SUPREME COURT OF FLORIDA

Case No.: **SC15-774**

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

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

Appellants,

vs.

PANAMA COMMONS L.P.,

Appellee.
_____/

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

Loren E. Levy
Fla. Bar No. 0814441
Jon F. Morris
Fla. Bar No. 113037
The Levy Law Firm
1828 Riggins Lane
Tallahassee, Florida 32308
Telephone: 850/219-0220
Facsimile: 850/219-0177
E-mail: *levytorres@me.com*
geri.smith@comcast.net

Counsel for Appellant, Dan Sowell, Bay County Property Appraiser

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PRELIMINARY STATEMENT

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

ARGUMENT

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

Panama Commons' Answer Brief fails to address whether there is any difference between the legislature's amendment of the ad valorem tax laws applicable to the current tax year as compared to a prior tax year in the analysis of a purported due process violation. The property appraiser's Initial Brief contained an extensive discussion of decisional law addressing arguments that certain changes to tax laws were unconstitutionally violative of due process. While Panama Commons attempts to distinguish and dispute the validity of those decisions, it does not cite a single case concluding that the legislature cannot change the tax laws applicable to the *current* tax year. The property appraiser certainly is unaware of any cases holding to this effect and, if any such cases had been discovered in researching the issue, they would have been cited and discussed in the Initial Brief.

Until this Court holds that the legislature lacks the constitutional authority to amend the tax laws applicable to the current tax year in which the legislature is in session, it is unnecessary to address any due process concerns raised by allegedly retroactive tax legislation. When the tax legislation is limited

to the current and future tax years, no retroactive application exists, and no due process concerns are implicated under the Florida Constitution.

The practical import of the argument that Panama Commons asserts is particularly acute in the context of ad valorem taxation. The Florida statutory framework for ad valorem taxation requires an annual determination of the valuation of property and any applicable exemptions or classified use status, i.e., agricultural classification. The measuring point for this annual determination is January 1 of each year. *See* § 192.042, Fla. Stat. (2015) (all property assessed at just value on January 1); § 196.011, Fla. Stat. (2015) (annual application for exemption required by owners of property entitled to exemption as a result of ownership and use on January 1); § 193.461, Fla. Stat. (2015) (classification of lands as agricultural required on annual basis).

The annual assessment process culminates with the property appraiser's certification and extension of the assessment rolls, and the tax collector's mailing of a tax bill in November. *See* § 193.122, Fla. Stat. (2015) (certification and extension of tax rolls); § 197.322, Fla. Stat. (2015) (mailing of tax bills required within 20 working days after receipt of certified assessment rolls). All ad valorem taxes are due and payable on November 1 of each year or as soon thereafter as the certified tax roll is received by the tax collector. § 197.333, Fla. Stat. (2015). Although payments of taxes are due in November, the lien for

taxes exists as of "January 1 of the year the taxes were levied until discharged by payment or until barred under chapter 95." § 197.122(1), Fla. Stat. (2015).

The Florida Legislature, however, historically meets for session subsequent to January 1 and during the annual ad valorem tax cycle. Under Panama Commons' position – and the First District Court's majority decision – the legislature *never* could amend the tax laws regarding valuation of property or applicable exemptions for the *current* tax year. Even if the legislature merely described the effective date of its legislation as January 1 of that year, as opposed to the instant case where the effective date was described as applicable "retroactively to the 2013 tax roll," the result would be that the legislation would be constitutionally infirm as violative of due process.

As discussed in the property appraiser's Initial Brief, the legislature often has amended the ad valorem tax laws applicable to the tax year in which the legislation was passed. (IB-12-13) Even constitutional amendments regarding ad valorem taxation have been declared retroactively applicable to January 1 of the year in which the amendment was approved by the voters. (IB-13)

Panama Commons suggests that this Court should not be concerned about laws creating new exemptions or reducing property owners' burdens for the current tax year because they do not implicate vested rights or impose new obligations. (AB-25, n.8) In its view, these laws are unlikely to be challenged as

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." (*Id.*) According to Panama Commons, laws removing exemptions in the current tax year are unconstitutionally violative of due process but laws expanding or granting exemptions are valid.

Panama Commons' cavalier view of the due process rights of other taxpayers and taxing authorities is remarkable considering how ardently it asserts its own rights. As this Court has observed, "any newly-created tax exemption necessarily involves a direct shift in tax burden from the exempt property to other, non-exempt properties." *Sebring Airport Auth. v. McIntyre*, 783 So.2d 238, 250 (Fla. 2001). It certainly is conceivable that a class of taxpayers may file suit to contest a shift in their tax burden resulting from an expansion in the applicable exemptions to other taxpayers. Likewise, school boards, counties, and cities that rely on ad valorem tax revenues to fund the school system and local government may be inclined to file suit if legislative action diminishes those revenues. These potential plaintiffs would assert that they had a vested right to the ad valorem tax laws in effect January 1, and the change in the laws would create new obligations. Panama Commons' assertion that such lawsuits are unlikely and, even if filed, would not arguably present a due process violation is unrealistic.

Throughout the Answer Brief, Panama Commons also argues that it is unfair to remove the ad valorem tax exemption because it had relied upon the exemption in deciding to provide the public benefit of affordable housing by making the necessary investment and accepting reduced rents from qualifying tenants for a 30-year period. Because such a change in the law could not be reasonably foreseen, it should not be permitted in the year in which the legislation is adopted, but must wait until the following year. (AB-3, 8-9, 19, 25, 37) Such an argument, however, misrepresents the factual record in this case.

For example, Panama Commons states that it acquired the land in 2010, completed construction of the project in 2011, and its ownership structure complied with the statute in effect from 2009-2012. "Panama Commons' project was developed with this ownership structure that qualified for exemption, and is dedicated to a 30 year affordable housing use." (AB-1, 9) Panama Commons would like this Court to believe that it entered into the project based upon the statutory exemption. Such a representation, however, would be incorrect.

The record on appeal includes the Low-Income Housing Tax Credit (LIHTC) application submitted by Panama Commons. (R-III-459-562; IV-564-669) The LIHTC application is the beginning point of the development process. The application was submitted as part of the *2008* LIHTC program and filed on April 7, 2008. (R-III-459, 488) The affidavit submitted by Panama Commons'

corporate representative, Mark Du Mas, specifically attests that the project was "planned under the federal and state Low Income Housing Tax Credit (LIHTC) Program" and that "Panama Commons was selected by FHFC as eligible for federal income tax credits based on an application in 2008." (R-II-340, 342) The LIHTC application reflects the ownership structure of Panama Commons as it existed in 2008. (R-III-460-61, 521) Mr. Du Mas extensively discussed the LIHTC application process in his deposition. (R-I-80-88, 92-105, 173)

The application includes the assignment of the purchase agreement for the land from the Paces Foundation, Inc. to Panama Commons. (R-IV-565-585) The assignment was dated April 1, 2008. (*Id.*) While the land acquisition did not close until 2010, it was under contract in 2008. (R-II-340, IV-565)

Panama Commons subsequently returned its carryover application of the 2008 tax credits to the Florida Housing Finance Corporation (FHFC) on April 29, 2009. (R-IV-670) At that time, Panama Commons sought funding under the American Recovery and Reinvestment Act and indicated that it would have "permits in hand by August 15, 2009 and being 'shovel ready' when our financing package is finalized." (*Id.*)

The factual record, therefore, reflects that Panama Commons' organizational structure and decision to construct the project was based on the government incentives in existence in 2008. At that time, the organizational

structure did not qualify for an ad valorem tax exemption under section 196.1978, Florida Statutes (2008). The statute was not amended until a year later, and was not effective until the 2010 tax year. Ch. 2009-96, § 35, Laws of Fla. (2009) (effective June 1, 2009).

This Court has rejected similar arguments regarding the unfairness of removing ad valorem tax exemptions for taxpayers that had taken certain actions in reliance upon existing tax statutes; albeit in the posture of an impairment of contracts argument. *Daytona Bch. Racing & Rec. Facilities Dist. v. Volusia County*, 372 So.2d 419, 420 (Fla. 1979); *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

Straughn involved individuals that had entered into 99-year leases of government property and constructed improvements thereon that, at the time the leases were entered, were exempt from ad valorem taxation. *Id*. at 692. This Court rejected the argument that "[m]erely because plaintiffs' (appellees') leaseholds were originally granted tax exemption and they enjoyed exempt status for a number of years, affords no basis for forever removing and completely immunizing them from taxation. Such exempt status may be changed by a subsequent legislature." *Id.* at 694. "The legislature cannot bind its successors with respect to the exercise of the tax power; a subsequent legislature has the

unquestioned authority to repeal prior tax exemption statutes." *Volusia County*, 372 So.2d at 420.

Although these cases involved enactments that were not applicable until the year following the legislative session, there should be no question that the legislature has the authority to remove ad valorem tax exemptions even when a taxpayer may have acted in reliance upon a previous statute. Here, Panama Commons cannot accurately assert that it acted in reliance upon a statutory exemption that was subsequently removed and its complaints of unfairness are without factual basis.

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

This Court has routinely analyzed allegations of a due process violation by reviewing decisions of the United States Supreme Court, Florida courts, and courts of other jurisdictions. *See State v. Robinson*, 873 So.2d 1205, 1212-14 (Fla. 2004) (relying on United States Supreme Court authority and decisions from other state courts in reviewing the constitutionality of Florida's Sexual Predator Act against a due process challenge); *J.B. v. Fla. Dep't of Children and Family Servs.*, 768 So.2d 1060, 1064 (Fla. 2000) ("While there is no laundry list of specific procedures that must be followed to protect due process

guarantees, an analysis of the United States Supreme Court's prior decisions identifies certain procedures that are typically required before an individual can be deprived of a property or liberty interest."). Panama Commons neither argues nor cites to any authority holding that Article I, section 9 of the Florida Constitution provides any greater due process protection in taxation matters than is provided under the United States Constitution.

Panama Commons attempts to summarily dismiss the replete federal and state authority cited to the Court in the Property Appraiser's Initial Brief. (AB-35) The courts, however, have consistently concluded that retroactive tax legislation is permissible when it promotes a legitimate non-arbitrary purpose and is furthered by rational means. *United States v. Carlton*, 512 U.S. 26, 30-34 (1994). *Carlton* set forth a rational basis standard for analyzing retroactive tax legislation and concluded that a modest period of retroactivity satisfies this requirement. *Id*. at 32. Other courts addressing the issue conclude that a period of retroactivity of less than one year is modest and does not violate due process protections.

Not less than ten (10) states have reviewed and upheld retroactive tax legislation against a due process challenge.[1] The United States Supreme Court also

[1] *See e.g.*, *Martin v. Bd. of Assessment Appeals of State*, 707 P.2d 348, 350-55 (Colo. 1985) (upholding retroactive ad valorem tax legislation and confirming that "property owners have no vested right to have their taxable property assessed by particular methods employed in prior years"); *Gunther v. Dubno*, 487 A.2d 1080, 1089-91 (Conn. 1985) (dismissing the taxpayer's argument that retroactive tax

has addressed the constitutionality of retroactive tax legislation in multiple opinions.[2] The weight of the authority provides that retroactive tax legislation is

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legislation constituted a new tax because the "corporate business tax was already in existence when the act was enacted" and the "unincorporated business tax was first enacted in 1921…and put into dormant state in 1969…Its revival in 1981 does not make it a new tax"); *Roberts v. Gunter*, 304 S.E.2d 369, 376 (Ga. 1983) (upholding the retroactive application of tax legislation within the calendar year of the enactment); (*Gardens at West Maui Vacation Club v. County of Maui*, 978 P.2d 772, 782-83 (Haw. 1999) (upholding an amendment to an existing ad valorem tax classification ordinance as it was enacted for a legitimate non-arbitrary purpose and established only a modest period of retroactivity, six months, within the pendency of the ongoing tax year); *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392, 397-403 (Ky. 2009) (upholding retroactive tax legislation that "had a legitimate governmental purpose (raising and controlling revenue))"; *Estate of Kennett v. State*, 333 A.2d 452, 453-56 (N.H. 1975) (upholding a retroactive tax statute and reasoning "[t]he sovereign, board, and exclusive power of the legislature to levy taxes is involved. There is need of a reasonable period of time for the legislature to choose a subject of taxation, introduce a bill, submit it to committees, and obtain its adoption"); *U.S. Bancorp v. Dep't of Revenue*, 103 P.3d 85, 91-93 (Or. 2004) (holding that due process is not violated when retroactive tax legislation applies to tax years still open to examination); *Burlington Northern R.R. Co. v. Strackbein*, 398 N.W.2d 144, 147 (S.D. 1986) (upholding tax legislation retroactively repealing a tax credit program and finding no vested right to a tax credit, which is in essence "an exemption from liability for a tax already determined and admittedly valid"); *Colonial Pipeline Co. v. Commonwealth*, 145 S.E.2d 227, 231-32 (Va. 1965) (relying on *Welch* 305 U.S. at 147, and confirming "[p]roperty taxes and benefit assessments of real estate, retroactively applied, are not open to the objection successfully urged in the gift cases"); *In re Estate of Hambleton*, 335 P.3d 398, 409-12 (Wash. 2014) (upholding retroactive tax legislation and stating "[o]ur analysis follows that of the federal constitution because the state constitution does not afford broader due process protection than the Fourteenth Amendment of the United States Constitution").

[2] *See e.g.*, *United States v. Carlton*, 512 U.S. 26, 30-34 (1994) (upholding retroactive tax legislation with a period of retroactivity "only slightly greater than one year"); *United States v. Darusmont*, 449 U.S. 292, 300 (1981) (upholding retroactive tax legislation "decreasing the allowable exemption and increasing the percentage rate of tax"); *Welch v. Henry*, 305 U.S. 134, 146-51 (1938) (upholding

permissible if enacted for a legitimate non-arbitrary purpose and if the period of retroactivity is modest.

Few state courts have held retroactive tax legislation unconstitutional due to an excessive period of retroactivity. *See James Square Assocs. LP v. Mullen*, 993 N.E.2d 374, 382 (N.Y. 2013); *Rivers v. State*, 490 S.E.2d 261, 265 (S.C. 1997). The court in *James Square* did not apply the test as set forth in *Carlton*, however, the court did declare "the retroactivity provisions of a tax statute [a]re not necessarily unconstitutional and are generally tolerated and considered valid if for a short period." *Id.* at 380. The court ultimately held unconstitutional a tax statute with a retroactive period of "16 or 32 months." *Id*. at 382. The court in *Rivers* held unconstitutional retroactive tax legislation with a period of retroactivity of at least two years. *Rivers*, 490 S.E.2d at 265. The retroactive period in the present case, if even appropriately classified as such, covers a period of no more than six (6) months, wholly within the tax year of the enactment. The 2013 legislation did not reach back and disturb any interest to which Panama Commons had "secured repose," as could be argued if the legislature had amended the statute to apply to a prior tax year. *See James Square*, 993 N.E.2d at 383.

Panama Commons also fails to cite authority holding that the revocation of an exemption from a tax equates to the imposition of a new tax. The

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a state's retroactive tax legislation with a period of retroactivity exceeding the calendar year of the enactment).

limited federal and state cases finding a tax unconstitutional for imposing a new tax all concern wholly novel tax obligations. Panama Commons directs the Court to *NetJets Aviation, Inc., v. Guillory*, 143 Cal. Rptr.3d 111, 135-36 (Cal. 4th Dist. 2012). There, the court held that a state law assessing, for the first time, fractionally owned aircraft constituted a "newly created assessment" that cannot be retroactively applied. *Id*. at 135. The court distinguished its holding from other decisions upholding retroactive tax legislation that removed a deduction, changed a tax rate, changed the amount of permissible tax exemptions, or limited the amount or availability of a tax deduction. *Id*. at 136.

Ad valorem taxation is not a novel tax. Panama Commons, in addition to every other property owner in the state of Florida, is tasked with knowing that an annual assessment is levied upon its property. §197.122(1), Fla. Stat. (2015). In the absence of a grant of exemption from the legislature, all property is subject to ad valorem taxation. *See Williams v. Jones*, 326 So.2d 425, 435 (Fla. 1975); § 196.001, Fla. Stat. (2015) (all property is subject to taxation unless expressly exempted).

Panama Commons incorrectly relies on three United States Supreme Court opinions that are products of an era of exacting review of economic legislation, an approach that has been abandoned by the Court. *See Carlton*, 512 U.S. at 34 (cautioning against continued reliance on *Nichols v. Coolidge*, 274 U.S.

531 (1927), *Blodgett v. Holden*, 275 U.S. 142 (1927), and *Untermyer v. Anderson*, 276 U.S. 440 (1928)). *Blodgett* and *Untermyer* involved challenges to the retroactive effect of a wholly novel tax, the nation's first federal gift tax. *Carlton* at 34. To the limited extent *Blodgett* and *Untermyer* remain good authority, they do not control in the instant case where the legislature amended an existing ad valorem tax statute by removing a certain type of organizational structure from qualifying for an exemption. *Nichols* addressed a "novel development in the estate tax which embraced a transfer that occurred 12 years earlier." *Id*. The period of retroactivity in the instant case is no more than six (6) months, a modest period as set forth by the Court in *Carlton*.

In the instant case, the 2013 legislation was enacted with a legitimate purpose, to address the "unintended effect of the expanded provision." 2013 Final Legislative Staff Analysis. Fla. H. Comm. on Economic Affairs and Finance & Tax Subcomm., CS/CS/HB 437 (2013) (R-III-419).[3] The period of retroactivity is at most six (6) months and is effective only to the current tax year. No authority holds that such a modest period of retroactivity violates due process.

[3] The unintended effect is demonstrated by comparing the projected fiscal impact of the 2009 legislation with the 2013 legislation. In 2009, the legislative staff analysis discussing the extension of the exemption to organizational structures such as Panama Commons concluded that it had a projected *negative* fiscal impact on local government revenues of $400,000 annually. (R-III-412) In 2013, the legislative staff analysis concluded that deleting the organizational structure had a projected *positive* fiscal impact on local government revenues of $23.4 million annually. (R-III-422, 430)

III. THE PROPERTY APPRAISER LAWFULLY DENIED THE EXEMPTION UNDER THE 2012 VERSION OF SECTION 196.1978.

Panama Commons argues that the Department of Revenue (department) is precluded from arguing that the property would be taxable under the 2012 version of section 196.1978 because the property appraiser waived his right to assert any other reason for denying the exemption than set forth in his original denial. (AB-46). Basically, Panama Commons argues that the property appraiser should have examined its entitlement to an exemption by assuming the 2013 statute was unconstitutional.

Such an argument is without lawful basis. This Court has held that "property appraisers, as public officials, lack standing to challenge the constitutionality of a statute." *Crossings at Fleming Island Cmty. Dev. Dist. v. Echeverri*, 991 So.2d 793, 803 (Fla. 2008). The property appraiser, therefore, would have no authority – and, indeed, no responsibility – to examine an application for ad valorem tax exemption based on his or her position that the current version of a statute was unconstitutional and that an earlier version should be applied. By issuing the denial subsequent to the trial court's partial summary

judgment, the property appraiser effectively provided notice of the basis for his denial under the 2012 version of section 196.1978.[4]

CONCLUSION

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

/s/ Loren E. Levy
Loren E. Levy
Fla. Bar No. 0814441
Jon F. Morris
Fla. Bar No. 113037
The Levy Law Firm
1828 Riggins Lane
Tallahassee, Florida 32308
Telephone: 850/219-0220
Facsimile: 850/219-0177
E-mail: *levytorres@me.com*
geri.smith@comcast.net

Counsel for Appellant, Dan Sowell, Bay County Property Appraiser

[4] The property appraiser adopts the remainder of the department's arguments regarding entitlement to the exemption under the 2012 statute.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant Dan Sowell, Bay County Property Appraiser, has been furnished **Via Electronic Mail** on this the **28th** day of August 2015 to:

M. Stephen Turner, Esquire
David K. Miller, Esquire
Broad and Cassel
Post Office Drawer 11300
Tallahassee, Florida 32302
Email: *sturner@broadandcassel.com*
pwilliams@broadandcassel.com
dmiller@broadandcassel.com
mubieta@broadandcassel.com

William H. Stafford, III, Esquire
Assistant Attorney General
Revenue Litigation Bureau
PL 01 – The Capitol
Tallahassee, Florida 32399-1050
Email: *William.stafford@myfloridalegal.com*
lorann.jennings@myfloridalegal.com
jon.annette@myfloridalegal.com

Osvaldo Vazquez, Esquire
Deputy Solicitor General
Office of the Attorney General
PL 01 – The Capitol
Tallahassee, Florida 32399-1050
Email: *osvaldo.vazquez@myfloridalegal.com*

/s/ Loren E. Levy
Loren E. Levy

CERTIFICATE OF COMPLIANCE

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

/s/ Loren E. Levy
Loren E. Levy