

STATE OF NEW HAMPSHIRE

SUPREME COURT

NO. 2019-0339

Richard Polonsky

v.

Town of Bedford, N.H.

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BRIEF OF APPELLEE, RICHARD POLONSKY

RULE 7 APPEAL OF FINAL DECISION OF  
HILLSBOROUGH COUNTY (NORTH) SUPERIOR COURT

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Counsel for Appellee/Plaintiff  
John F. Hayes, Esquire  
Alfano Law Office, PLLC  
4 Park Street  
Concord, NH 03301  
(603) 715-8395

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### **QUESTIONS PRESENTED**

1) Whether the trial court was correct in ruling that RSA 80:88-91 violates the takings clause of the New Hampshire Constitution because any right of a former property owner to recover excess proceeds under RSA 80:89 is contingent upon the municipality selling the former owner's property and the former owner is otherwise unable to compel the municipality to sell the property or recover an amount representing the difference between the property value and the amount owed to the town?

2) Whether the trial court was correct in ruling that the plaintiff's claims are not barred because of unclean hands because his actions in not paying his taxes, his inability to repurchase his former property, or that he did not request a tax abatement, were not materially different from former owners who are afforded relief under RSA 80:89 in cases where the municipality sells the property within three years of the tax deed?



## **TEXT OF STATUTES**

### **80:78. Incontestability**

No action, suit or other proceeding shall be brought to contest the validity of an execution of the real estate tax lien or any collector's deed based thereon after 10 years from the date of record of the collector's deed

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

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

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

II-a. If the governing body is authorized to transfer such liens during the 2-year redemption period, either a public auction shall be held, or the liens may be sold by advertised sealed bids. The governing body may establish minimum bids, and

may set the terms and conditions of the sale. Such liens may be sold singly or in combination, but no fractional interest in any lien shall be sold. Such transfer shall not affect the right of the owner or others with a legal interest in the land to redeem the tax lien pursuant to RSA 80:69, or make partial payments in redemption pursuant to RSA 80:71, but the transferee shall become the lienholder for purposes of RSA 80:72 and 80:76.

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

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

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

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

(a) Engage a real estate agent or broker to list and sell the property, including a sale conditional on the buyer's obtaining development approvals;

(b) Sell undeveloped parcels to abutters for consolidation into adjoining lots for the purpose of affordable housing development, preserving open space, or reducing development density; or

(c) Convey the property to a former owner, or to a third party for benefit of a former owner, upon such reasonable terms as may be agreed to in writing, including the authority of the municipality to retain a mortgage interest in the property, or to reimpose its tax lien, contingent upon an agreed payment schedule, which need not necessarily reflect any prior redemption amount. Any such agreement shall be recorded in the registry of deeds. This paragraph shall not be construed to obligate any municipality to make any such conveyance or agreement.

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

I. Notwithstanding any other provision of law, for any sale by a municipality of property which is acquired by tax deed on or after the effective date of this

section, the municipality's recovery of proceeds from the sale shall be limited to back taxes, interest, costs and penalty, as defined in RSA 80:90.

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

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

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

(c) The court shall issue such orders of notice as are necessary, and shall make such disposition of the funds as it finds appropriate, based upon ownership and lienholder interests at the time of the tax deed.

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

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



identified and located, in which case the excess proceeds shall be paid to such owner or owners.

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

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

II. Within 30 days after the notice required by paragraph I, or if no such notice is received, at any time within 3 years after the date of recording the tax deed, any former owner of the property may give notice by certified mail, return receipt requested, of intent to repurchase the property from the municipality, and stating

that such owner is ready, willing, and able to pay all back taxes, interest, costs and penalty, as defined in RSA 80:90. If all such back taxes, interest, costs and penalty have not been actually tendered within 15 days of such notice of intent to repurchase, the municipality may proceed with its offering and dispose of the property without any interest by the former owner.

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

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

V. A notice of intent to repurchase under this section may also be filed by the holder of any recorded mortgage interest in the property which was unredeemed as of the date of the tax deed. Upon payment the property shall be deeded as provided in paragraph III, but the mortgagee shall be entitled to add the amount paid to the municipality to the amount due under the mortgage.

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

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

**80:90. Definitions**

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

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

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

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

(d) All legal costs incurred by the municipality in connection with the property, including those connected with the municipality's sale or the former owner's repurchase.

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

(f) An additional penalty equal in amount to 15 percent of the assessed value of the property as of the date of the tax deed, adjusted by the equalization ratio for the year of the assessment.

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

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

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



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

### **STATEMENT OF FACTS AND THE CASE**

Richard Polonsky, Plaintiff/Appellee, (hereinafter “Polonsky”) was the owner of a property taken by tax deed by the Town of Bedford, Defendant/Appellant, (hereinafter “Bedford”) on May 31, 2011. APP. p. 3. Polonsky was 70 years old and resided with his wife in the property taken by the Town. APP. p. 22. He was unable to pay his taxes due to illness and his inability to work because of the illness, complications from medical procedures, and severe pain that he experienced. APP. p. 23. After the deeding of the property to Bedford on May 31, 2011, the Town’s Tax Collector lost track of the tax deed. ORDER (J. Ruoff, May 11, 2016) (“5/11/16 Order”) p. 2, *APP* p. 47. Consequently, Bedford took no action with respect to the property.

In April of 2013, the Town Manager contacted the Polonsky and informed him of back taxes, interest and the \$44,000 penalty that he would have to pay Bedford to repurchase his property. APP. p. 4. The Town Manager also

presented options to the Polonsky of the actions Bedford could take to allow him to repurchase the property. *Id.*

The Polonsky appeared before a meeting of the Bedford Town Council on June 12, 2013 to request a waiver of the penalty so that he could repurchase the property for the amount of the unpaid taxes, interest, and costs incurred by Bedford. APP. p. 6. The Town Council requested that Polonsky supply medical and financial information to the Town Manager in connection with his request of the waiver of the penalty. Polonsky supplied the Town Manager with information regarding his medical condition, but he did not to supply the financial information requested. APP. p. 10.

On July 17, 2013, the Town Council held a non-public meeting to discuss Polonsky's request for waiver of the penalty. The Town Council voted to deny Polonsky's request for a waiver of the penalty and that the property shall be sold. APP. p. 13. Bedford took no action with respect to the Town Council's vote to sell the property until December 17, 2013. On this date, the Tax Collector sent to Polonsky a notice of right to repurchase and offering for sale. He received this notice on January 2, 2014. APP. p. 15. In this notice, the Tax Collector wrote that the repurchase amount for \$90,442.42, with \$44,187.26 of that amount attributable to the penalty. The penalty amount was based on the \$309,900 assessed value of the property. APP. p. 18.

Under the terms of the notice, Polonsky was given thirty days to respond in writing to Bedford to indicate his intention to repurchase the property. He then had fifteen days from the date of his letter to Bedford to pay the repurchase amount. Polonsky did not take any action with respect to this notice. Bedford did not take any action with respect to the property. 5/11/16 Order, APP p. 48.

On April 10, 2015, the Tax Collector sent a second notice of right to repurchase the property, containing the same terms as the first, though the total amount due had risen to \$94,271.93. APP. p. 17. On May 10, 2015, Polonsky sent a letter to the Town Council stating that he was prepared to pay \$49,792 in back taxes, but he asked that the \$44,187 penalty be waived. APP p. 28. At a meeting on May 13, 2015, the Town Council voted to deny Polonsky's offer. The following day Bedford provided notice of the vote to Polonsky. Id.

The Appellant, through counsel, twice asked the Town Council to reconsider their May 13, 2015 decision. APP. p. 20. Appellant also notified Bedford Council that his relatives were prepared to assist him in paying off the entire amount owed. The Town Council declined to reconsider. Bedford, through counsel, claimed that the second right of repurchase notice sent April 10, 2015 was sent in error and was no longer operative. APP. p. 20.

When Bedford refused to allow the repurchase of the property and transfer of title in the name of Polonsky's relative in May of 2015, Polonsky filed a Complaint in the Hillsborough County (North) Superior Court requesting the deed

be set aside and in the alternative RSA 80:89 to be declared unconstitutional, APP. p. 21. Pursuant to a court-approved stipulation Polonsky resided at the subject property during the pendency of the action and has since moved out.

On May 11, 2016, the trial court (*David W. Ruoff, J.*) ruled on the parties' cross Motions for Summary Judgment, finding title to the property was vested in Bedford and that Polonsky was entitled to recover any excess proceeds over what is owed to Bedford when the property is sold. APP p.55.

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

After the trial court's March, 2017 decision, the matter returned to this Court. Oral argument was heard in September. In February, 2018, the Court invited the participation of *amicus curiae* on the issue of whether RSA 80:89, VII (2012) results in a taking under Part I, Article 12 of the State Constitution. Following the filing of briefs, the Court issued its decision on June 28, 2018 ruling that title vested in Bedford and remanding the case to the trial court for consideration of Polonsky's takings claim and Bedford's affirmative defenses. The trial court ruled that because the right to recover excess proceeds is contingent upon the municipality selling the property, and a former owner is unable to compel the sale of the property, the statute violates the takings clause of



the New Hampshire Constitution. The trial court further ruled that Polonsky is entitled to the excess proceeds of the sale. Bedford appealed the decision.

### **SUMMARY OF ARGUMENT**

A municipality that uses the tax lien statutes to take property through tax deed for unpaid taxes must provide compensation for the value of the property taken in excess of the amount owed to prevent a violation of the takings clause of the New Hampshire Constitution. The tax lien statutes provide a right in a former owner to receive excess proceeds, but only if the property is sold within three years of the tax deed.

The municipality bears the responsibility to sell the property within three years. The tax lien statutes do not provide the former owner with the ability to compel a municipality to sell the property.

A municipality that fails to sell the property within three years deprives the former owner of the fundamental right to receive compensation for the property taken by tax deed. There can be no justification for this deprivation of a right before it has come into existence through the sale of the property.

## ARGUMENT

### II. **BEDFORD VIOLATED THE TAKINGS CLAUSE BY TAKING THE PLAINTIFF'S HOME AND RETAINING MORE THAN WAS OWED.**

The takings clause under the New Hampshire Constitution is violated where a municipality uses the tax lien statute to take a property by tax deed and does not pay the surplus to the former owner. In this case, there were in fact two takings. The first taking occurred when Bedford took Polonsky's property by tax deed where the property's value far exceeded the amount owed. The second taking occurred three years after the tax deeding of the property when Bedford failed to sell the property within three years, and because of this failure, it deprived Polonsky of the right to receive excess proceeds from the sale over the amount owed to Bedford.

#### A. **The Takings Law under the New Hampshire Constitution**

Bedford's application of the tax lien procedure deprived the Plaintiff of his fundamental right in a property interest and was a taking without just compensation under Part I, Article 12 of the New Hampshire Constitution.

"Part I, Article 12 of the New Hampshire Constitution provides that "no part of a man's property shall be taken from him, or applied to public uses, without his consent, or that of the representative body of the people." This provision requires just compensation in the event of a taking. *Burrows v. City of Keene*, 121 N.H. 590, 596, 432 A.2d 15, 18 (1981). Because the right to property is a fundamental right in our State, all subsequent grants of power, including the taxing power, are limited as to how they adversely affect it. *Cf. id.*"

*Thomas Tool Services, Inc. v. Town of Croydon*, 145 N.H. 218, 220 (2000)

In *Thomas Tool*, the New Hampshire Supreme Court analyzed the operation of the tax lien statutes, RSA 80:57 – 80:87, before the statutes were amended. It found the regime to be unconstitutional as violative of the takings clause. It subsequently amended that decision to provide that the decision should be applied prospectively, leaving for another day the issue of whether the amendments to the tax lien statutes, RSA 80:88 – 80:91 are constitutional.

**B. Bedford Violated the Takings Clause by Taking More than Owed.**

Bedford appropriated and unconstitutionally took a fundamental property right when it used the tax lien statute to keep more than what Polonsky owed. The value of Polonsky's home at the time of the taking was approximately \$309,000 and the amount Polonsky owed at that time was \$94,000 including taxes, interest, costs, fees and a penalty that since has been eliminated for homeowners. Bedford has refused to pay Polonsky the excess proceeds over what is owed to Bedford. Bedford would rather use this windfall to fatten the town coffers.

To begin with, the trial Court found that the taking occurred when the property was taken by tax deed. (Order at 3). It was at this time that Bedford was vested with complete title to the property. As a matter of law, this ruling is only

partially correct because though Bedford took title to property, that did not terminate Polonsky's fundamental interest in the property. Additionally, when a municipality takes a property by tax deed, there is a quid pro quo because the former owner receives relief from its debt in exchange for the taking, if the value of the tax debt is greater than the value of the property there is a taking, but just compensation is provided at the time of the taking.

In this case, the value of the property far exceeded the amount of the tax debt so at the time of the taking by the tax deed, just compensation was not given. Though Bedford took a substantial amount of his bundle of rights in the property, Polonsky retained a substantial bundle of separate and distinct rights. One of the rights that Polonsky retained was the right to receive just compensation for the property to the extent its value exceeded the tax debt under the takings clause of the NH Constitution. Additionally, he retained the right to repurchase it and the right to receive the surplus from the sale of the property by Bedford. RSA 80:88 and RSA 80:89, II.

Another right Polonsky retained was the right to challenge the legality of the taking by tax deeds. This right includes both the right to challenge whether Bedford tax collector followed the statutory procedure of the tax deeding process and the right to challenge whether the law that authorizes tax deeds violates the Federal and New Hampshire Constitutions. This right was vested at the time of the tax deed. Another right that vested at the time of the tax deed was Polonsky's right to receive just



compensation for the value of the property taken in excess of the amount owed under Part I, Art. 12 of the N.H. Constitution and this court's decision in *Thomas Tool*. The final right that vested at the time of the tax deed was Polonsky's right to receive the excess proceeds of any sale pursuant to RSA 80:88 if Bedford sells the property pursuant to RSA 80:89 within the three years of the tax deed. This right was a future contingent beneficial interest that would vest if, and only if, Bedford sells the property within three years.

The government may constitutionally take and sell tax deeded properties for the public purpose of collecting a valid tax debt. But to avoid violating the just compensation component requirement of the takings clauses, government must either pay for the equity at the time it takes the property, or it must sell and refund to the former owner the surplus proceeds. *See First N.H. Bank v. Town of Windham*, 138 N.H. 319, 332 (Horton J. concurring) (1994); *Bogie v. Town of Barnett*, 129 Vt. 46, 46-47 (1970). The government is only entitled to collect as much as it is owed; it has no lawful entitlement or claim to anything more. *See First NH Bank v. Town of Windham*, at 332 (Horton J. concurring)

Bedford's retention of property in this case is not materially different from the retention of the property formerly owned by Thomas Tool Services, Inc. by the Town of Croydon in the *Thomas Tool* case. In *Thomas Tool*, Croydon attempted to retain property *Thomas Tool* had acquired for \$65,000 for an unpaid tax bill of \$390. *Thomas Tool* at 219. In this case, Bedford is attempting to retain

property with an assessed value of \$309,000 for an unpaid tax bill of \$94,000. In both cases, the towns attempted to retain property with values that far exceeded the taxes that were owed. In both cases the town's use of the tax lien statute effectuated a taking without just compensation.

**C. Bedford Committed a Second Taking Without Compensation When it Denied Polonsky the Right to Excess Proceeds by not Selling the Property.**

There are two ways in which the three-year limitation in RSA 80:89 violate the takings clause. First, because the compensation that was offered in connection with the taking of Polonsky's property by tax deed is the excess proceeds from the sale of the property, and the property was not sold within three years, the failure to sell the property made the original taking by tax deed violative of the takings clause. Secondly, the right to receive the excess proceeds is in itself a property interest that was terminated before any excess proceeds existed so it amounted to a taking of that property interest.

Bedford was well aware of the consequences of not selling the property for Polonsky. In an email from Jessie W. Levine, Town Manager to Polonsky dated April 4, 2013, the Town Manager wrote:

A third option is for the Town to proceeds to sell the property, which we typically do by auction. Since we are still within the three-year time frame, pursuant to RSA 80:88 it would appear the proceeds above back taxes, interest, costs and penalty would be

payable to you as the former owner (we are not currently aware of any other ownership interest or lienholders of the property). If you choose to repurchase the property as outlined in the above paragraph, it is likely that the Town will proceed down the path of selling the property, which would unfortunately have to include your departure from the property (I apologize for the lack of a kinder term). You would be eligible to receive the proceeds from the sale above the funds due the Town.

APP p.4 (MSJ Ex. II).

Though Bedford was aware of the draconian financial consequences of not selling the property within three years, it failed to sell the property. This had the effect of terminating the right of Polonsky to receive compensation for the property that was taken by him through the tax deed. Not only did it deprive Polonsky of the right to receive the excess proceeds, it transferred that right to Bedford which would experience a windfall if it were allowed to retain these excess proceeds. So, it was in all respects a taking that occurred three years from the date of the tax deed, which was the last day that Polonsky would be entitled to the excess proceeds from the sale.

### **III. THE STATUTE IS UNCONSTITUTIONAL BECAUSE IT PERMITS TAKINGS WITHOUT JUST COMPENSATION.**

The trial court was correct in finding that the legislative fix that was RSA 80:88 – 80:91 was partial at best. (Order at 5.) The decision to sell a property taken by tax deed is left to the discretion of the municipalities. If a municipality protects all of the former owner's rights by selling a tax-deeded property within three years, then in those cases RSA 80:88 – 80:91 will remedy the violation of



the takings clause where a property was taken under the authority of the tax lien statutes. However, RSA 80:88 – 80:89 creates a financial incentive for municipalities to hold a property for three years and only sell after the former owner's rights to receive the surplus expires. As is demonstrated by this case, a municipality that delays the sale of a tax-deeded property for three years would not have remedied the unconstitutional taking that occurred at the time of the tax deed. Additionally, the right of repurchase in RSA 80:89 does not prevent unconstitutional takings where the former owner lacks the ability to pay the amount owed in taxes and additional charges.

**A. The Procedure for the Sale and Payment of Proceeds is Optional.**

The inherent flaw in the legislative fix is that when a municipality acquires a property by tax deed whose value exceeds the amount owed, the decision of whether or when to dispose of the property is left entirely within the discretion of the municipality. A town may decide to dispose of the property immediately, it may hold on to it for an indefinite period and then sell it, or it may decide to retain the property permanently. Under the statute, the former owner is only entitled to receive the proceeds if the town sells it within three years from the date of the tax deed. *Polonsky v. Town of Bedford*, 171 N.H. 89, 96 (2018). In this way, it is left to the discretion of the town whether the former owner receives just compensation



for the property taken. Municipalities cannot be left with discretion of whether to violate the Constitution.

**B. The Right to Repurchase Does Not Cure the Unconstitutional Taking.**

The right to repurchase set forth in RSA 80:89, though having the effect of reducing litigation by providing former owners that have the ability to pay what is owed to a municipality a means to redeem their interests, does nothing for the former owner with no ability to pay. Fundamental rights that are protected by the Constitution do not have to be purchased. They are afforded to all people regardless of their ability to pay. Therefore, the right to repurchase by itself, did nothing to correct the takings issue for those with no ability to pay.

**III. RSA 80:88-91 DOES NOT OBLIGATE A MUNICIPALITY TO SELL A PROPERTY ACQUIRED BY TAX DEED.**

Instead of an argument based in the language of the statute Bedford has offered up a Trojan horse in the form of a proposed judicial remedy that it is asking this Court to sanction. Bedford is asking the Court to read into the statutes a judicial remedy that is available to all former owners of tax-deeded property to compel municipalities to sell the tax-deeded properties within three years of the tax deed in order to obligate the municipalities to pay to the former owners the surplus.

Under its theory, Bedford took without compensation at the time of the tax deed. Since Bedford did not sell the property within three years it no longer has to pay to Polonsky the surplus. According to this theory, this windfall to Bedford is not actionable because the legislature did not intend to allow former owners to receive the surplus after three years. Bedford argues this is not unconstitutional because although the legislature did not specifically create a remedy in which a former owner could force a sale by the municipality, because it created a right to receive the surplus, the former owner had such a right that could be enforced by a court of equity if it acted within three years. And because Polonsky did not, he has no right to receive the surplus or in the property that was taken without just compensation.

If this Trojan horse of an argument is opened to reveal what is inside, it will reveal that it has no basis in the statute and was not intended by the legislature when it enacted the statutes. The argument is at its core a request for this Court to legislate from the bench. Moreover, it is unworkable as illustrated by the facts of the case. Finally, even if the premise of the argument is accepted that a court in equity could compel the sale of the property because Bedford has a duty to distribute the surplus to Polonsky, what the argument sets forth are the elements of a breach of trust. Consequently, not only would a municipality be subject to a court of equity's order to fulfill its duty before it has been performed, it would be answerable in a court of equity for its breach of that duty after the

time for fulfilling the duty had passed. A court of equity could order compensation for the financial loss that a former owner suffered as a result of a municipality's failure to perform its duty to sell a property. Neither remedy was intended by the legislature and the remedies that the legislature did provide were the only remedies available to Polonsky, woefully inadequate as they have been proven to be.

**A. There is No Basis in the Statute for Bedford's Argument that an Action Could be Initiated to Compel the Sale of the Tax-deeded Property.**

The amendments to the tax lien procedure do not provide for a right in a former owner to compel the sale of a property taken by tax deed. In fact, RSA 80:91 provides that a municipality cannot be compelled to sell a property taken by tax deed. Thus the remedy proposed by Bedford would require the Court to improperly ignore the plain language of RSA 80:91. *Hemenway v. Hemenway*, 159 N.H. 680, 684 (2010) ("Courts can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include").

The discretion of a municipality with respect to a tax-deeded property could not be made clearer than in RSA 80:91. This statute, entitled "Liability and Obligations Limited", provides as follows:

With respect to actions of a municipality under RSA 80:88 and 80:89, if the municipality has complied with the provisions of this chapter it shall not have any liability whatsoever to any former owner or lienholder in connection with its management of the property or for the

amount of consideration received upon disposition of the property.

RSA 80:91

Because RSA 80:88 and 80:89 do not require a municipality to sell a tax-deeded property within three years of the tax deeding or at all, a municipality would in all respects be in compliance with RSA 80:88 and 80:89, and therefore could not be held accountable to a former owner either with respects to the proceeds or in the timing of the sale of the property.

The provision of RSA 80:91 that the trial court found demonstrates the discretion that a municipality has with respect to the timing of the disposition of tax-deeded property was the third sentence of RSA 80:91.

Nothing in RSA 80:88 or 80:89 shall require a municipality to dispose of property acquired by tax deed, except as provided in RSA 80:89.

*Id.*

The trial court correctly found that RSA 80:89 creates no duty on the part of municipality to sell, “but rather sets out the procedure should a municipality decide to sell the property within the three-year period for sale and corresponding duty to distribute excess proceeds.” (Order at 5); *citing Gordonville Corp. N.V. LRI-A Ltd. P’ship*, 151 N.H. 371, 374 (2004). As RSA 80:89 does not require a municipality to dispose of a property, a municipality cannot be compelled to do so within three years of the tax deed as Bedford has argued.



Additionally, other provisions of the tax lien statutes provide additional discretion in a municipality to retain a tax-deeded property. A municipality may retain a property acquired by collector's deed for public purposes. RSA 80:80, V. Consequently, if a former owner sued to compel a sale, a governing board could simply vote to use the property for a public purpose. As a municipality is afforded this discretion to do so, a court would not compel a sale.

**B. It is Bedford's Obligation to Provide Compensation for Its Unconstitutional Taking.**

The crux of Bedford's argument is that because the legislature set up a remedy that provided a former owner with the right to receive the excess proceeds from Bedford's sale of the tax deeded property, it was the right of the former owner to compel Bedford to do what it should have done and sell the property within three years of the tax deed. And because, according to Bedford, the Polonsky did not bring an action to compel Bedford to sell the property within three years, he has lost any right to the property. In fact, Bedford has completely reversed the rights and obligations under the N.H. Constitution the Supreme Court found to exist when municipalities take property by tax deed. It is the obligation of the municipality to comply with the N.H. Constitution and this court's decision in *Thomas Tool* in the first instance. Because the authority to use the tax liening and deeding process is limited by the N.H. Constitution and it may only be used to the extent that it does not violate the rights of individuals as set forth in the

N.H. Constitution. Consequently, the burden is on Bedford to demonstrate that it has complied with the Constitution.

In a similar case, in *White v. Wolfeboro*, 131 N.H. 1 (1988), the tax sale process that predated the tax lien process was brought into question. In that case the taxes with respect to land in the Town of Wolfeboro were not paid for the years 1982 and 1983. As the result of White's divorce, he had changed residences from Dover, N.H. to Durham, N.H. The town sent a notice of the tax sale to White's former address in Dover which was returned to the town marked "Returned to Sender, Moved, not forwardable." *Id.* at 2. The tax sale was conducted at the Selectmen's office with and the property was sold to the town for the amount of taxes, interest and costs due. Subsequently, the notice that the property would be deeded to the payer of taxes (the town) unless the owner redeemed the property was also returned as undeliverable. *Id.*

An important feature of the tax sale process is that the law requires that only so much of an interest in property be sold as will satisfy the taxes, interest and charges. *Id.* at 5; *citing* RSA 80:24-a. In this way the tax sale process attempted to avoid the situations that occur using the tax lien process like in this case and the *Thomas Tool* case, where title to the entire property, whose value far exceeds the amount owed, is taken. The issue in *White* was whether the town had conducted the tax sale in accordance with RSA 80:24-a. The court found that the town had violated the procedure set forth in RSA 80:24-a because it had not sold

a fractional interest in the property that satisfied the amount of taxes owed. It found that a municipality conducting a tax sale is required by RSA 80:24-a to sell a fractional interest in the property according to its value and the amount owed. *Id.* at 5.

In doing so it also set forth the rule of law that the burden is on the municipality conducting the tax sale to sell only a fractional interest unless it can establish that “particular exigencies” prevented it from doing so. *Id.* at 6. With respect to this rule of law, it effectively overruled the case of *Spurias v. Morissette*, 109 N.H. 275 (1969), a case in which a former owner was denied a claim for surplusage over the amount owed from a sale under the tax sale process. The *Spurias* dictum suggested the burden was on the former owner to demonstrate that RSA 80:24-a was violated when a sale for more than a fractional interest was sold at a tax sale by demonstrating that a bidder was willing to bid for such a fractional interest. The *White v. Wolfeboro* case made it clear that the taxpayer was relieved of the burden of showing that the municipality could have sold it for a fractional interest.

Similarly, Bedford’s argument is rooted in a *Spurias* mindset that the former owner must compel the municipality to do what it is obligated to do. In the same way that a municipality has complete control over whether to sell a fractional interest at a tax sale, the municipality has complete control over whether to sell a property within three years and be obligated to return the excess

proceeds to the former owner. Just as *White* court found that the burden should rest with municipality to demonstrate it could not sell the property for a fractional interest, the burden should be on a municipality to demonstrate it was not able to sell a property within the three years provided by RSA 80:89, V. To hold otherwise, would set former owners' rights back to a time before *Thomas Tool*, before *First NH v. Town of Windham*, and before *White v. Wolfeboro*.

**C. The Facts of This Case Demonstrate That the Remedy Proposed by the Town is Unworkable.**

Attorney Mayer described Bedford's proposed remedy to Judge Nicolosi as follows:

Mr. Mayer: I wouldn't hesitate to come before this Court and state that I went to the town offices and said I can't afford to repurchase this property. When are you going to sell it? And they say, we're not going to sell it.

Court: Um-hum.

Mr. Mayer: I would come to this Court and ask this Court to compel the Town to sell it because I have a right - - within the three-year period I have a right to excess proceeds. The right terminates upon the three-year period expiring. But I still have a viable right to come to this Court and ask for an accounting. And since laches is a judicial construct, the legislature placed a three-year statute of limitations on the rights that were granted.

TR Evidentiary Hearing at 21

While Attorney Mayer describes an ideal situation in which the town discloses that it is not going to sell the property, this case demonstrates that it is



difficult for a former owner to divine what a town will do for whatever reason. The facts in this case are that Polonsky received a notice of his right to repurchase and the intent of Bedford to sell the property in January 2, 2014. *See* 5/16/16 ORDER at 3, fn.1, APP p.48. This is approximately two years and seven months after the date the property was taken by tax deed. *See* Ruoff Order at 2, APP at 47. So as far as Polonsky knew, Bedford was going to sell the property at some point after January 2, 2014. So how was Polonsky supposed to have had known that Bedford was not going to follow through with the sale of the property? Was he supposed to file suit just in case Bedford didn't do what it said it was going to do? Polonsky, under Bedford's line of reasoning, should have initiated an action to compel Bedford to do what it had already expressly indicated it was going to do. And because Polonsky failed to exercise this right he did not know he had to compel Bedford to do something he did not know Bedford was not going to do, Bedford argues that it should be able to keep the entire proceeds from the sale of Polonsky's home.

**D. Bedford's Proposed Judicial Remedy Sets Forth the Elements of a Breach of Trust.**

In offering its proposed judicial remedy, which Bedford argues prevents the statute from being unconstitutional, Bedford has set forth the elements of a breach of trust. Though it was not created pursuant to a trust document, Bedford did hold title to property for the benefit of another and according to its argument,

Bedford's duties to deal with the property for the benefit of Polonsky were enforceable by a court of equity.

To begin with the Restatement (Second) of Trusts sets forth the elements of a trust:

A trust involves three elements, namely, (1) a trustee, who holds the trust property and is subject to equitable duties to deal with it for the benefit of another; (2) a beneficiary, to whom the trustee owes equitable duties to deal with the trust property for his benefit; (3) trust property, which is held by the trustee for the beneficiary.

Restatement (Second) of Trusts §2 cmt. H (1959) (emphasis added).

According to Bedford's argument, Bedford satisfies all the elements of a trust. Although not created by a trust, Bedford's ownership of property in which it owes an equitable duty to deal with for the benefit of another would best be described as a resulting trust. Black's Law defines a resulting trust as follows:

A trust imposed by law when property is transferred under circumstances suggesting that the transferor did not intend for the transferee to have the beneficial interest in the property. Also termed implied trust, presumptive trust cf. constructive trust

Black's Law Dictionary (revised 7<sup>th</sup> edition, 1999)

Certainly, Polonsky as the transferor did not intend for Bedford to have a beneficial interest in the property. The resulting trust relationship is not based upon the intentions of the parties but the legal duties that Bedford claims are enforceable in a court of equity.

Now Bedford's argument is based upon a court of equity compelling it to do something with respect to property for the benefit of another. If Bedford could be compelled by a court of equity to sell the property, it could also be held to answer for the failure to perform that duty to by a court of equity. A breach of trust is defined as "a violation (either through fraud or negligence) by a trustee of a duty that equity requires of him." Black's Law Dictionary (revised 7<sup>th</sup> edition, 1999)

In the case of *Hodges v. Johnson*, 177 A.3d 86 (N.H. 2017), the trustees were held to answer for decanting a trust so that it eliminated the future beneficial interests of certain beneficiaries. "Decanting is the term generally used to describe the distribution of trust property to another trust pursuant to the trustee's discretionary authority to make distributions to, or for the benefit of, one or more beneficiaries." *Id.* at 88; *quoting* William R. Culp, Jr. & Briani Bennett Mellen, *Trust Decanting: An Overview and Introduction to Creative Planning Opportunities*, 45 Real Prop. Tr. & Est. L.J. 1, 2 (Spring 2010); *see* RSA 564-B:4-418(a) (Supp. 2016) (explaining that "[t]he power to decant is the power to appoint some or all of the trust property of a trust ... to another trust"). The Supreme Court affirmed the trial court's decision and found that the trustees had failed to give due consideration to the future beneficial interests of the plaintiff beneficiaries.

If Bedford were answerable to a court of equity, then its failure to sell the property timely eliminated the future beneficial interest of Polonsky to the surplus proceeds. In a similar way that the trustees failed to give due consideration to the future beneficial of the plaintiff beneficiaries in *Hodges*, Bedford failed to give due consideration to the future beneficial interest of Polonsky to the surplus proceeds.

Because Bedford failed to sell the property within three years, then Polonsky would have suffered a substantial financial loss as a result of Bedford's breach of a duty to sell the property. Therefore, Bedford would be answerable to a court of equity for its failure to perform that duty and liable to Polonsky for the financial loss suffered as a result of that breach of a duty.

And because 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 it was a continuing breach of that duty. Therefore, the statute of limitations to bring an action for a breach of trust would begin to run on May 31, 2014.

Bedford's failure to sell the property effectively denied Polonsky the benefit of his future beneficial interest in his rights to the proceeds under RSA 80:88 to Bedford's benefit. Nevertheless, there is no indication that the legislature intended a municipality to be answerable in a court of equity for such a breach of trust in the language of RSA 80:88 – 80:91. In the same way, there is no indication that the legislature intended that a former owner could bring an



action to compel a municipality to sell a property. Bedford is asking this Court to create a remedy not intended by the legislature.

If the legislature believes it is in the best interest of taxpayers and municipalities to change the statutory scheme to provide a former owner the ability to bring an action to compel a municipality to sell a tax-deeded property or for a former owner to bring an action for a breach of trust, it is within its power to do so. As this Court has stated with respect to changes to the statutory scheme:

[W]e simply note that if the legislature disagrees with our construction of the statutes, or it determines that changes to the statutory scheme are either necessary or warranted, then the decision as to what changes should be made may involve policy judgments that are for the legislature, rather than this court to make. [T]he legislature is institutionally better equipped to determine what any changes should be, what any changes should be. Cf. *In re Grand Jury Subpoena* (Issued July 10, 2006), 155 N.H. 557, 562, 926 A.2d 280 (2007) (stating that legislature is institutionally better equipped to decide whether adopting a new privilege is in society's best interests).

*Polonsky v. Town of Bedford*, 171 N.H. 89, 97 (2018).

As the legislature has not seen fit to provide the proposed judicial remedy argued by Bedford, this Court should not provide one.

**IV. RSA 80:89 IS UNCONSTITUTIONAL BECAUSE IT TERMINATES THE RIGHT TO JUST COMPENSATION BEFORE IT CAN BE EXERCISED.**

Bedford has argued that RSA 80:89, VII is a statute of limitations that prevents Polonsky from bringing his claim that Bedford violated the takings

clause in its retention of proceeds from the sale of the property in excess of what was owed. Def. Brf at 27. Not only is this argument not supported by the language of the statute, but the long-recognized statute of limitations governing tax deeds is RSA 80:78 and its counterpart for the tax sale process RSA 80:39. As the trial court properly ruled, the right to excess proceeds is contingent upon a municipality selling the property. If a municipality does not sell a property within three years of the date of the tax deed, the former owner has no right to receive excess proceeds because they do not exist until a sale occurs if at all. Thus, if RSA 89:89 were a statute of limitations, it would likely deprive a former owner of due process because there would be no opportunity to be heard before recovery would be barred.

**A. The Legislature's Imposition of a Three-Year Limitation Regardless of Whether a Sale Occurred and is Not Necessary to the Accomplishment of its Purpose.**

The right to own property is a fundamental right. Polonsky was deprived of the ownership of property initially through the tax deed. Additionally, he was entitled to receive the excess proceeds from the sale of the property pursuant to RSA 80:88 – 80:91. However, because Bedford failed to sell the property within the three years Polonsky was also deprived of the right to receive the excess proceeds which would have provided him just compensation for the original taking at the time of the tax deed.

The issue is whether the three-year limitation in RSA 80:89, which operates regardless of whether there has been a sale of the property violates Pt. 1, Art. 14 of the N.H. Constitution. Under this provision, "[e]very subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws." Pt. 1, Art. 14. of the N.H. Constitution.

In analyzing a restriction on a remedy, the analysis begins by selecting "the appropriate standard of review by examining the purpose and scope of the State-created classification and the individual rights affected." *Follansbee v. Plymouth District Court*, 151 N.H. 365, 367 (2004) quoting *In re Sandra H.*, 150 N.H. 634, 637 (2004). The selection of a standard is the same as the equal protection analysis.

Classifications based upon suspect classes or affecting a fundamental right are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be necessary to the accomplishment of its legitimate purpose. Classifications involving important substantive rights must be reasonable and rest upon some ground of difference having a fair and substantial relation to the object of the legislation.... Finally, absent some infringement of a fundamental right, an important substantive right, or application of some recognized suspect classification, the constitutional standard to be applied is that of rationality.

*Id.* at 637-38.



The remedy at issue is the right to receive payment for property taken at the time of the tax deed. This is a post-deprivation remedy for the deprivation of a fundamental right. As it implicates a fundamental right the appropriate standard of review is strict or exacting scrutiny. Under this standard the limitation of the remedy may only be justified by a compelling governmental interest and must be necessary to the accomplishment of a legitimate public purpose. Additionally, the government bears the burden of demonstrating a compelling governmental interest and the limitation must be narrowly tailored to accomplish that objective.

The collection of taxes is a compelling governmental interest, but Bedford has offered no justification for the termination of the right to excess proceeds before the sale that produces the excess proceeds takes place. While there needs to be an end point in the tax collection process, there is no reason to allow the termination of the right to excess proceeds where the municipality has not sold the property. If the only compensation offered by the municipality is the excess proceeds from the sale of the property, the right to receive those proceeds should not end until after the sale has taken place.

There can be no justification for terminating a right before it exists. As the right to excess proceeds is contingent upon a sale, if no sale takes place before the three years then the right will have been abolished before it existed. In *Heath v. Sears Roebuck*, this court described the unreasonableness of the termination of



a cause of action before the wrong could reasonably be discovered by quoting Judge Frank's dissent in *Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir.1952). *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 525 (1983). It would seem Judge Frank's "Alice in Wonderland" condemnation would be equally applicable to this case.

Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of logical 'axiom,' that a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to a plaintiff.

*Heath v. Sears Roebuck & Co.*, 123 N.H. 512, 525 (1983); quoting *Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir.1952). There can be no justification for the termination of the right to excess proceeds before they exist. It is for this reason, that Bedford has not even attempted a justification, but rather offered a proposed judicial remedy rather than an analysis of the procedure and its restrictions set forth in the statute.

Even if Bedford's proposed judicial remedy were analyzed, it does not satisfy the strict scrutiny standard. There is no reason to require a former owner to compel a municipality to sell a property. Given that the municipality has chosen to utilize the tax lien process to collect taxes, it should be up to the municipality to do all things necessary to comply with the takings clause. A

person who has been deprived of the ownership of property should not have to force a municipality to sell his or her former property.

**B. There Is an End Point to the Tax Collection Process it is RSA 80:78.**

To begin with, RSA 80:88 – 80:89 do not exist in isolation but those statute are part of a larger set of statutes known as the tax lien statutes. The tax lien statute procedure is set forth in RSA 80:58 -80:87. The tax lien statutes are the same statutes that were found to be unconstitutional in *Thomas Tool Services, Inc. v. Town of Croydon*. The statute of limitations that is part of the tax lien statutes is RSA 80:78 which reads as follows:

No action, suit or other proceeding shall be brought to contest the validity of an execution of the real estate tax lien or any collector's deed based thereon after 10 years from the date of record of the collector's deed.

RSA 80:78.

This statute of limitations specifically applies to an action based on any collector's deed ten (10) years from the date of the recording. In *Town of Hudson v. Gate City Development Corp.*, 139 N.H. 606 (1995), the Court analyzed whether RSA 80:39 barred recovery where the trial court had determined that the tax deeds in this case were invalid because of due process concerns. RSA 80:39, which contains identical language to that of RSA 80:78, governed tax deeds issued through the tax sale process. The Supreme Court found that RSA 80:39

barred a claim that the tax deed was invalid because it was not brought within ten years of the tax deed. *Hudson* at 609.

Similarly, RSA 80:78 would bar a claim that the tax deed violated the takings clause of the Federal and N.H. constitutions. However, in this case the claim that the tax deed violated the takings clause was brought well before the statute of limitations expired.

### **CONCLUSION**

Based on the foregoing, Appellee respectfully requests this honorable Court affirm the decision of the trial court in favor of the Plaintiff ordering the Town of Bedford to pay to the Plaintiff the excess proceeds from the sale of the property.

### **REQUEST FOR ORAL ARGUMENT**

Richard Polonsky requests the opportunity to present oral argument, not to exceed 15 minutes, to be presented by John F. Hayes, Esquire.

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

I hereby certify that the within brief complies with Sup. Ct. R. 26(7) and contains 8,320 words, excluding cover page, table of contents, table of authorities, statutes, rules and appendix.

Respectfully submitted,

Richard Polonsky, Plaintiff  
By his attorneys,  
Alfano Law Office, PLLC

Dated: December 3, 2019

By: /s/ John F. Hayes  
John F. Hayes, Esquire, Bar #9328  
4 Park Street,  
Concord NH 03301  
(603) 715-8395

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was this date forwarded to Barton L. Mayer, Esquire, Corey M. Belobrow, Esq., Bernard Campbell, Esquire, and Stephen Buckley, Esquire.

/s/ John F. Hayes  
John F. Hayes



## **TRIAL COURT ORDER**

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

Hillsborough Superior Court Northern District  
300 Chestnut Street  
Manchester NH 03101

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

May 15, 2019

**FILE COPY**

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

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

RE: COURT ORDER:

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

W. Michael Scanlon  
Clerk of Court

(923)

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

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

Richard Polonsky

v.

Town of Bedford

Docket No. 216-2015-CV-00388

**ORDER**

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

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

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



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

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

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



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

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

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



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

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

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

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



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

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



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

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

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

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



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

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

Having determined plaintiff is entitled to recover any excess proceeds that result from the sale of his former property, the court must determine what, if any, additional penalty should be assessed in calculating the excess. RSA 80:88, 1 provides that "the municipality's recovery of proceeds from the sale shall be limited to back taxes, interest, costs and penalty, as defined by RSA 80:90. The current version of RSA 80:90 (f), amended in 2016, provides for "[a]n additional penalty equal in amount to 10 percent of the assessed value of the property as of the date of the tax deed, adjusted by the equalization ratio for the year of the assessment." At the time the Town acquired plaintiff's property via tax deed in 2011, RSA 80:90 provided for a 15 percent penalty.



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

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

(Emphasis added).

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

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

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

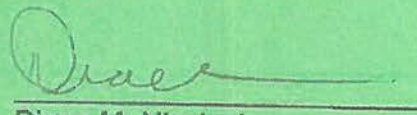


laws. Judge Ruoff reasoned that, because the relevant point in time for the calculation of the penalty is upon sale, which has not yet occurred, the law in effect at the time of sale would apply. Although the Supreme Court chose not to review these rulings on appeal, they remain the law of the case and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

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

**SO ORDERED.**

5/14/2019  
Date

  
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Diane M. Nicolosi  
Presiding Justice