

STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2019-0339

Richard Polonsky

v.

Town of Bedford, N.H.

---

**REPLY 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 CONTENTS.....	2
TABLE OF AUTHORITIES .....	3
I. INTRODUCTION .....	4
II. APPELLEE FAILED TO PRESERVE ISSUES PRESENTED IN HIS BRIEF, AND THEREFORE THOSE LEGAL THEORIES MUST BE DISMISSED .....	5
A. The Trial Court Ruled That One Taking Occurred, and that Taking Took Place at the Time of The Execution of the Tax Deed. Plaintiff Did Not Appeal That Ruling, But Now Seeks to Raise a New Issue, Alleging “Two Takings.” .....	6
B. Appellee’s Estoppel Claim is Barred by the Doctrine of <i>Res Judicata</i> , Having Been Resolved by the Trial Court in Polonsky I, and Was Not Raised at the Hearing on the Merits on Remand. ....	7
C. Appellee Failed To Raise His Current Theory That RSA 80:89 Violated Part I, Article 14 of the New Hampshire Constitution.....	8
III. A TAKING OF PROPERTY OCCURS AT THE TIME OF THE EXECUTION OF THE TAX DEED, WHICH IS MANIFESTED BY THEACCEPTANCE OF THE DEED BY THE MUNICIPALITY, WITHOUT PAYING COMPENSATION .....	8
IV. APPELLEE’S BREACH OF TRUST THEORY SUPPORTS THE TOWN’S POSITION THAT A FORMER OWNER MAY ENFORCE HIS OR HER RIGHTS TO EXCESS PROCEEDS BY COMPELLING SALE OF THE PROPERTY .....	9
V. THE LIMITATIONS PERIOD PRESCRIBED IN RSA 80:89, VII DOES NOT VIOLATE PART I, ARTICLE 14 OF THE NEW HAMPSIRE CONSTITUTION .....	10
VI. APPELLEE WAS ON NOTICE OF THE THREE YEAR LIMITATIONS PERIOD PROVIDED IN RSA 80:89, VII .....	13
CERTIFICATION OF COMPLIANCE WITH WORD LIMIT .....	14
CERTIFICATE OF SERVICE .....	14

## **TABLE OF AUTHORITIES**

### **Cases**

<i>Appeal of Silva</i> , 172 N.H. 183, 190 (2019).....	8
<i>Burke v. Pierro</i> , 159 N.H. 504, 513-14 (2009) .....	6
<i>CBDA Dev., LLC v. Town of Thornton</i> , 168 N.H. 715, 726 (2016) .....	6
<i>First NH Bank v. Town of Windham</i> , 133 N.H. at 332 .....	10
<i>First NH Bank v. Town of Windham</i> , 138 N.H. 319, 323 (1994) .....	6
<i>In the Matter of Mannion</i> , 155 N.H. 52, 54 (2007) .....	6
<i>Lennartz v. Oak Point Assoc.s, P.A.</i> , 167 N.H. 459, 464 (2015) .....	13
<i>Marshall v. Keene State College</i> , 147 N.H. 215, 218 (2001) .....	5
<i>Phetteplace v. Town of Lyme</i> , 144 N.H. 621 (2000).....	12
<i>Polonsky v. Town of Bedford</i> , 171 N.H. 89, 97-98 (2018) .....	5
<i>State v. Mouser</i> , 168 N.H. 19, 26 (2015) .....	5, 7
<i>Sullivan v. Town of Hampton Board of Selectmen</i> , 153 N.H. 690, 695 (2006) .....	5
<i>Thomas Tool Service, Inc. v. Town of Croydon</i> , 145 N.H. 218 (2000) .....	9
<i>Town of Auburn v. McEvoy</i> , 131 N.H. 383 (1988) .....	11
<i>Town of Hudson v. Gate City Development Corp.</i> , 139 N.H. 606, 609 (1995) ....	11
<i>Wise Shoe v. Exeter</i> , 119 N.H. 700 (1979) .....	12
<i>Yager v. Clauson</i> , 169 N.H. 1, 9-10 (2016) .....	5

### **Statutes**

RSA 677:15.....	11
RSA 80:78.....	12
RSA 80:88-91 .....	9, 11, 13
RSA 80:89.....	5, 7, 8
RSA 80:89, VII .....	11, 12, 13
RSA 80:91 .....	6

### **Other Authorities**

Part I, Article 12 of the New Hampshire Constitution .....	4, 11
--	-------

## **I. INTRODUCTION**

This case was initiated by a complaint in Superior Court in which the Appellee presented the following legal theories:

- Count I – Violation of Tax Lien and Tax Deed Procedural Statutes. Town Appendix, Volume II, p. 83.
- Count II – The Tax Sale Will Violate RSA 80:88 and Part I, Article 12 of the New Hampshire Constitution as applied. *Id.*, p. 84.
- Count III – The Town is Estopped from Denying Polonsky’s Right to Repurchase the Property. *Id.*, p. 85.
- Count IV – The Town’s Failure to Give Polonsky Notice of the Expiration of the Right to Repurchase and Right to Proceeds of a Tax Sale Under RSA 80:88 Violated His Right to Due Process Under the New Hampshire Constitution as applied. *Id.*, p. 85.
- Count V – The Penalty Provided For in RSA 80:88-90 Violates Part I, Article 12 of the New Hampshire Constitution On Its Face. *Id.*, p. 87.

The Trial Court disposed of all of Appellee’s allegations that the Town violated the tax lien deed procedural statutes, ruling the Town had satisfied all of the statutory prerequisites to the deeding of the property. Appellee Appendix, pp 49-53 (Order, pp. 4-8). Likewise, the Trial Court rejected Appellee’s estoppel theory. *Id.* at 55 (p. 10) and due process theory. *Id.* at 56 (Order, p. 11).

Appellee appealed the Trial Court’s decision, but this Court affirmed the trial court’s decision in all respects, except its construction of the statutory scheme, and remanded the matter to the trial court solely to consider the “takings”

issue under Part I, Article 12 of the New Hampshire Constitution. *Polonsky v. Town of Bedford*, 171 N.H. 89, 97-98 (2018) (hereinafter “Polonsky I”). Appellee did not seek reconsideration.

On remand, the trial court ruled that RSA 80:89 violated Part I, Article 12 of the New Hampshire Constitution, and the Town appealed. Appellee did not file an appeal.

## **II. APPELLEE FAILED TO PRESERVE ISSUES PRESENTED IN HIS BRIEF, AND THEREFORE THOSE LEGAL THEORIES MUST BE DISMISSED**

The New Hampshire Supreme Court ordinarily reviews issues on appeal only if they were first properly presented to the trial court. “The purpose underlying the preservation rule is to afford the trial court an opportunity to correct any error it may have made before those issues are presented for appellate review.” *State v. Mouser*, 168 N.H. 19, 26 (2015) (quotation omitted). This ruling is significant not only to ensure process fairness – affording each party the opportunity to articulate the rationale supporting each position – but also to ensure accuracy in result – avoiding appellate review on an incomplete record. This case illustrates the point well, as the Court remanded this case to the trial court for consideration of the takings issue, which had not been addressed.

To be preserved for appeal, substantive issues must be raised during trial in a timely manner. See, *Sullivan v. Town of Hampton Board of Selectmen*, 153 N.H. 690, 695 (2006). For example, a party cannot argue one theory of recovery at trial and then, after losing, argue a different theory on appeal. See, *Yager v. Clauson*, 169 N.H. 1, 9-10 (2016); *Marshall v. Keene State College*, 147 N.H. 215, 218 (2001).

“The appealing party bears the burden of demonstrating that it raised its issues before the trial forum.” *In the Matter of Mannion*, 155 N.H. 52, 54 (2007). If an issue is not included in a Notice of Appeal or later added, briefing the issue will not preserve it, and the court may disregard the issue, regardless of its merits. See, e.g., *CBDA Dev., LLC v. Town of Thornton*, 168 N.H. 715, 726 (2016). In this case, appellee did not file an appeal from the trial court’s rulings. Nor does he identify in any portion of the record having presented several theories now relied upon in his brief. He has failed to preserve numerous issues for appellate review.

**A. The Trial Court Ruled That One Taking Occurred, and that Taking Took Place at the Time of The Execution of the Tax Deed. Plaintiff Did Not Appeal That Ruling, But Now Seeks to Raise a New Issue, Alleging “Two Takings.”**

The Trial Court found “the taking occurred when the tax deed was issued and no compensation was received by Mr. Polonsky.” Town Brief, p. 43 (Order, p. 3). Such is consistent with this Court’s rulings that the taking occurred “upon the termination of the right of redemption and the execution of the tax deed.” *First NH Bank v. Town of Windham*, 138 N.H. 319, 323 (1994); *Burke v. Pierro*, 159 N.H. 504, 513-14 (2009); see also, RSA 80:91 (“after the execution of a tax deed, the municipality may treat the property in all respects as the fee owner thereof.”). Appellee candidly admits in his Brief at pp. 20-21, “this ruling is only partially correct.” (emphasis added).

Yet appellee did not appeal the trial court’s decision. Nevertheless, he now seeks to argue a new theory, that “there were in fact two takings.” Appellee Brief, p. 18. This issue was not presented in his complaint, nor in

his original brief. Indeed, he cites no portion of the record to suggest this issue was ever presented to the trial court. “The purpose underlying the preservation rule is to afford the trial court an opportunity to correct any error it may have made before those issues are presented for appellate review.” *State v. Mouser*, 168 N.H. at 26 (quotation omitted). Appellee failed to preserve this issue for appellate review.

Moreover, the trial court’s decision is correct on the merits, and is supported by this Court’s decisions.

**B. Appellee’s Estoppel Claim is Barred by the Doctrine of *Res Judicata*, Having Been Resolved by the Trial Court in Polonsky I, and Was Not Raised at the Hearing on the Merits on Remand.**

Appellee argues at pp. 32-33 of his Brief that the Town sent a notice of impending sale, upon which he relied to his detriment. However, the trial court expressly ruled on this issue, noting “even though the Town notified plaintiff after offering the property for sale, plaintiff suffered no prejudice and was afforded every opportunity to repurchase the property as contemplated by RSA 80:89. Because the purpose of the statute was ultimately achieved, the deficient notice does not warrant invalidation of the proceedings.” Appellee Appendix, p. 51 (Order, p. 6). The trial court similarly rejected Appellee’s second estoppel claim, based upon the second notice provided by the Town, observing, “Plaintiff has failed to establish any detrimental reliance on the Town’s second notice.” *Id.* at p. 55.

“The Doctrine of *Res Judicata* prevents parties from re-litigating matters actually litigated and matters that could have been litigated in a previous action...the Doctrine applies when three elements are met: (1) the

parties in the instant action must be the same as the parties in the previous action (or must be in privity with them); (2) the ‘cause of action’ must be the same; and (3) the previous action must have resulted in a ‘final judgment on the merits.’” *Appeal of Silva*, 172 N.H. 183, 190 (2019). All of the elements of *res judicata* are satisfied here, and the plaintiff’s estoppel claims are barred.

**C. Appellee Failed To Raise His Current Theory That RSA 80:89 Violated Part I, Article 14 of the New Hampshire Constitution.**

An examination of Appellee’s complaint reveals only one due process argument: inadequate notice. Appellee Appendix, p. 28. Nor was the issue raised in his reply brief in *Polonsky I*. On remand, this issue was not raised before the trial court, and Appellee makes no effort to identify in the record where it may have been addressed.

The appealing party bears the burden of demonstrating that it raised the issue before the trial forum. Having failed to raise this issue, it is barred.

**III. A TAKING OF PROPERTY OCCURS AT THE TIME OF THE EXECUTION OF THE TAX DEED, WHICH IS MANIFESTED BY THE ACCEPTANCE OF THE DEED BY THE MUNICIPALITY, WITHOUT PAYING COMPENSATION**

Appellee argues a taking occurred at the time the tax deed was executed, and again when compensation was not paid for the execution of the tax deed. Nevertheless, Appellee acknowledges, “the failure to sell the property made **the original taking by tax deed violative of the takings clause.**” Appellee Brief, p. 23 (emphasis added). This novel theory is



duplicative and circular. A taking occurred when the tax deed was executed for the very reason that no compensation was paid. If it were otherwise, this Court's decisions have been wrong. In *Thomas Tool Service, Inc. v. Town of Croydon*, 145 N.H. 218 (2000), this Court ruled the tax lien process represented a taking under Part I, Article 12 of the New Hampshire Constitution because no compensation was paid at the time of the execution of the tax deed. The Court expressly did not rule on the 1998 amendments, RSA 80:88-91, which provided the **remedy** for the unconstitutional taking that occurred at the time of the execution of the tax deed, as identified in *Thomas Tool*. See, Appellee Brief, pp. 23-24 ("RSA 80:88-80:91 will **remedy** the violation of takings clause where a property was taken under the authority of the tax lien statutes." (emphasis added)). A taking cannot occur under the New Hampshire Constitution unless there is no compensation, and that occurs at the time of the tax deed.

**IV. APPELLEE'S BREACH OF TRUST THEORY SUPPORTS THE TOWN'S POSITION THAT A FORMER OWNER MAY ENFORCE HIS OR HER RIGHTS TO EXCESS PROCEEDS BY COMPELLING SALE OF THE PROPERTY**

The parties are in agreement that former owners have "the **right** to receive excess proceeds." Appellee Brief, p. 23 (emphasis added). And the ability to compel a sale so as to enforce that "right" to received excess proceeds would be a "judicial **remedy**." *Id.* at p. 25 (emphasis added). At pages 33-38 of his Brief, Appellee argues that the enforcement of the right may be based on a breach of trust theory of recovery.

As for the breach of trust argument, there are essential elements missing. First, the Town becomes the owner upon the execution of the tax

deed, which annihilates the previous title. Second, the Town holds the property first and foremost for the benefit of the Town's taxpayers. Moreover, the terms of the Town's possession are set by the legislative policy that distribution of excess proceeds is subject to a three year period of limitations, which appellee acknowledges at page 36 of his Brief. ("Bedford's failure to sell the property continued from the date of the tax deed to three years from the date of the tax deed.").

Setting aside the fact that Appellee failed to raise or preserve this issue, his argument in fact provides further legal support for the Town's position that the former owner may vindicate his or her right to excess proceeds by petitioning a court in equity to compel the sale of the property. Cf. *First NH Bank v. Town of Windham*, 133 N.H. at 332, Horton. J. concurring ("I would permit an interested party...to petition in equity for an accounting by the taxing authority and further return, in priority and as equitable, of a sum equal to the excess of the land value."). Certainly, Justice Horton's concurring opinion formed the framework for the present legislative remedy embodied in RSA 80:88-91.

**V. THE LIMITATIONS PERIOD PRESCRIBED IN RSA 80:89, VII DOES NOT VIOLATE PART I, ARTICLE 14 OF THE NEW HAMPSHIRE CONSTITUTION**

In the event that the Court rules that Appellee did raise his new due process argument, the Town addresses the merits here. The predicate for this argument is his theory that there were two takings, which has been refuted *supra* at Section III. Appellee further argues that because the fundamental right to property ownership is involved, heightened scrutiny is

required. This argument fails to consider existing decisions of this Court which belie this argument.

First, it is worth noting that Part I, Article 12 of the New Hampshire Constitution, entitled “Protection and Taxation Reciprocal,” incorporates both the obligation to pay taxes and right to protection of private property on an equal footing. *Amicus* NH Tax Collector’s Association provides a sound factual and legal basis for concluding that the collection of taxes is a compelling State interest. However, such an analysis is unnecessary.

In *Town of Auburn v. McEvoy*, 131 N.H. 383 (1988), a case involving a taking of property, the Court considered whether a claim grounded in the Constitution was subject to the 30-day appeal period for challenging Planning Board decisions under RSA 677:15. Writing for the Court, Souter, J. concluded that a constitutional challenge to a planning board action does not enjoy favored status so as to be exempt from the 30 day appeal period. Furthermore, the Court could identify no reason to suppose the limitation period represented an unreasonable restriction on the assertion of constitutional property rights. *Id.* at 388; see also, *Town of Hudson v. Gate City Development Corp.*, 139 N.H. 606, 609 (1995) (time period in which taxpayers may assert their constitutional due process rights in tax deed cases under RSA 80:78 “is like any other statute of limitations. It is not affected by what the rights of the landowner were.”). Nor has Appellee proffered any reason to suppose the three year limitation period represents an unreasonable restriction on the assertion of constitutional property rights. 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*”). The language of RSA 80:89, VII is clear, Polonsky I at 95-96, and is consistent with the legislative policy to establish a *terminus* to the tax collection process.

Appellee agrees, and cites RSA 80:78 as the appropriate limitations period be applied in this case. It is notable that in *Town of Hudson v. Gate City Development Corp.*, *supra* Gate City was denied due process and thereby lost its property, having failed to receive any notices from the community of the execution of the tax deed. Nevertheless, the limitations period was applied to Gate City’s claim, and the case was dismissed. Here, the legislature has provided a very specific time period of three years, contained in RSA 80:89, VII. RSA 80:78 does not apply, as the Appellee acquiesced to the trial court’s ruling that all prerequisites necessary to the deeding of the property were satisfied. See, Polonsky I, Polonsky Brief, p. 4. Thus, neither the “validity of an execution of the real estate tax lien or any collector’s deed based thereon” is at issue in this case. RSA 80:78.

The limit on the remedy provided by the legislature in RSA 80:88-91 is not unlike the “deadline” imposed on the filing of an abatement. An abatement is justified where the assessment placed on a property is disproportionately higher in relation to its true value than other property in general. *Wise Shoe v. Exeter*, 119 N.H. 700 (1979). Simply put, the taxpayer is paying more than his or her fair share of taxes. Yet the failure to seek an abatement in a timely fashion bars the recovery of that excess payment to the municipality. *Phetteplace v. Town of Lyme*, 144 N.H. 621 (2000).

Prior to the execution of the deed, Appellee had up to three years to redeem his property, and received numerous notices of the existing tax

delinquency and the consequences thereof. Following the execution of the tax deed, Appellee had an additional three years to marshal his resources to repurchase the property. Alternatively, he could have conveyed his interest to a third party, Town Appendix, Volume II, p. 91 (agreement between Town of Canterbury and Walter relative to marketing property), pursued relief in Bankruptcy Court, or made other arrangements to repurchase the property. Having failed to do so, the limitations period provided in RSA 80:89, VII expired, bringing the necessary end to the tax collection process.

**VI. APPELLEE WAS ON NOTICE OF THE THREE YEAR LIMITATIONS PERIOD PROVIDED IN RSA 80:89, VII**

Appellee and Amicus New Hampshire Legal Assistance argue that because a former owner does not received notice of the three year period of limitation, RSA 80:89, VII is unconstitutional. Neither cite any law in support of this proposition, nor is there any. In *Lennartz v. Oak Point Assoc.s, P.A.*, 167 N.H. 459, 464 (2015), the Court concluded:

The plaintiff also argue[d] that she lacked notice of the application of the statute of repose to bar claims. We rejected this claim because every person is presumed to know the law and, therefore, to organize his or her conduct and affairs accordingly. The plaintiff then, is presumed to have known about the statute of repose and the statute of limitations prior to filing this case; she is also presumed to have known that claims must satisfy both the statute of repose and applicable statute of limitations. Any suggestion by the plaintiff to the contrary is, therefore, unavailing.

(Citations and quotations omitted).

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

I hereby certify that the within brief complies with Sup. Ct. R. 26(7) and contains 2,853 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

January 13, 2020

/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 Ovide M. LaMontagne, Esquire, Christina Martin, Esquire, Ruth Heintz, Esquire, Steven Tower, Esquire, and John F. Hayes, Esquire.

/s/ Barton L. Mayer  
Barton L. Mayer