

Shaw's Supermarket Company

v.

City of Lebanon

Docket Nos.: 22957-06PT/23513-07PT

ORDER

This Order responds to the City's June 10, 2009 Motion for Costs and Attorney's Fees ("Motion") and Attorney Mark F. Murphy's "Opposition" to the Motion.

Attorney Murphy filed these appeals on behalf of his client, Shaw's Supermarket Company ("Shaw's"), and now cites a section of the lease with the owner of the shopping center (Dead River Powerhouse Plaza, LLC ("Dead River")) giving Shaw's a right to pursue tax appeals in its own name, subject to the owner's consent which could not be "unreasonably withheld or delayed." See Attorney Murphy's Affidavit, paragraph 2, quoting Section 19.7 of the lease, and the attached June 22, 2009 letter from the owner's Asset Manager ("the lease provides that the (o)wner has no authority to withhold its permission if Shaw's requests it"). While Shaw's, either on its own or through Attorney Murphy, should have attempted to obtain Dead River's consent on a timely basis, rather than waiting until after the Motion was filed, the failure to do so does not rise to the level of frivolous conduct warranting an award of costs and attorney's fees to the City. Although the board has the discretion to make such an award in appropriate cases, see RSA 71-B:9, Tax 201.39 and Tax 102.14, it declines to do so here, finding

the facts and circumstances to be distinguishable from the principal authority relied upon in the Motion. Compare Keenan v. Fearon, 130 N.H. 494, 497-98 (1988), with, e.g., Maguire v. Merrimack Mut. Ins. Co., 133 N.H. 51, 54 (1990).

To the extent the City has concerns regarding the representations and professional conduct of Attorney Murphy, those concerns can be addressed through the state's "Attorney Discipline System." See Supreme Court Rule 37 and the New Hampshire Rules of Professional Conduct; and Tax 201.09(d).

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

CERTIFICATION

I hereby certify a copy of the foregoing Order has been mailed this date, postage prepaid to: Mark F. Murphy, Esq., Wulsin Murphy LLP, 30 Walpole Street, Norwood, MA 02062; Counsel for Shaw's Supermarket Company; Chairman, Board of Assessors, City of Lebanon, 51 North Park Street, Lebanon, NH 03766; Adele M. Fulton, Esq., Gardner, Fulton & Waugh, PLLC, 78 Bank Street, Lebanon, NH 03766; and an additional copy to Dead River Properties, Two Monument Square, Suite 910, Portland, ME 04101, Attn: Tracey Mezzanotte, Asset Manager.

Dated: July 16, 2009

Melanie J. Ekstrom, Deputy Clerk