

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

_____	)	
TOWN OF TYNGSBOROUGH,	)	
	)	CASE NO. 18 TL 001223
Plaintiff,	)	
	)	
v.	)	
	)	
PAULA RECCO, ET AL.,	)	
	)	
Defendants.	)	
_____	)	

**DEFENDANT PAULA RECCO’S COMBINED MEMORANDUM OF LAW IN
OPPOSITION TO PLAINTIFF’S MOTION FOR JUDGMENT ON THE PLEADINGS
AND REPLY MEMORANDUM IN SUPPORT OF DEFENDANT’S MOTION FOR
JUDGMENT ON THE PLEADINGS OR IN THE ALTERNATIVE MOTION TO
DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

INTRODUCTION

After allowing the Plaintiff Town of Tyngsborough’s (the “Town” or “Plaintiff”) amended complaint (the “Operative Complaint”) – which requested an order requiring Defendant Paula Recco (“Ms. Recco”) pay the Town in the amount of property taxes due, interest, fees, and costs – this Court asked the parties to file motions for judgment on the pleadings on the Operative Complaint. Instead of filing this motion based on the Operative Complaint, the Town appears to have filed for judgment on the pleadings based on the relief requested in the initiating complaint in this matter (the “Original Complaint”), which requested absolute title to and the foreclosure of Ms. Recco’s right of redemption in her property, located at 4 Danforth Road in Tyngsborough (the “Property”). This is puzzling because the Town supposedly abandoned its request for this relief when it filed the Operative Complaint.

Notwithstanding this reversion in relief requested, the Town’s constitutional analysis of G.L. c. 60, §§ 64 – 70 (“Chapter 60”) is incorrect and, as such, the Town cannot obtain the relief requested in the Original Complaint. Additionally, the Town cannot obtain the relief requested in the Operative Complaint as the Land Court is without the proper jurisdictional authority to grant such relief or, in the alternative, the Operative Complaint fails to state a claim upon which this Court can grant equitable relief. No matter what the Town is asking for, its motion for judgment on the pleadings should be denied and this Court should either dismiss this case for lack of subject matter jurisdiction or grant Ms. Recco’s motion for judgment on the pleadings and enter judgment in her favor.

ARGUMENT

I. Foreclosing on a taxpayer’s right of redemption under G.L. c. 60, § 64 is not constitutional.

The Town mistakenly argues that Chapter 60 is still constitutional reasoning that the constitutional takings violation occurs not at the moment of the taking – when the municipality is granted absolute title to the property – but when a municipality retains equity from a taken property, supposedly after a property sale. The Town is misstating the key constitutional deficiency here. As extensively briefed by Ms. Recco, and as argued by many amici including the Attorney General, Chapter 60 itself is unconstitutional because it does not contain a right to or mechanism for taxpayers to recover their surplus equity.¹ This principle has been firmly established by the Massachusetts Supreme Judicial Court and by the U.S. Supreme Court, and it cannot be disregarded or tossed out by the Town for the sake of expediency or convenience.

¹ Mem. of Law in Support of Def. Paula Recco’s Mot. for Summ. Jdg., Aug. 7, 2023 at 7; Mem. of Law in Support of Def. Paula Recco’s Mot. for Jdg. On the Pleadings or in the Alt. Mot. to Dismiss for Lack of Subject Matter Juris., Feb. 28, 2024 at 11; Amicus Brief of the Att’y Gen., Jan. 9, 2024 at 3.

Bromfield v. Treasurer & Receiver Gen., 390 Mass. 665, 668 (1983) (internal citation omitted) (“[A statute] granting the power [to take] must provide for compensation, and a ready means of ascertaining the amount.”); *cf Tyler v. Hennepin Cnty., Minnesota*, 598 U.S. 631 (2023) (explaining prior case law and that state statute authorizing tax taking will not violate Taking Clause when that statute provides for a process by which the taxpayer can claim surplus equity); *Nelson v. City of New York*, 352 U.S. 103 (1956) (finding no takings clause violation where the takings ordinance contained a procedure for taxpayers to request surplus).

Not only is the Town’s position that Chapter 60 does not need to contain a mechanism to recover the surplus equity legally incorrect, but it is also impracticable. Requiring a specific mechanism in the statute authorizing the taking makes practical sense because municipalities like the Town in this case must know for certain what their obligations in returning the surplus equity are and taxpayers must know what steps they must go through to recover the equity. This process is complex and involves determining how to calculate just compensation, when to measure the compensation, how to make the compensation available to taxpayers, within what amount of time is the compensation to be made available and for how long will it remain available, and so on. In the context of tax lien foreclosure takings, these questions have not been answered by the Legislature or by a court with sufficient discretionary powers. No matter how much the Town or this Court may want to come up with that equity savings procedure themselves, this task lies with the legislature.

In support of its position, the Town argues that its ability to voluntarily remit excess equity renders the requirement of a specific mechanism for return unnecessary. Not only is a voluntary remittance not authorized by law, *see Kelly v. City of Boston*, 348 Mass. 385, 389 (1965), it is an unworkable solution to a problem that is being faced by many more

municipalities than just the Town.² The Town also suggests that even if a mechanism were required, Chapter 60 already contains such a mechanism in G.L. c. 60, §§ 28, 43, or 68 (“§ 28,” “§ 43,” and “§ 68”). Again, this is incorrect. The statutes the Town points to were not intended by the Legislature to be used in this context and it would exceed this Court’s powers to manipulate them to do so. Section 28 does require a town’s tax collector to pay the surplus of any goods taken from sale on distress or seizure under G.L. c. 60, § 24, but this levy by distress or seizure statute applies only to *personal goods* and no court has expanded this application by deciding that § 28 applies to the taking of real property taken under G.L. c. 60, § 64. G.L. c. 60, § 24 (emphasis added) (“...the collector may without unnecessary delay levy the same by distress, or seizure and sale of *his goods*...”).³ The SJC in *Kelly v. City of Boston* already considered whether § 43 provided for the return of surplus equity to a taxpayer after a foreclosure of the right of redemption judgment, and the Court found that it did not. 348 Mass. 385, 388 (1965). Finally, the discretionary powers in setting the terms of redemption granted to the Land Court in § 68 are cabined by the provisions in and scheme of Chapter 60. *See Town of Lynnfield v. Owners of Unknown*, 397 Mass. 470, 473 (1986). As previously briefed by Ms. Recco, these powers are limited to carrying out the provisions already present in Chapter 60 – determining

² The Town states that *Kelly v. City of Boston* has “most obviously been smashed, leaving its holding relatively meaningless after the *Tyler* decision,” and that municipalities do have the power to voluntarily remit any surplus. *Kelly* is still good law. The SJC in *Kelly* solely interpreted the Legislature’s intent when writing the tax lien foreclosure statutory scheme. The SJC did not decide or even consider the constitutionality of that scheme. So long as Chapter 60 remains on the books as written, *Kelly* remains a binding authority on the contours of Chapter 60 as intended by the Legislature.

³ In its memorandum of law, the Town mentions *Butkus v. Charles L. Silton, Inc.*, 95 Mass. App. Ct. 1112 (2019) and states that the Appeals Court disagreed with the municipality’s argument in that case that G.L. c. 60, § 24 only applied to personal property. The Town goes too far by saying this. In that case, the Appeals Court did not reach that question because it decided that all remaining interest in the property had been extinguished. 95 Mass. App. Ct. 1112 at *2.

whether a party has a right to redeem and is financially capable of redeeming, and setting a deadline for redemption.⁴ Finding that a pre-foreclosure order of sale and distribution of the proceeds is a term of redemption that fits within the Land Court's discretionary powers under § 68 would be a complete re-writing of the statute.⁵ Chapter 60 is unconstitutional, and this Court does not have the authority to save it. The body with the proper authority to resolve this constitutional issue is the Legislature.

II. Ms. Recco's interests in preserving her constitutional rights must be protected and the Town's smearing of Ms. Recco is improper and should be ignored.

The Town seems to suggest, through inadmissible hearsay and facts that cannot be properly considered under its motion⁶, that Ms. Recco is no longer worthy of the full protection of her constitutional rights because she has not acted exactly as the Town deems wise, but the

⁴ Mem. of Law in Support of Def. Paula Recco's Mot. for Jdg. on the Pleadings or in the Alt. Mot. to Dismiss for Lack of Subject Matter Juris., Feb. 28, 2024 at 5-6.

⁵ While the Land Court has entered a pre-foreclosure sale order at least once before in *Town of Arlington v. Holman*, 14 TL 148023 (Mass Land Ct. Nov. 30, 2016), it did so without any analysis of the operative statutes. If it had done such analysis, the Court surely would not have reached the conclusion that it did. Ultimately, the Land Court acted without the proper authority in *Town of Arlington* when it entered that pre-foreclosure sale order.

⁶ The Town has attempted to enter facts into the record through its Rule 12(c) Motion for Judgment on the Pleadings and corresponding memorandum of law. The Town did so by submitting Exhibit 3, Affidavit of Brian H. Kane. Aside from being inadmissible hearsay, this affidavit and the purported statements contained therein cannot be considered by this Court as facts outside of those which judicial notice may be taken cannot be considered when deciding a motion for judgment on the pleadings. See *Guardianship of A.R.*, 99 Mass. App. Ct. 349, 359 n.16 (2021) (internal quotations and citations omitted) ("Hearsay is defined as an out-of-court statement offered to establish the truth of the words contained in the statement. Hearsay is generally inadmissible unless it falls within an exception to the hearsay rule"); *Commonwealth v. The Landing Grp., Inc.*, 100 Mass. App. Ct. 1107 (2021) (internal quotations and citations omitted) ("In considering a motion for judgment on the pleadings, a court can properly take into consideration facts of which judicial notice may be taken, including matters of public record, ... items appearing in the record of the case, and exhibits attached to the complaint."); *Ridgeley Management Corp. v. Planning Bd. of Gosnold*, 82 Mass. App. Ct. 793, 801 (2012) (stating that fact finding by the court when considering a motion for judgment on the pleadings is not permissible).

preservation of one's constitutional rights is not based on one's character or decision making. Private property rights, as guaranteed by the Constitution, are among this nation's most foundational and protected interests. A court's duty to preserve an individual's constitutional private property rights, unless properly waived by that individual, is not an optional obligation.

Moreover, the Town's painting of itself as the victim and Ms. Recco as a manipulator of the system is unwarranted and inappropriate. There are two sides to every story and the Town's ad hominem attack on Ms. Recco respecting her motives in this litigation is taking it too far. Ms. Recco is a disabled, elderly widow living on a small, fixed income. (Mem. of Law in Support of Def. Paula Recco's Mot. to Vacate Default Jdg., Dec. 9, 2022 at 2). Ms. Recco has lived at the Property for more than forty years. (*Id.* at 3). The Property is a remote, five-acre piece of land with a large indoor arena for horses and it has at least one cloud on title.⁷ (*See id.*). This is a unique property to sell, and Ms. Recco continues to exercise her best efforts to sell the Property. However, in actuality, all of these facts are not relevant here, because regardless of what the Town thinks of Ms. Recco, she is entitled to the full protection of her constitutional rights just as everyone else is.

⁷ See Declaration of Caroline Meade for information on clouds on title of the Property attached as Exhibit A. All information in said declaration comes from items which this Court may take judicial notice of, specifically the property records of the Middlesex North Registry of Deeds and the laws of this Commonwealth. While the Property has two recorded writs of execution from previous actions, these executions have expired as a matter of law under G.L. c. 223, § 114A, as both executions were not "brought forward" or re-recorded within the required six years of the recording of the original execution. *See* G.L. c. 223, § 114A ("An attachment of land, or of a right or interest therein, shall, unless otherwise dissolved, expire by operation of law at the end of six years from the date of filing the same in the office of the register of deeds in the county or district where said land or some part of it is situated, unless said register shall, within said period, at the written request of the plaintiff or his attorney bring forward the same upon the books of attachments.").

The Town insinuates that its right to recover the unpaid property taxes outweighs Ms. Recco's right to preserve her equity however she likes, but there is no balancing of rights here. Ms. Recco has an inviolable interest in preserving her private property rights guaranteed by both the Fifth Amendment and Article X of the Massachusetts' Constitution and the Town cannot avoid these rights. *See Tyler*, 598 U.S. 631 (2023) (internal quotation omitted) ("But state law cannot be the only source [on property rights]. Otherwise, a State could sidestep the Takings Clause by disavowing traditional property interests in assets it wishes to appropriate."). The Town's statutorily created right must be subservient to the preservation of Ms. Recco's constitutional rights. Not to mention that the very purpose of the Bill of Rights is to protect an individual's essential rights and civil liberties against government infringement, not the other way around.

Moreover, the Town's right to recover the unpaid property taxes will not be extinguished by the dismissal of this case or entering judgment in Ms. Recco's favor.⁸ The Town's property ownership right will still exist and be protected, and the Town has alternative means to recovering the debt beyond waiting for the Legislature to amend Chapter 60 or waiting for Ms. Recco to sell the Property.⁹ Ms. Recco's remaining equity in the Property on the other hand will

⁸ Once taxes are assessed on a property, a lien arises automatically, giving the municipality a security interest in the property. G. L. c. 60, § 37. The municipality's tax collector can take action to preserve or perfect the lien by executing a tax taking, G. L. c. 60, §§ 53-54, which ensures that the lien will remain on the property regardless of a change in ownership. *See* G.L. c. 60, § 54 ("Such title shall...be held as security for the repayment of said taxes with all intervening costs, terms imposed for redemption and charges, with interest thereon, and the premises so taken, both before and after either redemption or foreclosure, shall also be subject to and have the benefit of all easements and restrictions lawfully existing in, upon or over said land or appurtenant thereto, and, except as provided in section seventy-seven, all covenants and agreements running with said premises either at law or in equity, when so taken.").

⁹ *See* Mem. of Law in Support of Def. Paula Recco's Mot. for Jdg. on the Pleadings or in the Alt. Mot. to Dismiss for Lack of Subject Matter Juris., Feb. 28, 2024 at 9 for a discussion of alternative remedies already created by the Legislature municipalities can pursue in collecting

not be protected if judgment is entered for the Town, and currently there exists no legally authorized way for her to recover that equity. Accordingly, none of the facts regarding Ms. Recco's efforts to sell the Property or interest arguments raised by the Town serve as an obstacle to granting Ms. Recco judgment on the pleadings.

CONCLUSION

The Town's requests for relief are either unconstitutional or beyond the jurisdiction of this Court and not viable. Ms. Recco has sufficiently shown that this Court lacks subject matter jurisdiction over Plaintiff's amended complaint. For this reason alone, this action must be dismissed. Ms. Recco has also sufficiently shown that Plaintiff has failed to state a claim upon which this court can grant relief, and her motion for judgment on the pleadings should be granted and judgment should be entered in her favor.

Respectfully submitted,
PAULA RECCO

This 25th day of March, 2024

By her attorney,

/s/ Caroline M. Meade
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Lawrence, MA 01840
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unpaid taxes. In addition to the remedies discussed in Ms. Recco's February 28, 2024 Memorandum of law, the Town may also hold an assignment auction of the Property whereby it may auction off the tax title to the Property to a private party purchaser under G.L. c. 60, § 52.

CERTIFICATE OF SERVICE

I certify that I mailed by first-class mail copies of Defendant Paula Recco's Combined Memorandum of Law in Opposition to Plaintiff's Motion for Judgment on the Pleadings and Reply Memorandum in Support of Defendant's Motion for Judgment on the Pleadings or in the Alternative Motion to Dismiss for Lack of Subject Matter Jurisdiction to counsel for the Town of Tyngsborough, Ronald J. Berenson, to 116 Pleasant Street, Suite 312, Easthampton, MA 01027-2785 and Brian Hollander Kane, to 116 Pleasant Street, Suite 312, Easthampton, MA 01027-2785, and to counsel for the MSPCA, Stephen Rider, to 350 Lincoln Street, Suite 2400, Hingham, MA 02043 on March 25, 2024.

/s/ Caroline M. Meade
Caroline M. Meade

EXHIBIT A

	)	
TOWN OF TYNGSBOROUGH,	)	
	)	CASE NO. 18 TL 001223
Plaintiff,	)	
	)	
v.	)	
	)	
PAULA RECCO, ET AL.,	)	
	)	
Defendants.	)	
	)	

I, Caroline M. Meade, state that the following facts are true and accurate, based on my personal knowledge, and I am competent to testify to the truth and accuracy of the same:

- 1

on June 5, 2007 in Civil Action Number 06-0466 in a matter between the Massachusetts Society for the Prevention of Cruelty to Animals and Paula C. Miloglav-Recco.

6. No other executions were responsive to the records search under Paula Recco's name.

7. I next conducted a records search on masslandrecords.com within the Northern Middlesex Recorded/Registered Land records for the property 4 Danforth Road, Tyngsborough, Massachusetts 01879.

8. That search resulted in ten records, including one execution.

9. The only responsive execution is dated June 5, 2019 and is recorded in Book number 3302 at page 256. This is an execution issued by the Superior Court Department of the Trial Court on June 5, 2007 in Civil Action Number 06-0466 in a matter between the Massachusetts Society for the Prevention of Cruelty to Animals and Paula C. Miloglav-Recco.

10. This execution recorded on June 5, 2019 at Book number 3302, page 256 appears to be a re-recording of the June 18, 2007 execution originally recorded in Book number 21336 at page number 222. This re-recording took place almost twelve years after the original recording.

11. The September 27, 2006 execution recorded in Book number 20541 at page 288 does not appear to have been re-recorded as no subsequent recording appears for this execution.

I declare under the penalties of perjury that the foregoing is true and accurate to the best of my personal knowledge.

Executed this 25th day of March, 2024, by:

/s/ Caroline M. Meade
Caroline M. Meade, Esq.