THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 11-ALJ-17-0267-CC

Carolina Walk, LLC and Serrus Carolina Walk, LLC..... Appellants,

v.

Richland County Assessor. .....Respondent.

BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. THE ALC'S DECISION WAS ARBITRARY AND AGAINST THE SUBSTANTIAL WEIGHT OF THE EVIDENCE BECAUSE IT INEXPLICABLY DISREGARDED THE APPELLANTS' OPINION OF FAIR MARKET VALUE.

II. THE PROPERTY VALUE DETERMINED BY THE ALC WAS ARBITRARY AND DID NOT REFLECT THE ACTUAL VALUE OF THE PROPERTIES BECAUSE THE ASSESSMENT RELIED UPON INVALID COMPARABLE SALES.

III. THE TIMING OF THE COMPARABLE SALES USED IN THE ALC'S PROPERTY VALUE DETERMINATION CONTRADICTS THE SUBSTANTIAL WEIGHT OF THE EVIDENCE AND DOES NOT REFLECT CAROLINA WALK'S ACTUAL VALUE.

IV. THE ALC DECISION GOES AGAINST THE SUBSTANTIAL WEIGHT OF THE EVIDENCE AND ARBITRARILY DISREGARDED THE FACT THAT THE ASSESSOR IGNORED COMPARABLE SALES FROM THREE COMPARABLE GAME-DAY CONDOMINIUM COMPLEXES AS WELL AS ABSOLUTE AUCTION SALES OF CAROLINA WALK UNITS.

V. THE ALC ABUSED ITS DISCRETION BY FAILING TO DETERMINE ITS OWN PROPERTY VALUE FOR CAROLINA WALK WHEN THE RECORD INDICATED THAT SUCH AN EXERCISE OF DISCRETION WAS WARRANTED AND NECESSARY.

VI. THE ALC'S DETERMINATION THAT JOHN CREECH'S TESTIMONY WAS NOT CREDIBLE AND ITS SUBSEQUENT CHARACTERIZATION OF THE ASSESSOR'S COMPARABLE SALES AS ARMS-LENGTH WAS BOTH ARBITRARY AND AGAINST THE SUBSTANTIAL WEIGHT OF THE EVIDENCE.

STATEMENT OF THE CASE

This appeal arises out of a contested case pursuant to the Administrative Procedures Act (APA) in which Appellants, Carolina Walk, LLC and Serrus Carolina Walk, LLC (collectively "Carolina Walk"), challenged the Richland County Board of Assessment Appeals' ("Board") decision upholding the Richland County Assessor's ("Assessor") appraised value of their property. In ruling for the Assessor, the Board set the value of

Carolina Walk's property, consisting of 29 condominium units, at $6,767,300 for the 2009 tax year. (R. p. 7)

Carolina Walk timely appealed the Board's decision to the Administrative Law Court (ALC) and a hearing was held on October 5, 2011. On February 8, 2012, the ALC issued a final order affirming the Assessor's valuation. (R. pp. 4-12)

Carolina Walk timely filed a Rule 59(e) Motion requesting the ALC to alter or amend its Final Order. On March 9, 2012, the ALC amended its final order, but did not alter the valuation. (R. pp. 34-35) Carolina Walk filed a Notice of Appeal to the South Carolina Court of Appeals on March 28, 2012.

STANDARD OF REVIEW

Tax appeals to the ALC are subject to the Administrative Procedures Act. *Long Cove Home Owners' Ass'n v. Beaufort Cnty. Tax Equalization Bd.*, 327 S.C. 135, 139, 488 S.E.2d 857 860 (1997). Accordingly, review of the ALC decision is governed by S.C. Code Ann. § 1-23-380(5) (Supp. 2010), which states:

> The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
>
> * * *
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

As the South Carolina Supreme Court recently stated in *Media General v. South*

Carolina Department of Revenue, 388 S.C. 138, 144, 694 S.E.2d 525, 527-28 (2010): "A reviewing court may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law. S.C. Code Ann. §1-23-610(B)(a), (d) (Supp. 2009)."

FACTS

The parties entered into a Stipulation of Facts. (R. pp. 53, 619-621) This Stipulation states, in part:

1. [Carolina Walk] contests the [Board's] decision which upholds the [Assessor]'s appraised value of condominiums known as Carolina Walk for the tax year 2009. [Carolina Walk] timely appealed the 2009 property tax bills on 29 condominium units owned by it on Stadium Road in Columbia, South Carolina.

2. The tax year in dispute is 2009. As such, the issue for this court to determine is the fair market value of the [Carolina Walk's] property as of December 31, 2008 (the statutory valuation date for the 2009 tax year).

3. The real property consists of the Carolina Walk Condominiums located at 900 Stadium Road, Columbia, SC. The property at issue is as follows:

29 Condominium Units

Tax Map Number 11293-01-02, 04, 05, 07, 08 & 10

Tax Map Number 11293-02-07 & 09

Tax Map Number 11293-02-22

Tax Map Number 11293-03-04, 05 & 09

Tax Map Number 11293-04-03, 04, 05 & 9

Tax Map Number 11293-05-01, 02, 04 & 07

Tax Map Number 11293-06-03, 05, 07, 08, 09 & 10

Tax Map Number 11293-07-02, 05 & 07

4. On or about March 30, 2011 the taxpayer, Serrus Carolina Walk, LLC, purchased the condominium units and parking spaces from Carolina Walk, LLC for a combined consideration of $2,962,500.

5. After the sale, the seller, Carolina Walk, LLC assigned all its right, title and interest in any taxes and tax refunds to the purchaser, Serrus.

6. The parties assert the following FMV for the respective condo units:

	TMS	Condo Unit #	Assessor's FMV	Petitioner's Proposed FMV
1	11293-02-22	N213	268,000.00	215,000.00
2	11293-01-10	S101	166,900.00	95,202.00
3	11293-01-05	S102	166,900.00	95,202.00
4	11293-01-04	S104	348,600.00	206,916.00
5	11293-01-08	S107	182,500.00	104,490.00
6	11293-01-07	S109	173,600.00	99,201.00
7	11293-01-02	S110	173,600.00	99,201.00
8	11293-02-09	S203	348,600.00	214,936.00
9	11293-02-07	S209	173,600.00	103,046.00
10	11293-03-05	S302	210,600.00	139,430.00
11	11293-03-09	S303	348,600.00	230,976.00
12	11293-03-04	S304	348,600.00	238,996.00
13	11293-04-05	S402	210,600.00	144,205.00
14	11293-04-09	S403	348,600.00	238,996.00
15	11293-04-04	S404	348,600.00	247,016.00
16	11293-04-03	S408	182,500.00	124,740.00
17	11293-05-04	S504	348,600.00	255,036.00
18	11293-05-07	S509	173,600.00	118,426.00
19	11293-05-02	S510	173,600.00	122,271.00
20	11293-05-01	S512	248,600.00	188,604.00

21	11293-06-10	S601	166,900.00	117,342.00
22	11293-06-05	S602	210,600.00	153,755.00
23	11293-06-09	S603	348,600.00	255,036.00
24	11293-06-08	S607	182,500.00	128,790.00
25	11293-06-03	S608	182,500.00	132,840.00
26	11293-06-07	S609	173,600.00	122,271.00
27	11293-07-05	S702	210,600.00	163,305.00
28	11293-07-07	S709	173,600.00	129,961.00
29	11293-07-02	S710	173,600.00	133,806.00
			6,767,300.00	4,618,996.00

(R. pp. 619-620) (End of Stipulation.)

The Richland County Assessor's Office valued the Property (29 condo units) at $6,767,300 as of December 31, 2008, and issued a tax notice for the 2009 tax year based upon that value. (R. p. 7) Carolina Walk disputed the Assessor's value and asserted that the properties should be valued at $4,618,996. (R. p. 7) The Board considered Appellants' appeal and affirmed the Assessor's value, stating:

> *The Board wholly believes that the value of these condominiums is something less than what the County has appraised them.* However, the Board does not believe it has sufficient evidence to support a finding of some dollar figure lower than what has been established by the Assessor's Office. Therefore, the Board has arrived at a decision to uphold the County's appraised value of the condominiums known as Carolina Walk for tax year 2009.

(R. p. 299; p. 73, lines 6-12) (emphasis added)

The parties agree that the comparable sales method was an appropriate method to value the condo units. The Assessor, however, used the following "comps" to value all 29 units:

Carolina Walk Unit S-104

(Same comps used to value 7 other Units)

Unit	Sale Date	Square Foot $
N-416	4/18/2008	228.03
S-704	6/13/2008	308.60
N-614	7/2/2008	254.52

Carolina Walk Units N-213 and S-512

Unit	Sale Date	Square Foot $
S-712	1/11/2008	377.28
N-614	4/8/2008	228.03
N-712	12/31/2008	231.18
S-112	6/19/2009	222.28

Carolina Walk Unit S-110*

(Same Comps used to value other 7 other Units)

Unit	Sale Date	Square Foot $
S-309	3/17/2008	331.60
S-708	5/8/2008	394.75
S-701	5/8/2008	433.27
S-108	8/15/2008	238.89

Carolina Walk Unit S-102*

(Same Comps used to value 2 other Units)

Unit	Sale Date	Square Foot $
S-309	3/17/2008	331.60
S-708	5/8/2008	394.75
S-701	5/8/2008	433.27
S-108	8/15/2008	238.89

Carolina Walk Unit S-107*

(Same Comps used to value 3 other Units)

Unit	Sale Date	Square Foot $
S-309	3/17/2008	331.60
S-708	5/8/2008	394.75
S-701	5/8/2008	433.27
S-108	8/15/2008	238.89

Carolina Walk Unit S-302*

(Same Comps used to value 3 other Units)

Unit	Sale Date	Square Foot $
S-309	3/17/2008	331.60
S-708	5/8/2008	394.75
S-701	5/8/2008	433.27
N-509	8/15/2008	222.76

*Notice that these 4 groups all use the same four comparable sales (except that N-509 replaces S-108 in group for Unit S-302)

Explaining the above, for illustration purposes the first chart shows the Assessor's valuation for the appealed condo Unit S-104. To value this unit the assessor utilized three comparable sales to arrive at the valuation of $348,600: the sales of Unit N-416, Unit S-704 and Unit N-614. Once the assessor had valued Unit S-104, that value was then also assigned to seven other units that were similar in square footage, bathrooms, quality, etc. (R. p. 215, lines 1-20) (discussing the same method applied to a different unit) Thus, the Assessor used three comparable sales to value Unit S-104, which was then representative of the other 7 units under appeal. This means that the three same comparable sales were used to value a group of eight condos at issue in this appeal.

Again, for illustration purposes, the second chart lists the comps used to value unit N-213 S-512. These comps were the sales of Unit S-712, N-614, N-712 and S-112.

The third chart lists the comps used to value S-110. These four comps were S-309, S-708, S-701 and S-108. These comps were used to value a total of eight units. In addition (with one exception—S-108), these same comps were also used to value eleven other units for a total of 19 units. *See* chart for S-102 and S-107.

Thus, the assessor used only 11 different comparable sales to represent the value of all 29 Carolina Walk units.

Carolina Walk is one of four large condominium complexes built around the University of South Carolina ("USC") football stadium which were built at the height of the real estate market in 2006 and 2007. (R. p. 67, lines 7-8; p. 88, lines 1-4; p. 91, lines 15-19) Carolina Walk was marketed as a second home condominium complex for USC football fans on game-day weekends. (R. p. 90, lines 6-25) Since being constructed, Carolina Walk, along with the other complexes around the stadium, has suffered from severe financial difficulties. (R. p. 54, lines 2-5)

These financial difficulties resulted from one of the most severe real estate recessions in U.S. history, and a period that Richard Comyns, an appraiser for the Richland County Tax Assessor's office, testified was the worst real estate recession of his lifetime. (R. p. 227, lines 10-14) Particularly, December 31, 2008 was identified by Richland County Assessor John Cloyd, who testified on behalf of the Assessor, as the very bottom of this unprecedented market and the depths of the Great Recession for Richland County. (R. p. 293, lines 14-18) It was undisputed at trial that this period was the low point for local real estate markets and

that the second home condominium market, and game-day properties specifically, suffered even worse losses in demand and value than most properties. (R. p. 9)

As a result, actual sales for the subject property, as well as the three adjoining large condominium complexes around the USC football stadium, showed dramatic declines both in the number of closings and in sales prices. (R. p. 98, lines 21-24) For example, this collapse of the condominium market around the USC football stadium is evident in the MLS records for sales of all condominiums around the stadium, which showed the following: 1st Qtr. 2008: 37 units sold; 2nd Qtr. 2008: 8 sales; 3rd Qtr. 2008: 5 sales; and 4th Qtr. 2008: 1 sale. (R. p. 98, lines 10-20)

This record of sales is consistent with all condominium sales in MLS Area 7 (MLS area 7 includes condominium sales outside the stadium area including the neighborhoods in Rosewood, Shandon and USC). (R. p. 101, line 18-p. 102, line 6) MLS records reflect the following sales in Area 7: 1st Qtr. 2008: 48 sales; 2nd Qtr.: 18 sales; 3rd Qtr.: 10 sales; 4th Qtr.: 6 sales. (R. p. 102, lines 7-19) Although not all sales are listed on MLS (e.g., direct developer sale; for sale by owner, etc.) this drastic decline helps to illustrate the dire condition of the market for these condominiums on December 31, 2008. (R. p. 99, lines 2-18)

It was during the depths of this recession, December 31, 2008, that the Assessor valued Carolina Walk for the 2009 tax year assessment. (R. p. 4, lines 16-21; p. 7) The appraisal report prepared by Comyns shows that he grouped the subject condominiums by square footage and established seven size-groups of properties that were representative of the twenty-nine units at Carolina Walk. (R. p. 180, lines 16-24; p. 7) He then prepared an appraisal for each of the seven size-groups using the comparable sales method of valuation.

(R. p. 180, lines 16-24; p. 7) As a result of this process, the Assessor assigned the properties a value of $6,767,300. (R. pp. 4, 7)

John Creech, a local realtor who had the listing agreement for Carolina Walk and experience selling other similar properties, testified at trial on behalf of Carolina Walk in regards to the comparable sales chosen by the Assessor for the valuation of the 29 Carolina Walk units. (R. p. 83, line 21-p. 84, line 16) Again, by being selected as comparable sales, these sales units were chosen by the Assessor to be representative of the actual value of Carolina Walk's units. Creech first testified about unit S309. (R. p. 111, line 20-p. 112, line 5) He testified that S309 first sold to Kevin Morris, a client of his, for $205,000 and that the client subsequently deeded the unit over to his mother-in-law for $229,500. (R. p. 112, line 14-p. 115, line 12) She paid cash for the property to pay off the mortgage so that the condominium could be traded for interest in a beach house. (R. p. 113, line 14-16) Creech further testified that the very next day the family deeded the property over to Robert Lewis for $173,600, at a $40,000 loss, and obtained a one-third share in a beach house in return. (R. p. 113, lines 11-13) Thus, he stated that the $173,600 value was not established by a cash sale price. (R. p. 114, lines 10-25)

Creech also testified on the similar circumstances that surrounded the sales of units S708 and S701. He testified that he had unsuccessfully been trying to sell unit S708 for $197,500 when both it and unit S701 were separately sold to two different buyers with close ties to the Carolina Walk development for the same price of $319,270. (R. p. 118, line 23-p. 119, line 6 (discussing sale to Robert Newton, a friend of the developer); p. 120, lines 1-22 (discussing sale to Arnold Ramsey, one of the original people with Carolina Walk, LLC)) These units were subsequently foreclosed on at the exact same date, February 9, 2011, for the

same amount, $150,000. (R. p. 118, line 23-p. 120, line 22) Creech further testified that upon foreclosure, both units were sold to the same buyer for $118,450. (R. p. 120, lines 20-22)

Despite Creech's testimony and the undisputed recognition that the real estate market had hit rock bottom on December 31 2008, the ALC affirmed the property value that the Richland County Assessor's Office assigned to the Carolina Walk properties. (R. p. 12) This appeal followed.

ARGUMENT

I. THE ALC'S DECISION WAS ARBITRARY AND AGAINST THE SUBSTANTIAL WEIGHT OF THE EVIDENCE BECAUSE IT INEXPLICABLY DISREGARDED THE APPELLANTS' OPINION OF FAIR MARKET VALUE.

By way of background, as stated in South Carolina Property Tax (SCDOR April 2011): "Real property . . . is appraised to determine fair market value. Real property is reassessed (revalued) every five years . . . . SC Code § 12-43-217."

"Article X, Section 1, of the South Carolina Constitution provides for taxation by classification based on 'fair market value.' Similarly, SC Code §12-37-930 provides that all property is to be valued 'at its true value in money that is the price that the property would bring following reasonable exposure to the market where both seller and buyer are willing.' See also *Lindsey v. S.C. Tax Comm'n,* 302 S.C. 504, 397 S.E.2d 95 (1990); *Smith v. Newberry County Assessor,* 350 S.C. 572, 567 S.E.2d 501 (Ct. App. 2002)."

As stated above, Serrus purchased the subject 29 condo units (and parking spaces which are not part of this appeal) for combined $2.9 million in March 30, 2011.

Stephen Mudge, President and co-owner of Serrus testified at length regarding his opinion of the units' fair market value (FMV) on December 31, 2008.

Prior to forming Serrus in 2009, Mudge was executive Vice President of a mixed-use development for Marriott International and Ritz Carlton Hotel Company from 2004 – 2009. (R. p. 59, lines 13-18) Prior to that, he was Vice President of Planning and Development for Centex Destination Properties for some five years. (R. p. 60, lines 7-9) At that time, Centex was one of the top three home builders in the United States. (R. p. 60, line 20-p. 61, line 1)

Before working for Centex, Mudge was with Medallist Golf Developments, a joint venture between Greg Norman and Macguarie Bank for five years. (R. p. 61, lines 5-7) Prior to that, he was Vice President of Viking Enterprises for seven to eight years. (R. p. 61, line 23-p. 62, line 10)

In his current role as President of Serrus, he has acquired, on behalf of his company, over 150 properties (including Carolina Walk) since 2009. (R. p. 63, lines 2-4) In his career, he has built or managed thousands of condo projects all over the world. (R. p. 64, lines 4-22)

Mudge testified that Carolina Walk had 125 condo units in one building with two towers (North and South) with a parking structure in the middle. (R. p. 65, lines 12-17) Both Mudge and the listing real estate agent testified Carolina Walk was built at the top of the real estate market for higher-end USC football fans. (R. p. 65, line 5-p. 66, line 8)

After testifying at length as to the causes and impact of the Great Recession, he testified that in his opinion the FMV of the condos on the lien date was between $2.8 and $3 million. (R. p. 81, lines 7-16)

Prior to acquiring the units, and as part of his due diligence, Mudge commissioned a valuation study by Diane Permar. (R. p. 441; p. 67, lines 16-25) Permar's background is as follows: In 1973, she was employed in the Marketing Research Department at Sea Pines Plantation. (R. p. 141, lines 1-6) She worked there both in-house and as an independent

contractor until 1979 when she was employed by the Kiawah Island Company where she was responsible for market analysis and market research. (R. p. 141, lines 16-22) In 1985, she and a group of senior managers left to form Permar, Inc., a consulting company where she remains. (R. p. 141, line 24-p. 142, line 10) Her focus has been in market analysis and market research for real estate developers in the southeast. (R., p. 143, lines 13-21) Representative clients include St. Joe Co., Crescent Resources, Burroughs and Chapin, Greenwood Development, Pacolet Milliken, the South Carolina State Ports Authority, Morgan Stanley, and Wachovia Bank. (R. p. 143, line 22-p. 144, line 14)

She has been active with the Urban Land Institute and chaired its council. (R. p. 146, line 17-p. 147, line 5) She has been retained as an expert witness on valuations "maybe a dozen times" and testified once in Federal Court before Judge Blatt. (R. p. 147, line 22-p. 148, line 11)

As part of Serrus's due diligence, Permar developed a pricing strategy for the units. (R. p. 443) This report yielded a total value of $4,618,996 for all 29 units in Carolina Walk on December 31, 2008, and was used by Petitioner to develop its opinion of the property's fair market value. (R., p. 442; p. 67, lines 19-25; p. 70, lines 4-7; p. 171, lines 16-19) Petitioner's opinion of the property's fair market value, $4,618,996, found in the stipulation above was based upon the value proposed by Permar's pricing strategy report. (R. pp. 4, 9-10; p. 442) Significantly, she examined sales from the adjoining other three "game day" condo units, which the assessor and the ALC ignored. (R. pp. 450-452)

In regards to Permar's and thus Mudge's valuation, the ALC stated that "After a careful review of all the evidence presented by the Petitioners I find that they have not presented evidence of a single arms-length sale of a condominium that was sold within a year

of December 2008 that is as comparable in size, location, and features to the subject as the comparable sales relied upon by the Assessor." (R. p. 10) However, Carolina Walk presented a report prepared by Permar that included several "arms-length sales of a condominium that was sold within a year of December 2008 that [were] as comparable in size, location, and features to the subject" even if those comparable sales were not discussed individually. (R. pp. 448-452) Contrary to the ALC's conclusion, Permar testified that in preparing the report submitted by Carolina Walk her company used **Carolina Walk** condominiums that had sold in 2008 on the first floor as the basis of their pricing strategy for the other 29 units. (R. p. 172, lines 11-17) These sales from Carolina Walk used by Permar are not only comparable in size, location, and features to the subject properties but they also clearly fit within the ALC's finding that "comparable sales of the condominiums in [the] same development [are] more persuasive evidence of the value of the subject Properties." (R., p. 10) Furthermore, Permar testified that her report used the same specific comparable sales data that an appraisal, such as the Assessor's, would include to value the Carolina Walk properties. (R. p. 175, lines 17-21) In addition to the specific comparable sales sought by the ALC, Permar's report also included a larger base of comparable sales and other data indicative of broader downward trends in order to accurately reflect the drop in South Carolina second home values that the Assessor's valuation failed to reflect. (R. p. 173, lines 11-16)

It is well established that "a property owner, who is familiar with his property and its value, may give his estimate of its value . . . even though he is not an expert." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 43-44, 691 S.E.2d 135, 146 (2010); *Whisenant v. James Island Corporation,* 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981) (noting that

ordinarily a property owner, who is familiar with his property and its value, may give his estimate of its value even though he is not an expert); *Abercrombie v. Abercrombie,* 372 S.C. 643, 647, 643 S.E.2d 697, 699 (Ct. App. 2007) (recognizing general rule in South Carolina that a property owner is competent to offer testimony as to the value of his property); *Hawkins v. Greenwood Dev. Corp.,* 328 S.C. 585, 598, 493 S.E.2d 875, 881 (Ct. App. 1997) ("The rule that a property owner is competent to present an opinion as to the property's value is well recognized."); *Barton v. Superior Motors, Inc.,* 309 S.C. 491, 494, 424 S.E.2d 524, 526 (Ct. App. 1992).

Mudge, of course, was not your ordinary property owner. He spent his entire career in real estate development and built or operated thousands of condo units all over the world. In addition, as part of his due diligence in acquiring the property he retained a valuation firm with enterprise valuation experience who also arrived at a value some $2 million less than the county assessor's office.

Accordingly, the ALC should not have disregarded Mudge's opinion of the Carolina Walk property's value or Permar's pricing strategy report and property values that were used by Petitioner in stipulating its opinion of the FMV.

II. THE PROPERTY VALUE DETERMINED BY THE ALC WAS ARBITRARY AND DID NOT REFLECT THE ACTUAL VALUE OF THE PROPERTIES BECAUSE THE ASSESSMENT RELIED UPON INVALID COMPARABLE SALES.

In a challenge to a valuation by the assessor, the taxpayer bears the burden of demonstrating that the assessor's valuation is incorrect. *Newberry Mills, Inc. v. Dawkins*, 259 S.C. 7, 15-16, 190 S.E.2d 503, 507 (1972). Ordinarily, the taxpayer meets this burden by proving the actual value of the property. *Cloyd v. Mabry*, 295 S.C. 86, 88-89, 367 S.E.2d 171, 173 (Ct. App. 1988). Proving actual value is not, however, the only way to demonstrate

an incorrect valuation. *See id.* (stating that if the taxpayer can show the assessing authority's valuation is incorrect, the presumption of correctness is removed and the taxpayer is entitled to appropriate relief). As the ALC recognized in its Final Order, the appealing taxpayer may demonstrate fatal errors in the Assessor's valuation to overcome the burden of demonstrating that the Assessor's value is incorrect. (R. p. 11)

The assessor's valuation was incorrect in this appeal because:

(1) the Assessor used related party sales as comps; (2) the Assessor relied upon defective comps without conducting the requisite due diligence to ascertain the defects; (3) the Assessor relied upon too few comps; and (4) the Assessor "cherry picked" comps which took place before the full impact of the Great Recession.

A. THE SALES COMPARISON APPROACH – GENERAL.

As described in *The Appraisal of Real Estate*:

> In the sales comparison approach, an opinion of market value is developed by comparing properties similar to the subject property that have recently sold, are listed for sale, or are under contract (i.e., for which purchase offers and a deposit have been recently submitted). A major premise of the sales comparison approach is that an opinion of the market value of a property can be supported by studying the market's reaction to comparable and competitive properties.

The Appraisal Inst., *The Appraisal of Real Estate* 297 (13th Ed. 2008).

Finding proper comps can be difficult in a thin real estate market, as existed in Richland County as a result of the Great Recession.

> In real estate markets, the availability of transaction data is a vital aspect in the valuation process under the comparison approach. Hence, a thin market may have dire consequences on the accuracy of real estate values. A thin real estate market refers to the lack of comparable properties when undertaking an appraisal.

M. Junainah et al., *The Existence and Implications of Thin Real Estate Market*, International Journal of Trade, Economics and Finance, Vol. 2, No. 5 (October 2011) at p. 376. According to another expert:

> The market peak usually corresponds with the last few meaningful sales, and after a crash there are often no closed sales suitable for analysis. After a market peak, the trepidation of market participants creates a stalemate in which buyers are reluctant to make offers, and sellers are reluctant to accept the offers they receive. The reasons for buyers' reluctance to make offers is reasonably well understood: a perceived lack of demand for the projected product, e.g., buildable lots, inability to obtain satisfactory financing; a fear of further declines in value; and a general adversity to risk. Seller's reluctance may result from several factors, including a reluctance to accept a loss, a weighted analysis of the costs of holding versus the possibility of recovery, and (in the case of properties in or nearing foreclosure) a lack of cooperation from the lien holder, especially if a short sale is involved where the sale price is less than the mortgage balance. The implied equilibrium point of classical supply and demand curves is replaced by a kind of demilitarized zone: buyers unwilling to advance upward and sellers unwilling to retreat downward.

R. Greene, *Market Conditions Adjustments for Residential Development Land in a Declining Market*, 80 Appraisal Journal 1 (January 1, 2012) at p. 2. In addition:

> The latest evidence of property values is a vital aspect in assessments as property taxes are levied based on the said values. Hence, is very important to ensure the comparables can adequately represent the current market value is reflects [sic] the demand and supply conditions of the market. however, [sic] there is a significant difficult [sic] in gathering required information in a thin market with low transaction volume. As a result, property taxes may be inaccurate determined based on outdated market values. According to the required information in an appeal to reduce taxes is also difficult in a thin market because the value of a property may be higher than expected.

The Existence and Implications of Thin Real Estate Market, supra, at p. 377.

B. THE ASSESSOR RELIED UPON RELATED PARTY SALES.

An assessor is required to conduct due diligence of comparable sales. "The data gathered must be verified to be sure the sales are valid arms-length transactions." *Property Taxation* at p. 139. As stated in *The Appraisal of Real Estate*:

> Regardless of the number of sales analyzed, the appraiser must understand each sale used for comparison to draw credible conclusions from comparisons. *For example, the conditions of sale in a transaction of real property between parent and child may not be consistent with the definition of market value.* It may be possible to determine the relationship between the reported sale price and market value only after the sale, the comparable property, and its market are researched and understood.

Id. at 302 (emphasis added).

The Appraisal of Real Estate also states:

> Appraisers should verify information with a party to the transaction to ensure its accuracy and to gain insight into the motivation behind each transaction. The buyer's and seller's views of precisely what was being purchased at the time of sale are important. *Sales that are not arm's-length market transactions* (in accordance with the definition of market value used in the appraisal) *should be identified and rarely, if ever, used. To verify sales data, the appraiser confirms statements of fact with the principals to the transaction, if possible, or with the brokers, closing agents, or lenders involved.*

Id. at 304 (emphasis added). This Treatise also states:

> *Referencing public records and data services does not verify a sales transaction.* It simply confirms that a transaction was recorded. Similarly, referencing the source of secondary data only confirms its existence and does not verify the transaction. Generally, secondary sources do not provide adequate information about sale concessions, *whether the sale was an arm's-length transaction, if multiple properties were involved* in the sale, if personal property was included, and other factors influencing value.

Id. at 305. Mr. Comyns testified that related party sales are generally not accurate comps to use. (R. p. 234, line 17-p. 235, line 7)

Unit S-309 was used by the County to value S-110 (and seven similar units) as well as Unit S-102 (3 units) and S-107 (4 units). The assessor listed it at a value of $255,000. John Creech, the listing agent, testified that S-309 was deeded by the owner to his mother-in-law, and the next day was deeded over for a $40,000 loss at $173,600 for a partial interest in a beach house. (R. p. 112, line 14-p. 115, line 12) Clearly this was an invalid comp.

S-701 and S-708 were also related party sales, as discussed in detail below.

C. THE ASSESSOR RELIED UPON DEFECTIVE COMPS WITHOUT CONDUCTING THE REQUIRED DUE DILIGENCE.

> To apply the comparison sales approach, appraisers follow a systematic procedure:
>
> 1. Research the competitive market for information on properties that are similar to the subject property and that have recently sold, are listed for sale, or are under contract.....
>
> 2. *Verify the information by confirming that the data obtained is factually accurate and that the transactions reflect arm's-length market considerations.* Verification should elicit additional information about the property and the market so that comparisons are credible.

The Appraisal of Real Estate, supra, at p. 301 (emphasis added).

Nineteen of the 29 units under appeal relied upon Units S701 and S708 as comps. (R. p. 217, lines 18-24) The Assessor relied on values of $319,750 for both units. Robert Newton purchased S708 on May 8, 2008, for a stated consideration of $319,750, and Arnold Ramsey purchased S701 for the same exact stated amount on the same day. (R. p. 118, line 25-p. 120, line 7) Both units were subsequently foreclosed on the same date, February 9, 2011, and for the same amount for $150,000. (R. p. 120, lines 20-22)

Carolina Walk's Exhibit 3 contains the listing prices on September 25, 2008, by the developer. Both Units 701 and 708 were listed for sale on that date and at the identical list price - $197,950. This listing price for units S-701 and S-708 was consistent with all the other 1 bedroom/1 bath units' listing prices in Carolina Walk's available inventory. (R. p. 305) As can be seen in Exhibit 3, these units were all priced at $197,950 and included units S-101, S-102, S-107, S-109, S-110, S-209, S-408, S-509, S-510, S-601, S-607, S-608, S-609, S-708, S-709, and S-710. (R. p. 305) Accordingly, the listing agent, Creech, testified that anyone could have walked in and purchased either unit for $197,950. (R. p. 115, line 22-p. 116, line 6; p. 120, lines 8-14)

Creech testified that the purchaser, Robert Newton, was "[a] friend of the developer." (R. p. 119, line 1) The other purchaser, Arnold Ramsey, "was one of the original people with Carolina Walk, LLC (the developer)" and "[h]e was with Carolina Walk from day one...." (R. p. 120, lines 1-5) Accordingly, both of these sales would be considered related party sales.

Comyns testified that he would not use a comp if the sales price listed in a deed was not accurate, and he would discard the comp if he subsequently discovered this fact. (R. p. 213, lines 13-21)

He further testified that he was not aware until shortly before the ALC Hearing that the consideration stated on the deeds was for double the listing price. (R. p. 218, lines 1-11) He admitted that due diligence for each transaction is required as filed deeds are not always accurate and that a developer might file a deed for more than the purchase price to justify, for example, a bank loan. (R. p. 210, lines 2-25) As part of his due diligence, he stated he would contact the grantor or the grantee or check MLS. (R. p. 209, lines 6-10) However, he

testified he was not sure if he contacted either purchaser for S-701 or S-708. (R. p. 218, line 12-p. 219, line 19) S-708 was on the MLS, but the listing expired on January 15, 2008. (R. p. 219, lines 17-19)

> One significant advantage of using comparable listings is the accuracy with which they are reported to the databases. Obtaining accurate sale prices of **comparable sales** is difficult in some markets because some brokers and builders may enter exaggerated sale prices to prevent appraisal problems later. *However, builders and brokers almost never exaggerate the list price* because it only increases the difficulty of selling the property. If you are appraising in a market where sale prices are sometimes manipulated by the sellers or the sellers' agents, then *looking at listings is critical.*

M. Rattermann, *Could Sherlock Holmes Find Clues to Market Value in This Market?*, 79 Appraisal Journal 3 (July 1, 2011) at p. 64 (emphasis added).

Indeed, Standards Rule 1-5 of Uniform Standards of Professional Appraisal Practice specifically says an appraiser must "analyze all agreements of sale, options and listings of the subject property current as of the effective date of the appraisal."

> Analysis of pending sales is also a requirement of Standards Rule 1-5, which requires the appraiser to "analyze all agreements of sale . . . of the subject property current as of the effective date of the appraisal." Logically, it can be said if the subject is selling now, that is an indication of value. However, this is not a justification for appraising all properties at their reported price for the following reasons:
>
> ...
>
> 3. The subject may not be an arm's-length sale. If the buyer and seller are not both looking out for their own best interests, then the sale price may not be an indication of market value. This would include situations where the sale is between related parties, or the buyer has some other inducement or motivation....

79 *Appraisal Journal 3, supra.* As *The Appraisal of Real Estate* notes:

> All "raw" data obtained from a general source (e.g., assessors' records, data services) will need further research and verification with a party to the transaction.

Id. at 303.

Comyns' failure to conduct the requisite due diligence - - and even use units S-701 and S-708 as comparable sales - - is even more egregious given that his office was aware of possible discrepancies in the purported sales prices of these units. The Deputy Assessor for the Appraisal Section (R. p. 245, lines 15-22) Terrance Fancey testified at the hearing. He stated:

> If you notice Unit S701, 708 and then also unit 712 – but 701 and 78 – S701, S708, were the two in question. They sold for [$]319,750, *to everybody's amazement*, over the asking price of [$]197,950. (Emphasis added.) (R. p. 266, lines 2-6)

D. THE ASSESSOR RELIED UPON TOO FEW COMPS.

"There must be a sufficient number of reliable market transactions from which comparisons may be drawn." Inst. of Property Taxation, *Property Taxation* 132 (Jerrold F. Janata ed., 2d ed. 1993). Comyns used 11 comps to value all 29 units. (R. p. 209, lines 7-9) (These comps are listed in charts above.). Significantly, eight of the eleven comps he used were appealed by the owner. (R. p. 209, line 8) Certain of the comps (e.g. S-701 and S-708) were used repeatedly.

Comyns testified that he used a "minimum of three" comps to value units (or, in our case, blocks of similar units). (R. p. 212, line 25-p. 213, line 2) He was asked:

> Q. Minimum of three? Okay. And four would be better?
>
> A. Yeah, you can use four, five or six.

(R. p. 213, lines 3-5)

As stated above, Comyns testified he would not use a comp, or would subsequently discard it, if he discovered a deed did not accurately reflect the purchase price. (R. p. 213, lines 6-21)

As stated in the charts above, Unit S-110 (total of 9 units) was valued with four comps, which included S-701 and S-708. Unit S-102 (total of 5 units) and S-107 (total of 5 units) were valued with the minimum of three comps, two of which were Units S-701 and S-708.

S-701 and S-708 were defective comps. Both were related party sales with deeds filed for a consideration substantially in excess of the list price.

Throwing these two comps out results in a valuation based upon two comps for Unit S-110 (9 units) (one of which was the related party sale to a family member) and only one comp for S-102 (5 units) and S-107 (5 units).

By Comyns' own admission, this is an inadequate number of comps to value a total of 19 units.

E. THE ASSESSOR IMPROPERLY RELIED ON COMPS WHICH WERE SOLD PRIOR TO THE GREAT RECESSION.

"In a depressed economy, recent sales are often difficult to find. Older sales, occurring prior to the onset of the depressed economy, *should be used with great caution* because they may not reflect the problems associated with the depressed economy." *The Appraisal of Real Estate, supra*, at p. 333 (emphasis added). The circumstances surrounding the erroneous assessment in *Cloyd v. Mabry*, 295 S.C. 86, 367 S.E.2d 171 (Ct. App. 1988), are remarkably analogous to the tax assessor's fatal errors in this case where the Assessor relied upon related party sales and failed to account for the unprecedented market collapse and subsequent low market volume and prices in determining the property value for Carolina

Walk. In *Cloyd*, the properties in question were located in a floodway and, in August of 1981, became subject to significant restrictions on use after the County enacted a Flood Damage Prevention Ordinance. *Id.* at 87, 367 S.E.2d at 172. However, because there were no sales of property in the floodway during 1982 to show that property values had been affected, the Assessor made no allowance for the effect new restrictions would have on fair market value in his appraisal for 1982. *Id.* The property owners appealed the assessments to the Richland County Board of Assessment Appeals which then concluded that the ordinance reduced the value of the property by 20%. *Id.*

The assessment reduction decision was ultimately reviewed by the South Carolina Court of Appeals where the Assessor argued that his assessment carried a presumption of correctness that could not be set aside unless the property owners prove the actual value of the properties, relying on *Newberry Mills v. Dawkins,* 259 S.C. 7, 190 S.E.2d 503 (1972), and *South Carolina Tax Commission v. South Carolina Tax Board of Review,* 278 S.C. 556, 299 S.E.2d 489 (1983) for that proposition. *Cloyd* at 88, 367 S.E.2d at 173. However, the Court of Appeals refused to impose such a narrow rule, stating that although proving the actual value of the property is one way to overcome the presumption of correctness, the taxpayer may also show fatal errors in the assessing authority's valuation to meet this burden. *See id.* at 88-89, 367 S.E.2d at 173. Accordingly, the *Cloyd* court held that the taxpayers successfully established that the taxing authority's valuation was in error even though (unlike in this case) they did not prove the actual value of the property. *Id.* at 89, 367 S.E.2d at 173. In so holding, the Court recognized there were no comparable sales to use for an appraisal of the properties in question, but there was evidence that the floodway ordinance placed substantial restrictions on the highest and best use of the properties, making them less

attractive to potential purchasers. *Id.* Although the Assessor challenged this evidence as arbitrary and without evidentiary support because it lacked any comparable sales, the Court disagreed and stated, "For reasons beyond the control of all concerned, there were no comparable sales upon which to base an appraisal of the eight properties in question." *Id.*

The circumstances surrounding the assessment of Carolina Walk are analogous to those in *Cloyd.* Here, the Petitioner provided evidence which showed that when assessing the value of condominiums in Carolina Walk, the Richland County Tax Assessor failed to fully account for the unprecedented crash in the second-home condominium market which largely occurred in the third quarter of 2008, and instead used sales from condominiums that had occurred well prior to this watershed event. These sales were not "comparable" and in relying on them, the Assessor committed a fatal error in the valuation. In *Cloyd,* the assessor failed to include any effects the flood ordinance had on property values in his assessment. Both cases involve property that has a substantially reduced value based on a recent plunge in the property's marketability and assessments that fail to reflect those market changes. Both involve situations where this plunge in marketability resulted in there being no sales that were actually comparable.

The low property values and poor market conditions in this case were well-established at trial. The record repeatedly shows that local markets collapsed along with markets throughout the country in the fall of 2008 and bottomed out near the December 31, 2008 appraisal date. The testimony of Stephen Mudge, the President of Serrus Capital Partners who has significant career experience in condominium planning and development, indicated how poor the 2008 market conditions were for second homes in both the U.S. and South Carolina. (R. p. 73, line 18-p. 80, line 12) He testified that the market for

condominiums and other second homes began to decline in 2007, the decline accelerated in 2008, and that the market went into a free fall in the latter part of 2008 with the onset of the Great Recession. (R. p. 74, lines 4-8) Mudge indicated that the catalyst for this free fall in the second home condominium market was the failure of Bear Stearns in March or April of 2008, the failure of Lehman Brothers in September of 2008, the volatility in the stock market, and the resulting "failure of our financial system." (R. p. 75, line 15-22; p. 77, lines 2-7) He added that the market for condominiums was hit much worse than the market for traditional homes or even second homes because of the near impossibility of obtaining financing for condominiums. (R. p. 74, lines 21-24; p. 77, line 12-p. 78, line 23)

As stated in *The Appraisal of Real Estate*, *supra*,

> Sales activity is also influenced by lenders because most real estate purchases involve some form of financing, which is directly related to purchasing power....When loan money becomes scarce, either due to high interest rates or restrictive underwriting standards, market activity can be severely reduced. The ability of buyers to obtain financing is the real impediment to additional demand in most markets.

Id. at 298. The unprecedented market conditions brought on by the Great Recession were confirmed by Richard Comyns, who prepared the appraisals for the assessment and testified for the Assessor. He testified that the recent recession was the worst real estate recession of his lifetime and that the end of 2008 was the bottom of the real estate market in South Carolina. (R. p. 227, lines 10-14; p. 228, lines 10-23) More specifically, the Richland County Assessor himself, Mr. Cloyd, confirmed that **12/31/08 was the very bottom for the condominium markets in Richland County**. (R. p. 293, lines 14-18) Furthermore, the small niche market created by the Carolina Walk condominiums was undoubtedly hit even harder than the "normal" condominium market, as these were marketed solely as second homes for The University of South Carolina football fans on game days. (R. p. 90, line 6-p.

91, line 6) Comyns verified that this market was the "worst of the worst" as he testified that the market for second-home condominiums was worse than that for primary residences, and the game-day condominium market in question was the worst of that condominium market. (R. p. 228, line 16-p. 229, line 7)

The exclusive listing agent for Carolina Walk for 2005 through 2008 also testified that the Midlands area condominium market "fell off a cliff" in 2008 because there was no demand at all in the condominium market, much less the game-day condominium market and even if there was, no creditors were willing to finance condominiums. (R. p. 88, lines 4-24) As a matter of fact, the game-day condominium market was so devastated that he, as Carolina Walk's exclusive listing agent, determined that it was no longer worth the effort to market the properties on MLS because there simply was no market for them. (R. p. 93, line 24-p. 94, line 1) Beyond this testimony of the market's effect on Carolina Walk sales specifically, an MLS report presented at trial showed the Great Recession's drastic effect on closed sales for all game-day condominiums near the stadium. (R. p. 94, line 10-p. 98, line 24) This report included at least 95% of all closed sales in the market for those properties and indicated that there were thirty-seven closed sales for game-day condominiums in the first quarter of 2008 which fell to eight sales in the second quarter, five sales in the third quarter, and only one sale in the fourth quarter of 2008. (R. p. 98, lines 10-20) Another MLS report included these same sales from around the stadium, but also included closed sales for condominiums from a broader area encompassing Rosewood, Shandon, and the USC Campus area. (R. p. 101, line 1-p. 102, line 16) The steep decline in sales from this broader area mirrored that of the game-day condominiums as it showed forty-eight closed condominium sales in the first quarter of 2008, eighteen sales in the second quarter, ten sales

in the third quarter, and only six sales in the fourth quarter of 2008. (R. p. 102, lines 7-16) Thus, these MLS reports confirm the testimonies that the Richland County market for both condominiums and game-day condominiums had all but disappeared on the appraisal date of December 31, 2008.

Despite substantial evidence that market conditions had deteriorated to unprecedented levels, the December 31, 2008 assessments fail to reflect that market "free fall". (R. p. 273, lines 16-19) Incredibly, even though it occurred at what the Assessor testified was the bottom of the Richland County market, Deputy Assessor Fancey admitted that in its December 31, 2008 reassessment of all properties in Richland County, **Richland County did not drop the value of a single condominium that did not appeal!** (R. p. 273, line 19) Specifically, Fancey was asked (R. p. 273, lines 2-7, 16-19):

> Q: When did Richland County go through reassessments?
> * * * *
> A: It was finished December 31st of 2008, implemented 2009.
> * * * *
> Q: Okay. And isn't it true that Richland County didn't drop the value of a single condo that didn't appeal?
> A: No, it did not.

Interestingly (or maybe incredibly) the assessed values in Richland County (which included improvements but also the 15% cap mandated by Act 388) *increased* during this unprecedented fall in the real estate market! Chief Assessor, John Cloyd testified (R. p. 290, lines 3-12):

> The last general reassessment was in 2009. For tax year 2007 the value of the county was 22 and a half billion dollars. In increased in 2008 to 23 and a half billion dollars. And in 2009 the market value of all property within the county as a result of reassessment was 25 billion dollars.

Like the assessment in *Cloyd,* the Carolina Walk assessment fails to reflect recent market conditions that negatively affected the property's value. Accordingly, the ALC's affirmance of the Assessor's valuation was contrary to the substantial evidence in the record and should be reversed on appeal.

III. THE TIMING OF THE COMPARABLE SALES USED IN THE ALC'S PROPERTY VALUE DETERMINATION CONTRADICTS THE SUBSTANTIAL WEIGHT OF THE EVIDENCE AND DOES NOT REFLECT CAROLINA WALK'S ACTUAL VALUE.

Mr. Comyns testified that Carolina Walk sales from the third or fourth quarter would be more accurate than the first two quarters of 2008. (R. p. 233, lines 2-12) This emphasis on timing was reinforced by Mr. Cloyd who testified that in a declining market, such as the one faced in 2008, an assessor would want to use comparable sales as close to the end of the year as possible to ensure that the declining market is properly reflected in the property values. (R. p. 293, lines 9-13) Furthermore, Mr. Fancey, a licensed appraiser and deputy assessor for Richland County who testified on behalf of the Assessor, testified that the sales from the first two quarters are not the best indicator of value for the fourth quarter in which the December 31, 2008 appraisal took place. (R. p. 284, line 25-p. 285, line 5) He also testified that although there were comparable sales available in the fourth quarter from The Gates, The Spur, and the Stadium Lofts, the Assessor's Office failed to use any of those in the valuation, despite the fact that they were from the quarter that, according to his own testimony, would have provided the best indication of value. (R. p. 285, lines 6-10) These testimonies serve as substantial evidence that the timing of a comparable sale within the appraisal year has a significant effect on its reliability as an indicator of property value when the market is in decline. The importance of that year-end timing of a comparable sale as an

indication of value presumably becomes much greater when the market is in an unprecedented downward spiral such as the one experienced in the last two quarters of 2008.

In contrast to the testimonies of Richland County assessors which highlighted the importance of the timing of comparable sales, the actual assessment included only one sale (out of 11) from the same fourth quarter as the appraisal date. (R. p. 235, line 13-p. 237, line 9) All but one of the remaining comparable sales used were from periods prior to the September and October 2008 crash of the real estate market. (R. p. 237, lines 3-7) This lack of fourth quarter comparable sales and evidence in the record of their importance to an accurate valuation indicates that such a lopsided inclusion of "pre-crash" comparable sales distorted the assessment value of Carolina Walk and provided an erroneous determination of actual property value. Thus, although the ALC took exception to the testimony of the Carolina Walk's expert, Mr. Creech, there was substantial independent testimony in the record demonstrating a fatal error in the assessment of Carolina Walk because it failed to include a meaningful number of comparable sales from the "post-crash" period or bottom of the market. The ALC's failure to fully consider the timing of comparable sales was clearly erroneous.

IV. THE ALC DECISION GOES AGAINST THE SUBSTANTIAL WEIGHT OF THE EVIDENCE AND ARBITRARILY DISREGARDED THE FACT THAT THE ASSESSOR IGNORED COMPARABLE SALES FROM THREE COMPARABLE GAME-DAY CONDOMINIUM COMPLEXES AS WELL AS ABSOLUTE AUCTION SALES OF CAROLINA WALK UNITS.

In addition to Carolina Walk, there are three other game-day condominium complexes that are similarly located around the USC football stadium and marketed as second-homes for the South Carolina game-day crowd. (R. p. 91, line 22-p. 92, line 6) The other three complexes are The Spur, The Stadium Village Lofts, and The Gates at Williams-

Brice. (R. p. 91, lines 15-18) Although the ALC concluded that the three nearby developments were inferior to Carolina Walk and disapproved of using their sales as comparable sales, there was substantial testimony suggesting otherwise. For example, Creech, who listed properties in Carolina Walk, The Spur, and The Gates, testified that the condominium units in each of the three other complexes were comparable to those in Carolina Walk. (R. p. 91, line 22-p. 92, line 6) Similarly, though he would not agree that Carolina Walk was inferior, Richland County Assessor Richard Comyns testified that the Carolina Walk condominiums units had the same finishes, in regards to the interiors, as the units in the other three complexes. (R. p. 231, line 21) Furthermore, and in direct contradiction to the ALC's conclusion, Comyns admitted that condominium units from The Spur specifically could be used as good comparable sales for Carolina Walk. (R. p. 239, lines 18-21)

The comparable sales from the other game-day condominium complexes, which the Assessor could have readily used, indicate sales prices that were almost fifty percent less than the values assigned to the similar Carolina Walk units. (R. p. 239, line 25) As previously established, there was exhaustive testimony about the lack of fourth quarter sales from Carolina Walk and the importance of such sales to an accurate property valuation suggesting that such fourth quarter comparable sales from other complexes would have been especially useful under these circumstances. However, the Assessor used only Carolina Walk sales and ignored comparable sales from all other similar complexes. (R. p. 238, lines 8-17) In doing so, the Assessor committed a fatal error in the property valuation, which the ALC erroneously disregarded by affirming its valuation.

Similarly, the ALC erroneously disregarded the fact that there were ten absolute auction sales of Carolina Walk properties in 2008, yet the Assessor's valuation failed to include a single one of those sales. (R. p. 201, lines 1-7; p. 206, line 22-p. 206, line 7; p. 590) Respondent's Exhibit 14 provides a schedule of sales at Carolina Walk from 2008. (R. p. 590) Comyns testified that 12 of the 14 listed sales were auction sales and that the only two sales he used from the list in his appraisal were the two non-auction sales. (R. p. 206, line 23-p. 207, line 7) The chart indicates that the net value of the Carolina Walk properties in the sales was $3,450,600 while the 2008 assessed value of the same properties was substantially higher at $4,212,000. (R. p. 590) This indicates both that the Assessor's property values at Carolina Walk were inflated and that Comyns' report failed to include sales of Carolina Walk properties that would have reflected lower property values than the assessment.

V. THE ALC ABUSED ITS DISCRETION BY FAILING TO DETERMINE ITS OWN PROPERTY VALUE FOR CAROLINA WALK WHEN THE RECORD INDICATED THAT SUCH AN EXERCISE OF DISCRETION WAS WARRANTED AND NECESSARY.

The ALC's decision to merely affirm the Assessor's property valuation rather than make its own determination of value yielded an assessment and decision that was arbitrary, capricious, and an abuse of discretion. This Court may reverse or modify the decision of the ALC if it is arbitrary, capricious, or characterized by abuse of discretion. S.C. Code Ann. § 1-23-610(B). The Supreme Court of South Carolina has held that "[i]t is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly." *State v. Smith,* 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). Though this matter reached the ALC somewhat in the posture of an appeal, the proceeding before it was a *de novo* contested case hearing to determine the *appropriate valuation* of the

property based upon the evidence presented at the hearing. *See Smith v. Newberry County Assessor,* 350 S.C. 572, 577, 567 S.E.2d 501, 504 (Ct. App. 2002). Accordingly, the ALC had the discretion to consider the evidence presented at the hearing and determine its own property valuation rather than merely selecting one party's valuation over the other's. The ALC's failure to exercise such discretion by making its own property value determination amounts to an abuse of discretion.

Carolina Walk is aware that the ALC was faced with an unprecedented situation and does not deny the difficulty of determining property value during "The Great Recession" after the collapse of the market in which the property in question was being sold. Highlighting the difficulty of an assessment in this climate, Mr. Comyns testified that there just simply were not any comparable sales from the fourth quarter to use for the Carolina Walk appraisal. (R. p. 232, lines 18-21) Thus, much like in *Cloyd,* the record reflects that, for reasons beyond the control of all concerned, there were no comparable sales upon which to base an appraisal of the Carolina Walk properties in question. It is evident that the traditional market data such as fourth quarter same-complex sales that could have ordinarily been used as reliable comparable sales no longer existed because the market fell so quickly and there were so few market transactions. Here, the ALC chose to simply compare Carolina Walk's evidence with that of the Assessor, finding that although it "[was] very helpful in understanding the general market climate and the general decline in demand for, and value of, these type properties, it [was] inferior to [the Assessor's] evidence of comparable sales close to the date of valuation in determining the actual fair market value of the properties." (R. p. 9)

In other words, the ALC determined that because she disagreed with Carolina Walk's value, she had no choice but to adopt the tax assessor's. In reality, the ALC had discretion to assign value, and her failure to exercise discretion was an abuse of that discretion. Carolina Walk's evidence about the decline in demand for and value of those properties combined with the Assessor's testimony about the timing of comparable sales chosen should have informed the ALC that her characterization of the Assessor's comparable sales as "close to the date of valuation" was erroneous. As previously discussed, these comparable sales were not close enough to the date of valuation to accurately reflect the property value because that critical period of decline acknowledged by the ALC took place in-between almost all of the comparable sales used and the appraisal date, December 31, 2008. Thus, an exercise of the ALC's discretion was warranted and rather than affirming the comparable sales as "close to the date of valuation" simply because they were in the same year, the ALC should have acted on the evidence before it and made its own determination of value.

The ALC further stated that Carolina Walk's evidence was not "as comparable in size, location, and features . . . as the comparable sales relied upon by the Assessor." (R. p. 10) Assuming, arguendo, that the court's statements about Carolina Walk's evidence are true, they provide only reasons not to adopt Carolina Walk's valuation but no reason why the ALC should have ignored the fatal errors in the Assessor's valuation and affirmed its exact valuation.

VI. THE ALC'S DETERMINATION THAT JOHN CREECH'S TESTIMONY WAS NOT CREDIBLE AND ITS SUBSEQUENT CHARACTERIZATION OF THE ASSESSOR'S COMPARABLE SALES AS ARMS-LENGTH WAS BOTH ARBITRARY AND AGAINST THE SUBSTANTIAL WEIGHT OF THE EVIDENCE.

Carolina Walk is aware that because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court's findings

where matters of credibility are involved. *See Menne v. Keowee Key Property Owners' Ass'n, Inc.* 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006). Although the ALC's credibility determination of the listing agent, John Creech is accordingly a difficult burden to overcome, the record indicates that the ALC's characterization of his testimony being "not credible and contrary to other documents" is against the substantial weight of evidence and arbitrary in light of that evidence.

Creech was employed by a national real estate company with a local office in the Midlands and during that employment the company awarded him with a Top 25 ranking out of nearly 35,000 employees three different times. (R. p. 86, lines 15-18) He was further lauded by the Wall Street Journal when in 2006 he earned national recognition as a member of the Top 50 realtors in America by being chosen as at least one of the best twenty-six realtors out of a pool of 1.4 million realtors. (R. p. 87, lines 6-14) His qualifications and credibility also extend to the properties in question as he has sold over three hundred fifty "game-day properties" in Richland County and served as the exclusive listing agent for Carolina Walk from 2005 to 2008. (R. p. 85, lines 8-20; p. 89, lines 10-11) Additionally, his expertise is such that even the Richland County Assessor's Office has called him seeking assistance with market research for comparable sales. (R. p. 110, lines 14-24)

The ALC initially characterized Creech's testimony for units S708 and S709 as hearsay (R. p. 9), but in its Order on Reconsideration, the court "clarified" that she meant his testimony was less credible because it contradicted the values listed on the deeds. (R. p. 45) The deeds the ALC stated as "contrary" to Creech's showed that on May 2, 2008, units S708 and S701 were transferred from Carolina Walk to Robert N. Newton, Jr. and Arnold J. Ramsey, respectively, at the same stated consideration of $319,750. (R. p. 187, line 23-p.

188, line 13; pp. 552-557) Richard Comyns, who prepared the appraisals for the assessment, testified on behalf of the Assessor that he used these deeds in the appraisals he prepared for units S701 and S708 which he subsequently included as comparable sales in the assessment for 19 out of 29 units at Carolina Walk. (R. p. 187, line 15-p. 188, line 7) Comyns further testified that because even filed deeds may not be totally accurate, due diligence such as contacting the grantee or grantor and checking the MLS is required to ensure that the sales prices on those deeds are not inflated. (R. p. 209, line 6-p. 210, line 25) He confirmed that a probable situation in which an inflated deed price would be a concern is where a developer files a deed for more than the purchase price to justify a bank loan or valuation in an effort to avoid foreclosure or having the loan called. (R. p. 210, line 7-13) Comyns then admitted that he was not sure whether he had performed such due diligence by contacting the parties of the sale to ensure that the deed prices were not inflated for units S701 and S709. (R. p. 218, line 20-p. 219, line 19)

Rather than being contrary to the deeds used by Comyns, Creech's testimony and exhibit merely provided the context for those sales prices that Comyns was unable to obtain by explaining why the deeds and the Assessor's comparable sales prices did not reflect the actual value of the properties and why they were not arm's-length transactions. Creech testified that he himself had unsuccessfully tried to sell these same units at $197,950 and supported his testimony with listing prices of $197,950 from a list of available inventory that was prepared by Carolina Walk. (R. p. 120, line 9; p. 305) In addition to providing these listing prices, which were substantially lower than the alleged sales price ($319,270), Creech testified from his own personal knowledge that each of these buyers had close relationships, i.e. were "insiders," with the Carolina Walk developer thus suggesting further reason that

these comparable sales should not be used in the property valuation. (R. p. 118, line 23-p. 119, line 6; p. 120, lines 1-22) Finally, Creech used the Assessor Data View's Sales History, which was before the ALC during his testimony, to confirm that both of these properties were foreclosed for the same amount ($150,000) on the same date, February 9, 2011. (R. p. 120, lines 20-22) Thus, because Creech's testimony included the deed sales price, was not in fact contradictory to those deeds, and was intended to show that the deed prices were not reliable, the ALC's determination that it was not credible was arbitrary.

The ALC also appears to have taken issue with Creech's testimony in regards to the comparable sales of Unit S309. (R. p. 8) The ALC determined that Creech's testimony in regards to Unit S309 was not credible because it was contradictory to the deeds of that property. (R. p. 8) The deed the ALC presumably refers to is the title to Unit S309 that was presented by the Assessor as evidence that Robert Lewis paid $255,000 in consideration for the unit on March 14, 2008. (R. p. 550-551; p. 184, lines 8-11) Comyns, the appraiser for the assessment, also testified to the value of this unit simply by reading through the chain of deeds and stating that the property was transferred on March 17, 2008, for the $255,000. (R. p. 185, lines 10-16) However, unlike Creech, Comyns again failed to provide any additional information about the alleged sales price on the deed to show that he had performed the due diligence necessary to ensure the deed price had not been inflated. (R. p. 185, lines 10-16) Creech's testimony on the other hand provided insight into why the deed may not have reflected the actual value of the property by giving the context of the property's transfer. He testified that no cash actually traded hands for the March 17, 2008 transfer of Unit S309, but instead that property was traded for a one-third interest in a beach house worth $173,600. (R. p. 114, lines 6-16; p. 115, lines 10-25) Because there was no cash sale price to tie to the

property value it becomes more probable that the price on the deed was arbitrarily assigned a value of $255,000 instead of the value of the beach house interest. Therefore, Creech's testimony merely provided additional information surrounding the sale of Unit S309 that could have explained the value discrepancy and was not "contradicted" by any other evidence before the ALC.

Beyond the alleged contradictions discussed above, neither the ALC nor the record provides any reasons why the testimony of Creech, a licensed realtor who was responsible for selling these particular condominiums, should not be considered credible. Despite this substantial evidence suggesting that Creech had the experience and relationship with Carolina Walk necessary to provide the in-depth testimony on the comparable sales of the properties he gave, the ALC inexplicably and arbitrarily disregarded his entire testimony as "not credible".

CONCLUSION

Based on the foregoing, the ALC's order should be reversed. This court can either determine the value on its own based on the substantial evidence in the record or remand the matter to the ALC with a directive to lower the value in accordance with the evidence presented.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

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Carolina Walk, LLC and Serrus Carolina Walk, LLC..... Appellants,

v.

Richland County Assessor. .....Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this ***Brief of Appellants*** complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I hereby certify that I have served a copy of the Final Brief of Appellant, Reply Brief of Appellant, and Record on Appeal on the Richland County Assessor by depositing the copy in the United States Mail, postage prepaid, on November 30, 2012, addressed to their attorney of record, Malane S. Pike, Post Office Box 729, White Rock, SC 29177.

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