THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Karl A. Folkens, Special Referee
Fifteenth Judicial Circuit

Case Nos. 2015-CP-26-1084 / 2013-CP-26-5530 (combined)
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.

FINAL BRIEF OF RESPONDENT

Demetri K. Koutrakos, SC Bar #11318
CALLISON TIGHE & ROBINSON, LLC
1812 Lincoln St., Ste. 200
PO Box 1390
Columbia, SC 29202-1390
Telephone: (803) 404-6900
Attorneys for Respondent

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STATEMENT OF ISSUES ON APPEAL

I. Did the lower court correctly find the Ordinance did not create a defect in or lien or encumbrance on title and is therefore not covered by the Policies when the Ordinance merely affected use of the property and did not affect title?

II. Did the lower court correctly find the Ordinance did not create unmarketability of title and is therefore not covered by the Policies when the Ordinance affected use of the property and not title?

III. Did the lower court correctly find Exclusion 1 of the Policies bars coverage for the Ordinance when that exclusion plainly and unambiguously excludes coverage for "any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to" the occupancy, use, or enjoyment of the property or a separation in ownership or change in the dimensions or area of the land?

IV. Did the lower court correctly find Exclusion 2 of the Policies bars coverage for the claims when that exclusion plainly and unambiguously excludes coverage for "[r]ights of eminent domain unless notice of the exercise thereof has been recorded in the public records" on the date of the Policies and no such notice of the exercise was recorded in the public records on the date of the Policies?

V. Did the lower court correctly find Exclusion 3(d) of the Policies bars coverage for the claims when that exclusion plainly and unambiguously excludes coverage for matters that take place after the Policies were issued and the condemnation action was filed after the Policies were issued?

VI. Did the lower court correctly find there were no issues of material fact on Appellants' bad faith claims when Respondent had a reasonable basis to contest Appellants' claims and there is no coverage for Appellants' claims?

VII. Should the lower court be affirmed when many of the issues raised by the Appellants have not been preserved for review as they were either not raised or ruled upon by the lower court and Appellants failed to file a motion to alter or amend judgment?

STATEMENT OF THE CASE

On July 29, 2011, Appellant Jericho State Capital Corp. ("Jericho State") filed an action against Respondent Chicago Title Insurance Company ("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 and asserting defenses therein.

On February 12, 2015, Lynx Jericho Partners, LLC ("Lynx Jericho") filed an action against Chicago Title asserting the same causes of action that Jericho State asserted. Chicago Title filed its answer on May 13, 2015, denying the material allegations and asserting defenses therein.

By orders of reference entered February 13, 2015, and November 13, 2015, these cases were consolidated and referred to Karl A. Folkens as Special Referee.

Jericho State and Lynx Jericho ("Appellants") moved for summary judgment on May 19, 2016. Chicago Title moved for summary judgment on August 23, 2016. On January 28, 2017, Judge Folkens heard the motions for summary judgment. Pursuant to an Order entered July 10, 2017, Judge Folkens granted summary judgment in favor of Chicago Title.

STATEMENT OF FACTS

1. The Property.

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. (R. pp. 413-423; R. p. 990).

2. The Ordinance.

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. (R. pp. 373-374). 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 is attached to the Ordinance.

The Ordinance does not mention the property affected by the possible future construction of the Carolina Bay Parkway. The Ordinance does not contain a list of property owners who may be affected in the future. The conceptual roadway plan attached to the Ordinance does 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, are not mentioned in the Ordinance or in the conceptual plans attached thereto.

On July 9, 2002, the Ordinance, which was neither witnessed nor notarized, was recorded with the Horry County Register of Deeds. It is indexed under the name of Horry County. The Ordinance 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.

Appellants' expert abstractor testified the Ordinance was not indexed by the Register of Deeds in the grantor-grantee indices under the name of the owner of the Property, but instead is

indexed under the name of Horry County. (R. p. 1025). He unequivocally testified a person searching and examining title to the Property would not find the Ordinance in the chain of title to the Property. (R. p. 1026).

Therefore, one searching title to the properties affected would not find the Ordinance.

3. Purchase of the Property, the Mortgages, and the Policies.

In July 2006, Peachtree Properties of North Myrtle Beach, LLC ("Peachtree") purchased the Property from the McClam family for $22,500,000. (R. pp. 413-423). To finance its purchase of the Property, Peachtree obtained mortgage loans from R.E. Loans, LLC ("REL") and Jericho State.

Peachtree gave an $18,520,000.00 first mortgage covering the Property to REL ("REL Mortgage."). (R. pp. 424-440). 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"). (R. pp. 497-515).

Peachtree gave a $4,263,888.00 second mortgage covering the Property to Jericho State ("Jericho State Mortgage"). (R. pp. 441-496). Chicago Title issued a loan policy of title insurance to Jericho State. The policy date is July 25, 2006, and the insured amount is $4,263,888.00 ("Jericho State Policy"). (R. pp. 506-515).[1]

4. The Bridge and Zoning Letter.

Prior to the closing, Jericho State's attorney provided Peachtree's attorney with a closing checklist. (R. pp. 982-983). One item required "[s]atisfactory resolution of the determination by

[1] The Jericho State Policy and the REL Policy will be collectively referred to at times as "the Policies."

the 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. *Id.* The item was removed from the checklist. (R. pp. 1110-1115).

Another item on the checklist was the 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 possible future highway or any use restriction. (R. pp. 1116-1118).

5. Approval of Funding and Agreement to Construct the Carolina Bays Parkway.

According to a verified complaint filed by Jericho State in another action, described below as the Zoning Rescission Action, and supporting documentation attached to the 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. (R. pp. 543-599). In other words, funding for the project was not in place until after the effective dates of the Policies and almost five years after the Ordinance.

6. Rezoning of the Property.

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"). (R. pp. 561-571). The PDD Ordinance approved development of the Property as a mixed-use development with numerous residential parcels. The PDD Ordinance states 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 traverses 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. *Id.*

7. Foreclosure of the Jericho State Mortgage.

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. (R. pp. 1119-1136). At the foreclosure hearing held October 30, 2007, Jericho State's attorney testified:

> [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) (R. p. 1148).

The court entered a foreclosure order on November 7, 2007, ordering the Property be sold subject to the REL Mortgage and finding $7,490,000 was due under the note secured by the Jericho State Mortgage. (R. pp. 516-532). 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. (R. pp. 533-542). Thus, on February 26, 2008, the Property was owned by Jericho State subject to the REL Mortgage.

8. Jericho State's Lawsuit Against the SCDOT and Horry County.

On October 12, 2009, Jericho State filed a verified complaint against Horry County and the SCDOT 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"). (R. pp. 543-599).

The Zoning Rescission Action does not reference the Ordinance. Jericho State alleged it owned the Property, including the Parkway Parcel.

On March 18, 2010, the parties dismissed the Zoning Rescission Action. The Stipulation of Dismissal states 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. (R. pp. 1154-1157).

9. <u>The Condemnation Action.</u>

The eminent domain action referenced in the dismissal of the Zoning Rescission Action was filed by the SCDOT on December 15, 2009, against Jericho State, REL, and Mortgage Fund '08, LLC, and it was amended on April 20, 2011, (the "Condemnation Action"). (R. pp. 1167-1189). The 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 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)." (emphasis added). [*Id.*].

During the Condemnation Action, Jericho State admitted "[t]hat the date of taking for valuation purposes is December 15, 2009." (R. p. 1190). No attempt was made by Jericho State or Lynx Jericho to seek valuation of the Property on a date earlier than December 15, 2009. Neither

Jericho State nor Lynx Jericho claimed the valuation date should be earlier based on the Ordinance or on an inverse condemnation theory. (R. pp. 1192-1556).

Jericho State and Lynx Jericho claimed the condemnation of the Parkway Parcel resulted in a $4,010,000 loss. (R. p. 1527). The SCDOT argued the loss totaled $998,000. (R. p. 1534). On November 19, 2014, the jury awarded $2,100,000 just compensation for the taking of the Parkway Parcel to Jericho State and Lynx Jericho. (R. p. 1553; R. pp. 1557-1561). Jericho State released its interest in the judgment proceeds to Lynx Jericho. (R. pp. 719-721).

10. Assignment of the REL Mortgage to Lynx Jericho.

REL assigned the REL Mortgage to Mortgage Fund '08, LLC by instrument recorded July 28, 2011. (R. pp. 672-673). 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 ("Liquidating Trust"). (R. pp. 1158-1162). The Liquidating Trust assigned the REL Mortgage to Lynx Jericho by instrument recorded May 22, 2013. (R. pp. 716-718).

11. Jericho State's Title Insurance Claim.

By letter dated February 26, 2009, Jericho State submitted a claim to Chicago Title based on the assertion that the Jericho State Policy protected against the Condemnation. (R. pp. 1562-1563). Chicago Title denied that claim. (R. pp. 722-723).

12. Lynx Jericho's Title Insurance Claim.

Lynx Jericho submitted a claim on the Lynx Jericho Policy by letter dated June 21, 2013. (R. pp. 1564-1565). Chicago Title requested documents from Lynx Jericho as part of its

investigation. Lynx Jericho provided documents to Chicago Title in December 2014. Chicago Title denied the claim on January 30, 2015. (R. pp. 724-731).

13. Jericho State and Lynx Jericho's lawsuits.

Appellants moved for partial summary judgment on liability. Chicago Title moved for summary judgment on all issues. The parties submitted memoranda of law to the Special Referee. The Special Referee held a hearing on January 26, 2017, which lasted approximately four hours. R. p. 71, p. 222). The Special Referee drafted and signed an order granting Chicago Title Summary Judgment, which Appellants now appeal.

Appellants did not file a motion to alter, amend, or reconsider the order pursuant to Rule 59(e), SCRCP.

STANDARD OF REVIEW

"An appellate court reviews a grant of summary judgment under the same standard applied by the [circuit] court pursuant to Rule 56, SCRCP." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that . . . no genuine issue [exists] as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. Even though courts are required to view the facts in the light most favorable to the nonmoving party, to survive a motion for summary judgment, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

ARGUMENT

I. THE LOWER COURT CORRECTLY FOUND THE ORDINANCE DID NOT CREATE A DEFECT IN OR LIEN OR ENCUMBRANCE ON TITLE AND DID NOT MAKE TITLE TO THE PROPERTY UNMARKETABLE BECAUSE THE ORDINANCE AFFECTED USE OF THE PROPERTY AND NOT TITLE.

A. Insuring provisions of the Policies.

The Policies insure title to the Property. The covered risks of the Policies are invoked only if title to the Property fails, in whole or in part, or if the title is encumbered by a lien or encumbrance that is not excluded from coverage.

The insuring provisions of the Policies at issue are as follows:

> 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;

Appellants have the burden of showing a claim falls within coverage of an insurance contract. *Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 103, 160 S.E.2d 523, 525 (1968). Appellants 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."

The lower court correctly found the Ordinance did not make title to the Property unmarketable and did not create a defect in or lien or encumbrance on title because the Ordinance merely affected use of the Property and did not affect title to the Property.

Appellants contend the Ordinance establishes a right-of-way and rights in a third party. However, both the applicable Horry County ordinances and the South Carolina statutory framework for official maps upon which the ordinances are based show the official map and the Ordinance merely affect use of the Property, not title to the Property.

a. <u>The Ordinance is a land planning tool that governs use of the Property.</u>

The Ordinance amends the official map to show the future locations 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 derives its authority from Ordinance 107-98, enacted in 1998, which provides for an official map for the unincorporated sections of Horry County. (R. pp. 360-367). Ordinance 107-98 derives its authority from Title 6, Chapter 7, Article 13, as amended, of the South Carolina Code of Laws, in which the South Carolina General Assembly authorizes counties and municipalities to adopt an official map as a land planning tool.

i. S.C. Code Ann. §§ 6-7-1210 to 6-7-1280.

According to the South Carolina statutory framework for Official Maps, upon which the Ordinance is based, 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 (emphasis added). "Counties and municipalities may 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 (emphasis added).

The South Carolina General Assembly has determined the authority to establish official maps is necessary "to promote and preserve the public safety, economy, good order, appearance, convenience, prosperity, and general welfare and is one of the several instruments of **land use control** authorized by this chapter for the implementation of comprehensive plans, or parts thereof, adopted in accordance with the provisions of this chapter." *Id.* (emphasis added).

A landowner whose permit for "the construction, improvement, repair or moving of any building or structure and no change in land use" has been denied because of the official map may appeal to the appropriate local planning commission. S.C. Code Ann. § 6-7-1270. The planning commission can then recommend the governing authority: (a) take official action to exempt the affected land from the restrictions of the official map; (b) take official action to authorize the issuance of desired permits subject to specified conditions; or (c) initiate appropriate action to acquire the property. *Id.*

Upon receipt of the report of the local planning commission, the governing authority shall within 100 days "exempt the affected land from the restrictions of the official map," authorize the issuance of the denied permits, or "enter into an agreement to acquire or institute condemnation proceedings to acquire the property affected. Action to acquire such property may be instituted by the governing authority or other appropriate public agency." *Id.*

A property owner may apply to the local planning commission for an exemption from the restrictions of the official map. S.C. Code Ann. § 6-7-1280. The local planning commission must evaluate the application and make a report within 30 days to the governing authority and to any other appropriate public agency. *Id.* If no report is made within 30 days, the planning commission shall be deemed to have recommended that the application be granted. *Id.* In its report, the local

planning commission must recommend either to exempt the property or "[t]hat the governing authority initiate appropriate action to acquire the property." *Id.*

Upon the governing authority's receipt of the report of the local planning commission, the governing authority must within 75 days (a) take official action to exempt the affected property from the restrictions of the official map or (b) "[e]ither enter into an agreement to acquire or institute condemnation proceedings to acquire the property affected. Action to acquire such property may be instituted by the governing authority or other appropriate public agency." *Id.*[2]

ii. Horry County Ordinance 107-98

The ordinance setting forth Horry County's right to adopt an official map, Ordinance 107-98 (R. pp. 360-367), known as the "Official Map Ordinance of Horry County," follows the above-referenced statutes. It provides landowners with an opportunity to challenge decisions made by Horry County zoning officials related to property that may be affected in the future by the official map. If challenged, the Planning Commission must recommend one of the following actions to the County Council: (a) "[e]xempt the affected land from the restrictions of the Official map," (b) "[i]ssuance of desired permits with specified conditions," or (c) "[i]nitiate appropriate action *to acquire* the property." *Id.* § 5.2.1 (emphasis added).

County Council must then (a) take official action to exempt the land; (b) take official action to authorize the issuance of denied permits subject to conditions accepted by the owner; or (c) "[e]nter into *an agreement to acquire or institute condemnation proceedings to acquire the*

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[2] "Failure of the governing authority to act within seventy-five days of the receipt of the report of the local planning commission shall be deemed to constitute granting of the application." S.C. Code Ann. § 6-7-1280(3)(b).

affected property," with the condemnation proceedings being instituted by County Council or another appropriate governmental agency. *Id.* § 5.2.2 (emphasis added). [3]

iii. Appellants misconstrue the scope and effect of the Official Map.

Appellants argue the official map is not a land planning tool and does not just merely regulate use of property, but instead somehow establishes rights-of-way or an interest in a third-party. Appellants ignore several critical sections of applicable Horry County ordinances and avoid discussing the General Assembly's statutory framework for official maps.

First, Appellants fail to mention the General Assembly set forth the statutory framework for official maps as "one of the several instruments of land use control" available to local governments. S.C. Code Ann. § 6-7-1220. The official map is enforced by the zoning administrator, which shows the official map is a zoning and land use control matter.

Second, Appellants focus on the word "reservation," but ignore that the reservation is for "*future locations* of streets, highways, and public utility rights-of-way, public building sites and public open space for *future public acquisition*." (R. pp. 360-367).

Third, Appellants ignore the definition of "Official Map" in the Official Map Ordinance, which is "[a] map or maps showing the location of existing or *proposed* public streets, highways, public utility rights-of-way, public building sites, and public open spaces." *Id.* (emphasis added).

Fourth, Appellants ignore section 4.0 of the Official Map Ordinance, entitled "Adoption of Official Maps," which states "Official Maps may show the location of existing or *proposed* public

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[3] This ordinance defines "condemnation" as "[t]he exercise by a governmental agency of the right of eminent domain." (R. p. 361), This ordinance defines "eminent domain" as "[t]he authority of a government to take or to authorize the taking of private property for public use." *Id.*

streets, highways and utility right-of-ways, public building sites, and public open spaces." *Id.* (emphasis added).

Fifth, the word "proposed" is defined as "[p]ut forward for consideration, discussion, or adoption; suggest." THE AMERICAN HERITAGE COLLEGE DICTIONARY 1097 (3rd ed. 1993). The word "future" is defined as "the indefinite time yet to come;" "a prospective or expected condition, esp. one considered with regard to growth, advancement, or development;" or "action that has not yet occurred or states not yet in existence." *Id.* at 554.

The Official Map therefore puts forward for *consideration, discussion, or adoption* the location of rights-of-way that may exist sometime, but that has *not yet occurred* and not yet in existence. No right-of-way was established by the Ordinance. A right-of-way, road, or street can *only* be established by the filing of a condemnation action.

Sixth, Appellants ignore the above-cited detailed provisions adopted by the General Assembly and the Horry County Council that set forth procedures whereby landowners can seek building permits or seek to exempt the property from the official map.[4] Accordingly, Horry County has the ability, provided by the General Assembly and the Horry County Council, to eliminate the use restriction set forth by the official map. If Horry County does not issue a building permit or exempt the property from the official map, it must enter into an agreement to acquire or institute condemnation proceedings to acquire the affected property—the latter of which Appellants claim had already occurred.

[4] The statutes and ordinances do not leave the landowner in an "indefinite no man's land" as claimed by Appellants.

As is evidenced by the South Carolina General Assembly and the Horry County Council, the official map merely affects use of property. If a right-of-way already had been established, as Appellants disingenuously contend, there would have been no need to provide Horry County with the ability to grant permits for construction or the authority to exempt the property from the official map. Furthermore, as discussed below, there would have been no need for the SCDOT to condemn the Parkway Parcel if, as Appellants contend, a right-of-way had already been established.

b. <u>The Ordinance does not affect title to the Property, it is not an encumbrance or defect, and does not render title unmarketable.</u>

Title insurance policies indemnify for loss related to title to 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). "[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 the insured 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." 11A COUCH ON INS. § 159:48. Furthermore, even though "title 'defect' and title 'marketability' are both used to describe the peril against which title insurance offers protection, it is important to understand that only that decreased marketability which stems from the condition of title is within title insurance." 11A COUCH ON INS. § 159:7

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."

Our case law defines "encumbrance" as 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, 51, 317 S.E.2d 133, 136 (Ct. App. 1984).

Our courts recognize the distinct concepts of title to property and non-title matters that affect the use of property.

In *McMaster v. Strickland*, 305 S.C. 527, 409 S.E.2d 440 (Ct. App. 1991), the property was designated as wetlands by the federal government and the city. Even though a purchaser possibly would not be able to use the property for the purpose he intended, the Court of Appeals held this did not establish the sellers were incapable of providing marketable title. In so holding, it concluded the trial court "confused the concepts of title and marketability with use and value." The Court of Appeals found there was no evidence "the sellers do not own the property, therefore they have title." Even though a "purchaser may not be able to use the property for the purpose for which he sought, such does not mean the sellers cannot deliver marketable title." *Id.* at 530, 409 S.E.2d at 442.

Similarly, in *Truck South, Inc. v. Patel*, 339 S.C. 40, 528 S.E.2d 424 (2000), the South Carolina Supreme Court held a declaration that part of the property was federally-protected wetlands, which prevented the purchaser from constructing a hotel on the property, was not an encumbrance. It did not render the title unmarketable. *Id.* at 49, 528 S.E.2d at 429.

In *Martin v. Floyd*, 282 S.C. 47, 317 S.E.2d 133 (Ct. App. 1984), the Court of Appeals found residential lots that were in either marsh or water were free from encumbrances. The court

held that "[w]hile marsh or water might be a burden upon the property, it is certainly not a lien, easement, or right existing in a third party." *Id.* at 52, 317 S.E.2d 136.

In *Stanley v. Atlantic Title Ins. Co.*, 377 S.C. 405, 661 S.E.2d 62 (2008), a drainage field rendered part of the property useless. The South Carolina Supreme Court concluded "[t]he fact that property may be useless or may be put to only limited use does not mean that the property is not marketable." *Id.* at 411, 661 S.E.2d at 65.

Ordinances and resolutions that regulate the use of property do not affect title. Courts in other jurisdictions agree. *See, e.g., Notaro Homes, Inc. v. Chicago Title Ins. Co.*, 722 N.E.2d 208, 214 (Ill. Ct. App. 1999) ("... the [zoning ordinance] does not constitute a lien upon the subject property. Nor does it constitute a defect that would cloud the title to the property. Plaintiff has confused marketability of title with marketability of land."); *Hocking v. Title Ins. and Trust Co.*, 234 P.2d 625, 629 (Cal. 1951) (finding a violation of subdivision laws resulting in restricted use affected market value not marketability of title; one "can hold perfect title to land that is valueless; one can have marketable title to land while the land itself is unmarketable."); *Somerset Sav. Bank v. Chicago Title Ins. Co.*, 649 N.E.2d 1123, 1127-28 (Mass. 1995) (holding "it is well established that building or zoning laws are not encumbrances or defects affecting title to property"; therefore the existence of a statutory restriction requiring governmental approval prior to issuance of a building permit does not give rise to coverage under a title insurance policy); *Wolf v. Commonwealth Land Title Ins. Co.*, 690 N.Y.S.2d 880, 881 (N.Y. App. Div. 1999) ("Since zoning laws regulate the manner in which the property can be used and do not impair title, the damages claimed by plaintiffs do not fall within the scope of the title insurance policy"); *Bear Fritz Land Co. v. Kachemak Bay Title Agency, Inc.*, 920 P.2d 759, 76 (Alaska 1996) ("It is well established

that building or zoning laws are not encumbrances or defects affecting title to property. Such restrictions are concerned with the use of land").

In *Haw River Land & Timber Co. v. Lawyers Title Ins. Corp*, 152 F.3d 275 (4th Cir. 1998), ordinances were filed in the register of deeds that prohibited timber harvesting in a flood plain buffer zone. Some of the property was within the buffer zone, negating the insured's ability to exercise its timber rights on the land. The Fourth Circuit acknowledged the economic effect on the insured, but found the ordinance did not impair title:

> While it is true that the ... ordinances have effectively frustrated [timbering], thereby substantially reducing the economic value of the interest purchased, Haw River Timber raises no issue about whether it received legal title to the timber from the grantors. And the Lawyers Title policy insuring marketable title under the timber deed only guarantees Haw River Timber a title that could be enforced in a suit for specific performance, not the economic value of the timber purchased. Indeed, the explicit definition of marketable title provided in the policy limits any more expansive notion by insuring against only those title defects that would entitle a purchaser "to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title." The ordinances on which Haw River relies as a title defect do not impair the grantor's ability to convey a timber deed.
>
> *Id.* at 279.

Here, there is no evidence that on the date the Policies were issued, any party other than Peachtree, the owner, and the two mortgagees had any claims, liens, or interest in and to the Property.

While the Ordinance may have made it difficult to develop certain parts of the Property, as zoning laws, ordinances, and regulations tend to do, the Ordinance, like other land planning tools, simply affected the use of the Property, not its title. This conclusion is supported by both statutes passed by the South Carolina General Assembly and ordinances enacted by the Horry County Council. According to the foregoing, title to the affected property would only pass to the

government when the governmental entity "enter[s] into *an agreement to acquire [the affected property] or institute[s] condemnation proceedings to acquire the affected property.*"[5] (R. pp. 360-367) (emphasized added)]. That did not occur here.

The Ordinance is not a defect or encumbrance. It did not impair title to the Property and did not impair the ability to convey title to the Property. *See Somerset* 649 N.E.2d at 1126-28 ("An individual can hold clear title to a parcel of land, although the same parcel is valueless or considered economically unmarketable because of some restriction or regulation on its use. A title insurance policy provides protection against defects in, or liens or encumbrances on, title. Such coverage affords no protection for governmentally imposed impediments on the use of the land or for impairments in the value of the land."); *Dave Robbins Const., LLC v. First American Title Co.*, 249 P.3d 625, 628 (Wash. Ct. App. 2010) (finding lots on which developer planned to build homes were not rendered "unmarketable," within meaning of title insurance policies because the lots were in a historical district, even though the historical district designation burdened the ability to develop the land; there were no defects affecting legally recognized rights and incidents of ownership of the lots).

Appellants argue the threat of future eminent domain litigation created unmarketable title. However, "the hazard of litigation, to render the title to real property unmarketable, must be a reasonable probability of litigation. The mere, bare possibility or remote probability that there may be litigation with respect to the title is not sufficient to render it unmarketable." 77 Am. Jur. 2d *Vendor and Purchaser* § 119 (2017).

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[5] At the time the Policies were issued, funding was not even secured for the construction of the right-of-way. (R. pp. 543-559).

Keeping in mind all real property is subject to eminent domain powers of the sovereign, mere preliminary steps or plans for the future appropriation of property, or of a portion thereof, do not constitute a defect or encumbrance rendering title unmarketable. *See Creative Living, Inc. v. Steinhauser*, 355 N.Y.S.2d 897 (N.Y. Sup. Ct. 1974), *aff'd*, 365 N.Y.S.2d 987 (1975); *see also* 77 Am. Jur. 2d *Vendor and Purchaser* § 121 (2017) ("Marketability of title, however, is not affected where preliminary plans for future appropriation of property are made prior to the close of escrow.").

Furthermore, "[a] title insurance commitment or policy is not a zoning or building code due diligence report, or a substitute for that due diligence." J. Bushnell Nielsen, *Title and Escrow Claims Guide*, at 11-2 (2016 Ed.). Jericho State appeared to understand this concept when it requested and obtained a zoning verification letter. That is also why Jericho State requested a letter from the municipality confirming that a bridge would not be built. (R. pp. 982-988). Jericho State's attorneys were asked to remove that item from the closing checklist. Jericho State and its attorneys, at their own peril, decided not to proceed with this due diligence.

Jericho State cannot rely on Chicago Title to stand in the place of that failure to complete its due diligence. That is because the Policies do not cover zoning matters and use regulations. *See Aldrich v. Hawrylo*, 656 A.2d 1304, 1309 (N.J. Super. Ct. App. Div. 1995) (finding zoning ordinances and resolutions are not title matters and the title policy at issue "squarely places on the prospective purchaser and his attorney the burden of investigation and compliance with local ordinances and land use resolutions as they may affect a particular property").

Accordingly, the lower court correctly found the Ordinance does not fall within the insuring provisions of the Policies.[6]

II. EXCLUSION 1 OF THE POLICIES BARS COVERAGE FOR THE ORDINANCE.

"[I]nsurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or a statutory prohibition." *S.C. Farm Bureau Mut. Ins. Co. v. Dawsey*, 371 S.C. 353, 638 S.E.2d 103, 104–05 (Ct. App. 2006). Courts cannot "torture the ordinary meaning of language to extend coverage expressly excluded by the terms of the policy." *Sphere Drake Ins. Co. v. Litchfield*, 313 S.C. 471, 474, 438 S.E.2d 275, 277 (Ct. App. 1993). If there is no coverage under the insuring provisions of an insurance policy, coverage cannot be created based on the exceptions or qualifications contained in the exclusions. 8 Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, § 6:2.

The insurer bears the burden of establishing exclusions to coverage. *Boggs v. Aetna Cas. & Sur. Co.*, 272 S.C. 460, 252 S.E.2d 565, 568 (1979).

To the extent the Ordinance falls under the insuring provisions of the Policies, which Chicago Title denies, and the Special Referee ruled it did not, coverage is excluded by Exclusion 1, removing coverage against various forms of governmental regulation of the use of property.

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[6] Appellants argue the Special Referee "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 . . .'" The Special Referee's concern is not new and has been expressed by at least one other court. *See Hoffer v. Callister*, 47 P.3d 1261, 1264 (Idaho 2002) (stating "we decline to extend the traditional scope of a general warranty against encumbrances to include zoning matters. To expand the concept of encumbrance as urged by Hoffer would create uncertainty and confusion in the law of conveyancing and title insurance. Neither the title search nor a physical examination of the premises would have disclosed the alleged violation").

A. <u>Any claimed loss related to the Ordinance is excluded by Exclusion 1.</u>

The Polices exclude various forms of governmental regulation of the use of property. The Policies exclude coverage for loss or damage which arises by reason of any law, ordinance, or government regulation. More specifically, the Policies exclude from coverage loss or damage, costs, attorneys' fees or expenses which arise by reason of:

> 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) the 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 a change in the dimensions or area of the land or any parcel of which the land is or was a part*; 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. (emphasis added).[7]

As referenced in detail above, the Ordinance is a land planning tool in the nature of a zoning matter. S.C. Code Ann. § 6-7-1220 (an official map is "one of the several instruments of land use control"). Despite the plain language of the statutes which refer to the map as a land planning tool, Appellants argue the purpose of the Ordinance is not to regulate use but rather to designate a right-of-way and transfer title.

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[7] Appellants state this exclusion, on "its face . . . 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." Appellants, in an attempt to lessen the broad provisions of Exclusion 1, omit in their characterization of Exclusion 1 that this exclusion covers "*[a]ny law, ordinances, or government regulation*. . . restricting, regulating, prohibiting or relating to (i) occupancy, use, or enjoyment of land." (emphasis added).

However, as detailed below, a right-of-way could not have existed, and title thereto could not have vested in any governmental entity, until a condemnation action was filed, which is consistent with the ordinance and statute establishing official maps. A right-of-way is not created by changes to an official map. No deprivation of property or rights occurred as a matter of law.

"Upon the adoption of an official map, or even amendments to the map, there is not an immediate deprivation of either property or rights." 3 *Rathkopf's The Law of Zoning and Planning* § 50:11 (4th ed. 2016). The designation of a "particular property or area as a potential or future site for a public program or project does not constitute a taking." 2A *Nichols on Eminent Domain* § 6.01[17][a] (3rd ed. 2004). Similarly, "the adoption, filing, or recording of maps or plans for future roadway development does not constitute a taking." *Id.* §6.01[17][b].

A public right-of-way is created only by the filing of a condemnation action. A condemnation action was filed after the effective dates of the Policies and after the date funding was approved for the Parkway Project.[8]

Ordinance 107-98, the authority for the creation of official maps, controls use of property. (R. pp. 360-367). The Ordinance states its purpose is to provide opportunities for governmental entities to reduce "future acquisition cost" by "limiting development." *Id.* As mentioned above, Ordinance 107-98 sets forth a "Procedure for Appealing Building Permit and **Land Use Restrictions**." *Id.* § 5.2 (emphasis added). Landowners are provided an opportunity to request a building permit or to exempt the property from the Official Map. *Id.* If Horry County rejects such

[8] *See Danforth v. United States*, 308 U.S. 271, 286 (1939) ("The mere enactment of legislation which authorizes condemnation of property cannot be a taking. Such legislation may be repealed or modified, or appropriations may fail.").

a request, it must then "enter into an agreement to acquire *or institute condemnation proceedings to acquire* the affected property," with the condemnation proceedings being instituted by County Council or another appropriate governmental agency. *Id.* § 5.2.2 (emphasis added).

The Ordinance falls squarely within Exclusion 1(a) because it is a zoning law or regulation that restricts, regulates, and prohibits "the occupancy, use, or enjoyment of the land." *See Aldrich*, 656 A.2d at 1309 (finding zoning ordinances and resolutions are not title matters and "they are excluded from coverage in title insurance policies."); *Dyer & Moody, Inc. v. Dynamic Constructors, Inc.*, 357 So. 2d 615, 619 (La. Ct. App. 1978) (finding code restrictions prohibiting improvements that would prevent the natural run-off of water were excluded by the exclusion for any law, ordinance or governmental regulation relating to building requirements); *Haw River,* 152 F.3d at 280 (holding ordinances which prohibited certain uses of property within a designated distance from the shore of a river were found not to affect title and to be excluded by Exclusion 1); *Sonnett v. First American Title Ins. Co.*, 309 P.3d 799, 805-806 (Wyo. 2013) (finding a "master plan" of use restrictions that an owner imposed on his own property to obtain a zoning change were part of the zoning use conditions, not a declaration of restrictions, and therefore were excluded from coverage under Exclusion 1).

In *Whitlock v. Stewart Title Guar. Co.*, 2011 WL 4549367 (D.S.C. Oct. 3, 2011), a district judge from the United States District Court for the District of South Carolina, in an unpublished order granting partial summary judgment (in a case ultimately settled and dismissed with prejudice), found a county resolution was not excluded by a very different type of title insurance policy, a residential owner's policy, which contained vastly different insuring provisions and a very different Exclusion 1. In *Whitlock,* the insured in 2006 purchased property on the intracoastal

waterway, but the residential owner's policy did not take exception to a spoil easement recorded since the 1930s. The county passed a no-build resolution in 2003 regarding property affected by the spoil easement. The resolution allowed the issuance of building permits for repair, remodeling, and replacement of existing structures, but it otherwise precluded the issuance of building permits.

The residential owner's policy in *Whitlock* contained expanded insuring provisions that covered the instance where the insured could not "use the land because use as a single-family residence violates a restriction shown in Schedule B or an existing zoning law." More specifically, the expanded insuring provisions covered the following title risks:

> 10. Someone else has an easement on your land ... 13. You cannot use the land because use as a single-family residence violates a restriction shown in Schedule B or an existing zoning law. 14. Other defects, liens or encumbrances. *Id.* at *2.

In addition, Exclusion 1 in the residential owner's policy in *Whitlock* provided it did not limit the coverage as to single family residences and zoning contained in its expanded insuring provisions. More specifically, Exclusion 1 in *Whitlock* provides as follows:

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

The residential owner's policy in *Whitlock* contains expanded insuring provisions related to zoning, such that it provides coverage if use of the property as a single-family residence violates an existing zoning law. The no-build resolution at issue in *Whitlock* is a zoning law. Furthermore, the residential owner's policy in *Whitlock* contains limitations on the application of Exclusion 1 related to the expanded zoning coverage, which means the no-build resolution, as a zoning law, did not fall within Exclusion 1. Appellants' argument that "the facts of this case mirror the facts of *Whitlock*" is incorrect because the Policies here do not contain expanded insuring provisions and do not contain limitations on the application of Exclusion 1. The Special Referee therefore correctly concluded that "[u]nlike 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." Judge Folkens Order Addressing Motions for Summary Judgment at 14 (emphasis in the original) (R. p. 18).

Similarly, Appellants appear to rely on the vacated opinion of this Court in *Lyons v. Fidelity Nat. Title Ins. Co.*, 415 S.C. 115, 781 S.E.2d 126 (Ct. App. 2015). *Lyons* involved the identical expanded insuring provisions as the policy in *Whitlock*. For that reason, and because *Lyons* was vacated by this Court per an order entered August 26, 2016, it has no precedential effect and has no bearing on this case.

B. The exception to Exclusion 1 does not apply.

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."

First, there is no evidence of a notice of the enforcement of any "law, ordinance or governmental regulation," including "building and zoning laws, ordinances, or regulations," as required by the exception to Exclusion 1(a). "Enforcement" is defined as "the act of compelling observance of or compliance with a law, rule, or obligation." *New Oxford Am. Dictionary* 574 (2010). There is absolutely no evidence of any act compelling observation or compliance with the Ordinance.

The Ordinance, an amendment to the official map, alone cannot be the notice of the enforcement of its own provisions. *See Notaro Homes, Inc. v. Chicago Title Ins. Co.*, 722 N.E.2d 208, 214 (Ill. Ct. App. 1999) (finding an amendment to a zoning ordinance recorded "adds nothing in terms of its enforcement" and therefore the exception to the exclusion was inapplicable); *Elysian Investment Group v. Stewart Title Guar. Co.*, 129 Cal.Rptr.2d 372 (Cal. Ct. App. 2002) (finding a recorded municipal notice of structures classified as either hazardous, substandard or a nuisance, did not comprise either a defect, lien, or encumbrance on title or unmarketability of title under the policy, even if subsequent events might result in enforcement ultimately affecting title; the notice related to the physical condition of the property, and building restrictions created by ordinance, for which there is no coverage, was not a notice of enforcement under municipal procedures).

There is no evidence of a notice of a defect, lien, or encumbrance resulting "from a violation or alleged violation affecting the land," as required by the exception to Exclusion 1(a). The word "violation" is defined as "Injury; infringement; breach of right, duty or law. The act of breaking, infringing, or transgressing the law" *Black's Law Dictionary* 1570 (6th ed. 1990) (citing *Rabon v. South Carolina State Highway Dept.*, 258 S.C. 154, 187 S.E.2d 652, 654 (1972)).

Appellants argue the general penalty provisions of Ordinance 107-98 constitute written notice of enforcement or a violation on the public records of Ordinance 88-202. Appellants therefore claim the exclusions regarding ordinances in the Policies do not apply because the exception to the exclusion applies.

Under South Carolina Code section 6-29-950, counties may provide for enforcement of any ordinance by "withholding of building or zoning, or both, and the issuance of stop orders against any work undertaken by an entity not having a proper building or zoning permit, or both." S.C. Code Ann. § 6-29-950. In addition,

> the zoning administrator or other appropriate administrative officer, municipal or county attorney, or other appropriate authority of the municipality or county or an adjacent or neighboring property owner who would be specially damaged by the violation may, in addition to other remedies, institute injunction, mandamus, or other appropriate action or proceeding to prevent the unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use, or to correct or abate the violation, or to prevent the occupancy of the building, structure, or land.
>
> *Id.*

Finally, in case "a building, structure, or land is or is proposed to be used in violation of an ordinance adopted pursuant to this chapter, the zoning administrator or other designated administrative officer may in addition to other remedies, issue and serve upon a person pursuing the activity or activities a stop order requiring that entity stop all activities in violation of the zoning ordinance." *Id.*

Horry County provided the authority referenced in section 6-29-950 by enacting Ordinance 1300, originally enacted in 1999 as Ordinance No. 51-99. Ordinance 1300 provides:

> The Horry County Council shall fund sufficient personnel to administer and enforce the provisions of this ordinance. If the Zoning Administrator shall find that any of the provisions of this ordinance are being violated, he shall notify in writing the

> person responsible for such violations, indicating the nature of the violation and ordering the action necessary to correct it. He shall order discontinuance of illegal use of land, buildings or structures; removal of illegal buildings or structures or of illegal additions, alterations, or structural changes, discontinuance of any illegal work being done; or shall take any other action authorized by this ordinance to ensure compliance with or to prevent violation of its provisions.
>
> (R. p. 224)

Ordinance 1300 provides the mechanism by which a notice of enforcement of the Ordinance 88-202 or notice of an alleged violation of the Ordinance 88-202 would have been recorded in the public records at the date the Policies was issued. It is undisputed that no such notice existed on the date of the Policies or thereafter and certainly no such notice was "recorded in the public records at Date of Policy" as set forth in Exclusion 1(a).

There is no evidence in the record that there was any violation of the Ordinance. Because there was never a violation, neither alleged nor existing, of the Ordinance, there cannot be a notice of a violation or alleged violation. The Ordinance is not a notice of a violation or alleged violation of itself. There is no notice in the public records resulting from a violation or alleged violation of a law, ordinance, or governmental regulation. *See Haw River*, 152 F.3d at 281 (holding even though the ordinance was recorded, "there is no evidence that any enforcement proceeding was ever initiated or 'notice' given to enforce the buffer zone established by Garner's ordinances. Nor is there any indication that a notice of a violation of that buffer zone was ever issued.").

Assuming for the sake of argument that the Ordinance itself is a notice of violation of itself, which Chicago Title denies, Horry County failed to have the Ordinance indexed in such a manner that property owners who may be affected could find the Ordinance when conducting a title search.

No constructive notice is provided by a document that cannot be found when checking title because the document is not indexed properly. *See Thomas v. Thomas*, 286 S.C. 294, 333 S.E.2d

76 (Ct. App. 1985) ("proper indexing supplies inquiry notice of an instrument, while recordation without proper indexing supplies no notice at all."); *Liberty Loan Corp. of Darlington, S.C. v. Mumford*, 283 S.C. 134, 322 S.E.2d 17 (Ct. App. 1984) ("because Liberty's lien was not properly recorded until April 22, 1977, HUD became a bona fide purchaser for value without notice when it received its title on February 28, 1977.").

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

Here, it is undisputed the Ordinance was only indexed under the name of Horry County, not the name of the owners of property who may be affected by the Ordinance. The Ordinance was therefore not in the chain of title to the Property and could not be found in a title search.

The Policies defines "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."[9] Because a document not indexed properly cannot provide constructive notice, like the Ordinance at issue, it does not constitute a public record as defined in the Policies. *See Manchester Fund, Ltd. v. First American Title Ins. Co.*, 753 A.2d 740 (N.J. Super. 1999) (finding an improperly indexed lis pendens was not part of the public record,

[9] The term "public records," although defined in the part of the Policies containing definitions, is not included in any of the insuring provisions of the Policies, but instead appears in the definition of "knowledge" and "known" and in three of the exclusions in the Policies—Exclusion 1, Exclusion 2, and Exclusion 3(b).

did not provide constructive notice under the recording act, and was not a public record under an agreement to issue a title insurance policy).

Our General Assembly correctly appreciates the importance of indexing documents to be recorded with the Register of Deeds. The General Assembly, through section 30-9-40, has determined that the indexing of documents constitutes an "*integral, necessary and inseparable part of the recordation of the deed, mortgage, or other written instrument*" and that "[t]he entries in the indexes required to be made are notice to all persons sufficient to put them upon inquiry as to the purport and effect of the deed, mortgage or other written instrument so filed for record . . . ." S.C. Code Ann. § 30-9-40 (emphasis added).

However, and most importantly, "the recordation of a deed, mortgage or other written instrument is not notice as to the purport and effect of the deed, mortgage, or other written instrument unless the filing of the instrument for record is entered as required in the indexes." *Id.*

Appellants incorrectly argue that the lower court imposed an indexing requirement in the definition of public records in the Policies. It is not the lower court, but instead is S.C. Code Ann. § 30-9-40, which establishes that indexing is an "integral, necessary and inseparable part of the recordation" of documents.[10]

Furthermore, Appellants' reliance on *Whitlock* as it relates to the exception to Exclusion 1 is misplaced. First, the Special Referee found that the Ordinance, whether recorded or not, is not

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[10] As succinctly stated by a commentator, "a misindexed or unindexed document is virtually worthless to a searcher, since the indexes are essential to the search process; it is, in effect, a needle in a haystack. The cases turn in part on the specific language of the statute, but the modern trend is to treat such *instruments as if they were unrecorded*, and hence as giving no constructive notice." 4 *Law of Distressed Real Estate* § 40:14 (2017) (emphasis added); *see also Liberty Loan Corp.*, 283 S.C. at 139, 322 S.E.2d at 20 (since "mortgage was not properly indexed, it was not properly recorded.").

"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." Only if the Court finds that the Ordinance itself is 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 does the Court need to consider the next step, whether it is "recorded in the public records at Date of Policy."

Moreover, the Court in *Whitlock* incorrectly concluded an unrecorded ordinance is a public record. It relied on *Carolina Chloride, Inc. v. Richland Cty.*, 394 S.C. 154, 169, 714 S.E.2d 869, 876 (2011), in which a landowner filed an action against a county arising from the county's mistaken representation of a zoning designation of property. The court found "Carolina Chloride could have, through reasonable diligence, acquired knowledge of the proper zoning designation from the public records." There was no discussion in either *Carolina Chloride* or *Whitlock* as to how a zoning matter is a public record in the context of a real estate transaction and under a title insurance policy containing a definition of public records like we have here. A zoning designation may be located somewhere in the public records, when the phrase "public records" is broadly defined like it is in the Freedom of Information Act,[11] but a zoning designation does not affect title to property and there is no statute providing that such a designation gives constructive notice to purchasers of real property.

Also, the exception to the exclusion in *Whitlock* is quite different from the exception to the exclusion here. The exception to the exclusion in *Whitlock* provides: "This exclusion does not

[11] *See* S.C. Code Ann. § 30-4-20(c) (defining "public record" as "all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body.").

apply to violations or the enforcement of these matters which ***appear in the public records*** at Policy Date." Here, the exception to Exclusion 1(a) in the Policies provides: "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."

Some context is necessary to understand the holdings in these cases and whether they are appropriate to follow. The Policies unambiguously define "public records." There is simply no statute providing that either a zoning designation or an ordinance, like the ordinance in this case, are "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."

The Ordinance does not set forth a notice of enforcement of its own provisions. The Ordinance is not a notice of any violation or alleged violation of its own terms. To the extent the Ordinance is somehow found to be a notice of enforcement, it was not "recorded in the public records."[12]

Therefore, the exception to Exclusion 1 does not apply.

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[12] **Appellants argue that if Chicago Title "wanted to limit covered defects and encumbrances to only those items fully indexed with the chain of title, it should have said so in the Policies." However, as to the exception to the exclusion, Chicago Title did exactly that by requiring either a notice of enforcement or notice of defect resulting from a violation be "recorded in the public records," with public records being defined 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."**

III. THE LOWER COURT CORRECTLY FOUND EXCLUSION 2 OF THE POLICIES BARS COVERAGE FOR THE ORDINANCE.

The Polices exclude coverage for loss or damage arising from rights of eminent domain. More specifically, the Policies exclude loss or damage which arise by reason of:

> 2 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 the Date of Policy which would be binding on the rights of a purchaser for value without knowledge.

Eminent domain is "the power to take private property for public use by the state, municipalities, and private corporations authorized to exercise functions of public character." *Black's Law Dictionary* 523 (6th ed. 1990). It is difficult to discern what Appellants claim when it comes to Exclusion 2. On the one hand, Appellants contend Exclusion 2 does not apply. On the other hand, they argue it does apply and that it provides coverage.[13]

Jericho State did, in its Complaint claim coverage due to the condemnation. Jericho alleged "[t]he recorded Ordinance is notice of the county's intent to exercise its power to condemn the Property; therefore, the claim is properly evaluated under the exclusion found in the Title Policy relating specifically to eminent domain, rather than the exclusion relating to governmental Regulation cited by the Defendant, which clearly related to land-use regulations." (R. pp. 24-31). In addition, Jericho State alleged "the exclusion relating to eminent domain provides explicit coverage for a loss resulting from the rights of eminent domain provided that 'notice of the exercise

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[13] Exclusions do not create coverage—they limit coverage. *See Laidlaw Enviro. Serv. v. Aetna Cas. & Sur. Co. of Ill.*, 338 S.C. 43, 51-52, 524 S.E.2d 847, 853 (Ct. App. 1999); *Engineered Prods., Inc. v. Aetna Cas. & Sur. Co.,* 295 S.C. 375, 378-79, 368 S.E.2d 674, 675-76 (Ct. App. 1988) ("an exclusion does not provide coverage but limits coverage" (quoting *LaMarche v. Shelby Mut. Ins. Co.*, 390 So.2d 325, 326 (Fla. 1980)).

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.'" *Id.*

Although incorrect as a matter of law, Appellants argue the Ordinance resulted in a deprivation of title to part of the Property. In other words, Appellants claim the ordinance amounted to a taking or the exercise of eminent domain rights.

Exclusion 2 unambiguously excludes any damages resulting from rights of eminent domain.

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 has occurred prior to the Date of Policy which would be binding on the rights of a purchaser for value without knowledge."

The only way for the government to exercise its right of eminent domain is under the South Carolina Eminent Domain Procedure Act (the "Act"). 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. Most importantly, "[t]he provisions of [the Act] shall constitute the exclusive procedure whereby condemnation may be undertaken in [South Carolina]." *Id.*

The Parkway Parcel was condemned, as a matter of law, on December 15, 2009, when the Condemnation Action was filed, not before and certainly not on the date of the Policies, July 25, 2006. The Ordinance is not a condemnation or the notice of exercise of eminent domain rights. Under the Act, eminent domain rights are exercised, the taking is complete, and the condemning

authority is entitled to take possession, when the condemnation notice is given. S.C. Code Ann. § 28-2-90.

The condemnation notice must contain certain information 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 owners of the land being condemned, contain a legal description of 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 this.

If the landowner disputes the amount of compensation offered by the condemning authority, the matter goes to trial; however, the dispute over the amount of compensation does not delay the transfer of the property.[14]

The Parkway Parcel had not been condemned on the effective dates of the Policies—July 25, 2006. If the Parkway Parcel had already been condemned or taken on July 25, 2006, the SCDOT would have had no reason to file the Condemnation Action. If the Parkway Parcel had already been taken, Peachtree would not have offered in 2007 to convey the Parkway Parcel to Horry County (R. pp. 543-599); Jericho State's foreclosure counsel would not have testified in 2007 that there were no liens or encumbrances on the Property (R. p. 1148); Jericho State would not have alleged in 2009 in the Zoning Rescission Action that it was the owner of the Parkway Parcel (R. pp. 543-599); the SCDOT would not have alleged in 2009 in the Condemnation Action that Jericho State was the owner of the Parkway Parcel (R. pp. 1167-1190); and Jericho State's

[14] S.C. Code Ann. §§ 28-2-220; 28-2-230.

attorney would not have argued to the jury that "[o]n December 15, 2009, the [Jericho State] owned 131.40 acres of land . . . They owned that. That land was intact." (R. p. 1223).

Appellants allege a taking occurred by the recording of the Ordinance. That claim is without merit. A governmental entity's threat to condemn or a governmental entity's publishing of plans to possibly do something in the future, including documenting such plans on an official map, does not amount to a taking. *See* 2A *Nichols On Eminent Domain* §6.01[17][b] at 6-93 (3rd ed. 2004) ("The adoption, filing, or recording of maps or plans for future roadway development does not constitute a taking.").

The South Carolina Supreme Court analyzed this issue in *Kiriakides v. The School District of Greenville County*, 382 S.C. 8, 675 S.E.2d 439 (2009). In *Kiriakides*, the landowner sued a school district, claiming the "stigmatization of [his] property as well as the unreasonable delay in commencing condemnation [proceedings] has amounted to an inverse condemnation of [his] property." *Id.* at 12, 675 S.E.2d at 441. The master found no taking occurred. *Id.* at 15-16, 675 S.E.2d at 443.

The South Carolina Supreme Court, in a unanimous opinion, affirmed the master and adopted his reasoning. The master concluded the school district's pre-condemnation activities "certainly did not give rise to a taking, regulatory or otherwise." *Id.* at 16, 675 S.E.2d at 443. In adopting the master's reasoning, the Court stated as follows:

> 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."
>
> We agree with the master's determination that Kiriakides did not establish a claim for inverse condemnation. We find no merit to his arguments that the mere threat of a condemnation suit stigmatized his property and that the School District's alleged delay in bringing this action entitled him to damages for an inverse condemnation. *Id.*[15]

Numerous other courts have held that pre-planning activity by government officials and targeting a property for possible future condemnation does not amount to a taking. *See, e.g., NBH Land Co. v. United States.,* 576 F.2d 317, 318 (Ct. Cl. 1978) ("Mere candor by public officials about their plans has never been held to constitute a taking. Even a threat of condemnation is not a taking."); *Weintraub v. Flood Control Distr. of Maricopa County*, 456 P.2d 936, 939, 941 (Ariz. 1969) (noting that "[o]ther jurisdictions have uniformly held that the mere publication of the fact that particular or specified property may be" the subject of a future condemnation proceeding, "or the plotting or planning thereof, is not a taking or damaging of such property entitling the owner to be compensated therefor and "notice of preliminary proceedings of proposed actions which

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[15] The South Carolina Supreme Court and the master cited favorably to the following authorities in support of their rulings: *Joseph M. Jackovich Revocable Trust v. Alaska Dep't of Transp.*, 54 P.3d 294, 302 (Alaska 2002) (stating "there is no indication the state did anything more than make announcements, prepare and publish plans, and provide publicity concerning the project" and no evidence the state interfered with the property rights of the landowners); *City of Chicago v. Loitz*, 295 N.E.2d 478, 480 (Ill. 1973) (observing "the weight of authority in other states and in the Federal courts, is that mere planning by a governmental body in anticipation of the taking of land for public use and preliminary steps taken to accomplish this, without the filing of proceedings and without physically taking or actual invasion of the real estate, is not actionable by the owner of the land"); 29A C.J.S. *Eminent Domain* § 90 (2007) (stating the mere planning in anticipation of a public improvement is not an actionable taking of property).

may result in taking land for public use is not a damaging of a property which would entitle the owner to compensation therefor," and holding no taking occurred as a matter of law."); *Calhoun v. City of Durant*, 970 P.2d 608, 611 (Okla. Ct. App. 1997) ("Future plans which include a landowner's property in a public use project are not sufficient to bring an inverse condemnation action. The constitution measures a taking of property not by what a state says, or what it intends, but by what it does."); *Westgate Ltd. v. State*, 843 S.W.2d 448, 453 (Tex. 1992) ("publicly targeting a property for condemnation, resulting in economic damage to the owner, generally does not give rise to an inverse condemnation cause of action unless there is some direct restriction on use of the property.").

Appellants' reliance on the North Carolina Supreme Court's opinion in *Kirby v. N.C. Dep't of Transp.*, 786 S.E.2d 919 (N.C. 2016) is misplaced. North Carolina enacted the Transportation Corridor Official Map Act, N.C. Gen. Stat. § 136–44.50 *et seq.* ("the Map Act"), which authorized several entities, including the NCDOT, to file a "transportation corridor official map" with a county's register of deeds, creating a protected corridor in the future location of a planned roadway project. N.C. Gen. Stat. § 136–44.50 (2015). Filing the map effectuates restrictions on the demarcated land, so that "no building permit shall be issued for any building or structure or part hereof located within the transportation corridor, nor shall approval of a subdivision, as defined in G.S. 153A–335 and G.S. 160A–376, be granted with respect to property within the transportation corridor." N.C. Gen. Stat. § 136–44.51(a). Pursuant to the Map Act, these restrictions were to last

for an indefinite period of time." *Id.* at 921 (citing N.C. Gen. Stat. § 136–44.51).[16] After the map is filed, NCDOT was not obligated to build or complete the highway project. *Id.*

The North Carolina Supreme Court found the Map Act's indefinite restraint on fundamental property rights was squarely outside the scope of the police power. *Id.* at 855, 786 S.E.2d at 925. "Justifying the exercise of governmental power in this way would allow the State to hinder property rights indefinitely for a project that may never be built." *Id.* "The societal benefits envisioned by the Map Act are not designed primarily to prevent injury or protect the health, safety, and welfare of the public. Furthermore, the provisions of the Map Act that allow landowners relief from the statutory scheme are inadequate to safeguard their constitutionally protected property rights." *Id.* Thus, the court held that, by recording the corridor restricting the landowners' "rights to improve, develop, and subdivide their property for an indefinite period of time, NCDOT effectuated a taking of fundamental property rights." *Id.* at 925-926.

Unlike the North Carolina corridor maps, the Map Ordinance here allows landowners who want to use the property to request the issuance of building permits or to exempt the property from the official map. The governing authority must act upon the request quickly, not in three years like North Carolina's Map Act. If it grants the request, no one can claim a taking has occurred.

Under the Map Ordinance at issue here, if the governing authority denies the request, it must within 100 days "enter into *an agreement to acquire or institute condemnation proceedings to acquire the affected property.*" (emphasis added). The Map Ordinance defines "condemnation" as "[t]he exercise by a governmental agency of the right of eminent domain." The Map ordinance

[16] Although the Court found the restrictions were to last for an indefinite period, the Map Act provides for administrative procedures that a landowner can undertake, but such procedures did not require the government to do anything for three years. N.C. Gen. Stat. § 136–44.51

defines "eminent domain" as "[t]he authority of a government to take or to authorize the taking of private property for public use."

Appellants ignore this clear language in the Map Ordinance, which mirrors the dictates of the South Carolina General Assembly, and argue a taking had occurred simply upon the filing of the official map.

However, the General Assembly's authorization for official maps is similar to statutes in other states. Those state's statutes, like South Carolina's statute, are much different than the North Carolina statutory scheme rejected by the court in *Kirby*.[17]

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[17] **Florida**: Fla. Stat. Ann. §§ 337.243 & 337.2735 (owner can challenge the corridor map and FDOT has 180 days from a negative finding to acquire property, amend the map, withdraw the map, issue the permit, or file appropriate proceedings); **Illinois**: 605 ILCS § 5/4-510 (owner must provide sixty 60 days' notice of new improvements, government has 45 days after notice to inform the owner of the intention to acquire the land, and government has additional 120 days to acquire land by purchase or to initiate action to acquire said land through the exercise of the right of eminent domain); **Indiana**: Ind. Code Ann. § 8-23-5-9 (owner must give at least 60 days' notice before improving the property, within 45 days after the notice, the department shall provide notice of its intent to acquire the property, and Department must purchase or condemn property within 180 days); **Iowa**: I.C.A. § 306.19 (provides for a 30-day delay for permit to allow the State time to decide whether to acquire the property; and IDOT must begin acquisition process within 10 days of stopping permit); **Missouri**: R.S. Mo. §§ 226.955, 226.961 & 226.967 (local entity has 45 days to delay a building permit, and notice the highway commission, commission then has 120 days to buy or condemn); **Nebraska**: Neb. Rev. St. § 39-1311.03 (NDOT has 60 days once an owner applies for a permit to alert local planning that it will negotiate with the owner involved and NDOT has six months to negotiate or condemn the land; otherwise the permit issues); **New Hampshire**: N.H. Rev. Stat. §§ 230-A:1 & 230-A:9 (government has 60 days to review permit and must buy property in 180 days or permit issues); **New Jersey**: N.J.S.A. § 27:7-67 (government has 45 days to review permit, and 120 days to buy or condemn property, or permit shall issue); **Ohio**: Ohio R.C. § 5511.01 (if zoning changes or permit is applied for within 300 feet of proposed road, local planning must put permit on hold for 120 days and notify ODOT; ODOT can decide to buy or condemn the property within 120 days or permit or zoning change will issue); **Tennessee**: Tenn. Code Ann. § 54-18-208 et seq. (delays permit for 40 days during which time highway officials may negotiate with the owner, condemn the property or allow permit to issue.); **Utah**: Utah Code Ann. § 72-5-405 (owner may petition government to purchase fee simple interest of

No court has found a taking occurred due to those state statutes.[18]

This Court should reject Appellants' mischaracterization of the scope and effect of the official map.

The Ordinance is not a notice of the exercise of eminent domain rights. The exercise of eminent domain rights and the taking took place only upon the filing of the Condemnation Action—December 15, 2009.

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land in corridor and if government does not acquire the interest in the property then government may not restrict the property).

[18] **Florida**: Fla. Stat. Ann. §§ 337.243 & 337.2735 (no case law); **Illinois**: 605 ILCS § 5/4-510 (*Davis v. Brown*, 851 N.E.2d 1198, 1205 (Ill. 2006) (the mere filing of a map setting forth a right of way reserving rights-of-way for future additions to the highway system, did not, by itself, constitute a regulatory taking.)); **Indiana**: Ind. Code Ann. § 8-23-5-9 (no case law); **Iowa**: I.C.A. § 306.19 (*Cahill v. Cedar Cty., Iowa*, 367 F. Supp. 39 (N.D. Iowa 1973), *aff'd*, 419 U.S. 806 (1974) (stating I.C.A. § 306 is "clothed in a presumption of constitutionality" and does not violate due process.)); **Missouri**: R.S. Mo. §§ 226.955, 226.961 & 226.967 (no case law); **Nebraska**: Neb. Rev. St. § 39-1311.03 (*Bakody Homes & Dev., Inc. v. City of Omaha*, 516 N.W.2d 244 (Neb. 1994) (State did not have duty to provide corridor maps for road on which developer planned townhome subdivision to developer's surveyor; developer and surveyor were charged with knowledge of corridor protection law, surveyor admittedly was unfamiliar with that law, and surveyor specifically inquired only about right-of-way plans for road); **New Hampshire**: N.H. Rev. Stat. § 230-A:1 § 230-A:9 (no case law); **New Jersey**: N.J.S.A. § 27:7-67 (*Rieder v. State Dep't of Transp.*, 221 N.J. Super. 547, 535 A.2d 512 (App. Div. 1987) (no compensable taking could have occurred as result of filing of alignment preservation map); (*Schnack v. State, By Dep't of Transp.*, 389 A.2d 1006 (N.J. App. Div. 1978) (filing of the alignment preservation map did not constitute a compensable taking, even though the salable value of the property may have been reduced by the filing of the map); **Ohio**: Ohio R.C. § 5511.01 (*Hurst v. N. Seventh St. Church of Christ of Hamilton, Ohio*, 1991 WL 118195, at *3 (Ohio Ct. App. July 1, 1991)) (the mere expression or conveyance of an intent to take private property in the future is not such a substantial interference with private property as to constitute a permanent taking); (*J. P. Sand & Gravel Co. v. State*, 367 N.E.2d 54 (Ohio Ct. App. 1976) (holding that Fact that Director of Department of Transportation notified city, pursuant to statute, that the state contemplated highway construction on or about certain property did not amount to a compensable "taking" of the property; mere expression or conveyance of an intent to take private property in the future is not such a substantial interference as to constitute a taking; in the absence of a physical taking, a "taking" occurs only where there is a substantial interference with the rights of ownership)); **Tennessee**: Tenn. Code Ann. § 54-18-208 *et seq.* (no case law); **Utah**: Utah Code Ann. § 72-5-405 (no case law).

Assuming for sake of argument the Ordinance was an exercise of eminent domain rights, the Ordinance is not a public record for the reasons set forth above.

Accordingly, the exception to Exclusion 2 does not apply and Exclusion 2 bars Appellants' claims.

IV. APPELLANTS' CLAIMS ARE EXCLUDED BY EXCLUSION 3(D).

The Policies exclude coverage for matters that take place after the Policies were issued. More specifically, the Policies exclude loss or damage which arise by reason of: "3. Defects, liens, encumbrances, adverse claims or other matters: . . . (d) attaching or created subsequent to Date of Policy . . . . ."

The SCDOT exercised its right of eminent domain for the first time pursuant to the Condemnation Action filed December 15, 2009, after the effective dates of the Policies. Any loss or damage claimed by Appellants as result of the condemnation is therefore excluded.

V. THE LOWER COURT CORRECTLY FOUND THERE WERE NO ISSUES OF MATERIAL FACT ON APPELLANTS' BAD FAITH CLAIMS WHEN CHICAGO TITLE HAD A REASONABLE BASIS TO CONTEST APPELLANTS' CLAIMS AND THERE IS NO COVERAGE FOR APPELLANTS' CLAIMS

The elements of an action for bad faith refusal to pay benefits under an insurance contract are as follows: "(1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) refusal by the insurer to pay benefits *due under the contract*; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured." *Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 6, 466 S.E.2d 727, 730 (1996) (emphasis added).

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." *Doe v. S.C. Medical Malpractice Liab. Joint Underwriting Ass'n*, 347 S.C. 642, 649, 557 S.E.2d 670, 674 (2001). Generally, if there is a reasonable ground for contesting a claim, the denial of the claim does not constitute bad faith. *Hansen ex rel. Hansen v. United Services Auto. Ass'n*, 350 S.C. 62, 565 S.E.2d 114 (Ct. App. 2002); *see also Varnadore v. Nationwide Mut. Ins. Co.*, 289 S.C. 155, 345 S.E.2d 711 (1986) ("[T]he Plaintiff must prove that there was no reasonable basis to support the decision of the insurance. . . '[and] [I]f there is any reasonable ground for contesting the claim, there is no bad faith'").

As set forth in detail above, there is no coverage under the Policies. Because there is no coverage under the Policies, Appellants' bad faith causes of action fail as a matter of law.

Chicago Title had a reasonable basis to contest Appellants' claims.[19] Appellants' claims are based on an ordinance and eminent domain proceedings. The Policies contain exclusions specifically referencing ordinances and eminent domain. The exceptions to those exclusions are not implicated. Chicago Title exercised honest and informed judgment in processing Appellants' claims, and it had a reasonable basis to support its decisions, all of which are supported by abundant case law. Chicago Title has not failed to pay benefits under the Policies, nor has it engaged in bad faith in considering and investigating Appellants' claims.

Appellants argue "there is ample evidence of record that shows [Chicago Title] 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." Most of Appellants' arguments regarding bad faith center on Appellants' claims that Chicago Title misinterpreted the Policies or was wrong in asserting various coverage defenses. On most of these issues, the Special Referee agreed with

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[19] *See* Affidavits of J. Bushnell Nielsen. (R. pp. 1626-1786; R. pp. 1787-1977).

Chicago Title's interpretation of the Policies. On some of the coverage defenses, the Special Referee did not grant Chicago Title summary judgment, but, at the same time, did not grant Appellants summary judgment. The Special Referee correctly found Chicago Title had a reasonable basis to support its decisions. There is simply no bad faith shown on behalf of Chicago Title.

Appellants also argue Chicago Title determined the wrong date of loss under the Policies. However, the date of loss was established by Appellants when they provided appraisals in discovery using the date of the filing of the condemnation action. Appellants then disingenuously claim Chicago Title acted in bad faith by using the date of loss selected by Appellants.[20]

The Special Referee correctly granted summary judgment to Chicago Title on Appellants' bad faith claims.

VI. MANY OF THE ISSUES RAISED BY APPELLANTS HAVE NOT BEEN PRESERVED FOR REVIEW AS THEY WERE EITHER NOT RAISED OR RULED UPON BY THE LOWER COURT AND APPELLANTS FAILED TO FILE A MOTION TO ALTER OR AMEND JUDGMENT.

"Preserving issues for appellate review is a fundamental component of appellate practice." *Kennedy v. South Carolina Retirement Sys.*, 349 S.C. 531, 532-33, 564 S.E.2d 322, 323 (2001). "The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). A litigant must specifically raise an

[20] Regarding the date of loss, Appellants argue Chicago Title ignores "its own policy language," but Chicago Title cannot determine the language Appellants claim Chicago Title ignored because there is no language in the Policies that supports Appellants' argument regarding the proper date to measure loss. The policy considered by the court in *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 732 S.E.2d 626 (2012), was a residential homeowner's policy that, *unlike* the Policies here, did not define actual loss and set forth no method of valuation.

issue to the trial court **and** then obtain a ruling from the court on that specific issue for the issue to be preserved for review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments. *Smith v. Phillips,* 318 S.C. 453, 458 S.E.2d 427 (1995) (the appellate court will not address an issue unless the issue was raised to and ruled upon by the trial court); *Revis v. Barrett*, 321 S.C. 206, 467 S.E.2d 460 (Ct. App. 1996) (where appellant failed to seek clarification of discrepancy in order with a post-trial motion, appellate court may not address issue); *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (when the trial court does not explicitly rule on a question and appellant fails to move under Rule 59(e), SCRCP, to amend or alter the judgment on that ground, the issue is not preserved).

Moreover, the issues raised on appeal must be the same as those raised to the trial court. *See, e.g., Morris v. Anderson Cty.*, 349 S.C. 607, 564 S.E.2d 649 (2002) (an appellant cannot raise new arguments or change grounds between trial and appeal); *Hanahan v. Simpson*, 326 S.C. 140, 155, 485 S.E.2d 903, 911 (1997) (if the appellate argument differs from the basis for the argument to the trial court, then the issue is not preserved for appellate review). This requirement "prevents a party from keeping an ace card up his sleeve-intentionally or by chance-in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." *I'On*, 338 S.C. at 422, 526 S.E.2d at 724.

Additionally, if the trial court does not initially rule on the issue, it is incumbent on the party to file an applicable post-trial motion requesting a ruling on the argument from the trial court. *S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Grp.*, 347 S.C. 333,

343, 554 S.E.2d 870, 876 (Ct. App. 2001) (when an issue is raised but not ruled on by the trial judge, the party must file a motion to alter or amend, or the issue is not preserved for review); Failure to follow these explicit rules renders the issue not preserved for review. Id. at 343, 554 S.E.2d at 876.

Here, Appellants failed to file a motion to alter or amend. Appellants did not attempt to "convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." *I'On, L.L.C.*, 338 S.C. at 406, 526 S.E.2d at 724. Appellants also raise many arguments and issues that were either not raised to, or not ruled upon, by the lower court, or raised for the first time on appeal.

Appellants argue a taking occurred by the adoption of the official map. Essentially, Appellants want this Court to find unconstitutional the South Carolina General Assembly's framework for official maps. Nonetheless, a constitutional claim must be raised and ruled on to be preserved for appellate review. *See Hoffman v. Powell*, 298 S.C. 338, 380 S.E.2d 821 (1989).

The following additional issues and arguments do not appear to be preserved for appellate review: (1) the Ordinance differs from a "common land use" ordinance. Appellants' Br. at 11; (2) the sole purpose of the Ordinance is to reserve for future use and acquisition by Horry County the property covered by the Ordinance. Appellants' Br. at 11; (3) the Ordinance reserves property for future acquisition by Horry County that will certainly occur in the future. Appellants' Br. at 12; (4) if the Ordinance is not part of the land records of Horry County, it is an "off record" risk not excluded from coverage. Appellants' Br. at 13; (5) marketability includes the concept of title being reasonably free from the threat of litigation. Appellants' Br. at 16; (6) the Ordinance, by its very existence and as soon as it was recorded, created a covered defect in title to the property.

Appellants' Br. at 22; (7) the exception to Exclusion 2 is operative in that the Ordinance existed on the date of the Policies and the Ordinance, in and of itself, created a defect in title. Appellants' Br. at 23.; (8) "Notice of the enforcement thereof" is ambiguous and it must be construed in favor of the insured and against Chicago Title. Appellants' Br. at 22; (9) the Special Referee failed to construe various parts of the Policies in the light most favorable to Appellants; and (10) the Special Referee added an indexing or chain of title requirements to the Policies' definition of public records. Appellants' Br. at 20.

The Special Referee concluded Chicago Title did not act in bad faith by failing to investigate Appellants' claims and Chicago Title had a reasonable basis for denying those claims. Because the Special Referee did not specifically address the following bases now raised on appeal, they are not preserved for appellate review: denial based on there being no evidence in the public record of a covered defect; denial based on failure to tender a proof of loss; denial because the Ordinance is not a defect, lien or encumbrance on title; denial based on the Ordinance not being in the public land records of Horry County; denial based on the Ordinance only addressing the possible future use of the property; denial based on Exclusions 3(a), 3(b); and denial based on no actual loss.

CONCLUSION

For the above-referenced reasons, the Special Referee's order should be affirmed.

Respectfully submitted,

Demetri K. Koutrakos, SC Bar #11318
Callison Tighe & Robinson, LLC
1812 Lincoln Street, Suite #200
P. O. Box 1390
Columbia, SC 29202-1390
Telephone: 803-404-6900
Facsimile: 803-404-6902
Email: jimkoutrakos@callisontighe.com

ATTORNEYS FOR RESPONDENT

May 9, 2018

CERTIFICATE OF COUNSEL

I hereby certify that this Final Brief complies with Rule 211(b), SCACR.

Demetri K. Koutrakos, SC Bar #11318
Callison Tighe & Robinson, LLC
1812 Lincoln Street, Suite #200
P. O. Box 1390
Columbia, SC 29202-1390
Telephone: 803-404-6900
Facsimile: 803-404-6902
Email: jimkoutrakos@callisontighe.com

ATTORNEYS FOR RESPONDENT

May 9, 2018