[Cite as *State ex rel. River City Capital v. Clermont Cty. Bd. of Commrs.*, 2011-Ohio-4039.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE ex rel. RIVER CITY CAPITAL, et al.,	:	
	:	CASE NO. CA2010-07-051
Petitioners-Appellants,	:	O P I N I O N
	:	8/15/2011
- vs -	:	
	:	
BOARD OF COUNTY COMMISSIONERS, et al.,	:	
Respondents-Appellees.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2007CVH01114

Katz, Teller, Brant & Hild, James F. McCarthy III, 2400 Chemed Center, 255 East 5th Street, Cincinnati, Ohio 45202, for petitioners-appellants

Donald W. White, Clermont County Prosecuting Attorney, Mary Lynne Birck, 101 East Main Street, 3rd Floor, Batavia, Ohio 45103, for respondents-appellees, Clermont Cty. Bd. Of Commrs., Robert L. Proud, Mary Walker and R. Scott Croswell

Manley Burke, LPA, Timothy M. Burke, 225 West Court Street, Cincinnati, Ohio 45202-1053, amicus curiae for Furniture Row USA, Inc.

PIPER, J.

{¶1} Petitioner-appellant, River City Capital, L.P. (River City), appeals the decision of the Clermont County Court of Common Pleas denying its petition for a writ of mandamus to compel the Board of Commissioners of Clermont County (Clermont County) to institute an

appropriation action. We affirm the decision of the trial court.

{¶2} River City owns property in a commercial district off of State Route 32, in Clermont County. River City's property is located along the northern boundary of the commercial district, home to large retail stores such as biggs, Sam's Club, and Wal-Mart, as well as smaller stores and restaurants.

{¶3} In 1984, River City's general partner, Anthony Nickert, acquired the property in trust from Eastgate Square Associates. Prior to the 1984 purchase, River City hired a professional engineering firm, Thomas Graham & Associates, to review and investigate the land. The firm was able to locate and identify existing water retention areas, underground storm water pipes, and was able to explain to River City how the storm water in the area was retained and distributed.

{¶4} At the time of the 1984 purchase, the pertinent survey plat referenced a 15-foot-wide storm sewer easement. The storm water pipes on the property were located within the easement and installed as of the date of the 1984 purchase.

{¶5} The commercial district, of which River City's property is a part, has progressed from farmland in the late 1970s to its current commercial expanse by gradually adding service centers, fast food restaurants, and large retail stores. With each new development, impervious surfaces such as buildings, rooftops, parking lots, driveways and streets, have added to the drainage watershed, or natural drainage area that contributes storm water to a single point. The River City property is located in a 280-acre watershed where more than 70 percent of the area is covered with impervious surfaces of residential and commercial developments and public roadways. Because the impervious surfaces prevent natural drainage and alter the characteristics of the drainage, the volume and velocity of storm water runoff has increased with each new addition to the area.

{¶6} In order to manage the runoff, Clermont County required the commercial district

developers to design and build a water management system, and only issued building permits for development in the watershed once it approved the water management plans. However, Clermont County did not require the developers to construct the water systems in any particular way, nor did it require the runoff to be directed to River City's pipes.

{¶7} The storm water management system in place throughout the 280-acre watershed is comprised of open channels, retention facilities, underground pipes, inlets, curbs, gutters, manholes, and catch basins. The management system ultimately drains the runoff storm water from the watershed area into two water pipes on the River City property, one a 36-inch pipe, and the other a 72-inch pipe. The 36-inch pipe runs near a McDonald's and crosses the River City property before emptying into the 72-inch pipe that runs under River City's property. Another 72-inch pipe runs to the west of River City's property, once occupied by Oak Express, and connects to the 72-inch pipe on the River City Property. River City's 72-inch pipe then connects into a catch basin and drains into a public 72-inch pipe under State Route 32 before eventually emptying into Jackson Lake, located north of State Route 32.

{¶8} A main element of the water management system is a man-made retention pond built by a developer on approximately three acres of private land to the southwest of the River City property. Between 70 percent and 85 percent of the storm water runoff from the watershed drains into the pond before emptying through the 72-inch pipe under the Oak Express property. The water from the Oak Express property, as mentioned above, ultimately empties into the 72-inch pipe on River City's property.

{¶9} The River City property is also burdened with and subject to several easements, including sanitary sewer, waterline, access, and a reciprocal easement agreement with McDonald's for the pipe mentioned above.

{¶10} In 1996, Clermont County accepted the dedication of Eastgate Drive, Eastgate

South Drive, and Clepper Lane by the developer. These roads surround the River City Property, and with the dedication, Clermont County became the owner of the roads and was responsible for their maintenance and control. Prior to accepting the dedications, Clermont County inspected the roads and accompanying storm water facilities, and was aware of the way in which the watershed drained into the pipes on River City's property that acted as a connection between the public storm water facilities beneath Eastgate South Drive and those beneath State Route 32.

{¶11} In 2001, a portion of the 72-inch pipe on River City's property failed and collapsed because of improper installation and corrosion of the metal pipe. Instead of a concrete or cement pipe, which would have been the proper material under the circumstances, the metal pipe corroded from improper backfilling as well as salt runoff from private parking lots and public and private streets.

{¶12} Representatives from River City, Oak Express, and others met with a Clermont County engineer on the River City property to discuss the expanding sink hole created by the pipe's collapse. River City and the other interested parties continued to explore repair options, and discussed who bore the responsibility for repairing the storm water pipes. After approximately four months passed from the time of the collapse, the Clermont County prosecuting attorney issued a letter stating that Clermont County was under no obligation to maintain or repair the 72-inch pipe on River City's property, and immediate action needed to be taken to repair the problem before flooding caused damage to the roads and structures.

{¶13} River City hired FOPPE Technical Group to inspect and test the backfill placement for new pipe sections, and hired Nixco Plumbing to install the water pipe on the River City property and also under the Oak Express property once a 30-foot manhole on River City's property collapsed and crushed sections of the 72-inch pipe under Oak Express' property. Nixco also repaired gas service and sanitary sewers that had been damaged as a

result of the collapses. The cost of these repairs exceeded $270,000.

{¶14} In April 2003, River City commenced an action against Clermont County in the United States District Court for the Southern District of Ohio, alleging a taking claim pursuant to the Fifth and Fourteenth Amendments, as well as a due process claim, a nuisance claim, and a claim for a writ of mandamus. The district court held a bench trial and issued a decision in September 2005. *River City Capital L.P., v. Bd. of Cty. Commrs.* (S.D.Ohio 2005), Case No. C-1-03-289, 2005 WL 2211303. On appeal, the Sixth Circuit dismissed the case for lack of subject matter jurisdiction, finding the alleged claims were not ripe for a federal venue where River City had not fully exhausted state law remedies. *River City Capital, L.P. v Bd. of Cty. Commrs.* (C.A.6, 2007) 491 F.3d 301.

{¶15} In 2007, River City commenced an action against Clermont County in the Clermont County Court of Common Pleas, alleging a taking and requesting a writ of mandamus, alleging a due process violation, and a nuisance claim. Clermont County filed a motion for summary judgment, claiming that it was immune from suit, and the trial court denied the motion. On appeal to this court, we affirmed the decision of the trial court regarding immunity, and found that genuine issues of material fact remained to be litigated. *State of Ohio ex. rel. River City Capital, L.P., v. Bd. of Clermont Cty. Commrs.*, Clermont App. No. CA2008-12-110, 2009-Ohio-4675.

{¶16} The Clermont County Court of Common Pleas held a bench trial over three days in March 2010, during which it heard testimony from expert witnesses, and accepted as an exhibit the testimony from the hearing held before the federal district court. The parties agreed that the sole issue before the trial court was whether Clermont County took River City's property and if so, on what date the taking occurred. In doing so, the parties agreed to bifurcate the trial of River City's other claims because the disposition of the other claims was dependent upon whether a taking occurred.

{¶17} After the trial, the trial court found that Clermont County had not taken River City's property, and even if it had, the statute of limitations for bringing an appropriations action had tolled, thus barring any of River City's claims based on a taking. River City now appeals the decision of the trial court, raising the following assignments of error. Because we find River City's second assignment of error dispositive of this appeal, we will address it first.

{¶18} Assignment of Error No. 2:

{¶19} "THE TRIAL COURT ERRED IN FINDING THAT CLERMONT COUNTY HAD NOT TAKEN RIVER CITY'S PROPERTY."

{¶20} In River City's second assignment of error, it argues that the trial court erred by finding that Clermont County did not take its property. We disagree.

{¶21} River City sought a writ of mandamus, compelling Clermont County to institute an eminent domain proceeding under R.C. Chapter 163 to compensate it for the alleged taking of its property. River City's request for a writ is based on the theory that Clermont County took its property according to Section 19, Article I of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

{¶22} "Mandamus should issue in this case only if appellant shows (1) that appellant has a clear legal right to the relief requested; (2) that appellee is under a clear legal duty to perform the requested act; and (3) that appellant has no plain and adequate remedy in the ordinary course of law." *State ex. rel. Ney v. Niehaus* (1987), 33 Ohio St.3d 118, 118-119, citing *State ex rel. Middletown Bd. of Edn. v. Butler Cty. Budget Comm.* (1987), 31 Ohio St.3d 251, 253. "The facts and proof submitted to establish these criteria must be 'plain, clear, and convincing before a court is justified in using the strong arm of the law by way of granting the writ.'" *State ex rel. Berquist v. Bd. of Trustees of the Ohio Police and Fire Pension Fund*, 174 Ohio App.3d 516, 2008-Ohio-278, ¶12, quoting *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141, 161.

{¶23} "When an appellate court reviews a denial of a writ of mandamus, the standard of review employed is abuse of discretion. This standard requires more than a determination by the reviewing court that there was an error of judgment, but rather that the trial court acted unreasonably, arbitrarily, or unconscionably." *Truman v. Village of Clay Center*, 160 Ohio App.3d 78, 2005-Ohio-1385, ¶16. (Internal citations omitted.)

{¶24} In the context of takings, "the United States and Ohio Constitutions guarantee that private property shall not be taken for public use without just compensation. Mandamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged." *State ex rel. Shemo v. City of Mayfield Heights*, 95 Ohio St.3d 59, 63, 2002-Ohio-1627.

{¶25} Two main theories exist for establishing a taking, one based on land-use or zoning regulations and the other, on physical invasions by the government. "The United States Supreme Court has consistently held that 'application of land-use regulations to a particular piece of property is a taking only if the ordinance does not substantially advance legitimate state interests * * * or denies an owner economically viable use of his land.'" Id., quoting *United States v. Riverside Bayview Homes, Inc.* (1985), 474 U.S. 121, 126, 106 S.Ct. 455. Regarding physical invasions, "any direct encroachment upon land, which subjects it to a public use that excludes or restricts the dominion and control of the owner over it, is a taking of his property, for which he is guaranteed a right of compensation ***." *State ex rel. Gilbert v. City of Cincinnati*, 125 Ohio St.3d 385, 2010-Ohio-1473, ¶29, quoting *Norwood v. Sheen* (1933), 126 Ohio St. 482, paragraph one of the syllabus.

{¶26} Essentially, River City asserts that Clermont County has taken its property by gradually encroaching upon its land and subjecting the pipes that run beneath its property to public use. In support of this contention, River City cites to Clermont County's regulatory mandate that development in the watershed area cannot occur unless the developer submits

water drainage plans, and those plans are approved. While it is true that the majority of water now drains through River City's pipe, the record is clear that Clermont County never required the developers who sought approval for building plans to route their water runoff through River City's pipes, or in any way promulgated regulations that necessarily involved River City's property. Nor did Clermont County design the plans, or assure developers that the best possible method of managing storm water was to directly involve River City's pipes or property.

{¶27} Several courts have found that repeated flooding of private property from government-owned sewer and water management systems constitutes a taking. See *State ex rel. Livingston Court Apartments v. City of Columbus* (1998), 130 Ohio App.3d 730; and *State ex rel. Gilbert v. City of Cincinnati*, 125 Ohio St.3d 385, 2010-Ohio-1473. However, the evidence demonstrates that the runoff water that empties into or runs through River City's pipes does so as a result of water management systems created by private owners so that commercial lots could be developed. Further, River City is unable to demonstrate that Clermont County owned or operated the pipes, or that it was in any way responsible for the pipe's collapse.

{¶28} Next, River City argues that Clermont County began using the pipes on its property once the road dedication occurred. River City asserts that because Clermont County accepted the dedication of the roads, it also accepted responsibility for the curbs, gutters, and catch basins above ground, and the storm water pipes beneath them that drain through the River City pipes.

{¶29} Initially, we note that River City was not the party that dedicated the streets for public use, and the streets were not River City's property before the dedication. However, even if River City had owned and dedicated the roads, the dedication itself states that, "Clermont County Commissioners assume no legal obligation to maintain or repair any open

drainage ditches or channels designated as 'drainage easements' on this plat. The easement area of each lot and all improvements with it shall be maintained continuously by the lot owner. Within the easements, no structure, planting, fencing, culvert or other material shall be placed or permitted to remain which may obstruct, retard, or divert the flow through the water course." The street dedication specifically states that Clermont County did not accept the legal obligation to maintain or repair the pipes, and instead, the obligation remained with the lot owner.

{¶30} Moreover, Clermont County took no action to increase or modify the drainage after dedication of the street. There is no evidence on the record that River City's pipes were burdened to any greater degree due to Clermont County's action or inaction once it accepted the dedication. Instead, the street dedication did not alter the way the runoff water management system worked or in any way increased the burden on River City's pipes, as water from the streets had drained into the system before the dedication the same way it did after the dedication.

{¶31} River City next argues that Clermont County took its property through the prosecuting attorney's letter demanding repair of the pipe and water drainage situation in order to protect the general public. In support of its contention, River City claims that the letter, in addition to the general policy regarding watershed management, placed a higher burden on River City as a single property owner that was "drastically out of proportion" to the percentage of runoff actually created by River City's developments.

{¶32} However, the letter, written by the Clermont County prosecuting attorney, did not amount to a physical invasion of River City's property. The letter, addressed to River City's occupant, stated that the Clermont County prosecutor represented the Clermont County Engineer, and that the Engineer had been forced to close part of Eastgate Drive because of the flooding and the collapsed pipe. The letter went on to state that Clermont

County "searched the records and found no dedication to public use pertaining to the storm sewer easement as it runs across" the McDonald's, Oak Express, or River City properties. Clermont County concluded that it had "no legal obligation to maintain, upgrade and/or repair such easement ***. Until the recent flooding occurred, we believed the situation to be a private matter. However, we are now concerned with the possible damage to the road and its underlying structure. In addition, we are concerned about issues of public safety and welfare. Consequently, we must insist that you take immediate action to repair the storm sewer system. We intend to hold you responsible for any damages resulting from this problem."

{¶33} Initially, we note that the letter was addressed to River City's occupant, not River City, asking for repair of the problem. Even though the letter ultimately reached River City, Clermont County did not threaten to condemn or even take River City's property if it failed to repair the pipes, but instead, threatened to hold the occupant responsible if the collapsed pipe damaged the roadways. While the letter may have caused River City to expend money to fix the pipe situation, a taking does not occur every time the government suggests or requires a private owner to expend money on their property so that it does not cause damage to public property. Nor does threatening to hold an occupant or private owner responsible for damage to government property constitute a taking.

{¶34} For example, Justice Rehnquist recognized a nuisance exception to the taking clause, and noted that "the government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use." *Penn Central Transportation Co. v. City of New York* (1978), 438 U.S. 104, 145, 98 S.Ct. 2646, Rehnquist, J., dissenting. By way of example, Justice Rehnquist discussed whether the government could stop a landowner from grazing his cattle near other people's land, and concluded that the government "could constitutionally require the owner to fence his land or

take other action to prevent his cattle from straying onto others' land without compensating him." Id. Likewise, Clermont County did not take River City's property. It merely directed River City to do something about the water that was coming from its land and flooding a public roadway.

{¶35} Paying the fee to repair the problem may have initially diminished River City's profits, but it did not result in a taking. Instead, trial testimony demonstrates that the new pipe should be effective for the next 30 years, and that the new system will work in the same manner as the system that was originally installed on the property before River City bought it.

{¶36} River City also argues that due to the prosecutor's letter demanding repair, it was unable to exclude Clermont County or the general public from permanently occupying the pipes on its property due to the watershed management system. However, River City was aware of the watershed and associated issues before it purchased the land, and cannot establish a taking simply because its pipe needed repair.

{¶37} Trial testimony established that prior to River City's 1984 purchase of the land, it hired a professional engineering firm, Thomas Graham & Associates, to review and investigate the land. The firm was able to locate and identify existing underground storm water pipes and was therefore able to explain to River City how the pipe system conveyed storm water in the area and how the underground culverts located on the property worked.

{¶38} Additionally, River City was aware of the pre-purchase survey plat, which referenced a 15-foot-wide storm sewer easement. The storm water pipes on the property were located within the easement and installed as of the date of the 1984 purchase. The testimony at trial revealed that River City would have been aware that watershed management emptied water into the pipe under River City's land before it purchased the property.

{¶39} Lastly, River City argues that Clermont County has taken its land because it is

forced to bear the burden of repair, which should be borne by the public as a whole. River City claims that the use of its pipes is so public that such use outweighs any private character the pipes may have once held. However, River City did not offer any persuasive evidence that its private pipes became a public storm sewer. Instead, Clermont County has continually denied any obligation to maintain or repair River City's pipes. See *State ex rel. Stamper v. City of Richmond Heights*, Cuyahoga App. No. 94721, 2010-Ohio-3884, ¶31 (denying writ of mandamus claim because Richmond Heights possessed "no duty to maintain or repair a private storm water sewer system on private property that it did not construct, did not appropriate or accept, and was not part of a regularly running public watercourse").

{¶40} We also note that any increase in volume or velocity of the runoff water is due to private development. The record demonstrates that the runoff is attributed to the roofs, parking lots, and impervious surfaces of the private stores and restaurants, and, as the trial court found, only a de minimis portion can be attributed to the public roads. While River City may have a cognizable dispute with the private developers who have routed their runoff through River City's property, Clermont County has not effectuated a taking.

{¶41} Moreover, the reason for the pipe's collapse was improper installation, which included improper backfilling combined with corrosion of the metal pipe from salt runoff. There was no evidence that Clermont County caused the improper installation or that only its streets created a salt runoff. The combination of factors leading to the pipe's collapse cannot be contributed to Clermont County, nor can River City claim that a taking occurred once the pipe collapsed.

{¶42} After reviewing the record, River City failed to establish that Clermont County took its land, and therefore failed to submit the necessary facts and proof to establish by plain, clear, and convincing evidence that it is entitled to a writ of mandamus. The trial court's decision denying the writ is therefore not unreasonable, arbitrary, or unconscionable,

and River City's second assignment of error is overruled.

{¶43} Assignment of Error No. 1:

{¶44} "THE TRIAL COURT ERRED IN FINDING RIVER CITY'S MANDAMUS CLAIM FOR THE TAKING OF ITS PROPERTY BARRED BY THE STATUTE OF LIMITATIONS."

{¶45} River City argues in its second assignment of error that the trial court erred by finding that the statute of limitations had tolled, therefore barring its taking claim.

{¶46} Prior to 2002, the statute of limitations on a mandamus action was 21 years until the Ohio Supreme Court released *State ex rel. R.T.G., Inc. v. Ohio*, 98 Ohio St.3d 1, 2002-Ohio-6716, and held that "the statute of limitations applicable to a mandamus action to compel the state to begin appropriation proceedings is the six-year limitation set out in R.C. 2305.07." Id. at ¶31. In 2004, the Ohio General Assembly modified R.C. 2305.09, and expressly set forth a four-year statute of limitations for "relief on the grounds of a physical or regulatory taking of real property." No matter the number of years that applies, "a cause of action for injury to real property and relief on the grounds of a physical or regulatory taking accrues *** when the injury or taking is first discovered, or through the exercise of reasonable diligence, should have been discovered." *State ex. rel Stamper*, 2010-Ohio-3884 at ¶25.

{¶47} In analyzing this issue, the trial court reviewed the different applications of the statute of limitations, as referenced above, and found that the six-year time frame was applicable because the Ohio Supreme Court released *R.T.G*. in 2002, a year before River City filed its case in federal court. The trial court also noted that the 2004 change to R.C. 2305.09(E) was inapplicable because the statutory amendment was intended to be prospective in its application. While we agree with the trial court that the six-year time frame is applicable, we find it unnecessary and impractical to analyze whether River City's claim was barred by the six-year statute of limitations.

{¶48} As stated above, the statute of limitations begins to run "when the injury or

taking is first discovered" or when it should have been discovered. However, here, Clermont County never injured or took River City's property and therefore there was no taking to be discovered. The trial court noted that if there had been a taking, *it would have been* the day that Clermont County accepted the dedication of the roads on February 7, 1996. Based on that 1996 date, River City had until February 7, 2002 to bring its claim, and it did not.

{¶49} While we do not necessarily find error in the trial court's analysis on this issue, we decline to address the statute of limitations issue because we are unwilling to speculate about a fictional "triggering" event to a taking that never occurred. Because there was no actual taking, it is impossible to choose a date wherein an injury or taking occurred. River City's first assignment of error is overruled.

{¶50} Judgment affirmed.

HENDRICKSON, P.J., and HUTZEL, J., concur.