No. 2018-1307

In the Supreme Court of Ohio

ORIGINAL ACTION FOR WRIT OF PROHIBITION

STATE OF OHIO, ex rel. ELLIOTT G. FELTNER,

Relator,

v.

CUYAHOGA COUNTY BOARD OF REVISION, et al,

Respondents.

AMICUS CURIAE BRIEF OF CUYAHOGA COUNTY LAND REUTILIZATION CORPORATION AND OHIO LAND BANK ASSOCIATION IN SUPPORT OF RESPONDENTS AND URGING DENIAL OF WRIT OF PROHIBITION

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AMICI'S STATEMENT OF INTEREST

This Amicus Brief is being filed by the Cuyahoga County Land Reutilization Corporation (the "Cuyahoga Land Bank") and the Ohio Land Bank Association (the "Land Bank Association") in support of the Respondents, Cuyahoga County, Cuyahoga County Board of Revision, and the three statutory members of the Cuyahoga County Board of Revision, Armond Budish, County Executive, Dennis Kennedy, County Fiscal Officer, and Michael Gallagher, Cuyahoga County Council member. As set forth more fully below, the Cuyahoga Land Bank and the Ohio Land Bank Association urge this Court to deny a writ of prohibition because Relator Eliott Feltner ("Feltner") has failed to satisfy his heavy burden to establish that the administrative tax foreclosure statutes set forth in Ohio Revised Code 323.65 through 323.79 are facially unconstitutional beyond a reasonable doubt. Indeed, since the relevant statutes relate solely to the enforcement of tax laws, the General Assembly clearly has the constitutional authority to determine the statutory procedures that govern the foreclosure of tax liens and to establish an administrative hearing process that is subject to judicial review. Accordingly, the Court should deny a writ of prohibition and uphold the constitutionality of the challenged statutes, which are intended to remedy the significant problem caused by abandoned delinquent properties that negatively impact the health, safety, and welfare of our communities.

The Cuyahoga Land Bank clearly has a strong interest in the outcome of this case because it was created under R.C. 1724.04 for the purpose of "[f]acilitating the reclamation, rehabilitation, and reutilization of vacant, abandoned, tax-foreclosed, or other real property" within Cuyahoga County. *See* R.C. 1724.01. Municipal and county land banks are not a new concept. They have been used in the State of Ohio over the past fifty years in order to provide cities, counties, and townships with the opportunity to take control of abandoned, distressed, unproductive and tax foreclosed properties. Indeed, in legacy cities, such as Cleveland,

abandoned and unoccupied tax foreclosed properties are neighborhood nuisances that foster serious criminal activity, create safety hazards, and degrade neighborhoods because they are blighted and abandoned. Most of the property owners of abandoned, tax delinquent properties, in fact, refuse to pay any real estate taxes for several years before a tax foreclosure is instituted and, when the abandoned property is placed in tax foreclosure proceedings, it is often not purchased or is purchased by a speculator who also fails to pay real estate taxes or put the land to productive use. The vacant, abandoned land, therefore, goes through cycle after cycle of tax foreclosure proceedings without any payment of taxes, and thus continues the cycle of community decay.

In 2009, at the height of the foreclosure crisis, the General Assembly adopted S.B. 353, which, among other things, sought to create a new breed of county land banks that would have the same powers as a traditional community improvement corporation to acquire, own, and sell real estate, and would have all of the "landbanking" powers granted to municipal land banks by Ohio's land bank statute, R.C. 5722.01, *et seq*. In creating county land banks, therefore, the General Assembly sought to develop a creative and flexible response to the significant problem caused by vacant and unoccupied lands that have a negative impact on local communities and are subject to a repeating cycle of tax foreclosure proceedings.

The Cuyahoga Land Bank was created in April 2009, after the passage of S.B. 353, by a resolution of the Cuyahoga County Board of Commissioners. (Agreed Statement of Facts, ¶5, Ex. 5). In 2010, with the success of the Cuyahoga Land Bank, the state legislature amended the land bank legislation to allow any county with over 60,000 residents to create a county land bank, and by 2014, the statute was again amended to allow all counties in Ohio to create a county land reutilization corporation. This legislation established land banks as quasi-governmental

agencies, a hybrid model that combines the efficiencies of nonprofit corporations with the public-purpose, powers and funding of a governmental organization. The General Assembly's goal was for land banks to serve as a catalyst for community revitalization through the acquisition and strategic disposition of vacant, delinquent, abandoned, blighted properties that have plagued our communities.

The Ohio Land Bank Association is an association that was formed by a number of county and municipal land banks in the State of Ohio. There are currently fifty-four (54) county land reutilization corporations throughout the State of Ohio, and at least 14 counties, including Cuyahoga County, utilize Board of Revision tax foreclosure proceedings for abandoned delinquent properties. (Agreed Statement of Facts, Ex. 13, Affidavit of Gus Frangos ¶ 19). Indeed, since H.B. 294 was adopted in 2004, there have been over 31,200 cases adjudicated in administrative tax foreclosure proceedings. (Frangos Aff. ¶ 19). As a result, there have been thousands of severely blighted and abandoned properties that have been subject to demolition and/or have been renovated or reutilized for green spaces, side lots, churches and places of worship expansions, and economic development projects. (*Id*.)

The combination of H.B. 294 and county land reutilization corporations, therefore, has resulted in the elimination of tens of thousands of blighted and vacant properties throughout the State. (*Id*. at ¶ 18). Moreover, it has attracted in excess of Two Hundred Fifty Million Dollars ($250,000,000) in demolition and community development funding from the U.S. Department of Housing and Urban Development, United States Treasury, the Ohio State Attorney General, and various counties throughout the State. (*Id.*) Thus, both the Cuyahoga Land Bank and the Ohio Land Bank Association have a strong interest in ensuring that the Court upholds the administrative tax foreclosure process set forth in R.C. 323.65 through R.C. 323.79.

STATEMENT OF FACTS

A. The Cuyahoga County Land Reutilization Corporation

As previously discussed, the Cuyahoga Land Bank is an Ohio not-for-profit corporation incorporated by the County in 2009 pursuant to Revised Code Chapter 1724. (Agreed Statement of Facts, ¶ 4-5). Under R.C. 1724.03(B), the Board of Directors of a county land reutilization corporation must be composed of five, seven, or nine members, including the county treasurer, at least two of the members of the board of county commissioners, one representative of the largest municipal corporation, one representative of a township of a population of at least 10,000, and any remaining members selected by the county treasurer and the county commissioners who are members of the Board. *See* R.C. 1724.03(B).

The statutory requirements for county land banks are slightly different for a county, such as Cuyahoga County, that has adopted an alternative form of government, by charter, under Article X, Section 3 of the Ohio Constitution. Pursuant to R.C. 1.62, where a charter form of government is adopted, each officer that served or was assigned to a particular board or commission retains that role in the new charter government. Hence, the county treasurer retains his/her statutory role as a member of the Board of Directors for a county land reutilization corporation. Moreover, if any section of the Revised Code requires county representation on a board by more than one county officer, and the Charter vests the powers, duties, or functions of each county officer in only a single county officer, then R.C. 1.62 provides that the "taxing authority" of the county shall adopt a resolution to fill the vacancy in the representation of the county on the board. Here, Section 3.01 of the Charter defines the County Council as the "taxing authority" of Cuyahoga County. (Agreed Statement of Facts, Ex. 2, Cuyahoga County Charter). Thus, under R.C. 1724.03 and R.C. 1.62, the Board of Directors for the Cuyahoga Land Bank

must include the County Executive, and the County Council must appoint a representative to fill the vacancy of the other County Commissioner.

Here, in accordance with R.C. 1724.03, the Cuyahoga Land Bank has a nine (9) member Board of Directors. Pursuant to and in accordance with R.C. 1724.03 and R.C. 1.62, the Board of Directors includes the County Treasurer, the County Executive, a member appointed by the County Council, and two representatives of the municipal corporation with the largest population, the City of Cleveland. The remaining members of the Board of Directors must be unanimously selected by the County Executive, County Treasurer, and the County Council Director. At least one of the Directors must have private sector or non-profit experience in real estate rehabilitation or acquisition. (Agreed Statement of Facts, ¶ 6). Thus, in accordance with the statutory requirements set forth in R.C. 1724.03, as modified by R.C. 1.62 and the Cuyahoga County Charter, the nine current members of the Board of Directors for the Land Bank are:

(a) Anthony Brancatelli (Chair), Council Member, City of Cleveland
(b) Brad Sellers (Vice Chair), Mayor, City of Warrensville Heights
(c) Dan Brady, Council President, Cuyahoga County
(d) Armond Budish, Cuyahoga County Executive
(e) W. Christopher Murray, II, Cuyahoga County Treasurer
(f) Nate Kelly, Managing Director, Cushman and Wakefield
(g) Ed Rybka, Chief of Regional Development, City of Cleveland
(h) Michael Summers, Mayor, City of Lakewood
(i) April Urban, Research Associate, Case Western Reserve University.

(Agreed Statement of Facts, ¶ 7).

B. Summary of Expedited Foreclosure Process Set Forth In R.C. 323.65-323.79

It is undisputed that this writ of prohibition action arises from a delinquent tax foreclosure proceeding that was filed under R.C. 323.66 on November 19, 2015, with the Cuyahoga County Board of Revision, styled *Treasurer of Cuyahoga County, Ohio v. Elliott G. Feltner*, Case No. BR-15-010620 (the "BOR Action"). (Agreed Statement of Facts, ¶ 8). The administrative tax foreclosure process set forth in R.C. 323.65 through R.C. 323.79 was

originally adopted by the Ohio General Assembly in H.B. 294, effective September 28, 2006. As set forth more fully in the Affidavit of Gus Frangos, attached as Exhibit 13 to the Agreed Statement of Facts and Joint Submission of Evidence filed in this case, H.B. 294 was adopted in order to provide a more expedited and efficient process for tax delinquent foreclosures involving unoccupied lands. (Frangos Aff. ¶ 3-11).[1]

H.B. 294 was precipitated by an increasing level of concern by mayors, city councils, community groups, and other not-for-profit organizations about the increasing numbers of cases of property abandonment, blight, and tax base destabilization in their communities. In Cuyahoga County, for example, there were annual spikes in the number of abandoned delinquent properties in the tens of thousands per year. (Frangos Aff. ¶ 5). This problem was exacerbated by the fact that tax foreclosures were taking anywhere between two (2) and five (5) years to complete. (*Id.*) As a result of the lengthy judicial process, vacant and abandoned homes often ended up beyond repair, and a property that may have had a chance to be rehabilitated would eventually become further vandalized, stripped, or arsoned, requiring it to be demolished. (*Id.*)

Under H.B. 294, therefore, if the property involves vacant and unoccupied land, the County Treasurer may initiate an expedited foreclosure proceeding with the county board of revision, which has been granted the statutory jurisdiction to conduct hearings and, upon any adjudication of foreclosure, to issue final orders of sale and deeds. *See* R.C. 323.66(B). In granting statutory jurisdiction over certain foreclosure proceedings to the county board of

[1] We note that a number of states have responded to the foreclosure crisis by adopting nonjudicial foreclosure procedures. *See* Alexander, F., Immergluck, D., Balthrop, K., Schaeffing, P. and Clark, J., "Legislative Responses to the Foreclosure Crisis in Nonjudicial Foreclosure States," Urban Studies Institute, Review of Banking and Financial Law 31(1), pp. 341-410 (2012). A copy of this law review article also is available online: https://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1003&context=urban_studies_institute.

revision, however, the General Assembly implemented extensive procedural safeguards to protect the rights of affected property owners and lien holders. (Frangos Aff. ¶ 10-14).

First, with respect to service of process, R.C. 323.66(C) provides that "the clerk of court, in the same manner as in civil actions, shall provide summons and notice of hearings, maintain an official case file, docket all proceedings, and tax as costs all necessary actions in connection therewith in furtherance of the foreclosure of abandoned land" under sections 323.65 to 323.79. (*Id.*) The clerk of courts therefore follows the same requirements for service of process that are set forth in Civ.R. 4 and 5, which provide, among other things, for service by United States certified mail or by a commercial carrier service, such as Federal Express. *See* Civ.R. 4.1(A). If the attempted service of process by certified mail or Federal Express is returned as "unclaimed," then Civ. R. 4.6(D) provides for ordinary mail service, which shall be evidenced on the docket by a certificate of mailing and "shall be deemed completed when the fact of mailing is entered of record, provided that the ordinary mail envelope is not returned by the postal authorities with an endorsement showing failure of delivery." *See* Civ.R. 4.6(D).

Second, the relevant statutes provide that an affected property owner who wants to contest the foreclosure action in a common pleas court shall have the right to obtain an automatic transfer of the tax foreclosure proceeding to the court of common pleas by simply requesting a transfer. *See* R.C. 323.691 and R.C. 323.70. In particular, R.C. 323.691 provides that a county board of revision may order that a tax foreclosure proceeding filed under section 323.69 be transferred to the court of common pleas or to a municipal court with jurisdiction over the property, upon a motion filed by the record owner of the parcel or the county prosecuting attorney, or upon its own motion. *See* R.C. 323.691(A). Moreover, R.C. 323.70(B) provides that "[i]f, on or before the fourteenth day after service of process is perfected under division (B)

of section 323.69 of the Revised Code, a record owner files with the clerk of court a motion requesting that the county board of revision order the case be transferred to a court pursuant to section 323.691 of the Revised Code, the board shall, without conducting a hearing on the matter, promptly transfer the case for foreclosure of that land to a court pursuant to section 323.691 of the Revised Code to be conducted in accordance with the applicable laws." *See* R.C. 323.70(B) (emphasis added). Thus, the record owner of the parcel has the automatic right to transfer the case to the common pleas court under R.C. 323.70(B).

Third, the relevant statutes provide that the record owner of the parcel shall retain the statutory right of redemption by paying all outstanding taxes in full. R.C. 323.72(A)(2). In particular, R.C. 323.72(B) provides:

> (B) If the record owner or another person having a legal or equitable ownership interest in a parcel of abandoned land files a pleading with the county board of revision under division (A)(1) of this section, or if a lienholder or another person having a security interest of record in the abandoned land files a pleading with the board under division (A)(2) of this section that asserts that the impositions have been paid in full, the board shall schedule a hearing for a date not sooner than thirty days, and not later than ninety days, after the board receives the pleading. Upon scheduling the hearing, the board shall notify the person that filed the pleading and all interested parties, other than parties in default, of the date, time, and place of the hearing, and shall conduct the hearing. The only questions to be considered at the hearing are the amount and validity of all or a portion of the impositions, whether those impositions have in fact been paid in full, and, under division (A)(1) of this section, whether valid issues pertaining to service of process and the parcel's status as abandoned land have been raised.

"If the record owner, lienholder, or other person shows by a preponderance of the evidence that all impositions against the parcel have been paid, the board shall dismiss the complaint and remove the parcel of abandoned land from the abandoned land list, and that land shall not be offered for sale or otherwise conveyed under sections 323.65 to 323.79 of the Revised Code." *Id.* (emphasis added). Moreover, R.C. 323.72(B) provides that "if the board determines that the

impositions have been paid, then the board, on its own motion, may dismiss the case without a hearing." *Id.* This statutory right of redemption exists throughout the foreclosure proceeding.[2]

Finally, the statutory scheme seeks to protect the rights of affected property owners by providing for an administrative appeal of a final order of foreclosure under Chapters 2505 and 2506 of the Revised Code. In particular, R.C. 323.79 provides:

> Any party to any proceeding instituted pursuant to sections 323.65 to 323.79 of the Revised Code who is aggrieved in any of the proceedings of the county board of revision under those sections may file an appeal in the court of common pleas pursuant to Chapters 2505. and 2506. of the Revised Code upon a final order of foreclosure and forfeiture by the board. A final order of foreclosure and forfeiture occurs upon confirmation of any sale or upon confirmation of any conveyance or transfer to a certificate holder, community development organization, county land reutilization corporation organized under Chapter 1724. of the Revised Code, municipal corporation, county, or township pursuant to sections 323.65 to 323.79 of the Revised Code. An appeal as provided in this section shall proceed as an appeal de novo and may include issues raised or adjudicated in the proceedings before the county board of revision, as well as other issues that are raised for the first time on appeal and that are pertinent to the abandoned land that is the subject of those proceedings.

In this regard, an administrative appeal under R.C. 323.79 differs from a traditional R.C. 2506 appeal because the appeal under R.C. 323.79 "shall proceed as an appeal de novo and may include issues raised or adjudicated in the proceedings before the county board of revision, as well as other issues that are raised for the first time on appeal and that are pertinent to the abandoned land that is the subject of those proceedings." (*Id.*) In other words, R.C. 323.79 expressly grants an adversely affected party with the right to obtain *de novo* review in the common pleas court and raise any and all issues, including any constitutional issues that can be raised for the first time on appeal. (*Id.*)

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[2] We note that R.C. 323.65(J) and R.C. 323.78 also provides that, if the alternative right of redemption is invoked, the property owner shall continue to have the right to redeem the property for an additional 28 days after the order of foreclosure. *See* R.C. 323.65(J) and 323.78.

C. The Underlying Tax Foreclosure Proceedings

This case involves a typical tax foreclosure proceeding that was filed on November 19, 2015, with the Cuyahoga County Board of Revision, styled *Treasurer of Cuyahoga County, Ohio v. Elliott G. Feltner*, Case No. BR-15-010620. A true and correct copy of the docket, pleadings, and other documents that were filed with the Cuyahoga County Clerk of Courts is attached to the Agreed Statement of Facts as Exhibit 1. As set forth in the Agreed Statement of Facts, it is undisputed that the subject property (PPN 114-26-004) is located at 18927 St. Clair Avenue, Cleveland, Ohio 44110, and was owned by Elliott G. Feltner at the time of the filing of the Complaint. (Agreed Statement of Facts, ¶ 8). A copy of a 2014 Deed in the name of Elliott G. Feltner at the tax mailing address of 907 East 214th Street, Euclid, Ohio 44119 is included among the papers filed in the BOR Action. (*Id.*, Ex. 1, pp. 0017-0018). Moreover, it is undisputed that Feltner was delinquent in paying his real estate taxes for the Property, and that the total due, as reflected in the Final Judicial Report filed on February 9, 2017, was $64,004.74. (*Id.* at ¶ 11, Ex. 1, pg. 0178).[3]

In this regard, a review of the docket attached as Exhibit 1 to the Agreed Statement of Facts further confirms that the Clerk of Courts successfully effectuated service of process upon Mr. Feltner by mailing a copy of the summons and complaint to the mailing address that Feltner provided to the Cuyahoga County Treasurer: 907 E. 214 Street, Cleveland, Ohio 44119. (Agreed Statement of Facts, Ex. 1, pp. 0001-0003). This mailing address is set forth in Feltner's 2014 Fiduciary Deed and in the 2014 and 2016 tax bills that are included with the documents attached as Exhibit 1. (*Id*. at 0017-0018, 0019-0020, 0182-0185). It is the same mailing address set forth in the Docket Sheet and in the Summons filed with the Clerk. (*Id*. at 0001-0003, 0025,

[3] The tax bills that are included in the documents attached as Exhibit 1 to the Agreed Statement of Facts show that Feltner *never* paid any real estate taxes at any time.

0026, 0049-0054, 0077-0078). In particular, the Docket Sheet shows that the Clerk of Court first attempted to effectuate service of process upon Feltner by Federal Express and Certified Mail, but that each mailing was returned as "unclaimed." (Agreed Statement of Facts, Ex. 1, Docket, pp. 0002-0003, 0179). In accordance with Civ. R. 4.6(D), however, the Docket Sheet also confirms that a Summons was sent by Regular Mail Service on 02/12/2016 and 11/03/2016 and was not returned as undeliverable. (Agreed Statement of Facts, Ex. 1, Docket, pp. 0001, 0003, 0179). Thus, service of process was properly effectuated in accordance with Civ. R. 4.6(D).

In any event, it is undisputed that Feltner had actual knowledge of the tax foreclosure proceeding because he personally appeared at the first scheduled hearing before the Board of Revision on March 15, 2017. (Agreed Statement of Facts, ¶ 13) In particular, the records filed with this Court include an Attendance Sign-In Sheet for the March 15th Hearing that was signed by Elliott Feltner. (*See* Affidavit of Wendy Kaster, filed on 9/17/18, Ex. A-2, Sign-In Sheet for March 15th hearing, #8 person). Moreover, the BOR records attached as Exhibit A-13 to the original Affidavit of Whitney Kaster include an Oral Hearing Journal Summary for the March 15th Hearing that shows that Elliott G. Feltner made an appearance, and the Board continued the hearing for "90 days until 6/21/2017 upon request of the titleholder." (*See* Kaster Aff., Ex. A-13, Oral Hearing Journal Summary, filed 9/17/18).

There also is evidence in the record to show that the buildings and structures on the subject property were unoccupied at the time that the foreclosure proceedings were initiated. In particular, the Clerk of Court's records include an Affidavit from Douglas Sawyer of the Cuyahoga County Land Reutilization Corporation that was filed on May 24, 2016, and which provided that "there are buildings or structures that are not in occupancy of any person," and that the Cuyahoga County Land Reutilization Corporation had determined that the property was

eligible for transfer under Section 5722 of the Ohio Revised Code as "nonproductive land." (*See* Agreed Statement of Facts, Ex. 1, Affidavit of Douglas Sawyer, pp. 0080-0082). Thus, the evidence in the record shows that the BOR had jurisdiction under R.C. 323.66 because taxes were delinquent and the land was unoccupied.

In this regard, the Affidavit of Douglas Sawyer was submitted in accordance with R.C. 323.77 and R.C. 323.78, which provides that a county land reutilization corporation can request to acquire an abandoned parcel if, upon an order of foreclosure and the expiration of the statutory or common law right of redemption, the owner fails to redeem by paying the taxes. *See* R.C. 323.77 and R.C. 323.78. In such circumstances, where, as here, the property owner has failed to protect his property by failing to contest the foreclosure proceeding and by exercising his statutory right of redemption by paying the delinquent taxes in full, then R.C. 323.78(B) provides that the parcel may be "transferred by deed to the county land reutilization corporation without appraisal and without a sale, free and clear of all impositions and any other liens on the property, which shall be deemed forever satisfied and discharged." (*Id.*)[4]

With respect to this issue, the Notice of Summons and Complaint that was issued by the Clerk of Courts expressly provided notice to the taxpayer that "the parcel(s), if ordered foreclosed, will be sold at public auction *or conveyed to a political subdivision, land reutilization corporation, school district or eligible community development organization* as prescribed in R.C. 323.65 to 323.79 unless redeemed by the owner or interested party." (Agreed Statement of

[4] The provision set forth in R.C. 323.78 were part of an amendment to the statute that was adopted by the Ohio General Assembly on April 7, 2009, as part of S.B. 353 at the height of the foreclosure crisis. It seeks to ensure that abandoned and unoccupied lands do not enter the cycle of foreclosure sales in which they are not sold at all or are sold at low values to speculators who also do not pay real estate taxes or put the property to productive use. In so doing, the General Assembly provided for the same outcome of tax foreclosure proceedings under the land bank statute in existence since the 1970's (R.C. Chapter 5722), *i.e.*, if there is no redemption, the property passes free and clear to the electing subdivision.

Facts, Ex. 1, pg. 0077) (emphasis added). Here, although Feltner attended the first hearing on March 15, 2017, and knew that there would be a second hearing on June 21, 2017, he did not appear at the June 21st Hearing and did not make any attempt to redeem the property by paying the taxes, penalties, and interest that were owed. (Agreed Statement of Facts, ¶ 14-15). Following the June 21st Hearing, therefore, the Cuyahoga County Board of Revision issued an Adjudication of Foreclosure and Order to the Sheriff on June 26, 2017. (*Id.* at ¶ 14).

Upon the issuance of the Adjudication of Foreclosure, Feltner had an additional 28-day period to pay the real estate taxes owed on the Property and thereby exercise the alternative right of redemption set forth in Sections 323.65(J) and 323.78 of the Ohio Revised Code. (Agreed Statement of Facts, ¶ 15). Feltner did not redeem the Property pursuant to statute, however, and did not file an appeal from the final order of foreclosure and forfeiture under R.C. 323.79. (*Id.*) After the 28-day redemption period terminated under R.C. 323.76(C)(2), therefore, a Sheriff's Deed was issued on July 28, 2017, transferring the Property to the Cuyahoga Land Bank under R.C. 323.74(D). (*Id.* at ¶ 16). A certified copy of the Sheriff's Deed, dated July 28, 2017, is attached to the Agreed Statement of Facts as Exhibit 9. (*Id.* at ¶ 16, Ex. 9). The Cuyahoga Land Bank then transferred the property on August 21, 2017, to East Side Automotive Services, Inc. for use as an automotive repair facility. (Compl. ¶ 30); (Agreed Statement of Facts, ¶ 17).[5] Since this transfer, all real estate taxes for the Property have been paid. (*Id.*)

[5] Although Feltner alleges that no consideration was paid for the Property, the Affidavit of Gus Frangos states that $15,000 was paid in consideration for the Property. (Agreed Statement of Facts, Ex. 13, Frangos Aff. ¶ 20). Because the state conveyance statutes exempt transfers to and from a county land reutilization corporation, this consideration would not be reflected in the DTX 101 exemption form filed with the Cuyahoga County Fiscal Office. (*Id.*)

ARGUMENT

I. THE COURT SHOULD DENY A WRIT OF PROHIBITION BECAUSE RELATOR HAS FAILED TO CARRY HIS HEAVY BURDEN TO ESTABLISH THAT THE BOARD OF REVISION PATENTLY AND UNAMBIGUOUSLY LACKED JURISDICTION OVER THE TAX FORECLOSURE PROCEEDING.

A. Applicable Standard of Review for Writ of Prohibition Action

It is well-established that "[a] writ of prohibition is an extraordinary remedy that is granted in limited circumstances 'with great caution and restraint.'" *State ex rel. O'Malley v. Collier-Williams*, 153 Ohio St.3d 553, 2018-Ohio-3154, 108 N.E.3d 1082, ¶ 9, citing *State ex rel. Corn v. Russo*, 90 Ohio St.3d 551, 554, 740 N.E.2d 265 (2001). In order to obtain a writ of prohibition, therefore, Relator bears the heavy burden to prove that (1) the Board of Revision is about to exercise or has exercised judicial or quasi-judicial power, (2) the exercise of that power is unauthorized by law, and (3) denying the writ would result in injury for which no other adequate remedy exists in the ordinary course of the law. *State ex rel. Garrett v. Costine*, 153 Ohio St.3d 29, 2018-Ohio-1613, 100 N.E.3d 368, ¶ 9; *State ex rel. Elder v. Camplese*, 144 Ohio St.3d 89, 2015-Ohio-3628, 40 N.E.3d 1138, ¶ 13; *State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573, 859 N.E.2d 923, ¶ 15.

Here, this Court already has dismissed all of Feltner's claims for a writ of prohibition, except for Counts I and III. Count I is a facial attack on the constitutionality of R.C. 323.65 through R.C. 323.79 on the ground that the statutes violate the separation of powers doctrine by granting "judicial power to an executive branch board in violation of Art. IV, Sec. 1 of the Ohio Constitution." (Compl. ¶ 35). Count III alleges that the BOR proceedings violated due process and separation of powers because of an alleged conflict of interest by the statutory members of the Cuyahoga County Board of Revision. (Compl. ¶ 56). All of the merit briefing, therefore, will be limited to these two constitutional claims.

With respect to the two remaining constitutional claims, it is well established that the proper forum for a constitutional challenge to a legislative enactment is the common pleas court, not a writ of prohibition. *State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573, 859 N.E.2d 923, ¶¶ 21-22 (dismissing a writ of prohibition because "[c]onstitutional challenges to legislation are generally resolved in an action in a common pleas court rather than in an extraordinary writ action"); *accord State ex rel. Sliwinski v. Burnham Unruh*, 118 Ohio St. 3d 76, 2008-Ohio-1734, 886 N.E.2d 201, ¶ 21; *State ex rel. Brooks v. O'Malley*, 117 Ohio St.3d 385, 2008-Ohio-1118, 884 N.E.2d 42, ¶ 11; *Rammage v. Saros*, 97 Ohio St.3d 430, 2002-Ohio-6669, 780 N.E.2d 278, ¶ 11. The sole exception to this rule arises if the Relator can show that the Respondent "patently and unambiguously" lacks jurisdiction. *State ex rel. Shumaker v. Nichols*, 137 Ohio St.3d 391, 2013-Ohio-4732, 999 N.E.2d 630, ¶ 9, citing *State ex rel. Sapp v. Franklin Cty. Court of Appeals*, 118 Ohio St.3d 368, 2008-Ohio-2637, 889 N.E.2d 500, ¶ 15. In order to prevail in this writ of prohibition action, therefore, Feltner must not only prevail on the merits of his constitutional claims; he must show that the lower tribunal patently and unambiguously lacked jurisdiction over the tax foreclosure proceeding. *Id*.

B. Relator Bears The Heavy Burden To Prove That The Statutes Are Unconstitutional Beyond A Reasonable Doubt.

In order to prevail on his two remaining constitutional claims, Feltner bears a very heavy burden of proof. As this Court has held, "[l]aws are entitled to 'a strong presumption of constitutionality,' and the party challenging the constitutionality of a law 'bears the burden of proving that the law is unconstitutional beyond a reasonable doubt.'" *Beaver Excavating Co. v. Testa*, 134 Ohio St.3d 565, 2012-Ohio-5776, 983 N.E.2d 1317, ¶ 27, quoting *Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, 916 N.E.2d 446, ¶ 11. Feltner must do more than simply cast doubt on the constitutionality of the statutes. Rather, Relator must show beyond

a reasonable doubt that the relevant statutes are unconstitutional. *See State ex rel. Brown v. Ashtabula Cty. Bd. of Elections*, 142 Ohio St.3d 370, 2014-Ohio-4022, 31 N.E.3d 596, ¶ 21. "This is so because '[t]he ability to invalidate legislation is a power to be exercised only with great caution and in the clearest of cases.'" *Id*., quoting *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 632, ¶ 16.

Finally, with respect to each constitutional claim, it is incumbent upon Feltner to show how his claim results in the ultimate conclusion that the Board of Revision patently and unambiguously lacked jurisdiction over the underlying tax foreclosure proceeding. This is particularly true with respect to Count III, which alleges a due process violation. (Compl. ¶ 56). Such a claim does not relate to the Board of Revision's jurisdiction; it relates to an alleged due process violation, which is a separate constitutional claim that can be brought in the context of a declaratory judgment action or upon judicial review of a foreclosure order under R.C. 323.79. *Scott* at ¶¶ 21-22. Accordingly, in order to prevail on Counts I and/or III of the Complaint, Feltner bears the heavy burden to show that (1) the statutes are unconstitutional beyond a reasonable doubt, and (2) that the alleged constitutional violation means that the Board of Revision "patently and unambiguously" lacked jurisdiction over the tax foreclosure proceeding.

II. THE COURT SHOULD DENY A WRIT OF PROHIBITION ON COUNT I.

A. The General Assembly's Adoption Of An Administrative Tax Foreclosure Process Does Not Violate The Separation Of Powers Doctrine, Particularly Given That The Statute Provides For Judicial Review Of BOR Orders By The Courts.

As previously discussed, Count I of the Complaint alleges a facial attack on the constitutionality of R.C. 323.65 through R.C. 323.79 on the ground that the statutes violate the separation of powers doctrine by granting "judicial power" to an executive branch board "in violation of Art. IV, Sec. 1 of the Ohio Constitution." (Compl. ¶ 35). As this Court has held, a

facial challenge to a state statute is the most difficult to mount successfully because the challenger bears the heavy burden to establish "that *there is no set of circumstances* in which the statute would be valid." *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 25-26 (emphasis added). "The fact that a statute might operate unconstitutionally under some plausible set of circumstances is insufficient to render it wholly invalid.'" *See Stetter v. R.J. Corman Derailment Servs.*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, ¶ 33, citing *Arbino* at ¶ 26. Accordingly, it is incumbent upon Feltner to prove that the statutes are unconstitutional beyond a reasonable doubt and in *all* circumstances.

Here, Feltner cannot satisfy this heavy burden. Although there is no specific section of the Ohio Constitution that sets forth a separation of powers doctrine, this Court has recognized that this doctrine is "implicitly imbedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government." *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 42, citing *S. Euclid v. Jemison*, 28 Ohio St.3d 157, 158-159, 503 N.E.2d 136 (1986). In this regard, the Court has adopted a pragmatic approach to the separation of powers doctrine, which recognizes that "the Madisonian vision of the separation of powers did not contemplate three branches operating in isolation, each without influence over the others." *Bodyke* at ¶ 49. As explained in *Bodyke*, the separation of powers doctrine "was designed to protect against 'the *whole* power of one department [being] exercised by the same hands which possess the *whole* power of another department.'" (Emphasis sic, citations omitted) *Id.* Thus, this Court has followed U.S. Supreme Court precedent in holding that "our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence and independence

* * *." *Bodyke* at ¶ 49, quoting *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 657, 102 L.Ed.2d 714 (1989).

"In cases specifically involving the judicial branch," both the U.S. Supreme Court and the Ohio Supreme Court have recognized that the separation-of-powers doctrine seeks to protect against "two dangers: 'that the Judicial Branch neither be assigned nor allowed tasks that are more properly accomplished by [other] branches,'" and "second, that no provision of law 'impermissibly threatens the institutional integrity of the Judicial Branch.'" *Bodyke.* at ¶ 53, citing *Mistretta*, 488 U.S. at 383, *Morrison v. Olson*, 487 U.S. 654, 680-681, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988), and *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986). In this regard, this Court has held that a legislative act would violate the separation of powers doctrine "by vesting officials in the executive branch with the power to review judicial decisions or by commanding that the court reopen final judgments." *Bodyke* at ¶ 53, citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995).

Here, there is nothing in R.C. 323.65-323.79 that in any way infringes upon the "two dangers" recognized by this Court. The statute does not assign the judicial branch with any tasks that ordinarily should be accomplished by the other branches of government. Moreover, it does not grant the board of revision with the authority to review any judicial decisions or to reopen any final judgments of the courts. Quite the contrary, the statutory scheme provides for judicial primacy: it expressly provides an affected property owner with the unilateral and automatic right to transfer the case to the court of common pleas and grants the right to obtain *de novo* review of a final order by the court of common pleas. Thus, R.C. 323.65-323.79 does not violate the separation-of-powers doctrine because it does not authorize the Board of Revision to review a

prior determination of a common pleas court, nor empower the Board of Revision to control or impede how a common pleas court decides a tax foreclosure action that is transferred or appealed by an affected party. *See Central Ohio Transit Authority v. Transport Workers Union of America, Local 208*, 37 Ohio St.3d 56, 62, 524 N.E.2d 151 (1988) (holding that R.C. 4117.16(A), which granted SERB with the exclusive authority to determine whether a strike presents a clear and present danger, did not violate separation of powers because "[t]he statute does not authorize SERB to review a prior determination of the court of common pleas, nor does it empower SERB to control or impede the court's jurisdiction").

This conclusion finds further support in this Court's decision in *Bodyke*. In *Bodyke*, this Court determined that a state law, which required the Attorney General to reclassify sex offenders (who had already been classified as sex offenders by the courts) violated the separation of powers doctrine. The two reasons for this holding, however, were based upon the fact "the reclassification scheme vests the executive branch with authority to review judicial decisions, and it interferes with the judicial power by requiring the reopening of final judgments." *Bodyke* at ¶ 55. Here, there is nothing in the challenged statutes that grants an administrative body or officer with the authority to review judicial decisions or to reopen final judgments. Thus, unlike the administrative review scheme in *Bodyke*, there is no separation-of-powers violation.

In his Brief, Feltner argues that R.C. 323.65 to R.C. 323.79 violates the separation-of-powers doctrine because it grants "judicial power" over tax foreclosure actions to an administrative body. This argument, however, ignores the applicable case law that governs the separation of powers doctrine. Although this Court has held that it violates separation of powers to delegate the "determination of guilt in a criminal matter" to an administrative agency, *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 136, 729 N.E.2d 359 (2000), it has long recognized that

the ***civil*** enforcement of state statutes may be delegated to administrative agencies so long as the agency's determinations are subject to judicial review. *Walker v. Toledo*, 143 Ohio St.3d 420, 2014-Ohio-5461, 39 N.E.3d 474; *Belden v. Union Central Life Ins. Co.*, 143 Ohio St. 329, 55 N.E.2d 629, 638 (1944); *Stanton v. State Tax Commission*, 114 Ohio St. 658, 151 N.E. 760 (1926). In so doing, this Court in *Stanton* reviewed the applicable U.S. Supreme Court precedent, and concluded that "[i]t seems quite certain [from] the foregoing decisions of the United States Supreme Court that matters usually classed as of judicial cognizance may be submitted for determination to administrative boards and commissions, or other public officials, without violating the requirements of due process, if provision is made for a judicial review." *Id.* at 675. Thus, upon review, this Court concluded in *Stanton* that, if a matter involves "a controversy over rights of person or property – that is to say, a matter of judicial cognizance – a court of competent jurisdiction is not deprived of that jurisdiction by the fact that some administrative agency having first made some determination of it" so long as the Legislature provides for judicial review. *Id.* at 680.

This well established principle of constitutional law and administrative law can be found throughout the Ohio Revised Code, which often creates and empowers administrative agencies to enforce state statutes by conducting hearings and deciding the legal rights of parties subject to judicial review of the agency's final "orders" and "adjudications" under R.C. 119.12 and R.C. 2506.01. As this Court explained in *Stanton*:

> During the past 20 years there has been a distinct tendency on the part of the federal government, and of the governments of all the states of the Union, to commit the discharge of many governmental functions to administrative boards and commissions; and in almost all of such legislation the legislation creating such commissions provides for the members being appointed by the executive branch of the government.
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> * * *

> The question arises whether, in cases where no specific legislative power is conferred by the Constitution in that behalf, a commission can by legislation be lawfully invested with authority to hear and determine controversies which involve the application of statutes and principles of law to proven facts. In view of the prevalence of commissions in Ohio, and the extensive character of the functions performed by them, and the importance of those functions, any declaration of this court at this time, denying the right of a board or commission whose members hold office by appointment to determine matters of a judicial character, would completely disarrange the entire plan of our state government, and some of our most important governmental functions would be brought to a complete standstill until some very comprehensive legislation and public elections could take place.

Id., 114 Ohio St. at 674. Thus, this Court "has consistently recognized that the General Assembly can delegate discretionary functions to administrative bodies or officers so that they can apply the law to various sets of facts or circumstances," *Blue Cross of Northeast Ohio v. Ratchford*, 64 Ohio St.2d 256, 259 (1980), and Relator cites *zero* cases where this well-established practice has been declared to violate the separation of powers doctrine.

Given the absence of Supreme Court precedent to support their constitutional argument, Relator's Merit Brief cites a number of cases from the late 1800s and early 1900s as purporting to support their separation-of-powers claim. (Relator's Brief, pp. 18-19). None of the cases cited on pages 18 and 19 of the Relator's Brief, however, conclude that it violates the separation-of-powers doctrine for the General Assembly to create an administrative hearing process to decide controversies involving the application of statutes to proven facts, particularly where, as here, the administrative decisions are subject to *de novo* judicial review.[6] This specific issue, in fact, was not discussed or decided in virtually all of the cases cited by Relator's Brief, except

[6] Most of the early cases cited on pages 18 and 19 of Relator's Brief actually support Respondent's position in this case. For example, in *State ex rel. Atty. Gen. v. Harmon*, 31 Ohio St. 250 (1877), this Court expressly rejected the argument that "[t]he distribution of powers among the legislative, executive, and judicial branches of the government" is subject to an "exact rule" because "no exact rule can be laid down, *a priori*, for determining, in all cases, what powers may or may not be assigned by law to each branch." *Id.* at 5. Thus, *Harmon* held that the Legislature has the constitutional authority to assign election law disputes to the executive branch, and did not adopt the type of bright-line rule advocated by Feltner in this case.

Stanton (cited on page 19 of Relator's Brief) where the Court upheld the constitutional authority of the General Assembly to vest the State Tax Commission with the authority to decide questions of "judicial character" subject to judicial review. *Stanton*, 114 Ohio St. at 663-664, 674-675, 680. Moreover, Relator's argument was rejected by this Court in *Fassig v. State ex rel Turner*, 95 Ohio St. 232, 116 N.E. 104 (1913), which is cited on page 17 of Relator's Brief. Thus, none of the cases cited by Relator's Brief support the type of bright-line rule advocated by Feltner, which, if adopted by this Court, would undo over one hundred years of legal precedent by precluding the General Assembly from authorizing administrative boards and commissions from hearing and deciding cases of a "judicial character," even if the administrative decisions are subject to judicial review. *Stanton*, 114 Ohio St. at 674 (holding that such a ruling "would completely disarrange the entire plan of our state government, and some of our most important governmental functions would be brought to a complete standstill").

Given this well established principle of constitutional law, Relator ultimately are forced to admit that administrative boards and commissions often are delegated the authority by statute to decide the rights and responsibilities of parties relating to "workers compensation, unemployment compensation, professional licensing, real estate valuation, environmental protection, public utilities and elections, to name a few." (Relator's Brief, pp. 17-18). Although Relator argues that the tax foreclosure process is somehow different because it does not "further the function of the administrative agency," Feltner cites absolutely no case law to substantiate this alleged distinction.[7] Indeed, in making this argument, Feltner ignores the fact that R.C.

[7] In support of this argument, Relator's Brief cites two election law cases, *State ex rel. Miller v. Warren County Board of Elections*, 130 Ohio St.3d 24, 2011-Ohio-4623, 955 N.E.2d 379, and *State ex rel. Upper Arlington v. Franklin County Bd. of Elections*, 119 Ohio St.3d 478, 2008-Ohio-5093, 895 N.E.2d 177. (Relator's Brief, pg. 17). Neither case, however, involves the separation-of-powers doctrine.

323.65 to R.C. 323.79 relate to the *collection of taxes* and the *enforcement of tax laws*, and thus only apply if a taxpayer is delinquent in paying his real estate taxes. The enforcement of tax laws and tax liens is inherently a statutory power that arises from the General Assembly's plenary authority over the levy and collection of taxes. Thus, as one federal court recently observed, a tax foreclosure action relates to the "'collection' of a tax" and is not the same as a "standard foreclosure proceeding." *Johnson v. Sawyer*, No. 1:15-CV-0730, 2015 WL 4743815, *5 (N.D. Ohio 2015).

This is a critical point because it is well established, as this Court explained in *Stanton*, that the General Assembly has broad constitutional authority to empower administrative agencies to hear and decide cases relating to the enforcement of tax laws. *Id.,* 114 Ohio St. at 667-668. As this Court explained in *Stanton*, the General Assembly has broad constitutional authority to pass laws relating to the enforcement of tax laws because "the power of taxation is concededly a legislative function." *Id.* at 670. Here, the General Assembly has adopted a comprehensive administrative enforcement scheme that seeks to advance the legitimate public policy goal of enforcing tax liens on vacant lands through expedited foreclosure procedures where a taxpayer, as here, chronically never pays its taxes. Under this statutory enforcement scheme, the General Assembly has bestowed jurisdiction over most tax foreclosure actions to the court of common pleas, but with respect to unoccupied lands, as defined by R.C. 323.65, has created an expedited administrative procedure for tax foreclosures that is subject to judicial review. In so doing, the Legislature expressly preserved the authority of the judiciary to determine what the law is, and the rights of the parties thereto, by granting any party with the right to the automatic transfer of an administrative proceeding under R.C. 323.70(B) and with the right to appeal *de novo* any foreclosure order to the court of common pleas under R.C. 323.79. Thus, the relevant statutes

are no different than any other state statute that delegates statutory authority to an administrative agency or board to enforce state statutes through an administrative hearing process that is subject to judicial review.

This interpretation of the separation-of-powers doctrine finds further support in this Court's recent decision in *Walker v. Toledo*, 143 Ohio St.3d 420, 2014-Ohio-5461, 39 N.E.3d 474, involving the administrative enforcement of automatic red light cameras by municipalities. In that case, the City of Toledo had established an administrative enforcement scheme that provided for administrative hearings to determine civil liability and civil penalties for alleged violations of the City's automated red-light camera ordinance. Among other things, Walker argued that Toledo's ordinance violated "the separation-of-powers doctrine" because the municipality "has taken over a judicial function bestowed exclusively on municipal courts by R.C. 1901.20 and the Ohio Constitution, Article IV, Section 1." *Id.* at ¶ 20. Upon review, however, this Court rejected the separation-of-power argument, holding that "civil enforcement of municipal ordinances complements the work of the courts. It does not restrict it." *Id.* at ¶ 21. In so doing, the Court held that R.C. 1901.20 did not grant "exclusive" jurisdiction over municipal traffic violations to the municipal court, and that traffic violators still have an adequate judicial remedy in the ordinary course of law through judicial review. *Id.* at ¶ 22-25, ¶ 28; *see also Scott,* 112 Ohio St.3d 324, 2006-Ohio-6573, 859 N.E.2d 923, at ¶ 15-24 (denying writ of prohibition relating to Cleveland's administrative enforcement scheme because "appellants have an adequate remedy in the ordinary course of law by way of the administrative proceedings set forth in Section 413.031 and by appeal of the city's decision to the common pleas court").

This well established principle of law also is illustrated by this Court's 2010 decision in *Stetter v. R. J. Corman Derailment Services, L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927

N.E.2d 1092. In *Stetter*, this Court examined whether Ohio's employer intentional-tort statute, R.C. 2745.01, violated the separation-of-powers doctrine because it "delegate[s] to the Industrial Commission of Ohio the exclusively judicial function of adjudicating the civil recovery of certain intentional tort victims." *Id.* at ¶ 89. Upon review, however, this Court concluded that R.C. 2745.01 does not violate the separation of powers doctrine because it "does not attempt to remove from the courts the power to adjudicate claims of employer intentional torts." *Id.* at ¶ 91. Rather, "[t]he courts retain the ability to handle such claims." *Id.* Thus, the Court held that R.C. 2745.01 "does not violate the separation-of-powers doctrine." *Id.* at ¶ 92.

The same conclusions about the separation-of-powers doctrine should be reached in this case. The administrative tax enforcement scheme at issue in this case does not involve the imposition of criminal liability or criminal punishment, or the adjudication of common law tort or contract claims. Rather, it involves the civil and administrative enforcement of **tax** laws through the exercise of **statutory** powers created by the General Assembly. As in *Stetter*, the General Assembly did not remove from the courts the power to adjudicate all tax foreclosure actions. Rather, under the statutory enforcement scheme established by the General Assembly, common pleas courts continue to have jurisdiction to hear and decide tax foreclosure actions via a complaint filed under R.C. 323.25 or R.C. 5721.18, the transfer of a BOR action under R.C. 323.691 or R.C. 323.70(B), or a *de novo* administrative appeal of a BOR final order under R.C. 323.79. Thus, as in *Walker*, the administrative enforcement scheme established by the General Assembly "complements the work of the courts" and does not interfere with the operations of the judicial branch of government at all. *Walker* at ¶ 21.[8]

[8] Feltner's Brief argues that the General Assembly's decision to grant "concurrent" jurisdiction over tax foreclosure cases to the court of common pleas, municipal court, and board of revision

For all of these reasons, therefore, this Court should conclude that the General Assembly's adoption of an administrative tax enforcement scheme in R.C. 323.65 through R.C. 323.79 does not violate the separation of powers doctrine. As in *Central Ohio Transit Authority*, "[t]he statute does not authorize [an administrative board] to review a prior determination of the court of common pleas, nor does it empower [the administrative board] to control or impede the court's jurisdiction." *Id*., 37 Ohio St.3d at 62. Quite the contrary, common pleas courts continue to have jurisdiction over tax foreclosure actions under R.C. 323.25 and R.C. 5721.18 and have the authority to conduct *de novo* review of BOR orders under R.C. 323.79. Thus, as in *Stanton, Stetter* and *Walker*, the Court should conclude that the administrative tax foreclosure process set forth in R.C. 323.65 to R.C. 323.79 does not interfere with the operations of the judicial branch of government in violation of the separation-of-powers doctrine.

B. Feltner Misconstrues The Statutory Powers Granted To Boards of Revision Under R.C. 323.65 – 323.79.

In his Brief, Feltner also argues that the Board of Revision lacks jurisdiction over tax foreclosure proceedings because "a board of revision, as an administrative agency 'does not have equitable jurisdiction,'" and a "foreclosure proceeding is purely an action in equity." (Relator's Brief, pg. 24). This argument misconstrues the nature of **tax** foreclosure proceedings, and the nature of the **statutory** jurisdiction that has been granted to both courts of common pleas and county boards of revision to hear and decide tax foreclosure proceedings under Ohio law. While *private mortgage* foreclosure proceedings were historically based upon a court's equitable jurisdiction, they are now based primarily upon the statutory right to foreclosure set forth in the Ohio Revised Code. *See Emery Woods Acquisition, L.L.C. v. Stanley*, 8th Dist. Cuyahoga No.

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in R.C. 323.25 demonstrates a separation-of-powers violation, but he cites no case law to support this argument. In fact, his argument conflicts with this Court's reasoning in *Walker*. *Id.* at ¶ 21.

93706, 2010-Ohio-3421, ¶ 26 (holding that private company which filed foreclosure action was not seeking "equitable relief from the trial court, but rather, sought to enforce its statutory right to foreclosure pursuant to R.C. 2329.01," and thus "equitable defenses were not applicable"). Thus, the references to "equitable" authority in the cases cited in Relator's Brief are readily distinguishable from this case because none of them involve tax foreclosure proceedings.[9]

Unlike private mortgage foreclosure proceedings, tax foreclosure proceedings are based entirely upon the authority and powers granted by statute. Taxation is inherently a statutory matter, and thus the County's authority to collect taxes and to enforce tax liens is also based upon statutory powers, not equity. As this Court explained in *Gen. Motors Corp. v. Limbach*, 67 Ohio St.3d 90, 616 N.E.2d 204 (1993), "we have not applied equitable principles to tax matters." *Id.* at 93. "Where taxes are legally assessed, the taxing authority is without power to compromise, release or abate them except as specifically authorized by statute." *Id.* at 92, citing *State ex rel. Donsante v. Pethtel*, 158 Ohio St. 35, 106 N.E.2d 626 (1952), syllabus ¶ 1. Thus, as previously discussed, a tax foreclosure action relates to the "'collection' of a tax" and is not the same as a "standard foreclosure proceeding." *Johnson*, 2015 WL 4743815, at *5.

Since the authority to levy and collect taxes and to enforce a tax lien is created by statute, the procedures that govern the filing and prosecution of *tax* foreclosure proceedings are also based upon statutes. *See* R.C. 323.25 to R.C. 323.28, R.C. 323.65 to 323.79, and R.C. Chapters

[9] In his Brief, Feltner cites this Court's opinion in *Deutsche Bank Natl. Trust Co. v. Holden*, 147 Ohio St.3d 85, 2016-Ohio-4603, 60 N.E.2d 1243, for the proposition that the "right to foreclose on the mortgage can be viewed as a 'right to an equitable remedy' for the debtor's default on the underlying obligation." (Relator's Brief, pg. 24). This argument misconstrues the Court's ruling and wrongfully omits some key qualifying language from Feltner's citation. In *Deutsche Bank*, the debtor had no obligation to pay the mortgage because a "bankruptcy court has discharged their obligation in that regard." *Id.* at ¶ 6. The quoted language, therefore, omitted some important qualifying language: "**When a debtor declares bankruptcy**, 'the creditor's surviving right to foreclose on the mortgage can be viewed as a 'right to an equitable remedy' for the debtor's default on the underlying obligation." *Id.* at ¶ 27 (emphasis added).

5721, 5722, and 5723. In particular, R.C. 323.25 sets forth the authority of the County Treasurer to enforce a tax lien and provides, in relevant part, as follows:

> When taxes charged against an entry on the tax duplicate, or any part of those taxes, are not paid within sixty days after delivery of the delinquent land duplicate to the county treasurer as prescribed by section 5721.011 of the Revised Code, the county treasurer shall enforce the lien for the taxes by civil action in the treasurer's official capacity as treasurer, for the sale of such premises in the same way mortgage liens are enforced or for the transfer of such premises to an electing subdivision pursuant to section 323.28 or 323.78 of the Revised Code, in the court of common pleas of the county, in a municipal court with jurisdiction, or in the county board of revision with jurisdiction pursuant to section 323.66 of the Revised Code.

Similarly, R.C. 5721.18 sets forth the authority of a county prosecuting attorney to file a tax foreclosure action:

> The county prosecuting attorney, upon the delivery to the prosecuting attorney by the county auditor of a delinquent land or delinquent vacant land tax certificate, or of a master list of delinquent or delinquent vacant tracts, shall institute a foreclosure proceeding under this section in the name of the county treasurer to foreclose the lien of the state, in any court with jurisdiction or in the county board of revision with jurisdiction pursuant to section 323.66 of the Revised Code, unless the taxes, assessments, charges, penalties, and interest are paid prior to the time a complaint is filed, or unless a foreclosure or foreclosure and forfeiture action has been or will be instituted under section 323.25, sections 323.65 to 323.79, or section 5721.14 of the Revised Code. If the delinquent land or delinquent vacant land tax certificate or the master list of delinquent or delinquent vacant tracts lists minerals or rights to minerals listed pursuant to sections 5713.04, 5713.05, and 5713.06 of the Revised Code, the county prosecuting attorney may institute a foreclosure proceeding in the name of the county treasurer, in any court with jurisdiction, to foreclose the lien of the state against such minerals or rights to minerals, unless the taxes, assessments, charges, penalties, and interest are paid prior to the time the complaint is filed, or unless a foreclosure or foreclosure and forfeiture action has been or will be instituted under section 323.25, sections 323.65 to 323.79, or section 5721.14 of the Revised Code.

Id. Both statutes provide that the tax foreclosure action shall be filed "in the name of the county treasurer," and may be filed in the court of common pleas or the municipal court "with jurisdiction," or with "the county board of revision with jurisdiction pursuant to section 323.66 of the Revised Code." *Id.*

Given that tax foreclosure proceedings are created by statute, the legislative determination of whether a common pleas court, municipal court, or board of revision has jurisdiction over a tax foreclosure proceeding is also determined by statute. Indeed, it is well established that the General Assembly has the constitutional authority to adopt statutes that define the scope of a common pleas court's jurisdiction. *Central Ohio Transit Authority v. Transport Workers Union of America, Local 208*, 37 Ohio St.3d 56, 60, 524 N.E.2d 151 (1988). Thus, it does not violate the separation of powers doctrine for the General Assembly to adopt statutes that define the jurisdiction of a court of common pleas, municipal court, and/or board of revision over tax foreclosure matters. *Id.* ("the jurisdiction of the common pleas courts is limited to whatever the legislature may choose to bestow").

Here, it is undisputed that R.C. 323.25 expressly grants jurisdiction over tax foreclosure cases to "the court of common pleas of the county, in a municipal court with jurisdiction, or in the county board of revision with jurisdiction pursuant to section 323.66 of the Revised Code." *Id*. In particular, R.C. 323.25 to R.C. 323.28 sets forth the statutory procedures that govern a tax foreclosure action in the courts, including the statutory authority to authorize the direct transfer of land to an electing subdivision as defined by section 5722.01 of the Revised Code. *See* R.C. 323.28 (if "the property is delinquent vacant land as defined in section 5721.01 of the Revised Code, abandoned lands as defined in section 323.65 of the Revised Code, or lands described in division (F) of section 5722.01 of the Revised Code," then "the court or board of revision having jurisdiction over the matter on motion of the plaintiff, or on the court's or board's own motion, shall, upon any adjudication of foreclosure, order, without appraisal and without sale," transfer "the fee simple title of the property" to "an electing subdivision as defined in division (A) of section 5722.01 of the Revised Code"). Thus, under R.C. 323.28, a court of common pleas has

been granted the same *statutory* authority to order the transfer of the delinquent abandoned property to an electing subdivision under R.C. 5722.01 that has been granted to the Board of Revision. Accordingly, the power to order the direct transfer of delinquent abandoned property to a land bank, without a sale, is not an *equitable* power; it is a power *created entirely by statute*, and ultimately is enforced by the courts through the civil actions filed under R.C. 323.25, the transfer of actions under R.C. 323.70(B), and *de novo* administrative appeals under R.C. 323.79.

For this reason, Feltner's Brief misconstrues the nature of the Board of Revision's statutory authority to hear tax foreclosure cases under R.C. 323.65 through 323.79. In hearing the specific types of cases set forth in R.C. 323.65 through 323.79, the Board of Revision is not exercising "equitable" jurisdiction. Rather, the Board's authority is strictly limited to the specific powers granted by the statute because the Board has no general equitable powers. The fact that the Board of Revision lacks equitable jurisdiction, however, does not mean that it lacks the statutory authority to exercise the specific powers granted by statute. In *Columbus Southern Lumber Co. v. Peck*, 159 Ohio St. 564, 113 N.E.2d 1 (1953), for example, the Board of Tax Appeals refused to order restitution of an overpayment of sales taxes because it observed that "it was without equitable jurisdiction and therefore unable to afford the appellant relief." *Id.* at 569. Upon review, however, this Court *reversed* the BTA's decision because it held that, while "[i]t is true that the board does not have equitable jurisdiction," the BTA nevertheless had the "statutory authority" to refund the overpayment. *Id.* Thus, the fact that the Board of Revision lacks equitable jurisdiction does not mean that it lacks the statutory authority to exercise the powers granted by R.C. 323.65 through 323.79.

In his Brief, Feltner cites *Bank of Am., N.A. v. Kutcha*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, for the proposition that "actions in foreclosure are within the subject-

matter jurisdiction of a court of common pleas." *Id.* at ¶ 20. There is nothing in the *Kutcha* opinion, however, that establishes that common pleas courts have *exclusive* jurisdiction over foreclosure actions, which is what Feltner implies on page 21 of his Brief. Indeed, there is nothing in *Kutcha* that addresses the separation-of-powers doctrine at all. Similarly, Feltner's citation to *Union Trust Co. v. Lessovitz*, 122 Ohio St. 406, 171 N.E. 849 (1930), on page 24 of Relator's Brief is irrelevant because this case merely addresses whether an order that denied subrogation to a trust company was an appealable order. It also does not address the tax foreclosure statutes or the separation-of-powers doctrine at all. Thus, both cases are not relevant to this writ of prohibition action.

In his Brief, Feltner also argues that "the power to foreclose" must rest solely in the judiciary because the foreclosure process involves the marshalling of liens and determining the priority of liens. (Relator's Brief, pp. 22-23). In making this argument, however, Relator once again misunderstands the difference between private foreclosures and tax foreclosures. In the case of a private foreclosure, liens are marshalled and the property is appraised in order to ensure that the minimum bid for the property is two-third of the appraised value. *See* R.C. 2329.20. In the tax foreclosure context, however, the General Assembly has determined that tax liens are superior to the interests of other lienholders, and that no appraisal is required. R.C. 323.28(A) and (B). Moreover, with respect to unoccupied and delinquent lands, the General Assembly has determined that the minimum bid at any foreclosure sale is the amount of unpaid taxes and assessments, interest, penalties and charges, plus the costs apportioned to the land under Section 323.75. *See* R.C. 323.73(B). This statutory distinction between tax foreclosures and private foreclosures has been created by the General Assembly, in its legislative discretion, as part of its

constitutional authority over the procedures that govern the enforcement of tax liens, and it has been settled tax foreclosure law and practice long before the passage of H.B. 294.

Relator's argument about the marshalling and priority of liens further ignores the plain language of R.C. 323.72, which provides that a lienholder or another person having a security interest of record in the abandoned land has the right to request a transfer of the case to the court of common pleas "at any time" before an order of foreclosure is entered. Moreover, even after a foreclosure order is entered, R.C. 323.79 provides that a lienholder or other party to a foreclosure proceeding has the right to file an administrative appeal and obtain *de novo* review of the BOR's foreclosure decision. Thus, given the right to request a transfer and the availability of *de novo* judicial review, the General Assembly's statutory scheme does not violate the separation of powers doctrine because it ensures that lien holders have the right to a judicial remedy, if necessary, to protect their financial interests in the subject property. *See Hayslip v. Hanshaw*, 2016-Ohio-3339, 54 N.E.2d 1272, ¶ 30 (2d Dist.) (holding that the child support modification procedures set forth in R.C. 3119.65 did not violate separation of powers because the law granted "the right of the interested parties . . . to judicial review by requesting a court hearing").

Finally, the Court should reject Feltner's argument that R.C. 323.65 is unconstitutional because it permits the filing of a complaint by a "county land reutilization corporation or certificate holder," and thus provides that the board of revision may hear disputes between "two purely private individuals." (Relator's Brief, pg. 22). This argument ignores the fact that R.C. 323.65, *et seq*. is limited only to the foreclosure of **tax** liens on abandoned land. Indeed, under the relevant tax foreclosure statutes, the only time that a county land reutilization corporation or certificate holder would have standing to file a tax foreclosure action would be if they purchased a tax lien certificate under R.C. 5721.30 to 5721.40. Thus, the Board of Revision is not deciding

common law tort or contract claims between private parties. Rather, it is exercising the statutory powers granted by the General Assembly with respect to the collection of taxes and enforcement of tax liens. Accordingly, the Court should reject Feltner's arguments and conclude that the General Assembly has the constitutional authority to enforce tax liens on abandoned land through administrative proceedings that are subject to judicial review.

C. The Court Also Should Deny A Writ of Prohibition On Count I Because Feltner Cannot Establish The Lack of An Adequate Remedy At Law.

Given that the Board of Revision did not patently and unambiguously lack jurisdiction and given that Board of Revision proceedings are subject to judicial review, this Court also should deny the petition for writ of prohibition because it is undisputed that Feltner has an adequate remedy in the ordinary course of law. First, as previously discussed, R.C. 323.691 and R.C. 323.70(B) grant the automatic right to transfer his tax foreclosure proceeding to the court of common pleas upon request. Moreover, R.C. 323.79 grants the statutory right to appeal any foreclosure order to the court of common pleas. Thus, under the circumstances and well-established case law, Feltner is not entitled to a writ of prohibition because he has an adequate remedy at law via an administrative appeal or automatic transfer under R.C. 323.70(B) and R.C. 323.79. *See Scott*, 112 Ohio St.3d 324, 2006-Ohio-6573, 859 N.E.2d 923, at ¶ 24 (affirming dismissal of writ of prohibition action to challenge administrative civil enforcement proceedings because the underlying municipal ordinance provided for judicial review); *see also State ex rel. Fenwick v Finkbeiner*, 72 Ohio St.3d 457, 460, 650 N.E.2d 896 (1995) (writ of prohibition should have been dismissed because the employee had an adequate remedy at law through the filing of an administrative appeal).

The fact that Feltner did not actually request an automatic transfer to the court of common pleas or file a timely administrative appeal does not change the fact that he did not lack

an adequate remedy at law. As this Court has held, "[t]he 'mere fact that this remedy may no longer be available because' the relator failed to pursue it 'does not entitle [the relator] to the requested extraordinary relief in prohibition.'" *Collier-Williams*, 153 Ohio St.3d 553, 2018-Ohio-3154, 108 N.E.3d 1082, at ¶ 15, citing *State ex rel. Hamilton Cty. Bd. of Commrs. v. Hamilton Cty. Ct. of Comm. Pleas*, 126 Ohio St.3d 111, 2010-Ohio-2467, 931 N.E.2d 98, ¶ 38. Accordingly, the Court should deny the writ of prohibition action because Feltner has failed to show the lack of an adequate remedy at law. *Scott* at ¶ 24; *State ex rel. Zein v. Calabrese*, 2017-Ohio-8325, 99 N.E.3d 900, ¶ 12-16 (8th Dist.) (denying writ of prohibition to vacate foreclosure order because Zein "was permitted to appeal the order of foreclosure, but did not file an appeal").

Finally, to the extent that Feltner seeks to prosecute a facial challenge to the constitutionality of a state statute through this writ of prohibition action, then he has an adequate remedy of law through the filing of a declaratory judgment action. *Scott* at ¶¶ 21-22; *Sliwinski,* 118 Ohio St.3d 76, 2008-Ohio-1734, 886 N.E.2d 201, at ¶ 21; *State ex rel. Brooks v. O'Malley*, 117 Ohio St.3d 385, 2008-Ohio-1118, 884 N.E.2d 42, ¶ 11; *Rammage v. Saros*, 97 Ohio St.3d 430, 2002-Ohio-6669, 780 N.E.2d 278, ¶ 11. Accordingly, for this additional reason, the Court should deny a writ of prohibition for Count I.

III. THE COURT SHOULD DENY A WRIT OF PROHIBITION FOR COUNT III.

As previously discussed, Count III of the Complaint alleges that the composition of the Board of Revision creates a conflict of interest that violates due process of law and the separation of powers doctrine because the County Treasurer and the County Fiscal Officer serve "at the pleasure" of the County Executive, and because both the County Executive and County Fiscal Officer are two of the three statutory members of the Board of Revision. Moreover, Feltner alleges that a due process violation arises from the fact that the County Executive and County

Treasurer both serve on the Board of Directors for the Cuyahoga Land Bank. Both arguments are meritless arguments that should be rejected by this Court.

A. The Composition Of The Cuyahoga County Board of Revision Does Not Violate Due Process.

As previously discussed, the composition of county boards of revision is established by statute. In particular, R.C. 5715.02 provides that "[t]he county treasurer, county auditor, and a member of the board of county commissioners selected by the board of county commissioners shall constitute the county board of revision," and that they shall have the authority to create three-member hearing panels to decide the Board of Revision cases. With respect to a county that has an alternative form of government, by charter, under Article X, Section 3 of the Ohio Constitution, Ohio Rev. Code 1.62 provides that "if any section of the Revised Code requires county representation on a board by more than one county officer, and the Charter vests the powers, duties, or functions of each county officer in only a single county officer, then the "taxing authority" of the county shall adopt a resolution to fill the vacancy in the representation of the county on the board. *Id*. Here, Section 3.01 of the Charter defines the County Council as the "taxing authority" of the County. (Agreed Statement of Facts, Ex. 2, Cuyahoga County Charter, § 3.01). Thus, under R.C. 1.62 and Section 6.02 of the Charter, the three members of the Cuyahoga County Board of Revision are the County Executive, either the County Fiscal Officer or the County Treasurer, and a representative of the Cuyahoga County Council. (Agreed Statement of Facts, Ex. 2, Cuyahoga County Charter, § 6.02, and Ex. 12, Affidavit of Shelley Davis, ¶ 2). The three current members are the County Executive, Armond Budish, the County Fiscal Officer, Dennis Kennedy, and County Council Member, Michael Gallagher. (*Id.*)

The role of the County Treasurer in prosecuting tax foreclosure cases is also established by statute. R.C. 323.25 provides that, "[w]hen taxes charged against an entry on the tax

duplicate, or any part of those taxes, are not paid within sixty days after delivery of the delinquent land duplicate to the county treasurer as prescribed by section 5721.011 of the Revised Code, the county treasurer **shall** enforce the lien for the taxes by civil action in the treasurer's official capacity as treasurer, for the sale of such premises in the same way mortgage liens are enforced or for the transfer of such premises to an electing subdivision pursuant to section 323.28 or 323.78 of the Revised Code, in the court of common pleas of the county, in a municipal court with jurisdiction, or in the county board of revision with jurisdiction pursuant to section 323.66 of the Revised Code." (Emphasis added) *Id.* The tax foreclosure action therefore is prosecuted by the Cuyahoga County Prosecutor's office in the name of the County Treasurer in the same manner as any other county in the State of Ohio.

The fact that the County Executive and/or the County Fiscal Officer may have an interest, as county officers who manage the fiscal affairs of the county, in the collection of taxes does not mean that the composition of the Board of Revision violates due process. This Court in fact has examined this due process issue in prior Board of Revision cases, and repeatedly affirmed this conclusion time and time again. In *Alliance Towers, Ltd. v. Stark Cty. Bd. of Rev.*, 37 Ohio St.3d 16, 523 N.E.2d 826 (1988), for example, the taxpayers argued that they were denied due process in a tax valuation proceeding because one of the members of the Stark County Board of Revision was "the county auditor, whose initial valuation of the property was the topic of the inquiry." *Id.* at 25. Upon review, however, this Court rejected the due process argument on two grounds. First, it found that the taxpayers failed to show that the action taken by the three-person hearing panel "was not performed in good faith and in the exercise of sound judgment." *Id.* Moreover, the Court held that the statutory scheme did not violate due process because it provided for *de novo* review by the Board of Tax Appeals or the court of common pleas. *Id.* In so doing, the

Court observed that "the General Assembly recognized the possible conflict of interest in the roles of the board members as officials who conduct the affairs of the county, and provided for an appeal to the BTA or the court of common pleas." *Id.* at 25.

Although *Alliance Towers* did not involve the Cuyahoga County Board of Revision, this Court recently reached a similar conclusion about the Cuyahoga County Board of Revision in *Jakobovitch v. Cuyahoga County Board of Revision*, 152 Ohio St.3d 187, 2017-Ohio-8818, 94 N.E.2d 519. In *Jakobovitch*, the taxpayer also argued that the "BOR violated her due-process right to a fair and impartial decision-maker" because of a "conflict of interest resulting from the fact that the fiscal officer and the BOR are represented by the same counsel." *Id.* at ¶ 27. Upon review, however, this Court again rejected the due process argument. Although the three statutory members of the Cuyahoga County Board of Revision "conduct the affairs of the county" and have "an interest in the case because the value decision affects the county's tax revenues," this Court nevertheless concluded that no due process violation arises because "the General Assembly 'provided for an appeal to the BTA or the court of common pleas' for a de novo hearing." *Id.*, citing *Alliance Towers* at 25.

The same conclusion should be reached in this case. Although Feltner argues that the County Executive and the County Fiscal Officer have a greater conflict of interest in tax foreclosure actions than property valuation complaints, this is not true because property valuation complaints often have a significant *greater* impact on the county's tax revenues than tax foreclosure actions. Nevertheless, in light of the potential conflict of interest, the statutory members of the Cuyahoga County Board of Revision are not involved in any manner in the adjudication of BOR cases. (*See* Agreed Statement of Facts, Ex. 12, Affidavit of Shelley Davis, ¶ 3-4). Rather, all tax foreclosure cases are heard by three-member hearing panels who issue

final decisions that are not subject to further review or approval by the statutory members of the Board. (*Id.*) Rather, the foreclosure orders of the three-person hearing panel are final orders that can be directly appealed to the Cuyahoga County Court of Common Pleas under Section 323.79 of the Ohio Revised Code. (*Id.* at ¶ 4).

Indeed, under Section 6.02 of the Charter, the Cuyahoga County Board of Revision must "establish merit qualifications for the individuals serving on hearing panels" and must "enact and publish additional rules, procedures, or regulations to ensure that the system is administered fairly, including rules, procedures, or regulations governing conflicts of interest." (*See* Agreed Statement of Facts, Ex. 2, Cuyahoga County Charter, § 6.02(6) and (8)). Moreover, Section 6.02(7) of the Charter provides that "no member of the Board of Revision may serve on any of the hearing panels," and that the "no member of the Board or any of the hearing panels may have any *ex parte* communications . . . regarding the merits of any pending matter before the panel." (Charter, § 6.02(7) and (8)). Thus, in tax foreclosure cases, none of the official Board members (the County Executive, the County Fiscal Officer, and County Council representative) "ever hear, decide, or participate in any way with the hearings or review or approve the final decisions of the hearing panels." (Agreed Statement of Facts, Ex. 12, Davis Aff. ¶ 4).

This is critical because, as in *Alliance Towers*, there is no evidence in the record to show that the three-person hearing panel that decided Feltner's case did not perform their duties "in good faith and in the exercise of sound judgment." *Alliance Towers* at 25. Feltner in fact makes no such argument in his brief. Thus, as in *Alliance Towers*, the Court should conclude that Feltner has failed to establish that the three-member panel who heard and decided his foreclosure action actually violated his due process rights. *Id.* (rejecting due process challenge because "[t]he taxpayers offered no testimony or evidence that the action of the board of revision was not

performed in good faith and in the exercise of sound judgment. Absent this proof, the action of the board of revision must be presumed to be valid").

Ultimately, however, any potential conflict of interest that may arise from the composition of the Board of Revision does not constitute a due process violation because, as in the *Alliance Towers* and *Jakobovitch* cases, the General Assembly has provided for *de novo* review of the BOR's orders in R.C. 323.79. In particular, R.C. 323.79 provides that "an appeal as provided in this section shall proceed **as an appeal de novo** and may include issues raised or adjudicated in the proceedings before the county board of revision, ***as well as other issues that are raised for the first time on appeal*** and that are pertinent to the abandoned land that is the subject of those proceedings." (Emphasis added.) *Id.* Thus, under R.C. 323.79, a party is entitled to *de novo* review by the court of common pleas, which is not limited to the administrative record, but permits the consideration of new issues that are raised for the first time on appeal. *Johnson*, 2015 WL 4743815, *6 (explaining that R.C. 323.79 provides "plain, speedy, and efficient" judicial remedy because it provides the right to file an appeal to the court of common pleas in which "the parties may assert issues raised for the first time on appeal and that are pertinent to the abandoned land that is the subject of those proceedings").

In prior briefing in this action, Feltner has argued that R.C. 323.79 does not provide for *de novo* review because it provides that new issues raised for the first time on appeal must be "pertinent to the abandoned land that is the subject of those proceedings." This is a meritless argument because the quoted language from R.C. 323.79 does not impose a substantive limitation on the *de novo* review that may be conducted by the trial court, but simply prevents a party from raising *irrelevant* issues that are not "pertinent" to the property that was the subject of the tax foreclosure proceeding. Indeed, in providing for *de novo* review by the Court of

Common Pleas, the scope of review provided by R.C. 323.79 is actually broader and more expansive than the *de novo* review conducted by the Board of Tax Appeals because it permits a party to raise constitutional questions for the first time on appeal that are ordinarily beyond the jurisdiction of the Board of Tax Appeals. *Glob. Knowledge Training, L.L.C. v. Levin*, 127 Ohio St.3d 34, 2010-Ohio-4411, 936 N.E.2d 463, ¶ 16. Thus, for the same reasons discussed in *Alliance Towers* and *Jakobovitch*, the Court should conclude that no due process violation arises from the composition of the Board of Revision because the General Assembly provided for *de novo* review of the BOR's foreclosure decisions by the court of common pleas.

B. The Composition of the Cuyahoga Land Bank's Board of Directors Does Not Violate Due Process.

Similarly, the Court should reject Feltner's argument that a due process violation arises because the County Executive and the County Treasurer serve as two of the nine members of the Board of Directors for the Cuyahoga Land Bank. As previously discussed, the composition of the board of directors for a county land reutilization corporation is also established by statute, R.C. 1724.03(B) and R.C. 1.62. Indeed, as a quasi-governmental body, the members of the Board of Directors for the Cuyahoga Land Bank are selected based upon their status as county and municipal officials in order to represent the interests of the general public, not their individual interests. Moreover, unlike a for-profit corporation, the members of the Board of Directors do not receive compensation based upon the financial performance of the Cuyahoga Land Bank, which is a not-for-profit corporation that was formed solely to carry out the public purpose of "[f]acilitating the reclamation, rehabilitation, and reutilization of vacant, abandoned, tax-foreclosed, or other real property." *See* R.C. 1724.01.

The fact that the Ohio Revised Code places the County Executive and County Treasurer on the Board of Directors for the Cuyahoga Land Bank, therefore, does not create a due process

violation for the same reasons why the Ohio Revised Code's composition of a Board of Revision does not violate due process. Like property valuation complaints, tax foreclosure cases are not heard by the statutory members of the Board of Revision. They are heard by three-person hearing panels, and there is no evidence that the hearing panel in this case did not act "in good faith and in the exercise of sound judgment." *Alliance Towers* at 25. Moreover, as in *Alliance Towers* and *Jakobovitch*, any potential conflict of interest does not violate due process because the General Assembly has provided for *de novo* review of BOR decisions by the court of common pleas. *Jakobovitch* at ¶ 27; *Alliance Towers* at 25.

C. The Statutory Role of the County Treasurer In Prosecuting Tax Foreclosure Actions Does Not Violate Due Process Or Separation of Powers.

The Court also should reject Feltner's argument that the statutory role of the County Treasurer in prosecuting tax foreclosure actions violates due process and/or the separation of powers doctrine. In his Brief, Feltner suggests that the statutory role of the County Treasurer as "prosecutor" violates due process and separation of powers because the County Treasurer allegedly "appoints members of the hearing panels that decide the cases." (Relator's Brief, pg. 27). This is not true, and there is no evidence in the record to support this unsubstantiated allegation. Indeed, with respect to Cuyahoga County, the County Treasurer is not a member of the Board of Revision and plays no role in the hiring of three-member hearing panels. Thus, the role of the County Treasurer in Cuyahoga County is different than other county boards of revision where the county treasurer is a statutory member under R.C. 5715.02.[10]

[10] As previously discussed, the Cuyahoga County Charter provides that the three statutory members of the Cuyahoga County Board of Revision shall be the County Executive, *either* the County Fiscal Officer *or* the County Treasurer, and a representative of the Cuyahoga County Council. (Agreed Statement of Facts, Ex. 2, Cuyahoga County Charter, § 6.02, and Ex. 12, Affidavit of Shelley Davis, ¶ 2). In this case, however, it is the County Fiscal Officer, Dennis Kennedy, who serves on the Board of Revision, not the County Treasurer. (Davis Aff. ¶ 2).

In any event, Feltner's due process theory is flawed because it is well established that it does not violate due process for a member of the executive branch of government to appoint the administrative hearing officer or board that may decide the merits of a claim as part of an administrative hearing process. As both the U.S. Supreme Court and this Court have explained, due process merely requires notice and "the opportunity to be heard in a meaningful time and a meaningful manner." *Woods v. Teib*, 89 Ohio St.3d 504, 514, 733 N.E.2d 1103 (2000), citing *Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). In the administrative hearing context, therefore, it is well established that the hearing officer "need not be a judicial officer." *See Woods*, 89 Ohio St.3d at 514, quoting *Moriseey v. Brewer*, 408 U.S. 471, 486, 92 S.Ct. 2593, 2603, 33 L.Ed.2d 484, 497 (1972). Rather, in *Goldberg*, the U.S. Supreme Court only required "that the hearing be conducted by some other person other than the one initially dealing with the case." *Id.* Thus, in *Woods*, this Court held that it does not violate due process for an administrative agency (the Adult Parole Authority) to conduct post-release control violation hearings so long as the hearings were not conducted by the parole officer who was presenting the allegations and recommending revocation. *Id.*, 89 Ohio St.3d at 514.

Here, as previously discussed, tax foreclosure proceedings comply with this due process requirement because they are heard and decided by three-person hearing panels who were appointed based upon a merit-based selection process and are prohibited by the Charter from engaging in *ex parte* communications or in deciding cases in which they have a conflict of interest. (Agreed Statement of Facts, Ex. 2, Cuyahoga County Charter, § 6.02(6), (7) and (8)). Indeed, contrary to Feltner's suggestions, tax foreclosure proceedings do not involve the situation where the "prosecutor" and "hearing officer" are the same person. While tax foreclosure actions are prosecuted in the name of the County Treasurer, the Treasurer is not the

"prosecutor" who presents evidence at the BOR hearing. Rather, the prosecutor in the BOR's tax foreclosure proceedings is the Assistant County Prosecutor assigned to the particular tax foreclosure matter, and the "hearing officer" is an independent, three-person hearing panel that hears and decides BOR cases without any review and/or approval by the County Executive, the County Fiscal Officer, or the County Treasurer. (Davis Aff. ¶ 3-4). Thus, as in *Woods*, this Court should conclude that the BOR's administrative hearing process does not violate due process because the "prosecutor" and the "hearing officer" are not the same person. *Id.*, 89 Ohio St.3d at 514 (holding that post-release control violation hearings did not violate due process because they were not conducted by the petitioner's parole officer).

Indeed, the role of three-person panels in BOR tax foreclosure cases is no different than the three-person hearing panels who decide BOR tax valuation complaints and any other type of administrative hearing officer or board who has been appointed by the executive officer or agency to hear and decide cases in an administrative proceeding. If the Court were to accept Relator's argument that the composition of the Cuyahoga County Board of Revision violates due process and/or separation of powers, therefore, it would be undermining the entire administrative hearing process in a whole host of situations where hearing officers are appointed by an executive officer or agency to hear and decide adversarial cases subject to judicial review. *Stanton*, 114 Ohio St. at 675 (holding that matters of judicial cognizance "may be submitted for determination to administrative boards and commissions, or other public officials, without violating the requirements of due process, if provision is made for a judicial review").

Ultimately, however, the Court need not reach this far-reaching result because Relator's Brief completely fails to cite any case law that establishes beyond a reasonable doubt that the composition of the Cuyahoga County Board of Revision violates due process or the separation of

powers doctrine. (Relator's Brief, pp. 26-28). Indeed, even though this Court directly addressed this same due process issue in *Alliance Towers* and *Jakobovitch*, Relator's Brief completely fails to cite or address either Supreme Court case. Moreover, Relator's Brief fails to address how the availability of judicial review negates his alleged due process argument, as this Court determined in the *Alliance Towers* and *Jakobovitch* cases. Accordingly, Amici respectfully request that this Court reject Feltner's unsubstantiated arguments and follow its prior precedents in *Alliance Towers* and *Jakobovitch* to deny a writ of prohibition for Count III.

D. The Court Also Should Deny A Writ of Prohibition On Count III Because Feltner Cannot Establish The Lack of An Adequate Remedy At Law.

Finally, the Court should deny a writ of prohibition on Count III because this constitutional claim presents a due process argument, not an argument relating to whether the Board of Revision patently and unambiguously lacked jurisdiction. Indeed, to the extent that the Board of Revision violated Feltner's due process rights, Feltner did not lack an adequate remedy at law because he had the right to request an automatic transfer under R.C. 323.70(B) and to appeal the BOR's decision to the court of common pleas under R.C. 323.79. Thus, under the circumstances and well-established case law, Feltner is not entitled to a writ of prohibition on Count III because he has an adequate remedy for the alleged due process violation via an administrative appeal. *See Scott*, 112 Ohio St.3d 324, 2006-Ohio-6573, 859 N.E.2d 923, at ¶ 24; *see also Fenwick*, 72 Ohio St.3d at 460 (writ of prohibition should have been dismissed because the employee had an adequate remedy at law through the filing of an administrative appeal).

IV. THE EVIDENCE IN THE RECORD ESTABLISHES THAT THE BOARD OF REVISION HAD JURISDICTION OVER FELTNER'S TAX FORECLOSURE PROCEEDINGS UNDER OHIO REVISED CODE 323.66.

As previously discussed, R.C. 323.66 provides that a county board of revision has jurisdiction over any tax foreclosure proceeding involving "unoccupied" lands, as defined by

R.C. 323.65. Here, with respect to the key jurisdictional facts, the evidence in the record shows that the Summons and Complaint were properly served upon Feltner by ordinary mail to the last known tax mailing address in accordance with Civ. R. 4.6. *See Groveport Madison Local Sch. Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 149 Ohio St.3d 706, 2017-Ohio-1428, 77 N.E.3d 957, ¶¶ 16-17 (service to owner's tax mailing address is sufficient unless the agency has actual knowledge of a different, better address); *In re Foreclosure of Liens for Delinquent Taxes*, 62 Ohio St.2d 333, 337, 405 N.E. 2d 1030 (1980) (notification "by ordinary mail to the record addresses" would comport with due process requirements) (citing *Mullane*).[11] Moreover, there is uncontested evidence in the record that Feltner was delinquent in paying his real estate taxes, and that the land was unoccupied. (*See* Agreed Statement of Facts, ¶ 11 and Ex. 1, pp. 0080-0082, 0178). Thus, the evidence shows that BOR had jurisdiction over Feltner's tax foreclosure proceedings under R.C. 323.66 because the taxes were delinquent and the land was unoccupied.

To the extent that the Board of Revision committed any errors in determining its own jurisdiction under the relevant statutes, then the appropriate remedy would have been a timely administrative appeal, not a writ of prohibition. *See Scott*, 112 Ohio St.3d 324, 2006-Ohio-6573, 859 N.E.2d 923, at ¶ 16 ("a tribunal having general subject-matter jurisdiction can determine its own jurisdiction, and a party challenging that jurisdiction has an adequate remedy in the ordinary course of law by appeal"). Indeed, in this case, it is undisputed that Feltner had notice of the BOR proceedings because he attended the first hearing on March 15, 2017, and had personal notice of the second BOR hearing on June 21, 2017. Yet, for some reason, he elected not to

[11] R.C. 323.13 provides that a taxpayer must notify the County Treasurer in writing of any change in the tax mailing address. Thus, this Court has held that service by mail to the property owner's last known tax mailing address is sufficient to comply with due process "because the owner designates that address to the auditor at the time of transfer (R.C. 319.20) and has a duty to notify the treasurer of any changes (R.C. 323.13)." *Groveport Madison* at ¶ 17.

attend the June 21st Hearing and did not appeal the BOR's decision. The fact that Feltner did not file an appeal, however, does not mean that he lacked an adequate remedy at law. Accordingly, for this additional reason, the Court should deny a writ of prohibition in this case.

V. THIS COURT SHOULD NOT ISSUE ANY RULING THAT WOULD RETROACTIVELY AFFECT THE VALIDITY OF PRIOR SALES OR TRANSFERS OF PROPERTY IN TAX FORECLOSURE PROCEEDINGS.

In his Brief, Relators argues that any ruling by this Court that the underlying statutes are unconstitutional means that all prior foreclosure orders issued by boards of revision are "wholly unauthorized and void." (Relator's Brief, pg. 34). This argument overstates the impact of any potential adverse ruling in this case. Even in the unlikely event that the Court were to conclude that any portion of R.C. 323.65 to 323.79 is unconstitutional, such a ruling should not be applied retroactively. Although the general rule is that a decision overruling a statute is retrospective in its operation, this Court "has carved out exceptions to this rule: in those instances where a court expressly indicates that its decision is to apply only prospectively," or "in those cases in which contractual rights have arisen or a party has acquired vested rights under prior law. *See Roberts v. Treasurer, State of Ohio*, 147 Ohio App.3d 403, 2001-Ohio-8867, 770 N.E.2d 1085, ¶ 21 (10th Dist.), citing *Lakeside Ave. L.P. v. Cuyahoga Cty. Bd. of Rev.*, 85 Ohio St.3d 125, 127, 707 N.E.2d 472 (1999); *State ex rel. Bosch v. Indus. Comm.*, 1 Ohio St. 3d 94, 98, 438 N.E.2d 413 (1982); *Peerless Elec. Co. v. Bowers*, 164 Ohio St. 209, 210, 129 N.E. 2d 467 (1955); *Cartwright v. Maryland Ins. Group*, 101 Ohio App.3d 439, 443, 655 N.E.2d 827 (9th Dist. 1995); and *King v. Safeco Ins. Co.*, 66 Ohio App.3d 157, 161, 583 N.E.2d 1051 (1st Dist. 1990).

Here, since 2004, there have been over 31,200 administrative tax foreclosure orders that have resulted in the sale or transfer of *tens of thousands* of abandoned, tax delinquent properties in 14 counties. (Agreed Statement of Facts, Ex. 13, Frangos Aff. ¶ 19). In the unlikely event that the Court were to conclude that the administrative tax foreclosure statutes were

unconstitutional, therefore, it should exercise its discretion to apply such a ruling prospectively and/or in a manner that does not affect the vested rights of any party who purchased or received abandoned land that was the subject of a prior tax foreclosure proceeding. *See Linkletter v. Walker*, 381 U.S. 618, 628-629, 85 S.Ct. 1731, 14 L.Ed.2d 801 (1965) ("the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective" because "the Constitution neither prohibits nor requires retrospective effect").

CONCLUSION

For these reasons, Amicus Parties, the Cuyahoga County Land Reutilization Corporation and the Ohio Land Bank Association, respectfully request that the Court reject the separation-of-powers and due process arguments presented by Relator in Counts I and III of the Complaint and deny Feltner's request for a writ of prohibition.

Respectfully submitted,

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PROOF OF SERVICE

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