[Cite as *Belmont Cty. v. Barack*, 2022-Ohio-1452.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

BELMONT COUNTY, OHIO, c/o BELMONT COUNTY COMMISSIONERS,

Plaintiff-Appellee,

v.

LANA J. BARACK, et al.,

Defendants-Appellants.

OPINION AND JUDGMENT ENTRY
Case No. 21 BE 0010

Civil Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 20-CV-163

BEFORE:
Cheryl L. Waite, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Adam L. Myser, Myser & Myser, 320 Howard Street, Bridgeport, Ohio 43912, for Plaintiff-Appellee

Atty. Cory R. Barack, Barack Law LLC, 3201 Belmont Street, Suite 814, Bellaire, Ohio 43906, for Defendants-Appellants.

Dated: March 25, 2022

WAITE, J.

{¶1} Appellants, Lana J. and Roger A. Barack, appeal from a Belmont County Common Pleas Court judgment entry granting Appellee's motion for determination of the necessity for an appropriation. Appellees, Belmont County, Ohio c/o Belmont County Commissioners, sought a finding that the appropriation of 0.076 acres of Appellants' property, located in Pultney Township, was necessary pursuant to R.C. 163.09. Based on the following, the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} Sometime in 2000, the Bellaire community built a new middle school that needed sewer services. The parties began discussions regarding establishment of a sewage pump station. According to the record, Appellants requested that the pump station be located on property they owned rather than on school property. (2/10/21 Tr., p. 28.) It was jointly agreed that the pump station would be placed on a 0.076-acre portion of a 108 acre parcel owned by Appellants, with the understanding that Appellee would acquire a lawful deed or easement from Appellants for the 0.076-acre portion of the parcel. In 2001, construction of the sewer pump station began at the agreed site. The pump station was completed a short time later. According to the record, Appellee has made numerous attempts to engage in negotiations with Appellants about obtaining a legal interest in the pump station property since that time, to no avail.

{¶3} On May 1, 2019, the entire 108-acre parcel was appraised at Appellee's request to determine the fair market value of the property in order to seek appropriation of the pump station property. The appraisal concluded that the 0.076 portion of the property where the pump station was located had a fair market value of $2,000. By a letter dated April 20, 2020, Appellee sent Appellants a notice of intent to acquire, and an offer to purchase, the 0.076 tract of land. Pursuant to R.C. 163.04, the notice included a legal description of the property, the reasons why appropriation was necessary, and the fair market value offer of $2,000. Appellants received the notice via certified mail on April 30, 2020, but did not respond.

{¶4} On June 17, 2020, after it was apparent that Appellants were not planning to engage in good faith negotiations regarding the appropriation, Appellee passed a resolution to appropriate the property for public use. On June 19, 2020, Appellee filed a complaint for appropriation with the trial court. On July 27, 2020, Appellants filed an answer containing counterclaims, which was amended on November 2, 2020. Appellants raised the affirmative defenses of illegality, laches, and estoppel. Their counterclaims included abuse of process, abuse of discretion, abuse of authority, unconstitutional taking, negligence, unjust enrichment, conversion, slander of title, nuisance, a violation of open records law, as well as seeking a declaration that Appellee acted unlawfully and abused its power.

{¶5} In a letter dated November 19, 2020, counsel for Appellee once again reached out to Appellants, this time to inquire if they would be interested in settling the matter through mediation. Appellants declined. On November 20, 2020, Appellee filed its answer to Appellants' counterclaims. Appellants began discovery, sending Appellee

interrogatories, production of documents, and requests for admissions. The documents requested included telephone records from the time the sewer pump was first proposed in the year 2000. On February 3, 2021, Appellants filed a motion requesting Appellee's unanswered discovery questions admitted and an order compelling Appellee to respond to the outstanding interrogatories and requests for production of documents. On February 5, 2021, Appellee filed notice that it had filed answers to the outstanding discovery requests with Appellants' counsel. On that same day, Appellee filed a motion for determination of the necessity for an appropriation and hearing pursuant to R.C. 163.09. Counsel for the Appellants was served with the notice on the same day. The trial court set the matter for a necessity hearing on February 10, 2021. Both parties appeared at the hearing with counsel. Appellee presented the testimony of Belmont County Commissioner Josh Meyer as well as the testimony of Kelly Porter, the Director of the Belmont County Water and Sanitary Sewer District. On direct examination, Meyer testified that he had been a commissioner for approximately seven years and that he was made aware of the sewer pump location. It served Bellaire Middle School and the surrounding community. He also stated that, since he has been commissioner, he was aware that several attempts were made to negotiate with Appellants for title in the property, to no avail. He also testified regarding the passing of the resolution by the commissioners to move forward with the appropriation action.

{¶6} Prior to cross-examination of Meyer, the following exchange occurred:

> DEFENSE COUNSEL: To start, Your Honor, I would like to make a note on the record that right now is the first time that I've been made aware there would be a witness.

The first time that I and my client had any notice of this hearing was on Monday morning, when I received a call from the office.

The law says this type of hearing has to be done within five to 15 days. So we've had less than two days of notice to prepare, and the statement that plaintiff's counsel made about bifurcation, that's the first I've heard of it as well.

I understand what we're doing here. I understand that the law says there is a necessity hearing that is supposed to be part of an eminent domain action whenever the landowner files an answer.

So I understand what we're doing, but I object to the fact that this is has been thrown on us. And now there is a witness here that I'm asked to cross-examine, and apparently another witness, who I've had—and I know who they are, but until two minutes ago, I had no idea that there were going to be witnesses or exhibits.

THE COURT: Now [Appellants' counsel], you do understand this is not about the valuation?

DEFENSE COUNSEL: Yes, sir. Yes, sir.

THE COURT: The jury is going to determine that.

DEFENSE COUNSEL: Yes, sir.

THE COURT: Or by agreement of parties.

DEFENSE COUNSEL: Yes. I do agree with that, or I understand that statement, Your Honor.

And I know [plaintiff's counsel] knows this as well. He's acknowledged—we do have counterclaims in this case, so it is—my client is not concerned only with the value. We have valid claims about how this appropriation action has taken place, and I understand that this necessity hearing is not going to address those claims. This is just one part of it.

But, as to the importance of this necessity hearing, to my client and I, it is a very, very critical part of this. So if we were to lose at this necessity hearing, it's another strike against our case.

I don't see this necessity hearing as just something that where we're checking a box. We should have time to prepare for it.

THE COURT: Are you asking for a continuance?

DEFENSE COUNSEL: Yes, sir.

THE COURT: [Plaintiff's Counsel]?

* * *

PLAINTIFF COUNSEL: And I know that we had a pretrial on this matter. We've had multiple black[sic]-and-forth discussions, and unfortunately have not had a lot of progress in regards to those discussions.

We are asking the Court simply to follow the statutory, not guidelines but requirements as it pertains to appropriation actions. We're asking the Court to have this hearing.

We had respectfully requested the Court to set this as soon as possible given the time frames of when the answers were filed.

This particular hearing is in regards to specifically whether or not this property is necessary, and this particular property has had an aboveground structure on it for what has already been testified to for some time, over 20 years.

So we believe that no further movement, that we need to continue to follow the statutory requirements as it pertains to necessity in this appropriation action.

(2/10/21 Tr., pp. 11-14.)

{¶7} The trial court overruled the oral motion and the hearing proceeded. On cross-examination, Meyer was asked why the resolution authorizing the appropriation was recently passed when the pump had been built and in operation for twenty years. Meyers stated that it became obvious that Appellants were not going to engage in any negotiations. He was also asked if the timing of the appropriation was related to the

"multiple grants and loans from the U.S. Department of Agriculture that were applied for by the county?" (2/10/21 Tr., pp. 16-17.) Meyer affirmed that the appropriation may have been related to obtaining grants and loans for the county.

{¶8} Porter testified on direct that he had been the director of the water and sewer district for approximately five years and was a project manager for the county prior to that time. He testified the pump station was completed sometime in 2002. He testified that the pump station portion of the property measures 58 feet x 57 feet. The pump station was responsible for pumping sewage from the Bellaire Middle School and surrounding community out to the East Ohio Regional Waste Authority, and the pump station was in constant use and necessary. On cross-examination Porter was asked why the county took so many years to file the action. Porter stated that in 2009 or 2010, while working on another project, officials realized the county did not have title to the pump station property and that a county USDA loan required the county to hold title to all aboveground structures and easements for underground pipelines. Porter also testified:

> This has been a process that has carried on 20 years. We were just really hoping just to be able to get this issue taken care of.
>
> We have attempted to take care of the easement areas with your client multiple times in the past and had multiple meetings with multiple attorneys and came to no resolution.

(2/10/21 Tr., p. 27.)

{¶9} On February 19, 2021, the trial court issued a special entry finding that the appropriation of the 0.076 tract of Appellant's parcel was necessary.

{¶10} Appellants filed this timely appeal.

ASSIGNMENT OF ERROR NO. 1

The trial court erred when it violated Appellants' procedural due process rights.

ASSIGNMENT OF ERROR NO. 4

The trial court erred by failing to hold the necessity hearing within the timeframe prescribed by Ohio law.

{¶11} In the first and fourth assignments of error, Appellants raise the issue of whether the trial court violated their procedural due process rights by failing to reasonably schedule and conduct the necessity hearing, causing prejudice to Appellants. In their first assignment of error, Appellants contend the trial court abused its discretion by holding "a rushed necessity hearing that infringed upon Appellants' due process rights." (Appellants' Brf., p. 4.) In their fourth assignment of error, Appellants argue the opposite: that the trial court unfairly prejudiced Appellants by not conducting the hearing within the statutory timeframe. As both assignments relate to the timing of the necessity hearing in this matter, they will be addressed together.

{¶12} We review a trial court's decision to hold a hearing for an abuse of discretion. In determining whether the trial court abused its discretion, a reviewing court will not independently assess and reweigh each factor, as our review is limited to the narrow determination of whether the trial court abused its discretion. A trial court abuses its discretion if its decision is unreasonable, arbitrary or unconscionable. *AAAA Ents.,*

Inc. v. River Place Community Urban Redev. Corp., 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). An unreasonable decision cannot be supported by any sound reasoning process. *Id.* An arbitrary decision is made without consideration of the facts or circumstances. *State v. Beasley,* 152 Ohio St.3d 470, 2018-Ohio-16, 97 N.E.3d 474, ¶ 12. An unconscionable decision is one that affronts "the sense of justice, decency, or reasonableness." *Hise v. Laiviera,* 7th Dist. Monroe No. 18 MO 0010, 2018-Ohio-5399, ¶ 29, quoting *State v. Waugh,* 10th Dist. No. 07AP-619, 2008-Ohio-2289, ¶ 13.

{¶13} The U.S. Constitution and the Ohio Constitution address a citizen's rights to property. U.S. Const. Amend. 14; Oh. Const. Art. I, § 16. Due process requires that notice be given to those whose property interests are at issue in a legal proceeding. This notice must be "reasonably calculated, under all the circumstances, to apprise those persons of the pendency of the action and afford them the opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652 (1950). "Although the concept is flexible, at its core, procedural due process under both the Ohio and United States Constitutions requires, at a minimum, an opportunity to be heard when the state seeks to infringe a protected liberty or property right." *State v. Cowan,* 103 Ohio St.3d 144, 2004-Ohio-4777, 814 N.E.2d 846, ¶ 8, citing *Boddie v. Connecticut,* 401 U.S. 371, 377, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

{¶14} The exercise of the eminent domain power is discretionary and "[t]he decision of a legislative body to appropriate a particular piece of property is afforded great deference by the courts. *Pepper Pike v. Hirschauer,* 8th Dist. Cuyahoga Nos. 56963, 56964, 56965, 57667, 1990 WL 6976, at *2 (Feb.1, 1990). R.C. 163.09(B) allows for judicial review of a decision to appropriate property in order to determine: (1) whether the

legislation's determination that the appropriation is necessary was an abuse of discretion; (2) whether the legislature's allegation in its petition that the parties could not agree is true; and (3) whether the legislature has the right to appropriate the property. *Akron v. Tractor Place, Inc.,* 9th Dist. Summit No. 21379, 2003-Ohio-4531, ¶ 10.

{¶15} R.C. Chapter 163 et seq. governs the appropriation of property. Statutory provisions regarding the use of eminent domain are strictly construed against the governmental agency and a heightened scrutiny must be applied in reviewing such statutes. *Norwood*, ¶ 10. Prior to filing a petition for appropriation, the agency seeking the appropriation of property must satisfy the requirements set forth in R.C. 163.04. One of those requirements is that the agency must provide notice to the owner of the agency's interest in acquiring the property at least thirty days prior to filing a petition for appropriation. R.C. 163.04(A). It is not disputed that Appellants received Appellee's notice of intent more than thirty days prior to filing the petition.

{¶16} Next, R.C. 163.04(B) requires that, after providing notice but not less than thirty days before filing a petition, the agency must provide the owner with a written good faith offer to purchase the property. A review of the record reveals that Appellee provided Appellants with an offer to purchase along with the notice of their intent to appropriate. R.C. 163.04(C) requires that the agency obtain an appraisal of the property and provide a copy of the appraisal to the owner. A full copy of the appraisal in this matter was attached to the notice of intent. The record shows Appellants received the combined notice of intent and good faith offer to purchase with the appraisal attached on April 30, 2020 by certified mail.

{¶17} R.C. 163.04(D) provides that an agency may appropriate real property only after the relevant parties are unable to agree on a conveyance or the terms of a conveyance. Appellee asserts, and Appellants do not dispute, that all of Appellee's attempts at reaching an agreement or even beginning negotiations after the notice was received were ignored by Appellants. Thus, it is clear from this record that the parties were unable to reach an agreement on the conveyance.

{¶18} On June 17, 2020, approximately two months after Appellants had received notice, the Commissioners passed a resolution declaring the necessity for the appropriation. Pursuant to R.C. 163.09(B)(1)(a), this legislative act creates a rebuttable presumption of the necessity for the appropriation. Appellee filed its complaint seeking appropriation on June 19, 2020. Appellants filed an answer and counterclaims on July 27, 2020, followed by an amended answer and counterclaims on November 2, 2020. R.C. 163.09(B) provides that when an answer is filed and any matters relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation are specifically denied, then the court shall set a day not less than five nor more than fifteen from the date of filing of the answer to hear such questions. R.C. 163.09(B). The statute specifically states the burden of proof is on the property owner. *Id.* Thus, once Appellants filed their answer raising specific facts supporting their denial of the necessity of the appropriation, the trial court had the duty, as a matter of law, to set the matter for hearing within the five to fifteen-day timeline. R.C. 163.09(B). See *Weir v. Wiseman,* 2 Ohio St.3d 92, 443 N.E.2d 152 (1982).

{¶19} It is not clear from the record whether the trial court reviewed the answer to determine if it contained the specificity necessary to require that the hearing be held within

15 days and no hearing was scheduled in that time. However, this record reveals Appellants did not initially file a motion seeking a necessity hearing. It was Appellee which ultimately sought a hearing on the matter. While the right to a necessity hearing may also be enforced through a writ of mandamus, *State ex rel. Horwitz v. Cuyahoga Cty. Court of Common Pleas,* 65 Ohio St.3d 323, 603 N.E.2d 1005 (1992), Appellants chose not to seek a writ of mandamus. Instead, Appellants opted to pursue the matter through litigation on the complaint and conducted extensive discovery, including requests for production of documents that had been drafted and exchanged over a span of 19 years. In an apparent attempt to bring the matter to a head, Appellee filed its request for a necessity hearing on February 5, 2021 when it filed a Motion for Determination of Necessity for Appropriation. Appellants' counsel was served with this motion and request for hearing on the same day. While the hearing was set to occur five days later, on February 10, 2021, this was far beyond the 15-day period following Appellant's filing of their amended answer on November 2, 2020. Our sister districts have held that when a party fails to pursue their right to an immediate necessity hearing and proceeds instead with discovery requests, the right to an immediate necessity hearing has been waived. See *Ohio River Pipe Line, LLC v. Henley,* 144 Ohio App.3d 703, 761 N.E.2d 640 (5th Dist.2001); See also *Madison Cty. Bd. of Commrs. v. Bell,* 12th Dist. Madison No. CA20065-09-036, 2007-Ohio-1373, ¶ 59-60. In *Toledo v. Bernard Ross Family Ltd. Partnership,* 165 Ohio App.3d 557, 2006-Ohio-117, 847 N.E.2d 466 (6th Dist.), the Sixth District held that simply failing to pursue the right to a necessity hearing even absent any discovery requests by the landowner waived the right on appeal to raise the issue of a timely necessity hearing. *Id.* ¶ 31.

{¶20} This record demonstrates the trial court did not hold a necessity hearing in this matter within the statutory five to fifteen-day timeline. However, because Appellants failed to take action to exercise their right to a necessity hearing, the trial court did not abuse its discretion by holding this hearing well beyond the statutory timeframe. Appellants were clearly not prejudiced in the delay. In fact, their other argument is based on the trial court's "rush" to a hearing, because they contend that they did not receive sufficient time to prepare for the hearing. Based on the record, here, Appellants had ample time to prepare for the necessity hearing, since they actually had much more than five to fifteen days. This record shows Appellants were aware Appellee sought to appropriate the land for several years. Regardless, Appellants received the notice of intent to appropriate and offer on April 30, 2020 and the appropriation complaint was filed June 19 of that year. Appellants filed their amended answer and counterclaim November 2. Hearing could have been set five to fifteen days thereafter by law. Hearing was not held until February 10, 2021. Based on this, it is apparent that Appellants were afforded their procedural due process. Moreover, we conclude that, where, as here, Appellants failed to pursue its right to an immediate hearing on necessity and instead opted to proceed with extensive discovery requests, the right to raise the issue on appeal has been waived. See *Henley at 704; Bell* at ¶ 59-60.

{¶21} Appellants' first and fourth assignments of error are without merit and are overruled.

ASSIGNMENT OF ERROR NO. 2

> The trial court erred when it overruled Appellants' motion for continuance of the necessity hearing.

{¶22} Appellants contend the trial court abused its discretion in denying the motion for a continuance.

{¶23} It is well established that a trial court has supervisory control over its own docket. *State ex rel. Buck v. McCabe,* 140 Ohio St. 535, 537, 45 N.E.2d 763 (1942). Thus, the court has broad discretion in determining whether to grant a motion for a continuance. *State v. Unger,* 67 Ohio St.2d 65, 423 N.E.2d 1078 (1981), syllabus. A reviewing court will not reverse a trial court's ruling on such a motion absent an abuse of discretion. *Buck* at 537-538.

{¶24} When considering a motion for a continuance, a trial court may consider certain factors such as the length of the delay requested, the reason for the delay, prior continuances, inconvenience to the parties, and whether the movant has contributed in any way to the delay. *State v. Ahmed,* 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, ¶ 44. The court may also consider any other unique facts of the case in making its determination. *Unger* at 67. The trial court must balance any potential prejudice to a party against the court's right to manage its docket and the public's interest in judicial economy. *Id.* Ohio courts have long recognized a party has a right "to a reasonable opportunity to be present at trial and a right to a continuance for that purpose." *Hartt v. Munobe,* 67 Ohio St.3d 3, 9, 615 N.E.2d 617 (1993). However, a party is not entitled to an unreasonable delay of a matter. *Id.* at 68.

{¶25} A review of this record clearly shows the trial court did not abuse its discretion in denying Appellants a continuance. Counsel for Appellants argued that the hearing was tantamount to an "ambush" because he was not made aware of the witnesses and exhibits that Appellee intended to present at the hearing. This assertion

appears dubious, at best. First, although Appellants claim Appellee had four witnesses, there were only two: Porter; who is the director for the Belmont County Water and Sewer District, and Meyer; one of the three Belmont County Commissioners. Neither of the two witnesses could accurately be characterized as "surprise" witnesses, as both had been directly involved with Appellants and the issue of the appropriation for a substantial number of years, and would be expected to testify for Appellee. Second, although Appellants argue that they could not adequately prepare a cross-examination of the witnesses, both witnesses gave predominantly foundational testimony regarding the existence of the sewer pump station and the timeline of events. Meyer also authenticated the resolution to proceed with the appropriation passed by the Commissioners. It is undisputed that Appellee informed Appellants in their response to an interrogatory that "one of the available commissioners" would appear as a witness at the hearing. While there were three commissioners and Appellee did not specify which one would appear on Appellee's behalf, the foundational testimony of the commissioners regarding the resolution would not have varied widely and certainly not to a degree that would make preparing for cross-examination burdensome for Appellants.

{¶26} Other pertinent factors in determining whether the trial court abused its discretion in failing to grant a continuance are whether the parties or the court would be inconvenienced and whether the movant contributed to the delay. Appellants in this case were aware of Appellee's intention to obtain title to the property as far back as the year 2000 when the project began and, according to the record, had offered their property as the site for the station. Additionally, Appellants do not contest they were properly served with the notice to appropriate and offer to purchase within the required 30-day statutory

timeframe. The notice clearly delineates the statutory requirements, including the ability to hold a necessity hearing within the five to fifteen-day timeframe set forth in R.C. 163.04. Appellants' counsel acknowledged at the hearing that he was aware of the statutory requirements and that such a hearing would be held. He received the appropriate notice advising him the hearing was set and he was well aware of its purpose. Again, the parties had years to prepare for a necessity hearing. Therefore, to characterize the timing of the hearing as an "ambush" is disingenuous at best. Appellants had purposefully chosen to ignore all communications from Appellee throughout the past twenty years. They cannot argue that they were caught unaware. This argument is particularly suspect because Appellants argue in this same appeal that the trial court erred in not conducting the necessity hearing much earlier in the proceedings, in direct contradiction to their assertion here that the trial court erred in failing to grant a continuance to extend the matter even further.

{¶27} Lastly, Appellants contend they were not informed of the exhibits that Appellee intended to introduce at the hearing. However, the exhibits presented at trial consisted of the 2019 appraisal of the property as well as a copy of the resolution passed by the county commissioners to proceed with appropriation. Both of these documents were attached as exhibits and sent to Appellants along with the notice of appropriation on April 30, 2020, as required by R.C. 163 et seq.

{¶28} Thus, in considering the relevant factors as well as the unique facts of this particular case, it is apparent the trial court did not abuse its discretion in denying Appellants' motion for a continuance in this matter.

{¶29} Appellant's second assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 3

The trial court erred by ruling in favor of Appellee, because Appellee attempts to appropriate more real property than legally necessary.

{¶30} In their third assignment of error, Appellants claim the trial court erred in ruling in favor of Appellee at the necessity hearing and concluding that Appellants were entitled to a fee simple interest in the property when Appellee required only a surface easement.

{¶31} Judicial review in eminent domain cases is narrow in scope; however, state actions must be reviewed to ensure the necessary restraint is exercised, including ensuring that the state does not take more than that which is necessary to promote the public use. *Norwood,* at 373. Here, Appellant argues Appellee only needed to obtain a surface easement for the sewer pump station rather than a fee simple interest in the 0.076 acre plot.

{¶32} A review of the record, including a transcript of the hearing, reveals that Appellants never raised the issue of a fee simple interest versus a surface easement during the necessity hearing. This issue is being raised for the first time on appeal despite the twenty-year existence of the sewer pump station. Again, the necessity hearing in this matter was required pursuant to R.C. 163.09. At this hearing, Appellants bore the burden of rebutting the presumption that the appropriation was necessary. In Appellants' brief they provide details regarding such issues as the placement of sewer lines on the property, sewer gravity flow, and other alleged encroachments that Appellants claim would cause the county's appropriation of the parcel to interfere with their property rights.

None of these arguments were presented by Appellants at the necessity hearing, and so, were not before the trial court. It is axiomatic that arguments raised for the first time on appeal are improper under Ohio law. *Ohio Farmers Ins. Co. v. Estate of Brace,* 116 Ohio App.3d 395, 401, 688 N.E.2d 298 (10th Dist. 1997). Further, all of Appellants' arguments rely on facts not found in this record, and so also may not be considered on appeal. Even if Appellants had properly raised and supported this issue at hearing, the claim that the trial court impermissibly allowed Appellee to appropriate more of the property necessary for public use would likely fail. Appellants' participation in the appropriation process and hearing was minimal at best. However, there is no evidence that the sewer pump station was not properly moving sewage or that placement of the sewer lines compromised Appellants' property rights. It appears that Appellants requested that the station be placed at this particular location on their property. Prior to the filing of the complaint for appropriation, the sewer pump station had been in place and serving Bellaire Middle School and the surrounding community for nearly twenty years, apparently without issue. Appellants were on notice for all of those years that Appellee sought title to the plot of land on which the pump station was located and at no time before or at the hearing suggested that appropriation of the property was an overreach. The record does clearly support the necessity of the appropriation and Appellants failed to meet their burden in any way.

{¶33} Because a hearing was conducted specifically to address the necessity of appropriation of the twenty-year-old pump station and the property on which it sits and Appellants failed to raise the issue of overreach, we decline to consider this new issue on appeal. Appellants' third assignment of error is without merit and is overruled.

{¶34} Based on the foregoing, Appellants' assignments of error are without merit and the judgment of the trial court is affirmed.

Robb, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs to be taxed against the Appellants.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.