

IN THE

SUPREME COURT OF OHIO

**STATE EX REL. U.S. BANK TRUST,
NATIONAL ASSOCIATION,**

Relator-Appellant,

vs.

**CUYAHOGA COUNTY, OHIO, ET
AL.,**

Respondent-Appellees

:
: Consolidated Appeals Nos.
: 2021-1090, 2021-1091, 2021-1181
:
: Appeal of Right from Eighth
: Appellate District, Cuyahoga Case
: No. CA 21-110297, Sixth Appellate
: District, Lucas Case No. L-21-1087,
: and Ninth Appellate District, Summit
: No. 29889
:

**BRIEF OF AMICUS CURIAE, THE OHIO PROSECUTING ATTORNEYS
ASSOCIATION, IN SUPPORT OF RESPONDENTS**

JOSEPH T. DETERS (0012084)
Hamilton County Prosecuting Attorney
CHARLES W. ANNESS (0082194)
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3021
Fax No. (513) 946-3018

COUNSEL FOR AMICUS CURIAE, THE
OHIO PROSECUTING ATTORNEYS
ASSOCIATION

ANDREW M. ENGEL (0047971)
MARC E. DANN (0039425)
ADVOCATE ATTORNEYS, LLP
1629 K St NW, Suite 300
Washington, DC 20006
(202) 935-6990
COUNSEL FOR APPELLANT

STEPHEN W. FUNK (0058506)
ROETZEL & ANDRESS, LPA
222 S. Main Street, Suite 400
Akron, OH 44308
(330) 376-2700
Fax No. (303) 376-4577
COUNSEL FOR APPELLEES

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	1
STATE OF AMICUS INTEREST	3
STATEMENT OF THE CASE	4
ARGUMENT	5
<i>A. PROPOSITION OF LAW NO. 1: US BANK’S COMPLAINT FAILS TO STATE A VALID WRIT OF MANDAMUS CLAIM BECAUSE IT CANNOT ESTABLISH A CLEAR LEGAL RIGHT TO THE REQUESTED RELIEF</i>	6
<i>B. PROPOSITION OF LAW NO. 2: US BANK IS NOT ENTITLED TO A WRIT OF MANDAMUS AS IT CANNOT DEMONSTRATE A CLEAR LEGAL DUTY ON THE PART OF THE APPELLEES TO PROVIDE THE REQUESTED RELIEF</i>	8
<i>C. PROPOSITION OF LAW NO. 3: US BANK IS NOT ENTITLED TO A WRIT OF MANDAMUS AS IT CANNOT SHOW IT LACKED AN ADEQUATE REMEDY IN THE ORDINARY COURSE OF THE LAW</i>	9
CONCLUSION	13
PROOF OF SERVICE	14

TABLE OF AUTHORITIES

PAGE

Cases

Bana v. Pittsburgh Plate Glass Co., 48 Ohio L. Abs. 594, 76 N.E.2d 625 (Ohio App. 9 Dist. 1947) 6

Cincinnati v. Jennewein, 1st Dist. Hamilton No. C-77240, 1978 WL 216461, *1 (Jun. 7, 1978) 6

Davis v. State, ex rel. Pecsok, 130 Ohio St. 411, 200 N.E. 181 (1936)..... 9

Ohio Cas. Ins. Co. v. D&J Distrib. & Mfg., Inc., 6th Dist. Lucas No. L-08-1104, 2009-Ohio-3806, ¶ 22 6

State ex rel. Dix v. McAllister, 81 Ohio St.3d 107, 108, 689 N.E.2d 561 (1998)..... 9

State ex rel. Evans v. Scioto County Common Pleas Court, 155 Ohio St.3d 41, 2018-Ohio-4696, 118 N.E.3d 249, ¶ 6 5

State ex rel. Harris v. Rhodes, 54 Ohio St.2d 41, 42, 374 N.E.2d 641 (1978) 5

State ex rel. National City Bank, v. Bd. of Education, 52 Ohio St.2d 81, 369 N.E.2d 1200 (1977) 5

State ex rel. Smith v. Cuyahoga Cty. Court of Common Pleas, 106 Ohio St.3d 151, 2005-Ohio-4103, 832 N.E.2d 126, ¶19 9

State, ex rel. Stanley, v. Cook, 146 Ohio St. 348, 66 N.E.2d 207 (1946) 9

State ex rel. Tucker v. Matia, 147 Ohio St.3d 418, 2016-Ohio-7450, 66 N.E.3d 730, ¶ 2..... 5

Constitutions

Ohio Constitution, Article IV 5

Statutes

R.C. 323.28 11

R.C. 323.65-.79..... 3, 4, 12

R.C. 323.66 4

R.C. 323.68 4

R.C. 323.69.....	4
R.C. 323.691.....	12
R.C. 323.70.....	12
R.C. 323.79.....	4, 9
R.C. 1724.04.....	8
R.C. 2731.01.....	5
R.C. 5713.01.....	6
R.C. 5723.01.....	11
R.C. 5723.04.....	11
R.C. 5723.05.....	11
R.C. 5723.06.....	11
 Rules	
Ohio Civ. R. 4.....	4
Ohio Civ. R. 5.....	4

STATEMENT OF AMICUS INTEREST

The Ohio Prosecuting Attorneys Association (“OPAA”) offers this amicus brief in support of the Respondents, Cuyahoga County, Ohio, Lucas County, Ohio Board of Commissioners, and Summit County, Ohio.

The Ohio Prosecuting Attorneys Association is a private non-profit membership organization that was founded for the benefit of the 88 elected county prosecutors. The Association’s Mission Statement dictates that the Association “assists county prosecuting attorneys to pursue truth and justice as well as promote public safety. The Association advocates for public policies that strengthen prosecuting attorneys’ ability to secure justice for crime victims and serve as legal counsel to county and township authorities. Further, the Association sponsors continuing legal education programs and facilitates access to best practices in law enforcement and community safety. The Association also offers information to the public about the role of prosecutors in the justice system.”

The OPAA is interested in this case, and offers this amicus brief in support of the Appellees, because prosecuting attorneys, and the county officials they represent, will be directly affected by the decision of this Court. Pursuant to Section 323.65 through 323.79 of the Ohio Revised Code, qualifying Ohio counties can establish expedited tax foreclosure procedures before the Board of Revision for vacant and abandoned land and enforce the statutory remedies adopted by the General Assembly. The Respondents in these appeals are counties in which expedited tax foreclosure proceedings, in accordance with the Ohio Revised Code, were filed and prosecuted. These counties and all other counties throughout the State need the assurance they can collect taxes through foreclosure actions without fear of the threat of fanciful eminent domain accusations. To endorse post-judgment litigation based solely on phantom property values would severely burden Ohio counties in their fight to collect delinquent property taxes

and to enforce the requirements of Ohio's tax collection laws. The Court should reject the taxpayer funded bank bailout advanced by US Bank. The decisions of the Courts of Appeals should be affirmed and the Writ of Mandamus should be denied.

STATEMENT OF THE CASE

Amicus adopts by reference the Statement of Case contained in the Appellees' Merit Brief. The OPPA wants to emphasize, however, that Prosecuting Attorneys have a statutory duty under R.C. 323.69 to prosecute a tax foreclosure complaint on behalf of the county treasurer and expend significant time and resources in ensuring that tax foreclosure proceedings are conducted in accordance with the statutory requirements of R.C. 323.65 to R.C. 323.79. Indeed, prior to filing the complaint, R.C. 323.68 provides that the County Prosecutor shall perform a title search to identify all persons who may have an interest in the tax delinquent property, and to ensure that every interested party is properly served in accordance with R.C. 323.66 and Civil Rules 4 and 5. In performing both statutory obligations, the County Prosecutor expects the property owner and any lienholders to come forward *during* the tax foreclosure proceedings if they want to contest the foreclosure, request a transfer, or enter into a payment plan to pay the outstanding taxes.

The vast majority of Defendants, however, fail to appear in the tax foreclosure proceedings at all, and US Bank and its predecessors were no different in the tax foreclosure actions at issue in this case. Indeed, it is undisputed that US Bank and its predecessors did *nothing* to respond to the tax foreclosure complaints; they did not file an answer, appear at any of the hearings, or pay any of the outstanding taxes. Yet, they now want to come forward years after the fact to pursue alleged "takings" claims for the alleged deprivation of a property interest that they essentially disclaimed and failed to protect during the underlying tax foreclosure proceedings. Under the circumstances, therefore, this Court should not permit US Bank to circumvent the judicial review scheme set forth in R.C. 323.79, but should affirm the lower court

judgments that this statute provides an adequate remedy at law. Moreover, the Court should conclude that US Bank's legal theory is legally meritless, and affirm the dismissal of the complaints, with prejudice, for failure to state a claim.

ARGUMENT

A writ of mandamus is an extraordinary source of relief provided for in Article IV of the Ohio Constitution and R.C. 2731. R.C. 2731.01 states that “[m]andamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.” R.C. 2731.01.

The Ohio Supreme Court has held that in order to be entitled to a writ of mandamus, the relator must show that (1) relator has a clear legal right to the relief prayed for, (2) the respondents are under a clear legal duty to perform the acts, and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Harris v. Rhodes*, 54 Ohio St.2d 41, 42, 374 N.E.2d 641 (1978); citing *State ex rel. National City Bank, v. Bd. of Education*, 52 Ohio St.2d 81, 369 N.E.2d 1200 (1977). See also *State ex rel. Evans v. Scioto County Common Pleas Court*, 155 Ohio St.3d 41, 2018-Ohio-4696, 118 N.E.3d 249, ¶ 6, citing *State ex rel. Tucker v. Matia*, 147 Ohio St.3d 418, 2016-Ohio-7450, 66 N.E.3d 730, ¶ 2. The Relator fails on all three of these necessary elements.

I. PROPOSITION OF LAW NO. 1: US BANK’S COMPLAINT FAILS TO STATE A VALID WRIT OF MANDAMUS CLAIM BECAUSE IT CANNOT ESTABLISH A CLEAR LEGAL RIGHT TO THE REQUESTED RELIEF.

US Bank’s complaint is based upon the allegation that the lawful enforcement of a tax foreclosure action allegedly deprived the property owner and the junior lienholders of the alleged “surplus equity” in a tax-foreclosed property. In so doing, US Bank defines “surplus equity” as being the difference between the auditor’s most recent tax valuation and the amount of taxes owed. This is a legally meritless theory for several reasons.

First, US Bank’s theory is meritless because it wrongfully attempts to use the auditor’s most recent tax valuation as evidence of the “fair market value” of the property at the time of the tax foreclosure order. This simply cannot be. The auditor must assess the taxable value of property only once every six years. R.C. 5713.01. These bulk value assessments are very different from individual professional appraisals. Additionally, Ohio courts have held, “the general rule is that the [auditor-] assessed valuation of property is not evidence of...value for other than tax purposes.” *Ohio Cas. Ins. Co. v. D&J Distrib. & Mfg., Inc.*, 6th Dist. Lucas No. L-08-1104, 2009-Ohio-3806, ¶ 22, quoting *Bana v. Pittsburgh Plate Glass Co.*, 48 Ohio L. Abs. 594, 76 N.E.2d 625 (Ohio App. 9 Dist. 1947); see also *Cincinnati v. Jennewein*, 1st Dist. Hamilton No. C-77240, 1978 WL 216461, *1 (Jun. 7, 1978) (“As a general rule the assessed valuation of property is not evidence of value for other than tax purposes”). Given this general prohibition on presenting this very evidence as evidence of true value, US Bank has failed to satisfy the first requirement for the requested writ of mandamus.

Indeed, by attempting to use the auditor’s value to prove that there was “surplus equity” in these vacant and abandoned properties, US Bank’s theory is wrongfully attempting to use a tax foreclosure order as a vehicle to obtain a financial windfall at the expense of the law-abiding

taxpayers of each county. Arguably, evidence of the true value of US Bank's property interest may be found in the conduct of US Bank. It is undisputed that US Bank and its predecessors failed to contest the tax foreclosure complaints and failed to pursue any remedy in the tax foreclosure proceedings. This fact suggests that the properties at issue (and associated recorded instruments) were worthless. In fact, if the properties had any value, then US Bank and/or its predecessors would have answered the complaint and otherwise taken action to protect its alleged interests. It did nothing. Instead, years later, US Bank is seeking to prosecute a new judicial action, apart from the one it completely ignored, to obtain a financial windfall from its admitted failure to pay taxes and/or enforce its rights. US Bank (or its predecessors) could have initiated its own private mortgage foreclosure or, in the case of the property US Bank owned, simply paid the taxes. Instead, the bank ignored all the due process it was afforded in the foreclosures, but now expects to be paid for its tax delinquency investment strategy.

The issue in the desired litigation resulting from the writ will be effectively how much money from the county treasury is owed to US Bank. The purported plaintiff in this new action will be the county government, which did not order the transfer, receive the property, or incur any benefit from the taking. US Bank is an unrepentant tax dodger expecting compensation for a vacant property that it never sought to protect in the underlying tax foreclosure proceedings. If US Bank were permitted to pursue a takings claim based upon this legal theory, it would open the door to a whole host of delinquent taxpayers who did not pay their taxes or otherwise contest the foreclosure, but now want to be paid at the expense of the county's law-abiding taxpayers.

For these reasons, the Court should conclude that US Bank cannot show a clear legal right to the relief prayed in the Complaint because no legal right exists to recover expected

profits in the wake of unopposed tax foreclosure proceedings. As US Bank cannot show a clear legal right for the relief requested, it is not entitled to a writ of mandamus.

II. PROPOSITION OF LAW NO. 2: US BANK IS NOT ENTITLED TO A WRIT OF MANDAMUS AS IT CANNOT DEMONSTRATE A CLEAR LEGAL DUTY ON THE PART OF THE APPELLEES TO PROVIDE THE REQUESTED RELIEF.

In this consolidated action, US Bank has named two counties (in geographic name only) and one board of county commissioners. The OPAA would like to note the problem with labeling multiple governmental and quasi-governmental entities as one. Setting aside the *sui juris* issues presented with a geographic area as a party, the county commissioners appear to be named only in an attempt to anchor an eminent domain proceeding against the government. The Court, in evaluating the second requirement for a writ of mandamus, should consider the ridiculous logical leap necessary to place *any* duty with the county commissioners (or the county executive in a county with an alternative form of county government) to file eminent domain proceedings to determine the value of a property every time that a county prosecutor files a tax foreclosure proceeding.¹

In this regard, County Commissioners generally play no role in tax foreclosure proceedings. Although the County Prosecutor files a tax foreclosure proceeding on behalf of the County Treasurer, it is simply following the statutory requirements established by the General Assembly. Similarly, the Board of Revision is action as an agent of the State in enforcing Ohio's tax foreclosure laws. Although, US Bank's Complaint attempts to allege that the County has a "clear legal duty" to initiate appropriation proceedings because the properties were transferred to a county land reutilization corporation, this argument ignores the fact that county land reutilization corporations are separate corporations from the county. *See* R.C. 1724.04 (requiring

¹ For ease of the reader, the term "commissioners," will refer to the executives in all forms of county government in Ohio.

articles of incorporation be filed with the secretary of state). A county land reutilization corporation (or “county land bank”), therefore, is not a county agency and does not fall under the jurisdiction of the county commissioners. As such, no duty can be placed on the commissioners as it relates to these tax foreclosures and resulting transfers of the subject properties to the wholly separate third party in accordance with Ohio’s tax foreclosure statutes.

As this Court has held, a court in a writ of mandamus proceeding cannot create a legal duty that the relator would enforce through it. Rather, creation of the duty is the distinct function of the legislative branch of government. *State, ex rel. Stanley, v. Cook*, 146 Ohio St. 348, 66 N.E.2d 207 (1946); *Davis v. State, ex rel. Pecsok*, 130 Ohio St. 411, 200 N.E. 181 (1936), paragraph one of the syllabus. The county commissioners (or the geographic area of the county) have no duty to reimburse US Bank for an alleged lost value in a tax-foreclosed property.

Here, none of the Appellees owe US Bank a clear legal duty to provide it with the relief it seeks. US Bank’s Complaints therefore were properly dismissed because US Bank has failed to satisfy the second prong for a writ of mandamus.

III. PROPOSITION OF LAW NO. 3: US BANK IS NOT ENTITLED TO A WRIT OF MANDAMUS AS IT CANNOT SHOW IT LACKED AN ADEQUATE REMEDY IN THE ORDINARY COURSE OF THE LAW.

Lastly, as the triumvirate of court of appeals decisions below found, a viable, adequate remedy at law existed – an appeal under R.C. 323.79. Ohio law is clear that when an adequate remedy at law exists mandamus will not lie. *State ex rel. Smith v. Cuyahoga Cty. Court of Common Pleas*, 106 Ohio St.3d 151, 2005-Ohio-4103, 832 N.E.2d 126, ¶19. This Court has held that the right to a direct appeal qualifies as an adequate remedy at law. *State ex rel. Dix v. McAllister*, 81 Ohio St.3d 107, 108, 689 N.E.2d 561 (1998). As a result, US Bank is not entitled to the extraordinary remedy of a writ of mandamus.

In the introduction to its brief, US Bank attempts to explain away the logic of the Courts of Appeal:

Appellant acknowledges that it or its predecessors could have challenged the result of the foreclosure actions that underlie these cases through appeal. But it does not believe that the actions of the respective Board of Revisions were improper, so there was nothing to appeal...In other words, Appellant is not trying to reverse the foreclosure actions or the subsequent taking of property. Rather it asks only for that which the Ohio Constitution protects – the right to just compensation when private property is taken for public use.

Appellant's Brief at 9.

US Bank states that these tax foreclosure actions are *fait accompli*, and have no bearing on the requested relief. But, in laying out the presupposition that the foreclosures were practically perfect in every way, the OPAA contends that Appellant has been hoist with its own petard.

US Bank contends that the foreclosures themselves are irrelevant, despite the nuclei of fact surrounding these consolidated writs being these very tax foreclosure cases. Without the appealable orders from the tax foreclosures, no transfer of property, and therefore no alleged taking, would have occurred. Thus, the takings claims clearly arose from the tax foreclosure proceedings and are therefore subject to the exclusive judicial review scheme established by the General Assembly for tax foreclosure orders.

US Bank's legal theory is particularly meritless because, in this case, US Bank and its predecessors had the audacity to ignore and divest itself from the tax foreclosure proceedings and suspend the finality of the judgments against it by claiming that it was victim of an alleged violation of its constitutional rights. US Bank forfeits all credible arguments, however, because it admits that it had no intention of challenging the tax bill, paying the taxes, or enforcing its mortgage interest in the property before judgment was rendered.

US Bank admits its issue is with the constitutionality of the statute authorizing transfer without sale. US Bank's argument that its mandamus claim was not ripe until after the judicial order was executed ignores the absolute fact the offending order could have been directly appealed. Indeed, an ideal time to raise the alleged unconstitutionality of a law would be in the face of judicial enforcement of that law. But, instead of challenging the statute itself, US Bank intends to game the system. This allegation of unconstitutionality is merely a ruse to affect a raid on the *actual* taxpayers.

This rationale, if accepted by the Court, could bring about a flood of litigation against counties merely collecting delinquent taxes. Contrary to the implications of US Bank, not all tax foreclosure sales result in windfall profits for the former owner and mortgage holder. In fact, the majority of tax foreclosures sent to sheriff's sale fail to sell after two attempts. These properties are then forfeited to the State under R.C. 323.28(D). Forfeited lands are sold annually, typically for *de minimis* starting bids far below the taxes owed on each property. See R.C. 5723.05, 5723.06. Additionally, once placed on the forfeited land list, properties can be requested by the county land reutilization corporation. R.C. 5723.01. The county auditor is then bound by statute to transfer the forfeited lands to the county land reutilization corporation for no cost. R.C. 5723.04.

The post-foreclosure writ of mandamus requested by US Bank would open up the possibility of takings claims for all delinquent former owners displeased with the loss of their property and perceived value. Where would US Bank halt its entitlement to lost value? The net impact of US Bank's legal theory on counties throughout the State is huge and cannot be understated or overlooked. County prosecutors in larger counties likely prosecute several hundred (if not thousands) of tax foreclosure actions each year. Eminent domain cases are

exceedingly rare in comparison. To allow former owners and interested parties to demand eminent domain proceedings every time that a property owner loses their alleged “surplus equity” in a property as a result of a tax foreclosure action would create a huge disincentive to prosecute tax foreclosure actions and seriously upset counties’ ability to collect property taxes.

Before the Ohio legislature passed the relevant provisions in R.C. 323.65-323.79, the worst properties would be in a constant cycle of tax foreclosures. The statutory remedy to permit the transfer of tax-foreclosed vacant and abandoned property to land reutilization corporations was designed as an alternative remedy to forfeiture, and was based upon the legitimate goal of breaking the cycle of tax foreclosures to return these vacant and abandoned properties to the tax rolls as quickly as possible. The changes in the law that US Bank is proposing would be contrary to the intention of the legislature.

The General Assembly clearly sought to adopt an expedited tax foreclosure process for vacant and abandoned properties that sought to ensure the timely, efficient, and conclusive resolution of all issues before any transfer occurs. Indeed, if a property owner or lienholder wanted to contest the foreclosure proceedings in court, the General Assembly provided a statutory means for transferring the case to common pleas court upon request. See R.C. 323.691 and R.C. 323.70(B). Moreover, it provided for the right to raise any and all issues in the common pleas court after a final tax foreclosure order is issued. Yet, US Bank and its predecessors failed to take advantage of any of these judicial remedies, which clearly provided an adequate remedy at law. Accordingly, the Court should reject US Bank’s arguments and conclude that Relator has failed to meet the third prong for a writ of mandamus.

CONCLUSION

Therefore, for the aforementioned reasons, the Relator's Complaints failed to satisfy all three prongs for a writ of mandamus. Accordingly, this Court should affirm the lower courts judgments as a matter of law. In so doing, the OPAA urges this Court to reject the legal theories advanced by US Bank in this case and put a halt to this profit-seeking bailout disguised as a constitutional claim.

Respectfully,

JOSEPH T. DETERS
PROSECUTING ATTORNEY
HAMILTON COUNTY, OHIO

/s/Charles W. Anness
Charles W. Anness (0082194)
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
Phone: (513) 946-3273
*Counsel for Amicus Curiae, The Ohio
Prosecuting Attorneys Association*

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Brief of Amicus Curiae of The Ohio Prosecuting Attorneys Association in Support of Appellees was sent via regular United States mail on the 25th day of January, 2022, to the following:

ANDREW M. ENGEL (0047971)
MARC E. DANN (0039425)
ADVOCATE ATTORNEYS, LLP
1629 K St NW, Suite 300
Washington, DC 20006
(202) 935-6990
COUNSEL FOR APPELLANT

STEPHEN W. FUNK (0058506)
ROETZEL & ANDRESS, LPA
222 S. Main Street, Suite 400
Akron, OH 44308
(330) 376-2700
Fax No. (303) 376-4577
COUNSEL FOR APPELLEES

/s/Charles W. Anness
Charles W. Anness (0082194)
Assistant Prosecuting Attorney