevada takings jurisprudence, expanding it much further than it has ever previously been extended.

The decision in *Argier v. Nevada Power Co.*, is instructive. 114 Nev. 137, 139, 952 P.2d 1390, 1391 (1998). In *Argier*, 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; 952 P.2d at 1391. Under Nevada caselaw, then, the Fritzes cannot challenge government action that occurred before they purchased their property. Still, *Fritz* determined with

short shrift that "a genuine issue of material fact remains as to the issue of standing." *Fritz*, 132 Nev. Adv. Opn. at 4. This is so even though the Fritzes didn't purchase their property until after the government action they asserted—over a decade later—condemned it.

As a threshold matter, *Fritz* avoided an important standing issue. The Fritzes' ability to challenge government action that occurred before they owned the property is of critical importance and necessitates en banc reconsideration under NRAP 40A.

Conclusion

The panel's *Fritz* opinion presents two independent bases for this Court to reconsider it. First, concluding that a government becomes substantially involved with private development when it accepts a developer's dedication of its roadways and drainage systems is significant. It implicates this state's precedent and public policy regarding local-government liability for private development. Regardless whether it's determined that Washoe County was substantially involved with the private developments at issue in this case, in light of *Fritz*, municipalities now face liability for an administrative act that attends virtually all private development.

Second, there is no material fact in dispute regarding when the Fritzes purchased their land: after Washoe County accepted all but two of the developer's dedications of its roadways and drainage systems. Allowing the Fritzes to

continue challenging government action that occurred before they had a property interest contravenes Nevada's inverse condemnation caselaw; this Court should reconsider *Fritz* to reconcile it with that precedent. Otherwise, *Fritz* creates an inverse-condemnation cloaked end-run around the fundamental principle that one cannot recover for a nuisance he or she moved to. As Sir William Blackstone usefully illustrated, "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." Blackstone 1766: 402-403. This is what the Fritzes are attempting, having purchased land and built a home downhill from private developments. If en banc reconsideration is not granted on both of the above grounds, it must be granted on at least one.

Dated this 14th day of November, 2016.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for en banc reconsideration 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 en banc reconsideration complies with the type-volume limitation of NRAP 40A because it does not exceed 4,667 words. This petition contains 2,926 words.

Dated this 14th day of November, 2016.

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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 14th day of November, 2016.

/s/C. Mendoza
C. Mendoza