

STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2019-0339

Richard Polonsky

v.

Town of Bedford, N.H.

---

**BRIEF OF APPELLANT, TOWN OF BEDFORD**

**RULE 7 APPEAL OF FINAL DECISION OF  
HILLSBOROUGH SUPERIOR COURT, NORTHERN DISTRICT**

---

Counsel for Appellant/Defendant  
Town of Bedford:  
Barton L. Mayer, Esquire  
Michael P. Courtney, Esquire  
Upton & Hatfield, LLP  
10 Centre Street, PO Box 1090  
Concord, NH 03302-1090  
(603) 224-7791

Arguing the Case: Barton L. Mayer, Esquire

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	4
QUESTIONS PRESENTED.....	6
TEXT OF STATUTES .....	7
STATEMENT OF FACTS .....	15
STATEMENT OF THE CASE.....	18
SUMMARY OF ARGUMENT .....	19
I.    THE REMEDY PROVIDED BY THE LEGISLATURE FOR THE TAKING WITHOUT COMPENSATION WHICH OCCURS AT THE TIME OF THE TAX DEEDING IS TO PERMIT THE FORMER OWNER TO RECEIVE THE EXCESS PROCEEDS FROM A SALE OF THE PROPERTY OR TO REPURCHASE IT.....	19
A. The Taking of the Property Without Just Compensation Occurs at the Time of the Tax Deeding. ....	19
B. In 1998, the Legislature Amended the Alternative Tax Lien Procedure to Provide a Remedy For the Unconstitutional Taking Which Occurs at the Time of the Tax Deeding. ....	20
II.   RSA 80:89 DOES NOT PROHIBIT A FORMER OWNER FROM PETITIONING A COURT TO COMPEL THE SALE OF TAX-DEEDED PROPERTY WITHIN THREE YEARS OF THE DATE OF THE RECORDING OF THE DEED.....	22
III.  THIS COURT WILL INTERPRET A STATUTE IN A MANNER THAT WILL PRESERVE ITS CONSTITUTIONALITY .....	25
IV.  THERE MUST BE AN END POINT TO THE TAX COLLECTION PROCESS .....	27
A. The Remedy Provided By the Legislature Should Not Be Confused With the Period of Limitation Imposed by the Legislature on the Exercise of that Remedy.....	27
B. The Legislature Intended to Impose a Period of Limitation.....	28

C. The Legislature’s Prescription of a Three Year Limitation Period Within Which Taxpayers May Assert Their Right to Receive a Distribution of Excess Proceeds or Repurchase the Property is Reasonable and Constitutional. ....	30
V. RSA 80:89, VII MUST BE READ IN THE CONTEXT OF THE ENTIRE STATUTORY SCHEME. ....	34
REQUEST FOR ORAL ARGUMENT .....	37
CERTIFICATION OF COMPLIANCE WITH WORD LIMIT .....	37
CERTIFICATE OF SERVICE .....	38
TRIAL COURT ORDER.....	40

## TABLE OF AUTHORITIES

### **Cases**

<u>Ansara v City of Nashua</u> , 118 N.H. 879 (1978).....	36
<u>Bennett v. Town of Hampstead</u> , 157 N.H. 477 (2008) .....	25
<u>Blackthorne Group v. Pines of Newmarket</u> , 150 N.H. 804 (2004).....	33
<u>Burke v. Pierro</u> , 159 N.H. 504 (2009).....	20
<u>Carr v. New London</u> , 170 N.H. 10 (2017) .....	35
<u>Cote v. Cote</u> , 94 N.H. 372 (1947) .....	30
<u>First NH Bank v. Town of Windham</u> , 138 N.H. 319 (1994) .....	20, 21, 24, 26
<u>Gordonville Corporation N.V. v. LRI-A Limited Partnership</u> , 151 N.H. 371 (2004).....	21, 29
<u>Heath v. Sears, Roebuck &amp; Co.</u> , 123 N.H. 512 (1983).....	29, 31, 33
<u>J.E.D. Associates, Inc. v. Town of Atkinson</u> , 121 N.H. 581 (1981).....	34
<u>Keeton v. Hustler Magazine</u> , 131 N.H. 6 (1988) .....	31
<u>Phetteplace v. Town of Lyme</u> , 144 N.J. 621 (2000).....	25
<u>Polonsky v. Town of Bedford</u> , 171 NH 89 (2018) .....	28, 29, 31
<u>Saranac Land &amp; Timber Co. v. Comptroller of N.Y.</u> , 177 U.S. 318 (1900)...	27, 33
<u>State v. Lapointe</u> , 81 N.H. 227 (1924).....	25
<u>Thomas Tool Service, Inc. v. Town of Croydon</u> , 145 N.H. 218 (2000)...	20, 21, 27
<u>Town of Auburn v. McEvoy</u> , 131 N.H. 383 (1988) .....	27, 34
<u>Town of Hudson v. Gate City Development Corp.</u> , 139 N.H. 606 (1995).....	33
<u>White v. Lee</u> , 124 N.H. 69 (1983) .....	26

### **Statutes**

RSA 508:4.....	19, 27, 33
RSA 677:15.....	34
RSA 677:15, I .....	34
RSA 72:36-a.....	35
RSA 72:37.....	35
RSA 72:37-b .....	35
RSA 72:38-a.....	35
RSA 72:38-b .....	35
RSA 72:39.....	35
RSA 80.....	26
RSA 80:21.....	26



RSA 80:39.....	33
RSA 80:61.....	20
RSA 80:78.....	30, 33
RSA 80:80, V.....	24
RSA 80:80, VI .....	14, 36
RSA 80:88.....	6, 12, 13, 14, 32
RSA 80:88-91 .....	6, 21
RSA 80:89, I .....	36
RSA 80:89, II.....	21
RSA 80:89, VII.....	6, 28, 30, 31, 34

### **Other Authorities**

Black's Law Dictionary (revised 4 <sup>th</sup> edition, 1968).....	23
N.H. Const. Pt. First Art. 14 .....	31

### **QUESTIONS PRESENTED**

- 1) Whether the trial court erred when it concluded that the statutory scheme contained in RSA 80:88-91 is unconstitutional.
- 2) Whether RSA 80:89, VII, extinguishing a former owner's right to recover excess proceeds, is a lawful restriction on a former owner's right to receive excess proceeds as it operates as a statute of limitations and does not constitute a taking under Part I, Article 12 of the New Hampshire Constitution.
- 3) Whether the trial court erred when it ruled that the former owner had the right to recover excess proceeds from the sale of a tax deeded property after the three year period provided in RSA 80:89, VII expired. ("The duty of the municipality to notify former owners and to distribute proceeds pursuant to RSA 80:88, and the former owners' right of repurchase, under this section shall terminate 3 years after the date of recording of the deed.")
- 4) Whether the trial court erred when it concluded the statutory scheme provided under RSA 80:88-91 precludes a former owner from asking the court to exercise its equitable powers to compel the sale of a tax deeded property prior to the expiration of the three year period provided in RSA 80:89, VII.
- 5) Whether the plaintiff's claim is barred by the equitable doctrine of unclean hands.

## TEXT OF STATUTES

### **80:80 Transfer of Tax Lien.**

I. No transfer of any tax lien upon real estate acquired by a town or city as a result of the execution of the real estate tax lien by the tax collector for nonpayment of taxes thereon shall be made to any person by the municipality during the 2-year period allowed for redemption, nor shall title to any real estate taken by a town or city in default of redemption be conveyed to any person, unless the town, by majority vote at the annual meeting, or city council by vote, shall authorize the governing body to transfer such lien or to convey such property by deed.

II. If the governing body is so authorized to convey such property by deed, either a public auction shall be held, or the property may be sold by advertised sealed bids. The governing body shall have the power to establish a minimum amount for which the property is to be sold and the terms and conditions of the sale.

II-a. If the governing body is authorized to transfer such liens during the 2-year redemption period, either a public auction shall be held, or the liens may be sold by advertised sealed bids. The governing body may establish minimum bids, and may set the terms and conditions of the sale. Such liens may be sold singly or in combination, but no fractional interest in any lien shall be sold. Such transfer shall not affect the right of the owner or others with a legal interest in the land to redeem the tax lien pursuant to RSA 80:69, or make partial payments in redemption pursuant to RSA 80:71, but the transferee shall become the lienholder for purposes of RSA 80:72 and 80:76.

III. The governing body may, by a specific article in the town warrant, or by ordinance, be authorized to dispose of liens or tax deeded properties in a manner other than as provided in this section, as justice may require. Before proceeding under this provision, the governing body shall make an affirmative finding that disposal by a method other than sealed bid or public auction is in the public interest.

IV. Such authority to transfer or to sell shall continue in effect for one year from the date of the town meeting or action by the city or town council provided, however, that the authority to transfer tax liens, or to sell real estate acquired in default of redemption, or to vary the manner of such sale or transfer as justice may require, may be granted for an indefinite period, in which case the warrant article or vote granting such authority shall use the words "indefinitely, until rescinded" or similar language.

V. Towns and cities may retain and hold for public uses real property the title to which has been acquired by them by tax collector's deed, upon vote of the town meeting or city council approving the same.

VI. For purposes of this section, the authority to dispose of the property "as justice may require" shall include the power of the governing body to:

- (a) Engage a real estate agent or broker to list and sell the property, including a sale conditional on the buyer's obtaining development approvals;
- (b) Sell undeveloped parcels to abutters for consolidation into adjoining lots for the purpose of affordable housing development, preserving open space, or reducing development density; or
- (c) Convey the property to a former owner, or to a third party for benefit of a former owner, upon such reasonable terms as may be agreed to in writing,



including the authority of the municipality to retain a mortgage interest in the property, or to reimpose its tax lien, contingent upon an agreed payment schedule, which need not necessarily reflect any prior redemption amount. Any such agreement shall be recorded in the registry of deeds. This paragraph shall not be construed to obligate any municipality to make any such conveyance or agreement.

**80:88 Distribution of Proceeds From the Sale of Tax-Deeded Property.**

I. Notwithstanding any other provision of law, for any sale by a municipality of property which is acquired by tax deed on or after the effective date of this section, the municipality's recovery of proceeds from the sale shall be limited to back taxes, interest, costs and penalty, as defined in RSA 80:90.

II. If there are excess proceeds over and above the amount of municipal recovery permitted under paragraph I:

(a) Within 60 days of settlement by the purchaser or purchasers of the property sold, the municipality shall file a bill of interpleader with the superior court for the county in which the property is located, naming the former owner or owners, and all persons having a recorded interest in the property as defendants, and paying to the court all amounts over and above those entitled to be retained.

(b) The municipality shall also be entitled to retain its reasonable costs and attorneys' fees for the preparation and filing of the petition.

(c) The court shall issue such orders of notice as are necessary, and shall make such disposition of the funds as it finds appropriate, based upon



ownership and lienholder interests at the time of the tax deed.

(d) The municipality shall be deemed to have a continuing interest in said funds, and in default of valid claims made by other parties, such funds shall be decreed to be the property of the municipality, free and clear of any remaining liability.

III. No bill of interpleader shall be necessary under subparagraph II(a) if, at the time of the tax deed execution, there were no record lienholders, and only one record owner or joint owners, and such former owner or owners are easily identified and located, in which case the excess proceeds shall be paid to such owner or owners.

**80:89 Notice to Former Owner and Opportunity for Repurchase.**

I. At least 90 days prior to the offering for sale by a municipality of property which is acquired by tax deed on or after the effective date of this section, the municipal governing body or its designee shall send notice by certified mail, address service requested, return receipt requested, to the last known post office address of the owner of the property at the time of the tax deed, if known, or to the person to whom notice of the impending tax deed was given under RSA 80:77. The notice shall set forth the terms of the offering and the right of the former owner or owners to repurchase the property, as set forth in paragraph II. Copies of any such notice shall also be sent by certified mail, return receipt requested, to any mortgagee to whom notice of the impending tax deed was sent under RSA 80:77-a. For any notice sent pursuant to this paragraph, \$10 may be added to the municipality's "costs" as defined in RSA 80:90. In this section, an "offering for sale" means the authorization by the municipality's governing body to

its designee to sell the property.

II. Within 30 days after the notice required by paragraph I, or if no such notice is received, at any time within 3 years after the date of recording the tax deed, any former owner of the property may give notice by certified mail, return receipt requested, of intent to repurchase the property from the municipality, and stating that such owner is ready, willing, and able to pay all back taxes, interest, costs and penalty, as defined in RSA 80:90, except that if the property is the former owner's principal residence, or was the former owner's principal residence at the time of execution of the tax deed under RSA 80:76, the additional penalty under RSA 80:90, I(f) shall not apply. If all such back taxes, interest, costs and penalty have not been actually tendered within 30 days of such notice of intent to repurchase, the municipality may proceed with its offering and dispose of the property without any interest by the former owner.

III. The deed from the municipality upon such repurchase shall convey the municipality's interest in the property, or such portion as has not been previously disposed of by the municipality, to all record former owners in the same proportional undivided interests as the former owners of record.

IV. The former owners' title upon repurchase shall be subject to any liens of record against the property as of the time of the tax deed to the municipality, and subject to any leases, easements, or other encumbrances as may have been granted or placed on the property by the municipality. In the case of multiple former owners, any owner paying more than a proportional share of the purchase price to the municipality shall have a lien against the other owners for the amount of the excess paid.

V. A notice of intent to repurchase under this section may also be filed

by the holder of any recorded mortgage interest in the property which was unredeemed as of the date of the tax deed. Upon payment the property shall be deeded as provided in paragraph III, but the mortgagee shall be entitled to add the amount paid to the municipality to the amount due under the mortgage.

VI. Conveyances to a former owner under this section shall not be subject to the real estate transfer tax under RSA 78-B.

VII. The duty of the municipality to notify former owners and to distribute proceeds pursuant to RSA 80:88, and the former owners' right of repurchase under this section shall terminate 3 years after the date of recording of the deed.

#### **80:90 Definitions**

I. For purposes of RSA 80:88 and 80:89, the phrase "back taxes, interest, costs and penalty" shall include all of the following:

(a) All taxes assessed but unpaid as of the date of the tax deed, together with all taxes which would thereafter otherwise have been assessed against such property based on its valuation, but for its ownership by the municipality.

(b) All statutory interest actually accrued on all back taxes as of the date of the tax deed, together with all statutory interest which would otherwise thereafter have accrued on all taxes listed in subparagraph (a), but for the property's ownership by the municipality.

(c) All allowable statutory fees charged for notice and recording in connection with the tax collection process.

(d) All legal costs incurred by the municipality in connection with the



property, including those connected with the municipality's sale or the former owner's repurchase.

(e) All incidental and consequential costs as are reasonably incurred or estimated to be incurred by the municipality in connection with its ownership and disposition of the property, including but not limited to insurance, maintenance, repairs or improvements, and marketing expenses.

(f) An additional penalty equal in amount to 10 percent of the assessed value of the property as of the date of the tax deed, adjusted by the equalization ratio for the year of the assessment.

II. For purposes of RSA 80:88 and 80:89, "former owner" shall mean any person in whom title to the property, or partial interest therein, was vested at the time of the tax deed, and shall include any heir, successor, or assign of any former owner, provided, however, that any person to whom a former owner has attempted to convey or assign any interest, lien, or expectancy in the property subsequent to the date of the tax deed shall not be deemed a former owner.

#### **80:91 Liability and Obligations Limited.**

With respect to actions of a municipality under RSA 80:88 and 80:89, if the municipality has complied with the provisions of this chapter it shall not have any liability whatsoever to any former owner or lienholder in connection with its management of the property or for the amount of consideration received upon disposition of the property. After the execution of a tax deed, the municipality may treat the property in all respects as the fee owner thereof, including leasing or encumbering all or any portion of the property, without any accountability to former owners, except that the

proceeds of any sale must be accounted for as provided in RSA 80:88. Nothing in this chapter shall obligate a municipality to dispose of property acquired by tax deed, except as provided in RSA 80:89. Nothing in RSA 80:88 or 80:89 shall be construed to preclude a municipality from granting more favorable terms to a former owner pursuant to RSA 80:80, VI.



## STATEMENT OF FACTS

The plaintiff is the former owner of property located at 21 Wentworth Drive, in the Town of Bedford, which he inherited from his mother (hereinafter “Property”). Appendix (hereinafter “APP”) p. 44. (Motion for Summary Judgment, Exhibit J (hereinafter “MSJ Ex. \_\_\_\_”). There were no mortgages on the Property. APP p. 194 (Request for Admissions, ¶5). At that time, plaintiff and his spouse also owned real estate in the Town of Bethlehem. APP p.44 (MSJ Ex. J). Plaintiff did not pay any real estate taxes on the Property since he acquired it in 2008. APP p. 192 (Request for Admissions, ¶1). Instead, plaintiff added skylights, constructed a deck, and installed air conditioning. APP p. 202 (Complaint, ¶25). On May 11, 2011, more than two years after the recording of the tax lien in the registry of deeds, RSA 80:76, the tax collector executed a deed to the Property to the Town of Bedford. APP p. 202 (MSJ Ex. G). Nevertheless, plaintiff continued to live at the Property, and paid no rent. See RSA 80:91.

Upon the initiation of the instant litigation, the parties entered into an agreement whereby plaintiff would pay into escrow rent in the amount of \$1,200 per month, pending the outcome of this litigation. This agreement was made a court order on August 19, 2015. On or about August 28, 2018, the attorney for plaintiff advised the attorney for the Town that plaintiff had ceased making these rental payments back in August of 2016. APP p. 220 (Trial Exhibit B (2019)). On August 30, 2018, an accounting was provided which confirmed the foregoing, and also indicated that previous payments were intermittent. In sum, plaintiff

disregarded the court's order as he did the notices from the Town, which ultimately resulted in the loss of the Property.

Plaintiff disregarded the following notices which he received from the Town:

- 2008 tax bills, APP pp. 21 & 23 (MSJ Ex. A and B);
- APP p. 25 (Notice of Tax Delinquency (RSA 80:77), MSJ Ex. C);
- APP pp. 25 (Notice of Impending Lien (RSA 80:60), MSJ Ex. D-1 and D-2);
- APP p. 27 & 28 (Notice of Impending Tax Deed (RSA 80:77), MSJ Ex. F-1 and F-2); see also, APP p. 192 (Response to Request for Admission, ¶2A).

See also, APP p. 41 (MSJ Ex. I). These same statutory notices were provided to plaintiff for the tax years 2009 APP p. 133, 135 & 141 (MSJ Ex. BB, CC, and FF)) and 2010 APP p. 137, 139 & 169 (MSJ Ex. DD, EE, and GG)). As a consequence of plaintiff's failure to heed all of these warnings, a tax deed was executed by the tax collector on May 31, 2011. APP p. 37 (MSJ Ex. G).

For the ensuing two years, plaintiff took no steps to repurchase the Property, and the Town took no action to sell it. During this period, the Town Manger died suddenly (November 10, 2011) and the Town lost track of the Property. In April, 2013, the new Town Manager became aware of the status of the Property. APP p. 39 (MSJ Ex. H). She then contacted plaintiff. *Id.* Rather than paying the amount due, plaintiff made a series of attempts to avoid paying the amount. See, e.g. APP pp. 202, 203 (Complaint, ¶¶22, 27, 29, and 32). Plaintiff met with the Town Council on June 12, 2013, seeking to avoid paying the amount due. APP p. 43 (MSJ

Ex. J). Financial information was requested by the Council, but never received. APP p. 44 (MSJ Ex. K).

On December 17, 2013, the Town provided to plaintiff notice of his right to repurchase the Property and the Town's intention to sell it, under the provisions of RSA 80:89. APP p. 56 (MSJ Ex. M-2). The Plaintiff did nothing.

On May 10, 2015, almost four years after the tax deed, plaintiff wrote a letter to the Town Council, again seeking to negotiate a deal. APP p. 58 (MSJ Ex. N). On May 13, 2015, the Council rejected his proposal. APP pp. 60-61 (MSJ Ex. O). Undeterred, plaintiff, through his attorney, again sought to negotiate a deal. First, his attorney proposed a resale to his client, for a portion of the amount due, with a lien securing payment of the balance. APP p. 65 (MSJ Ex. Q). At about the same time, the Council discovered an IRS lien, which would have rendered the proposed lien meaningless. APP p. 68 (MSJ Ex. R); see APP p. 195 (Request for Admissions, ¶8). The Council rejected the proposal. APP p. 72 (MSJ Ex. T).

On June 3, 2015, plaintiff finally proposed paying the amount due, but on the condition the Property was to be conveyed to a third party. APP p. 70 (MSJ Ex. S). The Town Council was unwilling to enter into a deal which had the appearance of a scheme to avoid the IRS tax lien. On June 10, 2015, the Town's attorney advised plaintiff's attorney that the Council had rejected the proposal. APP p. 74 (MSJ Ex. U).

### **STATEMENT OF THE CASE**

On May 11, 2011, the Town of Bedford received a tax deed to the plaintiff's property as a result of the failure of plaintiff to pay any real estate taxes in 2008, 2009, 2010, and 2011. Four years later, in June of 2015, plaintiff filed a complaint in the Superior Court, requesting the deed be set aside and in the alternative RSA 80:89 to be declared unconstitutional.

On May 11, 2016, the trial court ruled on the parties' cross Motions for Summary Judgment, finding title to the property was vested in the Town and construing the statutes to permit the plaintiff to recover any proceeds in excess of the debt due the Town, if the property were ever sold.

Both parties appealed. Briefs were filed. The matter was then remanded in January of 2017 for consideration of ancillary issues resulting from certain statutory amendments.

Following the trial court's January, 2017 decision, the matter returned to this Court, whereupon Oral argument was heard in September. In February, 2018, the Court invited the participation of *amicus curiae*. Following the filing of briefs, the Court issued its decision on June 28, 2018, ruling title to the property properly vested in the Town and overruling the trial court's statutory interpretation.

The matter was remanded to the trial court for consideration of plaintiff's taking claim, and whether the court has the power to compel the sale of tax deeded property under the statutes. Concluding the court had no power to compel a sale, the trial court ruled the statute unconstitutional. This appeal ensued.



## SUMMARY OF ARGUMENT

It is established law that a taking of property without just compensation occurs at the time of the execution of the tax deed. The remedies provided by the legislature for this unconstitutional aspect of the tax lien statutes were to grant the former owner the right to repurchase the property or receive the excess proceeds resulting from the sale of the property. Those rights may be vindicated by petitioning a court in equity to compel the sale of the property or to disgorge the excess proceeds from a previous sale. The court is not powerless to exercise its equitable authority within the statutory scheme. Consistent with all other rights to recover for an injury, the legislature has imposed a period of limitation on the exercise of that right, in this case three years after the execution of the tax deed. Cf. RSA 508:4 (three years for personal actions). The question presents itself: Why is the legislature incompetent to prescribe a limitation period in this case?

## ARGUMENT

### **I. THE REMEDY PROVIDED BY THE LEGISLATURE FOR THE TAKING WITHOUT COMPENSATION WHICH OCCURS AT THE TIME OF THE TAX DEEDING IS TO PERMIT THE FORMER OWNER TO RECEIVE THE EXCESS PROCEEDS FROM A SALE OF THE PROPERTY OR TO REPURCHASE IT.**

#### **A. The Taking of the Property Without Just Compensation Occurs at the Time of the Tax Deeding.**

“[T]he issuance of the [tax] deed annihilates the previous owner’s interest in the property.” *First NH Bank v. Town of Windham*, 138 N.H.



319, 323 (1994). A municipal lienholder takes a “100 percent common and undivided interest in the property’ upon execution of the lien, RSA 80:61, and this interest matures into a tax title upon the termination of the right of redemption and the execution of the tax deed.” *Id.* at 323. “After the execution of a tax deed, the municipality may treat the property in all respects as the fee owner thereof.” RSA 80:91. It is at this time that the taking of the property occurs. *Burke v. Pierro*, 159 N.H. 504, 513-14 (2009). No compensation whatsoever is paid to the former owner.

The trial court found “the taking occurred when the tax deed was issued and no compensation was received by Mr. Polonsky.” Brief, p. 43, (Order, p. 3).

**B. In 1998, the Legislature Amended the Alternative Tax Lien Procedure to Provide a Remedy For the Unconstitutional Taking Which Occurs at the Time of the Tax Deeding.**

In *Thomas Tool Service, Inc. v. Town of Croydon*, 145 N.H. 218 (2000), the Court found the tax lien procedure unconstitutional because it violated the takings clause of the New Hampshire Constitution, NEW HAMPSHIRE CONSTITUTION, Part 1 Art.12, but expressed no opinion on the amendments here at issue. The Court observed that while the majority in *First NH Bank v. Town of Windham*, 138 N.H. 319 (1999) decided the case on due process grounds, Justice Horton’s concurrence “addressed the takings issue and would have found the alternative lien procedure...constitutional only if it [were] read to provide for taking of the taxable property only to the extent of the lien.” *Thomas Tool*, 145 N.H. at

220. Justice Horton's concurrence provided the framework for RSA 80:88-91:

I would find the notice adequate, but would hold that the statutory alternative tax lien procedure is constitutional only if it is read to provide for taking of the taxable property only to the extent of the lien. Following the tax lien deed for a period not barred by *laches*, I would permit an interested party, owner, mortgagee, attaching creditor, mechanic's lien holder, or other party having rights in the deeded real estate to petition in equity for an accounting by the taxing authority and for the return, in priority and as equitable, of a sum equal to the excess of the land value, at the time of taking, over the amount of the taxes and charges accrued at taking. Such a construction, combined with the supplementary procedure, would permit the statutory procedure to withstand constitutional challenge and would provide for collection of taxes properly due and for the integrity of titles conveyed by tax lien deed.

*First NH Bank*, 138 N.H. at 332.

In amending the tax lien statutes, "the legislature sought to prohibit towns from too harshly penalizing delinquent taxpayers by refusing to resell them their property." *Gordonville Corporation N.V. v. LRI-A Limited Partnership*, 151 N.H. 371, 374 (2004). The remedies provided by the legislature for the taking without compensation at the time of the deed permit a former owner to repurchase the property or receive the proceeds from the sale of the property in excess of the taxes, interest, fees, costs, and any penalty due the municipality. RSA 80:88, I and RSA 80:89, II. That remedy is complete, and comports with this Court's holding in *Thomas Tool*. See also *First NH Bank v. Windham* 138 N.H. at 332 (Horton J. concurring).

**II. RSA 80:89 DOES NOT PROHIBIT A FORMER OWNER FROM PETITIONING A COURT TO COMPEL THE SALE OF TAX-DEEDED PROPERTY WITHIN THREE YEARS OF THE DATE OF THE RECORDING OF THE DEED.**

The trial court erred when it concluded the courts are powerless to apply the statute in a manner which would permit former owners to petition in equity to compel a municipality to sell a tax deeded property, relying upon RSA 80:91. This led the court to conclude the statutory scheme violated the New Hampshire Constitution:

Accordingly, because any right of the former property owner to recover excess proceeds under RSA 80:89 is contingent upon the municipality selling the former owner's property and the former owner is otherwise unable to compel the municipality to sell the property or recover an amount representing the difference between the property value and the amount owed to the town, the court finds the statute violates the takings clause of the New Hampshire Constitution.

Brief, p. 47 (Order, p.7). Ironically, after holding the statute unconstitutional, the court ordered precisely the remedy the Town contends is permitted under the current statutory scheme by ordering the sale of the property:

To remedy the violation, the court holds that Mr. Polonsky is entitled to the excess proceeds of the sale after payment of the amount owed to the Town.

Id.

The right to the distribution of excess proceeds and right to repurchase are meaningless without the ability to enforce those rights. Would a court not have the power to compel the distribution of excess



proceeds to a former owner if a town refused to do so? It follows that a former owner may compel a municipality to sell a property within the three year period in order to realize that right.

In its definition of the word “duty,” Black’s Law Dictionary (revised 4<sup>th</sup> edition, 1968) observes:

In its use in jurisprudence, this word is the correlative of *right*. Thus, wherever there exists a right in any person, there also rests a corresponding duty upon some other person or upon all persons generally.

The duty of the Town under RSA 80:89 implies a corresponding right in the taxpayer. Thus, in this case, the duty of the Town to distribute excess proceeds, and the corresponding right of the taxpayer to those excess proceeds are co-extensive. Necessarily, the right of the taxpayer to recover the excess proceeds, and hence the right to compel the sale of the property, may be enforced by a petition in equity. Otherwise, the former owner’s rights are illusory. Such is consistent with the plain language of the statute.

**A. The Trial Court Erred When it Ruled That RSA 80:91 Prohibits a Court From Compelling The Sale of a Tax-Deeded Property.**

The trial court concluded that “forcing a sale would be directly contrary to” RSA 80:91. Brief, p. 45 (Order 5). However, RSA 80:91 does not present an impediment to concluding RSA 80:89 permits former owners to petition in equity within three years to compel the sale of the property. RSA 80:91 provides, in part, “[n]othing in this chapter shall obligate a municipality to dispose of property acquired by tax deed, **except as provided in RSA 80:89.**” (emphasis added). It is the interpretation of RSA 80:89 that is the very subject of this case. And there is nothing in

RSA 80:89 that would prevent a former owner from seeking to compel the sale of the property. Thus, the trial court erred, as RSA 80:91 cannot bar an interpretation of RSA 80:89.

Furthermore, in construing a statute, The Court “will attempt to do so in harmony with the overall statutory scheme.” *Saraghan v. Mt. Cranmore Ski Resort, Inc.*, 152 N.H. 399, 505 (2005). The trial court failed to give consideration to RSA 80:80, V. The town meeting has not exercised its right under RSA 80:80, V to “retain and hold for public uses real property the title to which has been acquired by them by tax collector’s deed.” Within the statutory scheme, RSA 80:89 represents only an interim step. Thus, RSA 80:91 does not bar a court from compelling a sale because the Town has not yet voted to retain the property under RSA 80:80, V.

If a municipality may be compelled to sell a property, then the trial court’s constitutional concerns are satisfied. It is the resistance to the appropriate remedy that creates the perceived unconstitutionality.

**B. The Trial Court Erred When It Cast a Shadow On The Equitable Powers of the Court.**

In his concurring opinion in *First NH Bank v. Town of Windham*, 138 H.H. at 332, Justice Horton would have permitted an interested party “to petition in equity for an accounting by the taxing authority ....” This equitable power of the court can apply with equal force to compel a sale of tax deeded property. “The court has broad and flexible equitable powers which allow it to shape and adjust the precise relief to the requirements of the particular situation.” *Chase v. Ameriquest Mortgage Co.*, 155 N.H. 19, 24 (2007) (quotation omitted). “A court of equity will order to be done that which in fairness and good conscience ought to be or should have been



done. It is the practice of courts of equity...to administer all relief which the nature of the case and facts demand.” *Id.* (quotation omitted).

There is no constraint on when a former owner may assert this right within the three year period. *Cf. Phetteplace v. Town of Lyme*, 144 N.H. 621 (2000) (September 1 deadline did not bar filing petition for abatement any time prior to that date). Indeed, a former owner will be on notice that a municipality will not be selling the property prior to the expiration of the three year period as a statutory notice of sale must be provided at least 90 days before the sale. *Bennett v. Town of Hampstead*, 157 N.H. 477, 485 (2008) (“[E]very person is presumed to know the law.”)

As a consequence, the Court would be acting well within its authority to rule that the rights preserved under RSA 80:89 are subject to vindication by a former owner, who may petition in equity to compel the sale of a property or compel the town to pay over excess proceeds from a sale, so long as suit is brought within the three years provided by the RSA 80:89, VII. This approach would also preserve the end point to the tax collection process clearly intended by the legislature.

### **III. THIS COURT WILL INTERPRET A STATUTE IN A MANNER THAT WILL PRESERVE ITS CONSTITUTIONALITY**

“If a statute is open to two interpretations, one making it constitutional and the other not, it will ordinarily be presumed that the former was the meaning intended.” *State v. Lapointe*, 81 N.H. 227, 228 (1924). On many occasions this Court has interpreted the tax statutes in a manner which preserves their constitutionality by prescribing supplementary, extra-statutory measures. For example, in *White v. Lee*,

124 N.H. 69, 74 (1983), the Court interpreted RSA 80:21 to require notice of an impending tax sale be sent to a current owner. In order to preserve the constitutionality of the tax sale statutes, the Court further required current tax bills to include all past arrearages and the date upon which the right of redemption expires. *Id.* at 78. “We conclude RSA 80, when read in conjunction with the notice requirements mandated herein is not unconstitutional.” *Id.* at 78.

Similarly, in *First NH Bank v. Town of Windham*, 138 N.H. 319, 326-28 (1994), the Court held that the mortgagee was entitled to notice of tax lien deeds as a matter of due process under the State and Federal Constitutions. “Although the bank’s right to notice prior to the delivery of the tax lien deeds is a constitutional mandate rather than an express statutory requirement, we do not hold that the tax lien procedures are invalid. When these statutory procedures are read in conjunction with a requirement that reasonably ascertainable mortgagees receive notice prior to the issuance of tax lien deeds, they are not unconstitutional.” *Id.* at 328.

In his concurring opinion in *First NH Bank*, Justice Horton proposed that former owners could petition a court in equity to demand an accounting of the proceeds from the sale of a tax-deeded property. He concluded, “[s]uch a construction, combined with the supplementary procedure, would permit the statutory procedure to withstand constitutional challenge....” *Id.* at 332.

In *Manchester v. Straw*, 86 N.H. 390, 393 (1933) the statute in question called for an assessment against each abutter of one-half the expense of constructing curbing in front of his or her premises. “If read literally, it would be unconstitutional.” *Id.* The Court concluded the statute

should be read to limit the assessment so that it will exceed neither one-half the expense nor the value of the special benefit. “Such a construction, being a reasonable one and giving the statute valid force, is to be made.”

Contrary to the trial court’s conclusions, this Court is not powerless to interpret and apply the statutory scheme in a manner that will preserve its constitutionality.

#### **IV. THERE MUST BE AN END POINT TO THE TAX COLLECTION PROCESS**

##### **A. The Remedy Provided By the Legislature Should Not Be Confused With the Period of Limitation Imposed by the Legislature on the Exercise of that Remedy.**

The remedy provided by the legislature should not be confused with the period of limitation contained in RSA 80:89, VII. A limitation period is neither novel nor unconstitutional. A statute of limitations is not controlled by whether the claim arises in tort or under the constitution. *See* RSA 508:4; *see also, Saranac Land & Timber Co. v. Comptroller of N.Y.*, 177 U.S. 318, 330 (1900) (Finding the two-year period constitutional, the Supreme Court explained that New York’s statute of limitations for tax deeds is like any other statute of limitations. It is not affected by what the rights of the landowner were.); *Town of Auburn v. McEvoy*, 131 N.H. 383 (1988) (constitutional property right challenge to planning board action does not enjoy favored status so as to be exempt from thirty day appeal period). In his analysis of the taking issue in *First NH* 138 N.H. at 332, ultimately adopted by this Court in *Thomas Tool*, Justice Horton would have permitted a former owner to petition in equity for an accounting, “for a period not barred by laches.”



**B. The Legislature Intended to Impose a Period of Limitation**

The legislature has prescribed that three years after the date of the recording of the tax deed the right to repurchase and the duty to distribute excess proceeds from a sale “terminate.” RSA 80:89, VII. The legislative history makes it abundantly clear that the legislature amended the House Bill which resulted in RSA 80:89 to specifically limit the time period within which the former owner could either repurchase the property or recover excess proceeds from its sale. APP p. 82 (MSJ Exhibit W). The language of RSA 80:89, VII is clear. “[A]ccording to the express language of the pertinent statutes, the legislature did *not* intend to allow a former owner to recover excess proceeds from a municipality after the three year period has elapsed.” *Polonsky*, 171 N.H. at p. 96 (emphasis in original). On this subject, the Court concluded:

[W]e simply note that if the legislature disagrees with our construction of the statutes, or it determines that changes to the statutory scheme are either necessary or warranted, then the decision as to what changes should be made may involve policy judgments that are for the legislature, rather than this court, to make.

*Id.* at p. 97. While expressing no opinion on the constitutionality of RSA 80:89, VII, the Court observed:

[T]he legislature is institutionally better equipped to determine what any such changes should be. *Cf. In re Grand Jury Subpoena (Issued July 10, 2006)*, 155 N.H. 557, 562, 926 A.2d 280 (2007) (stating that legislature is institutionally better equipped to decide whether adopting new privilege is in society’s best interests). Thus, while we remand this case for the trial court to consider the constitutional issues raised



by the facts of this particular case, nothing in this opinion is intended to prevent the legislature from considering whether amendments to the statutory scheme are either necessary or warranted. *See, Hogan v. Pat's Peak Skiing, LLC*, 168 N.H. 71-75, 121 A.3d 827 (2015) (if legislature disagrees with our construction of statutes, it is free, subject to constitutional limitations, to amend them).

*Polonsky* 171 N.H. at 97. The legislature's policy decision to impose a limitation period balances the private and public interest by requiring reasonable diligence on the part of the former owner while not "too harshly penalizing taxpayers by refusing to resell them their property." *Gordonville Corp. N.V.*, 151 N.H. at 374. "As an obvious and immediate benefit, [the statute] provides predictability to interested parties, allowing them to determine the status of the property itself, its title, and its encumbrances at any given time." *Id.* at 375.

A limitation period is not in derogation of the property right, but rather only requires that right be exercised in a timely fashion. "Generally, both federal and state courts recognize the power of legislative bodies to enact statutes of limitations which prescribe a reasonable time within which a party is permitted to bring suit for the recovery of rights." *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 523 (1983). There is no question that there is a terminus to the process. The question is: why is the legislature incompetent to prescribe that terminus in this case?

At oral argument, in Supreme Court Case No. 2016-0354, the following colloquy took place between Justice Bassett and counsel for the plaintiff, Mr. Hayes:

Justice Bassett: Do you recognize that as a matter of principle there is a time period within which that claim needs to be brought?

Mr. Hayes: Oh – Absolutely.

Justice Lynn inquired of Mr. Hayes, “if not three years, how long?” Mr. Hayes suggested RSA 80:78 should control, thereby conceding that once the period of limitations has passed, the right terminates. There was no explanation why the period prescribed in RSA 80:78 was to be chosen over RSA 80:89, VII. The language of the statute does not support its application in this case. (“No action, suit or other proceeding shall be brought to contest the **validity of an execution of the real estate tax lien or any collector’s deed** based thereon...” (emphasis added)). In this case, the validity of the liens and tax deed are not in question.

**C. The Legislature’s Prescription of a Three Year Limitation Period Within Which Taxpayers May Assert Their Right to Receive a Distribution of Excess Proceeds or Repurchase the Property is Reasonable and Constitutional.**

The legislature imposed a three year limit on the former owner’s right to recover excess proceeds, consistent with Justice Horton’s admonition in *NH Bank v. Town of Windham* (“for a period not barred by *laches*”). See RSA 80:89, VII. “[A] court of equity in applying the doctrine of *laches* will follow substantially the analogy of the statute of limitations.” *Cote v. Cote*, 94 N.H. 372, 374 (1947). The language of RSA 80:89, VII is clear. *Polonsky* 171 N.H.at, 95-96. The plaintiff’s right to recover excess proceeds from the sale of the property expired three years following the date of recording the tax deed.

N.H. Const. Part 1 Article 14 provides that: “[e]very subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his...property....” This right, however, is not absolute and is subject to the legislature’s reasonable prescription of a statute of limitations period. See *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 523 (1983) (“The concept of allowing a reasonable period of time for suit to be brought after the cause of action arises is not new in our law.”).

Like most States, New Hampshire recognized the elimination of stale or fraudulent claims as the principal purpose of statutes of limitations. Absent such statutes, a dilatory plaintiff might burden a defendant with suits of which he was not timely informed, and clog court dockets, interfering with the orderly administration of justice. Statutes of limitations reflect the fact that it becomes more difficult and time-consuming both to defend against and to try claims as evidence disappears and memories fade with the passage of time. Such statutes thus represent the legislature’s attempt to achieve a balance among State interests in protecting both forum courts and defendants generally against stale claims and in insuring a reasonable period of time which plaintiffs may seek recovery on otherwise sound causes of action.

*Keeton v. Hustler Magazine*, 131 N.H. 6, 14 (1988) (citations and quotations omitted).

The “standard of review is whether the statute of limitations provisions contained in [the statute] are reasonable and are substantially related to the legislative objective.” *Heath*, 123 N.H. at 524-25. RSA 80:89, VII (2007) was originally drafted to allow taxpayers to receive proceeds in perpetuity. But after numerous hearings the legislature found that a limitations period was necessary:



When the phrase “and to distribute proceeds pursuant to RSA 80:88” is removed, municipalities will be forced to locate former owners and distribute proceeds (or file bills of interpleader) forever. This change states that repurchase rights will terminate three years after the date of the recording of the deed, but still would require the towns to distribute proceeds after three years.

There would be many negative outcomes caused by removing these words. Properties could be sold many years after deeding, and as time goes by finding owners becomes more and more problematic. Much research was done to determine the break-even point for tax deeded property and three years was determined to be the appropriate time during which the interest and costs equal the value of the property. There are rarely any proceeds left after this three year time period, however, these changes would mean locating and reimbursing former owners indefinitely.

The property owner had three years to pay the taxes before it was deeded and three years after deeding to repurchase it. This seems like sufficient time for an owner to pay the back taxes and repurchase their property. We believe it is an unfair burden to the taxpayers of the municipality who have carried this expense for six years to then have to pay for finding the former owners and distributing whatever proceeds are left to them.

APP. p. 96 (MSJ, Exhibit W, Jill Hadaway, Testimony on HB 803). The bill was amended to include a three year limitation period. APP. p. 94, (MSJ, Exhibit W). After the expiration of the three year period, the former owner’s rights terminate. The victim of a tort is no less deprived of a remedy under the applicable statute of limitations. See RSA 508:4. As this Court has explained “the wisdom and reasonableness of the legislative



scheme are for the legislature, not the courts, to decide.” *Blackthorne Group v. Pines of Newmarket*, 150 N.H. 804 (2004).

The case of *Town of Hudson v. Gate City Development Corp.*, 139 N.H. 606 (1995), construing RSA 80:39, which contains the same language as RSA 80:78, is instructive as it confirms the legislature may prescribe a period beyond which a former owner may not recover a tax deeded property. The Court addressed Gate City’s claim that it had not received any notice of the tax sale or tax deed, as follows:

This incontestability provision is therefore conclusive against the alleged lack of notice here, provided the statute is itself not violative of due process. *See Saranac Land & Timber Co. v. Comptroller of N.Y.*, 177 U.S. 318, 330, 331, 20 S. Ct. 642, 647-48, 44 L.Ed. 786 (1900) (tax deed statute of limitations bars action to assert title provided a reasonable time is given to assert the right); *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 423, 464 A.2d 288, 294 (1983) (legislature has power to enact statute of limitations which prescribes a reasonable time within which a party may assert a right).

*Id.* at 608. Further, the time period in which taxpayers may assert their rights in tax deed cases:

is like any other statute of limitations. It is not affected by what the rights of the landowner were. Whatever they were, whatever may have been the defects in the proceedings of which they are the consummation, cannot now be disturbed.

*Town of Hudson*, 139 N.H. at 609 (quoting *Saranac Land & Timber Co. v. Comptroller of N.Y.*, 177 U.S. 318, 330 (1900)). Simply put, *Gate City* was deprived of its property without compensation and without notice, but having failed to timely challenge the tax deed, its appeal was dismissed.

In the case of *J.E.D. Associates, Inc. v. Town of Atkinson*, 121 N.H. 581, 584 (1981), the Court considered a subdivision regulation that required every developer of a subdivision to convey 7.5% of the total acreage of the proposed project to the Town. The Court characterized the regulation as “an out-and-out plan of extortion,” and set it aside as “unconstitutional.” In 1979, the defendant in *Town of Auburn v. McEvoy*, 131 N.H. 383 (1988), had been subjected to the same sort of ordinance. She became aware of the *J.E.D. Associates* decision and demanded a return of her property. Dismissing the claim, the Court ruled that even a constitutional objection to the enforcement of a subdivision regulation is subject to the 30 day period of limitation in RSA 677:15. The Court overruled *J.E.D. Associates* to the extent that it “may be read to exempt constitutional property claims from the demands of the appellate process as limited by RSA 677:15.” *Town of Auburn* 131 N.H. at 388. Perhaps more importantly, the Court observed that exempting a constitutional claim from the statutory process “would be justifiable only if the appeals period of RSA 677:15, I [30 days] imposed an unreasonable restriction on the assertion of constitutional property rights.” *Id.* No such claim is presented here. Thus, if the 30 day limitation period imposed on the right to challenge the unconstitutional taking of property in *Town of Auburn v. McEvoy* satisfies constitutional standards, it is difficult to discern how three years is constitutionally suspect.

**V. RSA 80:89, VII MUST BE READ IN THE CONTEXT OF THE ENTIRE STATUTORY SCHEME.**

There are numerous steps that taxpayers may take under the present statutory scheme to protect their interests. RSA 72:37-b provides a real estate exemption for qualifying disabled individuals. RSA 72:38-a

provides a tax deferral for qualifying disabled individuals. Plaintiff could have sought an abatement as a result of inability to pay the tax levy, recently reaffirmed in *Carr v. New London*, 170 N.H. 10 (2017). There is a wide array of credits and exemptions available to citizens who may be unable to pay all or a portion of their real estate taxes. *See, e.g.*, RSA 72:36-a (disabled veterans); RSA 72:37 (exemption for the blind); RSA 72:38-b (exemption for hearing impaired); RSA 72:39 (elderly exemptions).

Following the tax levy, a taxpayer has three years, which are the subject of numerous notices, to redeem property subject to unpaid taxes. This time period provides the taxpayer with an opportunity to marshal his or her resources, such as borrowing funds to avoid a deed of the property. After the property is deeded, a former owner is then afforded up to three additional years to marshal his or her resources to repurchase the property. It is at this point in the process that a former owner must realize that the expenses associated with a particular property may exceed his or her ability to support them.

There is nothing that would inhibit the former owner from taking legitimate steps to protect his or her interests. Options were available to the plaintiff. It would be a simple matter for a former owner to contract with a third party, whereby the third party would place in escrow a purchase price for the property which the former owner could use to repurchase the property from the town. The former owner would then execute a deed to the third party, and receive the balance of the funds in the escrow account. APP, p. 213 (Trial Exhibit A) represents an alternative approach. That document reveals a former owner entered into an agreement with the town,



which allowed the former owner to make improvements to the property and market it. In this way, the former owner was able to secure the full market value for the property, rather than what might have been realized by an auction.

Here it is worth noting that the plaintiff had in excess of three years to repurchase the property. He chose to attempt to negotiate a lower repurchase price, but failed to provide financial information requested by the Town. APP, p. 44 (MSJ, Exhibit J (p 2); *cf. Ansara v City of Nashua*, 118 N.H. 879 (1978) (“plaintiffs who claim that they are entitled to an abatement because of poverty and inability to pay, and who have some equity in their homes, must show that it is not reasonable for them to relocate, refinance or otherwise obtain additional public assistance. Without such a showing, the equities do not balance in the plaintiff’s favor.”). In another case that was before the Town Council at the very same time, the former owner and Town worked out a tax repayment agreement after the financial information was provided. *See* RSA 80:80, VI (tax repayment agreements); APP, p. 52-53 (MSJ, Exhibits L) and APP, p. 45 (MSJ Exhibit J (Stefanis)). Moreover, the question presents itself: which is the greater equity, an immediate sale by auction after 90 days, RSA 80:89, I, or providing three years to the former owner to marshal his or her resources?

Where a taxpayer fails to intervene at any point in the tax collection process, the process will, step-by-step proceed to its inexorable conclusion. Having failed to heed all of the notice prior to the tax deed, and failed to



take any steps thereafter to recover the property, plaintiff has no basis to complain.

### **CONCLUSION**

For the foregoing reasons, the trial court's order holding RSA 80:89 unconstitutional should be set aside and the power of the courts to vindicate a former owner's right to compel a sale of tax deeded property or secure the proceeds of a sale within three years of the recording of the tax deed should be vindicated.

### **REQUEST FOR ORAL ARGUMENT**

Town of Bedford requests the opportunity to present oral argument, not to exceed 15 minutes, to be presented by Barton L. Mayer, Esquire.

### **CERTIFICATION OF COMPLIANCE WITH WORD LIMIT**

I hereby certify that the within brief complies with Sup. Ct. R. 26(7) and contains 8,655 words, excluding cover page, table of contents, table of authorities, statutes, rules and appendix.

Respectfully submitted  
TOWN OF BEDFORD  
By Their Attorneys  
UPTON & HATFIELD, LLP

Dated: November 1, 2019

/s/ Barton L. Mayer  
Barton L. Mayer NHBA #1644  
10 Centre Street, PO Box 1090  
Concord, NH 03302-1090  
(603) 224-7791  
[bmayer@uptonhatfield.com](mailto:bmayer@uptonhatfield.com)

Michael P. Courtney NHBA #21150  
10 Centre Street, PO Box 1090  
Concord, NH 03302-1090  
(603) 224-7791  
[mcourtney@uptonhatfield.com](mailto:mcourtney@uptonhatfield.com)

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was this date forwarded to Corey Belobrow, Esquire, Bernard Campbell, Esquire, Stephen Buckley, Esquire and Richard Polonsky, *Pro se*.

/s/ Barton L. Mayer  
Barton L. Mayer

**TRIAL COURT ORDER**

**THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
SUPERIOR COURT**

Hillsborough Superior Court Northern District  
300 Chestnut Street  
Manchester NH 03101

Telephone: 1-855-212-1234  
TTY/TDD Relay: (800) 735-2964  
<http://www.courts.state.nh.us>

May 15, 2019

**FILE COPY**

Case Name: **Richard Polonsky v Town of Bedford**  
Case Number: **216-2015-CV-00388**

You are hereby notified that on May 14, 2019, the following order was entered:

RE: COURT ORDER:

See copy of Order attached. (Nicolosi, J.)

W. Michael Scanlon  
Clerk of Court

(923)

C: Richard Polonsky; Barton L. Mayer, ESQ; Corey M. Belobrow, ESQ



THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

Richard Polonsky

v.

Town of Bedford

Docket No. 216-2015-CV-00388

**ORDER**

The instant action arose out of the Town of Bedford's conveyance of plaintiff's property to the Town on May 31, 2011 by tax deed after he failed to pay his real estate taxes. The Supreme Court in Polonsky v. Town of Bedford, 171 N.H. 89 (2018) resolved the legality of the Town's title and remanded the case to this court. The Town now wishes to sell the property, which appears to be in both parties' best interests. Should the parties be unable to reach agreement, the Town may petition the court to lift the injunction that was issued by agreement at the start of the case.

The central issue before the court on remand is whether the statutory scheme, which, pursuant to RSA 80:90, VII, relieves a municipality, three years after the recording of the tax deed, of its duty to distribute to the former owner the "excess proceeds" of a sale, is unconstitutional under Part I, Article 12 of the NH Constitution.

By way of background, plaintiff inherited the property located at 21 Wentworth Drive in Bedford, New Hampshire in 2008. Plaintiff thereafter became delinquent on his property taxes and, in February 2009, the Town mailed him a notice of impending tax lien. The Town issued tax liens in 2009 and 2010 and, following plaintiff's continued non-payment, the Town acquired the property via tax deed on May 31, 2011. Between



2013 and 2015, plaintiff made multiple offers to repurchase the property through payment of the back taxes only—not the corresponding costs and penalties—and the Town declined each offer. Being unable to reach agreement, Mr. Polonsky filed this lawsuit challenging the validity of the Town's title and alternative to recover the excess proceeds from any sale. At the time of the tax deed, the property had substantial value over the amount due the town.

The New Hampshire Supreme Court recently held that the express language of RSA 80:89 demonstrates that "the legislature did not intend to allow a former owner to recover excess proceeds from a municipality after the three-year period has lapsed." Polonsky v. Town of Bedford, 171 N.H. at 96. Here, it is undisputed that the Town acquired the property via tax deed on May 31, 2011, and, because the property was not sold, the three-year period for Mr. Polonsky to recover excess proceeds has lapsed. The court must determine whether applying RSA 80:89 in the instant case, which would result in plaintiff being deprived of a \$300,000 property for a \$90,442.42 tax lien, without compensation, constitutes an unconstitutional taking, as plaintiff contends. The Town counters in opposition that the legislature, via RSA 80:89, placed reasonable restrictions on a former owner's ability to challenge a government taking and provided an adequate opportunity for a former owner to repurchase. It faults plaintiff for either failing to repurchase the property or to seek equitable relief from the court to compel a sale before the three-year period lapsed.

"Part I, Article 12 of the New Hampshire Constitution provides that 'no part of a man's property shall be taken from him, or applied to public uses, without his consent, or that of the representative body of the people.'" Thomas Tool Servs., Inc. v. Town of



Croydon, 145 N.H. 218, 220 (2000), as amended (Feb. 1, 2001). "This provision requires just compensation in the event of a taking." Id. "Because the right to property is a fundamental right in our State, all subsequent grants of power, including the taxing power, are limited as to how they adversely affect it." Id.

The Supreme Court identified two preliminary questions to be addressed on remand: 1. "whether the plaintiff has a vested property right that was taken from him without his consent[?]" and [2.] "if so, when [did] the taking occur[?]" Polonsky v. Town of Bedford, 171 N.H. at 97. The court answers the first question in the affirmative. There is no dispute Mr. Polonsky was the record owner of the home with significant equity in it at the time it was deeded to the Town without his consent. Secondly, again without dispute, the court finds the taking occurred when the tax deed was issued and no compensation was received by Mr. Polonsky. At that point, although he had a right to repurchase and to excess proceeds of a sale should it be sold within the three-year period, the statutory scheme allows the Town to utilize the property, after the tax deed issues, as fee owner, including leasing or encumbering the property or retaining it forever. RSA 80:91. Mr. Polonsky's right to repurchase is more akin to an option to purchase, without any right to enjoy, encumber, lease or convey the real estate.

The court now turns to the question of whether the current statutory scheme is constitutionally offensive. The court notes the statutory scheme contains no provision for a former owner to obtain a sum representing the difference between the fair value of the property and what the Town is due, nor does it provide a mechanism to compel the Town to sell. In Thomas Tool Services, the Supreme Court held that the then-alternative tax lien procedure, which permitted the Town to keep a former owner's



property without regard to its equity in it, violated the takings clause. Id. In that case, the Town of Croydon acquired Thomas Tool's property for \$370.26—the amount of the tax lien on the property. Id. This was despite Thomas Tool having paid at least \$65,000 for the property, an amount substantially greater than the tax lien. Id. In holding the procedure unconstitutional, the Supreme Court observed that the amount of surplus value the Town would realize would result “in an unduly harsh penalty.” Id.

This concern regarding government takings without just compensation was previously raised by Justice Horton in his concurrence in First NH Bank v. Town of Windham, 138 N.H. 319 (1994). Although the majority decided the case on due process grounds, Justice Horton took the time to analyze the takings issue, explaining that:

[He] would hold that the statutory alternative tax lien procedure is constitutional only if it is read to provide for taking of the taxable property only to the extent of the lien. Following the tax lien deed for a period not barred by laches, I would permit an interested party, owner, mortgagee, attaching creditor, mechanic's lien holder, or other party having rights in the deeded real estate to petition in equity for an accounting by the taxing authority and for the return, in priority and as equitable, of a sum equal to the excess of the land value, at the time of taking, over the amount of the taxes and charges accrued at taking. Such a construction, combined with supplementary procedure, would permit the statutory procedure to withstand constitutional challenge and would provide for collection of taxes properly due and for the integrity of titles conveyed by tax lien deed.

Id. at 332 (Horton, J., concurring). The Town contends that amended RSA 80:89, which post-dates First NH Bank, addressed Justice Horton's concerns, because it set a reasonable period, no different from a statute of limitations, during which a former owner could repurchase the real estate or appeal to the court to exercise its equitable powers to compel a sale. The court disagrees the right to repurchase satisfies the concern, or



that a motion to compel a sale would be almost automatically granted by a court in equity, as Town counsel contends. First, even if a property owner knew to seek equitable relief, forcing a sale would be directly contrary to statute. RSA 80:91 reads: "Nothing in this chapter shall obligate a municipality to dispose of property acquired by tax deed, except as provided in RSA 80:89. RSA 80:89 contains no duty on the part of the municipality to sell, but rather sets out a procedure should the municipality decide to sell the property within the three-year period for sale and corresponding duty to distribute excess proceeds. Gordonville Corp. N.V. v. LR1-A Ltd. P'ship, 151 N.H. 371, 374 (2004). Moreover, the statute provides no mechanism for compensation of the former owner during or after the three-year period in the event there is no sale. Although the legislature could have written the law to provide a time period in which a former owner must demand just compensation or a sale, after which the former owner's rights would be lost, it did not. The legislative fix, therefore, was partial at best.

The court finds no opportunistic motive or misconduct on the part of the town of Bedford; nonetheless, the scheme in place allows a municipality to receive a benefit beyond what it is entitled by delaying a sale or retaining a property for its use whatever its motive. Although RSA 80:89 expressly creates a statutory right for the former owner to repurchase his or her property and a detailed process to do so, for one who is unable to marshal the funds to pay the taxes, interest, costs and penalties, the right to repurchase, without a corresponding right to compensation in the event no sale takes place, is hollow. Likewise, the fact that Bedford and other towns have been or might be reasonable in their negotiations with former owners for the sale to others or repurchase of a tax deeded property does not cure the deficiency. Here, the Town has not chosen



to compensate Mr. Polonsky for his remainder interest in the property, Mr. Polonsky has not paid what is owed and repurchased the property, and the parties have been unable to reach a mutually acceptable alternative arrangement.

The Town argues the statutory scheme is not unconstitutional because a former owner has an implied right to compel the sale of the property within three years of the tax deeding that can be found in the language of RSA 80:89.<sup>1</sup> The Town points to the statute's imposition of a duty on the municipality to distribute the excess sale proceeds to the former owner and contends that the creation of such a duty creates a corresponding right on behalf of the former owner of compelled sale. However, the municipality's duty with regard to excess proceeds is a contingent one that does not arise until a sale takes place, a decision left wholly to the discretion of the Town. Therefore, because the municipality's duty to distribute the excess proceeds is not triggered until the property is actually sold, it stands to reason that any corresponding right of the former property owner does not materialize until the same event occurs. Thus, there is no right to protect.

The Town finally argues that plaintiff is not entitled to an equitable order because he does not come to the court with clean hands. It asserts plaintiff willfully ignored his obligations, including failing to pay his taxes, take any steps towards repurchasing the property, or coming to a deal with the Town. However, the court is unpersuaded by this argument. Under the statutory scheme, a former owner who does not pay his or her

---

<sup>1</sup> During the hearing, there was some discussion initiated by the court about whether a person in plaintiff's shoes could seek an equitable remedy comparable to partition, which might force a sale or payment to a former owner the fair value of his interest in the property. However, upon further reflection, the court concludes that partition is not available, because, as discussed above, once the tax deed issues, the former owner has no ownership or equitable right to partition. *see First Bank*, 138 N.H. at 323 ("[T]he issuance of the [tax] deed annihilates the previous owner's interest in the property . . . [The Town] takes a 100 percent common and undivided interest in the property . . .").



taxes and who also chooses not to repurchase his or her property suffers the loss of the property, but is still entitled to the excess proceeds of the municipality's sale of the property, as long as the sale occurs within three years of the date of the tax deed. See RSA 80:89. His same actions do not preclude relief. Therefore, the court finds plaintiff's failure to timely pay his taxes, repurchase his former property or avail himself of tax relief does not preclude him from seeking equitable relief from this court.

Accordingly, because any right of the former property owner to recover excess proceeds under RSA 80:89 is contingent upon the municipality selling the former owner's property and the former owner is otherwise unable to compel the municipality to sell the property or recover an amount representing the difference between the property value and the amount owed to the town, the court finds the statute violates the takings clause of the New Hampshire Constitution. To remedy the violation, the court holds that Mr. Polonsky is entitled to the excess proceeds of the sale after payment of the amount owed to the Town.

Having determined plaintiff is entitled to recover any excess proceeds that result from the sale of his former property, the court must determine what, if any, additional penalty should be assessed in calculating the excess. RSA 80:88, I provides that "the municipality's recovery of proceeds from the sale shall be limited to back taxes, interest, costs and penalty, as defined by RSA 80:90. The current version of RSA 80:90 (f), amended in 2016, provides for "[a]n additional penalty equal in amount to 10 percent of the assessed value of the property as of the date of the tax deed, adjusted by the equalization ratio for the year of the assessment." At the time the Town acquired plaintiff's property via tax deed in 2011, RSA 80:90 provided for a 15 percent penalty.



The 2016 amendment included an additional change to the statutory scheme. Prior to the 2016 amendment, the penalty was assessed upon a municipality's transfer of the tax-deeded property, regardless of whether the former owner exercised the right to repurchase under RSA 80:89 or upon sale. RSA 80:89, II, however, now provides an exception for former owners who repurchase. It reads:

any former owner of the property[,after receiving notice of the terms of the offering for sale and right to repurchase from the municipality,] may give notice [] of intent to repurchase the property from the municipality, and stating that such owner is ready, willing and able to pay all back taxes, interest, costs and penalty, as defined in RSA 80:90, except that if the property is the former owner's principal residence, or was the former owner's principal residence at the time of the execution of the tax deed under RSA 80:76, the additional penalty under RSA 80:90, I (f) shall not apply.

(Emphasis added).

Before oral argument, the Supreme Court remanded the case to the trial court for a decision on two points:

(1) the impact, if any, of the statutory changes contained within the laws 2016, chapter 37, upon [the trial court's] analysis of the party's rights and obligation, and (2) whether such statutory changes may be applied in this case consistent with part 16[,] article 23 of the New Hampshire Constitution.

Super. Ct. Order, January 24, 2017. The trial court (Ruoff, J.), after briefing, decided the 2016 penalty exception for former owners who repurchased their tax-deed property had no application to this case, because Mr. Polonsky did not exercise his right to repurchase and the option has passed. With regard to the percentage change, the trial court found, upon sale, the 10% penalty would apply without contravening part 16, article 23 of the state constitution, which prohibits the retroactive application of certain

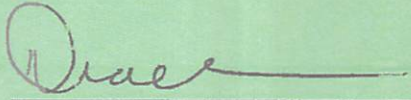


laws. Judge Ruoff reasoned that, because the relevant point in time for the calculation of the penalty is upon sale, which has not yet occurred, the law in effect at the time of sale would apply. Although the Supreme Court chose not to review these rulings on appeal, they remain the law of the case and will not be revisited here.

The remaining question is whether the imposition of the RSA 80:90 penalty would constitute double taxation as Mr. Polonsky contends. The court concludes it would not. A real estate tax serves the purpose to raise funds to pay for services provided by a municipality to citizens and property owners. A penalty, on the other hand, exists to encourage tax payers to meet their legal obligations and comply with the law. With regard to RSA 80:90, considering a typical sales broker's fee, the legislature reasonably determined a 10% penalty was appropriate to deter a property owner from using the alternative lien process as an alternative to a private sale process.

**SO ORDERED.**

5/14/2019  
Date

  
\_\_\_\_\_  
Diane M. Nicolosi  
Presiding Justice