

STATE OF SOUTH CAROLINA
 COUNTY OF Horry
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2015- CP-26-1084

Lynx Jericho Partners, LLC

Chicago Title Insurance Company

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> 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 or 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
- STAYED DUE TO BANKRUPTCY**
- 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: **RECEIVED**

ORDER INFORMATION

This order ends does not end the case.
 Additional Information for the Clerk :

JUL 31 2017

SC Court of Appeals

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)
		\$
		\$
		\$

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 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.

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)


RECEIVED
JUL 31 2017
SC Court of Appeals

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), SCRPC; *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.



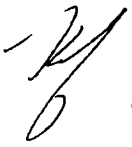
In July 2006, Jeffrey Shoup and Tom Hix through their company, Peachtree Properties of North Myrtle Beach, LLC ("Peachtree") purchased the Property from the McClam family for \$22,500,000. They intended to develop the land as a large residential complex with beautiful views and access to the Intracoastal 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

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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

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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. 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.”).

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.

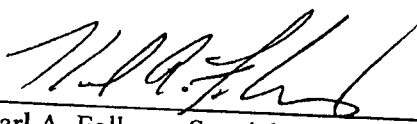
After considering all relevant factors in determining whether attorney's fees should be awarded in the motion to compel matter, I decline to award attorney's fees.

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