MOST &
ASSOCIATES

201 St. Charles Ave.
Ste. 114, #101
New Orleans, LA 70170

(504) 509-5023
mostlawoffice.com
williammost@gmail.com

Lucien J. Gauff, III, Assessor
St. John the Baptist Parish Assessor Office
1801 W. Airline Hwy., Room 103
LaPlace, LA 70068
Via U.S. Mail and Email

December 7, 2022

Re: *Ad Valorem* Tax Treatment of the Property of Greenfield Louisiana, LLC

Dear Assessor Gauff,

Our firm represents The Descendants Project, a non-profit organization that supports descendant communities in the river parishes. This letter is to advise you regarding the tax treatment of the property involved in the Greenfield Louisiana, LLC ("Greenfield") grain export elevator project.

Greenfield has announced its intent to shield part of its property from *ad valorem* taxes by placing that property temporarily under the nominal ownership of the Port of South Louisiana ("Port"). When you and I spoke last week, you stated that the property would be taxed regardless of the deal between the Port and Greenfield. Later that day, you wrote me to say "I was inaccurate in stating the land would be taxed. That is the reason they choose to look for this sort of deal is for the tax break when transferring the land."

This letter articulates why your first statement was correct. Per the terms of the Greenfield/Port agreement, Greenfield retains all of the indicia and rights of ownership: possession, control, right of redemption, right to alienate, mortgage rights, depreciation benefits, insurance proceeds, condemnation proceeds, *etc*., *etc*. The reality of the transaction is that Greenfield is keeping the land and paying the Port to rent its tax-exempt status.

Louisiana's Civil Code treats such a transaction as a "simulation" and not an actual transfer of property. For that reason, the Greenfield/Port agreement should not have the effect of exempting the property from *ad valorem* taxes. We bring this to your attention so that you can evaluate the appropriate and legal treatment of the property.

A. Background of the Greenfield/Port Deal

On April 11, 2022, Greenfield and the Port entered into a "Cooperative Endeavor and Payment in Lieu of Tax Agreement."[1] Under the terms of that Agreement, the Port will take title to certain land and improvements currently owned by Greenfield.[2] That land is approximately 1,100 acres.[3] The Port will then lease the property back to Greenfield for thirty years, and Greenfield will make certain annual payments to the Port and to the Sheriff as Ex-Officio Tax

[1] Attached as Exhibit A.
[2] Ex. A at 1.
[3] Ex. B at POSL-0909 to 0915.

Collector.[4] The "sale" of the property from Greenfield to the Port, and the leasing back from the Port to Greenfield, are to happen "contemporaneously."[5]

The explicit purpose of the Agreement is to avoid *ad valorem* taxes: it specifies that the structure of the deal is a "means of keeping the Project facilities off the *ad valorem* tax rolls, except for inventory taxes . . . "[6] The Agreement suggests that "Greenfield shall not be obligated to pay Ad Valorem Taxes, except for Inventory Taxes. . . ."[7]

To ensure that none of Greenfield's improvements are taxed, the deal documents specify that even if Greenfield adds additional components to the property in any given year, it will transfer ownership of those components to the Port before the year's end.[8] Those components are then "deemed immediately leased back" to Greenfield "without further action by or additional cost to either party hereto."[9]

The Greenfield/Port deal also requires the Port to issue an unspecified number of millions of dollars in bonds to help pay for Greenfield's project,[10] at Greenfield's request.[11] Greenfield agrees to pay for the debt service on the bonds and indemnify the Port,[12] but the deal documents do not require Greenfield to carry insurance to cover such obligations.

According to an economic analysis by Together Louisiana, if the Greenfield/Port deal were to shield the property from *ad valorem* taxes, the effect would be to deprive St. John the Baptist Parish schools, law enforcement, and parish government, of **$209,188,070** in tax revenue over the lifetime of the project. The net benefit to Greenfield would be $202,288,070 in avoided taxes, and the net benefit to the port would be $6,900,000 in payments from Greenfield.[13]

We understand that you are already aware of this deal. At a meeting of the Port, board member Murray said that he had spoken with you, and that you told him "very clearly that this deal…while it is a deal on the table if we approve it, it is not going to be challenged or it would be difficult to challenge."[14] Board member Joseph also said he had spoken with you, the Parish President, and the Sheriff, and that you told him that you "could get more."[15]

B. Duty and Liability of an Assessor

As you know, Louisiana assessors are subject to a state constitutional mandate to "determine the fair market value of all property subject to taxation within his respective parish

[4] *Id*. at 1, 3.
[5] Ex. D (Lease Agreement and Agreement to Issue Bonds) at POSL-0426.
[6] *Id*.
[7] *Id*. at 2.
[8] Ex. D at POSL-0426, § 3.1(a).
[9] *Id*.
[10] *Id*. at POSL-0427.
[11] *Id*.
[12] *Id*. at POSL -0428, § 3.3(c).
[13] Attached as Exhibit C.
[14] Ex. E (April 6, 2022 Minutes) at 4.
[15] *Id*. at 2.

or district except public service properties."[16] The state constitution provides an exclusive list of properties exempt from ad valorem taxation.[17]

Louisiana's revised statutes likewise require that "taxable property in the state, except public service properties, shall be assessed by the several assessors."[18] And if "any tax assessor intentionally or knowingly or through negligence omits any taxable property from the assessment list, or permits it to be omitted therefrom, he and his sureties in solido shall be liable on his official bond for the full amount of the taxes due on the property so omitted," plus interest, fees, and costs.[19]

"Exemptions from taxation are strictly construed, an exemption being an exceptional privilege which must be clearly and unequivocably and affirmatively established."[20] As a result, failing to assess as taxable the property of an improper PILOT (Payment In Lieu Of Taxes) program will trigger an assessor's liability.[21]

C. Because Greenfield Retains all the Rights and Indicia of Ownership, the Greenfield/Port Deal is a Simulation, Not a Sale. The Property is Therefore Not Shielded from *Ad Valorem* Taxes.

i. <u>The Greenfield/Port deal is a simulation because Greenfield retains corporeal possession and a right of redemption</u>.

Under the doctrine of a "simulation," Louisiana law will assess whether a purported act of sale was genuine – or whether it was a fabrication for some other purpose.[22] As one court explained:

> A simulation is a transfer of property which is not what it seems. In a pure simulation, sometimes called a nontransfer, the parties only pretend to transfer the property from one to another, but in fact both transferor and transferee intend that the transferor retains ownership of the property. When this type of simulation is successfully attacked, the true intent of the parties is revealed; that is, that no transfer had in fact taken place.[23]

To determine whether an act of sale was genuine or a simulation, courts look to whether the purported seller "retained the possession" and "continued to exercise the indicia of ownership."[24] Per Civil Code Art. 2480, when a "thing sold remains in the corporeal possession

[16] La. Const., Section VII, § 18(D).
[17] La. Const., Section VII, § 21(A) ("the following property and no other shall be exempt from ad valorem taxation").
[18] R.S. 47:1957(A).
[19] R.S. 47:1957(F).
[20] *Abundance Square Assocs., L.P. v. Williams*, 10–0324 (La.App. 4 Cir. 3/23/11), 62 So.3d 261.
[21] *Cameron Parish Police Jury v. Taxpayers*, 212 So. 3d 663, 670 (3rd Cir. 2017).
[22] *See* Civil Code Art. 2026 ("Absolute Simulation"); Art. 2027 ("Relative simulation").
[23] *Peacock v. Peacock*, 674 So.2d 1030, 1033 (La. App. 1996) (act of sale involving a right of redemption was a simulation.
[24] *Raines v. Lyons*, 6 So. 2d 364 (La. App. 1942) (facts surrounding a purported act of sale led the court to convince the court of the sale's "unreality and simulation).

of the seller the sale is presumed to be a simulation."[25] And where "the interest of heirs and creditors of the seller is concerned," the burden is on the parties to the sale to "show that their contract is not a simulation."[26]

The Civil Code also specifies one particular factual scenario where an act of sale is presumed to be a simulation: a "sale with right of redemption is a simulation when the surrounding circumstances show that the true intent of the parties was to make a contract of security."[27] A right of redemption is a "right to take back the thing from the buyer."[28] It is "settled doctrine" that a purported sale that contains a right of redemption and lack of delivery of the thing sold will be treated as a simulation.[29] In such a situation, the "purported vendor continues to be the owner" of the property.[30] Where a price of redemption is grossly disproportionate to the actual value of the "sold" item, courts are more likely to find a simulation.[31] And courts have specifically held sale/lease-back contracts to be simulations when they contain a right of redemption.[32]

Here, Greenfield and the Port have set up a purported "sale" by which Greenfield will "sell" its property to the Port, and the Port will immediately lease the property back to Greenfield for thirty years. Greenfield retains, however, a right of redemption to take the property back from the Port at the end of those thirty years, or anytime sooner that Greenfield wishes to take it back.

---

[25] This presumption is modified by R.S. 9:3371, which states that "[s]ale/lease-back commercial transactions involving immovable or movable property with a fair market value in excess of twenty-five thousand dollars" shall "not be presumed to be a simulation." However, that statute only removes the *presumption* of a simulation – it does not prevent the transaction from being found to be a simulation. And the statute cannot, of course, alter the constitutional mandate of Section VII, § 18(D) to assess properties.

[26] Civil Code Art. 2480.

[27] Civil Code Art. 2569.

[28] Civil Code Art. 2567.

[29] *Jackson v. Golson*, 91 So. 2d 394, 398 (La. Ct. App. 2d 1956) (holding that a purported sale with a right of redemption, inadequate consideration, and lack of delivery, was a simulation and actually a mortgage); *Menefee v. Pipes*, 159 So.2d 439, 444 (La. App. 1963) ("The offer to buy back does not contradict the presumption of simulation and lack of good faith but rather this testimony would support the presumption of simulation, indicating that the instrument was not in reality what it purported to be.")

[30] *Sealy Realty Company v. Brangato*, 222 So. 2d 620, 622 (La. Ct. App. 2d 1969). *See also Miller v. Jackson*, 80 So.3d 673 (La. App. 2011) (sale with a right of redemption was a simulation);

[31] *Tyler v. Rapid Cash, LLC*, 930 So.2d 1135 (La. App. 2006) (act of sale of a car was a simulation when the redemption price was $225, but the car was worth $1,000 to $2,450).

[32] *Lerner Shops of Louisiana, Inc. v. Reeves*, 73 So.2d 490, 495–97 (La.App. 1 Cir.1954) (construing purported sale and leaseback of immovable property as a pignorative contract or security device when arrangement provided (1) the vendor with an option to repurchase the realty from the purchaser during the term of the lease and for the consideration paid by the purchaser and (2) the purchaser with the right to compel the vendor to repurchase the realty during the same period and for the same amount). *Cypress Heights Acad. v. CHA Inv'rs*, 2021 CA 0820 (La. App. 1st 2022) (in challenge to a sale and lease-back of property, court found that testimony that it was "just a structure to hold the property, get the financing," generated material questions of fact that precluded resolving whether it was a simulation at the summary judgment phase.)

Specifically, Greenfield can ask for the property back at any time.[33] And if the lease terminates early (which Greenfield can do as it wishes), the Port must "convey full ownership of the Leased Facility and Project back to Greenfield without any restrictions."[34] The Port cannot, however, terminate the lease early without Greenfield's consent.[35]

Thus, the Greenfield/Port deal is a simulation (1) because the property remains in the corporeal possession of Greenfield,[36] and (2) because of Greenfield's right of redemption.[37]

ii. The Greenfield/Port deal is a simulation because Greenfield retains all the rights and indicia of ownership.

All other aspects of the Greenfield/Port deal confirm that the deal is a simulation of a sale, because Greenfield retains all the rights and indicia of ownership over the property.

For example, although Greenfield can assign its rights under the Agreement, the Port cannot.[38] Nor can the Port "dispose, sell, transfer, encumber or otherwise take any action affecting the Project" without Greenfield's consent.[39] It cannot even *negotiate* to do so without being in breach.[40] By contrast, if Greenfield wants the land back at any time, the Port must give it back.[41]

To emphasize how the deal is a simulation, compare these two statements from two different documents that are part of the Greenfield/Port deal:

- The Act of Conveyance says that Greenfield is giving the land to the Port "to have and to hold . . . **forever**, but subject to the terms of the pilot lease."[42]

- But the Agreement says that "**at the written direction of Greenfield**" the Port must "transfer the Project and property back to Greenfield."[43]

---

[33] Ex. A at 5 ("In the event Greenfield determines it is in the best interest of the Project for Greenfield to dispose, sell, mortgage, encumber, or otherwise transfer a portion of the Project for any reason, including such governmental or regulatory reasons, the Port shall at the written direction of Greenfield, execute transfer or conveyance documents as may be provided in the Lease as maybe necessary to transfer the Project and property back to Greenfield."); see also Ex. D at POSL-0441, § 10.1(b) (requiring the Port to sell the property back to Greenfield for $1 at any time Greenfield requests).
[34] Ex. A at 3.
[35] Ex. A at 4.
[36] *See* Civil Code Art. 2480.
[37] Civil Code Art. 2569.
[38] Ex. A at 4-5.
[39] *Id*.
[40] Ex. D at POSL-0439 (c).
[41] Ex. A at 5 ("In the event Greenfield determines it is in the best interest of the Project for Greenfield to dispose, sell, mortgage, encumber, or otherwise transfer a portion of the Project for any reason, including such governmental or regulatory reasons, the Port shall at the written direction of Greenfield, execute transfer or conveyance documents as may be provided in the Lease as maybe necessary to transfer the Project and property back to Greenfield.")
[42] Ex B at pg. 2, § 3.1. Emphasis added.
[43] Ex. A at 5. Emphasis added. See also Ex. D at POSL-0437, § 8.3 ("Lessee Entitled to Conveyance of the Leased Facility").

So under this purported "sale," the Port gets the property to have and to hold "forever" – until any time that Greenfield asks for it back – and the Port cannot sell or dispose of it in the meantime. Greenfield thus holds all "three constituent elements of civil law ownership, namely, the usus, fructus, and abusus, (rights to use, enjoy and dispose)."[44]

Other aspects of the deal show that the deal is not actually sale/lease-back. The supposed sale of land has no price paid by the buyer at all. Instead, the purported *seller* is paying the purported *buyer* $4 million upfront to take the land.[45] And unlike a typical lease, the Port has no obligation to make any sort of repairs or do any work to maintain the leased premises.[46] Despite the improvements being purportedly owned by the Port, the deal documents give Greenfield an unlimited right to take parts of the Port's property and "sell, trade-in, exchange, or otherwise dispose" of it.[47]

Unlike a typical lease, the Port cannot evict its tenant even if Greenfield stops paying rent. In the event that Greenfield stops paying, the Port cannot take possession of its property – it has to give the property to Greenfield.[48]

Greenfield retains all the other indicia of ownership, including possession, habitation, and cultivation;[49] insuring improvements on the property;[50] and assuming risk.[51] For example, the Agreement provides Greenfield "full access and use of the Project" and forbids the Port's interference except in emergencies.[52] The Agreement contemplates that Greenfield will be doing the work of "acquiring, constructing, improving, equipping, operating, financing and permitting the Project and export facility."[53]

Furthermore, in a variety of ways, the deal documents treat the property as belonging to Greenfield, even though it is owned in name by the Port. For example, the Agreement states that although the Port supposedly owns the land and improvements, Greenfield can take a tax credit for the depreciation of the improvements.[54] Similarly, the documents say that the property "shall be considered an asset of [Greenfield] for the purpose of its insurance practices. . . . "[55] Greenfield specifically is entitled to the proceeds of any insurance claims for damage to the property.[56] And if the property is taken by eminent domain, Greenfield gets the compensation.[57]

---

[44] *Humble v. John W. Nugier Real Estate & Ins. Agency, Inc*., 380 So.2d 206, 208 (La. App. 1980); *see also Queensborough Land Co. v. Cazeaux*, 136 La. 724, 67 So. 641 (La. 1915) ("ownership is composed of the rights to use, to enjoy, and to dispose of").
[45] Ex. A at 3.
[46] Ex. D at POSL-0431, § 5.1(b), § 5.2(a).
[47] Ex. D at POSL-0431, § 5.2(a).
[48] Ex. D at POSL-0440, § 9.2(c)-(d).
[49] *Cherami v. Cantrelle*, 174 La. 995, 1008 (La. 1932)
[50] *Houghton v. Houghton*, 165 La. 1019, 1023 (La. 1928).
[51] *Tahoe Corp. v. P & G Gathering Systems, Inc*., 506 So.2d 1336 (La. App. 1987) ("Possession and risk are classic indicia of ownership . . .").
[52] Ex. A at 2.
[53] *Id*.
[54] Ex. A at pg. 5, § 7(i); Ex. D at POSL – 0430, § 4.6.
[55] Ex. D at POSL-0432, § 5.4.
[56] Ex. D at POSL-0433, § 6.1.
[57] Ex. D at POSL-0433, § 6.2

Even if the Greenfield/Port agreement is rejected in bankruptcy, the Port *still* does not have control of the land that is supposedly its property. In that event, the Port is required to enter into a new lease on the same terms with whatever entity Greenfield's creditors require.[58]

In sum: the Port is the supposed owner of the land and improvements. But the Port (a) cannot use its own land; (b) cannot sell its own land; (c) cannot interfere with Greenfield's use of its land; and (d) has to give the land back to Greenfield when Greenfield asks. Greenfield can sell the Port's property if Greenfield wishes, can mortgage the Port's property, and can treat the Port's property as its own for insurance purposes, receiving the proceeds of any insurance payout or condemnation.

Imagine, by comparison, if you and I were to write out an act of sale for you to buy my car. But you don't pay me any money for it. And I get to keep driving the car. And you can't drive it. And you can't sell the car to anyone else. But I can sell pieces of the car and keep the money. And I can tell my insurer it is still mine and can claim any insurance proceeds if the car is in a crash. And if the government takes the car, they pay me for it, not you. And if I ask for the title back at any time, you have to give it back.

In what sense do you own the car at all? You do not. So too here. The Greenfield/Port deal is not a sale of land to the Port; it is a simulation.

Furthermore, the Greenfield/Port deal fails the legal test set out in *Cameron Parish Police Jury v. Taxpayers*, 212 So. 3d 663 (3rd Cir. 2017). In that case, the court explained that "legally valid PILOT [Payment In Lieu Of Taxes] agreements usually involve a public entity's lease of its own tax-exempt property for development purposes; the public entity then obtains a payment in lieu of tax agreement from the developer who pays an agreed upon amount in exchange for his own exemption from property taxes."[59] But crucially,

> [N]one of the statutes or jurisprudence authorize a [government entity] to enter into an agreement to reduce or effectively exempt ad valorem taxes for a single taxpayer already operating in the area.[60]

Here, Greenfield was "already operating in the area" – it owned the land prior to its purported sale to the Port. Thus, Greenfields' attempt to move its property temporarily into the Port's possession violates the legal test for valid PILOT agreements.[61]

D. Allowing Greenfield to Avoid *Ad Valorem* Taxes with This Deal Would Open a Large, Repeatable Tax Loophole.

If Greenfield is allowed to avoid taxation by temporarily placing its land with the Port, and then taking the land back when the project is done, then we expect that other entities will follow suit. Nothing about the Greenfield/Port deal is unique to these circumstances; any corporate entity with a willing political subdivision partner could avoid payment of *ad valorem* taxes by the same means.

---

[58] Ex. D at POSL-0438, § 8.5(e).
[59] *Id.*
[60] *Cameron Parish Police Jury v. Taxpayers*, 212 So. 3d 663, 670 (3rd Cir. 2017).
[61] *See also* Louisiana Attorney General Opinion 21-0077 (Sept. 30, 2022) (opining that constitutionality of PILOT program turns on "who actually owns the subject property").

In essence, Greenfield is paying the Port to rent its tax-exempt status. Such an arrangement, if allowed to operate, would incentivize any tax-exempt political subdivision in need of funds from following suit. But that would be at great cost to the public. As the court in *Cameron* noted, "[w]hile the CEA/PILOT payment amounts sound lucrative for the economically distressed parish," the amount of money received is far less than what would be paid if "the parish assessor assesses, and the sheriff collects, the ad valorem taxes based, as required, upon fair market value."[62] For that reason, we suggest that it is important to stop this gambit here, before it can spread to the rest of the state in a manner that substantially undermines the public fisc.

Thank you for your attention to this matter. Will you please evaluate the appropriate and legal treatment of the property, and include it in the rolls of taxable property? Will you please also send a copy of this letter to your attorney and your surety, so that they can advise you?

Very truly yours,

*/s/ William Most*_____
William Most

[62] *Id.* at fn. 1.