

**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.

**AMICUS CURIAE BRIEF ON BEHALF OF THE SOUTH CAROLINA
ASSOCIATION OF REALTORS ("REALTORS")**

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TABLE OF CONTENTS

I. INTEREST OF THE AMICUS1

II. ARGUMENT1

 A. GENERAL1

 B. RICHLAND COUNTY IS THE ONLY PLACE IN
 THE UNITED STATES WHERE THE TAX BASE DID
 NOT DECLINE DURING THE WORST REAL ESTATE
 RECESSION SINCE WWII.....2

 C. RICHLAND COUNTY IS THE ONLY PLACE IN
 THE UNITED STATES WHERE THE APPRAISAL VALUE
 OF CONDOMINIUMS DID NOT DECLINE IN THE GREATEST
 REAL ESTATE RECESSION SINCE WWII.....5

 D. THE TRIAL JUDGE ERRED IN RULING OUT THE
 CREDIBILITY OF SUCH A HIGHLY REGARDED
 MEMBER OF THE REAL ESTATE PROFESSION7

 1. The Price List Admitted by Petitioner and
 Regarded as Not Credible by Judge Durden
 Is Clearly Credible When Reviewing the
 Testimony in the Record9

 2. When the Record Is Reviewed as a Whole It
 Is Clear that Mr. Creech Is a Credible Witness,
 and Judge Durden’s Finding to the Contrary
 Is Arbitrary and an Abuse of Discretion10

 3. Mr. Creech’s Status in the Real Estate Profession
 and His Familiarity with the Property at Issue
 More Than Qualifies Him to Be a Credible
 Witness on the Fair Market Value of Such Property17

 E. THE COMPARABLE SALES METHOD USED BY THE RICHLAND
 COUNTY ASSESSOR DOES NOT ACCURATELY
 REFLECT THE MARKET CLIMATE FOR A
 SECOND HOME CONDOMINIUM IN 12/31/2008.....20

1. Although the Appraiser Considered the General Effects of the Housing Market Decline, He Did Not Consider Factors that Differentiate Second Home Condos from the General Housing Market.....	21
2. The Absence of Comparable Sales Data from the Fourth Quarter of 2008 Supports the Taxpayer's Argument that Use of Comparable Sales from August 2008 Does Not Accurately Depict the Value at 12/31/2008.....	24
CONCLUSION.....	25

TABLE OF AUTHORITIES

Cases

<i>Gooding v. St. Francis Xavier Hosp.</i> , 326 S.C. 248, 487 S.E.2d 596 (1997).....	18-19
<i>In re Philip Jay Berg</i> , 407 B.R. 167, 103 A.F.T.R.2d 2009-2490 (2009).....	16
<i>Lewis v. Lewis</i> , 392 S.C. 381, 709 S.E.2d 650 (2011)	10
<i>S.C. Dep't of Soc. Servs. v. Forrester</i> , 282 S.C. 512, 320 S.E.2d 39 (Ct. App. 1984).....	10, 16
<i>Smith v. Newberry Cnty. Assessor</i> , 350 S.C. 572, 567 S.E.2d 501 (Ct. App. 2002).....	10, 13-14
<i>State v. Davis</i> , 306 S.C. 246, 411 S.E.2d 220 (1991).....	10-11
<i>State v. Johnson</i> , 338 S.C. 114, 525 S.E.2d 519.....	10
<i>Thompson v. Comm'r of Internal Revenue</i> , 499 F.3d 129, 100 A.F.T.R.2d 2007-5792 (2d Cir. 2007).....	17

Statutes

26 U.S.C.A § 7491.....	16
S.C. Code Ann. § 40-60-38 (1976).....	1-2, 11

Other Authorities

Appraisal Institute, <i>The Appraisal of Real Estate</i> (13th ed. 2008).....	12-13, 14, 16
Appraisal Found., Appraisal Standards Bd., Uniform Standards of Professional Appraisal Practice (2008-2009).....	2, 11-12
Black's Law Dictionary 1691 (9th ed. 2009).....	24
D.L. Bennett & John Perry, <i>Why You're Paying Too Much in Property Taxes</i> , Atlanta Journal-Constitution, Dec. 7, 2009, available at http://www.ajc.com/news/news/local/why-youre-paying-too-much-in-property-taxes/nQZmR/	3
D.L. Bennett, <i>Hike Them or Slash Services? AJC Investigation: Property Tax Meltdown</i> , Atlanta Journal-Constitution, Dec. 13, 2009, available at http://www.ajc.com/news/news/local/hike-them-or-slash-services/nQZyg/	3-4
ERA Real Estate, www.era.com	8
J.P. Vaughan, <i>How to Determine Market Value</i> , CREOnline.com, June 26, 2012, available at http://www.creonline.com/how-to-determine-market-value.html	24
Jerry Hart, <i>Homeowners See Taxes Rise as Property Values Sink Amid Deficits</i> , Bloomberg.com, Mar. 12, 2009, available at http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aWSD3gPg9s7o	3
Kathleen M. Howley, <i>Record 19 Million U.S. Homes Stood Vacant in 2008</i> , Bloomberg.com (Feb. 3, 2009) available at http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a0IfdN5GEvcQ	2

TABLE OF AUTHORITIES CONT'D

Kelly Nolan, *Fall in Property-Tax Revenue Squeezes Cities*, Wall St. J, July 16, 2011, available at <http://online.wsj.com/article/SB10001424052702304521304576447940532071536.html>.....2

Les Christie, *Home Prices in Record 9% Decline*, CNNMoney.com, Nov. 18, 2008, available at http://money.cnn.com/2008/11/18/real_estate/home_prices_third_quarter/index.htm.....5-6

Les Christie, *Home Prices Post Record 18% Drop*, Dec. 30, 2008), available at http://money.cnn.com/2008/12/30/real_estate/October_Case_Shiller/index.htm.....21-22

Michelle E. Shaw, *Clayton Values Crash, Homeowners Get No Tax Break*, Atlanta Journal-Constitution, Dec. 7, 2009), available at <http://www.ajc.com/news/news/local/clayton-values-crash-homeowners-get-no-tax-break/nQZmd/>.....4

Sale of second homes fell 22% in 2008, Mar. 30, 2009, available at ... http://www.usatoday.com/money/economy/housing/2009-03-30-second-home-sales_N.htm.....5

The McGraw-Hill Companies, *Standard & Poor's Ratings Services*, June 26, 2012, available at <http://www.standardandpoors.com/indices/sp-case-shiller-home-price-indices/en/us/?indexId=spusa-cashpidff--p-us>.....22

TRAC Commission, *Final Report of the South Carolina Taxation Realignment Commission* (2010).....1

I. INTEREST OF THE AMICUS

The South Carolina Association of Realtors (“Realtors”) is a non-profit, private, real estate trade association that represents approximately 15,000 members in South Carolina on real estate regulatory and legislative matters. The Realtors offers programs and services that are designed to greatly enhance the freedom, competency and efficiency with which members conduct their real estate practice. The work of the Association is also dedicated to the protection and preservation of real property rights in South Carolina. Members of the Realtors conduct a substantial amount of their business in the residential housing market. Determining the accurate fair market value of residential and commercial real estate within a county is a very important factor in the real estate market and is of vital interest to the members of the Association. In particular this is true as according to the TRAC report, while real estate taxes on primary residences are quite low in South Carolina, the taxes on condos and other second homes are amongst the very highest in the country. TRAC Commission, *Final Report of the South Carolina Taxation Realignment Commission*, at 199-200 (2010). Inaccurate property tax assessments can have a very detrimental impact on Realtors members and the Realtors accordingly seek to file this Amicus Brief.

II. ARGUMENT

A. GENERAL

Realtors submits this *amicus curiae* brief to stress to the Court both the overall importance of this case and the significance of reaching an accurate valuation of real property during this decline in the housing market.

The South Carolina Legislature has enacted laws that govern how licensed appraisers, including the Richland County Assessor’s Office, are to perform real estate appraisals. *See*

S.C. Code Ann. § 40-60-38 (1976). These laws, based on the Uniform Standards of Professional Appraisal Practice (“USPAP”), and authorized by Congress, are updated annually by the Appraisal Standards Board of The Appraisal Foundation. See Appraisal Found., Appraisal Standards Bd., *Uniform Standards of Professional Appraisal Practice*, Standards Rule 2-3 (2008-2009). All licensed appraisers are required to adhere to, as well as stay abreast of, the changes made each year by the Board. *Id.*

B. IS RICHLAND COUNTY THE ONLY PLACE IN THE UNITED STATES WHERE THE TAX BASE DID NOT DECLINE DURING THE RECENT REAL ESTATE DOWNTURN?

In 2008, at the beginning of the recent recession, economic and market forces began to negatively impact the values of residential and commercial real estate across the United States. Kelly Nolan, *Fall in Property-Tax Revenue Squeezes Cities*, Wall St. J., July 16, 2011.¹ As real estate values declined and the volume of foreclosures increased, the primary source of revenue for many localities, property tax, was threatened. *Id.* Property tax collections could no longer provide local governments the relief they were looking for to “get them out of their fiscal doldrums” without tax hikes (and consequent voter adverse reaction). *Id.* When property values drop, as they did in 2008 the property tax collections also drop.

With the onset of the recent downturn in the real estate market the great majority of local governments should have (and most did) experience correlative declines in property values and property tax revenues.² Kathleen M. Howley, *Record 19 Million U.S. Homes Stood Vacant in 2008*, Bloomberg.com, Feb. 3, 2009³; Jerry Hart, *Homeowners See Taxes*

¹ Available at <http://online.wsj.com/article/SB10001424052702304521304576447940532071536.html>.

² See, e.g., http://fl-counties.com/Pages/Advocacy/Hot_Topics/Property_Taxes.aspx;
<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aWSD3gPg9s7o>.

³ Available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a0IfdN5GEvcQ>.

Rise as Property Values Sink Amid Deficits, Bloomberg.com, Mar. 12, 2009.⁴ Nationwide, home values dropped \$3.3 trillion in 2008. *Id.* And by the end of the year, “a record 19 million U.S. homes stood empty . . . and homeownership fell to an eight-year low as banks seized homes faster than they could sell them.” Howley, *supra*.

Local governments began to struggle to plug budget deficits, recognizing that their declining tax bases were a result of declining property assessments, because when property values drop, so must their assessed tax values.

Inexplicably however, on December 31, 2008, which Richland County Assessor John Cloyd described as “the very bottom” of this unprecedented market and the depths of the downturn for Richland County, when the property tax base should have declined, as it did in almost every county across the United States, Richland County did not experience a correlative decline in property tax value. R. p. 293, lines 14-18. Instead, and rather, the property tax value *increased* by about a billion dollars. R. p. 290, lines 3-12. Cloyd testified that “[f]or tax year 2007 the value of the county was 22 and a half billion dollars. It increased in 2008 to 23 and a half billion dollars.” R. p. 290, lines 6-9.

Interestingly, The Atlanta Journal-Constitution (AJC) conducted a lengthy investigation which revealed huge discrepancies between home values and tax appraisals. D.L. Bennett & John Perry, *Why You're Paying Too Much in Property Taxes*, Atlanta Journal-Constitution, Dec. 7, 2009 (“Across metro Atlanta, home values fell tens of thousands of dollars-sometimes hundreds of thousands-but tax appraisals did not follow them down.”).⁵ The AJC discovered that the County Assessor had been purposely ignoring decreasing property values in an attempt to generate more property tax revenue. D.L.

⁴ Available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aWSD3gPg9s7o>.

⁵ Available at <http://www.ajc.com/news/news/local/why-youre-paying-too-much-in-property-taxes/nQZmR/>.

Bennett, *Hike Them or Slash Services? AJC Investigation: Property Tax Meltdown*, Atlanta Journal-Constitution, Dec. 13, 2009 (“But assessors did ignore sale values in thousands of cases and by doing so protected local governments from even more massive losses.”).⁶ “If they lowered the values 70 percent, where they likely should [have] be[en], they’d have to raise the millage rate 300 percent to get the money they need to operate.” Michelle E. Shaw, *Clayton Values Crash, Homeowners Get No Tax Break*, Atlanta Journal-Constitution, Dec. 7, 2009.⁷ Despite the impending threat of revenue deficiencies, a county assessor cannot ignore declines in property values when he makes his appraisals in an attempt to stabilize property tax collections. It is the assessor’s job to accurately and fairly assess property values, not to preserve the county’s budget.

The situation in Richland County appears similar to the situation the AJC uncovered in Georgia in 2009. The Richland County Assessor testified that in late 2008 the property markets were at their very worst. R. p. 293, lines 14-18. In particular, the Midlands area condominium market “dropped off a cliff,” because, as the exclusive listing agent for Carolina Walk testified, there was no demand in the condominium market, much less in the market of condominiums predominantly, if not exclusively, used on game-days. R. p. 88, lines 16-24. Even if there had been a demand, no creditors were willing to finance these kinds of second home condominiums. R. p. 77, lines 12-15; R. p. 78, line 6 – p. 79, line 17. Consequently, the value of all property, and these condominiums in particular, dropped significantly.

⁶ Available at <http://www.ajc.com/news/hike-them-or-slash-239877.html?printArticle=y>.

⁷ Available at <http://www.ajc.com/news/news/local/clayton-values-crash-homeowners-get-no-tax-break/nQZmd/>.

As a result of the drastic decreases in property values, there *should* have been a correlative decline in the appraisal value. But that, however, was not the case. The fact that the appraisal values failed to reflect the decreased home values can only be attributed to one thing: the Richland County Assessor purposely chose to ignore the decreased property values in hopes of keeping the county's budget from declining. Homeowners should not be forced to pay tax on values their property no longer holds. Because the only explanation for the fact that property appraisal values failed to reflect the decreased values of the property is that the Assessor turned a blind eye to the effect the downturn was having on the real estate market, the ALC erred in affirming the Assessor's valuation, and its decision should be reversed.

C. IS RICHLAND COUNTY IS THE ONLY PLACE IN THE UNITED STATES WHERE THE APPRAISAL VALUE OF CONDOMINIUMS DID NOT DECLINE IN THE RECENT REAL ESTATE RECESSION?

When the recent downturn hit the real estate markets, home prices began to decline, with the sale of second homes being hit the hardest (the properties which are the subject of this appeal were all marketed as second homes). *Sale of Second Homes Fell 22% in 2008*, USA Today.com, Mar. 30, 2009.⁸ The National Association of Realtors reported that sales of vacation and investment homes slid 22% in 2008 due to tough economic conditions and tight lending requirements which shut out buyers. *Id.* "Overall, second-home sales dropped from about 2.09 million in 2007 to 1.63 million [in 2008]." *Id.* Second home sales slipped to 30 percent of all existing and new-home transactions in 2008, down from its peak of 40 percent in 2005. *Id.* In particular, condo markets sank nationally, down 7.1% to \$210,800 for the 57 metro area markets NAR surveyed. Les Christie, *Home Prices in Record 9% Decline*,

⁸ Available at http://www.usatoday.com/money/economy/housing/2009-03-30-second-home-sales_N.htm.

CNNMoney.com, Nov. 18, 2008.⁹ Regionally, the South saw the second largest decline in condo prices, dropping about 9.7% to \$165,200. *Id.*

Richard Comyns, the Deputy Richland County Assessor, described the recent downturn as the “worst real estate recession of [his] lifetime.” R. p. 227, lines 10-14. Further, he also testified that the end of 2008 was “the very bottom of the [real estate] market” in South Carolina. R. p. 228, lines 10-13. Mr. Cloyd, the Richland County Assessor, agreed, testifying that December 31, 2008 was when the condominium markets in Richland County were at “the very bottom.” R. p. 293, lines 14-18. While the market for first home condominiums was devastated, unquestionably those used as second homes were devastated even worse. R. p. 79, line 23 – p. 80, line 9; R. p. 228, lines 16-23. When people could no longer afford to buy new condos or even pay for the old condos they already owned, they obviously were not purchasing second home condos, such as those used predominantly by University of South Carolina football fans on game days. Comyns admitted that this second home game-day condo market was the “worst of the worst.” R. p. 228, line 24 – p. 229, line 4. However, Deputy Assessor Fancey shockingly admitted that in its December 31, 2008 reassessment, “Richland County didn’t drop the value of a single condo that didn’t appeal[.]” R. p. 273, lines 16-19. Fancey testified:

Q: When did Richland County go through reassessment:

* * * *

A: It was finished December 31st of 2008 and 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.

R. p. 273, lines 2-19.

⁹ Available at http://money.cnn.com/2008/11/18/real_estate/home_prices_third_quarter/index.htm.

This begs the question of how in such a devastated market Richland County did not decrease condo values accordingly. There is no logical explanation for why the Assessor's appraisals failed to reflect the devastated condo markets. The Carolina Walk assessment should have reflected the market conditions that negatively affected their property values, as they were undoubtedly hit worst of all. A property owner should not have to appeal to get a fair appraisal on his property. And the fact that the Assessor's reassessment showed no signs of the decreased property value is astonishing. The Assessor's appraisal cannot stand without a more accurate reflection of the property's true value in 2008, at the height of the real estate downturn.

D. THE TRIAL JUDGE ERRED IN RULING OUT THE CREDIBILITY OF REALTORS MEMBER JOHN CREECH.

Judge Durden has extensive experience hearing tax cases, having heard nineteen cases since being appointed to the bench in 2009,¹⁰ ruling in favor of the taxpayer in four of those cases.¹¹ In the present case, Judge Durden concluded in her Final Order and Decision

¹⁰ *Allison Row, LLC v. Lancaster Cnty. Assessor*, 10-ALJ-17-0811-CC, 2011 WL 2413268 (2011); *Bazzle v. Aiken Cnty. Assessor*, 11-ALJ-17-0084-CC, 2011 WL 7119247 (2011); *Charleston Cnty. Assessor v. Golbug Prop., LLC*, 09-ALJ-17-0469-CC, 2010 WL 6782566 (2010); *Dominion Pointe, LLC v. Charleston Cnty. Assessor*, 11-ALJ-17-0561-CC, 2011 WL 7119401 (2011); *Ellisor v. Lexington Cnty. Assessor*, 09-ALJ-17-0177-CC, 2009 WL 8167930 (2009); *Gomeringer v. Anderson Cnty. Auditor*, 09-ALJ-17-0293-CC, 2009 WL 8167945 (2009); *Hearn v. Laurens Cnty. Assessor*, 10-ALJ-17-0761-CC, 2011 WL 2413266 (2011); *Hinderer v. Horry Cnty. Assessor*, 09-ALJ-17-0220-CC, 2009 WL 8167940 (2009); *Horry Cnty. Assessor v. Brower*, 09-ALJ-17-0292-CC, 2009 WL 8167944 (2009); *Jacynycz v. Horry Cnty. Assessor*, 11-ALJ-17-0338-CC, 2011 WL 7119343 (2011); *Brite v. Edgefield Cnty. Assessor*, 11-ALJ-17-0039-CC (2011); *Fisher v. Georgetown Cnty. Assessor*, 09-ALJ-17-0337-CC, 2009 WL 6527336 (2009); *McCutchen-Perry, LLC v. Charleston Cnty. Assessor*, 10-ALJ-17-0858-CC, 10-ALJ-17-0859-CC, 2012 WL 683413 (2012); *Mickle v. Richland Cnty. Assessor*, 10-ALJ-17-0860-CC, 2011 WL 2413276 (2011); *New Jerusalem Missionary Baptist Church AAA Daycare Ctr. v. S.C. Dep't of Revenue*, 10-ALJ-17-0322-CC, 2010 WL 5781654 (2010); *Oliver v. Lexington Cnty. Assessor*, 11-ALJ-17-0621-CC, 2012 WL 1893271 (2012); *Shuler v. Horry Cnty. Assessor*, 09-ALJ-17-0195-CC, 2009 WL 8167934 (2009); *Sumter Cnty. Assessor v. Foxcroft of Sumter, LLC*, 11-ALJ-17-0587-CC, 2012 WL 1893270 (2012); *Waruszewski v. Georgetown Cnty. Assessor*, 09-ALJ-17-0461-CC, 09-ALJ-17-0462-CC, 09-ALJ-17-0463-CC, 09-ALJ-17-0464-CC, 2010 WL 6782565 (2010).

¹¹ *Charleston Cnty. Assessor v. Golbug Prop., LLC*, 09-ALJ-17-0469-CC, 2010 WL 6782566 (2010); *Horry Cnty. Assessor v. Brower*, 09-ALJ-17-0292-CC, 2009 WL 8167944 (2009); *Jacynycz v. Horry Cnty. Assessor*,

that John Creech, a listing agent and witness for the Petitioner, (and a member of the South Carolina Association of Realtors) presented testimony before the Court that was not credible, and she also represented that Mr. Creech had no personal knowledge of several transfers. R. p. 8.

Both of these findings go against the great weight of the evidence. Mr. Creech has been employed as a licensed Realtor with ERA Wilder Realty for over seven years. R. p. 84, 18-20. ERA is a worldwide real estate agency with over 32,000 real estate brokers and sales associates that was founded in 1971 to utilize the latest technology to provide the highest quality service in the real estate profession. *See* ERA Real Estate, www.era.com. Not only was Mr. Creech recognized as one of ERA's 25 best Realtors in the entire United States for three of his seven years, but was also ranked as one of the top 25 Realtors out of 1.4 million in a Wall Street Journal ranking. R. p. 87, lines 12-14. Additionally, Mr. Creech was the sole listing agent for Carolina Walk Condominiums and had extensive knowledge about the units and deeds in question. R. p. 89, lines 8-11.

Specifically, the Court disagreed with Mr. Creech's testimony that the comparable sale of unit S309, a comp relied upon in Appraisals one through four, was not an arms-length sale because the transfer had been a related party sale. R. p. 8. The court ignored not only Creech's credentials as a well-known and respected realtor, as well as his related experience selling properties similar to Carolina Walk, but also failed to acknowledge that unit S309 had been transferred from a client, Kevin Morris, to his mother-in-law, constituting a related-party sale and was subsequently traded for a partial interest in a beach house. Additionally, to say that Mr. Creech lacks "firsthand knowledge" of the transfers completely neglects the fact

11-ALJ-17-0338-CC, 2011 WL 7119343 (2011); *Brite v. Edgefield Cnty. Assessor*, 11-ALJ-17-0039-CC (2011).

that he was the exclusive listing agent for the Carolina Walk Condominiums and has extensive knowledge of the units and deeds in question. R. p. 90, line 25 – p. 90, line 5. Contrary to Judge Durden’s reasoning without explanatory rationale, the evidence *does in fact* support Creech’s testimony about the comp sale of unit S309 and also establishes him as a reliable witness testifying on behalf of the Petitioner. Therefore, the Administrative Law Court erred in ignoring these findings and their determinations on this point must be overruled.

1. The Price List Admitted by Petitioner Is Clearly Credible When Reviewing the Testimony in the Record.

Judge Durden determined that the price list, sent by the developer to Mr. Creech, the listing agent in charge, was “unpersuasive in determining the fair market value of the properties.” R. p. 9. Judge Durden stated that “none of the units were ever sold for the amounts listed on the document.” R. p. 9. However, Mr. Creech testified that one of the units contained in the price list was sold for \$258,000 and was listed at \$267,000. R. p. 107, lines 18-20. Furthermore, testimony shows that these price lists established by the developer are clear indications of the fair market value for the units at issue. Unit S309, at issue in this case, was sold by the developer on March 17th, 2008 for \$205,000. At the time of sale, the list price for the unit was \$199,900. R. p. 111, lines 23-25.

After Judge Durden stated her disbelief in the credibility of the price list established by the developer, she went on to refute it by referring to the comparable sales for units S701 and S708. These units were used in the assessor’s valuation and both had a purported sale price 161.5% above the amount on the list price. However, when looking at the sales price of units S701 and S708 in context, as argued below, it is clear these sales prices are not a

credible source for determining fair market value - i.e. they do not reflect an arm's-length sale.

2. When the Record Is Reviewed in Light of Previous Case Law, It Is Clear that Mr. Creech Was a Credible Witness and Judge Durden's Finding to the Contrary is Arbitrary and an Abuse of Discretion.

Judge Durden's determination that Mr. Creech lacked credibility is neither supported by the record nor prior case law and, therefore, is cause to remand the case for a ruling in favor of the taxpayer. Although South Carolina law does not require an appellate court to disregard credibility determinations of a trial judge, it has long been recognized that if a trial judge abuses their discretion in determining whether a witness is credible, the court's determination should not be upheld. *Lewis v. Lewis*, 392 S.C. 381, 385, 709 S.E.2d 650, 651 (2011); *see also State v. Johnson*, 338 S.C. 114, 124-25, 525 S.E.2d 519, 524 (2000).

Certain factors should be applied when determining whether a witness is credible, such as an evaluation of the entire record, extenuating circumstances surrounding value determinations, and the motive or interest a witness gains through participation in the case. *See generally State v. Davis*, 306 S.C. 246, 249, 411 S.E.2d 220, 222 (1991); *see also Smith v. Newberry Cnty. Assessor*, 350 S.C. 579, 567 S.E.2d 505 (Ct. App. 2002); *S.C. Dep't. of Social Servs. v. Forrester*, 282 S.C. 512, 320 S.E.2d 42 (Ct. App. 1984). A court which properly took these factors into consideration, as the lower court failed to do, would surely consider Mr. Creech a credible witness.

First, Judge Durden's decision is not based on the record as a whole and takes certain evidence out of context. In *Davis*, the court held that a judge's determination of credibility must be based on the entire record and not based on a portion of the record taken out of context. Although the court stated that it gives great deference to a trial judge's findings of

credibility, they denied doing so in *Davis* because the determination was not based on the record as a whole, but was instead based on parts that had been “take[n] . . . out of context and ignore[d].” *Id.* at 249, 411 S.E.2d at 221. The court subsequently reversed the decision of the trial court. *Id.* at 250, 411 S.E.2d at 222.

This rule, when applied to the case at bar, clearly demonstrates why this Court should not give Judge Durden’s credibility determination the deference normally given to a trial judge’s credibility determinations. Similar to the trial judge in *Davis*, Judge Durden fails to evaluate Mr. Creech’s credibility in light of the entire record. In her Final Order and Decision, Judge Durden says that she does not find Mr. Creech’s testimony credible “because it is contradictory to the [price listed in the] deeds.” R. p. 8. Judge Durden must believe the deeds are credible if she found contrary testimony not credible merely because it differed in terms of the price amount listed on the deed.

However, the appraiser failed to use due diligence when reviewing the information in the deeds and, therefore, the price listed within them should have been further evaluated before the lower court used it to dispute contradictory testimony. The appraiser responsible for the valuations on the property at issue testified that due diligence should always be performed when reviewing deeds because the price listed is not always completely accurate. R. p. 210, lines 2-25. However, when asked about whether he performed his due diligence by contacting at least one party listed on the deed to verify the amount, the appraiser refused to testify that he had. R. p. 218, line 7 – p. 219, line 20. South Carolina Code § 40-60-38 states that, “[a]ll . . . state licensed and certified appraisers shall conform their professional conduct to the National USPAP and its amendments, as promulgated by the Appraisal Standards Board.” S.C. Code Ann. § 40-60-38 (2008). Under USPAP Standards Rule 1-5,

“[w]hen the value opinion to be developed is market value, an appraiser must, if such information is available to the appraiser in the normal course of business: (a) analyze all agreements of sale, options, *and listings* of the subject property current as of the effective date of the appraisal” USPAP Standards Rule 1-5(a). The appraiser in this case failed to analyze price listings for the subject property. His failure to analyze the listing for units used as comp sales – i.e. S701 and S708 – resulted in him being unaware of the fact he was using comps that were two times the list price. R. p. 218, lines 7-11. Additionally, USPAP Standards Rule 1-1(b) and (c) state the following:

In developing a real property appraisal, an appraiser must: (b) not commit a substantial error of omission . . . that significantly affects an appraisal; and (c) not render appraisal services in a careless or negligent manner, such as by making a series of errors that, although individually might not significantly affect the results of an appraisal, in the aggregate affects the credibility of those results.

USPAP Standards Rule 1-1(b) and (c).

The appraiser in the case at bar not only neglected to investigate the list price of the units used as comp sales, he also apparently failed to contact either the grantor or grantee of the deeds filed for those comps. While this is clearly an “omission . . . that significantly affects an appraisal”, the assessor also testified that “we have to verify . . . all the deeds and . . . either the grantor or the grantee should be contacted to find out what’s going on.” R. p. 211, lines 12-17.

When applying the sales comparison method, an appraiser should “[v]erify the information by confirming that the data obtained is factually accurate and that the transactions reflect arms-length market considerations. Verification should elicit additional information . . . so that comparisons are *credible*.” The Appraisal Institute, *The Appraisal of*

Real Estate 301 (13th ed. 2008). Furthermore, an appraiser should “rely heavily on interviews, personal contacts, and proprietary research. Regardless of the number of sales analyzed, the appraiser must understand each sale used for comparison [in order] to draw *credible* conclusions from comparisons.” *Id.* at 302. Although the price on a deed must be verified and understood to determine its credibility, Judge Durden somehow found the deeds at issue credible regardless of the facts that no verifications were performed beyond copying the deed price; no interviews were performed with any of the interested parties; and no personal contacts were made whatsoever. Although the appraiser performed minimal research by reviewing the deeds and MLS reports, “[r]eferencing 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.” *Id.* at 305.

In conclusion, the appraiser failed to perform due diligence in reviewing the deeds as is required of all appraisers. Because of his oversight and apparent omission, he did not discover any discrepancies in the deeds. Therefore, any testimony offered that is contrary to any amount listed in the deed should not automatically be dismissed as lacking credibility, but should be evaluated in light of the entire record, including the manner in which the amounts were determined. Judge Durden failed to do this.

Additionally, Judge Durden does not consider the extensive circumstances surrounding the value determined in the deeds. In *Smith v. Newberry County Assessor*, 350 S.C. 572, 579, 567 S.E.2d 501, 505 (Ct. App. 2002), the court held that the purchase price on a deed is not conclusive in determining fair market value of a piece of property. In *Smith*, taxpayers bought a piece of property that was subsequently valued by a tax assessor

performing a mass appraisal analysis at \$85,800. *Id.* at 575, 567 S.E.2d at 502. The taxpayers then hired an independent appraiser who, using a market sales comparison approach, valued their property at \$61,000. *Id.* at 575, 567 S.E.2d at 503. Ultimately, the ALJ assessed the value of taxpayers' property at \$66,712. *Id.* at 576, 567 S.E.2d at 503.

On appeal, the assessor argued that the ALJ lacked the ability to select \$66,712 as the proper value because "neither [of the] expert[s] had] testified that the value of the property should be assessed at [that amount] and, if the ALJ chose to ignore the expert's proposed values, [the court] should have used the purchase price of the property" *Id.* at 577, 567 S.E.2d at 504. The court disagreed with the assessor's argument and reasoned that a valuation should not be bound by the price on a deed because other factors besides monetary valuation play a role in the price paid for real estate. *Id.* at 579, 567 S.E.2d at 505; *see also The Appraisal of Real Estate, supra*, at 162.

Like the assessor in *Smith*, the assessor in the case at bar failed to consider additional factors that possibly affected the price reported in the deed. The sale of units S701 and S708 were used as comps by the assessor in valuing nineteen of the twenty-nine units in question. R. p. 217, lines 18-23. Units S701 and S708, although listed at \$197,950 by the developer, were both sold for \$319,750 to Robert Newton, a personal friend of the developer, and also to Arnold Ramsey, an individual involved with the Carolina Walk project "from day one." R. p. 116, line 22 – p. 120, line 14. Although someone paying 161.5% of the asking price for a piece of property is suspicious enough on its own, there are other circumstances surrounding these deeds that should have prompted the assessor to perform an investigation. Not only were the purchasers of units S701 and S708 acquaintances with the developer/seller, the deeds for both of those units had the exact same sale date of May 8th,

2008. R. p. 187, line 23 – p. 188, line 7. Furthermore, the bank foreclosed on those same two units for the exact same amount—\$150,000—and on the exact same date of February 9th, 2011. R. p. 220, line 11 – p. 221, line 16. Although the foreclosure information would not have been available to the assessor on the 12/31/08 valuation date, Judge Durden should have taken these other factors into consideration when making her credibility determinations. Instead, Judge Durden completely disregards this evidence and states that “the Assessor’s valuation consists of arms-length comparable sales of condominium units,” when, in fact, it does not. R. p. 10.

Another comparable sale used by the assessor in his valuation of the property at issue was unit S309. R. p. 182, lines 20-24. Judge Durden found Mr. Creech’s testimony, that the comparable sale of unit S309 was not arms-length, not credible because Mr. Creech allegedly “had no first-hand knowledge of the transfers related to S309.” R. p. 8. However, this statement by Judge Durden is inaccurate. Mr. Creech testified under oath that unit S309 was originally sold to one of his clients by the developer. R. p. 112, lines 14-18. Furthermore, when asked about the basis of his knowledge for the sales of unit S309, Mr. Creech stated that he “was involved with these people personally.” R. p. 138, lines 16-17. He also testified, based on his relationship with the parties involved in S309, that “[t]hese people really could not afford the units. They bought them as an investment.” R. p. 138, lines 17-19. Therefore, this demonstrates that, not only did Judge Durden not make her credibility determinations based on the record as a whole and took certain statements from the record out of context, she also failed to consider additional factors that could affect the reported deed price, which the assessor admits is not always accurate.

Lastly, Judge Durden failed to consider that Mr. Creech did not have an interest, monetary or otherwise, in the outcome of this case when making her credibility determination. In *South Carolina Department of Social Services v. Forrester*, 282 S.C. 512, 515-16, 320 S.E.2d 39, 42 (Ct. App. 1984), the South Carolina Court of Appeals gave deference to the trial judge's finding that Forrester's testimony was less credible because Forrester had an interest in the outcome of the case. In *Forrester*, the defendant was charged with abusing his two nieces. The court agreed with the trial judge's credibility determination because they "found the testimony of the [nieces] worthy of belief. On the other hand, [defendant] had every reason to deny his own wrongdoing." *Id.*

Unlike the defendant in *Forrester*, Mr. Creech did not have an interest in the outcome of this case. Mr. Creech neither owns any of the units whose valuation is under appeal, nor does he stand to gain anything from a lower valuation of these units. While South Carolina law gives a clear picture of what credible evidence is, the Federal Courts have wrestled with the term "credible" for some time. IRC § 7491 refers to instances when "a taxpayer introduces credible evidence" 26 U.S.C.A § 7491. The United States Bankruptcy Court had an opportunity to clarify the meaning of "credible" in *In re Philip Jay Berg*, 407 B.R. 167, 103 A.F.T.R.2d 2009-2490 (2009). In *Berg*, the court held that "general and conclusory statements . . . without any corroborating documentation . . ." were not sufficient to be "credible evidence" as meant by IRC Section 7491. *Id.* at 177. Although the debtor in *Berg* testified that tax deductions were properly claimed, the court found that his statements lacked credibility because "the taxpayer made no effort to reconstruct his records or submit any documentation that would assist the court in evaluating the credibility of his statements" *Id.* at 176. However, the statements made by Mr. Creech in the case at bar are clearly

distinguishable because his testimony about the actual list price for units S701 and S708 is substantiated by the price list submitted by the taxpayer.

Judge Durden has clearly disregarded certain facts that should have impacted her credibility determinations. Therefore, because she did not consider the record as a whole and took certain information out of context, Judge Durden's ruling that Mr. Creech was not a credible witness, must be reversed.

3. Mr. Creech's Status in the Real Estate Profession and His Familiarity with the Property at Issue More Than Qualifies Him to Be a Credible Witness on the Circumstances Surrounding the Sales of Such Properties.

It has been established that credibility determinations should be based on the record as a whole when viewed in context. However, Judge Durden refused to acknowledge that Mr. Creech was a credible witness, a determination that is clearly not supported by the evidence before the Court. Mr. Creech has extensive knowledge about the real estate market, especially as it relates to the sale of condominium units. Additionally, Mr. Creech has been recognized nationally for his professionalism and success in the real estate market. Although Mr. Creech is not a licensed appraiser, his testimony was not attempting to establish correct methods of appraising real estate, but rather it was offered to establish the relevant market conditions, discrepancies in the deed prices as well as the related party relationships between several buyers and sellers—a subject on which a real estate agent, as the sole listing agent for the property in question, would have credible testimony.

First, Mr. Creech has extensive experience with condominiums. In *Thompson v. Commissioner of Internal Revenue*, 499 F.3d 129, 135, 100 A.F.T.R.2d 2007-5792 (2d Cir. 2007), the court held that taxpayer's witnesses were only marginally credible. The two witnesses in *Thompson* were an accountant and a lawyer, respectively, both whom testified

about the value of a closely held family business that had recently transitioned from a traditional to an Internet based company. However, the court found these witnesses' opinions less credible because they "demonstrated no experience with . . . Internet and technology-related companies' . . . and were 'too inexperienced, accommodating, and biased in favor of the [taxpayer] . . .'" *Id.* at 135. Unlike the witnesses in *Thompson*, Mr. Creech is very experienced with the type of property in question. In his seven years of working with ERA Wilder—three of which he was recognized as one of their best Realtors—Mr. Creech has listed over three-hundred condominium units for sale. R. p. 85, lines 8-13. Furthermore, he was the exclusive listing agent for the condominiums at issue from 2005 to 2008. R. p. 89, lines 8-11.

Secondly, Mr. Creech is clearly qualified to give a credible opinion on the circumstances surrounding the purchase of the condominium units in question. (Note that Creech did not render an opinion on the FMV of the units. He testified on the circumstances regarding the sale and purchase price of several units.) In *Gooding v. Saint Francis Xavier Hospital*, 326 S.C. 248, 253-54, 487 S.E.2d 596, 598 (1997), the Supreme Court of South Carolina held that the extent of a witness's training and experience is relevant in determining his credibility to testify about related matters. In *Gooding*, plaintiff filed suit against a hospital because the anesthesiologist chipped his two front teeth while intubating him for surgery. *Id.* at 251, 487 S.E.2d at 597. Plaintiff sought to introduce testimony of an emergency medical technician (EMT) and paramedic regarding intubation procedures. *Id.* The trial judge did not allow plaintiff's witness to testify and the Court of Appeals reversed this decision. *Id.* In refusing to allow such testimony, the trial judge stated that "even though the witness is somewhat trained in the mechanics of this medical [procedure], he is not a

medical doctor; he does not have the medical expertise required to testify under the circumstances of this case.” *Id.* In reversing the trial judge’s decision, the Court of Appeals found the proffered testimony presented circumstantial evidence that was relevant to the case. *Id.* at 252, 487 S.E.2d at 597-98. The South Carolina Supreme Court affirmed the finding of the Court of Appeals, reasoning that the plaintiff only sought to have his witness testify about the intubation procedures, and not about the general field of anesthesiology. *Id.* at 253, 487 S.E.2d at 598. The outcome in *Gooding* can easily be applied to the case at bar. Although Mr. Creech is not a licensed appraiser, his experience and expertise in the real estate profession clearly make his testimony about factors surrounding the sale of real estate credible. Mr. Creech has been involved in the sale of over three-hundred condominium units and over three-hundred and fifty “game day” properties. R. p. 85, lines 17-20. Furthermore, he has been recognized for his outstanding performance and professionalism as a real estate agent, ranking in the top twenty-five out of thirty-five thousand brokers and agents with his firm, ERA Realty, nationwide. R. p. 86, lines 12-16. Mr. Creech was also recognized as the number twenty-third ranked real estate agent out of approximately 1.4 million Realtors nationwide in a Wall Street Journal ranking. R. p. 87, lines 12-14.

Not only can his credibility be determined from his excellence in the real estate profession, but also from his standing with municipal appraisers. When county assessors actually perform their due diligence, they must investigate circumstances surrounding the sale of the property they are assessing. The record shows that assessors’ offices frequently contact Mr. Creech to get information to use in their comparable sale evaluations. R. p. 110, lines 18-24.

Similar to the trial judge in *Gooding*, Judge Durden detrimentally confuses Mr. Creech's testimony with that of the appraiser. Mr. Creech's testimony was not offered to show the proper way to appraise real estate. Instead, his testimony was offered to show circumstances affecting the fair market value of the condo units for which he was the sole listing agent. Mr. Creech was not attempting to testify about subject of real estate appraisal in general, but rather the circumstances surrounding several condominium transactions in which he had personal knowledge. Both Mr. Creech's past experience and his impressive recognition in the real estate profession, coupled with his exclusive familiarity with the property in question, make him a credible witness on the subject of the fair market value of the property in question.

Although a trial judge is usually given discretion on matters of witness credibility, such discretion should not be upheld if a credibility determination is clearly abuse of discretion. Therefore, because the record does not support Judge Durden's finding that Mr. Creech lacked credibility, her ruling must be reversed and the taxpayer should be granted relief by this Court.

E. THE COMPARABLE SALES METHOD USED BY THE RICHLAND COUNTY ASSESSOR DOES NOT ACCURATELY REFLECT THE MARKET CLIMATE FOR A SECOND HOME CONDOMINIUM ON 12/31/2008.

There is no question that the state of the housing market has been in decline during the latter part of the past decade. While indications of a downturn in the housing market were evident all throughout 2007, in 2008 the collapse of both Bear Stearns and Lehman Brothers had an overwhelmingly drastic effect, acting as a catalyst for the already existing market decline. Judge Durden states that the appraiser's valuation takes into account the decline of the housing market. However the appraiser does not apply the full effect of the

decline to his subsequent valuations. In fact, the only evidence Judge Durden points to as support for her belief that the appraiser considered the housing market decline is her statement that “values established by [the appraiser] are at or below the sale price of all comparables considered in each appraisal.” R. p. 9. While this is evidence that the appraiser *considered* the housing market decline, it does nothing to indicate the *extent* to which he researched, understood, and ultimately applied the decline to his resulting valuations.

1. Although the Appraiser Considered the General Effects of the Housing Market Decline, He Did Not Consider Any Factors that Differentiate Second Home Condos from the General Housing Market.

The assessor who appraised the property at issue agreed that the current recession has led to the worst real estate market of his lifetime. R. p. 227, lines 10-14. He also testified that the very bottom of the market occurred at the end of 2008, when the market for condominiums was far worse than even for primary residences. R. p. 228, lines 10-12. However, there is nothing in the record that shows to what extent, if at all, the appraiser applied any of these factors to the condos at issue – i.e. that second homes were affected much worse than primary residences, and further, that second home condos were affected much worse than second home detached single family dwellings. Furthermore, the Deputy Assessor of the Richland County Assessor’s office himself admitted that they did not adjust a single condo valuation unless the taxpayer appealed! R. p. 273, 16-19. Even if the appraiser in question had actually applied just the general effects of the housing market decline, such an adjustment to the valuations still does not take into account all of the negative impacts that apply exclusively to condominium units.

The Case-Shiller home price index reported its largest price drop in history on December 30th, 2008, just one day before the valuation date. Les Christie, *Home Prices Post*

Record 18% Drop, CNNMoney.com, Dec. 30, 2008.¹² This index, established by Standard and Poors, the “S&P”, is the leading measure for the US residential housing market and tracks changes in the value of residential real estate both nationally as well as in 20 metropolitan regions. The McGraw-Hill Companies, *Standard & Poor’s Ratings Services*, Standardandpoors.com (June 26, 2012).¹³ Additionally, a Harvard University study referred to the 2008 housing market as the worst downturn since World War II. R. p. 153, lines 12-13. Although neither the Case-Shiller index nor the Harvard University study looked specifically at second homes or condominiums, both sources demonstrate how drastic the decline of the entire housing market was on December 31st of 2008. Taking into account that second home condominiums (such as the property at issue) are affected much worse than both primary residences and second home detached single-family dwellings, logic would lead to a finding that Carolina Walk was more severely affected by the crisis than any other type of residential property. R. p. 74, lines 18-24; R. p. 364-73. Accordingly, the actual decrease in value is not accurately calculated by applying the effects of a general housing market decline to the property as the appraiser did—yet another example of his failing to carry out his appraiser duties under the USPAP guidelines.

There are several distinguishing factors between the property at issue in this case and the general housing market. One factor is that it was very difficult for any person to obtain financing to purchase a condominium unit at Carolina Walk. While loans typically given to buyers looking to purchase a primary residence were scarce, the amount of financing available for FHA and Fannie Mae approved condominiums was even worse. R. p. 77, line

¹² Available at http://money.cnn.com/2008/12/30/real_estate/October_Case_Shiller/index.htm.

¹³ Available at <http://www.standardandpoors.com/indices/sp-case-shiller-home-price-indices/en/us/?indexId=spusa-cashpidff--p-us>.

16 – p. 78, line 2. Furthermore, unless you had acquaintances at a local bank, financing for non-FHA and Fannie Mae approved condos, like Carolina Walk, was non-existent. R. p. 78, lines 10-23. As such, the potential buyers for Carolina Walk units were few and far between.

A second factor concerns the competition between second home condominiums and primary residences. While a primary residence must compete with other homes in its general area, a second home condo must compete not only with properties in its proximity, but also with other vacation/second home locations. R. p. 164, lines 6-15. The taxpayer in this case urged Judge Durden to consider the sales figures for other condominiums in the local area, as well as in locations statewide, where the market for second home condos is comparable to that of Columbia, South Carolina. However, Judge Durden determined that such use of additional figures would be both unpersuasive and unnecessary because, as she believed, Carolina Walk was “the most desirable of the . . . ‘game-day condominium’ developments” R. p. 10. Moreover, Judge Durden states that Carolina Walk’s “superior location” sets it apart from other “game-day condominiums” in the area. R. p. 10. While the taxpayer certainly appreciates Judge Durden’s opinion of Carolina Walk as a superior location, the attractiveness of real estate is a purely subjective notion, and not to mention, potentially volatile. What Judge Durden views as a superior attribute in one condominium could be considered an undesirable trait to someone looking to buy a “game-day condominium.” Although these two differences—the difficulty in obtaining financing and competition between second homes and primary residences—are not an exhaustive list of factors responsible for the vulnerability of second home condos, they both show that even if the appraiser did take the housing market decline into account, such a general application of the

decline to the condo units would still not provide an accurate value to the property in question.

2. The Absence of Comparable Sales Data from the Fourth Quarter of 2008 Supports the Taxpayer's Argument that Use of Comparable Sales from August 2008 Does Not Accurately Depict the Value at 12/31/2008.

Judge Durden states in her finding that, “[a]lthough it is true that there were fewer comparable sales occurring in the last half of 2008 than had been occurring in the preceding years . . .” the sales used by the assessor demonstrate compelling evidence of the value of the subject properties. R. p. 10. Essentially, this means that, even though the number of condo sales completely dropped off in the final quarter of the year, sales made in the first half of the year are more indicative of the value than the fact that no condos were sold at all. While using the last sale price on record can give a ballpark figure of where to start with a valuation, it is “dangerous to rely on the ‘Last Sale Price’ The [p]revious buyer may have paid too much or too little for it. . . . Moreover, it reflects an event that occurred much too far in the past to be relevant to the current market value.” J.P. Vaughan, *How to Determine Market Value*, CREOnline.com, June 26, 2012.¹⁴ Not only does the lack of sales in the second half of 2008 show how the effects of the housing market decline were on second home condos, it also evidences that the amounts on the price list admitted by taxpayer were actually higher than the fair market value, or “[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm’s-length transaction; the point at which supply and demand intersect.” Black’s Law Dictionary 1691 (9th ed. 2009). The fact there were no sales reported in the latter part of 2008, when a published price list was readily available through normal business activity, indicates that the actual fair

¹⁴ Available at <http://www.creonline.com/how-to-determine-market-value.html>.

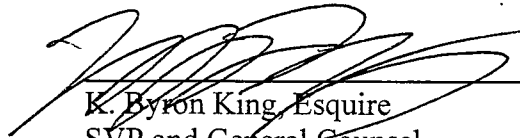
market value *was* the list price, if not lower, and there were no buyers willing to pay that listed price.

In light of the fact that second home condominiums are the least marketable real estate in a period of economic turmoil and that no units in Carolina Walk were sold in the latter part of 2008, the value established by the appraiser, based off of a “comparable sale” made over half a year prior to the valuation date, is not accurate. Therefore, Judge Durden’s finding to the contrary should be reversed and this Court should grant the necessary relief to the Taxpayer.

CONCLUSION

The REALTORS amicus curiae urges this Court to find the appraiser’s valuation inaccurate when viewed in light of all the facts presented above - the same finding the County Board of Tax Appeals reached. R. p. 299. We also urge this Court to determine that Judge Durden erred in finding that John Creech’s testimony lacked credibility when it, in fact, did not. The appraiser used comparable sales that clearly failed to accurately reflect the fair market value of the property and also lacked the fairness of an arm’s-length transaction. Mr. Creech, on the other hand, not only accurately testified about the property with which he had extensive and exclusive knowledge, he also gave testimony that was supported by the evidence, did not have an interest in the outcome of the case, and has been recognized on several occasions for his excellence in the real estate profession. Although the South Carolina Appellate Courts regularly give deference to a trial judge’s credibility determination, Judge Durden’s findings were made in error and should be reversed and

remanded by this Court so that a lower court may determine the actual fair market value of the taxpayer's property.



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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

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

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

vs.

Richland County Assessor.....Respondent.

PROOF OF SERVICE

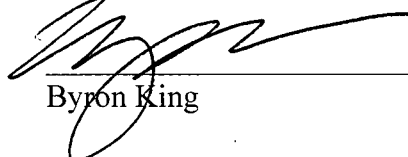
I certify that I served the South Carolina Association of Realtors (SCR) Motion for Leave to file a Brief as Amicus Curiae on the Appellants and Respondents by depositing it in the United States Mail, postage prepaid, on December 27, 2012 addressed to their attorney of record as follows:

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Columbia, South Carolina

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