THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2019-0339

2019 TERM

OCTOBER SESSION

Richard Polonsky

Vs.

Town of Bedford

AMICUS CURIAE BRIEF FILED ON BEHALF OF NEW HAMPSHIRE TAX COLLECTORS ASSOCIATION (NHTCA) IN SUPPORT OF DEFENDANT TOWN OF BEDFORD

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STATEMENT OF THE CASE

This matter is before the Court for the second time.

The case began in June 2015 when Richard Polonsky filed a Complaint with the Hillsborough County Superior Court (Northern District) seeking relief from a tax deeding completed by the Town of Bedford for property formerly owned by the Plaintiff. See, Polonsky vs. Town of Bedford, Hillsborough County Superior Court, Northern District #216-2015-CV-0388. The Plaintiff requested the deeding be set aside on several procedural grounds. In the alternative, the Plaintiff argued that he was still entitled to a claim to any proceeds of any subsequent sale, notwithstanding that three (3) years had passed since the tax deed had been recorded. Finally, the Plaintiff challenged the constitutionality of the Statutory Penalty under RSA 80:90(I)(f).

In a decision on Cross Motions for Summary Judgment issued on May 12, 2016 (date of Clerk's Notice), the Trial Court (Ruoff, J.), overruled the various claims of procedural defect raised by the Plaintiff and upheld the constitutionality of the penalty under RSA 80:90(I)(f). However the Trial Court ruled that the statutory language in RSA 80:89(VII) did not necessarily preclude a property owner from claiming "excess proceeds" even after the three (3) year period under which a Town is obligated to bring an Interpleader. RSA 80:89(VII). This ruling by the Trial Court was ultimately appealed by both Parties to this Court in July 2016. Polonsky vs. Town of Bedford, N.H. Supreme Court 2016-0354.

In January of 2018 this Court issued an "*Amicus* Invitation" to parties to submit *Amicus* Briefs on the issue of the constitutionality of RSA 80:89(VII) if interpreted to bar a former owner from recovery of "excess proceeds" after three (3) years from recording

of the tax deed. The New Hampshire Tax Collectors Ass'n. submitted an *Amicus* Brief in response to the Court's invitation. In addition, the New Hampshire Municipal Association and New Hampshire Legal Assistance submitted *Amicus* Briefs.

On June 28, 2018 this Court issued its opinion in the matter of Polonsky vs. Town of Bedford, 171 N.H. 89 (2018) (hereinafter Polonsky I). In its opinion, this Court affirmed the Trial Court rulings that there was no defect in the process of notifying the Plaintiff regarding the intent to resell the property. This Court reversed the Trial Court's ruling that RSA 80:89(VII) could be interpreted to allow a claim for "excess proceeds" more than three (3) years following recording of the deed, citing the plain language of RSA 80:91. This Court remanded to the Trial Court the question of the constitutionality of RSA 80:89(VII) as determined by this Court. Finally this Court declined to rule on the Plaintiff's appeal on the issue of the validity of the statutory penalty under RSA 80:90(I)(f). Polonsky I, Id.

In response to the Remand, the Superior Court (Nicolosi, J.) issued an Order on May 14, 2019 (date of Clerk's Certificate) in which it ruled that RSA 80:89(VII), as interpreted by this Court in Polonsky I, would result in an unconstitutional taking under Part I, Article 12 of the New Hampshire Constitution. It reaffirmed the prior ruling that the penalty under RSA 80:90(I)(f) would not be unconstitutional.

By Notice of Appeal dated June 10, 2019, the Town of Bedford filed an Appeal with this Court on the Remand Order. The case was accepted by this Court on July 2, 2019 and assigned a new docket number. Polonsky vs. Town of Bedford, N.H. Supreme Court Docket #2019-339. On July 30, 2019 the New Hampshire Tax Collector's Ass'n. filed a Motion for Leave to File *Amicus* Brief which was granted. A Briefing Order was issued on

September 17, 2019. On September 30, 2019, the New Hampshire Municipal Ass'n. filed a Motion to Appear and file an *Amicus* Brief, which was subsequently granted. On October 9, 2019 the Town filed a Notice of an Automatic Extension to file Brief Under Rule 21(6-A). As *Amicus* in support of the Town, its Brief is due on November 1, 2019.

QUESTIONS PRESENTED FOR REVIEW

1. Does RSA 80:89(VII), which provides a former owner who loses property by tax deed a right to repurchase said property within three (3) years of the deed recording, and/or a right to recovery of excess proceeds on any resale by the municipality within said three (3) year period, but not beyond, result in an unconstitutional taking in violation of Part I Article 12 of the State Constitution where the Legislature has specifically crafted it as a remedy to address a taking issue as outlined in Thomas Tool Services, Inc. vs. Town of Croydon (145 N.H. 218 (2002)), and where a three (3) year general statute of limitations (RSA 508:4) would be applicable to causes of action for damages or injuries, and the statute operates as a reasonable penalty in light of the critical importance of payment of local real estate taxes?

2. If this Court should find a constitutional defect with the remedy constructed under RSA 80:89 (VII), should this Court make any such ruling "prospective only" consistent with its history of rulings in tax collection matters and where a prospective ruling is consistent with the analysis applied in Opinion of the Justices, 131 NH 644 (1989)?

STATUTES INVOLVED

See, Appendix to Brief, pgs 3-8 infra.

STATEMENT OF FACTS

Amicus incorporates by reference the Statement of Facts as set forth in the Brief of the Defendant Town of Bedford.

SUMMARY OF ARGUMENT

The provisions of RSA 80:89(VII) were part of several new Sections of RSA Chapter 80 incorporated by the adoption of Chapter 238, Laws of 1998. This legislation was passed as a result of the anticipated decision in the matter of Thomas Tool Services, Inc. v. Town of Croydon, 145 NH 218 (2000) dealing with the constitutionality of the alternative tax lien collection process. In enacting Chapter 238, the Legislature provided a "remedy" to persons in the position of the Plaintiff which incorporated two (2) part relief:

- A right to repurchase property within three (3) years of the tax deeding;
- A right to any "excess proceeds" if the property was sold by the municipality within three (3) years of the deeding.

The "preamble" to Chapter 238 and the Legislative history preceding it, makes clear that the Legislature was attempting to address any claims of "taking" while still re-enforcing the supreme importance of the prompt collection of assessed real estate taxes, described as the "life blood" of municipal services. The tax deed process represents a constitutionally valid decision to create a "penalty", and not a taking, if a taxpayer fails to exercise the redemption rights available under RSA 80:88—80:91. The Legislature is entitled to deference in its decision on the scope of the penalty as weighed against the consequences of the act (failure to pay taxes),

The three (3) year period set forth in RSA 80:89(VII) comports with the "laches" period referred to by Justice Horton in his concurrence in the matter of First N.H. Bank v. Town of Windham, 138 NH 319 (1994). It also equates with the analogous applicable statute of limitations for civil actions generally under RSA 508:4. There is no constitutional infirmity to statute of limitations provisions in other contexts. Applying the appropriate

level of "intermediate scrutiny review" (See, Lennartz v. Oak Point Associates, 167 NH 459 (2015)), the three (3) year period is "substantially related" to the important governmental function (as noted in Pt 1 Art 12 of the State Constituion) to collect taxes which support New Hampshire municipalities. The "remedy" provision functions in much the same way as the statutory remedies provided for improper tax assessments, as they set out the "exclusive" remedy to aggrieved taxpayers.

In the event this Court should still believe that the provided remedies are not constitutionally adequate, it is incumbent on this Court to make its ruling "prospective" and applicable only to tax deedings on or after the date of its issued opinion. This would be consistent with the history of judicial rulings related to real estate tax collections. A "prospective" ruling in this case is appropriate because any decision which would change the currently settled understanding of how the tax collection statutes operate would be one not foreshadowed by prior decisions of this Court, including recent ones discussing tax deeds. In addition, any decision that was not "prospective only" will create a significant "unfunded liability" to communities who have previously sold real estate and appropriated the proceeds to public uses without anticipation that the sale process would be improper. This could result in significant unanticipated tax burdens on communities where property may have previously been sold.

Under the decision of this Court in the matter of Estate of Ireland vs Worcester Insurance Company, 149 N.H. 656 (2003), the prospective application of any decision cannot benefit the Plaintiff, and therefore the Plaintiff's claims must be rejected and the Superior Court ruling Reversed.

ARGUMENT

I. THE PROVISIONS OF RSA 80:89 (VII) CREATE A VALID AND CONSTITUTIONAL PENALTY AND REPRESENT A VALID AND CONSTITUTIONAL STATUTE OF LIMITATIONS ON THE REMEDY FOR PROPERTY OWNERS WHO HAVE LOST PROPERTY BY TAX DEED.

A. Introduction

In its decision in the matter of Thomas Tool Services, Inc. v. Town of Croydon, 145 NH 218 (2000), this Court held

> *that the statutory alternative lien procedure governing the tax lien in this case is unconstitutional. We are aware that the legislature amended the alternative tax lien procedure in 1998, see RSA 80:61, 88-:91 (Supp. 2000), but at this time express no opinion as to the Constitutionality of the amended process.*
>
> *Id. at 220.*

The Court reached this conclusion after a long procedural history:

- The underlying Superior Court filing was originally made in August of 1996. See, Thomas Tool Service v. Town of Croydon, Sullivan County Superior Court Docket # 96-E-048.
- The Superior Court ruled on a Motion for Summary Judgment in July of 1997, finding the statutory alternative tax lien procedure (RSA 80:58-87) is only constitutional if it limited the taking to the extent necessary to satisfy the tax debt and related items. (Cf, White v. Town of Wolfeboro, 131 NH 1 (1988)).
- The original Thomas Tool opinion was issued on August 28, 2000. In this ruling, the Court simply held that the tax lien procedure was unconstitutional, but did not reference a 1998 amendment and it did not address the issue of prospective application of the decision.

- That the State of New Hampshire, and *Amicus* Parties, New Hampshire Municipal Association (NHMA) and New Hampshire Tax Collectors Ass'n. (NHTCA) all filed requests for reconsideration and/or rehearing of the decision.
- That on January 30, 2001, this Court issued an Amended Opinion, which reflects the language now found in the New Hampshire Reports as quoted above.

The Legislative response to the claims raised in the original Thomas Tool lawsuit began in January 1997, five (5) months after the case was filed. Submitted herewith is the "Docket Report" for HB 676 which eventually became Chapter 238, Laws of 1998. See, Appendix to Brief (hereinafter App) pg. 10. As initially introduced, HB 676 appeared to provide for a right to recover "excess proceeds" for a period of three (3) years after a piece of tax deeded property which was sold by the municipality. There was no provision for an owner to "re-acquire" the property. HB 676-FN-Local as introduced. In testimony provided to the House Committee on Municipal and County Government on February 28, 1997, Counsel for NHMA stated:

> "In light of recent Court opinions criticizing the current tax lien law, whereby 100% of a taxpayer's interest is forfeited at the time of a tax deed, it is appropriate for the legislature to consider changes in the law. However, in light of the fact that property taxes are the life blood of Town's and Cities' ability to operate and provide services, the changes should not be undertaken hastily ..."
>
> Bernie Waugh, Esq.
> Chief Legal Counsel, NHMA

Minutes of the February 28, 1997 hearing reflect that legislators considered the possible "losing of one's property...an incentive to pay one's taxes." Rep. Anderson, House Committee on Municipal and County Government, Public Hearing on HB 676-FN-LOCAL

February 28, 1997. There were also comments that the "fractional sale" process as called for in White vs. Wolfeboro, (131 N.H. 1 (1988)) would be a procedural problem for municipalities attempting to collect taxes.

In March of 1997, the House voted to "re-refer" HB 676 to a Subcommittee which worked to combine its intent with a companion Senate Bill (SB56). In the fall of 1997 the Committee produced an Amended Bill which was the product of work by Attorney Waugh on behalf of NHMA with participation by the (then) President of the New Hampshire Tax Collector's Ass'n. In a Sub-Committee Meeting held on September 23, 1997 in discussion of a three (3) year redemption period and a 25% penalty as to taxes due, the minutes note:

> "Some members wanted to make the penalty more severe. Those involved in tax collecting reminded the Committee that communities have to underwrite the delinquent tax payer and efforts should be made to not make it too easy for those who fail to pay on time.
>
> SubCommittee Mtg on
> HB 676 and SB 56
> Municipal and County Government Committee
> September 23, 1997.

An additional (new) version of the penalty was produced at an October 1st subcommittee hearing, which was ultimately voted "ought to pass with Amendment" by the Committee.

The House of Representatives ultimately passed an amended version of HB 676 on January 15, 1998. See, Journal of the House, 1998, pgs. 161-162. The bill was subjected to a minor amendment in the Senate and was passed on May 28, 1998. According to Senator Hollingworth, who spoke for the Committee on Ways and Means, the new law would provide a former owner a total of five (5) years after a tax lien execution

to reclaim their property. The bill was characterized as "protecting the municipalities' ability to collect taxes". See, Journal of the Senate, 1998, pgs. 819-821.

The final enacted version of HB 676 became Chapter 238, Laws of 1998, which became effective upon passage on June 25, 1998. This law added RSA Sections 80:88-91. The enactment also included a "Statement of Intent" which does not appear in the statutes, but only in the Session Law. See, App. Pg 3. It is clear from this verbiage that the Legislature was seeking to "head off" the consequences of the possible adverse ruling in the Thomas Tool case, while affirming the need for "sufficient incentive" to pay taxes.. The final opinion of this Court in Thomas Tool recognized the legislative action, and deferred any ruling on the effectiveness of the amendment on the perceived defects.

In its decision in Polonsky I, this Court essentially affirmed the legislative intent in enacting Chapter 238, Laws of 1998. It remanded the case for consideration of the constitutionality of the statute. The Trial Court held that the statute constituted a "taking" under Part I, Article 12 of the State Constitution. Because the Trial Court "overlooked" the important "penal" nature of the tax deed process, and did not consider the valid interests in setting a statute of limitations on claims, the decision should be reversed and the validity of the tax deeding process (as amended in 1998) upheld.

B. RSA Chapter 80, as Amended by Chapter 238, Laws of 1988, Operates to Create a Constitutional Penalty for Failure to Pay Real Estate Taxes.

The decision in the Thomas Tool case (supra) rested upon the language of Pt I, Article 12 of the State Constitution, which states:

> "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.
>
> Id at 220.

This language was cited to support the proposition that "just compensation" is required in the event of a "taking". Id, citing, Burrows vs. City of Keene, 121 N.H. 590 (1981).

However the Thomas Tool decision also contained the following language:

> "The Defendant does not argue that the Trial Court incorrectly ordered it [the Town] to retain only an amount necessary to satisfy the tax debt; interest, reasonable costs and fees, and a reasonable penalty.
>
> Thomas Tool, supra at 220 (emphasis added).

It stands to reason that a "penalty" which is imposed does not operate as a "taking without just compensation" Cf, State vs. Fitzgerald, 137 N.H. 23, 26 (1993) (where legislature has indicated an intention to establish a civil penalty, we will determine whether the statutory scheme is so punitive in its purpose or effect as to negate that intention").

New Hampshire law is replete with examples of "penalties" associated with the failure to comply with statutory requirements involving taxation (e.g., RSA 21-J:31—failure to file state tax returns; RSA 74:12 – Doomage for failure to truthfully complete property inventory; RSA 79:12 – Doomage for failure to file Report of Timber Cut). The Trial Court failed to give the appropriate standard of "deference" to the legislature when it failed to consider the operation of the tax deeding process as inclusive of a "penalty" for failure to pay. State vs. Fitzgerald, supra (only the clearest of proof will establish the unconstitutionality of a penalty statute).

The general Constitutional standard for a "penalty" is found in Pt. I Article 18 of the Constitution which provides that:

> "All penalties ought to be proportioned to the nature of the offense. No wise legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason.

Id.

Although the "penalty" associated with the failure to pay one's real estate taxes (ultimate loss of the property, and an eventual loss of the right to excess proceeds) is apparently not within the actual scope of Pt. I, Article 18 (See, Opinion of the Justices, 117 N.H. 382, 384 (1977)), it establishes the principal of the reasonableness of the "penalty" in the current real estate tax collection process. Just how important (or damaging to a municipality) is the failure to pay real estate taxes?

The accompanying DRA report on 2018 Taxes (See, App pg. 11) reflects that property taxes assessed represent $3.8 Billion Dollars of revenue to Cities and Towns. This Court needs no reminders that property taxes represent the vast majority of revenue at the municipal level (e.g., Claremont School District vs. Governor, 142 N.H. 462 (1997). The legislature, in adopting the structure of RSA 80:88 et seq. was fully cognizant of the operation of the tax deed process. It extended an additional three (3) years after deeding for a party to "redeem" property taken by deed, mitigating the "penalty" (a/k/a "the taking") which existed prior to 1998, and viewed by the Thomas Tool Court as unreasonable.

The facts of Polonsky I admittedly, show a significant "penalty" in the ultimate "forfeiture" of the right to redeem (or secure excess proceeds) three (3) years from deeding. However the cumulative impact of taxpayers, like Mr. Polonsky, who fail to pay their real estate taxes, could have a devastating effect on the provision of municipal services, forcing communities into debt to borrow funds (Cf, RSA 33:7-d) until taxes are collected and/or defaulted properties are sold. The question is, is this "legislative determination" a valid penalty. In this Court, every presumption is to be indulged in favor of the validity of a statute. Nelson vs. Wyman, 99 N.H. 33 (1954). The Legislature must

be given the benefit of the presumption that a statute is valid. Wright vs. Clark Equipment Company, 125 N.H. 299 (1984). Such a "penalty" does not "shock the conscience" as the Thomas Tool Court noted the validity of such forfeitures in other jurisdictions. Thomas Tool at 221.

The Trial Court's decision failed to engage in the proper analysis of the operation of the tax collection process, discounting (or ignoring), the critical governmental interest in seeing taxes paid. Municipalities don't want sale proceeds for a deeded property; they want their taxes paid in a timely manner. The compulsory nature of the penalty of loss of the property, ameliorated by the additional time afforded by RSA 80:88-80:91 should be viewed as a reasonable decision made by the Legislature, and entitled to vindication by this Court.

C. The "Cause of Action" and When It Accrues.

The Thomas Tool decision found that the alternative tax lien procedure under RSA 80:58-87 was "unconstitutional" referencing Part I, Article 12 of the New Hampshire Constitution and its implied requirement to provide just compensation in the event of a property taking. Thomas Tool, supra at 220. While *Amicus* believes no "taking" occurs because the tax deed process acts as a constitutional "penalty", if this Court believes there is a taking, the only conclusion that can be drawn is that the "taking" occurs at the time of the tax deed.

The Thomas Tool decision does cite, and appears to adopt by reference, the Concurring Opinion of Justice Horton in the matter of First N.H. Bank v. Town of Windham, 138 NH 319 (1994) In his Concurrence in First N.H. Bank, Justice Horton (joined by Justice Thayer), argued that the majority opinion, which required additional due

process notice to mortgagees, was not well founded, and that the notice given was adequate. First N.H. Bank supra at 329. After citing both Federal and State tax forfeiture cases, Justice Horton concludes:

> *Thus, 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 deeding for a period not barred by laches, I would permit an interested 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.*
>
> Id, at 332.

It is important to focus on the very last line of Justice Horton's conclusion. He is not questioning, nor did the Trial Court question, nor do any of the decisions of this Court question, the integrity of the nature of the title conveyed by the Tax Collector's Deed. In the case of Burke v. Pierro, 159 NH 504 (2009), this Court reaffirmed that a "new and independent title to one hundred percent of the land charged for unpaid taxes is the ultimate product of the alternative tax lien procedure". Id, at 513.

Consequently, the "unconstitutional" action as found by Thomas Tool was the act of taking a 100% interest in the subject real estate as of the time of deeding. The remedy as seen by Justice Horton was a "Petition in Equity" for an accounting and payment of "damages". A "Cause of Action" for a personal action, arises once all the elements of such a claim are present. Jeffery v. City of Nashua, 163 NH 683 (2012). Under the analysis of Thomas Tool, the cause of action arises as of the deed date, when the

property is lost irretrievably by the taxpayer. It also "accrues" as of the date of deeding inasmuch as the property owner receives clear notice (See, RSA 80:77) of when and what the consequences will be of the deeding. Conrad v Hazen, 140 NH 249 (1995). The additional language in Chapter 238, Laws of 1998 does not change this construct. Instead, it attempts to fashion a remedy available to the property owner to assure that the "taking" can be mitigated or reversed.

D. "Laches" and the Statute of Limitations.

In the opinion of Justice Horton, the appropriate remedy for the perceived (and later confirmed by Thomas Tool, supra) unconstitutional operation of the alternative tax lien statute (as it existed prior to 1998) was an action brought within a period of time governed by laches. "Laches" is an equitable doctrine that bars litigation where a potential Plaintiff has slept on his rights. In Re: LaRocque, 164 NH 148 (2012). It is not solely related to the passage of time, but relates to the inequity of permitting the claim to be enforced. In Re: LaRocque, supra at 151. A laches analysis typically involves the consideration of four (4) factors:

> (1) the knowledge of the Plaintiffs, (2) the conduct of the Defendant; (3) the interest to be vindicated; and (4) the resulting prejudice.
>
> Id., citing Thayer v. Town of Tilton, 151 NH 483 (2004).

This Court has also recognized that in determining whether to apply laches, courts in this jurisdiction will turn to the analogous statute of limitations for evidence. Jenot v. White Mountain Acceptance Corporation, 124 NH 701, 710 (1984). This Court has held that "unless it is inequitable, a court of equity in applying the doctrine of laches, will follow

substantially the analogy of the statute of limitations." Cote v. Cote, 94 NH 372, 374 (1947).

When Justice Horton wrote his concurrence in First N.H. Bank, there was no specific "statute of limitations" set forth for recovery by a person in the position of the Plaintiff. However, as a result of Chapter 238 of Laws of 1998, the Legislature established RSA 80:89 (VII) which established a 3 year period to "remedy" the "taking" by the governmental entity. This three (3) year period can be viewed as a reasonable time frame, both as to a direct laches analysis as well as reference to the comparable statute of limitations.

In looking at the "laches" factors, the "Plaintiffs", (i.e. the property owners) have clear knowledge of the taking. They are provided statutory notice of the impending deed. See, RSA 80:77. They also stop receiving tax bills once the municipality takes title. There is no attributable "conduct" of the municipality which would impute any reason for extending a remedy to the Plaintiffs, presuming they have followed all the statutory procedures. Given the multiple notices received by the taxpayer (e.g., RSA 76:11-b) and the potential options to avoid a tax deeding (See, RSA 76:11-a(II)) there is no reason to impeach the conduct of the municipality in this process.

Of paramount importance would be the "interest to be vindicated" and the prejudice resulting from extending the period for a significant period of time. The municipalities of this state rely, nearly exclusively, on collection of real estate taxes for municipal revenue. See, Section I(B) above, infra. Any significant non-payment means that towns would need to borrow funds while awaiting tax revenue. Cf, RSA 33:7-d. As noted by the Legislature, the entire process must be designed to encourage timely payment of taxes.

The longer the period of time that is provided to taxpayers to either (i) recover their property by redemption, or (ii) force refund of "excess proceeds", the more tenuous the financial situation of New Hampshire municipalities. Consequently, any period of time for a "remedy" should be viewed with the idea that the shortest, but most reasonable period of time, should be applied.

The three (3) year period in RSA 80:89(VII) is in accordance with (See, Cote v. Cote, supra) the otherwise applicable Statute of Limitation on personal actions found in RSA 508:4. The concept that the legislature can constitutionally establish a "statute of limitations" is beyond question. Such statutes place a limit on the time in which a Plaintiff may bring suit after a cause of action accrues. Beane v. Dana S. Beane & Co., P.C., 160 NH 708 (2010); Cluff-Landry v. Roman Catholic Bishop of Manchester, 169 NH 670 (2017). The purpose of such statutes is to insure Defendants receive timely notice and to protect Defendants from stale or fraudulent claims. City of Rochester v. Marcel A. Payeur, Inc., 169 NH 502 (2016). Such legislatively constructed limitations can apply to claims founded in constitutional rights. See, Lennartz v. Oak Point Associates, PA, 167 NH 459 (2015).

The "cause of action" is appropriately characterized as a "personal action" governed by RSA 508:4 because this Court's prior decisions (e.g. Burke vs Pierro, supra) do not infer any defect in the "title" of the lands deeded to the Town, and in fact, presume that the parcels may be validly disposed of through the sale process. Therefore the action is not to "recover" real estate. See, RSA 508:2.

It has been intimated that the 10 year "incontestability" provisions found in RSA 80:78 would govern the claims of persons in the position of the Plaintiff. That statute is

inapplicable because it is limited to situations where the deeding process is challenged due to lack of notice. See, Town of Hudson v. Gate City Development Corporation, 139 NH 606 (1995). This is made even more apparent when this Court held that an error in the assessment process (i.e. assessing the land to the incorrect parties) is not governed by the provisions of RSA 80:39. See, J & N Fieldstone Supply, Inc. v. BHC Development Corp., 146 NH 500 (2001).

E. RSA 80:89(VII) Represents a Permissible Limit To The Remedy Given To Persons in the Position of the Plaintiff.

This Court must begin with the presumption that the legislative adoption of Chapter 238 Laws of 1998 represents a valid legislative enactment. Wright v. Clark Equipment Co., 125 NH 299 (1984). In matters of statutory interpretation, the goal of this Court is to apply statutes in light of the legislature's intent in enacting them and in light of the policy sought to be advanced by the entire statutory scheme. Carr v. Town of New London, 170 NH 10 (2017). The evaluation of a statute requires interpretation of a given provision in light of the overall statutory scheme and not in isolation. Lamb v. Shaker Regional School District, 168 NH 47 (2015).

On this point it is important to note that RSA 80:89(VII) cannot be read in isolation, but as part of an overall statutory response to the concerns raised by Thomas Tool. In fact there are two (2) remedies in the statute, one of which has not been given consideration by the Superior Court:

(i) There is the right to claim "excess proceeds" within three (3) years if the property is sold by the municipality during that period.

(ii) There is the right to re-acquire the property, at any time within three (3) years if the property is not sold, or within 30 days of receiving notice the community intends to sell the property. RSA 80:89(I) and (II).

Thus the party in the position of the Plaintiff has not only a right to proceeds, within three (3) years but also the right to re-acquire the property. This needs to be considered as part of the evaluation of RSA 80:89(VII).

The Trial Court decision finding a constitutional violation in RSA 80:89(VII) fails to address the issue of the "scrutiny" which must be applied in judicial review. The *Amicus* believes this Court's decision in Lennartz v. Oak Point Associates, 167 NH 459 (2015) is applicable, as it also involved evaluation of the constitutionality of a Statute of Limitations. Under Lennartz, this Court upheld the "Statute of Repose" under RSA 508:4-b. As part of that decision, the Court noted:

> *"because the right to recover for one's injuries implicates an important substantive right (cite omitted) intermediate scrutiny applies in this case".*
>
> Id. at 463

The test for intermediate scrutiny review was refined and restated in Community Resources for Justice, Inc. v. City of Manchester, 154 NH 748 (2007). In that case, the Court held that constitutional review associated with claims under Part I, Article 12 of the State Constitution:

> *"requires that the challenged legislation be substantially related to an important governmental objective."*
>
> Id. at 762.

Not unlike the justification for the limitation in Lennartz, the 3 year statute of limitations fosters an important governmental function. The real estate tax collection process is vital to the functioning of community throughout the site. See, Section I (B) infra at Pg.21. There is an important governmental interest in the efficient collection of property taxes and limiting the liability of the community to a time certain after which it can presume it no longer has a financial obligation to prior owners. It stands on the same general principle, and legal basis, as the general Statute of Limitations under RSA 508:4.

Viewed another way, there can be no more egregious "Constitutional Violation" than the death of an individual through the application of unjustified force. Yet there is no issue that the three (3) year statute of limitations under RSA 508:4 would govern any claim thereunder. It is hard to construct an argument that a greater or longer statute of limitations is necessary for essentially a suit based on a "takings" claim.

The Legislative "remedies" under RSA 80:88 and RSA 80:89 provide both remedies and a limit on the time for the exercise of those remedies. This is a constitutional remedy that should be upheld.

The construct of exclusive remedy for the constitutional deficiency in the tax deeding process is not without parallel in other parts of the tax collection process. The process of assessing taxes implicates constitutional principles as well. See, Rollins v. City of Dover, 93 NH 448 (1945) (A disproportionate, unequal assessment, so far as it is disproportional and unequal, is an act, not of taxation, but of confiscation, destitute of that element of equal rights which under our constitution is an essential part of the definition of law"). In the face of the need for a constitutional remedy, the legislature has enacted an abatement process under law which must be strictly followed. Thayer v. State Tax

Commission, 113 NH 113 (1973). It is deemed the exclusive remedy available to a tax payer to challenge their assessment and no collateral attacks are permitted. Tyler Road Development Corp. v. Town of Londonderry, 145 NH 615 (2000).

This Court should find that the legislative "construct" enacted through RSA 80:88-91 was intended and functions as the "exclusive remedy" to resolve the constitutional claims which arise through the otherwise "unconstitutional taking" (sic) which occurs when a community obtains a 100% interest in a property as a result of a tax debt of significantly lesser amount.

F. The Plaintiff Has Remedies Available for Repurchase Regardless of Economic Conditions.

In its opinion, the Trial Court puts significant emphasis on the inability of a person who lacks resources to exercise the respective rights granted under RSA 80:89. The Trial Court failed to consider at least two (2) different "remedies" available to a party in the position of the Plaintiff [NOTE: The record fails to disclose exactly why the Plaintiff did not or could not pay his taxes].

1) Contract for Sale of the Property. – In almost all tax deedings, the property is unencumbered by a mortgage. If a property is encumbered by a mortgage, when a mortgagee learns of a tax deeding after-the-fact, they historically take steps to redeem the sale. E.g., First N.H Bank, supra ; Federal National Mtg. Ass'n. vs. Town of Fremont, 141 N.H. 156 (1996). If there is no mortgage, a person in the position of the Plaintiff could enter into a contract to "sell" the property at its re-acquisition, obtain the funds through a "Buyer deposit" or other arrangement, and then conclude a sale upon reacquisition of the property. This

discussion appears in the Transcript of the February 25, 2019 hearing. Transcript, pgs. 25-27.

2) An important and undiscussed "remedy" for a person lacking resources to reacquire their property is through the mechanism of a Chapter 13 Bankruptcy proceeding. In the matter of In Re: Stevens, 374 B.R 31 (Bkrtcy D. N.H. 2007) the Court ruled that a party who lost their property by tax deeding, still held a "right to repurchase" and could exercise that right through a Chapter 13 Bankruptcy Plan. The Court ruled that the "right to cure" under 11 USC §1322(b) preempted the otherwise applicable redemption period under RSA 80:89. Consequently, a Chapter 13 Plan could be structured to allow a debtor to "repurchase" their property over the time period allowable for completion of Chapter 13 Plans. See, 11 USC §1322(c).

   This summer, Congress passed, and the President signed the Small Business Reorganization Act (SBRA) of 2019 (H.R. 3311). This further expands the category of Debtors who may file for reorganization in the same general fashion as previously limited to individuals with regular income. The bill introduces and applies aspects of the Chapter 13 process in Chapter 11 Proceedings. This would include the right to "cure" and extend the repurchase rights. The SBRA goes into effect in February 2020.

In addition to these two (2) post deeding remedies, there is at least one (1) remedy, available before deeding occurs, to wit: Petition for Tax Abatement, based on poverty

grounds. This Court has recognized that poverty of a taxpayer continues to be good cause" for an abatement. Ansara vs. City of Nashua, 118 N.H. 878 (1978).

G. Conclusion

The Trial Court did not engage in any constitutional analysis. This Court is the ultimate arbiter of the constitutionality of the law. *Amicus* believes that RSA 80:89(VII) represents a sustainable legislative judgment that:

(i) Enacts a "penalty" (i.e. the loss of property equity three (3) years after deeding) in vindication of a critical municipal need to enforce timely collection of real estate taxes.

(ii) Provides a "statute of limitations" of three (3) years in which a party may exercise a right to recover the "equity" lost by repurchasing the property.

Because of the deference owed to the Legislature in these policy judgments, the statute should be upheld and the Trial Court reversed.

II. ANY DECISION BY THIS COURT SHOULD BE APPLIED PROSPECTIVELY ONLY, AND UNDER CURRENT PRECEDENT, THE PLAINTIFF'S CLAIMS MUST BE REJECTED

If, notwithstanding the foregoing arguments, this Court is inclined to rule that the existing statutory scheme does not provide sufficient protection to parties in the position of the Plaintiff, the Court's ruling should be made "prospective" only and as a result, the Plaintiff's Petition must be dismissed as the ruling may only be applied prospectively to all parties and causes of action arising after the date of the decision and not selectively to the Plaintiff. As noted in Section II(C) *infra*, for the purposes of the application of the

"prospective ruling", the "date of decision" should be the date of the issuance of this Court's ruling in Polonsky I.

A. Basis For Prospective Ruling

Under Common Law theory, Court opinions and decisions operated retroactively, for in saying what the law is, they were saying what the law always was. Hampton National Bank v. Desjardins, 114 NH 68, 73 (1974), citing, Linkletter v. Walker, 381 U.S. 618 (1965). See also, Waid v. Ford Motor Company, 125 NH 640 (1984). While retroactive application of an announced rule of law may be constitutional, its effect may be harsh on persons who have relied upon the law now declared unlawful by the Court decision. Hampton National Bank, supra.

The concept of applying a decision of this Court prospectively has long been recognized by this Court, and does not violate the constitutionality of such prospective application. Hampton National Bank, supra at 73-74, citing, Great Northern Railway Co v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932). The Supreme Court in New Hampshire has applied its opinions and decisions prospectively whenever it has thought justice to be better served by doing so. Id. In deciding whether to make its ruling retroactive or prospective, this Court has found "useful" (See, Estate of Ireland v. Worcester Insurance Company, 149 NH 656, 658 (2003); Opinion of the Justices, 131 NH 644, 650 (1989)) but has never "adopted" (See, Opinion of the Justices, supra) the test set forth in Chevron Oil Co. v. Huson, 404 U.S. 97 106-107 (1971) as to the prospective or retroactive nature of a civil ruling:

> *(1) whether the holding establishes a new principle of law by overruling clear precedent or by deciding an issue that was not clearly foreshadowed; (2) whether the merits of the case warrant prospective application, viewed in*

light of the history of the rule in question, its purpose and effect, and whether retrospective application will advance or retard its operation; and (3) whether inequity would result from retrospective application.

Id.

Although the effect of the application of the Chevron principals has been modified by this Court (See, Estate of Ireland, supra at page 650; See, Section II(D) infra) this Court has not rejected the Chevron factors in considering whether or not to make a ruling prospective or retroactive. See, Estate of Ireland, supra at 650 ("This is not to say that we may not, in the course of issuing a new rule, state that the new rule will have only prospective effect"). In fact, this Court continues in appropriate circumstances to make certain of its rulings "prospective" in nature. E.g., Appeal of State Employee's Association of New Hampshire, 156 NH 507, 511 (2007), citing, Hampton National Bank, supra.

B. This Court Has Historically Treated Rulings in Tax Collection Matters as Prospective Rulings.

The process of how real estate taxes are collected in this state is of vital importance to both the state and local governments. Consequently, this Court has historically found that when it has made rulings which disturb the "settled practice" of tax collection, it has made such rulings "prospective only". Specific examples are:

(1) White v. Lee, 124 NH 69 (1983). In this case a property owner with unpaid taxes, transferred the property to a set of new owners. Following statutory practice then in place, the Tax Collector sent a notice of impending tax sale to the former owner but not to the new owners, who eventually lost the property by tax deed, without ever receiving any notice from the Town. On interlocutory

transfer, this Court held that constitutional due process required notice to "current owners" of any pending tax liens, as they would be parties who could lose valuable property rights. Id., at 74. Without engaging in any particular legal analysis with respect to prospective application, the Court held:

> *"In order to ensure due process ... we will on or after the date of this opinion require that all current tax bills include notice of past arrearages and tax sales."*
>
> Id, at 77.

[NOTE: This holding was subsequently codified in law as RSA 76:11-b – Notice of Arrearage].

(2) White v. Wolfeboro, 131 NH 1 (1988). In this case, the Supreme Court held that the Town of Wolfeboro failed to comply with the tax sale provisions of RSA 80:24, when the tax collector sold an undivided 100% interest in a parcel of land with an assessed value of $21,000.00 for Town bid of $387.39. The Court summarized its holding as follows:

> *Accordingly, we hold that when a tax sale is conducted by the collector, only that portion of the estate may be sold, as an undivided interest in common with the person to whom the property is taxed, as the amount of the tax, interest and charges bears to the value of the property in the tax year in question, computed by dividing the assessed valuation by the equalization ratio for the municipality used to equalize valuations under RSA 21-J:3, XIII (Supp. 1987).*
>
> Id, at 5.

Because the holding in White raised questions throughout the state on the status of titles which rested upon tax sales preceding the White decision, the Legislature proposed remedial legislation, which was then forwarded to this Court for an opinion. In Opinion of the Justices, 131 NH 644 (1989), this Court

held that its White opinion applied to the plaintiff in that case and to tax sales conducted from the date of the White opinion forward. Opinion of the Justices, supra at 649. The decision cited the Hampton Nat'l Bank (supra) decision, and contained a full analysis of the three (3) Chevron factors. Of particular note was the significant adverse impact on local governments. Opinion of the Justices, supra at 651.

(3) First N.H. Bank v. Town of Windham, 138 NH 319 (1994). In this case the Supreme Court held that although the Plaintiff, which held mortgages on several parcels which had been tax deeded to the municipality, had received notice of the imposition of the tax liens at the time of imposition (See, RSA 80:65), that due process required additional notice to it in advance of the deeding. Id. at 327. The Court concluded:

> *Since we have already recognized that a known owner is entitled to actual notice of a tax deeding, we cannot hold that a known mortgagee is constitutionally entitled to actual notice of a tax sale but not notice of a tax deeding. Accordingly, we hold that fundamental fairness under the New Hampshire Constitution requires notice to the mortgagee of the following: the issue date of the tax lien deeds; the expiration date of the right of redemption; and a warning that the mortgage will be eradicated by the tax lien deed if the property is not redeemed.* Id.

After reaching this conclusion, this Court specifically ruled that the decision applied to the parties before it, and any cases pending, but would not be retroactively applied. First NH Bank, supra at 328 citing, Opinion of the Justices, supra.

(4) Thomas Tool Services, Inc. v. Town of Croydon, 145 NH 218 (2000). In this case, this Court held that the "alternative tax lien procedure" (See, RSA 80:58-87 (1991 and Supp. 1992)) was unconstitutional as then existing because it provided for the municipality receiving an undivided 100% interest in the property subject to taxation. The Court adopted the concurring opinion of Justice Horton in the First N.H. Bank case, holding that the lien imposed should, by necessity, be limited to an amount related to the tax due. See, First N.H. Bank supra at 331-332 citing, White v. Wolfeboro, supra.

The ruling in Thomas Tool, acknowledged that the statute under review had been amended, and no opinion was offered as to the constitutionality of the amended statute. Thomas Tool, supra at 220.

When the Thomas Tool decision was first issued, it did not contain any language on the applicability of the decision, i.e., retrospective or prospective. As a result of Motions to Reconsider, including one by the instant *Amicus* party, the originally issued opinion was modified and included language that made the decision applicable to the party in that case, but not retroactively applied. Id, at 220, citing, First N.H. Bank, supra. The "prospective" nature of the Thomas Tool decision was challenged in the later case of Lee James Enterprises, Inc. v. Town of Northumberland, 149 NH 728 (2003), but was upheld. Id.

In all of these cases, the Court was cognizant of the effect of a retroactive application of its decision on municipalities and private landowners. For substantially the

same reasons, any decision of this Court which does not uphold the validity of RSA 80:89 (VII) must be applied prospectively only.

C. Circumstances of this Case, Including Application of Chevron Factors, Requires Any Decision Be Prospective Only.

While this Court has narrowed the applicability of the factors found in Chevron Oil Company v. Huson, 404 U.S. 97, 106-107 (1971) (See, Estate of Ireland, supra; Section II(D) infra), this Court still has applied the analysis of the factors in Chevron to consider whether a decision should be issued as "prospective" only. E.g., Opinion of the Justices, supra.

In this case, all (3) Chevron factors weigh in favor of prospective application of any ruling in this case:

a) *The ruling establishes a new principal of law by deciding an issue that was not clearly foreshadowed.* – The decision in Thomas Tool was issued in August of 2000. The decision did specifically indicate the Court was not expressing an opinion on the constitutionality of the "remedy" adopted by the legislature through the enactment of RSA 80:88-91. Thomas Tool, supra at 220. The Legislature clearly believed that they had "fixed" the constitutionality issue. See, Chapter 238, Laws of 1998: 238:1. In the nearly 19 years since that decision, there had been no indication that the amended statute would result in any new liability to the communities. This Court had not raised any concerns on passing on the validity of tax deedings in other contexts. See, e.g., Burke v. Pierro, 159 NH 504 (2009). In at least two (2) Superior Court cases, challenges to the statutory scheme for distribution of proceeds from tax

deedings have been upheld. See, White v. Town of Moultonborough, Carroll County Superior Court Docket # 212-2012 – CV-0133; Regina Real Estate, LLC v. City of Berlin, Coos County Superior Court, Docket # 06-C-99.

It was not until the issuance of the Polonsky I opinon that communities were on notice of the possibility of claims such as those created by the Superior Court ruling in this case. Admittedly any sales of tax deeded property (held more than three (3) years post-deeding) after Polonsky I were conducted with notice (foreshadowed) of possible claims but not before that date.

Against this backdrop, any ruling by this Court which would create liability beyond that in RSA 80:89 (VII), would be a significant new principal of law not clearly foreshadowed prior to June 28, 2018.

b) *Whether merits of the case warrant prospective application, viewed in light of the history of the rule in question.* – One cannot lose sight of the fact that this case arises as a result of the Plaintiff's (unexplained) failure to pay his real estate taxes. The "loss" of the property has been the historic "incentive" to assure the payment of local property taxes on which the State's communities rely. See, Section I (B) *infra*.

Retroactive application of the ruling would inure to the benefit of parties who did not pay their taxes for varied and sundry reasons, including (in some cases) a conscious decision to not pay, leaving the burden on other taxpayers.

The facts do not support a "retroactive" application, but instead a prospective one.

c) *A ruling which is not prospective only would result in significant inequity as it relates to municipalities which relied on the settled legal principals* – Real estate taxes constitute the single largest source of revenue for New Hampshire cities and towns. For the 2018 tax year, the "total commitment" for real estate taxes was $3,805,831,062. See, New Hampshire Department of Revenue Administration, Completed Public Tax Rates – 2018; App at pg. 11. Communities throughout the state end up in situations where property is deeded as a result of the non-payment of taxes. For the tax year which preceded the Polonsky I opinion, New Hampshire's 10 largest communities (as determined by tax base) deeded property which was originally liened for over $790,000. Source: *N.H. Dept. of Revenue Administration, Form MS-61 Reports, 2016-2017.* There are at least 230 municipalities in the state, so the overall total is well in excess of that amount. In many cases, after following the notice provisions in RSA 80:89(I), such properties are sold. The revenue from such sales inures to the general fund of the municipality. See, *The Basic Law of Budgeting: A Guide for Towns, Village Districts and School Districts,* NH Municipal Ass'n (2017) at pages 44-45. From there it can be appropriated by voters. Id. Consequently, in most cases the "proceeds" of tax deeded properties may have already been spent and are not available for claimants in the position of the Plaintiff. A retrospective application of any decision in this

case could create an "unfunded liability" to all of New Hampshire's cities and towns in an amount that cannot be immediately determined, but likely is in the hundreds of thousands of dollars. Further, if a community had been aware of the potential liability to former property owners, there are actions it could take (or could have taken):

(i) First and foremost, the community could have elected not to take a tax deed in the first instance. Under RSA 80:76 (II-a), a community could choose not to have the tax collector issue a deed if there was the possibility of liability.

(ii) The municipality could elect to appropriate the proceeds into a capital reserve fund pending resolution of the claims against it. RSA 35:1(V).

(iii) It could elect to leave the funds in unreserved fund balance until whatever final resolution of any claims had been reached.

None of these options were taken prior to June 28, 2018. If this Court were to make its decision "prospective", then a community could take one or more of these courses of action with respect to future takings or sales of property. If the decision is not prospective only, municipalities might be obligated to disgorge funds which they have already spent, resulting in unanticipated tax increases in communities which have sold tax deeded property.

Application of the Chevron factors requires this Court to make any decision "prospective" only, effective with the issuance of the Polonsky I decision.

D. The Consequence of the Need to Make the Decision in this Matter Prospective Means that the Plaintiff's Claims Must Be Rejected or Dismissed.

Any ruling by this Court with respect to the validity (or lack thereof) of the remedy provisions in RSA 80:89 (VII) must be deemed to be prospective, consistent with the action of this Court in previous similar circumstances. However, as a result of this Court's ruling in Estate of Ireland v. Worcester Insurance Company, 149 NH 656 (2003), this Court must reject the instant Plaintiff's claims because this Court has rejected "selective prospectivity". Relying on the US Supreme Court holding in James M. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991), this Court ruled that it would no longer apply "Selective Civil Prospectivity" in its decisions. Estate of Ireland, supra at 660.

The effect of this ruling can be seen in the language of the Lee James Enterprises, Inc. v. Town of Northumberland ruling (149 NH 728 (2003)). This case was decided one (1) month after Estate of Ireland, and focused on the prospective application language found in the Thomas Tool decision. The language in the Thomas Tool decision indicated it would apply to the parties in that case, but not retroactively applied. Thomas Tool, supra at 220. The Lee James Enterprises decision makes clear that if Thomas Tool had been decided after Estate of Ireland, the "Selective Prospectivity" of allowing the party the benefit of the new ruling could not be possible. Lee James Enterprises, supra at 731.

What that means in this case is if this Court should find the remedy provisions of RSA 80:89 (VII) constitutionally deficient, but it determines that such a finding should be prospective only, it cannot be applied to the Plaintiff in this case.

CONCLUSION

Based on the arguments herein, together with those of the Defendant, Town of Bedford, the *Amicus* party respectfully requests that:

- The Court affirm the constitutionality of RSA 80:89(VII) as an appropriate penalty and/or remedy adopted by the Legislature for persons in the position of the Plaintiff, and REVERSE the ruling of the Superior Court in favor of the Plaintiff; OR

- In the event the Court determines that RSA 80:89(VII) does not provide a full and constitutional remedy, make any such ruling "prospective" only, (as of June 28, 2018) and as a consequence of the decision in Estate of Ireland, supra, REVERSE the ruling of the Superior Court in favor of the Plaintiff.

Upon filing of all Briefs, the *Amicus* party respectfully reserves the right to request to be heard orally at any subsequent oral argument. See, Rule 30(4).

Respectfully submitted,
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Dated: October 31, 2019 By: _____
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CERTIFICATE

In accordance with applicable Rules of the Supreme Court (including but not limited to Rule 26), the undersigned certifies that copies of the foregoing Brief on behalf of the New Hampshire Tax Collector's Ass'n. have been transmitted by the Court Electronic Filing System in accordance with Rule 18 of the Supplemental rules for Electronic Filings to:

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Additionally, the document is in compliance with the word limitation in Rule 16(11) with 9468 words (exclusive of Cover, Table of Contents and Table of Authorities).

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