SUPREME COURT OF OHIO

STATE EX REL. FELTNER
v.
CUYAHOGA CTY. BD. OF REVISION
2018-1307
March 20, 2019

CASE ANNOUNCEMENTS

MERIT DECISIONS WITHOUT OPINIONS

In Mandamus and Prohibition. Sua sponte, alternative writ granted as to counts I and III against respondents Cuyahoga County Board of Revision, Armond Budish, Dennis G. Kennedy, and Michael Gallagher. The motion to dismiss of the Cuyahoga County Respondents is granted as to all remaining counts in the complaint. The following briefing schedule is set for presentation of evidence and filing of briefs as to counts I and III pursuant to S.Ct.Prac.R. 12.05: The parties shall file any evidence they intend to present within 20 days, relator shall file a brief within 10 days after the filing of the evidence, respondents shall file briefs within 20 days after the filing of relator's brief, and relator may file a reply brief within 7 days after the filing of respondents' briefs. Motions to dismiss of respondents Cuyahoga County Land Reutilization Corporation and Mike DeWine, Ohio Attorney General, and motion to dismiss of Cuyahoga County Respondents as to W. Christopher Murray II, and Cuyahoga County, are granted and these respondents are dismissed as parties from the case. Sua sponte, case to be scheduled for oral argument before the full court.

O'Connor, C.J., and Kennedy, French, and Donnelly, JJ., concur.

Fischer, J., would also grant an alternative writ as to counts V and VI.
DeWine, J., dissents and would grant respondents' motions to dismiss in full.
Stewart, J., not participating.

FILED
MAR 20 2019
CLERK OF COURT
SUPREME COURT OF OHIO

The Supreme Court of Ohio

State of Ohio, ex rel. Elliott G. Feltner	Case No. 2018-1307
v.	IN MANDAMUS AND PROHIBITION
Cuyahoga County, Ohio Board of Revision, et al.	(CORRECTED) E N T R Y

This cause originated in this court on the filing of a complaint for writs of mandamus and prohibition.

Upon consideration thereof, it is ordered by the court, sua sponte, that an alternative writ is granted as to counts I & III against respondents Cuyahoga County Board of Revision, Armond Budish, Dennis G. Kennedy, and Michael Gallagher. The motions to dismiss of respondents Cuyahoga County Board of Revision, Armond Budish, Dennis G. Kennedy, and Michael Gallagher, are granted as to all remaining counts in the complaint. The following briefing schedule is set for presentation of evidence and filing of briefs as to counts I and III pursuant to S.Ct.Prac.R. 12.05:

The parties shall file any evidence they intend to present within 20 days of the date of this entry; relator shall file a brief within 10 days of the filing of the evidence; respondents shall file a brief within 20 days after the filing of re1ator's brief; and relator may file a reply brief within 7 days after the filing of respondents' brief.

It is further ordered that the motions to dismiss of respondents, Cuyahoga County Land Reutilization Corporation, Mike DeWine, Ohio Attorney General, W. Christopher Murray, II, and Cuyahoga County are granted, and these respondents are dismissed as parties from this case.

It is further ordered, sua sponte, that this case be scheduled for oral argument before the full court.

/s Maureen O'Connor
Maureen O' Connor
Chief Justice

Official Case Announcement can be found at http://www.supremecourt.ohia.gov/ROD/ docs/

SUPREME COURT OF OHIO

SLIP OPINION NO. 2020-OHIO-3080

THE STATE EX REL. FELTNER v. CUYAHOGA COUNTY BOARD OF REVISION, ET AL.

Prohibition—R.C. 323.66—Writ sought to invalidate a foreclosure adjudication by a county board of revision—Board of revision did not patently and unambiguously lack jurisdiction—Writ denied.

(No. 2018-1307—Submitted November 13, 2019—Decided May 28, 2020.)

IN PROHIBITION.

FRENCH, J.

{¶ 1} R.C. 323.66(A) authorizes boards of revision to adjudicate foreclosures involving certain tax-delinquent abandoned land. In this original action, an owner whose property was the subject of a board-of-revision foreclosure seeks a writ of prohibition to invalidate the foreclosure adjudication. The owner contends that the board of revision lacked authority to foreclose on his property because the statutes under which the board proceeded are unconstitutional. We deny the writ because the board of revision did not patently and unambiguously lack jurisdiction when it proceeded in the foreclosure action at issue.

Background

{¶ 2} In 2006, the General Assembly passed legislation authorizing boards of revision to adjudicate tax-foreclosure actions involving abandoned land. *See* 2006 Sub.H.B. No. 294, 151 Ohio Laws, Part IV, 7334. These proceedings are designed to be an expeditious alternative to conventional judicial foreclosures. *See* R.C. 323.67(B)(1) and (C). Among other things, the law allows a board of revision, under certain circumstances, to order the sheriff to transfer property directly to a county land-reutilization corporation (or some other statutorily eligible political subdivision), without the need for an appraisal and public auction. R.C. 323.65(J), 323.71(A)(1), 323.73(G), 323.78.

{¶ 3} In June 2017, respondent Cuyahoga County Board of Revision ("BOR") entered a judgment of foreclosure concerning real property owned by relator, Elliott G. Feltner. After its judgment, the BOR transferred Feltner's property to the Cuyahoga County Land Reutilization Corporation ("the Land Bank") under R.C. 323.78. The Land Bank later transferred the property to a third party.

{¶ 4} More than a year later, Feltner filed this original action, asserting multiple prohibition and mandamus claims against the BOR, its members,[1] the Cuyahoga County treasurer, Cuyahoga County, the Land Bank, and the Attorney General. We previously dismissed the Cuyahoga County treasurer, Cuyahoga County, the Land Bank, and the Attorney General as

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[1] The members of the BOR are respondents Armond Budish, Michael Gallagher, and Michael Chambers, who is substituted automatically for former board member Dennis G. Kennedy as a party to this action. S.Ct.Prac.R. 4.06(B).

parties. 155 Ohio St.3d 1403, 2019-Ohio-943, 119 N.E.3d 431. But we granted an alternative writ of prohibition as to two of the claims against the BOR and its members. *Id.* Those claims present the question whether the statutes under which the BOR proceeded violate the separation-of-powers doctrine or the due-process clauses of the United States and Ohio Constitutions.

{¶ 5} The case is now ripe for our final determination.

Analysis

{¶ 6} To be entitled to a writ of prohibition, a relator ordinarily must prove that a lower tribunal is about to exercise judicial or quasi-judicial power without authority and that there is no adequate remedy in the ordinary course of the law. *State ex rel. Sliwinski v. Burnham Unruh*, 118 Ohio St.3d 76, 2008-Ohio-1734, 886 N.E.2d 201, ¶7. This standard reflects the well-established rule that prohibition "is a preventive rather than a corrective remedy, and issues only to prevent the commission of a future act, and not to undo an act already performed." High, *Treatise on Extraordinary Legal Remedies, Embracing Mandamus, Quo Warranto and Prohibition*, Section 766, at 606 (2d Ed.1884).

{¶ 7} The BOR is not about to exercise power concerning the property Feltner once owned—Feltner commenced this prohibition action more than a year after the BOR entered its final judgment. The BOR and its members contend that this fact alone precludes us from granting the writ in this case.

{¶ 8} But in *State ex rel. Adams v. Gusweiler*, 30 Ohio St.2d 326, 285 N.E.2d 22 (1972), paragraph two of the syllabus, we recognized an exception to the

general rule, holding that a writ of prohibition may issue correctively to arrest the continuing effects of an order when there was "a total want of jurisdiction" on the part of the lower tribunal. A few years after *Gusweiler*, we began to associate the exception with the modifying phrase "patent and unambiguous." *See State ex rel. Gilla v. Fellerhoff*, 44 Ohio St.2d 86, 87-88, 338 N.E.2d 522 (1975). We also began using that term with respect to a related exception adopted in *Gusweiler* at 329—namely, that the availability of an adequate remedy is immaterial when a tribunal patently and unambiguously lacks jurisdiction. *See, e.g.*, *State ex rel. Koren v. Grogan*, 68 Ohio St.3d 590, 595, 629 N.E.2d 446 (1994). Over time, we have issued writs of prohibition to correct the results of unauthorized exercises of authority, notwithstanding the availability of an appeal, if the tribunal patently and unambiguously lacked jurisdiction to enter the judgment at issue. *See, e.g.*, *State ex rel. V.K.B. v. Smith*, 142 Ohio St.3d 469, 2015-Ohio-2004, 32 N.E.3d 452, ¶ 8. And so, the narrow issue before us is whether the BOR patently and unambiguously lacked jurisdiction to adjudicate the foreclosure of Feltner's property.

{¶ 9} We typically will not hold that a tribunal patently and unambiguously lacked jurisdiction if the tribunal "had at least basic statutory jurisdiction to proceed." *Gusweiler* at 329. Therefore, in prohibition cases involving statutorily created tribunals of limited jurisdiction, we ordinarily ask whether the General Assembly gave the tribunal authority to proceed in the matter at issue. *See, e.g.*, *State ex rel. Goldberg v. Mahoning Cty. Probate Court*, 93 Ohio St.3d 160, 162, 753 N.E.2d 192 (2001); *State ex rel. Natalina Food Co. v. Ohio Civ. Rights Comm.*, 55 Ohio St.3d 98, 100, 562 N.E.2d 1383 (1990).

{¶ 10} Here, the legislature clearly gave the BOR statutory authority to proceed. *See* R.C. 323.25 and 323.65 through 323.79. But this case presents a more complicated issue because Feltner contends that the BOR's statutory authority is unconstitutional. The question, then, is the extent to which we may consider the merit of Feltner's constitutional challenge in deciding whether the BOR patently and unambiguously lacked jurisdiction.

{¶ 11} To date, we have not squarely explained what constitutes a patent and unambiguous lack of jurisdiction when a relator seeks to undo a final judgment by challenging the constitutionality of a lower tribunal's statutory authority. But our case law includes numerous examples in which we held that a tribunal did not patently and unambiguously lack jurisdiction under the specific law or facts at the time of the challenged proceedings. Most notably, in *Sliwinski*, 118 Ohio St.3d 76, 2008-Ohio-1734, 886 N.E.2d 201, at ¶ 21, we declined to resolve a constitutional challenge to legislation in view of the rule that a statute is presumed to be constitutional. In other cases, we indicated that a tribunal cannot patently and unambiguously lack jurisdiction if the absence of jurisdiction is not clear under *then-existing* law. *See State ex rel. Worrell v. Athens Cty. Court of Common Pleas*, 69 Ohio St.3d 491, 496, 633 N.E.2d 1130 (1994) (common pleas court's lack of jurisdiction was not patent and unambiguous prior to enactment of new statute conferring exclusive jurisdiction on the Court of Claims); *Natalina Food Co.*, 55 Ohio St.3d at 100, 562 N.E.2d 1383 (relator could not demonstrate tribunal's patent and unambiguous lack of jurisdiction in the absence of any statutory or constitutional authority that "definitively" prevented its exercise of jurisdiction); *State ex rel. Henry v. Britt*, 67 Ohio St.2d 71, 75, 424 N.E.2d 297 (1981) (court's lack of jurisdiction was not patent and unambiguous

when the underlying jurisdictional question was "not well settled"). And in *State ex rel. McSalters v. Mikus*, 62 Ohio St.2d 162, 163, 403 N.E.2d 1215 (1980), we declined to hold that a tribunal patently and unambiguously lacked jurisdiction because the jurisdictional question turned on the specific facts of the case. Importantly, we did not suggest in these prohibition cases that the claims presented were incapable of resolution or that they could not be resolved at the appropriate time in an appropriate forum. We simply concluded that the respondents named in each did not obviously lack jurisdiction under the law at the time.

{¶ 12} Cases in which we *have* found an obvious lack of jurisdiction support the idea that we must examine then-existing law (e.g., a statute, a rule, or precedent) when determining whether a tribunal patently and unambiguously lacked jurisdiction. *See, e.g.*, *State ex rel. Sanquily v. Lucas Cty. Court of Common Pleas,* 60 Ohio St.3d 78, 80, 573 N.E.2d 606 (1991) ("Although R.C. 2305.01 gives common pleas courts original jurisdiction in civil matters generally, R.C. 2743.02(F) patently and unambiguously takes it away from them in a specific class of civil cases"); *Ohio Dept. of Adm. Servs., Office of Collective Bargaining v. State Emp. Relations Bd.*, 54 Ohio St.3d 48, 52-53, 562 N.E.2d 125 (1990) (holding that a court lacked jurisdiction to hear an appeal under existing precedent interpreting a statute); *State ex rel. Safeco Ins. Co. of Am. v. Kornowski*, 40 Ohio St.2d 20, 21-22, 317 N.E.2d 920 (1974) (holding that a rule of appellate procedure patently and unambiguously did not confer jurisdiction on a court).

{¶ 13} In this light, the answer to the narrow question before us becomes clear. When a relator in a prohibition action seeks to undo a final judgment by challenging the constitutionality of the statutory

authority under which a lower tribunal acted, a court may consider only whether the authorizing statute was clearly unconstitutional under precedent existing at the time of the lower tribunal's judgment in determining whether the lower tribunal patently and unambiguously lacked jurisdiction. This rule is consistent with our caselaw, which recognizes that the limited purpose of a writ of prohibition is to police exercises of "ultra vires jurisdiction" by lower tribunals. *State ex rel. Nolan v. ClenDening*, 93 Ohio St. 264, 112 N.E. 1029 (1915), paragraphs three and four of the syllabus. In reality, a different rule—one that would allow for the issuance of a writ of prohibition to undo the outcome of a proceeding even when a tribunal exercised authority under a presumptively valid statute—would expand the writ beyond its limited purpose.

{¶ 14} In this case, at the time of its judgment, the BOR acted with apparent (and presumptively valid) statutory authority. We cannot conclude that the BOR patently and unambiguously lacked jurisdiction to proceed under these circumstances. We therefore have no authority to undo the BOR's final judgment and need not consider the merit of Feltner's constitutional challenge. *See Smith v. Leis*, 106 Ohio St.3d 309, 2005-Ohio-5125, 835 N.E.2d 5, ¶ 54 ("courts decide constitutional issues only when absolutely necessary").

Writ denied.

DONNELLY and HENDRICKSON, JJ., concur.

KENNEDY, J., concurs in judgment only.

FISCHER, J., concurs in judgment only, with an opinion joined by O'CONNOR, C.J.

DEWINE, J., concurs in judgment only, with an opinion.

ROBERT A. HENDRICKSON, J., of the Twelfth District Court of Appeals, sitting for STEWART, J.

FISCHER, J., concurring in judgment only.

{¶ 15} I agree with the lead opinion's conclusion that we should deny the writ of prohibition against respondents Cuyahoga County Board of Revision ("BOR"), Armond Budish, Michael Chambers, and Michael Gallagher, albeit for different reasons. Therefore, I respectfully concur in judgment only.

{¶ 16} I also write to express my concerns with this court's decision to dismiss counts V and VI alleged in the complaint filed by relator, Elliott G. Feltner. *See State ex rel. Feltner v. Cuyahoga Cty. Bd. of Revision*, 155 Ohio St.3d 1403, 2019-Ohio-943, 119 N.E.3d 431.

I. Patent and Unambiguous Lack of Jurisdiction

{¶ 17} In his petition for a writ of prohibition, Feltner alleged that the BOR patently and unambiguously lacked jurisdiction because R.C. 323.65 et seq., which gives a board of revision the ability to adjudicate tax-foreclosure proceedings, violates the separation-of-powers doctrine and that a conflict of interest created by the interplay between the statutory scheme and the Cuyahoga County Charter deprived him of due process.

{¶ 18} The lead opinion avoids the constitutional issues presented by Feltner by concluding simply that the BOR did not patently and unambiguously lack jurisdiction to enter a judgment of foreclosure on the real property owned by Feltner because the statutory scheme, which provided the BOR with the ability to adjudicate a tax foreclosure, had not been held unconstitutional by existing precedent at the time that the BOR held its hearing. I agree with the other opinion concurring in judgment only to the extent that the reasoning in the lead opinion is circular: this court's consideration of the issue is informed by the Ohio Constitution, and a lack of jurisprudence on an issue should not bar this court from determining matters related to another branch of government's alleged use of judicial power, which is reserved to the courts under Article IV, Section 1 of the Ohio Constitution. *See State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 467, 715 N.E.2d 1062 (1999) (the court must "jealously guard the judicial power against encroachment from the other two branches of government").

{¶ 19} Therefore, I believe that the constitutional issues in this case cannot and should not be avoided. I believe that this court should address Feltner's claims that the BOR patently and unambiguously lacked jurisdiction based on a violation of the separation-of-powers doctrine and his due-process rights.

A. Separation of Powers

{¶ 20} The separation-of-powers doctrine is implicitly embedded in the Ohio Constitution. *S. Euclid v. Jemison*, 28 Ohio St.3d 157, 159, 503 N.E.2d 136 (1986). And all judicial power is conferred on the courts of this state pursuant to Article IV, Section 1 of the Ohio Constitution.

{¶ 21} The Ohio Constitution prohibits the General Assembly from encroaching upon the courts' judicial power. Article II, Section 32, Ohio Constitution; *see Ohio Academy of Trial Lawyers*, 86 Ohio St.3d at 467, 715 N.E.2d 1062. The General Assembly cannot confer upon tribunals, other than courts, powers that are strictly and conclusively judicial. *Fassig v. State ex rel. Turner*, 95 Ohio St. 232, 116 N.E. 104 (1917), paragraph one of the syllabus, *overruled in part on other grounds by Griffin v. Hydra-Matic Div., Gen. Motors Corp.*, 39 Ohio St.3d 79, 529 N.E.2d 436 (1988).

{¶ 22} To facilitate the collection of taxes, the General Assembly has empowered boards of revision to foreclose on certain tax-delinquent properties and to order direct transfers to qualified parties, in this case, the Cuyahoga County Land Reutilization Corporation ("Land Bank"). *See* R.C. 323.66(A) and 323.78. The issue that we must resolve is whether the adjudication of tax foreclosures is *strictly* and *conclusively* an exercise of judicial power.

{¶ 23} There is no exact rule for determining what powers may or may not be assigned by law to each branch of government. *State ex rel. Atty. Gen. v. Harmon*, 31 Ohio St. 250, 258 (1877). In order to determine what constitutes judicial power within the meaning of our Constitution, we look to the common law and the history of our institutions as they existed before and at the time of the adoption of our Constitution. *Id.*

{¶ 24} The courts of this state have always held the power to adjudicate matters in equity, like foreclosures. *See St. Clair v. Morris*, 9 Ohio 15, 17 (1839). However, the power to tax is reserved for the legislative branch. *Bank of Toledo v. Toledo*, 1 Ohio St.

622, 701 (1853) (the right of taxation is a branch of the legislative authority); *see also Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 281, 15 L.Ed. 372 (1856), and *Musser v. Adair*, 55 Ohio St. 466, 45 N.E. 903 (1896) (citing *Murray's Lessee* favorably). Thus, the statutory scheme at issue creates a unique intersection of judicial and legislative power. Because of this unique intersection of power, it is difficult to determine that the adjudication of tax foreclosures is strictly and conclusively an exercise of judicial power.

{¶ 25} Therefore, Feltner has not clearly and convincingly established that the BOR patently and unambiguously lacked jurisdiction to adjudicate the tax foreclosure based simply on the separation-of-powers issue.

B. Due Process

{¶ 26} Feltner also raised a due-process claim in arguing that the BOR patently and unambiguously lacked jurisdiction to adjudicate the foreclosure of his property. He contends that many of the individuals who participated in this tax foreclosure and the transfer of his property to the Land Bank had aligned interests: (1) the county treasurer prosecuted the action under R.C. 323.25, and because the county executive appointed the treasurer, their interests are aligned, (2) the county executive and county fiscal officer sit on the BOR, and because the county executive appointed the fiscal officer, their interests are aligned, (3) the county treasurer invoked the alternative right-of-redemption period under R.C. 323.78, thus allowing for a direct transfer of the property to the Land Bank, and (4) because the county executive and county treasurer are on the Land Bank's board, they have an interest in prosecuting and deciding tax-foreclosure cases that result in direct

transfers to the Land Bank. Feltner maintains that because the prosecutor's, the adjudicative body's, and the beneficiary of the adjudication's interests in his property overlapped, his due-process rights were violated.

{¶ 27} I agree with Feltner that the interplay between the Cuyahoga County Charter and the statutory scheme at issue presents a troubling scenario. The similar interests of the state, the BOR, and the Land Bank—prosecutor, judge, and beneficiary—may create an appearance of impropriety and partiality. Such an appearance could cause the public to lose confidence in the integrity of this adjudicative process, regardless of whether all procedures were followed by the parties involved. The appearance of impropriety and partiality is always a concern of the judiciary when we decide cases, *see* Jud.Cond.R. 1.2 and 2.2, and I do not see why it would not also be a concern for a board of revision in a quasi-judicial proceeding. It is difficult to imagine how Ohioans can have due process of law in tax-foreclosure proceedings when there is even a slight question of impropriety or partiality due to a conflict of interest created by the interplay between the statutory scheme and a county charter.

{¶ 28} But while I am sympathetic to Feltner's situation, this possible conflict of interest does not demonstrate that the BOR patently and unambiguously lacked jurisdiction to adjudicate the tax foreclosure. Rather, Feltner raises a due-process claim that comes too late, a claim that could have been and should have been addressed—if he had requested to have the proceeding transferred "to a court of competent jurisdiction to be conducted in accordance with the applicable laws," R.C. 323.69(B)(2). *See also* R.C. 323.691(A)(1) and 323.70(B). Therefore, I would conclude that Feltner has not demonstrated by clear

and convincing evidence that the BOR patently and unambiguously lacked jurisdiction based upon a possible conflict-of-interest issue. But I would reiterate that this is likely an issue that needs to be reviewed further by the General Assembly or Cuyahoga County so that Ohioans have full confidence in the fundamental fairness of these foreclosure proceedings.

II. Dismissal of Unauthorized-Taking Counts

{¶ 29} This court has previously dismissed counts V and VI of Feltner's complaint, both of which raised issues related to an unauthorized taking of property by the government. *See Feltner*, 155 Ohio St.3d 1403, 2019-Ohio-943, 119 N.E.3d However, I would have granted an alternative writ on those counts and ordered briefing. *Id.*

{¶ 30} I did not write a dissenting opinion to the order dismissing these claims, but on further review, it has become apparent that the dismissal of those claims is exceedingly bothersome. There is no doubt that the facts alleged by Feltner in this case are disconcerting, especially in light of the fact that his allegations in counts V and VI had to be taken as true. *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 418, 650 N.E.2d 863 (1995) (when reviewing a motion to dismiss, all material allegations in the complaint must be construed as true). While I express no opinion on the merits of Feltner's takings claims, after reviewing the record and the parties' briefs, I wonder if the claims would have had merit.

{¶ 31} I recognize that there were arguably some procedural issues with Feltner's takings claims, such as whether Feltner had properly asserted a claim in mandamus. But I would have welcomed briefing on the issue, because I am bothered by the possibility that the BOR foreclosed on Feltner's property, which

was worth around $144,500 and on which he owed $65,189.94 in taxes, and then transferred that property to the Land Bank, all without providing him notice of the final judgment and without remitting the remaining value of the property to Feltner. Indeed, Feltner claims that the property was not sold but was merely transferred to a third party after the Land Bank received the deed to the property. The whole scheme is unsettling and just seems wrong. Thus, although I previously voted to grant an alternative writ in regard to counts V and VI, after reviewing the evidence and the briefs that have now been submitted, I renew my objection to this court's failure to address those claims. I believe that the court should have granted an alternative writ in regard to those counts, if only to have peace of mind that Feltner received some due process and that the government did not receive a windfall at Feltner's expense.

III. Conclusion

{¶ 32} Because Feltner has not demonstrated that the BOR patently and unambiguously lacked jurisdiction to adjudicate his tax foreclosure, and because he had an adequate remedy at law, I concur in the judgment denying his petition for a writ of prohibition. To fully adjudicate the issues before this court, I believe that an alternative writ should have been granted in regard to counts V and VI of Feltner's complaint. I encourage the General Assembly and Cuyahoga County to evaluate this process to ensure transparent and impartial proceedings, because the right to private property is an original right and is one of the primary and most sacred objects of the government to secure and protect, *see Bank of Toledo*, 1 Ohio St. at 632. Therefore, I respectfully concur in judgment only.

O'CONNOR, C.J., concurs in the foregoing opinion.

DEWINE, J., concurring in judgment only.

{¶ 33} The lead opinion would deny the writ on the ground that the Cuyahoga County Board of Revision did not patently and unambiguously lack jurisdiction. It reaches this conclusion because there was clear statutory authority for the board's actions and none of our prior case law had established that the statutory grant of authority was unconstitutional. It thereby avoids addressing the constitutional challenges Feltner raises to the board's actions in this case. As I explain, I do not agree that we can avoid the constitutional issues. But because I do not believe that Feltner's constitutional challenges have any merit, I concur in the judgment denying the writ.

{¶ 34} The lead opinion rightly notes that for us to undo the board's actions through a writ of prohibition, Feltner must establish that the board patently and unambiguously lacked jurisdiction over the tax-foreclosure proceedings. And the lead opinion also rightly emphasizes that we normally do not address constitutional questions in extraordinary writ actions when there is a remedy at law—that is, when those questions could have been addressed through the normal process in the courts of common pleas or the courts of appeals. *See State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573, 859 N.E.2d 923, ¶ 22.

{¶ 35} But in this case, Feltner brings a separation-of-powers claim, arguing that the statute that ostensibly gives the board power over the foreclosure proceeding unconstitutionally usurps a

judicial function. Unlike many other kinds of constitutional claims, a separation-of-powers claim goes to the basic authority of a government entity. Feltner is not arguing simply that the legislature enacted a statute that exceeded its authority but rather that the tribunal that heard his case lacked the authority to act. Thus, the challenge he brings is akin to those we typically consider in original writ actions when we determine if there is a patent and unambiguous lack of jurisdiction.

{¶ 36} Thus, unlike the lead opinion, I would proceed to the next question: is Feltner right? Did the tribunal that decided his case lack the authority to act? Do the authorizing statutes unconstitutionally usurp judicial functions? The lead opinion sensibly notes that to assess whether a tribunal patently and unambiguously lacks jurisdiction, we must look to then-existing law—that is, the law at the time that the tribunal acted. One would think that this would require an examination of the statutes and constitutional provisions in effect at the time of a tribunal's decision. But instead the lead opinion says what really matters is whether there is any *precedent* establishing that a tribunal's action is unconstitutional. Indeed, the lead opinion suggests that "a court may consider only whether the authorizing statute was clearly unconstitutional under precedent existing at the time of the lower tribunal's judgment in determining whether the lower tribunal patently and unambiguously lacked jurisdiction." Lead opinion at ¶ 13. This reasoning turns the judicial role on its head. Whether a tribunal lacks jurisdiction under the Ohio Constitution hinges not on what this court has said but on what the Constitution requires. We are subservient to the Constitution. It is not subservient to us. I therefore do not think that Feltner's constitutional challenges can be avoided in the way that the lead opinion proposes.

In order to assess whether there is a patent and unambiguous lack of jurisdiction, we must address Feltner's separation-of-powers arguments.

{¶ 37} Feltner's arguments come in two varieties. The first seeks to establish that the statute violates the separation-of-powers doctrine because it involves an improper consolidation of executive and judicial functions in the board. This argument fails because the statutory scheme allows independent judicial assessment by transferring the case to a court prior to an administrative hearing under R.C. 323.70(B) or by de novo appeal to the court of common pleas under R.C. 323.79. We have held that the availability of an appeal to a court is sufficient to avoid an unconstitutional consolidation of powers. *See Stanton v. State Tax Comm.*, 114 Ohio St. 658, 664, 681-682, 151 N.E. 760 (1926). Independent de novo review by the judiciary means that governmental powers are not functionally consolidated in one branch of government or in one entity.[2]

{¶ 38} The second line of argument is not so much concerned with the consolidation of multiple functions as with the usurpation of the judicial function by an executive agency. On this line of reasoning, the objection is that the board is doing a kind of activity—adjudication—that it cannot constitutionally do. This argument faces an uphill climb since it has never been the case that judicial,

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[2] Feltner protests that he was never notified of the board's decision and that this deprived him of his right to appeal. Whether or not that argument is sound, it doesn't bear on the jurisdiction of the board, and hence, cannot be used to support Feltner's claim for a writ of prohibition.

executive, and legislative functions are cleanly separated in our constitutional scheme. *See Fairview v. Giffee,* 73 Ohio St. 183, 186, 76 N.E. 865 (1905). And there are a host of constitutionally permissible activities performed by executive units that are quasi-judicial in nature. *See, e.g., State ex rel. Stewart v. Clinton Cty. Bd. of Elections*, 124 Ohio St.3d 584, 2010-Ohio-1176, 925 N.E.2d 601, ¶ 16. So, one cannot argue that an activity is judicial and hence improperly exercised by the executive branch merely by pointing out that the executive activity has some of the characteristics that are paradigmatic of judicial activity—taking evidence, hearing claims and arguments, etc. *See Fassig v. State ex rel. Turner*, 95 Ohio St. 232, 116 N.E. 104 (1917), paragraph two of syllabus. Rather, Feltner must show that the specific type of quasi-judicial proceeding at issue here may not be conducted by the executive branch.

{¶ 39} Does the Constitution prohibit the administrative handling of a tax proceeding like this one? As a general rule, the Constitution is to be "interpreted with reference to the usages and customs * * * at the time of its adoption." *De Camp v. Archibald*, 50 Ohio St. 618, 625, 35 N.E. 1056 (1893). As noted above, there are no clean conceptual boundaries to draw around the kinds of activities that are exclusively judicial, executive, or legislative. Thus, in separation-of-powers cases, it is especially important to look to historical practice. *See Zivotofsky v. Kerry*, 576 U.S. ___, 135 S.Ct. 2076, 2091, 192 L.Ed.2d 83 (2015). The problem for Feltner is that when the Ohio Constitution was adopted in the middle part of the 19th century, tax-levy and foreclosure matters were handled by the executive branch. An 1856 case makes this point clear. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 282, 15 L.Ed. 372 (1856). As the United States Supreme Court explained, tax recovery from tax debtors could

proceed through a summary-administrative process. This is because "there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy." *Id.*; *see also* Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum.L.Rev. 559, 589-590 (2007) (noting that the "traditional power of taxation enabled the government to take authoritative actions adverse to core private rights without any 'judicial' involvement").

{¶ 40} Similarly, the Supreme Court rejected the argument that the levy and sale of property to secure payment of a tax debt violated due-process protections because it was done through an administrative process. *Springer v. United States*, 102 U.S. 586, 592-594, 26 L.Ed. 253 (1880). The court reasoned that with regard to tax proceedings, "[t]he idea that every tax-payer is entitled to the delays of litigation is unreason. If the laws here in question involved any wrong or unnecessary harshness, it was for Congress, or the people who make congresses, to see that the evil was corrected." *Id.* at 594. And around the same time, this court observed that

> [t]he people of this country, in their colonial and subsequent history, have always collected taxes through the agency of administrative officers. The courts have remained open to those who could show that they had been aggrieved; but, that the state should resort to the courts for the purpose of making collections * * * has not been allowed * * *.

Adler v. Whitbeck, 44 Ohio St. 539, 570, 9 N.E. 672 (1887).

{¶ 41} The statutory scheme for tax collection in the middle part of the 19th century also supports the conclusion that tax proceedings like this one could permissibly be given over to executive authorities. In an 1832 case, this court explained the statutory process for a land sale associated with a tax lien. *Carlisle's Lessee v. Longworth*, 5 Ohio 368, 371-373 (1832), citing 23 Ohio Laws 89. That procedure included the following steps: (1) the tax collector would give the county auditor a list of delinquent taxpayers and certify under oath as to its veracity, (2) the county auditor would make a list of all lands noted as delinquent and would impose a penalty and publish the tax bill plus interest and penalty, (3) the auditor would then record and certify the publication, (4) the county collector would then hold a sale of the lands mentioned in the advertisement and still delinquent. *Id.* In short, it was a procedure that occurred outside the courts.

{¶ 42} The upshot of all of this is that as a matter of historical practice, tax assessment was handled by the executive branch of government and did not require judicial involvement. The result is that there cannot be a separation-of-powers problem with the administrative process at issue here. For that reason, Feltner has not shown that the board lacks jurisdiction over this matter. I therefore concur only in the judgment denying the writ.

The Dann Law Firm Co., L.P.A., Marc E. Dann, Whitney Kaster, and Brian D. Flick; and Andrew M. Engel Co., L.P.A., and Andrew M. Engel, for relator.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Charles E. Hannan and

Adam Jutte, Assistant Prosecuting Attorneys, for respondents.

Dave Yost, Attorney General, Benjamin M. Flowers, State Solicitor, and Michael J. Hendershot, Chief Deputy Solicitor, urging denial of the writ for amicus curiae Ohio Attorney General.

Roetzel & Andress, L.P.A., and Stephen W. Funk, urging denial of the writ for amici curiae Cuyahoga County Land Reutilization Corporation and Ohio Land Bank Association.

Julia R. Bates, Lucas County Prosecuting Attorney, and Suzanne Cotner Mandros, Assistant Prosecuting Attorney, urging denial of the writ for amicus curiae Ohio Prosecuting Attorneys Association.

Herman Law, L.L.C., and Edward F. Herman, urging denial of the writ for amicus curiae County Treasurers Association of Ohio.

Frances Shaiman Lesser; and Pappas & Associates and Thomas P. Pappas, urging denial of the writ for amicus curiae County Auditors' Association of Ohio.

Supreme Court of Ohio Clerk of Court –
Filed September 17, 2018 - Case No. 2018-1307

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, ex rel. ELLIOTT G FELTNER 907 EAST 214TH ST CLEVELAND, OH 44119	*	CASE NO.
RELATOR	*	Original Action in Prohibition and Mandamus
-vs-	*	
CUYAHOGA COUNTY, BOARD OF REVISION 2079 East Ninth Street Cleveland, OH 44115	*	
and	*	
DENNIS G KENNEDY, FISCAL OFFICER OF CUYAHOGA COUNTY, OHIO 2079 East Ninth Street Cleveland, OH 44115	*	
and	*	
MICHAEL GALLAGHER CUYAHOGA COUNTY COUNCIL MEMBER 2079 East Ninth Street Cleveland, OH 44115	*	

and *

W. CHRISTOPHER MURRAY II, TREASURER OF CUYAHOGA COUNTY, OHIO * 2079 East Ninth Street Cleveland, OH 44115 *

and *

CUYAHOGA COUNTY LAND REUTILIZATION CORPORATION * 812 Huron Road E, Suite 800 * Cleveland, OH 44115 *

CUYAHOGA COUNTY, OHIO 2079 East Ninth Street * Cleveland, OH 44115 *

and *

MIKE DEWINE, ATTORNEY GENERAL OF THE STATE OF OHIO * 30 E. Broad St., 14th Floor * Columbus, OH 43215 *

RESPONDENTS *

COMPLAINT FOR WRITS OF PROHIBITION AND MANDAMUS WITH SUPPORTING AFFIDAVIT

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INTRODUCTION

Relator used to own a parcel of commercial property in Cleveland. The Cuyahoga County Fiscal Officer valued the property at $144,500.00. He doesn't own that property any more. It was transferred by Sheriff's Deed to the Cuyahoga County Land Reutilization Corporation pursuant to an order of foreclosure issued by the Cuyahoga County Board of Revision. The deed was not issued because the Cuyahoga County Land Reutilization Corporation purchased the property at a foreclosure sale. Rather, title to Relator's property was directly transferred because the Cuyahoga County Land Reutilization Corporation asked for it. No money changed hands; the County collected no real estate taxes.

But the Cuyahoga County Land Reutilization Corporation wasn't the entity that ultimately benefited from the foreclosure case. Soon after it received title to Feltner's property, the Cuyahoga County Land Reutilization Corporation deeded the property to East Side Automotive Service, Inc., a

privately held corporation. East Side Automotive Service, Inc. apparently paid nothing for the property. Thus, after the dust settled, Feltner no longer owned the real estate; East Side Automotive Service, Inc. did. And Cuyahoga County collected no tax dollars.

The Board of Revision's exercise of judicial power in hearing and deciding a tax foreclosure case and the manner in which Feltner's case was handled, violate well-established constitutional principles of this state. Thus, the entirety of the Board of Revision proceedings is a nullity. Relator, Elliott G. Feltner ("Feltner"), files this Complaint seeking a writ of prohibition against the Respondent Cuyahoga County Board of Revision ("Board of Revision") and its members, Respondents Armond Budish, Dennis G. Kennedy, and Michael Gallaher ("Budish," "Kennedy," and "Gallagher," respectively, or "Members," collectively), relating to their exercise of judicial power against Feltner under the auspices of R.C. 323.65, et seq.

Further, Mr. Feltner's property was appropriated by governmental entities without compensation in violation of the Fifth Amendment to the United States Constitution and Article I Section 19 of the Ohio Constitution. A governmental agency cannot simply take someone's land and give it to another private party. Therefore, Feltner also seeks a writ of mandamus against Respondents W. Christopher Murray II ("Murray"), Cuyahoga County, Ohio ("County") and the Cuyahoga County Land Reutilization Corporation ("Land Bank") directing them to institute appropriation proceedings in accordance with law to compensate Feltner for the value of the real property taken from him and granted to the Land Bank in violation of Art. I, Sec. 19 of the Ohio Constitution.

For his Complaint, Feltner says as follows:

JURISDICTION AND PARTIES

1. This Court has jurisdiction over this matter pursuant to Art. IV, Sec. 2(B)(l)(b) and (d) of the Ohio Constitution and Ohio Revised Code § 2731.01 et seq.

2. Feltner was the defendant in *Treasurer, Cuyahoga County, Ohio v. Elliott G Feltner, et al.*, Cuyahoga County Board of Revision Case No. BR 010620 ("Board of Revision Case"), which was an expedited tax foreclosure case commenced and prosecuted by Murray, as Plaintiff, in the Board of Revision pursuant to R.C. 323.65, et seq. to foreclose the lien for delinquent real estate taxes owed on real property located at 18927 St. Clair Ave., Cleveland, Ohio.

3. At the time of the commencement of the Board of Revision Case, Feltner owned 18927 St. Clair Ave., Cleveland, Ohio (the "Property"). The Property, located in Cuyahoga County, Ohio, is identified as Permanent Parcel No. 114-26-004 and is a roughly 0.63 acre commercial property.

4. The Board of Revision is an administrative board of Cuyahoga County, Ohio, formed and operated pursuant to R.C. 5715.01, et seq. and the Charter of Cuyahoga County (the "Charter"), Sec. 6.02. Upon information and belief, the current members of the Board of Revision are Budish, Kennedy, and Gallagher.

5. Budish is the duly elected County Executive of Cuyahoga County, Ohio and possesses such powers and duties as are provided by the

Charter and the general law of Ohio. Budish is a member of the Board of Revision. Budish is also a member of the Board of Directors of the Land Bank. Budish is named as a defendant herein solely in his official capacities.

6. Kennedy is the appointed Fiscal Officer of Cuyahoga County, Ohio and possesses such powers and duties as are provided by the Charter and the general law of Ohio. Under the Charter, the Fiscal Officer has, inter alia, all the powers granted to, and duties imposed on, county auditors. Kennedy was appointed Fiscal Officer by Budish and serves in that position at the pleasure of Budish. Kennedy is a member of the Board of Revision. Kennedy is named as a defendant herein solely in his official capacities.

7. Gallagher is a member of the Cuyahoga County Council and possesses such powers and duties as are provided by the Charter of Cuyahoga County and the general law of Ohio. Gallagher is a member of the Board of Revision as the representative of the Cuyahoga County Council. Gallagher is named as a defendant herein solely in his official capacities.

8. Murray is the appointed Treasurer of Cuyahoga County, Ohio and possesses such powers and duties as are provided by the Charter of Cuyahoga County and the general law of Ohio. Murray was appointed Treasurer by Budish and serves in that position at the pleasure of Budish. Murray is also a member of the Board of Directors of the Land Bank. Murray is named as a defendant herein solely in his official capacities.

9. The Land Bank is an Ohio not-for-profit corporation incorporated by the County in 2009 pursuant to Revised Code Chapter 1724. The Land Bank is operated as a county land reutilization corporation for the essential governmental purposes provided for under Revised Code Chapters 1724 and 5722. Budish and Murray are permanent members of the Board of Directors of the Land Bank, as is a member of the Cuyahoga County Council.

10. The formation of the Land Bank was authorized by a resolution adopted by the Cuyahoga County Board of Commissioners on April 9, 2009 which found the need for "the implementation of a land reutilization program to foster either the return of such nonproductive land to tax revenue generating status or the devotion thereof to public use." The resolution went on to state that the formation of the Land Bank was in furtherance of the implementation of the County's land reutilization program.

11. The County is a body politic and corporate organized under Chapter 302 of the Revised Code and possesses and exercises such powers as are granted by the Charter of Cuyahoga County and the general law.

12. Mike DeWine is the Attorney General of the State of Ohio and is named for notice purposes only because this suit challenges the constitutionality of several statutes of the State of Ohio.

BOARD OF REVISION FORECLOSURES

13. County boards of revision are statutorily created and charged with hearing complaints regarding real estate valuations by the County Auditor.

14. Under R.C. 5715.02, the members of a board of revision are the county auditor, county treasurer, and a member of the county commission. That statute also provides that a board of revision "may provide for one or more hearing boards when they deem the creation of such to be necessary to the expeditious hearing of valuation complaints. Each such official may appoint one qualified employee from the official's office to serve in the official's place and stead on each such board for the purpose of hearing complaints as to the value of real property only, ... "

15. Cuyahoga County, Ohio has adopted an alternative form of county government pursuant to R.C. 302.01, and under its county charter, the members of the Board of Revision are (1) the County Executive, (2) the County executive's choice of either the county fiscal office or county treasurer, and (3) a member of the county council.

16. The Charter of Cuyahoga County (the "Charter") prohibits the actual Board of Revision Members from presiding over real estate valuation matters. Rather, the Charter provides that the Board of Revision may appoint one or more three-person hearing panels to hear and decide real estate valuation complaints. The Charter does not authorize hearing panels to hear foreclosure cases

brought in the Board of Revision under R.C. 323.66. Under the Charter, the members of hearing panels serve at the pleasure of the Board of Revision.

17. In 2008, the General Assembly enacted a statutory scheme which granted to county boards of revision the authority to preside over expedited tax foreclosure cases involving unoccupied lands. R.C. 323.65-.79.

18. Foreclosures relating to unoccupied lands are like any other tax foreclosure with a few notable exceptions:

    A. They can be had only on property deemed unoccupied, as defined by R.C. 323.65.

    B. They may be commenced and prosecuted in county boards of revision.

    C. Foreclosures filed in the board of revision are not heard by a judge. They are heard by the members of the board of revision.

    D. The Rules of Civil Procedure do not apply to board of revision foreclosures, except for those rules relating to service of process. But even with respect to those rules, the statutes modify the methods for service of process. Also, individual county boards of revision can adopt rules of procedure to be applied to these foreclosures.

    E. Upon judgment of foreclosure, a sale of the property is not required. Rather, the property may be transferred directly to an electing municipality or county land reutilization corporation. If a direct transfer

of property is ordered, all taxes, assessments and other impositions on the property are waived by the county.

F. A direct transfer of the property may be ordered in two circumstances: (I) when the amount of the impositions (i.e. taxes, assessments, etc. owed on the property) exceed the value of the property, or (2) when the Treasurer elects the employ the alternative redemption period, in which case the property owner may redeem the prope1iy within 28 days of the adjudication of foreclosure. If the property is not timely redeemed, then the sheriff issues a deed to the electing municipality or land reutilization corporation without consideration.

THE BOARD OF REVISION CASE

19. Murray, as Plaintiff, commenced the Board of Revision Case against Feltner on November 9; 2015 pursuant to 323.66, et seq. to collect delinquent real estate taxes owed on the Property.

20. At the time suit was commenced, certified delinquent taxes on the Property were $9,353.25, and total taxes owed relative to the Property were $42,785.26.

21. At the time suit was commenced, the market value of the Property, as set by the Cuyahoga County Fiscal Officer, was $144,500. Aside from the lien for real estate taxes, the property was unencumbered.

22. The initial complaint filed by Murray did not allege that the Property was vacant or abandoned. Nor did it allege the presence of any of the factors set forth in R.C. 323.65(F). The complaint did, however, mention R.C. 323.65-.78 as a possible statutory basis for the lawsuit. The complaint also mentioned that the relief requested might include direct transfer of the Property under R.C. 323.78.

23. On August 1, 2016, Murray filed an amended complaint. The amendment corrected the spelling of Feltner's first name. Like the initial complaint, the amended complaint did not allege that the Property was vacant or abandoned. Nor did it allege the presence of any of the factors set forth in R.C. 323.65(F). Further, the amended complaint did not mention R.C. 323.65-.79 or request a direct transfer of the property pursuant to the alternative right of redemption found in R.C. 323.78. In fact, the only relief requested in the amended complaint was for the property be sold at sheriff sale.

24. Soon after commencement of the Board of Revision Case, the Land Bank, through its staff attorney, executed an affidavit, ostensibly on behalf of the City of Cleveland, that stated that the Land Bank had determined that the acquisition of the Property was "eligible for the implementation of an effective land reutilization program." The affidavit did not mention any of the factors set forth in R.C. 323.65(F). The affidavit went on to assert that the City of Cleveland did not want to acquire the Property for its land reutilization program but that the Land Bank did want to acquire the Property.

25. Feltner was never properly served with the summons and complaint in the Board of Revision Case. He learned of the Board of Revision Case from a title agency who had performed a title search for a prospective buyer of the Property. The case proceeded to final hearing on June 21, 2017. Feltner was not aware of the date for the final hearing and did not attend.

26. The matter was not heard by the actual Members of the Board of Revision. Rather, the foreclosure case was heard and decided by a hearing panel appointed pursuant to the Charter to hear valuation complaints.

27. At the final hearing, the hearing panel called the case, and the prosecutor called a witness, identified only as "Ms. Smith." No exhibits were offered into evidence, but the witness testified that the "Cuyahoga County Land Bank is interested in the parcel." She also testified that "the impositions do not exceed the fair market value, therefore the property will transfer via the alternative right of redemption to the County Land Bank" The witness then testified that the estimated impositions on the Property were $65,189.94 and the fair market value of the Property was $144,500.00.

28. At the end of Ms. Smith's testimony, the hearing panel (a) found in favor of Murray on the foreclosure claim, (b) found that the Land Bank had "petitioned to acquire the property," (c) ordered that the alternative redemption period of R.C. 323.65(J) and 323.78 apply, and (d) ordered the Sheriff to issue a deed to the Property directly to the Land Bank at the expiration of the alternative redemption period.

29. At the direction of the Board of Revision hearing panel, a sheriff's deed was issued transferring the Property to the Land Bank on July 28, 2017.

30. As a result of the direct transfer of the Property to the Land Bank, all taxes, assessments, and impositions owed to the County were waived pursuant to R.C. 323.78(B). The County received nothing through the foreclosure process.

31. On August 21, 2017, the Land Bank issued a Quit Claim deed for the Property to East Side Automotive Services Inc. Upon information and belief, no consideration was given by East Side Automotive Services, Inc. for the Property. Upon information and belief, East Side Automotive Service, Inc. now uses the Property as an automotive repair facility.

32. Feltner has received no compensation for the Property.

33. On November 3, 2017, Feltner filed a *Motion to Vacate Judgment* the Board of Revision Case for lack of service of process. No response has been filed to the Motion, and the Board of Revision has taken no action on the motion.

Count I
Prohibition

34. Art. IV, Sec. I of the Ohio Constitution vests all judicial power of the State of Ohio in Ohio's courts.

35. Through enacting R.C. 323.65-.79, the General Assembly impermissibly granted judicial power

to an executive branch board in violation of Art. IV, Sec. I of the Ohio Constitution.

36. Because the General Assembly exceeded its constitutional power, the enactment of R.C. 323.65-.79 is void, and all actions taken thereunder are a nullity.

37. The Board of Revision hearing panel exercised jurisdiction in the Board of Revision Case that it patently and unambiguously lacked.

38. Prohibition is needed to correct the results of the jurisdictionally unauthorized actions of the Board of Revision hearing panel.

39. Feltner has no plain and adequate remedy in the ordinary course of the law.

Count II
Prohibition

40. Feltner restates the allegations of paragraphs 1 through 39 above as if fully rewritten herein.

41. The authority to foreclose the state's lien for taxes granted by R.C. 323.66, is limited to those delinquent lands that are abandoned, as that term is defined in R.C.323.65.

42. Because county boards of revision are creations of the legislature, they possess only those powers that the General Assembly expressly grants to them.

43. In order for a county board of revision to possess the power to order the foreclosure of delinquent property, there must be a finding by the board

of revision that the property is abandoned, as that term is defined in R.C. 323.65.

44. Because there was no allegation in the Complaint or the Amended Complaint that the Property was abandoned, the jurisdiction of the Board of Revision was not invoked by the filing of the Complaint or Amended Complaint.

45. Because no evidence was presented at any time that tended to prove that the Property was abandoned, the Board of Revision lacked the statutory power granted in R.C. 323.65-.79 to foreclose the state's lien on the Property.

46. As a result, the Board of Revision hearing panel exercised jurisdiction in the Board of Revision Case that it patently and unambiguously lacked.

47. Prohibition is needed to correct the results of the jurisdictionally unauthorized actions of the Board of Revision hearing panel.

48. Feltner has no plain and adequate remedy in the ordinary course of the law.

Count III
Prohibition

49. Feltner restates the allegations of paragraphs I through 48 above as if fully rewritten herein.

50. Under both the Charter and the general law of Ohio, Murray is required to be the plaintiff in all tax foreclosure cases commenced in the Board of Revision.

51. Pursuant to R.C. 323.78, Murray alone has the power to invoke the alternative redemption period which permits the direct transfer of real property to the Land Bank.

52. Because Murray was appointed by, and serves at the pleasure of, Budish, Murray's interest in prosecuting board of revision tax foreclosures is the same as Budish's.

53. Because Kennedy was appointed by, and serves at the pleasure of, Budish, Kennedy's interest in deciding board of revision tax foreclosure cases is the same as Budish's.

54. Because Budish and Murray are permanent members of the board of directors of the Land Bank, they have an interest in prosecuting and deciding Board of Revision tax foreclosure cases in a manner that results in the property being directly transferred to the Land Bank.

55. The result of these relationships is that Budish effectively controls both the plaintiff who prosecutes and the Board of Revision hearing panel that decides all tax foreclosure cases commenced in the Board of Revision. Further, Budish and Murray are members of the board of directors of the organization that directly benefits from the orders issued by the Board of Revision.

56. The proceedings in the Board of Revision Case are void because the statutes controlling such cases are structured so as to violate the separation-of-powers among the branches of county government and to deny defendants in such cases due process of law.

57. The hearing panel that decided the Board of Revision Case patently and unambiguously lacked jurisdiction to do so.

58. Prohibition is needed to correct the results of the jurisdictionally unauthorized actions of the hearing panel.

59. Feltner has no plain and adequate remedy in the ordinary course of the law.

Count IV
Prohibition

60. Feltner restates the allegations of paragraphs I through 59 above as if fully rewritten herein.

61. The Board of Revision Case was heard and decided by a hearing panel created and empowered by the Cuyahoga County Charter.

62. Neither the Charter nor the general law of Ohio grants to board of revision hearing panels the power to hear and decide foreclosure cases prosecuted under R.C. 323.65-.79.

63. The hearing panel that decided the Board of Revision Case patently and unambiguously lacked jurisdiction to do so.

64. Prohibition is needed to correct the results of the jurisdictionally unauthorized actions of the Board of Revision hearing panel.

65. Feltner has no plain and adequate remedy in the ordinary course of the law.

Count V
Prohibition

66. Feltner restates the allegations of paragraphs I through 65 above as if fully rewritten herein.

67. The power purportedly granted to boards of revision under R.C. 323.78 -to directly transfer private real property to an electing municipal corporation, township, county, school district, community development corporation, or county land reutilization corporation without the showing of a public need - is contrary to and irreconcilable with Art. I, Sec. 19 of the Ohio Constitution, which limits the power of Ohio government to take private property only for public use.

68. Because of this conflict, the Board of Revision hearing panel patently and unambiguously lacked jurisdiction to order the transfer of the Property to the Land Bank.

69. Prohibition is needed to correct the results of the jurisdictionally unauthorized actions of the Board of Revision hearing panel.

70. Feltner has no plain and adequate remedy in the ordinary course of the law.

Count VI
Prohibition

71. Feltner restates the allegations of paragraphs 1 through 70 above as if fully rewritten herein.

72. The power purportedly granted to boards of revision under R.C. 323.78 – to directly transfer private real property to an electing municipal

corporation, township, county, school district, community development corporation, or county land reutilization corporation, without first requiring payment of compensation – is contrary to and irreconcilable with Art. I, Sec. 19 of the Ohio Constitution, which limits the power of Ohio government to take private property only after payment or deposit of such compensation.

73. Because of this conflict, the Board of Revision hearing panel patently and unambiguously lacked jurisdiction to order the transfer of the Property to the Land Bank.

74. Prohibition is needed to correct the results of the jurisdictionally unauthorized actions of the Board of Revision hearing panel.

75. Feltner has no plain and adequate remedy in the ordinary course of the law.

Count VII
Mandamus

76. Feltner restates the allegations of paragraphs 1 through 75 above as if fully rewritten herein.

77. The direct transfer of the Property to the Land Bank constitutes a taking of private property under Art. I, Sec. 19 of the Ohio Constitution and the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

78. The Land Bank and the County are agencies as defined in R.C. 163.01.

79. Through their actions, Murray, the Land Bank, and the County deprived Feltner of title and possession to real property, the value of which far exceeded the amount owed in taxes. In fact, the Property was taken without regard for the tax liability owed on the Property.

80. The Land Bank and the County deprived Feltner of the Property with the intent to subsequently transfer the Property to a private person, for private use, and for no or little consideration.

81. The Land Bank and the County have failed to fulfill their statutory duty to commence an appropriation proceeding, to prove the propriety of the taking, and to pay just compensation for the taking of Feltner's property.

82. Feltner has no plain and adequate remedy in the ordinary course of the law to obtain a jury assessment of compensation for the Property.

83. Pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, Article I, § 19 of the Ohio Constitution, and Ohio Revised Code Chapter 163, the Land Bank and the County are liable to Feltner for the fair market value of the Property.

84. Pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, Article I, § 19 of the Ohio Constitution, Ohio Revised Code Chapter 2731, 42 U.S.C. § 1988(b), and 42 U.S.C. § 1983, the Land Bank and the County are liable to Feltner for the attorneys' fees Feltner incurred in

vindicating his constitutional right to just compensation.

CONCLUSION

Pursuant to Supreme Court Practice Rule 12.02(B), affidavits supporting the statement of facts upon which the claim for relief is based are attached hereto.

WHEREFORE, Relator requests relief from this Court as follows:

1) Issue a Peremptory Writ of Prohibition invalidating, in their entirety, the proceedings before the Cuyahoga County, Ohio Board of Revision in Case No. BR 010620;

2) Issue an Alternative Writ pursuant to S.Ct.Prac.R. 12.05, to order Respondents to show cause why a Peremptory Writ should not be issued;

3) Issue a Peremptory Writ of Mandamus compelling Respondents Cuyahoga County, Ohio and the Cuyahoga County Land Reutilization Corporation to initiate appropriation proceedings pursuant to Ohio Revised Code Chapter 163;

4) Issue an Alternative Writ pursuant to S.Ct.Prac.R. 12.05, to order Respondents Cuyahoga County, Ohio and the Cuyahoga County Land Reutilization Corporation to show cause why they should not be compelled to initiate appropriation proceedings pursuant to Ohio Revised Code Chapter 163;

5) Award Relators their attorneys' fees; and

6) Issue such other and further relief as may be available either at law or in equity.

Respectfully submitted,

/s/ Marc E. Dann
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Ohio Revised Code provisions at issue:

323.65 Definitions

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;

. . . .

(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.

….

(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.

323.78 Election to invoke alternative redemption period

(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.

5721.20 Unclaimed moneys remaining to owner

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.