THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2021 TERM

APRIL SESSION

Shaw's Supermarkets, Inc.

vs.

Town of Windham

Case #2020-275

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

From Rockingham County Superior Court

REPLY BRIEF OF APPEALING PARTY TOWN OF WINDHAM

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I. THE PLAINTIFF IS NOT ENTITLED TO STANDING AS IT DID NOT AGREE TO PAY TAXES ON THE VALUE OF THE LAND OWNED BY THE OWNER/LANDLORD

A) The Holding in Thermo-Fisher Scientific is Not Apposite To The Instant Case

In its brief, the Plaintiff cites the case of Appeal of Thermo-Fisher Scientific, Inc. (160 N.H. 670 (2010)) for the contention that it supports its claim to be a "person aggrieved" as set forth in RSA 76:16(I) (and by extension, RSA 76:17). However, that contention is not supported by the facts or holding. The issue in Thermo-Fisher related to the payment by a parent company of taxes assessed on a wholly owned subsidiary which was owner of the real estate in question. In addressing the contention of the appealing party, this Court stated:

> "(the statute – which was 76:16-a) does not further define "person aggrieved." 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 its wholly owned subsidiary."
>
> Thermo-Fisher at 672.

The instant case has no relationship to the parent-subsidiary situation raised by Thermo-Fisher. The cases relied upon in reaching the decision in Thermo-Fisher included Langford vs. Town of Newton, 119 N.H. 470 (1979) and Wise Shoe Company vs. Town of Exeter, 119 N.H. 700 (1979). In Langford, the issue related to standing of a successor-owner who purchased the property after the April 1st assessment date. The Plaintiffs were granted standing because:

> "they were the owners at the time the tax was levied and they have allegedly suffered the injury of being disproportionately assessed."
>
> Langford at 472 (emphasis added).

The Wise Shoe case presented the exact same issue, i.e. the story of a purchaser who purchased after the April 1st assessment date. Relying on Langford, this Court reversed a lower Court dismissal based on lack of standing.

None of the three (3) cases bear on the issue of the standing of a non-owner tenant to bring an abatement proceeding.

B) The Governing Precedent in This Case is In Re: Reid.

In In Re: Reid, 143 N.H. 246 (1998), this Court set forth its "judicially created exceptions" to the general proposition that the owner/lessor of real estate is the party with sufficient legal interest to file an abatement request. See, e.g., Hampton Beach Casino vs. Town of Hampton, 140 N.H. 785 (1996). The Plaintiff cites (Plaintiff Brief pg. 13) the seminal language from the Reid decision.

> "leasehold interests ... are taxable if the leases are either perpetual (cite omitted) or "renewable indefinitely" (cite omitted) or if the Petitioners agreed to pay taxes on the value of the land (cite omitted)".
>
> Reid at 249.

This framework was affirmed in the case of Appeal of City of Lebanon, 161 N.H. 463 (2011), when the question was tangentially related to the application of the Appeal of Sunapee (126 N.H. 214 (1985)) ruling related to multiple properties. This Court upheld a BTLA ruling that one of the two (2) owned properties was leased under a "ground

lease" fully tenanted to a Walgreens pharmacy. In that case, the lease at issue had explicit language which required the Tenant to pay taxes to the municipality and in fact, bills were to be forwarded directly to the tenant-in-possession. Appeal of City of Lebanon at pg. 465.

The fact is, the Plaintiff's lease does not encompass the entire taxes on the value of the land and does not include an obligation to pay all taxes "on the value of the land".

C) The Plaintiff's Lease Does Not Satisfy The Requirements of In Re: Reid.

Under New Hampshire law, a lease is a form of a contract that is construed in accordance with the standard rules of contract interpretation. Pope vs. Lee, 152 N.H. 296 (2005). See also, Sunapee Difference, LLC vs. State, 164 N.H. 788 (2013). Words and phrases used by parties to a lease will be assigned their common meaning and the Court will ascertain intended purpose of a lease based upon meaning that would be given to it by a reasonable person. Elca of New Hampshire, Inc. vs. McIntyre, 129 N.H. 114 (1987). In the absence of ambiguity, the intent of the parties is to be determined from the plain meaning of the language used. 190 Elm Street Realty, LLC vs. Beaudoin, 151 N.H. 205 (2004). This Court interprets lease terms as a matter of law. Pope, supra at 301.

As originally noted in the Town's Opening Brief (pgs. 15-16) the Plaintiff's lease does not obligate the Plaintiff to pay the taxes. The owner is to pay the taxes, and the Plaintiff/Tenant is contractually required to reimburse the owner within thirty (30) days. See, Defendant's Exhibit B; Def. App. pg. 82.

There is no basis to say that the lease was amended. Even though New Hampshire law would allow a "verbal amendment" even in the presence of a clause (see Lease, Paragraph 15.14; Def. App. pg. 131) requiring amendments in writing (See, Prime Financial Group, Inc. vs. Masters, 141 N.H. 33 (1996)), in this case, the Plaintiff, in response to discovery, provided only the written lease and did not assert any amendment thereto. Nor did it assert the existence of any amendment at trial. Consequently we are left with the lease language under which the Plaintiff did not agree to pay "taxes" to the Town, but instead, agreed to reimburse the Owner/Landlord in an amount equal to the allocated "share" of the taxes assessed. The lease language is clear and unambiguous, and the provisions of Section 4.2 of the lease must be given their plain meaning. 190 Elm Street Realty, supra. Consequently it is inaccurate to state (as the Plaintiff does on page 15 of its Brief) that the Plaintiff was "responsible for paying the real estate taxes." The Plaintiff was responsible to pay the Landlord a sum of money representing a "pro rata share" of the taxes. See, Lease, Section 4.2.1(b). In fact, said amount would not actually be the "taxes" but also other charges such as trash removal assessments, water charges and sewer rents, betterment assessments and other assessments "in lieu" of real estate taxes. See, Lease, Section 4.2.1(c).

D) The Plaintiff's Actual Payment to the Town Was as Agent for the Principal, the Owner/Landlord.

There is no contention that the Plaintiff did not actually pay the Town to satisfy the Tax Assessment (it was the Plaintiff's check). However, given the precise and unambiguous language of the lease, the Plaintiff's actions can be properly characterized as the Plaintiff acting as the "agent" for the Landlord/Owner in payment of the taxes. Cf,

Dent vs. Exeter Hospital, Inc., 155 N.H. 787 (2007). This is true even if one or both of the parties did not believe an agency relationship existed. Vandemark vs. McDonald's Corp., 153 N.H. 753 (2006). The lease obligated the Landlord/Owner to pay the real estate taxes. It chose to direct the Plaintiff to make payment in satisfaction of its obligation. It could have (and by lease language was responsible for) made payment itself. The Landlord/Owner directed the payment. The agent (Plaintiff) agreed to make the payment, and did so. This created the agency relationship. Herman vs. Monadnock PR-24 Training Council, Inc., 147 N.H. 754 (2002). While evidence exists that the Landlord/Owner directed payment on its behalf, the record is devoid of any evidence that the Landlord directed the filing of the abatement or gave its consent as required under Section 4.2.1(f) under the lease. Further, if such agency authority had been given, the abatement action would have been filed in the name of the principal rather than the agent.

E) The Plaintiff's Lease Does Not Obligate It to Pay the Taxes Because the Town Would Not Have Third Party Rights to Enforce Payment.

The Defendant believes the appropriate analysis as to whether or not "the leaseholder agrees to pay taxes on the value of the land" (Reid, supra at 249), would be to employ this Court's analysis of "third party beneficiary rights" under contract law. In other words:

> "Would the Plaintiff be liable to the Defendant (Town) if it were to sue (See, RSA 80:50) the Plaintiff to collect taxes due on the parcel?"

In the application of this Court's jurisprudence on third party beneficiary rights (See, e.g., Grossman vs. Murray, 144 N.H. 345 (1999)), the Town would clearly have no basis

for a direct action against the Plaintiff because there is no language in the lease that obligates the Plaintiff to pay the Town any monies. A third party beneficiary relationship exists if a contract calls for performance by the Promisor which will satisfy some obligation owned by the Promisee to the third party. Tamposi Associates vs. Star Market Co., Inc., 119 N.H. 630 (1979). Only the Landlord/Owner is obligated to pay the taxes. See, Lease, Section 4.2.1(a). As a result, the lease at issue fails the requirements of Reid and Appeal of City of Lebanon, and therefore does not usurp the general rule that the record owner is the only party who has standing to contest the tax assessment. Hampton Beach Casino vs. Town of Hampton, 140 N.H. 785 (1996).

II. THE PLAINTIFF'S EXPERT REPORT WAS DEFICIENT AS A MATTER OF LAW.

While the Defendant acknowledges that the Trial Court is granted great deference in the determination of fair market value, by weighing the conflicts in testimony (See, Ventas Realty Limited Partnership vs. City of Dover, 172 N.H. 752, 755 (2020)), where the Court did not hear or consider all the available evidence, then this results in an error of law. See, Crown Paper Company vs. City of Berlin, 142 N.H. 503 (1997).

While the Plaintiff apparently concedes that the expert report failed to properly appraise the correct 34.21 acre of land (See, Plaintiff's Brief pgs. 16-17), it dismisses the error in that the land valuation was "less than 1% difference" from the equalized land valuation assigned by the Town. In this first instance, that approach is irrelevant to market value (See, Appeal of Walsh, 156 N.H. 347, 355-356 (2007)), but it fails to miss the significance of this observation. The "error" in identifying the parcel to be appraised

bears on the validity of the report under Uniform Standards of Professional Practice (USPAP) Rule 1-1(c).

Likewise, the Plaintiff again relies on the "small difference in value of land" (see, Plaintiff's Brief, pg. 20) while excusing the glaring failure to include a relevant comparable, which the Plaintiff's own witness testified "should have" been included. While the effects of this "exclusion" on the ultimate question are not clear, what is clear is that it was contrary to USPAP Standards, whose governing provisions are not referred in the Plaintiff's Brief or in the Trial Court ruling.

Finally, in attempting to dismiss the failure of the Plaintiff's expert to consider the actual lease payments, the Plaintiff again states:

> "Ultimately, Mr. Jones' land value was almost identical to the value determined by the Defendant and used in its assessment."
>
> Plaintiff's Brief, pg. 23.

This is legally the wrong approach to the analysis of the evidence:

> "While the Taxpayers attempt to split the assessments into land and buildings, the board [Board of Tax and Land Appeals] correctly found that any property tax assessment appeal based on disproportionality requires a review of the market value of the property in its entirety..."
>
> Appeal of Walsh, supra at 356.

By its terms, the Plaintiff's appraisal, after proving details of the ground lease, including the significant annual rent, makes this comment:

> "Notwithstanding the above (i.e. the ground lease terms and rent payments) this appraisal estimates the fair market value of the fee simple interest based on market rent of the supermarket, and not leased fee interest based on contract rent relating to ground rent. Thus, existing

> lease terms and lease rates summarized above area not relied on in the valuation that follows.
>
> Alec Jones Report, pg. 7.

Mr. Jones re-affirmed this in cross-examination when indicating he did not rely on the lease at all in rendering his opinion of value. Tr. pg. 68. It was not part of his "assignment" to consider this formula.

While the Trial Court is entitled to deference as to the proper weight to be accorded the testimony of Mr. Jones, (See, LLK Trust vs. Town of Wolfeboro, 159 N.H. 734 (2010)), it must "consider all the evidence" (Crown Paper, supra), and apply recognized guiding principles [i.e. USPAP Standards] to that evidence. Because the Plaintiff's Appraisal failed to meet those standards, the Trial Court erred in relying upon it to uphold the Plaintiff's opinion of value.

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 reiterates its request 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
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Dated: April 5, 2021

By: _____
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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 5th day of April 2021 on:

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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 2320.

Dated: April 5, 2021

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