THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2012-CP-26-05222
Appellate Case No. 2016-000304

Opinion No. 5365 (S.C. Ct. App. Dec. 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 ON PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 213, SCACR, the Palmetto Land Title Association ("PLTA") hereby moves the Court for an order permitting the PLTA to file and serve an *Amicus Curiae* Brief in support of the Petition for Writ of Certiorari in the within matter in the form attached hereto.

The PLTA is a non-profit organization established in 1977. PLTA members include

individuals and organizations involved in the title insurance industry and the real estate field, and many real estate attorneys.

Among the objects and purposes of the PLTA are (1) to promote the safe and efficient transfer of ownership and interest in real property within the free enterprise system; (2) to provide information and education to consumers, to those who regulate, supervise, or enact legislation affecting the land title evidencing industry, and to its members; (3) to maintain liaison with users of the products and services provided by its members and with government; and (4) to maintain high professional standards and ethics.

The PLTA respectfully requests permission to file an *Amicus Curiae* Brief in support of the Petition for Writ of Certiorari and requests the opportunity to be heard on these issues because of its concern about the impact and unintended consequences the South Carolina Court of Appeals' opinion will have on the real estate industry, real estate lawyers, and the real estate conveyancing system.

Respectfully submitted,

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March 15, 2016

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AMICUS CURIAE BRIEF OF THE PALMETTO LAND TITLE ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*

The Palmetto Land Title Association ("PLTA") is interested in this case because the South Carolina Court of Appeals misconstrued two basic provisions of the title insurance policy at issue. These errors could have far reaching effects on the practice of real estate law and the issuance of title insurance policies in South Carolina. As more fully set forth below, PLTA supports the petition for a writ of certiorari to the South Carolina Court of Appeals and respectfully requests the writ be granted.

The PLTA is a non-profit organization established in 1977. PLTA members include individuals and organizations involved in the title insurance industry and the real estate field, and many real estate attorneys.

Among the objects and purposes of the PLTA are (1) to promote the safe and efficient transfer of ownership and interest in real property within the free enterprise system; (2) to provide information and education to consumers, to those who regulate, supervise, or enact legislation affecting the land title evidencing industry, and to its members; (3) to maintain liaison with users of the products and services provided by its members and with government; and (4) to maintain high professional standards and ethics.

INTRODUCTION

A. Nature of title insurance.

Title insurance indemnifies an insured for actual loss suffered due to partial or complete failure or unmarketability of title to the insured property, an unexcepted to lien or encumbrance affecting title to the insured property, or lack of access to the insured property.

Title insurance is priced and underwritten based on the premise of risk elimination, rather than the more usual insurance pricing and underwriting based on risk assumption. *See Crossman v. Yacubovich,* 290 S.W.3d 775, 779 (Mo. Ct. App. 2009). Before a title policy is issued, a search of the public land records of the jurisdiction where the property is located determines the recorded matters affecting title to the insured property. When issued, the title policy lists the recorded instruments affecting title as exceptions to coverage, eliminating those matters as covered risks under the title insurance policy.

B. Summary of issues before the Court of Appeals.

At issue in the Court of Appeals was the meaning of two phrases in the title insurance policy - the defined phrase "public records" and the undefined phrase "single family residence."

The title insurance policy defines "public records" as "*title* records that give constructive notice of matters affecting *your title* – according to the *state statutes* where your land is located." (Emphasis added). The Policy defines "title" as "the ownership of your interest in the land, as shown in Schedule 'A.'"

The Court of Appeals found the defined phrase "public records" ambiguous. The Court of Appeals concluded, therefore, a county resolution limiting the use of the insured property was

a "public record" and this use limitation is a matter against which the title insurance policy insured.

The Court of Appeals ignored the nature and purpose of title insurance and the plain and unambiguous language of the title insurance policy. The Court of Appeals' decision should be reversed.

The title insurance policy also insured against the possibility of the insured not being able to use the insured property "as a single family residence." The Court of Appeals found this undefined phrase ambiguous and found coverage where the use limiting resolution precluded the insureds from constructing a "site built home" on the insured property even though a manufactured home could be placed on the property.

The Court of Appeals ignored the plain and ordinary meaning of the phrase "single family residence" and its decision should be reversed.

STATEMENT OF THE CASE

A. Pertinent facts.

On May 5, 2005, Thomas P. and Desiree J. Lyons ("the insureds") purchased Lot 1 for $240,000. On October 28, 2005, the insureds purchased a portion of Lot 2, adjacent to Lot 1, for $100,000. With their purchase of a portion of Lot 2, the insureds were issued an owner's title insurance policy ("the Policy") from Security Title Guarantee Corporation of Baltimore ("Security Title"). The insureds subsequently combined Lot 1 and Lot 2, and the combined property abuts the Intracoastal Waterway.

The property is subject to a spoil easement in favor of the United States recorded with the Horry County Register of Deeds on September 17, 1932. The spoil easement allows the

dumping of dredging spoil on a spoil disposal area. Part of the insured property is in the spoil disposal area. The spoil easement was not excepted to in the Policy.

On November 4, 2003, Horry County adopted a zoning resolution ("Resolution") which provided Horry County would permit repairs to existing residences on parcels affected by the spoil easement, but would not issue new building permits. The Resolution also provided that "[m]obile homes within the spoil area may only be replaced with mobile homes."

In May 2011, relying on the Resolution, Horry County denied the insureds' request to construct a site built house to replace the mobile home then located on the property. The insureds filed a claim under the Policy which Security Title denied.

The insureds sued. The circuit court granted partial summary judgment for the insureds, finding coverage existed. The Court of Appeals affirmed.

B. Relevant policy provisions.

1. Police Power Exclusion.

The Policy excludes from coverage matters involving the exercise of:

> 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 ....

The Policy limits the police power exclusion, however, saying it does not apply to "violations or the enforcement of these [police power] matters which appear in the *public records* at Policy Date." (emphasis added).

The Policy defines "public records" as "title records that give constructive notice of matters affecting your title—according to the state statutes where your land is located." The Policy defines "title" as "the ownership of your interest in the land, as shown in Schedule A."

2. Single family residence coverage.

The Policy provides coverage if, "[the insured] cannot use the [insured] land because use as a single-family residence violates .... an existing zoning law. (Paragraph 13 of the "Owner's Coverage Statement").

C. The errors of the Court of Appeals.

Finding persuasive and relying on a United States District Court order entered in *Whitlock v. Stewart Title Guar. Co.*, 4:10-01992-RBH, 2011 WL 4549367 (D.S.C. January 9, 2013),[1] the Court of Appeals concluded the defined phrase "public records" was ambiguous and, therefore, the Resolution was a "public record" affecting title to the insured property and a covered matter under the Policy.

The Court of Appeals also determined the undefined phrase "single-family residence" was ambiguous and did not, therefore, include manufactured homes. The Court of Appeals decided the fact that the Resolution prohibited the insured from building a site constructed residence on the property was a covered matter, even though the Resolution did not prohibit a manufactured home being placed on the property.

[1] This case was settled and dismissed with prejudice before final judgment was entered.

QUESTIONS PRESENTED

1. Should the Petition be granted to correct the Court of Appeals' error in determining that the phrase "public records" is ambiguous when "public records," as defined in the Policy, is clear and unambiguous, is consistent with the statutes governing South Carolina's real estate conveyancing system, and does not include the Resolution?

2. Should the Petition be granted to correct the Court of Appeals' determination that the phrase "single family residence" is ambiguous and therefore does not include manufactured homes when the phrase clearly and unambiguously includes manufactured homes and South Carolina statutes define "single family residences" as including manufactured homes?

ARGUMENT

1. The Petition should be granted because the term "public records," as defined in the Policy, is clear and unambiguous, is consistent with South Carolina's real estate conveyancing system, and does not include the Resolution.

The policy defines "public records" as "*title* records that give constructive notice of matters affecting *your title*—according to the *state statutes* where your land is located." (emphasis added). The Policy defines "title" as "the ownership of your interest in the land . . . ."

The Court of Appeals failed to carefully consider and analyze a defined term in the Policy that is entirely clear and unambiguous and consistent with South Carolina statutes related to constructive notice and title to real property.

A. The South Carolina recording act, and related statutes, - the state statutes where the insured property is located - provides what items can constitute constructive notice for real estate conveyances and the Resolution is not a matter any of these statutes include as an item which, when properly recorded and indexed, provides constructive notice.

Since 1698, South Carolina has had a recording act. *See Epps v. McCallum Realty Co.*, 139 S.C. 481, 497, 138 S.E. 297, 302 (1927). The purpose of the recording act is "to protect subsequent creditors and purchasers for value without notice." *Id.*

The current version of the recording act, provides as follows:

> All deeds of conveyance of lands, tenements, or hereditaments, either in fee simple or for life, all deeds of trust or instruments in writing conveying estate, creating a trust in regard to the property, or charging or encumbering it, all mortgages or instruments in writing in the nature of a mortgage of any real property, all marriage settlements, or instruments in the nature of a settlement of a marriage, all leases or contracts in writing made between landlord and tenant for a longer period than twelve months, all statutory liens on buildings and lands for materials or labor furnished on them, all statutory liens on ships and vessels, all certificates of renunciation of dower, all contracts for the purchase and sale of real property, all assignments, satisfactions, releases, and contracts in the nature of subordinations, waivers, and extensions of landlords' liens, laborers' liens, sharecroppers' liens, or other liens on real property created by law or by agreement of the parties and generally all instruments in writing conveying an interest in real estate required by law to be recorded in the office of the register of deeds or clerk of court in those counties where the office of the register of deeds has been abolished or in the office of the Secretary of State delivered or executed after July 31, 1934, except as otherwise provided by statute, are valid so as to affect the rights of subsequent creditors (whether lien creditors or simple contract creditors), or purchasers for valuable consideration without notice, only from the day and hour when they are recorded in the office of the register of deeds or clerk of court of the county in which the real property affected is situated. In the case of a subsequent purchaser of real estate, or in the case of a subsequent lien creditor on real estate for valuable consideration without notice, the instrument evidencing the subsequent conveyance or subsequent lien must be filed for record in order for its holder to claim under this section as a subsequent creditor or purchaser for value without notice, and the priority is determined by the time of filing for record.

S.C. Code Ann. § 30–7–10.

In its opinion, the Court of Appeals quoted only part of the recording act, leaving out the numerous matters expressly set forth in the recording act that affect title to real property. The Court of Appeals also failed to state the obvious—that zoning laws, regulations, ordinances, and county resolutions are not contained within the recording act.

Besides the recording act, other statutes dictate what public records affect title to real property, all of which lead a title examiner or real estate attorney to the places where such

records affecting title to the property he or she is searching are located. A common theme among those statutes is the requirement that some indexing procedure exists that allows those documents to be found and tied to the property being searched.

"[P]urchasers of an interest are bound to search the records pertaining to that interest," but are "in general, only bound to search in the direct chain of title for the interest being purchased." 11 THOMPSON ON REAL PROPERTY § 92.09(c)(2)(A), at 184 (3rd ed. 2015). Moreover, "the purchaser is not bound to search all public records that may contain information about claims or interests in real estate." *Id.*

Generally, someone searching title in South Carolina would visit the Register of Deeds, Clerk of Court, and tax assessor's office to find documents affecting title to real property. [2]

1. The Register of Deeds or real estate records of the Clerk of Court.

The Register of Deeds[3] houses numerous documents, all set forth explicitly by the recording act and other similar statutes set forth below:

- Deeds § 30–7–10;
- Deeds of Trust § 30–7–10;

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[2] One exception is that records related to certain public rights-of-way are recorded in the SCDOT's office in Columbia. *See* S.C. Code Ann. § 57-5-550 (directing all rights-of-way and records of condemnation actions for state highways be filed at SCDOT "in its offices at Columbia, and a direct index of all such deeds, instruments and records shall be made and kept by the department"); *see also Fuller-Ahrens Partnership v. S. C. Dept. of Highways and Pub. Transp.*, 311 S. C. 177, 180, 427 S.E.2d 920, 922 (Ct. App. 1993) ("The Pattersons' deed and the other documents, as required by statute, were filed [in the SCDOT's] offices in Columbia. . . . The filing of these instruments provided a record sufficient 'to impart notice,' albeit constructive notice, to Fuller-Ahrens of the deed and its contents, including the deed's reference to the Department's plans . . .").

[3] Some counties do not have a Register of Deeds, but instead real estate records are maintained in the real estate records of the Clerk of Court. S.C. Code Ann. § 30-5-10.

- Mortgages § 30–7–10, § 30-5-130 (involving mortgages of leaseholds and other interests in real estate);

- Marriage Settlements § 30–7–10; § 30-5-90.

- Leases longer than twelve months § 30–7–10; § 27-33-30 ("[i]n order to give notice to third persons any lease or agreement for the use or occupancy of real estate shall be recorded in the same manner as a deed of real estate.");

- Statutory liens on buildings and lands for materials or labor furnished on them. § 30–7–10; § 29-5-90 (mechanic's liens);

- certificates of renunciation of dower § 30–7–10; § 30-5-90.

- contracts for the purchase and sale of real property § 30–7–10;

- all assignments, satisfactions, releases, and contracts like subordinations, waivers, and extensions of landlords' liens, laborers' liens, sharecroppers' liens, or other liens on real property created by law or by agreement of the parties § 30–7–10; § 30-7-20 (manner and form of recordation of contract affecting recorded lien on real property); § 30-7-30 (release or satisfaction of lien affecting title to real estate) § 30-7-40 (manner of recordation of assignment or transfer of mortgage); § 30-7-60 (assignment, satisfaction, or release of lien); § 29-3-100 (validity of certain assignments of rents, issues, or profits); § 29-3-350 (entry of cancellation on mortgages on indexes);

- All instruments in writing conveying an interest in real estate § 30–7–10;

- Federal tax liens § 12-57-30; § 12-57-40;

- State tax liens § 12-54-122 (G)(1); § 12-54-122; § 30-5-16;

- Proceedings in bankruptcy § 30-5-190.

Not only must these documents be recorded to affect title to property, the register of deeds must also index the documents, so they can be found by title examiners. Section 30-9-40 provides indexing constitutes an "integral, necessary and inseparable part of the recordation of the deed, mortgage or other written instrument" and that "[t]he entries in the indexes required to be made are notice to all persons sufficient to put them upon inquiry as to the purport and effect

of the deed, mortgage or other written instrument so filed for record, but the recordation of a deed, mortgage or other written instrument is not notice as to the purport and effect of the deed, mortgage, or other written instrument unless the filing of the instrument for record is entered as required in the indexes." S.C. Code Ann. § 30-9-40; *see also Thomas v. Thomas*, 286 S.C. 294, 298, 333 S.E.2d 76, 78 (Ct. App. 1985) ("[t]he clear construction of Section 30-9-40 is that proper indexing supplies inquiry notice of an instrument, while recordation without proper indexing supplies no notice at all.").

2. The Clerk of Court.

After visiting the Register of Deeds and reviewing the title records contained therein, an attorney or title abstractor would then visit the Clerk of Court to review various matters filed therein that affect title to property. Such matters include, but are not limited to, the following:

- Judgments: S.C. Code Ann. § 15-35-810: State and federal court judgments are "liens upon the real estate of the judgment debtor situate in any county in this State in which the judgment or transcript thereof is entered upon the book of abstracts of judgments and duly indexed."

- Lis Pendens: S.C. Code Ann. § 15-11-10 and § 15-11-20 specifically provide a properly filed lis pendens provides constructive notice.

The Clerk of Court is statutorily required to keep an index of judgments, for the purpose of the public checking title to real property so judgments can be found. *See* S.C. Code Ann. § 15-35-520 (entitled "Entries in abstract of judgments; index to judgments"); *Thomas v. Thomas*, 286 S.C. 294, 298, 333 S.E.2d 76, 78 (Ct. App. 1985) (addressing a divorce decree which, though filed with the Clerk of Court for the Court of Common Pleas, was not properly indexed under the husband's name in the judgment indexes and holding that "[t]he failure to index the judgment as required by [Section 15-35-520] deprived its recordation of its effectiveness as notice to

subsequent purchasers."); *Plyler v. Robertson (In re Graham)*, 54 S.C. 163, 32 S.E. 67 (1899) (noting that "a subsequent purchaser is affected with such notice as the index entries afford").

3. Tax Assessor's Records.

A real estate attorney or title abstractor also reviews the tax assessor's records because all taxes, assessments and penalties legally assessed are a first lien upon the property taxed, with the lien attaching at the beginning of the fiscal year during which the tax is levied. S.C. Code Ann. § 12-49-10; *Taylor v. Mill*, 310 S.C. 526, 528, 426 S.E.2d 311, 312 (1992). The lien attaches as of December 31 to real property for taxes to be assessed and paid during the ensuing year. S.C. Code Ann. § 12-49-20. No further action is needed to perfect the statutory lien. *Taylor v. Mill*, *supra.*

Tax records are simply found either under the name of the owner of the property or by parcel number.

B. Because of South Carolina's statutory scheme related to constructive notice of matters that affect title, the Policy's definition of "public records" is clear and unambiguous.

The Policy defines "public records" as "*title* records that give constructive notice of matters affecting *your title*—according to the *state statutes* where your land is located." (emphasis added). The Policy defines "title" as "the ownership of your interest in the land, as shown in Schedule A."

The Policy's definition of public records is limited to records affecting title. Those public records must under South Carolina statutory law provide constructive notice of matters affecting title. There is no statute which provides that a county resolution or ordinance provides constructive notice to those purchasing the property.

The Court of Appeals, in finding the Resolution is a public record, apparently relied on *Carolina Chloride, Inc. vs. Richland Cty.*, 394 S.C. 154, 169, 714 S.E.2d 869, 876 (2011) and described that case as "explaining that zoning designations are part of the public record." Even though a zoning designation may be located somewhere in the public records, when the phrase "public records" is broadly defined like it is in the Freedom of Information Act,[4] a zoning designation does not affect title to property and there is no statute which provides that such a designation gives constructive notice to purchasers of real property.

The policy unambiguously defines "public records" as those records which provide constructive notice of matters affecting title. The Court of Appeals ignored this definition finding persuasive a United States District Court order entered in *Whitlock, supra,* a case which was settled before entry of a final judgment. Several years earlier, in a case tried to the United States District Court that went to final judgment, a different United States District Judge, correctly interpreting the phrase "public records" and finding no ambiguity said, "[t]he policy defines 'public records' to mean 'title records that give constructive notice' .... Put another way the title risk [at issue] is excluded unless the risk is recorded in those South Carolina records established to put purchasers of real property on constructive notice of matters relating to title ...." *Investors Title Ins. Co. v. Bair,* 9:05-1434 – PMD, 2007 WL 6738625 at *5 (D.S.C. April 26, 2007). The District Judge in *Bair* concluded saying, the title examiner "properly limited her search to the matters of public record and did not consider local ordinances...." *Id.* at *6.

[4] *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....").

The Court of Appeals' opinion creates the undesirable and dangerous result of indirectly forcing not only title insurance companies, but also real estate lawyers, to find, review, and analyze state regulations, local regulations, state codes, local codes, local resolutions, county ordinances, and perhaps other documents that are in a governmental agency's file. These documents are in places where no one has traditionally looked, or is required to look by statute, when checking title for matters affecting title to real property.

The Policy is unambiguous. Public records are those records that give notice to matters affecting title under state law. This is entirely consistent with existing South Carolina statutory law and recording procedures, which require certain documents affecting title be recorded or filed in certain places, and accordingly indexed so they can be found, all of which are mentioned above. The matters referenced above impart constructive notice of matters related to title to real property and, for the purposes of this case, are "public records" as defined in the Policy.

The consequences to the recording system would be disastrous if a document imparts constructive notice on matters affecting title to property just because it is designated as a public record or it appears somewhere in the public records.

C. The Resolution is not a matter affecting title to property.

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. Stoebuck & 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").

Our courts have recognized the distinct concepts of title to property and non-title matters that affect the use of property. In *McMaster v. Strickland*, 305 S.C. 527, 409 S.E.2d 440 (Ct. App. 1991), the Court of Appeals found the trial court "confused the concepts of title and marketability with use and value." The Court of Appeals found there was evidence that "the sellers do not own the property, therefore they have title," and 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.

Similarly, in *Truck South, Inc. v. Patel*, 339 S.C. 40, 528 S.E.2d 424 (2000), this Court held a wetland designation that prevented the purchaser from constructing a hotel on the property was not an encumbrance. It did not render the title unmarketable. *Id.* at 49, 528 S.E.2d at 429.

Zoning ordinances and zoning resolutions regulate the use of property, not its title. Courts in other jurisdictions agree. *Aldrich v. Hawrylo*, 656 A.2d 1304, 1309 (N.J. Super. Ct. App. Div. 1995) ("Because zoning ordinances and planning board and board of adjustment resolutions are not title matters, are not part of the public land records and do not impart constructive notice to purchasers, they are not searched by title insurers and they are excluded from coverage in title insurance policies. The police power exclusion in the policy squarely places on the prospective purchaser and his attorney the burden of investigation and compliance with local ordinances and land use resolutions as they may affect a particular property"); *Logan v. Barretto*, 675 N.Y.S.2d 102, 103 (N.Y. App. Div. 1998) ("Since the Sanitary Code provisions regulate the manner in which the property can be used and do not impair title, the damages claimed ... do not fall within

the scope of the title insurance policy."); *Somerset Sav. Bank v. Chicago Title Ins. Co.*, 649 N.E.2d 1123, 1127-28 (Mass. 1995) (building or zoning laws are not encumbrances or defects affecting title; therefore the existence of a statutory restriction requiring governmental approval prior to issuance of a building permit does not give rise to coverage under a title insurance policy); *Dyer & Moody, Inc. v. Dynamic Constructors, Inc.*, 357 So. 2d 615, 619 (La. Ct. App. 1978) (civil code restrictions prohibiting improvements that would prevent the natural run-off of water were excluded by policy exclusion for any law, ordinance or governmental regulation relating to building requirements); *Wolf v. Commonwealth Land Title Ins. Co.*, 690 N.Y.S.2d 880, 881 (N.Y. App. Div. 1999) ("Since zoning laws regulate the manner in which the property can be used and do not impair title, the damages claimed by plaintiffs do not fall within the scope of the title insurance policy"); *Bear Fritz Land Co. v. Kachemak Bay Title Agency, Inc.*, 920 P.2d 759, 76 (Alaska 1996) ("It is well established that building or zoning laws are not encumbrances or defects affecting title to property. Such restrictions are concerned with the use of land").

Even where a zoning ordinance or regulation is recorded with the register of deeds, courts have found they do not impart constructive notice on the title to land and are excluded from coverage. In *Haw River Land & Timber Co. v. Lawyers Title Ins. Corp*, 152 F.3d 275 (4th Cir. 1998), ordinances were filed in the register of deeds. The Fourth Circuit found such recording did not satisfy the state statutes adopted to put purchasers on constructive notice about matters affecting the real property they are purchasing.

The Fourth Circuit stated:

> Thus, in order to be contained in the "public records," as used in the ALTA title policy, a notice of enforcement or of an encumbrance would have to be recorded in one of these public records designed to put purchasers of real property on

> constructive notice about matters affecting title to the property which they are purchasing.
>
> This interpretation of the title insurance policy language is consistent with the principles of marketable title discussed above. Since the purpose of title insurance is to insure that there are no defects in the legal title to the real property interests being insured, the adverse impact of zoning ordinances and regulations would be covered only if they somehow affected title to specific property as it appeared in state established records putting persons on legal notice about matters affecting that property. Thus, in North Carolina as elsewhere, zoning or environmental laws of general application, which are not recorded against specific parcels of property, are generally excluded from standard-form ALTA title insurance policies
>
> Were we to hold, contrary to the language of the title policy in question, that the inclusion of the town ordinances of general application maintained in minute books located in the office of the register of deeds would have the same effect as matters recorded against specific property, we would frustrate not only the intent of the title insurance policy but also North Carolina policy that purchasers have a "reliable means for purchasers to determine the state of the title to real estate."
>
> *Id.* at 280-81.

In addition, as referenced above, the definition of "public records" comes into play regarding Exclusion 1 because of the exception to the exclusion, which states "[t]his exclusion does not apply to violations or the enforcement of these matters which appear in the public records at Policy Date." Courts have found that zoning ordinances, which apply to everyone, do not amount to the imposition of a sanction or an act of enforcement against a specific piece of property. *See Notaro Homes, Inc. v. Chicago Title Ins. Co.*, 722 N.E.2d 208, 214 (Ill. Ct. App. 1999) (finding an amendment to a zoning ordinance recorded "adds nothing in terms of its enforcement" and therefore the exception to the exclusion was found not to apply); *Haw River Land & Timber Co.*, 152 F.3d at 281 (even though the ordinance was recorded, "there is no evidence that any enforcement proceeding was ever initiated or 'notice' given to enforce the

buffer zone established by Garner's ordinances. Nor is there any indication that a notice of a violation of that buffer zone was ever issued.").

The Resolution does not set forth a notice of a violation. The Resolution is not an enforcement of any violation. The exception to the exclusion therefore does not apply, even if the Court were to somehow find the Resolution is a matter in the public records that affects title to the property.

2. The Petition should be granted to correct the Court of Appeals' determination that the phrase "single family residence" is ambiguous and therefore does not include manufactured homes because the phrase clearly and unambiguously includes manufactured homes and South Carolina statutes define "single family residences" as including manufactured homes.

The phrase "single family residence" is not defined in the policy. When faced with an undefined term in an insurance policy, the court must interpret the term in accord with its usual and customary meaning. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 62, 504 S.E.2d 117, 122 (1998). In addition, the court should define the term according to the usual understanding of the term's significance to the normal person. *USAA Property and Casualty Ins. Co. v. Rowland*, 312 S.C. 536, 539, 435 S.E.2d 879, 881–82 (Ct. App. 1993). Our courts have sought guidance from statutory definitions when faced with an undefined term in a policy. *See S.C. Farm Bureau Mut. Ins. Co. v. Oates*, 356 S.C. 378, 382-83, 588 S.E.2d 643, 645 (Ct. App. 2003) (in analyzing the undefined word "abuse" in a policy, the court resorted to, among other things, the South Carolina Criminal Code's definition of "child abuse or neglect.").

The usual and customary meaning of a "single family residence" is a structure where one or more people can live, a meaning which includes manufactured homes. *See State v. Dean,* 248

A.2d 707, 708 (N.H. 1968) ("A 'mobile [manufactured] home' as its name implies is usable as a residence ....").

If additional guidance need be had as to the meaning of this phrase, our statutes are replete with references to single family residences as manufactured homes. *See e.g.* S.C. Code Ann. § 27-40-210(14) ("single family residence" is a structure maintained and used as a single dwelling unit") and § 27-40-210(3) (defining "dwelling unit" to include landlord-owned manufactured homes).

Despite its clear meaning, the Court of Appeals said, with no analysis, "this term's precise meaning is unclear...."

This conclusion is incorrect and should be reversed by this Court.

CONCLUSION

The decision of the Court of Appeals could have far reaching effects on the manner and means by which real property in South Carolina is conveyed and title insurance policies issued. For the foregoing reasons, *amicus curiae* PLTA respectfully requests the Court grant the pending petition for writ of certiorari.

Respectfully submitted,

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March 15, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2012-CP-26-05222
Appellate Case No. 2013-002137

Opinion No. 5365 (S.C. Ct. App. Dec. 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.

CERTIFICATE OF SERVICE

I, Kathleen S. Romero, an employee of Callison Tighe & Robinson, LLC, do hereby certify that, on this date, I served the foregoing **Motion for Leave to File *Amicus Curiae* Brief on Petition for Writ of Certiorari** upon counsel of record, by depositing a copy of the same in the United States mail with proper first-class postage affixed thereon, addressed as follows:

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March 15, 2016