IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Paul M. Burch, Circuit Court Judge

Case No. 2012-CP-26-5222
Appellate Case No.: 2016-000304

Opinion No. 5365 (S.C. Ct. App. December 2, 2015)

Thomas P. and Desiree J. Lyons, ... Respondents,

v.

Fidelity National Title Insurance Company as successor by merger to Lawyers Title Insurance Corporation, Bobby Gene Martin, and The Security Title Guarantee Corporation of Baltimore, ... Defendants,

Of Whom The Security Title Guarantee Corporation of Baltimore is the..... Petitioner.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF AMERICAN LAND TITLE ASSOCIATION

Pursuant to Rule 213, SCACR, American Land Title Association ("ALTA") moves to file an Amicus Curiae Brief in support of the Security Title Guarantee Corporation of Baltimore's Petitions for a Writ of Certiorari. As permitted by Rule 213, the Amicus Brief is filed conditionally with this Motion.

ALTA was founded in 1907 and is a National Trade Association representing nearly 5,500 Title Insurance Companies, Title and Settlement Agents, Independent

Abstractors, Title Searchers and Real Estate Attorneys. ALTA Members conduct title searches, examinations, closings and issue title insurance that protect real property owners and mortgage lenders against lawsuits from defects in titles.

ALTA moves to file an Amicus Brief supporting, in part, the Security Title Guarantee Corporation of Baltimore's Certiorari Petition in the following particulars:

I. Security Title's Petition for Certiorari should be granted because the public has a substantial interest in what constitutes "public records" for purposes of "constructive notice of matters affecting your title," as defined in the Policy.

II. Security Title's Petition for Certiorari should be granted because the Court of Appeals erred in holding the term "public records" to include a local, county zoning resolution.

III. Security Title's Petition for Certiorari should be granted because the Court of Appeal's holding as to "public records", as defined in the Policy, is overly broad and unnecessarily expands the number and type of documents that may affect title to real property.

ALTA believes that its perspective as an advocate for consumers and the general public, through its members, which include Title Agents, Abstractors, Title Insurance Companies, Attorneys, Builders, Developers, Lenders, Real Estate Brokers, Surveyors, Consultants, Educational Institutions, Computer Service Firms and related National Trade Associations, will assist this Court in deciding the important and novel title issue presented in this appeal. The Court's decision will have significant impact on the practice of abstracting and opining as to legal title of real estate, including the practice of real estate law in South Carolina.

Respectfully submitted,

McNair Law Firm, P.A.

Dated: March 1, 2016

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AMICUS CURIAE BRIEF OF AMERICAN LAND TITLE ASSOCIATION IN SUPPORT OF CERTIORARI PETITION

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II. **Security Title's Petition for Certiorari should be granted because the Court of Appeals erred in holding the term "public records" to include a local, county zoning resolution.**

III. **Security Title's Petition for Certiorari should be granted because the Court of Appeal's holding as to "public records", as defined in the Policy, is overly broad and unnecessarily expands the number and type of documents that may affect title to real property.**

INTRODUCTION

This is a title insurance case. The Security Title Guarantee Corporation of Baltimore ("Security Title") and Fidelity National Title Insurance Company issued title insurance policies to Thomas P. and Desiree J. Lyons for real property along the Intracoastal Waterway in Horry County, South Carolina. The Lyons made a claim under the title insurance policy for indemnification as a result of an undisclosed Spoil Easement recorded in the Horry County Register of Deeds on September 17, 1932, Deed Book 1785, Page 85-B and a "no-build" zoning resolution adopted by Horry County Council on November 4, 2003, Resolution R-143-03.

Security Title and Fidelity denied the Lyons claim. The Lyons filed suit for breach of contract and bad faith. On motion for summary judgment, the Honorable Paul M. Burch granted partial summary judgment in favor of the Lyons as to liability. Judge Burch denied summary judgment as to damages. Security Title appealed and the Court of Appeals affirmed. Security Title filed a Petition for Certiorari on February 22, 2016.

American Land Title Association ("ALTA") respectfully files this *amicus curiae* brief in partial support of Security Title's Petition for Certiorari, specifically as to whether

the Court of Appeals erred in finding the "no-build" zoning resolution to be "public records".

BACKGROUND

The Security Title policy is a form ALTA Residential Title Insurance Policy. ALTA licensees and ALTA members in good standing throughout South Carolina and the United States use ALTA forms, which, until 2013, included the form ALTA Residential Title Insurance Policy. ALTA's active members include title insurance companies, abstractors and title agents; in addition, ALTA's associate members include attorneys, builders, developers, lenders, real estate brokers, surveyors, consultants, educational institutions, computer services firms, and related national trade associations. As part of ALTA's function, ALTA works to develop a better understanding of its industry among those who use and otherwise interface with land title services. Title insurance is at the center of land title services and ALTA's industry.

The Security Title policy (the "Policy") covers the Lyons, as Insureds, in the amount of $100,000, for title risks as of January 23, 2006 to the real property described in Schedule A of the Policy as follows:

> All and singular, all that certain piece, parcel or lot of land, situate, lying and being in Socastee Township, Horry County, South Carolina, known for designated as Lot 1, all as is more particularly show and delineated on a plat by Culler Land Surveying Co., Inc. dated August 24, 2005 and recorded November 3, 2005 in the Office of the ROD for Horry County in Plat Book 208 at Page 235. Said plat is incorporated by reference herein.

(the "Land"). The Land is a residential lot located in Horry County, which included a mobile home with numerous extensions and additions at the time the Lyon's purchased the

property. The Policy indemnifies the Lyons for covered title risks in effect on the policy date, including, but not limited to:

> 10. Someone else has an easement on your land.
> ***
>
> 13. You cannot use the land because use as a single-family residence violates a restriction shown in Schedule B or an existing zoning law.

The Policy coverage is limited by Exclusions and Exceptions. Relevant in this *amicus* brief, Exclusion 1 of the Policy states the following:

> In addition to the Exceptions in Schedule B, you are not insured against loss, costs, attorneys' fees, and expenses resulting from:
>
> 1. Governmental police power, and the existence or violation of any law or government regulation. This includes building and zoning ordinances and also laws and regulations concerning:
>
> • land use
>
> • improvements on the land
>
> • land division
>
> • environmental protection
>
> *This exclusion does not apply to violations or the enforcement of these matters which appear in the public records at Policy Date.*
>
> This exclusion does not limit the zoning coverage described in Items 12 and 13 of Covered Title Risks.

(Emphasis supplied). "Public Records" are defined in the Policy as "title records that give constructive notice of matters affecting your title – according to the state statues where your land is located." Further, "Title" is defined in the policy as "the ownership of your interest in the land, as shown in Schedule A."

The Exceptions in Schedule B to the Policy do not include a Spoil Easement that was filed in the Horry County Register of Deeds on September 17, 1932 or an Horry County "no-build" zoning resolution, both of which the Lyons' assert affect the Land.

The Spoil Easement grants the federal government the following:

> [T]he perpetual right and easement to enter upon, excavate, cut away and remove any and all of the tracts hereinafter described as composing a part of the canal prism, as may be required at any time for construction and maintenance of the said Inland Waterway and to enter upon, occupy, and use any portion of the spoil disposal area [and] to deposit on the spoil disposal area, or any portion thereof, any and all spoil or other material excavated in construction and maintenance of the aforesaid waterway and its appurtenances.

Deed Book 1785, Page 085-B.

The Horry County "no-build" zoning resolution provides that:

> Horry County Council resolved to authorize the issuance of building permits to repair, remodel or replace existing structures within the spoil easements along the Intracoastal Waterway, but to otherwise continue the policy of denying building permits in this area. Mobile homes within the spoil area may only be replaced with mobile homes.

Horry County Res. 143–03.

In May 2011, Horry County refused to issue the Lyons a building permit due to the no-build resolution. Thereafter, the Lyons removed the existing mobile home structure from the Land.

The Lyons subsequently submitted a claim under the Policy. Security Title denied the claim for several reasons, including that Exclusion 1 of the Policy excludes coverage for the Horry County "no-build" zoning resolution and that "although this exclusion does

not limit Covered Risk 13; that Covered Risk is not applicable" because "the property can be used for a residence utilizing the existing mobile home".[1]

The Lyons filed an action for breach of contract and bad faith failure to pay insurance claims and moved for partial summary judgment.

The trial court held, *inter alia*, that Exclusion 1 of the Policy did not apply because the term "public records" was ambiguous. Therefore, the court granted summary judgment in favor of the Lyons finding the no-build resolution was "public records" not located during the title search and a covered title risk. The Court of Appeals affirmed, citing as persuasive authority Whitlock v. Stewart Title Guar. Co., 2011 WL 4549367 (D.S.C. Oct. 3, 2011).

ARGUMENTS

I. Security Title's Petition for Certiorari should be granted because the public has a substantial interest in what constitutes "public records" for purposes of "constructive notice of matters affecting your title," as defined in the Policy.

Security Title's Petition for Certiorari should be granted because the public has a substantial interest in what constitutes "public records" for purposes of "constructive notice of matters affecting your title," as defined in the Policy.

Title insurance is an indemnity agreement. Payment for loss is made according to the terms of the policy. Generally, title insurance operates to protect a purchaser or mortgagee against defects in or encumbrances on title. Firstland Vill. Assocs. v. Lawyer's Title Ins. Co., 277 S.C. 184, 186, 284 S.E.2d 582, 583 (1981). A title insurance policy is not an agreement to guarantee the state of title but is, rather an agreement to indemnify the policy holder. Unasserted claims, liens or defects do not trigger coverage. Claire T.

[1] ALTA concurs with Security Title's argument that the Court of Appeals also erred in finding that the "Lyons cannot use the Property for a 'Single Family Residence'".

Manning, 2 Handbook for South Carolina Dirt Lawyers § 4-C (2nd ed. 2008). A title insurer is generally liable for losses or damages caused by defects in the property's title. Preservation Capital Consultants, LLC v. First American Title Ins. Co., 406 S.C. 309, 316, 751 S.E.2d 256 (2013).

Title insurance provides the insured coverage for both "on-record" and "off-record" title defects. On-record defects are those risks that could have been discovered by the title examination. Manning, 2 Handbook for South Carolina Dirt Lawyers § 4-E. Off-record title defects are those risks that would not be disclosed by a title examination, such as forgery, undisclosed or missing heirs, misindexing, execution by a minor, revoked or expired powers of attorney, bankruptcy claims, unfiled mechanics lien, or unrecorded easements. Manning, 2 Handbook for South Carolina Dirt Lawyers § 4-F. The defects 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. Preservation Capital Consultants, LLC, 406 S.C. at 316, 751 S.E.2d at 259-260.

In South Carolina, examining titles and preparing title abstracts constitute the practice of law and our Courts have consistently required that licensed attorneys either conduct or supervise such activities for the purpose of protecting the public. See Ex parte Watson, 356 S.C. 432, 435, 589 S.E.2d 760, 76 (2003). The process of a title examination includes a title search, title examination, and title summary. A title search is the search of public records at the recording offices in the County for which the property is located for the chain of title, including, generally, deeds, estates, foreclosures, out-conveyances, liens, taxes, and judgments. The title examination or abstract is the review of the chain of title for defects. The title summary is the listing of title defects found to be

exceptions to title. See generally Manning, 2 Handbook for South Carolina Dirt Lawyers § 2-A through 2-J. South Carolina has consistently held that the processes for title search, examination, and summary require the supervision of an attorney for the public's interest and the protection of the public. See, e.g., Ex parte Watson, 356 S.C. 432, 589 S.E.2d 760.

Based on South Carolina's long and consistent precedent of the public interest involved in the examination and abstract of title to property, the public has a similar substantial interest in what constitutes "public records" for purposes of "constructive notice of matters affecting your title", as defined in the Policy. The form Policy at issue in this case has been used by title insurers throughout South Carolina for many years. The public has a substantial interest in determining what documents provide them "constructive notice of matters affecting your title", and therefore what can, or must, be relied upon in searching, examining, or summarizing title to property.

For these reasons, and pursuant to Rule 226(b), SCACR, the Supreme Court should grant certiorari for the purposes of reviewing the Court of Appeals holding that the term "public records" includes a local, county zoning resolution.

II. Security Title's Petition for Certiorari should be granted because the Court of Appeals erred in holding the term "public records" to include a local, county zoning resolution.

Security Title's Petition for Certiorari should be granted because the Court of Appeals erred in holding the term "public records" to include a local, county zoning resolution.

Exclusion 1 of the Policy, in short, excludes coverage for the adverse impact of governmental police power, law or government regulation on the Land. This exclusion applies unless a notice of enforcement or of a violation is recorded in the public records as of the Policy Date. Thus, the risk of "on-record" enforcement or violations of

governmental police power, law, or ordinance is transferred to the insurance company and the insurance company can address this risk by conducting an adequate title search of the "public records".

The Court of Appeals found that the term "public records", as defined in the Policy, was ambiguous. Further, the Court held that "the circuit court properly granted partial summary judgment in favor of coverage because the Spoil Easement and no-build resolution were public records not located during the title search," thus rendering Exclusion 1 of the Policy inapplicable.

"Public Records" is defined in the Policy as "title records that give constructive notice of matters affecting your title – according to the state statues where your land is located." "Title" is defined in the policy as "the ownership of your interest in the land, as shown in Schedule A." The Court of Appeals erred in finding the defined term "public records", ambiguous and includes the no-build resolution.

The term "public records" is a defined term under the Policy, as is the term "title." These terms are well-defined, unambiguous and incapable of more than one meaning in the Policy. The court erred in both finding the terms ambiguous and in torturing their meaning so as to find the no-build resolution a "public records", not located during the title search. See Diamond State Ins. Co. v. Homestead Indus., 318 S.C. 231, 236, 456 S.E.2d 912, 915, 1995 (1995) ("if the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend or defeat coverage that was never intended by the parties.").

The no-build resolution is not "public records" because: (a) it is not a "title" record, (b) it does not affect "title" to Land, and (c) does not provide constructive notice of matters affecting "title" according to South Carolina state statute.

(a) The no-build resolution is not a "title" record.

The Policy defines "public records", in part, as "title" records. The policy defines "Title" as "the ownership of your interest in the land, as shown on Schedule A." Thus, not all public records, as the term is ordinarily used or used in other contexts, are "public records", as defined under the Policy, because they are not also "title" records. For example, there is little question that the no-build resolution is a public record for purposes of the Freedom of Information Act. See S.C. Code Ann. §30-4-20(c) (defining "public record" as "all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body...."). However, the no-build resolution is not a "title" record because it is not a record of the ownership of the Lyons' interest in the Land. As a result, the no-build resolution is not a "public record", as defined under the Policy.

Further, title records in South Carolina are governed by the South Carolina recording statutes contained within Title 30 of the South Carolina Codes, including Chapters 7, 9, 11, and 13. The county Register of Deeds is charged with the duty of recording writings concerning title to real property within the county. See S.C. Code Ann. §30-5-10, et seq.

Generally, all instruments conveying an interest in real property must be recorded in the county Register of Deeds office in order to be valid as to third-parties. See S.C.

Code Ann. S.C. Code § 30-5-90 (Recording marriage settlements, conveyances, mortgages and other writings concerning the titles to lands in his/her county); S.C. Code § 30-5-130 (Recording mortgages of leaseholds or other interests in real estate); S.C. Code § 30-5-190 (Recording proceedings under the Bankruptcy Act of the United States); S.C. Code § 30-5-230 (Recording plats of real estate); S.C. Code § 30-7-30 (Recording assignments or transfers of mortgage); S.C. Code § 30-7-30 (Recording releases or satisfactions of lien on real estate); S.C. Code § 30-5-15 (Recording and indexing state tax liens); S.C. Code § 30-5-20 (Providing certified copies of any writing recorded in the office upon application and payment in advance of any required fees).

The no-build resolution is not recorded in the Register of Deeds office for Horry County and therefore is not a record of the ownership of the Lyons' interest in the Land. The no-build resolution is not a record of "title", as defined under the policy. As a result, the no-build resolution is not "public records" as defined by the Policy, because it is not a title record with the county Register of Deeds.

(b) The no-build resolution does not affect title to Land.

The no-build resolution does not affect "title" to the Land. The policy defines "Title" as "the ownership of your interest in the land, as shown on Schedule A." The no-build resolution may have an impact on the *uses* of the Land; however, it does not affect *title* to the Land. See J. Bushnell Neilson, Title and Escrow Claims Guide §9.14.1, Second Ed. ("The entire subject of zoning has traditionally been completely excluded because it affects use, not title."). Thus, while the Policy does provide some coverage for zoning under Title Risk 13, zoning does not otherwise affect "title" to Land. Id. ("For coverage

to be triggered [under Title Risk 13], then, the zoning code would have to prohibit the use of the existing structure for a single-family residence.").

Further, while a recorded violation of a zoning ordinance may affect "title" to the Land as set forth in Exclusion 1 of the Policy, there is no evidence that the no-build resolution prevented the use of the existing structure as a single family residence or that any violation of the no-build zoning resolution was within the "public records", as defined in the Policy. The only evidence is that after purchase, the Lyons were denied a building permit for a future structure.

The no-build resolution is not a "public records" as defined by the Policy because it does not affect "title" to the Land.

(c) The no-build resolution does not provide constructive notice of matters affecting title according to South Carolina state statute.

The no-build resolution does not provide constructive notice of matters affecting "title" to the Land. The policy defines "Title" as "the ownership of your interest in the land, as shown on Schedule A." The proper recording of title documents provides notice to subsequent purchasers or creditors of the interests of others in the Land and establishes priority of claims against the Land. The proper recording of title documents gives the world constructive notice of an interest or claim in real property "because the law assumes the grantee will search the index." Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006). Without recording and properly indexing a title document with the Register of Deeds, constructive notice of matters affecting title is not provided to the world. See S.C. Code Ann. §30-7-10.

The no-build resolution is not recorded and indexed with the Horry County Register of Deeds. As a result, the no-build resolution is not a "public records", as defined by the

Policy, because it does not provide constructive notice of matters affecting "title" to the Land pursuant to the South Carolina recording statutes.

For these reasons, the Court of Appeals erred in finding the defined term "public records" ambiguous and to include the no-build resolution. Pursuant to Rule 226(b), SCACR, the Supreme Court should grant certiorari for the purposes of reviewing the Court of Appeals holding that the term "public records" includes a local, county zoning resolution.

III. Security Title's Petition for Certiorari should be granted because the Court of Appeal's holding as to "public records", as defined in the Policy, is overly broad and unnecessarily expands the number and type of documents that may affect title to real property.

Security Title's Petition for Certiorari should be granted because the Court of Appeal's holding as to "public records", as defined in the Policy, is overly broad and unnecessarily expands the number and type of documents that may affect "title" to real property.

The Court of Appeals held that the no-build resolution was a "public records" not located during the title search and granted partial summary judgment in favor of the Lyons. In so holding, the Court of Appeals ignored the unambiguous definitions of "public records" and "title", under the Policy. "Public records" are defined in the Policy as "title records that give constructive notice of matters affecting your title – according to the state statues where your land is located" and "Title" is defined in the Policy as "the ownership of your interest in the land, as shown in Schedule A." For the Court of Appeals to conclude that the no-build resolution was a "public records", infers that it was a title record and should have been located during a title search. However, not only does the no-build resolution not affect title, it does even not rise to the level of an ordinance or law. Central

Realty Corp. v. Allison, 218 S.C. 435, 446, 63 S.E.2d 153, 158 (1951) (a "resolution is not a law").

As one Washington State case stated: "To import constructive notice from every piece of paper or computer file in every government office, from the smallest hamlet to the largest state agency, would wreak havoc with the land title system. As a matter of fact, it would render impossible a meaningful title search. Ellingsen v. Franklin County, 117 Wn.2d 24, 29-30, 810 P.2d 910, 913 (Wash. 1991). Similarly, to conclude that "public records", as defined in the Policy, includes local, county zoning resolutions would wreak havoc on the land title industry. Further, this holding opens the door for courts to expand title records and title searches to include all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body. Such expansion would render a meaningful title search impossible.

As a result, and pursuant to Rule 226(b), SCACR, the Supreme Court should grant certiorari for the purposes of reviewing the Court of Appeals holding that the term "public records" includes a local, county zoning resolution.

CONCLUSION

The Court of Appeals erred in finding the defined term "public records" ambiguous and to include the no-build resolution. Pursuant to Rule 226(b), SCACR, the Supreme Court should grant certiorari for the purposes of reviewing the Court of Appeals holding that the term "public records" includes a local, county zoning resolution.

Respectfully submitted,

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Dated: March 1, 2016

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PROOF OF SERVICE

I, Carole Koerner, an employee of the McNair Law Firm, certify that I have served the Motion for Leave to File *Amicus Curiae* Brief of American Land Title Association and the *Amicus Curiae* Brief of American Land Title Association and Proof of Service by depositing copies in the United States Mail, postage prepaid, on March 2, 2016; addressed to the attorneys of record as follows:

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