THE STATE OF SOUTH CAROLINA

IN THE SOUTH CAROLINA 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.

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. THE ORDINANCE AND AMENDED INDEX MAP IS NOT A MERE PLANNING TOOL BUT INSTEAD CREATES COVERED LOSSES UNDER THE POLICIES.

Respondent asserts the Official Map Statute's use of the terms "future locations" and "proposed" streets and highways essentially shows that Horry County's interest in the land serving as the Carolina Bays Parkway was limited to a mere unimplemented, conceptual plan for a highway, and therefore, the Ordinance and Amended Index Map could not have created any governmental rights in the subject land. This ignores, however, that Horry County's "reservation" of private property took place immediately, not on some indeterminable future date. It also conflicts with statute's explanation that official maps are established for the "implementation of comprehensive plans", not for the description of speculative ideas that may later take shape. Indeed, Horry County did not say construction of the Carolina Bays Parkway "may" occur if its plan subsequently proves worthwhile, it said construction of the highway "will occur." Finally, this interpretation ignores that Horry County took an immediate economic interest in the reserved land by suppressing its value now so it could purchase it cheaper later. More than a mere announcement of a plan, Horry County affirmatively instructed owners to not improve their property because the land was now officially reserved as a right-of-way for the government's acquisition for use as a highway.

Respondent objects to describing the reserved land as a "right-of-way". Whether or not this is an apt description can be resolved simply by reading the government's own definition contained in the Official Map Ordinance: "Right-of-Way – Land reserved, used, or to be used for a road, cross walk, railroad, electric transmission lines, oil or gas pipeline, waterline, sanitary storm sewer or other public purpose." [R.p. 361]. To be sure, the subject property squarely meets this definition as "land reserved" and "to be used for a road". Even the Ordinance's title describes that Horry County is "adding the *right-of-way* for the Carolina Bays Parkway", and its provisions amend the

Official Map Ordinance with the "addition of the *right-of-way* for the proposed Carolina Bays Parkway". [R.p. 373](emphasis added). Respondent claims the right-of-way did not exist when the Ordinance took effect and could never exist except by condemnation, but Horry County evidently had a different understanding of what it created and the county acted accordingly to protect and enforce its governmental rights and interests in the land.

Again, the real question is whether Horry County had any interest in the affected land 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). Respondent directs attention to numerous cases involving environmental restrictions or zoning laws that are dissimilar to the facts of this case and pertain more to marketability issues – a separate type of covered loss under the Policies – rather than encumbrances.[1] All of the cases cited by Respondent have two things in common: (1) none of them concern a reservation of land designated as a right-of-way for a governmental acquisition that will occur, and (2) none of them create a governmental interest in the land by suppressing its value so the government can more cheaply acquire it. Because the Ordinance and Amended Index Map create a defect or encumbrance, the Special Referee's Order finding there was no covered loss under the Policies should be reversed.

As to a covered loss due to unmarketability of title, Respondent again argues the Ordinance is a mere preliminary plan with no reasonable probability of litigation. Horry County, on the other

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[1] *McMaster v. Strickland*, 305, S.C. 527, 409 S.E.2d 440 (Ct.App. 1999)(wetlands); *Truck South v. Patel*, 339 S.C. 40, 528 S.E.2d 424 (2000)(wetlands); *Martin v. Floyd*, 282 S.C. 47, 317 S.E.2d 133 (1984)(marsh or water); *Stanley v. Atlantic Title Ins. Co.*, 377 S.C. 405, 661 S.E.2d 62 (2008)(drainage field); *Notaro Homes, Inc. v. Chicago Title Ins. Co.*, 722 N.E.2d 208 (Ill. Ct. App. 1999)(zoning ordinance limiting multi-family dwellings); *Hocking v. Title Ins. And Trust Co.*, 234 P.2d 625 (Cal. 1951)(subdivision laws); *Somerset Sav. Bank v. Chicago Title Ins. Co.*, 649 N.E.2d 1123 (Mass. 1995)(zoning law requiring approval for building permit); *Haw River Land & Timber Co. v. Lawyers Title Ins. Corp*, 152 F.3d 275 (4th Cir. 1998)(ordinance prohibiting timber harvesting in flood plain and buffer zone).

hand, said acquisition of the property and construction of the Carolina Bays Parkway "will occur." Thus, future condemnation litigation was promised and not imagined. Because there was, at the minimum, a reasonable probability of litigation, the Ordinance and Index Map rendered title to the reserved land unmarketable and was a covered loss under the Policies.

B. POLICY EXCLUSION #1 DOES NOT BAR COVERAGE.

Respondent cites many cases from other jurisdictions for the proposition that the Ordinance is a zoning law or regulation that falls within the meaning of Exclusion #1, although all of these cases pertain to common zoning and use matters that are not similar to the case at hand.[2] None of these cases pertain to laws that go beyond mere use restrictions, and none pertain to restrictions established to protect a governmental reservation of land for an acquisition that will occur. This exclusion must be interpreted "most strongly" against the Respondent. *General Acc. Ins. Co. v. Safeco Ins. Companies,* 314 S.C. 63 (Ct.App 1994). The Special Referee's analysis and the cases cited by Respondent only further illustrate that only a broad, rather than narrow, reading of the exclusion must be employed to apply in this case.

Respondent also argues the exception to Exclusion #1 has not been met as there has been no "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." Appellants do not contend there was a violation or alleged violation, so the issue is whether there was a "notice of enforcement" recorded in the public records. The Policies do not

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[2] *Aldrich v. Hawrulo*, 656 A.2d 1304, 281 N.J.Super. 201 (1995)(setback restrictions); *Dyer & Moody, Inc. v. Dynamic Constructors, Inc.* 357 So.2d 615(La.Ct.App.1978)(law restricting the natural flow of water); *Haw River Land & Timber Co. v. Lawyers Title Ins. Corp*, 152 F.3d 275 (4th Cir. 1998)(ordinance prohibiting timber harvesting in flood plan and buffer zone); *Sonnett v. First American Title Ins. Co.*, 309 P.3d 799 (Wyo. 2013)(zoning resolution prohibiting use of property as restaurant and tavern).

define "notice of the enforcement thereof", and a strong disagreement as to its unclear meaning is not unexpected.

Respondent argues the Ordinance itself cannot be deemed a notice of enforcement of its own provisions. In support, Respondent cites to S.C. Code §6-29-950 and Horry County Ordinance 1300 for the proposition that a notice of enforcement must consist of a new, subsequent action taken in response to a violation of a zoning law, such as providing written notice of a violation or filing an injunction due to a violation. However, this reasoning is inconsistent with the Policies' plain language excepting from the exclusion either a notice of enforcement **or** a notice of a violation. Respondent seems to argue, and the Special Referee concludes, they are essentially one in the same, disregarding the Policies' alternative language.

Keeping in mind that Exclusion #1 is to be interpreted most strongly against the insurer, a more reasonable interpretation of "notice of the enforcement thereof" would include a notice by the government that it is enforcing its rights and interest in the land as created by the law, ordinance or regulation. Enacting the Ordinance was not Horry County's only action in this regard, as the county also took the additional, subsequent step of recording the Ordinance in the deed books, which gave notice to all that the government was enforcing its interests.[3] Indeed, as argued above, Horry County's economic interest to immediately minimize the reserved land's value so it could

[3] Respondent cites to *Haw River Land & Timber Co. v. Lawyers Title Ins. Corp.*, 152 F.3d 275 (4th Cir. 1998), which is distinguishable on several grounds: (i) the court applies NC law, not SC law, and *Whitlock v. Stewart Title Guar. Co.*, 2011 WL 4549367 (D.S.C. 2011) provides guidance under SC law, (ii) the NC ordinance was recorded in the minute books, not in the deed books, (iv) the NC ordinance merely established a buffer zone and did not create a third-party, governmental interest in the property, and (iv) the ordinance did not contain enforcement provisions such as no-build restrictions and criminal penalties as such are seen in Horry County's Official Map Ordinance.

subsequently be purchased at a reduced cost is enforced and protected by setting forth restrictions and penalties in a publically recorded document.

Finally, Respondent argues the Ordinance was not recorded in the public records because, although it was recorded in the deed books, it was not indexed in the chain of title. The Policies define "public records" and it is absurd to assert that deed books do not squarely meet the definition as written. Respondent's definition does not state that a public record is only a "public record" if indexed within the chain of title. Instead, Respondent asks this court to apply additional qualifications to the Policies' definition to defeat Appellant's claim.

In this regard, Respondent faults the *Whitlock* Court for concluding an unrecorded ordinance is a public record that satisfies the exception to the governmental regulation exclusion in that case. This goes to how Respondent drafted its own contract, and as discussed in *Whitlock*:

> "Here, the insurance company was the drafter of the contract. It could have easily defined the term "public record" as not covering zoning laws. See also, *New England Federal Credit Union v. Stewart Title Guarantee Co.*, 171 Vt. 326, 765 A.2d 450, 456 (2000) ("Finally, we note that Stewart Title could have readily achieved the more narrow definition of public records that it seeks here simply by excluding from the definition certain locations where public records containing information about matters relating to land are maintained ... Unlike the Stewart Title policy, however, the title insurer in [another case] added language explaining that, "without limitation, such records shall not be construed to include records in any of the offices of federal, state or local environmental protection, zoning, building, health or public safety authorities.") Therefore, the exclusion does not apply as a matter of law because the term "public record", although defined, is patently ambiguous and should be construed as covering local zoning regulations."
> *Whitlock v. Stewart Title Guar. Co.*, 2011 WL 4549367 (D.S.C. October 3, 2011).

Respondent seeks to further distinguish *Whitlock* by asserting the covered title risks in that case were broader to include zoning laws relating to use as a single-family residence, which is true, but the insurance company still sought to exclude coverage by arguing that the zoning law did not appear in the public records. *Whitlock* remains relevant to both the interpretation of the term "public records" and what is necessary to meet the exception to Exclusion #1.

C. POLICY EXCLUSIONS #2 AND #3(D) DO NOT BAR COVERAGE.

Respondent's confusion as to whether Appellants contend the Ordinance constitutes a governmental exercise of eminent domain rights under the South Carolina Eminent Domain Procedure Act (the "Act") can be put to rest: the Appellants do not contend the Ordinance is such a proceeding under the Act. In their Complaints, Appellants allege the Ordinance is a title defect or otherwise renders title to the Property unmarketable, and further describes the *effect* of the Ordinance using terms such as "projected condemnation", "will be condemned", "proposed condemnation", and "notice of the county's intent to exercise its power to condemn the Property". [R.pp. 24-31; pp. 46-54]. Because Appellants do not claim the Ordinance is itself an eminent domain proceeding under the Act but instead a precursor to that inevitable litigation, and because Respondent agrees – and the Special Referee concludes - the Ordinance itself is not such a proceeding under the Act, Exclusion #2 does not apply to bar coverage. For the same reasons, Policy Exclusion 3(D) remains inapplicable as Appellants' claims are based on the Ordinance and Maps, which were filed in the public records *prior* to the date of policy, not the condemnation lawsuit that was filed several years later.

D. THRE ARE ISSUES OF FACT ON THE BAD FAITH CLAIM.

Respondent's arguments on bad faith essentially highlight the issues of fact clearly involved with Respondent's basis for denying the claims, and therefore Appellants incorporate their prior arguments in this regard. Appellants take issue, however, with being characterized as disingenuous because their discovery responses included documents from the condemnation action, including appraisals that were performed as part of the condemnation action on behalf of the landowner and the SCDOT, which were in addition to other appraisals produced in discovery using different dates. As argued to the Special Referee, Appellants contend the proper measuring

date is the Date of Policy as set forth in the first paragraph of the Policies whereby Respondent "...insures, as of Date of Policy as shown in Schedule A, against loss or damage....", and as further described in *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610 (2012). Because there are issues of fact as to whether Respondent denied Plaintiffs' claims in bad faith based on matters inconsistent with the Policies and applicable law, the Special Referee's decision on this issue should be reversed.

E. PRESERVATION OF ISSUES ON APPEAL.

Respondent misinterprets the law pertaining to the preservation of issues on appeal in a kitchen-sink effort to seek affirmance of the Special Referee's Order. All issues on appeal were presented to the Special Referee, and specifically ruled upon by the Special Referee, pursuant to reciprocal summary judgment motions. Appellants argued these matters not only in support of their own motions, but also in response to Respondent's motion showing there were facts and evidence at issue sufficient to preclude summary judgment in favor of Respondent.

It is not necessary that the trial court regurgitate verbatim each nugget of information or every piece of argument when granting summary judgment so as long as the issue was properly raised and ruled upon by the trial court. See, *Spence v. Wingate*, 381 S.C. 487, 674 S.E.2d 169 (2009)(where trial judge's order granted respondents' motion for summary judgment on precisely the grounds argued by respondents at summary judgment hearing, but did not restate the ground on which appellant opposed the motion, the ruling was sufficient to preserve appellant's argument, and appellant was not required to file a Rule 59(e), SCRCP, motion to preserve the issue for appeal). The issues on appeal in this case were raised by both parties and each issue was ruled upon in favor of the Respondent.

Moreover, importantly, the Record on Appeal in this case contains the complete record of the issues presented on summary judgment, including the motions, the memorandums in support of and in response to the motions, the transcript of the hearing on summary judgment and the trial court's order. See, *Bailey v. Segars*, 346 S.C. 359, 550 S.E.2d 910 (Ct.App. 2001)(a complete record of the proceedings below preserved issues after trial court issued a form order denying JNOV). The purpose of appeal under our procedure is to determine if the lower court did something that it should not have done, or omitted doing something it should have done; accordingly, a trial judge will not be reversed for failing to act on a matter that was not submitted to him. *Roche v. South Carolina Alcoholic Beverage Control Commission*, 263 S.C. 451, 211 S.E.2d 243 (1975). "Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it." *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011).

Respondents first assert that Appellants essentially seek a determination that South Carolina's Official Map Statute is unconstitutional, which was not an issue ruled upon by the trial court. This is not, and never has been, Appellants' position, as Appellants simply seek coverage under the policy they purchased.

Respondents also provide a laundry list of items that all pertain to issues ruled upon by the Special Referee. The Special Referee's Order granted Respondent's motion as to each such issue, and in so ruling, the Special Referee denied Appellants' claims. Specifically, both parties raised the issue of whether the Ordinance is a covered loss as a defect in or lien or encumbrance on title

or impaired marketability[4] and the Special Referee specifically ruled on that issue, concluding the Ordinance was not a covered defect in or lien or encumbrance on title and did not impair marketability. [R.p. 16-17]. The Special Referee's ruling was not vague but addressed the issues with findings that include: the Ordinance is a land planning tool only, the Ordinance affected only use of property not title, the Ordinance is governmentally imposed impediment that impaired land value, the Ordinance did not designate a right-of-way and transfer title, a conclusion that the publically recorded defect need not be indexed in the chain of title would wreak havoc in the title insurance industry, the Ordinance is not a public record, and governmental expression of a desire to consider acquiring rights-of-ways would chill economic development and spur inverse condemnation proceedings [R.p. 16-17].

Similarly, both parties raised the issue of whether Exclusion #1 applies[5] and the Special Referee specifically ruled on that issue concluding Exclusion #1 bars coverage and the exception to the exclusion does not apply. [R.p. 19]. Both parties also raised the issue of whether Exception #2 applies[6] and the Special Referee specifically ruled on that issue, concluding that Exclusion #2 bars coverage and the exception to Exclusion does not apply. [R.p. 18-19]. Both parties raised the issue of whether Respondent acted in bad faith[7], and the Special Referee specifically ruled on that issue concluding the Respondent had a reasonable, good faith basis for contesting the claims and

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[4] R.pp. 244-257; pp. 270-277; pp. 295-297; pp. 317-323; p. 342; pp. 351-356; p. 155, line 15 - p. 177, line 13; p. 182, line 20 – p. 185 line 22; p. 205 line 13 – p.208 line 1; p. 208 line 13 – p. 212, line 14.

[5] R.pp. 247-250; pp. 277-281; pp. 297-299; pp. 323-328; p. 342; p. 155, line 15 - p.164, line 16; p. 177, line 14 – p.188, line 2; p. 208, line 13 – p. 212 line 14.

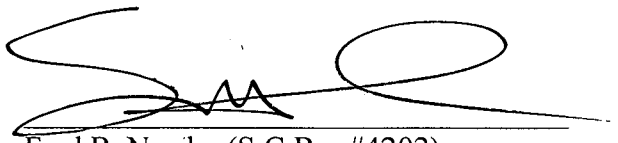
[6] R.pp. 250-251; pp.282-285; p.300; pp. 328-332; p. 342; p. 166, line 13 – p.169, line 23; p. 208 lines 6 – 12.

[7] R.pp. 342-349; pp. 350-359; p. 202 line 14 – p.205 line 10.

had succeeded in contesting coverage. The record is complete as to these issues presented to the Special Referee, and by concluding that Respondent successfully contested coverage under the Policies, his ruling clearly pertained to Appellants' parallel allegations of bad faith.

CONCLUSION

For the reasons previously stated in Appellants Brief on Appeal and as set forth above, the Special Referee's order should be reversed.



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