

MEMORANDUM

TO: Miami-Dade County Value Adjustment Board Community
FROM: Miami-Dade County Value Adjustment Board Attorney Rafael Millares
DATE: October 8, 2021
SUBJECT: A Petitioner's Standing When Petitioning the Value Adjustment Board for an Increase in Market Value

INTRODUCTION

The purpose of this memorandum is to notify the Miami-Dade County Value Adjustment Board ("VAB") community of a change to the VAB's internal operating procedures.¹

The Miami-Dade County Property Appraiser's Office ("PAO") requested that the VAB amend their internal operating procedures regarding petitioners who seek an increase in market value. In furtherance thereof, the PAO submitted court decisions, Florida statutes, and other supporting documents in an effort to advocate for their position. I shared these materials with the law firm of Rennert, Vogel, Mandler & Rodriguez P.A. to afford them an opportunity to respond if they so chose.² Both sides provided the VAB with their perspectives and we are grateful for their well-written legal briefs.

After reviewing the submitted materials and conducting independent research, the VAB feels obliged to update its internal operating procedures in order to comply with Florida law.³

This memorandum replaces and supersedes all previous memoranda on this topic. This memorandum is effective immediately.

¹ I find that this update is indispensable for the efficient operation of the VAB. *See* Rule 12D-9.005(2) F.A.C.

² "The board legal counsel is not an advocate for either party in a value adjustment board proceeding, but instead ensures that the proceedings are fair and consistent with the law." *See* Module two of the DOR's 2020 VAB Training Manual.

³ It is a VAB attorney's responsibility to "advise the board on all aspects of the value adjustment board review process to ensure that all actions taken by the board and its appointees meet the requirements of law." All Florida VAB actions must comply with Florida Law. *See* Rules 12D-9.009 & 12D-9.005(4) F.A.C.

BACKGROUND

Subparagraph (8) of section 4, Article VII of the Florida Constitution was added to provide for the portability of the Save Our Homes property tax limitation, such that a homeowner entitled to homestead exemption for the two years immediately prior to the establishment of a new homestead would be able to transfer the difference between the assessed value and the market value of the previous homestead in calculating the assessed value of the new homestead.

This opened the door for homeowners to petition the VAB to establish a higher just value in order to maximize the potential portability amount allowed by Subparagraph (8) of section 4, Article VII of the Florida Constitution.

FINDINGS

1) The VAB's relevant current internal operating procedure is to accept/entertain petitions requesting an increase in market value (and provide a VAB hearing) as long as the petitioner is the current owner of the subject property on the date that the relevant VAB petition is filed.

2) **New internal operating procedure: VAB petitioners who are requesting an increase in market value must be the current owner of the subject property on the date that they file the VAB petition and on the date of the VAB hearing.**⁴

3) Obtaining written authorization from the new property owner allowing (in theory) the previous owner to file a VAB petition or to move forward on a previously-filed petition would not cure the situation.⁵ Because the subsequent/new owner does not possess the right to petition the previous homestead, this is not a right that can be granted to the previous owner.⁶

4) The only exception to this is the following circumstance: A VAB petitioner who is requesting an increase in market value is the current owner of the subject property on the date that they file the VAB petition **but** they subsequently sell the subject property before the VAB hearing takes place, and the new owner takes over the existing VAB petition (that had been

⁴ Otherwise, they would lack standing.

⁵ “[A]ny agency with the owner is severed when the owner transfers the property to another” See Exhibit “A”.

⁶ See *Johnson v. Singh*, No. 2014-CA-012745-O (Fla. 9th Cir. Ct. 2014), Section 193.155(8)(i)8., F.S., Rule 12D- 8.0076(9)(b) and Rule 12D-9.028(7), F.A.C. “The first two cited provisions deal with the administration and calculation of portability and the last cited provision deals with administrative reviews of portability issues. Each of these provisions indicates lack of authority to review the previous homestead's just value, assessed value or taxable value.” See Exhibit “B”.

timely-filed by the previous owner) and appears⁷ at the VAB hearing.⁸ Please note that this is a different situation than what is referenced in paragraph 3 above.

ANALYSIS AND SOURCES

1) Florida Statute Section 194.011(6)(b) states in part, “However, the taxpayer may not petition to have the just, assessed, or taxable value of the previous homestead changed.” [emphasis added]

2) Florida Statute Section 193.155(8)(i)(8) states: “This subsection does not authorize the consideration or adjustment of the just, assessed, or taxable value of the previous homestead property.” [emphasis added]

3) 12D-9.028(6)(a) F.A.C. states in part: “However, the petitioner may not petition to have the just, assessed, or taxable value of the previous homestead changed.” [emphasis added]

4) 12D-8.0065(9)(b) F.A.C. states: “This rule does not authorize the consideration or adjustment of the just, assessed, or taxable value of the previous homestead property.” [emphasis added]

5) Florida Statute Section 192.001(13) defines “taxpayer” as “the person or other legal entity in whose name property is assessed”.

6) 12D-9.003(9) F.A.C. states: “Taxpayer” means the person or other legal entity in whose name property is assessed, including an agent of a timeshare period titleholder, and includes exempt owners of property, for purposes of this chapter.”

7) Florida’s Fourth District Court of Appeal (“4th DCA”), in *Boyle v. Nolte*⁹, affirmed the 19th Circuit Court’s dismissal of a case due to a lack of standing because the plaintiff was the prior owner of the homestead property. This is significant because the 4th DCA upheld the lower court’s decision, thereby giving it additional weight as persuasive authority.¹⁰ It is also noteworthy that the Florida Department of Revenue (“DOR”) was a defendant in this case and filed a pleading which outlined their position on this subject. The DOR’s position is in line

⁷ “Appears” refers to the new owner appearing in-person, electronically (if allowed in that jurisdiction), via a representative or any other means allowed under Florida law.

⁸ See Exhibits “A” through “C”.

⁹ *Boyle v. Nolte*, 88 So.3d 952 (Fla. 4th DCA 2012)

¹⁰ Typically, once a Florida district court of appeal issues a decision, that decision is considered the law of the land (binding authority) unless/until the Florida Legislature changes the law, a conflicting issue is issued by another district court or the Florida Supreme Court overturns a district court opinion. See *Pardo v. State*, 596 So.2d 665, 666 (Fla. 1992) (holding that in the absence of inter-district conflict or contrary precedent from the supreme court, the decision of a district court of appeal is binding throughout Florida). However, the 4th DCA issued a *Per Curiam* (“PCA”) decision in this case. “*Per Curiam*” means that a decision was reached but an opinion was not published. *Per Curiam* decisions are considered persuasive authority and are not binding on Florida VABs.

with that of the circuit court, the 4th DCA and generally supports our new internal operating procedure.¹¹ All of the authorities cited herein correctly apply Florida law with respect to a prior homestead owner's standing to petition a court/VAB for an increase in market value, to wit: that a prior homestead owner lacks the standing to do so.¹²

8) Plaintiff Boyle later attempted to get a "second bite at the apple" by filing another lawsuit before a different judge on the 19th Circuit Court.¹³ Boyle's arguments were then rejected a second time by a different circuit court judge; and again by the 4th DCA via another *per curiam* decision.¹⁴

9) In 2009, then-Miami-Dade County VAB attorney Mr. Steven A. Schultz wrote to Florida's Attorney General ("AG") seeking guidance regarding petitioners who were requesting an increase in market value. Specifically, he asked the following: "May the Miami-Dade County Value Adjustment Board consider and act upon petitions filed by taxpayers requesting that the 'just value' or market value of their currently-owned homestead property be increased?" In response, the AG issued an Advisory Legal Opinion (AGO 2009-50) which concluded the following:

The Miami-Dade County Value Adjustment Board may consider and act upon petitions filed by taxpayers to adjust the market value of currently-owned property, whether such petition seeks an increase or decrease in valuation. [emphasis added]

10) The court in *Kimmelman v. Nikolits*¹⁵ found that "while Florida law provides for portability of tax savings from a former homestead to a new homestead, it does not allow a former owner to seek an increase of ad valorem value to a former residence for the purpose of increasing portability tax savings." [emphasis added] The court also found that even though the Kimmelmans owned the property when they filed their VAB petition, the Kimmelmans had no standing on the day of the actual VAB hearing since they sold the property before the date of the VAB hearing.

Please note that the DOR filed a motion and memorandum of law in this case. It states, "As applied here, Florida law does not allow former owners to contest the ad valorem assessment value of their former homestead." While the DOR's guidance is not binding, it is persuasive. The DOR's stance on this issue supports amending our internal operating procedures as described herein.

11) The courts in *Melvina v. Singh*, Case No. 2014-CA-012745 O (Fla. 9th Cir. Ct. 2014) and *Gowdy V. Overton*, Case No. 16-2009-CA-006270 (Fla. 4th Cir. Ct. 2009) ruled in a similar fashion as the courts cited above.

¹¹ Florida's DOR has a supervisory roll over Florida VABs. This role was assigned to them by the Florida Legislature. While the law grants only limited enforcement powers to the DOR, the DOR's legal position on VAB-related topics is considered persuasive.

¹² *Boyle v. Nolte*, No. 31-2010-CA-011039 (Fla. 19th Cir. Ct. 2010)

¹³ *See Boyle v. Nolte*, No. 31-2011-CA-001306 (Fla. 19th Cir. Ct. 2011)

¹⁴ *Boyle v. Nolte*, 222 So.3d 1222 (Fla. 4th DCA 2017)

¹⁵ *Kimmelman v. Nikolits*, No. 50-2017-CA-1381 (Fla. 15th Cir. Ct. 2017)

12) The DOR responded to a taxpayer representative's inquiry about this issue in 2017. The DOR's response further supports amending our internal operating procedures as described above.¹⁶

13) The above-described update to our internal operating procedures brings us in line with how other Florida VABs handle similar situations.¹⁷

CONCLUSION

In conclusion, several Florida Statutes, several Florida Administrative Rules, one Florida District Court of Appeal (ruling the same way twice (PCA) in two separate cases), several Florida Circuit Courts, one Florida Attorney General Opinion, Several Florida DOR pleadings/E-mails all support the VAB's decision to update its internal operating procedures; as several other counties have already done.

¹⁶ See Exhibit "C".

¹⁷ At least seven other Florida VABs (and probably more) require that a petitioner who is requesting an increase in market value be the current owner of the subject property on the date that they file the VAB petition and on the date of the VAB hearing.

EXHIBIT "A"

From: Steve Keller <Steve.Keller@floridarevenue.com>
Sent: Tuesday, May 18, 2021 7:28 AM
To: Reed McClosky <rbm@freedmanmcclosky.com>
Subject: VAB Broward 2021 0518 / 0421 FW: Sale of property before VAB Hearing held

Dear Mr. McClosky:

We have reviewed this communication and previous advisements and do not see a way for a VAB to allow a proceeding to continue with an unauthorized non owner.

We do not believe there is a legal basis for a non owner to continue to maintain a petition on property they do not currently own. This is not a due process issue for a non owner. This due process issue was raised and not sustained in Johnson v. Singh, Orange County circuit court Case No 2014-12745, Final Order dismissing complaint, August 30, 2016. The court also ruled that the Johnsons had not suffered a deprivation of due process, as they no longer owned the property or were responsible for the payment of the property taxes. Any right to further due process was voluntarily lost when the property was voluntarily conveyed to another person. Attached is a copy of that circuit court ruling.

We believe it is questionable whether a non owner could continue to meet the provisions of section 194.011(3)(h), F.S. "The individual, agent, or legal entity that signs the petition becomes an agent of the taxpayer for the purpose of serving process to obtain personal jurisdiction over the taxpayer for the entire value adjustment board proceedings, including any appeals of a board decision by the property appraiser pursuant to s. 194.036." Any agency with the owner is severed when the owner transfers the property to another.

Please also recall that AGO 2009-50 states a petitioner must be the owner: "The discussion in this opinion is limited to consideration of the situation in which a petition to the value adjustment board seeking review of the just valuation of homestead property has been timely filed by a taxpayer who is the current owner of the homestead property." Attached is a copy of that AGO.

This is recognition that the VAB process was not designed to allow a non owner to file or maintain a petition after they transfer property to another.

Sincerely,



Stephen J. Keller
Chief Assistant General Counsel
Property Tax Oversight Section
Office of General Counsel
Department of Revenue
850 617 8347

email encryption status [unsecure]; signifies: not encrypted

EXHIBIT "B"



Mon 3/20/2017 10:22 AM

Steve Keller <Steve.Keller@floridarevenue.com>

VAB Miami Dade Petitions For Portability By Previous Owners

To: ■ Millares, Rafael (COC)

Dear Mr. Millares:

Thank you for your email dated March 10, 2017 in which you inquire about a current owner petitioning the value of the previous homestead in a portability situation. You state:

No, someone who sold their home cannot petition the VAB for portability purposes after they sold it. They would have to petition the VAB while they still own the homestead property or get written authorization from the current owner allowing them to file a VAB petition for portability purposes.

While we agree that an owner would have to petition the VAB while they still own the homestead property, we do not agree that a previous owner of a homestead could get written authorization from the current owner allowing them to file a VAB petition for portability purposes.

Because the current owner does not possess the right to petition the previous homestead, this is not a right that can be granted to the previous owner. See Johnson v. Singh, case no 2014-CA-0127450, Orange Co Cir Ct Order filed August 31, 2016. See also Section 193.155(8)(i)8., F.S. and Rules 12D-8.0076(9)(b) and 12D-9.028(7), F.A.C. The first two cited provisions deal with the administration and calculation of portability and the last cited provision deals with administrative reviews of portability issues. Each of these provisions indicates lack of authority to review the previous homestead's just value, assessed value, or taxable value.

AGO 2009-50 dealt with situation where property had not been transferred. The opinion specifically opines that the Value Adjustment Board may consider and act upon petitions filed by taxpayers to adjust the market value of currently-owned property, whether such petition seeks an increase or decrease in valuation. (E.s.)

Sincerely,

Stephen J. Keller
Executive Senior Attorney
Office of General Counsel
Department of Revenue
850-617-8347

email encryption status [unsecure]; signifies: not encrypted

EXHIBIT “C”

Millares, Rafael (COC)

From: Steve Keller <Steve.Keller@floridarevenue.com>
Sent: Thursday, September 14, 2017 1:03 PM
To: Millares, Rafael (COC); jschwartz@rvmrlaw.com
Subject: VAB Petition to Raise Market Value

Follow Up Flag: Follow up
Flag Status: Flagged

To: Raphael Millares, Esq., VAB Attorney, Miami Dade County
cc: Julie Schwartz, Esq.

Dear Mr. Millares:

We have reviewed the email from Ms. Schwartz dated August 25, 2017. The email states "[t]he VAB attorney has issued a memo stating that once a party sells their residence, they may no longer file a VAB petition, even if they have the consent of the Buyer."

Questions Presented

It states the following questions:

To isolate the issue, I suggest the following hypothetical. If A sells his property to B in June 2017, may A file a VAB petition on September 1, 2017 to raise the market value, provided that A has the written consent of B?

* * *

As a secondary issue, if you believe that the VAB attorney's position is correct, I would like to know whether party B in the hypothetical above may file a timely 2017 petition in his own name, for the property which he purchased in June 2017.

Our office had previously sent an advisement memorandum dated March 20, 2017 that discusses consent and states that a party may not give consent to a second party to file a petition which the first party does not have the right to file. In other words, one may not authorize another to do something one does not have the right to do.

Two scenarios are addressed by this advisement, as follows:

Scenario 1): An owner transfers property during the tax year, becoming the previous owner; the new owner then files the petition.

Scenario 2): An owner transfers property after filing the petition, becoming the previous owner; the new owner desires to pursue the petition and be substituted as petitioner.

Analysis

The property appraiser must update the assessment roll to list the new owner. This ministerial duty of the property appraiser to update the assessment roll is present, whether the transfer requiring the assessment roll to be changed is after January 1, after TRIM notices have been mailed, or after a petition has been filed. We believe this should normally be accomplished without undue delay. This function is part of the property appraiser's duty to list all property on the assessment rolls as provided in Section 193.085, F.S., and rules such as Rule 12D-8.007(2)(a), F.S.

Section 192.001 (13), F.S. defines "taxpayer" as "the person or other legal entity in whose name property is assessed". Section 194.181(1)(a), F.S. refers to "taxpayer or other person contesting the assessment of any tax, the payment of which he or she is responsible for under a statute or a person who is responsible for the entire tax payment pursuant to a contract and has the written consent of the property owner"

In this instance, the person or entity in whose name the property is assessed and responsible for the taxes is the person whose name is on the assessment roll (which may be corrected for changes in ownership during the year by certificate of correction if necessary) and who will receive a tax notice from the tax collector based on the property appraiser's assessment.

In a case such as this the new owner is the taxpayer for purposes of administrative review of the assessment.

Although the property appraiser must change ownership on the assessment roll, and the VAB must potentially substitute a new party, these actions are independent of each other. The VAB can review whether the owner is correctly listed on the assessment roll.

We believe the current owner is entitled to file a petition with the VAB, regardless of whether the assessment roll reflects the current owner. We also believe that the owner of the property is entitled to seek correction of the assessment roll to reflect ownership.

We have considered the memo from VAB attorney Millares dated March 30, 2017 in which two questions were summarized and answered correctly as follows:

"Can someone who already sold their previously homesteaded property file a VAB petition to increase market value for portability purposes after the sale? No.

Can someone who already sold their previously homesteaded property file a VAB petition to increase market value for portability purposes after the sale if they have written authorization to do so from the current owner of the property? No."

The memo cites AGO 2009-50 which dealt with a situation where the property had not been transferred. The opinion specifically opines that the Value Adjustment Board may consider and act upon petitions filed by taxpayers to adjust the market value of currently-owned property, whether such petition seeks an increase or decrease in valuation.

The memo states "[a]lthough a property owner may file a petition for portability while they still own the homesteaded property, they may not petition the VAB to increase market value for portability purposes after they have sold it."

In Florida, the ad valorem tax is laid directly on the property; it is not a personal obligation of the property owner. See e.g. *Miccosukee Tribe of Indians of Fla. v. Dep't of Env'tl. Prot.*, 78 So.3d 31, 34 (Fla. 2d DCA 2011) citing the U.S. Supreme Court:

the ad valorem tax created "a burden on the property alone," rather than on the owner. Id . at 266 . Such in rem assessments were proper against lands owned by the Yakimas ...

The analysis of the owner's right to pursue a property claim is illustrated by *Cont'l Equities, Inc. v. Jacksonville Transp. Auth.*, 360 So.2d 1101, 1105 (Fla. 1st DCA 1978) in which the court considered a plaintiff's motion to be substituted as the owner of real property in litigation and indicated the right to do so depended on the party moving to be substituted as plaintiff being in fact the owner.

Based on this analysis, a new owner should be substituted where the previous owner transfers the property after filing the petition as in Scenario 2) above, if the new owner wishes to pursue the petition.

Advisement

[1] The current owner of property can file a VAB petition. When the current owner files a petition, this is not an authorization from the previous owner, that cannot occur. This is not a challenge to the value of the previous homestead; this is not grant of power from the previous owner to new owner that previous owner did not have authority to grant. We also do not believe that the current owner can authorize the previous owner to file a petition "as if" the previous owner "is" the current owner.

[2] If the owner files a petition and then transfers the property to a new owner, this does not necessarily defeat the petition if the new owner wishes to pursue the petition.

[3] An owner cannot transfer or sell the property and then file a petition after the transfer or sale.

We are providing these general comments in an effort to be of some assistance and these are not a substitute for your own independent legal research on such matters. This response is advisory only and is sent in an effort to assist you; it is not directory or an order of any kind.

Sincerely,

Stephen J. Keller
Executive Senior Attorney
Office of General Counsel
Department of Revenue
850-617-8347
email encryption status [unsecure]; signifies: not encrypted

=====

From: Schwartz, Julie [mailto:jschwartz@rvmrlaw.com]

Sent: Friday, August 25, 2017 5:11 PM

To: Steve Keller <Steve.Keller@floridarevenue.com>
Subject: VAB Petition to Raise Market Value

Mr. Keller,

I am writing to request clarification on the issue of who may file a petition to increase market value. Based upon your memo to the Miami-Dade County VAB attorney, he has taken a position regarding filing that I think misunderstands a key element of your memo. The VAB attorney has issued a memo stating that once a party sells their residence, they may no longer file a VAB petition, even if they have the consent of the Buyer.

To isolate the issue, I suggest the following hypothetical. If A sells his property to B in June 2017, may A file a VAB petition on September 1, 2017 to raise the market value, provided that A has the written consent of B?

Your memo discusses consent and states that a party may not give consent to a second party to file a petition which the first party does not have the right to file. In other words, one may not authorize another to do something one doesn't have the right to do. While I agree with this premise, I believe it is undisputed that in the hypothetical above B has the right to file a 2017 VAB petition for the property he purchased in June 2017. To state otherwise would mean that neither A nor B has the right to file a 2017 VAB petition. It cannot be correct that no one has the right to contest the taxes on a parcel simply because it sold mid-year.

As a secondary issue, if you believe that the VAB attorney's position is correct, I would like to know whether party B in the hypothetical above may file a timely 2017 petition in his own name, for the property which he purchased in June 2017.

I would appreciate the opportunity to discuss this or to receive clarification on this issue.

Thank you,

Julie

Julie Schwartz, Esq. | [vCard](#)



RENNERT VOGEL
MANDLER & RODRIGUEZ, P.A.
ATTORNEYS AT LAW

100 SE 2nd Street, 29th Floor | Miami, FL
33131

305-375-6583 Direct | 305-347-6474 Fax |
jschwartz@rvmlaw.com

Miami | Boca Raton

DISCLAIMER

NOTIFICATION TO RECIPIENTS: The subject line of this email may indicate that this email has been sent unsecure. This is a default setting which in no way indicates that this communication is unsafe, but rather that the email has been sent unencrypted in clear text form. Revenue does provide secure email exchange. Please contact us if you need to exchange confidential information electronically.

If you have received this email in error, please notify us immediately by return email. If you receive a Florida Department of Revenue communication that contains personal or confidential information, and you are not the intended recipient, you are prohibited from using the information in any way. All record of any such communication (electronic or otherwise) should be destroyed in its entirety.

Cautions on corresponding with Revenue by email: Under Florida law, emails received by a state agency are public records. Both the message and the email address it was sent from (excepting any information that is exempt from disclosure under state law) may be released in response to a public records request.

Internet email is not secure and may be viewed by someone other than the person you send it to. Please do not include your social security number, federal employer identification number, or other sensitive information in an email to us.
