THE STATE OF SOUTH CAROLINA

IN THE SOUTH CAROLINA COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS

Karl a. Folkens, Special Referee

Appellate Case No.: 2017-001646

Jericho State Capital Corp. of Florida.....Plaintiff,

v.

Chicago Title Insurance Company.....Defendant,

AND

Lynx Jericho Partners, LLC.....Plaintiff,

v.

Chicago Title Insurance Company.....Defendant.

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

And Chicago Title Insurance Company is the Respondent.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

Appellants Jericho State Capital Corp. of Florida ("Jericho State") and Lynx Jericho Partners, LLC ("Lynx Jericho") are insureds under two title insurance loan policies issued by Respondent Chicago Title Insurance Company. Appellants contend the property insured by these policies suffers a title defect that is a covered loss under the policies. Respondent denied coverage, and Jericho State and Lynx Jericho thereafter filed lawsuits alleging breach of contract, breach of the covenant of good faith and fair dealing and bad faith, to which Chicago Title answered denying liability. [Jericho State Complaint and Chicago Title Answer; Lynx Jericho Complaint and Chicago Title Answer].

Subsequently, these actions were consolidated for trial and referred to Special Referee Karl A. Folkens. Respondent filed motions for summary judgment as to all issues, while Appellants filed motions for summary judgment as to liability only and reserving the issue of damages for trial. By Order Addressing Motions For Summary Judgment dated July 2, 2017, the Special Referee granted summary judgment in favor of Respondent. [Order, p. 1-19]. This appeal follows.

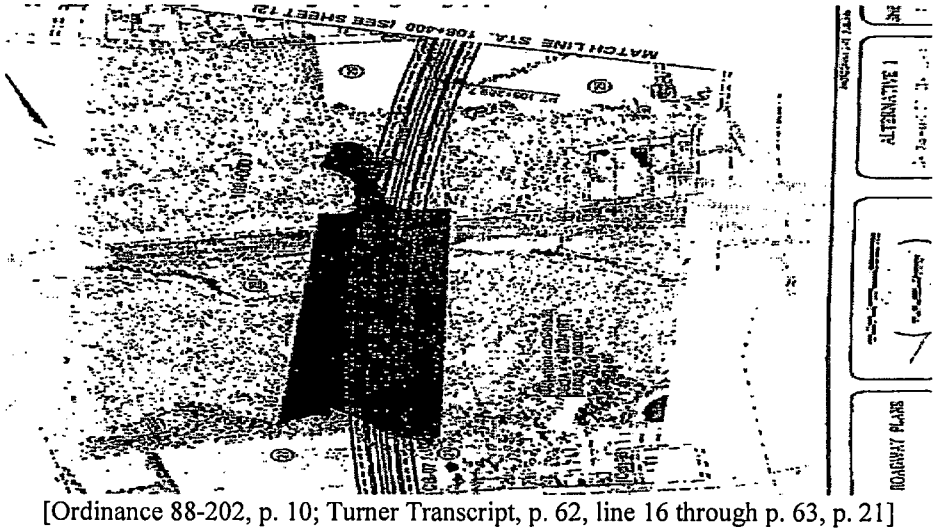
FACTS

The property in this case is known as Peachtree Plantation ("Property") and consists of 131 acres of raw land adjacent to the Intracoastal Waterway. The Property is located in the Socastee Townnship of Horry County and is subject to the laws and ordinances of Horry County.

South Carolina's Official Map Statute, S.C. Code §6-7-1210 *et seq.*, permits counties to establish official maps to reserve future locations of any street or highway for the implementation of comprehensive plans. Pursuant to this authority, Horry County enacted its Official Map Ordinance in 1999 for the purpose of "designating and reserving future locations of streets [and] highways...for future public acquisition." [Ordinance No 107-98](emphasis added). The Official Map Ordinance provides that once the County reserves certain property for acquisition, no

construction or improvements are permitted within the reservation area without prior exemption or exception. [Id. at p.4]. Shortly thereafter on October 5, 1999, Horry County created The Index Map to the Official Map, which showed the location of the first leg of a new four-lane highway known as the Carolina Bays Parkway. [Ordinance No. 153-99].

On July 2, 2002, Horry County passed Ordinance 88-202 (the "Ordinance") to amend the Index Map by "Adding the Right-Of-Way for the Carolina Bays Parkway from Highway 501 to Highway 17 By-Pass." [Ordinance 88-202]. The amended map shows where construction of the second leg of the Carolina Bays Parkway "will occur", and includes several detailed maps showing the "addition of the right-of-way" and depicting the specific location of Horry County's new four-lane highway. [Id.]. As shown on Sheet 11 of the amended Index Map, the highway bisects the Property and then crosses the Intracoastal Waterway toward Highway 17 By-Pass:



[Ordinance 88-202, p. 10; Turner Transcript, p. 62, line 16 through p. 63, p. 21]

On July 9, 2002, the Ordinance was recorded at the Horry County Register of Deeds in Deed Book 2497, Page 0986, indexed under the name of Horry County Council. [Id.]. By recording the Ordinance, the County gave public notice that it was enforcing its rights of acquisition and interests in the newly reserved right-of-way land, including the portion running through the middle of the Property, by immediately prohibiting any person from building or improving any land within

the reservation area. Under the terms of the Ordinance, this enforcement action was carried out "as a means of reducing acquisition costs." [Id.] The Official Map Ordinance provides several other enforcement provisions, up to and including imprisonment for up to thirty days against any person improperly building on the reserved right-of-way land. [Ordinance 107-98, p. 6].

On July 25, 2006, Jeffery Shoup and David Hix, through their company Peachtree Properties of North Myrtle Beach, LLC ("Peachtree Properties"), purchased the Property from the McLamb family for $22,520,000.00. [Deed]. Shoup and Hix planned to develop the land as a large residential complex with beautiful views and waterway access.

To finance the purchase, Peachtree Properties entered into two (2) loan agreements. First, R.E. Loans, LLC ("REL") loaned the company $18,520,000.00, securing the loan with a first mortgage on the Property ("First Mortgage"). [First Mortgage]. The second loan was from Appellant Jericho State for $4,263,888.00, which was secured by a second mortgage ("Second Mortgage"). [Second Mortgage].

At closing, Respondent Chicago Title issued a Loan Policy to each lender. The first Loan Policy was issued to REL, insuring REL's interest in the Property as holder of the First Mortgage, and a second Loan Policy was issued to Jericho State insuring its interest in the Property as lender under the Second Mortgage. [First Loan Policy, Second Loan Policy].

Policy Coverage. The first page of each Loan Policy describes the coverage afforded to the lenders subject to policy exceptions and exclusions. Specifically, the Policies insure for title defects as follows:

> "SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITION, AND STIPULATIONS, CHICAGO TITLE INSURANCE COMPANY, a Missouri corporation, herein called the Company, insures, as of the 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;"

Schedule A. Each Loan Policy includes a Schedule A, which identifies the Date of Policy, the insured parties, the limits of coverage, and a full description of the insured property. Both Policies share a Date of Policy of July 25, 2006, which is the date of closing.[1] The First Mortgage Loan Policy identifies the Insured as REL and its successors and/or assigns and provides coverage for title defects up to a limit of $17,071,873.33. The Second Mortgage Loan Policy identifies Jericho State and its successors and/or assigns as the named Insured and provides insurance for title defects up to $4,263,888.00.

Schedule B. Each Loan Policy also includes a Schedule B, which describes the status or condition of title to be insured by Chicago Title as of the Date of Policy. Specifically, Exhibit B lists "Exceptions from Coverage", which are specific items known by Chicago Title to have some effect on the Property's title. Chicago Title does not insure for items listed as an Exception because the Policy affirmatively discloses these items to the insured. The only Exception noted in the Policies is a recorded utility easement over the Property in favor of Grand Strand Water and Sewer Authority. Importantly, the Loan Policies do not except from coverage the Official Map Ordinance or the Ordinance or the amended Index Map which were publically recorded more than four years prior in the deed books at the Register of Deeds.

Each Loan Policy also includes the same boilerplate "Exclusions from Coverage" and "Conditions and Stipulations." These items, as more fully discussed below, identify certain items that are not covered by the policies and provide policy definitions, descriptions of each party's duties and responsibilities, and limitations on liability.

Importantly, at the time Chicago Title issued the Loan Policies, Jericho State did not know Horry County established the highway right-of-way nor that the county reserved a portion of the Property for acquisition. [Chwatt Transcript, p. 63, lines 13-18; p. 71, lines 6-25;p. 92, lines 1-3;

[1] The first Loan Policy contains a typographical error showing the year as 2007, but all parties agree 2006 is the correct year.

p. 141, line 1 through p. 142, line 17]. Instead, Jericho State completely relied on Chicago Title's Policy showing the only Exception to coverage being the water and sewer easement. [Id., at pg. 136, line 6-16; p. 137, lines 18-19]. To be sure, had Chicago Title revealed the Ordinance on the Policies, Jericho State would have never engaged in this loan transaction. [Id., at p. 63, lines 13-18; p. 134, lines 3-10; 140, lines 5-10; 141, line 1 through p. 142, line 17].

In 2007, Peachtree Properties defaulted on both loans. Jericho State made cure payments on the First Mortgage and foreclosed on its Second Mortgage, thus taking title to the Property subject to the First Mortgage. [7/7/2007 Foreclosure Order; 2/26/2008 Master's Deed.]. Throughout this process, Jericho State remained unaware the Peachtree Property was subject to the Ordinance and highway right-of-way, as evidenced by its counsel's testimony at the foreclosure hearing that their title examination found no other parties holding or claiming any interest of record in and to any of the Property. [Chwatt Transcript p. 133, lines 12-13; Transcript of Foreclosure Hearing, p. 12].

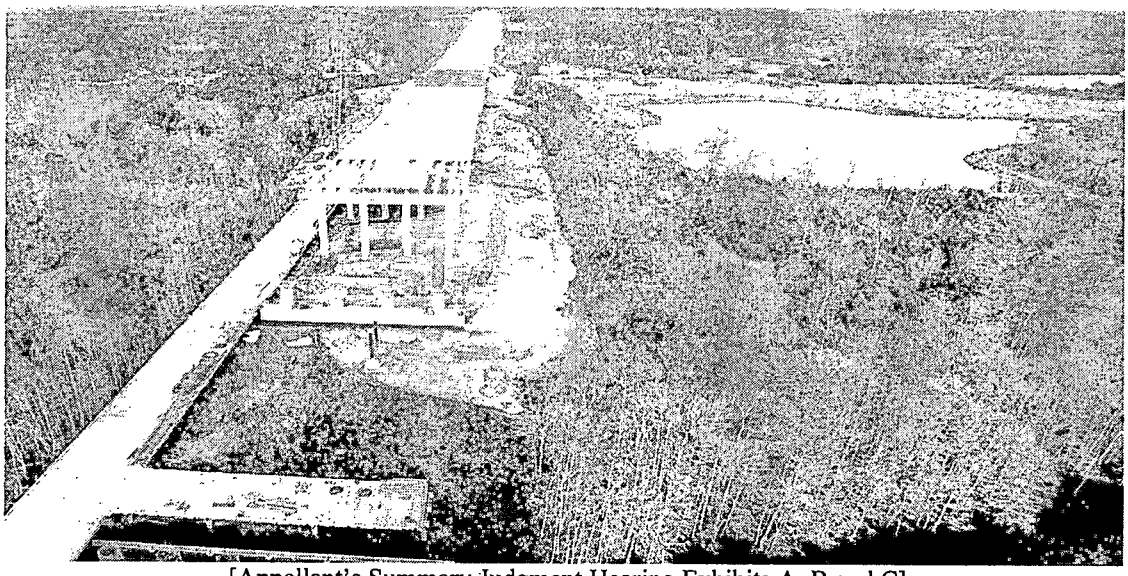
In 2008, about a year after taking title to the Property, Jericho State learned, for the first time, that the highway was going to be built through the middle of the Property, cutting it into two separate pieces. [Chwatt Transcript, p. 64, lines 8-18, Summary Judgment Hearing Plaintiffs' Exhibit C]. Thereafter, Jericho State also learned that Shoup and Hix previously agreed to donate the right-of-way land to Horry County to obtain a rezoning of the Property under Horry County Ordinance 76-07. [Id at 133, lines 4-17; Ordinance 76-07]. In an effort to preserve as much value in the Property as possible, Jericho State filed suit against Horry County seeking to set aside the donation. [PPD Lawsuit; Chwatt Transcript, p. 113, lines 4-17; p. 117, lines 9-23]. The lawsuit became moot and was dismissed when the SCDOT filed to condemn the right-of-way land.

On December 15, 2009, the SCDOT filed its condemnation proceeding to take 10.18 acres of the Peachtree Property for the Carolina Bays Parkway as previously reserved and protected by the Ordinance. [Condemnation Lawsuit]. This litigation lasted for 5 years.

In the meantime, on July 28, 2011, REL assigned the First Mortgage to Mortgage Fund '08 ("MF08"). [Corrective Assignment]. Less than two months later, MF08 filed Chapter 11 bankruptcy. The bankruptcy court transferred all of the debtor's assets, including the First Mortgage, to the Mortgage Fund '08 Liquidating Trust with instructions to sell those assets. [Bankruptcy Court Order 2/3/2012]. With the First Mortgage loan up for sale, Jericho State knew it would be in perilous situation, and could lose its interests and substantial investments in the Property, if a third party purchased the First Mortgage and foreclosed on the Property. [Svirsky Transcript, p. 34, line 22 through p. 35 line 4, p. 51, lines 9-20]. Therefore, Jericho State and its funding partner paid all of the back property taxes in return for a right of first refusal from the Liquidating Trust to purchase the First Mortgage. [Svirsky Transcript, p. 40, line 16 through p. 41, line 2]. When it came time to exercise its rights to purchase the First Mortgage, Jericho State could not afford the purchase price. [Svirsky Transcript, p. 32, line 11 – line 16]. Jericho State communicated its dilemma to an investment company who then formed Lynx Jericho, LLC to purchase the First Mortgage loan [Svirsky Transcript, p. 34, line 22 through p. 35 line 4, p. 51, lines 9-20]. Appellant Lynx Jericho took ownership of the First Mortgage by Assignment dated April 17, 2013. [Assignment to Lynx Jericho].

On December 5, 2014, the jury awarded Jericho State $2,100,000.00 in the condemnation case. [Condemnation Judgment]. After adding prejudgment interest and deducting attorney fees and costs, Jericho State paid the judgment's net proceeds to Lynx Jericho as First Mortgage holder. [Svirsky Transcript, p. 60, line 11 – p. 61, line 4].

There is now a four-lane highway and bridge under construction through the middle of Jericho State's property.



[Appellant's Summary Judgment Hearing Exhibits A, B and C]

Both Jericho State and Lynx Jericho filed title insurance claims with Chicago Title seeking coverage for the title defect created by the Ordinance and Respondent denied both claims. [2/26/2009 Jericho State claim letter; 12/3/2009 Chicago Title letter denying claim]. [6/21/2013 Lynx Jericho claim letter; 1/30/2015 Chicago Title letter denying claim]. This litigation followed.

Because the facts and issues are nearly identical, the cases were consolidated, and the parties filed reciprocal motions for summary judgment. The Special Referee denied Appellants' motion for summary judgment on liability only and granted Respondent's motion for summary judgment on the following grounds: (1) the Ordinance did not create an encumbrance on the Property, (2) the Ordinance did not render the Property unmarketable, (3) Exclusion #1 of the Loan Policy barred coverage, (4) Exclusion #2 of the Loan Policy barred coverage, (5) Exclusion #3(d) of the Loan Policy barred coverage, (6) Breach of the covenant and fair dealing is not an independent cause of action, and (7) Respondent did not engage in bad faith denial of insurance benefits. [Order Addressing Motions for Summary Judgment]. Appellants agree the covenant of good faith and fair dealing is subsumed within a claim for breach of contract, and therefore this

appeal pertains to the Special Referee's remaining grounds for granting summary judgment in favor of Respondent.

STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101 (1991). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant. *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607 (1976). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320 (2000).

ARGUMENT

"Generally, title insurance operates to protect a purchaser or mortgagee against defects in or encumbrances on title which are in existence at the time the insured takes title." *Firstland Village Associates v. Layer's Title Ins. Co.*, 277 S.C. 184 (1981). "The risks of title insurance end where the risks of other kinds begin. Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it." *Id* (emphasis added).

"The law strictly construes insurance policies against the drafter and in favor of coverage for the insured." *General Acc. Ins. Co. v. Safeco Ins. Companies*, 314 S.C. 63 (Ct. App. 1994). Insurance policy exclusions are construed "most strongly against the insurance company, which

also bears the burden of establishing the exclusion's applicability." *Owners Ins. Co. v. Clayton*, 364 S.C. 555 (2005).

A. THE ORDINANCE AND AMENDED INDEX MAP CREATED A DEFECT, ENCUMBRANCE OR BURDEN ON TITLE THAT IS A COVERED LOSS UNDER THE POLICIES.

The Special Referee erred in granting summary judgment on Appellants' breach of contract claim by concluding the Ordinance and accompanying maps were not covered defects or encumbrances on title. The Special Referee further erred by failing to interpret the Policies' coverage provisions against the drafter and in favor of coverage as required by applicable law.

Subject to the Policies' stated exceptions and exclusions, the Policies insure against loss or damages sustained or incurred by the insured by reason of "Any defect in or lien or encumbrance on the title." While Chicago Title's Loan Policies do not define these terms, South Carolina law provides guidance: an encumbrance is "a right or interest in the land granted which may subsist in third persons to the diminution in value of the estate although consistent with the passing of the fee." *Martin v. Floyd*, 282 S.C. 47 (S.C. App. 1984); *Truck South v. Patel*, 339 S.C. 40 (2000). "An encumbrance is a burden on land depreciative of its value, such as a lien, easement or servitude, which, though adverse to the interest of the landowner, does not conflict with the landowner's conveyance of the land in fee." *Morris v. Lain*, 176 S.C. 310 (1935). "A title insurer is generally liable for losses or damages caused by defects in the property's title, and 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." *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610 (2012). Thus, South Carolina courts recognize that a third party's interest in property, which is a burden on land that causes a decrease in value, is a defect and encumbrance to title that falls within the coverage provisions of a title insurance policy.

The threshold question, therefore, is whether a third party had any "right or interest" in the insured Property, which was a "burden on the land", after Horry County recorded the Ordinance and accompanying maps in 2002. A plain reading of the Ordinance reveals that not only did Horry County have a right and interest in the Property by reserving a right-of-way running through the middle of it, the Ordinance also specifically describes the scope and effect of the County's interest in the reserved Property.

First, the Official Map Ordinance describes the nature of Horry County's right and interest as a reservation of land. The County created its Official Map and Index Map for the purpose of designating and "reserving" the location of streets and highways, including the Carolina Bays Parkway. The Official Map Ordinance also prohibits the issuance of building permits in conflict with "the reservations of the Official Map." [Official Map Ordinance, p. 4]. The Ordinance's use of the terms "reserve" and "reservation" should be given their plain and ordinary meaning. *See, CRFE, LLC v. Greenville County Assessor*, 395 S.C. 67 (2011). "Reserve" means "to keep back, to retain, to keep in store for future or special use, and to retain or hold over to a future time." *Black's Law Dictionary* (5th Edition, 1983). Thus, under the plain terms of the Ordinance, the nature of the County's interest is reserving the land, setting it aside for future use and prohibiting any activity that interferes with its express reservation for use as a highway. This characteristic of the Ordinance is unique and is not found in common land use regulations, such as wetlands or zoning laws, which do not reserve private property for government use.

Second, the Ordinance describes the character of Horry County's right and interest in the land as a "right-of-way" and the Ordinance attaches maps specifically showing where the highway will run, including through the insured Property. Again, the Official Map Ordinance defines "right-of-way" as "land reserved, used, or to be used for a road, cross walk, railroad...or other public purpose." [Ordinance 107-98]. By designating the reserved land as a "right-of-way", Horry County

could not more clearly describe the type of interest it claims in the Appellant's insured Property. This too is unlike common land use regulations that do not designate public right-of-ways on private property but merely regulate the limits of the owner's use of his property.

Third, the Ordinance describes the purpose of Horry County's right and interest in the land. In this regard, the County reserves the right-of-way land for an acquisition that will occur. As such, the Ordinance reveals that a definite, future acquisition by the County to build a highway is the sole reason for reserving and setting aside this right-of-way land. This also contrasts with common land use restrictions, which do not state that the government will acquire private property.

Fourth, the Ordinance describes Horry County's economic right and interest in the land, as Horry County affirmatively bars any change in use of the property to "minimize its acquisition costs". In other words, since acquisition will occur, the Ordinance protects the County's economic interests in the insured Property by minimizing the Property's value. Since the insured Property is unimproved land, the County's economic interests to minimize the land value adversely affects the value of the insured Property to owners and the value of its security for its loans. Again, this is unlike common wetlands or zoning regulations that do not freeze and safeguard governmental financial interests in private property and reduce that of the owner.

Finally, the Ordinance describes the very substantial degree to which Horry County protects and enforces its interest in the insured Property. The County vigorously enforces its interest, as any person violating the Ordinance "shall be guilty of a misdemeanor, and upon conviction shall be imprisoned for a period not to exceed thirty (30) days and/or fined not more than five hundred ($500) dollars for each offense." [Id. at Section 6.3]. No doubt, the County is willing to send someone to jail to enforce its economic interests in the reserved right-of-way on the insured Property.

Thus, the Ordinance specifically reserves a significant piece of the insured Property for an acquisition that will occur, secures the County's economic interests in the land, and enforces the land reservation with restrictions and criminal penalties. Clearly, these facts show a third party's "right or interest" in the land, which is a burden on the land depreciative of its value, and therefore, the Ordinance and maps clearly create a title defect or encumbrance on the insured Property.

The Special Referee erroneously concludes the County had no interest in the land because the Ordinance is no more than a simple land planning tool. [Decision, p. 12]. To the contrary, not only does the Ordinance establish Horry County's plan, but it also begins *implementation* of that plan. The Ordinance actively put the County's plan into motion by affirmatively reserving a significant portion of the insured Property, specifically designating that land as a right-of-way, and strongly enforcing its economic interests in the land, all of which the County publically recorded in the Deed Books at the Horry County Register of Deeds. To be sure, if the Ordinance was only a hypothetical idea or mere plan and nothing more as suggested by the Special Referee, Horry County would not need to immediately and affirmatively protect its economic interests by prohibiting construction on the reserved land for the sole purpose of suppressing its value so the government's acquisition costs are reduced. If recording the Ordinance and maps did not mark the beginning of the County's actions to acquire the right-of-way, the Special Referee's interpretation would leave the status of the acquisition of the Property in an indefinite no-man's land.

The Special Referee also misapprehends the effect of the Ordinance when he concludes "the Ordinance, like other land planning tools, only affected the use of the Property, not its title." [Decision, p. 12]. Importantly, use is limited to what a landowner may or may not do with the land; on the other hand, an encumbrance is a third party's right and interest in the land. In this regard, the Ordinance goes far beyond simply affecting use of the land, as such is commonly seen in wetlands or general zoning laws, it affirmatively reserves a portion of the insured Property for

acquisition and immediately enforces restrictions to protect the government's interest in acquiring the land at the lowest price possible.

The Special Referee further erred by finding that the Ordinance did not give the County any right or interest in the land because "a contrary conclusion could wreak havoc in the title insurance industry", as the Official Map is not indexed under property owner names and it does not appear in the chain of title. [Decision, p. 12]. This anxiety over indexing and chain of title ignores the very nature of title insurance: it is intended to protect the insured from defects and encumbrances that may not be found in a standard title search. The South Carolina Federal District Court, referencing Respondent's expert Busnell Nielsen, explained this protection as follows:

> "As to matters that are outside the public record and not normally discoverable via standard title examination—e.g., wild or stray deeds, instruments filed outside the chain of title, frauds, forgeries, conveyances made under undue influence or by minors or incompetents—the title insurance policy normally provides coverage, but will not if an insured has knowledge of these matters outside the public record." *Investors Title Ins. Co. v. Bair*, 2007 WL 678625 (D.S.C. 2007).

As similarly stated by Professor Barlow Burke in the *Law of Title Insurance*, Third Edition, §2.01[B] (Walters Kluwer Law & Business, Supp.2013):

> "Title insurance insures not only on-record defects in title, but also covers defects not revealed by an abstractor's search of the public records related to real property. Such defects are known to title insurers as 'off-record risks'. They are interests not of record but nevertheless valid. Not even the most professional, thorough, and competent title search will identify them."

The title insurance company defines what it insures and does not insure, and it is the insurance company's responsibility to protect itself against this perceived "havoc" when they drafted the policy, not the court's. "The court's duty is limited to the interpretation of the contract made by the parties themselves regardless of its wisdom or folly, apparent unreasonableness, or failure [of the parties] to guard their interests carefully." *B.L.G. Enterprises, Inc. v. First Financial Ins. Co.*, 334 S.C. 529 (1999). A plain reading of the Loan Policies reflects the insuring provisions

do not require defects or encumbrances to be indexed under the property owners' names or in any other particular manner. Nor do the Policies' insuring provisions require that defects or encumbrances appear in the chain of title. In fact, the insuring provisions do not even require that defects or encumbrances be recorded in the public records at all. Indeed, the Policies insure for "any defect in or lien or encumbrance on the title" with no such strings attached, unless otherwise barred by some specific exception or exclusion. "Words cannot be read into a contract which impart intent wholly unexpressed when the contract was executed." *Blakeley v. Rabon*, 266 S.C. 68 (1976). If the title insurance company wanted to limit covered defects and encumbrances to only those items fully indexed within the chain of title, it should have said so in the Policies.

The Special Referee acknowledges that "a title insurer could affirmatively and unequivocally draft the Policies' insuring provisions to exclude any matters set forth on an official map." [Decision, p. 13]. The Appellants wholeheartedly agree, and the Special Referee should have interpreted the policies in light of these conspicuously absent terms. Rather than doing so, however, the Special Referee expresses concern that "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." [Decision, p. 13]. This concern is misplaced. First, the Appellants do not contend the Ordinance "transfers title" but that it encumbers title. Moreover, it is the Policies' insuring language as drafted by the insurer that determines coverage in this case, not a deed warranty that pertains only to a third party grantee. Because the purpose of title insurance is to protect the insured from a defect or encumbrance, including those not found in a standard title search, a proper interpretation of the Loan Policies' insuring provisions will have no impact on the law of general warranty deeds.

Finally, the Special Referee erred by relying on *Kiriakides v. The School Distrct of Greenville County*, 382 S.C. 8 (2009) to conclude the Ordinance did not create an encumbrance because "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 right-of-way to various tracts." [Decision, p. 12, 13]. This doomsday proclamation fails to take into account that *Kiriakides* is completely irrelevant to the insuring provisions of a title insurance policy. Indeed, *Kiriakides* is limited to an inverse condemnation claim where a school district served and quickly abandoned a notice of condemnation. The school district did not assert a claim or interest in the plaintiff's property, did not make any public filings, and did not impose any regulations or restrictions on the property. In this case, on the other hand, the issue is whether a title insurance policy covers the defect and encumbrance created by the publically filed Ordinance, which was authorized by a state statute and enforced the government's economic interests in the Property by affirmatively suppressing the value of the reserved land for the sole purpose of purchasing the property at a reduced price. Rather than properly evaluate the Loan Policies' straightforward insuring provisions, the Special Referee appears to create an inverse condemnation public policy concern that is not raised in the pleadings.

Appellants purchased title insurance to protect themselves from "any defect in or lien or encumbrance on the title", including any such item not normally discoverable in a standard title search. Because the Ordinance and maps expressly set forth Horry County's reservation of a right-of-way on a sizeable portion of the insured Property, and protects the County's economic interests in the land, it is a title defect and encumbrance and therefore a covered loss under the Policies. The Special Referee erred by failing to interpret the insuring provisions in favor of coverage and by granting Respondent's Motion for Summary Judgment on this issue.

B. THE ORDINANCE AND AMENDED INDEX MAP CREATED UNMARKETABILITY OF TITLE THAT IS A COVERED LOSS UNDER THE POLICIES.

The Special Referee erred in granting summary judgment on Appellants' breach of contract claim by concluding the Ordinance was not a covered loss because it did not render the Property unmarketable. [Decision, p. 12]. The Special Referee further erred by failing to interpret the Policies' coverage provisions against the drafter and in favor of coverage.

The Chicago Title Loan Policies insure against loss or damage sustained or incurred by the insured by reason of "unmarketability of title." The Policies define unmarketability of title as "an alleged or apparent matter affecting the title to the land, not excluded or excepted from a 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." [First and Second Loan Policies].

Delivery of marketable title not only requires the title be free from defect and encumbrance, the title must also be free from any reasonable probability of litigation. "A purchaser of realty cannot be required to take doubtful title, and if there is a reasonable probability of litigation with respect to the title, it is unmarketable." *Scalise Development, Inc. v. Tidelands Investments*, 392 S.C. 27 (Ct. App. 2011), quoting *Sanders v. Coastal Capital Ventures*, 296 S.C. 132 (Ct.App. 1988). "To be marketable, a title need not be flawless; rather, a marketable title is one free from encumbrances and any reasonable doubt to its validity." *Id.*

The Special Referee's analysis seems to lump together the concepts of encumbrance and marketability, despite the Policies treating these title issues as distinct types of covered losses. Nonetheless, it is clear the Ordinance not only creates an encumbrance, but it also creates a reasonable probability of litigation with respect to the reserved right-of-way land. Because the Property was reserved for a future acquisition where construction of the highway "will occur", a

future condemnation proceeding was at least a "reasonable probability", if not a near certainty. Moreover, this "reasonably probability" of litigation is fully supported by the Ordinance's immediate implementation of restrictions designed solely to reduce the government's costs to acquire the Property. The government said this "will occur" and it did occur when the SCDOT filed litigation in 2009, taking the very land reserved by the Ordinance. Because the Ordinance protects the County's economic interests in the insured Property for an acquisition that "will occur" and creates a reasonable probability of litigation with respect to that land, it meets South Carolina's definition of unmarketable title.

The Special Referee concludes that ordinances and resolutions that regulate the use of property do not affect title and therefore the Ordinance in this case does not render title to the right-of-way land unmarketable. [Order p. 12]. The Appellants concede there are many laws that regulate or restrict the use of property but create no third party claim to the property. Wetlands restrictions are the most common examples of such laws, but these would also include occupancy restrictions, subdivision requirements, and general zoning and permitting matters. Notably, these laws limit the use of land by its owner, but they do not create for the government, or any other third party, a physical or economic interest in the land. Nor do these laws create highway right-of-ways or reserve land for future acquisition that will occur, and importantly, they do not present a "reasonable probability" of litigation as to the government's express interest in the land. The Special Referee erred by treating the Ordinance the same as other general types of land use regulations or zoning laws because its unique character clearly impairs marketability. As such, the Special Referee failed to interpret the Loan Policies in favor of coverage and erred in granting Respondent's Motion for Summary Judgment on this issue.

C. THE COVERED LOSS IS NOT EXCLUDED BY POLICY EXCLUSION #1

The insurance company bears the burden of establishing an exclusion's applicability and these exclusions are construed "most strongly against the insurance company." *General Acc. Ins. Co. v. Safeco Ins. Companies,* 314 S.C. 63 (Ct.App 1994). Thus to grant summary judgment on an exclusion, without a trial on the merits, the exclusion must exist without any ambiguity or reasonable question.

Policy Exclusion #1 generally excludes from coverage governmental use restrictions, such as building codes, zoning laws and environmental regulations. Moreover, importantly, there is a public records exception to the exclusion, which applies when a notice of enforcement of the law has been recorded in the public records. This exclusion states as follows:

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

1. The Ordinance is Not Merely a Land Use Restriction or Regulation.

The Special Referee erred by concluding Exclusion #1 bars Appellant's claims based on an overly broad interpretation of the exclusion. [Decision, p. 14, 15]. On its face, Exclusion #1 applies to laws relating to land use only, and its language illustrates this limited scope by describing the types of excluded laws to include wetlands restrictions, occupancy limitations, subdivision requirements, and general zoning matters.

Rather than exercising his duty to interpret Exclusion #1 "most strongly" against the insurance company as required by law, the Special Referee instead *broadens* its scope of exclusion

and fails to account for those provisions of the Ordinance that go far beyond simple land use regulation. Of course, common building and zoning laws and wetlands restrictions, as such are identified in Exclusion #1, do not create third party rights and interests in the land, but the Ordinance clearly does. Similarly, those same common building and zoning restrictions as described in Exclusion #1 do not regulate land use solely for the purpose of minimizing the government's acquisition costs and protecting its economic interests in the land, but the Ordinance most certainly does. Indeed, nothing in Exclusion #1 excludes laws that create an encumbrance or a right or interest in land in favor of the government such as those created by the Ordinance.

The Special Referee erred by concluding Exclusion #1 applied to the Ordinance and further erred by failing to construe the Exclusion in favor of the insured and most strongly against the insurance company, and therefore his decision to grant the Respondent's motion for summary judgment on the breach of contract action should be reversed. To the extent that Exclusion #1 is ambiguous as to its scope, the Special Referee failed to interpret it in favor of coverage.

2. The Ordinance Meets the "Public Records" Exception to Exclusion #1.

To the extent Exclusion #1 applies to the Ordinance, which Appellants deny, the exclusion still does not bar coverage because the Ordinance and its amended Index Map is recorded in the public records, which clearly meets the exception to the exclusion.

As stated above, Exclusion #1 does not apply "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." The Policies define public records as "records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge." S.C. Code § 30-7-10 identifies these established records to include the Deed Books of Horry County, and therefore the Ordinance and accompanying maps, recorded in Deed

Book 2497 at Page 0986, squarely meets this definition. Truly, if something recorded in the Deed Books of Horry County is not a public record, what is?

Nonetheless, the Special Referee flatly rejects Appellant's contention that the recorded Ordinance and amended Index Map is a public record. [Order, p. 17]. Appellants' expert witness title examiner, David Turner, who has examined titles in Horry County for over 50 years, provided an affidavit confirming the Ordinance and its amended Index Map are recorded in the Deed Books and "are parts of the public records of Horry County, South Carolina and are freely accessible by both the general public and title examiners." [Turner Affidavit]. While such an opinion is seemingly obvious on its face, the Special Referee nonetheless rejects this because the Ordinance is not indexed under property owner names. [Order p. 17]. This defies common sense and confuses the distinction between a public record and chain of title. Moreover, the Special Referee's conclusion is contrary to the Policies' public records definition and is contrary to the purpose of title insurance to include coverage for defects not normally found in a title examination.

Notably, the Policies' definition of public records does not contain any indexing or chain of title requirements where they easily could have. By adding this requirement where it does not exist in the Policy definition, the Special Referee improperly broadens the scope of the Exclusion #1 rather than construing it most strongly against the insurer. To the extent that Respondent asserts the Policies' definition of public records should be interpreted by this Court to implicitly exclude public records that are recorded in the Deed Books *but* are not indexed within the chain of title, despite the complete absence of any such limiting language in the Policies, this ambiguity must be construed most strongly against Respondent.

In *Whitlock v Stewart Title Guaranty Company*, 2011 WL 4549367 (S.C.D. 2011)[2], the court addressed a very similar factual situation involving an Horry County resolution that

[2] The Special Referee mistakenly identified this an unpublished decision, when in fact it is an unreported decision with a Westlaw citation rather than F.Supp.2d citation.

prevented the issuance of building permits for new construction. Notably, the resolution was not recorded at the Horry County Register of Deeds. Similar to Exclusion #1 in the instant case, the Stewart Title policy excluded governmental regulations affecting land use, while the public records exception to the exclusion provided that the "exclusion does not apply to violations or the enforcement of these matters which appear in the public records at Policy Date." The insurer claimed the public records exception did not apply because the resolution was not a public record since it was not publically recorded at the Register of Deeds. After considering the policy's definition of public records (which is very similar to Chicago Title's definition), the court determined the term "public records" was ambiguous. Interpreting the terms against the drafter and in favor of coverage, the court concluded the resolution met the public records exception and the exclusion therefore did not bar coverage under the title insurance policy.

The facts of this case clearly show the Ordinance meets the public records exception to the Exclusion #1. First, the facts of this case mirror the facts of *Whitlock*. They also mirror the facts of *Lyons v. Fidelity Nat. Title Ins. Co*, 415 S.C. 115 (Ct. App. 2015), which, as correctly noted by the Special Referee, was vacated due to a settlement while the parties' summary judgment motions in this case were pending. Second, the Ordinance was recorded at the Horry County Register of Deeds as of the Date of Policy. As such, the Ordinance is recorded in a manner entirely consistent with the plain language of the Loan Policy's "public records" definition and it provides notice to the world of its enforcement provisions for any violation.

The Special Referee erroneously concludes the public records exception does not apply because "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." In this regard, the Special Referee failed to consider the Official Map Ordinance's definition of "right-of-way", which includes "land reserved, used, or to be used for a road". Moreover, the

Appellants do not contend, and have never contended, that the Ordinance transferred title, but instead have maintained only that the Ordinance created a defect or encumbrance on the Property and rendered the Property unmarketable, thus triggering coverage.

The Special Referee further erred by concluding the public records exception does not apply because the Ordinance is not "a notice of a violation or alleged violation of the Ordinance" and because there is no evidence of an enforcement proceeding. [Order p. 15]. The Special Referee misreads the exception by limiting its application only to violations of the Ordinance, as the exception also applies to public records providing "notice of the enforcement thereof", which is very similar to the public records exception discussed in *Whitlock*. As stated above, the publically recorded Ordinance provides ample notice to the world that Horry County began immediate and unequivocal enforcement of its rights and economic interests to the land by imposing restrictions and criminal penalties. To the extent that "notice of the enforcement thereof" is ambiguous or capable of multiple meanings, it must be construed in favor of the insured and against the insurance company, which the Special Referee failed to do.

The Special Referee failed to interpret the public records exception to the exclusion most strongly against the insurer and in favor of coverage and further failed to find the exception was applicable to the publically recorded Ordinance, and therefore his decision granting Respondent's motion for summary judgment on this issue should be reversed.

D. THE COVERED LOSS IS NOT EXCLUDED BY POLICY EXCLUSION #2

The Exclusion #2 excludes coverage for losses resulting from:

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

The Special Referee concludes Exclusion #2 bars the Appellants' claims and that the exception to the exclusion does not apply because the Ordinance is not a condemnation proceeding under the South Carolina Eminent Domain Procedure Act ("Act"). [Decision, p. 14, 15].

This is erroneous for several reasons. First, Appellants do not contend the Ordinance is a condemnation proceeding under the Act and do not seek coverage for the 2009 condemnation lawsuit. Instead, Appellants assert the Ordinance created an encumbrance and rendered the title unmarketable as of the Policies' date of July 25, 2006. In this regard, the Special Referee erred by improperly applying an eminent domain exclusion to Appellants' pre-existing encumbrance and unmarketability claim.

Second, Exclusion #2 can only apply if the Ordinance is considered to be an act of eminent domain. If it is not, then Exclusion #2 is completely irrelevant to the facts of this case. If it is, then Exclusion #2 still does not apply because the Ordinance and maps were recorded in the public records as of the Date of Policy.

Finally, the exception to Exclusion #2 applies because there is evidence that the Ordinance constitutes a "taking which has occurred prior to the Date of Policy". The Special Referee erroneously treats an eminent domain proceeding under the Act to be synonymous with a taking, but those terms are not synonymous under South Carolina law. To be sure, a "taking" can occur when a government agency takes private property without formally exercising its power of eminent domain through a condemnation lawsuit and may exist by physical appropriation or government-imposed limitations on the use of private property. *Carolina Chloride, Inc. v. S.C. Dep't. of Transp.*, 391 S.C. 429 (2011); *Byrd v. City of Hartsville*, 365 S.C. 650 (2005). "When the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas v SC Coastal Council*, 505 US 1003 (1992)(emphasis in original). In this case, since the insured

Property is vacant, the Ordinance and maps had the effect of depriving the owners of all economically beneficial use of that land reserved for acquisition by Horry County, thus rendingerin the entire 131 acre tract unmarketable. This deprivation continued until the reserved land was condemned and taken through legal force by the SCDOT.

The Appellants found themselves in a situation similar to the plaintiffs in *Kirby v. North Carolina Dept. of Trans.*, 368 N.C. 847, 786 S.E.2d 919 (2016), in which the North Carolina Supreme Court evaluated the effect of a Roadway Corridor Official Map that describes land identified by the NCDOT for acquisition for future use as a highway. The official map in the *Kirby* case has many characteristics similar to Horry County's Ordinance, such as its recordation at the county register of deeds and prohibition of any improvements on the future highway land for an indeterminate period of time. The N.C. Supreme Court concurred with the analysis of the lower court finding that the maps allowed the government to "foreshadow which properties will eventually be taken for roadway projects and in turn, decrease the future price the state must pay to obtain those affected parcels." Although the NCDOT asserted the official map was a mere planning tool, The *Kirby* Court concluded that the adverse effect of the official maps constituted a "taking" and remanded the case for a determination of damages. While *Kirby* does not address whether North Carolina's Roadway Corridor Official Map constitutes an encumbrance or rendered title unmarketable under a title insurance policy, the case is instructive on those issues as well, fully analyzing the government's physical and economic interests in the affected land.

Based on the above, Exclusion #2 does not apply because the Ordinance is not an eminent domain proceeding under the Act, the Ordinance and maps are recorded in the public records as of the Date of Policy, and there is evidence that the Ordinance constitutes a taking and meets the exception to Exclusion #2. Because the Special Referee improperly applied the exclusion to the

Appellant's claims and failed to interpret the exclusion most strongly against the Respondent and in favor of coverage, his order granting summary judgment on this issue should be reversed.

E. THE COVERED LOSS IS NOT EXCLUDED BY POLICY EXCLUSION #3(d)

Exclusion #3(d) excludes coverage for "defects, liens, encumbrances, adverse claims or other matters ... attaching or created subsequent to the Date of Policy".

The Special Referee concludes Appellants' claims are excluded by Exclusion #3(d) because the condemnation lawsuit took place subsequent to the effective dates of the Policies. [Decision, p. 17]. Again, Appellants do not seek coverage for the 2009 SCDOT condemnation lawsuit. Instead, Appellants assert the 2002 Ordinance creates an encumbrance and renders the title unmarketable. Because the Ordinance was filed nearly four years prior to the Policies' effective date, Exclusion #3(d) is wholly inapplicable to the facts of this case. The Special Referee's conclusion that Exclusion #3(d) excludes coverage is clearly erroneous because the Ordinance predates the date of policy, and therefore his decision granting Respondent's motion for summary judgment on this issue should be reversed.

F. THE SPECIAL REFEREE ERRED BY FINDING THERE WAS NO EVIDENCE OF BAD FAITH DENIAL OF INSURANCE BENEFITS.

"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). An insured may recover damages for a bad faith denial of coverage if he or she proves there was no reasonable basis to support the insurer's decision to deny benefits under a mutually binding insurance contract. *Varnadore v. Nationwide Mut. Ins. Co.*, 289 S.C. 155 (1986); *Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336 (1983). An insurer is not insulated from liability for bad faith merely because there is no clear precedent resolving a

coverage issue raised under the particular facts of the case. *Mixson v. American Loyalty Ins. Co.*, 348 S.C. 394 (2002).

The Special Referee granted Respondent's summary judgment motion on the bad faith cause of action because "Chicago Title had a reasonable, good faith basis for contesting the claims and has succeeded in contesting coverage." [Decision, p. 18]. However, as set forth below, there is ample evidence of record that shows the Respondent did not act in good faith and therefore summary judgment is improper, especially if all inferences are to be interpreted in a light most favorable to the Appellants.

Respondent denied Appellant Jericho State's claim on two grounds. The first basis for denial is under Exclusion #1 because "there is no evidence in the public records of a notice of the enforcement of the ordinance 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." [12/3/2009 Letter]. This basis is faulty on its face, as the Ordinance was publically recorded at the Horry County Register of Deeds and contradicts the Respondent's own definition of public records in its policy. Moreover, as discussed above, the Ordinance is self-effectuating and the county's enforcement of its rights began immediately upon recording the Ordinance and maps because the landowners are instantly enjoined from use of the land. Appellants contend this constitutes some evidence of bad faith and unreasonableness that precludes summary judgment on this issue.

The second ground given by Respondent is an alleged failure by Jericho State to provide proof of loss. [Id.]. However, this is not a valid reason to deny the claim because S.C. Code 38-59-10 provides that if the insurer fails to provide the insured with a proof of loss form within 20 days of the claim, then the insured is deemed to have complied with any requirement to provide a proof of loss. Because Chicago Title did not provide such a form,

Jericho State is deemed, as a matter of law, to be in compliance with this requirement. Chicago Title is presumed to know the law, and as such, denying the claim on this improper basis is evidence of bad faith and unreasonableness that precludes summary judgment on this issue.

Respondent denied Appellant Lynx Jericho's claim on several different grounds, none of which serve as a basis in their previous letter denying Jericho State's claim. First, Respondent denied the claim asserting the Ordinance is not a defect, lien or encumbrance on the Property but was instead merely "a proposed route" and the county did not assert "ownership" of the property. [1/30/15 Letter]. As argued previously, denial on this basis is inconsistent with a plain reading of the Ordinance, as Horry County designates its interest in the Property as a "right-of-way" for acquisition that will occur, and to protect the County's economic interests, the Ordinance stops the landowner from any use of the undeveloped Property. The denial is also inconsistent with South Carolina law defining encumbrance as a third party's interest in the land that does not require an assertion of ownership. *Martin v. Floyd*, 282 S.C. 47 (S.C. App. 1984); *Truck South v. Patel*, 339 S.C. 40 (2000). Respondent's failure to read the plain language of the Ordinance, and then to invent a requirement that an encumbrance must include a third parties' claim of ownership, is at least some evidence of unreasonableness and bad faith that precludes summary judgment on this issue.

Second, Respondent denied Lynx Jericho's claim asserting the Ordinance is not a public record as defined in the Policy because it is not indexed to the property owner or property. [Id.]. In doing so, Respondent ignores its own definition of public records and manufactures a new indexing requirement that is not present in its own policy. Appellants contend denial on this ground is at least some evidence of unreasonableness and bad faith that precludes summary judgment on this issue.

Third, Respondent denies the claim asserting that "at most, the ordinance is notice that the county may, in the future, bring a condemnation action" which is excluded by Exclusion #2. [Id.]. In this regard, Respondent takes the improper position that a notice of a future condemnation triggers Exclusion #2 despite the exclusion being clearly limited to only actual eminent domain proceedings under the Act. Moreover, Respondent again asserts the Ordinance, which is publically recorded in the Deed Books at the Register of Deeds Office, is not a public record. Appellants contend denial on this ground is at least some evidence of unreasonableness and bad faith that precludes summary judgment on this issue.

Fourth, Respondent denies the claim asserting Lynx Jericho has already been fully compensated for the diminution of value of the property through the condemnation process.[Id.]. However, Respondent fails to use the proper standard regarding valuation dates for the two types of claims: a plaintiff's loss in a condemnation proceeding is measured from the date of condemnation, while a loss under the Loan Policies is measured from the date of policy. *See*, S.C. Code §28-2-440 (in all condemnation actions, the date of valuation is the date of the filing of the condemnation notice); *Stanley v. Atl. Title Ins. Co.*, 377 S.C. 405 (2008)(the purpose of title insurance is to place the insured in the position that he thought he occupied when the policy was first issued). It should be noted that the condemnation action used a valuation date in 2009, during the depths of the "Great Recession" while the date of the policies is 2006, arguably the height of the "boom." While Appellants concede that the condemnation proceeds may act as an offset to the claimed damages under the Policies, Respondent ignores its own policy language and uses the wrong measurement of damages to deny the claim, which is at least some evidence of unreasonableness and bad faith that precludes summary judgment on this issue.

Fifth, Respondent denied Lynx Jericho's claim under Exclusion 3(b), which excludes any defect not known to Company and not recorded in the public records, because it again asserts the Ordinance is not a public record. [Id.]. Respondent's reason again ignores the fact that the Ordinance was publically recorded at the Register of Deeds and further ignores Respondent's own definition of public records, and therefore this is at least some evidence of unreasonableness and bad faith that precludes summary judgment on this issue.

Finally, Chicago Title denied Lynx Jericho's claim based on Exclusion 3(a), which excludes any defect that was created, suffered, assumed or agreed to by the insured, because Lynx Jericho purchased the First Mortgage with knowledge of the Ordinance. [Id.]. This basis also ignores the plain language of the Loan Policy, as the Policy insures risks "as of the Date of Policy", and nothing in the Policy suggests that a particular title defect is excluded from coverage because the insured learns of it *after* the Date of Policy. Indeed, it is absurd to suggest there is no coverage for defects known before the policy and no coverage for those discovered and known after the policy, as there would be no risks left to insure. *See*, *CAN Enterprises v. SC Health and Human Services*, 296 S.C. 373 (1988) (Common sense and good faith are the leading touchstones of construction of the provisions of a contract); *Firstland Village Associates v. Layer's Title Ins. Co.*, 277 S.C. 184 (1981)(Title insurance is unique in that it is retrospective, not prospective).

Importantly, Lynx Jericho is the assignee of the First Mortgage, and as assignee, it "stands in the shoes of its assignor...and should have all the same rights and privileges, including the right to sue on the contract, as the assignor." *Twelfth RMA Partners v. National Safe*, 335 S.C. 635 (S.C. App. 1999). In fact, pursuant to the Policy's Conditions and Stipulations Sections 1(a)(i), Respondent can only apply this exclusion to Lynx Jericho by proving that REL, the assignor and predecessor insured, assumed or agreed to the defect as of the Date of Policy. Because

Respondent's basis contradicts the plain terms of its own Loan Policy, this is at least some evidence of unreasonableness and bad faith that precludes summary judgment on this issue.

CONCLUSION

The Ordinance created a third party interest in, and burden upon, the insured Property by reserving a right-of-way through the middle of it and enforcing the government's interests by immediately prohibiting new construction to suppress land values and reduce acquisition costs in the inevitable condemnation proceeding. Thus, the Ordinance and maps created an encumbrance and unmarketability of title that are covered losses under the Policies. The Special Referee's conclusion that the term "public records" does not include items publically recorded in the Deed Books of Horry County's Register of Deeds is not only illogical but also improperly adds new indexing and chain of title requirements that do not exist in the Policies. Exclusion #1 does not apply to the Ordinance, and even if it did, the exception to the exclusion applies because the Ordinance and its enforcement provisions were recorded in the public records. Exclusions #2 and #3(d) are inapplicable to this case because they could only apply to the 2009 eminent domain proceeding which is not the basis of Appellants' claims. Indeed, Appellants assert damages arising as of the date of policy in 2006 due to the title defect created by the Ordinance, not the date of condemnation during the depths of the Great Recession. Finally, there is sufficient evidence of record creating a genuine issue of fact as to whether Respondent engaged in bad faith denial of Appellants' claims. Based on the above arguments, the Special Referee's Order for summary judgment should be reversed.

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September 21, 2017

THE STATE OF SOUTH CAROLINA

IN THE SOUTH CAROLINA COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS
Karl a. Folkens, Special Referee

Appellate Case No.: 2017-001646

Jericho State Capital Corp. of Florida.....Plaintiff,

v.

Chicago Title Insurance Company.....Defendant,

AND

Lynx Jericho Partners, LLC.....Plaintiff,

v.

Chicago Title Insurance Company.....Defendant.

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

And Chicago Title Insurance Company is the Respondent.

PROOF OF SERVICE

As an employee of Newby Sartip Masel & Casper, LLC, attorneys for the Appellant, I certify that I have served a copy of the Appellant's Initial Brief and Designation of Matter in the above case upon counsel for the Respondent via U.S. Mail, addressed as follows:

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Columbia, South Carolina 29202

Karen K. Madert

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September 22, 2017

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

VIA FEDEX OVERNIGHT

RE: Jericho State v. Chicago Title Insurance (Lynx Jericho Partners v. Chicago Title Insurance)
Appellate Case No.: 2017-001646

Dear Ms. Kitchings:

Enclosed please find the Appellant's Initial Brief, Designation of Matter, and Certificate of Service in the above case. Please file the same in your office and return filing confirmation in the self-addressed envelope provided.

Thank you for your assistance in this matter. Please contact my office with any questions.

Very truly yours,

NEWBY SARTIP MASEL & CASPER, LLC

C. Scott Masel
Attorney for Appellant

CSM/km
Encl: Stated

cc: Demetri K. Koutrakos

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