THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2021 TERM

JANUARY SESSION

Shaw's Supermarkets, Inc.

vs.

Town of Windham

Case #2020-275

Mandatory Appeal (Rule 7(1)(A))

From Rockingham County Superior Court

BRIEF OF APPEALING PARTY TOWN OF WINDHAM

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PROCEEDINGS BELOW

This statutory tax abatement proceeding (See, RSA 76:17) was commenced by the Plaintiff, Shaw's Supermarkets, Inc., by a filing made in the Rockingham County Superior Court on August 30, 2018. See, Shaw's Supermarkets, Inc. vs. Town of Windham, Rockingham County Superior Court #218-2018-CV-0974. See, Appendix to Defendant's Brief (hereinafter Def. App.) at pg. 3. The Defendant filed an Appearance and Answer on or about November 8, 2018. In its Answer, the Town denied the Plaintiff's allegations that certain property leased by the Plaintiff was improperly assessed. Def. App. pg. 7. The Defendant also raised an Affirmative Defense that the Plaintiff lacked standing to appeal based on its status as a tenant. Id.

On or about May 16, 2019, the Defendant filed a Motion to Dismiss, asserting that the Plaintiff lacked standing to bring the appeal, asserting *inter alia*, that

- The Plaintiff, as Tenant, was only leasing 1.5 acres of a 34 acre parcel.
- That the lease agreement specifically indicated that the Tenant (Plaintiff) was to pay taxes to the Landlord.
- That the lease specifically obligated the Landlord to pay the taxes.
- That the lease required the Tenant to pay to the Landlord a "pro rata" share of the taxes based on other site occupants [at the moment there are no other site occupants].

Def. App. pg. 10

On or about May 28, 2019, the Plaintiff filed an Objection to the Motion to Dismiss, accompanied by an Affidavit of a Corporate Official who affirmed that the Plaintiff had

paid 100% of the taxes on the subject parcel for the year under appeal (and prior). Def. App. pg. 28.

On June 19, 2019 the Court (Delker, J.) denied the Motion to Dismiss without comment other than indicating that it agreed with the contentions of the Plaintiff's Objection. See, pg. 41 infra.

After completion of unsuccessful Mediation, the matter was scheduled for a Bench Trial. A final Pre-trial Conference was held on December 19, 2019. In advance of that hearing, the Plaintiff filed a Motion *in Limine* to prohibit the Town from introducing certain evidence regarding the value of the property. Def. App. pg. 46. The Defendant objected to the Motion. Following the Pre-trial Conference the Court (Honigberg, J.) issued an Order which granted the motion in part, and denied it, in part. Def. App. pg. 60. The Court also granted a Motion to allow Attorney Mark F. Murphy to appear *Pro Hac Vice* for the Plaintiff.

A two (2) day Bench Trial (Honigberg, J.) was held on January 2 and January 3, 2020. The Plaintiff called two (2) witnesses: B. Alec Jones, a retained appraiser, and Scott Marsh, an employee of Municipal Resources, Inc., the contracted assessor for the Town of Windham. Following the hearing, the parties were provided an opportunity to file post Trial Memoranda, which were filed by both the Plaintiff (Def. App. pg. 63) and the Defendant. Def. App. pg. 70.

The Trial Court issued its decision on May 4, 2020, granting the Plaintiff its requested abatement. See, pg. 42, infra. By Notice of Appeal dated June 1, 2020 the Defendant filed an Appeal with this Court. By Order dated July 9, 2020 the case was

accepted by this Court. Following unsuccessful Appellate Mediation, a Transcript Order was issued on October 26, 2020. A Briefing Order was issued on November 30, 2020. On January 11, 2021 the Defendant, as Appealing Party, filed a Notice of Extension under Rule 21(6-A). As a result, this Brief is due on or before January 21, 2021.

This matter comes before the Court on the Appeal of the Town of Windham to the Trial Court Order of May 4, 2020.

STATUTES INVOLVED

RSA 75:1 How Appraised.

The Selectmen shall appraise ...all other taxable property at its market value. Market value means the property's full and true value as the same would be appraised in payment of a just debt due from a solvent debtor. The selectmen shall receive and consider all evidence that may be submitted to them relative to the value of property, the value of which cannot be determined by personal examination.

RSA 76:16 Abatement By Selectmen or Assessors.

I. (a) Selectmen or assessors, for good cause shown, may abate any tax, including prior years' taxes, assessed by them or by their predecessors, including any portion of interest accrued on such tax; or

(b) Any person aggrieved by the assessment of a tax by the selectmen or assessors and who has complied with the requirements of RSA 74, may, by March 1, following the date of notice of tax under RSA 76:1-a, and not afterwards, apply in writing on the form set out in paragraph III to the selectmen or assessors for an abatement of the tax. The municipality may charge the taxpayer a fee to cover the costs of the form required by paragraph III.

II. Upon receipt of an application under paragraph I(b), the selectmen or assessors shall review the application and shall grant, for good cause shown, or deny the application in writing by July 1 after notice of tax date under RSA 76:1-a. The failure to respond shall constitute denial. All such written decisions shall be sent by first class mail to the

taxpayer and shall include a notice of the appeal procedure under RSA 76:16-a and RSA 76:17 and of the deadline for such an appeal. The board of tax and land appeals shall prepare a form for this purpose. Municipalities may, at their option, require the taxpayer to furnish a self-addressed envelope with sufficient postage for the mailing of this written decision.

III. ...

RSA 76:17 Abatement By Court. –If the selectmen neglect or refuse so to abate in accordance with RSA 76:16, I(b), any person aggrieved, having complied with the requirements of RSA 74, may, in lieu of appealing pursuant to RSA 76:16-a, apply by petition to the superior court in the county, which shall make such order thereon as justice requires. The appeal shall be filed on or before September 1 following the date of notice of tax under RSA 76:1-a, and not afterwards. If the appeal is filed before July 1 following the date of notice of tax, the person aggrieved shall state in the appeal to the court the date of the municipality's decision on the RSA 76:16, I(b) application.

QUESTIONS PRESENTED

1) Did the Trial Court commit reversible error in denying the Defendant's Motion to Dismiss for Plaintiff's lack of standing, where (i) Plaintiff leased only a small portion of the Assessed Owner's property, (ii) the lease specifically provides that the Tenant pays its tax obligation to Landlord, (iii) the Landlord is specifically obligated to pay the taxes to the Town, and (iv) where the Plaintiff's tax obligation is reduced by rental of additional land by the owner? See, Defendant's Motion to Dismiss; Def. App. pg. 10.

2) Did the Trial Court commit reversible error by failing to apply the Uniform Standards of Professional Appraisal Practice (USPAP) which the Plaintiff's Expert conceded applied to his report, but who then admitted to errors and oversights inconsistent with such Standards which rendered the report unreliable to establish market value? See, Defendant's Memorandum of Law; Def. App. pgs. 74-81.

3) Did the Trial Court commit reversible error in concluding the Plaintiff carried its burden to establish the property "fair market value" (See, Porter vs. Sanbornton, 150 N.H. 363 (2003)), where the Plaintiff's only evidence was an appraisal report which failed to comply with USPAP Standard 1-1 in that it:

   (a) Failed to properly appraise the parcel at issue by misconstruing its boundaries and failing to consider the development potential of the additional frontage land area.

(b) Failed to include a significant comparable site in its valuation analysis which suggested the Plaintiff significantly undervalued the property on a comparative sales approach.

(c) Failed to consider the valuation, based on a capitalization of income, of the rental payments under the lease from the point of view of the landowner, when a demonstrated calculation of said income provided a land value 70% higher than in Plaintiff's appraisal report and the Plaintiff's expert elected "not to consider" that evidence? See, Defendant's Memorandum of Law; Def. App. pgs. 74-81.

4) Did the Trial Court commit reversible error in disregarding the property owner's capitalized income valuation of the land in question, reflecting a land value between $5.5 million and $8.0 million (the Plaintiff's appraisal was $3.5 million), by rejecting the "leased fee interest" which is inconsistent with the requirement that the Court must consider "all" relevant factors in considering valuation. Crown Paper Company vs. City of Berlin, 142 N.H. 563 (1997)? See, Defendant's Memorandum of Law; Def. App. pgs. 74-81.

STATEMENT OF FACTS

The property at issue in this case is known generally as 43 Indian Rock Road, Windham, New Hampshire, designated on the Windham Tax Map as 11-C-950. As of April 1, 2017, the property was owned by an entity named Route 111 Windham Realty, LLC (hereinafter the Owner). According to the assessment card for the property (See, Pltff Exhibit #4) it was acquired by the Owner by a deed recorded in April 2005. See also, Pltff Exhibit 1, pg. 69. The deed describes the property as 34.2 acres, and reflects the property as being depicted on a plan recorded in the Rockingham County Registry of Deeds as Plan #D-32540. Id. See also, Pltff Exhibit 1, pg. 97 (the Plan); Def Exhibit G. At the time it was acquired by the Owner, it was vacant and undeveloped. The parcel is depicted as having 1000 +/- feet of frontage on Indian Rock Road (aka N.H. Route 111) and also an access easement to the East to Wall Street. Pltff Exhibit 1, pg. 97; Def. Exhibit G.

Even before the Owner owned the subject property, it entered into a lease agreement with the Plaintiff, Shaw's Supermarket, Inc., as Tenant (hereinafter the Plaintiff's Lease or Lease). See, Defendant's Exhibit B; Def. App. pg. 82. The Plaintiff's Lease is dated January 30, 2004. The actual lot leased by the Plaintiff is a "pad" site of 1.5 acres. Lease, Section 2.1. The Owner was responsible to secure the permits to allow the Plaintiff to construct its store structure. Lease, Section 2.2A. Further, the Owner was responsible for all required site work and utilities to serve the "pad" site. Lease, Section 2.3. The Owner reserved the right to subdivide the property, and separate the pad from the surrounding land. Lease, Section 2.1.2. The Tenant was

At the time of purchase by the Owner, the property was enrolled in current use taxation under the provisions of RSA Chapter 79-A. Coincident with commencement of construction, a Land Use Change Tax (RSA 79-A:7) was assessed to the Owner and paid. See, Pltff. Exhibit #1, pg. 74. The Southeasterly portion of the site, consisting of approximately 17 acres, was released from Current Use, while the Westerly and Northerly sections remained in current use status. See, Defendant's Exhibit A.

The Plaintiff proceeded to construct its supermarket facility in 2005 (***corr 1-27-2021)***, which was twelve (12) years old as of April 1, 2017. A description of the building is found in the Plaintiff's Appraisal Report. See, Pltff. Exhibit 1 pgs. 26-27.

The lease had an original term of twenty years (Lease, Section 3.1), and a series of options to extend for an additional thirty (30) years. Lease, Section 3.2. The base rental ("minimum rent") to be paid by the Plaintiff is found in Section 4.1.1 of the lease. There are also provisions for "percentage rent" based on sales occurring in the supermarket. See, Lease, Section 4.3. As of 2017, the Plaintiff paid to the Owner an annual rental of $807,204. See, Def. Exhibit C.

The lease provisions related to taxes are found primarily in Article 4 and include the following:

- The Landlord (Owner) shall pay all real estate taxes assessed against the property. Lease, Section 4.2.1(a).

- Tenant (Plaintiff) is required to pay to the Landlord (Owner) a pro-rata share of real estate taxes assessed against the property, after being advised by the Owner of the amount due from the Tenant. Lease, Section 4.2.1(b).

- The Tenant must remit payment of the Tenant's share of the real estate taxes within thirty (30) days of notice from the Landlord. Lease, Section 4.2.1(e).

- Abatement proceedings shall be brought by the Landlord (Owner) at the request of the Tenant, or the Tenant, at Tenant's request, and with the Owner's permission, may institute proceedings in its own name. Each Tenant who requests commencement of an abatement proceeding shall be responsible for a pro-rata share of the costs. Lease, Section 4.2.1(f).

- The Tenant's share of the taxes shall be determined by the Gross Floor Area of the Tenant's building, as compared to the Gross Floor Area of all buildings in the shopping center. Lease, Section 4.2.1(b).

Under the last referenced section, the Plaintiff's building is currently the only building in the shopping center. As a result, the Tenant's share of the taxes, to be paid to the Landlord, is 100% at this time.

The lease contains an "Amendment" Clause which specifies that any amendments to the lease must be in writing and executed by the parties. Lease, Section 15.14. The Lease has not been amended.

The Owner has continued efforts to secure additional tenants for the property, and provided the Plaintiff's Appraiser with marketing brochures depicting development options for such expansions. See, Pltff Exhibit #1, pgs. 103-106. Transcript (hereinafter Tr.) pg. 19.

For the tax year (RSA 76:2) beginning April 1, 2017, the Town assessment of the Owner's property was $10,887,150. The New Hampshire Department of Revenue Administration Equalization Ratio (which was stipulated to by the Parties; See, Tr. pgs. 7-8) was 88.1%. This results in an equalized valuation of $12,357,718 as of April 1, 2017.

At Trial of this matter, the Plaintiff contended, based on the testimony, and report of its retained expert, B. Alec Jones, that the market value of the Owners property as of April 1, 2017 was $9,500,000 and that the resulting assessment should be $8,360,750. See, Pltff. Exhibit 1 at pg. 3.

SUMMARY OF ARGUMENT

The Trial Court erred in its failure to Dismiss the Plaintiff's tax appeal because it is not the Owner of the subject property. The specific terms of the Tenant's lease required it to pay a "pro-rata" share of real estate taxes to the Owner, who was obligated under the lease to pay the taxes. Consequently, the Plaintiff failed to meet the test for Tenant Standing as set forth in decisional law of this Court. This Court has apparently never ruled on the question of the standing of a "fractional lessee" (a party leasing less than the entirety of an assessed parcel), but application of rules adopted by other jurisdictions demonstrates that the Plaintiff's fractional lease is not sufficient to confer it standing to appeal in this case.

As the Plaintiff in a tax abatement, the Plaintiff had the burden to establish, by a preponderance of the evidence, the fair market value of the Owner's property. The Plaintiff's Expert and his accompanying report are governed by the Uniform Standards of Professional Appraisal Practice (USPAP). An evaluation of the available evidence demonstrates that the report failed to comply with the USPAP standards because of a series of errors (some admitted) which resulted in a cumulative effect making the report less than credible evidence of the property value. The errors included:

- A misunderstanding of the property boundaries resulting in disregard of a significant frontage area that affected the conclusion as to highest and best use.
- A failure to consider a highly relevant comparable sale in the evaluation of the land value of the subject parcel.

- The intentional disregard of the capitalized income of the lease payments received by the property owner.

The last item is in direct contradiction of the requirement that all relevant evidence of value must be considered in establishing a fair market value for tax purposes.

Because the Plaintiff's market value process was flawed by multiple errors, it cannot legally be considered sufficient to credibly establish market value and consequently, the Plaintiff's appeal should be dismissed.

ARGUMENT

I. LEGAL STANDARDS OF REVIEW AND PROOF

A. Standard of Review

In the review of a Trial Court decision, this Court has held that it will uphold the Trial Court's factual rulings unless they lack evidentiary support or are legally erroneous. Ventas Realty Limited Partnership vs. City of Dover, 172 N.H. 752, 755 (2020) citing, Marist Bros. of N.H. vs. Town of Effingham, 171 N.H. 305 (2018). The findings and rulings of the Trial Court must be sustained unless they are lacking in evidential support or tainted by errors of law. The LLK Trust vs. Town of Wolfeboro, 159 N.H. 734, 737 (2010). The interpretation of a statute is a question of law, which this Court reviews de novo. Id. at 736. While acknowledging that the search for "market value" is not an easy one (See, Public Service Company of New Hampshire vs. Town of Bow, 170 N.H. 539, 542 (2018)), where the Trial Court's rulings are inconsistent with the legal requirements for consideration of the evidence, the Trial Court must be reversed. Porter vs. Town of Sanbornton, 150 N.H. 363 (2003).

B. Burden of Proof on Plaintiff

The Plaintiff in a tax abatement appeal carries the "burden of proof". To succeed in a tax abatement claim, the Plaintiff has the burden of proving by a preponderance of the evidence that it paid more than its proportionate share of taxes. Ventas, supra at 755, citing, Porter, supra at 367. To prove disproportionality, the Plaintiff must establish that the taxpayers' property is assessed at a higher percentage of fair market value than

the percentage at which property is generally assessed in the Town. Ventas, supra; Appeal of Public Service Co. of N.H., 170 N.H. 87 (2017).

To carry its burden under law, the Plaintiff must establish, by credible proof, the "fair market value" of the Owner's property. Porter, supra at 367. Disproportionality is not established by demonstrating that the Town methodology was flawed, or may not have produced a "fair market value". Porter, supra at 369. Even where the Court might agree that the Town's methodology was incorrect, the Plaintiff does not prevail. Ventas, supra at 756. Disproportionality and not methodology is the linchpin in establishing entitlement to an abatement. The LLK Trust, supra at 739 citing, Verizon New England, Inc. vs. City of Rochester, 151 N.H. 263 (2004). Where the Plaintiff fails to produce a credible opinion of market value, its appeal must fail. Ventas, supra at 757.

While this Court gives deference to the Trial Court's judgment on such issues as resolving conflicts in testimony, credibility of witnesses, and determining the weight of evidence (Ventas, supra at 756) where the Trial Court fails to consider all legally relevant evidence, its findings are "tainted by errors of law" that require reversal. Cf, LLK Trust, supra.

II. THE TRIAL COURT ERRED IN FAILING TO DISMISS THE PETITION BECAUSE THE PLAINTIFF LACKS STANDING

It is undisputed that the property which is subject of the abatement request is owned in fee by Route 111 Windham, LLC. See, Assessment Cards, Pltff Exhibit 4. The parcel consists of over 34 acres of land. Id. See also, Def Exhibit G. The Plaintiff in this matter is a Tenant under a lease with the property owner under which it leases less than two (2) acres of the site. See, Lease, Defendant's Exhibit B, Section 2.1 (Lease of Premises) and Article 1 (Definitions) – Premises consist of Land and Improvements; Land is the Tenant Pad of 1.5 acres.

Based on those facts, the Defendant filed a Motion to Dismiss for lack of standing. See, Def. App. pg. 10. This Motion was denied by the Trial Court. Defendant contends this was legally erroneous.

This Court's rulings on the taxability of leasehold interests up through 1996 are summarized in the case of Hampton Beach Casino, Inc. vs. Town of Hampton, 140 N.H. 785 (1996). Citing the 1894 case of Kennard vs. City of Manchester, 68 N.H. 61 (1894), this Court stated:

> "The Trial Court correctly concluded that in situations involving a lease for a term of years, real property taxes are assessed on the fee, and not the separate leasehold and revisionary interests".
>
> Hampton Beach Casino at 788.

Further:

> Absent an agreement between the Lessor and Lessee to the contrary, the lessor as owner of the fee interest in the property pays taxes on the full value of the land as if the leasehold interest did not exist.
>
> Id, citing, Gowen vs. Swain, 90 N.H. 383 (1939).

In the 1998 case of In Re: Reid, 143 N.H. 246 (1998), this Court restated the same principal, with certain judicially created exceptions:

> "...leasehold tax interests ... are taxable if the leases are either perpetual (cite omitted), or "renewable indefinitely" (citing, Hampton Beach Casino, supra) or if the Petitioners agreed to pay taxes on the value of the land."
>
> In Re: Reid at 249.

In this case, the Plaintiff's lease is not indefinite or perpetual, and a fair analysis of the lease reveals that the Plaintiff did not agree to pay taxes on the value of the land.

In denying the Defendant's Motion to Dismiss, the Trial Court did not provide any written explanation other than adopting "the reasons set forth in the Objection". But the Plaintiff's Objection does not support the finding that the Plaintiff "agreed to pay taxes on the value of the land".

The Plaintiff's objection to the Motion to Dismiss cites language from two (2) cases decided by this Court:

- In Re: Thermo-Fisher Scientific, Inc., 160 N.H. 670 (2010).
- Appeal of City of Lebanon, 161 N.H. 463 (2011).

Neither of these cases support the Plaintiff's standing in this matter.

The Thermo-Fisher case addressed the question of whether or not a parent company of wholly owned subsidiary had standing to appeal real estate taxes levied against a parcel owned by the subsidiary. The issue in that case was framed as:

> "While we have previously adopted varied constructions of the phrase under different circumstances, we have not previously examined the

> phrase within the context of a parent corporation paying taxes on behalf of a wholly owned subsidiary".
>
> Thermo-Fisher, supra at 672.

After analysis, this Court concluded that:

> "...a disproportionate assessment of land and buildings is an injury to its wholly-owned subsidiaries, and hence because it [the parent company] paid the allegedly disproportionate taxes, an injury to it."
>
> Id. at 673.

There is nothing in Thermo-Fisher that addresses the relationship between a tenant and landowner, or can be seen as contradicting the language of In Re: Reid with respect to a tenant.

As further support for the contention that Thermo-Fisher was limited to the issue of payment on behalf of subsidiary, is this Court's decision, five (5) months later, in the matter of Appeal of City of Lebanon, 161 N.H. 463 (2011). While the primary focus of the case was related to the issue of the application of the Appeal of Town of Sunapee (126 N.H. 214 (1985)) rule as it relates to multiple properties, this Court did cite the Appeal of Reid case for the proposition that a party (Walgreens) who held a ground lease with exclusive possession for up to 75 years (Appeal of City of Lebanon, supra at 466) would be considered a separate taxpayer for the purpose of the Sunapee rule. In doing so, the Court cited Appeal of Reid for the proposition that leasehold interests are taxable if the terms are "either perpetual, renewable indefinitely, *or the leaseholder agrees to pay taxes on the value of the land.*" Id. at 469 (emphasis in original).

The facts as recited in Appeal of City of Lebanon are clearly distinguishable from the underlying facts in this case, and clearly show that the current Plaintiff should not be granted standing to appeal:

- The tenant (Walgreens) in the Lebanon case had exclusive possession of the entire parcel of land. In the current facts, the Plaintiff is leasing only a small fraction of the entire parcel belonging to the site owner, i.e. 1.5 acres out of a 34+/- acres parcel.

- In the Lebanon case, the lease specifically provided for the Tenant's right to file an abatement request in its name or in the name of the Owners. By contrast, the Abatement clause in the current lease provides, in the first instance, that the owner bring the abatement proceeding at the request of the Tenant or with the Owner's permission, the Tenant may bring such action. [N.B. There is nothing in the record evidence which demonstrates such permission was given].

Compare, Appeal of Lebanon, supra at 465
With, Def. Exhibit B; Def. App. pgs 91-93.

The consequences of the lease differences are born out in the Trial in this matter. The Plaintiff spent considerable time and effort seeking to establish a "value" for significant land of the owner which is totally outside their lease provisions. E.g. Tr. pgs. 18-23. And while the Plaintiff currently is responsible for 100% of the taxes as the only current occupant of the property (See, Plaintiff's Objection, Def. App. pg. 28) the Objection (which the Trial Court adopted as the basis for its denial) does not address what

happens when/if the Plaintiff is not the only occupant of the property. Would the Plaintiff's standing then disappear? Such an interpretation of the standing rules under RSA 76:16 would be an "absurd" result that this Court should avoid. See, e.g. Appeal of Town of Lincoln, 172 N.H. 244 (2019) (Interpreting statute to effectuate overall purpose and avoid an absurd or unjust result).

In this case, the Plaintiff's lease is intentionally structured in such a way that if/when multiple occupants of the site are in place, all would remit payment of pro-rata taxes to the Landlord who would then aggregate the payment and forward the same (as required under the lease) to the Town.

The issue raised appears to be one of first impression under New Hampshire law, i.e. the extent to which a "fractional lessee" may assert standing. All of the reported New Hampshire cases (In Re: Reid, Appeal of City of Lebanon, Thermo-Fisher) dealt with circumstances involving the lease of the entire assessed property. The standing of a "Fractional Lessee" has never been addressed. In at least one (1) other State, it has been addressed. In the case of Waldbaum, Inc. vs. Finance Administrator of the City of New York, 74 N.Y. 2nd 128; 542 N.E. 2nd 1078 (N.Y. Ct. of Appeals 1989), in ruling on the standing of a tenant who occupied roughly 50% of the Owner's property, New York's highest State Court held that implicit in its rulings on non-owner standing was the requirement for an "undivided tax liability". Waldbaum, supra at 74 N.Y. 2nd 133. In finding that the Petitioner did not have standing, the Waldbaum Court held:

> It seems necessary to us as a matter of sound policy and interpretation to condition a partial lessee's procedural standing in such matters on a direct obligation to pay the lessor's taxes or on a contractual authorization to pursue a tax certiorari proceeding, representing the undivided assessment

> unit, in the lessor's stead in order to avoid a fracturing of challenges against an assessment; to prevent duplicative petitions, ...to protect the taxing authority from multiple litigation as to the same parcel by parties of unknown relation to the taxes (sic) premises; and to ensure that the assessment consequences are proportionately spread among all entities having obligations flowing out of a divided assessment unit.
>
> Waldbaum at 74 N.Y. 2nd 134.

Because Waldaum was only a partial lessee, not obligated directly to pay the taxes levied against the whole property assessed and was not given a contractual entitlement to bring an abatement action in the Owner's name, it lacked standing to appeal. Id.

Because the lease in question does not require the tenant to pay to the municipality all the taxes assessed on the owner's property, and because the lease requires payment to the Landlord (not the Town), the lease does not fall in the category of leases as determined by this Court as "taxable" to the Tenant. See, Hampton Beach Casino, supra at 788, 790; Appeal of Reid, supra at 249. Further, even if this Court were to recognize the standing of a "fractional lessee", the Plaintiff in this case does not have lease provisions which would provide such standing if this Court were to adopt a Waldbaum test. As a result, the Plaintiff does not have standing to bring this appeal and the Trial Court committed reversible error in failing to grant the Town's Motion to Dismiss.

III. THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFF MET ITS BURDEN TO ESTABLISH THAT FAIR MARKET VALUE OF THE PROPERTY UNDER APPEAL.

As noted above, (See, Section I(B) infra), it is a necessary prerequisite to a Plaintiff's right to relief that it establish the fair market value of the subject property as of the assessment date. Porter vs. Town of Sanbornton, supra. This must be done by a "preponderance of the evidence" to meet the Plaintiff's burden of proof. Ventas Realty Limited Partnership vs. City of Dover, supra.

In this case, the Plaintiff submitted the testimony of its expert witness, B. Alec Jones, and his appraisal report (See, Plaintiff's Exhibit 1) to meet its legal burden of proof. Because of errors and omissions within that report, it cannot be found to have established a fair market value of the subject property. As a result, the Plaintiff's appeal should be Dismissed.

A. Uniform Standards of Professional Appraisal Practice (USPAP).

In this case the Defendant introduced (Def Exhibit D) a copy of the current Uniform Standards of Professional Appraisal Practice (USPAP). According to the testimony of the Plaintiff's Expert, they represent guidelines for the preparation of appraisal reports. Tr. pg. 79. They govern the work of an appraiser (Tr. pg. 79-80), and the report itself indicates that the report was prepared in conformance with the Standards of USPAP. See, Pltff Exhibit #1, pg. 1.

Under USPAP Standard 1: Real Property Appraisal, Development, one finds Standards Rule 1-1:

STANDARDS RULE 1-1

In developing a real property appraisal, an appraiser must:

(a) be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal;

(b) not commit a substantial error of omission or commission that significantly affects an appraisal; and

(c) not render appraisal services in a careless or negligent manner, such as by making a series of errors that, although individually might not significantly affect the results of an appraisal, in the aggregate affects the credibility of those results.

In its Order, the Trial Court makes no reference to the USPAP Standards (See, Def. App. pg. 151), or their applicability to the Plaintiff's Expert Report. The Trial Court acknowledges that the expert report did contain certain errors, details of which are provided below. Defendant believes that the errors detail sufficient deviations from the USPAP Standards, so as to implicate Rule 1-1(c), constituting a series of errors that, although individually may not affect the results of the appraisal, they have the cumulative effect to render the appraisal not sufficiently reliable to meet the Plaintiff's burden to establish a market value of the subject property.

B. The Report Did Not Correctly Identify the Property to be Appraised.

During his testimony, the Plaintiff's Expert, B. Alec Jones, testified as to the concept of surplus and excess land. See, Tr. pgs. 74-76. In the course of cross examination, Mr. Jones testified that his appraisal report was premised on the boundaries of the property as depicted on the Site Plan found on pg. 96 of his report, when in fact, that was not the boundary of the parcel owned by the Owner. On Direct

Examination, the witness testified that the State owned the land between the front of the site and the State highway. Tr. pg. 16. While the size of the parcel remained much the same, (See, Defendant's Exhibits F and G), the appraisal report failed to consider nearly 30,000 square feet of land adjacent to the Right-of-Way of Route 111. See, Tr. pgs. 113-118. Mr. Jones conceded (Tr. pgs. 84-85) that the area could feasibly be developed, but his report did not account for it because he was using the incorrect boundaries of the lot. See, Tr., pg. 117.

The Plaintiff's second witness, who was also determined to be an Expert, was Scott Marsh. Mr. Marsh, admittedly "hostile" in the sense that he was contracted to do appraisal and assessment work for the Town, testified that he was familiar with the USPAP Standards. Tr. pgs. 221-222. He rendered an opinion that suggested the failure to recognize the correct boundaries of the property would have affected the "highest and best" use analysis of Mr. Jones. Tr. pg. 233.

The failure of the Plaintiff's Expert to actually appraise the correct property boundaries, could, by itself be considered an error that individually might not affect the appraisal credibility, but in cumulative effect with other factors, should have caused the Trial Court to find the report not sufficiently credible to establish the value of the property under USAP Standards Rule 1-1(c)

C. The Report Failed to Include a Significant Comparable Property

The Plaintiff's Expert testified that one of the approaches to establish the fair market value of the property was a "cost approach". Tr. pgs. 31-39. To create this estimate, Mr. Jones testified that he developed a value for the land, then calculated a

value for the improvements utilizing a "cost of construction less depreciation" method. Id. Utilizing this method first requires the establishment of a land value using either a comparable sales or income approach. Tr. pgs. 118-119.

The "land value" for the Plaintiff's "cost" analysis was derived from a series of "comparable sales" which appeared in the Plaintiff's Expert report on pgs. 32-35. See also, Tr. pgs. 31-33. The five (5) comparables produced an unadjusted Sales Price/Acre ranging from $105,000 to $425,400. See, Plaintiff's Exhibit 1, pg. 33. The Plaintiff's Expert described the process used to develop the Comparable Sales he selected. Tr. pgs. 128-129.

However on cross examination, it was revealed that his report failed to include a land purchase by a market competitor (DeMoulas/Market Basket) only a relatively short distance from the site, and only a few months before the effective date of the appraisal. Tr. pgs. 130-135.

USPAP Standards, Rule 1-4 provides:

> "Standards Rule 1-4. In developing a real property appraisal, an appraiser must collect, verify, and analyze all the information necessary for credible assignments.
>
> (a) When a sale's comparison approach is necessary for credible assignment results, an appraiser must analyze such comparable sales data as are available to indicate a valid conclusion."
>
> Def. App. pg. 153

The witness testified that he did not discover the sale until after he created his report, (Tr. pg. 130), which was in July 2019 (Pltff Exhibit #1, pg. 1) over two (2) years

after the sale in question. During his direct testimony, the witness made direct reference to the supermarket being built in Salem. Tr. pg. 26.

Assuming for the purposes of argument, that Mr. Jones was not aware of the Market Basket Sale in July 2019, the witness testified that he "should have" included the Market Basket 2017 land purchase. Tr. pg. 135.

The Plaintiff's second witness, Scott Marsh, who was allowed to testify as an expert witness (over the Plaintiff's Objection) testified that the DeMoulas/Market Basket comparable should have been included (Tr. pg. 230), and that its exclusion was a "significant omission" which may have affected the validity of the report. Tr. pg. 231. On redirect examination, the Plaintiff's Expert testified he did not believe the error affected his conclusion (Tr. pg. 187), but the facts suggest otherwise:

- The sale would have been the closest in time to the preparation of the report.
- The unadjusted price/acre paid was $562,830/acre, significantly higher than any of the prices reflected on the table which appeared in the Plaintiff's Expert report. Pltff Exhibit 1, pg. 33.
- Even with adjustments discussed, it would appear that the adjusted price would have been considerably higher than any of the comparables employed.
- With one (1) exception, all of the comparables were transacted prior to April 1, 2015, two (2) years prior to the tax year. While "time adjustments" were made, it is not clear the "market conditions" described by the witness (Tr. pg. 26) reflected the possible demand, as reflected in the DeMoulas/Market Basket sale mere months before the effective date.

The failure of the Plaintiff's Expert to include a highly-relevant comparable could, by itself, be considered an error that individually might not affect the appraisal credibility, although the witness Marsh testified that it did. However, the cumulative effect, when considering other errors, should have caused the Trial Court to find the report not sufficiently credible to establish the market value of the subject property under USPAP Standards Rule 1-1(c).

D. The Plaintiff's Appraisal Report Failed to Properly Include Value Related to Lease Payments to the Owner

The obligation of the municipality is to appraise property at its "market value". RSA 75:1. The Plaintiff's Expert employed a definition of "Market Value" derived from the federal Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) of 1989. See, Tr. pgs. 6-69; Pltff Exhibit 1, pg. 9. In fact, New Hampshire has a statutory definition found in RSA 75:1:

> Market value means the property's full and true value as the same would be appraised in payment of a just debt due from a solvent debtor.
>
> Id.

The Plaintiff's Expert testified that he was not aware of this definition, but he agreed it is something he would review in the future. Tr. pgs. 69-70.

> In setting market value, the assessing officials are required to:
>
> ...receive and consider all evidence that may be submitted to them relative to the value of property, the value of which cannot be determined by personal examination.
>
> Id.

The Plaintiff's expert, in his report, acknowledges that the property in question is subject to the ground lease between the Owner, Route 111 Realty, LLC and the Plaintiff, Shaw's Supermarket's, Inc. See, Def. Exhibit B. However, in several places in his written report, he makes clear that he did not consider the ground lease in establishing the value estimates in the report. See, e.g. Pltff's Exhibit #1, pg. 2, pg. 7, pg. 9. See also, Tr. pgs. 46-47, 138. Defendant believes (with reference to Shakespeare's Hamlet) that he "doth protest too much". And with good reason.

As noted in the Plaintiff's Expert Report on page 7, (See also, Defendant's Exhibit C), the Plaintiff paid to the owner ground rent of over $807,000 for the tax year under consideration. Using similar adjustments that the Plaintiff's Expert applied in other parts of his analysis, the rental income produced a Capitalized Land Value of between $5,000,000 and $6,000,000, well above the $3,530,000 assumed by the Plaintiff's report. See, Tr. pgs. 141-146. See also, Def. Exhibit H.

The Plaintiff's Request for Findings of Fact and Rulings of Law make clear the Plaintiff's legal position that consideration of the capitalized ground rent would represent a "leased fee interest" as opposed to a "fee simple value". See, Plaintiff's Request for Findings of Fact and Rulings of Law, par. 45-48; Def. App. pg. 68. In support of their contention, they cite the case of DeMoulas vs. Town of Salem, 116 N.H. 775 (1976). In that case, the Plaintiff, seeking an abatement, relied on the "Capitalization of Net Income" approach to attempt to establish value. The record before the Court suggested that several of the leases relied upon by the Petitioner were unfavorable, and did not reflect the "capacity" of the property to earn income. DeMoulas at 781. The Court established a "general rule" that capacity for earning income, and not actual income is

taken into account in setting value for taxation. DeMoulas, supra. However, the DeMoulas Court also went on to state the following:

> We do not mean to suggest that consideration of actual income is improper in all cases.
>
> DeMoulas, at 782.

The overarching rule with regard to setting market value is that "all evidence" that might be relevant on value should be considered. 16 N.H. Practice (Loughlin) §21.02 and cases cited; Crown Paper Company vs. City of Berlin, 142 N.H. 563, 570 (1997).

By declining to consider the effect of the capitalized land rent to the Owner, who is the taxpayer, the Plaintiff's Expert Report improperly disregarded a significant component to the land value. The lease was to continue to at least 2026, or nine (9) more years from the effective date of the appraisal. Tr. pg. 157. It represents transmissible value that could pass to a purchaser of the property. Tr. pg. 148.

The Expert Witness, Scott Marsh, testified that under the USPAP Standards, that the Plaintiff's Expert should have considered the lease income. Tr. pg. 231-232.

Further, the use of capitalized land leases, whether actual or hypothetical, is a fairly typical approach to valuing commercial land. See, 16 N.H. Practice, supra at 21.04. Cases decided by this Court have focused on situations where the actual rental rates were concluded to be below market. E.g., DeMoulas, supra; Coliseum Vickerry Realty Co. Trust vs. City of Nashua, 126 N.H. 368 (1985).

By intentionally "disregarding" the Capitalization of income" method, the so-called "leased fee interest", the Plaintiff's Expert did not properly consider "all evidence" available to establish the property's "market value" under USPAP Standards Rule 1-4:

> In developing a real property appraisal, an appraiser must collect, verify and analyze all information necessary for credible assignment results.
>
> See, Def. App. pg. 153
> (Emphasis added).

With respect to creation of an "income approach" USPAP Standards require an appraiser to analyze:

> "the potential earnings capacity of the property to estimate the gross income potential of the property".
>
> USPAP Standards Rule 1-4(c)(i)
> Def. App. pg. 153.

By limiting, either on his own initiative, or at the direction of the Tenant, the scope of the report, the Plaintiff's Expert committed a "substantial error of omission" that significantly affected the appraisal. USPAP Standards Rule 1-1(b); Def. App. pg. 151.

The Trial Court ruling suggests that its reading of the DeMoulas opinion supported the action of the appraiser in disregarding the value of the "leased fee interest". As noted above, the DeMoulas case does not indicate that a capitalized ground lease is not evidence of market value. As the Town has contended throughout the process (See, Argument Section II infra) the Tenant's approach throughout this litigation has not focused on the Owner's position, but the Tenant's position. The "value" of the property to the Owner today is reflected in the income stream that the Owner is receiving now, and into the future beyond the period of the next re-assessment (lease through 2026; reassessment in 2020).

With respect to the clear "disregard" of the impact of the ground lease payments on the ultimate taxable value of the property, this was inconsistent with the USPAP Standards, which affected the report's credibility. Further, the Trial Court's "restrictive" interpretation of the DeMoulas opinion represented an error of law which affected its consideration of the evidence.

The failure of the Plaintiff's Expert to properly consider the impact of the rental income received by the Owner could, by itself, be considered an error that individually might not affect the appraisal credibility, although the witness Marsh testified that it did. However, the cumulative effect, when considering other errors, should have caused the Trial Court to find the report not sufficiently credible to establish the value of the property under USPAP Standards 1-1(c).

CONCLUSION

Based on the foregoing arguments, the Town of Windham respectfully requests that this Court Reverse the decisions of the Rockingham County Superior Court, and Dismiss the Plaintiff's underlying appeal.

The Town requests that its attorney, Bernard H. Campbell, Esquire, be heard orally, and that he be allotted the customary time for Oral Argument.

Respectfully submitted,
Town of Windham
BY ITS ATTORNEYS,
Beaumont & Campbell, Prof. Ass'n.
1 Stiles Road, Suite 107
Salem, New Hampshire 03079

Dated: January 21, 2021

By: _____
Bernard H. Campbell, Esq.,
Bar ID # 035

CERTIFICATE

I certify that in accordance with the rules of this Court, including Rule 26(2), a copy of the foregoing Brief was electronically served through the Court Electronic Filing System, on this 21st day of January 2021 on:

John Frances Hayes, Esq.
Alfano Law Office, PLLC
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Concord, New Hampshire 03301

Mark F. Murphy, Esq.
Mark Murphy Law Offices
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Norwood, Massachusetts 02062

Counsel for Plaintiff

Additionally, the document is in compliance with the word limitations contained in Rule 16(ii) and the number of words in the document, exclusive of pages containing the Table of Contents, Table of Authorities and any Addendum is 7495.

Dated: January 21, 2021

Bernard H. Campbell, Esq.
NH Bar ID #035

REFILING CERTIFICATE

This Brief is refiled this 27th day of January, 2021 because the Orders being appealed (See, Pgs. 41-47 *infra*) were inadvertently dropped during the final scanning. They appear in the original Table of Contents, and are referenced in the text. See, e.g., pg. 8. The Orders are attached in conformance with Rule 16(3)(i). One typographical error was also corrected on page 15 (also noted).

Dated: January 27, 2021

Bernard H. Campbell, Esq.
NH Bar ID #035

Copies of Decisions

Being Reviewed

See, Rule 16(3)(i)

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
Kingston NH 03848-1258

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

NOTICE OF DECISION

FILE COPY

Case Name: **Shaw's Supermarkets Inc. v Town of Windham**
Case Number: **218-2018-CV-00974**

Please be advised that on June 19, 2019 Judge Delker made the following order relative to:

Motion to Dismiss; "Denied for the reasons set forth in the objection."

June 19, 2019

Maureen F. O'Neil
Clerk of Court

(595)

C: John Francis Hayes, ESQ; Bernard H. Campbell, ESQ

THE STATE OF NEW HAMPSHIRE
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NOTICE OF DECISION

File Copy

Case Name: **Shaw's Supermarkets Inc. v Town of Windham**
Case Number: **218-2018-CV-00974**

Enclosed please find a copy of the court's order of May 04, 2020 relative to:

Bench Trial

May 04, 2020

Jennifer M. Haggar
Clerk of Court

(218340)

C: John Francis Hayes, ESQ; Bernard H. Campbell, ESQ; Mark F Murphy, ESQ

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

SHAW'S SUPERMARKETS, INC.

v.

TOWN OF WINDHAM

Docket No. 218-2018-CV-00974

ORDER

This is a tax appeal in which Shaw's Supermarkets, Inc. ("Shaw's"), challenges the property tax assessment at 43 Indian Rock Road (a/k/a State Route 111) in the Town of Windham for the tax year beginning April 1, 2017. The Court held a two-day bench trial on January 2 and 3, 2020, following which the parties made written submissions in the form of a Request for Findings of Fact and Rulings of Law from Shaw's ("Plaintiff's Request for Findings and Rulings"), and a Memorandum of Law from the Town ("Defendant's Memorandum of Law").

As explained further below, after considering the entire record, the Court finds Shaw's has established that the property in question was disproportionately assessed by the Town and enters judgement for Shaw's.

BACKGROUND

The parties' post-trial submissions accurately describe the procedural history of this dispute and the basic legal standard that applies, see Defendant's Memorandum of Law at 1-5; as well as the evidence presented by Shaw's, see Plaintiff's Request for Findings and Rulings ¶¶ 1-42. To that extent, the Court approves and adopts those portions of the parties' post-trial submissions as findings of fact and conclusions of law.

BURDEN OF PROOF AND EVIDENTIARY STANDARD

The parties agree that Shaw's has the burden of proving the Town subjected the property in question to a disproportionate assessment. Shaw's must show by a preponderance of the evidence the appropriate assessment for the property.

POSITIONS OF THE PARTIES

In summary, the Town assessed the property in question for $10,887,150 as of April 1, 2017. Shaw's believes the assessment should have been $8,370,250. At trial, Shaw's presented a report and expert testimony from B. Alec Jones of Fremeau Appraisal, Inc., to support its position. In addition, Plaintiff's Request for Findings and Rulings contains responses to some of the Town's arguments.[1]

The Town, for its parts, has tried to undercut the case presented by Shaw's in a number of ways. At bottom, the Town's position is that Mr. Jones' putative errors and omissions make his opinions unreliable.

First, the Town points out that Mr. Jones used a different definition of "market value" than the one provided in New Hampshire law. The Town recognizes that this may just be an issue of "semantics," but it is, unquestionably, a mistake. See Defendant's Memorandum of Law at 6.

Second, the Town asserts that Mr. Jones' analysis fails to appraise the land at the owner's "highest and best use." According to the Town, the land has additional development potential on the portions of the parcel in current use and in the existing

[1] The parties' submissions include discussions of other issues that, at the end of the day, are not disputed. They include the value of the portion of the property that is enrolled in the State's Current Use program and thus taxed at a much lower rate, and the equalization ratio of 88.1%. As to both, Shaw's uses the Town's numbers. The possible value of additional development that would include some of the Current Use portions of the property is discussed later in the text.

parking lot. The Town also argues that Mr. Jones' analysis undervalues the Shaw's lease and thus undervalues the land. See Defendant's Memorandum of Law at 6-10.

Third, as part of its critique of Mr. Jones' land value conclusion, the Town faults Mr. Jones' "comparable sales" analysis (a) for using sites that are not similar to the property in question, and (b) for not including a significant supermarket development that Mr. Jones conceded at trial he should have included in his discussion of "comparable" properties. See Defendant's Memorandum of Law at 10-11.

ANALYSIS

Taking the Town's criticisms in turn, Mr. Jones' use of different definition of market value is not, by itself, a significant problem. Were the rest of Mr. Jones' work seriously flawed, the "semantic" error might be part of a court's determination that he did not know what he was doing. The Court does not take that view here. Mr. Jones is an experienced, competent expert, who testified with confidence about his work on this matter. He acknowledged and explained his errors and shortcomings candidly.

With respect to additional development potential of the property in question, the Court finds that Mr. Jones' report and testimony addressed those possibilities adequately. The Town did not succeed in undercutting his opinion that additional development potential added little value. The Court credits Mr. Jones' explanation that he looked for evidence that the land in current use had value for development and could not find any. He specifically concluded that there were no indications that either the current owner or anyone else saw such value. See Trial Record, Jones Testimony. The Court can identify no reason to disagree with him.

Regarding the parking lot, Mr. Jones took the position that the existing lot was too small to support much in the way of additional development in the form of a small retail operation. The Town made much of Mr. Jones having a misunderstanding of the property line on the main road. The Court did not understand Mr. Jones' opinion about development in the parking lot to be based on that property line. Instead, the Court understood Mr. Jones' opinion to be that the slope from the existing parking lot to the main road made expansion of the lot impractical if not impossible. See Trial Record, Jones Testimony.

The Town elicited testimony from the Town's contract assessor, Scott Marsh, who has relevant training and experience and was allowed to testify as an expert, that the property had more room for development. Weighing the conflicting testimony, the Court believes Mr. Jones' analysis and opinion about development in the parking lot is more likely to be correct. For those reasons, the Court finds that Mr. Jones did not understate the value of the property by missing higher value uses.

Regarding how to recognize the value of the lease to the owner of the property, the Town argues that the Shaw's lease generated income for the owner of the property that should be reflected in a significantly higher value. Shaw's takes the position that the lease is old and, as of 2017, did not reflect market rents. Instead of analyzing the value of the lease to generate what Shaw's calls the "leased fee" interest, Mr. Jones analyzed market rents to determine the "fee simple" interest. Mr. Marsh agreed with the Town's position that Mr. Jones' analysis of the lease undervalued the property. The Court agrees with Shaw's that the objective is to determine the value of land using market rents and finds that Mr. Jones' approach achieved that objective. See

Demoulas v. Town of Salem, 116 N.H. 775, 781-82 (1976). The Court thus adopts the legal conclusions in ¶¶ 45-46 of Plaintiff's Request for Findings and Rulings, and agrees with the assertions made by Shaw's in ¶¶ 47-48.

With respect to Mr. Jones' analysis of other properties as he looked for comparable developments, the Court starts with the uncontroversial observation that no analysis of comparables will ever be perfect. More important, the Court recognizes that Mr. Jones had difficulty finding properties that were directly comparable to the property in question. The ones he analyzed were different in ways that required him to make adjustments to make comparisons. The Court finds that his adjustments were reasonable and that he explained his work appropriately. Regarding the seemingly obvious comparable development that he missed, Mr. Jones conceded his error and testified that including the additional property would not have changed his ultimate opinion regarding value. See Trial Record, Jones Testimony.

CONCLUSION

On this record, the Court finds that Shaw's has carried its burden of proof to establish the value of the property. Judgment to enter for Shaw's.

SO ORDERED.

May 4, 2020
Date

Judge Martin P. Honigberg