THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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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.

RESPONDENT CHICAGO TITLE INSURANCE COMPANY'S REPLY TO APPELLANTS' RETURN TO THE PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Respondent Chicago Title Insurance Company ("Chicago Title") hereby replies to the Return submitted by Appellants Jericho State Capital Corp. of Florida and Lynx Jericho Partners, LLC ("Appellants").

ARGUMENT IN REPLY

Appellants' Return highlights the issue raised by Chicago Title in its Petition for Rehearing: how could Horry County acquire an interest in the subject property that affected title—i.e. an encumbrance—without acquiring that interest through a taking?

As set forth in Chicago Title's briefing and Petition for Rehearing, under the circumstances of this case, South Carolina law only recognizes a use restriction pursuant to a governing authority's regulatory power OR an acquisition of a property interest through a taking. However, Appellants, like this Court, assert Horry County's interest arising from the Map Ordinance is some until-now-unrecognized middle ground. There is no in-between.

Either way, Appellants' claims are not covered.

A. THIS COURT HELD THE MAP ORDINANCE TOOK PROPERTY WITHOUT PAYING JUST COMPENSATION.

This Court held Horry County acquired an interest affecting title—creating both an encumbrance and a marketability problem, according to the Court—by passing the Map Ordinance and identifying a proposed future road over the subject property. Further, the Court held this interest was more than just a use restriction—because it affected title—and therefore was not excluded by the exclusion for ordinances regulating use and enjoyment of the property. While the Court's opinion does not call this interest affecting title a "taking," Chicago Title pointed out in its Petition for Rehearing that this Court in its decision describes a taking by finding Horry County's interest arising from the Map Ordinance affected title and not just use. *See Hardin v. South Carolina Dept. of Transp.*, 371 S.C. 598, 609 n. 4, 641 S.E.2d 437, 443 n. 4 (2007) ("Government action can effect no taking unless it has deprived an owner of a property interest."); *Sunrise Corp. v. City of Myrtle Beach*, 420 F.3d 322, 330 (4th Cir. 2005) *cert. den.* 547 U.S. 1093 (2006) ("The

analysis in a takings case necessarily begins with determining whether the government's action actually interfered with the landowner's antecedent bundle of rights.").

Whether the Map Ordinance is a taking is quite important.[1] If it is a taking, like this Court found, then Exclusion 1 for ordinances "restricting, regulating, prohibiting or relating to . . . the occupancy, use, or enjoyment of the land" would not exclude Appellants' claim, but Exclusion 2, a separate exclusion for eminent domain, most certainly would. Despite Appellants' assertion to the contrary (*see* Appellants' Return to Chicago Title's Petition for Rehearing at 12), Exclusion 2 applies to "rights of eminent domain," not just those done according to the Eminent Domain Procedure Act. South Carolina law recognizes these rights may either be exercised through eminent domain proceedings or by inverse condemnation. *See, e.g., Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (2005) (cited in Chicago Title's Petition for Rehearing at 7, n. 2).

This Court effectively adopted Appellants' argument that a taking occurred. Despite Appellants' protestations to the contrary, Appellants argued in their brief that the Map Ordinance is a taking and they are, to some extent, still making that same argument. *Compare* Appellants' Final Brief at 23–24 (stating "[t]o be sure, a 'taking' can occur when a government agency takes private property without formally exercising its power of eminent domain through a condemnation lawsuit and may exist by physical appropriation or government imposed limitations on the use of

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[1] Chicago Title's position is not alarmism—North Carolina courts have addressed similar issues with the constitutionality of planning maps. *See Chappell v. North Carolina Department of Transportation*, 841 S.E.2d 513 (N.C. 2020) *and Kirby v. N.C. Dep't of Transp*., 786 S.E.2d 919 (N.C. 2016). As mentioned in Chicago Title's brief, the North Carolina statute is much different than South Carolina's enabling statute and the Map Ordinance, with Chicago Title citing other states' statutes similar to South Carolina's and caselaw upholding their constitutionality. For Appellants to say they did not request this Court to make a finding that the enabling statute and the Ordinance is in essence a violation of the Fifth Amendment is simply wrong, as they heavily relied upon *Kirby*, the North Carolina case striking the North Carolina statute providing for corridor maps.

private property" and "there is evidence that the Ordinance constitutes a taking") *with* Appellant's Return to Chicago Title's Petition for Rehearing at 3 ("Contrary to Respondent's petition, this is not a takings case. It never has been.") *and* Appellant's Return to Chicago Title's Petition for Rehearing at 14 ("if Exclusion #2 does apply, which it does not, then its exception may still permit coverage because *at least some evidence shows a taking of the 10 acres occurred prior to the date of policy* resulting in the unmarketability of title to the entire tract.") (emphasis added).

Chicago Title is not abandoning its earlier position. To be clear, Chicago Title asserted and continues to assert the Map Ordinance is a use restriction, not a taking. If the Map Ordinance is a use restriction, then it is 1) not an encumbrance or 2) is excluded by a specific exclusion for ordinances "restricting, regulating, prohibiting or relating to . . . the occupancy, use, or enjoyment of the land." Chicago Title is simply reacting to this Court's decision that has in effect held the Map Ordinance results in a taking.[2]

Chicago Title agrees an encumbrance is not always a taking, but it is certainly a taking when the government acquires an interest in property by passing a law or ordinance rather than just regulating the use of property. The issue of what interest Horry County acquired by enacting the Map Ordinance is key in this dispute. Chicago Title asserts Horry County cannot acquire an interest in property except through an action that would be a taking, yet Horry County has regulatory power to govern use of property. Chicago Title is asserting there is no in-between—Horry County cannot encumber the property beyond use regulations without causing a taking.

[2] Appellants' argument that Chicago Title "flip-flopped" is patently false. Chicago Title simply argued that Appellants failed to preserve for appellate review their argument that a taking occurred, which in essence means the Ordinance is unconstitutional, by neither raising that constitutional issue below nor obtaining a ruling on that issue. Respondent's Final Brief at 48.

This takings problem is true regardless of whether other maps and map ordinances in South Carolina are the same. One point of such ordinances and maps is to identify possible future road right of ways. If other counties or municipalities use the same language as the Map Ordinance in this case, which language flows from the enabling statutes, then those counties would be acquiring property interests according to this Court's opinion. Contrary to Appellants' assertions, evidence of every map and map ordinance in South Carolina is not necessary.[3]

B. THE MAP ORDINANCE DID NOT CREATE A COVERED LOSS BECAUSE EXCLUSIONS 1 AND 2 APPLY REGARDLESS OF WHETHER THE MAP ORDINANCE WAS AN ENCUMBRANCE OR AFFECTED MARKETABILITY.

Chicago Title asserts the Map Ordinance was not covered under the insuring provisions of the title policies because it was not an encumbrance and did not affect marketability. *See* Petition for Rehearing at 4–13. However, the Map Ordinance is not a covered loss even if the Map Ordinance was an encumbrance or affected title.

The Map Ordinance reserved the location of a road for a possible future taking and restricted the use of the reserved land. However, this Court effectively held the Map Ordinance created an interest affecting title, beyond the expressed intent for a taking as described by the

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[3] In addition, Appellants' argument that the Ordinance is broader than the enabling statute by establishing a "reservation area" is simply wrong as the enabling statutes directly provide that authority. *See* S.C. Code Ann. § 6-29-1130(a) ("These regulations may provide for the harmonious development of the municipality and the county; . . .for the dedication or reservation of land for streets."); S.C. Code Ann. § 6-7-1220 ("Counties and municipalities may establish official maps to reserve future locations of any street, highway . . . 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. § 6-7-1230 ("Such official maps may show the location of existing or proposed public street, highway and utility rights-of-way, public building sites, and public open spaces."); S.C. Code Ann. § 6-29-340(B)(2)(c) (describing the functions, powers, and duties of local planning commissions to include preparing for adoption "an official map and appropriate revision on it showing the exact location of existing or proposed public street, highway, and utility rights-of-way, and public building sites, together with regulations to control the erection of buildings or other structures or changes in land use within the rights-of-way, building sites, or open spaces within its political jurisdiction or a specified portion of it . . . "). This Court appears to have impliedly found the above-statutes unconstitutional.

Supreme Court in *Kiriakides v. Sch. Dist. Of Greenville City*, 382 S.C. 8, 14, 675 S.E.2d 439, 442 (2009), and beyond a use restriction as set forth in the plain language of the Map Ordinance and the enabling statutes. The interest in the property that this Court found is held by Horry County can only have accrued through a taking by Horry County. Exclusion 2 of the title policy excludes such a taking. Applying this Court's opinion, the Map Ordinance did not create a covered loss.

A close review of the law and facts supports Chicago Title's position that the road reservation is a declared intent to possibly take property in the future, like *Kiriakides*, and the restriction on development in the reserved area is simply a limit on use, just like zoning ordinances tend to do. Accordingly, the Map Ordinance is properly considered a use restriction. If it is a use restriction, then whether the Map Ordinance is an encumbrance or whether it affected marketability would not matter because Exclusion 1 excludes coverage, as explained by Chicago Title in earlier briefing. *See* Respondent's Brief *and* Chicago Title's Petition for Rehearing. This is not an impermissibly broad interpretation—Exclusion 1 specifically excludes coverage for ordinances restricting, regulating, prohibiting or relating to the occupancy, use, or enjoyment of the land.

Moreover, the exceptions to both Exclusion 1 and 2 do not apply because the manner in which the Map Ordinance was recorded and indexed failed to impart constructive notice as required by the applicable statutes and the definition of "public records" in the policies.

Appellants argument that its abstractor happened to have independent knowledge of the Ordinance is misplaced. He admitted the Ordinance would not be found in a title search of the subject property. That is because indexing is an integral part of the recording system in South Carolina. It is absurd to argue that recording a document and indexing that document under the name of the county in which the property is located is appropriate.

Appellants further argue that if Chicago Title "wants a public record to be a 'public record' only if it is indexed with the chain of title, then it should have said so in its policies." Return at 13. However, the policies do exactly that by defining "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." The manner in which the Ordinance was recorded would not lead to any reasonable title abstractor or attorney finding the Ordinance and its recording did not comply with the applicable statutes. *See* S.C. Code Ann. § 30-9-40 (noting that indexing of documents is an inseparable part of the recordation of documents and recordation is not notice unless the filing of the instrument is entered as required in the indexes); S.C. Code Ann. § 30-9-30 (requiring the register of deeds to "keep a record" of "all conveyances, mortgages, judgments, liens, contracts, and papers relating to real and personal property" by "entering in the record the names of the grantor and grantee . . . or other parties to the written instruments, date of filing, and nature of the instrument immediately upon its lodgment for record. The filing is notice to all persons, sufficient to put them upon inquiry of the purport of the filed instrument and the property affected by the instrument.").

Therefore, the Ordinance does not constitute a public record as defined by the policies and the exceptions to Exclusions 1 and 2 do not apply.

C. APPELLANTS AGREE SUMMARY JUDGMENT ON THEIR SEPARATE CAUSE OF ACTION FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING WAS APPROPRIATE.

Appellants and Chicago Title agree the special referee's grant of summary judgment on Appellants' independent cause of action for breach of the implied covenant of good faith and fair dealing was proper. Appellants did not challenge this ruling and they so admit.

However, Appellants and Chicago Title disagree as to what the Court stated in its opinion on this issue. Although this appears to be an oversight, this Court's opinion seems to expressly

reverse the special referee's grant of summary judgment to Chicago Title on this independently pled cause of action:

> We therefore *reverse* the order of the special referee granting Chicago Title Insurance Company (Chicago Title) summary judgment as to Jericho State Capital Corporation of Florida's (Jericho's) and Lynx Jericho Partners, LLC's (Lynx Jericho's) (collectively Appellants) claims for breach of contract *and breach of the covenant of good faith and fair dealing*.
>
> Accordingly, we affirm 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* and remand to the special referee for proceedings consistent with this opinion.
>
> (emphasis added)

Accordingly, this Court mistakenly reversed the Special Referee's grant of summary judgment on Appellants' separate causes of action for breach of the implied covenant of good faith and fair dealing.

CONCLUSION

In short, Appellants' Return follows the Court's opinion and says essentially, "the county's interest is more than use and also affects title, but it is not a taking." Such an interest is not recognized in South Carolina and must either be a regulation affecting use or must rise to the level of a taking. Either way, Appellants' title claims are not covered.

Accordingly, 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.

Respectfully submitted,

s/ Demetri K. Koutrakos

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AND

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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 Reply to Appellants' Return to Respondent'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 July 13, 2020, as follows:

C. Scott Masel, Esquire
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(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
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ATTORNEYS FOR RESPONDENT

July 27, 2020

Kathy Romero

From:	Kathy Romero
Sent:	Monday, July 27, 2020 3:13 PM
To:	Scott Masel; fnewby@newbylaw.com
Cc:	Jim Koutrakos; Harry Dixon; Louis Lang
Subject:	RE: Jericho vs. Chicago Title / Appellate Case No. 2017-001646
Attachments:	Reply to Return to Petition for Rehearing.pdf; Proof of Service - Reply to Return to Petition for Rehearing.pdf; Clerk.003.pdf

Dear Mr. Masel and Mr. Newby,

Attached please find Respondent Chicago Title Insurance Company's Reply to Appellants' Return to the 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,

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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 Reply to Appellants' Return to Respondent'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.

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

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