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

RECEIVED
Jun 25 2020
SC Court of Appeals

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.

RESPONDENT CHICAGO TITLE INSURANCE COMPANY'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Respondent Chicago Title Insurance Company ("Chicago Title"), pursuant to Rule 221(a), SCACR, hereby moves and petitions the Court to reconsider and rehear the within appeal and the Court's opinion entered June 10, 2020, as Opinion Number 5731 (the "Opinion"). This Petition is based on the grounds that the Court overlooked or misapprehended certain matters set forth herein and Chicago Title respectfully requests the Court grant this Petition for Rehearing, vacate the Opinion, and affirm the Special Referee's order.

In addition, pursuant to Rule 219(b), SCACR, Chicago Title suggests that such rehearing should be *en banc*.

SUMMARY OF ARGUMENT

This Court concluded a county ordinance creates a defect, encumbrance, and a marketability issue. To reach that result, this Court broadly construed a county ordinance that affects only the use of property to create a third-party interest in the property in favor of the county. Without expressly saying so, this Court declared the county ordinance, as well as the carefully drafted land planning statute upon which it is based, unconstitutional—in violation of the Fifth Amendment—by finding statutorily authorized official maps vest, without just compensation to landowners, a "third-party interest" in local governments. This Court overlooked binding caselaw finding such pre-planning activities do not result in a taking. Despite trying to limit the broad and chilling reach of its Opinion by saying its decision is "[b]ased on the specific circumstances of this case," the end result is that this Court's decision provides an inverse condemnation claim to all landowners throughout the state whose property is affected by statutorily authorized official maps. No third-party interest was created by the county ordinance. The county had to do more for a third-party interest to vest, all of which is spelled out in detail in the ordinance and the statute. The ordinance affected only the use of property and, therefore, did not create a defect, encumbrance, or a marketability issue. This Court erred in concluding otherwise.

This Court correctly stated that parties to an insurance contract are free "to allocate risk as they see fit." The title insurance policies clearly allocate risks related to laws, ordinances, and governmental regulations on the insureds by a clear and unambiguous exclusion. This Court, however, shifted from the insured to the insurer the risk related to laws, ordinances, and governmental regulations. Ultimately, this Court has further shifted that risk and responsibility to

South Carolina real estate attorneys and title abstractors, who will now be faced with the impossible task of combing through unindexed documents "recorded" in the register of deeds by counties and other governmental entities in an attempt to discover ordinances or other documents that are not recorded in a manner that can be found in the chain of title, like the ordinance here.

In finding the county ordinance fell within the insuring provisions of the policies, this Court established the following principle: "matters that affect only the use of land are not title matters, but it does not follow that matter that affects use cannot also affect title." However, when construing the exclusion related to laws, ordinances, and governmental regulations "restricting, regulating, prohibiting or relating" to "the occupancy, use or enjoyment of the land," this Court failed to apply or consider that same principle. Assuming for sake of argument the accuracy of this Court's above statement (which is not conceded by Chicago Title), it should have concluded that an ordinance related to use or enjoyment is still excluded even if it affects title because of applicable exclusions from coverage set forth in the policies.

The findings and conclusions of this Court should not be taken lightly. This Court's Opinion has broad implications not only for the title insurance industry, closing attorneys, and title abstractors, but also for landowners who may now have potential deed warranty liability and local governments who will now be faced with inverse condemnation claims.

For these reasons and those outlined in detail below, Chicago Title requests this Court grant this Petition for Rehearing, vacate the Opinion, and affirm the Special Referee's order.

ARGUMENT

In its Opinion, this Court overlooked or misapprehended the following matters:

1. The ordinance did not create a defect, encumbrance, or title marketability issue because it was an exercise of statutorily granted land use planning authority that solely affected the use of the property and did not create an interest in a third party.

The Ordinance did not create a right in a third party under South Carolina law and, therefore, did not create a defect, encumbrance, or a title marketability issue. The Court's ruling that the Ordinance affected title means (1) every proposed road under the official map statute or a corresponding ordinance is a taking without just compensation that vests an inverse condemnation claim in all affected landowners or (2) use restrictions affect title. Without having acquired the right of way by consent or through eminent domain, the third-party interest the Court says Horry County acquired can be nothing other than a taking without just compensation. Also, the Court's holding that a use restriction affects title conflicts with South Carolina Supreme Court precedent.

As the Court held, title policies contain certain insuring provisions, and the insured has the burden of proving its claim falls in one of the policies' insuring provisions. *See Gamble v. Travelers Ins. Co*., 251 S.C. 98, 103, 160 S.E.2d 523, 525 (1968). The two Chicago Title policies ("Policies") at issue here include two relevant insuring provisions:

> 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;

An encumbrance is a right or interest in the land granted "which may subsist in third persons to the diminution in value of the estate although consistent with the passing of the fee." *Martin v. Floyd*, 282 S.C. 47, 51, 317 S.E.2d 133, 136 (Ct. App. 1984). 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."

A. This Court misconstrued the enabling statute and the Ordinance by finding they create a third-party interest in the property in favor of the county.

The Court held the Ordinance created a third-party interest in the property in favor of the county and, therefore, it constituted a defect, an encumbrance, and rendered title unmarketable. However, S.C. Code Ann. § 6-7-1220, which authorizes the Ordinance, and the Ordinance itself, are land use controls that do not create rights in governmental entities merely by enacting a map ordinance. The Ordinance created a procedure that could ultimately result in a future eminent domain action. However, as expressly spelled out in the statute and the Ordinance, further steps were necessary before Horry County could have any interest in the subject property.

The South Carolina General Assembly 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." S.C. Code Ann. § 6-7-1220 (emphasis added). 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 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.

This Court held the Ordinance itself creates a third-party interest in favor of the county, the result of which is a taking, by concluding the Ordinance created a right affecting title.[1] While the governmental entity may limit development in an area affected by the official map, like zoning laws and regulations tend to do, the statute and the Ordinance provide additional steps that may or may not result in a taking—a landowner with property covered by the map can apply to the planning commission which then must promptly (a) exempt the affected land; (b) authorize the issuance of desired permits (i.e., permit the requested use of the property); or (c) initiate appropriate action to acquire the property. *See* S.C. Code Ann. § 6-7-1270 and 1280; Ordinance 107-98 §§ 5.2.1, 5.2.2 (describing these procedures).

[1] The Court found that "[b]ecause the Ordinance created an interest in the land by reserving a right of way and restricting use of the reserved land, we conclude it diminished the owner's bundle of rights and, consequently, affected title." Zoning matters and ordinances in essence reduce the bundle of rights by depriving the uses to which the land can be put. *See Board of County Com'rs of Larimer County v. Conder*, 927 P.2d 1339, 1352 (Colo. 1996) (*en banc*) ("In law schools, property rights are envisioned as a bundle of sticks. Zoning deprives the landowner of some of the sticks in that bundle by reducing the uses to which the land may be devoted."). However, that does not mean that title is affected by an ordinance nor does it mean coverage is provided. Title insurance policies do not reference the bundle of rights and they do not insure the landowner's so-called bundle of rights would be uninterrupted. In fact, as plainly set forth by Exclusion 1, title insurance policies acknowledge that certain intrusions into the bundle of rights—any law, ordinance or governmental regulation—are not covered.

The effect of the statute and the Ordinance are the same: upon application by the landowner, the governing authority must decide promptly how it will proceed regarding the property. In other words, on request of the landowner, the use restrictions either go away or the county must initiate eminent domain proceedings. The Ordinance and the statutes on which it is based do not vest Horry County with a property right. Horry County does not and cannot have acquired a property right until it decides to take the property in question through appropriate eminent domain proceedings.

The Court stated a right of way was not created—"Chicago Title is correct that the Ordinance did not create a right-of-way"—but then went on to hold the Ordinance was a defect or encumbrance creating a third-party right in favor of the county with regard to the proposed right of way. *See* Op. at 45. South Carolina law has not recognized a property right of this nature. If the right of way was not created by the Ordinance, then this Court should construe the enabling statutes and the Ordinance as written and conclude that they merely affect use of the property.

There is no dispute the Ordinance complied with the statutes. By declaring the Ordinance created a third-party right in favor of the county, the Court has also declared all similar maps enacted pursuant to the statutes to be in violation of the Fifth Amendment and a taking without just compensation.[2] Instead, the Court should have presumed the applicable statutes and Ordinance are constitutional and interpreted them as they are written—as only affecting the use of property, an interpretation that would render the statutes and Ordinance valid and constitutional. *See*

[2] "Both the United States Constitution and the South Carolina Constitution provide that if the government takes private property for public use, then it must compensate the owner for the value. While the government typically takes property through an eminent-domain proceeding, a taking may occur without such a proceeding. That is called 'inverse condemnation.' An inverse condemnation may result from the government's physical appropriation of private property, or it may result from government-imposed limitations on the use of private property." *Byrd v. City of Hartsville*, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005) (internal citations omitted).

generally Joytime Distributors & Amusement Co. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999) ("All statutes are presumed constitutional and will, if possible, be construed so as to render them valid.").

Accordingly, no defect or encumbrance or title marketability problem could arise from the Ordinance, and the Court misinterpreted the Ordinance and related statutes in holding otherwise.

B. The South Carolina Supreme Court and other courts have recognized similar governmental limitations on use are not title defects or encumbrances and do not affect title marketability.

The Court held the Ordinance created an interest affecting title despite South Carolina appellate court cases addressing analogous facts and finding use restrictions do not affect title.

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. It followed earlier holdings by this Court reaching the same conclusion—a wetlands restriction did not encumber title or affect marketability. *McMaster v. Strickland*, 305 S.C. 527, 409 S.E.2d 440 (Ct. App. 1991); *Martin v. Floyd*, 282 S.C. 47, 51, 317 S.E.2d 133, 136 (Ct. App. 1984).

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. The restriction on harvesting in *Haw River* was enacted by county ordinance.

In the New York trial court case heavily relied upon on by this Court, *Ascot Homes, Inc. v. Lawyers Mortgage & Title Co.*, 237 N.Y.S.2d 179, 180–81 (N.Y. Sup. Ct. 1962), [3] the county map marked a strip of land for acquisition. The landowner applied for a building permit that was denied, but the government never took the land and no affirmative action was taken by the governmental entity. Both the plaintiff insured and the title insurer defendant moved for summary judgment. Both motions were denied. In fact, it does not appear the New York trial court made a final determination as to whether the acquisition map was a lien:

> Judgment cannot be awarded to the plaintiff for there has not been submitted to the court a proved copy of the acquisition map to enable the court to determine whether, as plaintiff contends, it does indeed create a lien. The determinations of the Zoning Board and the Board of Zoning Appeals also have not been properly proved in order to determine the claimed fact that the acquisition map is a lien and was so adjudged. Accordingly, both motions are denied, with leave, however, to plaintiff to renew its motion on proper papers, if so advised.

Id. at 182.

Besides not making a final determination as to whether the map created a lien, the New York trial court judge does not reference the underlying statute, if any, that authorizes the acquisition map. There is no way to determine the effect of the New York acquisition map and there is no mention of the statutory authority for the acquisition map under New York law. We do not know if the statutory authority for the New York acquisition map is similar to the framework

[3] This Court is the only court in the country to cite this New York trial court opinion.

set forth by our General Assembly such that it would have forced the New York governing authority to either acquire the property or file a condemnation action had it denied a building permit.

Ascot Homes is not the only New York trial court to address an official map or plan. *S.S. Kresge Co. v. City of New York* held a map ordinance was not a taking until the right to build was denied:

> There can be no doubt that the *official map or plan* serves a useful purpose and *does not, in and of itself, constitute a taking of property* included within the mapped street. Whether there is a taking of property depends upon the circumstances, and in a case such as this, upon *whether the action ultimately taken by the Board of Standards and Appeals may fairly be said to interfere with the use and enjoyment of the 9-foot strip within the boundaries of the mapped street*. Hence, unless and until Kresge applies to the Board of Standards and Appeals for a permit to erect the building in the mapped street, as provided in Section 35, and the application is denied, this Court is without jurisdiction to determine whether, under the circumstances, there has been a taking of the 9-foot strip without just compensation.

87 N.Y.S.2d 313, 316 (Sup. Ct.), *aff'd sub nom. S. S. Kresge Co v. City of New York*, 275 A.D. 1036, 92 N.Y.S.2d 414 (App. Div. 1949) (emphasis added). Although this case did not address the official map in the context of title insurance, the New York Supreme Court (trial level) equated interference with use and enjoyment as a taking, but only when a building permit was denied, something that our General Assembly considered in adopting the applicable statutes with which the Ordinance complied.

Finally, these cases also show title marketability is not affected by some restriction. Here, there is no allegation or fact indicating title to the subject property was threatened. Rather, only use of the property was restricted. Certainly, all real property is subject to eminent domain powers of the sovereign, and 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.").

C. This Court erred in finding the Ordinance created a third party interest in the property in favor of the county, as the purported interest acquired by the county pursuant to the Ordinance is a taking as a matter of law, but our Supreme Court has held an expressed intention to condemn does not create a taking as a matter of law.

This Court held the Ordinance created an interest affecting title when it was adopted. *See* Op. at 44 ("Ordinances may regulate land use without encumbering title, but the Ordinance here went beyond regulating use and created a third-party interest in the property in favor the County.") If the Ordinance affected title, then the right created by the Ordinance could have only arisen through a taking without just compensation as there was no grant by the landowner and no condemnation action was filed in 2002. However, the South Carolina Supreme Court has already rejected a claim that an expressed intent to take property results in a taking.

For planning purposes, the Ordinance raised as a possibility the future taking of the property, which may or may not take place. As demonstrated by our Supreme Court's holding in *Kiriakides v. Sch. Dist. of Greenville Cty.*, 382 S.C. 8, 14, 675 S.E.2d 439, 442 (2009), the Court erred in concluding the Ordinance did anything more than that.

In *Kiriakides*, the Supreme Court rejected the notion that planning activities constitute a taking. *Kiriakides* involved a notice and tender of condemnation by a school district that was served but not filed. Nine months later, the school district decided not to take the property. Even though the school district had targeted the property by serving an unfiled condemnation action, the Supreme Court did not find merit in the landowner's 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.*; *see also Byrd v. City of*

Hartsville, 365 S.C. 650, 661-63, 620 S.E.2d 76, 82 (2005) (finding an eleven-month delay in evaluating the rezoning of certain property did not result in a regulatory taking and inverse condemnation); *City of Chicago v. Loitz*, 295 N.E.2d 478, 480 (Ill. Ct. App. 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").

The school district in *Kiriakides* went far beyond what the Ordinance does here in both preparing and serving a condemnation notice. Yet the Supreme Court found no taking occurred. The Ordinance is part of a carefully designed land use planning tool, drafted with the Fifth Amendment in mind, that allows the landowner to proceed with building plans and submit permits, forcing the governmental agency to then decide whether to issue the building permits or proceed with acquiring the property or filing a condemnation action. Like the governmental entity in *Kiriakides*, Horry County could have decided to either not proceed or to alter the course of the proposed right of way. In fact, funding for the project was not in place until after the effective dates of the Policies and almost five years after the Ordinance. *See* (R. pp. 543-599).

North Carolina courts addressed a similar issue and held a much differently drafted land use planning statute was unconstitutional by causing a taking of the identified property. *See Kirby v. N.C. Dep't of Transp.*, 786 S.E.2d 919 (N.C. 2016). The statute had a three-year period in place before the governing authority was forced to do anything, unlike the Ordinance here. The North Carolina Supreme Court found the North Carolina 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. 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 925–26.[4]

Unlike the North Carolina corridor maps, the 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.

No right has been acquired by the county by the Ordinance or the official map until there is a decision or further action as provided by the enabling statute and the Ordinance. Unless and until the governing authority decides to take property through a condemnation action, which it may or may not decide to do, there can be no right in a third party affecting title.

The Court overlooked and misapprehended the applicable law and the facts. Appellants' claims do not fall within the insuring provisions of the Policies; there was no defect, encumbrance, or marketability issue; there is no coverage under the Policies; and the Special Referee correctly granted Chicago Title summary judgment.

2. Even assuming the Ordinance was a covered risk, Exclusions 1 and 2 apply.

In finding coverage for Plaintiffs, this Court stated that the "fundamental idea behind title insurance is to cover rather than exclude unforeseen and unknown risks; otherwise, title insurance would not provide the peace of mind it touts." Coverage under the Policies should not be based on what this Court believes is the fundamental idea behind title insurance, but instead should be based on the language of the Policies.

[4] The end result of the North Carolina Supreme Court's decision to find the statute authorizing the corridor maps unconstitutional is not surprising. See *Chappell v. North Carolina Department of Transportation*, 841 S.E.2d 513 (N.C. 2020) (landowners brought an inverse condemnation action against North Carolina Department of Transportation after portions of property were designated as within a roadway corridor pursuant to Roadway Corridor Official Map Act).

The Policies clearly, unambiguously, and broadly exclude from coverage losses arising from laws, ordinances, or governmental regulations relating to the occupancy, use, or enjoyment of the land and rights of eminent domain. The Policies clearly allocated risk of these matters on the insured, not the insurer. This Court erred in concluding otherwise. *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, loss related to the Ordinance is excluded from coverage by Exclusions 1 and 2 even under the Court's analysis holding the Ordinance affected title and not just use.

A. The Court held a use restriction created by an ordinance can also affect title and create an encumbrance or marketability issue, but the Court failed to apply the plain language of Exclusion 1 that bars coverage for exactly such an ordinance.

This Court should vacate its Opinion by applying the Court's own reasoning to the plain language of Exclusion 1. Even if the Ordinance was a defect or an encumbrance or affected marketability, Exclusion 1 bars coverage.

The Policies exclude from coverage loss or damage, costs, attorneys' fees or expenses which arise by reason of:

> *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).

This Court held, "We conclude, however, that the Ordinance interferes with the insured's title because it limits the rights and incidents of ownership. It is true that matters that affect only the use of land are not title matters, but it does not follow that matter that affects use cannot also affect title." Op. at 45. Despite so holding, the Court later ruled Exclusion 1 did not apply as a matter of law because "the Ordinance related to and affected the title of the land, not just its use." Op. at 48. The Court's own reasoning requires vacating the Opinion and affirming summary judgment.

Even though this Court found the Ordinance to be a use restriction that also affected title to find coverage under the insuring provisions of the Policies, when construing the exclusion related to laws, ordinances, and governmental regulations "restricting, regulating, prohibiting or relating" to "the occupancy, use or enjoyment of the land," this Court failed to apply or consider that same principle. To be consistent, this Court should have used the same reasoning to conclude that an ordinance related to use or enjoyment of the land is excluded even if it somehow affects title. The Court appears to have imposed a restriction on the application of Exclusion 1 that simply does not exist.

Additionally, the Court did not review or consider that Exclusion 1 applies to ordinances that affect "enjoyment." Generally, "enjoyment" comes up—like encumbrances—in deed warranties. The word "enjoyment" is defined as "the exercise of a right; the possession and fruition of a right, privilege, or incorporeal hereditament. . . . Such includes the beneficial use, interest, and purpose to which property may be put, and implies right to profits and income therefrom." *BLACK'S LAW DICTIONARY* 529 (6th ed. 1990). In South Carolina, "[t]he covenant of quiet enjoyment obligates the grantor to protect the estate against the lawful claim of ownership asserted by a third

person" and usually involves a claim for superior possession against the grantee. *Martin v. Floyd*, 282 S.C. 47, 51, 317 S.E.2d 133, 136 (Ct. App. 1984).

The title matter found by this Court to exist falls within either "use" or "enjoyment" as used in Exclusion 1. This Court held "use" as used in Exclusion 1 would not apply because the Ordinance affected title, but even if that is the case, which Chicago Title denies and is contrary to this Court's own holding, then the Ordinance to the extent it affects title must also fall within "enjoyment" as used in Exclusion 1.

Therefore, Exclusion 1 applies.

B. Exclusion 2 applies and bars coverage for rights arising from eminent domain because the Court effectively found a taking occurred by declaring the Ordinance created a third-party right in favor of the county.

Although the Court states "Neither Appellants nor Chicago Title claim the Ordinance constitutes an eminent domain action," Jericho State did in fact allege a taking in its Complaint.[5] In addition, this Court has effectively held the Ordinance was an exercise of the right of eminent domain by holding the Ordinance created rights in a third party affecting title.

Like *Kirby v. N.C. Dep't of Transp*., 786 S.E.2d 919 (N.C. 2016), this Court effectively held the Ordinance is a taking outside of the South Carolina eminent domain statutes. Accordingly, Exclusion 2 should apply under the Court's analysis.

The Policies exclude loss or damage which arise by reason of:

> 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.

[5] 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).

As explained above, any right created in Horry County as a third party could only be acquired by purchase, statutory eminent domain authority, or a taking that creates an inverse condemnation claim. Indisputably, there was no purchase or statutory proceeding when the Ordinance was enacted. This Court, however, held the Ordinance affected title beyond use. Under this analysis, the Ordinance must have caused a taking, which would fall under the exclusion expressly covering rights of eminent domain.

Therefore, Exclusion 2 applies.

C. The exceptions to Exclusions 1 and 2 do not apply.

The exception to Exclusion 1, barring the application of the exclusion "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," does not apply because the Ordinance, as mentioned below, was not indexed in a manner that can ever be found in a title search.

Exclusion 2 also contains an exception, which bars its application if "a 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." Any taking by the Ordinance would have occurred outside the public records and "a purchaser for value without knowledge" would not have constructive notice of the Ordinance.

The Ordinance was not indexed in a manner that someone could find the Ordinance in the chain of title. The evidence in the record is conclusive on this issue.

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); *see also* 11 *Thompson on Real Property* § 92.09(c)(2)(A), at 184 (3rd ed. 2015) ("[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," and "the purchaser is not bound to search all public records that may contain information about claims or interests in real estate.").

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.").

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. S.C. Code Ann. § 30-9-40 (the indexing of documents constitutes an "*integral, necessary and inseparable part of the recordation of the deed, mortgage, or other written instrument*" and that "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.").

The Policies define "public records" as "records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge." 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, did not provide constructive notice under the recording act, and was not a public record under an agreement to issue a title insurance policy). [6]

The Court overlooked and misapprehended the applicable law and the facts, the matters claimed by Plaintiffs do not fall within the insuring provisions of the Policies, but if they do, they are excluded by both Exclusions 1 and 2, they do not fall within the exceptions to the exclusions, there is no coverage under the Policies, and the Special Referee correctly granted Chicago Title summary judgment.

3. This Court mistakenly reversed the Special Referee's grant of summary judgment on the implied covenant of good faith and fair dealing claims because Appellants never appealed the Special Referee's ruling granting summary judgment on those claims, Appellants never challenged that ruling on appeal, and those claims are otherwise subsumed within Appellants' breach of contract claims.

The Special Referee found "Chicago Title is also granted summary judgment on the breach of the covenant of good faith and fair dealing claims. The implied covenant of good faith and fair dealing 'is not an independent cause of action separate from the claim for breach of contract.' *RoTec Servs., Inc. v. Encompass Servs. Inc.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App.

[6] 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).

2004)." However, in stating this Court was affirming "the special referee's grant of summary judgment to Chicago Title on Appellants' cause of action for bad faith, but we reverse the grant of summary judgment to Chicago Title on Appellants' remaining claims," the Court appears to have reversed the Special Referee's order granting summary judgment on the breach of the covenant of good faith and fair dealing claims.

Appellants never challenged that ruling on appeal. This Court overlooked that fact in apparently reversing the grant of summary judgment on the breach of the covenant of good faith and fair dealing claims. In any event, even if Appellants had appealed that issue, the Special Referee was correct. Those claims should not survive because there is no such independent cause of action.

The Court overlooked and misapprehended the applicable law and the facts and the Special Referee correctly granted Chicago Title summary judgment on the breach of the covenant of good faith and fair dealing claims.

III. CONCLUSION

Chicago Title respectfully requests its Petition for Rehearing be granted, the Court vacate its June 10, 2020 Opinion and affirm the Special Referee's grant of summary judgment in favor of Chicago Title on all causes of action.

[signature page immediately following]

Respectfully submitted,

s/ Demetri K. Koutrakos
Demetri K. Koutrakos, SC Bar #11318
Louis H. Lang, SC Bar #3127
Harry A. Dixon, SC Bar #103509
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
Email: louislang@callisontighe.com
Email: harrydixon@callisontighe.com

ATTORNEYS FOR RESPONDENT

June 25, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
Jun 25 2020
SC 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.

PROOF OF SERVICE

I hereby certify that, on this date, the **Respondent Chicago Title Insurance Company's Petition for Rehearing and Suggestion for Rehearing *En Banc*** was served on Appellants' counsel via AIS email, pursuant to Supreme Court Order dated March 20, 2020, as amended on May 29, 2020, as follows:

C. Scott Masel, Esquire
Fred B. Newby, Esquire
Newby, Sartip, Masel & Casper, LLC
P. O. Box 808
Myrtle Beach, SC 29578
Telephone: 843-449-9417

Email: fnewby@newbylaw.com
Email: smasel@newbylaw.com
(Attorneys for Appellants)

A copy of the service email is attached hereto, as required.

I further certify that all parties required by Rule to be served have been served.

s/ Demetri K. Koutrakos

Demetri K. Koutrakos, SC Bar #11318
Louis H. Lang, SC Bar #3127
Harry A. Dixon, SC Bar #103509
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
Email: louislang@callisontighe.com
Email: harrydixon@callisontighe.com

ATTORNEYS FOR RESPONDENT

June 25, 2020

Kathy Romero

From: Kathy Romero
Sent: Thursday, June 25, 2020 10:43 AM
To: Scott Masel; fnewby@newbylaw.com
Cc: Jim Koutrakos; Harry Dixon; Louis Lang
Subject: Jericho vs. Chicago Title / Appellate Case No. 2017-001646
Attachments: Petition for Rehearing - FINAL.pdf; Proof of Service.pdf; Clerk.001.pdf

Dear Mr. Masel and Mr. Newby,

Attached please find Respondent Chicago Title Insurance Company's Petition for Rehearing and Suggestion for Rehearing *En Banc,* Proof of Service, and letter to the appellate clerk regarding the above-referenced matter. The attached documents are being filed with the Court of Appeals today. Thank you.

With kind regards,

Kathy Romero
Legal Assistant to Demetri "Jim" K. Koutrakos, Esq.
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: kathyromero@callisontighe.com

CALLISON TIGHE

Demetri "Jim" K. Koutrakos
803-404-6900
JimKoutrakos@callisontighe.com

June 25, 2020

RECEIVED
Jun 25 2020
SC Court of Appeals

VIA EMAIL: ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

RE: Jericho State Capital Corp. of Florida vs. Chicago Title Insurance Company
Lynx Jericho Partners, LLC vs. Chicago Title Insurance Company
Appellate Case No. 2017-001646

Dear Ms. Kitchings:

Enclosed herewith please find the Respondent Chicago Title Insurance Company's Petition for Rehearing and Suggestion for Rehearing *En Banc,* together with the Proof of Service, in the above-referenced matter. Kindly file the same and return a clocked-in copy of each to the undersigned via return email. This firm's check in the amount of $50 in payment of the required filing fee is being mailed to the court today.

The enclosed documents have been served upon Appellants' counsel today via email as indicated in the Proof of Service.

Please feel free to contact me with any questions. Thank you.

With kind regards, I am

Sincerely yours,

CALLISON TIGHE & ROBINSON, LLC

s/ Demetri "Jim" K. Koutrakos

Demetri "Jim" K. Koutrakos

DKK:ksr
Enclosures
cc (via email): C. Scott Masel, Esquire
Fred B. Newby, Esquire
Louis H. Lang, Esquire
Harry A. Dixon, Esquire
1020.566\Appeal\Rehearing\Clerk.001