

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0339

Richard Polonsky

v.

Town of Bedford, N.H.

BRIEF OF *AMICUS CURIAE*, NEW HAMPSHIRE MUNICIPAL ASSOCIATION
IN SUPPORT OF THE TOWN OF BEDFORD

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

NEW HAMPSHIRE MUNICIPAL
ASSOCIATION
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STATEMENT OF THE FACTS

The New Hampshire Municipal Association defers to the Statement of Facts and of the Case in the Briefs by the Town of Bedford and relies thereon.

SUMMARY OF THE ARGUMENT

RSA 80:88 and RSA 80:89 do entitle the prior owner to just compensation after a property is taken by tax deed, by requiring the municipality to remit all excess proceeds from the sale of the property to the prior owner. RSA 80:88, I. However, the right to claim those proceeds is subject to a reasonable statute of limitations. RSA 80:89, VII. Extinguishing a municipality's duty to give notice and distribute excess proceeds from the sale of tax deeded property three years after the date of the tax deed should also be considered reasonable and constitutional under pt. I, art. 12 of the New Hampshire Constitution.

In the circumstances of this matter, Bedford has adequately demonstrated through the stated legislative purposes of Laws 1998, ch. 238 that RSA 80:89, VII is substantially related to an important governmental interest. Considering the numerous tax delinquency notices provided to the Plaintiff by the Town under RSA Chapter 80, and Plaintiff's failure to act before the deadline imposed by RSA 80:89, VII, this sufficiently establishes he is guilty of laches. Consequently, this equitable doctrine ought to direct that in these circumstances RSA 80:89, VII is not unconstitutional as applied to the Plaintiff.

It was erroneous for the Trial Court to rule that Plaintiff's ability to recover excess proceeds was exclusively dependent on the Town selling the tax deeded property within three years of the tax deed where Plaintiff could have employed the protections of the federal bankruptcy code.

The time limitation on the recovery of excess proceeds is not only equitable, but it also properly accounts for the burden placed on all taxpayers when property taxes are unpaid, and properties must be taken by tax deed. The three-year limitation embodied in RSA 80:89, VII is constitutionally reasonable and provides sufficient procedural safeguards.

ARGUMENT

I. RSA 80:89, VII is a constitutionally reasonable time period limit on the just compensation that is due to former owners of tax deeded property

RSA 80:88 and RSA 80:89 do entitle the prior owner to just compensation after a property is taken by tax deed, by requiring the municipality to remit all excess proceeds from the sale of the property to the prior owner. RSA 80:88, I. However, the right to claim those proceeds is subject to a reasonable statute of limitations. RSA 80:89, VII.

Under RSA Chapter 80, the taking of property occurs when the tax deed is transferred to the select board and all property rights in the former owner are extinguished. *See, Burke v. Pierro*, 159 N.H. 504, 514 (2009) (issuance of a tax lien deed terminates previous owner's interest in the property). Although the prior owner's property rights are terminated upon transfer of the deed, the prior owner retains the right to be notified 90 days prior to the municipality offering the property for sale, and the right to repurchase the property, pursuant to the procedure and timelines set forth in RSA 80:89. Even if the prior owner does not exercise his right to repurchase after being notified, the property owner will receive compensation after the property is sold, in the form of excess proceeds from the sale of the property, after back taxes, interest, costs, and penalty, if applicable, are deducted. RSA 80:88.

This "right to recover" is not unlimited; instead, the prior owner's right of recovery is subject to a three-year statute of limitations. Such excess proceeds are the damages for the taking of the property, and the three-year limitation is consistent with RSA 508:4, which limits an action to recovery for damages in personal actions to three years.

The three year-limitation addresses the concerns raised by Justice Horton's concurrence in *First NH Bank v. Town of Windham*, 138 N.H. 319 (1994). There, Justice Horton explained that no unconstitutional taking would occur as long as a party that had rights in the real estate

had the right to 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.” *Id.*, 332. Importantly, however, he explained that this right to a return of excess proceeds was necessary only for a period not barred by laches. Since this Court has determined “that a court of equity in applying the doctrine of laches will follow substantially the analogy of the statute of limitations,” *see, Cote v. Cote*, 94 N.H. 372 (1947), the three-year limitation is an equitable period of time for the prior owner to receive the return of the excess proceeds.

When the Legislature adopted amendments to RSA Chapter 80 in probable response to Justice Horton’s concurring opinion in *First NH Bank*, the Legislative Statement of Intent recognized the need to prevent unjust enrichment of a municipality while at the same time retaining a sufficient statutory incentive for the taxpayer to redeem tax deeded property. Laws 1998, ch. 238. The balance achieved by RSA 80:89, VII should be deemed constitutional under N.H. Const., pt. I, art. 12 because it does sufficiently recognize the interest of the former owner in tax deed sale proceeds that exceed the amount of back taxes, interest, costs and penalties due the municipality. This is consistent with the direction taken by the United States District Court for the District of Columbia in *Coleman v. District of Columbia*, 70 F. Supp. 3d 58 (D.D.C., 2014).

In *Coleman*, the District Court refused to dismiss a claim for the loss of substantial equity occasioned by a property owner through the District of Columbia tax sale process. The District of Columbia local government had argued that prior United States Supreme Court decisions did not find an unconstitutional taking occurs when a property tax levy scheme results in the retention of excess equity by a municipality. After undertaking an analysis of prior takings

claims arising under the Fifth Amendment, the District Court drew the following conclusions based upon the United States Supreme Court decisions in *United States v. Lawton*, 110 U.S. 146 (1884) and in *Nelson v. City of New York*, 352 U.S. 103 (1956):

Nelson makes clear that a Takings Clause violation regarding the retention of equity will not arise when a tax-sale statute provides an avenue for recovery of the surplus equity. 352 U.S. at 109. *Lawton* makes clear that a Takings Clause violation will arise when a tax-sale statute grants a former owner an independent property interest in the surplus equity and the government fails to return that surplus. 110 U.S. at 149. The question Mr. Coleman's case presents is: What if the tax-sale statute does not provide a right to the surplus and the statute provides no avenue for recovery of any surplus? A property interest in equity could conceivably be created by some other legal source. In that circumstance, failure to provide an avenue for recovery of the equity would appear to produce a result identical to *Lawton*: Property to which an individual is legally entitled has been taken without recourse. The issue, then, is whether Mr. Coleman has a property interest in his equity and, if so, whether an unconstitutional taking of that property has been alleged.

70 F. Supp. 3d at 80 (footnote omitted).

It is probable that the *Coleman* Court would find that Laws 1998, ch. 238 is constitutional under the Fifth Amendment because it affords an adequate avenue for recovery of equity. The District of Columbia tax sale process provides that any surplus equity the homeowner has in his home is irrevocably lost unless the property is redeemed from tax sale within six months. *Coleman*, at 62. Unlike the District of Columbia statute at issue in *Coleman*, RSA 80:89, VII simply imposes a statute of limitation on the duty of a municipality to disgorge excess proceeds. Even prior to the tax deeding, the owner has two years after the lien is recorded to redeem the property from tax lien to avoid a tax deed. And even before the lien is recorded, there is a nearly year-long period after the owner fails to pay the property taxes prior to the recording of lien, giving the owner a full six years before all rights related to the property or excess proceeds are cut off. During this time period, the owner or prior owner receives multiple notices regarding the

tax delinquency and available options. By enacting Laws 1998, ch. 238, the Legislature sufficiently remedied the constitutional concerns Justice Horton had identified in *First NH Bank*. Therefore, extinguishing a municipality's duty to give notice and distribute excess proceeds from the sale of tax deeded property three years after the date of the tax deed should also be considered reasonable and constitutional under pt. I, art. 12 of the New Hampshire Constitution.

II. Judging the constitutionality of RSA 80:89, IV on an as-applied basis, Plaintiff's dilatory response to the tax deeding process permits denial of equitable relief.

The Trial Court was directed in *Polonsky v. Town of Bedford*, 171 N.H. 89, 97 (2018) (hereinafter *Polonsky I*) to determine whether the plaintiff had a vested property right that was taken from him without his consent, and, if so when the taking occurred. In its order dated May 14, 2019 the Trial Court ruled that Plaintiff, as record owner of 21 Wentworth Drive, Bedford, had his property taken without his consent when it was tax deeded to the Town on May 31, 2011. Bedford Notice of Appeal, page 6, 8 (hereinafter NOA). The Trial Court also found that Plaintiff received no compensation for this taking. NOA, page 3.

From *Polonsky I* and the Trial Court Order, as well as the brief by the Town, a fair summary of the dealings between Plaintiff and the Town of Bedford can be summarized as follows. Plaintiff inherited the property located at 21 Wentworth Drive in Bedford, New Hampshire in 2008. Plaintiff paid the first half property tax bill he received for the year 2008 but failed to pay any property taxes assessed since that time. Plaintiff was sent and disregarded the tax bills, notices of tax delinquency, and notices of impending liens for the second half of the year of levy 2008, and the years of levy 2009 and 2010, resulting in the issuance of notice of impending tax deed and, finally, execution of tax deed by the tax collector on May 31, 2011.

Immediately after the tax deed was issued Plaintiff took no steps to repurchase the property, and the Town took no action to sell it. In April 2013, the Bedford Town Manager contacted Plaintiff; that communication resulted in a meeting with the Town Council on June 12, 2013 where Plaintiff offered to pay the back taxes but asked the town to waive the penalties. This proposal was rejected by the Town. On December 17, 2013, the Town provided written notice to the plaintiff of his right to repurchase the property and the Town's intention to sell it, under the provisions of RSA 80:89. On or about May 31, 2014, the Town's statutory obligations under RSA 80:89, VII to pay excess proceeds, and the right of the Plaintiff to repurchase, terminated.

A. RSA 80:89, VII Should not be Declared Invalid Except Upon Inescapable Grounds

In reviewing a legislative act, it is necessary to presume that the statute is constitutional. Furthermore, a statute should not be declared unconstitutional and invalid except upon inescapable grounds. *Baines v. N.H. Senate President*, 152 N.H. 124, 133 (2005). There must be a clear and substantial conflict between the statute and the Constitution. A statute should not be construed to be unconstitutional where it is susceptible to a construction rendering it constitutional. *White v. Lee*, 124 N.H. 69, 77-78 (1983). A statute will not be declared void unless its invalidity is beyond reasonable doubt. *Hynes v. Hale*, 146 N.H. 533, 535 (2001).

B. RSA 80:89, VII is not unconstitutional "as-applied" to the Plaintiff

In the circumstances of this matter, Bedford has adequately demonstrated through the stated legislative purposes of Laws 1998, ch. 238, that RSA 80:89, VII is substantially related to an important governmental interest. *Cnty. Res. for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 762 (2007). Considering the numerous tax delinquency notices provided to the Plaintiff by

the Town under RSA Chapter 80, and Plaintiff's failure to act before the deadline imposed by RSA 80:89, VII, this sufficiently establishes he is guilty of laches. Consequently, this equitable doctrine ought to direct that in these circumstances RSA 80:89, VII is not unconstitutional as applied to the Plaintiff. *Compare, J.E.D. Assocs. v. Atkinson*, 121 N.H. 581, 584 (1981) (plaintiff not barred by laches in asserting a constitutional claim who had previously contested the constitutionality of a regulation).

Four factors are assessed to determine whether Plaintiff is barred from claiming RSA 80:89, VII is unconstitutional as applied due to laches. As stated in *Mailloux v. Town of Londonderry*, 151 N.H. 555, 562 (2004):

We consider four factors in our analysis: (1) the knowledge of the plaintiffs; (2) the conduct of the defendants; (3) the interests to be vindicated; and (4) the resulting prejudice.

For each of the years of levy 2008, 2009 and 2010 Plaintiff received tax bills, notices of tax delinquency and notices of impending lien. Due to his default in responding to these notices a notice of impending tax deed was sent 30 days prior to the May 31, 2011 tax deed and then six months before his redemption rights expired the Town send a notice on December 17, 2013 of the right to repurchase. Plaintiff's attempts to negotiate a lower repurchase price during the summer of 2013 demonstrate Plaintiff was fully aware of his rights. Furthermore, he did not negotiate in good faith with the Town because he did not provide requested financial records sought by the Town Council to assess the merits of his request for wavier of penalties.

Indeed, the Town Council could have granted Plaintiff more favorable terms for the repurchase of his property than as dictated under RSA 80:89. RSA 80:91 states that nothing in RSA 80:88 or RSA 80:89 would have precluded the Town Council from granting more favorable repurchase terms as indicated in RSA 80:80, VI. That latter statute would have allowed the

Town Council to retain a mortgage contingent on upon an agreed repayment schedule. Here, Plaintiff intentionally stymied a negotiated arrangement with the Town by not providing financial records, essentially terminating discussions until after the period of redemption had expired. Taking into account that the Town Council was obligated to ensure that all taxpayers meet their proportional tax obligations, a significant municipal interest that had to be vindicated, the resulting prejudice to the Town due to Plaintiff's dilatory conduct, sufficiently supports a finding of laches that precludes any conclusion RSA 80:89, VII is unconstitutional as applied to the Plaintiff. The Trial Court's decision to the contrary is unsupported by the evidence.

III. The Trial Court's ruling that RSA 80:89 is unconstitutional because Plaintiff could not compel the Town to sell his property failed to account for available judicial remedies, and thus was erroneous.

The Trial Court reasoned that RSA 80:89, VII is unconstitutional because the right to excess proceeds is only triggered upon sale of the property by the Town, and the Town had no duty to undertake sale of the property during the three-year redemption period. Pointing to RSA 80:91, the Trial Court asserted that trying to seek judicial assistance to force a sale of the property during the 3-year redemption period would be directly contrary to law. NOA at page 11.

Plaintiff was not legally prostrate upon the expiration of the three-year redemption period provided under RSA 80:89, VII. In *In re Stevens*, 374 B.R. 31 (Bankr. D.N.H., 2007) the New Hampshire Bankruptcy court ruled that a taxpayer's statutory interest in the repurchase of tax deeded property, including the right to recover excess proceeds, would become property of the bankruptcy estate on the petition date. This ruling establishes that the rights of a former owner of tax deeded property to excess proceeds is not contingent upon municipal action. Rather, prior

to the redemption period expiration on or about May 31, 2014, Plaintiff had a statutory right to repurchase his property, and that property right could have been preserved through a timely filing invoking the protections of the federal bankruptcy code. Contrary to the conclusion of the Trial Court, the Plaintiff had a property right that could have been protected through an appropriate bankruptcy proceeding.

IV. The Three-Year Limitation Sufficiently Balances the Burden on Taxpayers Against the Rights of Former Owners

The time limitation on the recovery of excess proceeds is not only equitable, but it also properly accounts for the burden placed on all taxpayers when property taxes are unpaid, and properties must be taken by tax deed. Municipalities are required by law to assess and collect property taxes, and they are similarly *required* by law, with only a few specific exceptions, to take a property by tax deed two years after the lien is recorded. RSA 80:76, I, II & II-a. These properties become liabilities, as the municipality takes on any number of responsibilities regarding each property taken, such as maintaining insurance, handling personal property left behind, or even dealing with occupants remaining on the property.

The trial court concluded that “the scheme in place allows a municipality to receive a benefit beyond what it is entitled by delaying a sale or retaining property for its use whatever its motive.” NOA at page 5. However, delaying the sale of tax deeded property in fact adds more burdens on municipalities, in addition to the uncollected real estate taxes. Municipalities are motivated to avoid the responsibilities and expense of owning these properties by disposing of tax-deeded properties. Most importantly, municipalities are motivated to return these properties to taxable status and to recoup unpaid taxes and lost costs—to the extent the sale of the property will even cover those costs.

Furthermore, the fear that municipalities will retain the properties' "full value" by holding on to them for three years directly contradicts the Legislature's findings when enacting Laws 1998, ch. 238. Jill Hadaway, then Legislative Chairman for the Tax Collector's Association, testified that "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," going on to say that "There are rarely any proceeds left after this three year time period."

Pt I, art. 12 of The New Hampshire Constitution does more than protect a person's property from being taken; it goes on to provide: "Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore *bound to contribute his share in the expense of such protection.*" *Starr v. Governor*, 148 N.H. 72, 74, (2002)(emphasis added). This Court has "interpreted pt. I, art. 12 to require that taxes be proportional and similarly situated taxpayers be treated similarly." *Starr*, 148 N.H. at 74; *See also, Sirrell v. State*, 146 N.H. 364 (2001); *Smith v. New Hampshire Dept. of Revenue*, 141 N.H. 681 (1997); *Opinion of the Justices*, 131 N.H. 640 (1989). Property owners that fail to pay taxes cause a disproportionate share of taxes to be borne by their fellow taxpayers, since these uncollected taxes impact the municipality's tax rate. This disproportionality is further increased by the costs that the municipality—the taxpayers—must bear to hold onto the property until it can eventually be sold. Municipalities often struggle to sell these properties at a price that can even recover all that is due to them, the sale itself being often restricted to sealed bids or auction. RSA 80:80, II. Finally, the time limitation on the prior owner's right to recover also recognizes the need for finality when adjudicating rights related to property. Justice Horton noted that limiting the time period that proceeds could be recovered would both "permit the statutory

procedure to withstand constitutional challenge” and “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.

The three-year limitation embodied in RSA 80:89, VII is constitutionally reasonable and provides sufficient procedural safeguards.

CONCLUSION

For the foregoing reasons, the *amicus curiae* respectfully joins in the Town of Bedford’s requests for relief.

Dated: November 1, 2019

Respectfully submitted,
NEW HAMPSHIRE MUNICIPAL ASSOCIATION

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STATEMENT OF COMPLIANCE

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with New Hampshire Supreme Court Rule 26. Further, this brief complies with New Hampshire Supreme Court Rule 16(11), as it does not exceed 9,500 words.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November, 2019 a copy of this BRIEF OF THE NEW HAMPSHIRE MUNICIPAL ASSOCIATION AS *AMICUS CURIAE* has been transmitted via the NH Supreme Court’s electronic filing system to the following: Barton L. Mayer, Esquire, Corey M. Belobrow, Esquire, Bernard H. Campbell, Esquire, and Mr. Richard Polonsky.

Date: 11/1/19

/s/ Stephen C. Buckley
Stephen C. Buckley