

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2021 TERM

JANUARY SESSION

Shaw's Supermarkets, Inc.

v.

Town of Windham

Case No. 2020-0275

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

From Rockingham County Superior Court

**BRIEF FOR PLAINTIFF**

John F. Hayes, NH Bar #9328  
Alfano Law Office, PLLC  
4 Park Street  
Concord, NH 03301  
(603) 856-8348  
john@alfanolawoffice.com

Mark F. Murphy, Esq.  
Admitted Pro Hac Vice  
Mark Murphy Law Offices, LLC  
30 Walpole Street  
Norwood, MA 02062  
(781) 762-0088  
mmurphy@markmurphyllaw.com

Mark F. Murphy to Argue Case

TABLE OF CONTENTS

TITLE PAGE.....1

TABLE OF CONTENTS.....2

TABLE OF AUTHORITIES.....4

QUESTIONS PRESENTED.....5

STATEMENT OF THE FACTS AND THE CASE.....6

SUMMARY OF ARGUMENT.....9

ARGUMENT.....11

    I.    BURDEN OF PROOF AND LEGAL STANDARD OF  
          REVIEW.....11

    II.   PLAINTIFF WAS AN AGGRIEVED PARTY AND HAD  
          STANDING TO APPEAL THE PROPERTY TAXES.....12

    III.  THE COURT’S FACTUAL FINDINGS WERE  
          SUPPORTED BY EVIDENCE.....15

        A.   Plaintiff’s Expert Appraiser Valued the Entire Property  
              Including Any Additional, Potentially Developable  
              Land.....16

        B.   Plaintiff’s Expert Appraiser Had Sufficient Comparable  
              Land Sales to Support His Conclusion of the Value  
              of the Land.....20

C.    Plaintiff’s Expert Appraiser Considered the Actual Lease Payments Made by The Plaintiff to the Property Owner, But Ultimately Gave Them No Weight in Determining the Value.....	22
CONCLUSION.....	24
CERTIFICATES.....	24
ATTACHMENTS BY RULE.....	27

## TABLE OF AUTHORITIES

### **Cases**

<u>Appeal of City of Lebanon</u> , 161 N.H. 463 (2011).....	13, 14
<u>Appeal of Public Serv. Co. of N.H.</u> , 170 N.H. 87 (2017).....	16
<u>Appeal of Reid</u> , 143 N.H. 246 (1998) .....	13
<u>Appeal of Thermo-Fisher Scientific, Inc.</u> , 160 N.H. 670 (2010)....	12, 13, 14
<u>Appeal of Union Telephone Co.</u> , 160 N.H. 309 (2010).....	12
<u>Duncan v. State of New Hampshire</u> , 166 N.H. 630 (2014).....	15
<u>Marist Bros. of N.H. v. Town of Effingham</u> , 171 N.H. 305 (2018).....	11
<u>Porter v Sanbornton</u> , 150 N.H. 363 (2003).....	11
<u>Public Serv. Co. of N.H. v. Town of Bow</u> , 170 N.H. 539 (2018).....	12
<u>Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack</u> , 139 N.H. 253 (1994).....	11
<u>The LLK Trust v. Town of Wolfeboro</u> , 159 N.H. 734 (2010).....	11, 16
<u>Ventas Realty Limited Partnership v. City of Dover</u> , 235 A.3d 100 (2020).....	11, 12

### **Statutes**

RSA 76: 16-a, I.....	6, 9, 12, 14
----------------------	--------------

## QUESTIONS PRESENTED

1. Was the Plaintiff an aggrieved party and did it have standing to appeal the property tax assessment on the subject property?
2. Did the trial court's factual findings have evidentiary support?
  - a. Did Plaintiff's expert appraiser value the entire property including any additional, potentially developable land?
  - b. Did Plaintiff's expert appraiser have sufficient comparable land sales?
  - c. Did Plaintiff's expert appraiser give adequate consideration to the actual lease payments made by Plaintiff to the property owner to determine the value of the land?

## STATEMENT OF FACTS AND THE CASE

This statutory tax abatement proceeding was commenced by Plaintiff, Shaw's Supermarkets, Inc. (hereinafter "Plaintiff") pursuant to RSA 76:17, on August 30, 2018, by the filing of a Petition for Abatement Taxes Assessed as of April 1, 2017. Appendix to Defendant's Brief, p. 3 (hereinafter "Def. App., p. \_\_\_\_").

The subject property is located at 43 Indian Rock Road (Parcel ID# 11C 950 1097) in Windham, New Hampshire (the "Subject Property"). Plaintiff's Ex. 1, p. 4 (hereinafter "Ex. \_\_, p. \_\_."), a copy of which is in Appendix for Plaintiff, p. 3. The Subject Property contains approximately 34.21 acres fronting Indian Rock Road, which is also known as NH Route 111. Ex. 1, p. 4. Of the total lot area, 17.40 acres are in Current Use and 16.81 acres are not in Current Use. Ex. 1, pp. 31-32. The land removed from Current Use is improved with a free-standing supermarket, paved driveway and parking areas (300 parking spaces), a detached water building containing on-site water systems and pumps, and septic areas. Ex. 1, pp. 23-27.

The supermarket is a 1-story masonry and steel frame structure built in 2005 by and for Plaintiff on land leased from Route 111 Windham, LLC.

Plaintiff occupies the supermarket and is the only tenant at the Subject Property. Ex. 1, pp. 4-5 and 7-8. Plaintiff is responsible for paying all of the real estate taxes on the Subject Property. Defendant's Brief, p. 16 (hereinafter "Def. Brief, p. \_\_.>").

The Subject Property was assessed by the Defendant Town of Windham (hereinafter "Defendant") for \$10,887,150 as of April 1, 2017. Def. Brief, p. 17. The median equalization ratio for the Defendant as of April 1, 2017 was 88.1% and the equalized fair market value of the Subject Property was \$12,357,718. Id.

Defendant filed a Motion to Dismiss arguing that Plaintiff did not have standing. Def. App, p. 10. Plaintiff opposed the Motion to Dismiss arguing that Plaintiff had standing because Plaintiff was a tenant that assumed responsibility for paying all of the real estate on the Subject Property. Def. App., p. 28. The trial court denied Defendant's Motion to Dismiss. Notice of Decision dated June 19, 2019; Plaintiff's Brief, p. 28.

The bench trial of this matter was held on January 2nd and 3<sup>rd</sup>, 2020. Plaintiff called two (2) witnesses. Def. Brief, p. 8. The first witness was B. Alec Jones (hereinafter "Mr. Jones"), a Certified General Appraiser licensed in the State of New Hampshire and affiliated with Fremeau

Appraisal, Inc. of Manchester, N.H. Ex. 1, pp. 2-3. Mr. Jones was qualified as an expert in the valuation of real estate. Trial Transcript, pp. 11-12 (hereinafter “Tr., p. \_\_.”) a copy of which is in Appendix for Plaintiff, p. 188. Joseph G. Fremeau and Mr. Jones completed an appraisal of the Subject Property that was admitted into evidence. Ex. 1, p. 3. Mr. Jones was the only licensed real estate appraiser to testify at the trial.

The other witness called by Plaintiff was Scott Marsh (hereinafter “Mr. Marsh”), an employee of Municipal Resources, Inc., the contract assessor for Defendant. Def. Brief, p. 8. Mr. Marsh acknowledged that he had used Fremeau Appraisal, Inc. numerous times in the past. Tr. pp. 217-218. Defendant attempted to retain Mr. Jones to appraise the Subject Property in this matter. Id.

Defendant called no witnesses at the trial and offered no appraisal of the Subject Property.

The trial court issued its decision on May 4, 2020, agreeing with Mr. Jones’s opinion of value of the Subject Property and granting Plaintiff its requested abatement. Court Order dated May 4, 2020 (hereinafter “Court Order”); Plaintiff’s Brief, p. 29.



## SUMMARY OF ARGUMENT

In order to have standing to challenge the assessment of property taxes, Plaintiff must be a “person aggrieved” pursuant to RSA 76:16.

Plaintiff was a tenant that assumed responsibility for payment of all of the real estate taxes on the Subject Property and paid all of them for the Tax Year under appeal. Accordingly, Plaintiff was a “person aggrieved” and had standing to appeal the assessment.

The trial court’s findings of fact will not be overturned unless they lacked evidentiary support. Defendant argues that Plaintiff’s expert failed to:

1. value all of the land that makes up the subject property;
2. have sufficient comparable land sales to support his conclusion of the value of the land; and
3. give adequate consideration to the actual lease payments made by the Plaintiff to the property owner to determine the value of the land.

However, Plaintiff’s expert appraiser addressed all of the purported errors in his appraisal report or testimony. The trial court rejected Defendant’s interpretation of the evidence and agreed with Plaintiff’s expert appraiser

on all of the issues raised by Defendant. Accordingly, the trial court's findings of fact had evidentiary support and should be upheld.

## ARGUMENT

### I. BURDEN OF PROOF AND LEGAL STANDARD OF REVIEW

Plaintiff has the burden of proving by a preponderance of evidence that it paid more than its proportional share of taxes for the Tax Year at issue. Porter v Sanbornton, 150 N.H. 363, 367 (2003). “To carry the burden of proving disproportionality, the taxpayer must establish that the taxpayer’s property is assessed at a higher percentage of fair market value than the percentage at which property is generally assessed in the town.” Id. at 368.

This Court “will uphold the trial court’s factual findings and rulings unless they lack evidentiary support or are legally erroneous.” Ventas Realty Limited Partnership v. City of Dover, 235 A.3d 100, 103 (2020) *citing* Marist Bros. of N.H. v. Town of Effingham, 171 N.H. 305, 309 (2018). The interpretation of a statute is a question of law that the Court will review *de novo*. The LLK Trust v. Town of Wolfeboro, 159 N.H. 734, 737 (2010).

“The determination of fair market value is a question of fact.” Ventas Realty Limited Partnership, 235 A.3d at 103 *citing* Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253, 255

(1994). “As the trier of fact, the trial court was entitled to accept or reject such portions of the evidence as it found proper, including that of expert witnesses.” Ventas Realty Limited Partnership, 235 A.3d at 103 *citing* Public Serv. Co. of N.H. v. Town of Bow, 170 N.H. 539, 542 (2018). The Court does not “decide whether we would have ruled differently than the trial court, but rather, whether a reasonable person could have reached the same decision as the trial court based upon the same evidence.” Id. The Court, therefore, defers to “the trial court’s judgment on such issues as resolving conflicts in the testimony, measuring the credibility of witnesses, and determining the weight to be given evidence.” Id.

## II. PLAINTIFF WAS AN AGGRIEVED PARTY AND HAD STANDING TO APPEAL THE PROPERTY TAXES

In order to file an appeal of the property taxes, Plaintiff must have standing. RSA 76:16 authorizes that “any person aggrieved by the assessment of a tax” may appeal the assessment. RSA 76:16-a, I. It has been held that a person aggrieved is a “party [that] has suffered or will suffer an injury in fact.” Appeal of Thermo-Fisher Scientific, Inc., 160 N.H. 670, 673 (2010) *citing* Appeal of Union Telephone Co., 160 N.H. 309, 313 (2010). The party that has paid the taxes resulting from an allegedly

disproportionate assessment on land and buildings has suffered an injury in fact and is a “person aggrieved”. Thermo-Fisher, 160 N.H. at 673.

In Appeal of City of Lebanon, 161 N.H. 463 (2011), this Court found that a tenant that assumed responsibility for payment of the real estate taxes, through a binding lease, and pays them is a “person aggrieved”. Appeal of City of Lebanon, 161 N.H. at 469. In Appeal of City of Lebanon, the Court cited Appeal of Reid, 143 N.H. 246, 249 (1998) 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.* (emphasis in the original). In Appeal of City of Lebanon, this Court concluded that “[b]ecause the taxpayer bears the burden of any disproportionate tax, it follows that the taxpayer shall be entitled to the benefit of any abatement.” *Id.* Likewise, in the instant matter, Plaintiff bore the burden of a disproportionate real estate tax because it agreed, pursuant to the lease, to pay the real estate taxes for the Subject Property.

The decision in Appeal of City of Lebanon is consistent with the Supreme Court’s prior decision in Thermo-Fisher where the Court concluded that “[w]hen the legislature expressly authorized that ‘any person

aggrieved,' RSA 76:16-a, I, ....it did so to promote justice by granting standing to any person who has suffered or will suffer an injury in fact by the disproportionate assessment of taxes.” Thermo-Fisher, 160 N.H. at 673-74.

Here, Plaintiff entered into a lease with the owner of 43 Indian Rock Road and agreed to be responsible for paying its pro rata share of the real estate taxes on the Subject Property. Def. App., p. 39; Def.’s Brief, p. 16. The owner of the Subject Property directed Plaintiff to pay all of the Tax Year 2017 real estate taxes to Defendant. Def. App., p. 39. Plaintiff, through its parent company, Albertson’s, paid all of the Tax Year 2017 real estate taxes due on the property. Id. Moreover, a parent company that pays the real estate taxes for a wholly owned subsidiary also has suffered an injury and is a “person aggrieved”. Thermo-Fisher, 160 N.H. at 673. As a result, Plaintiff has suffered an injury in fact and is therefore a “person aggrieved” pursuant to RSA 76:16-a, I.

Defendant attempts to distinguish the facts of the instant case from the facts of Appeal of City of Lebanon. Defendant argues that there is the possibility that at some point in the future Plaintiff will not be the only tenant at the subject property and would then pay less than all of the real

estate taxes due on the property. However, it is undisputed that for the Tax Year 2017 Plaintiff was responsible for paying all of the real estate taxes pursuant to the lease it entered into with the owner and did in fact pay all of the real estate taxes. Def.'s Brief, p. 16. There is no reason for the Court to determine if a tenant that pays less than all of the real estate taxes is an "aggrieved" party with standing to bring an appeal because those are not the facts of the case before the Court. "The judicial power in this State is limited to deciding actual, and not hypothetical, cases." Duncan v. State of New Hampshire, 166 N.H. 630, 641 (2014) (emphasis in original).

Accordingly, the Court should hold that Plaintiff was an "aggrieved" party and has standing to appeal the assessment.

### III. THE COURT'S FACTUAL FINDINGS WERE SUPPORTED BY EVIDENCE

Defendant argues that Plaintiff's expert appraiser was not credible because of "errors or omissions" in his testimony and appraisal report. However, "credibility...is for the trial judge to determine as a matter of fact and if the findings could reasonably be made on all of the evidence, they must stand." Public Serv. Co. of N.H. v. Town of Bow, 170 N.H. at 542.

Defendant's arguments "concern the proper weight to be accorded" Mr. Jones's testimony and his appraisal report. LLK Trust v Town of Wolfeboro, 159 N.H. 734, 739 (2010). "However, we defer to the trial court's judgment on such issues as resolving conflicts in the testimony, measuring the credibility of witnesses, and determining the weight to be given evidence." Id. In addition, "[t]he credibility of an appraisal is a question of fact." Appeal of Public Serv. Co. of N.H., 170 N.H. 87, 97 (2017). Moreover, the trial court's factual findings and rulings were well supported and the Defendant's claim that there were errors in Mr. Jones's report were simply misplaced disagreements about the weight and credibility of the evidence.

A. Plaintiff's Expert Appraiser Valued the Entire Property Including Any Additional, Potentially Developable Land.

Defendant claims that Mr. Jones's opinion was flawed because his report "failed to consider nearly 30,000 square feet of land adjacent to the Right-of-Way of Route 111" that "could feasibly be developed." Def. Brief, p. 30. Defendant makes this claim despite the fact that there was less than a 1.0% difference in the value of the land determined by Mr. Jones and the equalized assessment as determined by Defendant.



Mr. Jones's appraisal report made clear that he valued the entire parcel. First, he valued the 16.81 acres of land that were not in Current Use. Ex. 1, pp. 31-35. Then he valued the 17.40 acres in Current Use. Ex. 1, pp. 115-118. In total he valued 34.21 acres of land, which is the same amount of land identified by Defendant on its record card. Ex. 1, pp. 99-102. Moreover, Defendant acknowledges in its Brief that the total land area of the parcel is the same 34.21 acres that Mr. Jones valued in his appraisal report. Def. Brief, p. 14.

Contrary to Defendant's argument, Mr. Jones also considered whether there was the potential for additional development of the Subject Property not in Current Use. In Mr. Jones's expert opinion, the potential for additional development of the Subject Property not in Current Use was so minimal that no potential purchaser would attribute any additional value to the Subject Property. In reaching his conclusion that there was no potential for additional development of the Subject Property not in Current Use, he relied on his:

- a. review of Town records;
- b. physical inspection of the Subject Property;

- c. review of Town parking requirements contained in the Town's Site Plan Regulations;
- d. review of proposed plans prepared by the owner of the Subject Property; and
- e. conversations with the owner of the Subject Property.

Tr., pp. 21-25 and 177-178; Ex. 1, pp. 23-25 and 27-30.

Mr. Jones's review of Town records demonstrated that no plans had been submitted or approved for additional development of the Subject Property since the supermarket was built in 2005. Tr., pp. 21-25. Mr. Jones's physical inspection of the Subject Property indicated that the supermarket parking lot was at an elevation approximately fifteen (15) feet higher than Indian Rock Road and the areas around the parking lot had steep grades and wetlands that would substantially hinder any potential development. Id. Mr. Jones's physical inspection of the Subject Property also revealed that the elevated parking lot limits the visibility of any potential building located on the supermarket parking lot. Id.

Mr. Jones's review of the Town's Site Plan Regulations indicated that the Town requires off-street parking of one (1) space per two hundred fifty (250) square feet of gross floor area for retail stores and shops. Tr.,

pp. 177-178. As a result, there are approximately thirty-four (34) excess parking spaces in the parking lot that could potentially be developed with a pad site, but the excess parking spaces are not sufficient to permit a new building to be added and still provide sufficient parking for the new building while also providing sufficient area to store plowed snow in the winter. Id.

Mr. Jones's review of the owner's proposed plans of the Subject Property indicated that the owner considered any potential future development to be on the portion of the Subject Property that was in Current Use, not the portion that was out of Current Use. Tr., pp. 21-25. Mr. Jones's conversations with a representative of the owner of the Subject Property indicated that the owner considered any potential future development to be on the portion of the Subject Property that was in Current Use and even that potential development was remote given that the topography of the site prevented easy access to the land in Current Use. Id.

The trial court gave credit to Mr. Jones's explanation that he did not believe there was the potential for additional development of the land not in Current Use. "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.” Court Order, Plaintiff’s Brief, p. 33. Given the above, the Court’s conclusion that Mr. Jones’s valued the entire Subject Property, including any additional potentially developable land, was persuasive and well supported.

B. Plaintiff’s Expert Appraiser Had Sufficient Comparable Land Sales to Support His Conclusion of the Value of the Land.

Defendant also claims that there were not a sufficient number of comparable sales to determine the value of the land despite there being only a small difference in the value of the land determined by Mr. Jones and Defendant’s own equalized value. Ex. 1, pp. 22 and 35. However, even if the small difference in value of the land was set aside, Mr. Jones’s opinion of the value of the was supported by five (5) sales that he relied on to determine the value of the land. Plaintiff’s Ex. 1, pp. 31-35. The circumstances of the land sales were thoroughly explained and adjusted to determine a value per acre. Id. That per acre value was then multiplied by the amount of land not in Current Use to determine the value of the land to be included in the cost approach. Mr. Jones also developed and relied on

income and sales comparison approaches both of which supported his conclusion using the cost approach. Ex. 1, pp. 39 and 50.

Defendant also claims that not including a purportedly comparable property in his cost approach was an error that “should have caused the Trial Court to find the report not sufficiently credible to establish the market value of the subject property.” Def. Brief, p. 33. Mr. Jones credibly explained that he did not have information about the land sale when he prepared his appraisal report. He stated that although it would have been helpful to include in his report, the other sale was significantly different than the subject property and would not have impacted his conclusion of value. Tr., pp. 186-188. Specifically, he stated that the location and use of the comparable property would be more densely developed than the Subject Property. Tr. 188. The comparable property, if included, would have needed to be adjusted downward to reflect the properties superior characteristics.

The trial court made the “uncontroversial observation that no analysis of comparables will ever be perfect.” Court Order, Plaintiff’s Brief, p. 34. The trial court found that Mr. Jones’s adjustments to his comparable sales “were reasonable and that [Mr. Jones] explained his work

appropriately.” Id. Concerning the sale that Mr. Jones did not include in his report, the trial court agreed with Mr. Jones that “including the additional property would not have changed his ultimate opinion regarding value.” Id. Accordingly, Mr. Jones conclusions that he valued the entire property and considered the potential for additional development of the Subject Property were well supported by evidence.

C. Plaintiff’s Expert Appraiser Considered The Actual Lease Payments Made By The Plaintiff to the Property Owner, But Ultimately Gave Them No Weight In Determining The Value.

Lastly, Defendant claims that Mr. Jones did not consider the actual lease payments made by Plaintiff to the property owner pursuant to the lease to value the land. Def. Brief, p. 33. That is not a correct characterization of Mr. Jones’s report and testimony. Mr. Jones testified that he considered the rent payments in determining the value of the property, but ultimately gave them no weight. Tr., p. 184. He stated the same in his report. Plaintiff’s Ex. 1, p. 7. A number of factors caused it to be unreliable in valuing the land as of April 1, 2017. For example, the lease was from 2004; the rent increased every (5) years regardless of changes in the market; the lease required the owner of the Subject Property to do site

work, install utilities and secure permits to develop the land; and the owner had to pay a land use change tax. Tr., pp. 181-186; Def.'s Brief, pp. 14-15. Ultimately, Mr. Jones's land value was almost identical to the value determined by Defendant and used in its assessment. Ex. 1, pp. 22 and 35. Mr. Jones's decision to consider, but not use the lease payments was based on the reasonable conclusion that it did not provide evidence of the market value of the land not in Current Use as of the valuation date.

In addressing the issue of whether the land should be valued by capitalizing the lease payments, the trial court agreed with Mr. Jones that "the objective is to determine the value of land using market rents and finds that Mr. Jones' approach achieved that objective." Def. App., pp. 33-34. The trial court read Mr. Jones's report, heard his testimony and agreed with that conclusion. Accordingly, this Court should find no error in the decision of the trial court to accept the opinion and conclusions of Plaintiff's expert witness.

### CONCLUSION

The Plaintiff was an aggrieved party and had standing to bring this appeal. In addition, the trial court's findings of fact were supported by evidence. Accordingly, the trial court's Judgment for Plaintiff should be affirmed.

### REQUEST FOR ORAL ARGUMENT

Shaw's Supermarkets, Inc. requests the opportunity to present oral argument, not to exceed 15 minutes, to be presented by Mark F. Murphy, Esquire.

### CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

I hereby certify that the within brief complies with Sup. Ct. R. 26(7) and contains 3,915 words, excluding the Table of Contents, Table of Authorities and any Addendum.



Respectfully submitted,

SHAW'S SUPERMARKETS, INC.,  
Plaintiff

By its Attorneys,

Dated: March 15, 2021

/s/ Mark F. Murphy

John F. Hayes, NH Bar #9328

Alfano Law Office, PLLC

4 Park Street

Concord, NH 03301

(603) 856-8348

john@alfanolawoffice.com

Mark F. Murphy

Admitted Pro Hac Vice

Mark Murphy Law Offices, LLC

30 Walpole Street

Norwood, MA 02062

(781) 762-0088

mmurphy@markmurphylaw.com

CERTIFICATE OF SERVICE

I hereby 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 15<sup>th</sup> day of March 2021 on Bernard H. Campbell, Esq., Beaumont & Campbell Prof. Assn., One Stiles Road – Suite 107, Salem, New Hampshire 03079, Counsel for Defendant.

Dated: March 15, 2021

/s/ Mark F. Murphy  
Mark F. Murphy, Esq.  
Admitted Pro Hac Vice

COPIES OF DECISIONS BEING REVIEWED

**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  
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**

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 Frembeau Appraisal, Inc., to support its position. In addition, Plaintiff's Request for Findings and Rulings contains responses to some of the Town's arguments.<sup>1</sup>

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

---

<sup>1</sup> 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