

THE STATE OF SOUTH CAROLINA
IN THE SOUTH CAROLINA COURT OF APPEALS

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

Karl A. Folkens, Special Referee
Fifteenth Judicial Circuit

APPELLATE CASE NO: 2026-000090

Jericho State Capital Corp. of Florida, Appellant,

v.

Chicago Title Insurance Company, Respondent, AND Lynx Jerico Partners,
LLC, Appellant, v. Chicago Title Insurance Company, Respondent.

.

RECORD ON APPEAL

VOLUME ONE

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STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Jericho State Capital Corp. of Florida,)
Plaintiff,)
v.)
Chicago Title Insurance Company,)
Defendant.)

C/A: 2013-CP-26-05530

Lynx Jericho Partners, LLC,)
Plaintiff,)
v.)
Chicago Title Insurance Company,)
Defendant.)

C/A: 2015-CP-26-01084
(Consolidated with the above case)

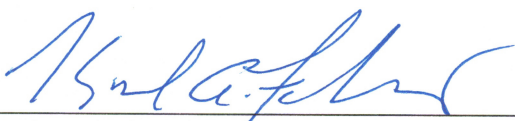
**ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION
AND TO ALTER OR AMEND ORDER**

Plaintiffs Jericho State Capital Corp. of Florida ("Jericho State") and Lynx Jericho Partners, LLC ("Lynx Jericho") have moved pursuant to Rule 59(e), SCRPC, for reconsideration and to alter or amend the Order Considering Defendant's Second Motion for Summary Judgment and Plaintiffs' Motion for Summary Judgment, dated July 7, 2025, and filed July 14, 2025 which granted summary judgment to Defendant and denied Plaintiffs' motion. Counsel for the parties have well-briefed the issues raised in this motion, and I will determine the motion without oral argument. *See* Rule 59(f), SCRPC. Also, the motion has been filed in each case in this consolidated action, and this Order will be a single response to each of the two motions by Plaintiffs, as the identical issues are raised in each.

I have reviewed the Plaintiffs' arguments, considered Defendant's responses, and the entire record. There does not appear to be any grounds to support an amendment or alteration to the Order.

Accordingly, Plaintiffs' motion for reconsideration and to alter or amend the Order is denied.

IT IS SO ORDERED.


Karl A. Folkens, Special Referee

Florence, South Carolina
December 14, 2025

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Jericho State Capital Corp. of Florida,)
Plaintiff,)
v.)
Chicago Title Insurance Company,)
Defendant.)

C/A: 2013-CP-26-05530

Lynx Jericho Partners, LLC,)
Plaintiff,)
v.)
Chicago Title Insurance Company,)
Defendant.)

C/A: 2015-CP-26-01084
(Consolidated with the above case)

**ORDER CONSIDERING DEFENDANT'S SECOND MOTION FOR SUMMARY
JUDGMENT AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

This matter is before me as Special Referee to consider Defendant's Second Motion for Summary Judgment and Plaintiffs' Motion for Summary Judgment.

Defendant Chicago Title Insurance Company moves for summary judgment, arguing:

1. As to Plaintiff Lynx Jericho Partners, LLC ("Lynx Jericho"), its claim under the lender's title insurance policy fails because Lynx Jericho released the insured mortgage in full, thereby terminating coverage under Policy Condition 9(c).
2. Before releasing its mortgage interest, Lynx Jericho failed to foreclose on its note and mortgage. This failure precludes recovery under the lender's title policy.
3. The Property has since been sold in its entirety, making foreclosure now

impossible.

4. As to Plaintiff Jericho State Capital Corp. of Florida ("Jericho State"), coverage under Section 2(c) of its policy was reduced to \$0 when Jericho State obtained title to the Property through foreclosure with a credit bid exceeding the amount owed on its note.
5. Even if summary judgment were denied on the foregoing grounds, Defendant contends it should be determined as a matter of law that the date of loss for both Lynx Jericho and Jericho State was when the foreclosure sale process was completed.

Plaintiffs move for summary judgment, arguing:

1. Lynx Jericho may pursue its claim for damages even though it did not foreclose on the Property because the proper date to measure damages under South Carolina law is the policy date, not a foreclosure date.
2. Jericho State's foreclosure of its second mortgage and subsequent ownership of the Property did not result in any equity interest, and therefore its bid is not a payment under Section 2(c).
3. Lynx Jericho may pursue its claim for damages even though it satisfied the first mortgage because it made its claim during the policy period for damages suffered prior to satisfaction.

FACTS

Ordinance 88-202 ("the Ordinance") was adopted on July 2, 2002, by the Horry County Council amending the official map of Horry County to show the future locations of a proposed highway. On July 25, 2006, Peachtree Properties bought approximately 131 acres of waterfront



property ("Property") in the Socastee Township in Horry County, South Carolina. It financed \$18,520,000 through a first mortgage to RE Loans, which was later assigned to Lynx Jericho, and a second mortgage in the amount of \$4,263,888 to Jericho State. Defendant issued lender title insurance policies in the amounts of \$17,071,873.33 as to the first mortgage, and \$4,263.888 as to the second mortgage (collectively referred to herein as "Policies") dated that same date. The Policies did not take exception to the future location of the proposed highway on the Horry County Map which traversed a portion of the Property.

Peachtree Properties went into default and Jericho State filed to foreclose on its second mortgage on June 8, 2007, almost a year after closing. On February 26, 2008, a Master's Deed was issued to Jericho State due to its \$9,000,000.00 winning foreclosure bid, with Jericho State taking ownership subject to the first mortgage. The indebtedness on the second mortgage at the time of sale was \$7,490,031.71, \$1,509,968.29 less than the winning bid. A year after the issuance of the Master's Deed, on February 26, 2009, Jericho State filed a title insurance claim on its lender's title insurance policy. Defendant denied the claim on December 9, 2009, and a lawsuit challenging that denial was filed on July 29, 2011.

As to the Lynx Jericho first mortgage, a condemnation action was filed by the South Carolina Department of Transportation on December 15, 2009. On November 14, 2014, a jury awarded \$2,100,000.00 just compensation to Jericho State, the owner of the property, for the taking of a portion of the Property. Jericho State released its interest in the judgment net proceeds to Lynx Jericho as first mortgage holder in the amount of \$1,941,737.32. The condemnation action caused the first mortgage to be discharged as a matter of law over the condemned property; but it remained a valid first mortgage lien over the remainder of the Property.



On June 21, 2013, Lynx Jericho submitted a title insurance claim by letter on its lender's title insurance policy. Defendant denied the claim, and Lynx Jericho filed a lawsuit challenging that denial on February 12, 2015. By Orders entered on February 13, 2015, and November 13, 2015, the cases were consolidated and referred to me as Special Referee.

A previous Order granting Defendant's first motion for summary judgment was appealed, and the South Carolina Court of Appeals affirmed in part, reversed in part, and remanded the matter for further proceedings. *See Jericho State Capital Corp., v. Chi. Title Ins. Co.*, 431 S.C. 437, 848 S.E.2d 572 (Ct. App. 2020). Defendant's pending summary judgment motions relate to the Policies' Conditions and Stipulations, and not the Exclusions which were addressed in the prior motion, and which were the subject of the appeal. Plaintiffs' motions relate to their entitlement as a matter of law to the payment of their covered losses under the Policies.

Counsel for all parties acknowledged at oral argument on the current motions that there are no genuine issues as to any material fact. The matter now turns on how the law applies to those facts.

ANALYSIS

A. The Policies are not ambiguous.

Before turning to the core issue of the date of loss, I will first address the issue of ambiguity in the Policies. Insurance policies are subject to the general rules of contract construction. *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 514 S.E.2d 327, 330 (1999). When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. *Id.* The court must enforce, not write, contracts of insurance



and must give policy language its plain, ordinary, and popular meaning. *Id.* “[I]f the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend coverage that was never intended by the parties.” *S.C. Farm Bureau Mut. Ins. Co. v. Wilson*, 344 S.C. 525, 544 S.E.2d 848, 850 (Ct. App. 2001). “The rule of strict construction against the insurer does not apply where the language used in the policy is so plain and unambiguous as to leave no room for construction. Nor does the rule of strict construction authorize a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exists.” *S.S. Newell & Co. v. American Mutual Liability Ins. Co.*, 199 S.C. 325, 19 S.E.2d 463, 466 (1942).

Lynx Jericho and Jericho State argue that the date of loss is the date of the Policies, relying on *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 732 S.E.2d 626 (2012). In *Whitlock*, an owner’s policy case, the South Carolina Supreme Court rejected the widely adopted rule in *Overholtzer v. Northern Counties Title Insurance Co.*, 253 P.2d 116 (Cal. Dist. Ct. App. 1953). *Whitlock* held that loss under a one- to four-family residential policy was measured as of the date of the policy, not the date of discovery of the title defect, because the relevant policy provision was ambiguous. The court found the term “actual loss” in the residential owner’s policy (not a loan policy) to be ambiguous, stating “[w]here the insurance contract unambiguously identifies a date for measuring the diminution in value of the insured property or otherwise unambiguously provides for the method of valuation as a result of the title defect, such date or method is controlling.” *Id.*, 399 S.C. at 613, 732 S.E. 2d at 627. The residential owner’s policy in *Whitlock* did not define actual loss and set forth no method of valuation; therefore, the court found the residential owner’s policy to be ambiguous and construed it in the light most favorable to the insured.



The *Whitlock* holding is a reasonable one for an owner title policy. Once a title defect is discovered, the owner has incurred an actual monetary loss: the reduction in its fee simple interest in the property. An owner's title insurance policy insures against loss arising from defects that diminish the fee simple interest in the property. Upon a subsequent sale, any known defect would be reflected in the market price, effectively incorporating the diminished value into the transaction—which determines the owner's actual monetary loss—and thus enabling the policy to fulfill its indemnity purpose by valuing that loss. By setting the date of loss as the policy date, the process in determining the diminished value is immediately available to the owner without requiring an immediate sale.

A lender's title insurance policy is fundamentally different. A lender suffers a covered loss only if the note is not repaid. The discovery of an insured-against lien or other title defect does not trigger recognition of an actual monetary loss. A property owner can continue to pay on the note and mortgage until it is paid off. A casualty loss or condemnation proceeding can generate funds which are paid to the lender to reduce or pay-off the mortgage. A lender can choose to forestall a foreclosure proceeding depending upon favorable and unfavorable real estate and financial market conditions.

Section 7 of the Policies unambiguously states:

7. DETERMINATION AND EXTENT OF LIABILITY.

This policy is a **contract of indemnity against actual monetary loss or damage sustained or incurred** by the insured claimant **who has suffered loss or damage** by reason of matters insured against by this policy and only to the extent herein described.

(a) The liability of the Company under this policy shall not exceed the least of:



(iii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

(Emphases added.) *See* Exhibit C (REL Policy); Exhibit E (Jericho State Policy). Although a date for determining loss is not set out in the policy, the provision requires “actual monetary loss or damage.” That phrase is not ambiguous. It is clear and precise, and logically excludes speculative, imprecise, and conjectural loss or damage.

Defendants’ reliance on *Whitlock* in this lender’s policy case is misplaced because under an owner’s policy the extent of liability can be determined once the title defect is discovered. Until an actual monetary loss is incurred under a lender’s policy, the extent of Defendant’s liability to Plaintiffs cannot be determined per the plain, unambiguous terms of the policy.

B. The Date of Loss under a lender’s title insurance policy is not the policy date.

Defendant asserts that Lynx Jericho has not sustained a determinable loss because the date of loss under the REL Policy is the date of foreclosure, and Lynx Jericho has never foreclosed. This issue also bears on the Jericho State second mortgage, because if the date of loss were the policy issuance date, the analysis of that claim would need to account for that timing.

The Court of Appeals in this case stated that “[t]itle insurance is designed to protect a real estate purchaser or mortgagee against defects in or encumbrances on the title; the purpose of title insurance is to ‘place the insured in the position he thought he occupied when the policy was issued.’ *Pres. Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 316, 751 S.E.2d 256, 260 (2013).” *Jericho State Capital Corp.*, 431 S.C. at 444, 848 S.E.2d at 576. This statement cannot be read as a determination that the policy issuance date is the date of loss. As



noted above, the distinction between an owner's and a lender's policy is important: an owner's title insurance policy insures the owner's interest in the property against covered defects existing as of the policy date, while a lender's title insurance policy protects only the lender's security interest, and the priority and enforceability of its mortgage. The two policies insure different parties for different risks, even when based on the same title examination. On the date of policy issuance, then, the both lenders were placed in the position of having title insurance policies which indemnified them against **actual monetary loss and damage** should a title defect become known. Contrary to Plaintiffs' position, that is not at odds with the Court of Appeals' statement of placing "the insured in the position he thought he occupied when the policy was issued." The date of determining the extent of that loss is a separate matter and should not be conflated with placing an insured in a position of having an indemnity policy in place if and when an actual loss or damage is sustained or incurred in the future.

An insured lender that has not yet taken title cannot prove that any defect in the title will cause it to suffer a loss and a claim is not ripe until the lender has taken title to the property. *Karl v. Commonwealth Land Title Ins. Co.*, 20 Cal.App.4th 972, 984, 24 Cal.Rptr.2d 912, 920 (Cal. App. 1993 "At [foreclosure sale], the lender's note is extinguished and replaced by assets recovered on foreclosure: either cash as paid by a third party bidder or the realty as bought in by the foreclosing lender. It is now possible to measure the value of the recovery by the lender, and we believe the loss which is insured by the title policy should be recognized as of that time." *Id.*, 20 Cal.App.4th at 984, 24 Cal.Rptr.2d at 920. "[A] lender suffers loss only if the note is not repaid." *Id.*, 20 Cal. App. 4th at 983, 24 Cal.Rptr.2d at 919. "[I]n the typical case the earliest a loss can be claimed on a lender's policy is at the time of completion of foreclosure." *Id.*, 20 Cal. App. 4th at 984, 24 Cal.Rptr.2d at 920.



The *Karl* court also cited with approval language from *Blackhawk Prod. Credit v. Chicago Title*, 144 Wis.2d 68, 423 N.W.2d 521 (1988), distinguishing between the insured interests of an owner versus a lender and commenting on arguments by policyholders about impairment of their security because of the title defect:

“Defining and measuring actual loss under a title insurance policy is not the same for the owner who has title to property, and a mortgagee who holds only a security interest in the borrower’s title. The fee interest of an owner is immediately diminished by the presence of lien since resale value will always reflect the cost of removing the lien. **A mortgagee’s loss cannot be measured unless the underlying debt is not repaid and the security for the mortgage proves inadequate.**” (423 N.W.2d at p. 525, emphasis added.)

Thus, generic statements about measuring the loss by the “diminishment in security” are misleading, because the inadequacy of the security becomes relevant only if the debt is unpaid, necessitating resort to the security.

Karl, 20 Cal. App. 4th at 982, 24 Cal.Rptr.2d at 918.

The Fifth Circuit Court of Appeals in *First American Bank v. First American Transportation Title Ins. Co.*, 759 F.3d 427 (5th Cir. 2014) concluded that the lender title policy in its case—which contained nearly identical language to the Policies here—unambiguously required valuation as of the date of the foreclosure sale.

Although Louisiana courts have not addressed this issue, a majority of courts from other jurisdictions have held that, in the absence of specific policy language, a title insurer’s liability to a mortgagee should be measured using the foreclosure date. These courts have reasoned that this date is appropriate because the foreclosure is when the insured actually incurs a covered loss.

Although date-of-discovery is the majority rule for owners’ policies, its use is generally justified on the ground that the owner of property suffers a loss immediately upon discovery of a defect, a rationale that is also not applicable to mortgagees.” *Id.*, 759 F.3d at 433-434. “The most appropriate date to use in calculating [the policyholder’s] losses is the date of the foreclosure sales, as that is when [the policyholder] incurred covered losses.”

Id., 759 F.3d at 433-434.

Plaintiffs cite cases from other jurisdictions to support their argument that the policy dates are the dates for determining their losses. In *Citicorp Sav. v. Stewart Title Guar. Co.*, 840 F.2d 526 (1988), a 2-1 decision applying Illinois law, the majority found an ambiguity because the lender title insurance policy failed to provide a date of loss. The majority also noted that tender of a deed curing the title defect was not a substitute for the lender's financial loss due to a possible decline in property value. ("[D]amages are not payable in real estate, any more than they are payable in potatoes or colored beads." *Id.*, 840 F.2d at 530.) By contrast, payments in money for covered losses under the lender title insurance Policies were available in this case if Plaintiffs could show actual monetary loss or damage. The majority in *Citicorp Sav.* also noted that the land may have been devalued over time, a concern not present in this record, especially given the Plaintiff's right to seek a post-foreclosure claim for any indemnity against actual losses incurred, as South Carolina allowed in the *Preservation* case discussed in more detail below.

In another case from Illinois cited by Plaintiffs, *CitiMortgage, Inc. v. Absolute Title Servs.*, U.S. Dist. WL 1108249 (2012), the court relied on *Citicorp Sav. v. Stewart Title Guar. Co.*, to find ambiguity and denied the lender summary judgment. No finding of ambiguity exists in this case.

Plaintiffs also cite to *Equity Income Partners LP v. Chi. Title Ins. Co.*, 2012 U.S. Dist. LEXIS 126495 (D. Ariz., Sept. 6, 2012) (*see also* 2012 U.S. Dist. LEXIS 198059 (D. Ariz. November 13, 2013) for the subsequent decision on motion for reconsideration), a federal district court case from Arizona, ruling in favor of a lender who took the position that the date of loss should be the date of discovery of the defect, and not the date it foreclosed on the



property and obtained title through a full credit bid. That court cited *Karl v. Commonwealth Land Title Ins.*, then found, in relying on *Citicorp Sav. of Illinois v. Stewart Title Guar. Co.*, that the title insurer should bear the loss of any market decline by using the date of the policy issuance rather than the date of foreclosure, noting that ambiguities should be construed against the insurer. Again, no finding of ambiguity exists in this case.

Plaintiffs also rely on *Firstland Vill. Assocs. v. Lawyer's Title Ins. Co.*, 277 S.C. 184, 186, 284 S.E.2d 582, 583 (1981), which states: “Generally, title insurance operates to protect a purchaser or mortgagee against defects in or encumbrances on the title [that] are in existence at the time the insured takes title.” However, *Firstland* offers little guidance here. It involved an owner’s policy rather than a lender’s policy, and the Supreme Court denied the owner’s claim, holding that the policy did not insure against the defect in question. The case does not hold that the policy issuance date is the date of loss; rather, it confirms that the defect or encumbrance must exist at the time the policy is issued—a condition that is not disputed here. It does not address the date of loss issue.

Plaintiff’s reliance on *Chicago Title Insurance Co. v. 100 Investment Ltd. Partnership*, 355 F.3d 759 (4th Cir. 2004), is also unpersuasive because it does not address the date of loss issue or any other dispositive question in this case. *100 Investment*, applying Maryland law, involved an owner’s policy and turned on issues of warranty of title (or lack thereof) in subsequent conveyances from an insured owner’s title, as well as the scope of coverage for losses occurring during the policy period. The holding aligns with the reasoning outlined above regarding an owner incurring a covered loss and being entitled to make a claim. The court in *100 Investment* rejected a “claims-made” approach to owner’s policies, holding instead that an owner could pursue covered losses arising during the policy period even if the claim was filed later. That case primarily



addressed the insurer's duty to defend in litigation over title defects while the insured owned the property—issues not present here, which involves lender title insurance policies.

As noted, this case presents a novel question of first impression in South Carolina. At oral argument, counsel for all parties candidly acknowledged that the prevailing rule in most United States jurisdictions is that the date of loss under a lender's title insurance policy is the date of the foreclosure sale. In contrast, the minority view treats the date of loss as either the policy's issuance date or another point in time, such as when the title defect is first discovered. Having carefully considered all authorities submitted by counsel, the majority rule is found to be more persuasive and is adopted here. The majority rule is more convincing because it reflects the indemnity nature of a lender's title insurance policy rather than treating it as a guaranty. A lender's policy does not promise to eliminate the risks—or the value of those risks—posed by title defects outright; instead, it indemnifies the lender for actual, quantifiable loss resulting from such defects. Until the lender's security interest is impaired in a concrete way—such as through foreclosure or another forced sale that extinguishes or reduces the debt—there is no ascertainable loss to indemnify. Moreover, borrowers may continue to make payments despite title defects, preserving the lender's repayment stream and avoiding any real loss. By tying the date of loss to foreclosure or comparable events, the majority rule ensures that indemnity obligations are triggered only when an actual, measurable loss occurs.

C. The foreclosure of the second mortgage with a successful bid in excess of the amount due under the title policy resulted in no actual monetary loss or damage to the policyholder.

Defendant asserts that coverage under the Jericho State second policy was reduced to \$0 because the foreclosure sale price exceeded the amount due on the Jericho State note. The foreclosure brought \$9,000,000.00—reflecting Jericho State's own successful bid—while the



amount owed under the note was \$7,490,031.71. The South Carolina Supreme Court in *Preservation Capital Consultants, LLC v. First American Title Ins. Co.*, 406 S.C. 309, 751 S.E.2d 256 (2013) (cited by the Court of Appeals in this case), addressed this very issue of how coverage is determined under a lender's title policy when a note is paid through a foreclosure sale. There, the insured lender obtained a \$3,075,000.00 mortgage secured by three properties and insured with a policy face amount of \$3,075,000.00. One parcel was sold and partially released from the mortgage by agreement. Following default by the borrower, the mortgage on the second parcel was found to be defective, with the parcel having been sold to a third party in a sale that would have provided \$345,335.00 to the insured lender if the mortgage were valid. The insured lender foreclosed and purchased the remaining parcel with a credit bid of \$3,250,000.00 when the total debt outstanding was \$3,641,190.00.

The insured lender then filed a title insurance claim for the \$345,335.00 that it was unable to recover due to the title defect on the second parcel. Section 2(a) of the *Preservation Capital* title policy controlled and governed "situations in which the insured lender, after default, acquires all or part of the collateral via foreclosure." Section 2(c) of the title policy sets the determination for the amount of insurance¹:

(c) *Amount of Insurance*: The amount of insurance after the acquisition [shall not] exceed the least of:

- (i) the amount of insurance stated in Schedule A; [or]
- (ii) the amount of principal of the indebtedness secured by the insured mortgage as of Date of Policy, interest thereon, expenses of foreclosure, amounts advanced pursuant to the insured mortgage to assure compliance with laws or to protect the lien of the insured mortgage prior to the time of acquisition of the estate or interest in

¹ Section 2(c) of the Jericho State Policy is identical to Section 2(c) of the Preservation Capital title policy.



the land and secured thereby and reasonable amounts expended to prevent deterioration of improvements, ***but reduced by the amount of all payments made.***

Id. at 313, 751 S.E.2d at 258 (emphasis added). Applying these provisions, the South Carolina Supreme Court recognized that the amount of coverage was reduced under Section 2(c) by the winning bid amount at the foreclosure sale, but also that more remained due under the *Preservation Capital* note after the foreclosure sale—\$391,190.00.² Because the note was not paid in full through foreclosure, coverage remained for the insured lender's loss. *See id.* at 318, 751 S.E.2d at 261 ("coverage would be limited to \$452,731.48, as that amount is less than the \$3,075,000 policy limit.").

Preservation Capital also rejected an argument that payment of more than the *face amount* of the title policy under Section 9(b) reduced the coverage to zero. In rejecting this argument, the court noted, "an insured mortgagee's coverage should continue after he purchases the mortgaged property at foreclosure **provided there remains unpaid principal indebtedness.**" *Id.* at 319, 751 S.E.2d at 261 (citing *Hodas v. First American Title Ins. Co.*, 696 A.2d 1095, 1097–98 (Me. 1997) (emphasis added)).³ Accordingly, the Court determined the insured lender's loss was covered **where some unpaid principal indebtedness remained.**

Applying the *Preservation Capital* analysis of Section 2(c) here reduces the coverage

² The Court noted this amount "appreciated to \$452,731.48 by gaining interest from the date of foreclosure until the entry of judgment in this action." *Pres. Cap. Consultants, LLC*, 406 S.C. at 318, 751 S.E.2d at 260–61.

³ *Hodas* reached the same conclusion with respect to Condition 2(c):

After an insured mortgagee purchases the mortgaged premises at foreclosure, coverage continues ***provided there remains unpaid principal indebtedness.*** Coverage is limited, however, to the lesser of the outstanding indebtedness or the stated policy limit. *Hodas*, 696 A.2d at 1097–98 (emphasis added).

amount under the Policy to \$0 because, unlike the *Preservation Capital* foreclosure sale, the Jericho State foreclosure sale satisfied the debt in full. In this case, Section 2(c) of the Jericho State Policy states the amount of insurance after acquiring the Property via foreclosure shall not exceed the lesser of the \$4,263,888.00 policy limit or the amount of unpaid principal indebtedness secured by the Jericho State Mortgage, coupled with interest and expenses, but reduced by the amount of all payments made. Here, after Jericho State acquired the Property, the borrower no longer owed anything under the Jericho State Note, which was paid in full (\$9,000,000.00 foreclosure sale price vs. \$7,490,031.71 due under the note). Jericho State's coverage therefore was reduced to \$0 under Section 2(c) of the Jericho State Policy, consistent with *Preservation Capital*.

Although I previously found an issue of fact existed concerning this full payment defense, discovery conducted since the prior ruling revealed that was not the case. Jericho State admits to the amounts owed under the Jericho State Note and its payment at the foreclosure sale. *See* Exhibit G (Answers to Chicago Title's First Requests for Admission). There is no factual dispute that Jericho State bid \$9 million on a debt of \$7,490,031.71, and the record does not show the borrower owed anything more after the foreclosure sale.

Jericho State asserts that it purchased the Property subject to an \$18,000,000.00+ first mortgage, which it claims makes the equity less than the \$9,000,000.00 winning bid. However, the facts are clear that Jericho State paid \$9,000,000.00 for what it admits is a second-place lien, the lien position insured by Chicago Title and the lien position with which Jericho State started. The Jericho State Policy excluded the senior REL Mortgage, and Jericho State took the Jericho State second mortgage subject to the REL first mortgage. Accordingly, its \$9,000,000.00 winning bid reduced the coverage under the Jericho State Policy to \$0.



South Carolina public policy also supports the application of *Preservation Capital*. In South Carolina, “a plaintiff can have but one satisfaction of his debt.” *Ayers v. Guess*, 217 S.C. 233, 235, 60 S.E.2d 315, 315 (1950). Allowing Jericho State a recovery beyond the satisfaction of its note at the foreclosure would violate this principle. Additionally, South Carolina disfavors any activities or practices that have the effect of “chilling” the bidding at a foreclosure sale. *Ex parte Keller*, 185 S.C. 283, 292, 194 S.E. 15, 19 (1937) (courts should be “particularly jealous of the integrity of judicial sales” and all such judicial sales “must be made on free, fair and competitive bidding.”). Allowing Jericho State to bid more than the amount due on the Jericho State Note and still claim a loss under the Jericho State Policy would allow a hypothetical insured lender to bid one dollar more than a third party whose bid would otherwise satisfy the note in full and still claim a loss under a loan policy of title insurance. *Preservation Capital*, *Ayers*, and *Ex parte Keller* do not allow such an outcome.

Accordingly, the amount of insurance under the Jericho State Policy is reduced to \$0, and Chicago Title does not owe Jericho State anything under the Jericho State Policy.

D. The first mortgage no longer encumbers any of the Property.

Paragraph 9(c) of the Conditions and Stipulations (“Condition 9(c)”) in the Defendant’s Policies provides:

9. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY

(c) Payment in full by any person *or the voluntary satisfaction or release* of the insured mortgage shall terminate all liability of the Company except as provided in Section 2(a) of these Conditions and Stipulations.

(Emphasis added). Paragraph 2(a) of the Conditions and Stipulations (“Condition 2(a)”) in

the REL Policy provides:

2. CONTINUATION OF INSURANCE

(a) After Acquisition of Title This coverage of this policy shall continue in force as of Date of Policy in favor of (i) an insured who acquires all or any part of the estate or interest in the land by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the insured mortgage; (ii) a transferee of the estate or interest so acquired from an insured corporation, provided the transferee is the parent or wholly-owned subsidiary of the insured corporation, and their corporate successors by operation of law and not by purchase, subject to any rights or defenses the Company may have against any predecessor insurers; and (iii) any governmental agency or governmental instrumentality which acquires all or any part of the estate or interest pursuant to a contract of insurance or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage.

Conditions 9(c) and 2(a) are not ambiguous and should be given their plain meaning. The record is clear that as of December 22, 2023, Lynx Jericho had completely released the insured first Mortgage, which no longer encumbers any of the Property through three separate transactions involving partial releases related to what the parties refer to as the Western Remainder, Eastern Remainder, and Southern Remainder of the Property, and a completed condemnation action in which a jury determined the value of the taking. These transactions constitute "voluntary satisfaction[s] or release[s] of the insured mortgage," which "terminate all liability of the Company" under the plain language in the REL Policy. Accordingly, Defendant's liability under the REL Policy is terminated.

Also, the Condition 2(a) exception in Condition 9(c) does not apply to Lynx Jericho. Prior to the releases of the REL first mortgage, Lynx Jericho never foreclosed and therefore cannot be "an insured who acquires all or any part of the estate or interest in the land by foreclosure, [etc.]" or "a transferee of the estate or interest so acquired."

Defendant's counsel candidly admits that there do not appear to be any cases directly



on point in South Carolina but does cite cases from around the country in support of termination of coverage under a loan policy of title insurance after a voluntary, complete satisfaction or release of an insured mortgage. *See Joglor, LLC v. First Am. Title Ins. Co.*, 261 F. Supp. 3d 224, 233 (D.P.R. 2016) (construing an identical condition 9(c)); *RNT Holdings, LLC v. United Gen. Title Ins. Co.*, 179 Cal. Rptr. 3d 175, 184 (Ct. App. 2014) (construing materially similar policy language to Condition 9(c) of the Policies); *Morrison v. Wells Fargo Bank, N.A.*, 711 F. Supp. 2d 369, 389 (M.D. Pa. 2010) (construing an identical condition 9(c)); *First Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 823 N.E.2d 168, 175 (Ill. App. Ct. 2005), *aff'd*, 843 N.E.2d 327 (Ill. 2006) (construing an identical Condition 9(c)). I have reviewed those cases and find them to support the conclusion that the Defendant's liability under the REL Policy is terminated.

CONCLUSION

Defendant's liability under the first and second mortgage title policies are terminated, and Defendant does not owe Plaintiffs any amounts. Accordingly, Plaintiffs' motions for summary judgment are denied, and Defendant's second motion for summary judgment is granted.

IT IS SO ORDERED.


 Karl A. Folkens, Special Referee

Florence, South Carolina
July 7, 2025

The Supreme Court of South Carolina

Jericho State Capital Corp. of Florida, Plaintiff,

v.

Chicago Title Insurance Company, Defendant,

AND

Lynx Jericho Partners, LLC, Plaintiff,

v.

Chicago Title Insurance Company, Defendant,

Of which Jericho State Capital Corp. of Florida and Lynx
Jericho Partners, LLC, are the Respondents,

and Chicago Title Insurance Company is the Petitioner.

Appellate Case No. 2020-001478

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT

BY Patricia C. Howard
CLERK

Columbia, South Carolina
June 7, 2022

RECEIVED

Jun 07 2022

SC Court of Appeals

cc:

Demetri K. Koutrakos, Esquire

C. Scott Masel, Esquire

Fred B. Newby, Sr., Esquire

Louis H. Lang, Esquire

Harry Alwyn Dixon, Esquire

Mary M Caskey, Esquire

The Honorable Jenny Abbott Kitchings

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jericho State Capital Corp. of Florida, Plaintiff,

v.

Chicago Title Insurance Company, Defendant,

AND

Lynx Jericho Partners, LLC, Plaintiff,

v.

Chicago Title Insurance Company, Defendant,

Of whom Jericho State Capital Corp. of Florida and Lynx
Jericho Partners, LLC are the Appellants,

and Chicago Title Insurance Company is the Respondent.

Appellate Case No. 2017-001646

Appeal From Horry County
Karl A. Folkens, Special Referee

Opinion No. 5731
Heard February 6, 2020 – Filed June 10, 2020
Withdrawn, Substituted, and Refiled October 7, 2020

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Fred B. Newby, Sr., and C. Scott Masel, both of Newby
Sartip & Masel LLC, of Myrtle Beach, for Appellants.

Demetri K. Koutrakos, of Callison Tighe & Robinson,
LLC, of Columbia, for Respondent.

HILL, J.: We are presented with the question of whether a reservation of a right-of-way on an official county map—as authorized by section 6-7-1220 of the South Carolina Code (2004) and a county ordinance—constitutes a defect in or encumbrance on the title to the affected land or renders its title unmarketable so as to come within the coverage of two title insurance policies. Based on the specific circumstances of this case, we hold it does. We further conclude none of the policies' coverage exclusions apply. We therefore reverse the order of the special referee granting Chicago Title Insurance Company (Chicago Title) summary judgment as to Jericho State Capital Corporation of Florida's (Jericho's) and Lynx Jericho Partners, LLC's (Lynx Jericho's) (collectively Appellants) claims for breach of contract. We affirm, however, the order granting summary judgment to Chicago Title on Appellants' bad faith claim.

I. FACTS

South Carolina law allows counties and municipalities to "establish official maps to reserve future locations of any street, highway, or public utility rights-of-way, public building site or public space open for future public acquisition and to regulate structures or changes in land use in such rights-of-way, building sites or open spaces." § 6-7-1220. In 1999, the Horry County Council established an official map by passing Ordinance 107-98 or the Official Map Ordinance (Ordinance).

The Ordinance created the official map to "show the location of existing or proposed public streets, highways and utility right-of-ways, public building sites and public open spaces." The Ordinance further provided that after the official map was adopted, "no building, structure, or other improvement, shall hereinafter be erected, constructed, enlarged or placed within the reservation area . . . without prior exemption or exception" The purpose of the Ordinance and the official map was to provide for the public welfare and Horry County's financial convenience by "designating and reserving" such locations. The Ordinance established a procedure for landowners to appeal land use restrictions and provided a criminal penalty for violating the Ordinance. Later in 1999, Horry County created the index map, which included the proposed locations for segments of the Carolina Bays Parkway.

In 2002, Horry County Council adopted Ordinance 88-202 (the 2002 Amendment), which amended the official map to add "the right-of-way identified as Alternative 1 for the proposed Carolina Bays Parkway . . . as shown in the document entitled 'Carolina Bays Parkway, Phase V FEIS Conceptual Roadway Plans.'" The roadway plan was attached to the 2002 Amendment, and the amended index map showed the Parkway bisecting the property at issue in this appeal and crossing the intracoastal waterway. Both the Ordinance and the 2002 Amendment were recorded with the Register of Deeds and indexed under Horry County.

In 2006, Peachtree Properties of North Myrtle Beach, LLC (Peachtree) purchased 131.40 acres in Horry County (the Property), which it planned to develop as a residential subdivision along the waterway, from the McClam family for \$22,500,000. Peachtree financed the purchase with two mortgage loans, granting a first mortgage to R.E. Loans, LLC (REL) and a second mortgage to Jericho. Both REL and Jericho received title insurance from Chicago Title. The title insurance policies are printed on the 1992 standard form of the American Land Title Association and contain the following identical language and provisions:

SUBJECT TO THE EXCLUSIONS FROM
COVERAGE, THE EXCEPTIONS FROM COVERAGE
. . . AND THE CONDITIONS AND STIPULATIONS,
CHICAGO TITLE INSURANCE COMPANY . . .
insures, as of Date of Policy . . . against loss or damage . . .
sustained or incurred by the insured by reason of: . . .

2. Any defect in or lien or encumbrance on the title;
3. Unmarketability of the title

In 2007, Peachtree defaulted on its loans. Jericho foreclosed, successfully bid on the Property at sale, and received a master's deed subject to the REL mortgage. In 2009, the South Carolina Department of Transportation (SCDOT) filed an eminent domain action against Jericho to take 10.18 acres of the Property for the Carolina Bay Parkway. Meanwhile, for reasons not pertinent here, the REL mortgage was assigned to Lynx Jericho. In 2014, a jury awarded Jericho and Lynx Jericho \$2.1 million as just compensation for the taking. During the five-year condemnation litigation, Jericho and Lynx Jericho submitted title insurance claims to Chicago Title, which Chicago Title denied.

In response to the denial of coverage, Jericho and Lynx Jericho sued Chicago Title for breach of contract, breach of the covenant of good faith and fair dealing, and bad faith refusal to pay insurance benefits. The cases were consolidated and referred to the special referee, who heard arguments on the parties' cross motions for summary judgment and conducted the proceedings expertly. The special referee denied Appellants' motion for summary judgment and granted Chicago Title summary judgment, ruling: 1) the Ordinance did not create a defect or encumbrance on the Property; 2) the Ordinance did not make title to the Property unmarketable; 3) exclusions 1, 2 and 3(d) barred coverage; and 4) Chicago Title did not act in bad faith by contesting Appellants' claims. This appeal followed.

II. STANDARD OF REVIEW

We review grants of summary judgment using the same yardstick as the trial court. *Woodson v. DLI Props., LLC*, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014). We view the facts in the light most favorable to Appellants, the non-moving parties, and draw all reasonable inferences in their favor. *NationsBank v. Scott Farm*, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995). Chicago Title is entitled to summary judgment only if "there is no genuine issue as to any material fact". Rule 56(c), SCRPC. Summary judgment is a drastic remedy to be invoked cautiously and must be denied if Appellants demonstrate a scintilla of evidence in support of their claims. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

III. COVERAGE UNDER THE TITLE INSURANCE POLICIES

A. General considerations regarding title insurance policy coverage

Title insurance is designed to protect a real estate purchaser or mortgagee against defects in or encumbrances on the title; the purpose of title insurance is to "place the insured in the position he thought he occupied when the policy was issued." *Pres. Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 316, 751 S.E.2d 256, 260 (2013). "Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it." *Firstland Vill. Assocs. v. Lawyer's Title Ins. Co.*, 277 S.C. 184, 186, 284 S.E.2d 582, 583 (1981) (quoting *Nat'l Mortg. Corp. v. Am. Title Ins. Co.*, 261 S.E.2d 844, 847–48 (N.C. 1980)); *see also Loflin v. BMP Dev., LP*, 427 S.C. 580, 595–96, 832 S.E.2d 294, 302 (Ct. App. 2019). One court has well explained:

The sole object of title insurance is to cover possibilities of loss through defects that may cloud the title. . . . Some defects will be disclosed by a search of the public transfer records; others will be disclosed only by a physical examination or a survey of the property itself. Often the existence of title defects will depend upon legal doctrines and judicial interpretations of various applicable statutes. Since the average purchaser has neither the skill nor the means to discover or protect himself against the myriad of defects, he must rely upon an institution holding itself out as a title insurer.

United States v. City of Flint, 346 F. Supp. 1282, 1285 (E.D. Mich. 1972).

As a leading commentator notes:

[T]itle insurance policies usually cover risks arising from errors in title examination, some known defects, defects that would be disclosed by examination, and some undisclosed defects that would remain hidden even after competent examination of public records In that sense, title insurance is "all-risks" coverage, under which a loss must fall within the basic description of the covered peril—such as a "defect in or a lien or encumbrance on the title"—and not be within any explicit exclusions.

11A Maldonado et al., *Couch on Ins.* § 159:20 (3d ed. 2019) (footnotes omitted).

We interpret the language of title insurance policies like other contracts and enforce plain and unambiguous language as written, giving the words their common meaning. *Williams v. Gov't Ins. Co. (Geico)*, 409 S.C. 586, 594, 762 S.E.2d 705, 709 (2014). Whether coverage exists under an insurance policy is a matter of law. *Id.* at 593, 762 S.E.2d at 709. The insured bears the burden of proving its claim falls within the policy's coverage. *Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 103, 160 S.E.2d 523, 525 (1968).

B. Defect, lien, or encumbrance

The policies insure Appellants from damages incurred by any "defect in or lien or encumbrance on the title." Appellants assert the Ordinance caused a defect in or encumbrance on the title because it created a third-party interest in the Property in favor of the County, which burdened the land and depreciated its value. We agree.

The policies do not define the term "encumbrance," but we have. An early case, noting encumbrance was a catch-all term found in English conveyances, defined it as any weight on the land that lowers its value without conflicting with passing of the fee. *Grice v. Scarborough*, 29 S.C.L. (2 Speers) 649, 652–53 (1844). More recent decisions have said the same thing in different ways, defining an encumbrance as "a right or interest in the land granted 'which may subsist in third persons to the diminution in value of the estate although consistent with the passing of the fee.'" *Truck S., Inc. v. Patel*, 339 S.C. 40, 48, 528 S.E.2d 424, 428–29 (2000) (quoting *Martin v. Floyd*, 282 S.C. 47, 51, 317 S.E.2d 133, 136 (Ct. App. 1984)); *see also Pres. Capital Consultants, LLC*, 406 S.C. at 316, 751 S.E.2d at 259 ("[D]efects for which title insurance policies provide coverage may generally be defined as liens and encumbrances that result in a loss in the title's value."). An encumbrance is a burden on the land that is adverse to the landowner's interest and impairs the value of the land but does not defeat the owner's title. *Butler v. Butler*, 67 S.C. 211, 45 S.E. 184, 185 (1903); *see* 21 C.J.S. Covenants § 18 (2020) ("[A]n 'encumbrance' is any right or interest held by someone other than the grantee or grantor which diminishes the value of the estate but not so much that it leaves the grantee with no title at all. That is, an 'encumbrance,' within the meaning of a covenant against encumbrances, is any interest in a third person consistent with a title in fee in the grantee, if such outstanding interest injuriously affects the value of property or constitutes a burden or limitation upon the rights of the fee title holder." (footnotes omitted)).

The Ordinance described the location of the highway as a "right-of-way," and defined "right-of-way" as "land reserved . . . for a road." The Ordinance declared its intention to "reserve" future locations of highways and proscribed any use of the Property that would interfere with the County's future acquisition of the highway parcel, and the Ordinance and amended map showing the location of the proposed highway were publicly recorded. As Chicago Title argues, the Ordinance allowed affected property owners to appeal their property's inclusion on the map, but that proves Appellants' point that the Ordinance encumbered the Property.

Ordinances may regulate land use without encumbering title, but the Ordinance here went beyond regulating use and created a third-party interest in the property in favor of the County. The enabling statute separates the concept of right-of-way from land

use. See § 6-7-1220 (noting one purpose of official map is to "regulate structures or changes in land use in such rights-of-way"). We agree with Appellants that the Ordinance, including its provisions regarding the appeal procedures and penalties for violations, constituted an encumbrance within the meaning of the policy coverage. Although Chicago Title is correct that the Ordinance did not create a right-of-way, the policy coverage turns not on whether the Ordinance created a legal right-of-way but whether it created a defect or encumbrance.

We find the Ordinance similar to the acquisition map at issue in *Ascot Homes, Inc. v. Lawyers Mortgage & Title Co.*, 237 N.Y.S.2d 179, 180–81 (N.Y. Sup. Ct. 1962). There, a 1949 county map marked a strip of certain land for public acquisition. When Plaintiff purchased the land in 1960, he applied to the zoning authority for a building permit. The permit was denied because, without the marked strip, plaintiff's lot was not large enough to meet setback requirements. When plaintiff then tried to sell the land, a purchaser refused to close, citing the map. Plaintiff's title insurer denied his claim, pointing to the exclusion from coverage for "[z]oning restrictions or ordinances imposed by any governmental body." The court, however, held plaintiff's loss was covered because the acquisition map qualified as a lien or encumbrance not excepted by the policy.

Ascot Homes is cited in a standard title insurance law treatise. Palomar, *Title Insurance Law* §§ 5.9, 6.3, 6.9 (2020 ed.). It has also been analyzed in a work published by the drafter of the policy forms and language at issue here. Nielsen, *Title and Escrow Clams Guide* § 11.1.5 (American Land Title Association, 2020). The analysis describes the import of *Ascot Homes* in detail and contends the decision prompted a 1970 change in the standard title insurance policy language to allow coverage for eminent domain as long as the "notice of the exercise thereof" appeared in the public records as of the date of the policy (this same language appears in Exclusion 2 of the policy here, as we later discuss in section IV.B). Yet, as the author points out, the acquisition map in *Ascot Homes* "did not 'exercise' the condemnation power," so its relationship to eminent domain coverage is inapposite. *Id.* Like the map in *Ascot Homes*, the Ordinance here is a different creature than an eminent domain proceeding, but it is still a defect or encumbrance triggering coverage.

Chicago Title also argues the policies provide no coverage to Appellants because a title examination of the subject property would not have revealed the Ordinance or map. We can find no support for this position in the policy. The coverage the policy promises is not limited to what a title examination reveals. The policy does not

define a covered defect, lien, or encumbrance as something that can only exist if it resides in the chain of title.

According to Chicago Title, a ruling that the Ordinance constitutes a defect, lien, or encumbrance will saddle real estate lawyers and title abstractors with the risk of liability for title defects that cannot be found in the chain of title. We are confident real estate practitioners know how to draft explanations of and exceptions to their title opinions. And this appeal is not about the scope of title opinions but the scope of coverage of a title insurance policy. Chicago Title may wish to shift the risk of loss to real estate lawyers or others, but that is not where the policy here places it.

The special referee warned that if the map and Ordinance constituted a defect, lien, or encumbrance, the entire world of warranty deeds would be upended. We find no justification for such a dystopian view. When Appellants bought the Property, the sellers presumably had notice of the map and the Ordinance showing the county's plan to build a highway through the Property, for the Ordinance declared that a "letter of notification" of the public hearing would be sent to all "property owners whose property lies within an area to be reserved for public use." Whether the sellers had a duty to disclose this knowledge to Appellants—and whether, if they did not disclose it, their silence violated any warranties they gave in the deed—are not questions before us.

We conclude the Ordinance constituted a defect and an encumbrance. We therefore reverse the special referee's grant of summary judgment to Chicago Title as to this issue.

C. Unmarketability of title

The policies define unmarketability of title as "an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle . . . the insured mortgage to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title." This opaque definition—a model of circularity—is unenlightening. We are confident, though, that a purchaser who discovered a portion of the real estate he was about to buy purportedly in fee simple absolute had been reserved by ordinance in favor of a governmental right-of-way may be entitled to rescind the sale. "To be marketable, a title need not be flawless. Rather, a marketable title is one free from encumbrances and any reasonable doubt to its validity. It is a title which a reasonable purchaser, well-informed as to the facts and their legal significance, is ready and willing to accept." *Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993).

Delivery of marketable title requires title be free of not only defects and encumbrances but also the reasonable probability of litigation. *Sales Int'l Ltd. v. Black River Farms, Inc.*, 270 S.C. 391, 398, 242 S.E.2d 432, 435 (1978) (providing a "reasonable probability of litigation" renders title unmarketable). The Ordinance created a reasonable probability of litigation concerning the title because the right-of-way was reserved for acquisition, making future condemnation reasonably probable.

The Ordinance differs from land use and zoning regulations, which can restrict development and impose an economic burden on the owner but do not create a third-party interest in property. *See McMaster v. Strickland*, 305 S.C. 527, 530, 409 S.E.2d 440, 442 (Ct. App. 1991) (holding wetlands designation did not render title unmarketable); *Patel*, 339 S.C. at 49, 528 S.E.2d at 429 ("Because the wetland designation does not render the title unmarketable, Patel cannot rescind the contract based upon an encumbrance."); *Martin*, 282 S.C. at 52, 317 S.E.2d at 136 ("While marsh or water might be a burden upon property, it is certainly not a lien, easement, or a right existing in a third party."). We recognize the Ordinance resembled zoning and other land use tools, given it was to be enforced by the zoning administrator and the enabling statute described the official maps as "instruments of land use control." § 6-7-1220. In substance, though, the Ordinance created a third party interest in the property and is so foreign from typical land use measures that there is no genuine issue of material fact that it rendered Appellant's title unmarketable.

A marketable title is one free from doubt and any reasonable threat of litigation. Unmarketability cannot be based on just any doubt or defect, for almost any title can be flyspecked. But if the doubt is an objectively reasonable one concerning a material defect, then the title is unmarketable. A material defect is one that interferes or conflicts with the rights and incidents of title—the insured's fee simple absolute's "bundle of rights"—to the extent that an ordinary and prudent purchaser would not buy the title, or only buy it at a discount reflecting the defect. 1 Palomar, *Title Ins. Law* § 5.7 (2019 ed.). This meshes with the policy definition of marketability, which explains coverage extends to any "alleged or apparent" matter affecting title.

Chicago Title argues the Ordinance did not affect marketability of the title because it only regulates use of the Property. We conclude, however, that the Ordinance interferes with the insured's title because it limits the rights and incidents of ownership. It is true that matters that affect only the use of land are not title matters, but it does not follow that a matter that affects use cannot also affect title. *Id.* No one would contend, for example, that a covenant restricting use does not also affect title and, therefore, marketability. Because the Ordinance created an interest in the land by reserving a right-of-way and restricting use of the reserved land, we conclude

it diminished the owner's bundle of rights and, consequently, affected title. And the diminishment was enough to cause a reasonable buyer to decline or discount a sale for a price less than what an unclouded title would demand on the market.

There is no factual dispute the Ordinance created a reasonable probability of litigation, thereby making the title unmarketable as a matter of law. The Ordinance, which, again, was publicly recorded, reserved the future site of the highway and took steps to minimize the County's future acquisition costs. Although we agree with Chicago Title that in general all landowners are at risk of eminent domain proceedings at any given time, the County's intent and preliminary steps set forth in the Ordinance foreshadowed a reasonable probability of condemnation. *Black River Farms, Inc.*, 270 S.C. at 398, 242 S.E.2d at 435 (mere possibility or remote probability of litigation is not sufficient to make title unmarketable). Therefore, we hold the Ordinance rendered Appellants' title unmarketable and reverse the special referee's grant of summary judgment to Chicago Title.

IV. EXCLUSIONS FROM COVERAGE

In deciding whether a policy exclusion bars coverage, the burden of proof flips: the insurer must prove the exclusion applies. *Owners Ins. Co. v. Clayton*, 364 S.C.555, 560, 614 S.E.2d 611, 614 (2005) ("Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability.").

A. Exclusion 1

In relevant part, Exclusion 1 bars coverage for losses arising by reason of:

Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use or enjoyment of the land

In granting Chicago Title summary judgment, the special referee ruled Exclusion 1 excluded coverage because the Ordinance merely affected the use of the land. As we have just discussed, the Ordinance related to and affected the title of the land, not just its use. Exclusion 1 therefore does not apply as a matter of law. We reverse the special referee's grant of summary judgment to Chicago Title as to this issue.

B. Exclusion 2

Exclusion 2 bars coverage for losses arising by reason of:

Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to the Date of Policy which would be binding on the rights of a purchaser for value without knowledge.

Neither Appellants nor Chicago Title claim the Ordinance constitutes an eminent domain action, and Appellants are not seeking coverage for the 2009 condemnation action, which began after the effective date of the policies. The special referee noted the exclusive procedure for eminent domain in this state is the Eminent Domain Procedure Act, S.C. Code Ann. §§ 28-2-10 to -510 (2007 & Supp. 2018). But this misses the mark. Appellants are not seeking recovery of loss for the 2009 condemnation action but for loss the Ordinance caused to the value of their title when they took it in 2007. Appellants contend these losses exceed and are different in kind from those sought in the condemnation action. Therefore, Exclusion 2 does not apply, and the special referee erred in granting Chicago Title summary judgment based on Exclusion 2.

Chicago Title maintains that if the Ordinance constitutes a "defect, lien, or encumbrance" then it necessarily also constituted a taking for which Exclusion 2 excludes coverage. We see several flaws in this logic, the fundamental one being the false equivalency between an encumbrance and a taking. We doubt Chicago Title means that every encumbrance is also a taking, but that is the cul-de-sac where its argument leads.

The issue of whether an Ordinance reserving of a right of way on an official county map adopted pursuant to § 6-7-1220 constitutes a taking has not been decided in South Carolina and is not before us now. The special referee did not rule on the issue. Neither Appellant nor Chicago Title filed a motion to reconsider requesting the Special Referee to make such a ruling, nor have they appealed on this ground. Accordingly, this issue is not preserved for our review. *See Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.").

C. Exclusion 3(d)

Exclusion 3(d) excludes coverage for "[d]efects, liens, encumbrances, adverse claims or other matters . . . attaching or created subsequent to Date of the Policy." The Ordinance and the 2002 Amendment were filed years before the effective date

of the policies, and therefore clouded the title as of the Date of the Policy. The special referee therefore erred in finding this exclusion applied.

Parties to title insurance contracts are free, within the bounds of public policy, to allocate risks as they see fit. Chicago Title's inability to pigeonhole this unique Ordinance into an exclusion to coverage is unsurprising. Real estate investors buy title insurance to protect against such unforeseen "off the record" risks. Old soldiers say it is the bullet you never hear that kills you, and the fundamental idea behind title insurance is to cover rather than exclude unforeseen and unknown risks; otherwise, title insurance would not provide the peace of mind it touts.

V. BAD FAITH

The special referee ruled Chicago Title had a reasonable, good faith basis for contesting Appellants' claims. We agree.

Appellants' bad faith cause of action fails because they did not demonstrate Chicago Title acted unreasonably in denying Appellants' claims. *See Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 359, 415 S.E.2d 393, 396–97 (1992) ("The elements of a cause of action for bad faith refusal to pay first party benefits under a contract of insurance are: (1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured."). The unusual nature of the Ordinance presented close policy interpretation issues. Chicago Title had a reasonable basis for denying the claims, and we affirm summary judgment to them as to this issue. *BMW of N. Am., LLC v. Complete Auto Recon Servs., Inc.*, 399 S.C. 444, 453, 731 S.E.2d 902, 907 (Ct. App. 2012) ("[W]here an insurer has a reasonable ground for contesting a claim, there is no bad faith.").

VI. CONCLUSION

Accordingly, we affirm the special referee's grant of summary judgment to Chicago Title on Appellants' cause of action for bad faith, but we reverse the grant of summary judgment to Chicago Title on Appellants' remaining claims and remand to the special referee for proceedings consistent with this opinion. Appellants have not appealed, and we therefore do not address, the grant of summary judgment to Chicago Title on Appellants' breach of covenant of good faith and fair dealing claim.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WILLIAMS and KONDUROS, JJ., concur.

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Jericho State Capital Corp. of Florida,)
Plaintiff,)
v.)
Chicago Title Insurance Company,)
Defendant.)

C/A: 2013-CP-26-5530

Lynx Jericho Partners, LLC,)
Plaintiff,)
v.)
Chicago Title Insurance Company,)
Defendant.)

C/A: 2015-CP-26-1084
(Consolidated with the above case)

ORDER ADDRESSING MOTIONS FOR SUMMARY JUDGMENT

(Ending Action)

This matter is before me as Special Referee to make appropriate findings of fact and conclusions of law with the authority to enter a final judgment in these cases pursuant to the terms of the Consent Order of Reference entered February 13, 2015. A hearing was held on January 28, 2017, at Folkens Law Firm, P.A., Florence, South Carolina. The parties appeared with their respective counsel of record. Based on the entire record before me, I make the following findings and conclusions:

The cases have been consolidated. Plaintiffs Jericho State Capital Corp. of Florida (herein "Jericho State") and Lynx Jericho Partners, LLC (herein "Lynx Jericho") have filed a motion for summary judgment as to liability only. Defendant Chicago Title Insurance Company (herein

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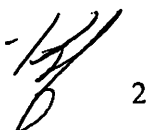
“Chicago Title”) has filed a motion for summary judgment as to liability and damages. Chicago Title filed an initial motion for summary judgment prior to these cases being consolidated. Later, a consolidated motion for summary judgment amended the originally filed motion.

Summary judgment may only be granted when “the pleadings [and] depositions . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c), SCRCP; *Lanham v. Blue Cross & Blue Shield of South Carolina, Inc.*, 349 S.C. 356, 361-62, 563 S.E.2d 331, 333 (2002) (when ruling on a motion for summary judgment, “the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party.”).

Many of the facts are not in dispute. As to the disputed facts, I have viewed those facts and the inferences which can be reasonably drawn therefrom in the light most favorable to the opposing party to each party’s respective motion for summary judgment. Although I acknowledge that with cross-motions for summary judgment this process can be rather convoluted, it must be done in the absence of a stipulation from the parties that I apply a preponderance of the evidence standard.

The subject property is approximately 131.40 acres located in Socastee Township, Horry County, South Carolina (“the Property”). The Property borders the Intracoastal Waterway. The McClam family owned the Property for decades until it sold the Property in July 2006.

Plaintiffs are two mortgagees insured under loan policies of title insurance issued by Chicago Title in 2006. The policies insure defects in the title which may have been missed by a title examination, omitted from the public record or arise by fraud or forgery, but also exclude, among other matters, zoning laws, ordinances, regulations, and eminent domain. Each claimed exclusion also has at least one exception.



TIMELINE

On July 2, 2002, the Horry County Council adopted Ordinance 88-202 ("the Ordinance"), which amended the official map of Horry County to show the future locations of a proposed highway to provide opportunities for Horry County or other governmental entities to purchase property and to reduce acquisition costs. The Ordinance added to the official map "the right-of-way identified as Alternative 1 for the proposed Carolina Bays Parkway from Highway 501 to Highway 17 By-pass as shown in the document entitled Carolina Bays Parkway, Phase V FEIS Conceptual Roadway Plans." The conceptual roadway plan was attached to the Ordinance.

The Ordinance did not identify the properties affected by the possible future construction of the Carolina Bay Parkway, nor did it contain a list of property owners who may have been affected in the future if the proposed Parkway was actually constructed. The conceptual roadway plan attached to the Ordinance also did not identify the property that may be affected in the future by the name of the owner or by tax map number. The McClam family, owners of the Property at that time, were not mentioned in the Ordinance or in the attached conceptual plan.

On July 9, 2002, the Ordinance was recorded with the Horry County Register of Deeds. It was indexed under the name "Horry County," but was not indexed under the names of the property owners who may be affected by the possible future construction of the Carolina Bays Parkway or under the names of any McClam family members who owned the Property on the date the Ordinance was recorded. Although the Ordinance states "the construction of The Carolina Bays Parkway from Highway 501 to Highway 17 By-pass will occur . . .", no condemnation action was filed at that time. One searching title to the properties affected would not find the Ordinance unless the person had prior knowledge of the Ordinance or checked every filed document sequentially in the Register of Deeds, a patently unrealistic endeavor.

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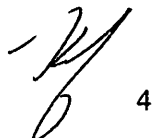
In July 2006, Jeffrey Shoup and Tom Hix through their company, Peachtree Properties of North Myrtle Beach, LLC ("Peachtree") purchased the Property from the McClam family for \$22,500,000. They intended to develop the land as a large residential complex with beautiful views and access to the Intracoastal Waterway. To finance its purchase of the Property, Peachtree obtained mortgage loans from R.E. Loans, LLC ("REL") and Jericho State Capital Corp. of Florida ("Jericho State"). Peachtree gave an \$18,520,000.00 first mortgage covering the Property to REL ("REL Mortgage"). Chicago Title issued a loan policy of title insurance to REL. The policy date is July 25, 2006, and the insured amount is \$17,071,873.33 ("REL Policy").

Peachtree also gave a \$4,263,888.00 second mortgage covering the Property to Jericho State ("Jericho State Mortgage"). Chicago Title issued a loan policy of title insurance to Jericho State. The policy date is also July 25, 2006, and the insured amount is \$4,263,888.00 ("Jericho State Policy"). The Jericho State Policy and the REL Policy will be collectively referred to at times as "the Policies."

Prior to the closing, Jericho State's attorney provided Peachtree's attorney with a closing checklist. One item required "[s]atisfactory resolution of the determination by municipality not to build a bridge." On July 17, 2006, Peachtree's attorney asked Jericho State and its attorneys to remove that item from the checklist. The item was then removed from the closing checklist.

Another item on the checklist was the requested receipt of a zoning verification letter. On July 19, 2006, Peachtree's attorney sent to Jericho State's attorney a zoning verification letter stating the Property is "currently zoned R-1 on the Horry County Zoning Maps." The zoning verification letter said nothing about a planned highway or any restriction from use.

On May 15, 2007, Horry County Council adopted ordinance 76-07, which rezoned the Property as the Peachtree Plantation Planned Development District (the "PDD Ordinance"). The



PDD Ordinance approved development of the Property as a mixed-use development with numerous residential parcels. The PDD Ordinance stated it was adopted based on an application submitted by Peachtree and that Peachtree agreed to donate part of the Property to Horry County:

The property owner *has agreed to donate* to Horry County at no cost, property sufficient to construct that portion of the 300 ft. wide Highway 31 (Carolina Bays Parkway) right-of-way that traverse the property in issue. *The property will be conveyed* to Horry County by general warranty deed, free of all encumbrances within 120 days of third reading of this ordinance. (Emphasis added.)

The PDD Ordinance set forth other agreements between Horry County and Peachtree about the land Peachtree agreed to donate and convey (the "Parkway Parcel"). The PDD Ordinance was recorded May 17, 2007.

On June 8, 2007, Jericho State filed a foreclosure action seeking to foreclose the Jericho State Mortgage and a mortgage it held on other property given by T & J Development of North Myrtle Beach. A foreclosure hearing was held on October 30, 2007, at which counsel for Jericho State testified as follows:

[W]e have conducted a title examination of the public records maintained by Horry County pertaining to the Defendants and to the mortgaged property, *and we find no other parties holding or claiming any interest of record* in and to any of [the Property] . . . as described in the [Jericho State] Mortgage . . . We therefore advise the Court that the [Jericho State] Mortgage is and remains a valid second mortgage lien upon the Peachtree Property . . . subject only to the . . . interests of the [REL Mortgage]. (Emphasis added.)

The court entered a foreclosure order on November 7, 2007, ordering the Property be sold subject to the REL Mortgage and finding \$7,490,031.71 was due under the note secured by the Jericho State Mortgage. Jericho State was the successful bidder with a bid of \$9,000,000, a bid exceeding the amount due under the note. Jericho State received a master's deed for the Property recorded February 26, 2008, resulting in Jericho State owning fee simple title to the Property subject to the REL Mortgage which at that time had a balance of approximately \$18,918,047.50.

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By letter dated February 26, 2009, Jericho State submitted a claim to Chicago Title “. . . due to the taking/condemnation of the Property in question pursuant to, amongst other documentation, the Ordinance . . . which Ordinance was not reflected as a title exception in the Loan Policy”

On October 12, 2009, Jericho State filed with the Horry County Court of Common Pleas a verified complaint against Horry County and the SCDOT, docket number 2009-CP-26-9968, seeking an order finding the PDD Ordinance was not binding, rescinding the rezoning granted by the PDD Ordinance, and terminating the obligation to donate the Parkway Parcel (“Zoning Rescission Action”). Exhibit C attached to that verified complaint, the agreement to construct and fund the applicable part of the Carolina Bays Parkway, was entered into by and between Horry County and the SCDOT on June 20, 2007, almost one year after the Policies were issued.

Jericho State’s February 26, 2009, claim was denied by Chicago Title by letter dated December 3, 2009. The claim was denied based on Exclusion 1(a) and noted that a proof of loss had not been provided.

On December 15, 2009, three years after the policies were issued, an eminent domain case (“Condemnation Action”) was filed by the South Carolina Department of Transportation regarding the proposed highway. The statutorily required tender of payment was made. SCDOT alleged Jericho State was the owner of the Property and condemned 10.18 acres of the Property—the Parkway Parcel—for highway purposes, as part of the Carolina Bays Parkway project. The SCDOT further alleged “[t]he property sought herein is to be acquired for public purposes, more particularly for the construction of a section of SC Route 31 (Carolina Bays Parkway).” During the course of the Condemnation Action, Jericho State admitted “[t]hat the date of taking for valuation purposes is December 15, 2009.” No attempt was made by Jericho State or Lynx Jericho



to seek valuation of the Property on a date earlier than December 15, 2009 based on the Ordinance or on an inverse condemnation theory. Jericho State and Lynx Jericho claimed the condemnation of the Parkway Parcel resulted in a \$4,010,000 loss. The SCDOT argued the loss totaled \$998,000.

On March 18, 2010, the parties dismissed the Zoning Rescission Action. The Stipulation of Dismissal stated that “[i]nsofar as the South Carolina Department of Transportation, as agent for Horry County, South Carolina, has filed an eminent domain action bearing Civil Action Number 2009-CP-26-11956, and which action resolves the issues raised in the present declaratory judgment matter,” Jericho State desired to dismiss the Zoning Rescission Action.

On July 29, 2011, Jericho State filed an action against Chicago Title asserting causes of action entitled Breach of Contract-Recovery of Insurance Benefits; Breach of Contract-Breach of the Covenant of Good Faith and Fair Dealing; and Tortious Bad Faith Refusal to Pay Insurance Benefits and Bad Faith Failure to Investigate an Insurance Claim. Chicago Title filed its answer on February 16, 2012, denying the material allegations of the complaint and asserting defenses therein.

REL assigned the REL Mortgage to Mortgage Fund ‘08, LLC by an instrument recorded May 16, 2008. Mortgage Fund ‘08, LLC filed for bankruptcy in 2011. With approval of the bankruptcy court in 2012, the REL Mortgage was assigned to Susan L. Uecker as trustee of the Mortgage Fund ‘08 Liquidating Trust (the “Liquidating Trust”). The Liquidating Trust assigned the REL Mortgage to Lynx Jericho by instrument recorded May 22, 2013.

Lynx Jericho submitted a claim on the Lynx Jericho Policy by letter dated June 21, 2013. Chicago Title requested documents from Lynx Jericho as part of its investigation. Lynx Jericho provided documents to Chicago Title in December 2014.



In December 5, 2014, a jury awarded Plaintiffs \$2,100,000 in the Condemnation Action as just compensation for the 2009 partial taking of the subject property.

Chicago Title denied the Lynx Jericho Policy claim on January 30, 2015.

On February 12, 2015, Lynx Jericho filed an action against Chicago Title asserting the same causes of action that Jericho State asserted in its action. Chicago Title filed its answer on May 13, 2015, denying the material allegations of the complaint and asserting various defenses.

TITLE INSURANCE

Insurance policies are subject to the general rules of contract construction. *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 514 S.E.2d 327, 330 (1999). When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. *Id.* The court must enforce, not write, contracts of insurance and must give policy language its plain, ordinary, and popular meaning. *Id.*

An insurer's obligation is defined by the terms of the policy and cannot be enlarged by judicial construction. *S.C. Ins. Co. v. White*, 301 S.C. 133, 390 S.E.2d 471, 474 (Ct. App. 1990). "[I]f the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend coverage that was never intended by the parties." *S.C. Farm Bureau Mut. Ins. Co. v. Wilson*, 344 S.C. 525, 544 S.E.2d 848, 850 (Ct. App. 2001). Courts are not authorized to pervert policy language or to exercise inventive powers to create an ambiguity where none exists. *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000).

Insurance contracts are construed against the drafter, and in favor of coverage for the insured. *General Acc. Ins. Co. v. Safeco Ins. Companies*, 314 S.C. 63, 443 S.E. 2d 813 (Ct. App. 1994). Insurance policy exclusions are construed "most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability." *Owners Ins. Co. v.*

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Clayton, 364 S.C. 555, 614 S.E.2d 611, 614 (2005). The rule that insurance contracts must be construed against the insurer applies to title insurance contracts. *First Carolinas Joint Stock Land Bank of Columbia v. New York Title*, 172 S.C. 435, 174 S.E. 402 (1934).

“The rule of strict construction against the insurer does not apply where the language used in the policy is so plain and unambiguous as to leave no room for construction. Nor does the rule of strict construction authorize a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exists.” *S.S. Newell & Co. v. American Mutual Liability Ins. Co.*, 199 S.C. 325, 19 S.E.2d 463, 466 (1942).

Title insurance “is designed to save (the insured) harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it.” *Firstland Village Associates v. Lawyer’s Title Insurance Co.*, 277 S.C.184, 284 S.E.2d 582 (1981). The purpose of title insurance is to place the insured in the position that he thought he occupied when the policy was first issued. *Whitlock v. Steward Title*, 399 S.C. 610 (2012).

The insuring provisions of the Policies at issue are

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS, AND STIPULATIONS, CHICAGO TITLE INSURANCE COMPANY, a Missouri corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

* * * *

2. Any defect in or lien or encumbrance on the title;

3. Unmarketability of the title;

* * * *

Plaintiffs contend the Ordinance falls under insuring provision 2, “[a]ny defect in or lien or encumbrance on the title,” and provision 3, “[u]nmarketability of the title.” Plaintiffs, as the



insureds, have the burden of showing their claims fall within coverage of the insurance contracts. *Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 160 S.E.2d 523, 525 (1968).

Title insurance policies indemnify for loss related to title to the property, not physical defects or government regulations which inhibit the use of property. R. Cunningham, W. Stoebeuck & D. Whitman, *The Law of Property* § 11.14 at 274 (1984); 11 COUCH ON INSURANCE § 159:48 (“a title insurer does not make any representation or assume any liability with respect to whether the insured will be able to procure government permits authorizing him or her to use the land in any particular manner; title insurance policy provides protection against defects in, or liens or encumbrances on, title, rather than against governmentally imposed impediments on use of land or for resulting impairments in the value of the land.”).

The Policies define “unmarketability of title” as:

an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A or the insured mortgage to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.

OFFICIAL MAP

An official map is “a map or maps showing the location of existing or proposed public street, highway, and public utility rights-of-way, public building sites and public open spaces adopted by the governing authority of a municipality or county.” S.C. Code Ann. §6-7-1210. Counties and municipalities “establish official maps to reserve future locations of any street, highway, or public utility rights-of-way, public building site or public open space for future public acquisition and to regulate structures or changes in land use in such rights-of-way, building sites or open spaces.” S.C. Code Ann. §6-7-1220.

The adoption of an official map is a land planning tool available to counties and municipalities. The Ordinance directly concerns the official map of Horry County, as it amends



the official map to show the future location of a proposed highway and to provide opportunities for Horry County or other governmental entities to purchase property and to reduce acquisition costs. The Ordinance is administered by the zoning administrator, and the statutes authorizing the adoption of an official map, which are cited in the Ordinance, state an official map is "one of the several instruments of land use control authorized by this chapter." Ordinance 107-98 § 6.0. It is clear the Ordinance by its very terms is a land planning tool.

TITLE, MARKETABILITY, BURDENS & ENCUMBRANCES

Title and marketability are concepts distinct from land use and value. *McMaster v. Strickland*, 305 S.C. 527, 409 S.E.2d 440 (Ct. App. 1991). Even though a "purchaser may not be able to use the property for the purpose for which he sought, such does not mean the sellers cannot deliver marketable title." *Id.* at 530, 409 S.E.2d at 442.

South Carolina defines an "encumbrance" as a third party's "right to or interest in land" resulting in diminution in value and generally includes liens, easements and other claims. *Martin v. Floyd*, 282 S.C. 47, 317 S.E.2d 133 (Ct. App. 1984); *Truck South, Inc. v. Patel*, 339 S.C. 40, 528 S.E.2d 424 (2000). A "burden on the property" does not always constitute a lien, easement or other encumbrance. *Martin* and *Truck South, Inc.* "The fact that property may be useless or may be put to only limited use does not mean that the property is not marketable." *Stanley v. Atlantic Title Ins. Co.*, 377 S.C. 405, 411, 661 S.E.2d 62, 65 (2008). Chicago Title cites a number of cases from other jurisdictions which support the contention that ordinances and resolutions that regulate the use of property do not affect title. I find these cases persuasive and consistent with the holding in *Stanley*.



DECISION

After reviewing the entire record and considering the able arguments of counsel, and in viewing the evidence in the light most favorable to the Plaintiffs, I conclude that on the date the Policies were issued, Peachtree, the owner, and the two mortgagees had the only claims, liens, or interest in and to the Property, subject only to a utility easement. While the Ordinance may have potentially frustrated or made it difficult to develop certain parts of the Property, the Ordinance, like other land planning tools, only affected the use of the Property, not its title. The Ordinance is not an encumbrance or defect, and does not render title unmarketable. The Policies provide protection against defects in, or liens or encumbrances on, title not otherwise noted in the policy, but there are no coverages for governmentally imposed impediments on the use of the land or for impairments in the value of the land.

I reject Plaintiffs' contention that the purpose of the Ordinance is not to regulate use but rather to designate a right-of-way and transfer title. As noted above, at the October 30, 2007, foreclosure hearing, counsel for Jericho State testified that after conducting a title examination, he could find no other parties holding or claiming any interest of record in and to any of the Property. He was right. The Jericho State Mortgage was a valid mortgage, subject only to the REL Mortgage (and a recorded utility easement over the Property in favor of Grand Strand Water and Sewer Authority which was listed as an exception on Schedule B to the Policies).

A contrary conclusion could potentially wreak havoc in the title insurance industry. The Official Map is not indexed under property owner names. It does not appear in the chain of title. A title abstractor and real estate lawyer would have to discern all potential ramifications of a county's expression of future plans as laid out in the Official Map if the map were deemed an encumbrance upon all affected properties. The cost of property transactions, including the



attendant cost of title insurance, would skyrocket. Economic development would be chilled as the State, counties and municipalities would be subject to inverse condemnation actions by simply expressing a desire to one day consider acquiring rights-of-way to various tracts. These are the types of concerns the South Carolina Supreme Court had in *Kiriakides v. The School District of Greenville County*, 382 S.C. 8, 675 S.E.2d 439 (2009).

The master additionally observed his conclusion was supported by public policy, namely, the construction of public projects would be severely impeded if the government incurred liability for inverse condemnation as a result of merely announcing plans to condemn, citing *National By-Products, Inc. v. City of Little Rock*, 323 Ark. 619, 916 S.W.2d 745, 749 (1996) (“Construction of public-works projects would be severely impeded if the government could incur inverse condemnation liability merely by announcing plans to condemn property in the future.”); *Santini v. Connecticut Hazardous Waste Management Service*, 251 Conn. 121, 739 A.2d 680, 691 (1999) (“[I]f the government were to be considered as having accomplished a compensable taking as a result of mere planning that, because of its publicity, harmed the value of property, public planning would be discouraged....”); *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 321 N.Y.S.2d 345, 269 N.E.2d 895, 903-04 (1971) (stating the threat of condemnation generally does not constitute a taking and any changes in value are incidents of ownership). The master stated that Kiriakides’s arguments, “if accepted, would have a devastating impact on government and its citizens.”

675 S.E.2d at 443.

Granted, a title insurer could affirmatively and unequivocally exclude any matters set forth on an official map. But a conclusion that the Ordinance is not to regulate use but rather to designate a right-of-way and transfer title would conceivably impact South Carolina law on general warranty deeds warranting property to be free of encumbrances, even when title insurance is not involved.

I also reject Plaintiffs’ contention that the Ordinance is a public record under *Lyons v. Fidelity Nat. Title Ins. Co.*, 415 S.C. 115, 781 S.E.2d 126 (Ct. App. 2015). In *Lyons*, the Court of Appeals found an Horry County no-build resolution to be a public record. The *Lyons* opinion was vacated by Order of the Court of Appeals dated August 26, 2016, and is not binding authority.



Plaintiffs also rely on *Whitlock v. Stewart Title Guar. Co.*, 2011 WL 4549367 (D.S.C. Oct. 3, 2011), an unpublished opinion of the United States District Court for the District of South Carolina, which is easily distinguishable. In *Whitlock*, United States District Court Judge R. Bryan Harwell specifically found the title policy in that case as providing “broad coverage for title problems caused by zoning laws and for laws and regulations concerning land use and improvements on the land.” *Id.* at page 6. Judge Harwell pointed out that “. . . the insurance company was the drafter of the contract. It could have easily defined the term ‘public record’ as not covering zoning laws.” *Id.*

Unlike the Stewart Title policy in *Whitlock*, the Policies in this case in Exclusion 1 specifically and broadly **exclude** various forms of governmental regulation of the use of property, including “any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land” (Underline added.)

Chicago Title bears the burden of establishing an exclusion’s applicability and the exclusion must be construed liberally in favor of Plaintiffs and strictly against Chicago Title. *See, Whitlock v. Stewart Title*, 399 S.C. 610 (2012) (the South Carolina Supreme Court decision answering a certified question from Judge Harwell in the *Whitlock* case above); *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005); *First Carolinas Joint Stock Land Bank of Columbia v. New York Title*, 172 S.C. 435 (1934).

Chicago Title has met its burden of establishing exclusions to coverage. Plaintiffs’ claimed losses are excluded by Exclusion 1 which removes coverage against various forms of governmental regulation of the use of property, and by Exclusion 2 which eliminates coverage for condemnation or eminent domain, and other exclusions.



As noted above, Exclusion 1 is clear and unambiguous as it specifically and broadly excludes any ordinance relating to the use of land. Under the facts of this case, a right-of-way could not have existed and title to that right-of-way could not have vested in any governmental entity until a condemnation action was filed. I know of no legal authority which establishes a right-of-way by changes to an Official Map.

I also reject the contention that the exception to Exclusion 1 applies. Exclusion 1(a) contains an exception "to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy." If a right-of-way had already been established, there would have been no need to condemn the Parkway Parcel or to provide the County with the ability to grant permits for construction. Neither the Ordinance itself, nor any amendment to the Ordinance, is a notice of a violation or alleged violation of the Ordinance. There is nothing in the record to suggest that any enforcement proceeding was ever initiated for any alleged violation.

I also reject the contention that the exception to Exclusion 2 applies. The eminent domain exclusion contains an exception when "notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which occurred prior to the Date of Policy which would be binding on the rights of a purchaser for value without knowledge."

The South Carolina Eminent Domain Procedure Act (the "Act") is the exclusive manner by which South Carolina governmental entities exercise their power of eminent domain. The Act provides that a "condemnor may commence an action under this chapter for the acquisition of an interest in any real property necessary for any public purpose." S.C. Code Ann. § 28-2-60. "The provisions of [the Act] shall constitute the exclusive procedure whereby condemnation may be



undertaken in [South Carolina].” *Id.* The Parkway Parcel was condemned on December 15, 2009, when the Condemnation Action was filed, not before. The Condemnation Action specifically stated December 15, 2009, as the date of the taking, and no one objected to that legal position.

Also, the condemnation notice must contain certain information in order to be effective to cause a transfer of title. A condemnation notice must be captioned “CONDEMNATION NOTICE, TENDER OF PAYMENT,” must designate the condemning authority and all of the owners of the land being condemned, contain a legal description for the land being taken, state the basis for the right to take the land, attach a map or sketch, state where the owner may go to inspect the plans for the project, and contain a detailed notice promulgated by S.C. Code Ann. § 28-2-280. The Ordinance contains none of these requirements.

I reject Chicago Title’s contention that Plaintiffs’ claims are excluded by Exclusions 3(a) and 3(b). Genuine issues of material fact exist as to whether Plaintiffs “created, suffered, assumed or agreed to” any provisions of the Ordinance to the extent they could be deemed defects and encumbrances. The inquiry by Jericho State’s attorney about “satisfactory resolution of the determination by municipality not to build a bridge” is problematic for Jericho State, but I conclude there are genuine issues surrounding that inquiry to deny summary judgment on this ground, such as viewing the removal of that particular concern from the checklist as evidence that Jericho State’s understanding was that the highway would be located on neighboring property. Also, I do not impute any alleged knowledge of Glenn Chwatt and Scott Svirsky to Lynx Jericho.

I also reject Chicago Title’s contention that Plaintiffs’ claims are excluded by Exclusion 3(c) because there is “no loss or damage to the Insured claimant.” I have considered the evidence of loss in the light most favorable to Plaintiffs. This is a close question, as the amounts due Jericho State at the time of the public sale when it foreclosed its second mortgage lien was \$7,490,000,



and its successful bid of \$9,000,000, arguably made it whole. Also, Lynx Jericho has yet to foreclose the REL mortgage which it currently holds. But sufficient genuine issues of material fact exist to warrant denying summary judgment on this ground.

Plaintiffs' claims are also excluded by Exclusion 3(d) which excludes claims for post-policy matters. The Condemnation Action was filed December 15, 2009, after the effective dates of the Policies. Any loss or damage claimed by Plaintiffs as result of the Condemnation Action is therefore excluded.

I also reject Plaintiffs' contention through the submitted affidavit from their expert, title examiner David Turner, that the Ordinance is a public record and freely available for inspection. Ordinarily, on its face, Mr. Turner's affidavit would create a genuine issue as to this one material fact. However, his conclusory affidavit is tempered by his sworn deposition testimony in which he candidly admits that one would first have to have independent knowledge before going to the Register of Deeds' office in order to check the indices under Horry County Council for the Ordinances, as they are not in the chain of title. [Def. Ex. #2 - Dep. Of David C. Turner, pg. 35, line 15 – pg. 36, line 14; pg. 51, lines 2 – 13.]

Much was made at the hearing and in the memoranda as to Jericho State having requested a letter from the municipality confirming that a bridge would not be built prior to closing. Although this fact may suggest prior knowledge of an alleged title defect by a potential purchaser which would negate title insurance coverage, I have considered that letter, the related checklist, and other facts in the light most favorable to Plaintiffs and find the issues raised not to be material for summary judgment purposes.

Because no coverage exists under the Policies as a matter of law, Chicago Title is granted summary judgment on the breach of contract – recovery of insurance benefits claims.



Chicago Title is also granted summary judgment on the breach of the covenant of good faith and fair dealing claims. The implied covenant of good faith and fair dealing “is not an independent cause of action separate from the claim for breach of contract.” *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004). As there is no coverage for any claimed loss, there is no breach of contract.

Chicago Title is also granted summary judgment on the bad faith claims, including the ones for refusal to pay insurance benefits and for failure to investigate an insurance claim. Chicago Title has not acted in bad faith in refusing to pay insurance benefits. Defendant Chicago Title denied Plaintiffs’ claims by separate letters. Jericho State’s claim was denied by letter dated December 3, 2009, in which Chicago Title based its denial on two grounds. Subsequently, by letter dated January 30, 2015, Chicago Title denied Lynx Jericho’s claim based on different grounds, despite the same underlying property defect. “Bad faith is a knowing failure on the part of the insurer to exercise an honest and informed judgment in processing a claim. . . . [A]n insurer acts in bad faith where there is no reasonable basis to support the insurer’s decision.” *American Fire & Cas. Co. v. Johnson*, 332 S.C. 307, 311 (Ct.App.1998); *Cock–N–Bull Steak House v. Generali Ins. Co.*, 321 S.C. 1 (1996).

Chicago Title has not acted in bad faith in failing to investigate an insurance claim. Chicago Title exercised an honest and informed judgment in processing Plaintiffs’ claims, and it had a reasonable basis to support its decision. It has not failed to pay benefits due under the Policies, nor has it engaged in any bad faith conduct in considering and investigating Plaintiffs’ claims. Chicago Title had a reasonable, good faith basis for contesting the claims and has succeeded in contesting coverage.



ORDER COMPELLING DISCOVERY and ATTORNEY'S FEES & COSTS

By Order Granting Defendant's Motions to Compel dated June 4, 2015, I ordered Jericho State to serve complete responses to Defendant's First Supplemental Requests for Production of Documents and to Defendant's Second Supplemental Requests for Production of Documents within 20 days of the date that Order was executed. Defendant's request for attorney's fees was held in abeyance.

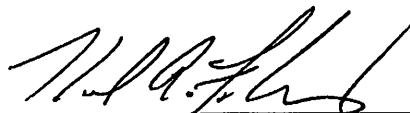
After considering all relevant factors in determining whether attorney's fees should be awarded in the motion to compel matter, I decline to award attorney's fees.

The parties will equally divide the costs of this reference.

CONCLUSION

For the foregoing reasons, Plaintiffs' motions for summary judgment are denied and Defendant's motion for summary judgment is granted. Defendant's request for attorney's fees sought in its motions to compel is denied.

IT IS SO ORDERED.



Karl A. Folkens, Special Referee

Florence, South Carolina
July 2, 2017

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2011-CP-26-6449

Jericho State Capital Corp. of Florida,

Plaintiff,

Vs.

Chicago Title Insurance Company,

Defendant.

COMPLAINT
(Jury Trial Demanded)

FILED
HORRY COUNTY
2011 JUL 29 PM 1:21
MELANIE HUGGINS-WARD
CLERK OF COURT

The Plaintiff, Jericho State Capital Corp. of Florida, complaining of the Defendant
Chicago Title Insurance Company, would respectfully show unto this Court the following:

Parties and Jurisdiction

1. The Plaintiff, Jericho State Capital Corp. of Florida ("Jericho" or "Plaintiff"), is a corporation organized and existing pursuant to the laws of the state of Florida.

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2. The Defendant, Chicago Title Insurance Company, is an insurance company organized and existing pursuant to the laws of the state of Missouri, doing business in Horry County, South Carolina.

3. Jurisdiction and venue is properly before this court because the action concerns real property that is located and situated in Horry County, South Carolina and a contract to be performed in Horry County, South Carolina.

Factual Allegations

4. By General Warranty Deed dated July 6, 2006 and recorded on July 25, 2006, (a copy of which is attached hereto as Exhibit A), Peachtree Properties of North Myrtle Beach, LLC ("Peachtree") acquired title to approximately 131.4 (+/-) acres of real property adjacent to

the Intracoastal Waterway in Socastee Township in Horry County, South Carolina (the "Property").

5. As a part of the transaction whereby it acquired the Property, Peachtree executed a first priority mortgage, recorded on July 25, 2006 in Mortgage Book 4629 at Page 255, in favor of R.E. Loans, LLC in the principle amount of \$18,520,000.00 (the "R.E. Loans Mortgage").

6. Peachtree also executed a second priority mortgage in favor of Plaintiff in the principle amount of \$4,263,888.00, which was recorded in Mortgage Book 4629 at Page 277 on July 25, 2006 (the "Jericho Mortgage"), a copy of which is attached hereto as Exhibit B.

7. On the same day the R.E. Loans Mortgage and the Jericho Mortgages were recorded, the Defendant Chicago Title Insurance Company issued a title policy, bearing Policy Number SC2330-46-06-RE-388A-2006.7210740-72338570, insuring Jericho's mortgage interest in the Property (the "Title Policy") under the Jericho Mortgage up to \$4,263,888.00. A copy of the Title Policy is attached hereto as Exhibit C.

8. Prior to Peachtree acquiring title to the Property and prior to the Defendant Chicago Title issuing the Title Policy, the Horry County Council adopted Ordinance 88-202 amending the "Official Map for Horry County," which shows the specific location of current and future roadway improvements within the county (the "Ordinance"). The Official Map for Horry County is now, and was in July 25, 2006, part of the public records of Horry County, South Carolina.

9. The Ordinance was recorded on July 9, 2002 in Deed Book 2497 at Page 986 in the office of the Register of Deeds for Horry County, South Carolina.

10. The maps recorded with Ordinance 88-202 show the proposed location of the Carolina Bays Parkway extending from Highway 501 to Highway 17 Bypass.

11. The Property upon which Plaintiff has its Mortgage (which is insured by the Title Policy) is clearly shown on the Official Map as being part of the property over which the Carolina Bays Parkway will be built and from which land will be taken.

12. Despite the Ordinance being recorded more than four years prior to the Title Policy being issued, this projected condemnation is not listed as an exception in the Title Policy.

13. When the Plaintiff learned that the Carolina Bays Parkway was to be constructed over the Property and that portions of the Property will be condemned as a result, it made a claim to the Defendant under the Title Policy.

14. Jericho filed a foreclosure action, bearing case number 2007-CP-26-03579, in the Court of Common Pleas for Horry County, South Carolina, seeking foreclosure of the Jericho Mortgage, which was granted by the court.

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15. Jericho was the successful bidder at the foreclosure sale and title to the Property was conveyed to Jericho by that certain Deed from the Horry County Master-In-Equity, recorded on February 26, 2008 in Deed Book 3317 at Page 992 in the Office of the Register of Deeds for Horry County, South Carolina. Jericho is the current owner of the Property.

16. The Defendant Chicago Title has denied the claim.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract-Recovery of Insurance Benefits)

17. The above allegations are hereby repeated as if set forth verbatim.

18. By issuing the Title Policy, the Defendant contractually agreed to insure the Plaintiff's mortgage interest in the Property against any loss sustained by it by reason of any defect or defects in the title of Peachtree to the Property and the estate granted to Plaintiff in the Jericho Mortgage, subject only to the stated exceptions.

19. The Title Policy states that Defendant agreed to insure against any loss or damage incurred by the Plaintiff for any loss it suffers as a result of:

- (a) Any defect in or lien or encumbrance on the title; or
- (b) unmarketability of the title.

20. The projected condemnation of a portion of the Property to construct the Carolina Bays Parkway is a defect to the title of the Property or otherwise renders title to the Property unmarketable.

21. The title defect existed prior to the time the Defendant issued the Title Policy.

22. Recordation of the Ordinance in the property records in the Office of the Register of Deeds for Horry County, South Carolina provided notice of the title defect to the Defendant prior to the Defendant issuing the Title Policy.

23. The Title Policy does not list the Ordinance, or the matters shown on the Official Map, or the proposed condemnation of the Property as an exceptions to coverage.

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4 of 8 24. The Plaintiff sent notice of its claim to the Defendant and made a proper demand for insurance benefits under the Title Policy by letter dated February 26, 2009.

25. The Plaintiff has suffered damages equal to the loss in value of the Property as a result of the title defect or unmarketability of the title to the Property.

26. The Defendant wrongfully denied the claim on the basis that the "defect on title (i.e. the taking/condemnation of the Property) relates to a matter that is an exception in the policy," citing the language in the Title Policy that excludes from coverage matters relating to government regulation when it knew or should have known that the referenced provision did not control this matter.

27. The Defendant materially breached the express contract of insurance by refusing to pay the Plaintiff for losses sustained by the Plaintiff as a result of the defect in the title to the Property.

28. Plaintiff is informed and believes that it is entitled to judgment against the Defendant for actual damages in an amount to be determined by the tier of fact for breach of contract.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract-Breach of the Covenant of Good Faith and Fair Dealing)

29. The above allegations are hereby repeated as if set forth verbatim.

30. The Title Policy is a contract of insurance between Plaintiff and Defendant that contains within its terms the implied covenant of good faith and fair dealing.

31. In denying the Plaintiff's claim, the Defendant relied on the language in the Title Policy that excludes from coverage matters relating to government regulation.

32. The recorded Ordinance is notice of the county's intent to exercise its power to condemn the Property; therefore, the claim is properly evaluated under the exclusion found in the Title Policy relating specifically to eminent domain, rather than the exclusion relating to governmental Regulation cited by the Defendant, which clearly related to land-use regulations.

33. The exclusion relating to eminent domain provides explicit coverage for a loss resulting from the rights of eminent domain provided that "notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy."

34. Recordation of the Ordinance in the property records in the Office of the Register of Deeds for Horry County, South Carolina provided notice of the title defect to the Defendant

prior to the Defendant issuing the Title Policy and clearly brings the claim within the coverage provisions of the Title Policy.

35. Defendant breached the covenant of good faith and fair dealing in directing the Plaintiff to the exclusionary language relating to governmental regulation rather than the language relating to eminent domain, and by wrongfully denying the claim.

36. Defendant breached the covenant of good faith and fair dealing in improperly and unreasonably denying the Plaintiff's claim on the basis of the exclusionary language relating to governmental regulation when it knew or should have known that it did not apply to this matter..

37. Plaintiff is informed and believes that it is entitled to judgment against the Defendant for actual damages in an amount to be determined by the tier of fact for breach of the covenant of good faith and fair dealing contained in the Title Policy.

FOR A THIRD CAUSE OF ACTION

(Tortious Bad Faith Refusal to Pay Insurance Benefits and Bad Faith Failure to Investigate an Insurance Claim)

38. The above allegations are hereby repeated as if set forth verbatim.

39. The Title Policy is a valid and mutually binding contract of insurance.

40. The Defendant refused to pay the Plaintiff insurance benefits despite a valid and proper claim being made by the Plaintiff to the Defendant.

41. The Defendant relied on the language in the Title Policy that excludes from coverage matters relating to government regulation in denying the claim on the basis that the condemnation is an exception to the Title Policy when it knew or should have known that another provision was controlling.

42. The recorded Ordinance is public notice of the county's intent to exercise its power to condemn the Property; therefore, the claim is properly evaluated under the exclusion found in

the Title Policy relating specifically to eminent domain rather than the exclusion relating to governmental Regulation cited by the Defendant.

43. The exclusion relating to eminent domain provides explicit coverage for a loss resulting from the rights of eminent domain provided that "notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy."

44. Recordation of the Ordinance on July 9, 2002 in Deed Book 2497 at Page 986 in the office of the Register of Deeds for Horry County, South Carolina in the public records provided notice of the title defect to the Defendant prior to the Defendant issuing the Title Policy.

45. The Defendant intentionally refused to pay the Plaintiff insurance benefits despite a valid and proper claim being made by the Plaintiff.

46. The Defendant purposefully directed the Plaintiff to the exclusionary language relating to governmental regulation rather than the language relating to eminent domain.

47. The Defendant improperly and unreasonably denied the Plaintiff's claim on the basis of the exclusionary language relating to governmental regulation.

48. The Defendant knew that the claim was properly evaluated under the eminent domain language and knowingly misrepresented to the Plaintiff the policy provision relating to coverage.

49. The Defendant failed to investigate and evaluate the claim under the eminent domain language within a reasonable time period.

50. As a result thereof, Plaintiff suffered consequential damages, including but not limited to financial loss, interest on the unpaid claim, and attorneys' fees and costs.

51. Plaintiff is informed and believes that it is entitled to judgment against the Defendant for actual and punitive damages, including but not limited to prejudgment interest, in an amount to be determined by the trier of fact for tortious bad faith refusal to pay insurance benefits.

WHEREFORE, the Plaintiff prays for the following relief:

- a. For judgment against the Defendant for actual damages in an amount to be determined by the trier of fact for breach of contract and refusal to pay insurance benefits under the First Cause of Action;
- b. For judgment against the Defendant for actual damages in an amount to be determined by the trier of fact for Breach of the Covenant of Good faith and Fair Dealing under the Second Cause of Action;
- c. For judgment against the Defendants for actual and punitive damages in an amount to be determined by the trier of fact for Tortious Bad Faith Refusal to Pay Insurance Benefits under the Fourth Cause of Action;
- d. For the costs of this action;
- e. For such other and further relief as the court deems just and proper.



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*Attorneys for the Plaintiff Jericho State
Capital Corp. of Florida*

April 1, 2011
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

Jericho State Capital Corp. of
Florida,

Case No. 2011-CP-26-6449

Plaintiff,

vs.

ANSWER

Chicago Title Insurance Company,

Defendant.

Defendant Chicago Title Insurance Company ("Chicago Title") hereby answers the
Complaint as follows:

FOR A FIRST DEFENSE

1. Chicago Title denies each and every allegation of the Complaint not hereinafter specifically admitted.

2. Chicago Title admits paragraph 1 of the Complaint upon information and belief.

3. As to the allegations of paragraph 2 of the Complaint, Chicago Title admits it is an insurance company doing business in Horry County, South Carolina, but denies it is currently organized and existing pursuant to the laws of the state of Missouri.

4. The allegations of paragraph 3 of the Complaint contain conclusions of law and, therefore, no response is required.

5. As to the allegations of paragraph 4 of the Complaint, Chicago Title admits by General Warranty Deed dated July 6, 2006 and recorded July 25, 2006, Peachtree Properties of North Myrtle Beach, LLC ("Peachtree") acquired title to the property described therein, which property is adjacent to the Intracoastal Waterway in Socastee Township in Horry County, South Carolina. With respect to the unanswered allegations of paragraph 4, Chicago Title craves

reference to the General Warranty Deed for the specific terms and import thereof and to the extent the unanswered allegations of paragraph 4 are inconsistent with the specific terms and import of the General Warranty Deed, the same are denied.

6. Chicago Title admits the allegations of paragraphs 5 and 6 of the Complaint.

7. As to the allegations of paragraph 7 of the Complaint, Chicago Title admits it issued a loan policy of title insurance bearing Policy Number SC2330-46-06-RE-388A-2006.721 0740-72338570, with its effective date being the same day the R.E. Loans Mortgage and the Jericho Mortgages were recorded, insuring the Jericho Mortgage on the Property (the "Title Policy") with an insured amount of \$4,263,888.00. Any allegations of paragraph 7 inconsistent with the foregoing are denied.

8. Chicago Title is without knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 8 of the Complaint and, therefore, denies the same.

9. Chicago Title admits the allegations of paragraph 9 of the Complaint, but would further allege the Ordinance does not comply with the recording act and it was not indexed against any owners of real property or anyone else and thus it would not provide constructive notice as it would not be found in a title search of the subject property.

10. Chicago Title is without knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of paragraphs 10 and 11 of the Complaint and, therefore, denies the same.

11. As to the allegations of paragraph 12 of the Complaint, Chicago Title admits the Title Policy contains no exception related to the Ordinance. Any allegations of paragraph 12

inconsistent with the foregoing are denied.

12. As to the allegations of paragraph 13 of the Complaint, Chicago Title admits Plaintiff made a claim with Chicago Title under the Title Policy. Chicago Title is without knowledge and information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph 13 and, therefore, denies the same.

13. Chicago Title admits the allegations of paragraphs 14 and 15 of the Complaint.

14. As to the allegations of paragraph 16 of the Complaint, Chicago Title would admit it denied the claim because it is not covered under the terms, conditions, stipulations, exclusions, and limitations of the Title Policy.

15. As to the reiterated allegations of paragraph 17 of the Complaint, Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

16. As to the allegations of paragraph 18 of the Complaint, Chicago Title craves reference to the Title Policy for the specific terms and import thereof and to the extent the allegations of paragraph 18 are inconsistent with the specific terms and import of the Title Policy, the same are denied.

17. As to the allegations of paragraph 19 of the Complaint, Chicago Title admits only that the Title Policy states Chicago Title insures against any loss or damage sustained or incurred by reason of (a) any defect in or lien or encumbrance on the title; or (b) unmarketability of the title, but would further allege this is subject to the exclusions from coverage set forth in the Title Policy, the exceptions from coverage contained in Schedule B of the Title Policy, and the Conditions, and Stipulations of the Title Policy. Any allegations of paragraph 19 inconsistent

with the foregoing are denied.

18. Chicago Title denies the allegations of paragraphs 20, 21, and 22 of the Complaint.

19. As to the allegations of paragraph 23 of the Complaint, Chicago Title admits the Title Policy does not list the Ordinance or the matters on the Official Map as stated exceptions in the Title Policy and Chicago Title would further allege it did not list the proposed condemnation of the Property as an exception to coverage as there was no condemnation or proposed condemnation.

20. As to the allegations of paragraph 24 of the Complaint, Chicago Title admits Plaintiff made a claim for insurance benefits under the Title Policy by letter dated February 26, 2009. The remaining allegations of paragraph 24 are denied.

21. Chicago Title denies the allegations of paragraphs 25, 26, 27 and 28 of the Complaint.

22. As to the reiterated allegations of paragraph 29 of the Complaint, Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

23. As to the allegations of paragraph 30 of the Complaint, Chicago Title admits the Title Policy is a contract of insurance between Chicago Title and Plaintiff. The remaining allegations of paragraph 30 contain conclusions of law and, therefore, no response is required.

24. As to the allegations of paragraph 31 of the Complaint, Chicago Title admits that in denying the Plaintiff's claim, it relied on the language in the Title Policy that excludes from coverage matters relating to government regulation, but Chicago Title would further allege this

was not the only or exclusive basis for the denial of Plaintiff's claim.

25. As to the allegations of paragraph 32 of the Complaint, Chicago Title admits Plaintiff's claim is also excluded pursuant to the eminent domain exclusion. With respect to the remaining allegations of paragraph 32, Chicago Title craves reference to the Title Policy and the Ordinance for the specific terms and import thereof and to the extent the allegations of paragraph 32 are inconsistent with the specific terms and import of the Title Policy and the Ordinance, the same are denied.

26. As to the allegations of paragraph 33 of the Complaint, Chicago Title craves reference to the Title Policy and its eminent domain exclusion for the specific terms and import thereof and to the extent the allegations of paragraph 33 are inconsistent with the specific terms and import of the Title Policy and its eminent domain exclusion, the same are denied.

27. Chicago Title denies the allegations of paragraphs 34, 35, 36, and 37 of the Complaint.

28. As to the reiterated allegations of paragraph 38 of the Complaint, Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

29. Chicago Title admits the allegations of paragraph 39 of the Complaint.

30. As to the allegations of paragraph 40 of the Complaint, Chicago Title admits it refused to pay Plaintiff insurance benefits. Chicago Title denies the remaining allegations of paragraph 40.

31. As to the allegations of paragraph 41 of the Complaint, Chicago Title admits it relied in part on the language in the Title Policy that excludes from coverage matters relating to

government regulation in denying the claim and admits the Title Policy excludes condemnation as more specifically set forth in the Title Policy. Chicago Title denies the remaining allegations of paragraph 41.

32. As to the allegations of paragraph 42 of the Complaint, Chicago Title admits Plaintiff's claim is also excluded pursuant to the eminent domain exclusion. With respect to the remaining allegations of paragraph 42, Chicago Title craves reference to the Title Policy and the Ordinance for the specific terms and import thereof and to the extent the allegations of paragraph 42 are inconsistent with the specific terms and import of the Title Policy and the Ordinance, the same are denied.

33. As to the allegations of paragraph 43 of the Complaint, Chicago Title craves reference to the Title Policy and its eminent domain exclusion for the specific terms and import thereof and to the extent the allegations of paragraph 43 are inconsistent with the specific terms and import of the Title Policy and its eminent domain exclusion, the same are denied.

34. Chicago Title denies the allegations of paragraphs 44, 45, 46, 47, 48, 49, 50, and 51 of the Complaint.

35. Chicago Title denies Plaintiff's prayer for relief, including all subparts.

FOR A SECOND DEFENSE

(Terms, Conditions, Stipulations, Exclusions, and Limitations of the Title Policy)

36. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

37. Each and every cause of action alleged in the Complaint is barred, in whole or in part, by the terms, conditions, stipulations, exclusions, and limitations in the Title Policy and the principles of law applicable thereto.

FOR A THIRD DEFENSE

(Terms, Conditions, Stipulations, Exclusions, and Limitations of the Title Policy)

38. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

39. The Title Policy contains conditions and stipulations which must be satisfied in order to obtain coverage under the Title Policy. The Title Policy's conditions and stipulations provide in part as follows:

5. PROOF OF LOSS OR DAMAGE

In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company a proof of loss or damage signed and sworn to by the insured claimant shall be furnished to the Company within 90 days after the Insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title or other matter insured against by this policy which constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the insured claimant to provide the required proof of loss or damage, the Company's obligations to the insured under the policy shall terminate including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage.

In addition, the insured claimant may reasonably be required to submit to examination under oath by an authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage.

All information designated as confidential by the insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this paragraph, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

40. After Plaintiff submitted its claim to Chicago Title, Chicago Title requested information from Plaintiff as set forth in Paragraph 5 of the conditions and stipulations of the Title Policy, but Plaintiff failed to provide such information to Chicago Title and, therefore, any potential liability Chicago Title may have had under the Title Policy terminated.

41. Accordingly, Plaintiff's claim under the Title Policy was appropriately denied and Plaintiff's Complaint should be dismissed in its entirety.

FOR A FOURTH DEFENSE
(Exclusions of the Title Policy)

42. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

43. The Title Policy sets forth numerous exclusions to coverage. The Title Policy specifically excludes coverage for loss or damage which arises by reason of rights of eminent domain. More specifically, the Title Policy provides as follows:

Exclusions from Coverage

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

2. Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not

excluding from coverage any taking which occurred prior to the Date of Policy which would be binding on the rights of a purchaser for value without knowledge.

44. Because no notice of the exercise of the rights of eminent domain was recorded in the public records at the date of the Title Policy, Plaintiff's claims are excluded under the Title Policy.

45. Accordingly, Plaintiff's claim under the Title Policy was appropriately denied and Plaintiff's Complaint should be dismissed in its entirety.

FOR A FIFTH DEFENSE
(Exclusions of the Title Policy)

46. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

47. The Title Policy sets forth additional exclusions to coverage. The Title Policy specifically excludes coverage for loss or damage which arises by reason of law, ordinance, government regulation, or any government police power. More specifically, the Title Policy provides as follows:

Exclusions from Coverage

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1. (a) any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or change in the dimensions or area of the land or any parcel of which the land is or was a part of; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a

defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.

- (b) Any government police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.

48. Neither a notice of the enforcement of the ordinance nor a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land was recorded in the public records at date of the Title Policy.

49. Accordingly, Plaintiff's claim under the Title Policy was appropriately denied and Plaintiff's Complaint should be dismissed in its entirety.

FOR A SIXTH DEFENSE
(Exclusions of the Title Policy)

50. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

51. The Title Policy sets forth additional exclusions to coverage. The Title Policy specifically excludes coverage for certain matters which result in no loss or damage to an insured claimant. More specifically, the Title Policy provides as follows:

Exclusions from Coverage

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

3 Defects, liens, encumbrances, adverse claims or other matters:

(c) resulting in no loss or damage to the insured claimant.

52. Plaintiff's property is encumbered by a mortgage in the original principal amount of \$18,520,000.00, which mortgage is an exception in the Title Policy.

53. The South Carolina Department of Transportation exercised its right of eminent domain for the first time pursuant to a condemnation notice and tender of payment filed with the Horry County Court of Common Pleas on December 15, 2009 ("Condemnation Action").

54. Plaintiff will be compensated for any loss it claims is established by virtue of the Condemnation Action.

55. Plaintiff has therefore suffered no loss or damage.

56. Accordingly, Plaintiff's claim under the Title Policy was appropriately denied and Plaintiff's Complaint should be dismissed in its entirety.

FOR A SEVENTH DEFENSE
(Exclusions of the Title Policy)

57. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

58. The Title Policy sets forth additional exclusions to coverage. The Title Policy specifically excludes coverage for matters that take place after the Title Policy is issued. More specifically, the Title Policy provides as follows:

Exclusions from Coverage

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

4 Defects, liens, encumbrances, adverse claims or other matters:

(d) attaching or created subsequent to Date of Policy

59. The South Carolina Department of Transportation exercised its right of eminent domain for the first time pursuant to a condemnation notice and tender of payment filed with the Horry County Court of Common Pleas on December 15, 2009 ("Condemnation Action"), after the date the Title Policy was issued.

60. Any loss or damage claimed by Plaintiff as result of the condemnation of the subject property is therefore excluded from coverage under the Title Policy.

61. Accordingly, Plaintiff's claim under the Title Policy was appropriately denied and Plaintiff's Complaint should be dismissed in its entirety.

FOR AN EIGHTH DEFENSE
(Terms of the Title Policy)

62. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

63. The Title Policy sets forth the following insuring provisions:

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS, AND STIPULATIONS, CHICAGO TITLE INSURANCE COMPANY, a Missouri corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1 Title to the estate or interest described in Schedule A being vested other than as stated therein;

2 Any defect in or lien or encumbrance on the title;

3 Unmarketability of the title;

4 lack of a right of access to and from the land;

5 The invalidity or unenforceability of the lien of the insured mortgage upon the title;

6 The priority of any lien or encumbrance over the lien of the insured mortgage;

7 Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material:

a. arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or

b. arising from an improvement or work related to the land which is contract for or commenced subsequent to the Date of Policy and which is

financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance;

8 The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage in the named insured assignee free and clear of all liens.

64. Plaintiff's claim does not fall within any of the insuring provisions of the Title Policy.

65. Accordingly, Plaintiff's claim under the Title Policy was appropriately denied and Plaintiff's Complaint should be dismissed in its entirety.

FOR A NINTH DEFENSE
(Failure to Mitigate Damages)

66. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

67. Plaintiff has failed to mitigate its damages.

FOR A TENTH DEFENSE
(Waiver)

68. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

69. Plaintiff's claims are barred by the doctrine of waiver.

FOR AN ELEVENTH DEFENSE
(Economic Loss Rule)

70. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

71. Plaintiff seeks damages for purely economic losses and therefore Plaintiff's remedies are limited by the economic loss rule, to include the prohibition against tort-based causes of action.

FOR A TWELFTH DEFENSE
(Additional Defenses Reserved)

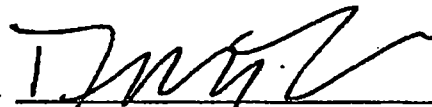
72. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

73. Chicago Title reserves the right to plead additional affirmative defenses upon further discovery.

WHEREFORE, having fully answered the Plaintiff's Complaint, Defendant Chicago Title Insurance Company respectfully requests that the Court issue an Order:

- A. Dismissing the Plaintiff's Complaint;
- B. Awarding Chicago Title attorney fees and the costs of this action; and
- C. Awarding any such other relief as the Court deems just and proper.

CALLISON TIGHE & ROBINSON, LLC



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**ATTORNEYS FOR DEFENDANT
CHICAGO TITLE INSURANCE
COMPANY**

February 15, 2012
1020.566 Answer

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2015-CP-26-1084

Lynx Jericho Partners, LLC,

Plaintiff,

Vs.

Chicago Title Insurance Company,

Defendant.

COMPLAINT

2015 FEB 12 PM 1:25
CLERK OF COURT
HORRY COUNTY

The Plaintiff, Lynx Jericho Partners, LLC, complaining of the Defendant, Chicago Title Insurance Company, would respectfully show unto this Court the following:

Parties and Jurisdiction

1. The Plaintiff, Lynx Jericho Partners, LLC ("**Jericho**" or "**Plaintiff**"), is a corporation organized and existing pursuant to the laws of the state of Florida.

2. The Defendant, Chicago Title Insurance Company, is an insurance company organized and existing pursuant to the laws of the state of Missouri, doing business in Horry County, South Carolina.

3. Jurisdiction and venue is properly before this court because the action concerns real property that is located and situated in Horry County, South Carolina and a contract to be performed in Horry County, South Carolina.

Factual Allegations

4. By General Warranty Deed dated July 6, 2006 and recorded on July 25, 2006 in Deed Book 3132 at Page 779 in the records of the Register of Deeds for Horry County, South Carolina, Peachtree Properties of North Myrtle Beach, LLC ("**Peachtree**") acquired title to

approximately 131.4 (+/-) acres of real property adjacent to the Intracoastal Waterway in Socastee Township in Horry County, South Carolina (the "**Property**").

5. As a part of the transaction whereby it acquired the Property, Peachtree executed a first priority mortgage, dated July 5, 2006 and recorded on July 25, 2006 in Mortgage Book 4629 at Page 255 in the records of the Register of Deeds for Horry County, South Carolina, in favor of R.E. Loans, LLC in the principle amount of \$18,520,000.00 (the "**R.E. Loans Mortgage**" or "**First Mortgage**"). A copy of the First Mortgage is attached as **Exhibit A** and incorporated by reference herein.

6. R.E. Loans, LLC assigned its First Mortgage to Wells Fargo Foothill, LLC by instrument dated July 17, 2001 and recorded on August 15, 2007 in Mortgage Book 4952 at Page 1521 in the records of the Register of Deed for Horry County, South Carolina.

7. Wells Fargo Foothill, LLC reassigned the First Mortgage back to R.E. Loans, LLC by instrument dated March 11, 2008 and recorded on December 12, 2008 in Mortgage Book 5130 at Page 2614 in the records of the Register of Deeds for Horry County, South Carolina.

8. R.E. Loans, LLC assigned the First Mortgage to Mortgage Fund '08, LLC by instrument recorded dated effective as of January 4, 2008 and recorded on May 16, 2008 in Mortgage Book 5071 at Page 96 in the records of the Register of Deeds for Horry County, South Carolina and subsequently corrected by that certain "Corrective Assignment of Mortgage" dated April 26, 2011 and recorded on July 28, 2011 in Mortgage Book 5336 at Page 3001 in the records of the Register of Deeds for Horry County, South Carolina.

9. First Mortgage Fund '08, LLC filed bankruptcy on September 12, 2011 in the United States Bankruptcy Court in the Northern District of California, Oakland Division, Case Number 11-49803-RLE.

10. By Order dated February 3, 2012, the bankruptcy court confirmed the "Joint Chapter 11 Plan and Disclosure Statement," which created the Mortgage Fund '08 Liquidating Trust (the "**Trust**") and transferred the assets of the debtor in possession, Mortgage Fund '08, to the Trust and empowered the trustee, Susan L. Uecker, to liquidate and transfer the assets. The First Mortgage was specifically referred to in the court's order as an asset and was transferred to the Trust.

11. Susan L. Uecker, as trustee of Mortgage Fund '08 Liquidating Trust, assigned the First Mortgage to the Plaintiff, Lynx Jericho Partners, LLC, by instrument dated April 17, 2013 and recorded on May 22, 2013 in Mortgage Book 5500 at Page 2940 in the records of the Register of Deeds for Horry County, South Carolina thereby making the Plaintiff the current holder of the First Mortgage.

12. Peachtree also executed a second priority mortgage in favor of Jericho State Capital of Florida in the principle amount of \$4,263,888.00, which was recorded in Mortgage Book 4629 at Page 277 on July 25, 2006 (the "**Jericho Mortgage**" or "**Second Mortgage**").

13. The Defendant Chicago Title Insurance Company issued a title policy, bearing Policy Number 7210740-73317401, insuring R.E. Loans LLC's first priority mortgage interest in the Property (the "**Title Policy**") under the R.E. Loans Mortgage up to \$17,071,873.33. A copy of the Title Policy is attached hereto as **Exhibit B** and incorporated by reference herein.

14. The "Date of Policy" as listed on Schedule A of the Title Policy is July 25, 2007 at 3:23 pm; however, upon information and belief, the date is incorrectly shown on the policy due to a typographical or scrivener's error and the correct "Date of Policy" for the Title Policy is July 25, 2006, which is the same date the First Mortgage was recorded.

15. Prior to Peachtree acquiring title to the Property and prior to the Defendant Chicago Title issuing the Title Policy, the Horry County Council adopted Ordinance 88-202 amending the "Official Map for Horry County," which shows the specific location of current and future roadway improvements within the county (the "**Ordinance**").

16. The Official Map for Horry County is now, and was in July 25, 2006, part of the public records of Horry County, South Carolina.

17. The Ordinance was recorded on July 9, 2002 in Deed Book 2497 at Page 986 in the office of the Register of Deeds for Horry County, South Carolina.

18. The maps recorded with Ordinance 88-202 show the location of the Carolina Bays Parkway extending from Highway 501 to Highway 17 Bypass.

19. The Property upon which Plaintiff has its Mortgage (which is insured by the Title Policy) is clearly shown on the Official Map as being part of the property over which the Carolina Bays Parkway will be built and from which land will be taken.

20. The above described Ordinance and Official Map reflects a proposed condemnation, the county's claim to the land, defect, and/or encumbrance upon to the subject property.

21. Despite the Ordinance being recorded more than four years prior to the Title Policy being issued, this projected condemnation, claim, defect and/or encumbrance is not listed as an exception in the Title Policy.

22. Jericho State Capital of Florida filed a foreclosure action on its second priority mortgage, bearing case number 2007-CP-26-03579, in the Court of Common Pleas for Horry County, South Carolina, seeking foreclosure of the Jericho Mortgage, which was granted by the court.

23. Jericho State Capital of Florida was the successful bidder at the foreclosure sale and title to the Property was conveyed to Jericho State Capital of Florida by that certain Deed from the Horry County Master-In-Equity, recorded on February 26, 2008 in Deed Book 3317 at Page 992 in the Office of the Register of Deeds for Horry County, South Carolina. Jericho is the current owner of the Property.

24. By letter dated June 21, 2013 sent certified mail, and by subsequent letter dated November 14, 2014, the Plaintiff, as successor and or/ assignee to the named insured R.E. Loans, LLC, made a claim to the Defendant under the Title Policy as a result of the condemnation of the property resulting from the Carolina Bays Parkway being constructed over the Property as shown on the Official Map.

25. The Defendant Chicago has denied the claim b letter dated January 30, 2015.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract-Recovery of Insurance Benefits)

26. The above allegations are hereby repeated as if set forth verbatim.

27. By issuing the Title Policy, the Defendant contractually agreed to insure the Plaintiff's mortgage interest in the Property against any loss sustained by it by reason of any defect or defects in the title of Peachtree to the Property and the estate granted to Plaintiff in the First Mortgage, subject only to the stated exceptions.

28. The Title Policy states that Defendant agreed to insure against any loss or damage incurred by the Plaintiff for any loss it suffers as a result of:

- (a) Any defect in or lien or encumbrance on the title; or
- (b) unmarketability of the title.

29. The portion of the Property designated for condemnation to construct the Carolina Bays Parkway is a claim, defect or encumbrance to the title of the Property or otherwise renders title to the Property unmarketable.

30. The title defect existed prior to the time the Defendant issued the Title Policy.

31. Recordation of the Ordinance in the property records in the Office of the Register of Deeds for Horry County, South Carolina provided notice of the title defect to the Defendant prior to the Defendant issuing the Title Policy.

32. The Title Policy does not list the Ordinance, the matters shown on the Official Map, or the proposed condemnation of the Property as an exceptions to coverage.

33. The Plaintiff sent notice of its claim to the Defendant and made a proper demand for insurance benefits under the Title Policy by letters dated June 21, 2013 and November 14, 2014.

34. The Plaintiff has suffered damages equal to the loss in value of the Property as a result of the title defect or unmarketability of the title to the Property.

35. The Defendant wrongfully denied the claim.

36. The Defendant materially breached the express contract of insurance by refusing to pay the Plaintiff for losses sustained by the Plaintiff as a result of the defect in the title to the Property.

37. Plaintiff is informed and believes that it is entitled to judgment against the Defendant for actual damages in an amount to be determined by the tier of fact for breach of contract.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract-Breach of the Covenant of Good Faith and Fair Dealing)

38. The above allegations are hereby repeated as if set forth verbatim.

39. The Title Policy is a contract of insurance between Plaintiff and Defendant that contains within its terms the implied covenant of good faith and fair dealing.

40. The recorded Ordinance is notice of the county's claim to the property and intent to exercise its power to condemn the Property and is a defect and/or encumbrance of the Property, and is a covered loss as defined in the Policy.

41. The exclusion relating to eminent domain provides coverage for a loss resulting from the rights of eminent domain that have been recorded in the public records at Date of Policy and any taking which has occurred prior to date of policy which would be binding on the rights of a purchaser for value without knowledge.

42. The exclusion relating to land use restriction provides coverage as to any ordinance or governmental regulation or police power when there is a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.

43. Recordation of the Ordinance in the property records in the Office of the Register of Deeds for Horry County, South Carolina provided notice of the title defect to the Defendant prior to the Defendant issuing the Title Policy and clearly brings the claim within the coverage provisions of the Title Policy.

44. The Defendant intentionally refused to pay the Plaintiff insurance benefits despite a valid and proper claim being made by the Plaintiff.

45. The Defendant improperly and unreasonably denied the Plaintiff's claim.

46. The Defendant failed to investigate and evaluate the claim within a reasonable time period.

47. Defendant breached the covenant of good faith and fair dealing by wrongfully denying the claim.

48. Plaintiff is informed and believes that it is entitled to judgment against the Defendant for actual damages in an amount to be determined by the tier of fact for breach of the covenant of good faith and fair dealing contained in the Title Policy.

FOR A THIRD CAUSE OF ACTION
(Tortious Bad Faith Refusal to Pay Insurance Benefits and Bad Faith Failure to Investigate an Insurance Claim)

49. The above allegations are hereby repeated as if set forth verbatim.

50. The Title Policy is a valid and mutually binding contract of insurance.

51. The Defendant refused to pay the Plaintiff insurance benefits despite a valid and proper claim being made by the Plaintiff to the Defendant.

52. The recorded Ordinance is public notice of the county's claim on the property and intent to exercise its power to condemn the Property and is a defect and/or encumbrance on the Property and is a covered loss under the Policy.

53. The Policy provides coverage for an ordinance or governmental regulation or police power, eminent domain and taking, as set forth above.

54. Recordation of the Ordinance on July 9, 2002 in Deed Book 2497 at Page 986 in the office of the Register of Deeds for Horry County, South Carolina in the public records provided notice of the title defect to the Defendant prior to the Defendant issuing the Title Policy.

55. The Defendant intentionally refused to pay the Plaintiff insurance benefits despite a valid and proper claim being made by the Plaintiff.

56. The Defendant improperly and unreasonably denied the Plaintiff's claim.

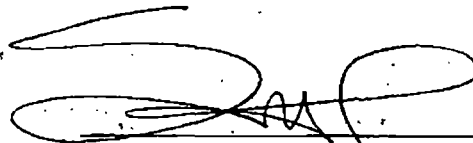
57. The Defendant failed to investigate and evaluate the claim within a reasonable time period.

58. As a result thereof, Plaintiff suffered consequential damages, including but not limited to financial loss, interest on the unpaid claim, and attorneys' fees and costs.

59. Plaintiff is informed and believes that it is entitled to judgment against the Defendant for actual and punitive damages, including but not limited to prejudgment interest, in an amount to be determined by the trier of fact for tortious bad faith refusal to pay insurance benefits.

WHEREFORE, the Plaintiff prays for the following relief:

- a. For judgment against the Defendant for actual damages in an amount to be determined by the trier of fact for breach of contract and refusal to pay insurance benefits under the First Cause of Action;
- b. For judgment against the Defendant for actual damages in an amount to be determined by the trier of fact for Breach of the Covenant of Good faith and Fair Dealing under the Second Cause of Action;
- c. For judgment against the Defendants for actual and punitive damages in an amount to be determined by the trier of fact for Tortious Bad Faith Refusal to Pay Insurance Benefits under the Fourth Cause of Action;
- d. For the costs of this action; and for such other and further relief as the court deems just and proper.



Fred B. Newby, SC Bar No. 04202
C. Scott Masel, SC Bar No. 12497
4593 Oleander Drive
Myrtle Beach, South Carolina 29577
(843) 449-9417
*Attorney for the Plaintiff Lynx Jericho
Partners, LLC*

February 11, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY

Case No. 2015-CP-26-1084

Lynx Jericho Partners, LLC,

Plaintiff,

vs.

Chicago Title Insurance Company,

Defendant.

ANSWER

HORRY COUNTY
2015 MAY 13 PM 12:16
CLERK OF COURT

Defendant Chicago Title Insurance Company ("Chicago Title") hereby answers the Complaint as follows:

FOR A FIRST DEFENSE

1. Chicago Title denies each and every allegation of the Complaint not hereinafter specifically admitted.

2. Chicago Title admits paragraph 1 of the Complaint upon information and belief.

3. As to the allegations of paragraph 2 of the Complaint, Chicago Title admits it is an insurance company doing business in Horry County, South Carolina, but denies it is currently organized and existing pursuant to the laws of the State of Missouri.

4. The allegations of paragraph 3 of the Complaint contain conclusions of law and, therefore, no response is required.

5. As to the allegations of paragraph 4 of the Complaint, Chicago Title admits by General Warranty Deed dated July 6, 2006 and recorded July 25, 2006, Peachtree Properties of North Myrtle Beach, LLC ("Peachtree") acquired title to the property described therein, which property is adjacent to the Intracoastal Waterway in Socastee Township in Horry County, South Carolina. With respect to the unanswered allegations of paragraph 4, Chicago Title craves

reference to the General Warranty Deed for the specific terms and import thereof and to the extent the unanswered allegations of paragraph 4 are inconsistent with the specific terms and import of the General Warranty Deed, the same are denied.

6. Chicago Title admits the allegations of paragraph 5 of the Complaint except that it denies there are any attachments to the Complaint.

7. As to the allegations of paragraph 6 of the Complaint, Chicago Title craves reference to the assignment instrument referenced therein for the specific terms and import thereof and to the extent the allegations of paragraph 6 are inconsistent with the specific terms and import of the assignment instrument, the same are denied.

8. As to the allegations of paragraph 7 of the Complaint, Chicago Title craves reference to the assignment instrument referenced therein for the specific terms and import thereof and to the extent the allegations of paragraph 7 are inconsistent with the specific terms and import of the assignment instrument, the same are denied.

9. As to the allegations of paragraph 8 of the Complaint, Chicago Title craves reference to the assignment instruments referenced therein for the specific terms and import thereof and to the extent the allegations of paragraph 8 are inconsistent with the specific terms and import of the assignment instruments, the same are denied.

10. Chicago Title is without knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of paragraphs 9 and 10 of the Complaint and, therefore, denies the same.

11. As to the allegations of paragraph 11 of the Complaint, Chicago Title craves reference to the assignment instrument referenced therein for the specific terms and import thereof and to the extent the allegations of paragraph 11 are inconsistent with the specific terms

and import of the assignment instrument, the same are denied. As to the allegations of paragraph 11 regarding Plaintiff being the current holder of the First Mortgage, Chicago Title is without knowledge and information sufficient to form a belief as to the truth or falsity of those allegations and, therefore, denies the same.

12. Chicago Title admits the allegations of paragraph 12 of the Complaint.

13. As to the allegations of paragraph 13 of the Complaint, Chicago Title admits it issued a loan policy of title insurance bearing Policy Number 7210740-73317401 (the "Title Policy") insuring the First Mortgage with an insured amount of \$17,071,873.33. Chicago Title denies there are any attachments to the Complaint. Any allegations of paragraph 13 inconsistent with the foregoing are denied.

14. Chicago Title is without knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of paragraphs 14 and 15 of the Complaint and, therefore, denies the same.

15. Chicago Title denies the allegations of paragraph 16 of the Complaint.

16. Chicago Title admits the allegations of paragraph 17 of the Complaint, but would further allege the Ordinance does not comply with the recording act, it was not properly witnessed and acknowledged and it was not indexed against any owners of real property or anyone else; therefore, it would not provide constructive notice as it would not be found in a title search of the Property.

17. Chicago Title is without knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 18 of the Complaint and, therefore, denies the same.

18. Chicago Title denies the allegations of paragraphs 19 and 20 of the Complaint.

19. As to the allegations of paragraph 21 of the Complaint, Chicago Title admits only that the Ordinance was not listed as an exception in the Title Policy, but denies the remaining allegations of paragraph 21.

20. Chicago Title admits the allegations of paragraphs 22 and 23 of the Complaint.

21. As to the allegations of paragraph 24 of the Complaint, Chicago Title admits that by letter dated June 21, 2013, Plaintiff made a claim with Chicago Title under the Title Policy and craves references to that letter for the terms and import of that letter.

22. Chicago Title admits the allegations of paragraph 25 of the Complaint.

23. As to the reiterated allegations of paragraph 26 of the Complaint, Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

24. As to the allegations of paragraph 27 of the Complaint, Chicago Title craves reference to the Title Policy for the specific terms and import thereof and to the extent the allegations of paragraph 27 are inconsistent with the specific terms and import of the Title Policy, the same are denied.

25. As to the allegations of paragraph 28 of the Complaint, Chicago Title admits only that the Title Policy states Chicago Title insures against any loss or damage sustained or incurred by reason of (a) any defect in or lien or encumbrance on the title; or (b) unmarketability of the title, but would further allege this is subject to the exclusions from coverage set forth in the Title Policy, the exceptions from coverage contained in Schedule B of the Title Policy, and the Conditions and Stipulations of the Title Policy. Any allegations of paragraph 28 inconsistent with the foregoing are denied.

26. Chicago Title denies the allegations of paragraphs 29, 30, and 31 of the Complaint.

27. As to the allegations of paragraph 32 of the Complaint, Chicago Title admits the Title Policy does not list the Ordinance or the matters on the Official Map as stated exceptions in the Title Policy and Chicago Title would further allege it did not list the proposed condemnation of the Property as an exception to coverage as there was no condemnation or proposed condemnation.

28. As to the allegations of paragraph 33 of the Complaint, Chicago Title admits Plaintiff made a claim for insurance benefits under the Title Policy by letters dated June 21, 2013 and November 14, 2014. The remaining allegations of paragraph 33 are denied.

29. Chicago Title denies the allegations of paragraphs 34, 35, 36, and 37 of the Complaint.

30. As to the reiterated allegations of paragraph 38 of the Complaint, Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

31. As to the allegations of paragraph 39 of the Complaint, Chicago Title admits the Title Policy is a contract of insurance between Chicago Title and the insured under the Title Policy. The remaining allegations of paragraph 39 contain conclusions of law and, therefore, no response is required.

32. Chicago Title denies the allegations of paragraph 40 of the Complaint.

33. As to the allegations of paragraph 41 of the Complaint, Chicago Title admits Plaintiff's claim is excluded pursuant to the eminent domain exclusion. With respect to the remaining allegations of paragraph 41, Chicago Title craves reference to the Title Policy for the

specific terms and import thereof and to the extent the allegations of paragraph 41 are inconsistent with the specific terms and import of the Title Policy, the same are denied.

34. As to the allegations of paragraph 42 of the Complaint, Chicago Title craves reference to the Title Policy for the specific terms and import thereof and to the extent the allegations of paragraph 42 are inconsistent with the specific terms and import of the Title Policy, the same are denied.

35. Chicago Title denies the allegations of paragraphs 43, 44, 45, 46, 47, and 48 of the Complaint.

36. As to the reiterated allegations of paragraph 49 of the Complaint, Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

37. Chicago Title admits the allegations of paragraph 50 of the Complaint.

38. As to the allegations of paragraph 51 of the Complaint, Chicago Title admits it refused to pay Plaintiff insurance benefits. Chicago Title denies the remaining allegations of paragraph 51.

39. Chicago Title denies the allegations of paragraphs 52, 53, 54, 55, 56, 57, 58, and 59 of the Complaint.

FOR A SECOND DEFENSE
(Rule 12(b)(6), SCRCPP)

40. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

41. Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action and should be dismissed.

FOR A THIRD DEFENSE

(Terms, Conditions, Stipulations, Exclusions, and Limitations of the Title Policy)

42. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

43. Each and every cause of action alleged in the Complaint is barred, in whole or in part, by the terms, conditions, stipulations, exclusions, and limitations of the Title Policy and the principles of law applicable thereto.

FOR A FOURTH DEFENSE

(Conditions and Stipulations of the Title Policy)

44. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

45. The Title Policy contains conditions and stipulations which must be satisfied in order to obtain coverage under the Title Policy. The Title Policy's conditions and stipulations provide in part as follows:

5. PROOF OF LOSS OR DAMAGE

In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company a proof of loss or damage signed and sworn to by the insured claimant shall be furnished to the Company within 90 days after the Insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title or other matter insured against by this policy which constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the insured claimant to provide the required proof of loss or damage, the Company's obligations to the insured under the policy shall terminate including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage.

In addition, the insured claimant may reasonably be required to submit to examination under oath by an authorized representative of the Company and shall produce for examination, inspection and copying, at such

reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage.

All information designated as confidential by the insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this paragraph, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

46. After Plaintiff submitted its claim to Chicago Title, Chicago Title requested information from Plaintiff as set forth in Paragraph 5 of the conditions and stipulations of the Title Policy, but Plaintiff failed to provide such information to Chicago Title and, therefore, any potential liability Chicago Title may have had under the Title Policy terminated.

47. Accordingly, Plaintiff's claim under the Title Policy was appropriately denied and Plaintiff's Complaint should be dismissed in its entirety.

FOR A FIFTH DEFENSE
(Exclusions of the Title Policy)

48. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

49. The Title Policy sets forth numerous exclusions to coverage. The Title Policy specifically excludes coverage for loss or damage which arises by reason of rights of eminent domain. More specifically, the Title Policy provides as follows:

Exclusions from Coverage

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

* * * *

2. Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which occurred prior to the Date of Policy which would be binding on the rights of a purchaser for value without knowledge.

50. Because no notice of the exercise of the rights of eminent domain was recorded in the public records at the date of the Title Policy, Plaintiff's claims are excluded under the Title Policy.

51. Accordingly, Plaintiff's claim under the Title Policy was appropriately denied and Plaintiff's Complaint should be dismissed in its entirety.

FOR A SIXTH DEFENSE

(Conditions and Exclusions of the Title Policy)

52. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

53. The Title Policy sets forth the following conditions:

7. DETERMINATION AND EXTENT OF LIABILITY.

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) The liability of the Company under this policy shall not exceed the least of:

(i) the Amount of Insurance stated in Schedule A, or, if applicable, the amount of insurance as defined in Section 2 (c) of these Conditions and Stipulations;

(ii) the amount of the unpaid principal indebtedness secured by the insured mortgage as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time the loss or damage insured against by this policy occurs, together with interest thereon; or

(iii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

54. The Title Policy sets forth additional exclusions to coverage. The Title Policy specifically excludes coverage for certain matters which result in no loss or damage to an insured claimant. More specifically, the Title Policy provides as follows:

Exclusions from Coverage

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

3 Defects, liens, encumbrances, adverse claims or other matters:

(c) resulting in no loss or damage to the insured claimant.

55. The South Carolina Department of Transportation exercised its right of eminent domain for the first time pursuant to a condemnation notice and tender of payment filed with the Horry County Court of Common Pleas on December 15, 2009 in the case captioned *South Carolina Department of Transportation vs. Jericho State Capital Corporation of Florida, et al.*, Case No. 2009-CP-26-11956 ("Condemnation Action").

56. Plaintiff was compensated for any loss it claims is established by virtue of the Condemnation Action.

57. Plaintiff has therefore suffered no loss or damage.

58. Accordingly, Plaintiff's claim under the Title Policy was appropriately denied and Plaintiff's Complaint should be dismissed in its entirety.

FOR A SEVENTH DEFENSE
(Exclusions of the Title Policy)

59. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

60. The Title Policy sets forth additional exclusions to coverage. The Title Policy specifically excludes coverage for matters that take place after the Title Policy is issued. More specifically, the Title Policy provides as follows:

Exclusions from Coverage

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

4 Defects, liens, encumbrances, adverse claims or other matters:

(d) attaching or created subsequent to Date of Policy

61. The South Carolina Department of Transportation exercised its right of eminent domain for the first time pursuant to the Condemnation Action, which was filed after the date the Title Policy was issued.

62. Any loss or damage claimed by Plaintiff as a result of the condemnation of the Property is therefore excluded from coverage under the Title Policy.

63. Accordingly, Plaintiff's claim under the Title Policy was appropriately denied and Plaintiff's Complaint should be dismissed in its entirety.

FOR AN EIGHTH DEFENSE
(Exclusions of the Title Policy)

64. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

65. The Title Policy sets forth the following additional exclusions to coverage:

Exclusions from Coverage

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

3. Defects, liens, encumbrances, adverse claims or other matters:

(a) created, suffered, assumed or agreed to by the insured claimant;

(b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;

66. At the time Plaintiff purchased the First Mortgage, it had knowledge of the issue about which it now claims, improperly, is a defect or encumbrance on title.

67. In addition, Plaintiff provided Chicago Title with what it represented to be its loan file, and in the loan file, there exists a contract of sale which identifies the Ordinance.

68. Plaintiff's claims are therefore excluded from coverage by Exclusions 3(a) and 3(b).

69. Accordingly, Plaintiff's claim under the Title Policy was appropriately denied and Plaintiff's Complaint should be dismissed in its entirety.

FOR A NINTH DEFENSE
(Terms of the Title Policy)

70. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

71. The Title Policy sets forth the following insuring provisions:

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS, AND STIPULATIONS, CHICAGO TITLE INSURANCE COMPANY, a Missouri corporation, herein called the Company, insures, as of Date of Policy shown in Schedule

A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1 Title to the estate or interest described in Schedule A being vested other than as stated therein;

2 Any defect in or lien or encumbrance on the title;

3 Unmarketability of the title;

4 Lack of a right of access to and from the land;

5 The invalidity or unenforceability of the lien of the insured mortgage upon the title;

6 The priority of any lien or encumbrance over the lien of the insured mortgage;

7 Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material:

a. arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or

b. arising from an improvement or work related to the land which is contract for or commenced subsequent to the Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance;

8 The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage in the named insured assignee free and clear of all liens.

72. Plaintiff's claim does not fall within any of the insuring provisions of the Title Policy.

73. Accordingly, Plaintiff's claim under the Title Policy was appropriately denied and Plaintiff's Complaint should be dismissed in its entirety.

FOR A TENTH DEFENSE

(Terms, Conditions, and Exclusions of the Title Policy)

74. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

75. Plaintiff's claims are excluded or not covered by the Title Policy because there is no proof of loss or damage and Plaintiff has suffered no loss or damage.

76. The Title Policy requires Plaintiff to provide Chicago Title with a "signed and sworn to" proof of loss or damage and to "describe the defect in, or lien or encumbrance on the title, or other matter ... which constitutes the basis of loss or damage." Plaintiff has not provided

such information to Chicago Title.

77. In order for its claim to be covered, Plaintiff must suffer loss or damage.

78. Plaintiff has suffered no loss or damage because it has not foreclosed the First Mortgage.

79. Until a foreclosure sale is held, and the amount received for the Property is established, Plaintiff has suffered no loss or damage.

80. Accordingly, there is no coverage for Plaintiff's claims under the Title Policy.

FOR A ELEVENTH DEFENSE
(Failure to Mitigate Damages)

81. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

82. Plaintiff has failed to mitigate its damages.

FOR AN TWELFTH DEFENSE
(Waiver)

83. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

84. Plaintiff's claims are barred by the doctrine of waiver.

FOR A THIRTEENTH DEFENSE
(Economic Loss Rule)

85. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

86. Plaintiff seeks damages for purely economic losses and therefore Plaintiff's remedies are limited by the economic loss rule, to include the prohibition against tort-based causes of action.

FOR A FOURTEENTH DEFENSE

(Payment)

87. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

88. Plaintiff has been paid for its loss by virtue of payment it received or should have received in the Condemnation Action.

89. Plaintiff's claims are therefore barred by the doctrine of payment.

FOR A FIFTEENTH DEFENSE

(Res Judicata and Collateral Estoppel)

90. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

91. Some or all of Plaintiff's claims are barred by the doctrines of *res judicata* and collateral estoppel by virtue of the Condemnation Action and the verdict rendered therein.

FOR A SIXTEENTH DEFENSE

(Additional Defenses Reserved)

92. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

93. Chicago Title reserves the right to plead additional affirmative defenses upon further discovery.

WHEREFORE, having fully answered the Plaintiff's Complaint, Defendant Chicago Title Insurance Company respectfully requests that the Court issue an Order:

- A. Dismissing the Plaintiff's Complaint;
- B. Awarding Chicago Title attorney fees and the costs of this action; and

C. Awarding any such other relief as the Court deems just and proper.

CALLISON TIGHE & ROBINSON, LLC



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ATTORNEYS FOR DEFENDANT

May 11, 2015

1020.566\lynx\Answer

State of South Carolina
In the Court of Common Pleas
County of Horry
2013-CP-26-5530
2015-CP-26-1084

Jericho State Capital Corp. Of Florida,
Plaintiff,

Vs.

Chicago Title Insurance Company,
Defendant

And

Lynx Jericho Partners, L.L.C.,
Plaintiff,

Vs.

Chicago Title Insurance Company, Defendant

Plaintiffs' Reply
In Support of Summary Judgment
Before the Honorable
Karl Folkens, Esq,
Special Referee

Location: 601 West Evans Street
Florence, South Carolina 29501

Date: Wednesday, August 28, 2024

Time: 9:30 a.m. - 12:04 p.m.

Court Reporter: Abigail M. Kiker

Job No. CS6881229

A P P E A R A N C E S

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Also: Harry Dixon, Esq.

Also Present:

The Honorable Karl Folkens, Esq.

Special Referee

Phil Magen, Chicago Title

Scott Svirsky, Plaintiff (Appearing via phone call)

Glen Chwatt, Plaintiff (Appearing via Zoom)

E X H I B I T S

Pg/Ln	Exhibit	Description
39/1	A	Chart of Preservation Capital
(Exhibit Retained by Counsel)		

** Uh-huh = Affirmative

Huh-uh = Negative**

1 Mr. Folkens: Okay. This is the matter of
2 Jericho State Capital Court of Florida versus Chicago
3 Title and Lynx Jericho Partners versus Chicago Title.
4 It's docket numbers 2013-CP-26-5530 and consolidated to
5 2015-CP-26-1084. It is before me on cross motions for
6 summary judgment, and Scott is coming. He works with
7 Glen. They're both --

8 Mr. Masel: My clients.

9 Mr. Folkens: Hello, Scott?

10 Mr. Svirsky: Yes?

11 Mr. Folkens: Yeah, this is Karl Folkens.
12 I'm the special referee. We just started the hearing.
13 Glen is here monitoring on his iPad, and you are here
14 -- I'm using my video, but you'll have audio. And
15 you'll be able to hear counsel's argument, and me.
16 Okay. Any questions?

17 Mr. Svirsky: No. Great. Thank you very
18 much.

19 Mr. Folkens: Okay. Thank you. Memoranda
20 have been filed and exhibits have been filed in support
21 of those respective motions. Gentlemen, before we get
22 started, let's have names for the record, beginning
23 with the plaintiff?

24 Mr. Masel: Sure. My name is Scott Masel,
25 and with me is States Roberson, and we represent the

1 plaintiffs in this case.

2 Mr. Folkens: Defense?

3 Mr. Koutrakos: Dimitri Koutrakos, here on
4 behalf of Chicago Title Insurance Company, and Harry
5 Dixon, my co-counsel with me. And on behalf of Chicago
6 Title Insurance Company, Phil Minion is here.

7 Mr. Folkens: And also coming in via Zoom
8 is Glen Chwatt, C-H-W-A-T-T, and Scott Svirsky,
9 S-V-I-R-S-K-Y. Any other appearances anticipated
10 today?

11 Mr. Koutrakos: No, sir.

12 Mr. Folkens: Have y'all discussed how you
13 would like to present?

14 Mr. Masel: We did not discuss, but I
15 assumed it would be --

16 Mr. Folkens: Is the word @2:24?

17 Mr. Koutrakos: Yeah, yeah. I think we --
18 we filed our motion first, so I -- I'll be happy to go
19 first.

20 Mr. Folkens: Okay. You have the floor.
21 And I would tell counsel, I read all the memoranda and
22 have reviewed all of the exhibits.

23 Mr. Koutrakos: Yeah. Yeah, thank you,
24 your Honor. May it please the Court. We are here on
25 summary judgment, a cross motion for summary judgment.

1 What was interesting here is I don't think any of the
2 parties dispute any of the material facts. I think the
3 facts are just simply not disputed. And I know we
4 have been here before on summary judgment years ago,
5 and you've read the briefs, but I want to focus on some
6 of the facts that I think are critical to the motion.
7 Some of them are the basic facts that we've all been
8 dealing with, but some are new and additional facts
9 that are relevant to this motion.

10 So as your Honor recalls, back in July -- July
11 25 2006, a lot of things happened on that day,
12 including Peach Tree purchasing property. It's 131.4
13 acres. That same Peach Tree gives the first mortgage
14 to RE Loans. That's the mortgage held by Lynx Jericho.
15 That was for \$18,520,000. The same day, Peach Tree
16 gives a second mortgage to Jericho State Capital for
17 \$4,263,000 approximately. At the same time, Chicago
18 Title issues a loan policy insuring RE Loans. That's
19 the first mortgage. That policy amount was about 17
20 million. And then Chicago Title issues a policy as
21 well to Jericho State for the loan amount, \$4,263,000.
22 Notably, the Jericho State policy has as an exception,
23 the first mortgage, which is the mortgage given by
24 Peach Tree to RE Loans.

25 The loan eventually goes into default, and

1 Jericho State -- not Lynx Jericho, Jericho State --
2 filed a foreclosure action. A foreclosure order was
3 issued in November of 2007. The Court determines that
4 on the note that secures the Jericho State mortgage
5 that's approximately 7.5 million due on the note, or
6 accurately, \$7,490,031 due on the note. On December 3,
7 2007, the foreclosure sale takes place. Jericho State
8 is the successful bidder and bids \$9 million for -- for
9 -- for the property.

10 In February of 2008 the Master-in-Equity issues
11 a Master-in-Equities deed. The property is -- the
12 subject is conveyed to Jericho State. Of course, it's
13 conveyed subject to first mortgage held by RE Loans,
14 now held by Lynx Jericho.

15 Just fast forward the timeline, December 15,
16 2009, the DOT files a condemnation action. February of
17 2009, Jericho State files a title claim. July 2011,
18 Jericho State filed suit. On May of 2013 -- May 22nd
19 of 2013, Lynx Jericho buys the first mortgage. So at
20 that point in time, the mortgage has been through a
21 series of assignments. By May of 2013, Lynx Jericho
22 holds the -- the RE Loan's first mortgage. Then Lynx
23 Jericho files a claim with Chicago Title, in June --
24 July 21, 2013. In November of 2014, in the
25 condemnation action, the jury awards -- a verdict is

1 reached, 2.1 million dollars. Shortly thereafter, in
2 January of 2015, Lynx Jericho files a claim which is
3 subsequently -- excuse me -- Lynx Jericho's claim is
4 denied. And then in February of 2015, Lynx Jericho
5 filed a lawsuit against Chicago Title. Notably, in
6 Chicago Title's answer, all the way back in 2015,
7 Chicago specifically alleged until a foreclosure sale
8 is held and the amount received for the property
9 determined, plaintiff has survived no loss or damage.

10 So that was back on May 13th, 2015. As you
11 recall, in 2016, in July and August we had a summary
12 judgment briefing. Those same issues were raised.
13 Chicago Title raised the issues of Lynx Jericho needing
14 to foreclose. In all the briefing -- the briefing took
15 place in July of 2016, August of 2016, and January of
16 2017 in this ver--- same room, I believe at this very
17 same table -- I argued -- and it's in the transcript,
18 and it's in the briefs -- that Lynx Jericho had to
19 foreclose its mortgage in order to suffer a loss.

20 Between the years 2020 and 2023, Jericho State
21 -- the property's basically divided into the three
22 parcels -- and it's all in the -- the details are all
23 in the briefs. There's the eastern, western
24 properties, and the remainder -- southern remainder, I
25 think we called it -- in the course of those three

1 years, Jericho State --

2 Mr. Folkens: Do you mind if I interrupt
3 you?

4 Mr. Koutrakos: Yeah.

5 Mr. Folkens: Just so --

6 Mr. Koutrakos: Yeah.

7 Mr. Folkens: Lynx Jericho, Peach Tree
8 Phase III is unrelated as far as entity to Lynch
9 Jericho Partners, L.L.C.; is that correct?

10 Mr. Masel: They don't have identical
11 ownership.

12 Mr. Folkens: It was a different company
13 altogether?

14 Mr. Masel: It's a different company.

15 Mr. Folkens: Okay.

16 Mr. Masel: That's correct.

17 Mr. Koutrakos: You're talking about the
18 grantees and the subsequent sale?

19 Mr. Folkens: Correct. The 35 acre
20 transfer.

21 Mr. Koutrakos: Right. So Jericho State
22 sells the property in three separate transactions. In
23 August of 2022, August 8th of 2022, Lynx Jericho, who
24 still has the first mortgage on the property, files a
25 release releasing the lien on the mortgage from what we

1 call the western and eastern parcels.

2 In August of 2023, we were specifically asked in
3 discovery -- we responded in discovery that -- and
4 continue to take that position that Lynx Jericho had to
5 foreclose its mortgage that establish any type of loss
6 under the policy. Despite that, in December of 2023
7 Lynx Jericho releases its mortgage. At that point in
8 time, the mortgage is released from all the property
9 that that it could theoretically encumber, and that
10 mortgage was -- that released to reported December 8th,
11 2023.

12 Okay. So again, I don't think any of these
13 facts are in dispute. And -- and in event, on this
14 motion for summary judgment, I want to focus first --
15 the first part of the motion, and I've kind of already
16 focused a little bit on it, on Lynx Jericho.

17 And in our briefing, your Honor, we termed Lynx
18 Jericho an irrational lender. And what do we mean by
19 that? What we mean by that is an irrational lender is
20 a lender that holds a first mortgage, 18.5
21 million-dollar first mortgage, on property since July
22 of 2006. Clearly, as far as we understand, that
23 mortgage has been in default since then. But
24 throughout that whole time, Lynx Jericho, the holder of
25 this 18.5 million dollar first mortgage, it never

1 foreclosed, never sought to realize on its collateral.
2 And in fact, it's done quite the opposite. It has
3 released its mortgage from the subject property.

4 So, your Honor, the question is why. Why did
5 that happen? Well, that happened because Jericho State
6 and Lynx Jericho, or Jericho State, the owner of the
7 property for most of the timeline, if you will, the
8 former owner the second mortgage, and -- and Jericho
9 State and Lynx Jericho are controlled -- are
10 essentially controlled, one and the same people.

11 Keep in mind that, you know, as I mentioned
12 before, the Jericho State policy took exception to the
13 Lynx Jericho first mortgage. That -- that's not
14 disputed anywhere. Jericho State would never have
15 allowed Lynx Jericho to foreclose because Jericho State
16 would lose title to the property. Even though Lynx
17 Jericho has released its mortgage, and it's refu---
18 without foreclosing, it still wants to maintain its
19 claim.

20 So we got kind of a -- a strategy on behalf of
21 the plaintiffs to maintain these dual claims. And what
22 -- what I kind of view as an attempt to seek a double
23 recovery, right? Because the rational lender -- or any
24 lender that I've ever heard of holding an 18.5 million
25 dollar first, would have foreclosed and realized its

1 collateral.

2 And I understand the reasons why. And it's a --
3 it's very obvious why Lynx Jericho didn't foreclose.
4 It's because Jericho State didn't want it to. But the
5 aura of trying to maintains -- still trying to maintain
6 -- these two claims and seeking a double recovery, we
7 don't think is appropriate. It's kind of the theme of
8 what we're going to talk about.

9 In any event, you know, I think the law does not
10 entitle Lynx Jericho to do this. And so that takes me
11 to my first argument -- our first argument. And the
12 first argument is that because Lynx Jericho fully and
13 voluntarily released its mortgage, coverage terminates
14 under the policy. So that is Paragraph 9-C of the
15 policy. That language is absolutely clear, absolutely
16 unambiguous. There's no Court that has determined that
17 language to be ambiguous. In fact the Courts, the very
18 few Courts that have interpreted 9-C have found the
19 language to be clear and unambiguous, and have applied
20 its terms to cancel coverage under a policy.

21 Mr. Folkens: Do you acknowledge there are
22 no specific South Carolina cases under --

23 Mr. Koutrakos: No. There are no -- there
24 are no South Carolina cases interpreting 9-C.

25 Mr. Folkens: So it would be a matter of

1 first impression on that issue?

2 Mr. Koutrakos: It would be a -- yeah.
3 Because interpreting the plain meaning of a policy is
4 not a novel question. But interpreting the plain
5 meaning of that particular policy provision has never
6 been done, as far as I know. It doesn't appear in any
7 published opinion in South Carolina.

8 And plaintiffs have pointed to -- to -- to no
9 case that finds that language is ambiguous or is
10 unclear. And what is that language? As Paragraph 9
11 says, the reduction of insurance, a reduction or
12 termination of liability. And we're relying on
13 Sub-Paragraph C, which is plain and unambiguous,
14 payment in full by any person or the voluntary
15 satisfaction or release of the insured mortgage shall
16 terminate all liability of the company, except as
17 provided in Section 2-A of the conditions and
18 stipulations. The exception in -- of 9-C, set forth in
19 Paragraph 2-A does not apply. I don't think the
20 plaintiffs contend that that exception applies.

21 The argument that the plaintiffs made is that
22 this is an exclusion. But it's not an exclusion. This
23 is not -- the policy has an exclusions section, which
24 we spent a lot of time litigating in this case, and it
25 also has exceptions. This is not one of them. And so

1 the case is that plaintiff's side, you know, construing
2 exclusions but only against the insurer don't -- don't
3 apply in this area. But even if they did -- even if
4 they did, there is no language within 9-C that -- let
5 me back up. 9-C is crystal clear and unambiguous.

6 Mr. Folkens: You mean 2-A?

7 Mr. Koutrakos: No, no. I mean 9-C.

8 Mr. Folkens: Okay.

9 Mr. Koutrakos: Yeah. 9-C, the reduction
10 of -- of the termination of coverage under the policy
11 when the insured mortgage voluntarily -- voluntarily
12 releases its lien, which exactly what Lynx Jericho has
13 done. And there's no distinction between a termination
14 -- excuse me -- a voluntarily release of a mortgage
15 done pre-claim or post-claim.

16 Plaintiffs would want you to read into the
17 language of -- of 9-C and say, hey if a claim is
18 pending, 9-C doesn't apply. But you know, they would
19 be asking the Court to rewrite that policy, which the
20 Court can't do. And would, in fact -- asking the Court
21 torture its meaning. So they're trying to -- they're
22 trying to create limitations, saying, yeah, 9-C doesn't
23 apply if the claim has already been filed, or
24 submitted.

25 And so we've cited -- and, your Honor, there's

1 not a of lot cases around the country on 9-C, and
2 reason why is most lenders would never voluntarily
3 release their mortgage. They just wouldn't do that.
4 They would, you know, foreclose. When they have an
5 issue, why would they ever voluntarily release a
6 mortgage? But it's happened, you know, I think a half
7 a dozen times, at least it's gone to litigation. And
8 we've cited the -- what we think is the four -- the
9 four cases where there was real analysis of 9-C.

10 And plaintiff agrees with us. There's one case
11 where the claim was filed first. There's a claim that
12 was filed, and during the course of the claim, the
13 insured lender sold the property, and then -- and this
14 is the RNT Holdings case, First United General. It's a
15 California case. And in that case, the Court applied
16 9-C and found coverage was terminated under that
17 provision of the policy.

18 Another case, which is not as clear, and I'll
19 submit to -- about when exactly the claim was made --
20 and this is the Morrison Vs. Wells Fargo case. It's a
21 Federal District case out of Commonwealth of
22 Pennsylvania. And in that case, it was where the
23 plaintiff filed suit, and his name was James Morrison.
24 He never signed the mortgage. There was some other
25 James Morrison that signed the mortgage, and it was a

1 real interesting scenario. But -- but the real James
2 Morrison sued the bank, and the bank added the title
3 company to the litigation. That's what the opinion
4 says.

5 Later after that happened, the real -- and I
6 don't know why he did this -- the real James Morrison
7 just paid off the mortgage, right? And then there was
8 subsequent litigation, and then the lender wanted --
9 wanted coverage from the -- from the title insurance
10 company. And the Court found and applied 9-C. And
11 that is arguably -- the way I read the opinion, that is
12 another one that's a post-claim release.

13 The other two cases we cited was the First
14 Midwest case, and that a wrap-around mortgage. There
15 was a refi of that wrap-around mortgage that paid off
16 -- the wrap-around mortgage paid off the prior
17 mortgages. The Court found the language of 9-C was
18 unambiguous, applied it, and terminated coverage.

19 The other case we cited was from the United
20 States District Court for District Court of Puerto
21 Rico. Joglor vs. First American Title Insurance
22 Company, and that was applying 9-C when a settlement
23 agreement satisfied the debt, and there was no debt to
24 support a mortgage that was subsequently assigned. 9-C
25 terminated coverage. And that -- that case would

1 involve a --

2 Mr. Folkens: That was an assignment of
3 another mortgage to a different lender, right?

4 Mr. Koutrakos: It was to a different
5 lender, but the debt had been satisfied, and the Court
6 said that there was nothing the mortgage -- there was
7 nothing -- the note follows the mortgage, and if
8 there's no debt, the assignment of the mortgage to the
9 new lender is meaningless.

10 Mr. Folkens: Not on point, but my analogy
11 -- it's not on point with these.

12 Mr. Koutrakos: Well, no. I'm -- the
13 Court found -- the Court determined as a matter of law
14 that the mortgage had been released because the debt
15 had been paid. Same scenario here. I'm just -- I
16 really reciting the case for the application of 9-C,
17 the Court finding it clear and unambiguous. We got two
18 cases where the claim was filed first, the mortgage
19 released second, and the Courts did not make a
20 distinction between a release that occurs before a
21 claim or a release that occurs after the claim.

22 And so the plaintiff has argued that, hey,
23 applying 9-C would be an absurd result. Applying 9-C
24 to the facts and circumstances of this case, they're
25 saying, would lead to an absurd result. So what's that

1 absurd result? Well, the plaintiffs claim that because
2 they made its claim a long time ago and the -- the
3 release was done years later, that -- that would lead
4 to an absurd result, with a -- with a claim pending.

5 So under -- under their interpretation, so long
6 as a claim is made, a lender freely can release its
7 mortgage. I mean, that's a natural consequence of
8 their -- of their position. An insured lender can
9 escape the application of 9-C so long as a claim is
10 pending.

11 So if you start to think of your typical
12 scenario, closing takes place on day one. Day two,
13 there's a defect discovered. Day three, there's a
14 claim made. Day four, mortgage is released. Title
15 Insurance Company, give me my money. You know, that's
16 an absurd result because --

17 Mr. Folkens: Well, in the context of the
18 absurdity -- I know that I'm jumping ahead --

19 Mr. Koutrakos: Yeah.

20 Mr. Folkens: -- but what about the
21 argument that that would incentivize any title insurer
22 to simply drag out a claim? So the irrational lender
23 would feel squeezed and have to take some action short
24 of a foreclosure? Where would be the incentive for a
25 prompt resolution of a claim if an insurer could simply

1 drag it out?

2 Mr. Koutrakos: Well, it's not -- it's not
3 -- it's not the insurance company that's dragged it out
4 here because --

5 Mr. Folkens: No, I'm not saying that, but
6 conceptually, you said day one, day two, and day three.
7 And then let's say the title insurance says, we'll I'm
8 going to make -- instead of adjusting the claim on day
9 five, we are going to do it on day 1,300?

10 Mr. Koutrakos: Right. Well, listen. The
11 -- in that scenario, for the loss to be established,
12 the lender has to file foreclosure. It has to realize
13 on its collateral, and that's what -- what -- what
14 hasn't happened here. Instead it -- it has collateral.
15 I mean, think about it. Lynx Jericho had a \$18.5
16 million mortgage, a property that, when you add up the
17 sales price, I don't know what it was, 10 million? 11
18 million? They gave it up. They refused to foreclose
19 for whatever reason. I don't -- I mean, I suggested
20 early on in this hearing why they didn't do it, but
21 they take the position -- it could be 20/60, your
22 Honor, and they still wouldn't foreclose because they
23 never would have foreclosed.

24 Mr. Folkens: Well, and the record also
25 talks about the market in 2007, turning. And would a

1 rational lender have said we don't want to take title
2 in the middle of this market?

3 Mr. Koutrakos: Okay. Well, if the
4 rational -- in my mind, I think a rational lender -- I
5 think it's irrational for the holder of a first
6 mortgage, or a almost \$20 million first mortgage to sit
7 back and let its collateral go, whether it's worth 8
8 million, 7 million, 6 million or 5 million. They just
9 -- they gave to up for free. I think that's -- I don't
10 see how that shows any sort of sense of rationality.

11 Mr. Folkens: Okay.

12 Mr. Koutrakos: And so -- so Lynx Jericho,
13 remember we repeatedly said, you know -- I added that
14 -- those things to the timeline as soon as the
15 complaint was filed. We let them know that they needed
16 to foreclose. We briefed it. We argued it. We
17 mentioned it numerous times. That never took place.
18 They were -- they were -- they were told. They were
19 informed. The policy -- they're a sophisticated party.
20 They knew they needed to do that, but instead they
21 released the mortgage.

22 So I mean, you know, quite frankly, I think the
23 -- Lynx Jericho has to live with its own consequences.
24 And again, it goes back to trying to mountain these two
25 claims. Because Lynx Jericho is controlled by the same

1 people as Jericho State. They want to be able to have
2 a double recovery. They want to be able to sell the
3 property unencumbered, but have the benefit of, you
4 know -- and the only way they could do that, the holder
5 -- the owner of the property could do that is get a
6 voluntarily -- voluntary satisfaction of the mortgage.
7 And Lynx Jericho gave up its collateral for free. It
8 -- it released its mortgage voluntarily, so there
9 should be no coverage.

10 In --in an attempt to really try to get out of
11 what I think is the clear, plain, and unambiguous
12 language of 9-C, they cited this case from the 4th
13 Circuits, Chicago Title vs. 100 Investors. That's an
14 owner policy case. It -- it -- the coverage was
15 provided under duty to defend, but the indemnity
16 obligation, what happened was the property was sold,
17 and -- and -- without warranty -- and coverage
18 terminated, under the terms of the policy. So again,
19 that's an owner's policy. There's no 9-C in that
20 policy. There's a similar provision, I guess you could
21 argue, if the owner sells the property with no
22 warranty, there's no coverage after the fact. The
23 Court applied that there, so I don't see how that how
24 that case helps us. And so --

25 Mr. Folkens: Let me ask -- this may be

1 more academic, but it may help me understand the
2 argument. If Lynx Jericho had received a deed in lieu
3 of foreclosure, what would your position be whether
4 that would be an appropriate date of loss and an
5 appropriate component for the calculation of damage?
6 Or is it the actual contested foreclosure action or is
7 -- is it the termination of the security interest, this
8 operative?

9 Mr. Koutrakos: I think if it takes title,
10 pursuit to deed in lieu, I think that's -- I think
11 that's equivalent to a deed of foreclosure.

12 Mr. Folkens: Okay.

13 Mr. Koutrakos: I mean, that's -- I mean,
14 I haven't thought about it. I'm not sure what the case
15 law says, but my interpretation of the policy -- and my
16 folks sitting with me, after they think about it could
17 tell me if I'm wrong -- but I would take the position
18 that -- and the language of the case will say that loss
19 is established when the insured lender either takes
20 title -- which I think contemplates exactly what you're
21 saying -- or foreclose -- or forecloses. And if it
22 takes title via deed in lieu, I -- I think that would
23 be applicable.

24 Mr. Folkens: Subject to determination, it
25 seems.

1 Mr. Koutrakos: Exactly. Exactly.

2 Mr. Folkens: And let me just, out of
3 fairness to you both --

4 Mr. Koutrakos: Yeah.

5 Mr. Folkens: -- if your position changes,
6 just submit a --

7 Mr. Koutrakos: Well, I mean, these guys
8 can jump in if -- Harry can chime in if --

9 Mr. Dixon: 2-A says to address in lieu of
10 forecloses.

11 Mr. Koutrakos: Yeah, yeah --

12 Mr. Dixon: Precisely in that situation.

13 Mr. Koutrakos: Yeah, yeah.

14 Mr. Folkens: Okay.

15 Mr. Dixon: 2-A, title by -- debates in
16 lieu of --

17 Mr. Koutrakos: Right, right, right. Yup.
18 2-A. I'm sorry.

19 Mr. Folkens: But here -- hang on. Let me
20 put eyes on that.

21 Mr. Koutrakos: Yeah, 2-A says
22 continuation of insurance after acquisition of title --

23 Mr. Folkens: Okay. Right. Conveyance in
24 lieu of foreclosure.

25 Mr. Koutrakos: Right.

1 Mr. Folkens: So it's that point that 2-A
2 is considered operative?

3 Mr. Koutrakos: Yup.

4 Mr. Folkens: Okay.

5 Mr. Dixon: 2-A was applied -- the
6 foreshadow -- I don't want to jump on you --

7 Mr. Koutrakos: No, go ahead.

8 Mr Dixon: That kind of foreshadows the
9 Preservation Capital case. You have that kind of
10 analysis if -- if there's a to deed in lieu, under
11 Section 2-A.

12 Mr. Folkens: Okay.

13 Mr. Koutrakos: Okay. So that sort of
14 concludes my argument on 2-A -- excuse me. 9-C.

15 But the -- the failure to distinguish between an
16 owner's policy and a lender's policy -- and it's --
17 it's a critical distinction. It's a different worded
18 policy, no question. It's almost a different product.
19 It's still a title insurance product, but it's a
20 different animal, right? You know, is it -- is it --
21 it's a CGL policy versus a hazard insurance pol--- I
22 mean, it's different. And they're handled differently.

23 That takes me my next argument, and again, the
24 first argument was that there that a -- you know, under
25 9-C, Lynx Jericho has no coverage 'cause it voluntarily

1 released the mortgage.

2 He second argument is Lynx Jericho never
3 suffered a loss, and cannot have survived a loss until
4 it forecloses, which of course, he can't do now, right?
5 So Lynx Jericho never foreclosed. It now cannot
6 foreclose, and this kind of -- well, going to our next
7 argument -- related to our next argument, going into
8 the date of loss, but in -- in order to establish -- in
9 order to establish a loss under a lenders policy, an
10 insured lender has to file foreclose, actually. We'll
11 talk about that more about that later, but you know,
12 this is a policy of indemnity. And -- and if you --
13 and Section 7 of the condition and stipulations of the
14 policy says this is a -- this policy is a contract of
15 indemnity against actual monetary loss or damage
16 sustained or incurred by the insured claimant who has
17 suffered loss or damages, by reason of the matters
18 insured against by this policy and only to the extent
19 herein described.

20 The reason why I bring that up is that, you
21 know, it's not a policy of guarantee. It's a policy of
22 indemnity. There's a critical difference in that, and
23 we'll talk more about that later.

24 But an insured lender doesn't suffer this actual
25 monetary loss because of a title defect until it either

1 owns the property or after foreclosure. The loss
2 cannot be measured and -- and determined until
3 foreclosure takes place. And the actual -- actual
4 monetary loss can't be incurred. So it can't be
5 measured or incurred until a foreclosure takes place.

6 Mr. Folkens: That's the Karl case? The
7 California case?

8 Mr. Koutrakos: Okay. Yeah, the Karl
9 case. Exactly.

10 Mr. Folkens: Spelled the good way.

11 Mr. Koutrakos: Exactly. Yes, sir. And
12 -- and so why is that? Because unless and until an
13 insured lender forecloses its insured mortgage -- let
14 me back up. An actual monetary loss cannot be occurred
15 until an insured lender -- unless and until an insured
16 lender forecloses and it realize -- and the title
17 defect reduces the value of the property, such as
18 insufficient to pay the mortgage, right?

19 Mr. Folkens: What about the concept the
20 plaintiff advances of an impairment of security? The
21 security is impaired because of the encumbrance.

22 Mr. Koutrakos: Okay. So -- okay. So I
23 think I understand your question. So there -- and just
24 to make the math easy, they got \$100,000 mortgage,
25 \$100,000 piece of property. There's a \$10,000

1 impairment, right? Under their theory of the case once
2 that impairment occurs, they're entitled to a check.
3 So they get the \$10,000 check. Two years later and
4 three years later, the note's fully paid off, you know,
5 but the sale of the property or payments are made.
6 They're claiming that it's like, a claims made policy,
7 or my car got in an accident. I mean, that -- that --
8 actual monetary loss takes place.

9 Mr. Folkens: But you would agree in an
10 owner's policy that would be appropriate?

11 Mr. Koutrakos: Owner's policy -- the
12 moment this defect is discovered, they suffer a loss
13 immediately because it's a reduction in the value of
14 their fee simple interest. Owner insured is not
15 entitled -- doesn't have to, rather -- sell its
16 property to establish a loss.

17 Mr. Folkens: Right.

18 Mr. Koutrakos: Because it's the fee owner
19 of the property, it suffers a loss immediately. A lot
20 different from an insured lender. I mean, just think
21 about the scenarios that would pop up. And you can --
22 and we've talked about hypotheticals to bring up to
23 you, and there's so many different hypotheticals which
24 would prove the point. But, you know, simple ones
25 like, what happens when a \$100,000 piece of property,

1 the insured mortgage is 50,000, the defect is 50,000,
2 or 60,000, right? Everybody knows what the defect is,
3 but the -- the -- but the loan is being paid back.
4 There's no default. There's no need to foreclose. And
5 in three, four years, or whatever time limit, the
6 note's paid off. The -- the insured lender would never
7 suffer a loss under the scenario.

8 Plaintiff's theory of the case, the plaintiff is
9 entitled to some sort of check when the security is
10 so-called impaired, right? The second there's issue
11 with -- the defect -- and they can put some sort of
12 value on it, regardless of whether they get paid in
13 full, regardless of whether the collateral brings in a
14 lot more to pay the debt. Under the plaintiff's theory
15 of the case, it doesn't matter. They're entitled to a
16 check the moment the defect is discovered, regardless
17 of the property -- of them -- regardless of them being
18 oversecured, regardless of the note being paid off.
19 And so that's why the distinction between a lender's
20 policy and an owner's policy is critical.

21 I mean, it's -- it's -- it's a huge difference,
22 and our Courts have treated it like that. If you look
23 at the opinions throughout the country, they all
24 uniformly acknowledge what you just asked me a question
25 on, the difference between an owner's policy and a

1 lender's policy. They clearly look -- look at -- they
2 look at and appreciate the -- the distinction between
3 the -- the two policies.

4 And so, you know, one of the things that the --
5 the plaintiffs suggest is that they look at the
6 language in the -- really the opening part of the
7 policy. And they say, hey, it's -- it's the date of
8 policy. That's what the language says. It's says it's
9 the date of policy. And if you look at the insurance
10 provisions, like, the first paragraph of the policy,
11 there's the company insurance as of date of policy
12 shown in Schedule A against loss or damage, not
13 exceeding the amount of insurance stated in Schedule A,
14 sustained or incurred by reason -- excuse me --
15 sustained or incurred by the insured by reason of --
16 and date of policy doesn't refer to when the loss
17 occurred. The date of policy refers to whether there's
18 a defect or not, right? As you know, a title insurance
19 company is retrospective. It's not prospective. It
20 looks at things that would have been on the public
21 record before the date of the policy. So it's the
22 status of title as of the date of policy, and that's
23 why the policy has the exclusion of 3-D, which is a
24 post-policy exclusion.

25 Mr. Folkens: Well, what do I do when the

1 Court of Appeals in this case specifically said the
2 insurance is designed to protect the purchase or
3 mortgagee when the policy was issued? You know, that's
4 in this case, and whether that's dictated because --

5 Mr. Koutrakos: The timing issue was never
6 before the Court of Appeals. They're quoting the
7 general language of what they believe the purpose of
8 title insurance to be. You know, language is not -- I
9 mean, it's -- it's -- they're not interpreting a policy
10 by setting forth that language. They're not
11 interpreting a particular policy provision. They're
12 not -- in that language, they were not determining a
13 date of loss. It was their understanding of what, in
14 general, the purpose of title insurance is, in their
15 mind.

16 Mr. Folkens: Sure.

17 Mr. Koutrakos: So under their theory of
18 the case, where you talk about that its, you know, the
19 loss occurs on the date of policy, regardless of
20 whether an insured lender forecloses, regardless of
21 whether insured lender would result in a double
22 recovery, it reads out other provisions of the policy,
23 right? It read out and makes Section 2 useless, and
24 Section 2 is after foreclosure or after an insured
25 lender takes title. Sections 9 of the policy is taking

1 into account partial payment or payment of loan. So
2 under plaintiff's interpretation, that would read out
3 those two interpretations of the policy. And going
4 back -- and I mentioned a policy of guarantee and the
5 difference between a policy of indemnity. And the
6 reason why I did that because you will see throughout
7 plaintiff's briefing, they say we never would have made
8 the loan -- had we known about the defect, we never
9 would have made the loan.

10 Well, the policy doesn't cover that. The policy
11 is a policy of indemnity. We did not guarantee the
12 status of the title. We didn't guarantee the value of
13 the property. We just agreed to indemnify the insured
14 lender for loss. But they act like, hey, we got this
15 policy. Had they told us this ordinance was out there,
16 we never would have made -- we never would have made
17 the loan. But that's -- that's not applicable
18 analysis. That's not how this policy works. This
19 policy doesn't cover that. It's clearly a policy of --
20 an indemnity -- a policy of indemnity, and it says
21 that. it says that. And there are cases in South
22 Carolina that have upheld that as well.

23 So that brings us to the date of loss, right?
24 And we've kind of talked about the date of loss. And
25 you know, what is the date of loss under a loan policy?

1 As we already mentioned, an insured lender must
2 foreclose to suffer or incur actual monetary loss.
3 Only then, when loss can be established -- of course
4 that's the difference from an owner's policy, because
5 the owner's interest is automatically diminished by the
6 presence of the defect.

7 On the other hand, for a lender --

8 Mr. Folkens: That's that Colorado case,
9 First Citizens, that specifically says that, right? Is
10 that what you --

11 Mr. Koutrakos: The owner's interest is
12 automatically --

13 Mr. Folkens: No, no. No. The
14 requirement, that the loss cannot be ascertained until
15 the foreclosure.

16 Mr. Koutrakos: That's a lot -- that's the
17 Karl case, that's -- that's most of the cases. I mean,
18 that -- that's when the insured lender suffers a loss
19 is when it forecloses. It's --

20 Mr. Folkens: Keep going.

21 Mr. Koutrakos: Yeah, yeah. Okay. It's
22 the Karl case, and it's a bunch of other cases.

23 So -- so the insured lender's loss is -- is
24 measured -- it can't -- excuse me. Actual monetary
25 can't be incurred or measured unless the underlying

1 debt is not repaid, and the security for the mortgage
2 proves to be inadequate. So therefore, foreclosure is
3 -- is the first time an insured can actually suffer an
4 actual monetary loss, and it can be measured.

5 So, you know, under South Carolina law, we're
6 not -- the -- the difference between a title theory
7 state and a lien theory state. A lender as the mere
8 lien holder and has a lien interest on the property.
9 As a creditor with a security interest, is not a legal
10 owner of the property. So again, the distinction --
11 the distinction between a owner's policy and lender's
12 policy is pretty clear.

13 So that takes me to discussion, and I'll be
14 brief about the discussion of what I think are -- are
15 -- are three very important cases. Just give me one
16 second. Okay. Yeah. The first case I want to talk
17 about is Whitlock. And Whitlock is -- is what
18 plaintiff's claim to be the case in South Carolina,
19 that talks about the date of loss under a policy. But
20 again, the key distinction in that case is it's an
21 owner's policy.

22 It's an owner's claim, different language of
23 course. The policies do not look the same. They're
24 not even close to being the same. And in that case,
25 even -- even looking at the analysis in that case, the

1 Court said -- and I'll -- I can't say it any better
2 than the Court -- whereas here the insurance contract
3 does not unambiguously identify a date for measuring
4 the demunition and value of insured property or
5 otherwise unambiguously provide for the method of
6 valuation as a result of the title defect. Such
7 ambiguity requires the construction, allowing the
8 measure of damages to be most favorable to the insured.

9 And so the Court was looking at it, and saying
10 hey -- first of all, it said -- well, obviously, terms
11 of individual insurance agreements can control the
12 method of valuation. Yes, they can, Supreme Court.
13 There's an owner's policy that you were interpreting in
14 that case that didn't help you. We have a lender's
15 policy in this case that absolutely helps in analyzing
16 the actual loss because -- actual monetary loss --
17 because in our case, we actually have a formula. And
18 the formula is right there. It is basically the
19 deminution of value formula -- 7 -- 7 -- Paragraph 7.
20 Seven-A.

21 But if you look at what the Supreme Court said
22 in Whitlock, it says the title -- the title policy here
23 does not unambiguously set forth the method of
24 valuation in line with the constructing defendant urges
25 us to adopt. And so then it applied the rule of

1 ambiguities. But at the end it says -- it says, the
2 insurance policy here simply fails to identify the
3 valuation date as the date of discovery of the title
4 defect or otherwise provide clear language that would
5 require a valuation date in line with defendant's
6 position here. We have a formula that's absolutely in
7 line with our -- with our position here. It's the
8 formula set forth in Paragraph 7-C.

9 The next case I want to talk to you about is the
10 Old Republic Vs. RM Kids case. In -- that case is
11 fascinating. It is from the Georgia Court of Appeals.
12 And in that case, the Court went under the same -- went
13 through the same analysis that this Court would need to
14 go through, and it looked at the distinction between an
15 owner's policy and a lender's -- that was a lender's
16 policy claim. Went to a jury. The jury -- the jury
17 was instructed that the date of loss was the date of
18 policy. The title insurance company took it up, and
19 the Court of Appeals said no, it's not date of policy.
20 We have a case in Georgia -- it's the U.S. Life Title
21 Insurance Company, which is Georgia's Whitlock case.
22 It's Georgia's Whitlock case. And the Court of Appeals
23 said, huh-uh. Georgia's Whitlock case is an owner's
24 policy. This is a lender's policy.

25 And it talked about the difference -- an owner's

1 policy, the fee interest is immediately diminished by
2 the presence of the lien, whereas in a lender's policy,
3 it's only -- a loss incurs only if the collateral's not
4 sufficient to pay the debt, as a result of the title
5 defect.

6 So the Court there looked at the equivalent of
7 Georgia's Whitlock case, and no -- yes, they found the
8 owner's policy in that case to be ambiguous. That case
9 doesn't apply 'cause that's an owner's policy. This is
10 a lender's policy. We're going to have to analyze it.
11 And they found -- and they reversed the jury verdict
12 and remanded -- and found that the date of loss was the
13 date of foreclosure. It went through the same analysis
14 that we're asking this Court to go through, and you
15 know, you Honor, you don't have to go very far to find
16 a similar analysis, 'Cause Harry Dixon's going to talk
17 about in a second, the Preservation Capital case.

18 In the Preservation Capital case our Supreme
19 Court took the same -- looked at the same analysis.
20 They looked at the lender's policy -- it's not an
21 owner's policy -- the mathematical formula and the
22 mathematic calculation was all done after the lender
23 foreclosed. And they looked that numbers that -- and
24 applied lien that opinion. That's when actual monetary
25 loss was suffered and determined. Not only that, it

1 cites -- our Supreme Court cited the Hodas case, which
2 is a case from Maine. And in that case, the Court said
3 the presence of a title defect immediately results in a
4 loss to the holder of fee interest since resale will
5 always reflect the cost of the defect.

6 We've talked about that. The -- in contrast,
7 the holder of a loan policy incurs a loss only if the
8 security for the loan proves inadequate to pay off the
9 underlying insured debt due to the presence of
10 undisclosed defects. So you know, the rule in -- in RM
11 kids, Hodas, that there is no determinable loss until
12 foreclosure is supported by the great weight of
13 authority throughout the country. It's also --

14 Mr. Folkens: But is -- is a credit bid a
15 payment?

16 Mr. Koutrakos: A credit bid would be a
17 payment. Absolutely. But you know --

18 Mr. Folkens: And a foreclosure --

19 Mr. Koutrakos: -- I think that's the next
20 argument.

21 Mr. Folkens: Okay.

22 Mr. Koutrakos: But I'm -- I'm just
23 wrapping up with the date of --

24 Mr. Folkens: Yeah.

25 Mr. Koutrakos: -- the date of loss. But

1 all those opinions on date of loss and the foreclosure
2 is necessary. It is supported by solid reasoning, by
3 -- by courts throughout the country. I mean, I haven't
4 seen a case telling -- that's -- that's wrong, showing
5 -- showing and analyzing the distinction between an
6 owner's policy and a lender's policy, saying that you
7 have to foreclose to establish a loss. So with that
8 in mind, if you -- if you'll just give me one second?

9 Mr. Folkens: Yeah.

10 Mr. Koutrakos: Yeah. I think I mentioned
11 7-A, about calculation of loss.

12 Mr. Masel: At one point I think you said
13 7-C.

14 Mr. Koutrakos: Oh, okay. Yeah. I meant
15 7-A. I'm sorry. I got the wrong -- the wrong
16 paragraph number. So -- and I've talked about
17 Preservation Capital, but leads to my -- our next
18 argument. I'm going to hand it off to my -- to my
19 colleague, Harry Dixon, if you don't mind, to -- to
20 talk about that -- that part of our summary judgment.
21 Unless you have some questions for me?

22 Mr. Folkens: No, I'm good. Thank you.

23 Mr. Koutrakos: Thank you.

24 Mr. Dixon: Thank you, your Honor. Harry
25 Dixon. As Jim said, I will speak to the Preservation

1 Capital, which really applies to the Jericho State
2 claim. Jim mentioned early on, Jericho State is the
3 second mortgagee, right? Slightly over a \$4 million
4 debt. They foreclosed in 2007, take title following a
5 foreclosure bid in excess of debt owed at the time of
6 foreclosure. I think right off the bat, summary
7 judgment, those facts aren't disputed.

8 We've attached Exhibits E, F, G, and H. The
9 foreclosure order that determined the debt owed at the
10 time which was seven -- roughly, 7,400,000. We've
11 attached the master's deed showing the \$9 million and
12 actual conveyance to Jericho State. We've got some
13 responses to requests of debt. I think there's some
14 slight argument about they're -- been advertising fees
15 in addition to this roughly 7.4 million, but there's no
16 real debate that 9 million is certainly more than what
17 was owed on the debt at the time of foreclosure.

18 So -- so I want to -- just because visuals help
19 me, we put together a -- a comparison here. I've got
20 several copies, for States, and one for you.

21 Mr. Masel: Thank you.

22 Mr. Dixon: So it's a simple comparison,
23 your Honor. The Preservation Capital facts --

24 Mr. Folkens: For the record, let's just
25 mark this as Hearing Exhibit A.

1 (Hearing Exhibit A is marked for
2 identification.)

3 Mr. Folkens: It's demonstrative, I
4 believe, but just so we can reference it as --

5 Mr. Dixon: Yeah.

6 Mr. Folkens: -- the Court's exhibit. Any
7 objection to that?

8 Mr. Masel: No objection.

9 Mr. Folkens: Okay. Exhibit A is a
10 demonstrative exhibit.

11 Mr. Dixon: So the -- the exhibit here
12 shows, of course, First Preservation Capital -- the
13 Preservation Capital facts on the -- on the left, where
14 we had a policy amount of slightly over 3 million At
15 the time of the foreclosure sale, Preservation Capital
16 we had an amount due on the note of just over 3.6
17 million. And then we have a foreclosure bid on the
18 property of 3.2 million. And as we've seen the Court
19 do the coverage reduction under Section 2-C of the
20 policy, identical policy language as to Preservation
21 Capital as what we have here.

22 We see that there's a coverage reduction in
23 Preservation Capital that reduces the coverage to the
24 amount of the debt in this remaining, which in that
25 case was 391,000 and some change. So we can do that

1 same analysis here. Here we have a policy base amount
2 of 4,200,000 -- in excess of that. And then at the
3 time of foreclose, the debt had increased to just over
4 7.4 million. We have a foreclosure bid, and that --
5 applying the same Preservation Capital analysis under
6 the identical 2 -- Section 2-C of the policy, the
7 coverage for Jericho State was reduced to zero dollars,
8 because there's no indebtedness remaining.

9 I think the cases are clear -- and I say cases.
10 Preservation Capital is relying on the Hodas case from
11 Maine. In both of these cases, it's -- both pointed
12 out by our Supreme Court, the -- the key language here,
13 provided there remains principal indebtedness. You
14 know, their coverage continues, and the remains
15 coverage under a policy, provided it remains principal
16 indebtedness.

17 Mr. Folkens: And that appreciation was
18 running interest and fees, right?

19 Mr. Dixon: The -- the amount from 391,000
20 --

21 Mr. Folkens: Right.

22 Mr. Dixon: -- to 452? By Preservation
23 Cap--- yes, sir.

24 Mr. Folkens: Okay.

25 Mr. Dixon: I think that's foreclosure to

1 the entry of judgment in the Preservation Capital
2 coverage case.

3 Mr. Folkens: Which was the coverage loss?

4 Mr. Dixon: Yes, sir.

5 Mr. Folkens: Okay.

6 Mr. Dixon: So there's -- there's -- yeah.

7 No question there's a covered loss of Preservation
8 Capital. And Preservation Capital, there's
9 indebtedness remaining, so there's coverage remaining.

10 In our case, for Jericho State, there is not
11 indebtedness remaining, so there is no coverage
12 remaining. It's been reduced to zero under Section
13 2-C. So I think on the face of it, it's pretty
14 straightforward, but we can look at, you know,
15 anticipating some of the arguments I think we're going
16 to hear from Scott. There's an idea that in
17 Preservation Capital, you had three parcels, right? It
18 wasn't just, you know, one tract. It was three
19 parcels. We have one that's voluntary -- one, the
20 parcels were sold, so voluntarily released before the
21 foreclosure. One parcel is foreclosed upon, and then
22 the other the -- is where the defect is. The mortgage
23 never attaches to the third parcel, right? So I think
24 that's an immaterial distinction because we can even
25 look at Preservation Capital, quoting extensively from

1 the Hodas case. I believe Scott's argument -- the
2 plaintiff's argument -- is going to be, well, we didn't
3 actually get any equity, right? Unlike the
4 Preservation Capital case, because the shopping center
5 that they obtained title to didn't have the defect, as
6 compared to Jericho State. In this case, they actually
7 acquired property with a defect. So -- but if we look
8 in the Hodas case, it's relied upon -- the
9 recognizes that we're citing the facts. Hodas is a --
10 is a house. The lender forecloses. The amount of debt
11 had increased beyond the face amount of the policy.
12 There's a -- there's a partial credit bid of 80,000,
13 when there's \$100,000 of indebtedness. The defect
14 isn't discovered until after the foreclosure, just like
15 the case here. So the fore--- the Hodas case has the
16 same facts. We have foreclosure. We have a later
17 discovery of the title defect on the same property that
18 issued the foreclosure. Which our Supreme Court filed
19 as Preservation Capital. Applied the exact same
20 analysis we're asking you to apply. The exact same
21 analysis that the Supreme Court applied in Preservation
22 Capital.

23 The other thing that, I think that -- you know,
24 it's a factual difference, but it's immaterial, Jericho
25 State, of course, is foreclosing a second mortgage, not

1 a first montage like the lender in Preservation
2 Capital. I think it's a distinction without a
3 difference because at all times, Jericho State is
4 supposed to have a second mortgage. In the foreclosure
5 order, it's declared to be a second mortgage. In the
6 master's deed, it's conveyed subject to the REL
7 mortgage, and the title policy a issue, you know,
8 specifically excludes the -- the senior REL mortgage,
9 Jericho State's title policy. So yes, it's a second
10 mortgage, but Jericho State's always been second. It's
11 foreclosing and taking title, and it's subject to the
12 senior montage.

13 So that's our analysis of Preservation Capital
14 and the fact that matters, it takes us from, you know,
15 potential damages to no damages. Jericho State paid
16 more than the debt. There is no remaining indebtedness
17 under 2-C, and that reduces coverage to zero.

18 Mr. Folkens: Okay.

19 Mr. Koutrakos: Yeah. And I think those
20 -- those are Chicago Title's arguments for -- for
21 summary judgment. We believe there's no issues of
22 material fact, and on that basis, we move --

23 Mr. Folkens: So I'm clear, you're asking
24 -- for various reasons, the primary request for summary
25 judgment is denying you still want a partial adjustment

1 judgment that declares that date of loss as -- strike
2 that. The date of foreclosure is the date of loss, not
3 the date of policy?

4 Mr. Koutrakos: Correct.

5 Mr. Dixon: Correct.

6 Mr. Folkens: Anything else, gentlemen?

7 Mr. Koutrakos: That's it.

8 Mr. Folkens: Okay. You're up.

9 Mr. Masel: All right. Thank you, your
10 Honor. Before I dive into the various policy
11 provisions, I do want to touch briefly on the -- the
12 history of the claim.

13 Mr. Folkens: Let me ask you one question.

14 Mr. Masel: Certainly.

15 Mr. Folkens: 'Cause I struggled with this
16 all week leading up to this hearing. Are any of the
17 facts that he related disputed?

18 Mr. Masel: None of the facts are
19 disputed.

20 Mr. Folkens: Okay. That's important.
21 This is summary judgment, so I'm just --

22 Mr. Masel: I -- I agree, and we knew that
23 coming in.

24 Mr. Folkens: Okay. We're not on this for
25 damages, understand. That isn't disputed.

1 Mr. Masel: The history and the
2 transactions that took place, Jim accurately --

3 Mr. Folkens: Okay.

4 Mr. Masel: -- set those forth. So -- and
5 just touching on the history a little bit, and
6 primarily because of the -- the legal principal that
7 has been by our Supreme Court and the Court of Appeals,
8 and that is the purpose of title insurance, is to place
9 the insured in the position that he thought he occupied
10 when the policy was issued. When the policy was issued
11 in this case, my clients thought that their loan --
12 Jericho State believed its loan was fully secured by
13 the value of 131 acres that was unencumbered waterfront
14 property. When the policy was issued, Jericho State
15 did not know of the title defect, and had it known of
16 the title defect, it would have never made the \$4
17 million loan. Shortly thereafter when the borrower
18 went into default, Jericho State still did not know
19 there was a title defect, and it would not have made
20 any of the \$2 million worth of cure payments on the
21 first mortgage, had it known that the property was
22 subject to the title defect. Moving forward to almost
23 two years after the policy was issued, Jericho State's
24 --

25 Mr. Folkens: Let me interject, if you

1 don't mind?

2 Mr. Masel: Certainly.

3 Mr. Folkens: Let me interrupt. Were
4 those advance payments, were they deemed part of the
5 indebtedness?

6 Mr. Masel: They were.

7 Mr. Folkens: Okay.

8 Mr. Masel: You'll see in the foreclosure
9 order that --

10 Mr. Folkens: Dollar for dollar.

11 Mr. Masel: -- that is was the amount of
12 the loan plus secure payments and some expenses brought
13 the -- the --

14 Mr. Folkens: Up to date?

15 Mr. Masel: -- loan balance from about 4
16 million up to 7.5 million. So and -- and at the
17 foreclosure, Jericho State still did not know that
18 there was a title defect, and it would not have
19 foreclosed and taken title to the property subject to
20 an \$18 million loan, had it known of the title defect.

21 I know Jim has said that -- that what Jericho
22 State would have done or would not have done at -- at
23 the closing and -- and what they knew at -- at the time
24 of the purchase or -- and of the loan is irrelevant,
25 but it's -- it's very relevant in the minds of my

1 clients, and it's very relevant under South Carolina
2 law. When my clients learned of the defect, Jericho
3 State made their title claim. That's been pending for
4 almost 15 years. Lynx Jericho made their title claim.
5 That's been pending for over 10 years. They are still
6 pending today. Since that foreclosure, since Jericho
7 State has owned the property, they've continued to
8 incur caring costs ad expenses relating to the
9 property, and they've been trying to figure out some
10 way out of this mess that they've found themselves in.
11 They didn't know the defect. They didn't know a
12 four-lane highway was going to bisect the property.
13 The market crashed, and you know, this -- this was a
14 situation that they found themselves in, that like I
15 said, had they known the true status of the title as of
16 the date of policy, they would've -- they would've
17 never entered into this transaction. We wouldn't even
18 be here today.

19 But trying to -- to do the best they can with
20 they have, beginning in 2020, they found buyers. And
21 as Jim mentioned, three parcels -- the property was
22 divided into three sections. They were sold to buyers
23 for about a grand total of 7.9 million dollars, and
24 that is on property that was originally purchased for
25 22.5 million dollars. So no doubt my clients believe

1 that the title defect had a devastating effect on the
2 value of the property, a devastating effect on their
3 security on their loans based on the value of the
4 property, and a devastating effect on their bottom
5 line, of course. If -- if the policy had reflected the
6 defect, if the title exam performed by Chicago Title's
7 agent had revealed the defect, like I said, they would
8 not have entered into the transaction. We wouldn't be
9 here. But we are, and so my clients are seeking that
10 they be put into the place that they thought they
11 occupied when the policy was first issued.

12 Getting into the policy, I'm going to start with
13 Section 7, and that's the -- the section of the policy
14 that has the formula on how to calculate damages, and
15 it relates to date of loss or the date of -- of
16 valuation. So basically, Section 7 is the formula, and
17 it is looking at the value of the insured's interest in
18 the property, unencumbered by the title defect, and
19 comparing that to the value of the insured's interest
20 in the property, subject -- subject to the title
21 defect. So what is the insured's interest in this
22 case? The plaintiff's interest, the lender's interest,
23 is the amount by which their loans are secured by the
24 value of the property. That's their -- that's the
25 interest that is being insured by these insurance

1 policies. The formula in Section 7, I don't think we
2 can even apply it, and it's basically worthless until
3 we know the date of loss, or the valuation date.

4 And that's because property values fluctuate
5 over time and on any given day, property may be worth
6 more or less. Same thing with the loan balances. The
7 loan fluctuate on a day-to-day basis, so we got to
8 pinpoint a valuation date so that we lock down the
9 property value, and we lock down the loan balance.
10 Until those numbers can be locked down, this formula in
11 Section 7, we -- we can't apply. I mean, it's -- you
12 got to have one before you can apply the other. So of
13 course, we claim the valuation date is the date of
14 policy. Chicago Title says it's the foreclosure date.
15 We both can't be right.

16 The most important question in this analysis is
17 whether the policy unambiguously states what the
18 valuation date is. Does it unambiguously state that
19 the valuation date is the foreclosure date? And we
20 know that it doesn't say that. There's no -- it's not
21 in the policy. If the policy said the valuation date
22 is the foreclosure date -- and I said this in my brief
23 a couple of time -- Chicago Title would have pointed us
24 to that sentence. It would have been highlighted. It
25 would have been put in bold, the valuation date is the

1 foreclosure date. We've read the policy tons of times.
2 It's just simply not in there. If the policy said the
3 foreclosure date is the valuation date, I sincerely
4 believe we wouldn't be here today because the -- the
5 answer would be found in the policy.

6 So the fact that the valuation date is not
7 specifically set forth in the policy, how do we -- how
8 do we that? What are we asking the Court to do? So
9 first we determine whether that missing term creates an
10 ambiguity. And if that missing term created an
11 ambiguity, then that ambiguity must be construed
12 liberally in favor of the plaintiffs, the insured, and
13 against the insurer.

14 And how do we do that? That's where we get to
15 the Whitlock case. The Whitlock case -- and that
16 opinion was offered by our now Chief Judge Kitrich,
17 right? It gives us a blueprint on how do we do this
18 analysis. What is the valuation date? So I know
19 Chicago Title says, well, Whitlock, we don't need to
20 look at that because that's an owner's policy. But it
21 misses the point. The point of Whitlock is that the
22 Court is construing an ambiguous contract, or an
23 ambiguous policy. And the ambiguity in that policy is
24 nearly identical to the ambiguity in this policy. So
25 in Whitlock, the dispute was the valuation date. The

1 owner said the valuation date should be the date of
2 policy. The title insurer said that the valuation date
3 should be the date that the owner discovered the
4 defect.

5 The Court knew the formula, and it references
6 the formula, and that's similar to the Section 7
7 formula that is -- you know, you compare the value of
8 the property unencumbered by the title defect to the
9 value of the property subject to the defect. But the
10 Court needed to determine what is the valuation date.
11 We got to -- we got to pin down the date so that we
12 know what the value of the property is.

13 And I'll point out that the difference in the
14 two dates in Whitlock are similarly as important as
15 they are in this case. In Whitlock, the date of policy
16 is 2006. The date of discovery, the date that the
17 title insurer wanted to use for the valuation date, was
18 2010. So similar to this case, we've got a valuation
19 date during the boom in Horry County, and using the
20 title insurance valuation date, it's after the great
21 recession just socked it to us, and the values were
22 dramatically less. So this was an important issue. I
23 feel comfortable that the Supreme Court understood the
24 numbers involved because depending on what date you
25 use, either that's a great value for the plaintiff, or

1 it's a lot less that the title insurance has to pay.
2 So, anyway, the Court's tasked with finding out, well,
3 okay, under this policy, what's the valuation date?

4 The Supreme Court looks at the policy. The
5 Supreme Court reads the policy, and it doesn't say
6 either date. It doesn't say policy date. It doesn't
7 say date of discovery. So who would win?

8 Title insurance company provided wonderful
9 arguments, lots of case law, and explained that, based
10 on this argument, based on what all these other cases
11 from across the country, what they say, the only
12 logical explanation, the only logical and correct
13 valuation date is the date of discovery. That's the
14 only way you can properly measure damages. And the
15 Supreme Court said, those are good arguments. In fact,
16 we could conceivably agree everything you're saying,
17 Title Insurance Company. And those cases you cite,
18 they make sense. However when we read the policy, it
19 doesn't say what you're trying to say. The policy does
20 not say -- does not state what the date -- what the
21 valuation date is.

22 This is a policy that the insurance company
23 wrote. And despite the great arguments, despite case
24 law from across the country, we're interpreting an
25 insurance contract. And if it's ambiguous as to that

1 term, then we got to construe that ambiguity against
2 the insurer and in favor of the insured. That's why
3 they came up with valuation date under the owner's
4 policy as being the policy date. It's not because
5 there's this grand difference in the terms of how
6 damages are calculated. It's because the policy was
7 ambiguous as to the valuation date. We've got the same
8 ambiguity on this policy. It's the exact same term and
9 concept that we're trying to get an answer to. And the
10 valuation date is missing in this policy, just as it
11 was missing in the Whitlock policy.

12 So Chicago Title's arguments in this case make
13 sense. The cases that Chicago Title cites to provide a
14 very logical analysis, and that makes this issue very
15 challenging. And just like it is -- it was challenging
16 in this case, it was just as challenging for the
17 Supreme Court in the Whitlock case. I don't know how
18 often I've seen in a Supreme Court decision, we
19 conceptually agree with you, but you lose because of --
20 of this particular fact. Any one of us can
21 conceptually agree with why the valuation date should
22 be the foreclosure date, and the case is articulated
23 well.

24 Mr. Folkens: Let me ask you right there

25 --

1 Mr. Masel: Certainly.

2 Mr. Folkens: Are there any cases from
3 other jurisdictions in lender cases that hold what
4 you're proposing?

5 Mr. Masel: There are, and I didn't cite
6 them in my memo, but I can get -- I know Arizona's a
7 big one with -- the cases. I don't have the cite on my
8 -- in my

9 Mr. Folkens: Yeah.

10 Mr. Masel: -- fingertips.

11 Mr. Folkens: Could you supplement that?
12 That would be very helpful.

13 Mr. Masel: I -- I can do that. Yes, I
14 can get that to you.

15 Mr. Folkens: Would you agree with me --
16 does it rise to the level of majority-minority
17 position, or --

18 Mr. Masel: It does.

19 Mr. Folkens: -- or is this all anecdotal,
20 and you just find a state and see what its holding is?

21 Mr. Masel: In all honesty, based on my
22 research, the majority of states follow the foreclosure
23 date rule. The minority follow the -- the date of --
24 the date of policy.

25 Mr. Folkens: I won't hold you to it, but

1 the minority cases, do they go down the ambiguity route
2 and then construe it against the insurer, or do they go
3 down -- that word was insurer -- or do they go down a
4 different path? And if you don't recall, that's fine.
5 'Cause at that --

6 Mr. Masel: I don't recall specifically,
7 but I believe it is on the ambiguity issue.

8 Mr. Folkens: Okay.

9 Mr. Masel: But don't -- don't hold me to
10 that.

11 Mr. Folkens: No. Okay. I apologize.
12 Keep going.

13 Mr. Masel: And the reason I didn't get
14 into the competing case law from all the states is
15 because Whitlock really does provide the blueprint on
16 how do you analyze this when the policy doesn't say
17 what the date is? And I think by following that
18 blueprint, the only answer that is out there is that
19 the term's not in there. It's not. It's got to be
20 deemed ambiguous. And because it's ambiguous, the
21 issue being construed in favor of the plaintiff, in
22 that -- in that we use the date of the policy.

23 And like I was saying before, what -- Jim's
24 argument, the cases he cites, they all make sense. We
25 can all conceptually agree with that. That mirrors

1 what the Supreme Court was faced with in Whitlock, but
2 the bottom line is can you read the policy and point to
3 something that says the valuation date is the
4 foreclosure date. We've read it so many times trying
5 to decipher this, and it's not in there. It's just not
6 in the policy, just like it wasn't in the policy in
7 Whitlock.

8 Mr. Folkens: And let's talk about 7-A --
9 3 -- or whatever it is.

10 Mr. Masel: Uh-huh.

11 Mr. Folkens: 3's a little --

12 Mr. Masel: Yes.

13 Mr. Folkens: I mean, in choosing -- their
14 choice of words is value, right? They talk about the
15 value something. Yet in the predicate, the first
16 paragraph, it talks about actual monetary loss or
17 damage sustained.

18 Mr. Masel: Sure.

19 Mr. Folkens: Now, is there ambiguity
20 between those two provisions? In the first section,
21 should the concept of actual monetary loss be deemed
22 like a realized versus an unrealized loss, like in a
23 security? Any security? If -- if Walmart drops 20
24 percent, and the value of Walmart has dropped 20
25 percent, but I don't sell it, and I ride it out, and

1 then it goes up 10 percent a year later, does the
2 concept of an actual loss in the first part of 7
3 suggest that it needs to be a realized loss, one that
4 is actually sustained?

5 Or if I parse that, it would say an actual loss
6 sustained or incurred, as opposed to unrealized loss.
7 But then whether I get to 7-A 3, the language used by
8 the insurer talks about value. And the way I read
9 Judge Hill's decision in this case -- now Justice Hill
10 -- you know, he -- he says the fear, the reasonable
11 likelihood of litigation and all of that is -- is a
12 loss. It's something that rises to the level of an
13 encumbrance. So you know, that -- so when you say
14 that, I don't know, does it help or hurt your argument
15 below when it talks about value? And value can be
16 realized or unrealized. It's the value of a stock
17 today. If I don't cash it in, it's still -- I've lost
18 20 percent on Walmart. The value can be easily
19 determined, even if it's unrealized.

20 But does the predicate of an actual loss,
21 sustained or incurred, require it to be a realized loss
22 through the foreclosure. Or is that so unambiguous,
23 that Whitlock then helps the analysis?

24 Mr. Masel: I'll -- yes. I'll answer that
25 in -- in two parts of. In Whitlock, that's addressed.

1 That -- that was the -- the basis to the title
2 insurance --

3 Mr. Folkens: On an owner's policy.

4 Mr. Masel: On an owner's policy. But --

5 Mr. Folkens: And I think --

6 Mr. Masel: Go ahead.

7 Mr. Folkens: Yeah. I think the defendant
8 would agree, in an owner's policy, there's something
9 very intuitive to them because of a loss of capital --
10 a loss of something is very identifiable at that point.

11 Mr. Masel: And that could be. But I'll
12 point out that in the Whitlock case, the Supreme Court
13 said damages -- according to the policy, damages are
14 for an actual loss, but actual loss is not defined in
15 the policy. It's ambiguous.

16 Mr. Folkens: Okay.

17 Mr. Masel: All right? So in this policy,
18 and -- and Jim refers to it many times as actual loss,
19 or actual monetary loss, as it's phrased in this
20 policy. But it's more than that. It is for actual
21 monetary loss or damage.

22 So I think we can look at Whitlock and say, well
23 actual loss, is it defined in the policy? It's not
24 defined in the policy. It wasn't defined in the
25 Whitlock policy. The Court said that was ambiguous if

1 it's not defined. We don't know what actual loss is.
2 That puts us in the -- the position of what you're just
3 saying. Is this a realized loss? Is this a loss that
4 can be calculated because of the decrease in value?
5 What is -- what is the value? It's vague, 'cause the
6 policy doesn't address it.

7 Mr. Folkens: But does Preservation
8 Capital help us --

9 Mr. Masel: I think Preservation --

10 Mr. Folkens: -- define what this means --

11 Mr. Masel: -- Capital helps us an awful
12 lot. And -- and I'll get to Preservation --

13 Mr. Folkens: I'm sorry.

14 Mr. Masel: -- Capital in just a second --

15 Mr. Folkens: I keep interrupting you.

16 Mr. Masel: -- because I think it helps an
17 awful lot. But going back to, you know, actual
18 monetary loss or damage, is that ambiguous? We already
19 know that the term actual loss is ambiguous by looking
20 at -- at Whitlock.

21 How about the term damage? What is damage? Is
22 that -- is that defined? Actual monetary loss or
23 damage? I'd submit that that's just as vague, or even
24 more vague of a word, than actual loss. So what we're
25 looking at is the predicate, or the beginning of -- of

1 the Section 7, damage calculation, indemnify for actual
2 monetary loss or damage. That's ambiguous. And then
3 trying to apply the formula in Section 7, you got to
4 have a valuation date. It's nowhere in the policy, and
5 trying to figure out what the valuation date is just as
6 ambiguous.

7 And I'll leave it at this, that Whitlock gives
8 the blueprint. We're trying to interpret this policy
9 in this case. How do you interpret this policy in this
10 case? Read Whitlock, and you'll see exactly how to
11 interpret this policy, 'cause they interpreted it an
12 owner's policy. Not a lender's policy, but an owner's
13 policy, trying to figure out the exact same thing with
14 the exact same issues with the exact same stakes
15 involved.

16 And I don't think finding that the -- the -- the
17 valuation date being the -- the policy date is
18 outrageous or illogical. Granted, it would go against
19 the weight of case law in other jurisdictions, but
20 using the policy date is the same date that South
21 Carolina uses for owner's policies. That's not uniform
22 around the country either. Other states -- and you saw
23 it in -- in the Whitlock case -- lots of other states
24 have case law that says, oh, for an owner's policy,
25 it's not the date of policy. It's some other date.

1 But South Carolina said, you know, that's what we're
2 going to use, because of what the policy said. So it's
3 not outrageous, just to go against the -- the weight of
4 authority from other jurisdictions, because South
5 Carolina doesn't hesitate to do that when it thinks
6 that's the right thing to do, and in fact, did so in --
7 in the Whitlock case. In the First Land Village
8 Association case that -- that we've cited, the Supreme
9 Court noted that generally, title insurance operates to
10 protect a purchaser or mortgagee against defects in or
11 encumbrance of that title, that are in existence at the
12 time the insured takes title. And your Honor mentioned
13 it at the -- at the very beginning that our own Court
14 of Appeals said that title insurance is designed to
15 protect real estate purchaser or mortgagee against
16 defects or encumbrances on the title. And the purpose
17 of title insurance is to place the insured in the
18 position he thought he occupied when the policy was
19 issued.

20 So in sum, I guess, on this Section 7 and
21 valuation date issue, determining the valuation date
22 can't be done by just reading the policy. It's just
23 not in there. Using the blueprint given to us by the
24 Whitlock case, that's got to be deemed an ambiguous
25 term. And that needs to be resolved in -- in favor of

1 -- of the insured and that we should use date of
2 policy. And such a finding would be consistent with
3 how South Carolina generally interprets title insurance
4 policies. That's how they did several, with an owner's
5 policy, and that's how the Court of Appeals in this
6 case references the purpose of title insurance.

7 So -- okay. Let me -- now let me get to the
8 Preservation Capital case because we both have -- both
9 sides have sort of varying perspectives on -- on how it
10 should be applied to this case. So we do believe that
11 the Preservation Capital case actually benefits the
12 plaintiff and supports the plaintiff's position.
13 Number one, the Supreme Court calculated damages using
14 a date that is neither the policy date nor the
15 foreclosure date. Two, it calculated the lender
16 damages based on the lender's lost security due to the
17 title defect.

18 That -- and that's what -- that's what we're
19 asking for. If you lost security, the -- the insured
20 interest the by which the property secures the loan.
21 So I'm just going to hit it real quick. It was one
22 loan in the Preservation Capital case that was secured
23 by three parcels. One parcel was sold by the borrower,
24 and the proceeds were paid to lender, and that reduced
25 the loan balance. As to the remaining two parcels, one

1 of them -- and it was shopping center -- suffered -- it
2 didn't have title defect. And it didn't have a higher
3 priority mortgage on it, just the lender had a mortgage
4 on the shopping center with -- and that property didn't
5 have any property defect. The second -- or I guess the
6 third parcel did suffer a title defect, and that title
7 defect to was a matter of ownership. It ended up that
8 the borrower didn't really own it after all. It was
9 owned by some company called Monarch.

10 So the first parcel of sold. Borrower went into
11 default. The lender foreclosed on the shopping center.
12 The proceeds, or the bid on the shopping center, that
13 acted to reduce the loan balance, right? And no one
14 complained about that. That -- I mean, that wasn't an
15 issue. That wasn't even claimed to be a damage in that
16 case -- in that case. The damage that the lender was
17 claiming had to do with that third parcel that the
18 borrower didn't own.

19 The Supreme Court was tasked with the question,
20 how do we value the lender's damages as to the prop---
21 that property, not the property that was -- that it had
22 foreclosed on. So they had the same damage formula
23 that we've got in Section 7, the unencumbered value
24 versus the encumbered value. And just like I said
25 before, to apply that formula, you've got to have a

1 valuation date so that you know what the value is on --
2 on the particular date. The Court used the date that
3 Monarch sold that property to some third party.
4 They didn't use the policy date. There was never a
5 foreclosure on that piece of property. They couldn't,
6 'cause the borrower don't even own it. But it wasn't a
7 foreclosure date. It was a seemingly random date that
8 Monarch sold -- sold this lot that to -- to a third
9 party.

10 So it -- to me, it supports our position in
11 that, you know, there's no requirement that a foreclose
12 has to take place. But Chicago has been arguing -- and
13 continues to argue -- that prior to a lender taking
14 title via foreclose, it is impossible for the lender to
15 claim that it has suffered damages because it has not
16 yet suffered an actual loss. Chicago's been arguing
17 that prior to foreclosure, the lender basically doesn't
18 have an interest that can suffer loss or damages
19 because it's only a lienholder, and it -- it is just
20 possessing an outstanding debt that it wants to
21 collect.

22 But contrary to what Chicago Title's arguing,
23 the Court and Preservation Capital recognize that
24 lender did suffer a loss or damage, even though it
25 didn't foreclose. And it looked to the equity and the

1 value of the property that it couldn't foreclose on,
2 all right?

3 So let me go back to my ambiguity argument just
4 real quick. I'd like to ask does Chicago's policy
5 expressly state whether or not the valuation date used
6 by the Preservation Capital Court, was that valuation
7 date right or wrong under the terms of this policy that
8 we're talking about?

9 Mr. Folkens: Yeah.

10 Mr. Masel: If the policy's truly
11 unambiguous, then we should be able to look at the
12 policy and say, this date that the Supreme Court chose,
13 the date that Monarch sold the property, is either the
14 right date or the wrong date. But we can't, because
15 it's not in the policy.

16 Mr. Folkens: But how does that help me if
17 you're saying -- I would assume Preservation would have
18 said, we would never have loaned \$3,075,000 that we
19 knew we were not going to get a security on that third
20 parcel. And they would have said, the date of the
21 policy should measure because whatever that loss was on
22 the date of policy should be the measure, and the
23 Preservation court could easily have said, as you're
24 urging me to do, that that's what it should be. They
25 didn't even do that. I mean, they picked that -- but

1 you have to agree that was a very utilitarian kind of
2 approach.

3 Mr. Masel: It was utilitarian, I -- I
4 agree. And to be honest about you, I can't figure out
5 why, other than it was just for convenience. We -- oh,
6 here's the value of the property. We know what it is
7 on this particular date, and we know what the loan
8 balance was on this particular date, let's just use
9 this.

10 Mr. Folkens: But it is legal argument.
11 There's nothing equitable about the argument.

12 Mr. Masel: What do you mean by that?

13 Mr. Folkens: Well, does the Court have a
14 right to find to a fair valuation date, or is it
15 compelled to have a bright line rule such as the other
16 jurisdictions apparently have of just saying this is
17 the law in this state, this is the law in this state?
18 Or is it what Preservation Capital did by finding a
19 fair workable date?

20 Mr. Masel: You know, I -- to me
21 Preservation Capital's just a little bit weird when it
22 comes to the date, and the lender didn't ask for the
23 valuation date to be the policy date. In my mind, it
24 could have. It didn't. Everyone just agreed on this
25 other date, and I think the Court just embraced it, and

1 that's how it -- I mean, that's how it --

2 Mr. Folkens: It does make the demand on
3 their end too, that once you do that, right, in
4 Preservation Capital? It's just when you read it, the
5 remedy appears to make sense for the lender.

6 Mr. Masel: It does, and I think if we had
7 similar facts in this case then -- then we could, you
8 know, look to see if it would work -- work in -- in
9 this case. But, you know, as far as your question,
10 could Preservation Capital have chosen the -- the date
11 of policy, I'm going to say it could have. But really,
12 my argument today, and why I'm highlighting the date in
13 Preservation Capital is that what we need to look at is
14 whether the Chicago policy is ambiguous as to the date.
15 Is it ambiguous as to whether the foreclosure date must
16 be used, as has been argued, or can it be some other
17 date? And under Whitlock, it's ambiguous. That's what
18 we -- that's why we're claiming the policy date.

19 And I'm illustrating the date in Preservation
20 Capital because that doesn't fit under the policy
21 either. You know, you don't see it. That date's not
22 in the policy. I mean, our position is that the
23 Supreme Court, in -- in Preservation Capital, acted
24 well within, you know, its rights or within the terms
25 of -- of the policy. So picking that date, I don't

1 think, violates the valuation date that -- that, you
2 know, you would use to -- to calculate damages under
3 this particular policy. It's just a different date
4 than -- than what we're asking for.

5 So let me jump back in. So on that date, this
6 date that Monarch sold the property, the defective
7 property valued at 590,000 was subject to 244,000 first
8 mortgage of higher priority. That left equity of
9 345,000. That's what the Court awarded as damages to
10 -- to the lender. And it used the same formula that --
11 that we're looking to apply, and that is, what is the
12 value of the insured's interest not subject to the
13 defect? So in Preservation Capital, that was the value
14 of the property minus the higher priority first
15 mortgage, less subject to the defect. It was worth
16 zero. So applying the -- the formula, the Court was
17 looking at what was the equity involved. And so that
18 -- this is going to dovetail into my argument later
19 when it comes to payment. But to me the -- the value
20 to the plaintiff for Preservation Capital is one, that
21 it highlights the facts that the title policy is -- is
22 ambiguous as to determining a valuation date, and two,
23 the measure of damages isn't just based on an actual
24 monetary amount that the -- that the lender receives.
25 It is based on its interest in the property, that

1 interest being the amount by which its loan is secured.
2 All right. So --

3 Mr. Folkens: So before you get to payment
4 then --

5 Mr. Masel: Yeah.

6 Mr. Folkens: -- help -- the concept of on
7 day one, if it's date of loss and value and equity, and
8 we would never have made that investment, and they file
9 a claim, the law becomes in the state you don't have to
10 foreclose, it's as to the date of the policy. And then
11 later, the owner pays off the mortgage for whatever
12 reason. Under your construction or proposition, the
13 lender still has a policy with a valuation date with no
14 reduction for subsequent payments or facts or anything.
15 And so let's say the policy was for \$300,000, and they
16 later did paid it off \$300,000, but they're holding
17 this policy that's -- can they then follow through and
18 sue on that claim because on that date of loss, the
19 equity was a \$300,000 loss, even though it was
20 gratuitously paid off at a later date? And does that
21 result in a double recovery to the lender?

22 Mr. Masel: I believe that if the loan was
23 paid off, if the borrower was making payments, that
24 would be deemed a payment under Section 2-C. So the
25 amount of insurance would be reduced by the amount of

1 payments. So if it was a \$300,000 loan, and the lender
2 makes a claim for a title defect, and you know, we've
3 got this damage as of the date of policy, his damages
4 would be offset by the amount of payments made, and
5 that -- that -- that's in the policy. And as far as --
6 as, you know, this -- we can conceive these, you know,
7 seemingly --

8 Mr. Folkens: But the owner's get -- the
9 owner's getting the benefit of that claim by the
10 reduction of the lien.

11 Mr. Masel: And the damages understand the
12 policy would be reduced, right?

13 Mr. Folkens: Okay. I'm sorry. Keep --
14 go ahead. I'm just --

15 Mr. Masel: But you make a good point, and
16 Jim brings up the same point. We can conceive of these
17 situations that it just -- it doesn't feel right. But
18 Chicago Title wrote the policy. And this is the policy
19 that we're dealing with. And it's ambiguous as to what
20 the valuation date is. This is Chicago title's policy.
21 So if there are things that we can conceive that don't
22 feel comfortable -- that Chicago Title doesn't want to
23 insure, it needs to make sure that the policy is not
24 ambiguous.

25 Mr. Folkens: Okay.

1 Mr. Masel: Let me go to Section 2, and
2 this goes to Jericho State, the original second
3 mortgage holder, then owner of the property. And
4 Section 2 is the one that says that -- it reduces the
5 amount of insurance companies insurance by the amount
6 of all payments made.

7 Mr. Folkens: Uh-huh.

8 Mr. Masel: And Chicago contends that
9 Chicago's foreclosure bid of \$9 million was a payment,
10 and that this payment does not take into account the
11 effect of first mortgage or whether Jericho State
12 actually had any equity in the property lenders by way
13 of foreclose. We contend that the foreclosure bid can
14 only be considered a payment under Section 2 if the
15 equity received by Jericho State actually reduces the
16 loan balance, that there's equity that it received.

17
18 And before I dive deeper in that, I want to
19 point out that when you read Section 2, it does not say
20 that a foreclosure bid is a payment. What do we
21 normally think a payment means --

22 Mr. Folkens: 2-C?

23 Mr. Masel: 2-C.

24 Mr. Folkens: Yeah.

25 Mr. Masel: And it's 2-C, then two little

1 Is.

2 Mr. Folkens: Right.

3 Mr. Masel: What do we normally think a
4 payment means? What is it? Like, when I owe you
5 money, and I make a payment to you, and you receive my
6 payment, it -- it reduces the balance -- the loan
7 balance of -- of what I owe you. I can't think of a
8 situation where there's a payment made on a loan that
9 does not have an effect on the loan balance. To me, it
10 would be absurd to say that the term payment means
11 something other than a payment on the loan balance and
12 on the amount that is owed.

13 Taking that one step further on Section 2 -- I
14 apologize. So to goes to -- Section 2, at the
15 beginning it says, you know, this is the amount that
16 that insurance is limited. And in Section 2-C, little
17 two Is, the amount of principal of the indebtedness,
18 plus interest and costs, reduced by payments made. And
19 if you look at the context, it's clear that what we're
20 talking about is a loan balance, and borrowers -- and
21 when you just read it, it seems like payments -- we're
22 talking about payments made by the borrower. The
23 borrower is the entity with the indebtedness. The
24 borrower is the one responsible to pay for interest.
25 The borrower's the one responsible to pay for the cost

1 of the loan. And in the context of this 2-C, when
2 you're talking about the indebtedness in payments made,
3 it only makes sense that it's the payments that the
4 borrower makes, all right?

5 So in my mind, the term payment, it doesn't say
6 foreclosure bids are a payment. When you read it in
7 context, it sounds like these are payments to be made
8 by a borrower, not a foreclosure bid. And to me, that
9 makes this term payment ambiguous. And I -- I think it
10 needs to be construed in favor of -- of the insured for
11 this case.

12 Mr. Folkens: Would the payment made by
13 Jericho State to Lynx Jericho, the \$2 million, reduce
14 the --

15 Mr. Masel: That would be a payment on the
16 first mortgage.

17 Mr. Folkens: Right.

18 Mr. Masel: Right.

19 Mr. Folkens: But would that have
20 affected, reduced the liability on that first mortgage?
21 Would that be deemed the payment, even if it was simply
22 done to preserve the --

23 Mr. Masel: We have -- early on, and I
24 think in my memos on our previous motions for summary
25 judgment, acknowledged that the payment by Jericho

1 State to Lynx Jericho -- and I think we're talking
2 about the condemnation proceeds, right? That the
3 payment of the condemnation proceeds would be a payment
4 toward and reduce the claim for damages by Lynx Jericho
5 on the first mortgage. This 2-C -- Section 2-C
6 argument relates to Jericho State and --

7 Mr. Folkens: Right.

8 Mr. Masel: -- and their -- and their bid
9 -- and their -- their foreclo--- their foreclosure bid.
10 So, like I said, you know, when you read it, and you
11 just -- if -- I think if anyone just reads that Section
12 2-C, it sounds like this is payment, is what we're
13 talking about. It doesn't say anything about a
14 foreclosure bid.

15 But even if the foreclosure bid is a payment,
16 then according to this section, it must reduce the
17 amount of the principal indebtedness, plus the -- the
18 interest and costs. The only way that the amount of
19 the loan balance could be offset or reduced is if
20 Jericho State obtained equity in the property.

21 For example, if the property is worth \$9
22 million, and loan balance is \$7.5 million, and the --
23 the bid is \$9 million, and the lender receives the
24 property worth \$9 million, then that's more than the
25 loan balance. And the lender's been made whole. The

1 value of the property kind of substitutes for what --
2 what the loan balance is. In this case --

3 Mr. Folkens: Why did -- why did -- I'm
4 sorry. Why did it pay the 9 million?

5 Mr. Masel: It's very important. They did
6 not know at that time that this property was subject to
7 the defect, okay? So you know -- and I cited in my
8 memo too, a couple cases. One is like, Aero Bonding,
9 and there was another one. But when you looked at the
10 value of the property at the time of foreclosure, you
11 know, you look at the -- the amount of bid, plus the
12 amount of the -- the mortgage you take it subject to.
13 So you know, it would be a \$9 million bid, plus the
14 first mortgage of 18 million. That would be -- and I'm
15 not going to get into the -- the specific value --

16 Mr. Folkens: But you argue the
17 encumbering effect was not known, and therefore, was
18 not the factored into the bid?

19 Mr. Masel: Right. And so for
20 illustrative purposes, you know, if -- if you bid 9
21 million, and it's subject to an \$18 million mortgage,
22 you're thinking you're going to get equity of 9
23 million, meaning the property should be worth at least
24 27 million, right? You think it's worth 27 million.
25 It's subject to an \$18 million mortgage, but my -- what

1 I'm looking for to -- to satisfy the debt is --is
2 equity in the property, that -- that you know, is -- is
3 a value of my debt. So in this case, that bid was made
4 not knowing that the title defect existed, so what
5 we're -- part of --

6 Mr. Folkens: Why wouldn't that be deemed,
7 under Preservation Capital as a convenient date of
8 valuation?

9 Mr. Masel: What's that?

10 Mr. Folkens: Why wouldn't that be deemed
11 a convenient date in keeping with Preservation Capital
12 for a determination of loss? Because it's -- it's not
13 factoring in the encumbering effect, right?

14 Mr. Masel: It's not -- it's not factoring
15 in the -- the encumbering effect.

16 Mr. Folkens: Right.

17 Mr. Masel: I mean, I think that's a good
18 point. I mean, it's -- if -- if the Court is tasked
19 with merely determining a convenient date, then I think
20 could -- that could be done, but I don't -- I don't --
21 that's not where we are.

22 Mr. Folkens: Yeah.

23 Mr. Masel: I mean, really. I mean, it's
24 -- it's -- it's interpreting the contract itself. If
25 Preservation Capital, no one -- no one objected to that

1 date. I mean, it really seems like the parties
2 themselves agreed to that date. So I don't think the
3 --

4 Mr. Folkens: Okay.

5 Mr. Masel: -- Court was making that
6 effort --

7 Mr. Folkens: Sorry for the rabbit hole.

8 Mr. Masel: No, that's fine. But I don't
9 think the Court was making an effort to find a
10 convenient date. It just ended up that that's what the
11 parties and everyone agreed to.

12 So, anyway, I guess -- I guess where I'm going
13 with -- with is that -- that when we're talking about a
14 payment made by way of the -- the foreclosure bid. If
15 that's going to act as a payment under Section 2, it
16 can only act as a payment to the extent that the equity
17 in the property has some value to offset the amount of
18 loan balance. If -- if there is no equity in the
19 property, and going back to my example, if -- if the
20 property's -- if -- if the foreclosure bid is \$9
21 million, and the debt is \$7.5 million dollars, and the
22 bid \$9 million, but there's an \$18 million first
23 mortgage on the property, the -- the foreclosing party
24 is not getting any equity. I mean, it's under water.
25 The value of the mortgage exceeds the value of the

1 property. So by making that \$9 million bid, it's not
2 getting any benefit. It's not getting any equity.
3 There's -- it's not getting anything that could offset
4 the loan balance.

5 So in this case, we're not arguing what the
6 value is as of the foreclosure date, 'cause that's --
7 that's going to be an issue of fact when it comes to
8 what the payment is. But my point is that whatever
9 that value is, it needs to be calculated so that we
10 know whether or not Jericho State got any equity in the
11 property. Our -- our position is that when it made the
12 \$9 million bid and not knowing of the property defect,
13 it didn't get any equity in the property, because due
14 to the defect, the value of the property went down so
15 much. And so it would not be a payment under Section
16 2.

17 Mr. Folkens: Okay.

18 Mr. Masel: All right. And just tying in
19 Preservation Capital again, we're talking about the
20 equity in the property, and that's how the Court
21 calculated damages in -- in Preservation Capital. It
22 was the equity after taking into consideration the
23 mortgage of higher priority. That's what we're asking
24 as far as the payment goes, is that the payment only
25 counts -- the -- the foreclosure bid only counts as a

1 payment in light of the existence of the first
2 mortgage.

3 Mr. Folkens: If the encumbering effect had
4 been known with the \$9 million bid was made, would you
5 acknowledge that that effect would have been baked into
6 the bid?

7 Mr. Masel: Yeah. You would -- you would
8 think, but that -- to some degree that goes back to how
9 I, you know, began my argument. Jericho State would
10 have never foreclosed on the property and taken title
11 subject to an \$18 million mortgage, had it known that
12 the property wasn't what it thought it was. So I mean,
13 if they decided to anyway, then I'm -- and knew about
14 it -- then I'm sure that, like you said, that it would
15 be baked in. But according to my clients and the
16 deposition excerpts that -- that I attached, they
17 wouldn't have even foreclosed in the first place. I
18 mean, why -- why buy into that kind of ridiculous
19 situation, of value that -- a piece of property that's
20 not worth as much as the first mortgage? So I -- I
21 don't -- they wouldn't have done it.

22 The last section, this is Section 9-C.

23 Mr. Folkens: Uh-huh.

24 Mr. Masel: And that's the -- the section
25 that -- that relates to relates to Lynx Jericho

1 satisfying -- satisfying the -- the first mortgage. So
2 both sides think the other person's -- the other side's
3 position leads -- leads to an absurd result.

4 Courts are directed to interpret contracts in a
5 reasonable, in a fair, and in a just manner. And they
6 do so by ascertaining the intention of the parties by
7 looking at the entire agreement, not just one
8 particular provision. So what's the intention of the
9 parties when you look at the entire agreement, or the
10 entire policy? That the policy insures against loss or
11 damage as of the date of policy, that the insured gives
12 Chicago Title notice of a loss or damage, if damage or
13 loss is suffered, then the amount is calculated by the
14 formula in Section 7, if the parties can't agree on an
15 amount of damages, they can liquidate -- they can
16 litigate those issues. And overall, it's clear that
17 the parties' intention, by reading the entire
18 agreement, is that the policy covers damages for losses
19 that are incurred during the policy period.

20 So what's a reasonable interpretation of this
21 Section 9-C? And to me, it's clear that that section
22 -- this section establishes a policy period. The
23 coverage begins when the policy is issued, and the
24 coverage period ends when the mortgage is satisfied.
25 It's -- it's a coverage period. This limits Chicago's

1 risk to a definable time period, and it closes the door
2 to any claims for damages that arise after the mortgage
3 is satisfied. And it's straightforward. And it makes
4 sense. And it's consistent with how I've always known
5 insurance to work, and that is if a claim is made for
6 damages that are incurred during the policy period,
7 those damages are covered by the policy. If a claim a
8 made for damages that are incurred outside the policy
9 period, then those are not covered.

10 It -- by using 9-C to establish the -- the
11 coverage period, it makes sense, it's reasonable, and
12 it's consistent with the parties' intentions when you
13 read the policy as a whole. So why is Chicago's
14 interpretation of Section 9-C unreasonable? Number
15 one, 9-C is silent as to pretending and existing
16 claims. They have said that we're trying to get the
17 Court to read in something that's not there in Section
18 9-C. We believe Chicago is asking the Court to read
19 something into 9-C that doesn't exist because it's
20 silent as to existing claims that were made during the
21 policy period for damages incurred during the policy
22 period. It's unreasonable because it's inconsistent
23 with the parties' intentions when you read the policy
24 as a whole. It excludes claims -- it excludes claims
25 for damages incurred during the policy period, and that

1 seems far from reasonable. It excludes claims that
2 were timely made during the policy period. Again, that
3 feels like a far cry that from -- from being
4 reasonable.

5 And, as your Honor mentioned earlier, it creates
6 an unfair leverage in favor of the title insurance
7 policy, in that the lender has to hold the property
8 indefinitely until the claims are resolved. Even
9 though the claim was timely made, and even though the
10 claim was made during the policy period, under their
11 interpretation it disappears. It evaporates. We've
12 been litigating it for, what, 10 years, and it's gone.

13 The reasonable interpretation is Section 9
14 creates the policy period, damages -- and it goes to
15 the satisfaction of the mortgage. The claims before
16 the satis---- for damages before the satisfaction are
17 covered. That's the policy period. After the policy
18 period expires, when the mortgage is satisfied, claims
19 that arise thereafter are not covered by the policy.

20 So I went on way longer than I meant to. But
21 we've got the three policy provisions, Section 7. We
22 believe that's ambiguous. Whitlock provides the
23 blueprint. All we need to do is read Whitlock, and
24 apply it to this case. Under Section 2, we believe the
25 term payment is ambiguous, but to the extent a

1 foreclosure bid constitutes a payment, and can only do
2 so to the extent that the foreclosing lender receives
3 some equity in the property. And under Section 9, that
4 establishes the policy period. We're got a beginning,
5 we've got an end, and that's the most reasonable way to
6 interpret that -- that policy provision. And the
7 claims made in this case were made during the policy
8 period for damages incurred during the policy period.
9 And 9-C would only act to exclude claims for damages
10 that were made after the mortgage satisfaction.

11 Mr. Folkens: Thank you. States, anything
12 you'd like to add?

13 Mr. Roberson: No, sir.

14 Mr. Folkens: Okay. Let's take a
15 10-minute break. Okay. We are back on the record at
16 11:44 a.m. Defense reply?

17 Mr. Koutrakos: Yes. Just real briefly,
18 you know, it appears when we talk about construction
19 and everything -- let me -- let me first start off --
20 the date of loss, we don't even need to get to that
21 argument if the Court finds that Lynx Jericho
22 terminated coverage by releasing its mortgage under
23 9-C, right? And if the Court also finds that Jericho
24 State, because of the bid that it made, bidding a lot
25 more than its debt, that there's coverage left, we

1 don't even get -- date of loss at that point in time
2 becomes irrelevant.

3 As to certain parts of the policy, I heard some
4 new things today that 9-C, which is labeled reduction
5 of insurance, reduction or termination of liability,
6 somehow now creates a policy period, a coverage period,
7 a claims made period. Simply, plaintiff, to try to get
8 out of the reach of 9-C is adding things to the po---
9 they're rewriting the policy. They're asking your
10 Honor to rewrite the policy, and torture its meaning.
11 He's basically trying to turn it into some kind of
12 commercial general liability policy or some other
13 product, and he's asking you to read things in there
14 that simply do not exist.

15 And the same for -- same goes for Paragraph 2-C
16 about the payments made and trying to put some
17 limitation on it, like it's -- the only way that counts
18 is if it's some kind of -- if there's equity in the
19 property. I mean, limitations on the application of
20 that language that simply doesn't exist. Same with
21 Paragraph 9-C. They're trying to add some sort of
22 post-claim limitation on it that simply doesn't exist.
23 Going back to Paragraph 7, it is -- this policy is -- I
24 mean, I think your Honor hit on it with some of the
25 questions you asked, is this is a contract of indemnity

1 against actual monetary loss or damage sustained or
2 incurred.

3 That language does not appear in Whitlock. It's
4 fundamentally clear, for a loan when you have
5 collateral, that a lender does not suffer actual
6 monetary loss or damage that until such time that the
7 collateral does improve enough to pay the debt. Just
8 like your Walmart stock example; it's directly on
9 point. Market's down 10 percent, I don't suffer it,
10 'cause I didn't sell it. Next year, I sell it, it's up
11 10 percent. Hey, I gained -- or you lost next year.
12 It's an unrealized loss. There was no response to the
13 hypothetical, what happens day one? Day one you -- you
14 find a defect that reduces the value by \$10,000.

15 Insurance Company, I want my check because I'm entitled
16 to a date of policy. Here's your check, sir. Here's
17 your check, Lender. And -- and under the new rewriting
18 of the policy, apparently, when the lender continues to
19 make payments to give them the 10,000, of course Bank
20 of America or any other reasonable lender is going to
21 start reimbursing the title insurance company. 'Cause
22 that -- I mean, that's how he answered your question.
23 There's no response to the question, what happens when
24 you suffer the defect, you suffered the loss, I want my
25 check for \$10,000. But what happens when your loan is

1 fully repaid or the collateral sell -- sells for an
2 amount that fully covers your debt? So I think that's
3 all I wanted to say. I think Harry --

4 Mr. Folkens: Well, help me understand
5 that -- when the \$9 million bid is made there's no
6 appreciation for the encumbrance effect.

7 Mr. Koutrakos: Encumbrance effect of
8 what? The first mortgage?

9 Mr. Folkens: Yes.

10 Mr. Koutrakos: Okay. The --

11 Mr. Folkens: And that -- yes.

12 Mr. Koutrakos: The -- the first mortgage
13 is specifically excluded, excepted to. So we keep on
14 hearing, hey, I'd get on the property, but I'm stuck
15 with the 18 million. That same 18 million, we keep on
16 talking about the position I thought you were in.
17 Well, if there's one thing clear, when somebody loans
18 \$4.5 million behind \$18.5 million, that's one thing
19 they did know when they did the loan closing, is they
20 were behind an \$18.5 million mortgage, right? They
21 always knew that. In fact, there's an exception for it
22 in the policy. So for them to argue that when we bid,
23 it doesn't count because we were behind 18.5, I'm
24 sorry. You knew that at the date of policy. That's
25 the position you were in on the date of closing and the

1 date of the loan. And it's excepted to, so none of
2 that matters. They bid \$9 million.

3 I don't know why they did it. You asked the
4 question earlier. Who knows why they did it. But they
5 bid more than the debt. That reduces -- that reduces
6 the coverage to zero -- and again, that has nothing to
7 do with date of loss. That has something to do with
8 how you value what's left on the policy, and that goes
9 straight the Preservation Capital. So -- you have
10 anything to add, Harry? I hope I answered your
11 question.

12 Mr. Dixon: Yeah, so --

13 Mr. Folkens: That may have been Harry,
14 'cause he -- he took a stab at it, Preservation Capital
15 specifically, which is a lender policy case, right?

16 Mr. Dixon: Right.

17 Mr. Folkens: And actually uses the
18 express language on the date of the policy? I don't
19 know if you looked that up --

20 Mr. Dixon: Well --

21 Mr. Folkens: -- but it's just the -- to
22 place the insured in the position he thought he
23 occupied when the policy was issued.

24 Mr. Koutrakos: Is that -- is that from
25 Preservation Capital, or is that from Jericho?

1 Mr. Folkens: That is from Jericho, citing
2 Preservation Capital

3 Mr. Koutrakos: Okay. Okay. Well, I'll
4 be free to answer that question. I mean --

5 Mr. Folkens: But then, you don't like him
6 -- the plaintiff's counsel bringing up the notion of a
7 stated period, but Preservation Capital introduces the
8 concept of a stated period of time, you know, between
9 the issuance of the policy and until there's a loss, so
10 --

11 Mr. Dixon: Well, I'll say I think that
12 quote -- it's in the Court of Appeals opinion in this
13 case, quoting the language about putting him back in
14 the position he thought he'd be in. I mean, our
15 position on that is the position you thought you're in
16 is satisfied. So the cases do quote the kind of
17 general -- I think it actually all comes from the
18 Personal Village Associates, versus Lawyers Title, the
19 9-10 one case that kind of policy statements the Courts
20 made. That matters in Personal Village 'cause it's
21 about the post-policy exception. So yeah, that quote's
22 in there, but I think it's talking about status of
23 title based on the encumbrance.

24 Mr. Folkens: Okay.

25 Mr. Dixon: But what I -- I don't think --

1 you asked me earlier, is a credit bid a payment? Under
2 First Preservation Capital, the answer is yes. I mean,
3 Preservation Capital. So the analysis it goes through
4 it's clearly taking the credit bid in -- in the
5 foreclosure in the Preservation Capital case and
6 reducing the coverage by that amount.

7 Mr. Folkens: They -- they used the actual
8 bid as the credit, correct? The Preservation Capital?

9 Mr. Dixon: Yes. That's the amount that
10 -- that -- how the Court calculates the coverage
11 reduction. And that's on -- 2-C of course, provides
12 the -- the coverage remaining is either the policy
13 amount or the unpaid indebtedness. So when it looks
14 at, okay, how did this foreclosure reduce the
15 indebtedness, we have three -- three -- and that's the
16 illustration I have there. 3 million -- roughly \$3
17 million -- the policy amount, the debt increases to a
18 little over 3.6. The -- the foreclosure -- the credit
19 bid is only 3.2, and that's the roughly \$400,000 that's
20 left. So that the outstanding indebtedness is 3.6,
21 reduced by 3.25 leaving there roughly 400,000. The
22 credit -- the big -- the foreclosure bid at
23 Preservation Capital, you know, reduces the
24 indebtedness.

25 And that's the difference in this case, which is

1 the other point I want to make about the whole -- what
2 equity did I get, you know, based on my foreclosure
3 bid? What Preservation Capital's looking at, and the
4 Supreme Court of South Carolina's looking at is whether
5 there's any indebtedness remaining. No question,
6 Jericho State's indebtedness is wiped out as a result
7 of foreclosure. And that's what's important in
8 Preservation Capital, and I'm quoting the Court, it
9 said, as the Court held in Hodas and insured
10 mortgagee's coverage to continue after he purchases the
11 mortgaged property in foreclosure, provided there
12 remains unpaid principle indebtedness. And that's
13 what's wiped out here. And that's why there is
14 coverage remaining.

15 Mr. Folkens: Does your analysis differ if
16 the bid is in a deficiency foreclosure or not? Because
17 you do argue a public policy in one of your memorandum
18 about the policy consideration of, you know, lender has
19 to -- if no deficiency is asked for, the \$500 nominal
20 bid would be acceptable, correct?

21 Mr. Dixon: In the hypothetical where
22 there's no deficiency?

23 Mr. Folkens: Right.

24 Mr. Dixon: And the lender bid only like,
25 under this scenario, bid \$500, rather than --

1 Mr. Folkens: Right. Would that \$500 be
2 deemed a -- a valuation?

3 Mr. Dixon: I think the \$500 would still
4 be a payment. Like, that would be included as a
5 payment under the policy in the Preservation Capital
6 analysis for sure. The fact that it wiped -- you know,
7 there is no deficiency, so the debt's been
8 extinguished, I think under -- under Preservation
9 Capital, you have a problem in that there's no debt
10 left, so that it's reducing the coverage.

11 Mr. Folkens: But in a \$500 bid, somebody
12 would do that. Talk about gaming the system, to simply
13 make it up on their title insurance claim with an
14 ascertainable loss.

15 Mr. Koutrakos: Well, that -- that would
16 be a situation where it would be a nominal bid. And I
17 think that that would be treated differently. But, you
18 know, the lender would make a nominal bid. Here, for
19 whatever reason -- the lender could have made a nominal
20 -- but no, I can't recall if it was receiving
21 deficiency judgment or not, but it didn't. It could
22 have made the bid you suggested, but it didn't. It bid
23 9 million. Why did it do so? I don't know. Remember,
24 in 2006, right? It was a -- well, whatever the year of
25 foreclosure, the date the sale took place was 2007,

1 there was somebody there bidding. Did somebody else
2 want the property? 'Cause you know what? We don't
3 know. But if somebody else wanted the property for
4 \$8.9 million, right, the note would have been paid. I
5 mean, if they'd bid one dollar more, or one dollar less
6 than Jericho bid, then they would have been fully paid,
7 and they walked away. We don't that know. They
8 chilled the bid. Or there was competitive bidding? We
9 don't know. They bid \$9 million. But hypothetically
10 -- and you have to assume -- there was somebody there
11 willing to pay \$8.5 million. Their note would have
12 been paid in full. Instead, they bid \$9 million, and
13 that reduces the amount due under the note. That
14 reduces coverage under the policy, and it's only fair
15 that it does.

16 We didn't decide to bid -- I mean, Jericho State
17 consciously -- and they have great lawyers, a great law
18 firm -- decide to bid that amount. Again, we don't
19 know if there was competitive bidding or not, but when
20 you make a bid like that, you do it for a reason. And
21 I think you have to live with the consequences of that.
22 They effectively -- effectively chilled the bidding.
23 Maybe there was somebody out there willing to buy the
24 property for 8.5 million, subject to a 20 million -- 18
25 million first. Apparently then, everybody thought the

1 property was worth \$100 million, so sounded like a
2 great deal, right? And we don't -- we don't know. And
3 --

4 Mr. Folkens: But -- but --

5 Mr. Koutrakos: -- but they're stuck with
6 the consequence of that bid.

7 Mr. Folkens: -- in furtherance of your
8 argument then, an irrational person -- lender -- would
9 want to squeeze out competitive bidding because they
10 find value in taking title.

11 Mr. Koutrakos: And that's fine. But if
12 they do that -- if they do that, it reduces the -- they
13 have to know it reduces the debt. It reduces the
14 policy amount.

15 Mr. Folkens: But does that create then --
16 and he can answer the question when you finish, but is
17 that then the equity concept, they're getting value by
18 bidding it up, by taking title to the property? When
19 the plaintiff says, you know, there's no realization of
20 equity --

21 Mr. Koutrakos: And it --

22 Mr. Folkens: But aren't they getting
23 something of value by taking title because they
24 perceive value in it?

25 Mr. Dixon: Absolutely.

1 Mr. Folkens: But if they perceive value
2 in it, they also have a pending title insurance claim
3 that they believe has value?

4 Mr. Masel: Not that -- That's not --

5 Mr. Folkens: You're correct.

6 Mr. Dixon: And I would add in Hodas, we
7 had the same fact pattern we have here. Jericho State,
8 you have the foreclosure, and then the title claim
9 comes afterwards. The defect's discovered later.
10 There's no mention in Hodas or in Preservation --

11 Mr. Folkens: The Maryland -- the Maryland
12 case that Preservation Capital --

13 Mr. Dixon: Yes, sir -- made -- but it's
14 the -- it's the case that Preservation Capital's
15 relying on. So it doesn't change the analysis or how
16 you calculate the coverage reduction under 2-C because
17 there's a later defect following a foreclosure sale.
18 You know, nobody goes back and says, well, what was it
19 really worth at foreclosure. We would just look at the
20 foreclosure bidding.

21 Mr. Folkens: Okay. Anything else,
22 gentlemen?

23 Mr. Koutrakos: We're good.

24 Mr. Folkens: You get final word.

25 Mr. Masel: Okay. I'll keep it quick. So

1 I'll just stick with the 2-C Preservation Capital
2 issue. For payment to be made under the context of
3 2-C, it needs to be a payment that reduces the loan
4 balance. In Preservation Capital, there was a higher
5 priority mortgage on the property that they foreclosed
6 on. So the value of that property wasn't subject to a
7 higher priority mortgage, and there was 100 percent
8 equity in the property that the lender received. So
9 that's why the full amount of the bid counted as -- as
10 a reduction to the loan balance because they got 100
11 percent value of the property. It reduced the loan
12 balance. The distinction in our case is that the
13 property that was foreclosed on was subject to a higher
14 priority mortgage so the equity that Jericho State
15 received was not an amount that acted to reduce the
16 loan balance. It did -- there was no substitution of
17 land value or loan for outstanding loan balance.

18 And Jim mentioned something about the first
19 mortgage is excepted from coverage under Jericho
20 State's policy. But I mean, it's my understanding that
21 the exception is that Jericho State can't make a claim
22 for a title defect saying, oh, there's this first
23 mortgage. That's a title defect. It's an -- it's an
24 exception. It's -- it's not a covered loss because
25 it's been excepted from coverage. Excepted coverage

1 does not prevent it from severing as a lien on the --
2 on the property that affects the equity that Jericho
3 State gets when it forecloses on the property.

4 Mr. Folkens: Okay. Thank you. How many
5 days do you need to get that supplemental memoranda in?

6 Mr. Masel: I mean -- I mean, by the end
7 of the week, 'cause -- I mean, I can do it whenever --

8 Mr. Folkens: Well, 10 days? 10 days?

9 Mr. Masel: Easily. Yes. Yes.

10 Mr. Folkens: Okay. And with nothing
11 further, we are adjourned, but once we go off the
12 record, a couple of questions, okay?

13 Mr. Masel: Okay. Can I ask one quick
14 question on --

15 Mr. Folkens: Yeah. On the record.

16 Mr. Masel: -- on the supplement?

17 Mr. Folkens: Okay.

18 Mr. Masel: Yeah, yeah. It was as far as
19 the cases from other jurisdictions --

20 Mr. Folkens: Yes.

21 Mr. Masel: -- when were you taking about
22 it before, you said something about if -- if it had to
23 do with the ambiguity issue, and if so -- like, do you
24 want me to give you any kind of analysis in those
25 cases?

1 Mr. Folkens: No, no, no.

2 Mr. Masel: Or just copies of the cases?

3 Mr. Folkens: Just give me all the cases
4 that you know of that say the date of the policy as
5 opposed to the --

6 Mr. Masel: Okay.

7 Mr. Folkens: -- date of the foreclosure
8 or subsequent, as an appropriate measure.

9 Mr. Masel: Okay.

10 Mr. Folkens: No, I fully you understand
11 your other argument about ambiguity. We're not
12 ambiguous -- you were not ambiguous in your argument
13 about the ambiguity --

14 Mr. Masel: Okay.

15 Mr. Folkens: -- position. Thank you.
16 Off the record.

17

18

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CERTIFICATE OF REPORTER

State of South Carolina

County of Florence

I, Abigail M. Kiker, Court Reporter and Notary Public for the State of South Carolina, do hereby that the foregoing hearing was, by me, reported; that said hearing transcript is a stenographic report and was transcribed by computer-aided transcription; that the foregoing transcript contains a true record of the proceedings.

I further certify that I am neither attorney nor Counsel for, nor related to or employed by any of the parties connected to the action, nor am I financially interested in the action.

Witness my hand at Florence, South Carolina, this 28th day of August, 2024.

/s/ Abigail M. Kiker

Abigail M. Kiker

Notary Public for South Carolina

My Commission Expires: July 1, 2031

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 2 COUNTY OF HORRY)
)
 3)
 4 JERICH0 STATE CAPITAL) CASE NO: 2013-CP-26-5530
 CORPORATION OF FLORIDA,)
)
 5 PLAINTIFF,))
)
 6 -VS-)
)
 7 CHICAGO TITLE INSURANCE) TRANSCRIPT OF SUMMARY
 COMPANY,) JUDGEMENT BEFORE A
) SPECIAL REFEREE
 8 DEFENDANT.))
 -----))
 9 LYNX JERICH0, LLC,) CASE NO: 2013-CP-26-1084
) (CONSOLIDATED WITH ABOVE
 10 PLAINTIFF,) CASE)
)
 11 -VS-)
 12 CHICAGO TITLE INSURANCE)
 COMPANY,)
)
 13 DEFENDANT.))
 14
 15

16 Given before Crystal Knappenberger, Court Reporter and
 17 Notary Public, at Folkens Law Firm at 601 West Evans Street
 18 in Florence, South Carolina, on Thursday, January 26th,
 19 2017, commencing at 10:00 am.

20
 21
 22
 23
 24
 25 Job No. CS2523474

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1 due --

2 MR. KOUTRAKOS: In a lender's policy.

3 JUDGE: Right.

4 MR. KOUTRAKOS: Yes.

5 JUDGE: So in those cases, that's why you're
6 distinguishing --

7 MR. KOUTRAKOS: Yes, in a lender's policy you
8 can't really know your losses until you foreclose
9 and you come in title of the property. So I can
10 tell you, you're asking a question if Chicago
11 Title has ever taken the position, I can't tell
12 you for certain what positions Chicago Title has
13 taken around the country, but I can tell you in
14 my experience as to the date of measure under the
15 owner's policy it would be the Over Holster case
16 and that is what was argued by the Stewart Title
17 in the Whitlock case, in the one before as the
18 residential case. In that particular case, the
19 one before, where it says the policy has the
20 actual loss. Supreme Court said "listen guys, you
21 need to provide us a defined measure -- a defined
22 way to calculate the loss," and I would really
23 like to point in the record here it's available
24 on the public records through Pacer but this is
25 the title policy, the owner's title policy is

1 Stewart Title. If you look at it, it's a one to
2 four residential policy. It's kind of a plain
3 language type thing and it is not nearly as
4 detailed as our policy and it says with respect
5 to damages, we will pay up to your actual loss or
6 the policy amount before the loss of claim is
7 made, whichever is less. That's all it says,
8 alright.

9 We don't have that here, we have a 1992 loan
10 policy and it has a very detailed way to measure
11 loss and that is on the last page of this handout
12 where it discusses statutes. Determination and
13 extent of liability -- it goes through -- this is
14 what the Supreme Court wanted.

15 JUDGE: The case you cited earlier was the Carl
16 Case you said?

17 MR. KOUTRAKOS: The Carl Case -- my client wrote
18 it down and I was going to mention it by you --
19 the loan policy throughout the country is the
20 Carl Case, and that's what title insurers around
21 the country followed and it makes sense because a
22 lender cannot establish a loss because it knows
23 the note will be paid off. If the lender files a
24 claim before it's foreclosed, title insurance
25 companies are going to say it's not right. You

1 have not established a loss. So, that's what we
2 have here in this case. With respect, which takes
3 me to my next argument. Well, let me backup. The
4 plaintiff has submitted a title insurance claim,
5 it has sued Chicago Title for breach of contract
6 and bad faith. It's got to show some kind of
7 damage, right? What is damage? Damage would be
8 some kind of loss compensable under the title
9 insurance company.

10 They're saying -- and I think wrongly
11 they're saying that -- the date of loss is the
12 date the policy is issued. Why are they saying
13 that, Your Honor? I know why they're saying that.
14 Because they certainly don't want to say the date
15 of condemnation because they've already been
16 paid! They've already been paid! So what they
17 want to do is say, "Okay, we've got paid by the
18 state of South Carolina, the tax payers as of
19 December 15, 2009. We want to go back to July of
20 2006 and we want to be paid for that through the
21 title insurance policy." They're not going to
22 argue the date of condemnation because they
23 wouldn't because they realize that's what they
24 have argued because they gave us expert
25 appraisals saying the date is December 15, 2009.

1 So what did they do, Your Honor? We went out,
2 they're the plaintiff, they establish their
3 damage through an appraisal, we go and get an
4 appraisal done and we pick the same date they
5 pick. Right? If it's construed in the policy and
6 the like most favored insured, the insured has
7 picked a date that presumably is best. So we got
8 that date done. And they're arguing their brief
9 that Chicago Title doesn't know what it's doing
10 but they can't make up their mind what date to
11 pick. I can tell you the date, the usual date, is
12 the date of the foreclosure of the mortgage. The
13 date the lender comes into title of the property,
14 right? If it goes into defect at that time,
15 right? That's what we would have in this case and
16 that would be the earliest date upon which loss
17 can be established. But they're saying "no, it's
18 the policy date." That's their position, they had
19 to come into this court and provide some evidence
20 that there's a loss, right? They'll argue, and
21 they've argued in their brief, of course there's
22 loss guys, there's a bridge and highway going
23 through our property. I don't need an appraiser
24 to tell me that. Well, guess what? They've
25 already admitted in their -- and it's the right

1 thing to do, to say that \$2.1 million is an
2 offset. Their jury awards an offset to their
3 damages, so it's a loss. So they're in a hole,
4 they have to somehow provide evidence that the
5 loss, and not in 2006, that's the date they
6 picked for their claim that they're prosecuting.
7 They're the masters of their own complaint in
8 their own case. They have to show some evidence
9 on it. In July 2006, that this alleged defect in
10 title or this alleged issue that they claim is
11 covered in the title policy caused more damages
12 than \$2.1 million and there's nothing in the
13 record that shows that. Absolutely nothing. It's
14 their burden to come up with their damages. So
15 even though they'll say we move to summary
16 judgment liability, we move to summary judgment,
17 you have to prove your case and you haven't done
18 it. They haven't shown any evidence of damages.
19 Because I think what they realize is we're not
20 going to use the date of condemnation, let's find
21 another date even though the Carl Case and cases
22 around the country say that's the date when you
23 establish the loss because they want to get paid
24 more. So they're picking 2006 and it's their
25 chance to get paid more. This is their chance to

1 get -- I'm arguing to a jury and not to a judge,
2 but -- this is their chance to get the \$4 million
3 that they wanted and the jury didn't give them,
4 so this is what they're arguing. They've moved
5 the goal post to an earlier date.

6 So anyway, we don't believe they have
7 established loss under the policy. We don't
8 believe they have established a loss at all, it's
9 really part of their case, a breach of contract.
10 You have to establish loss, what your damage is.
11 They haven't done that.

12 Okay. There is a liability noncumulative
13 provision of the policy I mentioned in the brief
14 which basically says if you decide that somebody
15 has to pay something it's a payment to a first
16 mortgage holder constitutes a payment to the
17 second mortgage, that's just in the policy.
18 That's not really a summary judgment basis to let
19 them notify the court of that.

20 Bad faith -- they've elected bad faith and
21 maybe it's the right way to do it -- the two
22 clauses of action: one is a breach of implied
23 covenant of good faith and fair dealing. There's
24 the Road Tech case from 2004 -- that's not a
25 separate clause of action. That clause of action

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY

Jericho State Capital Corp. of Florida,

Plaintiff,

Case No. 2013-CP-26-5530

vs.

Chicago Title Insurance Company,

Defendant.

Lynx Jericho Partners, LLC,

Plaintiff,

Case No. 2015-CP-26-1084
(Consolidated with the above case)

vs.

Chicago Title Insurance Company,

Defendant.

**DEFENDANT CHICAGO TITLE INSURANCE COMPANY'S
RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR
RECONSIDERATION AND TO ALTER OR AMEND THE ORDER**

I. INTRODUCTION¹

This Court ruled in favor of Defendant Chicago Title Insurance Company ("Chicago Title") in its July 14, 2025 Order ("Order"), holding that there was no coverage for Plaintiff Jericho State Capital Corp. of Florida ("Jericho State") or Plaintiff Lynx Jericho Partners, LLC ("Lynx Jericho") (together, "Plaintiffs") under their two separate title insurance policies. Now, Plaintiffs assert this Court overlooked material facts and law and that the Court should alter or amend its

¹ The relevant facts are fully set forth in the Order finding in favor of Chicago Title and are incorporated fully herein.

Order.² However, Plaintiffs have only re-hashed already rejected arguments and pointed to immaterial facts that do not support reconsidering, altering, or amending the Order. This Court correctly (and thoroughly) rejected these arguments in its Order and should deny Plaintiffs' motions without argument.³

II. LEGAL STANDARD

This Court exercises its discretion when deciding whether to grant the relief under Rule 59. *See Pollard v. Cty. of Florence*, 314 S.C. 397, 402, 444 S.E.2d 534, 536 (Ct. App. 1994) (discretion left to court when considering motion pursuant to Rule 59(e), SCRCP); *see generally BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502–03 (2006) (discretion left to court when considering motion pursuant to Rule 60(b), SCRCP). “An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support.” *Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006).

III. ANALYSIS

Plaintiffs have not identified a basis to alter, amend, or reconsider any portion of the Order finding in favor of the Chicago Title. The grounds set forth by Plaintiffs should be rejected as set forth below.

A. The Court properly rejected Plaintiffs' argument that date of policy is the appropriate date of loss under Plaintiffs' loan policies of title insurance.

Plaintiffs re-assert the same arguments that the Court previously rejected after extensive

² Plaintiffs filed two identical motions, one in each case, although these cases have been consolidated. For clarity, Chicago Title is filing this single response in opposition in the consolidated action and in response to each of the two motions by Plaintiffs.

³ Under Rule 59(f), SCRCP, the Court need not hold a hearing on this motion. Chicago Title asserts the Court can deny Plaintiffs' motions based on the briefing before it.

briefing and oral argument for “date of policy” as the date of loss under their loan policies of title insurance. *See Plaintiffs’ July 17, 2025 Motion to Reconsider*, §§ 1–8. Like Plaintiffs asserted in their motion for summary judgment, Plaintiffs assert again that they should be placed in the position they thought they occupied as of date of policy such that Plaintiffs are paid the value of Plaintiffs’ security interest as of date of the title insurance policies—before the borrower or mortgagor under the insured mortgage could have ever defaulted. *See Order*, p. 8; *see also Plaintiffs’ April 2, 2024 Motion for Summary Judgment*, 11–13. The Court rightly rejected this argument, holding that the date of a foreclosure sale is the appropriate date to establish a loss because “until the lender’s security interest is impaired in a concrete way—such as through foreclosure or another forced sale that extinguishes or reduces the debt—there is no ascertainable loss to indemnify.” *See Order*, p. 12. The Court should again reject these same arguments for the same reasons.

Plaintiffs specifically assert the following bases to reconsider, alter or amend the Order related to the date of loss under the title policies at issue:

1. Plaintiffs should be placed in the position they thought they occupied because they were entitled to the full value of their collateral at the time of the title policies and that they would not have made the loans had they known of the encumbrance.
2. South Carolina law treats owner’s and lender’s title policies the same.
3. The Order should properly recognize the nature and value of the Plaintiffs’ insured interest at the time the Policy was issued.
4. The terms “actual monetary loss or damage” in Plaintiffs’ loan policies of title insurance are ambiguous, and the Order fails to interpret said terms “liberally in favor of the insured and strictly against the insurer” under *Whitlock*.
5. Lost security is a valid measure of a lender’s loss under a title insurance policy.

6. The Policy does not set forth a date to measure damages and is therefore ambiguous.
7. South Carolina law recognizes that a lender's title policy covers actual monetary loss or damage suffered on a date other than the foreclosure date.
8. The law of foreign jurisdictions is not applicable to this South Carolina case.

See Plaintiffs' July 17, 2025 Motion to Reconsider, §§ 1–8, pp. 1–10. Plaintiffs principally rely on *Jericho State Capital v. Chicago Title*, 431 S.C. 437, 848 S.E.2d 572 (Ct. App. 2020), *Pres. Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 751 S.E.2d 256 (2013), and *Whitlock v. Stewart Title*, 399 S.C. 610, 732 S.E.2d 626 (2012).

The Court thoroughly considered these authorities in the Order and held 1) the title policies are not ambiguous and 2) date of policy is not the date of loss for these loan policies of title insurance. *See Order*, pp. 4–12. As Chicago Title argued in its motion for summary judgment, the Court held Section 7 of the policies unambiguously set forth a method of determining loss because the policy language stated the title insurance policy was a contract of indemnity that required “actual loss or damage.” *Id.*, p. 6–7. The Court went on to hold that *Whitlock* is factually distinguishable because it considered an owner's title insurance policy that did not contain any method for calculating loss.

Plaintiffs have not identified any new analysis from these previously considered cases that should change the Court's ruling on this issue. The parties thoroughly briefed these same arguments over the effect of *Whitlock*, *Preservation Capital*, and other cases. *Compare Chicago Title's January 23, 2024 Motion for Summary Judgment*, p. 21–25, and *Chicago Title's May 1, 2024 Response*, pp. 2–11, with *Plaintiffs' April 2, 2024 Motion for Summary judgment*, pp. 5–13. The Court fully addressed these arguments in the Order. *See Order*, pp. 4–12. There is no need to re-hash them, and this Court should deny Plaintiffs' motion to reconsider, alter, or amend on this basis.

Plaintiffs now assert *Jaffe-Spindler Co. v. Genesco, Inc.*, 747 F.2d 253, 256 (4th Cir. 1984), supports their position and justifies reconsideration. *See Plaintiffs' July 17, 2025 Motion to Reconsider*, § 3. *Jaffe-Spindler* considered an action for waste by a mortgagee in a multi-party dispute over damaged premises that were previously leased (with the mortgage secured by the leased property). *Id.* While *Jaffe-Spindler* allowed the action for waste before the mortgagee obtained title, the court upheld a judgment in the amount of the debt owed (despite the lost value of security exceeding the amount of the debt) and held that “on the facts of the present case . . . there was the essential equivalent of foreclosure.” *See id.* at 258. *Jaffe-Spindler* allowed the functional equivalent of a foreclosure action in an equitable action for waste “on the special facts” before the court where the loan at issue was in default and the mortgagee was limited to recovering the amount of its debt. *Id.* at 257 (“We believe that, given the special facts of the present case, the district court was correct in assuming that the South Carolina Supreme Court would apply the rule which usually governs in title states.”). *Jaffe-Spindler* did not consider a loan policy of title insurance or insurance of any sort. Accordingly, *Jaffe-Spindler* does not support Plaintiffs’ position and does not establish any legal error in the Order.

It is worth reiterating, although previously addressed by the Court, that the South Carolina Supreme Court has implicitly recognized a difference between owner’s and loan policies of title insurance. *Compare Preservation Capital Consultants, LLC*, 406 S.C. at 317–18, 751 S.E.2d at 260 (calculating coverage under loan policy at foreclosure) *with Whitlock*, 399 S.C. at 613, 732 S.E.2d at 62 (“[w]here the insurance contract unambiguously identifies a date for measuring the diminution in value of the insured property *or otherwise unambiguously provides for the method of valuation as a result of the title defect*, such date or method is controlling.”) (emphasis added). Plaintiffs’ continued reliance on *Whitlock* in the face of different facts and policy provisions

presented here is not a basis to reconsider the Order.

Additionally, Plaintiffs' interpretation of *Preservation Capital* is not supported by the facts in *Preservation Capital*, where the court determined the amount of the loss at the time of foreclosure⁴ even though the insured lender's lien failed to attach to one of the parcels that should have secured the loan at issue:

Preservation Capital ultimately foreclosed on the Shopping Center parcel. Atlantic purchased the property at the foreclosure sale by way of a credit bid for \$3,250,000. At the time of the foreclosure sale, Monarch Development's debt to Preservation Capital had risen to \$3,641,190. Thus, after foreclosing on the Shopping Center parcel, Monarch Development owed Preservation Capital a remaining balance of \$391,190. Thereafter, Preservation Capital filed a claim under its policy with First American for \$345,335—the amount it was unable to collect on the King Street parcel due to the title defect. First American denied coverage.

Preservation Capital Consultants, LLC, 406 S.C. at 312, 751 S.E.2d at 257 (emphasis added).

Finally, Plaintiffs contend that law from other jurisdictions should not be considered on the date of loss issue, despite *Preservation Capital* following a Maine case to address a question under a loan policy of title insurance when, like here, no South Carolina case previously addressed the precise issue presented. *Id.* at 317, 751 S.E.2d at 260 (relying on *Hodas v. First American Title Insurance Co.*, 696 A.2d 1095 (Me.1997)).⁵

Accordingly, the Court's analysis of the date of loss was correct, and Plaintiffs have not identified any reason to reconsider, alter, or amend the Order on this basis.

B. The Court properly applied *Preservation Capital* and held coverage for Jericho State was reduced to \$0.

Plaintiffs assert that “[t]he foreclosure sale price did not make Jericho State whole, and the

⁴ Cf. *Plaintiffs' July 17, 2025 Motion to Reconsider*, § 5 (“In *Preservation Capital v. First American Title*, 406 S.C. 309 (2013), the Supreme Court measured the Plaintiff's damages based on lost security due to the title defect.”).

⁵ Cf. *Plaintiffs' July 17, 2025 Motion to Reconsider*, § 8 (“The law of foreign jurisdictions is not applicable to this South Carolina case.”).

Order penalizes Jericho State for not knowing that the property suffered a defect when it made its foreclosure bid.” *Plaintiffs’ July 17, 2025 Motion to Reconsider*, § 9. However, the Court already rejected this same argument, holding that coverage for Jericho State was reduced to \$0 under the clear policy terms and a faithful application of *Preservation Capital*. *See* Order, p. 15–16.

Plaintiffs have not identified anything in *Preservation Capital* that should change the Court’s analysis but only reiterate their position that “[a] lender’s successful foreclosure bid can only satisfy the debt if the lender receives equity in the amount of the debt.” However, there is no such limitation in *Preservation Capital*, which interpreted the same policy provision at issue here. *See Preservation Capital*, 406 S.C. at 318, 751 S.E.2d at 260–61 (finding coverage reduced but not to \$0 because the debt remained unpaid: “after Preservation Capital acquired the Shopping Center parcel, Monarch Development *remained indebted* for \$391,190, which appreciated to \$452,731.48 by gaining interest from the date of foreclosure until the entry of judgment in this action.”) (emphasis added). There is no dispute here that Jericho State’s winning bid at the foreclosure sale was in excess of the amount of the debt, which was also subject to a first mortgage known to Jericho State. *Preservation Capital* clearly applied the credit bid (there, \$3,250,000) by the lender to reduce the amount of the debt outstanding (there, \$3,641,190) under Section 2(c). *See id.* at 318, 751 S.E.2d at 260 (“as for the amount of coverage available, section 2(c) states the amount of insurance after acquiring property via foreclosure shall not exceed the lesser of the \$3,075,000 policy limit or *the amount of unpaid principal indebtedness secured by the insured mortgage, coupled with interest and expenses*, but reduced by the amount of all payments made. Here, after Preservation Capital acquired the Shopping Center parcel, Monarch Development *remained indebted for \$391,190 . . .* Accordingly, coverage would be limited to \$452,731.48, as that amount is less than the \$3,075,000 policy limit.”) (emphasis added).

Accordingly, Plaintiffs have not identified a basis to reconsider, alter, or amend the Order on this basis, and the Court should deny Plaintiffs' motion.

C. The Court correctly held that Paragraph 9(c) of the Conditions and Stipulations terminates coverage under the Lynx Jericho policy because Lynx Jericho released and voluntarily satisfied its mortgage.

Plaintiffs again ask the Court to disregard the plain language of Paragraph 9(c) and impose a time limitation for Paragraph 9(c) that is not in the Lynx Jericho title policy. Plaintiffs again argue that Paragraph 9(c) does not apply because Lynx Jericho released its mortgage lien after it submitted a claim under the Lynx Jericho title policy. However, Paragraph 9(c) does not include a temporal limitation, and courts may not read one into the title policy. *See generally S.C. Farm Bureau Mut. Ins. Co. v. Dawsey*, 371 S.C. 353, 356, 638 S.E.2d 103, 105 (Ct. App. 2006) (“The court cannot torture the meaning of policy language to extend coverage not intended by the parties.”). Moreover, Paragraph 9(c) only applies now, long after the borrower’s default, because of Lynx Jericho’s irrational decision to never foreclose and realize its collateral.

Plaintiffs assert Paragraph 9(c) is ambiguous because it fails to address how pending claims might affect its application. Rather than being ambiguous, the provision is clear that “[p]ayment in full by any person *or the voluntary satisfaction or release of the insured mortgage* shall terminate all liability of the Company” (except for other exceptions not implicated here) without any timing limitation. *See Order*, p. 17 (quoting Paragraph 9(c) of the Conditions and Stipulations in the Lynx Jericho policy) (emphasis added). Plaintiffs would have this Court insert a new term into this clear provision, which it cannot do. *See S.C. Farm Bureau Mut. Ins. Co.*, 371 S.C. at 356, 638 S.E.2d at 105 (“The court cannot torture the meaning of policy language to extend coverage not intended by the parties.”).

Plaintiffs also acknowledge, as they did in their motion for summary judgment, that other courts interpreting Paragraph 9(c), or materially the same language, have not drawn a distinction

as to whether the voluntary satisfaction occurred before submission of a title insurance claim (*see Joglor, LLC v. First Am. Title Ins. Co.*, 261 F. Supp. 3d 224, 233 (D.P.R. 2016); *Morrison v. Wells Fargo Bank, N.A.*, 711 F. Supp. 2d 369, 389 (M.D. Pa. 2010); *First Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 823 N.E.2d 168, 175 (Ill. App. Ct. 2005)) or after (*see RNT Holdings, LLC v. United Gen. Title Ins. Co.*, 179 Cal. Rptr. 3d 175, 184 (Ct. App. 2014)). *See Plaintiffs' July 17, 2025 Motion to Reconsider*, § 10; *see also Plaintiffs' Motion for Summary Judgment*, p. 21 (“Aside from *RNT*, these cases show that the lenders made their claims under the title policy after the loan was paid in full and the mortgage was satisfied.”). Plaintiffs now assert that following *RNT Holdings* would lead to an absurd result. However, courts apply unambiguous provisions as written—there is no absurd result when the policy is given its only reasonable interpretation. *See, e.g., Pres. Cap. Consultants, LLC*, 406 S.C. at 316, 751 S.E.2d at 259 (“Where the contract’s language is clear and unambiguous, the language alone determines the contract’s force and effect.”); *S.S. Newell & Co. v. American Mutual Liability Ins. Co.*, 199 S.C. 325, 19 S.E.2d 463, 466 (1942) (“The rule of strict construction against the insurer does not apply where the language used in the policy is so plain and unambiguous as to leave no room for construction. Nor does the rule of strict construction authorize a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exists.”).

Plaintiffs again attempt to find support in *Chicago Title Ins. Co. v. 100 Inv. Ltd. P'ship*, 355 F.3d 759 (4th Cir. 2004), which held that a title insurer had a duty to defend an insured against a trespass claim made regarding the then-insured’s conduct after the date of policy but before coverage terminated when the insured sold the property. Unlike *100 Investment*, Plaintiffs are not seeking a defense for a lawsuit filed by a third party, which makes *100 Investment* factually inapposite. As previously noted, *100 Investment* actually *rejected* an analogous claim by the

insured for indemnity because the insured sold the property at issue without a general warranty—terminating coverage—even though there was a complete failure of title on 1.45 acres. Under Plaintiffs’ theory asserted here, the failure of title for the *100 Investment* insured should have occurred before coverage terminated such that coverage for the indemnity claim should have been provided—in contrast to what *100 Investment* actually held. While Lynx Jericho made a claim before it voluntarily terminated its mortgage, any actual loss or damage was not determinable because Lynx Jericho never foreclosed. The Court thoroughly addressed this decision in the Order (in the Court’s analysis of the appropriate date of loss, not the section on Paragraph 9(c)), the parties each briefed it, and *100 Investment* does not address Paragraph 9(c) or similar title insurance provisions. The Court properly rejected Plaintiffs’ reading of *100 Investment* in the Court’s analysis on date of loss, and the Court should reject Plaintiffs’ interpretation of *100 Investment* in support of Plaintiffs’ Paragraph 9(c) arguments here.

Accordingly, *100 Investment* does not support Plaintiffs’ position, and it is not a basis to reconsider, alter or amend the Court’s holding in the Order that Paragraph 9(c) precludes coverage under the Lynx Jericho title policy.

IV. CONCLUSION

This Court considered completely and thoroughly the facts and law in the Order. Accordingly, Plaintiffs’ motion to reconsider, alter, or amend should be denied.

[Signatures on following page]

Respectfully submitted,

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**ATTORNEYS FOR DEFENDANT
CHICAGO TITLE INSURANCE
COMPANY**

September 8, 2025

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
Case No. 2013-CP-26-5530
Case No. 2015-CP-26-1084
(Consolidated)

Jericho State Capital Corp. of Florida,
Plaintiff,

vs.

Chicago Title Insurance Company,
Defendant.

Lynx Jericho Partners, LLC,
Plaintiff,

vs.

Chicago Title Insurance Company,
Defendant.

**PLAINTIFFS' MOTION
FOR RECONSIDERATION AND TO ALTER
OR AMEND ORDER**

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Plaintiffs Jericho State Capital Corp. of Florida ("Jericho State") and Lynx Jericho Partners, LLC ("Lynx Jericho") hereby move for reconsideration and to alter or amend the Order Considering Defendant's Second Motion for Summary Judgment and Plaintiffs' Motion for Summary Judgment, dated July 7, 2025, and filed July 14, 2025 ("Order" and attached hereto as Exhibit A), which granted summary judgment to Defendant and denied Plaintiffs' motion. Respectfully, Plaintiffs contend the Court overlooked or failed to properly consider certain facts, legal authority and arguments, including those set forth below.

1. The Order should have placed Plaintiffs in the position they thought they occupied at the time the Policy was issued. "The purpose of title insurance is to place the insured in the position he thought he occupied when the policy was issued." *Jericho State Capital v. Chicago Title*, 431 S.C. 437 (S.C. App. 2020). This is consistent with the first page of the subject title

insurance policies (collectively, the “Policy”) where it states the Company “insures, *as of Date of Policy* ..., against loss or damage, ... sustained or incurred by the insured” (emphasis added).

When the Policy was issued and the loans were made, Plaintiffs thought the position they occupied was as lenders *fully secured* by a mortgage on 131 acres of waterfront property, subject only to a first mortgage and not the encumbrance created by Horry County’s Official Map Ordinance, as amended (“Ordinance”) and its proposed 6-lane highway and bridge running through the middle of the property. The heavy significance of this encumbrance cannot be overstated – it was of such an effect that it rendered the title to the property unmarketable and would entitle the purchaser to rescind the sale. See, *Jericho State Capital v. Chicago Title*, 431 S.C. 437 (S.C. App. 2020).

When they made the loans, Plaintiffs believed they were fully secured based their experience, appraisals, development plans, and most importantly, on the Policy itself, which failed to disclose the encumbrance. Had Plaintiffs known of the massive highway and bridge, and had the Policy disclosed this encumbrance, they would have never made the loan because it materially decreased the property’s value and therefore failed to fully secure the loans. When the borrower defaulted shortly thereafter, Jericho State still did not know of the encumbrance, and had they known the defect left them unsecured by the property, they would not have paid several million dollars to the first mortgage holder as cure payments. A short time after that, when they foreclosed on the property, they still did not know of the planned highway and bridge, and had they known they were unsecured, they would not have made the bid and taken ownership of the defective property subject to an \$18 million first mortgage. Unlike a purchaser who can rescind the sale, the Plaintiffs could not rescind the transaction and thus sought their remedy under the title policy.

The Order suggests that even if the encumbrance devalued the property to a measly \$1.00, the Plaintiffs’ lost loan security is wholly immaterial, and they were standing in the same position

on the Policy date as if there was no encumbrance. Plaintiffs respectfully submit that this is not how lenders and banks work - they make such a loan only if the property values in an amount sufficient to cover the amount of the loan. The borrower may default or may not default - no one knows at the time the loan is made - but lenders want to be *fully secured* when making such a loan in the event the borrower does default. Thus, the property's value and the amount of security it provides at the time the loan is absolutely critical to consummate the transaction. As discussed in *Jaffe-Spindler Co. v. Genesco, Inc.* (discussed more below), the property's value establishes a measure of "safety" for the lender. This safety has value, and the Plaintiffs in this case sought to insure that safety via the Policy when they made the loans.

The harm to Plaintiffs arises from the fact that they made the loans in the first place without knowing their safety, security and basis for making the loans had evaporated. Wholly ignorant of the encumbrance, Jericho State paid millions of dollars and took title to the defective property subject to an enormous first mortgage that left Jericho state naked with no security. The position in which Plaintiffs found themselves is nowhere near what they thought when they made the loan. The Order should be reconsidered, altered or amended to be consistent with South Carolina law and place the insured in the position they thought was occupied at the time the Policy was issued.

2. South Carolina law recognizes that owners and lenders are treated similarly when evaluating the purpose of title insurance. "Title insurance is designed to protect a real estate **purchaser or mortgagee** against defects in or encumbrances on the title; the purpose of title insurance is to place the insured in the position he thought he occupied **when the policy was issued.**" *Jericho State Capital v. Chicago Title*, 431 S.C. 437 (S.C. App. 2020)(emphasis added). See also, *Pres. Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309 (2013); *Firstland Vill. Assocs. v. Lawyer's Title Ins. Co.*, 277 S.C. 184 (1981)("Generally, title insurance operates to

protect a **purchaser or mortgagee** against defects in or encumbrances on the title [that] are in existence at the time the insured takes title”).

Instead of evaluating the purpose of title insurance similarly for owners and lenders, the Order effectively assigns differing purposes for an insured under an owner’s policy versus a lender’s policy. For an insured owner, the Order acknowledges the insured should be placed in the position he thought he occupied when the policy was issued, but for an insured lender who thought it was fully secured when the loan was made, the Order does not do so.

3. The Order should properly recognize the nature and value of the Plaintiffs’ insured interest at the time the Policy was issued. “It may be said, generally, that anyone has an insurable interest in property who derives a benefit from its existence or would suffer loss from its destruction.” *Benton & Rhodes v. Boden*, 310 S.C. 400 (Ct. App. 1993). An insurable interest is a right or benefit arising from the property or any relation to the property that results in harm to the insured if the property is affected by peril. *Id.*

Both mortgages “grant, bargain, and sell” the property to the Plaintiffs, “to have and to hold” until the debts secured by the property are paid. When the Policy was issued, the Plaintiffs’ insured interest was its mortgage lien and the security the property provided for the loan amount. This security interest has objective value, obviously, and its value is based on the property’s value. Conversely, if a property is worth zero, then the security it provides for a loan is worth zero and serves no purpose to a lender. The Order cites to *Jaffe-Spindler Co. v. Genesco, Inc.*, for the proposition that a mortgagee is deemed to “only have a lien on real property as opposed to actual title.” 747 F.2d 253(4th Cir. 1984). In *Jaffe-Spindler*, however, the Court recognized the mortgagee’s right to sue the borrower for committing waste on the subject property that diminished its value, which greatly prejudiced the mortgagee’s security interest. While noting that South Carolina was a “lien state”, the Court concluded the mortgagee’s security interest had measurable

value and it did not have to foreclose on the subject property to seek compensation for the damage to its security interest. By footnote, the court explained:

“Because collateral whose value has been diminished through fault attributable to the mortgagor may still be worth something in excess of the outstanding indebtedness one day does not mean that the collateral will suffice on a later, rainy day. The margin of safety will have been significantly reduced.”

Id., at footnote 6. In this case, the Plaintiffs’ margin of safety was significantly reduced as of the Policy date.

Finally, Section 7(a)(iii) calculates damages based on “the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.” Plaintiffs contend this provision is the proper formula to measure damages. However, the Order suggests lost value of Plaintiff’s insured interest on the Policy date is immaterial, as actual monetary loss or damage can only be calculated at foreclosure. This interpretation fails to distinguish, and seems to contradict, lost “value” of the insured interest as used in Section 7(a)(iii) and the meaning and application of “actual monetary loss or damage” (discussed below). Not only does this add to the ambiguity of the Policy, it ignores the existence of the real value of loan security at the time the loan is made.

As such, the Order should be reconsidered, altered or amended to more properly recognize the nature of Plaintiffs’ insured interest at the time the Policy was issued, the measurable value of the insured interest, and loss and damage suffered to the insured interest due to the encumbrance.

4. The contractual terms “actual monetary loss or damage” are ambiguous, and the Order fails to interpret said terms “liberally in favor of the insured and strictly against the insurer.” See, *Whitlock v. Steward Title*, 399 S.C. 619 (2012). The Order states these terms, as used in Section 7 of the Policy, are “clear and precise”. However, these terms are not defined in the Policy. Moreover, the Order itself does not define the meaning of “actual monetary loss or damage.”

Despite the lack of any articulated definition, the Order still concludes that it can only be calculated at foreclosure.

The Order acknowledges that under an owner's policy, the owner incurs an "actual monetary loss" on the policy date due to the immediate reduction in its fee simple interest in the property. Following the same logic, the mortgagee incurs an actual monetary loss or damage due to the immediate reduction in the value of its security in the property. In either scenario, a future transaction is not required to measure that loss – the owner is not required to sell the property to actualize his loss and the lender does not have to foreclose to measure the amount of lost security that has already taken place. The values of both interests can be measured on the policy date.

In *Whitlock*, the owner's title policy did not define "actual loss". The Court found that the policy's failure to define the term provided no guidance for determining a valuation date. As in *Whitlock*, the Policy does not define actual monetary loss and similarly fails to provide guidance as to its meaning. The term should be interpreted most favorably to the insured, not the insurer.

Notably, the Policy in this case not only insures against actual monetary loss, but it also insures against "damage" sustained or incurred by the insured. By including the term "damage", the Policy is even more ambiguous than the *Whitlock* policy. As referenced in *United States v. James*, 478 U.S. 597 (1986), "It might be noted here that there is distinction between damage and damages. Black's Law Dictionary cautions that the word 'damage,' meaning 'Loss, injury, or deterioration,' is to be distinguished from its plural, 'damages', which means a compensation in money for a loss or damage." It appears the Order fails to appreciate the Policy's undefined use of the term "damage", as it concludes that "Until an actual monetary loss is incurred under a lender's policy, the extent of Defendant's liability to Plaintiffs cannot be determined per the plain, unambiguous terms of the Policy." Notably, the Order does not address the meaning or effect of the Policy's use of the term "damage". The Order should have applied this term to the insured

interest using its common meaning, “loss, injury or deterioration”, or should have deemed it ambiguous and interpreted it in a manner liberally in favor of the insured and strictly against the insurer. The analysis is straightforward: the Plaintiff’s possessed an insurable interest at the time the Policy was issued, their insurable interest had value as it provided them a full measure of safety and security up to the amount of the loans when made, and their insurable interest suffered actual monetary loss or damage as a result of the Ordinance because its encumbering effects resulted in loss, injury or deterioration to the value of their interest.

5. South Carolina law recognizes that lost security is a valid measure of a lender’s loss under a title insurance policy. In *Preservation Capital v. First American Title*, 406 S.C. 309 (2013), the Supreme Court measured the Plaintiff’s damages based on *lost security* due to the title defect. In *Preservation Capital*, the lender did not foreclose, and the court did not require the lender to foreclose, on the property suffering a defect to calculate the lender’s damages. Instead, relying on the value of the property after deducting a higher priority mortgage, the Court measured damages based on the fact that, due to the defect, the property no longer secured the debt. In other words, the property secured the loan up to a certain amount, the lender lost that security due to the defect, and the measure of loss was that lost security. Thus, the Order should be reconsidered, altered or amended to conclude, consistent with *Preservation Capital*, that (i) lost security is a valid measure of a lender’s loss, and (ii) lost security is measured in light of a higher priority mortgage.

6. The Policy does not set forth a date to measure damages and is therefore ambiguous; the Order should have interpreted this ambiguity most favorably to the insureds. "The terms of individual insurance agreements can control the method of valuation, but the purpose of title insurance has been stated as seeking to place the insured in the position that he thought he occupied when the policy was issued." *Stanley v. Atl. Title Ins. Co.*, 377 S.C. 405 (2008); *Jericho State Capital v. Chicago Title*, 431 S.C. 437 (S.C. App. 2020). “The rubric of loss valuation is not

limited only to mathematical consideration ... The specific matter of timing is an inherent part of the task of measuring damages.” *Whitlock v. Steward Title*, 399 S.C. 619 (2012). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *McGill v. Moore*, 381 S.C. 179 (2009). “Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer.” *Whitlock v. Steward Title*, 399 S.C. 619 (2012).

In effect, the Order concludes the Policy unambiguously requires that foreclosure is mandatory if the Plaintiffs seek damages, and thus the Policy requires that the foreclosure date is the date used to measure damages. In theory, this could be a simple condition precedent, but those words don’t actually exist anywhere in the Policy. No doubt, the Defendant could have included a sentence to that effect, but it did not do so. Its omission is glaring and causes ambiguity.

Section 7(a) of the Policy measures the Defendant’s liability for a lender’s actual monetary loss or damage, limiting the Defendant’s exposure to the lesser of amounts calculated under three subsections. None of the three subsections set a valuation date, and none require foreclosure to trigger the liability calculation. In fact, the word foreclosure does not even appear in Section 7(a). Notably, however, Section 7(a)(i) does refer to Section 2(a), but only “if applicable”, and it is only applicable if the lender takes title by foreclosure. This suggests liability also exists when Section 2(c) is *not* applicable. Similarly, Section 7(b) states that “in the event” the lender obtains title via foreclosure, then liability continues as set forth in Section 7(a).” Again, this suggests liability under 7(a) also exists in the event no foreclosure occurs. Thus, the terms “if applicable” and “in the event” add to the ambiguity because they suggest foreclosure is not mandatory to trigger liability and calculate damages under Section 7.

Per *Whitlock*, the first step of contract interpretation is looking at the contract itself, and in this case, the first step should be looking at whether the Policy clearly and unambiguously states a

date to measure damages. Here, the Policy states the company “insures, as of Date of Policy..., against loss or damage, ... sustained or incurred by the insured...” Otherwise, the Policy is 100% silent as to the date to measure damages. This date is nowhere to be found in the four corners of the Policy. Plaintiffs contend the date of policy is the date to calculate damages, and neither the Defendant nor the Order point to a specific contractual provision that clearly sets forth a different date. If there was such a date, it would have been quoted, underlined and emphasized, completely resolving the ambiguity. The Order should be reconsidered, altered or amended to identify the ambiguity and resolve it liberally in favor of the insured and strictly against the insurer.

7. South Carolina law recognizes that a lender’s title policy covers actual monetary loss or damage suffered on a date other than the foreclosure date. In *Preservation Capital*, the court calculated damages for the lender’s lost security using a date that was not the foreclosure date, as no foreclosure of that property ever took place. It was some other date – the date the borrower sold the property suffering a defect to a third party.

8. The law of foreign jurisdictions is not applicable to this South Carolina case. The Order finds “persuasive” the case law from other jurisdictions pertaining to the date to measure damages. However, resorting to foreign law is unnecessary, as SC law requires the court to first look at the contract and determine whether ambiguities exist, and if so interpret them in favor of the insured and against the insurer. As seen in *Whitlock*, the law of other jurisdictions takes a back seat to South Carolina’s rules of contract interpretation, even if those foreign holdings appear logical or equitable. Following the blueprint laid out by the *Whitlock*, the Order should have first determined whether the Policy either (i) unambiguously identifies a valuation date, or (ii) fails to specifically identify a valuation date.

As described above, a plain reading of the Policy shows that it does not define “actual monetary loss or damage”. Moreover, it does not set forth a valuation date. These exact same

deficiencies were identified in the *Whitlock* policy. These same deficiencies were deemed by the *Whitlock* Court to create ambiguities that were interpreted most favorably to the insured. The Order, while intending to be logical, equitable and consistent with foreign jurisdictions, finds these terms to be clear and precise despite our Supreme Court's prior conclusion that they are not. The Order should be reconsidered, altered or amended to be consistent with *Whitlock* and South Carolina law.

Even if or when the law of foreign jurisdictions is considered, it should be considered in light of South Carolina law. Those cases cited by Plaintiffs showing that the policy date is the proper date to calculate damages are consistent with S.C. law, as they acknowledge ambiguous policy language and place the insured lender in the position he thought he was in when the policy was issued.

9. The foreclosure sale price did not make Jericho State whole, and the Order penalizes Jericho State for not knowing that the property suffered a defect when it made its foreclosure bid. The Order concludes that Jericho State's foreclosure bid of \$9 million satisfied the debt of \$7,490,031,071, but this finding does not account for the effect of the first mortgage and the fact that Jericho State bid this amount believing the property was free from the encumbering effects of the Ordinance. While the Order focuses on the amount of debt at the time of foreclosure, it should have also recognized that Jericho State received no equity in the property to serve as a "payment" on that debt.

A lender's successful foreclosure bid can only satisfy the debt if the lender receives equity in the amount of the debt. The equity is purchased using a credit bid and therefore acts as a "payment" under Section 2(c). In other words, the lender is made whole because it now holds equity in the property that secured the debt in an amount at least equal to the debt – they cancel

each other out. This makes sense, as the term “payment” suggests something of value was given or received, and the term would logically exclude anything valueless or meaningless.

This is supported by *Preservation Capital v. First American Title*, 406 S.C. 309 (2013). In *Preservation Capital*, the lender foreclosed on a property that had no title defect and no higher priority mortgage. It purchased the property by way of a credit bid for \$3,250,000. Since the property had no defect and no higher priority mortgage, the lender received property with an equity value of \$3,250,000, thus allowing the Court to conclude that this value served as a payment toward the outstanding debt. On the other hand, the other property securing the lender’s loan, which did suffer a title defect, was encumbered by a higher priority mortgage. The Court expressly recognized that the higher priority mortgage ate into the property’s equity and therefore concluded that the value of lender’s insured interest was limited to only the excess equity.

When Jericho State made \$9 million bid and took title at foreclosure, the property was subject to the \$18 million first mortgage. The foreclosure sale price plus the amount of existing mortgages and liens is a proper measure of a property’s value at foreclosure. *Arrow Bonding v. Warren*, 399 S.C. 603 (2012). Similarly, when determining whether a foreclosure bid is grossly inadequate, South Carolina recognizes using the “debt method”, which adds the bid plus mortgages and liens assumed. *Winrose Homeowners' Ass'n v. Hale*, 428 S.C. 563 (2019). Thus, in this case, a fair measurement of the property’s value at foreclosure is \$9 million plus \$18 million, or \$27 million. In such a case, Jericho State would have received \$9 million in equity and its bid would fairly act as payment on the underlying debt. However, when Jericho State made its bid, it did not know of the Ordinance. The Ordinance measurably reduced the property’s value. As a result, Jericho State did not receive \$9 million in equity. It contends it received zero equity because the \$18 million first mortgage exceeded the diminished value of the property.

Unlike the lender in *Preservation Capital* who took ownership free and clear of any encumbrance or higher priority lien, Jericho State's bid cannot be used to establish a "payment" under Section 2(c). The bid was based on missing information and is an inherently unreliable measure of payment. Had the Policy disclosed the Ordinance, Jericho State would not have made any bid on the property. As it stands, the bid did not pay the debt because there was no equity available to pay the debt.

Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails. *Koon v. Fares*, 379 S.C. 150 (2008). An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided. *Id.* In this case "payment" should be given a reasonable, fair and just interpretation – something of real value given or received.

Jericho State is being penalized for not knowing the property suffered a defect. The Order treats the bid as a true bid, but the bid amount was premised on facts that proved to be false. The "payment" was essentially a bounced check that the Order now says serves as payment in full. This interpretation of "payment" is unreasonable and leads to an absurd result. Because Jericho State received no equity at foreclosure and did not know of the defect, its bid should not be considered a "payment" as contemplated by Section 2(c) or as applied by the Supreme Court in *Preservation Capital*.

10. Lynx Jericho's release of the first mortgage does not affect coverage for losses incurred and claims made during the policy period. Section 9(c) of the Policy should be interpreted reasonably and in a manner that avoids absurd results. *Koon v. Fares*, 379 S.C. 150 (2008). Moreover, this section should be construed against the drafter and in favor of the insured. *General Acc. Ins. Co. v. Safeco Ins. Companies*, 314 S.C. 63 (Ct. App. 1994). "The cardinal rule of contract

interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *McGill v. Moore*, 381 S.C. 179 (2009).

Lynx Jericho timely made its claim in 2013. The claim has now been pending for 12 years. The parties have been litigating the claim for 10 years. It is unreasonable to interpret this section in a way that requires insureds to maintain their interest in the Property indefinitely after a claim is timely made. Here, the title defect caused the Property's title to be encumbered and unmarketable, Jericho State has already paid millions to preserve and maintain the property, and Lynx Jericho had maintained its mortgage since 2013. A more reasonable interpretation of this section, and one that would avoid an absurd result, would be that once a claim is timely made for a loss or damage sustained during the policy period, that claim exists and is preserved until resolved, while liability is terminated for claims made and/or damages incurred *after* the mortgage is released. This avoids the unreasonable and absurd result of forcing an insured to maintain its interest indefinitely, even for more than a decade, while also providing certainty and protection to the insurer from claims for damages suffered after the mortgage is released.

This reasonable interpretation is consistent with *Chicago Title Ins. Co. v. 100 Inv. Ltd. Partnership*, 355 F.3d 759 (4th Cir. 2004), in which the Court interpreted a similar provision in an owner's policy that terminated coverage upon the insured's transfer/sale of the property. The Court allowed coverage on the insured's claim for a defense that related to a loss that occurred *during* the policy period despite the subsequent transfer, but rejected an indemnification claim for damage suffered *after* it transferred ownership in the property.

Section 9(c) is an exclusion to coverage. Insurance policy exclusions are construed "most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability." *Owners Ins. Co. v. Clayton*, 364 S.C. 555 (2005). Here, the Order interprets Section 9(c) favorably for the Defendant by constructing a "heads I win, tails you lose

scenario”, which leads to unreasonable and absurd results for the insured who has made a timely claim. The insurer pays nothing, has deep pockets, and can wait out extended litigation, and it “wins” if the insured, whose lien is saddled with a defect on the collateral and doesn’t have the resources of a large insurance company, must finally move on from the financially problematic situation. The insured “loses” if it is forced to maintain its interest for years and years during litigation, incurring costs and forgoing opportunities to improve its situation, just to maintain a claim that was already timely made.

The Order concludes Section 9(c) is not ambiguous. However, Section 9(c) is silent as to its effect on *pending* claims and this creates an ambiguity. “Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer.” *Whitlock v. Steward Title*, 399 S.C. 619 (2012). Again, when interpreting Section 9(c) reasonably and with an effort to avoid absurd results, and in a manner liberally in favor of the insured and strictly against the insured, it makes sense and appears consistent with the parties intentions, that this Section only bars claims for damages suffered after the mortgage is released, not claims that are timely made.

Finally, the Order finds support for its conclusion in four cases from other jurisdictions (*Joglor*, *RNT Holdings*, *Morrison*, and *First Midwest*). Three of the cases are inapplicable because the insureds’ claims were made *after* the insured released its mortgage, while only *RNT Holdings*, a California case, barred a claim made prior to the release. The *RNT* case conflicts with South Carolina requirement that courts must interpret contracts reasonably and in a manner that avoids absurd results, to construe exclusions most strongly against the insurer, and to construe ambiguous provisions liberally in favor of the insured and strictly against the insurer.

For the above reasons, the Court should reconsider, alter or amend the Order, grant the Plaintiffs' Motion for Summary Judgment, and deny the Defendant's Motion for Summary Judgment.

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

Case No. 2013-CP-26-5530

Case No. 2015-CP-26-1084

(Consolidated)

Jericho State Capital Corp. of Florida,

Plaintiff,

vs.

Chicago Title Insurance Company,

Defendant.

Lynx Jericho Partners, LLC,

Plaintiff,

vs.

Chicago Title Insurance Company,

Defendant.

**PLAINTIFFS' REPLY
IN SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT**

By way of Reply to Defendant Chicago Title's Response to the Plaintiffs' Motion for Summary Judgment, Plaintiffs offer the following:

A. THE VALUATION DATE OF SECTION 7 IS STILL MISSING.

It is fair to say that both Plaintiffs and Defendant have reasonable grounds for their respective positions on what the valuation date should be. However, the same was true in *Whitlock v. Stewart Title*, 399 S.C. 619 (2012). In *Whitlock*, the Supreme Court went so far as to acknowledge the "equity and inherent logic" of the insurance carrier's position, and the Court even said "we conceptually agree" with the carrier's choice of the valuation date.

But a good argument – even one embraced by other jurisdictions – or even an argument that our state's highest court could conceptually agree with - does not supersede the court's obligation to construe an ambiguity of the contract "most favorably to the insured." *Whitlock* at 628, 629.

In *Whitlock*, Stewart Title, despite its reasonable argument that its interpretation should prevail, simply could not point out where the title policy “unambiguously set forth a method of valuation in line with the construction” that it urged the Court to adopt. *Id* at 628. Indeed, fatal to Stewart Title’s argument was the fact that “the insurance policy here simply fails to identify the valuation date”. *Id* at 628.¹

The same is true in this case: Chicago Title’s Policy simply fails to identify the valuation date. Like Stewart Title in *Whitlock*, Chicago Title articulates its legal position well, but as stated before, if the Policy really and unambiguously says the date to measure damages is the foreclosure date, and not the Policy date, then Chicago Title would most surely point it out, quote it, highlight it, and boldly emphasize the specific Policy language that says so.

Following the blueprint laid out by the *Whitlock* Court, this court should first determine whether the Policy either (i) unambiguously identifies a valuation date, or (ii) fails to specifically identify a valuation date. A plain reading of the Policy shows it simply fails to identify a valuation date to be used for the damage calculation under Section 7, and therefore, pursuant to SC law, the Policy must be construed most favorably for the Plaintiffs.

A construction of the Policy favorable to the Plaintiffs should be consistent with South Carolina law as recognized by the Court of Appeals:

“Title insurance is designed to protect a real estate purchaser **or mortgagee** against defects in or encumbrances on the title; the purpose of title insurance is to place the insured in the position he thought he occupied **when the policy was issued.**”

Jericho State Capital v. Chicago Title, 431 S.C. 437 (S.C. App. 2020)(emphasis added)

¹ Stewart Title also argued that the Plaintiff could not suffer an “actual loss” until the occurrence of the date it contended was the valuation date. However, the term “actual loss” was also not defined in Stewart Title’s policy, adding to the policy’s ambiguity. *Whitlock* at p. 627. In this case, the Chicago Title Policy “insures, as of **Date of Policy** shown in Schedule A, against loss or damage”, and insures “against actual monetary loss **or damage**”. See first paragraph of the Policy and Section 7 (emphasis added). While “loss” and “damage” are not defined in the Policy and adds to the ambiguity of this issue, the fact that the Policy insures “as of the Date of Policy” infers that is the date when loss or damage is measured. In fact, as argued previously, the Plaintiffs suffered “loss” or “damage” as of the Policy date, as their insured interest (the degree to which the property secured their loans under the mortgages) measurably diminished due to the defect.

Absent a stipulation by the parties to use a different date (as seen in *Preservation Capital, infra*), only the Policy date protects the Plaintiffs and places them in the position they thought they occupied when the Policy was issued. On the Policy Date, Plaintiffs believed the property fully secured their loans. Indeed, the Policy itself says the Plaintiffs are insured “as of the Policy Date ... against loss or damage” due to a defect. Using the foreclosure date does not fulfill the objective articulated by our higher courts, because as of the Policy Date, the Jericho State believed the Property was free from defects and would have never made the loan if it knew otherwise.

The Policy fails to unambiguously set forth the date to calculate damages. Chicago Title, while competently repeating the rationale used by other courts in foreign jurisdictions that utilize the foreclosure date, cannot point to any specific Policy language that identifies the precise valuation date because none exists. Chicago Title wrote the Policy and it could have easily identified a specific valuation date, but it did not do so. Our Supreme Court has already determined that the failure to identify a valuation date causes an ambiguity that must be construed in favor of the Plaintiffs. Moreover, the Court of Appeals has made clear that title insurance exists to place the insured in the position it thought it possessed “when the policy was issued.” Therefore, the Policy Date is the only proper date to measure damages under Section 7.

(i) Sections 2 & 9.

Chicago Title suggests the ambiguity should be resolved in its favor because if, as Plaintiffs contend, the Policy date is used as the valuation date, then Sections 2 and 9 of the Policy would never apply. This is inaccurate. Section 2(a) says that coverage continues for the lender, even after it forecloses and takes title to the property – clearly, this provision still applies in this case and it has no bearing on the damages calculation of Section 7. Moreover, Section 2(c) and Section 9 say the “amount of insurance” is reduced by the amount of all payments made toward the principal indebtedness. These provisions still apply as well, although inapplicable to Jericho State since zero

payments were made on second loan, and these provisions would still apply to Lynx Jericho to the extent any payments were made on the principal of the indebtedness. The amount of damage calculation (or extent of liability) under Section 7 using the Policy date is not implicated, although these provisions could reduce the “amount of insurance” available to pay the damages. As such, the presence of Sections 2 & 9 do not resolve the ambiguity created by the Policy’s failure to unambiguously set forth a date to calculate damages.

(ii) Preservation Capital Case

The parties disagree as to the effect of *Preservation Capital v. First American Title*, 406 S.C. 309 (2013). In *Preservation Capital*, the Supreme Court was not asked to decide, and did not attempt to decide, the proper date to calculate damages under a lender’s policy. The date was not in dispute, and it appears the parties agreed or stipulated to use a specific date to calculate damages. It was not the policy date. It was not the foreclosure date. It was some other date – the date the borrower sold the property suffering a defect to a third party. Thus, *Preservation Capital* presents no basis to support Chicago Title’s assertion that the Policy unambiguously sets forth the foreclosure date as the date to be used to calculate damages.

What is clear from *Preservation Capital*, however, is that the Court measured the Plaintiff’s damages based on *lost security* due to the title defect. Importantly, the Plaintiff lender did not foreclose, and the court did not require the lender to foreclose, on the property suffering a defect to calculate its damages. Instead, relying on the value of the property after deducting a higher priority first mortgage, the Court measured damages based on what the Plaintiff would have been able to collect but for the title defect. And, because the lender received payments by way of foreclosure on other parcels, Section 2(c) operated to reduce the amount of insurance. This supports Plaintiffs’ contention that (i) their damages are measured by lost security, (ii) lost security

is measured in light of a mortgage with priority, and (iii) a lack of foreclosure on the subject property does not preclude application of Section 2(c).

Chicago Title's analysis of *Preservation Capital* confuses the property foreclosed upon and the property suffering a defect. These were two distinct parcels. The property foreclosed upon did not suffer a defect and was not subject to a mortgage of higher priority. Therefore, the credit bid was a payment toward the loan balance, as that represented the amount of equity realized by the lender. On the other hand, the parcel subject to the title defect *was* encumbered by a higher priority mortgage. The defective property was valued at \$590k and was subject to a first mortgage of \$244,665, resulting in equity of \$345,335. As such, the Court awarded damages based on the plaintiff's lost security due to the defect, which was an amount equal to the value of the property less the first mortgage (\$345,335). Contrary to Chicago Title's argument, the effect of the first mortgage is considered when determining the damages consisting lost security for the loan. Although the *Preservation Capital* Court used a date that is not applicable to the facts of this case, its calculation of damages is the just same as proffered by Jericho State and Lynx Jericho.

B. SECTION 9(c) APPLIES TO POST-POLICY CLAIMS ONLY.

The first page of the Policy states that Chicago Title "insures, as of the Date of Policy...against loss or damage", and in Section 7, it states that it insures against "actual monetary loss or damage by reasons of matters insured against by this policy". Lynx Jericho suffered its loss or damage as of the Policy date. It made its claim for the loss or damage while the Policy was in effect. As such, it timely made and preserved its claim on the Policy and the claim remains pending today.

"An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided." *Koon v. Fares*, 379 S.C. 150 (2008). Where one interpretation of a contract makes it unusual or

extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails. *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975).

The most reasonable reading of the Policy is that once a claim is timely made under the Policy, for a loss or damage sustained during the policy period, that claim exists and is preserved until resolved. On the other hand, Chicago Title advocates for an interpretation that leads to an absurd result: that the claim was timely made in 2013, for loss or damage sustained during the policy period, then litigated for years, but must be subsequently terminated in the midst of litigation when Lynx Jericho released the first mortgage after Jericho State ultimately found a buyer of the Property 10 years later in 2023.

Since Chicago Title expressed wonder as to why Plaintiffs cite to *Chicago Title Ins. Co. v. 100 Inv. Ltd. Partnership*, 355 F.3d 759 (4th Cir. 2004), it is cited because the case provides an example of a reasonable interpretation of a title insurance policy in a similar circumstance. In that case, Chicago Title argued that the insured was not covered or entitled to a defense because the insured had transferred ownership of the property, an event Chicago Title claimed terminated coverage under the policy. The Court evaluated the subject policy as advocated by the Plaintiffs herein and concluded that (i) the insured's claim for indemnification could not be maintained because the damage suffered by the insured (an out of pocket payment to a third party) occurred *after* it transferred ownership in the property, and (ii) the insured's claim for a defense, on the other hand was covered, because the loss occurred *during* the policy period. The court specifically noted that "the policy provides that it insures against any 'loss or damage ... and cost, attorneys' fees and expenses which [100 Investment] may become obligated to pay' during the policy period because of the title defect." *Id* at 765.

Section 9(c) is a policy exclusion that must be strictly construed against the drafter and in favor of coverage for the insured. See, *General Acc. Ins. Co. v. Safeco Ins. Companies*, 314 S.C. 63 (Ct. App. 1994). Interpreted most strongly against Chicago Title, and in favor of coverage for Lynx Jericho, this Court should conclude that that 9(c) applies only to claims first made *after* a mortgage satisfaction for matters not insured during the policy period.

CONCLUSION

For the above reasons, the Plaintiffs' Motion for Summary Judgment should be granted and Chicago Title's Motion should be denied.

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Plaintiff,

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Lynx Jericho Partners, LLC,

Plaintiff,

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Chicago Title Insurance Company,

Defendant.

Case No. 2015-CP-26-1084
(Consolidated with the above case)

**DEFENDANT CHICAGO TITLE INSURANCE COMPANY'S
RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AND REPLY IN SUPPORT OF ITS SECOND
MOTION FOR SUMMARY JUDGMENT**

Plaintiffs misinterpret the subject title insurance policies to avoid their plain language, fail to read the subject policies as a whole, fail to understand the simple distinctions between a loan policy and an owner's policy, and ignore the legal and practical impact and effect of the ruling in *Preservation Capital*.

For the reasons set forth in Chicago Title's Second Motion for Summary Judgment and below, Chicago Title's motion for summary judgment should be granted, Plaintiffs' motion for summary judgment should be denied, and judgment should be entered in favor of Chicago Title and against Plaintiffs.

ARGUMENT IN RESPONSE/REPLY¹**A. THE DATE OF LOSS FOR A LOAN POLICY CANNOT BE THE DATE OF POLICY UNDER THE POLICY LANGUAGE AT ISSUE AND SOUTH CAROLINA LAW.**

Plaintiffs assert that because the REL Policy and the Jericho State Policy, both loan policies, do not define “actual loss or damage,” the Policies must be ambiguous. Plaintiffs then argue that the date of loss is the date of the Policies, as the South Carolina Supreme Court held when interpreting a residential owner’s policy in *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 732 S.E.2d 626 (2012). See Plaintiffs’ Motion for Summary Judgment, §§ A, B. However, this argument disregards material distinctions between the Policies and the *Whitlock* policy, would render meaningless other provisions in the Policies, and fails to recognize the distinction between an owner’s policy and a loan policy.

“The rule of strict construction against the insurer does not apply where the language used in the policy is so plain and unambiguous as to leave no room for construction. Nor does the rule of strict construction authorize a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exists.” *S.S. Newell & Co. v. American Mutual Liability Ins. Co.*, 199 S.C. 325, 19 S.E.2d 463, 466 (1942). “A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one.” *Portrait Homes - S.C., LLC v. Pennsylvania Nat’l Mut. Cas. Ins. Co.*, Op. No. 6038 (S.C. Ct. App. filed Dec. 13, 2023) (Howard Adv. Sh. No. 48 at 15). “Where the contract’s language is clear and unambiguous, the language alone determines the contract’s force and effect.” *Pres. Cap. Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 316, 751 S.E.2d 256, 259 (2013).

¹ Any capitalized terms have the same meaning set forth in Chicago Title’s Second Motion for Summary Judgment. The exhibits are referenced using the same letters as those attached to that Motion.

While “[a]mbiguous or conflicting terms . . . must be construed liberally in favor of the insured and strictly against the insurer,” *id.*, “[a] contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause,” *see McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). “The meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the policy as a whole and considering the context and subject matter of the insurance contract.” *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). “As a rule of construction, the Court must consider the entire contract between the parties to determine the meaning of its provisions [and] [t]hat construction will be adopted which will give effect to the whole instrument and to each of its various parts and provisions, if it is reasonable to do so.” *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 349 (1976).

1. ***Whitlock* (an owner’s policy case) is factually distinguishable because the loan policies here provide a method for valuation after an actual loss occurs and a lender, unlike an owner, cannot suffer an actual loss prior to foreclosure.**

In *Whitlock*, the court considered an owner’s policy with no method for valuation and no date for valuation, only coverage for undefined “actual loss.” The court found the date of loss was ambiguous and therefore used the date of the policy, the date advocated by the insured, to calculate the insured’s loss. However, the Court confirmed, “[w]here the insurance contract unambiguously identifies a date for measuring the diminution in value of the insured property or otherwise unambiguously provides for the method of valuation as a result of the title defect, such date or method is controlling.” *Whitlock*, 399 S.C. at 613, 732 S.E.2d at 627 (emphasis added). Because the date of loss under the *Whitlock* policy was found to be ambiguous, the Court concluded the date of loss should be the date of the policy, which was the date the insured purchased the property. Thus, where the title defect could not be removed, and the policy did not clearly identify a date of loss, the *Whitlock* court measured the owner’s diminution in value as of the date of purchase.

Here, unlike the *Whitlock* owner's policy, the REL Policy and the Jericho State Policy are loan policies that unambiguously provide a detailed method of calculating loss in Section 7 of the Policies, which state:

7. DETERMINATION AND EXTENT OF LIABILITY.

This policy is a contract of indemnity ***against actual monetary loss or damage*** sustained or incurred by the insured claimant ***who has suffered loss or damage*** by reason of matters insured against by this policy and only to the extent herein described.

(a) The liability of the Company under this policy shall not exceed the least of:

(iii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

See **Exhibit C** (REL Policy); **Exhibit E** (Jericho State Policy) (emphasis added).

Unlike an owner, a lender cannot suffer "actual loss" until it has taken title. Prior to foreclosure, the lender is a mere lienholder, not a titleholder. See *Jaffe-Spindler Co. v. Genesco, Inc.*, 747 F.2d 253, 257 (4th Cir. 1984) ("Under South Carolina law a mortgagee is deemed to have only a lien on real property as opposed to actual title."); see also *Glover v. U.S.*, 164 U.S. 294, 296 (1896) (construing S.C. Code § 29-3-10 as making the position of a mortgagee merely that of a creditor with security, and not that of a legal owner); see generally *Bartles v. Livingston*, 282 S.C. 448, 455, 319 S.E.2d 707, 711 (Ct. App. 1984) (describing the equity of redemption and its history in South Carolina, which allows the mortgagor the right to satisfy the debt and redeem the property until the right is foreclosed).

As confirmed in Chicago Title's Second Motion for Summary Judgment at sections B and D, pages 15–16 and 21–24, and discussed in more detail below, prior to taking title, a lender cannot prove that any defect in title caused it to suffer a loss, because a loss is suffered only if the collateral

was reduced in value because of the defect **and** the value of the collateral does not satisfy the debt. Thus, while an owner may suffer a loss due to an uncurable title defect at the time of its purchase, a lender cannot suffer a loss until it forecloses, because only after it forecloses can a lender ascertain whether the title defect reduces the value of the property to such a degree that satisfaction of the debt is not possible. Accordingly, the method for determining “actual loss” under the Policies distinguishes this case from *Whitlock*.

2. Plaintiffs’ policy interpretation is unreasonable because it would read-out and render meaningless other provisions of the Policies if the date of loss were the date of the Policies.

Plaintiffs’ suggestion that loss occurs as of the date of the policy suggests an interpretation that has no support in the language of the Policies. Any defect that could encumber the title must have existed as of the date of the Policies, as defined in the Policies. However, Sections 2 and 9 of the Conditions and Stipulations both apply circumstances to reduce coverage that must occur post-policy such as in the event of foreclosure (Section 2) or partial or full payment of the loan (Section 9). Plaintiffs’ interpretation would mean a loss is suffered immediately on the date of a policy—before any loan payment is made and when the loan is current but the collateral is reduced in value. If this were so, payment would be owed under a loan policy before the insured loan was in default and before a lender could ever suffer an actual loss. Additionally, Section 9, which reduces coverage as loan payments are made, could never apply. Under Plaintiffs’ theory, even where a borrower repays the entire indebtedness, there is a recoverable loss under a loan policy if the loan collateral is reduced in value because of an insured title defect. This is not, and cannot be, the law. Likewise, if the date of loss is the date of the policy, then Section 2 could never apply for a lender taking title following foreclosure. Reading out these two provisions is an unreasonable interpretation of the Policies. *See Yarborough*, 266 S.C. at 592, 225 S.E.2d at 349 (“[t]hat construction will be adopted which will give effect to the whole instrument and to each of its

various parts and provisions, if it is reasonable to do so.”). The only reasonable interpretation of the Policies, as a whole, is to determine the diminution at the time a loss actually occurs—which for a lender is at foreclosure.

3. The South Carolina Supreme Court has already implicitly recognized this distinction in a loan policy and followed persuasive case law recognizing distinctions between a loan policy and an owner’s policy.

In *Preservation Capital*, the South Carolina Supreme Court implicitly recognized that a lender—whose mortgage did not attach to a parcel as insured—incurred damages *after it foreclosed* and in the amount of equity that the lender could not recover from the parcel to which its lien did not attach. *Preservation Capital Consultants, LLC*, 406 S.C. at 317–18, 751 S.E.2d at 260. The Court did not discuss a hypothetical loss on the date of the policy but one that occurred after the lender foreclosed on its collateral but was left with unsatisfied debt due to the defect in the collateral. Applying Plaintiffs’ interpretation would effectively overrule *Preservation Capital* because none of the analysis in *Preservation Capital* could ever apply—if the date of loss is the date of the policy, there would never be an application of Section 2 because foreclosure can never occur on the date of the policy.

Moreover, *Preservation Capital* followed the analysis of *Hodas v. First Am. Title Ins. Co.*, 696 A.2d 1095 (Me. 1997), when considering the application of Sections 2 and 9 of a loan policy. In construing Section 2 and an insured’s loss after foreclosure, *Hodas* recognized the distinction between a loan policy and an owner’s policy:

[T]he presence of a title defect immediately results in a loss to the holder of a fee interest since resale value will always reflect the cost of removing the defect. In contrast, *the holder of a loan policy incurs a loss only if the security for the loan proves inadequate to pay off the underlying insured debt* due to the presence of undisclosed defects.

Hodas, 696 A.2d at 1097 (emphasis added). In South Carolina, it cannot be known whether the underlying security is sufficient to satisfy the debt until the foreclosure is completed and the debt

is determined because the mortgagor, until then, retains an equity of redemption in the property or the sale may satisfy the debt. *See generally Bartles*, 282 S.C. at 455, 319 S.E.2d at 711. The property may be redeemed in full at foreclosure or sold for more or less than the amount of the debt. *Id.* (considering a deficiency judgment).

Hodas follows what many other courts have noted around the country. As previously noted by Chicago Title, the great weight of authority around the country is that there is no determinable loss until foreclosure. *See, e.g., First American Bank v. First American Transp. Title Ins. Co.*, 759 F.3d 427, 432 (5th Cir. 2014) (“a majority of courts from other jurisdictions have held that, in the absence of specific policy language, a title insurer’s liability to a mortgagee should be measured using the foreclosure date”); *Associated Bank, N.A. v. Stewart Title Guaranty Company*, 2012 WL 3067895, at *5 (D. Minn. 2012) (“[T]he majority of courts considering the [date of valuation] issue have held that such loss cannot be measured until the note has been repaid and the security for the mortgage is shown to be inadequate ... The majority view comports with the nature of a title insurance policy.”); *Marble Bank v. Commonwealth Land Title Ins. Co.*, 914 F. Supp. 1252 (E.D.N.C. 1996) (“Since a lender suffers loss only if the note is not repaid, the discovery of an insured-against lien does not trigger recognition of that loss. Further, even though the lender’s note is in default, an anticipated loss cannot be measured until completion of foreclosure because only then is there certainty the lender will not be paid in full. Consequently, it is clear that in the typical case the earliest a loss can be claimed on a lender’s policy is at the time of completion of foreclosure.”); *Blackhawk Prod. Credit Ass’n v. Chicago Title Ins. Co.*, 423 N.W.2d 521, 525 (Wis. 1988) (holding a mortgagee’s insured loss is sustained only if the “mortgagee’s debt is not repaid and the security for the mortgage proves inadequate,” so the loss must be measured as of that date).

An appellate court from one of our sister states recently considered the same argument that Plaintiffs have raised and flatly rejected it. In *Old Republic Nat'l Title Ins. Co. v. RM Kids, LLC*, 788 S.E.2d 542 (Ga. Ct. App. 2016), Peachtree Bank loaned BBC \$11,400,000 in 2007, secured by two tracts. In connection with the loan, Old Republic issued a loan policy that did not mention environmental issues and restrictions that had been missed in a title search. RM Kids subsequently acquired the loan.

RM Kids then sued Old Republic. Before trial, the court denied Old Republic's motion to set the date of loss at the time of the foreclosure. The jury rendered a verdict in favor of RM Kids on its breach of contract claim and awarded \$7,130,370 in damages. Old Republic appealed. It argued the trial court erred in ruling that the date of loss was the date of the loan closing² rather than the date RM Kids foreclosed on the subject property.

In reversing the trial court, the Georgia Court of Appeals held the foreclosure date is "appropriate because the foreclosure is when the insured actually incurs a covered loss." *RM Kids, LLC*, 788 S.E.2d at 548. In reaching this conclusion, the court focused on the difference between a loan policy and an owner's policy. In addition, it distinguished another Georgia case that, like *Whitlock*, held the date of policy applied to an owner's policy.³ In so holding, the Court stated:

In determining "actual" loss or damage, it is generally held that "for purposes of title insurance, a mortgagee's loss is measured by the extent to which the insured debt is not repaid because the value of the security property is diminished or

² While *RM Kids* does not explicitly state the date of the loan closing was the date of the title policy, the loan closing date appears to be the date the title insurer issued the policy. *See RM Kids, LLC*, 788 S.E.2d at 548 ("the title insurance policy issued by Old Republic to Peachtree Bank at the time the subject property was acquired by BBC insured . . .").

³ In Georgia, like South Carolina, "insurance policies are construed in favor of the insured and against the insurance company." *See Collier v. State Farm Mut. Auto. Ins. Co.*, 549 S.E.2d 810, 812 (Ga. Ct. App. 2001). *Cf. Whitlock*, 399 S.C. at 615, 732 S.E.2d at 628 ("Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer."). Applying this similar rule of construction for insurance policies under Georgia law, the Georgia court still held that no actual loss could occur under a loan policy of title insurance until foreclosure.

impaired by outstanding lien encumbrances or title defects covered by title insurance.” And although Georgia’s appellate courts do not appear to have specifically addressed *when* such loss to a mortgagee or lender *actually occurs*, “a majority of courts from other jurisdictions have held that, in the absence of specific policy language, a title insurer’s liability to a mortgagee should be measured using the foreclosure date,” reasoning that the foreclosure date is “appropriate because the foreclosure is when the insured actually incurs a covered loss.”

Upon consideration of this authority, we find the majority view to be persuasive and applicable here in Georgia. Indeed, while not explicitly adopted, this Court *has* previously acknowledged that “[c]onsideration of the amount obtained by a mortgagee through foreclosure of collateral is a recognized method for determining whether the mortgagee has suffered an actual monetary loss covered by the policy.” Furthermore, as noted *supra*, the policy issued by Old Republic in this matter is one of indemnity, and as a result, it “provides for indemnity only to the extent that the insured’s security is impaired and to the extent of the resulting loss that it sustains.” It does not, however, “guarantee either that the mortgaged premises are worth the amount of the mortgage or that the mortgage debt will be paid.”

Nevertheless, citing *U.S. Life Title Ins. Co. of Dallas v. Hutsell*, RM Kids argues that Georgia law has established that a loss under a title-insurance policy is measured as of the closing date. But as RM Kids concedes in its appellate brief, this case involved determining the date of loss under an *owner’s* title-insurance policy rather than a *lender’s* policy. Critically, defining and measuring actual loss “under a title insurance policy is not the same for the owner who has title to property, and a mortgagee who holds only a security interest in the borrower’s title.” This is because “[t]he fee interest of an owner is immediately diminished by the presence of lien since resale value will always reflect the cost of removing the lien[,]” but, as noted *supra*, “[a] mortgagee’s loss cannot be measured *unless the underlying debt is not repaid and the security for the mortgage proves inadequate*.” Consequently, we do not find RM Kids’s argument persuasive, and given the particular circumstances before us, we hold that RM Kids’s loss in this matter occurred at the time it foreclosed on the subject property. Accordingly, we reverse the trial court’s ruling in this regard, and remand the case for retrial.

RM Kids, LLC, 788 S.E.2d at 548–49 (footnotes omitted) (emphasis in the original).

Unlike the owner’s policy in *Whitlock* and the Georgia owner’s policy case that the Georgia Court of Appeals rightfully distinguished, the Policies are loan policies that unambiguously require determining the loss as of the foreclosure date—when the “actual loss” occurs—which as confirmed herein and in Chicago Title’s moving brief is the date of foreclosure.

In support of their position, Plaintiffs offer first a non-sequitur—that the lender with a title policy has an insurable interest as of the date of the Policies. See Plaintiffs’ Motion for Summary Judgment, p. 10 (citing *Benton & Rhodes, Inc. v. Boden*, 310 S.C. 400, 402, 426 S.E.2d 823, 825 (Ct. App. 1993)). *Benton & Rhodes, Inc.* is inapposite and addressed an argument that the insured did not own the equipment subject to the insurance claim. Here, Plaintiffs have insurable interests by virtue of their respective mortgage liens insured by the Policies. However, it does not follow that those interests cause a lender to suffer any determinable actual loss absent or prior to foreclosure, when the lienholder actually realizes on its collateral. As set forth above, South Carolina law recognizes a lienholder does not hold title but a security interest that depends on foreclosure before the lender can realize its interest. See *Jaffe-Spindler Co.*, 747 F.2d at 257; *Glover*, 164 U.S. at 296; *Bartles*, 282 S.C. at 455, 319 S.E.2d at 711. The fact that Plaintiffs have an insurable interest as of the date of the Policies does not imply that the loss must occur or become determinable as of the date of the Policies.

Additionally, Plaintiffs cite the Court of Appeals opinion from this case, *Jericho State Cap. Corp. of Fla. v. Chicago Title Ins. Co.*, 431 S.C. 437, 444–45, 848 S.E.2d 572, 576 (Ct. App. 2020), and *Firstland Vill. Assocs. v. Lawyer’s Title Ins. Co.*, 277 S.C. 184, 186, 284 S.E.2d 582, 583 (1981), which state generally the public policy behind title insurance. *Firstland*, an owner’s policy case, and *Jericho* did not address the date of loss in either case but instead considered whether defects encumbered title as of the date of a policy or after. The language cited by Plaintiffs accurately states when the status of the insured title is determined (Date of Policy), but the quoted portions of the cases do not address when a loss occurs under a loan policy of title insurance. Accordingly, they do not support Plaintiffs’ position here.

Accordingly, to construe the date of loss under the Policies as the date of the Policies would disregard the different position of a lender from an owner, render certain other policy provisions meaningless, implicitly overrule *Preservation Capital*, and reject other persuasive case law.

B. THE ONLY MATERIAL DIFFERENCE BETWEEN *PRESERVATION CAPITAL* AND THE JERICO STATE CASE IS THE FORECLOSURE BID BY SECOND MORTGAGEE JERICO STATE MORE THAN SATISFIED JERICO STATE’S DEBT IN FULL.

Plaintiffs assert *Preservation Capital* does not apply as written and that Jericho State’s \$9,000,000.00 bid at foreclosure does *not* reduce the amount of coverage under Section 2(a) of the Jericho State Policy. See Plaintiffs’ Motion for Summary Judgment, § C. However, Plaintiffs disregard the plain language of *Preservation Capital*.

Plaintiffs assert no payment is made under Section 2(a) or *Preservation Capital* unless the foreclosing party actually obtains equity. Specifically, Plaintiffs assert the \$9,000,000.00 more-than-credit bid (the debt was only \$7,000,000.00+ at that time) was subject to the \$18,000,000.00 first mortgage yet the property was worth less than the first because of the then-unknown property defect. However, *Preservation Capital* clearly applies the credit bid (\$3,250,000) by the lender to reduce the amount of the debt outstanding (\$3,641,190) under Section 2(c). See *Pres. Cap. Consultants, LLC*, 406 S.C. at 318, 751 S.E.2d at 260 (“as for the amount of coverage available, section 2(c) states the amount of insurance after acquiring property via foreclosure shall not exceed the lesser of the \$3,075,000 policy limit or *the amount of unpaid principal indebtedness secured by the insured mortgage, coupled with interest and expenses*, but reduced by the amount of all payments made. Here, after *Preservation Capital* acquired the Shopping Center parcel, Monarch Development *remained indebted for \$391,190 . . .* Accordingly, coverage would be limited to \$452,731.48, as that amount is less than the \$3,075,000 policy limit.”) (emphasis added).

The court did not consider the actual equity or market value of the property subject to the lender's bid but instead simply reduced the amount of coverage by the amount of the foreclosure bid under Section 2(c) in line with the plain language of the policy. The court did not consider whether the lender acquired equity equal in value to the lender's foreclosure bid. And Plaintiffs' suggestion that coverage should remain because Jericho State took subject to a prior mortgage is the classic red herring—Plaintiffs fail to mention that the REL Mortgage, which remained a lien when Jericho State acquired the property at foreclosure, is a specific exception in the Jericho State Policy.

Moreover, Plaintiffs suggest the date of loss is not the date of foreclosure in *Preservation Capital* because the amount claimed by the lender was the equity lost on the parcel to which the lender's mortgage did not attach. However, Plaintiffs overlook that in *Preservation Capital* no loss is ascertainable until foreclosure. While the equity for the unencumbered parcel was knowable because that parcel sold for a known amount prior to foreclosure, whether there was any covered loss was not determined until the lender foreclosed, just as Chicago Title asserts here. *Preservation Capital* understandably and properly did not look to the date of policy to determine valuation.

It is beyond dispute that *Preservation Capital* applied the lender's foreclosure bid to reduce the amount of debt and therefore the amount of coverage remaining under the policy. Applying the same analysis to the Jericho State Policy reduces the amount of coverage remaining to zero because Jericho State's bid exceeded the amount of its debt.

C. SECTION 9(c) OF THE POLICIES UNAMBIGUOUSLY TERMINATES LIABILITY UNDER THE REL POLICY BECAUSE LYNX JERICO VOLUNTARILY SATISFIED ITS MORTGAGE AND RELEASED ITS MORTGAGE LIEN.

Plaintiffs ask the Court to disregard the plain language of Section 9(c) and impose a time limitation that is not in the REL Policy. Specifically, Plaintiffs argue that Section 9(c) does not

apply because Lynx Jericho released its mortgage lien after it submitted a claim under the REL Policy. However, Section 9(c) does not include a temporal limitation, and courts may not read one into the REL Policy. *See generally S.C. Farm Bureau Mut. Ins. Co. v. Dawsey*, 371 S.C. 353, 356, 638 S.E.2d 103, 105 (Ct. App. 2006) (“The court cannot torture the meaning of policy language to extend coverage not intended by the parties.”). Moreover, Section 9(c) only applies now, long after the borrower’s default, because of Lynx Jericho’s irrational decision to never foreclose and realize its collateral.

Plaintiffs acknowledge that the courts interpreting Section 9(c), or materially the same language, have not drawn a distinction as to whether the voluntary satisfaction occurred before submission of a title insurance claim (*Joglor, LLC v. First Am. Title Ins. Co.*, 261 F. Supp. 3d 224, 233 (D.P.R. 2016); *Morrison v. Wells Fargo Bank, N.A.*, 711 F. Supp. 2d 369, 389 (M.D. Pa. 2010); *First Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 823 N.E.2d 168, 175 (Ill. App. Ct. 2005)) or after a claim (*RNT Holdings, LLC v. United Gen. Title Ins. Co.*, 179 Cal. Rptr. 3d 175, 184 (Ct. App. 2014)). *See Plaintiffs’ Motion for Summary Judgment*, p. 21 (“Aside from *RNT*, these cases show that the lenders made their claims under the title policy after the loan was paid in full and the mortgage was satisfied.”). Nor should courts draw a distinction between pre- or post-claim application of Section 9(c)—the plain language of Section 9(c) does not include language tethering application only to releases made pre-claim. The plain language of Section 9(c) states and confirms that coverage terminates with the voluntary release of the insured mortgage.

More importantly, Plaintiffs overlook the principal issue—Lynx Jericho never foreclosed on its mortgage before releasing it. Instead, it allowed the second mortgagee, Jericho State, who acquired title after foreclosing its second-place mortgage, to sell the property and retain the proceeds. Rather than foreclosing and determining the amount of its debt and loss by realizing on

its collateral, Lynx Jericho chose not to foreclose. Only in this rare situation where a lender refuses to realize on its collateral is a title insurer left to argue application of Section 9(c) so long after a borrower's default. Lynx Jericho created the situation it finds itself in and must live with the consequences of the release and satisfaction of the REL Mortgage and its failure to foreclose thereon. To be sure, if Lynx Jericho had foreclosed when it had the right to do so, then the Section 9(c) termination would not have occurred. Instead, the Lynx Jericho loan could have been satisfied in full through the foreclosure sale (like Jericho State) or it could have been partially satisfied leaving a reduced coverage amount like the insured lender in *Preservation Capital*.

Chicago Title has long made it clear to Lynx Jericho that foreclosure would be necessary to determine whether an actual loss occurred and, if so, to what extent. The timeline below shows how and when Chicago Title has repeatedly informed Lynx Jericho of the need to foreclose for nearly a decade:

- **February 12, 2015**—Lynx Jericho filed its complaint;
- **May 13, 2015**—Chicago Title filed its answer, asserting Lynx Jericho must foreclose:

77. In order for its claim to be covered, Plaintiff must suffer loss or damage.

78. Plaintiff has suffered no loss or damage because it has not foreclosed the First Mortgage.

79. Until a foreclosure sale is held, and the amount received for the Property is established, Plaintiff has suffered no loss or damage.

80. Accordingly, there is no coverage for Plaintiff's claims under the Title Policy.

- **July 11, 2016**—Chicago Title raised the need to foreclose in its memorandum opposing Plaintiffs' motion for summary judgment:

5. **Lynx Jericho cannot suffer a loss, and loss cannot be measured, until Lynx Jericho forecloses the REL Mortgage.**

Jericho State foreclosed its junior mortgage and became owner of the Property in 2008. Lynx Jericho holds the first mortgage, the REL Mortgage, and has not foreclosed. If Lynx Jericho were to foreclose on the REL Mortgage, it would come into title. To the extent Lynx Jericho has a valid claim, that claim would become ripe only when it comes into title.

An insured lender that has not yet taken title to real estate is unable to prove any defect in the title will cause it to suffer a loan loss. *See J. Bushnell Nielsen, Title and Escrow Claims Guide*, at 3-52 (2016 Ed.). “An insured mortgagee has not suffered an identifiable loss unless and until it forecloses its insured deed of trust and a title defect reduces the value of the property, thereby preventing the mortgagee from recouping its loan amount upon resale. If a title defect exists, but the value of the property is nevertheless sufficient to pay the mortgagee the loan amount, then there is no damage compensable under the loan policy.” *First Citizens Bank & Trust Co. v. Stewart Title Guar. Co.*, 320 P.3d 406 (Colo. Ct. App. 2014).

Further, a claim concerning an alleged defect in title is not ripe under a loan policy until the lender has taken title to the property. Under a loan policy, the date of foreclosure is the date on which loss is measured. *See, e.g., Karl v. Commonwealth Land Title Ins. Co.*, 24 Cal.Rptr.2d 912, 920 (Cal Ct. App. 1993) (“At [foreclosure sale], the lender’s note is extinguished and replaced by assets recovered on foreclosure: either cash as paid by a third party bidder or the realty as bought in by the foreclosing lender. It is now possible to measure the value of the recovery by the lender, and we believe the loss which is insured by the title policy should be recognized as of that time.”).⁵⁹

⁵⁹ *See also Associated Bank, N.A. v. Stewart Title Guar. Co.*, 2012 WL 3067895, at *5 (D. Minn. 2012) (“[T]he majority of courts considering the [date of valuation] issue have held that such loss cannot be measured until the note has been repaid and the security for the mortgage is shown to be inadequate ... The majority view comports with the nature of a title insurance policy.”); *Marble Bank v. Commonwealth Land Title Ins. Co.*, 914 F. Supp. 1252 (E.D.N.C. 1996) (“Since a lender suffers loss only if the note is not repaid, the discovery of an insured-against lien does not trigger recognition of that loss. Further, even though the lender’s note is in default, an anticipated loss cannot be measured until completion of foreclosure because only then is there certainty the lender will not be paid in full. Consequently, it is clear that in the typical case the earliest a loss can be claimed on a lender’s policy is at the time of completion of foreclosure.”); *Hodas v. First American Title Ins. Co.*, 696 A.2d 1095, 1097 (Me. 1997) (“The presence of a title defect immediately results in a loss to the holder of a fee interest since resale value will always reflect the cost of removing the defect. In contrast, the holder of a loan policy incurs a loss only if the security for the loan proves inadequate to pay off the underlying insured debt due to the presence of undisclosed defects.”); *Blackhawk Prod. Credit Ass’n v. Chicago Title Ins. Co.*, 423 N.W.2d 521, 525 (Wis. 1988) (holding a mortgagee’s insured loss is sustained only if the “mortgagee’s debt is not repaid and the security for the mortgage proves inadequate,” so the loss must be measured as of that date).

- **August 23, 2016**—Chicago Title raised the same argument above in its memorandum in support of its motion for summary judgment;
- **January 6, 2017**—Chicago Title pressed the need to foreclose at the first summary judgment hearing before the special referee in 2017; and
- **August 7, 2023**—Chicago Title stated multiple times in responses to supplemental Interrogatories that without foreclosure, a loss has not occurred because the value of the collateral and the extent of the impairment is determined as of the foreclosure date. These responses were served after Lynx Jericho had partially released the REL Mortgage but before it fully released the REL Mortgage.⁴

Only in this unlikely factual scenario where Lynx Jericho refused to foreclose for almost ten years will Section 9(c) apply so long after a claim under a loan policy is first filed.

Lynx Jericho also cannot avoid the application of Section 9(c) by asserting it had already suffered a loss as of the date of the REL Policy, thus the subsequent satisfaction and release of the mortgage is of no consequence. It is true that a defect must exist at the time the title policy is issued to be covered under the policy. As the Court of Appeals noted in this case, “[t]itle insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it.” *Jericho State*, 431 S.C. at 444–45, 848 S.E.2d at 576 (quoting *Firstland Vill. Assocs.*, 277 S.C. at 186, 284 S.E.2d at 583). “Title insurance is unique in that it is retrospective, not prospective.” *Firstland Vill. Assocs.*, 277 S.C. at 186, 284 S.E.2d at 583. Accordingly, any covered defect always exists on the date of the policy, which determines the status of the insured title and those defects, etc., insured against or excepted to and excluded. However, as confirmed above, the date of the policy does not determine when a defect causes “actual loss” to a lender under a loan policy. As confirmed in *Preservation Capital*,

⁴ Chicago Title’s August 7, 2023 Answers to Plaintiffs’ Supplemental Interrogatories were not attached to Chicago Title’s Second Motion for Summary Judgment and are attached here as **Exhibit 1**.

the date of loss under the REL Policy is the date of foreclosure, not on the date of the policy. *Pres. Cap. Consultants, LLC*, 406 S.C. at 318, 751 S.E.2d at 260.

Finally, Plaintiffs' argument is not supported by their reliance on *Chicago Title Ins. Co. v. 100 Inv. Ltd. P'ship*, 355 F.3d 759, 765 (4th Cir. 2004), which held the title insurer had a duty to defend an insured against a trespass claim made regarding the then-insured's conduct after the date of policy but before coverage terminated when the insured sold the property. Plaintiffs are not seeking a defense for a title claim from a third party, which makes *100 Investment* factually inapposite, and it is unclear why Plaintiffs cite the case here.⁵ Moreover, *100 Investment* actually *rejected* the analogous claim by the insured for indemnity for a complete failure of title on 1.45 acres where the insured sold the property without a general warranty, terminating coverage. Under Plaintiffs' theory, the failure of title would have occurred before coverage terminated and coverage should have been provided, in contrast to what *100 Investment* actually held. And while Lynx Jericho made a claim before it voluntarily terminated its mortgage, any actual loss or damage was not determinable because Lynx Jericho never foreclosed, as set forth above. Accordingly, *100 Investment* does not support Plaintiffs' position here.

CONCLUSION

For the reasons set forth in its second motion for summary judgment and herein, Chicago Title asks that the Court deny Plaintiffs' motion for summary judgment and grant summary judgment in favor of Chicago Title on the remaining causes of action asserted by Lynx Jericho and Jericho State.

⁵ Even to the extent *100 Investment* could be read as Plaintiffs suggest, the case is non-binding federal authority interpreting Maryland law that apparently did not address the post-policy exclusion present in the policies here, which likely would exclude from coverage any duty to defend for trespass after the date of the policy. *Cf. Exhibit C* (REL Policy); *Exhibit E* (Jericho State Policy) (Exclusion from Coverage 3(d) excluding coverage for "Defects, liens, encumbrances, adverse claims or other matters: . . . attaching or created subsequent to Date of Policy.").

Respectfully submitted,

s/ Demetri K. Koutrakos

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May 1, 2024

EXHIBIT 1

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

Jericho State Capital Corp. of Florida,

Plaintiff,

vs.

Chicago Title Insurance Company,

Defendant.

Case No. 2013-CP-26-5530

**DEFENDANT'S ANSWERS TO PLAINTIFFS'
SUPPLEMENTAL INTERROGATORIES**

Case No. 2015-CP-26-1084
(Consolidated with the above case)

Lynx Jericho Partners, LLC,

Plaintiff,

vs.

Chicago Title Insurance Company,

Defendant.

**TO: FRED B. NEWBY, ESQUIRE and C. SCOTT MASEL, ESQUIRE, Attorneys for
Plaintiffs Jericho State Capital Corp. of Florida and Lynx Jericho Partners, LLC:**

Pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, Defendant Chicago Title Insurance Company ("Chicago Title") responds to Plaintiffs' Supplemental Interrogatories dated May 12, 2023, as follows:

GENERAL OBJECTIONS

A. Chicago Title objects to any interrogatory to the extent that it seeks information that constitutes or discloses confidential communications between Chicago Title and any of its counsel or constitutes or discloses work product or trial preparation materials of Chicago Title or its counsel.

B. Chicago Title objects to any interrogatory request that exceeds the scope of discovery allowed pursuant to the South Carolina Rules of Civil Procedure.

C. Chicago Title objects to the production of any documents not within its possession, custody, or control and to the production of documents equally accessible to Plaintiffs, including in the public record.

D. Chicago Title has made a reasonable and good-faith effort to comply with the interrogatory requests of Plaintiffs and has searched for the requested information in the places where the documentation was most likely to be found. If additional information is discovered that is responsive to the interrogatories, Chicago Title will supplement these responses.

E. The answers to these discovery requests are based on information available to Chicago Title at this time and are made based on Chicago Title's current knowledge and belief after reasonable inquiry. There may be additional facts and/or documents affecting Chicago Title's responses of which it is currently unaware, despite reasonable investigation and inquiry. Chicago Title reserves the right to modify its responses with such relevant information it may subsequently discover. Chicago Title's responses are made without prejudice to using or relying on subsequently discovered information or documents at trial that are omitted from these responses as the result of good faith oversight, error, or mistake.

F. Chicago Title objects to providing documents and information responsive to Plaintiffs' discovery requests to the extent such requests would require an invasion of personal, constitutional, and property rights of Chicago Title.

G. Chicago Title objects to creating lists describing information or documents irrelevant to this matter and reproducing documents already in the custody or control of Plaintiffs. Consequently, such a request is overly broad, unduly burdensome, harassing, and goes beyond the requirements of the South Carolina Rules of Civil Procedure.

H. Chicago Title objects to Plaintiffs' discovery requests to the extent they seek information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

I. Chicago Title objects to Plaintiffs' discovery requests to the extent they purport to require Chicago Title to search for and produce documents that may be in the possession of other persons.

J. Chicago Title objects to Plaintiffs' discovery requests to the extent that compliance with the same would be unduly burdensome, impose an extreme hardship on it, or result in the expenditure of unnecessary time and resources.

K. Chicago Title objects to the disclosure of information falling within any of the foregoing general objections or the specific objections set forth below, and in the event any information falling within one or more of these objections is disclosed in these responses, the disclosure is inadvertent and shall not constitute a waiver of the objection.

L. Without waiving its objections, Chicago Title may offer responses that provide Plaintiffs with the information that they might have been able to obtain by discovery had they submitted appropriate and proper discovery requests. By this voluntary response, Chicago Title neither waives its objections to such discovery requests nor limits its rights to produce other relevant information or facts at trial.

M. Chicago Title has made reasonable efforts to locate and produce information responsive to the interrogatories and requests for production as it understands and reasonably interprets them. If Plaintiffs subsequently assert an interpretation which differs from that which Chicago Title made, Chicago Title reserves its rights to supplement and amend the responses and objections accordingly.

N. In setting forth these answers, Chicago Title does not waive the attorney/client, work/product, or other privilege or immunity from disclosure which may attach to information called for in, or responsive to, the interrogatory.

O. Chicago Title does not concede the relevance or materiality of the interrogatory or the subject matter to which the interrogatory refers.

P. Chicago Title submits these answers subject to, without in any way waiving or intending to waive, but on the contrary intending to reserve and reserving:

1) All questions as to competency, relevancy, materiality, privilege, and admissibility of evidence for any purpose of any of the documents referred to or answers given, or the subject thereof, in any subsequent proceeding or the trial of this action or any other action or proceedings;

2) The right to object to other discovery procedures involving or relating to the subject matter of the interrogatory herein responded to; and

3) The right at any time to revise, correct, add to, or clarify any of the answers set forth herein, or documents referred to herein.

ANSWERS TO SUPPLEMENTAL INTERROGATORIES

INTERROGATORY 1.

Please identify all documents received in response to Defendant's subpoena to AG ECH II (LEN) Multi State 1, LLC, and all documents received in response to Defendant's subpoena to Lennar Carolinas, LLC.

ANSWER:

Any documents that Chicago Title received in response to the subpoenas described above are being produced contemporaneously herewith.

INTERROGATORY 2.

Please identify all written communications, including emails, between Defendant or its counsel and AG ECH II (LEN) Multi State 1, LLC or its counsel relating to the Property and subpoena issued by Defendant, and all written communications, including emails, between

Defendant or its counsel and Lennar Carolinas, LLC or its counsel relating to the Property and subpoena issued by Defendant.

ANSWER:

The written communications between Chicago Title's counsel and counsel for Lennar Carolinas, LLC and counsel for AG EHC II (LEN) Multi State 1, LLC are being produced contemporaneously herewith.

INTERROGATORY 3.

Please identify all documents received in response to any other subpoena or any freedom of information act request.

ANSWER:

Chicago Title has received documents in response to subpoenas to Robert Gwin and David Turner, which documents have been previously produced.

Chicago Title received responsive documents from two FOIA requests to Horry County and the SCDOT. The documents received in response to the first FOIA request to Horry County and the FOIA request to the SCDOT have been previously produced. The documents received in response to the second FOIA request to Horry County are being produced contemporaneously herewith.

INTERROGATORY 4.

To the extent Defendant has obtained or identified additional information responsive to Plaintiffs' previous discovery requests that has not previously been identified and/or provided in prior responses, please identify and supplement said information.

ANSWER:

Any additional documents are being produced contemporaneously herewith.

Chicago Title is unaware of other responsive information that has yet to be produced and identified.

INTERROGATORY 5.

Please state all facts and identify all documents Defendant contends supports its Sixth Defense in its Answer to Jericho State's Complaint as such related to Policy Exclusion 3(c).

ANSWER:

The date of loss under the Jericho State policy is the date of the foreclosure sale. Under

Section 2(c) of the Policy, the amount of insurance under the Policy is reduced by the amount of the foreclosure sale because Jericho State acquired title to the Property through foreclosure. At that time, the winning bidder at the foreclosure sale paid \$9,000,000.00 and received a master's deed to the property. The total indebtedness owed to Jericho State at that time was less than \$9,000,000.00, and Jericho State's loan balance was thus satisfied in full through the foreclosure sale. Accordingly, coverage under the Policy was reduced to \$0.

Additionally, the value of the alleged defect was determined in the Condemnation Action, *South Carolina Department of Transportation vs. Jericho State Capital Corporation of Florida, et al.*, Case No. 2009-CP-26-11956, as defined in the Answer in each case. The award paid in the Condemnation Action to Plaintiffs fully compensated them for the alleged defect. Accordingly, there is no loss or damage under the Policy. The documents supporting this defense are the records of the Condemnation and the publicly available trial record.

Additionally, after obtaining title through foreclosure, Jericho State sold portions of the property subject to the insured mortgage, the proceeds of which also fully compensated Jericho State for any loss under the Policy.

INTERROGATORY 6.

Please state all facts and identify all documents Defendant contends supports its Eighth Defense in its Answer to Jericho State's Complaint asserting Plaintiff failed to mitigate damages.

ANSWER:

To the extent Jericho State alleges it suffered a loss due to the actions of the SCDOT and Horry County and the Ordinance in question, Jericho State should not have admitted in the Condemnation Action that the date of valuation was the date the SCDOT filed the Condemnation Notice, but instead should have argued for an earlier valuation date. Had Jericho State done so, it could have received an increased jury award.

INTERROGATORY 7.

Please state all facts and identify all documents Defendant contends supports its Ninth Defense in its Answer to Jericho State's Complaint asserting Plaintiff's claims are barred by waiver.

ANSWER:

See Answer to Interrogatory No. 6.

INTERROGATORY 8.

Please identify any additional affirmative defenses Defendant contends are applicable that were reserved but not pled as referenced in the Twelfth Defense in its Answer to Jericho State's Complaint.

ANSWER:

Chicago Title is not aware of any unalleged additional affirmative defenses at this time.

INTERROGATORY 9.

Please state all facts and identify all documents Defendant contends supports its Sixth Defense in its Answer to Lynx Jericho's Complaint as such relates to Policy Exclusion 3(c).

ANSWER:

The date of loss under the Lynx Jericho policy is the date of a foreclosure sale, which has not occurred to date.

Alternatively, the value of the alleged defect was determined in the Condemnation Action, *South Carolina Department of Transportation vs. Jericho State Capital Corporation of Florida, et al.*, Case No. 2009-CP-26-11956, as defined in the Answer in each case. The award paid in the Condemnation Action to Plaintiffs fully compensated them for the alleged defect. Accordingly, there is no loss or damage under the Policy. The documents supporting this defense are the records of the Condemnation and the publicly available trial record.

Additionally, Lynx Jericho executed a partial release of the insured mortgage when Jericho State sold portions of the property. The proceeds from these sales and/or the value of these releases fully compensated Lynx Jericho (or would have if it is determined Lynx Jericho waived its right to receive payment) for any loss under the Policy.

INTERROGATORY 10.

Please state all facts and identify all documents Defendant contends supports its Tenth Defense in its Answer to Lynx Jericho's Complaint as such relates to it [sic] assertion Lynx Jericho has suffered no loss or damage.

ANSWER:

Lynx Jericho has failed to foreclose for 17 years. With no foreclosure, a loss has not occurred because the value of the collateral and the extent of the impairment is determined as of the foreclosure date.

INTERROGATORY 11.

Please state all facts and identify all documents Defendant contends supports is Eleventh Defense in its Answer to Lynx Jericho's Complaint asserting Plaintiff failed to mitigate damages.

ANSWER:

To the extent Plaintiffs allege they suffered a loss due to the actions of the SCDOT and

Horry County and the Ordinance in question, Plaintiffs should not have admitted in the Condemnation Action that the date of valuation was the date the SCDOT filed the Condemnation Notice, but instead should have argued for an earlier valuation date. Had Plaintiffs done so, they could have received an increased jury award. Furthermore, Lynx Jericho has not foreclosed for 17 years, released its mortgage to significant portions of the secured property, and apparently released those portions without receiving partial payments of its mortgage.

INTERROGATORY 12.

Please state all facts and identify all documents Defendant contends supports its Twelfth Defense in its Answer to Lynx Jericho's Complaint asserting Plaintiff's claims are barred by waiver.

ANSWER:

See Answer to Interrogatory Nos. 6 and 11. Additionally, Lynx Jericho and its predecessor failed to foreclose on the mortgage and limit its damages. Moreover, Lynx Jericho partially released the insured mortgage without receiving the proceeds of the sale of the property. Accordingly, by waiving its right to enforce the mortgage, Lynx Jericho has waived a right to recover under the policy.

INTERROGATORY 13.

Please identify any additional affirmative defenses Defendant contends are applicable that were reserved but not pled as referenced in the Sixteenth Defense in its Answer to Lynx Jericho's Complaint.

ANSWER:

Chicago Title is not aware of any unalleged additional affirmative defenses at this time.

INTERROGATORY 14.

Does Defendant contend the date of condemnation is the date used to calculate Lynx Jericho's loss or damage under Section 7 of the Policy? If so, please identify all facts and identify all documents, including any specific Policy language that supports this contention.

ANSWER:

To the extent the court determines the consummation of a foreclosure sale by the issuance of the Master's Deed is not the appropriate date to determine a loss under the title insurance policy, then the date of condemnation is appropriate in this case because it is the date that the asserted defect or encumbrance was reduced to a monetary value. The language of Section 7(a)(c) supports this valuation date.

INTERROGATORY 15.

Does Defendant contend the date of condemnation is the date used to calculate Lynx Jericho's loss or damage under Section 7 of the Policy? If so, please identify all facts and identify all documents, including any specific Policy language, that supports this contention.

ANSWER:

See Answer to Interrogatory No. 14 as Interrogatory No. 15 is the same as Interrogatory No. 14.

INTERROGATORY 16.

Does Defendant contend the date of Jericho State's foreclosure is the date used to calculate Jericho State's loss or damage under Section 7 of the Policy? If so, please identify all facts and identify all documents, including any specific Policy language, that supports this contention.

ANSWER:

Yes, the date of loss under the Jericho State policy is the date of the foreclosure sale. Under Section 2(c) of the Policy, the amount of insurance under the Policy is reduced by the amount of the foreclosure sale because Jericho State acquired title to the Property through foreclosure. At that time, the winning bidder at the foreclosure sale paid \$9,000,000.00 and received a master's deed to the property. The total indebtedness owed to Jericho State at that time was less than \$9,000,000.00, and Jericho State's loan balance was thus satisfied in full through the foreclosure sale. Accordingly, coverage under the Policy was reduced to \$0. To the extent the Court thinks otherwise, the date of loss is the date Jericho State came into title by the issuance of the Master's Deed to the subject property.

INTERROGATORY 17.

Does Defendant contend Lynx Jericho must foreclose on the subject property before it can assert a loss or damage? If so, please identify all facts and identify all documents, including any specific Policy language, that supports this contention.

ANSWER:

Yes, the appropriate date to determine a loss under a lender's title policy is the date the foreclosure is completed because that is the date on which the value of the collateral is determined as compared to the amount owed on the debt. Because foreclosure has not occurred and the amount of the Policy is reduced by the amounts paid under the note and/or obtained through foreclosure in Sections 2 and 9 of the Policy, Lynx Jericho has not suffered a loss. Moreover, the extent of any loss under the Policy is not determinable until the debt is foreclosed.

INTERROGATORY 18.

Does Defendant contend any date other than the date of condemnation or date of foreclosure is the date used to calculate either Plaintiffs' loss or damage under Section 7 of the Policy? If so, please identify all facts and identify all documents, including any specific Policy language, that supports this contention.

ANSWER:

For Jericho State, no, the foreclosure date is the correct date to determine the loss, and at that time the foreclosure reduced the amount of insurance under the policy under 2(c) to \$0 after the indebtedness owed to Jericho State was paid in full. To the extent a court determines the date of condemnation should apply, the condemnation award determined the extent of loss under Section 7(a)(iii) of the Policy, and that amount was paid to Jericho State as part of the condemnation proceedings. See Answer to Interrogatory 16.

For Lynx Jericho, the date of foreclosure is the date used to calculate loss or damage under Section 7 of the Policy, and this date has not occurred. See Answer to Interrogatory 17.

INTERROGATORY 19.

As to Jericho State, does Defendant contend that are any applicable payments that act to reduce the amount of insurance as described in Section 2(c)(ii) of the Policy's Conditions and Stipulations? If so, please specifically identify said payments by date and amount, and identify all facts and documents that support this contention.

ANSWER:

Yes, the \$9,000,000.00 successful foreclosure bid satisfied the entire indebtedness owing to Jericho State and reduced the amount of insurance to \$0 under Section 2(c)(ii) of the Policy. The facts of the payment and the amount due on the debt at that time, the trial court's docket, and the master's deed, all public records, support this contention.

Alternatively, the value of the alleged defect was determined in the Condemnation Action, *South Carolina Department of Transportation vs. Jericho State Capital Corporation of Florida, et al.*, Case No. 2009-CP-26-11956, as defined in the Answer in each case. The award paid in the Condemnation Action to Plaintiffs reduced the amount of insurance as a payment to Jericho State under the Policy. The documents supporting this defense are the records of the Condemnation and the publicly available trial record.

To the extent the amount of insurance was not reduced to \$0 under Section 2(c)(ii) of the Policy, Jericho State sold portions of the property formerly subject to the insured mortgage. The proceeds from these sales fully compensated Jericho State for any loss under the Policy.

INTERROGATORY 20.

As to Jericho State, does Defendant contend there are any applicable payments that act to reduce the amount of insurance as described in Section 9(b) of the Policy's Conditions and Stipulations? If so, please specifically identify such payments by date and amount, and identify all facts and documents that support this contention.

ANSWER:

It is Chicago Title's position that Section 2(c) of the Policy governs the reduction in the amount of insurance where Jericho State acquired title to the Property through foreclosure.

However, to the extent any Court were to hold otherwise, and that Section 9(b) of the Policy applied where Jericho State acquired title to the Property through foreclosure, the amounts and supporting facts are the same as outlined in the answer to Interrogatory 19.

INTERROGATORY 21.

As to Lynx Jericho, does Defendant contend there are any applicable payments that act to reduce the amount of insurance as described in Section 9(b) of the Policy's Conditions and Stipulations? If so, please specifically identify said payments by date and amount, and identify all facts and documents that support this contention.

ANSWER:

To be clear, the appropriate date to determine a loss under a lender's title policy is the date the foreclosure is completed because that is the date on which the value of the collateral is determined as compared to the amount owed on the debt. Because foreclosure has not occurred and the amount of the Policy is reduced by the amounts paid under the note and/or obtained through foreclosure in Sections 2 and 9 of the Policy, Lynx Jericho has not suffered a loss. Moreover, the extent of any loss under the Policy is not determinable until the debt is foreclosed.

However, if a date of loss were determinable, then the following payments apply to reduce the coverage for Lynx Jericho:

- The cure payments by Jericho State as reflected in the foreclosure order for Jericho State;
- The condemnation award and payment; and
- The amounts Lennar (or its affiliates) paid to Jericho State and/or Lynx Jericho to acquire portions of the property secured by the Lynx Jericho mortgage.

The foreclosure order in the Jericho State foreclosure action from 2007, the documents and records in the condemnation action, and the documents included in the Lennar subpoena (produced contemporaneously herewith) support this contention.

INTERROGATORY 22.

Does Defendant contend Jericho State has suffered no loss or damage by reason of the Ordinance constituting a defect and encumbrance? If so, please identify all facts and identify all documents, including any specific Policy language, that supports this contention.

ANSWER:

Jericho State foreclosed its second-position mortgage in late 2007. At the time of foreclosure, there was \$7,490,031.71 due and owing on the note secured by the insured, second position mortgage. The successful bidder at the foreclosure sale bid \$9,000,000.00, complied with the bid terms, and received a master's deed to the property in February 2008. Accordingly, the note was paid in full, and there was no loss under the Jericho State policy because the total indebtedness was satisfied. The facts and documents supporting this are the court's public docket and the recorded master's deed, all publicly available.

To the extent any court determines otherwise and that Jericho State suffered any loss at all, it was determined and paid in the condemnation action.

INTERROGATORY 23.

Does Defendant contend Lynx Jericho has suffered no loss or damage by reason of the Ordinance constituting a defect and encumbrance? If so, please identify all facts and identify all documents, including any specific Policy language, that supports this contention.

ANSWER:

Because Lynx Jericho has not yet foreclosed and reduced its debt to judgment, the amount of any loss from the alleged defect or encumbrance is not determinable.

To the extent a court determines otherwise, and to the extent Lynx Jericho suffered any loss at all, it was determined and paid in the condemnation action.

To the extent a court determines the date of loss is some other time, the amount of any loss is exceeded by the amount recovered by Lynx Jericho as a result of the condemnation action.

CALLISON TIGHE & ROBINSON, LLC

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ATTORNEYS FOR DEFENDANT

August 7, 2023

CERTIFICATE OF SERVICE

Pursuant to Order No. 2022-05-06-02 issued by the Supreme Court of South Carolina, the undersigned hereby certifies that he has on this date served the foregoing **Defendant's Answers to Plaintiffs' Supplemental Interrogatories** upon counsel of record, via email:

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s/ Demetri K. Koutrakos

Demetri K. Koutrakos

Attorney for Defendant

August 7, 2023

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Jericho State Capital Corp. of Florida,

Plaintiff,

vs.

Chicago Title Insurance Company,

Defendant.

Lynx Jericho Partners, LLC,

Plaintiff,

vs.

Chicago Title Insurance Company,

Defendant.

IN THE COURT OF COMMON PLEAS

Case No. 2013-CP-26-5530

Case No. 2015-CP-26-1084

(Consolidated)

**PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT
AND RESPONSE TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

The issues presented in this motion for summary judgment, as well as those in Defendant's motion, stem primarily from the title insurance policies' failure to set forth a date of loss to calculate damages. As stated by the Court of Appeals in this case, "title insurance is designed to protect a real estate purchaser *or mortgagee*", and its purpose is to "place the insured in the position he thought he occupied *when the policy was issued*." *Jericho State Capital Corp., v. Chi. Title Ins. Co.*, 431 S.C. 437 (Ct. App. 2020). A finding by this court consistent with the law cited by the Court of Appeals unlocks the answers to most of the remaining issues now pending in both parties' summary judgment motions.

Much of the factual background is not in dispute. Of note, subsequent to Plaintiffs' appeal, Jericho State sold the subject property, and Lynx Jericho released its mortgage. Rather than a lengthy historical narrative, Plaintiffs' offer the following summary of relevant transactions and events in this case:

Date	Event	Description	Exhibit
7/25/2006	Purchase	\$22,500,000 Purchase by Peachtree Properties of 131 acres of waterfront property ("Property") \$18,520,000, 1 st Mortgage - RE Loans (later assigned to Lynx Jericho) \$4,263,888, 2 nd Mortgage - Jericho State	Defendant Exhibits: A, B, D
7/25/2006	Policy Date	On the Purchase date, Chicago Title issued loan policies to RE Loans and Jericho State.	Defendant Exhibits C, E
2/26/2008	Master's Deed (Foreclosure Date)	Peachtree Properties went into default and Jericho State filed to foreclose on its 2 nd Mortgage on 6/8/07. \$9,000,000 winning foreclosure bid by Jericho State, taking ownership subject to 1 st Mortgage.	Defendant Exhibits F, H
12/15/2009	Condemnation Date	\$2.1M jury verdict on 11/19/2014, for the taking and damages relating to the 10 acre right of way for highway	Defendant Exhibit I
2/26/2009	Jericho State Title Insurance Claim	Chicago Title denied the claim on 12/9/2009; lawsuit filed 7/29/2011.	
6/21/2013	Lynx Jericho Title Insurance Claim	Chicago Title Denied 1/30/15; lawsuit filed 2/12/15.	
7/17/2020	Partial Sale (Western)	Jericho State sold 58.2ac to Lennar for \$4.7M	Defendant Exhibit L
9/18/2020	Partial Transfer and Sale (Eastern)	Jericho State transferred 35ac to Lynx Jericho Peachtree Phase III, who sold to Lennar for \$2.1M on 3/14/2022.	Defendant Exhibit N
8/8/22	Partial Mortgage Release	Lynx Jericho released the 1 st Mortgage Lien from the Western and Eastern parcels	Defendant Exhibit M
9/18/2020	Final Transfer and Sale (Southern)	Jericho State transferred 27.5ac to Lynx Jericho Peachtree Phase II, who sold to Beverly Homes for \$1.1M on 8/25/2023.	Defendant Exhibit O
12/28/23	Final Mortgage Release	Lynx Jericho released the 1 st Mortgage Lien from the Southern Parcel. A corrected release was filed 1/10/2024.	Defendant Exhibit P

In 2006, Jericho State loaned \$4.6 million to the purchaser of the Property and secured that loan with a mortgage. It did not know that Horry County's Official Map Ordinance, as amended, encumbered the Property by reserving land to be used for the Carolina Bays Parkway, a proposed 6-lane highway and bridge that cut through the middle of 131 acres of undeveloped, contiguous waterfront property. Had Jericho State known of the Ordinance, it would never have made the \$4.6 million dollar loan.¹

The Chicago Title Insurance Policy failed to disclose the encumbering effect of the Ordinance. Jericho State paid for and relied on the Policy, believing the Policy fully insured Jericho State's security interest in the Property. When the Policy was issued, had Jericho State known that the title to the Property was not the same as insured by the Policy, it would never have made the \$4.6 million loan.²

When the borrower stopped making loan payments shortly thereafter, Jericho State made cure payments of over \$2 million on the 1st Mortgage Loan. Had Jericho State known that the title to the Property was encumbered by the Ordinance, it would never have paid another \$2 million to protect the Property.³

Ultimately, Jericho State foreclosed on its 2nd Mortgage. At that time, Jericho State still believed it enjoyed the position it had when the Policy was issued, and again, had it known otherwise, it would never have foreclosed and taken title to the Property subject to the \$18 million 1st Mortgage.⁴

Jericho State first learned of the Ordinance in 2008, after it became owner of the Property. This is when the Great Recession started. Jericho State had already pumped in well over \$7m

¹ The deposition transcripts of Glenn Chwatt and Scott Svirsky have already been filed with this Court as exhibits to Plaintiffs' prior Motion for Summary Judgment. Excerpts from these transcripts are attached as Plaintiffs' Exhibit 1.

² Id.

³ Id.

⁴ Id.

toward the Property, and now it owned the future home of a massive unwanted highway amid a crashing real estate market. Jericho State made a title insurance claim on the Chicago Title Policy in 2009. Nearly 15 years later, its claim remains unresolved.

In 2013, the 1st Mortgage was assigned to Lynx Jericho. It made a title insurance claim in 2013, which was denied and also remains pending. Lynx Jericho also contends that because the Chicago Title Policy failed to disclose the encumbering Ordinance, the 1st Mortgage was not secured as insured by the Policy.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCP.

ARGUMENT

Generally, a title insurance claim considers the following: (1) whether the insured suffer a covered loss, (2) if there is covered loss, whether that loss is subject to a policy exclusion, and (3) if there is a covered loss that is not subject to an exclusion, whether the policy’s conditions and stipulations limit recovery. In this case, the Court of Appeals determined the Ordinance resulted in a covered loss under the Policy issued by Chicago Title, and further concluded that Policy Exclusions 1, 2 and 3(d) do not apply.⁵ The pending summary judgment motions relate to the Policy’s Conditions and Stipulations.

⁵ There are two policies that have identical coverage provisions, exclusions and conditions. For ease of reference, the policies will be referred to singularly as the “Policy”, unless otherwise specially noted.

The issues submitted by the parties for Summary Judgment are as follows:

1. Under Section 7, the effect of the Policy's failure to specifically set forth a date of loss to calculate damages.
2. Under Section 7, the effect of Lynx Jericho not foreclosing its 1st Mortgage.
3. Under Section 2(c), the effect of Jericho State's foreclosure bid exceeding the amount owed on the 2nd Mortgage Note.
4. Under Section 9(c), the effect of Lynx Jericho releasing the 1st Mortgage as of 12/22/23.

A. UNDER SC LAW, THE DATE OF LOSS IS THE DATE OF POLICY.

As stated above, analysis of the pending issues should begin with determining the date of loss (also referred to as the date to calculate damages or the valuation date). Section 7 of the Policy's Conditions and Stipulations sets forth a *formula* to calculate damages resulting from a covered loss, but it does not specify a date to apply the formula. Section 7 states:

7. DETERMINATION AND EXTENT OF LIABILITY

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) The liability of the Company under this policy shall not exceed the least of:

(i) the Amount of Insurance stated in Schedule A, or, if applicable, the amount of Insurance as defined in Section 2 (c) of these Conditions and Stipulations.

(ii) the amount of the unpaid principal indebtedness secured by the insured mortgage as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations at the time the loss or damage insured against by this policy occurs, together with interest thereon; or

(iii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

A plain reading of Section 7 shows the date to calculate damages is missing. Knowing the date of loss is important because the Property value and amount of debt secured by the insured mortgage will fluctuate over time. For example, the Property was purchased for \$22.5 million on 7/25/2006, and there is no dispute that the Great Recession caused its value to measurably diminish thereafter. At the same time, the amount of debt secured by Jericho State's 2nd Mortgage was \$4.2 million at the time of purchase, but the amount of debt increased to \$7.5 million at the time Jericho State foreclosed and took title to the Property on 2/26/2008.

Under 7(a)(i), damages are capped at the stated Policy limits. This section typically applies only when there is a total failure of title, which is not present in this case. This subsection references Section 2(c), which does not limit damages but instead limits the "amount of insurance" and is discussed below.

Under 7(a)(ii), damages are capped at the amount of principle indebtedness *at the time the loss or damage insured against by this policy occurs*, but this subsection does not identify the "time" or date that the loss occurs. This subsection references Section 8, which is not applicable to this case, and it also references Section 9, which reduces the amount of insurance and damages, and is discussed below.

Under 7(a)(iii), damages are capped at the difference between the value of the insured estate or interest as insured and its value subject to the defect or encumbrance. The lender's "insured estate or interest" is the amount of security for the loan provided by the value of the land. In this case, the Property was insured to be free from the encumbering effects of the Ordinance. Thus, the lender's damage is its **lost security for the loan** resulting from the property's lesser value due to the encumbrance. The calculation under this subsection 7(a)(iii) requires knowing both the value of the property and the amount of indebtedness, which again depends on the date used to calculate those values.

Plaintiffs contend Section 7(a)(iii) serves as the proper measure of damages in this case. To conduct the calculation, a date of loss must be established to measure the Property's value and amount of indebtedness. For the following reasons, the date of loss should be the date the Policies were issued (the "Policy date").

1. Ambiguity.

"Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *Whitlock v. Steward Title*, 399 S.C. 619 (2012).

"The law strictly construes insurance policies against the drafter and in favor of coverage for the insured." *General Acc. Ins. Co. v. Safeco Ins. Companies*, 314 S.C. 63 (Ct. App. 1994). Insurance policy exclusions are construed "most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability." *Owners Ins. Co. v. Clayton*, 364 S.C. 555 (2005).

While Plaintiffs contend the date to measure damages is the Policy date, Chicago Title argues the date of loss is the foreclosure date. However, this is nowhere to be found in the Policy. If the Policy really says the date to measure damages is the foreclosure date, then Chicago Title would most surely point it out, quote it, highlight it, and boldly emphasize the specific Policy language that says so. However, the Policy simply does not say what Chicago Title wishes it to say. Notably, the Policy seems to say something different, as the top of page one states that Chicago Title "insures, ***as of Date of Policy*** ..., against loss or damage, ... sustained or incurred by the insured" (emphasis added). No doubt, the Policy's failure to specifically set forth a date to measure damages creates an ambiguity and the ambiguity should be resolved liberally in favor of the insured.

Chicago Title attempts to steer around the Policy's omission by referencing cases from other jurisdictions that say a lender only suffers an "actual loss" when it forecloses on the property

and the sale proceeds are insufficient to pay the debt. However, while these foreign cases offer some logic, they should carry very little weight, as the South Carolina Supreme Court has already determined that the term “actual loss”, as used in a title insurance policy without defining that term or providing any guidance for determining the valuation date, is ambiguous.

In *Whitlock v. Stewart Title*, 399 S.C. 619 (2012), an owner’s title policy did not define “actual loss” and did not set forth a “valuation date”, just the same as in this case. While the owner argued that the Policy date should be the date to calculate damages, the title insurance company was unable to identify a different date in the policy and therefore resorted to citing cases from other jurisdictions that suggested that the date of loss should be the date of discovery. The South Carolina Supreme Court appreciated the equity and logic set forth in the law from other jurisdictions, but in the end, the insurance company’s failure to define critical terms guided the Court under South Carolina law:

We conceptually agree with Defendant, but we are construing a contract of insurance, not attempting to fashion an equitable remedy. The insurance policy here simply fails to identify the valuation date as the date of discovery of the title defect or otherwise provide clear language that would require a valuation date in line with Defendant's position. The well-established rule concerning construction of ambiguous terms in insurance contracts compels a result adverse to Defendant's position. *Id.* at 615.

Due to the Policy’s ambiguity, the Supreme Court concluded that the Policy must be interpreted in a manner “allowing for the measure of damages most favorable to the insured”, and therefore, it held that the proper date to measure damages is the Policy date. *Id.*

Chicago Title seeks to distinguish *Whitlock* because it involved an owner’s policy rather than a lender’s policy, but this distinction misses the point. The Supreme Court was looking at the same issue: an ambiguous title insurance policy. The *Whitlock* policy used the term “actual loss” but did not define it; Chicago Title’s Policy uses the term “actual monetary loss or damage” but

does not define it.⁶ Similarly, the *Whitlock* policy failed to identify a date of loss or valuation date; Chicago Title's Policy also fails to identify a date of loss or valuation date. The vague terms discussed in *Whitlock* mirror the vague terms used in the Policy in this case.

Just as in *Whitlock*, this is a matter of contract interpretation, not fashioning an equitable remedy. Jericho State and Lynx Jericho are not trying to establish a new or novel legal argument. The Court of Appeals has already noted that the purpose of title insurance is to put the mortgagee in the position it thought it held when the policy was issued. Our Supreme Court has already decided that a title insurance policy's omission of critical terms defining actual loss and setting forth a specific date of loss should be construed strictly against the insurer and liberally in favor of the insured. Due to Chicago Title's failure to set forth a date of loss in the Policy, a critical ambiguity exists, and this Court should determine that the date of loss is the Policy date.

2. The Lender's Insured "Interest" is the Degree to Which the Property Secures its Lien.

As stated above, Section 7(a)(iii) calculates damages based on "the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy." Chicago Title seems to contend that the value of the insured interest cannot be measured on the Policy date because the lender's insured interest has no value unless a foreclosure takes place.

It is absurd to contend that Jericho State and Lynx Jericho (as assignee) had no measurable insured interest at the time the Policy was issued. It is equally absurd to contend that the lenders had no insured interest during the following weeks, months or years. After all, Chicago Title sold the Policy stating on its first page that the Company "insures, *as of Date of Policy* ..., against loss or damage, ... sustained or incurred by the insured"

⁶ By using the term "damage" in addition to actual monetary loss, the Policy creates a *greater* ambiguity than as seen in *Whitlock*, as damage is a word with a much more broad meaning.

Chicago Title argues that a mortgagee is deemed to have only a lien on real property as opposed to actual title as in *Whitlock*. However, even a lien is an “interest” in the Property. The lenders’ interest in the Property is described in the Mortgages. The 1st Mortgage provides that “FOR GOOD AND VALUABLE CONSIDERATION and in order to secure the payment of a promissory note from Borrower to Lender...Borrower has granted, bargained, sold and released to Lender ... and by this Mortgage does grant, bargain, sell and release to Lender ... the real property described below ... TO HAVE AND TO HOLD all and singular the Property unto Lender and the successors and assigns of Lender forever ... [until the] Borrower pays or causes to be paid to Lender the debts secured hereby....” [Defendant’s Exhibit C].

The 2nd Mortgage similarly provides that the “Mortgagor does hereby grant, bargain, sell, mortgage, warrant, pledge, assign, transfer and convey to Mortgagee...the following property [the Property is fully described]... TO HAVE AND TO HOLD the Mortgaged Property and all parts therefo unto Mortgagee, its successors and assigns forever.” [Defendant’s Exhibit E].

As stated in *Benton & Rhodes v. Boden*, 310 S.C. 400 (Ct. App. 1993):

“It may be said, generally, that any one has an insurable interest in property who derives a benefit from its existence or would suffer loss from its destruction.

An insurable interest in property is any right, benefit or advantage arising out of or dependent thereon, or any liability in respect thereof, or any relation to on concern therein of such a nature that it might b so affected by the contemplated peril as to directly damnify the insured.”

Thus, it is plain that Jericho State and Lynx Jericho (as assignee) had insurable interests on the Policy date. Moreover, this interest has value that can be measured. When calculating damages under Section 7(a)(iii), the lender’s “insured estate or interest”, as of the date of policy, is the amount of security for the loan provided by the value of the land. In this case, the Property was insured to be free from the encumbering effects of the Ordinance. The Property value decreased as a result of the Ordinance, and therefore the lenders suffered a loss or damage to their insured

interests because, as of the date of policy, the Property failed to provide the same security for the loans.

3. SC Law Reflects the Date of Policy is the Proper Date to Measure Damages.

While *Whitlock v. Stewart Title* clearly shows that the Policy date is the date to measure damages under an owner's policy, South Carolina law also reflects that the same date should be used to calculate damages under a lender's title insurance policy.

This Court needs to look no further than the Court of Appeal's decision in this case:

“Title insurance is designed to protect a real estate purchaser **or mortgagee** against defects in or encumbrances on the title; the purpose of title insurance is to place the insured in the position he thought he occupied **when the policy was issued.**”

Jericho State Capital v. Chicago Title, 431 S.C. 437 (S.C. App. 2020)(emphasis added)

Similarly, as stated in *Firstland Vill. Assocs. v. Lawyer's Title Ins. Co.*, 277 S.C. 184, 186, 284 S.E.2d 582, 583 (1981), “Generally, title insurance operates to protect a purchaser **or mortgagee** against defects in or encumbrances on the title [that] are in existence at the time the insured takes title.” This is echoed in *Pres. Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 316, 751 S.E.2d 256, 260 (2013). Unlike the law from foreign jurisdictions cited by Chicago Title, South Carolina law repeatedly minimizes the distinction between the interests of an owner and a lender, as the courts repeatedly note that title insurance seeks to protect them both by placing them in the position they thought they occupied at the time the policy is issued.

Not only should the ambiguous terms of the Policy be interpreted strictly against the insurer and in a manner “allowing for the measure of damages most favorable to the insured”, a conclusion that the Policy date should serve as the date to measure damages is consistent with South Carolina's general presumption – and clear pronouncement by the Court of Appeals - that the insured mortgagee should be placed in the position he thought he occupied “when the policy was issued.”

At the time the Chicago Title Policy was issued, and based on the insuring provisions of the Policy, Plaintiffs believed the Property was free from encumbrances. Because of this, Jericho State made the \$4.2 million loan, paid many more millions of dollars to preserve the Property and ultimately foreclosed and took title to the Property subject to the 1st Mortgage. Jericho State undertook these very costly actions because, when the Policy was issued, it believed it occupied a position where the Property's value fully secured the loans.

Of course, when the Policy was issued, the Property's value did not fully secure the loans because of the encumbering effects of the Ordinance. Had Jericho State known of the Ordinance, and had it known that the Property was not worth what it thought it was worth, and had it known that the Property did not fully secure the loans as it believed, Jericho State would have never have made the loan in the first place or paid millions to preserve the Property or taken title to the Property.

Plaintiffs should be placed in the position they thought they occupied when the Policy was issued - the full value of the Property securing their loans, unencumbered by the Ordinance. This is the position that Chicago Title insured when the Policy was issued.

As of the Policy date (7/25/2006), the amount of the outstanding debt equals the face amount of both loans, as the initial loan disbursements were made on the same day that the Policy was issued. The value of the Property on the Policy date, is a question of fact, as the purchase price was \$22,500,000 and both parties have exchanged appraisals showing the value of the Property with and without the encumbering effect of the Ordinance. However, while the Property's value on the Policy date remains in dispute, there is *no dispute* that the effect of the Ordinance decreased the value of the Property as of the Policy date. This decreased value resulted in lost security for the loans. The lost security, calculated as of the Policy date, is the measure of damages suffered by the Plaintiffs.

This Court should rule, consistent with South Carolina law, that the Policy date is the proper date to measure damages under Section 7.

B. BECAUSE THE DATE OF LOSS IS THE POLICY DATE, LYNX JERICHO IS NOT REQUIRED TO FORECLOSE ON THE PROPERTY TO SEEK DAMAGES.

“In South Carolina, it is well established that an ‘assignee ... stands in the shoes of its assignor...’ When a contract is assigned, the assignee should have all the same rights and privileges, including the right to sue upon the contract as the assignor.” *Twelfth RMA Partners v. National Safe Corp.*, 335 S.C. 635 (Ct. App. 1999)(internal citations omitted).

As of the Policy date, Lynx Jericho’s “insured estate or interest” (as assignee) is the amount of security that the value of the Property provided for the 1st Mortgage loan. Because the Property value decreased as a result of the encumbering effect of the Ordinance, Lynx Jericho suffered a loss or damage to its insured interest, as of the Policy date, since the Property failed to provide the same amount of security for the 1st Mortgage loan. As set forth above, the Policy date is the proper date to calculate damages, and therefore, Lynx Jericho is not required to foreclose on the property to claim damages under the Policy.

C. JERICHO STATE’S SUCCESSFUL FORECLOSURE BID IS NOT A PAYMENT UNDER SECTION 2(c).

Section 2(c) of the Policy’s Conditions and Stipulations does not reference the date of loss or the manner of calculating damages, but it reduces the amount of insurance available to the extent “payments” are made on the loan balance. Section 2(c) limits the available insurance as follows:

2. CONTINUATION OF INSURANCE

(c) Amount of Insurance. The amount of insurance after the acquisition or after the conveyance shall in neither event exceed the least of:

(i) the Amount of Insurance stated in Schedule A;

(ii) the amount of the principal of the indebtedness secured by the insured mortgage as of Date of Policy, interest thereon, expenses of foreclosure amounts advanced pursuant to the insured mortgage to assure compliance with laws or to protect the lien of the insured mortgage prior to the time of acquisition the estate or interest in the land and secured thereby and reasonable amounts expended to prevent deterioration of improvements, but reduced by the amount of all payments made;

Chicago Title contends Jericho State's successful foreclosure bid is a "payment" on the 2nd Mortgage Loan balance. It argues that under Section 2(c), the amount of insurance is reduced to zero because Jericho State's successful bid of \$9 million exceeded the amount due under the 2nd Mortgage Loan (approx.. \$7.5 million). In support, Chicago Title relies on *Preservation Capital v. First American Title*, 406 S.C. 309 (2013). However, Chicago Title misapplies *Preservation Capital* to the facts of this case, and *Preservation Capital* actually favors the Plaintiffs' motions for summary judgment in this case.

In *Preservation Capital*, the lender made a \$3,075,000 loan, securing the loan with a mortgage on three parcels of land. The lender's title insurance policy insured that the borrower owned all three parcels. Two of the parcels were free of any title defect. However, the third parcel, known as the "King Street Parcel", was not actually owned by the borrower but instead by a company called Monarch Holdings.

The borrower sold one parcel for \$250,000 and paid that amount to the lender. Thereafter, the borrower defaulted on the loan. The lender foreclosed on the remaining parcel owned by the borrower, but it could not foreclose on the King Street Parcel because the borrower did not own it. At the time of foreclosure, the loan balance had increased to \$3,641,190. The lender made a credit bid of \$3,250,000 and took title to the borrower's remaining parcel free and clear of any lien, leaving a loan balance of \$391,190.

In the meantime, Monarch Holdings transferred the King Street Parcel to a third party. At the time of this transfer, the King Street Parcel was valued at \$590,000 and subject to a \$244,665 mortgage to a different bank. The lender claimed damages for the amount of equity in the King Street parcel (\$345,335) that existed at the time it was transferred from Monarch Holdings to the third party. The Supreme Court concluded that the lender's damages were \$345,335 – the amount of equity in the King Street Parcel that the lender would have been able to collect but for the title defect.

There are several important takeaways from *Preservation Capital*.

1. The Date of Loss is Not the Foreclosure Date.

In *Preservation Capital*, neither the date of policy nor the date of foreclosure was used to calculate the lender's damages. Instead, it was the date Monarch Holdings transferred the King Street Parcel to a third party. The case does not explain why this unspecified date was used. Nonetheless, this shows that a date prior to the foreclosure date is an acceptable date to measure loss and calculate damages under a lender's title insurance policy. Nothing in *Preservation Capital* precludes using the Policy date as the date of loss.

2. Damages are Measured by Lost Security.

Notably, the *Preservation Capital* Court calculated the lender's damages in a manner consistent with Section 7(a)(iii), stating that "Generally, the measure of damages should compare the encumbered value of the entire tract of land with what the value of the entire tract of land would be without any encumbrances." *Id* at 316. The Court compared the difference between the lender's security in the King Street Parcel as insured (parcel value with no defect less the other bank's lien = \$345,335) and the lender's security subject to the ownership defect (\$0). This is the same calculation that Plaintiffs contend is applicable to this case, and notably, the *Preservation Capital* Court made this calculation of lost security without the necessity of foreclosure.

3. A “Payment” is Made Only When the Lender Obtains Equity.

The *Preservation Capital* lender did not foreclose on the property that suffered the title defect. Instead, it foreclosed on the parcel owned by the borrower that had no defect and no superior lien. Therefore, by virtue of its successful credit bid, the lender took free and clear title and owned all of the “equity” of that parcel. In other words, the lender became the new owner of property worth \$3,250,000 with no offsets or title issues and it was proper to consider the monetary value of that equity ownership as a “payment” under Section 2(c).

4. Application of Section 2(c) and *Preservation Capital* to This Case.

As stated by the Supreme Court, “in determining whether *Preservation Capital* is entitled to recover under the policy, the Court must determine (1) *Preservation Capital*’s damages; (2) whether those damages are covered by the policy, and (3) if so, what amount is recoverable.” *Id.* at 317. Following this framework in the instant case, the Plaintiff’s damages are measured using Section 7(a)(iii) as of the Policy date, calculating the difference between the value of the insured estate as insured and the value of the insured estate subject to the encumbrance. Second, these are damages covered by the Policy, as the Court of Appeals has already declared that the encumbering effect of the Ordinance is a covered loss. Finally, the amount recoverable is capped under Section 2(c) as the lesser of the Policy limits or the amount of outstanding indebtedness less payments made. As determined by the *Preservation Capital* Court, a “payment” under Section 2(c) is the equity the lender receives when it takes title to the property.

In this case, unlike the lender in *Preservation Capital* who took ownership free and clear of any encumbrance or higher priority lien, Jericho State took title to the Property at foreclosure subject to (i) the encumbering effects of the Ordinance, and (ii) the \$18 million 1st Mortgage lien. Moreover, unlike the lender in *Preservation Capital*, Jericho State obtained little to zero equity in

the Property and therefore its bid is not a payment as contemplated by the Supreme Court or Section 2(c).

Jericho State bid \$9 million to own the Property. But why would anyone pay \$9 million to own property that is subject to an \$18 million mortgage? The only rational explanation, as clearly exists in this case, is that the lender believed the Property is worth \$9 million plus the \$18 million senior secured debt, or a total value of at least \$27 million.⁷ This would give the lender \$9 million in equity and the property still values at an amount sufficient to cover the existing mortgage. If these were the true facts of this case, then Jericho State's \$9 million bid would serve as a "payment" under Section 2(c) since it received the benefit of \$9 million equity in the Property.

However, at the time of the foreclosure, the Property was still subject to the title defect. Jericho State did not know of the defect at the time it made its \$9 million bid or when it took title to the Property. Had it known that the Property was subject to the Ordinance, it would never have foreclosed and taken ownership of the Property subject to the 1st Mortgage.

Again, there is no dispute that the encumbering effect of the Ordinance reduced the value of the Property. Plaintiffs have testified that due to the Ordinance the Property was worth less than the appraised value of \$2,648,900 and Jericho State believed that the Carolina Bays bridge built through the middle of the Property was going to destroy the Property and it was going to be worth nothing.⁸ If, at the time of foreclosure, the Property – subject to the Ordinance – was worth less than \$18 million, then Jericho State obtained zero equity in the Property. And if its bid of \$9 million did not result in Jericho State having any equity in the Property, then that bid cannot serve as a "payment" under Section 2(c) and *Preservation Capital*. Indeed, Jericho State was not made whole by taking title to the Property at foreclosure; instead, its financial condition went backwards,

⁷ See, *Arrow Bonding v. Warren*, 399 S.C. 603 (2012)(Master properly considered the foreclosure sale price plus the amount of existing mortgage and liens as the measure of a property's value at foreclosure); *Investors Sav. Bank v. Philps*, 303 S.C. 15 (1990)(amount of loans and mortgage is competent evidence of the value of property);

⁸ Chwatt Dep. Tr., p. 59, 60, 117

taking on an \$18 million 1st Mortgage lien on Property that was not worth what Jericho State believed it was worth at the time it made the bid and took ownership of the Property.

In sum, while Jericho State's amount of damages are calculated as of the Policy date under Section 7(a)(iii), the degree to which the amount of insurance is reduced under Section 2(c) is measured by the equity Jericho State may or may not have obtained when it took title to the Property. In truth, Plaintiffs do not believe that Chicago Title contends the Property value at foreclosure, subject to Ordinance, was so high that Jericho State possessed any equity at all after taking into account the \$18 million 1st Mortgage, but if it does, then that calculation remains an issue of fact dependent on the value of the Property when Jericho State became the owner.

This Court should rule that Jericho State's \$9 million foreclosure bid is not a "payment" under Section 2(c) unless Jericho State's ownership of the Property resulted in measurable equity beyond the \$18 million First Mortgage.

D. LYNX JERICHO'S RELEASE OF THE 1ST MORTGAGE IS OF NO EFFECT.

Section 9(c) of the Policy's Conditions and Stipulations terminates Chicago Title's liability under the Policy if there is "Payment in full by any person or the voluntary satisfaction or release of the insured mortgage." Chicago Title contends that Lynx Jericho's release of the 1st Mortgage on 12/22/2023 terminates liability under the Policy. This ignores, however, the fact that Lynx Jericho had already made a claim under the Policy in 2013, and that the claim had been pending in litigation since 2015 before it released the 1st Mortgage.

1. Chicago Title's Interpretation of Section 9(c) Leads to Absurd Results.

Lynx Jericho's claim has been pending for over 10 years and has been in litigation for more than 8 years. Chicago Title's position has no end date – it contends a satisfaction at any time, even a decade later while the claim is pending is a sufficient basis to terminate coverage. This interpretation of Section 9(c) can only motivate Chicago Title to deny the claim and drag litigation

out for as long as possible. To be sure, Lynx Jericho made its claim long ago under the Policy for damages suffered as of the Policy date, and it expected that its claim would remain pending until decided by the courts.

South Carolina law avoids absurd contract interpretations:

The purpose of the rules of contract construction is to ascertain the intention of the parties as gathered from the contents of the entire document and not from any particular provision within the contract. *Litchfield Co. of S.C., Inc. v. Kiriakides*, 290 S.C. 220, 223, 349 S.E.2d 344, 346 (Ct. App. 1986). Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails. *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975). **An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided.** *Id.*
Koon v. Fares, 379 S.C. 150 (2008)(emphasis added).

The Plaintiffs maintained their interest in the Property for over a decade, ultimately seeking buyers of the Property that had a 6-lane highway running through the middle of it. It is an absurd result to require them to maintain their interest for an even longer period of time, and for as long as this case remains pending, including potential (likely) future appeals.

Moreover, the law strictly construes insurance policies against the drafter and in favor of coverage for the insured. *General Acc. Ins. Co. v. Safeco Ins. Companies*, 314 S.C. 63 (Ct. App. 1994). Insurance policy exclusions are construed “most strongly against the insurance company, which also bears the burden of establishing the exclusion’s applicability.” *Owners Ins. Co. v. Clayton*, 364 S.C. 555 (2005).

Section 9(c) is an exclusion. Interpreted most strongly against Chicago Title, and in favor of coverage for Lynx Jericho, this Court should conclude that Chicago Title’s interpretation is unusual and extraordinary and leads to an absurd result. A much more reasonable interpretation is that once an insured makes a claim during the policy period for damages incurred during the policy

period, the claim is preserved, while claims first made after a mortgage satisfaction for matters not insured during the policy period are excluded under Section 9(c).

2. The Policy Insures Against Loss or Damage Suffered During the Policy Period.

As stated previously, the first page of the Policy states that Chicago Title “insures, as of the Date of Policy...against loss or damage...”. Similarly, in Section 7, the Policy states that it insures against “actual monetary loss or damage by reasons of matters insured against by this policy....” Lynx Jericho suffered its loss or damage as of the Policy date. This is exactly what the Policy insures.

In *Chicago Title Ins. Co. v. 100 Inv. Ltd. Partnership*, 355 F.3d 759 (4th Cir. 2004), the Court addressed a similar situation. In *100 Inv.*, the insured sought coverage for damage sustained during the policy period. Chicago Title argued that because the insured transferred the property prior to making a claim, the insured was precluded from recovery. The Fourt Circuit concluded that the proper analysis is to (i) determine when the damage or loss occurred, and (ii) if it occurred during the policy period, then the damage or loss is covered by the policy.

In our case, the damage and loss was suffered, and the damages are to be calculated, as of the Policy date. Not only was the damage and loss suffered during the policy period, Lynx Jericho made its claim to Chicago Title during the policy period.

Chicago Title cites to 4 cases from other jurisdiction to support its interpretation of Section 9(c): *First Midwest Bank v. Stewart Title*, 823 N.E.2d 168 (1st App. Cir, 2005); *Morrison v. Wells Fargo Bank*, 711 F.Supp. 2d 369 (M.D. Pa. 2010); *Joglor v. First American Title Ins. Co.*, 261 F.Supp. 3d 224 (D.P.R 2016); and *RNT Holdings v. United General Title Ins. Co.*, 230 Cal. App. 4th 1289 (2014). These cases support Lynx Jericho’s position.

In *First Midwest Bank*, *Morrison* and *Joglor*, the mortgages were satisfied **before** the lender made its title insurance claim. In *First Midwest*, the loan was paid in full by a new “wrap-

around loan” and the lender satisfied its mortgage; 2 years after the satisfaction, the borrower sued the lender claiming damages due to a title defect. After the lender was sued and, as a result, became subject to a potential loss, it made its title claim. The court concluded that the satisfaction occurred before the borrower’s lawsuit and therefore held that Section 9(c) precluded coverage.

In *Morrison*, the lender satisfied its mortgage after the loan was paid in full. After the loan was paid, a third party sued the lender claiming damages due to a title defect. After the lender was sued and, as a result, became subject to a potential loss, the lender made its title claim. The court concluded that because the loan was paid in full before the claim arose, Section 9(c) precluded coverage.

In *Joglor*, the original lender settled a disputed loan balance with the borrower by payment in full and satisfied the mortgage. Then the mortgages were assigned to Joglor, who couldn’t record the mortgages for various reasons under Puerto Rico law. Nearly 2 years after the mortgage was satisfied, Joglor made its title claim asserting the mortgages could not be recorded. The court concluded that Section 9(c) precluded coverage because the loan was paid and the mortgage was satisfied prior to Joglor’s claim.

In *RNT*, after the lender made a title claim asserting the borrower didn’t own the property secured by the mortgage, the property was transferred to a third party who refinanced and paid the loan in full. While the *RNT* satisfaction occurred after the claim was filed, the court determined that a provision similar to Section 9(c) barred coverage because the loan was paid in full.

Aside from *RNT*, these cases show that the lenders made their claims under the title policy after the loan was paid in full and the mortgage was satisfied. Conversely, in our case, Lynx Jericho made the claim before its satisfaction was filed. While it makes sense that the lender cannot make a claim for damages that arise or are suffered after the loan is paid in full, such is not the case for Lynx Jericho. Unlike the lenders in *First Midwest*, *Morrison* and *Joglor*, Lynx Jericho incurred

damage and loss during the policy period and made its title insurance claim during the policy period and prior to its satisfaction of the mortgage.

CONCLUSION

The Plaintiffs' Motion for Summary Judgment should be granted, and Chicago Title's Motion should be denied, on the following grounds: (1) The proper date to measure damages, under South Carolina law, is the Policy Date; (2) Lynx Jericho may pursue its claim for damages even though it did not foreclose on the Property because the proper date to measure damages is the Policy date, not the foreclosure date; (3) Jericho State's foreclosure of its 2nd Mortgage and ownership of the Property did not result in Jericho State possessing any equity in the Property and therefore its bid is not a payment under Section 2(c); and (4) Lynx Jericho may pursue its claim for damages even though it satisfied the 1st Mortgage because it made its claim during the policy period for damages suffered during the policy period prior to the satisfaction.

/s/ C. Scott Masel

C. Scott Masel

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1 (Defendant's Exhibit 2, land records, was
2 marked for identification.)

3 BY MR. KOUTRAKOS:

4 Q. There you go. Exhibit No. 2 is --

5 MR. KOUTRAKOS: I could represent to
6 everybody I went online yesterday, I believe it
7 was, and printed out this information from
8 horrycounty.org.

9 BY MR. KOUTRAKOS:

10 Q. Mr. Chwatt, if you look at the tax map
11 number, the legal description, the owner, does that
12 information appear to be accurate on the first page?

13 A. Yes.

14 Q. On the second page, the tax assessor has
15 given a fair market value of the property of \$2,648,900.

16 Do you see that?

17 A. I see that.

18 Q. And then it listed the taxes paid, it looks
19 like, going back to 2004. Do you see that?

20 A. Yes.

21 Q. Does Jericho have any reason to question
22 the validity of the total taxes paid; I mean, the
23 accuracy of those figures?

24 A. Of the taxes paid?

25 Q. Yes.

1 A. No.

2 Q. Does it sound right that you all paid about
3 \$27,000 in taxes?

4 A. Yes. The assessed value is \$129,282, and
5 the taxes are \$26,478.16.

6 Q. Right. So you don't have any reason to
7 question any of the information on Exhibit 2?

8 A. Other than the fair market value.

9 Q. You think the fair market value is too
10 high?

11 A. Yes. I don't know how they determined that
12 number.

13 Q. Okay.

14 MR. NEWBY: Jim, I don't want to interrupt
15 your train of thought, but can we take a break?

16 MR. KOUTRAKOS: Absolutely.

17 (A brief recess was taken from 11:07 a.m.
18 to 11:18 a.m.)

19 BY MR. KOUTRAKOS:

20 Q. Lynx Jericho Partners, do they have any
21 remaining obligation to the entity from which it
22 purchased the Jericho mortgage?

23 A. Do they have any -- ask me again, please.

24 Q. When I asked you the question, you said you
25 paid 2.5 million for the first mortgage on the Saucepan

1 pointed out to you and expressed to you.

2 Look at this house next to the property.
3 It's worth -- and you go onto the appraiser thing and you
4 look at his site. You can see the property of that
5 single house is worth at that time \$3 million next door
6 to it on the Intracoastal Waterway.

7 There is a bunch of houses along the
8 property that we looked at the values and said, wow,
9 that's a beautiful home.

10 Q. Can you, on behalf of Jericho, explain to
11 me the basis on which Jericho has sued Chicago Title in
12 this case?

13 A. Yes. There is a bridge going through the
14 property, and we had no knowledge that there would be a
15 bridge going through it. We would never ever, ever have
16 made any loan much less a second, first. I wouldn't have
17 lent the guy a dollar if there was a bridge going through
18 the middle of the property.

19 We've done hundreds and hundreds and
20 hundreds of deals. We have done a couple billion and a
21 half dollars in financing. I have never seen anything
22 like this. We used Chicago Title. In our whole lives,
23 we've never seen anything like this. Someone should have
24 said something. We never would have made this loan.

25 Q. When was the first time -- when you say --

1 Q. Is it your understanding that they
2 dismissed Exhibit No. 12 just because the South Carolina
3 Department of Transportation filed a condemnation as
4 stated in the stipulation of dismissal?

5 A. I have absolutely truly no idea what you're
6 getting at. I don't know what you're talking about.

7 Q. So you don't know the purpose of Exhibit
8 No. 12?

9 A. I know why it was filed. We wanted to stop
10 the bridge. That was my direction to them. We have to
11 stop the bridge. It's going to destroy the property.
12 The property is going to be worth nothing.

13 Q. It was stop the bridge or get money for the
14 bridge?

15 A. No, no, no. That was not contemplated. I
16 didn't want the bridge. There is no value to the
17 property anymore with a big bridge going through it. I
18 have to keep saying that.

19 I don't know what you're trying to do, but
20 I promise you, I really mean it. I just wanted to stop
21 it so I can go and develop it. It's beautiful property
22 on the Intracoastal Waterway. It's got a massive bridge
23 on it.

24 Q. Did the South Carolina -- you agree with me
25 that the South Carolina Department of Transportation

1 Q. I can tell you the foreclosure was 2007.
2 The foreclosure sale and the deed was -- the foreclosure
3 sale was December 3, 2007.

4 You would have known about the bridge by
5 December 3, 2007, correct?

6 A. No, I didn't.

7 Q. You didn't know about the bridge? You
8 didn't receive the --

9 A. December 2007?

10 Q. Yes. You didn't receive Exhibit No. 11
11 dated September 10, 2007 before the foreclosure sale?

12 A. At the foreclosure, I knew nothing about
13 the bridge.

14 Q. So you would have known nothing about the
15 bridge?

16 A. That's what I testified to, yes.

17 Q. You mentioned in the complaint that you
18 filed against Chicago Title that you didn't think the
19 property is marketable at all.

20 A. Correct.

21 Q. And the damages you seek against Chicago
22 Title is basically the amount that you loaned; is that
23 correct?

24 A. Are you talking about -- not only the money
25 I loaned, but the monies I paid for the cure payments to

1 keep the first mortgage in place for a long period of
2 time without the knowledge of this.

3 Because if I knew there was a bridge, I
4 never would have made cure payments. Every day that goes
5 by, I have outstanding loans on the monies I put up, and
6 they are accruing at 14 percent a year. I don't know if
7 there's a final number yet.

8 Q. Had you known about the bridge, you never
9 would have made cure payments?

10 A. I would never have made the loan.

11 Q. If you knew about the bridge before you
12 made the cure payments, would you have made the cure
13 payments?

14 A. No.

15 Q. So you think the property is worth nothing?

16 A. I think the property has lost almost all
17 its value now. I don't know what you can build there.

18 Q. Let me ask you: Why did you buy the first
19 mortgage for 2.5 million if you thought the property was
20 worth nothing?

21 A. To protect -- I'm a general partner in The
22 Fund, and The Fund had to protect it so hopefully, one
23 day -- I don't know what's going to happen -- to see if
24 you can use the property. I have no idea, but it was to
25 protect the assets.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

Jericho State Capital Corp. of Florida,

Plaintiff,

vs.

Chicago Title Insurance Company,

Defendant.

Case No. 2013-CP-26-5530

Lynx Jericho Partners, LLC,

Plaintiff,

vs.

Chicago Title Insurance Company,

Defendant.

Case No. 2015-CP-26-1084
(Consolidated with the above case)

DEFENDANT CHICAGO TITLE INSURANCE COMPANY'S
SECOND MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs Jericho State Capital Corp. of Florida ("Jericho State") and Lynx Jericho Partners, LLC ("Lynx Jericho") (together, "Plaintiffs") are mortgagees that hold or held insured mortgages under loan policies of title insurance issued by Chicago Title Insurance Company ("Chicago Title") in 2006. The policies insure title to and/or mortgages encumbering certain real property in Horry County.

This is the second motion for summary judgment by Chicago Title. As explained below, summary judgment is appropriate for the claims brought by both Lynx Jericho and Jericho State. As for Lynx Jericho, its claim under its policy fails because it has released the insured mortgage

in full and therefore coverage is terminated under policy Condition 9(c). Additionally, prior to releasing its mortgage interest, Lynx Jericho failed to foreclose on its note and mortgage. That failure precludes recovery under Lynx Jericho's policy. As set forth more fully below, the property has been sold in its entirety, and foreclosure is now impossible.

Summary judgment is also appropriate for the claims brought by Jericho State because coverage under Section 2(c) of its policy was reduced to \$0 when Jericho State obtained title to the Property (defined below) through foreclosure with a credit bid over the amount owed on its note.

Even if the Court were inclined to deny summary judgment for Lynx Jericho and Jericho State, as set forth below, it should still determine as a matter of law that the date of loss for Lynx Jericho and Jericho State was when the foreclosure sale process was completed.

The Court should therefore grant Chicago Title's motion for summary judgment.

STATEMENT OF FACTS

A. The Property.

The subject property is approximately 131.40 acres in Socastee Township, Horry County, South Carolina ("Property"). The Property borders the Intracoastal Waterway. The McClam family owned the Property for decades until it sold it in July 2006.

B. The Ordinance.

On July 2, 2002, the Horry County Council adopted Ordinance 88-202 ("the Ordinance"), which amended the official map of Horry County to show the future locations of a proposed highway. The Ordinance added to the official map "the right-of-way identified as Alternative 1 for the proposed Carolina Bays Parkway from Highway 501 to Highway 17 By-pass as shown in the document entitled Carolina Bays Parkway, Phase V FEIS Conceptual Roadway Plans." The

conceptual roadway plan is attached to the Ordinance.

On July 9, 2002, the Ordinance, which was neither witnessed nor notarized, was recorded with the Horry County Register of Deeds and indexed under the name of “Horry County,” not under the names of the then-owners of the Property, the McClams.

C. Sale of the Property to Peachtree, the Mortgages, and the Policies.

In July 2006, Peachtree Properties of North Myrtle Beach, LLC (“Peachtree”) purchased the Property from the McClam family for \$22,500,000.¹ To finance its purchase of the Property, Peachtree obtained mortgage loans from R.E. Loans, LLC (“REL”) and Jericho State.

To secure repayment of the loan to REL, Peachtree gave REL an \$18,520,000.00 first mortgage covering the Property (“REL Mortgage.”). Chicago Title issued a loan policy of title insurance to REL insuring the REL Mortgage, which policy date is July 25, 2006, and the insured amount is \$17,071,873.33 (“REL Policy”).²

To secure repayment of the loan to Jericho State, Peachtree gave a \$4,263,888.00 second mortgage covering the Property to Jericho State (“Jericho State Mortgage”). Chicago Title issued a loan policy of title insurance to Jericho State insuring the Jericho State Mortgage, which policy date is July 25, 2006, and the insured amount is \$4,263,888.00 (“Jericho State Policy”).³ The Jericho State Policy and the REL Policy will be collectively referred to at times as “the Policies.”

D. Foreclosure of the Jericho State Mortgage.

On June 8, 2007, Jericho State filed a foreclosure action seeking to foreclose the second lien Jericho State Mortgage.⁴

¹ **Exhibit A** (Peachtree Deed).

² **Exhibit B** (REL Mortgage); **Exhibit C** (REL Policy).

³ **Exhibit D** (Jericho State Mortgage); **Exhibit E** (Jericho State Policy).

⁴ **Exhibit F** (Foreclosure Order).

The court entered a foreclosure order on November 7, 2007, ordering the sale of the Property subject to the REL Mortgage and finding \$7,490,031.71 was due under the note secured by the Jericho State Mortgage (“Jericho State Note”).⁵ Jericho State was the successful bidder at the foreclosure sale with a credit bid of \$9,000,000.00, which exceeded the amount due under the Jericho State Note.⁶ Jericho State received a master’s deed for the Property recorded February 26, 2008.⁷ Thus, as of February 26, 2008, the Property was owned by Jericho State subject to the REL Mortgage.

E. The Condemnation Action.

Following the dismissal of an action over disputed zoning,⁸ on December 15, 2009, SCDOT filed a condemnation action against Jericho State, REL, and Mortgage Fund ’08, LLC (the “Condemnation Action”). SCDOT alleged Jericho State was the owner of the Property and condemned 10.18 acres of the Property—the “Parkway Parcel”—for highway purposes as part of the Carolina Bays Parkway project. The SCDOT alleged “[t]he property sought herein is to be acquired for public purposes, more particularly for the construction of a section of SC Route 31 (Carolina Bays Parkway).” (emphasis added). On November 19, 2014, the jury awarded \$2,100,000.00 just compensation for the taking of the Parkway Parcel to Jericho State.⁹ Jericho

⁵ *Id.*

⁶ Jericho State admits these facts. See **Exhibit G** (Answers to Chicago Title’s First Requests for Admission).

⁷ **Exhibit H** (Master’s Deed) (reciting consideration of \$9,000,000.00).

⁸ On October 12, 2009, Jericho State filed with the Horry County Court of Common Pleas a verified complaint against Horry County and the South Carolina Department of Transportation (“SCDOT”) seeking an order finding that a separate 2007 rezoning ordinance (where Peachtree agreed to donate the Parkway Parcel) was not binding, rescinding the rezoning granted by the separate 2007 ordinance, and terminating the obligation to donate the Parkway Parcel (defined below).

⁹ **Exhibit I** (Condemnation Judgment).

State released its interest in the judgment proceeds to Lynx Jericho.¹⁰ The Condemnation Action caused the REL Mortgage to be discharged as a matter of law over the Parkway Parcel. However, it remained as a valid first mortgage lien on the remainder of the Property.

F. Assignment of the REL Mortgage to Lynx Jericho.

REL assigned the REL Mortgage to Mortgage Fund '08, LLC by an instrument recorded May 16, 2008. Mortgage Fund '08, LLC filed for bankruptcy in 2011. With approval of the bankruptcy court in 2012, the REL Mortgage was assigned to Susan L. Uecker as trustee of the Mortgage Fund '08 Liquidating Trust (the "Liquidating Trust"). The Bankruptcy Court approved the sale of the REL Mortgage to Lynx Jericho for \$950,000.00 by Order entered April 3, 2013. The Liquidating Trust assigned the REL Mortgage to Lynx Jericho by instrument recorded May 22, 2013.¹¹

After Lynx Jericho purchased the REL Mortgage, Lynx Jericho became an insured under the REL Policy.

G. Title Insurance Claims.

By letter dated February 26, 2009, Jericho State submitted a claim to Chicago Title based on the assertion that the Jericho State Policy protected against the Condemnation Action. Chicago Title denied that claim.

¹⁰ See Plaintiffs' May 19, 2016 Memorandum in Support of Plaintiffs' Motion for Summary Judgment, 13:

On December 5, 2014, the jury awarded Jericho State \$2,100,000.00 for the condemnation taking of the 10.18 acres of the highway right-of-way and damage to the remainder of the Property. After taking into account prejudgment interest and attorney fees and costs, Jericho State paid the judgment's net proceeds of \$1,941,737.32 to Lynx Jericho as First Mortgage holder, who directed the attorneys to wire the funds directly to LAS pursuant to the Operating Agreement.⁴¹

¹¹ See **Exhibit J** (Bankruptcy Court Order) (reciting history); **Exhibit K** (Assignment to Lynx Jericho).

Lynx Jericho submitted a claim on the Lynx Jericho Policy by letter dated June 21, 2013 (roughly a month after it acquired the REL Mortgage). Chicago Title denied the claim.

H. Jericho State and Lynx Jericho's lawsuits.

On July 29, 2011, Jericho State filed an action against Chicago Title asserting causes of action entitled Breach of Contract-Recovery of Insurance Benefits; Breach of Contract-Breach of the Covenant of Good Faith and Fair Dealing; and Tortious Bad Faith Refusal to Pay Insurance Benefits and Bad Faith Failure to Investigate an Insurance Claim. Chicago Title filed its answer on February 16, 2012, denying the material allegations of the complaint and asserting defenses.

On February 12, 2015, Lynx Jericho filed an action against Chicago Title asserting the same causes of action that Jericho State asserted. Chicago Title filed its answer on May 13, 2015, denying the material allegations of the complaint and asserting defenses.

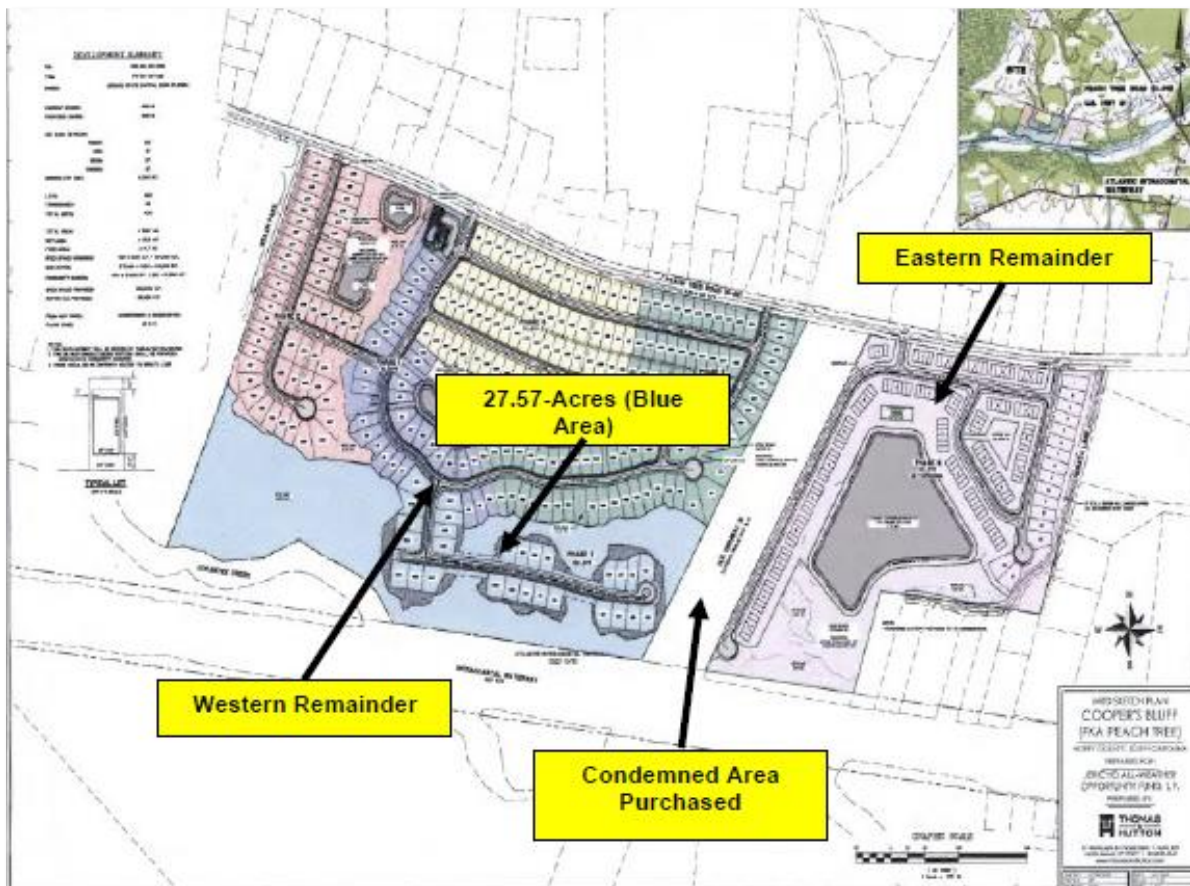
By orders entered on February 13, 2015, and November 13, 2015, these cases were consolidated and referred to Karl A. Folkens as Special Referee.

Jericho State and Lynx Jericho moved for summary judgment on May 19, 2016. Chicago Title moved for summary judgment on August 23, 2016. On January 28, 2017, Special Referee Folkens heard the motions for summary judgment. Pursuant to an Order entered July 10, 2017, Special Referee Folkens granted summary judgment in favor of Chicago Title.

Lynx Jericho and Jericho State appealed. By its amended opinion filed on October 7, 2020, the Court of Appeals affirmed in part and reversed in part the order by Special Referee Folkens, reversing summary judgment for Chicago Title on the Plaintiffs' breach of contract claims, but affirming the dismissal of the bad faith/tort causes of action asserted against Chicago Title by both Lynx Jericho and Jericho State. The claims remaining are Lynx Jericho's breach of contract claim under the REL Policy and Jericho State's breach of contract claim under the Jericho State Policy.

I. The Entire Property was Sold by Jericho State and Lynx Jericho Voluntarily Released the REL Mortgage.

Following the condemnation, the Property was ultimately subdivided into three parcels: The “Western Remainder” containing 58.12 acres, the “Eastern Remainder” containing 35.27 acres, and the “Southern Remainder” containing 27.57 acres. These parcels are depicted below:



58.12-Acre Parcel – Western Remainder

The Western Remainder is a 58.12-acre parcel on the west side of the bridge (which was the subject of the Condemnation Action). By Limited Warranty Deed dated July 13, 2020, Jericho State conveyed the Western Remainder to Lennar Carolinas, LLC (“Lennar”) for \$4,700,000.¹² Lennar developed the Western Remainder into the Cooper’s Bluff Subdivision.

¹² See **Exhibit L** (Western Remainder Deed)

By Partial Release of Mortgage Lien dated August 5, 2022, recorded on August 8, 2022, Lynx Jericho voluntarily released the lien of the REL Mortgage from the Western Remainder.¹³

35.27-Acre Parcel – Eastern Remainder

The Eastern Remainder is a 35.27-acre parcel on the east side of the bridge. On September 14, 2020, the Eastern Remainder was conveyed by quitclaim deed from Jericho State to Lynx Jericho Peachtree Phase III, LLC. By Limited Warranty Deed dated January 11, 2022, recorded on March 14, 2022, Lynx Jericho Peachtree Phase III, LLC conveyed the Eastern Remainder to Lennar for \$2,102,500.00.¹⁴ On April 28, 2022, Lennar conveyed this property to AG EHC II Multi State 1, LLC for \$2,057,675.00.

By Partial Release of Mortgage Lien dated August 5, 2022, recorded on August 8, 2022, Lynx Jericho voluntarily released the lien of the REL Mortgage from the Eastern Remainder.¹⁵

The Western Remainder and Eastern Remainder release provided in pertinent part:

The real property described in **Exhibit A** attached hereto, which is incorporated herein by reference (the “**Real Property**”), is hereby released and forever discharged from the lien, operation and effect of the [REL] Mortgage and all claims and interests of the Mortgagee in and to the Real Property are forever terminated.

See **Exhibit M** (Western Remainder and Eastern Remainder release) (emphasis original).

27.57-Acre Parcel – Southern Remainder

The Southern Remainder is a 27.57-acre parcel on the south part of the Property and fronts the Intracoastal Waterway. Lynx Jericho Peachtree Phase II, LLC, having received title by quit claim deed from Jericho State, conveyed it to Beverly Homes, LLC, a local builder, by Limited

¹³ See **Exhibit M** (Western Remainder and Eastern Remainder release).

¹⁴ See **Exhibit N** (Eastern Remainder Deed).

¹⁵ See **Exhibit M** (Western Remainder and Eastern Remainder release).

Warranty Deed dated August 24, 2023, recorded on August 25, 2023.¹⁶ The consideration stated on the deed is \$1,100,000.00.

By Partial Release of Mortgage Lien dated December 22, 2023, recorded on December 22, 2023, Lynx Jericho voluntarily released the lien of the REL Mortgage from the Southern Remainder.¹⁷

The release of the Southern Remainder (following the Condemnation Action and the prior release of the Western and Eastern Remainders) completely released the REL Mortgage from the Property, stating in pertinent part:

The real property described in **Exhibit A** attached hereto, which is incorporated herein by reference (the “**Real Property**”), is hereby released and forever discharged from the lien, operation and effect of the [REL] Mortgage and all claims and interest of the Mortgagee in and to the Real Property are forever terminated.

See **Exhibit P** (Southern Remainder release) (emphasis original).

LEGAL STANDARD

Summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCP. The purpose of summary judgment is to expedite the disposition of cases that do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003). In that way, “[a] motion for summary judgment is akin to a motion for a directed verdict” because “[i]n each instance, one party must lose as a matter of law.” *Main v. Corley*, 281 S.C. 525, 526, 316 S.E.2d 406, 407 (1984); see also *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (standard for summary judgment “mirrors” standard

¹⁶ See **Exhibit O** (Southern Remainder Deed)

¹⁷ See **Exhibit P** (Southern Remainder release).

for directed verdict).

A party opposing summary judgment must show a genuine dispute of fact—“the ‘mere scintilla’ standard does not apply under Rule 56(c). Rather, the proper standard is the ‘genuine issue of material fact’ standard set forth in the text of the Rule.” *Kitchen Planners, LLC v. Friedman*, No. 28173, 2023 S.C. LEXIS 164, at *8 (Aug. 23, 2023) (citing and overruling *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). Moreover, “‘it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.’” *Id.*

To the extent any ground for summary judgment asserted in this motion was considered in whole or in part in the Court’s prior order and not granted, a second summary judgment motion may be construed as a motion to reconsider the earlier denial. *See Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994) (“The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion.”); *Johnston v. Bowen*, 313 S.C. 61, 63, 437 S.E.2d 45, 47 (1993) (holding “trial court interlocutory orders are amendable” where the trial court denied a motion for summary judgment, allowed leave to re-file after a motion to amend, and ultimately granted the re-filed motion for summary judgment); *PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr., Inc.*, 297 S.C. 176, 183, 375 S.E.2d 331, 334 (Ct. App. 1988) (“A trial judge, until final judgment, controls the trial of the case before him, and as a general rule may amend, correct, modify, or otherwise change its findings of fact and conclusions of law before entry of judgment or decree.”).

ANALYSIS

A. **LYNX JERICO FULLY AND VOLUNTARILY RELEASED THE INSURED MORTGAGE AND COVERAGE TERMINATES UNDER POLICY CONDITION 9(c) OF THE REL POLICY.**

As of December 22, 2023, Lynx Jericho has completely released the insured REL Mortgage, which no longer encumbers any of the Property. See **Exhibits L; M; N; O; P** (Deeds and Releases); **Exhibit I** (Condemnation Action judgment). With the complete release of the REL Mortgage, coverage under the REL Policy is terminated.

Paragraph 9(c) of the Conditions and Stipulations (“Condition 9(c)”) in the REL Policy provides:

9. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY

(c) Payment in full by any person *or the voluntary satisfaction or release* of the insured mortgage shall terminate all liability of the Company except as provided in Section 2(a) of these Conditions and Stipulations.

Exhibit C (REL Policy) (emphasis added). Paragraph 2(a) of the Conditions and Stipulations (“Condition 2(a)”) in the REL Policy provides:

2. CONTINUATION OF INSURANCE

(a) After Acquisition of Title This coverage of this policy shall continue in force as of Date of Policy in favor of (i) an insured who acquires all or any part of the estate or interest in the land by foreclosure, trustee’s sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the insured mortgage; (ii) a transferee of the estate or interest so acquired from an insured corporation, provided the transferee is the parent or wholly-owned subsidiary of the insured corporation, and their corporate successors by operation of law and not by purchase, subject to any rights or defenses the Company may have against any predecessor insurers; and (iii) any governmental agency or governmental instrumentality which acquires all or any part of the estate or interest pursuant to a contract of insurance or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage.

Id.

Insurance policies are subject to the general rules of contract construction. *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 514 S.E.2d 327, 330 (1999). When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. *Id.* The court must enforce, not write, contracts of insurance and must give policy language its plain, ordinary, and popular meaning. *Id.* “[I]f the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend coverage that was never intended by the parties.” *S.C. Farm Bureau Mut. Ins. Co. v. Wilson*, 344 S.C. 525, 544 S.E.2d 848, 850 (Ct. App. 2001). “The rule of strict construction against the insurer does not apply where the language used in the policy is so plain and unambiguous as to leave no room for construction. Nor does the rule of strict construction authorize a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exists.” *S.S. Newell & Co. v. American Mutual Liability Ins. Co.*, 199 S.C. 325, 19 S.E.2d 463, 466 (1942).

The plain language of Condition 9(c) applies here because Lynx Jericho has executed, with respect to three separate transactions, a “voluntary satisfaction or release of the insured mortgage,” which “terminate[d] all liability of the Company” under the REL Policy. The partial release of the Western Remainder, Eastern Remainder, and Southern Remainder (coupled with the prior condemnation of the Parkway Parcel) function as a complete release of the REL Mortgage. Accordingly, Chicago Title’s liability under the REL Policy is terminated.

The Condition 2(a) exception in Condition 9(c) does not apply to Lynx Jericho. Prior to the release of the REL Mortgage, Lynx Jericho never foreclosed and therefore cannot be “an insured who acquires all or any part of the estate or interest in the land by foreclosure, [etc.]” or “a transferee of the estate or interest so acquired.” *Cf. Exhibit C* (REL Policy) at Section 2(a)(i),

(ii). Lynx Jericho acquired no other interest in the Property. Thus, with the release of the REL Mortgage, Lynx Jericho has no interest in the Property at all. Further, Section 2(a)(iii) does not apply because Lynx Jericho is not a “governmental agency or governmental instrumentality.”

While there do not appear to be any cases directly on point in South Carolina, cases from around the country support termination of coverage under a loan policy of title insurance after a voluntary, complete satisfaction or release of an insured mortgage. *See Joglor, LLC v. First Am. Title Ins. Co.*, 261 F. Supp. 3d 224, 233 (D.P.R. 2016) (construing an identical condition 9(c)); *RNT Holdings, LLC v. United Gen. Title Ins. Co.*, 179 Cal. Rptr. 3d 175, 184 (Ct. App. 2014) (construing materially similar policy language to Condition 9(c) of the Policies); *Morrison v. Wells Fargo Bank, N.A.*, 711 F. Supp. 2d 369, 389 (M.D. Pa. 2010) (construing an identical condition 9(c)); *First Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 823 N.E.2d 168, 175 (Ill. App. Ct. 2005), *aff'd*, 843 N.E.2d 327 (Ill. 2006) (construing an identical Condition 9(c)).

First Midwest Bank addressed the satisfaction and release of an insured \$300,000.00 mortgage where the insured mortgage and another mortgage were satisfied as part of a “wrap around” refinance with a new \$752,000.00 mortgage loan. The insured mortgage was satisfied and released in the refinance. The court held that an identical condition 9(c) terminated coverage under the lender’s policy because the insured mortgage was satisfied and the mortgage was released as part of the refinance. *First Midwest Bank*, 823 N.E.2d at 176 (“Once payment in full occurred, or the satisfaction or release of the insured mortgage occurred, both of which happened in this matter, all liability of the title company terminated.”).

Morrison addressed an insured mortgage that encumbered the wrong property where two separate properties were owned by separate individuals in the same town with the same name (James E. Morrison). The *Morrison* plaintiff, who owned the improperly encumbered property,

filed an action against the bank, which then added the title company as a third-party defendant. The bank separately filed an action against the correct owner to whom the loan was made and upon whose property the mortgage should have attached. The bank's separate action against the correct owner triggered the correct owner's father to pay the outstanding loan in full. The bank then asserted breach of contract claims against the title company under the title policy for failing to defend it against the *Morrison* plaintiff. The title company asserted an identical condition 9(c) applied—"[p]ayment in full by any person or the voluntary satisfaction or release of the insured mortgage shall terminate all liability of the Company except as provided in Section 2(a) of these Conditions and Stipulations." *See Morrison*, 711 F. Supp. 2d at 388. The court agreed, holding that the loan secured by the insured mortgage was paid in full and that "once the mortgage was paid [the title company's] obligations under the policy ended." *Id.* at 389.

RNT Holdings, LLC considered an insured trust deed recorded before the property owner received the vesting deed. The owner later sold the property, and the insured lender agreed to release the trust deed from the encumbered property—the reconveyed trust deed provided that "all sums secured by that deed have been fully paid" and that the insured lender released "all the estate, title and interest acquired and now held by [the insured lender] in [that deed]." *RNT Holdings, LLC*, 179 Cal. Rptr. 3d at 184 (internal citation omitted). The insured lender sued the title company for breach of contract asserting the mortgage never attached. The title company asserted that the mortgage did attach and that coverage was barred by section 10(b) of the title policy, which provided "[t]he voluntary satisfaction or release of the Insured Mortgage shall terminate all liability of [the title company] except as provided in Section 2 of these Conditions." *Id.* at 182 (same material provision at issue in the REL Policy). The court held that the insured lender had released the mortgage, which terminated coverage under the nearly identical title policy provision.

Moreover, the court noted that even if the lien had not attached, then the full release would still have terminated the insurer's liability. *See id.* at 184, n. 6 ("a full release of the insured's interests in the pertinent property, by itself, terminates the insurer's liability.") (citing *First Midwest Bank*, 823 N.E.2d at 176–77).

Joglor considered coverage under a loan policy of title insurance after a settlement agreement and release satisfied in full two lines of credit where the mortgages securing the lines of credit were insured. *Joglor*, 261 F. Supp. 3d at 224. The debts secured by the mortgages were satisfied and released, but the mortgages and notes were assigned to a new lender. *Id.* at 229–30. Under Puerto Rican law, "the mortgage notes and mortgage liens were discharged when the Settlement Agreement was executed." *Id.* at 233–34. Accordingly, "Section 9(c) terminated [the title company's] two title insurance policies when the Settlement Agreement was executed." *Id.* at 235.

The plain language of the REL Policy and the cases are clear—Condition 9(c) of the Policies terminates the title insurer's liability when the insured's property interest is fully released. Indisputably, the REL Mortgage has been completely released as a lien against the Property. *See Exhibit I* (Condemnation Judgment); *Exhibit M* (Western Remainder and Eastern Remainder release); *Exhibit P* (Southern Remainder release). Accordingly, Condition 9(c) applies, coverage under the REL Policy for Lynx Jericho is terminated, and summary judgment should be entered against Lynx Jericho.

B. LYNX JERICO HAS NOT SUSTAINED A DETERMINABLE LOSS BECAUSE THE DATE OF LOSS UNDER A LOAN POLICY IS THE DATE OF FORECLOSURE, LYNX JERICO NEVER FORECLOSED, AND LYNX JERICO CANNOT DO SO NOW.

Lynx Jericho, like its predecessors in interest, never foreclosed on the REL Mortgage. That failure, independent of the release of the REL Mortgage, precludes recovery under the REL Policy

because Lynx Jericho's claim is not ripe until it forecloses and the amount due on the debt is determined.

Paragraph 7 of the Conditions and Stipulations of the REL Policy states they are "contract[s] of indemnity against actual monetary loss or damage." **Exhibit C** (REL Policy). Lynx Jericho must show it has suffered a loss to establish liability, and without a loss, there can be no viable claim under the REL Policy. *Marble Bank v. Commonwealth Land Title Ins. Co.*, 914 F. Supp. 1252, 1254 (E.D.N.C. 1996).

An insured lender that has not yet taken title cannot prove that any defect in the title will cause it to suffer a loss and a claim is not ripe until the lender has taken title to the property. *See, e.g., Karl v. Commonwealth Land Title Ins. Co.*, 24 Cal.Rptr.2d 912, 920 (Ct. App. 1993) ("At [foreclosure sale], the lender's note is extinguished and replaced by assets recovered on foreclosure: either cash as paid by a third party bidder or the realty as bought in by the foreclosing lender. It is now possible to measure the value of the recovery by the lender, and we believe the loss which is insured by the title policy should be recognized as of that time."); *First Citizens Bank & Trust Co. v. Stewart Title Guar. Co.*, 320 P.3d 406 (Colo. Ct. App. 2014) ("An insured mortgagee has not suffered an identifiable loss unless and until it forecloses its insured deed of trust and a title defect reduces the value of the property, thereby preventing the mortgagee from recouping its loan amount upon resale. If a title defect exists, but the value of the property is nevertheless sufficient to pay the mortgagee the loan amount, then there is no damage compensable under the loan policy."); *Marble Bank*, 914 F. Supp. at 1254 (it is clear that in the typical case the earliest a loss can be claimed on a lender's policy is at the time of completion of foreclosure).

Here, the record is clear that Lynx Jericho has not foreclosed and therefore it has not suffered "actual monetary loss" under Condition 7. Accordingly, summary judgment is appropriate

on Lynx Jericho's claim.

C. COVERAGE UNDER THE JERICHO STATE POLICY WAS REDUCED TO \$0 BECAUSE THE FORECLOSURE SALES PRICE EXCEEDED THE AMOUNT DUE UNDER THE JERICHO STATE NOTE PURSUANT TO POLICY CONDITION 2(c) AND *PRESERVATION CAPITAL*.

Jericho State's claim fails because the foreclosure brought more (\$9,000,000.00—Jericho States's own successful bid) than the amount due under the note (\$7,490,031.71).¹⁸ Under *Preservation Capital Consultants*, a South Carolina Supreme Court opinion that squarely controls the outcome in this case, coverage is reduced to \$0 under the Jericho State Policy when more than the amount of the note is paid through the foreclosure sale. Accordingly, no breach occurred under the Jericho State Policy, and Chicago Title is entitled to judgment as a matter of law against Jericho State.

Preservation Capital considered the precise issue presented here—how coverage is determined under a lender's title policy when a note is paid through a foreclosure sale. See *Preservation Capital Consultants, LLC v. First American Title Ins. Co.*, 406 S.C. 309, 751 S.E.2d 256 (2013). The insured lender in *Preservation Capital* obtained a \$3,075,000.00 mortgage secured by three properties and insured with a policy face amount of \$3,075,000.00. *Id.* at 312, 751 S.E.2d at 257. One parcel was sold and partially released from the mortgage by agreement. *Id.* Following default by the borrower, the mortgage on the second parcel was found to be defective, with the parcel having been sold to a third party in a sale that would have provided \$345,335.00 to the insured lender if the mortgage were valid. *Id.* The insured lender foreclosed and purchased the remaining parcel with a credit bid of \$3,250,000.00 when the total debt outstanding was

¹⁸ Again, the court entered a foreclosure order on November 7, 2007, ordering the Property to be sold subject to the REL Mortgage and finding that \$7,490,031.71 was due under the note secured by the Jericho State Mortgage. See **Exhibit F** (Foreclosure Order).

\$3,641,190.00. *Id.*

The insured lender then filed a title insurance claim for the \$345,335.00 that it was unable to recover due to the title defect on the second parcel. *Id.* Section 2(a) of the *Preservation Capital* title policy¹⁹ controlled and governed “situations in which the insured lender, after default, acquires all or part of the collateral via foreclosure.” *Id.* Section 2(c) of the title policy sets the determination for the amount of insurance:

(c) *Amount of Insurance*: The amount of insurance after the acquisition [shall not] exceed the least of:

(i) the amount of insurance stated in Schedule A; [or]

(ii) the amount of principal of the indebtedness secured by the insured mortgage as of Date of Policy, interest thereon, expenses of foreclosure, amounts advanced pursuant to the insured mortgage to assure compliance with laws or to protect the lien of the insured mortgage prior to the time of acquisition of the estate or interest in the land and secured thereby and reasonable amounts expended to prevent deterioration of improvements, **but reduced by the amount of all payments made . . .**²⁰

Id. at 313, 751 S.E.2d at 258 (emphasis added). Applying these provisions, the South Carolina Supreme Court recognized that the amount of coverage was reduced under Section 2(c) by the winning bid amount at the foreclosure sale but also that more remained due under the *Preservation Capital* note after the foreclosure sale—\$391,190.00.²¹ Because the note was not paid in full through foreclosure, coverage remained for the insured lender’s loss. *See id.* at 318, 751 S.E.2d at

¹⁹ Section 2(a) of the *Preservation Capital* title policy provided, “(a) *After Acquisition of Title*: The coverage of this policy shall continue in force . . . in favor of . . . an insured who acquires **all or any part of the estate or interest in the land by foreclosure . . .**” *Pres. Cap. Consultants, LLC*, 406 S.C. at 313, 751 S.E.2d at 257. Section 2(a) of the Jericho State Policy is identical to Section 2(a) of the *Preservation Capital* title policy. *Cf. Exhibit E* (Jericho State Policy).

²⁰ Section 2(c) of the Jericho State Policy is identical to Section 2(c) of the *Preservation Capital* title policy. *Cf. Exhibit E* (Jericho State Policy).

²¹ The Court noted this amount “appreciated to \$452,731.48 by gaining interest from the date of foreclosure until the entry of judgment in this action.” *Pres. Cap. Consultants, LLC*, 406 S.C. at 318, 751 S.E.2d at 260–61.

261 (“coverage would be limited to \$452,731.48, as that amount is less than the \$3,075,000 policy limit.”).

Preservation Capital also rejected an argument that payment of more than the *face amount* of the title policy under Section 9(b) reduced the coverage to zero. *Id.* In rejecting this argument, the court noted, “an insured mortgagee’s coverage should continue after he purchases the mortgaged property at foreclosure ***provided there remains unpaid principal indebtedness.***” *Id.* at 319, 751 S.E.2d at 261 (citing *Hodas v. First American Title Ins. Co.*, 696 A.2d 1095, 1097–98 (Me. 1997) (emphasis added)).²² Accordingly, the Court determined the insured lender’s loss was covered where some unpaid principal indebtedness remained.

Applying the *Preservation Capital* analysis of Section 2(c) here reduces the coverage amount under the Policy to \$0 because, unlike the *Preservation Capital* foreclosure sale, the Jericho State foreclosure sale satisfied the debt in full. *Cf. Pres. Cap. Consultants, LLC*, 406 S.C. at 319, 751 S.E.2d at 261 (“an insured mortgagee’s coverage should continue after he purchases the mortgaged property at foreclosure ***provided there remains unpaid principal indebtedness.***”) (emphasis added). In this case, Section 2(c) of the Jericho State Policy states the amount of insurance after acquiring the Property via foreclosure shall not exceed the lesser of the \$4,263,888.00 policy limit or the amount of unpaid principal indebtedness secured by the Jericho State Mortgage, coupled with interest and expenses, but reduced by the amount of all payments made. Here, after Jericho State acquired the Property, the borrower no longer owed anything under the Jericho State Note, which was paid in full (\$9,000,000.00 foreclosure sale price vs.

²² *Hodas* reached the same conclusion with respect to Condition 2(c):

After an insured mortgagee purchases the mortgaged premises at foreclosure, coverage continues ***provided there remains unpaid principal indebtedness.*** Coverage is limited, however, to the lesser of the outstanding indebtedness or the stated policy limit.

Hodas, 696 A.2d at 1097–98 (emphasis added).

\$7,490,031.71 due under the note). Jericho State's coverage thus was reduced to \$0 under Section 2(c) of the Jericho State Policy and *Preservation Capital*.

Although Special Referee Folkens previously found an issue of fact existed concerning this full payment defense, discovery conducted since the prior ruling reveals that is not the case. Jericho State admits to the amounts owed under the Jericho State Note and its payment at the foreclosure sale. See **Exhibit G** (Answers to Chicago Title's First Requests for Admission). There is no factual dispute that Jericho State bid \$9 million on a debt of \$7,490,031.71.

Jericho State asserts that it purchased the Property subject to an \$18,000,000.00+ first mortgage, which it claims makes the equity less than the \$9,000,000.00 winning bid. However, the facts are clear that Jericho State paid \$9,000,000.00 for what it admits is a second-place lien, the lien position insured by Chicago Title and the lien position with which Jericho State started. The Jericho State Policy excluded the senior REL Mortgage and Jericho State took the Jericho State Mortgage subject to the REL Mortgage. Accordingly, its \$9,000,000.00 winning bid reduced the coverage under the Jericho State Policy to \$0.

South Carolina public policy also supports the application of *Preservation Capital*. In South Carolina, "a plaintiff can have but one satisfaction of his debt." *Ayers v. Guess*, 217 S.C. 233, 235, 60 S.E.2d 315, 315 (1950). Allowing Jericho State a recovery beyond the satisfaction of its note at the foreclosure would violate this principle. Additionally, South Carolina disfavors any activities or practices that have the effect of "chilling" the bidding at a foreclosure sale. *Ex parte Keller*, 185 S.C. 283, 292, 194 S.E. 15, 19 (1937) (courts should be "particularly jealous of the integrity of judicial sales" and all such judicial sales "must be made on free, fair and competitive bidding."). Allowing Jericho State to bid more than the amount due on the Jericho State Note and still claim a loss under the Jericho State Policy would allow a hypothetical insured lender to bid

one dollar more than a third party whose bid would otherwise satisfy the note in full and still claim a loss under a loan policy of title insurance. *Preservation Capital*, *Ayers*, and *Ex parte Keller* do not allow such an outcome.

Accordingly, the amount of insurance under the Jericho State Policy is reduced to \$0, Chicago Title does not owe Jericho State anything under the Jericho State Policy, and summary judgment in favor of Chicago Title is appropriate as a matter of law on Jericho State's claim.

D. TO THE EXTENT THE COURT DENIES SUMMARY JUDGMENT WITH RESPECT TO LYNX JERICO AND/OR JERICO STATE, THE COURT SHOULD DETERMINE AS A MATTER OF LAW THAT THE DATE OF LOSS UNDER THE POLICIES IS THE DATE FORECLOSURE IS COMPLETED.

As set forth in § B above, Lynx Jericho cannot suffer a loss because it never foreclosed on the REL Mortgage prior to releasing the REL Mortgage. To the extent the Court denies summary judgment on this ground, it should still rule the date of loss for Lynx Jericho is the date of foreclosure.

As to Jericho State, even if the Court declines to grant summary judgment as set forth in § C above, the date of any Jericho State loss should be measured from the date Jericho State's foreclosure was completed. As confirmed above, the court entered a foreclosure order for Jericho State on November 7, 2007. The foreclosure sale occurred on December 3, 2007, with Jericho State being the successful bidder with a bid of \$9,000,000. Jericho State received a master's deed for the Property recorded on February 26, 2008.

Even though South Carolina courts have not weighed in on this issue, the weight of authority around the country is that there is no determinable loss until foreclosure. *See, e.g., First American Bank v. First American Transp. Title Ins. Co.*, 759 F.3d 427, 432 (5th Cir. 2014) ("a majority of courts from other jurisdictions have held that, in the absence of specific policy language, a title insurer's liability to a mortgagee should be measured using the foreclosure date");

Old Republic Nat'l Title Ins. Co. v. RM Kids, LLC, 788 S.E.2d 542 (Ga. Ct. App. 2016) (stating the majority rule is that liability to a mortgagee should be measured using the foreclosure date because the foreclosure date is “appropriate because the foreclosure is when the insured actually incurs a covered loss.”); *Associated Bank, N.A. v. Stewart Title Guaranty Company*, 2012 WL 3067895, at *5 (D. Minn. 2012) (“[T]he majority of courts considering the [date of valuation] issue have held that such loss cannot be measured until the note has been repaid and the security for the mortgage is shown to be inadequate ... The majority view comports with the nature of a title insurance policy.”); *Marble Bank*, 914 F. Supp. at 1252 (“Since a lender suffers loss only if the note is not repaid, the discovery of an insured-against lien does not trigger recognition of that loss. Further, even though the lender’s note is in default, an anticipated loss cannot be measured until completion of foreclosure because only then is there certainty the lender will not be paid in full. Consequently, it is clear that in the typical case the earliest a loss can be claimed on a lender’s policy is at the time of completion of foreclosure.”); *Hodas*, 696 A.2d at 1097 (“The presence of a title defect immediately results in a loss to the holder of a fee interest since resale value will always reflect the cost of removing the defect. In contrast, the holder of a loan policy incurs a loss only if the security for the loan proves inadequate to pay off the underlying insured debt due to the presence of undisclosed defects.”); *Blackhawk Prod. Credit Ass’n v. Chicago Title Ins. Co.*, 423 N.W.2d 521, 525 (Wis. 1988) (holding a mortgagee’s insured loss is sustained only if the “mortgagee’s debt is not repaid and the security for the mortgage proves inadequate,” so the loss must be measured as of that date). *Hodas* is particularly relevant because the South Carolina Supreme Court already followed *Hodas* in *Preservation Capital Consultants*. See *Preservation Capital Consultants*, 406 S.C. at 319, 751 S.E.2d at 261 (citing *Hodas*, 696 A.2d at 1097–98).

From their prior filings, it is anticipated that Lynx Jericho and Jericho State will argue that the date of loss is the date of the Policies, relying on *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 732 S.E.2d 626 (2012). Any such argument should be rejected. In *Whitlock*, an owner's policy case, the South Carolina Supreme Court rejected the widely adopted rule in *Overholtzer v. Northern Counties Title Insurance Co.*, 253 P.2d 116 (Cal. Dist. Ct. App. 1953). *Whitlock* held that loss under a one to four-family residential policy was measured as of the date of the policy, not the date of discovery of the title defect, because the relevant policy provision was ambiguous. The court found the term "actual loss" in the residential owner's policy (not a loan policy) to be ambiguous, stating "[w]here the insurance contract unambiguously identifies a date for measuring the diminution in value of the insured property or otherwise unambiguously provides for the method of valuation as a result of the title defect, such date or method is controlling." The residential owner's policy in *Whitlock* did not define actual loss and set forth no method of valuation; therefore, the court found the residential owner's policy to be ambiguous and construed it in the light most favorable to the insured.

Unlike the residential owner's policy in *Whitlock*, the REL Policy and the Jericho State Policy are loan policies that unambiguously provide a detailed method of calculating loss in Section 7:

7. DETERMINATION AND EXTENT OF LIABILITY.

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) The liability of the Company under this policy shall not exceed the least of:

(iii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

See **Exhibit C** (REL Policy); **Exhibit E** (Jericho State Policy). As confirmed above, the amount of the insured loss cannot be ascertained until an insured lender forecloses or acquires title after foreclosure.

After all, unlike the insured owner in *Whitlock*, who owned the subject property, Lynx Jericho was a mere lienholder and never held title to the Property or any portion thereof. See *Jaffe-Spindler Co. v. Genesco, Inc.*, 747 F.2d 253, 257 (4th Cir. 1984) (“Under South Carolina law a mortgagee is deemed to have only a lien on real property as opposed to actual title.”); S.C. Code Ann. § 29-3-10 (“No mortgagee shall be entitled to maintain any possessory action for the real estate mortgaged . . .”); see also *Glover v. U.S.*, 164 U.S. 294, 296 (1896) (construing section 29-3-10 as making the position of a mortgagee merely that of a creditor with security, and not that of a legal owner).

Accordingly, unlike the policy in *Whitlock*, the REL Policy and the Jericho State Policy unambiguously confirm the majority rule of determining the loss as of the foreclosure date applies. Summary judgment should be granted adjudicating that, as a matter of law, the date of loss for Lynx Jericho and Jericho State was when the foreclosure sale process was completed.

CONCLUSION

For these reasons, Chicago Titles asks that the Court grant summary judgment in its favor on the remaining causes of action asserted by Lynx Jericho and Jericho State and finding that the date of loss for Lynx Jericho and Jericho State was when the foreclosure sale process was completed.

Respectfully submitted,

s/ Demetri K. Koutrakos

Demetri K. Koutrakos, SC Bar No. 11318

Harry A. Dixon, SC Bar No. 103509

Callison Tighe & Robinson, LLC

1812 Lincoln Street, Suite #200

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Columbia, SC 29202-1390

Telephone: 803-404-6900

Email: jimkoutrakos@callisontighe.com

Email: harrydixon@callisontighe.com

***Attorneys for Defendant Chicago Title Insurance
Company***

January 23, 2024

EXHIBIT A

(Peachtree Deed)

580498

Prepared By and Return to:
Gwin Law Offices, LLC
2105-B Cromley Circle
Myrtle Beach, SC 29577
Telephone: 843-839-2239 Fax: 843-839-2244
File No.: 06-RE-388

FILED
Horry County S.C.
2006 JUL 25 PM 3:23
DALLEY V. SKIPPER
REGISTRAR OF DEEDS

STATE 58,500.00 COUNTY 24,750.00

EXEMPT YES (NO)

ASSESSOR 178-00-05-032 + 178-00-06-024 + 025

07/26/05

(Please do not write above this line - Reserved for Register of Deeds Office)

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

)
)
)

WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS, that RUTH LUDLAM MCCLAM (A/K/A RUTH L. MCCLAM), MLM I, LLC, PATRICIA ANN MCCLAM AND STEPHEN BOYD MCCLAM, in the State aforesaid, for and in consideration of the sum of TWENTY TWO MILLION FIVE HUNDRED THOUSAND AND 00/100 DOLLARS (\$22,500,000.00), unto us paid by PEACHTREE PROPERTIES OF NORTH MYRTLE BEACH, LLC, in the State aforesaid, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released and by these presents do grant, bargain, sell, and release unto the said Peachtree Properties of NORTH MYRTLE BEACH, LLC, its successors and assigns, forever, in fee simple, together with every contingent remainder and right of reversion, the following described property, to wit:

SEE ATTACHED EXHIBIT "A"

Tax Map #: 178-00-05-032
Property Address: Myrtle Beach, SC 29588
Grantee(s) Address: 408 Sea Mountain Hwy, North Myrtle Beach, SC 29582

THIS CONVEYANCE IS MADE SUBJECT TO easements and restrictions of record and otherwise affecting the property.

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

DEED
0128 0278

3/32-229

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said Peachtree Properties of NORTH MYRTLE BEACH, LLC, its successors and assigns, forever, in fee simple, together with every contingent remainder and right of reversion.

AND Grantors do hereby bind themselves and their heirs and assigns, to warrant and forever defend all and singular the said premises unto the said Peachtree Properties of NORTH MYRTLE BEACH, LLC, its successors and assigns, forever, in fee simple, together with every contingent remainder and right of reversion against the Grantors' heirs and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

THIS PORTION INTENTIONALLY LEFT BLANK

IN WITNESS WHEREOF our Hands and Seals this 6 day of July, 2006.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

J. Nina Haven
1st Witness

Ruth L. McClam (L.)
Ruth L. McClam

J. Blanchard
2nd Witness or Notary

STATE OF North Carolina)
COUNTY OF Wake)

PROBATE

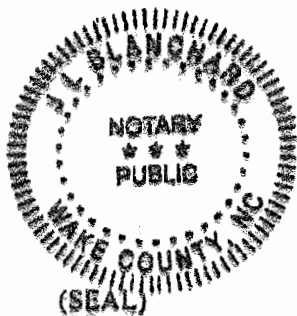
PERSONALLY appeared before me the undersigned witness and made oath that (s)he was present and saw the within Grantors sign, seal, and as act and deed, deliver the within Warranty Deed; that deponent with the other witness whose name is subscribed above, witnessed the execution thereof.

SWORN to before me this
7 day of July, 2006.

J. Blanchard

J. Blanchard
Notary Public for Wake Co., NC
My Commission Expires: 06-06-2008

J. Nina Haven
Witness



File # 06-RE-388

IN WITNESS WHEREOF our Hands and Seals this 6 day of July, 2006.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

J. Nisel Hansen
1st Witness

MLM I, LLC (L.)
MLM I, LLC

By: Therese J. McLean

J. Blanchard
2nd Witness or Notary

STATE OF NORTH CAROLINA)
COUNTY OF Wake)

PROBATE

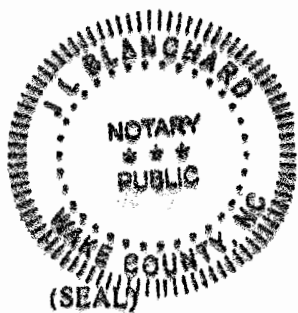
PERSONALLY appeared before me the undersigned witness and made oath that (s)he was present and saw the within Grantors sign, seal, and as act and deed, deliver the within Warranty Deed; that deponent with the other witness whose name is subscribed above, witnessed the execution thereof.

J. Blanchard

SWORN to before me this
6 day of July, 2006.

J. Blanchard
Notary Public for Wake Co
My Commission Expires: 06-08-2008

J. Nisel Hansen
1st Witness



File # 06-08-388

IN WITNESS WHEREOF our Hands and Seals this 6 day of July, 2006.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Richard Thompson
1st Witness

Patricia Ann McClam (L.)
Patricia Ann McClam

Lea J. Woods
2nd Witness or Notary

STATE OF Tennessee)
COUNTY OF Knox)

PROBATE

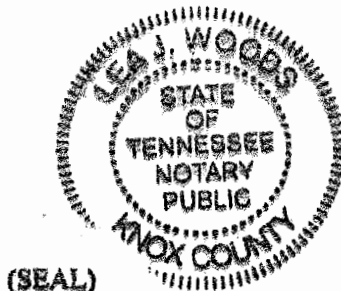
PERSONALLY appeared before me the undersigned witness and made oath that (s)he was present and saw the within Grantors sign, seal, and as act and deed, deliver the within Warranty Deed; that deponent with the other witness whose name is subscribed above, witnessed the execution thereof.

SWORN to before me this
6 day of July, 2006.

Lea J. Woods

Notary Public for Knox County Tennessee
My Commission Expires: June 5, 2010

Richard Thompson
1st Witness



(SEAL)

File # 04-RE-388

IN WITNESS WHEREOF our Hands and Seals this 6 day of July, 2006.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

[Signature]
1st Witness

[Signature] (L.)
Stephen Boyd McClam

[Signature]
2nd Witness or Notary

STATE OF Florida)
COUNTY OF Orange)

PROBATE

PERSONALLY appeared before me the undersigned witness and made oath that (s)he was present and saw the within Grantors sign, seal, and as act and deed, deliver the within Warranty Deed; that deponent with the other witness whose name is subscribed above, witnessed the execution thereof.

[Signature]

SWORN to before me this
6 day of July, 2006.

[Signature]
Notary Public for Florida
My Commission Expires: 7/20/2009

[Signature]
1st Witness

(SEAL)

File # 06-RE-388



FILED FROM OFFICE FILED 2024 JAN 23 5:03 PM Horry - COMMON PLEAS CASE#2019092605530

STATE OF SOUTH CAROLINA

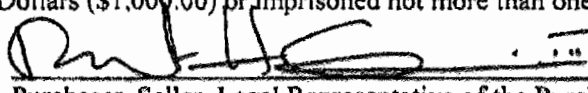
COUNTY OF HORRY

AFFIDAVIT

PERSONALLY appeared before me the undersigned, who, being duly sworn, deposes and says:

1. The property being transferred is located at Myrtle Beach, SC 29588, bearing Horry County Tax Map Number 178-00-05-032, was transferred by Ruth L. McClam, MLM I, LLC, Patricia Ann McClam and Stephen Boyd McClam to Peachtree Properties of North Myrtle Beach, LLC on July 24, 2006.
2. ☒ an arm's length real property transaction and the sales price paid or to be paid in money or money's worth was \$22,500,000.00*.

☐ NOT an arm's length real property transaction and the fair market value of the property is \$.
3. The above transaction is exempt, or partially exempt, from the recording fee as set forth in S.C. Code Ann. Section 12-24-10, *et seq.*, because the Deed is:
4. As required by Code § 12-24-70, I state that I am a responsible person who was connected with the transaction as: ATTORNEY FOR PURCHASER
5. I further understand that a person required to furnish this Affidavit who willfully furnishes a false or fraudulent Affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than One Thousand and no/100 Dollars (\$1,000.00) or imprisoned not more than one year, or both.



Purchaser, Seller, Legal Representative of the Purchaser or other Responsible Person Connected with this Transaction

SWORN to before me this
24th day of July, 2006.



Notary Public for South Carolina
My Commission Expires: 9/17/14

• The fee is based on the real property's value. Value means the realty's fair market value. In arm's length real property transactions, this value is the sales price to be paid in money or money's worth (e.g. stocks, personal property, other realty, forgiveness of debt, mortgages assumed or placed on the realty as a realty of the transaction). However, a deduction is allowed from this value for the amount of any lien or encumbrance existing on land, tenement, or realty before the transfer and remaining on it after the transfer.

A

EXHIBIT "A"

All that certain lot or parcel of land situate in the City of Myrtle Beach, County of Horry, State of South Carolina, and being more particularly described as follows:

PARCEL ONE

ALL AND SINGULAR those three (3) certain Lots in Socastee Township, Horry County, South Carolina, being shown on a Plat prepared for the Estate of John C. Spivey by J.F. Thomas, Surveyor, dated September 1, 1965, recorded November 16, 1965, in Plat Book 43 at Page 183, and designated thereon as Hursey Three Lots, to which Plat reference is made, being described as follows:

Beginning at a point on the inland Waterway the lands intersects with the Inland Waterway and Spivey Road, a right-of-way from which has been granted at a corner designated Concrete N; thence North: 78 degrees, 10 minutes West 225 feet to Concrete N; thence North 27 degrees 10 minutes East 250 feet to Pipe N; thence South 78 degrees 10 minutes East to Pipe N; thence South 27 degrees 10 minutes East 250 feet to the beginning corner.

Bounded on the North by lands of Ruth L. McClam; on the East by lands of Ruth L. McClam, on the South by the Northern margin of Intracoastal Waterway, and on the West by lands of Ruth L. McClam.

PARCEL TWO:

ALL AND SINGULAR, that lot of land in Socastee Township, Horry County, South Carolina, on the Northern side of the Inland Waterway and located near the Old Sweet Ditch, bounded and described as follows:

Commencing at an iron stake on the Northern bank of the Inland Waterway being a point where the Eastern bank of the Old Socastee Creek intersects the Inland Waterway, and running thence in a Northerly direction 21 degrees East 250 feet to an iron stake; thence Eastward 79 degrees East 100 feet to an iron stake; thence South 21 degrees East 250 feet to an iron stake on the Northern bank of the Inland Waterway; thence Westwardly along the Northern bank of the Inland Waterway 100 feet to the beginning corner.

Bounded on the North by other lands of Ruth L. McClam; on the East by other lands of Ruth L. McClam; on the South by the Inland Waterway; and on the west by other lands of Ruth L. McClam.

PARCEL THREE:

ALL AND SINGULAR, that certain tract or parcel of land in Socastee Township, Horry County, South Carolina, on hundred thirty-five (135) acres, more or less, having been platted and shown on a Plat prepared by J.F. Thomas, Surveyor, dated September 1, 1965. This 135 acres is situate North of the Intracoastal Waterway. The Plat is recorded in Plat Book 43, Page 183, in the Office of the Clerk of Court of Horry County, to which Plat reference is made.

The 135 acres is exclusive of the proposed highway area shown on the Plat above referenced to and is described as follows:

Beginning at Concrete N on the Southern margin of the proposed highway as shown on the referenced Plat (this road is known as the Peachtree Ferry Road); and running thence North approximately 26°5' East 33 feet to a point in the center of the road, the point being taken from the Highway Department survey; thence South 68°22' East 441 feet to point of intersection, as shown on the above Plat; thence South 62°45' East 984.3 feet to point of

intersection, as shown on the above Plat; thence South $75^{\circ}15'$ East 1028.6 feet to point of intersection, as shown on the Plat; thence North 33 feet to Concrete N on the Northern margin of the road above described; thence North $19^{\circ}5'$ East 473.5 feet to Pipe O; thence $53^{\circ}10'$ East 516 feet to Concrete N; thence South $13^{\circ}55'$ West 872.5 feet to Concrete N on the Northern margin of the road; thence South 33 feet to point in center of the road described above; thence South $75^{\circ}15'$ East 710 feet to point of intersection as shown on the Plat; thence South $85^{\circ}11'$ minutes East 340.5 feet to point of intersection in center of the road described above, as shown on the Plat; thence Southwest 33 feet to Concrete N on the Southern margin of the road described above; thence South $21^{\circ}45'$ West 1045.5 feet to Pipe O and Concrete N; thence North $78^{\circ}50'$ West 750 feet to Pipe O and Concrete N; thence South $20^{\circ}55'$ West 438.5 feet to Concrete N; thence North $78^{\circ}10'$ West 566 feet to Concrete N; thence North $27^{\circ}10'$ East to Pipe N; thence North $78^{\circ}10'$ West 225 feet to Pipe N; thence South $27^{\circ}10'$ West 250 feet to concrete N; thence North $78^{\circ}10'$ West 1284.5 feet to Concrete N; thence North 21° East 250 feet to Concrete N; thence North $78^{\circ}10'$ West 100 feet to Concrete N; thence South 21° West 250 feet to Concrete N; thence North $26^{\circ}25'$ West 145 feet along Socastee Creek, the Creek being the line; thence North 45° West 100 feet; thence North 57° West 100 feet; thence North $63^{\circ}10'$ West 100 feet; thence North $54^{\circ}45'$ West 130 feet; thence South $70^{\circ}25'$ West 185 feet; thence North $89^{\circ}20'$ West 200 feet; thence North $61^{\circ}45'$ West 94 feet; thence North $70^{\circ}20'$ West 100 feet; thence South $86^{\circ}50'$ West 80 feet to Gum 3MO; thence North $27^{\circ}40'$ East 383.5 feet to Gum OM; thence North $27^{\circ}20'$ East 261 Feet to Gum OM; thence North $26^{\circ}05'$ East 1119.5 feet to the beginning corner.

Bounded on the North by the center of the proposed, highway as shown on the Plat in part, and in part by the lands, now or formerly, of Brice J. Ward; on the East by lands, now or formerly, of Roy Collins, in part, and in part by lands, now or formerly, of Virginia Zeigler; on the South by lands, now or formerly, of J.M. Cooper, in part, and lands, now or formerly, of Virginia Zeigler, in part, and by the Northern margin of the Intracoastal Waterway, in part, Lucy S. Kolb, in part, and Socastee Creek, in part; and on the West by land, now or formerly, of Maggie L. Roberts.

LESS AND EXCEPT:

ALL AND SINGULAR that certain piece, parcel or lot of land situate, lying, and being in Socastee Township, County and State aforesaid, designated as Pump Site and containing 215 square feet and shown on a plat of Pump Site For Grand Strand Water & Sewer Authority owned by Ruth L. McClam; made by Engineering and Technical Services, Inc., dated November 1, 1990; a copy of which is recorded in Plat Book 112, Page 65, public records of Horry County and which is by way of reference made a part and parcel of this description.

This property was heretofore conveyed by Ruth Ludlum McClam, et al to the Grand Strand Water and Sewer Authority by Deed dated 23 November, 1990; and recorded in Deed Book 1438, Page 163, in the office of the Clerk of Court for Horry County, South Carolina.

SEE ATTACHED EXHIBIT "A" FOR DERIVATION

DERIVATION

The respective interests of the Grantors were acquired as follows:

Ruth Ludlum McClam

1. A portion of the property was conveyed to Ruth L. McClam by deed of T. B. Ludlum dated October 21 1966 and recorded on January 23 1967 in the Office of the Clerk of Court for Horry County in Deed Book 360 at Page 199.
2. A portion of the property was conveyed to Ruth L. McClam by deed of Larry W. Paul dated February 15, 1982 and recorded on February 18, 1982 and recorded on February 18, 1982 in the Office of the Clerk of Court for Horry County in Deed Book 737 at Page 818.
3. The remaining portion of the property was devised to Ruth Ludlam McClam by Item VIII of the Last Will and Testament of John C. Spivey, Deceased, and conveyed by deed of Lucy S. Kolb Executrix, T. B. Ludlum, and C. A. Spivey as Executors of the Last Will and Testament of J. C. Spivey, dated November 13, 1965 and recorded on November 16, 1965 in the office of the Clerk of Court for Horry County n Deed Book 336 at Page 482.
4. The interest of Ruth Ludlam McClam was mistakenly conveyed by her to McClam Family Limited Partnership on November 23, 1999 and recorded in Deed Book 2214 at Page 1410 in the Office of the Register of Mesne Conveyances for Horry County, South Carolina, and reconveyed to her by Corrective Deed from the McClam Family Limited Partnership on December 4, 2000 and recorded in Deed Book 2324 at Page 1205 in the Office of the Register of Mesne Conveyances for Horry County, South Carolina.

Patricia Ann McClam

The interests of Patricia Ann McClam were acquired by various deeds from Ruth Ludlum McClam as set forth hereinbelow:

<u>Interest</u>	<u>Date</u>	<u>Recording Date</u>	<u>Deed Book</u>	<u>Page No.:</u>
1/49	March 19, 2004	April 2, 2004	2717	290
1/49	May 23, 2003	July 3, 2003	2614	1051
1/49	April 19, 2002	June 14, 2002	2490	392
1/49	April 9, 2001	April 27, 2001	2366	241
1/49	December 14, 2000	December 15, 2000	2326	1012
1/49	June 8, 1998	August 21, 1998	2065	999
1//49	June 23, 1997	November 19, 1997	1992	21
<u>Interest</u>	<u>Date</u>	<u>Recording Date</u>	<u>Deed Book</u>	<u>Page No.:</u>

1/49	July 30, 1966	August 22, 1996	1885 (1896)	328 (657)
1/49	July 25, 2995		1817	1431
1/49	July 21, 1994	July 25, 1994	1743	825
1/70	March 2, 1993	March 4, 1993	1618	345
1/70	February 28, 1992	March 3, 1992	1530	895
1/70	February 27, 1992	March 4, 1991	1454	430
1/70	February 2, 1991	February 5, 1990	1368	670
1/70	November 10, 1989	November 15, 1989	1352	565

Stephen Boyd McClain

The interests of Stephen Boyd McClam were acquired by various deeds from Ruth Ludlum McClam as set forth hereinbelow:

<u>Interest</u>	<u>Date</u>	<u>Recording Date</u>	<u>Deed Book</u>	<u>Page No.:</u>
1/49	March 19 2004	April 2, 2004	2717	276
1/49	May 23, 2003	July 3, 2003	2614	1058
1/49	April 19, 2002	June 14, 2002	2490	400
1/49	April 9, 2001	April 27, 2001	2366	234
1/49	December 14, 200	December 15, 2000	2326	1006
1/49	June 8, 1998	September 4, 1998	2358	1023
1/49	June 23, 1977	November 19, 1997	1992	27
1/49	July 30, 1996	August 22, 1996	1885 (1896)	322 (651)
1/49	July 25, 1995		1817	1425
1/49	July 21, 1994	July 25, 1994	1743	815
1/70	March 2, 1993	March 4, 1993	1618	350
1/70	February 28, 1992	March 3, 1992	1530	885
1/70	February 27, 1991	March 4, 1991	1454	440
1/70	February 2, 1990	February 5, 1990	1368	665
1/70	November 10, 1989	November 15, 1908	1352	

MLM I, LLC

The interests of the MLM 1, LLC were acquired by a deed from Marvin Louis McClam dated 3/32, and recorded July 25th, 2006 in Deed Book 774 at Page 3132, records of Horry County, South Carolina.

EXHIBIT B

(REL Mortgage)

580498

FILED
Horry County, S.C.
2006 JUL 25 PM 3:23
DALLAY V. SKIPPER
REGISTRAR OF DEEDS

ELECTRONICALLY FILED - 2024 Jan 23 5:03 PM - HORRY - COMMON PLEAS - CASE#2013CP2605530

Insert recording information above

Loan No. P0095

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

COMMERCIAL MORTGAGE
OF REAL PROPERTY
AND SECURITY AGREEMENT

THIS COMMERCIAL MORTGAGE OF REAL PROPERTY AND SECURITY AGREEMENT, is dated as of July 5, 2006, and is made by Peachtree Properties of North Myrtle Beach, LLC, a South Carolina limited liability company ("Borrower"), whose mailing address is 408 Sea Mountain Highway, N Myrtle Beach, SC 29582 in favor of R.E. LOANS LLC, a California limited liability company ("Lender"), whose mailing address is c/o Bar K, Inc., Attention Barney Ng, 201 Lafayette Circle, 2nd Floor, Lafayette, California 94549.

WITNESSETH:

FOR GOOD AND VALUABLE CONSIDERATION and in order to secure the payment of a promissory note from Borrower to Lender of even date herewith in the principal amount of \$18,520,000.00 (the "Note") plus interest thereon and costs of collection, including attorneys' fees and to secure in accordance with Section 29-3-50, as amended, of the South Carolina Code of Laws, all existing indebtedness to Lender evidenced by the Note and all modifications, renewals and extensions thereof; all future advances that may be made to Borrower in accordance with the provisions herein or to be evidenced by other promissory notes and all modifications, renewals and extensions thereof; all other sums or indebtedness of Borrower to Lender accruing pursuant to the terms and conditions of this Mortgage provided, the maximum amount of existing indebtedness and future advances outstanding at any one time secured hereby shall not exceed twice the face amount of the Note, plus interest thereon, all charges and expenses of collection incurred by the Lender, including court costs and reasonable attorneys fees; and to charge the properties, interests and rights hereinafter described with the performance and observance of the terms of this Mortgage and the Note, Borrower has granted, bargained, sold and released to Lender and the heirs, successors and assigns of Lender, and by this Mortgage does grant, bargain, sell, and release to Lender and the heirs, successors and assigns of Lender, the real property described in Exhibit A attached hereto and made a part hereof, which together with the property described below is hereinafter referred to

TO THE EXTENT, IF ANY, PROVIDED IN THE NOTE, INTEREST OR DISCOUNT WILL BE DEFERRED, ACCRUED, OR CAPITALIZED.

THIS MORTGAGE AND SECURITY AGREEMENT COVERS FIXTURES AND CONSTITUTES A FIXTURE FINANCING STATEMENT. PROCEEDS OF THE NOTE SECURED HEREBY SHALL BE USED FOR LAND ACQUISITION OR REFINANCING AND CONSTRUCTION OF IMPROVEMENTS ON THE LAND.

MORTGAGE
4629 0255

ORIGINAL
4629-255
RB

as the "Property" (Note: all references, representations, warranties and covenants contained herein to the Property shall be deemed made by and applicable to the record owner of such portion of the Property as indicated on Exhibit A).

TOGETHER WITH:

(1) all and singular rights, members, privileges, easements, hereditaments and appurtenances belonging or in any way incident or appertaining to the above-described real property; all buildings and improvements now or hereafter situated thereon; and all fixtures now or hereafter attached thereto;

(2) All fixtures, fittings, furnishings, appliances, apparatus, equipment, and machinery; all other fixtures and personal property of whatever kind and nature at present contained in or hereafter placed in any building standing on the above-described real property; and all renewals or replacements thereof or articles in substitution thereof; and all proceeds and profits thereof and all of the estate, right, title and interest of the Borrower in and to all property of any nature whatsoever, now or hereafter situated on the above - described real property and improvements or intended to be used in connection with the operation thereof;

(3) All rents, incomes, profits, revenues, royalties, bonuses, rights, accounts, contract rights, instruments, chattel paper, cash, rights to withdraw cash, general intangibles and benefits under any and all leases or tenancies now existing or hereafter created on the above-described real property and improvements or any part thereof with the right to receive and apply the same to said indebtedness, which Lender may demand, sue for and recover such payments but shall not be required to do so; and

(4) A security interest in (i) all property and fixtures now or hereafter acquired and affixed to or located on the above-described real property which, to the fullest extent permitted by law shall be deemed fixtures and a part of said real property, (ii) all articles of personal property now or hereafter acquired, including without limitation all fixtures, inventory, equipment, appliances and machinery, and all materials, now or hereafter located on or related to the above-described real property owned by Borrower; (iii) all sanitary sewer tap certificates and water tap certificates and all other contract rights of Borrower concerning the provision of water, sanitary sewer, storm drainage and other utility services to the Property; (iv) all personal property, accounts, contract rights, instruments, chattel paper, cash, rights to withdraw cash, general intangibles, actions and rights in action now or hereafter acquired pertaining to the above-described real property and improvements, including all rights to insurance proceeds; and (v) all proceeds, products, replacements, additions, substitutions, renewals and accessions of any of the foregoing. Borrower (Debtor) hereby grants to Lender (Secured Party) a security interest in all fixtures, rights in action and personal property described herein. This Mortgage is a self-operative security agreement with respect to such property, but Borrower agrees to execute and deliver on demand such other security agreements, financing statements and other instruments as Lender may reasonably request in order to perfect its security interest or to impose the lien hereof more specifically upon any of such property. on demand, Borrower will promptly pay all costs and expenses of filing statements, continuation statements, partial releases, and termination statements deemed necessary or appropriate by Lender to establish and maintain the validity and priority of the security interest of Lender, or any modification thereof, and all costs and expenses of any searches reasonably required by Lender. Lender may exercise any or all of the remedies of a secured party available to it under the Uniform Commercial Code (South Carolina) including the right to pursue any deficiency judgments. Ten (10) days' notice by Lender to Borrower shall be deemed to be reasonable notice under any provision of the Uniform Commercial Code (South Carolina) requiring such notice; provided, however, that Lender may at its option dispose of the collateral in accordance with Lender's rights and remedies in respect to the real property pursuant to the provisions of

this Mortgage and Security Agreement, in lieu of proceeding under the Uniform Commercial Code (South Carolina).

As to items of property described herein which are goods that are or are to become fixtures related to the real estate described herein, it is intended that, as to those goods, this Mortgage and Security Agreement shall be effective as a financing statement filed as a fixture filing from the date of its filing for record in the real estate records of the county in which the land is located. Information concerning the security interest created by this instrument may be obtained from the Lender, as Secured Party, or the Borrower, as Debtor, at the addresses first shown above.

TO HAVE AND TO HOLD all and singular the Property unto Lender and the successors and assigns of Lender forever.

PROVIDED ALWAYS, nevertheless, and it is the true intent and meaning of Borrower and Lender, that if Borrower pays or causes to be paid to Lender the debt secured hereby, the estate hereby granted shall cease, determined and be utterly null and void; otherwise said estate shall remain in full force and effect.

IT IS AGREED that Borrower shall be entitled to hold and enjoy the Property until an Event of Default as herein defined has occurred.

ARTICLE I

AGREEMENTS AND COVENANTS OF BORROWER

1.1 Warranty of Title. Borrower covenants and warrants that Borrower is lawfully seized of the Property in fee simple absolute, that Borrower has good right and is lawfully authorized to sell, convey or encumber the same, and that the Property is free and clear of all encumbrances except as shown in the title insurance policy accepted by Lender. Borrower further covenants to warrant and forever defend all and singular the Property unto Lender and all persons whomsoever lawfully claiming the same or any part thereof.

1.2 Transfer of Property. Borrower shall not transfer the Property without the prior written consent of Lender, which consent may be withheld in lender's sole discretion. Consent to one transfer shall not be deemed to be a waiver of the right to require consent to other transfers. Except for a transfer resulting in a partial reconveyance of this Mortgage if the Note, any Loan Agreement between Borrower and Lender, or this Mortgage has a partial release clause, if Borrower transfers the Property or any portion thereof, or any interest therein, without first obtaining the written consent of Lender, all indebtedness secured by this Mortgage shall, at the option of Lender and without notice or demand, become immediately due and payable. As used herein, transfer includes, but is not limited to, the sale, option to sell, contract to sell, convey, encumber, mortgage (including encumber by a mortgage), pledge, hypothecate, or lease with option to purchase of the Property, or any portion thereof, or any interest therein, whether voluntary, involuntary, by operation of law, or otherwise, or the transfer of more than a 50% interest of Borrower if Borrower is anything other than a natural person.

1.3 Payment of Note. The Borrower shall promptly and punctually pay all principal and interest, prepayment premiums, and all other sums to become due under the Note, together with any modification or renewals thereof, according to the true intent and meaning thereof.

1.4 Performance of Loan Agreement. Borrower shall perform, observe and comply with all provisions of that certain Loan Agreement entered into by and between Borrower and Lender of event date herewith (the "Loan Agreement").

1.5 Maintenance Repair and Inspection. The Borrower covenants to keep the Property in good operating order, repair and condition and shall not commit or permit any waste thereof. Borrower shall make all repairs, replacements, renewals, additions and improvements and shall complete and restore promptly and in good workmanlike manner any improvements that may be constructed, damaged, or destroyed thereon, and pay when due all costs incurred thereof. Borrower shall not remove any of the Property, demolish any of the Property, or materially alter such Property without the prior written consent of the Lender. Borrower agrees to permit and shall permit Lender or its agents the opportunity to inspect the Property, including the interior of any structures, at any reasonable time.

1.6 Expenses. Borrower agrees to pay or reimburse Lender for all costs, charges and expenses, including reasonable attorneys fees and disbursements, and costs incurred or paid by Lender in any action which is threatened, pending or completed or proceeding or dispute which affects or might affect this Mortgage, the Note, or the Property or any part thereof. The amounts so incurred or paid by Lender, together with interest thereon at the Event of Default Rate as hereinafter defined from the date incurred until paid by Borrower, shall be added to the indebtedness and secured by the lien of this Mortgage.

1.7 Compliance with Laws. The Borrower shall comply with all laws, ordinances, regulations, covenants, conditions and restrictions affecting the Property or the operation thereof, and shall pay all fees or charges of any kind in connection therewith.

1.8 Zoning and Environmental Laws.

(a) Borrower covenants and warrants that all applicable zoning laws, ordinances and regulations affecting the Property permit the use and occupancy of the Property and further covenants and warrants to comply with all such laws, ordinances and regulations, including, but not limited to, all environmental and ecological laws, ordinances and regulations affecting the Property or the use thereof. Without limiting the generality of the foregoing, Borrower warrants and represents to Lender that to the best of Borrower's knowledge: (a) the Property described herein is now and at all times hereafter will continue to be in full compliance with all federal, state and local environmental laws and regulations, including, but not limited to, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), Public Law No. 96-510, 94 Stat. 2767, 42 USC 9601 *et seq.* and the Superfund Amendments and Reauthorization Act of 1986 (SARA), Public Law No. 99-499, 100 Stat. 1613, and any amendments thereto, and (b)(i) as of the date hereof there are no hazardous materials, substances, wastes or other environmentally regulated substances (including without limitation, any materials containing asbestos) located on, in or under the Property or used in connection therewith, or (ii) Borrower has fully disclosed to Lender in writing the existence, extent and nature of any such hazardous materials, substances, wastes or other environmentally regulated substances, which Borrower is legally authorized and empowered to maintain on, in or under the Property or use in connection therewith, and Borrower has obtained and will maintain all licenses, permits and approvals required with respect thereto, and is in full compliance with all of the terms, conditions and requirements of such licenses, permits and approvals. Borrower further warrants and represents that it will promptly notify Lender of any change in the nature or extent of any hazardous materials, substances or wastes maintained on, in or under the Property or used in connection therewith, and will transmit to Lender copies of any citations, orders, notices or other material governmental or other communication received with respect to any other hazardous materials, substances, wastes or other environmentally regulated substances affecting the Property.

(b) Borrower shall indemnify and hold Lender harmless from and against any and all damages, penalties, fines, claims, liens, suits, liabilities, costs (including clean-up costs), judgments and expenses (including attorneys' consultants' or experts' fees and expenses) of every kind and nature suffered by or asserted against Lender as a direct or indirect result of any warranty or representation made by Borrower in the preceding paragraph being false or untrue in any material respect or any requirement under any law, regulation or ordinance, local, state or federal, which requires the elimination or removal of any hazardous materials, substances, wastes or other environmentally regulated substances by Lender, Borrower or any transferee of Borrower or Lender.

(c) Borrower's obligations hereunder shall not be limited to any extent by the term of the Note secured hereby, and, as to any act or occurrence prior to payment in full and satisfaction of said Note which gives rise to liability hereunder, shall continue, survive and remain in full force and effect notwithstanding payment in full and satisfaction of said Note and this Mortgage or foreclosure under this Mortgage, or delivery of a deed in lieu of foreclosure.

1. Insurance. (a) Borrower agrees to keep all improvements and fixtures which are now or hereafter part of the Property and which are subject to possible casualty insured by such company or companies as Lender may reasonably approve for the full insurable value thereof, including replacement cost endorsement, against all risks including, if coverage is available, flood and earthquake. Such insurance will be payable to Lender as the interest of Lender may appear pursuant to the standard form of mortgagee clause or such other form of mortgagee clause as may be required in South Carolina and will not be cancelable by either the insurer or the insured without at least thirty (30) days prior written notice to Lender. Borrower will keep the Property continuously insured as herein required and will deliver to Lender the original of each policy of insurance required hereby. Borrower will pay each premium coming due on any such policy of insurance and will deliver to Lender upon demand by Lender proof of such payment at least thirty (30) days prior to the date such premium would become overdue or delinquent. Upon the expiration or termination of any such policy of insurance, Borrower will furnish to Lender at least thirty (30) days prior to such expiration or termination the original of a renewal or replacement policy of insurance meeting the requirements hereof. If Borrower fails to insure the Property as herein required, Lender may, but shall not be obligated to, after giving ten (10) days written notice to Borrower so insure the Property in the name of Borrower or in the name of Lender or both in such amounts as Lender may deem necessary to protect its lien, and the premiums for any such insurance obtained by Lender shall be the obligation of Borrower. Upon foreclosure of this Mortgage, all right, title and interest of Borrower in and to any policy of insurance upon the Property which is in the custody of the Lender, including the right to unearned premiums, shall vest in the purchaser of the Property at foreclosure, and Borrower hereby appoints Lender as the attorney in fact of Borrower to assign all right, title and interest of Borrower in and to any such policy of insurance to such purchaser. This appointment is coupled with an interest and shall be irrevocable.

(b) In the event the Property is entirely destroyed or is partially destroyed to the extent that restoration will in the opinion of Lender cost in excess of One Hundred Thousand (\$100,000.00) Dollars, or in the event restoration costs will not exceed said amount but the conditions of the next sentence are not satisfied, all insurance proceeds shall, at the option of Lender, be applied to the Note (first to expenses, then interest, and then principal) and the Note and all other amounts secured hereby shall, at the option of Lender, become immediately due and payable. Notwithstanding any provisions of this Section to the contrary, (i) if the Property is only partially destroyed to the extent that in the opinion of Lender the Property can be restored for a cost not to exceed One Hundred Thousand (\$100,000.00) Dollars; (ii) if in the opinion of Lender the Property as restored will produce sufficient revenue to repay the Note; (iii) if rental insurance or business interruption insurance is available in amounts sufficient to pay all payments due on the Note during restoration, or if Borrower makes some other provision satisfactory to Lender for

making all payments due on the Note during restoration; (iv) if all tenants agree in writing to remain on the Property under their leases and, if applicable, any purchasers of the Property or portions thereof agree in writing that their purchase contracts shall remain in effect; (v) if the Lender receives evidence satisfactory to it and its counsel that the Property as restored will comply with all local zoning ordinances and building restrictions; and (vi) if the Borrower covenants to make the necessary repairs and restoration and provides all additional funds necessary therefor, the Lender will make the insurance proceeds (less expenses incurred in collecting the same) available to the Borrower for the purpose of such repair and restoration, disbursement of proceeds to be in accordance with Lender's standard disbursement procedures. If Lender elects to restore the improvements, any balance of such monies after restoration shall, at the option of Lender, either be applied toward the reduction of indebtedness and other sums secured hereby or be paid to Borrower. Lender shall not be responsible for any failure to collect any insurance proceeds due under the terms of any policy regardless of the cause of such failure.

1.10 Taxes and Assessments. Borrower agrees to pay all taxes, assessments and other charges which constitute or are secured by a lien upon the Property and will deliver to Lender proof of payment of the same not less than ten (10) days prior to the date the same become delinquent; provided, however, that Borrower shall be entitled by appropriate proceedings to contest the amount or validity of such tax, assessment or charge so long as the collection of the same by foreclosure of the lien upon the Property is stayed during the pendency of such proceedings and Borrower deposits with the authority to which such tax, assessment or charge is payable or with Lender appropriate security for payment of the same, together with any applicable interest and penalties, should the same be determined due and owing.

1.11 Expenditures by Lender. If Borrower fails to make payment for restoration or repair of the Property, for insurance premiums or for taxes, assessments or other charges as required in this Mortgage, Lender may, but shall not be obligated to, pay for the same, and any such payment by Lender will be secured by this Mortgage and have the same rank and priority as the principal debt secured hereby and bear interest from the date of payment at the Event of Default Rate, as defined. Borrower shall pay to Lender in cash on demand an amount equal to any payment made by Lender pursuant to this paragraph plus interest thereon as herein provided.

1.12 Condemnation. In the event that by, or pursuant to, proper authority there is taken or condemned the entire Property or any part thereof, under power of eminent domain exercised by any actual or quasi governmental authority or public utility, the Borrower hereby assigns to the Lender any and all awards that may be given, made or due the Borrower in any proceedings in connection therewith, and the amounts of such awards shall be applied by the Lender to the reduction of the indebtedness secured hereby, and the Borrower agrees to execute any and all such further instruments of assignment of any and all such condemnation awards as may be required by the Lender to carry out the purposes of this Section. The Borrower shall give written notice of such condemnation proceeding within ten (10) days of receipt of any service or process in connection therewith. In any condemnation proceedings against the Property, the Lender hereby reserves, and the Borrower hereby acknowledges, the Lender's right to institute or intervene in any such condemnation proceedings to assert said interest. In the event the entire Property is taken or so much thereof that restoration will in the opinion of Lender cost in excess of One Hundred Thousand (\$100,000.00) Dollars, or in the event restoration costs will not exceed said amount but the conditions of the next sentence are not satisfied, all condemnation proceeds shall, at the option of Lender, be applied to the Note (first to expenses, then interest, and then principal) and the Note and all other amounts secured hereby shall, at the option of Lender, become immediately due and payable. Notwithstanding any provisions of this Section to the contrary, (i) if the entire Property is not taken and in the opinion of Lender the Property can be restored for a cost not to exceed One Hundred Thousand (\$100,000.00) Dollars; (ii) if in the opinion of Lender the Property as restored will produce sufficient revenue to repay the Note; (iii) if provision satisfactory to Lender is made for making all payments due on the Note during restoration; (iv)

if any purchasers of the Property or portions thereof agree in writing that their purchase contracts shall remain in effect; (v) if the Lender receives evidence satisfactory to it and its counsel that the Property as restored will comply with all local zoning ordinances and building restrictions; and (vi) if the Borrower covenants to make the necessary repairs and restoration and provides all additional funds necessary therefor, the Lender will make said award (less expenses incurred in collecting the same) available to the Borrower for the purpose of such repair and restoration, disbursement of proceeds to be in accordance with Lender's standard disbursement procedures. Any excess of the proceeds of the award over the cost of repair and restoration shall be applied to reduce the principal amount of the Note and accrued interest thereon.

1.13 Escrow. Lender may, in its sole discretion, require Borrower to deposit with Lender, in addition to making regular payments of principal and/or interest, an amount sufficient to enable Lender to pay when due all insurance premiums and real property taxes, which deposits shall be made in installments satisfactory to Lender. Such deposits shall not be, nor be deemed to be, trust funds, but may be commingled with the general funds of Lender. No interest shall be payable in respect thereof. Upon demand by Lender, Borrower shall deliver to Lender such additional monies as are necessary to enable Lender to pay such premiums or taxes when due. In the event of a default under any of the terms, covenants and conditions in the Note, this Mortgage or any other instrument securing the Note to be kept, performed or observed by Borrower, Lender may apply to the reduction of the sums secured hereby, in such manner as Lender shall determine, any amount under this paragraph refining to Borrower's credit and any return premium received from cancellation of any insurance policy by Lender upon foreclosure of this Mortgage.

1.14 Use of Property. Borrower shall develop the Property pursuant to the terms and conditions of the planned development approved by Horry County, as amended, which use or uses, shall not change without the prior written consent of Lender.

ARTICLE II

DEFAULT AND REMEDIES

2.1 Event of Default. The term Event of Default, wherever used in this Mortgage, shall mean any one or more of the following events:

- (a) Failure to pay the Note in full on its maturity date.
- (b) Failure to pay any other payment due on the Note, which failure shall continue for ten (10) days after written notice provided in accordance with the Loan Agreement.
- (c) Failure of the Borrower to fulfill any of the obligations contained in the Note, this Mortgage, any Loan Agreement, or any other agreement between the parties.

2.2 Acceleration of Maturity. If an Event of Default shall have occurred, Lender may declare the outstanding principal amount of the Note and the interest accrued thereon, and all other sums secured hereby, to be due and payable immediately, and upon such declaration such principal and interest and other sums shall immediately become and be due and payable without demand or notice.

2.3 Lender's Power of Enforcement. If an Event of Default shall have occurred, Lender may, either with or without entry or taking possession as hereinabove provided or otherwise, proceed by suit or suits at law or in equity or by any other appropriate proceeding or remedy: (a) to enforce payment of the

Note or the performance of any term hereof or any other right; (b) to foreclose this Mortgage and to sell, as an entirety or in separate lots or parcels, the Property, under the judgment or decree of a court or courts of competent jurisdiction; and (c) to pursue any other remedy available to it. Lender shall take action either by such proceedings or by the exercise of its powers with respect to entry or taking possession, or both, as Lender may determine.

2.4 Lender's Right to Enter and Take Possession, Operate and Apply Income.

(a) If an Event of Default shall have occurred, Borrower, upon demand of Lender, shall forthwith surrender to Lender the actual possession, and if and to the extent permitted by law, Lender itself, or by such officers or agents as it may appoint, may enter and take possession of all the Property, and may exclude Borrower and its agents and employees wholly therefrom, and may have joint access with Borrower to the books, papers and accounts of Borrower.

(b) If Borrower shall for any reason fail to surrender or deliver the Property or any part thereof after Lender's demand, Lender may obtain a judgment or decree conferring on Lender the right to immediate possession or requiring Borrower to deliver immediate possession of all or part of the Property to Lender along with all books, papers and accounts of Borrower, to the entry of which judgment or decree Borrower hereby specifically consents.

(c) Borrower shall pay to Lender, upon demand, all reasonable costs and expenses of obtaining such judgment or decree and reasonable compensation to Lender, its attorneys and agents, and all such costs, expenses and compensation shall, until paid, be secured by the lien of this Mortgage.

(d) Upon every such entering upon or taking of possession, Lender may hold, store, use, operate, manage and control the Property and conduct the business thereof, and, from time to time:

- (i) make all necessary and proper maintenance, repairs, renewals, replacements, additions, betterments and improvements thereto and thereon and purchase or otherwise acquire additional fixtures, personally and other property;
- (ii) insure or keep the Property insured;
- (iii) manage and operate the Property and exercise all the rights and powers of Borrower in its name or otherwise, with respect to the same;
- (iv) enter into agreements with others to exercise the powers herein granted Lender;

all as Lender in its reasonable judgment from time to time may determine; and Lender may collect and receive all the income, revenues, rents, issues and profits of the same, including those past due as well as those accruing thereafter; and shall apply the monies so received by Lender in such priority as Lender may determine to (1) the reasonable compensation, expenses and disbursements of the agents and attorneys; (2) the cost of insurance, taxes, assessments and other proper charges upon the Property or any part thereof; (3) the deposits for taxes and assessments and insurance premiums due; and (4) the payment of accrued interest on the Note.

2.5 Leases. Lender, at its option, is authorized to foreclose this Mortgage subject to the rights of any tenants of the Property, and the failure to make any such tenants parties defendant to any such foreclosure proceedings and to foreclose their rights will not be, nor be asserted by Borrower to be, a

defense to any proceedings instituted by Lender to collect the sums secured hereby or to collect any deficiency remaining unpaid after the foreclosure sale of the Property.

2.6 Purchase by Lender. Upon any such foreclosure sale, Lender may bid for and purchase the Property and, upon compliance with the terms of sale, may hold, retain and possess and dispose of such property in its own absolute right without further accountability.

2.7 Application of Indebtedness Toward Purchase Price. In the event Lender purchases any portion of the Property at any foreclosure sale, Lender may, to the extent permitted by law, apply toward payment of the foreclosure purchase price, in lieu of cash, any portion of or all sums due to Lender under the Note, this Mortgage or any other instrument securing the Note.

2.8 Waiver of Stay, Extension, Redemption and Appraisal Laws. Borrower agrees to the full extent permitted by law that in case of a default on its part hereunder, neither Borrower nor anyone claiming through or under it shall or will set up, claim or seek to take advantage of any stay, extension or redemption laws now or hereafter in force, in order to prevent or hinder the enforcement or foreclosure of this Mortgage, or the absolute sale of the Property or the final and absolute putting into possession thereof, immediately after such sale, of the purchasers thereat, and Borrower, for itself and all who may at any time claim through or under it, hereby waives, to the full extent that it may lawfully so do, the benefit of all such laws, and any and all right to have the assets comprising the Property marshalled upon any foreclosure of the lien hereof and agrees that Lender or any court having jurisdiction to foreclose such lien may sell the Property in part or as an entirety. In the event this Mortgage is foreclosed, Borrower also waives, to the extent such waiver may be enforceable at the time of foreclosure, any right to have the Property appraised after foreclosure for the purpose of reducing a deficiency judgment.

2.9 Receiver. If an Event of Default shall have occurred, Lender, to the extent permitted by law and without regard to the value or occupancy of the security, shall be entitled as a matter of right if it so elects to the appointment of a receiver to enter upon and take possession of the Property and to collect all rents, revenues, issues, income, products and profits thereof and apply the same as the court may direct. The receiver shall have all rights and powers permitted under the laws of the state where the Land is located and such other powers as the court making such appointment shall confer. The expenses, including receiver's fees, attorney's fees, costs and agent's compensation, incurred pursuant to the powers herein contained shall be secured by this Mortgage. The right to enter and take possession of and to manage and operate the Property, and to collect the rents, issues and profits thereof, whether by a receiver or otherwise, shall be cumulative to any other right or remedy hereunder or afforded by law, and may be exercised concurrently therewith or independently thereof. Lender shall be liable to account only for such rents, issues and profits actually received by Lender, whether received pursuant to this paragraph or paragraph 2.4. Notwithstanding the appointment of any receiver or other custodian, Lender shall be entitled as secured party hereunder to the possession and control of any cash, deposits, or instruments at the time held by, or payable or deliverable under the terms of this Mortgage to, Lender.

2.10 Suits to Protect the Property. Lender shall have the power and authority to institute and maintain any suits and proceedings as Lender may deem advisable (a) to prevent any impairment of the Property by any acts which may be unlawful or any violation of this Mortgage, (b) to preserve or protect its interest in the Property, and (c) to restrain the enforcement of or compliance with any legislation or other governmental enactment, rule or order that may be unconstitutional or otherwise invalid, if the enforcement of or compliance with such enactment, rule or order might impair the security hereunder or be prejudicial to Lender's interest.

2.11 Proofs of Claim. In the case of any receivership, insolvency, bankruptcy, reorganization, arrangement, adjustment, composition or other judicial proceedings affecting Borrower, any person, partnership or corporation guaranteeing or endorsing any of Borrower's obligations, its creditors or its property, Lender, to the extent permitted by law, shall be entitled to file such proofs of claim and other documents as may be necessary or advisable in order to have its claims allowed in such proceedings for the entire amount due and payable by Borrower under the Note, this Mortgage and any other instrument securing the Note, at the date of the institution of such proceedings, and for any additional amounts which may become due and payable by Borrower after such date.

2.12 Borrower to Pay the Note on Any Event of Default in Payment; Application of Monies by Lender.

(a) If default shall be made in the payment of any amount due under the Note, this Mortgage or any other instrument securing the Note, then, upon Lender's demand, Borrower will pay to Lender the whole amount due and payable under the Note and all other sums secured hereby; and if Borrower shall fail to pay the same forthwith upon such demand, Lender shall be entitled to sue for and to recover judgment for the whole amount so due and unpaid together with costs and expenses including the reasonable compensation, expenses and disbursements of Lender's agents and attorneys incurred in connection with such suit and any appeal in connection therewith. Lender shall be entitled to sue and recover judgment as aforesaid either before, after or during the pendency of any proceedings for the enforcement of this Mortgage, and the right of Lender to recover such judgment shall not be affected by any taking, possession or foreclosure sale hereunder, or by the exercise of any other right, power or remedy for the enforcement of the terms of this Mortgage, or the foreclosure of the lien hereof.

(b) In case of a foreclosure sale of all or any part of the Property and of the application of the proceeds of sale to the payment of the sums secured hereby, Lender shall be entitled to enforce payment of and to receive all amounts then remaining due and unpaid and to recover judgment for any portion thereof remaining unpaid, with interest.

(c) Borrower hereby agrees, to the extent permitted by law, that no recovery of any such judgment by Lender and no attachment or levy of any execution upon any of the Property or any other property shall in any way affect the lien of this Mortgage upon the Property or any part thereof or any lien, rights, powers or remedies of Lender hereunder, but such lien, rights, powers and remedies shall continue unimpaired as before.

(d) Any monies collected or received by Lender under this paragraph shall be applied as follows:

i. First, to the payment of reasonable compensation, expenses and disbursements of the agents and attorneys; and

ii. Second, to payment of amounts due and unpaid under the Note, this Mortgage and all other instruments securing the Note.

2.13 Delay or Omission No Waiver. No delay or omission of Lender or of any holder of the Note to exercise any right, power or remedy accruing upon any Event of Default shall exhaust or impair any such right, power or remedy or shall be construed to waive any such Event of Default or to constitute acquiescence therein. Every right, power and remedy given to Lender may be exercised from time to time and as often as may be deemed expedient by Lender.

2.14 No Waiver of One Event of Default to Affect Another. No waiver of any Event of Default hereunder shall extend to or affect any subsequent or any other Event of Default then existing, or impair any rights, powers or remedies consequent thereon. If Lender (a) grants forbearance or an extension of time for the payment of any sums secured hereby; (b) takes other or additional security for the payment thereof; (c) waives or does not exercise any right granted in the Note, this Mortgage or any other instrument securing the Note; (d) releases any part of the Property from the lien of this Mortgage or any other instrument securing the Note; (e) consents to the filing of any map, plat or re-plat of the Land; (f) consents to the granting of any easement on the Land; or (g) makes or consents to any agreement changing the terms of this Mortgage or subordinating the lien or any charge hereof, no such act or omission shall release, discharge, modify, change or affect the original liability under the Note, this Mortgage or otherwise of Borrower, or any subsequent purchaser of the Mortgaged property or any part thereof or any maker, cosigner, endorser, surety or guarantor. No such act or omission shall preclude Lender from exercising any right, power or privilege herein granted or intended to be granted in case of any Event of Default then existing or of any subsequent Event of Default nor, except as otherwise expressly provided in an instrument or instruments executed by Lender, shall the lien of this Mortgage be altered thereby. In the event of the sale or transfer by operation of law or otherwise of all or any part of the Property, Lender, without notice to any person, firm or corporation, is hereby authorized and empowered to deal with any such vendee or transferee with reference to the Property or the indebtedness secured hereby, or with reference to any of the terms or conditions hereof, as fully and to the same extent as it might deal with the original parties hereto and without in any way releasing or discharging any of the liabilities or undertakings hereunder.

2.15 Discontinuance of Proceedings; Position of Parties Restored. If Lender shall have proceeded to enforce any right or remedy under this Mortgage by foreclosure, entry or otherwise, and such proceedings shall have been discontinued or abandoned for any reason, or shall have been determined adversely to Lender, then and in every such case Borrower and Lender shall be restored to their former positions and rights hereunder, and all rights, powers and remedies of Lender shall continue as if no such proceeding had occurred or had been taken.

2.16 Remedies Cumulative. No right, power or remedy conferred upon or reserved to Lender by the Note, this Mortgage or any other instrument securing the Note is exclusive of any other right, power or remedy, but each and every such right, power and remedy shall be cumulative and concurrent and shall be in addition to any other right, power and remedy given hereunder or under the Note or any other instrument securing the Note, or now or hereafter existing at law, in equity or by statute.

ARTICLE III

MISCELLANEOUS

3.1 Waiver. Lender may, in the sole discretion of Lender, from time to time waive or forbear from enforcing any provision of this Mortgage, and no such waiver or forbearance shall be deemed a waiver by Lender of any other right or remedy provided herein or by law or be deemed a waiver of the right at any later time to enforce strictly all provisions of this Mortgage and to exercise any and all remedies provided herein and by law.

3.2 Event of Default Rate. The Event of Default Rate shall be the rate of interest after default as set forth in the Note.

3.3 Future Advances. Lender, at its option, may make future advances to Borrower; provided, that nothing contained herein shall constitute an obligation to do so. Such future advances, with interest at the

rate payable from time to time on the outstanding principal under the Note, shall be secured by this Mortgage when evidenced by the Note or by any other instrument indicating that such advances are secured by this Mortgage or when advanced under the terms of this Mortgage. Lender may make such future advances (a) at the request of Borrower, whether or not there is any obligation to make future advances; or (b) to pay, with or without the consent or request of Borrower, any amounts which may be due under any other mortgage or lien affecting the Property.

3.4 Construction. This Mortgage shall be construed and enforced in accordance with the laws of South Carolina. Paragraph captions are included herein only for convenience of reference and shall not be deemed to limit or define the purpose or effect of any provision hereof. The provisions of this Mortgage are severable, and the invalidity of one or more provisions shall not be deemed to invalidate the remainder. This Mortgage shall be binding upon the Borrower and the heirs, successors and assigns of Borrower and shall inure to the benefit of Lender and the heirs, successors and assigns of Lender. Borrower agrees that time is of the essence hereof. The terms "Borrower" and "Lender" as used herein shall be deemed to include the respective heirs, successors and assigns of Borrower and Lender.

3.5 Notices. Any notice given by either party hereto to the other party shall be in writing and shall be signed by the party giving notice. Any notice or other document to be delivered to either party hereto by the other party shall be deemed delivered if mailed postage prepaid to the party to whom directed at the address of such party stated above. This paragraph shall not be deemed to prohibit any other manner of delivering a notice or other document.

3.6 Modifications. This Mortgage may not be amended or modified or the terms hereof waived except by an instrument in writing signed by the party against which enforcement of such amendment, modification or waiver is sought.

3.7 Jurisdiction. Borrower submits to the jurisdiction of any court of competent jurisdiction within the State of South Carolina. Borrower agrees that any action concerning this Mortgage, the Note or any other loan document, whether initiated by Lender, Borrower or any other party, shall be tried only in a court of competent jurisdiction within the State of South Carolina, and Borrower waives all objections to venue. All matters arising hereunder shall be determined in accordance with the law and practice of such South Carolina court. Borrower further agrees to comply with all requirements necessary to give such court in personam jurisdiction and agrees that service of process may be accomplished by, in addition to any other lawful means, certified mail, return receipt requested, to the Borrower at Borrower's address set forth above or any new address of which Lender has been notified by Borrower in writing.

3.8 Subordinate Liens. Borrower shall not further encumber the title to the Property without the prior written consent of the Lender.

3.9 Partial Releases. Lender shall release parcels from the lien of this Mortgage only as provided in the Loan Agreement.

3.10 WAIVER OF JURY TRIAL. BY THE EXECUTION HEREOF, BORROWER KNOWINGLY, VOLUNTARILY AND INTENTIONALLY HEREBY AGREES, THAT:

A) NEITHER BORROWER NOR LENDER, NOR ANY ASSIGNEE, SUCCESSOR, HEIR, OR LEGAL REPRESENTATIVE OF BORROWER OR LENDER, SHALL SEEK A JURY TRIAL IN ANY LAWSUIT, PROCEEDING, COUNTERCLAIM, OR ANY OTHER LITIGATION PROCEDURE ARISING FROM OR BASED UPON THIS MORTGAGE, THE NOTE, THE LOAN AGREEMENT (IF ANY) OR ANY OF THE LOAN DOCUMENTS EVIDENCING, SECURING, OR RELATING TO THE

INDEBTEDNESS SECURED HEREBY, OR TO THE DEALINGS OR RELATIONSHIP BETWEEN OR AMONG THE PARTIES THERETO;

(B) NEITHER BORROWER NOR LENDER WILL SEEK TO CONSOLIDATE ANY SUCH ACTION, IN WHICH A JURY TRIAL HAS BEEN WAIVED, WITH ANY OTHER ACTION IN WHICH A JURY TRIAL HAS NOT BEEN OR CANNOT BE WAIVED;

(C) THE PROVISIONS OF THIS SECTION HAVE BEEN FULLY NEGOTIATED BY THE PARTIES HERETO, AND THESE PROVISIONS SHALL BE SUBJECT TO NO EXCEPTIONS;

(D) NEITHER BORROWER NOR LENDER HAS IN ANY WAY AGREED WITH OR REPRESENTED TO ANY OTHER PARTY THAT THE PROVISIONS OF THIS SECTION WILL NOT BE FULLY ENFORCED IN ALL INSTANCES; AND

(E) THIS PROVISION IS A MATERIAL INDUCEMENT FOR LENDER TO MAKE THE LOAN SECURED HEREBY.

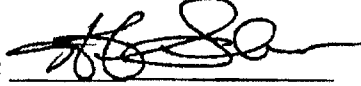
The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. THE UNDERSIGNED HEREBY WAIVE AND RELINQUISH THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.

IN WITNESS WHEREOF, Borrower has caused this Mortgage to be executed the day and year first above written.

Signed, sealed and delivered
in the presence of



Peachtree Properties of North Myrtle Beach, LLC,
a South Carolina limited liability company

By: 
Jeffrey T. Shoup, Manager

NOTARY ACKNOWLEDGEMENT(S) ON NEXT PAGE

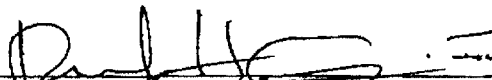
STATE OF SOUTH CAROLINA

ACKNOWLEDGEMENT

COUNTY OF Horry

I, ROBERT H. GWIN, JR., do hereby certify that **Jeffrey T. Shoup**, a Manager of Peachtree Properties of North Myrtle Beach, LLC, a South Carolina limited liability company, appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and seal this the 24 day of JULY, 2006.


Notary Public for South Carolina
My Commission expires: 8/8/2012

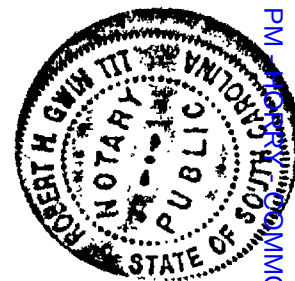


EXHIBIT A

All that certain lot or parcel of land situate in the City of Myrtle Beach, County of Horry, State of South Carolina, and being more particularly described as follows:

All and singular those three (3) certain Lots in Socastee Township, Horry County, South Carolina, being shown on a Plat prepared for the Estate of John C. Spivey by J.F. Thomas, Surveyor, dated September 1, 1965, recorded November 16, 1965, in Plat Book 43 at Page 183, and designated thereon as Hursey Three Lots, to which Plat reference is made being described as follows:

Beginning at a point on the inland Waterway the lands intersects with the Inland Waterway and Spivey Road, a right-of-way from which has been granted at a corner designated Concrete N; thence North: 78 degrees, 10 minutes West 225 feet to Concrete N; thence North 27 degrees 10 minutes East 250 feet to Pipe N; thence South 73 degrees 10 minutes East to Pipe N; thence South 27 degrees 10 minutes East 250 feet to the beginning corner.

Bounded on the North by lands of Ruth L. McClam; on the East by lands of Ruth L. McClam, on the South by the Northern margin of Intracoastal Waterway, and on the West by lands of Ruth L. McClam.

This being the same property conveyed to Ruth L. McClam by Deed of T.S. Ludlam dated October 21, 1966, and recorded January 23, 1967, in the Office of the Clerk of Court for Horry County in Deed Book 360 at Page 199.

ALSO:

All and certain lot of land in Socastee Township, Horry County, South Carolina, on the Northern side of the Inland Waterway and located near the Old Sweet Ditch, bounded and described as follows:

Commencing at an iron stake on the Northern bank of the Inland Waterway being a point where the Eastern bank of the Old Socastee Creek intersects the Inland Waterway, and running thence in a Northerly direction 21 degrees East 250 feet to an iron stake; thence Eastward 79 degrees East 100 feet to an iron stake; thence South 21 degrees East 250 feet to an iron stake on the Northern bank of the Inland Waterway; thence Westwardly along the Northern bank of the Inland Waterway 100 feet to the beginning corner.

Bounded on the North by other lands of Ruth L. McClam; on the East by other lands of Ruth L. McClam; on the South by the Inland Waterway; and on the west by other lands of Ruth L. McClam.

This being the same property conveyed to Ruth L. McClam by Deed of Larry W. Paul dated February 15, 1982, and recorded on February 18, 1982, in the office of the Clerk of Court for Horry County in Deed Book 737 at Page 818.

ALSO:

PARCEL No. 1: All and singular, that certain tract or parcel of land in Socastee Township, Horry County, South Carolina, on hundred thirty-five (135) acres, more or less, having been platted and shown on a Plat prepared by J.F. Thomas, Surveyor, dated September 1, 1965. This 135 acres is situate North of the Intracoastal Waterway. The Plat is recorded in Plat Book 43, Page 183, in the Office of the Clerk of Court of Horry County, to which Plat reference is made.

The 135 acres is exclusive of the proposed highway area shown on the Plat above referred to and is described as follows:

Beginning at Concrete N on the Southern margin of the proposed highway as shown on the referenced Plat (this road is known as the Peachtree Ferry Road); and running thence North approximately 26°5' East 33 feet to a point in the center of the road, the point being taken from the Highway Department survey; thence South 68°22' East 441 feet to point of intersection, as shown on the above Plat; thence South 62°45' East 984.3 feet to point of intersection, as shown on the above Plat; thence South 75°15' East 1028.6 feet to point of intersection, as shown on the Plat; thence North 33 feet to Concrete N on the Northern margin of the road above described; thence North 19°5' East 473.5 feet to Pipe O; thence 53°10' East 516 feet to Concrete N; thence South 13°55' West 872.5 feet to Concrete N on the Northern margin of the road; thence South 33 feet to point in center of the road described above; thence South 75°15' East 710 feet to point of intersection as shown on the Plat; thence South 85°11 minutes East 340.5 feet to point of intersection in center of the road described above, as shown on the Plat; thence Southwest 33 feet to Concrete N on the Southern margin of the road described above; thence South 21°45' West 1045.5 feet to Pipe O and Concrete N; thence 78°50' West 750 feet to Pipe O and Concrete N; thence North 27°55' West 438.5 feet to Concrete N; thence North 78°10' West 566 feet to Concrete N; thence North 27°10' East to Pipe N; thence North 78°10' West 225 feet to Pipe N; thence South 27°10' West 250 feet to concrete N; thence North 78°10' West 1284.5 feet to Concrete N; thence North 21° East 250 feet to Concrete N; thence North 78°10' West 100 feet to Concrete N; thence South 21° West 250 feet to Concrete N; thence North 26°25' West 145 feet along Socastee Creek, the Creek being the line; thence North 45° West 100 feet; thence North 57° West 100 feet; thence North 63°10' West 100 feet; thence North 54°45' West 130 feet; thence South 70°25' West 185 feet; thence North 89°20' West 200 feet; thence North 61°45' West 94 feet; thence North 70°20' West 100 feet; thence South 86°50' West 80 feet to Gum 3MO; thence North 27°40' East 383.5 feet to Gum OM; thence North 27°20' East 261 Feet to Gum OM; thence North 26°05' East 1119.5 feet to the beginning corner.

Bounded on the North by the center the proposed, highway as shown on the Plat in part, and in part by the lands, now or formerly, of Brice J. Ward; on

the East by lands, now or formerly, of Roy Collins, in part, and in part by lands, now or formerly, of Virginia Zeigler; on the South by lands, now or formerly, of J.M. Cooper, in part, and lands, now or formerly, of Virginia Zeigler, in part, and by the Northern margin of the Intracoastal Waterway, in part, Lucy S. Kolb, in part, and Socastee Creek, in part; and on the West by land, now or formerly, of Maggie L. Roberts.

LESS AND EXCEPT:

ALL AND SINGULAR that certain piece, parcel or lot of land situate, lying, and being in Socastee Township, County and State aforesaid, designated as Pump Site and containing 215 square feet and shown on a plat of Pump Site For Grand Strand Water & Sewer Authority owned by Ruth L. McClam; made by Engineering and Technical Services, Inc., dated November 1, 1990; a copy of which is recorded in Plat Book 112, Page 65, public records of Horry County and which is by way of reference made a part and parcel of this description.

This property was heretofore conveyed by Ruth Ludlum McClam, et al to the Grand Strand Water and Sewer Authority by Deed dated 23 November, 1990; and recorded in Deed Book 1438, Page 163, in the office of the Clerk of Court for Horry County, South Carolina.

Being the same lands and premises conveyed to Peachtree Properties of North Myrtle Beach LLC by Deed from McClam, et al, dated 7/24/06 and recorded in Deed Book 3132 @ page 779, public records Horry County, South Carolina,

EXHIBIT C

(REL Policy)

AMERICAN LAND TITLE ASSOCIATION
LOAN POLICY
(10-17-92)

Policy No. SC2330-46-06-RE-388A-2006.7210740-72338570

CHICAGO TITLE INSURANCE COMPANY

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS, AND STIPULATIONS, CHICAGO TITLE INSURANCE COMPANY, a Missouri corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

- 1 Title to the estate or interest described in Schedule A being vested other than as stated therein;
- 2 Any defect in or lien or encumbrance on the title;
- 3 Unmarketability of the title;
- 4 ~~Lack of a right of access to and from the land;~~
- 5 The invalidity or unenforceability of the lien of the insured mortgage upon the title;
- 6 The priority of any lien or encumbrance over the lien of the insured mortgage;
- 7 Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material:
 - a arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or
 - b arising from an improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance;
- 8 The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage in the named insured assignee free and clear of all liens

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title, as insured, but only to the extent provided in the Conditions and Stipulations.

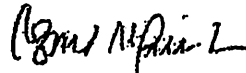
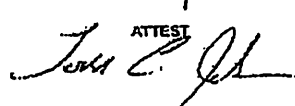
In Witness Whereof, CHICAGO TITLE INSURANCE COMPANY has caused this policy to be signed and sealed as of Date of Policy shown in Schedule A, the policy to become valid when countersigned by an authorized signatory.

NOTICE IS HEREBY GIVEN THAT THIS POLICY IS SUBJECT TO ARBITRATION PURSUANT TO THE PROVISIONS OF CHAPTER 48 OF TITLE 15 (SEC. 15-48-10 ET SEQ.) OF THE SOUTH CAROLINA CODE OF LAWS, 1976, AS AMENDED.

SC2330 06-RE-388A
Oleander Title Agency
2105-B Cromley Circle
Myrtle Beach, SC 29577
Tel: (843) 839-2239
Fax: (843) 839-2244



CHICAGO TITLE INSURANCE COMPANY

By  Agent
Attest  Secretary

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1. (a) Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.
- (b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.
2. Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.
3. Defects, liens, encumbrances, adverse claims or other matters:
 - (a) created, suffered, assumed or agreed to by the Insured claimant;
 - (b) not known to the Company, not recorded in the public records at Date of Policy, but known to the Insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an Insured under this policy;
 - (c) resulting in no loss or damage to the Insured claimant;
 - (d) attaching or created subsequent to Date of Policy (except to the extent that this policy insures the priority of the lien of the Insured mortgage over any statutory lien for services, labor or material); or
 - (e) resulting in loss or damage which would not have been sustained if the Insured claimant had paid value for the Insured mortgage.
4. Unenforceability of the lien of the insured mortgage because of the inability or failure of the insured at Date of Policy, or the inability or failure of any subsequent owner of the indebtedness, to comply with applicable doing business laws of the state in which the land is situated.
5. Invalidity or unenforceability of the lien of the insured mortgage, or claim thereof, which arises out of the transaction evidenced by the insured mortgage and is based upon usury or any consumer credit protection or truth in lending law.
6. Any statutory lien for services, labor or materials (or the claim of priority of any statutory lien for services, labor or materials over the lien of the insured mortgage) arising from an improvement or work related to the land which is contracted for and commenced subsequent to Date of Policy and is not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance.
7. Any claim which arises out of the transaction creating the interest of the mortgagee insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that is based on:
 - (i) the transaction creating the interest of the insured mortgagee being deemed a fraudulent conveyance or fraudulent transfer; or
 - (ii) the subordination of the interest of the insured mortgagee as a result of the application of the doctrine of equitable subordination; or
 - (iii) the transaction creating the interest of the insured mortgagee being deemed a preferential transfer except where the preferential transfer results from the failure:
 - (a) to timely record the instrument of transfer; or
 - (b) of such recordation to impart notice to a purchaser for value or a judgment or lien creditor.

CONDITIONS AND STIPULATIONS

1. DEFINITION OF TERMS

The following terms when used in this policy mean:

(a) "Insured": the insured named in Schedule A. The term "Insured" also includes

(i) the owner of the indebtedness secured by the Insured mortgage and each successor in ownership of the indebtedness except a successor who is an obligor under the provisions of Section 12(c) of these Conditions and Stipulations (reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor insured, unless the successor acquired the indebtedness as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim or other matter insured against by this policy as affecting title to the estate or interest in the land);

(ii) any governmental agency or governmental instrumentality which is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage, or any part thereof, whether named as an insured herein or not;

(iii) the parties designated in Section 2(a) of these Conditions and Stipulations.

(b) "Insured claimant": an insured claiming loss or damage

(c) "knowledge" or "known": actual knowledge, not constructive knowledge or notice which may be imputed to an Insured by reason of the public records as defined in this policy or any other records which impart constructive notice of matters affecting the land.

(d) "land": the land described or referred to in Schedule A, and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule A, nor any right, title interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(e) "mortgage": mortgage deed of trust, trust deed, or other security instrument

(f) "public records": records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge. With respect to Section 12(a)(iv) of the Exclusions From Coverage "public records" shall also include environmental protection liens filed in the records of the clerk of the United States district court for the district in which the land is located.

(g) "unmarketability of the title": an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A or the insured mortgage to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title

2. CONTINUATION OF INSURANCE

(a) **After Acquisition of Title** The coverage of this policy shall continue in force as of Date of Policy in favor of (i) an Insured who acquires all or any part of the estate or interest in the land by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the insured mortgage; (ii) a transferee of the estate or interest so acquired from an insured corporation, provided the transferee is the parent or wholly-owned subsidiary of the insured corporation, and their corporate successors by operation of law and not by purchase, subject to any rights or defenses the Company may have against any predecessor insureds; and (iii) any governmental agency or governmental instrumentality which acquires all or any part of the estate or interest pursuant to a contract of insurance or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage.

(b) **After Conveyance of Title** The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured only so long as the Insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the Insured, or only so long as the Insured shall have liability by reason of covenants of warranty made by the Insured in any transfer or conveyance of the estate or interest. This policy shall not continue in force in favor of any

from the insured of either (i) an estate or interest in the land, or (ii) an indebtedness secured by a purchase money mortgage given to the insured.

(c) Amount of Insurance. The amount of insurance after the acquisition or after the conveyance shall in neither event exceed the least of:

- (i) the Amount of Insurance stated in Schedule A;
- (ii) the amount of the principal of the indebtedness secured by the insured mortgage as of Date of Policy, interest thereon, expenses of foreclosure amounts advanced pursuant to the insured mortgage to assure compliance with laws or to protect the lien of the insured mortgage prior to the time of acquisition of the estate or interest in the land and secured thereby and reasonable amounts expended to prevent deterioration of improvements, but reduced by the amount of all payments made; or
- (iii) the amount paid by any governmental agency or governmental instrumentality, if the agency or instrumentality is the insured claimant, in the acquisition of the estate or interest in satisfaction of its insurance contract or guaranty

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT

The insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 4(a) below, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest or the lien of the insured mortgage, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest or the lien of the insured mortgage, as insured, is rejected as unmarketable. If prompt notice shall not be given to the Company, then as to the insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

4. DEFENSE AND PROSECUTION OF ACTIONS; DUTY OF INSURED CLAIMANT TO COOPERATE

(a) Upon written request by the insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy.

(b) The Company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured, or to prevent or reduce loss or damage to the insured. The Company may take any appropriate action under the term of this policy, whether or not it shall be liable hereunder and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

(c) Whenever the Company shall have brought an action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(d) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of the insured for this purpose. Whenever requested by the Company, the insured, at the Company's expense, shall give the Company all reasonable aid (i) in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured. If the Company is prejudiced by the failure of the insured to furnish the required cooperation the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

5. PROOF OF LOSS OR DAMAGE

In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company a proof of loss or damage signed and sworn to by the insured claimant shall be furnished to the Company within 90 days after the insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title or other matter insured against by this policy which constitutes the basis of loss or damage and shall state, to the extent possible the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the insured claimant to provide the required proof of loss or damage, the Company's obligations to the insured under the policy shall terminate including any liability or obligation to

defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage.

In addition, the insured claimant may reasonably be required to submit to examination under oath by any authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage. All information designated as confidential by the insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in the above paragraph, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

6. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance or to Purchase the Indebtedness.

- (i) to pay or tender payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred by the insured claimant, which were authorized by the Company, up to the time of payment or tender of payment and which the Company is obligated to pay; or
- (ii) to purchase the indebtedness secured by the insured mortgage for the amount owing thereon together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of purchase and which the Company is obligated to pay.

If the Company offers to purchase the indebtedness as herein provided, the owner of the indebtedness shall transfer assign, and convey the indebtedness and the insured mortgage, together with any collateral security to the Company upon payment therefore.

Upon the exercise by the Company of either of the options provided for in paragraphs a (i) or (ii), all liability and obligations to the insured under this policy, other than to make the payment required in those paragraphs, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation and the policy shall be surrendered to the Company for cancellation.

(b) To Pay or Otherwise Settle With Parties Other than the Insured or With the Insured Claimant.

(i) to pay or otherwise settle with other parties for or in the name of an insured claimant any claim insured against under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay; or

(ii) to pay or otherwise settle with the insured claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in paragraphs b(i) or (ii), the Company's obligations to the insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

7. DETERMINATION AND EXTENT OF LIABILITY

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) The liability of the Company under this policy shall not exceed the least of:

- (i) the Amount of Insurance stated in Schedule A, or, if applicable, the amount of insurance as defined in Section 2 (c) of these Conditions and Stipulations;
- (ii) the amount of the unpaid principal indebtedness secured by the insured mortgage as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time the loss or damage insured against by this policy occurs, together with interest thereon; or
- (iii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

(b) In the event the insured has acquired the estate or interest in the manner described in Section 2(a) of these Conditions and Stipulations or has

under the title, then the liability of the Company shall continue as set forth in Section 7(a) of these Conditions and Stipulations.

(c) The Company will pay only those costs attorneys' fees and expenses incurred in accordance with Section 4 of these Conditions and Stipulations.

8. LIMITATION OF LIABILITY

(a) If the Company establishes the title, or removes the alleged defect lien or encumbrance, or cures the lack of a right of access to or from the land, or cures the claim of unmarketability of title, or otherwise establishes the lien of the insured mortgage, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom adverse to the title or to the lien of the insured mortgage, as insured.

(c) The Company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without the prior written consent of the Company.

(d) The Company shall not be liable for: (i) any indebtedness created subsequent to Date of Policy except for advances made to protect the lien of the insured mortgage and secured thereby and reasonable amounts expended to prevent deterioration of improvements; or (ii) construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the land which at Date of Policy were secured by the insured mortgage and which the insured was and continued to be obligated to advance at and after Date of Policy.

9. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY

(a) All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of the insurance pro tanto. However, any payments made prior to the acquisition of title to the estate or interest as provided in Section 2(a) of these Conditions and Stipulations shall not reduce pro tanto the amount of the insurance afforded under this policy except to the extent that the payments reduce the amount of the indebtedness secured by the insured mortgage.

(b) Payment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage, or any voluntary partial satisfaction or release of the insured mortgage, to the extent of the payment, satisfaction or release, shall reduce the amount of insurance pro tanto. The amount of insurance may thereafter be increased by accruing interest and advances made to protect the lien of the insured mortgage and secured thereby, with interest thereon provided in no event shall the amount of insurance be greater than the Amount of Insurance stated in Schedule A.

(c) Payment in full by any person or the voluntary satisfaction or release of the insured mortgage shall terminate all liability of the Company except as provided in Section 2(a) of these Conditions and Stipulations.

10. LIABILITY NONCUMULATIVE

If the insured acquires title to the estate or interest in satisfaction of the indebtedness secured by the insured mortgage, or any part thereof, it is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A and the amount so paid shall be deemed a payment under this policy.

11. PAYMENT OF LOSS

(a) No payment shall be made without producing this policy for endorsement of the payment unless the policy has been lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

(b) When liability and the extent of loss or damage has been definitely fixed in accordance with these Conditions and Stipulations, the loss or damage shall be payable within 30 days thereafter.

12. SUBROGATION UPON PAYMENT OR SETTLEMENT

(a) The Company's Right of Subrogation.

Whenever the Company shall have settled and paid a claim under this policy all right of subrogation shall vest in the Company unaffected by any act of the insured claimant.

The Company shall be subrogated to and be entitled to all rights and remedies which the insured claimant would have had against any person or property in respect to the claim had this policy not been issued. If requested by the Company, the insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect this right of subrogation. The insured claimant shall permit the Company to sue, compromise or settle in the name of the insured claimant and to use the name of the insured claimant in any transaction or litigation involving these rights or remedies.

If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated to all rights and remedies of the insured claimant after the insured claimant shall have recovered its principal interest, and costs of collection.

(b) The Insured's Rights and Limitations.

Notwithstanding the foregoing, the owner of the indebtedness secured by the insured mortgage, provided the priority of the lien of the insured mortgage or its enforceability is not affected, may release or substitute the personal liability of any debtor or guarantor, or extend or otherwise modify the terms of payment, or release a portion of the estate or interest from the lien of the insured mortgage, or release any collateral security for the indebtedness.

When the permitted acts of the insured claimant occur and the insured has knowledge of any claim of title or interest adverse to the title to the estate or interest or the priority or enforceability of the lien of the insured mortgage, as insured, the Company shall be required to pay only that part of any losses insured against by this policy which shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation.

(c) The Company's Rights Against Non-Insured Obligors.

The Company's right of subrogation against non-insured obligors shall exist and shall include, without limitation, the rights of the insured to indemnities, guarantees, other policies of insurance or bonds notwithstanding any terms or conditions contained in those instruments which provide for subrogation rights by reason of this policy.

The Company's right of subrogation shall not be avoided by acquisition of the insured mortgage by an obligor (except an obligor described in Section 1(a)(ii) of these Conditions and Stipulations) who acquires the insured mortgage as a result of an indemnity, guarantee, other policy of insurance, or bond and the obligor will not be an insured under this policy, notwithstanding Section 1(a)(ii) of these Conditions and Stipulations.

13. ARBITRATION

Unless prohibited by applicable law, either the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All arbitrable matters when the Amount of Insurance is \$1,000,000 or less shall be arbitrated at the option of either the Company or the insured. All arbitrable matters when the Amount of Insurance is in excess of \$1,000,000 shall be arbitrated only when agreed to by both the Company and the insured. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules.

A copy of the Rules may be obtained from the Company upon request.

14. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT

(a) This policy together with all endorsements, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company. In interpreting any provision of this policy this policy shall be construed as a whole.

(b) Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the lien of the insured mortgage or of the title to the estate or interest covered hereby or by any action asserting such claim, shall be restricted to this policy.

(c) No amendment of or endorsement to this policy can be made except by a writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary or validating officer or authorized signatory of the Company.

15. SEVERABILITY

In the event any provision of this policy is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision and all other provisions shall remain in full force and effect.

16. NOTICES, WHERE SENT

All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the number of this policy and shall be addressed to the Company at the issuing office or to:

Claims Department
P.O. Box 45023
Jacksonville FL 32232-5023

LOAN FORM
CHICAGO TITLE INSURANCE COMPANY
3700 Forest Drive, Suite 201, Columbia, SC 29204

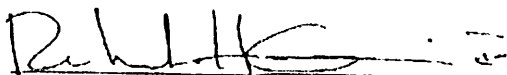
SCHEDULE A

OFFICE FILE NUMBER: 06-RE-388
POLICY NUMBER: 7210740-73317401
DATE OF POLICY: July 25, 2007 at 3:23 pm
AMOUNT OF INSURANCE: \$17,071,873.33

1. Name of Insured:
RE Loans, LLC, its successors and/or assigns as their interests may appear
2. The estate or interest in the land which is encumbered by the insured mortgage is:
Fee Simple
3. Title to the estate or interest in the land is vested in:
Peachtree Properties of North Myrtle Beach, LLC
4. The insured mortgage and assignments thereof, if any, are described as follows:
Mortgage from Peachtree Properties of North Myrtle Beach, LLC to RE Loans, LLC dated July 5, 2006, and recorded July 25, 2007, at 3:23 pm, in Book 4629, Page 255, in the Register of Deeds of City of Myrtle Beach, County of Horry, South Carolina.
5. The land referred to in this Policy is described as follows:
All that certain lot or parcel of land situate in the City of Myrtle Beach, County of Horry, State of South Carolina, and being more particularly described as follows:
PARCEL ONE
ALL AND SINGULAR those three (3) certain Lots in Socastee Township, Horry County, South Carolina, being shown on a Plat prepared for the Estate of John C. Spivey by J.F. Thomas, Surveyor, dated September 1, 1965, recorded November

Countersigned

Oleander Title Agency
2105-B Cromley Circle
Myrtle Beach, SC 29577


Authorized Signatory

SCHEDULE A
Loan Form (Rev. 1/89)

This Policy valid only if Schedule B is attached.

Exhibit B

LOAN FORM
CHICAGO TITLE INSURANCE COMPANY

SCHEDULE A
(continued)

Policy Number: 7210740-73317401

16, 1965, in Plat Book 43 at Page 183, and designated thereon as Hursey Three Lots, to which Plat reference is made, being described as follows:

Beginning at a point on the inland Waterway the lands intersect with the Inland Waterway and Spivey Road, a right-of-way from which has been granted at a corner designated Concrete N; thence North: 78 degrees, 10 minutes West 225 feet to Concrete N; thence North 27 degrees 10 minutes East 250 feet to Pipe N; thence South 78 degrees 10 minutes East to Pipe N; thence South 27 degrees 10 minutes East 250 feet to the beginning corner.

Bounded on the North by lands of Ruth L. McClam; on the East by lands of Ruth L. McClam, on the South by the Northern margin of Intracoastal Waterway, and on the West by lands of Ruth L. McClam.

PARCEL TWO:

All AND SINGULAR, that lot of land in Socastee Township, Horry County, South Carolina, on the Northern side of the Inland Waterway and located near the Old Sweet Ditch, bounded and described as follows:

Commencing at an iron stake on the Northern bank of the Inland Waterway being a point where the Eastern Bank of the Old Socastee Creek intersects the Inland Waterway, and running thence in a Northerly direction 21 degrees East 250 feet to an iron stake; thence Eastward 79 degrees East 100 feet to an iron stake; thence South 21 degrees East 250 feet to an iron stake on the Northern bank of the Inland Waterway; thence Westwardly along the Northern bank of the Inland Waterway 100 feet to the beginning corner.

Bounded on the North by other lands of Ruth L. McClam; on the East by other lands of Ruth L. McClam; on the South by the Inland Waterway; and on the west by other lands of Ruth L. McClam.

PARCEL THREE:

All AND SINGULAR, that certain tract or parcel of land in Socastee Township, Horry County, South Carolina, on hundred thirty-five (135) acres, more or less, having been platted and shown on a Plat prepared by J.F. Thomas, Surveyor, dated September 1, 1965. This 135 acres is situate North of the Intracoastal Waterway. The Plat is recorded in Plat Book 43, Page 183, in the Office of the Clerk of Court of Horry County, to which Plat reference is made.

The 135 acres is exclusive of the proposed highway area shown on the Plat above referenced to and is described as follows:

LOAN FORM
CHICAGO TITLE INSURANCE COMPANY

SCHEDULE A
(continued)

Policy Number: 7210740-73317401

In Plat Book 112, Page 65, public records of Horry County and which is by way of reference made a part and parcel of this description.

This property was heretofore conveyed by Ruth Ludlum McClam, et al to the Grand Strand Water and Sewer Authority by Deed dated 23 November, 1990; and recorded in Deed Book 1438, Page 163, in the office of the Clerk of Court for Horry County, South Carolina.

SEE ATTACHED EXHIBIT "A" FOR DERIVATION

04 April 2013 13:07:26 EST Scott Svirsky
thejerichogroup.com

SCHEDULE A continued
Loan Form (Rev. 1/89)

This Policy valid only if Schedule B is attached.

LOAN FORM
CHICAGO TITLE INSURANCE COMPANY

SCHEDULE A
(continued)

Policy Number: 7210740-73317401

Beginning at Concrete N on the Southern margin of the proposed highway as shown on the referenced Plat (this road is known as the Peachtree Ferry Road); and running thence North approximately 28°5' East 33 feet to a point in the center of the road, the point being taken from the Highway Department survey; thence South 68°22' East 441 feet to point of intersection, as shown on the above Plat; thence South 62°45' East 984.3 feet to point of intersection, as shown on the above Plat; thence South 75°15' East 1028.6 feet to point of intersection, as shown on the Plat; thence North 33 feet to Concrete N on the Northern margin of the road above described; thence North 19°5' East 473.5 feet to Pipe O; thence 53°10' East 516 feet to Concrete N; thence South 13°55' West 872.8 feet to Concrete N on the Northern margin of the road; thence South 33 feet to point in center of the road described above; thence South 75°15' East 710.3 feet to point of intersection as shown on the Plat; thence South 85°11' minutes East 340.5 feet to point of intersection in center of the road described above, as shown on the Plat; thence Southwest 33 feet to Concrete N on the Southern margin of the road described above; thence South 21°45' West 1045.5 feet to Pipe O and Concrete N; thence North 78°50' West 750 feet to Pipe O and Concrete N; thence South 20°55' West 438.5 feet to Concrete N; thence North 78°10' West 566 feet to Concrete N; thence North 27°10' East to Pipe N; thence North 78°10' West 225 feet to Pipe N; thence South 27°10' West 250 feet to Concrete N; thence North 78°10' West 1284.5 feet to Concrete N; thence North 21° East 250 feet to Concrete N; thence North 78°10' West 100 feet to Concrete N; thence South 21° West 250 feet to Concrete N; thence North 26°25' West 145 feet along Socastee Creek, the Creek being the line; thence North 45° West 100 feet; thence North 57° West 100 feet; thence North 63°10' West 100 feet; thence North 54°45' West 130 feet; thence South 70°25' West 185 feet; thence North 89°20' West 200 feet; thence North 61°45' West 94 feet; thence North 70°20' West 100 feet; thence South 86°50' West 80 feet to Gum 3MO; thence North 27°10' East 383.5 feet to Gum OM; thence North 27°20' East 261 feet to Gum OM; thence North 26°05' East 1119.5 feet to the beginning corner.

Bounded on the North by the center of the proposed, highway as shown on the Plat in part, and in part by the lands, now or formerly, of Brice J. Ward; on the East by lands, now or formerly, of Roy Collins, in part, and in part by lands, now or formerly, of Virginia Zeigler; on the South by lands, now or formerly, of J.M. Cooper, in part, and lands, now or formerly, of Virginia Zeigler, in part, and by the Northern margin of the Intracoastal Waterway, in part, Lucy S. Kolb, in part, and Socastee Creek, in part; and on the West by land, now or formerly, of Maggie L. Roberts.

LESS AND EXCEPT:

ALL AND SINGULAR that certain piece, parcel or lot of land situate, lying, and being in Socastee Township, County and State aforesaid, designated as a Pump Site and containing 215 square feet and shown on a plat of Pump Site For Grand Strand Water & Sewer Authority owned by Ruth L. McClam; made by Engineering and Technical Services, Inc., dated November 1, 1990; a copy of which is recorded

SCHEDULE A continued
Loan Form (Rev. 1/89)

This Policy valid only if Schedule B is attached.

CHICAGO TITLE INSURANCE COMPANY
3700 Forest Drive, Suite 201, Columbia, SC 29204

SCHEDULE B

Policy Number: 7210740-73317401

Exceptions from Coverage

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of:

Special Exceptions:

1. Taxes and assessments for the year 2006, and subsequent years, which are a lien but are not yet due and payable.
2. Timber Deed in favor of Canal Wood Corporation, dated June 25, 1988, recorded in Deed Book 1229, page 129, aforesaid records, conveying 2,985 pine trees. According to its terms, the timber Deed expired on July 1, 1990.
3. Easement in favor of Grand Strand Water and Sewer Authority, recorded in Deed Book 1438 at Page 1693, aforesaid records.
4. Riparian rights incident to the premises.
5. This policy does not insure title to that portion of the subject property, if any, lying below the mean high water mark of abutting tidal Intracoastal Waterway.
6. Interest created by, or limitations on use imposed by, the Federal Coastal Zone Management Act or other federal law or regulation, or by South Carolina Code §48-39-10 through 48-39-380, as amended, or any regulations promulgated pursuant to said state or federal laws.

PART II

In addition to the matters set forth in Schedule B, the title to the estate or interest in the land described or referred to in Schedule A is subject to the following matters, but the Company insures that such matters are subordinate to the lien or charge of the insured mortgage upon said estate or interest:

1. Subject to a Mortgage from Peachtree Properties of North Myrtle Beach, LLC to Jericho State Capital Corp. of Florida, dated July 24, 2006 and recorded in Mortgage Book 4629 at Page 277, public records of Horry County, South Carolina.

EXHIBIT D

(Jericho State Mortgage)

580478

FILED

2006 JUL 25 PM 3:27

DALLEY V. SKIPPER
REGISTRAR OF DEEDS

PEACHTREE PROPERTIES OF NORTH MYRTLE BEACH, LLC,

Mortgagor,

JERICO STATE CAPITAL CORP. OF FLORIDA,

Mortgagee.

MORTGAGE, SECURITY AGREEMENT
AND ASSIGNMENT OF LEASES AND RENTS

Mortgage Amount: \$4,263,888.00

Date: July 24, 2006

131.4 acres +/-
County: Horry

Record and Return to:

Westerman Ball Ederer Miller & Sharfstein, LLP
170 Old Country Road, 4th Floor
Mineola, New York 11501
Attn: Philip L. Sharfstein, Esq.

MORTGAGE
4629 0277

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ORIGINAL

4629-277

MORTGAGE, SECURITY AGREEMENT AND ASSIGNMENT OF LEASES AND RENTS

This MORTGAGE, SECURITY AGREEMENT AND ASSIGNMENT OF LEASES AND RENTS is made and entered into on the 24th day of July, 2006 by PEACHTREE PROPERTIES OF NORTH MYRTLE BEACH, LLC, a South Carolina limited liability company having an address at 408 Sea Mountain Highway, North Myrtle Beach, South Carolina 29582 ("Mortgagor"), in favor of JERICO STATE CAPITAL CORP. OF FLORIDA, a Florida corporation having an address at 2500 N. Military Trail, Suite 240, Boca Raton, Florida 33431 ("Mortgagee").

WITNESSETH:

WHEREAS, Mortgagor is the lawful owner of the fee estate in certain vacant land located in Horry County, Myrtle Beach, South Carolina, as more particularly described on Exhibit A attached hereto (the "Premises"); and

WHEREAS, Mortgagor has this date borrowed \$4,263,888.00 from Mortgagee and is making this Mortgage as security therefor as a second priority lien in the principal amount of \$4,263,888.00.

THE GRANTING CLAUSE:

NOW, THEREFORE, in consideration of the premises and covenants herein contained, and in order to secure the payment of the principal, interest and other sums due under that certain Mortgage Note executed the date hereof by Mortgagor to the order of Mortgagee in the original principal amount of \$4,263,888.00 (as same may be hereafter modified, amended, extended, renewed or substituted for, the "Note"), and in order to secure the payment of all other indebtedness which this Mortgage by its terms secures and the compliance with all of the terms hereof, of the Note and any other document executed in connection herewith (provided, however, that the maximum principal sum secured by this Mortgage at execution or which under any contingency may be secured hereby at any time in the future shall not exceed the principal sum stated above);

Mortgagor does hereby grant, bargain, sell, mortgage, warrant, pledge, assign, transfer and convey to Mortgagee, and to its participants, successors and assigns, subject to a first mortgage in favor of R.E. Loans LLC, a California limited liability company, securing a note in the principal sum of \$18,520,000.00 (the "Superior Mortgage"), the following property (collectively hereinafter referred to as the "Mortgaged Property"):

- (a) the Premises;

(b) all additional lands and estates hereafter acquired by Mortgagor for use in connection with the Premises and all lands and estates that may, from time to time, by supplemental mortgage or additional agreement be made subject to the lien of this Mortgage;

(c) any improvements, structures and buildings and any alterations thereto or replacements thereof, now or hereafter erected upon the Premises, all fixtures, fittings, appliances, apparatus, equipment, machinery, material and replacements thereof (other than those articles of personal property owned by tenants under the "Leases" (as defined in clause (d) below)) now or at any time hereafter affixed to, attached to, placed upon or used in any way in connection with the complete and comfortable use, enjoyment, occupancy or operation of the Land or such improvements, and any and all structures or buildings, including but not limited to furnaces, boilers, oil burners, radiators and piping, coal stokers, plumbing and bathroom fixtures, refrigeration, air conditioning and sprinkler systems, wash-tubs, sinks, gas and electric fixtures, stoves, ranges, ovens, disposals, dishwashers, hood and fan combinations, awnings, screens, window shades, elevators, motors, dynamos, refrigerators, kitchen cabinets, incinerators, kitchen equipment, laundry equipment, plants and shrubbery and all other equipment and machinery, appliances, fittings and fixtures of every nature whatsoever now or hereafter owned or acquired by Mortgagor and located in or on, or attached to, and used or intended to be used in connection with or with the operation of, the Premises, buildings, structures or other improvements, or in connection with any construction being conducted or which may be conducted thereon, and owned by Mortgagor, and all extensions, additions, improvements, betterments, renewals, substitutions and replacements to any of the foregoing, and all of the right, title and interest of Mortgagor in and to any such personal property or fixtures subject to any lien, security interest or claim, which, to the fullest extent permitted by law, shall be conclusively deemed fixtures and a part of the real property encumbered hereby (collectively, the "Improvements");

(d) all leases and all other occupancy agreements (written or oral), by concession, license or otherwise (including any guarantees or sureties of any of the foregoing), of the Mortgaged Property, or any part thereof, now existing or hereafter entered into between Mortgagor (or any predecessor in interest as owner of the Mortgaged Property or otherwise) and tenants of Mortgagor (or such predecessor in interest), and all right, title and interest of Mortgagor therein and thereunder, including cash, securities, letters of credit or other security deposited thereunder to secure performance by the tenants under the Leases of their obligations thereunder and any proof of claim in any bankruptcy proceeding instituted by or against any such tenant or guarantor and the right to enforce, whether by action at law or in equity or by other means, all provisions, covenants and agreements thereof (hereinafter collectively referred to as the "Leases");

(e) all furniture, furnishings, equipment and other articles of personal property, together with all replacements and renewals thereof, other than those articles of trade fixtures and other personal property owned by tenants under the Leases, now or at any time hereafter placed upon, located in or used in any way in connection with the complete and

comfortable use, enjoyment, occupancy and operation of the Property (hereinafter collectively referred to as the "Furniture, Furnishings and Equipment");

(f) Mortgagor's interest in all agreements, contracts, certificates, instruments and other documents, now or hereafter entered into, pertaining to the construction, operation or management of any structure or building now or hereafter erected on the Land or to the sale of any direct or indirect interest in the Property, including any purchase money mortgage or security agreement securing the payment of any portion of the purchase price due to Mortgagor for such interest, and all right, title and interest of Mortgagor therein and thereunder, including the right upon the happening of any default hereunder, to receive and collect any sums payable to Mortgagor thereunder;

(g) Mortgagor's interest in the franchises, permits, licenses and rights therein and thereto respecting the use, occupation and operation of the Mortgaged Property and any part thereof and respecting any business or activity conducted on the Mortgaged Property and any part thereof, including to the extent permitted by law the name or names, if any, now or hereafter used for the Improvements, and the good will associated therewith;

(h) Mortgagor's interest in all easements, rights-of-way, gores of land, streets, ways, alleys, passages, sewer rights, water courses, water rights and powers, and all appurtenances whatsoever, in any way belonging, relating or appertaining to any of the Mortgaged Property described in the preceding clauses (a) through (g), or which hereafter shall in any way belong, relate or be appurtenant thereto, whether now owned or hereafter acquired by Mortgagor;

(i) Mortgagor's interest claims and causes of action relating directly or indirectly to the Mortgaged Property (including, without limitation, tax appeals and tax and other refunds), whether such claims or causes of action arise in Mortgagor's name or such claims or causes of action are acquired by Mortgagor, directly or indirectly, by subrogation or otherwise;

(j) Mortgagor's interest in all proceeds, products, replacements, additions, substitutions, renewals and accessions of and to the Mortgaged Property described in the preceding clauses (a) through (i) (including, without limitation, insurance proceeds and proceeds from governmental or charitable grants or loans including without limitation grants or loans from the Federal Emergency Management Agency or any other federal, state or local agency or instrumentality or any charitable organization);

(k) all rents, income and other benefits to which the Mortgagor may now or hereafter be entitled from the Mortgaged Property described in the preceding clauses (a) through (j), to be applied against the indebtedness and other sums secured hereby; provided, however, that permission is hereby given to the Mortgagor, so long as no Event of Default has occurred hereunder, to collect and use such rents, income and other benefits as they become due and payable, but not in advance thereof;

(l) all air rights and unused development rights (including, without limitation, rights (whether or not transferable to other parties) to restrict the use of the Mortgaged Property);

(m) the reversion and reversions, remainder and remainders, and all land lying in the bed of any street, road or avenue, opened or proposed, in front of or adjoining the Mortgaged Property, to the center line thereof and all the estates, rights, titles, interests, dower and rights of dower, curtesy and rights of curtesy, property, possession, claim and demand whatsoever, both at law and in equity, of Mortgagor of, in and to the Mortgaged Property;

(n) all awards or payments, including interest thereon, which may heretofore and hereafter be made with respect to the Mortgaged Property, whether from the exercise of the right of eminent domain (including but not limited to any transfer made in lieu of or in anticipation of the exercise of said right), or for a change of grade, or for any other injury to or decrease in the value of the Mortgaged Property;

(o) all proceeds of and any unearned premiums on any insurance policies covering the Mortgaged Property, including, without limitation, the right to receive and apply the proceeds of any insurance, judgments, or settlements made in lieu thereof, for damage to the Mortgaged Property;

(p) the right, in the name and on behalf of Mortgagor, to appear in and defend any action or proceeding brought with respect to the Mortgaged Property and to commence any action or proceeding to protect the interest of Mortgagee in the Mortgaged Property;

(q) all title insurance policies, management, franchise and service agreements, accounts, occupancy permits and licenses, building and other permits, governmental approvals, licenses, agreements with utilities companies, water and sewer capacity reservation agreements, bonds, governmental applications and proceedings, feasibility studies, maintenance and service contracts, marketing agreements, development agreements, surveys, engineering work, architectural plans and engineering plans, site plans, landscaping plans, engineering contracts, and all other consents, approvals and agreements which Mortgagor may now or hereafter own in connection with the Mortgaged Property and/or improvements constructed thereon, and all deposits, down payments and profits paid or deposited thereunder, now existing or hereafter obtained by or on behalf of Mortgagor; and

(r) the proceeds of any loan secured by any interest in the Mortgaged Property described in the preceding sections (a) through (q).

AND, without limiting any of the other provisions of this Mortgage, Mortgagor expressly grants to Mortgagee, as secured party, a security interest in all of those portions of the Mortgaged

Property which are or may be subject to the provisions of the Uniform Commercial Codes of the state in which the Mortgaged Property is located and of the state in which Mortgagor was organized, applicable to secured transactions.

TO HAVE AND TO HOLD the Mortgaged Property and all parts thereof unto Mortgagee, its successors and assigns forever.

AND Mortgagor further covenants and agrees with Mortgagee as follows:

ARTICLE I

The Note

1.01 Payment of the Note. Mortgagor will duly and punctually pay (a) the principal of and premium, if any, and interest and other charges on the Note at the time outstanding in accordance with the terms thereof and hereof, and (b) when and as due and payable from time to time as provided herein, all other sums payable hereunder or secured hereby, together with, to the extent permitted by applicable law, interest at the Default Rate on any sums as shall not be paid when due and payable from the date when due and payable (whether during a grace period, if any, or otherwise) until payment thereof.

1.02 Late Charge. In the event that any payment due hereunder or under the Note shall not be made by Mortgagor within five (5) days from the date when such payment is due and payable, a late charge of five cents (\$.05) for each dollar (\$1.00) so over due, may be charged by Mortgagee for the purpose of defraying the expense incident to handling such delinquent payment.

1.03 Prepayment of the Note. The Note may only be prepaid to the extent provided in the Note.

1.04 Guaranty. Mortgagor has delivered to Mortgagee simultaneously with the execution and delivery of this Mortgage, the unconditional guaranty (the "Guaranty") of the payment of and performance under the Note, this Mortgage and any other document evidencing or securing the performance of the obligations secured hereby, duly executed by the Guarantors.

1.05 Disbursement of Loan Proceeds. The proceeds of the loan secured hereby will be disbursed by Mortgagee, upon the execution and delivery of the Note, the Guaranty and this Mortgage, to acquire the Premises, and to pay the necessary expenses incidental to such transaction and the perfection of the lien hereof, including recording costs, documentary and intangible taxes, title insurance premiums and Mortgagee's and Mortgagor's counsels' fees and disbursements, all in accordance with the terms and conditions of this Mortgage and of the commitment letter (the "Mortgage Commitment Letter"), if any, issued by Mortgagee to

Mortgagor in connection with the loan evidenced by the Note as the Mortgage Commitment Letter may be amended herein or in other instruments executed contemporaneously herewith.

ARTICLE 2

OWNERSHIP, CONDITION, ETC., OF MORTGAGED PROPERTY

2.01 Representations, Covenants and Warranties as to Title to Mortgaged Property, etc. Mortgagor represents, covenants and warrants that as of the date hereof and at all times thereafter during the term hereof: (a) Mortgagor is and shall be seized of an indefeasible estate in fee simple in, and has and shall have good, marketable and absolute title to, the Mortgaged Property, and has good right, full power and lawful authority to mortgage and pledge the same as provided herein and Mortgagee may at all times peaceably and quietly enter upon, hold, occupy and enjoy the Mortgaged Property in accordance with the terms hereof; the Mortgaged Property is and shall be free and clear of all liens, security interests, charges and encumbrances whatsoever except those exceptions to title as are specified in the title insurance policy to be issued pursuant to the title insurance commitment endorsed and redated on the date hereof and accepted by the Mortgagee (the "Permitted Encumbrances"); (b) Mortgagor has good and lawful right, power and authority to execute this Mortgage and to mortgage the Mortgaged Property, to assign its right, title and interest as landlord under the Leases and to grant a security interest in the Mortgaged Property; (c) this Mortgage has been duly executed and delivered by the duly authorized representatives of Mortgagor and constitutes the legal, valid and binding obligation of Mortgagor, enforceable in accordance with its terms; (d) all costs arising from construction of any Improvements and the purchase of all equipment located on the Mortgaged Property have been paid; and (e) neither Mortgagor nor any prior owner or present or former tenant or other person has taken any action (or been responsible for any omission) that would cause the Mortgaged Property or any part thereof or any interest therein to be subject to forfeiture under applicable laws, and (f) the Mortgaged Property is not subject to rent control, rent stabilization or other governmental rent regulations. Notwithstanding anything to the contrary contained herein, this Mortgage is subject to and subordinate to the lien of the Superior Mortgage. Mortgagor at its expense will warrant and defend to Mortgagee such title to the Mortgaged Property and the lien and security interest of Mortgagee thereon and therein, against all claims and demands and will maintain and preserve such lien and security interest and will keep this Mortgage a lien upon and a priority perfected security interest in the Mortgaged Property, subject only to the Permitted Encumbrances.

2.02 Title Insurance.

2.02.01 Title Insurance Policy. Prior to or concurrently with the execution and delivery of this Mortgage, Mortgagor, at its own cost and expense, will obtain and deliver to Mortgagee a mortgagee's title insurance policy in the amount of this Mortgage, issued by a title

insurance company satisfactory to Mortgagee and in form and substance satisfactory to Mortgagee and its counsel, naming Mortgagee as the insured, insuring title to and priority of the lien of this Mortgage upon the Land and the Improvements, together with such reinsurance and co-insurance as Mortgagee may require.

2.02.02 Current Survey. Prior to the execution and delivery of this Mortgage, Mortgagor, at its own cost and expense, has obtained and delivered to Mortgagee a current survey of the Land and Improvements satisfactory to Mortgagee and to the title insurance company specified pursuant to Section 2.02.01.

2.02.03 Title Insurance Proceeds. All proceeds received by Mortgagee for any loss under the title insurance policy or policies delivered to Mortgagee under Section 2.02.01 or otherwise in connection with this Mortgage, or under any title insurance policy or policies delivered to Mortgagee in substitution therefor or in replacement thereof, shall be the property of Mortgagee and applied in the manner provided in Section 5.08.

2.03 Recordation. Mortgagor, at its expense, will at all times cause this Mortgage and any instruments amendatory hereof or supplemental hereto and any instruments of assignment hereof or thereof (and any appropriate financing statements or other instruments and continuations thereof with respect to any thereof) to be recorded, registered and filed and to be kept recorded, registered and filed, in such manner and in such places, and will pay all such recording, registration, filing fees and other charges, and will comply with all such statutes and regulations as may be required by law in order to establish, preserve, perfect and protect the lien of this Mortgage as a valid, direct mortgage lien and priority perfected security interest in the Mortgaged Property, subject only to the Permitted Encumbrances. Mortgagor will pay or cause to be paid, and will indemnify Mortgagee in respect of, all taxes (including interest and penalties) at any time payable in connection with the filing and recording of this Mortgage and any and all supplements and amendments thereto.

2.04 Payment of Impositions, etc. Subject to Section 2.07 (relating to permitted contests) and Section 2.08 (relating to escrow deposits), Mortgagor will pay or cause to be paid when due and payable all taxes, assessments (including, but not limited to, all assessments for public improvements or benefits), water and sewer rates, ground rents, maintenance or common charges, vault charges and license fees for the use of vaults, chutes and similar areas adjoining the Mortgaged Property, charges for public or private utilities, license permit fees, inspection fees and other governmental levies or payments, of every kind and nature whatsoever, general and special, ordinary and extraordinary, unforeseen as well as foreseen, which at any time may be assessed, levied, confirmed, imposed or which may become a lien upon the Mortgaged Property, or any portion thereof, or which are payable with respect thereto, or upon the rents, issues, income or profits thereof, or on the occupancy, operation, use, possession or activities thereof, whether any or all of the same be levied directly or indirectly or as excise taxes or as income taxes, and all taxes, assessments or charges which may be levied on the Note, or the

interest thereon (collectively, the "Impositions"). Mortgagor will deliver to Mortgagee, upon request, copies of official receipts or other satisfactory proof evidencing such payments.

2.05 Insurance and Legal Requirements. Subject to Section 2.07 (relating to permitted contests), Mortgagor, at its expense, will comply, or cause compliance with:

(a) all provisions of any insurance policy covering or applicable to the Mortgaged Property or any part thereof, all requirements of the issuer of any such policy, and all orders, rules, regulations and other requirements of the Board of Fire Underwriters (or any other body exercising similar functions) applicable to or affecting the Mortgaged Property or any part thereof or any use or condition of the Mortgaged Property or any part thereof (collectively, the "Insurance Requirements"), and

(b) all laws, statutes, codes, acts, ordinances, orders, permits, judgments, decrees, injunctions, rules, regulations, permits, licenses, authorizations, directions and requirements (including, without limitation, those relating to the protection of the environment) of all governments, departments, commissions, boards, courts, authorities, agencies, officials and officers, foreseen or unforeseen, ordinary or extraordinary, which now or at any time hereafter may be applicable to the Mortgaged Property or any part thereof, or any of the adjoining sidewalks, curbs, vaults and vault space, if any, streets or ways, or any use or condition of the Mortgaged Property or any part thereof (collectively, the "Legal Requirements");

whether or not compliance therewith shall require structural changes in or interference with the use and enjoyment of the Mortgaged Property or any part thereof and whether or not such compliance could be foreseen or is unforeseen.

2.06 Liens, etc. Except for the Superior Mortgage and its related security documents, Mortgagor will not directly or indirectly create or permit or suffer to be created or to remain, and will promptly discharge or cause to be discharged, any mortgage, lien, encumbrance or charge on, pledge of, security interest in or conditional sale or other title retention agreement with respect to the Mortgaged Property or any part thereof or the interest of Mortgagor or Mortgagee therein or any rents or other sums arising therefrom, other than (a) the Permitted Encumbrances and (b) liens of mechanics, materialmen, suppliers or vendors or rights thereto which are at the time being contested as permitted by Section 2.07. Mortgagor is prohibited from placing any subordinate or other mortgages or liens on the Mortgaged Property and to the fullest extent permitted by law any such purported mortgages or liens (which are not a Permitted Encumbrance) placed on all or any portion of the Mortgaged Property shall be deemed void ab initio. Mortgagor will not postpone the payment of any sums for which liens of mechanics, materialmen, suppliers or vendors or rights thereto have then incurred (unless such liens or rights thereto are at the time being contested as permitted by Section 2.07), or enter into any contract under which payment of such sums is postponable (unless such contract expressly provides for the legal, binding and effective waiver of any such liens or rights thereto), in either case, for more than 30 days after the completion of the action giving rise to such liens or rights thereto.

2.07 Permitted Contests. Mortgagor at its expense, may, with the prior written consent of Mortgagee or, in the case of tax certiorari proceedings, upon notice to Mortgagee, contest, or cause to be contested, by appropriate legal proceedings conducted in good faith and with due diligence, the amount or validity of application, in whole or in part, of any Imposition, Legal Requirement or Insurance Requirement or of any lien, encumbrance or charge referred to in Section 2.06, provided that (a) in the case of an unpaid Imposition, lien, encumbrance or charge, such proceedings shall suspend the collection thereof from Mortgagor, Mortgagee, the Mortgaged Property and any rent or other income therefrom and shall not interfere with the payment of any such rent or income, (b) neither the Mortgaged Property nor any rent or other income therefrom nor any part thereof or interest therein would be in any danger of being sold, forfeited, lost or interfered with, (c) in the case of a Legal Requirement, neither Mortgagor nor Mortgagee would be in danger of any civil or criminal liability for failure to comply therewith, (d) Mortgagor shall have furnished such security, if any, as may be required in the proceedings or as may be reasonably requested by Mortgagee, (e) the nonpayment of the whole or any part of any tax, assessment or charge will not result in the delivery of a tax deed to the Mortgaged Property or any part thereof because of such nonpayment, (f) the payment of any sums required to be paid under the Note or under this Mortgage (other than any unpaid Imposition, lien, encumbrance or charge at the time being contested in accordance with this Section 2.07) shall not be interfered with or otherwise affected, and (g) in the case of any Insurance Requirement, the failure of Mortgagor to comply therewith shall not affect the validity of any insurance required to be maintained by Mortgagor under Section 3.01.

2.08 Deposits for Impositions, Insurance Premiums, etc. To the extent not being escrowed for payment by Superior Mortgagee (as hereinafter defined in this Mortgage), Mortgagor will pay or cause to be paid to Mortgagee, on the first day of each month following the date hereof, such amounts as Mortgagee from time to time estimates as necessary to create and maintain a reserve fund to be held by Mortgagee, without interest, from which to pay one month before the same become due, all Impositions (including all taxes, assessments, liens and charges on or against the Mortgaged Property and any part thereof) and premiums for insurance required to be maintained by Mortgagor under Section 3.01. Payments from such reserve fund for such purposes may be made at Mortgagee's discretion even though subsequent owners of the Mortgaged Property or any part thereof may benefit thereby. In the event of any default under the terms of this Mortgage, any part or all of such reserve fund may be applied to any part of the indebtedness secured hereby. In refunding any part of such reserve fund, Mortgagee may deal with whomever is represented to be the owner of the Mortgaged Property or such part thereof at the time. If one month prior to the due date of any of the aforementioned obligations the amount then on deposit therefor shall be insufficient for the payment of such obligation in full, Mortgagor, within ten (10) days after written notice from Mortgagee, shall deposit the amount of the deficiency with Mortgagee. Until expended or applied as above provided, any amounts in the reserve fund shall constitute additional security for the payment of the Indebtedness. The reserve fund shall not constitute a trust fund and may be commingled with other monies held by Mortgagee. No earnings or interest on the reserve fund shall be payable to Mortgagor.

2.09 Leases.

2.09.01 Subordination of Leases; Attornment. Except as otherwise consented to in writing by Mortgagee, all of the Leases shall be made expressly subject and subordinate to this Mortgage and shall contain provisions obligating the tenants thereunder, at Mortgagee's option, to attorn to Mortgagee in the event Mortgagee succeeds to the interest of Mortgagor under such Lease.

2.09.02 Enforcement, etc. Mortgagor will faithfully keep and perform all of the obligations of the lessor under each of the Leases in accordance with their terms. Mortgagor will maintain the Leases in full force and effect, and will not, without the prior written consent of Mortgagee, (a) terminate or cancel any Lease or consent to or accept any termination, cancellation or surrender thereof, or permit any condition or event to exist or to occur that would, or would entitle the tenant thereunder to, terminate or cancel the same, (b) amend, modify or otherwise change the terms of any Lease except to increase the rent or other charges or assessments payable by tenants thereunder upon any renewal or extension of any such lease, (c) waive any default under or breach of any Lease, (d) consent to or permit any prepayment or discount of rent or payment of advance rent under any Lease (other than the usual prepayment of rent as would result from the acceptance on the first day of each month of the rent for the ensuing month and a reasonable and customary security deposit of not more than two months' rent in accordance with the terms of any such lease), (e) enter into any Lease not in effect on the date hereof without the prior written consent of Mortgagee, (f) give any waiver, consent or approval under any Lease or take any other action in connection with any such Lease that would or might impair the value of Mortgagor's interest thereunder or of the Mortgaged Property subject thereto, or impair the interest of Mortgagee therein, (g) collect any rent more than one (1) month in advance of the date due, (h) collect any sums from or settle any claim with any tenant in bankruptcy or guarantor of any Lease without the prior written consent of Mortgagee; any such sums shall be paid directly to Mortgagee and applied first against accrued but unpaid interest due under the Note and then in reduction of the principal balance due under the Note, or (i) consent to any assignment of or subletting or other matter requiring the lessor's consent under any Lease without the prior written consent of Mortgagee.

2.09.03 Assignment of Leases, etc. Subject to the Superior Mortgage and related security documents, Mortgagor hereby assigns to Mortgagee all its right, title and interest as landlord under Leases now existing or hereafter entered into, and all rents and other sums payable to Mortgagor under each such Lease, together with the right to collect and receive the same, provided that, if and so long as no Event of Default (as defined in Section 5.01) shall have occurred and be continuing, Mortgagor shall be permitted to exercise its rights and perform its obligations as landlord under the Leases and to collect and receive such rents and other sums for its own uses and purposes but nonetheless subject to Section 2.09.02 hereinabove. Upon the occurrence of an Event of Default, such permission shall terminate and shall not be reinstated upon a cure of such Event of Default without Mortgagee's express written consent. Such

assignment shall be fully operative without any further action on the part of either party and Mortgagee shall be entitled, at its option, upon the occurrence of an Event of Default hereunder, to all rents, income and other benefits from the Mortgaged Property whether or not Mortgagee takes possession of the Mortgaged Property. Mortgagor hereby further grants to Mortgagee the right, at Mortgagee's option, to (i) enter upon and take possession of the Mortgaged Property for the purpose of collecting the said rents, income and other benefits, (ii) dispossess by the usual summary proceedings any tenant defaulting in the payment thereof to Mortgagee, (iii) let the Mortgaged Property or any part thereof, and (iv) apply such rents, income and other benefits, after payment of all necessary charges and expenses, on account of the indebtedness and other sums secured hereby. Such assignment and grant shall continue in effect until the indebtedness and other sums secured hereby are paid, the execution of this Mortgage constituting and evidencing the irrevocable consent of Mortgagor to the entry upon and taking possession of the Mortgaged Property by Mortgagee pursuant to such grant, whether or not foreclosure has been instituted. Neither the exercise of any rights under this paragraph by Mortgagee nor the application of any such rents, income or other benefits to the indebtedness and other sums secured hereby, shall cure or waive any default, Event of Default, or notice of default hereunder or invalidate any act done pursuant hereto or to any such notice, but shall be cumulative of all other rights and remedies. Upon the occurrence of an Event of Default, all such rents and other sums shall be collected and held by Mortgagee and shall be applied as provided in Section 5.08.

2.09.04 Further Assignments. Subject to the Superior Mortgage and related security documents, Mortgagor shall assign to Mortgagee, upon request, as further security for the indebtedness secured hereby, Mortgagor's interests in all agreements, contracts, licenses and permits affecting the Mortgaged Property, such assignments to be made by instruments in form satisfactory to Mortgagee; but no such assignment shall be construed as a consent by Mortgagee to any agreement, contract, license or permit so assigned, or to impose upon Mortgagee any obligations with respect thereto.

2.09.05 Rent Roll. If any of the Property is rented, Mortgagor shall furnish to Mortgagee, annually on or before March 1 of each year, and, in addition, within ten (10) days after a request by Mortgagee to do so, a certified statement containing the names of all tenants of the Mortgaged Property or any part thereof, the term of their respective leases, the space occupied, the rents payable and the securities deposited thereunder, together with true copies of each Lease and any amendments and supplements thereto.

2.09.06 No Commingling. All securities deposited by tenants of the Mortgaged Property shall be treated as trust funds not to be commingled with any other funds of Mortgagor and Mortgagor shall, upon demand, furnish to Mortgagee satisfactory evidence of compliance with this provision, together with a verified statement of all securities deposited by the tenants.

2.09.07 Successor Not Bound. To the extent not so provided by applicable law, each Lease of the Mortgaged Property, or of any part thereof, entered into after the date hereof, shall provide that, in the event of the enforcement by Mortgagee of the remedies provided for by

law or by this Mortgage, any person succeeding to the interest of Mortgagor as a result of such enforcement shall not be bound by any payment of rent or additional rent for more than one month in advance.

2.10 Use of Property, etc. Mortgagor shall continue to operate the Mortgaged Property for the purposes for which used on the date hereof and for no other purpose, and shall not acquire any fixtures, equipment, furnishings or apparatus covered by this Mortgage subject to any security interest or other charge or lien taking precedence over the security interest and lien of this Mortgage. Mortgagor shall not make or suffer any improper or offensive use of the Mortgaged Property or any part thereof and will not use or permit to be used any part of the Mortgaged Property for any dangerous, noxious, offensive or unlawful trade or business or for any purpose which will reduce the value of the Mortgaged Property in any respect or will cause the Mortgaged Property or any part thereof or interest therein to be subject to forfeiture. In the case of any action or omission of any party which may cause the Mortgaged Property or any part thereof or any interest therein to be subject to forfeiture under applicable laws, then the Mortgagor shall, within 5 days thereafter, (1) give notice to the Mortgagee thereof, (2) take at its expense all action (including, without limitation, the commencement of all summary proceedings required to evict any party responsible for such act or omission) required to prevent such forfeiture and (3) bond the forfeiture proceeding so that it no longer constitutes a lien against any portion of the Mortgaged Property. Mortgagor will not do or permit any act or thing which is contrary to any Legal Requirement or Insurance Requirement or any document of record affecting the Property, or which might impair the value or usefulness of the Mortgaged Property or any part thereof, or commit or permit any waste of the Mortgaged Property or any part thereof, and will not cause or maintain any nuisance in, at or on the Mortgaged Property or any part thereof, or commit or permit any waste of the Mortgaged Property. Mortgagor at its expense will promptly comply with all rights of way or use, privileges, franchises, servitudes, licenses, easements, tenements, hereditaments and appurtenances forming a part of the Mortgaged Property and all instruments relating or evidencing the same, in each case, to the extent compliance therewith is required of Mortgagor under the terms thereof. Mortgagor will not take any action which results in a forfeiture or termination of the rights afforded to Mortgagor under any such instruments and will not, without the prior written consent of Mortgagee, amend in any material respect any of such instruments. Mortgagor shall at all times comply with any instruments of record at the time in force affecting the Mortgaged Property or any part thereof and shall procure, maintain and comply with all permits, licenses and other authorizations required for any use of the Mortgaged Property or any part thereof then being made, and for the proper erection, installation, operation and maintenance of the Improvements or any part thereof.

2.11 Utility Services. Mortgagor will pay or cause to be paid all charges for all public and private utility services, all public or private communications services and all sprinkler systems and protective services at any time rendered to or in connection with the Mortgaged Property or any part thereof, will comply or cause compliance with all contracts relating to any such services, and will do all other things required for the maintenance and continuance of all such services.

2.12 Maintenance and Repair, etc. Subject to Section 2.13, Mortgagor will keep or cause to be kept all presently and subsequently erected or acquired Improvements and the sidewalks, curbs, vaults and vault space, if any, in good and substantial order and repair and in such a fashion that the value and utility of the Mortgaged Property will not be diminished, and, at its sole cost and expense, will promptly make or cause to be made all necessary and appropriate repairs, replacements and renewals thereof, whether interior or exterior, structural or nonstructural, ordinary or extraordinary, foreseen or unforeseen. All repairs, replacements and renewals shall be at least equal in quality and class to the original Improvements. Mortgagor's obligation to repair shall include the obligation to rebuild in the event of destruction however caused, provided that damage by fire or other cause for which Mortgagor is obligated to maintain insurance by any of the provisions of Section 3.01 shall be governed by the provisions of Sections 3.01 and 3.02, and damage by any taking shall be governed by the provisions of Section 3.02. Mortgagor at its expense will do or cause to be done all shoring of foundations and walls of any building or other Improvements and (to the extent permitted by law) of the ground adjacent thereto, and every other act necessary or appropriate for the preservation and safety of the Mortgaged Property by reason of or in connection with any excavation or other building operation upon the Mortgaged Property and upon any adjoining property, whether or not Mortgagor shall, by any Legal Requirement, be required to take such action or be liable for failure to do so.

2.13 Alterations, Additions, etc. Except as set forth in this Section 2.13, Mortgagor shall make no alterations of or additions to the Mortgaged Property (nor shall Mortgagor demolish all or any portion of the Mortgaged Property). So long as no Event of Default shall have occurred and be continuing, and with the prior written consent of Mortgagee, Mortgagor shall have the right at any time and from time to time to make or cause to be made reasonable alterations of and additions to the Property or any part thereof. Mortgagee agrees to not unreasonably withhold or delay its consent to any alteration or addition provided that such alteration or addition (a) shall not change the general character of the Property or reduce the fair market value thereof below its value immediately before such alteration or addition, or impair the usefulness of the Property, (b) is effected with due diligence, in a good and workmanlike manner and in compliance with all Legal Requirements and Insurance Requirements, (c) is promptly and fully paid for, or caused to be paid for, by Mortgagor when due, (d) is made, in case the estimated cost of such alteration or addition exceeds \$25,000, only after Mortgagee shall have consented thereto in writing and shall have reviewed and approved in writing the plans and specifications therefor, (e) is made under the supervision of a qualified architect, engineer or other professional approved by Mortgagee in writing, and (f) is made only after Mortgagor shall have furnished to Mortgagee, if Mortgagee so requires, a payment and performance bond or other security reasonably satisfactory to Mortgagee. Mortgagor shall not demolish all or any portion of the Mortgaged Property without the prior written consent of Mortgagee, which consent may be withheld in Mortgagee's sole and absolute discretion.

2.14 Acquired Property Subject to Lien. All property at any time acquired by Mortgagor and required by this Mortgage to become subject to the lien and security interest hereof, including any property acquired as provided in Section 2.13, whether such property is acquired by exchange, purchase, construction or otherwise, shall forthwith become subject to the lien and security interest of this Mortgage without further action on the part of Mortgagor or Mortgagee. Mortgagor, at its expense, will execute and deliver to Mortgagee (and will record and file as provided in Section 2.03) an instrument supplemental to this Mortgage, satisfactory in substance and form to Mortgagee, whenever such an instrument is necessary under applicable law to subject to the lien and security interest of this Mortgage all right, title and interest of Mortgagor in and to all property required by this Mortgage to be subject to the lien and security interest hereof and acquired by Mortgagor since the date of this Mortgage or the date of the most recent supplemental instrument so subjecting property to the lien hereof, whichever is later.

2.15 No Claims Against Mortgagee, etc. Nothing contained in this Mortgage shall constitute any consent or request by Mortgagee, express or implied, for the performance of any labor or services or the furnishing of any materials or other property in respect of the Mortgaged Property or any part thereof, or shall be construed to permit the making of any claim against Mortgagee in respect of labor or services or the furnishing of any materials or other property or any claim that any lien based on the performance of such labor or services or the furnishing of any such materials or other property is prior to the lien of this Mortgage.

2.16 Indemnification Against Liabilities. Mortgagor will protect, indemnify, save harmless and defend Mortgagee from and against any and all liabilities, obligations, claims, damages, penalties, causes of action, judgments, costs and expenses (including attorneys' fees and expenses) imposed upon or incurred by or asserted against Mortgagee by reason of (a) ownership of a mortgagee's interest in the Mortgaged Property, (b) any accident, injury to or death of persons or loss of or damage to or loss of the use of property occurring on or about the Mortgaged Property or any part thereof or the adjoining sidewalks, curbs, vaults and vault spaces, if any, streets, alleys or ways, (c) any use, non-use or condition of the Mortgaged Property or any part thereof or the adjoining sidewalks, curbs, vaults and vault spaces, if any, streets, alleys or ways, (d) any failure on the part of Mortgagor to perform or comply with any of the terms of this Mortgage, (e) performance of any labor or services or the furnishing of any materials or other property in respect of the Mortgaged Property or any part thereof made or suffered to be made by or on behalf of Mortgagor, (f) any negligence or tortious act on the part of Mortgagor or any of its agents, contractors, lessees, licensees or invitees, (g) any work in connection with any alterations, changes, new construction or demolition of or additions to the Property, or (h) any agreement between Mortgagor and the Mortgagee originally named herein in connection with the closing of the loan evidenced by the Note. If any action or proceeding be commenced, including an action to foreclose this Mortgage or to collect the indebtedness secured hereby, to which action or proceeding the Mortgagee is made a party by reason of the execution of this Mortgage or the Note, or in which it becomes necessary to defend or uphold the lien of this Mortgage, all sums paid by Mortgagee for the expense of any litigation to prosecute or defend the rights and lien created hereby, shall be paid by Mortgagor to Mortgagee as hereinafter

provided. Mortgagor will pay and save Mortgagee harmless against any and all liability with respect to any intangible personal property tax or similar imposition of the state in which the Mortgaged Property is located or any subdivision or authority thereof now or hereafter in effect, to the extent that the same may be payable by Mortgagee in respect of this Mortgage or the Note. All amounts payable to Mortgagee under this Section 2.16 shall be deemed indebtedness secured by this Mortgage and any such amounts that are not paid within ten (10) days after written demand therefor by Mortgagee shall bear interest at the Default Rate from the date of such demand. In case any action, suit or proceeding is brought against Mortgagee by reason of any such occurrence, Mortgagor, upon request of Mortgagee, will, at Mortgagor's expense, resist and defend such action, suit or proceeding or cause the same to be resisted or defended, by counsel designated by Mortgagor and approved by Mortgagee. The obligations of Mortgagor under this Section 2.16 shall survive any discharge of this Mortgage and payment in full of the Note.

2.17 Mortgagee's Exculpation. Mortgagor is advised and agrees that this Mortgage is made on the express condition that any obligation hereunder of Mortgagee shall be enforceable only against Mortgagee's interest in this Mortgage, and that no trustee, officer, director, beneficiary, shareholder, employee or representative of Mortgagee shall be personally liable for any matter in connection with, or arising out of this Mortgage. The foregoing shall not be deemed in any way to impose any obligations on Mortgagee except as expressly provided herein. In particular, and without implied limitation, Mortgagee shall not be liable for the failure, seizure or similar circumstance of any financial institution in which Mortgagee shall have deposited sums on account of Mortgagor (for example, without implied limitation, tax escrow deposits and Proceeds (hereafter defined) held for the restoration and/or replacement of all or part of the Mortgaged Property) regardless whether or not such financial institution shall be affiliated with Mortgagee and whether or not the sums on deposit shall have exceeded the maximum amount covered by any applicable federal or other insurance.

2.18 Disposition of the Mortgaged Property.

(a) Mortgagor shall not, during the term hereof, sell, assign, convert the Mortgaged Property or any part thereof into a condominium or coöperative, mortgage, pledge or hypothecate or otherwise transfer, encumber or dispose of the Mortgaged Property or any part thereof or any interest therein or any of the rents or other sums to be earned therefrom or of any direct or indirect interest in Mortgagor, if Mortgagor is a partnership, limited liability company, corporation or any other entity (in each of the foregoing cases, either of record or beneficially), without Mortgagee's prior written consent.

(b) A sale, assignment, mortgage, pledge, hypothecation or transfer within the meaning of this Section 2.18 shall be deemed to include (i) an installment sales agreement wherein Mortgagor agrees to sell the Mortgaged Property or any part thereof for a price to be paid in installments; (ii) an agreement by Mortgagor leasing all or a substantial part of the Mortgaged Property for other than actual occupancy by a space tenant thereunder or a sale, assignment or other transfer of or the grant of a security interest in, Mortgagor's right, title and

interest in and to any Leases; (iii) if Mortgagor, Guarantors, or any general partner of Mortgagor or Guarantors is a corporation, the voluntary or involuntary sale, conveyance or transfer of such corporation's stock (or the stock of any corporation directly or indirectly controlling such corporation by operation of law or otherwise) or the creation or issuance of new stock by which an aggregate of more than 10% of such corporation's stock shall be vested in a party or parties who are not now stockholders; (iv) if Mortgagor, Guarantors, or any general partner of Mortgagor or Guarantors is a limited liability company, the voluntary or involuntary sale, conveyance or transfer of direct or indirect interests in such limited liability company (or interests in any limited liability company directly or indirectly controlling such limited liability company by operation of law or otherwise) or the creation or issuance of membership interests by which an aggregate of more than 10% of such limited liability company's membership interests shall be vested in a party or parties who are not now members; (v) if Mortgagor, Guarantors or any general partner of Mortgagor or Guarantors is a limited or general partnership or joint venture, the change, removal or resignation of a general partner or managing partner or the transfer of the partnership interest of any general partner or managing partner; (vi) if Mortgagor, Guarantors, or any general partner of Mortgagor or Guarantors is a limited or general partnership, the voluntary or involuntary sale, conveyance or transfer of direct or indirect interests in such partnership (or interests in any partnership directly or indirectly controlling such partnership by operation of law or otherwise) or the creation or issuance of partnership interests by which an aggregate of more than 10% of such partnership's partnership interests shall be vested in a party or parties who are not now partners; (vii) the removal or resignation of the managing agent for the Mortgaged Property or the transfer of ownership, management or control of such managing agent to a person or entity other than the general partner or managing partner of Mortgagor.

2.19 Tax Appeals and Refunds. Mortgagor shall not collect any sums from any governmental authority or settle any claim with any governmental authority in respect of a claim by Mortgagor for a reduction in any taxes (real property or otherwise) due in respect of any of the Mortgaged Property (regardless of whether such claims or sums shall relate to a period prior to the date of this Mortgage) without the prior written consent of Mortgagee. Subject to the terms of the Superior Mortgage, any such sums shall be paid directly to Mortgagee and applied first against accrued but unpaid interest due under the Note and then in reduction of the principal balance due under the Note. If acquired directly by Mortgagor, subject to the terms of the Superior Mortgage, such sums shall be held in trust and immediately paid over to Mortgagee. Upon an Event of Default hereunder, subject to the terms of the Superior Mortgage, Mortgagee (i) may prosecute any tax protests in respect of the Mortgaged Property, (ii) may settle any claims therein in the name of and on behalf of Mortgagor and collect any sums on account thereof.

2.20 Mortgage Foreclosure Moratorium Laws. If this Mortgage is now or hereafter protected or affected by moratorium laws, or by any other statutes, preventing the Mortgagee from foreclosing for nonpayment of the principal at the expiration date hereof, the Mortgagor shall continue or commence to pay amortization to the Mortgagee (if the Mortgagee so elects,

and only so long as such laws or statutes protect the Mortgagee from foreclosure for nonpayment of the balance of the principal debt), based upon the greater of (i) a five (5) year amortization schedule (subject to the highest rate permitted by law) or (ii) the same rate (if any) existing immediately preceding the maturity date of this Mortgage. If, however, applicable laws require or permit, in connection with mortgages so protected or affected, that installment payments to the Mortgagee amortizing such debt be in greater annual amounts than the aggregate per annum of the payments that would be due if based on such year's payments, the Mortgagee may elect, as soon as permitted after the debt matures, that the installments payable after the maturity date hereof, shall be at the rate and as provided for in such laws. If the Mortgagor defaults in payment of any such amortization installment beyond any applicable grace period, such default shall constitute an Event of Default hereunder entitling Mortgagee to exercise all of its rights and remedies including, without limitation, instituting foreclosure proceedings solely by reason of such default. Nothing in this Section 2.20 shall be deemed to extend the maturity date of the Note and no acceptance of a payment by Mortgagee on account of the Note pursuant to this Section 2.20 or otherwise shall be deemed to extend the maturity date of the Note unless Mortgagee shall have agreed to such extension in writing.

ARTICLE 3

Insurance; Damage, Destruction or Taking, etc.

3.01 Insurance.

3.01.01 Risks to be Insured. Mortgagor shall carry the insurance required under the Superior Mortgage and this Mortgage. Mortgagor will, at its expense, maintain or cause to be maintained with insurers approved by Superior Mortgagee (a) insurance with respect to the Improvements (which shall not include development and site work at the Mortgaged Property) against loss or damage by perils customarily included under standard "all-risk" policies, in amounts sufficient to Superior Mortgagee (b) public liability, including bodily injury and property damage, insurance, with personal injury endorsement, applicable to the Mortgaged Property in such amounts as are usually carried by persons operating similar properties in the same general locality, (c) flood hazard insurance if Mortgagee determines that the Mortgaged Property is in a flood zone and that the Improvements (which does not include site work and development) located on the Mortgaged Property should be insured., (d) all-risk builders' risk insurance with respect to the Mortgaged Property during any period in which there is any construction occurring at the Improvements (which shall not include development and site work at the Mortgaged Property), against loss or damage by fire and such other risks, including vandalism, malicious mischief and sprinkler leakage, as are included in so-called "extended coverage" clauses at the time available with respect to similar property, in an amount to be determined by Superior Mortgagee, and (e) such other insurance with respect to the Mortgaged Property in such amounts and against such insurable hazards as Superior Mortgagee and Mortgagee from time to time may reasonably require. Notwithstanding any provisions to the

contrary, Mortgagor shall not be required to carry any insurance or amount of insurance coverage not required by the Superior Mortgagee.

3.01.02 Policy Provisions. Subject to the terms of the Superior Mortgage, all insurance maintained by Mortgagor pursuant to subsection 3.01.01, shall (a) name Mortgagor as owner and Mortgagee as loss payee under a mortgagee endorsement satisfactory to Mortgagee, (b) (except public liability insurance) provide that the proceeds for any losses shall be adjusted by Mortgagor, subject to the approval of Mortgagee in the event the proceeds shall exceed \$25,000, and shall be payable to Mortgagee, to be held and applied as provided in Section 3.03, (c) include effective waivers by the insurer of all rights of subrogation against any named insured, the indebtedness secured by this Mortgage and the Mortgaged Property and all claims for insurance premiums against Mortgagee, (d) provide that any losses shall be payable notwithstanding (i) any foreclosure or other action or proceeding taken by Mortgagee pursuant to any provision of this Mortgage, or (ii) any change in title or ownership of the Mortgaged Property, (e) provide that no cancellation, reduction in amount or material change in coverage thereof or any portion thereof shall be effective until at least 30 days after receipt by Mortgagee of written notice thereof, and (f) be satisfactory in all other respects to Mortgagee.

3.01.03 Delivery of Policies, etc. Mortgagor will deliver, or cause to be delivered, to Mortgagee, promptly upon request, (a) the original or true copies of all policies evidencing all insurance required to be maintained under subsection 3.01.01 or certificates of insurance and a letter from an insurance broker or agent satisfactory to Mortgagee to the effect that the insurance policies maintained by Mortgagor comply with the terms of this Mortgage, and (b) evidence as to the payment of all premiums due thereon (with respect to public liability insurance policies, all installments for the current year due thereon to such date), provided that Mortgagee shall not be deemed by reason of its custody of such policies to have knowledge of the contents thereof. Mortgagor will also deliver to Mortgagee, promptly upon request, a certificate of a principal of Mortgagor (a "Compliance Certificate") setting forth the particulars as to all such insurance policies and certifying that the same comply with the requirements of this Section, that all premiums due thereon have been paid and that the same are in full force and effect. Mortgagor will also deliver to Mortgagee not later than 30 days prior to the expiration of any policy a binder or certificate of the insurer evidencing the replacement thereof and not later than 15 days prior to the expiration of such policy an original copy (or true copy) of the new policy. In the event Mortgagor shall fail to effect or maintain any insurance required to be effected or maintained pursuant to the provisions of this Section 3.01: (i) Mortgagor will indemnify Mortgagee against any damage, loss or liability resulting from all risks for which such insurance should have been effected or maintained; and (ii) Mortgagee shall have the right, but not the obligation, to obtain any such insurance and any amount expended by Mortgagee in connection therewith shall be deemed indebtedness secured by this Mortgage and shall be repaid by Mortgagor, on demand, together with interest thereon from the date of expenditure at the Default Rate.

3.01.04 Separate Insurance. Mortgagor will not take out separate insurance concurrent in form or contributing in the event of loss with that required to be maintained pursuant to this Section 3.01.

3.02 Damage, Destruction or Taking; Mortgagor to Give Notice; Assignment of Awards. In case of (a) any damage to or destruction of the Mortgaged Property or any part thereof, or (b) any taking (whether for permanent or temporary use) of all or any part of the Mortgaged Property or any interest therein or right accruing thereto, as the result of or in lieu or in anticipation of the exercise of the right of condemnation or eminent domain, or a change of grade affecting the Mortgaged Property or any part thereof (a "Taking"), or the commencement of any proceedings or negotiations which might result in any such Taking, Mortgagor will promptly give written notice thereof to Mortgagee (including providing copies of any and all papers from time to time served in connection with such proceedings), generally describing the nature and extent of such damage or destruction or of such Taking or the nature of such proceedings or negotiations and the nature and extent of the Taking which might result therefrom, as the case may be. Subject to the provisions of the Superior Mortgage, Mortgagee shall be entitled to all insurance proceeds payable on account of such damage or destruction and to all awards or payments allocable to the Mortgaged Property on account of such Taking, and Mortgagor hereby irrevocably assigns to Mortgagee all rights of Mortgagor to any such proceeds, award or payment and irrevocably authorizes and empowers Mortgagee, at its option, in the name of Mortgagor or otherwise, to file and prosecute what would otherwise be Mortgagor's claim for any such proceeds, award or payment and to collect, receipt for and retain the same for disposition in accordance with Section 3.03. Mortgagor shall continue to pay the Indebtedness at the time and in the manner provided for its payment in the Note and in this Mortgage and the Indebtedness shall not be reduced until any award or payment therefor shall have been actually received and applied by Mortgagee, after the deduction of expenses of collection, to the reduction or discharge of the Indebtedness. Subject to the provisions of the Superior Mortgage, Mortgagee shall not be limited to the interest paid on the award by the condemning authority but shall be entitled to receive out of the award interest at the rate or rates provided for herein and in the Note. Mortgagor will pay all reasonable costs and expenses incurred by Mortgagee in connection with any such damage, destruction or Taking and seeking and obtaining any insurance proceeds, award or payment in respect thereof.

3.03 Application of Proceeds. Subject to the rights of the holder of the Superior Mortgage, Mortgagee may at its option apply all amounts recovered under any insurance policy maintained by Mortgagor hereunder, and all net awards received by it on account of any Taking (collectively, "Proceeds") in any one or more of the following ways: (a) as provided in Section 5.08, regardless of whether part or all of the indebtedness secured hereby shall then be matured or unmatured (provided that to the extent that any sums shall remain outstanding under this Mortgage or the Note after such application, the obligations of Mortgagor to repay such sums shall continue in full force and effect and Mortgagor shall not be excused in the payment thereof), or (b) to fulfill any of the covenants contained herein as Mortgagee may determine, or (c) released to Mortgagor for application to the cost of restoration and/or replacement of all or

part of the Mortgaged Property. Any Proceeds which Mortgagee shall determine to release to Mortgagor for the restoration and/or replacement of all or part of the Mortgaged Property shall be held by Mortgagee without payment or allowance of interest thereon and shall be paid out from time to time upon compliance by Mortgagor with such provisions and requirements as may be imposed by Mortgagee (which provisions and requirements shall provide, among other things, that disbursements shall only be made in reimbursement of invoices previously paid for work done in accordance with plans and specifications approved of by Mortgagee and then only upon (i) a certification of compliance by a licensed architect that the work to be reimbursed was performed in accordance with the approved plans and specifications and performed in a good and workmanlike manner and (ii) the delivery of lien waivers for the sums being paid). Proceeds held by Mortgagee pursuant to this Section shall not be deemed trust funds, shall not bear interest and Mortgagee may commingle same with its other funds.

3.04 Total Taking and Total Destruction. In case of (a) a Taking of the entire Mortgaged Property, or (b) a Taking of less than the entire Mortgaged Property, or any material damage to or destruction of the Mortgaged Property, in either case which, in the good faith judgment of Mortgagee, renders the Mortgaged Property remaining after such Taking, damage or destruction unsuitable for restoration for use as property of substantially the same value, condition, character and general utility as the Mortgaged Property prior to such Taking, damage or destruction (any such Taking being herein called a "Total Taking" and any such damage or destruction being herein called a "Total Destruction"), then, subject to the terms of the Superior Mortgage, the Proceeds received by Mortgagee or Mortgagor on account of such Total Taking or Total Destruction shall be applied by Mortgagee in the manner specified in Section 5.08.

ARTICLE 4

Miscellaneous Covenants of Mortgagor

4.01 Maintenance of Existence, etc. Mortgagor will at all times maintain, preserve and keep in full force and effect its existence, good standing, franchises, rights and privileges as an entity under the laws of the state of its organization and the state in which the Mortgaged Property is located and its right to own and operate the Mortgaged Property and to transact business in such states.

4.02 Restrictions on Business Activities. Mortgagor will not, so long as any amounts are payable under the Note or otherwise secured by this Mortgage, directly or indirectly engage in any activity in a manner which would impair the security value to Mortgagee of the Mortgaged Property or any part thereof or which would impair in any material respect the position or interest of Mortgagee.

4.03 Inspection, etc. Upon reasonable notice and during regular business hours, Mortgagor will permit Mortgagee and any representatives designated by Mortgagee to visit and

inspect the Mortgaged Property or any part thereof, to inspect the books of account of Mortgagor and all other property, books and records relating to the Mortgaged Property and to make copies thereof and extracts therefrom, and to discuss its affairs, finances and accounts with, and to be advised as to the same by, the officers, employees, agents and independent accountants of Mortgagor, all at such reasonable times and intervals as from time to time may be requested. Mortgagee shall not have any duty to make any such inspection and shall not incur any liability or obligation for not making any such inspection or, once having undertaken any such inspection, for not making the same carefully or properly, or for not completing the same; nor shall the fact that such inspection may not have been made by Mortgagee relieve Mortgagor of any obligations that it may otherwise have under this Mortgage.

4.04 Certificates as to No Default; Notice by Mortgagor, etc.

4.04.01 Certificate as to No Default, etc. by Mortgagor.

(a) Within five (5) days after a request therefor by Mortgagee, Mortgagor will furnish to Mortgagee a Compliance Certificate certifying (i) the principal amount then outstanding on the Note, (ii) the rate of interest on the Note, (iii) that there are no offsets or defenses to the payment of the Indebtedness, (iv) that the Note and this Mortgage are valid, legal and binding obligations and have not been modified, except as specified in such Compliance Certificate and (v) that there is no condition or event which constitutes an Event of Default or which, after notice or lapse of time or both, would constitute an Event of Default or, if any such condition or event exists, specifying the nature and period of existence thereof and what action Mortgagor is taking or proposes to take with respect thereto.

(b) Within five (5) days after a request therefor by Mortgagee, Mortgagor will furnish to Mortgagee estoppel certificates from any of the lessees under the Leases, as required by their respective Leases.

4.04.02 Notice by Mortgagor. Mortgagor shall give prompt notice to Mortgagee of (a) a default or Event of Default, (b) any notice given or any other action taken or, to Mortgagor's knowledge, intended to be taken by (i) a tenant under any Lease, (ii) a holder of any indebtedness of Mortgagor or otherwise encumbering the Mortgaged Property, or (iii) any other Person, if such notice is given or such other action is taken with respect to (x) a claimed default under such Lease or other indebtedness, (y) a default or Event of Default under this Mortgage, or (z) a claimed default involving a potential liability in excess of \$5,000, under any other indenture, lease, assignment, agreement or other instrument to which Mortgagor or any Guarantor is a party or by which it or the Mortgaged Property may be bound or affected, and (c) any proceedings instituted by or against Mortgagor in any federal or state court or by any governmental department, agency or instrumentality, or any such proceedings threatened against Mortgagor in any federal or state court or by any governmental department, agency or instrumentality, affecting the Mortgaged Property or any portion thereof or which, if adversely determined, would have a material adverse effect upon Mortgagor's business, assets or condition,

financial or other, or upon the lien of this Mortgage. Any notice so given shall specify the nature and period of existence of such event or condition and what action Mortgagor or such Guarantor is taking or causing to be taken and proposes to take or cause to be taken with respect thereto and shall include a copy of any documents relevant thereto.

4.05 No Credit for Payment of Taxes. Mortgagor shall not be entitled to any credit against the principal of or interest on the Note or any other sum which may become payable under the terms thereof or hereof by reason of the payment of any tax on the Mortgaged Property or any part thereof or by reason of the payment of any other Imposition, and shall not apply for or claim any deduction from the taxable value of the Mortgaged Property or any part thereof by reason of this Mortgage.

4.06 Books and Records; Financial Statements. Mortgagor covenants to keep adequate records and books of account in which complete entries will be made in accordance with generally accepted accounting principles consistently applied reflecting all financial transactions of Mortgagor in respect of the Mortgaged Property. Mortgagor further covenants that it will, at any reasonable time and from time to time, permit Mortgagee or any agents or representatives thereof to examine and make copies of and abstracts from such books and records of account and visit the Mortgaged Property to discuss the affairs, finances and accounts with respect thereto with Mortgagor and any of its officers, directors or agents in respect of the Mortgaged Property. Mortgagor shall deliver to Mortgagee, not later than thirty (30) days after the end of each quarter and three months after the end of each fiscal year of Mortgagor, (a) financial statements in detail satisfactory to Mortgagee, certified by a principal of Mortgagor and prepared in accordance with generally accepted accounting principles consistently applied by a firm of certified public accountants acceptable to Mortgagee, of annual income and expenses with respect to the ownership and operation of the Mortgaged Property for such fiscal year, setting forth in comparative form the figures for the previous fiscal year, and (b) balance sheets in detail satisfactory to Mortgagee, certified by a principal, of (i) Mortgagor, as at the end of such fiscal year, setting forth in comparative form the figures as at the end of the preceding fiscal year, and (ii) the Guarantors. Mortgagor shall also deliver to Mortgagee such other information and data with respect to the business, operations, affairs, prospects, condition, properties and assets of Mortgagor, each Guarantor and the Mortgaged Property as Mortgagee may from time to time reasonably request.

ARTICLE 5

Events of Default; Remedies, etc.

5.01 Events of Default; Declaration of Note Due. If any one or more of the following events (herein sometimes called "Events of Default") shall occur:

(a) Mortgagor shall default in the due and punctual payment of any principal of or interest on the Note when and as due and payable (whether at maturity or as an installment of interest or by reason of any prepayment requirement or by declaration of acceleration or otherwise) and such default shall continue for five (5) or more days; or

(b) Mortgagor shall default in the payment, when and as due and payable, of any other indebtedness or other sums payable pursuant to the Note, this Mortgage, or if Mortgagor shall be in default on any other mortgage or instrument encumbering the Mortgaged Premises or any note or bond secured by any of the foregoing, or if there shall be a default under any other mortgage or other instrument securing payment due under the Note and such default shall continue for five (5) or more days; or

(c) Mortgagor shall default in the due performance or observance of any term of Section 2.01, 2.02, 2.03, 2.04, 2.06, 2.08, 2.09, 2.18, 3.01, 9.04, 13.01, 13.02, 13.04, 13.05, 14.02 and 14.05 and such default shall continue for ten (10) or more days from notice thereof sent by Mortgagee to Mortgagor; or

(d) Mortgagor shall default in the due performance or observance of any of the terms of this Mortgage, the Note or any other Loan Document other than those referred to in subdivisions (a), (b), and (c) of this Section 5.01, and such failure shall continue for fifteen (15) or more days from notice thereof sent by Mortgagee to Mortgagor; or

(e) any warranty, representation or other statement made by or on behalf of Mortgagor in or pursuant to this Mortgage or in connection with the application of the loan secured hereby (including, without limitation, any financial statement delivered pursuant to Section 4.06) is false, incorrect or misleading in any material respect; or

(f) Mortgagor or the Guarantors shall make an assignment for the benefit of creditors, or shall be generally not paying its debts as they become due, or shall commence a case under the federal bankruptcy laws, or shall file any petition or answer seeking for itself any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any present or future statute, law or regulation, or shall file an answer admitting or not contesting the material allegations of a petition against it in any such proceeding, or shall seek or consent to or acquiesce in the appointment of any trustee, custodian, receiver or liquidator of Mortgagor or any Guarantor, or any material part of its properties or assets, or if Mortgagor or the Guarantor shall take any action for the purpose of the foregoing; or

(g) within 30 days after the commencement of an action against Mortgagor or the Guarantors seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any present or future statute, law or regulation, such action shall not have been dismissed or all orders entered therein or proceedings thereunder affecting its business, operations and properties stayed, or if the stay of any such order or proceeding shall thereafter be set aside, or if, within thirty (30) days after the appointment, without the consent or

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acquiescence of Mortgagor or the Guarantors, of any trustee, custodian, receiver or liquidator of Mortgagor or any Guarantor, or of any material part of its properties or assets, such appointment shall not have been vacated; or

(h) Mortgagor shall take any action looking to its dissolution or liquidation; or

(i) Mortgagor or the Guarantors shall default (as principal or surety) in the payment of any principal of, premium, if any, or interest on any indebtedness for borrowed money in the amount of \$25,000 or more in any one case or in the aggregate, or if Mortgagor shall default in the due performance or observance of any of the terms of any such indebtedness or of any lease, mortgage, indenture or other agreement or instrument relating thereto beyond any grace period provided with respect thereto; or

(j) subsequent to the date of this Mortgage the laws of the state in which the Mortgaged Property is located shall be changed by statutory enactment, judicial decision, regulation or otherwise, so as (i) to deduct from the value of land for the purpose of taxation (for state, county, municipal or other purpose) any lien or charge thereon, or (ii) to change the taxation of mortgages or debts secured by land or the manner of collecting any such taxation, so as to affect this Mortgage, and thereafter, within 30 days following receipt of a written request from Mortgagee, Mortgagor shall have failed to enter into a lawful and binding agreement with Mortgagee, satisfactory in substance and form to Mortgagee, obligating Mortgagor to reimburse Mortgagee for any increase in taxation imposed on Mortgagee by reason of any of the foregoing; or

(k) a final judgment shall be entered against Mortgagor or the Guarantors, and if, within thirty (30) days after entry thereof, such judgment shall not have been discharged or execution thereof stayed pending appeal, or if, within thirty (30) days after the expiration of any such stay, such judgment shall not have been discharged, or

(l) Except as provided in this Mortgage, Mortgagor, or any of its successors or assigns, shall make any conveyance of all or any part of the Mortgaged Property or any interest therein; or

(m) the Guarantors shall default in the full and timely performance of any obligation under the Guaranty; or

(n) there shall be any default, beyond applicable grace periods under any mortgage, or any note secured by any mortgage, which is prior, equal or subordinate to the lien of this Mortgage (including but not limited to the Superior Mortgage) or the mortgagee under any such prior, equal or subordinate mortgage commences a foreclosure action in connection with such mortgage; or

(o) any act or omission on or relating to the Mortgaged Property or any part thereof or any interest therein shall render it to or any such part or interest subject to forfeiture under applicable law; or

(p) the amendment or modification of any mortgage, or any note secured by any mortgage, which is prior, equal or subordinate to the lien of this Mortgage; or

(q) Mortgagor's failure to cure any violations of laws or ordinances affecting or which may be interpreted to affect the Mortgaged Property within fifteen (15) days of the violation;

(r) there shall be a default, beyond applicable grace periods, in any agreement, other than the Note, the Guaranty and this Mortgage, between Mortgagee and Mortgagor, Guarantors or any "principal" (as hereafter defined) of Mortgagor or Guarantors. For purposes of this Section 5.01, "principal" of an entity shall mean any person or entity which owns, directly or indirectly, an interest in such entity of 50% or more; or

(s) Mortgagor or any entity affiliated therewith shall default, beyond applicable grace periods, in any agreement relating to other property owned by Mortgagor or any entity affiliated therewith which is secured by a mortgage between Mortgagee and Mortgagor or any entity affiliated therewith.

then and in any such event (i) interest at the Default Rate shall be due and payable on the principal of and (to the extent permitted by law) interest and other charges thereon as due under the Note at the time outstanding together with all other indebtedness secured hereby, from the date of the Event of Default until actual receipt by Mortgagee of payment in full of the Indebtedness and (ii) Mortgagee may, at any time after any Event of Default, declare, by written notice to Mortgagor, the Note, and all other indebtedness secured hereby to be due and payable upon the date specified in such notice and upon such date the same shall become due and payable, together with interest accrued thereon, without presentment, demand, protest or notice, all of which Mortgagor hereby waives. Mortgagor will pay on demand all costs and expenses (including reasonable attorneys' fees and expenses) incurred by or on behalf of Mortgagee in enforcing this Mortgage or the Note, or occasioned by any default or Event of Default under this Mortgage, or incurred in connection with any foreclosure action or other proceeding brought by Mortgagee to enforce and protect its rights and interest under the Mortgage or Note. Without limiting the foregoing, Mortgagee shall have the right to recover all such costs and expenses, including reasonable attorneys' fees and expenses, in any judgment of foreclosure and sale. For purposes of this Section 5.01, the rendering of a judgment in an action to foreclose this Mortgage shall not be deemed "payment in full of the Indebtedness" and it is the intention of the Mortgagee and Mortgagor that any such judgment shall bear interest at the Default Rate.

5.02 Security Agreement; Legal Proceedings; Foreclosure, etc. This Mortgage is both a real property mortgage and a "security agreement" within the meaning of the Uniform Commercial Code. The Mortgaged Property includes both real and personal property and all other rights and interests, whether tangible or intangible in nature, of Mortgagor in the Mortgaged Property. Mortgagor by executing and delivering this Mortgage has granted and hereby grants to Mortgagee, as security for the Indebtedness, a security interest in the Mortgaged Property to the full extent that the Mortgaged Property may be subject to the Uniform Commercial Code. If an Event of Default shall have occurred and be continuing, Mortgagee at any time may, at its election, do one or more of the following: (i) Mortgagee may proceed at law or in equity or otherwise to enforce the payment of the Note at the time outstanding in accordance with the terms hereof and thereof, (ii) Mortgagee may foreclose the lien of this Mortgage as against all or any part of the Mortgaged Property and have the same sold under the judgment or decree of a court of competent jurisdiction, or Mortgagee may, in an uncontested foreclosure, foreclose the lien of this Mortgage as against all or any part of the Mortgaged Property and have the same sold pursuant to any non-judicial foreclosure remedy available to mortgages under applicable South Carolina law, and/or (iii) Mortgagee may exercise any or all of the remedies of a secured party under the Uniform Commercial Code with respect to any personal property covered hereby. If Mortgagee should proceed to dispose of any personal property in accordance with the provisions of the Uniform Commercial Code, five (5) days' notice by Mortgagee to Mortgagor shall be deemed to be commercially reasonable notice under any provision of the Uniform Commercial Code requiring notice. Mortgagor, however, agrees that all other property of every nature and description, whether real or personal, covered by this Mortgage, together with all personal property used on or in connection with the Mortgaged Property or any business conducted thereon by the Mortgagor and covered by separate security agreements, are encumbered as one unit, that this Mortgage and such security interests, at Mortgagee's option, may be foreclosed or sold in the same proceeding, and that all property encumbered (both realty and personalty), at Mortgagee's option, may be sold as such in one unit as a going business, subject to the provisions of applicable law. In any action service of process may be made upon the Mortgagor by mailing a copy of the papers to be served to the Mortgagor at the address set forth on the first page hereof, and such service shall be deemed complete upon the posting of such papers in any mail box regularly maintained by the United States Post Office.

This Mortgage shall constitute a security agreement for purposes of the Uniform Commercial Code.

5.03 Power of Sale. Upon or at any time the occurrence of an Event of Default, Mortgagee may, either with or without entry or taking possession of the Mortgaged Property as provided in this Mortgage or otherwise, personally or by its agents or attorneys and without prejudice to the right to bring an action for foreclosure of this Mortgage, subject to the terms of the Superior Mortgage, sell the Mortgaged Property or any part thereof pursuant to any procedures provided by applicable law, and all estate, right, title, interest, claim and demand therein, and right of redemption thereof, at one or more sales in its entirety or in parcels, and at such time and place upon such terms and after such notice thereof as may be required or

permitted by applicable law. All notices relating to or in connection with such a sale or under any applicable law pertaining thereto shall be in writing and shall be deemed by sufficient given or served for all purposes when delivered (i) by personal service or courier service, and shall be deemed given on the date when signed for or, if refused, when refused by Mortgagor's agent, or (ii) by United States certified mail, return receipt requested, postage prepaid, and shall be deemed given two (2) days after being sent, to any party hereto at its applicable address as set forth herein. For purposes hereof, notices may be given by Mortgagee or by its attorneys.

5.04 Purchase of Mortgaged Property by Mortgagee. Mortgagee may be a purchaser of the Mortgaged Property or of any part thereof or of any interest therein at any sale thereof, whether pursuant to foreclosure or otherwise, and may apply upon the purchase price thereof the indebtedness secured hereby owing to Mortgagee. Mortgagee shall, upon any such purchase, acquire good title to the properties so purchased, free of the lien of this Mortgage and free of all rights of redemption in Mortgagor.

5.05 Waiver of Appraisal, Valuation, etc. Mortgagor hereby waives, to the fullest extent it may lawfully do so, the benefit of all appraisal, valuation, stay, extension and redemption laws now or hereafter in force and all rights of marshalling in the event of any sale of the Mortgaged Property or any part thereof or any interest therein.

5.06 Sale a Bar Against Mortgagor. Any sale of the Mortgaged Property or any part thereof or any interest therein under or by virtue of this Mortgage, whether pursuant to foreclosure or otherwise, shall forever be a bar against Mortgagor.

5.07 Sale in One or More Parcels. If this Mortgage is foreclosed, the Mortgaged Property, or any interest therein, may at Mortgagee's discretion, be sold in one or more parcels or in several interests or portions in any order or manner.

5.08 Application of Proceeds of Sale and Other Moneys. The proceeds of any sale of the Mortgaged Property or any part thereof or any interest therein under or by virtue of this Mortgage, whether pursuant to foreclosure or otherwise, and all other moneys at any time held by Mortgagee as part of the Mortgaged Property, shall be applied as follows:

First: to the payment of the costs and expenses of such sale (including, without limitation, attorneys' fees and expenses, the cost of evidence of title and the costs and expenses, if any, of taking possession of, retaining custody over, repairing, managing, operating, maintaining and preserving, the Mortgaged Property or any part hereof prior to such sale), all costs and expenses of any receiver of the Mortgaged Property or any part thereof, and any taxes, assessments or charges prior to the lien of this Mortgage, which Mortgagee may consider necessary or desirable to pay;

Second: to the payment of any indebtedness secured by this Mortgage, other than indebtedness with respect to the Note at the time outstanding, which Mortgagee may consider necessary or desirable to pay;

Third: to the payment of all amounts of principal of, premium, if any, and interest at the time due and payable on the Note at the time outstanding (whether due by reason of maturity or as an installment of interest or by reason of any prepayment requirement or by declaration of acceleration or otherwise), including interest at the Default Rate on any overdue principal and premium, if any, and (to the extent permitted under applicable law) on any overdue interest; and in case such moneys shall be insufficient to pay in full the amounts so due and unpaid upon the Note at the time outstanding, then, first, to the payment of all amounts of interest and other charges at the time due and payable on the Note, and second to the payment of all amounts of principal at the time due and payable on the Note; and

Fourth: the balance, if any, held by Mortgagee after payment in full of all amounts referred to in subdivisions First, Second and Third above, shall, unless a court of competent jurisdiction may otherwise direct by final order not subject to appeal, be paid to or upon the direction of Mortgagor.

5.09 Appointment of Receiver. Subject to the terms of the Superior Mortgage, if an Event of Default shall have occurred and be continuing, then for so long as, and until, the indebtedness secured hereby is repaid in full, Mortgagee shall, as a matter of right and without regard to the adequacy of any security for the indebtedness secured hereby and without regard to whether Mortgagee has commenced an action to foreclose the lien of this Mortgage and without requirement for prior notice, be entitled to the appointment of a receiver for all or any part of the Mortgaged Property, whether such receivership be part of the Mortgaged Property or otherwise, and without regard to the nature of the action in which the appointment of a receiver is sought, and Mortgagor hereby consents to, and waives prior notice of, the appointment of such a receiver and will not oppose any such appointment. Mortgagee may also seek a temporary restraining order or other injunctive relief with respect to any act of omission constituting an Event of Default.

5.10 Possession, Management and Income. If an Event of Default shall have occurred and be continuing, Mortgagee, without notice to Mortgagor, may enter upon and take possession of the Mortgaged Property or any part thereof by force, summary proceeding, ejectment or otherwise and may remove Mortgagor and all other Persons and any and all property therefrom and may hold, operate, maintain, repair, preserve and manage the same and receive all earnings, income, rents, issues and proceeds accruing with respect thereto or any part thereof. Mortgagor, if it is then the occupant of the Mortgaged Property or any part thereof, shall immediately surrender possession of the space so occupied to Mortgagee and if Mortgagor is permitted to remain in possession, the possession shall be as a month-to-month tenant of Mortgagee, and, on demand, Mortgagor shall pay to Mortgagee monthly, in advance, a fair market rental as determined by Mortgagee, for the space so occupied, and in default thereof Mortgagor may be

dispossessed by the usual summary proceedings. Mortgagee shall be under no liability for or by reason of any such taking of possession, entry, removal or holding, operation or management, except that any amounts so received by Mortgagee shall be applied to pay all reasonable costs and expenses of so entering upon, taking possession of, holding, operating, maintaining, repairing, preserving, and managing the Mortgaged Property or any part thereof, and any taxes, assessments or other charges prior to the lien and security interest of this Mortgage which Mortgagee may consider necessary or desirable to pay, and any balance of such amounts shall be applied as provided in Section 5.08. The covenants herein contained may be (or if required pursuant to applicable law, shall be) enforced by a receiver of the Mortgaged Property or any part thereof.

5.11 Right of Mortgagee to Perform Mortgagor's Covenants, etc. If Mortgagor shall fail to make any payment or perform any act required to be made or performed hereunder, Mortgagee, without notice to or demand upon Mortgagor, and without waiving or releasing any obligation or default, may (but shall be under no obligation to) at any time thereafter make such payment or perform such act for the account and at the expense of Mortgagor, and may enter upon the Mortgaged Property for such purpose and take all such action thereon as, in Mortgagee's opinion, may be necessary or appropriate therefor. No such entry and no such action shall be deemed an eviction of any tenant of the Mortgaged Property or any part thereof. All sums so paid by Mortgagee and all costs and expenses (including, without limitation, attorneys' fees and expenses) so incurred, together with interest thereon at the Default Rate from the date of payment or incurring, shall constitute additional indebtedness secured by this Mortgage and shall be paid by Mortgagor to Mortgagee on demand.

5.12 Remedies, etc., Cumulative. Each right, power and remedy of Mortgagee provided for in this Mortgage or now or hereafter existing at law or in equity or by statute or otherwise shall be cumulative and concurrent and shall be in addition to every other right, power or remedy provided for in this Mortgage or now or hereafter existing at law or in equity or by statute or otherwise, and the exercise or beginning of the exercise by Mortgagee of any one or more of the rights, powers or remedies provided for in this Mortgage or now or hereafter existing at law or in equity or by statute or otherwise shall not preclude the simultaneous or later exercise by Mortgagee of any or all such other rights, powers or remedies.

5.13 Provisions Subject to Applicable Law. All rights, powers and remedies provided in this Mortgage may be exercised only to the extent that the exercise thereof does not violate any applicable provisions of law and are intended to be limited to the extent necessary so that they will not render this Mortgage invalid, unenforceable or not entitled to be recorded, registered or filed under the provisions of any applicable law. If any term of this Mortgage or any application thereof shall be invalid or unenforceable, the remainder of this Mortgage and any other application of such term shall not be affected thereby.

5.14 No Waiver, etc. No failure by Mortgagee or any holder of the Note to insist upon the strict performance of any term hereof or thereof, or to exercise any right, power or remedy

consequent upon a breach hereof or thereof, shall constitute a waiver of any such term or of any such breach. No waiver of any breach shall affect or alter this Mortgage, which shall continue in full force and effect with respect to any other then existing or subsequent breach. By accepting payment of any amount secured hereby before or after its due date, neither Mortgagee nor any holder of the Note shall be deemed to waive its right either to require prompt payment when due of all other amounts payable hereunder or to declare a default for failure to effect such prompt payment. Any and all special notations or endorsements on checks by Mortgagor to Mortgagee shall be of no effect against Mortgagee and will not result in an accord and satisfaction.

5.15 Compromise of Actions, etc. Any action, suit or proceeding brought by Mortgagee pursuant to any of the terms of this Mortgage or otherwise, and any claim made by Mortgagee hereunder may be compromised, withdrawn or otherwise dealt with by Mortgagee without any notice to or approval of Mortgagor, except as shall be required by law and cannot be waived.

5.16 Intentionally Deleted.

5.17 Mortgage Includes All Mortgaged Property. Upon the foreclosure of this Mortgage and the sale of the Mortgaged Property resulting therefrom including to Mortgagee or its designee, and regardless of the amount bid at the foreclosure sale and whether or not there is a deficiency remaining on the Note, the purchaser shall acquire all of Mortgagor's interest in and to all of the Mortgaged Property including, without limitation, the proceeds relating to all or any part thereof. By way of example, without implied limitation, the purchaser shall be deemed to have acquired all tax refunds, insurance proceeds and any other claims attributable to the Mortgaged Property even if actually received or collected after such foreclosure sale.

5.18 Actions and Proceedings. Mortgagee has the right to appear in and defend any action or proceeding brought with respect to the Mortgaged Property and to bring any action or proceeding, in the name and on behalf of Mortgagor, which Mortgagee, in its discretion, decides should be brought to protect its interest in the Mortgaged Property. Mortgagee is hereby granted an irrevocable power of attorney, coupled with an interest, to act, after the occurrence of an Event of Default, in the stead of Mortgagor for the purpose of commencing, continuing and/or maintaining any tax certiorari proceeding in respect of the Mortgaged Property for any period, whether before, during or after the date of such Event of Default. Mortgagee shall, at its option, be subrogated to the lien of any mortgage or other security instrument discharged in whole or in part by the Indebtedness, and any such subrogation rights shall constitute additional security for the payment of the Indebtedness.

5.19 Waiver of Counterclaim. MORTGAGOR HEREBY WAIVES THE RIGHT TO ASSERT A COUNTERCLAIM, OTHER THAN A MANDATORY OR COMPULSORY COUNTERCLAIM, IN ANY ACTION OR PROCEEDING BROUGHT AGAINST IT BY MORTGAGEE, AND WAIVES TRIAL BY JURY IN ANY ACTION OR PROCEEDING BROUGHT BY EITHER PARTY HERETO AGAINST THE OTHER OR IN ANY

COUNTERCLAIM ASSERTED BY MORTGAGEE AGAINST MORTGAGOR, OR IN ANY MATTERS WHATSOEVER ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS MORTGAGE, THE NOTE, ANY OTHER DOCUMENTS EXECUTED IN CONNECTION THEREWITH, OR THE INDEBTEDNESS.

5.20 Marshalling and Other Matters. Mortgagor hereby waives, to the extent permitted by law, the benefit of all appraisement, valuation, stay, extension, reinstatement and redemption laws now or hereafter in force and all rights of marshalling in the event of any sale hereunder of the Mortgaged Property or any part thereof or any interest therein. Further, Mortgagor hereby expressly waives any and all rights of redemption from sale under any order or decree of foreclosure of this Mortgage on behalf of Mortgagor, and on behalf of each and every person acquiring any interest in or title to the Mortgaged Property subsequent to the date of this Mortgage and on behalf of all persons to the extent permitted by applicable law.

5.21 Remedies of Mortgagor. Mortgagor understands and agrees that in no event shall Mortgagee (or any of its partners, shareholders, trustees, officers, directors, employees, agents, attorneys or representatives) have any personal liability hereunder or be liable for any consequential damages hereunder. In particular but without implied limitation, in the event that a claim or adjudication is made that Mortgagee has acted unreasonably or has unreasonably delayed acting in any case where by law or under the Note, this Mortgage or other documents executed in connection therewith, it has an obligation to act reasonably or promptly, Mortgagee shall not be liable for any monetary damages, and Mortgagor's exclusive remedies shall be limited to injunctive relief or declaratory judgment.

5.22 Waiver of Right of Redemption and Other Rights. To the full extent permitted by law, Mortgagor hereby covenants and agrees that it will not at any time: (a) insist upon or plead, or in any manner whatsoever claim or take any advantage of, any stay, exemption or extension law or any so-called "moratorium law" now or at any time hereafter in force; or (b) claim, take or insist upon any benefit or advantage of or from any law now or hereafter in force providing for the valuation or appraisement of the Mortgaged Property, or any part thereof, prior to any sale or sales thereof to be made pursuant to any provisions herein contained or prior to any decree, judgment or order of any court of competent jurisdiction; or (c) claim or exercise any rights under any statute now or hereafter in force to redeem the property, or any part thereof, or relating to the marshaling thereof, upon foreclosure sale or other enforcement hereof. To the full extent permitted by law, Mortgagor hereby expressly waives any and all rights to reinstatement and redemption, on its own behalf, on behalf of all persons claiming or having an interest (direct or indirect) by, through or under Mortgagor and on behalf of each and every person acquiring any interest in or title to the Mortgaged Property subsequent to the date hereof, it being the intent hereof that any and all such rights of reinstatement and redemption of Mortgagor and such other persons are and shall be deemed to be hereby waived to the full extent permitted by applicable law. To the full extent permitted by law, Mortgagor hereby waives any statute of limitations applicable to this Mortgage or the other Loan Documents. To the full extent permitted by law, Mortgagor agrees that it will not, by invoking or utilizing any applicable law or laws or

otherwise, hinder, delay or impede the exercise of any right, power or remedy herein or otherwise granted or delegated to Mortgagee, but will suffer and permit the exercise of every such right, power and remedy as though no such law or laws have been or will have been made or enacted. To the full extent permitted by law, Mortgagor hereby agrees that no action for the enforcement of the lien or any provision hereof shall be subject to any defense which would not be good and valid in an action at law upon the Note.

ARTICLE 6

Representations and Warranties

Mortgagor represents and warrants and covenants and agrees that, as of the date of delivery of this Mortgage:

6.01 Organization, Standing, etc., of Mortgagor. If Mortgagor is a partnership, limited partnership, corporation, limited liability company or other entity (whichever is set forth after the name of Mortgagor in the Preamble to this Mortgage) duly formed, it is validly existing and in good standing under the Uniform Partnership Act, Uniform Limited Partnership Act, business corporations law, limited liability company law or other applicable law, as the case may be, of the state in which the Mortgagor was organized, and is in good standing in the state in which the Mortgaged Property is located, and has all requisite power and authority to own and operate its properties, to carry on its business as now conducted and proposed to be conducted, and to execute, deliver and perform this Mortgage and to issue and sell the Note. Mortgagor and the Guarantors are now able to meet their respective debts as they mature, the fair market value of their respective assets exceeds their respective liabilities and no bankruptcy or insolvency proceedings are pending against or by or contemplated by the Mortgagor or the Guarantors. The execution of this Mortgage, the Note, the Guaranty and the documents executed and/or delivered in connection therewith will not defraud, hinder or delay any of the creditors of the Mortgagor or the Guarantors and neither the Mortgagor nor the Guarantors is or will be rendered insolvent by reason of the execution of this Mortgage, the Note, the Guaranty or the documents executed in connection therewith. The Mortgagor and the Guarantors are, to the best of their knowledge, not in default, nor have either of them received any notice of any uncured default, under the terms of any instrument evidencing or securing any indebtedness of the Mortgagor or the Guarantors, respectively, and there has, to the best of their knowledge, occurred no event, which, if uncured or uncorrected would constitute a default under any such instrument upon notice or lapse of time or both. All reports, statements and other data furnished by the Mortgagor and the Guarantors to the Mortgagee in connection with the loan evidenced by the Note are true, correct and complete in all material respects and do not omit to state any fact or circumstance necessary to make the statements contained therein not misleading. This Mortgage, the Note, the Guaranty and other instruments securing the Note or otherwise executed in connection therewith are valid and binding obligations enforceable in accordance with their respective terms.

6.02 Compliance with Other Instruments, etc. The execution, delivery, recordation and performance of this Mortgage and the consummation of the transactions contemplated hereby (including the issue and sale of the Note) will not result in any violation of any term or condition of any contract, agreement, lease, instrument, judgment, decree, order, statute, rule, regulation, ordinance, franchise, certificate, permit or the like applicable to Mortgagor or the Guarantors or by which Mortgagor or the Guarantors or its or their properties or assets are bound or affected.

6.03 Governmental Consent. No consent, approval or authorization of, or registration, declaration or filing with, any governmental or public authority, body or agency is required in connection with the valid execution, delivery and performance by Mortgagor of this Mortgage and the issue and sale of the Note except the recordation of this Mortgage in the appropriate recording office or offices and the filing of all necessary financing statements with respect thereto.

6.04 Litigation, etc. There is no action, suit, proceeding or investigation pending or threatened; or, to the best of Mortgagor's knowledge, any basis therefor known to Mortgagor, which questions the validity of this Mortgage or the Note, or any action taken or threatened to be taken pursuant thereto. No notice has been given by any governmental authority of any proceeding to condemn, purchase or otherwise acquire the Mortgaged Property or any part thereof or interest therein and, to the best of Mortgagor's knowledge, no such proceeding is contemplated.

6.05 No Violations, etc. Mortgagor is in compliance in all respects with all governmental laws, rules and regulations and other requirements which are applicable to the Mortgaged Property or any part thereof, or any use or condition of the Mortgaged Property or any part thereof. Mortgagor has no knowledge of any violation, nor is there any notice or other record of violation, of any zoning, health, safety, building, fire, labor, environment, or other statute, ordinance, rule, regulation or restriction applicable to the Mortgaged Property or any part or use thereof.

6.06 Use of Proceeds. Mortgagor has applied and will apply the proceeds of the Note for such purpose as does not and will not constitute a use of any part thereof, directly or indirectly, for the purpose of purchasing or carrying any "margin security" within the meaning of Regulation G, 12 C.F.R. 207, as amended, and no part of the proceeds of the Note was used or will be used for the purpose (whether immediate, incidental or ultimate) of "purchasing" or "carrying" any "margin security" within the meaning of such Regulation G or for the purpose of reducing or retiring any indebtedness which was originally incurred for any such purpose. Mortgagor does not own or have any present intention of acquiring any such margin security and will not otherwise knowingly take or permit any action which would involve a violation of such Regulation G or any other Regulation of the Board of Governors of the Federal Reserve System.

6.07 Easements and Utility Services. Mortgagor has all easements, including those for use, maintenance, repair and replacement of and access to structures, facilities or space for support, mechanical systems, utilities (including water and sewage disposal) and any other private or municipal improvements, services and facilities, necessary for the proper operation, repair, maintenance, occupancy and use of the Mortgaged Property for its current and any proposed uses. Electric, gas, sewer and water facilities and all other necessary utilities are available in sufficient capacity to satisfactorily service the Mortgaged Property.

6.08 Disclosure. Neither this Mortgage nor any other document or certificate furnished to Mortgagee or to counsel for Mortgagee in connection with the transactions contemplated hereby contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements contained herein or therein not misleading.

6.09 Offering of the Note. Neither Mortgagor nor anyone acting on its behalf has directly or indirectly offered the Note or any part thereof or any similar instrument for sale to, or solicited any offer to buy any of the same from, anyone other than Mortgagee. Neither the Mortgagor nor anyone acting on its behalf has taken or will take any action which would subject the issuance of the Note to the provisions of Section 5 of the Securities Act of 1933, as amended, or similar state or local laws.

ARTICLE 7

Definitions

7.01 Definitions. For all purposes of this Mortgage, the following terms have the following respective meanings unless the context otherwise requires:

Compliance Certificate: a certificate of the Mortgagor, executed and delivered by a principal of the Mortgagor, or if the Mortgagor is an individual or individuals, by such individual or individuals, setting forth in reasonable detail the investigation upon which the matters set forth in such certificate are based and the section of this Mortgage pursuant to which the certificate is being delivered.

Default: any condition or event which constitutes an Event of Default or which, after notice or lapse of time or both, would constitute an Event of Default.

Default Rate: the meaning specified in the Note but if not so specified than an interest rate equal to twenty four and one-half (24-1/2%) percent per annum, or the highest interest rate permitted by law, whichever is lower.

Due and Payable: when used with reference to the principal of, or premium or interest on, or when referring to any and all other sums secured by this Mortgage shall mean due

and payable, whether at the monthly or other date of payment or at the date of maturity specified in the Note or this Mortgage; or, in the case of Impositions, the last day upon which any charge may be paid without penalty and/or interest and/or without becoming a lien upon the Mortgaged Property.

Event of Default: the meaning specified in Section 5.01.

Furniture, Furnishings and Equipment: the meaning specified in the Granting Clause.

Guarantors: Jeffrey Shoup, Joyce Shoup, David Hix, Paula Hix, Ocean Developers LLC and T&J Development Inc.

Guaranty: the meaning specified in Section 1.04.

Herein, Hereof, Hereto and Hereunder: shall refer to this Mortgage and all amendments, modifications, extensions and renewals hereof.

Impositions: the meaning specified in Section 2.04.

Improvements: the meaning specified in the Granting Clause.

Including: shall mean "including but not limited to".

Insurance Requirements: the meaning specified in Section 2.05.

Land: the meaning specified in the recitals.

Leases: the meaning specified in the Granting Clause.

Legal Requirements: the meaning specified in Section 2.05.

Loan Documents: shall mean the Note, this Mortgage and each and every other document executed and delivered in connection therewith.

Mortgage: this Mortgage (and Assignment of Leases and Rents and Security Agreement), dated the date hereof between Mortgagor and Mortgagee.

Mortgage Commitment Letter: the meaning specified in Section 1.05.

Mortgaged Property: the meaning specified in the Granting Clause.

Note: the meaning specified in the Granting Clause.

Permitted Encumbrances: the meaning specified in Section 2.01.

Person: a corporation, an association, a partnership, a limited liability company or partnership, an entity, an organization, a business, an individual, a trust, a government or political subdivision thereof or a governmental or quasi-governmental agency.

Property: the same as the Mortgaged Property.

Superior Mortgage: the meaning specified in the Granting Clause.

Superior Mortgagee: shall mean R.E. Loans LLC, and its successors as holder of the Superior Mortgage.

Taking: the meaning specified in Section 3.02.

Total Destruction: the meaning specified in Section 3.04.

Total Taking: the meaning specified in Section 3.04.

ARTICLE 8

Miscellaneous

8.01 Further Assurances. Mortgagor at its expense will execute, acknowledge and deliver all such instruments and take all such actions as Mortgagee from time to time may reasonably request (a) to better subject to the lien and security interest of this Mortgage all or any portion of the Mortgaged Property, (b) to perfect, publish notice or protect the validity of the lien and security interest of this Mortgage, (c) to preserve and defend the title to the Mortgaged Property and the rights of Mortgagee therein against the claims of all persons and parties so long as this Mortgage shall remain undischarged, (d) to better subject to the lien and security interest of this Mortgage with respect to any replacement or substitution for any Improvements or any other after-acquired property, or (e) in order to further effectuate the purpose of this Mortgage and to carry out the terms hereof and to better assure and confirm to the Mortgagee its rights, powers and remedies hereunder. Mortgagor grants to Mortgagee an irrevocable power of attorney coupled with an interest for the purpose of exercising and perfecting any and all rights and remedies available to Mortgagee at law and in equity, including without limitation such rights and remedies available to Mortgagee pursuant to this Section 8.01.

8.02 Certificates. At Mortgagee's request, Mortgagor shall without charge, at any time and from time to time, deliver promptly to Mortgagee or its designee a certificate duly executed by Mortgagor and each Guarantor certifying the principal amount then outstanding

hereon, or on the Note, the date to which interest has been paid, and that no condition exists and no event has occurred under this Mortgage or the Note which constitutes a default hereunder, or which, with the passage of time or giving of notice or both, would constitute a default hereunder or, if any such condition exists or event has occurred, specifying the nature and period of existence thereof or the date of occurrence.

8.03 Additional Security. Without notice to or consent of Mortgagor, and without impairment of the lien and rights created by this Mortgage, Mortgagee may accept from Mortgagor or from any other Person additional security for the Note; neither the giving of this Mortgage nor the acceptance of any such additional security shall prevent Mortgagee from resorting, first, to such additional security, or, first, to the security created by this Mortgage, or concurrently to both, in any case without affecting Mortgagee's lien and rights under this Mortgage.

8.04 Notices, etc. All notices, demands, requests, consents, approval and other instruments under this Mortgage or the Note shall be in writing and shall be deemed to have been actually or properly given if and when mailed by first-class registered or certified mail, return receipt requested, postage prepaid, addressed (a) if to Mortgagor, to it at its address set forth above with a copy to Robert Gwin, Esq., Robert Gwin Law Offices, LLC, 2105 Cromley Circle Suite B, Myrtle Beach South Carolina 29577, (b) if to Mortgagee originally named herein to it at Suite 240, 2500 N. Military Trail, Boca Raton, Florida 33431, Attention: Richard Chwatt, with a copy to Westerman Ball Ederer Miller & Sharfstein, LLP, Suite 400, 170 Old Country Road, Mineola, New York 11501, Attention: Philip L. Sharfstein, Esq., or at such other address as Mortgagee may have designated by notice to Mortgagor, or (c) if to any other holder of any Note, at such address as such holder shall have designated by notice in writing to Mortgagor, or, until an address is so designated, to and at the address of the last holder so designating an address. The foregoing insertion of Mortgagor's mailing address shall be deemed to be a request by Mortgagor that a copy of any notice of default and of any notice of sale hereunder be mailed to Mortgagor at such address as provided by law. Mortgagor hereby irrevocably appoints Robert Gwin, Esq. as Mortgagor's agent for the service of process ("Agent") in any action on the Note, this Mortgage or any other document executed in connection therewith, and Agent hereby accepts such appointment. Mortgagor hereby agrees that service of process on Mortgagor may be made solely by serving Agent in any manner provided by law and that personal service upon Mortgagor is hereby waived. Agent may resign as Agent hereunder provided that (i) Agent shall give ten (10) days' prior written notice thereof to Mortgagee, (ii) Agent shall appoint a successor agent for the service of process on Mortgagor, which agent must acknowledge in writing its acceptance of such appointment and must be an attorney or law firm located within the State of South Carolina, and (iii) Agent shall include in its notice referred to in (i) above the name and address of the successor agent and an original of the acceptance of the appointment referred to in (ii) above. From and after the effective date of the notice referred to in the preceding sentence, the successor agent shall be referred to as the "Agent" hereunder. The rights given to Mortgagee in this Paragraph to just serve Agent shall be in addition to Mortgagee's permitted methods of service under applicable law and nothing in this Paragraph shall limit or restrict Mortgagee to

just serving Agent and Mortgagee shall be permitted to otherwise serve Mortgagor in any manner provided by law (with or without also serving Agent). Mortgagor shall not be entitled to any notices of any nature whatsoever from Mortgagee except with respect to matters for which this Mortgage specifically and expressly provides for the giving of notice by Mortgagee to Mortgagor and except with respect to matters for which Mortgagee is required by applicable law to give notice, and Mortgagor hereby expressly waives the right to receive any notice from Mortgagee with respect to any matter for which this Mortgage does not specifically and expressly provide for the giving of notice by Mortgagee to Mortgagor.

8.05 Amendments and Waivers. This Mortgage, the Note, and any term hereof or thereof may be amended, discharged or terminated and the observance of any term of this Mortgage or the Note may be waived (either generally or in a particular instance and either retroactively or prospectively) only by an instrument in writing signed by the party to be charged.

8.06 Expenses. Mortgagor will pay or cause to be paid (a) the cost of filing and recording of this Mortgage, the Uniform Commercial Code financing statements and any other documents to be filed or recorded in connection with the execution and delivery hereof or thereof; (b) all taxes (including interest and penalties) at any time payable in connection with the execution and delivery of this Mortgage and any other instruments or agreements relating hereto or thereto, any amendment or waiver relating hereto or thereto, the issue and acquisition of the Note and, where applicable, such filing and recording (Mortgagor agreeing to indemnify Mortgagee in respect of such taxes, interest and penalties); (c) the cost of Mortgagor's performance of and compliance with the terms and conditions of this Mortgage and of the other instruments mentioned herein; (d) the cost of title insurance, reinsurance, security interest searches and surveys required hereby or delivered in connection herewith; (e) the fees, expenses and disbursements of Mortgagee's counsel in connection with the subject matter of this Mortgage and any amendments, releases or other actions or waivers hereunder or in respect hereof; and (f) all reasonable out-of-pocket expenses incurred by Mortgagee in connection herewith. Mortgagor shall indemnify and hold Mortgagee harmless from and against all claims in respect of all fees of brokers and finders payable in connection with this Mortgage.

8.07 INTENTIONALLY OMITTED.

8.08 Limitation on Interest. Under no circumstances shall Mortgagor be charged under the Note or this Mortgage, more than the highest rate of interest which lawfully may be charged by the holder of the Note and paid by the Mortgagor on the indebtedness secured hereby. It is, therefore, agreed that if at any time interest on the indebtedness secured hereby would otherwise exceed the highest lawful rate, only such highest lawful rate shall be charged to or paid by Mortgagor. Should any amount be paid to Mortgagee in excess of such legal rate, such excess shall be deemed to have been paid in reduction of the principal balance of the Note.

8.09 Miscellaneous. All the terms of this Mortgage shall apply to and be binding upon the respective successors, assigns, heirs, legal representatives and beneficiaries of Mortgagor, and all Persons claiming under or through Mortgagor or any such successor or assign, and shall inure to the benefit of and be enforceable by Mortgagee and its successors, participants and assigns. The headings and table of contents, if any, in this Mortgage are for convenience of reference only and shall not limit or otherwise affect any of the terms hereof. This Mortgage may be executed in several counterparts, each of which shall constitute one and the same instrument. This Mortgage and the Note shall be construed and enforced in accordance with and governed by the laws of the State of South Carolina without taking into effect its conflicts of law provisions. Mortgagor hereby irrevocably submits himself to the jurisdiction of the Courts of the State of South Carolina, for any litigation relating to the Note, this Mortgage or the Mortgaged Property.

8.10 Set-Offs. (i) From time to time in connection with the payment of interest due and payable under the Note, and (ii) in all other instances, after the occurrence and during the continuance of an Event of Default, the Mortgagor hereby irrevocably authorizes and directs Mortgagee from time to time to charge the Mortgagor's accounts and deposits with Mortgagee, (general or special, time or demand, provisional or final), and to pay over to the Mortgagee an amount equal to any amounts from time to time due and payable to the Mortgagee hereunder or under any other Loan Document. The Mortgagor hereby grants to the Mortgagee, subject to the terms and conditions of this Mortgage, a security interest in and to all such accounts and deposits maintained by the Mortgagor with Mortgagee.

8.11 Securitization/Participation. Mortgagee reserves the right at any time during the term of the Indebtedness and in its sole and absolute discretion to effect a so-called securitization of (or to sell a participation interest in) the Indebtedness in such manner and on such terms and conditions as Mortgagee shall deem to be appropriate in its sole and absolute discretion and with such domestic or foreign banks, insurance companies, pension funds, trusts or other institutional lenders or other persons, parties or investors (including, but not limited to, grantor trusts, owner trusts, special purpose corporations, real estate mortgage investment conduits, real estate investment trusts or other similar or comparable investment vehicles) as may be selected by Mortgagee in its sole and absolute discretion.

8.12 Sole Discretion of Mortgagee. Wherever pursuant to this Mortgage, Mortgagee exercises any right given to it to approve or disapprove, or any arrangement or term is to be satisfactory to Mortgagee, the decision of Mortgagee to approve or disapprove or to decide that arrangements or terms are satisfactory or not satisfactory shall be in the sole discretion of Mortgagee and shall be final and conclusive, except as may be otherwise expressly and specifically provided herein.

8.13 No Oral Modification. This Mortgage, and any provisions hereof, may not be modified, amended, waived, extended, changed, discharged or terminated orally or by any act or failure to act on the part of Mortgagor or Mortgagee, but only by an agreement in writing signed

by the party against whom enforcement of any modification, amendment, waiver, extension, change, discharge or termination is sought.

8.14 Duplicate Originals. This Mortgage may be executed in any number of duplicate originals and each such duplicate original shall be deemed to be an original.

8.15 ERISA Compliance. Mortgagor represents and warrants that it has no employees and that it does not offer or maintain any pension, welfare or benefit plan for any managers, members, officers or employees, and that Mortgagor has not violated ERISA. Upon the hiring of any employees, Mortgagor shall at all times comply with ERISA and the contractual and legal requirements of any pension, welfare or benefit plan.

ARTICLE 9

Particular Provisions

9.01 INTENTIONALLY OMITTED

9.02 Joint and Several. If more than one party constitute Mortgagor hereunder, each such party shall be jointly and severally liable hereunder.

9.03 Owner Occupied. In the event that the Mortgaged Property shall be occupied by Mortgagor or any affiliate of Mortgagor, whether by lease or otherwise, upon an Event of Default hereunder Mortgagor and such affiliate shall be jointly and severally liable to pay to Mortgagee rent based on the higher of the rent called for in their lease, if any, or the then fair market rental value of the Mortgaged Property. Upon the default in the payment of such rent, Mortgagee, by itself or by its agent or receiver, shall be entitled to evict Mortgagor and all affiliates from the Mortgaged Property. The payment of such rent shall only serve to make Mortgagor and its affiliate a month to month tenant and shall in no manner affect a cure of the Event of Default hereunder.

9.04 Environmental Regulations. (a) Mortgagor has furnished to Mortgagee, at Mortgagor's expense, a report by an independent and licensed engineer satisfactory to Mortgagee, stating that the Mortgaged Property and any buildings and other improvements and additions thereon are (i) free of toxic waste, asbestos, PCB's, petroleum products or by-products, other "Hazardous Materials" (as defined below in this Section), or other deleterious materials which impair, in the opinion of Mortgagee, the value of the Mortgaged Property or otherwise may pose a health risk to persons, animals or vegetation, and (ii) in compliance with all applicable laws, rules, regulations or orders pertaining to health, the environment or Hazardous Materials. Such report shall be delivered to Mortgagee on the date hereof. If such engineer's report recommends that any work be done to the Mortgaged Property, or if Mortgagee requires that any work be done to the Mortgaged Property, to satisfy the conditions set forth in clauses (i) and (ii) of this paragraph, such work shall be done by Mortgagor within

-30 days of the date of this Mortgage, and, at Mortgagee's option, Mortgagor shall place in escrow with Mortgagee an amount which is sufficient, in the opinion of Mortgagee, to pay for the cost of such work. Mortgagor shall provide Mortgagee with documentation of the completion of such work. Mortgagee has accepted the reports furnished by Mortgagor.

(b) Mortgagor covenants, represents and warrants, to the best of its knowledge and belief (i) that the Mortgaged Property does not contain and will not contain (A) asbestos in any form; (B) urea formaldehyde foam insulation; (C) transformers or other equipment which contain dielectric fluid containing polychlorinated biphenyls (PCB's); (D) fuel oil, gasoline, other petroleum products or by-products, or (E) any flammable explosives, radioactive materials, hazardous materials, hazardous wastes, hazardous, controlled or toxic substances, or any pollutant or contaminant, or related materials defined in or controlled pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. Sections 9601, et seq.), the Hazardous Materials Transportation Act, as amended (49 U.S.C. Sections 1801 et seq.), the Resource Conservation and Recovery Act, as amended (42 U.S.C. Sections 9601, et seq), and in the regulations adopted and publications promulgated pursuant thereto, or any other federal, state or local environmental law, ordinance, rule, or regulation; or which, even if not so regulated, may or could pose a hazard to the health or safety of the occupants of the Mortgaged Property or the owners of the Mortgaged Property (the substances described in (A), (B), (C), (D) or (E) above are referred to collectively herein as "Hazardous Materials"), (ii) that the Mortgaged Property and any buildings and other improvements and additions previously, now or hereafter located thereon, are not now being used nor have ever been used and will never be used for any activities involving, directly or indirectly, the use, generation, treatment, transportation, storage or disposal of any Hazardous Materials whether by Mortgagor, any prior owner of the Mortgaged Property or any tenant or prior tenant of the Mortgaged Property; (iii) that there has never been any Hazardous Materials Release (as defined below in this section) on, from or affecting the Mortgaged Property; (iv) that none of the Mortgaged Property, any previous owner of the Mortgaged Property, nor Mortgagor are subject to any past, existing, pending, or threatened notice, summons, citation, directive, investigation, litigation, proceeding, inquiry, lien, encumbrance or restriction, settlement, remedial, response, cleanup or closure arrangement or any other remedial obligations by or with any governmental authority (collectively "Regulatory Actions") under, or are in violation of, any applicable laws, rules, regulations or orders pertaining to health, the environment or Hazardous Materials; and (v) that none of the Mortgaged Property and any buildings and other improvements and additions previously or now located thereon have ever been used as an industrial or manufacturing facility or as a petroleum storage, refining or distribution facility or terminal, or a gasoline station, whether by Mortgagor, any prior owner or any tenant or prior tenant of the Mortgaged Property. Mortgagor does not know and has no reason to know of any violation of the foregoing representations, warranties and covenants.

(c) Mortgagor represents, warrants and covenants that with respect to the Mortgaged Property and any buildings and other improvements and additions thereon, the

Mortgagor (i) shall comply with and ensure compliance by all tenants and other occupants with all applicable laws, rules and regulations or orders pertaining to health, the environment or Hazardous Materials, (ii) shall not store, utilize, generate, treat, transport or dispose (or permit or acquiesce in the storage, utilization, generation, transportation, treatment or disposal of) any Hazardous Materials on or from the Mortgaged Property, (iii) shall ensure that all tenant leases of the Mortgaged Property contain agreements requiring tenant's compliance with the requirements of the foregoing clauses (i) and (ii); and (iv) shall cause any tenant or other person or entity using and/or occupying any part of the Mortgaged Property to comply with the representations, warranties and covenants contained in this Section.

(d) In the event of any storage, presence, utilization, generation, transportation, treatment or disposal of Hazardous Materials on the Mortgaged Property or in the event of any Hazardous Materials Release, Mortgagor shall as soon as is possible, at the direction of Mortgagee or any federal, state, or local authority or other governmental authority, remove any such Hazardous Materials and rectify any such Hazardous Materials Release, and otherwise comply with the laws, rules, regulations or orders of such authority, all at the expense of Mortgagor, including without limitation, the undertaking and completion of all investigations, studies, sampling and testing and all remedial, removal and other actions necessary to clean up and remove all Hazardous Materials, on, from or affecting the Mortgaged Property. If Mortgagor shall fail to proceed with such removal or otherwise comply with such laws, rules, regulations or orders within any reasonable cure period set by Mortgagee, or within the cure period permitted under the applicable regulation or order, whichever period expires first, the same shall constitute an Event of Default under Article 5 hereof, and Mortgagee shall have the right, at its sole option, to accelerate the maturity of the Mortgage indebtedness and declare the indebtedness secured hereby due and payable, and either in addition to or in lieu of the foregoing, at Mortgagee's sole option, Mortgagee may, but shall not be obligated to, do whatever is necessary to eliminate such Hazardous Materials from the Mortgaged Property or otherwise comply with the applicable law, rule, regulation or order, acting either in its own name or in the name of Mortgagor pursuant to this Section, and the cost thereof shall be part of the indebtedness secured hereby and shall become immediately due and payable without notice. In addition to and without limiting Mortgagee's rights pursuant to this Mortgage, Mortgagor shall give to the Mortgagee and its agents and employees access to the Mortgaged Property and all buildings and other improvements and additions thereon for such purposes and hereby specifically grants to Mortgagee a license to remove the Hazardous Materials and otherwise comply with applicable laws, rules, regulations or orders, acting either in its own name or in the name of the Mortgagor pursuant to this Section.

(e) Mortgagor shall indemnify and save Mortgagee and each of its shareholders, subsidiaries, affiliates, officers, directors, partners, and trustees and any receiver, trustee or other fiduciary appointed for the Mortgaged Property harmless from, against, for and in respect of, any and all damages, losses, settlement payments, obligations, liabilities, claims, actions or causes of actions, encumbrances, fines, penalties, and costs and expenses suffered, sustained, incurred or required to be paid by any such indemnified party (including, without limitation,

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fees and disbursements of attorneys, engineers, laboratories, contractors and consultants) because of, or arising out of or relating to any "Environmental Liabilities" (as defined below) in connection with the Mortgaged Property or any buildings previously, now or hereafter located thereon. For purposes of this indemnification clause, "Environmental Liabilities" shall include all costs and liabilities with respect to the past, present or future presence, removal, utilization, generation, storage, transportation, disposal or treatment of any Hazardous Materials or any release, spill, leak, pumping, pouring, emitting, emptying, discharge, injection, escaping, leaching, dumping or disposing into the environment (air, land or water) of any Hazardous Materials (each a "Hazardous Materials Release"), including without limitation, (i) cleanups, remedial and response actions, remedial investigations and feasibility studies, permits and licenses required by, or undertaken in order to comply with the requirements of, any federal, state or local law, regulation, or agency or court, any damages for injury to person, property or natural resources, claims of governmental agencies or third parties for cleanup costs and costs of removal, discharge, and satisfaction of all liens, encumbrances and restrictions on the Mortgaged Property relating to the foregoing and (ii) injury to person or property in any manner related to a Hazardous Materials Release on, near or from the Mortgaged Property or otherwise related to environmental matters on or near the Mortgaged Property. Hazardous Materials Release shall also include by means of any contamination, leaking, corrosion or rupture of or from underground or above ground storage tanks, pipes or pipelines.

(f) Mortgagor shall promptly notify Mortgagee in writing of the occurrence of any Hazardous Materials Release or any pending or threatened Regulatory Actions, or any claims made by any governmental authority or third party, relating to any Hazardous Materials or Hazardous Materials Release on or from, the Mortgaged Property, or any buildings or other improvements or additions previously, now or hereafter located thereon and shall promptly furnish Mortgagee with copies of any correspondence or legal pleadings or documents in connection therewith. Mortgagee shall have the right, but shall not be obligated, to notify any governmental authority of any state of facts which may come to its attention with respect to any Hazardous Materials or Hazardous Materials Release on or from the Mortgaged Property.

(g) The liability of Mortgagor to Mortgagee pursuant to, by reason of or arising from the representations, warranties, covenants and indemnities provided for this Section is not limited by any exculpatory provision contained herein or in the Note or in the other documents further securing the indebtedness secured hereby and shall survive the payment in full of the Note and the satisfaction or assignment of this Mortgage following such payment, any foreclosure of this Mortgage, any transfer of the Premises by deed in lieu of foreclosure, any transfer of the Premises or interests therein or any change in ownership thereof.

(h) In the event this Mortgage is foreclosed, or Mortgagor tenders a deed in lieu of foreclosure, Mortgagor shall deliver the Mortgaged Property to Mortgagee free of any and all Hazardous Materials and any liens, encumbrances and restrictions relating to Environmental Liabilities, so that the conditions of the Mortgaged Property shall conform with all applicable

federal, state and local laws, rules, regulations and orders pertaining to health, the environment or Hazardous Materials.

(i) Mortgagor covenants, represents and warrants that to the best of its knowledge and belief, the Mortgaged Property, and any buildings and other improvements and additions previously, now or hereafter located thereon, do not now and never have, contained any underground or aboveground storage tanks, pipes or pipelines for the storage or transportation of Hazardous Materials, including without limitation, heating oil, fuel oil, gasoline and/or other petroleum products, whether such tanks are in operation, not operational, closed, removed or abandoned, except for such underground storage tanks heretofore disclosed to Mortgagee in writing and which are utilized solely for heating oil consumed on the Mortgaged Premises, and which are of a capacity of less than 2,000 gallons, all of which are in compliance with all federal, state and local legal requirements and do not have any leaks or corrosion. Without limiting the generality of the foregoing, Mortgagor is in full compliance with all registration and other requirements of 42 USC § 6991, "Regulation of Underground Storage Tanks" and all federal, state and local laws and regulations implementing the provisions of such act.

9.05 Modifications. Any written agreement or agreements hereafter entered into by Mortgagee which (i) extend the time of payment of the indebtedness secured by this Mortgage, (ii) change or modify the time or times of payment or the amount of the installments or fixed sums or the interest rate thereof, (iii) change, modify, extend, renew or terminate other terms, provisions, covenants or conditions of this Mortgage or the notes, bonds, or obligations which it secures, or (iv) consolidate, spread, release or sever the lien of the Mortgage, shall be effective in accordance with the terms and provisions thereof and shall be binding according to the tenor thereof on the owner or holder of subordinate, intervening or subsequent liens on any of the Mortgaged Property and any such liens shall continue.

9.06 Intentionally Deleted.

ARTICLE 10

Bankruptcy

10.01 Relief From Bankruptcy Stay. Mortgagor agrees that, in the event that Mortgagor, any Guarantor or any of the persons or parties constituting Mortgagor or a Guarantor shall (i) file with any bankruptcy court of competent jurisdiction or be the subject of any petition under Title 11 of the U.S. Code, as amended ("Bankruptcy Code"), (ii) be the subject of any order for relief issued under the Bankruptcy Code, (iii) file or be the subject of any petition seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any present or future federal or state act or law relating to

bankruptcy, insolvency, or other relief for debtors, (iv) have sought or consented to or acquiesced in the appointment of any trustee, receiver, conservator, or liquidator, or (v) be the subject of any order, judgment, or decree entered by any court of competent jurisdiction approving a petition filed against such party for any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any present or future federal or state act or law relating to bankruptcy, insolvency, or relief for debtors, Mortgagee shall thereupon be entitled and Mortgagor irrevocably consents to immediate and unconditional relief from any automatic stay imposed by Section 362 of the Bankruptcy Code, or otherwise, on or against the exercise of the rights and remedies otherwise available to Mortgagee as provided for herein, in the Note, other loan documents delivered in connection herewith and as otherwise provided by law; and Mortgagor (a) hereby irrevocably waives any right to object to such relief and acknowledges that no reorganization in bankruptcy is feasible; (b) waives its exclusive right pursuant to Section 1121(b) of the Bankruptcy Code to file a plan of reorganization and irrevocably consents to Mortgagee filing a plan immediately upon the entry of an order for relief if an involuntary petition is filed against Mortgagor or upon the filing of a voluntary petition by such Mortgagor; and (c) in the event that Mortgagee shall move pursuant to Section 1121(d) of the Bankruptcy Code for an order reducing the 120-day exclusive period, Mortgagor shall not object to any such motion.

ARTICLE 11

Foreclosure Judgment

11.01 (a) Mortgagor agrees that the obligations and liabilities of Mortgagor under this Mortgage shall survive and continue in full force and effect and shall not be terminated, discharged or released, in whole or in part, irrespective of any entry of any foreclosure judgment in respect of this Mortgage.

(b) All obligations of the Mortgagor under this Mortgage, (collectively, the "Payment Obligations") including but not limited to, payment of Impositions, insurance premiums, expenses of Mortgagee (including without limitation expenses to be reimbursed pursuant to Section 8.06, and all other expenses incurred by Mortgagee in connection with its ownership of this Mortgage and the Note, the enforcement of its right under this Mortgage and this Note, or the enforcement of any judgment of foreclosure or any deficiency judgment), in any proceeding whatsoever, including a bankruptcy proceeding, shall not merge into any foreclosure judgment and shall continue in full force and effect upon any entry of any foreclosure judgment.

(c) Upon the entry of a foreclosure judgment in respect of the Mortgage, Mortgagor shall continue to perform its obligations under the Mortgage, including, but not limited to, payment of all Payment Obligations.

(d) In the event, upon entry of a foreclosure judgment in respect of the

Mortgage, Mortgagor fails to perform any of its obligations under the Mortgage, including but not limited to, the Payment Obligations: (i) Mortgagee may, but shall not be obligated to, perform said obligations, (ii) Mortgagor shall remain liable to Mortgagee for Mortgagee's performance of Mortgagor's obligations under the Mortgage, and (iii) Mortgagee shall be entitled to any remedies available under the Mortgage for Mortgagor's failure to perform its obligations.

(e) The obligations and liabilities under this paragraph 11.01 shall survive any entry of any foreclosure judgment in respect of the Mortgage.

ARTICLE 12.

Future Advances

12.01 It is agreed that this Mortgage shall also secure such future or additional advances as may be made by the Mortgagee at its option to the Mortgagor, or its successor in title, for any purpose, provided that all those advances are to be made within twenty (20) years from the date of this Mortgage, or within such lesser period of time as may be provided hereafter by law as a prerequisite for the sufficiency of actual notice or record notice of the optional future or additional advances as against the rights of creditors or subsequent purchasers for valuable consideration. The total amount of indebtedness secured by this Mortgage may decrease or increase from time to time, but the total unpaid balance so secured at any one time shall not exceed the maximum principal amount of \$8,527,776.00, plus interest, and any disbursements made for the payment of taxes, levies or insurance on the Mortgage Property with interest on those disbursements.

ARTICLE 13

Provisions Regarding Superior Mortgage

13.01 Mortgagor covenants and agrees as follows: (i) to promptly pay when due, all payments, additional payments and other sums or charges required to be paid by Mortgagor under the Superior Mortgage; (ii) to perform and observe all covenants and conditions to be performed and/or observed by Mortgagor under the Superior Mortgage; (iii) not to prepay, in whole or in part, any amounts owed pursuant to the Superior Mortgage; (iv) not to do, permit, suffer or refrain from doing anything as a result of which there could be a default under or breach of any of the terms of the Superior Mortgage; (v) not to waive, excuse or discharge any of the obligations and agreements of the Superior Mortgagee under the Superior Mortgage; and (vi) to do all things necessary to preserve unimpaired all of Mortgagor's rights under the Superior Mortgage.

13.02 The Mortgagor shall not consummate any agreement with the Superior Mortgagee to (i) increase the principal indebtedness or other amounts secured by the Mortgage, whether principal, interest or otherwise, (ii) increase the interest rate under loan secured by the Superior Mortgage, or (iii) shorten the term of the loan secured by the Superior Mortgage, either orally or in writing and whether or not permitted to do so by the terms of the Superior Mortgage (other than advances and other principal increases by Superior Mortgage permitted under the Superior Mortgage as such documents exist on the date hereof), without the prior written consent of the Mortgagee.

13.03 Any Event of Default under the Superior Mortgage or any instrument or agreement relating thereto shall ipso facto constitute an Event of Default under this Mortgage.

13.04 The Mortgagor shall (i) promptly notify the Mortgagee in writing of the occurrence of any default or Event of Default known to the Mortgagor under the Superior Mortgage or any instrument or agreement related thereto, (ii) promptly notify the Mortgagee of receipt by the Mortgagor of any notice noting or claiming the occurrence of any default or Event of Default under the Superior Mortgage or any instrument or agreement relating thereto and (iii) promptly cause a copy of each such notice received by the Mortgagor to be delivered by the Mortgagee.

13.05 The Mortgagor shall furnish to the Mortgagee ten (10) days after the mailing by the Mortgagee of a written request therefor, proof reasonably satisfactory to the Mortgagee of payment of all items which are required to be paid by the Mortgagor under the Superior Mortgage or any instrument or agreement related thereto.

13.06 The Mortgagee shall have the right, at its option, to perform the obligations of the Mortgagor under the Superior Mortgage upon the expiration of one-half of any applicable grace period for the curing of any defaults thereunder without the Mortgagee waiving any other of its rights under this Mortgage. Should the Mortgagee exercise its right hereunder to cure a default, the Mortgagor will reimburse the Mortgagee for any reasonable expenses the Mortgagee shall have incurred pursuant to the provisions of this Section 13.06, and any such expenditure shall become a lien upon the Mortgaged Property and shall be added to the principal of and be secured by this Mortgage. The Mortgagor will take all reasonable steps to insure the Mortgagee will have a reasonable opportunity to cure all defaults under the Superior Mortgage.

ARTICLE 14

Purchase Agreements

14.01 Subject to the terms of the Superior Mortgage, Mortgagor does hereby collaterally assign, transfer, set over, grant a security interest in, and deliver unto Mortgagee all the right, title and interest of Mortgagor in, under, and to any and all purchase agreements for the sale of building lots, together with any and all modifications or amendments thereof, which are in effect and which are hereinafter entered into by Mortgagor pursuant to the terms of this Mortgage (the "Purchase Agreements").

14.02 Mortgagor shall timely abide by, perform and discharge in all material respects each and every obligation, covenant, and condition of the Purchase Agreements to which it is a party to be performed by Mortgagor, and Mortgagor shall exercise its rights to enforce performance by the other party thereto of each and every obligation, covenant, condition and agreement to be performed by such other party, all in accordance with the terms of the Purchase Agreements, unless a waiver thereof is consented to in advance by Mortgagee.

14.03 Subject to the terms of the Superior Mortgage, at any time after the occurrence and during the continuance of an Event of Default hereunder, Mortgagee, at its option, without notice, either in person or by agent, with or without bringing any action or proceeding, or by a receiver to be appointed by a court at any time hereafter, may enforce for its own benefit the Purchase Agreements or any of them.

14.04 Subject to the terms of the Superior Mortgage, following an Event of Default, each party to the Purchase Agreements upon written notice from Mortgagee of the occurrence of an Event of Default, shall be and is hereby authorized by Mortgagor to perform under their respective Purchase Agreements for the benefit of Mortgagee in accordance with the terms and conditions thereof without any obligation to determine whether or not such an Event of Default has in fact occurred.

14.05 Mortgagor shall not assign, sell, pledge, transfer, mortgage, hypothecate or otherwise encumber its interests in the Purchase Agreements or any of them, except as permitted pursuant to the Mortgage. Mortgagor has not performed any act which will prevent Mortgagee from operating under or enforcing any of the terms and conditions of this Article or which would limit Mortgagee in such operation or enforcement.

ARTICLE 15

Waiver of Appraisal Rights

15.01 The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transactions. **THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.**

IN WITNESS WHEREOF, Mortgagor has caused this Mortgage to be duly executed on the day and year first above written.

WITNESS:

MORTGAGOR:

PEACHTREE PROPERTIES OF NORTH MYRTLE BEACH, LLC



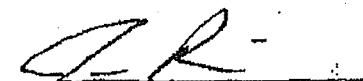
Print Name: ROBERT H. GWIN, III

By:



Jeffrey T. Shoup, Manager

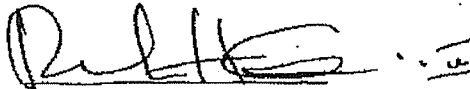
WITNESS:



Print Name:

Jon Row

The undersigned executes this Mortgage solely for the purpose of acknowledging and agreeing to the provisions of Paragraph 8.04 hereinabove and the undersigned hereby accepts his appointment as the "Agent" herein listed.

A handwritten signature in black ink, appearing to read 'Robert Gwin', with a horizontal line underneath it.

Robert Gwin, Esq.

ACKNOWLEDGEMENT

STATE OF SOUTH CAROLINA)
)ss.:
COUNTY OF HORRY)

I, Robert H. Gwin, III, a Notary Public in and for the County and State aforesaid, hereby certify that Jeffrey T. Shoup appeared before me this date and acknowledged that he executed the within instrument on behalf of Peachtree Properties of North Myrtle Beach, LLC, a South Carolina limited liability company, the Mortgagor, as its Manager.


Notary Public

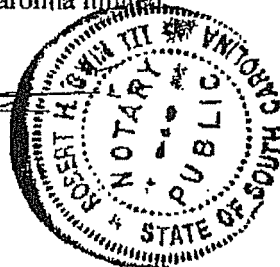


EXHIBIT A

Legal Description

All that certain lot or parcel of land situate in the City of Myrtle Beach, County of Horry, State of South Carolina, and being more particularly described as follows:

PARCEL ONE:

ALL AND SINGULAR those three (3) certain Lots in Socastee Township, Horry County, South Carolina, being shown on a Plat prepared for the Estate of John C. Spivey by J.F. Thomas, Surveyor, dated September 1, 1965, recorded November 16, 1965, in Plat Book 43 at Page 183, and designated thereon as Hursey Three Lots, to which Plat reference is made, being described as follows:

Beginning at a point on the inland Waterway the lands intersects with the Inland Waterway and Spivey Road, a right-of-way from which has been granted at a corner designated Concrete N; thence North: 78 degrees, 10 minutes West 225 feet to Concrete N; thence North 27 degrees 10 minutes East 250 feet to Pipe N; thence South 78 degrees 10 minutes East to Pipe N; thence South 27 degrees 10 minutes East 250 feet to the beginning corner.

Bounded on the North by lands of Ruth L. McClam; on the East by lands of Ruth L. McClam, on the South by the Northern margin of Intracoastal Waterway, and on the West by lands of Ruth L. McClam.

This being the same property conveyed to Ruth L. McClam by Deed of T.S. Ludlum dated October 21, 1966, and recorded January 23, 1967, in the Office of the Clerk of Court for Horry County in Deed Book 360 at Page 199.

Steven Boyd McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 and recorded November 15, 1989 in Deed Book 1352 at Page 555, public records of Horry County, South Carolina.

Marion Louis McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 in Deed Book 1352 at Page 560, public records of Horry County, South Carolina.

Patrice Ann McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 and recorded November 15, 1989 in Deed Book 1352 at Page 565, public records of Horry County, South Carolina.

PARCEL TWO:

All AND SINGULAR, that lot of land in Socastee Township, Horry County, South Carolina, on the Northern side of the Inland Waterway and located near the Old Sweet Ditch, bounded and described as follows:

Commencing at an iron stake on the Northern bank of the Inland Waterway being a point where the Eastern bank of the Old Socastee Creek intersects the Inland Waterway, and running thence in a Northerly direction 21 degrees East 250 feet to an iron stake; thence Eastward 79 degrees East 100 feet to an iron stake; thence South 21 degrees East 250 feet to an iron stake on the Northern bank of the Inland Waterway; thence Westwardly along the Northern bank of the Inland Waterway 100 feet to the beginning corner.

Bounded on the North by other lands of Ruth L. McClam; on the East by other lands of Ruth L. McClam; on the South by the Inland Waterway; and on the west by other lands of Ruth L. McClam.

This being the same property conveyed to Ruth L. McClam by Deed of Larry W. Paul dated February 15, 1982, and recorded on February 18, 1982, in the office of the Clerk of Court for Horry County in Deed Book 737 at Page 818.

Steven Boyd McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 and recorded November 15, 1989 in Deed Book 1352 at Page 555, public records of Horry County, South Carolina.

Marion Louis McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 in Deed Book 1352 at Page 560, public records of Horry County, South Carolina.

Patrice Ann McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 and recorded November 15, 1989 in Deed Book 1352 at Page 565, public records of Horry County, South Carolina.

PARCEL THREE:

All AND SINGULAR, that certain tract or parcel of land in Socastee Township, Horry County, South Carolina, on hundred thirty-five (135) acres, more or less, having been platted and shown on a Plat prepared by J.F. Thomas, Surveyor, dated September 1, 1965. This 135 acres is situate North of the Intracoastal Waterway. The Plat is recorded in Plat Book 43, Page 183, in the Office of the Clerk of Court of Horry County, to which Plat reference is made.

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The 135 acres is exclusive of the proposed highway area shown on the Plat above referenced to and is described as follows:

Beginning at Concrete N on the Southern margin of the proposed highway as shown on the referenced Plat (this road is known as the Peachtree Ferry Road); and running thence North approximately $26^{\circ}5'$ East 33 feet to a point in the center of the road, the point being taken from the Highway Department survey; thence South $68^{\circ}22'$ East 441 feet to point of intersection, as shown on the above Plat; thence South $62^{\circ}45'$ East 984.3 feet to point of intersection, as shown on the above Plat; thence South $75^{\circ}15'$ East 1028.6 feet to point of intersection, as shown on the Plat; thence North 33 feet to Concrete N on the Northern margin of the road above described; thence North $19^{\circ}5'$ East 473.5 feet to Pipe O; thence $53^{\circ}10'$ East 516 feet to Concrete N; thence South $13^{\circ}55'$ West 872.5 feet to Concrete N on the Northern margin of the road; thence South 33 feet to point in center of the road described above; thence South $75^{\circ}15'$ East 710 feet to point of intersection as shown on the Plat; thence South $85^{\circ}11'$ minutes East 340.5 feet to point of intersection in center of the road described above, as shown on the Plat; thence Southwest 33 feet to Concrete N on the Southern margin of the road described above; thence South $21^{\circ}45'$ West 1045.5 feet to Pipe O and Concrete N; thence North $78^{\circ}50'$ West 750 feet to Pipe O and Concrete N; thence South $20^{\circ}55'$ West 438.5 feet to Concrete N; thence North $78^{\circ}10'$ West 566 feet to Concrete N; thence North $27^{\circ}10'$ East to Pipe N; thence North $78^{\circ}10'$ West 225 feet to Pipe N; thence South $27^{\circ}10'$ West 250 feet to concrete N; thence North $78^{\circ}10'$ West 1284.5 feet to Concrete N; thence North 21° East 250 feet to Concrete N; thence North $78^{\circ}10'$ West 100 feet to Concrete N; thence South 21° West 250 feet to Concrete N; thence North $26^{\circ}25'$ West 145 feet along Socastee Creek, the Creek being the line; thence North 45° West 100 feet; thence North 57° West 100 feet; thence North $63^{\circ}10'$ West 100 feet; thence North $54^{\circ}45'$ West 130 feet; thence South $70^{\circ}25'$ West 185 feet; thence North $89^{\circ}20'$ West 200 feet; thence North $61^{\circ}45'$ West 94 feet; thence North $70^{\circ}20'$ West 100 feet; thence South $86^{\circ}50'$ West 80 feet to Gum 3MO; thence North $27^{\circ}40'$ East 383.5 feet to Gum OM; thence North $27^{\circ}20'$ East 261 Feet to Gum OM; thence North $26^{\circ}05'$ East 1119.5 feet to the beginning corner.

Bounded on the North by the center of the proposed, highway as shown on the Plat in part, and in part by the lands, now or formerly, of Brice J. Ward; on the East by lands, now or formerly, of Roy Collins, in part, and in part by lands, now or formerly, of Virginia Zeigler; on the South by lands, now or formerly, of J.M. Cooper, in part, and lands, now or formerly, of Virginia Zeigler, in part, and by the Northern margin of the Intracoastal Waterway, in part, Lucy S. Kolb, in part, and Socastee Creek, in part; and on the West by land, now or formerly, of Maggie L. Roberts.

LESS AND EXCEPT:

ALL AND SINGULAR that certain piece, parcel or lot of land situate, lying, and being in Socastee Township, County and State aforesaid, designated as Pump Site and containing 215 square feet and shown on a plat of Pump Site For Grand Strand Water & Sewer Authority owned by Ruth L. McClam; made by Engineering and Technical Services, Inc., dated November 1, 1961.

1990; a copy of which is recorded in Plat Book 112, Page 65, public records of Horry County and which is by way of reference made a part and parcel of this description.

This property was heretofore conveyed by Ruth Ludlum McClam, et al to the Grand Strand Water and Sewer Authority by Deed dated 23 November, 1990; and recorded in Deed Book 1438, Page 163, in the office of the Clerk of Court for Horry County, South Carolina.

PARCEL THREE (3) is a portion of the property devised to Ruth Ludlum McClam by Item VIII of the Last Will and Testament of John C. Spivey, Deceased, and conveyed by Deed of Lucy S. Kolb, Executrix, T.B. Ludlum and C.A. Spivey, as Executors of the Last Will and Testament of J.C. Spivey, dated November 13, 1965, and recorded in the Office of the Clerk of Court for Horry County in Deed Book 336 at Page 482 on November 16, 1965.

Steven Boyd McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 and recorded November 15, 1989 in Deed Book 1352 at Page 555, public records of Horry County, South Carolina.

Marion Louis McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 in Deed Book 1352 at Page 560, public records of Horry County, South Carolina.

Patrice Ann McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 and recorded November 15, 1989 in Deed Book 1352 at Page 565, public records of Horry County, South Carolina.

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EXHIBIT E

(Jericho State Policy)

**AMERICAN LAND TITLE ASSOCIATION
LOAN POLICY
(10-17-92)**

Policy No. SC2330-46-06-RE-388A-2006.7210740-72338570

CHICAGO TITLE INSURANCE COMPANY

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS, AND STIPULATIONS, CHICAGO TITLE INSURANCE COMPANY, a Missouri corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

- 1 Title to the estate or interest described in Schedule A being vested other than as stated therein;
- 2 Any defect in or lien or encumbrance on the title;
- 3 Unmarketability of the title;
- 4 ~~Lack of a right of access to and from the land;~~
- 5 The invalidity or unenforceability of the lien of the insured mortgage upon the title;
- 6 The priority of any lien or encumbrance over the lien of the insured mortgage;
- 7 Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material:
 - a arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or
 - b arising from an improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance;
- 8 The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage in the named insured assignee free and clear of all liens

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title, as insured, but only to the extent provided in the Conditions and Stipulations.

In Witness Whereof, CHICAGO TITLE INSURANCE COMPANY has caused this policy to be signed and sealed as of Date of Policy shown in Schedule A, the policy to become valid when countersigned by an authorized signatory.

NOTICE IS HEREBY GIVEN THAT THIS POLICY IS SUBJECT TO ARBITRATION PURSUANT TO THE PROVISIONS OF CHAPTER 48 OR TITLE 15 (SEC. 15-48-10 ET SEQ.) OF THE SOUTH CAROLINA CODE OF LAWS, 1976, AS AMENDED.

SC2330 06-RE-388A
Oleander Title Agency
2105-B Cromley Circle
Myrtle Beach, SC 29577
Tel: (843) 839-2239
Fax: (843) 839-2244



CHICAGO TITLE INSURANCE COMPANY

By *[Signature]*
ATTEST
[Signature]
Secretary

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1. (a) Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) an environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.
- (b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.
2. Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.
3. Defects, liens, encumbrances, adverse claims or other matters:
 - (a) created, suffered, assumed or agreed to by the Insured claimant;
 - (b) not known to the Company, not recorded in the public records at Date of Policy, but known to the Insured claimant and not disclosed in writing to the Company by the Insured claimant prior to the date the Insured claimant became an Insured under this policy;
 - (c) resulting in no loss or damage to the Insured claimant;
 - (d) attaching or created subsequent to Date of Policy (except to the extent that this policy insures the priority of the lien of the Insured mortgage over any statutory lien for services, labor or material); or
 - (e) resulting in loss or damage which would not have been sustained if the Insured claimant had paid value for the Insured mortgage.
4. Unenforceability of the lien of the Insured mortgage because of the inability or failure of the Insured at Date of Policy, or the inability or failure of any subsequent owner of the indebtedness, to comply with applicable doing business laws of the state in which the land is situated.
5. Invalidity or unenforceability of the lien of the Insured mortgage, or claim thereof, which arises out of the transaction evidenced by the Insured mortgage and is based upon usury or any consumer credit protection or truth in lending law.
6. Any statutory lien for services, labor or materials (or the claim of priority of any statutory lien for services, labor or materials over the lien of the Insured mortgage) arising from an improvement or work related to the land which is contracted for and commenced subsequent to Date of Policy and is not financed in whole or in part by proceeds of the indebtedness secured by the Insured mortgage which at Date of Policy the Insured has advanced or is obligated to advance.
7. Any claim which arises out of the transaction creating the interest of the mortgagee Insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that is based on:
 - (i) the transaction creating the interest of the Insured mortgagee being deemed a fraudulent conveyance or fraudulent transfer; or
 - (ii) the subordination of the interest of the Insured mortgagee as a result of the application of the doctrine of equitable subordination; or
 - (iii) the transaction creating the interest of the Insured mortgagee being deemed a preferential transfer except where the preferential transfer results from the failure:
 - (a) to timely record the instrument of transfer; or
 - (b) of such recordation to impart notice to a purchaser for value or a judgment or lien creditor.

CONDITIONS AND STIPULATIONS

1. DEFINITION OF TERMS

The following terms when used in this policy mean:

(a) "Insured": the Insured named in Schedule A. The term "Insured" also includes

(i) the owner of the indebtedness secured by the Insured mortgage and each successor in ownership of the indebtedness except a successor who is an obligor under the provisions of Section 12(c) of these Conditions and Stipulations (reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor Insured, unless the successor acquired the indebtedness as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim or other matter insured against by this policy as affecting title to the estate or interest in the land);

(ii) any governmental agency or governmental instrumentality which is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing the indebtedness secured by the Insured mortgage, or any part thereof, whether named as an Insured herein or not;

(iii) the parties designated in Section 2(a) of these Conditions and Stipulations.

(b) "Insured claimant": an Insured claiming loss or damage

(c) "knowledge" or "known": actual knowledge, not constructive knowledge or notice which may be imputed to an Insured by reason of the public records as defined in this policy or any other records which impart constructive notice of matters affecting the land.

(d) "land": the land described or referred to in Schedule A, and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(e) "mortgage": mortgage deed of trust, trust deed, or other security instrument

(f) "public records": records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge. With respect to Section 1(a)(iv) of the Exclusions From Coverage "public records" shall also include environmental protection liens filed in the records of the clerk of the United States district court for the district in which the land is located.

(g) "unmarketability of the title": an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A or the Insured mortgage to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF INSURANCE

(a) After Acquisition of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of (i) an Insured who acquires all or any part of the estate or interest in the land by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the Insured mortgage; (ii) a transferee of the estate or interest so acquired from an Insured corporation, provided the transferee is the parent or wholly-owned subsidiary of the Insured corporation, and their corporate successors by operation of law and not by purchase, subject to any rights or defenses the Company may have against any predecessor insureds; and (iii) any governmental agency or governmental instrumentality which acquires all or any part of the estate or interest pursuant to a contract of insurance or guaranty insuring or guaranteeing the indebtedness secured by the Insured mortgage.

(b) After Conveyance of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured only so long as the Insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the Insured, or only so long as the Insured shall have liability by reason of covenants of warranty made by the Insured in any transfer or conveyance of the estate or interest. This policy shall not continue in force in favor of any

purchaser from the insured of either (i) an estate or interest in the land, or (ii) an indebtedness secured by a purchase money mortgage given to the insured.

(c) Amount of Insurance. The amount of Insurance after the acquisition or after the conveyance shall in neither event exceed the least of:

- (i) the Amount of Insurance stated in Schedule A;
- (ii) the amount of the principal of the Indebtedness secured by the insured mortgage as of Date of Policy, Interest thereon, expenses of foreclosure amounts advanced pursuant to the insured mortgage to assure compliance with laws or to protect the lien of the insured mortgage prior to the time of acquisition of the estate or interest in the land and secured thereby and reasonable amounts expended to prevent deterioration of improvements, but reduced by the amount of all payments made; or
- (iii) the amount paid by any governmental agency or governmental instrumentality, if the agency or instrumentality is the insured claimant, in the acquisition of the estate or interest in satisfaction of its insurance contract or guaranty

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT

The insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 4(a) below, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest or the lien of the insured mortgage, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest or the lien of the insured mortgage, as insured, is rejected as unmarketable. If prompt notice shall not be given to the Company, then as to the insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

4. DEFENSE AND PROSECUTION OF ACTIONS; DUTY OF INSURED CLAIMANT TO COOPERATE

(a) Upon written request by the insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy.

(b) The Company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured, or to prevent or reduce loss or damage to the insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable hereunder and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

(c) Whenever the Company shall have brought an action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(d) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of the insured for this purpose. Whenever requested by the Company, the insured, at the Company's expense, shall give the Company all reasonable aid (i) in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured. If the Company is prejudiced by the failure of the insured to furnish the required cooperation the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

5. PROOF OF LOSS OR DAMAGE

In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company a proof of loss or damage signed and sworn to by the insured claimant shall be furnished to the Company within 80 days after the insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title, or other matter insured against by this policy which constitutes the basis of loss or damage and shall state, to the extent possible the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the insured claimant to provide the required proof of loss or damage, the Company's obligations to the insured under the policy shall terminate including any liability or obligation to

defend, prosecute, or continue any litigation with regard to the matter or matters requiring such proof of loss or damage.

In addition, the insured claimant may reasonably be required to submit to examination under oath by any authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage. All information designated as confidential by the insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in the above paragraph, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

6. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance or to Purchase the Indebtedness.

(i) to pay or tender payment of the amount of Insurance under this policy together with any costs, attorneys fees and expenses incurred by the insured claimant, which were authorized by the Company, up to the time of payment or tender of payment and which the Company is obligated to pay; or

(ii) to purchase the indebtedness secured by the insured mortgage for the amount owing thereon together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of purchase and which the Company is obligated to pay.

If the Company offers to purchase the indebtedness as herein provided, the owner of the indebtedness shall transfer assign, and convey the indebtedness and the insured mortgage, together with any collateral security to the Company upon payment therefore.

Upon the exercise by the Company of either of the options provided for in paragraphs (i) or (ii), all liability and obligations to the insured under this policy, other than to make the payment required in those paragraphs, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation and the policy shall be surrendered to the Company for cancellation.

(b) To Pay or Otherwise Settle With Parties Other than the Insured or With the Insured Claimant.

(i) to pay or otherwise settle with other parties for or in the name of an insured claimant any claim insured against under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay; or

(ii) to pay or otherwise settle with the insured claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in paragraphs b(i) or (ii), the Company's obligations to the insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

7. DETERMINATION AND EXTENT OF LIABILITY

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) The liability of the Company under this policy shall not exceed the least of:

(i) the Amount of Insurance stated in Schedule A, or, if applicable, the amount of Insurance as defined in Section 2 (c) of these Conditions and Stipulations;

(ii) the amount of the unpaid principal indebtedness secured by the insured mortgage as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time the loss or damage insured against by this policy occurs, together with interest thereon; or

(iii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

(b) In the event the insured has acquired the estate or interest in the manner described in Section 2(a) of these Conditions and Stipulations or has

conveyed the title, then the liability of the Company shall continue as set forth in Section 7(a) of these Conditions and Stipulations.

(c) The Company will pay only those costs, attorneys' fees and expenses incurred in accordance with Section 4 of these Conditions and Stipulations.

8. LIMITATION OF LIABILITY

(a) If the Company establishes the title, or removes the alleged defect lien or encumbrance, or cures the lack of a right of access to or from the land, or cures the claim of unmarketability of title, or otherwise establishes the lien of the insured mortgage, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom adverse to the title or to the lien of the insured mortgage, as insured.

(c) The Company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without the prior written consent of the Company.

(d) The Company shall not be liable for: (i) any indebtedness created subsequent to Date of Policy except for advances made to protect the lien of the insured mortgage and secured thereby and reasonable amounts expended to prevent deterioration of improvements; or (ii) construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the land which at Date of Policy were secured by the insured mortgage and which the insured was and continued to be obligated to advance at and after Date of Policy.

9. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY

(a) All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of the insurance pro tanto. However, any payments made prior to the acquisition of title to the estate or interest as provided in Section 2(a) of these Conditions and Stipulations shall not reduce pro tanto the amount of the insurance afforded under this policy except to the extent that the payments reduce the amount of the indebtedness secured by the insured mortgage.

(b) Payment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage or any voluntary partial satisfaction or release of the insured mortgage, to the extent of the payment, satisfaction or release, shall reduce the amount of insurance pro tanto. The amount of insurance may thereafter be increased by accruing interest and advances made to protect the lien of the insured mortgage and secured thereby, with interest thereon provided in no event shall the amount of insurance be greater than the Amount of Insurance stated in Schedule A.

(c) Payment in full by any person or the voluntary satisfaction or release of the insured mortgage shall terminate all liability of the Company except as provided in Section 2(a) of these Conditions and Stipulations.

10. LIABILITY NONCUMULATIVE

If the insured acquires title to the estate or interest in satisfaction of the indebtedness secured by the insured mortgage, or any part thereof, it is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy.

11. PAYMENT OF LOSS

(a) No payment shall be made without producing this policy for endorsement of the payment unless the policy has been lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

(b) When liability and the extent of loss or damage has been definitely fixed in accordance with these Conditions and Stipulations, the loss or damage shall be payable within 30 days thereafter.

12. SUBROGATION UPON PAYMENT OR SETTLEMENT

(a) The Company's Right of Subrogation.
Whenever the Company shall have settled and paid a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant.

The Company shall be subrogated to and be entitled to all rights and remedies which the insured claimant would have had against any person or property in respect to the claim had this policy not been issued. If requested by the Company, the insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect this right of subrogation. The insured claimant shall permit the Company to sue, compromise or settle in the name of the insured claimant and to use the name of the insured claimant in any transaction or litigation involving these rights or remedies.

If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated to all rights and remedies of the insured claimant after the insured claimant shall have recovered its principal interest and costs of collection.

(b) The Insured's Rights and Limitations.

Notwithstanding the foregoing, the owner of the indebtedness secured by the insured mortgage, provided the priority of the lien of the insured mortgage or its enforceability is not affected, may release or substitute the personal liability of any debtor or guarantor, or extend or otherwise modify the terms of payment, or release a portion of the estate or interest from the lien of the insured mortgage, or release any collateral security for the indebtedness.

When the permitted acts of the insured claimant occur and the insured has knowledge of any claim of title or interest adverse to the title to the estate or interest or the priority or enforceability of the lien of the insured mortgage, as insured, the Company shall be required to pay only that part of any losses insured against by this policy which shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation.

(c) The Company's Rights Against Non-Insured Obligors.

The Company's right of subrogation against non-insured obligors shall exist and shall include, without limitation, the rights of the insured to indemnities, guarantees, other policies of insurance or bonds notwithstanding any terms or conditions contained in those instruments which provide for subrogation rights by reason of this policy.

The Company's right of subrogation shall not be avoided by acquisition of the insured mortgage by an obligor (except an obligor described in Section 1(a)(ii) of these Conditions and Stipulations) who acquires the insured mortgage as a result of an indemnity, guarantee, other policy of insurance, or bond and the obligor will not be an insured under this policy, notwithstanding Section 1(a)(i) of these Conditions and Stipulations.

13. ARBITRATION

Unless prohibited by applicable law, either the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All arbitrable matters when the Amount of Insurance is \$1,000,000 or less shall be arbitrated at the option of either the Company or the insured. All arbitrable matters when the Amount of Insurance is in excess of \$1,000,000 shall be arbitrated only when agreed to by both the Company and the insured. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules.

A copy of the Rules may be obtained from the Company upon request.

14. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT

(a) This policy together with all endorsements, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company. In interpreting any provision of this policy this policy shall be construed as a whole.

(b) Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the lien of the insured mortgage or of the title to the estate or interest covered hereby or by any action asserting such claim, shall be restricted to this policy.

(c) No amendment of or endorsement to this policy can be made except by a writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary or validating officer or authorized signatory of the Company.

15. SEVERABILITY

In the event any provision of this policy is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision and all other provisions shall remain in full force and effect.

16. NOTICES, WHERE SENT

All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the number of this policy and shall be addressed to the Company at the issuing office or to:

Claims Department
P.O. Box 45023
Jacksonville, FL 32232-5023

LOAN FORM
CHICAGO TITLE INSURANCE COMPANY
3700 Forest Drive, Suite 201, Columbia, SC 29204

SCHEDULE A

OFFICE FILE NUMBER: 06-RE-388A
POLICY NUMBER: 7210740-72338570
DATE OF POLICY: July 25, 2006 at 3:27 P.M.
AMOUNT OF INSURANCE: \$4,263,888.00

1. Name of Insured:

Jericho State Capital Corp. of Florida, its successors and/or assigns as their interests may appear

2. The estate or interest in the land which is encumbered by the insured mortgage is:

Fee Simple

3. Title to the estate or interest in the land is vested in:

Peachtree Properties of North Myrtle Beach, LLC

4. The insured mortgage and assignments thereof, if any, are described as follows:

Mortgage from Peachtree Properties of North Myrtle Beach, LLC to Jericho State Capital Corp. of Florida dated July 24, 2006, and recorded in the Land Records of Horry County, South Carolina, in Deed Book 4629 Page 277.

5. The land referred to in this Policy is described as follows:

All that certain lot or parcel of land situate in the City of Myrtle Beach, County of Horry, State of South Carolina, and being more particularly described as follows:

PARCEL ONE

ALL AND SINGULAR those three (3) certain Lots in Socastee Township, Horry County, South Carolina, being shown on a Plat prepared for the Estate of John C. Spivey by J.F. Thomas, Surveyor, dated September 1, 1965, recorded November

Countersigned

2105-B Cromley Circle
Myrtle Beach, SC 29577


Authorized Signatory

SCHEDULE A
Loan Form (Rev 1/89)

This Policy valid only if Schedule B is attached.

**LOAN FORM
CHICAGO TITLE INSURANCE COMPANY**

**SCHEDULE A
(continued)**

Policy Number:

16, 1985, in Plat Book 43 at Page 183, and designated thereon as Hursey Three Lots, to which Plat reference is made, being described as follows:

Beginning at a point on the inland Waterway the lands intersect with the Inland Waterway and Spivey Road, a right-of-way from which has been granted at a corner designated Concrete N; thence North: 78 degrees, 10 minutes West 225 feet to Concrete N; thence North 27 degrees 10 minutes East 250 feet to Pipe N; thence South 78 degrees 10 minutes East to Pipe N; thence South 27 degrees 10 minutes East 250 feet to the beginning corner.

Bounded on the North by lands of Ruth L. McClam; on the East by lands of Ruth L. McClam, on the South by the Northern margin of Intracoastal Waterway, and on the West by lands of Ruth L. McClam.

This being the same property conveyed to Ruth L. McClam by Deed of T.S. Ludlam dated October 21, 1966, and recorded January 23, 1967, in the Office of the Clerk of Court for Horry County in Deed Book 360 at Page 199.

Steven Boyd McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 and recorded November 15, 1989 in Deed Book 1352 at Page 555, public records of Horry County, South Carolina.

Marion Louls McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 in Deed Book 1352 at Page 580, public records of Horry County, South Carolina.

Patrice Ann McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 and recorded November 15, 1989 in Deed Book 1352 at Page 565, public records of Horry County, South Carolina.

PARCEL TWO:

All AND SINGULAR, that lot of land in Socastee Township, Horry County, South Carolina, on the Northern side of the Inland Waterway and located near the Old Sweet Ditch, bounded and described as follows:

Commencing at an iron stake on the Northern bank of the Inland Waterway being a point where the Eastern bank of the Old Socastee Creek intersects the Inland Waterway, and running thence in a Northerly direction 21 degrees East 250 feet to an iron stake; thence Eastward 78 degrees East 100 feet to an iron stake; thence South 21 degrees East 250 feet to an iron stake on the Northern bank of the Inland Waterway; thence Westwardly along the Northern bank of the Inland Waterway 100 feet to the beginning corner.

LOAN FORM
CHICAGO TITLE INSURANCE COMPANY

SCHEDULE A
(continued)

Policy Number:

Bounded on the North by other lands of Ruth L. McClam; on the East by other lands of Ruth L. McClam; on the South by the Inland Waterway; and on the west by other lands of Ruth L. McClam.

This being the same property conveyed to Ruth L. McClam by Deed of Larry W. Paul dated February 15, 1982, and recorded on February 18, 1982, in the office of the Clerk of Court for Horry County in Deed Book 737 at Page 818.

Steven Boyd McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 and recorded November 15, 1989 in Deed Book 1352 at Page 555, public records of Horry County, South Carolina.

Marion Louis McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 in Deed Book 1352 at Page 560, public records of Horry County, South Carolina.

Patrice Ann McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 and recorded November 15, 1989 in Deed Book 1352 at Page 565, public records of Horry County, South Carolina.

PARCEL THREE:

All AND SINGULAR, that certain tract or parcel of land in Socastee Township, Horry County, South Carolina, on hundred thirty-five (135) acres, more or less, having been platted and shown on a Plat prepared by J.F. Thomas, Surveyor, dated September 1, 1965. This 135 acres is situate North of the Intracoastal Waterway. The Plat is recorded in Plat Book 43, Page 183, in the Office of the Clerk of Court of Horry County, to which Plat reference is made.

The 135 acres is exclusive of the proposed highway area shown on the Plat above referenced to and is described as follows:

Beginning at Concrete N on the Southern margin of the proposed highway as shown on the referenced Plat (this road is known as the Peachtree Ferry Road); and running thence North approximately 26°5' East 33 feet to a point in the center of the road, the point being taken from the Highway Department survey; thence South 68°22' East 441 feet to point of intersection, as shown on the above Plat; thence South 62°45' East 984.3 feet to point of intersection, as shown on the above Plat; thence South 75°15' East 1028.6 feet to point of intersection, as shown on the Plat; thence North 33 feet to Concrete N on the Northern margin of the road above described; thence North 19°5' East 473.5 feet to Pipe O; thence 53°10' East 516 feet to Concrete N; thence South 13°55' West 872.5 feet to Concrete N on the Northern margin of the road; thence South 33 feet to point in center of the road described above; thence South 75°15' East 710 feet to point of intersection as

SCHEDULE A continued
Loan Form (Rev. 1/89)

This Policy valid only if Schedule B is attached.

**LOAN FORM
CHICAGO TITLE INSURANCE COMPANY**

**SCHEDULE A
(continued)**

Policy Number:

shown on the Plat; thence South 85°11 minutes East 340.5 feet to point of intersection in center of the road described above, as shown on the Plat; thence Southwest 33 feet to Concrete N on the Southern margin of the road described above; thence South 21°45' West 1045.5 feet to Pipe O and Concrete N; thence North 78°50' West 750 feet to Pipe O and Concrete N; thence South 20°55' West 438.5 feet to Concrete N; thence North 78°10' West 566 feet to Concrete N; thence North 27°10' East to Pipe N; thence North 78°10' West 225 feet to Pipe N; thence South 27°10' West 250 feet to concrete N; thence North 78°10' West 1284.5 feet to Concrete N; thence North 21° East 250 feet to Concrete N; thence North 78°10' West 100 feet to Concrete N; thence South 21° West 250 feet to Concrete N; thence North 26°25' West 145 feet along Socastee Creek, the Creek being the line; thence North 45° West 100 feet; thence North 57° West 100 feet; thence North 63°10' West 100 feet; thence North 54°45' West 130 feet; thence South 70°25' West 185 feet; thence North 89°20' West 200 feet; thence North 61°45' West 94 feet; thence North 70°20' West 100 feet; thence South 86°50' West 80 feet to Gum 3MO; thence North 27°40' East 383.5 feet to Gum OM; thence North 27°20' East 261 Feet to Gum OM; thence North 26°05' East 1119.5 feet to the beginning corner.

Bounded on the North by the center of the proposed, highway as shown on the Plat in part, and in part by the lands, now or formerly, of Brice J. Ward; on the East by lands, now or formerly, of Roy Collins, in part, and in part by lands, now or formerly, of Virginia Zeigler; on the South by lands, now or formerly, of J.M. Cooper, in part, and lands, now or formerly, of Virginia Zeigler, in part, and by the Northern margin of the Intracoastal Waterway, in part, Lucy S. Kolb, in part, and Socastee Creek, in part; and on the West by land, now or formerly, of Maggie L. Roberts.

LESS AND EXCEPT:

ALL AND SINGULAR that certain piece, parcel or lot of land situate, lying, and being in Socastee Township, County and State aforesaid, designated as Pump Site and containing 215 square feet and shown on a plat of Pump Site For Grand Strand Water & Sewer Authority owned by Ruth L. McClam; made by Engineering and Technical Services, Inc., dated November 1, 1990; a copy of which is recorded in Plat Book 112, Page 65, public records of Horry County and which is by way of reference made a part and parcel of this description.

This property was heretofore conveyed by Ruth Ludlum McClam, et al to the Grand Strand Water and Sewer Authority by Deed dated 23 November, 1990; and recorded in Deed Book 1438, Page 163, in the office of the Clerk of Court for Horry County, South Carolina.

PARCEL THREE (3) is a portion of the property devised to Ruth Ludlum McClam by Item VIII of the Last Will and Testament of John C. Spivey, Deceased, and conveyed by Deed of Lucy S. Kolb, Executrix, T.B. Ludlum and C.A. Spivey, as Executors of the Last Will and Testament of J.C. Spivey, dated November 13, 1965,

SCHEDULE A continued
Loan Form (Rev 1/89)

This Policy valid only if Schedule B is attached.

LOAN FORM
CHICAGO TITLE INSURANCE COMPANY

SCHEDULE A
(continued)

Policy Number:

and recorded in the Office of the Clerk of Court for Horry County in Deed Book 336 at Page 482 on November 16, 1965.

Steven Boyd McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 and recorded November 15, 1989 in Deed Book 1352 at Page 555, public records of Horry County, South Carolina.

Marion Louis McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 in Deed Book 1352 at Page 560, public records of Horry County, South Carolina.

Patrice Ann McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 and recorded November 15, 1989 in Deed Book 1352 at Page 565, public records of Horry County, South Carolina.

**LOAN FORM
CHICAGO TITLE INSURANCE COMPANY
SCHEDULE B**

Policy Number:

Exceptions from Coverage

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of:

Special Exceptions:

1. Taxes and assessments for the year 2006, and subsequent years, which are a lien but are not yet due and payable.
2. Easement in favor of Grand Strand Water and Sewer Authority, recorded in Deed Book 1438 at Page 1693, aforesaid records.
3. Riparian rights incident to the premises.
4. This policy does not insure title to that portion of the subject property, if any, lying below the mean high water mark of abutting tidal Intracoastal Waterway.
5. Interest created by, or limitations on use imposed by, the Federal Coastal Zone Management Act or other federal law or regulation, or by South Carolina Code §48-39-10 through 48-39-380, as amended, or any regulations promulgated pursuant to said state or federal laws.
6. Rights of the public generally is and to the use of that subject property used as Remote Lane as shown upon survey prepared for Jeff Shoup by Trico Engineering Consultants, Inc. dated March 28, 2006.
7. Mortgage from Peachtree Properties of North Myrtle Beach, LLC to R.E. Loans, LLC dated July 5, 2006 and recorded in the Land Records of Horry County, South Carolina in Deed Book 4629 at Page 255.

PART II

In addition to the matters set forth in Schedule B, the title to the estate or interest in the land described or referred to in Schedule A is subject to the following matters, but the Company insures that such matters are subordinate to the lien or charge of the insured mortgage upon said estate or interest:

Schedule B of this Policy consists of 1 page(s).

SCHEDULE B
Loan Form (Rev. 1/89)

ENDORSEMENT

Attached to Policy No.

Issued by

CHICAGO TITLE INSURANCE COMPANY

The Company insures the owner of the indebtedness secured by the insured mortgage against loss or damage sustained by reason of:

- 1 The existence at Date of Policy of any of the following:
 - (a) Covenants, conditions or restrictions under which the lien of the mortgage referred to in Schedule A can be divested, subordinated or extinguished, or its validity, priority or enforceability impaired.
 - (b) Unless expressly excepted in Schedule B:
 - (1) Present violations on the land of any enforceable covenants, conditions or restrictions and any existing improvements on the land which violate any building setback lines shown on a plat of subdivision recorded or filed in the public records.
 - (2) Any instrument referred to in Schedule B as containing covenants, conditions or restrictions on the land which, in addition, (i) establishes an easement on the land; (ii) provides a lien for liquidated damages; (iii) provides for a private charge or assessment; (iv) provides for an option to purchase a right of first refusal or the prior approval of a future purchaser or occupant.
 - (3) Any encroachment of existing improvements located on the land onto adjoining land, or any encroachment onto the land of existing improvements located on adjoining land.
 - (4) Any encroachment of existing improvements located on the land onto that portion of the land subject to any easement excepted in Schedule B.
 - (5) Any notices of violation of covenants, conditions and restrictions relating to environmental protection recorded or filed in the public records.
- 2 Any future violation on the land of any existing covenants, conditions or restrictions occurring prior to the acquisition of title to the estate or interest in the land by the insured, provided the violation results in:
 - (a) invalidity, loss of priority, or unenforceability of the lien of the insured mortgage; or
 - (b) loss of title to the estate or interest in the land if the insured shall acquire title in satisfaction of the indebtedness secured by the insured mortgage.
- 3 Damage to existing improvements, including lawns, shrubbery or trees:
 - (a) which are located on or encroach upon that portion of the land subject to any easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved;
 - (b) resulting from the future exercise of any right to use the surface of the land for the extraction or development of minerals excepted from the description of the land or excepted in Schedule B.
- 4 Any final court order or judgment requiring the removal from any land adjoining the land of any encroachment excepted in Schedule B
- 5 Any final court order or judgment denying the right to maintain any existing improvements on the land because of any violation of covenants, conditions or restrictions or building setback lines shown on a plat of subdivision recorded or filed in the public records

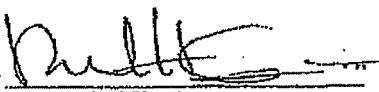
Wherever in this endorsement the words "covenants, conditions or restrictions" appear, they shall not be deemed to refer to or include the terms covenants, conditions or limitations contained in an instrument creating a lease.

As used in paragraphs 1(b)(1) and 5, the words "covenants, conditions or restrictions" shall not be deemed to refer to or include any covenants, conditions or restrictions relating to environmental protection.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and of any prior endorsements, nor does it extend the effective date of the policy and of any prior endorsements, nor does it increase the face amount thereof.

IN WITNESS WHEREOF the Company has caused its corporate name and seal to be affixed hereto by its duly authorized officers

Countersigned:

By 
Authorized Signatory

Note: This endorsement shall not be valid or binding until countersigned by an authorized signatory

ALTÁ Endorsement - Form 9
(Restrictions, Encroachments, Minerals) (3/27/92)

ENDORSEMENT

Attached to and forming a part of

Policy No. _____

Issued by

CHICAGO TITLE INSURANCE COMPANY

3700 Forest Drive, Suite 201, Columbia, SC 29204

SURVEY ENDORSEMENT

The Company insures the Insured against loss or damage sustained by the Insured by reason of the failure of the Insured property to be the same as that delineated on the plat of survey prepared by Inco Engineering Consultant, dated March 20, 2000, designated as Job No. N/A.

The total liability of the Company under said policy and any endorsements therein shall not exceed, in the aggregate, the face amount of said policy and costs which the Company is obligated under the conditions and stipulations thereof to pay.

This endorsement is made a part of the commitment or policy. It is subject to all of the terms of the commitment or policy.

Date:

CHICAGO TITLE INSURANCE COMPANY


Authorized Signatory

Note. This endorsement shall not be valid or binding until signed by an authorized signatory.

Survey End

and prior endorsements. Except as expressly stated on this endorsement, the terms, dates and amounts of the commitment or policy and prior endorsements are not changed.

Date:

CHICAGO TITLE INSURANCE COMPANY


Authorized Signatory

*Note: This endorsement shall not be valid or binding
until signed by an authorized signatory*

Survey End

ENDORSEMENT

Attached to and forming a part of

Policy No. SC2330-46-06-RE-388A.72

Issued by

CHICAGO TITLE INSURANCE COMPANY
3700 Forest Drive, Suite 201, Columbia, SC 29204

CONTIGUITY ENDORSEMENT

The Company insures the Insured against loss or damage sustained by the Insured by reason of the failure of the land described in Parcel 1 and the land described in Parcel 2-3 to be contiguous to each other and, taken as a tract, constitute one parcel of land.

This endorsement is made a part of the commitment or policy. It is subject to all the terms of the commitment or policy and prior endorsements. Except as expressly stated on this endorsement, the terms, dates and amounts of the commitment or policy and prior endorsements are not changed

DATE:

CHICAGO TITLE INSURANCE COMPANY



Authorized Signatory

Note: This endorsement shall not be valid or binding until signed by an authorized signatory

Form 3594 R 12/82

EXHIBIT F

(Foreclosure Order)

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Jericho All-Weather Opportunity Fund, L.P., a
Delaware limited partnership, and Jericho State
Capital Corporation of Florida, a Florida
corporation

Plaintiffs,

vs.

T & J Development of NMB, LLC, a South
Carolina limited liability company, a/k/a T & J
Development LLC, Peachtree Properties of
North Myrtle Beach, LLC, a South Carolina
limited liability company, Jeffrey Shoup, Joyce
Shoup, David Hix, Paula Hix, Ocean
Developers LLC, a South Carolina limited
liability company, Glenn Michaels, Manny
Pappus, T. J. Ungaro, North Myrtle Beach
Investment Group, LLC, Horst Goetz, Durward
W. Hancock, Hortense G. Hancock, and
McClam Investment Company, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No. 07-CP-26-3579

**ORDER AND DECREE OF
FORECLOSURE**

DEFICIENCY REQUESTED

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HORRY COUNTY
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Pursuant to Rules 53 and 71 of the South Carolina Rules of Civil Procedure and upon the stipulation and agreement of all non-defaulting parties, all causes of action under this proceeding were referred to the undersigned for the purpose of taking testimony and evidence and entering a final judgment or decree, with any appeal being directly to the South Carolina Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules.

Pursuant to an Order of Reference dated October 10, 2007, a hearing was held on October 30, 2007 attended by S. Sterling Laney, III of Womble Carlyle Sandridge & Rice, PLLC, attorneys for Plaintiffs. Testimony of Plaintiffs was presented by Affidavit, and from the testimony and evidence I make the following findings of fact and conclusions of law and enter the following Order.

FINDINGS OF FACT

1. The Notice of Pendency of Action was filed on June 8, 2007.
2. The Summons and Complaint were filed on June 8, 2007.

3. The Motion for Reference was filed on October 10, 2007

4. Service was made upon the defendants as shown by Affidavits of Service on file in this action. Defendants Peachtree Properties of North Myrtle Beach, LLC ("Peachtree"); Jeffrey Shoup; Ocean Developers, LLC; T & J Development of NMB, LLC; David Hix; Paula Hix; Joyce Shoup; North Myrtle Beach Investment Group, LLC; Hortense G. Hancock; Durward W. Hancock and McClam Investment Company, LLC have filed Answers in this action. Defendants Glenn Michaels, T. J. Ungaro and Horst Goetz are in default as shown by Affidavits of Default on file in this action.

5. Affidavit is on file in this action pursuant to 50 App. U.S.C. §§ 501, *et seq.* stating that none of the defendants who are natural persons is in military service, a minor or incompetent.

6. Plaintiff Jericho All-Weather Opportunity Fund, L.P., a Delaware limited partnership ("Jericho"), is a limited partnership organized under the laws of the State of Delaware with a principal place of business in Boca Raton, Florida has an interest in the real property that is the subject of this action, and, as such, is subject to the jurisdiction of this Court.

7. Plaintiff Jericho State Capital Corporation of Florida, a Florida corporation ("Jericho Florida"), is a corporation organized under the laws of the State of Florida with a principal place of business in Boca Raton, Florida has an interest in the real property that is the subject of this action, and, as such, is subject to the jurisdiction of this Court.

8. Jericho and Jericho Florida shall be collectively referred to herein as "Plaintiffs."

9. Defendant T & J Development of NMB, LLC, a South Carolina limited liability company, a/k/a T & J Development, LLC ("T & J") is a limited liability company organized and existing under the laws of the State of South Carolina with a principal place of business in Horry County, South Carolina, has an interest in the real property that is the subject of this action, and, as such, is subject to the jurisdiction of this Court.

10. Defendant Peachtree Properties of North Myrtle Beach, LLC, a South Carolina limited liability company ("Peachtree"), is a limited liability company organized and existing under the laws of the State of South Carolina with a principal place of business in Horry County, South Carolina, has an interest in the real property that is the subject of this action, and, as such, is subject to the jurisdiction of this Court.

11. Defendant Jeffrey Shoup is a citizen and resident of Horry County, South Carolina, and as such, is subject to the jurisdiction of this Court.

12. Defendant Joyce Shoup is a citizen and resident of Horry County, South Carolina, and, and as such, is subject to the jurisdiction of this Court.

13. Defendant David Hix is a citizen and resident of Horry County, South Carolina, and as such, is subject to the jurisdiction of this Court.

14. Defendant Paula Hix is a citizen and resident of Horry County, South Carolina, and as such, is subject to the jurisdiction of this Court.

15. Defendant Ocean Developers LLC, a South Carolina limited liability company ("Ocean Developers"), is a limited liability company organized and existing under the laws of the State of South Carolina with a principal place of business in North Myrtle Beach, South Carolina, and as such, is subject to the jurisdiction of this Court.

16. Defendant Glenn Michaels ("Michaels") has an interest in the real property that is the subject of this action, and, as such, is subject to the jurisdiction of this Court pursuant to S.C. Code Ann. § 36-2-803(A)(5).

17. Defendants Manny Pappus ("Pappus") and T.J. Ungaro ("Ungaro") have an interest in the real property that is the subject of this action, and, as such, they are each subject to the jurisdiction of this Court pursuant to S.C. Code Ann. § 36-2-803(A)(5).

18. Defendant North Myrtle Beach Investment Group, LLC ("North Myrtle Beach") is a limited liability company organized and existing under the laws of the State of South Carolina with a principal place of business in North Myrtle Beach, South Carolina, and had an interest in the real property that is the subject of this action, and, as such, is subject to the jurisdiction of this Court.

19. Defendant Horst Goetz ("Goetz") had an interest in the real property that is the subject of this action, and as such is subject to the jurisdiction of this Court pursuant to S.C. Code Ann. § 36-2-803(A)(5).

20. Defendant Durward W. Hancock ("D. Hancock") had an interest in the real property that is the subject of this action, and as such is subject to the jurisdiction of this Court pursuant to S.C. Code Ann. § 36-2-803(A)(5).

21. Defendant Hortense G. Hancock ("H. Hancock") had an interest in the real property that is the subject of this action, and as such is subject to the jurisdiction of this Court pursuant to S.C. Code Ann. § 36-2-803(A)(5).

22. Defendant McClam Investment Company, LLC ("McClam"), is a limited liability company organized and existing under the laws of the State of South Carolina with a principal place of business in Columbia, South Carolina, and claims an interest in the real property that is the subject of this action, and, as such, is subject to the jurisdiction of this Court.

23. The real property which is the subject of this action is located in Horry County, South Carolina, and, as such, is subject to the jurisdiction of this Court.

24. The Order of Reference was filed on October 10, 2007.

25. A Notice of Hearing, giving notice of October 30, 2007, 2:30 p.m. hearing, was served upon all defendants as shown by a Certificate of Service dated October 16, 2007.

26. On July 24, 2006, for value received, Defendant Peachtree executed and delivered to Plaintiff Jericho Florida a promissory note in the original principal amount of \$4,263,888.00 (the "Peachtree Note"), pursuant to which Peachtree promised to pay to Jericho Florida said principal amount, together with interest on the unpaid principal balance as set forth therein, late charges as provided therein, and all expenses of collection or enforcement of payment of the Peachtree Note, including, but not limited to, reasonable attorney's fees and expenses. A copy of the Peachtree Note is attached and incorporated herein as Exhibit A.

27. In order to secure the payment of the Peachtree Note, for value received, Peachtree granted to Jericho Florida a Mortgage, Security Agreement and Assignment of Leases and Rents dated July 24, 2006 (the "Peachtree Mortgage"), covering certain real property, described more fully therein, along with any improvements, structures and buildings and any alterations thereto, located in Horry County, South Carolina, all fixtures thereon, and all other contracts, contract rights, leases, rents and other personal property described more fully therein (collectively, the "Peachtree Property"). The Peachtree Mortgage was recorded in the Office of the Register of Deeds for Horry County, South Carolina, on July 25, 2006 in Mortgage Book 4629 at Page 277. A copy of the Peachtree Mortgage is attached hereto and incorporated herein as Exhibit B.

28. By its terms, the Peachtree Mortgage additionally secures any future or additional advances made by Jericho Florida at its option to Peachtree, up to a maximum principal secured indebtedness of \$8,527,776.00, plus interest and any disbursements made for the payment of taxes, levies, or insurance on the Peachtree Property, plus any sums expended to cure a default under the Peachtree Superior Mortgage defined therein, plus all attorneys' fees and expenses incurred by Jericho Florida in connection with enforcing the Peachtree Note and Peachtree Mortgage, or incurred in connection with any foreclosure action or other proceeding brought by Jericho Florida to enforce and protect its rights and interest under the Peachtree Mortgage and Peachtree Note, whether incurred before or after any decree of judgment of foreclosure.

29. By its terms, the Peachtree Mortgage secures the covenant of Peachtree not to create or suffer any mortgage, lien or encumbrance, directly or indirectly, with respect to all or any portion of the Peachtree Property with any such mortgage or lien placed on the Peachtree Real Property to be deemed void *ab initio*. The Peachtree Mortgage further recites that it is subject to a first mortgage upon the Peachtree Property in favor of R. E. Loans, LLC, a California limited liability company, securing a note in the principal sum of \$18,520,000.00 (the "Peachtree Superior Mortgage").

30. In order to further secure Peachtree's obligations to Jericho Florida, Peachtree granted to Jericho Florida an Assignment of Leases and Rents dated July 24, 2006 (the "Peachtree Assignment"). The Peachtree Assignment was recorded in the Office of the Register of Deeds for Horry County, South Carolina, on September 5, 2006, in Deed Book 3152 at Page 472. A copy of the Peachtree Assignment is attached hereto and incorporated herein as Exhibit C.

31. In order to further evidence the grant of a security interest in the personal property and fixtures described in the Peachtree Mortgage and Peachtree Assignment, Jericho filed a

UCC-1 Financing Statement on July 25, 2006 in the office of the Register of Deeds for Horry County in Mortgage Book 4629 at Page 333, that identifies Peachtree as debtor and Jericho Florida as secured party (the "Peachtree UCC"). A copy of the Peachtree UCC is attached hereto and incorporated herein as Exhibit D.

32. In order to further secure Peachtree's obligations to Jericho Florida, Defendants Jeffrey Shoup, Joyce Shoup, David Hix, Paula Hix, Ocean Developers and T & J (collectively, the "Peachtree Guarantors," individually, each a "Peachtree Guarantor") granted to Jericho Florida a Guaranty, dated July 24, 2006 (the "Peachtree Guaranty"), pursuant to which each Peachtree Guarantor unconditionally, jointly, severally and irrevocably guaranteed to Jericho Florida prompt and complete payment when due of the principal, together with any and all interest and other sums due and payable, and the performance, observance and discharge by Peachtree of all covenants and conditions set forth in the Peachtree Note, the Peachtree Mortgage, the Peachtree Assignment, the Peachtree UCC, and any and all other documents evidencing or securing the obligations set forth therein (collective, the "Peachtree Loan Documents"), and the payment of any and all expenses paid or incurred by Jericho Florida in collecting any or all of the sums due and in enforcing its rights under the Peachtree Guaranty or the Peachtree Loan Documents, including, but not limited to, attorneys fees. A copy of the Peachtree Guaranty is attached hereto and incorporated herein as Exhibit E.

33. On October 30, 2006, Peachtree gave to Defendant Michaels a Mortgage of Real Property upon the Peachtree Property purporting to secure the principal amount of \$1,500,000.00, which mortgage was recorded on November 7, 2006 in the Office of the Register of Deeds for Horry County, South Carolina, in Mortgage Book 4762 at page 785 (the "Michaels Mortgage").

34. The Michaels Mortgage was granted and recorded after the Peachtree Mortgage was recorded. Further, it appears from the uncontroverted testimony of Glenn Chwatt, President of Plaintiff Jericho Florida that the Michaels Mortgage was additionally granted without the knowledge or consent of Jericho Florida. Accordingly, the Michaels Mortgage is subordinate to lien of the Peachtree Mortgage.

35. Defendant Michaels is in default as shown by the Amended Affidavit of Default on file and dated October 16, 2007. Defendant Michaels is now represented by attorney Charles Bernstein of the Charleston County Bar who has made an appearance on behalf of Defendant Michaels and joins in the request that the Michaels Mortgage be considered a subordinate mortgage to the Peachtree Mortgage.

36. On March 9, 2007, Defendants Pappus and Ungaro filed an Amended Lis Pendens (the "Amended Lis Pendens") in the Office of the Clerk of Court for Horry County South Carolina in File No. 06-LP-126 purporting to affect the title to the Peachtree Property.

37. No summons or complaint was filed by Pappus and Ungaro in connection with the Amended Lis Pendens within twenty (20) days after such filing or at any time subsequent thereto.

38. Based on the above and the uncontroverted testimony of Plaintiffs, any interest claimed by Defendants Pappus and Ungaro is considered null and void and the Amended Lis Pendens should be considered of no consequence to this action and cancelled as of record in the Clerk of Court's Office for Horry County.

39. On October 6, 2006, for value received, T & J executed and delivered to Plaintiffs a promissory note in the original principal amount of \$8,000,000.00 (the "T & J Note"), pursuant to which T & J promised to pay Plaintiffs said principal amount, together with interest on the unpaid principal balance as set forth therein, late charges as provided therein and all expenses of collection or enforcement of payment of the T & J Note, whether or not suit is brought, and if suit is brought, then through all appellate actions, including, but not limited to, reasonable attorneys' fees and expenses. A copy of the T & J Note is attached hereto and incorporated herein as Exhibit F.

40. In order to secure the payment of the T & J Note, for value received, T & J granted to Jericho and Jericho Florida a Mortgage, Security Agreement and Assignment of Leases and Rents dated October 6, 2006 (the "T & J Mortgage"), covering certain real property described more fully therein, along with any improvements, structures and buildings and any alterations thereto, located in Horry County, South Carolina, all fixtures thereon and all other contracts, contract rights, leases, rents and other personal property described more fully therein (collectively, the "T & J Property"). Individual portions of the T & J Property are sometimes referred to herein and in the T & J Mortgage as Parcel 1, Parcel 2, Parcel 3, Parcel 4, Parcel 5, Parcel 6, Parcel 7 and Parcel 8. The T & J Mortgage was recorded in the Office of the Register of Deeds for Horry County, South Carolina, on October 9, 2006, in Mortgage Book 4724 at Page 685. A copy of the T & J Mortgage is attached hereto and incorporated herein as Exhibit G.

41. By its terms, the T & J Mortgage additionally secures any future or additional advances made by Plaintiffs at its option to T & J, up to a maximum principal secured indebtedness of \$16,000,000.00, plus interest and any disbursements made for the payment of taxes, levies or insurance on the T & J Property, plus any sums expended to cure a default under the T & J Superior Mortgage defined therein, plus all attorneys' fees and expenses incurred by Plaintiffs in connection with enforcing the T & J Note and T & J Mortgage, or incurred in connection with any foreclosure action or other proceedings brought by Plaintiffs to enforce and protect their rights and interest under the T & J Mortgage and T & J Note, whether incurred before or after any decree or judgment of foreclosure.

42. By its terms, the T & J Mortgage secures the covenant of T & J not to create or suffer any mortgage, lien or encumbrance, directly or indirectly, with respect to all or any portion of the T & J Property with any such mortgage or lien placed on the T & J Property to be deemed void *ab initio*. The T & J Mortgage further recites that it is subject to a first mortgage upon the T & J Property in favor of R. E. Loans, LLC, a California limited liability company, securing a note in the principal sum of \$12,950,000.00 and a first mortgage upon Parcel 8 of the T & J Property in favor of First Palmetto Savings Bank FSB securing a note in the principal amount of \$1,100,000.00 (collectively, the "T & J Superior Mortgages").

43. In order to further secure T & J's obligations to Plaintiffs, T & J granted to Plaintiffs its Assignment of Leases and Rents dated October 6, 2006 (the "T & J Assignment"). The T & J Assignment was recorded in the Office of the Register of Deeds for Horry County, South Carolina, on October 9, 2006, in Deed Book 3170 at Page 419. A copy of the T & J Assignment is attached hereto as Exhibit H.

44. In order to further secure T & J's obligations to Plaintiffs, Defendants Jeffrey Shoup, Joyce Shoup, David Hix, Paula Hix, Ocean Developers and Peachtree (collectively, the "T & J Guarantors," and individually, each a "T & J Guarantor") granted to Plaintiffs a Guaranty, dated October 6, 2006 (the "T & J Guaranty"), pursuant to which each T & J Guarantor unconditionally, jointly, severally and irrevocably guaranteed to Plaintiffs the prompt and complete payment when due of the principal, together with any and all interest and other sums due and payable, and the performance, observance and discharge by T & J of all covenants and conditions set forth in the T & J Note, the T & J Mortgage, the T & J Assignment and any and all other documents evidencing or securing the obligations set forth therein (collectively, the "T & J Loan Documents"), and the payment of any and all expenses paid or incurred by Plaintiffs in collecting any or all of the sums due and in enforcing any rights under the T & J Guaranty or the T & J Loan Documents, including, but not limited to, attorneys fees. A copy of the T & J Guaranty is attached hereto and incorporated herein as Exhibit I.

45. On July 24, 2006, T & J gave a Mortgage covering parcels 4, 5, 6, and 7 of the T & J Property to Defendant McClam in the principal amount of \$2,942,286.09 that was recorded on July 25, 2006 in the Office of the Register of Deeds for Horry County in Mortgage Book 4629 at Page 340 (the "McClam \$2MM Mortgage").

46. It appears from the testimony in this matter and the Answer on file from Defendant McClam, that the debt secured by the McClam \$2MM Mortgage was satisfied at the closing of the T & J Loan and the McClam \$2MM Mortgage is no longer a valid lien on Parcels 4, 5, 6 and 7 of the T & J Property and should be cancelled of record.

47. On January 4, 2004, T & J gave a Mortgage covering Parcels 6 and 7 of the T & J Property to Goetz in the principal amount of \$506,250.00 that was recorded on January 7, 2004 in the Office of the Register of Deeds for Horry County in Mortgage Book 3534 at page 951 (the "Goetz Mortgage").

48. Defendant Goetz is in default as shown by the Amended Affidavit of Default on file and dated October 16, 2007.

49. It appears from the testimony in this matter that the debt secured by the Goetz Mortgage was satisfied at the closing of the T & J Loan and the Goetz Mortgage is no longer a valid lien on Parcels 6 and 7 of the T & J Property and should be cancelled of record.

50. On March 4, 2004, T & J gave a mortgage covering parcel 8 of the T & J Property to Defendants Durward W. Hancock and Hortense G. Hancock ("Defendants Hancock") in the principal amount of \$200,000.00 that was recorded on March 5, 2004 in the Office of the

Register of Deeds for Horry County in Mortgage Book 3579 at Page 1469 (the "Hancock Mortgage").

51. It appears from the uncontroverted testimony of Plaintiffs, as well as the Answer of Defendants Hancock in this matter, that the debt secured by the Hancock Mortgage was satisfied at the closing of the T & J Loan and the Hancock Mortgage is no longer a valid lien on Parcel 8 of the T & J Property and should be cancelled of record.

52. On October 6, 2006, T & J gave a Mortgage, Assignment of Rents and Security Agreement covering the T & J Property to McClam in the principal amount of \$850,000.00 that was recorded on October 9, 2006 in the Office of the Register of Deeds for Horry County in Mortgage Book 4724 at Page 744 (the "McClam \$850M Mortgage").

53. From the testimony of Plaintiffs the lien of the McClam \$850M Mortgage was granted and recorded after the T & J Mortgage was granted and recorded without the knowledge or consent of Jericho Florida. It appears from the public records documents maintained in the Office of the Register of Deeds of Horry County that the McClam \$850M Mortgage was recorded after the T & J Mortgage and is therefore subordinate to lien of the T & J Mortgage, which fact is supported by the Answer on file by Defendant McClam.

54. As a condition to Plaintiff's issuing to T & J the T & J Loan, T & J and Defendant Peachtree Properties of North Myrtle Beach, LLC ("Peachtree") granted to Plaintiffs a Cross-Collateralization Agreement dated October 6, 2006 (the "Cross-Collateralization Agreement") whereby T&J and Peachtree each agreed that the Peachtree Note, Peachtree Mortgage and other Peachtree Loan Documents as those terms are defined in the Complaint and the T&J Note, T&J Mortgage and other T&J Loan Documents as those terms are defined in the Complaint are and will be cross-collateralized and cross-defaulted with one another so that the Peachtree Mortgage, Peachtree Assignment, T&J Mortgage and T&J Assignment shall secure payment and performance of all of the Peachtree Note and T&J Note and that a default under any of the Peachtree Loan Documents shall also constitute a default under all of the T&J Loan Documents. A true and correct copy of the Cross-Collateralization Agreement is attached hereto and incorporated herein as Exhibit J.

55. On or about March 14, 2007, Plaintiff Jericho Florida gave written notice to Peachtree of its receipt of notification from the holder of the Peachtree Superior Mortgage of Peachtree's failure to make payment of a total past due amount of \$708,600.00 due under the Peachtree Superior Mortgage, which notice required Peachtree to cure such default under the Peachtree Superior Mortgage. On or about March 23, 2007, Plaintiff Jericho Florida gave additional written notice to Peachtree of its failure to pay such past due amount and advised Peachtree of Plaintiff Jericho Florida's intent to cure such Peachtree Superior Mortgage default by paying said past due amount on March 26, 2007, and further advising Peachtree that in the event that it failed to reimburse Plaintiff Jericho Florida in full within five days following the date of Plaintiff Jericho Florida's payment of the past due amount, Peachtree would thereupon be in default under the terms of the Peachtree Loan Documents. Plaintiff Jericho Florida paid the sum of \$713,152.50 to the holder of the Peachtree Superior Mortgage on March 26, 2007 to cure Peachtree's defaults under the Peachtree Superior Mortgage, and Peachtree has thereafter failed

or refused to reimburse all or any portion thereof to Plaintiff Jericho Florida. Copies of the foregoing letters dated March 14, 2007 and March 23, 2007 (the "Peachtree Demand Letters") are attached hereto and incorporated herein as Exhibit K.

56. Plaintiff Jericho Florida has subsequently paid seven additional monthly installments due to the holder of the Peachtree Superior Mortgage on April 10, 2007 in equal monthly amounts of \$185,200.00. No reimbursement of any such sums has been paid by Peachtree to Plaintiff Jericho Florida.

57. The sums so paid by plaintiff Jericho Florida on account of the Peachtree Superior Mortgage, totaling \$2,009,552.50, are a portion of the secured indebtedness under the terms of the Peachtree Mortgage. Peachtree's failure or refusal to pay the same within the time required by the Peachtree Demand Letters constitutes an event of default on the part of Peachtree under the terms of the Peachtree Note, Peachtree Mortgage and the other Peachtree Loan Documents.

58. Peachtree's grant of the Michaels Mortgage without the knowledge or consent of Plaintiff Jericho Florida also constitutes an event of default under the Peachtree Mortgage and Peachtree Note.

59. The foregoing events of default under the Peachtree Mortgage confer upon Plaintiff Jericho Florida the right to accelerate payment of the Peachtree Note in accordance with its term and to exercise all rights and remedies available to Plaintiff Jericho Florida under the terms and provisions of the Peachtree Loan Documents, including the right without limitation to institute this action for foreclosure of the Peachtree Mortgage and to seek and obtain a deficiency judgment against Peachtree and the Peachtree Guarantors, jointly and severally, in the amount of any deficiency remaining after the foreclosure sale of the Peachtree Property in accordance with applicable law.

60. As of the date of this Order, Plaintiff Jericho Florida is due from Peachtree the outstanding principal balance of the Peachtree Note in the sum of \$6,941,981.42, which includes principal, default interest, unreimbursed payments made by Plaintiff Jericho Florida to the Peachtree Superior Mortgage holder, together with all expenses associated with or incurred in connection with this action, including, but not limited to, reasonable attorneys' fees and costs.

61. Based on the foregoing, Plaintiffs are entitled to have an order entered foreclosing the Peachtree Mortgage and selling the Peachtree Property at public sale in accordance with law, subject to the Peachtree Superior Mortgage, but free and clear of all subordinate liens, including without limitation the Michaels Mortgage and the Amended Lis Pendens.

62. Further, Plaintiffs are entitled to a judgment against Defendants Peachtree, Jeffrey Shoup, Joyce Shoup, David Hix, Paula Hix, Ocean Developers and T & J jointly and severally, in the amount of any deficiency remaining after sale of the Peachtree Property. From the testimony of Plaintiffs, it appears Plaintiffs are reserving their right to waive such deficiency judgment by providing this Court with written notice, with copy to Defendants Peachtree, Jeffrey Shoup, Joyce Shoup, David Hix, Paula Hix, Ocean Developers and T & J prior to the publication of Notice of Sale for the foreclosure of the Peachtree Property and the T & J Property.

63. As seen by the terms and conditions of the Note, Mortgage and Guaranty, the Defendants Peachtree, Jeffrey Shoup, Joyce Shoup, David Hix, Paula Hix, Ocean Developers and T & J have waived the statutory right of appraisal, and the high bid at the judicial foreclosure sale shall be applied to the debt regardless of any appraised value of the Peachtree Property.

64. Pursuant to the terms of the Cross-Collateralization Agreement, the foregoing events of default under the Peachtree Note, Peachtree Mortgage and other Peachtree Loan Documents constitute an event of default under the T & J Note, T & J Mortgage and other T & J Loan Documents.

65. Additionally, T & J's grant of the McClam \$850M Mortgage without the knowledge or consent of Plaintiffs constitutes an event of default under the T & J Mortgage.

66. The foregoing events of default under the Peachtree Note, Peachtree Mortgage, Peachtree Loan Documents, T & J Note, T & J Mortgage and other T & J Loan Documents confer upon Plaintiffs the right to accelerate payment of the T & J Note in accordance with its terms and to exercise all rights and remedies available to Plaintiffs under the terms and provisions of the T & J Loan Documents, including the right without limitation to institute this action for foreclosure of the T & J Mortgage and to seek and obtain a deficiency judgment against T & J and the T & J Guarantors, jointly and severally, in the amount of any deficiency remaining after the foreclosure sale of the T & J Property in accordance with applicable law. Plaintiffs are exercising their rights to accelerate and declare to be due and payable in full the T & J Note and all other enumerated sums secured by the T & J Mortgage, and to foreclose the T & J Mortgage.

67. As of the date of this Order, the following sum is due to Plaintiffs pursuant to the T & J Loan Documents and are secured by the T & J Mortgage: \$9,334,244.18, which includes principal, interest, and default interest through the date of this Order, unreimbursed payments made by Plaintiffs on account of the T & J Superior Mortgages, together with all expenses associated with or incurred in connection with this action, including, but not limited to, reasonable attorneys' fees and costs.

68. Plaintiffs are entitled to have an order entered, foreclosing the T & J Mortgage and selling the T & J Property at public sale in accordance with law, subject to the T & J Superior Mortgages, but free and clear of all subordinate liens, including without limitation the McClam \$850M Mortgage.

69. Plaintiffs are entitled to the entry of a further order awarding judgment against Defendants T & J, Jeffrey Shoup, Joyce Shoup, David Hix, Paula Hix, Ocean Developers and Peachtree jointly and severally, in the amount of any deficiency remaining after sale of the T & J Property. From the testimony of Plaintiffs, it appears Plaintiffs are reserving their right to waive such deficiency judgment by providing this Court with written notice, with copy to Defendants Peachtree, Jeffrey Shoup, Joyce Shoup, David Hix, Paula Hix, Ocean Developers and T & J prior to the publication of Notice of Sale for the foreclosure of the Peachtree Property and the T & J Property.

70. From the uncontroverted testimony of Plaintiffs, Defendants Peachtree, Peachtree Guarantors, T & J and the T & J Guarantors have each waived the statutory right of appraisal, and the high bid at the judicial foreclosure sale shall be applied to the debt regardless of any appraised value of the T & J Property.

71. From the uncontroverted testimony of Plaintiffs, By deed dated January 23, 2004, Defendant North Myrtle Beach attempted to convey or conveyed Parcel 8 of the T & J Property to T & J Development, LLC (the "North Myrtle Beach Deed"). The North Myrtle Beach Deed was recorded in the Office of the Register of Deeds for Horry County in Deed Book 2691 at Page 456.

72. On January 23, 2004, T & J Development, LLC did not exist, nor does it currently exist according to the records of the South Carolina Secretary of State as of the date of the Complaint.

73. Through the North Myrtle Beach Deed, North Myrtle Beach intended to and did convey Parcel 8 to T & J.

74. Neither North Myrtle Beach nor T & J Development LLC has any remaining right, claim or interest of any kind in Parcel 8 of the T & J Real Property.

75. T & J is the current owner and holder of fee simple title to Parcel 8 of the T & J Property.

76. From the Affidavit for Attorneys' Fees on file in this matter and the affidavits of Plaintiffs, the sum of \$80,000.00 is a reasonable fee to allow as an attorney's fees under the terms of the Peachtree Note and T & J Note for Plaintiffs' attorneys' services performed and anticipated to be performed until final adjudication of this action.

77. The Plaintiffs have incurred taxable expenses to date in connection with this matter in the amount of \$300.00 which includes \$150.00 for the filing fee for the Complaint; \$125.00 for the Master-in-Equity's Reference Fee, and \$25.00 for motion fee, and will additionally incur advertising charges for the Notice of Sale.

78. If Plaintiffs make no payments prior to the projected Sales Date of December 3, 2007, the following items will constitute the full balance due to the Plaintiffs upon the Peachtree Note and the T & J Note as of the Projected Sales Date as follows:

Principal for Peachtree Mortgage	\$ 4,263,888.00
Interest	\$ 795,891.21
Unreimbursed payments for the Peachtree	

Superior Mortgage	\$ 2,379,952.50
Taxable Expenses as of October 23, 2007 ¹	\$ 300.00
Attorneys' fees	\$ 50,000.00
TOTAL	\$ 7,490,031.71 ²

Principal for T & J Mortgage	\$ 8,000,000.00
Interest	\$ 1,491,849.46
Unreimbursed payments for the T & J Superior Mortgage	\$ 401,317.53
Attorney's Fees and Insurance Payments	\$ 50,000.00
TOTAL	\$ 9,943,166.99 ³

GRAND TOTAL DUE PLAINTIFFS	\$ 17,433,198.70 ⁴
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CONCLUSIONS OF LAW

1. The Peachtree Mortgage is a good and valid second mortgage lien on the Peachtree Property, subject only to the Peachtree Superior Mortgage and any past due and applicable property taxes for the Peachtree Property.

2. Plaintiff Jericho Florida shall have judgment of foreclosure of its Peachtree Mortgage for the aforementioned amounts due and owing under the Peachtree Note, Peachtree Mortgage and other Peachtree Loan Documents.

3. The T&J Mortgage is a good and valid second mortgage lien on the T&J Property, subject only to the T&J Superior Mortgages and any past due and applicable property taxes for the T&J Property.

4. Plaintiffs Jericho and Jericho Florida shall have judgment of foreclosure of their T&J Mortgage for the aforementioned amounts due and owing under the T&J Note, T & J Mortgage and other T & J Loan Documents.

5. The Peachtree Property and the T&J Property shall be ordered sold at public auction after due advertisement. The sale shall be made subject to the rights and interests of the Peachtree Superior Mortgage and T & J Superior Mortgages, and all taxes and assessments that are due on the day of the sale. After making the required deposit, the successful bidder shall be required to pay interest at the Default Rate set forth respectively in the Peachtree Note and T&J Note from the date of sale to the date of compliance.

¹ Plus advertising charges incurred for the Notice of Sale.

² Plus advertising charges and Prepayment Premium to be calculated at the time of sale.

³ Plus advertising charges and Prepayment Premium to be calculated at the time of sale.

⁴ Plus advertising charges and Prepayment Premium to be calculated at the time of sale.

6. The Peachtree Property and T&J Property shall be sold according to law and the practice of this Court, the equity of redemption shall be barred, and that the proceeds of sale shall be applied as follows: First: to the costs and expenses, including reasonable attorneys' fees, of this action and such sale; and Second: to the payment and discharge of all amounts due Plaintiffs pursuant to the Peachtree Note and the Peachtree Mortgage as aforesaid. Any surplus shall be held pending further order of this court.

7. At the conclusion of the aforementioned foreclosure sale of the Peachtree Property and T&J Property, Plaintiffs shall be granted judgments against Defendants Peachtree, T & J, Jeffrey Shoup, Joyce Shoup, David Hix, Paula Hix, and Ocean Developers, personally, jointly and severally, in the amount of any deficiency remaining after sale of both the Peachtree Property and the T&J Property and Fixtures thereon, such deficiency to be based upon the high bid at the judicial foreclosure sale regardless of any appraised value of either or both the Peachtree Property and T&J Property and Fixtures thereon. Plaintiffs may waive their right to a deficiency judgment by providing this Court with written notice of such waiver with a copy to Defendants Peachtree, T & J, Jeffrey Shoup, Joyce Shoup, David Hix, Paula Hix and Ocean Developers at any time prior to the publication of the Notice of Sale of the Peachtree Property and T & J Property which is the subject of this action.

8. For the reasons set forth herein, the McClam \$2MM Mortgage is considered to be satisfied and should be cancelled as of record in the Office of the Register of Deeds for Horry County.

9. For the reasons set forth herein, the Michael Mortgage is considered to be subordinate to the lien, rights and interests of the Peachtree Mortgage.

10. For the reasons set forth herein, the Hancock Mortgage is considered to be satisfied and should be cancelled as of record in the Office of the Register of Deeds for Horry County.

11. For the reasons set forth herein, the Goetz Mortgage is considered to be satisfied and should be cancelled as of record in the Office of the Register of Deeds for Horry County

12. The McClam \$850M Mortgage is and shall be considered subordinate to the rights and interests set forth in the T & J Mortgage.

13. The deed from North Myrtle Beach Investment Group to T & J Development, LLC is considered reformed so that title to Parcel 8 of the T & J Property is fully vested in T & J.

14. The Amended Lis Pendens of Defendant Manny Pappus and T. J. Ungaro is declared null and void and should be cancelled of record in the Office of the Clerk of Court for Horry County.

ORDER

It is therefore Ordered, Adjudged and Decreed that:

1. Pursuant to Rule 53(e) of the South Carolina Rules of Civil Procedure, this Order shall constitute a final judgment, and any appeal shall be directly to the Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules.

2. The Peachtree Mortgage is a good and valid second mortgage lien on the Peachtree Property, subject only to the Peachtree Superior Mortgage and any past due and applicable property taxes for the Peachtree Property. Further, Plaintiff Jericho Florida shall have judgment of foreclosure of its Peachtree Mortgage for the aforementioned amounts due and owing under the Peachtree Note, Peachtree Mortgage and other Peachtree Loan Documents.

3. The T&J Mortgage is a good and valid second mortgage lien on the T&J Property, subject only to the T&J Superior Mortgages and any past due and applicable property taxes for the T&J Property. Further, Plaintiffs Jericho and Jericho Florida shall have judgment of foreclosure of their T&J Mortgage for the aforementioned amounts due and owing under the T&J Note, T & J Mortgage and other T & J Loan Documents.

4. If the Defendants Peachtree, T&J, Peachtree Guarantors, T&J Guarantors make no payments prior to the projected Sales Date of December 3, 2007, the sum of \$17,433,198.70 (representing principal, interest, default interest, escrow payments, late fees, advanced funds, costs and attorneys fees) plus the costs of advertising the Notice of Sale, all calculated at the time of sale, will be due Plaintiffs under the Peachtree Note, the Peachtree Mortgage, the T&J Note and the T&J Mortgage.

5. The McClam \$2MM Mortgage is hereby ordered, adjudged and decreed to be satisfied and shall be cancelled as of record in the Office of the Register of Deeds for Horry County. is hereby ordered, adjudged and decreed to be satisfied

6. The Michael Mortgage is hereby ordered, adjudged and decreed to be subordinate to the lien, rights and interest of the Peachtree Mortgage.

7. The Hancock Mortgage is hereby ordered, adjudged and decreed to be satisfied and shall be cancelled as of record in the Office of the Register of Deeds for Horry County.

8. The Goetz Mortgage is hereby ordered, adjudged and decreed to be satisfied and shall be cancelled as of record in the Office of the Register of Deeds for Horry County

9. The McClam \$850M Mortgage is hereby ordered, adjudged and decreed to be subordinate to the lien, rights and interests set forth in the T & J Mortgage.

10. The Amended Lis Pendens is hereby ordered, adjusted and decreed to be null and void and is to be cancelled of record in the Office of the Clerk of Court for Horry County.

11. If Defendants Peachtree, T&J, Peachtree Guarantors or T&J Guarantors shall fail to pay the full amount set forth in paragraph 78 above to Plaintiffs prior to the Sales Date, the

Peachtree Property and T&J Property shall be sold by the Honorable J. Stanton Cross, Master in Equity for Horry County, South Carolina, at public auction, at the Horry County Courthouse, Conway, South Carolina, on December 3, 2007, or on some other convenient sales day. Should the regular day of judicial sales fall on a legal holiday, the sales day shall be on the Tuesday next succeeding such holiday. Sale shall be on the following terms:

- a. A good faith deposit of 5% of the amount of the bid (in cash or its equivalent) is required at the time of public sale. Such amount shall be applied to the purchase price only upon full compliance with the bid.
- b. Full compliance with the bid must occur within 20 days after the date of public sale. If the successful bidder does not comply within such time period, the good faith deposit shall be forfeited and applied to the costs and to the debt owed by Defendants to Plaintiffs.
- c. Interest on the balance of the bid must be paid to the day of full compliance at the Default Rate.
- d. The sale shall be subject to the rights and interests of the Peachtree Superior Mortgage and the T&J Superior Mortgages, as well as subject to any and all unpaid taxes and assessments, easements existing on the Peachtree Property and T & J Property and other easements and restrictions of record.
- e. Purchaser shall pay for the preparation of the deed, for deed stamps and for the cost of recording the deed.

12. If Plaintiffs are the successful bidder, for a sum not exceeding the amount due it under this Order, Plaintiffs shall pay to the undersigned the amount of the costs and expenses of the sale and credit the balance of its bid to its indebtedness.

13. Plaintiffs are currently seeking a deficiency judgment and therefore it is hereby ordered that Plaintiffs shall be entitled to the entry of an order of judgment against Defendants Peachtree, T & J, Jeffrey Shoup, Joyce Shoup, David Hix, Paula Hix, and Ocean Developers, personally, jointly and severally which shall be entered at the conclusion of the aforementioned foreclosure sale of the Peachtree Property and T&J Property, in the amount of any deficiency remaining after sale of both the Peachtree Property and the T&J Property and Fixtures thereon, such deficiency to be based upon the high bid at the judicial foreclosure sale regardless of any appraised value of either or both the Peachtree Property and T&J Property and Fixtures thereon. However, Plaintiffs are reserving their right to waive such deficiency judgment provided such waiver is in writing by Plaintiffs to the Court with notice to Defendants Peachtree, Peachtree Guarantors, T & J and T & J Guarantors prior to the publication of the Notice of Sale. If such written waiver is given, then any sale of the Peachtree Property and T&J Property on the sales date shall be final. If Plaintiffs do not waive their right to a deficiency judgment by providing Notice to this Court and to Defendants Peachtree, Peachtree Guarantors, T & J and T & J Guarantors prior to the Notice of Sale being published then the bidding and sale shall remain open after the sales date for a period of thirty (30) days as required by South Carolina law.

14. The Master in Equity will, by advertisement according to law, give notice of the time and location of sale and the terms thereof and will execute to the purchaser, or purchasers, a deed to the Property. Plaintiffs or another party to this action may become a purchaser at such sale. If the purchaser or purchasers should fail to comply with the terms of sale within twenty (20) days after the date of sale, then the Master in Equity may advertise the Property for sale on the next or some other subsequent sales day, at the risk of the former highest bidder, and from time to time thereafter until full compliance shall have occurred. In the event Plaintiffs are the successful bidder, for a sum not exceeding the amount due it under this Order, at its option or the option of its assignee, the deed may be taken subject to payment by grantee of any taxes or assessments constituting a lien on the Property.

15. The Master in Equity shall apply the proceeds of the sale as follows:

First, proceeds shall be applied to payment of the costs and expenses of this action and the sale, to any special assessments against the Property and to any taxable disbursements by Plaintiffs.

Second, proceeds shall be applied to payment to Plaintiffs, or Plaintiffs' attorneys, of the amount due Plaintiffs under this Order.

Third, any surplus shall be held by the Master in Equity pending further order of this Court as provided in Rule 71(c) of the South Carolina Rules of Civil Procedure.

16. In the event the successful bidder is other than one of the Defendants in possession herein, the Sheriff of Horry County is ordered and directed to take such action necessary to put the successful bidder or his assigns in full, quiet and peaceful possession of the property without delay and to keep the successful bidder or his assigns in such peaceful possession.

17. The deed from North Myrtle Beach to T & J is hereby ordered reformed to show the title to Parcel 8 of the T & J Property is fully vested in T & J.

18. Defendants Peachtree, T&J, Jeffrey Shoup, Joyce Shoup, David Hix, Paula Hix, and Ocean Developers, and all persons whosoever claiming under them, shall be forever barred and foreclosed of all right, title, interest and equity of redemption in the Property, or any part thereof.

19. The deed of conveyance given pursuant to such sale shall contain the names of only the first-named Plaintiff and the first-named Defendant and the Defendant who was the titleholder of the mortgaged Peachtree Property and mortgaged T & J Property and mortgaged at the time of the filing of the notice of pendency of this action, and the name of the grantee, and the Office of Register of Deeds, is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deed.

20. Attached as Exhibit L is a description of the mortgaged Peachtree Property and mortgaged T & J Property ordered to be sold pursuant to the Peachtree Mortgage and the T & J Mortgage.

Conway, South Carolina
October 6, 2007

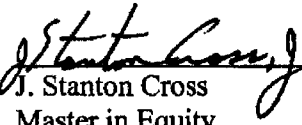

J. Stanton Cross
Master in Equity

EXHIBIT G

**(Jericho's Answers to CTIC's
First Requests for Admission)**

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

Jericho State Capital Corp. of Florida,

Plaintiff,

vs.

Chicago Title Insurance Company,

Defendant.

Case No. 2013-CP-26-5530

**PLAINTIFF JERICHO STATE CAPITAL
CORP. OF FLORIDA'S RESPONSE TO
DEFENDANT'S FIRST REQUESTS FOR
ADMISSION**

Lynx Jericho Partners, LLC,

Plaintiff,

vs.

Chicago Title Insurance Company,

Defendant.

Case No. 2015-CP-26-1084
(Consolidated with the above case)

TO: Defendant and its Counsel:

Plaintiff hereby responds to the Requests for Admission from Defendant, as follows:

1. Admit that, pursuant to the Order and Decree of Foreclosure entered November 7, 2007, in the Jericho State Foreclosure Action, which is attached as Exhibit A, the Court found \$7,490,031.71 was due under the note secured by the Jericho State Mortgage on or before December 3, 2007.

RESPONSE: Denied in part and admitted in part with qualification: Plaintiff denies the Court found \$7,490,031.71 was the total amount due, as this figure appears to be subject to the Court's footnote adding additional amounts; Plaintiff admits the Court found \$7,490,031.71 was due "Plus advertising charges and Prepayment Premium to be calculated at the time of sale" as referenced in footnote 2, p. 12 of the Order.

2. Admit that, according to the Deed of Master in Equity recorded February 26, 2008, attached as Exhibit B, Jericho State was the successful bidder at the foreclosure sale arising from the

Jericho State Foreclosure Action pursuant to Jericho State's bid of \$9,000,000 made on December 3, 2007.

RESPONSE: Admitted with qualification: Plaintiff admits it successfully bid \$9,000,000 at the sale, however it qualifies this response as to the fact that it took title to the property, as referenced in the 2/26/2008 Deed of Master in Equity, subject to a first mortgage lien of over \$18,000,000.00.

3. Admit that Jericho State's bid at the foreclosure sale of the Property that resulted from the Jericho State Foreclosure Action exceeded the amount due under the note secured by the Jericho State Mortgage.

RESPONSE: Admitted with qualification: Plaintiff admits \$9,000,000 is a numerical figure greater than the numerical figure representing the amount due under the note secured by the Jericho State Mortgage, however Jericho State took title to the subject property subject to a first mortgage lien of over \$18,000,000.00 and therefore the property's equity, valued subject to the title defect, is less than the bid of \$9 million and did not exceed the amount due under the note.

/s/ C. Scott Masel

Fred B. Newby

fnewby@newbylaw.com

C. Scott Masel

smasel@newbylaw.com

NEWBY, SARTIP & MASEL, LLC

4593 Oleander Dr., Myrtle Beach, SC 29577

843-449-9417

Attorneys for Plaintiff

Dated: 5/12/23

EXHIBIT H

(Master's Deed)

Grantee's Address: 3835 NW Boca Raton Blvd #200
Boca Raton, FL 33431

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

DEED OF MASTER IN EQUITY

Recitals

- A.** On June 8, 2007, Jericho All-Weather Opportunity Fund, L.P., a Delaware limited partnership, and Jericho State Capital Corporation of Florida, a Florida corporation filed its complaint in the Court of Common Pleas for Horry County, South Carolina, against T & J Development of NMB, LLC, a South Carolina limited liability company, a/k/a T & J Development LLC, Peachtree Properties of North Myrtle Beach, LLC, a South Carolina limited liability company, Jeffrey Shoup, Joyce Shoup, David Hix, Paula Hix, Ocean Developers LLC, a South Carolina limited liability company, Glenn Michaels, Manny Pappus, T.J. Ungaro, North Myrtle Beach Investment Group, LLC, Horst Goetz, Durward W. Hancock, Hortense G. Hancock, and McClam Investment Company, LLC, defendants, case number 07-26-3579, demanding foreclosure of its mortgage over (i) the real property described on attached **Exhibit A** (the **"Real Property"**); (ii) the fixtures located on the Real Property (the **"Fixtures"**); and (iii) the personal property (the **"Personal Property"**) described on attached **Exhibit B** (collectively, the Real Property, Fixtures, and Personal Properties shall be referred to as the **"Premises"**).
- B.** The matter was heard on October 30, 2007, and a decree was entered ordering that the Real Property, Fixtures, and the Personal Property be sold by J. Stanton Cross, Master in Equity for Horry County, on the terms set forth therein.
- C.** J. Stanton Cross, Master in Equity, after having duly advertised the Real Property, Fixtures, and Personal Property for sale by public outcry on December 3, 2007 openly and publicly, according to the custom of auction, sold the Real Property and Fixtures to Jericho State Capital Corporation of Florida, a Florida corporation, its successors and assigns forever, for the sum of Nine Million and 00/100 Dollars (\$9,000,000.00), being at that price the highest bidder.

Now, therefore, know all men by these presents, that:

I, J. Stanton Cross, Master in Equity in and for Horry County, South Carolina, in consideration of the sum of Nine Million and 00/100 Dollars (\$9,000,000.00) to me paid by Jericho State Capital Corporation of Florida, a Florida corporation, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto Jericho State Capital Corporation of Florida, a Florida corporation, its successors and assigns forever, those certain pieces, parcels and tracts of land described on attached **Exhibit A** together with the Fixtures located thereon and all easements, rights-of-way and rights used in connection with such property and the improvements thereon or as a means of access thereto, and all tenements, hereditaments and appurtenances thereof and thereto, and the Personal Property described on attached **Exhibit B**.

The above described Real Property, Fixtures, and Personal Property were sold subject to any past due or accruing property taxes and assessments, existing easements and restrictions of record, and to the security interests of R. E. Loans, LLC, a California limited liability company.

Together with all and singular the rights, hereditaments and appurtenances to the said premises belonging or in any wise incident or appertaining and with all the estate, right, title, claim and interest of the parties to the cause aforesaid and of all other persons rightfully claiming from, under or by them or any of them.

To have and to hold, all and singular the premises before mentioned unto Jericho State Capital Corporation of Florida, a Florida corporation, its successors and assigns forever.

In witness whereof, I, J. Stanton Cross, Master in Equity, under and by virtue of the aforesaid decree, have hereunto set my hand and seal this 25 day of February, 2008.

Signed, sealed and delivered in the presence of:

Deane H. Bishop
Anne H. Lawson

J. Stanton Cross (SEAL)
J. Stanton Cross, Master in Equity

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

ACKNOWLEDGMENT

The undersigned, a notary public for South Carolina, hereby certifies that J. Stanton Cross, Master in Equity, personally appeared before me this day and acknowledged the due execution of the foregoing Deed.

Witness my hand and official seal this 25 day of February, 2008.

Anne H. Lawrence (SEAL)
Signature of Notary Public
My commission expires: 10-4-15

WCSR 3831049x1

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EXHIBIT A

Real Property

All those certians lots or parcels of land situate in the City of Myrtle Beach, County of Horry, State of south Carolina, and being more particularly described as follows:

Parcel One:

ALL AND SINGULAR those three (3) certain Lots I Socastee Township, Horry County, South Carolina, being shown on a Plat prepared for the Estate of John C. Spivey by J. F. Thomas, Surveyor, dated September 1, 1965, recorded November 16, 1965, in Plat Book 43 at Page 183, and designated thereon as Hursey Three Lots, to which Plat reference is made, being described as follows:

Beginning at a point on the inland Waterway the lands intersects with the Inland Waterway and Spivey Road, a right-of-way from which has been granted at a corner designated Concrete N; thence North: 78 degrees, 10 minutes West 225 feet to Concrete N; thence North 27 degrees 10 minutes East 250 feet to Pipe N; thence South 78 degrees 10 minutes East to Pipe N; thence South 27 degrees 10 minutes East 250 feet to the beginning corner.

Bounded on the North by lands of Ruth L. McClam; on the East by lands of Ruth L. McClam, on the South by the Northern margin of Intracoastal Waterway, and on the West by lands of Ruth L. McClam.

Parcel Two:

ALL AND SINGULAR, that lot of land in Socastee Township, Horry County, South Carolina, on the Northern side of the Inland Waterway and located near the Old Sweet Ditch, bounded and described as follows:

Commencing at an iron stake on the Northern bank of the Inland Waterway being a point where the Eastern bank of the Old Socastee Creek intersects the Inland Waterway, and running thence in a Northerly direction 21 degrees East 250 feet to an iron stake; thence Eastward 79 degrees East 100 feet to an iron stake; thence South 21 degrees East 250 feet to an iron stake on the Northern bank of the Inland Waterway; thence Westwardly along the Northern bank of the Inland Waterway 100 feet to the beginning corner.

Bounded on the North by other lands of Ruth L. McClam; on the East by other lands of Ruth L. McClam; on the South by the Inland Waterway; and on the west by other lands of Ruth L. McClam.

Parcel Three:

ALL AND SINGULAR, that certain tract or parcel of land in Socastee Township, Horry County, South Carolina, one hundred thirty-five (135) acres, more or less, having been platted and shown on a Plat prepared by J. F. Thomas, Surveyor, dated September 1, 1965. This 135 acres is situate North of the Intracoastal Waterway. The Plat is recorded in Plat Book 43, Page 183, in the Office of the Clerk of Court of Horry County, to which Plat reference is made.

The 135 acres is exclusive of the proposed highway area shown on the Plat above referenced to and is described as follows:

Beginning at Concrete N on the Southern margin of the proposed highway as shown on the referenced Plat (this road is known as the Peachtree Ferry Road); and running thence North approximately 26°5' East 33 feet to a point in the center of the road, the point being taken from the Highway Department survey; thence South 68°22' East 441 feet to point of intersection, as shown on the above Plat; thence South 62°45' East 984.3 feet to point of intersection, as shown on the above Plat; thence South 75°15' East 1028.6 feet to point of intersection, as shown on the Plat; thence North 33 feet to Concrete N on the Northern margin of the road above described; thence North 19°5' East 473.5 feet to Pipe O; thence 53°10' East 516 feet to Concrete N; thence South 13°55' West 872.5 feet to Concrete N on the Northern margin of the road; thence South 33 feet to point in center of the road described above; thence South 75°15' East 710 feet to point of intersection as shown on the Plat; thence South 85°11 minutes East 340.5 feet to point of intersection in center of the road described above, as shown on the Plat; thence Southwest 33 feet to Concrete N on the Southern margin of the road described above; thence South 21°45' West 1045.5 feet to Pipe O and Concrete N; thence North 78°50' West 750 feet to Pipe O and Concrete N; thence South 20°55' West 438.5 feet to Concrete N; thence North 78°10' West 566 feet to Concrete N; thence North 27°10' East to Pipe N; thence North 78°10' West 225 feet to Pipe N; thence South 27°10' West 250 feet to Concrete N; thence North 78°10' West 1284.5 feet to Concrete N; thence North 21° East 250 feet to Concrete N; thence North 78°10' West 100 feet to Concrete N; thence South 21° West 250 feet to Concrete N; thence North 26°25' West 145 feet along Socastee Creek, the Creek being the line; thence North 45° West 100 feet; thence North 57° West 100 feet; thence North 63°10' West 100 feet; thence

North 54°45' West 130 feet; thence South 70°25' West 185 feet; thence North 89°20' West 200 feet; thence North 61°45' West 94 feet; thence North 70°20' West 100 feet; thence South 86°50' West 80 feet to Gum 3MO; thence North 27°40' East 383.5 feet to Gum OM; thence North 27°20' East 261 Feet to Gum OM; thence North 26°05' East 1119.5 feet to the beginning corner.

Bounded on the North by the center of the proposed highway as shown on the Plat in part, and in part by the lands, now or formerly, of Brice J. Ward; on the East by lands, nor or formerly, of Roy Collins, in part, and in part by lands, nor or formerly, of Virginia Zeigler; on the South by lands, nor or formerly, of J. M. Cooper, in part, and lands, nor or formerly, of Virginia Zeigler, in part, and by the Northern margin of the Intracoastal Waterway, in part, Lucy S. Kolb, in part, and Socastee Creek, in part; and on the West by land, nor or formerly, or Maggie L. Roberts.

Less and Except:

ALL AND SINGULAR that certain piece, parcel or lot of land situate, lying, and being in Socastee Township, County and State aforesaid, designated as Pump Site and containing 215 square feet and shown on a plat of Pump Site For Grand Strand Water & Sewer Authority owned by Ruth L. McClam; made by Engineering and Technical Services, Inc., dated November 1, 1990; a copy of which is recorded in Plat Book 112, Page 65, public records of Horry County and which is by way of reference made a part and parcel of this description.

This property was heretofore conveyed by Ruth Ludlum McClam, et al to the Grand Strand Water and Sewer Authority by Deed dated 23 November, 1990; and recorded in Deed Book 1438, Page 163, in the office of the Clerk of Court for Horry County, South Carolina.

These being the same properties conveyed to Peachtree Properties of North Myrtle Beach, LLC, by deed of Ruth Ludlam McClam et al, dated July 6, 2006, and recorded in the Office of the Register of Deeds for Horry County in Deed Book 3132 at Page 779.

WCSR 3831049v1

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EXHIBIT B
Personal Property

All present and future fixtures, fittings, appliances, apparatus, equipment, machinery, building materials, inventory and articles of personal property and replacements thereof, other than those rented or owned by lessees, now or at any time hereafter affixed to, attached to, installed upon, placed upon, or used in any way or connection with the complete and comfortable use, enjoyment, occupancy or operation of the Real Property described in Exhibit A attached hereto, or the improvements on the Real Property;

All proceeds of the conversion, voluntary or involuntary of any of the foregoing into cash or liquidated claims, including, without limitation, proceeds of insurance and condemnation awards and any unearned premiums accrued, accruing or to accrue under any and all insurance policies.

All leases of the Premises or any part thereof entered into and all right, title and interest of the Peachtree Properties of North Myrtle Beach, LLC thereunder; and including, without limitation, the Peachtree Properties of North Myrtle Beach, LLC right, if any, to cash or securities deposited thereunder whether or not same was deposited to secure performance by the lessees of their obligations thereunder, including, further, the right upon the happening of an Event of Default, to receive and collect the rents and other charges thereunder;

All utility or municipal deposits made by or on behalf of Peachtree Properties of North Myrtle Beach, LLC or made in connection with the Premises;

All plans, drawings, specifications, site plans, sketches, samples, contracts and agreements, however characterized from time to time prepared for use in connection with the construction of the improvements in and to the Premises;

All contracts, agreements and understandings now or hereafter entered into, relating to or involving the performance of any work, rendering or any services, and supply of any materials or the conduct of operations in and the management of the Premises including, without limitation, construction contracts, architect agreements, management agreements, options and other agreements, however characterized affecting the Premises and/or the improvements in and to the Premises;

Any and all permits, certificates, approvals and authorizations, however characterized, issued or in any way furnished whether necessary or not, for the operation and use of the Premises and/or the improvements in and to the Premises and/or chattels, including, without limitation, building permits, environmental certificates, certificates of operation, warranties and guarantees;

Any and all "Purchase Agreements", as such term is defined in the Mortgage, Security Agreement and Assignment of Leases and Rents from Peachtree Properties of North Myrtle Beach, LLC, to Jericho State Capital Corp. of Florida, recorded in the Office of the Register of Deeds for Horry County in Mortgage Book 4629 at Page 277 All deposits and accounts of Peachtree Properties of North Myrtle Beach, LLC made with or for the benefit of Jericho State Capital Corporation of Florida, a Florida corporation; and

All of the right, title, and interest of Peachtree Properties of North Myrtle Beach, LLC in and to the items defined as Items (a) through (r) of the Granting Clause all as set forth in the Mortgage, Security Agreement and Assignment of Leases and Rents from Peachtree Properties of North Myrtle Beach, LLC, to Jericho State Capital Corp. of Florida, recorded in the Office of the Register of Deeds for Horry County in Mortgage Book 4629 at Page 277.

WCSB 383104891

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

DEED AFFIDAVIT

PERSONALLY appeared before me the undersigned, who duly sworn, deposes and says:

- 4) I have read the information on this affidavit and I understand such information.
- 5) The property being transferred bearing Horry County Tax Map No. 178-00-05-032 by J. Stanton Cross, Master in Equity for Horry County to Jericho State Capital Corporatin of Florida, a Florida coproation.
- 6) Check one of the following - the deed is:
- (c) _____ subject to the deed recording fees as a transfer for consideration paid in money or money's worth.
 - (d) _____ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
 - (e) ☒ exempt from the deed recording fee - see Item 13(See information section of this affidavit)
(If exempt, please skip items 4-7, and go to item 8 on this affidavit).
- 4) Check one of the following if either item 3(a) or 3(b) above has been checked (See information section of this affidavit):
- (b) The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of \$ _____.
 - (b) The fee is computed on the fair market value of the realty which is _____.
 - (c) The fee is computed on the fair market value of the realty as established for property tax purposes which is _____.
- 5) Check Yes _____ or No _____ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "Yes," the amount of the outstanding balance of this lien or encumbrance is _____.
- 6) The deed recording fee is computed as follows:
- (c) Place the amount listed in item 4 above here: \$ _____
 - (d) Place the amount listed in item 5 above here: \$ _____
(If no amount is listed, place zero here)
 - (e) Subtract line 6(b) from Line 6(a) and place result here: \$ _____
- 7) The deed recording fee due is based on the amount listed on line 6(c) above and the recording fee due is \$ _____
- 8) As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as Foreclosure Attorney
- 9) I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year or both.

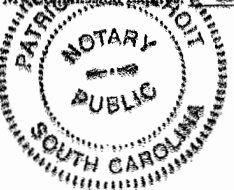
S. Sterling Loney, III

SWORN TO before me this 25th

day of February, 2008

Notary Public for South Carolina

My Commission Expires: 1-3-13



WGR 2316233v1

INFORMATION

Except as provided in this paragraph, the term "value" means the consideration paid or to be paid in money or money's worth for the realty. Consideration paid or to be paid in money's worth includes, but is not limited to, other realty, personal property, stocks, bonds, partnership interest and other intangible property, the forgiveness or cancellation of a debt, the assumption of a debt, the surrendering of any right. The fair market value of the consideration must be used in calculating the consideration paid in money's worth. Taxpayers may elect to use the fair market value of the realty being transferred in determining fair market value of the consideration. In the case of realty transferred between a corporation, a partnership, or other entity and a stockholder, partner or owner of the entity, and in the case of realty transferred to a trust or as a distribution to a trust beneficiary, "value" means the realty's fair market value. A deduction from value is allowed for the amount of any lien or encumbrance existing on the land, tenement or realty before the transfer and remaining on the land, tenement, or realty after the transfer. Taxpayers may elect to use the fair market value for property tax purposes in determining fair market value under the provisions of the law.

Exempted from the fee are deeds:

- (1) transferring realty in which the value of the realty, as defined in Section 12-24-30, is equal to or less than one hundred dollars;
- (2) transferring realty to the federal government or to a state, its agencies and departments, and its political subdivisions, including school districts;
- (3) that are otherwise exempted under the laws and Constitution of this State or of the United States;
- (4) transferring realty in which no gain or loss is recognized by reason of Section 1041 of the Internal Revenue Code as defined in Section 12-6-40(A);
- (5) transferring realty in order to partition realty, as long as no consideration is paid for the transfer other than the interests in the realty that are exchanged in order to effect the partition;
- (6) transferring an individual grave space at a cemetery owned by a cemetery company licensed under Chapter 55 of Title 39;
- (7) that constitute a contract for the sale of timber to be cut;
- (8) transferring realty to a corporation, a partnership, or a trust as a stockholder, partner, or trust beneficiary of the entity or as to become a stockholder, partner, or trust beneficiary of the entity as long as no consideration is paid for the transfer other than stock in the corporation, interest in the partnership, beneficiary interest in the trust, or the increase in value in the stock or interest held by the grantor. However, except for transfers from one family trust to another family trust without consideration, the transfer of realty from a corporation, a partnership, or a trust to a stockholder, partner, or trust beneficiary of the entity is subject to the fee, even if the realty is transferred to another corporation, a partnership, or trust;
- (9) transferring realty from a family partnership to a partner or from a family trust to a beneficiary, as long as no consideration is paid for the transfer other than a reduction in the grantee's interest in the partnership or trust. A "family partnership" is a partnership whose partners are all members of the same family. A "family trust" is a trust in which the beneficiaries are all members of the same family. "Family" means the grantor, the grantor's spouse, parents, grandparents, sisters, brothers, children, stepchildren, grandchildren, and the spouses and lineal descendant of any of them, and the grantor's and grantor's spouse's heirs under a statute of descent and distribution. A "family partnership" or "family trust" also includes charitable entities, other family partnerships and family trusts of the grantor, and charitable remainder and charitable lead trusts, if all the beneficiaries are charitable entities or members of the grantor's family. A "charitable entity" means an entity which may receive deductible contributions under Section 170 of the Internal Revenue Code as defined in Section 12-6-40(A);
- (10) transferring realty in a statutory merger or consolidation from a constituent corporation to the continuing or new corporation;
- (11) transferring realty in a merger or consolidation from a constituent partnership to the continuing or new partnership;
- (12) that constitute a corrective deed or a quitclaim deed used to confirm title already vested in the grantees, as long as no consideration is paid or is to be paid under the corrective or quitclaim deed;
- (13) transferring realty subject to a mortgage to the mortgagee whether by a deed in lieu of foreclosure executed by the mortgagor or deed executed pursuant to foreclosure proceedings;
- (14) Transferring realty from an agent to the agent's principal in which the realty was purchased with funds of the principal, provided that a notarized document is also filed with the deed that establishes the fact that the agent and principal relationship existed at the time of the original purchase as well as for the purpose of purchasing the realty.
- (15) Transferring title to facilities for transmitting electricity that is transferred, sold, or exchanged by electrical utilities, municipalities, electric cooperatives, or political subdivisions to a limited liability company which is subject to regulation under Federal Power Act (16 U.S.C. Section 791(a)) and which is formed to operate or take functional control of electric transmission assets as defined in the Federal Power Act.

WCER 2316233v1

EXHIBIT I

(Condemnation Judgment)

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2009CP2611956

Department Of
Transportation South
Carolina

Jericho State Capital
Corporation of Florida

Lynx Jericho Partners
LLC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried and heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit)
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

WE THEY JURY, FIND FOR THE LANDOWNER IN THE AMOUNT OF TWO MILLION ONE HUNDRED THOUSAND DOLLARS AND NO/100 (\$2,100,000.00).

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

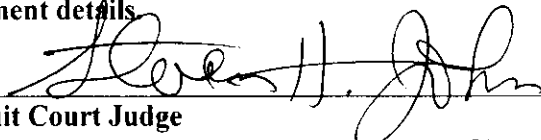
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
JERICO STATE CAPITAL CORPORATION OF FLORIDA, LANDOWNER AND LYNX JERICO PARTNERS LLC.	SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, CONDEMNOR	\$2,100,000.00

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed

2024 NOV 19 PM 4:16
CLERK OF COURT

such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**


Circuit Court Judge
129
Judge Code
11/19/2014
Date
For Clerk of Court Office Use Only

11-19-14
This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

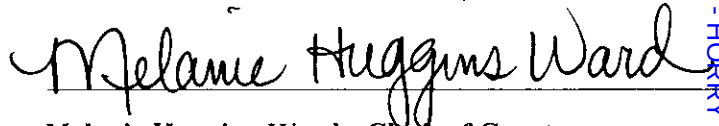
Franklin Hartselle Baker 38 Spruce Drive Suches, GA
30572
Edward B. Davis Inabnit Jr. PO Box 3646 Myrtle Beach,
SC 29578
John B. McCutcheon Jr. PO Box 1740 Conway, SC 29528

Howell V. Bellamy Jr. Bellamy Law Firm PO Box 357
Myrtle Beach, SC 29578

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter


Melanie Huggins-Ward - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



STATE OF SOUTH CAROLINA
COUNTY OF HORRY

South Carolina Department of Transportation,

Condemnor,

vs.

Jericho State Capital Corporation of Florida,

Landowner,

and

Lynx Jericho Partners, LLC.

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) CASE NUMBER: 2009-CP-26-11956

VERDICT

FILED
2014 NOV 19 PM 4:16
CLERK OF COURT

We the jury, by unanimous decision, find that just compensation to be paid to the Landowner to be:

Two million one hundred thousand dollars ^{no}/₁₀₀ (\$2,100,000)

(Write out amount in words)

NOTE: You cannot return a verdict in an amount less than the offer of \$998,000.00 or more than the landowner's opinion of \$4,010,000.00


FOREPERSON'S SIGNATURE

November 19, 2014
Conway, South Carolina

PLEASE KNOCK ON THE DOOR AND NOTIFY THE BALIFF WHEN YOU ARE FINISHED.

EXHIBIT J

(Bankruptcy Court Order)

April 03, 2013

GLORIA L. FRANKLIN, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

MACDONALD | FERNANDEZ LLP
 IAIN A. MACDONALD (SBN 051073)
 RENO F.R. FERNANDEZ III (SBN 251934)
 221 Sansome Street, Third Floor
 San Francisco, CA 94104
 Telephone: (415) 362-0449
 Facsimile: (415) 394-5544

The following constitutes
 the order of the court. Signed April 3, 2013

Attorneys for Susan L. Uecker, Trustee of th
 Mortgage Fund '08 Liquidating Trust


 Roger L. Efremsky
 U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF CALIFORNIA

In Re:

MORTGAGE FUND '08 LLC,
 Debtor.

Case No. 11-49803-RLE-11

Chapter 11

ORDER APPROVING SALE OF
 PEACHTREE PLANTATION LOAN

Date: March 27, 2013

Time: 2:00 pm

Place: 1300 Clay Street, Courtroom 201
 Oakland, California

Honorable Roger L. Efremsky

A hearing on the Motion for Authority to Sell Peachtree Plantation Loan (the "Motion"), filed by Susan L. Uecker, Trustee of the Mortgage Fund '08 Liquidating Trust, (the "Trustee"), was held before this Court on March 27, 2013, at 2:00 pm. Reno F.R. Fernandez III of Macdonald Fernandez LLP appeared for the Trustee; Linda Sorensen of Pinnacle Law Group LLP appeared for Jericho All-Weather Opportunity Fund LP and Jericho State Capital Corporation of Florida (collectively, "Jericho"); Jeffrey Olsen appeared *in pro per*.

Having considered the Motion and all related pleadings, any opposition thereto, and the arguments of counsel,

THE COURT FINDS THAT:

- A. Notice of the Motion was proper and adequate.
- B. The Buyer (as defined below) has acted in good faith and is entitled to the protections of Section 363(m) of the Bankruptcy Code.

Based on the foregoing and the findings of fact and conclusions of law stated orally in the record, and good cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The notice of the Motion and the hearing thereon is approved as proper and adequate under the circumstances.

2. The objection of Jeffrey Olsen is overruled.

3. The Motion is granted and the sale to Jericho or its assignee ("Buyer") is approved as the highest and best offer.

4. The Trustee is authorized to sell all of the Trust's right, title and interest in and to that certain loan to Peachtree Properties of North Myrtle Beach, LLC in the original principal amount of \$18,520,000 dated as of July 5, 2006 (Loan No. P0095) ("Sale Assets") to Buyer for the purchase price of \$950,000.00, and in accordance with the terms and conditions of a purchase agreement with terms (other than price) materially equivalent to those that are set forth in the purchase agreement which is attached to the Declaration of Susan Uecker as Exhibit J.

5. Buyer has not assumed any liabilities of the Trustee.

6. The Trustee is authorized to execute any such releases, termination statements, assignments, consents or instruments on behalf of any third party that are necessary or appropriate to effectuate or consummate the sale.

7. The Trustee, and any escrow agent upon the Trustee's written instruction, shall be authorized to make such disbursements on or after the closing of the sale as are required by the purchase agreement or order of this Court, if any, including but not limited to brokers' commissions.

8. The Trustee and her employees and agents be and they hereby are authorized to execute the purchase agreement, or other related documents that are reasonably necessary or appropriate to complete the sale, and to undertake such other actions as may be reasonably necessary or appropriate to complete the sale.

9. Except as otherwise provided in the Motion, the Sale Assets shall be sold, transferred, and delivered to Buyer on an "as is, where is" and "with all faults" basis.

10. Buyer is approved as a buyer in good faith in accordance with Section 363(m) of the Bankruptcy Code, and Buyer shall be entitled to all protections of Section 363(m) of the Bankruptcy Code.

11. This Order shall be effective immediately upon entry. No automatic stay of execution, pursuant to Rule 62(a) of the Federal Rules of Civil Procedure, or Bankruptcy Rules 6004(h) or 6006(d), applies with respect to this Order.

12. This Court retains jurisdiction to enforce and implement the terms and provisions of this Order and the purchase agreement, all amendments thereto, any waivers and consents thereunder, and each of the documents executed in connection therewith in all respects, including retaining jurisdiction to (a) compel delivery of the Sale Assets to the Buyer, (b) resolve any disputes arising under or related to the purchase agreement, and (c) resolve any disputes regarding liens, claims, or interests asserted against the Sale Assets, if any.

13. The purchase agreement and any related documents or other instruments may be modified, amended or supplemented by the parties thereto, in a writing signed by both parties without further order of the Court, provided that any such modification, amendment or supplement does not have a material adverse effect on the bankruptcy estate.

****END OF ORDER****

COURT SERVICE LIST

Jeffrey Brett Olsen
7121 Norfolk Road
Berkeley, California 94705

All other parties in interest required to be served are registered ECF participants. B.L.R. 9022-1(a).

EXHIBIT K

(Assignment to Lynx Jericho)

RECORDING REQUESTED BY AND
WHEN RECORDED, RETURN TO:

Lynx Jericho Partners LLC
Attention: Glenn Chwatt
3835 NW Boca Raton Blvd., Suite #200
Boca Raton, FL 33431

**ASSIGNMENT OF
TRANSFER AND ASSIGNMENT (PEACHTREE) OF
COMMERCIAL MORTGAGE OF REAL PROPERTY AND SECURITY
AGREEMENT AND CORRECTIVE ASSIGNMENT OF MORTGAGE**

For Value Received, the undersigned hereby grants, assigns and transfers to Lynx Jericho Partners, LLC, a Florida limited liability company, all beneficial interest under that certain Commercial Mortgage of Real Property and Security Agreement ("Commercial Mortgage") dated as of July 5, 2006, between Peachtree Properties of North Myrtle Beach, LLC, a South Carolina limited liability company, as Borrower, and R.E. Loans, LLC, a California limited liability company, as Lender recorded on July 25, 2006 in the Official Records of the County of Horry, South Carolina in Mortgage Book 4629 Page 255 and subsequently transferred and assigned by R.E. Loans, LLC to Mortgage Fund '08 LLC, pursuant to Transfer and Assignment (Peachtree) (the "Transfer and Assignment") dated effective January 4, 2008 executed by R.E. Loans, LLC, a California limited liability company, as Assignor, to Mortgage Fund '08 LLC, a Delaware limited liability company, as Assignee, recorded in the Official Records of the County of Horry County, South Carolina, in Mortgage Book 5071 Page 96 and subsequently corrected by Corrective Assignment of Mortgage dated April 26, 2011 by R.E. Loans, LLC transferring and assigning all rights, title and interest recorded on July 28, 2011 in the Official Records of the County of Horry, South Carolina in Mortgage Book 5336 Page 3001 describing land therein as any other security instruments, including but not limited to those described on Schedule I attached hereto, together with all the rights, powers and privileges conferred there under. Together with the money due and to become due thereon with interest and all rights accrued or to accrue under said Commercial Mortgage.

Dated as of April 17, 2013

MORTGAGE FUND '08 LIQUIDATING
TRUST

By:


Susan L. Uecker,
Trustee

MF08/CBRENoteSale/JerichoFinslSale/Assignment-PeachtreePlantation

ELECTRONICALLY FILED - 2024 Jan 23 5:08 PM - Horry - COMMON PLEAS - CASE#2013CP2605530

STATE OF California

COUNTY OF San Francisco

BEFORE ME, the undersigned Notary Public, duly authorized in the County and State aforesaid, personally appeared Susan L. Uecker as Trustee of Mortgage Fund '08 Liquidating Trust, who is personally known by me, or who has produced CA DL as identification, who in my presence executed the foregoing instrument and who took an oath.

Witness my hand and official seal in the County and State last aforesaid this 17 day of April, 2013.

Notary Signature

Andrew F. Albright

Printed Notary Signature



As witnessed by:

Ali Amir Mo
Witness #1

Quashan Peyton
Witness #2

MF08/CBRENoteSale/JerichoFinalSale/Assignment-PeachtreePlantation

SCHEDULE 1
Peachtree Plantation
of North Myrtle Beach, LLC ("Peachtree Properties LLC")

Property	Description	Parties	Date	Recorded Date	Notes
Peachtree	Mortgage	To RE LOANS from Peachtree Properties LLC	7/5/2006		Notes total: \$18,500,000
Peachtree	Intercreditor Agreement	RE LOANS, LLC (d/b/a) and Jericho State Capital Corp of FL (d/b/a)	7/5/2006		No document - Record of Filing of Mortgage Book 4629 Page 255
Peachtree	Mortgage	To RE LOANS from Peachtree Properties, LLC		7/5/2006	Book 2006000058962, Horry County, SC Registrar of Deeds
Peachtree	UCC-1 Filing	To RE LOANS from Peachtree Properties, LLC		7/5/2006	No document - Record of Filing of UCC-1 Filing Book 2006000058963, Horry County, SC Registrar of Deeds
Peachtree	Conditional Assignment of Mortgage and Loan Documents	To Wells Fargo Foothill LLC from RE LOANS LLC	7/17/2007	8/15/2007	Aug 15 4:53 PM 1521144 2007000113791 Horry County, SC Registrar of Deeds
Peachtree	Assignment	To Wells Fargo Foothill LLC from RE LOANS LLC	7/17/2007		
Peachtree	Commercial Mortgage of Real Property and Security Agreement	To RE LOANS from Peachtree Properties of Myrtle Beach, LLC	7/5/2006	7/5/2006	No document - Record of Filing of Mtg Bk 4629 Pg 255 Inst#Unknown Horry County, SC Registrar of Deeds
Peachtree	Note Purchase Agreement	To Mortgage Fund '08 LLC from RE LOANS, LLC	3/4/2008		Exhibit A to Note Purchase Agreement
Peachtree	Assignment	To Mortgage Fund '08 LLC from RE LOANS, LLC	5/9/2008		Exhibit B to Note Purchase Agreement
Peachtree	Transfer and Assignment	To Mortgage Fund '08 LLC from RE LOANS, LLC	5/9/2008		Record of Filing of Mtg Book 5071 Page 96 Horry County, SC Registrar of Deeds
Peachtree	Deed of Minister or Equity	Jericho State Capital Corp of FL	2/25/2008	2/25/2008	Record of Filing of Inst#2008000058996, Horry County, SC Registrar of Deeds
Peachtree	Re-Assignment of Mortgage and Loan Documents	To RE LOANS, LLC from Wells Fargo Foothill LLC		12/11/2008	No document - Record of Filing of Inst#2008000115761, Horry County, SC Registrar of Deeds
Peachtree	Corrective Assignment of Mortgage	To Mortgage Fund '08 LLC from RE LOANS, LLC		7/11/2011	No document - Record of Filing of Mtg Bk 5349 Pg 300 Inst#20110003046, Horry County, SC Registrar of Deeds

Additional Documents:
 UCC Financing Statement
 Given Law Offices Cover Letter
 Chicago Title Insurance Policy #7210740-7331401 Schedule A
 Certificate of Liability Insurance
 Greenberg Traurig Cover Letter
 CBST Financial Services Invoice
 CBST Financial Services Invoice
 Rogers Townsend & Thomas Cover Letter
 Purchases Closing Statement (Biller Ludam)

7/5/2006
 7/18/2006
 7/25/2007
 10/10/2007
 5/13/2008
 9/4/2007
 9/19/2007
 8/17/2011
 No Date

Inst#20110003046, Horry County, SC Registrar of Deeds
 Peachtree Plantation

MF08/CBRENoteSale/JerichoFinalSale/Assignment-PeachtreePlantation

EXHIBIT L

(Western Remainder Deed)

43960000037,

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STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

LIMITED WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS, that **JERICHO STATE CAPITAL CORPORATION OF FLORIDA**, a Florida corporation and **JERICHO ALL-WEATHER OPPORTUNITY FUND, L.P.**, a Delaware limited partnership (collectively the “**Grantor**”) for and in consideration of the premises and the sum of FOUR MILLION SEVEN HUNDRED THOUSAND AND No/100 (\$4,700,000.00) DOLLARS to it in hand paid at and before the sealing of these presents by **LENNAR CAROLINAS, LLC**, a Delaware limited liability company, the receipt and sufficiency of which are hereby acknowledged, has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release, unto **LENNAR CAROLINAS, LLC**, a Delaware limited liability company (the “**Grantee**”), its successors and assigns forever, the following described property to wit:

SEE EXHIBIT “A” ATTACHED HERETO.

Grantee’s Address: 1941 Savage Road, Suite 100-C
 Charleston, South Carolina 29407

THIS CONVEYANCE is made subject only to those matters set forth on **EXHIBIT “B” ATTACHED HERETO** (the “**Exceptions**”).

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the said premises before mentioned unto the said Grantee, its successors and assigns forever.

AND the Grantor does hereby bind itself, its successors and assigns, to warrant and forever defend all and singular the said premises unto the said Grantee, its successors and assigns, against it, but no other, subject only to the Exceptions.

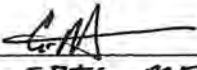
[signatures appearing on next page]

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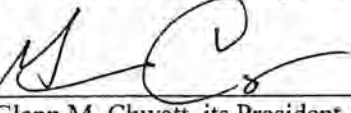
WITNESS the Grantor's Hand and Seal this 13 day of July, 2020.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

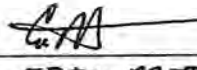
**JERICHO STATE CAPITAL CORPORATION
OF FLORIDA**, a Florida corporation


Name: EDIL METZ

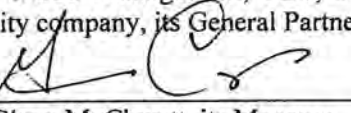
Name: Scott Swirsky

By: 
Glenn M. Chwatt, its President

**JERICHO ALL-WEATHER OPPORTUNITY
FUND, L.P.**, a Delaware limited partnership

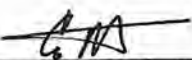

Name: EDIL METZ

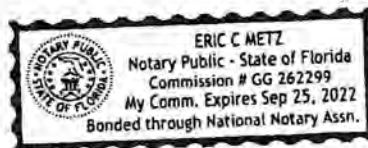
Name: Scott Swirsky

By: SRKD Management, LLC, a Florida limited
liability company, its General Partner
By: 
Glenn M. Chwatt, its Manager

STATE OF FLORIDA)
COUNTY OF Palm Beach) ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me this 13 day of July, 2020, by Glenn M. Chwatt, as President of **JERICHO STATE CAPITAL CORPORATION OF FLORIDA**, a Florida corporation, as his act and deed and as the act and deed of the corporation.

 (SEAL)
Notary Public for GLENN M. CHWATT
Name: ERIC METZ
My Commission Expires:
(AFFIX SEAL)



STATE OF FLORIDA)
COUNTY OF Palm Beach) ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me this 13 day of July, 2020, by Glenn M. Chwatt, as Manager of SRKD Management, LLC, General Partner of **JERICHO ALL-WEATHER OPPORTUNITY FUND, L.P.**, a Delaware limited partnership, as his act and deed and as the act and deed of the limited partnership.

 (SEAL)
Notary Public for GLENN M. CHWATT
Name: ERIC METZ
My Commission Expires:
(AFFIX SEAL)

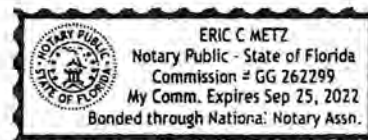


EXHIBIT "A"

Legal Description of Property

ALL AND SINGULAR, that certain piece, parcel or lot of land situate, lying and being in Socastee Township, Horry County, South Carolina, containing 58.12 acres, more or less, designated as **PARCEL A, 58.12 AC.**, as shown on that certain plat entitled "**SUBDIVISION PLAT OF TWO PARCELS TOTALING 85.69 AC., COOPER'S BLUFF, SOCASTEE TOWNSHIP, HORRY COUNTY, SOUTH CAROLINA**", prepared for Lennar Carolinas, LLC by Thomas & Hutton, recorded in the Horry County Register of Deeds Office on May 7, 2020 in Plat Book 292 at Page 265 (the "Plat"), reference to said Plat being made for the complete metes and bounds description thereof.

PIN No.: 439-00-00-0037

DERIVATION: This being a portion of the property conveyed to Jericho State Capital Corporation of Florida by Deed of J. Stanton Cross, as Master-in-Equity for Horry County, recorded February 26, 2008 in Deed Book 3317 at Page 969, and a portion of the property conveyed to Jericho All-Weather Opportunity Fund, L.P. by Deed of J. Stanton Cross, as Master-in-Equity for Horry County, recorded February 26, 2008 in Deed Book 3317 at Page 979, in the Office of the Register of Deeds for Horry County, South Carolina.

1
INCORRECT
969

EXHIBIT "B"

Exceptions

1. Taxes and assessments for the year 2020 and subsequent years.
2. Terms and conditions of SC Department of Transportation case for Eminent Domain# 2009-CP-26-11956.
3. Easement in favor of Grand Strand Water and Sewer Authority recorded in Book 1438, Page 163.
4. Sewer line easement in favor of Grand Strand Water and Sewer Authority recorded in Book 3819, Page 342.
5. Right of way easement to Horry County Electric Cooperative recorded in Book 3873, Page 193.
6. Right of Way easement to the County of Horry recorded in Book 3917, Page 2718.
7. Any right, easement, setback, interest, claim, encroachment, encumbrance, violation, variation, or other adverse circumstance affecting the Title disclosed by plat(s) recorded in Plat Book 43, Page 183; Plat Book 112, Page 65; Plat Book 215, Page 81; Plat Book 43, Pages 184A and 184B; Plat Book 292, Page 265.

STATE OF SOUTH CAROLINA

AFFIDAVIT FOR TAXABLE OR EXEMPT TRANSFERS

COUNTY OF HORRY

PERSONALLY appeared before me the undersigned, who, being duly sworn, deposes and says:

- I have read the information on this Affidavit and I understand such information.
- The property being transferred is identified as A 58.12 +/- Acre Parcel, bearing Horry County PIN No.: 439-00-00-0032 was transferred by **JERICO STATE CAPITAL CORPORATION OF FLORIDA** and **JERICO ALL-WEATHER OPPORTUNITY FUND, L.P.** to **LENNAR CAROLINAS, LLC**, on July __, 2020.
- Check one of the following: *The DEED is*
(a) ☒ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
(b) _____ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
(c) ☐ EXEMPT from the deed recording fee because (Exemption # _____)
(Explanation if required _____.)
(If exempt, please skip items 4-7, and go to item 8 of this affidavit.)
- Check one of the following if either item 3(a) or item 3(b) above has been checked.
(a) ☒ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of **\$4,700,000.00**.
(b) _____ The fee is computed on the fair market value of the realty which is \$ _____.
(c) _____ The fee is computed on the fair market value of the realty as established for property tax purposes which is \$ _____.
- Check YES _____ or NO ☒ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "YES", the amount of the outstanding balance of this lien or encumbrance is \$ _____.
- The DEED Recording Fee is computed as follows:
(a) \$4,700,000.00 the amount listed in item 4 above
(b) \$ 0.00 the amount listed in item 5 above (no amount place zero)
(c) \$4,700,000.00 subtract line 6(b) from line 6(a) and place the result.
- The deed recording fee due is based on the amount listed on Line 6(c) above and the deed recording fee due is: **\$17,390.00**
- As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: **GRANTOR**
- I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

Sworn to before me this
13 day of July, 2020.

[Signature]
Notary Public for Florida
Name: ERIC C METZ
My Commission Expires: 9/25/22

JERICO STATE CAPITAL CORPORATION OF FLORIDA, a Florida corporation

By: [Signature]
Glenn M. Chwatt, its President



HORRY COUNTY REGISTER OF DEEDS
TRANSMITTAL SHEET

TO BE FILED WITH EACH INSTRUMENT PRESENTED ELECTRONICALLY FOR RECORDING.
HORRY COUNTY REGISTER OF DEEDS, 1301 SECOND AVENUE POST OFFICE BOX 470 , CONWAY ,
SOUTH CAROLINA 29526

DOCUMENT TYPE OF INSTRUMENT BEING FILED: Deed

DATE OF INSTRUMENT: .

DOCUMENT SHALL BE RETURNED TO:

NAME: St. Amand & Efird PLLC

ADDRESS:
3315 SPRINGBANK LN STE 308
CHARLOTTE, NC 28226-3198

TELEPHONE: (980) 474-4251

FAX: (980) 474-4251

E-MAIL ADDRESS: ahs@stamand-efird.com

Related Document

(s):

PURCHASE PRICE / MORTGAGE AMOUNT: \$ 4700000.00

BRIEF PROPERTY DESCRIPTION: ALL AND SINGULAR, that certain piece, parcel or lot of land situate, lying and being in Socastee Township, Horry County, South Carolina, containing 58.12 acres, more or less, designated as PARCEL A, 58.12 AC., as shown on that certain plat entitled "SUBDIVISION PLAT OF TWO PARCELS TOTALING 85.69 AC., COOPER'S BLUFF, SOCASTEE TOWNSHIP, HORRY COUNTY, SOUTH CAROLINA", prepared for Lennar Carolinas, LLC by Thomas & Hutton, recorded in the Horry County Register of Deeds Office on May 7, 2020 in Plat Book 292 at Page 265

TAX MAP NUMBER (TMS #) 43900000037 / PIN NUMBER: .

GRANTOR / MORTGAGOR / OBLIGOR / MARKER (FROM WHO):

FULL BUSINESS NAME

1. JERICO STATE CAPITAL CORPORATION OF FLORIDA
2. JERICO ALLWEATHER OPPORTUNITY FUND, LP

GRANTEE / MORTGAGEE / OBLIGEE (TO WHO):

FULL BUSINESS NAME

1. LENNAR CAROLINAS, LLC

EXHIBIT M

**(Western Remainder and
Eastern Remainder Release)**

Marion D. Foxworth III
Horry County, SC Registrar of Deeds

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY) PARTIAL RELEASE OF MORTGAGE LIEN
Mortgage Book 4629, Page 255

PURSUANT TO SECTION 29-3-330(B)(3) OF THE SOUTH CAROLINA CODE OF LAWS, 1976, AS AMENDED

The undersigned being the mortgagee of record, or the legal representative, agent or officer, or attorney-in-fact of the mortgagee of record, with respect to the Mortgage (hereafter defined), hereby certifies as follows.

(1) The instrument as to which this Partial Release of Mortgage Lien (this "**Partial Release**") applies is entitled Commercial Mortgage of Real Property and Security Agreement from Peachtree Properties of North Myrtle Beach, LLC, a South Carolina limited liability company (the "**Mortgagor**") in favor of Lynx Jericho Partners, LLC, a Florida limited liability company, as assignee (the "**Mortgagee**") dated July 5, 2006 and recorded July 25, 2006 in the Office of the Register of Deeds for Horry County, South Carolina (the "**Recording Office**") in Book 4629 at Page 255, as last assigned in Book 5500 Page 2940 and last modified in Book 6000, Page 825 (as amended and assigned, the "**Mortgage**").

(2) The real property described in **Exhibit A** attached hereto, which is incorporated herein by reference (the "**Real Property**"), is hereby released and forever discharged from the lien, operation and effect of the Mortgage and all claims and interests of the Mortgagee in and to the Real Property are forever terminated.

The Recording Official shall enter this Partial Release of record and mark the Mortgage and related indexes to reflect that the Real Property has been released of record from the lien of the Mortgage.

Under penalties of perjury, the undersigned declares that it has, by its duly authorized officers, examined this affidavit this 5th day of August, 2022, and to the best of its knowledge and belief, it is true, correct and complete.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Arleen Lieberman
Witness #1 Arleen Lieberman
Carrie A. Cooper
Witness #2 Carrie A. Cooper

STATE OF New Jersey)
COUNTY OF Monmouth)

MORTGAGEE:

Lynx Jericho Partners, LLC

By: [Signature]
Printed Name: Michael Altieri
Its: VP

ACKNOWLEDGMENT

I, the undersigned Notary Public for the State of New Jersey, do hereby certify that Michael Altieri, the V.P. of Lynx Jericho Partners, LLC, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Arleen Lieberman
Notary Public for State of NEW JERSEY
Print Name of Notary Public: ARLENÉ LIEBERMAN
My Commission Expires: 10/15/2024

[NOTARY SEAL]

EXHIBIT A**Legal Description of Released Real Property**

ALL AND SINGULAR, that certain piece, parcel or lot of land situate, lying and being in Socastee Township, Horry County, South Carolina, containing 58.12 acres, more or less, designated as **PARCEL A, 58.12 AC.**, as shown on that certain plat entitled "**SUBDIVISION PLAT OF TWO PARCELS TOTALING 85.69 AC., COOPER'S BLUFF, SOCASTEE TOWNSHIP, Horry COUNTY, SOUTH CAROLINA**", prepared for Lennar Carolinas, LLC by Thomas & Hutton, recorded in the Horry County Register of Deeds Office on May 7, 2020 in Plat Book 292 at Page 265 (the "**Plat**"), reference to said Plat being made for the complete metes and bounds description thereof.

PIN No.: 439-00-00-0037 (now or formerly)

AND

ALL AND SINGULAR, that certain lot, parcel or tract of land located in Socastee Township, Horry County, South Carolina containing 35.27 acres and shown on a survey thereof entitled "**BOUNDARY SURVEY OF PEACHTREE PARCEL C TOTALING 35.27 AC.**" dated January 18, 2022, prepared by Matthew J. Svejksky (PLS No. 21233) of Thomas & Hutton Engineering Co. and recorded on January 31, 2022 in the Office of the Register of Deeds for Horry County, South Carolina in Plat Book 303, Page 32, reference to said survey made hereby for a more accurate and complete description of the foregoing property.

PIN No.: 439-00-00-0013 (now or formerly)

EXHIBIT N

(Eastern Remainder Deed)