

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. US BANK)
TRUST, NATIONAL ASSOCIATION,) CASE NO. 2021-1090
)
Relator-Appellant) Appeal of Right from the Cuyahoga
) County Court of Appeals, Eighth Judicial
v.) District, Case No. CA 21 110297
)
CUYAHOGA COUNTY, OHIO,)
)
Respondent-Appellee.)

STATE OF OHIO, ex rel. US BANK)
TRUST, NATIONAL ASSOCIATION,) CASE NO. 2021-1091
)
Relator-Appellant) Appeal of Right from the Lucas County
) Court of Appeals, Sixth Judicial District
v.) Case No. L-21-1087
)
LUCAS COUNTY, OHIO BOARD)
OF COUNTY COMMISSIONERS,)
)
Respondent-Appellee)

STATE OF OHIO, ex rel. US BANK)
TRUST, NATIONAL ASSOCIATION,) CASE NO. 2021-1181
)
Relator-Appellant) Appeal of Right from the Summit County
) Court of Appeals, Ninth Judicial District
v.) Case No. 29889
)
SUMMIT COUNTY, OHIO,)
)
Respondent-Appellee.)

**MERIT BRIEF OF APPELLEES CUYAHOGA COUNTY, LUCAS COUNTY
BOARD OF COMMISSIONERS, AND SUMMIT COUNTY**

Andrew M. Engel (0047371)
Marc E. Dann (0039425)
ADVOCATE ATTORNEYS, LLP
1629 K St NW, Suite 20006
Washington, DC 20006
Telephone: (202) 935-6990
aengel@advocateattorneys.com
mdann@advocateattorneys.com

*Attorneys for Relators-Appellants
State of Ohio ex rel. US Bank Trust,
National Association, as Trustee of
The American Homeowner Preservation
Trust Series 2015+ and The American
Homeowners Preservation Trust Series 2014A*

Jay R. Carson (0068526)
The Buckeye Institute
88 East Broad Street, Suite 1300
Columbus, OH 43215
Telephone: (614) 224-4422
j.carson@buckeyeinstitute.org

*Attorney for Amicus Curiae,
The Buckeye Institute*

Oliver J. Dunford (0073933)
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
Telephone: (916) 503-9060
ODunford@pacificlegal.org

*Attorney for Amicus Curiae
Pacific Legal Foundation*

Stephen W. Funk (0058506)
ROETZEL & ANDRESS, LPA
222 S. Main Street, Suite 400
Akron, Ohio 44308
Telephone: (330) 376-2700
Facsimile: (330) 376-4577
sfunk@ralaw.com

*Attorneys for Respondents-Appellees,
Cuyahoga County, Ohio, Lucas County,
Ohio Board of Commissioners, and
Summit County, Ohio*

Joseph T. Deters (0012084)
Hamilton County Prosecuting Attorney
Charles W. Anness (0082194)
Assistant Prosecuting Attorney
230 East Ninth Street Suite 4000
Cincinnati, Ohio 45202
Telephone: (513) 946-3021
Charles.anness@hcpros.org

*Attorneys for Amicus Curiae,
The Ohio Prosecuting Attorneys
Association*

Matthew P. Yourkvitch (0088117)
Yourkvitch & Dibo, LLC
1549 Hamilton Ave, Suite 200
Cleveland, Ohio 44114
Telephone: (216) 367-1330
mpy@goydlaw.com

*Attorney for County Commissioners
Association of Ohio, the County
Treasurers Association of Ohio, the
County Auditors Association of Ohio, and
Ohio Mayors Alliance*

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF FACTS 4

 A. Statutory Background 4

 B. The Underlying Tax Foreclosure Proceedings And Complaints For
 Writ of Mandamus 7

 1. The Cuyahoga County Tax Foreclosure Action and Complaint
 for Writ of Mandamus 8

 2. The Lucas County Tax Foreclosure Action And Complaint For
 Writ of Mandamus.....10

 3. The Summit County Tax Foreclosure Action And Complaint
 For Writ of Mandamus.....12

STANDARD OF REVIEW14

ARGUMENT15

I. PROPOSITION OF LAW NO. 1: THE GENERAL ASSEMBLY’S
JUDICIAL REVIEW SCHEME FOR TAX FORECLOSURE ORDERS
PROVIDES AN ADEQUATE REMEDY AT LAW, AND ANY PARTY
WHO FAILS TO FILE A TIMELY APPEAL UNDER R.C. 323.79 SHOULD
NOT BE PERMITTED TO CIRCUMVENT THE STATUTORY
REQUIREMENTS BY FILING A WRIT OF MANDAMUS CLAIM AFTER
THE APPEAL TIME EXPIRED.....15

 A. The Court Should Reject US Bank’s Argument That Takings Claims
 Are Not Subject To The Judicial Review Scheme Established By The
 General Assembly In Ohio Revised Code 323.79.....19

 B. The Court Should Reject US Bank’s Ripeness Arguments.....24

II. PROPOSITION OF LAW NO. 2: A JUNIOR LIENHOLDER LACKS
STANDING TO PROSECUTE A TAKINGS CLAIM IF IT DID NOT OWN
AN INTEREST IN THE PROPERTY WHEN THE TAX FORECLOSURE
PROCEEDING WAS DECIDED28

III.	<u>PROPOSITION OF LAW NO. 3: A COUNTY HAS NO CLEAR LEGAL DUTY TO PAY COMPENSATION TO A DELINQUENT TAXPAYER OR LIENHOLDER WHO LOSES THEIR INTERESTS IN A PROPERTY AS A RESULT OF A TAX FORECLOSURE ACTION</u>	32
A.	The Court Should Reject US Bank’s Theory That A Takings Claim Can Arise From The Enforcement Of Ohio’s Tax Foreclosure Laws.....	34
B.	A Property Owner Or Junior Lienholder Has No Constitutionally-Protected Interest In Recovering The Alleged “Surplus Equity” In A Tax Foreclosed Property That Becomes Subject To A Tax Foreclosure Order	38
	CONCLUSION	45
	PROOF OF SERVICE	46
APPENDIX		
	Ohio Revised Code 323.65-323.79	
	Ohio Revised Code 5721.20	

TABLE OF AUTHORITIES

Cases

<i>Addleman v. O'Malley</i> , 8th Dist. Cuyahoga No. 110173, 2021-Ohio-4429	14
<i>Armstrong v. United States</i> , 364 U.S. 40 (1980)	43
<i>Beaver Excavating Co. v. Testa</i> , 134 Ohio St.3d 565, 2012-Ohio-5776, 983 N.E.2d 1317	26, 39
<i>Bennis v. Michigan</i> , 516 U.S. 442, 116 S.Ct. 994 (1996).....	3, 33, 35
<i>Bogie v. Town of Barnet</i> , 129 Vt. 46, 270 A.2d 898 (1970)	43
<i>Boice v. Ottawa Hills</i> , 6th Dist. Lucas No. L-09-1253, 2011-Ohio-5681, <i>rev'd on other grounds</i> , 137 Ohio St.3d 412 (2013)	21
<i>Burger Brewing Co. v. Liquor Control Comm., Dept. of Liquor Control</i> , 34 Ohio St.2d 93, 296 N.E.2d 261 (1973).....	28
<i>C&C Realty v. N. Olmstead Bd. of Zoning Appeals</i> , 8th Dist. Cuyahoga No. 88162, 2007-Ohio-2224.....	21
<i>Carroll v. City of Cleveland</i> , 522 F. App'x 299 (6th Cir. 2013)	23
<i>City of Anchorage v. Thomas</i> , 624 P.2d 271 (Alaska 1981).....	43
<i>City of Cleveland v. Posner</i> , 193 Ohio App.3d 211, 951 N.E.2d 476 (8th Dist. 2011).....	21
<i>Committee of Concerned Citizens v. Union Twp.</i> , 66 Ohio St.3d 452 (1993).....	20
<i>Cone v. Forest</i> , 126 Mass. 97 (1879)	42
<i>Deutsche Bank Natl. Trust Co. v. Richardson</i> , 2d Dist. Darke No. 2010-CA-3, 2011-Ohio-1123	31
<i>Epice Corp. v. Land Reutilization Authority of City of St. Louis</i> , No. 4:07Cv00206 HEA, 2010 WL 3270114 (E.D. Mo. Aug. 17, 2012)	35
<i>Farnham v. Jones</i> , 32 Minn. 7, 19 N.W. 83 (1884).....	42
<i>Fed. Home Loan Mtge. Corp. v. Schwartzwald</i> , 134 Ohio St .3d 13, 2012–Ohio– 5017, 979 N.E.2d 1214.....	28
<i>Gen. Motors Corp. v. Limbach</i> , 67 Ohio St.3d 90, 616 N.E.2d 204 (1993).....	39

<i>Golden v. Mercer Cty. Tax Claim Bureau (In re Golden)</i> , 190 B.R. 52 (Bankr. W.D. Penn. 1995)	35
<i>Griffin v. Mixon</i> , 38 Miss. 424 (1860).....	43
<i>Harrison v. Montgomery Cnty., Ohio</i> , 997 F.3d 643 (6th Cir. 2021).....	27
<i>Hembree v. Mid-America Fed. S&L Assn.</i> , 64 Ohio App.3d 144, 580 N.E.2d 1103 (2d Dist. 1989).....	30
<i>Johnson v. Sawyer</i> , No. 1:15 CV 0730, 2015 WL 4743815 (N.D. Ohio Aug. 11, 2015), <i>aff'd</i> , Case No. 15-3972	22
<i>Joyce v. Gen. Motors Corp.</i> , 49 Ohio St.3d 93, 551 N.E.2d 172 (1990).....	14
<i>King v. Hatfield</i> , 130 F. 464 (D. W.Va. 1900)	43
<i>Kuhnle Bros., Inc. v. Cty. of Geauga</i> , 103 F.3d 516 (6th Cir. 1997).....	27
<i>Lake County Auditor v. Burks</i> , 802 N.E.2d 896 (Ind. 2004).....	43
<i>Leasor v. Kapszukiewicz</i> , 6th Dist. Lucas No. L-08-1004, 2008-Ohio-6176	3, 33, 35, 38
<i>Leber v. United States</i> , 146 Fed. Cl. 9, 12 (2019).....	35
<i>Lexington Ridge Homeowners Assn. v. Schlueter</i> , 9th Dist. Medina No. 10CA0087-M, 2013-Ohio-1601	31
<i>McDuffee v. Collins</i> , 117 Ala. 487, 23 So. 45 (1898).....	42
<i>Miner v. Clinton Cty.</i> , 541 F.3d 464 (2d Cir. 2008).....	35
<i>Mobil Oil Corp. v. City of Rocky River</i> , 38 Ohio St. 2d 23, 309 N.E.2d 900, 902 (1974).....	21
<i>Moore v. Hiram Twp.</i> , 988 F.3d 353 (6th Cir. 2021).....	23
<i>Nelson v. City of New York</i> , 352 U.S. 103 (1956)	36, 44
<i>Painesville Mini Storage, Inc. v. Painesville</i> , 11th Dist. Lake No. 2008-L-092, 2009-Ohio-3656, <i>aff'd</i> , 124 Ohio St.3d 504, 2010-Ohio-920, 924 N.E.2d 357	27
<i>Pakdel v. City & Cty. of San Francisco, California</i> , --- U.S. ----, 141 S.Ct. 2226, 210 L.Ed.2d 617 (2021).....	25
<i>Palazzolo v. Rhode Island</i> , 533 U.S. 606 (2001).....	24, 25

<i>Phillips v. Wash. Legal Found.</i> , 524 U.S. 156 (1998).....	39
<i>Rafaeli, LLC v. Oakland Cty.</i> , 505 Mich. 429, 952 N.W.2d 434 (2020)	34, <i>passim</i>
<i>Raguet v. Wade</i> , 4 Ohio 107 (1829)	4
<i>Scarborough v. Gibson</i> , 13 Ohio Dec. 738, 740 (1903), <i>aff'd</i> , 69 Ohio St. 578, 70 N.E. 1130 (1904).....	4, 36, 37
<i>Settlers Bank v. Burton</i> , 4th Dist. Washington Nos. 12CA36 and 12CA38, 2014- Ohio-335	30, 31
<i>Shattuck v. Smith</i> , 6 N.D. 56, 69 N.W. 5 (1896).....	42
<i>Speed v. Mills</i> , 919 F.Supp.2d 122 (D.D.C. 2013).....	35
<i>State ex rel. Ames v. Portage Cty. Bd. of Revision</i> , 2021-Ohio-4486, --- N.E.3d ---- (Dec. 23, 2021).....	14
<i>State ex rel. A.N. v. Cuyahoga Cty. Prosecutor's Off.</i> , 165 Ohio St. 3d 71, 2021- Ohio-2071, 175 N.E.3d 539.....	14
<i>State ex rel. AWMS Water Solutions, L.L.C. v. Mertz</i> , 162 Ohio St.3d 400, 2020- Ohio-5482, 165 N.E.3d 1167	24, 25
<i>State ex rel. Berger v. McMonagle</i> , 6 Ohio St.3d 28, 451 N.E.2d 225 (1983).....	15
<i>State ex rel. Feltner v. Cuyahoga Cty. Bd. of Revision</i> , 160 Ohio St.3d 359, 2020- Ohio-3080, 157 N.E.3d 689, <i>cert. denied</i> , 141 S.Ct. 1734 (2021)	3, 4
<i>State ex rel. Feltner v. Cuyahoga Cty. Bd. of Rev.</i> , 155 Ohio St.3d 1403, 2019- Ohio-943, 119 N.E.3d 431.....	3
<i>State ex rel. Gilbert v. Cincinnati</i> , 125 Ohio St. 3d 385, 2010-Ohio-1473, 928 N.E.2d 706	38
<i>State ex rel. Kerns v. Simmers</i> , 153 Ohio St.3d 103, 2018-Ohio-256, 101 N.E.3d 430.....	1, <i>passim</i>
<i>State ex rel. Martre v. Reed</i> , 161 Ohio St.3d 281, 2020-Ohio-4777, 162 N.E.3d 773	14
<i>State ex rel. R.T.G., Inc. v. State</i> , 141 Ohio App. 3d 784, 753 N.E.2d 869, <i>rev'd in</i> <i>part on other grounds</i> , 98 Ohio St. 3d 1, 2002-Ohio-6716, 780 N.E.2d 998	30, 31
<i>State ex rel. US Bank Trust, Nat'l Assn. v. Cuyahoga Cty.</i> , 8th Dist. Cuyahoga No. 110297, 2021-Ohio-2524, 2021 WL 3121395.....	1, 10, 30, 32

<i>State ex rel. US Bank Trust, Nat'l Assn. v. Lucas Cty. Bd. of Commrs.</i> , 6th Dist. Lucas No. L-21-1087 (Aug. 5, 2021)	1, 12
<i>State ex rel. US Bank Trust, Nat'l Ass'n v. Summit Cty.</i> , 9th Dist. Summit No. 29889, 2021-Ohio-3189	1, 14
<i>Stierle v. Rohmeyer</i> , 218 Wis. 149, 260 N.W. 647 (1935)	43
<i>Syntax, Inc. v. Hall</i> , 899 S.W.2d 1809 (Tex. 1995).....	42
<i>Texaco, Inc. v. Short</i> , 454 U.S. 516 (1982).....	37
<i>Three-C Body Shops, Inc. v. Francois</i> , 10th Dist. Franklin No. 19AP-471, 2020-Ohio-4710	32
<i>Tyler v. Hennepin Cty.</i> , No. 20-CV-0889, 2020 WL 7129894 (D. Minn. Dec. 4, 2020).....	44
<i>United States v. Lawton</i> , 110 U.S. 146, 3 S.Ct. 545, 28 L.Ed. 100 (1884)	42
<i>United States v. Taylor</i> , 104 U.S. 216, 26 L.Ed. 721 (1881)	42
<i>Webb's Fabulous Pharmacies v. Beckwith</i> , 449 U.S. 155 (1980).....	44
<i>Zuckerman, Daiker & Lear Co., L.P.A. v. Signer</i> , 186 Ohio App.3d 686, 2009-Ohio-968, 930 N.E.2d 336 (8th Dist.).....	30

Statutes

42 U.S.C. § 1983	27
Ohio Revised Code Chapter 323.....	4, 35, 36
Ohio Revised Code Chapter 1724.....	16
Ohio Revised Code Chapter 2505.....	7, 15, 16
Ohio Revised Code Chapter 2506.....	7, <i>passim</i>
Ohio Revised Code Section 323.31.....	5
Ohio Revised Code Section 323.65.....	1, <i>passim</i>
Ohio Revised Code Section 323.65(A).....	4
Ohio Revised Code Section 323.65(J).....	5, <i>passim</i>
Ohio Revised Code Section 323.66(C).....	6

Ohio Revised Code Section 323.69.....	6, 17
Ohio Revised Code Section 323.69(D)(1)	31
Ohio Revised Code Section 323.69(B)(1)	6
Ohio Revised Code Section 323.691	6, 7, 16, 17
Ohio Revised Code Section 323.691(A).....	6, 17
Ohio Revised Code Section 323.70(B).....	6, 7, 16, 17
Ohio Revised Code Section 323.72.....	5, 7
Ohio Revised Code Section 323.72(A)(2)	5
Ohio Revised Code Section 323.72(B).....	5
Ohio Revised Code Section 323.78.....	1, <i>passim</i>
Ohio Revised Code Section 323.78(B).....	5
Ohio Revised Code Section 323.79.....	1, <i>passim</i>
Ohio Revised Code Section 2506.04.....	23
Ohio Revised Code Section 5715.02.....	38
Ohio Revised Code Section 5721.10.....	40
Ohio Revised Code Section 5721.18.....	40
Ohio Revised Code Section 5721.20.....	39, 41, 45
Ohio Revised Code Section 5721.25.....	5
<u>Constitutional Provisions</u>	
Ohio Constitution, Article I, Section 19	1
Ohio Constitution Article II, Section 1	4, <i>passim</i>
United States Constitution, Fifth Amendment	1, 21
United States Constitution, Fourteenth Amendment.....	1, 21

INTRODUCTION

The above-referenced consolidated appeals arise from final orders of the Sixth, Eighth, and Ninth District Courts of Appeal to dismiss the original actions for a writ of mandamus filed by U.S. Bank Trust, National Association (“US Bank Trust”), that were based upon the allegation that the direct transfer of a tax-foreclosed property under Ohio Revised Code 323.78 constitutes a “taking” under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 19 of the Ohio Constitution. *State ex rel. US Bank Trust Nat’l Assn. v. Cuyahoga Cty.*, 8th Dist. Cuyahoga No. 110297, 2021-Ohio-2524, 2021 WL 3121395; *State ex rel. US Bank Trust, Nat’l Assn. v. Lucas Cty. Bd. of Commrs.*, 6th Dist. Lucas No. L-21-1087 (Aug. 5, 2021); *State ex rel. US Bank Trust, Nat’l Ass’n v. Summit Cty.*, 9th Dist. Summit No. 29889, 2021-Ohio-3189.

In proceedings below, the Sixth, Eighth, and the Ninth Districts all agreed that the judicial review scheme created by the General Assembly for administrative tax foreclosure orders – Ohio Revised Code 323.65 to 323.79 – provides an adequate remedy at law. *Id.* In so doing, the appellate courts followed this Court’s unanimous ruling in *State ex rel. Kerns v. Simmers*, 153 Ohio St.3d 103, 2018-Ohio-256, 101 N.E.3d 430, which dismissed a writ of mandamus action for an alleged takings claim because it was based upon an administrative order that was not timely appealed to the court of common pleas under the applicable judicial review scheme. Thus, consistent with this Supreme Court precedent, the Court should affirm the lower courts’ decisions.

Moreover, this Court should affirm the dismissal of US Bank’s mandamus claims by holding that the State (or any local government) has no legal duty under the Taking Clause to pay “just compensation” to a delinquent property owner (or any junior lienholders) who lose

their interests in a property as a result of a tax foreclosure proceeding. Here, regardless of the statutory remedy ordered (sale, transfer, or forfeiture), the undisputed fact remains that US Bank and its predecessors-in-interest lost their interests in the tax-foreclosed property as a result of the failure to pay taxes. While the General Assembly has granted a property owner of a vacant and abandoned land with the statutory right of redemption if it pays the outstanding taxes and costs within 28 days after the issuance of a final order, it did not grant a delinquent taxpayer with any alleged right to recover the alleged “surplus equity” in a tax-foreclosed property based upon the difference between the alleged “fair market value” of the property and the amount of taxes owed. Thus, no takings claim can arise as a matter of law because US Bank cannot establish that it has a constitutionally-protected property interest in recovering the “surplus equity” in any property that becomes subject to a final tax foreclosure order.

Indeed, while US Bank’s Complaint focuses exclusively upon the direct transfer remedy in R.C. 323.78, its legal theory – that it is entitled to recover the difference between the alleged “value” of the property and the amount of taxes owed – is a theory that is not supported by any case law and, if adopted, would significantly undermine *all* of Ohio’s tax foreclosure laws by providing an unjustified financial windfall to tax delinquent property owners at the expense of law-abiding taxpayers. This argument, however, fails to appreciate that a property owner only can lose their alleged interests in a property *if*, and *only if*, it fails to pay the taxes owed in accordance with Ohio’s tax laws. In other words, but for the failure to pay taxes, there would be no foreclosure – or any sale or transfer – under Ohio’s tax foreclosure laws. Thus, no takings claim can arise as a matter of law because the alleged loss of a property interest is caused by the failure to pay taxes.

This is fatal to US Bank’s alleged “takings” theory because the U.S. Supreme Court has long held that “[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain.” *Bennis v. Michigan*, 516 U.S. 442, 452-453, 116 S.Ct. 994 (1996). Here, R.C. 323.78 is set forth in the Chapter of the Ohio Revised Code, entitled, “Collection of Taxes,” and is one of the statutory remedies created by the General Assembly for the failure to pay taxes. *See* R.C. Chapter 323.78. Thus, it is well-established that a taking claims cannot arise as a matter of law if a property owner loses its ownership of a real property as a result of a tax foreclosure proceeding. *Leasor v. Kapszukiewicz*, 6th Dist. Lucas No. L-08-1004, 2008-Ohio-6176, ¶ 14 (dismissing takings claim arising from tax foreclosure proceedings because it arose from exercise of the “State’s taxing power, not the power of eminent domain”) (citing cases).

For all of these reasons, therefore, the Court should affirm the judgments entered by the lower courts to dismiss US Bank’s mandamus actions for failure to state a claim. Indeed, contrary to the arguments raised in US Bank’s Brief and the Amicus Brief filed by the Pacific Legal Foundation and the Buckeye Institute, this appeal does not raise any novel issues of first impression. Rather, the same attorneys who represent US Bank in this case presented the same takings claims to the Ohio Supreme Court in *State ex rel. Feltner v. Cuyahoga Cty. Bd. of Revision*, 160 Ohio St.3d 359, 2020-Ohio-3080, 157 N.E.3d 689, *cert. denied*, 141 S.Ct. 1734 (2021). Upon review, however, this Court granted Cuyahoga County’s Motion to Dismiss the takings claims for failure to state a claim. *See State ex rel. Feltner v. Cuyahoga Cty. Bd. of Rev.*, 155 Ohio St.3d 1403, 2019-Ohio-943, 119 N.E.3d 431 (Table). While two of the justices later explained that they would have ordered additional briefing on the takings claims, *Feltner*,

160 Ohio St. 3d 359, 2020-Ohio-3080, 157 N.E.3d 689, at ¶ 29 (Fischer, J., concurring), the other five justices agreed that they were properly dismissed for failure to state a claim. *Id.* Accordingly, as in *Feltner*, this Court should once again conclude that the takings claims alleged by Relators should be dismissed for failure to state a claim.

STATEMENT OF FACTS

A. Statutory Background

It is well established that the power of taxation is indispensable to the existence of the State of Ohio, as being necessary for the funding of all aspects of governmental operations. *Raguet v. Wade*, 4 Ohio 107 (1829). “The taxing power is an exercise of the sovereignty of the state through its general assembly.” *Scarborough v. Gibson*, 13 Ohio Dec. 738, 740 (1903), *aff’d*, 69 Ohio St. 578, 70 N.E. 1130 (1904). Indeed, as this Court has explained, “the power to tax lies exclusively with the General Assembly pursuant to the general legislative grant conferred by the Ohio Constitution, Article II, Section 1.” *Beaver Excavating Co. v. Testa*, 134 Ohio St.3d 565, 2012-Ohio-5776, 983 N.E.2d 1317, ¶ 40. Pursuant to the constitutional authority granted to Ohio’s legislative branch, therefore, the General Assembly has adopted a comprehensive statutory scheme for the collection of property taxes that is set forth in Chapter 323 of the Ohio Revised Code, which is entitled, “Collection of Taxes.” *Id.*

In accordance with its taxing powers under the Ohio Constitution, the General Assembly in 2006 adopted expedited tax foreclosure procedures for vacant and abandoned lands that are codified in Sections 323.65 to 323.79 and are included in the Appendix to this Brief. Under the operative statutes, where a tax delinquent property involves “abandoned” land, as defined by R.C. 323.65(A), the county treasurer may initiate a tax foreclosure proceeding with the board of revision, which, upon any adjudication of foreclosure, may order

disposition of the abandoned land by public auction or may transfer the property to an “electing subdivision” under R.C. 323.78(B), which provides:

. . . upon adjudication of foreclosure of the parcel, the court or board of revision shall order, in the decree of foreclosure or by separate order, that the equity of redemption and any statutory or common law right of redemption in the parcel by its owner shall be forever terminated after the expiration of the alternative redemption period and that the parcel shall be transferred by deed directly to the requesting municipal corporation, township, county, school district, community development corporation, or 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. The court or board of revision shall order such a transfer regardless of whether the value of the taxes, assessments, penalties, interest, and other charges due on the parcel, and the costs of the action, exceed the fair market value of the parcel. No further act of confirmation or other order shall be required for such a transfer, or for the extinguishment of any statutory or common law right of redemption.

See Ohio Rev. Code § 323.78.

Importantly, this statutory remedy can be imposed *only if* a property owner or other interested party fails to pay the outstanding taxes in accordance with Ohio’s tax collection laws. Under R.C. 323.72, in fact, the owner or any other interested party has the unilateral and unconditional right to terminate a tax foreclosure proceeding at any time by paying all outstanding taxes, or by showing that the impositions have been paid. R.C. 323.72(A)(2) and R.C. 323.72(B). Moreover, R.C. 323.31 and R.C. 5721.25 provide that a property owner may enter into a tax delinquent installment contract to pay the outstanding taxes over time. Indeed, even if the Board issues a final order that provides for the direct transfer of a property under R.C. 323.78, Ohio’s tax collection laws provide that the property owner shall be granted an additional 28-day period to redeem their interest in the property by paying the outstanding taxes. *See* R.C. 323.65(J) and R.C. 323.78.

In creating this statutory remedy for abandoned, tax delinquent lands, the General Assembly implemented a number of procedural safeguards to protect the rights of property owners and other interested parties. 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.* Moreover, under R.C. 323.69(B)(1), the Summons must notify the property owner and other interested parties that the tax foreclosure proceeding may result in the transfer of the property to an electing subdivision “in the manner prescribed in sections 323.65 to 323.79 of the Revised Code,” and that the defendant(s) in the tax foreclosure proceeding can avoid the imposition of this remedy “by paying the total of the impositions against the land at any time before confirmation of sale or transfer of the parcel as prescribed in sections 323.65 to 323.79 of the Revised Code or before the expiration of the alternative redemption period, as may be applicable to the proceeding[.]” *Id.*

Second, the relevant tax statutes provide that a property owner who wants to contest the foreclosure action in a judicial proceeding shall have the unilateral right to obtain an automatic transfer to the court of common pleas upon request. *See* R.C. 323.691, R.C. 323.70(B). In particular, R.C. 323.691 provides that the board of revision may order the transfer of the tax foreclosure action to the court of common pleas or to a municipal court with jurisdiction over the property, upon a motion filed by the property owner, 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.” R.C. 323.70(B) (emphasis added). Similarly, R.C. 323.72 provides that a lienholder may plead and contest the tax foreclosure in the Board of Revision or move to transfer the action to the common pleas court under R.C. 323.691. *Id.*

Third, the statutory scheme adopted by the General Assembly provides an aggrieved party with the right to obtain *de novo* judicial review of a final order of foreclosure and transfer under Chapters 2505 and 2506 of the Revised Code. *See* R.C. 323.79. An administrative appeal under R.C. 323.79, however, is more expansive than a traditional R.C. 2506 appeal because R.C. 323.79 provides that the appeal “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.* Thus, an aggrieved party has the right to raise any new constitutional claims for the first time in the court of common pleas, even if they were not previously raised in the administrative tax foreclosure proceedings.

B. The Underlying Tax Foreclosure Proceedings And Complaints For Writ of Mandamus.

The Complaints for Writ of Mandamus at issue arise from three administrative tax foreclosure proceedings that were filed with the Cuyahoga County Board of Revision, Lucas County Board of Revision, and Summit County Board of Revision under R.C. 323.65-323.79: (1) *Treasurer of Cuyahoga County, Ohio v. Richard Kurman, et al.*, Case No. 17014376; (2)

Wade Kapszukiewicz, Treasurer of Lucas County, Ohio v. Jason J. Dimodica, et al., Case No. TF-16-1790; and (3) *Kristen M. Scalise, Fiscal Officer v. U.S. Bank Trust, N.A., as Trustee of the American Homeowner Preservation Trust, Series 2014A*, Case No. CV-2017-10-4168 (collectively, the “Tax Foreclosure Actions”).

In this regard, it is undisputed that none of the delinquent property owners or any of the junior lienholders in the Tax Foreclosure Actions filed timely answers or otherwise participated in any of the hearings. Moreover, it is undisputed that none of the defendants in the Tax Foreclosure Actions filed a timely appeal from the Board’s final order of foreclosure under R.C. 323.79. All three Tax Foreclosure Actions were decided over four years ago in 2017. US Bank Trust was the property owner in the Summit County Tax Foreclosure Action, but was a successor in interest to the junior lienholders in the Lucas County and Cuyahoga County Tax Foreclosure Actions. Yet, with respect to all three of the Tax Foreclosure Actions, US Bank Trust and/or its predecessors did absolutely nothing to protect their alleged interest in the tax delinquent properties until the filing of the instant mandamus actions several years later. We discuss each of the Tax Foreclosure Actions and US Bank’s Complaints for Writ of Mandamus below.¹

1. The Cuyahoga County Tax Foreclosure Action and Complaint for Writ of Mandamus.

The Tax Foreclosure Action filed by the Cuyahoga County Treasurer was originally filed with the Cuyahoga County Board of Revision on June 28, 2017, for delinquent real estate

¹ The Complaints for Writ of Mandamus that were filed by US Bank with the Sixth, Eight, and Ninth Districts are included in the Supplement to the Briefs. The Supplement to the Briefs has been paginated and shall be referred to herein as “Supp.”

taxes owed on real property located at 2978 E. 59th Street, Cleveland, Ohio 44127. (Supplement to the Briefs, pp. 003-004, Cuyahoga Cty. Compl. ¶ 2 and ¶ 10). A final hearing in the Cuyahoga County Tax Foreclosure Action was held on October 11, 2017, but neither the property owner (Richard A. Kurman) nor the mortgage holder (Biltmore Funding, LLC) appeared at the Hearing. (Supp. 003-004, Compl. ¶ 6, ¶ 13). Therefore, the Cuyahoga County Board of Revision issued an Adjudication of Foreclosure that was docketed on October 16, 2017, that, among other things, ordered the foreclosure and transfer of the property to the Cuyahoga County Land Reutilization Corporation under R.C. 323.78. (Supp. 005, Compl. ¶ 14-16); (Supp. 069-073, Compl. Ex. D, Adjudication of Foreclosure). The Adjudication of Foreclosure further provided that “any statutory or common law right of redemption shall be forever terminated and extinguished as against all parties” upon the expiration of “twenty-eight (28) days from the journalization of the Decree.” (Supp. 070-071, Compl. Ex. D, pp. 2-3).

Pursuant to R.C. §§ 323.65(J) and 323.78, the property owner then had 28 days to redeem the Property by paying any and all delinquent real estate taxes, current real estate taxes, and the court costs associated with the Cuyahoga County Tax Foreclosure Action. No interested party, however, exercised their statutory right to redemption by either paying the impositions owed or entering into a payment plan. Moreover, no timely appeal was filed from the Board’s final order of foreclosure with the Cuyahoga County Court of Common Pleas under R.C. 323.79. Accordingly, after the 28-day redemption period expired, the Cuyahoga County Sheriff proceeded to record a Sheriff’s Deed on November 13, 2017, to transfer the tax-foreclosed property to the Cuyahoga County Land Reutilization Corporation. (Supp. 005, Compl. ¶ 17).

Approximately four years later, on February 12, 2021, US Bank Trust, National Association, as Trustee of American Homeowners Preservation Trust Series 2015A+ (“US Bank”) filed a Complaint for Writ of Mandamus against Cuyahoga County. (Supp. 001-008, US Bank Compl., filed 2/12/21). In the Complaint, US Bank alleged that it was the “successor in interest” to Biltmore Funding because it was assigned the underlying mortgage on November 13, 2017. (Supp. 003-004, Compl. ¶ 2, ¶ 7). Even though it was not the property owner or a lienholder at the time of the Tax Foreclosure Action, US Bank alleged that it had standing to prosecute the mandamus action because the Board allegedly “deprived Relator’s predecessor in interest of a valuable property right,” i.e., the mortgage lien. (Supp. 006-007, Compl. ¶¶ 25, 27).

Cuyahoga County then filed a Motion to Dismiss with the Eighth District Court of Appeals based upon three grounds: (a) lack of standing, (b) adequate remedy at law; and (c) failure to state a claim. Upon review, the Eighth District granted the Motion to Dismiss, finding that (1) US Bank lacked standing to prosecute a mandamus claim because, as a successor-in-interest to a junior lienholder, it was not deprived of a “constitutionally-protected” property interest; and (2) that US Bank and its predecessors had an adequate remedy at law under the judicial review scheme established by the General Assembly in R.C. 323.79. *See State ex rel. US Bank Trust, N.A. v. Cuyahoga Cty.*, 8th Dist. Cuyahoga No. 110297, 2021-Ohio-2524 (July 19, 2021) (copy in Appendix to Appellant’s Brief).

2. The Lucas County Tax Foreclosure Action And Complaint For Writ of Mandamus.

The Lucas County Tax Foreclosure Action was filed with the Lucas County Board of Revision on December 20, 2016, for delinquent real estate taxes owed on real property located

at 526 E. Streicher Street, Toledo, Ohio 43608-1922. (Supp. 101-102, Lucas Cty. Compl. ¶ 2, ¶ 10). A final hearing in the Lucas County Tax Foreclosure Action was held on March 30, 2017, but the property owner (Jason Dimodica) and the prior lienholder (Freddie Mac) failed to appear at the Hearing. (Supp. 103, Compl. ¶ 13). Therefore, the Lucas County Board of Revision entered an Adjudication of Foreclosure on March 30, 2017. (Supp. 103, Compl. ¶ 13); (Supp. 167-171, Affidavit of Andrew Engel in Support of Complaint, Ex. E, Adjudication of Foreclosure, dated 3/30/2017). Among other things, the Adjudication of Foreclosure provided for the direct transfer of the tax-foreclosed property to an electing subdivision under R.C. 323.78 upon the expiration of the 28-day alternative right of redemption period. (Supp. 103, Compl. ¶ 14).

Pursuant to R.C. §§ 323.65(J) and 323.78, the property owner then had 28 days to redeem the Property by paying any and all delinquent real estate taxes, current real estate taxes, and the court costs associated with the Tax Foreclosure Action. No interested party, however, exercised their statutory right to redeem the tax-foreclosed property by either paying the impositions owed or by entering into a payment plan. Moreover, no timely appeal was filed from the Board's final order of foreclosure with the Lucas County Court of Common Pleas under R.C. 323.79. Accordingly, after the 28-day alternative right of redemption period expired, the Sheriff recorded a Sheriff's Deed on May 5, 2017, to transfer the tax-foreclosed property to the Lucas County Land Reutilization Corporation. (Supp. 103, Compl. ¶ 16).

Approximately four years later, on February 4, 2021, US Bank Trust, National Association, as Trustee of American Homeowners Preservation Trust Series 2015+ ("US Bank") filed a Complaint for Writ of Mandamus against "Lucas County, Ohio" with the Sixth District Court of Appeals. Upon review, however, the Sixth District dismissed the mandamus

action, *sua sponte*, because US Bank sued Lucas County, rather than the Lucas County Board of Commissioners. See *US Bank Trust, N.A., as Trustee for the American Homeowner Preservation Trust Series 2015A+ v. Lucas County, Ohio*, Case No. G- G-4801-CL-0202101087-000, Decision and Judgment, dated March 17, 2021.

US Bank did not appeal this ruling, but instead filed a second Complaint for Writ of Mandamus against “the Lucas County Board of County Commissioners” on May 13, 2021. (Supp. 100-107, Complaint for Writ of Mandamus, filed 5/13/2021). In the Complaint, US Bank alleged that it was the “successor in interest” to Freddie Mac because it was assigned the underlying mortgage on April 30, 2018. (Supp. 101-102, Lucas Cty. Compl. ¶ 2 and ¶ 7). Even though US Bank was not the property owner or lienholder at the time of the Tax Foreclosure Action, it nevertheless alleged that it had standing to prosecute a mandamus action because the Board allegedly “deprived Relator’s predecessor in interest of a valuable property right” without compensation. (Supp. 105, US Bank Compl. ¶ 25).

The Lucas County Board of Commissioners then filed a Motion to Dismiss based upon three grounds: (a) lack of standing, (b) adequate remedy at law, and (c) failure to state a claim. Upon review, the Sixth District granted the Motion to Dismiss, finding that US Bank and its predecessors had an adequate remedy at law under the judicial review scheme adopted by the General Assembly in R.C. 323.65-323.79. See *State ex rel. US Bank Trust, N.A. v. Lucas Cty.*, 6th Dist. Lucas No. L-21-1087, ¶ 23 (Aug. 5, 2021) (copy in Appendix to Appellant’s Brief).

3. The Summit County Tax Foreclosure Action And Complaint For Writ of Mandamus.

The Summit County Tax Foreclosure Action was filed with the Summit County Board of Revision on October 4, 2017, for delinquent real estate taxes owed on Parcel No. 68-20462,

or 1025 Dietz Avenue, Akron, Ohio 44301. (Supp. 218, Summit Cty. Compl. ¶ 2, ¶ 6). Unlike the Cuyahoga County and Lucas County Tax Foreclosure Actions, US Bank was named as a Defendant in the Summit County Tax Foreclosure Action because it was the owner of the tax delinquent property at issue. (Supp. 218, Compl. ¶ 3). US Bank admits, however, that it did not file an answer or attend the tax foreclosure hearing that was held on November 17, 2017. (Supp. 219, Compl. ¶ 9). Therefore, the Board of Revision entered an Adjudication of Foreclosure on November 17, 2017. (*Id.* at ¶ 9-10); (Supp. 229-236, Adjudication of Foreclosure, dated 11/17/17). Among other things, the Adjudication of Foreclosure ordered that the property be transferred to the Summit County Land Reutilization Corporation under R.C. 323.78 if US Bank did not exercise the alternative right of redemption within 28 days. (Supp. 219, Compl. ¶ 10); (Supp. 232-234, Order, pp. 4-6).

Pursuant to R.C. §§ 323.65(J) and 323.78, therefore, US Bank had 28 days to redeem the tax-foreclosed property by paying all of the delinquent real estate taxes, current real estate taxes, and the court costs associated with the Tax Foreclosure Action. US Bank did not redeem the property by paying all of the taxes or by entering a payment plan. Moreover, US Bank did not file a timely appeal from the Board's final order of foreclosure with the Summit County Court of Common Pleas under R.C. 323.79. Accordingly, in accordance with the Board's final decision, the Sheriff recorded a Sheriff's Deed on January 11, 2018, to transfer title to the Summit County Land Reutilization Corporation. (Supp. 219, Compl. ¶ 12).

Approximately three years later, on December 23, 2020, US Bank Trust, National Association, as Trustee of American Homeowners Preservation Trust Series 2014A ("US Bank") filed a Complaint for Writ of Mandamus with the Ninth District Court of Appeals. (Supp. 217-222, Complaint for Writ of Mandamus, filed 12/23/2020). Summit County then

filed a Motion to Dismiss based upon two grounds: (a) adequate remedy at law, and (b) failure to state a claim. Upon review, the Ninth District granted the Motion to Dismiss, finding that US Bank had an adequate remedy at law under the judicial review scheme established by the General Assembly in R.C. 323.79. See *State ex rel. US Bank Trust, N.A. v. Summit Cty.*, 2021-Ohio-3189, 177 N.E.3d 661, ¶ 17-27 (Sept. 15, 2021) (copy in Appendix to Appellant’s Brief).

STANDARD OF REVIEW

This Court conducts *de novo* review of whether the court of appeals properly dismissed an original action for failure to state a claim. *State ex rel. A.N. v. Cuyahoga Cty. Prosecutor's Off.*, 165 Ohio St. 3d 71, 2021-Ohio-2071, 175 N.E.3d 539, ¶ 8. Although the Court must presume that the factual allegations of the complaint are true, this presumption does not apply to the “legal conclusions” alleged in the Complaint, “even when cast as factual assertions.” *State ex rel. Ames v. Portage Cty. Bd. of Revision*, 2021-Ohio-4486, --- N.E.3d ----, ¶ 8 (Dec. 23, 2021). Thus, in deciding whether the mandamus claims were properly dismissed, this Court need not accept US Bank’s legal conclusions as true, including whether US Bank has standing or an adequate remedy at law. *Id.* (affirming dismissal for lack of standing); *State ex rel. Martre v. Reed*, 161 Ohio St.3d 281, 2020-Ohio-4777, 162 N.E.3d 773, ¶ 12 (holding that court was not required to accept relator's assertion that he lacked an adequate remedy at law).

Further, in conducting *de novo* review, it is well established that “an appellate court must affirm a trial court’s judgment if there are any valid grounds to support it.” *Addleman v. O'Malley*, 8th Dist. Cuyahoga No. 110173, 2021-Ohio-4429, ¶ 27, citing *Joyce v. Gen. Motors Corp.*, 49 Ohio St.3d 93, 96, 551 N.E.2d 172 (1990). Accordingly, the Court can affirm the judgment based upon any legal ground, even if it is based upon an issue that not decided by the lower courts.

ARGUMENT

I. PROPOSITION OF LAW NO. 1: THE GENERAL ASSEMBLY’S STATUTORY REVIEW SCHEME FOR TAX FORECLOSURE ORDERS PROVIDES AN ADEQUATE REMEDY AT LAW, AND ANY PARTY WHO FAILS TO FILE A TIMELY APPEAL UNDER R.C. 323.79 SHOULD NOT BE PERMITTED TO CIRCUMVENT THE STATUTORY REQUIREMENTS BY FILING A WRIT OF MANDAMUS CLAIM AFTER THE APPEAL TIME HAS EXPIRED.

As previously discussed, all three of the appellate courts dismissed the complaints for writ of mandamus because they concluded that Ohio’s judicial review scheme for administrative tax foreclosure orders, Ohio Rev. Code 323.65-323.79, provides an adequate remedy at law. In so doing, all three courts followed this Court’s ruling in *State ex rel. Kerns v. Simmers*, 153 Ohio St.3d 103, 2018-Ohio-256, 101 N.E.3d 430, which held that there are three (3) essential elements for a writ of mandamus claim that is based upon an alleged taking: “(1) that [the respondent] had a clear legal right to appropriation proceedings, (2) that respondents have a clear legal duty to commence the proceedings, and (3) that the landowner has no plain and adequate legal remedy.” See *State ex rel. Kerns v. Simmers*, 153 Ohio St.3d 103, 2018-Ohio-256, 101 N.E.3d 430, ¶ 5, citing *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28, 29, 451 N.E.2d 225 (1983). Thus, as this Court held in *Kerns*, a party cannot pursue a taking claim via a writ of mandamus where, as here, the General Assembly has created a judicial review scheme for the underlying administrative order through the filing of an administrative appeal, and the party failed to pursue this statutory remedy. *Id.* at ¶¶ 8-15.

Here, it is undisputed that the General Assembly’s judicial review scheme for administrative tax foreclosure proceedings provides any aggrieved party with the right to file an administrative appeal under R.C. Chapters 2505 and 2506 with the court of common pleas, and to raise any new issues for the first time on appeal that were “pertinent” to the land that

was the subject of the tax foreclosure proceeding. The judicial review scheme in R.C. 323.79, in fact, is actually broader and more expansive the judicial review scheme in *Kerns* because it provides for “de novo” review and expressly permits a party to raise new issues, including constitutional issues, even if they were not previously raised during the tax foreclosure proceedings. In particular, Section 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.

R.C. 323.79 further provides that the appeal must be filed within 14 days after the confirmation of any sale, or in the case of a direct transfer, within 14 days of “the date on which an order of transfer or conveyance, whether included in the decree of foreclosure or a separate order, is first filed with and journalized by the clerk of court.” *Id.*

Ohio’s judicial review scheme for administrative tax foreclosure proceedings is also more expansive because it provides any party with the statutory right, during the course of the tax foreclosure proceeding before the Board of Revision, to transfer the case to the court of common pleas under R.C. 323.691 or R.C. 323.70(B). In particular, R.C. 323.691 provides that the board of revision may order the transfer of the tax foreclosure proceeding to the court of common pleas or to a municipal court with jurisdiction over the property, upon a motion

filed by the property owner, 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.” R.C. 323.70(B) (emphasis added). Thus, R.C. 323.70(B) provides the ability to transfer the case to the common pleas court where the party could have pursued any and all legal remedies, including potential counterclaims.

In this case, however, it is undisputed that none of the defendants who were named in the underlying Tax Foreclosure Actions sought to exercise any of the statutory remedies that were provided by the General Assembly in R.C. 323.65 through R.C. 323.79. This is fatal to US Bank’s mandamus claims because, as this Court explained in *Kerns*, the availability of an administrative appeal provides an adequate remedy for an alleged takings claim. *Id.*, 2018-Ohio-256, at ¶ 8-15. Indeed, in *Kerns*, this Court held that a party’s failure to pursue an available administrative appeal “does not render the remedy inadequate,” and that the expiration of the appeal time does not mean that the party lacked an adequate remedy at law. *Id.* at ¶ 9. Accordingly, as in *Kerns*, this Court should affirm the dismissal of the mandamus claims because US Bank cannot satisfy this essential element of a writ of mandamus claim.

The dismissal of the writ of mandamus claims is not only warranted by this Court’s ruling in *Kerns*; it is consistent with the clear legislative intent of the General Assembly in adopting a comprehensive judicial review scheme for administrative tax foreclosure

proceedings in R.C. 323.65 through R.C. 323.79. Here, a review of the applicable statutes confirms that the General Assembly purposefully and carefully crafted a comprehensive judicial review scheme for administrative tax foreclosure orders that was designed to ensure that *all* issues, including any potential constitutional issues, that may be “pertinent” to a tax-delinquent property are timely filed, so that they can be expeditiously, efficiently, and conclusively resolved by the courts. Indeed, in accordance with the legislative intent to expedite the resolution of tax foreclosure proceedings involving vacant and abandoned lands, R.C. 323.79 expressly broadened the scope of judicial review over tax foreclosure orders in order to grant an aggrieved party with the right to “de novo” judicial review, and with the right to raise any “new” issues may be “pertinent” to the land that was the subject of the tax foreclosure order. In so doing, the General Assembly clearly sought to ensure that all issues arising from or relating to the foreclosure, sale, or transfer of vacant and abandoned land were timely raised and expeditiously resolved by the courts. Thus, if US Bank were permitted to circumvent R.C. 323.79 by filing a writ of mandamus claim almost four years after the statutory appeal time had expired, it would directly undermine and wrongfully defeat the clear purpose and intent of the comprehensive judicial review scheme for administrative tax foreclosure proceedings that was adopted by the General Assembly.

In its Brief, US Bank does not dispute that the General Assembly has adopted a judicial review scheme for expedited tax foreclosure proceedings in R.C. 323.65 through R.C. 323.79. Notwithstanding this fact, US Bank asks this Court to create a statutory exception for “takings” claims based upon the same arguments that were raised and rejected by this Court in *Kerns*. Moreover, it erroneously argues that its alleged takings claims were not “ripe” for adjudication

until after the statutory appeal time had expired. Both arguments are legally meritless and conflict with Supreme Court precedent. Accordingly, they should be rejected by this Court.

A. The Court Should Reject US Bank’s Argument That Takings Claims Are Not Subject To The Judicial Review Scheme Established By The General Assembly In Ohio Revised Code 323.79.

In its Brief, US Bank does not dispute that a writ of mandamus claim must be dismissed if the Relator fails to demonstrate the lack of an adequate remedy at law. *See Kerns*, 153 Ohio St.3d 103, 2018-Ohio-256, 101 N.E.3d 430, at ¶ 5, ¶ 8-15. Although US Bank seeks to distinguish *Kerns* based upon the nature of the takings claim alleged in that mandamus action, its arguments ignore the undisputed fact that the constitutional claim in *Kerns* was also based upon the allegation that an administrative order “directs a taking of the landowners’ property without compensation in violation of the Ohio and United States Constitutions.” *Id.* at ¶ 3-4 (emphasis added). Indeed, like this case, the relators in *Kerns* were not seeking to invalidate the administrative order at issue, but were requesting a writ of mandamus to compel “appropriation proceedings” in order to recover “just compensation” for the alleged “taking.” *Id.* at ¶ 1. Thus, the relators in *Kerns* were alleging the same type of takings claim and seeking the same remedy as US Bank is seeking in its Complaints.

For this reason, *Kerns* is directly on point because US Bank’s Complaints also request a writ of mandamus based upon the allegation that the administrative order at issue directs the “taking” of property “without compensation.” (Supp. 006-008, 105-106, 220-221, US Bank’s Complaints for Writ of Mandamus, Count I). While US Bank’s Brief argues that it is not challenging the “constitutionality” of any state statute or the tax foreclosure orders, this argument ignores the fact that US Bank’s takings claim is based upon the allegation that the Board of Revision’s enforcement of the statutory remedy set forth in R.C. 323.78 resulted in

the unconstitutional “taking” of property “without compensation” (*Id.*) Thus, US Bank’s writ of mandamus claim is, in fact, alleging the same type of mandamus claim alleged in *Kerns* in that they are both based upon the allegation that the administrative order at issue resulted in the “taking” of property “without compensation” in violation of the Takings Clauses in the U.S. and Ohio Constitutions. (*Id.*)

In arguing that an administrative appeal is not an adequate remedy for an alleged takings claim, therefore, US Bank is essentially making the same arguments that were made in *Kerns* where the relators also argued that an administrative appeal was not an “adequate” or “complete” remedy because the common pleas court “could not conduct an appropriation hearing and determine compensation.” *Id.*, 2018-Ohio-256, at ¶ 13. Upon review, however, this Court rejected this argument as a matter of law, holding that an administrative appeal provided an adequate remedy for the alleged takings claim, and therefore dismissed the writ of mandamus action on the ground that the Relators failed to demonstrate the lack of an adequate remedy at law. *Id.* at ¶ 13. Accordingly, based upon this Supreme Court precedent, the lower courts properly dismissed US Bank’s Complaints for failure to state a claim because US Bank failed to satisfy this essential element of a writ of mandamus claim.

For the same reasons set forth in *Kerns*, this Court also should reject US Bank’s arguments on pages 26-28 of its Brief that the judicial review scheme set forth in R.C. 323.79 would not permit an aggrieved party to raise an “affirmative claim” in the context of an administrative appeal. Although US Bank cites *Committee of Concerned Citizens v. Union Twp.*, 66 Ohio St.3d 452 (1993), as allegedly supporting its position, this case actually supports Respondents’ position because the Supreme Court in that case actually heard and decided the merits of the takings claim that was raised in the underlying administrative appeal. *Id.* at 457-

458 (“Therefore, we hold that appellee's refusal to grant appellant's application for a conditional use was not a taking under the Fifth or Fourteenth Amendments to the United States Constitution”). Thus, this decision actually supports this Court’s ruling in *Kerns* that takings claims can in fact be raised and decided via an administrative appeal.

Indeed, contrary to US Bank’s assertions, the Ohio courts have long held that a party may raise “as-applied” constitutional claims for the first time in an administrative appeal, even if they were not raised in the underlying administrative proceedings. *Mobil Oil Corp. v. City of Rocky River*, 38 Ohio St. 2d 23, 26, 309 N.E.2d 900 (1974) (holding that a party may raise an “as-applied” constitutional challenge in a R.C. 2506 appeal even though it “was not initially argued before the administrative officer or board”); *see also City of Cleveland v. Posner*, 193 Ohio App.3d 211, 2011-Ohio-1370, 951 N.E.2d 476, ¶ 17 (8th Dist.) (“The constitutionality of a statute *as applied* to a particular defendant may be raised in an appeal [of] an administrative decision in a court of common pleas, with the court permitting the parties to offer additional evidence”) (citations omitted) (emphasis added). Thus, it is well established that a party may raise takings claims in conjunction with a R.C. 2506 appeal. *See, e.g., Boice v. Ottawa Hills*, 6th Dist. Lucas No. L-09-1253, 2011-Ohio-5681, ¶ 29-31, *rev’d on other grounds*, 137 Ohio St.3d 412 (2013) (holding that Ohio courts have authority to decide “constitutional takings claims when they are raised in an administrative appeal”) (citing cases); *C&C Realty v. N. Olmstead Bd. of Zoning Appeals*, 8th Dist. Cuyahoga No. 88162, 2007-Ohio-2224, ¶ 13-23 (deciding merits of alleged takings claim in 2506 appeal).

In this regard, the judicial remedy provided by R.C. 323.79 is actually broader than a traditional R.C. Chapter 2506 administrative appeal because R.C. 323.79 expressly provides for “de novo” judicial review in the common pleas court, and expressly states that a party may

raise *any* new issues “for the first time on appeal” that are “pertinent” to the land that is the subject of the tax foreclosure order. *Id.* There are no statutory limitations imposed upon the nature or type of the “issues” that may be raised, except that they be “pertinent” to the property that is the subject of the tax foreclosure proceeding. Thus, it is clear that the General Assembly purposefully and carefully crafted a judicial review scheme for tax foreclosure orders that seeks to ensure that all issues relating to the foreclosure, sale, and/or transfer of a vacant, tax-delinquent property are timely, efficiently, and conclusively resolved by the courts.

Given this broad, expansive language in R.C. 323.79, US Bank’s Brief attempts to create a statutory exception for takings claims by erroneously suggesting that R.C. 323.79 only permits a party to raise new “issues,” not new “claims.” (Appellant’s Brief, pg. 25). This is a meritless argument that is not supported by any case law and is inconsistent with the clear intent of the General Assembly to expand – not limit – the rights of aggrieved parties to obtain complete and independent judicial review of all issues that may be “pertinent” to a tax-foreclosed property. *See Johnson v. Sawyer*, No. 1:15 CV 0730, 2015 WL 4743815, at *6 (N.D. Ohio Aug. 11, 2015), *aff’d*, Case No. 15-3972 (6th Cir. Apr. 6, 2016). Indeed, the definition of “issue” is actually broader than the definition of a “claim.” The Merriam-Webster Dictionary defines “issue” as “a matter that is in dispute between two or more parties.” *See* <https://www.merriam-webster.com/dictionary/issue>. The definition of “issue,” therefore, is clearly broad enough to include a claim, defense, or any other matter in dispute that may be “pertinent” to a tax-foreclosed property. Accordingly, the Court should reject US Bank’s narrow interpretation of the statute, and conclude that the language of R.C. 323.79 applies broadly to any and all claims, defenses, or other matters that may be “pertinent” to a tax-foreclosed property.

Finally, this Court should reject US Bank’s argument that it lacked an adequate remedy at law because R.C. 2506.04 does not permit a party to recover “damages” for an alleged taking. This argument should be rejected for a number of reasons. First, it fails to appreciate that the writ of mandamus complaints filed by US Bank also did not request an award of damages, but merely requested that the courts make a legal ruling that the transfer of a tax-foreclosed property under R.C. 323.78 constitutes a “taking,” and then, upon making such a ruling, to issue a writ of mandamus to compel each county to commence a separate appropriation proceeding to pay “just compensation” for the alleged “taking.” Under the circumstances, therefore, there was nothing in R.C. 323.79 that would have prohibited US Bank or its predecessors from raising the same takings arguments and requesting the same type of judicial ruling from the courts.

Second, this argument fails to appreciate that there is nothing in Ohio law that would have prohibited an aggrieved party from filing a civil action for damages, or for a writ of mandamus, in conjunction with a timely administrative appeal under R.C. 323.79. As the Sixth Circuit explained in *Moore v. Hiram Twp.*, 988 F.3d 353 (6th Cir. 2021), and *Carroll v. City of Cleveland*, 522 F. App’x 299 (6th Cir. 2013), Ohio law in fact permits the filing of damages claims in conjunction with a timely administrative appeal if a party “follows the proper procedures.” *Moore*, 988 F.3d at 362-364; *Carroll*, 522 F. App’x. at 305-306. In so doing, the Sixth Circuit in *Moore* and *Carroll* cited numerous Ohio cases where the plaintiffs filed a complaint for damages that was then consolidated with a timely R.C. Chapter 2506 appeal. *See Moore*, 988 F.3d at 362; *Carroll*, 522 F. App’x at 305-306. Accordingly, the Court should reject US Bank’s arguments and refrain from creating a statutory exception in R.C. 323.79 for alleged takings claims.

For all of these reasons, therefore, this Court should follow its prior ruling in *Kerns* and enforce the carefully-crafted judicial review scheme established by the General Assembly for administrative tax foreclosure proceedings. The General Assembly clearly intended to establish a comprehensive judicial review scheme that would ensure that all “issues” that may be “pertinent” to a tax-foreclosed property, including any constitutional issues, would be heard and decided by the courts in a timely and efficient manner. By arguing that its alleged takings claims are not subject to R.C. 323.79, therefore, US Bank is wrongfully asking this Court to re-write the plain language of R.C. 323.79 and create a huge exception to the comprehensive judicial review scheme created by the General Assembly. Accordingly, as in *Kerns*, the Court should affirm the dismissal of US Bank’s mandamus claims.

B. The Court Should Reject US Bank’s Ripeness Arguments.

In its Brief, US Bank also argues that the administrative appeal remedy in R.C. 323.79 is not an adequate remedy because its takings claims allegedly did not become “ripe” for adjudication until after the administrative appeal deadlines had expired. This is a meritless argument that once again ignores Ohio Supreme Court precedent. As this Court held in *State ex rel. AWMS Water Solutions, L.L.C. v. Mertz*, 162 Ohio St.3d 400, 2020-Ohio-5482, 165 N.E.3d 1167, a takings claim becomes ripe for adjudication once “the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.” *Id.* at ¶ 32-33 (citations omitted). Thus, under existing precedent, the alleged takings claims at issue became ripe for adjudication once the Board issued its “final decision” that applied R.C. 323.78 to the property.

In this regard, US Bank’s Brief misconstrues the U.S. Supreme Court’s holding in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). US Bank cites pages 638-639 of the

Palazzolo opinion as allegedly standing for the proposition that a takings claim is not ripe until “the moment when the relevant property interest is alienated from its owner.” (US Bank Brief, pg. 29). The pages cited, however, come from a concurring/ dissenting opinion that was not joined by any of the other justices. *Id.*, 533 U.S. at 638-639 (Stevens, J., concurring in part, and dissenting, in part). Indeed, in the majority opinion in *Palazzolo*, the U.S. Supreme Court held that the takings claim became ripe for adjudication as soon as a “final decision” was made by the administrative agency that applied the challenged wetlands regulations to the property. *Id.*, 533 U.S. at 618-626. In so doing, the majority opinion did not in any way suggest that the property owner needed to wait until after legal title has been transferred before alleging a takings claim. *Id.*

This is not a difficult or novel issue to decide. As the U.S. Supreme Court recently clarified in *Pakdel v. City & Cty. of San Francisco, California*, --- U.S. ----, 141 S.Ct. 2226, 210 L.Ed.2d 617 (2021), the “final decision” standard is a “relatively modest” requirement for determining the ripeness of an alleged takings claim, and thus nothing more than “de facto finality is necessary.” *Id.* at 2230 (emphasis added). Thus, under both U.S. and Ohio Supreme Court precedent, it is clear that the alleged takings claim became ripe for adjudication as soon as the Board of Revision issued a final decision that applied the statutory remedy in R.C. 323.78 to the Property. *Id.*; *State ex rel. AWMS Water Solutions*, 2020-Ohio-5482, at ¶ 32-33.

In its Brief, US Bank ignores the “final decision” standard and argues that its takings claim did not become ripe for adjudication until after the Sheriff’s Deed was recorded. This is a meritless argument that should be rejected by this Court. The recording of the Sheriff’s Deed was simply a ministerial act that implemented the final decision that was issued by the Board of Revision. Indeed, as previously discussed, it makes perfect sense that the General

Assembly would seek to impose a statutory deadline for filing an administrative appeal before the deed for the property is permanently transferred to a third party. Thus, in R.C. 323.79, the General Assembly provided that any and all claims should be filed within 14 days of the final order of foreclosure order, so that they can be filed before the Sheriff's Deed is recorded.

In its Brief, US Bank fails to present any argument to explain why this Court should permit a party to circumvent the General Assembly's judicial review scheme by filing takings claims years after the appeal deadline has expired. While the Pacific Legal Foundation's Amicus Brief argues that the 14-day appeal deadline violates "due process" because it does not afford sufficient time to allege a takings claim, this argument was never raised by US Bank in the proceedings below or in any of their Complaints, which did not allege any due process violations at all. Moreover, it is a meritless argument that essentially asks this Court to rewrite Ohio's tax foreclosure laws, but ignores the fact that Article II, Section 1 of the Ohio Constitution grants the General Assembly with exclusive authority over taxation laws. *Beaver Excavating*, 134 Ohio St.3d 565, 2012-Ohio-5776, 983 N.E.2d 1317, at ¶ 40. Accordingly, the Court should reject this meritless argument because it was not raised below and fails to state a valid due process claim.

Finally, the Court should reject US Bank's theory that its particular takings claims were not ripe until after the Sheriff's Deed was recorded because they are based upon a "physical taking" as opposed to a "regulatory taking." This is a meritless argument because it ignores the fact that US Bank's takings claims are based upon the alleged loss of "surplus value," not the loss of legal title to the property itself. In any event, the fact remains that US Bank or its predecessors knew or should have known of the alleged injury as soon as the Board issued its final decisions that applied R.C. 323.78 to each property. Thus, under both federal and state

law, its takings claims would have arisen at that time. See *Painesville Mini Storage, Inc. v. Painesville*, 11th Dist. Lake No. 2008-L-092, 2009-Ohio-3656, ¶ 21, *aff'd*, 124 Ohio St.3d 504, 2010-Ohio-920, 924 N.E.2d 357; see also *Kuhnle Bros., Inc. v. Cty. of Geauga*, 103 F.3d 516, 520 (6th Cir. 1997) (holding that takings claims arise “when the plaintiff knows or has reason to know of the injury which is the basis of his action”).

In this regard, US Bank’s Brief cites no case law that would suggest that a takings claim arising from a tax foreclosure order is not subject to the “final decision” ripeness standard. While US Bank cites the Sixth Circuit’s decision in *Harrison v. Montgomery Cnty., Ohio*, 997 F.3d 643 (6th Cir. 2021), as allegedly supporting its ripeness arguments, this opinion actually supports Respondents’ position that the takings claims at issue became ripe when the Board of Revision issued its Adjudication of Foreclosure. In *Harrison*, the Sixth Circuit also applied the “final decision” standard for the alleged takings claim. *Id.* at 650-651. In so doing, the panel did not hold that the takings claim did not become ripe until after the Sheriff’s Deed was recorded. Rather, it expressly cited the “final decision” standard, and *twice* stated that the alleged takings claim became ripe when the Board of Revision “adjudicated the foreclosure.” *Id.* at 650 (“The taking, so far as federal law is concerned, happened when the Board adjudicated the foreclosure of Harrison’s property“); *Id.* at 651 (explaining that the final decision standard was met “when the Board adjudicated foreclosure”). Accordingly, *Harrison* actually supports Respondents’ position that the “final decision” standard applies to the type of takings claims alleged in these cases.²

² We note that *Harrison* involved a Section 1983 claim, not mandamus claim. It therefore did not address the essential elements of a mandamus claim under Ohio law, including whether Ohio’s judicial review scheme provides an adequate remedy at law.

II. PROPOSITION OF LAW NO. 2: A JUNIOR LIENHOLDER LACKS STANDING TO PROSECUTE A TAKINGS CLAIM IF IT DID NOT OWN AN INTEREST IN THE PROPERTY WHEN THE TAX FORECLOSURE PROCEEDING WAS DECIDED.

In addition to the foregoing, this Court also should conclude that US Bank lacked standing to prosecute the writ of mandamus claims alleged in the Cuyahoga County and Lucas County actions. Here, as discussed more fully below, US Bank lacks standing to prosecute the takings claims alleged in the Cuyahoga County and Lucas County mandamus actions because it did not own any interest in the tax-foreclosed property at the time when the Board of Revision issued its final decision that applied R.C. 323.78 to the tax-foreclosed properties. Thus, US Bank cannot allege that it was “deprived” of any “constitutionally-protected” property interest since, by its own admission, it did not own any interest in the subject property when the Board issued its Adjudication of Foreclosure.

Under Ohio law, a case or controversy is not “justiciable” unless the plaintiff has suffered a “direct and immediate” injury as a result of the challenged conduct. *Burger Brewing Co. v. Liquor Control Comm., Dept. of Liquor Control*, 34 Ohio St.2d 93, 97–98, 296 N.E.2d 261 (1973). As this Court has explained:

“Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends on whether the party has alleged * * * a “personal stake in the outcome of the controversy.” ’ ’ ”

Fed. Home Loan Mtge. Corp. v. Schwartzwald, 134 Ohio St.3d 13, 2012–Ohio–5017, 979 N.E.2d 1214, ¶ 21 (citations omitted). Thus, “[s]tanding to sue is part of the common understanding of what it takes to make a justiciable case,” and constitutes a “jurisdictional

requirement” that must be satisfied in order to invoke the jurisdiction of the Court. *Id.* at ¶ 21-22 (citations omitted).

Here, US Bank’s Complaints admit that it did not own any interest in the tax-foreclosed property that was the subject of the Cuyahoga County and Lucas County Tax Foreclosure Actions at the time when the Board of Revision issued a final Adjudication of Foreclosure that ordered the transfer of the property under R.C. 323.78. (Supp. 003-005, Cuyahoga County Compl. ¶ 2-3, ¶ 13-15); (Supp. 101-103, Lucas County Compl. ¶ 6-7, ¶ 14). Rather, in both cases, US Bank’s takings claims is based upon the allegation that it subsequently was assigned the underlying mortgage on the property. (*Id.*) Thus, in the Complaints filed by US Bank in Cuyahoga County and Lucas County mandamus actions, US Bank’s takings claims were based upon the allegation that the County allegedly “deprived Relator’s *predecessor in interest* of a valuable property right.” (Supp. 007, Cuyahoga County Compl. ¶ 27); (Supp. 105, Lucas Cty. Complaint, ¶ 25) (Emphasis added.)

This is fatal to US Bank’s takings claims in the Cuyahoga County and Lucas County mandamus actions because, by its own admission, US Bank did not own any interest in the subject property at the time of the alleged “taking,” and thus cannot demonstrate that it suffered any direct or immediate injury as a result of the challenged conduct. While it later was assigned the underlying mortgage on the property, this assignment occurred after the predecessor lienholder had already lost its mortgage lien by virtue of the Board’s tax foreclosure order. In the Cuyahoga County Tax Foreclosure Action, in fact, it is undisputed that the Adjudication of Foreclosure was issued on October 16, 2017, before the Assignment of Mortgage on November 13, 2017. (Supp. 003-005, Compl. ¶ 7, ¶ 14). Similarly, in the Lucas County Tax Foreclosure Action, the Adjudication of Foreclosure was issued on March 30, 2017, but the

Assignment of Mortgage did not occur until April 30, 2018. (Supp. 101-103, Lucas Cty. Compl. ¶ 7 and ¶ 13). Accordingly, in both cases, US Bank lacks the standing to prosecute a mandamus claim because it admits that it did not own any interest in the subject property when the Board of Revision issued its final decisions in the Tax Foreclosure Actions, and thus it cannot establish that it was deprived of a constitutionally-protected property interest as a result of the challenged conduct. *See State ex rel. R.T.G., Inc. v. State*, 141 Ohio App. 3d 784, 794, 753 N.E.2d 869, *rev'd in part on other grounds*, 98 Ohio St. 3d 1, 2002-Ohio-6716, 780 N.E.2d 998 (takings claims may be brought only by a person who owned the property at the time of the alleged taking, “not the owner at an earlier or later date”).

Indeed, even if US Bank was permitted to stand in shoes of the former lienholder, it still would not have standing to prosecute a takings claim because its predecessor-in-interest also did not suffer any constitutional injury as a result of the challenged conduct. As the Eighth District properly held, a junior lienholder has no constitutionally-protected property interest in a mortgage lien that was extinguished as a result of a foreclosure proceeding initiated by a senior lienholder. *State ex rel. US Bank Trust*, 2021-Ohio-2524, ¶ 11, citing *Hembree v. Mid-America Fed. S&L Assn.*, 64 Ohio App.3d 144, 152, 580 N.E.2d 1103 (2d Dist. 1989). This is particularly true where, as here, the junior lienholder defaults in the foreclosure proceeding by failing to file an answer or otherwise appearing at any of the hearings. As the Eighth District correctly held, such a default constitutes a “disclaimer” by the junior lienholder of any interests in the property. *State ex rel. US Bank Trust*, 2021-Ohio-2524, ¶ 11-12, citing *Zuckerman, Daiker & Lear Co., L.P.A. v. Signer*, 186 Ohio App.3d 686, 2009-Ohio-968, 930 N.E.2d 336, ¶ 34 (8th Dist.); *Settlers Bank v. Burton*, 4th Dist. Washington Nos. 12CA36 and 12CA38, 2014-Ohio-335, ¶ 31; *Lexington Ridge Homeowners Assn. v. Schlueter*, 9th Dist. Medina No.

10CA0087-M, 2013-Ohio-1601, ¶ 20-21; *Deutsche Bank Natl. Trust Co. v. Richardson*, 2d Dist. Darke No. 2010-CA-3, 2011-Ohio-1123, ¶ 19.

In this case, in fact, Ohio Rev. Code § 323.69(D)(1) provides that “[a] party shall be deemed in default of the proceedings in an action brought under sections 323.65 to 323.79 of the Revised Code” if the “party fails to appear at any hearing after being served with the notice of the summons and complaint by certified or ordinary mail,” or “fails to appear, move, or otherwise plead to the complaint within twenty-eight days after service by publication is completed.” *Id.* Here, it is undisputed that *all* of the Defendants in the Tax Foreclosure Actions failed to appear at any hearings or otherwise answer, move, or plead in response to the tax foreclosure complaints. Accordingly, even if US Bank were able to stand in the shoes of the former property owner or lienholder, it still would be unable to demonstrate that it has standing because its alleged predecessors in interest had already “disclaimed” any interest in the properties when they defaulted in the Tax Foreclosure Actions.

In the Complaints, US Bank also alleged that it has standing because the original property owner allegedly “assigned” the right to receive any “miscellaneous proceeds” that may be paid for an alleged taking of the property. (Supp. 004, Cuyahoga County Compl. ¶ 9);(Supp. 102, Lucas County Compl. ¶ 9). This contractual language, however, is not legally sufficient to confer standing upon US Bank because the plain language of the Mortgage merely assigns the right to receive the “miscellaneous proceeds” that are actually received by the property owner. (Supp. 021, Cuyahoga Cty. Compl. Ex. A, Mortgage, pg. 10, ¶ 11); (Supp. 118, Lucas Cty. Compl. Ex. A, Mortgage, pg. 5, ¶ 11). The quoted contractual language, therefore, did not purport to assign any affirmative “claims” or “causes of action” to US Bank.

Accordingly, the language in the Mortgage also does not operate to confer standing upon US Bank to file a takings claim.

In this regard, the Eighth District also was correct in finding “the assignment of a cause of action is distinct from the assignment of proceeds or the right to funds that results from a cause of action.” *See State ex rel. US Bank Trust*, 2021-Ohio-2524, at ¶ 15, citing *Three-C Body Shops, Inc. v. Francois*, 10th Dist. Franklin No. 19AP-471, 2020-Ohio-4710. As the Eighth District explained, therefore, the language quoted in Paragraph 9 of US Bank’s Complaint is nothing more than “a contractual right to funds between the mortgagee and the mortgagor.” *Id.* at ¶ 15. In fact, in this case, US Bank did not file its mandamus actions “on behalf of” the former property owner based upon an alleged assignment of a cause of action. Rather, it sought to prosecute its own takings claim based upon the allegation that its “predecessor-in-interest” was deprived of its mortgage lien. (Supp. 007, Compl. ¶ 27); (Supp. 105, Compl., ¶ 25). Accordingly, for all of these reasons, the Court should conclude that US Bank lacked standing to prosecute the Cuyahoga County and Lucas County mandamus actions.

III. PROPOSITION OF LAW NO. 3: A COUNTY HAS NO CLEAR LEGAL DUTY TO PAY COMPENSATION TO A DELINQUENT TAXPAYER OR LIENHOLDER WHO LOSES THEIR INTERESTS IN A PROPERTY AS A RESULT OF A TAX FORECLOSURE ACTION.

This Court also should affirm the dismissal of the mandamus actions because US Bank’s legal theory – that it was unconstitutionally deprived of the “surplus equity” in the tax foreclosed property – fails to state a valid takings claim on the merits. In this regard, there are two primary legal reasons for why no takings claim can arise as a matter of law.

First, as set forth more fully below, it is well established that a takings claim cannot be based upon the alleged loss of a property interest that was caused by a final judgment or order

that was entered in a tax foreclosure proceeding. As the U.S. Supreme Court has held, “[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain.” *Bennis v. Michigan*, 516 U.S. 442, 452-453, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996). Here, it is undisputed that the property owners (and all lienholders) lost their alleged interests in the tax-foreclosed properties at issue as a result of the failure to pay taxes. This is true, regardless of the statutory remedy – sale, transfer, or forfeiture – that may be imposed under the Ohio Revised Code. Thus, no “takings” claim can arise as a matter of law because the challenged conduct arose from the exercise of the State’s taxing powers, not the power of eminent domain. *Leasor v. Kapszukiewicz*, 6th Dist. Lucas No. L-08-1004, 2008-Ohio-6176, ¶ 14 (affirming dismissal of takings claim arising from tax foreclosure it involved the State’s “taxing power, not the eminent domain power of the government”) (citing cases).

Second, US Bank’s legal theory should be rejected because it is based upon the flawed proposition that a property owner and junior lienholders have a “constitutionally protected” interest in recovering the “surplus equity” of a tax-foreclosed property under Ohio law. This argument should be rejected as a matter of law because there is nothing in the Ohio Constitution or the Ohio Revised Code that requires the State (or a county) to pay any financial compensation to a property owner or junior lienholder who loses their interest in a tax foreclosed property as a result of the failure to pay taxes. This is true, regardless of the fair market value of the property and regardless of whether the property is later sold, transferred, or forfeited to the State. If this Court were to accept US Bank’s legal theory, therefore, it would significantly undermine Ohio’s tax foreclosure laws by requiring the payment of financial windfall to delinquent taxpayers at the expense of law-abiding taxpayers. *See*

Rafaeli, LLC v. Oakland Cty., 505 Mich. 429, 952 N.W.2d 434, 465-466 & n.134 (2020) (rejecting argument that “just compensation” clause requires that “plaintiffs be awarded the fair market value of their properties so as to be put in as good of a position had their properties not been taken at all” because it was not supported by any case law and would result in a financial “windfall” to delinquent taxpayers at the expense of the public at-large).

Indeed, contrary to US Bank’s assertions, there is no legal support for the proposition that a delinquent taxpayer has a constitutionally-protected property interest in recovering the “surplus equity” in a property that has become subject to a tax foreclosure action. While US Bank and its amici supporters cite to a number of cases from other states involving the right to recover the “surplus proceeds” of a tax sale, there is a fundamental distinction between the statutory right to recover the surplus proceeds of a sale, and the alleged right to recover “surplus equity” based upon the difference between the alleged “fair market value” of a tax-foreclosed property and the amount of taxes owed. US Bank’s legal theory, in fact, was expressly rejected by the Michigan Supreme Court in *Rafaeli*, which found that there was no legal support (in Michigan or any other state) for the proposition that a delinquent taxpayer has constitutionally-protected interest in recovering the difference between the fair market value of tax-foreclosed property and the amount of taxes owed. *Id.* at 465-466 & n.134. Accordingly, the Court also should reject US Bank’s legal theory, and affirm the dismissal of the takings claims alleged in these cases.

A. The Court Should Reject US Bank’s Theory That A Takings Claim Can Arise From The Enforcement Of Ohio’s Tax Foreclosure Laws.

As the United States Supreme Court has held, a taking claim cannot arise as a matter of law where, as here, the property at issue was “lawfully acquired under the exercise of

governmental authority other than the power of eminent domain.” *Bennis*, 516 U.S. at 452-453. Here, it is undisputed that the property owner lost all of its right, title, and interest in a tax-foreclosed property as a result of the failure to pay taxes. In other words, but for the failure to pay taxes, no foreclosure and no transfer would have occurred. Thus, no takings claim can arise as a matter of law because the Board’s lawful enforcement of Ohio’s tax foreclosure statutes in R.C. Chapter 323 involves the exercise of the State’s *taxing power*, not the power of eminent domain. *Leasor*, 2008-Ohio-6176, at ¶ 14 (rejecting alleged takings claim as a matter of law because it arose from the exercise of the State’s “taxing power, not the eminent domain power of the government”) (citing cases).

The opinion in *Leasor* is based upon the Supreme Court’s ruling in *Bennis* and is supported by numerous federal court opinions. *See Leber v. United States*, 146 Fed. Cl. 9, 12 (Ct. Cl. 2019) (“It is well settled that ‘the lawful exercise of the Government’s tax collection powers does not amount to a taking’ ”) (citations omitted); *see also Speed v. Mills*, 919 F.Supp.2d 122, 129 (D.D.C. 2013); *Epice Corp. v. Land Reutilization Authority of City of St. Louis*, No. 4:07Cv00206 HEA, 2010 WL 3270114, *2 (E.D. Mo. Aug. 17, 2012); *Golden v. Mercer Cty. Tax Claim Bureau (In re Golden)*, 190 B.R. 52, 57-58 (Bankr. W.D. Penn. 1995). The vast majority of the federal courts that have addressed this issue, therefore, have determined that a property owner does not have a valid takings claim if he or she loses his or her interest to a property as a result of a tax foreclosure action. *Id.*, *see also Nelson v. City of New York*, 352 U.S. 103, 110 (1956); *Miner v. Clinton Cty.*, 541 F.3d 464, 474-475 (2d Cir. 2008).

Although the direct transfer remedy imposed by R.C. 323.78 involves the transfer – rather than the sale – of a tax-foreclosed property, this distinction is immaterial because the

source of the Board’s authority to impose both statutory remedies is the State’s taxing powers, not the power of eminent domain. As this Court has explained, Article II, Section 1 of the Ohio Constitution delegates “the power to tax” exclusively to the General Assembly. *Beaver Excavating Co.*, 134 Ohio St.3d 565, 2012-Ohio-5776, 983 N.E.2d 1317, at ¶ 40. In this regard, county boards of revision act as the “state’s agents” in carrying out the statutory powers granted by the General Assembly pursuant to taxing powers conferred by Ohio Constitution, Art. II, § 1. *Scarborough v. Gibson*, 13 Ohio Dec. 738, 740 (1903), *aff’d*, 69 Ohio St. 578, 70 N.E. 1130 (1904). R.C. 323.78, in fact, is part of the Chapter of the Ohio Revised Code, entitled “Collection of Taxes.” *See* R.C. Chapter 323. Thus, by enforcing the statutes established by the General Assembly for the collection of taxes, the Board of Revision is exercising *the State’s* taxing powers under the Ohio Constitution.

In its Complaints, US Bank alleges that the Board’s tax foreclosure orders effectuated a “taking” of its property interests because the fair market value of the tax-foreclosed property allegedly exceeded the amount of tax impositions owed. This argument, however, should be rejected as a matter of law because the plain language of R.C. 323.78 expressly provides for the imposition of a direct transfer remedy for the failure to pay taxes, “*regardless* of whether the value of the taxes, assessments, penalties, interest, and other charges due on the parcel, and the costs of the action, exceed the fair market value of the parcel.” *Id.* (emphasis added). Indeed, regardless of the statutory remedy that may be imposed, a property owner (and all junior lienholders) only lose their interest in a tax-foreclosed property as a result of their own inaction and their own failure to pay the outstanding taxes. In other words, but for the failure to pay taxes, there can be no foreclosure, or any sale, transfer or forfeiture. Thus, the cause of the alleged injury is the property owner’s failure to pay taxes.

This is critical because the Supreme Court “has never required the State to compensate the owner for the consequences of his own neglect.” *See Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982). In *Texaco*, for example, the Supreme Court held that the State cannot be held liable to pay compensation for the loss of property where, as here, it results from an owner’s failure to comply with certain statutory conditions imposed by state law. *Id.* at 529-530. Similarly, the State of Ohio also cannot be liable for an alleged taking that arises from a person’s neglect in failing to comply with the statutory requirements for the payment of real estate taxes. This is particularly true where, as here, the property owner and all junior lienholders were in “default” in the Tax Foreclosure Actions, and thereby “disclaimed” any interest in the tax-foreclosed properties. Accordingly, under the circumstances, the State clearly should not be required to compensate a tax delinquent property owner (or any junior lienholders) for the consequences of their own “neglect” in failing to pay their taxes and in failing to take advantage of the statutory rights and remedies provided by Ohio’s tax foreclosure laws.

In its Complaints, US Bank sought to circumvent the foregoing case law by making the conclusory allegation that the Board’s imposition of the direct transfer remedy under R.C. 323.78 was allegedly in furtherance of the County’s “land reutilization program.” (Supp. 007, Compl. ¶ 28); (Supp. 105, Compl. ¶ 26); (Supp. 221, Compl. ¶ 21). This conclusory allegation, however, is immaterial to the outcome of this appeal because it does not change the fact that the Board of Revision was acting as an agent of the State of Ohio in imposing a statutory remedy for the failure to pay taxes. *Scarborough*, 13 Ohio Dec. at 740 (holding that boards of revisions act as “the state's agents” in carrying out the statutory powers granted by the General Assembly “in accordance with the constitutional rules giving taxation, one of its sovereign

powers”). Thus, it is clear that the Board of Revision’s authority to order the foreclosure and transfer of a property under R.C. 323.78 is based entirely upon the State’s taxing powers under Article I, Section II of the Ohio Constitution, not the power of eminent domain.

Indeed, under Ohio law, a county board of revision is a creature of statute that does not have any powers or authority *other* than the specific statutory powers granted by the Ohio Revised Code. The General Assembly, however, has never granted any eminent domain powers to boards of revision. *See* R.C. 5715.02 (granting authority to hear tax valuation complaints); R.C. 323.65 (granting authority to hear tax foreclosure proceedings). Rather, the statutory powers granted to boards of revision under R.C. 323.65 through R.C. 323.79 are based entirely upon the State’s *taxing* powers under the Ohio Constitution. Accordingly, consistent with *Leasor* and the other cases cited above, this Court should conclude that no takings claim can arise as a matter of law because the Board of Revision was exercising the State’s taxing power, not the power of eminent domain, when it applied the statutory remedy in R.C. 323.78 to the tax-foreclosed properties.

B. A Property Owner Or Junior Lienholder Has No Constitutionally-Protected Interest In Recovering The Alleged “Surplus Equity” In A Tax Foreclosed Property That Becomes Subject To A Tax Foreclosure Order.

US Bank’s complaints also fail to state a claim because they are based upon the flawed proposition that a property owner and junior lienholders have a “constitutionally-protected” interest in recovering the “surplus equity” of a property that becomes subject to a tax foreclosure action. As this Court has held, in order to state a valid takings claim in a writ of mandamus action, a Relator first must establish that they were unconstitutionally deprived of “a constitutionally protected property interest” as a result of the challenged conduct. *State ex rel. Gilbert v. Cincinnati*, 125 Ohio St. 3d 385, 2010-Ohio-1473, 928 N.E.2d 706, ¶ 19. In this regard, it is well-established that “property interests” are not created or defined by the U.S.

Constitution, but are created and defined by state law. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998). Thus, it was incumbent upon US Bank to establish that it has the right to recover the alleged “surplus equity” in a tax-foreclosed property under Ohio law, not based upon some general constitutional principles or the laws of other states.

Indeed, given that this case involves Ohio’s taxation laws, it is the Ohio Revised Code that is ultimately controlling in creating and defining US Bank’s alleged property interests. As this Court has held, Ohio’s taxation laws are created and defined exclusively by the General Assembly under Article II, Section 1 of the Ohio Constitution. *Beaver Excavating Co.*, 134 Ohio St.3d 565, 2012-Ohio-5776, 983 N.E.2d 1317, at ¶ 40. Thus, in reviewing a taxpayer’s rights and obligations under Ohio law, this Court has strictly followed the requirements of the Ohio Revised Code, and has never “applied equitable principles to tax matters.” *See Gen. Motors Corp. v. Limbach*, 67 Ohio St.3d 90, 93, 616 N.E.2d 204 (1993). Accordingly, all of the arguments in US Bank’s Merit Brief that are based upon alleged “equitable” interests should be rejected by this Court.

Here, US Bank’s Brief and the amicus brief filed by the Pacific Legal Foundation and the Buckeye Institute fail to cite a single section of the Ohio Revised Code that provides that a delinquent taxpayer and/or a junior lienholder has any alleged right to recover the “surplus equity” of a property that becomes subject to a tax foreclosure order. While R.C. 5721.20 provides a property owner with the statutory right to recover the surplus proceeds of tax sale if they follow the relevant statutory procedures, this statute applies only if a tax sale actually occurs and only if it actually results in surplus proceeds, and does not in any way provide a delinquent taxpayer with the right to recover compensation based upon the difference between the alleged “value” of a tax-foreclosed property and the amount of taxes owed. Indeed, under the plain language of R.C.

5721.20, no right to recover the surplus proceeds would arise at all if a tax-foreclosed property were sold for the minimum bid, or if it were not sold for lack of a minimum bid under R.C. 5721.18. Moreover, by its express terms, R.C. 5721.20 does not apply “in cases where the property is transferred without sale to a municipal corporation, township, county, community development organization, or county land reutilization corporation pursuant to the alternative redemption period procedures contained in section 323.78 of the Revised Code.” *Id.*

In their Briefs, therefore, US Bank and its amici supporters are essentially asking this Court to re-write Ohio’s taxation laws by converting the statutory right to recover the surplus proceeds of a tax sale into a constitutional right to recover the difference between the alleged “fair market value” of a tax-foreclosed property and the amount of taxes owed. The Court should reject this invitation, however, because it would intrude upon the General Assembly’s exclusive constitutional authority over taxation laws under Article II, Section 1 of the Ohio Constitution. Indeed, while US Bank suggests that the County should at least attempt to sell a property before it is forfeited to the State or transferred to a land bank, this argument essentially is asking this Court to re-write Ohio’s taxation laws and to impose its own judicial remedy for tax foreclosure actions, rather than upholding the General Assembly’s constitutional authority over taxation matters. Accordingly, the Court should reject US Bank’s arguments as a matter of law.

In this regard, US Bank fails to appreciate that the General Assembly has both the constitutional authority and the flexibility, as a legislative body, to take into account all of the unique facts and circumstances surrounding the disposition of vacant and abandoned tax delinquent properties in deciding the proper statutory remedies for tax foreclosure actions. With respect to vacant and abandoned properties, the vast majority of such properties are in poor condition and fail to sell for the minimum bid at a Sheriff’s auction because the renovation

and demolition costs often exceed the actual value of the property or the amount of taxes owed. Prior to the adoption of R.C. 323.78, therefore, vacant and abandoned properties generally were not sold for the minimum bid at Sheriff's auctions, but were forfeited to the State, and then were sold to speculators who failed to pay the taxes. As a result, vacant and abandoned properties were becoming subject to cycle after cycle of futile tax foreclosure proceedings. Accordingly, the General Assembly clearly has the constitutional authority, as a legislative body, to take into account all of the unique problems caused by vacant and abandoned properties in deciding upon the appropriate statutory remedies for the disposition of tax delinquent properties that become subject to foreclosure under Ohio's tax collection laws.

In their Briefs, US Bank and its amici supporters argue that the General Assembly lacks the constitutional authority to create a direct transfer remedy because property owners allegedly have a right under Ohio law to recover the "surplus equity" in a tax-foreclosed property. This argument, however, fails to appreciate the difference between the statutory right to recover the surplus proceeds of a tax sale, and the alleged "right" to recover the difference between the fair market value of a tax-foreclosed property and the amount of taxes owed. This difference is best explained by the Michigan Supreme Court's recent opinion in *Rafaeli, LLC v. Oakland Cty.*, 505 Mich. 429, 952 N.W.2d 434 (2020), which actually supports the County's position in this case. This case involved Oakland County's refusal to refund the surplus proceeds that were actually received and retained by the County as a result of a tax foreclosure sale of the property. *Id.* In so doing, however, the Michigan Supreme Court clearly differentiated between the right to recover the "surplus proceeds" of a tax sale, and any right to recover the difference between the "fair market value" of the property and the amount of taxes owed, finding that a delinquent taxpayer has no constitutionally-protected interest in

recovering the alleged “surplus equity” of a tax-foreclosed property, and that such a ruling would result in a financial windfall to delinquent taxpayers who are “largely responsible for the loss of their properties’ value by failing to pay their taxes on time and in full,” and would be “taking money away from the public as a whole.” *Id.*, 952 N.W.2d at 465-466.

This is a critical distinction that is largely ignored by US Bank and the Pacific Legal Foundation in their Briefs. Most of the tax foreclosure cases cited in the Pacific Legal Foundation’s amicus brief, in fact, involve the alleged failure to refund the surplus proceeds that were actually received by the state from an actual tax sale, not any right to recover the alleged “surplus equity” in a tax-foreclosed property. *See, e.g., United States v. Taylor*, 104 U.S. 216, 217-218, 26 L.Ed. 721 (1881) (interpreting federal tax statute as granting a statutory right to recover the surplus proceeds of a tax sale); *United States v. Lawton*, 110 U.S. 146, 3 S.Ct. 545, 28 L.Ed. 100 (1884) (following *Taylor* to conclude that tax debtor was entitled to the surplus proceeds of a tax sale); *see also McDuffee v. Collins*, 117 Ala. 487, 23 So. 45 (1898) (right to recover surplus proceeds of tax sale created by state statute); *City of Anchorage v. Thomas*, 624 P.2d 271 (Alaska 1981) (right to recover surplus proceeds created by state statute); *Lake County Auditor v. Burks*, 802 N.E.2d 896, 899-900 (Ind. 2004) (right to recover surplus proceeds under Indiana Tax Code); *Cone v. Forest*, 126 Mass. 97, 97-98 (1879) (holding that the failure to refund the surplus proceeds of a tax sale violated Massachusetts statute); *Farnham v. Jones*, 32 Minn. 7, 19 N.W. 83 (1884) (right to recover surplus proceeds created by Minnesota statutes and common law); *Shattuck v. Smith*, 6 N.D. 56, 69 N.W. 5 (1896) (upholding North Dakota statute that provided for the recovery of surplus proceeds from tax sale); *Syntax, Inc. v. Hall*, 899 S.W.2d 1809 (Tex. 1995) (interpreting Sections 34.06 and 34.02 of Texas Tax Code, which provided the disgorgement of the ‘excess proceeds’ of a

tax sale); *Bogie v. Town of Barnet*, 129 Vt. 46, 270 A.2d 898 (1970) (holding that Vermont statutes granted the right to recover the surplus proceeds of a tax sale).³ Thus, none of the cases support the flawed proposition that a delinquent taxpayer has the right to recover the difference between the alleged “fair market value” of a property and the taxes owed. *See Rafaeli*, 952 N.W.2d at 466, n.134 (explaining difference between the right to surplus proceeds, and right to recover “surplus equity,” and holding that “we are unaware of any authority affirming a vested property right in equity held in property generally”).

Given the lack of authority to support their legal theory, therefore, US Bank’s Brief and the Pacific Legal Foundation’s Brief rely primarily upon general constitutional principles from other U.S. Supreme Court cases that do not involve the enforcement of a state’s tax foreclosure laws. The Supreme Court’s decisions in *Armstrong v. United States*, 364 U.S. 40 (1980), and *Webb’s Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), however, are readily distinguishable because they do not involve takings claims arising from the lawful enforcement of a state’s tax foreclosure laws at all. Thus, neither case discusses or addresses whether a property owner (or junior lienholder) has a constitutionally-protected interest in recovering the “surplus equity” of a property that becomes subject to a tax foreclosure order under state law, which is controlling in defining whether US Bank was unconstitutionally deprived of a

³ We note that Amici’s Brief also cites several other state cases that either do not involve tax foreclosure actions at all, or involved the statutory right of redemption, are not relevant to the takings claims alleged in this case. *See Stierle v. Rohmeyer*, 218 Wis. 149, 260 N.W. 647 (1935) (discussing the constitutionality of state statute relating to private mortgage foreclosures); *King v. Hatfield*, 130 F. 564 (D. W.Va. 1900) (holding that it violated due process under the West Virginia Constitution to provide for the forfeiture of real property, by legislation, without any judicial proceeding or the right of redemption); *Griffin v. Mixon*, 38 Miss. 424 (1860) (holding that forfeiture of property for the failure to pay taxes violated the Mississippi Constitution because the legislature failed to provide the delinquent taxpayer with the “opportunity to show that he has paid” the taxes owed).

“property interest” in this case. *See Nelson v. City of New York*, 352 U.S. 103, 111, 77 S. Ct. 195, 199, 1 L. Ed. 2d 171 (1956) (rejecting alleged takings claims arising from the enforcement of New York’s taxation laws, finding that “any relief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts, unless some constitutional guarantee is infringed.”); *see also Tyler v. Hennepin Cty.*, 505 F.Supp.3d 879, 891-95 (D. Minn. 2020) (granting motion to dismiss alleged takings claim because Minnesota law did not provide any right to recover the “surplus equity” of a property that became subject to forfeiture under Minnesota’s tax foreclosure laws).

For all of these reasons, therefore, this Court should conclude that the takings claims alleged by US Bank fail to state a claim upon which relief can be granted. While R.C. 5721.20 grants a statutory right to recover the surplus proceeds of a tax sale, it does not in any way create a right for a taxpayer to recover the difference between the alleged fair market value of a tax-foreclosed property and the amount of taxes owed. Accordingly, consistent with the case law cited above and the General Assembly’s constitutional authority under Article II, Section 1 of the Ohio Constitution, this Court should conclude that US Bank’s Complaints failed to allege a valid takings claim as a matter of law.

CONCLUSION

This case is only one of many cases that have been filed by US Bank’s attorneys that allege that the lawful enforcement of the statutory remedy set forth in R.C. 323.78 effectuates a “taking” of the “surplus equity” in a tax-foreclosed property. While this Court can and should affirm the judgments entered by the lower courts based upon the fact that Ohio Revised Code 323.65-323.79 provides an adequate remedy at law, Respondents respectfully request that the Court also conclude that US Bank’s legal theory of an alleged taking is legally meritless and fails to state a valid takings claim as a matter of law.

Respectfully submitted,

/s/ Stephen W. Funk

Stephen W. Funk (0058506)
ROETZEL & ANDRESS, LPA
222 S. Main Street, Suite 400
Akron, Ohio 44308
Telephone: (330) 376-2700
sfunk@ralaw.com

*Attorneys for All Respondents-Appellees
Cuyahoga County, Lucas County Board of
Commissioners., and Summit County*

PROOF OF SERVICE

I hereby certify that on the 25th day of January, 2022, the foregoing Brief of Appellees Cuyahoga County, Lucas County Board of Commissioners, and Summit County, has been served upon all counsel of record via electronic mail.

/s/ Stephen W. Funk

Stephen W. Funk

APPENDIX



Ohio Revised Code

Section 323.65 Expedited foreclosure on unoccupied land definitions.

Effective: September 4, 2014

Legislation: Senate Bill 172 - 130th General Assembly

As used in sections 323.65 to 323.79 of the Revised Code:

(A) "Abandoned land" means delinquent lands or delinquent vacant lands, including any improvements on the lands, that are unoccupied and that first appeared on the list compiled under division (C) of section 323.67 of the Revised Code, or the delinquent tax list or delinquent vacant land tax list compiled under section 5721.03 of the Revised Code, at whichever of the following times is applicable:

(1) In the case of lands other than agricultural lands, at any time after the county auditor makes the certification of the delinquent land list under section 5721.011 of the Revised Code;

(2) In the case of agricultural lands, at any time after two years after the county auditor makes the certification of the delinquent land list under section 5721.011 of the Revised Code.

(B) "Agricultural land" means lands on the agricultural land tax list maintained under section 5713.33 of the Revised Code.

(C) "Clerk of court" means the clerk of the court of common pleas of the county in which specified abandoned land is located.

(D) "Delinquent lands" and "delinquent vacant lands" have the same meanings as in section 5721.01 of the Revised Code.

(E) "Impositions" means delinquent taxes, assessments, penalties, interest, costs, reasonable attorney's fees of a certificate holder, applicable and permissible costs of the prosecuting attorney of a county, and other permissible charges against abandoned land.

(F)(1) "Unoccupied," with respect to a parcel of land, means any of the following:



- (a) No building, structure, land, or other improvement that is subject to taxation and that is located on the parcel is physically inhabited as a dwelling;
- (b) No trade or business is actively being conducted on the parcel by the owner, a tenant, or another party occupying the parcel pursuant to a lease or other legal authority, or in a building, structure, or other improvement that is subject to taxation and that is located on the parcel;
- (c) The parcel is uninhabited and there are no signs that it is undergoing a change in tenancy and remains legally habitable, or that it is undergoing improvements, as indicated by an application for a building permit or other facts indicating that the parcel is experiencing ongoing improvements.
- (2) For purposes of division (F)(1) of this section, it is prima-facie evidence and a rebuttable presumption that may be rebutted to the county board of revision that a parcel of land is unoccupied if, at the time the county auditor makes the certification under section 5721.011 of the Revised Code, the parcel is not agricultural land, and two or more of the following apply:
- (a) At the time of the inspection of the parcel by a county, municipal corporation, or township in which the parcel is located, no person, trade, or business inhabits, or is visibly present from an exterior inspection of, the parcel.
- (b) No utility connections, including, but not limited to, water, sewer, natural gas, or electric connections, service the parcel, or no such utility connections are actively being billed by any utility provider regarding the parcel.
- (c) The parcel or any improvement thereon is boarded up or otherwise sealed because, immediately prior to being boarded up or sealed, it was deemed by a political subdivision pursuant to its municipal, county, state, or federal authority to be open, vacant, or vandalized.
- (d) The parcel or any improvement thereon is, upon visible inspection, insecure, vacant, or vandalized.
- (G) "Community development organization" means a nonprofit corporation that is formed or



organized under Chapter 1702. or 1724. of the Revised Code and to which both of the following apply:

(1) The organization is in good standing under law at the time the county auditor makes the certification under section 5721.011 of the Revised Code and has remained in good standing uninterrupted for at least the two years immediately preceding the time of that certification or, in the case of a county land reutilization corporation, has remained so from the date of organization if less than two years.

(2) As of the time the county auditor makes the certification under section 5721.011 of the Revised Code, the organization has received from the county, municipal corporation, or township in which abandoned land is located official authority or agreement by a duly authorized officer of that county, municipal corporation, or township to accept the owner's fee simple interest in the abandoned land and to the abandoned land being foreclosed, and that official authority or agreement had been delivered to the county treasurer or county board of revision in a form that will reasonably confirm the county's, municipal corporation's, or township's assent to transfer the land to that community development organization under section 323.74 of the Revised Code. No such official authority or agreement by a duly authorized officer of a county, municipal corporation, or township must be received if a county land reutilization corporation is authorized to receive tax-foreclosed property under its articles of incorporation, regulations, or Chapter 1724. of the Revised Code.

(H) "Certificate holder" has the same meaning as in section 5721.30 of the Revised Code.

(I) "Abandoned land list" means the list of abandoned lands compiled under division (A) of section 323.67 of the Revised Code.

(J) "Alternative redemption period," in any action to foreclose the state's lien for unpaid delinquent taxes, assessments, charges, penalties, interest, and costs on a parcel of real property pursuant to section 323.25, sections 323.65 to 323.79, or section 5721.18 of the Revised Code, means twenty-eight days after an adjudication of foreclosure of the parcel is journalized by a court or county board of revision having jurisdiction over the foreclosure proceedings. Upon the expiration of the alternative redemption period, the right and equity of redemption of any owner or party shall terminate without further order of the court or board of revision. As used in any section of the



Revised Code and for any proceeding under this chapter or section 5721.18 of the Revised Code, for purposes of determining the alternative redemption period, the period commences on the day immediately following the journalization of the adjudication of foreclosure and ends on and includes the twenty-eighth day thereafter.

(K) "County land reutilization corporation" means a corporation organized under Chapter 1724. of the Revised Code.



Ohio Revised Code

Section 323.66 Expedited foreclosure by board of revision on unoccupied land.

Effective: April 7, 2009

Legislation: Senate Bill 353 - 127th General Assembly

(A) In lieu of utilizing the judicial foreclosure proceedings and other procedures and remedies available under sections 323.25 to 323.28 or under Chapter 5721., 5722., or 5723. of the Revised Code, a county board of revision created under section 5715.01 of the Revised Code, upon the board's initiative, expressed by resolution, may foreclose the state's lien for real estate taxes upon abandoned land in the county and, upon the complaint of a certificate holder or county land reutilization corporation, foreclose the lien of the state or the certificate holder held under sections 5721.30 to 5721.43 of the Revised Code. The board shall order disposition of the abandoned land by public auction or by other conveyance in the manner prescribed by sections 323.65 to 323.79 of the Revised Code.

(B)(1) A county board of revision may adopt rules as are necessary to administer cases subject to its jurisdiction under Chapter 5715. or adjudicated under sections 323.65 to 323.79 of the Revised Code, as long as the rules are consistent with rules adopted by the tax commissioner under Chapter 5715. of the Revised Code. Rules adopted by a board shall be limited to rules relating to hearing procedure, the scheduling and location of proceedings, case management, and practice forms.

(2) A county board of revision, upon any adjudication of foreclosure under sections 323.65 to 323.79 of the Revised Code, may prepare final orders of sale and deeds. For such purposes, the board may create its own order of sale and deed forms. The sheriff or clerk of court shall execute and deliver any forms prepared under this division in the manner prescribed in sections 323.65 to 323.79 of the Revised Code.

(C) In addition to all other duties and functions provided by law, under sections 323.65 to 323.79 of the Revised Code 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 those sections. The county board of revision shall file with the clerk of



court all orders and adjudications of the board, and the clerk shall docket, as needed, and journalize all orders and adjudications so filed by the board. The clerk may utilize the court's existing journal or maintain a separate journal for purposes of sections 323.65 to 323.79 of the Revised Code. Other than notices of hearings, the orders and adjudications of the board shall not become effective until journalized by the clerk. Staff of the board of revision may schedule and execute, and file with the clerk of courts, notices of hearings.

(D) For the purpose of efficiently and promptly implementing sections 323.65 to 323.79 of the Revised Code, the prosecuting attorney of the county, the county treasurer, the clerk of court of the county, the county auditor, and the sheriff of the county may promulgate rules, not inconsistent with sections 323.65 to 323.79 of the Revised Code, regarding practice forms, forms of notice for hearings and notice to parties, forms of orders and adjudications, fees, publication, and other procedures customarily within their official purview and respective duties.



Ohio Revised Code

Section 323.67 List of parcels of abandoned land.

Effective: April 7, 2009

Legislation: Senate Bill 353 - 127th General Assembly

(A) The county treasurer, county auditor, a county land reutilization corporation, or a certificate holder, from the list compiled under division (C) of this section or the delinquent tax list or delinquent vacant land tax list compiled under section 5721.03 of the Revised Code, may identify and compile a list of the parcels in the county that the treasurer, auditor, corporation, or certificate holder determines to be abandoned lands suitable for disposition under sections 323.65 to 323.79 of the Revised Code. The list may contain one or more parcels and may be transmitted to the board of revision in such a form and manner that allows the board to reasonably discern that the parcels constitute abandoned lands.

(B)(1) From the list of parcels compiled under division (A) of this section, the county treasurer or prosecuting attorney, for purposes of collecting the delinquent taxes, interest, penalties, and charges levied on those parcels and expeditiously restoring them to the tax list, may proceed to foreclose the lien for those impositions in the manner prescribed by sections 323.65 to 323.79 of the Revised Code.

(2) If a certificate holder or county land reutilization corporation compiles a list of parcels under division (A) of this section that the certificate holder determines to be abandoned lands suitable for disposition under sections 323.65 to 323.79 of the Revised Code, the certificate holder or corporation may proceed under sections 323.68 and 323.69 of the Revised Code.

(C) For purposes of sections 323.65 to 323.79 of the Revised Code, the county auditor or county treasurer may compile or certify a list of abandoned lands in any manner and at such times as will give effect to the expedited foreclosure of abandoned land.



Ohio Revised Code

Section 323.68 Title search to identify persons with interest in land.

Effective: April 7, 2009

Legislation: Senate Bill 353 - 127th General Assembly

(A)(1) For each parcel subject to foreclosure under sections 323.65 to 323.79 of the Revised Code, the prosecuting attorney shall cause a title search to be conducted for the purpose of identifying any lienholders or other persons having a legal or equitable ownership interest or other security interest of record in such abandoned land.

(2) If a certificate holder or a county land reutilization corporation compiles a list of the parcels that the certificate holder or corporation determines to be abandoned land under division (A) of section 323.67 of the Revised Code, the certificate holder or corporation shall cause a title search to be conducted for the purpose of identifying any lienholders or other persons having a legal or equitable ownership interest or other security interest of record in the abandoned land.

(B) Notwithstanding section 5301.252 of the Revised Code, an affidavit of a type described in that section shall not be considered a lien or encumbrance on the abandoned land, and the recording of an affidavit of a type described in that section shall not serve in any way to impede the bona fide purchaser status of the purchaser of any abandoned land sold at public auction under sections 323.65 to 323.79 of the Revised Code or of any other recipient of abandoned land transferred under those sections. However, any affiant who records an affidavit pursuant to section 5301.252 of the Revised Code shall be given notice and summons under sections 323.69 to 323.79 of the Revised Code in the same manner as any lienholder.



Ohio Revised Code

Section 323.69 Complaint for foreclosure - dismissal by board.

Effective: September 4, 2014

Legislation: Senate Bill 172 - 130th General Assembly

(A) Upon the completion of the title search required by section 323.68 of the Revised Code, the prosecuting attorney, representing the county treasurer, the county land reutilization corporation, or the certificate holder may file with the clerk of court a complaint for the foreclosure of each parcel of abandoned land appearing on the abandoned land list, and for the equity of redemption on each parcel. The complaint shall name all parties having any interest of record in the abandoned land that was discovered in the title search. The prosecuting attorney, county land reutilization corporation, or certificate holder may file such a complaint regardless of whether the parcel has appeared on a delinquent tax list or delinquent vacant land tax list published pursuant to division (B) of section 5721.03 of the Revised Code.

(B)(1) In accordance with Civil Rule 4, the clerk of court promptly shall serve notice of the summons and the complaint filed under division (A) of this section to the last known address of the record owner of the abandoned land and to the last known address of each lienholder or other person having a legal or equitable ownership interest or security interest of record identified by the title search. The notice shall inform the addressee that delinquent taxes stand charged against the abandoned land; that the land will be sold at public auction or otherwise disposed of if not redeemed by the owner or other addressee; that the sale or transfer will occur at a date, time, and place, and in the manner prescribed in sections 323.65 to 323.79 of the Revised Code; that the owner or other addressee may redeem the land by paying the total of the impositions against the land at any time before confirmation of sale or transfer of the parcel as prescribed in sections 323.65 to 323.79 of the Revised Code or before the expiration of the alternative redemption period, as may be applicable to the proceeding; that the case is being prosecuted by the prosecuting attorney of the county in the name of the county treasurer for the county in which the abandoned land is located or by a certificate holder, whichever is applicable; of the name, address, and telephone number of the county board of revision before which the action is pending; of the board case number for the action, which shall be maintained in the official file and docket of the clerk of court; and that all subsequent pleadings, petitions, and papers associated with the case and filed by any interested party must be filed with the clerk of court and will become part of the case file for the board of revision.



(2) The notice required by division (B)(1) of this section also shall inform the addressee that any owner of record may, at any time on or before the fourteenth day after service of process is perfected, file a pleading with the clerk of court requesting that the board transfer the case to a court of competent jurisdiction to be conducted in accordance with the applicable laws.

(C) Subject to division (D) of this section, subsequent pleadings, motions, or papers associated with the case and filed with the clerk of court shall be served upon all parties of record in accordance with Civil Rules 4 and 5, except that service by publication in any case requiring such service shall require that any such publication shall be advertised in the manner, and for the time periods and frequency, prescribed in section 5721.18 of the Revised Code. Any inadvertent noncompliance with those rules does not serve to defeat or terminate the case, or subject the case to dismissal, as long as actual notice or service of filed papers is shown by a preponderance of the evidence or is acknowledged by the party charged with notice or service, including by having made an appearance or filing in relation to the case. The county board of revision may conduct evidentiary hearings on the sufficiency of process, service of process, or sufficiency of service of papers in any proceeding arising from a complaint filed under this section. Other than the notice and service provisions contained in Civil Rules 4 and 5, the Rules of Civil Procedure shall not be applicable to the proceedings of the board. The board of revision may utilize procedures contained in the Rules of Civil Procedure to the extent that such use facilitates the needs of the proceedings, such as vacating orders, correcting clerical mistakes, and providing notice to parties. To the extent not otherwise provided in sections 323.65 to 323.79 of the Revised Code, the board may apply the procedures prescribed by sections 323.25 to 323.28 or Chapters 5721., 5722., and 5723. of the Revised Code. Board practice shall be in accordance with the practice and rules, if any, of the board that are promulgated by the board under section 323.66 of the Revised Code and are not inconsistent with sections 323.65 to 323.79 of the Revised Code.

(D)(1) A party shall be deemed to be in default of the proceedings in an action brought under sections 323.65 to 323.79 of the Revised Code if either of the following occurs:

(a) The party fails to appear at any hearing after being served with notice of the summons and complaint by certified or ordinary mail.



(b) For a party upon whom notice of summons and complaint is required by publication as provided under section 5721.18 of the Revised Code and has been considered served pursuant to that section, the party fails to appear, move, or plead to the complaint within twenty-eight days after service by publication is completed.

(2) If a party is deemed to be in default pursuant to division (D)(1) of this section, no further service of any subsequent pleadings, papers, or proceedings is required on the party by the court or any other party.

(E) At any time after a foreclosure action is filed under this section, the county board of revision may, upon its own motion, transfer the case to a court pursuant to section 323.691 of the Revised Code if it determines that, given the complexity of the case or other circumstances, a court would be a more appropriate forum for the action.



Ohio Revised Code

Section 323.70 Final hearing on complaint - dismissal on petition.

Effective: September 4, 2014

Legislation: Senate Bill 172 - 130th General Assembly

(A) Subject to this section and to sections 323.71 and 323.72 of the Revised Code, a county board of revision shall conduct a final hearing on the merits of a complaint filed under section 323.69 of the Revised Code, including the validity or amount of any impositions alleged in the complaint, not sooner than thirty days after the service of notice of summons and complaint has been perfected. If, after a hearing, the board finds that the validity or amount of all or a portion of the impositions is not supported by a preponderance of the evidence, the board may order the county auditor to remove from the tax list and duplicate amounts the board finds invalid or not supported by a preponderance of the evidence. The auditor shall remove all such amounts from the tax list and duplicate as ordered by the board of revision, including any impositions asserted under sections 715.26 and 715.261 of the Revised Code.

(B) If, 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 to 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.

(C) A county board of revision, in accordance with the Rules of Civil Procedure, may issue subpoenas compelling the attendance of witnesses and the production of papers, books, accounts, and testimony as necessary to conduct a hearing under this section or to otherwise adjudicate a case under sections 323.65 to 323.79 of the Revised Code.



Ohio Revised Code

Section 323.71 Procedure where impositions exceed fair market value.

Effective: September 4, 2014

Legislation: Senate Bill 172 - 130th General Assembly

(A)(1) If the county board of revision, upon its own motion or pursuant to a hearing under division (A)(2) of this section, determines that the impositions against a parcel of abandoned land that is the subject of a complaint filed under section 323.69 of the Revised Code exceed the fair market value of that parcel as currently shown by the latest valuation by the auditor of the county in which the land is located, then the board may proceed to hear and adjudicate the case as provided under sections 323.70 and 323.72 of the Revised Code. Upon entry of an order of foreclosure, the parcel may be disposed of as prescribed by division (G) of section 323.73 of the Revised Code.

If the board of revision, upon its own motion or pursuant to a hearing under division (A)(2) of this section, determines that the impositions against a parcel do not exceed the fair market value of the parcel as shown by the county auditor's then-current valuation of the parcel, the parcel shall not be disposed of as prescribed by division (G) of section 323.73 of the Revised Code, but may be disposed of as otherwise provided in section 323.73, 323.74, 323.75, 323.77, or 323.78 of the Revised Code.

(2) By a motion filed not later than seven days before a final hearing on a complaint is held under section 323.70 of the Revised Code, an owner or lienholder may file with the county board of revision a good faith appraisal of the parcel from a licensed professional appraiser and request a hearing to determine whether the impositions against the parcel of abandoned land exceed or do not exceed the fair market value of that parcel as shown by the auditor's then-current valuation of that parcel. If the motion is timely filed, the board of revision shall conduct a hearing and shall make a factual finding as to whether the impositions against the parcel exceed or do not exceed the fair market value of that parcel as shown by the auditor's then-current valuation of that parcel. An owner or lienholder must show by a preponderance of the evidence that the impositions against the parcel do not exceed the auditor's then-current valuation of the parcel in order to preclude the application of division (G) of section 323.73 of the Revised Code.

(B) Notwithstanding sections 323.65 to 323.79 of the Revised Code to the contrary, for purposes of



AUTHENTICATED,
OHIO LEGISLATIVE SERVICE
COMMISSION
DOCUMENT #243011

determining in any proceeding under those sections whether the total of the impositions against the abandoned land exceed the fair market value of the abandoned land, it is prima-facie evidence and a rebuttable presumption that may be rebutted to the county board of revision that the auditor's then-current valuation of that abandoned land is the fair market value of the land, regardless of whether an independent appraisal has been performed.



Ohio Revised Code

Section 323.72 Answer - hearing on or dismissal of complaint.

Effective: September 4, 2014

Legislation: Senate Bill 172 - 130th General Assembly

(A)(1) At any time after a complaint is filed under section 323.69 of the Revised Code, and before a decree of foreclosure is entered, the record owner or another person having a legal or equitable ownership interest in the abandoned land may plead only that the impositions shown by the notice to be due and outstanding have been paid in full or are invalid or inapplicable in whole or in part, and may raise issues pertaining to service of process and the parcel's status as abandoned land.

(2) At any time before a decree of foreclosure is filed under section 323.69 of the Revised Code, a lienholder or another person having a security interest of record in the abandoned land may plead either of the following:

(a) That the impositions shown by the notice to be due and outstanding have been paid in full;

(b) Subject to division (C) of this section, that in order to preserve the lienholder's or other person's security interest of record in the land, the abandoned land should not be disposed of as provided in sections 323.65 to 323.79 of the Revised Code and the case should be transferred to a court pursuant to section 323.691 of the Revised Code.

(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. If the record owner, lienholder, or other person fails to appear, or appears and fails to show by a preponderance of the evidence that all impositions against the parcel have been paid, the board shall proceed in the manner prescribed in section 323.73 of the Revised Code. A hearing under this division may be consolidated with any final hearing on the matter under section 323.70 of the Revised Code.

If the board determines that the impositions have been paid, then the board, on its own motion, may dismiss the case without a hearing.

(C) If a lienholder or another person having a security interest of record in the abandoned land, other than the owner, timely files a pleading under division (A)(2)(b) of this section requesting that the abandoned land not be disposed of as provided in sections 323.65 to 323.79 of the Revised Code and the complaint be transferred to a court pursuant to section 323.691 of the Revised Code in order to preserve the lienholder's or other person's security interest, the county board of revision may approve the request if the board finds that the sale or other conveyance of the parcel of land under sections 323.65 to 323.79 of the Revised Code would unreasonably jeopardize the lienholder's or other person's ability to enforce the security interest or to otherwise preserve the lienholder's or other person's security interest. The board may conduct a hearing on the request and make a ruling based on the available and submitted evidence of the parties. If the board approves the request without a hearing, the board shall file the decision with the clerk of court, and the clerk shall send a notice of the decision to the lienholder or other person by ordinary mail. In order for a lienholder or other person having a security interest to show for purposes of this division that the parcel of abandoned land should not be disposed of pursuant to sections 323.65 to 323.78 of the Revised Code and the complaint should be transferred to a court pursuant to section 323.691 of the Revised Code in order "to preserve the lienholder's or other person's security interest," the lienholder or other person must first make a minimum showing by a preponderance of the evidence pursuant to section 323.71 of the Revised Code that the impositions against the parcel of abandoned land do not exceed the fair market value of the abandoned land as determined by the auditor's then-current valuation of that parcel, which valuation is presumed, subject to rebuttal, to be the fair market value of the land. If



the lienholder or other person having a security interest makes the minimum showing, the board of revision may consider the request and make a ruling based on the available and submitted evidence of the parties. If the lienholder or other person having a security interest fails to make the minimum showing, the board of revision shall deny the request.

(D) If a pleading as described in division (B) or (C) of this section is filed and the county board of revision approves a request made under those divisions, regardless of whether a hearing is conducted under division (C) of this section, the board shall dismiss the complaint in the case of pleadings described in division (B) of this section or transfer the complaint to a court in the case of pleadings described in division (C) of this section.

If the county board of revision does not dismiss the complaint in the case of pleadings described in division (B) of this section or does not approve a request to transfer to a court as described in division (C) of this section after conducting a hearing, the board shall proceed with the final hearing prescribed in section 323.70 of the Revised Code and file its decision on the complaint for foreclosure with the clerk of court. The clerk shall send written notice of the decision to the parties by ordinary mail or by certified mail, return receipt requested. If the board renders a decision ordering the foreclosure and forfeiture of the parcel of abandoned land, the parcel shall be disposed of under section 323.73 of the Revised Code.



Ohio Revised Code

Section 323.73 Disposal of abandoned land at public auction.

Effective: September 28, 2016

Legislation: House Bill 390 - 131st General Assembly

(A) Except as provided in division (G) of this section or section 323.78 of the Revised Code, a parcel of abandoned land that is to be disposed of under this section shall be disposed of at a public auction scheduled and conducted as described in this section. At least twenty-one days prior to the date of the public auction, the clerk of court or sheriff of the county shall advertise the public auction in a newspaper of general circulation that meets the requirements of section 7.12 of the Revised Code in the county in which the land is located. The advertisement shall include the date, time, and place of the auction, the permanent parcel number of the land if a permanent parcel number system is in effect in the county as provided in section 319.28 of the Revised Code or, if a permanent parcel number system is not in effect, any other means of identifying the parcel, and a notice stating that the abandoned land is to be sold subject to the terms of sections 323.65 to 323.79 of the Revised Code.

(B) The sheriff of the county or a designee of the sheriff shall conduct the public auction at which the abandoned land will be offered for sale. To qualify as a bidder, a person shall file with the sheriff on a form provided by the sheriff a written acknowledgment that the abandoned land being offered for sale is to be conveyed in fee simple to the successful bidder. At the auction, the sheriff of the county or a designee of the sheriff shall begin the bidding at an amount equal to the total of the impositions against the abandoned land, plus the costs apportioned to the land under section 323.75 of the Revised Code. The abandoned land shall be sold to the highest bidder. The county sheriff or designee may reject any and all bids not meeting the minimum bid requirements specified in this division.

(C) Except as otherwise permitted under section 323.74 of the Revised Code, the successful bidder at a public auction conducted under this section shall pay the sheriff of the county or a designee of the sheriff a deposit of at least ten per cent of the purchase price in cash, or by bank draft or official bank check, at the time of the public auction, and shall pay the balance of the purchase price within thirty days after the day on which the auction was held. At the time of the public auction and before the successful bidder pays the deposit, the sheriff or a designee of the sheriff may provide notice to the successful bidder that failure to pay the balance of the purchase price within the prescribed period



shall be considered a default under the terms of the sale and shall result in retention of the deposit as payment for the costs associated with advertising and offering the abandoned land for sale at a future public auction. If such a notice is provided to the successful bidder and the bidder fails to pay the balance of the purchase price within the prescribed period, the sale shall be deemed rejected by the county board of revision due to default, and the sheriff shall retain the full amount of the deposit. In such a case, rejection of the sale shall occur automatically without any action necessary on the part of the sheriff, county prosecuting attorney, or board. If the amount retained by the sheriff is less than the total costs of advertising and offering the abandoned land for sale at a future public auction, the sheriff or county prosecuting attorney may initiate an action to recover the amount of any deficiency from the bidder in the court of common pleas of the county or in a municipal court with jurisdiction.

Following a default and rejection of sale under this division, the abandoned land involved in the rejected sale shall be disposed of in accordance with sections 323.65 to 323.79 of the Revised Code or as otherwise prescribed by law. The defaulting bidder, any member of the bidder's immediate family, any person with a power of attorney granted by the bidder, and any pass-through entity, trust, corporation, association, or other entity directly or indirectly owned or controlled by the bidder or a member of the defaulting bidder's immediate family shall be prohibited from bidding on the abandoned land at any future public auction for five years from the date of the bidder's default.

Notwithstanding section 321.261 of the Revised Code, with respect to any proceedings initiated pursuant to sections 323.65 to 323.79 of the Revised Code, from the total proceeds arising from the sale, transfer, or redemption of abandoned land, twenty per cent of such proceeds shall be deposited to the credit of the county treasurer's delinquent tax and assessment collection fund to reimburse the fund for costs paid from the fund for the transfer, redemption, or sale of abandoned land at public auction. Not more than one-half of the twenty per cent may be used by the treasurer for community development, nuisance abatement, foreclosure prevention, demolition, and related services or distributed by the treasurer to a land reutilization corporation. The balance of the proceeds, if any, shall be distributed to the appropriate political subdivisions and other taxing units in proportion to their respective claims for taxes, assessments, interest, and penalties on the land. Upon the sale of foreclosed lands, the clerk of court shall hold any surplus proceeds in excess of the impositions until the clerk receives an order of priority and amount of distribution of the surplus that are adjudicated by a court of competent jurisdiction or receives a certified copy of an agreement between the parties entitled to a share of the surplus providing for the priority and distribution of the surplus. Any party



to the action claiming a right to distribution of surplus shall have a separate cause of action in the county or municipal court of the jurisdiction in which the land reposes, provided the board confirms the transfer or regularity of the sale. Any dispute over the distribution of the surplus shall not affect or revive the equity of redemption after the board confirms the transfer or sale.

(D) Upon the confirmation of sale or transfer of abandoned land pursuant to this section, the owner's fee simple interest in the land shall be conveyed to the purchaser. A conveyance under this division is free and clear of any liens and encumbrances of the parties named in the complaint for foreclosure attaching before the sale or transfer, and free and clear of any liens for taxes, except for federal tax liens and covenants and easements of record attaching before the sale.

(E) The county board of revision shall reject the sale of abandoned land to any person if it is shown by a preponderance of the evidence that the person is delinquent in the payment of taxes levied by or pursuant to Chapter 307., 322., 5737., 5739., 5741., or 5743. of the Revised Code or any real property taxing provision of the Revised Code. The board also shall reject the sale of abandoned land to any person if it is shown by a preponderance of the evidence that the person is delinquent in the payment of property taxes on any parcel in the county, or to a member of any of the following classes of parties connected to that person:

- (1) A member of that person's immediate family;
- (2) Any other person with a power of attorney appointed by that person;
- (3) A sole proprietorship owned by that person or a member of that person's immediate family;
- (4) A partnership, trust, business trust, corporation, association, or other entity in which that person or a member of that person's immediate family owns or controls directly or indirectly any beneficial or legal interest.

(F) If the purchase of abandoned land sold pursuant to this section or section 323.74 of the Revised Code is for less than the sum of the impositions against the abandoned land and the costs apportioned to the land under division (A) of section 323.75 of the Revised Code, then, upon the sale or transfer, all liens for taxes due at the time the deed of the property is conveyed to the purchaser following the



sale or transfer, and liens subordinate to liens for taxes, shall be deemed satisfied and discharged.

(G) If the county board of revision finds that the total of the impositions against the abandoned land are greater than the fair market value of the abandoned land as determined by the auditor's then-current valuation of that land, the board, at any final hearing under section 323.70 of the Revised Code, may order the property foreclosed and, without an appraisal or public auction, order the sheriff to execute a deed to the certificate holder or county land reutilization corporation that filed a complaint under section 323.69 of the Revised Code, or to a community development organization, school district, municipal corporation, county, or township, whichever is applicable, as provided in section 323.74 of the Revised Code. Upon a transfer under this division, all liens for taxes due at the time the deed of the property is transferred to the certificate holder, community development organization, school district, municipal corporation, county, or township following the conveyance, and liens subordinate to liens for taxes, shall be deemed satisfied and discharged.



Ohio Revised Code

Section 323.74 Disposition of abandoned land not sold at auction.

Effective: October 16, 2009

Legislation: House Bill 1 - 128th General Assembly

(A) If a public auction is held for abandoned land pursuant to section 323.73 of the Revised Code, but the land is not sold at the public auction, the county board of revision may order the disposition of the abandoned land in accordance with division (B) or (C) of this section.

(B) The abandoned land offered for sale at a public auction as described in section 323.73 of the Revised Code, but not sold at the auction, may be offered for sale in any usual and customary manner by the sheriff as otherwise provided by law. The subsequent public auction may be held in the same manner as the public auction was held under section 323.73 of the Revised Code, but the minimum bid at an auction held under this division shall be the lesser of fifty per cent of fair market value of the abandoned land as currently shown by the county auditor's latest valuation, or the sum of the impositions against the abandoned land plus the costs apportioned to the land under section 323.75 of the Revised Code. Notice of any subsequent sale pursuant to this section may be given in the original notice of sale listing the time, date, and place of the subsequent sale.

(C) Upon certification from the sheriff that abandoned land was offered for sale at a public auction as described in section 323.73 of the Revised Code but was not purchased, a community development organization or any school district, municipal corporation, county, or township in which the land is located may request that title to the land be transferred to the community development organization, school district, municipal corporation, county, or township at the time described in this division. The request shall be delivered to the board of revision at any time from the date the complaint for foreclosure is filed under section 323.69 of the Revised Code, but not later than sixty days after the date on which the land was first offered for sale. The request shall include a representation that the organization, district, or political subdivision, not later than thirty days after receiving legal title to the abandoned land, will begin basic exterior improvements that will protect the land from further unreasonable deterioration. The improvements shall include, but are not limited to, the removal of trash and refuse from the exterior of the premises and the securing of open, vacant, or vandalized areas on the exterior of the premises. The representation shall be deemed to have been given if the notice is supplied by an electing subdivision as defined in section



5722.01 of the Revised Code.

(D) The county board of revision, upon any adjudication of foreclosure and forfeiture against the abandoned land, may order the sheriff to dispose of the abandoned land as prescribed in sections 323.65 to 323.79 of the Revised Code. The order by the board shall include instructions to the sheriff to transfer the land to the specified community development organization, school district, municipal corporation, county, or township after payment of the costs of disposing of the abandoned land pursuant to section 323.75 of the Revised Code or, if any negotiated price has been agreed to between the county treasurer and the community development organization, school district, municipal corporation, county, or township, after payment of that negotiated price as certified by the board to the sheriff.

(E) Upon receipt of payment under this section, the sheriff shall convey by sheriff's deed the fee simple interest in, and to, the abandoned land. If the abandoned land is transferred pursuant to division (D) of this section and the county treasurer reasonably determines that the transfer will result in the property being occupied, the county treasurer may waive, but is not required to waive, some or all of the impositions against the abandoned land or costs apportioned to the land under section 323.75 of the Revised Code.

(F) Upon a transfer under this section, all liens for taxes due at the time the deed of the property is conveyed to a purchaser or transferred to a community development organization, school district, municipal corporation, county, or township, and liens subordinate to liens for taxes, shall be deemed satisfied and discharged.

(G) Any parcel that has been advertised and offered for sale pursuant to foreclosure proceedings and has not sold for want of bidders or been otherwise transferred under sections 323.65 to 323.79 of the Revised Code shall be forfeited or otherwise disposed of in the same manner as lands under section 323.25 or 5721.18 or Chapter 5723. of the Revised Code.



Ohio Revised Code

Section 323.75 Apportionment of costs of sale at auction.

Effective: September 29, 2011

Legislation: House Bill 153 - 129th General Assembly

(A) The county treasurer or county prosecuting attorney shall apportion the costs of the proceedings with respect to abandoned lands offered for sale at a public auction held pursuant to section 323.73 or 323.74 of the Revised Code among those lands according to actual identified costs, equally, or in proportion to the fair market values of the lands. The costs of the proceedings include the costs of conducting the title search, notifying record owners or other persons required to be notified of the pending sale, advertising the sale, and any other costs incurred by the county board of revision, county treasurer, county auditor, clerk of court, prosecuting attorney, or county sheriff in performing their duties under sections 323.65 to 323.79 of the Revised Code.

(B) All costs assessed in connection with proceedings under sections 323.65 to 323.79 of the Revised Code may be paid after they are incurred, as follows:

(1) If the abandoned land in question is purchased at public auction, from the purchaser of the abandoned land;

(2) In the case of abandoned land transferred to a community development organization, school district, municipal corporation, county, or township under section 323.74 of the Revised Code, from either of the following:

(a) At the discretion of the county treasurer, in whole or in part from the delinquent tax and assessment collection funds created under section 321.261 of the Revised Code, allocated equally among the respective funds of the county treasurer and of the prosecuting attorney;

(b) From the community development organization, school district, municipal corporation, county, or township, whichever is applicable.

(3) If the abandoned land in question is transferred to a certificate holder, from the certificate holder.



(C) If a parcel of abandoned land is sold or otherwise transferred pursuant to sections 323.65 to 323.79 of the Revised Code, the officer who conducted the sale or made the transfer, the prosecuting attorney, or the county treasurer may collect a recording fee from the purchaser or transferee of the parcel at the time of the sale or transfer and shall prepare the deed conveying title to the parcel or execute the deed prepared by the board for that purpose. That officer or the prosecuting attorney or treasurer is authorized to record on behalf of that purchaser or transferee the deed conveying title to the parcel, notwithstanding that the deed may not actually have been delivered to the purchaser or transferee prior to the recording of the deed. Receiving title to a parcel under sections 323.65 to 323.79 of the Revised Code constitutes the transferee's consent to an officer, prosecuting attorney, or county treasurer to file the deed to the parcel for recording. Nothing in this division shall be construed to require an officer, prosecuting attorney, or treasurer to file a deed or to relieve a transferee's obligation to file a deed. Upon confirmation of that sale or transfer, the deed shall be deemed delivered to the purchaser or transferee of the parcel.



Ohio Revised Code

Section 323.76 Termination of right of redemption on sale or transfer.

Effective: April 7, 2009

Legislation: Senate Bill 353 - 127th General Assembly

Upon the sale of abandoned land at public auction pursuant to section 323.73 or 323.74 of the Revised Code, or upon the county board of revision's order to the sheriff to transfer abandoned land to a community development organization, school district, municipal corporation, county, or township under section 323.74 of the Revised Code, any common law or statutory right of redemption shall forever terminate upon the occurrence of whichever of the following is applicable:

(A) In the case of a sale of the land at public auction, upon the order of confirmation of the sale by the county board of revision and the filing of such order with the clerk of court, who shall enter it upon the journal of the court or a separate journal;

(B) In the case of a transfer of the land to a community development organization, school district, municipal corporation, county, or township under section 323.74 of the Revised Code, upon the filing with the clerk of court an order to transfer the parcel based on the adjudication of foreclosure by the county board of revision ordering the sheriff to transfer the land in fee simple to the community development organization, school district, municipal corporation, county, or township pursuant to such adjudication, which the clerk shall enter upon the journal of the court or a separate journal;

(C)(1) In the case of a transfer of the land to a certificate holder or county land reutilization corporation pursuant to division (G) of section 323.73 of the Revised Code, upon the filing with the clerk of court the county board of revision's order to the sheriff to execute a deed to the certificate holder or corporation based on the adjudication of foreclosure, which the clerk shall enter upon the journal of the court or a separate journal;

(2) In the case of an adjudication of foreclosure in which a court or board of revision has included in its adjudication decree that the alternative redemption period authorized in section 323.78 of the Revised Code applies, then upon the expiration of such alternative redemption period.



Ohio Revised Code

Section 323.77 Notice by electing subdivision of desire to acquire land.

Effective: October 16, 2009

Legislation: House Bill 1 - 128th General Assembly

(A) As used in this section, "electing subdivision" has the same meaning as in section 5722.01 of the Revised Code.

(B) At any time from the date the complaint for foreclosure is filed under section 323.69 of the Revised Code, but not later than sixty days after the date on which the land was first offered for sale, an electing subdivision or a county land reutilization corporation may give the county treasurer, prosecuting attorney, or board of revision notice in writing that it seeks to acquire any parcel of abandoned land, identified by parcel number, from the abandoned land list. If any such parcel of abandoned land identified under this section is offered for sale pursuant to section 323.73 of the Revised Code, but is not sold for want of a minimum bid, the electing subdivision or a county land reutilization corporation that identified that parcel of abandoned land shall be deemed to have appeared at the sale and submitted the winning bid at the auction, and the parcel of abandoned land shall be sold to the electing subdivision or corporation for no consideration other than the costs prescribed in section 323.75 of the Revised Code or those costs to which the electing subdivision or corporation and the county treasurer mutually agree. The conveyance shall be confirmed, and any common law or statutory right of redemption forever terminated, upon the filing with the clerk of court the order of confirmation based on the adjudication of foreclosure by the county board of revision, which the clerk shall enter upon the journal of the court or a separate journal.

If a county land reutilization corporation and an electing subdivision both request to acquire the parcel, the electing subdivision shall have priority to acquire the parcel. Notwithstanding its prior notice to the county treasurer under this section that it seeks to acquire the parcel of abandoned land, if a county land reutilization corporation has also requested to acquire the parcel, the electing subdivision may withdraw the notice before confirmation of the conveyance, in which case the parcel shall be conveyed to the county land reutilization corporation.



Ohio Revised Code

Section 323.78 Invocation of alternative redemption period.

Effective: September 4, 2014

Legislation: Senate Bill 172 - 130th General Assembly

(A) Notwithstanding anything in Chapters 323., 5721., and 5723. of the Revised Code, a county treasurer may elect to invoke the alternative redemption period in any petition for foreclosure of abandoned lands under section 323.25, sections 323.65 to 323.79, or section 5721.18 of the Revised Code.

(B) If a county treasurer invokes the alternative redemption period pursuant to this section, and if a municipal corporation, township, county, school district, community development organization, or county land reutilization corporation has requested title to the parcel, then upon adjudication of foreclosure of the parcel, the court or board of revision shall order, in the decree of foreclosure or by separate order, that the equity of redemption and any statutory or common law right of redemption in the parcel by its owner shall be forever terminated after the expiration of the alternative redemption period and that the parcel shall be transferred by deed directly to the requesting municipal corporation, township, county, school district, community development corporation, or 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. The court or board of revision shall order such a transfer regardless of whether the value of the taxes, assessments, penalties, interest, and other charges due on the parcel, and the costs of the action, exceed the fair market value of the parcel. No further act of confirmation or other order shall be required for such a transfer, or for the extinguishment of any statutory or common law right of redemption.

(C) If a county treasurer invokes the alternative redemption period pursuant to this section and if no community development organization, county land reutilization corporation, municipal corporation, county, township, or school district has requested title to the parcel, then upon adjudication of foreclosure of the parcel, the court or board of revision shall order the property sold as otherwise provided in Chapters 323. and 5721. of the Revised Code, and, failing any bid at any such sale, the parcel shall be forfeited to the state and otherwise disposed of pursuant to Chapter 5723. of the Revised Code.



Ohio Revised Code

Section 323.79 Appeal by aggrieved party in court of common pleas.

Effective: September 4, 2014

Legislation: Senate Bill 172 - 130th General Assembly

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.

An appeal shall be filed not later than fourteen days after one of the following dates:

(A) The date on which the order of confirmation of the sale is filed with and journalized by the clerk of court;

(B) In the case of a direct transfer to a certificate holder, community development organization, county land reutilization corporation, municipal corporation, county, or township under section 323.78 or division (G) of section 323.73 of the Revised Code, the date on which an order of transfer or conveyance, whether included in the decree of foreclosure or a separate order, is first filed with and journalized by the clerk of court.

The court does not have jurisdiction to hear any appeal filed after the expiration of the applicable fourteen-day period. If the fourteenth day after the date on which the order is filed with the clerk of court falls upon a weekend or official holiday during which the court is closed, then the filing shall be made on the next day the court is open for business.



AUTHENTICATED,
OHIO LEGISLATIVE SERVICE
COMMISSION
DOCUMENT #245404

The expiration of the fourteen-day period in which an appeal may be filed with respect to an abandoned parcel under this section shall not extinguish or otherwise affect the right of a party to redeem the parcel as otherwise provided in sections 323.65 to 323.79 of the Revised Code.



Ohio Revised Code

Section 5721.20 Unclaimed moneys remaining to owner.

Effective: April 7, 2009

Legislation: Senate Bill 353

Except in cases where the property is transferred without sale to a municipal corporation, township, county, community development organization, or county land reutilization corporation pursuant to the alternative redemption period procedures contained in section 323.78 of the Revised Code, any residue of moneys from the sale or foreclosure of lands remaining to the owner on the order of distribution, and unclaimed by such owner within sixty days from its receipt, shall be paid into the county treasury and shall be charged separately to the county treasurer by the county auditor, in the name of the supposed owner. The treasurer shall retain such excess in the treasury for the proper owner of such lands upon which the foreclosure was had, and upon demand by such owner, within three years from the date of receipt, shall pay such excess to the owner. If the owner does not demand payment of the excess within three years, then the excess shall be forfeited to the delinquent tax and assessment collection fund created under section 323.261 of the Revised Code, or in counties that have established a county land reutilization corporation fund under section 323.263 of the Revised Code, to the county land reutilization corporation fund.
