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## Fritz v. Washoe County, 132 Nev. Adv. Op. 57 (Aug. 4, 2016)

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PROPERTY: INVERSE CONDEMNATION

**Summary**

This case involved the question of whether a counties' approval of subdivision maps and street dedications which included flood channels constituted inverse condemnation where the plaintiff's property flooded as a result. The Supreme Court of Nevada adopted a six part element test for inverse condemnation, and determined that genuine issues of material fact existed as to whether the County's actions constituted substantial involvement in the drainage system sufficient to deem it public use.

**Background**

Appellants purchased property neighboring a creek in Washoe County, Nevada known as White's Creek. Prior to the Appellants purchase, Washoe County approved maps for an upstream development, and approved maps for a separate upstream development after the Appellants purchased the property. The County later accepted various street dedications that incorporated drainage systems, which diverted water to Whites Creek. Since the construction of these developments, the Appellants' property has flooded during rainstorms.

Appellants filed for inverse condemnation against Washoe County alleging that the County's approval of the maps and acceptance of the drainage system dedication that diverted water to Whites Creek, caused the flooding to their property. Appellants alleged that this conduct constituted substantial involvement in events that caused the taking of their property. The County sought summary judgment arguing that the Appellants lacked standing for maps it approved prior to Appellants owning the property, and also argued that the conduct pertaining to the maps after the purchase of the property was not substantial enough to give rise to inverse condemnation. In opposing the motion, the Appellants attached documents detailing the County's involvement.

The district court granted summary judgment in favor of the County finding approval of subdivision maps and acceptance of dedications did not amount to substantial involvement sufficient to support a claim for inverse condemnation.

**Discussion**

*Standing*

The County contended that the Appellants did not have standing because the County approved most of the subdivision maps prior to the Appellants' purchase of the land. The Appellants argued that their property was taken by flooding as a result of heavy rain during their ownership. Since, takings claims lie with the party who owned the property at the time the taking

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<sup>1</sup> By Jessie Folkestad.

occurred,<sup>2</sup> and the district court's order failed to determine when the taking occurred; the Court concluded a genuine issue of material fact remained as to the issue of standing.

### *Substantial involvement*

The district court found that the County did approve the maps along with certain dedications; however the court found that this was insufficient to constitute substantial involvement giving rise to a claim for inverse condemnation. However, the Appellants presented evidence that the County also directed a developer to divert water north into Whites Creek. Appellants argued that those actions cumulatively constituted substantial government involvement in public activities, which led to an increase in the flow of water in Whites Creek causing flooding on their property.

As the elements of inverse condemnation had not previously been set forth, the Supreme Court of Nevada held the elements to be as follows: 1) a taking 2) of real or personal interest in private property 3) for public use 4) without just compensation being paid 5) that is proximately caused by a governmental entity 6) that has not instituted formal proceedings.<sup>3</sup> Moreover, although a private party cannot recover in inverse condemnation for property taken by another private party, when a private party and government entity act in concert, government responsibility arises when the government entity was substantially involved "in the development of private lands for public use which unreasonably injured the property of others."<sup>4</sup> In *County of Clark v. Powers*, the government acted with various private parties to cause large amounts of water to be cast upon the property of the plaintiff landowners.<sup>5</sup>

In arriving at its decision, the district court distinguished the present case from *Powers* because unlike in *Powers*, the government conduct could not be described as physical involvement directly attributable to the government entity.<sup>6</sup> The Supreme Court of Nevada agreed with the district court that the facts of *Powers* were distinguishable from the facts of this case. However, the Supreme Court of Nevada found that this distinction was not dispositive of the appeal because although mere planning is insufficient to constitute substantial involvement, the range of actions that can constitute substantial involvement are not limited to physical engagements.

The district court also relied in part on *Ullery v. Contra Costa County* in addressing a novel question of law:<sup>7</sup> "Whether government activities short of physical labor, but with more engagement than mere planning, can constitute substantial involvement in a private development sufficient to constitute public use in support of inverse condemnation." In *Ullery*, the court recognized that a public use cannot be demonstrated by mere subdivision map approval and drew a distinction between merely approving subdivision maps and taking other actions, including

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<sup>2</sup> See *Argier v. Nev. Power Co.*, 114 Nev. 137, 139, 952 P.2d 1390, 1391 (1998).

<sup>3</sup> See *Dickgieser v. State*, 105 P.3d 26, 29 (Wash. 2005); see also *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 645-47, 173 P.3d 734, 738-39 (2007); *Gutierrez v. Cty. of San Bernardino*, 130 Cal. Rptr. 3d 482, 485 (Ct. App. 2011).

<sup>4</sup> See *Cnty. of Clark v. Powers*, 96 Nev. 497, 505 (1980) (finding the government liable for inverse condemnation).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Ullery v. Contra Costa Cnty.*, 248 Cal. Rptr. 727 (Ct. App. 1988).

accepting dedications. The Supreme Court of Nevada, however, held that the district court misapplied *Ullery*. Instead the Court distinguished *Ullery* from the present case, because the Appellants alleged the County did more than merely approve subdivision maps, it also accepted dedications and entered into agreements to direct water to certain areas. Thus, summary judgment was improper.

### **Conclusion**

In reversing the district court, the Supreme Court of Nevada found that under the newly adopted six element test, genuine issues of material fact existed as to whether the County's actions constituted substantial involvement in the drainage system sufficient to deem it public use.<sup>8</sup>

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<sup>8</sup> The Court also found the district court's order granting summary judgment insufficient as it did not explicitly state which facts were undisputed as required by NRCP 56(c).