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Elizabeth A. Brown  
Clerk of Supreme Court

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

JOHN AND MELISSA FRITZ,

Plaintiff-Appellant(s),

Vs.

CASE No. 67660

WASHOE COUNTY,

Defendant-Respondent.

\_\_\_\_\_ /

**APPELLANT'S ANSWER TO PETITION**

**FOR EN BANC RECONSIDERATION**

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

1 for En Banc Reconsideration in response to Respondent WASHOE  
2 COUNTY's November 15, 2016 Petition for En Banc Reconsideration  
3 (hereinafter "Petition"), filed pursuant to Nevada Rule of Appellate  
4 Procedure ("NRAP") 40A, seeking reconsideration of the Court's  
5 August 4, 2016 Opinion in *Fritz v. Washoe Cnty.*, 376 P.3d 794, 132 Nev.  
6 Adv. Rep. 57 (Nev. 2016) (hereinafter the "Panel's Opinion").  
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10  
11 Washoe County's Petition makes the following two primary  
12 arguments: The Panel's Opinion states that inverse condemnation  
13 requires nothing more than a local government accepting dedication of  
14 a privately constructed road that that this creates "unbounded liability"  
15 for local governments (Petition at 1); and the Panel's Opinion "signals"  
16 that events that occurred years before homeowners purchased their  
17 property can be grounds for inverse condemnation.  
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21  
22 **I. Washoe County misreads the Panel's Opinion on several**  
23 **key points**  
24

25 Washoe County argues that the Panel's Opinion states that inverse  
26 condemnation requires nothing more than a local government accepting  
27 dedication of a privately constructed road that that this creates  
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1 “unbounded liability” for local governments (Petition at 1). The Fritzes  
2  
3 dispute that the Panel’s Opinion was this far-reaching in its conclusions.  
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5 What the Panel’s Opinion did rule was that because Washoe County had  
6  
7 taken actions beyond approving subdivision maps, the Fritzes inverse  
8  
9 condemnation claim is actionable and should not have been dismissed  
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11 by the District Court on summary judgment because the District Court  
12  
13 misapplied the ruling from *Ullery v. Contra Costa County*, 248 Cal. Rptr.  
14  
15 727 (Ct. App. 1988). *Fritz v. Washoe Cnty.*, 376 P.3d at 798 (Nev. 2016)  
16  
17 Ullrey and its implications are discussed at length below.

18  
19 However, the rule that inverse condemnation liability is imposed  
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21 on a public entity which has approved and accepted, for a public  
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23 purpose, work performed by a subdivider or private owner of property  
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25 is well-established in California. *Yox v. City of Whittier*, 182 Cal. App. 3d  
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27 347, 353 (Cal. App. 2d Dist. 1986) citing *Sheffet v. County of Los Angeles*, 3  
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29 Cal.App.3d 720 (1970). Although the Panel’s Opinion did not reach this  
30  
31 same conclusion, the Panel's Opinion resolved in the affirmative the  
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33 novel question as to whether government activities short of physical  
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35 labor, but with more engagement than mere planning, can constitute

1 substantial involvement in a private development sufficient to constitute  
2 a public use in support of an inverse condemnation claim. *Fritz v.*  
3 *Washoe Cnty.*, 376 P.3d at 797 (Nev. 2016).  
4

5  
6 The Panel's Opinion, under the heading "Substantial  
7 Involvement," finds that the Fritzes provided evidence that, among  
8 other activities, Washoe County formally accepted dedications of the  
9 streets in the developments and entered into an agreement with the  
10 Nevada Department of Transportation to direct water from the  
11 developments [Lancer Estates and Monte Rosa] north into Whites  
12 Creek, rather than to allow the water to follow its natural path down  
13 Mount Rose Highway. *Fritz v. Washoe Cnty.*, 376 P.3d at 798 (Nev. 2016).  
14  
15 Based on these facts, the Panel's Opinion concluded that genuine issues  
16 of material fact exist as to whether Washoe County's actions constituted  
17 substantial involvement in the drainage system of Lancer Estates and  
18 MonteRosa sufficient to deem it a public use, and remanded this case to  
19 the District Court. *Id.*  
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26 Washoe County's argument that, before the Panel's Opinion,  
27 "direct and physical" involvement with private development that injured  
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1 another's property is a required basis for an inverse condemnation claim  
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3 was the law in Nevada is false. Washoe County's Petition states, "*Fritz*,  
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5 despite its ultimate determination, properly characterized substantial  
6 involvement as direct and physical involvement with private  
7 development." Washoe County cites the Panel's Opinion at 7 citing  
8  
9 *Gutierrez v. County of San Bernardino*, 130 Cal. Rptr. 3d 482, 489 (Ct. App.  
10  
11 2011 in support of this argument. (Petition at 8) The Panel's Opinion,  
12  
13 on the other hand, does not state this. In other words, the phrase  
14 "direct and physical" does not appear at all in the Panel's Opinion.  
15  
16 "Direct and physical" involvement was never the standard in Nevada  
17 for imposing inverse condemnation liability on local governments -  
18 Washoe County plucks this false standard out of the thin air. To the  
19  
20 contrary the Panel's Opinion specifically states, "We have not limited  
21  
22 the range of actions that constitute substantial involvement to physical  
23 engagement in private activities." *Fritz v. Washoe Cnty.*, 376 P.3d at 797  
24  
25 (Nev. 2016). However, this underlying issue was addressed by the  
26  
27 Panel's Opinion by its ruling in the affirmative that government  
28 activities short of physical labor, but with more engagement than mere

1 planning, can constitute substantial involvement in a private  
2 development sufficient to constitute public use in support of inverse  
3 condemnation. *Fritz v. Washoe Cnty.*, 376 P.3d at 797 (Nev. 2016).  
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6 **II. The Panel's Option adopted the correct statement of**  
7 **law from *Ullery***  
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9 Washoe County argues that Panel's Opinion adopted a "purported  
10 statement" of law from the California Court of Appeal's decision in  
11 *Ullery v. Contra Costa County*, 248 Cal. Rptr. 727 (Ct. App. 1988) (Petition  
12 at 6). In footnote 2 of the Petition, Washoe County further argues that  
13 the rule from *Ullery* that the Panel's Opinion adopted misstates  
14 California inverse-condemnation law because the California Court of  
15 Appeal's subsequent decision in *Gutierrez v. County of San Bernardino*, 130  
16 Cal. Rptr. 3d 482 (Ct. App. 2011), clarified *Ullery*.  
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22 The Panel's Opinion adopted a narrow ruling from from *Ullrey* that  
23 a public use or improvement cannot be demonstrated by mere  
24 subdivision map approval, finding that, without Contra Costa County's  
25 acceptance of the dedication, its sole participation in the development  
26 process was approval of the tentative and final subdivision maps *Fritz v.*  
27  
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1 *Washoe Cnty.*, 376 P.3d at 797 (Nev. 2016).

2  
3 Washoe County's argument that *Gutierrez* "clarified" the finding in  
4 *Ullery* is erroneous. The *Gutierrez* Court analyzed the language in *Ullery*  
5 that could be read to support the assertion that mere ownership of  
6 property is sufficient to support the finding that such property is a  
7 "public improvement," even if there is nothing built on the land.  
8 (*Gutierrez* at Fn. 5). In other words, the issue in *Gutierrez* was whether  
9 unimproved raw land that has not been deliberately acted upon by the  
10 County was a "public improvement" for purposes of inverse  
11 condemnation. *Id.* at 841. The Fritzes case does not involve  
12 unimproved land. It involves what are undoubtedly "public  
13 improvements" for "public use," i.e. streets and storm drainage systems  
14 in Lancer Estates and Monte Rosa, which are now largely owned by  
15 Washoe County, and which convey runoff water from Lancer Estates  
16 and Monte Rosa over the Fritzes property.  
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25 The rule from *Ullery* adopted by the Panel's Opinion was never  
26 "corrected" by *Gutierrez*. To the contrary, the *Gutierrez* Court found  
27 that even in the absence of acceptance of dedications, inverse  
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1 condemnation liability can be shown where a local government does  
2 something less than accepting dedications, i.e. where the local  
3 government exercises “dominion and control” over a public  
4 improvement. *Gutierrez* at Fn. 5.  
5

6  
7 Washoe County seeks to have this Court read the ruling in *Gutierrez*  
8 to mean that a local government can accept dedication of a public  
9 improvement without exercising “dominion or control” over that  
10 public improvement. This conclusion is clearly unreasonable and is a  
11 result of Washoe County misreading of *Gutierrez*. There is no  
12 reasonable question as to whether Washoe County has exercised  
13 dominion or control over the drainage system in Lancer Estates as it  
14 has accepted dedication of this infrastructure or whether streets and  
15 drainage systems are “public improvements.” In Nevada title to  
16 property in developments dedicated or accepted for streets and  
17 easements passes when the final map is recorded and the local  
18 government, “....accept[s] and open[s] the streets for public use.”  
19 Nevada Revised Statutes (“NRS”) 278.390.  
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1           **III. Washoe County is using the Fritzes property as a**  
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3 **floodway for increased runoff from upstream developments**  
4 **without paying for that public use**  
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6           Washoe County argues that the conclusion that accepting privately  
7 constructed roadway and drainage-system dedications is enough for  
8 inverse condemnation will significantly impact development throughout  
9 Nevada (Petition at 7) and that if local governments are required to  
10 insure private development that local governments will simply stop  
11 accepting dedications or the costs associated with development will have  
12 to be passed on to the local governments citizens through a fee or tax.  
13  
14 (Petition at 8)  
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18           This Court has long held that a taking occurs when property is  
19 subjected to intermittent, but inevitable flooding which causes  
20 substantial injury. *County of Clark v. Powers*, 96 Nev. 497, 502 Fn. 3 (Nev.  
21 1980) It has also long been the case that Nevada law provided that a  
22 local government's substantial involvement in the development of  
23 private lands would subject that local government to inverse  
24 condemnation liability. *Id.* at 505. The policy behind this rule as applied  
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1 in this case is that the economic costs incident to the expulsion of  
2 surface waters in the transformation of Lancer Estates and Monte Rosa  
3 from rural and semirural areas into suburban communities should not  
4 be borne solely by the Fritzes, nor similarly situated property owners.  
5  
6 *Id.* at 503.  
7

8  
9 Washoe County's substantial involvement with the development of  
10 Lancer Estates and Monte Rosa was catalogued at length in the Fritzes  
11 Opposition to Washoe County's Motion for Summary Judgment,  
12 located in the Appendix at Bates Nos. 99-121. The Panel's Opinion was  
13 correct to rule that, "genuine issues of material fact exist as to whether  
14 Washoe County's actions constituted substantial involvement in the  
15 drainage system sufficient to deem it a public use." *Fritz v. Washoe Cnty.*,  
16 376 P.3d at 798 (Nev. 2016).  
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22 Nothing in the Panel's Opinion constitutes a sea-change in the  
23 scope of applied inverse condemnation claims in Nevada in cases where  
24 flooding from public improvements damage adjacent properties, as can  
25 be inferred from Washoe County's vociferous objections to the policy  
26 behind the Panel's Opinion. What the Panel's Opinion does do is offer  
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1 a great deal of clarification on the elements of an inverse condemnation  
2 claims in Nevada. *Id.* at 796 Further, the Panel's Opinion clearly adopts  
3 the standard un *Ullrey* that mere planning in not sufficient to show  
4 inverse condemnation. *Id.* at 798. Hence, the Panel's Opinion  
5 reinforces, reaffirms, and clarifies the preexisting rule that local  
6 governments must be sure that the policy goals espoused in *County of*  
7 *Clark v. Powers*, which ensure that the costs of development are not  
8 unconstitutionally borne by the neighbors to development, are  
9 enforceable. Further, the said policy ensures that local governments,  
10 when regulating the development of land, ensure that adequate  
11 measures are taken by developers to protect neighboring property  
12 owners from excess flooding created by development, or that such uses  
13 are adequately addressed in a manner consistent with the the protections  
14 guaranteed by the Nevada and the United States Constitution, i.e. when  
15 property is taken for public use just compensation must be paid.

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25 **IV. The evidence indicates that the taking occurred when**  
26 **the Fritzes owned the property**

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28 Washoe County argues that the Fritzes did not have a valid

1 property interest at the time the County approved the subdivision maps  
2  
3 for Lancer Estates and Monte Rosa or when the County accepted all  
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5 but two of the related dedications and that the Fritzes cannot challenge  
6 government action that occurred before they purchased their property.

7  
8 (Petition at 10)

9 Washoe County's Petition states that the Panel's Opinion  
10  
11 "avoided" an important standing issue. (Petition at 11) However, this  
12 assertion is directly contradicted by the Panel's findings:

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14 The Fritzes alleged that their property was taken by  
15 flooding as a result of heavy rainstorms occurring during  
16 the course of their ownership. The district court made no  
17 findings with regard to when the taking occurred. Thus, a  
18 genuine issue of material fact remains as to the issue of  
19 standing, and we cannot uphold summary judgment on this  
20 ground. *Fritz v. Washoe Cnty.*, 376 P.3d 794, 796. 132 Nev.  
21 Adv. Rep. 57 (Nev. 2016)

22 In other words, the Panel's Opinion correctly ruled that whether the  
23 Fritzes had an interest in the property at the time the taking occurred is  
24 essentially a question of fact which should be considered at the level of  
25 the District Court.  
26

27  
28 In *Argier v. Nevada Power Co.*, 114 Nev. 137 (Nev. 1998), this Court

1 found, in the context of a case where a power company sought to  
2 install power lines that a claim for inverse condemnation does not run  
3 with the land, but vests at the time the land is entered - i.e. when the  
4 power company physically occupied the land to install the power lines.  
5  
6 *Id.* at 140. The taking of the Fritzes Property vested due to a physical  
7 invasion of storm waters, not when Washoe County first approved of  
8 the building plans for Lancer Estates and Monte Rosa, or accepted  
9 dedication of the streets and storm drains in Lancer Estates. Washoe  
10 County impliedly admits that at least some of the actions of Washoe  
11 County complained of by the Fritzes occurred after they purchased the  
12 Property. (Petition at 4 and 10)

13  
14 The U.S. Supreme Court has addressed the issue of damages and  
15 periods of limitation in an inverse condemnation case where flood  
16 damages are continuing and cumulative and the precise moment of  
17 taking cannot reasonably be determined because the physical  
18 occupation takes place over time, which is clearly the case before the  
19 Court. The U.S. Supreme Court concluded that the choice to forgo the  
20 condemnation process by the Government should not force a property  
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1 owner into premature or piecemeal litigation, and that the Court should  
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3 avoid procedural rigidities:

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

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

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

23       Because the flooding on the Fritzes Property is continuing in  
24 nature, and the fact that the gradual, continuing, and ongoing nature of  
25 the development of Lancer Estates and Monte Rosa, determining the  
26 exact date on which physical occupation of the Property that amounted  
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28

1 to a taking occurred extremely difficult if not impossible because  
2  
3 Washoe County left the taking of the Fritzes Property to “physical  
4  
5 events” resulting from the development of Lancer Estates and Monte  
6 Rosa. The primary evidence before the District Court describing these  
7  
8 physical events was in the affidavit of John Fritz, which states that since  
9  
10 2002, he was able to easily walk across the Whites Creek No. 4 and that  
11  
12 since that time, the creek as increased significantly in size and depth  
13  
14 and further erosion and flooding occurs on the Property in question.  
15  
16 (Appx. Vol. 1 at 123) Through this and other evidence, the Fritzes  
17  
18 showed substantial injury sufficient to sustain an inverse condemnation  
19  
20 claim. *Buzz Stew, LLC v. City of N. Las Vegas*, 341 P.3d 646, at 651  
21  
22 (Nev. 2015) The Panel correctly ruled that a genuine issue of material  
23  
24 fact exists as to the standing issue.  
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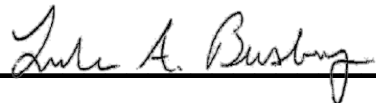
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## CONCLUSION

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

Respectfully submitted this November 27th, 2016

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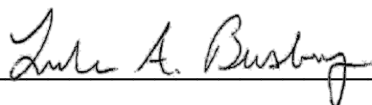
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2  
3 **ATTORNEY'S CERTIFICATE**  
4

5 I hereby certify that this Answer for en banc reconsideration  
6  
7 complies with the formatting requirements of NRAP 32(a)(4), the  
8  
9 typeface requirements of NRAP 32(a)(5) and the type style  
10  
11 requirements of NRAP 32(a)(6) because this brief has been prepared in  
12  
13 a proportionally spaced typeface using Google Docs in Garamond 16  
14  
15 font.

16 I further certify that this petition for en banc reconsideration  
17  
18 complies with the type-volume limitation of NRAP 40A because it does  
19  
20 not exceed 4,667 words.

21  
22 This Answer contains 2,885 words.

23  
24 Respectfully submitted this November 27th, 2016

25 By: 

26 Luke Busby, Esq.  
27 Nevada Bar No. 10319  
28

1  
2  
3  
4 **CERTIFICATE OF SERVICE**

5 I hereby certify that I have on this day served the foregoing  
6 document upon the following parties by U.S. Mail and/or Electronic  
7 Service and/or hand delivery to:  
8

9  
10 Washoe County DA's Office  
11 Attn: Stephan Hollandsworth  
12 Washoe County District Attorney Civil Div.  
13 P.O. Box 11130  
14 Reno, NV 89520

15 Respectfully submitted this November 27th, 2016

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17 By: Luke A. Busby

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