IN THE DISTRICT COURT OF APPEAL, FIRST DISTRICT
STATE OF FLORIDA

ED CRAPO, as Alachua County Property Appraiser,

Appellant,

v.

CASE NO.: 1D17-1895
L.T. NO.: 01-2015-CA-001554

ACADEMY FOR FIVE ELEMENT ACUPUNCTURE, INC.,

Appellee.
_____/

On Appeal from the Circuit Court, Eighth Judicial Circuit,
Alachua County, Florida, Civil Division

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# APPELLEE'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

**Page(s)**

TABLE OF CITATIONS

**Statutes and Rules**

## SUMMARY OF ARGUMENT

The doctrine of administrative finality, or other preclusive doctrine, attaches to a value adjustment board decision in a tax exemption case where the property appraiser fails to appeal an adverse decision affirming a taxpayer's exempt status. A property appraiser who fails to appeal such an adverse decision is precluded from subsequently denying the same exemption absent changed circumstances. To deny attachment of the preclusive doctrine in such circumstances is inconsistent with administrative and judicial economy and will lead to absurd, inconsistent results.

Here, the facts and law have remained unchanged from year to year since 2008 when the VAB first denied the Academy's status as a tax exempt educational institution after an evidentiary hearing and presentation of arguments by the parties before a special magistrate who recommended that the educational exemption be granted. The property appraiser *did not appeal* that decision, and the Academy enjoyed its tax exempt status for six years until 2014 when the same property appraiser – admittedly without any change in the facts or the law – decided to deny the exemption. The property appraiser hauled the Academy to circuit court for tax years 2014, 2015 and 2016[1] following the VAB process and a decision favorable to

[1] The circuit court case for tax year 2016 has been stayed pending this Court's final decision.

the Academy in each of these years. In addition to said litigation the instant case before this Court, the property appraiser has – without changed circumstances – continued to deny the exemption after requiring the Academy to file an application, or by removing the exemption altogether without notice to the Academy (in the case of tax year 2017 though the VAB had affirmed the exemption for tax year 2016). As a result, the Academy has successfully litigated and defended its tax exempt status before four separate VABs[2] from 2014 to 2018.

A property appraiser can deny an exemption the property appraiser previously granted which was not litigated through a VAB proceeding. An appraiser can, of course, deny an exemption which was litigated through a VAB proceeding which likewise denied the exemption. And an appraiser can deny an exemption following a VAB decision granting a tax exemption, when circumstances later change as administrative finality then does not apply. However, when a taxpayer successfully contests the property appraiser's denial of an exemption through an adversarial and formal, quasi-judicial VAB process resulting in a VAB decision – as is the case at bar – the property appraiser must exercise his right to appeal the VAB decision, or he will

[2] Due to lack of notice, the Academy filed a consolidated petition to the VAB for tax years 2017 and 2018. In December 2018, the special magistrate issued a recommended decision that the VAB grant the Academy's petition.

be precluded from subsequently denying the exemption (and hauling the taxpayer repeatedly through the VAB and court processes) each year, absent changed circumstances. The panel opinion has no effect or application on any other situation and should stand.

Finally, no amicus curiae has expressed any opposition to the Academy's educational exemption under § 196.198, Florida Statutes.[3] Accordingly, the Academy stands on its arguments contained in the Answer Brief and on the amicus curiae brief of the Florida Department of Education which was filed at the panel's request.

## ARGUMENT

## I. PRECLUSIVE DOCTRINE BARS A PROPERTY APPRAISER WHO FAILS TO APPEAL AN ADVERSE VAB DECISION IN A TAX EXEMPTION CASE FROM LATER DENYING THE SAME EXEMPTION ABSENT CHANGED FACTS OR CIRCUMSTANCES.

### A. **The VAB is an adversarial, quasi-judicial proceeding governed by formal procedures.**

As has been recognized by the Florida Supreme Court, the Value Adjustment Board is "a quasi-judicial body established for the primary purpose of hearing taxpayer petitions and complaints against decisions of the appraiser. The procedures set forth in section 194.032 contemplate that there will be adversary parties before the

[3] All citations to Florida statutes and rules are to 2018 version unless otherwise noted. Emphasis are supplied unless noted as original.

board who will bear the burden of making their case and will initiate any appeals of board decisions to circuit courts." Redford v. Department of Revenue, 478 So.2d 808, 810-11 (Fla. 1985). The VAB review process is a formal proceeding governed by an expansive and detailed set of rules and uniform procedures promulgated by the Department of Revenue ("DOR") and codified in Chapter 12D-9 of the Florida Administrative Code.[4] § 194.034(1)(e) (requiring DOR to promulgate VAB rules and procedures which shall include the right of cross-examination of any witness). The Legislature intended the VAB process to provide meaningful and adversarial review with the same assurances of fairness and due process afforded to other quasi-judicial proceedings. See e.g. Fla. Stat. § 194.034(1)(a) (permitting petitioners to be represented by an attorney who may present testimony and other evidence); § 194.034(1)(d) (permitting property appraiser to be represented by an attorney "in opposing an exemption and [to] present testimony and other evidence"); § 194.011(4)(a) (requiring the petitioner to provide a list of evidence to be presented at the hearing, together with copies of all documentation to be considered by the value adjustment board and a summary of evidence to be presented by witnesses).

[4] The VAB review process is discussed in more detail in the Tax Section's Brief at p. 6 and PAAF's Brief at pp. 8-10.

The VAB must render its decision in writing which "must contain findings of fact and conclusions of law and must include reasons for upholding or overturning the determination of the property appraiser." § 194.034(2). "Findings of fact must be based on admitted evidence or a lack therefor." Id. Further,

> [c]onclusions of law must be based on findings of fact. For each of the statutory criteria for the issue under administrative review, findings of fact must identify the corresponding admitted evidence, or lack thereof. Each final decision shall contain sufficient factual and legal information and reasoning to enable the parties to understand the basis for the decision, and shall otherwise meet the requirements of law.

Fla. Admin. Code R. 12D-9.032(1)(a). The VAB must be represented by experienced legal counsel who shall advise the VAB to "ensure that all actions taken by the board and its appointees meet the requirements of law." § 194.015; Fla. Admin. Code R. 12D-9.009(1)(a).

Pursuant to § 194.035(1), for counties such as Alachua County with a population greater than 75,000, the VAB is required to appoint experienced and qualified special magistrates "not influenced by the property appraiser" who shall take and preserve testimony and evidence and make recommendations to the VAB "which shall include proposed findings of fact, proposed conclusions of law, and the reasons for upholding or overturning the determination of the property appraiser ..." Fla. Admin. Code R. 12D-9.011 (setting forth the role of special magistrates); see also

Fla. Admin. Code. R. 12D-9.030 (setting forth the requirements of recommended decisions). The VAB must consider the recommended decision and must limit its consideration to whether the recommended decision complies with §§ 194.301 (burden of proof and presumptions), 194.034(2) (findings of fact and conclusions of law), and 194.035(1) (special magistrates appointments and qualifications).

Given the expansive and detailed set of VAB rules and procedures designed to safeguard fairness and due process and ensure compliance with requirements of law and the adversarial nature of the proceeding, the doctrine of administrative finality or other preclusive doctrine should attach to a VAB decision like the one in this case. See Verdi v. Metropolitan Dade County, 684 So.2d 870 (Fla. 3d DCA 1996)(finding county code enforcement proceedings were quasi-judicial to which preclusive doctrine applied); Coral Reef Nurseries, Inc. v. Babcock Company, 410 So.2d 648, 651 (Fla. 3d DCA 1982) (recognizing the State of Florida's long history of applying the doctrine of res judicata to municipal zoning decisions unless it can be shown there has been a substantial change in circumstances). After all, "it is the character of the administrative hearing leading to the action of the administrative body that determines the label to be attached to the action and, in turn, determines the applicability of the doctrine of administrative res judicata." Id. at 652. Preclusive doctrine applies to rulings or decisions of such bodies "unless it can be shown that

since the earlier ruling thereon there has been a substantial change of circumstances relating to the subject matter with which the ruling was concerned, sufficient to prompt a different or contrary determination." Id.

Accordingly, as recognized in the panel decision, preclusive doctrine will virtually never apply in a valuation case (as opposed to an exemption case as is here) because the facts of market value are fluid and necessarily subject to change each year. Therefore, preclusive doctrine must not be analyzed in a vacuum or by conflating valuation and exemption cases as amici have done. Moreover, the applicability of preclusive doctrine to a VAB decision rendered after an adversarial quasi-judicial proceeding must not be conflated with a situation in which the property appraiser has granted the exemption but not pursuant to an adversarial VAB process (in which case preclusion does not apply).

Here, the 2008 VAB decision which the property appraiser failed to appeal was rendered following an adversarial hearing before a special magistrate and the Alachua County VAB and pursuant to the rules and procedures set forth in the Florida Administrative Code Rules. For the reasons further discussed below, under the facts and circumstances of this case, the property appraiser should be precluded from denying the exemption inconsistent with the 2008 VA decision which he has failed to appeal, absent changed circumstances.

B. **The Property Appraiser has a right to appeal VAB decisions.**

Section 194.036(1) permits a property appraiser who "disagrees with the decision of the [value adjustment] board ... **to appeal the decision to the circuit court**" if he "determines and affirmatively asserts in any legal proceeding that there is a **specific constitutional or statutory violation, or a specific violation of administrative rules, in the decision of the board** ..." § 194.036(1)(a). As discussed in the Tax Section's Brief (p. 8), the right to appeal an adverse VAB decision granted to property appraisers was a significant and intentional change by the Florida Legislature. The failure to exercise that right must have consequences. See Redford, 478 So.2d at 811 ("the appraiser failed to exercise his right to appeal the department's position, adopting it as his own, and the board had no authority, on its own volition, to overrule the decision of the appraiser and department that the leaseholds were not exempt").

That the standard of review by the circuit court is de novo has no bearing on the preclusion analysis. See B & B Hardware, Inc. v. Hargis Industries, Inc., 135 S.Ct. 1293, 1305 (2015) ("Ordinary preclusion law teaches that if a party to a court proceeding does not challenge an adverse decision, that decision can have preclusive effect in other cases, even if it would have been reviewed de novo.") "[I]t must be

assumed that the Legislature knows the plain and ordinary meaning of words used in statutes and that it intended the plain and obvious meaning of the words used." Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co., 945 So. 2d 1216, 1225 (Fla. 2006). Significance and effect must be given to every word used by the Legislature. See Raymond James Fin. Servs. v. Phillips, 126 So. 3d 186, 191 (Fla. 2013) (interpreting the term "proceeding" to give effect to Legislative intent). Giving significance and effect to the use of the word "appeal" evinces a legislative intent for the property appraiser to be subject to the same consequences of finality as any party who fails to appeal an adverse decision.

It is by no accident that the Florida Legislature chose to use the term "appeal" in delineating the property appraiser's right to contest the VAB decision. While the taxpayer, too, is entitled to seek review of the VAB decision, the taxpayer's initiation of a circuit court action is not referred to as an "appeal" and the taxpayer does not have to assert a specific constitutional or statutory violation, or a specific violation of administrative rules in the VAB decision. § 194.036(2). Moreover, the taxpayer can bypass the VAB process altogether and initiate a circuit court action contesting a tax assessment in the first instance. Thus, it is clear that the Legislature has intended for the taxpayer to be treated differently from the property appraiser.

Accordingly, the issue to be decided must be guided and limited by the facts of this case – an instance in which the property appraiser fails to appeal an adverse VAB decision in a tax exemption case and denies the same exemption years later admittedly without any changed circumstances – under the well-established legal principles governing administrative finality and other preclusive doctrine, as discussed further below. In this case, the property appraiser (represented by the same attorney) defended his denial of the Academy's exemption in 2008 in the above described adversarial, quasi-judicial process before the VAB which rendered an adverse written decision against him. The property appraiser chose not to appeal that VAB decision. He must bear the consequences of his failure to exercise the right of appeal. Absent changed circumstances, he must be barred from denying the exemption and effectively hauling the taxpayer through the adversarial VAB and legal system year in and year out, which is what has happened in this case.

### C. Barring the Property Appraiser from denying an exemption which was granted by a VAB decision that he failed to appeal, absent changed circumstances, is consistent with the legislative intent and statutory scheme.

"It is now well settled that [preclusive doctrine such as] res judicata may be applied in administrative proceedings." Thomson v. Department of Environmental Regulation, 511 So.2d 989, 991 (Fla. 1987); see also B & B Hardware, Inc., 135 S.Ct.

at 1303 ("when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact property before it which the parties have had an adequate opportunity to litigate, the court have not hesitated to apply res judicata to enforce repose") (internal citations omitted). Administrative finality or any other preclusive doctrine, applies only where there is a complete identity of the parties and identical cause of action, and there is no change in the law or facts. Florida Power Corporation v. Garcia, 780 So.2d 34, 44 (Fla. 2001) ("A decision, once final, may only be modified if there is a significant change in circumstances or if modification is required in the public interest."[5]); see also Thomson, 511 So.2d at 991 ("The proper rule in a case where a previous permit application has been denied is that res judicata will apply only if the second application is not supported by new facts, changed conditions, or additional submissions by the applicant.").

Given the careful parameters set by the Florida Supreme Court in cases such as Garcia and Thomson to ensure that a party is not barred by a prior decision when circumstances have changed, preclusive doctrine should apply to decisions of a quasi-judicial body such as VAB absent clear legislative intent to the contrary. See B & B Hardware, Inc, 135 S.Ct. at 1306 ("Issue preclusion is available unless it is 'evident'

[5] Crapo has never sought to change the VAB determination on the Academy's exemption based on an assertion of public interest.

that Congress does not want it.") (internal citation omitted). Contrary to the suggestion in the Tax Section's Brief, there is no *arguable*, much less clear, legislative intent not to apply preclusive doctrine to a VAB decision in exemption cases (as opposed to valuation cases which, as the panel decision has recognized, are inherently incompatible with preclusive doctrine due to the fluidity of rapidly changing circumstances). In fact, attaching preclusive doctrine to a VAB decision in an exemption case which the property appraiser fails to appeal is consistent with legislative intent and the statutory scheme to achieve finality through the VAB proceeding by placing the burden on the property appraiser to appeal an adverse VAB decision to circuit court. Cf. § 196.199(5) (providing that governmental exemptions granted by the VAB *or* established by judicial proceedings "shall remain valid for the duration of the lease unless the lessee changes its use").

No party or amicus curiae has presented a case which renders preclusive doctrine inapplicable to a decision by a quasi-judicial body such as the VAB where the parties have been afforded due process, there have been no changed circumstances and the rules of preclusion (i.e., identify of parties and issues) have observed. DOR's suggestion that preclusive doctrine should be limited to proceedings subject to the Florida Administrative Procedure Act ("APA"), or to judicial proceedings is simply unsupported and contradicted by precedent that applies

preclusive doctrine to local government proceedings and decisions. See Verdi, 684 So.2d 870 (applying preclusive doctrine to county code enforcement proceedings); Coral Reef Nurseries, 410 So.2d 648 (applying preclusive doctrine to county zoning proceedings); Metropolitan Dad County Board of County Commissioners, 231 So.2d 41 (Fla. 3d DCA 1970).

Davis v. Macedonia Housing Author., 641 So.2d 131 (Fla. 1st DCA 1994), cited by PAAF, does not change or affect the analysis. There, this Court held that the circuit court had no jurisdiction over a prior tax year which the taxpayer did not timely contest after receiving notice that the exemption was denied. And this Court reversed the circuit court's summary judgment in favor of the charitable purpose exemption given the existence of disputed issues of material fact. In what is clearly dicta – not a holding as characterized by PAAF – this Court "comment[ed] briefly" on mooted issues that there was nothing in the record to indicate the taxpayer had applied for the exemption (which includes submitting records on exempt and nonexempt uses) each subsequent year which was required unless the property appraiser waived or modified that requirement. As it appeared that the property appraiser had not waived the annual application requirement, this Court disapproved the circuit court's order that the property appraiser grant the exemption for ensuing years as infringing on the property appraiser's right to receive information supporting

the exemption. Id. at 132. In contrast, here, the panel decision does not purport to waive the Property Appraiser's ability to collect an annual application from the Academy.

Moreover, the *Sowell* cases discussed in the Tax Section's Brief are factually and procedurally inapposite; involve § 194.036(1)(c) which allows the property appraiser to bring an action for injunctive relief against the VAB if the DOR upon an "assertion" by the property appraiser finds a consistent and continuous violation of the intent of the law or administrative rules by the VAB; and do not have any bearing on the administrative finality analysis in this case. *Sowell I* involves a procedural defect requiring the dismissal of the "appeal" which should have been filed as a petition for writ of mandamus. Sowell v. DOR, 122 So.3d 996 (Fla. 1st DCA 2013) (Makar, J., concurring with written opinion). In *Sowell II*, this Court granted the Bay County property appraiser's petition for writ of mandamus because the DOR's finding of no probable cause adversely affected the property appraiser and amounted to agency action within the meaning of Chapter 120, but the DOR's refusal to file the probable cause review ruling with the agency clerk prevented the property appraiser from seeking "judicial review as contemplated by § 120.68(1)." Sowell v. DOR, 136 So.3d 1285, 1287-88 (Fla. 1st DCA 2014).

In *Sowell III*, the Bay County property appraiser appealed the DOR's agency action (filing of the probable cause review with the agency clerk as directed by this Court in *Sowell II*) arguing that the DOR erred in determining that there was no probable cause. This Court granted the appeal given "the parties' strong disagreement as to whether the [VAB's] actions in this case violated the law and the complexities of the [valuation] issues involved" which were never litigated against the VAB. Sowell v. DOR, 168 So.3d 355, 355-56 (Fla. 1st DCA 2015) (Mem). The Tax Section's suggestion that this Court "accepted, at face value, an unsubstantiated assertion (by Mr. Sowell) that his county's VAB had engaged in a 'consistent and continuous' violation of the law" and that this Court "refused to accept the VAB rulings" in *Sowell III* (Tax Brief at 9), is not accurate and misses the point that the *Sowell* cases dealt with a separate statutory mechanism which permits the property appraiser to sue the VAB directly upon an "assertion" of "consistent and continuous" violation by the VAB.

Notably, none of the amici briefs discuss or apply the law to the facts of the instant case. The facts of this case demonstrate that failing to apply administrative finality will lead to absurd results. In 2008, the Alachua County VAB decided on the merits that the Academy is a tax exempt educational institution after an evidentiary hearing and presentation of arguments by the parties before a special magistrate who

recommended that the educational exemption be granted. The property appraiser could have but *did not appeal* the 2008 VAB decision to the circuit court, and the Academy continuously maintained its tax exempt status year to year until the same property appraiser – admittedly without any change in the facts or the law – decided to revisit the issue and deny the Academy's exemption six years later in 2014. The consequence of the property appraiser disregarding administrative finality and taking action to deny the exemption based on his changed mind without any change in the facts or the law, is that the Academy which has relied on the exemption and operated its educational institution accordingly, has been hauled to circuit court for tax years 2014, 2015 and 2016 after proceeding through the VAB process and obtaining a decision in the Academy's favor in each of these years. In addition to said litigation (and litigation before this Court), the property appraiser has – without changed circumstances – continued to deny the exemption after requiring the Academy to file an application, or by removing the exemption altogether without notice to the Academy (in the case of tax year 2017 though the VAB affirmed the exemption for tax year 2016). As a result, the Academy has litigated and defended its tax exempt status before four separate VABs from 2014 to 2018.

This case underscores the unnecessary burden on the parties and the administrative and judicial resources when the VAB decision that the property

appraiser could have but failed to appeal is deemed to have no preclusive effect on the property appraiser. Public interest is fostered when the parties are able to rely on the final step of the process – whether it be VAB or the courts – as dispositive of the rights and issues between them unless the circumstances have changed.

When the circumstances change, administrative finality does not apply, and the property appraiser is never precluded from denying an exemption. Moreover, the property appraiser is never precluded from denying an exemption the property appraiser previously granted but was never litigated through the VAB proceeding. However, when the taxpayer successfully challenges the property appraiser's denial of an exemption through an adversarial and formal, quasi-judicial VAB process resulting in a VAB decision – as is the case at bar – the property appraiser must exercise his right to appeal the VAB decision, or be precluded from subsequently denying the exemption (and hauling the taxpayer through the VAB and court process) year in and year out, absent changed circumstances. The panel opinion has no effect on any other situation and should stand.

## II. THE ACADEMY IS ENTITLED TO THE EDUCATIONAL TAX EXEMPTION.

No amicus curiae has expressed any opposition to the Academy's educational exemption under § 196.198, Florida Statutes. Accordingly, the Academy stands on

its prior arguments and briefs and on the amicus curiae brief of the Florida Department of Education which was filed at the panel's request.

Appellant's recent submission of "20 U.S.C. §§ 1099b(a), 1099c(a)" as "supplemental authority" adds no support to his position on this issue. These statutes which Appellant now suggests are somehow pertinent on the definition of educational institution, are not new. Section 1099c(a) provides: "For purposes of qualifying institutions of higher education for participation in programs under this title, the Secretary shall determine the legal authority to operate within a State, the accreditation status, and the administrative capability and financial responsibility of an institution of higher education in accordance with the requirements of this section." Section 1099b(a) provides that the Secretary of Education shall establish criteria for determining whether an accrediting agency or association may "be a reliable authority as to the quality of education or training offered for purposes of the Act or for other Federal purposes ..."

It is undisputed that the Academy is an accredited postsecondary educational institution which has participated in the federal student financial aid programs since at least 2008 and has satisfied the definition of an eligible institution under the Higher Education Act of 1965, as amended (HEA) (R-418, R-642-651). The issue at bar, however, is whether the Academy is an educational institution within the meaning of

§ 196.012(5), Florida Statutes. Based on its prior arguments and for the reasons articulated by the Florida Department of Education, the Academy satisfies this definition. Accordingly and consistent with Judge Makar's concurrence on this second issue, the Academy respectfully requests that the trial court's determination that the Academy is entitled to the educational tax exemption under § 196.198, be affirmed.

## CONCLUSION

For the reasons discussed above, the panel decision should stand. Moreover, the lower court's ruling on the Academy's tax exemption should be affirmed.

## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been electronically filed on this 15th day of February, 2019, through the Florida Courts E-Filing Portal which provides an electronic copy to the following:

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I hereby certify that this brief complies with the font requirements of Fla.R.App.P. 9.210(a)(2).

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