

Tax Deeded Property: You Own It; NOW WHAT?

A Presentation for the NH Tax Collector's Association (NHTCA) Fall Convention - 2023

By: Bernard H. Campbell, Esq.
State Counsel, NHTCA
Beaumont & Campbell Prof. Ass'n.
1 Stiles Road, Suite 107
Salem, New Hampshire 03079
603-898-2635
Bcampbell@beaumontandcampbell.com

Note: This outline was used for presentation at the 2016 New Hampshire Municipal Association Annual Conference, and the Fall 2017 NHTCA Annual Conference. It was updated in the fall of 2021 primarily to address the effects of the N H Supreme Court Opinions in the matter of Polonsky vs. Town of Bedford. An addendum has been added for commentary on the US Supreme Court opinion in Tyler vs Hennepin County MN decided May 25, 2023.

The acquisition of property by Tax Deed by a community is often necessary to protect the financial interest of the community and to convert the property back to a revenue producing (and maybe job creating) asset. However, it carries with it responsibilities and challenges that need to be weighed.

The following is offered as guidance to communities as they work their way through the process:

I. THE PREQUEL- What if we don't want it?

Under New Hampshire law (RSA 80:77), the Tax Collector must send "intent to deed" notices to property owners at least 30 days before a deed can be issued. This is the "starting line" for the final decision making process:

- There should be a reporting process by which this "hit list" gets to the governing body as soon as the notices go out.

- The governing body should arrange for the properties to be “inspected” physically by Code Enforcement; Building Inspector(s); Fire Marshall or other municipal representative to evaluate any immediate visible concerns as to conditions of liability (e.g. environmental issues; junk & debris, “hazardous and dilapidated” conditions). In residential properties, note presence or absence of occupants. For commercial occupancies, consider running a “name check” with the New Hampshire Secretary of State to ascertain the legal status and contact information for any operating businesses.
- If needed (or suggested by inspection) check building department records and/or NH Dept. of Environmental Services files on the site. Information may be available through the DES “OneStop” data site at <http://des.nh.gov/onestop/index.htm> .
- If deemed necessary, and voluntary cooperation is not available, consider obtaining an “Administrative Inspection Warrant” to conduct an inspection of the interior of buildings or structures:

595-B:1 Definition. – *An inspection warrant shall be a written order in the name of the state, signed by a justice, associate justice or special justice of any municipal, district or superior court, directed to an official or employee of a state agency, municipality, or other political subdivision, commanding him to conduct any inspection, testing or sampling required or specifically authorized by state law or administrative rule, or municipal ordinance, code or regulation.*

Finally, in the days immediately prior to the deed deadline, the “decision maker” (Board of Selectmen; Town Manager; Mayor) needs to decide whether the Municipality does not want the Tax Collector to issue a Tax Deed to the community.

There are two (2) statutory grounds for refusing to accept a tax deed; one is environmental concerns:

“...the collector shall not execute a deed of the real estate to a municipality when the governing body of the municipality has notified the collector that it shall not accept the deed because acceptance would subject the municipality to potential liability as an owner of property under

the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. section 9601 et seq., the Resource Conservation and Recovery Act, 42 U.S.C. section 6901 et seq., RSA 147-A and 147-B, and any other federal or state environmental statute which imposes strict liability on owners for environmental impairment of the real estate involved.

RSA 80:76(II)

the other relates to avoiding liabilities or obligations:

“...the governing body of the municipality may refuse to accept a tax deed on behalf of the municipality, and may so notify the collector, whenever in its judgment acceptance and ownership of the real estate would subject the municipality to undesirable obligations or liability risks, including obligations under real estate covenants or obligations to tenants, or for any other reason would be contrary to the public interest. Such a decision shall not be made solely for the private benefit of a taxpayer.

RSA 80:76(II-a)

This is the usual basis for refusing to accept such things as mobile homes (liability for lot rent commences as of ownership date), condominium units subject to assessments (See, Buchholz vs Waterville Estates Associates, 156 N.H. 172 (2007) (tax deed does not eliminate pre-existing covenants which include obligation to pay assessments); multi-family structures with numerous tenants, etc. The instruction to the Tax Collector must be in writing. The NH Tax Collector’s Association has developed a “deed waiver” form for instructing the collector not to issue a deed.

Finally, don’t “ignore” the last sentence of the above statute. The decision not to deed a property should be made only when documented risks of liability exist. Be careful to avoid charges of “selective” decision making in taking some properties but not others similarly situated (owned by family, friends, political supporters, etc.).

If the municipality decides not to have a property deeded, then the tax lien remains in effect, and interest continues to accrue. RSA 80:76(III). At some later point in time, the governing body can vote to resume the deeding process if the delay circumstances change. Bringing a direct lawsuit for the taxes due remains an option. RSA 80:50.

II- THE IMMEDIATE STEPS ON DEEDING

If the community has not directed the Tax Collector to “not execute” the deed, then the deed “shall issue” in the normal course. The immediate actions would be classified as following:

- Arrange to record the deed! Technically not a statutory duty of the Tax Collector, it is the responsibility of the “lienholder” (read-municipality). The can be done by Administrative staff OR by delegating the Tax Collector to act on behalf of the Municipality to record the deed. This delegation should be in the form of a writing.
- Notify your insurance carrier. Most policies have language to provide some level of immediate insurance coverage for newly acquired property, but often there is a “notice requirement” included. Immediately after deed recording, the carrier should be informed to assure liability and casualty coverage for the municipality.
- Notify your public safety folks of the list of properties; the “loss” of property by tax deed could impact owners and residents of such properties in a way which may not be positive and actually could heighten the “threat” to first responders. For undeveloped and vacant property, the police need to be aware of trespassing activities.
- Re-inspect the property for any changes in condition since the pre-deeding inspection. Note any immediate actions that need to be taken. This may depend on the type of property (occupied vs unoccupied structure vs undeveloped land). Take photographs of conditions of any structures. Create an “inspection report” for possible future use in litigation involving the former owner or mortgage holder(s).
- On undeveloped property, consider “posting” the property for “No Trespassing”

635:4 Prescribed Manner of Posting. – A person may post his land to prohibit criminal trespass and physical activities by posting signs of durable material with any words describing the physical activity prohibited, such as “No Hunting or Trespassing”, printed with block letters no less than 2 inches in height, and with the name and address of the owner or

lessee of such land. Such signs shall be posted not more than 100 yards apart on all sides and shall also be posted at gates, bars and commonly used entrances. This section shall not prevent any owner from adding to the language required by this section.

- In the case of unoccupied structures, **first confirm they are unoccupied**. You don't want to "board up" a home where someone is on vacation or in the hospital. Thereafter, secure the property by changing locks and board-up if necessary. Depending on season and immediate plans, consider turning off utilities and winterizing properties which may have re-sale value, but which could be subject to freeze-up damage.
- Arrange removal of any debris which constitutes a health hazard or code violation. Remember that if the prior owner does re-purchase later, the municipality is granted immunity for actions by the community while it is the owner:

"...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.

RSA 80:91.

- If any structure is truly beyond salvage, or creates a threat to public safety or first responders, consider demolishing the building using the same statute for protection against claims. Utilize the definition found in RSA 155-B:1:

II. "Hazardous building" means any building which, because of inadequate maintenance, dilapidation, physical damage, unsanitary condition, or abandonment, constitutes a fire hazard or a hazard to public safety or health.

- Occupied buildings present a whole host of different challenges. Legal counsel involvement is absolutely essential. Don't try and "free-lance." Avoid the temptation to "lock-out" or cut off services to force

removal. Penalties in RSA 540-A:4 can be expensive. See, e.g., Simpson vs Young, 153 N.H. (2006) (Penalty of \$34,000 assessed for wrongful lock-out of tenant). The choices of the municipality are either (i) negotiate some type of lease agreement OR (ii) begin a statutory eviction process with an eviction notice that provides a minimum of 30 days notice (just like a foreclosing mortgage holder).

III- FUTURE DISPOSITION OF PROPERTY- SALE OR RETENTION

Once a property has been acquired by tax deed, the community must decide how it will manage the property and what the plan is for the property's future. As a practical matter, the options are (i) sell it to get it back on the tax rolls, or (ii) keep it for future community use.

A) In the area of tax deeded properties, there are only two mechanisms to authorize the disposal (sale) of tax deeded property:

1. Authority Authorized under RSA 80:80*
2. Authority Authorized under RSA 80:89

* This is the provision relating to property acquired through the *alternative tax lien* process. The comparable statute for tax sale real estate is RSA 80:42. Because there are no communities currently known to be using the tax sale method of collection, the references will be to RSA 80:80.

It is important to think about these two (2) statutes as;

1. RSA 80:80 is when the Community wants to sell. The process may be affected by provisions in RSA 80:88 et seq.
2. RSA 80:89 is when the request initiates from the outside (i.e. the former owner, or a former mortgage holder).

B. RSA 80:80 – The Requirements

The statutory language reinforces the need to have legislative body authority:

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.

The Town can chose to insert such an article on an annual basis, or it may chose to grant such authority “indefinitely, until rescinded”. RSA 80:80 (IV). Most communities have adopted “until rescinded” authority. If so, it would be wise to keep a note of the “when and what” of that adoption as it fades into history. You can also check with DRA Municipal and Property Division, who may also track that type of information.

C. RSA 80:80 – The Available Options

There are three (3) available sale options under RSA 80:80. Two of them specifically contemplate a competitive bid process:

80:80 Transfer of Tax Lien. –

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.

Note that this process is not really well suited to those circumstances where the governing body wants to “direct” a sale, such as to a former owner, or perhaps to an abutter as part of a lot consolidation. This also does not allow property to be “listed” in the traditional mode of private sales.

Apart from sealed bids and public auction, the statute provides a third option:

80:80 Transfer of Tax Lien. –

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.

A 2018 amendment also added the last sentence of the statute, which now requires that when the municipality is not going to use advertised seal bids or public auction, there must be a “finding” that justifies the use of another method. This “finding” should be documented in the minutes of the body at the time the decision is made to dispose of a property.

If your community has not previously voted an “as justice may require” authority, the only options are sealed bids or public auction.

In 1997 the Legislature added RSA 80:80(VI), which made clear that an “as justice may require” disposition could include reconveyance to a former owner. The 2018 amendment also specifically added two (2) additional categories (i) sale through real estate agents, and (ii) sale to abutting property owners. Those were “presumed” before under the “as justice may require” language, but are now explicit. The current statute reads:

80:80 Transfer of Tax Lien. –

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.

D – The Retention Statute

Under RSA 80:80(V), municipalities may “hold for public uses” property which has been acquired by tax deed. The statute requires a town meeting

vote. One may ask, why do we need a vote, if we never sell the property. The short answer is “once tax-deeded property, always tax-deeded property” unless a retention vote is taken. The retention vote essentially converts the property to municipally owned, meaning that it cannot be disposed of by the governing body under general disposition statutes.

The statute does not define “public uses” but a quick recourse to the powers and authority of Towns under ***old versions*** RSA 31:3 would be a good place to start.

It must be kept in mind that a decision to “retain” a piece of property would likely be considered a “purchase” of the property, which may trigger the repurchase provisions of RSA 80:88, et seq. infra in light of the language of the Polonsky v. Town of Bedford decision discussed below. The decision to “retain” a tax deeded property could trigger a requirement to institute a “taking” procedure under State law, with the property owner receiving the “equivalent” of “excess proceeds” as required under the repurchase provisions.

E- Repurchase Rights Under RSA 80:89

(a) Background

In the late summer of 2000, the Supreme Court issued its decision in the case of Thomas Tool Co. vs Town of Croydon, 145 N.H. 218 (2000). This case held that the alternative tax lien statute was unconstitutional because it violated the New Hampshire Constitution’s prohibition on unconstitutional taking. This was because the municipality could recover a windfall of value for a modest amount of unpaid taxes. In response, the Legislature enacted new provisions for disposing of tax deeded property. These new provisions provided that a municipality must offer additional opportunities to allow repurchase of the property, and/or the turning over of “excess proceeds” when a tax deeded property is sold. These provisions were enacted as Chapter 238, Laws of 1998 and became effective for any property deeded on or after June 25, 1998. The provisions are found in RSA 80:88-91.

In 2020, the statutory scheme for disposing of tax deeded property again came under scrutiny, and again was found deficient under Part I, Article 12 of the New Hampshire Constitution. In Polonsky vs. Town of Bedford, 173 N.H. 226(2020) the rights of a municipality to retain all proceeds from a

tax deeded property after three (3) years was deemed to be a “taking” prohibited under law. As a result, municipalities disposing of tax deeded properties (other than by return to the former owners) are limited in the amount of proceeds they can retain on any sale.

The current provisions on disposal of tax deeded property are as follows:

(b) Recovery Limited

The central concept of the current statute, and a necessary constitutional requirement under the Polonsky decision, is that after a municipality acquires a parcel of land, it may only recover (or retain) “back taxes, interest, costs and penalty”. See, RSA 80:88(I); RSA 80:89(II). This phrase is statutorily defined in RSA 80:90 and includes

- (i) all taxes unpaid as of the deeding and all taxes that would have been assessed but for the deeding
- (ii) all interest that was due at time of deeding, plus all interest that would have accrued, including that which would have accrued on taxes that did not get assessed.
- (iii) notice fees and recording costs
- (iv) legal costs
- (v) incidental and consequential costs, including maintenance, repairs or insurance
- (vi) a statutory penalty equal to 10% of the equalized assessed value

The “statutory penalty” amount was previously 15% but was changed by Chapter 37, Laws of 2016, effective July 2, 2016. The same law also eliminated the penalty altogether if the property was the owner’s principal residence at the time of the deeding.

(c) Selling Acquired property – The Impact on RSA 80:80 Sales-

If a municipality wishes to dispose of tax deeded property (under authority granted in RSA 80:80) within three (3) years of acquisition (See, RSA 80:89 (VII)), it must first give notice, by certified mail, address service requested, return receipt requested, to the last known address of the owner at the time the property was taken, and/or to whom the notice of impending deeding was given. RSA 80:89(I). This includes any mortgage holders at the time of

deeding. Id. This notice must be sent at least 90 days prior to offering the property for sale. The notice must specify that the property is being sold, and that such person has a right of repurchase:

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

I. At least 90 days prior to the offering for sale or conveyance 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.

The statutory reference to “terms of the offering” might include notice of intent to sell by auction or sealed bid (including any stated “reserve” amounts). If the sale is via a listing with a broker, the “terms” would be the terms of the listing agreement, which, by statute, must not become effective until 90 days after the notice has gone out.

With regard to the Notices sent, keep in mind the US Supreme Court case of Jones vs Flowers, 547 U.S. 220 (2006) may require additional steps if a notice is returned to the municipality refused or unclaimed.

(c) Right to Repurchase

Central to the protections given by the revised statute are the former owner's rights to repurchase. Within 30 days of receiving a notice of the municipality's intent to sell, or anytime within 3 years from the deed, a former owner or mortgage holder may notify the municipality of the intent to repurchase. The repurchase must be consummated within 30 days after intent notice is delivered. The purchase price is fixed as the “back taxes, interest, costs and penalty as defined in RSA 80:90”. RSA 80:89 (II). If the property is reconveyed, it is to be returned to the same owners, in the same proportions as existed prior to the deed. RSA 80:89 (III). In addition, all liens or

encumbrances which existed, are presumed to re-attach to the property. RSA 80:89(IV). The deed is exempt from the state transfer tax. RSA 80:89 (VI).

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

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, except that if the property is the former owner's principal residence, or was the former owner's principal residence at the time of execution of the tax deed under RSA 80:76, the additional penalty under RSA 80:90, I(f) shall not apply. If all such back taxes, interest, costs and penalty have not been actually tendered within 30 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.

The repurchase right may flow to co-owners and heirs, successors and assigns of the former owner, provided that the assignee cannot be a person who is “assigned” the interest in this particular parcel:

80:90 Definitions. –

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.

(e) Subsequent Sale Proceeds

If the former owner elects not to repurchase, the municipality may elect to go forward with the sale. Once the sale is completed, the municipality is entitled to ‘retain’ the recovery allowed by statute, i.e. the defined “back taxes interest, costs and penalty”. While the obligation to return any excess proceeds was originally statutorily limited to three (3) years, the Polonsky decision held that provision unconstitutional. Consequently, there is apparently no limit on the obligation to return “excess proceeds” if they exist. This requires the municipality to follow the provisions governing distribution of excess proceeds which must be turned over to the former owner(s) if there was only one (or joint) former owners, easily identified, available and there are no other lienholders, (RSA 80:88(III)), otherwise the municipality must file an Interpleader in Superior Court. RSA 80:80 (II).

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.

Note that the municipality may still claim all the sale proceeds if no parties come forward during the Interpleader process (e.g. the former owner has gone into hiding in South America to avoid Indictment).

(f) Three year period – Still Relevant

The statutory language provides that the right to repurchase and/or the right of a former owner to excess proceeds expires in three (3) years from the date the deed is recorded. This is important because if there has been any delay in recording the deed, the repurchase right is extended.

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

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.

This particular language was the focus of the Polonsky decision. The statutory limit on the obligation to return proceeds was specifically found to be unconstitutional. Polonsky at 240. Curiously, the Court did not strike down the notice provisions, or the limit on repurchase rights. Polonsky at 238. As a result, after three (3) years, a municipality apparently is not under an obligation to provide notice of disposition or a right of the former owner to repurchase. Polonsky only addresses the fact that in any later sale, the municipality must account for and return “excess proceeds” to the extent there are any resulting from the sale.

(g) Limited Liability

The legislature has attempted to give the municipality the broadest possible protection from liability with respect to use or management of tax deeded properties. This is found in RSA 80:91. The municipality need not account for rents and profits during its ownership.

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*

Recall that under RSA 80:89(IV) if the Town reconveys the property to the former owner, it can be subject to “leases, easements or other encumbrances” which the municipality may have placed while it owned the property.

(h) Don’t Mix and Match –

Remember that the authority to reconvey to former owners derived under RSA 80:89 does not allow the governing body to “waive” any of its provisions, including the 10% penalty. The only option to avoid that is to go back to some type of voted authority under RSA 80:80(IV).

80:91 Liability and Obligations Limited. –

.... 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.

(i) *Tyler vs Hennepin County Minnesota* US Supreme Court 5/25/2023 598 U.S. 631 (2023).

The Polonsky case was decided under State Constitutional provisions. In 2023, the US Supreme Court dealt with the question of whether the US Constitution, in particular the Fifth Amendment prohibition against takings without just compensation, prohibited governmental agencies from retaining the proceeds from re-sale of tax deeded properties. A unanimous decision in Tyler vs Hennepin County MN, held that the Minnesota law, which allowed retention of \$40,000 in proceeds from a sale to satisfy a \$15,000 tax debt, did violate the Fifth Amendment takings clause. While a majority of states (including New Hampshire) already prohibited retention of all proceeds, at least 14 states (including Massachusetts) will need to modify their tax deeding process to comply with federal law.

The Plaintiff in the Tyler case also raised a claim that the process of retaining all the proceeds violated the Eighth Amendment to the US Constitution prohibiting excessive fines. The majority opinion did not address this issue, but a concurring Opinion by two Justices indicated that a claim that keeping the net proceeds was a deterrent to non-payment, could be considered a violation of the Eighth Amendment. According to the Concurring Opinion, “economic penalties imposed to deter willful noncompliance with law are

finer” which cannot be excessive. The NHMA legal staff, following issuance of the opinion, raised a question of whether the 10% penalty which municipalities may retain for properties that are not owner-occupied residential, could be excessive in some circumstances. Governing bodies are advised to consider all factors in deciding to collect the 10% penalty.

IV- THE SEQUEL- We want to sell it... but can't!

With improvements to tax assessment practices, and documented tax taking procedures, a municipality should find that selling a parcel taken by tax deed should be no more complicated than a resident selling their home. However, this is sometimes not the case. Issues related to either the assessment of the property, or defects in the taking process, can leave a community holding a parcel which is not “marketable” for sale, meaning a Buyer will “refuse to take delivery” at a closing. This is particularly true for parcels a community may have been holding as vacant land, which may have been assessed to:

- “Owner Unknown” – the classic case of defective title
- “Heirs of John Doe” where John Doe’s estate was not probated
- “Widget, Inc.” where the corporation was dissolved prior to the taking.

In all of these cases, and in others, the municipality may find itself with a parcel no Buyer will take!

Being forewarned is being forearmed! Depending on the circumstances (particularly in cases noted above), you may want to engage municipal counsel to address the title problems before you start the sale process. Ask for a title search before you go to auction, or list it for sale. There may be “fixes” available, including:

- Release deeds from former owners
- Probate documents from other jurisdictions that can be obtained and filed
- Curative Affidavits that can be obtained.

There are some statutes which can help. If the problem is related to some defect in the tax taking process, keep in mind RSA 80:78:

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.

This will not “fix” all problems, as our Supreme Court has ruled this will not “cure” a problem with assessing the wrong owner. In BHC Development vs Town of Plaistow, 146 N.H. 500 (2001) the Court held that the incontestability statute did not bar a challenge to the tax deed where it was determined that the notices of tax sale and the tax deed listed the wrong persons as owners.

In the end, it may be necessary to “fix” the title problem by bringing a “Petition to Quiet Title” in the Superior Court:

498:5-a Real and Personal Property; Disputed Titles. – An action may be brought in the superior court by any person claiming title to, or any interest in, real or personal property, or both, against any person who may claim to own the same, either in fee, for years, for life or in reversion or remainder, or to have any interest in the same, or any lien or encumbrance thereon, adverse to the plaintiff, or in whom the land records disclose any interest, lien, claim or title conflicting with the plaintiff's claim, title or interest, whether or not the plaintiff is entitled to the immediate or exclusive possession of such property, for the purpose of determining such adverse estate, interest or claim, and to clear up all doubts and disputes and to quiet and settle the title to the same,

The result of the process is a “decree” which quiets the title in the Petitioner-

498:5-d Decrees. –

I. The court in any action brought under the provisions of RSA 498:5-a shall hear the several claims and determine the rights of the parties, whether derived from deeds, wills or other instruments or courses of title, and may determine the construction of the same, and may render judgment determining the questions and disputes and quieting and settling the title to such property. In any case in which a tax sale is adjudged invalid, the court, as a condition precedent to the entry of a decree setting aside such sale, shall require the claimant of the property in question to pay to the purchaser a sum of money equal to the amount paid by such purchaser at the tax sale in question, including fees prescribed by law and the amounts paid by such purchaser to satisfy any taxes assessed against the property in question subsequent to such tax sale, with interest thereon at the legal rate from the date of such sale or date of payment of such subsequent taxes to the date of the decree.

II. If the provisions of RSA 80:58-86 are adopted by a municipality as provided in RSA 80:87, the provisions of paragraph I relative to tax sales shall not apply.

The last sentence was added in 1997, but I am not sure it does what was intended! A legislative “fix” perhaps???

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