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February 3, 2020

Mary A. Bousquet, Tax Collector
Holliston Town Hall
703 Washington Street
Holliston, MA 01568

Re: Town of Holliston, Massachusetts
Vs: Nancy Farrell
Land Court Case No.: 17 TL 000 404 [14 Exchange Street Holliston, MA]

Madam:

I represent the Defendant, Nancy Farrell ("Nancy Farrell"), in the above entitled matter.

Please have the Town of Holliston's ("Town") lawyer direct all correspondence, relative to this matter, to my attention at the above address. The clear dictate of the law, however, required me to serve this two-pronged demand upon you directly for two distinct legal reasons.

The instant letter contains two types of demands which must be made specifically upon you: (i) a demand under M.G.L. c. 60, §28; and (ii) a constitutional demand under 42 U.S.C. §1983 in accord with Medina v. Rivera-Berdecia, Slip. Op. @ 17-19 (1st Cir. 9.17.14) [Docket No. 12-2492].

I attach the tax taking document ("Tax Taking Document") which you caused, on behalf of the Town and in your capacity as its tax collector ("Tax Collector"), to be recorded in 2012 relative to Nancy Farrell's real property ("Property") situated at 14 Exchange Street, Holliston, Middlesex County, Massachusetts. Said document is marked A, attached hereto, incorporated herein and expressly made a part hereof.[1] You signed the Tax Taking Document in your capacity as Tax Collector.[2] See Ex. A. Nancy Farrell has been the sole title holder to the Property since May 27, 2009 as per the Deed recorded at Book 52882, Page 109 in the Middlesex South District Registry of Deeds on May 29, 2009.

The Town, also through you as its Tax Collector, caused a Massachusetts Land Court action ("Case") to be instituted against the Property and Nancy Farrell which seeks to foreclose all of her rights of redemption, in the Property, because it had previously been taken by the Town for taxes under M.G.L. c. 60, §§43, 53,54. I attach the complaint ("Complaint") you filed in the Case. See Ex. B. You signed the Complaint in your capacity as Tax Collector. Through the Complaint you seek "absolute title" which includes an approximately $222,920.98 interest in said Property to

[1] All exhibits (A-E) are attached hereto, incorporated herein and expressly made a part hereof. Exhibits shall be referred to as "Ex. A" etc.

[2] At all times material herein you acted under color of State law pursuant to State legal authorities.

which neither you, as Tax Collector, nor the Town is legally, equitably or constitutionally entitled. This $222,920.98 interest would constitute a literal windfall for the Town. By seeking "absolute title" the Town seeks to convert the equity ("Surplus")[3] in the Property, to which Nancy Farrell is legally entitled under M.G.L. c. 60, §28 and the U.S. Constitution, to its own coffers. Neither State law nor the Constitution permits such a result.

No foreclosure judgment has entered in the Case as the Docket Sheet makes clear. See also agreement ("Agreement") of the parties. (Ex. C).

My client demands that you and the Town fully comply with the spirit and letter of M.G.L. c. 60, §28 which section is applicable here and entitled "Accounting for Surplus":

> Section 28. The collector shall **upon demand** give a written account of every sale on distress or seizure and charges, and pay to the owner any surplus above the taxes, interest and charges of keeping and sale. (emphasis added).

Upon any sale of the Property by the Town, if it effects such a sale, it is demanded that the Town and you, as its Tax Collector, comply with the dictate of M.G.L. c. 60, §28. The cited statutory subsection essentially just embeds the constitutional requirements of the Takings Clause of the Fifth Amendment to the United States Constitution ("Fifth Amendment") into it. "The Takings Clause of the Fifth Amendment states that 'private property [shall not] be taken for public use, without just compensation.'" Knick v. Scott, 588 U.S.___ (2019) Slip. Op. @ p. 1. (brackets in original). "A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it." Id., at 2. The "property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation…" Id.

When the Town "took" Nancy Farrell's Property in 2012, through the Tax Taking Document, it did not pay for it. It has not since. Through the Tax Taking Document and the Complaint the Town, through you as its Tax Collector, asserts that it is due the sum of $3710.98 for taxes, interest and incidental expenses. See Ex. A, B. Nancy Farrell readily concedes though that this sum is no longer accurate. On December 6, 2018 Nancy Farrell and the Town agreed to a finding ("Finding") which called for her to pay $63,160.97 (taxes and interest), $400.19 (costs) and $2460.00 (legal fees). See Ex. D. Nancy Farrell further concedes that the "taxes and interest" component of the Finding is itself no longer accurate due to the mere passage of time. As of 2.3.20 the monies owed by her are as follows: $88,218.83 (taxes and interest), $400.19 (costs) and $2460.00 (legal fees). See Ex. D (Finding) and the real estate tax statement ("Tax Statement") generated by the Tax Collector on 2.3.20. See Ex. E.

The Town's Tax Statement dictates that the assessed value of the Property is currently $314,000. See Ex. E. The market value of the Property is approximately $314,000 as well. The surplus ("Surplus"), market value less the taxes, interest, charges of keeping and charges of sale under M.G.L. c. 60, §28, is in excess of $222,920 under M.G.L. c. 60, §28 as per Exhibits A - E which define the scope the indebtedness alleged to be owed to the Town by Nancy Farrell. ($314,000 - $88,218.83 - $400.19 - $2460.00 = $222,920.98). Nancy Farrell is entitled to this Surplus when

[3] For the purposes of this letter "Surplus" shall have the same meaning as it has in the context of M.G.L. c. 60, §28. In short, "Surplus" is the "equity" which Nancy Farrell has in the Property exclusive of any monies she legitimately owes to the Town for taxes, interest, charges of holding, charges of sale, attorney's fees and costs.

and if the Town sells the Property subject only to additional permissible deductions, under M.G.L. c. 60, §28, due, once again, to the mere passage of time.

In the event that there is a sale of the Property, which is effected by the Town, it is demanded that the Town not only comply with M.G.L. c. 60, §28 but that it only effectuate a sale in the event that the purchasing party makes an offer of purchase which is equal to or above the then current market value of the Property. In the event that the Town decides it will not sell the property but will, instead, retain it ("Retention") then, in that event, it is further demanded that the Town comply with M.G.L. c. 60, §28 in the Retention context i.e. – remit a sum of money to the Property owner, as of the date of Retention, equal to the difference between the then market value of the Property and the taxes, interest, charges of keeping and charges of sale as per M.G.L. c. 60, §28 and the Finding.

It is understood that towns in the Commonwealth have long relied on Kelly v Boston, 348 Mass. 385, 388 (1965) for the proposition that municipalities are entitled to obtain the Surplus from the sale of property taken for back taxes. It is not only inapplicable to this action but its use would expressly violate binding U.S. Supreme Court precedent, the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution ("Due Process Clause"). Kelly did not address a claim under M.G.L. c. 60, §28 (surplus statute) or a claim that retention of the Surplus would violate the Takings Clause of the Fifth Amendment. In a recent panel decision the Massachusetts Appeals Court held that because the litigant in Butkus v. Silton failed to timely request a Surplus under M.G.L. c. 60, §28 – which must have been before a foreclosure judgment entered by the Land Court – there was no need for it even to decide if M.G.L. c. 60, §28 overrode applicable Kelly rulings. See Massachusetts Appeals Court decision in Butkus v. Silton, App. Ct. Slip. Op. @ p. 5-8 & n. 6 (May 19, 2019). **(Summary Disposition Rule 1:28).** This timeliness issue is not extant here because no Land Court foreclosure judgment has entered and Nancy Farrell has already made her demand herein under M.G.L. c. 60, §28. See Exhibit D.

The Appeals Court in Butkus did not opine that Kelly foreclosed application of M.G.L. c. 60, §28; it only held that the litigant at issue failed to timely make demand under M.G.L. c. 60, §28. Likewise, the Butkus Court also did not rule that Kelly thwarted the Fifth Amendment Takings Clause claims before it. The Butkus Court only held, in the Fifth Amendment Context, that because the appellant did not possess a ***title interest*** in the affected property she was without the consequent ability to even assert a Takings Clause claim much less prevail upon one. Id. **The Property owner has possessed the sole title interest in the Property since 2009 and has made a timely demand herein under M.G.L. c. 60, §28**. In both contexts (M.G.L. c. 60, §28 and Taking Clause claim) the Appeals Court in Butkus simply held the appellant lacked standing to assert these claims. See Butkus v. Silton, App. Ct. Slip. Op. @ p. 5-8 & n. 6. There are no such standing issues here. The Butkus court did not hold that either of these two claims were barred by Kelly because Kelly speaks to neither of them.

It is of great moment to dispel the contention that the Town could now resort to the legal positions embraced by the trial court ("Superior Court") in the Butkus case as the means to retain Nancy Farrell's Surplus in her Property. Attempts to deploy these legal positions – which amount to blind adherence to the Kelly case – would not only be in be in bad faith but would expressly violate binding U.S. Supreme Court precedent, the Fifth Amendment and the Due Process Clause.

In the Butkus case the Superior Court held, in the presence of an asserted Taking Clause claim, that it was "bound by [statutory] precedent and Massachusetts appellate case law…" regarding the retention of the Surplus. See Butkus v. Silton, Middlesex Superior Ct. Slip. Op. @ p. 4 (6.14.17). This

holding would amount to a crude constitutional error in the present context. The State law statutory principles and authorities cited in Kelly do not overrule the Fifth Amendment. At this late date it need not be stated that: (i) a state statute may not be employed as the basis to divest litigants of federal constitutional rights; (ii) the United States Supreme Court is the "ultimate interpreter of the Constitution"; and (iii) the United States Constitution is the "supreme law of the land" which trumps all inconsistent state statutes. See Baker v. Carr, 369 U.S. 186, 211 (1962); Cooper v. Aaron, 358 U.S. 1, 18-20 (1958); Marbury v. Madison, 1 Cranch 137, 177, 2 L. Ed. 60, 73 (1803); McCulloch v. Mayland, 4 Wheat 316 (1819); United States v. Nixon, 418 U.S. 683 (1974); U.S. Const. art. VI (Supremacy Clause). Hence, it would be gross constitutional error for any litigant or trial court to assert that the ability to prevail upon an ironclad federal constitutional claim (Takings Clause claim) can somehow be thwarted by a putatively inconsistent state statutory framework. The use of Kelly, in the context of this matter, makes this very assertion.

The case of Kelly v Boston, 348 Mass. 385 (1965) speaks to none of the legal issues at play here and thus could not, in any way, thwart the effect of Takings Clause jurisprudence authored by the United States Supreme Court due to Supremacy Clause grounds alone. See Knick v. Scott, 588 U.S.___ (2019) Slip. Op. @ p. 1-23. Blind adherence to Kelly, in the face the ironclad Takings Clause claim at issue here, would be acute error. Kelly simply does not "overrule" United States Supreme Court precedent on Fifth Amendment Takings Clause claims. Moreover, it never even spoke to them. An express Kelly holding makes manifest the fact that it ***never*** even considered M.G.L. c. 60, §28 much less the Fifth Amendment: "Manifestly on any theory of 'equity and good conscience' a municipality has no power to pay out money whenever there may be a surplus after a sale of real estate following foreclosure of a tax title. Such disbursements without statutory authority would be wholly voluntary. If there should be a remedy for someone in the plaintiff's position, the matter rests in the legislative domain." Kelly, 348 Mass., at 389. The Legislature ***did*** provide us with the "Surplus" statutory remedy (M.G.L. c. 60, §28) to cure the ill highlighted by Kelly. The Fifth Amendment, though likewise not even considered by the Kelly court, effects this same end. We simply cannot give deference to a 54 year old case which failed to consider either the statute (M.G.L. c. 60, §28) or the federal constitutional provisions (Fourteenth and Fifth Amendments) at issue here. To do so would be grave constitutional error.

Kelly simply does not permit any Town to take a Surplus and keep it for itself. It really is that simple. That would violate M.G.L. c. 60, §28, the Due Process Clause and the Fifth Amendment. M.G.L. c. 60, §28 could be no clearer: if there is a Surplus the Town must give it to Nancy Farrell if she makes demand for it before judgment enters in her Land Court Case. She has made such a demand and no judgment has entered in her Land Court Case. The Due Process Clause claim is equally as clear. The "prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free from governmental interference." Fuentes v. Shevin, 407 U.S. 67, 81 (1972). Due Process of law requires M.G.L. c. 60, §28 to be enforced in accord with its plain terms.

Attempts to contort M.G.L. c. 60, §28, to insure it has no application here, would violate the Due Process Clause for rather simplistic reasons. "As in all statutory construction cases, we begin with the language of the statute. The first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.' The inquiry ceases 'if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) (citations omitted). Since M.G.L. c. 60, §28 is both "plain and unambiguous" the "inquiry ceases". Ibid. After all, the command of M.G.L.

c. 60, §28 could be no clearer: "The collector shall **upon demand** give a written account of every sale on distress or seizure and charges, and pay to the owner any surplus above the taxes, interest and charges of keeping and sale." (emphasis supplied). Since Nancy Farrell timely made her statutory demand she is entitled to "any surplus" after payment of the expenses set forth in M.G.L. c. 60, §28. Attempts to place a contrary construction upon M.G.L. c. 60, §28 would violate the Due Process Clause since "the touchstone of due process is the protection against the arbitrary action of the government…" Wolf v. McDonnell, 418 U.S. 539, 558 (1974). What could be more arbitrary - given the plain and unambiguous terms of the statute - then to construe it in a manner which would deprive Nancy Farrell of her property (Surplus) and then give it to the Town even though the Town has never had any legal or equitable entitlement to it? The Fifth Amendment claim is also simplistic. "A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it." Knick v. Scott, 588 U.S.___ (2019) Slip. Op. @ p. 1. If the Town took the Surplus, relative to Nancy Farrell's Property, it would simply be taking "property without paying for it..." in violation of the Fifth Amendment. Id.

The Surplus here is, at present, in excess of $222,920. There is no legal, equitable or factual predicate upon which the Town could assert that it may retain these monies for itself. It cannot and to do so would give rise to claims under the Fifth Amendment, Due Process Clause, Federal Civil Rights Act (42 U.S.C. §1983), M.G.L. c. 60, §28 and common law tort claims including conversion, fraud, deceit and the like. Moreover, the retention of any such Surplus, within the meaning of M.G.L. c. 60, §28, would violate our criminal larceny statutes. See M.G.L. c. 266, §30(1). Through the prayer in the Complaint you seek, as Tax Collector, to take and keep the Surplus. Doing this would violate each of the above authorities. **This demand is intended to provide both you and the Town with "notice" as to how wrongful and illegal your planned course of conduct would be so that you both can conform your conduct to law. This is precisely why we have taken great pains to explain the law and inform both you and the Town concerning its parameters.**

Under 42 U.S.C. § 1983, "[p]ublic officials may be held liable . . . for a constitutional violation only if a plaintiff can establish that his or her constitutional injury resulted from the direct acts or omissions of the official, or from indirect conduct that amounts to condonation or tacit authorization." Ocasio- Hernández, 640 F.3d at 16 (internal quotation marks omitted). To that end, "[a]n important factor in making the determination of liability is whether the official was put on some kind of notice of the alleged violations, for one cannot make a 'deliberate' or 'conscious' choice to act or not to act unless confronted with a problem that requires the taking of affirmative steps." Rodríguez-García v. Miranda-Marín, 610 F.3d 756, 768 (1st Cir.2010) (quoting Lipsett v. Univ. of P.R., 864 F.2d 881, 902 (1st Cir. 1988) (quoting Pembaur v. City of Cincinnati, 475 U.S. 469,483-84 (1986))). "Once an official is so notified, either actually or constructively, it is reasonable to infer that the failure to take such steps, as well as the actual taking of them constitutes a choice 'from among various alternatives.'" Lipsett, 864 F.2d at 902 (quoting Pembaur, 475 U.S. at 483). See Medina v. Rivera-Berdecia, Slip. Op. @ 17-19 (1st Cir. 9.17.14) [Docket No. 12-2492].

In the event that you fail to comply with the above authorities and the demands, under 42 U.S.C. §1983 and M.G.L. c. 60, §28, I will engage in any and all legal activities necessary to protect my client's Property interests which will include the initiation of litigation in the United States District

Court for the District of Massachusetts against both you and the Town.[4] If such an action is filed claims will be asserted, inter alia, under the Federal Civil Rights Act (42 U.S.C. §1983), the Fifth Amendment, the Fourteenth Amendment and for common law torts including conversion, fraud, deceit and the like against you and the Town. Compensatory and punitive damages will be sought as will attorney's fees. See 42 U.S.C. §1988. It is beyond cavil, given this Demand Letter and the notice with which it provides you and the Town, that both you and the Town can be named as defendants in any money damage claims my client may assert under 42 U.S.C. §1983 in the context of this matter. See Monell v. New York City Department of Social Services, 436 U.S. 658, 690 - 691 & n. 54 (1978) (Brennan, J.); Hafler v. Mayo, 502 U.S. 21 (1991); Board of Commissioners of Bryan County, Oklahoma v. Brown, 520 U.S. 397, 404 (1997). It is the "policy" of the Town to take the "Surplus", in cases such as these, and this "policy" was promulgated by the Town's "policymakers" which include you as its Tax Collector. The "requisite degree of culpability" will be proved here if you and the Town persist in seeking the "Surplus" notwithstanding the notice of illegality herein provided. Id., at 404.

Both the Town and you have now been adequately forewarned that retention of the Surplus, relative to the Property in the sale or retention context, would violate the law for the recounted reasons. Please comply with the above directives so that we may all avoid needless, expensive and time consuming Federal Court litigation. I look forward to my client receiving her Surplus should the Town ever sell or retain the Property.

Please refrain from the illegal conduct you and the Town contemplate in your Complaint and comply with the spirit and letter of M.G.L. c. 60, §28, the Fifth Amendment, the Fourteenth Amendment, 42 U.S.C. § 1983 and the cited common law authorities.

Nancy Farrell is not sitting on her rights. She currently has her Property listed for sale with Keller Williams through MLS. She full well intends to sell her Property forthwith and pay the total arrearage owed to the Town. In the interim though she does not want to be unconstitutionally deprived of her Surplus in violation of M.G.L. c. 60, §28 and the Takings Clause.

Governments are simply not entitled, under the cited authorities, to obtain windfalls out of the wallets of their residents. Your attempt to put the Surplus from my client's Property in the Town coffers does just that.

Sincerely,
BRENDAN J. PERRY & ASSOCIATES, P.C.

By:*/s/ Christopher M. Perry*
Christopher M. Perry

CMP/mcp

[4]It is noteworthy to point out that in June of 2019 the U.S. Supreme Court ruled that litigants need not avail themselves to or participate in any State proceeding or process as a condition precedent to commencing Fifth Amendment based litigation in a Federal District Court. The "'general rule' is that plaintiffs may bring constitutional claims under §1983 'without first bringing any sort of state law lawsuit, even when the state court actions addressing the underlying behavior are available." Knick v. Scott, 588 U.S.___ (2019) Slip. Op. @ p. 11. Through Knick the Supreme Court corrected earlier precedent.

CERTIFICATE OF SERVICE

I, Christopher M. Perry, Attorney of Holliston, Massachusetts, do hereby certify that I have this date served Mary A. Bousquet, in her capacity as Tax Collector for the Town of Holliston, Massachusetts and Mark Ahronian, in his capacity as Chairman of the Holliston, Massachusetts Board of Selectmen, in hand with the instant seven (7) page Demand Letter ("Demand Letter"), and Exhibits A – E "(Exhibits"). Said Demand and Exhibits were also served this date upon the Attorney for Town in this Case (David E. Condon, Esquire) and the Attorney General which service upon said lawyers was via U.S. Postal Service, first class and postage prepaid, by mailing to said Attorneys as follows:

Mary A. Bousquet, Tax Collector
Tax Collector's Office
Holliston Town Hall
703 Washington Street
Holliston, MA 01568

Mark Ahronian, Chairman
Holliston Board of Selectmen
Holliston Town Hall
703 Washington Street
Holliston, MA 01568

David E. Condon, Esquire
Louison, Costello, Condon & Pfaff, LLP
101 Summer Street
Boston, MA 02110

Maura Healey, Esquire
Attorney General
1 Ashburton Place 20th Floor
Boston, MA 02108

Signed under the pains and penalties of perjury this 3rd day of February, 2020.

/s/ *Christopher M. Perry*
Christopher M. Perry