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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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 ..... Respondents

and Chicago Title Insurance Company is the ..... Petitioner.

APPENDIX
Volume I of V

Fred B. Newby, SC Bar #4202
C. Scott Masel, SC Bar #12497
NEWBY, SARTIP & MASEL, LLC
P. O. Box 808
Myrtle Beach, SC 29578
Telephone: 843-449-9417
Attorneys for Respondents

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
Attorneys for Petitioner

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Court of Common Pleas
Karl A. Folkens, Special Referee

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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.

RECORD ON APPEAL

VOLUME ONE

Fred B. Newby
C. Scott Masel
Newby, Sartip & Masel, LLC
4593 Oleander Drive
Myrtle Beach, South Carolina 29577
(843) 449-9417
Attorneys for Appellants

Demetri K. Koutrakos
Callison, Tighe & Robinson, LLC
1812 Lincoln Street, Suite #200
P.O. Box 1390
Columbia, SC 29202-1390
(803) 404-6900
Attorneys for Respondent

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STATE OF SOUTH CAROLINA)) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Jericho State Capital Corp. of Florida, Plaintiff, v. Chicago Title Insurance Company, Defendant.	C/A: 2013-CP-26-5530
Lynx Jericho Partners, LLC, Plaintiff, v. Chicago Title Insurance Company, Defendant.	C/A: 2015-CP-26-1084 (Consolidated with the above case)

ORDER ADDRESSING MOTIONS FOR SUMMARY JUDGMENT

(Ending Action)

This matter is before me as Special Referee to make appropriate findings of fact and conclusions of law with the authority to enter a final judgment in these cases pursuant to the terms of the Consent Order of Reference entered February 13, 2015. A hearing was held on January 28, 2017, at Folkens Law Firm, P.A., Florence, South Carolina. The parties appeared with their respective counsel of record. Based on the entire record before me, I make the following findings and conclusions:

The cases have been consolidated. Plaintiffs Jericho State Capital Corp. of Florida (herein "Jericho State") and Lynx Jericho Partners, LLC (herein "Lynx Jericho") have filed a motion for summary judgment as to liability only. Defendant Chicago Title Insurance Company (herein

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"Chicago Title") has filed a motion for summary judgment as to liability and damages. Chicago Title filed an initial motion for summary judgment prior to these cases being consolidated. Later, a consolidated motion for summary judgment amended the originally filed motion.

Summary judgment may only be granted when "the pleadings [and] depositions . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP; *Lanham v. Blue Cross & Blue Shield of South Carolina, Inc.*, 349 S.C. 356, 361-62, 563 S.E.2d 331, 333 (2002) (when ruling on a motion for summary judgment, "the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party.").

Many of the facts are not in dispute. As to the disputed facts, I have viewed those facts and the inferences which can be reasonably drawn therefrom in the light most favorable to the opposing party to each party's respective motion for summary judgment. Although I acknowledge that with cross-motions for summary judgment this process can be rather convoluted, it must be done in the absence of a stipulation from the parties that I apply a preponderance of the evidence standard.

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.

Plaintiffs are two mortgagees insured under loan policies of title insurance issued by Chicago Title in 2006. The policies insure defects in the title which may have been missed by a title examination, omitted from the public record or arise by fraud or forgery, but also exclude, among other matters, zoning laws, ordinances, regulations, and eminent domain. Each claimed exclusion also has at least one exception.

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TIMELINE

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. 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 was attached to the Ordinance.

The Ordinance did not identify the properties affected by the possible future construction of the Carolina Bay Parkway; nor did it contain a list of property owners who may have been affected in the future if the proposed Parkway was actually constructed. The conceptual roadway plan attached to the Ordinance also did 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, were not mentioned in the Ordinance or in the attached conceptual plan.

On July 9, 2002, the Ordinance was recorded with the Horry County Register of Deeds. It was indexed under the name "Horry County," but 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. Although the Ordinance states "the construction of The Carolina Bays Parkway from Highway 501 to Highway 17 By-pass will occur . . .", no condemnation action was filed at that time. One searching title to the properties affected would not find the Ordinance unless the person had prior knowledge of the Ordinance or checked every filed document sequentially in the Register of Deeds, a patently unrealistic endeavor.

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In July 2006, Jeffrey Shoup and Tom Hix through their company, Peachtree Properties of North Myrtle Beach, LLC ("Peachtree") purchased the Property from the McClam family for $22,500,000. They intended to develop the land as a large residential complex with beautiful views and access to the Intracoastal Waterway. To finance its purchase of the Property, Peachtree obtained mortgage loans from R.E. Loans, LLC ("REL") and Jericho State Capital Corp. of Florida ("Jericho State"). Peachtree gave an $18,520,000.00 first mortgage covering the Property to REL ("REL Mortgage"). 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").

Peachtree also gave a $4,263,888.00 second mortgage covering the Property to Jericho State ("Jericho State Mortgage"). Chicago Title issued a loan policy of title insurance to Jericho State. The policy date is also July 25, 2006, and the insured amount is $4,263,888.00 ("Jericho State Policy"). The Jericho State Policy and the REL Policy will be collectively referred to at times as "the Policies."

Prior to the closing, Jericho State's attorney provided Peachtree's attorney with a closing checklist. One item required "[s]atisfactory resolution of the determination by 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. The item was then removed from the closing checklist.

Another item on the checklist was the requested 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 planned highway or any restriction from use.

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"). The

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PDD Ordinance approved development of the Property as a mixed-use development with numerous residential parcels. The PDD Ordinance stated 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 traverse 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.

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 given by T & J Development of North Myrtle Beach. A foreclosure hearing was held on October 30, 2007, at which counsel for Jericho State testified as follows:

> [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.)

The court entered a foreclosure order on November 7, 2007, ordering the Property be sold subject to the REL Mortgage and finding $7,490,031.71 was due under the note secured by the Jericho State Mortgage. 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, resulting in Jericho State owning fee simple title to the Property subject to the REL Mortgage which at that time had a balance of approximately $18,918,047.50.

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By letter dated February 26, 2009, Jericho State submitted a claim to Chicago Title ". . . due to the taking/condemnation of the Property in question pursuant to, amongst other documentation, the Ordinance . . . which Ordinance was not reflected as a title exception in the Loan Policy . . . ."

On October 12, 2009, Jericho State filed with the Horry County Court of Common Pleas a verified complaint against Horry County and the SCDOT, docket number 2009-CP-26-9968, 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"). Exhibit C attached to that 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.

Jericho State's February 26, 2009, claim was denied by Chicago Title by letter dated December 3, 2009. The claim was denied based on Exclusion 1(a) and noted that a proof of loss had not been provided.

On December 15, 2009, three years after the policies were issued, an eminent domain case ("Condemnation Action") was filed by the South Carolina Department of Transportation regarding the proposed highway. The statutorily required tender of payment was made. 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 further 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)." During the course of the Condemnation Action, Jericho State admitted "[t]hat the date of taking for valuation purposes is December 15, 2009." No attempt was made by Jericho State or Lynx Jericho

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to seek valuation of the Property on a date earlier than December 15, 2009 based on the Ordinance or on an inverse condemnation theory. Jericho State and Lynx Jericho claimed the condemnation of the Parkway Parcel resulted in a $4,010,000 loss. The SCDOT argued the loss totaled $998,000.

On March 18, 2010, the parties dismissed the Zoning Rescission Action. The Stipulation of Dismissal stated 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.

On July 29, 2011, Jericho State filed an action against 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 of the complaint and asserting defenses therein.

REL assigned the REL Mortgage to Mortgage Fund '08, LLC by an instrument recorded May 16, 2008. 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 (the "Liquidating Trust"). The Liquidating Trust assigned the REL Mortgage to Lynx Jericho by instrument recorded May 22, 2013.

Lynx Jericho submitted a claim on the Lynx Jericho Policy by letter dated June 21, 2013. Chicago Title requested documents from Lynx Jericho as part of its investigation. Lynx Jericho provided documents to Chicago Title in December 2014.

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In December 5, 2014, a jury awarded Plaintiffs $2,100,000 in the Condemnation Action as just compensation for the 2009 partial taking of the subject property.

Chicago Title denied the Lynx Jericho Policy claim on January 30, 2015.

On February 12, 2015, Lynx Jericho filed an action against Chicago Title asserting the same causes of action that Jericho State asserted in its action. Chicago Title filed its answer on May 13, 2015, denying the material allegations of the complaint and asserting various defenses.

TITLE INSURANCE

Insurance policies are subject to the general rules of contract construction. *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 514 S.E.2d 327, 330 (1999). When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. *Id.* The court must enforce, not write, contracts of insurance and must give policy language its plain, ordinary, and popular meaning. *Id.*

An insurer's obligation is defined by the terms of the policy and cannot be enlarged by judicial construction. *S.C. Ins. Co. v. White*, 301 S.C. 133, 390 S.E.2d 471, 474 (Ct. App. 1990). "[I]f the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend coverage that was never intended by the parties." *S.C. Farm Bureau Mut. Ins. Co. v. Wilson*, 344 S.C. 525, 544 S.E.2d 848, 850 (Ct. App. 2001). Courts are not authorized to pervert policy language or to exercise inventive powers to create an ambiguity where none exists. *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000).

Insurance contracts are construed against the drafter, and in favor of coverage for the insured. *General Acc. Ins. Co. v. Safeco Ins. Companies*, 314 S.C. 63, 443 S.E. 2d 813 (Ct. App. 1994). Insurance policy exclusions are construed "most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability." *Owners Ins. Co. v.*

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Clayton, 364 S.C. 555, 614 S.E.2d 611, 614 (2005). The rule that insurance contracts must be construed against the insurer applies to title insurance contracts. *First Carolinas Joint Stock Land Bank of Columbia v. New York Title*, 172 S.C. 435, 174 S.E. 402 (1934).

"The rule of strict construction against the insurer does not apply where the language used in the policy is so plain and unambiguous as to leave no room for construction. Nor does the rule of strict construction authorize a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exists." *S.S. Newell & Co. v. American Mutual Liability Ins. Co.*, 199 S.C. 325, 19 S.E.2d 463, 466 (1942).

Title insurance "is designed to save (the insured) harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it." *Firstland Village Associates v. Lawyer's Title Insurance Co.*, 277 S.C.184, 284 S.E.2d 582 (1981). The purpose of title insurance is to place the insured in the position that he thought he occupied when the policy was first issued. *Whitlock v. Steward Title*, 399 S.C. 610 (2012).

The insuring provisions of the Policies at issue are

> 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;
>
> * * * *

Plaintiffs 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." Plaintiffs, as the

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insureds, have the burden of showing their claims fall within coverage of the insurance contracts. *Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 160 S.E.2d 523, 525 (1968).

Title insurance policies indemnify for loss related to title to the 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); 11 COUCH ON INSURANCE § 159:48 ("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 him or her 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.").

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.

OFFICIAL MAP

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. Counties and municipalities "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.

The adoption of an official map is a land planning tool available to counties and municipalities. The Ordinance directly concerns the official map of Horry County, as it amends

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the official map to show the future location 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 is administered by the zoning administrator, and the statutes authorizing the adoption of an official map, which are cited in the Ordinance, state an official map is "one of the several instruments of land use control authorized by this chapter." Ordinance 107-98 § 6.0. It is clear the Ordinance by its very terms is a land planning tool.

TITLE, MARKETABILITY, BURDENS & ENCUMBRANCES

Title and marketability are concepts distinct from land use and value. *McMaster v. Strickland*, 305 S.C. 527, 409 S.E.2d 440 (Ct. App. 1991). 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.

South Carolina defines an "encumbrance" as a third party's "right to or interest in land" resulting in diminution in value and generally includes liens, easements and other claims. *Martin v. Floyd*, 282 S.C. 47, 317 S.E.2d 133 (Ct. App. 1984); *Truck South, Inc. v. Patel*, 339 S.C. 40, 528 S.E.2d 424 (2000). A "burden on the property" does not always constitute a lien, easement or other encumbrance. *Martin* and *Truck South, Inc.* "The fact that property may be useless or may be put to only limited use does not mean that the property is not marketable." *Stanley v. Atlantic Title Ins. Co.*, 377 S.C. 405, 411, 661 S.E.2d 62, 65 (2008). Chicago Title cites a number of cases from other jurisdictions which support the contention that ordinances and resolutions that regulate the use of property do not affect title. I find these cases persuasive and consistent with the holding in *Stanley*.

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DECISION

After reviewing the entire record and considering the able arguments of counsel, and in viewing the evidence in the light most favorable to the Plaintiffs, I conclude that on the date the Policies were issued, Peachtree, the owner, and the two mortgagees had the only claims, liens, or interest in and to the Property, subject only to a utility easement. While the Ordinance may have potentially frustrated or made it difficult to develop certain parts of the Property, the Ordinance, like other land planning tools, only affected the use of the Property, not its title. The Ordinance is not an encumbrance or defect, and does not render title unmarketable. The Policies provide protection against defects in, or liens or encumbrances on, title not otherwise noted in the policy, but there are no coverages for governmentally imposed impediments on the use of the land or for impairments in the value of the land.

I reject Plaintiffs' contention that the purpose of the Ordinance is not to regulate use but rather to designate a right-of-way and transfer title. As noted above, at the October 30, 2007, foreclosure hearing, counsel for Jericho State testified that after conducting a title examination, he could find no other parties holding or claiming any interest of record in and to any of the Property. He was right. The Jericho State Mortgage was a valid mortgage, subject only to the REL Mortgage (and a recorded utility easement over the Property in favor of Grand Strand Water and Sewer Authority which was listed as an exception on Schedule B to the Policies).

A contrary conclusion could potentially wreak havoc in the title insurance industry. The Official Map is not indexed under property owner names. It does not appear in the chain of title. A title abstractor and real estate lawyer would have to discern all potential ramifications of a county's expression of future plans as laid out in the Official Map if the map were deemed an encumbrance upon all affected properties. The cost of property transactions, including the

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attendant cost of title insurance, would skyrocket. Economic development would be chilled as the State, counties and municipalities would be subject to inverse condemnation actions by simply expressing a desire to one day consider acquiring rights-of-way to various tracts. These are the types of concerns the South Carolina Supreme Court had in *Kiriakides v. The School District of Greenville County*, 382 S.C. 8, 675 S.E.2d 439 (2009).

> 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."

675 S.E.2d at 443.

Granted, a title insurer could affirmatively and unequivocally exclude any matters set forth on an official map. But a conclusion that the Ordinance is not to regulate use but rather to designate a right-of-way and transfer title would conceivably impact South Carolina law on general warranty deeds warranting property to be free of encumbrances, even when title insurance is not involved.

I also reject Plaintiffs' contention that the Ordinance is a public record under *Lyons v. Fidelity Nat. Title Ins. Co.*, 415 S.C. 115, 781 S.E.2d 126 (Ct. App. 2015). In *Lyons*, the Court of Appeals found an Horry County no-build resolution to be a public record. The *Lyons* opinion was vacated by Order of the Court of Appeals dated August 26, 2016, and is not binding authority.

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Plaintiffs also rely on *Whitlock v. Stewart Title Guar. Co.*, 2011 WL 4549367 (D.S.C. Oct. 3, 2011), an unpublished opinion of the United States District Court for the District of South Carolina, which is easily distinguishable. In *Whitlock*, United States District Court Judge R. Bryan Harwell specifically found the title policy in that case as providing "broad coverage for title problems caused by zoning laws and for laws and regulations concerning land use and improvements on the land." *Id.* at page 6. Judge Harwell pointed out that ". . . the insurance company was the drafter of the contract. It could have easily defined the term 'public record' as not covering zoning laws." *Id.*

Unlike 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, including "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. . . ." (Underline added.)

Chicago Title bears the burden of establishing an exclusion's applicability and the exclusion must be construed liberally in favor of Plaintiffs and strictly against Chicago Title. *See, Whitlock v. Stewart Title*, 399 S.C. 610 (2012) (the South Carolina Supreme Court decision answering a certified question from Judge Harwell in the *Whitlock* case above); *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005); *First Carolinas Joint Stock Land Bank of Columbia v. New York Title*, 172 S.C. 435 (1934).

Chicago Title has met its burden of establishing exclusions to coverage. Plaintiffs' claimed losses are excluded by Exclusion 1 which removes coverage against various forms of governmental regulation of the use of property, and by Exclusion 2 which eliminates coverage for condemnation or eminent domain, and other exclusions.

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As noted above, Exclusion 1 is clear and unambiguous as it specifically and broadly excludes any ordinance relating to the use of land. Under the facts of this case, a right-of-way could not have existed and title to that right-of-way could not have vested in any governmental entity until a condemnation action was filed. I know of no legal authority which establishes a right-of-way by changes to an Official Map.

I also reject the contention that the exception to Exclusion 1 applies. 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." If a right-of-way had already been established, there would have been no need to condemn the Parkway Parcel or to provide the County with the ability to grant permits for construction. Neither the Ordinance itself, nor any amendment to the Ordinance, is a notice of a violation or alleged violation of the Ordinance. There is nothing in the record to suggest that any enforcement proceeding was ever initiated for any alleged violation.

I also reject the contention that the exception to Exclusion 2 applies. 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 occurred prior to the Date of Policy which would be binding on the rights of a purchaser for value without knowledge."

The South Carolina Eminent Domain Procedure Act (the "Act") is the exclusive manner by which South Carolina governmental entities exercise their power of eminent domain. 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. "The provisions of [the Act] shall constitute the exclusive procedure whereby condemnation may be

undertaken in [South Carolina]." *Id.* The Parkway Parcel was condemned on December 15, 2009, when the Condemnation Action was filed, not before. The Condemnation Action specifically stated December 15, 2009, as the date of the taking, and no one objected to that legal position.

Also, the condemnation notice must contain certain information in order 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 of the owners of the land being condemned, contain a legal description for 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 these requirements.

I reject Chicago Title's contention that Plaintiffs' claims are excluded by Exclusions 3(a) and 3(b). Genuine issues of material fact exist as to whether Plaintiffs "created, suffered, assumed or agreed to" any provisions of the Ordinance to the extent they could be deemed defects and encumbrances. The inquiry by Jericho State's attorney about "satisfactory resolution of the determination by municipality not to build a bridge" is problematic for Jericho State, but I conclude there are genuine issues surrounding that inquiry to deny summary judgment on this ground, such as viewing the removal of that particular concern from the checklist as evidence that Jericho State's understanding was that the highway would be located on neighboring property. Also, I do not impute any alleged knowledge of Glenn Chwatt and Scott Svirsky to Lynx Jericho.

I also reject Chicago Title's contention that Plaintiffs' claims are excluded by Exclusion 3(c) because there is "no loss or damage to the Insured claimant." I have considered the evidence of loss in the light most favorable to Plaintiffs. This is a close question, as the amounts due Jericho State at the time of the public sale when it foreclosed its second mortgage lien was $7,490,000,

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and its successful bid of $9,000,000, arguably made it whole. Also, Lynx Jericho has yet to foreclose the REL mortgage which it currently holds. But sufficient genuine issues of material fact exist to warrant denying summary judgment on this ground.

Plaintiffs' claims are also excluded by Exclusion 3(d) which excludes claims for post-policy matters. The Condemnation Action was filed December 15, 2009, after the effective dates of the Policies. Any loss or damage claimed by Plaintiffs as result of the Condemnation Action is therefore excluded.

I also reject Plaintiffs' contention through the submitted affidavit from their expert, title examiner David Turner, that the Ordinance is a public record and freely available for inspection. Ordinarily, on its face, Mr. Turner's affidavit would create a genuine issue as to this one material fact. However, his conclusory affidavit is tempered by his sworn deposition testimony in which he candidly admits that one would first have to have independent knowledge before going to the Register of Deeds' office in order to check the indices under Horry County Council for the Ordinances, as they are not in the chain of title. [Def. Ex. #2 - Dep. Of David C. Turner, pg. 35, line 15 – pg. 36, line 14; pg. 51, lines 2 – 13.]

Much was made at the hearing and in the memoranda as to Jericho State having requested a letter from the municipality confirming that a bridge would not be built prior to closing. Although this fact may suggest prior knowledge of an alleged title defect by a potential purchaser which would negate title insurance coverage, I have considered that letter, the related checklist, and other facts in the light most favorable to Plaintiffs and find the issues raised not to be material for summary judgment purposes.

Because no coverage exists under the Policies as a matter of law, Chicago Title is granted summary judgment on the breach of contract – recovery of insurance benefits claims.

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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. 2004). As there is no coverage for any claimed loss, there is no breach of contract.

Chicago Title is also granted summary judgment on the bad faith claims, including the ones for refusal to pay insurance benefits and for failure to investigate an insurance claim. Chicago Title has not acted in bad faith in refusing to pay insurance benefits. Defendant Chicago Title denied Plaintiffs' claims by separate letters. Jericho State's claim was denied by letter dated December 3, 2009, in which Chicago Title based its denial on two grounds. Subsequently, by letter dated January 30, 2015, Chicago Title denied Lynx Jericho's claim based on different grounds, despite the same underlying property defect. "Bad faith is a knowing failure on the part of the insurer to exercise an honest and informed judgment in processing a claim. . . . [A]n insurer acts in bad faith where there is no reasonable basis to support the insurer's decision." *American Fire & Cas. Co. v. Johnson*, 332 S.C. 307, 311 (Ct.App.1998); Cock–N–Bull Steak House v. Generali Ins. Co., 321 S.C. 1 (1996).

Chicago Title has not acted in bad faith in failing to investigate an insurance claim. Chicago Title exercised an honest and informed judgment in processing Plaintiffs' claims, and it had a reasonable basis to support its decision. It has not failed to pay benefits due under the Policies, nor has it engaged in any bad faith conduct in considering and investigating Plaintiffs' claims. Chicago Title had a reasonable, good faith basis for contesting the claims and has succeeded in contesting coverage.

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ORDER COMPELLING DISCOVERY and ATTORNEY'S FEES & COSTS

By Order Granting Defendant's Motions to Compel dated June 4, 2015, I ordered Jericho State to serve complete responses to Defendant's First Supplemental Requests for Production of Documents and to Defendant's Second Supplemental Requests for Production of Documents within 20 days of the date that Order was executed. Defendant's request for attorney's fees was held in abeyance.

After considering all relevant factors in determining whether attorney's fees should be awarded in the motion to compel matter, I decline to award attorney's fees.

The parties will equally divide the costs of this reference.

CONCLUSION

For the foregoing reasons, Plaintiffs' motions for summary judgment are denied and Defendant's motion for summary judgment is granted. Defendant's request for attorney's fees sought in its motions to compel is denied.

IT IS SO ORDERED.

Karl A. Folkens, Special Referee

Florence, South Carolina
July 2, 2017

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	**CASE NO. 2011-CP-26-**0449
Jericho State Capital Corp. of Florida,	)	
	)	
Plaintiff,	)	**COMPLAINT**
	)	(Jury Trial Demanded)
Vs.	)	
	)	
Chicago Title Insurance Company,	)	
	)	
Defendant.	)	
	)	

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MELANIE HUGGINS-WARD
CLERK OF COURT

The Plaintiff, Jericho State Capital Corp. of Florida, complaining of the Defendant, Chicago Title Insurance Company, would respectfully show unto this Court the following:

Parties and Jurisdiction

1. The Plaintiff, Jericho State Capital Corp. of Florida ("**Jericho**" or "**Plaintiff**"), is a corporation organized and existing pursuant to the laws of the state of Florida.

2. The Defendant, Chicago Title Insurance Company, is an insurance company organized and existing pursuant to the laws of the state of Missouri, doing business in Horry County, South Carolina.

3. Jurisdiction and venue is properly before this court because the action concerns real property that is located and situated in Horry County, South Carolina and a contract to be performed in Horry County, South Carolina.

Factual Allegations

4. By General Warranty Deed dated July 6, 2006 and recorded on July 25, 2006, (a copy of which is attached hereto as Exhibit A), Peachtree Properties of North Myrtle Beach, LLC ("**Peachtree**") acquired title to approximately 131.4 (+/-) acres of real property adjacent to

the Intracoastal Waterway in Socastee Township in Horry County, South Carolina (the "**Property**").

5. As a part of the transaction whereby it acquired the Property, Peachtree executed a first priority mortgage, recorded on July 25, 2006 in Mortgage Book 4629 at Page 255, in favor of R.E. Loans, LLC in the principle amount of $18,520,000.00 (the "**R.E. Loans Mortgage**").

6. Peachtree also executed a second priority mortgage in favor of Plaintiff in the principle amount of $4,263,888.00, which was recorded in Mortgage Book 4629 at Page 277 on July 25, 2006 (the "**Jericho Mortgage**"), a copy of which is attached hereto as Exhibit B.

7. On the same day the R.E. Loans Mortgage and the Jericho Mortgages were recorded, the Defendant Chicago Title Insurance Company issued a title policy, bearing Policy Number SC2330-46-06-RE-388A-2006.7210740-72338570, insuring Jericho's mortgage interest in the Property (the "**Title Policy**") under the Jericho Mortgage up to $4,263,888.00. A copy of the Title Policy is attached hereto as Exhibit C.

8. Prior to Peachtree acquiring title to the Property and prior to the Defendant Chicago Title issuing the Title Policy, the Horry County Council adopted Ordinance 88-202 amending the "Official Map for Horry County," which shows the specific location of current and future roadway improvements within the county (the "**Ordinance**"). The Official Map for Horry County is now, and was in July 25, 2006, part of the public records of Horry County, South Carolina.

9. The Ordinance was recorded on July 9, 2002 in Deed Book 2497 at Page 986 in the office of the Register of Deeds for Horry County, South Carolina.

10. The maps recorded with Ordinance 88-202 show the proposed location of the Carolina Bays Parkway extending from Highway 501 to Highway 17 Bypass.

11. The Property upon which Plaintiff has its Mortgage (which is insured by the Title Policy) is clearly shown on the Official Map as being part of the property over which the Carolina Bays Parkway will be built and from which land will be taken.

12. Despite the Ordinance being recorded more than four years prior to the Title Policy being issued, this projected condemnation is not listed as an exception in the Title Policy.

13. When the Plaintiff learned that the Carolina Bays Parkway was to be constructed over the Property and that portions of the Property will be condemned as a result, it made a claim to the Defendant under the Title Policy.

14. Jericho filed a foreclosure action, bearing case number 2007-CP-26-03579, in the Court of Common Pleas for Horry County, South Carolina, seeking foreclosure of the Jericho Mortgage, which was granted by the court.

15. Jericho was the successful bidder at the foreclosure sale and title to the Property was conveyed to Jericho by that certain Deed from the Horry County Master-In-Equity, recorded on February 26, 2008 in Deed Book 3317 at Page 992 in the Office of the Register of Deeds for Horry County, South Carolina. Jericho is the current owner of the Property.

16. The Defendant Chicago Title has denied the claim.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract-Recovery of Insurance Benefits)

17. The above allegations are hereby repeated as if set forth verbatim.

18. By issuing the Title Policy, the Defendant contractually agreed to insure the Plaintiff's mortgage interest in the Property against any loss sustained by it by reason of any defect or defects in the title of Peachtree to the Property and the estate granted to Plaintiff in the Jericho Mortgage, subject only to the stated exceptions.

19. The Title Policy states that Defendant agreed to insure against any loss or damage incurred by the Plaintiff for any loss it suffers as a result of:

(a) Any defect in or lien or encumbrance on the title; or

(b) unmarketability of the title.

20. The projected condemnation of a portion of the Property to construct the Carolina Bays Parkway is a defect to the title of the Property or otherwise renders title to the Property unmarketable.

21. The title defect existed prior to the time the Defendant issued the Title Policy.

22. Recordation of the Ordinance in the property records in the Office of the Register of Deeds for Horry County, South Carolina provided notice of the title defect to the Defendant prior to the Defendant issuing the Title Policy.

23. The Title Policy does not list the Ordinance, or the matters shown on the Official Map, or the proposed condemnation of the Property as an exceptions to coverage.

24. The Plaintiff sent notice of its claim to the Defendant and made a proper demand for insurance benefits under the Title Policy by letter dated February 26, 2009.

25. The Plaintiff has suffered damages equal to the loss in value of the Property as a result of the title defect or unmarketability of the title to the Property.

26. The Defendant wrongfully denied the claim on the basis that the "defect on title (i.e. the taking/condemnation of the Property) relates to a matter that is an exception in the policy," citing the language in the Title Policy that excludes from coverage matters relating to government regulation when it knew or should have known that the referenced provision did not control this matter.

27. The Defendant materially breached the express contract of insurance by refusing to pay the Plaintiff for losses sustained by the Plaintiff as a result of the defect in the title to the Property.

28. Plaintiff is informed and believes that it is entitled to judgment against the Defendant for actual damages in an amount to be determined by the tier of fact for breach of contract.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract-Breach of the Covenant of Good Faith and Fair Dealing)

29. The above allegations are hereby repeated as if set forth verbatim.

30. The Title Policy is a contract of insurance between Plaintiff and Defendant that contains within its terms the implied covenant of good faith and fair dealing.

31. In denying the Plaintiff's claim, the Defendant relied on the language in the Title Policy that excludes from coverage matters relating to government regulation.

32. The recorded Ordinance is notice of the county's intent to exercise it 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.

33. 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 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."

34. Recordation of the Ordinance in the property records in the Office of the Register of Deeds for Horry County, South Carolina provided notice of the title defect to the Defendant

prior to the Defendant issuing the Title Policy and clearly brings the claim within the coverage provisions of the Title Policy.

35. Defendant breached the covenant of good faith and fair dealing in directing the Plaintiff to the exclusionary language relating to governmental regulation rather than the language relating to eminent domain, and by wrongfully denying the claim.

36. Defendant breached the covenant of good faith and fair dealing in improperly and unreasonably denying the Plaintiff's claim on the basis of the exclusionary language relating to governmental regulation when it knew or should have known that it did not apply to this matter..

37. Plaintiff is informed and believes that it is entitled to judgment against the Defendant for actual damages in an amount to be determined by the tier of fact for breach of the covenant of good faith and fair dealing contained in the Title Policy.

FOR A THIRD CAUSE OF ACTION

(Tortious Bad Faith Refusal to Pay Insurance Benefits and Bad Faith Failure to Investigate an Insurance Claim)

38. The above allegations are hereby repeated as if set forth verbatim.

39. The Title Policy is a valid and mutually binding contract of insurance.

40. The Defendant refused to pay the Plaintiff insurance benefits despite a valid and proper claim being made by the Plaintiff to the Defendant.

41. The Defendant relied on the language in the Title Policy that excludes from coverage matters relating to government regulation in denying the claim on the basis that the condemnation is an exception to the Title Policy when it knew or should have known that another provision was controlling.

42. The recorded Ordinance is public notice of the county's intent to exercise it 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.

43. 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 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."

44. Recordation of the Ordinance on July 9, 2002 in Deed Book 2497 at Page 986 in the office of the Register of Deeds for Horry County, South Carolina in the public records provided notice of the title defect to the Defendant prior to the Defendant issuing the Title Policy.

45. The Defendant intentionally refused to pay the Plaintiff insurance benefits despite a valid and proper claim being made by the Plaintiff.

46. The Defendant purposefully directed the Plaintiff to the exclusionary language relating to governmental regulation rather than the language relating to eminent domain.

47. The Defendant improperly and unreasonably denied the Plaintiff's claim on the basis of the exclusionary language relating to governmental regulation.

48. The Defendant knew that the claim was properly evaluated under the eminent domain language and knowingly misrepresented to the Plaintiff the policy provision relating to coverage.

49. The Defendant failed to investigate and evaluate the claim under the eminent domain language within a reasonable time period.

50. As a result thereof, Plaintiff suffered consequential damages, including but not limited to financial loss, interest on the unpaid claim, and attorneys' fees and costs.

51. Plaintiff is informed and believes that it is entitled to judgment against the Defendant for actual and punitive damages, including but not limited to prejudgment interest, in an amount to be determined by the tier of fact for tortious bad faith refusal to pay insurance benefits.

WHEREFORE, the Plaintiff prays for the following relief:

a. For judgment against the Defendant for actual damages in an amount to be determined by the trier of fact for breach of contract and refusal to pay insurance benefits under the First Cause of Action;

b. For judgment against the Defendant for actual damages in an amount to be determined by the trier of fact for Breach of the Covenant of Good faith and Fair Dealing under the Second Cause of Action;

c. For judgment against the Defendants for actual and punitive damages in an amount to be determined by the trier of fact for Tortious Bad Faith Refusal to Pay Insurance Benefits under the Fourth Cause of Action;

d. For the costs of this action;

e. For such other and further relief as the court deems just and proper.

Fred B. Newby, SC Bar No. 04202
C. Leigh Andrew, SC Bar No. 72898
4593 Oleander Drive
Myrtle Beach, South Carolina 29577
(843) 449-9417
Attorneys for the Plaintiff Jericho State Capital Corp. of Florida

April 1, 2011
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS
Jericho State Capital Corp. of Florida, Plaintiff, vs. Chicago Title Insurance Company, Defendant.	)	Case No. 2011-CP-26-6449 **ANSWER**

Defendant Chicago Title Insurance Company ("Chicago Title") hereby answers the Complaint as follows:

FOR A FIRST DEFENSE

1. Chicago Title denies each and every allegation of the Complaint not hereinafter specifically admitted.

2. Chicago Title admits paragraph 1 of the Complaint upon information and belief.

3. As to the allegations of paragraph 2 of the Complaint, Chicago Title admits it is an insurance company doing business in Horry County, South Carolina, but denies it is currently organized and existing pursuant to the laws of the state of Missouri.

4. The allegations of paragraph 3 of the Complaint contain conclusions of law and, therefore, no response is required.

5. As to the allegations of paragraph 4 of the Complaint, Chicago Title admits by General Warranty Deed dated July 6, 2006 and recorded July 25, 2006, Peachtree Properties of North Myrtle Beach, LLC ("Peachtree") acquired title to the property described therein, which property is adjacent to the Intracoastal Waterway in Socastee Township in Horry County, South Carolina. With respect to the unanswered allegations of paragraph 4, Chicago Title craves

reference to the General Warranty Deed for the specific terms and import thereof and to the extent the unanswered allegations of paragraph 4 are inconsistent with the specific terms and import of the General Warranty Deed, the same are denied.

6. Chicago Title admits the allegations of paragraphs 5 and 6 of the Complaint.

7. As to the allegations of paragraph 7 of the Complaint, Chicago Title admits it issued a loan policy of title insurance bearing Policy Number SC2330-46-06-RE-388A-2006.721 0740-72338570, with its effective date being the same day the R.E. Loans Mortgage and the Jericho Mortgages were recorded, insuring the Jericho Mortgage on the Property (the "Title Policy") with an insured amount of $4,263,888.00. Any allegations of paragraph 7 inconsistent with the foregoing are denied.

8. Chicago Title is without knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 8 of the Complaint and, therefore, denies the same.

9. Chicago Title admits the allegations of paragraph 9 of the Complaint, but would further allege the Ordinance does not comply with the recording act and it was not indexed against any owners of real property or anyone else and thus it would not provide constructive notice as it would not be found in a title search of the subject property.

10. Chicago Title is without knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of paragraphs 10 and 11 of the Complaint and, therefore, denies the same.

11. As to the allegations of paragraph 12 of the Complaint, Chicago Title admits the Title Policy contains no exception related to the Ordinance. Any allegations of paragraph 12

inconsistent with the foregoing are denied.

12. As to the allegations of paragraph 13 of the Complaint, Chicago Title admits Plaintiff made a claim with Chicago Title under the Title Policy. Chicago Title is without knowledge and information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph 13 and, therefore, denies the same.

13. Chicago Title admits the allegations of paragraphs 14 and 15 of the Complaint.

14. As to the allegations of paragraph 16 of the Complaint, Chicago Title would admit it denied the claim because it is not covered under the terms, conditions, stipulations, exclusions, and limitations of the Title Policy.

15. As to the reiterated allegations of paragraph 17 of the Complaint, Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

16. As to the allegations of paragraph 18 of the Complaint, Chicago Title craves reference to the Title Policy for the specific terms and import thereof and to the extent the allegations of paragraph 18 are inconsistent with the specific terms and import of the Title Policy, the same are denied.

17. As to the allegations of paragraph 19 of the Complaint, Chicago Title admits only that the Title Policy states Chicago Title insures against any loss or damage sustained or incurred by reason of (a) any defect in or lien or encumbrance on the title; or (b) unmarketability of the title, but would further allege this is subject to the exclusions from coverage set forth in the Title Policy, the exceptions from coverage contained in Schedule B of the Title Policy, and the Conditions, and Stipulations of the Title Policy. Any allegations of paragraph 19 inconsistent

with the foregoing are denied.

18. Chicago Title denies the allegations of paragraphs 20, 21, and 22 of the Complaint.

19. As to the allegations of paragraph 23 of the Complaint, Chicago Title admits the Title Policy does not list the Ordinance or the matters on the Official Map as stated exceptions in the Title Policy and Chicago Title would further allege it did not list the proposed condemnation of the Property as an exception to coverage as there was no condemnation or proposed condemnation.

20. As to the allegations of paragraph 24 of the Complaint, Chicago Title admits Plaintiff made a claim for insurance benefits under the Title Policy by letter dated February 26, 2009. The remaining allegations of paragraph 24 are denied.

21. Chicago Title denies the allegations of paragraphs 25, 26, 27 and 28 of the Complaint.

22. As to the reiterated allegations of paragraph 29 of the Complaint, Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

23. As to the allegations of paragraph 30 of the Complaint, Chicago Title admits the Title Policy is a contract of insurance between Chicago Title and Plaintiff. The remaining allegations of paragraph 30 contain conclusions of law and, therefore, no response is required.

24. As to the allegations of paragraph 31 of the Complaint, Chicago Title admits that in denying the Plaintiff's claim, it relied on the language in the Title Policy that excludes from coverage matters relating to government regulation, but Chicago Title would further allege this

was not the only or exclusive basis for the denial of Plaintiff's claim.

25. As to the allegations of paragraph 32 of the Complaint, Chicago Title admits Plaintiff's claim is also excluded pursuant to the eminent domain exclusion. With respect to the remaining allegations of paragraph 32, Chicago Title craves reference to the Title Policy and the Ordinance for the specific terms and import thereof and to the extent the allegations of paragraph 32 are inconsistent with the specific terms and import of the Title Policy and the Ordinance, the same are denied.

26. As to the allegations of paragraph 33 of the Complaint, Chicago Title craves reference to the Title Policy and its eminent domain exclusion for the specific terms and import thereof and to the extent the allegations of paragraph 33 are inconsistent with the specific terms and import of the Title Policy and its eminent domain exclusion, the same are denied.

27. Chicago Title denies the allegations of paragraphs 34, 35, 36, and 37 of the Complaint.

28. As to the reiterated allegations of paragraph 38 of the Complaint, Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

29. Chicago Title admits the allegations of paragraph 39 of the Complaint.

30. As to the allegations of paragraph 40 of the Complaint, Chicago Title admits it refused to pay Plaintiff insurance benefits. Chicago Title denies the remaining allegations of paragraph 40.

31. As to the allegations of paragraph 41 of the Complaint, Chicago Title admits it relied in part on the language in the Title Policy that excludes from coverage matters relating to

government regulation in denying the claim and admits the Title Policy excludes condemnation as more specifically set forth in the Title Policy. Chicago Title denies the remaining allegations of paragraph 41.

32. As to the allegations of paragraph 42 of the Complaint, Chicago Title admits Plaintiff's claim is also excluded pursuant to the eminent domain exclusion. With respect to the remaining allegations of paragraph 42, Chicago Title craves reference to the Title Policy and the Ordinance for the specific terms and import thereof and to the extent the allegations of paragraph 42 are inconsistent with the specific terms and import of the Title Policy and the Ordinance, the same are denied.

33. As to the allegations of paragraph 43 of the Complaint, Chicago Title craves reference to the Title Policy and its eminent domain exclusion for the specific terms and import thereof and to the extent the allegations of paragraph 43 are inconsistent with the specific terms and import of the Title Policy and its eminent domain exclusion, the same are denied.

34. Chicago Title denies the allegations of paragraphs 44, 45, 46, 47, 48, 49, 50, and 51 of the Complaint.

35. Chicago Title denies Plaintiff's prayer for relief, including all subparts.

FOR A SECOND DEFENSE

(Terms, Conditions, Stipulations, Exclusions, and Limitations of the Title Policy)

36. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

37. Each and every cause of action alleged in the Complaint is barred, in whole or in part, by the terms, conditions, stipulations, exclusions, and limitations in the Title Policy and the principles of law applicable thereto.

FOR A THIRD DEFENSE

(Terms, Conditions, Stipulations, Exclusions, and Limitations of the Title Policy)

38. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

39. The Title Policy contains conditions and stipulations which must be satisfied in order to obtain coverage under the Title Policy. The Title Policy's conditions and stipulations provide in part as follows:

> **5. PROOF OF LOSS OR DAMAGE**
>
> In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company a proof of loss or damage signed and sworn to by the insured claimant shall be furnished to the Company within 90 days after the Insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title or other matter insured against by this policy which constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the insured claimant to provide the required proof of loss or damage, the Company's obligations to the insured under the policy shall terminate including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage.
>
> In addition, the insured claimant may reasonably be required to submit to examination under oath by an authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage.

> All information designated as confidential by the insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this paragraph, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

40. After Plaintiff submitted its claim to Chicago Title, Chicago Title requested information from Plaintiff as set forth in Paragraph 5 of the conditions and stipulations of the Title Policy, but Plaintiff failed to provide such information to Chicago Title and, therefore, any potential liability Chicago Title may have had under the Title Policy terminated.

41. Accordingly, Plaintiff's claim under the Title Policy was appropriately denied and Plaintiff's Complaint should be dismissed in its entirety.

FOR A FOURTH DEFENSE
(Exclusions of the Title Policy)

42. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

43. The Title Policy sets forth numerous exclusions to coverage. The Title Policy specifically excludes coverage for loss or damage which arises by reason of rights of eminent domain. More specifically, the Title Policy provides as follows:

Exclusions from Coverage

> The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses 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 occurred prior to the Date of Policy which would be binding on the rights of a purchaser for value without knowledge.

44. Because no notice of the exercise of the rights of eminent domain was recorded in the public records at the date of the Title Policy, Plaintiff's claims are excluded under the Title Policy.

45. Accordingly, Plaintiff's claim under the Title Policy was appropriately denied and Plaintiff's Complaint should be dismissed in its entirety.

FOR A FIFTH DEFENSE
(Exclusions of the Title Policy)

46. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

47. The Title Policy sets forth additional exclusions to coverage. The Title Policy specifically excludes coverage for loss or damage which arises by reason of law, ordinance, government regulation, or any government police power. More specifically, the Title Policy provides as follows:

Exclusions from Coverage

The following matters are expressly excluded from the coverage of this policy and the Company will not pay 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 change in the dimensions or area of the land or any parcel of which the land is or was a part of; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a

defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.

(b) Any government police power not excluded by (a) above, except to the extent that a notice of the exercise 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.

48. Neither a notice of the enforcement of the ordinance nor a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land was recorded in the public records at date of the Title Policy.

49. Accordingly, Plaintiff's claim under the Title Policy was appropriately denied and Plaintiff's Complaint should be dismissed in its entirety.

FOR A SIXTH DEFENSE
(Exclusions of the Title Policy)

50. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

51. The Title Policy sets forth additional exclusions to coverage. The Title Policy specifically excludes coverage for certain matters which result in no loss or damage to an insured claimant. More specifically, the Title Policy provides as follows:

Exclusions from Coverage

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

****

3 Defects, liens, encumbrances, adverse claims or other matters:
* * * *

(c) resulting in no loss or damage to the insured claimant.

52. Plaintiff's property is encumbered by a mortgage in the original principal amount of $18,520,000.00, which mortgage is an exception in the Title Policy.

53. The South Carolina Department of Transportation exercised its right of eminent domain for the first time pursuant to a condemnation notice and tender of payment filed with the Horry County Court of Common Pleas on December 15, 2009 ("Condemnation Action").

54. Plaintiff will be compensated for any loss it claims is established by virtue of the Condemnation Action.

55. Plaintiff has therefore suffered no loss or damage.

56. Accordingly, Plaintiff's claim under the Title Policy was appropriately denied and Plaintiff's Complaint should be dismissed in its entirety.

FOR A SEVENTH DEFENSE
(Exclusions of the Title Policy)

57. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

58. The Title Policy sets forth additional exclusions to coverage. The Title Policy specifically excludes coverage for matters that take place after the Title Policy is issued. More specifically, the Title Policy provides as follows:

Exclusions from Coverage

> The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:
>
> ****
>
> 4 Defects, liens, encumbrances, adverse claims or other matters:
> * * * *
>
> (d) attaching or created subsequent to Date of Policy . . . . .

59. The South Carolina Department of Transportation exercised its right of eminent domain for the first time pursuant to a condemnation notice and tender of payment filed with the Horry County Court of Common Pleas on December 15, 2009 ("Condemnation Action"), after the date the Title Policy was issued.

60. Any loss or damage claimed by Plaintiff as result of the condemnation of the subject property is therefore excluded from coverage under the Title Policy.

61. Accordingly, Plaintiff's claim under the Title Policy was appropriately denied and Plaintiff's Complaint should be dismissed in its entirety.

FOR AN EIGHTH DEFENSE
(Terms of the Title Policy)

62. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

63. The Title Policy sets forth the following 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:
>
> 1 Title to the estate or interest described in Schedule A being vested other than as stated therein;
> 2 Any defect in or lien or encumbrance on the title;
> 3 Unmarketability of the title;
> 4 lack of a right of access to and from the land;
> 5 The invalidity or unenforceability of the lien of the insured mortgage upon the title;
> 6 The priority of any lien or encumbrance over the lien of the insured mortgage;
> 7 Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material:
>
> a. arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or
> b. arising from an improvement or work related to the land which is contract for or commenced subsequent to the Date of Policy and which is

financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance;

8 The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage in the named insured assignee free and clear of all liens.

64. Plaintiff's claim does not fall within any of the insuring provisions of the Title Policy.

65. Accordingly, Plaintiff's claim under the Title Policy was appropriately denied and Plaintiff's Complaint should be dismissed in its entirety.

FOR A NINTH DEFENSE
(*Failure to Mitigate Damages*)

66. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

67. Plaintiff has failed to mitigate its damages.

FOR A TENTH DEFENSE
(*Waiver*)

68. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

69. Plaintiff's claims are barred by the doctrine of waiver.

FOR AN ELEVENTH DEFENSE
(*Economic Loss Rule*)

70. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

71. Plaintiff seeks damages for purely economic losses and therefore Plaintiff's remedies are limited by the economic loss rule, to include the prohibition against tort-based causes of action.

FOR A TWELFTH DEFENSE
(Additional Defenses Reserved)

72. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

73. Chicago Title reserves the right to plead additional affirmative defenses upon further discovery.

WHEREFORE, having fully answered the Plaintiff's Complaint, Defendant Chicago Title Insurance Company respectfully requests that the Court issue an Order:

A. Dismissing the Plaintiff's Complaint;

B. Awarding Chicago Title attorney fees and the costs of this action; and

C. Awarding any such other relief as the Court deems just and proper.

CALLISON TIGHE & ROBINSON, LLC

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

ATTORNEYS FOR DEFENDANT CHICAGO TITLE INSURANCE COMPANY

February 15, 2012
1020.566\Answer

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	**CASE NO. 2015-CP-26-** 1084
Lynx Jericho Partners, LLC,	)	
	)	
Plaintiff,	)	**COMPLAINT**
	)	
Vs.	)	
	)	
Chicago Title Insurance Company,	)	
	)	
Defendant.	)	

2015 FEB 12 PM 1:25
COUNTY
CLERK OF COURT

The Plaintiff, Lynx Jericho Partners, LLC, complaining of the Defendant, Chicago Title Insurance Company, would respectfully show unto this Court the following:

Parties and Jurisdiction

1. The Plaintiff, Lynx Jericho Partners, LLC ("**Jericho**" or "**Plaintiff**"), is a corporation organized and existing pursuant to the laws of the state of Florida.

2. The Defendant, Chicago Title Insurance Company, is an insurance company organized and existing pursuant to the laws of the state of Missouri, doing business in Horry County, South Carolina.

3. Jurisdiction and venue is properly before this court because the action concerns real property that is located and situated in Horry County, South Carolina and a contract to be performed in Horry County, South Carolina.

Factual Allegations

4. By General Warranty Deed dated July 6, 2006 and recorded on July 25, 2006 in Deed Book 3132 at Page 779 in the records of the Register of Deeds for Horry County, South Carolina, Peachtree Properties of North Myrtle Beach, LLC ("**Peachtree**") acquired title to

approximately 131.4 (+/-) acres of real property adjacent to the Intracoastal Waterway in Socastee Township in Horry County, South Carolina (the "**Property**").

5. As a part of the transaction whereby it acquired the Property, Peachtree executed a first priority mortgage, dated July 5, 2006 and recorded on July 25, 2006 in Mortgage Book 4629 at Page 255 in the records of the Register of Deeds for Horry County, South Carolina, in favor of R.E. Loans, LLC in the principle amount of $18,520,000.00 (the "**R.E. Loans Mortgage**" or "**First Mortgage**"). A copy of the First Mortgage is attached as **Exhibit A** and incorporated by reference herein.

6. R.E. Loans, LLC assigned its First Mortgage to Wells Fargo Foothill, LLC by instrument dated July 17, 2001 and recorded on August 15, 2007 in Mortgage Book 4952 at Page 1521 in the records of the Register of Deed for Horry County, South Carolina.

7. Wells Fargo Foothill, LLC reassigned the First Mortgage back to R.E. Loans, LLC by instrument dated March 11, 2008 and recorded on December 12, 2008 in Mortgage Book 5130 at Page 2614 in the records of the Register of Deeds for Horry County, South Carolina.

8. R.E. Loans, LLC assigned the First Mortgage to Mortgage Fund '08, LLC by instrument recorded dated effective as of January 4, 2008 and recorded on May 16, 2008 in Mortgage Book 5071 at Page 96 in the records of the Register of Deeds for Horry County, South Carolina and subsequently corrected by that certain "Corrective Assignment of Mortgage" dated April 26, 2011 and recorded on July 28, 20011 in Mortgage Book 5336 at Page 3001 in the records of the Register of Deeds for Horry County, South Carolina.

9. First Mortgage Fund '08, LLC filed bankruptcy on September 12, 2011 in the United States Bankruptcy Court in the Northern District of California, Oakland Division, Case Number 11-49803-RLE.

10. By Order dated February 3, 2012, the bankruptcy court confirmed the "Joint Chapter 11 Plan and Disclosure Statement," which created the Mortgage Fund '08 Liquidating Trust (the "**Trust**") and transferred the assets of the debtor in possession, Mortgage Fund '08, to the Trust and empowered the trustee, Susan L. Uecker, to liquidate and transfer the assets. The First Mortgage was specifically referred to in the court's order as an asset and was transferred to the Trust.

11. Susan L. Uecker, as trustee of Mortgage Fund '08 Liquidating Trust, assigned the First Mortgage to the Plaintiff, Lynx Jericho Partners, LLC, by instrument dated April 17, 2013 and recorded on May 22, 2013 in Mortgage Book 5500 at Page 2940 in the records of the Register of Deeds for Horry County, South Carolina thereby making the Plaintiff the current holder of the First Mortgage.

12. Peachtree also executed a second priority mortgage in favor of Jericho State Capital of Florida in the principle amount of $4,263,888.00, which was recorded in Mortgage Book 4629 at Page 277 on July 25, 2006 (the "**Jericho Mortgage**" or "**Second Mortgage**").

13. The Defendant Chicago Title Insurance Company issued a title policy, bearing Policy Number 7210740-73317401, insuring R.E. Loans LLC's first priority mortgage interest in the Property (the "**Title Policy**") under the R.E. Loans Mortgage up to $17,071,873.33. A copy of the Title Policy is attached hereto as **Exhibit B** and incorporated by reference herein.

14. The "Date of Policy" as listed on Schedule A of the Title Policy is July 25, 2007 at 3:23 pm; however, upon information and belief, the date is incorrectly shown on the policy due to a typographical or scrivener's error and the correct "Date of Policy" for the Title Policy is July 25, 2006, which is the same date the First Mortgage was recorded.

15. Prior to Peachtree acquiring title to the Property and prior to the Defendant Chicago Title issuing the Title Policy, the Horry County Council adopted Ordinance 88-202 amending the "Official Map for Horry County," which shows the specific location of current and future roadway improvements within the county (the "**Ordinance**").

16. The Official Map for Horry County is now, and was in July 25, 2006, part of the public records of Horry County, South Carolina.

17. The Ordinance was recorded on July 9, 2002 in Deed Book 2497 at Page 986 in the office of the Register of Deeds for Horry County, South Carolina.

18. The maps recorded with Ordinance 88-202 show the location of the Carolina Bays Parkway extending from Highway 501 to Highway 17 Bypass.

19. The Property upon which Plaintiff has its Mortgage (which is insured by the Title Policy) is clearly shown on the Official Map as being part of the property over which the Carolina Bays Parkway will be built and from which land will be taken.

20. The above described Ordinance and Official Map reflects a proposed condemnation, the county's claim to the land, defect, and/or encumbrance upon to the subject property.

21. Despite the Ordinance being recorded more than four years prior to the Title Policy being issued, this projected condemnation, claim, defect and/or encumbrance is not listed as an exception in the Title Policy.

22. Jericho State Capital of Florida filed a foreclosure action on its second priority mortgage, bearing case number 2007-CP-26-03579, in the Court of Common Pleas for Horry County, South Carolina, seeking foreclosure of the Jericho Mortgage, which was granted by the court.

23. Jericho State Capital of Florida was the successful bidder at the foreclosure sale and title to the Property was conveyed to Jericho State Capital of Florida by that certain Deed from the Horry County Master-In-Equity, recorded on February 26, 2008 in Deed Book 3317 at Page 992 in the Office of the Register of Deeds for Horry County, South Carolina. Jericho is the current owner of the Property.

24. By letter dated June 21, 2013 sent certified mail, and by subsequent letter dated November 14, 2014, the Plaintiff, as successor and or/ assignee to the named insured R.E. Loans, LLC, made a claim to the Defendant under the Title Policy as a result of the condemnation of the property resulting from the Carolina Bays Parkway being constructed over the Property as shown on the Official Map.

25. The Defendant Chicago has denied the claim b letter dated January 30, 2015.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract-Recovery of Insurance Benefits)

26. The above allegations are hereby repeated as if set forth verbatim.

27. By issuing the Title Policy, the Defendant contractually agreed to insure the Plaintiff's mortgage interest in the Property against any loss sustained by it by reason of any defect or defects in the title of Peachtree to the Property and the estate granted to Plaintiff in the First Mortgage, subject only to the stated exceptions.

28. The Title Policy states that Defendant agreed to insure against any loss or damage incurred by the Plaintiff for any loss it suffers as a result of:

(a) Any defect in or lien or encumbrance on the title; or

(b) unmarketability of the title.

29. The portion of the Property designated for condemnation to construct the Carolina Bays Parkway is a claim, defect or encumbrance to the title of the Property or otherwise renders title to the Property unmarketable.

30. The title defect existed prior to the time the Defendant issued the Title Policy.

31. Recordation of the Ordinance in the property records in the Office of the Register of Deeds for Horry County, South Carolina provided notice of the title defect to the Defendant prior to the Defendant issuing the Title Policy.

32. The Title Policy does not list the Ordinance, the matters shown on the Official Map, or the proposed condemnation of the Property as an exceptions to coverage.

33. The Plaintiff sent notice of its claim to the Defendant and made a proper demand for insurance benefits under the Title Policy by letters dated June 21, 3013 and November 14, 2014.

34. The Plaintiff has suffered damages equal to the loss in value of the Property as a result of the title defect or unmarketability of the title to the Property.

35. The Defendant wrongfully denied the claim.

36. The Defendant materially breached the express contract of insurance by refusing to pay the Plaintiff for losses sustained by the Plaintiff as a result of the defect in the title to the Property.

37. Plaintiff is informed and believes that it is entitled to judgment against the Defendant for actual damages in an amount to be determined by the tier of fact for breach of contract.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract-Breach of the Covenant of Good Faith and Fair Dealing)

38. The above allegations are hereby repeated as if set forth verbatim.

39. The Title Policy is a contract of insurance between Plaintiff and Defendant that contains within its terms the implied covenant of good faith and fair dealing.

40. The recorded Ordinance is notice of the county's claim to the property and intent to exercise it power to condemn the Property and is a defect and/or encumbrance of the Property and is a covered loss as defined in the Policy.

41. The exclusion relating to eminent domain provides coverage for a loss resulting from the rights of eminent domain that have been recorded in the public records at Date of Policy and any taking which has occurred prior to date of policy which would be binding on the rights of a purchaser for value without knowledge.

42. The exclusion relating to land use restriction provides coverage as to any ordinance or governmental regulation or police power when there 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 has been recorded in the public records at Date of Policy.

43. Recordation of the Ordinance in the property records in the Office of the Register of Deeds for Horry County, South Carolina provided notice of the title defect to the Defendant prior to the Defendant issuing the Title Policy and clearly brings the claim within the coverage provisions of the Title Policy.

44. The Defendant intentionally refused to pay the Plaintiff insurance benefits despite a valid and proper claim being made by the Plaintiff.

45. The Defendant improperly and unreasonably denied the Plaintiff's claim.

46. The Defendant failed to investigate and evaluate the claim within a reasonable time period.

47. Defendant breached the covenant of good faith and fair dealing by wrongfully denying the claim.

48. Plaintiff is informed and believes that it is entitled to judgment against the Defendant for actual damages in an amount to be determined by the tier of fact for breach of the covenant of good faith and fair dealing contained in the Title Policy.

FOR A THIRD CAUSE OF ACTION
(Tortious Bad Faith Refusal to Pay Insurance Benefits and Bad Faith Failure to Investigate an Insurance Claim)

49. The above allegations are hereby repeated as if set forth verbatim.

50. The Title Policy is a valid and mutually binding contract of insurance.

51. The Defendant refused to pay the Plaintiff insurance benefits despite a valid and proper claim being made by the Plaintiff to the Defendant.

52. The recorded Ordinance is public notice of the county's claim on the property and intent to exercise its power to condemn the Property and is a defect and/or encumbrance on the Property and is a covered loss under the Policy.

53. The Policy provides coverage for an ordinance or governmental regulation or police power, eminent domain and taking, as set forth above.

54. Recordation of the Ordinance on July 9, 2002 in Deed Book 2497 at Page 986 in the office of the Register of Deeds for Horry County, South Carolina in the public records provided notice of the title defect to the Defendant prior to the Defendant issuing the Title Policy.

55. The Defendant intentionally refused to pay the Plaintiff insurance benefits despite a valid and proper claim being made by the Plaintiff.

56. The Defendant improperly and unreasonably denied the Plaintiff's claim.

57. The Defendant failed to investigate and evaluate the claim within a reasonable time period.

58. As a result thereof, Plaintiff suffered consequential damages, including but not limited to financial loss, interest on the unpaid claim, and attorneys' fees and costs.

59. Plaintiff is informed and believes that it is entitled to judgment against the Defendant for actual and punitive damages, including but not limited to prejudgment interest, in an amount to be determined by the tier of fact for tortious bad faith refusal to pay insurance benefits.

WHEREFORE, the Plaintiff prays for the following relief:

a. For judgment against the Defendant for actual damages in an amount to be determined by the trier of fact for breach of contract and refusal to pay insurance benefits under the First Cause of Action;

b. For judgment against the Defendant for actual damages in an amount to be determined by the trier of fact for Breach of the Covenant of Good faith and Fair Dealing under the Second Cause of Action;

c. For judgment against the Defendants for actual and punitive damages in an amount to be determined by the trier of fact for Tortious Bad Faith Refusal to Pay Insurance Benefits under the Fourth Cause of Action;

d. For the costs of this action; and for such other and further relief as the court deems just and proper.

Fred B. Newby, SC Bar No. 04202
C. Scott Masel, SC Bar No. 12497
4593 Oleander Drive
Myrtle Beach, South Carolina 29577
(843) 449-9417
Attorney for the Plaintiff Lynx Jericho Partners, LLC

February 11, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY

Case No. 2015-CP-26-1084

Lynx Jericho Partners, LLC,

Plaintiff,

vs.

Chicago Title Insurance Company,

Defendant.

ANSWER

HORRY COUNTY
2015 MAY 13 PM 12:16
CLERK OF COURT

Defendant Chicago Title Insurance Company ("Chicago Title") hereby answers the Complaint as follows:

FOR A FIRST DEFENSE

1. Chicago Title denies each and every allegation of the Complaint not hereinafter specifically admitted.

2. Chicago Title admits paragraph 1 of the Complaint upon information and belief.

3. As to the allegations of paragraph 2 of the Complaint, Chicago Title admits it is an insurance company doing business in Horry County, South Carolina, but denies it is currently organized and existing pursuant to the laws of the State of Missouri.

4. The allegations of paragraph 3 of the Complaint contain conclusions of law and, therefore, no response is required.

5. As to the allegations of paragraph 4 of the Complaint, Chicago Title admits by General Warranty Deed dated July 6, 2006 and recorded July 25, 2006, Peachtree Properties of North Myrtle Beach, LLC ("Peachtree") acquired title to the property described therein, which property is adjacent to the Intracoastal Waterway in Socastee Township in Horry County, South Carolina. With respect to the unanswered allegations of paragraph 4, Chicago Title craves

reference to the General Warranty Deed for the specific terms and import thereof and to the extent the unanswered allegations of paragraph 4 are inconsistent with the specific terms and import of the General Warranty Deed, the same are denied.

6. Chicago Title admits the allegations of paragraph 5 of the Complaint except that it denies there are any attachments to the Complaint.

7. As to the allegations of paragraph 6 of the Complaint, Chicago Title craves reference to the assignment instrument referenced therein for the specific terms and import thereof and to the extent the allegations of paragraph 6 are inconsistent with the specific terms and import of the assignment instrument, the same are denied.

8. As to the allegations of paragraph 7 of the Complaint, Chicago Title craves reference to the assignment instrument referenced therein for the specific terms and import thereof and to the extent the allegations of paragraph 7 are inconsistent with the specific terms and import of the assignment instrument, the same are denied.

9. As to the allegations of paragraph 8 of the Complaint, Chicago Title craves reference to the assignment instruments referenced therein for the specific terms and import thereof and to the extent the allegations of paragraph 8 are inconsistent with the specific terms and import of the assignment instruments, the same are denied.

10. Chicago Title is without knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of paragraphs 9 and 10 of the Complaint and, therefore, denies the same.

11. As to the allegations of paragraph 11 of the Complaint, Chicago Title craves reference to the assignment instrument referenced therein for the specific terms and import thereof and to the extent the allegations of paragraph 11 are inconsistent with the specific terms

and import of the assignment instrument, the same are denied. As to the allegations of paragraph 11 regarding Plaintiff being the current holder of the First Mortgage, Chicago Title is without knowledge and information sufficient to form a belief as to the truth or falsity of those allegations and, therefore, denies the same.

12. Chicago Title admits the allegations of paragraph 12 of the Complaint.

13. As to the allegations of paragraph 13 of the Complaint, Chicago Title admits it issued a loan policy of title insurance bearing Policy Number 7210740-73317401 (the "Title Policy") insuring the First Mortgage with an insured amount of $17,071,873.33. Chicago Title denies there are any attachments to the Complaint. Any allegations of paragraph 13 inconsistent with the foregoing are denied.

14. Chicago Title is without knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of paragraphs 14 and 15 of the Complaint and, therefore, denies the same.

15. Chicago Title denies the allegations of paragraph 16 of the Complaint.

16. Chicago Title admits the allegations of paragraph 17 of the Complaint, but would further allege the Ordinance does not comply with the recording act, it was not properly witnessed and acknowledged and it was not indexed against any owners of real property or anyone else; therefore, it would not provide constructive notice as it would not be found in a title search of the Property.

17. Chicago Title is without knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 18 of the Complaint and, therefore, denies the same.

18. Chicago Title denies the allegations of paragraphs 19 and 20 of the Complaint.

19. As to the allegations of paragraph 21 of the Complaint, Chicago Title admits only that the Ordinance was not listed as an exception in the Title Policy, but denies the remaining allegations of paragraph 21.

20. Chicago Title admits the allegations of paragraphs 22 and 23 of the Complaint.

21. As to the allegations of paragraph 24 of the Complaint, Chicago Title admits that by letter dated June 21, 2013, Plaintiff made a claim with Chicago Title under the Title Policy and craves references to that letter for the terms and import of that letter.

22. Chicago Title admits the allegations of paragraph 25 of the Complaint.

23. As to the reiterated allegations of paragraph 26 of the Complaint, Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

24. As to the allegations of paragraph 27 of the Complaint, Chicago Title craves reference to the Title Policy for the specific terms and import thereof and to the extent the allegations of paragraph 27 are inconsistent with the specific terms and import of the Title Policy, the same are denied.

25. As to the allegations of paragraph 28 of the Complaint, Chicago Title admits only that the Title Policy states Chicago Title insures against any loss or damage sustained or incurred by reason of (a) any defect in or lien or encumbrance on the title; or (b) unmarketability of the title, but would further allege this is subject to the exclusions from coverage set forth in the Title Policy, the exceptions from coverage contained in Schedule B of the Title Policy, and the Conditions and Stipulations of the Title Policy. Any allegations of paragraph 28 inconsistent with the foregoing are denied.

26. Chicago Title denies the allegations of paragraphs 29, 30, and 31 of the Complaint.

27. As to the allegations of paragraph 32 of the Complaint, Chicago Title admits the Title Policy does not list the Ordinance or the matters on the Official Map as stated exceptions in the Title Policy and Chicago Title would further allege it did not list the proposed condemnation of the Property as an exception to coverage as there was no condemnation or proposed condemnation.

28. As to the allegations of paragraph 33 of the Complaint, Chicago Title admits Plaintiff made a claim for insurance benefits under the Title Policy by letters dated June 21, 2013 and November 14, 2014. The remaining allegations of paragraph 33 are denied.

29. Chicago Title denies the allegations of paragraphs 34, 35, 36, and 37 of the Complaint.

30. As to the reiterated allegations of paragraph 38 of the Complaint, Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

31. As to the allegations of paragraph 39 of the Complaint, Chicago Title admits the Title Policy is a contract of insurance between Chicago Title and the insured under the Title Policy. The remaining allegations of paragraph 39 contain conclusions of law and, therefore, no response is required.

32. Chicago Title denies the allegations of paragraph 40 of the Complaint.

33. As to the allegations of paragraph 41 of the Complaint, Chicago Title admits Plaintiff's claim is excluded pursuant to the eminent domain exclusion. With respect to the remaining allegations of paragraph 41, Chicago Title craves reference to the Title Policy for the

specific terms and import thereof and to the extent the allegations of paragraph 41 are inconsistent with the specific terms and import of the Title Policy, the same are denied.

34. As to the allegations of paragraph 42 of the Complaint, Chicago Title craves reference to the Title Policy for the specific terms and import thereof and to the extent the allegations of paragraph 42 are inconsistent with the specific terms and import of the Title Policy, the same are denied.

35. Chicago Title denies the allegations of paragraphs 43, 44, 45, 46, 47, and 48 of the Complaint.

36. As to the reiterated allegations of paragraph 49 of the Complaint, Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

37. Chicago Title admits the allegations of paragraph 50 of the Complaint.

38. As to the allegations of paragraph 51 of the Complaint, Chicago Title admits it refused to pay Plaintiff insurance benefits. Chicago Title denies the remaining allegations of paragraph 51.

39. Chicago Title denies the allegations of paragraphs 52, 53, 54, 55, 56, 57, 58, and 59 of the Complaint.

FOR A SECOND DEFENSE
(Rule 12(b)(6), SCRCP)

40. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

41. Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action and should be dismissed.

FOR A THIRD DEFENSE

(Terms, Conditions, Stipulations, Exclusions, and Limitations of the Title Policy)

42. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

43. Each and every cause of action alleged in the Complaint is barred, in whole or in part, by the terms, conditions, stipulations, exclusions, and limitations of the Title Policy and the principles of law applicable thereto.

FOR A FOURTH DEFENSE

(Conditions and Stipulations of the Title Policy)

44. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

45. The Title Policy contains conditions and stipulations which must be satisfied in order to obtain coverage under the Title Policy. The Title Policy's conditions and stipulations provide in part as follows:

> **5. PROOF OF LOSS OR DAMAGE**
>
> In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company a proof of loss or damage signed and sworn to by the insured claimant shall be furnished to the Company within 90 days after the Insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title or other matter insured against by this policy which constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the insured claimant to provide the required proof of loss or damage, the Company's obligations to the insured under the policy shall terminate including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage.
>
> In addition, the insured claimant may reasonably be required to submit to examination under oath by an authorized representative of the Company and shall produce for examination, inspection and copying, at such

reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage.

All information designated as confidential by the insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this paragraph, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

46. After Plaintiff submitted its claim to Chicago Title, Chicago Title requested information from Plaintiff as set forth in Paragraph 5 of the conditions and stipulations of the Title Policy, but Plaintiff failed to provide such information to Chicago Title and, therefore, any potential liability Chicago Title may have had under the Title Policy terminated.

47. Accordingly, Plaintiff's claim under the Title Policy was appropriately denied and Plaintiff's Complaint should be dismissed in its entirety.

FOR A FIFTH DEFENSE
(*Exclusions of the Title Policy*)

48. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

49. The Title Policy sets forth numerous exclusions to coverage. The Title Policy specifically excludes coverage for loss or damage which arises by reason of rights of eminent domain. More specifically, the Title Policy provides as follows:

Exclusions from Coverage

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses 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 occurred prior to the Date of Policy which would be binding on the rights of a purchaser for value without knowledge.

50. Because no notice of the exercise of the rights of eminent domain was recorded in the public records at the date of the Title Policy, Plaintiff's claims are excluded under the Title Policy.

51. Accordingly, Plaintiff's claim under the Title Policy was appropriately denied and Plaintiff's Complaint should be dismissed in its entirety.

FOR A SIXTH DEFENSE
(*Conditions and Exclusions of the Title Policy*)

52. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

53. The Title Policy sets forth the following conditions:

7. DETERMINATION AND EXTENT OF LIABILITY.

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) The liability of the Company under this policy shall not exceed the least of:

(i) the Amount of Insurance stated in Schedule A, or, if applicable, the amount of insurance as defined in Section 2 (c) of these Conditions and Stipulations;

(ii) the amount of the unpaid principal indebtedness secured by the insured mortgage as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time the loss or damage insured against by this policy occurs, together with interest thereon; or

(iii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

54. The Title Policy sets forth additional exclusions to coverage. The Title Policy specifically excludes coverage for certain matters which result in no loss or damage to an insured claimant. More specifically, the Title Policy provides as follows:

Exclusions from Coverage

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

****

3 Defects, liens, encumbrances, adverse claims or other matters:

* * * *

(c) resulting in no loss or damage to the insured claimant.

55. The South Carolina Department of Transportation exercised its right of eminent domain for the first time pursuant to a condemnation notice and tender of payment filed with the Horry County Court of Common Pleas on December 15, 2009 in the case captioned *South Carolina Department of Transportation vs. Jericho State Capital Corporation of Florida, et al.*, Case No. 2009-CP-26-11956 ("Condemnation Action").

56. Plaintiff was compensated for any loss it claims is established by virtue of the Condemnation Action.

57. Plaintiff has therefore suffered no loss or damage.

58. Accordingly, Plaintiff's claim under the Title Policy was appropriately denied and Plaintiff's Complaint should be dismissed in its entirety.

FOR A SEVENTH DEFENSE
(Exclusions of the Title Policy)

59. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

60. The Title Policy sets forth additional exclusions to coverage. The Title Policy specifically excludes coverage for matters that take place after the Title Policy is issued. More specifically, the Title Policy provides as follows:

Exclusions from Coverage

> The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:
>
> ****
>
> 4 Defects, liens, encumbrances, adverse claims or other matters:
>
> * * * *
>
> (d) attaching or created subsequent to Date of Policy . . . . .

61. The South Carolina Department of Transportation exercised its right of eminent domain for the first time pursuant to the Condemnation Action, which was filed after the date the Title Policy was issued.

62. Any loss or damage claimed by Plaintiff as a result of the condemnation of the Property is therefore excluded from coverage under the Title Policy.

63. Accordingly, Plaintiff's claim under the Title Policy was appropriately denied and Plaintiff's Complaint should be dismissed in its entirety.

FOR AN EIGHTH DEFENSE
(Exclusions of the Title Policy)

64. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

65. The Title Policy sets forth the following additional exclusions to coverage:

Exclusions from Coverage

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

3. Defects, liens, encumbrances, adverse claims or other matters:

(a) created, suffered, assumed or agreed to by the insured claimant;

(b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;

66. At the time Plaintiff purchased the First Mortgage, it had knowledge of the issue about which it now claims, improperly, is a defect or encumbrance on title.

67. In addition, Plaintiff provided Chicago Title with what it represented to be its loan file, and in the loan file, there exists a contract of sale which identifies the Ordinance.

68. Plaintiff's claims are therefore excluded from coverage by Exclusions 3(a) and 3(b).

69. Accordingly, Plaintiff's claim under the Title Policy was appropriately denied and Plaintiff's Complaint should be dismissed in its entirety.

FOR A NINTH DEFENSE
(Terms of the Title Policy)

70. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

71. The Title Policy sets forth the following 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:

1 Title to the estate or interest described in Schedule A being vested other than as stated therein;
2 Any defect in or lien or encumbrance on the title;
3 Unmarketability of the title;
4 Lack of a right of access to and from the land;
5 The invalidity or unenforceability of the lien of the insured mortgage upon the title;
6 The priority of any lien or encumbrance over the lien of the insured mortgage;
7 Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material:

a. arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or
b. arising from an improvement or work related to the land which is contract for or commenced subsequent to the Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance;

8 The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage in the named insured assignee free and clear of all liens.

72. Plaintiff's claim does not fall within any of the insuring provisions of the Title Policy.

73. Accordingly, Plaintiff's claim under the Title Policy was appropriately denied and Plaintiff's Complaint should be dismissed in its entirety.

FOR A TENTH DEFENSE
(Terms, Conditions, and Exclusions of the Title Policy)

74. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

75. Plaintiff's claims are excluded or not covered by the Title Policy because there is no proof of loss or damage and Plaintiff has suffered no loss or damage.

76. The Title Policy requires Plaintiff to provide Chicago Title with a "signed and sworn to" proof of loss or damage and to "describe the defect in, or lien or encumbrance on the title, or other matter ... which constitutes the basis of loss or damage." Plaintiff has not provided

such information to Chicago Title.

77. In order for its claim to be covered, Plaintiff must suffer loss or damage.

78. Plaintiff has suffered no loss or damage because it has not foreclosed the First Mortgage.

79. Until a foreclosure sale is held, and the amount received for the Property is established, Plaintiff has suffered no loss or damage.

80. Accordingly, there is no coverage for Plaintiff's claims under the Title Policy.

FOR A ELEVENTH DEFENSE
(*Failure to Mitigate Damages*)

81. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

82. Plaintiff has failed to mitigate its damages.

FOR AN TWELFTH DEFENSE
(*Waiver*)

83. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

84. Plaintiff's claims are barred by the doctrine of waiver.

FOR A THIRTEENTH DEFENSE
(*Economic Loss Rule*)

85. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

86. Plaintiff seeks damages for purely economic losses and therefore Plaintiff's remedies are limited by the economic loss rule, to include the prohibition against tort-based causes of action.

FOR A FOURTEENTH DEFENSE
(*Payment*)

87. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

88. Plaintiff has been paid for its loss by virtue of payment it received or should have received in the Condemnation Action.

89. Plaintiff's claims are therefore barred by the doctrine of payment.

FOR A FIFTEENTH DEFENSE
(*Res Judicata and Collateral Estoppel*)

90. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

91. Some or all of Plaintiff's claims are barred by the doctrines of *res judicata* and collateral estoppel by virtue of the Condemnation Action and the verdict rendered therein.

FOR A SIXTEENTH DEFENSE
(*Additional Defenses Reserved*)

92. Chicago Title repeats and realleges each and every one of the preceding paragraphs as if set forth verbatim herein.

93. Chicago Title reserves the right to plead additional affirmative defenses upon further discovery.

WHEREFORE, having fully answered the Plaintiff's Complaint, Defendant Chicago Title Insurance Company respectfully requests that the Court issue an Order:

A. Dismissing the Plaintiff's Complaint;

B. Awarding Chicago Title attorney fees and the costs of this action; and

C. Awarding any such other relief as the Court deems just and proper.

CALLISON TIGHE & ROBINSON, LLC

Demetri K. Koutrakos, SC Bar No. 11318
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 DEFENDANT

May 11, 2015

1020.566\Lynx\Answer

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF HORRY)	
)	
)	
JERICHO STATE CAPITAL)	CASE NO: 2013-CP-26-5530
CORPORATION OF FLORIDA,)	
)	
PLAINTIFF,)	
)	
-VS-)	
)	TRANSCRIPT OF SUMMARY
CHICAGO TITLE INSURANCE)	JUDGEMENT BEFORE A
COMPANY,)	SPECIAL REFEREE
DEFENDANT.)	
----------)	
LYNX JERICHO, LLC,)	CASE NO: 2013-CP-26-1084
)	(CONSOLIDATED WITH ABOVE
PLAINTIFF,)	CASE)
)	
-VS-)	
CHICAGO TITLE INSURANCE)	
COMPANY,)	
)	
DEFENDANT.)	

Given before Crystal Knappenberger, Court Reporter and Notary Public, at Folkens Law Firm at 601 West Evans Street in Florence, South Carolina, on Thursday, January 26th, 2017, commencing at 10:00 am.

Job No. CS2523474

A P P E A R A N C E S

FOR THE PLAINTIFF: SCOTT MASEL, FRED NEWBY, AND MATTHEW VAN WIE
NEWBY LAW FIRM
4593 OLEANDER DRIVE
POST OFFICE BOX 808
MYRTLE BEACH, SC 29577

FOR THE DEFENDANT: DEMETRI "JIM" K. KOUTRAKOS
CALLISON TIGHE
POST OFFICE BOX 1390
COLUMBIA, SC 29202-1390

ALSO APPEARING: KARL A. FOLKENS
FOLKENS LAW FIRM
601 WEST EVANS STREET
FLORENCE, SC 29502

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JUDGE: We're on Jericho State Capital Corporation of Florida versus Chicago Title Insurance Company in the joined action of Lynx Jericho Partners, LLC versus Chicago Title. Document number 2013-CP-26-5530 and document number 2015-CP-26-1084 which I understand have been consolidated. If anyone feels the need for opening statements you can do it. Please introduce yourself for the record.

MR. MASEL: My name is Scott Masel. I'm here for the plaintiffs.

MR. NEWBY: Fred Newby, also here for the plaintiffs.

MR. VAN WIE: Matthew Van Wie, also here on behalf of the plaintiffs.

MR. KOUTRAKOS: Demetri Koutrakos here on behalf of the defendant.

MR. ARAN: I'm Kenneth Aran, not appearing as an attorney but as a client.

JUDGE: And that's A-A-R-O-N?

MR. ARAN: It's spelled A-R-A-N.

JUDGE: Thank you all. I have cross-motioned for summary judgment before me. Plaintiffs are the plaintiffs and we will let the Plaintiffs proceed.

MR. KOUTRAKOS: Your Honor, we had talked about and agreed this beforehand. My motion for summary judgment initially was filed when it began. It's been indicated that one case filed first, I filed the motion of summary of judgment two years ago, three years ago, I can't remember it was a long time ago. Second case was filed and we let the mature a little bit and so my motion for summary judgment was filed first.

JUDGE: Okay.

MR. KOUTRAKOS: It was something we talked about unless you have some kind of defense -- the plaintiff has some kind of objection, I think I need to go first.

JUDGE: If there's no objection we will have the defendant proceed on all the grounds for its motion for summary judgment.

TESTIMONY BY MR. KOUTRAKOS:

MR. KOUTRAKOS: Thank you, Your Honor. If it may please the Court, I represent defendant Chicago Title Insurance Company. This case involves, and I know we have given you a lot of paper and a lot of briefs and I'm sure you're familiar with some of the basic facts of the case, but in essence this case involves an ordinance that was enacted

in Horry County in 2002 and it amended the official map of Horry County to show proposed roads. Subsequently, there was a condemnation action in 2009 and the question is whether those two events, an ordinance act in 2002 and condemnation action filed in 2009, are covered by two loan policies issued by Chicago Title in the 2006. We'll talk about this in more detail but the ordinance, which I believe is unusual, but the ordinance was recorded and filed with the Horry County Register of Deeds. It wasn't indexed, it was just filed under Horry County and we'll talk more about that later.

The loan policy contains two very important exclusions: one exclusion is for zoning laws, regulations, and ordinances and also an exclusion for eminent domain and we believe those exclusions apply. Before we even get to that, we believe that the ordinance is not covered by the insurance provisions of the policy. So normally you would have to have something fall within the insurance provisions of the policy before you get to whether any of the exclusions apply. And so we believe that there is not title defect and these issues do not affect the marketability of title,

and we'll talk more about that later.

From the onset, having handled title insurance claims pretty much my whole career, it's kind of odd because normally when you have a title insurance claim, you have a lender and especially in a first listing position it is not a seconding position. There's a $30,000 warranty you know somebody's got to pay the mortgage ahead of you, pay them off or find an argument to get a ahead of them. Somebody might own a 10% interest in a property that you didn't know about.

Normally all of those events do not lead the person claiming that insurance to then fund or take care of the alleged title defect. He of course didn't believe a title defect existed but essentially the alleged title defect for the alleged title defect the plaintiffs had been paid by your money, my money, my tax dollars. They received a 2.1 million condemnation award. So the extent of the defect, and that's why I say it's odd because normally you don't have that scenario, but this particular case they have already been paid.

Our primary argument is that the policies insured title to the real property. They don't

insure use of the property. I'm going to talk a lot more in detail about the ordinance at issue, but it's really a lame planning instrument, it controls the usage of the property, it does not affect or encumber title to the property, it is not datum. Even if it falls with the insurance provisions of the policy, we believe it is excluded by the zoning laws, ordinances, and regulations exclusions, the eminent domain exclusion, the no-loss exclusion, the post-policy exclusion. On top of that, we believe the plaintiffs have presented no evidence of loss. They have provided no evidence that they have suffered a loss. Finally, we believe there is no evidence of bad faith. Plaintiffs have not submitted into evidence to we meet their burden of those particular claims. In general, that's the reasons why we're moving for summary judgment.

What I want is to go into the facts, I know you probably have a lot of briefs, but the property at issue is 131 acres of property. It was owned by the McClan family for decades. It's in Horry County, it is along the coastal border way. It was eventually sold in 2006 and that is

the transaction at issue in both policies and the royalties were dated in July of 2006. Prior to that there was an ordinance passed in July 2, 2000 Horry County passed Ordinance 88-202, it amended the official map to show future location of a proposed highway. It's called Carolina Bays Parkway and that ordinance attached to it a conceptual road plan by the DOT.

Before we go into the details of that, I really think what is important is to discuss both the South Carolina State Statutory framework for the official map. Discuss the similarly Horry County framework for the official map and I'm going to talk a little bit more in detail about the ordinance at issue here.

What I have here, Your Honor, is this is the chapter seven -- I'm going to pass this to everybody, here you go -- it's Chapter seven, of Plan by Local Governments. This is the statutory framework for the local ordinances that we will be discussing in a minute. Under 67-10, the intent of the chapter is to enable counties acting individually or in concert to preserve and enhance their present vantage to overcome present hardships and to minimize future problems. So

anyway, this is the code of chapter seven article one is the general provisions of the local government statue. When we really start getting into the meat of things, Article 13, it talks about the official map. Section 6-7-1210 defined the official map as being 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 in accordance with the provision of this chapter."

The next section, 6-7-1220, Authorization for and purpose of the official maps says "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." The remainder of that section says necessary for the public welfare.

6-7-1230 gives the authority to establish the official map as the governing authority of

the county. And by the way, I am kind of reading off the highlighted areas, I don't want to read the whole thing into the record and I won't. "The governing authority of the county may establish an official map of the unincorporated areas of the county. 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."

Section 6-7-1240 talks about the creation of maps by a local planning commission. And if you look at the end of that section, it says, "the making or certifying of such maps by the planning commission shall be in the form of a recommendations and shall not of itself constitute the opening or establishment of any street or highway or public building site or public park, public playground, public utility or other public open space or the taking or acceptance of any land for such purpose."

Section 6 on the second to the last page of this handout if you will, 6-7-1270 talks about no permits for construction or change in land use allowed with the mapped lines, and it talks about an appeal provision which says basically an

appeal can't be present to the appropriate planning commission. The planning commission can evaluate the appeal and the planning commission will then give a report and a report says you can take an official action to exempt the property from the ordinance, the governing authority can then issue permits or the governing authority can initiate appropriate action to acquire the property.

In the next section, well in the same section, it talks about once the planning commission gives a report to county council and county council can then take three choices, one of which is to enter into agreement to purchase the property.

Same thing with the 6-7-1280, it's a procedure for obtaining exemption of property from restrictions of the official map. And in subparagraph two, it gives a recommendation and one of the recommendations is to either exempt the property from the restrictions of the official map or initiate appropriate action to acquire the property. And upon receipt of that recommendation it's the same thing, the county council or the governing authority can either

exempt the property or then purchase the property.

That takes us to the enabling ordinance in Horry County. I got that for you for everybody else here, it is Ordinance 107-98, this is something that isn't included in the materials that have been provided. If you look at the first Whereas Clause, it relates back to the same statutory section I just read, chapter seven article six. Excuse me -- title six chapter seven with the code of law. This ordinance comes from the statutory authority provided by sections beginning at 6-7-10. If you look up 1.1 the purpose it to again promote the public safety, economy, good order, appearance, general welfare by designating and reserving future locations of streets, highways, and public utility rights-of-way.

In Subsection two, there's a definition that I think are important, one is the definition of the official map, "a map or map showing the location of existing or proposed public streets, highways, public utility rights-of-way, public building sites and open public spaces." It has a definition of condemnation and eminent domain; I

believe the same definition that everybody would give to those two terms.

On the third page of this section 3, and it talks about modifying or preparing an official map. It says the planning commission may receive, make, cause to be made map showing the location of lines or proposed new extended or otherwise in previous streets or highways.

Section four gives the authority to adopt official map showing the location of the proposed public streets. It's starting in section five which is page four of this document, it talks about the procedure for appealing building permits and land use restrictions and in the next page, section 5.2.1 talks about viewing the planning commission. Section 5.2.2 talks about official acts of the county council and those mirror what is said in the enabling state legislation including having the option to exempting the affected land from the official map issuing permits with certain conditions, and initiating an action to acquire the property or negotiating to acquire the property.

Section six talks about administration enforcement. It says the zoning administrator

shall administer and enforce his ordinance. Section 6.3 talks about the remedies, and we'll talk about that more in detail later on when it comes up. That is the statutory authority for the ordinance at issue. The ordinance at issue which you have in your notebook but I can hand this to you if you like so you don't have to dig around in your notebook --

JUDGE: That's okay. 88202?

MR. KOUTRAKOS: 88202.

JUDGE: I'll take a look at that.

MR. KOUTRAKOS: Okay. It goes through again the authority from title six chapter seven and actually in the decreed part if you will of the ordinance it says the index map is amended and it's condition of the right-of-way identifies alternative one for the proposed Carolina Bays Parkway. It attaches to it these conceptual plans.

JUDGE: Does the photo have any relevance?

MR. KOUTRAKOS: No, it has absolutely no relevance, I don't know where that came from, actually. The second page is where it's signed. Just a couple of things about this ordinance. First of all, when we record things in the

Register of Deeds it should be witnessed and notarized. It is not indexed. I mean, it is indexed, rather, and it is --

JUDGE: Under Horry County.

MR. KOUTRAKOS: It is indexed under Horry County and here is the -- you can go look for yourself right now and it will say the same exact thing -- it's indexed under Horry County Council. So unless somebody is doing a title examination under Horry County Council they would not find this particular ordinance.

JUDGE: I don't mean to interrupt you, you're on a flow, but if I may. To the extent the law has the concept of cloud on title. Is this a cloud on title?

MR. KOUTRAKOS: No, it's not.

JUDGE: Because --

MR. KOUTRAKOS: It's not a cloud on the title, it's a real estate so it doesn't affect the title of the real estate.

JUDGE: Okay.

MR. KOUTRAKOS: Okay. The --

JUDGE: Why did they record it?

MR. KOUTRAKOS: I have no idea why they recorded it. Your Honor, it's like taking the South

Carolina Code, taking it and recording it the Register of Deeds. Why would you do that? I have no idea. I don't know why they record it, if they were to do it properly they would -- I think it's from a misunderstanding on how our reporting systems works. Our reporting system works to provide constructive notes of matter affecting title to the real property. If you record something, without having it indexed, no one can possibly find it. For example, if I was conveying property to you and it's indexed under the Grantor index, it's indexed instead of K for Koutrakos, it's under C for Koutrakos -- unless someone guesses on a misspelling, no one is going to be able to find it. So you can record a piece of paper, write whatever you want on it, if it's not indexed, nobody is going to find it, it's not like --

JUDGE: I'm going to stop you right there. Does anyone object to any of the exhibits submitted to me being in this record?

MR. MASEL: No, Your Honor.

MR. KOUTRAKOS: No.

JUDGE: For the record, all exhibits submitted me designated in Volume 1 and 2 involving one

motion and involving one on 2 and the other motions are in the record. Thank you.

MR. KOUTRAKOS: Okay. This is one of the questions I ask plaintiffs' expert abstractor and I asked him "Sir, when you do a title search, Horry County is not in the chain of title to a specific piece of property, you're not going to follow it, correct?" He answered, "that is correct." "So you wouldn't check Horry County and every title it's in, would you," "No, with the exception of planning and zoning." "Now would you agree with if you're checking title to this piece of property in the grantor or grantee indices or any other indices, you would not run across Ordinance 88202, is that correct?" "That is correct." "If you were doing a title examination on this piece of property, you would agree with me that you would not run across 88202 in the Register of Deeds office, correct?" He answered, "correct."

So this document is not, like I said, it's not indexed where anybody can find it. It's not indexed under any property owners, it's certainly not indexed under the name of the McClan family which would have owned the subject property at

the time the ordinance was recorded. So, that was done in 2002. Fast forward a little bit to July 2006 --

JUDGE: Was that the David Turner transcript?

MR. KOUTRAKOS: That is the David Turner transcript, yes. It's in the record.

JUDGE: Right.

MR. KOUTRAKOS: So, in July 2006, Peachtree Properties of North Myrtle Beach purchased the property from the McClan family for 22.5 million dollars. Peachtree financed the purchase as follows: they gave a first mortgage to an entity called RE Loans, that first mortgage amount was $18,520,000; Chicago Title issued a policy to RE Loans for its less than the loan amount of $17,710,813. The Peachtree also financed the purchase of the property by getting a second mortgage, and that's with Jericho State Capital Corporation of Florida and that mortgage was in the amount of $4,263,888 and Chicago Title issued a policy for the same amount. So at the time after closing, we have RE Loans mortgage first in position of $18.5 million mortgage. You have Jericho State secondly in position for $4.263 million.

At the time of closing, I think some important facts is prior to closing, Jericho's attorney provided Peachtree's attorney with a checklist. Peachtree being the borrower -- let me back up a little bit. This is a commercial real estate transaction. All the parties are sophisticated.

JUDGE: Which of the attorneys was the policy issuing agent?

MR. KOUTRAKOS: It was Bob Gwen.

JUDGE: And he was the attorney for -- refresh my memory.

MR. KOUTRAKOS: He would have been the attorney for the borrowers. He would have been the attorney for Peachtree of North Myrtle Beach.

JUDGE: Okay.

MR. KOUTRAKOS: And so Bob Gwen represented Peachtree. It was law firm out of New York, which represented Jericho State Capital, I believe it was a lawyer from California that represented RE Loans. So this was not a residential transaction, this was a sophisticated commercial real estate transaction with sophisticated parties involved.

So as you can see in certain commercial real estate closings, Jericho's attorneys provided a

checklist to the parties involved. And on that checklist, one of the items there was satisfactory resolution of the determination by municipality not to build a bridge. And in July of 2006 for whatever reason Gwen said "Can you please remove that from the checklist?" and Jericho's attorneys said "yes, fine, we'll do that." And Defendant's Exhibit 3 is a revised checklist and that checklist eliminates that requirement or that item from the checklist. Another thing that they asked for on the checklist is municipal department violations, that's when they were looking zoning violations. That was supposed to be done by borrower's council.

They also asked for, it was on the checklist, to get zoning verification letter. On that checklist, there is certain responsibilities of Jericho's lawyer I believe he is Western Law firm and the checklist should saw Westlaw on it. There was responsibilities of the title company like issuing and conveying -- they were saying title company, Chicago Title that they defined in the checklist. There were other requirements of borrower's council, BC. One of those things was

getting the verification letter and looking at the zoning map. So, I guess Bob obtained his own verification letter, this zoning verification letter says, "hey, this property is zoned R.1." And it says nothing about the ordinance; it says nothing about any issues of the property; the only thing it says is what it's zoned for.

The point of that is there was some due diligence done by Jericho's lawyers outside of the scope of the title insurance policy and they're asking questions about zoning and they didn't receive answers for that.

In June of 2007, about a year after closing, five years after the ordinance, Horry County and the South Carolina Department of Transportation entered in agreement to fund the construction of the applicable part of the Carolina Bays Parkway. So funding for this project was approved not at the time the ordinance was filed but it was proved only in June of 2007.

In May of 2007, there was some dealings between Peachtree and Horry County Zoning. The property was re-zoned to a planned development district. An ordinance was passed, this Ordinance 7607, that's Plaintiff's Exhibit Number 12 and in

that ordinance it says that the owner has agreed to donate to Horry County at no cost property to construct the highway and it says the property will be conveyed by Peachtree by general warranty deeds. So that was in May of 2007.

In June of 2007, Jericho filed foreclosure action --

JUDGE: Is there any acquiescence by the lender in that donation?

MR. KOUTRAKOS: No donation was ever done --

JUDGE: No, it wasn't done, but the intent to donate -- was there any acquiescence of any part by the --

MR. KOUTRAKOS: No; was there any involvement in the letter that rezoned?

JUDGE: Or a commitment to release any land if it was donated?

MR. KOUTRAKOS: Not that I know, not that I'm aware of, and I don't think there is.

In June of 2007, Jericho filed a foreclosure action seeking a foreclosing on a second mortgage. In October of 2007, the foreclosure hearing takes place; foreclosure council testifies a sworn testimony to the master in equity, they zone a title of examination of the

public records pertaining to the defendants in the mortgage property and find no other parties claiming any interest of record. A foreclosure order was issued in November of 2007, it found $7.5 million due under the note secured by Jericho's mortgage.

In I believe it was December of 2003 -- and by the way, that amount due was as of the date of the proposed foreclosure sale, which I think was December, it's in the record but it's December the third of 2007. Jericho bids at the foreclosure sale and bids $9 million for the property. Jericho becomes, at that point in time the successful bidder, and it was issued a master deed which was recorded in February 26, 2008. So that point in time, February 26, 2008, Jericho owned the property subject to a first mortgage held by RE Loans.

JUDGE: What happened to the excess bid on the master's accounting? I'm curious. I couldn't see that in the record. If there was a $9 million bid --

MR. KOUTRAKOS: It was a credit bid --

JUDGE: -- Even though it was credit bid, but the credit's just against the outstanding

judgment of settlement, so it probably wouldn't have the --

MR. KOUTRAKOS: Yes, it theoretically should have gone to the borrower or the second --

JUDGE: Is there anything in the record that says --

MR. KOUTRAKOS: No.

JUDGE: -- that says what happened to the excess?

MR. KOUTRAKOS: No, I mean I think there might be some -- I don't believe we have that in the record. I believe we have --

JUDGE: You made reference in one of your arguments about having a chilling effect to other bidders. That then raised question to me about what happened to the excess if it's in the record.

MR. KOUTRAKOS: I don't know if it's in the record. I will have to look at part of the book here. I don't know if we put the master's report in here.

JUDGE: That just set the $7.5 million judgment amount --

MR. KOUTRAKOS: I know --

JUDGE: -- As of the date of sale.

MR. KOUTRAKOS: I believe we have it somewhere; I don't have it on me but I believe somewhere there is the master's report where it -- I don't recall what it did with the excess and I don't think we did anything with the excess, it just gave a credit bit.

MR. MASEL: Do you mind if I --

MR. KOUTRAKOS: Do you have it?

MR. MASEL: I do not have it, but one thing I do remember is that they were foreclosing on this two mortgages. I mean, we're just talking about the Peachtree property?

MR. KOUTRAKOS: Right.

MR. MASEL: But there was a total bid of I think it was 16 million for the two properties; nine of which went to this property, seven of which went to the property that's not --

MR. KOUTRAKOS: -- Both properties --

MR. MASEL: -- Part of this case.

MR. KOUTRAKOS: -- Were sold in the same sale.

MR. MASEL: I think the master's disbursement sheet was going by the total number of 16 million, but in answer to your question, I don't know, I don't remember anything about --

JUDGE: Okay.

MR. KOUTRAKOS: Any action?
MR. MASEL: -- actually where the excess --
MR. KOUTRAKOS: It acted like it was a credit bid for that amount where it wouldn't really be -- it's beyond a full credit bid. Because a full credit bit would only be the amount you already know, so this would be excess and above the credit but it's got as two properties being sold but the known amount allocated, the known amount was 7 million and the amount bid for this particular property was allocated through this particular piece of property was $9 million...
MR. NEWBY: I would assume that if there was an excess, it would have gone to the first mortgage holder, who was already loaned.
MR. KOUTRAKOS: Right. That's what would normally happen. So in --
JUDGE: But only for the foreclosed -- only if the first mortgage holder was claiming an entitlement to it. Right?
MR. NEWBY: I don't know if it would be in action or not.
MR. KOUTRAKOS: There would have to be surplus --
JUDGE: Right.

MR. KOUTRAKOS: Alright, but if it's evidence it's out of the question.

JUDGE: Okay, sorry.

MR. KOUTRAKOS: Okay. So in that point in time in February of 2008, Jericho subject property subject to the first in favor of RE Loans that first is now held by Lynx Jericho, one of the plaintiffs in this case. In October of 2009, Jericho filed an action to rescind this deed, this plan and district development, zoning classification and it adds York County and DOT as its parties. And basically really the end shot of that is they're trying to get somebody to do something. It wanted to set aside the zoning classification but a couple of months later, that case was dismissed because in December 15, 2009, South Carolina Department of Transportation files its condemnation action. It's your typical condemnation notice, it says that it's condemning 10.188 acres of Peachtree's property, I guess at that point in time it would have been Jericho's property, sorry. It's your typical condemnation notice during the course of that litigation, the valuation date was agreed to by the parties as a request to admit where the parties agreed to the

valuation date. There is no claim for inverse condemnation asserted by Jericho at that time, they filed a separate action saying no, the taking occurred at an earlier date -- it occurred before December 15, 2009.

They go to trial in November of 2014. Plaintiffs alleged their loss was for $4 million; DOT says no, your loss is approximately a million dollars; jury comes back with a verdict awarding just compensation of $2.1 million. Jericho then releases its interests in the condemnation proceeds to Lynx Jericho being the first mortgage holder having acquired the first mortgage.

During the course of that time, before that verdict came out in February of 2009, Jericho files a claim with Chicago Title, that claim is subsequently denied. In June of 2013, Lynx Jericho files a claim with Chicago Title, that claim was denied. This action was filed first by Jericho, then after Lynx Jericho acquired the first mortgage, Lynx Jericho filed an action as well, the actions were similar, some different allegations but those cases were both consolidated referred to as a special referee and now here we are today with a motion for summary

judgment pending.
JUDGE: I have a question.
MR. KOUTRAKOS: Yes?
JUDGE: The SCDOT payment, that was only included interest and not fees -- was there a fee hearing on that?
MR. KOUTRAKOS: For my understanding --
JUDGE: Fees were denied?
MR. KOUTRAKOS: Fees would not be awarded because it was closer to the state's valuation then --
JUDGE: -- The formula?
MR. KOUTRAKOS: Yes, under that formula, right. Is that right?
MR. NEWBY: We need to represent them in the condemnation action.
MR. KOUTRAKOS: Right, so that's what happened.
JUDGE: Okay, thank you.
MR. KOUTRAKOS: No problem.
JUDGE: But that does go to your other argument as far as whether they remain whole or not out of the sale.
MR. KOUTRAKOS: Absolutely. I would argue, I have argued, and I'll argue later on that those were made whole by this condemnation act.

JUDGE: That's why I wanted to complete that thread.

MR. KOUTRAKOS: Right. And so a summary judgment argument is kind of hinted at what its going to be that an ordinance does not affect title to the property, it doesn't fall within the insurance provisions of the policies, even if it does, the ordinance is excluded by the ordinance exclusion and the eminent domain action, the condemnation action is excluded by the eminent domain exclusion. Also I believe there is no loss shown on the development of the policy and no loss provided in conjunction with this proceeding here today. I believe there is no bad faith as a matter of loss if we had a reasonable basis to contest a claim. I know Your Honor said that at the onset there might be some cases out there where there's bad faith where there's no counter but I think those cases are rare. We'll talk about those later.

Anyway, what I wanted to provide to Your Honor is to make life a little bit easier and also because the policies' copies are difficult to read, I am handing out what I call the Applicable Provisions of the Loan Policies.

JUDGE: Can we use this just an exhibit and since it is already understand to the extracts of existence --

MR. KOUTRAKOS: That's fine, absolutely. The insurance provisions of the policy are the first page of the policies but it's your standard title insurance policies, subject to exclusions from coverage exceptions from coverage containing schedule B and the conditions and stipulations Chicago Title ensures as of the date of policy against loss or damage, not exceeding the amount of insurance, sustaining by reason of any defect in or lien or encumbrance of title and un-marketability of title. I site those two things because the those are the two things being claimed by the plaintiff. It's plaintiff's burden show that their claim falls within the insurance provision of the policies.

The next thing I want to refer to you is if you go to the next page, and I tried to put everything in order the way it appears in the policy. The condition and stipulations is the definition of unmarketability of title. It's defined as an alleged or apparent matter affecting the title to the land not excluded or

accepted from coverage which entitle a purchaser of the estate or interest described as 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. That is the policy's definition of unmarketability of title.

As to encumbrance, our case law has defined encumbrance as a right of interest in the land granted which may subsist of third persons. The question becomes whether in this particular case, whether the ordinance is either an encumbrance or it affects marketability of title.

So, there are South Carolina cases which speak to those particular issues and the first one I want to discuss is McMaster versus Strickland. And Your Honor, I have a copy of the case for you and for everybody else. McMaster versus Strickland is a case where there is a contract of sale to purchase a three quarter of an acre lot in North Myrtle Beach for $50,000. The purchaser -- the contract of sale requires the sellers to convey the property by marketable title and deliver a proper warranty deed. What happened was, the parties found out that the

property was by -- and so if you look at the second page, the sellers contend the trial judge erred in finding could not deliver marketable title to the property based on the fact the property was designated as wetlands, rendering it useless and of no value. We agree -- by the way, this is the South Carolina Court of Appeals decided this case in 1991. It is clear the trial judge confused the concepts of title and marketability with the use and value. This is very important statement in particular to this case, I'll repeat it: it is clear the trial judge confused the concepts of title and marketability with use and the value. That is, there is no evidence that the sellers do not own the property therefore, they have title. Further, there's no evidence it was unlawful to sell the property, therefore it is legally if not actually marketable.

In that next paragraph of this case, again, court language, the 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. This simply boils down to a case of the purchaser taking a calculated

business risk. The court of appeals address a trial judge and say "hey, we have marketable title here." Because it affects use of the property and not title of the property. The next case -- I'm not going to go through every occasion, I'm just going to highlight some important ones -- the next is Truck South versus Patel. This case involves the Patels were wanting to buy this piece of property and they bought it from the entity called Truck South. They wanted to build a motel there. They have, the contract says it has to be zoned for commercial purposes permitting the construction of a two-story motel containing 80 units. In the contract, Truck South was also obligated to convey title free from encumbrances. After the execution of contract, Patel hired a contracting firm and architecture firm, they go out there, they inspect the property and realize the property -- most of the property -- a good part of the property -- was declared to be federally-protected wetlands. So, because of the wetlands designation, Patel could not construct a hotel on the property. He filed this action against -- excuse me, he did not want to go forward with the closing, so Truck South

filed an action for specific performance. Patel asserted that relief should be denied because the wetlands designation on the property is an encumbrance rendering title of the property unmarketable and for some other reasons to rescind the contract, but with respect the marketability and encumbrance discussion, that begins on the third page of this opinion and in the beginning its under section A. Truck South covenanted in the Contract of Sale to convey the property to Patel free from encumbrances. Then he gives the definition of encumbrance, which is the same definition I gave you before from the Martin versus Floyd case which is "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 fees." It talks about the case of McMaster versus Strickland, which is the case we just talked about. Subsequently, it says because the wetlands designation does not render the title unmarketable, Patel cannot rescind the contract based on encumbrance. Basically, it found along the lines of the McMaster versus Strickland case again, this affects use of the

property does not affect title of the property. So, in South Carolina it is clear there is a difference between title of the property and use of the property. Ordinances often make it difficult to buy and purchase property and to use property but the ordinance like other lay-and-plan fields simply affect the use of the property and doesn't affect its title.

This ordinance did not impair either Peachtree or Jericho's ability to convey the property. We sited a bunch of cases in our brief from other jurisdictions, which find that these types of matters, zoning matters and ordinances like this type of nature do not constitute encumbrance or affect of marketability of title. Instead of going through all those cases which are decidedly brief, I want to discuss this case a little closer to home and this is case from the United State Court of Appeals for the fourth circuit and I think it is directly on point.

It's the Haw River versus Mortgage Title Insurance Company Case. In that particular case, it's a little bit different because Haw River is buying timber rights instead of the dirt rights. Under North Carolina law, timber rights have the

same as South Carolina, timber rights are interest in the property. They purchase timber on 712 acres of property in North Carolina in Garner. They pay $800,000 for this timber rights. Haw River gets a policy from lawyers' title, $800,000. If you look at it, it ensures any defect of lien against any loss resulting in a defect in lien or an encumbrance on the title or the unmarketability of title to the timber. It has the same kind of exclusions that we have. The court noted that the policy expressly excluded from coverage any loss or damage resulting from an ordinance zoning law or environmental protection legislation and it basically cites exclusion of law which we'll talk about in a minute.

Eventually Haw River began harvesting the timber and it was informed that approximately that it was ordinance by the town of Garner that it creates some kind of buffer that prevented Haw River from harvesting about 179 acres. They valued that timber to be about $375,000. Apparently, the Haw River had a title search done and it did not reveal the existence of these ordinances. These ordinances were recorded in the

Wake County Register of Deeds but they were not cross-indexed with the sellers or previous land owners in the chain of title, similar to what we have here. A cross motions for summary judgment of district court found that the municipal ordinance neither constituted an encumbrance on plaintiff's title or otherwise deprived it of marketable title. Consensual to the trial court's reasoning was that zoning ordinance in effect all land generally not of encumbrances at the use of restriction of some of the property did not render the entire title of the property unmarketable. The Court of appeals goes to the policy's definitions, it goes through the definition of unmarketablity of title, which is the same as ours and on page three of this opinion it goes to some of the concepts involving marketability of title. The reason why I bring it up in this particular case is because it's a title insurance case but it's the concepts that our Court of Appeals espouse in the two prior cases; the McMaster case and the Patel case. It says quote "title refers to the legal ownership of a property interest that one having title to a property interest can withstand the assertion of

others claiming the right to ownership. But title to property does not characterize the property itself as valuable, marketable, or even usable. Thus when title of property may be unsalable, the property itself may have no value and may not even constitute a burden to its owner."

For these reasons, an insurance policy insuring legal title coverage only the right of the owner can assert ownership against others claiming ownership or claiming interest of that ownership and marketable title is one that is free from reasonable doubt in law or fact. So what happened is, the court made the determination that while the ordinance may have frustrated Haw River's ability to timber the property it raised no issue about whether they received legal title of the property and it denied claims under the policy that there was coverage through that marketability provision of the policy. The court said the ordinances on which Haw River relies on the title defect do not impair the grandeur's ability to convey timber. Along the same lines --

JUDGE: Did you notice the setting judge in the Haw River case --

MR. KOUTRAKOS: Yes, I saw that.
JUDGE: -- Was a South Carolina judge on the panel?
MR. KOUTRAKOS: Yes, I saw that. I understand. But the fourth circuit appropriately held and I think it is inconsistent misinterpreting North Carolina law but its consistent with our South Carolina theories. And the South Carolina theory is marketability of title involves -- use of property does not affect marketability of title. And in those cases, like the Patel case, they couldn't use the property at all because it was -- they couldn't build a hotel for certain. I feel sorry for them, I mean they got the short end of the stick there but it is not, it did not create a marketability of title problem. And I think what's important is and in one of the treaties for the title insurance says that -- and I think that it's entirely accurate -- that a title insurance commitment or policy is not a zoning or building code due diligence report or a substitute for that due diligence. That goes back to the checklist. When you look at due diligence done in a commercial real estate transaction, you have certain things that require a title

insurance company. It makes sure my mortgage, if I may, is in a first thing position, it makes sure that the person who is giving me the mortgage actually owns the property.

And then you have other matters that generally have nothing to do with title insurance. That's what happened here. The checklist with the bridge issue, you have the zoning stuff, why would they request zoning from the borrower's attorney if they thought it was covered by the title insurance policy? It's not. They knew, and they did their due diligence and tried to do their due diligence. They asked about the letter from the bridge not being built, they item was removed from the checklist, they asked for a zoning letter. But it's really -- the reason why they were asking, and they were asking borrower's council to obtain this is because it's their responsibility. It's outside the context of title insurance and so that's why --

JUDGE: It's also your agent in the policy issuing agent, the same person.

MR. KOUTRAKOS: Right, but it's also the closing attorney who usually knows because the duties are different between a policy issue and your agent

and a council for a buyer to sell. The obligations are different. Obligations on how to issue a policy are entirely different from obligations to your client. For example, somebody might decide to -- a title insurance company may decide that a 30-year title search is good enough but I think the standard care in South Carolina would be different and you might be required to do something different for your particular title, for your client. This particular case --

JUDGE: It's noticed that the policy in issuing the agent happens to be the borrower's attorney notice to the title insurance?

MR. KOUTRAKOS: Say again?

JUDGE: It's notice to the borrower's attorney who happens to also be the policy issuing agent notice to the insured, to the title insurance company.

MR. KOUTRAKOS: If it is actual notice -- are you asking if an agent of the title company has noticed of this was imputable to the principle?

JUDGE: Correct.

MR. KOUTRAKOS: The answer is yes.

JUDGE: Okay.

MR. KOUTRAKOS: In one of the cases I decided to

bring is the Aldrich case from New Jersey and it says that it's particularly important in this case, it says zoning ordinances and resolutions are not title matters and not the title policy squarely places on a perspective purchaser and his attorney the burden of investigation and compliance with local ordinances and land use restrictions that may affect the particular piece of property. The case was pretty clear that --

JUDGE: Which case was that?

MR. KOUTRAKOS: That is the Aldrich case of New Jersey in 1995.

JUDGE: Okay.

MR. KOUTRAKOS: I just quote it because the language in there was entirely appropriate. That's the kind of argument we're making. And the argument is really supported by the checklist. The New York attorneys for Jericho knew who to ask for the zoning stuff. They asked the borrower's council. They didn't ask their own to do it. Our argument is that it's their burden to show they come within the insuring provisions of the policy and we believe there is no coverage under the insurance provisions of the policy.

Now we get to the exclusions from the

the policy. Exclusions, if you look at this little handout I have with the provisions of the policy, the first exclusion is the exclusion for -- the exclusion provision says that "the following matters are expressly excluded from coverage in this policy and the company will not pay loss or damage, cost of attorneys fees or expenses which derive reason of" -- and this is exclusion one -- "a. any law or ordinance or government regulation including but not limited to a building and of the laws ordinances and regulations restricting, regulating, prohibiting, or relating to the occupancy used for the enjoyment of the land, the character dimensions or location of any improvement now or hereafter erected on the land. A separation in ownership or a change in the dimensions or area of the land or any parcel on which land is or was a part." The next little subsection talks about environmental protection and the next section is the exception to the exclusion which I'll discuss in a minute.

I think this ordinance clearly falls within the exclusion for ordinances. The ordinance is a law, ordinance of government regulation that restricts and regulates the way the property is

being used. It's a land planning tool that clearly falls within in the embrace of exclusion in 1.A. We have an ordinance which is excluded by the ordinance exclusion. Plaintiffs are arguing this is more than that, it's a divestment of title to the property. A right-of-way was established by the ordinance. And that's just not correct. If you look at the enabling ordinance and we went through it when it talks about various provisions on if you want a building permit, you can apply with us, you can appeal it, we can decide to grant you a building permit, we can exempt the property, we can grant you a building permit with conditions, or we may decide to purchase the property or we can condemn the property. So the fact that the stamp, the ordinance says that we can either work it out or we can acquire it then the county may acquire the property or may file a condemnation action makes it so that it's exactly not that. It is a use of ordinance regulating the use of the property. I believe it falls squarely within the exclusion one.

If title had changed hands, Peachtree would not have offered in 2007. I mean no one ever

thought that the title would ever change hands, Peachtree offered to convey the property to Horry County when they were doing their 2007 ordinance. It's not like "hey it's already ours, the ordinance is our property." That never happened, if Peachtree was going to convey the property, Jericho's attorney testified in foreclosure "we own the property, no one else owns the interest in the property." And in the zoning rescission act Jericho stated we own the property. The South Carolina Department of Transportation wouldn't condemn the property if Jericho at that time -- initially Peachtree and then Jericho -- had not owned the property, there would have been made -- the title owner at that time was Jericho and soon they had trial, the condemnation trial representations were made that the jury by Jericho's attorney that "we own the property until SCDOT filed the condemnation action in December 15, 2009."

I think it falls squarely within order within exclusion one. The question that becomes does it fall within the exception to exclusion number one. The exception to exclusion number one is that 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 record of a date of the policy. There's no evidence it was very a violation of the statue. I don't think anybody is contending there was ever a violation of the statue. Any requirement that a notice of a violation be recorded in the public records simply does not exist and cannot exist and I don't think anybody is contending that it doesn't exist.

One of the things I wanted to focus on is the --

JUDGE: Wait.

MR. KOUTRAKOS: Yes, sir?

JUDGE: How do you read the exception on the resulting from the violation? Is that on the encumbrance resulting from the violation or is it defect lien or encumbrance resulting from the violation?

MR. KOUTRAKOS: Defect, lien, or encumbrance.

JUDGE: Resulting from --

MR. KOUTRAKOS: Right.

JUDGE: All three of those resulting from --

MR. KOUTRAKOS: Right.

JUDGE: To the extent, it might be deemed the notice and enforcement thereof in the penalty provisions especially of the ordinance. The language says it's to be recorded in the public records at the date of policy. It's admitted, I believe, by the defendant they have -- it was recorded in the public records just not properly indexed.

MR. KOUTRAKOS: Okay. I'm glad you raised the argument. It is --

JUDGE: And address this proposition, if the policy is to be strictly constricted against the insurer, why wouldn't it say it's been recorded and indexed for some other language other than simply the act of recording?

MR. KOUTRAKOS: Okay. I have to look through the definition of public records which is on page two of this handout. The records established under state statues as date of policy for the purpose of imparting constructive notice of matters relating to real property to purchase for value and without knowledge. So what does that mean? And so the question becomes the document was recorded and again, under -- this is not a public

record. Recording something, under this definition, the law is the public record, right? I'm sure there's a county office across the street and there's some kind of public record in there. There's probably a public record of the construction of this building, right? There's probably the plans for this construction of this building as a public record. But it is the public records that provide constructive notice under state statues and that's the recording act. The recording statues of the South Carolina and there's section 30-9-40 that says indexing is integral, necessary, and an inseparable part of the coordination of the deed, mortgage, or other written instrument.

JUDGE: What are you reading?

MR. KOUTRAKOS: 30-9-40. Again, if you look at case law in South Carolina is, for example, liberty of -- Thomas versus Thomas, that had to do with the indexing of a judicial order. It's a family court action and this is an established case, I don't think anybody would dispute this case or this particular holding, the course of proper indexing supplies inquiring notices of instrument. While recordation without proper

indexing supplies no notice at all. Like I said, I can take this document and record it in the Register of Deeds, it tells me anybody else constructed notice of this document unless it's recorded under the name. In South Carolina, as you know, we check title under the names of individuals, so under South Carolina law, if you're doing a title search, you generally check three places: the first place you check is the Register of Deeds office, you can check under the Grantor-Grantee indices, and so if I'm selling a piece of property, you look under Koutrakos, find the deed in to me, if I bought the property from Newby, you check under Newby's name and you go back in the chain of title. This is not complicated.

In the Register of the Deeds you will see things such as deeds, mortgages, mechanic's liens, and you will see I think state tax liens and federal tax liens would be recorded in the register of deeds. The other place you look for documents is the Court House with it's penances and judgments. At their place, you look under tax assistant's office to see if a document -- to make sure taxes, which are the highest lien of

all, are up to date. That South Carolina law, that's what provides constructive guard. We get to the Register of Deeds' court and he said this document was recorded. It can be recorded all day long but it doesn't provide constructive notice under South Carolina law unless it is indexed. Because a document that is not indexed properly can't provide constructive notice like this ordinance in this case the way it was recorded -- and I will use the term "recorded" loosely here, I would like to say "filed" because to me, when I used the word "recorded" it kind of implies that it was recorded properly and it was not recorded properly. It was recorded under -- maybe that's the way they intended to record it. Like I said, Your Honor, it's like if I took the South Carolina Code of Laws 1976 and I printed it up and I went over to the Florence County Register of Deeds, it's not recorded enough. That's fine and everything, it's not indexed I mean, but you're not going to find it unless you go to know where to go so that's my argument out of the public records. I hope I answered your question verbally.

JUDGE: You provided an answer.

MR. KOUTRAKOS: I provided an answer, that's it. Thank you.

JUDGE: Thank you.

MR. KOUTRAKOS: The question becomes does the exception to the exclusion apply? There is no notice of anything; we have in the record is the ordinance and that's it. There is no subsequent action by Horry County or any governmental entity for that matter giving notice of anything. There certainly wasn't a notice of violation of anything. There's certainly no notice of enforcement of anything. I think plaintiffs will argue because they have no choice. Of course there's a notice of enforcement. The enabling ordinance has a right to enforce and so there is an enforcement right in the enabling ordinance. Because if there is an enforcement right, that's your notice of enforcement right there and no it's not. A notice of enforcement would be a stop order, would be an action for injunctive relief, it would be something on the public records. It would be an action filed by the county or neighbor or somebody for declaratory relief saying this -- or an injunctive relief saying this notice should be -- this violation -- this

ordinance should be enforced and so --

JUDGE: Your argument is that it's the function primarily the despondent as an example the notice of --

MR. KOUTRAKOS: That is one example and just to talk about that, we talked about the statutory framework for the adoption of the official map. Here is the statutory framework on what enforcement means. That state statutory framework is a 629 -- do you mind if I stand up for a second?

JUDGE: No.

MR. KOUTRAKOS: Okay. In section 629950 Enforcement of zoning ordinances remedies for violations and it provides for enforcement of an ordinance by means of withholding a building or zoning permit or both, the issuance of stop orders against any work undertaken by an entity not having the proper building or zoning permit. Towards the end of the paragraph, it talks about the zoning administrator or other appropriate administrative officer, municipal or county attorney or other appropriate authority of the municipality or county or adjacent neighbor property owner who would be especially damaged by

the violation may in addition to other remedies issue an injunction. Mandamus or other appropriate action of 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. The next section of there is a subjection B talks about stop work orders. With that statutory provision, none of that happened. There's no notice of that happening anywhere. That goes to there is the ordinance that is recorded -- here is the ordinance that you would find today. This is a 1999 ordinance which is section 700. That talks about administration and enforcement.

JUDGE: What did you say, section 700?

MR. KOUTRAKOS: I'm sorry. Section 1300.

JUDGE: Section 1300.

MR. KOUTRAKOS: Is that right, is this section 1300? Yes, section 1300. I meant to say it's from 1999, this is pulled off online from Horry County Code of Ordinances and this mirrors the statutory section we've just discussed. South Carolina Code 6-29950 and says "a zoning administrator shall

find that any provision of the ordinance are being violated shall notify in writing the person responsible for such violations indicating the nature of the violations and ordering the action necessary to correct it. He shall order the discontinuance of the illegal use of the land, building, or structures, removal of illegal buildings or structures or 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 violations of its provisions." That is the enforcement Horry County has the power to enforce.

The question becomes where is the notice of enforcement? First off all, there is no violation. No one ever tried to do anything with the property prior to the date of the policy, number one. Number two, there are so many known notices under the public record, so the exclusion number two is abundantly clear. It talks about ordinances that regulate the use of the property, the character or dimension or location of improvement. This ordinance certainly falls

within --

JUDGE: Exclusion number two?

MR. KOUTRAKOS: Excuse me, exclusion number one, I apologize. So it doesn't fall within it. Now the case that I discussed before, I probably spent too much time one it, is the Haw River case. That case looks also at this particular issue. Not only did it find the title unmarketable, it also found that it fell within exclusion number one, and it also found that there was no notice of enforcement. There was no notice givem to enforce the buffer zone -- remember there was a buffer zone? -- nor was there any indication that a notice of a violation of a buffer zone was ever issued. Excuse me for a second. It also said in order for this notice -- which brings back the issue that I think what the plaintiffs are going to reply upon and say "hey this notice of violation" -- they have to point at something because it falls clearly within the exclusion, they're going to point to the ordinance itself and the remedy provision of ordinance which not enough, because there is not a notice that the ordinance is being violated at all. There is no evidence of any violation in the

first place. For them to make the argument, they have to show us it recorded in the public records and it's not recorded in the public records for reasons set forth below this index where anybody can find it.

We believe exclusion number one applies and the exception to exclusion number one does not apply. We have cited the case from other jurisdictions which reached the same holding under similar circumstances, and those cases are cited in out brief.

That brings us to exclusion number two, which is the right of eminent domain. It's kind of interesting on the history of this litigation because at first, the first claims were "hey this condemnations covered." Condemnation actions is not covered by the terms of the policy. This condemnation action first of all was found post-policy, it was filed years after the policy was issued. So the question is whether this ordinance amounts to a condemnation of some sort. Does it amount to a condemnation?

The question becomes how do we analyze that? And so if you look at what is required for a condemnation action to be filed, there's only one

way under South Carolina law to file an eminent domain action and that is the South Carolina Eminent Domain Procedures Act. It says this is constitute to the act, constitute to the conclusive procedure whereby condemnation may be undertaken in South Carolina. The condemnation notice by December 15, 2009 that is on the state -- that is the date on which the state's eminent domain rights were exercised. Under Statues, eminent domain rights are exercised and the taking is complete and the condemning authorities are entitled to take possession once their final condemnation notice was filed.

There is various requirements of what is involved in these condemnation notices overall for orders in the room -- all of us. Except one of South Carolina lawyers; we know that when a condemnation notice looks like and under statutory requirement the ordinance does not meet anything like that. Note there is no -- I don't think a stretch can be made that the ordinance constitutes a condemnation. Or it's condemnation notice on the public record. The recent case in 2009 our Supreme Court case in the Kiriakides case, a good Greek name, the Court found that the

near threat of condemnation does not equal the taking, merely announced his claims to condemn in the future does not amount to the taking, and planning by governmental body and in anticipation of taking a land and preliminary steps to do that without actually filing a proceeding, or physically invading the property does not constitute a taking. So the ordinance is not in exercise of eminent domain rights and if it was, it would be included in the policy. So eminent domain rights were undertaken December 15, 2009 after the date the policy was issued.

We believe that under exclusion 3-D as well if you're just looking at trying to get coverage, I think that's what they initially tried to do, for the condemnation action that it would be excluded as a post-policy matter. That's exclusion 3-D.

The other exclusions that we believe are applicable are what I call the "no-loss" exclusions. That is exclusion, this would be the second page of the handout, it would be "Defects, Liens, Encumbrances, Adverse Claims or Other Matters resulting in no-loss or damage to the insured claimant." So let's think about this for

a second. At least with respect, we have Jericho's lawsuit, we have Lynx Jericho's lawsuit, and a lot of what I've said today, at least us to this point maybe with an exception or two, applies equally to both. Here is where we get a little bit different analysis. At least as with respect to Jericho's State claim. Jericho State forecloses its mortgage for seven million -- forecloses its $4 million second mortgage. It's a successful bidder at the foreclosure sale, it comes into title of the subject property. It comes in a title subject to a first of 18 million, which today has a balance of 34, it might be 45 now who knows. Subject to the first of a balance of $34 million.

If you look at the place values that have been thrown about and pick any of the dates, the condemnation date, there's a more recent appraisal provided by plaintiff. It doesn't come close to come -- the value of the property doesn't come close to covering the first mortgage. So, there is no loss for Jericho, Jericho bought a piece of property that subject to original balance of $18 million first. The actual balance now according to Lynx Jericho is

an excess of $34 million. There's no evidence in the record that the property is worth anywhere near $34 million. So Lynx Jericho has suffered no loss under the policy.

We also contended and we believe and I think it's absolutely true that Lynx Jericho -- that neither Jericho State nor Lynx Jericho suffered any loss because they were both paid in the condemnation action. They had their date, like I said, from the outset kind of an odd title claim where the title claim ends with a jury verdict of $2.1 million in favor of the landowner. That's what happened in this particular case. They got $2.1 million verdict and they were paid. They were paid by the government. That's a constitutional responsible party that should paid for that. They're arguing, "no, we think we should be covered for the loss from the title insurance company." And they've been paid for their loss. Jury's determined what the value is and the tax payers have paid the plaintiffs for any potential loss assuming any of this is covered by the title insurance policy. Assuming any of this is not excluded by the title insurance policy.

Alright, Your Honor, again with one of these no-loss arguments, the policy amount has simply been reduced to zero. As I mentioned earlier on and we discussed this at length, the foreclosure order found that the dept was about $7.5 million under the Jericho note of December 3, 2007. At the foreclosure sale according to the record we have on December 3, 2007, there was bid of $9 million. I don't want to say full part of it, they bid more than their debt. So the applicable case of the preservation capital case and I cited it my brief but I would like to hand it out because it might be easier to understand for everybody including me. This is a case that went through the South Carolina Supreme Court. It's kind of an odd case because it has numerous properties and there's a defect on one. But ultimately, the property was Atlantic Carolina Retail Loan $3 million to Monarch. Eventually Atlantic assigned the loan to preservation capital. These were three properties in Charleston. Preservation Capital foreclosed on the shopping center parcel and so Atlantic purchased the property of the foreclosure sale by way of credit bid for $3.2 million. At the time

of the foreclosure sale, the dept had risen to $3.6 million. So thus after foreclosing on the shopping center parcel Monarch developed a Preservation Capital with a remaining balance of $391 then Preservation Capital filed a title insurance claim with First American Title Insurance Company.

If you go to page three at the top paragraph on page three on the first column, the trial court says at the time of the foreclosure sale, Monarch developed and owed Preservation Capital $3.6 million consequently the $3.25 million credit bid Preservation Capital was awarded on the shopping center parcel did not satisfy the dept full. So what the court did is a credit bid reduced the dept. The trial court said your credit bid reduced the dept under the note. The trial court noted that the dept had appreciated by the time from the date of foreclosure. Order until the entry of judgment or vice versa so the court concluded the coverage remain in the amount of $425,000. That was the amount due under the note. So, take that analysis in this case and actually if you go on to page four, a more simple example the South Carolina Supreme Court talks

about a Maine case, this is called Hodash versus First American Title Insurance. It's a little bit easier for me to understand because the numbers are a little bit easier than I just discussed. Now, I'm quoting here, Hodash was the lender, it loaned $71,000 and purchased a $71,000 title insurance policy. Hodash, the lender, foreclosed with an $80,000 credit bid. At the time the credit bid was given, the balance of the note went up to $180,000. When they went to sell the property, he discovered another party had an ownership interest in the property. Hodash makes a claim to the title insurance company. Supreme Court of Maine found out that Hodash was entitled to coverage of the loss resulting from a title defect. South Carolina Supreme Court quotes a paragraph from the Hodash case, and it's instructive, it says after the insured mortgagee purchased a mortgage premises at a foreclosure, the coverage continues provided it remains unpaid principle indebtedness. Coverage is limited however, to the lesser of the outstanding indebtedness or the state of policy eliminates -- in other words, the policy lowered the amount due on the note.

In this case, after Hodash purchased the property of foreclosure for $80,000 there remained a loan deficiency of $28,000. That amount, since it was less than the state of policy limit of $71,000 comprised the maximum limit of Hodash's recovery provided by the continuing coverage. The court applied more confusing to that principle -- is the more confusing fact of the Preservation Capital case. It adopted that law set forth by the Supreme Court of Main. So, what we have here is, we have a $7.4 million due under the note in a $9 million bid. So the note balance, the negative balance if you will, but it's a zero balance under the note. Why is that important? It's important because somebody could have purchased the property for that amount. Somebody could have purchased the property for more than the loan amount and no one was given the opportunity to do so.

In case law from around the country, you're talking about full credit bids. I talk about cases all over the country, but South Carolina case directly on point, do use the same mathematical calculation used by our Supreme Court, the balance is zero. The note Lynx Jericho

has been paid. So Lynx Jericho has no loss under its policy.

The next argument is again it's similar to the no-loss argument but it goes beyond the policy. The plaintiff has failed to provide evidence of loss, and I think it's absolutely fatal to the plaintiff's case. How did they not provide the evidence of loss? The correct -- in the defendant's opinions supported by the majority of case law throughout the country -- vast majority of case, so the measure of loss under a lender's title insurance policy is the date of the foreclosure. It's the date the lender comes into title of the property.

JUDGE: Even though the policy states it's at the date of the policy?

MR. KOUTRAKOS: No, that's the policy. The policy about is at as the date of the policy, the status of the title of the policy. The policy does not state that the measure of loss is at the date of policy.

Plaintiff claims that the date of loss is the date of the policy issues and why is it come to that?

JUDGE: The maladies are calculated as to the

date of policy is how I understand your argument.
MR. KOUTRAKOS: That is my argument. They didn't say how they value the property, the value of the property as of the date of the policy. So if you go back, the valuation date would be date of policy issued as opposed to any other date. So what they have done is they provided no evidence of that. They provided no evidence, we just agreed with them. We think the case law is abundantly clear that the date of loss is the date of foreclosure on under lender's policy.

They cite to the Whitlock versus Stewart Title Case. In that particular case, the court found an owner's policy. An owner's policy, and I have it right here and you can look at, it's a residential -- I don't know if you've ever read a residential formal policy, but I'm going to --

JUDGE: While you're looking for that, has Chicago Title ever taken a position property is just greatly appreciated to the date of whatever that the value would be as the date of the policy as opposed to the date of the loss?

MR. KOUTRAKOS: I can tell you, I've been doing this for a long time, he's been doing it longer than I have; and ever since I've known, because

you know, it makes a difference to people, it makes a difference to the insurer as well as to what position you take and whether the market is rising or falling. Right? You realize that particular issue. What I can tell you, as long as I've been doing it, we've followed in the companies that I represent followed a case called the Over Holster (ph) Case from California. The Over Holster said it's the date of discovery in their owner's policy. It's the date of discovery of the title defect. That is as far as I know and almost every other state that is the measure of validity. And then we've got --

JUDGE: Would you send me that case?

MR. KOUTRAKOS: The Over Holster case? I'll send it to you, but I mean the Whitlock case, that was argued to the South Carolina Supreme Court. Remember that's an owner's policy. In the Whitlock case that was our view.

JUDGE: From an insured policy wouldn't benefit the insured, the insurer is a declining usually in most cases a declining exposure policy.

MR. KOUTRAKOS: Pardon, a what now?

JUDGE: It's a declining exposure policy in that. And what they pay is usually the balance

due --

MR. KOUTRAKOS: In a lender's policy.

JUDGE: Right.

MR. KOUTRAKOS: Yes.

JUDGE: So in those cases, that's why you're distinguishing --

MR. KOUTRAKOS: Yes, in a lender's policy you can't really know your losses until you foreclose and you come in title of the property. So I can tell you, you're asking a question if Chicago Title has ever taken the position, I can't tell you for certain what positions Chicago Title has taken around the country, but I can tell you in my experience as to the date of measure under the owner's policy it would be the Over Holster case and that is what was argued by the Stewart Title in the Whitlock case, in the one before as the residential case. In that particular case, the one before, where it says the policy has the actual loss. Supreme Court said "listen guys, you need to provide us a defined measure -- a defined way to calculate the loss," and I would really like to point in the record here it's available on the public records through Pacer but this is the title policy, the owner's title policy is

Stewart Title. If you look at it, it's a one to four residential policy. It's kind of a plain language type thing and it is not nearly as detailed as our policy and it says with respect to damages, we will pay up to your actual loss or the policy amount before the loss of claim is made, whichever is less. That's all it says, alright.

We don't have that here, we have a 1992 loan policy and it has a very detailed way to measure loss and that is on the last page of this handout where it discusses statues. Determination and extent of liability -- it goes through -- this is what the Supreme Court wanted.

JUDGE: The case you cited earlier was the Carl Case you said?

MR. KOUTRAKOS: The Carl Case -- my client wrote it down and I was going to mention it by you -- the loan policy throughout the country is the Carl Case, and that's what title insurers around the country followed and it makes sense because a lender cannot establish a loss because it knows the note will be paid off. If the lender files a claim before it's foreclosed, title insurance companies are going to say it's not right. You

have not established a loss. So, that's what we have here in this case. With respect, which takes me to my next argument. Well, let me backup. The plaintiff has submitted a title insurance claim, it has sued Chicago Title for breach of contract and bad faith. It's got to show some kind of damage, right? What is damage? Damage would be some kind of loss compensable under the title insurance company.

They're saying -- and I think wrongly they're saying that -- the date of loss is the date the policy is issued. Why are they saying that, Your Honor? I know why they're saying that. Because they certainly don't want to say the date of condemnation because they've already been paid! They've already been paid! So what they want to do is say, "Okay, we've got paid by the state of South Carolina, the tax payers as of December 15, 2009. We want to go back to July of 2006 and we want to be paid for that through the title insurance policy." They're not going to argue the date of condemnation because they wouldn't because they realize that's what they have argued because they gave us expert appraisals saying the date is December 15, 2009.

So what did they do, Your Honor? We went out, they're the plaintiff, they establish their damage through an appraisal, we go and get an appraisal done and we pick the same date they pick. Right? If it's construed in the policy and the like most favored insured, the insured has picked a date that presumably is best. So we got that date done. And they're arguing their brief that Chicago Title doesn't know what it's doing but they can't make up their mind what date to pick. I can tell you the date, the usual date, is the date of the foreclosure of the mortgage. The date the lender comes into title of the property, right? If it goes into defect at that time, right? That's what we would have in this case and that would be the earliest date upon which loss can be established. But they're saying "no, it's the policy date." That's their position, they had to come into this court and provide some evidence that there's a loss, right? They'll argue, and they've argued in their brief, of course there's loss guys, there's a bridge and highway going through our property. I don't need an appraiser to tell me that. Well, guess what? They've already admitted in their -- and it's the right

thing to do, to say that $2.1 million is an offset. Their jury awards an offset to their damages, so it's a loss. So they're in a hole, they have to somehow provide evidence that the loss, and not in 2006, that's the date they picked for their claim that they're prosecuting. They're the masters of their own complaint in their own case. They have to show some evidence on it. In July 2006, that this alleged defect in title or this alleged issue that they claim is covered in the title policy caused more damages than $2.1 million and there's nothing in the record that shows that. Absolutely nothing. It's their burden to come up with their damages. So even though they'll say we move to summary judgment liability, we move to summary judgment, you have to prove your case and you haven't done it. They haven't shown any evidence of damages. Because I think what they realize is we're not going to use the date of condemnation, let's find another date even though the Carl Case and cases around the country say that's the date when you establish the loss because they want to get paid more. So they're picking 2006 and it's their chance to get paid more. This is their chance to

get -- I'm arguing to a jury and not to a judge, but -- this is their chance to get the $4 million that they wanted and the jury didn't give them, so this is what they're arguing. They've moved the goal post to an earlier date.

So anyway, we don't believe they have established loss under the policy. We don't believe they have established a loss at all, it's really part of their case, a breach of contract. You have to establish loss, what your damage is. They haven't done that.

Okay. There is a liability noncumulative provision of the policy I mentioned in the brief which basically says if you decide that somebody has to pay something it's a payment to a first mortgage holder constitutes a payment to the second mortgage, that's just in the policy. That's not really a summary judgment basis to let them notify the court of that.

Bad faith -- they've elected bad faith and maybe it's the right way to do it -- the two clauses of action: one is a breach of implied covenant of good faith and fair dealing. There's the Road Tech case from 2004 -- that's not a separate clause of action. That clause of action

as a matter of law should be dismissed but they have alleged judicial of bad faith, Your Honor, the elements is in existence of the contract, refusal to pay benefits due under the contract resulting from insurer's breach of implied covenant in good faith and fair dealing causing damage. This standard is, when the insure acts with no reasonable basis to support its decisions of bad faith, when there is reasonable grounds for contesting coverage there is no bad faith.

I don't know what else I could possibly say about reasonable grounds contesting the claim. You have an ordinance clearly covered by the ordinance exclusion. We have a condemnation clearly covered by the eminent domain exclusion. We have case law from the United States Court of Appeals for the fourth circuit which is directly on point regarding this particular issue, exclusion of at the time the coverage provisions were made. You also have to remember included in the briefs -- and we've mentioned this in our reply brief, the last brief I believe we filed, when they said I think we're moving for summary judgment, they spent a lot of time saying "you've committed bad faith because you didn't miss this

opinion, you missed that opinion." Well, guess what? Those opinions, most of them weren't even around. The opinions that were around like the fourth circuit opinion, the Haw River case, entirely supports the denial of coverage. Clearly a reasonable basis did not cover -- not to mention the cases all around the country that support that. We've submitted affidavits of Bush Nielsen who is our expert on bad faith. He has argued and testified that there is no bad faith in the incidence. They're saying we have bad faith on the Lion's Decision. The Lion's Decision of 2015 opinion didn't exist at the time any coverage decision was made. And in fact it has been vacated. It was vacated earlier this fall. There are other cases, there was a federal district court case of 2007 that's in ordinance filed in public record. I believe that was Judge Morris or North, I believe. Knowing that, we think that Chicago Title has a reasonable basis to deny coverage.

In conclusion, we believe the claim doesn't fall within the insurance provisions of policy. It effects and regulates use of the property, not title because numerous cases in South Carolina on

point, there's the Haw River Case, the enabling statue and the South Carolina Ordinance which talks about the adoption of the map doesn't constitute a taking. Clearly shows title doesn't pass, there's a mechanism to obtain permits, and there's a provision in the statues for subsequent acquiring them the property by the governing authority. We believe, and Chicago Title contends that the claim doesn't fall under the insurance provisions of the policy, even if it does, it's excluded by the ordinance in government regulation exclusion. The exception of the exclusions does not apply, there is no notice of enforcement, there is no notice of violation, and the ordinance was simply never violated. We believe exclusion number two applies, the condemnation exclusion. There's no notice of a final condemnation action prior to the date of policy or the post-policy exclusions of no-loss which I just talked about and clearly bad faith and I just talked about that.

For all those reasons, Chicago Title moves for summary judgment and I think I'll wrap up our argument, maybe if I can take a two minute break to talk with my client and see if he wants to add

anything?

JUDGE: In for the record, all of the arguments set forth in your various memorandum are also protected, for instance, I don't think you covered your argument that Lynx Jericho has created separately assumed -- and all those arguments are protected, I don't have to state them but I am --

MR. KOUTRAKOS: Understood. And one of the things I want --

JUDGE: You're protected on the record as to any additional arguments, and that is true for both parties.

MR. KOUTRAKOS: One of the things I wanted to do is --

JUDGE: All parties.

MR. KOUTRAKOS: -- because I've had this happen in this before is I want to make this part of the record and I've written on mine, but it's Ordinance 1300, because that's something I've cited in the fellow court all day long and they might not be able to find it.

JUDGE: I will take judicial notice of Ordinance Section 1300 unless there is any objection and we will mark this as Defendant's Exhibit A. Court

Exhibits admitted at the proceeding will be entered by letters instead of numbers.

(Defendant's Exhibit A marked for identification)

MR. KOUTRAKOS: Can we just take a two minute break?

JUDGE: Let's take a two minute break.

(Whereupon there was a break).

JUDGE: We are back on the record.

MR. KOUTRAKOS: I just want to say one thing that I happened to leave out is -- you asked me question about -- you remember you asked me the agency questions?

JUDGE: Yes.

MR. KOUTRAKOS: I think I mentioned to you the title insurance agent wears two hats, and so I think knowledge the title agent has that would be in the course and scope of his agency of what he does would be imputative to the principle but anything more than that would not. If that makes sense? Do you understand it?

JUDGE: No.

MR. KOUTRAKOS: Knowledge of an agent in the course and scope of his agency is imputative to the principle. Anything that is outside of the

course and scope of his agency is not imputative the principle.

JUDGE: What if the agent finds out that there is a -- has actual knowledge of a known title defect. Let's say a first mortgage and it's told that, but that does not make its way into the policy?

MR. KOUTRAKOS: I --

JUDGE: Let's go off the record.

(Deposition went off the record for a brief period of time)

JUDGE: Off the record we were having a discussion about title insurance in general, but let me ask on the record: Has anyone ever -- I tried to do some research on this question, the constitutionality of the mapping statute because it would seem to be -- when the government is by doing what they do, chilling -- I mean, I think we all would agree that it has the effect of chilling property and it is difficult for the title insured to underwrite accordingly. How else --

MR. NEWBY: It's still a loss, so presumably either it's been challenged and it's passed or it hasn't been challenged.

JUDGE: I'm thinking, what if somebody went and looked at the map when it was issued and then purchased property along that entire strip and did it nefariously but then also obtained the title insurance? And knowing that this is just a gold mine right here waiting to go in that -- I'm trying to get my arms around the constitutionality of it as far as the effect the mapping has on properties. I do understand it is statutory construct that allows an appeal and all of that and I guess somebody could argue at that point it's an inverse taking if their appeal fails, would be my argument?

MR. NEWBY: If you look at a semi-analogous situation the spoilages are no longer royalties --

JUDGE: Right.

MR. NEWBY: Those maps were put on the record in 1930s --

JUDGE: Title insurance companies I know now in Horry County are struggling with that because I know that three-fourths of the attorneys at the beach never check those.

MR. NEWBY: A lot of the spoilage is now being released. But for many years, it was a thousand

feet on one side of the river and it was just there, even though the core of engineers never used it. It was there.

JUDGE: Right. But if you were a local attorney who knew about those, people just didn't know about it.

MR. NEWBY: We checked.

JUDGE: Yeah?

MR. NEWBY: I think most of them -- it had been there a long time. It was common knowledge among the community for lawyers and non-lawyers. As a map? It says what it says.

JUDGE: But if a Columbia attorney sends their title abstractor down there, they're not going to find it --

MR. NEWBY: Not without a 30 year search.

MR. KOUTRAKOS: Are you talking about the --

JUDGE: Inner coastal way water spoilage easements.

MR. KOUTRAKOS: Spoilage? Okay.

JUDGE: They're a challenge and there's litigations against those right now. Anyway, we are back on the record and the plaintiff's presentation.

MR. NEWBY: Let me say one thing, if I may,

before we start. I think a photo or two or three of the area was submitted as part of the earlier briefs, but we would like the record to show that we would like place the property in evidence, if you want to call it that.

JUDGE: Yes.

MR. NEWBY: I don't know if you want to go down there to look at it; but we have some pictures; I think Jim has seen them.

JUDGE: I do have the maps attached to the Ordinance Number 88202.

MR. NEWBY: We took pictures of what has actually been built.

JUDGE: Okay.

MR. MASEL: The top one is what was on the second page of our memo and then this --

JUDGE: I've seen this but let's formally put this in the record. Any objection to the photos coming in as Plaintiff's Exhibits A, B, and C?

MR. KOUTRAKOS: Are these pictures from the brief? I have no objection to it. Is that --

MR. MASEL: That's from Jay Rose.

MR. KOUTRAKOS: Yes, I have no objection to entering those as exhibits.

JUDGE: Plaintiff's Exhibits A, B, and C are

admitted into evidence.
(Plaintiff's Exhibits A, B, and C marked for identification)
MR. NEWBY: Before we start, Scott is going to make the primary argument but in light of Mr. Koutrakos's great oratory skill, I may not be able to keep quiet if you don't object, I may add some comments at the end.
JUDGE: Unless you want to make the appearance for Lynx Jericho and you're making the argument for Jericho State.
MR. NEWBY: Whatever works.
JUDGE: Let's proceed.
TESTIMONY BY MR. MASEL:
MR. MASEL: Thank you, Your Honor. I think where I want to start with are a couple cases that Jim had mentioned in his argument and the cases are used throughout the plaintiff's memorandum. They're both South Carolina cases and have facts that parallel to the facts that we're dealing with in this case and gives everybody here a good application of South Carolina law to these effects as opposed to the numerous cases from other jurisdictions applying the laws for other states.

The first is the Whitlock case. That's a case that originated in Horry County; it was removed to the federal district court and was heard by Judge Hartwell. That case involved the spoilages that we had just mentioned before as well as an Horry County resolution. That was a no-build resolution as opposed to something that created a right-of-way or a location for a future highway. It was a simple no-build resolution. That resolution was not recorded at the Register of Deeds, it was not recorded in the deed books of Horry County. In that case, the title insurance company referred to the exact same exclusion, exclusion one, raising very similar arguments that the defendant is raising today, saying that the Horry County resolution does not meet the definition of the public record; that that ordinance or that resolution is not simply -- or that it is simply a zoning matter and that it is being recorded the way it was did not meet the public records definition. In that case, it was just recorded in the minute books, it was not at the Register of Deeds like I said, so part of that argument went to the fact that it was not indexed. The title insurance company can't find

or track the title because it wasn't indexed by grantor and grantee, it was just indexed under the county name or it wasn't indexed in the deed books. The court looked at the resolution --

JUDGE: Which one are you talking about the turn pike law?

MR. MASEL: This is the --

JUDGE: The certified case or the district --

MR. MASEL: This is in front of Judge Hartwell in the district court.

JUDGE: Alright.

MR. MASEL: Look at the policy to see what exactly does public records mean? What does it say? So he found the definition of the public records, nearly identical to the definition of public records in that policy as we have in the policy today. That said, I still don't know what public records mean. The title insurance company is telling me that it has to be indexed at the Register of Deeds in a certain way. Plaintiff is telling me is that an Horry County resolution is by its very nature a public record and the policy doesn't tell me in the plain words within the policy who's right.

Because of that, he said the definition of

public record remains ambiguous. There's two different ways that two parties are trying to interpret this. It is ambiguous and therefore under the law, an ambiguous term has to be construed most strictly against the title insurance company. In that case, there were reciprocal motions for summary judgment just like there are today. Judge Hartwell granted summary judgment to the plaintiff on this issue regarding public records because that term was vague; there were two separate ways to interpret it. I say vague -- ambiguous -- and it needed to be resolved in favor of coverage and against the insurance company.

With that happening, the parties got into a dispute about how we value the damage that has occurred because of this defect to the policy. The homeowner or the landowner said it should be measured from the date of policy. The title insurance company, similar to the defendant today, said no, it needs to be a different date, it needs to be a later day. Judge Hartwell said, "I don't know who's supposed to win this argument; both parties have a good point; I don't know what South Carolina says about this

particularly, so I am going to certify this question to the state Supreme court of South Carolina." When you're trying to measure damages, what is it? Do you look at it from the time the policy was issued or do you look at it from some other date? So the South Carolina Supreme Court looked at the title insurance policy and they said, "if the title insurance policy tells me what date we should measure damages from, then we're going to use that date." They looked into the policy: it doesn't say; it doesn't give a date. So again, when there is no date in the policy, The Supreme Courts say you have to interpret this policy in a matter in favor of coverage for the insured because no date is set forth in the policy itself and timing is important if we're going to apply the date that the policy was issued.

In the defendant's brief, there is some mention that the district court case was unpublished. Actually it's unreported and in unpublished cases when the court determines it's not going to be published is because they don't want to set precedence on it; unreported is just simply Westlaw deciding whether or not they're

going to assign a reporter citation of this or this is just going to have the Westlaw citation to it. But of course the certified question is: is this reported? This is a reported case, so the case law and Whitlock both in front of the district court Judge Hartwell as well as the Supreme Court remains good law and it is law that is South Carolina law that applies to facts that are very similar to the facts that we have in this case.

JUDGE: Part of Judge Hartwell's decision, if I remember right, had to do with construing the term "public records" against the title insurance company as opposed to -- what's your position, since you brought up Whitlock, that the definition in Whitlock appears to be different than the one here that they have cited as far as a specific definition of public records?

MR. MASEL: I don't know that they are that different; let me find --

JUDGE: See --

MR. MASEL: I'm going to find in the case if he sets forth what that definition is.

JUDGE: In Whitlock it said public records as title records can give constructive notice of

matters affecting your title insurance.

MR. MASEL: That's right. In our public records definition relates to those established under state's statue for the purpose of imparting constructive knowledge as well.

JUDGE: Right.

MR. MASEL: I think they are both, both the Whitlock case and this case we're talking about what the public records are. So in Whitlock, he found that an unrecorded Horry County resolution was a public record that fit this same definition. In that case, they also cite to the same South Carolina statute that Jim referenced as far as the statue that South Carolina sets up for giving notice. Ours is in the deed book, so our case takes it even one step further than what Judge Hartwell found in the Whitlock case. In that case, there's a public record and it was unrecorded, here we have an Horry County ordinance that exists and on top of that existing as a passed ordinance and a public record has already found similarly in Whitlock, ours is recorded in the deed books. It's hard for anyone to say I think that something that's recorded in the deed books of the county is not a public

record.

The other case is Lions. And just one more step on Whitlock, I know in the Chicago Title's brief there is a mention that that case was decided before a final judgment in that case, I think it's important to note that that case -- and that's true -- that case was settled, and that was settled after the trial court awarded summary judgment in favor of the plaintiff on these issues. After the state Supreme Court issued their opinion that the proper time to measure damages is the date of the policy.

The second case is Lions, and again as Jim mentioned, that was good law when we first began writing our briefs and it had since been vacated and that is correct. You'll see in the orders that Jim attached to his final reply brief that the parties had settled that case and that as a condition of that settlement, the case had to be vacated. That case paralleled the Whitlock case. Very similar issues, it had the same spoilages there, and it involved the exact same Horry County resolution that created the defect. It paralleled with that case, Lions relied on the Whitlock case as established in good law on these

issues. Once the court of appeals issued their decision, the insurance company petitioned for an appeal to the state's Supreme Court. It's important to note that in the Lions case, just like in the Whitlock case, and just like what we're asking for today, the trial court awarded summary judgment in favor of the plaintiff on the issue of whether the public records exception to exclusion number one applied and for the same reasons. So, the title insurance company appealed it to the Supreme Court that's when the parties began negotiating. This is an important issue to the title insurance companies, it's been an issue in Whitlock, it became a big issue in Lions, and you'll find there were number of Amekis briefs filed on behalf of the title insurance industry including one of the very good lawyers we have right here in the room with us because there is hole in these policies. South Carolina addresses this hole. And that is that the public records definition isn't well drafted to cover these type of situations. Judge Hartwell found that, the Lions court found that, and both cases we have a record of how that decision making process went through and they both had been settled before the

merits or heard.

Putting that all in context, both of those cases stand for the proposition of what title insurance is and that is the purpose of title insurance is to put the insured back into the position he thought he occupied when the policy was issued. That's a guiding principle I think that everyone needs to keep in mind when we're evaluating decisions. We want to put the insured back into the position they thought they occupied when that policy was issued not some other date in time whether it be the condemnation date or a foreclosure date or a date as of today in the measurement based on that. That's what Whitlock says, that's what Lions said, and that's the law that we need to apply in this case.

I'm going to go through briefly the points on the policy. As you know, we're making -- this is a case on the policy. When making a claim on the policy, we're looking at a few different things. One: is there a covered loss that the policy provided coverage for, two: is that loss accepted from coverage, and three: if there is covered loss that is not accepted from coverage, it is excluded from coverage?

Beginning with the covered loss as Jim mentioned and he is correct, there are two different types of covered losses that we claim exist in this case. One is any defect or lien or encumbrance on the title and two is the unmarketability of title. Those are two separate things and I get the impression that at times, the defendant has blended those together and hasn't made a clear distinction between the two because there are lots of cases that are being cited that have to do with a defect or encumbrance on the title that have to do with wetlands, they have to do with the buffer zone and of course deciding that those do not affect the marketability of title. Those are marketability cases. That's a separate covered loss from what I am going to begin with, and that is an encumbrance on the title. That is not defined in the policy itself. That's defined in South Carolina law.

An encumbrance is a third party's right or interest in land. A right or interest in land. That's South Carolina law and that has been the law for quite some time. And there has been some reference to the other cases that say the

wetlands isn't an encumbrance because there is no third party interest in the land. The buffer zone, the timber restrictions and the reasons those don't count as encumbrances is because those are restrictions on the use of the land only. They're not giving an interest to any third party. So the wetlands delineations or the wetlands restrictions, when you look at those documents, they're not saying a third party has an interest in those. Those are preventing the owner from using that property in a way that violates those provisions.

In this case, the ordinance does create a right or interest in the land on behalf of Horry County. The ordinance creates a right-of-way and it's a right-of-way for a four-lane highway that goes right through the middle of the Peachtree property.

JUDGE: Did that amount to a taking?

MR. MASEL: I think it could amount to a taking because it effectively made the plaintiff's use of that property impossible. The taking issue is sort of a side issue under one of the exclusions. Its policy exclusion two on the eminent domain -- I'm going to jump on that real quick and then go

back --

JUDGE: That's good.

MR. MASEL: -- Because the eminent domain procedure, the condemnation lawsuit that was filed in 2009, we're not claiming that act was the defect or the loss that is being incurred under this policy. The defect is the effect of the ordinance that was filed in 2002. That ordinance in 2002 reserved this property as a right-of-way for the highway. That's what gave the county its interest in the property and then by condemnation, took title to the property several years later. The actual lawsuit for condemnation, that's not what we're claiming the loss is, just that legal action in and of itself. It's the right-of-way and the rights that the official map gave to the county which is the defect that existed at the time the policy was issued.

Anyway, the exclusion two excludes rights of eminent domain. Since we're not claiming that a lawsuit that took place subsequent to the date of policy is the defect then we're not claiming that that existed -- I don't think Chicago Title says that that's a defect that should be covered and I

don't even know that we need to talk about exclusion two at all. To the extent we do, the exception to that exclusion is if there is a taking which has occurred prior to the date of policy and that goes to your question and what is a taking. There's lot of cases on that.

One of those that I cite to is Lucas versus South Carolina Coastal Council. While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. In the defendant's memorandums and in their arguments, they referred to the Kiriakides -- am I pronouncing that close enough? -- case, where the procession was that a notice of a future condemnation by itself is not enough to constitute a taking and that's fine when it comes to a taking. This ordinance isn't nearly a notice of potential future condemnation, what we're saying is the taking issue is exclusion two, the encumbrance issue is our first issue. This is an encumbrance because it creates a right-of-way in favor of the highway or in favor of the county.

In Chicago Title --

JUDGE: They didn't have the right-of-way until they exercised their taking rights.

MR. MASEL: In that --

JUDGE: They wouldn't have a right to possess it under just the mapping statue.

MR. MASEL: They don't have a title to it but designating it as a right-of-way is the county's interest in the property. So I don't know what threshold needs to be crossed to say does the county have an interest in this Peachtree property by virtue of this right-of-way? The ordinance itself refers to this strip of land for the highway as a right-of-way. Chicago Title doesn't like the term "right-of-way" and for good reason. But going to Chicago Title's point and in part what you're saying, you know, what about its effect today versus its effect when the county or the government actually takes title to the property? The original ordinance defines right-of-way: land reserved, which takes place in this ordinance, land reserved, used, or to be used for a road, crosswalk, railroad, electric transmission lines, oil, gas pipeline, waterline, sanitary storm sewer, or other public purposes. A right-of-way includes --

JUDGE: Are you reading from 88202 or 10798?

MR. MASEL: I apologize. I am reading from

Ordinance Number 107-98. That's the original ordinance establishing our official map for Horry County.

That defines right-of-ways, land reserved, used, or to be used for road.

JUDGE: Which category was this map designation of those three?

MR. MASEL: I think it was most clearly reserved because that word's actually used in the statue as what he county can do with the property owning to others.

MR. KOUTRAKOS: Scott, which section are referring to? I'm sorry.

MR. MASEL: So this --

JUDGE: He said 107-98.

MR. MASEL: Ordinance 107-98 and just on page two in the section two definitions.

MR. KOUTRAKOS: Okay.

MR. MASEL: And you go down and it provides the definition of right-of-way.

MR. KOUTRAKOS: Okay.

MR. MASEL: So this ordinance, the ordinance affecting the Peachtree property, that right-of-way one reserved that land for the county and two it identified that as land to be used for a

roadway. So my answer to your question is that two of those three words is the result of what this ordinance is enacted for. In one we've got that they've established a right-of-way for Horry County, not because the condemnation hasn't taken place but within the definition of the very ordinance that permits the county to do it; that is used and to be reserved to be used.

Not only that, they are protecting their interest in the property. They know they are going to have to buy the highway right-of-way some point in time by way of condemnation actions. Within the very words of the ordinance itself, they want to reduce those acquisition costs. For the sole purpose of reducing those acquisitions costs, they will not issue any building permits or anything to take place on their right-of-way on that land that the county has reserved, that the county has identified to be used. They're protecting their interest. So, there is clearly a third party interest created as a result of this ordinance passed by Horry County. And it's an interest that is specifically designated and reserved to be used and it is an interest that is not just a map, here you go look

at it, this is what we want to do, this is the county saying "We're going to protect that right; we're going to protect that and if you try to build without getting a building permit, you're subject to prosecution." There's even a fine of, I believe, $500 and up to 30 days in jail if you try to do something on the land that they reserved for their use. We believe most certainly that there is a covered loss that there is a right or interest to this land on behalf of Horry County. They are protecting that right or interest of the land by virtue of the penalty provisions in the ordinance itself.

As far as the unmarketability of title goes, that relates better to what Chicago Title has cited to as far as the wetlands cases referred to. And again, these are two alternate types of losses. If there is a defect or encumbrance found to occur as a result of the ordinance, then the unmarketability of title loss is extra or on top of. Anyway, within the unmarketability of title case law in South Carolina, this is something that was cited in our cases but not in the defendant's, and that is if there is a reasonable probability of litigation with respect to the

title it is unmarketable. That is the Scalise versus Tightlands(ph) case, which is a court of appeals case in 2011. But if there is a reasonable probability of litigation with respect to the title, then it is unmarketable. In this case, the ordinance says we are reserving this to be used for our highway and we're going to be acquiring this property and we're going to minimize our acquisition costs and there's going to be a condemnation proceeding that takes place. In this case, not only is condemnation litigation a reasonable probability, it's a near certainty. In fact of course it took place.

On both counts, a loss is clearly established under the terms of the policy. That there is an encumbrance or defect to the title and then second that the title is unmarketable because it is subject to a reasonable probability of litigation regarding title to that property.

JUDGE: While you're on that vibe, and this the downside of going second but you have to follow the threads of thought -- but when your mortgagors attorney on the checklist has asked to put that on a list of considerations and then it comes off of that, how is that imputable to the

mortgagee and doesn't that suggest in the record that this is more of the type of risk that is outside a title and more of a use issue than a legal title issue?

MR. MASEL: No, it's not. In fact this is why you purchase title insurance. It's for things that exist that people don't know about that affect title.

JUDGE: Didn't that suggest that the municipality and the bridge topic was introduced pre-policy?

MR. MASEL: That's true.

JUDGE: And then your mortgagor assumed that risk?

MR. MASEL: What we're looking for is coverage under the policy and I think in part where your question is going is whether our clients had knowledge of this ordinance for the future bridge and did nothing with --

JUDGE: Is the knowledge of the mortgagor imputable to the mortgagee on the loan policy?

MR. MASEL: So knowledge by the developer?

JUDGE: Yes.

MR: MASEL: I don't see how.

JUDGE: Okay.

MR. MASEL: I don't see that at all. I mean, what we're talking about is --

JUDGE: Didn't Jericho's New York council make the inquiry and say add the bridge issue to the punch-list of considerations?

MR. MASEL: If you read the exhibit and it's an email from Bob Gwen where he wants to remove that from the -- and this is just the pre-closing checklist.

JUDGE: Right.

MR. MASEL: Okay. So, Bob Gwen wants to remove that. Now the assumption has been our client's attorneys at the closing said okay we're fine with it, that's okay; just take it off, we're not concerned at all. That's not in the record anywhere. This is what we do know: Bob Gwen said I want to take this off the closing checklist, and then the next checklist that came out, it wasn't there. So, I don't think anybody knows why Bob brought that up in the first place or why it wasn't there later on, other than the concern wasn't present that this needed to be resolved as part of the closing. That's the reason you buy title insurance, is because that's to protect you against things that you don't know of. If the

contention is our clients knew of it at the time the policy was issued, I think the evidence is clear that they did not; I don't even know if we're still arguing that back and forth between the plaintiff and defendant too strongly.

JUDGE: Doing that tidbit of evidence like most favorable to your client, does that suggest that it had knowledge of 107-98?

MR. MASEL: It says --

JUDGE: That's only referencing to the concept of a municipal bridge. Because who would have thought of a bridge in the middle of 101 acre tract of land that actually abuts something else?

MR. MASEL: That's right. Within the testimony of 30B-6 witness for -- actually both witnesses for both of the plaintiffs, they were told that there was a planned bridge but that the highway and bridge were coming through adjacent property. They never believed that it was coming through the Peachtree property. That's the only knowledge that they had -- that there was a bridge coming but it wasn't going to be on their property.

JUDGE: Does that put your people on notice of duty to inquire or is that an inquiry?

MR. MASEL: I don't know if there's a legal duty

of inquiry that if they don't perform that inquiry they're barred from every complaining about again. Of course, when you're buying a $22 million piece of property, the buyers and the lenders want to protect themselves as best as possible. That's not just having your lawyers do a title search, conducting negotiations, create pre-closing checklists, it also includes buying insurance for when there is a defect to the title that nobody found, that nobody addressed. Maybe they should have looked harder, maybe the shouldn't have, I don't know but that's what the insurance is there for.

I'm going to move to the policy exclusion one, that's one of the big ones that we've spent time with. Let me ask you this, I was told that you had an afternoon matter --

JUDGE: Yes, but go ahead. You're doing well.

MR. MASEL: Alright, so this is the zoning regulation exclusion. We don't even believe this exclusion applies. This is Chicago Title trying to fit a square peg into a round hole. This ordinance is not a simple zoning ordinance. It's not a simple ordinance that sets forth a buffer zone or wetlands. This is an ordinance that

creates a right-of-way. It creates that interest in that property on behalf of the government that they are enforcing it -- protecting their rights in that interest. It's not merely a planning tool, it's not pertaining to just the character of the property or the safety or the environment or something like that. That's what exclusion one pertains to, is use restrictions. This exclusion doesn't apply to situations where the government is giving itself an interest in somebody else's land. So, number one I don't think this exclusion even applies because as I said, it doesn't apply in situations where the government is giving itself interest that they're taking from somebody else or they're applying to themselves as it applies to somebody else's property.

Taking it one step further, most definitely the exception to this exclusion does apply and that's where it says "except to the extent that a notice of the enforcement thereof or notice of the violation has been recorded in the public records at the date of policy." I'm going to jump back to where I began on this and that is this same exclusion, this same exception to the exclusion, has been litigated in the Whitlock

case, it has been litigated in the Lions case.

The public records is defined within the policy but Chicago Title is trying to give it a definition and a meaning and an application that you can't find by looking at the policy itself. The definition is broad enough and the same or similar definition in the other cases, Whitlock and Lions, were found to be still ambiguous because you can read it in any way. Whitlock and Lions but not vacated, Whitlock says that in Horry County resolution not even recorded in the deed books counts as an exception to this exclusion. Ours is recorded in the deed books but even in Whitlock, one not in the deed books counts toward the exclusion. We have South Carolina law that already addresses this issue.

Jim said that probably what we'll say, and I'm going to go ahead and say it, and that is that the act of recording --

JUDGE: Isn't in Whitlock the spoilage easement of the record?

MR. KOUTRAKOS: It was.

MR. MASEL: The spoilage easement, but if you read that case it also includes an unrecorded -- and when I say "unrecorded" not in the deed

books, in Horry County no build --

JUDGE: -- In 1931 resolution --

MR. MASEL: -- Resolution, exactly. And as you'll see in that case, there's a -- I have a list of indices -- hang on, I'm going to make reference to one more thing because it's important. So in the Whitlock case and in the Lions case, when talking about the public records and the fact that theirs wasn't in the deed books although ours is, they cite to another case that existed; it's a Supreme Court case of 2011: Carolina Chloride versus Richland County, and that's one where --

JUDGE: Right. Is it zoning rigs are public records?

MR. MASEL: Zoning rigs are public records. That particular case, the Richland County case, I don't believe had to do with title insurance; I think it had more to deal with freedom of information act request that in fact remains that Whitlock, which is a title insurance case, looked at that and of course, like I said, determined that the resolution was a public record.

Alright. So just looking at south Carolina law by itself and that being the Whitlock case, I

don't know that we need to go any further to see to determine whether the exception to the exclusion number one has been met. Chicago Title seems to take the position that there needs to be some separate document that constitutes a notice of enforcement. That passing the law and recording it in the deed books is not enough. That the county needs to also file something in the public records, a separate document that says "hey we're going to enforce this law." That doesn't make sense. The law exists, and they're going to enforce it. They put it in the public records and the deed books and that has the enforcement provisions within the ordinance. And it seems ridiculous to say that the only way this exception is met is if the county files another item, another document in the public records that says we're going to enforce the ordinance that we just passed and just record it already in the deed books. Our position is that one what is this notice of enforcement? The policy does not define what that is. My guess is that most people when they read that exception and they say okay it requires a notice of enforcement to be filed in the public records. What does that mean? What is

a notice of enforcement? Jim gave the example of a stop order or an injunction or mandamus. That could be considered a notice of enforcement, but what that actually is and why that being present in the zoning ordinances is that those would be notices of a defect, lien, or encumbrance resulting from a violation or alleged violation affecting the land. This exception can be met two ways: one: with a notice of enforcement or two: a notice relating to a violation or alleged violation. A stop order or an injunction that would only be filed with regard to a violation that is taking place. We're not claiming that some violation has been taking place, and we're not saying that there's been any stop orders or injunctions filed. But that is one way to meet the exception. The other way is for the notice of enforcement of the ordinance to be recorded in the public records.

JUDGE: Address the issue -- the argument that the title abstractor would not have discovered this.

MR. MASEL: Alright. That's good because that was also discussed in the Whitlock and Lions cases. What we're looking at is what the policy

covers. It may very well be true that the title abstractor may not be able to find something that would constitute an encumbrance on the title to the property when we reflect an interest to the title to the property. There's a case cited by Chicago Title in their final reply brief, and it's Investor's Title versus Carolyn Bear. In this case, the court discusses what some of the things are that title insurance covers that might not even be a matter of indexing or wouldn't be revealed by improper or with the indexing. As to matters that are outside the public record and not normally discoverable via standard title examination, e.g. wild or stray deeds, instruments filed outside the chain of title, frauds, forgeries, conveyances made under undue influence or by minors or incompetence, the title insurance policy normally provides coverage but will not if the insured has knowledge of those matters outside of the public record. Title insurance is there to protect the insured. The ordinance is indexed in the Register of Deeds --

JUDGE: In Horry County.

MR. MASEL: -- it's in the deed book, it is indexed in Horry County or in the Horry County

Council, it is indexed as the grantor and grantee. So saying that it was not indexed is inaccurate because it is indexed and it is indexed the way that all of the Horry County ordinances that are filed at the Register of Deeds have been indexed.

JUDGE: Was it indexed in the chain of title to this property I think is what the argument is.

MR. MASEL: That is the argument, and no it is not indexed in the name of the McClans or one of the individuals that would be in the chain of title. So this is where I go with that: is that if Chicago Title wants to define public records as documents that are indexed within the chain of title only, then that's the definition you put in the policy. They don't say anything about indexing in the policy.

JUDGE: And that's consistent with Judge Hartwell's dicta.

MR. MASEL: That's exactly what Judge Hartwell found.

JUDGE: -- And what he found.

MR. KOUTRAKOS: Can you show me where Judge Hartwell finds that dicta you're talking about? About indexing documents under --

JUDGE: No, no. He has a whole concept and that's why I referred to it as dicta, that insurance company had intended a different definition of public record but it's free to define it.

MR. KOUTRAKOS: Okay.

JUDGE: That's paraphrasing it.

MR. KOUTRAKOS: That's brilliant. That's a good story there. I thought he mentioned an indexing problem and I didn't see that anywhere in the --

JUDGE: No, his concept -- your argument is analogous to his dicta that an insurer as in that case, Stewart Title could have or should have defined public records, and they're head to a single family so let me get to his exact quote. "Finally we note that Stewart Title could easily readily achieved the more narrow definition of public records that it seeks here simply by excluding from the definition certain locations" and he's quoting in his order from the Vermont case in New England Federal Credit Union.

MR. KOUTRAKOS: Okay. Thank you.

JUDGE: I'm just trying to track your thinking.

MR. MASEL: I need all the help I can get, I appreciate it.

JUDGE: No, that's good.

MR. MASEL: Alright. I'm sticking with the exception to the exclusion just very briefly. Notice of enforce, whether it is recorded in the public records, what is a notice of enforcement? So I went to Black's Dictionary to see what does enforce mean. And that means: to put into execution, to cause to take effect, to make effective as to enforce the rent, adjustment, or collection of a debt or fine. The Horry County Ordinance was passed and it was effective upon being passed. To put into execution -- there's the next step. And the next step is going to the Register of Deeds and recording it in the deed books. It's a two-step process. The notice of enforcement as Jim knew that I would argue is important in the fact that within the ordinance, there are enforcement provisions.

That's going to take me to this Haw River versus Mortgage Title case Chicago Title has referred to because that's a case that is specifically talked about what is a notice of enforcement. As you correctly pointed out, the descending opinion said what is a notice of enforcement? That can be viewed to be anything,

that's an ambiguous term. There is some distinctions to the Haw River as compared to our case. Number one, their ordinance was recorded in the minute books, our ordinance is recorded in the deed books. In that case, under North Carolina law, recording the ordinance in the minute books didn't meet the exception. It doesn't discuss whether if that ordinance had been recorded in the deed book public records, if that would have then met either exception. Moreover, the ordinance in Haw River is one that was a timber restriction. Everything I saw in that case, that ordinance didn't say anything about the enforcement of the governmental rights within the four corners of the ordinance. Our case on the other hand, does. There's two things going on here. Number one: Haw River can be distinguished because that was just a minute books, it does not address the deed books; and two: the Haw River ordinance doesn't have its own enforcement provisions within the ordinance, and ours does. So, our belief that the actual recording of this Horry County ordinance is its act of notice of enforcement into the public records of Horry County meets this exception and

that its different how the Haw River court analyzed it.

I touched on exclusion two already.

JUDGE: Eminent domain?

MR. MASEL: On the eminent domain. As to Exclusion 3A, that's one that we haven't talked about much yet. That's the exclusion that relates to defects, liens, encumbrances, adverse claims or other matters that were created, suffered, assumed, or agreed to by the insured client. Going back to one of the questions that you had asked before with regard to were they under some duty to investigate further. This is the exclusion that -- at least within the four corners of this insurance policy, this is the exclusion that would apply if the insured knew about a defect and assumed or agreed to it. I don't know to what degree Chicago Title still asserts that Jericho State had actual knowledge of the bridge or this ordinance prior to the policy being issued. Our client's testimony is unequivocal. They did not know a thing about it until at least 2008 that the pre-closing checklist, while there was a reference to a bridge, that reference was deleted. No one even

talked about anymore. There was a reference to the bridge in one of the early drafts of the real estate sales contract that was deleted; nobody ever talked about it again. In fact, our clients were not even a party to the at contract and keeping in mind and not forgetting that attorney Gwen wasn't heavily involved in all of these documents in the exchange of the information while also serving as the agent for the title insurance company. Going to whether somebody knew or no, only under the policy, it does defines knowledge or known and it defines it as actual knowledge, not constructive knowledge. While at best, and we don't agree, that evidence would show maybe some degree of constructive knowledge of our clients and of Chicago Title that's not the standard that the policy requires. The real question is as far as Lynx Jericho goes. That's the second plaintiff that now owns the first mortgage because Chicago Title is taking the position that when they came into ownership of the first mortgage, everyone already knew about this ordinance and everybody already knew about the condemnation. They took ownership of this mortgage and became an insured under the

policies with knowledge of the condemnation case and the defect to the property. There's a couple problems with using this exclusion to borrow coverage for Lynx Jericho. Primarily, it's that what the policy is measuring is knowledge at the time the policy was issued. Did the insured know of this defect when it took the policy? Lynx Jericho did not even exist on the date of policy. There's no way that it had knowledge of anything if it didn't even exist at that date. Moreover, it stands in the shoes of the original first mortgage holder, that's the RE Loans company.

JUDGE: Is that knowledge imputable to Lynx?

MR. MASEL: So if RE Loans, the original first mortgagor, had knowledge of the defect prior to closing, then yes. That could be imputable to Lynx Jericho. But there is no evidence that original first mortgage holder or any other party had any actual notice. It's even within the policy itself --

JUDGE: Did RE Loans have, you mentioned the attorney on this section mortgage -- the lawyer from up north -- did RE Loans have a separate lawyer involved? I didn't see anything in the record about that.

MR. MASEL: I don't recall.
JUDGE: Was there anyone involved to whom actual notice could be --
MR. MASEL: I don't recall. I do know that there were attorneys representing the second mortgage holder and attorneys representing the seller --
JUDGE: Right.
MR. MASEL: -- Or the purchaser, but as far as the first mortgage --
JUDGE: I haven't seen any allegation --
MR. MASEL: -- I just assumed so, but I don't know --
JUDGE: -- I saw the allegation that the attorney for Jericho may have acquired some knowledge. I don't see any evidence that would lead a fact finder to believe that RE Loans had somebody in the mix to whom actual notice could be attributed.
MR. MASEL: That's correct and the policy actually lets Chicago Title pursue an assignee --
JUDGE: -- Right --
MR. MASEL: -- of the mortgage, for knowledge that the original mortgage holder may have possessed. It's silent and doesn't provide that Chicago Title can go after an assignee for

knowledge that it could not have had at the time that the policy was issued.

JUDGE: Right.

MR. MASEL: Moving on, we have policy exclusion 3B, not known to the company, not recorded in the public records at date of policy but known to the insured clamant and not disclosed in writing to the company. I think this dovetails with some of the other arguments we made and that is that this is something that is recorded in the public records. The deed books of Horry County are of course public records. Excluded from coverage, this is exclusion 3B, another exclusion Chicago Title has asserted, defects attaching or creating subsequent to the date of policy. As I mentioned with the eminent domain exclusion, we're not asserting that the eminent domain lawsuit that was filed is the defect we're asserting coverage for. Similarly, the only defect that we're looking for is the defect that existed as of the date of policy, that being the ordinance. This exclusion 3B doesn't apply either because we're not asserting anything that attached subsequent to the date of policy.

I'm going to go to the next issue we have is

of course damages. As we've made clear in our memo and today, we believe there remains an issue of fact on that. Chicago Title asserts there's zero damages. We assert there are considerable damages. You'll see in my memo that there is some evidence of damages and I'll disagree with Jim that looking at this picture with a four-lane highway and a bridge going through the property and the right-of-way that paved the way for that to happen is not in and of itself some evidence of damages, at least as far as the motion of summary judgment goes. That is some evidence of damages, but looking at the appraisals that had been supplied as part of the condemnation action and Jim mentioned that we provided those, and that's true, but those were all appraisals that were provided to the parties in that condemnation action. Those weren't separate appraisals that were obtained as part of this title insurance litigation.

One of those is the Jay Rowe appraisals and there were other appraisals that took place but as far as showing that there is least an issue of fact when it comes to the damages and what proof we have. The defect exists; the right-of-way

exists and it was the same right belonging to the county on the date the policy was issued or the date of the sale of the property has existed the second before the condemnation case was filed.

JUDGE: But you do agree then I am bound by the determination of the jury on the value of the taking --

MR. MASEL: Yes.

JUDGE: -- as a matter of law as of the date of the actual taking. I don't want to use any other concept.

MR. MASEL: Absolutely. And we agree that the value of the taking as of the date of condemnation which was $2.1 million --

JUDGE: Right.

MR. MASEL: -- Is something that would that would act as a credit --

JUDGE: -- Offset credit --

MR. MASEL: -- to the -- or offset to our damages. We don't dispute that number.

But going back to some evidence of damages, Jay Rowe's appraisal as of the date of condemnation showed a value of the property without a defect and the value of the property with the defect basically that defect reduced the

property value by 44%. Each of the appraisers reduced the property value by some percentage as a result of this defect.

JUDGE: And that's in your exhibit 14, I believe.

MR. MASEL: I believe -- let's see. Exhibit 14, that is correct. What we have --

JUDGE: What you're arguing is that some evidence --

MR. MASEL: That the property lost value. It's the same thing that caused it to lose value in 2009 as it was that caused it to lose value in 2002, when the policy was issued. There's a loss of value as a result of this defect to the title. It is measured in a percentage as of the condemnation. That's some evidence that of course, yes, the property has lost value. It is tangible; it has been measured. As far as measuring damages under the policy, we are looking for coverage as the policy provides. They cover for losses as of the date of policy. So the damages can be measured; there's some evidence of damages one: by knowing that right-of-way is going through the middle of some property that was purchased for $22 million and two: that it's

been quantified for the purposes of a subsequent condemnation action. Saying that there's no evidence in the record that the plaintiffs have suffered any damage whatsoever as of the date of policy is contrary to what we have put forth.

JUDGE: And part of the argument too is fact finder -- I would not be able to look given the photographs and all that there is any tangible benefit to the remaining property as a result of this taking.

MR. MASEL: Right.

JUDGE: There's no off ramps there, there's no -- it just --

MR. MASEL: It goes right through the middle of it.

JUDGE: Right.

MR. MASEL: And that's right. While Jay Rowe says this has caused this piece of property to lose almost, not quite 50% of its value, our clients saw it totally different from day one. They would have never have made this loan in the first place had they known that there was going to be a highway going through the middle of it --

JUDGE: It's only nine percent taking of the whole, isn't it?

MR. MASEL: It is, but that's a big nice piece of property on the inner coastal waterway. Now it's cut in half and you can't do the same development that they were initially planning. That's part of the complaint from our clients is that in their mind, the property was worthless. They had plans to use this property and once they found out this is how this is happening, it's worthless. We're not claiming 100% loss in the property, there's some evidence that there is a loss, but not 100% loss, maybe 50% loss.

My guess is you already know where we're coming from as far as the date to measure damages?

JUDGE: Right.

MR. MASEL: I'm trying to get --

JUDGE: But if the defendant's summary judgment is denied, you're still maintaining your right to summary judgment as to liability only with serving a hearing on damages, which would be as of the date of the policy.

MR. MASEL: Absolutely correct.

JUDGE: That is how I understand your argument.

MR. MASEL: Yes. We're saying liability, one: that there is a covered loss, two: it was not

accepted in the policy, and three: that the exclusions do not apply as a matter of law. The damages to be determined at a later hearing date. Now we go to everything that we have been talking about. I think that could go to the date the loss was established. That can go to the effect of foreclosure and how those bids may apply or not apply, we don't think they do, but I understand the arguments in favor of that as well as if even the claim for damages might be right for Lynx Jericho. I will touch on that because requiring Lynx Jericho to foreclose as a condition of asserting damages is nowhere to be found in this policy. It is not in the policy. The policy provides for a manner of calculating damages, a formula if you will, but it doesn't set forth the date. That has been a big part of our case is that it doesn't set forth a date.

JUDGE: What if the property is worth $100 million and you foreclose and you get paid $100 million?

MR. MASEL: We have that issue whether it's a lender's title policy or an owner's title policy. Requiring Lynx Jericho to foreclose before anybody can assert damages because you have to

have the sale, you have to know how much is brought in to measure the value is the same as requiring an owner to sell the property before they can find out whether or not --

JUDGE: Is the difference in a loan policy, you have a declining benefit based upon the loan balance usually, right?

MR. MASEL: Usually is key. We didn't have it for either one of the loans in this case.

JUDGE: Okay. Address the issue of the $9 million credit bid.

MR. MASEL: Okay. So, what you don't see in the -- which case was that that we decided to -- the Preservation Capital case or the other cases cited to by Chicago Title is that here we have a huge first mortgage that Jericho State, as a second mortgage holder, is taking ownership of. They are -- so when you take a bid of $9 million on a piece of property that has an $18 million first mortgage on it, you only do that if you believe the property is worth nine plus 18, $27 million. Alright? So, the credit bid is then -- goes to --

JUDGE: Is your argument then that there is no loss? Because nine plus 18 equals 27.

MR. MASEL: Well, thank you, because there is a part two to what I was going to say. That is that credit bid, what took place at the foreclosure sale, was before there was any knowledge of the defect. So, that's not a fair measure of the property. That would be a fair measure of the property if there was no defect on the property. When Jericho State made their foreclosure bid, they did not have knowledge of this ordinance and made that bid accordingly. If they --

JUDGE: But when it foreclosed --

MR. MASEL: Yes?

JUDGE: -- wouldn't it foreclose on liens and encumbrances on the public record? Does that make it a circular argument that --

MR. MASEL: I don't know that it would because they -- that I don't know the answer to. Usually when the liens are foreclosed out, they're given a notice -- the lien holders are given a notice that they can respond or have an opportunity to go through the properties themselves. I don't know if a foreclosure --

JUDGE: I think we had that issue --

MR. KOUTRAKOS: Are you talking about junior lien holder?

JUDGE: It wouldn't be a junior lien holder because action predates the mortgage and as far as somebody -- it's that core concept, if you didn't know at the time of closing and then you didn't know at the time of foreclosure and you had two separate entities in that process, does that erode the argument that this mapping ordinance is a public record and known to the world?

MR. NEWBY: My argument would be from somebody who knows foreclosures, if you have lender's title policy and you're foreclosing a mortgage, you are going to look for events that have gone on record after the date of the mortgage because everything that's predating the mortgage should be included as an exception in the policy you have.

JUDGE: But then it's your --

MR. NEWBY: You wouldn't be looking back at ordinances passed years ago before the mortgage.

JUDGE: But then as a matter of practice, you also to the successful bidder do a full search to reissue the policy if it's going to be reissued.

MR. NEWBY: There's no requirement on that --

JUDGE: There's no requirement but --

MR. NEWBY: -- If you have insurance.
JUDGE: But as a matter of practice, don't you normally do that?
MR. NEWBY: But you also -- not necessarily because as a successful bidder at a foreclosure sale, if I'm not mistaken, you're covered by that policy and you've got your insurance.
JUDGE: Okay. I follow.
MR. MASEL: Alright. The only items that I think I will still address if we have the time --
JUDGE: Yes.
MR. MASEL: Very briefly --
JUDGE: Please.
MR. MASEL: The bad faith. And again, we're contending there are at least issues of facts to be addressed regarding these things. The Jericho State denial letter gave two reasons for denying the claim. One was that exclusion one applied and there was no evidence of a notice of enforcement in the public records. Again, that was based on -- our position is that it was clearly in the public records. Alright, so the deed books are clearly public records and by trying to make a distinction as to whether it was indexed properly or not indexed properly that requires going into

the deed book and making a document by document determination. Is this properly in the public record, is this not properly in the public record? The deed books are public record. I think there's an issue of fact as to that. But what's more important is that Chicago Title denied the claim because they said that Jericho State did not provide a proof of loss. As you may know, South Carolina Code 385910 says that they cannot -- they cannot -- deny a claim for a lack of written proof of loss if the company doesn't provide a form to the claimant within 20 days of making the claim. So, the statue precludes them from using that as a grounds to deny Jericho State's claim, yet they did. I believe that's at least some evidence of bad faith.

Lynx Jericho, the ordinance is not a covered loss, they did not give the county any ownership interest. At no time did the deed claim that the ordinance gave the county an ownership interest by a deed. What they have is an encumbrance and that is a third party's interest in the property, a third party's right to or right in or interest in the property. Not that they're on the title itself but an interest in that title. It was

denied; the ordinance is not recorded in the public records. As defined in the policy since not indexed by owner name, again there's some evidence of bad faith for they're using reasons and a basis to deny the claim that is not found anywhere in the policy itself. There's no requirement that there be indexing before the public records exception takes place. Three: that Lynx has already been fully compensated; they have not. They're measuring from the wrong date and that is the date of condemnation when their own policy says that they insure for losses as of the date of policy. Not known to the company but was known to the insured again if one party knew it, they other did, but Lynx did not even exist on the date of policy. There's at least some evidence of the company being unreasonable when they're asserting that Lynx Jericho had knowledge on the date of policy --

JUDGE: What company do you mean? Chicago Title?

MR. MASEL: Chicago Title asserting that they had knowledge on a day they did not even exist. And saying that the defect assumed to or agreed to by Lynx Jericho again, denying their claim because they assumed or agreed to a defect as of

the date of title is unreasonable or at least some evidence of unreasonableness when they did not even exist on the date of title.

As far as the bad faith goes, the arguments mirror our claim and motion for summary judgment that that there is some issue. In fact, some of the reasons for rejecting the claim are so egregious that there is some basis for our bad faith claim, and that's something to be determined by the entire fact.

JUDGE: Thank you.

TESTIMONY BY MR. NEWBY:

MR. NEWBY: I'll be brief. As I think number one: in copies, you've already got lots of material you've already viewed and again with Scott's arguments, I think it touched on just about every point, but because of that, I would like to sort of just give you the big picture as we see it. We being Lynx Jericho and that really mirrors the Jericho State position. Chicago Title is taking the position and has made it repeatedly that the first exclusion applies because it's a governmental regulation or an ordinance and there's been no notice of defect or enforcement. The fact that they rely on the language of there

being no enforcement makes it clear that the first part of that exclusion relates to zoning ordinances. There can be lots of encumbrances that don't require a notice of enforcement. There can be lots of ordinances.

What if this is super fund site and there is a notice posted in the public record that this is a super fund site? For Pete's sake, everybody knows that's going to make the property unmarketable. No buyer is going to buy it, and yet there's no enforcement required if you just put the property on the super fund list. One day, if the government ever comes up with money, it might be cleaned up but there is no enforcement taken against that property. Clearly, that makes it unmarketable. This property is unmarketable.

The 30B-6 deposition of the principle and with Jericho State, he was clear in saying if you look at the picture, I bought 130 acres or put a mortgage on 130 acre parcel. The issue of marketability I think has lost in the jumble of words so that we end up talking about the roadway. This was a policy on 130 acres. The 130 acres, the nature of that property as a whole which is our insured property changed

dramatically by virtue of this road right-of-way bridge. This monstrosity is now built through the property. You look at the picture and you look at the testimony that he says, "I wouldn't have made the loan at all if I thought this thing that looks like I-95 freeway going through it on a bridge" -- he said, "we were going to build high-end houses on the waterway. Who's going to buy that when they look up out their window and they see this flyway going over the adjacent property?" He says, "It has no value to me. I would not have made the loan period. My loss," in his testimony, "is the entire $4 million because as far as I'm concerned, a) I wouldn't have invested money in the property and b) now as far as I'm concerned it isn't worth anything." It is unmarketable in his mind, because who is going to buy it? Who is going to buy this property with road through it? It's not even just a road. It's 80 to 100 feet in the air running through the middle of it. "The noise," he testified, "the noise and all these other things that goes with that road makes the adjacent land that he still owns because of foreclosure worthless." So, I don't see how marketability can even be

questioned by this --

JUDGE: Are you citing Trotters Foresky(ph) on that?

MR. NEWBY: Swat.

JUDGE: Okay.

MR. NEWBY: While we don't think it constitutes eminent domain, if it did, clearly there is a notice and Chicago Title can't have it both ways. It either is eminent domain with notice, or it's not eminent domain which means the second exclusion doesn't apply. I don't know which it is, but either way, it doesn't apply.

The whole question of the public record makes no sense to me. We've got a state law that was passed in the sixties for Pete's sake. The first ordinance in South Carolina in Horry County was put on record in the early sixties. The last two ordinances were done much later. Chicago Title, just like everybody else in the world, is supposed to know what the law is. They could have told their title examiner to be checking the public records or ordinances.

Sorry, I have a cold, but I'm going to get over it one day. And again, talking about two different things at the same time to argue that

Bob Gwen, their agent who wrote the policy and signed it, is that not their agent? His knowledge is not imputed to the title company? It's his knowledge that created all the other exceptions. They rely on his knowledge for those exceptions, they give him that authority. And yet he has knowledge on this bridge based on the email he wrote and they that doesn't matter. That makes no sense either. How can it matter some times and not matter at other times? He didn't represent our client; he represented the borrower and the title company. Our client was the mortgagee who is in Florida, not Horry County. They relied on the title policy. It's very simple. You talk about due diligence, the due diligence issue comes right with the borrower. The borrower may go out and get -- is there adequate electricity, is there adequate water, sewer, blah, blah, blah -- the lender just wants a good first mortgage or a second mortgage in this case. It's their title.

So you get a title commitment that says this is what's going to be listed as the exceptions, you review that, if it looks good, you'll make the loan and you get your policy with those two exceptions. That's what happened here. There's

nothing about a road, nothing about a right-of-way, nothing about a bridge, nothing about an ordinance, nothing about the state law, none of that.

Which Bob, much as I like him, practiced with me for some time, and I hate to say it, but he must have had knowledge because he wrote the email saying take it out of the checklist. He knew something; he knew more than we knew, which was nothing. If anybody had a duty of further inquiry, it would have been Chicago Title who's agent wrote that email. And the fact that, and as my client testified in his claim, I believe for today's purposes, to the degree that they knew anything, if they even looked at the checklist, which I think he said he never saw, and he saw something about a bridge and heard something about it being on adjacent property and then saw an email from the title agent that, and the buyer's lawyer to take it out, the clear implication of that which that court is entitled to take, the clear implication is that it's not an issue. It must have been on the adjacent property. It doesn't apply. Take it out of the checklist. There's absolutely no reason that I

have heard --
JUDGE: Is it acceptable or is there another interpretation that it was an acceptable use by the borrower?
MR. NEWBY: If that's the case then it was insured over because they didn't list it as an exception.
JUDGE: No, an expectable use. Is it, like if somebody discovers a zoning classification, is it acceptable as opposed to unacceptable land making the decision: is it worthy of being purchased?
MR. NEWBY: I would say that would apply for something like covenants and restrictions. They are listed as an exception --
JUDGE: That's what they're trying to slot it into. They're trying to say it's more like land use issue as opposed to a legal title issue.
MR. NEWBY: I understand what they're trying to say and if I was them, I would be trying to say something too. I'd come up with something.
JUDGE: But that nugget of evidence I think can be argued either way and I have heard both of you argue it both ways.
MR. NEWBY: Assuming any of this can be argued either way, which I don't believe, but for

argument's sake that it can be argued either way, then that would imply that the case law has said that ambiguities existed in the policy. And we know what happens when ambiguity exists in the policy, they're all construed against the company. And that's where we are today. There are, I think, few of any sound bases for the defenses for the degree they exist, they're pulling them out of ambiguous clauses that they want to define but that are not defined in the policies. If they're not defined in the policies and they're making up the definitions for purposes of this proceeding, they're ambiguous and it needs to be construed against them.

JUDGE: Was there any consideration given to suing -- I did have an issue in Exhibit Number 27, the very last exhibit, having to do with the notice to property owners.

MR. NEWBY: I'm sorry?

JUDGE: The notice to property owners from 2002.

MR. NEWBY: I'm not sure what that is.

JUDGE: That's the May 15th letter.

MR. MASEL: If I'm not mistaken, this letter is part of our documents in this case because it was an exhibit to early draft that one of the real

estate sale contracts and this is the letter that was sent to owners --

JUDGE: Right, between the argument of the seller into the purchasers that that affects their warranty deed.

MR. NEWBY: In other words, would there have been a claim under the deed -- under the general warranty of the deed against the seller?

JUDGE: Right.

MR. NEWBY: Perhaps, but we're not the buyer. We are simply a mortgagee with a policy.

MR. KOUTRAKOS: You are the owner.

JUDGE: You stand in the --

MR. NEWBY: We didn't get a warranty deed from the seller, we got a deed from --

JUDGE: No. But you benefit from the warranty deed in the title that you've obtained. The equitable --

MR. NEWBY: There hasn't been -- the short answer to your question is there has not been a consideration by us to go against the seller. If the seller made that available to Peachtree, their buyer, maybe there's no claim anyway against them because they made them aware of it unlike us.

JUDGE: Right. Okay.
MR. NEWBY: So, there you go. I'm not going to argue with more.
MR. KOUTRAKOS: How much time do we have?
JUDGE: You have five minutes in rebuttal.
(Whereupon there was break)
JUDGE: We're back on the record.
MR. NEWBY: You have three minutes.
MR. KOUTRAKOS: Right quick. I take offense to being accused of bad faith, I don't take that emotionally but saying that we're making up words when we have case law. Hundreds of cases cited in one of my briefs, but dozens and dozens of cases cited on this very point. Sophisticated parties are involved, if they have to look up the word "encumbrance" or "and" or look up the definition of this, I find that that's what courts do and lawyers try to do when they're looking for money when it's not there. They say, "I don't understand what it means and we couldn't define it." To define every word in the policy to make people who want to look for ambiguities you would have to have a dictionary -- attach a dictionary to the policy because that's what we're doing. It's ambiguous. I don't know what it means. What

is a notice of enforcement mean? Well, it's a notice that we're enforcing the ordinance. It's pretty common sense. It's a notice that the government's going to come in and it's going to enforce the ordinance it has on the record. To say that the fact the enforcement provisions in the actual statutory provision of itself that's the notice of enforcement. It wouldn't have been -- that language would have been stated in the policy. Assuming there is no notice of enforcement on public records at all. I see no logical refutation or anything that would say that there's nothing left on the Jericho State policy. They made a $9 million credit bid, that policy is reduced to zero, the argument was made -- I don't know if it was in good faith or bad faith -- but the argument is being made that "oh no, we had no knowledge of it at the time." The Supreme Court, our Supreme Court, in the first preservation case cited that Hodash case from Maine. In the Hodash case, the knowledge, and it's right here in the language cited by the South Carolina Supreme Court, the mortgagee had knowledge after the foreclosure, after he became entitled to the property. There was a reduction

made to the amount due and that's what happened this particular case and now it's happening this case.

So regardless of whether Lynx Jericho had knowledge before or after, there is a reduction silent share -- excuse me, Jericho State, they bid more than their debt, the policy amount is zero, they have no coverage, there are --

JUDGE: Arguing new matters --.

MR. KOUTRAKOS: -- Arguing new matters, okay. There are South Carolina cases on point for that particular which I didn't cite before and I can just provide them to the court after the fact --

JUDGE: There are two of them in your brief.

MR. KOUTRAKOS: -- as to you -- right -- as to the --

JUDGE: You asked those questions to see if I really read --

MR. KOUTRAKOS: Yeah, alright. The ordinance creates a right-of-way I heard. An ordinance doesn't create a right-of-way. It doesn't divest title to the property. The ordinance passed by our general assembly that we all elected was very careful to make sure that it didn't happen. You asked about the constitutionality of it. There is

a provision in there that I cited that we talked about, it says it constitute the adoption of the map, doesn't constitute a taking. There's clearly a procedure available for exclusions to be made for the property to be taken out of it being in the zone with use of its prohibited and then the last step is that it allows the county to either -- it has the option of seeking to buy the property or to institute a condemnation action. So saying that the ordinance creates a right-of-way, that's simply not true. There's only one way to create a right-of-way, it's for the owner of the property to grant one or in this particular -- or to file condemnation action and do so, and that did not take place. By reasonable probability of litigation everybody owns the property, there's always a possibility of litigation involving eminent domain. You can't differentiate between the government coming and possibly purchasing the property as to opposed to litigation automatically saying that litigation is going to take place.

In a lot of contracts of sale, you see there are eminent domain provisions and condemnation provisions. The reasons why is exactly this. It's

exactly for this very purpose because it doesn't affect marketability. Okay.

I know have a couple minutes left. Whitlock is not binding precedent, it is one opinion of a South Carolina District court judge. The analysis is thin on the issue of public record --

JUDGE: But the certified question is bonding.

MR. KOUTRAKOS: The certified question is bonding by the Supreme Court, it's their evaluation under an owner's policy. A family, one to four family residential owner's policy. As to both Whitlock and Lions when interpreted the policy, that policy the actual insuring provisions are different. Nobody pays attention to it and the insuring provisions of that policy say you cannot use the land because of -- excuse me -- you cannot use the land because use as a single-family residence violates restriction showing schedule B or an existing zoning law. So this policy is totally different. That is affirmative zoning coverage provided in both the policies in Lions and in Whitlock.

The issue of the public records issue, again that relates as to the exception to exclusion one, that's notice of enforcement and I don't

think you can get any more clear that there is no notice of enforcement filed. It's about damages to be determined, we talked about damages, it's about question. If they're going to pick the date, and they act like we're picking up all these dates, and we followed along with them. We didn't pick the date. We sent them interrogatories, they said show us what your damages are, we hired this appraiser, here is the appraisal, it's the date of condemnation. That's the date they picked. That's the date they picked and that's the date we followed. So there's no appraisals for no valuation provided by plaintiff that as of the date of the policy which is again the wrong date for the loss that there is any loss, any diminution of value to the property and owner under what we have here, it has to exceed $2.1 million. This just because you show a picture of a bridge, which wasn't in existence at the time of the policy, remember the title of the policy the bridge was not in existence. They have to show competent evidence at that time, not just saying "hey, it could have been more than $2.1 million" but I don't know or the value the property could have exceeded both the value of

the first and the second mortgage at the time the policy was issued, I don't know, it's all speculation. I don't have the burden of proof, the plaintiff has the burden of proof, and I believe he's failed to meet it, so, or the plaintiffs have failed to meet it.

JUDGE: Okay. Thank you. Let me cover some things. Housekeeping stuff first. I understand that the agreement is the cost of the reference will be divided equally and if the Court Reporter would issue her appearance fee to both of the law firms respectively and they will pay that equally. Any other subsequent requests for copies of transcript will be in accordance with whatever they work out directed with the Court Reporter. Any objection?

MR. KOUTRAKOS: No objection.

JUDGE: Okay. Second, I ask that all of both sides submit Word documents to me of all of your memoranda that you've already submitted to me. That's is very helpful and some of it has a lot of long narrative stuff that will keep me from typing a lot of stuff that will reduce your bill accordingly. I may or may not utilize something I do in my arbitration proceedings and Special

Referee proceedings. I may issue a tentative ruling, I don't know if any of you are familiar with that process, but a tentative ruling is simply my at that moment analysis that I put out for comment. I reserve all rights to change any tentative ruling; it is designed for you all to -- how I send it may have two different characterizations of the tentative ruling. Some of it may be "please identify any miscalculations, errors of fact, but do not comment on the reasoning." It's designed to keep you from having to file a motion for reconsideration on simple stuff. If I said it's a 134 acres and it's really 131 acres, it's designed to clean up something before it actually gets filed with the court house. Again, that's designed to save you time, money, and resources.

I could open it up; I may even ask for a proposed order from one side or the other, if I do that, I want it to be clear now: I'm not bound by any memorandum decision I give out. I reserve all rights to change my final ruling up until the time I put my signature on the final one that will be served on everybody.

If there's no objection, I will serve

interim communications via email instead of first class mail objected by things unless any party objects otherwise. The final will be sent by email and by first class mail addressed to the clerk of court and you will get a copy of it. Any objections or questions on those general rules?

Okay. The record is closed and thank you.

(Hearing concluded at 2:10 p.m.)

Page 153

STATE OF SOUTH CAROLINA)
)
C-E-R-T-I-F-I-C-A-T-E
)
COUNTY OF KERSHAW)

I, Crystal Knappenberger, Court Reporter and Notary Public, certify that I did appear before the Special Referee at 10:00 a.m. on Thursday, January 26th, 2017 at the Folkens Law Firm at 601 West Evans Street in Florence, South Carolina; that the pages constitute a true and accurate transcript of the testimony given at that time and place.

I further certify that I am not of counsel or kin to any of the parties to this cause of action, nor am I interested in any manner in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this the 1st day of February, 2017.

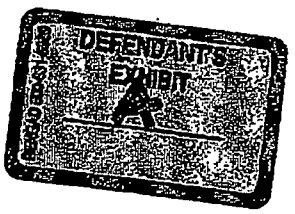
Crystal Knappenberger

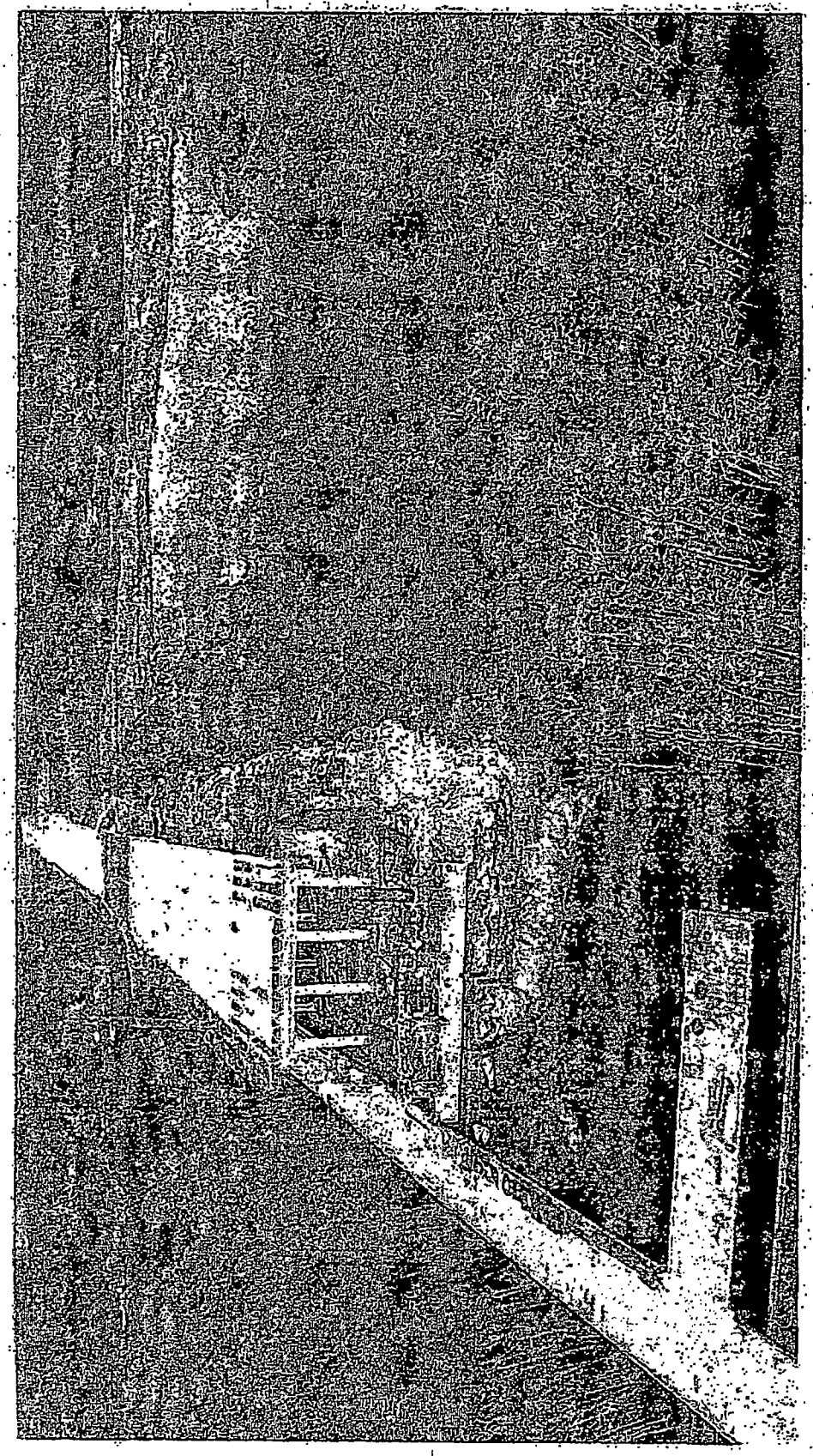
Notary Public for South Carolina
My Commission Expires: November 17th, 2026

1300. - Administration and enforcement.

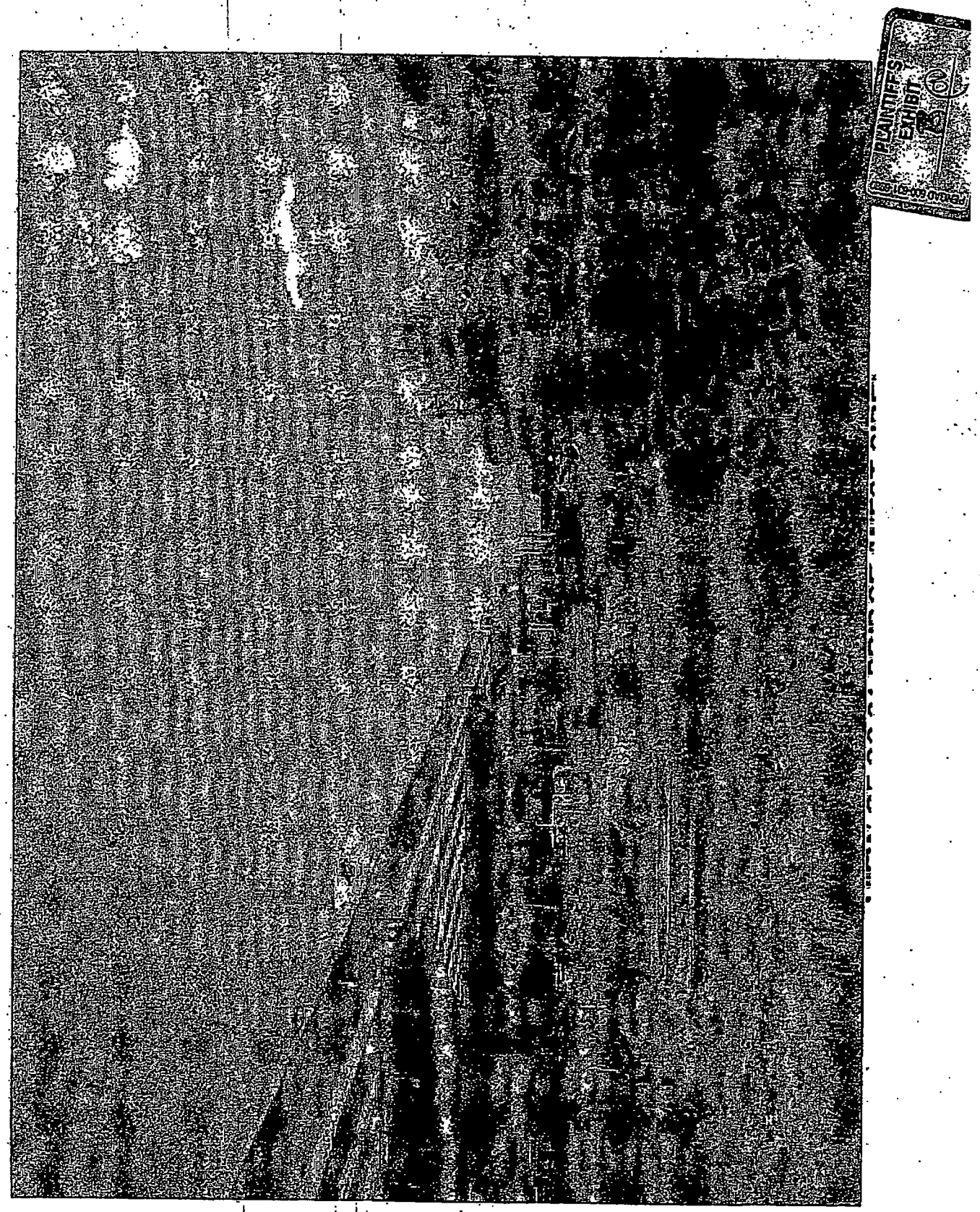
The Horry County Council shall fund sufficient personnel to administer and enforce the provisions of this ordinance. If the Zoning Administrator shall find that any of the provisions of this ordinance are being violated, he shall notify in writing the person responsible for such violations, indicating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

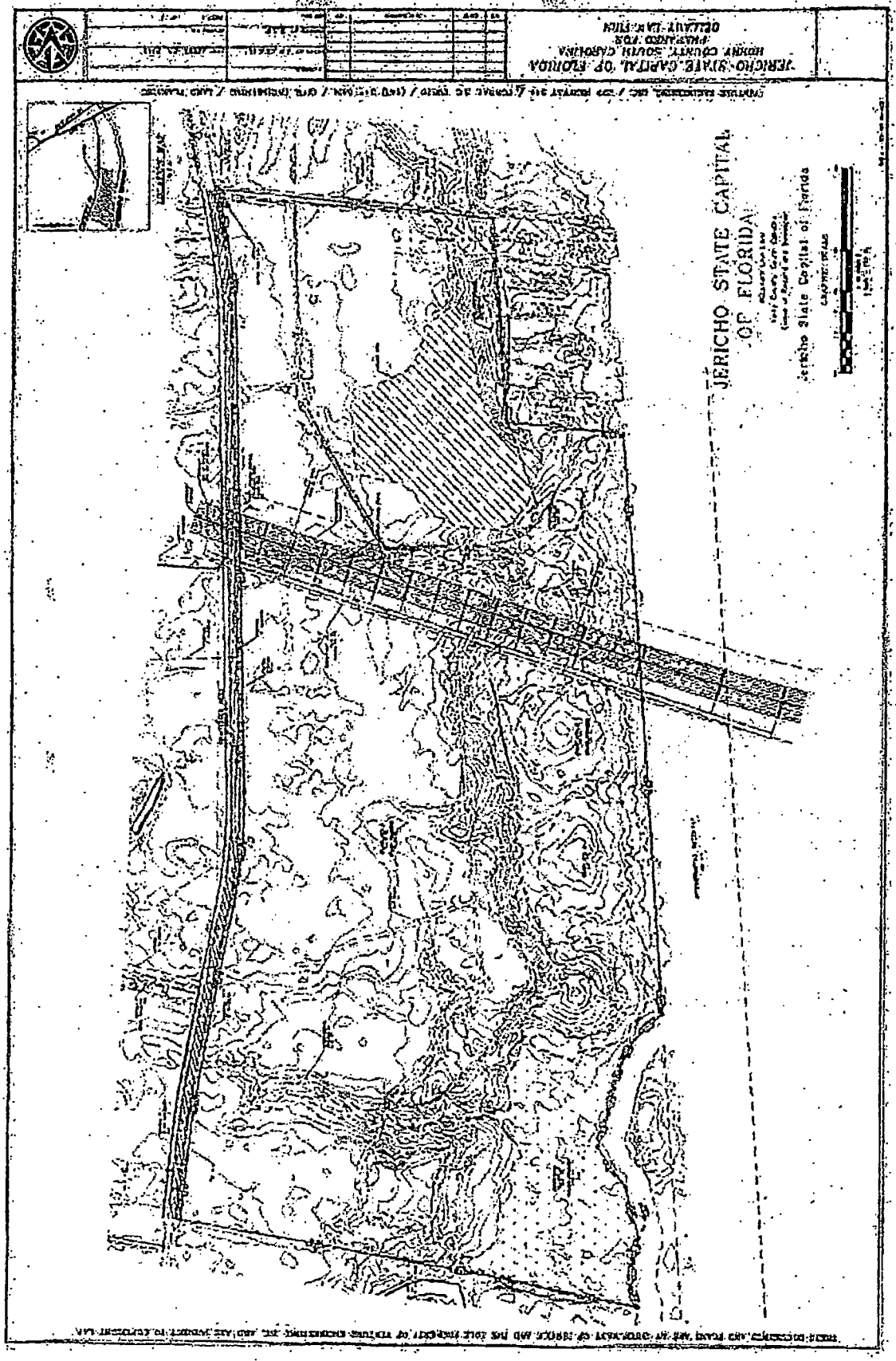
(Ord. No. 51-99, §.31, 12-7-99)






PLAINTIFF'S
EXHIBIT
A-02


PLAINTIFF'S
EXHIBIT



PLAINTIFF'S EXHIBIT 3

STATE OF SOUTH CAROLINA)) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Jericho State Capital Corp. of Florida,)) Plaintiff,) v.)) Chicago Title Insurance Company,)) Defendant.) _____)	C/A: 2013-CP-26-5530
) Lynx Jericho Partners, LLC,)) Plaintiff,) v.)) Chicago Title Insurance Company,)) Defendant.) _____)	C/A: 2015-CP-26-1084 (Consolidated with the above case)

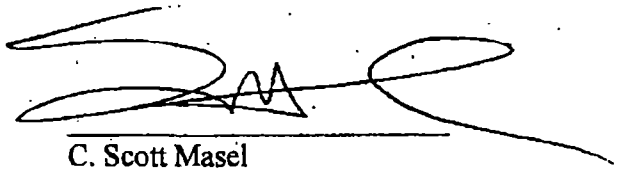
2015 JUL 29 PM 4:38

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT
(As to Liability Only)

TO: The Defendant Chicago Title Insurance Company and its Attorney, Demetri K. Koutrakos:

PLEASE TAKE NOTICE that in these consolidated cases, Plaintiffs Jericho State Capital Corp. of Florida and Lynx Jericho Partners, LLC, by and through his undersigned attorney, will move before the Presiding Judge of the Fifteenth Judicial Circuit on the tenth (10) day after service hereof or at such other time and place as the parties may agree or is convenient to the Court, for an Order Granting Summary Judgment as to Defendant's liability on their breach of contract claims. Plaintiffs' motion is made pursuant to the applicable Rules of the South Carolina Rules of Civil Procedure, including but not limited to, Rule 56.

This motion is accompanied by written memorandum and exhibits, and Plaintiffs reserve the right to supplement with further legal argument, affidavits and/or oral arguments of counsel.



C. Scott Masel
Fred B. Newby
NEWBY, SARTIP, MASEL & CASPER
Attorneys for Plaintiff
4593 Oleander Drive, Myrtle Beach, SC 29578
(803) 449-9417

Date:5/16/16

STATE OF SOUTH CAROLINA)) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Jericho State Capital Corp. of Florida, Plaintiff, v. Chicago Title Insurance Company, Defendant.	C/A: 2013-CP-26-5530
Lynx Jericho Partners, LLC, Plaintiff, v. Chicago Title Insurance Company, Defendant.	C/A: 2015-CP-26-1084 **PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** **(As to Liability Only)**

In these consolidated cases, Plaintiffs assert Defendant Chicago Title Insurance Company wrongfully denied their claims for title insurance benefits and each have filed actions alleging: (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, and (3) bad faith refusal to pay insurance benefits. Plaintiffs seek summary judgment for liability on the breach of contract actions only.

SUMMARY OF CASE

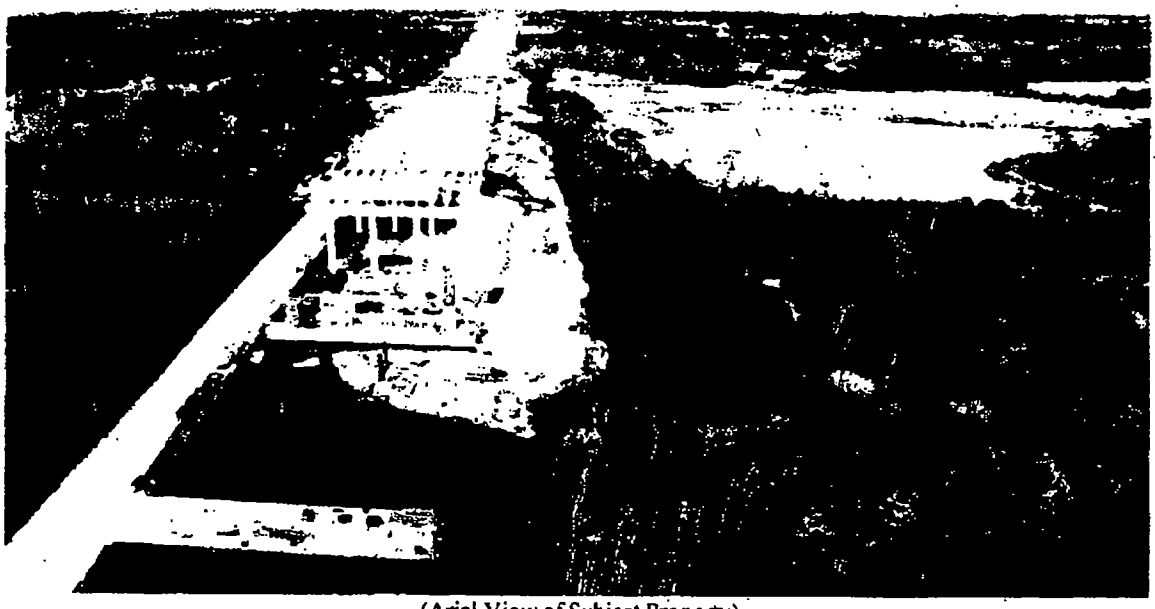
Generally, title insurance operates to protect a purchaser or mortgagee against defects in or encumbrances on title which are in existence at the time the insured takes title. *Lyons v. Fidelity Nat. Title Ins. Co.*, 415 S.C. 115 (Ct. App. 2015). The purpose of title insurance is to place the insured in the position that he thought he occupied when the policy was first issued. *Whitlock v. Steward Title*, 399 S.C. 610 (2012).

Plaintiffs are insureds under two (2) Chicago Title Loan Policies. The Policies insure title to a tract of land known as Peachtree Plantation, which consists of approximately 131 acres in Horry County. Plaintiff Lynx Jericho Partners ("Lynx Jericho") owns by assignment a first mortgage on the property. Plaintiff Jericho State Capital Corp. of Florida ("Jericho State") owned a second mortgage on the property, upon which it subsequently foreclosed, and is now the owner of the property. As insureds, Plaintiffs seek damages under the Loan Policies for losses caused by a title defect on the property.

The title defect is a highway "right-of-way" running through the middle of the Peachtree Property. The right-of-way is designated by a 2002 Horry County Ordinance that "reserves for future acquisition" property to be used for a four-lane highway known as the Carolina Bays Parkway. The Ordinance, together with an Index Map that specifically shows the location of the right-of-way, was recorded at the Horry County Register of Deeds on July 9, 2002. Because the Ordinance grants the County a "right or interest in" the right-of-way property, it is a defect and encumbrance on the land and is a covered loss as defined by the title policies.

Although the highway right-of-way was a matter of public record at the time Chicago Title issued the Loan Policies on July 25, 2006, Chicago Title failed to identify the defect or except the defect from coverage. Unaware of the highway right-of-way, Plaintiff Jericho State entered into its loan transaction relying on the Chicago Title policy showing clean title.

To be sure, Plaintiffs suffered substantial damage because of the title defect. Following a condemnation action initiated in 2009, there is now a four-lane highway and bridge under construction through the middle of Plaintiffs' property.



(Arial View of Subject Property)

Chicago Title wrongfully denied Plaintiffs' claims for policy benefits. Plaintiffs acknowledge there remain factual issues as to the measure of damages and bad faith; however, there are no material issues of fact pertaining the recorded Ordinance and the plain language of Chicago Title's Loan Policies and therefore summary judgment as to contractual liability is proper at this time.

STATEMENT OF FACTS

To provide the court an efficient reference for the voluminous factual background discussed below, Plaintiffs have prepared a summary timeline referencing each exhibit which is attached at the end of this memorandum.

The Property

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



(photo from Jayroe's Appraisal, Exhibit 14)

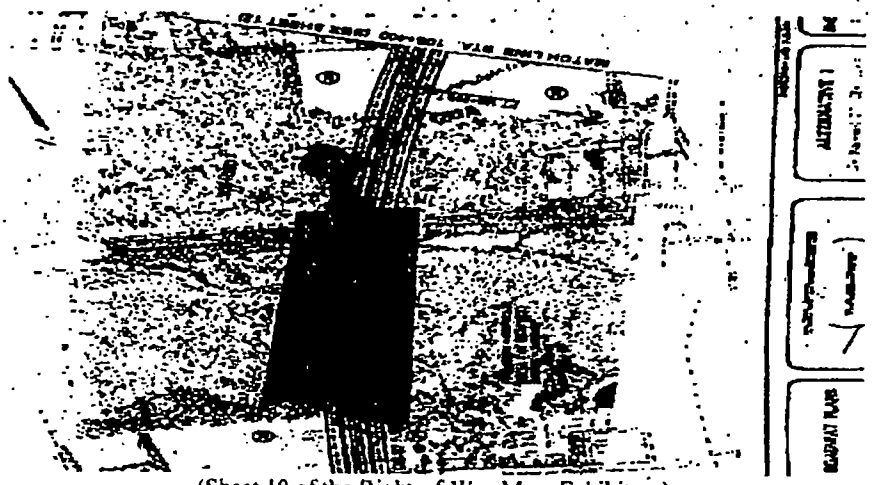
The Title Defect
(2002)

South Carolina's Official Map Statute permits a county to create an "Official Map" to show the location of proposed highways for "future acquisition" by the county. S.C. Code, § 6-7-1210, *et seq.* In 1999, Horry County created its Official Map for the purpose of "designating and reserving future locations of streets [and] highways for future public acquisition."[1] Under this law, once the County designates land for acquisition, those affected landowners are prohibited from any construction or enlargement of any improvements on the reserved land. Subsequently, Horry County adopted an Index Map for the Official Map, which incorporates SCDOT plans showing the "proposed right-of-way alignment for the Carolina Bays Parkway and Conway Bypass."[2] Initially, the Index Map included only the first leg of the Carolina Bays Parkway.

On July 2, 2002, Horry County passed Ordinance 88-202 (the "Ordinance"), which amends the Index Map to expand the County's right-of-way to include the Peachtree Property, "upon which

[1] EXHIBIT 1, 1999 Ordinance 107-98.
[2] EXHIBIT 2, 1999 Ordinance 153-99.

the construction of the Carolina Bays Parkway from Highway 501 to Highway 17 By-pass **will occur**" (emphasis added).[3] Specifically, attached to the Ordinance are several maps depicting the "addition of the right-of-way" and showing the four-lane highway going through the middle of the Peachtree Property and across the Intracoastal Waterway.



(Sheet 10 of the Right-of-Way Map, Exhibit __)

On July 9, 2002, the Ordinance was recorded at the Horry County Register of Deeds in Deed Book 2497, Page 0986. Thus, by recording the Ordinance, the County put the world on notice of the location of the highway right-of-way and where construction of the Carolina Bays Parkway will occur. Moreover, the Ordinance declares the government's right to purchase the right-of-way property prior to issuing building permits or rezoning approvals "as a means of reducing acquisition costs."

Purchase of the Peachtree Property
(2006)

Several years after Horry County recorded the Ordinance, Jeffrey Shoup and Tom Hix entered into a contract to purchase the Property through their company Peachtree Properties of

[3] EXHIBIT 3, 2002 Ordinance #88-202.

North Myrtle Beach, LLC.[4] On July 25, 2006, the company purchased the property from the McClam family for $22,520,000.00.[5] Shoup and Hix planned to develop the land as a large residential complex with beautiful views and waterway access.

To finance the purchase, Peachtree Properties entered into two (2) loan agreements. First, R.E. Loans, LLC ("REL") loaned the purchaser $18,520,000.00, securing the loan with a first mortgage on the Property ("First Mortgage").[6] The second loan was from Plaintiff Jericho State for $4,263,888.00, which was secured by a second mortgage ("Second Mortgage").[7]

Prior to the closing of the Property, Shoup and Hix informed Jericho State that a new highway was going to be built near the Peachtree Property, but not on the Property, which would be very beneficial to their planned project.[8] In fact, Shoup and Hix provided Jericho State with an appraisal which said "the subject [property] is only a few miles from the new Highway 31 [and] you can drive to the north or south end of the strand in less than 20 minutes."[9] Had Jericho State known this was untrue and that the government actually possessed a right-of-way and planned to build this highway through the middle of the Property, it would have never made the loan.[10]

The Chicago Title Insurance Policies
(2006)

At closing, Defendant Chicago Title issued a Loan Policy to each lender. The buyer's closing attorney, Robert H. Gwinn, III, served as insurance agent for Chicago Title. As Chicago Title's agent, Attorney Gwinn performed a title search on the Property and prepared, signed and

[4] EXHIBIT 4, Fully Executed Contract of Sale
[5] EXHIBIT 5, Deed
[6] EXHIBIT 6, First Mortgage
[7] EXHIBIT 7, Second Mortgage. Jericho All Weather Opportunity Fund, LP ("JAWOF") was a funding partner in the second Peachtree loan. JAWOF made a separate loan to Shoup and Hix on different property in North Carolina known as the "Saucepan Property", which was cross-collateralized with this loan.
[8] EXHIBIT 24, Chwatt Transcript, p. 66-68, 71; EXHIBIT 25, Svirsky Transcript, p. 72.
[9] EXHIBIT 24, Chwatt Transcript, p. 66-68.
[10] EXHIBIT 24, Chwatt Transcript, p. 63, 71, 92, 134, 141; Svirsky Transcript, p. 92, 93, 94, 96.

delivered two Chicago Title Loan Policies. The First Loan Policy was issued to REL, insuring REL's interest in the Property as holder of the First Mortgage, and a Second Loan Policy was issued to Jericho State insuring its interest in the Property as lender under the Second Mortgage.[11]

Policy Coverage. The first page of each Loan Policy describes the coverage afforded to Insureds subject to policy exceptions and exclusions. Specifically, the Policies state that Chicago Title "insures, as of the Date of Policy shown in Schedule A, against loss or damage sustained or incurred by the insured by reason of...any defect in or lien or encumbrance on the title [or] unmarketability of title", among other types of losses.

Schedule A. Each Policy includes a Schedule A, which identifies the Date of Policy, the insured parties, the limits of coverage, and a full property description. Both Policies share a Date of Policy of July 25, 2006, which is the date of closing.[12] The First Loan Policy identifies the Insured as REL and its successors and/or assigns and provides coverage for title defects up to a limit of $17,071,873.33. The Second Mortgage Loan Policy identifies Plaintiff Jericho State and its successors and/or assigns as the named Insured and provides insurance for title defects up to $4,263,888.00.

Schedule B. Each Policy also includes a Schedule B, which describes the status or condition of title as of the Date of Policy to be insured by Chicago Title. Specifically, Exhibit B lists "Exceptions from Coverage". These Exceptions are specific items known by Chicago Title to have some effect on the Property's title. When title to property passes subject to a listed exception, a title insurance company will not afford coverage for the potential defect because the policy affirmatively discloses that defect to the insured in Exhibit B.

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[11] EXHIBIT 8, First Loan Policy
EXHIBIT 9, Second Loan Policy
Attorney Gwinn writes title insurance and acts as agent for Chicago Title through his company, Oleander Title Agency. In this capacity, Attorney Gwinn executed both Loan Policies on behalf of Chicago Title.

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

For example, Attorney Gwinn's title search revealed a recorded utility easement over the Property in favor of Grand Strand Water and Sewer Authority. Thus, because Chicago Title provided notice of the easement to the Insureds as an exception on Schedule B, the Policy insures title subject to the easement and provides no coverage for any loss suffered as a result.

Notably, in both Loan Policies, Chicago Title failed to identify the recorded Ordinance and the forthcoming highway in its Exceptions to Coverage. As such, Chicago Title failed to give the Insureds notice of the highway right-of-way and therefore the Loan Policies do not except this title defect from coverage.

Exclusions from Coverage. Each Policy includes the same boilerplate "Exclusions from Coverage". As discussed more fully below, the Policies list general exclusions, such as certain zoning laws, certain rights of eminent domain, defects created or agreed to by the insured, and defects resulting in no damage to the insured, among others.

Conditions and Stipulations. The Policies also contain boilerplate "Conditions and Stipulations", which extend coverage to mortgage assignees (such as Lynx Jericho) and to mortgagees who take title to the property by foreclosure (such as Jericho State), and further provide policy definitions, descriptions of each party's duties and responsibilities and limitations on liability.

At the time Chicago Title issued the Loan Policies, Jericho State did not know of the highway right-of-way nor that Horry County reserved for acquisition and ownership a portion of the Peachtree Property.[13] Instead, Jericho State completely relied on Chicago Title's Policy showing clean title.[14] To be sure, had Chicago Title revealed the defect, Jericho State would have never engaged in this transaction.[15]

[13] EXHIBIT 24, Chwatt Transcript, p. 63, 71, 92, 134, 141
[14] Id., at p. 136
[15] Id., at p. 43, 63, 134, 136, 137, 140, 141

The Foreclosure
(2007)

Peachtree Properties defaulted on both loans shortly after the purchase and Jericho State filed for foreclosure. By Order dated November 7, 2007, the Master-In-Equity ordered foreclosure and sale of the Property.[16] In the Order, the court concluded Peachtree Properties owed Jericho State $7,490,031.71, which consisted of the full principal amount of the Second mMortgage plus accrued interest, fees and expenses, plus $2,379,952.50 of cure payments made by Jericho State to keep the First Mortgage in good standing and to preserve Jericho State's interest in the Property.

Jericho State's bid of $9,000,000.00 was the only bid at the judicial sale. As such, Jericho State took title to the Peachtree Property, subject to the First Mortgage, by Master's Deed filed February 26, 2008.[17] The Property remained subject to the First Mortgage with an outstanding balance of approximately $18,918,047.50.[18] Throughout this process, Jericho State remained unaware that the Peachtree Property was subject to the Ordinance and highway right-of-way.[19]

Knowledge of the Defect and the PPD Lawsuit
(2008-2009)

Jericho State learned in 2008, for the first time, that the government planned to build the Carolina Bays Parkway through the middle of its land.[20] At the same time, the real estate market began its downward spiral, particularly affecting property values in coastal areas such as Myrtle Beach. Because Jericho State relied on the Chicago Title Loan Policy showing clean title, it found itself in 2008 owning property that was diminishing in value and currently serving as the designated and reserved location of the government's forthcoming four-lane highway and bridge.

[16] EXHIBIT 10, Foreclosure Order.
[17] EXHIBIT 11, Master's Deed
[18] Based on the promissory note: original balance plus interest less cure payments made by Jericho State
[19] EXHIBIT 24, Chwatt Transcript, p. 63, 133; EXHIBIT 25, Svirsky Transcript, p. 92, 93
[20] EXHIBIT 24, Chwatt Transcript, p. 64-66; EXHIBIT 25, Svirsky Transcript, p. 93.

Jericho State also learned in 2008, for the first time, that Shoup and Hix agreed in 2007 to donate the right-of-way land to Horry County in return for a PPD rezoning. In an effort to preserve as much value in the Property as possible, Jericho State filed suit against Horry County on October 12, 2009, seeking to set aside the Shoup and Hix donation.[21] In response, the SCDOT filed a condemnation proceeding to simply take the highway property. With condemnation filed, the PPD lawsuit became moot and was dismissed.

The Condemnation Lawsuit (2009)

On December 15, 2009, the SCDOT filed its condemnation proceeding to take 10.18 acres of the Peachtree Property for the Carolina Bays Parkway as previously identified by the Ordinance.[22] The SCDOT presented evidence that the state's taking resulted in a $998,000 loss to the Property's value as of the condemnation date of December 15, 2009.[23] On the other hand, Jericho State presented evidence that the highway taking resulted in a $4,010,000 loss to the Property.[24] This litigation lasted 5 years, ultimately resulting in a jury verdict of $2,100,000, which was paid by Jericho State to the First Mortgage holder as more fully described below.

The First Mortgage Assignments and Bankruptcy

While Jericho State spent time and money protecting its rights to the Peachtree Property, the First Mortgage was transferred and assigned many times. Ultimately, by Corrective Assignment dated July 28, 2011, REL assigned the First Mortgage to Mortgage Fund '08 (hereinafter, "MF08").[25] Less than two months later, MF08 filed Chapter 11 bankruptcy.

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[21] EXHIBIT 12, PPD Lawsuit; EXHIBIT 24, Chwatt Deposition, p. 113, 117
[22] EXHIBIT 13, Condemnation Lawsuit
[23] EXHIBIT 14, Haskell Condemnation Appraisal
[24] EXHIBIT 15, Jayroe Condemnation Appraisal
[25] EXHIBIT 16, The Corrective Assignment corrected the following previous transactions: In 2007, REL assigned the First Mortgage to Wells Fargo, but then again assigned it in 2008 to MF08. Later that year, Wells Fargo assigned the First Mortgage back to REL presumably so REL could properly assign to MF08 in 2011.

The bankruptcy court transferred all mortgages owned by MF08 to the Mortgage Fund '08 Liquidating Trust. True to its name, the Liquidating Trust sought to liquidate MF08 assets and therefore listed all mortgages, including the Peachtree First Mortgage, for sale to third parties.

Because the Peachtree Property had decreased in value and remained subject to the First Mortgage, Jericho State recognized that a new mortgage owner could take ownership of the Property through foreclosure, leaving Jericho State unable to recoup any of its investment and costs.[26] To safeguard its interests in the Property, Jericho State obtained from the Trustee a first right of refusal to purchase the First Mortgage in return for Jericho State paying back taxes on the Property.[27] When a third party offered to purchase a portfolio of 5 loans that included the Peachtree First Mortgage, the Trustee gave Jericho State three (3) days to exercise its first right of refusal, conditioned upon purchasing all 5 loans.[28]

Lynx Jericho Partners, LLC
(2013)

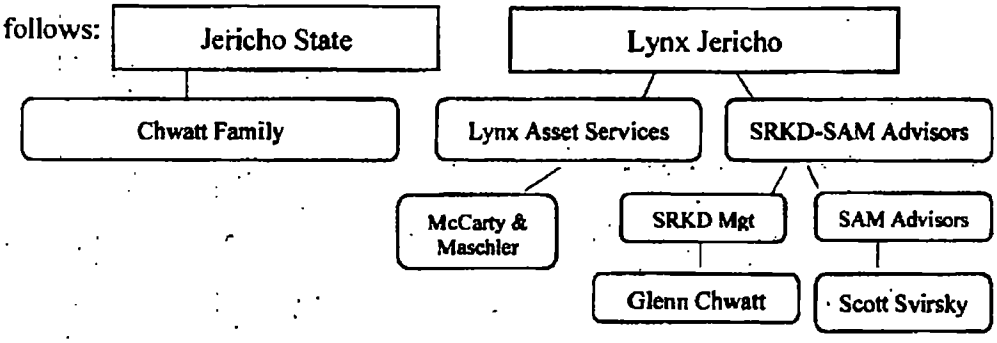
Jericho State could not afford to purchase all five loans.[29] Therefore, Jericho State communicated its dilemma to an investment company known as Lynx Asset Services, LLC ("LAS"), who could afford such a purchase.[30] Jericho State is not affiliated with LAS but it had worked with one of its principals on prior occasions.[31] LAS agreed to purchase the loans and created Lynx Jericho for this purpose on April 3, 2013.

With funds provided by LAS, Lynx Jericho purchased the 5 loan portfolio for $1,950,000, of which $950,000.00 was allocated by the Trustee to the Peachtree First Mortgage based on a pro-

[26] EXHIBIT 25, Svirsky Transcript, p. 34, 35, 51
[27] Id., at p. 29, 40, 41. This package of loans included the first mortgage on the N.C. Saucepan Property, which JAWOF owned by foreclosure.
[28] EXHIBIT 17, Trustee Letter. EXHIBIT 25, Svirsky Transcript, p. 45, 49, 50. The portfolio of loans included the first mortgage on the North Carolina Saucepan Property, which JAWOF owned by foreclosure of its second mortgage in a prior NC foreclosure proceeding.
[29] EXHIBIT 25, Svirsky Transcript 32
[30] Id., at p. 32, 33
[31] Id., at p. 44, 49, 50

rata measurement of each loan's face value.[32] LAS also provided an additional $500,000 to satisfy back taxes and contractor liens on the other properties and related legal fees.[33] By Assignment dated April 17, 2013, the Trustee executed the transfer and Lynx Jericho became owner of the Peachtree First Mortgage.[34]

The members of Lynx Jericho are (i) LAS, which owns 100% of the Class A membership, and (ii) SRKD-SAM Advisors, LLC, which owns 100% of the Class B membership shares.[35] For clarity, LAS shares no common ownership with Jericho State and is owned by Mike McCarty and the Maschler family.[36] Jericho State, on the other hand, is owned by Glenn Chwatt and his family.[37] Chwatt is the President of Jericho State and he also owns SRKD Management, which is a member of SRKD-SAM Advisors.[38] Under the Lynx Jericho Operating Agreement, SRKD-SAM is related to and/or an affiliate of the property owner. Ownership of the Plaintiffs is more easily visualized as follows:



As the sole Class A member, LAS agreed that Lynx Jericho would not foreclose on the Peachtree Property for at least three years.[39] However, this forbearance was not gratuitous, as LAS will be repaid its $2.5 million contribution at an interest rate of 12%, plus it will additionally

[32] EXHIBIT 18, Bankruptcy Court Orders approving sale; EXHIBIT 25, Svirsky Transcript, p.__.
[33] Id., at p 50
[34] EXHIBIT 20, Assignment to Lynx Jericho.
[35] EXHIBIT 19, Lynx Jericho Operating Agreement
[36] EXHIBIT 24, Chwatt Transcript, p. 25; EXHIBIT 25, Svirsky Transcript, p. 36
[37] Id., p. 19
[38] Id., p. 32, 33; Chwatt Transcript, p. 13, 26
[39] EXHIBIT 19, Operating Agreement; EXHIBIT 25, Svirsky Transcript, p. 51.

receive 10% of any funds derived from the loan portfolio including the Peachtree First Mortgage title claim.[40]

Payment of Condemnation Award
(2014)

On December 5, 2014, the jury awarded Jericho State $2,100,000.00 for the condemnation taking of the 10.18 acres of the highway right-of-way and damage to the remainder of the Property. After taking into account prejudgment interest and attorney fees and costs, Jericho State paid the judgment's net proceeds of $1,941,737.32 to Lynx Jericho as First Mortgage holder, who directed the attorneys to wire the funds directly to LAS pursuant to the Operating Agreement.[41]

Denied Title Insurance Claims

Both Jericho State and Lynx Jericho filed title claims with Chicago Title asserting damages arising from the title defect which was not identified as an exception from coverage. Initially, Chicago Title denied Jericho State's claim based on the Policy's Government Regulation Exclusion, which pertains to losses arising from zoning and land-use laws.[42] Thereafter, Chicago Title denied Lynx Jericho's claim based on the following: (i) the Ordinance did not create a "defect, lien or encumbrance", (ii) the Ordinance is not recorded in the "public records", (iii) the Ordinance does not constitute eminent domain or a taking, (iv) the condemnation proceeds fully compensated Lynx Jericho, (v) the Ordinance was known by Lynx Jericho but not Chicago Title at the time Lynx Jericho became an insured, and (vi) Lynx Jericho knew of the Ordinance at the time it purchased the First Mortgage.[43] This litigation followed.

[40] EXHIBIT 19, Operating Agreement; EXHIBIT 25, Svirsky Transcript p. 39
[41] EXHIBIT 21, Judgment and Disbursement; EXHIBIT 25, Svirsky Transcript, p. 60, 61
[42] EXHIBIT 22, Second Loan Policy Claim and Denial of Claim
[43] EXHIBIT 23, First Loan Policy Claim and Denial of Claim

SUMMARY JUDGMENT STANDARD

Summary Judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

There are no genuine issues of any material fact pertaining to the plain language of the Loan Policies or the Ordinance's effect on the Property. Interpretation of ambiguous terms in the Policies are matters of law that are resolved by the court in favor of coverage. Therefore, summary judgment as to liability only on Plaintiffs' breach of contract actions are proper at this time.

ARGUMENT

Insurance contracts are construed against the drafter, and in favor of coverage for the insured. *General Acc. Ins. Co. v. Safeco Ins. Companies*, 314 S.C. 63, 443 S.E. 2d 813 (Ct. App. 1994). Insurance policy exclusions are construed "most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability." *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 614 S.E.2d 611, 614 (2005). The rule that insurance contracts must be construed against the insurer applies to title insurance contracts. *First Carolinas Joint Stock Land Bank of Columbia v. New York Title*, 172 S.C. 435, 174 S.E. 402 (1934). Title insurance "is designed to save (the insured) harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it." *Firstland Village Associates v. Lawyer's Title Insurance Co.*, 277 S.C.184, 284 S.E.2d 582 (1981).

When evaluating a title insurance claim, the analysis generally involves: (i) determining whether a covered loss occurred, (ii) if there was a covered loss, determining whether the policy's Exceptions from Coverage specifically identify and exclude that particular loss from coverage, (iii) if there was a covered loss not specifically excepted by the policy, determining whether the

loss falls into the policy's general Exclusions from Coverage, and (iv) if there was a covered loss not excepted and not excluded by the policy, what damages are paid by the policy.

Plaintiffs have the burden of proof to establish the title defect is a covered loss. On the other hand, Defendant Chicago Title bears the burden to prove Plaintiffs' loss is barred by an Exclusion to Coverage. As set forth below, the facts show the Ordinance is a title defect and covered loss which is not excepted or excluded from coverage under the Policies.

A. THE RIGHT-OF-WAY IS A COVERED LOSS

Title insurance operates to protect a purchaser or mortgagee against defects in or encumbrances on title which are in existence at the time the insured takes title. *Lyons v. Fidelity Nat. Title Ins. Co.*, 415 S.C. 115 (Ct. App. 2015).

1. Title Defect and Encumbrance.

The Chicago Title Loan Policies insure against loss or damage sustained or incurred by the Insured by reason of "any defect in or lien or encumbrance on the title." While Chicago Title's Policies fails to define the terms "defect, lien or encumbrance", South Carolina defines an "encumbrance" as a third party's "right to or interest in land" resulting in diminution in value and generally includes liens, easements and other claims. *Martin v. Floyd*, 282 S.C. 47 (S.C. App. 1984); *Truck South v. Patel*, 339 S.C. 40 (2000). An encumbrance is a third party's "right or interest in the land" resulting in diminution in value and generally includes liens, easements and other claims. *Martin v. Floyd*, 282 S.C. 47 (S.C. App. 1984).

No doubt, the Ordinance establishes Horry County's claim, right or interest in the highway right-of-way land. First, Horry County created its Official Map and Index Map for the purpose of "designating and reserving" locations of streets and highways for "future acquisition". Moreover, the Ordinance unambiguously declares this acquisition for the Carolina Bays Parkway "will occur", thus removing any uncertainty as to the existing status and forthcoming use of the land.

Second, Horry County designates the location of its future highway as a "right-of-way" and attaches maps specifically showing where the highway will run. Indeed, the County defines right-of-way as "land reserved, used, or to be used for a road, cross walk, railroad...or other public purpose."[44] By creating this right-of-way, the County could not more clearly designate its highway right-of-way on the Peachtree Property.

Finally, as soon as the Ordinance was filed in the public records, the County actively enforced its right and interest in the right-of-way land. In this regard, the Ordinance affirmatively bars any change in use of the property to "minimize its acquisition costs". In fact, the County takes steps to aggressively protect its property interest, as any person violating the Ordinance "shall be guilty of a misdemeanor, and upon conviction shall be imprisoned for a period not to exceed thirty (30) days and/or fined not more than five hundred ($500) dollars for each offense."[45] No doubt, the County is willing to send someone to jail in an effort to protect its property interests.

When it denied Lynx Jericho's claim, Chicago Title cited cases from New York, California and Florida and explained "the ordinance merely sets forth a proposed route (as envisioned in 2002) of an extension of the Carolina Bays Parkway" and creates no third party interest in the Property.[46] Plaintiffs believe such a position lacks good faith because (i) it conflicts with a plain reading of the Ordinance and (ii) ignores South Carolina law. To the extent Chicago Title applies a meaning to these undefined policy terms (defect, lien or encumbrance) which is inconsistent with well established South Carolina law or renders them ambiguous, these terms must be strictly construed against Chicago Title and in favor of Plaintiffs. To be sure, if Chicago Title desired to bar coverage for title defects that include a highway right-of-way that is established by law, then it should have defined those policy terms to say so.

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[44] EXHIBIT 1, Ordinance 107-98, Section 2.1
[45] Id., at Section 6.3
[46] EXHIBIT 23, Denial Letter. See also, Defendant's Answers to Plaintiffs' Complaints.

Because the Ordinance plainly creates a highway right-of-way and establishes the County's claim, right or interest in the land, Plaintiffs are entitled to Summary Judgment finding that the Ordinance is a "defect, lien or encumbrance" on the Property and is therefore a covered loss under the Policies.

2. Unmarketability of the Title.

The Chicago Title Loan Policies also insure against loss or damage sustained or incurred by the Insured by reason of "unmarketability of title." The Policies define unmarketability of title as "an alleged or apparent matter affecting the title to the land, not excluded or excepted from a coverage, which would entitle a purchaser of the estate or interest described in Schedule A or the insured mortgage to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title." In other words, Chicago Title essentially defines an unmarketable title as one that is not marketable, which offers little guidance to this claim.

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

In this case, the Ordinance is not only a defect and encumbrance, it creates a reasonable probability of litigation with respect to the right-of-way. Because the Property was reserved for future acquisition where construction of the highway "will occur", a future condemnation proceeding was at least a "reasonable probability", if not a near certainty. Indeed, the SCDOT did file litigation, taking the very land described in the Ordinance. Because the Ordinance creates a reasonable probability of litigation with respect to the government's claim, right or interest in the

right-of-way land, it meets South Carolina's definition of unmarketable title and Plaintiffs are entitled to Summary Judgment finding that the Ordinance creates a covered loss under the Policies.

B. THE COVERED LOSS IS NOT EXCEPTED FROM COVERAGE.

Once it is determined that a covered loss occurred, the analysis shifts to whether Chicago Title disclosed the covered loss in the Policies as an Exception from Coverage. Again, the Exceptions listed in Schedule B inform the Insureds of the condition and status of title to the Property and that Chicago Title will not cover losses for these items. In this case, Chicago Title failed to include the Ordinance and highway right-of-way on Schedule B and therefore the Policies do not except this title defect from coverage.

When a covered loss is not excepted from coverage, the next step in the analysis is whether one of the policy's boilerplate exclusions apply.

C. THE COVERED LOSS IS NOT EXCLUDED BY POLICY EXCLUSION #1 (GOVERNMENT REGULATION).

Chicago Title bears the burden of establishing an exclusion's applicability. *Lyons v. Fidelity*, 415 S.C. 115 (2015). The exclusion must be construed liberally in favor of Plaintiffs and strictly against the Chicago Title. *See, Whitlock v. Stewart Title*, 399 S.C. 610 (2012); *First Carolinas Joint Stock Land Bank of Columbia v. New York Title*, 172 S.C. 435 (1934).

Chicago Title contends Policy Exclusion #1 ("Government Regulation Exclusion") excludes the covered loss from coverage. This Exclusion generally includes governmental use restrictions, such as building codes and zoning laws. Moreover, there is an exception to the exclusion, which applies when a notice of enforcement of the law has been recorded in the public records. The Government Regulation Exclusion excludes coverage for:

> 1. (a) any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) occupancy, use, or enjoyment of the land; (ii) the character dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or change in the dimensions or area of the

land or any parcel of which the land is or was a part of; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.

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

While building and zoning laws may restrict the use of land, they are not intended to establish future governmental ownership rights that "will occur". The Ordinance's purpose is not to regulate occupancy, or to govern the character and dimensions of improvements, or to protect the environment. The purpose of the Ordinance is to designate a right-of-way, reserve the land for future acquisition and to reduce the costs of acquiring that property.

The Loan Policies' Government Regulation Exclusion does not reference the creation of highway right-of-ways or any other type of government claim or right to future property ownership. On its face, this exclusion applies to laws relating to land use only, not those affecting title itself. The Ordinance is not such a law. As such, Chicago Title seeks to broaden the scope of this exclusion beyond its plain language[47] and thus, at its best, creates an ambiguity that must be construed against Chicago Title. The Government Regulation Exclusion is inapplicable to the Ordinance and Plaintiffs are therefore entitled to summary judgment on this issue as a matter of law.

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

To the extent the Government Regulation Exclusion applies to the Ordinance, which Plaintiffs deny, this exclusion still does not bar coverage because the Ordinance is recorded in the public records, which meets the exception to the exclusion. Chicago Title, on the other hand,

[47] EXHIBITS 22 and 23, Denial Letters. See also, Defendant's Answers to Plaintiffs' Complaints.

asserts this exception is not met because the Ordinance was not indexed by property owner name and therefore fails to give constructive notice.[48]

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." However, the Policy does not say the "public records" must be indexed in any particular way.

South Carolina has already specifically addressed this issue. In *Lyons v. Fidelity National Title Insurance Company*, 415 S.C. 115 (Ct.App. 2015), the title insurance company (a related entity to Chicago Title) asserted this same exclusion to deny coverage for an Horry County "no build" resolution because it was not recorded at the Register of Deeds. While the Plaintiff argued that a governmental regulation is an inherently public record, the insurer argued the resolution was not recorded in the public records and was not available for title examination on the date the policy was issued. After considering the policy's definition of public records (which is nearly identical to Chicago Title's definition) and the applicable South Carolina statute, S.C. Code §30-7-10, the Court of Appeals determined the term "public records" was ambiguous. Because ambiguous terms are interpreted against the drafter, the *Lyons* Court rejected the insurer's argument and interpreted the policy in favor of coverage, concluding the resolution met the public records exception to the exclusion.

The facts of this case clearly show the Ordinance meets the public records exception to the exclusion. First, the Ordinance was recorded at the Horry County Register of Deeds as of the Date of Policy. As such, the Ordinance is recorded in a manner entirely consistent with the plain language of the Policy's "public records" definition and it provides notice to the world of its enforcement provisions for any violation. Second, any argument the Ordinance is not properly

[48] EXHIBIT 23, Denial Letter. See also, Defendant's Answers to Plaintiffs' Complaints.

indexed for a title search is without merit because this is not required by the Policy and as previously decided to be futile by the *Lyons* Court. Finally, if Chicago Title desired a definition of public records to exclude items recorded in the Deed Books of the Horry County Register of Deeds in a manner consistent with S.C. Code §30-7-10, it could have simply drafted its contract to say so. Based on *Lyons*, the Ordinance meets the public records exception and the Government Regulation Exclusion is inapplicable to this claim as a matter of law.

D. THE COVERED LOSS IS NOT EXCLUDED BY POLICY EXCLUSION #2 (EMINENT DOMAIN)

Upon information and belief, Chicago Title does not assert this exclusion bars coverage for Ordinance, as the condemnation proceeding took place after the Date of Policy and the Policies do not insure for events that occur subsequent to the Date of Policy.[49] To the extent this is true, no further analysis is required.

The Eminent Domain Exclusion excludes coverage for losses resulting from:

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

To the extent Chicago Title does assert this exclusion, the exception to the exclusion applies. In this regard, the Ordinance constitutes a "taking" that occurred prior to the Date of Policy. As stated in *Lucas v SC Coastal Council*, 505 US 1003 (1992), "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." In this case the Ordinance deprived the owner of the Peachtree Property all economically beneficial use

[49] While Plaintiffs have previously referred to the Ordinance as notice of a projected condemnation, their claims are not based on the subsequent condemnation itself but instead on the Ordinance's designation of the right-of-way and the County's plans for "future acquisition" of the property where construction of the highway "will occur".

of the portion designated within the right-of-way, as the Ordinance prohibits any change of use of this raw land. This deprivation continued until the subject land was condemned and taken through legal force by the SCDOT. As such, this Exclusion does not bar coverage as a matter of law.

E. THE COVERED LOSS IS NOT EXCLUDED BY POLICY EXCLUSION #3(a) (CREATED, SUFFERED, ASSUMED OR AGREED TO BY INSURED)

Chicago Title contends Policy Exclusion #3(a) excludes the covered loss from coverage. This Exclusion bars coverage for defects and encumbrances that are "created, suffered, assumed or agreed to by the insured claimant." Chicago Title bears the burden of establishing an exclusion's applicability. *Lyons v. Fidelity*, (2015). The exclusion must be construed liberally in favor of Plaintiffs and strictly against the Chicago Title. *See, Whitlock v. Stewart Title*, 399 S.C. 610 (2012); *First Carolinas Joint Stock Land Bank of Columbia v. New York Title*, 172 S.C. 435 (1934).

Obviously this exclusion is limited to those matters which were actually known by the Insured as of the Date of Policy, as it is impossible for an Insured to assume or agree to something it does not know exists. The Policies define "knowledge or known" as "actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of the public records as defined in this policy or any other records which impart constructive notice of matters affecting title." This exclusion does not apply because the Insureds had no actual knowledge of the Ordinance at the Date of Policy.

1. Plaintiff Jericho State.

Chicago Title asserts Jericho State knew of the highway right-of-way as of the Date of Policy while Chicago Title did not know of the defect. Curiously, Chicago Title seeks to prove this with documents prepared or negotiated by its own agent prior to closing.[50] The first document is an email from Chicago Title's agent to Plaintiff's counsel with a "cc" to Glenn Chwatt of Jericho

[50] EXHIBIT 23, Denial Letter

State.[51] In this email, Chicago's agent requests to "delete the following requirements from the preliminary checklist: Page 3 Satisfactory resolution of the determination by municipality not to build a bridge...." This checklist requirement was thereafter deleted and there was no further mention of the highway and bridge in any other due diligence paperwork by Chicago Title's agent or the other lawyers.[52]

Chicago Title also relies on an exhibit to an early, unsigned draft of the sale contract between their agent's client, Peachtree Properties, and the McClams.[53] The exhibit is a letter "To Whom It May Concern" from Horry County stating the County is "considering the addition of the future right-of-way for the Carolina Bays Parkway" and "your property is either directly affected by the proposal or is adjacent to the property affected by this proposal." Subsequently, reference to this letter was deleted and the fully executed Real Estate Sales Contract makes no reference to the highway right-of-way.[54] Notably, Jericho State was not even a party to this contract.

While Chicago Title plucks a couple items from a plethora of closing documents and uses hindsight to assert what it believes Jericho State knew in 2006, these documents actually support Jericho State's understanding that the highway was going to be located on neighboring property. First, Jericho State's testimony in this regard is unambiguous and unrebutted. At most, Chicago Title could assert the documents establish some very weak form of constructive notice, but that is clearly insufficient under the terms of the Policies. Second, the County letter was specifically sent to owners of property *adjacent to* the property affected by the highway right-of-way. Third, all references to any alleged concerns were removed from the due diligence and final sale documents.

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[51] EXHIBIT 26, 7/17/06 Email from Attorney Gwinn with attached preliminary checklist.
[52] EXHIBIT 24, Chwatt Transcript, p. 84
[53] EXHIBIT 27, 5/15/02 Letter from Horry County
[54] EXHIBIT 4, Fully Signed Sales Contract; EXHIBIT 24 Chwatt Transcript, p. 93, 94, 96

The most bizarre part of Chicago Title's argument is its reliance on documents that were prepared or negotiated by their own Agent. When an agent contracts with the authority of his principal, the principal's liability to the third party is contractual and direct. *South Carolina Ins. Co. v. James C. Green*, 290 S.C. 171 (Ct. App. 1986). If these documents provided unambiguous and actual knowledge of the defect, then Chicago Title would have listed it on the Policies' Exceptions to coverage. It is absurd to conclude the documents gave Jericho State notice of the defect but were insufficient to give the same notice to Chicago Title.

Finally, the evidence clearly shows that once Jericho State learned the Peachtree Property was subject to the highway right-of-way in 2008, it quickly filed a lawsuit against the County. Indeed, as is consistent with the entirety of the evidence of record, Jericho State did not know of the defect and it would have never made the loan in the first place had Chicago Title disclosed the Ordinance in its Policy.[55]

2. Plaintiff Lynx Jericho.

Chicago Title argues Lynx Jericho "assumed or agreed to" the title defect because (i) it asserts the knowledge of Jericho State is imputed to Lynx Jericho and (ii) Lynx Jericho purchased the First Mortgage subsequent to the Date of Policy with actual knowledge of the defect.[56]

In this regard, Chicago Title claims any information known by Glenn Chwatt and Scott Svirsky at the Date of Policy was also known by Lynx Jericho. This reasoning is flawed for several reasons. First, there is no evidence that Jericho State knew of the defect on or before the Date of Policy. Glenn Chwatt (as part owner of Jericho State) and Scott Svirsky (who participated in the Jericho State loan transaction in 2006) testified repeatedly that if they had known of the highway right-of-way on the Peachtree Property, Jericho State would never entered into the loan transaction.

[55] EXHIBIT 24, Chwatt transcript
[56] EXHIBIT 23, Denial Letter. See also, Defendant's Answer to the Lynx Jericho Complaint.

Second, Lynx Jericho did not even exist on the Date of Policy. The company was formed in 2013 and could not have possibly possessed any knowledge about anything on the Date of Policy in 2006.

Third, Chicago Title disregards its own policy terms to the extent it asserts Lynx Jericho's claim is barred because it assumed or agreed to the defect approximately 7 years *after* the Date of Policy. Again, the Chicago Title Policy insures risks "as of the Date of Policy". It defies logic to suggest that a title defect is excluded from coverage because the insured learns of it at some time after the policy is issued. If that were true, this exclusion would preclude any claim whatsoever and defeat the whole purpose of title insurance.

Fourth, Lynx Jericho's status as mortgage assignee does not change the date upon which the law measures whether an insured assumed or agreed to the defect. In South Carolina, it is well established that an "assignee ... stands in the shoes of its assignor .... When a contract is assigned, the assignee should have all the same rights and privileges, including the right to sue on the contract, as the assignor." *Twelfth RMA Partners v. National Safe*, 335 S.C. 635 (S.C.App.1999). As such, Lynx Jericho stands in the shoes of REL, the original lender, and is subject to the same rights and benefits as REL as of the Date of Policy.

Actually, the Loan Policy embraces Lynx Jericho's rights as a mortgage assignee. Pursuant to Section 1(a)(2), the Policy explains that an Insured includes each successor in ownership of the indebtedness, "reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor insured." Therefore, the Policy provides that Chicago Title can only apply this exception to Lynx Jericho by proving that REL, the predecessor insured, assumed or agreed to the defect as of the Date of Policy. Because Chicago Title cannot prove, and has not even alleged, that REL assumed or agreed to the defect, this exclusion is inapplicable.

Finally, other jurisdictions that have addressed this issue hold that the Date of Policy applies, not the date of mortgage assignment. *See*, *Fidelity Nat'l Title Ins. Co. v. Matrix Financial Services Corp.*, 255 Fla.App. 874 (Ga.App.2002)(An original lender that became an assignee when it repurchased its loan after being informed of a title defect did not assume or agree to the defect without evidence that it knew of the defect at the time it originated the loan); *Steward Title Guar. Co. v. National Enterprises, Inc.*, 1997 WL 800294, p. 1 (9th Cir. Cal)(unpublished)(Neither the assignee nor its predecessors in interest knew of the defect on the date the policy was issued and therefore the assumed or agreed to exclusion does not apply).

Because neither Jericho State nor Lynx Jericho assumed or agreed to the defect before the Date of Policy, this exclusion does not apply as a matter of law.

F. THE COVERED LOSS IS NOT EXCLUDED BY POLICY EXCLUSION #3(b) (NOT KNOWN BY COMPANY BUT KNOWN BY INSURED)

Chicago Title contends Policy Exclusion #3(b) excludes the covered loss from coverage. This Exclusion bars coverage for defects and encumbrances that are "not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this title policy." Chicago Title bears the burden of establishing this exclusion's applicability and any ambiguity as to the terms of the exclusion must be construed liberally in favor of the insured and strictly against the insurer. *Lyons v. Fidelity*, (2015); *Whitlock v. Stewart Title*, 399 S.C. 610 (2012).

A simple reading of this exclusion shows that it does not apply when the defect is recorded in the public records at Date of Policy. Again, the Ordinance and highway right-of-way was recorded at the Register of Deeds and in the public records of Horry County as of the Date of Policy, and therefore this exclusion does not apply as a matter of law.

G. THE COVERED LOSS IS NOT EXCLUDED BY POLICY EXCLUSION #3(c) (NO LOSS OR DAMAGE SUFFERED)

Chicago Title contends Policy Exclusion #3(c) excludes the covered loss from coverage. This Exclusion bars coverage for defects and encumbrances that "result in no loss or damage to the Insured claimant." Chicago Title bears the burden of establishing an exclusion's applicability. *Lyons v. Fidelity*, (2015). The exclusion must be construed liberally in favor of Plaintiffs and strictly against the Chicago Title. *See, Whitlock v. Stewart Title*, 399 S.C. 610 (2012); *First Carolinas Joint Stock Land Bank of Columbia v. New York Title*, 172 S.C. 435 (1934).

Under Section 7(a) of the Policy, Chicago Title's contractual liability is capped at the policy limits[57] and damages are measured by "the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy." Since the value of a mortgagee's interest is the amount by which the property secures its loan, a lender's damages equals its lost security due to the defect.

Chicago Title claims Plaintiffs have already been fully compensated by the condemnation award and therefore they have suffered no further loss to be covered by the Policies.[58] However, Chicago Title fails to measure Plaintiffs' losses as of the Date of Policy, and it instead measures damages for the defect at the subsequent condemnation date, which is a date nowhere to be found in its Policy. This is a date of financial convenience, as Chicago Title seeks to wrongly benefit from the massive depreciation of the Property's value and ignores that the purpose of title insurance is "to place the insured in the position that he thought he occupied when the policy was first issued." *Whitlock v. Steward Title*, 399 S.C. 610 (2012). While Jericho State acknowledges

[57] Section 7(a)(i) directs attention to Section 2(c) of the Policy when the insured lender takes title by foreclosure, in which case the amount of coverage is the stated liability limits, not to exceed the amount of principal indebtedness plus interests, cost and amounts advanced to protect the property, less payments received.
[58] EXHIBIT 23, Denial Letter. See also, Defendant's Answers to Plaintiffs' Complaints.

the condemnation award is an offset to its damages, Plaintiffs contend the proper date to measure loss is the Date of Policy, as that is the date of purchase and consistent with South Carolina law.

1. The Importance of Timing.

In *Whitlock v. Steward Title*, 399 S.C. 610, (2012), the insured owner measured its damages as of the date of purchase (which was the same as the date of policy), while the title insurance company sought to use a later date (date of discovery) to establish a lower measurement of damages. The Supreme Court of South Carolina analyzed the issue as follows:

> [T]he rubric of loss-valuation is not limited only to mathematical considerations. The specific matter of timing is an inherent part of the task of measuring damages. The question is thus answered by the insurance contract. Consequently, where the insurance contract unambiguously identifies a date for measuring the diminution in value of the insured property or otherwise unambiguously provides for the method of valuation as a result of the title defect, such date or method is controlling. Where, as here, the insurance contract does not unambiguously identify a date for measuring the diminution in value of the insured property or otherwise unambiguously provide for the method of valuation as a result of the title defect, such ambiguity requires a construction allowing for the measure of damages most favorable to the insured. In this case, the policy merely references "actual loss," but does not define the term or provide any guidance for determining the valuation date. Because of the ambiguity in the policy, the insured's damages should be measured as of the date of purchase of the property.
> *Whitlock*, at 613.

The time at which the property is valued is important because the value of a lender's security will fluctuate depending the date but the amount of coverage does not. In this case, the Peachtree Property was purchased in 2006 on the Date of Policy at a value of $22.5 million[59], thus providing the lenders near 100% security for their loans. On the other hand, at the condemnation date in 2009, in the depths of the Great Recession, the Property without defect was valued at between $5.2 million and $9.2 million.[60] At these depressed values, the First Mortgage had less

[59] The price paid for property at an actual, voluntary, and bona fide sale thereof is presumptive evidence of the property's value. *Rutledge v. St. Paul Fire & Marine Ins. Co.*, 286 S.C. 360 (1985).
[60] In the condemnation case, Jayroe valued the Property at $9.2m without defect and Haskell valued the property at $5.26m without defect. Chicago Title's expert values the Property at $5.915m without defect as of the condemnation date.

than half of its original security before considering the effect of the defect, and the Second Mortgage had no security. This is certainly not the position the insureds thought they occupied when the Policies were first issued.

To illustrate, Jayroe opined the defect reduced the Property value by 44% on the condemnation date, from $9.2m to $5.19m. Applying this loss percentage to the value at Date of Purchase, the Peachtree Property decreased in value from $22.5m to $12.6m due to the defect. As such, the First Mortgage lost security from $18.52m (fully secured) to $12.6m (security with defect), which equals a $5.92m loss. Similarly, the Second Mortgage lost security from $3.98m (security without defect after First Mortgage) to $0 (security with defect), which equals a $3.98m loss. On the other hand, measuring the loss in value as of the condemnation date as set forth by Chicago Title's expert, the First Mortgage lost security of $1.08m due to the defect and the Second Mortgage had no security to lose due to the defect. Thus, depending on the date of valuation, the difference is nearly $9 million of lost security.

2. The Policy is Ambiguous as to the Date to Measure Damages.

Exclusion 3(c) does not set forth a date to measure loss or damage. Although the Policies insure against loss or damage by reason of a defect "as of the Date of Policy", Chicago Title arbitrarily asserts such loss or damage is measured at some different time not found anywhere in its Policies. Therefore, this exclusion is ambiguous at best and "must be construed liberally in favor of the insured and strictly against the insurer." *Whitlock, supra.*

3. Date of Purchase is the Proper Date to Calculate Damages.

As the Court concluded in *Whitlock*, Plaintiffs assert the purchase date is the proper date to measure damages, as this places them in the position they thought they occupied when the Policies were first issued. Moreover, this date is consistent with a plain reading of the Policies which state Chicago Title shall insure against loss or damage by reason of a defect "as of the Date

of Policy." To be sure, if Chicago Title desired that damages be measured by some future condemnation date, or any other date, it could have said so in the Policy.

As stated above, Plaintiffs do not seek summary judgment as to a specific amount of damages. However, Exclusion 3(c) does not bar Plaintiffs' claims as a matter of law, because Plaintiffs suffered damages as of the Policy Date, and the condemnation award, while acting as a set-off, is a measurement based on date that is arbitrary and inconsistent with South Carolina law, and is a value far lower than what would restore Plaintiffs to the position they occupied at the time the Policies were first issued.

CONCLUSION

There are no material issues of fact as to the effect of the Ordinance and the plain language of the Loan Policies. The highway right-of-way created by the Ordinance and recorded in the public records is a defect and encumbrance on the Peachtree Property. Moreover, the Policies fail to identify the Ordinance as an Exception and the Exclusions are inapplicable as a matter of law. Therefore, Plaintiffs are entitled to summary judgment as to liability on their breach of contract actions, with the issue of damages reserved for a future proceeding along with the cause of action for bad faith.

Fred B. Newby
C. Scott Masel
NEWBY, SARTIP, MASEL & CASPER, LLC
P.O. Box 808, Myrtle Beach, SC 29578
(843) 449-9417
Attorneys for Plaintiffs

Date: 5/13/16

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

Jericho State Capital Corp. of Florida,

Plaintiff,

vs.

Chicago Title Insurance Company,

Defendant.

Case No. 2013-CP-26-5536

HORRY COUNTY
2016 JUL 11 AM 10:46
CLERK OF COURT

Lynx Jericho Partners, LLC,

Plaintiff,

vs.

Chicago Title Insurance Company,

Defendant.

Case No. 2015-CP-26-1084
(Consolidated with the above case)

DEFENDANT CHICAGO TITLE INSURANCE COMPANY'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (as to Liability Only)

Defendant Chicago Title Insurance Company ("Chicago Title") submits this memorandum of law in opposition to Plaintiffs' Motion for Summary Judgment.

INTRODUCTION

On July 9, 2002, Horry County recorded an ordinance amending its official map to show the future location of a proposed highway. The official map allows proposed future roadway improvements to be identified and provides opportunities for Horry County or other governmental entities to purchase property prior to building permits being issued as a means to reduce acquisition costs. The ordinance was indexed in the Register of Deeds only under Horry County, not under property owners that may be interested in the amendment to the official map.

Plaintiffs are two mortgagees insured under loan policies of title insurance issued by Chicago Title in 2006. The policies exclude, among other matters, zoning laws, ordinances, regulations, police powers, and eminent domain.

In 2009, three years after the policies were issued, a condemnation action was filed regarding the proposed highway. Prior to that, no third party, other than the owner and the mortgagees, had any interest in or claimed title to the subject property. In 2014, a jury awarded Plaintiffs $2,100,000 just compensation for the 2009 partial taking of the subject property.

The policies insure title to real property. The ordinance is a land-planning instrument that does not affect or encumber title. The policies do not provide coverage because the ordinance is not a title defect, not an encumbrance, and it did not cause title to be unmarketable. Even if the ordinance, for sake of argument, falls within the insuring provisions of the policies, the policies exclude zoning laws, ordinances, regulations, eminent domain, and post-policy matters. Moreover, Plaintiffs have failed to present evidence of loss, a required element of their case.

Accordingly, there is no coverage under the policies and Plaintiffs' motion for summary judgment should be denied.

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.[1]

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

[1] Plaintiffs' Ex. 5, *Deed*; Defendant's Ex. 1, *Plat*.

highway to provide opportunities for Horry County or other governmental entities to purchase property and to reduce acquisition costs.[2] 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. Therefore, one searching title to the properties affected would not find the Ordinance.[3]

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.[4] To finance its purchase of the Property,

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[2] Plaintiffs' Ex. 3, *Ordinance* 88-202.

[3] Plaintiffs' expert abstractor testified the Ordinance was not indexed by the Register of Deeds in the grantor-grantee indices, except under the name of Horry County. *Turner Dep. P. 35.* Defendant's Ex. 2. He also testified a person searching and examining title to the Property would not find the Ordinance in the chain of title. *Id.* at 36.

[4] Plaintiffs' Ex. 5, *Deed.*

Peachtree obtained mortgage loans from R.E. Loans, LLC ("REL") and Jericho State Capital Corp. of Florida ("Jericho State").

Peachtree gave an $18,520,000.00 first mortgage covering the Property to REL ("REL Mortgage."). 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").[5]

Peachtree gave a $4,263,888.00 second mortgage covering the Property to Jericho State ("Jericho State Mortgage"). 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").[6]

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

4. **The Bridge and Zoning Letter.**

Prior to the closing, Jericho State's attorney provided Peachtree's attorney with a closing checklist.[7] One item required "[s]atisfactory resolution of the determination by 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.[8] The item was removed from the checklist.[9]

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 planned highway or any restriction from use.[10]

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[5] Plaintiffs' Ex. 6, *REL Mortgage*; Plaintiffs' Ex. 8 *REL Policy*.
[6] Plaintiffs' Ex. 7 *Jericho State Mortgage*; Plaintiffs' Ex. 9, *Jericho State Policy*.
[7] Plaintiffs' Ex. 26.
[8] *Id.*
[9] Defendant's Ex. 3, *Revised Checklist*.
[10] Defendant's Ex. 4, *Zoning Verification Letter and Fax*.

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

According to a verified complaint filed by Jericho State in an 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.[11]

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").[12] 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 traverse 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.[13]

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 given by T & J Development of North

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[11] Plaintiffs' Ex. 12, *PDD Lawsuit.*
[12] *Id.*
[13] *Id.*

Myrtle Beach.[14] A foreclosure hearing was held on October 30, 2007, at which counsel for Jericho State testified as follows:

> [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 [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).[15]

The court entered a foreclosure order on November 7, 2007, ordering the Property be sold subject to the REL Mortgage.[16] Jericho State was the successful bidder with a bid of $9,000,000. Jericho State received a master's deed for the Property recorded February 26, 2008.[17] Thus, on February 26, 2008, the Property was owned by Jericho State subject to the REL Mortgage.

8. <u>Jericho State's Lawsuit Against the SCDOT and Horry County.</u>

On October 12, 2009, Jericho State filed with the Horry County Court of Common Pleas 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").[18]

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, County, South Carolina, has filed an eminent domain action bearing Civil

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[14] Defendant's Ex. 5, *Foreclosure Complaint.*
[15] Defendant's Ex. 6, *Foreclosure Transcript of Hearing* at 12.
[16] Plaintiffs' Ex. 10, *Foreclosure Order.*
[17] Plaintiffs' Ex. 11, *Master's Deed.*
[18] Plaintiffs' Ex. 12, *PDD Lawsuit.*

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.[19]

9. **Assignment of the REL Mortgage to Lynx Jericho and the Relationship between Lynx Jericho and Jericho State.**

REL assigned the REL Mortgage to Mortgage Fund '08, LLC by an instrument recorded May 16, 2008.[20] 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 (the "Liquidating Trust").[21]

On October 22, 2012, the trustee of the Liquidating Trust, Jericho State, and Jericho All-Weather Opportunity Fund LP ("Jericho All-Weather") signed an Engagement Agreement with a law firm to have the law firm represent the three parties in the Condemnation Action described in detail below. The Engagement Agreement stated Jericho State and Jericho All-Weather had a first right of refusal to purchase the REL Mortgage loan if the trustee obtained a third-party offer to buy that loan. Jericho All-Weather was a participant in the Jericho State Loan.[22]

On January 8, 2013, the Liquidating Trust gave notice to Jericho State and Jericho All-Weather of their opportunity to purchase the REL Mortgage for $447,725, the price allocated to that loan in an offer received from a third party for the purchase of several loans.[23]

Lynx Asset Services, LLC ("LAS") formed Plaintiff Lynx Jericho Partners, LLC ("Lynx Jericho") on April 4, 2013. SRKD-SAM Advisors LLC ("SRKD-SAM") became the Class B member of Lynx Jericho on April 17, 2013. LAS was the manager of Lynx Jericho.[24]

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[19] Defendant's Ex. 7, *Stipulation of Dismissal of Zoning Rescission Action.*
[20] Plaintiffs' Ex. 16, *Assignments.*
[21] Defendant's Ex. 8, *Bankruptcy Court Order.*
[22] Defendant's Ex. 9, *Engagement Agreement.*
[23] Plaintiffs' Ex. 17, *Trustee Notice-ROFR.*
[24] Plaintiffs' Ex. 19, *Operating Agt.* Glenn Chwatt signed the Operating Agreement as Manager/Member of SRKD-SAM and is manager of SRKD-SAM. Scott D. Svirsky is its registered agent. Chwatt is president of Jericho State. Svirsky is partner in Jericho All-Weather. *Chwatt Dep.* 13-14, 24-25, Plaintiffs' Ex. 24.

Lynx Jericho purchased the REL Mortgage and the note it secures (the "REL Loan") and another loan, termed the Saucepan Loan, secured by property in North Carolina. Lynx Jericho paid $2,500,000 to purchase the REL Loan and the Saucepan Loan. The Liquidating Trust assigned the REL Mortgage to Lynx Jericho by instrument recorded May 22, 2013.[25]

The Lynx Jericho Operating Agreement states that the REL Loan and the Saucepan Loan are the two "Portfolio Loans" that are assets of the company. Further, the members agreed they will use any condemnation proceeds and proceeds paid on any title claim other than the claim made on the Lynx Jericho Policy to repay the Portfolio Notes.

In the Lynx Jericho Operating Agreement dated April 17, 2013, the members agreed that, for three years after the effective date, there "shall be no action taken with regard to" the Portfolio Loans, or the collateral for those loans, without the approval of SRKD-SAM as the Class B member, "it being understood that the Class B Member is related to and/or an Affiliate of the owner of such Portfolio Property, and it is based upon such forbearance/action with regard to the Portfolio Notes, the Portfolio Loans and the Portfolio Loan Documents that they have entered into this Agreement."

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

The SCDOT filed a condemnation notice on December 15, 2009, and an amended condemnation notice on April 20, 2011, against Jericho State, REL, and Mortgage Fund '08, LLC (the "Condemnation Action").[26] 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

[25] Plaintiffs' Ex. 20, *Assignment to Lynx Jericho.*
[26] Defendant's Ex. 10, *Condemnation Notice and Amended Condemnation Notice.*

section of SC Route 31 (Carolina Bays Parkway)." (emphasis added).

During the course of the Condemnation Action, Jericho admitted "[t]hat the date of taking for valuation purposes is December 15, 2009."[27] 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.[28]

Jericho State and Lynx Jericho claimed the condemnation of the Parkway Parcel resulted in a $4,010,000 loss. The SCDOT argued the loss totaled $998,000. 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.[29] Jericho State released its interest in the judgment proceeds to Lynx Jericho.[30]

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.[31] Chicago Title denied that claim.[32]

Jericho State filed suit against Chicago Title on July 29, 2011, bringing claims for breach of contract, breach of the covenant of good faith and fair dealing, and bad faith. Jericho State alleges Chicago Title committed bad faith in part for analyzing Jericho State's claim under Exclusion 1, excluding zoning laws, ordinances, and regulations. This is the same exclusion under which Jericho State now, for the first time in its motion, seeks coverage.

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[27] Defendant's Ex. 11, *Landowner's Responses to Condemnor's First Requests to Admit, answer No. 1.*
[28] Defendant's Ex. 12, *Trial Transcript—Condemnation Action.*
[29] *Id.* at 362; Defendant's Ex. 13, *Condemnation Judgement.*
[30] Plaintiffs' Ex. 21, *Payment to LAS.*
[31] Defendant's Ex. 14, *Jericho State claim letter.*
[32] Plaintiffs' Ex. 22, *Jericho State claim denial letter.*

12. **Lynx Jericho's Title Insurance Claim.**

Lynx Jericho submitted a claim on the Lynx Jericho Policy by letter dated June 21, 2013.[33] 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, and Lynx Jericho filed suit on February 12, 2015.[34]

ARGUMENT

The Ordinanee is a land planning and zoning instrument that does not affect or encumber title to the Property. The Ordinance does not fall within the insuring provisions of the Policies. Even if the Ordinance falls within the insuring provisions of the Policies, the Policies exclude any loss related to the Ordinance and the Condemnation Action. Moreover, Plaintiffs have suffered no loss and have failed to present evidence of loss, a required element of their case.

1. **Rules of Construction.**

Insurance policies are subject to the general rules of contract construction. *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 514 S.E.2d 327, 330 (1999). When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. *Id.* The court must enforce, not write, contracts of insurance and must give policy language its plain, ordinary, and popular meaning. *Id.*

An insurer's obligation under a policy of insurance is defined by the terms of the policy and cannot be enlarged by judicial construction. *S.C. Ins. Co. v. White*, 301 S.C. 133, 390 S.E.2d 471, 474 (Ct. App. 1990). "[I]f the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend coverage that was never intended by the parties." *S.C. Farm Bureau Mut. Ins. Co. v. Wilson*, 344 S.C. 525, 544 S.E.2d 848, 850 (Ct. App.

[33] Defendant's Ex. 15, *Lynx Jericho Claim Letter.*
[34] Plaintiffs' Ex. 23, *Lynx Jericho Denial Letter.*

2001). Courts are not authorized to pervert policy language or to exercise inventive powers to create an ambiguity where none exists. *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000). "The rule of strict construction against the insurer does not apply where the language used in the policy is so plain and unambiguous as to leave no room for construction. Nor does the rule of strict construction authorize a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exists." *S.S. Newell & Co. v. American Mutual Liability Ins. Co.*, 199 S.C. 325, 19 S.E.2d 463, 466 (1942).

2. <u>The Ordinance does not fall within the insuring provisions of the Policies.</u>

a. <u>Insuring provisions of the Policies.</u>

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

> 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;

The insured has the burden of showing a claim falls within coverage of an insurance contract. *Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 160 S.E.2d 523, 525 (1968). Plaintiffs 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." Plaintiffs cannot meet their burden. The Ordinance does not fall within these insuring provisions of the Policies.

b. **The Ordinance is a land planning tool.**

The adoption of an official map is a land planning tool available to counties and municipalities. The Ordinance directly concerns the official map of Horry County, as it amends the official map to show the future location of a proposed highway and to provide opportunities for Horry County or other governmental entities to purchase property and to reduce acquisition costs.

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 "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).

To the extent there is doubt as to whether the Ordinance is a land planning tool, the Ordinance is administered by the zoning administrator and the statutes authorizing the adoption of an official map, which are cited in the Ordinance, state an official map is "one of the several instruments of land use control authorized by this chapter." *Id.*: Ordinance 107-98 § 6.0.[35]

c. **The Ordinance does not affect title to the Property, it is not an encumbrance or defect, and does not render title unmarketable.**

Title insurance policies indemnify for loss related to title to the 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); 11 COUCH ON INSURANCE § 159:48 ("a title insurer does not make any representation or assume any liability with respect to

[35] Plaintiffs' Ex. 1, *Ordinance 107-98*.

whether the insured will be able to procure government permits authorizing him or her 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.").

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 of 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 have recognized 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, 51, 317 S.E.2d 133, 136 (Ct. App. 1984), the Court of Appeals found residential lots that were in either marsh or water were free from encumbrances. The court stated 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 (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 building or zoning laws are not encumbrances or defects affecting title; 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.
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> *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.

In addition, Plaintiff's argument that the threat of a future condemnation action caused title to the property to be unmarketable is without merit. 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. In *Lansburgh v. Market St. Ry. Co.*, 98 220 P.2d 423 (Cal Ct. App. 1950), for example, the court rejected the contention that preliminary steps taken by the city, including incurring bonded debt for a street project, and the presence of a provisional map showing a contemplated future acquisition of part of the property, made the seller's title defective, or at least doubtful, and therefore not marketable. The Court stated there was no resulting "change in the legal relations of the city and county and the owner with respect to the property. The city and county had still in the property in question no more than the same inchoate right of eminent domain which it had in all other property within its boundaries, a right which clearly is not an encumbrance or defect of title." *Id.* at 426-427.

Plaintiffs liberally use the term "right of way" in their brief, trying to confuse the Court as to the effect of the Ordinance. The Ordinance did not establish a right of way and did not alter title to the Property. In fact, the Ordinance is simply an amendment to the official map.

The ordinance setting forth Horry County's right to adopt an official map, Ordinance 107-98,[36] 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) "exempt the land from the restrictions of the Official Map," (b) "issuance of desired permits with specified conditions," or (c) initiate appropriate action *to acquire* the

[36] Plaintiffs' Ex. 1, *Ordinance 107-98.*

property." (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) "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 other appropriate governmental agency.[37] (emphasis added). If a right of way already had been established, as Plaintiffs disingenuously contend, there would have been no need to condemn the Parkway Parcel or to provide the County with the ability to grant permits for construction.

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 Sav. Bank v. Chicago Title Ins. Co.*, 649 N.E.2d 1123, 1126-28 (Mass. 1995) ("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 located in 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).

[37] *Id.* at 5. This ordinance defines "condemnation" as "[t]he exercise by a governmental agency of the right of eminent domain." 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.* at 2.

"A title insurance commitment or policy is not a zoning or building code due diligence report, or a substitute for that due diligence."[38] In that regard, as mentioned above, Jericho State requested a letter from the municipality confirming that a bridge would not be built.[39] 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, and Jericho State cannot rely on Chicago Title to stand in the place of that failure to complete that due diligence. The Policies simply do not cover zoning matters and use regulations. That is why Jericho State's attorneys requested additional information regarding the bridge and zoning in the first place. *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").

The Ordinance does not fall within the insuring provisions of the Policies.

3. <u>Plaintiffs' claims are excluded.</u>

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). "[I]nsurers have a 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

[38] J. Bushnell Nielsen, *Title and Escrow Claims Guide*, at 11-2 (2016 Ed.).
[39] Plaintiffs' Ex. 26, *Gwinn Email.*

on the exceptions or qualifications contained in the exclusions. 8 Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, § 6:2.

To the extent the Ordinance falls under the insuring provisions of the Policies, which Chicago Title denies, coverage is excluded by Exclusion 1, removing coverage against various forms of governmental regulation of the use of property. Exclusion 2, eliminating coverage for condemnation or eminent domain, and other exclusions.

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, government regulation, or any government police power. More specifically, the Policies exclude 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 change in the dimensions or area of the land or any parcel of which the land is or was a part of;* or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.
>
> (b) *Any government police power* not excluded by (a) above, except to the extent that a notice of the exercise 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).

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 referring to the map as a land planning tool, Plaintiffs argue the purpose of the Ordinance is not to regulate use but rather to designate a right-of-way and transfer title. Plaintiffs argue "this exclusion applies to laws relating to land use only, not those affecting title itself," and "the Ordinance is not such a law."

However, as detailed below, the right of way could not have existed and title to that right of way could not have vested in any governmental entity until a condemnation action was filed, which is consistent with official map ordinance. 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.[40]

The Ordinance is an attempt to control use of the Property. The Ordinance states its purpose is to provide opportunities for governmental entities to reduce "future acquisition cost" by "limiting development." The Ordinance is a zoning law or regulation that restricts, regulates, and prohibits "the occupancy, use, or enjoyment of the land," falling squarely within Exclusion

[40] *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.").

1. If, for sake of argument, the Ordinance is not a law, ordinance or governmental regulation, then it is a government police power excluded from coverage by Section 1(b) of Exclusion 1.

Plaintiffs inappropriately rely on *Lyons v. Fidelity Nat. Title Ins. Co*, 415 S.C. 115, 781 S.E.2d 126 (Ct. App. 2015). *Lyons* involved a residential owner's title policy and the ability to place a mobile home on property. The residential owner's title policy contained expanded insuring provisions, including insuring the situation where the owner could not use the property because use as a single-family residence violated an existing zoning law. The zoning exclusion in the residential owner's policy stated it did not limit the coverage as to single family residences and zoning contained in the expanded insuring provisions. Here, the Policies contain no such provisions or carveouts.

The Ordinance is excluded by the plain meaning of Exclusion 1.[41]

b. <u>The exception to Exclusion 1 does not apply.</u>

Exclusion 1 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[42] of any "law, ordinance or governmental regulation," including "building and zoning laws, ordinances, or regulations." The

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[41] *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 "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 Land & Timber Co. v. Lawyers Title Ins. Corp.*, 152 F.3d 275 (4th Cir. 1998) (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 in order to get a zoning change were part of the zoning use conditions, not a declaration of restrictions, and therefore were excluded from coverage under Exclusion 1).

[42] "Enforcement" is defined as "The act of putting something such as a law into effect; the execution of a law; the carrying out of a mandate or command." *Black's Law Dictionary* 528 (6th ed. 1990).

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 found 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 the 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." Because there was never a violation,[43] 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 the Ordinance. 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 Land & Timber Co.*, 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.").

[43] "Violation" is defined as "Injury; infringement; breach of right, duty or law. The act of breaking, infringing, or transgressing the law. Rabon v. South Carolina State Highway Dept., 258 S.C. 154, 187 S.E.2d 652, 654." *Black's Law Dictionary* 1570 (6th ed. 1990)."

The Ordinance does not set forth a notice of enforcement of its own provisions. The Ordinance is not notice of any violation or alleged violation of its own terms. Therefore, the exception to the Exclusion 1 does not apply.

c. **Plaintiffs' claims are excluded by Exclusion 2.**

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

The Parkway Parcel was condemned, as a matter of law, on December 15, 2009, when the Condemnation Action was filed, not before. The Ordinance is not a condemnation. Under South Carolina law, 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 in order to be effective to cause a transfer of title.[44] 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.[45]

The Parkway Parcel had not been condemned on the effective dates of the Policies—July 25, 2006. The SCDOT accordingly would have had no reason to file the Condemnation Action if the Parkway Parcel had already been condemned on July 25, 2006. If the Parkway Parcel had

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[44] *See* S.C. Code Ann. § 28-2-280. A condemnation notice must be captioned "CONDEMNATION NOTICE, TENDER OF PAYMENT," must designate the condemning authority and all of the owners of the land being condemned, contain a legal description for 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 this section. The Ordinance contains none of this.

[45] S.C. Code Ann. §§ 28-2-220; 28-2-230. *See also Carolina Power & Light Co. v. Copeland*, 188 S.E.2d 188, 258 S.C. 206 (1972); *City of North Charleston v. Claxton*, 315 S.C. 56, 431 S.E.2d 610 (1994); *City of Folly Beach v. Atlantic House Properties, Ltd.*, 321 S.C. 241, 467 S.E.2d 928 (1996).

already been taken, Peachtree would not have offered in 2007 to convey the Parkway Parcel to Horry County;[46] Jericho State's foreclosure counsel would not have testified in 2007 that there were no liens or encumbrances on the Property;[47] Jericho State would not have alleged in 2009 in the Zoning Rescission Action that it was the owner of the Parkway Parcel;[48] the SCDOT would not have alleged in 2009 in the Condemnation Action that Jericho State was the owner of the Parkway Parcel;[49] and Jericho State's 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."[50]

Plaintiffs claim a taking occurred by the recording of the Ordinance. That claim is without merit because 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.[51]

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.* The master found no taking occurred. *Id.*

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.

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[46] Plaintiffs' Ex. 12, *PDD Lawsuit*

[47] Defendant's Ex. 6, *Foreclosure Transcript of Hearing* at 12.

[48] Plaintiffs' Ex. 12, *PDD Lawsuit.*

[49] Defendant's Ex. 10, *Condemnation Notice and Amended Condemnation Notice.*

[50] Defendant's Ex. 12, *Trial Transcript—Condemnation Action* at 32.

[51] "The adoption, filing, or recording of maps or plans for future roadway development does not constitute a taking." 2A *Nichols On Eminent Domain* §6.01[17][b], at 6-93 (3rd ed. 2004).

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. [52]

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[52] The 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). 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 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.").

The Ordinance did not amount to a taking. The Parkway Parcel was not taken until such time that the SCDOT filed the Condemnation Action. Exclusion 2 excludes any damages resulting from the Condemnation Action.

d. <u>The exception to Exclusion 2 does not apply.</u>

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

As mentioned above, 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, "The provisions of [the Act] shall constitute the exclusive procedure whereby condemnation may be undertaken in [South Carolina]." *Id.*

The Ordinance and the recording thereof is not contemplated by the Act and it is not an exercise of any part of the exclusive procedure set forth by the Act. The Act requires the filing of a condemnation notice and mandates certain language in the condemnation notice. S.C. Code Ann. §§ 28-2-230 and 28-2-280. The Ordinance is not required or contemplated by the Act.

The taking took place only upon the filing of the Condemnation Action, on December 15, 2009. No taking or inverse condemnation could have occurred as a result of the Ordinance. Accordingly, the exception to Exclusion 2 does not apply.

e. **Plaintiffs' 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 Plaintiffs as result of the condemnation is therefore excluded.

4. **Summary Judgment should be denied because Plaintiffs either have no loss or have not provided evidence of loss.**

a. **Plaintiffs' claims are excluded by Exclusion 3(c).**

The Policies specifically exclude coverage for certain matters which result in no loss or damage to an insured claimant. More specifically, the Policies exclude "3. Defects, liens, encumbrances, adverse claims or other matters . . . . (c) resulting in no loss or damage to the insured claimant."

Jericho State acquired title to the Property after foreclosing its second mortgage lien, subject to the $18,520,000.00 REL Mortgage, an exception in the Jericho State Policy. The amount due on the REL Mortgage exceeds $34,000,000.00.[53] According to Plaintiffs' appraisals, the value of the Property, even without the loss of the Parkway Parcel, does not come close to the original balance of the REL Mortgage.[54] Accordingly, Jericho State has not suffered a loss.

In addition, Plaintiffs have been compensated for any loss. Any loss Plaintiffs claim to have suffered were compensated by the jury award in the Condemnation Action. Accordingly,

[53] Defendant's Ex. 16, *Lynx Jericho First Supplemental Responses to Interrogatories.*
[54] Plaintiffs' Ex. 14, *Jayroe Appraisal December 15, 2009*; Defendant's Ex. 17, *Jayroe Appraisal June 9, 2015.*

Plaintiffs have suffered no loss or damage.

b. **Jericho State was fully paid.**

The order foreclosing the Jericho State Mortgage found the debt due under the note it secured totaled $7,490,000 as of December 3, 2007.[55] At the foreclosure sale on December 3, 2007, Jericho State was the successful bidder with a bid of $9,000,000.[56]

In *Preservation Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 751 S.E.2d 256 (2013), the insured lender bid at foreclosure an amount that exceeded the policy amount, but was less than the amount owed under the note. The South Carolina Supreme Court, in construing identical policy language, affirmed the trial court's order reducing the amount due on the note by the amount bid at the foreclosure, and accordingly found the policy amount was reduced to the remaining amount due on the note.

Here, Jericho State's bid exceeded not only the policy amount, but also exceeded the amount due on the note. Jericho State has been fully paid and has suffered no loss.

This finding is consistent with the theory that "a plaintiff can have but one satisfaction of his debt." *Ayers v. Guess*, 217 S.C. 233, 235, 60 S.E.2d 315, 315 (1950). The courts in South Carolina disfavor any activities or practices which have the effect of "chilling" the bidding at a foreclosure sale. *Ex parte Keller*, 185 S.C. 283, 292, 194 S.E. 15, 19 (1937) (courts should be "particularly jealous of the integrity of judicial sales" and all such judicial sales "must be made on free, fair and competitive bidding.").

Jericho State's $9,000,000 bid effectively chilled the bidding. To the extent there existed a bidder interested in buying the Property, Jericho State's bid exceeding the amount due under the note reduced the possibility of third-parties bidding.

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[55] Plaintiffs' Ex. 10, *Foreclosure Order* at 11-12.
[56] Plaintiffs' Ex. 11, *Master's Deed*.

c. **Plaintiffs have provided no evidence of loss.**

Paragraph 7 of the Conditions and Stipulations of the Policies state they are "contract[s] of indemnity against actual monetary loss or damage."[57] Without a loss, there can be no viable claim under the Policies, contracts of indemnity. Plaintiffs moved for summary judgment on liability, but to show there exists liability, they must show they have suffered a loss. *Marble Bank v. Commonwealth Land Title Ins. Co.*, 914 F. Supp. 1252, 1254 (E.D.N.C. 1996).

Plaintiffs have simply failed to submit competent evidence that they suffered a loss.

Plaintiffs argue the correct date to measure loss is the date the Policies were issued. Chicago Title disagrees with that date of valuation. Nonetheless, Plaintiffs have provided no evidence, expert or otherwise, that the defect they claim exists resulted in any loss on that date. Although Plaintiffs provided appraisals as of the date of condemnation and a subsequent date,[58] Plaintiffs failed to provide any evidence showing a loss on the date the Policies were issued.

At the very least, there is a genuine issue of material fact on this issue and Plaintiffs' motion should be denied.

5. **Lynx Jericho cannot suffer a loss, and loss cannot be measured, until Lynx Jericho forecloses the REL Mortgage.**

Jericho State foreclosed its junior mortgage and became owner of the Property in 2008. Lynx Jericho holds the first mortgage, the REL Mortgage, and has not foreclosed. If Lynx Jericho were to foreclose on the REL Mortgage, it would come into title. To the extent Lynx Jericho has a valid claim, that claim would become ripe only when it comes into title.

[57] Plaintiffs' Ex. 8 *REL Policy*; Plaintiffs' Ex. 9, *Jericho State Policy*.
[58] Plaintiffs' Ex. 14, *Jayroe Appraisal December 15, 2009*; Defendant's Ex. 17, *Jayroe Appraisal June 9, 2015*.

An insured lender that has not yet taken title to real estate is unable to prove any defect in the title will cause it to suffer a loan loss. *See* J. Bushnell Nielsen, *Title and Escrow Claims Guide*, at 3-52 (2016 Ed.). "An insured mortgagee has not suffered an identifiable loss unless and until it forecloses its insured deed of trust and a title defect reduces the value of the property, thereby preventing the mortgagee from recouping its loan amount upon resale. If a title defect exists, but the value of the property is nevertheless sufficient to pay the mortgagee the loan amount, then there is no damage compensable under the loan policy." *First Citizens Bank & Trust Co. v. Stewart Title Guar. Co.*, 320 P.3d 406 (Colo. Ct. App. 2014).

Further, a claim concerning an alleged defect in title is not ripe under a loan policy until the lender has taken title to the property. Under a loan policy, the date of foreclosure is the date on which loss is measured. *See, e.g., Karl v. Commonwealth Land Title Ins. Co.*, 24 Cal.Rptr.2d 912, 920 (Cal Ct. App. 1993) ("At [foreclosure sale], the lender's note is extinguished and replaced by assets recovered on foreclosure: either cash as paid by a third party bidder or the realty as bought in by the foreclosing lender. It is now possible to measure the value of the recovery by the lender, and we believe the loss which is insured by the title policy should be recognized as of that time.").[59]

[59] *See also Associated Bank, N.A. v. Stewart Title Guar. Co.*, 2012 WL 3067895, at *5 (D. Minn. 2012) ("[T]he majority of courts considering the [date of valuation] issue have held that such loss cannot be measured until the note has been repaid and the security for the mortgage is shown to be inadequate ... The majority view comports with the nature of a title insurance policy."); *Marble Bank v. Commonwealth Land Title Ins. Co.*, 914 F. Supp. 1252 (E.D.N.C. 1996) ("Since a lender suffers loss only if the note is not repaid, the discovery of an insured-against lien does not trigger recognition of that loss. Further, even though the lender's note is in default, an anticipated loss cannot be measured until completion of foreclosure because only then is there certainty the lender will not be paid in full. Consequently, it is clear that in the typical case the earliest a loss can be claimed on a lender's policy is at the time of completion of foreclosure."); *Hodas v. First American Title Ins. Co.*, 696 A.2d 1095, 1097 (Me. 1997) ("The presence of a title defect immediately results in a loss to the holder of a fee interest since resale value will always reflect the cost of removing the defect. In contrast, the holder of a loan policy incurs a loss only if the security for the loan proves inadequate to pay off the underlying insured debt due to the presence of undisclosed defects."); *Blackhawk Prod. Credit Ass'n v. Chicago Title Ins. Co.*, 423 N.W.2d 521, 525 (Wis. 1988) (holding a mortgagee's insured loss is sustained only if the "mortgagee's debt is not repaid and the security for the mortgage proves inadequate," so the loss must be measured as of that date).

Plaintiffs cite *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 732 S.E.2d 626 (2012), for the proposition that loss is measured on the date of the policy. In *Whitlock*, the South Carolina Supreme Court answered the question certified to it by a federal court and announced that loss under an owner's title insurance policy is measured as of the date of policy, not the date of discovery of the title defect, despite prevailing case law to the contrary. The court found the term "actual loss" in the residential owner's policy under consideration to be ambiguous. In so holding, the court stated "[w]here the insurance contract unambiguously identifies a date for measuring the diminution in value of the insured property or otherwise unambiguously provides for the method of valuation as a result of the title defect, such date or method is controlling." The residential owner's policy at issue in *Whitlock* did not define actual loss and set forth no method of valuation; therefore, the court found the residential owner's policy to be ambiguous.

Here, the Policies unambiguously provide a method of valuation:

> 7. DETERMINATION AND EXTENT OF LIABILITY.
>
> This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.
> (a) The liability of the Company under this policy shall not exceed the least of:
> (i) the Amount of Insurance stated in Schedule A, or, if applicable, the amount of insurance as defined in Section 2 (c) of these Conditions and Stipulations;
> (ii) the amount of the unpaid principal indebtedness secured by the insured mortgage as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time the loss or damage insured against by this policy occurs, together with interest thereon; or
> (iii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.
> (b) In the event the insured has acquired the estate or interest in the manner described in Section 2(a) of these Conditions and Stipulations or has conveyed the title, then the liability of the Company shall continue as set forth in Section 7(a) of these Conditions and Stipulations.
> (c) The Company will pay only those costs, attorneys' fees and expenses incurred in accordance with section 4 of these Conditions and Stipulations.

Unlike the residential owner's policy in *Whitlock*, the Policies, which are loan policies, provide a detailed method of calculating loss, which cannot be ascertained until an insured lender forecloses or acquires title after foreclosure. Accordingly, the Policies are not ambiguous.[60]

Plaintiffs appear to argue the Condemnation Action and the jury's award therein did not provide them full just compensation for the taking of the Parkway Parcel because the valuation date of the taking was December 15, 2009. However, Plaintiffs conceded that issue in that litigation, instead of arguing an earlier date should have been used.[61] Plaintiffs should have raised this issue in the Condemnation Action. Instead of looking to the constitutionally responsible party, the SCDOT, to provide just compensation. Plaintiffs now improperly seek additional just compensation from Chicago Title for a matter clearly not covered by the Policies.[62]

6. <u>Lynx Jericho's claim is excluded because it created, suffered, assumed or agreed to the claimed defect.</u>

The Lynx Jericho Policy excludes from coverage loss that arises by reason of "defects, liens, encumbrances, adverse claims or other matters" that are "created, suffered, assumed or agreed to by the insured claimant."

Lynx Jericho knew of the Ordinance and the condemnation when it purchased the REL Loan in 2013. Lynx Jericho has the power to foreclose and take title to the Property free and clear of other interests, including the rights of Jericho State. Lynx Jericho then would own the 121.11 acres of land remaining, after the taking by condemnation of 10.18 acres by the SCDOT.

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[60] Plaintiffs argue Chicago Title mistakenly chose the date of the condemnation action as the date of valuation. However, it is Plaintiffs' burden to establish its claimed loss. Plaintiffs' motion was the first time Chicago Title was made aware Plaintiffs contended the date of loss is the date the Policies were issued. Plaintiffs provided expert appraisals as of the date of the condemnation. That is why Chicago Title provided expert appraisals for the same date. Nonetheless, the date of the policy is not the correct valuation date for loss under a loan policy.

[61] Defendant's Ex. 11, *Landowner's Responses to Condemnor's First Requests to Admit, answer No. 1*

[62] Plaintiffs' claims or argument that a taking occurred earlier are also barred under the doctrine of collateral estoppel or res judicata.

Lynx Jericho's appraiser values the Property as of June 9, 2015, at $2,500,000 *without* the condemned portion of the parcel.

Lynx Jericho "assumed" the condemnation, as that term is used in the Policy, by purchasing the REL Loan and the REL Mortgage. It "agreed to" take subject to the condemnation of the highway property, as that term is used in the Policy, when it purchased the Peachtree Loan for the offer price of $447,725.[63]

Lynx Jericho purchased the REL Loan and obtained the right to own the Property through foreclosure for less than a half million dollars. Its own appraiser opined the Property, minus the condemned land and subject to the noise and other issues created by the condemnation, is worth more than five times what Lynx Jericho paid for it.[64]

An insured cannot establish that it has suffered "actual monetary loss or damage" due to a condition the insured knew existed, while at the same time admitting the Property is worth more than what the insured paid for it.[65]

Exclusion 3(a) bars such claims, because an insured that has contracted to buy land at a certain price due to its known condition is not entitled to be "reimbursed" for a title condition

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[63] Plaintiffs' Ex. 17, *Trustee Notice-ROFR.*

[64] Chwatt testified Lynx Jericho purchased the Peachtree Loan and the Saucepan Note together for $2,500,000. Even if the collateral securing the Saucepan Note had no value, Lynx Jericho would be fully secured as to its purchase price for both loans by the value of the Peachtree Property. Plaintiffs' Ex. 14; Plaintiffs' Ex. 24, Chwatt Dep. at. 22.

[65] "There is no duty to indemnify an insured when there is no evidence that the defect lessens the value of the property." *Nielsen*, § 3.2.3, at 3-12, n. 31. For example, in *Summer Pond Properties, Inc. v. Transamerica Title Ins. Co.*, 1998 WL 283052 (Wash. Ct. App. 1998), the policy mistakenly included some land which the seller did not own and which the insurer argued the insured had not intended to purchase. The trial court found the insured had failed to submit credible evidence of the value of the land. The appellate court affirmed, finding the insurer did not owe anything because the insured had failed to establish a value for the parcel mistakenly insured. In *Zeiger v. Shons*, 2001 WL 470175 (Ohio Ct. App.), the court said the insured had not suffered a loss due to the fact that the insured parcel was smaller than the insured had thought, when his own appraiser put the value of the property actually owned by the insured at more than policy limits. The "no loss" exclusion, 3(c), states in the negative that there is no coverage if the insured does not suffer a loss in the value of the property. *See Nielsen*, § 3.2.3, at 3-12, n. 31.

that was factored into its purchase price.[66] Payment of such a claim would convert the policy from an indemnity contract to a windfall.

7. **Lynx Jericho and Jericho State cannot both recover under the Policies.**

If the Court were to determine Chicago Title was required to pay a loss, the Policies state such loss would be payable to only one insured. Conditions & Stipulations 10 provides a payment to the senior lender is deemed to be a payment for the benefit of the junior lender also, negating the possibility that the insurer will pay both insureds for the same loss:

> LIABILITY NONCUMULATIVE.
>
> If the insured acquires title to the estate or interest in satisfaction of the indebtedness secured by the insured mortgage, or any part thereof, it is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy.

When an insurer has policies in favor of two lenders and makes a claim payment, the money is delivered to the senior lienholder. In this case, if Chicago Title was obligated to make a loss payment, that money would be paid to Lynx Jericho as the holder of the senior lien. That payment would simultaneously extinguish the claims on both Policies.

CONCLUSION

The Policies do not provide coverage for the Ordinance because the Ordinance is neither a title defect nor an encumbrance and the Ordinance did not make title to the Property unmarketable. Zoning ordinances and resolutions are not title matters, and the Policies place on parties other than Chicago Title the burden of investigating and complying with local ordinances and land use resolutions affecting the Property.

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[66] See *Nielsen*, §§ 11.2.1, 11.2.2.

Even if the Court were to conclude the Ordinance or the Condemnation Action falls within the insuring provisions of the Policies, such matters are not covered as the Policies exclude zoning laws, ordinances, and regulations, police powers, eminent domain, post-policy events, matters resulting in no loss or damage, and matters created, suffered, assumed or agreed to by the insured.

Accordingly, there is no coverage afforded to Plaintiffs under the Policies and Plaintiffs' motion for summary judgment should be denied.

Respectfully submitted,

CALLISON TIGHE & ROBINSON, LLC

Demetri K. Koutrakos, SC Bar No. 11318
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 DEFENDANT CHICAGO TITLE INSURANCE COMPANY

July 8, 2016

STATE OF SOUTH CAROLINA)) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Jericho State Capital Corp. of Florida, Plaintiff, v. Chicago Title Insurance Company, Defendant.	C/A: 2013-CP-26-5530
Lynx Jericho Partners, LLC, Plaintiff, v. Chicago Title Insurance Company, Defendant.	C/A: 2015-CP-26-1084 (Consolidated with the above case)

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PLAINTIFFS' REPLY MEMORANDUM

Chicago Title's legal position rests primarily upon its assertion that the Ordinance is nothing more than a simple zoning and regulation of land use. Contrary to Chicago Title's interpretation, the plain language of the Ordinance shows it is not merely a land regulation, but instead is a land *reservation* for a governmental acquisition that "will occur".

Title insurance operates to protect a purchaser or mortgagee against defects in or encumbrances on title which are in existence at the time the insured takes title. *Lyons v. Fidelity Nat. Title Ins. Co.*, 415 S.C. 115 (Ct. App. 2015). Title insurance contracts are construed against the drafter, and in favor of coverage for the insured. *Whitlock v. Stewart Title Guar. Co., 2011 WL 4549367 (S.C.D. 2011).*

1. **Covered Loss**. Chicago Title denies the Ordinance creates a covered loss because it is merely a land use regulation. In support of its position, Chicago Title mainly relies on several

South Carolina cases holding that wetlands restrictions do not render title unmarketable.[1] Of course, this is not a wetlands case and the Ordinance is not designed to protect the environment. Chicago Title also cites to several cases from other states holding that occupancy restrictions, subdivision requirements, and general zoning and permitting matters do not render title unmarketable. These cases miss the point as well. The Ordinance is not intended to regulate occupancy or to govern the character and dimensions of improvements or to control the environment. Indeed, the clear purpose of the Ordinance is to establish the government's interest in the property by designating a highway right-of-way, reserving that land for future acquisition and reducing its costs of acquiring that property. None of the cases cited by Chicago Title discuss any law that bestows upon the government rights to reserve a highway right-of-way for acquisition.

Chicago Title further cites to a California case for the proposition that mere preliminary steps or plans for future appropriation of the property do not constitute a defect or encumbrance rendering the title unmarketable. However, in that case, the California court openly conceded that an encumbrance may very well exist if the planning map was recorded or publicly filed and had a legal significance that impeded the free use of property. *Lansburgh v. Market Street Ry. Co.*, 220 P.2d 423 (1950). In the instant case, the Ordinance is publicly filed at the Register of Deeds of Horry County and most certainly impedes the Plaintiff's free use of their Property.

The effect of the Ordinance clearly meets South Carolina's definition of "encumbrance": an interest in the land which may subsist in third persons to the diminution in value of the estate although consistent with the passing of the fee; it is a burden upon land depreciative of its value and general includes liens, easements and other claims. *Martin v. Floyd*, 282 S.C. 47 (S.C. App. 1984); *Truck South v. Patel*, 339 S.C. 40 (2000); *Marathon Finance Co v. HHC Liquidation Corp.*,

[1] Although these wetlands cases primarily relate to title marketability, the cases fail to address that marketability is affected by the reasonable probability of condemnation litigation as described in Plaintiffs' initial memorandum. Importantly, the Loan Policies also cover losses due to "any defect or lien or encumbrance", in addition to unmarketability.

325 S.C. 589 (S.C.App 1997). In this case, the Ordinance is a defect or encumbrance because the law creates a third party interest by designating a highway right-of-way for government ownership that will occur.

Chicago Title also complains of Plaintiffs' use of the term highway "right-of-way" when describing the effect of the Ordinance. This term, however, is used by Horry County in the Ordinance itself to describe the new highway. Moreover, when Horry County first established its Official Map, it defined "right-of-way" as "land reserved, used or to be used for a road...."[2] *See, City of Myrtle Beach v. Juel P. Corp.*, 344 S.C. 43 (2001) ("In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation"). Under a plain reading of the Ordinance, and as a matter of common sense, the Ordinance has created a right which is an interest in and burden upon Plaintiffs' Property.

Plaintiffs submit the Ordinance created a highway right-of-way that burdened their Property and created a governmental interest in its Property as a matter of law. This interest is cemented with the specific designation and location of the right-of-way, the County's express property reservation, the County's certainty of acquisition, and the stiff legal penalties for any change of use for the sole purpose of reducing acquisition costs. Plaintiffs are entitled to Summary Judgment that the Ordinance is a covered loss under the Loan Policies.

2. **Exclusion #1 (Governmental Regulation)**. Chicago Title seeks to prove this exclusion by once again asserting the Ordinance is just a zoning and land use regulation. "Insurance policy exclusions are construed "most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability." *Lyons v. Fidelity Nat. Title Ins. Co.*, 415 S.C. 115 (Ct. App. 2015).

[2] Plaintiff Memorandum Exhibit 1.

In support of its argument, Chicago cites to *Danforth v. United States* and a couple treatises that say designating property for future public use, or recording maps for future public development, does not constitute a taking. However, whether there is a "taking" is not the subject of Exclusion #1. Indeed, Exclusion #1 relates only to general zoning and land use regulations; Exclusion #2 pertains to takings.

Chicago also relies on numerous cases from other states, which upon closer review, reveal that the subject laws were mere use restrictions and nothing more: the New Jersey case of *Aldrich v. Hawrylo* relates to set-back restrctions in a subdivision; the Louisiana case of *Dyer & Moody v. Dynamic Constructors* pertains to a law prohibiting new construction from altering the natural flow of water; the federal case interpreting North Carolina law of *Haw River land & Timber v. Lawyers Title Ins.* addresses an ordinance protecting a flood plain buffer zone; and the Wyoming case of *Sonnett v. Fist American Title* refers to restrictions against operating a restaurant and tavern.

The authorities cited by Chicago Title again fail to address the facts of the instant case, namely that the Horry County Ordinance is vastly different than a mere land use regulation because (i) the Ordinance affirmatively creates a defined highway right-of way and governmental interest in the land for future acquisition that will occur, and (ii) the Ordinance's restrictions are solely designed to reduce acquisition costs and do not address any occupancy or zoning or dimensions or environmental concerns as those are described in Exclusion #1. Chicago Title seeks to stretch the meaning of Exclusion #1 to matters not contained in the exclusion's plain language and has cited to no case that supports such a stretch. To be sure, Exclusion #1 must be strictly construed against the title insurance company and Chicago Title has failed to prove that it applies to the Ordinance.

Finally, Chicago Title argues the exception to Exclusion #1 is not present because a notice of enforcement has not been recorded in the public records. Other title insurance companies have

already tried this argument in South Carolina on at least two occasions and have failed both times. In *Lyons v. Fidelity Nat. Title Ins. Co.*, 415 S.C. 115 (Ct. App. 2015), the title insurance company argued the exception to the governmental regulation exclusion was not met because the subject resolution was not recorded in the public records. The *Lyons* Court found the resolution was a public record even though it was not filed in the Register of Deeds and therefore the exception applied and the claim was not excluded from coverage.

The *Lyons* Court relied on Judge Harwell's reasoning found in *Whitlock v. Stewart Title Guar. Co.*, 2011 WL 4549367 (S.C.D. 2011). In *Whitlock*, the title insurance company made the same argument as Chicago Title does in this case. Judge Harwell rejected this argument as follows:

> Exclusion Number 1 does not apply, by its specific terms, to the situation in the case at bar. First, the exclusion provides that it does not apply to "violations or the enforcement of these matters which appear in the public records at Policy Date." It is uncontroverted that, as shown by the affidavits of the real estate attorney (Exhibit F to Docket Entry # 18) and title examiner (Exhibit E to Docket Entry # 18), the spoilage easement was of record and available for title examination in South Carolina before the issuance of this policy.
>
> As to the unrecorded Horry County Resolution, Judge Harwell similarly found the "exclusion does not apply as a matter of law because the term 'public record', although defined, is patently ambiguous and should be construed as covering local zoning regulations".

In this case, the Ordinance is recorded in the Register of Deeds office and is clearly a public record as defined in the Policies. Moreover, Plaintiffs have submitted an affidavit from its expert, title examiner David Turner, reflecting the Ordinance is a public record and freely available for inspection.[3] Because the Ordinance creates property rights is not a mere land use restriction, Exclusion #1 does not apply. Even if Exclusion #1 applies, which Plaintiffs deny, the Ordinance is recorded in the public records and thus meets the exception to the exclusion pursuant to *Lyons* and *Whitlock* as a matter of law.

[3] Defendant's Summary Judgement Exhibit #2.

3. **Exclusion #2 (Eminent Domain).** Chicago Title concedes the Ordinance is not a condemnation. As such, neither this Exclusion nor its public records exception is relevant.

4. **Exclusion #3(d) (Defect Attaching Subsequent to Date of Policy).** Chicago Title contends this Exclusion bars coverage for loss or damage suffered as a result of the condemnation lawsuit that was filed after the Date of Policy. Plaintiffs have already conceded that any award from the condemnation action is an offset to their claimed damages resulting from the effect of the Ordinance as of the Date of Policy in this case. Therefore, this Exclusion as to the condemnation proceeds is irrelevant.

5. **Exclusion #3(c) (No Loss or Damage).** In its argument, Chicago Title offers multiple dates to measure Plaintiffs' loss, but none of these dates correspond to the Date of Policy, which is the proper date to measure damages. By offering so many dates to measure damages, Chicago Title essentially admits the Loan Policies are vague as to this issue. "Insurance policy exclusions are construed "most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability." *Lyons v. Fidelity, supra.*

First, Chicago Title asserts Jericho State suffered no loss because the current amount of the First Mortgage exceeds the current value of the property. In this regard, Chicago Title wishes to measure damages as of today. Second, Chicago Title claims Jericho State suffered no loss as of the date of foreclosure because its bid exceeded the Second Mortgage debt. Chicago Title's argument omits, importantly, that the property (i) remained subject to the First Mortgage at foreclosure and (ii) remained subject to a property defect that remained unknown to Jericho State at that time.[4] In this regard, the value of the property at foreclosure would be measured by the $9m bid plus the amount of the First Mortgage debt, which was approximately $18.9m (beginning

[4] In its Response, Chicago Title refers to the 2007 foreclosure hearing transcript, in which Plaintiff's counsel said there were no liens or encumbrances on the Property. This only supports Plaintiffs' position that the effect of the Ordinance was not known until 2008 as shown by the undisputed facts and as previously argued in Plaintiffs' initial memorandum.

balance + interest – cure payments). *See, Arrow Bonding v. Warren*, 399 S.C. 603 (2012)(Master-In-Equity properly added the amounts of existing mortgages and liens to the judgment foreclosure bid price to determine property value at foreclosure sale).

With a property value of approximately $26.9m, Chicago Title is correct that Jericho State would have suffered no loss after taking into account the First Mortgage debt as of the foreclosure date – but *only* if there was no defect to the property. In other words, Jericho State paid $9m in satisfaction of its debt and took title to property that would have $9m remaining value/equity after deducting the First Mortgage debt. To the extent the title defect caused a 44% reduction in value (as such is described in Plaintiffs' initial memorandum), however, the property value at foreclosure drops to approximately $15m, which resulted in Jericho State owning the property with a *negative* value in light of the First Mortgage debt. Therefore, while Jericho State would have obtained full value of its debt through foreclosure if there was no defect, Jericho State lost the *entirety* of such value as a result of the defect. In fact, the lost value of Jericho State's debt/security at the foreclosure date ($7.49m) less an offset for the amount subsequently paid by SCDOT ($2.1m) measurably exceeds the Second Loan Policy liability limits of $4,263,888.00.[5]

Third, Chicago Title asserts the condemnation date is the date to measure damages. Chicago Title points to Jericho State's admission in the condemnation proceeding that the date of condemnation is the proper date to measure damages in that case. Of course this is true, as S.C. Code §28-2-440 requires that "in all condemnation actions, the date of valuation is the date of the filing of the condemnation notice." That statute, however, has no relevance here because this case pertains only to Chicago Title's insurance policies and is not a condemnation proceeding. As argued in Plaintiffs' initial memorandum, this is a contract case and the proper date to measure

[5] Plaintiffs acknowledge their damages can be calculated as of the foreclosure date but maintain this date is nowhere to be found in the Loan Policies. Moreover, because Chicago Title's analysis omits the effect of the defect and First Mortgage debt, its "chilling effect" argument is inapplicable.

loss is the Date of Policy because that is the date set forth in the insurance contracts and is the date that restores Plaintiffs to the position they occupied at the time the Policies were first issued. *Whitlock v. Stewart Title*, 399 S.C. 610 (2012).

Finally, Chicago Title asserts Plaintiffs have provided no proof of damages, or alternatively, that damages remain a material issue of fact. As set forth above and in the Plaintiffs' initial memorandum, Plaintiffs have submitted extensive and unambiguous proof of damages due to the Ordinance and highway right-of-way going through the middle of their property.

Plaintiffs acknowledge the amount of damages is an issue of fact and Plaintiffs therefore do not seek summary judgment as to this issue.

6. **Lynx Jericho Loss**. Chicago Title asserts Lynx Jericho cannot measure damages unless and until it forecloses on the property. This proposition is unsupported by any South Carolina law and is akin to asserting that a property owner cannot claim damages for a defect until it sells the property to establish a value. Lynx Jericho's damages are lost security under the First Mortgage. Lost security can be measured at a point in time, in this case the Date of Policy. On that date, the parties knew the value of the Property and knew the amount of the debt and therefore the court can calculate the amount of lost security due to a defect as of that date.[6] This is just the same as the property owner was permitted to do when calculating damages due to a defect as of the Date of Policy in *Whitlock v. Stewart Title*, 399 S.C. 610 (2012).

Chicago Title says the Loan Policies provide a detailed method of calculating loss under Policy Section 7(a). Plaintiffs agree. However, Chicago Title identifies at least three different dates to measure damages for Jericho State and another future, unknown and yet to be determined date for Lynx Jericho. Obviously, if the Loan Policies identify a date other than the Date of Policy to

[6] Plaintiff acknowledges that Lynx Jericho's damages can also be calculated on the foreclosure date, as the First Mortgage debt and property value can be calculated as of that date, but Plaintiffs' maintain the Date of Policy is the proper date to measure damages.

measure damages, or if the Policies mandate lender foreclosure as a prerequisite to calculating damages, Chicago Title surely would have quoted that provision of the Policies. It has not done so because there is no such thing in the Policies.

Therefore, the Loan Policies either establish that the Date of Policy is the proper date to measure damages, which Plaintiffs contend is proper, or the Policies are ambiguous in this regard. Because any ambiguities are resolved in favor of the insured and against the insurance company, and because the policies are construed to restore insures to the position they occupied at the time the Policies were first issued, the proper date to measure damages is the Date of Policy. *Whitlock v. Stewart Title*; *Lyons v. Fidelity, supra.*

7. **Exclusion 3(a) (Defect Assumed or Agreed to by Insured).** Chicago Title asserts Lynx Jericho "assumed or agreed to" the title defect because Lynx Jericho purchased the First Mortgage with actual knowledge of the defect. "Insurance policy exclusions are construed "most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability." *Lyons v. Fidelity, supra.*

Chicago Title's position finds no support in the Loan Polices or in South Carolina law. In fact, contrary to Chicago Title's argument, its Loan Policies insure risks "as of the Date of Policy". Nothing in the Loan Policies suggest that a title defect is excluded from coverage because the insured learns of it *after* the Date of Policy. Indeed, it is absurd to suggest there is no coverage for defects known before the policy and no coverage for those known after the policy, as there would be no risks left to insure. *See, CAN Enterprises v. SC Health and Human Services*, 296 S.C. 373 (1988) (Common sense and good faith are the leading touchstones of construction of the provisions of a contract).

Importantly, Lynx Jericho is the assignee of the First Mortgage, and as assignee, Lynx Jericho "stands in the shoes of its assignor...and should have all the same rights and privileges,

including the right to sue on the contract, as the assignor." *Twelfth RMA Partners v. National Safe*, 335 S.C. 635 (S.C. App. 1999). In fact, pursuant to Section 1(a)(2), Chicago Title can only apply this exception to Lynx Jericho by proving that REL, the assignor and predecessor insured, assumed or agreed to the defect as of the Date of Policy. While Plaintiffs are hesitant to quote Chicago Title's designated expert in this case, it should be noted that he states on this topic, "A mortgage assignee's knowledge of a defect in title or to the mortgage does not invoke Exclusion 3(a). The exclusion applies to defects assumed by the named insured at the time the policy is issued." J. Bushell Nielsen, *Title and escrow Claims Guide*, at §11.2.10 (2014 Ed.).

CONCLUSION

For the reasons set forth above and in Plaintiffs' initial memorandum, Plaintiffs are entitled to summary judgment as to liability on their breach of contract actions, with the issue of damages reserved for a future proceeding along with the cause of action for bad faith.

Fred B. Newby
C. Scott Masel
NEWBY, SARTIP, MASEL & CASPER, LLC
P.O. Box 808, Myrtle Beach, SC 29578
(843) 449-9417
Attorneys for Plaintiffs

7/29/16

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CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by email and/or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure and/or regular practice of the parties: **Demetri Jim Koutrakos** Attorney for Defendant via email and regular mail at P.O. Box 1390 Columbia, SC 29202

C. Scott Masel
Newby Sartip, Masel & Casper, LLC

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

Jericho State Capital Corp. of Florida,

Plaintiff,

vs.

Chicago Title Insurance Company,

Defendant.

Case No. 2013-CP-26-5530

Lynx Jericho Partners, LLC,

Plaintiff,

vs.

Chicago Title Insurance Company,

Defendant.

Case No. 2015-CP-26-1084
(Consolidated with the above case)

DEFENDANT CHICAGO TITLE INSURANCE COMPANY'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO: FRED B. NEWBY, ESQUIRE, AND SCOTT MASEL, ESQUIRE, Attorneys for Plaintiff:

PLEASE TAKE NOTICE that Defendant Chicago Title Insurance Company ("Chicago Title") hereby moves pursuant to Rule 56, SCRCP, for an order granting Chicago Title summary judgment in its favor as there are no genuine issues of material fact and Chicago Title is entitled to judgment in its favor as a matter of law. The Court should dismiss with prejudice all claims asserted against Chicago Title by Plaintiff Jericho State Capital Corp. of Florida ("Jericho State") and Plaintiff Lynx Jericho Partners, LLC ("Lynx Jericho").[1]

[1] On September 16, 2014, prior to these cases being consolidated, Chicago Title filed a motion for summary judgment in Case No. 2013-CP-26-5530, the case filed by Jericho State. This consolidated motion for summary judgment amends that motion.

Chicago Title's motion is based on the following:

1. Plaintiffs' claims, including any claimed loss related to the Ordinance, do not fall within the insuring provisions of the title insurance policies ("the Policies").

2. To the extent the Ordinance falls within the insuring provisions of the Policies, which Chicago Title denies, Plaintiffs' claims are excluded by Exclusion 1 of the Policies.

3. To the extent the Ordinance falls within the insuring provisions of the Policies, which Chicago Title denies, Plaintiffs' claims are excluded by Exclusion 2 of the Policies.

4. Plaintiffs' claims are excluded by Exclusion 3(d) of the Policies.

5. Plaintiffs either have no loss or have provided no evidence of loss.

6. Plaintiffs' claims are excluded by Exclusion 3(c) of the Policies.

7. Jericho State was fully paid and the policy amount of the Jericho State title insurance policy has been reduced to zero.

8. Lynx Jericho cannot suffer a loss, and loss cannot be measured, until Lynx Jericho forecloses the REL Mortgage.

9. Lynx Jericho and Jericho State cannot both recover under the Policies pursuant to Condition & Stipulation 10 of the Policies.

10. Plaintiffs' cause of action for breach of the covenant of good faith and fair dealing fails because it is not an independent cause of action separate from a claim for breach of contract. In addition, it fails because there is no coverage due under the Policies and Plaintiffs submitted no evidence to support their claims.

11. Plaintiffs' cause of action for bad faith fails because there is no coverage due under the Policies, there was a reasonable basis to contest coverage, and Plaintiffs submitted no evidence to support their claims.

This motion is supported by those matters set forth in, and the documents and evidence referenced in, the accompanying Memorandum of Law in Support of Chicago Title's Motion for Summary Judgment.

Respectfully submitted,

CALLISON TIGHE & ROBINSON, LLC

Demetri K. Koutrakos, SC Bar No. 11318
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 DEFENDANT CHICAGO TITLE INSURANCE COMPANY

August 18, 2016

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

Jericho State Capital Corp. of Florida,

Plaintiff,

vs.

Chicago Title Insurance Company,

Defendant.

Case No. 2013-CP-26-5530

Lynx Jericho Partners, LLC,

Plaintiff,

vs.

Chicago Title Insurance Company,

Defendant.

Case No. 2015-CP-26-1084
(Consolidated with the above case)

DEFENDANT CHICAGO TITLE INSURANCE COMPANY'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Defendant Chicago Title Insurance Company ("Chicago Title") submits this memorandum of law in support of its Motion for Summary Judgment.

INTRODUCTION

On July 9, 2002, Horry County recorded an ordinance amending its official map to show the future location of a proposed highway. The official map allows proposed future roadway improvements to be identified and provides opportunities for Horry County or other governmental entities to purchase property prior to building permits being issued as a means to reduce acquisition costs. The ordinance was indexed in the Register of Deeds only under Horry County, not under property owners that may be interested in the amendment to the official map.

Plaintiffs are two mortgagees insured under loan policies of title insurance issued by Chicago Title in 2006. The policies exclude, among other matters, zoning laws, ordinances, regulations, and eminent domain.

In 2009, three years after the policies were issued, a condemnation action was filed regarding the proposed highway. Prior to that, no third party, other than the owner and the mortgagees, had any interest in or claimed title to the subject property. In 2014, a jury awarded Plaintiffs $2,100,000 just compensation for the 2009 partial taking of the subject property.

The policies insure title to real property. The ordinance is a land planning instrument, it does not result in a taking, and does not affect or encumber title. The policies do not provide coverage because the ordinance is not a title defect, not an encumbrance, and it did not cause title to be unmarketable. Even if the ordinance, for sake of argument, falls within the insuring provisions of the policies, the policies exclude zoning laws, ordinances, regulations, eminent domain, and post-policy matters.

Plaintiffs failed to present evidence of loss, a required element of their case.

Finally, Plaintiffs presented no evidence to support their bad faith and breach of the implied covenant of good faith and fair dealing causes of action.

The Court should therefore grant Chicago Title's motion for summary judgment.

STATEMENT OF FACTS[1]

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.[2]

[1] The exhibits referenced herein are to exhibits filed in conjunction with Plaintiffs' motion for summary judgment.
[2] Plaintiffs' Ex. 5, *Deed*; Defendant's Ex. 1, *Plat*.

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.[3] 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 plan 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. Therefore, one searching title to the properties affected would not find the Ordinance.[4]

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[3] Plaintiffs' Ex. 3, *Ordinance* 88-202.

[4] Plaintiffs' expert abstractor testified the Ordinance was not indexed by the Register of Deeds in the grantor-grantee indices, except under the name of Horry County. *Turner Dep. P. 35.* Defendant's Ex. 2. He also testified a person searching and examining title to the Property would not find the Ordinance in the chain of title. *Id.* at 36.

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.[5] To finance its purchase of the Property, Peachtree obtained mortgage loans from R.E. Loans, LLC ("REL") and Jericho State Capital Corp. of Florida ("Jericho State").

Peachtree gave an $18,520,000.00 first mortgage covering the Property to REL ("REL Mortgage."). 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").[6]

Peachtree gave a $4,263,888.00 second mortgage covering the Property to Jericho State ("Jericho State Mortgage"). 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").[7]

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

4. **The Bridge and Zoning Letter.**

Prior to the closing, Jericho State's attorney provided Peachtree's attorney with a closing checklist.[8] One item required "[s]atisfactory resolution of the determination by 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.[9] The item was removed from the checklist.[10]

Another item on the checklist was the receipt of a zoning verification letter. On July 19,

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[5] Plaintiffs' Ex. 5, *Deed.*
[6] Plaintiffs' Ex. 6, *REL Mortgage*; Plaintiffs' Ex. 8 *REL Policy.*
[7] Plaintiffs' Ex. 7 *Jericho State Mortgage*; Plaintiffs' Ex. 9, *Jericho State Policy.*
[8] Plaintiffs' Ex. 26.
[9] *Id.*
[10] Defendant's Ex. 3, *Revised Checklist.*

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 planned highway or any restriction from use.[11]

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

According to a verified complaint filed by Jericho State in an 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.[12]

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").[13] 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 traverse 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.[14]

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[11] Defendant's Ex. 4, *Zoning Verification Letter and Fax.*
[12] Plaintiffs' Ex. 12, *PDD Lawsuit.*
[13] *Id.*
[14] *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 given by T & J Development of North Myrtle Beach.[15] A foreclosure hearing was held on October 30, 2007, at which counsel for Jericho State testified as follows:

> [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 [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).[16]

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.[17] 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.[18] 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 with the Horry County Court of Common Pleas 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").[19]

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[15] Defendant's Ex. 5, *Foreclosure Complaint*.
[16] Defendant's Ex. 6, *Foreclosure Transcript of Hearing* at 12.
[17] Plaintiffs' Ex. 10, *Foreclosure Order*.
[18] Plaintiffs' Ex. 11, *Master's Deed*.
[19] Plaintiffs' Ex. 12, *PDD Lawsuit*.

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, 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.[20]

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").[21] 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).

During the course of the Condemnation Action, Jericho admitted "[t]hat the date of taking for valuation purposes is December 15, 2009."[22] 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.[23]

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[20] Defendant's Ex. 7, *Stipulation of Dismissal of Zoning Rescission Action.*
[21] Defendant's Ex. 10, *Condemnation Notice and Amended Condemnation Notice.*
[22] Defendant's Ex. 11, *Landowner's Responses to Condemnor's First Requests to Admit, answer No. 1.*
[23] Defendant's Ex. 12, *Trial Transcript—Condemnation Action.*

Jericho State and Lynx Jericho claimed the condemnation of the Parkway Parcel resulted in a $4,010,000 loss. The SCDOT argued the loss totaled $998,000. 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.[24] Jericho State released its interest in the judgment proceeds to Lynx Jericho.[25]

10. Assignment of the REL Mortgage to Lynx Jericho.

REL assigned the REL Mortgage to Mortgage Fund '08, LLC by an instrument recorded May 16, 2008.[26] 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 (the "Liquidating Trust").[27] The Liquidating Trust assigned the REL Mortgage to Lynx Jericho by instrument recorded May 22, 2013.[28]

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.[29] Chicago Title denied that claim.[30]

12. Lynx Jericho's Title Insurance Claim.

Lynx Jericho submitted a claim on the Lynx Jericho Policy by letter dated June 21, 2013.[31] Chicago Title requested documents from Lynx Jericho as part of its investigation. Lynx

[24] *Id.* at 362; Defendant's Ex. 13, *Condemnation Judgement.*
[25] Plaintiffs' Ex. 21, *Payment to LAS.*
[26] Plaintiffs' Ex. 16, *Assignments.*
[27] Defendant's Ex. 8, *Bankruptcy Court Order.*
[28] Plaintiffs' Ex. 20, *Assignment to Lynx Jericho.*
[29] Defendant's Ex. 14, *Jericho State claim letter.*
[30] Plaintiffs' Ex. 22, *Jericho State claim denial letter.*
[31] Defendant's Ex. 15, *Lynx Jericho Claim Letter.*

Jericho provided documents to Chicago Title in December 2014. Chicago Title denied the claim on January 30, 2015.[32]

13. **Jericho State and Lynx Jericho's lawsuits.**

On July 29, 2011, Jericho filed an action against 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 of the complaint and asserting defenses therein.

On February 12, 2015, 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 of the complaint and asserting defenses therein.

ARGUMENT

The Ordinance is a land planning and zoning instrument that does not affect or encumber title to the Property. The Ordinance does not fall within the insuring provisions of the Policies. Even if, for sake of argument, the Ordinance falls within the insuring provisions of the Policies, the Policies exclude any loss related to the Ordinance and the Condemnation Action.

Moreover, Plaintiffs have suffered no loss and have failed to present evidence of loss, a required element of their case. Finally, Plaintiff is not entitled to relief on its breach of the implied covenant of good faith and fair dealing and bad faith because there is no evidence to support these claims.

[32] Plaintiffs' Ex. 23, *Lynx Jericho Denial Letter.*

1. **Rules of Construction.**

Insurance policies are subject to the general rules of contract construction. *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 514 S.E.2d 327, 330 (1999). When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. *Id.* The court must enforce, not write, contracts of insurance and must give policy language its plain, ordinary, and popular meaning. *Id.*

An insurer's obligation is defined by the terms of the policy and cannot be enlarged by judicial construction. *S.C. Ins. Co. v. White*, 301 S.C. 133, 390 S.E.2d 471, 474 (Ct. App. 1990). "[I]f the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend coverage that was never intended by the parties." *S.C. Farm Bureau Mut. Ins. Co. v. Wilson*, 344 S.C. 525, 544 S.E.2d 848, 850 (Ct. App. 2001). Courts are not authorized to pervert policy language or to exercise inventive powers to create an ambiguity where none exists. *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000). "The rule of strict construction against the insurer does not apply where the language used in the policy is so plain and unambiguous as to leave no room for construction. Nor does the rule of strict construction authorize a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exists." *S.S. Newell & Co. v. American Mutual Liability Ins. Co.*, 199 S.C. 325, 19 S.E.2d 463, 466 (1942).

2. **The Ordinance does not fall within the insuring provisions of the Policies.**

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

> 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;

The insured has the burden of showing a claim falls within coverage of an insurance contract. *Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 160 S.E.2d 523, 525 (1968). Plaintiffs 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." Plaintiffs cannot meet their burden. The Ordinance does not fall within these insuring provisions of the Policies.

b. <u>The Ordinance is a land planning tool.</u>

The adoption of an official map is a land planning tool available to counties and municipalities. The Ordinance directly concerns the official map of Horry County, as it amends the official map to show the future location of a proposed highway and to provide opportunities for Horry County or other governmental entities to purchase property and to reduce acquisition costs.

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 "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).

To the extent there is doubt as to whether the Ordinance is a land planning tool, the Ordinance is administered by the zoning administrator and the statutes authorizing the adoption of an official map, which are cited in the Ordinance, state an official map is "one of the several instruments of land use control authorized by this chapter." *Id.*; Ordinance 107-98 § 6.0.[33]

c. **The Ordinance does not affect title to the Property, it is not an encumbrance or defect, and does not render title unmarketable.**

Title insurance policies indemnify for loss related to title to the 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); 11 COUCH ON INSURANCE § 159:48 ("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 him or her 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.").

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."

[33] Plaintiffs' Ex. 1, *Ordinance 107-98*.

Our case law defines "encumbrance" as "a right of 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 have recognized 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 stated 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 (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 building or zoning laws are not encumbrances or defects affecting title; 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.

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 Sav. Bank v. Chicago Title Ins. Co.*, 649 N.E.2d 1123, 1126-28 (Mass. 1995) ("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 located in 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).

"A title insurance commitment or policy is not a zoning or building code due diligence report, or a substitute for that due diligence."[34] In that regard, as mentioned above, Jericho State requested a letter from the municipality confirming that a bridge would not be built.[35] 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, and Jericho State cannot rely on Chicago Title to stand in the place of that failure to complete that due diligence. The Policies simply do not cover zoning matters and use regulations. That is why Jericho State's attorneys requested additional information regarding the bridge and zoning in the first place. *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").

The Ordinance does not fall within the insuring provisions of the Policies.

3. **Plaintiffs' claims are excluded.**

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). "[I]nsurers have a 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.

[34] J. Bushnell Nielsen, *Title and Escrow Claims Guide*, at 11-2 (2016 Ed.).
[35] Plaintiffs' Ex. 26, *Gwinn Email.*

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.

To the extent the Ordinance falls under the insuring provisions of the Policies, which Chicago Title denies, coverage is excluded by Exclusion 1, removing coverage against various forms of governmental regulation of the use of property, Exclusion 2, eliminating coverage for condemnation or eminent domain, and other exclusions.

a. **Any claimed loss related to the Ordinance is excluded by Exclusion 1.**

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 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 change in the dimensions or area of the land or any parcel of which the land is or was a part of;* or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy. (emphasis added).

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 referring to the map as a land planning tool, Plaintiffs will argue the purpose of the Ordinance is not to regulate use but rather to designate a right-of-way and transfer title. Plaintiffs will argue this exclusion applies to laws relating to land use only, not those affecting title itself, and Plaintiff will argue the Ordinance is not such a law.

However, as detailed below, a right of way could not have existed and title to that right of way could not have vested in any governmental entity until a condemnation action was filed, which is consistent with official map ordinance.[36] 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].

[36] The ordinance setting forth Horry County's right to adopt an official map, Ordinance 107-98, Plaintiffs' Ex. 1, *Ordinance 107-98*, 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) "exempt the land from the restrictions of the Official Map," (b) "issuance of desired permits with specified conditions," or (c) initiate appropriate action *to acquire* the property." (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) "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. (emphasis added). If a right of way already had been established, as Plaintiffs disingenuously contend, there would have been no need to condemn the Parkway Parcel or to provide the County with the ability to grant permits for construction.

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.[37]

The Ordinance is an attempt to control use of the Property. The Ordinance states its purpose is to provide opportunities for governmental entities to reduce "future acquisition cost" by "limiting development." The Ordinance is a zoning law or regulation that restricts, regulates, and prohibits "the occupancy, use, or enjoyment of the land," falling squarely within Exclusion 1(a).

The Ordinance is excluded by the plain meaning of Exclusion 1(a).[38]

b. <u>The exception to Exclusion 1 does not apply.</u>

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[39] of any "law, ordinance or governmental regulation," including "building and zoning laws, ordinances, or regulations." The

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[37] *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.").

[38] *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 "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 Land & Timber Co. v. Lawyers Title Ins. Corp.*, 152 F.3d 275 (4th Cir. 1998) (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 in order to get a zoning change were part of the zoning use conditions, not a declaration of restrictions, and therefore were excluded from coverage under Exclusion 1).

[39] "Enforcement" is defined as "The act of putting something such as a law into effect; the execution of a law; the carrying out of a mandate or command." *Black's Law Dictionary* 528 (6th ed. 1990).

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 found 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 the 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." Because there was never a violation,[40] 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 the Ordinance. 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 Land & Timber Co.*, 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.").

[40] "Violation" is defined as "Injury; infringement; breach of right, duty or law. The act of breaking, infringing, or transgressing the law. Rabon v. South Carolina State Highway Dept., 258 S.C. 154, 187 S.E.2d 652, 654." *Black's Law Dictionary* 1570 (6th ed. 1990)."

The Ordinance does not set forth a notice of enforcement of its own provisions. The Ordinance is not notice of any violation or alleged violation of its own terms. Therefore, the exception to Exclusion 1 does not apply.

c. Plaintiffs' claims are excluded by Exclusion 2.

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 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 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).

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

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

d. The exception to Exclusion 2 does not apply.

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 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, "The 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. 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 in order 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 of the owners of the land being condemned, contain a legal description for 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.[41]

The Parkway Parcel had not been condemned on the effective dates of the Policies—July 25, 2006. The SCDOT accordingly would have had no reason to file the Condemnation Action if the Parkway Parcel had already been condemned on July 25, 2006. If the Parkway Parcel had

[41] S.C. Code Ann. §§ 28-2-220; 28-2-230. *See also Carolina Power & Light Co. v. Copeland*, 188 S.E.2d 188, 258 S.C. 206 (1972); *City of North Charleston v. Claxton*, 315 S.C. 56, 431 S.E.2d 610 (1994); *City of Folly Beach v. Atlantic House Properties, Ltd.*, 321 S.C. 241, 467 S.E.2d 928 (1996).

already been taken, Peachtree would not have offered in 2007 to convey the Parkway Parcel to Horry County;[42] Jericho State's foreclosure counsel would not have testified in 2007 that there were no liens or encumbrances on the Property;[43] Jericho State would not have alleged in 2009 in the Zoning Rescission Action that it was the owner of the Parkway Parcel;[44] the SCDOT would not have alleged in 2009 in the Condemnation Action that Jericho State was the owner of the Parkway Parcel;[45] and Jericho State's 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."[46]

Plaintiffs allege a taking occurred by the recording of the Ordinance. That claim is without merit because 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.[47]

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.* The master found no taking occurred. *Id.*

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.

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[42] Plaintiffs' Ex. 12, *PDD Lawsuit*
[43] Defendant's Ex. 6, *Foreclosure Transcript of Hearing* at 12.
[44] Plaintiffs' Ex. 12, *PDD Lawsuit*.
[45] Defendant's Ex. 10, *Condemnation Notice and Amended Condemnation Notice*.
[46] Defendant's Ex. 12, *Trial Transcript—Condemnation Action* at 32.
[47] "The adoption, filing, or recording of maps or plans for future roadway development does not constitute a taking." 2A *Nichols On Eminent Domain* §6.01[17][b], at 6-93 (3rd ed. 2004).

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. [48]

[48] The 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). 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 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.").

In any event, 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.

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

e. **Plaintiffs' 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 Plaintiffs as result of the condemnation is therefore excluded.

4. **Plaintiffs either have no loss or have not provided evidence of loss.**

a. **Plaintiffs' claims are excluded by Exclusion 3(c).**

The Policies specifically exclude coverage for certain matters which result in no loss or damage to an insured claimant. More specifically, the Policies exclude "3. Defects, liens, encumbrances, adverse claims or other matters . . . . (c) resulting in no loss or damage to the insured claimant."

Jericho State acquired title to the Property after foreclosing its second mortgage lien, subject to the $18,520,000.00 REL Mortgage, an exception in the Jericho State Policy. The amount due on the REL Mortgage exceeds $34,000,000.00.[49] According to Plaintiffs' appraisals,

[49] Defendant's Ex. 16, *Lynx Jericho First Supplemental Responses to Interrogatories.*

the value of the Property, even without the loss of the Parkway Parcel, does not come close to the original balance of the REL Mortgage.[50] Accordingly, Jericho State has not suffered a loss.

In addition, Plaintiffs have been compensated for any loss. Any loss Plaintiffs claim to have suffered was compensated by the jury award in the Condemnation Action. Accordingly, Plaintiffs have suffered no loss or damage.

b. Jericho State was fully paid and the Jericho State Policy amount has been reduced to zero.

The order foreclosing the Jericho State Mortgage found the debt due under the note it secured totaled $7,490,000 as of December 3, 2007.[51] At the foreclosure sale on December 3, 2007, Jericho State was the successful bidder with a bid of $9,000,000.[52]

In *Preservation Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 751 S.E.2d 256 (2013), the insured lender bid at foreclosure an amount that exceeded the policy amount, but was less than the amount owed under the note. The South Carolina Supreme Court, in construing identical policy language, affirmed the trial court's order reducing the amount due on the note by the amount bid at the foreclosure, and accordingly found the policy amount was reduced to the remaining amount due on the note.

Here, Jericho State's bid exceeded not only the policy amount, but also exceeded the amount due on the note. Jericho State has been fully paid and has suffered no loss. Under the formula set forth by our Supreme Court, the amount of coverage remaining under the Jericho State Policy is zero.

This finding is consistent with the theory that "a plaintiff can have but one satisfaction of his debt." *Ayers v. Guess*, 217 S.C. 233, 235, 60 S.E.2d 315, 315 (1950). The courts in South

[50] Plaintiffs' Ex. 14, *Jayroe Appraisal December 15, 2009*; Defendant's Ex. 17, *Jayroe Appraisal June 9, 2015.*
[51] Plaintiffs' Ex. 10, *Foreclosure Order* at 11-12.
[52] Plaintiffs' Ex. 11, *Master's Deed.*

Carolina disfavor any activities or practices which have the effect of "chilling" the bidding at a foreclosure sale. *Ex parte Keller*, 185 S.C. 283, 292, 194 S.E. 15, 19 (1937) (courts should be "particularly jealous of the integrity of judicial sales" and all such judicial sales "must be made on free, fair and competitive bidding.").

Jericho State's $9,000,000 bid effectively chilled the bidding. To the extent there existed a bidder interested in buying the Property, Jericho State's bid exceeding the amount due under the note reduced the possibility of third-parties bidding.

c. Plaintiffs failed to provide evidence of loss and this failure is fatal to Plaintiffs' case.

Paragraph 7 of the Conditions and Stipulations of the Policies state they are "contract[s] of indemnity against actual monetary loss or damage."[53] Without a loss, there can be no viable claim under the Policies, contracts of indemnity. For Plaintiffs to show there exists liability, they must show they have suffered a loss. *Marble Bank v. Commonwealth Land Title Ins. Co.*, 914 F. Supp. 1252, 1254 (E.D.N.C. 1996).

Plaintiffs have no competent evidence to show they suffered a loss.

Plaintiffs will argue the correct date to measure loss is the date the Policies were issued. Chicago Title disagrees with that date of valuation. Nonetheless, Plaintiffs have provided no evidence, expert or otherwise, showing the defect they claim exists resulted in any loss on that date. Although Plaintiffs provided appraisals as of the date of condemnation and a subsequent date,[54] Plaintiffs failed to provide any evidence showing a loss on the date the Policies were issued. No loss can be shown also because Lynx Jericho, as mentioned below, has not foreclosed the REL Mortgage.

[53] Plaintiffs' Ex. 8 *REL Policy*; Plaintiffs' Ex. 9, *Jericho State Policy*.
[54] Plaintiffs' Ex. 14, *Jayroe Appraisal December 15, 2009*; Defendant's Ex. 17, *Jayroe Appraisal June 9, 2015*.

5. **Lynx Jericho cannot suffer a loss, and loss cannot be measured, until Lynx Jericho forecloses the REL Mortgage.**

Jericho State foreclosed its junior mortgage and became owner of the Property in 2008. Lynx Jericho holds the first mortgage, the REL Mortgage, and has not foreclosed. If Lynx Jericho were to foreclose on the REL Mortgage, it would come into title. To the extent Lynx Jericho has a valid claim, that claim would become ripe only when it comes into title.

An insured lender that has not yet taken title to real estate is unable to prove any defect in the title will cause it to suffer a loan loss. *See* J. Bushnell Nielsen, *Title and Escrow Claims Guide*, at 3-52 (2016 Ed.). "An insured mortgagee has not suffered an identifiable loss unless and until it forecloses its insured deed of trust and a title defect reduces the value of the property, thereby preventing the mortgagee from recouping its loan amount upon resale. If a title defect exists, but the value of the property is nevertheless sufficient to pay the mortgagee the loan amount, then there is no damage compensable under the loan policy." *First Citizens Bank & Trust Co. v. Stewart Title Guar. Co.*, 320 P.3d 406 (Colo. Ct. App. 2014).

Further, a claim concerning an alleged defect in title is not ripe under a loan policy until the lender has taken title to the property. Under a loan policy, the date of foreclosure is the date on which loss is measured. *See, e.g., Karl v. Commonwealth Land Title Ins. Co.*, 24 Cal.Rptr.2d 912, 920 (Cal Ct. App. 1993) ("At [foreclosure sale], the lender's note is extinguished and replaced by assets recovered on foreclosure: either cash as paid by a third party bidder or the realty as bought in by the foreclosing lender. It is now possible to measure the value of the

recovery by the lender, and we believe the loss which is insured by the title policy should be recognized as of that time.").[55]

Plaintiffs will rely on *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 732 S.E.2d 626 (2012), for the proposition that loss is measured on the date of the policy. In *Whitlock*, the South Carolina Supreme Court answered the question certified to it by a federal court and announced that loss under an owner's title insurance policy is measured as of the date of policy, not the date of discovery of the title defect, despite prevailing case law to the contrary. The court found the term "actual loss" in the residential owner's policy under consideration to be ambiguous. In so holding, the court stated "[w]here the insurance contract unambiguously identifies a date for measuring the diminution in value of the insured property or otherwise unambiguously provides for the method of valuation as a result of the title defect, such date or method is controlling." The residential owner's policy at issue in *Whitlock* did not define actual loss and set forth no method of valuation; therefore, the court found the residential owner's policy to be ambiguous.

Here, the Policies unambiguously provide a method of valuation:

> 7. DETERMINATION AND EXTENT OF LIABILITY.
>
> This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

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[55] *See also Associated Bank, N.A. v. Stewart Title Guar. Co.*, 2012 WL 3067895, at *5 (D. Minn. 2012) ("[T]he majority of courts considering the [date of valuation] issue have held that such loss cannot be measured until the note has been repaid and the security for the mortgage is shown to be inadequate ... The majority view comports with the nature of a title insurance policy."); *Marble Bank v. Commonwealth Land Title Ins. Co.*, 914 F. Supp. 1252 (E.D.N.C. 1996) ("Since a lender suffers loss only if the note is not repaid, the discovery of an insured-against lien does not trigger recognition of that loss. Further, even though the lender's note is in default, an anticipated loss cannot be measured until completion of foreclosure because only then is there certainty the lender will not be paid in full. Consequently, it is clear that in the typical case the earliest a loss can be claimed on a lender's policy is at the time of completion of foreclosure."); *Hodas v. First American Title Ins. Co.*, 696 A.2d 1095, 1097 (Me. 1997) ("The presence of a title defect immediately results in a loss to the holder of a fee interest since resale value will always reflect the cost of removing the defect. In contrast, the holder of a loan policy incurs a loss only if the security for the loan proves inadequate to pay off the underlying insured debt due to the presence of undisclosed defects."); *Blackhawk Prod. Credit Ass'n v. Chicago Title Ins. Co.*, 423 N.W.2d 521, 525 (Wis. 1988) (holding a mortgagee's insured loss is sustained only if the "mortgagee's debt is not repaid and the security for the mortgage proves inadequate," so the loss must be measured as of that date).

(a) The liability of the Company under this policy shall not exceed the least of:
(i) the Amount of Insurance stated in Schedule A, or, if applicable, the amount of insurance as defined in Section 2 (c) of these Conditions and Stipulations;
(ii) the amount of the unpaid principal indebtedness secured by the insured mortgage as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time the loss or damage insured against by this policy occurs, together with interest thereon; or
(iii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.
(b) In the event the insured has acquired the estate or interest in the manner described in Section 2(a) of these Conditions and Stipulations or has conveyed the title, then the liability of the Company shall continue as set forth in Section 7(a) of these Conditions and Stipulations.
(c) The Company will pay only those costs, attorneys' fees and expenses incurred in accordance with section 4 of these Conditions and Stipulations.

Unlike the residential owner's policy in *Whitlock*, the Policies, which are loan policies, provide a detailed method of calculating loss, which cannot be ascertained until an insured lender forecloses or acquires title after foreclosure. Accordingly, the Policies are not ambiguous.[56]

Plaintiffs will argue the Condemnation Action and the jury's award therein did not provide them full just compensation for the taking of the Parkway Parcel because the valuation date of the taking was December 15, 2009. However, Plaintiffs conceded that issue in that litigation, instead of arguing an earlier date should have been used.[57] Plaintiffs should have raised this issue in the Condemnation Action. Instead of looking to the constitutionally

[56] Plaintiffs will argue Chicago Title mistakenly chose the date of the condemnation action as the date of valuation. However, it is Plaintiffs' burden to establish its claimed loss. Plaintiffs' motion for summary judgment was the first time Chicago Title was made aware Plaintiffs contended the date of loss is the date the Policies were issued. Plaintiffs provided expert appraisals as of the date of the condemnation. That is why Chicago Title provided expert appraisals for the same date. Nonetheless, the date of the policy is not the correct valuation date for loss under a loan policy.

[57] Defendant's Ex. 11, *Landowner's Responses to Condemnor's First Requests to Admit, answer No. 1.* Plaintiffs' claims or argument that a taking occurred earlier are also barred under the doctrine of collateral estoppel or res judicata. Plaintiffs should have raised this issue in the Condemnation Action. *See Laughon v. O'Brailis*, 360 S.C. 520, 527, 602 S.E.2d 108, 112 (Ct. App. 2004) ("It is a fundamental principle of jurisprudence that material facts or questions which were directly in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form that the issue may take in the subsequent action.").

responsible party, the SCDOT, to provide just compensation, Plaintiffs now improperly seek additional just compensation from Chicago Title for a matter clearly not covered by the Policies.

6. Lynx Jericho and Jericho State cannot both recover under the Policies.

If the Court were to determine Chicago Title was required to pay a loss, the Policies state such loss would be payable to only one insured. Conditions & Stipulations 10 provides a payment to the senior lender is deemed to be a payment for the benefit of the junior lender also, negating the possibility that the insurer will pay both insureds for the same loss:

> LIABILITY NONCUMULATIVE.
>
> If the insured acquires title to the estate or interest in satisfaction of the indebtedness secured by the insured mortgage, or any part thereof, it is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy.

When an insurer has policies in favor of two lenders and makes a claim payment, the money is delivered to the senior lienholder. In this case, if Chicago Title was obligated to make a loss payment, that money would be paid to Lynx Jericho as the holder of the senior lien. That payment would simultaneously extinguish the claims on both Policies.

7. Chicago Title is entitled to summary judgment on Plaintiffs' breach of the covenant of good faith and fair dealing and bad faith claims as there is no coverage due under the Policies, there was a reasonable basis to contest coverage, and Plaintiffs submitted no evidence to support their claims.

a. Breach of the implied covenant of good faith and fair dealing.

Plaintiffs assert claims against Chicago Title for breach of the implied covenant of good faith and fair dealing. The implied covenant of good faith and fair dealing, however, "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. 2004). On that basis alone, Chicago Title is entitled to summary judgment.

In addition, there is no breach of an implied covenant of good faith "where a party to a contract has done what provisions of the contract expressly gave him the right to do." *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995). Here, Plaintiffs submitted claims to Chicago Title. Chicago Title investigated the claims and properly denied the claims. There is no coverage under the Policies and coverage was properly denied. Finally, Plaintiffs submitted no evidence to support their claims of a breach of the covenant of good faith and fair dealing. Accordingly, Plaintiffs' claims for breach of the implied covenant of good faith and fair dealing are without merit.

b. **Bad Faith.**

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, 466 S.E.2d 727 (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. South Carolina Medical Malpractice Liability Joint Underwriting Ass'n*, 347 S.C. 642, 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 company to deny certain insurance benefits . . . '[and] [I]f there is any reasonable ground for contesting the claim, there is no bad faith'").

As mentioned above, there is no coverage under the Policies. Because there is no coverage under the Policies, Plaintiffs' bad faith causes of action fail as a matter of law.

Moreover, Chicago Title had a reasonable basis to contest Plaintiffs' claims.[58] Plaintiffs' claims are based on an ordinance and eminent domain. The Policies expressly exclude such matters from coverage under exclusions that specifically reference ordinances and eminent domain. The exceptions to those exclusions are not implicated.

Accordingly, Chicago Title is entitled to summary judgment on Plaintiffs' claims for bad faith.

CONCLUSION

The Policies do not provide coverage for the Ordinance because the Ordinance is neither a title defect nor an encumbrance and the Ordinance did not make title to the Property unmarketable. Zoning ordinances and resolutions are not title matters, and the Policies place on parties other than Chicago Title the burden of investigating and complying with local ordinances and land use resolutions affecting the Property.

Even if the Court were to conclude the Ordinance or the Condemnation Action falls within the insuring provisions of the Policies, such matters are not covered as the Policies exclude zoning laws, ordinances, and regulations, eminent domain, post-policy events, and matters resulting in no loss or damage.

Accordingly, there is no coverage afforded to Plaintiffs.

[58] See Affidavits of J. Bushnell Nielsen. Defendant's Ex. 18 and Ex. 19.

Because there is no coverage under the Policies, Chicago Title could not have committed bad faith and could not have violated the covenant of good faith and fair dealing. For sake of argument, even if there is coverage, Chicago Title had a good faith basis to contest Plaintiffs' claims.

The Court should therefore grant Chicago Title's motion for summary judgment.

Respectfully submitted,

CALLISON TIGHE & ROBINSON, LLC

Demetri K. Koutrakos, SC Bar No. 11318
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 DEFENDANT CHICAGO TITLE INSURANCE COMPANY

August 18, 2016

1020.566\Memo-SJM2

STATE OF SOUTH CAROLINA)) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Jericho State Capital Corp. of Florida,)) Plaintiff,) v.)) Chicago Title Insurance Company,)) Defendant.)) Lynx Jericho Partners, LLC,)) Plaintiff,) v.)) Chicago Title Insurance Company,)) Defendant.)	C/A: 2013-CP-26-5530 C/A: 2015-CP-26-1084 (Consolidated with the above case)

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CLERK C. COURT

PLAINTIFFS' RESPONSE
TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In this Response to Defendant's Motion for Summary Judgment, Plaintiffs hereby incorporate their prior memorandums and exhibits as to Plaintiffs' contract actions, as these matters have already been fully briefed by the parties as part of Plaintiffs' Motion for Summary Judgment. Defendant Chicago Title also seeks summary judgment as to Plaintiffs' bad faith claims, to which Plaintiffs herein respond as follows.

Plaintiffs contend Chicago Title denied their claims unreasonably and in bad faith and suffered damages as a result of that denial. "Bad faith is a knowing failure on the part of the insurer to exercise an honest and informed judgment in processing a claim.... [A]n insurer acts in bad faith where there is no reasonable basis to support the insurer's decision." *American Fire & Cas. Co. v. Johnson*, 332 S.C. 307, 311 (Ct.App.1998); *Cock–N–Bull Steak House v. Generali Ins. Co.*, 321

S.C. 1 (1996). An insured may recover damages for a bad faith denial of coverage if he or she proves there was no reasonable basis to support the insurer's decision to deny benefits under a mutually binding insurance contract. *Varnadore v. Nationwide Mut. Ins. Co.*, 289 S.C. 155 (1986); *Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336 (1983). An insurer is not insulated from liability for bad faith merely because there is no clear precedent resolving a coverage issue raised under particular fact of the case. *Mixson v. American Loyalty Ins. Co.*, 348 S.C. 394 (2002).

Defendant Chicago Title denied Plaintiffs' claims by separate letters. Jericho State's claim was denied by letter dated December 3, 2009, in which Chicago Title based its denial on two grounds.[1] Subsequently, by letter dated January 30, 2015, Chicago Title denied Lynx Jericho's claim based on different grounds, despite the same underlying property defect.[2] Plaintiffs contend the facts show the grounds for denial as asserted by Chicago Title in these letters are inconsistent with a plain reading of its own policy, a plain reading of the Ordinance and the laws of South Carolina. As such, there are genuine issues of material fact as to whether Chicago Title acted unreasonably and in bad faith.

LEGAL STANDARD

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994).

In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary

[1] Plaintiffs' Summary Judgment Exhibit 22, and attached hereto.
[2] Plaintiffs' Summary Judgment Exhibit 23, and attached hereto.

judgment. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326 (2009). Even if there is no dispute regarding the facts, summary judgment should be denied if there is a dispute as to the conclusions to be drawn therefrom. *Dowling v. Home Buyers Warranty Corp.*, 303 S.C. 295 (1991).

ARGUMENT

While both Plaintiffs sought coverage for the same property defect created by the Ordinance, Chicago Title denied each claim on different grounds. As such, Plaintiffs address each denial separately.

1. BAD FAITH REJECTION OF JERICHO STATE'S CLAIM.

Relying on Exclusion #1 (Governmental Regulation), Chicago Title denied Jericho State's claim as follows: "the Company denies any duty to defend or indemnify under the policy. There is no evidence in the public records of a notice of the enforcement of the ordinance or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy. Further, you have not provided any information requested relative to proof of loss."

Essentially, Chicago Title concluded there is no evidence in the public records giving notice of the County's enforcement of the Ordinance, despite having been provided a copy of the Ordinance as recorded in Horry County Deed Book 2497, Page 0986.[3] This contradicts South Carolina law. As argued previously, South Carolina courts have held that the public records exception applies when notice is provided by an unrecorded Horry County resolution because even unrecorded resolutions are considered public records. *See, Lyons v. Fidelity Nat. Title Ins. Co.*, 415 S.C. 115 (Ct. App. 2015); *Whitlock v. Stewart Title Guar. Co.*, 2011 WL 4549367 (S.C.D.

[3] Defendant's Exhibit 14 (Jericho State's notice of claim letter)

2011). The instant case goes much further, as Horry County has given notice of its enforcement of the Ordinance by recording it in the Deed Books at the County's Register of Deeds, which squarely fits within the Policies' definition of "public records". While Chicago Title asserts different interpretations from different states[4], it has a duty to handle South Carolina claims under South Carolina law and the company's obvious failure to do so is evidence of unreasonableness and bad faith.

Chicago Title also denied Jericho State's claim for lack of proof of loss. However, this is not a valid reason to deny the claim because S.C. Code 38-59-10 provides:

> When an insurer under an insurance policy requires a written proof of loss after the notice of the loss has been given by the insured or beneficiary, the insurer or its representative shall furnish a blank to be used for that purpose. If the forms are not furnished within twenty days after the receipt of the notice, the claimant is considered to have complied with the requirements of the policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss written proof covering the occurrence, character, and extent of the loss for which claim is made. The twenty-day period after notice of loss to furnish forms applies to all types of insurance unless a lesser time period is specifically provided by law.

In this case, Chicago Title did not provide such a form. Thus, Jericho State is deemed, as a matter of law, to be in compliance with the notice of loss requirement. Chicago Title is presumed to know the law, and as such, its denial of Jericho State's claim on this basis is unreasonable and is clear evidence of bad faith.

2. **BAD FAITH REJECTION OF LYNX JERICHO'S CLAIM**

Chicago Title denied Lynx Jericho's claim on several different grounds, none of which served as a basis in their previous letter denying Jericho State's claim. First, Chicago Title denied

[4] Chicago suggests in its memorandum, based on case law from two other states, that in addition to the county enacting the Ordinance and subsequently giving notice by filing it in the Deed Books, the public records exception only applies if the county again files a second notice stating that it is enforcing the Ordinance. Not only is this theory inconsistent with *Lyons* and *Whitlock*, and further ignores the fact that recording the Ordinance is the County's notice that it will enforce its terms (up to and including jail time), it is illogical. "The court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something." *Cowan v. Allstate Ins. Co.*, 351 S.C. 626 (Ct.App. 2002)(rev'd on other grounds).

the claim because it asserted the Ordinance is not a defect, lien or encumbrance on the Property but was instead merely "a proposed route" and the county did not assert "ownership" of the property. As argued previously, denial on this basis is inconsistent with South Carolina law and a plain reading of the Ordinance. Again, Horry County designates its interest in the Property as a "right-of-way" for acquisition that will occur, and well established South Carolina law defines encumbrance as a third party's interest in the land, which although consistent with the passing of fee, is a burden depreciative of the land's value. *Martin v. Floyd*, 282 S.C. 47 (S.C. App. 1984); *Truck South v. Patel*, 339 S.C. 40 (2000); *Marathon Finance Co v. HHC Liquidation Corp.*, 325 S.C. 589 (S.C. App 1997). Chicago's failure to read the plain language of the Ordinance, and then to invent a requirement that an encumbrance must include a third parties' claim of property ownership, is evidence of unreasonableness and bad faith.

Second, Chicago Title denied Lynx Jericho's claim asserting the Ordinance is not a public record as defined in the Policies because it is not indexed to the property owner or property. However, this is wholly inconsistent with the plain language of Chicago Title's own Policies which define public records as those "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." In South Carolina, those records include Deed Books. *See*, S.C. Code §30-7-10. It is unreasonable for Chicago Title to ignore its own definition of public records and to ignore that South Carolina law recognizes that even unrecorded resolutions are public records. But it is even more unreasonable to manufacture a new indexing requirement not found in the definition as a basis to deny the claim. Plaintiffs contend denial on these grounds are evidence of unreasonableness and bad faith.

Third, Chicago Title denies the claim asserting Lynx Jericho has already been fully compensated for the diminution of value of the property through the condemnation process. As argued previously, this is based on Chicago Title's assertion that the date of loss is measured only on the condemnation date, which is a date nowhere to be found in the Policies. This arbitrary date is inconsistent with the plain language of its own policy language covering losses as of the Date of Policy, and is further inconsistent with South Carolina law holding that the proper date to determine damages is the policy date. This basis for denying the claim is again evidence of unreasonableness and bad faith.

Fourth, Chicago Title denied Lynx Jericho's claim under Exclusion 3(c) (Defect Not Known to Company and Not Recorded in the Public Records) because it again baldly asserts the Ordinance is not a public record. For the reasons set forth above and in previous arguments, Chicago's failure to follow South Carolina law, ignoring to its own definition of public records, and substituting arbitrary requirements not found in the Policies is evidence of unreasonableness and bad faith.

Moreover, Defendant's denial letter states Exclusion 3(c) also applies because the documents included an early version of a purchase agreement listing the ordinance on a schedule and information on an early version of a closing checklist pertained to the Carolina Bays Parkway. Presumably, Chicago Title identified these documents to show Lynx Jericho knew of the Ordinance prior to closing but Chicago Title did not. As previously argued, Lynx Jericho did not exist at that time and could not have possessed such knowledge. Moreover, there is no evidence that Lynx Jericho or its principals had any actual knowledge of the defect and Chicago Title's own agent was part of the very communications that Chicago Title references. In its denial letter, Chicago Title fails to apply its own definition of knowledge, which is limited to "actual

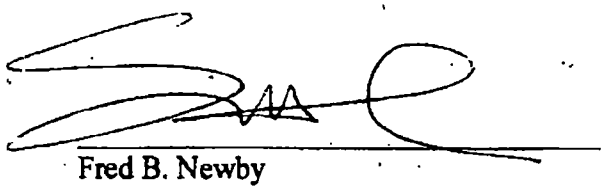
knowledge" only, and nonsensically attempts to impute knowledge from documents prepared or negotiated by its own agent while simultaneously denying its own knowledge of those very same documents. "It is well established that a principal is affected with constructive knowledge of all material facts of which his agent receives notice while acting within the scope of his authority." *Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp.*, 273 S.C. 306 (1979). This clearly erroneous analysis is evidence of unreasonableness and bad faith.

Finally, Chicago Title denied Lynx Jericho's claim based on Exclusion 3(a), claiming the defect was created, suffered, assumed or agreed to by Lynx Jericho several years *after* the Policy Date. As argued previously, this ignores well established South Carolina law (and as previously pointed out, the opinion of Chicago's own expert) that a mortgage assignee stands in the shoes of the assignor. This basis further ignores the plain language of Chicago's own Policy under Section 1(a)(2), which permit the carrier to utilize the knowledge of the assignor as of the date of policy but not the assignee. Finally, this rationale has the unconscionable effect of barring claims for coverage due to the insured's knowledge of a defect before the policy date as well as any knowledge of the defect that occurs after the policy date, effectively negating any coverage at all. This is unreasonable and inconsistent with South Carolina law and is evidence of Defendant's unreasonableness and bad faith.

CONCLUSION

As to Plaintiffs' bad faith claims, there is more than sufficient evidence reflecting a genuine factual dispute as to whether Chicago Title's grounds for denying Plaintiffs' claims were inconsistent with a plain reading of its own Policies, a plain reading of the Ordinance and the laws of South Carolina. Plaintiffs believe Defendant first decided to deny the claims, and only then

concocted its reasons for doing so. Based on the above and Plaintiffs' prior memorandums, Defendant's motion for summary judgment should be denied.



Fred B. Newby
C. Scott Masel
NEWBY, SARTIP, MASEL & CASPER, LLC
P.O. Box 808, Myrtle Beach, SC 29578
(843) 449-9417
Attorneys for Plaintiffs

Date: 8/28/16

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

2016 OCT -4 AM 8:54

Jericho State Capital Corp. of Florida,

Plaintiff,

vs.

Chicago Title Insurance Company,

Defendant.

Case No. 2013-CP-26-5530

Lynx Jericho Partners, LLC,

Plaintiff,

vs.

Chicago Title Insurance Company,

Defendant.

Case No. 2015-CP-26-1084
(Consolidated with the above case)

DEFENDANT CHICAGO TITLE INSURANCE COMPANY'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Defendant Chicago Title Insurance Company ("Chicago Title") submits this reply memorandum of law in support of its motion for summary judgment.

INTRODUCTION

In their response to Chicago Title's motion for summary judgment, Plaintiffs solely focus on Plaintiffs' bad faith claims. Plaintiffs' title insurance claims are not covered by the Policies; therefore, there can be no bad faith. Plaintiffs cannot show it was bad faith for Chicago Title to deny claims related to an ordinance and an eminent domain proceeding when the Policies specifically contain exclusions for claims based on ordinances and eminent domain proceedings.

Plaintiffs claim Chicago Title should have considered a United States District Court opinion that did not exist at the time Chicago Title made its coverage decision. Plaintiffs claim Chicago Title should have considered a South Carolina Court of Appeals opinion that did not exist at the time Chicago Title made its coverage decision and that has since been vacated. Plaintiffs also misconstrue Chicago Title's letters denying coverage.

Although it is their burden to do so, Plaintiffs presented no evidence to support their bad faith causes of action. On the other hand, Chicago Title presented unopposed affidavits from a title insurance expert showing Chicago Title had a reasonable basis to support its coverage decisions.[1]

The Court should therefore grant Chicago Title's motion for summary judgment.

ARGUMENT

1. Chicago Title's proper denial of Jericho State's claim.

a. Jericho State asserts Chicago Title failed to consider two judicial opinions in making its coverage decision, but those opinions were not issued until years later and one has since been vacated.

In arguing Chicago Title ignored South Carolina law in denying its claim, Jericho State references two judicial opinions, both of which were issued years after the coverage decision was made. One of those opinions has since been vacated.

Jericho State relies on *Lyons v. Fidelity Nat. Title Ins. Co.*, 415 S.C. 115, 781 S.E.2d 126 (Ct. App. 2015) in support of its argument that an ordinance is a public record under the Policies regardless of whether it is recorded with the register of deeds. In *Lyons*, the court found a county no-build resolution was a public record under the residential owner's policy at issue. That opinion did not exist when Chicago Title denied Jericho State's claim on December 3, 2009. In

[1] Defendant's Ex. Nos. 18 and 19.

any event, *Lyons* was vacated by the South Carolina Court of Appeals per an order entered August 26, 2016.[2]

Jericho State also relies on *Whitlock v. Stewart Title Guar. Co.*, 2011 WL 4549367 (D.S.C. Oct. 3, 2011), an unpublished opinion of the United States District Court for the District of South Carolina. That case was settled before entry of a final judgment. Like the court in *Lyons*, the judge in *Whitlock* found a county no-build resolution was a public record under the owner's policy at issue. *Whitlock*, which nonetheless is not binding authority, was decided almost two years after Chicago Title made its coverage decision.

At the time Chicago Title made its coverage decision, there was only one opinion the undersigned can find issued by any court in South Carolina concerning the term "public records" as used in a title insurance policy. In 2007, in a case tried in the United States District Court that went to final judgment, the court, correctly interpreting the phrase "public records" and finding no ambiguity, said "the title risk [at issue] is excluded unless the risk is recorded in those South Carolina records established to put purchasers of real property on constructive notice of matters relating to title ...." *Investors Title Ins. Co. v. Bair*, 2007 WL 6738625 at *5 (D.S.C. April 26, 2007). The District Judge in *Bair* concluded saying, the title examiner "properly limited her search to the matters of public record and did not consider local ordinances...." *Id.* at *6.

At the time Chicago Title made its coverage decision on Jericho State's claim, there existed case law from our sister state, North Carolina, regarding a case with similar circumstances and supporting Chicago Title's denial of coverage. In *Haw River Land & Timber Co. v. Lawyers Title Ins. Corp.*, 152 F.3d 275 (4th Cir. 1998), the court, in upholding the title insurance company's denial of coverage, held that even though an ordinance was recorded,

[2] The motion to vacate the *Lyons* opinion and the order vacating the *Lyons* opinion are collectively attached as Defendant's Exhibit 20.

"there is no evidence that any enforcement proceeding was ever initiated or 'notice' given to enforce the buffer zone established by [the town's] ordinances. Nor is there any indication that a notice of a violation . . . was ever issued."

Accordingly, Chicago Title could not have made its coverage decision in bad faith by ignoring judicial opinions that did not exist at the time.

b. <u>The Ordinance is not a public record</u>.

Horry County caused the Ordinance to be recorded with the Horry County Register of Deeds. However, 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.

At the time the coverage decision was made, there existed case law which provides that 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 Policy 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." Because a document not indexed properly cannot provide constructive notice, like the Ordinance at issue, it does not constitute a public record under the Policy. *See Manchester Fund, Ltd. v. First American Title Ins. Co.*, 753 A.2d 740 (N.J. Super. 1999) (finding that 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); S.C. Code Ann. § 30-9-40 (providing indexing 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, but 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 Ordinance is not an encumbrance or defect. The Ordinance does not affect title to the Property. The Ordinance is not a public record under the Jericho State Policy. The Ordinance therefore does not fall within the insuring provisions of the Jericho State Policy. If, for sake of argument, the Ordinance falls within the insuring provisions of the Jericho State Policy, it is excluded by Exclusion 1 regarding Ordinances. The exception to Exclusion 1 does not apply

because there never existed a notice of enforcement or a notice of a violation of the Ordinance. That simply never took place.

Accordingly, Chicago Title had a reasonable basis to deny Plaintiffs' claims.[3]

2. Chicago Title's proper denial of Lynx Jericho's claim.

a. The Ordinance is neither a defect nor encumbrance.

As to Plaintiffs' claims that Chicago Title wrongfully denied Lynx Jericho's claim on the basis that the Ordinance is not a defect, lien, or encumbrance on the Property, Plaintiffs assert Chicago Title invented a requirement that an encumbrance must include a third parties' claim of ownership. However, that requirement was not invented by Chicago Title, it was invented by our courts.

Our case law defines "encumbrance" as "a right of 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) (emphasis added).

Here, as thoroughly outlined in Chicago Title's prior memorandum, Horry County never claimed title to any part of the Property nor did any right of interest in the Property subsist in Horry County. Under our statutes and case law, the only way Horry County or any other governmental entity can take property is through a condemnation action. A condemnation action was filed years after the Policies were issued. Ordinance 88-202 purports to regulate the manner in which the Property can be used. It did not impair title and it did not vest Horry County with title to any part of the Property.

Accordingly, Chicago Title had a good faith basis for denying Plaintiffs' claims as the claims do not fall within the insuring provisions of the Policies.

[3] The same analysis applies to Lynx Jericho's claims.

b. **The Ordinance is not a public record.**

Regarding Lynx Jericho's contention that Chicago Title's denial of the claim on the basis that the Ordinance is not a public record was without reasonable basis, Lynx Jericho's claim was denied before the South Carolina Court of Appeals issued its opinion in *Lyons*, which opinion nonetheless has been vacated.

At the time Lynx Jericho's claim was denied, January 30, 2015, there existed two opinions from the United States District Court which considered whether a county resolution or ordinance is a public record: *Whitlock v. Stewart Title* and *Bair v. Investors Title*, both mentioned above. Both opinions are not binding precedent. *Whitlock v. Stewart Title* involved a residential owner's policy, not the loan policies involved in this case. *Bair v. Investors Title* supports Chicago Title's position. Chicago Title's position is also supported by case law around the country that existed at the time, all of which Chicago Title cited in its prior memorandum.

As referenced above, the Ordinance is not a public record under the Policies. Accordingly, Chicago Title had a good faith basis for denying Lynx Jericho's claim.

c. **Lynx Jericho was fully compensated by the condemnation award.**

Chicago Title did not commit bad faith by claiming Lynx Jericho will be fully compensated for diminution in value to the property through the condemnation process. Lynx Jericho claims its alleged loss should be measured on the date of the REL Policy, but that is simply an incorrect statement of the law.

Lynx Jericho's claim, to the extent it has one, which Chicago Title denies, does not ripen until such time that it forecloses on the collateral. Only when Lynx Jericho comes into title could there ever be a conceivable loss, to the extent there is coverage in the first place. Under a loan

policy, the date of foreclosure is the date on which loss is measured. *See, e.g., Karl v. Commonwealth Land Title Ins. Co.*, 24 Cal.Rptr.2d 912, 920 (Cal Ct. App. 1993).

Lynx Jericho failed to foreclose on the collateral. The date of Lynx Jericho's alleged loss—for a claim that is not covered in the first place—has not been established. In fact, Lynx Jericho admits the condemnation award is an offset to its claim.

Accordingly, Chicago Title had a reasonable ground for denying coverage on this basis.

d. **Exclusion 3(b).**

Lynx Jericho claims Chicago Title's denial under exclusion 3(b) based on a version of the contract of sale that lists the Ordinance was made in bad faith. Lynx Jericho misconstrues Chicago Title's denial letter. In its denial letter, Chicago Title states it requested from Lynx Jericho a copy of Lynx Jericho's loan file. Chicago Title stated that denial of the claim on this basis was qualified to the extent the documents provided by Lynx Jericho constitute Lynx Jericho's loan file.

e. **Exclusion 3(a).**

Chicago Title denied coverage under exclusion 3(a) because Lynx Jericho had knowledge of the claim at the time it purchased the REL Mortgage. Exclusion 3(a) bars coverage for matters "created, suffered, assumed, or agreed to" by an insured.

On January 8, 2013, the prior holder of the REL Mortgage, pursuant to a right of first refusal, gave Jericho State notice of its right to purchase the REL Mortgage for $447,725.[4] Lynx Jericho was ultimately created to buy the REL Mortgage, it purchased the REL Mortgage, and holds the REL Mortgage. Lynx Jericho has the power to foreclose and take title to the Property free and clear of other interests, including the rights of Jericho State.

[4] Plaintiffs' Ex. 17, *Trustee Notice-ROFR.*

Lynx Jericho "assumed" the effect of the Ordinance and the condemnation by purchasing the REL Mortgage. Lynx Jericho "agreed to" take subject to the condemnation of the highway property when it purchased the REL Mortgage for the offer price of $447,725. The Property is worth more than $447,725.[5]

An insured cannot establish that it has suffered "actual monetary loss or damage" due to a condition that the insured knew existed, while at the same time admitting that the Property is worth more than what the insured paid for it.[6] Exclusion 3(a) bars such claims, because an insured that has contracted to buy land at a certain price due to its known condition is not entitled to be "reimbursed" for a title condition that was factored into its purchase price.[7] Payment of such a claim would convert the policy from an indemnity contract to a windfall.[8]

Lynx Jericho paid far less for the REL Mortgage than the Property is worth, with full knowledge of the pending Condemnation Action and its effect on the value of the Property. Lynx Jericho therefore "created, suffered, assumed or agreed to" the effect of the condemnation when it purchased the REL Mortgage, and it did not suffer a compensable loss due to the condemnation.[9]

Chicago Title therefore had a good faith basis for denying Lynx Jericho's claim under Exclusion 3(a).

CONCLUSION

The Policies do not provide coverage for Plaintiffs' claims. Because there is no coverage under the Policies, Chicago Title could not have committed bad faith and could not have violated

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[5] Plaintiffs' Ex. 14, *Jayroe Appraisal December 15, 2009*; Defendant's Ex. 17, *Jayroe Appraisal June 9, 2015.*
[6] *Nielsen Aff.* ¶ 111, Defendant's Ex. 19.
[7] *Id.*
[8] *Id.*
[9] *Id.* ¶ 112.

the covenant of good faith and fair dealing. For sake of argument, even if there is coverage, Chicago Title had reasonable grounds to contest Plaintiffs' claims.

It is Plaintiffs' burden to show "there was no reasonable basis to support the decision of the insurance company to deny certain insurance benefits." *Varnadore v. Nationwide Mut. Ins. Co.*, 289 S.C. 155, 345 S.E.2d 711 (1986). Plaintiffs failed to meet their burden.

Instead, Chicago Title has shown there were reasonable grounds for contesting Plaintiffs' claim; therefore, there is no bad faith. *Id.*

For all the reasons stated herein, and in Chicago Title's prior memorandum of law, the Court should grant Chicago Title's motion for summary judgment.

Respectfully submitted,

CALLISON TIGHE & ROBINSON, LLC

Demetri K. Koutrakos, SC Bar No. 11318
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 DEFENDANT CHICAGO TITLE INSURANCE COMPANY

September 28, 2016

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COUNTY, S.C
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REGISTER OF DEEDS

COUNTY OF HORRY)
) ORDINANCE NO. 107-98
STATE OF SOUTH CAROLINA)

AN ORDINANCE PROVIDING FOR AN OFFICIAL MAP FOR THE UNINCORPORATED SECTIONS OF HORRY COUNTY.

WHEREAS, Title 6, Chapter 7, Code of Laws of South Carolina 1976 as amended, authorizes counties to prepare and adopt an Official Map in order to promote and preserve the public safety, economy, good order, appearance, convenience, prosperity, and general welfare.

WHEREAS, The Horry County Planning Commission after due notice has reviewed and conducted public hearings and recommends the adoption of the Official Map ordinance.

NOW, THEREFORE, PURSUANT TO THE AUTHORITY GRANTED BY THE CONSTITUTION OF THE STATE OF SOUTH CAROLINA, AND THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA, BE IT ORDAINED BY THE COUNTY COUNCIL OF HORRY COUNTY, SOUTH CAROLINA:

Section 1. The Horry County Code of Ordinances is hereby amended by the addition of the following language, to be entitled "Official Map:"

SECTION 1 - GENERAL

1.0 **AUTHORITY** - This Chapter is adopted pursuant to the authority granted under the South Carolina Code of Laws 1976, Title 6, Chapter 7, Article 13, as amended.

1.1 **PURPOSE** - It is the purpose of this ordinance to protect and promote the public safety, economy, good order, appearance, convenience, prosperity and general welfare, by designating and reserving future locations of streets, highways and public utility rights-of-way, public building sites and public open space for future public acquisition.

1.2 **JURISDICTION** - This Ordinance shall be effective in the unincorporated portions of Horry County, South Carolina.

1.3 **TITLE** - This Ordinance shall be known and may be cited as the "Official Map Ordinance of Horry County."

1.4 **SEVERABILITY** - If any section, subsection or clause of this ordinance shall be deemed to be unconstitutional or otherwise invalid, the validity of the remaining sections subsections and clauses shall not be affected thereby.

1.5 **CONFLICTING ORDINANCES REPEALED** - All ordinances or parts of ordinances in conflict with the provisions of this ordinance are hereby repealed.

1.6 **EFFECTIVE DATE** - This ordinance shall be effective upon third reading.

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SECTION 2 - DEFINITIONS

2.0 **WORDS TO HAVE CUSTOMARY MEANINGS** - Except as specifically defined herein, the word and phrases used in this ordinance shall have their customary meanings, as defined in a standard dictionary.

2.1 **INTERPRETATION OF TERMS** – The following terms shall be defined as follows:

Access – A way or means of approach to provide vehicular or pedestrian entrance or exit to a property.

Access Road – A street designed to provide vehicular access to abutting property and to discourage through traffic.

Activity Node (Center) - A location where numerous transportation trips are generated because of a dense, compact concentration of similar or complimentary land uses. Examples of Activity Nodes are office complexes or regional malls (shopping centers).

Condemnation – The exercise by a governmental agency of the right of eminent domain.

Eminent Domain – The authority of a government to take or to authorize the taking of private property for public use.

Encroachment – Any obstruction in a delineated right-of-way or easement.

Official Map – 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. A public building site is one on which a public building will be constructed using public funds.

Right-of-Way – Land reserved, used, or to be used for a road, cross walk, railroad, electric transmission lines, oil or gas pipeline, waterline, sanitary storm sewer or other public purpose.

Right-of-Way Cost – All costs of acquired property, special damages, tenant and lessee right, legal and appraisal fees, relocation assistance payments, and all other incidental expenses and costs incurred in connection with the acquisition of said right-of-way.

Setback – The perpendicular distance between the property line and the primary structure running the length of the distance, excluding uncovered porches, decks, and 18" overhangs.

Street – Any public or private way set-aside for vehicular travel. The word "street" shall include the words "roads", "roadway", and "thoroughfare".

1. **Arterial** – Carry longer-distance major traffic flows between important activity centers. Conveys traffic between centers. They are designed to provide high-speed.

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high level service for efficient movement of people and goods.

2. **Frontage Road** - A public or private drive which generally parallels a public street between the right-of-way and the front building setback line. The frontage road provides access to private properties while separating them from the arterial street.

3. **Collector** – A street which is used or intended to be used for moving traffic from minor or local streets to arterial streets including the principal entrance and circulation street or streets of a residential developer.

4. **Residential Street** - A street which carries no through traffic and which is used or intended to be used primarily for access to abutting residential lots.

5. **Cul-de-sac** – A local street having one (1) end open to traffic and the other end terminated by a circular vehicle turn-around.

6. **Alley** – A minor way intended to be used primarily for vehicle service access to the rear or side of properties otherwise abutting a street.

SECTION 3 - MAP CREATION

3.0 **PREPARATION AND MODIFICATION OF OFFICIAL MAP** - The Planning Commission may receive, make or cause to be made, maps showing the location of lines of proposed new, extended, widened and otherwise improved streets and highways; boundary lines of proposed new and enlarged sites for public buildings, public parks, public playgrounds, public utilities; and other public open spaces in the whole or in any portion of the unincorporated areas of Horry County. When complete, such maps shall become part of, or be considered, the Official Map for Horry County. As necessary, the County Council or Planning Commission may require that surveys showing the exact location of proposed, new, extended, widened or otherwise improved public use areas be completed.

From time to time, as appropriate, the Planning Commission may modify the Official Map. Such modifications shall require that maps showing the location of lines of proposed new, extended, widened and otherwise improved streets and highways; boundary lines of proposed new and enlarged sites for public buildings, public parks, public playgrounds, public utilities; and other public open spaces in the whole or in any portion of the unincorporated areas of Horry County. As necessary, the County Council or Planning Commission may require that surveys showing the exact location of proposed, new, extended, widened or otherwise improved public use areas.

SECTION 4 - MAP ADOPTION

4.0 **ADOPTION OF OFFICIAL MAPS** - Official Maps may show the location of existing or proposed public streets, highways and utility right-of-ways, public building sites and public open spaces. The Official Map may include the whole or any part or parts of the unincorporated area of Horry County. County Council shall certify the fact of the establishment of the Official Maps to the Clerk of the Circuit Court of Horry County. The Official Map may consist of any number of separate maps which need not be drawn

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to the same scale; however, such maps shall be indexed on a single map depicting unincorporated areas of Horry County.

4.1 **PUBLIC HEARING** - Before enacting the Official Map Ordinance, or amending the adopted Official Map, the County Council shall hold a public hearing thereon; notice of the time and place of which shall be published in a newspaper of general circulation in the county at least fifteen (15) days in advance of the scheduled public hearing date. For property owners whose property lies within an area to be reserved for public use, a letter of notification shall be sent informing them of the date, time and location of the public hearing.

4.2 **AMENDMENTS** - County Council may from time to time make additions to or modifications of the Official Map and this ordinance.

4.3 **PROCEDURES FOR ADDITIONS AND MODIFICATIONS** - The following procedures shall be followed in making additions and modifications: No change in or departure from the maps shall be made until such proposed changes or departures shall first have been submitted to the Planning Commission for review and recommendation. The Planning Commission shall have thirty (30) days within which to submit its report. If the Planning Commission fails to submit a report within the thirty (30) day period, it shall be deemed to have recommend the proposed amendment.

Once the Planning Commission recommendation has been received by the County Council, a public hearing shall be held.

SECTION 5 - REGULATION

5.0 **CONSTRUCTION OR ENLARGEMENT OF IMPROVEMENTS PROHIBITED** - After adoption of any Official Map by the county, no building, structure, or other improvement, shall hereafter be erected, constructed, enlarged or placed within the reservation area, or setbacks beyond such area, without prior exemption or exception as established by this ordinance or amendments hereto.

5.1 **CONFLICTING PERMITS** - No department, office or employee of Horry County vested with the duty or authority to issue permits or grant approval of the subdivision of land shall issue a permit or approval for uses, buildings, structures, or subdivision where the same would be in conflict with the reservations of the Official map. Any such permit or approval shall be null and void if issued in conflict with the provision of this ordinance.

5.2 **PROCEDURE FOR APPEALING BUILDING PERMIT AND LAND USE RESTRICTIONS** - In cases where any permit has been refused under this authority, the following appeal procedure may be utilized by any affected property owner:

a. An Appeal shall be presented to the Planning Commission.

b. The Planning Commission shall evaluate the appeal and make a report within thirty

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(30) days to the County Council and other appropriate public agency. If no report is made within thirty (30) days, the Planning Commission shall be deemed to have recommended that the appeal be granted.

5.2.1 **REVIEW – PLANNING COMMISSION**

The local Planning Commission shall recommend one of the following actions to the County Council:

a. Exempt the affected land from the restrictions of the Official map.

b. Issuance of desired permits with specified conditions.

c. Initiate appropriate action to acquire the property.

5.2.2 **OFFICIAL ACTION – COUNTY COUNCIL**

Upon receipt of the report of the Planning Commission, the County Council shall within one hundred (100) days:

a. Take official action to exempt the affected land from the restrictions of the Official map provided that such exemption shall have no effect on any applicable zoning restrictions pertaining to the property.

b. Take official action to authorize the issuance of the denied permits subject to specified conditions accepted by the owner; provided that such conditions shall not be contrary to any applicable zoning restrictions pertaining to permitted uses.

c. Either enter into an agreement to acquire or institute condemnation proceedings to acquire the affected property. Action to acquire such property may be instituted by the County Council or other appropriate public agency.

5.2.3 **TIME LIMITS ON COUNCIL ACTION** - Failure of the County Council to act within one hundred (100) days of the receipt of the report of the Planning Commission shall be deemed to constitute approval of the proposed appeal. Thereupon denied permits shall be issued upon demand.

5.2.4 **PUBLIC HEARING** – Before taking final action, County Council shall hold a public hearing as prescribed in Section 4-1 of this ordinance.

SECTION 6 - ADMINISTRATION, ENFORCEMENT, COMPLAINTS AND REMEDIES

6.0 **ADMINISTRATION AND ENFORCEMENT** - The Zoning Administrator shall administer and enforce this ordinance. The Zoning Administrator may be provided with the assistance of such other persons as the Planning Director my direct. It is the intent of this chapter that all questions of administration and enforcement shall first be presented to the Zoning Administrator and that such questions shall be presented to the Planning

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Commission only upon reference by or appeal from the decisions of the Zoning Administrator.

No building shall be issued a zoning permit or certificate of zoning compliance under the terms and conditions of the Official Map Ordinance of Horry County until all plans for the development proposal have been submitted to the Zoning Administrator for review and approval.

6.1 **FILING FEES** - A non-refundable fee of $150.00 will be charged for appeal and exemption of properties from the restrictions of the Official Map.

6.2 **COMPLAINTS REGARDING VIOLATIONS AND REMEDIES** - Whenever a violation of this ordinance occurs or is alleged to have occurred, any person may file a written complaint. Such complaint stating fully the causes and basis thereof shall be filed with the Zoning Administrator. The Zoning Administrator shall record properly such complaint, immediately investigate and take whatever action is necessary to assure compliance with the ordinance.

6.3 **REMEDIES** - In case any building or structure is proposed to be, or is erected, constructed, reconstructed, altered, maintained, or used; or any land is proposed to be or is used in violation of this ordinance, the Zoning Administrator or any other person aggrieved may in addition to other remedies provided by law institute an injunction, abatement, or any other appropriate action or proceeding to prevent, enjoin, abate, or remove, such unlawful erection, construction, reconstruction, alteration, maintenance, or use.

6.3 **PENALTIES FOR VIOLATION** - Any person violating any provisions of this ordinance shall be guilty of a misdemeanor, and upon conviction shall be imprisoned for a period not to exceed thirty (30) days and/or fined not more than five hundred ($500) dollars for each offense. Each day such violation continues shall constitute a separate offense.

Dated this _____ day of _____, 1998.

HORRY COUNTY COUNCIL

_____
Raymond J. Brown, Acting Chairman

_____ _____
Ray Skidmore, Jr., District 1 John Kost, District 2

_____
Chandler Brigham, District 4

_____ _____
Chandler C. Prosser, District 5 James R. Frazier, District 7

_____ _____

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Elizabeth D. Gilland, District 8

Ulysses Dewitt, District 9

Johnny Shelley, District 10

Janice Jordan, District 11

ATTEST

Rosella H. Carroll, Clerk to Council

Approved:

County Staff Attorney

FIRST READING: 8-18-98

SECOND READING: 9-1-98

THIRD READING: 6-22-99

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HORRY COUNTY COUNCIL

Chad Prosser, Chairman

Ray Skidmore, Jr., District One

John Kost, District Two

Ray Brown, District Three

Chandler Brigham, District Four

Terp B. Cooper, District Five

Marvin C. Heyd, District Six

James R. Frazier, District Seven

Liz Gilland, District Eight

Ulysses Dewitt, District Nine

Johnny Shelley, District Ten

Janice G. Jordan, District Eleven

ATTEST:

Rosella H. Carroll, Clerk to Council

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COUNTY OF HORRY

FILED
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99 OCT 14 AM 8:20
R.M.C.

STATE OF SOUTH CAROLINA

ORDINANCE NO. 153-99

AN ORDINANCE PROVIDING FOR THE ADOPTION OF AN OFFICIAL MAP FOR THE UNICORPORATED SECTIONS OF HORRY COUNTY.

Whereas, Title 6, Chapter 7, Code of Laws of South Carolina 1976 as amended, authorizes counties to prepare and adopt an Official Map, and

Whereas, Horry County Council developed and adopted Ordinance # 107-98 allowing an Official Map to be created for the purpose of promoting and preserving the public health, safety, and welfare in Horry County, and

Whereas, one purpose of the Official Map is to designate and preserve future locations of streets and highways, and

Whereas, the Carolina Bays Parkway and Conway By-Pass are two important roadways that are needed in Horry County to promote and preserve the public safety, economy, prosperity, and general welfare, and

Whereas, the Horry County Planning Commission has reviewed the plans for the Carolina Bays Parkway and Conway By-Pass and recommends that their locations be shown on an Official Map,

NOW, THEREFORE BE IT ORDAINED BY THE COUNTY COUNCIL OF HORRY COUNTY, SOUTH CAROLINA:

Ordinance 107-98 is amended as follows:

Section 1. The attached map shall be adopted as the Index Map for the Official Map. The index map shows the proposed right-of-way alignment for the Carolina Bays Parkway and Conway By-Pass.

Section 2. Further, the following supporting maps, right-of-way plans, and effected tax map lists shall be included as attachments to the Official Map. These documents include detailed descriptions and information that provide accurate locations for the Carolina Bays Parkway and Conway By-Pass. The supporting materials are:

1. South Carolina Department of Transportation, Plan and Profile of Proposed State Highway Horry County Carolina Bays Parkway S.C. Route 31 (Segment "A") Dated April 1999.

2. South Carolina Department of Transportation, Plan and Profile of Proposed State Highway Horry County Carolina Bays Parkway S.C. Route 31 (Segment "B") Dated April 1999.

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3. South Carolina Department of Transportation, Plan and Profile of Proposed State Highway Horry County Carolina Bays Parkway S.C. Route 31 (Segment "C") Dated April 1999.

4. South Carolina Department of Transportation, Plan and Profile of Proposed State Highway Horry County Conway By-Pass (Segment 1), Dated January 1993, Certified by S.C.P.E. 13500 May 1994.

5. South Carolina Department of Transportation, Plan and Profile of Proposed State Highway Horry County Conway By-Pass (Segment 2), Revised May, 1998.

6. South Carolina Department of Transportation, Plan and Profile of Proposed State Highway Horry County Conway By-Pass (Segment 3), Revised May, 1998.

7. South Carolina Department of Transportation, Plan and Profile of Proposed State Highway Horry County Conway By-Pass (Segment 4), Revised May, 1998.

Section 3. **Effective Date.** This ordinance shall become effective on third reading.

FIRST READING: 9-7-99
Second Reading: 9-21-99
Third Reading: 10-5-99

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HORRY COUNTY COUNCIL

Chad Prosser, Chairman

Ray Skidmore, Jr., District One

John Krawcheck, District Two

Ray Brown, District Three

Chandler Brigham, District Four

Terry B. Cooper, District Five

Marion C. Heyd, District Six

James R. Frazier, District Seven

Liz Gilland, District Eight

Ulysses Dewitt, District Nine

Johnny Shelley, District Ten

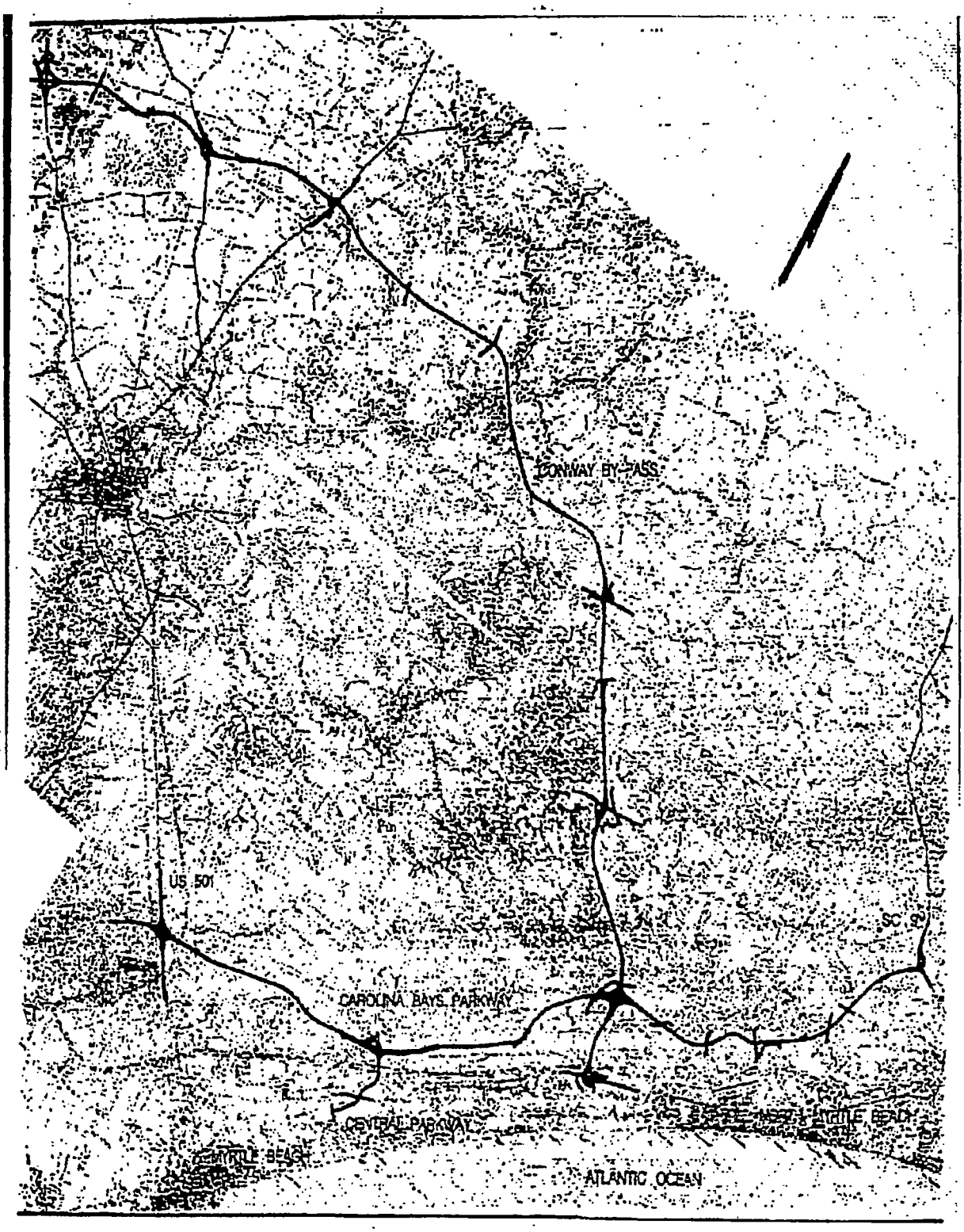
Janice G. Jordan, District Eleven

ATTEST:

Amelia L. Snipes, Interim Clerk to Council

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COUNTY COUNCIL OFFICE

COUNTY OF HORRY
COUNTY COUNCIL MEMORANDUM

TO COUNTY COUNCIL:

FROM: Janet L. Carter

DIVISION: Economic Development Division

COMMITTEE WITH JURISDICTION:

☐ General Government ☐ Public Safety ☐ Finance

☐ Human Services ☐ Public Works ☒ Economic Development

SUBJECT OF RESOLUTION OR ORDINANCE: Official Map Ordinance

PURPOSE OF RESOLUTION OR ORDINANCE:

DATE OF FIRST SUBMISSION: September 7, 1999

BRIEF DESCRIPTION:

Costs to other County Programs:

☐ Mandated ☐ Budgeted ☐ Budget Revision Necessary

FINANCIAL IMPACT:

Projections:	Balance Of: YR1	YR2	YR3	YR4
County Cost:	$	$	$	$
State Funds:	$	$	$	$
Federal Funds:	$	$	$	$
Other:	$	$	$	$

If NONE Check Here: ☐

County Administrator Approval

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COUNTY OF HORRY)
) ORDINANCE NO. 98-200
STATE OF SOUTH CAROLINA)

FILED
HORRY COUNTY
98 JUL -9 PM 12:27
R.M.C.

AN ORDINANCE TO AMEND THE INDEX MAP OF THE OFFICIAL MAP ORDINANCE FOR HORRY COUNTY ADDING THE RIGHT-OF-WAY FOR THE CAROLINA BAYS PARKWAY FROM HIGHWAY 501 TO HIGHWAY 17 BY-PASS.

WHEREAS, Title 6, Chapter 7, Sections 1210 through 1280 of the Code of Laws of the State South Carolina, as amended, authorizes local governments to adopt an Official Map Ordinance for their jurisdictions; and

WHEREAS, the Horry County Council under such authority adopted Ordinance 107-98 creating an Official Map for Horry County; and

WHEREAS, the Horry County Council established an Index Map for the Official Map (Ordinance 153-99) which provides for the specific location of current and future roadway improvements within the county; and

WHEREAS, the establishment of such map allows the location of current and future roadway improvements to be identified and provides opportunities for Horry County or other governmental entities to purchase such properties prior to issuance of building permits or granting of rezoning approvals as a means of reducing acquisition costs; and

WHEREAS, the Index Map does not include the property upon which the construction of the Carolina Bays Parkway from Highway 501 to Highway 17 By-pass will occur; and

WHEREAS, adding this property to the Index Map is in the public interest since it provides an alternative north/south route of travel for residents and tourists as well as provides opportunities to reduce future acquisition cost by limiting development in the path of such improvements.

NOW THEREFORE by the power and authority granted to the Horry County Council by the Constitution of the State of South Carolina and the powers granted to the County by the General Assembly of the State, it is ordained that:

DEED 2497 0986

1) Amendment of the Index Map of the Official Map Ordinance, Ordinance 153-99:

The Index Map of the Official Map Ordinance (Ordinance 153-99) shall be amended as follows:

Addition of 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 "Caroline Bays Parkway, Phase V FEIS Conceptual Roadway Plans", dated May 1998 prepared by the LPA Group of Columbia, South Carolina, attached hereto and incorporated herein by reference.

2) Severability: If a Section, Sub-section or part of this Ordinance shall be deemed or found to conflict with a provision of South Carolina law, or other pre-emptive legal principle, then that

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Section, Sub-section or part of this Ordinance shall be deemed ineffective, but the remaining parts of this Ordinance shall remain in full force and effect.

3) Conflict with Preceding Ordinances: If a Section, Sub-section or provision of this Ordinance shall conflict with the provisions of a Section, Sub-section or part of a preceding Ordinance of Horry County, then the preceding Section, Sub-section or part shall be deemed repealed and no longer in effect.

4) Effective Date: This ordinance shall become effective on third reading.

AND IT IS SO ORDAINED, ENACTED AND ORDERED.

Dated this 2nd day of July, 2002.

HORRY COUNTY COUNCIL

Chad Prosser, Chairman

Ray Skidmore, Jr., District 1 — John Kost, District 2 — District 3

Michael L. Ryan, District, 4 — Terry B. Cooper, District 5 — Gene R. Smith, Jr., District 6

James R. Frazier, District 7 — Elizabeth Gilland, District 8 — W. Paul Prince, District 9

Kevin J. Hardee, District 10 — Janice Jordan, District 11

ATTEST:

Patricia S. Hartley, Clerk to Council

FIRST READING: May 7, 2002
SECOND READING: June 18, 2002
THIRD READING: July 2, 2002

Official Map Addition- CSP (501 to Hwy 17 Bypass)

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U.S. ROUTE 17
MATCH LINE (SEE SHEET 7)
CAROLINA BAYS PARKWAY
CONCEPTUAL ROADWAY PLANS
ALTERNATIVE 1

CAROLINA BAYS PARKWAY
CONCEPTUAL ROADWAY PLANS
ALTERNATIVE 1
SHEET
7
101+000
MATCH LINE STA. 101+000 (SEE SHEET 8)

5 of 15
Image Size: 8.5 x 11
MATCH LINE STA. 101+600 (SEE SHEET 7)
102+000
MATCH LINE STA. 102+700 (SEE SHEET 9)
CAROLINA BAYS PARKWAY
CONCEPTUAL ROADWAY PLANS
ALTERNATIVE 1
SHEET

CAROLINA BAYS PARKWAY
CONCEPTUAL ROADWAY PLANS
ALTERNATIVE 1
SHEET
MATCH LINE STA. 102+700
(SEE SHEET 3)
MATCH LINE STA. 104+200
(SEE SHEET 5)
104+000

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CAROLINA BAYS PARKWAY
CONCEPTUAL ROADWAY PLANS
ALTERNATIVE 1
SHEET
MATCH LINE STA. 102+700
(SEE SHEET 8)
104+000
MATCH LINE STA. 104+000
(SEE SHEET 10)

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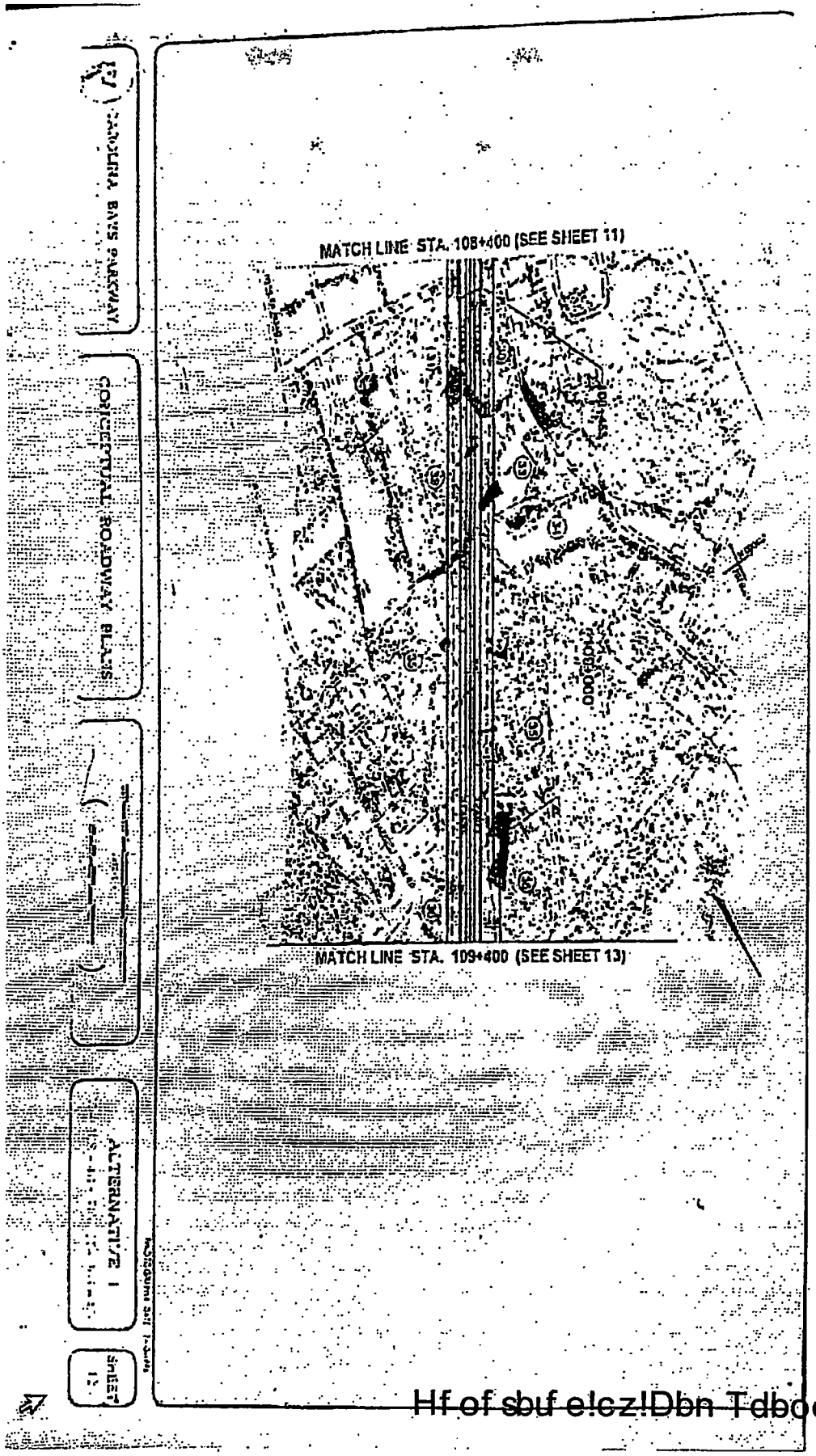
R.380

APPENDIX 381

MATCH LINE STA. 104+210 (SEE SHEET 9)
105+000
Potential Wildlife Crossings
106+000
Socastee Recreation Center
CAROLINA BAYS PARKWAY
CONCEPTUAL ROADWAY PLANS
ALTERNATIVE 1
SHEET 10

CTIC_02323

MATCH LINE STA. 95+00 (SEE SHEET 10)
MATCH LINE STA. 108+00 (SEE SHEET 12)
CAROLINA BAYS PARKWAY
CONCEPTUAL ROADWAY PLANS
ALTERNATIVE 1
SHEET



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CTIC_02326

R.384

APPENDIX 385

MATCH LINE STA. 116+800 (SEE SHEET 14)
MATCH LINE STA. 112+000 (SEE SHEET 16)
CAROLINA BAYS PARKWAY
CONCEPTUAL ROADWAY PLANS
ALTERNATIVE 1
SHEET

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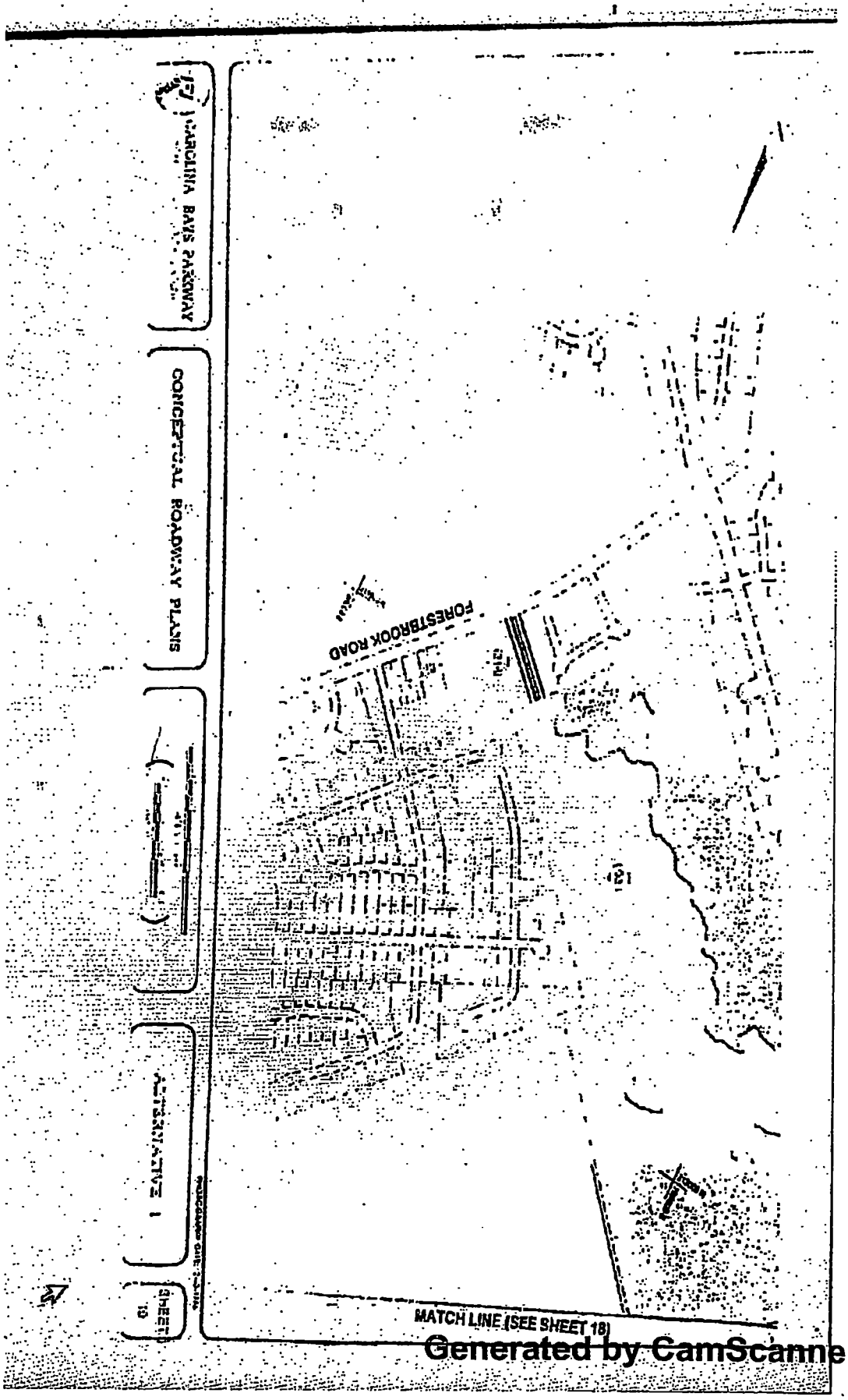
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R.386

APPENDIX 387

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R.390

APPENDIX 391

CTIC_02333

R.391

APPENDIX 392

REAL ESTATE SALES AGREEMENT

THIS REAL ESTATE SALES AGREEMENT (the "Agreement") made and entered into at and as of the Effective Date (as defined in Section 12.11(c) below) by and between RUTH L. MCCLAM, a resident of North Carolina, LOUIS M. MCCLAM, a resident of North Carolina, PATRICIA A. MCCLAM, a resident of Tennessee, and STEPHEN B. MCCLAM, a resident of South Carolina (collectively, the "Seller"), and JEFFREY T. SHOUP, his permitted successors and assigns hereunder (the "Purchaser"). Seller and Purchaser are sometimes singularly referred to herein as "Party," and collectively referred to herein as the "Parties."

WITNESSETH:

WHEREAS, Seller is the owner of that certain piece, parcel or tract of land composed o 130 acres, more or less, located in Socastee, Horry County, South Carolina and further described on Exhibit "A" hereto and incorporated herein by this reference (the "Land"); and

WHEREAS, Purchaser desires to purchase the Land from Seller, and Seller desires to sell, transfer and convey the same to Purchaser.

NOW, THEREFORE, for and in consideration of the premises and mutual covenants and agreements herein contained and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereto agree as follows:

Article 1

Identification of Property

1.1 Property. The Seller agrees to sell and convey and the Purchaser agrees to purchase Seller's full, fee simple interest in and to the property enumerated in Section 1.2 hereof (the "Property") pursuant to the terms and conditions set forth herein and unencumbered except for the "Permitted Exceptions" under Section 4.1(a)(ii) below and standard permitted exceptions in the title insurance policy to be issued to Purchaser as of the Closing.

1.2 Description of Property. The Property shall consist of the following:

(a) The Land;

(b) All easements and rights of egress and ingress appurtenant to the Land, and all other rights or interests appurtenant to, serving or pertaining to the Land; and

(c) All improvements to the Land.

Article 2

Purchase Price

2.1 Amount. The total purchase price for the Property is $22,000,000.

NPMB1:15035.1-CS-(BFK) 900000-00241

EXHIBIT 9
Deponent Charatt
Date 4/3/14 EAS
Ref.
www.aldersonreporting.com

2.2 Earnest Money. Purchaser has delivered to Nexsen Pruet Adams Kleemeier, LLC (the "Escrow Agent") its check in the amount of $10,000. Purchaser shall deliver to Escrow Agent an additional check or wire transfer to Escrow Agent in the amount of $90,000 on or before the expiration of five (5) Business Days (as defined in Section 12.11(a) below). The said sums delivered to Escrow Agent shall be held by Escrow Agent in trust in a non-interest-bearing account by the Escrow Agent as an earnest money deposit. The earnest money deposits are referred to in this Agreement as the "Earnest Money" and shall be applied and disbursed pursuant to Section 2.3 below and in accordance with the terms of this Agreement, unless otherwise agreed to in writing by the Parties.

(a) Escrow Agent's Wiring Instructions. Escrow Agent's wiring instructions are:

WIRE TO: BANK OF AMERICA
2501 OAK STREET
MYRTLE BEACH, SC 29577
TELEPHONE NUMBER: (843) 946-2100

ROUTE #026009593
ACCOUNT #0700320527

ACCOUNT NAME:
NEXSEN PRUET ADAMS & KLEEMEIER, LLC
2411 OAK STREET, SUITE 105
MYRTLE BEACH, SOUTH CAROLINA 29577

ESCROW ACCOUNT INSTRUCTION: CALL BARBARA ALLEN OR BRIAN KERNAGHAN AT (843) 445-9688 WHEN TRANSFER IS COMPLETE.

2.3 Disbursement of Earnest Money. The Earnest Money shall be held and disbursed as follows:

(a) Escrow Agent's Duties. The duties of the Escrow Agent shall be discharged in accordance with and pursuant to the terms of Section 12.15 of this Agreement.

(b) Closing Occurs. If Purchaser does not terminate this Agreement within the Due Diligence Period set forth in Section 12.11(b) below, then Escrow Agent shall pay to the Seller the Earnest Money at Closing.

(c) Closing Does Not Occur. If the Closing is not consummated the Earnest Money shall be paid over as provided in this Agreement.

2.4 Cash at Closing. At Closing, the Purchase Price (less the Earnest Money received by Seller) plus all other sums due and payable by Purchaser hereunder shall be paid in U.S. funds, either in cash or other immediately available funds (as adjusted pursuant to the terms set forth in this Agreement).

(a) Documented Ability to Close. Purchaser shall deliver to Seller a bank reference of Purchaser's financial capability to Close without financing or such bank's commitment to provide such financing as shall be required for Purchaser to Close. Seller will deliver such information within five (5) Business Days following the Effective Date hereof. Seller's failure to provide such information, and to provide such supplemental information thereto as Seller reasonably requires to satisfy itself, of Purchaser's financial capability to Close, Seller will have the right at any time thereafter to declare this Agreement null and void and to direct the Escrow Agent to refund to Purchaser, the Earnest Money deposit.

Article 3

Seller's Representations and Warranties

Seller hereby makes the following representations and warranties, each of which is material and is relied upon by Purchaser and shall survive the Closing and delivery of the deed to the Property.

3.1 Title to Property. Except for such portions of the Property lying at or below the mean highwater mark of any abutting creeks or tidal waters, to the knowledge of Seller, Seller is the sole owner of good and marketable, fee simple title to the Property. "Good and marketable, fee simple title" shall be such title as is acceptable to a title insurance company selected by the Purchaser, which title company will issue its owner's title policy on the current ALTA Policy Form at its standard rates, subject to the "Permitted Exceptions" under Section 4.1(a)(ii) below and standard permitted exceptions in said title policy. The Purchaser shall pay all expenses (including attorney's fees) and premiums relative to obtaining such title insurance. Seller shall neither cause nor permit any new encumbrances on title to the Property between the Effective Date of this Agreement and Closing without Purchaser's prior written consent.

3.2 Possession of Property. There are no persons in possession of any of the Land, and the Seller knows of no other claims to any right of possession to the Land by any person or entity.

3.3 Standing and Authority of Seller. The Seller has the right, power and authority to enter into this Agreement and to sell the Property in accordance with the terms and conditions hereof. This Agreement, when executed and delivered by the Seller, will be a valid and binding obligation of the Seller in accordance with its terms.

3.4 Options, Leases or Contracts. No options, leases, licenses, timber contracts, off-site improvement obligations, mineral conveyances service contracts, or other contracts of any type have been granted or entered into by the Seller which are still outstanding which give any other party a right to occupy or purchase any interest in the Property or any part thereof or which materially affect the Property, its zoning classification, or its future development.

3.5 Condemnation Proceedings and Roadways. To the knowledge of the Seller, there are no condemnation or eminent domain proceedings pending or contemplated against the Property or any part thereof and Seller has received no notice, oral or written, of the desire of any public authority or other entity to take or use the Property or any part thereof. Seller has

received no written notice of any change or proposed change in the route, grade, width or other specification of any street or road located within or adjacent to the Property.

3.6 Mechanics' Liens. No payments for work, materials, or improvements furnished to the Property by the Seller (excluding any obligations created by Purchaser) will be due or owing at Closing and no mechanic's lien, materialmen's lien, or other similar lien shall be of record against the Property at the time of Closing, or within one hundred eighty (180) days thereafter on account of labor or materials furnished on behalf of Seller.

3.7 No Defaults. Neither the execution of this Agreement nor the consummation of the sale contemplated hereby will:

(a) Conflict with, or result in a breach of, the terms, conditions, or provisions of, or constitute a default under, any agreement or instrument to which Seller is a party, or

(b) Violate any restriction to which the Seller is subject; or

(c) Result in the acceleration of any mortgage or note pertaining to the Property or the cancellation of any contract pertaining to the Property; or

(d) Result in the creation of any lien, charge or encumbrance upon any of the Property to be sold or assigned to Purchaser pursuant to the provisions of this Agreement.

3.8 Environmental Condition. Except for the presence of Tropical Soda Apple (*Solanum viarum*) on the Property, and the regulatory conditions imposed upon the Property pursuant to S.C. Code of Regulations § 27-55, the Seller has no information or knowledge that there are any laws, ordinances, or restrictions, or any changes contemplated therein, any judicial or administrative actions, any actions by any adjacent landowners or neighborhood associations, any hazardous or regulated substances, materials, wastes, or conditions at or near the Property, any gravesites, archeological sites, or other protected sites on the Property, or any other facts or conditions which would have an adverse effect upon the Property, the cost of its development, or its value for residential development. Seller agrees to indemnify Purchaser for and hold Purchaser harmless from and against any claim, loss, damage, liability or expense, (including reasonable attorneys' fees and court costs), which are suffered or incurred by Purchaser as a direct or indirect result of acts or omissions at any time prior to Closing, except those caused by Purchaser or its agents, contractors or representatives. Purchaser agrees to indemnify the Seller for and hold the Seller harmless from and against any claim, loss, damage, liability or expense (including reasonable attorney's fees and court costs), which are suffered or incurred by the Seller as a direct or indirect result of acts or omissions at any time after the Closing. Such indemnifications shall survive the Closing and delivery of the deed.

3.9 Events Prior to Closing and Other Information. The Seller will not cause or permit any action to be taken which would cause any of Seller's representations or warranties to be materially untrue as of the Closing. The Seller agrees to immediately notify Purchaser in writing of any event or condition that occurs prior to Closing hereunder, which causes any of Seller's representations to be rendered materially untrue.

3.10 Further Acts of Seller. On or before the Closing, the Seller will do, make, execute and deliver all such additional and further acts, deeds, instruments and documents as may be reasonably required by Purchaser or by Purchaser's title insurance company to completely vest in and assure title to the Property as required by this Agreement.

Article 4

Conditions Precedent to Purchaser's Obligations

The following shall be conditions precedent to Purchaser's obligation to purchase the Property:

4.1 Status of Title.

(a) Conveyance. The Seller shall have conveyed fee simple title to the Property to Purchaser by general warranty deed, and by deed without warranty to such portions of the Property below the mean high water mark of abutting creeks and tidal waters, free and clear of any and all liens and options, subject only to

(i) Real estate taxes for the year of Closing and subsequent years not yet due and payable; and

(ii) Such matters as are shown on the title commitment and the Survey that are approved by Purchaser (collectively the "Permitted Exceptions").

(b) Survey. Not later than ten (10) Business Days prior to the expiration of the Due Diligence Period, the Purchaser shall have acquired, at Purchaser's cost, a boundary survey of the Property of substance and form customary in the local market to convey title to the Property (the "Survey"), which Survey shall have been reviewed and approved by Purchaser and Purchaser's title insurance company.

(i) Title Exceptions Based Upon Survey Review. Purchaser shall submit in writing to the Seller notice of the exceptions to title shown in the Survey that are not acceptable to Purchaser. Notice shall be given to Seller on or before the commencement of the last ten (10) Business Days prior to expiration of the Due Diligence Period. The failure of Purchaser to deliver said notice shall be deemed a waiver of its right to object to exceptions to title with respect to the Property arising from the Survey except as may be otherwise provided in this Agreement. The Seller shall have five (5) Business Days from the receipt of the aforesaid notice to resolve, at the Seller's expense, exceptions to the Survey to Purchaser's satisfaction; provided that the Seller shall have no obligation to satisfy Purchaser's objections. If, at the end of said five (5) Business Day period the Seller has not caused the deletion or satisfaction of such exceptions, Purchaser may elect as provided in Section 4.1(d)(i) and Section 4.1(d)(ii) below.

(c) ALTA Title Policy Commitment. Not later than ten (10) Business Days prior to the expiration of the Due Diligence Period, the Purchaser shall have acquired, at Purchaser's cost, a commitment for an owner's title insurance policy, together with legible copies of all exceptions listed therein, on the current standard ALTA Policy Form, by which commitment the title insurance company agrees to insure the fee simple title to the Property in

Purchaser at its standard rates and in an amount equal to the Purchase Price of the Property set forth herein, subject only to the Permitted Exceptions. The commitment shall be updated at Closing at Purchaser's expense.

(d) Exceptions to Title Commitment. Purchaser shall submit in writing to the Seller notice of the exceptions to title shown in said commitment that are not acceptable to Purchaser. Notice shall be given to Seller on or before the commencement of the last ten (10) Business Days prior to expiration of the Due Diligence Period. The failure of Purchaser to deliver said notice shall be deemed a waiver of its right to object to exceptions to title with respect to the Property except as may be otherwise provided in this Agreement. The Seller shall have five (5) Business Days from the receipt of the aforesaid notice to delete or commit to delete, at the Seller's expense, from Purchaser's commitment the title exceptions which are not acceptable to Purchaser; provided that the Seller shall have no obligation to satisfy Purchaser's objections, except the Seller shall cause all monetary liens created by the Seller to be discharged by Closing. If, at the end of said five (5) Business Day period the Seller have not caused the deletion or satisfaction of such exceptions, Purchaser may:

(i) Waive its objections in writing within five (5) Business Days after the end of said period and consummate the within transaction without a reduction in the Purchase Price of the Property, or

(ii) Deliver to the Seller within five (5) Business Days after the end of said period a Notice of Termination (as defined in Section 12.11(d) below), in which event Purchaser shall have no further obligation to purchase the Property and the Earnest Money shall be returned by Escrow Agent to Purchaser.

4.2 Purchaser's Unimpeded Access to Property and Inspections. From and after the Effective Date and until the Closing hereunder or the earlier termination of this Agreement, but subject to S.C. Code of regulations § 27-55, Purchaser shall have access to the Property. Purchaser and its experts shall also have the Due Diligence Period to conduct its inspections of the Property. Such inspections shall include but not be limited to Purchaser's right to make such surveys, wetlands delineations, inspections, analyses, soil tests, environmental assessments and tests, appraisals, engineering reports, market feasibility studies, and other investigations of the Property as Purchaser deems reasonably necessary or desirable. Purchaser shall indemnify and hold the Seller harmless from and against any claim, loss, damage, liability or expense (including reasonable attorneys' fees and court costs) which are suffered or incurred by the Seller as a result of such access and use of the Property by Purchaser and the inspections, saving and excepting such costs and expenses as may arise as a result of a mandatory notice to regulatory authority with jurisdiction of any reportable environmental condition discovered as a part of the inspections, or for any cleanup or remediation costs resulting from any discovered environmental problems that were merely discovered and not caused or, in the case of Tropical Soda Apple, disturbed by the Purchaser. Such indemnification shall survive Closing or termination of this Agreement. Furthermore, prior to commencing its inspection of the Property, Purchaser shall deposit with the Seller evidence of a paid up general liability policy naming the Seller as an additional insured in the amount of not less than $1,000,000.00 of coverage. In its sole discretion, Purchaser may elect to terminate this Agreement by delivering to Seller, at any time prior to the end of the Due Diligence Period a Notice of Termination. Upon such Notice of

Termination, Purchaser shall have no further obligation to purchase the Property, and Escrow Agent shall thereupon return the Earnest Money to Purchaser.

4.3 Purchaser's Required Satisfaction. Purchaser's obligation to purchase the Property is subject to approval by Purchaser, in the exercise of its sole discretion, of the Property and its condition. If Purchaser, for any reason, elects to terminate this Agreement during the Due Diligence Period, Purchaser shall, within five (5) Business Days of termination, furnish the Seller with copies of all maps, studies, delineations, environmental audits and assessments, engineering reports, permits, permit applications, soil tests and other investigations of the Property performed by Purchaser or its agents or employees.

Article 5

Closing

5.1 Closing. The sale and purchase of the Property as contemplated herein shall be closed (the "Closing") in the offices of Purchaser's counsel, in Myrtle Beach, South Carolina, or at such other place as the Parties may mutually agree. Closing shall occur on or before the expiration of ten (10) Business Days following the expiration of the Due Diligence Period. The Closing may take place in escrow, and neither Seller nor Purchaser will be required to attend the Closing, but may, instead, participate by making all deliveries required to be made by hand delivery or mail to the Closing attorney prior to the Closing date.

Article 6

Closing Costs, Payments, Prorations, and Adjustments

6.1 Closing Costs and Payments. Costs and payments, related to the purchase and sale of the Property shall be paid at Closing as follows:

(a) Seller shall pay for:

(i) All mortgages and other liens consented to or created by Seller (other than the lien of taxes for the year of Closing which are not yet due and payable) with respect to the Property and all transfer, servicing, or prepayment penalties or fees assessed by the holders of such mortgages;

(ii) All of Seller's legal fees;

(iii) The cost of preparing the deed; and

(iv) The recording cost (including transfer tax) of the deed conveying title to the Property to Purchaser.

(b) Purchaser shall pay for:

(i) All of Purchaser's legal fees;

(ii) Title examination and title insurance premiums due in connection with the issuance of Purchaser's owner's title insurance policy, and any mortgagee policy to be issued to Purchaser's lender; and

(iii) The Survey; and

(iv) All costs and expenses of its inspections during the Due Diligence Period.

(c) Except as herein provided, the Party incurring an applicable cost of Closing shall pay that cost.

6.2 Prorations. Ad valorem taxes and assessments (if any) upon the Property for the year of the sale shall be prorated between the Parties as of the Closing date. All back taxes (excluding rollback taxes) shall be the responsibility of the Seller. If the amount of such real property taxes and assessments is not then known, the apportionment of taxes and assessments shall be estimated upon the basis of best information then available, with due provision for an adjustment to be made upon the final tax assessment and determination of tax rates for the year of sale. All prorations required under this Agreement shall be computed as of the date of Closing, and the cash portion of the Purchase Price paid to the Seller shall be adjusted to reflect such prorations. The provisions of this Section 6.2 shall survive the Closing.

6.3 Rollback Taxes. Purchaser shall pay all rollback taxes, if any, assessed against the Property.

Article 7

Seller's Deliveries at Closing

7.1 Closing Items. The Seller shall deliver the following items at Closing:

(a) A General Warranty Deed in recordable form and in a form satisfying the requirements of the Commitment, conveying good and marketable fee simple title to the Property, free and clear of all liens, encumbrances, easements and restrictions except for the Permitted Exceptions and such other qualifications or restrictions as Purchaser may have elected to accept, if any. Notwithstanding the aforesaid, the deed shall contain no warranty as to any portion of the Property lying at or below the mean high water mark of abutting creeks and tidal waters.

(b) A Bill-of-Sale and Assignment sufficient to vest in Purchaser title to any portion of the Property that is not conveyed by the General Warranty Deed.

(c) An Owner's Affidavit, lien waiver, and other title insurance forms and agreements satisfactory for the purpose of removing the mechanic's lien and "parties in possession" exception from Purchaser's Owner's Title Insurance Policy for the Property.

(d) Federal non-resident affidavit.

(e) Such other documents as may reasonably be required to give effect to the transaction contemplated under this Agreement, or as required by applicable Federal, State or Local law.

(f) Possession of the Property to the Purchaser.

Article 8

Purchaser's Deliveries at Closing

At Closing, Purchaser shall deliver the following to Seller:

8.1 Purchase Price. At the Closing, Purchaser shall pay to or for the benefit of the Seller the Purchase Price, by wire transfer or other good funds, adjusted as required herein. The Earnest Money amount shall be credited to the Purchase Price at Closing.

Article 9

Risk of Loss; Condemnation

9.1 Risk of Loss. The Seller shall bear all risk of casualty loss to the Property occurring prior to Closing.

9.2 Condemnation. If, after the Effective Date of the Agreement and prior to Closing, all or a portion of the Property is subjected to a bona fide threat of condemnation by a governmental entity having the power of eminent domain or is taken by eminent domain or condemnation (or sale in lieu thereof), the Purchaser shall have the option of terminating this Agreement or of proceeding to Closing. If the Purchaser elects to terminate this Agreement, the Earnest Money shall be promptly refunded to the Purchaser, and this Agreement shall become null and void and the Parties released from any and all further liability hereunder. If the Purchaser elects to proceed to Closing, this Agreement shall remain in full force and effect and the purchase contemplated herein, less any interest taken by eminent domain or condemnation or sale in lieu thereof, shall be effected without adjustment in the Purchase Price and at the time of Closing, the Seller shall assign, transfer and set over to the Purchaser all right, title and interest of the Seller in and to any awards that have been or may thereafter be made as a result of such taking.

Article 10

Real Estate Commission

10.1 Real Estate Commission. Each of Seller and Purchaser represent and warrant to the other that no company or person is entitled to any commission based upon an agency relationship, whether a seller's broker or a buyer's broker. The Seller agrees to defend, indemnify, and hold Purchaser harmless from any claims, costs, judgments, or liabilities of any kind advanced by other persons claiming real estate brokerage fees through Seller. Purchaser agrees to defend, indemnify, and hold the Seller harmless from any claims, costs), judgments, or liabilities of any kind advanced by other persons claiming real estate brokerage fees through Purchaser. The provisions of this Section 10.1 shall survive the Closing.

Article 11

Default

11.1 Default.

(a) Purchaser's Default. If Purchaser wrongfully fails to consummate the purchase and sale contemplated herein, then Seller shall give Purchaser notice of such circumstances and two (2) days opportunity to cure, and upon Purchaser's failure to cure, Seller shall be entitled as its sole and exclusive remedy hereunder to retain the Earnest Money as liquidated damages.

(b) Seller's Default. If the Seller wrongfully fails to consummate sale contemplated herein, then Purchaser shall give Seller notice of such circumstances, with a copy to Escrow Agent, and two (2) days' opportunity to cure, and upon Seller's failure to cure, Purchaser's sole and exclusive remedy hereunder shall be to (i) receive a refund of the Earnest Money, or (ii) an action for specific performance of this Agreement; and Purchaser shall elect such remedy in writing to Escrow Agent within ten (10) Business Days following the date of the event giving rise to the default, with a copy thereof to Seller. Purchaser's failure to elect its remedy in writing as aforesaid shall be deemed an election to receive a refund of the Earnest Money, which Escrow Agent shall promptly process.

(c) No Limitation on Indemnifications. Nothing herein shall limit either party's liability under the indemnification provisions of Section 4.2 and Section 10.1 of this Agreement.

Article 12

Miscellaneous Provisions

12.1 Completeness and Modification. This Agreement constitutes the entire agreement between the Parties hereto with respect to the transactions contemplated herein and supersedes all prior discussions, undertakings or agreements between the Parties. This Agreement shall not be modified except by a written agreement executed by both Parties.

12.2 Binding Effect. This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective heirs, devisees, personal representatives, successors and assigns.

12.3 Waiver. Failure by the Purchaser or the Seller to insist upon or enforce any of its or their rights hereunder shall not constitute a waiver thereto.

12.4 Governing Law. This Agreement shall be governed by and construed according to the laws of the State of South Carolina.

12.5 Article and Section Headings. The Article and Section headings as herein used are for convenience or reference only and shall not be deemed to vary the content of this Agreement or the covenants, agreements, representations, and warranties herein set forth or limit the provisions or scope of any Article.

12.6 Pronouns. All pronouns and any variations thereof shall be deemed to refer to the masculine, feminine, neuter, singular or plural, as the identity of the person or entity may require.

12.7 Time of Essence. Both Parties hereto specifically agree that time is of the essence to this Agreement.

12.8 Counterparts. This Agreement may be signed in any number of counterparts, each of which shall be an original, and all of which taken together shall constitute a single agreement, with the same effect as if the signatures thereto and hereto were upon the same instrument. For purposes of this Agreement, a telecopy of an executed counterpart shall constitute an original. Any Party delivering an executed counterpart of this Agreement by telecopier shall also deliver an original executed counterpart of this Agreement, but the failure to deliver an originally executed counterpart shall not affect the validity of this Agreement.

12.9 Notices. All notices, requests, consents and other communications hereunder shall be in writing and shall be personally delivered, delivered by overnight courier service, by facsimile (with electronic confirmation of successful transmission) or mailed by first-class, registered or certified mail, return receipt requested, postage prepaid, as follows:

If to Seller:
c/o Louis M. McClam
Gateway Bank
3600 Glenwood Ave., Suite 150
Raleigh, NC 27612
E-mail: LouisMcClam@gwfh.com
Facsimile: 919-782-6020
Telephone: 919-782-9500

With copies to:
Brian F. Kernaghan, Esq.
Nexsen Pruet Adams Kleemeier, LLC
2411 N. Oak Street, Suite 105
Myrtle Beach, South Carolina 29577
E-Mail: bkernaghan@nexsenpruet.com
Facsimile: (843) 443-8147
Direct Dial: (843) 443-8143

If to Purchaser:
As set forth below on Purchaser's Signature Page

With copies to:
_____
_____
_____
_____
_____
E-mail: _____
Facsimile: _____
Telephone: _____

Any notice given solely to Louis M. McClam shall be deemed to have been given to each individual Seller hereunder.

Notices and other information required hereunder shall be deemed delivered upon hand delivery, electronic facsimile transmission (with confirmation of successful transmission), delivery by nationally recognized courier service (such as Federal Express), or Five (5) days after deposit of the delivered item in the U.S. Mail, correctly addressed, by certified mail, return receipt requested. Counsel for the Parties may deliver notice on behalf of the Parties.

12.10 Invalid Provisions. If any provision of this Agreement shall be held in be invalid, whether generally or as to specific facts or circumstances, the same shall not affect in any respect whatsoever the validity of the remainder of this Agreement, which shall continue in full force and effect. Any provision held invalid as to any particular facts and circumstances shall remain in full force and effect as to all other facts and circumstances and any invalid provision, if invalid because it transcends applicable limits of law, shall be deemed *ipso facto* to be reduced to such permitted level or limit.

12.11 Defined Terms.

(a) Business Day. The term "Business Day" will mean a day other than a day that is a Saturday or a Sunday or a day on which banks are closed in Myrtle Beach, South Carolina.

(b) Due Diligence Period. The term "Due Diligence Period" will mean the time period between the Effective Date and 5:00 o'clock P.M. local time, April 24, 2006.

(c) Effective Date. The "Effective Date" shall be the date of the last signature of Purchaser and each Seller on this Agreement; provided, however, this Agreement shall be executed by Purchaser and by each Seller not later than February 24, 2006 and delivered to Escrow Agent, with the initial Earnest Money deposit under Section 2.2 above, no later than Monday, February 27, 2006.

(d) Notice of Termination. The term "Notice of Termination" shall mean a written notice delivered in accordance with the terms for this Agreement which, by its terms, terminates this Agreement pursuant to any expressly stated Article of this Agreement.

12.12 Assignment by Purchaser. Purchaser may assign this Agreement, at its sole discretion, to an entity that is affiliated with Purchaser. To be an affiliated entity for purposes of this Agreement, Purchaser shall own not less than a 51% ownership interest, or Purchaser shall be the Manager of any limited liability company assignee. The Seller's consent shall be required prior to any other assignment, but such consent shall not be unreasonably withheld or delayed.

12.13 Successors and Assigns. This Agreement shall be binding upon, and shall inure to the benefit of, the successors and assigns of the Parties.

12.14 Attorneys' Fees. A defaulting Party shall bear the expense of enforcement of this Agreement as against such defaulting Party, including, without limitation, court costs and reasonable attorneys' fees.

12.15 Earnest Money Escrow. Escrow Agent shall execute one complete counter-signed original of this Agreement delivered to it signed by Purchaser and Seller, shall send to Seller and Purchaser copies of the Agreement as executed by Escrow Agent, and Escrow Agent shall retain the one (1) fully executed copy of this Agreement. Except as modified by written settlement instructions executed by all Parties and accepted by the Escrow Agent, the following conditions of escrow shall apply to this escrow or settlement, and the property received hereunder:

(a) Upon receipt of the Escrow Money, Escrow Agent agrees to hold the same in accordance with the terms hereof and subject to the conditions and limitations contained herein.

(b) In performing its duties hereunder, Escrow Agent shall not incur liability to any Party for damages, losses, or expenses, except for willful default or breach of trust. Accordingly, Escrow Agent shall not incur liability with respect to any action taken or omitted in reliance upon any instrument, including any written notice or instructions provided for in this Agreement, not only as to its due execution and the validity and effectiveness of its provisions, but also as to the truth and accuracy of any information contained herein which Escrow Agent shall, in good faith, believe to be genuine, to have been signed or presented by a proper person or persons and to conform with the provisions of this Agreement.

(c) In the event of any dispute among the Parties hereto, Escrow Agent shall render into the registry or custody of any court of competent jurisdiction all money or property in its hands under this Agreement, together with such pleadings as it deemed appropriate, and thereupon be discharged from all further duties and liabilities under this Agreement.

(d) Escrow Agent may consult with and obtain advice from legal counsel (other than counsel to any of the Parties to the Agreement) in the event of any questions as to any of the provisions of this Agreement or its duties hereunder, and it shall incur no liability and shall be fully protected in acting in good faith in accordance with the opinion and instructions of such counsel.

(e) Escrow Agent shall hold the Earnest Money in its attorney escrow account, and no interest shall be paid thereon. Escrow Agent may commingle the Earnest Money received by it in the same fund with a federally insured Trust Company, Bank, Savings Bank or Savings Association account. If the account is interest-bearing, all accrued interest thereon shall be paid directly into the South Carolina Bar's Client Security Fund Account and no party shall have or claim any right thereto.

(f) In the event that Escrow Agent is in doubt as to duties or liabilities under the provisions hereof it may, in its sole discretion, continue to hold the monies which are subject to this escrow until the Parties hereto mutually agree to the disbursement thereof, or until a judgment of a court of competent jurisdiction shall determine the rights of the Parties hereto, or Escrow Agent may deposit all of the monies then held pursuant hereto with the Clerk of the Circuit Court of Horry County, South Carolina, and upon notifying all Parties concerned of such action, all liability on the part of Escrow Agent shall fully cease and terminate, except to the extent of accounting for all monies thereto delivered out of escrow.

(g) The Escrow Agent's acceptance of its duties under this document and the Agreement creates a contract entirely separate and distinct from any contract between the Escrow Agent and the Seller or the Purchaser for the performance of legal services that may have existed in the past, may now exist or may exist in the future (any such contract being an "Engagement"), and the fiduciary duties of the Escrow Agent hereunder shall be determined and evaluated without reference to any duty that Escrow Agent may owe to the Seller or the Purchaser under any Engagement.

(h) In the event the Escrow Agent, prior to termination of its duties hereunder, is unable to fulfill its duties hereunder for any reason whatsoever, or believes that its fulfillment of such duties hereunder might conflict with its duties under an Engagement, Seller shall appoint another South Carolina law firm as the successor escrow agent hereunder and upon such successor firm's acceptance of its duties hereunder, such firm shall continue as Escrow Agent until the obligations of Escrow Agent under these escrow provisions and the Agreement terminate; provided, however, that such successor may resign if a successor to it is designated as Escrow Agent and the designee accepts such designation.

[Remainder of Page Purposely Blank]

EXHIBIT "A"

All and singular those three (3) certain Lots in Socastee Township, Horry County, South Carolina, being shown on a Plat prepared for the Estate of John C. Spivey by J.F. Thomas, Surveyor, dated September 1, 1965, recorded November 16, 1965, in Plat Book 43, Page 183, and designated thereon as Hursey Three Lots, to whit Plat reference is made being described as follows.

Beginning at a point on the inland Waterway where the lands intersects with the Inland Waterway and Spivey Road, a right-of-way from which has been granted at a corner designated Concrete N; thence North: 78 degrees, 10 minutes West 225 feet to Concrete N; thence North 27 degrees 10 minutes East 250 feet to Pipe N; thence South 73 degrees 10 minutes East to Pipe N; thence South 27 degrees 10 minutes East 250 feet to the beginning corner.

Bounded on the North by lands of Ruth L. McClam; on the East by lands of Ruth L. McClam, on the South by the Northern margin of Intracoastal Waterway, and on the West by lands of Ruth L. McClam.

This being the same property conveyed to Ruth L. McClam by Deed of T.S. Ludlam dated October 21, 1966, and recorded on January 23, 1967, in the office of the Clerk of Court for Horry County in Deed Book 360 at Page 199.

ALSO:

All and certain lot of land in Socastee Township, Horry County, South Carolina, on the Northern side of the Inland Waterway and located near the Old Sweet Ditch, bounded and described as follows:

Commencing at an iron stake on the Northern bank of the Inland Waterway being a point where the Eastern bank of the Old Socastee Creek intersects the Inland Waterway, and running thence in a Northerly direction 21 degrees East 250 feet to an iron stake; thence Eastward 79 degrees East 100 feet to an iron stake; thence South 21 degrees East 250 feet to an iron stake on the Northern bank of the Inland Waterway; thence Westwardly along the Northern bank of the Inland Waterway 100 feet to the beginning corner.

Bounded on the North by other lands of Ruth L. McClam; on the East by other lands of Ruth L. McClam; on the South by the Inland Waterway; and on the west by other lands of Ruth McClam.

This being the same property conveyed to Ruth L. McClam by Deed of Larry W. Paul dated February 15, 1982, and recorded on February 18, 1982, in the office of the Clerk of Court for Horry County in Deed Book 737 at Page 818.

LESS AND EXCEPT:

ALL AND SINGULAR that certain piece, parcel or lot of land situate, lying, and being in Socastee Township, County and State aforesaid, designated Pump Site and containing 215 square feet and shown or a plat of Pump Site For Grand Strand Water & Sewer Authority owned by Ruth L. McClam; made by Engineering and Technical Services, Inc., dated November 1, 1990; a copy of which is recorded in Plat Book 112, Page 65, public records of Horry County and which is by way of reference made a part and parcel of this description.

This property was heretofore conveyed by Ruth Ludlum McClam, et al to the Grand Strand Water and Sewer Authority by deed dated 23 November, 1990; and recorded in Deed Book 1438. Page 163, in the office of the RMC for Horry County.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the day and year set forth below each signatory's execution.

WITNESSES:

J Blanchard

D. McCollum

SELLER:

Ruth L. McClam

Ruth L. McClam

Date: 02/22/06

[Remainder of Page Purposely Blank]

NPMB1:450za.1-CS-(BFK) 900000-00141

WITNESSES:

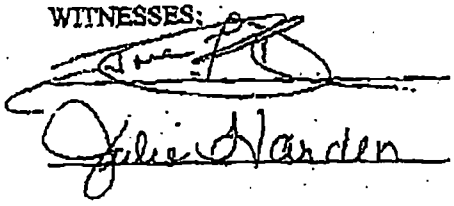
SELLER:

M. Louis McClam

Date: 2/22/06

[Remainder of Page Purposely Blank]

WITNESSES:



SELLER:

Patricia A. McClara

Patricia A. McClara

Date: 2-22-06

[Remainder of Page Purposely Blank]

WITNESSES:

SELLER:

Stephen B. McClam

Date: February 22, 2006

[Remainder of Page Purposely Blank]

WITNESSES:

PURCHASER:

Jeffrey P. Shoup

Date: 2/22/06

408 Sea Mt. Hwy
Address

Address

Winb 28582
City State Zip

Home Phone

343 463 3600
Office Phone

843 463 3604
Fax

shoup@worthnmh.com
E-mail Address

NPM31:15035 4-CS-(BFK) 900000-00241

580498

Prepared By and Return to:
Gwin Law Offices, LLC
2105-B Cromley Circle
Myrtle Beach, SC 29577
Telephone: 843-839-2239 Fax: 843-839-2244
File No.: 06-RE-388

FILED
HORRY C.T.K S.C.
2006 JUL 25 PM 3:23
DALLEN V. SKIPPER
REGISTRAR OF DEEDS

STATE 58,500.00 COUNTY 24,750.00

EXEMPT YES (NO)

ASSESSOR 178-00-08-032 + 178-00-06-024 + 025

07/26/06 SEP

(Please do not write above this line – Reserved for Register of Deeds Office)

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS, that **RUTH LUDLAM MCCLAM (A/K/A RUTH L. MCCLAM), MLM I, LLC, PATRICIA ANN MCCLAM AND STEPHEN BOYD MCCLAM**, in the State aforesaid, for and in consideration of the sum of **TWENTY TWO MILLION FIVE HUNDRED THOUSAND AND 00/100 DOLLARS ($22,500,000.00)**, unto us paid by **PEACHTREE PROPERTIES OF NORTH MYRTLE BEACH, LLC**, in the State aforesaid, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released and by these presents do grant, bargain, sell, and release unto the said Peachtree Properties of NORTH MYRTLE BEACH, LLC, its successors and assigns, forever, in fee simple, together with every contingent remainder and right of reversion, the following described property, to wit:

SEE ATTACHED EXHIBIT "A"

Tax Map #: 178-00-08-032

Property Address: Myrtle Beach, SC 29588

Grantee(s) Address: 408 Sea Mountain Hwy, North Myrtle Beach, SC 29582

THIS CONVEYANCE IS MADE SUBJECT TO easements and restrictions of record and otherwise affecting the property.

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

DEED
0198 0238

3/32 - 029

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said Peachtree Properties of NORTH MYRTLE BEACH, LLC, its successors and assigns, forever, in fee simple, together with every contingent remainder and right of reversion.

AND Grantors do hereby bind themselves and their heirs and assigns, to warrant and forever defend all and singular the said premises unto the said Peachtree Properties of NORTH MYRTLE BEACH, LLC, its successors and assigns, forever, in fee simple, together with every contingent remainder and right of reversion against the Grantors' heirs and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

THIS PORTION INTENTIONALLY LEFT BLANK

IN WITNESS WHEREOF our Hands and Seals this 6 day of July, 2006.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

1st Witness

Ruth L. McClam (L.S.)
Ruth L. McClam

2nd Witness or Notary

STATE OF North Carolina)
)
COUNTY OF Wake)

PROBATE

PERSONALLY appeared before me the undersigned witness and made oath that (s)he was present and saw the within Grantors sign, seal, and as act and deed, deliver the within Warranty Deed; that deponent with the other witness whose name is subscribed above, witnessed the execution thereof.

SWORN to before me this
7 day of July, 2006.

Notary Public for Wake Co, NC
My Commission Expires: 06-06-2008

Witness

BLANCHARD NOTARY PUBLIC WAKE COUNTY, NC
(SEAL)

File # 06-RE-388

IN WITNESS WHEREOF our Hands and Seals this 6 day of July, 2006.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Q. Nicol Hansen
1st Witness

MLM I, LLC (L.)
MLM I, LLC

By: Theresa J. McClain

J. Blanchard
2nd Witness or Notary

STATE OF North Carolina)
)
COUNTY OF Wake) PROBATE

PERSONALLY appeared before me the undersigned witness and made oath that (s)he was present and saw the within Grantors sign, seal, and as act and deed, deliver the within Warranty Deed; that deponent with the other witness whose name is subscribed above, witnessed the execution thereof.

J. Blanchard

SWORN to before me this
6 day of July, 2006.

J. Blanchard
Notary Public for Wake Co
My Commission Expires: 06-08-2008

Q. Nicol Hansen
1st Witness

J. BLANCHARD NOTARY PUBLIC WAKE COUNTY, NC (SEAL)

File # 06-BB-288

IN WITNESS WHEREOF our Hands and Seals this 6 day of July, 2006.

SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF:

Rachel Thompson
1st Witness

Patricia Ann McClam (L.
Patricia Ann McClam

Lea J Wood
2nd Witness or Notary

STATE OF Tennessee
COUNTY OF Knox

PROBATE

PERSONALLY appeared before me the undersigned witness and made oath that (s)he was present and saw the within Grantors sign, seal, and as act and deed, deliver the within Warranty Deed; that deponent with the other witness whose name is subscribed above, witnessed the execution thereof.

Lea J Wood

SWORN to before me this
6 day of July, 2006.

Rachel Thompson
1st Witness

Notary Public for Knox County Tennessee
My Commission Expires: June 5, 2010

LEA J WOOD
STATE OF TENNESSEE
NOTARY PUBLIC
KNOX COUNTY

(SEAL)

File # 06-RE-388

IN WITNESS WHEREOF our Hands and Seals this 6 day of July, 2006.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

1st Witness

Stephen Boyd McClam (L.S.)

2nd Witness or Notary

STATE OF Florida)
) PROBATE
COUNTY OF Orange)

PERSONALLY appeared before me the undersigned witness and made oath that (s)he was present and saw the within Grantors sign, seal, and as act and deed, deliver the within Warranty Deed; that deponent with the other witness whose name is subscribed above, witnessed the execution thereof.

SWORN to before me this
6 day of July, 2006.

Notary Public for Florida
My Commission Expires: 7/20/2009

1st Witness

(SEAL)

File # 06-RE-388

BRIAN DAVID GRISSER
Expires
Notary Public
07-20-2009
STATE OF FLORIDA

STATE OF SOUTH CAROLINA)
) **AFFIDAVIT**
COUNTY OF HORRY)

PERSONALLY appeared before me the undersigned, who, being duly sworn, deposes and says:

1. The property being transferred is located at **Myrtle Beach, SC 29588**, bearing **Horry County Tax Map Number 178-00-05-032**, was transferred by **Ruth L. McClam, MLM I, LLC, Patricia Ann McClam and Stephen Boyd McClam** to **Peachtree Properties of North Myrtle Beach, LLC** on **July 21, 2006.**

2. ☑ an arm's length real property transaction and the sales price paid or to be paid in money or money's worth was **$22,500,000.00***.

   ☐ **NOT** an arm's length real property transaction and the fair market value of the property is $.

3. The above transaction is exempt, or partially exempt, from the recording fee as set forth in S.C. Code Ann. Section 12-24-10, *et seq.*, because the Deed is:

4. As required by Code § 12-24-70, I state that I am a responsible person who was connected with the transaction as: ATTORNEY FOR PURCHASER

5. I further understand that a person required to furnish this Affidavit who willfully furnishes a false or fraudulent Affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than One Thousand and no/100 Dollars ($1,000.00) or imprisoned not more than one year, or both.

Purchaser, Seller, Legal Representative of the Purchaser or other Responsible Person Connected with this Transaction

SWORN to before me this
21st day of July, 2006.

Notary Public for South Carolina
My Commission Expires: 9/17/14

- The fee is based on the real property's value. Value means the realty's fair market value. In arm's length real property transactions, this value is the sales price to be paid in money or money's worth (e.g. stocks, personal property, other realty, forgiveness of debt, mortgages assumed or place on the realty as a realty of the transaction). However, a deduction is allowed from this value for the amount of any lien or encumbrance existing on land, tenement, or realty before the transfer and remaining on it after the transfer.

A

EXHIBIT "A"

All that certain lot or parcel of land situate in the City of Myrtle Beach, County of Horry, State of South Carolina, and being more particularly described as follows:

PARCEL ONE

ALL AND SINGULAR those three (3) certain Lots in Socastee Township, Horry County, South Carolina, being shown on a Plat prepared for the Estate of John C. Spivey by J.F. Thomas, Surveyor, dated September 1, 1965, recorded November 16, 1965, in Plat Book 43 at Page 183, and designated thereon as Hursey Three Lots, to which Plat reference is made, being described as follows:

Beginning at a point on the inland Waterway the lands intersects with the Inland Waterway and Spivey Road, a right-of-way from which has been granted at a corner designated Concrete N; thence North: 78 degrees, 10 minutes West 225 feet to Concrete N; thence North 27 degrees 10 minutes East 250 feet to Pipe N; thence South 78 degrees 10 minutes East to Pipe N; thence South 27 degrees 10 minutes East 250 feet to the beginning corner.

Bounded on the North by lands of Ruth L. McClam; on the East by lands of Ruth L. McClam, on the South by the Northern margin of Intracoastal Waterway, and on the West by lands of Ruth L. McClam.

PARCEL TWO:

All AND SINGULAR, that lot of land in Socastee Township, Horry County, South Carolina, on the Northern side of the Inland Waterway and located near the Old Sweet Ditch, bounded and described as follows:

Commencing at an iron stake on the Northern bank of the Inland Waterway being a point where the Eastern bank of the Old Socastee Creek intersects the Inland Waterway, and running thence in a Northerly direction 21 degrees East 250 feet to an iron stake; thence Eastward 79 degrees East 100 feet to an iron stake; thence South 21 degrees East 250 feet to an iron stake on the Northern bank of the Inland Waterway; thence Westwardly along the Northern bank of the Inland Waterway 100 feet to the beginning corner.

Bounded on the North by other lands of Ruth L. McClam; on the East by other lands of Ruth L. McClam; on the South by the Inland Waterway; and on the west by other lands of Ruth L. McClam.

PARCEL THREE:

All AND SINGULAR, that certain tract or parcel of land in Socastee Township, Horry County, South Carolina, on hundred thirty-five (135) acres, more or less, having been platted and shown on a Plat prepared by J.F. Thomas, Surveyor, dated September 1, 1965. This 135 acres is situate North of the Intracoastal Waterway. The Plat is recorded in Plat Book 43, Page 183, in the Office of the Clerk of Court of Horry County, to which Plat reference is made,

The 135 acres is exclusive of the proposed highway area shown on the Plat above referenced to and is described as follows:

Beginning at Concrete N on the Southern margin of the proposed highway as shown on the referenced Plat (this road is known as the Peachtree Ferry Road); and running thence North approximately 26°5' East 33 feet to a point in the center of the road, the point being taken from the Highway Department survey; thence South 68°22' East 441 feet to point of intersection, as shown on the above Plat; thence South 62°45' East 984.3 feet to point of

intersection, as shown on the above Plat; thence South 75°15' East 1028.6 feet to point of intersection, as shown on the Plat; thence North 33 feet to Concrete N on the Northern margin of the road above described; thence North 19°5' East 473.5 feet to Pipe O; thence 53°10 East 516 feet to Concrete N; thence South 13°55' West 872.5 feet to Concrete N on the Northern margin of the road; thence South 33 feet to point in center of the road described above; thence South 75°15' East 710 feet to point of intersection as shown on the Plat; thence South 85°11 minutes East 340.5 feet to point of intersection in center of the road described above, as shown on the Plat; thence Southwest 33 feet to Concrete N on the Southern margin of the road described above; thence South 21°45' West 1045.5 feet to Pipe O and Concrete N; thence North 78°50' West 750 feet to Pipe O and Concrete N; thence South 20°55' West 438.5 feet to Concrete N; thence North 78°10' West 566 feet to Concrete N; thence North 27°10' East to Pipe N; thence North 78°10' West 225 feet to Pipe N; thence South 27°10' West 250 feet to concrete N; thence North 78°10' West 1284.5 feet to Concrete N; thence North 21° East 250 feet to Concrete N; thence North 78°10' West 100 feet to Concrete N; thence South 21° West 250 feet to Concrete N; thence North 26°25' West 145 feet along Socastee Creek, the Creek being the line; thence North 45° West 100 feet; thence North 57° West 100 feet; thence North 63°10' West 100 feet; thence North 54°45' West 130 feet; thence South 70°25' West 185 feet; thence North 89°20' West 200 feet; thence North 61°45' West 94 feet; thence North 70°20' West 100 feet; thence South 86°50' West 80 feet to Gum 3MO; thence North 27°40' East 383.5 feet to Gum OM; thence North 27°20' East 261 Feet to Gum OM; thence North 26°05' East 1119.5 feet to the beginning corner.

Bounded on the North by the center of the proposed, highway as shown on the Plat in part, and in part by the lands, now or formerly, of Brice J. Ward; on the East by lands, now or formerly, of Roy Collins, in part, and in part by lands, now or formerly, of Virginia Zeigler; on the South by lands, now or formerly, of J.M. Cooper, in part, and lands, now or formerly, of Virginia Zeigler, in part, and by the Northern margin of the Intracoastal Waterway, in part, Lucy S. Kolb, in part, and Socastee Creek, in part; and on the West by land, now or formerly, of Maggie L. Roberts.

LESS AND EXCEPT:

ALL AND SINGULAR that certain piece, parcel or lot of land situate, lying, and being in Socastee Township, County and State aforesaid, designated as Pump Site and containing 215 square feet and shown on a plat of Pump Site For Grand Strand Water & Sewer Authority owned by Ruth L. McClam; made by Engineering and Technical Services, Inc., dated November 1, 1990; a copy of which is recorded in Plat Book 112, Page 65, public records of Horry County and which is by way of reference made a part and parcel of this description.

This property was heretofore conveyed by Ruth Ludlum McClam, et al to the Grand Strand Water and Sewer Authority by Deed dated 23 November, 1990; and recorded in Deed Book 1438, Page 163, in the office of the Clerk of Court for Horry County, South Carolina.

SEE ATTACHED EXHIBIT "A" FOR DERIVATION

DERIVATION

The respective interests of the Grantors were acquired as follows:

Ruth LudlumMcClam

1. A portion of the property was conveyed to Ruth L. McClam by deed of T. B. Ludlum dated October 21 1966 and recorded on January 23 1967 in the Office of the Clerk of Court for Horry County in Deed Book 360 at Page 199.

2. A portion of the property was conveyed to Ruth L. McClam by deed of Larry W. Paul dated February 15, 1982 and recorded on February 18, 1982 and recorded on February 18, 1982 in the Office of the Clerk of Court for Horry County in Deed Book 737 at Page 818.

3. The remaining portion of the property was devised to Ruth Ludlam McClam by Item VIII of the Last Will and Testament of John C. Spivey, Deceased, and conveyed by deed of Lucy S. Kolb Executrix, T. B. Ludlum, and C. A. Spivey as Executors of the Last Will and Testament of J. C. Spivey, dated November 13, 1965 and recorded on November 16, 1965 in the office of the Clerk of Court for Horry County n Deed Book 336 at Page 482.

4. The interest of Ruth Ludlam McClam was mistakenly conveyed by her to McClam Family Limited Partnership on November 23, 1999 and recorded in Deed Book 2214 at Page 1410 in the Office of the Register of Mesne Conveyances for Horry County, South Carolina, and reconveyed to her by Corrective Deed from the McClam Family Limited Partnership on December 4, 2000 and recorded in Deed Book 2324 at Page 1205 in the Office of the Register of Mesne Conveyances for Horry County, South Carolina.

Patricia Ann McClam

The interests of Patricia Ann McClam were acquired by various deeds from Ruth Ludlum McClam as set forth hereinbelow:

Interest	Date	Recording Date	Deed Book	Page No.:
1/49	March 19, 2004	April 2, 2004	2717	290
1/49	May 23, 2003	July 3, 2003	2614	1051
1/49	April 19, 2002	June 14, 2002	2490	392
1/49	April 9, 2001	April 27, 2001	2366	241
1/49	December 14, 2000	December 15, 2000	2326	1012
1/49	June 8, 1998	August 21, 1998	2065	999
1//49	June 23, 1997	November 19, 1997	1992	21
Interest	Date	Recording Date	Deed Book	Page No.:

1/49	July 30, 1966	August 22, 1996	1885 (1896)	328 (657)
1/49	July 25, 2995		1817	1431
1/49	July 21, 1994	July 25, 1994	1743	825
1/70	March 2, 1993	March 4, 1993	1618	345
1/70	February 28, 1992	March 3, 1992	1530	895
1/70	February 27, 1992	March 4, 1991	1454	430
1/70	February 2, 1991	February 5, 1990	1368	670
1/70	November 10, 1989	November 15, 1989	1352	965

Stephen Boyd McClaim

The interests of Stephen Boyd McClam were acquired by various deeds from Ruth Ludlum McClam as set forth hereinbelow:

Interest	Date	Recording Date	Deed Book	Page No.:
1/49	March 19 2004	April 2, 2004	2717	276
1/49	May 23, 2003	July 3, 2003	2614	1058
1/49	April 19, 2002	June 14, 2002	2490	400
1/49	April 9, 2001	April 27, 2001	2366	234
1/49	December 14, 200	December 15, 2000	2326	1006
1/49	June 8, 1998	September 4, 1998	2358	1023
1/49	June 23, 1977	November 19, 1997	1992	27
1/49	July 30, 1996	August 22, 1996	1885 (1896)	322 (651)
1/49	July 25, 1995		1817	1425
1/49	July 21, 1994	July 25, 1994	1743	815
1/70	March 2, 1993	March 4, 1993	1618	350
1/70	February 28, 1992	March 3, 1992	1530	885
1/70	February 27, 1991	March 4, 1991	1454	440
1/70	February 2, 1990	February 5, 1990	1368	665
1/70	November 10, 1989	November 15, 1908	1352	

MLM 1, LLC

The interests of the MLM 1, LLC were acquired by a deed from Marvin Louis McClam dated _____, and recorded July 25th, 2006 in Deed Book 3132 at Page 774, records of Horry County, South Carolina.

580498

FILED
HORRY COUNTY, S.C.
2006 JUL 25 PM 3:23
DALLERY V. SKIPPER
REGISTRAR OF DEEDS

Insert recording information above

Loan No. P0095

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

COMMERCIAL MORTGAGE OF REAL PROPERTY AND SECURITY AGREEMENT

THIS COMMERCIAL MORTGAGE OF REAL PROPERTY AND SECURITY AGREEMENT, is dated as of July 5, 2006, and is made by Peachtree Properties of North Myrtle Beach, LLC, a South Carolina limited liability company ("Borrower"), whose mailing address is 408 Sea Mountain Highway, N Myrtle Beach, SC 29582 in favor of R.E. LOANS LLC, a California limited liability company ("Lender"), whose mailing address is c/o Bar K, Inc., Attention Barney Ng, 201 Lafayette Circle, 2nd Floor, Lafayette, California 94549.

WITNESSETH:

FOR GOOD AND VALUABLE CONSIDERATION and in order to secure the payment of a promissory note from Borrower to Lender of even date herewith in the principal amount of $18,520,000.00 (the "Note") plus interest thereon and costs of collection, including attorneys' fees and to secure in accordance with Section 29-3-50, as amended, of the South Carolina Code of Laws, all existing indebtedness to Lender evidenced by the Note and all modifications, renewals and extensions thereof; all future advances that may be made to Borrower in accordance with the provisions herein or to be evidenced by other promissory notes and all modifications, renewals and extensions thereof; all other sums or indebtedness of Borrower to Lender accruing pursuant to the terms and conditions of this Mortgage provided, the maximum amount of existing indebtedness and future advances outstanding at any one time secured hereby shall not exceed twice the face amount of the Note, plus interest thereon, all charges and expenses of collection incurred by the Lender, including court costs and reasonable attorneys fees; and to charge the properties, interests and rights hereinafter described with the performance and observance of the terms of this Mortgage and the Note, Borrower has granted, bargained, sold and released to Lender and the heirs, successors and assigns of Lender, and by this Mortgage does grant, bargain, sell, and release to Lender and the heirs, successors and assigns of Lender, the real property described in Exhibit A attached hereto and made a part hereof, which together with the property described below is hereinafter referred to

TO THE EXTENT, IF ANY, PROVIDED IN THE NOTE, INTEREST OR DISCOUNT WILL BE DEFERRED, ACCRUED, OR CAPITALIZED.

THIS MORTGAGE AND SECURITY AGREEMENT COVERS FIXTURES AND CONSTITUTES A FIXTURE FINANCING STATEMENT. PROCEEDS OF THE NOTE SECURED HEREBY SHALL BE USED FOR LAND ACQUISITION OR REFINANCING AND CONSTRUCTION OF IMPROVEMENTS ON THE LAND.

MORTGAGE
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as the "Property" **(Note: all references, representations, warranties and covenants contained herein to the Property shall be deemed made by and applicable to the record owner of such portion of the Property as indicated on Exhibit A).**

TOGETHER WITH:

(1) all and singular rights, members, privileges, easements, hereditaments and appurtenances belonging or in any way incident or appertaining to the above-described real property; all buildings and improvements now or hereafter situated thereon; and all fixtures now or hereafter attached thereto;

(2) All fixtures, fittings, furnishings, appliances, apparatus, equipment, and machinery; all other fixtures and personal property of whatever kind and nature at present contained in or hereafter placed in any building standing on the above-described real property; and all renewals or replacements thereof or articles in substitution thereof; and all proceeds and profits thereof and all of the estate, right, title and interest of the Borrower in and to all property of any nature whatsoever, now or hereafter situated on the above - described real property and improvements or intended to be used in connection with the operation thereof;

(3) All rents, incomes, profits, revenues, royalties, bonuses, rights, accounts, contract rights, instruments, chattel paper, cash, rights to withdraw cash, general intangibles and benefits under any and all leases or tenancies now existing or hereafter created on the above-described real property and improvements or any part thereof with the right to receive and apply the same to said indebtedness, which Lender may demand, sue for and recover such payments but shall not be required to do so; and

(4) A security interest in (i) all property and fixtures now or hereafter acquired and affixed to or located on the above-described real property which, to the fullest extent permitted by law shall be deemed fixtures and a part of said real property, (ii) all articles of personal property now or hereafter acquired, including without limitation all fixtures, inventory, equipment, appliances and machinery, and all materials, now or hereafter located on or related to the above-described real property owned by Borrower; (iii) all sanitary sewer tap certificates and water tap certificates and all other contract rights of Borrower concerning the provision of water, sanitary sewer, storm drainage and other utility services to the Property; (iv) all personal property, accounts, contract rights, instruments, chattel paper, cash, rights to withdraw cash, general intangibles, actions and rights in action now or hereafter acquired pertaining to the above-described real property and improvements, including all rights to insurance proceeds; and (v) all proceeds, products, replacements, additions, substitutions, renewals and accessions of any of the foregoing. Borrower (Debtor) hereby grants to Lender (Secured Party) a security interest in all fixtures, rights in action and personal property described herein. This Mortgage is a self-operative security agreement with respect to such property, but Borrower agrees to execute and deliver on demand such other security agreements, financing statements and other instruments as Lender may reasonably request in order to perfect its security interest or to impose the lien hereof more specifically upon any of such property. on demand, Borrower will promptly pay all costs and expenses of filing statements, continuation statements, partial releases, and termination statements deemed necessary or appropriate by Lender to establish and maintain the validity and priority of the security interest of Lender, or any modification thereof, and all costs and expenses of any searches reasonably required by Lender. Lender may exercise any or all of the remedies of a secured party available to it under the Uniform Commercial Code (South Carolina) including the right to pursue any deficiency judgments. Ten (10) days' notice by Lender to Borrower shall be deemed to be reasonable notice under any provision of the Uniform Commercial Code (South Carolina) requiring such notice; provided, however, that Lender may at its option dispose of the collateral in accordance with Lender's rights and remedies in respect to the real property pursuant to the provisions of

this Mortgage and Security Agreement, in lieu of proceeding under the Uniform Commercial Code (South Carolina).

As to items of property described herein which are goods that are or are to become fixtures related to the real estate described herein, it is intended that, as to those goods, this Mortgage and Security Agreement shall be effective as a financing statement filed as a fixture filing from the date of its filing for record in the real estate records of the county in which the land is located. Information concerning the security interest created by this instrument may be obtained from the Lender, as Secured Party, or the Borrower, as Debtor, at the addresses first shown above.

TO HAVE AND TO HOLD all and singular the Property unto Lender and the successors and assigns of Lender forever.

PROVIDED ALWAYS, nevertheless, and it is the true intent and meaning of Borrower and Lender, that if Borrower pays or causes to be paid to Lender the debt secured hereby, the estate hereby granted shall cease, determined and be utterly null and void; otherwise said estate shall remain in full force and effect.

IT IS AGREED that Borrower shall be entitled to hold and enjoy the Property until an Event of Default as herein defined has occurred.

ARTICLE I

AGREEMENTS AND COVENANTS OF BORROWER

1.1 Warranty of Title. Borrower covenants and warrants that Borrower is lawfully seized of the Property in fee simple absolute, that Borrower has good right and is lawfully authorized to sell, convey or encumber the same, and that the Property is free and clear of all encumbrances except as shown in the title insurance policy accepted by Lender. Borrower further covenants to warrant and forever defend all and singular the Property unto Lender and all persons whomsoever lawfully claiming the same or any part thereof.

1.2 Transfer of Property. Borrower shall not transfer the Property without the prior written consent of Lender, which consent may be withheld in lender's sole discretion. Consent to one transfer shall not be deemed to be a waiver of the right to require consent to other transfers. Except for a transfer resulting in a partial reconveyance of this Mortgage if the Note, any Loan Agreement between Borrower and Lender, or this Mortgage has a partial release clause, if Borrower transfers the Property or any portion thereof, or any interest therein, without first obtaining the written consent of Lender, all indebtedness secured by this Mortgage shall, at the option of Lender and without notice or demand, become immediately due and payable. As used herein, transfer includes, but is not limited to, the sale, option to sell, contract to sell, convey, encumber, mortgage (including encumber by a mortgage), pledge, hypothecate, or lease with option to purchase of the Property, or any portion thereof, or any interest therein, whether voluntary, involuntary, by operation of law, or otherwise, or the transfer of more than a 50% interest of Borrower if Borrower is anything other than a natural person.

1.3 Payment of Note. The Borrower shall promptly and punctually pay all principal and interest, prepayment premiums, and all other sums to become due under the Note, together with any modification or renewals thereof, according to the true intent and meaning thereof.

1.4 Performance of Loan Agreement. Borrower shall perform, observe and comply with all provisions of that certain Loan Agreement entered into by and between Borrower and Lender of event date herewith (the "Loan Agreement").

1.5 Maintenance Repair and Inspection. The Borrower covenants to keep the Property in good operating order, repair and condition and shall not commit or permit any waste thereof. Borrower shall make all repairs, replacements, renewals, additions and improvements and shall complete and restore promptly and in good workmanlike manner any improvements that may be constructed, damaged, or destroyed thereon, and pay when due all costs incurred thereof. Borrower shall not remove any of the Property, demolish any of the Property, or materially alter such Property without the prior written consent of the Lender. Borrower agrees to permit and shall permit Lender or its agents the opportunity to inspect the Property, including the interior of any structures, at any reasonable time.

1.6 Expenses. Borrower agrees to pay or reimburse Lender for all costs, charges and expenses, including reasonable attorneys fees and disbursements, and costs incurred or paid by Lender in any action which is threatened, pending or completed or proceeding or dispute which affects or might affect this Mortgage, the Note, or the Property or any part thereof. The amounts so incurred or paid by Lender, together with interest thereon at the Event of Default Rate as hereinafter defined from the date incurred until paid by Borrower, shall be added to the indebtedness and secured by the lien of this Mortgage.

1.7 Compliance with Laws. The Borrower shall comply with all laws, ordinances, regulations, covenants, conditions and restrictions affecting the Property or the operation thereof, and shall pay all fees or charges of any kind in connection therewith.

1.8 Zoning and Environmental Laws.

(a) Borrower covenants and warrants that all applicable zoning laws, ordinances and regulations affecting the Property permit the use and occupancy of the Property and further covenants and warrants to comply with all such laws, ordinances and regulations, including, but not limited to, all environmental and ecological laws, ordinances and regulations affecting the Property or the use thereof. Without limiting the generality of the foregoing, Borrower warrants and represents to Lender that to the best of Borrower's knowledge: (a) the Property described herein is now and at all times hereafter will continue to be in full compliance with all federal, state and local environmental laws and regulations, including, but not limited to, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), Public Law No. 96-510, 94 Stat. 2767, 42 USC 9601 et seq. and the Superfund Amendments and Reauthorization Act of 1986 (SARA), Public Law No. 99-499, 100 Stat. 1613, and any amendments thereto, and (b)(i) as of the date hereof there are no hazardous materials, substances, wastes or other environmentally regulated substances (including without limitation, any materials containing asbestos) located on, in or under the Property or used in connection therewith, or (ii) Borrower has fully disclosed to Lender in writing the existence, extent and nature of any such hazardous materials, substances, wastes or other environmentally regulated substances, which Borrower is legally authorized and empowered to maintain on, in or under the Property or use in connection therewith, and Borrower has obtained and will maintain all licenses, permits and approvals required with respect thereto, and is in full compliance with all of the terms, conditions and requirements of such licenses, permits and approvals. Borrower further warrants and represents that it will promptly notify Lender of any change in the nature or extent of any hazardous materials, substances or wastes maintained on, in or under the Property or used in connection therewith, and will transmit to Lender copies of any citations, orders, notices or other material governmental or other communication received with respect to any other hazardous materials, substances, wastes or other environmentally regulated substances affecting the Property.

(b) Borrower shall indemnify and hold Lender harmless from and against any and all damages, penalties, fines, claims, liens, suits, liabilities, costs (including clean-up costs), judgments and expenses (including attorneys' consultants' or experts' fees and expenses) of every kind and nature suffered by or asserted against Lender as a direct or indirect result of any warranty or representation made by Borrower in the preceding paragraph being false or untrue in any material respect or any requirement under any law, regulation or ordinance, local, state or federal, which requires the elimination or removal of any hazardous materials, substances, wastes or other environmentally regulated substances by Lender, Borrower or any transferee of Borrower or Lender.

(c) Borrower's obligations hereunder shall not be limited to any extent by the term of the Note secured hereby, and, as to any act or occurrence prior to payment in full and satisfaction of said Note which gives rise to liability hereunder, shall continue, survive and remain in full force and effect notwithstanding payment in full and satisfaction of said Note and this Mortgage or foreclosure under this Mortgage, or delivery of a deed in lieu of foreclosure.

1.9Insurance. (a) Borrower agrees to keep all improvements and fixtures which are now or hereafter part of the Property and which are subject to possible casualty insured by such company or companies as Lender may reasonably approve for the full insurable value thereof, including replacement cost endorsement, against all risks including, if coverage is available, flood and earthquake. Such insurance will be payable to Lender as the interest of Lender may appear pursuant to the standard form of mortgagee clause or such other form of mortgagee clause as may be required in South Carolina and will not be cancelable by either the insurer or the insured without at least thirty (30) days prior written notice to Lender. Borrower will keep the Property continuously insured as herein required and will deliver to Lender the original of each policy of insurance required hereby. Borrower will pay each premium coming due on any such policy of insurance and will deliver to Lender upon demand by Lender proof of such payment at least thirty (30) days prior to the date such premium would become overdue or delinquent. Upon the expiration or termination of any such policy of insurance, Borrower will furnish to Lender at least thirty (30) days prior to such expiration or termination the original of a renewal or replacement policy of insurance meeting the requirements hereof. If Borrower fails to insure the Property as herein required, Lender may, but shall not be obligated to, after giving ten (10) days written notice to Borrower so insure the Property in the name of Borrower or in the name of Lender or both in such amounts as Lender may deem necessary to protect its lien, and the premiums for any such insurance obtained by Lender shall be the obligation of Borrower. Upon foreclosure of this Mortgage, all right, title and interest of Borrower in and to any policy of insurance upon the Property which is in the custody of the Lender, including the right to unearned premiums, shall vest in the purchaser of the Property at foreclosure, and Borrower hereby appoints Lender as the attorney in fact of Borrower to assign all right, title and interest of Borrower in and to any such policy of insurance to such purchaser. This appointment is coupled with an interest and shall be irrevocable.

(b) In the event the Property is entirely destroyed or is partially destroyed to the extent that restoration will in the opinion of Lender cost in excess of One Hundred Thousand ($100,000.00) Dollars, or in the event restoration costs will not exceed said amount but the conditions of the next sentence are not satisfied, all insurance proceeds shall, at the option of Lender, be applied to the Note (first to expenses, then interest, and then principal) and the Note and all other amounts secured hereby shall, at the option of Lender, become immediately due and payable. Notwithstanding any provisions of this Section to the contrary, (i) if the Property is only partially destroyed to the extent that in the opinion of Lender the Property can be restored for a cost not to exceed One Hundred Thousand ($100,000.00) Dollars; (ii) if in the opinion of Lender the Property as restored will produce sufficient revenue to repay the Note; (iii) if rental insurance or business interruption insurance is available in amounts sufficient to pay all payments due on the Note during restoration, or if Borrower makes some other provision satisfactory to Lender for

making all payments due on the Note during restoration; (iv) if all tenants agree in writing to remain on the Property under their leases and, if applicable, any purchasers of the Property or portions thereof agree in writing that their purchase contracts shall remain in effect; (v) if the Lender receives evidence satisfactory to it and its counsel that the Property as restored will comply with all local zoning ordinances and building restrictions; and (vi) if the Borrower covenants to make the necessary repairs and restoration and provides all additional funds necessary therefor, the Lender will make the insurance proceeds (less expenses incurred in collecting the same) available to the Borrower for the purpose of such repair and restoration, disbursement of proceeds to be in accordance with Lender's standard disbursement procedures. If Lender elects to restore the improvements, any balance of such monies after restoration shall, at the option of Lender, either be applied toward the reduction of indebtedness and other sums secured hereby or be paid to Borrower. Lender shall not be responsible for any failure to collect any insurance proceeds due under the terms of any policy regardless of the cause of such failure.

1.10 Taxes and Assessments. Borrower agrees to pay all taxes, assessments and other charges which constitute or are secured by a lien upon the Property and will deliver to Lender proof of payment of the same not less than ten (10) days prior to the date the same become delinquent; provided, however, that Borrower shall be entitled by appropriate proceedings to contest the amount or validity of such tax, assessment or charge so long as the collection of the same by foreclosure of the lien upon the Property is stayed during the pendency of such proceedings and Borrower deposits with the authority to which such tax, assessment or charge is payable or with Lender appropriate security for payment of the same, together with any applicable interest and penalties, should the same be determined due and owing.

1.11 Expenditures by Lender. If Borrower fails to make payment for restoration or repair of the Property, for insurance premiums or for taxes, assessments or other charges as required in this Mortgage, Lender may, but shall not be obligated to, pay for the same, and any such payment by Lender will be secured by this Mortgage and have the same rank and priority as the principal debt secured hereby and bear interest from the date of payment at the Event of Default Rate, as defined. Borrower shall pay to Lender in cash on demand an amount equal to any payment made by Lender pursuant to this paragraph plus interest thereon as herein provided.

1.12 Condemnation. In the event that by, or pursuant to, proper authority there is taken or condemned the entire Property or any part thereof, under power of eminent domain exercised by any actual or quasi governmental authority or public utility, the Borrower hereby assigns to the Lender any and all awards that may be given, made or due the Borrower in any proceedings in connection therewith, and the amounts of such awards shall be applied by the Lender to the reduction of the indebtedness secured hereby, and the Borrower agrees to execute any and all such further instruments of assignment of any and all such condemnation awards as may be required by the Lender to carry out the purposes of this Section. The Borrower shall give written notice of such condemnation proceeding within ten (10) days of receipt of any service or process in connection therewith. In any condemnation proceedings against the Property, the Lender hereby reserves, and the Borrower hereby acknowledges, the Lender's right to institute or intervene in any such condemnation proceedings to assert said interest. In the event the entire Property is taken or so much thereof that restoration will in the opinion of Lender cost in excess of One Hundred Thousand ($100,000.00) Dollars, or in the event restoration costs will not exceed said amount but the conditions of the next sentence are not satisfied, all condemnation proceeds shall, at the option of Lender, be applied to the Note (first to expenses, then interest, and then principal) and the Note and all other amounts secured hereby shall, at the option of Lender, become immediately due and payable. Notwithstanding any provisions of this Section to the contrary, (i) if the entire Property is not taken and in the opinion of Lender the Property can be restored for a cost not to exceed One Hundred Thousand ($100,000.00) Dollars; (ii) if in the opinion of Lender the Property as restored will produce sufficient revenue to repay the Note; (iii) if provision satisfactory to Lender is made for making all payments due on the Note during restoration; (iv)

if any purchasers of the Property or portions thereof agree in writing that their purchase contracts shall remain in effect; (v) if the Lender receives evidence satisfactory to it and its counsel that the Property as restored will comply with all local zoning ordinances and building restrictions; and (vi) if the Borrower covenants to make the necessary repairs and restoration and provides all additional funds necessary therefor, the Lender will make said award (less expenses incurred in collecting the same) available to the Borrower for the purpose of such repair and restoration, disbursement of proceeds to be in accordance with Lender's standard disbursement procedures. Any excess of the proceeds of the award over the cost of repair and restoration shall be applied to reduce the principal amount of the Note and accrued interest thereon.

1.13 Escrow. Lender may, in its sole discretion, require Borrower to deposit with Lender, in addition to making regular payments of principal and/or interest, an amount sufficient to enable Lender to pay when due all insurance premiums and real property taxes, which deposits shall be made in installments satisfactory to Lender. Such deposits shall not be, nor be deemed to be, trust funds, but may be commingled with the general funds of Lender. No interest shall be payable in respect thereof. Upon demand by Lender, Borrower shall deliver to Lender such additional monies as are necessary to enable Lender to pay such premiums or taxes when due. In the event of a default under any of the terms, covenants and conditions in the Note, this Mortgage or any other instrument securing the Note to be kept, performed or observed by Borrower, Lender may apply to the reduction of the sums secured hereby, in such manner as Lender shall determine, any amount under this paragraph refining to Borrower's credit and any return premium received from cancellation of any insurance policy by Lender upon foreclosure of this Mortgage.

1.14 Use of Property. Borrower shall develop the Property pursuant to the terms and conditions of the planned development approved by Horry County, as amended, which use or uses, shall not change without the prior written consent of Lender.

ARTICLE II

DEFAULT AND REMEDIES

2.1 Event of Default. The term Event of Default, wherever used in this Mortgage, shall mean any one or more of the following events:

(a) Failure to pay the Note in full on its maturity date.

(b) Failure to pay any other payment due on the Note, which failure shall continue for ten (10) days after written notice provided in accordance with the Loan Agreement.

(c) Failure of the Borrower to fulfill any of the obligations contained in the Note, this Mortgage, any Loan Agreement, or any other agreement between the parties.

2.2 Acceleration of Maturity. If an Event of Default shall have occurred, Lender may declare the outstanding principal amount of the Note and the interest accrued thereon, and all other sums secured hereby, to be due and payable immediately, and upon such declaration such principal and interest and other sums shall immediately become and be due and payable without demand or notice.

2.3 Lender's Power of Enforcement. If an Event of Default shall have occurred, Lender may, either with or without entry or taking possession as hereinabove provided or otherwise, proceed by suit or suits at law or in equity or by any other appropriate proceeding or remedy: (a) to enforce payment of the

Note or the performance of any term hereof or any other right; (b) to foreclose this Mortgage and to sell, as an entirety or in separate lots or parcels, the Property, under the judgment or decree of a court or courts of competent jurisdiction; and (c) to pursue any other remedy available to it. Lender shall take action either by such proceedings or by the exercise of its powers with respect to entry or taking possession, or both, as Lender may determine.

2.4 Lender's Right to Enter and Take Possession. Operate and Apply Income.

(a) If an Event of Default shall have occurred, Borrower, upon demand of Lender, shall forthwith surrender to Lender the actual possession, and if and to the extent permitted by law, Lender itself, or by such officers or agents as it may appoint, may enter and take possession of all the Property, and may exclude Borrower and its agents and employees wholly therefrom, and may have joint access with Borrower to the books, papers and accounts of Borrower.

(b) If Borrower shall for any reason fail to surrender or deliver the Property or any part thereof after Lender's demand, Lender may obtain a judgment or decree conferring on Lender the right to immediate possession or requiring Borrower to deliver immediate possession of all or part of the Property to Lender along with all books, papers and accounts of Borrower, to the entry of which judgment or decree Borrower hereby specifically consents.

(c) Borrower shall pay to Lender, upon demand, all reasonable costs and expenses of obtaining such judgment or decree and reasonable compensation to Lender, its attorneys and agents, and all such costs, expenses and compensation shall, until paid, be secured by the lien of this Mortgage.

(d) Upon every such entering upon or taking of possession, Lender may hold, store, use, operate, manage and control the Property and conduct the business thereof, and, from time to time:

(i) make all necessary and proper maintenance, repairs, renewals, replacements, additions, betterments and improvements thereto and thereon and purchase or otherwise acquire additional fixtures, personally and other property;

(ii) insure or keep the Property insured;

(iii) manage and operate the Property and exercise all the rights and powers of Borrower in its name or otherwise, with respect to the same;

(iv) enter into agreements with others to exercise the powers herein granted Lender;

all as Lender in its reasonable judgment from time to time may determine; and Lender may collect and receive all the income, revenues, rents, issues and profits of the same, including those past due as well as those accruing thereafter; and shall apply the monies so received by Lender in such priority as Lender may determine to (1) the reasonable compensation, expenses and disbursements of the agents and attorneys; (2) the cost of insurance, taxes, assessments and other proper charges upon the Property or any part thereof; (3) the deposits for taxes and assessments and insurance premiums due; and (4) the payment of accrued interest on the Note.

2.5 Leases. Lender, at its option, is authorized to foreclose this Mortgage subject to the rights of any tenants of the Property, and the failure to make any such tenants parties defendant to any such foreclosure proceedings and to foreclose their rights will not be, nor be asserted by Borrower to be, a

defense to any proceedings instituted by Lender to collect the sums secured hereby or to collect any deficiency remaining unpaid after the foreclosure sale of the Property.

2.6 Purchase by Lender. Upon any such foreclosure sale, Lender may bid for and purchase the Property and, upon compliance with the terms of sale, may hold, retain and possess and dispose of such property in its own absolute right without further accountability.

2.7 Application of Indebtedness Toward Purchase Price. In the event Lender purchases any portion of the Property at any foreclosure sale, Lender may, to the extent permitted by law, apply toward payment of the foreclosure purchase price, in lieu of cash, any portion of or all sums due to Lender under the Note, this Mortgage or any other instrument securing the Note.

2.8 Waiver of Stay, Extension, Redemption and Appraisal Laws. Borrower agrees to the full extent permitted by law that in case of a default on its part hereunder, neither Borrower nor anyone claiming through or under it shall or will set up, claim or seek to take advantage of any stay, extension or redemption laws now or hereafter in force, in order to prevent or hinder the enforcement or foreclosure of this Mortgage, or the absolute sale of the Property or the final and absolute putting into possession thereof, immediately after such sale, of the purchasers thereat, and Borrower, for itself and all who may at any time claim through or under it, hereby waives, to the full extent that it may lawfully so do, the benefit of all such laws, and any and all right to have the assets comprising the Property marshalled upon any foreclosure of the lien hereof and agrees that Lender or any court having jurisdiction to foreclose such lien may sell the Property in part or as an entirety. In the event this Mortgage is foreclosed, Borrower also waives, to the extent such waiver may be enforceable at the time of foreclosure, any right to have the Property appraised after foreclosure for the purpose of reducing a deficiency judgment.

2.9 Receiver. If an Event of Default shall have occurred, Lender, to the extent permitted by law and without regard to the value or occupancy of the security, shall be entitled as a matter of right if it so elects to the appointment of a receiver to enter upon and take possession of the Property and to collect all rents, revenues, issues, income, products and profits thereof and apply the same as the court may direct. The receiver shall have all rights and powers permitted under the laws of the state where the Land is located and such other powers as the court making such appointment shall confer. The expenses, including receiver's fees, attorney's fees, costs and agent's compensation, incurred pursuant to the powers herein contained shall be secured by this Mortgage. The right to enter and take possession of and to manage and operate the Property, and to collect the rents, issues and profits thereof, whether by a receiver or otherwise, shall be cumulative to any other right or remedy hereunder or afforded by law, and may be exercised concurrently therewith or independently thereof. Lender shall be liable to account only for such rents, issues and profits actually received by Lender, whether received pursuant to this paragraph or paragraph 2.4. Notwithstanding the appointment of any receiver or other custodian, Lender shall be entitled as secured party hereunder to the possession and control of any cash, deposits, or instruments at the time held by, or payable or deliverable under the terms of this Mortgage to, Lender.

2.10 Suits to Protect the Property. Lender shall have the power and authority to institute and maintain any suits and proceedings as Lender may deem advisable (a) to prevent any impairment of the Property by any acts which may be unlawful or any violation of this Mortgage, (b) to preserve or protect its interest in the Property, and (c) to restrain the enforcement of or compliance with any legislation or other governmental enactment, rule or order that may be unconstitutional or otherwise invalid, if the enforcement of or compliance with such enactment, rule or order might impair the security hereunder or be prejudicial to Lender's interest.

2.11 Proofs of Claim. In the case of any receivership, insolvency, bankruptcy, reorganization, arrangement, adjustment, composition or other judicial proceedings affecting Borrower, any person, partnership or corporation guaranteeing or endorsing any of Borrower's obligations, its creditors or its property, Lender, to the extent permitted by law, shall be entitled to file such proofs of claim and other documents as may be necessary or advisable in order to have its claims allowed in such proceedings for the entire amount due and payable by Borrower under the Note, this Mortgage and any other instrument securing the Note, at the date of the institution of such proceedings, and for any additional amounts which may become due and payable by Borrower after such date.

2.12 Borrower to Pay the Note on Any Event of Default in Payment; Application of Monies by Lender.

(a) If default shall be made in the payment of any amount due under the Note, this Mortgage or any other instrument securing the Note, then, upon Lender's demand, Borrower will pay to Lender the whole amount due and payable under the Note and all other sums secured hereby; and if Borrower shall fail to pay the same forthwith upon such demand, Lender shall be entitled to sue for and to recover judgment for the whole amount so due and unpaid together with costs and expenses including the reasonable compensation, expenses and disbursements of Lender's agents and attorneys incurred in connection with such suit and any appeal in connection therewith. Lender shall be entitled to sue and recover judgment as aforesaid either before, after or during the pendency of any proceedings for the enforcement of this Mortgage, and the right of Lender to recover such judgment shall not be affected by any taking, possession or foreclosure sale hereunder, or by the exercise of any other right, power or remedy for the enforcement of the terms of this Mortgage, or the foreclosure of the lien hereof.

(b) In case of a foreclosure sale of all or any part of the Property and of the application of the proceeds of sale to the payment of the sums secured hereby, Lender shall be entitled to enforce payment of and to receive all amounts then remaining due and unpaid and to recover judgment for any portion thereof remaining unpaid, with interest.

(c) Borrower hereby agrees, to the extent permitted by law, that no recovery of any such judgment by Lender and no attachment or levy of any execution upon any of the Property or any other property shall in any way affect the lien of this Mortgage upon the Property or any part thereof or any lien, rights, powers or remedies of Lender hereunder, but such lien, rights, powers and remedies shall continue unimpaired as before.

(d) Any monies collected or received by Lender under this paragraph shall be applied as follows:

i. First, to the payment of reasonable compensation, expenses and disbursements of the agents and attorneys; and

ii. Second, to payment of amounts due and unpaid under the Note, this Mortgage and all other instruments securing the Note.

2.13 Delay or Omission No Waiver. No delay or omission of Lender or of any holder of the Note to exercise any right, power or remedy accruing upon any Event of Default shall exhaust or impair any such right, power or remedy or shall be construed to waive any such Event of Default or to constitute acquiescence therein. Every right, power and remedy given to Lender may be exercised from time to time and as often as may be deemed expedient by Lender.

2.14 No Waiver of One Event of Default to Affect Another. No waiver of any Event of Default hereunder shall extend to or affect any subsequent or any other Event of Default then existing, or impair any rights, powers or remedies consequent thereon. If Lender (a) grants forbearance or an extension of time for the payment of any sums secured hereby; (b) takes other or additional security for the payment thereof; (c) waives or does not exercise any right granted in the Note, this Mortgage or any other instrument securing the Note; (d) releases any part of the Property from the lien of this Mortgage or any other instrument securing the Note; (e) consents to the filing of any map, plat or re-plat of the Land; (f) consents to the granting of any easement on the Land; or (g) makes or consents to any agreement changing the terms of this Mortgage or subordinating the lien or any charge hereof, no such act or omission shall release, discharge, modify, change or affect the original liability under the Note, this Mortgage or otherwise of Borrower, or any subsequent purchaser of the Mortgaged property or any part thereof or any maker, cosigner, endorser, surety or guarantor. No such act or omission shall preclude Lender from exercising any right, power or privilege herein granted or intended to be granted in case of any Event of Default then existing or of any subsequent Event of Default nor, except as otherwise expressly provided in an instrument or instruments executed by Lender, shall the lien of this Mortgage be altered thereby. In the event of the sale or transfer by operation of law or otherwise of all or any part of the Property, Lender, without notice to any person, firm or corporation, is hereby authorized and empowered to deal with any such vendee or transferee with reference to the Property or the indebtedness secured hereby, or with reference to any of the terms or conditions hereof, as fully and to the same extent as it might deal with the original parties hereto and without in any way releasing or discharging any of the liabilities or undertakings hereunder.

2.15 Discontinuance of Proceedings; Position of Parties Restored. If Lender shall have proceeded to enforce any right or remedy under this Mortgage by foreclosure, entry or otherwise, and such proceedings shall have been discontinued or abandoned for any reason, or shall have been determined adversely to Lender, then and in every such case Borrower and Lender shall be restored to their former positions and rights hereunder, and all rights, powers and remedies of Lender shall continue as if no such proceeding had occurred or had been taken.

2.16 Remedies Cumulative. No right, power or remedy conferred upon or reserved to Lender by the Note, this Mortgage or any other instrument securing the Note is exclusive of any other right, power or remedy, but each and every such right, power and remedy shall be cumulative and concurrent and shall be in addition to any other right, power and remedy given hereunder or under the Note or any other instrument securing the Note, or now or hereafter existing at law, in equity or by statute.

ARTICLE III

MISCELLANEOUS

3.1 Waiver. Lender may, in the sole discretion of Lender, from time to time waive or forbear from enforcing any provision of this Mortgage, and no such waiver or forbearance shall be deemed a waiver by Lender of any other right or remedy provided herein or by law or be deemed a waiver of the right at any later time to enforce strictly all provisions of this Mortgage and to exercise any and all remedies provided herein and by law.

3.2 Event of Default Rate. The Event of Default Rate shall be the rate of interest after default as set forth in the Note.

3.3 Future Advances. Lender, at its option, may make future advances to Borrower; provided, that nothing contained herein shall constitute an obligation to do so. Such future advances, with interest at the

rate payable from time to time on the outstanding principal under the Note, shall be secured by this Mortgage when evidenced by the Note or by any other instrument indicating that such advances are secured by this Mortgage or when advanced under the terms of this Mortgage. Lender may make such future advances (a) at the request of Borrower, whether or not there is any obligation to make future advances; or (b) to pay, with or without the consent or request of Borrower, any amounts which may be due under any other mortgage or lien affecting the Property.

3.4 Construction. This Mortgage shall be construed and enforced in accordance with the laws of South Carolina. Paragraph captions are included herein only for convenience of reference and shall not be deemed to limit or define the purpose or effect of any provision hereof. The provisions of this Mortgage are severable, and the invalidity of one or more provisions shall not be deemed to invalidate the remainder. This Mortgage shall be binding upon the Borrower and the heirs, successors and assigns of Borrower and shall inure to the benefit of Lender and the heirs, successors and assigns of Lender. Borrower agrees that time is of the essence hereof. The terms "Borrower" and "Lender" as used herein shall be deemed to include the respective heirs, successors and assigns of Borrower and Lender.

3.5 Notices. Any notice given by either party hereto to the other party shall be in writing and shall be signed by the party giving notice. Any notice or other document to be delivered to either party hereto by the other party shall be deemed delivered if mailed postage prepaid to the party to whom directed at the address of such party stated above. This paragraph shall not be deemed to prohibit any other manner of delivering a notice or other document.

3.6 Modifications. This Mortgage may not be amended or modified or the terms hereof waived except by an instrument in writing signed by the party against which enforcement of such amendment, modification or waiver is sought.

3.7 Jurisdiction. Borrower submits to the jurisdiction of any court of competent jurisdiction within the State of South Carolina. Borrower agrees that any action concerning this Mortgage, the Note or any other loan document, whether initiated by Lender, Borrower or any other party, shall be tried only in a court of competent jurisdiction within the State of South Carolina, and Borrower waives all objections to venue. All matters arising hereunder shall be determined in accordance with the law and practice of such South Carolina court. Borrower further agrees to comply with all requirements necessary to give such court in personam jurisdiction and agrees that service of process may be accomplished by, in addition to any other lawful means, certified mail, return receipt requested, to the Borrower at Borrower's address set forth above or any new address of which Lender has been notified by Borrower in writing.

3.8 Subordinate Liens. Borrower shall not further encumber the title to the Property without the prior written consent of the Lender.

3.9 Partial Releases. Lender shall release parcels from the lien of this Mortgage only as provided in the Loan Agreement.

3.10 WAIVER OF JURY TRIAL. BY THE EXECUTION HEREOF, BORROWER KNOWINGLY, VOLUNTARILY AND INTENTIONALLY HEREBY AGREES, THAT:

A) NEITHER BORROWER NOR LENDER, NOR ANY ASSIGNEE, SUCCESSOR, HEIR, OR LEGAL REPRESENTATIVE OF BORROWER OR LENDER, SHALL SEEK A JURY TRIAL IN ANY LAWSUIT, PROCEEDING, COUNTERCLAIM, OR ANY OTHER LITIGATION PROCEDURE ARISING FROM OR BASED UPON THIS MORTGAGE, THE NOTE, THE LOAN AGREEMENT (IF ANY) OR ANY OF THE LOAN DOCUMENTS EVIDENCING, SECURING, OR RELATING TO THE

INDEBTEDNESS SECURED HEREBY, OR TO THE DEALINGS OR RELATIONSHIP BETWEEN OR AMONG THE PARTIES THERETO;

(B) NEITHER BORROWER NOR LENDER WILL SEEK TO CONSOLIDATE ANY SUCH ACTION, IN WHICH A JURY TRIAL HAS BEEN WAIVED, WITH ANY OTHER ACTION IN WHICH A JURY TRIAL HAS NOT BEEN OR CANNOT BE WAIVED;

(C) THE PROVISIONS OF THIS SECTION HAVE BEEN FULLY NEGOTIATED BY THE PARTIES HERETO, AND THESE PROVISIONS SHALL BE SUBJECT TO NO EXCEPTIONS;

(D) NEITHER BORROWER NOR LENDER HAS IN ANY WAY AGREED WITH OR REPRESENTED TO ANY OTHER PARTY THAT THE PROVISIONS OF THIS SECTION WILL NOT BE FULLY ENFORCED IN ALL INSTANCES; AND

(E) THIS PROVISION IS A MATERIAL INDUCEMENT FOR LENDER TO MAKE THE LOAN SECURED HEREBY.

The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. THE UNDERSIGNED HEREBY WAIVE AND RELINQUISH THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.

IN WITNESS WHEREOF, Borrower has caused this Mortgage to be executed the day and year first above written.

Signed, sealed and delivered
in the presence of

Peachtree Properties of North Myrtle Beach, LLC,
a South Carolina limited liability company

By: _____
Jeffrey T. Shoup, Manager

NOTARY ACKNOWLEDGEMENT(S) ON NEXT PAGE

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

ACKNOWLEDGEMENT

I, ROBERT H. GWIN, III do hereby certify that **Jeffrey T. Shoup**, a Manager of Peachtree Properties of North Myrtle Beach, LLC, a South Carolina limited liability company, appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and seal this the 24 day of July, 2006.

Notary Public for South Carolina
My Commission expires: 8/8/2012

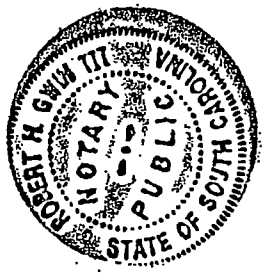


EXHIBIT A

All that certain lot or parcel of land situate in the City of Myrtle Beach, County of Horry, State of South Carolina, and being more particularly described as follows:

All and singular those three (3) certain Lots in Socastee Township, Horry County, South Carolina, being shown on a Plat prepared for the Estate of John C. Spivey by J.F. Thomas, Surveyor, dated September 1, 1965, recorded November 16, 1965, in Plat Book 43 at Page 183, and designated thereon as Hursey Three Lots, to which Plat reference is made being described as follows:

Beginning at a point on the Inland Waterway the lands intersects with the Inland Waterway and Spivey Road, a right-of-way from which has been granted at a corner designated Concrete N; thence North: 78 degrees, 10 minutes West 225 feet to Concrete N; thence North 27 degrees 10 minutes East 250 feet to Pipe N; thence South 73 degrees 10 minutes East to Pipe N; thence South 27 degrees 10 minutes East 250 feet to the beginning corner.

Bounded on the North by lands of Ruth L. McClam; on the East by lands of Ruth L. McClam, on the South by the Northern margin of Intracoastal Waterway, and on the West by lands of Ruth L. McClam.

This being the same property conveyed to Ruth L. McClam by Deed of T.S. Ludlam dated October 21, 1966, and recorded January 23, 1967, in the Office of the Clerk of Court for Horry County in Deed Book 360 at Page 199.

ALSO:

All and certain lot of land in Socastee Township, Horry County, South Carolina, on the Northern side of the Inland Waterway and located near the Old Sweet Ditch, bounded and described as follows:

Commencing at an iron stake on the Northern bank of the Inland Waterway being a point where the Eastern bank of the Old Socastee Creek intersects the Inland Waterway, and running thence in a Northerly direction 21 degrees East 250 feet to and iron stake; thence Eastward 79 degrees East 100 feet to an iron stake; thence South 21 degrees East 250 feet to an iron stake on the Northern bank of the Inland Waterway; thence Westwardly along the Northern bank of the Inland Waterway 100 feet to the beginning corner.

Bounded on the North by other lands of Ruth L. McClam; on the East by other lands of Ruth L. McClam; on the South by the Inland Waterway; and on the west by other lands of Ruth L. McClam.

This being the same property conveyed to Ruth L. McClam by Deed of Larry W. Paul dated February 15, 1982, and recorded on February 18, 1982, in the office of the Clerk of Court for Horry County in Deed Book 737 at Page 818.

ALSO:

PARCEL No. 1: All and singular, that certain tract or parcel of land in Socastee Township, Horry County, South Carolina, on hundred thirty-five (135) acres, more or less, having been platted and shown on a Plat prepared by J.F. Thomas, Surveyor, dated September 1, 1965. This 135 acres is situate North of the Intracoastal Waterway. The Plat is recorded in Plat Book 43, Page 183, in the Office of the Clerk of Court of Horry County, to which Plat reference is made.

The 135 acres is exclusive of the proposed highway area shown on the Plat above referred to and is described as follows:

Beginning at Concrete N on the Southern margin of the proposed highway as shown on the referenced Plat (this road is known as the Peachtree Ferry Road); and running thence North approximately 26°5' East 33 feet to a point in the center of the road, the point being taken from the Highway Department survey; thence South 68°22' East 441 feet to point of intersection, as shown on the above Plat; thence South 62°45' East 984.3 feet to point of intersection, as shown on the above Plat; thence South 75°15' East 1028.6 feet to point of intersection, as shown on the Plat; thence North 33 feet to Concrete N on the Northern margin of the road above described; thence North 19°5' East 473.5 feet to Pipe O; thence 53°10 East 516 feet to Concrete N; thence South 13°55' West 872.5 feet to Concrete N on the Northern margin of the road; thence South 33 feet to point in center of the road described above; thence South 75°15' East 710 feet to point of intersection as shown on the Plat; thence South 85°11 minutes East 340.5 feet to point of intersection in center of the road described above, as shown on the Plat; thence Southwest 33 feet to Concrete N on the Southern margin of the road described above; thence South 21°45' West 1045.5 feet to Pipe O and Concrete N; thence 78°50' West 750 feet to Pipe O and Concrete N; thence North 27°55' West 438.5 feet to Concrete N; thence North 78°10' West 566 feet to Concrete N; thence North 27°10' East to Pipe N; thence North 78°10' West 225 feet to Pipe N; thence South 27°10' West 250 feet to concrete N; thence North 78°10' West 1284.5 feet to Concrete N; thence North 21° East 250 feet to Concrete N; thence North 78°10' West 100 feet to Concrete N; thence South 21° West 250 feet to Concrete N; thence North 26°25' West 145 feet along Socastee Creek, the Creek being the line; thence North 45° West 100 feet; thence North 57°West 100 feet; thence North 63°10' West 100 feet; thence North 54°45' West 130 feet; thence South 70°25' West 185 feet; thence North 89°20' West 200 feet; thence North 61°45' West 94 feet; thence North 70°20' West 100 feet; thence South 86°50' West 80 feet to Gum 3MO; thence North 27°40' East 383.5 feet to Gum OM; thence North 27°20' East 261 Feet to Gum OM; thence North 26°05' East 1119.5 feet to the beginning corner.

Bounded on the North by the center the proposed, highway as shown on the Plat in part, and in part by the lands, now or formerly, of Brice J. Ward; on

the East by lands, now or formerly, of Roy Collins, in part, and in part by lands, now or formerly, of Virginia Zeigler; on the South by lands, now or formerly, of J.M. Cooper, in part, and lands, nor or formerly, of Virginia Zeigler, in part, and by the Northern margin of the Intracoastal Waterway, in part, Lucy S. Kolb, in part, and Socastee Creek, in part; and on the West by land, now or formerly, of Maggie L. Roberts.

LESS AND EXCEPT:

ALL AND SINGULAR that certain piece, parcel or lot of land situate, lying, and being in Socastee Township, County and State aforesaid, designated as Pump Site and containing 215 square feet and shown on a plat of Pump Site For Grand Strand Water & Sewer Authority owned by Ruth L. McClam; made by Engineering and Technical Services, Inc., dated November 1, 1990; a copy of which is recorded in Plat Book 112, Page 65, public records of Horry County and which is by way of reference made a part and parcel of this description.

This property was heretofore conveyed by Ruth Ludlum McClam, et al to the Grand Strand Water and Sewer Authority by Deed dated 23 November, 1990; and recorded in Deed Book 1438, Page 163, in the office of the Clerk of Court for Horry County, South Carolina.

Being the same lands and premises conveyed to Peachtree Properties of North Myrtle Beach LLC by Deed from McClam, et al, dated 4/24/06 and recorded in Deed Book 3132 @ page 779, public records Horry County, South Carolina,

FILED
HORRY COUNTY, S.C.
2006 JUL 25 PM 3:27
BALLERY V. SKIPPER
REGISTRAR OF DEEDS

PEACHTREE PROPERTIES OF NORTH MYRTLE BEACH, LLC,

Mortgagor,

JERICHO STATE CAPITAL CORP. OF FLORIDA,

Mortgagee.

MORTGAGE, SECURITY AGREEMENT

AND ASSIGNMENT OF LEASES AND RENTS

Mortgage Amount: $4,263,888.00

Date: July 24, 2006

131.4 acres +/-
County: Horry

Record and Return to:

Westerman Ball Ederer Miller & Sharfstein, LLP
170 Old Country Road, 4th Floor
Mineola, New York 11501
Attn: Philip L. Sharfstein, Esq.

COPY

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MORTGAGE, SECURITY AGREEMENT AND ASSIGNMENT OF LEASES AND RENTS

This MORTGAGE, SECURITY AGREEMENT AND ASSIGNMENT OF LEASES AND RENTS is made and entered into on the 24th day of July, 2006 by PEACHTREE PROPERTIES OF NORTH MYRTLE BEACH, LLC, a South Carolina limited liability company having an address at 408 Sea Mountain Highway, North Myrtle Beach, South Carolina 29582 ("Mortgagor"), in favor of JERICHO STATE CAPITAL CORP. OF FLORIDA, a Florida corporation having an address at 2500 N. Military Trail, Suite 240, Boca Raton, Florida 33431 ("Mortgagee").

WITNESSETH:

WHEREAS, Mortgagor is the lawful owner of the fee estate in certain vacant land located in Horry County, Myrtle Beach, South Carolina, as more particularly described on Exhibit A attached hereto (the "Premises"); and

WHEREAS, Mortgagor has this date borrowed $4,263,888.00 from Mortgagee and is making this Mortgage as security therefor as a second priority lien in the principal amount of $4,263,888.00.

THE GRANTING CLAUSE:

NOW, THEREFORE, in consideration of the premises and covenants herein contained, and in order to secure the payment of the principal, interest and other sums due under that certain Mortgage Note executed the date hereof by Mortgagor to the order of Mortgagee in the original principal amount of $4,263,888.00 (as same may be hereafter modified, amended, extended, renewed or substituted for, the "Note"), and in order to secure the payment of all other indebtedness which this Mortgage by its terms secures and the compliance with all of the terms hereof, of the Note and any other document executed in connection herewith (provided, however, that the maximum principal sum secured by this Mortgage at execution or which under any contingency may be secured hereby at any time in the future shall not exceed the principal sum stated above);

Mortgagor does hereby grant, bargain, sell, mortgage, warrant, pledge, assign, transfer and convey to Mortgagee, and to its participants, successors and assigns, subject to a first mortgage in favor of R.E. Loans LLC, a California limited liability company, securing a note in the principal sum of $18,520,000.00 (the "Superior Mortgage"), the following property (collectively hereinafter referred to as the "Mortgaged Property"):

(a) the Premises;

(b) all additional lands and estates hereafter acquired by Mortgagor for use in connection with the Premises and all lands and estates that may, from time to time, by supplemental mortgage or additional agreement be made subject to the lien of this Mortgage;

(c) any improvements, structures and buildings and any alterations thereto or replacements thereof, now or hereafter erected upon the Premises, all fixtures, fittings, appliances, apparatus, equipment, machinery, material and replacements thereof (other than those articles of personal property owned by tenants under the "Leases" (as defined in clause (d) below)) now or at any time hereafter affixed to, attached to, placed upon or used in any way in connection with the complete and comfortable use, enjoyment, occupancy or operation of the Land or such improvements, and any and all structures or buildings, including but not limited to furnaces, boilers, oil burners, radiators and piping, coal stokers, plumbing and bathroom fixtures, refrigeration, air conditioning and sprinkler systems, wash-tubs, sinks, gas and electric fixtures; stoves, ranges, ovens, disposals, dishwashers, hood and fan combinations, awnings, screens, window shades, elevators, motors, dynamos, refrigerators, kitchen cabinets, incinerators, kitchen equipment, laundry equipment, plants and shrubbery and all other equipment and machinery, appliances, fittings and fixtures of every nature whatsoever now or hereafter owned or acquired by Mortgagor and located in or on, or attached to, and used or intended to be used in connection with or with the operation of, the Premises, buildings, structures or other improvements, or in connection with any construction being conducted or which may be conducted thereon, and owned by Mortgagor, and all extensions, additions, improvements, betterments, renewals, substitutions and replacements to any of the foregoing, and all of the right, title and interest of Mortgagor in and to any such personal property or fixtures subject to any lien, security interest or claim, which, to the fullest extent permitted by law, shall be conclusively deemed fixtures and a part of the real property encumbered hereby (collectively, the "Improvements");

(d) all leases and all other occupancy agreements (written or oral), by concession, license or otherwise (including any guarantees or sureties of any of the foregoing), of the Mortgaged Property, or any part thereof, now existing or hereafter entered into between Mortgagor (or any predecessor in interest as owner of the Mortgaged Property or otherwise) and tenants of Mortgagor (or such predecessor in interest), and all right, title and interest of Mortgagor therein and thereunder, including cash, securities, letters of credit or other security deposited thereunder to secure performance by the tenants under the Leases of their obligations thereunder and any proof of claim in any bankruptcy proceeding instituted by or against any such tenant or guarantor and the right to enforce, whether by action at law or in equity or by other means, all provisions, covenants and agreements thereof (hereinafter collectively referred to as the "Leases");

(e) all furniture, furnishings, equipment and other articles of personal property, together with all replacements and renewals thereof, other than those articles of trade fixtures and other personal property owned by tenants under the Leases, now or at any time hereafter placed upon, located in or used in any way in connection with the complete and

comfortable use, enjoyment, occupancy and operation of the Property (hereinafter collectively referred to as the "Furniture, Furnishings and Equipment");

(f) Mortgagor's interest in all agreements, contracts, certificates, instruments and other documents, now or hereafter entered into, pertaining to the construction, operation or management of any structure or building now or hereafter erected on the Land or to the sale of any direct or indirect interest in the Property, including any purchase money mortgage or security agreement securing the payment of any portion of the purchase price due to Mortgagor for such interest, and all right, title and interest of Mortgagor therein and thereunder, including the right upon the happening of any default hereunder, to receive and collect any sums payable to Mortgagor thereunder;

(g) Mortgagor's interest in the franchises, permits, licenses and rights therein and thereto respecting the use, occupation and operation of the Mortgaged Property and any part thereof and respecting any business or activity conducted on the Mortgaged Property and any part thereof, including to the extent permitted by law the name or names, if any, now or hereafter used for the Improvements, and the good will associated therewith;

(h) Mortgagor's interest in all easements, rights-of-way, gores of land, streets, ways, alleys, passages, sewer rights, water courses, water rights and powers, and all appurtenances whatsoever, in any way belonging, relating or appertaining to any of the Mortgaged Property described in the preceding clauses (a) through (g), or which hereafter shall in any way belong, relate or be appurtenant thereto, whether now owned or hereafter acquired by Mortgagor;

(i) Mortgagor's interest claims and causes of action relating directly or indirectly to the Mortgaged Property (including, without limitation, tax appeals and tax and other refunds), whether such claims or causes of action arise in Mortgagor's name or such claims or causes of action are acquired by Mortgagor, directly or indirectly, by subrogation or otherwise;

(j) Mortgagor's interest in all proceeds, products, replacements, additions, substitutions, renewals and accessions of and to the Mortgaged Property described in the preceding clauses (a) through (i) (including, without limitation, insurance proceeds and proceeds from governmental or charitable grants or loans including without limitation grants or loans from the Federal Emergency Management Agency or any other federal, state or local agency or instrumentality or any charitable organization);

(k) all rents, income and other benefits to which the Mortgagor may now or hereafter be entitled from the Mortgaged Property described in the preceding clauses (a) through (j), to be applied against the indebtedness and other sums secured hereby; provided, however, that permission is hereby given to the Mortgagor, so long as no Event of Default has occurred hereunder, to collect and use such rents, income and other benefits as they become due and payable, but not in advance thereof;

(l) all air rights and unused development rights (including, without limitation, rights (whether or not transferable to other parties) to restrict the use of the Mortgaged Property);

(m) the reversion and reversions, remainder and remainders, and all land lying in the bed of any street, road or avenue, opened or proposed, in front of or adjoining the Mortgaged Property, to the center line thereof and all the estates, rights, titles, interests, dower and rights of dower, curtesy and rights of curtesy, property, possession, claim and demand whatsoever, both at law and in equity, of Mortgagor of, in and to the Mortgaged Property;

(n) all awards or payments, including interest thereon, which may heretofore and hereafter be made with respect to the Mortgaged Property, whether from the exercise of the right of eminent domain (including but not limited to any transfer made in lieu of or in anticipation of the exercise of said right), or for a change of grade, or for any other injury to or decrease in the value of the Mortgaged Property;

(o) all proceeds of and any unearned premiums on any insurance policies covering the Mortgaged Property, including, without limitation, the right to receive and apply the proceeds of any insurance, judgments, or settlements made in lieu thereof, for damage to the Mortgaged Property;

(p) the right, in the name and on behalf of Mortgagor, to appear in and defend any action or proceeding brought with respect to the Mortgaged Property and to commence any action or proceeding to protect the interest of Mortgagee in the Mortgaged Property;

(q) all title insurance policies, management, franchise and service agreements, accounts, occupancy permits and licenses, building and other permits, governmental approvals, licenses, agreements with utilities companies, water and sewer capacity reservation agreements, bonds, governmental applications and proceedings, feasibility studies, maintenance and service contracts, marketing agreements, development agreements, surveys, engineering work, architectural plans and engineering plans, site plans, landscaping plans, engineering contracts, and all other consents, approvals and agreements which Mortgagor may now or hereafter own in connection with the Mortgaged Property and/or improvements constructed thereon, and all deposits, down payments and profits paid or deposited thereunder, now existing or hereafter obtained by or on behalf of Mortgagor; and

(r) the proceeds of any loan secured by any interest in the Mortgaged Property described in the preceding sections (a) through (q).

AND, without limiting any of the other provisions of this Mortgage, Mortgagor expressly grants to Mortgagee, as secured party, a security interest in all of those portions of the Mortgaged

Property which are or may be subject to the provisions of the Uniform Commercial Codes of the state in which the Mortgaged Property is located and of the state in which Mortgagor was organized, applicable to secured transactions.

TO HAVE AND TO HOLD the Mortgaged Property and all parts thereof unto Mortgagee, its successors and assigns forever.

AND Mortgagor further covenants and agrees with Mortgagee as follows:

ARTICLE 1

The Note

1.01 Payment of the Note. Mortgagor will duly and punctually pay (a) the principal of and premium, if any, and interest and other charges on the Note at the time outstanding in accordance with the terms thereof and hereof, and (b) when and as due and payable from time to time as provided herein, all other sums payable hereunder or secured hereby, together with, to the extent permitted by applicable law, interest at the Default Rate on any sums as shall not be paid when due and payable from the date when due and payable (whether during a grace period, if any, or otherwise) until payment thereof.

1.02 Late Charge. In the event that any payment due hereunder or under the Note shall not be made by Mortgagor within five (5) days from the date when such payment is due and payable, a late charge of five cents ($.05) for each dollar ($1.00) so over due, may be charged by Mortgagee for the purpose of defraying the expense incident to handling such delinquent payment.

1.03 Prepayment of the Note. The Note may only be prepaid to the extent provided in the Note.

1.04 Guaranty. Mortgagor has delivered to Mortgagee simultaneously with the execution and delivery of this Mortgage, the unconditional guaranty (the "Guaranty") of the payment of and performance under the Note, this Mortgage and any other document evidencing or securing the performance of the obligations secured hereby, duly executed by the Guarantors.

1.05 Disbursement of Loan Proceeds. The proceeds of the loan secured hereby will be disbursed by Mortgagee, upon the execution and delivery of the Note, the Guaranty and this Mortgage, to acquire the Premises, and to pay the necessary expenses incidental to such transaction and the perfection of the lien hereof, including recording costs, documentary and intangible taxes, title insurance premiums and Mortgagee's and Mortgagor's counsels' fees and disbursements, all in accordance with the terms and conditions of this Mortgage and of the commitment letter (the "Mortgage Commitment Letter"), if any, issued by Mortgagee to

Mortgagor in connection with the loan evidenced by the Note as the Mortgage Commitment Letter may be amended herein or in other instruments executed contemporaneously herewith.

ARTICLE 2

OWNERSHIP, CONDITION, ETC., OF MORTGAGED PROPERTY

2.01 Representations, Covenants and Warranties as to Title to Mortgaged Property, etc. Mortgagor represents, covenants and warrants that as of the date hereof and at all times thereafter during the term hereof: (a) Mortgagor is and shall be seized of an indefeasible estate in fee simple in, and has and shall have good, marketable and absolute title to, the Mortgaged Property, and has good right, full power and lawful authority to mortgage and pledge the same as provided herein and Mortgagee may at all times peaceably and quietly enter upon, hold, occupy and enjoy the Mortgaged Property in accordance with the terms hereof; the Mortgaged Property is and shall be free and clear of all liens, security interests, charges and encumbrances whatsoever except those exceptions to title as are specified in the title insurance policy to be issued pursuant to the title insurance commitment endorsed and redated on the date hereof and accepted by the Mortgagee (the "Permitted Encumbrances"); (b) Mortgagor has good and lawful right, power and authority to execute this Mortgage and to mortgage the Mortgaged Property, to assign its right, title and interest as landlord under the Leases and to grant a security interest in the Mortgaged Property; (c) this Mortgage has been duly executed and delivered by the duly authorized representatives of Mortgagor and constitutes the legal, valid and binding obligation of Mortgagor, enforceable in accordance with its terms; (d) all costs arising from construction of any Improvements and the purchase of all equipment located on the Mortgaged Property have been paid; and (e) neither Mortgagor nor any prior owner or present or former tenant or other person has taken any action (or been responsible for any omission) that would cause the Mortgaged Property or any part thereof or any interest therein to be subject to forfeiture under applicable laws, and (f) the Mortgaged Property is not subject to rent control, rent stabilization or other governmental rent regulations. Notwithstanding anything to the contrary contained herein, this Mortgage is subject to and subordinate to the lien of the Superior Mortgage. Mortgagor at its expense will warrant and defend to Mortgagee such title to the Mortgaged Property and the lien and security interest of Mortgagee thereon and therein, against all claims and demands and will maintain and preserve such lien and security interest and will keep this Mortgage a lien upon and a priority perfected security interest in the Mortgaged Property, subject only to the Permitted Encumbrances.

2.02 Title Insurance.

2.02.01 Title Insurance Policy. Prior to or concurrently with the execution and delivery of this Mortgage, Mortgagor, at its own cost and expense, will obtain and deliver to Mortgagee a mortgagee's title insurance policy in the amount of this Mortgage, issued by a title

insurance company satisfactory to Mortgagee and in form and substance satisfactory to Mortgagee and its counsel, naming Mortgagee as the insured, insuring title to and priority of the lien of this Mortgage upon the Land and the Improvements, together with such reinsurance and co-insurance as Mortgagee may require.

2.02.02 Current Survey. Prior to the execution and delivery of this Mortgage, Mortgagor, at its own cost and expense, has obtained and delivered to Mortgagee a current survey of the Land and Improvements satisfactory to Mortgagee and to the title insurance company specified pursuant to Section 2.02.01.

2.02.03 Title Insurance Proceeds. All proceeds received by Mortgagee for any loss under the title insurance policy or policies delivered to Mortgagee under Section 2.02.01 or otherwise in connection with this Mortgage, or under any title insurance policy or policies delivered to Mortgagee in substitution therefor or in replacement thereof, shall be the property of Mortgagee and applied in the manner provided in Section 5.08.

2.03 Recordation. Mortgagor, at its expense, will at all times cause this Mortgage and any instruments amendatory hereof or supplemental hereto and any instruments of assignment hereof or thereof (and any appropriate financing statements or other instruments and continuations thereof with respect to any thereof) to be recorded, registered and filed and to be kept recorded, registered and filed, in such manner and in such places, and will pay all such recording, registration, filing fees and other charges, and will comply with all such statutes and regulations as may be required by law in order to establish, preserve, perfect and protect the lien of this Mortgage as a valid, direct mortgage lien and priority perfected security interest in the Mortgaged Property, subject only to the Permitted Encumbrances. Mortgagor will pay or cause to be paid, and will indemnify Mortgagee in respect of, all taxes (including interest and penalties) at any time payable in connection with the filing and recording of this Mortgage and any and all supplements and amendments thereto.

2.04 Payment of Impositions, etc. Subject to Section 2.07 (relating to permitted contests) and Section 2.08 (relating to escrow deposits), Mortgagor will pay or cause to be paid when due and payable all taxes, assessments (including, but not limited to, all assessments for public improvements or benefits), water and sewer rates, ground rents, maintenance or common charges, vault charges and license fees for the use of vaults, chutes and similar areas adjoining the Mortgaged Property, charges for public or private utilities, license permit fees, inspection fees and other governmental levies or payments, of every kind and nature whatsoever, general and special, ordinary and extraordinary, unforeseen as well as foreseen, which at any time may be assessed, levied, confirmed, imposed or which may become a lien upon the Mortgaged Property, or any portion thereof, or which are payable with respect thereto, or upon the rents, issues, income or profits thereof, or on the occupancy, operation, use, possession or activities thereof, whether any or all of the same be levied directly or indirectly or as excise taxes or as income taxes, and all taxes, assessments or charges which may be levied on the Note, or the

interest thereon (collectively, the "Impositions"). Mortgagor will deliver to Mortgagee, upon request, copies of official receipts or other satisfactory proof evidencing such payments.

2.05 Insurance and Legal Requirements. Subject to Section 2.07 (relating to permitted contests), Mortgagor, at its expense, will comply, or cause compliance with:

(a) all provisions of any insurance policy covering or applicable to the Mortgaged Property or any part thereof, all requirements of the issuer of any such policy, and all orders, rules, regulations and other requirements of the Board of Fire Underwriters (or any other body exercising similar functions) applicable to or affecting the Mortgaged Property or any part thereof or any use or condition of the Mortgaged Property or any part thereof (collectively, the "Insurance Requirements"), and

(b) all laws, statutes, codes, acts, ordinances, orders, permits, judgments, decrees, injunctions, rules, regulations, permits, licenses, authorizations, directions and requirements (including, without limitation, those relating to the protection of the environment) of all governments, departments, commissions, boards, courts, authorities, agencies, officials and officers, foreseen or unforeseen, ordinary or extraordinary, which now or at any time hereafter may be applicable to the Mortgaged Property or any part thereof, or any of the adjoining sidewalks, curbs, vaults and vault space, if any, streets or ways, or any use or condition of the Mortgaged Property or any part thereof (collectively, the "Legal Requirements");

whether or not compliance therewith shall require structural changes in or interference with the use and enjoyment of the Mortgaged Property or any part thereof and whether or not such compliance could be foreseen or is unforeseen.

2.06 Liens, etc. Except for the Superior Mortgage and its related security documents, Mortgagor will not directly or indirectly create or permit or suffer to be created or to remain, and will promptly discharge or cause to be discharged, any mortgage, lien, encumbrance or charge on, pledge of, security interest in or conditional sale or other title retention agreement with respect to the Mortgaged Property or any part thereof or the interest of Mortgagor or Mortgagee therein or any rents or other sums arising therefrom, other than (a) the Permitted Encumbrances and (b) liens of mechanics, materialmen, suppliers or vendors or rights thereto which are at the time being contested as permitted by Section 2.07. Mortgagor is prohibited from placing any subordinate or other mortgages or liens on the Mortgaged Property and to the fullest extent permitted by law any such purported mortgages or liens (which are not a Permitted Encumbrance) placed on all or any portion of the Mortgaged Property shall be deemed void ab initio. Mortgagor will not postpone the payment of any sums for which liens of mechanics, materialmen, suppliers or vendors or rights thereto have then incurred (unless such liens or rights thereto are at the time being contested as permitted by Section 2.07), or enter into any contract under which payment of such sums is postponable (unless such contract expressly provides for the legal, binding and effective waiver of any such liens or rights thereto), in either case, for more than 30 days after the completion of the action giving rise to such liens or rights thereto.

2.07 Permitted Contests. Mortgagor at its expense, may, with the prior written consent of Mortgagee or, in the case of tax certiorari proceedings, upon notice to Mortgagee, contest, or cause to be contested, by appropriate legal proceedings conducted in good faith and with due diligence, the amount or validity of application, in whole or in part, of any Imposition, Legal Requirement or Insurance Requirement or of any lien, encumbrance or charge referred to in Section 2.06, provided that (a) in the case of an unpaid Imposition, lien, encumbrance or charge, such proceedings shall suspend the collection thereof from Mortgagor, Mortgagee, the Mortgaged Property and any rent or other income therefrom and shall not interfere with the payment of any such rent or income, (b) neither the Mortgaged Property nor any rent or other income therefrom nor any part thereof or interest therein would be in any danger of being sold, forfeited, lost or interfered with, (c) in the case of a Legal Requirement, neither Mortgagor nor Mortgagee would be in danger of any civil or criminal liability for failure to comply therewith, (d) Mortgagor shall have furnished such security, if any, as may be required in the proceedings or as may be reasonably requested by Mortgagee, (e) the nonpayment of the whole or any part of any tax, assessment or charge will not result in the delivery of a tax deed to the Mortgaged Property or any part thereof because of such nonpayment, (f) the payment of any sums required to be paid under the Note or under this Mortgage (other than any unpaid Imposition, lien, encumbrance or charge at the time being contested in accordance with this Section 2.07) shall not be interfered with or otherwise affected, and (g) in the case of any Insurance Requirement, the failure of Mortgagor to comply therewith shall not affect the validity of any insurance required to be maintained by Mortgagor under Section 3.01.

2.08 Deposits for Impositions, Insurance Premiums, etc. To the extent not being escrowed for payment by Superior Mortgagee (as hereinafter defined in this Mortgage), Mortgagor will pay or cause to be paid to Mortgagee, on the first day of each month following the date hereof, such amounts as Mortgagee from time to time estimates as necessary to create and maintain a reserve fund to be held by Mortgagee, without interest, from which to pay one month before the same become due, all Impositions (including all taxes, assessments, liens and charges on or against the Mortgaged Property and any part thereof) and premiums for insurance required to be maintained by Mortgagor under Section 3.01. Payments from such reserve fund for such purposes may be made at Mortgagee's discretion even though subsequent owners of the Mortgaged Property or any part thereof may benefit thereby. In the event of any default under the terms of this Mortgage, any part or all of such reserve fund may be applied to any part of the indebtedness secured hereby. In refunding any part of such reserve fund, Mortgagee may deal with whomever is represented to be the owner of the Mortgaged Property or such part thereof at the time. If one month prior to the due date of any of the aforementioned obligations the amount then on deposit therefor shall be insufficient for the payment of such obligation in full, Mortgagor, within ten (10) days after written notice from Mortgagee, shall deposit the amount of the deficiency with Mortgagee. Until expended or applied as above provided, any amounts in the reserve fund shall constitute additional security for the payment of the Indebtedness. The reserve fund shall not constitute a trust fund and may be commingled with other monies held by Mortgagee. No earnings or interest on the reserve fund shall be payable to Mortgagor.

2.09 Leases.

2.09.01 Subordination of Leases; Attornment. Except as otherwise consented to in writing by Mortgagee, all of the Leases shall be made expressly subject and subordinate to this Mortgage and shall contain provisions obligating the tenants thereunder, at Mortgagee's option, to attorn to Mortgagee in the event Mortgagee succeeds to the interest of Mortgagor under such Lease.

2.09.02 Enforcement, etc. Mortgagor will faithfully keep and perform all of the obligations of the lessor under each of the Leases in accordance with their terms. Mortgagor will maintain the Leases in full force and effect, and will not, without the prior written consent of Mortgagee, (a) terminate or cancel any Lease or consent to or accept any termination, cancellation or surrender thereof, or permit any condition or event to exist or to occur that would, or would entitle the tenant thereunder to, terminate or cancel the same, (b) amend, modify or otherwise change the terms of any Lease except to increase the rent or other charges or assessments payable by tenants thereunder upon any renewal or extension of any such lease, (c) waive any default under or breach of any Lease, (d) consent to or permit any prepayment or discount of rent or payment of advance rent under any Lease (other than the usual prepayment of rent as would result from the acceptance on the first day of each month of the rent for the ensuing month and a reasonable and customary security deposit of not more than two months' rent in accordance with the terms of any such lease), (e) enter into any Lease not in effect on the date hereof without the prior written consent of Mortgagee, (f) give any waiver, consent or approval under any Lease or take any other action in connection with any such Lease that would or might impair the value of Mortgagor's interest thereunder or of the Mortgaged Property subject thereto, or impair the interest of Mortgagee therein, (g) collect any rent more than one (1) month in advance of the date due, (h) collect any sums from or settle any claim with any tenant in bankruptcy or guarantor of any Lease without the prior written consent of Mortgagee; any such sums shall be paid directly to Mortgagee and applied first against accrued but unpaid interest due under the Note and then in reduction of the principal balance due under the Note, or (i) consent to any assignment of or subletting or other matter requiring the lessor's consent under any Lease without the prior written consent of Mortgagee.

2.09.03 Assignment of Leases, etc. Subject to the Superior Mortgage and related security documents, Mortgagor hereby assigns to Mortgagee all its right, title and interest as landlord under Leases now existing or hereafter entered into, and all rents and other sums payable to Mortgagor under each such Lease, together with the right to collect and receive the same, provided that, if and so long as no Event of Default (as defined in Section 5.01) shall have occurred and be continuing, Mortgagor shall be permitted to exercise its rights and perform its obligations as landlord under the Leases and to collect and receive such rents and other sums for its own uses and purposes but nonetheless subject to Section 2.09.02 hereinabove. Upon the occurrence of an Event of Default, such permission shall terminate and shall not be reinstated upon a cure of such Event of Default without Mortgagee's express written consent. Such

assignment shall be fully operative without any further action on the part of either party and Mortgagee shall be entitled, at its option, upon the occurrence of an Event of Default hereunder, to all rents, income and other benefits from the Mortgaged Property whether or not Mortgagee takes possession of the Mortgaged Property. Mortgagor hereby further grants to Mortgagee the right, at Mortgagee's option, to (i) enter upon and take possession of the Mortgaged Property for the purpose of collecting the said rents, income and other benefits, (ii) dispossess by the usual summary proceedings any tenant defaulting in the payment thereof to Mortgagee, (iii) let the Mortgaged Property or any part thereof, and (iv) apply such rents, income and other benefits, after payment of all necessary charges and expenses, on account of the indebtedness and other sums secured hereby. Such assignment and grant shall continue in effect until the indebtedness and other sums secured hereby are paid, the execution of this Mortgage constituting and evidencing the irrevocable consent of Mortgagor to the entry upon and taking possession of the Mortgaged Property by Mortgagee pursuant to such grant, whether or not foreclosure has been instituted. Neither the exercise of any rights under this paragraph by Mortgagee nor the application of any such rents, income or other benefits to the indebtedness and other sums secured hereby, shall cure or waive any default, Event of Default, or notice of default hereunder or invalidate any act done pursuant hereto or to any such notice, but shall be cumulative of all other rights and remedies. Upon the occurrence of an Event of Default, all such rents and other sums shall be collected and held by Mortgagee and shall be applied as provided in Section 5.08.

2.09.04 Further Assignments. Subject to the Superior Mortgage and related security documents, Mortgagor shall assign to Mortgagee, upon request, as further security for the indebtedness secured hereby, Mortgagor's interests in all agreements, contracts, licenses and permits affecting the Mortgaged Property, such assignments to be made by instruments in form satisfactory to Mortgagee; but no such assignment shall be construed as a consent by Mortgagee to any agreement, contract, license or permit so assigned, or to impose upon Mortgagee any obligations with respect thereto.

2.09.05 Rent Roll. If any of the Property is rented, Mortgagor shall furnish to Mortgagee, annually on or before March 1 of each year, and, in addition, within ten (10) days after a request by Mortgagee to do so, a certified statement containing the names of all tenants of the Mortgaged Property or any part thereof, the term of their respective leases, the space occupied, the rents payable and the securities deposited thereunder, together with true copies of each Lease and any amendments and supplements thereto.

2.09.06 No Commingling. All securities deposited by tenants of the Mortgaged Property shall be treated as trust funds not to be commingled with any other funds of Mortgagor and Mortgagor shall, upon demand, furnish to Mortgagee satisfactory evidence of compliance with this provision, together with a verified statement of all securities deposited by the tenants.

2.09.07 Successor Not Bound. To the extent not so provided by applicable law, each Lease of the Mortgaged Property, or of any part thereof, entered into after the date hereof, shall provide that, in the event of the enforcement by Mortgagee of the remedies provided for by

law or by this Mortgage, any person succeeding to the interest of Mortgagor as a result of such enforcement shall not be bound by any payment of rent or additional rent for more than one month in advance.

2.10 Use of Property, etc. Mortgagor shall continue to operate the Mortgaged Property for the purposes for which used on the date hereof and for no other purpose, and shall not acquire any fixtures, equipment, furnishings or apparatus covered by this Mortgage subject to any security interest or other charge or lien taking precedence over the security interest and lien of this Mortgage. Mortgagor shall not make or suffer any improper or offensive use of the Mortgaged Property or any part thereof and will not use or permit to be used any part of the Mortgaged Property for any dangerous, noxious, offensive or unlawful trade or business or for any purpose which will reduce the value of the Mortgaged Property in any respect or will cause the Mortgaged Property or any part thereof or interest therein to be subject to forfeiture. In the case of any action or omission of any party which may cause the Mortgaged Property or any part thereof or any interest therein to be subject to forfeiture under applicable laws, then the Mortgagor shall, within 5 days thereafter, (1) give notice to the Mortgagee thereof, (2) take at its expense all action (including, without limitation, the commencement of all summary proceedings required to evict any party responsible for such act or omission) required to prevent such forfeiture and (3) bond the forfeiture proceeding so that it no longer constitutes a lien against any portion of the Mortgaged Property. Mortgagor will not do or permit any act or thing which is contrary to any Legal Requirement or Insurance Requirement or any document of record affecting the Property, or which might impair the value or usefulness of the Mortgaged Property or any part thereof, or commit or permit any waste of the Mortgaged Property or any part thereof, and will not cause or maintain any nuisance in, at or on the Mortgaged Property or any part thereof, or commit or permit any waste of the Mortgaged Property. Mortgagor at its expense will promptly comply with all rights of way or use, privileges, franchises, servitudes, licenses, easements, tenements, hereditaments and appurtenances forming a part of the Mortgaged Property and all instruments relating or evidencing the same, in each case, to the extent compliance therewith is required of Mortgagor under the terms thereof. Mortgagor will not take any action which results in a forfeiture or termination of the rights afforded to Mortgagor under any such instruments and will not, without the prior written consent of Mortgagee, amend in any material respect any of such instruments. Mortgagor shall at all times comply with any instruments of record at the time in force affecting the Mortgaged Property or any part thereof and shall procure, maintain and comply with all permits, licenses and other authorizations required for any use of the Mortgaged Property or any part thereof then being made, and for the proper erection, installation, operation and maintenance of the Improvements or any part thereof.

2.11 Utility Services. Mortgagor will pay or cause to be paid all charges for all public and private utility services, all public or private communications services and all sprinkler systems and protective services at any time rendered to or in connection with the Mortgaged Property or any part thereof, will comply or cause compliance with all contracts relating to any such services, and will do all other things required for the maintenance and continuance of all such services.

2.12 Maintenance and Repair, etc. Subject to Section 2.13, Mortgagor will keep or cause to be kept all presently and subsequently erected or acquired Improvements and the sidewalks, curbs, vaults and vault space, if any, in good and substantial order and repair and in such a fashion that the value and utility of the Mortgaged Property will not be diminished, and, at its sole cost and expense, will promptly make or cause to be made all necessary and appropriate repairs, replacements and renewals thereof, whether interior or exterior, structural or nonstructural, ordinary or extraordinary, foreseen or unforeseen. All repairs, replacements and renewals shall be at least equal in quality and class to the original Improvements. Mortgagor's obligation to repair shall include the obligation to rebuild in the event of destruction however caused, provided that damage by fire or other cause for which Mortgagor is obligated to maintain insurance by any of the provisions of Section 3.01 shall be governed by the provisions of Sections 3.01 and 3.02, and damage by any taking shall be governed by the provisions of Section 3.02. Mortgagor at its expense will do or cause to be done all shoring of foundations and walls of any building or other Improvements and (to the extent permitted by law) of the ground adjacent thereto, and every other act necessary or appropriate for the preservation and safety of the Mortgaged Property by reason of or in connection with any excavation or other building operation upon the Mortgaged Property and upon any adjoining property, whether or not Mortgagor shall, by any Legal Requirement, be required to take such action or be liable for failure to do so.

2.13 Alterations, Additions, etc. Except as set forth in this Section 2.13, Mortgagor shall make no alterations of or additions to the Mortgaged Property (nor shall Mortgagor demolish all or any portion of the Mortgaged Property). So long as no Event of Default shall have occurred and be continuing, and with the prior written consent of Mortgagee, Mortgagor shall have the right at any time and from time to time to make or cause to be made reasonable alterations of and additions to the Property or any part thereof. Mortgagee agrees to not unreasonably withhold or delay its consent to any alteration or addition provided that such alteration or addition (a) shall not change the general character of the Property or reduce the fair market value thereof below its value immediately before such alteration or addition, or impair the usefulness of the Property, (b) is effected with due diligence, in a good and workmanlike manner and in compliance with all Legal Requirements and Insurance Requirements, (c) is promptly and fully paid for, or caused to be paid for, by Mortgagor when due, (d) is made, in case the estimated cost of such alteration or addition exceeds $25,000, only after Mortgagee shall have consented thereto in writing and shall have reviewed and approved in writing the plans and specifications therefor, (e) is made under the supervision of a qualified architect, engineer or other professional approved by Mortgagee in writing, and (f) is made only after Mortgagor shall have furnished to Mortgagee, if Mortgagee so requires, a payment and performance bond or other security reasonably satisfactory to Mortgagee. Mortgagor shall not demolish all or any portion of the Mortgaged Property without the prior written consent of Mortgagee, which consent may be withheld in Mortgagee's sole and absolute discretion.

2.14 Acquired Property Subject to Lien. All property at any time acquired by Mortgagor and required by this Mortgage to become subject to the lien and security interest hereof, including any property acquired as provided in Section 2.13, whether such property is acquired by exchange, purchase, construction or otherwise, shall forthwith become subject to the lien and security interest of this Mortgage without further action on the part of Mortgagor or Mortgagee. Mortgagor, at its expense, will execute and deliver to Mortgagee (and will record and file as provided in Section 2.03) an instrument supplemental to this Mortgage, satisfactory in substance and form to Mortgagee, whenever such an instrument is necessary under applicable law to subject to the lien and security interest of this Mortgage all right, title and interest of Mortgagor in and to all property required by this Mortgage to be subject to the lien and security interest hereof and acquired by Mortgagor since the date of this Mortgage or the date of the most recent supplemental instrument so subjecting property to the lien hereof, whichever is later.

2.15 No Claims Against Mortgagee, etc. Nothing contained in this Mortgage shall constitute any consent or request by Mortgagee, express or implied, for the performance of any labor or services or the furnishing of any materials or other property in respect of the Mortgaged Property or any part thereof, or shall be construed to permit the making of any claim against Mortgagee in respect of labor or services or the furnishing of any materials or other property or any claim that any lien based on the performance of such labor or services or the furnishing of any such materials or other property is prior to the lien of this Mortgage.

2.16 Indemnification Against Liabilities. Mortgagor will protect, indemnify, save harmless and defend Mortgagee from and against any and all liabilities, obligations, claims, damages, penalties, causes of action, judgments, costs and expenses (including attorneys' fees and expenses) imposed upon or incurred by or asserted against Mortgagee by reason of (a) ownership of a mortgagee's interest in the Mortgaged Property, (b) any accident, injury to or death of persons or loss of or damage to or loss of the use of property occurring on or about the Mortgaged Property or any part thereof or the adjoining sidewalks, curbs, vaults and vault spaces, if any, streets, alleys or ways, (c) any use, non-use or condition of the Mortgaged Property or any part thereof or the adjoining sidewalks, curbs, vaults and vault spaces, if any, streets, alleys or ways, (d) any failure on the part of Mortgagor to perform or comply with any of the terms of this Mortgage, (e) performance of any labor or services or the furnishing of any materials or other property in respect of the Mortgaged Property or any part thereof made or suffered to be made by or on behalf of Mortgagor, (f) any negligence or tortious act on the part of Mortgagor or any of its agents, contractors, lessees, licensees or invitees, (g) any work in connection with any alterations, changes, new construction or demolition of or additions to the Property, or (h) any agreement between Mortgagor and the Mortgagee originally named herein in connection with the closing of the loan evidenced by the Note. If any action or proceeding be commenced, including an action to foreclose this Mortgage or to collect the indebtedness secured hereby, to which action or proceeding the Mortgagee is made a party by reason of the execution of this Mortgage or the Note, or in which it becomes necessary to defend or uphold the lien of this Mortgage, all sums paid by Mortgagee for the expense of any litigation to prosecute or defend the rights and lien created hereby, shall be paid by Mortgagor to Mortgagee as hereinafter

provided. Mortgagor will pay and save Mortgagee harmless against any and all liability with respect to any intangible personal property tax or similar imposition of the state in which the Mortgaged Property is located or any subdivision or authority thereof now or hereafter in effect, to the extent that the same may be payable by Mortgagee in respect of this Mortgage or the Note. All amounts payable to Mortgagee under this Section 2.16 shall be deemed indebtedness secured by this Mortgage and any such amounts that are not paid within ten (10) days after written demand therefor by Mortgagee shall bear interest at the Default Rate from the date of such demand. In case any action, suit or proceeding is brought against Mortgagee by reason of any such occurrence, Mortgagor, upon request of Mortgagee, will, at Mortgagor's expense, resist and defend such action, suit or proceeding or cause the same to be resisted or defended, by counsel designated by Mortgagor and approved by Mortgagee. The obligations of Mortgagor under this Section 2.16 shall survive any discharge of this Mortgage and payment in full of the Note.

2.17 Mortgagee's Exculpation. Mortgagor is advised and agrees that this Mortgage is made on the express condition that any obligation hereunder of Mortgagee shall be enforceable only against Mortgagee's interest in this Mortgage, and that no trustee, officer, director, beneficiary, shareholder, employee or representative of Mortgagee shall be personally liable for any matter in connection with, or arising out of this Mortgage. The foregoing shall not be deemed in any way to impose any obligations on Mortgagee except as expressly provided herein. In particular, and without implied limitation, Mortgagee shall not be liable for the failure, seizure or similar circumstance of any financial institution in which Mortgagee shall have deposited sums on account of Mortgagor (for example, without implied limitation, tax escrow deposits and Proceeds (hereafter defined) held for the restoration and/or replacement of all or part of the Mortgaged Property) regardless whether or not such financial institution shall be affiliated with Mortgagee and whether or not the sums on deposit shall have exceeded the maximum amount covered by any applicable federal or other insurance.

2.18 Disposition of the Mortgaged Property.

(a) Mortgagor shall not, during the term hereof, sell, assign, convert the Mortgaged Property or any part thereof into a condominium or cooperative, mortgage, pledge or hypothecate or otherwise transfer, encumber or dispose of the Mortgaged Property or any part thereof or any interest therein or any of the rents or other sums to be earned therefrom or of any direct or indirect interest in Mortgagor, if Mortgagor is a partnership, limited liability company, corporation or any other entity (in each of the foregoing cases, either of record or beneficially), without Mortgagee's prior written consent.

(b) A sale, assignment, mortgage, pledge, hypothecation or transfer within the meaning of this Section 2.18 shall be deemed to include (i) an installment sales agreement wherein Mortgagor agrees to sell the Mortgaged Property or any part thereof for a price to be paid in installments; (ii) an agreement by Mortgagor leasing all or a substantial part of the Mortgaged Property for other than actual occupancy by a space tenant thereunder or a sale, assignment or other transfer of or the grant of a security interest in, Mortgagor's right, title and

interest in and to any Leases; (iii) if Mortgagor, Guarantors, or any general partner of Mortgagor or Guarantors is a corporation, the voluntary or involuntary sale, conveyance or transfer of such corporation's stock (or the stock of any corporation directly or indirectly controlling such corporation by operation of law or otherwise) or the creation or issuance of new stock by which an aggregate of more than 10% of such corporation's stock shall be vested in a party or parties who are not now stockholders; (iv) if Mortgagor, Guarantors, or any general partner of Mortgagor or Guarantors is a limited liability company, the voluntary or involuntary sale, conveyance or transfer of direct or indirect interests in such limited liability company (or interests in any limited liability company directly or indirectly controlling such limited liability company by operation of law or otherwise) or the creation or issuance of membership interests by which an aggregate of more than 10% of such limited liability company's membership interests shall be vested in a party or parties who are not now members; (v) if Mortgagor, Guarantors or any general partner of Mortgagor or Guarantors is a limited or general partnership or joint venture, the change, removal or resignation of a general partner or managing partner or the transfer of the partnership interest of any general partner or managing partner; (vi) if Mortgagor, Guarantors, or any general partner of Mortgagor or Guarantors is a limited or general partnership, the voluntary or involuntary sale, conveyance or transfer of direct or indirect interests in such partnership (or interests in any partnership directly or indirectly controlling such partnership by operation of law or otherwise) or the creation or issuance of partnership interests by which an aggregate of more than 10% of such partnership's partnership interests shall be vested in a party or parties who are not now partners; (vii) the removal or resignation of the managing agent for the Mortgaged Property or the transfer of ownership, management or control of such managing agent to a person or entity other than the general partner or managing partner of Mortgagor.

2.19 Tax Appeals and Refunds. Mortgagor shall not collect any sums from any governmental authority or settle any claim with any governmental authority in respect of a claim by Mortgagor for a reduction in any taxes (real property or otherwise) due in respect of any of the Mortgaged Property (regardless of whether such claims or sums shall relate to a period prior to the date of this Mortgage) without the prior written consent of Mortgagee. Subject to the terms of the Superior Mortgage, any such sums shall be paid directly to Mortgagee and applied first against accrued but unpaid interest due under the Note and then in reduction of the principal balance due under the Note. If acquired directly by Mortgagor, subject to the terms of the Superior Mortgage, such sums shall be held in trust and immediately paid over to Mortgagee. Upon an Event of Default hereunder, subject to the terms of the Superior Mortgage, Mortgagee (i) may prosecute any tax protests in respect of the Mortgaged Property, (ii) may settle any claims therein in the name of and on behalf of Mortgagor and collect any sums on account thereof.

2.20 Mortgage Foreclosure Moratorium Laws. If this Mortgage is now or hereafter protected or affected by moratorium laws, or by any other statutes, preventing the Mortgagee from foreclosing for nonpayment of the principal at the expiration date hereof, the Mortgagor shall continue or commence to pay amortization to the Mortgagee (if the Mortgagee so elects,

and only so long as such laws or statues protect the Mortgagee from foreclosure for nonpayment of the balance of the principal debt), based upon the greater of (i) a five (5) year amortization schedule (subject to the highest rate permitted by law) or (ii) the same rate (if any) existing immediately preceding the maturity date of this Mortgage. If, however, applicable laws require or permit, in connection with mortgages so protected or affected, that installment payments to the Mortgagee amortizing such debt be in greater annual amounts than the aggregate per annum of the payments that would be due if based on such year's payments, the Mortgagee may elect, as soon as permitted after the debt matures, that the installments payable after the maturity date hereof, shall be at the rate and as provided for in such laws. If the Mortgagor defaults in payment of any such amortization installment beyond any applicable grace period, such default shall constitute an Event of Default hereunder entitling Mortgagee to exercise all of its rights and remedies including, without limitation, instituting foreclosure proceedings solely by reason of such default. Nothing in this Section 2.20 shall be deemed to extend the maturity date of the Note and no acceptance of a payment by Mortgagee on account of the Note pursuant to this Section 2.20 or otherwise shall be deemed to extend the maturity date of the Note unless Mortgagee shall have agreed to such extension in writing.

ARTICLE 3

Insurance; Damage, Destruction or Taking, etc.

3.01 Insurance.

3.01.01 Risks to be Insured. Mortgagor shall carry the insurance required under the Superior Mortgage and this Mortgage. Mortgagor will, at its expense, maintain or cause to be maintained with insurers approved by Superior Mortgagee (a) insurance with respect to the Improvements (which shall not include development and site work at the Mortgaged Property) against loss or damage by perils customarily included under standard "all-risk" policies, in amounts sufficient to Superior Mortgagee (b) public liability, including bodily injury and property damage, insurance, with personal injury endorsement, applicable to the Mortgaged Property in such amounts as are usually carried by persons operating similar properties in the same general locality, (c) flood hazard insurance if Mortgagee determines that the Mortgaged Property is in a flood zone and that the Improvements (which does not include site work and development) located on the Mortgaged Property should be insured, (d) all-risk builders' risk insurance with respect to the Mortgaged Property during any period in which there is any construction occurring at the Improvements (which shall not include development and site work at the Mortgaged Property), against loss or damage by fire and such other risks, including vandalism, malicious mischief and sprinkler leakage, as are included in so-called "extended coverage" clauses at the time available with respect to similar property, in an amount to be determined by Superior Mortgagee, and (e) such other insurance with respect to the Mortgaged Property in such amounts and against such insurable hazards as Superior Mortgagee and Mortgagee from time to time may reasonably require. Notwithstanding any provisions to the

contrary, Mortgagor shall not be required to carry any insurance or amount of insurance coverage not required by the Superior Mortgagee.

3.01.02 Policy Provisions. Subject to the terms of the Superior Mortgage, all insurance maintained by Mortgagor pursuant to subsection 3.01.01, shall (a) name Mortgagor as owner and Mortgagee as loss payee under a mortgagee endorsement satisfactory to Mortgagee, (b) (except public liability insurance) provide that the proceeds for any losses shall be adjusted by Mortgagor, subject to the approval of Mortgagee in the event the proceeds shall exceed $25,000, and shall be payable to Mortgagee, to be held and applied as provided in Section 3.03, (c) include effective waivers by the insurer of all rights of subrogation against any named insured, the indebtedness secured by this Mortgage and the Mortgaged Property and all claims for insurance premiums against Mortgagee, (d) provide that any losses shall be payable notwithstanding (i) any foreclosure or other action or proceeding taken by Mortgagee pursuant to any provision of this Mortgage, or (ii) any change in title or ownership of the Mortgaged Property, (e) provide that no cancellation, reduction in amount or material change in coverage thereof or any portion thereof shall be effective until at least 30 days after receipt by Mortgagee of written notice thereof, and (f) be satisfactory in all other respects to Mortgagee.

3.01.03 Delivery of Policies, etc. Mortgagor will deliver, or cause to be delivered, to Mortgagee, promptly upon request, (a) the original or true copies of all policies evidencing all insurance required to be maintained under subsection 3.01.01 or certificates of insurance and a letter from an insurance broker or agent satisfactory to Mortgagee to the effect that the insurance policies maintained by Mortgagor comply with the terms of this Mortgage, and (b) evidence as to the payment of all premiums due thereon (with respect to public liability insurance policies, all installments for the current year due thereon to such date), provided that Mortgagee shall not be deemed by reason of its custody of such policies to have knowledge of the contents thereof. Mortgagor will also deliver to Mortgagee, promptly upon request, a certificate of a principal of Mortgagor (a "Compliance Certificate") setting forth the particulars as to all such insurance policies and certifying that the same comply with the requirements of this Section, that all premiums due thereon have been paid and that the same are in full force and effect. Mortgagor will also deliver to Mortgagee not later than 30 days prior to the expiration of any policy a binder or certificate of the insurer evidencing the replacement thereof and not later than 15 days prior to the expiration of such policy an original copy (or true copy) of the new policy. In the event Mortgagor shall fail to effect or maintain any insurance required to be effected or maintained pursuant to the provisions of this Section 3.01: (i) Mortgagor will indemnify Mortgagee against any damage, loss or liability resulting from all risks for which such insurance should have been effected or maintained; and (ii) Mortgagee shall have the right, but not the obligation, to obtain any such insurance and any amount expended by Mortgagee in connection therewith shall be deemed indebtedness secured by this Mortgage and shall be repaid by Mortgagor, on demand, together with interest thereon from the date of expenditure at the Default Rate.

3.01.04 Separate Insurance. Mortgagor will not take out separate insurance concurrent in form or contributing in the event of loss with that required to be maintained pursuant to this Section 3.01.

3.02 Damage, Destruction or Taking; Mortgagor to Give Notice; Assignment of Awards. In case of (a) any damage to or destruction of the Mortgaged Property or any part thereof, or (b) any taking (whether for permanent or temporary use) of all or any part of the Mortgaged Property or any interest therein or right accruing thereto, as the result of or in lieu or in anticipation of the exercise of the right of condemnation or eminent domain, or a change of grade affecting the Mortgaged Property or any part thereof (a "Taking"), or the commencement of any proceedings or negotiations which might result in any such Taking, Mortgagor will promptly give written notice thereof to Mortgagee (including providing copies of any and all papers from time to time served in connection with such proceedings), generally describing the nature and extent of such damage or destruction or of such Taking or the nature of such proceedings or negotiations and the nature and extent of the Taking which might result therefrom, as the case may be. Subject to the provisions of the Superior Mortgage, Mortgagee shall be entitled to all insurance proceeds payable on account of such damage or destruction and to all awards or payments allocable to the Mortgaged Property on account of such Taking, and Mortgagor hereby irrevocably assigns to Mortgagee all rights of Mortgagor to any such proceeds, award or payment and irrevocably authorizes and empowers Mortgagee, at its option, in the name of Mortgagor or otherwise, to file and prosecute what would otherwise be Mortgagor's claim for any such proceeds, award or payment and to collect, receipt for and retain the same for disposition in accordance with Section 3.03. Mortgagor shall continue to pay the Indebtedness at the time and in the manner provided for its payment in the Note and in this Mortgage and the Indebtedness shall not be reduced until any award or payment therefor shall have been actually received and applied by Mortgagee, after the deduction of expenses of collection, to the reduction or discharge of the Indebtedness. Subject to the provisions of the Superior Mortgage, Mortgagee shall not be limited to the interest paid on the award by the condemning authority but shall be entitled to receive out of the award interest at the rate or rates provided for herein and in the Note. Mortgagor will pay all reasonable costs and expenses incurred by Mortgagee in connection with any such damage, destruction or Taking and seeking and obtaining any insurance proceeds, award or payment in respect thereof.

3.03 Application of Proceeds. Subject to the rights of the holder of the Superior Mortgage, Mortgagee may at its option apply all amounts recovered under any insurance policy maintained by Mortgagor hereunder, and all net awards received by it on account of any Taking (collectively, "Proceeds") in any one or more of the following ways: (a) as provided in Section 5.08, regardless of whether part or all of the indebtedness secured hereby shall then be matured or unmatured (provided that to the extent that any sums shall remain outstanding under this Mortgage or the Note after such application, the obligations of Mortgagor to repay such sums shall continue in full force and effect and Mortgagor shall not be excused in the payment thereof), or (b) to fulfill any of the covenants contained herein as Mortgagee may determine, or (c) released to Mortgagor for application to the cost of restoration and/or replacement of all or

part of the Mortgaged Property. Any Proceeds which Mortgagee shall determine to release to Mortgagor for the restoration and/or replacement of all or part of the Mortgaged Property shall be held by Mortgagee without payment or allowance of interest thereon and shall be paid out from time to time upon compliance by Mortgagor with such provisions and requirements as may be imposed by Mortgagee (which provisions and requirements shall provide, among other things, that disbursements shall only be made in reimbursement of invoices previously paid for work done in accordance with plans and specifications approved of by Mortgagee and then only upon (i) a certification of compliance by a licensed architect that the work to be reimbursed was performed in accordance with the approved plans and specifications and performed in a good and workmanlike manner and (ii) the delivery of lien waivers for the sums being paid). Proceeds held by Mortgagee pursuant to this Section shall not be deemed trust funds, shall not bear interest and Mortgagee may commingle same with its other funds.

3.04 Total Taking and Total Destruction. In case of (a) a Taking of the entire Mortgaged Property, or (b) a Taking of less than the entire Mortgaged Property, or any material damage to or destruction of the Mortgaged Property, in either case which, in the good faith judgment of Mortgagee, renders the Mortgaged Property remaining after such Taking, damage or destruction unsuitable for restoration for use as property of substantially the same value, condition, character and general utility as the Mortgaged Property prior to such Taking, damage or destruction (any such Taking being herein called a "Total Taking" and any such damage or destruction being herein called a "Total Destruction"), then, subject to the terms of the Superior Mortgage, the Proceeds received by Mortgagee or Mortgagor on account of such Total Taking or Total Destruction shall be applied by Mortgagee in the manner specified in Section 5.08.

ARTICLE 4

Miscellaneous Covenants of Mortgagor

4.01 Maintenance of Existence, etc. Mortgagor will at all times maintain, preserve and keep in full force and effect its existence, good standing, franchises, rights and privileges as an entity under the laws of the state of its organization and the state in which the Mortgaged Property is located and its right to own and operate the Mortgaged Property and to transact business in such states.

4.02 Restrictions on Business Activities. Mortgagor will not, so long as any amounts are payable under the Note or otherwise secured by this Mortgage, directly or indirectly engage in any activity in a manner which would impair the security value to Mortgagee of the Mortgaged Property or any part thereof or which would impair in any material respect the position or interest of Mortgagee.

4.03 Inspection, etc. Upon reasonable notice and during regular business hours, Mortgagor will permit Mortgagee and any representatives designated by Mortgagee to visit and

inspect the Mortgaged Property or any part thereof, to inspect the books of account of Mortgagor and all other property, books and records relating to the Mortgaged Property and to make copies thereof and extracts therefrom, and to discuss its affairs, finances and accounts with, and to be advised as to the same by, the officers, employees, agents and independent accountants of Mortgagor, all at such reasonable times and intervals as from time to time may be requested. Mortgagee shall not have any duty to make any such inspection and shall not incur any liability or obligation for not making any such inspection or, once having undertaken any such inspection, for not making the same carefully or properly, or for not completing the same; nor shall the fact that such inspection may not have been made by Mortgagee relieve Mortgagor of any obligations that it may otherwise have under this Mortgage.

4.04 Certificates as to No Default; Notice by Mortgagor, etc.

4.04.01 Certificate as to No Default, etc. by Mortgagor.

(a) Within five (5) days after a request therefor by Mortgagee, Mortgagor will furnish to Mortgagee a Compliance Certificate certifying (i) the principal amount then outstanding on the Note, (ii) the rate of interest on the Note, (iii) that there are no offsets or defenses to the payment of the Indebtedness, (iv) that the Note and this Mortgage are valid, legal and binding obligations and have not been modified, except as specified in such Compliance Certificate and (v) that there is no condition or event which constitutes an Event of Default or which, after notice or lapse of time or both, would constitute an Event of Default or, if any such condition or event exists, specifying the nature and period of existence thereof and what action Mortgagor is taking or proposes to take with respect thereto.

(b) Within five (5) days after a request therefor by Mortgagee, Mortgagor will furnish to Mortgagee estoppel certificates from any of the lessees under the Leases, as required by their respective Leases.

4.04.02 Notice by Mortgagor. Mortgagor shall give prompt notice to Mortgagee of (a) a default or Event of Default, (b) any notice given or any other action taken or, to Mortgagor's knowledge, intended to be taken by (i) a tenant under any Lease, (ii) a holder of any indebtedness of Mortgagor or otherwise encumbering the Mortgaged Property, or (iii) any other Person, if such notice is given or such other action is taken with respect to (x) a claimed default under such Lease or other indebtedness, (y) a default or Event of Default under this Mortgage, or (z) a claimed default involving a potential liability in excess of $5,000, under any other indenture, lease, assignment, agreement or other instrument to which Mortgagor or any Guarantor is a party or by which it or the Mortgaged Property may be bound or affected, and (c) any proceedings instituted by or against Mortgagor in any federal or state court or by any governmental department, agency or instrumentality, or any such proceedings threatened against Mortgagor in any federal or state court or by any governmental department, agency or instrumentality, affecting the Mortgaged Property or any portion thereof or which, if adversely determined, would have a material adverse effect upon Mortgagor's business, assets or condition,

financial or other, or upon the lien of this Mortgage. Any notice so given shall specify the nature and period of existence of such event or condition and what action Mortgagor or such Guarantor is taking or causing to be taken and proposes to take or cause to be taken with respect thereto and shall include a copy of any documents relevant thereto.

4.05 No Credit for Payment of Taxes. Mortgagor shall not be entitled to any credit against the principal of or interest on the Note or any other sum which may become payable under the terms thereof or hereof by reason of the payment of any tax on the Mortgaged Property or any part thereof or by reason of the payment of any other Imposition, and shall not apply for or claim any deduction from the taxable value of the Mortgaged Property or any part thereof by reason of this Mortgage.

4.06 Books and Records; Financial Statements. Mortgagor covenants to keep adequate records and books of account in which complete entries will be made in accordance with generally accepted accounting principles consistently applied reflecting all financial transactions of Mortgagor in respect of the Mortgaged Property. Mortgagor further covenants that it will, at any reasonable time and from time to time, permit Mortgagee or any agents or representatives thereof to examine and make copies of and abstracts from such books and records of account and visit the Mortgaged Property to discuss the affairs, finances and accounts with respect thereto with Mortgagor and any of its officers, directors or agents in respect of the Mortgaged Property. Mortgagor shall deliver to Mortgagee, not later than thirty (30) days after the end of each quarter and three months after the end of each fiscal year of Mortgagor, (a) financial statements in detail satisfactory to Mortgagee, certified by a principal of Mortgagor and prepared in accordance with generally accepted accounting principles consistently applied by a firm of certified public accountants acceptable to Mortgagee, of annual income and expenses with respect to the ownership and operation of the Mortgaged Property for such fiscal year, setting forth in comparative form the figures for the previous fiscal year, and (b) balance sheets in detail satisfactory to Mortgagee, certified by a principal, of (i) Mortgagor, as at the end of such fiscal year, setting forth in comparative form the figures as at the end of the preceding fiscal year, and (ii) the Guarantors. Mortgagor shall also deliver to Mortgagee such other information and data with respect to the business, operations, affairs, prospects, condition, properties and assets of Mortgagor, each Guarantor and the Mortgaged Property as Mortgagee may from time to time reasonably request.

ARTICLE 5

Events of Default; Remedies, etc.

5.01 Events of Default; Declaration of Note Due. If any one or more of the following events (herein sometimes called "Events of Default") shall occur:

(a) Mortgagor shall default in the due and punctual payment of any principal of or interest on the Note when and as due and payable (whether at maturity or as an installment of interest or by reason of any prepayment requirement or by declaration of acceleration or otherwise) and such default shall continue for five (5) or more days; or

(b) Mortgagor shall default in the payment, when and as due and payable, of any other indebtedness or other sums payable pursuant to the Note, this Mortgage, or if Mortgagor shall be in default on any other mortgage or instrument encumbering the Mortgaged Premises or any note or bond secured by any of the foregoing, or if there shall be a default under any other mortgage or other instrument securing payment due under the Note and such default shall continue for five (5) or more days; or

(c) Mortgagor shall default in the due performance or observance of any term of Section 2.01, 2.02, 2.03, 2.04, 2.06, 2.08, 2.09, 2.18, 3.01, 9.04, 13.01, 13.02, 13.04, 13.05, 14.02 and 14.05 and such default shall continue for ten (10) or more days from notice thereof sent by Mortgagee to Mortgagor; or

(d) Mortgagor shall default in the due performance or observance of any of the terms of this Mortgage, the Note or any other Loan Document other than those referred to in subdivisions (a), (b), and (c) of this Section 5.01, and such failure shall continue for fifteen (15) or more days from notice thereof sent by Mortgagee to Mortgagor; or

(e) any warranty, representation or other statement made by or on behalf of Mortgagor in or pursuant to this Mortgage or in connection with the application of the loan secured hereby (including, without limitation, any financial statement delivered pursuant to Section 4.06) is false, incorrect or misleading in any material respect; or

(f) Mortgagor or the Guarantors shall make an assignment for the benefit of creditors, or shall be generally not paying its debts as they become due, or shall commence a case under the federal bankruptcy laws, or shall file any petition or answer seeking for itself any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any present or future statute, law or regulation, or shall file an answer admitting or not contesting the material allegations of a petition against it in any such proceeding, or shall seek or consent to or acquiesce in the appointment of any trustee, custodian, receiver or liquidator of Mortgagor or any Guarantor, or any material part of its properties or assets, or if Mortgagor or the Guarantor shall take any action for the purpose of the foregoing; or

(g) within 30 days after the commencement of an action against Mortgagor or the Guarantors seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any present or future statute, law or regulation, such action shall not have been dismissed or all orders entered therein or proceedings thereunder affecting its business, operations and properties stayed, or if the stay of any such order or proceeding shall thereafter be set aside, or if, within thirty (30) days after the appointment, without the consent or

acquiescence of Mortgagor or the Guarantors, of any trustee, custodian, receiver or liquidator of Mortgagor or any Guarantor, or of any material part of its properties or assets, such appointment shall not have been vacated; or

(h) Mortgagor shall take any action looking to its dissolution or liquidation; or

(i) Mortgagor or the Guarantors shall default (as principal or surety) in the payment of any principal of, premium, if any, or interest on any indebtedness for borrowed money in the amount of $25,000 or more in any one case or in the aggregate, or if Mortgagor shall default in the due performance or observance of any of the terms of any such indebtedness or of any lease, mortgage, indenture or other agreement or instrument relating thereto beyond any grace period provided with respect thereto; or

(j) subsequent to the date of this Mortgage the laws of the state in which the Mortgaged Property is located shall be changed by statutory enactment, judicial decision, regulation or otherwise, so as (i) to deduct from the value of land for the purpose of taxation (for state, county, municipal or other purpose) any lien or charge thereon, or (ii) to change the taxation of mortgages or debts secured by land or the manner of collecting any such taxation, so as to affect this Mortgage, and thereafter, within 30 days following receipt of a written request from Mortgagee, Mortgagor shall have failed to enter into a lawful and binding agreement with Mortgagee, satisfactory in substance and form to Mortgagee, obligating Mortgagor to reimburse Mortgagee for any increase in taxation imposed on Mortgagee by reason of any of the foregoing; or

(k) a final judgment shall be entered against Mortgagor or the Guarantors, and if, within thirty (30) days after entry thereof, such judgment shall not have been discharged or execution thereof stayed pending appeal, or if, within thirty (30) days after the expiration of any such stay, such judgment shall not have been discharged, or

(l) Except as provided in this Mortgage, Mortgagor, or any of its successors or assigns, shall make any conveyance of all or any part of the Mortgaged Property or any interest therein; or

(m) the Guarantors shall default in the full and timely performance of any obligation under the Guaranty; or

(n) there shall be any default, beyond applicable grace periods under any mortgage, or any note secured by any mortgage, which is prior, equal or subordinate to the lien of this Mortgage (including but not limited to the Superior Mortgage) or the mortgagee under any such prior, equal or subordinate mortgage commences a foreclosure action in connection with such mortgage; or

(o) any act or omission on or relating to the Mortgaged Property or any part thereof or any interest therein shall render it to or any such part or interest subject to forfeiture under applicable law; or

(p) the amendment or modification of any mortgage, or any note secured by any mortgage, which is prior, equal or subordinate to the lien of this Mortgage; or

(q) Mortgagor's failure to cure any violations of laws or ordinances affecting or which may be interpreted to affect the Mortgaged Property within fifteen (15) days of the violation;

(r) there shall be a default, beyond applicable grace periods, in any agreement, other than the Note, the Guaranty and this Mortgage, between Mortgagee and Mortgagor, Guarantors or any "principal" (as hereafter defined) of Mortgagor or Guarantors. For purposes of this Section 5.01, "principal" of an entity shall mean any person or entity which owns, directly or indirectly, an interest in such entity of 50% or more; or

(s) Mortgagor or any entity affiliated therewith shall default, beyond applicable grace periods, in any agreement relating to other property owned by Mortgagor or any entity affiliated therewith which is secured by a mortgage between Mortgagee and Mortgagor or any entity affiliated therewith.

then and in any such event (i) interest at the Default Rate shall be due and payable on the principal of and (to the extent permitted by law) interest and other charges thereon as due under the Note at the time outstanding together with all other indebtedness secured hereby, from the date of the Event of Default until actual receipt by Mortgagee of payment in full of the Indebtedness and (ii) Mortgagee may, at any time after any Event of Default, declare, by written notice to Mortgagor, the Note, and all other indebtedness secured hereby to be due and payable upon the date specified in such notice and upon such date the same shall become due and payable, together with interest accrued thereon, without presentment, demand, protest or notice, all of which Mortgagor hereby waives. Mortgagor will pay on demand all costs and expenses (including reasonable attorneys' fees and expenses) incurred by or on behalf of Mortgagee in enforcing this Mortgage or the Note, or occasioned by any default or Event of Default under this Mortgage, or incurred in connection with any foreclosure action or other proceeding brought by Mortgagee to enforce and protect its rights and interest under the Mortgage or Note. Without limiting the foregoing, Mortgagee shall have the right to recover all such costs and expenses, including reasonable attorneys' fees and expenses, in any judgment of foreclosure and sale. For purposes of this Section 5.01, the rendering of a judgment in an action to foreclose this Mortgage shall not be deemed "payment in full of the Indebtedness" and it is the intention of the Mortgagee and Mortgagor that any such judgment shall bear interest at the Default Rate.

5.02 Security Agreement; Legal Proceedings; Foreclosure, etc. This Mortgage is both a real property mortgage and a "security agreement" within the meaning of the Uniform Commercial Code. The Mortgaged Property includes both real and personal property and all other rights and interests, whether tangible or intangible in nature, of Mortgagor in the Mortgaged Property. Mortgagor by executing and delivering this Mortgage has granted and hereby grants to Mortgagee, as security for the Indebtedness, a security interest in the Mortgaged Property to the full extent that the Mortgaged Property may be subject to the Uniform Commercial Code. If an Event of Default shall have occurred and be continuing, Mortgagee at any time may, at its election, do one or more of the following: (i) Mortgagee may proceed at law or in equity or otherwise to enforce the payment of the Note at the time outstanding in accordance with the terms hereof and thereof, (ii) Mortgagee may foreclose the lien of this Mortgage as against all or any part of the Mortgaged Property and have the same sold under the judgment or decree of a court of competent jurisdiction, or Mortgagee may, in an uncontested foreclosure, foreclose the lien of this Mortgage as against all or any part of the Mortgaged Property and have the same sold pursuant to any non-judicial foreclosure remedy available to mortgages under applicable South Carolina law, and/or (iii) Mortgagee may exercise any or all of the remedies of a secured party under the Uniform Commercial Code with respect to any personal property covered hereby. If Mortgagee should proceed to dispose of any personal property in accordance with the provisions of the Uniform Commercial Code, five (5) days' notice by Mortgagee to Mortgagor shall be deemed to be commercially reasonable notice under any provision of the Uniform Commercial Code requiring notice. Mortgagor, however, agrees that all other property of every nature and description, whether real or personal, covered by this Mortgage, together with all personal property used on or in connection with the Mortgaged Property or any business conducted thereon by the Mortgagor and covered by separate security agreements, are encumbered as one unit, that this Mortgage and such security interests, at Mortgagee's option, may be foreclosed or sold in the same proceeding, and that all property encumbered (both realty and personalty), at Mortgagee's option, may be sold as such in one unit as a going business, subject to the provisions of applicable law. In any action service of process may be made upon the Mortgagor by mailing a copy of the papers to be served to the Mortgagor at the address set forth on the first page hereof, and such service shall be deemed complete upon the posting of such papers in any mail box regularly maintained by the United States Post Office.

This Mortgage shall constitute a security agreement for purposes of the Uniform Commercial Code.

5.03 Power of Sale. Upon or at any time the occurrence of an Event of Default, Mortgagee may, either with or without entry or taking possession of the Mortgaged Property as provided in this Mortgage or otherwise, personally or by its agents or attorneys and without prejudice to the right to bring an action for foreclosure of this Mortgage, subject to the terms of the Superior Mortgage, sell the Mortgaged Property or any part thereof pursuant to any procedures provided by applicable law, and all estate, right, title, interest, claim and demand therein, and right of redemption thereof, at one or more sales in its entirety or in parcels, and at such time and place upon such terms and after such notice thereof as may be required or

permitted by applicable law. All notices relating to or in connection with such a sale or under any applicable law pertaining thereto shall be in writing and shall be deemed by sufficient given or served for all purposes when delivered (i) by personal service or courier service, and shall be deemed given on the date when signed for or, if refused, when refused by Mortgagor's agent, or (ii) by United States certified mail, return receipt requested, postage prepaid, and shall be deemed given two (2) days after being sent, to any party hereto at its applicable address as set forth herein. For purposes hereof, notices may be given by Mortgagee or by its attorneys.

5.04 Purchase of Mortgaged Property by Mortgagee. Mortgagee may be a purchaser of the Mortgaged Property or of any part thereof or of any interest therein at any sale thereof, whether pursuant to foreclosure or otherwise, and may apply upon the purchase price thereof the indebtedness secured hereby owing to Mortgagee. Mortgagee shall, upon any such purchase, acquire good title to the properties so purchased, free of the lien of this Mortgage and free of all rights of redemption in Mortgagor.

5.05 Waiver of Appraisement, Valuation, etc. Mortgagor hereby waives, to the fullest extent it may lawfully do so, the benefit of all appraisement, valuation, stay, extension and redemption laws now or hereafter in force and all rights of marshalling in the event of any sale of the Mortgaged Property or any part thereof or any interest therein.

5.06 Sale a Bar Against Mortgagor. Any sale of the Mortgaged Property or any part thereof or any interest therein under or by virtue of this Mortgage, whether pursuant to foreclosure or otherwise, shall forever be a bar against Mortgagor.

5.07 Sale in One or More Parcels. If this Mortgage is foreclosed, the Mortgaged Property, or any interest therein, may at Mortgagee's discretion, be sold in one or more parcels or in several interests or portions in any order or manner.

5.08 Application of Proceeds of Sale and Other Moneys. The proceeds of any sale of the Mortgaged Property or any part thereof or any interest therein under or by virtue of this Mortgage, whether pursuant to foreclosure or otherwise, and all other moneys at any time held by Mortgagee as part of the Mortgaged Property, shall be applied as follows:

First: to the payment of the costs and expenses of such sale (including, without limitation, attorneys' fees and expenses, the cost of evidence of title and the costs and expenses, if any, of taking possession of, retaining custody over, repairing, managing, operating, maintaining and preserving the Mortgaged Property or any part hereof prior to such sale), all costs and expenses of any receiver of the Mortgaged Property or any part thereof, and any taxes, assessments or charges prior to the lien of this Mortgage, which Mortgagee may consider necessary or desirable to pay;

Second: to the payment of any indebtedness secured by this Mortgage, other than indebtedness with respect to the Note at the time outstanding, which Mortgagee may consider necessary or desirable to pay;

Third: to the payment of all amounts of principal of, premium, if any, and interest at the time due and payable on the Note at the time outstanding (whether due by reason of maturity or as an installment of interest or by reason of any prepayment requirement or by declaration of acceleration or otherwise), including interest at the Default Rate on any overdue principal and premium, if any, and (to the extent permitted under applicable law) on any overdue interest; and in case such moneys shall be insufficient to pay in full the amounts so due and unpaid upon the Note at the time outstanding, then, first, to the payment of all amounts of interest and other charges at the time due and payable on the Note, and second to the payment of all amounts of principal at the time due and payable on the Note; and

Fourth: the balance, if any, held by Mortgagee after payment in full of all amounts referred to in subdivisions First, Second and Third above, shall, unless a court of competent jurisdiction may otherwise direct by final order not subject to appeal, be paid to or upon the direction of Mortgagor.

5.09 Appointment of Receiver. Subject to the terms of the Superior Mortgage, if an Event of Default shall have occurred and be continuing, then for so long as, and until, the indebtedness secured hereby is repaid in full, Mortgagee shall, as a matter of right and without regard to the adequacy of any security for the indebtedness secured hereby and without regard to whether Mortgagee has commenced an action to foreclose the lien of this Mortgage and without requirement for prior notice, be entitled to the appointment of a receiver for all or any part of the Mortgaged Property, whether such receivership be part of the Mortgaged Property or otherwise, and without regard to the nature of the action in which the appointment of a receiver is sought, and Mortgagor hereby consents to, and waives prior notice of, the appointment of such a receiver and will not oppose any such appointment. Mortgagee may also seek a temporary restraining order or other injunctive relief with respect to any act of omission constituting an Event of Default.

5.10 Possession, Management and Income. If an Event of Default shall have occurred and be continuing, Mortgagee, without notice to Mortgagor, may enter upon and take possession of the Mortgaged Property or any part thereof by force, summary proceeding, ejectment or otherwise and may remove Mortgagor and all other Persons and any and all property therefrom and may hold, operate, maintain, repair, preserve and manage the same and receive all earnings, income, rents, issues and proceeds accruing with respect thereto or any part thereof. Mortgagor, if it is then the occupant of the Mortgaged Property or any part thereof, shall immediately surrender possession of the space so occupied to Mortgagee and if Mortgagor is permitted to remain in possession, the possession shall be as a month-to-month tenant of Mortgagee, and, on demand, Mortgagor shall pay to Mortgagee monthly, in advance, a fair market rental as determined by Mortgagee, for the space so occupied, and in default thereof Mortgagor may be

dispossessed by the usual summary proceedings. Mortgagee shall be under no liability for or by reason of any such taking of possession, entry, removal or holding, operation or management, except that any amounts so received by Mortgagee shall be applied to pay all reasonable costs and expenses of so entering upon, taking possession of, holding, operating, maintaining, repairing, preserving, and managing the Mortgaged Property or any part thereof, and any taxes, assessments or other charges prior to the lien and security interest of this Mortgage which Mortgagee may consider necessary or desirable to pay, and any balance of such amounts shall be applied as provided in Section 5.08. The covenants herein contained may be (or if required pursuant to applicable law, shall be) enforced by a receiver of the Mortgaged Property or any part thereof.

5.11 Right of Mortgagee to Perform Mortgagor's Covenants, etc. If Mortgagor shall fail to make any payment or perform any act required to be made or performed hereunder, Mortgagee, without notice to or demand upon Mortgagor, and without waiving or releasing any obligation or default, may (but shall be under no obligation to) at any time thereafter make such payment or perform such act for the account and at the expense of Mortgagor, and may enter upon the Mortgaged Property for such purpose and take all such action thereon as, in Mortgagee's opinion, may be necessary or appropriate therefor. No such entry and no such action shall be deemed an eviction of any tenant of the Mortgaged Property or any part thereof. All sums so paid by Mortgagee and all costs and expenses (including, without limitation, attorneys' fees and expenses) so incurred, together with interest thereon at the Default Rate from the date of payment or incurring, shall constitute additional indebtedness secured by this Mortgage and shall be paid by Mortgagor to Mortgagee on demand.

5.12 Remedies, etc., Cumulative. Each right, power and remedy of Mortgagee provided for in this Mortgage or now or hereafter existing at law or in equity or by statute or otherwise shall be cumulative and concurrent and shall be in addition to every other right, power or remedy provided for in this Mortgage or now or hereafter existing at law or in equity or by statute or otherwise, and the exercise or beginning of the exercise by Mortgagee of any one or more of the rights, powers or remedies provided for in this Mortgage or now or hereafter existing at law or in equity or by statute or otherwise shall not preclude the simultaneous or later exercise by Mortgagee of any or all such other rights, powers or remedies.

5.13 Provisions Subject to Applicable Law. All rights, powers and remedies provided in this Mortgage may be exercised only to the extent that the exercise thereof does not violate any applicable provisions of law and are intended to be limited to the extent necessary so that they will not render this Mortgage invalid, unenforceable or not entitled to be recorded, registered or filed under the provisions of any applicable law. If any term of this Mortgage or any application thereof shall be invalid or unenforceable, the remainder of this Mortgage and any other application of such term shall not be affected thereby.

5.14 No Waiver, etc. No failure by Mortgagee or any holder of the Note to insist upon the strict performance of any term hereof or thereof, or to exercise any right, power or remedy

consequent upon a breach hereof or thereof, shall constitute a waiver of any such term or of any such breach. No waiver of any breach shall affect or alter this Mortgage, which shall continue in full force and effect with respect to any other then existing or subsequent breach. By accepting payment of any amount secured hereby before or after its due date, neither Mortgagee nor any holder of the Note shall be deemed to waive its right either to require prompt payment when due of all other amounts payable hereunder or to declare a default for failure to effect such prompt payment. Any and all special notations or endorsements on checks by Mortgagor to Mortgagee shall be of no effect against Mortgagee and will not result in an accord and satisfaction.

5.15. **Compromise of Actions, etc.** Any action, suit or proceeding brought by Mortgagee pursuant to any of the terms of this Mortgage or otherwise, and any claim made by Mortgagee hereunder may be compromised, withdrawn or otherwise dealt with by Mortgagee without any notice to or approval of Mortgagor, except as shall be required by law and cannot be waived.

5.16 Intentionally Deleted.

5.17 **Mortgage Includes All Mortgaged Property.** Upon the foreclosure of this Mortgage and the sale of the Mortgaged Property resulting therefrom including to Mortgagee or its designee, and regardless of the amount bid at the foreclosure sale and whether or not there is a deficiency remaining on the Note, the purchaser shall acquire all of Mortgagor's interest in and to all of the Mortgaged Property including, without limitation, the proceeds relating to all or any part thereof. By way of example, without implied limitation, the purchaser shall be deemed to have acquired all tax refunds, insurance proceeds and any other claims attributable to the Mortgaged Property even if actually received or collected after such foreclosure sale.

5.18 **Actions and Proceedings.** Mortgagee has the right to appear in and defend any action or proceeding brought with respect to the Mortgaged Property and to bring any action or proceeding, in the name and on behalf of Mortgagor, which Mortgagee, in its discretion, decides should be brought to protect its interest in the Mortgaged Property. Mortgagee is hereby granted an irrevocable power of attorney, coupled with an interest, to act, after the occurrence of an Event of Default, in the stead of Mortgagor for the purpose of commencing, continuing and/or maintaining any tax certiorari proceeding in respect of the Mortgaged Property for any period, whether before, during or after the date of such Event of Default. Mortgagee shall, at its option, be subrogated to the lien of any mortgage or other security instrument discharged in whole or in part by the Indebtedness, and any such subrogation rights shall constitute additional security for the payment of the Indebtedness.

5.19 **Waiver of Counterclaim.** MORTGAGOR HEREBY WAIVES THE RIGHT TO ASSERT A COUNTERCLAIM, OTHER THAN A MANDATORY OR COMPULSORY COUNTERCLAIM, IN ANY ACTION OR PROCEEDING BROUGHT AGAINST IT BY MORTGAGEE, AND WAIVES TRIAL BY JURY IN ANY ACTION OR PROCEEDING BROUGHT BY EITHER PARTY HERETO AGAINST THE OTHER OR IN ANY

COUNTERCLAIM ASSERTED BY MORTGAGEE AGAINST MORTGAGOR, OR IN ANY MATTERS WHATSOEVER ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS MORTGAGE, THE NOTE, ANY OTHER DOCUMENTS EXECUTED IN CONNECTION THEREWITH, OR THE INDEBTEDNESS.

5.20 Marshalling and Other Matters. Mortgagor hereby waives, to the extent permitted by law, the benefit of all appraisement, valuation, stay, extension, reinstatement and redemption laws now or hereafter in force and all rights of marshalling in the event of any sale hereunder of the Mortgaged Property or any part thereof or any interest therein. Further, Mortgagor hereby expressly waives any and all rights of redemption from sale under any order or decree of foreclosure of this Mortgage on behalf of Mortgagor, and on behalf of each and every person acquiring any interest in or title to the Mortgaged Property subsequent to the date of this Mortgage and on behalf of all persons to the extent permitted by applicable law.

5.21 Remedies of Mortgagor. Mortgagor understands and agrees that in no event shall Mortgagee (or any of its partners, shareholders, trustees, officers, directors, employees, agents, attorneys or representatives) have any personal liability hereunder or be liable for any consequential damages hereunder. In particular but without implied limitation, in the event that a claim or adjudication is made that Mortgagee has acted unreasonably or has unreasonably delayed acting in any case where by law or under the Note, this Mortgage or other documents executed in connection therewith, it has an obligation to act reasonably or promptly, Mortgagee shall not be liable for any monetary damages, and Mortgagor's exclusive remedies shall be limited to injunctive relief or declaratory judgment.

5.22 Waiver of Right of Redemption and Other Rights. To the full extent permitted by law, Mortgagor hereby covenants and agrees that it will not at any time: (a) insist upon or plead, or in any manner whatsoever claim or take any advantage of, any stay, exemption or extension law or any so-called "moratorium law" now or at any time hereafter in force; or (b) claim, take or insist upon any benefit or advantage of or from any law now or hereafter in force providing for the valuation or appraisement of the Mortgaged Property, or any part thereof, prior to any sale or sales thereof to be made pursuant to any provisions herein contained or prior to any decree, judgment or order of any court of competent jurisdiction; or (c) claim or exercise any rights under any statute now or hereafter in force to redeem the property, or any part thereof, or relating to the marshaling thereof, upon foreclosure sale or other enforcement hereof. To the full extent permitted by law, Mortgagor hereby expressly waives any and all rights to reinstatement and redemption, on its own behalf, on behalf of all persons claiming or having an interest (direct or indirect) by, through or under Mortgagor and on behalf of each and every person acquiring any interest in or title to the Mortgaged Property subsequent to the date hereof, it being the intent hereof that any and all such rights of reinstatement and redemption of Mortgagor and such other persons are and shall be deemed to be hereby waived to the full extent permitted by applicable law. To the full extent permitted by law, Mortgagor hereby waives any statute of limitations applicable to this Mortgage or the other Loan Documents. To the full extent permitted by law, Mortgagor agrees that it will not, by invoking or utilizing any applicable law or laws or

otherwise, hinder, delay or impede the exercise of any right, power or remedy herein or otherwise granted or delegated to Mortgagee, but will suffer and permit the exercise of every such right, power and remedy as though no such law or laws have been or will have been made or enacted. To the full extent permitted by law, Mortgagor hereby agrees that no action for the enforcement of the lien or any provision hereof shall be subject to any defense which would not be good and valid in an action at law upon the Note.

ARTICLE 6

Representations and Warranties

Mortgagor represents and warrants and covenants and agrees that, as of the date of delivery of this Mortgage:

6.01 Organization, Standing, etc., of Mortgagor. If Mortgagor is a partnership, limited partnership, corporation, limited liability company or other entity (whichever is set forth after the name of Mortgagor in the Preamble to this Mortgage) duly formed, it is validly existing and in good standing under the Uniform Partnership Act, Uniform Limited Partnership Act, business corporations law, limited liability company law or other applicable law, as the case may be, of the state in which the Mortgagor was organized, and is in good standing in the state in which the Mortgaged Property is located, and has all requisite power and authority to own and operate its properties, to carry on its business as now conducted and proposed to be conducted, and to execute, deliver and perform this Mortgage and to issue and sell the Note. Mortgagor and the Guarantors are now able to meet their respective debts as they mature, the fair market value of their respective assets exceeds their respective liabilities and no bankruptcy or insolvency proceedings are pending against or by or contemplated by the Mortgagor or the Guarantors. The execution of this Mortgage, the Note, the Guaranty and the documents executed and/or delivered in connection therewith will not defraud, hinder or delay any of the creditors of the Mortgagor or the Guarantors and neither the Mortgagor nor the Guarantors is or will be rendered insolvent by reason of the execution of this Mortgage, the Note, the Guaranty or the documents executed in connection therewith. The Mortgagor and the Guarantors are, to the best of their knowledge, not in default, nor have either of them received any notice of any uncured default, under the terms of any instrument evidencing or securing any indebtedness of the Mortgagor or the Guarantors, respectively, and there has, to the best of their knowledge, occurred no event, which, if uncured or uncorrected would constitute a default under any such instrument upon notice or lapse of time or both. All reports, statements and other data furnished by the Mortgagor and the Guarantors to the Mortgagee in connection with the loan evidenced by the Note are true, correct and complete in all material respects and do not omit to state any fact or circumstance necessary to make the statements contained therein not misleading. This Mortgage, the Note, the Guaranty and other instruments securing the Note or otherwise executed in connection therewith are valid and binding obligations enforceable in accordance with their respective terms.

6.02 Compliance with Other Instruments, etc. The execution, delivery, recordation and performance of this Mortgage and the consummation of the transactions contemplated hereby (including the issue and sale of the Note) will not result in any violation of any term or condition of any contract, agreement, lease, instrument, judgment, decree, order, statute, rule, regulation, ordinance, franchise, certificate, permit or the like applicable to Mortgagor or the Guarantors or by which Mortgagor or the Guarantors or its or their properties or assets are bound or affected.

6.03 Governmental Consent. No consent, approval or authorization of, or registration, declaration or filing with, any governmental or public authority, body or agency is required in connection with the valid execution, delivery and performance by Mortgagor of this Mortgage and the issue and sale of the Note except the recordation of this Mortgage in the appropriate recording office or offices and the filing of all necessary financing statements with respect thereto.

6.04 Litigation, etc. There is no action, suit, proceeding or investigation pending or threatened, or, to the best of Mortgagor's knowledge, any basis therefor known to Mortgagor, which questions the validity of this Mortgage or the Note, or any action taken or threatened to be taken pursuant thereto. No notice has been given by any governmental authority of any proceeding to condemn, purchase or otherwise acquire the Mortgaged Property or any part thereof or interest therein and, to the best of Mortgagor's knowledge, no such proceeding is contemplated.

6.05 No Violations, etc. Mortgagor is in compliance in all respects with all governmental laws, rules and regulations and other requirements which are applicable to the Mortgaged Property or any part thereof, or any use or condition of the Mortgaged Property or any part thereof. Mortgagor has no knowledge of any violation, nor is there any notice or other record of violation, of any zoning, health, safety, building, fire, labor, environment, or other statute, ordinance, rule, regulation or restriction applicable to the Mortgaged Property or any part or use thereof.

6.06 Use of Proceeds. Mortgagor has applied and will apply the proceeds of the Note for such purpose as does not and will not constitute a use of any part thereof, directly or indirectly, for the purpose of purchasing or carrying any "margin security" within the meaning of Regulation G, 12 C.F.R. 207, as amended, and no part of the proceeds of the Note was used or will be used for the purpose (whether immediate, incidental or ultimate) of "purchasing" or "carrying" any "margin security" within the meaning of such Regulation G or for the purpose of reducing or retiring any indebtedness which was originally incurred for any such purpose. Mortgagor does not own or have any present intention of acquiring any such margin security and will not otherwise knowingly take or permit any action which would involve a violation of such Regulation G or any other Regulation of the Board of Governors of the Federal Reserve System.

6.07 Easements and Utility Services. Mortgagor has all easements, including those for use, maintenance, repair and replacement of and access to structures, facilities or space for support, mechanical systems, utilities (including water and sewage disposal) and any other private or municipal improvements, services and facilities, necessary for the proper operation, repair, maintenance, occupancy and use of the Mortgaged Property for its current and any proposed uses. Electric, gas, sewer and water facilities and all other necessary utilities are available in sufficient capacity to satisfactorily service the Mortgaged Property.

6.08 Disclosure. Neither this Mortgage nor any other document or certificate furnished to Mortgagee or to counsel for Mortgagee in connection with the transactions contemplated hereby contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements contained herein or therein not misleading.

6.09 Offering of the Note. Neither Mortgagor nor anyone acting on its behalf has directly or indirectly offered the Note or any part thereof or any similar instrument for sale to, or solicited any offer to buy any of the same from, anyone other than Mortgagee. Neither the Mortgagor nor anyone acting on its behalf has taken or will take any action which would subject the issuance of the Note to the provisions of Section 5 of the Securities Act of 1933, as amended, or similar state or local laws.

ARTICLE 7

Definitions

7.01 Definitions. For all purposes of this Mortgage, the following terms have the following respective meanings unless the context otherwise requires:

Compliance Certificate: a certificate of the Mortgagor, executed and delivered by a principal of the Mortgagor, or if the Mortgagor is an individual or individuals, by such individual or individuals, setting forth in reasonable detail the investigation upon which the matters set forth in such certificate are based and the section of this Mortgage pursuant to which the certificate is being delivered.

Default: any condition or event which constitutes an Event of Default or which, after notice or lapse of time or both, would constitute an Event of Default.

Default Rate: the meaning specified in the Note but if not so specified than an interest rate equal to twenty four and one-half (24-1/2%) percent per annum, or the highest interest rate permitted by law, whichever is lower.

Due and Payable: when used with reference to the principal of, or premium or interest on, or when referring to any and all other sums secured by this Mortgage shall mean due

and payable, whether at the monthly or other date of payment or at the date of maturity specified in the Note or this Mortgage; or, in the case of Impositions, the last day upon which any charge may be paid without penalty and/or interest and/or without becoming a lien upon the Mortgaged Property.

Event of Default: the meaning specified in Section 5.01.

Furniture, Furnishings and Equipment: the meaning specified in the Granting Clause.

Guarantors: Jeffrey Shoup, Joyce Shoup, David Hix, Paula Hix, Ocean Developers LLC and T&J Development Inc.

Guaranty: the meaning specified in Section 1.04.

Herein, Hereof, Hereto and Hereunder: shall refer to this Mortgage and all amendments, modifications, extensions and renewals hereof.

Impositions: the meaning specified in Section 2.04.

Improvements: the meaning specified in the Granting Clause.

Including: shall mean "including but not limited to".

Insurance Requirements: the meaning specified in Section 2.05.

Land: the meaning specified in the recitals.

Leases: the meaning specified in the Granting Clause.

Legal Requirements: the meaning specified in Section 2.05.

Loan Documents: shall mean the Note, this Mortgage and each and every other document executed and delivered in connection therewith.

Mortgage: this Mortgage (and Assignment of Leases and Rents and Security Agreement), dated the date hereof between Mortgagor and Mortgagee.

Mortgage Commitment Letter: the meaning specified in Section 1.05.

Mortgaged Property: the meaning specified in the Granting Clause.

Note: the meaning specified in the Granting Clause.

Permitted Encumbrances: the meaning specified in Section 2.01.

Person: a corporation, an association, a partnership, a limited liability company or partnership, an entity, an organization, a business, an individual, a trust, a government or political subdivision thereof or a governmental or quasi-governmental agency.

Property: the same as the Mortgaged Property.

Superior Mortgage: the meaning specified in the Granting Clause.

Superior Mortgagee: shall mean R.E. Loans LLC, and its successors as holder of the Superior Mortgage.

Taking: the meaning specified in Section 3.02.

Total Destruction: the meaning specified in Section 3.04.

Total Taking: the meaning specified in Section 3.04.

ARTICLE 8

Miscellaneous

8.01 Further Assurances. Mortgagor at its expense will execute, acknowledge and deliver all such instruments and take all such actions as Mortgagee from time to time may reasonably request (a) to better subject to the lien and security interest of this Mortgage all or any portion of the Mortgaged Property, (b) to perfect, publish notice or protect the validity of the lien and security interest of this Mortgage, (c) to preserve and defend the title to the Mortgaged Property and the rights of Mortgagee therein against the claims of all persons and parties so long as this Mortgage shall remain undischarged, (d) to better subject to the lien and security interest of this Mortgage with respect to any replacement or substitution for any Improvements or any other after-acquired property, or (e) in order to further effectuate the purpose of this Mortgage and to carry out the terms hereof and to better assure and confirm to the Mortgagee its rights, powers and remedies hereunder. Mortgagor grants to Mortgagee an irrevocable power of attorney coupled with an interest for the purpose of exercising and perfecting any and all rights and remedies available to Mortgagee at law and in equity, including without limitation such rights and remedies available to Mortgagee pursuant to this Section 8.01.

8.02 Certificates. At Mortgagee's request, Mortgagor shall without charge, at any time and from time to time, deliver promptly to Mortgagee or its designee a certificate duly executed by Mortgagor and each Guarantor certifying the principal amount then outstanding

hereon, or on the Note, the date to which interest has been paid, and that no condition exists and no event has occurred under this Mortgage or the Note which constitutes a default hereunder, or which, with the passage of time or giving of notice or both, would constitute a default hereunder or, if any such condition exists or event has occurred, specifying the nature and period of existence thereof or the date of occurrence.

8.03 Additional Security. Without notice to or consent of Mortgagor, and without impairment of the lien and rights created by this Mortgage, Mortgagee may accept from Mortgagor or from any other Person additional security for the Note; neither the giving of this Mortgage nor the acceptance of any such additional security shall prevent Mortgagee from resorting, first, to such additional security, or, first, to the security created by this Mortgage, or concurrently to both, in any case without affecting Mortgagee's lien and rights under this Mortgage.

8.04 Notices, etc. All notices, demands, requests, consents, approval and other instruments under this Mortgage or the Note shall be in writing and shall be deemed to have been actually or properly given if and when mailed by first-class registered or certified mail, return receipt requested, postage prepaid, addressed (a) if to Mortgagor, to it at its address set forth above with a copy to Robert Gwin, Esq., Robert Gwin Law Offices, LLC, 2105 Cromley Circle Suite B, Myrtle Beach South Carolina 29577, (b) if to Mortgagee originally named herein to it at Suite 240, 2500 N. Military Trail, Boca Raton, Florida 33431, Attention: Richard Chwatt, with a copy to Westerman Ball Ederer Miller & Sharfstein, LLP, Suite 400, 170 Old Country Road, Mineola, New York 11501, Attention: Philip L. Sharfstein, Esq., or at such other address as Mortgagee may have designated by notice to Mortgagor, or (c) if to any other holder of any Note, at such address as such holder shall have designated by notice in writing to Mortgagor, or, until an address is so designated, to and at the address of the last holder so designating an address. The foregoing insertion of Mortgagor's mailing address shall be deemed to be a request by Mortgagor that a copy of any notice of default and of any notice of sale hereunder be mailed to Mortgagor at such address as provided by law. Mortgagor hereby irrevocably appoints Robert Gwin, Esq. as Mortgagor's agent for the service of process ("Agent") in any action on the Note, this Mortgage or any other document executed in connection therewith, and Agent hereby accepts such appointment. Mortgagor hereby agrees that service of process on Mortgagor may be made solely by serving Agent in any manner provided by law and that personal service upon Mortgagor is hereby waived. Agent may resign as Agent hereunder provided that (i) Agent shall give ten (10) days' prior written notice thereof to Mortgagee, (ii) Agent shall appoint a successor agent for the service of process on Mortgagor, which agent must acknowledge in writing its acceptance of such appointment and must be an attorney or law firm located within the State of South Carolina, and (iii) Agent shall include in its notice referred to in (i) above the name and address of the successor agent and an original of the acceptance of the appointment referred to in (ii) above. From and after the effective date of the notice referred to in the preceding sentence, the successor agent shall be referred to as the "Agent" hereunder. The rights given to Mortgagee in this Paragraph to just serve Agent shall be in addition to Mortgagee's permitted methods of service under applicable law and nothing in this Paragraph shall limit or restrict Mortgagee to

just serving Agent and Mortgagee shall be permitted to otherwise serve Mortgagor in any manner provided by law (with or without also serving Agent). Mortgagor shall not be entitled to any notices of any nature whatsoever from Mortgagee except with respect to matters for which this Mortgage specifically and expressly provides for the giving of notice by Mortgagee to Mortgagor and except with respect to matters for which Mortgagee is required by applicable law to give notice, and Mortgagor hereby expressly waives the right to receive any notice from Mortgagee with respect to any matter for which this Mortgage does not specifically and expressly provide for the giving of notice by Mortgagee to Mortgagor.

8.05 Amendments and Waivers. This Mortgage, the Note, and any term hereof or thereof may be amended, discharged or terminated and the observance of any term of this Mortgage or the Note may be waived (either generally or in a particular instance and either retroactively or prospectively) only by an instrument in writing signed by the party to be charged.

8.06 Expenses. Mortgagor will pay or cause to be paid (a) the cost of filing and recording of this Mortgage, the Uniform Commercial Code financing statements and any other documents to be filed or recorded in connection with the execution and delivery hereof or thereof; (b) all taxes (including interest and penalties) at any time payable in connection with the execution and delivery of this Mortgage and any other instruments or agreements relating hereto or thereto, any amendment or waiver relating hereto or thereto, the issue and acquisition of the Note and, where applicable, such filing and recording (Mortgagor agreeing to indemnify Mortgagee in respect of such taxes, interest and penalties); (c) the cost of Mortgagor's performance of and compliance with the terms and conditions of this Mortgage and of the other instruments mentioned herein; (d) the cost of title insurance, reinsurance, security interest searches and surveys required hereby or delivered in connection herewith; (e) the fees, expenses and disbursements of Mortgagee's counsel in connection with the subject matter of this Mortgage and any amendments, releases or other actions or waivers hereunder or in respect hereof; and (f) all reasonable out-of-pocket expenses incurred by Mortgagee in connection herewith. Mortgagor shall indemnify and hold Mortgagee harmless from and against all claims in respect of all fees of brokers and finders payable in connection with this Mortgage.

8.07 INTENTIONALLY OMITTED.

8.08 Limitation on Interest. Under no circumstances shall Mortgagor be charged under the Note or this Mortgage, more than the highest rate of interest which lawfully may be charged by the holder of the Note and paid by the Mortgagor on the indebtedness secured hereby. It is, therefore, agreed that if at any time interest on the indebtedness secured hereby would otherwise exceed the highest lawful rate, only such highest lawful rate shall be charged to or paid by Mortgagor. Should any amount be paid to Mortgagee in excess of such legal rate, such excess shall be deemed to have been paid in reduction of the principal balance of the Note.

8.09 Miscellaneous. All the terms of this Mortgage shall apply to and be binding upon the respective successors, assigns, heirs, legal representatives and beneficiaries of Mortgagor, and all Persons claiming under or through Mortgagor or any such successor or assign, and shall inure to the benefit of and be enforceable by Mortgagee and its successors, participants and assigns. The headings and table of contents, if any, in this Mortgage are for convenience of reference only and shall not limit or otherwise affect any of the terms hereof. This Mortgage may be executed in several counterparts, each of which shall constitute one and the same instrument. This Mortgage and the Note shall be construed and enforced in accordance with and governed by the laws of the State of South Carolina without taking into effect its conflicts of law provisions. Mortgagor hereby irrevocably submits himself to the jurisdiction of the Courts of the State of South Carolina, for any litigation relating to the Note, this Mortgage or the Mortgaged Property.

8.10 Set-Offs. (i) From time to time in connection with the payment of interest due and payable under the Note, and (ii) in all other instances, after the occurrence and during the continuance of an Event of Default, the Mortgagor hereby irrevocably authorizes and directs Mortgagee from time to time to charge the Mortgagor's accounts and deposits with Mortgagee, (general or special, time or demand, provisional or final), and to pay over to the Mortgagee an amount equal to any amounts from time to time due and payable to the Mortgagee hereunder or under any other Loan Document. The Mortgagor hereby grants to the Mortgagee, subject to the terms and conditions of this Mortgage, a security interest in and to all such accounts and deposits maintained by the Mortgagor with Mortgagee.

8.11 Securitization/Participation. Mortgagee reserves the right at any time during the term of the Indebtedness and in its sole and absolute discretion to effect a so-called securitization of (or to sell a participation interest in) the Indebtedness in such manner and on such terms and conditions as Mortgagee shall deem to be appropriate in its sole and absolute discretion and with such domestic or foreign banks, insurance companies, pension funds, trusts or other institutional lenders or other persons, parties or investors (including, but not limited to, grantor trusts, owner trusts, special purpose corporations, real estate mortgage investment conduits, real estate investment trusts or other similar or comparable investment vehicles) as may be selected by Mortgagee in its sole and absolute discretion.

8.12 Sole Discretion of Mortgagee. Wherever pursuant to this Mortgage, Mortgagee exercises any right given to it to approve or disapprove, or any arrangement or term is to be satisfactory to Mortgagee, the decision of Mortgagee to approve or disapprove or to decide that arrangements or terms are satisfactory or not satisfactory shall be in the sole discretion of Mortgagee and shall be final and conclusive, except as may be otherwise expressly and specifically provided herein.

8.13 No Oral Modification. This Mortgage, and any provisions hereof, may not be modified, amended, waived, extended, changed, discharged or terminated orally or by any act or failure to act on the part of Mortgagor or Mortgagee, but only by an agreement in writing signed

by the party against whom enforcement of any modification, amendment, waiver, extension, change, discharge or termination is sought.

8.14 **Duplicate Originals.** This Mortgage may be executed in any number of duplicate originals and each such duplicate original shall be deemed to be an original.

8.15 **ERISA Compliance.** Mortgagor represents and warrants that it has no employees and that it does not offer or maintain any pension, welfare or benefit plan for any managers, members, officers or employees, and that Mortgagor has not violated ERISA. Upon the hiring of any employees, Mortgagor shall at all times comply with ERISA and the contractual and legal requirements of any pension, welfare or benefit plan..

ARTICLE 9

Particular Provisions

9.01 **INTENTIONALLY OMITTED**

9.02 **Joint and Several.** If more than one party constitute Mortgagor hereunder, each such party shall be jointly and severally liable hereunder.

9.03 **Owner Occupied.** In the event that the Mortgaged Property shall be occupied by Mortgagor or any affiliate of Mortgagor, whether by lease or otherwise, upon an Event of Default hereunder Mortgagor and such affiliate shall be jointly and severally liable to pay to Mortgagee rent based on the higher of the rent called for in their lease, if any, or the then fair market rental value of the Mortgaged Property. Upon the default in the payment of such rent, Mortgagee, by itself or by its agent or receiver, shall be entitled to evict Mortgagor and all affiliates from the Mortgaged Property. The payment of such rent shall only serve to make Mortgagor and its affiliate a month to month tenant and shall in no manner affect a cure of the Event of Default hereunder.

9.04 **Environmental Regulations.** (a) Mortgagor has furnished to Mortgagee, at Mortgagor's expense, a report by an independent and licensed engineer satisfactory to Mortgagee, stating that the Mortgaged Property and any buildings and other improvements and additions thereon are (i) free of toxic waste, asbestos, PCB's, petroleum products or by-products, other "Hazardous Materials" (as defined below in this Section), or other deleterious materials which impair, in the opinion of Mortgagee, the value of the Mortgaged Property or otherwise may pose a health risk to persons, animals or vegetation, and (ii) in compliance with all applicable laws, rules, regulations or orders pertaining to health, the environment or Hazardous Materials. Such report shall be delivered to Mortgagee on the date hereof. If such engineer's report recommends that any work be done to the Mortgaged Property, or if Mortgagee requires that any work be done to the Mortgaged Property, to satisfy the conditions set forth in clauses (i) and (ii) of this paragraph, such work shall be done by Mortgagor within

30 days of the date of this Mortgage, and, at Mortgagee's option, Mortgagor shall place in escrow with Mortgagee an amount which is sufficient, in the opinion of Mortgagee, to pay for the cost of such work. Mortgagor shall provide Mortgagee with documentation of the completion of such work. Mortgagee has accepted the reports furnished by Mortgagor.

(b) Mortgagor covenants, represents and warrants, to the best of its knowledge and belief (i) that the Mortgaged Property does not contain and will not contain (A) asbestos in any form; (B) urea formaldehyde foam insulation; (C) transformers or other equipment which contain dielectric fluid containing polychlorinated biphenyls (PCB's); (D) fuel oil, gasoline, other petroleum products or by-products, or (E) any flammable explosives, radioactive materials, hazardous materials, hazardous wastes, hazardous, controlled or toxic substances, or any pollutant or contaminant, or related materials defined in or controlled pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. Sections 9601, et seq.), the Hazardous Materials Transportation Act, as amended (49 U.S.C. Sections 1801 et seq.), the Resource Conservation and Recovery Act, as amended (42 U.S.C. Sections 9601, et seq), and in the regulations adopted and publications promulgated pursuant thereto, or any other federal, state or local environmental law, ordinance, rule, or regulation; or which, even if not so regulated, may or could pose a hazard to the health or safety of the occupants of the Mortgaged Property or the owners of the Mortgaged Property (the substances described in (A), (B), (C), (D) or (E) above are referred to collectively herein as "Hazardous Materials"), (ii) that the Mortgaged Property and any buildings and other improvements and additions previously, now or hereafter located thereon, are not now being used nor have ever been used and will never be used for any activities involving, directly or indirectly, the use, generation, treatment, transportation, storage or disposal of any Hazardous Materials whether by Mortgagor, any prior owner of the Mortgaged Property or any tenant or prior tenant of the Mortgaged Property; (iii) that there has never been any Hazardous Materials Release (as defined below in this section) on, from or affecting the Mortgaged Property; (iv) that none of the Mortgaged Property, any previous owner of the Mortgaged Property, nor Mortgagor are subject to any past, existing, pending, or threatened notice, summons, citation, directive, investigation, litigation, proceeding, inquiry, lien, encumbrance or restriction, settlement, remedial, response, cleanup or closure arrangement or any other remedial obligations by or with any governmental authority (collectively "Regulatory Actions") under, or are in violation of, any applicable laws, rules, regulations or orders pertaining to health, the environment or Hazardous Materials; and (v) that none of the Mortgaged Property and any buildings and other improvements and additions previously or now located thereon have ever been used as an industrial or manufacturing facility or as a petroleum storage, refining or distribution facility or terminal, or a gasoline station, whether by Mortgagor, any prior owner or any tenant or prior tenant of the Mortgaged Property. Mortgagor does not know and has no reason to know of any violation of the foregoing representations, warranties and covenants.

(c) Mortgagor represents, warrants and covenants that with respect to the Mortgaged Property and any buildings and other improvements and additions thereon, the

Mortgagor (i) shall comply with and ensure compliance by all tenants and other occupants with all applicable laws, rules and regulations or orders pertaining to health, the environment or Hazardous Materials, (ii) shall not store, utilize, generate, treat, transport or dispose (or permit or acquiesce in the storage, utilization, generation, transportation, treatment or disposal of) any Hazardous Materials on or from the Mortgaged Property, (iii) shall ensure that all tenant leases of the Mortgaged Property contain agreements requiring tenant's compliance with the requirements of the foregoing clauses (i) and (ii); and (iv) shall cause any tenant or other person or entity using and/or occupying any part of the Mortgaged Property to comply with the representations, warranties and covenants contained in this Section.

(d) In the event of any storage, presence, utilization, generation, transportation, treatment or disposal of Hazardous Materials on the Mortgaged Property or in the event of any Hazardous Materials Release, Mortgagor shall as soon as is possible, at the direction of Mortgagee or any federal, state, or local authority or other governmental authority, remove any such Hazardous Materials and rectify any such Hazardous Materials Release, and otherwise comply with the laws, rules, regulations or orders of such authority, all at the expense of Mortgagor, including without limitation, the undertaking and completion of all investigations, studies, sampling and testing and all remedial, removal and other actions necessary to clean up and remove all Hazardous Materials, on, from or affecting the Mortgaged Property. If Mortgagor shall fail to proceed with such removal or otherwise comply with such laws, rules, regulations or orders within any reasonable cure period set by Mortgagee, or within the cure period permitted under the applicable regulation or order, whichever period expires first, the same shall constitute an Event of Default under Article 5 hereof, and Mortgagee shall have the right, at its sole option, to accelerate the maturity of the Mortgage indebtedness and declare the indebtedness secured hereby due and payable, and either in addition to or in lieu of the foregoing, at Mortgagee's sole option, Mortgagee may, but shall not be obligated to, do whatever is necessary to eliminate such Hazardous Materials from the Mortgaged Property or otherwise comply with the applicable law, rule, regulation or order, acting either in its own name or in the name of Mortgagor pursuant to this Section, and the cost thereof shall be part of the indebtedness secured hereby and shall become immediately due and payable without notice. In addition to and without limiting Mortgagee's rights pursuant to this Mortgage, Mortgagor shall give to the Mortgagee and its agents and employees access to the Mortgaged Property and all buildings and other improvements and additions thereon for such purposes and hereby specifically grants to Mortgagee a license to remove the Hazardous Materials and otherwise comply with applicable laws, rules, regulations or orders, acting either in its own name or in the name of the Mortgagor pursuant to this Section.

(e) Mortgagor shall indemnify and save Mortgagee and each of its shareholders, subsidiaries, affiliates, officers, directors, partners, and trustees and any receiver, trustee or other fiduciary appointed for the Mortgaged Property harmless from, against, for and in respect of, any and all damages, losses, settlement payments, obligations, liabilities, claims, actions or causes of actions, encumbrances, fines, penalties, and costs and expenses suffered, sustained, incurred or required to be paid by any such indemnified party (including, without limitation,

fees and disbursements of attorneys, engineers, laboratories, contractors and consultants) because of, or arising out of or relating to any "Environmental Liabilities" (as defined below) in connection with the Mortgaged Property or any buildings previously, now or hereafter located thereon. For purposes of this indemnification clause, "Environmental Liabilities" shall include all costs and liabilities with respect to the past, present or future presence, removal, utilization, generation, storage, transportation, disposal or treatment of any Hazardous Materials or any release, spill, leak, pumping, pouring, emitting, emptying, discharge, injection, escaping, leaching, dumping or disposing into the environment (air, land or water) of any Hazardous Materials (each a "Hazardous Materials Release"), including without limitation, (i) cleanups, remedial and response actions, remedial investigations and feasibility studies, permits and licenses required by, or undertaken in order to comply with the requirements of, any federal, state or local law, regulation, or agency or court, any damages for injury to person, property or natural resources, claims of governmental agencies or third parties for cleanup costs and costs of removal, discharge, and satisfaction of all liens, encumbrances and restrictions on the Mortgaged Property relating to the foregoing and (ii) injury to person or property in any manner related to a Hazardous Materials Release on, near or from the Mortgaged Property or otherwise related to environmental matters on or near the Mortgaged Property. Hazardous Materials Release shall also include by means of any contamination, leaking, corrosion or rupture of or from underground or above ground storage tanks, pipes or pipelines.

(f) Mortgagor shall promptly notify Mortgagee in writing of the occurrence of any Hazardous Materials Release or any pending or threatened Regulatory Actions, or any claims made by any governmental authority or third party, relating to any Hazardous Materials or Hazardous Materials Release on or from, the Mortgaged Property, or any buildings or other improvements or additions previously, now or hereafter located thereon and shall promptly furnish Mortgagee with copies of any correspondence or legal pleadings or documents in connection therewith. Mortgagee shall have the right, but shall not be obligated, to notify any governmental authority of any state of facts which may come to its attention with respect to any Hazardous Materials or Hazardous Materials Release on or from the Mortgaged Property.

(g) The liability of Mortgagor to Mortgagee pursuant to, by reason of or arising from the representations, warranties, covenants and indemnities provided for this Section is not limited by any exculpatory provision contained herein or in the Note or in the other documents further securing the indebtedness secured hereby and shall survive the payment in full of the Note and the satisfaction or assignment of this Mortgage following such payment, any foreclosure of this Mortgage, any transfer of the Premises by deed in lieu of foreclosure, any transfer of the Premises or interests therein or any change in ownership thereof.

(h) In the event this Mortgage is foreclosed, or Mortgagor tenders a deed in lieu of foreclosure, Mortgagor shall deliver the Mortgaged Property to Mortgagee free of any and all Hazardous Materials and any liens, encumbrances and restrictions relating to Environmental Liabilities, so that the conditions of the Mortgaged Property shall conform with all applicable

federal, state and local laws, rules, regulations and orders pertaining to health, the environment or Hazardous Materials.

(i) Mortgagor covenants, represents and warrants that to the best of its knowledge and belief, the Mortgaged Property, and any buildings and other improvements and additions previously, now or hereafter located thereon, do not now and never have, contained any underground or aboveground storage tanks, pipes or pipelines for the storage or transportation of Hazardous Materials, including without limitation, heating oil, fuel oil, gasoline and/or other petroleum products, whether such tanks are in operation, not operational, closed, removed or abandoned, except for such underground storage tanks heretofore disclosed to Mortgagee in writing and which are utilized solely for heating oil consumed on the Mortgaged Premises, and which are of a capacity of less than 2,000 gallons, all of which are in compliance with all federal, state and local legal requirements and do not have any leaks or corrosion. Without limiting the generality of the foregoing, Mortgagor is in full compliance with all registration and other requirements of 42 USC § 6991, "Regulation of Underground Storage Tanks" and all federal, state and local laws and regulations implementing the provisions of such act.

9.05 Modifications. Any written agreement or agreements hereafter entered into by Mortgagee which (i) extend the time of payment of the indebtedness secured by this Mortgage, (ii) change or modify the time or times of payment or the amount of the installments or fixed sums or the interest rate thereof, (iii) change, modify, extend, renew or terminate other terms, provisions, covenants or conditions of this Mortgage or the notes, bonds, or obligations which it secures, or (iv) consolidate, spread, release or sever the lien of the Mortgage, shall be effective in accordance with the terms and provisions thereof and shall be binding according to the tenor thereof on the owner or holder of subordinate, intervening or subsequent liens on any of the Mortgaged Property and any such liens shall continue.

9.06 Intentionally Deleted.

ARTICLE 10

Bankruptcy

10.01 Relief From Bankruptcy Stay. Mortgagor agrees that, in the event that Mortgagor, any Guarantor or any of the persons or parties constituting Mortgagor or a Guarantor shall (i) file with any bankruptcy court of competent jurisdiction or be the subject of any petition under Title 11 of the U.S. Code, as amended ("Bankruptcy Code"), (ii) be the subject of any order for relief issued under the Bankruptcy Code, (iii) file or be the subject of any petition seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any present or future federal or state act or law relating to

bankruptcy, insolvency, or other relief for debtors, (iv) have sought or consented to or acquiesced in the appointment of any trustee, receiver, conservator, or liquidator, or (v) be the subject of any order, judgment, or decree entered by any court of competent jurisdiction approving a petition filed against such party for any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any present or future federal or state act or law relating to bankruptcy, insolvency, or relief for debtors, Mortgagee shall thereupon be entitled and Mortgagor irrevocably consents to immediate and unconditional relief from any automatic stay imposed by Section 362 of the Bankruptcy Code, or otherwise, on or against the exercise of the rights and remedies otherwise available to Mortgagee as provided for herein, in the Note, other loan documents delivered in connection herewith and as otherwise provided by law; and Mortgagor (a) hereby irrevocably waives any right to object to such relief and acknowledges that no reorganization in bankruptcy is feasible; (b) waives its exclusive right pursuant to Section 1121(b) of the Bankruptcy Code to file a plan of reorganization and irrevocably consents to Mortgagee filing a plan immediately upon the entry of an order for relief if an involuntary petition is filed against Mortgagor or upon the filing of a voluntary petition by such Mortgagor; and (c) in the event that Mortgagee shall move pursuant to Section 1121(d) of the Bankruptcy Code for an order reducing the 120-day exclusive period, Mortgagor shall not object to any such motion.

ARTICLE 11

Foreclosure Judgment

11.01 (a) Mortgagor agrees that the obligations and liabilities of Mortgagor under this Mortgage shall survive and continue in full force and effect and shall not be terminated, discharged or released, in whole or in part, irrespective of any entry of any foreclosure judgment in respect of this Mortgage.

(b) All obligations of the Mortgagor under this Mortgage, (collectively, the "Payment Obligations") including but not limited to, payment of Impositions, insurance premiums, expenses of Mortgagee (including without limitation expenses to be reimbursed pursuant to Section 8.06, and all other expenses incurred by Mortgagee in connection with its ownership of this Mortgage and the Note, the enforcement of its right under this Mortgage and this Note, or the enforcement of any judgment of foreclosure or any deficiency judgment), in any proceeding whatsoever, including a bankruptcy proceeding, shall not merge into any foreclosure judgment and shall continue in full force and effect upon any entry of any foreclosure judgment.

(c) Upon the entry of a foreclosure judgment in respect of the Mortgage, Mortgagor shall continue to perform its obligations under the Mortgage, including, but not limited to, payment of all Payment Obligations.

(d) In the event, upon entry of a foreclosure judgment in respect of the

Mortgage, Mortgagor fails to perform any of its obligations under the Mortgage, including but not limited to, the Payment Obligations: (i) Mortgagee may, but shall not be obligated to, perform said obligations, (ii) Mortgagor shall remain liable to Mortgagee for Mortgagee's performance of Mortgagor's obligations under the Mortgage, and (iii) Mortgagee shall be entitled to any remedies available under the Mortgage for Mortgagor's failure to perform its obligations.

(e) The obligations and liabilities under this paragraph 11.01 shall survive any entry of any foreclosure judgment in respect of the Mortgage.

ARTICLE 12.

Future Advances

12.01 It is agreed that this Mortgage shall also secure such future or additional advances as may be made by the Mortgagee at its option to the Mortgagor, or its successor in title, for any purpose, provided that all those advances are to be made within twenty (20) years from the date of this Mortgage, or within such lesser period of time as may be provided hereafter by law as a prerequisite for the sufficiency of actual notice or record notice of the optional future or additional advances as against the rights of creditors or subsequent purchasers for valuable consideration. The total amount of indebtedness secured by this Mortgage may decrease or increase from time to time, but the total unpaid balance so secured at any one time shall not exceed the maximum principal amount of $8,527,776.00, plus interest, and any disbursements made for the payment of taxes, levies or insurance on the Mortgage Property with interest on those disbursements.

ARTICLE 13

Provisions Regarding Superior Mortgage

13.01 Mortgagor covenants and agrees as follows: (i) to promptly pay when due, all payments, additional payments and other sums or charges required to be paid by Mortgagor under the Superior Mortgage; (ii) to perform and observe all covenants and conditions to be performed and/or observed by Mortgagor under the Superior Mortgage; (iii) not to prepay, in whole or in part, any amounts owed pursuant to the Superior Mortgage; (iv) not to do, permit, suffer or refrain from doing anything as a result of which there could be a default under or breach of any of the terms of the Superior Mortgage; (v) not to waive, excuse or discharge any of the obligations and agreements of the Superior Mortgagee under the Superior Mortgage; and (vi) to do all things necessary to preserve unimpaired all of Mortgagor's rights under the Superior Mortgage.

13.02 The Mortgagor shall not consummate any agreement with the Superior Mortgagee to (i) increase the principal indebtedness or other amounts secured by the Mortgage, whether principal, interest or otherwise, (ii) increase the interest rate under loan secured by the Superior Mortgage, or (iii) shorten the term of the loan secured by the Superior Mortgage, either orally or in writing and whether or not permitted to do so by the terms of the Superior Mortgage (other than advances and other principal increases by Superior Mortgage permitted under the Superior Mortgage as such documents exist on the date hereof), without the prior written consent of the Mortgagee.

13.03 Any Event of Default under the Superior Mortgage or any instrument or agreement relating thereto shall ipso facto constitute an Event of Default under this Mortgage.

13.04 The Mortgagor shall (i) promptly notify the Mortgagee in writing of the occurrence of any default or Event of Default known to the Mortgagor under the Superior Mortgage or any instrument or agreement related thereto, (ii) promptly notify the Mortgagee of receipt by the Mortgagor of any notice noting or claiming the occurrence of any default or Event of Default under the Superior Mortgage or any instrument or agreement relating thereto and (iii) promptly cause a copy of each such notice received by the Mortgagor to be delivered by the Mortgagee.

13.05 The Mortgagor shall furnish to the Mortgagee ten (10) days after the mailing by the Mortgagee of a written request therefor, proof reasonably satisfactory to the Mortgagee of payment of all items which are required to be paid by the Mortgagor under the Superior Mortgage or any instrument or agreement related thereto.

13.06 The Mortgagee shall have the right, at its option, to perform the obligations of the Mortgagor under the Superior Mortgage upon the expiration of one-half of any applicable grace period for the curing of any defaults thereunder without the Mortgagee waiving any other of its rights under this Mortgage. Should the Mortgagee exercise its right hereunder to cure a default, the Mortgagor will reimburse the Mortgagee for any reasonable expenses the Mortgagee shall have incurred pursuant to the provisions of this Section 13.06, and any such expenditure shall become a lien upon the Mortgaged Property and shall be added to the principal of and be secured by this Mortgage. The Mortgagor will take all reasonable steps to insure the Mortgagee will have a reasonable opportunity to cure all defaults under the Superior Mortgage.

ARTICLE 14

Purchase Agreements

14.01 Subject to the terms of the Superior Mortgage, Mortgagor does hereby collaterally assign, transfer, set over, grant a security interest in, and deliver unto Mortgagee all the right, title and interest of Mortgagor in, under, and to any and all purchase agreements for the sale of building lots, together with any and all modifications or amendments thereof, which are in effect and which are hereinafter entered into by Mortgagor pursuant to the terms of this Mortgage (the "Purchase Agreements").

14.02 Mortgagor shall timely abide by, perform and discharge in all material respects each and every obligation, covenant, and condition of the Purchase Agreements to which it is a party to be performed by Mortgagor, and Mortgagor shall exercise its rights to enforce performance by the other party thereto of each and every obligation, covenant, condition and agreement to be performed by such other party, all in accordance with the terms of the Purchase Agreements, unless a waiver thereof is consented to in advance by Mortgagee.

14.03 Subject to the terms of the Superior Mortgage, at any time after the occurrence and during the continuance of an Event of Default hereunder, Mortgagee, at its option, without notice, either in person or by agent, with or without bringing any action or proceeding, or by a receiver to be appointed by a court at any time hereafter, may enforce for its own benefit the Purchase Agreements or any of them.

14.04 Subject to the terms of the Superior Mortgage, following an Event of Default, each party to the Purchase Agreements upon written notice from Mortgagee of the occurrence of an Event of Default, shall be and is hereby authorized by Mortgagor to perform under their respective Purchase Agreements for the benefit of Mortgagee in accordance with the terms and conditions thereof without any obligation to determine whether or not such an Event of Default has in fact occurred.

14.05 Mortgagor shall not assign, sell, pledge, transfer, mortgage, hypothecate or otherwise encumber its interests in the Purchase Agreements or any of them, except as permitted pursuant to the Mortgage. Mortgagor has not performed any act which will prevent Mortgagee from operating under or enforcing any of the terms and conditions of this Article or which would limit Mortgagee in such operation or enforcement.

ARTICLE 15

Waiver of Appraisal Rights

15.01 The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transactions. **THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.**

IN WITNESS WHEREOF, Mortgagor has caused this Mortgage to be duly executed on the day and year first above written.

WITNESS:

Print Name: ROBERT H. GWIN, III

MORTGAGOR:

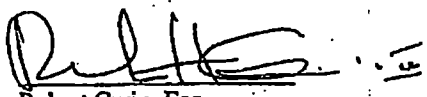
PEACHTREE PROPERTIES OF NORTH MYRTLE BEACH, LLC

By: _____
Jeffrey T. Shoup, Manager

WITNESS:

Print Name:
JON. RION

The undersigned executes this Mortgage solely for the purpose of acknowledging and agreeing to the provisions of Paragraph 8.04 hereinabove and the undersigned hereby accepts his appointment as the "Agent" herein listed.

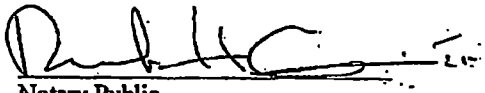


Robert Gwin, Esq.

ACKNOWLEDGEMENT

STATE OF SOUTH CAROLINA)
)ss.:
COUNTY OF HORRY)

I, Robert H. Gwin, III, a Notary Public in and for the County and State aforesaid, hereby certify that Jeffrey T. Shoup appeared before me this date and acknowledged that he executed the within instrument on behalf of Peachtree Properties of North Myrtle Beach, LLC, a South Carolina limited liability company, the Mortgagor, as its Manager.



Notary Public

EXHIBIT A

Legal Description

All that certain lot or parcel of land situate in the City of Myrtle Beach, County of Horry, State of South Carolina, and being more particularly described as follows:

PARCEL ONE:

ALL AND SINGULAR those three (3) certain Lots in Socastee Township, Horry County, South Carolina, being shown on a Plat prepared for the Estate of John C. Spivey by J.F. Thomas, Surveyor, dated September 1, 1965, recorded November 16, 1965, in Plat Book 43 at Page 183, and designated thereon as Hursey Three Lots, to which Plat reference is made, being described as follows:

Beginning at a point on the inland Waterway the lands intersects with the Inland Waterway and Spivey Road, a right-of-way from which has been granted at a corner designated Concrete N; thence North: 78 degrees, 10 minutes West 225 feet to Concrete N; thence North 27 degrees 10 minutes East 250 feet to Pipe N; thence South 78 degrees 10 minutes East to Pipe N; thence South 27 degrees 10 minutes East 250 feet to the beginning corner.

Bounded on the North by lands of Ruth L. McClam; on the East by lands of Ruth L. McClam, on the South by the Northern margin of Intracoastal Waterway, and on the West by lands of Ruth L. McClam.

This being the same property conveyed to Ruth L. McClam by Deed of T.S. Ludlam dated October 21, 1966, and recorded January 23, 1967, in the Office of the Clerk of Court for Horry County in Deed Book 360 at Page 199.

Steven Boyd McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 and recorded November 15, 1989 in Deed Book 1352 at Page 555, public records of Horry County, South Carolina.

Marion Louis McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 in Deed Book 1352 at Page 560, public records of Horry County, South Carolina.

Patrice Ann McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 and recorded November 15, 1989 in Deed Book 1352 at Page 565, public records of Horry County, South Carolina.

PARCEL TWO:

All AND SINGULAR, that lot of land in Socastee Township, Horry County, South Carolina, on the Northern side of the Inland Waterway and located near the Old Sweet Ditch, bounded and described as follows:

Commencing at an iron stake on the Northern bank of the Inland Waterway being a point where the Eastern bank of the Old Socastee Creek intersects the Inland Waterway, and running thence in a Northerly direction 21 degrees East 250 feet to an iron stake; thence Eastward 79 degrees East 100 feet to an iron stake; thence South 21 degrees East 250 feet to an iron stake on the Northern bank of the Inland Waterway; thence Westwardly along the Northern bank of the Inland Waterway 100 feet to the beginning corner.

Bounded on the North by other lands of Ruth L. McClam; on the East by other lands of Ruth L. McClam; on the South by the Inland Waterway; and on the west by other lands of Ruth L. McClam.

This being the same property conveyed to Ruth L. McClam by Deed of Larry W. Paul dated February 15, 1982, and recorded on February 18, 1982, in the office of the Clerk of Court for Horry County in Deed Book 737 at Page 818.

Steven Boyd McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 and recorded November 15, 1989 in Deed Book 1352 at Page 555, public records of Horry County, South Carolina.

Marion Louis McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 in Deed Book 1352 at Page 560, public records of Horry County, South Carolina.

Patrice Ann McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 and recorded November 15, 1989 in Deed Book 1352 at Page 565, public records of Horry County, South Carolina.

PARCEL THREE:

All AND SINGULAR, that certain tract or parcel of land in Socastee Township, Horry County, South Carolina, on hundred thirty-five (135) acres, more or less, having been platted and shown on a Plat prepared by J.F. Thomas, Surveyor, dated September 1, 1965. This 135 acres is situate North of the Intracoastal Waterway. The Plat is recorded in Plat Book 43, Page 183, in the Office of the Clerk of Court of Horry County, to which Plat reference is made.

The 135 acres is exclusive of the proposed highway area shown on the Plat above referenced to and is described as follows:

Beginning at Concrete N on the Southern margin of the proposed highway as shown on the referenced Plat (this road is known as the Peachtree Ferry Road); and running thence North approximately 26°5' East 33 feet to a point in the center of the road, the point being taken from the Highway Department survey; thence South 68°22' East 441 feet to point of intersection, as shown on the above Plat; thence South 62°45' East 984.3 feet to point of intersection, as shown on the above Plat; thence South 75°15' East 1028.6 feet to point of intersection, as shown on the Plat; thence North 33 feet to Concrete N on the Northern margin of the road above described; thence North 19°5' East 473.5 feet to Pipe O; thence 53°10 East 516 feet to Concrete N; thence South 13°55' West 872.5 feet to Concrete N on the Northern margin of the road; thence South 33 feet to point in center of the road described above; thence South 75°15' East 710 feet to point of intersection as shown on the Plat; thence South 85°11 minutes East 340.5 feet to point of intersection in center of the road described above, as shown on the Plat; thence Southwest 33 feet to Concrete N on the Southern margin of the road described above; thence South 21°45' West 1045.5 feet to Pipe O and Concrete N; thence North 78°50' West 750 feet to Pipe O and Concrete N; thence South 20°55' West 438.5 feet to Concrete N; thence North 78°10' West 566 feet to Concrete N; thence North 27°10' East to Pipe N; thence North 78°10' West 225 feet to Pipe N; thence South 27°10' West 250 feet to concrete N; thence North 78°10' West 1284.5 feet to Concrete N; thence North 21° East 250 feet to Concrete N; thence North 78°10' West 100 feet to Concrete N; thence South 21° West 250 feet to Concrete N; thence North 26°25' West 145 feet along Socastee Creek, the Creek being the line; thence North 45° West 100 feet; thence North 57° West 100 feet; thence North 63°10' West 100 feet; thence North 54°45' West 130 feet; thence South 70°25' West 185 feet; thence North 89°20' West 200 feet; thence North 61°45' West 94 feet; thence North 70°20' West 100 feet; thence South 86°50' West 80 feet to Gum 3MO; thence North 27°40' East 383.5 feet to Gum OM; thence North 27°20' East 261 Feet to Gum OM; thence North 26°05' East 1119.5 feet to the beginning corner.

Bounded on the North by the center of the proposed, highway as shown on the Plat in part, and in part by the lands, now or formerly, of Brice J. Ward; on the East by lands, now or formerly, of Roy Collins, in part, and in part by lands, now or formerly, of Virginia Zeigler; on the South by lands, now or formerly, of J.M. Cooper, in part, and lands, now or formerly, of Virginia Zeigler, in part, and by the Northern margin of the Intracoastal Waterway, in part, Lucy S. Kolb, in part, and Socastee Creek, in part; and on the West by land, now or formerly, of Maggie L. Roberts.

LESS AND EXCEPT:

ALL AND SINGULAR that certain piece, parcel or lot of land situate, lying, and being in Socastee Township, County and State aforesaid, designated as Pump Site and containing 215 square feet and shown on a plat of Pump Site For Grand Strand Water & Sewer Authority owned by Ruth L. McClam; made by Engineering and Technical Services, Inc., dated November 1,

1990; a copy of which is recorded in Plat Book 112, Page 65, public records of Horry County and which is by way of reference made a part and parcel of this description.

This property was heretofore conveyed by Ruth Ludlum McClam, et al to the Grand Strand Water and Sewer Authority by Deed dated 23 November, 1990; and recorded in Deed Book 1438, Page 163, in the office of the Clerk of Court for Horry County, South Carolina.

PARCEL THREE (3) is a portion of the property devised to Ruth Ludlam McClam by Item VIII of the Last Will and Testament of John C. Spivey, Deceased, and conveyed by Deed of Lucy S. Kolb, Executrix, T.B. Ludlam and C.A. Spivey, as Executors of the Last Will and Testament of J.C. Spivey, dated November 13, 1965, and recorded in the Office of the Clerk of Court for Horry County in Deed Book 336 at Page 482 on November 16, 1965.

Steven Boyd McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 and recorded November 15, 1989 in Deed Book 1352 at Page 555, public records of Horry County, South Carolina.

Marion Louis McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 in Deed Book 1352 at Page 560, public records of Horry County, South Carolina.

Patrice Ann McClam acquired an undivided 1/70 interest in the property described above by Deed of Ruth Ludlum McClam dated November 10, 1989 and recorded November 15, 1989 in Deed Book 1352 at Page 565, public records of Horry County, South Carolina.

AMERICAN LAND TITLE ASSOCIATION
LOAN POLICY
(10-17-92)

Policy No. SC2330-46-06-RE-388A-2006.7210740-72338570

CHICAGO TITLE INSURANCE COMPANY

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:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
2. Any defect in or lien or encumbrance on the title;
3. Unmarketability of the title;
4. ~~Lack of a right of access to and from the land;~~
5. The invalidity or unenforceability of the lien of the insured mortgage upon the title;
6. The priority of any lien or encumbrance over the lien of the insured mortgage;
7. Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material:
   a. arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or
   b. arising from an improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance;
8. The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage in the named insured assignee free and clear of all liens

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title, as insured, but only to the extent provided in the Conditions and Stipulations.

In Witness Whereof, CHICAGO TITLE INSURANCE COMPANY has caused this policy to be signed and sealed as of Date of Policy shown in Schedule A, the policy to become valid when countersigned by an authorized signatory.

NOTICE IS HEREBY GIVEN THAT THIS POLICY IS SUBJECT TO ARBITRATION PURSUANT TO THE PROVISIONS OF CHAPTER 48 OF TITLE 15 (SEC. 15-48-10 ET SEQ.) OF THE SOUTH CAROLINA CODE OF LAWS, 1976, AS AMENDED.

CHICAGO TITLE INSURANCE COMPANY

By: _____ President

ATTEST _____ Secretary

SC2330 06-RE-388A
Oleander Title Agency
2105-B Cromley Circle
Myrtle Beach, SC 29577
Tel:(843) 839-2239
Fax:(843) 839-2244

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay 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.
   (b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise 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.
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 Date of Policy which would be binding on the rights of a purchaser for value without knowledge.
3. Defects, liens, encumbrances, adverse claims or other matters:
   (a) created, suffered, assumed or agreed to by the insured claimant;
   (b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;
   (c) resulting in no loss or damage to the insured claimant;
   (d) attaching or created subsequent to Date of Policy (except to the extent that this policy insures the priority of the lien of the insured mortgage over any statutory lien for services, labor or material); or
   (e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the insured mortgage.
4. Unenforceability of the lien of the insured mortgage because of the inability or failure of the insured at Date of Policy, or the inability or failure of any subsequent owner of the indebtedness, to comply with applicable doing business laws of the state in which the land is situated.
5. Invalidity or unenforceability of the lien of the insured mortgage, or claim thereof, which arises out of the transaction evidenced by the insured mortgage and is based upon usury or any consumer credit protection or truth in lending law.
6. Any statutory lien for services, labor or materials (or the claim of priority of any statutory lien for services, labor or materials over the lien of the insured mortgage) arising from an improvement or work related to the land which is contracted for and commenced subsequent to Date of Policy and is not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance.
7. Any claim which arises out of the transaction creating the interest of the mortgagee insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that is based on:
   (i) the transaction creating the interest of the insured mortgagee being deemed a fraudulent conveyance or fraudulent transfer; or
   (ii) the subordination of the interest of the insured mortgagee as a result of the application of the doctrine of equitable subordination; or
   (iii) the transaction creating the interest of the insured mortgagee being deemed a preferential transfer except where the preferential transfer results from the failure:
      (a) to timely record the instrument of transfer; or
      (b) of such recordation to impart notice to a purchaser for value or a judgment or lien creditor.

CONDITIONS AND STIPULATIONS

1. DEFINITION OF TERMS

The following terms when used in this policy mean:

(a) "insured": the insured named in Schedule A. The term "insured" also includes

(i) the owner of the indebtedness secured by the insured mortgage and each successor in ownership of the indebtedness except a successor who is an obligor under the provisions of Section 12(c) of these Conditions and Stipulations (reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor insured, unless the successor acquired the indebtedness as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim or other matter insured against by this policy as affecting title to the estate or interest in the land);

(ii) any governmental agency or governmental instrumentality which is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage, or any part thereof, whether named as an insured herein or not;

(iii) the parties designated in Section 2(a) of these Conditions and Stipulations.

(b) "insured claimant": an insured claiming loss or damage.

(c) "knowledge" or "known": actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of the public records as defined in this policy or any other records which impart constructive notice of matters affecting the land.

(d) "land": the land described or referred to in Schedule A, and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(e) "mortgage": mortgage, deed of trust, trust deed, or other security instrument.

(f) "public records": 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. With respect to Section 1(a)(iv) of the Exclusions From Coverage, "public records" shall also include environmental protection liens filed in the records of the clerk of the United States district court for the district in which the land is located.

(g) "unmarketability of the title": 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.

2. CONTINUATION OF INSURANCE

(a) After Acquisition of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of (i) an insured who acquires all or any part of the estate or interest in the land by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the insured mortgage; (ii) a transferee of the estate or interest so acquired from an insured corporation, provided the transferee is the parent or wholly-owned subsidiary of the insured corporation, and their corporate successors by operation of law and not by purchase, subject to any rights or defenses the Company may have against any predecessor insureds; and (iii) any governmental agency or governmental instrumentality which acquires all or any part of the estate or interest pursuant to a contract of insurance or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage.

(b) After Conveyance of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest. This policy shall not continue in force in favor of any

conveyance from the Insured of either (i) an estate or interest in the land, or (ii) an indebtedness secured by a purchase money mortgage given to the Insured.

(c) Amount of Insurance. The amount of insurance after the acquisition or after the conveyance shall in neither event exceed the least of:

(i) the Amount of Insurance stated in Schedule A;

(ii) the amount of the principal of the indebtedness secured by the Insured mortgage as of Date of Policy, interest thereon, expenses of foreclosure, amounts advanced pursuant to the Insured mortgage to assure compliance with laws or to protect the lien of the Insured mortgage prior to the time of acquisition of the estate or interest in the land and secured thereby and reasonable amounts expended to prevent deterioration of improvements, but reduced by the amount of all payments made; or

(iii) the amount paid by any governmental agency or governmental instrumentality, if the agency or instrumentality is the Insured claimant, in the acquisition of the estate or interest in satisfaction of its insurance contract or guaranty

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT

The Insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 4(a) below, (ii) in case knowledge shall come to an Insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest or the lien of the Insured mortgage, as Insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest or the lien of the Insured mortgage, as Insured, is rejected as unmarketable. If prompt notice shall not be given to the Company, then as to the Insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any Insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice

4 DEFENSE AND PROSECUTION OF ACTIONS; DUTY OF INSURED CLAIMANT TO COOPERATE

(a) Upon written request by the Insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim adverse to the title or interest as Insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the Insured in the defense of those causes of action which allege matters not insured against by this policy.

(b) The Company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest or the lien of the Insured mortgage, as Insured, or to prevent or reduce loss or damage to the Insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable hereunder and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

(c) Whenever the Company shall have brought an action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(d) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the Insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of the Insured for this purpose. Whenever requested by the Company, the Insured, at the Company's expense, shall give the Company all reasonable aid (i) in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest or the lien of the Insured mortgage, as Insured. If the Company is prejudiced by the failure of the Insured to furnish the required cooperation the Company's obligations to the Insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation

5. PROOF OF LOSS OR DAMAGE

In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company a proof of loss or damage signed and sworn to by the Insured claimant shall be furnished to the Company within 90 days after the Insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title, or other matter insured against by this policy which constitutes the basis of loss or damage and shall state, to the extent possible the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the Insured claimant to provide the required proof of loss or damage, the Company's obligations to the Insured under the policy shall terminate including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage.

In addition, the Insured claimant may reasonably be required to submit to examination under oath by any authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage. All information designated as confidential by the Insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the Insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in the above paragraph, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

6. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance or to Purchase the Indebtedness.

(i) to pay or tender payment of the amount of Insurance under this policy together with any costs, attorneys' fees and expenses incurred by the Insured claimant, which were authorized by the Company, up to the time of payment or tender of payment and which the Company is obligated to pay; or

(ii) to purchase the indebtedness secured by the Insured mortgage for the amount owing thereon together with any costs, attorneys' fees and expenses incurred by the Insured claimant which were authorized by the Company up to the time of purchase and which the Company is obligated to pay.

If the Company offers to purchase the indebtedness as herein provided, the owner of the indebtedness shall transfer, assign, and convey the indebtedness and the Insured mortgage, together with any collateral security to the Company upon payment therefore.

Upon the exercise by the Company of either of the options provided for in paragraphs a (i) or (ii), all liability and obligations to the Insured under this policy, other than to make the payment required in those paragraphs, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation and the policy shall be surrendered to the Company for cancellation

(b) To Pay or Otherwise Settle With Parties Other than the Insured or With the Insured Claimant.

(i) to pay or otherwise settle with other parties for or in the name of an Insured claimant any claim Insured against under this policy, together with any costs, attorneys' fees and expenses incurred by the Insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay; or

(ii) to pay or otherwise settle with the Insured claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the Insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay

Upon the exercise by the Company of either of the options provided for in paragraphs b(i) or (ii), the Company's obligations to the Insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend prosecute or continue any litigation

7. DETERMINATION AND EXTENT OF LIABILITY

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) The liability of the Company under this policy shall not exceed the least of:

(i) the Amount of Insurance stated in Schedule A, or, if applicable, the amount of Insurance as defined in Section 2 (c) of these Conditions and Stipulations;

(ii) the amount of the unpaid principal indebtedness secured by the Insured mortgage as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time the loss or damage Insured against by this policy occurs, together with interest thereon; or

(iii) the difference between the value of the Insured estate or interest as insured and the value of the Insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

(b) In the event the Insured has acquired the estate or interest in the manner described in Section 2(a) of these Conditions and Stipulations or has

against the title, then the liability of the Company shall continue as set forth in Section 7(a) of these Conditions and Stipulations.

(c) The Company will pay only those costs attorneys' fees and expenses incurred in accordance with Section 4 of these Conditions and Stipulations.

8. LIMITATION OF LIABILITY

(a) If the Company establishes the title, or removes the alleged defect lien or encumbrance, or cures the lack of a right of access to or from the land, or cures the claim of unmarketability of title, or otherwise establishes the lien of the insured mortgage, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom adverse to the title or to the lien of the insured mortgage, as insured.

(c) The Company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without the prior written consent of the Company.

(d) The Company shall not be liable for: (i) any indebtedness created subsequent to Date of Policy except for advances made to protect the lien of the insured mortgage and secured thereby and reasonable amounts expended to prevent deterioration of improvements; or (ii) construction loan advances made subsequent to Date of Policy, except construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the land which at Date of Policy were secured by the insured mortgage and which the insured was and continued to be obligated to advance at and after Date of Policy.

9. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY

(a) All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of the insurance pro tanto. However, any payments made prior to the acquisition of title to the estate or interest as provided in Section 2(a) of these Conditions and Stipulations shall not reduce pro tanto the amount of the insurance afforded under this policy except to the extent that the payments reduce the amount of the indebtedness secured by the insured mortgage.

(b) Payment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage, or any voluntary partial satisfaction or release of the insured mortgage, to the extent of the payment, satisfaction or release, shall reduce the amount of insurance pro tanto. The amount of insurance may thereafter be increased by accruing interest and advances made to protect the lien of the insured mortgage and secured thereby, with interest thereon provided in no event shall the amount of insurance be greater than the Amount of Insurance stated in Schedule A.

(c) Payment in full by any person or the voluntary satisfaction or release of the insured mortgage shall terminate all liability of the Company except as provided in Section 2(a) of these Conditions and Stipulations.

10. LIABILITY NONCUMULATIVE

It is the insured acquires title to the estate or interest in satisfaction of the indebtedness secured by the insured mortgage, or any part thereof, it is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy.

11. PAYMENT OF LOSS

(a) No payment shall be made without producing this policy for endorsement of the payment unless the policy has been lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

(b) When liability and the extent of loss or damage has been definitely fixed in accordance with these Conditions and Stipulations, the loss or damage shall be payable within 30 days thereafter.

12. SUBROGATION UPON PAYMENT OR SETTLEMENT

(a) **The Company's Right of Subrogation.**

Whenever the Company shall have settled and paid a claim under this policy all right of subrogation shall vest in the Company unaffected by any act of the insured claimant.

The Company shall be subrogated to and be entitled to all rights and remedies which the insured claimant would have had against any person or property in respect to the claim had this policy not been issued. If requested by the Company, the insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect this right of subrogation. The insured claimant shall permit the Company to sue, compromise or settle in the name of the insured claimant and to use the name of the insured claimant in any transaction or litigation involving these rights or remedies.

If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated to all rights and remedies of the insured claimant after the insured claimant shall have recovered its principal interest, and costs of collection.

(b) **The Insured's Rights and Limitations.**

Notwithstanding the foregoing, the owner of the indebtedness secured by the insured mortgage, provided the priority of the lien of the insured mortgage or its enforceability is not affected, may release or substitute the personal liability of any debtor or guarantor, or extend or otherwise modify the terms of payment, or release a portion of the estate or interest from the lien of the insured mortgage, or release any collateral security for the indebtedness.

When the permitted acts of the insured claimant occur and the insured has knowledge of any claim of title or interest adverse to the title to the estate or interest or the priority or enforceability of the lien of the insured mortgage, as insured, the Company shall be required to pay only that part of any losses insured against by this policy which shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation.

(c) **The Company's Rights Against Non-Insured Obligors.**

The Company's right of subrogation against non-insured obligors shall exist and shall include, without limitation, the rights of the insured to indemnities, guaranties, other policies of insurance or bonds, notwithstanding any terms or conditions contained in those instruments which provide for subrogation rights by reason of this policy.

The Company's right of subrogation shall not be avoided by acquisition of the insured mortgage by an obligor (except an obligor described in Section 1(a)(ii) of these Conditions and Stipulations) who acquires the insured mortgage as a result of an indemnity, guarantee, other policy of insurance, or bond and the obligor will not be an insured under this policy, notwithstanding Section 1(a)(i) of these Conditions and Stipulations.

13. ARBITRATION

Unless prohibited by applicable law, either the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All arbitrable matters when the Amount of Insurance is $1,000,000 or less shall be arbitrated at the option of either the Company or the insured. All arbitrable matters when the Amount of Insurance is in excess of $1,000,000 shall be arbitrated only when agreed to by both the Company and the insured. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules.

A copy of the Rules may be obtained from the Company upon request.

14. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT

(a) This policy together with all endorsements, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the lien of the insured mortgage or of the title to the estate or interest covered hereby or by any action asserting such claim, shall be restricted to this policy.

(c) No amendment of or endorsement to this policy can be made except by a writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary or validating officer or authorized signatory of the Company.

15. SEVERABILITY

In the event any provision of this policy is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision and all other provisions shall remain in full force and effect.

16. NOTICES, WHERE SENT

All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the number of this policy and shall be addressed to the Company at the issuing office or to:

Claims Department
P.O. Box 45023
Jacksonville FL 32232-5023