

New Hampshire Tax Collector's Ass'n.
Spring Workshops, 2018

COURT CASE UPDATE

Bernard H. Campbell, Esq.
NHTCA State Counsel

Beaumont & Campbell Prof. Ass'n.
1 Stiles Road-Suite 107
Salem, New Hampshire 03079
603-898-2635
E-mail: bcampbell@beaumontandcampbell.com

Since January 1, 2014, there have only been 2 NH Supreme Court cases which have referenced or dealt with issues involving "tax deeds", "tax liens", "tax sales" or "tax collectors". Both were decided in April 2016, and both have been the subject of prior discussions at NHTCA Workshops:

- 1) Benoit vs Cerasaro, Trustee, 169 N.H. 10 (2016)- Involved a tax deeded property sold by the Town of Merrimack and involved the question of whether the tax deed extinguished a restrictive covenant against development (it did not).
- 2) Everett Ashton, Inc vs City of Concord, 169 N.H. 40 (2016) – Involved the taxation of manufactured home units and required the city to allow the relocation and demolition of units with unpaid taxes in parks where lot rent was unpaid.

HOWEVER, there is a case that is likely to be decided in 2018 related to the issue of the municipality's liability to former owners of property taken by tax deed.

AMICUS ANNOUNCEMENT

THE SUPREME COURT IS SOLICITING AMICUS BRIEFS OR MEMORANDA IN THE FOLLOWING MATTER PENDING BEFORE THE COURT:

Case No. 2016-0354, Richard Polonsky v. Town of Bedford

In 2008, the plaintiff, Richard Polonsky, inherited residential property in Bedford that, at that time, was assessed at approximately \$300,000. Because the plaintiff failed to pay his real estate taxes in 2008, 2009, and 2010, tax liens were imposed on his property, and, in May 2011, a tax deed for the property was issued to the defendant, the Town of Bedford (Town). The tax deed was recorded in June 2011. In July 2013, the Town decided to sell the property. However, to date, it has not done so.

Pending before the court are the plaintiff's appeal and the Town's cross-appeal of an order of the Superior Court (Ruoff, J.) on the parties' cross-motions for summary judgment as to the plaintiff's petition for injunctive and declaratory relief and to quiet title to the property. In addition to other claims, the plaintiff appeals the trial court's denial of his challenges to the validity of the tax lien and tax deed. The Town cross-appeals the trial court's determination that, even though the tax deed in this case was recorded more than three years ago, upon the eventual sale of the property, the plaintiff may bring a claim for any amounts in excess of the outstanding taxes, interest, costs, and statutory penalty (if any) owed.

The court is soliciting amicus briefs or memoranda from interested persons on the following issue:

Would RSA 80:89, VII (2012) result in a taking without just compensation, in violation of Part I, Article 12 of the State Constitution, if it were interpreted to bar a former owner from recovering from a municipality amounts in excess of the outstanding taxes, interest, costs, and statutory penalty (if any) owed, when the municipality sells the former owner's tax-deeded property more than three years after the tax deed has been recorded?

Posted with this announcement are: (1) the trial court's May 11, 2016 order on the parties' cross-motions for summary judgment; (2) the plaintiff's notice of appeal; (3) the Town's notice of cross-appeal, and the parties' briefs; (4) this court's January 13, 2017 order remanding the case to the trial court for the sole purpose of addressing the impact of statutory changes; (5) the trial court's March 7, 2017 order on remand; and (6) the Town's supplemental memorandum of law addressing the trial court's March 7, 2017 order.

Amicus submissions are due on or before March 5, 2018. Persons filing amicus briefs are expected to comply with the requirements of Rules 16 and 17 of the Rules of the Supreme Court of New Hampshire. To assist the court, amicus briefs and memoranda should focus on the ramifications of a decision and not solely upon the interests of the parties filing such briefs.

Interested parties shall file an original and eight copies of their briefs or memoranda in the Office of the Clerk, New Hampshire Supreme Court, One Charles Doe Drive, Concord, New Hampshire 03301, and should also provide a copy of any amicus brief or memorandum to counsel for the plaintiff, John F. Hayes, Alfano Law Office, PLLC, 4 Park Street, Concord, NH 03301, and to counsel for the defendant, Barton L. Mayer and Michael P. Courtney, Upton & Hatfield, LLP, 10 Centre Street, P.O. Box 1090, Concord, NH 03301, and Corey M. Belobrow, Maggiotto, Belobrow, Feeney & Fraas, PLLC, 58 Pleasant Street, Concord, NH 03301.

**Eileen Fox,
Clerk**

THE PLAINTIFF'S ISSUES ON APPEAL:

Case Name: Polonsky v. Town of Bedford

RULE 7 NOTICE OF MANDATORY APPEAL

13. LIST SPECIFIC QUESTIONS TO BE RAISED ON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL. STATE EACH QUESTION IN A SEPARATELY NUMBERED PARAGRAPH. SEE SUPREME COURT RULE 16(3)(b).

1. Did the trial court err in ruling that the proceedings related to the tax deeding of the personal residence of the plaintiff for unpaid taxes were valid where the trial court found that the Town of Bedford had failed to provide notice to the plaintiff of the right to repurchase the property in the time prescribed by RSA 80:89, I?

2. Did the trial court err in ruling that the penalty prescribed by RSA 80:88 - 90 did not violate Part I, Article 12 of the New Hampshire Constitution on its face and declining to rule that the penalty constitutes double taxation?

THE TOWN'S ISSUES ON APPEAL

Case Name: Richard Polonsky v. Town of Bedford

RULE 7 NOTICE OF MANDATORY APPEAL

13. LIST SPECIFIC QUESTIONS TO BE RAISED ON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL. STATE EACH QUESTION IN A SEPARATELY NUMBERED PARAGRAPH. SEE SUPREME COURT RULE 16(3)(b).

1. Whether the trial court erred when it ruled that the former owner had the right to recover excess proceeds from the sale of a tax deeded property after the three year period provided in RSA 80:89, VII expired? ("The duty of the municipality to notify former owners and to distribute proceeds pursuant to RSA 80:88, and the former owners' right of repurchase, under this section shall terminate 3 years after the date of recording of the deed.")

2. Whether RSA 80:89, VII, in extinguishing a former owner's right to recover excess proceeds is a lawful restriction on a former owner's right to receive excess proceeds as it operates as a statute of limitations and does not constitute a taking under Part I, Article 2 of the New Hampshire Constitution?

THE NHTCA QUESTIONS PRESENTED FOR REVIEW:

QUESTIONS PRESENTED FOR REVIEW

1. Does RSA 80:89(VII), which limits a recovery by a former owner who loses property by tax deed, to recovery of excess proceeds for three (3) years from deeding, 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 the taking issue, and where a three (3) year general statute of limitations (RSA 508:4) would be applicable to causes of action generally?

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)?

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 deed;
- A right to any “excess proceeds” if the property was sold by the municipality within three (3) years of the deed.

The “preamble” to Chapter 238 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 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 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 Affirmed in part with, respect to rulings in favor of the Defendant, and Reversed in part with respect to the applicability of RSA 80:89(VII).