SUPREME COURT OF FLORIDA

Case No.: **SC15-774**

Lower Tribunal Case Nos.
1D14-1671
032013-CA-1355

DAN SOWELL, in his official capacity as Property Appraiser of Bay County, Florida; et al.,

Appellants,

vs.

PANAMA COMMONS L.P.,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT, DAN SOWELL, BAY COUNTY PROPERTY APPRAISER

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PRELIMINARY STATEMENT

Appellant, Dan Sowell, Bay County Property Appraiser, will be referred to herein as the "property appraiser." Appellant, Marshall Stranburg, Executive Director of the Florida Department of Revenue will be referred to herein as the "department." Appellee, Panama Commons, L.P., will be referred to herein as "Panama Commons." References to the record on appeal will be delineated as (R-volume #-page #).

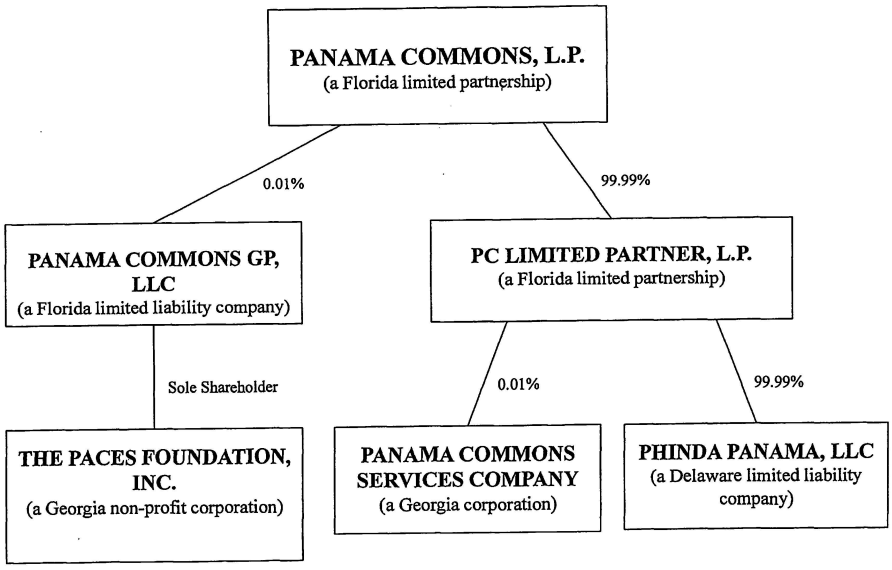
STATEMENT OF THE CASE AND OF THE FACTS

In this ad valorem tax case, the First District Court of Appeal, in a 2-1 decision, declared unconstitutional the legislature's 2013 amendments to section 196.1978, Florida Statutes, which eliminated a type of limited partnership ownership structure from qualifying for the affordable housing tax exemption. *Stranburg v. Panama Commons L.P.*, 160 So.3d 160 (Fla. 1st DCA 2015). The district court concluded that the 2013 amendments were unconstitutional because they retroactively repealed the taxpayer's vested right to receive an ad valorem tax exemption that had accrued on January 1, 2013. The property appraiser respectfully submits that the district court's decision was erroneous and should be reversed.

The property at issue is known as "Panama Commons Apartments" and is located in Panama City, Florida (subject property). (R-I-2, ¶5) The improvements on the subject property were completed in 2011 and consist of 92 units that are restricted for use by persons qualified as extremely-low-income, very-low-income, low-income, or moderate-income, as defined by section 420.0004, Florida Statutes (2013). (R-I-6, ¶25) On January 1, 2013, five of those units were vacant. (R-III-440) The remaining 87 units were occupied by qualifying tenants. (*Id.*)

The subject property is owned by Panama Commons, LP, a Florida limited partnership (Panama Commons). (R-I-129) The sole general partner of Panama Commons is Panama Commons GP, LLC, a Florida limited liability company (general partner). (R-I-2, ¶2) The sole member of the general partner is Paces Foundation, Inc., a non-profit corporation exempt from federal income tax under section 501(a) and (c)(3) of the Internal Revenue Code (Paces Foundation). (R-I-2, ¶4) The general partner has a 0.01% ownership interest in Panama Commons. (R-I-132)

The remaining 99.99% ownership interest in Panama Commons is attributable to PC Limited Partner, LP, which is another Florida limited partnership (PCLP). (R-I-132) Panama Commons Services Company, a Georgia corporation (PCSC), is a wholly owned subsidiary of the Paces Foundation and has a 0.01% ownership interest in PCLP. (R-I-139-40) PHINDA Panama, LLC, a Delaware limited liability company (PHINDA), has the remaining 99.99% ownership interest in PCLP. (R-I-67, p. 170) The complex ownership structure may be best explained with the following chart:



(R-I-67, exh. #2)

For the 2012 tax year, Panama Commons applied for and received the affordable housing tax exemption pursuant to section 196.1978, Florida Statutes (2012), which provided:

> Property used to provide affordable housing serving eligible persons as defined by s. 159.603(7) and natural persons or families meeting the extremely-low-income, very-low-income, low-income, or moderate-income limits specified in s. 420.0004, which property is owned entirely by a nonprofit entity that is a corporation not for profit, qualified as charitable under s. 501(c)(3) of the Internal Revenue Code and in compliance with Rev. Proc. 96-32, 1996-1 C.B. 717, *or a Florida-based limited partnership, the sole general partner of which is a corporation not for profit which is qualified as charitable under s. 501(c)(3) of the Internal Revenue Code and which complies with Rev. Proc. 96-32, 1996-1 C.B. 717*, shall be considered property owned by an exempt entity and used for a charitable purpose, and those portions of the affordable housing property which provide housing to natural persons or families classified as extremely low

> income, very low income, low income, or moderate income under s. 420.0004 shall be exempt from ad valorem taxation to the extent authorized in s. 196.196. All property identified in this section shall comply with the criteria for determination of exempt status to be applied by property appraisers on an annual basis as defined in s. 196.195. The Legislature intends that any property owned by a limited liability company *or limited partnership* which is disregarded as an entity for federal income tax purposes pursuant to Treasury Regulation 301.7701-3(b)(1)(ii) shall be treated as owned by its sole member *or sole general partner*.

§ 196.1978, Fla. Stat. (2012) (emphasis added). The language in italics authorizing a limited partnership entity with a general partner that is a non-profit entity to qualify for the exemption only had recently been added to the statute in 2009. Ch. 2009-96, § 18, Laws of Fla. (2009). Prior to that time, such an organizational structure was not eligible for the affordable housing tax exemption.

During the 2013 session, the legislature passed two bills amending section 196.1978 "retroactively to the 2013 tax roll." Ch. 2013-72, § 11, Laws of Fla. (2013); Ch. 2013-83, § 3, Laws of Fla. (2013). The 2013 amendments deleted language providing that property owned by a "Florida-based limited partnership, the sole general partner of which is a corporation not for profit which is qualified as charitable under s. 501(c)(3) of the Internal Revenue Code and which complies with Rev. Proc. 96-32, 1996-1 C.B. 717" was eligible to receive the affordable housing tax exemption. The bills were signed into law on May 30, 2013, and took effect on July 1, 2013.

The title language of Chapter 2013-72 described the amendment as "removing the ability of a general partner classified as a 501(c)(3) organization to qualify as a limited partnership for the affordable housing property tax exemption." The title language of Chapter 2013-83 stated that it was "deleting an ad valorem tax exemption for property owned by certain Florida-based limited partnerships and used for affordable housing for certain income-qualified persons." Thus, the result of the 2013 amendments was that an affordable housing tax exemption was limited to property owned by a section 501(c)(3) corporation. Under the 2013 amendments, Panama Commons would not qualify for the exemption.

In March 2013, Panama Commons filed an application for the affordable housing tax exemption for the 2013 tax year. (R-II-291) The property appraiser timely denied the exemption based on the 2013 amendments. (R-II-319) The denial stated as follows:

> The property is not 'owned entirely by a nonprofit entity that is a corporation not for profit, qualified as charitable under s. 501(c)(3) of the Internal Revenue Code and in compliance with Rev. Proc. 96-32, 1996-1 C.B. 717,' as required by section 196.1978, Florida Statutes (2013). The property owner, Panama Commons, L.P., is a limited partnership, which is not included as an entity qualifying for the exemption under section 196.1978.

(*Id.*)

Panama Commons filed a complaint contesting the denial of its exemption. (R-I-1) In its complaint, Panama Commons asserted that the 2013

amendments "retroactively eliminate" its affordable housing tax exemption for the 2013 tax year. (R-I-7, ¶28) Panama Commons further asserted that because its "right to a tax exemption for 2013 was vested by virtue of [its property's] exempt ownership and use on January 1, 2013, under the law in effect on that date," the legislature could not "retroactively repeal" the exemption. (R-I-1, 8, ¶¶ 1, 33)

After discovery, the property appraiser and the Department of Revenue (department) filed summary judgment motions. (R-II-185-201; 273-286) The motions argued that the 2013 amendments were constitutional and, accordingly, the property appraiser correctly denied the affordable housing exemption for the 2013 tax year. (*Id.*)

Panama Commons submitted a memorandum in opposition to the summary judgment motions. (R-II-320-336) Panama Commons also filed a summary judgment motion, arguing that it was entitled to the affordable housing exemption for its property for the 2013 tax year under the prior version of section 196.1978. (R-III-389-390)

At the hearing on the summary judgment motions, the parties agreed that there were no disputed issues of material fact and that the constitutionality of the 2013 amendments presented a question of law. (R-V-773-774) The trial court ruled that the 2013 amendments could not be constitutionally applied to the 2013

tax year and granted partial summary judgment in favor of Panama Commons on this issue. (R-III-432-434) The trial court concluded, in pertinent part, as follows:

> 5. Defendants contend that the Legislature can enact new tax laws in the 2013 session that apply to the 2013 tax roll, and that such laws are not retroactive because Property Appraisers can apply them to deny exemptions after enactment. However, Ch. 2013-72 § 11 and Ch. 2013-83 § 3 were intended by the Legislature to be retroactively applied to January 1, 2013. This is clear from the plain language in the acts themselves, which expressly direct retroactive application to the 2013 tax roll; and from the context of the annual tax cycle, in which the status of property as taxable or exempt is determined for the year by its ownership and use on January 1, under laws in effect on January 1. *See Dade County Taxing Auth. v. Cedars of Lebanon Hosp. Corp.,* 355 So. 2d 1202, 1204 (Fla. 1978), citing Fla. Stat. § 192.042; *Page v. City of Fernandina Beach*, 714 So. 2d 1070, 1072 (Fla. 1st DCA 1998).
>
> 6. As retroactively applied to the 2013 tax roll, both Ch. 2013-72 § 11 and Ch. 2013-83 § 3 are unconstitutional under the rational of *State Farm Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995); *Coventry First LLLC v. State*, 30 So. 3d 552 (Fla. 1st DCA 2010), and *Dept. of Revenue v. Liberty Nat'l Ins. Co.*, 667 So. 2d 445 (Fla. 1st DCA 1996), since they impair a vested right (to wit: a property owner's right to an exemption which was established on January 1, 2013, prior to the effective date of the legislative change); and also because they would create a new obligation on property and property owners which was not in effect on January 1, 2013 (to wit: the obligation to pay property taxes on otherwise exempt property).

(R-III-433-434)

The effect of the trial court's ruling was that Panama Commons' entitlement to the affordable housing exemption was to be determined by applying the 2012 version of section 196.1978. After the trial court entered the ruling, therefore, the property appraiser issued a second notice of denial under the 2012 statute. (R-III-439)

The property appraiser also served a response in opposition to Panama Commons' summary judgment motion. (R-III-441-454) The response argued that the receipt of tax credits and depreciation write-offs were benefits that precluded Panama Commons from qualifying as an exempt entity under section 196.195(3), Florida Statutes (2013), as held in *TEDC/Shell City, Inc. v. Robbins*, 690 So.2d 1323 (Fla. 3d DCA 1997). *Robbins* held that, because section 196.195(3) precludes the applicant, its members, directors, or officers or "any person or firm operating for profit or for a non-exempt purpose," from receiving any benefit inuring from the property, the receipt of tax credits disqualified the applicant from receiving an ad valorem tax exemption. *Id.* at 1324.

At the subsequent hearing, the parties again agreed that there was no disputed issue of material fact and that whether Panama Commons qualified for the affordable housing tax exemption under the prior version of section 196.1978 presented an issue of law. (R-V-763) The trial court rejected the property appraiser's reliance upon *TEDC/Shell City* and rendered a final summary judgment

in favor of Panama Commons, concluding that it was entitled to the exemption with the exception of the five vacant units. (R-IV-750).

On appeal, the majority opinion of the First District Court concluded that the retroactive repeal of the tax exemption was unconstitutional because it impaired a vested right and imposed a new tax obligation. *Stranburg*, 160 So.3d at 162. Because the taxable or exempt status of property is determined as of January 1 of each year, the majority reasoned that the legislature had "created a constitutionally protected expectation that the substantive law in effect on that date will be used to make the determination." *Id.* at 163. Thus, the legislature's attempt during the 2013 legislative session to eliminate an organizational structure qualifying for the affordable housing tax exemption for that tax year was constitutionally infirm.

In his dissent, Judge Benton opined that, although January 1 of each year is the determinative date for ascertaining the use to which potentially exempt property is put, the legislature was not constitutionally prohibited from repealing that exemption for the current tax year. The right to the exemption does not vest "prior to applying for the exemption, prior to receiving notice of the Property Appraiser's determination, prior to the Property Appraiser's certification of the tax roll, and prior to the levy of any tax." *Id.* at 166. Judge Benton concluded that there was no vested right to the exemption but, rather, only a mere expectation

based on an anticipation of the continuance of an existing law that it would receive the exemption for the 2013 tax year after it had received the exemption for the 2012 tax year. *Id.* In his view, there really was no retroactive application of the statute because the "2013 repeal applied to 2013 and to no prior tax year." *Id.* at 165.

SUMMARY OF THE ARGUMENT

The district court erred by declaring the 2013 amendments unconstitutional. The 2013 amendments are not retroactive so as to raise any due process concerns because they apply to the *current* tax year for which the statute was amended rather than a *prior* tax year. As such, the legal issue presented to this Court is whether the legislature has the constitutional authority to amend the ad valorem tax laws applicable to the current tax year.

The legislature frequently enacts changes to the ad valorem tax laws that are intended to apply to the same tax year as the session in which they were adopted. There are no tax cases concluding that the legislature is constitutionally prohibited from changing the tax laws to be applied for that year and no retroactivity concerns are implicated.

Assuming arguendo that the 2013 amendments are retroactive when applied to January 1, such an application is not unconstitutional because it does not raise any due process concerns or impair any vested rights of Panama Commons,

either in (1) receiving an affordable housing tax exemption for the 2013 tax year based on a statute in effect on January 1, 2013, or (2) continuing to receive an affordable housing tax exemption for the 2013 tax year because it received the exemption in the 2012 tax year. At most, Panama Commons had a mere *expectation*, rather than a vested right, that the eligibility requirements for an affordable housing tax exemption in effect for the 2012 tax year would continue during the 2013 tax year. Moreover, because a property appraiser is in no way bound to reach the same determination on a taxpayer's entitlement to an exemption from one tax year to the next, Panama Commons has no vested rights in continuing to receive an affordable housing tax exemption simply because it received the exemption in a prior year.

STANDARD OF REVIEW

The constitutionality of a state statute is a question of law that is reviewed *de novo*. *Haddock v. Carmody*, 1 So.3d 1133 (Fla. 1st DCA 2009). Although courts review such questions *de novo*, they are obliged to accord legislative acts a presumption of constitutionality and to construe challenged legislation to effect a constitutional outcome whenever possible. *Dep't of Revenue v. Howard*, 916 So.2d 640 (Fla. 2005).

ARGUMENT

I. THE LEGISLATURE HAS THE CONSTITUTIONAL AUTHORITY TO AMEND THE AD VALOREM TAX LAWS APPLICABLE TO THE CURRENT TAX YEAR.

In the instant case, the 2013 session laws amending section 196.1978 provide that the amendments apply "retroactively to the 2013 tax roll." Ch. 2013-72, § 11, Laws of Fla. (2013) ("Applying retroactively to the 2013 tax roll..."); Ch. 2013-83, § 3, Laws of Fla. (2013) ("Effective upon this act becoming law and operating retroactively to the 2013 tax roll..."). Numerous examples exist whereby the legislature has utilized language similar to that in the 2013 amendments when enacting or amending ad valorem tax statutes to make it clear that the legislation was applicable to the same tax year in which the legislation was passed. *See e.g.* Ch. 2013-95, § 4, Laws of Fla. (2013) (providing that a 2013 amendment regarding agricultural classification and value adjustment boards "shall take effect upon becoming a law and applies retroactively to January 1, 2013"); Ch. 2012-193, § 33, Laws of Fla. (2012) (amending numerous provisions regarding ad valorem taxation and exemptions to "take effect upon this act becoming law and shall first apply to ad valorem tax rolls for 2012"); Ch. 2011-93, § 6, Laws of Fla. (2011) (providing that the exemption for deployed servicemembers created under section 196.173, Florida Statutes, "shall take effect upon becoming a law, and first applies to ad valorem tax rolls for 2011"); Ch. 2010-170, § 2, Laws of Fla. (2010) (enacting

provisions for the assessment of properties with contaminated drywall that "shall apply to the 2010 and subsequent assessment rolls"); Ch. 2009-121, § 3, Laws of Fla. (2009) (changing the burden of proof in property tax cases that "shall first apply to assessments in 2009"). In each of these instances, the legislature was expressing its intent that the act should be applied to the current tax year.

Even constitutional amendments have been declared retroactively applicable to January 1 of the year in which the amendment was approved by the voters. For example, the 2008 property tax relief amendments that created a 10 percent assessment cap on non-homestead real property, doubled the $25,000 homestead tax exemption, exempted $25,000 of tangible personal property owned by businesses, and provided for portability of the "Save Our Homes" assessment cap differential all were submitted to the voters in the special election held January 29, 2008, but expressly made retroactive to January 1, 2008. *See* Art. XII, § 27, Fla. Const.

In contrast, the legislature has passed ad valorem tax legislation intended to retroactively apply to prior tax years. In 2010, the legislature passed an amendment to the agricultural classification statute that was declared "remedial and clarifying in nature and applies retroactively to all parcels for which a final court order has not yet been entered as of the effective date of this act." Ch. 2010-277, § 2, Laws of Fla. (2010). In 2009, the legislature provided that changes

regarding the educational exemption "shall operate retroactively to January 1, 2005." Ch. 2009-130, § 3, Laws of Fla. (2009). In 1997, the legislature amended the definition of special district for purposes of the governmental exemption statute and declared it was to "take effect upon this act becoming a law and shall apply to the 1995 tax rolls and thereafter." Ch. 97-255, § 4, Laws of Fla. (1997).

Certainly, a more difficult question may be presented if a challenge were made to any legislative enactment that retroactively applied to a prior tax year. The Florida ad valorem tax system contemplates an annual determination of the valuation of property and entitlement to exemptions. *See* §§ 192.042, 196.011, Fla. Stat. (2013). It is well settled that a property appraiser's assessed value must stand or fall on its own validity, unconnected with the assessment against that property during any prior or subsequent year. *See Simpson v. Merrill*, 234 So.2d 350 (Fla. 1970); *Container Corp. v. Long*, 274 So.2d 571 (Fla. 1st DCA 1973); *Keith Invs., Inc. v. James*, 220 So.2d 695 (Fla. 4th DCA 1969). Accordingly, evidence of the prior years' assessments is irrelevant when contesting the value for a subsequent year. *Long*, 274 So.2d at 573; *Hecht v. Dade County*, 234 So.2d 709 (Fla. 3d DCA 1970). Even when there may be a showing that no change in circumstances occurred since the last year's assessment, evidence of the prior year's assessment is irrelevant and inadmissible. *Simpson*, 234 So.2d at 352;

Homer v. Hialeah Race Course, Inc., 249 So.2d 491 (Fla. 3d DCA 1971); *Long*, 274 So.2d at 573.

In the instant case, while the legislation is retroactive in the sense that it applies to a date earlier in the same calendar year, it does not retroactively apply to a prior tax year. The 2013 amendments, therefore, clearly indicate the legislature's intent that property appraisers rely upon the new language in reviewing affordable housing tax exemption applications for the 2013 tax year. The practical result is that the 2013 amendments are being applied to the *current* tax year rather than a *prior* tax year. As such, the legal issue presented to this Court is whether the legislature has the constitutional authority to amend the ad valorem tax laws applicable to the current tax year. This Court should decline to declare that the legislature lacks authority to make changes to Florida's tax laws effective to the current tax year and future tax years. No retroactive application exits, and no due process concerns are implicated.

A review of the statutory framework governing the tax roll process supports the conclusion that the 2013 amendments are not retroactive to a *prior* tax year but, rather, are applicable to the *current* tax year. Each year, property appraisers prepare real property and tangible personal property assessment rolls, which reflect the just, assessed, and taxable value of property, and any applicable exemptions. § 193.114, Fla. Stat. (2013). A taxpayer must annually file an

exemption application by March 1 of each year. § 196.011(1)(a), Fla. Stat. (2013). A taxpayer may file a late application with the property appraiser until the 25th day following the mailing of the Notices of Proposed Property Taxes and Non-Ad Valorem Assessments (TRIM), which the property appraiser may grant if he or she determines that the taxpayer demonstrated extenuating circumstances for the late filing. § 196.011(8), Fla. Stat. (2013). Absent extenuating circumstances, the property appraiser decides whether to grant or deny an exemption by July 1 of the tax year for which the application was filed. *See* §§ 196.011(6)(a); 196.151, 196.193(5)(a), Fla. Stat. (2013). The taxpayer's failure to apply for the exemption, however, constitutes a waiver of the exemption for that year. § 196.011(1)(a), Fla. Stat. (2013).

Property appraisers submit preliminary assessment rolls to the department by July 1 of each tax year. § 193.1142(1)(a), Fla. Stat. (2013). Once the department approves the assessment rolls, property appraisers mail TRIM notices to all taxpayers typically in August of each year. *See* § 200.069, Fla. Stat. (2013). Upon receiving the TRIM notice, a taxpayer can file a petition contesting the assessment – either the value or exempt status – of its property with the value adjustment board (VAB). *See* § 194.011(2), (3) Fla. Stat. (2013). Property appraisers certify the assessment rolls to the tax collector for collection in October of each year. *See* § 193.122, Fla. Stat. (2013).

The certification date, or the date the VAB renders its decision concerning a petition, are the trigger dates for the filing of any suit to contest the assessment. § 194.171, Fla. Stat. (2013). Florida has a 60-day jurisdictional non-claim period in which to file suit so as to ensure prompt payment of taxes due and make available revenues that are not disputed. *Ward v. Brown*, 894 So.2d 811, 815 (Fla. 2004).

A property appraiser loses any authority to change the assessed value or exempt status of property once he or she certifies the tax roll for collection. *Korash v. Mills*, 263 So.2d 579 (Fla. 1972); *Underhill v. Edwards*, 400 So.2d 129 (Fla. 5th DCA 1981). A property appraiser's revocation of an exemption is prohibited as a "change in judgment" once the tax roll has been certified to the tax collector. *Underhill*, 400 So.2d at 132. Accordingly, a property appraiser only may correct errors of omission or commission after he or she certifies the tax roll for collection. *See* § 197.122(1), Fla. Stat. (2013). This Court discussed the narrow types of clerical and mathematical errors that may be corrected after the tax roll is certified in *Smith v. Kroschell*, 937 So.2d 658, 661 (Fla. 2006).

It is well established that the ownership and use of the property on January 1 of the tax year is the dispositive issue in determining entitlement to an exemption. "The law in Florida has long been that January 1st is the critical day for ad valorem taxation on real property and it is the property's actual use on that

day that is dispositive of its tax treatment." *Parrish v. Pier Club Apts., LLC*, 900 So.2d 683, 687 (Fla. 4th DCA 2005); *see also Dade County Taxing Auths. v. Cedars of Lebanon Hosp. Corp.,* 355 So.2d 1202 (Fla.1978) (holding hospital not entitled to exemption for newly constructed patient care center for 1974 tax year because, while building was complete, as of January 1st, no patient had yet been admitted and, in fact, premises were occasionally rented to businessmen); *Lake Worth Towers, Inc. v. Gerstung,* 262 So.2d 1 (Fla.1972) (stating property not entitled to exemption that applied to homes for the aged for 1968 tax year where the building was not complete until March); *Lanier v. Overstreet,* 175 So.2d 521, 523-24 (Fla.1965) ("In this state, the ad valorem tax on real and personal property accrues as of January 1st of the tax year. . . . The character of a particular parcel . . . is determined as of January 1st and continues throughout the tax year regardless of any change in its character during that year.").

The requirement that entitlement to an exemption rests upon the ownership and use as of January 1, however, does not preclude the legislature from changing the statutes applicable to that exemption for the current tax year. In this regard, property appraisers simply are applying the controlling statute to the exemption application at issue for the current tax year based on the ownership and use as of January 1.

The 2013 amendments do not retroactively repeal an affordable housing tax exemption *received* by a taxpayer in a *prior* tax year. An affordable housing tax exemption received by a taxpayer for any tax year prior to the 2013 tax year is unaffected by the 2013 amendments. A more difficult question perhaps might be presented if the 2013 amendments were intended to repeal Panama Commons' affordable housing tax exemption for the 2012 tax year. However, that is not the situation in the instant case.

As this Court has explained, a statute "does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment." *Metro. Dade County v. Chase Fed. Housing Corp.*, 737 So.2d 494, 499 (Fla.1999), quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70 (1994). Instead, a court must focus on "whether the new provision attaches new legal consequences to *events completed* before its enactment." *Id*. (emphasis added). Under the facts presented here, the 2013 amendments apply to the *current* tax year and are not retroactive to a *prior* tax year so as to raise any due process concerns. The tax roll is not completed until it is certified to the tax collector.

II. THE 2013 AMENDMENTS DO NOT UNCONSTITUTIONALLY IMPAIR ANY VESTED RIGHT OF PANAMA COMMONS TO RECEIVE THE AFFORDABLE HOUSING TAX EXEMPTION.

Article I, Section 2 of the Florida Constitution guarantees the right "to acquire, possess and protect property." Art. I, § 2, Fla. Const. Section 9 of Article I provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const. These constitutional provisions protect individuals from the retroactive application of a substantive law that "impairs vested rights, creates new obligations, or imposes new penalties." *State Farm Mut. Auto Ins. Co. v. Laforet,* 658 So.2d 55, 61 (Fla. 1995) (citations omitted).[1]

A court must focus on two "interrelated" issues when considering the retroactive application of a substantive statute. *Chase Fed.*, 737 So.2d at 499. First, a court must determine whether there is clear evidence of legislative intent that the statute apply retroactively. *Id.* If so, a court then must determine whether retroactive application of the statute is constitutionally permissible. *Id.* The second prong of the retroactivity analysis need not be reached unless a court determines that the legislature expressed a clear intent that the statute apply

[1] Substantive law "prescribes duties and rights" while procedural law "concerns the means and methods to apply and enforce those duties and rights." *Alamo Rent-a-Car, Inc. v. Mancusi,* 632 So. 2d 1352, 1358 (Fla. 1994) (citation omitted).

retroactively. *See Memorial Hosp.-W. Volusia, Inc. v. News-Journal Corp.*, 784 So.2d 438, 441 (Fla. 2001).

Assuming *arguendo* that the 2013 amendments should be determined as retroactively applicable to January 1, they do not impair any vested rights of Panama Commons. Retroactive application of a statute only is unconstitutional "in those cases wherein vested rights are adversely affected or destroyed or when a new obligation or duty is created or imposed, or an additional disability is established, [in] connection with transactions or considerations previously had or expiated." *Chase Fed.,* 737 So.2d at 503, quoting *McCord v. Smith,* 43 So.2d 704, 708-09 (Fla. 1949). A court, therefore, must reject retroactive application of a statute if such an application "impairs vested rights, creates new obligations, or imposes new penalties." *Laforet,* 658 So.2d at 61 (citations omitted).

This Court has defined a vested right as an immediate, fixed right of present enjoyment, or a present, fixed right of future enjoyment. *City of Sanford v. McClelland*, 163 So. 513, 514-15 (1935) (citation omitted); *See also In re Will of Martell*, 457 So.2d 1064, 1067 (Fla. 2d DCA 1984) ("A substantive, vested right is an immediate right of present enjoyment, or a present fixed right of future enjoyment.") (citations omitted). "To be vested, a right must be *more than a mere expectation based on an anticipation of the continuance of an existing law*; it must have become a title, legal or equitable, to the present or future enforcement of a

demand." *Div. of Workers' Comp. v. Brevda*, 420 So.2d 887, 891 (Fla. 1st DCA 1982) (emphasis added), quoting *Aetna Ins. Co. v. Richardelle*, 528 S.W.2d 280, 284 (Tex.Civ.App. 1975).

Vested rights are distinguished from expectant or contingent rights. *R.A.M. of South Fla., Inc. v. WCI Cmties., Inc.*, 869 So.2d 1210, 1218 (Fla. 2d DCA 2004). Rights are expectant when they "depend upon the continued existence of the present condition of things until the happening of some future event" and they are contingent when they "are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting." *Id.,* quoting *Pearsall v. Great N. Ry*., 161 U.S. 646, 673 (1896).

This Court recently addressed the issue of vested rights in the context of a change in the state pension statutes. *Blaesser v. State Bd. of Admin.*, 134 So.3d 1013 (Fla. 2012). There, a retiree asserted that a statutory change could not apply to him without impairing his vested right to renewed membership in the FRS when he returned to FRS-covered employment. This Court rejected the argument, stating that:

> Even if retirees had a right to renewed membership in the FRS prior to the 2009 enactment of section 121.122(2), *the legislature had the inherent authority to unilaterally alter that right as it applied to retirees who returned to state service after the amendment. See Fla. Sheriff's Ass'n v. Dep't of Admin., Div. of Ret.,* 408 So.2d 1033,

> 1037 (Fla.1981) (recognizing that a future legislature is not precluded from "prospectively altering benefits which accrue for future state service."). Absent the existence of a vested right to renewed membership in the FRS, appellant cannot assert the application of section 121.122(2) impaired his contractual rights under article I, section 10 of the Florida Constitution; constituted an improper taking of property under article X, section 6 of the Florida Constitution; or violated any other constitutional limitation.

Id. at 1016 (emphasis added).

Blaesser should be compared with another decision of this Court issued the next year. *Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners' Ass'n, Inc.*, 127 So.3d 1258 (Fla. 2013). In that case, the legislature enacted a statute that effectively abolished a cause of action for breach of implied warranties during the pendency of a case before this Court. The legislation was retroactively applicable to "all cases accruing before, pending on, or filed after" July 1, 2012. Ch. 2012-161, § 3, Laws of Fla. (2012).

This Court held that the statute could not be retroactively applied because it abolished Lakeview Reserve's vested right to a cause of action that had accrued under the common law. As this Court stated:

> Here, Lakeview Reserve is correct in its contention that section 553.835 is substantive and not remedial in nature because it does not simply clarify an existing right, but rather, prescribes legal duties and rights. Section 553.835 cannot be constitutionally applied retroactively to Lakeview Reserve's cause of action because that action is a vested right. Similar to the legislation in *Spiewak,*

> which attempted to limit legal rights in an action for injuries caused by asbestos by limiting such an action to individuals who could establish a particular level of personal injury, section 553.835 attempts to limit an individual's legal rights under an action for breach of the implied warranties by limiting such an action to only improvements specifically on or under a particular new home's lot that immediately and directly support the habitability of the home even if the defects specifically impact the habitability of the home. Therefore, as this Court held with regard to the statute in *Spiewak,* section 553.835 is substantive and not remedial in nature.

Maronda Homes, 127 So.3d at 1274.

The instant case is more akin to *Blaesser* than *Maronda Homes*. The district court incorrectly held that Panama Commons had a right to receive the affordable housing tax exemption for the 2013 tax year that vested on January 1 of that year. While the exemption is determined by the ownership and use as of January 1, no ad valorem tax case has concluded that the legislature cannot change the law applicable to that date during the same calendar year. Likewise, the district court's conclusion that the 2013 amendments unconstitutionally create a new obligation to pay taxes on otherwise exempt property is contrary to the line of cases holding that the anticipation of the continuance of existing law does not create a vested right. The obligation to pay taxes exists absent an exemption therefrom.

There is no right to an affordable housing tax exemption. *See Horne v. Markham*, 288 So.2d 196, 199 (Fla. 1973) (holding that there is no self-

executing constitutional right to a homestead tax exemption); *Zingale v. Powell*, 885 So.2d 277 (Fla. 2004) (holding that a taxpayer only qualifies for the Save Our Homes cap when he or she properly applies for and receives a homestead tax exemption). Instead, a taxpayer's ability to annually claim entitlement to *any* ad valorem tax exemption is established by the legislature. *See* § 196.001(1), Fla. Stat. (2013) (all real property is subject to taxation "unless expressly exempted").

The legislature has the "unquestioned authority" to modify or repeal ad valorem tax exemption statutes. *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974). As the court in *Straughn* explained, "it lies within the legislature's prerogative to repeal tax exemptions and impose taxes on lands previously exempt." *Id.* at 695 (citations omitted). Because the legislature "cannot bind its successors with respect to the exercise of the taxing power; a subsequent legislature has the unquestioned authority to repeal prior tax exemption statutes." *Daytona Bch. Racing & Rec. Facilities Dist. v. Volusia County*, 372 So.2d 419, 420 (Fla. 1979) (citations omitted).

Straughn involved long-term lease agreements for private residences and commercial properties on Santa Rosa Island. When the leases were entered, the controlling statute declared such properties exempt. In 1971, the legislature changed the controlling statute so as to eliminate the exemption.

Straughn held that the 1971 amendment did not unconstitutionally impair any contractual rights. This Court observed that "a subsequent legislature has the unquestioned authority to repeal prior tax exemption statutes." *Straughn*, 293 So.2d at 694. Simply because the properties originally were granted a tax exemption and enjoyed exempt status for a number of years afforded "no basis for forever removing and completely immunizing them from taxation." *Id*. As the Court further stated:

> It is our view that Chapter 71-133, Laws of Florida 1971, which became effective December 31, 1971, should be applied to all of the plaintiffs' leases executed prior to December 31, 1971, and that these leaseholds were taxable for the year 1972 and thereafter. To hold otherwise is contrary to existing legislative intent and obviously would give the statute a discriminatory and unconstitutional interpretation.
>
> We find no basis whatever for holding that the imposition of ad valorem taxation on plaintiffs' leaseholds would impair the obligation of contract. As before stated, there was no binding obligation on the part of the County or the Authority or the State, nor could there have been one constitutionally entered into by any of them, that never in the future could the legislature impose an ad valorem tax on plaintiffs' leasehold interests.

Id. at 695.

In the instant case, the district court's ruling is contrary to both *Straughn* and *Volusia County*. The district court effectively has allowed one legislature to bind a successor legislature with respect to the exercise of taxing

power. Such a conclusion is legally impermissible. Consider a situation where the legislature passes a statute in the waning days of session that creates an unintended loophole in the tax exemption laws resulting in many entities receiving tax exemptions for the 2012 tax year. During the next session, the legislature realizes its mistake and corrects the statute "retroactively" for the 2013 tax year. Under the district court's ruling, such a statute could not take effect until the following tax year.

Here, the 2013 staff analysis certainly suggests that the legislation was intended to close an unintended loophole created by the 2009 law. As it stated:

> *The unintended effect of the expanded provision* is that an affordable housing (i.e., low income housing tax credit) development with a nonprofit general partner can claim a tax exemption even though the limited partnership that owns the property is a for-profit corporation. While the provision may be beneficial to non-profit developments, *the provision may also be misused* if a for-profit developer uses a compliant non-profit, which has no significant role in the development's construction or operations, to gain the tax exemption.

2013 Final Legislative Staff Analysis. Fla. H. Comm. on Economic Affairs and Finance & Tax Subcomm., CS/CS/HB 437 (2013) (on file with Comm., emphasis added). (R-III-419)[2] If the legislature discovers that prior tax legislation contained

[2] Legislative staff analyses "are not determinative of final legislative intent;" however, they are "one touchstone of the collective legislative will." *White v. State*, 714 So.2d 440, 443 n. 5 (Fla. 1998).

a loophole creating unintended effects that allow it to be misused, the district court's decision would preclude the legislature from correcting that loophole in the current tax year of the legislative session but, rather, must wait until the following year.

Significantly, the language allowing limited partnership entities with a non-profit general partner to qualify for the affordable housing exemption only was effective for three tax years, i.e., 2010, 2011, and 2012. More specifically, the 2009 legislation inserting this type of organizational structure into the statute was declared unconstitutional for violating the single subject rule in *City of Weston v. Crist*, No. 2009-CA-2639 (Fla. 2d Jud. Cir. Ct. 2010), reversed on other grounds, *v. City of Weston*, 64 So.3d 701 (Fla. 1st DCA 2011). While the case was pending on appeal, the legislature reenacted the legislation as a separate bill "to cure any alleged constitutional violation." Ch. 2011-15, Laws of Fla. (2011). The bill included language that the legislature intended that it "operate retroactively to June 1, 2009" and if "such retroactive application is held by a court of last resort to be unconstitutional, this act shall apply prospectively from the date that this act becomes law." *Id.* at § 20.

This Court has observed that, when an "amendment to a statute is enacted *soon after controversy as to the interpretation of the original act arose*, a court may consider that amendment as a legislative interpretation of the original

law and not a substantive change thereof." *Chase Fed.*, 737 So.2d at 503 (emphasis in original). Here, the legislature quickly realized the unintended consequences and tax loophole created by the 2009 enactment and eliminated the limited partnership entity as a qualifying ownership structure.

The receipt of the affordable housing tax exemption is not a vested right because it is subject to modification or elimination by the legislature. At best, Panama Commons had a mere *expectation* and hope that the eligibility requirements for an affordable housing tax exemption in effect for the 2012 tax year would continue during the 2013 tax year. In fact, Panama Commons alleged that it "relied on the *continued* exemption." (R-I-1, ¶1, emphasis added) Vested rights, however, are more than mere expectations that an existing law will continue; such rights must rise to the level of a present or future enforcement of a demand. *See Brevda,* 420 So.2d at 891 (until a judgment awarding fees has been properly entered, "any right under a fee statute constitutes nothing more than an expectable interest – not a vested right."); *Notami Hosp. of Fla.. Inc. v. Bowen,* 927 So. 2d 139, 143-44 (Fla. 1st DCA 2006) (hospital had no vested right in confidentiality of medical records, as any right was "no more than an expectation that previously existing statutory law would not change"); *Pronomentry Enst., Inc. v. Southern Eng'g & Contracting, Inc.*, 864 So.2d 479, 486 (Fla. 5th DCA 2004) ("Possibilities based on what may or may not occur in the future do not create

vested rights because possibilities are not immediate and fixed rights of present or future enjoyment."); *Campus Commc'ns, Inc. v. Earnhardt*, 821 So.2d 388, 398 (Fla. 5th DCA 2002) (Right to inspect autopsy photographs under the Act was not a vested right because it was "a right subject to divestment by enactment of statutory exemptions by the Legislature.").

A. United States Supreme Court decisions generally reject challenges to retroactive tax legislation asserting due process violations.

The United States Supreme Court has repeatedly upheld retroactive tax legislation against challenges alleging a violation of due process. *See e.g. United States v. Carlton*, 512 U.S. 26 (1994); *United States v. Hemme*, 476 U.S. 558 (1986); *United States v. Darusmont*, 449 U.S. 292 (1981); *Welch v. Henry*, 305 U.S. 134 (1938); *United States v. Hudson*, 299 U.S. 498 (1937); *Milliken v. United States*, 283 U.S. 15 (1931). Although some of the Court's earlier decisions concerning retroactive tax legislation analyzed the contested statutes under a "harsh and oppressive" standard, the Court in *Carlton* clarified that such a test "does not differ from the prohibition against arbitrary and irrational legislation that applies generally to enactments in the sphere of economic policy." *Carlton*, 512 U.S. at 30, citing *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984).

Retroactive tax legislation, therefore, is reviewed using the same rational basis standard as is generally applicable to retroactive economic legislation. *Carlton* set forth as follows:

> Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches....
>
> To be sure, ... retroactive legislation does have to meet a burden not faced by legislation that has only future effects.... 'The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former'.... But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.

Id. at 31, quoting *Pension Benefit Guar. Corp.,* 467 U.S. at 729-30.

In *Carlton*, the Court reviewed the constitutionality of an amendment to the Internal Revenue Code, which revoked an exemption available to estates for the sale of certain stock. *Carlton*, 512 U.S. at 28-29. There, the amendment to the tax statute was enacted in December 1987, retroactively effective as to the date of the original enactment in October 1986. *Id*. The retroactive tax legislation, therefore, covered a period exceeding one calendar year.

In applying the rational basis test as set forth, the Court first observed that "Congress' purpose in enacting the amendment was neither illegitimate nor arbitrary." *Id*. at 32. As the Court reasoned:

> There is no plausible contention that Congress acted with an improper motive, as by targeting estate representatives such as Carlton after deliberately inducing them to engage in ESOP transactions. Congress, of course, might have chosen to make up the unanticipated revenue loss through general prospective taxation, but that choice would have burdened equally "innocent" taxpayers. Instead, it decided to prevent the loss by denying the deduction to those who had made purely tax-motivated stock transfers. We cannot say that its decision was unreasonable.

Id.

The Court next analyzed the period of retroactivity and held that "Congress acted promptly and established only a modest period of retroactivity." *Id*. The Court noted that "Congress almost without exception has given general revenue statutes effective dates prior to the dates of actual enactment," which generally have been "confined to short and limited periods required by the practicalities of producing national legislation." *Id*. at 32-33. *Carlton*, therefore, utilized a rational basis standard and upheld the constitutionality of tax legislation exceeding one year in retroactive effect, which revoked an exemption previously available under the Internal Revenue Code.

Carlton also addressed the taxpayer's arguments concerning reliance and notice. *Id*. at 33-34. Although reliance on the pre-existing statutory language was uncontested, the Court held "[t]ax legislation is not a promise, and a *taxpayer has no vested right in the Internal Revenue Code*." *Id*. (emphasis added). The Court reiterated its reasoning, first set forth in *Welch*, 305 U.S. at 146-47 that:

> Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute.

Carlton, 512 U.S. at 34.

Lack of notice is not dispositive in determining whether retroactive tax legislation violates the due process clause. *Id.* at 34. The Court emphasized that it had reached consistent holdings in its prior decisions in *Welch* and *Milliken*. *Id*. In *Milliken*, the Court rejected an argument from the taxpayer concerning lack of notice and declared that a taxpayer "should be regarded as taking his chances of any increase in the tax burden which might result from carrying out the established policy of taxation." *Milliken*, 283 U.S. at 23.

Comparatively, the Supreme Court has rarely struck down retroactive tax legislation as unconstitutionally violative of the due process clause. *See*

Untermeyer v. Anderson, 276 U.S. 440 (1928); *Blodgett v. Holden*, 275 U.S. 142 (1927); *Nichols v. Coolidge*, 274 U.S. 531 (1927). Although these cases have not been overruled, the Court in more recent opinions has cautioned against relying on their holdings, noting they "were decided during an era characterized by exacting review of economic legislation under an approach that 'has long been discarded.'" *Carlton*, 512 U.S. at 34, citing *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). Moreover, "*Blodgett* and *Untermeyer*, which involved the Nation's first gift tax, essentially have been limited to situations involving the 'creation of a wholly new tax,' and their 'authority is of limited value in assessing the constitutionality of subsequent amendments that bring about certain changes in the operation of the tax laws.'" *Id*., citing *Hemme*, 476 U.S. at 568.

In *Nichols*, the Court struck down retroactive tax legislation that "embraced a transfer that occurred 12 years earlier." *Carlton,* 512 U.S. at 34. This extensive period of retroactivity is beyond the permissible temporal boundaries that the Court has subsequently upheld in *Welch*, *Darusmont*, and *Carlton*.[3]

[3] An excellent discussion of the United States Supreme Court cases is contained in Constitutionality of Retroactive Tax Legislation, Erika K. Lunder, et al., Cong. Research Serv., R42791 (2012).

B. State Supreme Court decisions generally reject challenges to retroactive tax legislation asserting due process violations.

Subsequent to the Supreme Court's decision in *Carlton*, individual state supreme courts that addressed constitutional challenges to retroactive tax legislation have repeatedly upheld such legislation as constitutional. *See e.g*. *Gardens at West Maui Vacation Club v. County of Maui*, 978 P.2d 772, 782-83 (Haw. 1999); *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392, 397-403 (Ky. 2009); *U.S. Bancorp v. Dep't of Revenue*, 103 P.3d 85, 91-93 (Or. 2004); *In re Estate of Hambleton*, 335 P.3d 398, 409-412 (Wash. 2014). *But see James Square Assocs. LP v. Mullen*, 993 N.E.2d 374, 380-83 (N.Y. 2013); *Rivers v. State*, 490 S.E.2d 261, 261-265 (S.C. 1997).

For example, the Supreme Court of Hawaii upheld an amendment to an ad valorem tax ordinance that was approved on June 13, 1997, effective retroactive to January 1, 1997. *Gardens at West Maui Vacation Club*, 978 P.2d at 776. There, the taxpayer assailed the constitutionality of a retroactive tax ordinance, which resulted in a classification of its property as "Hotel Resort" whereas under the law in existence as of January 1, the property would have been classified as "Apartment." *Id.* This retroactive enactment resulted in a sixty-eight percent increase in the taxpayer's assessment.

The taxpayer argued that it had acquired a vested right under the ordinance in existence as of January 1, 1997. The Hawaii Supreme Court rejected the argument, holding that:

> In any case, appellant did not acquire vested rights in its 'Apartment' classification. A vested right, 'entitled to be protected from legislation, must be something more than a mere expectation based upon an anticipated continuance of the existing law[.]' '[I]t must have become a title, legal or equitable, to the present or future enjoyment of property; ... and if before rights become vested in particular individuals, the convenience of the state induces amendment or repeal of certain laws, these individuals have no cause to complain.'

Id. (citations omitted).

The court applied the test as set forth in *Carlton* and held that the County's purpose for enacting the ordinance "was neither illegitimate or arbitrary" and that the ordinance "established a reasonable period of retroactivity of slightly over six months from June 13, 1997, to January 1, 1997." *Id*. at 782. The court further held that the taxpayer's reliance upon the tax classification statute as it existed on January 1, 1997, "without more, does not constitute a violation of due process." *Id*. at 783.

In *Hambleton,* the Supreme Court of Washington applied a rational basis standard and upheld a 2013 amendment that applied retroactively to May 17, 2005. There, the court held that the "legislature ha[d] a legitimate purpose for the

retroactive amendment, and the period of retroactivity [was] rationally related to that purpose." *Hambleton*, 335 P.3d at 409.

As to the taxpayers' claim that the retroactive tax legislation impaired a vested right, the court held the "tax does not deprive the remaindermen of their interest in the property or change the nature of their interest. It simply taxes the transfer of assets." *Id*. at 412. Further, the taxpayers "do not have a vested right in Washington's pre-2005 pickup tax scheme." *Id*. *See also Miller*, 296 S.W.3d at 397 (holding retroactive tax legislation constitutional and reasoning that, as there is no vested right in the Internal Revenue Code, neither "is there a vested right in the Kentucky Revenue Code."); *U.S. Bancorp,* 103 P.3d at 93 (holding constitutional a retroactive administrative rule that "applied to only tax years still open to examination.").

Few state supreme courts have reached a determination that retroactive tax legislation violates due process. In *Rivers,* however, the Supreme Court of South Carolina held retroactive tax legislation unconstitutional while applying the test set forth in *Carlton*. *Rivers*, 490 S.E.2d at 262-265. There, the taxpayers contested the constitutionality of a 1991 law that retroactively amended a 1989 provision of the tax code, which provided for refunds on capital gains taxes. *Id*. at 262. After affirming that "taxpayers have no vested interest in tax laws remaining unchanged" the court applied the *Carlton* test and held that, because the

retroactivity period "at issue is at least two years and possibly as long as three years," the retroactive tax legislation was unconstitutional under both the federal and state constitutions. *Id*. at 263-265. *See also James Square Assocs. LP,* 993 N.E.2d at 383 (holding tax legislation with a retroactive effect of either 16 or 32 months unconstitutional and reasoning that although "one year of retroactivity is not considered excessive according to *Replan* [517 N.E.2d 200 (N.Y. 1987)], the period of retroactivity was long enough in the present case so that plaintiffs gained a reasonable expectation that they would 'secure repose' in the existing tax scheme.").

A majority of state supreme court decisions preceding *Carlton* have concluded that retroactive tax legislation was constitutional against a due process challenge. *See Martin v. Bd. of Assessment Appeals of State*, 707 P.2d 348, 350-55 (Colo. 1985); *Gunther v. Dubno*, 487 A.2d 1080, 1089-91 (Conn. 1985); *Roberts v. Gunter*, 304 S.E.2d 369, 376 (Ga. 1983); *Estate of Kennett v. State*, 333 A.2d 452, 453-456 (N.H. 1975); *Colonial Pipeline Co. v. Commonwealth*, 145 S.E.2d 227, 231-32 (Va. 1965). *See also Burlington Northern Railroad Co. v. Strackbein*, 398 N.W.2d 144, 147 (S.D. 1986) (holding constitutional a retroactive repeal of a tax credit and reasoning that "deductions or exemptions as a legislature may allow … are privileges accorded as a matter of legislative grace and not as a matter of taxpayer right.").

In *Martin*, the Supreme Court of Colorado upheld retroactive tax legislation that amended the methodology used to assess property for ad valorem tax purposes. The amendment was signed into law on May 3, 1982, retroactive to all property tax years commencing on or after January 1, 1982.

The taxpayers challenged the statute, arguing that the amended statute was unconstitutionally retroactive because the statute in effect as of January 1, 1982, vested in them a right to have their property assessed based on the ad valorem tax statutes in effect on that date. *Id*. at 351. The Colorado Constitution specifically prohibited the legislature from passing a law "retrospective in its operation." Art. II, § 11, Colo. Const. The court declared that a statute is unconstitutionally "retrospective in operation" if it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already passed." *Id*. Under this standard, the court held that, "property owners have *no vested rights* to have their taxable property assessed by particular methods employed in prior years." *Id*. (emphasis added). "Since the statute only alters the factors which may be considered in determining actual value, it does not impair the taxpayers' vested rights, and therefore is not unconstitutionally retrospective in its operation." *Id*.

In *Kennett's Estate*, the Supreme Court of New Hampshire, another state with an express constitutional provision prohibiting retrospective laws, addressed the constitutionality of a statute enacted April 22, 1970, which taxed business profits and applied as of January 1, 1970. There, the court held that the tax was constitutional as "income, *at least in the taxable year in which it was earned, cannot be said to have acquired such a vested status* as to place it beyond the ambit of an income tax statute intended to reach it." *Id*. at 455 (emphasis added). Further, although the tax applied to income earned prior to the statutes enactment it "cannot be considered under the circumstances to be so 'highly injurious, oppressive and unjust' as to violate article 23, part I of our State Constitution." *Id*. at 456. The court also dismissed the taxpayer's contention that the tax violated the federal due process clause, relying on *Welch*, and distinguished the Supreme Court's prior cases regarding the imposition of a gift tax retroactively. *Id*.

In *Colonial Pipeline* the Supreme Court of Virginia addressed a taxpayer's challenge to the constitutionality of retroactive tax legislation. There, the statute in question was enacted on March 10, 1964, however, the legislation applied to the tax year beginning on January 1, 1964, and all tax years thereafter. *Colonial Pipeline Co.*, 145 S.E.2d at 230. The court first noted that "it is debatable, to say the least, whether a statute enacted during the taxable year

authorizing the assessment of a tax on property held by a taxpayer as of January first of that year should be classified as 'retroactive tax legislation' which has sometimes been condemned by the courts." *Id*. at 231. The court noted also that the state legislature frequently revised the tax structure and "makes such revisions effective as of the first day of that year." *Id*.

The court held that, even if the amendment to the tax statute was properly classified as retroactive legislation, no vested right had been disturbed by the imposition of the tax on the corporation. "No one has the vested right to be free of taxation, nor does he have the constitutional right to know that a tax will be levied in such a manner that he may avoid it." *Id*. The court reasoned, "the retroactive operation of the statute was within the current year and within three months of the date on which the statute became effective. Surely, such a retroactive operation did not extend for more than a reasonable period, nor was it 'so harsh and oppressive as to transgress the constitutional limitations.'" *Id*. quoting *Welch,* 305 U.S. at 147; s*ee also Roberts,* 304 S.E.2d at 376 (holding "a tax enacted during a calendar year is not unconstitutionally retroactive if it relates back so as to tax for that entire year.").

In the instant case, the 2013 amendments easily satisfy the rational basis standard set forth in *Carlton*. The legislature's determination that the affordable housing ad valorem tax exemption should no longer be available to

limited liability partnerships in the current tax year and prospectively is neither an illegitimate nor arbitrary decision.

The retroactive period, moreover, is of limited effect and is confined to the temporal boundaries of the tax year in which the legislation was passed, well within the parameters of the United States Supreme Court decisions addressing the issue. The Court has consistently upheld tax legislation that is made retroactive as to an earlier date within the current tax year.

The 2013 amendment did not create a wholly new tax. Florida local governments have long received revenue from ad valorem assessments of property within its taxable boundaries. The appellee had reason to know that, through ownership of property within the state of Florida, it was subjecting itself to ad valorem tax liability. "All owners of property are held to know that taxes are due and payable annually and are responsible for ascertaining the amount of current and delinquent taxes and paying them before April 1st of the year following the year in which taxes are assessed." §197.122(1), Fla. Stat. (2013); *see Wal-Mart Stores, Inc. v. Day*, 742 So.2d 408, 416 (Fla. 5th DCA 1999).

The amendment of a statute to eliminate a certain type of ownership structure qualifying for a tax exemption does not equate with the creation of a wholly new tax. The ad valorem tax obligation is continually present, whereas the availability of an exemption from such taxation is dependent upon grants made by

the legislature and the underlying factual circumstances of a particular property. Taxation is the norm and exemption is the exception.

Panama Commons does not have a vested right in the tax laws as they existed on January 1, 2013. The United States Supreme Court and other state supreme courts have concluded that taxation is not a penalty imposed on an individual, rather it is a method of apportioning the burden associated with the costs of government. The legislature, during the pendency of the 2013 ad valorem tax year, made a determination that certain ownership structures would no longer qualify for the affordable housing tax exemption by amending section 196.1978. The determination of entities eligible for tax exemption for the 2013 tax year is a legitimate purpose. Moreover, the means used to implement the legislative purpose, a six (6) month retroactive provision, within the current tax year, is well within the temporal scope upheld by the Supreme Court and other state supreme courts. The six-month period of retroactive effect is modest and rationally related to achieving the legislative purpose.

This Court has previously held constitutional the imposition of the Florida corporate income tax on gains realized from the sale of property, which occurred prior to the amendment of the Florida Constitution permitting such a tax. *Roger Dean Enterprises, Inc. v. Dep't of Revenue*, 387 So.2d 358 (1980). This Court held that such a tax, even though based on an event occurring prior to the

amendment's effective date is not an unconstitutional denial of due process. *Id*. at 364. "The result reached by applying section 220.13(1)(c), Florida Statutes (1973), to the taxpayer's 1972 and 1973 installment receipts from its 1971 sale in no way infringes upon the federal due process of law requirement." *Id*.

As a final note, legislative enactments are reviewed under a presumption in favor of constitutionality. *Graham v. Haridopolos*, 108 So.3d 597, 603 (Fla. 2013). It is a "well-established principle that a legislative enactment is presumed to be constitutional." *Haddock,* 1 So.3d at 1135, quoting *Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So.2d 503, 508 (Fla. 2008). For a statute to be declared unconstitutional, the "'unconstitutionality must appear beyond all reasonable doubt.'" *Ellis v. Hunter*, 3 So.3d 373, 378-79 (Fla. 5th DCA 2009), quoting *Bonvento v. Bd. of Pub. Instruction*, 194 So.2d 605, 606 (Fla. 1967). To establish the invalidity of a statute, the challenger "bears a heavy burden" in overcoming the presumption in favor of constitutionality. *Id*. Courts should construe challenged legislation to effect a constitutional outcome whenever possible. *Dep't of Revenue v. Howard*, 916 So.2d 640 (Fla. 2005).

When the legislature is utilizing its taxing authority, there is an even greater presumption in favor of the statute's validity. *Eastern Airlines, Inc. v. Dep't of Revenue*, 455 So.2d 311, 314 (Fla. 1984). The Florida Supreme Court in *Eastern Airlines* held that in "the field of taxation particularly, the legislature

possesses great freedom in classification." *Id*. Only when the challenger has shown a "clear and demonstrated usurpation of power" will the court be authorized to interfere with the legislation. The burden is on the challenger "to negate every conceivable basis which might support [the legislation]." *Id*. When the legislature utilizes its taxing authority "every presumption in favor of the validity of its action is indulged." *Id*.

In the instant case, the district court's majority decision fails to provide the necessary judicial deference to the legislature in the field of taxing statutes. By concluding that the 2013 amendments to section 196.1978 could not be constitutionally applied to the current tax year, the court disregarded the legislature's clear intent and converted a mere expectant right and hope that the exemption laws would continue unchanged into a vested right. Such a ruling was erroneous and should be reversed. Instead, this Court should adopt the well-reasoned dissenting opinion of Judge Benton. *C.f. Howard*, 916 So.2d at 644-646 (agreeing with Judge Benton's dissenting opinion that section 193.016, Florida Statutes – which addressed the impact of a Value Adjustment Board's decision reducing a tangible personal property assessment on the assessment in the subsequent year – was constitutional). [4]

[4] The constitutionality issue presented in the instant case also has been asserted in the following circuit court actions elsewhere in the state. *C.f. Ybor III, Ltd. v. Property Appraiser, Gadsden Co., Fla., et al.*, Case No. 13-CA-1202 (2nd Jud.

CONCLUSION

Based on the aforementioned arguments and authorities, this Court respectfully is requested to reverse the district court's decision that the 2013 amendments to section 196.1978 were unconstitutional.

Cir.); *Pelican Isles Ltd. Ptr., v. Indian River Co., Fla. Property Appraiser*, *et al.*, Case No. 13-CA-1700 (19th Jud. Cir.); *Dunwoodie of Orlando, Ltd. v. Rick Singh, et al.,* Case No. 13-CA-14652 (9th Jud. Cir.); *Brentwood Club on Millenia Blvd., Partners, Ltd. v. Rick Singh, et al.*, Case No. 14-CA- 5377 (9th Jud. Cir.); *Commander Place Housing, Ltd. v. Rick Singh, et al*., Case No. 14-CA-5375 (9th Jud. Cir.); *Conroy Housing Partners, Ltd. v. Rick Singh, et al.,* Case No. 14-CA-5376 (9th Jud. Cir.); *East Lake Partners, Ltd. v. Rick Singh, et al.*, 14-CA-5348 (9th Jud. Cir.); *Forest Edge, Ltd. v. Rick Singh, et al.*, Case No. 14-CA-5318 (9th Jud. Cir.); *Lake Sherwood Partners Phases 6 Through 8, Ltd. v. Rick Singh, et al.*, Case No. 14-CA-5378 (9th Jud. Cir.); *Lee Vista Club Partners, Ltd. v. Rick Singh, et al.*, 14-CA-5379 (9th Jud. Cir.); *Orange Co. Waterbridge Partners, Ltd. v. Rick Singh, et al.*, Case No. 14-CA-5357 (9th Jud. Cir.); *River Ridge Apartments, Ltd. v. Rick Singh, et al.*, Case No. 14-CA-5369 (9th Jud. Cir.); *Rouse Road Partners, Ltd. v. Rick Singh, et al.*, 14-CA-5343 (9th Jud. Cir.); *SAS Fountains at Pershing Park, Ltd. v. Rick Singh, et al.*, Case No. 14-CA-5358 (9th Jud. Cir.); *Valencia Village Partners, Ltd. v. Rick Singh, et al.*, Case No. 14-CA-5373 (9th Jud. Cir.); *Waterford East Partners, Ltd. v. Rick Singh, et al.*, Case No. 14-CA-5360 (9th Jud. Cir.); *Water View Partners, Ltd. v. Rick Singh, et al.*, Case No. 14-CA-5361 (9th Jud. Cir.); *Winter Country Garden Assocs., L.P. v. Rick Singh, et al.*, 14-CA-5367 (9th Jud. Cir.); *Huntington Reserve Assocs., Ltd. v. Seminole Co. Florida Property Appraiser, et al.*, Case No. 14-CA-692 (18th Jud. Cir.); *Seminole Co. Loma Vista Partners, Ltd. v. David Johnson, et al.*, Case No. 14-CA-1101 (18th Jud. Cir.); *Seminole Co. State Road 46, Ltd. v. David Johnson, et al.*, Case No. 14-CA-1102 (18th Jud. Cir.); *Rick Singh, as Orange Co. Property Appraiser v. Fox Hollow Associates, Ltd., et al.*, Case No. 14-CA-3484 (9th Jud. Cir.).

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the appellee certifies that the font size and style used in the foregoing Initial Brief is 14 Times New Roman and complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a)(2).

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