

**TO:** MONROE COUNTY VALUE ADJUSTMENT BOARD  
**FROM:** THOMSON REUTERS (PROPERTY TAX SERVICES), INC.  
**CONTACT:** IMRAN THOBANI  
KEVIN BRICK  
**RE:** PETITION NO.: RO46-2010  
PARCEL NO.: 00453475-109700  
TAXPAYER: SOLOMON BEACON INN  
**DATE:** FEBRUARY 4, 2011

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**PETITIONER'S INFORMAL BRIEF IN SUPPORT OF ADMISSION OF EVIDENCE**

Solomon Beacon Inn ("Petitioner"), by and through its agents, Thomson Reuters (Property Tax Services), Inc. ("Thomson Reuters") hereby submit this, Petitioner's Informal Brief in Support of Admission of Evidence to the Monroe County Value Adjustment Board.

**STATEMENT OF FACTS**

Petitioner appeared at a Value Adjustment Board ("VAB") hearing on February 1, 2011 to contest the value of its property, located in Monroe County, designated by parcel number 00453475-109700 (the "Property").

Petitioner attempted to submit evidence of the income and expenses of the Property ("Evidence") at the hearing. The Evidence was submitted to the Monroe County Appraiser ("Appraiser") during the statutory evidentiary exchange prior to the hearing. It was not provided to the Appraiser prior to the original determination of value.

The Appraiser contested the introduction of the Evidence due to the fact that it was not provided to him prior to the original determination of value. The Appraiser's position was that the ruling in Higgs v. Good<sup>1</sup> precluded the admission of the Evidence and he requested that the VAB rule that it is inadmissible at the hearing. Petitioner's position was that (1) the Evidence is admissible under the applicable statutes and rules; (2) the VAB must follow the Florida Department of Revenue's ("DOR") interpretation of Higgs; and, (3) Higgs is not applicable to the presentation of evidence at administrative hearings. Appraiser rebutted that the DOR does not have authority over the decisions of the Third District Court of Appeal (which handed down the Higgs decision).

The VAB requested that the parties submit informal written briefs outlining their respective positions on this issue.

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<sup>1</sup> Higgs v Good 813 So. 2d 178 (Fla 3d DCA 2002).

## ANALYSIS OF APPLICABLE LAW

### 1. THE EVIDENCE IS ADMISSIBLE UNDER THE APPLICABLE STATUTES AND RULES.

The evidentiary procedure for submission of evidence before a VAB hearing is dictated by Fla. Stat. 194.034. With regard to the Evidence at issue, subsection (1)(d) applies; it states:

Notwithstanding the provisions of this subsection, no petitioner may present for consideration, nor may any board or special magistrate accept for consideration testimony or other evidentiary materials that were requested of the petitioner in writing by the property appraiser of which the petitioner had knowledge and denied the property appraiser.<sup>2</sup>

The Florida Administrative Rules provide additional information which dictates the proper procedures:

The petitioner has the option of participating in an exchange of evidence with the property appraiser. If the petitioner chooses not to participate in the evidence exchange, the petitioner may still present evidence for consideration by the board or the special magistrate. However, as described in this section, if the property appraiser asks in writing for specific evidence before the hearing in connection with a filed petition, and the petitioner has this evidence and knowingly refuses to provide it to the property appraiser a reasonable time before the hearing, the evidence cannot be presented by the petitioner or accepted for consideration by the board or special magistrate. Reasonableness shall be determined by whether the material can be reviewed, investigated, and responded to or rebutted in the time frame remaining before the hearing.<sup>3</sup>

It is clear that the Petitioner followed the required rule by providing the Evidence to the appraiser during the exchange of evidence. Here, the Appraiser requested the Evidence *before the hearing and in connection with the filed petition*. Prior to filing a petition, there was no requirement to provide evidence (even if it had been requested) because there was no hearing and it could not have been provided in connection with a filed petition. Due to the language of the rule, it is clear that this evidence is not required before a petition is filed and must only be provided a reasonable time after one is filed<sup>4</sup> if the assessor has requested it in writing. The Petitioner met this burden by providing the requested information during the evidence exchange. There are no additional requirements for the proper exchange of the evidence. Accordingly, the Evidence is admissible under the current Fla. Stat. 194.034 and Fla. Admin. Rule 12D-9.020.

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<sup>2</sup> Fla. Stat. 194.034(1)(d).

<sup>3</sup> Fla. Admin. Rule 12D-9.020(1) (*emphasis added*). See also Fla. Admin. Rule 12D-9.025(4)(a) and (4)(f) providing substantially the same requirements.

<sup>4</sup> A 15-day notice is generally sufficient pursuant to the Rules. Fla. Admin. Rule 12D-9.020(8).

## 2. THE VAB MUST FOLLOW THE DOR'S INTERPRETATION OF THE HIGGS CASE.

Despite the fact that the Petitioner clearly met his burden according to the applicable statute and administrative rules, the Appraiser contends that the Petitioner's actions were insufficient. The Appraiser attempts to apply an additional standard to the Petitioner's requirements. The Appraiser asserts that the Higgs case provides additional procedural and evidentiary requirements for Petitioner's submission of evidence at VAB hearings.

The DOR has had the opportunity to consider the Assessor's position.<sup>5</sup> On August 30, 2010, the DOR published PTO 10-24 which addresses procedural and evidentiary issues which are applicable to VAB hearings and discussed the Higgs case in particular.<sup>6</sup> The DOR's conclusions included the following:

1. VABs are quasi-judicial bodies where strict rules of evidence and procedure do not apply as they do in judicial reviews.<sup>7</sup>
2. The Court's holding in Higgs applied to judicial review; it did not apply to quasi-judicial review (VAB hearings).<sup>8</sup>
3. The determination of admissibility for VAB hearings is governed by Fla. Stat. 194.034 and Rules FAC 12D-9.020 and 12D-9.025. There is no statute or rule applicable to VAB hearings which would cause the case of Higgs or any of its holdings to apply to VAB hearings.<sup>9</sup>
4. If a taxpayer complies with the requirements of Fla. Stat. 194.034 and FAC Rule 12D-9.020 than otherwise admissible income data not provided by the taxpayer when requested during the appraisal development process may still be accepted for consideration in a VAB hearing.<sup>10</sup>

The clear conclusion of the Bulletin is that Higgs does not apply to VAB hearings; and, instead, Fla. Stat. 194.034 and Rule 12D0-9.020 and -9.025 do apply. (As noted above, Petitioner has satisfied these statutory and procedural prerequisites to the submission of evidence.) Further, if evidence is not submitted during the appraisal development process, but the taxpayer complies with the statute and rules, the evidence may still be accepted at a VAB hearing. Despite the DOR's pronouncement that Higgs does not apply and the fact that the Petitioner complied with existing rules which clearly do apply, the Appraiser continues to make the case to the VAB that the Petitioner's actions were insufficient.

It is uncontested that *the DOR* has concluded that Higgs does not control the procedure required by the VAB. It appears that the Appraiser has suggested that the DOR's interpretation of this issue is not controlling over the VAB because "the DOR does not have authority over the Third District Court of Appeal."<sup>11</sup> While Petitioner agrees that the DOR does not have authority over the judiciary, the

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<sup>5</sup> Fla. Dept. of Rev. Bulletin PTO 10-24 (August 30, 2010).

<sup>6</sup> Id.

<sup>7</sup> Id. at 1.

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Paraphrasing Appraiser's argument at VAB hearing on 2/1/2011.

real issue is whether the DOR has authority over the VAB. In other words, the issue is whether the DOR's interpretation of Higgs controls the VAB's procedures.

Petitioner admits that the courts are not required to follow the rules set out by administrative agencies. Courts may take the rules and interpretations of administrative agencies under advisement and consider them to be persuasive; however, courts do maintain the ability to rule in a way that is contrary to administrative rules. Despite this fact, there are two flaws in the Appraiser's application of this principle to the case at bar: (a) while the judiciary is not bound by the DOR's rules and interpretations of law, the VABs are bound by them<sup>12</sup> and (b) the DOR's rules are not inconsistent with Higgs.<sup>13</sup>

The Appraiser is contending that the VAB may also simply consider the DOR's pronouncements as helpful guidance that it can choose to follow or ignore when making its decisions. The VAB and the entire property assessment and administration function is governed by the DOR.<sup>14</sup> By decree of Florida Statute:

The Department of Revenue shall prescribe reasonable rules and regulations for the assessing and collecting of taxes, and such rules and regulations shall be followed by the property appraisers, tax collectors, clerks of the circuit court and value adjustment boards.<sup>15</sup>

It is clear that Florida Statute requires VABs to follow the rules of the DOR. The DOR's rules allow for a petitioner to provide evidence to the assessor when requested before a petition. This rule establishes the requirements for VABs to accept such evidence at hearings. It is not within the VAB's discretion to decide that the DOR's rules are not sufficient or do not apply. It is not within the VAB's discretion to apply an additional standard due to its own interpretation of case law. The VAB may not unilaterally stray from the DOR's interpretations. It has no discretion as to whether to follow the rules and policy pronouncements of the DOR. If an affected party determines that the DOR rules are incorrect as applied by the VAB, it can pursue a judicial remedy. However, it is not for the individual VABs to decide whether to apply DOR rules or to choose to interpret cases in their own way and apply them in a way that is inconsistent with DOR's stated rules and policies. The DOR has clearly spoken on this exact issue<sup>16</sup> and individual VABs must comply accordingly.

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<sup>12</sup> This point is considered *infra*.

<sup>13</sup> This point is considered in Section 3 (*infra*).

<sup>14</sup> Fla. Stat. 195.0012; Fla. Stat. 195.002.

<sup>15</sup> Fla. Stat. 195.027 (*emphasis added*).

<sup>16</sup> Fla Dept. of Rev. Bulletin PTO 10-24 (August 30, 2010).

3. AN INDEPENDENT INTERPRETATION OF THE HIGGS CASE REVEALS THAT IT DOES NOT APPLY TO ADMINISTRATIVE HEARINGS.

Assuming *arguendo* that the DOR's interpretation of Higgs did not bind the VAB, an independent analysis of the case leads to the conclusion that it stands for the proposition:

...it was error for the trial court to allow Good (the taxpayer) to defer the submission of the income data until it pleased him to submit it (tardily), then use the data to demand either administrative or judicial reduction of his property's tax assessment valuation.<sup>17</sup>

This conclusion was based in part on existing Florida case law, which provided that certain evidence was inadmissible at the trial court level because it was not timely submitted to the appraiser.<sup>18</sup> As the DOR concluded in its review<sup>19</sup>, the prior ruling applied to the admissibility of evidence *in Florida trial courts*, not administrative hearings. It appears that the Appraiser contends that the Higgs case expands upon prior case law and attempts to apply the ruling to VAB hearings as well. This enlargement of the case is unsound and unnecessary because the statute and rules address the policy concern in Higgs.

The policy concern in Higgs was that a taxpayer may not "...conceal an ace-in-the-hole for subsequent play against an official who is attempting to carry out his duties."<sup>20</sup> However, the exchange-of-evidence rules provide sufficient protection against this issue at the administrative hearing level. These rules ensure that the appraiser would have an opportunity to review all pertinent data which would be used at a hearing and then determine the fair market value of the property in an informal negotiation with the taxpayer prior to a hearing. In other words, the appraiser will not have this information sprung upon him at the VAB hearing without any opportunity to defend his position, review the data or come to an agreeable negotiated value with the taxpayer.

The DOR's rules are sufficient to provide protection at the administrative level for the concerns addressed at the trial court level in Higgs. This position is even more strongly cemented by the fact that the issue in Higgs was that the taxpayer submitted the information "tardily". That could not occur in the VAB hearing context if the DOR rules were followed and, in fact, it did not occur in the case at bar. The information was submitted to the Appraiser within the time period required by the applicable statutes and rules. Under these rules, the evidence would be submitted within the timeframe required or else it would be inadmissible. No further requirement is necessary.

As such, there are no unaddressed concerns whereby additional requirements from Higgs are needed to ensure fair play between the taxpayer and the appraiser at the administrative hearing. Accordingly, even an independent review of Higgs suggests that its ruling is inapplicable and unnecessary to the VAB context.

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<sup>17</sup> 813 So. 2.d at 179.

<sup>18</sup> Pier House Joint Venture v. Higgs 555 So. 2d 899 (Fla. 3d DCA 1990).

<sup>19</sup> Fla. Dept. of Rev. Bulletin PTO 10-24 (August 30, 2010).

<sup>20</sup> 813 So. 2.d at 179.

## **CONCLUSION**

The Petitioner followed all required rules to submit the evidence in question. The VAB is required to follow the rules of the DOR. Here, the VAB would be required to accept evidence which was submitted in accordance with DOR rules. The VAB cannot unilaterally interpret case law and apply additional rules outside the scope of the DOR's clear policies. Finally, the Higgs case likely only establishes rules of evidentiary admissibility for trial courts, not administrative boards. Any policy arguments for applying Higgs to VAB hearings are already addressed by the existing rules.

For these reasons, the VAB must allow the Petitioner's Evidence to be admitted.

cc: Florida Department of Revenue  
Client  
File