IN THE SUPREME COURT OF FLORIDA

DAN SOWELL, in his official capacity as Bay County Property Appraiser; and MARSHALL STRANBURG, in his official capacity as Executive Director, Florida Department of Revenue,

Appellants,

v.

PANAMA COMMONS L.P.,

Appellee.

CASE NO. SC15-774
L.T. Case Nos. 1D14-1671 and 2013-CA-1355

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The main issue is whether the Legislature can retroactively repeal a property tax exemption, or can do so in the circumstances of this case. The parties agree the material facts are undisputed, but dispute what is material.[1]

Panama Commons acquired land for the affordable housing project in 2010 and completed construction in 2011. It encumbered the project with a land use restriction agreement (LURA) that assures the project will meet affordable housing rent restriction requirements for 30 years. du Mas Aff. R 340, 342-44, attaching copy of LURA, R 346-66; Dep. 53, 55, R 122, 124.

Panama Commons LP, a nonprofit Florida limited partnership, holds title to the property. Its sole general partner is Panama Commons GP LLC, a Florida limited liability company. The LLC's sole member is Paces Foundation Inc., a nonprofit corporation exempt from federal tax under IRC § 501(c)(3). The limited partnership and LLC are disregarded entities for federal tax purposes but partake of Paces' federal tax exempt status. Aff. R 342-43; Dep. 73-77, R 143-46.

This project ownership structure met requirements for tax exemption under Fla. Stat. § 196.1978 (2009-2012), which exempted affordable housing property owned by either a non-profit corporation exempt from federal tax under IRC §

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[1] Appellants are referred to as the "Appraiser" and "Director;" Appellee, as "Panama Commons." Testimony of Panama Commons' principal Mark du Mas refers to his Affidavit, R 340-68 ("Aff.") and Deposition, R 73-182 ("Dep.").

501(c)(3), or by a Florida limited partnership with a 501(c)(3) general partner. This exemption law disregarded limited liability companies and limited partnerships that are disregarded for federal tax purposes.

The Appraiser agreed that the project met requirements for tax exemption under § 196.1978 by approving a full tax exemption for 2012. Aff. R 343.

The property had the same ownership and use on January 1, 2013, as in the year before. Request for Admission no. 3, R 55; Appraiser's Response, R 62 (admitting no change). The law in effect January 1, 2012, remained in effect on January 1, 2013. January 1 is the date on which property ownership and use are determined to establish its status as taxable or exempt. *See* Point I A below; Appraiser In. Br. 17; Director In. Br. 5.

Panama Commons perfected its claim for a 2013 exemption by a timely renewal application in March 2013. R 370-79.

The 2013 legislative session then enacted two laws eliminating the exemption for affordable housing owned by a limited partnership. *See* Chs. 2013-72 § 11 and 2013-83 § 3, Laws of Fla. These laws were approved May 30, 2013, but state they are effective "retroactively" to the 2013 tax roll.

On June 19, 2013, the Appraiser issued a Notice of Disapproval, citing that the property was owned by a limited partnership, not a 501(c)(3) corporation; and that this ownership did not meet the exemption requirements under the 2013 laws.

R 289-90, Notice of Disapproval, R 319. The Appraiser's notice did not question the property's exempt status under the 2012 law, which had been in effect on January 1, 2013. *Id.*

Panama Commons had expected the exemption to continue for 2013. The unexpected retroactive tax caused hardship, even beyond the amount of tax imposed. Mr. du Mas testified:

> The Panama Commons project received a full property tax exemption from the Bay County Property Appraiser for 2012. There has been no change in the Panama Commons project ownership or use since January 1, 2012, so we understood the tax exemption that was in effect in 2012 and on January 1, 2013, would apply in 2013....
>
> We did not foresee the Florida Legislature's enactment of new laws in the 2013 session to retroactively change the requirements for exemption and impose a new property tax on this project for the year 2013. This event made the expected stabilization of the project impossible, so we were not able to retire the bridge loan and replace it with a permanent loan in 2013 as planned. The project has paid the 2013 assessed property tax, using project reserves that were planned for use to meet stabilization requirements for purposes of a permanent loan. If this tax had not been imposed for 2013, the project could have retired the construction loan and replaced it with a permanent loan in 2013. The unexpected 2013 property tax placed the project in a more difficult financial position, in that it not only had to pay the tax, and the extra expense for the high interest bridge loan, but is also subject to additional risk that the bridge lender will call its loan or impose onerous extension terms, with potentially devastating effect. R 343

No one contends Panama Commons should have foreseen this retroactive change in the law. Req. for Adm. no. 5, R 55, Response, R 63 (after inquiry, the Appraiser lacked information on whether repeal was reasonably foreseeable).

Panama Commons had no opportunity to recoup the new tax by raising rents. Under its LURA, loan commitment, and regulations, the project can only rent to eligible tenants who meet income standards established by the U.S. Department of Housing and Urban Development in February of each year. Unit rental charges are limited to 30% of the tenant's income. Because rental charges are both fixed by the lease agreement and limited by law, Panama Commons cannot backcharge its existing tenants, or increase rentals to new tenants to recoup the unexpected tax liability. Dep. 33-36, 43-44, R 102-05, 112-13.

Panama Commons brought this declaratory action to challenge this denial of the 2013 exemption. It alleged the property was tax exempt for 2012, and that the 2013 laws were unconstitutional as retroactively applied.

The Circuit Court considered the parties' cross motions for summary judgment, and granted partial summary judgment for Panama Commons, holding that the 2013 laws by their terms retroactively imposed tax, and that this retroactive application impaired a vested right to exemption and imposed a new obligation on property and property owners, which was unconstitutional. R 432-34.

In an effort to avoid the constitutional issue, the Director raises an additional statutory construction issue. This issue arose when, after the partial summary judgment, on March 3, 2014, the Appraiser issued a new Notice of Disapproval for the 2013 exemption, stating as its basis, that the property did not qualify for

exemption under the 2012 law, because it had received federal tax credits; that it later exchanged the tax credits for a federal loan; and that the project sold depreciation deduction rights to a private for-profit entity. R 439-40.

Panama Commons objected to this new notice as untimely and invalid under laws requiring Appraisers to specify reasons for denying exemptions by July 1 of the tax year and deeming later objections invalid. R 833-34[2] There is a question whether this issue is preserved for Court review. *See* Argument Point II C.

If this issue is preserved for consideration, it requires some understanding of the Low Income Housing Tax Credit (LIHTC) program established by federal and state law. Mr. du Mas explained the LIHTC program and the project's capitalization at length. Aff. R 340-43; Dep. 15-35, 44-46, 51-57; R 84-104, 113-15, 120-26. In sum, the State initially selected Panama Commons as eligible for an allocation of LIHTC tax credits, which can be used to attract for-profit investors to provide capital for affordable housing. R 342. However, no tax credits can issue until the project is complete and eligible tenants under lease are issued keys to their units. Dep. 17-18, 29, R 86-87, 98. But no tax credits were effective or used for this project because, during the Recession, no investors would commit to buy tax credits. Congress enacted a new law offering loans to projects that would have been eligible for tax credits. Instead of tax credits Panama Commons used this loan

[2] The Appraiser also admitted the property's exempt status under the 2012 law in his pleading. Complaint ¶s 1, 10, and 22, R1-3; Answer ¶s 1, 10, and 22, R 18-20.

to acquire and build the project. Aff. R 342; Dep. 31-33, 55-56, 107-08; R 100-02, 124-25, 166-67. *See also* R 670-73 (Panama Commons' letter returning tax credit allocation, showing inability to use tax credits).

This federal loan was insufficient by itself to build the project, so Panama Commons took out an additional high interest short term construction bridge loan for $1.6 million. R 342.

Panama Commons also raised an additional $400,000 for the project by selling a limited partner share in the limited partner to a for-profit entity, PHINDA Panama LLC. As consideration, Panama Commons gave PHINDA an ownership share of the project on the books of 99.99%. This allocation of book ownership was to allow PHINDA to use most of the depreciation deduction, which was otherwise of no value to Panama Commons LP and the other Paces-related entities, which are exempt from federal income tax. This transaction slightly increased the project's capital, furthering the purpose of the affordable housing laws.[3]

However, PHINDA, the limited partner's limited partner, did not develop the property, or control, manage, occupy or use the property. The property remains under the control of Paces, the 501(c)(3) corporation, as the general partner's sole

[3] This $400,000 investment, R 448, was a small fraction of the total project cost. *Compare* pro forma showing $14 million cost, R 483-85.

member. Aff. R 343; Dep. 66-67, R 135-36. This is consistent with a general partner's normal role in limited partnerships. *See* Fla. Stat. § 620.1406(1).

The Circuit Court considered the Second Notice of Disapproval on the merits, and rejected the argument reinterpreting the 2012 law, holding that Panama Commons qualified for exemption under the law in effect on January 1, 2013, and granted final summary judgment for Panama Commons. R 749-50.

The First District Court of Appeal agreed with the Circuit Court that the 2013 laws were retroactively applied to impair vested rights and impose new obligations, and as such, were unconstitutional. It held:

> ... we believe the trial court correctly found the retroactive repeal of this tax exemption to be unconstitutional because it impaired a vested right and imposed a new tax obligation....
>
> ... the effect of the law 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.

Stranburg v. Panama Commons L.P., 160 So. 3d 160, 162-63 (Fla. 1st DCA 2015). The Court also affirmed the ruling that the property was entitled to a tax exemption under the 2012 law in effect on January 1, 2013, without discussion. *Id.*

The Appraiser appealed to this Court based on the decision holding the 2013 amendment unconstitutional. The Appraiser appears to have abandoned any argument over the application of the 2012 law in his brief to this Court. However, the Director seeks to advance that argument in this Court.

SUMMARY OF THE ARGUMENT

The lower courts correctly applied the established Florida constitutional principle that substantive laws are invalid if they act retroactively to *either* impair vested rights *or* create new obligations. The 2013 laws, as retroactively applied to the 2013 tax roll, violate both of these constitutional tests.

Appellants seek to use this case to establish a novel exception for laws imposing new taxes. There is no sound legal or practical reason why retroactive tax obligations should be different from all other retroactive obligations.

The 2013 laws are substantive changes that expressly apply "retroactively" to the 2013 tax roll. This is consistent with the framework of the annual property tax cycle, in which tax exemption rights accrue and vest for the year based on the property's ownership and use on January 1, under the law in effect on that date. Property owners must know the law *before* January 1, in order to qualify for exemption on that date, and apply for exemption by March 1. Property owners cannot be expected to anticipate changes in the tax laws that are enacted later in the year. Applying laws enacted on some indefinite later date, to retroactively impose a new tax obligation where no tax was due before, is arbitrary and unfair, as in any other areas of legislative activity. Affirming the lower courts' adherence to this bright line constitutional rule for all retroactive laws can be readily understood as fair by the political branches, and easily administered by the lower courts.

But even if the Court should fashion some new and different rule for tax laws, retroactive application of these 2013 laws should be unconstitutional in the particular circumstances of this case. Florida has encouraged private investment in affordable housing in order to serve residents and communities in desperate need. Such projects are high risk and produce no net income. As affordable housing needs became more acute in recent years, the state has enacted financial incentives, including the property tax exemption in Fla. Stat. §196.1978, to induce more private investment. The 2009-2012 version of this law extended the exemption to property of limited partnerships with for-profit limited partners (including projects developed with LIHTC tax credits, which use this ownership structure).

Panama Commons' project was developed with this ownership structure that qualified for exemption, and is dedicated to a 30 year affordable housing use. It cannot recoup the new tax from rent-restricted tenants. The State, having received this irrevocable public benefit, should not impose a retroactive new tax that the project owner had no reason to foresee. These 2013 laws exemplify an unfair, harsh and oppressive retroactive tax, and should be held invalid.

Appellants cite cases from other jurisdictions that allow retroactive tax changes in different circumstances, *e.g.*, if the new law simply adjusts an existing tax, and a short retroactive application is needed to equalize tax on all income recognized throughout a current year; or to clarify a misinterpretation of an earlier

law; or where tax is triggered by some event outside the taxpayer's control which it could not avoid. But if the tax is a new obligation that taxpayers could not reasonably anticipate in voluntary transactions prior to its enactment, then a retroactive application of such law is invalid.

Appellants cite a legislative staff report for one of the 2013 laws, saying that the 2009-2012 law had an "unintended effect," in which "misuse" of the exemption could occur if for-profit developers constructed or operated affordable housing projects using a compliant non-profit. This comment does not apply to Panama Commons' project, developed and operated by a 501(c)(3) entity. In any case, the expanded exemption was not a mistake. On the contrary, the Legislature repeatedly passed bills to expand this exemption, in 2007, 2008, 2009 and 2011, and left this expanded exemption law on the books for 4 years, from 2009 to 2013.

The Director's argument that the project did not qualify for exemption under the 2009-2012 law, would negate the purpose for that law. The Director argues that any benefit to for-profit investors defeats exemption under Fla. Stat. § 196.195(3). However the disqualifying condition in § 196.195(3) applies only if "part of the subject property, or the proceeds of the sale, lease, or other disposition thereof, will inure to the benefit of" the for-profit entity. There is no basis to argue that this project is disqualified under this condition. Selection of Panama Commons as eligible for federal tax credits under the LIHTC program is irrelevant because a tax

credit is an intangible right established by federal law for use in calculating federal tax, and is not part of the property or proceeds of sale of the property.

Moreover, this project was unable to use tax credits because no one would commit to buy them in the Recession. Panama Commons took out a federal loan to build the project. This loan is not a benefit to a for-profit entity either.

The project sold depreciation deduction rights to PHINDA for a relatively small investment to enhance the affordable housing services. This depreciation deduction is not a benefit to a for-profit entity that defeats exemption either.

Section 196.195(3) cannot be construed beyond its terms to defeat the purpose of later enacted and more specific laws such as § 196.1978 (2009-2012), which was to extend exemption to affordable housing projects with for-profit limited partners, such as those that can develop using federal tax credits, and including Panama Commons which also used this ownership structure.

Finally, Appellants did not preserve any objection to exemption under the controlling 2012 law. The Appraiser was obliged to raise specific objections in a timely notice of disapproval, under Fla. Stat. §§ 196.193(5)(a) and (b), 196.011(6), and 192.0105(1)(f) and (2)(a). This objection was not preserved. Belatedly raised objections are invalid under these statutes. This objection was waived by the Appraiser (who does not assert it here), and cannot be revived now by the Director as a way to avoid a ruling on the constitutional issue.

ARGUMENT

I. THE 2013 LAWS REPEAL TAX EXEMPTION RIGHTS THAT ACCRUED AND VESTED ON JANUARY 1, 2013, AND ARE UNCONSTITUTIONAL AS RETROACTIVELY IMPAIRING VESTED RIGHTS OR CREATING A NEW OBLIGATION.

(Responding to Appraiser's Brief Point I, Director's Brief Point III)

Standard of Review

All parties agree this appeal raises only issues of law for de novo review.

A. The 2013 laws apply retroactively by their terms, and in context of tax law

Before addressing whether retroactive application of a law is constitutional, courts normally consider whether the law is clearly intended to apply retroactively. *Metro. Dade Cnty. v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 499 (Fla. 1999).

Here each of these laws expressly says it is to be applied "retroactively" to the 2013 tax roll. Ch. 2013-72 § 11 provides:

> Applying retroactively to the 2013 tax roll, section 196.1978, Florida Statutes, is amended to read: (e.s.)

Ch. 2013-83 § 3 provides:

> Effective upon this act becoming a law and operating retroactively to the 2013 tax roll, section 196.1978, Florida Statutes, is amended to read: (e.s.)

The Legislature used the word "retroactively" (twice) for a good reason. Without this express term, courts would apply these laws prospectively only, not retroactively to the 2013 tax roll. The Court cannot simply ignore the word

"retroactively." *See Johnson v. Feder,* 485 So. 2d 409, 411 (Fla. 1986) (courts do not presume that a statute employs useless language).

The acts expressly provided for retroactive operation because the annual tax cycle fixes property exemption rights on January 1. The decision below explained:

> By 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. 160 So. 3d at 163.

The Court cited established law governing the annual tax cycle, which fixes tax exemption rights on January 1 of the year. *See Dade County Taxing Authorities v. Cedars of Lebanon Hospital Corp.*, 355 So. 2d 1202, 1204 (Fla. 1978):

> The taxable status of property is determined on January 1 of each year. *See* Section 192.042, Florida Statutes (1973). This is the date on which the tax assessor determines whether a particular parcel of property is entitled to exemption from taxation for the tax year.

The cited statute, Fla. Stat. § 192.042, entitled "Date of assessment," provides:

> All property shall be assessed according to its just value as follows:
> (1) Real property, on January 1 of each year....

The term "assessed" normally includes a determination of property's status as taxable or exempt.[4]

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[4] Consistently, other laws use the terms "assess" and "assessment" to include exemption issues. *See, e.g.,* Fla. Stat. § 192.011 and § 194.171, as construed in *Ward v. Brown*, 894 So. 2d 811 (Fla. 2004) (nonclaim law governing challenges to tax "assessments" applies to claims that an exemption was wrongly denied).

Fla. Stat. § 196.011(1)(a) confirms that exemption rights are fixed on January 1:

> Every person or organization 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, on or before March 1 of each year, file an application for exemption .... (e.s.)

The phrase "entitled by law" means that the exemption right is fixed based on the property's ownership and use on January 1. The law does not leave exemption uncertain, by allowing later enacted laws to retroactively alter or eliminate it.

This rule has been in effect for at least 50 years. *See Lanier v. Overstreet*, 175 So. 2d 521, 523-24 (Fla. 1965) ("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"). *See also Lake Worth Towers, Inc. v. Gerstung,* 262 So. 2d 1, 3 (Fla. 1972) ("Taxable status for the year also is determined as of that date" [January 1]); *Smith v. Am. Lung Ass'n, Inc.*, 870 So. 2d 241, 242 (Fla. 2d DCA 2004) ("The taxable status of property is determined on January 1 of each year"); *Page v. City of Fernandina Beach*, 714 So. 2d 1070, 1072 (Fla. 1st DCA 1998) ("January 1 ... is the date on which the tax assessor determines whether a particular parcel of property is entitled to exemption from taxation for the tax year"). If the Legislature had intended a different rule, it would have amended the statutes long ago.

Appellants admit that property ownership and use are determined on January 1, but argue that controlling law for exemptions (and other status like agricultural classification) can be retroactively altered at an indefinite later time. Artificially separating the ownership and use on January 1 from the law then in effect would render ownership and use on January 1 irrelevant, and create practical hardship and unfairness for property owners. Property owners must be able to structure their ownership and use prior to January 1, to meet the known law in effect on that date, not some unpredictable future law. If new controlling laws can be enacted at some indefinite later time, then property owners can never predict the property's exempt or taxable status, or trust that ownership and use on January 1 will have any meaning. Such unpredictability not only defeats the constitutional rule of law, but defeats the laws' purpose, to encourage property owners to commit to exempt uses.

Appellants admit that a law is retroactive if it attaches "new legal consequences to events completed before its enactment." *Chase Fed. Hous. Corp.*, 737 So. 2d at 499. This is precisely why these 2013 laws are retroactive.

Later administrative functions in the annual tax cycle do not affect property's accrued exemption rights. Fla. Stat. §196.011(1)(a), quoted above, requires owners to apply for exemption by March 1. To make an application, the owner must know the existing law. Owners cannot be expected to apply for exemption based on unknown laws enacted later. That would be an absurd construction.

Appellants argue that exemption rights do not vest until the Appraiser approves an exemption under Fla. Stat. §§ 196.011(6)(a) and 196.193(5)(a). These laws allow Appraisers 4 months, until July 1, to review exemption applications and make follow-up inquiries to determine exemption claims under laws already in effect on January 1. This review period is not intended to create opportunities for the Legislature to step in and retroactively rewrite the tax laws. Under Appellants' theory, if the Governor approves new retroactive laws in late May or June, the Appraiser's time to learn and apply new laws (that are not always crystal clear) is reduced to weeks or days. Moreover, the Appraiser's decision is not discretionary and is not the last word; it is subject to review by the Value Adjustment Board or court, also based on laws in effect on January 1. Appellants' reasoning would allow new laws enacted during VAB review, or while cases are pending in the trial and appellate courts (years later), to operate retroactively. This would be grossly unfair and impractical. To use a sports analogy, Appellants would allow changes in rules and scoring, after the game is played.

The Legislature understood the annual tax cycle. In enacting the 2013 laws, it used the word "retroactively" advisedly, in order to eliminate exemptions in effect January 1, 2013. The lower courts properly construed this clear intent in the framework of property tax law, and properly reached the constitutional issue.

B. Retroactive application of the challenged laws is unconstitutional

The First District cited *Maronda Homes, Inc. v. Lakeview Reserve Homeowners Ass'n, Inc.,* 127 So. 3d 1258, 1272 (Fla. 2013), which summarizes the Florida constitutional rule on retroactive laws, as follows:

> These constitutional due process rights protect individuals from the retroactive application of a substantive law that adversely affects or destroys a vested right; imposes or creates a new obligation or duty in connection with a previous transaction or consideration; or imposes new penalties. For the retroactive application of a law to be constitutionally permissible, the Legislature must express a clear intent that the law apply retroactively, and the law must be procedural or remedial in nature. [citing Fla. Const. Art. I §§ 2 and 9, *Chase Fed. Hous. Corp.,* 737 So.2d at 503; and *State Farm Mut. Aut. Ins. Co. v. Laforet,* 658 So.2d 55, 61 (Fla.1995)].

Thus substantive laws that *either* adversely affect vested rights, *or* create a new obligation, are unconstitutional. No exceptions have been recognized for tax laws. New taxes are just as burdensome as other new obligations.

Raphael v. Schecter, 18 So. 3d 1152, 1155 (Fla. 4th DCA 2009), *rev. den.*, 75 So. 3d 1246 (Fla. 2011), *approved in Miles v. Weingrad*, 164 So. 3d 1208, 1212-13 (Fla. 2015), explains why retroactive substantive laws are fundamentally unfair:

> It is a fundamental principle of jurisprudence that retroactive application of new laws is usually unfair." 2 Norman J. Singer, Statutes and Statutory Construction § 41:2, at 375 (6th ed. 2001). As the United States Supreme Court has explained,
>
> > [r]etroactivity is generally disfavored in the law, *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988), in accordance with

> "fundamental notions of justice" that have been recognized throughout history, *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855, 108 L. Ed. 2d 842, 110 S. Ct. 1570 (1990) (Scalia, J., concurring). . . . H. Broom, Legal Maxims 24 (8th ed. 1911) ("Retrospective laws are, as a rule, of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law").

E. Enters. v. Apfel, 524 U.S. 498, 532-33, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (U.S. 1998). It is therefore well settled that retrospective laws are "generally unjust." *Id.* at 533 (quoting 2 J. Story, Commentaries on the Constitution § 1398 (5th ed. 1891)).

The 2013 laws prescribe new rights and duties, and are substantive under the *Maronda* definition. No one suggests that these laws are procedural or remedial. The 2013 laws are thus unconstitutional on both established grounds – they impair vested rights, and create a new obligation. *Stranburg,* 160 So. 3d at 162-63.

Appellants argue that tax laws should either be immune from due process constraints entirely, or subject to some undefined lesser degree of constraint than all other laws. This argument has no support in the text of the Constitution. Florida due process protects private property without exception. Fla. Const. Art. I §§ 2 and 9. The clauses do not except retroactive tax laws. From the property owner's perspective, a retroactive tax is no different from any other retroactive obligation. Appellants offer no textual or policy basis for creating such a significant exception to this foundation due process principle.

The Taxpayers' Bill of Rights Amendment, Fla. Const. Art. I § 25, requires the Legislature to set forth "government's responsibilities to deal fairly with taxpayers under the laws of this state." This provision recognizes that government has "responsibilities" to "deal fairly" with "taxpayers." Retroactive imposition of a new tax is the opposite of fair dealing with taxpayers. While this provision is directed to the Legislature, this Court can lend its aid to carry out a constitutional mandate. *See Dade County Classroom Teachers Ass'n v. Legislature,* 269 So. 2d 684 (Fla.1972) (Court would implement Fla. Const. Art. I. § 6 guarantee of collective bargaining rights for public employees, if Legislature did not do so).

The application of each constitutional test is separately discussed below.

1. 2013 laws retroactively impair vested exemption rights

A vested right is "an immediate right of present enjoyment, or a present, fixed right of future enjoyment." *City of Sanford v. McClelland,* 163 So. 513, 514-15 (Fla. 1935). Under proper analysis of the tax cycle framework, Point I A above, Panama Commons' tax exemption right for 2013 accrued and vested January 1, 2013, even if enjoyment of that right might occur in the future, when the Appraiser approved the exemption application or a court directed such approval.

An accrued cause of action exemplifies a vested right that cannot be retroactively impaired. *Maronda,* 127 So. 3d at 1272; *Miles,* 164 So. 3d at 1212-13; *Am. Optical Corp. v. Spiewak,* 73 So. 3d 120, 131-33 (Fla. 2011); *Menendez v.*

Progressive Ins. Co., 35 So. 3d 873, 875 (Fla. 2010); *State Farm Mut. Aut. Ins. Co. v. Laforet,* 658 So. 2d 55, 61 (Fla. 1995). A property tax exemption is an enforceable cause of action by court process under Fla. Stat. § 194.171. Exemption rights do not turn on local Appraisers' discretion or favor. *See* Fla. Stat. § 196.011(1)(a), quoted above ("entitled by law to exemption"), and § 196.192(1) ("all property owned by an exempt entity… and used exclusively for exempt purposes shall be totally exempt from ad valorem taxation"). Thus an exemption right accrues and vests like any other cause of action.

Appellants disparage tax exemptions as just a "privilege." However, this Court has held a tax exemption is a "property right" protected by procedural due process (right to notice and hearing) in *Hollywood Jaycees v. State Dep't of Revenue*, 306 So. 2d 109, 112 (Fla. 1974):

> Section 193.122(1), F.S., as amended, is facially valid but was given an unconstitutional application in this case. It is requisite … that due process procedures of notice and hearing and appropriate findings thereon be afforded as necessary constitutional conditions precedent. Upon denial of the tax exemption previously allowed, … [taxpayer's] pecuniary and property rights were affected to an extent that required administrative due process. Even though the statute is silent as to due process requisites, they are constitutionally implied. Insofar as Section 120.21(1), F.S., of the Administrative Procedure Act purports to exempt the DOR from due process requirements in this situation, it is invalid.

The decision also observed:

> A tax exemption is a valuable right to a citizen and should not be lightly shorn …

Due process protections do not vary with labels like"right" and "privilege." *E.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (rejecting the argument that public assistance benefits are mere largesse and not property rights). *Accord, see generally Speiser* v. *Randall*, 357 U.S. 513 (1958) (rejecting argument that state could arbitrarily deny a tax exemption for failure to sign a loyalty oath because tax exemption is just a "privilege"); *Bell v. Burson*, 402 U. S. 535, 539 (1971) (rejecting argument that driver's license is just a "privilege" and not a "property right" for due process protection); *Board of Regents v. Roth*, 408 U.S. 564, 572 n. 9, 583 (1972) (rejecting argument that public employment is just a "privilege," not subject to due process protection, citing cases).

Florida also rejects a distinction between "rights" and "privileges." *See Florida Dep't of HSMV v. Hernandez,* 74 So. 3d 1070, 1078 (Fla. 2011) (driver's license, citing *Bell*); *Petition of Rocafort*, 186 So. 2d 496, 498 (Fla. 1966) ("diploma privilege" for admission to Bar is vested right); *Simmons v. Div. of Pari-Mutuel Wagering*, 407 So. 2d 269, 270 n. 3 (Fla. 3d DCA 1981) (racing permit). Thus regardless of how the Appellants would label Panama Commons' exemption, its exemption right accrued and vested January 1, 2013.[5]

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[5] Appellants' argued distinction between a right and a privilege is a quagmire to be avoided. *Cf. Black's Law Dictionary* (9th ed. 2009) at 1316 "privilege" means "[a] special legal *right,* exemption, or immunity " and 1436 ("right" means "[a] power, *privilege,* or immunity secured to a person by law") (e.s.).

In *City of Naples v. Conboy,* 182 So. 2d 412 (Fla. 1965), the Court enforced a city's grant of reduced valuation for tax purposes (similar to a partial exemption), even though this action violated a constitutional directive for uniform and equal tax rates, *id.* at 416, because it would be unfair to the owner to back assess the property at its full value, in effect recognizing a vested right:

> Where the taxing authority is in full possession of all pertinent facts it is better to impose the burden upon it to exercise care than to create uncertainty as to the tax status of property for prior years. *Id.* at 418.

Panama Commons has a stronger case than the owner in *Conboy*, as it relied on a valid exemption law, not an *ultra vires* ordinance or contract for reduced tax.

Dep't of Revenue v. Liberty Nat'l Ins. Co., 667 So. 2d 445, 446-47 (Fla. 1st DCA 1996), refused to give effect to a retroactive retaliatory tax law that would have drastically altered tax liability for preceding years, citing the vested right rule in *Laforet,* 658 So. 2d at 61- 62. The Court rejected the state's argument that the new law was "clarifying" or "remedial."[6]

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[6] By similar reasoning, laws that retroactively impose sales tax on transactions entered prior to enactment are invalid as impairment of contract. *In re Advisory Opinion to the Governor*, 509 So. 2d 292, 315-16 (Fla. 1987); *Dep't of Revenue v. Florida Home Builders Ass'n*, 564 So. 2d 173, 175-76 (Fla. 1st DCA 1990). Both the contract clause and the due process clause protect "vested rights," so this case law is analogous. *Board of Com'rs of Everglades Drainage Dist. v. Forbes Pioneer Boat Line*, 86 So. 199, 202 (Fla. 1920) (vested rights doctrine is not limited in any narrow or technical sense, but applies wherever it is equitable that law protect an interest and not arbitrarily and unjustly deprive it), *rev'd on other grounds*, 258 U.S. 338 (1922) (holding state law invalid based on petitioner's claim of vested right under both the contract clause and due process clause).

Appellants offer a circular argument that, because the Legislature can alter tax exemptions, property owners can never have a vested right. But the cases cited for this argument addressed *prospective* laws. *Cf. Straughn v. Camp*, 293 So. 2d 689, 695 (Fla. 1974) (reviewing Ch. 71-133, which took effect December 31, 1971, and thus applied prospectively to the 1972 tax roll); *Daytona Bch. Rac. & Rec. Fac. Dist v. Volusia Cnty.*, 372 So. 2d 419 (Fla. 1979), *aff'g* 355 So. 2d 175 (Fla. 1st DCA 1978) (reviewing Ch. 73-647, which took effect January 1, 1974).[7] In those cases taxpayers challenged prospective repeal of laws, in effect seeking a permanent constitutional exemption that the Legislature could never repeal. These cases do not support Appellants' argument here that a retroactive new tax is valid.

If allowed, Appellants' argument has no logical limit. If no constitutional line protects property from retroactive property tax, the Legislature could impose new taxes retroactively for whatever period of back assessment it likes, and eliminate any statutory period of limitation or repose.

Appellants cite *Florida Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478 (Fla. 2008), for a novel position that statutory exemptions of any kind can never be vested rights. *Buster* did not adopt any such blanket rule for all exemptions in all circumstances. It held that medical providers had no vested right to keep

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[7] A prior opinion in *Daytona* quoted this effective date in Ch. 73-647. *See Volusia Cnty. v. Daytona Beach Rac and Rec. Fac. Dist.*, 341 So. 2d 498, at 500-01 n. 3 (Fla. 1976). An effective date signifies prospective operation only. *Dep't of Revenue v. Zuckerman –Vernon Corp.*, 354 So. 2d 353, 358 (Fla. 1977).

information about adverse incidents from their patients who might be injured in such incidents, after the voters adopted the "Patients' Right to Know" constitutional amendment to require such disclosure. This information was not privileged under prior law, but was subject to disclosure in professional discipline and peer review actions, *id.* at 490-92. *Buster* turned on the parties' reasonable expectations in the circumstances, and possibly the amendment's remedial nature. Of course, this constitutional amendment could not be invalid under the Florida Constitution.

In other circumstances a statutory exemption can be a vested right that cannot be divested by a later statute. *See Coventry First, LLC v. State,* 30 So. 3d 552, 559 (Fla. 1st DCA 2010) (law retroactively revoking exemption from the public records law for private trade secret information in the state's possession, held invalid, distinguishing *Buster*).

Appellants misconstrue *R.A.M., Inc. v. WCI Communities, Inc.*, 869 So. 2d 1210 (Fla. 2d DCA 2004), which, contrary to their argument, held that once a party complies with conditions for an exemption, an exemption right can vest:

> R.A.M. could have no "settled expectation" or claim of "reasonable reliance" based on the cure provision *until R.A.M. had taken the steps necessary to be legally licensed. Id.* at 1217. (e.s.)

Here Panama Commons complied with all ownership and use requirements for exemption on January 1, 2013, and perfected its claim by timely application, all prior to enactment of the new laws, so its exemption right vested under *R.A.M.*

Finally, property owners could not reasonably have anticipated retroactive repeal of this exemption, because it appears that Florida has never done this before. *See* 160 So. 3d at 162 (apparent case of first impression).[8]

2. 2013 laws retroactively create a new obligation

Even if this tax exemption were not a "vested right," the 2013 laws are invalid under the second test, because they create a new obligation. As of January 1, 2013, no tax was due. If tax is imposed, it becomes a first lien dating back to January 1 of the year tax is imposed. Fla. Stat. §§ 192.053 and 197.122(1). No sound argument is offered that property tax is not an "obligation," or that imposing a new tax by retroactively repealing an exemption is not a "new" obligation.

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[8] Cited laws that retroactively create new exemptions or reduce property owners' burdens are not comparable, as such laws do not impair vested rights nor impose new obligations. *Cf.* Ch. 97-255 § 4 (extending municipal exemption to special district property); Ch. 2007-36 (discounts for disabled veterans); Ch. 2009-121 (law clarifying burden of proof to challenge assessments, applied to 2009 roll because challenges could only be filed after law took effect); Ch. 2009-130 § 3 (clarifying act allowing apportioned exemption for predominant exempt use by educational institutions); Ch. 2010-170 (granting right to reduced tax valuation for property adversely affected by defective drywall); Ch. 2010-277 §§ 1 and 2 ("remedial and clarifying" law to extend favorable agricultural classification applicable to pending actions); Ch. 2011-93 (granting additional homestead exemption to deployed service members); Ch. 2012-193, §§ 24-26 and 33 (extending exemptions for service members, educational property and municipal property); Ch. 2013-95 § 4 (repealing laws that would have denied favorable agricultural classification). The 2008 "Save Our Homes" constitutional amendment providing tax relief to covered properties could not violate the Florida Constitution under any circumstances. These laws have not been challenged. Any effect they might have on other taxable properties is speculative or *de minimus*, as annual millage rate adjustment is a normal burden for taxable property.

C. The 2013 laws were not a correction of a mistake

Appellants try to foster the impression that the expanded exemption was not really intended, but was a mistake; that it was tacked onto another bill on the Senate floor in 2009 with little deliberation; and that the 2013 laws corrected this mistake. This argument seeks to disparage the vested right claim, implying that Panama Commons should not have relied on the 2009-2012 exemption law.

The Court is normally skeptical of arguments that the Legislature did not intend what it said. *See Florida Real Estate Comm'n v. McGregor*, 268 So. 2d 529, 530 (Fla. 1972) (improper to construe law as meaning other than what it says). Here no cogent reason is offered that this exemption was not intended. On the contrary, a more complete discussion of the exemption law's history and context shows that Appellants' "mistake" argument is unsupported.

Florida has long recognized a public need to help low income residents obtain housing. To meet this need, public affordable housing has been authorized as tax exempt since the Great Depression. *E.g., State ex rel. Grubstein v. Campbell*, 1 So. 2d 483 (Fla. 1941) (applying the 1937 act; Justice Terrell's comments on why affordable housing fills public needs are still applicable).

As many communities lack financial capacity and expertise to develop and operate public affordable housing projects, Florida has sought to encourage private affordable housing. *See* State Housing Strategy Act and State Housing Finance

Corporation Act, Fla. Stat. Ch. 420 Parts I and V (containing legislative findings on need for affordable housing); *see also* § 420.5093 (state participation in LIHTC program). Because affordable housing has high risks and no net returns, financial incentives are needed to induce private capital to invest in such projects. *See* Fla. Stat. § 420.0003(1), (3)(b)3. and (e)1. (state strategy to provide incentives for private sector investment). These include tax exemption which helps make private projects feasible (and promotes fair competition with tax exempt public housing).

Florida first enacted a specific tax exemption for private affordable housing in 1999. Fla. Stat. § 196.1978 (1999). This law applied only to property owned by a nonprofit corporation qualified as charitable under IRC § 501(c)(3). The next year, 2000, it expanded this exemption to include property owned by a "nonprofit entity" that qualifies as charitable under IRC § 501(c)(3). Ch. 2000-353, § 9, Laws of Fla. This law did not define the term "entity," but this broad term might reasonably include entities other than corporations, *e.g.*, LLCs or partnerships that are disregarded under federal tax law, but partake of a 501(c)(3) corporate owner's federal exempt status.

In 2007 the Legislature passed a law to expand the exemption to include property owned by "a limited partnership, the sole general partner of which is a corporation not for profit which is qualified as charitable under [IRC § 501(c)(3)]" (similar to the 2009-2012 law). Ch. 2007-321 § 21, Laws of Fla. The staff analysis

explained that Floridians faced decreased ability to afford housing, citing data from 2003 to 2005 (pre-Recession), as a reason for this expanded tax exemption. *See* House of Reps. Staff Analysis for Bill H1B, June 13, 2007, at pp. 4, 9.[9]

This 2007 law was to take effect upon ratification of a constitutional amendment proposed in the same special session, to be voted on in a special election in January 2008. Ch. 2007-321 § 34, referring to SJR 4B. A later special session substituted a new constitutional amendment, *see* SJR 2D, so the exemption law in Ch. 2007-321 § 21, although enacted, did not go into effect.

In 2008, each house of the Legislature unanimously passed a similar expanded affordable housing tax exemption in CS/CS/482 § 3. The Senate version of this bill was amended in the House (no. 651451, not affecting the exemption provision), and the bill as so amended died in returning messages in the Senate.

In 2009, the state was in the depths of the Recession, with many persons facing loss of income and savings, and loss of their homes to foreclosure. The Legislature again felt this broader affordable housing tax exemption was needed. This provision did not just arise on the Senate floor with no review, but was vetted in CS/CS/SB 1024 and CS/CS/HB 161, then joined to another bill, enacted as Ch. 2009-96, § 18, Laws of Fla. The amendment provided:

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[9] This and other cited legislative history is available on the Florida Legislature website, commonly known as "Online Sunshine," at http://www.leg.state.fl.us/.

> Property used to provide affordable housing ... owned entirely 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 ..., shall be considered property owned by an exempt entity and used for a charitable purpose .... 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. (e.s.)

The 2011 Legislature re-enacted the exemption to assure its preservation against a single subject challenge. Ch. 2011-15, § 4, Laws of Fla.[10]

Under this law, it did not matter who the limited partner was; it could be a for-profit entity. Nor did the limited partner's percentage of ownership on the books matter; it could be 99.99%. The reason for this expanded tax exemption was to exempt projects with for-profit limited partners, *e.g.*, under the LIHTC program.

Passing this expanded exemption provision in 4 separate sessions (2007, 2008, 2009, and 2011) and keeping it in effect for 4 years (2009-2012), makes it unlikely that this law was passed by mistake. The context – widespread inability of Floridians to afford decent housing – shows the law's purpose.[11]

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[10] The single subject challenge was dismissed in *Atwater v. City of Weston*, 64 So. 3d 701 (Fla. 1st DCA 2011). No one disputes that the 2009-2012 law is valid.

[11] The Court can judicially notice the Recession and its economic effects. *See Mahood v. Bessemer Properties*, 18 So. 2d 775, 777 (Fla. 1944).

In 2013 the Legislature repealed this expanded exemption. Chs. 2013-72 § 11 and 2013-83 § 3. But these laws contain no statement that the prior expanded exemption law in effect from 2009 to 2012 was never intended.

Appellants cite a 2013 legislative staff bill analysis which opined that expansion of the exemption had an "unintended effect," specifically "misuse" of the expanded exemption in cases where a for-profit developer controlled a project that was exempt under the exemption:

> 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 tax exemption. [staff bill analysis for CS/CS/HB 437, enacted as Ch. 2013-83, R 419]

According to this staff bill analysis, the only "unintended effect" of the 2009-2012 law was that the exemption could be "misused" for property developed or operated by a for-profit entity. But Panama Commons did not "misuse" the exemption. Its project has no for-profit developer. The 501(c)(3) corporation and its controlled limited partnership are not just a front for a for-profit developer. The for-profit entity (a limited partner's limited partner) had no role in developing or operating the project, and invested a relatively small amount in comparison with the project's cost, for a depreciation deduction that had no value otherwise. The cited staff bill analysis fails to explain why the exemption for Panama Commons' property was

repealed at all, much less retroactively repealed. It provides no reason for the laws to be retroactively applied to Panama Commons.[12]

D. Cases from other jurisdictions do not control or compel a different result

The decision below applies a well-established uniform Florida constitutional rule, so the Court does not need to analyze cases from federal courts or other states.

However, to the extent such cases are considered, properly analyzed, they do not adopt any hard and fast rule that retroactive taxes are valid. Rather, they require case by case analysis of the taxpayer's circumstances and the nature of the tax, to determine whether retroactive application is arbitrary and unfair. This rule would not disturb the result below, as the 2013 laws are arbitrary and unfair in retroactive application to Panama Commons.

Appellants cite income tax cases, but changes in income tax rates or methods of computation normally apply to all income received throughout the year. *Green & Milam v. State Revenue Comm'n*, 4 S.E.2d 144, 145 (Ga. 1939), explained that application of new income tax laws within the current year is allowed because such application is not really retroactive, and assures uniformity and fairness:

> Black on Income and Other Federal Taxes, 3d ed., § 56, has this to say: 'On general principles and irrespective of explicit constitutional limitations, a statute imposing an income tax may subject to taxation

[12] To the extent the staff in 2013 had expertise to interpret laws enacted in prior years, this staff analysis also undermines the Director's argument that the prior law did not have this "effect" (addressed in Point II below).

> the income of the citizen for the whole of the current year in which the statute is passed, that is, not only so much of the income as accrued from the date of the enactment of the law to the end of the year, but also that portion which accrued or was earned from the beginning of the year to the date of the law. For the year's income is treated and considered as one entire thing, not as being made up of several portions or items. And hence, although the statute might be called retrospective in its operation upon a part of the first year's income, it is not retrospective in such a sense as to render it unconstitutional.

This rule treats income recognized in the early part of the year the same as income recognized later in the year.

Property tax is different because property's status as taxable or exempt vests on January 1. Although the tax rate (millage) on taxable property is adjusted later, that is not imposition of a completely new obligation where no tax was due.

Retroactive application of a new tax that the taxpayer could not foresee is unconstitutional under federal law. *See Nichols v. Coolidge,* 274 U.S. 531, 542-43 (1927), holding an estate tax law offended due process by including the value of property that a decedent had transferred before enactment of the tax on the gross estate; *Untermyer v. Anderson,* 276 U.S. 440, 445-46 (1928), holding a retroactive tax on a completed gift was invalid. These decisions still stand.

Welch v. Henry, 305 U.S. 134, 147 (1938), acknowledged the validity of *Nichols* and *Untermyer*, but upheld a state income tax that retroactively applied to dividends received in a prior year that had escaped taxes due on other income. The Court apparently felt it was unlikely that taxpayers would have refused dividend

income, simply because a new rate applied. *Welch* harmonized the decisions, based on whether taxpayers could reasonably anticipate the new law and avoid the tax:

> In the cases in which this Court has held invalid the taxation of gifts made and completely vested before the enactment of the taxing statute, decision was rested on the ground that the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event. [citing *Nichols* and *Untermyer*] Since, in each of these cases, the donor might freely have chosen to give or not to give, the taxation, after the choice was made, of a gift which he might well have refrained from making had he anticipated the tax, was thought to be so arbitrary and oppressive as to be a denial of due process. But there are other forms of taxation whose retroactive imposition cannot be said to be similarly offensive, because their incidence is not on the voluntary act of the taxpayer. ... In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation" *Id.* at 147.

Welch did not hold that all taxes can apply retroactively in all circumstances. If the taxpayer could not foresee any tax, and cannot turn back the calendar to avoid the new tax, the retroactive tax is "harsh and oppressive," and thus invalid.[13]

United States v. Darusmont, 449 U.S. 292, 294-95, 300 (1981), similarly upheld an increase in the income tax rate and reduction in the exemption amount, enacted in 1976, for the entire 1976 tax year, in order to equalize the tax burden for 1976. The Court noted that application of an income tax law to the full calendar

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[13] The *Welch* majority opinion citation to "property tax" cases are actually special assessments, which pay for actual benefits received, and may apply retroactively to equalize the burden with the benefit. The dissent notes these cases do not touch the validity of general ad valorem property tax retroactively imposed. 305 U.S. at 159.

year in which enacted did not *per se* violate due process, *id.* at 297, meaning the circumstances may vary the result. It distinguished *Nichols* and *Untermyer* as unconstitutionally imposing a *new tax* on events before the tax law took effect, whereas the income tax changes in *Darusmont* did not impose a *new tax* but simply adjusted the *rate of tax* for all income recognized that year. *Id.* at 299-300.

United States v. Carlton, 512 U.S. 26 (1994), continued the distinction between a change in the operation of a tax and imposition of a new tax. *Id.* at 34. *Carlton* also held that the *Welch* "harsh and oppressive" standard is the same as the arbitrary and irrational standard for due process for other economic laws thus tax laws are treated the same as other retroactive laws, which are valid if supported by a legitimate, non-arbitrary purpose. *Id.* at 30-32, 35. There the new law promptly cured an unintended defect in an earlier law, a non-arbitrary purpose. *Id.* at 32. [14]

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[14] While Florida law prohibits *any* new retroactive obligation, federal law is more flexible. *See E. Enterprises v. Apfel*, 524 U.S. 498, 528-29 (1998):

> Congress also may impose retroactive liability to some degree, particularly where it is "confined to short and limited periods required by the practicalities of producing national legislation." (citation omitted). Our decisions, however, have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience.

The subject laws fail this federal test. They are not required by any practicalities of producing national legislation, and impose a severe new tax obligation on a limited group of property owners, not anticipated or proportionate to their experience.

As discussed above, this 2009-2012 exemption was intentionally enacted for good reason. The staff bill analysis offered by Appellants does not explain any purpose for the 2013 repealer laws to retroactively apply to Panama Commons. Thus the reasoning in *Carlton* has no application to the 2013 laws in this case.

Other states' cases following *Welch, Darusmont* and *Carlton* are similarly distinguished. These cases generally fall within 3 groups, some of which overlap. First, some laws simply adjust the rate or method of existing taxes but do not impose a new tax, and apply retroactively in order to equalize the tax burden or otherwise assure fairness to all similarly situated taxpayers.[15] Second, some laws clarify a prior law to overrule a mistaken application.[16] Third, some cases find that

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[15] *E.g., Darusmont,* above; *Gunther v. Dubno,* 487 A. 2d 1080, 1090 (Conn. 1985) (law changing rate of income tax in existence but "dormant," to equalize income tax burden on income received before and after the change in law within the same tax year, for which taxpayers had advance notice); *Estate of Kennett v. State*, 333 A.2d 452, 454-55 (N.H. 1975) (same); *see also Martin v. Board of Assessment Appeals*, 707 P.2d 348, 352-55 (Colo. 1985) (in determining value of property already subject to tax, law allowed appraiser to consider property's conversion from apartments to condos, to reflect actual value and achieve uniform fair valuation); *In re Estate of Hambleton*, 335 P. 3d 398, 411 (Wash. 2014) (law change equalized estate tax between married and unmarried persons).

[16] *E.g.*, *Carlton*, above; *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392, 394, 400-01 (Ky. 2009) (clarifying law as a result of misconstruction allowing unified rather than separate corporate tax returns, and addressing amended returns seeking refunds); *U.S. Bancorp. v. Dep't of Revenue*, 103 P.3d 85, 90-93 (Ore. 2004) (revising income tax regulation to implement statutory directive to apply apportionment factors in a manner that fairly and accurately reflects income from in-state business); *Gardens at West Maui Club v. County of Maui*, 978 P. 2d 772, 775-77, 780-81 (Haw. 1999) (ordinance clarifying that time share units are

the law change is foreseeable or otherwise not unfair to taxpayers in the circumstances.[17]

Other states have held retroactive operation of tax laws is invalid. *James Square Assocs. LP v. Mullen*, 993 N.E. 2d 374 (N.Y. 2013), involved tax incentives to induce private investment in depressed areas. The court held that retroactive application of statutes limiting eligibility for these tax incentives (to "rein in abuses," *id.* at 376-77), was invalid as applied, using a three factor fairness test to determine whether retroactive tax violates due process. These included (1) the taxpayer's forewarning of a change in the legislation and reasonable reliance on the old law, (2) the length of the retroactive period, and (3) the public purpose for the retroactive application. *Id.* at 380-81. Applying these factors, the court held that property owners had no warning of a change in the law, and reasonably relied on

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classified as "hotel resort" not "apartment" property, where prior ordinance already defined "hotel resort" as "units occupied by transient tenants for periods of less than six consecutive months").

[17] *E.g., Gunther,* above; *Colonial Pipeline Co. v. Commonwealth*, 145 S.E. 2d 227, 229-32 (Va. 1965) (company coming into state to exercise eminent domain power to build pipeline should have anticipated intangible property tax being planned); *Burlington N. R. Co. v. Strackbein*, 398 N.W.2d 144, 145-47 (S.D. 1986) (no right vested where railroad did not perfect its claim to tax credit for expenses to upgrade its lines by certifying amounts spent prior to new law limiting eligibility). *Rivers v. State*, 490 S.E. 2d 261, 263, 265 (S.C. 1997), held invalid a law limiting refund rights arising from an earlier retroactive tax change. The statement that such laws could be valid if limited to one year and supported by a legitimate purpose, *id.* at 264, is dicta, and would not necessarily apply to all laws in all circumstances.

continuation of the old law. The state presented no purpose for retroactive application beyond raising revenue, so the new law was invalid. *Id.* at 382-83.

NetJets Aviation, Inc. v. Guillory, 143 Cal. Rptr. 3d 111, 135-36 (Cal. 4th Dist. 2012), held that retroactive application of a new tax violated due process and recognized the continued validity of *Untermyer.*

In *Oberhand v. Director, Div. of Taxation*, 940 A. 2d 1202 (N.J. 2008), a plurality held retroactive application of a new estate tax to the period 6 months prior to its enactment is invalid on equitable grounds as a "manifest injustice." A concurring Justice held the law invalid as violating due process. *Id.* at 1211.

If particular case-by-case circumstances are considered, the following features of this case support Panama Commons' claim of unconstitutionality, under a rule prohibiting arbitrary, unfair, harsh and oppressive retroactive laws:

(1) A new tax that property owners could not have reasonably foreseen;

(2) Consideration by property owners, in providing an irrevocable public benefit (a 30 year commitment to new affordable housing during the Recession, coupled with the practical and legal inability to pass the new tax on to tenants);

(3) Property owners' ability to structure project ownership to qualify for exemption, if requirements were known before January 1, 2013, and inability to retroactively structure project ownership to comply with the new exemption law;

(4) No proffered reason why retroactive application of the new tax is needed. Again, the staff analysis of the 2013 bill provides no justification for retroactively taxing Panama Commons' property.

On the contrary, the new laws foster inequality among like properties: this LURA-dedicated affordable housing property owned by a limited partnership under the control of a 501(c)(3) corporation is much more like an exempt private project owned directly by a 501(c)(3) corporation, or an exempt public affordable housing project, than like a taxable for-profit housing project that can rent to anyone at market rates.

These features all weigh against retroactive taxation of Panama Commons' project under any case by case analysis, if such rule were adopted.

Regardless, Florida law prohibits substantive laws retroactively impairing vested rights or imposing new obligations. This rule is uniform. There is no broad exception for property tax laws, nor any arbitrary grace period to apply property tax retroactively to January 1 of the year. The Court should decline Appellants' invitation to judicially insert new exceptions into the Constitution.

E. Miscellaneous arguments

The First District properly distinguished *Horne v. Markham*, 288 So. 2d 196, 199 (Fla. 1973), and *Zingale v. Powell*, 885 So. 2d 277, 285 (Fla. 2004), as they

held exemption claims are subject to statutory procedural conditions, *i.e.*, timely application, but did not address retroactive repeal of perfected exemption rights.

Appellants refer in passing to the fact that 5 of 92 Panama Commons units were vacant January 1, 2013. Appellants may think the 5 vacant units are taxable because they were not occupied on the tax date. Fla. Stat. § 196.1978 exempts property "used to provide affordable housing." This entire property is dedicated to housing tenants who meet eligibility requirements. When a unit becomes vacant, Panama Commons must do cleanup and repair to prepare it for new tenants, and await an eligible tenant who is ready to move in. Holding units temporarily vacant until both the unit and the eligible tenant are ready is unavoidable. A briefly vacant unit awaiting an eligible tenant is a use that serves the exemption's purpose. Vacant municipal land is deemed to be an exempt use for future municipal purposes. *See City of Sarasota v. Mikos,* 374 So. 2d 458, 460-61 (Fla. 1979). The same reasoning should apply here because temporary vacancy is a practical necessity for this use.

Appellants did not preserve this issue below by raising it in the Appraiser's disapproval notice, or in the District Court of Appeal; and did not raise it as a point for reversal in this Court. This Court should not consider any vacancy argument. [18]

[18] If the Court considers this issue, it should disapprove *Parrish v. Pier Club Apts., LLC*, 900 So. 2d 683 (Fla. 4th DCA 2005) (not cited by Appellants), as wrongly decided, for the reasons stated herein. "They also serve who stand and wait." *Galbreath-Ruffin Corp. v. 40th & 3rd Corp.*, 267 N.Y.S.2d 520, 523 (1966), *aff'd in part,* 227 N.E.2d 30 (N.Y. 1967) (paraphrasing John Milton, Sonnet XIX).

II. THE PANAMA COMMONS PROJECT IS TAX EXEMPT UNDER THE 2012 LAW IN EFFECT JANUARY 1, 2013.

(Responding to Director's Point II, not raised by the Appraiser)

Standard of Review

The parties agree this point raises issues of law for de novo review.

A. Tax credit affordable housing projects can be exempt under the 2012 law.

Fla. Stat. § 196.1978 (2009-2012) was enacted to allow projects owned by a Florida limited partnership, with for-profit limited partners (which can use tax credits) to be tax exempt. If having for profit limited partners that can use tax credits were an automatic disqualifier, that would defeat the purpose for this expanded tax exemption. That was not the Legislature's intent.

Section 196.1978 refers to meeting the requirements of Fla. Stat. § 196.195, a general law governing all kinds of charitable nonprofit exemptions. Section 196.195(3) provides that "no part of the subject property, or the proceeds of the sale, lease, or other disposition thereof, will inure to the benefit of ... any person or firm operating for profit or for a nonexempt purpose." Thus if a for-profit entity uses or occupies the property for private benefit, or has a right to the proceeds of sale or lease, then the exemption can be denied. The "benefit" must be in one of these two categories to disqualify the exemption. Any other type of "benefit" does not disqualify the exemption, by the plain language of §196.195(3), and the

expressio unius rule of construction. The statute says nothing about tax credits (or depreciation deductions or anything else) as a basis to deny exemption.

TEDC/Shell City Inc. v. Robbins, 690 So. 2d 1323 (Fla. 3d DCA 1997) (*TEDC*), denied affordable housing exemptions for 1991 and 1992 based on an expansive reading of §196.195(3) to mean that that LIHTC tax credits are a "benefit" to a for-profit entity. This interpretation has no actual support in the statutory language, as tax credits are neither "part of the subject property" or "proceeds of the sale, lease or other disposition thereof."

Moreover, later laws have undermined *TEDC* 's reasoning. First, the Legislature enacted Ch. 2002-18, §§ 12 and 13, Laws of Fla. (amending Fla. Stat. §§ 420.5093 and 420.5099), and Ch. 2004-349 § 6, Laws of Fla. (enacting Fla. Stat. § 193.017), to direct that LIHTC tax credits and resulting financing be disregarded in assessing tax value of affordable housing projects. *See Holly Ridge L. P. v. Pritchett*, 936 So. 2d 694 (Fla. 5th DCA 2006), *rev. den.*, 945 So. 2d 1291 (Fla. 2006) (rejecting an Appraiser's attempt to circumvent these laws).

Holly Ridge explains the LIHTC program as a way to attract for-profit investors to affordable housing:

> The LIHTC program was created by Congress as part of the Tax Reform Act of 1986. ... The purpose of this program is to encourage the private sector to develop affordable rental housing. Each state receives an annual allotment of low income housing tax credits. Tax credits equate to a dollar-for-dollar reduction of the holder's federal

> tax liability, which can be taken for up to ten years if the project satisfies governmental requirements each year.
>
> Florida Housing Finance Corporation is the statutorily-created agency responsible for the allocation and distribution of tax credits to Florida applicants. The tax credits are awarded to qualified applicants through a competitive process. The tax credits provide a financing mechanism for the developer to pay most of the project construction costs. Upon receiving the tax credits, the developer typically sells them to a banking institution that qualifies to use the credits and pays the developer approximately eighty cents for each dollar of tax credit purchased. The banking institution that purchases the tax credits then becomes a limited partner in the entity owning the development and the developer becomes the general partner. Once construction is completed and the project is placed in service, the banking institution may use one-tenth of the tax credits each year for ten consecutive years. After ten years, the tax credits are exhausted.
>
> The tax credit sales proceeds are used to minimize project debt and thereby enable the project to be economically feasible given the substantial and long-term restrictions placed on the developed property. These restrictions are set forth in a Land Use Restriction Agreement ("LURA"). .... Tax credits may be disallowed or recaptured if a project is out of compliance. 936 So. 2d at 695-96.

As *Holly Ridge* notes, in LIHTC projects, the for-profit investors typically become limited partners in a limited partnership. The tax exempt general partner remains responsible for project management, as IRC § 42 requires. Dep. 76-77, R 145-46.

Holly Ridge recognized that tax credits are intangible property, not part of the taxable real property. *Id.*, 936 So. 2d at 698-99. Thus tax credits are not "part of the property" under §196.195(3). Nor are they "proceeds from sale" of the property as they can be used only if the property remains in its dedicated use. *TEDC* did not consider these later laws dealing with the treatment of tax credits.

Then, the 2009-2012 amendment to § 196.1978 extended the exemption to projects owned by limited partnerships with a § 501(c)(3) general partner, to exempt projects with for-profit limited partners (who can use tax credits). Under this amended statute, a limited partner's interest is not deemed ownership or use of the property, so it cannot be considered ownership or use for purposes of § 196.195(3).

Appellants' argument would nullify the 2009-2012 amendment. The statutes must be applied harmoniously if possible, and in any case, the earlier and more general statute (§ 196.195(3)) cannot nullify the later and more specific statute (§ 196.1978 as amended). *See Ideal Farms Drainage Dist. v. Certain Lands*, 19 So. 2d 234, 239 (Fla. 1944); *Barnett Banks, Inc. v. Dep't of Revenue*, 738 So. 2d 502, 505 (Fla. 1st DCA 1999).

Although exemptions are strictly construed, exemptions that are intended to induce publicly beneficial development should be honored. *See City of Tampa v. Tampa Ship Bldg. & Eng'g Co.*, 186 So. 411, 412 (Fla. 1939):

> Obviously, the purpose of this amendment was to encourage and stimulate the construction and operation of industrial plants within the state of Florida by securing to those persons entering into such ventures relief from taxation for a period of fifteen years..., and, in determining whether the exemptions in the amendment apply to the construction of steel ships, we can well use the rule laid down in the case of City of Jacksonville v. Continental Can Co., 113 Fla. 168, 151 So. 488, where it was said by the Court:

> 'We should not employ that strict construction used in criminal law, but such a construction which will carry out the real intention of the people in making the instrument through their representatives.' Text 490 of 151 So. 488
>
> Although we are not charged with passing on the wisdom of the policy of giving tax exemptions to foster construction of factories for various purposes, we cannot but bear in mind, in considering the present controversy, how important it is that every incentive should be offered to those who would venture to construct manufacturing plants in the State, where comparatively few factories now exist. Doubtless the people were actuated by this desire for development in sanctioning the amendment, and it is this intent which bears great weight in interpreting the constitutional provision.

The same rule should apply to affordable housing in this case. *Accord, Orange Cnty. v. Orlando Osteo. Hosp.*, 66 So. 2d 285, 287 (Fla. 1953).

B. Panama Commons did not use or sell tax credits

While FHFC initially selected Panama Commons as *eligible* for tax credits, no tax credits were sold or used in this project. Selection as eligible for tax credits did not entitle Panama Commons (or any for-profit investor) to receive tax credits unless and until the project is built in conformity with the approved affordable housing plan, and eligible low-income tenants actually have keys to their units. Dep. 17-18, 29; R 86-87, 98. Here, Panama Commons' eligibility for tax credits never matured because private investors would not commit to buy tax credits. R 342; *see also* R 100-01, 124, 670-72.

Congress ultimately recognized that tax credits were useless in the circumstances, and offered low interest loans to eligible developers. Panama

Commons obtained and used such a loan to acquire and build the project. Aff. R 342; Dep. 31-33, 55-56, 107-08; R 100-02, 124-25, 166-67. Panama Commons relinquished inchoate eligibility for tax credits and took the federal loan conditioned on compliance with federal and Florida regulations governing affordable housing. Dep. 55-57, R 124-26. *See also* Appraiser's certified records at R 671 (loan application attested by Mr. du Mas). This loan, administered by FHFC (a state agency) was the project's main source of financing, with no tax credits involved. Dep. 110-11, R 169-170.

The Director argues that this federal loan was a benefit to a for-profit entity. But the loan was made to Panama Commons, a non-profit entity, and was restricted for use to create affordable housing as a public / charitable purpose.

The Director then argues that exemption should be denied because, in a separate transaction not connected with tax credit eligibility, Panama Commons raised some extra funds by allowing PHINDA to become the limited partner's limited partner and use a depreciation deduction. A depreciation deduction is just a bookkeeping entry to amortize investment over a property's useful life, which federal taxpaying entities can use to reduce federal tax on other income. They are not tangible property subject to ad valorem tax, nor "part of the subject property," nor "proceeds of the sale, lease or other disposition" of the subject property, and do not disqualify a tax exemption under §196.195(3).

C. The Director's objection is not preserved because the Appraiser did not raise it in a notice of disapproval by July 1, 2013

Fla. Stat. § 196.193(5)(a) and (b) require the Appraiser to give applicants for exemption a written notice of decision by July 1, in which the Appraiser states "in clear and unambiguous language the specific requirements of the state statutes which [he or she] relied upon to deny the application the exemption." The notice must also include "specific facts the property appraiser used to determine that the applicant failed to meet the statutory requirements."

Paragraph (5)(b) of this law provides that if the Appraiser fails to provide timely and specific notice of denial the denial is invalid:

> If a property appraiser fails to provide a notice that complies with this subsection, any denial of an exemption or an attempted denial of an exemption is invalid.

Similarly, Fla. Stat. § 196.011(6) requires the Appraiser to set forth grounds for denial of a renewal exemption by mailed notice on or before July 1.

The Taxpayer's Bill of Rights, Fla. Stat. § 192.0105(1)(f) and (2)(a), implementing Fla. Const. Art. I § 25, confirms that property owners have an enforceable right to proper notice of denial under the above-cited statutes.

By law, if the Appraiser fails to raise a timely and specific objection, the property is exempt by default. The Director cannot circumvent the law by making moving target objections, after the time has lapsed, simply because the reason offered by the Appraiser's notice was wrong.

Here the Appraiser's Notice of Disapproval dated June 19, 2013, did not present any objection based on the 2012 law (*i.e.*, tax credits or federal loans or depreciation deductions or any benefit to a for-profit entity). R 319. Instead, after the Circuit Court held the 2012 law was controlling, the Appraiser issued a new Notice of Disapproval, dated March 3, 2014 (over 8 months after the July 1 deadline). R 437-40. This second notice is invalid under the cited statutes, which do not make exceptions or excuses from timely objections, on grounds that the initial objection failed to apply the proper law in effect on January 1.

These laws work no hardship on Appraisers. The Appraisers have 4 months to investigate exemption applications to determine if exemptions apply (which time would be greatly reduced if retroactive laws were allowed).

The tax laws impose deadlines on property owners too. They must meet the March 1 application deadline, absent extenuating circumstances, and must bring challenges timely under the nonclaim law, § 194.171(2). Appraisers should likewise be bound to state any and all objections to exemption by July 1.

Appraisers (like taxpayers and everyone else) are presumed to know the law. The Appraiser should be expected to know that exemption rights vest on January 1 by law, and that that effect of the 2013 laws is to retroactively create a new obligation. *See* Point IA above. The constitutional rule against such laws is well established, and a reasonable Appraiser would expect that the 2013 laws would be

challenged, and preserve his objection under the prior law. In any case, nothing in the statutes excuses the Appraiser from the duty to give timely and specific notice to preserve any and all reasons for denying exemption.

This issue was the Appraiser's alone to preserve by a timely denial notice. The Appraiser did not preserve this issue and has now abandoned it by not asserting it in his Brief. The Director should not be allowed to inject issues that the Appraiser waived, which would defeat the purpose of the notice laws.

Conclusion

The First District's decision below should be affirmed.

Respectfully submitted this 3rd day of August, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by E-mail through the Florida Court's E-Filing Portal system, on counsel listed below, this 3rd day of August, 2015.

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I HEREBY CERTIFY that this brief was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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