From:	Vaupel, Jessica
To:	"Patrick J. Risch"; "Robert Grimaldi"
Cc:	Smith, Katie; VAB; "Cristina Saya"; "tsokalava@ocpafl.org"; "aarroyo@ocpafl.org"; Camille A. Smith (csmith@ocpafl.org); "jkleitz@ocpafl.org"; "dan.leonard@am.jll.com"
Subject:	RE: Request for Reconsideration: 2020-00147
Date:	Wednesday, December 23, 2020 5:28:53 PM
Attachments:	image001.png image002.png image003.png image004.png image005.png image006.png image007.png image008.png image009.png

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Good Evening, All.

Please see the below from VAB Counsel Thalwitzer.

Land Value

Obviously, as both participants note, the land value should be included in the recommendation.

Introduction

As to "substantial completion", I reviewed Mr. Grimaldi's request and Mr. Risch's response, the cited cases, and my own research. I looked for authorities on point, but, as Mr. Risch stated, that there do not appear to be any "substantial completion" cases under the current statute. In recommending denial of the PAO's second request for reconsideration, I am forced to rely on little more than the plain language of the statute (which is, fortunately, clear on its face) and partially obsolete case law.

The Certificate of Occupancy

While Mr. Grimaldi makes strong points, and I empathize with the very real, practical difficulties the PAO faces in determining whether a building is substantially complete, the absence of a certificate of occupancy ("CO") clearly impacts the taxpayer's ability to use the building as intended, compelling me to find that the building was not substantially complete on January 1. See Markham v. Yankee Clipper Hotel, Inc., 427 So. 2d 383, 386 (Fla. 4th DCA 1983) (hotel building improvements not substantially complete under F.S. 192.042(1) where CO not issued until after January 1 and numerous inspections were required and conducted after January 1).

Because a CO is essentially a permit allowing a building to be occupied, the lack of a CO allows for an easier determination that the building could not be occupied on January 1. Like other permits, a CO, while generally unrecorded, runs with the land in that it affects all owners of the property, and is therefore part of the property owner's bundle of rights.

The AHCA License

Unlike the CO, the AHCA license does not run with the land, but is nevertheless essential for the

petitioner to use the building "for the purpose for which it was constructed." The PAO stresses that even "[i]f no license is obtained, the building still exists and may either be operated as ***something else*** in the interim or ***remain vacant*** until a business operator with the appropriate license is located" (emphasis supplied). Respectfully, I find this analysis to be flawed. Even assuming *arguendo* that the building could be used as something besides an ALF (or allowed to sit vacant) until the AHCA license was issued, neither "used for the purpose for which it was constructed." F.S. 192.042(1). In this case, the evidence is clear that the building's purpose was to house an ALF. Whether it might be "operated as something else" until the AHCA license is obtained is irrelevant, as it would require us to disregard the plain language of the statute.

Additionally, contrary to the PAO's hypothetical in which the owner simply leaves the property vacant until someone with the AHCA license can be located, an AHCA license to operate an ALF is not fungible; another AHCA licenseholder *cannot* simply attach their license to the building and commence using the building as an ALF. Rather, a new application must be completed and accepted, just as the owner did in this case. The AHCA license also seems to be a relevant "substantial completion" factor is the fact that AHCA considers the building itself (e.g., number and types of beds, the building's fire safety inspection report, septic/water evaluations, and zoning documentation, among other items) in determining whether to issue a license.

Analysis

While actual occupancy is usually highly relevant to the issue of substantial completion, I do not find it to be particularly helpful in this case. *See, e.g.,* Culbertson v. Seacoast Towers E., Inc., 232 So. 2d 753, 757 (Fla. 3d DCA 1970) ("By far the most serious objection to the trial court's determination [that the property was substantially complete] is the fact that some of the apartments were occupied. ... It is clear that occupancy is the single most telling indication of completion."). Rather, in this petition, the decisive issue is whether the building *may* be legally occupied for its intended purpose.

In one case, City Nat. Bank of Miami v. Blake, 257 So. 2d 264, 266 (Fla. 3d DCA 1972), which was decided under the obsolete "every reasonable hypothesis" standard, the court gave examples of "minor difficulties" which, it held, did not impede a finding of substantial completion:

> The statute specifies substantial completion, and not that every detail of construction and ornamentation be final. Here, the structure was built and the business in operation. The minor difficulties to which the appellant points, such as with the elevator, telephone and roof problems, are the usual 'bugs' which any business must expect. (internal citation omitted).

Here, the building was (apparently) structurally complete on January 1, but could not be legally used as an ALF due to a lack of a CO and ACHA license. As such, the business could not be "in operation", and I simply cannot find that the CO and AHCA license are "minor difficulties". Unlike City Nat., these issues are not like "elevator, telephone and roof problems" which might be inconvenient, but which the business could work through.

Conclusion

The AHCA license and CO are required for the building to be "used for the purpose for which it was constructed" -- as an ALF. F.S. 192.042(1). The absence of both the AHCA license and the CO on January 1 precludes a finding of substantial completion. *See, e.g.*, Markham. Based upon the foregoing, I recommend that the PAO's second request for reconsideration be denied.

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Subject: RE: Request for Reconsideration: 2020-00147

Mr. Thalwitzer,

I am writing of behalf of the petitioner with regard to the Property Appraiser's second request for reconsideration of Petition 2020-00147.

I have reviewed the decision at issue as well as the Property Appraiser's prior request for reconsideration, your response, and this second request for reconsideration. Similar to your prior conclusion, this additional request should be denied with respect to the improvements.

I see no evidence regarding the land value, but would agree a land value should be included. The property record card online indicates a land value of $2,495,256. Assuming that is the correct land value, it should be included in a revised value as substantial completion decision does not remove the land value, only the improvements and potentially the extra features. With respect to the extra features, there is no record to make a determination either way, but I would assume the Property Appraiser argued this issue at the hearing and lost as the Special Magistrate determined those were not substantially complete. Accordingly, the value of the extra features should not be included in the VAB decision.

As you noted in your prior response, the key part of the substantial completion analysis is whether the improvement can be used for the purpose for which it was constructed pursuant to section 192.042(1). The subject property was constructed to be an ALF. As such a final Certificate of Occupancy and a License need to be in place before the improvements can be used for their intended purpose. In this case, the Certificate of Occupancy was issued after January 1, 2020, on January 28, 2020. With respect to the license that was not issued until March 30, 2020, you noted in your prior email:

> The ACHA license is not "minor" to the intended use of the subject property, it is critical. It is also not something which "might" be necessary; it is a strict legal requirement which must be satisfied before the subject property may serve as an ALF.

Therefore, as of January 1, 2020, the improvements were not substantially complete such that they could have been used for their intended purpose.

I would also point out the two cases on substantial completion cited by the Property Appraiser were decided under the obsolete prior burden of proof. See *Mikos v. Two M. Development Corp.*, 546 So. 2d 1110 (2d DCA 1989) (noting "the burden on a taxpayer challenging an assessment is heavy because a tax assessment carries a presumption of correctness. In order for a taxpayer to overcome this presumption, he must present evidence which excludes every reasonable hypothesis of a legal assessment, i.e., the taxpayer must present evidence that shows the assessment to be so unreasonable as to be arbitrary and capricious"); *see also Markham v. Kauffman*, 284 So. 2d 416, 418 (Fla. 4th DCA 1973) (tax assessor's determination that property was substantially complete must be "affirmatively overcome by appropriate and sufficient allegations and proofs excluding every reasonable hypothesis of a legal assessment."). I believe every reported appellate case involving substantial completion was decided upon this obsolete every reasonable hypothesis standard. As such, they should be viewed with heavy scrutiny as it is arguable these cases would have been decided differently under the current burden of proof. As you know, in this matter, the taxpayer only needed to prove by a preponderance of evidence that the subject property was not substantially complete.

Additionally, the cases cited by the Property Appraiser do not involve the same property type as the subject property. This is a key distinction because the analysis focuses on whether the property is complete for its intended purpose. None of the cases cited by the Property Appraiser involve an ALF which cannot operate without a ACHA license—which as you noted is not "minor." On the certificate of occupancy side, the case of *Markham v. Yankee Clipper Hotel, Inc.*, 427 So. 2d 383, 386 (Fla. 4th DCA 1983) held that hotel building improvements were not substantially complete when certificate of occupancy was not issued until January 12 and numerous inspections were required and conducted after January 1. As another court noted while determining a property was not substantially complete under the any reasonable hypothesis standard, "occupancy is the single most telling indication of completion." *Culbertson v. Seacoast Towers East, Inc.* 232 So. 2d 753 (Fla. 3d DCA 1970). Occupancy is not determinative, but it is an important factor. The subject property was not occupied until well after January 1, 2020.

Therefore, on behalf of the petitioner I would request you deny this second request for reconsideration. As you and the Property Appraiser are aware, the Property Appraiser has a legal right to appeal the decision by filing a circuit court action. If he continues to feel the decision was wrongly decided, that is the forum where these type of requests should be raised.

Thank you for your consideration.

Patrick Risch

Patrick J. Risch

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Subject: [EXTERNAL] RE: Request for Reconsideration: 2020-00147

Good afternoon,

I would like to thank Mr. Thalwitzer for taking the time to opine on this matter. I have a great deal of respect for his opinion and believe that he wants the Board to make the right decision. I do not want to take an unwarranted "second bite at the apple" but I feel the need to point out that there seems to be a disconnect somewhere.

Firstly, the Special Magistrate's recommendation states the subject property's value should be $0 (zero dollars). There is at least land value attributable to the property and there is value in the extra features, neither of which were challenged during the hearing. The Property Appraiser would, at a minimum, request that the other values associated with the property be accurately reflected on the recommendation.

Secondly, perhaps I did not fully explain the Property Appraiser's duties when adding improvements to the tax roll. As stated many times by all parties, §192.042(1), *Florida Statutes*, defines "substantial completion as when "*the improvement* or some self-sufficient unit within it can be used for the purpose for which it was constructed." (Emphasis added) The Property Appraiser is charged with valuing the fee simple, unencumbered interest in the

property; not whether a business is able to operate on the property (Fla. Const. art. VII, § 4, *see also* Bystrom v. Valencia Ctr., 432 So. 2d 108 (Fla. 3d DCA 1983); Singh v. Walt Disney Parks & Resorts US, Inc., *45 Fla. L. Weekly D1873* (Fla. 5th DCA August 7, 2020)). Nothing in case law or any other definition of "substantial completion" directs a Property Appraiser to determine whether the business intended to operate within the building is able to do so. Instead, the plain language demands an analysis of whether the improvement *can be used*, and in this case, the subject property could have been used for its intended purpose on January 1. The subject improvement simply was not being used while the intended occupant awaited their business license. A business license was the only thing impeding the subject improvements from being used as an assisted living facility and nothing was presented to show that the physical improvements themselves were not substantially complete.

It is not within a Property Appraiser's area of expertise to check every business license to determine if a business can, in fact, operate on a parcel. There are simply too many business types for the Property Appraiser to have the requisite expertise to know all the requirements to operate every possible business. Many businesses require numerous certifications, not just a business license, to operate. Requiring the Property Appraiser to follow the Special Magistrate and Mr. Thalwitzer's analysis, it would be impossible for the Property Appraiser to make a substantial completion determination and only fully operational newly constructed businesses would be added to the tax roll, rendering the "substantially complete" provisions of the law useless. Nothing in any relevant legal authority refers to a business license being needed to place substantially complete tangible/physical improvements on the tax roll. All analyses of "substantial completion" speak of the physical building itself. In the case Markham v. Kauffman, 284 So. 2d 416 (Fla. 4th DCA 1973), the *building could not be occupied*, but the court still deemed it appropriate to place the improvements on the tax roll. Here, as the evidence demonstrated, the building was ready for occupancy. To disregard the improvements on the property and not assess them is not only contrary to professionally accepted appraisal practices, but contrary to Florida law.

I would like to provide some illustrations of the Property Appraiser's position in an effort to clarify further: let's say we have a situation where a construction company is in the business of constructing assisted living facilities for the purpose of leasing them out to separate companies which would obtain their own licenses to actually operate the facility. On January 1, construction is complete, but the builder has not yet acquired a tenant with that license. Under the analysis provided by Mr. Thalwitzer and the Special Magistrate, that complete building would not be added to the tax roll. The building is complete for the purpose for which it is intended, but the ability to actually operate the business within the improvement has not yet come to fruition. A business license, even if it is required to fulfill the true purpose for which the building was constructed, has nothing to do with the completeness, or *substantial* completeness, of the improvement; whether the improvement is complete for the purpose for which it was intended, or whether or not it should go on the tax roll. If no license is obtained, the building still exists and may either be operated as something else in the interim or remain vacant until a business operator with the appropriate license is located, but it is still appropriately added to the tax roll, even if as vacant. The ultimate purpose may be as an assisted living facility, but if that specific business license was never granted, under the analysis provided, the improvements would never be added to the tax roll.

Put simply, there is no correlation between a substantially complete improvement and a business license. Another such example would be a hair salon. If the space is not leased, or the operator does not obtain his or her DBPR license for the operation of a salon until after January 1, that unoccupied space still must be placed on the tax roll. It would be

impermissible for the Property Appraiser to deduct or delete the square footage of a building or remove a stand-alone improvement from the tax roll due to the hair stylists' license not being in-place as of January 1. A Property Appraiser assesses the unencumbered fee simple interest. A business license is an "encumbrance" as part of the leased fee interest, which we do not assess. This same scenario applies to substantially complete restaurants (which require many more certifications than just a business license), day cares, medical office buildings, specialty retail space, and virtually all property types.

Orange County has several properties that fit this scenario which are added to the tax roll, or remain on the tax roll, every year when the improvements are unoccupied or the type business that the building was intended for is not in operation. The same is true for counties across the state. The Courts have ruled that: "(A)ctual occupancy is not the appropriate test for substantial completion of an improvement project subject to assessment under Fla. Stat. ch. 192.042(1) (1987) in every case. In the present day business world, there may be several stages between the beginning of construction and the time of occupancy during which the improvement is substantially complete for the purpose for which the taxpayer constructed it." Mikos v. Two M. Dev. Corp., 546 So. 2d 1110 (Fla. 2d DCA 1989). (*Note: the 1987 version of §192.042(1) is identical to the 2019 version.*) To treat the subject property differently will yield an inequitable assessment and the future ramifications would have a chilling effect on the Orange County tax roll.

There is no question that subject improvement was substantially complete on January 1. There was no testimony that any portion of the improvement still needed to be constructed, just that the business license had not been obtained. The subject improvement was ready for occupancy and was rightfully added to the tax roll by the Property Appraiser, so the Property Appraiser asks again that the Special Magistrate's recommendation be overturned.

Thank you,

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Subject: FW: Request for Reconsideration: 2020-00147

Good Afternoon.

Please see the below response from VAB Counsel Thalwitzer regarding the Property Appraiser's Request for Reconsideration concerning petition 2020-00147.

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PHIL DIAMOND, CPA
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Subject: RE: Request for Reconsideration: 2020-00147

Hi Jessica,

In this substantial completion petition, the subject property was intended to be an assisted

living facility ("ALF"). In Florida, an operator of an ALF requires approval from Florida's Agency for Healthcare Administration, Division of Health Care Quality Assurance ("ACHA"). Such approval was not issued until 3/30/2020, well after the 1/1/20 date of assessment. As such, it appears undisputed that the petitioner could not operate an ALF at the subject property on 1/1/20.

The PAO argues that this petition and the underlying factual background, are indistinguishable from a different petition in which the SM found that substantial completion had been reached even though only a Temporary Certificate of Occupancy had been issued. I disagree. In the instant petition, the petitioner cannot use the property for its intended use, as an ALF, without a license which it lacked on 1/1/20. The PAO's argument is essentially that, because the petitioner could make *some* use of the subject property even with the license, it is irrelevant that it could not make its intended use. In other words, the PAO appears to take the position that the SM should find substantial completion because, even without the ACHA license, the subject property could house regular tenants or be used in some other non-ALF way. This argument ignores the definition of "substantially completed" cited in the PAO's request: "the improvement or some self-sufficient unit within it *can be used for the purpose for which it was constructed*" (emphasis supplied) F.S. 192.042(1). Using the subject property other than as an ALF is not using it "for the purpose for which it was constructed".

The PAO also attempts to minimize the importance of the ACHA license to the intended use of the subject property, analogizing it to a case in which a property was found to be substantially complete "even though some minor items might be required to be added." Implicit in this argument is the conclusion that the ACHA license is a "minor item[]" which "might" be required. I disagree with this notion. The ACHA license is not "minor" to the intended use of the subject property, it is critical. It is also not something which "might" be necessary; it is a strict legal requirement which must be satisfied before the subject property may serve as an ALF.

Consequently, I agree with the recommended decision's finding that the subject property had not reached substantial completion on 1/1/20, and accordingly would deny the request for reconsideration.

Thank you,

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Subject: Request for Reconsideration: 2020-00147

Good afternoon,

Please see the attached correspondence.

Thank you,

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