ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
APR 18 2016
SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Administrative Law Judge

Appellate Case No. 2015-002611

James F. Early Trust.....Appellant,

v.

Charleston County Assessor .....Respondent.

APPELLANT'S FINAL BRIEF

G. Hamlin O'Kelley, III
S.C. Bar No. 15491
Buist, Byars & Taylor, LLC
652 Coleman Blvd., Suite 200
Mt. Pleasant, SC 29464
(843) 856-4488

Attorneys for the Appellant James F. Early Trust

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONS

STATUTES

COURT RULES

STATEMENT OF ISSUES ON APPEAL

I. THE ADMINISTRATIVE LAW COURT IMPROPERLY DISMISSED THIS APPEAL FOR LACK OF SUBJECT MATTER JURISDICITON WHERE THE GENERALLY ASSEMBLY HAS SPECIFICALLLY SET FORTH THE METHOD FOR APPEALING FROM A COUNTY BOARD OF ASSESSMENT APPEALS AND THE EXCLUSIVE JURSIDICTION FOR SUCH AN APPEAL TO BE HEARD BY THE SOUTH CAROLINA ADMNISTRATIVE LAW COURT FOR AN "AS APPLIED" CHALLENGE SUCH AS THIS ONE

II. THE DENIAL OF THE 4% SPECIAL ASSESSMENT APPLICATION BASED UPON THE 4% ASSESSMENT RATIO STATUTE VIOLATES THE DUE PROCESS RIGHTS AND EQUAL PROTECTION RIGHTS OF THE APPELLANT SO THAT THE STATUTE SHOULD BE RULED UNSCONSTITUTIONAL AS TO HAVE THE 4% SPECIAL ASSESSMENT RATIO APPLY TO THE PROPERTY AT ISSUE IN THIS CASE IN THIS AS APPLIED CHALLENGE TO THE STATUTE

STATEMENT OF THE CASE

This matter began as an appeal of the denial of the Legal Residence (4%) Special Assessment Application of Mary E. Early and Paul L. Behling as Trustees of the James F. Early Trust by the Charleston County Board of Assessment Appeals (the "Board") and the Charleston County Assessor (the "Assessor"). (R. pp. 12-16). The Trustees are the Owners of 206 Sand Fiddler Count on Kiawah Island, South Carolina (the "Property") *Id.*

In September 2013, the Trustees applied for the Legal Residence 4% Special Assessment (the "4% Special Assessment). In prior tax years, specifically in 2010, Charleston County agreed that the Property should receive the 4% Special Assessment. (R. ppp. 432-433).

In 2012, the Property was transferred to the Trustees of the James F. Early Trust triggering a reassessment of the Property. (*Id.*) Accordingly, Mrs. Early, as one of the Trustees of the James F. Early Trust, applied, once again, for the 4% Special Assessment. (*Id.*) That application was denied solely on the fact that Mrs. Early's spouse, James F. Early, had a Connecticut driver's license. (*Id.*) Mr. Early does not own the Property. That denial was based upon S.C. Code Ann. §12-43-220(c)(2)(ii) that requires an applicant for the 4% Special Assessment to agree that "....neither I nor any **member of my household** claim to be a legal resident of a jurisdiction other than South Carolina for any purpose." (emphasis added).

On September 6, 2013, Mrs. Early submitted documentation to Ms. Pam Mecke at the Charleston County Assessor's Office in support of her 4% Special Assessment Application. (R. pp. 63-211). That letter contained the following items:

a. Attachment A – Legal Residence 4% Special Assessment Application

b. Attachment B – SC Form 2848 Power of Attorney
c. Attachment C – South Carolina Driver's License – Mary E. Early
d. Attachment D – Connecticut Driver's License – James F. Early
e. Attachment E – South Carolina Voter Registration – Mary E. Early
f. Attachment F – South Carolina Vehicle Registrations – Mary E. Early
g. Attachment G – IRS Form 1040 – U.S. Individual Income Tax Return for 2012 (James & Mary Early)
h. Attachment H – South Carolina Department of Revenue Form SC 1040 – 2012 Individual Income Tax Return (Mary Early)
i. Attachment I – Connecticut Form CT-1040NR/PY-2012 – Connecticut Nonresident & Part-Year Resident Income Tax Return (Mary Early)
j. Attachment J – New York Form IT-203 – Nonresident & Part-Year Resident Income Tax Return for 2012 (James Early)
k. Attachment K – Connecticut Form CT-1040 – 2012 Connecticut Resident Income Tax Return (James Early)
l. Attachment L – James F. Early 2012 Trust Agreement.

(*Id.*).

On January 2, 2014, the Charleston County Assessor's office denied the application for the 4% Special Assessment due to Mr. Early being a resident of Connecticut. (R. pp. 212-213). That was the only reason for denial[1].

On March 19, 2014, counsel for the Appellant wrote to the Charleston County Assessor's Office to contest the denial of the 4% Special Assessment application. (R. p. 214-216). On March 31, 2014, the Charleston County Assessor's Office wrote to Appellant's counsel to confirm the phone conference held on March 20, 2014, and to provide a Protest Form for the appeal of the denial of the 4% Special Assessment application. (R. pp. 217-220).

On April 28, 2014, the Appellant filed her formal Protest of Assessment for Tax Year 2013 with the Charleston County Assessor's Office. (R. pp. 221-316). That Protest of Assessment for Tax Year 2013 contained all prior correspondence from counsel as

[1] Were that Mrs. Early and Mr. Early legally separate, she would have qualified for the 4% Special Assessment.

well as the exhibits marked as Attachments A – L in the September 6, 2013 letter to the Charleston County Assessor's Office. *Id.*

On May 6, 2014, the Charleston County Assessor's Office once again denied the 4% Special Assessment Application. (R. p. 317). Counsel wrote to the Charleston County Assessor's Office on June 2, 2014, as an appeal of the May 6, 2014, decision denying the 4% Special Assessment Application. (R. pp. 318-335).

Lynn Carmody, Chair of the Board of Assessment Appeals for Charleston County, wrote to counsel for the Appellant advising that a conference would be set to hear the appeal of the denial of the 4% Special Assessment Application. (R. pp. 336-337).

On April 8, 2015, the Charleston County Board of Assessment Appeals held its conference to address the Appellant's denial of the 4% Special Assessment Application and heard from the Charleston County Assessor's office as well as from counsel for the Appellants. (R. pp. 432-433). At the conference, counsel advised that the only reason for the denial was the change in law by the General Assembly in 2012. *Id.* In 2012, the General Assembly clarified that "member of my household" included a spouse, regardless of that spouse's state of residence. *Id.* Neither the Charleston County Assessor nor the Charleston County Board of Assessment Appeals allowed the appeal for the 4% Special Assessment based upon the revised definition of "member of my household" as set forth in S.C. Code Ann. §12-43-220(c)(2)(iii) that defines "member of my household" to be "the owner-occupant's spouse, except when that spouse is legally separated from the owner-occupant." S.C. Code Ann. §12-43-220(c)(2)(iii)(1976, as amended). After the change by the General Assembly, therefore, a "member of the household" includes spouses who may live in another state, who may be residents of another state, and who

may pay taxes in another state. *Id.* If Mr. and Mrs. Early were legally separated, the 4% Special Assessment would be approved. (R. pp. 432-433).

On April 13, 2016, Lynn Carmody, Chair of the Charleston County Board of Assessment Appeals wrote to Appellant's counsel to advise of the decision of the Charleston County Board of Assessment Appeals denying the 4% Special Assessment. (*Id.*).

On April 16, 2015, the Appellant filed a Request for Contested Hearing Form with the Clerk of the South Carolina Administrative Law Court. (R. pp. 8-11). By Order dated April 24, 2015, the case was assigned to the Honorable Ralph King Anderson, III, Chief Administrative Law Judge. On May 27, 2015, the parties entered into a Stipulation of Facts of the matters to be presented to Judge Anderson as the presiding Administrative Law Judge. (R. pp. 12-16).

A Consent Extended Scheduling Order in the Administrative Law Court was filed on June 26, 2015, providing for times to file the briefs in the matters. (R. p. 17).

The Appellant filed its Brief on August 3, 2015. The Respondent filed its Brief on August 27, 2015.

On October 20, 2015, Judge Anderson filed his Final Order and Decision in this matter. (R. pp. 1-4). In that Order, Judge Anderson ruled that the Administrative Law Court lacked subject matter jurisdiction to hear the appeal due to his interpretation that the Appellant made a facial challenge to the constitutionality of a statute by the Appellant. *Id.*

Pursuant to Rule 29(D) of the South Carolina Administrative Law Court Rules and Rule 59(e) of the South Carolina Rules of Civil Procedure, the Appellant filed a Motion to Reconsider the Final Order and Decision on October 29, 2015. (R. pp. 47-54).

Judge Anderson filed his Order on Reconsideration on November 13, 2015. (R. p. 5-7). In that Order, Judge Anderson upheld his decision to dismiss the appeal from the Charleston County Assessor. *Id.*

The Appellant filed his Notice of Appeal on December 15, 2015. (Notice of Appeal). This appeal followed.

STATEMENT OF FACTS

This matter came before the Administrative Law Court for an appeal of the denial of the Legal Residence (4%) Special Assessment Application ("Application") of Mary E. Early and Paul L. Behling as Trustees of the James F. Early Trust (the "Trust") by the Charleston County Board of Assessment Appeals (the "Board") and Charleston County Assessor (the "Assessor") as more fully described in the joint Stipulation of Facts filed in this mater by the Petitioner and the Respondent (R. pp. 12-16).

On April 13, 2015, the Board issued its decision denying the Appellant's Legal Residence (4%) Special Assessment Application and affirming the decision of the Charleston County Assessor. (R. pp. 432-433). This appeal to the Administrative Law Court by the Trustees of the James F. Early Trust followed (R. pp. 8-11).

This matter arises from the original denial on May 6, 2014, by the Charleston County Assessor of the Application submitted by Mary E. Early, individually, and as Trustee of the James F. Early Trust, for property located at 206 Sand Fiddler Court,

Kiawah Island, South Carolina. (R. pp. 212-213). That application arose from Mary E. Early submitting her Protest of Assessment for tax year 2013 claiming, among other things, that the County's denial of "Mrs. Early's Application is unreasonable in that it fails to take in to consideration all elements of Mrs. Early's eligibility under the statute and her inherent property rights under the United States Constitution" and that "the statute unfairly penalizes a married couple over individuals who are unmarried and owning property in South Carolina." (R. pp. 214-216)

As set forth in the Stipulation of Facts, Mary Early is a resident of South Carolina and lives full time at 206 Sand Fiddler Court on Kiawah Island. (R. pp. 338-340; R. pp. 341-3423). James F. Early is a resident of and domiciled in Connecticut. (R. pp. 338-431; R. pp. 214-216; R. pp. 63-211).

By way of background, on June 15, 2000, James and Mary Early purchased 206 Sand Fiddler Court, Kiawah Island, for $3,762,500 by virtue of that Title to Real Estate recorded June 16, 2000, in Book N349, Page 201 in the Office of the Register of Mesne Conveyance for Charleston County. (R. pp. 469-473). On April 1, 2010, James and Mary Early submitted an application for the 4% Special Assessment ratio to the Assessor. On June 8, 2010, the Assessor qualified the Earlys for the 4% Special Assessment ratio. (R. pp. 434-469). James and Mary Early sought to forever sever their joint tenancy and hold the property as tenants in common. On December 26, 2012, James and Mary Early as joint tenants with rights of survivorship and not as tenants in common conveyed the property to James Early and Mary Early by virtue of that Quitclaim Deed dated December 26, 2012, and recorded December 27, 2012, in Book 0299, Page 826 in the Office of the Register of Mesne Conveyance for Charleston County. (R. pp. 474-481).

Further on December 26, 2012, James Early transferred the property to Mary Early and Paul L. Behling as Trustees of The James F. Early 2012 Trust Agreement by virtue of that Title to Real Estate dated December 26, 2012, and recorded December 27, 2012, in Book 0299, Page 827 in the Office of the Register of Mesne Conveyance for Charleston County. (R. pp. 482-489). The conveyance to the Trustees in 2012 triggered a review of the tax assessment ratio by the Assessor that resulted in a change of the tax assessment rate from the 4% ratio to 6% ratio.

James Early owns no interest in the property by virtue of the conveyance in 2012 of all of his rights, title, and interest in the property to Mary Early and Paul L. Behling as Trustees of The James F. Early 2012 Trust Agreement. (R. pp. 482-489). Mary Early claims she owns 100% of the property as a Trustee (50% individually and 50% as the income beneficiary under the Trust). (R. p. 341-342). Despite this ownership by Mrs. Early, neither the Assessor nor the Board of Assessment Appeals would grant the 4% ratio due to changes in the applicable statute defining "member of household." It is this definition as applied to Mrs. Early, who lives in another state from her husband, that penalizes married couples who are not domiciled in the same state and which cannot pass constitutional scrutiny for Due Process or Equal Protection under either the United States Constitution or the South Carolina Constitution of 1895.

The Earlys submitted the following documents to the Board and Assessor, as well as to Judge Anderson, in support of their Application for 4% property assessment. Both the Appellant and Respondent stipulated to all the facts represented and contained in those documents as facts stated verbatim therein as follows:

m. Attachment A – Legal Residence 4% Special Assessment Application
n. Attachment B – SC Form 2848 Power of Attorney

o. Attachment C – South Carolina Driver's License – Mary E. Early
p. Attachment D – Connecticut Driver's License – James F. Early
q. Attachment E – South Carolina Voter Registration – Mary E. Early
r. Attachment F – South Carolina Vehicle Registrations – Mary E. Early
s. Attachment G – IRS Form 1040 – U.S. Individual Income Tax Return for 2012 (James & Mary Early)
t. Attachment H – South Carolina Department of Revenue Form SC 1040 – 2012 Individual Income Tax Return (Mary Early)
u. Attachment I – Connecticut Form CT-1040NR/PY-2012 – Connecticut Nonresident & Part-Year Resident Income Tax Return (Mary Early)
v. Attachment J – New York Form IT-203 – Nonresident & Part-Year Resident Income Tax Return for 2012 (James Early)
w. Attachment K – Connecticut Form CT-1040 – 2012 Connecticut Resident Income Tax Return (James Early)
x. Attachment L – James F. Early 2012 Trust Agreement.

(R. pp. 12-15; R. pp. 121-211).

STANDARD OF REVIEW

In an appeal from the decision of an administrative agency, the Administrative Procedures Act provides the standard of review. *Olson v. S.C. Dep't Health & Env. Control,* 379 S.C. 57, 63, 663 S.E.2d 497, 500-510 (Ct. App. 2008); *Turner v. S.C. Dep't of Health & Env. Control*, 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008); *Clark v. Aiken County Gov't*, 366 S.C. 102, 107, 620 S.E.2d 99, 101(Ct. App. 2005); S.C. Code Ann. §1-23-610(C)(1976, as amended). Section 1-23-610(C) sets forth the standard of review as follows:

The administrative law judge's order must be confined to the record. The reviewing tribunal may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petition have been prejudice because the finding, conclusion, or decision is

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(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

S.C. Code Ann. §1-23-610(C)(1976, as amended). The decision of the Administrative Law Court should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law. *Olson,* 379 S.C. at 63, 663 S.E.2d at 501 ("[T]his court can reverse the ALC if the findings are affected by error of law, are not supported by substantial evidence, or are characterized by abuse of discretion or clearly unwarranted exercise of discretion."). The ALC judge's order should be affirmed if supported by

substantial evidence in the record. *Whitworth v. Window World Inc.*, 377 S.C. 637, 640, 661 S.E.2d 333, 335 (2008). "However, the reviewing court may reverse or modify the decision of the ALC judge if the finding, conclusion, or decision reached is 'clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record' or is affected by an error of law." *South Carolina Coastal Conservation League v. S.C. Dep't of Health & Env. Control*, 380 S.C. 349, 669 S.E.2d 899 (Ct. App. 2008); *see also SGM-Moonglo, Inc. v. S.C. Dep't of Revenue*, 378 S.C. 293, 662 S.E.2d 487 (Ct. App. 2008) ("The court of appeals may reverse or modify the decision only if the appellant's substantive rights have been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law."). Substantial evidence, when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the Administrative Law Court and is more than a mere scintilla of evidence. *South Carolina Coastal Conservation League v. S.C. Dep't of Health & Env. Control*, 380 S.C. 349, 669 S.E.2d 899 (Ct. App. 2008). "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." *Olson*, 379 S.C. at 63, 663 S.E.2d at 501.

ARGUMENT

I. THE ADMINISTRATIVE LAW COURT IMPROPERLY DISMISSED THIS APPEAL FOR LACK OF SUBJECT MATTER JURISDICITON WHERE THE GENERALLY ASSEMBLY HAS SPECIFICALLLY SET FORTH THE METHOD FOR APPEALING FROM A COUNTY BOARD OF ASSESSMENT APPEALS AND THE EXCLUSIVE JURSIDICTION FOR SUCH AN APPEAL TO BE HEARD BY THE SOUTH CAROLINA ADMNISTRATIVE LAW COURT FOR AN "AS APPLIED" CHALLENGE SUCH AS THIS ONE

The Administrative Law Court improperly dismiss the appeal from the Charleston County Board of Assessment Appeals where the General Assembly has specifically set forth that appeals from County Boards of Assessment appeals must be heard by the Administrative Law Court for an "as applied" challenge such as this one. *See* S.C. Code Ann. §12-60-2540 (1976, as amended). The General Assembly has required that appeals from County Boards of Assessment be made directly to the Administrative Law Court. The applicable Code Section states:

> **SECTION 12-60-2540.** Contested case hearing; time for requesting following board's decision.
> (A) Within thirty days after the date of the board's written decision, a property taxpayer or county assessor may appeal a property tax assessment made by the board by requesting a contested case hearing before the Administrative Law Court in accordance with the rules of the Administrative Law Court.
> (B) If a taxpayer requests a contested case hearing before the Administrative Law Court without exhausting his prehearing remedy because he failed to file a protest or attend the conference with the county board of assessment appeals, the administrative law judge shall dismiss the action without prejudice. If the taxpayer failed to provide the county board with the facts, law, and other authority supporting his position, he shall provide the representative of the county at the hearing with the facts, law, and other authority he failed to present to the county board earlier. The administrative law judge shall then remand the case to the county board for reconsideration in light of the new facts or issues unless the representative of the county at the hearing elects to forego the remand.

> Upon remand the county board has thirty days, or a longer period ordered by the administrative law judge, to consider the new facts and issues and amend its decision. The county board shall issue its amended decision in the same manner as the original. The taxpayer has thirty days after the date the county board's decision was mailed or delivered to the taxpayer to again request a contested case hearing. Requests for a hearing before the Administrative Law Court must be made in accordance with its rules. If the county board fails to issue its amended decision within thirty days of the date of the remand, or a longer period ordered by the administrative law judge, the taxpayer can again request a contested case hearing. At the new hearing the facts, law, and other authority presented at the original hearing must be deemed to have been presented in a timely manner for purposes of exhausting the taxpayer's prehearing remedy. The statute of limitations remains suspended by Section 12-54-85(G) during this process.

Id. (*see also* HISTORY: 1995 Act No. 60, Section 4A.) There are no other procedures for appealing a decision of a County Board of Assessments Appeals. *Id.* The Editor's note for this Code Section state "This act is intended to provide a uniform procedure for contested cases and appeals from administrative agencies ...." *Id.* There are no other venues or jurisdictions for the appeals process in this case. *Id.* This is the only venue for this matter to be heard. By dismissing the appeal on subject matter grounds, the Appellant is left without any administrative remedy where there is a challenge to the statute as it has been applied to the Appellant.

The Administrative Law Court agreed that it has the exclusive jurisdiction as the court for the redress of the grievances complained of by the Appellant. In his Order on Reconsideration dated November 13, 2015, Judge Anderson "agrees with [Appellant] that the General Assembly has established this Court as the venue to hear as contested case appeals form county boards of assessment appeals." (R. pp. 5-7). Judge Anderson further ruled that the Court had "no desire to deprive **any** party of an administrative remedy or any procedural rights guaranteed by the General Assembly. However, in order to invoke its remedy or rights, Petitioner must make arguments that this Court can consider." *Id.*

That is exactly what the Appellant did in the appeal: made arguments for the Court to consider. The appeal to the Administrative Law Court was and is an "as-applied" challenge to the statute and not just a facial challenge since Mrs. Early as the Trustee was challenged the constitutionality of the statute as applied to her as a married woman living in another state from her husband but not legally separated. Mrs. Early for the Trust appealed the interpretation of the statute and its applicability in addition to its constitutionality. *See* Brief of the Petitioner. Specifically, the appeal was of the "strict reading and interpretation" from the Charleston Board of Assessment Appeals. *Id.* at Page 2. The interpretation and strict reading are at issue in this case as the apply to Mrs. Early, Mr. Early, and the "member of my household" language being changed to include "spouse" regardless of that spouse's state of residence.

The Administrative Law Court has jurisdiction to hear this type of appeal regarding interpretation and strict reading of the statute at issue and upon which the Charleston County Board of Assessment Appeals based its denial of the 4% Special Assessment Application. In *Travelscape LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011), the Supreme Court clarified the law regarding the Administrative Law Court's ability to determine the constitutionality of a statute. In *Travelscape*, the Supreme Court reiterated that as a part of the Executive Branch of state government, the Administrative Law Court is without power to pass on the constitutionality of a statute. *Id.* at 108-109, 705 S.E.2d at 38. However, the General Assembly requires that litigants bring "as-applied" challenges before a tribunal not suited to make factual determinations. *Id.* at 109, 705 S.E.2d at 38. The Administrative Law Court did, and does, have the ability to hear "as-applied' challenges to statutes and regulations. *Id.* at 109; 705 S.E.2d

at 38-39. That is exactly the case that was before the Administrative Law Court: the as applied challenge to Section 12-43-220(c)(2)(ii) and (iii) as applied to Mr. Early as the married spouse of Mrs. Early as Trustee, so that this violation as applied should be ruled unconstitutional as this classification rewards un-married couples, legally separated couples, and single people with significant tax advantages. "ALC's are better suited for making the factual determinations necessary for an as applied challenge and finding a statute or regulation unconstitutional as applied to specific party does not affect the facial validity of that provision." *Id.* As applied to Mrs. Early, the statute should be deemed unconstitutional as they place married couples who reside in different states into a different tax category than legally separated couples. All Mrs. Early would have to do to receive the 4% Special Assessment ration would be to apply for a legal separation from her husband. That cannot have been the intent of the General Assembly: to encourage couples who reside in different states for employment reasons to legally separate, as that is the effect of this statute and goes against public policy of encouraging families to remain together.

The Respondent erroneously characterized this appeal as a facial challenge of the statutes at issue when it is clear from the record that it is the application of these statutes to Mrs. Early's application for the 4% Special Assessment as applied to her that is being challenged as violating both Due Process and Equal Protection for treating married couples who live in different states differently from other married couples. In its Brief before Judge Anderson, the Charleston County Board of Assessment Appeals went to great lengths to discuss how the application of the 4% Assessment Ratio statute as amended does not violate Due Process or Equal Protection as applied in this matter. (See

Respondent's Brief, pp. 4-12) There was never a motion to dismiss or other challenge to the Administrative Law Court's jurisdiction from the Respondent. Instead, there was a lengthy argument as to why the 4% Assessment Ration statute **as applied** to the Petitioner would be constitutional. *Id.* The Appellant made an as applied argument which should have been heard by the Administrative Law Court. *Travelscape LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011). The Appellant would ask that this Court make its finding that the Administrative Law Court had and has jurisdiction to hear this matter as an "as-applied" challenged to the statutes at issue.

II. THE DENIAL OF THE 4% SPECIAL ASSESSMENT APPLICATION BASED UPON THE 4% ASSESSMENT RATIO STATUTE VIOLATES THE DUE PROCESS RIGHTS AND EQUAL PROTECTION RIGHTS OF THE APPELLANT SO THAT THE STATUTE SHOULD BE RULED UNSCONSTITUTIONAL AS TO HAVE THE 4% SPECIAL ASSESSMENT RATIO APPLY TO THE PROPERTY AT ISSUE IN THIS CASE IN THIS AS APPLIED CHALLENGE TO THE STATUTE

The Assessor and the Board of Assessment Appeals denied the application for the 4% tax ratio due to statutory language defining "member of my household" having to be an occupant of the residence to receive the 4% rate which violates both Due Process and Equal Protection so that the application should be ruled unconstitutional. S.C. Code Ann. §12043-220(c)(2)(ii)(1976, as amended). The James F. Early Trust is challenging the denial of the Application in the contested case on both constitutional and due process grounds. This is a denial as applied to the Trustee due to her marital status only.

The Assessor and the Board of Assessment Appeals refused to allow Mrs. Early's appeal based upon a strict reading and interpretation of a recently amended Section of the South Carolina Tax Code as applied to her since her husband lives in and is domiciled in

Connecticut. Specifically, the Assessor and the Board of Assessment Appeals relied upon Section 12-43-220(c)(2)(ii) that states:

> Under penalty of perjury, I certify that:
>
> (A) The residence which is the subject of this application is my legal residence and where I am domiciled at the time of this application and that neither I, **nor any member of my household**, claim to be a legal resident of a jurisdiction other than South Carolina for **any** purpose; and
> (B) That neither I nor a member of my household claim the special assessment ration allowed by this section on another residence.

S.C. Code Ann. §12-43-220(c)(2)(ii) (1976, as amended)(emphasis added).

More importantly to this case, the General Assembly also added the following language to the statute which, as applied, penalizes spouses who are domiciled in different states and treats them differently from spouses who reside in the same states:

> (iii) For purposes of subitem (ii)(B) of this item, "a member of my household" means
> **(A) the owner-occupant's spouse, except when that spouse is legally separated from the owner-occupant**
> ....

S.C. Code Ann. §12-43-220(c)(2)(iii)(1976, as amended)(emphasis added)

The General Assembly changed this Section to provide that a member of a household means an owner-occupant's spouse, unless the owner-occupant and the spouse are legally separated. *Id.* Such a change violates both Due Process and Equal Protection guaranteed by both the United States Constitution and the South Carolina Constitution of 1895. *See United States v. Windsor*, 133 S.Ct. 2675 (U.S. 2013)(the Federal Defense of Marriage Act in a tax setting deemed unconstitutional for treating classes of people differently even though recognition of civil marriages is central to state and domestic relations law applicate to its residents and citizens); *Williams v. North Carolina*, 63 S.Ct.

207 (1942)(each state has a rightful and legitimate concern in the marital statue of persons domiciled within its borders). As in the case of *United States v. Windsor* arising from a tax issue as applied to single-sex couples, and ultimately declaring the Federal Defense of Marriage Act unconstitutional, the definition of "member of my household" to include an owner-occupant's spouse violates both Due Pocess and Equal Protection as it inures to a small group and assumes that spouses cannot be domiciled in different states without having to be legally separated. *Id.* at 133 S.Ct. 2675 (U.S. 2013). Such a definition flies in the face of the Constitution's guarantee of equality and cannot justify a different treatment of husbands and wives who many not live together on a regular basis and imposes a higher tax burden on an owner-occupant simply because she is marred. *Department of Agriculture v. Moreno,* 93 S.Ct. 2821 (1973)(guarantee of equality must mean that a desire to harm a politically unpopular group cannot justify the disparate treatment of that group). In this case, Mrs. Early is the owner-occupant who has been treated disparately by the State of South Carolina simply because she is married to a man who lives in Connecticut and is domiciled there.

If Mrs. Early were to legally separate from her husband, she would come into compliance with the "member of household" definition and qualify for the 4% Special Assessment ratio. Were she to divorce her husband, she would qualify for the 4% Special Assessment ratio. It could not have been the intent of the General Assembly to encourage divorce or separation in order to close a tax loophole, but that is what the General Assembly has done in this tax setting. Since marriage is the bedrock of society, the General Assembly cannot have meant to encourage divorce and separation by defining "member of household" to be a spouse regardless of that spouse's residence.

The way the County has applied this statute to Mrs. Early in denying her application punishes her and treats her differently and unequally from spouses who do in fact live full time with each other. This treatment is an echo of an earlier time where a female spouse was subsumed to her husband. This definition of "member of household" brings financial harm to Mrs. Early and any other spouse who choose to have different domiciles from their spouses for whatever reason. This definition of "member of household" raises taxation and costs by taxing residences at the 6% rate any time a husband or spouse lives in another domicile. This increased burden cannot withstand scrutiny. *See Windsor, id.* at 133 S.Ct. 2675 (U.S. 2013). The power of the Constitution both grants and restrains so that legislatures have great authority but they must also comply with Due Process and Equal Protection. *Id.* The effects of the "member of household" definition basically demean and vilify those in a lawful marriage who, for whatever reason, live in different domiciles so that they are taxed at a higher rate than those spouses who live together in Charleston County or any other county in South Carolina.

Mrs. Early is being denied the same liberties given to any other married couple not domiciled together with the General Assembly assuming that all married spouses must live together so as to make her unqualified for the 4% taxation ratio. The liberty protected by the Constitution contains within it the prohibition against denying to any person equal protection of the law. *Aderand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995). The class of persons this definition of "member of household" seeks to include takes into account the legal fiction that spouses are one person and must live together. This legal fiction was abolished in the Nineteenth Century with the enactment of the

Married Women's Property Acts in the United States obliterating the fiction that a woman became her subsumed to all of her husband's rights. *See* S.C. Code Ann. §20-5-10, *et seq.*; South Carolina Constitution of 1895, Article 17, Section 9. The South Carolina Constitution of 1895, Article 17, Section 9 provides

> The real and personal property of a woman held at the time of her marriage, or that which she may thereafter acquire, either by gift, grant, inheritance, devise or otherwise, shall be her separate property, and she shall have all the rights incident to the same to which an unmarried woman or a man is entitled. She shall have the power to contract and be contracted with in the same manner as if she were unmarried.

S.C. Const. of 1895, Art. 17, §9.

In the South Carolina Constitution of 1895, South Carolina destroyed the idea that a married woman's property became that of her husband. The definition of "member of household" in the act giving rise to this appeal takes South Carolina back to a time prior to the South Carolina Constitution of 1895 and cannot stand as applied to Mrs. Early and any other person whose spouses are domiciled in different states.

To hold Mrs. Early to the 6% rate would be to ignore the South Carolina Constitution's allowance of women to hold property in their own names and to not be subsumed to the identity of their spouse by requiring spouse to be domiciled together by virtue of marriage alone. Defining "member of household" to be the owner-occupant's spouse regardless of domicile places spouses, mainly women, back into the position of being subsumed to that of her husband, which violates both the United States Constitution and the South Carolina Constitution of 1895. This definition singles out a class of persons and imposes a burden upon them while refusing to acknowledge the realities of marriage today: spouses can and do live in separate domiciles for many reasons while continuing to be married. These marriages are no less worthy than those of

spouses who choose to live together. In an attempt by the General Assembly to close a tax loophole, they have taken away the rights of a certain class and group of people who for whatever reason remained married but are domiciled in different states. Such attempt is a directly violation of due process and equal protection. *Windsor, id.* at 133 S.Ct. 2675 (2013). That Mr. Early is domiciled in Connecticut is not in dispute; that this violates both Mr. and Mrs. Early's rights is not in dispute.

The Charleston County Assessor and the Board of Assessment Appeals decisions amount to errors of law which this Court should reverse due to the violation of the constitutionally guaranteed right to Equal Protection. The statute for which Mrs. Early is seeking the 4% rate is a tax exemption statute and must be given its plain ordinary meaning. *Ford v. Beaufort Cty. Assessor;* 398 S.C. 508, 730 S.E.2d 335 (2012); *Owen Indus. Prod. v. Sharpe*, 274 S.C. 193, 262 S.E.2d 33 (1980). That does not mean that this Court should strictly construe the claimed exemption where such an exemption and the decision based on that standard violate the constitutional or statutory rights of the appellant. S.C. Code Ann. §1-23-380(5)(a) (1976, as amended). Generally, the taxpayer should receive the benefit in cases of doubt. *South Carolina Nat'l Bank v. South Carolina Tax Comm'n*, 297 S.C. 279, 376 S.E.2d 512 (1989). The case before this Court is one in which the taxpayer should receive the benefit of the doubt where the strict interpretation of the definition of "member of household" places undue and unconstitutional burdens upon the taxpayer. Again, were the Earlys to divorce or legally separate, then Mrs. Early would independently qualify for the 4% assessment ratio. A strict construction of the assessment statute's definition of "member of household" penalizes the Earlys and any other couple that does not live together full time and who

pay taxes in more than one state. That Mr. Early is a resident of another state is not in dispute. That the General Assembly makes him a "member of the household" by a stroke of the pen creates a larger tax burden simply by virtue of marriage. This cannot pass constitutional muster. *See Windsor*, *id.* at 133 S.Ct. 2675 (2013). Accordingly, the Petitioner would urge this Court to reverse the decision of the Charleston County Board of Assessment Appeals and allow the 4% assessment ratio for 2013 and each subsequent tax year as long as Mrs. Early is a resident of South Carolina. The General Assembly cannot have desired to create a class of newly divorced couples so that the former spouse who lives in South Carolina full time would qualify for the 4% assessment ratio. That is what the General Assembly has done with its definition of "member of household" placing an undue burden on couples who are similarly situated to the Earlys who are validly married yet domiciled in different states.

CONCLUSION

The Administrative Law Court improperly dismissed this appeal for lack of subject matter jurisdiction where the General Assembly has specifically set forth the method for appealing from a County Board of Assessment Appeals and the exclusive jurisdiction is with the Administrative Law Court. Further, the denial of the 4% Special Assessment Application as applied violates the Due Process and Equal Protection Rights of the Appellant so that the 4% Special Assessment Ration should apply.

Respectfully submitted,

Mt. Pleasant, South Carolina
April 12, 2016

G. Hamlin O'Kelley, III
SC Bar No. 15491
Buist, Byars & Taylor, LLC
652 Coleman Blvd., Suite 200
Mt. Pleasant, SC 29464
(843) 856-4488

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Administrative Law Judge

Case No. 2015-002611

James F. Early Trust.....Appellant,

v.

Charleston County Assessor .....Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies the Appellant's Final Brief complies with Rule 211(b) SCACR and with the South Carolina Supreme Court Order dated August 13, 2007, regarding personal data identifiers.

G. Hamlin O'Kelley, III
S.C. Bar No. 15491
Buist, Byars & Taylor, LLC
652 Coleman Blvd., Suite 200
Mt. Pleasant, SC 29464
(843) 856-4488

AttorneyS for the Appellant

Mt. Pleasant, South Carolina
April 14, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Administrative Law Judge

Appellate Case No. 2015-002611

James F. Early Trust.....Appellant,

v.

Charleston County Assessor .....Respondent.

PROOF OF SERVICE

I hereby certify that I have served the Appellant's Final Brief in this matter by depositing a copy of same in the U.S. Mail, postage prepaid, on April 14, 2016, addressed to counsel of record as follows: Bernard E. Ferrara, Jr., Esq. and Johanna S. Gardner, Esq., Charleston County Attorney's Office, 4045 Bridge View Drive, North Charleston, SC 29405-7674.

G. Hamlin O'Kelley, III
S.C. Bar No. 15491
Buist, Byars & Taylor, LLC
652 Coleman Blvd., Suite 200
Mt. Pleasant, SC 29464
(843) 856-4488

Mt. Pleasant, South Carolina
April 14, 2016