THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Appellate Case No. 2015-002611

James Early Trust, ... Appellant,

v.

Charleston County Assessor, ... Respondent.

FINAL BRIEF OF RESPONDENT

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II. DOES THE 4% ASSESSMENT RATIO STATUTE VIOLATE APPELLANT'S DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE UNITED STATES AND SOUTH CAROLINA CONSTITUTIONS?

STATEMENT OF THE CASE

On December 26, 2012, the subject property was transferred, in part, to the Trustees of the James F. Early Trust ("Trust") which triggered a review of the tax assessment ratio by the Charleston County Assessor ("Assessor") that resulted in a change of the tax assessment rate from 4% to 6%. The Trust applied for the 4% special assessment pursuant to S.C. Code Ann. § 12-43-220(c)(2)(ii), which the Assessor denied on January 2, 2013, based on the fact that Mr. Early claimed to be a legal resident of a jurisdiction other than South Carolina. On April 13, 2015, the Charleston County Board of Assessment Appeals ("Board") upheld the Assessor's denial.

On April 20, 2015, Appellant filed a Request for Contested Case with the Administrative Law Court ("ALC"). The parties entered into a Stipulation of Facts of the matters to be presented to Judge Ralph King Anderson, III, Chief Administrative Law Judge assigned to the case. Pursuant to a consent scheduling order and in lieu of a hearing, the Appellant filed its brief on August 3, 2015, and the Respondent filed its brief on August 27, 2015. Judge Anderson issued his Final Order and Decision ("Final Order") on October 20, 2015, dismissing the case for lack of subject matter jurisdiction on the grounds that Appellant presented a facial challenge to S.C. Code Ann. § 12-43-220(c)(2)(iii), the Amended 4% Assessment Ratio Statute. Appellant filed a Motion to Reconsider on October 29, 2015. The ALC issued its Order on Reconsideration on November 13, 2015, denying reconsideration.

STATEMENT OF FACTS

This is a subject matter jurisdiction appeal questioning whether the Trust has made a "facial" or an "as applied" challenge to the constitutionality of an amendment to the 4% Assessment Ratio Statute. Mary E. Early and Paul L. Behling, as Trustees of the James F. Early Trust own property located at 206 Sand Fiddler Court, Kiawah Island, South Carolina ("Property"). Mary Early is a resident of South Carolina and lives full time at 206 Sand Fiddler Court. (R. p. 339-40, 228-29). Mrs. Early's husband, James F. Early, is a resident of, and domiciled in, Connecticut. (R. p. 339-40, 214-15, 63, 121-23). By way of background, on June 15, 2000, James and Mary Early purchased the Property for $3,762,500. (R. p. 469-73). On April 1, 2010, James and Mary Early submitted an application for a 4% special tax assessment ratio to the Charleston County Assessor. On June 8, 2010, the Assessor qualified the Property for the special property tax assessment ratio. (R. p. 435-36).

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. (R. p. 474-81). 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. (R. p. 482-89). Based on the conveyances, James Early owns no interest in the Property. (R.

p. 482-89). Mary Early claims she owns 100% of the Property (50% individually and 50% as the income beneficiary under the Trust). (R. p. 121). The 2012 conveyance further triggered a review of the tax assessment ratio by the Assessor that resulted in a change of the tax assessment ratio from the 4% to 6%.

On August 31, 2013, Mary E. Early individually and as Trustee, submitted a Legal Residence (4%) Special Assessment Application ("Application") in the name of the owner of the Property as the James F. Early Trust to the Assessor for the 4% Assessment Ratio. (R. p. 121). On May 6, 2014, the Assessor denied the Trust's Application (R. p. 317, 212). The Assessor denied the Application because Mrs. Early's spouse was a legal resident of a jurisdiction other than South Carolina. The Trust appealed the Assessor's denial of its Application. On April 13, 2015, the Charleston County Board of Assessment Appeals issued its decision denying Appellant's Application and affirming the decision of the Assessor. (R. p. 432-33). The Trust[1] appealed the Board decision because the Trust believes the 4% Assessment Ratio Statute violates the Constitution. The ALC requested briefs on the issues raised in the Trust's appeal. The ALC issued its Final Order and Decision on October 20, 2015, ruling that the Trust's challenge to the Amended 4% Assessment Ratio Statute is a facial challenge and that the ALC was without jurisdiction to decide the matter. The ALC dismissed the appeal with prejudice.

[1] Although this appeal is styled with James F. Early Trust as the Appellant, Mary Early claims to own 100% of the property (50% individually and 50% as the income beneficiary under the Trust) and should have been a petitioner in this case.

STANDARD OF REVIEW

This appeal is governed by the South Carolina Administrative Procedures Act. See S.C. Code Ann. § 1-23-380.

> Pursuant to the APA, this court may reverse or modify the ALC if the appellant's substantial rights have been prejudiced because the administrative decisions are: (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 an 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.

MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control & Coastal Carolina Med. Ctr., 394 S.C. 567, 572, 716 S.E.2d 111, 113 (Ct.App.2011).

"Tax appeals to the ALC are subject to the Administrative Procedures Act (APA). CFRE, LLC v. Greenville Cnty Assessor, 395 S.C. 67, 73, 716 S.E.2d 877, 880 (2011). Accordingly, appellate courts review the decision of the ALC for errors of law. Id. at 74, 716 S.E.2d at 881. Questions of statutory interpretation are questions of law, which appellate courts are free to decide without any deference to the court below." Charleston Cnty Assessor v. LMP Props., Inc., 403 S.C. 194, 198, 743 S.E.2d 88, 90 (Ct.App.2013).

ARGUMENTS

I. THE ADMINISTRATIVE LAW COURT PROPERLY DISMISSED THIS CASE FOR LACK OF JURISDICTION BECAUSE APPELLANT MAKES A FACIAL CHALLENGE TO THE CONSTITUTIONALITY OF THE 4% ASSESSMENT RATIO STATUTE.

A. Appellant's Attack Against the Amendment to the 4% Assessment Ratio Statute Suggests That It Is Unconstitutional in All Respects.

The ALC correctly found that Appellant's claim is a facial challenge to the Amended 4% Assessment Ratio Statute; therefore, the ALC lacked jurisdiction to hear Appellant's case. The South Carolina Administrative Law Court cannot decide facial challenges to a statute or regulation. Travelscape, LLC v. S.C. Dep't of Revenue, 391 S.C. 89, 705 S.E.2d 28 (2011). "Subject matter jurisdiction is 'the power to hear and determine cases of the general class to which the proceedings in question belong.'" Dove v. Gold Kist, 314 S.C. 235, 442 S.E.2d 598 (1994). The ALC found that "Petitioner argues that the 'member of my household' language in S.C. Code Ann. § 12-43-220(c)(2)(ii)(A), (iii)(A) (2014) violates both the Due Process and Equal Protection Clauses under the United States and South Carolina Constitutions." (R. p. 2). South Carolina law provides:

> 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**; . . .

S.C. Code Ann. § 12-43-220(C)(2)(ii)(emphasis added).[2]

[2] The 4% Tax Assessment Statute defines "member of my household" as "the owner-occupant's spouse, except when that spouse is legally separated from the owner-occupant." S.C. Code Ann. § 12-

In addition, the ALC found that "Petitioner specifically states that it is 'the definition of 'member of household' in the act [that] g[ave] rise to this appeal . . . ." (R. p. 3). Accordingly, the ALC found that "Petitioner is challenging the denial of the Application on constitutional and due process grounds . . ." and dismissed the Appellant's case. (R. p. 2). It is apparent from the ALC's Final Order and Appellant's petition that the Trust framed its case as a challenge to the "member of my household" language in S.C. Code Ann. § 12-43-220(c)(2)(ii)(A) and (iii)(A) (2014), which is a facial attack on the constitutionality of the amendment in all of its applications, not just as applied to the Trust.

It is unquestioned that the ALC is empowered to hear appeals from county boards of assessment appeals regarding as applied constitutional challenges to a statute. See S.C. Code Ann. § 12-60-80(B) and -2540. Rather, the question here is whether Appellant's challenge is a facial attack or not. The death knell of the Trust's appeal is its failure to distinguish the difference between a facial challenge and an as applied challenge. Appellant offers no legal basis or analysis demonstrating the ALC's error in designating Appellant's challenge as facial.

The United States Supreme Court in Salerno defined a constitutional facial challenge as a constitutional challenge premised on the fact that no circumstances exist under which the statute would be valid. U.S. v. Salerno, 481 U.S. 739, 107 S. Ct. 2095,

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43-220(C)(2)(iii)(A). The ALC rationalizes the application of S.C. Code Ann. § 12-43-220(c)(2)(iii)(A) to apply to both S.C. Code Ann. § 12-43-220(c)(2)(ii)(A) regarding non-resident spouses and S.C. Code Ann. § 12-43-220(c)(2)(ii)(B) regarding claims for the special assessment ratio on another residence.

95 L. Ed. 2d 697 (1987). Stated differently, it is a case where it is alleged "that the law is unconstitutional in all of its applications." Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450, 128 S.Ct. 1184, 1159 (2008). Conversely, "[a]n as-applied challenge requires the moving party to show that the statute cannot be constitutionally applied to the defendant under the particular facts of the case." Town of Mt. Pleasant v. Chimento, 401 S.C. 522, 543, 737 S.E.2d 830, 843 (2012) (Hearn, J., dissenting on other grounds)(citing Chapman v. U.S., 500 U.S. 453, 467-68, 111 S.Ct. 1919 (1991). Consequently, an as applied challenge requires a showing that the statute being challenged is otherwise constitutional, but that it is unconstitutional as it relates to him or her. Therefore, in order to successfully bring an as applied challenge to the constitutionality of the 4% Assessment Ratio Statute before the ALC, the Appellant must show that the statute is otherwise constitutional, except as applied to the Trust's case. No such showing exists in Appellant's Contested Case petition or in its brief.

Based on Appellant's arguments and the Contested Case it filed before the Court, the ALC found that the Trust did not make this showing. The ALC cites in its Final Order the following contentions of Appellant:

> . . . the General Assembly has 'created, with its definition of 'member of household,' 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 . . .' and this has 'plac[ed] an undue burden on couples who are similarly situated to the Earlys who are validly married yet domiciled in different states.' According to [Appellant], it is this change by the General Assembly to the definition of 'member of my household' in Section 12-43-220(c)(2)(iii)(A) that 'violates both Due Process and Equal Protection guaranteed by both the United States Constitution and the South Carolina Constitution of 1895.'

(R. p. 3)(internal revisions omitted).

Further, "[Appellant] does not specify **how** the Assessor and Board applied the statutory provisions in an unconstitutional manner or even offer an alternative interpretation of the provisions." (R. p. 2)(emphasis added). Based on the Appellant's own arguments and its inartful presentation of its constitutional challenge, the ALC properly dismissed the Appellant's case for lack of jurisdiction.[3]

B. Appellant's Attempt to Convert Its "Facial Challenge" Into an "As Applied Challenge" by Reference is Misplaced.

Although Appellant attempts to convert its facial challenge into an as applied challenge by simply adding the phrase "as applied" throughout its brief, this conversion is nothing more than form over substance. Rather, the substance of the Trust's appeal is whether it is lawful to treat married couples domiciled[4] in South Carolina differently (for tax purposes) from nonresident married couples (except if you are legally separated). According to Appellant, the Amended 4% Assessment Ratio Statute "rewards un-married couples, legally separated couples, and single people with significant tax advantages." (Appellant's Br. 15). Therefore, Appellant believes the amendment offends the constitution. Appellant's attack on the amendment is nothing

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[3] Even Appellant's brief before this Court, by virtue of the way it has framed its argument again demonstrates its misunderstanding of the difference between a "facial" versus "an as applied" challenge to the amendment to S.C. Code Ann. § 12-43-220(c)(2)(iii)(A). Appellant's brief is replete with illustrations of its facial challenges to the constitutionality of the amendment. By way of example, Appellant states, "The interpretation and strict reading are at issue in this case as the (sic) 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." (Appellant's Br. 14). Further, Appellant states that "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." (Appellant's Br. 15).

[4] Black's Law Dictionary defines "domicile" as a person's legal home; that place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning.

more than an attempt to have the ALC strike the amendment in its entirety, which is a facial challenge. That is exactly what the ALC is not empowered to do. See Travelscape, LLC, 391 S.C. 89, 705 S.E.2d 28 (2011). Since Appellant has not alleged any set of circumstances under which the amendment would be valid, Appellant's challenge to the statute must be a facial attack and must be dismissed.[5]

"[South Carolina Courts have] a very limited scope of review in cases involving a constitutional challenge to a statute. All statutes are presumed constitutional and will, if possible, be construed so as to render them valid." Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 528 S.E.2d 647 (1999). In particular, the ALC is limited to making factual determinations for an as applied challenge to determine if a statute is unconstitutional as applied to a party and not affecting the facial validity of the statute. See Travelscape, 391 S.C. 89, 705 S.E.2d 28 (2011).

> ALC's are empowered to hear as applied challenges to statutes and regulations. 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 a specific party does not affect the facial validity of that provision. We wish to reiterate that our decision today does not affect the ALC's inability to decide facial challenges to a statute or regulations; those are legal questions that are properly raised for the first time on appeal or in a declaratory judgment action before the circuit court.

Id.

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[5] Given how the Trust has framed this case, the outcome of this Appeal will gravely affect the procedure for Appellant to appeal the Assessor's denial of the Trust's 4% Assessment Ratio Application. Should this Court uphold the ALC's decision that Appellant presents a facial challenge, in effect, Appellant would be precluded from bringing this case before the ALC. However, if Appellant persists in referring to its challenge as an as applied challenge it would also be precluded from bringing its claim before the circuit court pursuant to S.C. Code Ann. § 12-60-80(B).

Since the Appellant claims that S.C. Code Ann. § 12-43-220(c)(2)(iii) violates both due process and equal protection guaranteed by both the United States Constitution and the South Carolina Constitution, this Court should dismiss the claim for lack of jurisdiction.

II. THE 4% ASSESSMENT RATIO STATUTE DOES NOT VIOLATE APPELLANT'S DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE UNITED STATES AND SOUTH CAROLINA CONSTITUTIONS.

Assuming, *arguendo*, that Appellant's constitutional attack on the 4% Assessment Ratio Statute is in fact an as applied constitutional challenge, rather than a facial one, it is improper for this Court to address the merits of Appellant's case. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998). It is obvious in this case that the ALC did not reach the merits of Appellant's appeal because it concluded that it lacked subject matter jurisdiction. Consequently, the ALC never ruled on the substantive question raised by Appellant - whether the Assessor properly denied the Trust the 4% tax assessment ratio. Therefore, the substantive question has not been preserved for appellate review and/or determination. Nevertheless, Appellant seeks a determination on the merits of its claims. Accordingly, the Assessor responds with the following arguments raised before the ALC.

A. There are No Violations of the United States or South Carolina Constitutions.

The Appellant mistakenly claims that the Amended 4% Assessment Ratio Statute violates the due process and equal protection guaranteed by the United States and South Carolina Constitutions. Appellant contends that the statute imposes a higher *ad valorem* real property tax burden on spouses who live apart and are domiciled in South Carolina and another state, compared to spouses who live apart but are domiciled in South Carolina. (Appellant's Br. 19). The South Carolina Constitution provides that "[t]he General Assembly may provide for the ad valorem taxation by the State or any of its subdivisions of all real and personal property. The assessment of all property shall be equal and uniform in the following classifications . . . ." S.C. Const. art. X, § I.[6] To that end, the Legislature adopted the 4% Assessment Ratio Statute which provides that:

> The legal residence and not more than five acres contiguous thereto . . . are taxed on an assessment equal to four percent of the fair market value of the property . . . For purposes of the assessment ratio allowed pursuant to this item, a residence does not qualify as a legal residence unless the residence is determined to be the domicile of the owner-applicant.

S.C. Code Ann. § 12-43-220(C)(1).

As a prerequisite to qualify for the 4% Assessment Ratio, the otherwise qualifying taxpayer must certify to the following statement:

> 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

[6] The Constitution also provides that "[t]he General Assembly may define the classes of property and values for property tax purposes of the classes of property set forth in Section 1 of this article and establish administrative procedures for property owners to qualify for a particular classification." S.C. Const. art. X, § 2.

> **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**; . . .

S.C. Code Ann. § 12-43-220(C)(2)(ii)(emphasis added).[7]

The gravamen of Appellant's attack lies at the feet of the above-mentioned certification, which creates a class of taxpayers who are not eligible to receive the tax benefit. In Fop v. S.C. Dep't of Revenue, "[the] Court recognizes that 'the determination of whether a classification is reasonable is initially one for the legislature and will not be set aside by the courts unless it is plainly arbitrary.'" Fop v. S.C. Dep't of Revenue, 352 S.C. 420, 430, 574 S.E.2d 717, 722 (2002). Moreover, "[f]or tax statutes, 'the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.' The purpose of the tax statutes is to raise revenue." Id. (citing Madden v. Ky., 309 U.S. 83, 88, 60 S.Ct. 406, 408, 84 L. Ed. 590 (1940)). To that end, South Carolina Courts have held:

> A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt. [Citation Omitted]. A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution.

Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 528 S.E.2d 647 (1999).

It is clear that the Legislature has created a classification, which excludes spouses from receiving the 4% Assessment Ratio's tax benefit when one of them is not domiciled in South Carolina. Absent a showing by the Trust that this classification is a "hostile and

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[7] See Footnote 2.

oppressive discrimination" and "its repugnance to the constitution is clear and beyond a reasonable doubt," its challenge must fail as illustrated below.

1. Due Process

The Trust claims that Mrs. Early as owner-occupant has been treated disparately by the State of South Carolina simply because she is married, and therefore, her due process has been violated.[8] (R. p. 23). The Trust's claim is patently false because her tax treatment is not based on the fact that she is married, but rather it is based on the legal residency of both spouses. The S.C. Constitution article I, § 3 states that no person shall ". . . be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."[9] "Substantive due process

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[8] S.C. Const. art. I, § 22 provides:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

Although Appellant does not specify whether the alleged violation is substantive or procedural, the procedure for adjudicating this very claim dispenses with any such procedural claim. Therefore, a procedural due process claim would not be justiciable. The Legislature has afforded the Trust a mode of procedure with the right of judicial review in the Revenue Procedures Act ("RPA"). The RPA authorizes a taxpayer to pay his taxes and file a request for a refund within two years from the date the tax was paid. See S.C. Code Ann. § 12-60-2560. The United States Supreme Court in McKesson Corp. stated:

> Our precedents establish that if a State penalizes taxpayers for failure to remit their taxes in a timely fashion, thus requiring them to pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional.

McKesson Corp. v. Div. of Alcoholic Bevs. & Tobacco, 496 U.S. 18, 22, 110 S. Ct. 2238, 2242 (1990).

The RPA provides a post payment remedy for taxpayers after making their tax payments. Therefore, the RPA passes constitutional muster.

[9] The 14th Amendment to the United States Constitution is similar to the South Carolina Constitution. It states that, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

provides that one may not be deprived of property for arbitrary reasons. Worsley Cos. v. Town of Mount Pleasant, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000) ('Substantive due process protects a person from being deprived of life, liberty or property for arbitrary reasons.'). To support a substantive due process violation, a party must show "'he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law.'" Anonymous Taxpayer v. S.C. Dep't of Revenue, 377 S.C. 425, 437-38, 661 S.E.2d 73, 79 (2008). In R.L. Jordan, Inc. v. Boardman Petroleum, Inc., this Court adopted the modern test for substantive due process challenges to social and economic welfare legislation. 338 S.C. 475, 527 S.E.2d 763 (2000). Noting that modern rules give great deference to legislative judgment to promote public welfare, this Court adopted the modern standard for reviewing all substantive due process challenges to state statutes. Id. Under R.L. Jordan, "'legislation is not overturned unless the law has no rational relationship to any legitimate interest of government.'" Fop v. S.C. Dep't of Revenue, 352 S.C. 420, 433-34, 574 S.E.2d 717, 724 (2002).

The Trust has not been deprived of its money through the exaction of *ad valorem* property taxes without notice and the opportunity to be heard. In addition, the Legislature has a legitimate interest in treating residents of South Carolina different from non-residents. South Carolina courts have held:

> When an act is challenged under the due process clause, this 'Court only requires the act to be reasonably designed to accomplish its purposes, unless some fundamental right or suspect class is implicated. Legislation restricting or impairing a fundamental right 'is subject to 'strict scrutiny' in

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due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. 14, § 1.

> determining its constitutionality.' Legislation that does not infringe on fundamental rights is subject only to a rational basis test. Under either type of analysis, the one who attacks the law bears the burden of showing it is unconstitutional.

In re Treatment & Care of Luckabaugh, 351 S.C. 122, 139-40, 568 S.E.2d 338, 346-47 (2002).

Despite Appellant's failure to show what substantive due process right has been violated or the type of scrutiny (i.e., strict or rational basis) this Court should apply to the alleged unconstitutional conduct, Appellant simply rests on its generalized assertions that "the definition of 'member of my household' to include an owner-occupant's spouse violates both Due Process 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." (R. p. 22). These assertions are lacking and insufficient to prove a substantive due process violation.

First, there is no fundamental right or suspect class implicated by the statute. American jurisprudence has defined a suspect class as a class "'saddled with such disabilities, or subjected to such history of purposeful unequal treatment, or relegated to such a position of powerlessness as to command extraordinary protection from the majoritarian political process.'" Denene, Inc. v. City of Charleston, 359 S.C. 85, 93-94, 596 S.E.2d 917, 921 (2004)(citing Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313, 49 L. Ed. 2d 520, 96 S. Ct. 2562 (1976)). Suspect classes are generally based on race, alienage, national origin, sex or illegitimacy. Luckabaugh at 147, 568 S.E.2d at 351. Appellant claims, "Mrs. Early is being denied the same liberties given to any other married couple that is not domiciled together." (R. p. 24). That is not true. Married

couples could qualify for the 4% Assessment Ratio on one property if they lived apart but were both domiciled in South Carolina.

However, even if Appellant's claims were accurate, there is no case law or common sense to support this as a suspect class in South Carolina. Since there is no fundamental right or suspect class implicated, the statute is subject to a rational basis test. "In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." Denene at 96, 596 S.E.2d at 923 (citation omitted). "The standard for reviewing all substantive due process challenges to state statutes or municipal ordinances, including economic and social welfare legislation, is whether the ordinance bears a reasonable relationship to any legitimate interest of government." Id. Here, the statute bears a reasonable relationship to South Carolina's legitimate interest in providing a legal residence (4%) special tax assessment ratio and exemption to South Carolina property owners, which includes spouses who are both domiciled in South Carolina but has no bearing on whether they live together. Therefore, there is some rational basis, and it is not unreasonable to disqualify someone who is not domiciled in South Carolina, or to disqualify an owner-occupant if his/her spouse is not domiciled in South Carolina.

2. Equal Protection

Appellant also alleges the 4% Assessment Ratio Statute violates the Equal Protection rights of married couples under the United States and South Carolina Constitutions who are domiciled in South Carolina and another State. In particular, the Trust claims that "the statute unfairly penalizes a married couple over individuals who

are unmarried and owning property in South Carolina." (R. p. 19). This claim does not support an equal protection violation. The Equal Protection Clause of the South Carolina Constitution provides:

> The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

S.C. Const. art. I, § 3.

> Equal protection requires that 'all persons be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed.' [Citation Omitted]. . . . 'The fact that the classification may result in some inequity does not render it unconstitutional.'

Skyscraper Corp. v. Cnty of Newberry, 323 S.C. 412, 417, 475 S.E.2d 764, 766 (1996).

An equal protection analysis begins with the determination of the level of scrutiny to apply. Luckabaugh, 351 S.C. 122, 139-40, 568 S.E.2d 338, 346-47 (2002). Strict scrutiny is applied if the law involves a suspect classification, which are generally based on race, alienage, national origin, sex or illegitimacy. Id. (citations omitted). Appellant's argument is based on couples who are married and one spouse is not domiciled in South Carolina. This is not a suspect classification, so the rational basis test applies.

For equal protection challenges, the rational basis test is satisfied when: (1) the classification bears a reasonable relation to the legislative purpose sought to be affected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis. Denene at 92, 596 S.E.2d at 920 (citations omitted). "'The determination of whether a classification is reasonable is initially one for the legislative body and will be sustained if it is not plainly

arbitrary and there is a reasonable hypothesis to support it.'" Luckabaugh at 149, 568 S.E.2d at 352 (citation omitted). Here, the reasonable hypothesis is the South Carolina General Assembly chose to confer a benefit on an owner-occupant and his/her spouse, so long as both are domiciled in South Carolina. The General Assembly did not sweepingly alienate married couples who simply do not live together as Appellant asserts, but instead, South Carolina chose to confer the benefit of legislative grace to owner-occupants and their spouses, so long as both are domiciled in South Carolina.

The South Carolina Supreme Court's policy is "to strictly construe a tax credit against the taxpayer as it is a matter of legislative grace." Centex Int'l, Inc. v. S.C. Dep't of Revenue, 406 S.C. 132, 140, 750 S.E.2d 65, 68 (2013)(emphasis added). Interlaced with standard canons of statutory construction is the Court's policy of strictly construing tax exemption statutes against the taxpayer. CFRE, L.L.C. v. Greenville Cnty Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). Further, this rule of strict construction means that constitutional and statutory language will not be strained or liberally construed in the taxpayer's favor. Id. However, courts will not search for an interpretation in the taxing authority's favor where the plain and unambiguous language leaves no room for construction. Id. "It is only when the literal application of the statute produces an absurd result will [courts] consider a different meaning." Id.

S.C. Code Ann. § 12-43-220 is a tax exemption statute that authorizes a special (4%) legal residence assessment ratio if an owner-occupant meets specific qualifications as dictated by the South Carolina General Assembly. The General Assembly has made it a requirement that an owner-occupant's spouse claim legal

residence only in South Carolina. Under South Carolina law, this requirement must be strictly construed against Appellant and cannot be limited or liberally construed in favor of the taxpayer/Appellant. Therefore, Appellant does not qualify for the exemption.

Notwithstanding the Trust's contentions, the Amended 4% Assessment Ratio Statute applies to married couples, on one qualifying residence in South Carolina, as long as they are South Carolina residents – whether they live separate or apart.[10] In order to prove an equal protection violation, a party must show that similarly situated persons received disparate treatment. TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 626, 503 S.E.2d 471, 479 (1998). That is not present here. Rather, the Trust's chief complaint is that the statute imposes a higher *ad valorem* real property tax burden on spouses who live apart and are domiciled in South Carolina and another state compared to spouses who live apart but are both domiciled in South Carolina.[11]

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[10] For instance, a married couple could live in Charleston County and Richland County, own houses in both Counties, and be domiciled separately in each County. Notwithstanding the other conditions of the statute, if the married couple applies for the 4% Assessment Ratio for their home in Charleston County and not Richland, the Charleston County home would qualify for the 4% Assessment Ratio. All married couples who are legal residents of South Carolina whether living separate or together qualify for the 4% Assessment Ratio for one property, and therefore, are treated the same.

In addition, an owner-occupant whose spouse does not live in South Carolina but is domiciled in South Carolina would qualify for the 4% Assessment Ratio. However, spouses who live apart and only one spouse lives in South Carolina and the other spouse is domiciled in a state other than South Carolina would not qualify for the 4% Assessment Ratio. No one within each classification is treated differently, and there are no facts in the record to support any other conclusion.

Accordingly, there is no valid equal protection claim. In this case, Mrs. Early is not treated differently because she is married. Instead, she does not qualify for the 4% Assessment Ratio because her spouse is not domiciled in South Carolina. Appellant correctly states that if Mrs. Early were to legally separate from her husband or divorce him, she would qualify for the 4% assessment ratio. (R. p. 23). In the same vein, if Mrs. Early's husband made South Carolina his domicile – and did not claim legal residence in any other jurisdiction for any purpose – she would equally qualify.

[11] It is interesting to note that Appellant claims that 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." (Appellant's Br. 21). However, that is an incomplete statement of the law that does not apply to tax exemption statutes. Appellant cites to S.C. Nat'l Bank v.

"The equal protection clause does not require that mathematical symmetry be attained between benefits received and payment for those benefits." Ex parte Yeargin, 295 S.C. 521, 525, 369 S.E.2d 844, 845-46 (1988). Additionally, the "constitutional guaranty of equal protection of the laws requires that all persons shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. . . .The equal protection guaranty is intended to secure equality of protection not only for all, but against all similarly situated." Luckabaugh at 147, 568 S.E.2d at 351(citing Thompson v. S.C. Comm'n on Alcohol and Drug Abuse, 267 S.C. 463, 229 S.E.2d 718, 722 (1976)).

B. The 4% Assessment Ratio Statute Does Not Impair a Woman's Right to Own Property.

Appellant contends that Mrs. Early's disqualification from receiving the 4% Assessment Ratio "ignore[s] 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 spouses to be domiciled together by virtue of marriage alone." (R. p. 24-25). To the contrary, the Trust's failure to qualify for the 4% Assessment Ratio's tax benefit has nothing to do with gender. Rather it has to do with legal residency. As stated before, in order to qualify for the 4% Assessment Ratio, the otherwise qualifying taxpayer must certify to the following statement: "Under penalty of perjury I certify: . . . **that neither I, nor any member of my household, claim to be a legal resident of a**

S.C. Tax Comm'n, 297 S.C. 279, 376 S.E.2d 512 (1989). The full quote reads, "In the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt." Id. However, Appellant fails to distinguish between the "enforcement of tax statutes" generally and the construction of tax exemption statutes.

jurisdiction other than South Carolina for any purpose; . . . ." S.C. Code Ann. § 12-43-220(C)(2)(ii)(emphasis added). This certification is gender neutral and has nothing to do with which spouse has title to the property. Appellant's gender based claim is nothing more than a ruse to conceal the fact that Appellant is simply upset that Mrs. Early does not qualify for an exemption that courts have characterized as "legislative grace." [12] See Centex, 406 S.C. 132, 140, 750 S.E.2d 65, 68 (2013); CFRE, L.L.C. v. Greenville Cnty Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). Nothing in the statute undermines women's rights to hold and own property or treats men differently from women. In fact, the statute refers generically to "the owner-occupant's spouse" without regard to whether the owner-occupant is a man or woman.

Even by Appellant's own admission by virtue of its citation and reference to Williams v. N.C., 63 S.Ct. 207 (1942) (each state has a rightful and legitimate concern in the marital statue of persons domiciled within its borders), the Legislature has chosen to confer a special benefit on married persons domiciled in South Carolina. Here, the fact that the statute allows the 4% Assessment Ratio to couples domiciled in South Carolina is a permissible application of South Carolina's legitimate concern in the marital status of persons domiciled in South Carolina, which does not impair a woman's right to own property.

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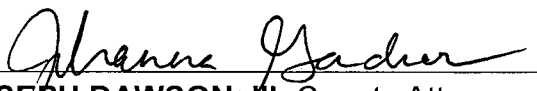
[12] By the Trust's own admission, it cannot meet the requirements of the 4% Assessment Ratio Statute based on the words of the statute not based on the property owners' gender. "The burden of proving the entitlement to an exemption is on the party asserting the exemption." Bovain v. Canal Ins., 383 S.C. 100, 110, 678 S.E.2d 422, 427 (2009). "In general, exemptions are an act of legislative grace and, as such, they are to be strictly and reasonably construed. See State v. Life Ins. Co., 254 S.C. 286, 293-94, 175 S.E.2d 203, 206-07 (1970) (noting exemptions are provided as an act of legislative grace and are to be construed strictly; a party must meet the specified conditions to obtain the benefit conferred by the exemption)." Id.

CONCLUSION

For the reasons stated, Respondent asks this Court to dismiss Appellant's claim and uphold the Charleston County Board of Assessment Appeals and the Charleston County Assessor's denial of the application for the 4% Assessment Ratio by the Appellant.

Respectfully submitted,

CHARLESTON COUNTY ASSESSOR



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April 13, 2016

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent Charleston County Assessor complies with Rule 211(b), S.C.A.C.R.

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PROOF OF SERVICE

I certify that I have served the **Final Brief of Respondent** on counsel for Appellant by depositing a copy of the same in the United States Mail, postage prepaid, on April 13, 2016, addressed as follows:

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