SC15-774

IN THE SUPREME COURT OF FLORIDA

DAN SOWELL, IN HIS OFFICIAL CAPACITY AS PROPERTY APPRAISER OF BAY COUNTY, FLORIDA; MARSHALL STRANBURG, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR, FLORIDA DEPARTMENT OF REVENUE,
Appellants,

v.

PANAMA COMMONS L.P.,
Appellee.

ON APPEAL FROM THE
FIRST DISTRICT COURT OF APPEAL
Case No. 1D14-1671

INITIAL BRIEF OF APPELLANT MARSHALL STRANBURG

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STATEMENT OF THE CASE AND FACTS

This case involves the Legislature's ability to remove a tax exemption that it determined had led to the "unintended effect" of allowing an "affordable housing . . . development with a nonprofit general partner [to] claim a tax exemption even though the limited partnership that owns the property is a for-profit corporation."[1] The Respondent here, Panama Commons L.P., is a limited partnership that is 99.99% owned by a for-profit entity. Panama Commons claimed exemption from ad valorem taxation for an affordable housing development in Bay County. The exemption, set forth in Section 196.1978, Florida Statutes, relieves developers of qualifying affordable housing from paying ad valorem taxes. Before 2009, the law covered only developments owned by non-profit corporations. That year, the Legislature amended the law to include developments owned by a "limited partnership, the sole general partner of which" is a non-profit corporation, and, in 2013, the Legislature amended the law to revert to its pre-2009 scope.

The District Court held that Panama Commons had a constitutionally protected right to the tax exemption, despite the fact that the Legislature removed it before the property appraiser certified the tax rolls or even approved the exemption application, because it held the Legislature's removal improperly retroactive. The District Court's holding fails to give sufficient weight to the fact that the 2013 law

[1] H. Final Bill Analysis, CS/CS/HB 437, at 6 (May 30, 2013).

is *tax* legislation, which implicates unique interests in retroactivity analysis. As Judge Learned Hand recognized decades ago, "*[n]obody* has a vested right in the rate of taxation, which may be retroactively changed at the will of Congress at least for periods of less than twelve months; Congress has done so from the outset . . ." *Cohan v. Commissioner*, 39 F.2d 540, 545 (2d Cir. 1930) (emphasis added). Moreover, in reaching this constitutional holding, the District Court failed to analyze in its opinion the appellants' statutory arguments that Panama Commons would not qualify for an exemption even under the pre-2013 law. As either a statutory or a constitutional matter, Panama Commons' arguments fail.

Factual Background

A. State and Federal Tax Incentives Related to Affordable Housing

Both Florida and federal law provide tax incentives for private investment in affordable housing, two of which the Respondent, Panama Commons, utilized. In Florida, an entity created by the Legislature called the Florida Housing Finance Corporation ("Florida Housing") administers both the Multifamily Mortgage Revenue Bonds Program and the State Apartment Incentive Loan ("SAIL") Program to provide below market rate loans to developers, among other programs. Fla. Legislature Office of Program Policy Analysis & Government Accountability, *Florida Housing Finance Corporation Overview*, Jan. 2009, at 2, *available at* http://bit.ly/1Rgh4cX. In addition, numerous private and public grantmaking

organizations provide funding for affordable housing construction. *See, e.g.*, MacArthur Found., *Housing Grant Guidelines*, http://bit.ly/1C9g6IB. Florida also provides an ad valorem tax exemption for certain properties used to provide affordable housing. § 196.1978, Fla. Stat. Finally, the State also has a role in administering the federal Low Income Housing Tax Credit ("LIHTC") program within the state.

Congress created the LIHTC program in the 1980s to provide a dollar-for-dollar reduction in tax liability for organizations that create housing for individuals meeting certain income guidelines. *See generally* Fla. Hous. Fin. Corp., *Housing Credits*, http://bit.ly/1TnTG11. The Treasury Department annually provides each state an allocation of credits to award to developers. In Florida, the LIHTC program is administered through Florida Housing. *See id.*

To take advantage of the LIHTC program, a developer will submit an application to Florida Housing, outlining the proposed development. *See* R1:91-95.[2] If a developer that is awarded credits is a nonprofit, it will be unable to use the credits itself because they are a reduction in federal tax liability, which are of no use to an entity that has no such liability. Credits are transferrable, however, and a nonprofit will typically sell the credits to a banking institution at a slight discount

[2] The record on appeal comprises five volumes. This brief will refer to the record as R#:*, with # as the volume number and * as the page number.

from their face value. *See* R1:84-88, 99-100. As Panama Commons' corporate representative, Mark Du Mas, testified at his deposition, a nonprofit can usually expect to receive roughly 85 cents on the dollar through such a sale. R1:85. In addition, a nonprofit may partner with a for-profit institution to allow the for-profit to take advantage of depreciation on the property (counted as an expense in calculating organizational income) for tax purposes.[3] *See* ABT Assocs., Inc., *What Happens to Low-Income Housing Tax Credit Properties at Year 15 and Beyond?* at 11, Report for U.S. Department of Housing & Urban Development, Aug. 2012 ("HUD 2012 Report"), *available at* http://bit.ly/1yHWY3w.

The Respondent, Panama Commons, applied for and received LIHTC funding as well as the state ad valorem tax exemption in Section 196.1978.

B. The Timeline for Assessing Ad Valorem Taxes and Determining Whether Properties Are Exempt.

Ad valorem tax exemptions, including Section 196.1978, are administered on a lengthy timeline culminating in a final levy of taxes in the fall of each year. *See generally* Fla. Dep't of Revenue, *Property Appraiser Calendar*, R3:391-94.

[3] The discount from face value accounts for the time value of money (tax credits are spread out over ten years), market conditions, and other factors that reduce the attractiveness of credits. On the other hand, the right to take a depreciation deduction increases the attractiveness of credits, leading to a higher price. *See* HUD 2012 Report at 23-24.

January—the just value of real property is assessed as of January 1 of each year. § 192.042(1), (2), Fla. Stat. The use and ownership of property is fixed for ad valorem tax purposes as of that date.

March—owners of property that is potentially subject to an exemption must apply for an exemption on or before March 1. § 196.011(1)(a). If the property owner fails to file by the deadline, the owner waives the exemption privilege for that year. *Id.*

July—the property appraiser must notify the property owner, on or before July 1, if the appraiser determines the property is not exempt or is exempt "to an extent other than that requested in the application." § 196.193(5)(a). The appraiser must also, on or before July 1, assess the value of all real property and submit the assessment roll, with the amount of each exemption, to the Department of Revenue for its review. §§ 193.023(1); 193.114(2)(g); 193.1142(1)(a). Finally, the appraiser must certify to each taxing authority the taxable value of property in its jurisdiction, after which the authorities will prepare tentative budgets, compute proposed millage rates, and advise the appraiser of the proposed rate. *See* § 200.065(2)(a)1., (b), (c).

August—The property appraiser uses the taxing authorities' proposed millage rates to prepare notices of proposed property taxes that are mailed to

taxpayers in late August. *See* §§ 200.065(2)(b); 200.069. The taxing authorities then adopt a final budget and final millage rate. *See* § 200.065(2)(d).

October—After making any necessary changes to the assessment roll, the property appraiser delivers the certified assessment roll to the tax collector, usually in October. *See* §§ 193.122(1)-(3); 197.322(1)-(2); 197.323(1). Once the tax roll is certified, authorities generally cannot correct mistakes in the property appraiser's judgment, including mistakes in granting or denying exemptions. *See Korash v. Mills*, 263 So. 2d 579, 581-82 (Fla. 1972); *Underhill v. Edwards*, 400 So. 2d 129, 132 (Fla. 5th DCA), *rev. denied* 411 So. 2d 381 (Fla. 1981). The tax collector sends each taxpayer a notice of taxes due within 20 working days, § 197.322(3), and all taxes are due and payable on November 1 "or as soon thereafter as the certified tax roll is received by the tax collector," § 197.333.

C. Panama Commons Receives LIHTC Funding and Sells an Ownership Stake to a For-Profit Entity.

In this case, Panama Commons benefitted from both LIHTC incentives and the tax exemption in Section 1978. Panama Commons submitted an application for LIHTC funding in 2008. R3:485-512. At the time, the entity was a Georgia limited partnership owned by a Georgia non-profit corporation named The Paces Foundation, Inc., and a separate Georgia corporation that was itself owned by the Paces Foundation. R3:521. By the time suit was filed, Panama Commons was a Florida limited partnership owned by a general partner named Panama Commons

GP, LLC (a Florida LLC, itself wholly owned by The Paces Foundation, Inc.) and a limited partner named PC Limited Partner, L.P. (a separate Florida limited partnership owned by a Georgia corporation named Panama Commons Services Company and a Delaware LLC named PHINDA Panama, LLC). R1:131-33, 136-41. Panama Commons GP had a 0.01% share in Panama Commons while the limited partner retained the remaining 99.99% share. Florida Housing awarded Panama Commons tax credits totaling $10,837,500. R4:719.

In light of the economic situation in 2009, Panama Commons could not find a buyer for its tax credits but was able to take advantage of a federal program that allowed it to return its credits to Florida Housing, at the rate of 85 cents per credit dollar, in exchange for a low-interest loan.[4] R1:102-05, 124, 167; R4.670. The loan was actually more of a conditional gift in that, under the terms of the program, the loan would be forgiven after 15 years so long as the development continued to be used to provide affordable housing. R1:124-26. As Mark Du Mas later testified, the state, under the modified arrangement "gave actually very good terms," compared to the typical arrangement with a private entity taking LIHTC funding. R1:101; *see also* R1:166-70. This arrangement did not require Panama Commons to enter into a limited partnership with any for-profit entity. *See* R1:170 ("[Florida Housing is]

[4] The amount of the loan/gift to Panama Commons was $8,504,851. R4:719.

really our partner. They are the big equity partner in this. We don't have a limited partner anymore.").

As a nonprofit entity, Panama Commons is exempt from federal taxes and would be unable to take tax advantage of any depreciation of the property. *See* R2:342. Accordingly, during the construction process, Panama Commons sold depreciation rights to a Delaware for-profit entity, PHINDA Panama LLC, for $400,000, which now has a 99.99% interest in the limited partner share. *See* R1:131-33, 136-41. As a result, PHINDA Panama, LLC now owns the vast majority of PC Limited Partner, LP, which in turn owns a 99.99% share of Panama Commons. See R1:131-33, 136-41. Panama Commons completed the project in 2011. R2:340.

D. The Legislature Amends the Affordable Housing Exemption to Cover Limited Partnerships and Amends the Statute Again to Restore the Original Scope.

In 2009, after Panama Commons applied for LIHTC funding but before it completed the project, the Legislature amended Section 196.1978. Before the amendment, the statute exempted "[p]roperty used to provide affordable housing . . ., which property is owned entirely by a nonprofit entity" qualified as charitable under Section 501(c)(3) of the Internal Revenue Code. The 2009 legislation added language allowing a "Florida-based limited partnership, the sole general partner of which is a corporation not for profit which is qualified as

charitable under" Section 501(c)(3) to claim the exemption. Ch. 2009-96, § 18, Laws of Fla. A trial court declared the 2009 legislation unconstitutional on single-subject grounds and the Legislature reenacted the law in 2011. *See* Ch. 2011-15, § 4, Laws of Fla. Neither the 2009 nor the 2011 legislation contained legislative findings specific to the amendment of Section 196.1978. Moreover, the available legislative history contained no explanation of the Legislature's motivation in enacting the 2009 and 2011 amendments.[5]

In 2013, the Legislature again amended Section 196.1978, passing bills that removed the language allowing limited partnerships to claim the exemption. Ch. 2013-72, § 11, Laws of Fla.; Ch. 2013-83, § 3, Laws of Fla. ("the 2013 Amendment"). Each bill provided that the change would be effective upon the act becoming law and would "operat[e] retroactively to the 2013 tax roll." The Final Bill Analysis for the House bill explained that the Legislature enacted it to address an "unintended effect" of the prior law—that it applied more broadly than anticipated:

> 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

[5] The statute was added to a larger bill as an amendment on the floor of the Senate. *See Fla. S. Jour.* 1092-93 (Reg. Sess. 2009).

> compliant non-profit, which has no significant role in the development's construction or operations, to gain the tax exemption.

H. Final Bill Analysis, CS/CS/HB 437, at 6 (May 30, 2013); *see also id.* (describing history of 2009 and 2011 legislation expanding the exemption). The 2013 Amendment became law on May 30. *See* Ch. 2013-72, Laws of Fla.

E. Sowell Denies Panama Commons a Tax Exemption Pursuant to Amended Section 196.1978 and Again Denies a Tax Exemption Pursuant to the 2012 Version of the Statute.

Panama Commons applied for a tax exemption in March 2013. R2:291. On June 19, 2013, Property Appraiser Sowell denied Panama Commons' application based on the amended scope of Section 196.1978:

> 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.

R2:319 (emphasis added). After the trial court in this action held the 2013 Amendment impermissibly retroactive, *see infra*, Sowell analyzed Panama Commons' eligibility for a tax exemption under the 2012 version of Section 196.1978. Sowell determined that Panama Commons did not satisfy the requirements of Section 196.195, which are incorporated into Section 196.1978, because Panama Commons received benefits from ownership of the property, stating:

> The taxpayer applied for and received an award of tax credits in the amount of $10,837,500 in connection with the construction of the subject property. The taxpayer subsequently exchanged the award of tax credits for a loan from the Florida Housing Finance Corporation in the amount of $8,504,851, that will be forgiven and discharged in full at the end of 15 years, which the taxpayer is receiving the benefit thereof. Additionally, the taxpayer sold a 99.99% interest in the depreciation loss allocated to its limited partner to PHINDA PANAMA, LLC. The receipt of such benefits disqualifies the taxpayer as an exempt entity under section 196.195(3), and the property is taxable in its entirety.
>
> Lastly, the subject property consists of a total of 92 units of which 5 units were vacant on January 1, 2013 and, therefore, were not being used to ”provide housing to natural persons or families classified as extremely low income, very low income, or moderate income“ as required by section 196.1978, Florida Statutes (2012). No exemption would inure to those 5 units.

R3:439-40.

Procedural Background

Panama Commons filed a complaint for declaratory relief, against Sowell and Executive Director Stranburg in their official capacities, alleging that the 2013 Amendment was unconstitutionally retroactive. R3:432. Defendants moved for summary judgment on the constitutional issue, while Panama Commons moved for summary judgment on grounds that it was entitled to an exemption under the 2012 version of the statute. R2:185-201, 273-86; R2:389-90. The trial court granted partial summary judgment in favor of Panama Commons, ruling that the 2013 Amendment could not be constitutionally applied to the 2013 tax year. R3:432-34.

After the trial court's ruling, Sowell analyzed Panama Commons' eligibility for an exemption under the 2012 statute and determined that Panama Commons still did not qualify. *See supra.* The trial court entered a final summary judgment in favor of Panama Commons, concluding that the development *did* qualify for an exemption notwithstanding the fact that Panama Commons had sold depreciation rights to a for-profit entity and had benefited from LIHTC funding. R4:749-50. Defendants appealed.

Before the District Court, both Sowell and Stranburg argued that the 2013 Amendment was constitutional and that, in any case, Panama Commons did not qualify for a tax exemption under the prior statute. Over a vigorous dissent, the District Court affirmed the trial court's summary judgment order, though it addressed only the constitutional issues. *See* op. at 2. The court acknowledged that the issue was one of first impression, *id.* at 3, and concluded that the effect of the 2013 Amendment was "to retroactively eliminate appellee's entitlement to a tax exemption on January 1, 2013, or impose a new tax obligation on appellee that did not exist on January 1, 2013," *id.* at 4. The court reasoned that "[b]y setting January 1 as the date on which the taxable or tax exempt status of real property is to be determined, the Legislature has created a constitutionally protected expectation that the substantive law in effect on that date will be used to make the determination." *Id.* at 5.

Judge Benton dissented, reasoning that under the process and timeline for determining ad valorem taxes, Panama Commons did not have a vested right to any tax exemption before the 2013 Amendment became law. *See id.* at 6-9. As Judge Benton noted, "no Florida case holds that the 'right' to a property tax exemption vests on January 1." *Id.* at 8. Judge Benton acknowledged that January 1 is the "determinative date for ascertaining the use to which potentially exempt property is put," *id.* at 9, but noted that the use of the property was not at issue—the question was what law applied to determine whether such use qualified the taxpayer for an exemption, *id.* Because no statute or other law established that Panama Commons had a protected right to a tax exemption, it had 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." *Id.* at 12 (quoting *Div. of Workers' Comp. v. Brevda*, 420 So. 2d 887, 891 (Fla. 1st DCA 1982)).

Sowell filed a timely appeal, to which Stranburg filed a timely joinder.

SUMMARY OF THE ARGUMENT

As an act of the Legislature, the 2013 Amendment to Section 196.1978 is presumed constitutional and this Court must uphold the statute unless Panama Commons is able to establish its unconstitutionality "beyond reasonable doubt." *Crist v. Fla. Ass'n of Criminal Def. Lawyers, Inc.*, 978 So. 2d 134, 139 (Fla. 2008). Because this case involves tax legislation, the challenger's burden is, if anything,

even heavier. Panama Commons fails to satisfy its burden, but this Court need not reach the constitutional question because Panama Commons would not qualify for a tax exemption even if the 2013 Amendment to Section 196.1978 were disregarded.

Both Panama Commons and the for-profit entity that has a 99.99% ownership share in Panama Commons have received benefits from the property, thereby disqualifying Panama Commons from being able to claim the limited tax exemption in Section 196.1978. Section 196.1978, like any tax exemption, must be construed strictly against the party claiming an exemption. The Section incorporates the standards of 196.195, the plain terms of which limit coverage of the exemption to owners of property that have not inured to the owner's benefit or to the benefit of a for-profit entity. *See TEDC/Shell City, Inc. v. Robbins*, 690 So. 2d 1323, 1325 (3d DCA 1997). Panama Commons has benefited from the subject property, receiving a favorable loan—in reality, a gift—in lieu of LIHTC credits. Moreover, the for-profit entity, PHINDA Panama, LLC has received benefits from the property in the form of depreciation rights. The District Court's opinion failed to analyze this statutory argument; the Court should have held that the subject property is not exempt even under the pre-2013 statute.

If this Court does reach the constitutional issue, it should reverse the District Court's retroactivity holding. First, the 2013 Amendment is not truly retroactive.

Although the Legislature characterized the provision as retroactive, this Court must look to the *effect* of the law, which reached properties as to which the tax roll had not been certified, no tax had been levied, and exemption applications had not even been approved. The law did not ascribe new legal consequences to events completed before its enactment. *Metro. Dade Cnty. v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 500 (Fla. 1999).

Even if the 2013 Amendment did operate retroactively, it would still satisfy due process. Because tax legislation implicates unique legislative concerns, the United States Supreme Court has long upheld federal and state tax legislation against retroactivity challenges, noting that Congress has for decades provided for tax statutes to operate for short retroactive periods (usually fewer than twelve months). *See, e.g.*, *United States v. Carlton*, 512 U.S. 26 (1994). This Court has long looked to the United States Supreme Court's retroactivity decisions and incorporated their standards; Panama Commons does not provide a sufficient reason to depart from this tradition in this case. Moreover, because the Legislature can, indisputably, change tax exemptions at any time, the statutes providing for exemptions do not provide a sufficient basis to find that anyone has a vested right in a statutory tax exemption. *See Fla. Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 250 (Fla. 2005). The District Court's holding otherwise depends on statutes saying

that exemptions are determined *as of* January 1, but statutes that simply set forth a measuring date do not establish a vested right under this Court's precedent.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the District Court's decision regarding the constitutionality of Section 196.1978 de novo. *Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005). Because it is an act of the Legislature, section 196.1978 comes "clothed with a presumption of constitutionality," *Crist v. Fla. Ass'n of Criminal Def. Lawyers, Inc.*, 978 So. 2d 134, 139 (Fla. 2008), and this Court must indulge all reasonable presumptions in favor of its constitutionality, *see State v. Bales*, 343 So. 2d 9, 11 (Fla. 1977); *accord City of Gainesville*, 918 So. 2d at 256. This Court must uphold the statute unless a challenger establishes its constitutional invalidity "beyond reasonable doubt." *Crist*, 978 So. 2d at 139 (internal quotation marks omitted).

Review of whether Panama Commons would qualify for an exemption under the 2012 version of Section 196.1978, *see supra* Part II, is de novo as a matter of statutory interpretation. *Zingale v. Powell*, 885 So. 2d 277, 280 (Fla. 2004). Because the statute at issue is a tax exemption, it must be strictly construed against the party claiming it. *Sebring Airport Auth. v. McIntyre*, 642 So. 2d 1072, 1073 (Fla. 1994).

II. PANAMA COMMONS WOULD NOT QUALIFY FOR A TAX EXEMPTION UNDER THE PRE-2013 VERSION OF SECTION 196.1978 BECAUSE IT RECEIVED A BENEFIT FROM THE PROPERTY.

Panama Commons would not qualify for an ad valorem tax exemption even if the pre-2013 version of Section 196.1978 were to apply. While the District Court's holding fails as a constitutional matter, *see supra* Part III, this Court should not even reach the question because the case should be resolved on these statutory grounds.

A. The District Court Erred in Failing to Reverse on the Statutory Issue.

For years, this Court has "adhere[d] to the settled principle of constitutional law that courts should not pass upon the constitutionality of statutes if the case in which the question arises may be effectively disposed of on other grounds." *Singletary v. State*, 322 So. 2d 551, 552 (Fla. 1975); *accord In re Holder*, 945 So. 2d 1130, 1133 (Fla. 2006). Lower courts have similarly viewed this principle as an obligation to avoid reaching constitutional questions unless doing so is necessary. *See Sarasota Herald-Tribune v. State*, 924 So. 2d 8, 13 (Fla. 2d DCA 2005) ("[W]e are *required*, whenever possible, to resolve a dispute without reaching the constitutional issues and without declaring statutes unconstitutional.") (emphasis added).

Here, the District Court affirmed the trial court's summary judgment on the statutory question, *see* op. at 2, but expressly "limit[ed] [its] discussion to the

constitutional issue," *id.* at 2. Had the District Court correctly applied the "principle of judicial restraint," *Holder*, 945 So. 2d at 1133, that this Court has long directed, it would have analyzed the statutory argument and reversed on that issue without reaching the constitutional question. Courts are required to indulge all reasonable presumptions in favor of a statute's constitutionality. *See supra* Part I. As the appellants showed, under a construction of Section 196.195 that is, at the very least, reasonable, Panama Commons does not qualify for a tax exemption because it received a benefit from the property within the meaning of the statute.

B. Panama Commons Failed to Show that It Did Not Receive a Benefit from the Property that Disqualified It from Receiving a Tax Exemption.

At all times relevant to this case, Section 196.1978 has required that any property covered by the exemption comply with the requirements of Section 196.195. Section 196.195, in turn, requires that "[e]ach applicant affirmatively show that no part of the subject property, or the proceeds of the sale, lease, or other disposition thereof, will inure to the benefit of its members, directors, or officers or any person or firm operating for profit or for a nonexempt purpose." § 196.195(3).

Because Section 196.1978, which incorporates this standard, is a tax exemption, the requirement that a taxpayer not derive a benefit from property must be "strictly construed" against the party claiming an exemption. *Sebring Airport Auth. v. McIntyre*, 642 So. 2d 1072, 1073 (Fla. 1994). As the Third District held,

the plain language of the statute "requires an exemption applicant to demonstrate that the entity, its members or directors, are not receiving any benefit from the property." *TEDC/Shell City, Inc. v. Robbins*, 690 So. 2d 1323, 1325 (3d DCA 1997). In *TEDC/Shell*, the Third District held that an entity failed to show that it was not receiving "any benefit" from a property where it had received federal LIHTC funding to construct affordable housing. *See id.* The Court rejected the taxpayers' arguments that the fact that they were not receiving *profits* from the development meant that Section 196.195(3) did not disqualify them from receiving the additional benefit of a tax exemption. The Court reasoned that "the receipt by the various partners of a federal income tax credit is certainly a benefit as the word is used in its plain and ordinary sense." *Id.* (internal quotations omitted); *see also id.* ("The tax credit based on property ownership is a benefit flowing from the property."). The language of Section 196.195(3) has not changed since the Third District's decision.

The record is clear that Panama Commons has failed to show that it satisfies the requirements of Section 196.195(3). Panama Commons applied for and received federal LIHTC benefits, though it subsequently returned them to the State for alternate financing. That this alternate financing came in the form of a loan subject to forgiveness rather than tax credits makes no difference—Panama Commons is still receiving a substantial benefit as the result of its ownership of the

subject property. As Mark Du Mas himself acknowledged, the program under which Panama Commons swapped its tax credits for alternate funding "gave actually very good terms" compared to traditional LIHTC arrangements. *See supra* at 7. As the *TEDC/Shell Court* noted, a "benefit" in its plain and ordinary sense is "anything contributing to an improvement in condition; advantage," *TEDC/Shell*, 690 So. 2d at 1325 (quoting *Webster's New World Dictionary* 138 (1959)). Simply put, ownership of the subject property has inured to the benefit of Panama Commons and its for-profit limited partner. And if there *were* any doubt as to whether a low-interest loan subject to forgiveness is a benefit, the rule that tax exemptions are "strictly construed" would require that doubt to be resolved in favor of denying the exemption. *See Sebring Airport Auth.*, 642 So. 2d at 1073.

Section 196.195(3) also disqualified Panama Commons from an exemption for an independent but related reason—a for-profit entity, PHINDA Panama, LLC is benefitting from the property in the form of taking a depreciation expense. As Mr. Du Mas testified, Panama Commons sold depreciation rights to PHINDA allowing it to take a substantial share in the entity—a 99.99% interest. R3:448. Based on this ownership share, PHINDA is able to claim substantially all of the property's depreciation as an expense to offset taxes. *See generally* HUD 2012 Report, *supra*, at 11, 23-24. There can be no real dispute that this depreciation is a valuable benefit to PHINDA—the entity paid $400,000 for the ability to claim this

depreciation—or that PHINDA is a for-profit entity. As such, Panama Commons fails to show that no benefit from the property is inuring to "any person or firm operating for profit or for a nonexempt purpose." § 196.195(3), Fla. Stat.

The trial court held that *TEDC/Shell* did not apply because the cases were *factually* different, but that disregards the broader reasoning of the *TEDC/Shell* Court and the language of Section 196.195(3) itself. The trial court noted that *TEDC/Shell* involved tax credits, and for-profit entities that were able to use them, and that the case "did not address whether the sale by a non-profit entity of a depreciation loss constitutes a benefit pursuant to § 196.195(3)." R4:750. But whether the benefit to Panama Commons—or to the for-profit entity PHINDA—came in the form of tax credits, depreciation expenses, or anything else, the *TEDC/Shell* Court's reasoning applies. The plain language of Section 196.195(3) limits an applicant's ability to claim a tax exemption if any part of the property or its disposition inures to the benefit of the owner or to a for-profit.

In the District Court, Panama Commons' only real response to Stranburg's and Sowell's showing was to claim that Section 196.195(3), which again has not been amended since the *TEDC/Shell* decision, has been undermined by unrelated legislation including the amendments to Section 196.1978 itself. Panama Commons argued that 2002 and 2004 amendments to *other* laws, addressing the distinct issue of property valuation, "undermined *TEDC*'s 'any benefit' reasoning."

Dist. Ct. Ans. Br. of Panama Commons at 30 (citing amendments to §§ 420.5093 and 420.5099, Fla. Stat. and enactment of § 193.017, Fla. Stat.); *see also id.* (citing *Holly Ridge L.P. v. Pritchett*, 936 So. 2d 694, 695-96 (Fla. 5th DCA 2006)). But these statutes provide that LIHTC funding is not to be counted as income *to the property*, *see* § 420.5099(5); they do not address the separate issue of whether LIHTC or other benefits may be benefits *from the property* for purposes of applying a tax exemption. Panama Commons argued that the statutes and caselaw recognized that tax credits are "intangible property," and therefore not part of the taxable real property, but as *TEDC/Shell* recognized, the plain text of Section 196.195(3) more broadly removes eligibility for a tax exemption when an entity receives a benefit from the property. That the benefit comes in the form of "intangible property" is simply immaterial and no court has held otherwise.

Panama Commons' other statutory argument—that the 2009 amendment to Section 196.1978 itself undermined *TEDC/Shell*[6]—also fails. As Panama Commons acknowledged, Section 196.1978 expressly incorporates Section 196.195(3), and the Legislature did not amend Section 196.195(3) when it

[6] This Court is, of course, not bound by *TEDC/Shell*, but Panama Commons has done nothing to undermine that case's reasoning or its demonstration that the plain language of the statute compelled its result. Moreover, that court's outcome is correct as a policy matter—the exemption in Section 196.1978 is a narrow one and the definitions in Section 196.195 are narrow as well, ensuring that the benefits of tax exemptions flow only to those entities that are truly nonprofit. The rule that statutory exemptions are "strictly construed," *see supra*, applies with full force.

amended Section 196.1978. *See* Dist. Ct. Ans. Br. of Panama Commons at 31. Nevertheless, Panama Commons argued that the Legislature in 2009 intended to extend the tax exemption to entities receiving LIHTC funding because "[t]he [limited partnership] ownership structure is designed to implement tax credit financing (from for-profit limited partners), so the amended law was intended to exempt such projects." *Id.* at 30. But Panama Commons cited nothing for this expansive claim, nor is there anything in the statute itself or even the legislative history that establishes that the Legislature sought to extend the exemption specifically to LIHTC projects structured as limited partnerships. *See supra* at 8. Had the Legislature's intent been as Panama Commons describes it, a far simpler solution would have been to amend the exemption to cover projects funded "pursuant to 28 U.S.C. § 42" (the statute setting forth the LIHTC program). Indeed, the vast majority of LIHTC projects are developed by for-profit entities.[7]

Panama Commons' argument is unavailing. Even if it were proper to draw inferences from unrelated legislation—and it is not, because as the *TEDC/Shell* City Court noted, the plain language is clear—the inferences Panama Commons

[7] *See* ABT Assocs., Inc., *Updating the Low-Income Housing Tax Credit (LIHTC) Database Projects Placed in Service Through 2003*, Report for U.S. Dep't of Housing & Urban Devel., Jan. 2006, at 9, *available at* http://bit.ly/1HQ580F (reporting that under 13% of projects placed in service between 1995 and 2003 were sponsored by nonprofits). HUD's database of LIHTC projects, accessible at http://www.huduser.org/portal/datasets/lihtc.html, lists 1071 projects in the state of Florida. Of these, 967 had a for-profit sponsor.

asked the District Court to draw were unreasonable. Panama Commons' argument relies on an unsupported inference that the Legislature sought to induce LIHTC projects by extending a tax exemption to a relatively narrow slice of such projects. The argument relies on the further inference that the Legislature, sub silento, sought to repeal the limitation in Section 196.195(3), but only as to LIHTC projects. Neither inference is necessary for the statutes to be read in harmony—it is possible for a non-profit to enter into a limited partnership with a for-profit, without the overwhelming ownership share going to the for-profit and for purposes other than to receive LIHTC funding. It is also possible for the partnership to build affordable housing using any of the myriad programs aside from LIHTC that exist for that purpose. *See supra* at 2. Finally, it is also possible for such entities to construct housing without directly receiving a benefit from the property within the meaning of Section 196.195(3).

Even if Panama Commons had a plausible statutory argument, the rule that tax exemptions are to be construed strictly against the party claiming them requires a greater showing and this Court need not indulge Panama Commons' strained statutory reading. Moreover, because the plain language of the statutes leads to entirely reasonable results, there is no need to look beyond that language. *See, e.g.*, *State v. Sousa*, 903 So. 2d 923, 928 (Fla. 2005). And that language is fatal to Panama Commons' arguments.

III. THE LEGISLATURE'S 2013 AMENDMENT TO SECTION 196.1978 DOES NOT VIOLATE DUE PROCESS.

If this Court were to reach the constitutional question of whether the 2013 Amendment violates due process, it should still reverse the District Court's holding. The Amendment was neither retroactive nor did it violate Panama Commons' due process rights.

A. Tax Legislation Provides a Special Case and Does Not Give Rise to Traditional Due Process Concerns.

Section 196.1978, like any legislation, carries a presumption of constitutionality, and Panama Commons bears the burden of proving "beyond reasonable doubt" that it is invalid. *Crist*, 978 So. 2d at 139. If anything, Panama Commons' burden is even higher in this case because Section 196.1978 is tax legislation. As this Court noted in *Eastern Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 311, 314 (Fla. 1984), "[w]hen the state legislature, acting within the scope of its authority, undertakes to exert the taxing power, every presumption in favor of the validity of the action is indulged. Only clear and demonstrated usurpation of power will authorize judicial interference with legislative action."

The United States Supreme Court has also expressed special solicitude for governments' taxing authority, particularly in the area of retroactive legislation. As the Court noted decades ago, the distribution of the costs of government through

taxation "is a delicate and difficult task," and "experience has shown the importance of reasonable opportunity for the legislative body" to distribute increased costs among taxpayers "in the light of present need for revenue." *Welch v. Henry*, 305 U.S. 134, 149 (1938); *see also Cohan v. Comm'r*, 39 F.2d 540, 545 (2d Cir. 1930) (Hand, J.) ("It is notoriously impossible nicely to adjust the weight of taxes."). More recently, Justice O'Connor reasoned that "[r]etroactive application of revenue measures is rationally related to the legitimate governmental purpose of raising revenue" because retroactivity allows for this proper distribution of costs with knowledge of *current* needs and resources. *United States v. Carlton*, 512 U.S. 26, 37 (1994) (O'Connor, J., concurring in judgment). For that reason, as the Supreme Court has noted, "Congress 'almost without exception' has given general revenue statutes effective dates prior to the dates of actual enactment," at least for short and limited periods. *Id.* at 32-33 (majority op.) (quoting *United States v. Darusmont*, 449 U.S. 292, 296 (1981) (per curiam)); *see also Cohan*, 39 F.2d at 545 (noting that Congress had retroactively changed tax laws, for periods of less than twelve months, "from the outset").

The United States Supreme Court's solicitude for state and federal taxing decisions and this Court's deference to tax legislation are based in the same principle—tax legislation reflects a "delicate and difficult" balancing of multiple interests. Where, as here, the Legislature realizes that a recently enacted statute has

led to an "unintended effect" allowing entities to claim a tax exemption that wasn't meant for them, *see supra* at 10, the Legislature must have the flexibility to act. The District Court failed to abide by this principle, treating the amendment to Section 196.1978 just as it would a retroactive repeal of a cause of action or an impairment of contract.[8] The District Court made a more fundamental error, however, because the 2013 amendment to Section 196.1978 is not even retroactive.

B. The 2013 Amendment to Section 1978 Was Not Retroactive and Did Not Affect Panama Commons' Pre-Existing Rights.

The amendment to Section 196.1978 became law when the Governor signed the bill on May 30, 2013. *See* Ch. 2013-83, § 3 (providing that the amendment was effective upon becoming law). At that point, the tax rolls in Bay County had not been certified, the property appraiser had not approved Panama Commons'

[8] While the caselaw in Florida is not as developed, it is likely because the Florida Legislature has not enacted retroactive tax statutes as regularly as has the United States Congress. The available caselaw is not inconsistent with the federal courts' solicitude for state and federal taxing authority and their acceptance of legislation with relatively limited retroactivity periods. *See, e.g.*, *Roger Dean Ents., Inc. v. Dep't of Revenue*, 387 So. 2d 358, 363-64 (Fla. 1980) (upholding application of corporate income tax to installment payments received for sale of property accomplished prior to enactment of tax); *cf. Dep't of Revenue v. Liberty Nat. Ins. Co*., 667 So. 2d 445, 446-47 (Fla. 1st DCA 1996) (holding that interpretation of statute that would have altered tax liability for period of four to eight years preceding law was impermissibly retroactive); *but cf. In re Advisory Op. to the Governor*, 509 So. 2d 292, 314-15 (Fla. 1987) (providing opinion that law retroactively imposing sales tax on certain construction contracts violated contracts clause). *See also infra* n.15 (noting that the Florida and federal Due Process Clauses are construed identically).

application for an exemption, and no party had been assessed any tax. *See supra* at 4-6.

The District Court's determination that the law is retroactive depended heavily on the fact that the 2013 Amendment provided that it would "operat[e] retroactively to the 2013 tax roll." *See* op. at 3-4 (quoting Ch. 2013-83, § 3).[9] But this Court has instructed that the effect of a law, rather than the label attached to it, is what counts for purposes of retroactivity analysis. *Cf. State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995) ("Just because the Legislature labels something as being remedial, however, does not make it so.").[10] In other words, where the Legislature both *states* that a law should "operat[e] retroactively" and enacts a law that in fact *operates* only prospectively, the law is not retroactive. *See generally Chase Fed. Hous. Corp.*, 737 So. 2d at 500 ("In order to determine legislative intent as to retroactivity, both the terms of the statute and the purpose of the enactment must be considered.").

Under the traditional test for determining whether a law is retroactive—whether it "attaches new legal consequences to events completed before its

[9] As Judge Benton noted in dissent, the Legislature's use of the term "retroactively" was "potentially confusing" but did not alter the fact that it operated to cover only the 2013 tax year. Op. at 10.

[10] This inquiry differs from the question of whether, if a court finds that an act is in fact retroactive, it is clear that the Legislature intended the act to be retroactive. *See Metro. Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 499 (Fla. 1999).

enactment"[11]—the 2013 Amendment was not retroactive. Under the timeline for tax assessment and levying described above, *see supra* at 4-6, at the point that the Amendment was signed by the Governor—May 30—Panama Commons had not been approved for a tax exemption, had not been sent a tax assessment, and had paid no taxes. Panama Commons, like every other taxpayer, was subject to valid "change[s] in judgment" by the property appraiser until the tax rolls were certified, typically in October. *See Korash v. Mills*, 263 So. 2d 579, 581-82 (Fla. 1972). These could include changes in assessment and revocation of previously approved exemptions. *See id.* In other words, given the unsettled nature of Panama Commons' tax status as of May 30, there were no new legal consequences within the meaning of *Chase Federal Housing*.

Moreover, because this case involves a property tax statute, the *Chase Federal* standard does not apply neatly. *Landgraf*, the case upon which the *Chase Federal* Court relied, stresses that the determination of whether a law is retroactive is not a black-and-white process but "comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Landgraf*, 511 U.S. at 270; *see also id.* ("Any test of retroactivity . . . is unlikely to

[11] *Chase Fed. Hous. Corp.*, 737 So. 2d at 499 ((quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994)).

classify the enormous variety of legal changes with perfect philosophical clarity."); *see also R.A.M. of S. Fla. v. WCI Cmties., Inc.*, 869 So. 2d 1210, 1215-16 (Fla. 2d DCA 2004) (Canady, J.). Here, the relevant conduct—purchasing the land—occurred well before enactment of the 2013 Amendment. Indeed, the *Landgraf* Court cited a change to property taxes as an example of an "uncontroversially prospective statute[] [that] may unsettle expectations and impose burdens on past conduct" because it might upset the reasonable expectations that prompted an owner to acquire property. *Id.* at 269 n.24. The key question, and one related to the question of whether a party has a vested right, *see infra*, is whether the statute affects a reasonably settled expectation that the law will not change. As both the *Landgraf* and *Chase Federal* Courts noted, a statute "does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment." *Chase Fed. Hous. Corp.*, 737 So. 2d at 499. That is precisely the case here.

C. If the 2013 Amendment Were Retroactive, It Would Not Violate Due Process Because It Did Not Eliminate a Vested Right Or Impermissibly Create a New Obligation.

Even if the 2013 Amendment were retroactive, it would not be impermissibly retroactive under this Court's caselaw. As this Court has held, a retroactive statute will not violate due process unless it "impairs vested rights, creates new obligations, or imposes new penalties." *Laforet*, 658 So. 2d at 61.

Nobody suggests this case has anything to do with penalties, and, as shown below, the 2013 Amendment does not impair any vested right or create any new obligation.

1. Panama Commons did not have a vested right to a tax exemption before the 2013 Amendment was enacted. A vested right is "an immediate, fixed right of present or future enjoyment" that "must be more than a mere expectation based on an anticipation of the continuance of an existing law." *R.A.M. of S. Florida, Inc.*, 869 So. 2d at 1218 (quoting *City of Sanford v. McClelland*, 163 So. 513, 514-15 (Fla. 1935); *Div. of Workers' Comp. v. Brevda*, 420 So. 2d 887, 891 (Fla. 1st DCA 1982)); *see also Fla. Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 490-91 (Fla. 2008). A right that is contingent or expectant is not vested, because a vested right exists only where the right to enjoyment is "immediate." Expectant rights are those that "depend upon the continued existence of the present condition of things until the happening of some future event," while contingent rights "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." *Pearsall v. Great N. Ry.*, 161 U.S. 646, 673 (1896) (quoted in *R.A.M. of S. Fla.*, 869 So. 2d at 1218). A "mere expectation based on an anticipation of the continuance of an existing law," *Buster*, 984 So. 2d at 490 (quoting *Brevda*, 420 So. 2d at 891), is not a vested right.

Critically for purposes of this case, a right is neither fixed nor vested where it is "subject to modification or elimination at any time by the Legislature." *Buster*, 984 So. 2d at 490. There can be no reasonable dispute that the Legislature "has the unquestioned authority to repeal prior tax exemption statutes." *Straughn v. Camp*, 293 So. 2d 689, 694 (Fla. 1974). And it is fully "within the legislature's prerogative to repeal tax exemptions and impose taxes on lands previously exempt." *Id.* at 695. As in *Buster*, the "legislative scheme" for tax exemptions "has remained fluid and subject to the discretion of the Legislature, which at any time could modify or repeal the governing statutes." *Buster*, 984 So. 2d at 491. The expansion of the exemption to cover affordable housing occurred in 2009—*after* Panama Commons submitted an application for LIHTC funding[12]—and that came just a decade after the affordable housing exemption was created in the first place. *See* Ch. 99-378, § 15, Fla. Laws. Moreover, as Judge Benton pointed out in dissent below, the Legislature *created* new exemptions, applied to the tax years in which they were enacted, in both 2011 and 2012. Op. at 12 n.3. Simply put, Panama Commons could have no reasonable expectation that any statutory tax exemption would remain unchanged.

[12] To be clear, the LIHTC application is an extensive undertaking, requiring the applicant to demonstrate the availability of financing, land, plans, and additional information. For example, Panama Commons' application, with addenda, occupies fully 220 pages of the Record. *See* R3:486 - R4:705.

The District Court found otherwise, relying on statutes and caselaw that stand for nothing more than the rule that property values are *measured* as of January 1. *See* op. at 4 (citing § 192.042, Fla. Stat.). Indeed, Panama Commons has not, to date, cited a single case that holds that a taxpayer has a *vested right* to a tax exemption as of January 1. *Dade County Taxing Authorities v. Cedars of Lebanon Hospital Corp.*, 355 So. 2d 1202 (Fla. 1978), upon which the District Court relied in its opinion, held that a taxpayer was not eligible for an exemption covering hospitals where the subject property was not operated as a hospital on January 1. *See id.* at 1204 ("[T]he actual use of the Care Center as of the assessment date, rather than its intended future use, controls the determination of whether the property qualifies for exemption from ad valorem taxes as a nonprofit hospital."). While the *Cedars of Lebanon* Court said that the taxable status of the property was "determined on January 1," *id.*, the proper reading of this language is as an acknowledgment that January 1 is the date for determining the character of property use and its ownership. *See Lake Worth Towers, Inc. v. Gerstung*, 262 So. 2d 1 (Fla. 1972) (, 3 ("Taxable status for the year . . . is determined *as of* [the January 1] date.") (emphasis added); *abrogated on other grounds*, *Markham v. Neptune Hollywood Beach Club*, 527 So. 2d 814 (Fla. 1988). That was the sole issue in the case. *See Cedars of Lebanon*, 355 So. 2d at 1203 (quoting certified question). Nor can this dicta be read to mean that, implicitly, the Court was holding

that the tax could not be changed after the January 1 date—this Court had held to the contrary just six years earlier, *see Korash v. Mills*, 263 So. 2d 579, 581-82 (Fla. 1972), and had for decades held the same, *see Stieff v. Hartwell*, 17 So. 899, 900 (Fla. 1895) (holding that an assessment need not be completed within the year for which the assessment is made). Moreover, it is clear that a property appraiser can take into account information that comes to light *after* January 1 for purposes of determining what a property's value was as of that date. *Sec. Mgt. Corp. v. Markham*, 516 So. 2d 959, 963 (Fla. 4th DCA 1987), *rev. denied*, 518 So. 2d 1276 (Fla. 1987).

The District Court's reliance on Section 192.042 and on cases like *Cedars of Lebanon* squarely conflicts with this Court's decision in *Buster*. Even if the statutes did provide that a tax exemption is set as of January 1, under the logic of *Buster*, that fails to create a vested right. In *Buster*, a constitutional amendment provided that patients would have access to medical records. Such records were, however, protected by pre-existing statutes that "provide[d] that the investigations, proceedings, and records of the respective medical committees or organizations [were] not subject to discovery." 984 So. 2d at 490. After the amendment passed, all records, even those created in reliance on the prior statutory scheme, *were* subject to discovery, and plaintiffs in several cases sought their production. This Court held that the prior statutes did not create any *vested* right in the secrecy of

the information. Instead, they created only "an expectancy that legislative policy favored only limited access" to the records. *Id.* at 491. Thus, while the existing statutes did protect the secrecy of the information, the fact that the Legislature could modify those statutes meant that the protection was not a vested right.

Here, the fact that Section 1978 is a tax exemption means that any protection as of January 1 is even weaker. Rather than vested rights, "[e]xemptions to taxing statutes are special favors granted by the Legislature." *Hous. by Vogue, Inc. v. Dep't of Revenue*, 403 So. 2d 478, 480 (Fla. 1st DCA 1981), *aff'd* 422 So. 2d 3 (Fla. 1982); *see also R.A.M. of S. Fla.*, 869 So. 2d at 1217 (finding no vested right where statutory benefit "was a matter of legislative grace that could be withdrawn by subsequent legislative action"); *Stott v. Stott Realty Co.*, 284 N.W. 635, 639 (Mich. 1939) ("It is a general rule of constitutional law that a citizen has no vested right in statutory privileges and exemptions . . .") (quoted in *Buster*, 984 So. 2d at 492). Given the Legislature's unquestioned power to modify tax exemption statutes, the long tradition of governments at both the state and federal level modifying taxation for short periods, *see supra*, and the lack of any constitutional or statutory language expressly preventing a change, Panama Commons fails to establish that it had a vested right to a tax exemption as of January 1, 2013.

Looked at from a different perspective, the fact that the January 1 date has little or no protection should have led a taxpayer in Panama Commons' position to

realize that it did not have a vested right to an exemption. As Judge Learned Hand noted decades ago, "nobody has a vested right in the rate of taxation." The reason for this is both legislative practice rooted in the critical need for flexibility, *see supra* at 25, as well as the specific calendar for property tax assessment, *see supra* at 4-6. Tax rates change throughout the year and determinations regarding exemption change as well.[13] The fact that property's use and ownership is *evaluated as of* January 1 is an insufficient basis for a party to conclude that any such exemption is unchangeable as of that date in light of these realities.

In the District Court, Panama Commons also relied on Section 196.011(1)(a), Florida Statutes, to argue that the Legislature sufficiently protected its eligibility for an exemption as of January 1. *See* Panama Commons Dist. Ct. Ans. Br. at 20. That section requires each taxpayer to apply for an exemption on or before March 1 of each year, providing that "[e]very person who, on January 1, has the legal title to real or personal property . . . which is entitled by law to exemption from taxation as a result of its ownership and use" shall apply by that date. Seizing

[13] In the District Court, Panama Commons attempted to distinguish changes in the taxation rate from changes to a party's eligibility for an exemption. But there is no principled distinction between the two. An exemption is, effectively, a millage rate of zero and from a practical perspective, a party that receives a tax bill for $500 after an exemption is denied is in no worse position than a party whose existing tax bill increases by the same amount. Moreover, a property can be exempt in part, as occurred here, since not all of Panama Commons' units were occupied as of January 1, so it would not be eligible for a full exemption in any case. *See supra* at 10.

on the "entitled by law" language, Panama Commons argued that the Legislature had created a vested right for retroactivity purposes, but this argument fails for multiple reasons. First, this Court has required stronger language to create a vested right. In *Buster*, for example, the Court found insufficient the fact that existing statutes squarely provided that certain information was not to be disclosed. *See supra* at 35. In other words, *Buster* requires greater protection—such as a statutory provision creating a privilege or a provision expressly protecting a right—to result in a vested right. Second, Section 196.011(1)(a) does not even create a statutory right in any party—the statute provides that a *property* is "entitled by law" to exemption, but of course properties do not have rights.[14] The better reading of this statute is to mean that the property is *eligible* (or more accurately, makes an owner eligible) for an exemption. Generally accepted canons of statutory construction support such a reading—to accept Panama Commons' interpretation, the Court would have to conclude that the Legislature sought to bar itself from future changes to tax exemptions, not by expressly declaring that tax exemptions would not be changed and not by including any language in the sections dealing with

[14] By contrast, the constitutional homestead exemption provides that "*[e]very person* who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner . . . *shall be exempt* from taxation thereon . . ." Fla. Const. Art. VII, § 6 (emphasis added). Prior to the 1968 constitutional revision, the homestead exemption provided that "[e]very *person*" who satisfied certain conditions "shall be entitled" to the exemption. *See Garcia v. Andonie*, 101 So. 3d 339, 343 n.5 (Fla. 2012).

exemptions themselves, but by using the word "entitled" in a law dealing with the *application process*. This Court can assume that the Legislature would not "hide elephants in mouseholes," *see Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), and set out such an important limitation in "vague terms or ancillary provisions," *id.*

Instead, Section 196.011 supports the Executive Director's position that Panama Commons did *not* have a vested right to an exemption as of January 1. That Section provides that a taxpayer must apply for an exemption after that date. A person that does not apply for an exemption waives the right to the exemption for that year. *See Zingale v. Powell,* 885 So. 2d 277, 284 (Fla. 2004). A right to an exemption is therefore contingent on the taxpayer's applying and the property appraiser's granting the application, and a right that is contingent is not a vested right at all. *See Pearsall*, 161 U.S. at 673; *see also Dep't of Mgt. Servs. v. City of Delray Beach*, 40 So. 3d 835, 841 (Fla. 1st DCA 2010) (finding right claimed by retirement plan to be contingent and not vested where right was contingent on DMS's determination that plan was in compliance with current law).

There can be no serious question that the 2013 Amendment, even if it were retroactive, would be constitutional under the Federal Due Process Clause.[15] As the

[15] In the District Court, Panama Commons sought to brush away the force of federal case law, attempting to distinguish Florida and Federal due process law. *See* Dist. Ct. Ans. Br. of Panama Commons at 23. But this Court has not held that

U.S. Supreme Court has recognized, "[r]etroactivity is generally tolerated" with tax legislation. *E. Enters. v. Apfel*, 524 U.S. 498, 534 (1998) (plurality op.). The Court has upheld federal and state tax legislation that, for example, imposed taxes on dividends received two years prior, *Welch v. Henry*, 305 U.S. 134, 150 (1938), increased the amount of taxation on an estates that entered into a transactions twelve months before the effective date of a statute, *United States v. Carlton*, 512 U.S. 26, 28-29 (1994), or altered the amount of deductions available for gifts made ten months earlier, *United States v. Darusmont*, 449 U.S. 292, 294-95 (1981). In its most recent decision, the Court noted that the proper standard for determining whether a retroactive tax is permissible is whether retroactive application is "so harsh and oppressive as to transgress the constitutional limitation," and held that this standard does not differ from the rational basis standard. *Carlton*, 512 U.S. at 30. The Court noted that it "repeatedly ha[d] upheld retroactive tax legislation

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the United States Supreme Court's retroactivity decisions, made under the federal standard, are irrelevant. To the contrary, it has long looked to those decisions for guidance. *See, e.g.*, *Chase Fed. Hous. Corp.*, 737 So. 2d at 499-500 (adopting reasoning of *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994)); *City of Sanford*, 163 So. at 514-15 (adopting standard from *Pearsall v. Great N. R. Co.*, 161 U.S. 646 (1896) for defining vested right); *id.* at 515 ("The Constitutions of both the state of Florida and of the United States provide that no person shall be deprived of his property without due process of law. These constitutional provisions fully protect any impairment of vested rights.") (citations omitted). Moreover, District Courts have long concluded that the due process protections in the Florida and federal Constitutions are identical. *See, e.g.*, *Barrett v. State*, 862 So. 2d 44, 48 (Fla. 2d DCA 2003).

against a due process challenge," particularly where the retroactivity period was modest. *Id.* at 30, 32. As the Court recognized decades ago, given the "difficult and delicate" balancing involved in taxation determinations, allowing some small measure of retroactivity is critical to enable governments to make reasonable legislative judgments. *Welch*, 305 U.S. at 149, 145. Perhaps for this reason, it has long been recognized that "nobody has a vested right in the rate of taxation." *See supra* at 25-26.

While the Court in the past has disallowed taxes that were entirely unforeseen,[16] Panama Commons has a particularly weak claim on such equitable grounds—it applied for LIHTC funding and secured its special loan before the tax exemption was even expanded to limited partnerships. *See supra* at 6-8; *see also* Ch. 2009-96, Laws of Fla. It did not complete its project until 2011 and, therefore, enjoyed the benefit of the tax exemption for one year only—2012. And it bears noting that there is no dispute that Panama Commons is subject to the revised scope of Section 196.1978 for the years 2014 on, regardless of its expectations in

[16] In *Untermeyer v. Anderson*, 276 U.S. 440 (1928), for example, the Court held that a newly enacted gift tax could not be imposed on gifts made prior to its enactment. Panama Commons relied on *Untermeyer* and similar cases in the District Court, but as *Carlton* notes, such cases were "decided during an era characterized by exacting review of economic legislation under an approach that 'has long since been discarded," and their precedential value is doubtful. *Carlton*, 512 U.S. at 34. Moreover, even if such cases were good law, the Court just a few years later recognized that property taxes are of a different nature and "are not open to the objection successfully urged in the gift cases." *Welch*, 305 U.S. at 147.

2008, 2009, or at any other point. Moreover, during the 2009-13 period, the Legislature continued changing tax exemptions, as it had done in the past. *See supra* at 33. In no sense can it be said that the tax exemption motivated Panama Commons' transactions.

To the extent a taxpayer has a vested right in a tax exemption, the *earliest* date at which that right vests is when the tax rolls are certified, which typically occurs in October of each year. That date, not January 1, is the date that this Court has identified as the one beyond which a property appraiser cannot make any further changes in judgment. *Korash v. Mills*, 263 So. 2d 579, 581-82 (1972); *Underhill v. Edwards*, 400 So. 2d 129, 132 (Fla. 5th DCA 1981), *rev. denied* 411 So. 2d 381 (Fla. 1981); *see also State v. Thursby*, 139 So. 372, 376 (Fla. 1932) (noting that there must be a date for repose and "there can be no better time" than the date of the certified tax rolls). Moreover, that date is also when the time begins to run for a taxpayer to file a challenge to an assessment. § 194.171(2), Fla. Stat.[17] If the date on which a right to an exemption vests is in October, Panama

[17] Florida Statutes provide for a procedure for challenging assessments or denials of exemptions before a value adjustment board. *See* ch. 194, Fla. Stat. Such boards cannot meet to consider appeals before July 1. § 194.032(b), Fla. Stat. Even if this Court were to conclude that July 1, rather than the date the tax roll is certified, is when any right to an assessment would vest, Panama Commons' retroactivity arguments would still fail, because the law became effective in May.

Commons' arguments necessarily fail since the 2013 Amendment became effective several months earlier.

***2. The 2013 Amendment did not impose a "new obligation" on Panama Commons within the meaning of* Laforet.** For the same reasons, the 2013 Amendment did not impose any new obligation on Panama Commons. At the time the legislation became effective, Panama Commons had not yet been assessed any tax and certainly had not paid a tax, nor had it been granted a 2013 tax exemption. Panama Commons had only an expectation that the law would continue as it was. It did not have a baseline obligation against which to measure any "new obligation." When the Legislature acted to correct the "unintended effect" of the law it had passed four years earlier, this expectation was dashed, but this did not give rise to a "new obligation" within the meaning of *Laforet*. Because all real property in Florida is subject to taxation unless specifically exempted, the 2013 Amendment did not create a new tax obligation. It merely addressed an unintended consequence of the 2009 and 2011 amendments.

Panama Commons has not proven that the 2013 Amendment was impermissibly retroactive and has certainly not done so "beyond a reasonable doubt," *Crist v. Fla. Ass'n of Criminal Def. Lawyers, Inc.*, 978 So. 2d 134, 139 (Fla. 2008). The 2013 Amendment, which was a reasonable, limited attempt to

correct an "unintended effect" of prior legislation and to ensure that all taxpayers pay their fair share, is constitutional.

CONCLUSION

This Court should reverse the decision of the District Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by electronic service through the Florida Courts E-Filing Portal on June 26, 2015 to the following counsel of record:

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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