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 V of V

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Karl A. Folkens, Special Referee

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v.

Chicago Title Insurance Company.....Defendant,

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Lynx Jericho Partners, LLC.....Plaintiff,

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Chicago Title Insurance Company.....Defendant.

Of whom Jericho State Capital Corp. of Florida and Lynx Jericho Partners, LLC are the Appellants,

And Chicago Title Insurance Company is the Respondent.

BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

Appellants Jericho State Capital Corp. of Florida ("Jericho State") and Lynx Jericho Partners, LLC ("Lynx Jericho") are insureds under two title insurance loan policies issued by Respondent Chicago Title Insurance Company. Appellants contend the property insured by these policies suffers a title defect that is a covered loss under the policies. Respondent denied coverage, and Jericho State and Lynx Jericho thereafter filed lawsuits alleging breach of contract, breach of the covenant of good faith and fair dealing and bad faith, to which Chicago Title answered denying liability. [R.pp. 24-31; pp. 32-45; pp. 46-54; pp. 55-70].

Subsequently, these actions were consolidated for trial and referred to Special Referee Karl A. Folkens. Respondent filed motions for summary judgment as to all issues, while Appellants filed motions for summary judgment as to liability only and reserving the issue of damages for trial. By Order Addressing Motions For Summary Judgment dated July 2, 2017, the Special Referee granted summary judgment in favor of Respondent. [R.pp. 5-23]. This appeal follows.

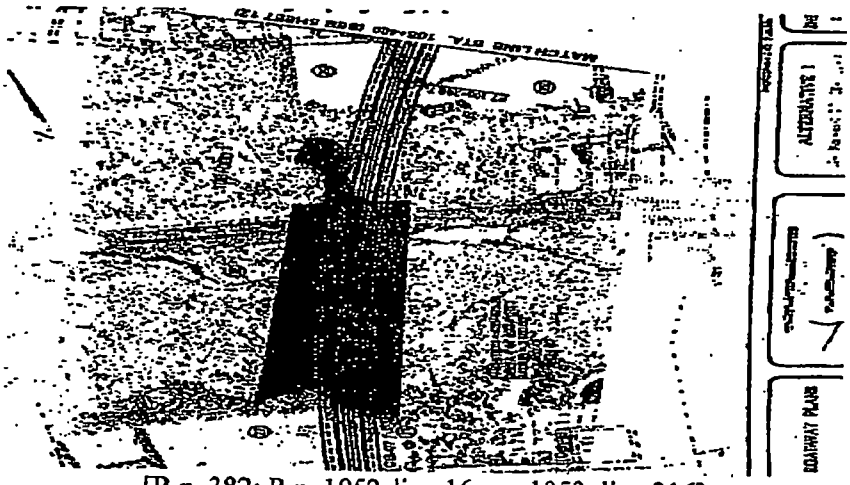
FACTS

The property in this case is known as Peachtree Plantation ("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.

South Carolina's Official Map Statute, S.C. Code §6-7-1210 *et seq.*, permits counties to establish official maps to reserve future locations of any street or highway for the implementation of comprehensive plans. Pursuant to this authority, Horry County enacted its Official Map Ordinance in 1999 for the purpose of "designating and reserving future locations of streets [and] highways...for future public acquisition." [R.pp. 360-367](emphasis added). The Official Map Ordinance provides that once the County reserves certain property for acquisition, no construction or improvements are permitted within the reservation area without prior exemption or exception.

[R.p. 363]. Shortly thereafter on October 5, 1999, Horry County created The Index Map to the Official Map, which showed the location of the first leg of a new four-lane highway known as the Carolina Bays Parkway. [R.pp. 368-372].

On July 2, 2002, Horry County passed Ordinance 88-202 (the "Ordinance") to amend the Index Map by "Adding the Right-Of-Way for the Carolina Bays Parkway from Highway 501 to Highway 17 By-Pass." [R.pp. 373-391]. The amended map shows where construction of the second leg of the Carolina Bays Parkway "will occur", and includes several detailed maps showing the "addition of the right-of-way" and depicting the specific location of Horry County's new four-lane highway. [R.p. 373]. As shown on Sheet 11 of the amended Index Map, the highway bisects the Property and then crosses the Intracoastal Waterway toward Highway 17 By-Pass:



[R.p. 382; R.p. 1052, line 16 – p. 1053, line 216]

On July 9, 2002, the Ordinance was recorded at the Horry County Register of Deeds in Deed Book 2497, Page 0986, indexed under the name of Horry County Council. [R.p. 373]. By recording the Ordinance, the County gave public notice that it was enforcing its rights of acquisition and interests in the newly reserved right-of-way land, including the portion running through the middle of the Property, by immediately prohibiting any person from building or improving any land within the reservation area. Under the terms of the Ordinance, this enforcement

action was carried out "as a means of reducing acquisition costs." [R.p. 373]. The Official Map Ordinance provides several other enforcement provisions, up to and including imprisonment for up to thirty days against any person improperly building on the reserved right-of-way land. [R.p. 365].

On July 25, 2006, Jeffery Shoup and David Hix, through their company Peachtree Properties of North Myrtle Beach, LLC ("Peachtree Properties"), purchased the Property from the McLamb family for $22,520,000.00. [R.p. 413]. 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 company $18,520,000.00, securing the loan with a first mortgage on the Property ("First Mortgage"). [R.pp. 424-440]. The second loan was from Appellant Jericho State for $4,263,888.00, which was secured by a second mortgage ("Second Mortgage"). [R.pp. 441-496].

At closing, Respondent Chicago Title issued a Loan Policy to each lender. 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. [R.pp. 497-505; pp. 506-515].

Policy Coverage. The first page of each Loan Policy describes the coverage afforded to the lenders subject to policy exceptions and exclusions. [R.pp. 497-505; pp. 506-615]. Specifically, the Policies insure for title defects as follows:

> "SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITION, AND STIPULATIONS, CHICAGO TITLE INSURANCE COMPANY, a Missouri corporation, herein called the Company, insures, as of the 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;"

Schedule A. Each Loan Policy includes a Schedule A, which identifies the Date of Policy, the insured parties, the limits of coverage, and a full description of the insured property. Both Policies share a Date of Policy of July 25, 2006, which is the date of closing.[1] The First Mortgage 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. [R.p. 501]. The Second Mortgage Loan Policy identifies Jericho State and its successors and/or assigns as the named Insured and provides insurance for title defects up to $4,263,888.00. [R.p. 510]

Schedule B. Each Loan Policy also includes a Schedule B, which describes the status or condition of title to be insured by Chicago Title as of the Date of Policy. Specifically, Exhibit B lists "Exceptions from Coverage", which are specific items known by Chicago Title to have some effect on the Property's title. Chicago Title does not insure for items listed as an Exception because the Policy affirmatively discloses these items to the insured. The only Exception noted in the Policies is a recorded utility easement over the Property in favor of Grand Strand Water and Sewer Authority. [R.p.505, 515]. Importantly, the Loan Policies do not except from coverage the Official Map Ordinance or the Ordinance or the amended Index Map which were publically recorded more than four years prior in the deed books at the Register of Deeds.

Each Loan Policy also includes the same boilerplate "Exclusions from Coverage" and "Conditions and Stipulations." [R.pp. 498-500; pp507-509]. These items, as more fully discussed below, identify certain items that are not covered by the policies and provide policy definitions, descriptions of each party's duties and responsibilities, and limitations on liability.

Importantly, at the time Chicago Title issued the Loan Policies, Jericho State did not know Horry County established the highway right-of-way nor that the county reserved a portion of the Property for acquisition. [R.p. 794, lines 13-18; p. 802, lines 6-25; p. 823, lines 1-3; p. 872, line 1

[1] The first Loan Policy contains a typographical error showing the year as 2007, but all parties agree 2006 is the correct year.

through p. 873, line 17]. Instead, Jericho State completely relied on Chicago Title's Policy showing the only Exception to coverage being the water and sewer easement. [R.p. 867, line 6-16; p. 868, lines 18-19]. To be sure, had Chicago Title revealed the Ordinance on the Policies, Jericho State would have never engaged in this loan transaction. [R.p. 794, lines 13-18; p. 865, lines 3-10; 871, lines 5-10; p. 872, line 1 through p. 873, line 17].

In 2007, Peachtree Properties defaulted on both loans. Jericho State made cure payments on the First Mortgage and foreclosed on its Second Mortgage, thus taking title to the Property subject to the First Mortgage. [R.p. 516–532; R.p. 533-542]. Throughout this process, Jericho State remained unaware the Peachtree Property was subject to the Ordinance and highway right-of-way, as evidenced by its counsel's testimony at the foreclosure hearing that their title examination found no other parties holding or claiming any interest of record in and to any of the Property. [R.p. 864, lines 12-13; R.p. 1148].

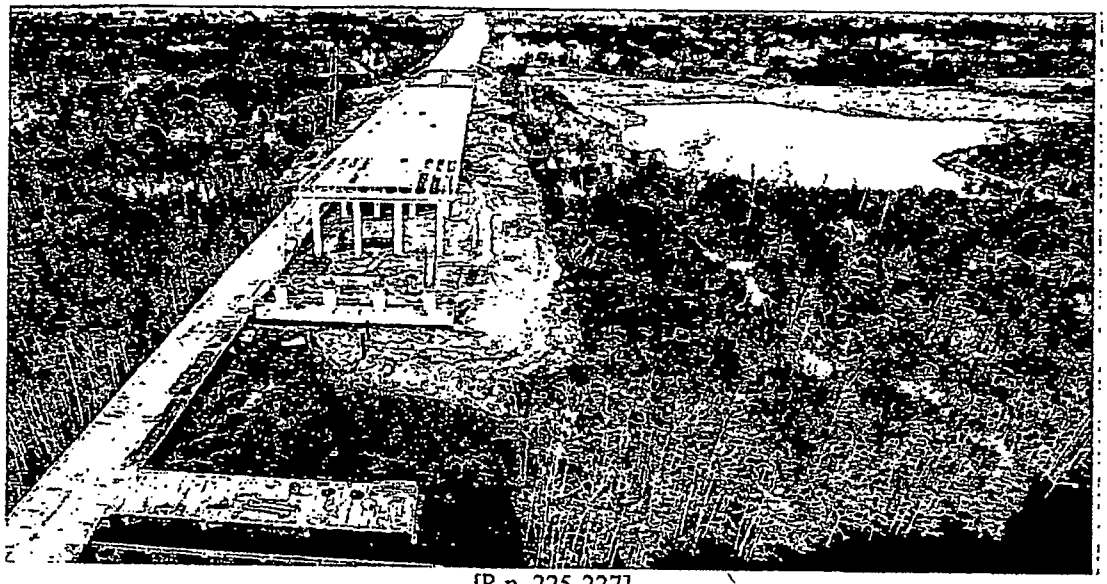
In 2008, about a year after taking title to the Property, Jericho State learned, for the first time, that the highway was going to be built through the middle of the Property, cutting it into two separate pieces. [R.p. 795, lines 8-18; R.p. 227]. Thereafter, Jericho State also learned that Shoup and Hix previously agreed to donate the right-of-way land to Horry County to obtain a rezoning of the Property under Horry County Ordinance 76-07. [R.p. 864, lines 4-17; R.p. 562]. In an effort to preserve as much value in the Property as possible, Jericho State filed suit against Horry County seeking to set aside the donation. [543-599; R.p. 844, lines 4-17; R.p. 848, lines 9-23]. The lawsuit became moot and was dismissed when the SCDOT filed to condemn the right-of-way land.

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 reserved and protected by the Ordinance. [R.p. 600-605]. This litigation lasted for 5 years.

In the meantime, on July 28, 2011, REL assigned the First Mortgage to Mortgage Fund '08 ("MF08"). [R.p. 672-673]. Less than two months later, MF08 filed Chapter 11 bankruptcy. The bankruptcy court transferred all of the debtor's assets, including the First Mortgage, to the Mortgage Fund '08 Liquidating Trust with instructions to sell those assets. [R.p. 1158-1160]. With the First Mortgage loan up for sale, Jericho State knew it would be in perilous situation, and could lose its interests and substantial investments in the Property, if a third party purchased the First Mortgage and foreclosed on the Property. [R.p., lines 22 - p. 35 line 4; R.p. 931, lines 9-20]. Therefore, Jericho State and its funding partner paid all of the back property taxes in return for a right of first refusal from the Liquidating Trust to purchase the First Mortgage. [R.p. 920, line 16 - p. 921, line 2]. When it came time to exercise its rights to purchase the First Mortgage, Jericho State could not afford the purchase price. [R.p. 912, lines 11-16]. Jericho State communicated its dilemma to an investment company who then formed Lynx Jericho, LLC to purchase the First Mortgage loan [R.p. 914, lines 22 - p. 915 line 4; R.p. 931, lines 9-20]. Appellant Lynx Jericho took ownership of the First Mortgage by Assignment dated April 17, 2013. [R.p. 716].

On December 5, 2014, the jury awarded Jericho State $2,100,000.00 in the condemnation case. [R.p. 1557-1559; R.p. 719-721]. After adding prejudgment interest and deducting attorney fees and costs, Jericho State paid the judgment's net proceeds to Lynx Jericho as First Mortgage holder. [R.p. 720; p. 940, line 11 – p. 941, line 4].

There is now a four-lane highway and bridge under construction through the middle of Jericho State's property.



[R.p. 225-227]

Both Jericho State and Lynx Jericho filed title insurance claims with Chicago Title seeking coverage for the title defect created by the Ordinance and Respondent denied both claims. [R.p. 1562-1563; p. 722-723; p. 1564-1565; p. 724-731]. This litigation followed.

Because the facts and issues are nearly identical, the cases were consolidated, and the parties filed reciprocal motions for summary judgment. The Special Referee denied Appellants' motion for summary judgment on liability only and granted Respondent's motion for summary judgment on the following grounds: (1) the Ordinance did not create an encumbrance on the Property, (2) the Ordinance did not render the Property unmarketable, (3) Exclusion #1 of the Loan Policy barred coverage, (4) Exclusion #2 of the Loan Policy barred coverage, (5) Exclusion #3(d) of the Loan Policy barred coverage, (6) Breach of the covenant and fair dealing is not an independent cause of action, and (7) Respondent did not engage in bad faith denial of insurance benefits. [R.p. 5-23]. Appellants agree the covenant of good faith and fair dealing is subsumed within a claim for breach of contract, and therefore this appeal pertains to the Special Referee's remaining grounds for granting summary judgment in favor of Respondent.

STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101 (1991). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant. *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607 (1976). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320 (2000).

ARGUMENT

"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." *Firstland Village Associates v. Layer's Title Ins. Co.*, 277 S.C. 184 (1981). "The risks of title insurance end where the risks of other kinds begin. Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it." *Id* (emphasis added).

"The law strictly construes insurance policies against the drafter and in favor of coverage for the insured." *General Acc. Ins. Co. v. Safeco Ins. Companies*, 314 S.C. 63 (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 (2005).

A. THE ORDINANCE AND AMENDED INDEX MAP CREATED A DEFECT, ENCUMBRANCE OR BURDEN ON TITLE THAT IS A COVERED LOSS UNDER THE POLICIES.

The Special Referee erred in granting summary judgment on Appellants' breach of contract claim by concluding the Ordinance and accompanying maps were not covered defects or encumbrances on title. The Special Referee further erred by failing to interpret the Policies' coverage provisions against the drafter and in favor of coverage as required by applicable law.

Subject to the Policies' stated exceptions and exclusions, the Policies insure against loss or damages sustained or incurred by the insured by reason of "Any defect in or lien or encumbrance on the title." While Chicago Title's Loan Policies do not define these terms, South Carolina law provides guidance: an encumbrance is "a right or interest in the land granted which may subsist in third persons to the diminution in value of the estate although consistent with the passing of the fee." *Martin v. Floyd*, 282 S.C. 47 (S.C. App. 1984); *Truck South v. Patel*, 339 S.C. 40 (2000). "An encumbrance is a burden on land depreciative of its value, such as a lien, easement or servitude, which, though adverse to the interest of the landowner, does not conflict with the landowner's conveyance of the land in fee." *Morris v. Lain*, 176 S.C. 310 (1935). "A title insurer is generally liable for losses or damages caused by defects in the property's title, and defects for which title insurance policies provide coverage may generally be defined as liens and encumbrances that result in a loss in the title's value." *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610 (2012). Thus, South Carolina courts recognize that a third party's interest in property, which is a burden on land that causes a decrease in value, is a defect and encumbrance to title that falls within the coverage provisions of a title insurance policy.

The threshold question, therefore, is whether a third party had any "right or interest" in the insured Property, which was a "burden on the land", after Horry County recorded the Ordinance and accompanying maps in 2002. A plain reading of the Ordinance reveals that not only did Horry

County have a right and interest in the Property by reserving a right-of-way running through the middle of it, the Ordinance also specifically describes the scope and effect of the County's interest in the reserved Property.

First, the Official Map Ordinance describes the nature of Horry County's right and interest as a reservation of land. The County created its Official Map and Index Map for the purpose of designating and "reserving" the location of streets and highways, including the Carolina Bays Parkway. [R.p. 360]. The Official Map Ordinance also prohibits the issuance of building permits in conflict with "the reservations of the Official Map." [R.p. 363]. The Ordinance's use of the terms "reserve" and "reservation" should be given their plain and ordinary meaning. *See, CRFE, LLC v. Greenville County Assessor*, 395 S.C. 67 (2011). "Reserve" means "to keep back, to retain, to keep in store for future or special use, and to retain or hold over to a future time." *Black's Law Dictionary* (5th Edition, 1983). Thus, under the plain terms of the Ordinance, the nature of the County's interest is reserving the land, setting it aside for future use and prohibiting any activity that interferes with its express reservation for use as a highway. This characteristic of the Ordinance is unique and is not found in common land use regulations, such as wetlands or zoning laws, which do not reserve private property for government use.

Second, the Ordinance describes the character of Horry County's right and interest in the land as a "right-of-way" and the Ordinance attaches maps specifically showing where the highway will run, including through the insured Property. Again, the Official Map Ordinance defines "right-of-way" as "land reserved, used, or to be used for a road, cross walk, railroad...or other public purpose." [R.p. 361]. By designating the reserved land as a "right-of-way", Horry County could not more clearly describe the type of interest it claims in the Appellant's insured Property. This too is unlike common land use regulations that do not designate public right-of-ways on private property but merely regulate the limits of the owner's use of his property.

Third, the Ordinance describes the purpose of Horry County's right and interest in the land. In this regard, the County reserves the right-of-way land for an acquisition that will occur. As such, the Ordinance reveals that a definite, future acquisition by the County to build a highway is the sole reason for reserving and setting aside this right-of-way land. This also contrasts with common land use restrictions, which do not state that the government will acquire private property.

Fourth, the Ordinance describes Horry County's economic right and interest in the land, as Horry County affirmatively bars any change in use of the property to "minimize its acquisition costs". In other words, since acquisition will occur, the Ordinance protects the County's economic interests in the insured Property by minimizing the Property's value. Since the insured Property is unimproved land, the County's economic interests to minimize the land value adversely affects the value of the insured Property to owners and the value of its security for its loans. Again, this is unlike common wetlands or zoning regulations that do not freeze and safeguard governmental financial interests in private property and reduce that of the owner.

Finally, the Ordinance describes the very substantial degree to which Horry County protects and enforces its interest in the insured Property. The County vigorously enforces its 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." [R.p. 365]. No doubt, the County is willing to send someone to jail to enforce its economic interests in the reserved right-of-way on the insured Property.

Thus, the Ordinance specifically reserves a significant piece of the insured Property for an acquisition that will occur, secures the County's economic interests in the land, and enforces the land reservation with restrictions and criminal penalties. Clearly, these facts show a third party's

"right or interest" in the land, which is a burden on the land depreciative of its value, and therefore, the Ordinance and maps clearly create a title defect or encumbrance on the insured Property.

The Special Referee erroneously concludes the County had no interest in the land because the Ordinance is no more than a simple land planning tool. [R.p. 16]. To the contrary, not only does the Ordinance establish Horry County's plan, but it also begins *implementation* of that plan. The Ordinance actively put the County's plan into motion by affirmatively reserving a significant portion of the insured Property, specifically designating that land as a right-of-way, and strongly enforcing its economic interests in the land, all of which the County publically recorded in the Deed Books at the Horry County Register of Deeds. To be sure, if the Ordinance was only a hypothetical idea or mere plan and nothing more as suggested by the Special Referee, Horry County would not need to immediately and affirmatively protect its economic interests by prohibiting construction on the reserved land for the sole purpose of suppressing its value so the government's acquisition costs are reduced. If recording the Ordinance and maps did not mark the beginning of the County's actions to acquire the right-of-way, the Special Referee's interpretation would leave the status of the acquisition of the Property in an indefinite no-man's land.

The Special Referee also misapprehends the effect of the Ordinance when he concludes "the Ordinance, like other land planning tools, only affected the use of the Property, not its title." [R.p. 16]. Importantly, use is limited to what a landowner may or may not do with the land; on the other hand, an encumbrance is a third party's right and interest in the land. In this regard, the Ordinance goes far beyond simply affecting use of the land, as such is commonly seen in wetlands or general zoning laws, it affirmatively reserves a portion of the insured Property for acquisition and immediately enforces restrictions to protect the government's interest in acquiring the land at the lowest price possible.

The Special Referee further erred by finding that the Ordinance did not give the County any right or interest in the land because "a contrary conclusion could wreak havoc in the title insurance industry", as the Official Map is not indexed under property owner names and it does not appear in the chain of title. [R.p. 16]. This anxiety over indexing and chain of title ignores the very nature of title insurance: it is intended to protect the insured from defects and encumbrances that may not be found in a standard title search. The South Carolina Federal District Court, referencing Respondent's expert Busnell Nielsen, explained this protection as follows:

> "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 incompetents—the title insurance policy normally provides coverage, but will not if an insured has knowledge of these matters outside the public record."
> *Investors Title Ins. Co. v. Bair*, 2007 WL 678625 (D.S.C. 2007).

As similarly stated by Professor Barlow Burke in the *Law of Title Insurance*, Third Edition, §2.01[B] (Walters Kluwer Law & Business, Supp.2013):

> "Title insurance insures not only on-record defects in title, but also covers defects not revealed by an abstractor's search of the public records related to real property. Such defects are known to title insurers as 'off-record risks'. They are interests not of record but nevertheless valid. Not even the most professional, thorough, and competent title search will identify them."

The title insurance company defines what it insures and does not insure, and it is the insurance company's responsibility to protect itself against this perceived "havoc" when they drafted the policy, not the court's. "The court's duty is limited to the interpretation of the contract made by the parties themselves regardless of its wisdom or folly, apparent unreasonableness, or failure [of the parties] to guard their interests carefully." *B.L.G. Enterprises, Inc. v. First Financial Ins. Co.*, 334 S.C. 529 (1999). A plain reading of the Loan Policies reflects the insuring provisions do not require defects or encumbrances to be indexed under the property owners' names or in any other particular manner. Nor do the Policies' insuring provisions require that defects or

encumbrances appear in the chain of title. In fact, the insuring provisions do not even require that defects or encumbrances be recorded in the public records at all. Indeed, the Policies insure for "any defect in or lien or encumbrance on the title" with no such strings attached, unless otherwise barred by some specific exception or exclusion. "Words cannot be read into a contract which impart intent wholly unexpressed when the contract was executed." *Blakeley v. Rabon*, 266 S.C. 68 (1976). If the title insurance company wanted to limit covered defects and encumbrances to only those items fully indexed within the chain of title, it should have said so in the Policies.

The Special Referee acknowledges that "a title insurer could affirmatively and unequivocally draft the Policies' insuring provisions to exclude any matters set forth on an official map." [R.p. 17]. The Appellants wholeheartedly agree, and the Special Referee should have interpreted the policies in light of these conspicuously absent terms. Rather than doing so, however, the Special Referee expresses concern that "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." [R.p. 17]. This concern is misplaced. First, the Appellants do not contend the Ordinance "transfers title" but that it encumbers title. Moreover, it is the Policies' insuring language as drafted by the insurer that determines coverage in this case, not a deed warranty that pertains only to a third party grantee. Because the purpose of title insurance is to protect the insured from a defect or encumbrance, including those <u>not</u> found in a standard title search, a proper interpretation of the Loan Policies' insuring provisions will have no impact on the law of general warranty deeds.

Finally, the Special Referee erred by relying on *Kiriakides v. The School Distrct of Greenville County*, 382 S.C. 8 (2009) to conclude the Ordinance did not create an encumbrance because "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 right-of-way to various tracts." [R.p. 17]. This doomsday proclamation fails to take into account that *Kiriakides* is completely irrelevant to the insuring provisions of a title insurance policy. Indeed, *Kiriakides* is limited to an inverse condemnation claim where a school district served and quickly abandoned a notice of condemnation. The school district did not assert a claim or interest in the plaintiff's property, did not make any public filings, and did not impose any regulations or restrictions on the property. In this case, on the other hand, the issue is whether a title insurance policy covers the defect and encumbrance created by the publically filed Ordinance, which was authorized by a state statute and enforced the government's economic interests in the Property by affirmatively suppressing the value of the reserved land for the sole purpose of purchasing the property at a reduced price. Rather than properly evaluate the Loan Policies' straightforward insuring provisions, the Special Referee appears to create an inverse condemnation public policy concern that is not raised in the pleadings.

Appellants purchased title insurance to protect themselves from "any defect in or lien or encumbrance on the title", including any such item not normally discoverable in a standard title search. Because the Ordinance and maps expressly set forth Horry County's reservation of a right-of-way on a sizeable portion of the insured Property, and protects the County's economic interests in the land, it is a title defect and encumbrance and therefore a covered loss under the Policies. The Special Referee erred by failing to interpret the insuring provisions in favor of coverage and by granting Respondent's Motion for Summary Judgment on this issue.

B. <u>THE ORDINANCE AND AMENDED INDEX MAP CREATED UNMARKETABILITY OF TITLE THAT IS A COVERED LOSS UNDER THE POLICIES.</u>

The Special Referee erred in granting summary judgment on Appellants' breach of contract claim by concluding the Ordinance was not a covered loss because it did not render the Property

unmarketable. [Decision, p. 16]. The Special Referee further erred by failing to interpret the Policies' coverage provisions against the drafter and in favor of coverage.

The Chicago Title Loan Policies 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." [R.p. 498, 507].

Delivery of marketable title not only requires the title be free from defect and encumbrance, the title must also be free from any reasonable probability of litigation. "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.*

The Special Referee's analysis seems to lump together the concepts of encumbrance and marketability, despite the Policies treating these title issues as distinct types of covered losses. Nonetheless, it is clear the Ordinance not only creates an encumbrance, but it also creates a reasonable probability of litigation with respect to the reserved right-of-way land. Because the Property was reserved for a future acquisition where construction of the highway "will occur", a future condemnation proceeding was at least a "reasonable probability", if not a near certainty. Moreover, this "reasonably probability" of litigation is fully supported by the Ordinance's immediate implementation of restrictions designed solely to reduce the government's costs to acquire the Property. The government said this "will occur" and it did occur when the SCDOT

filed litigation in 2009, taking the very land reserved by the Ordinance. Because the Ordinance protects the County's economic interests in the insured Property for an acquisition that "will occur" and creates a reasonable probability of litigation with respect to that land, it meets South Carolina's definition of unmarketable title.

The Special Referee concludes that ordinances and resolutions that regulate the use of property do not affect title and therefore the Ordinance in this case does not render title to the right-of-way land unmarketable. [R.p. 16]. The Appellants concede there are many laws that regulate or restrict the use of property but create no third party claim to the property. Wetlands restrictions are the most common examples of such laws, but these would also include occupancy restrictions, subdivision requirements, and general zoning and permitting matters. Notably, these laws limit the use of land by its owner, but they do not create for the government, or any other third party, a physical or economic interest in the land. Nor do these laws create highway right-of-ways or reserve land for future acquisition that will occur, and importantly, they do not present a "reasonable probability" of litigation as to the government's express interest in the land. The Special Referee erred by treating the Ordinance the same as other general types of land use regulations or zoning laws because its unique character clearly impairs marketability. As such, the Special Referee failed to interpret the Loan Policies in favor of coverage and erred in granting Respondent's Motion for Summary Judgment on this issue.

C. THE COVERED LOSS IS NOT EXCLUDED BY POLICY EXCLUSION #1

The insurance company bears the burden of establishing an exclusion's applicability and these exclusions are construed "most strongly against the insurance company." *General Acc. Ins. Co. v. Safeco Ins. Companies,* 314 S.C. 63 (Ct.App 1994). Thus to grant summary judgment on an exclusion, without a trial on the merits, the exclusion must exist without any ambiguity or reasonable question.

Policy Exclusion #1 generally excludes from coverage governmental use restrictions, such as building codes, zoning laws and environmental regulations. Moreover, importantly, there is a public records exception to the exclusion, which applies when a notice of enforcement of the law has been recorded in the public records. This exclusion states as follows:

> 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. <u>The Ordinance is Not Merely a Land Use Restriction or Regulation.</u>

The Special Referee erred by concluding Exclusion #1 bars Appellant's claims based on an overly broad interpretation of the exclusion. [R.p. 18-19]. On its face, Exclusion #1 applies to laws relating to land use only, and its language illustrates this limited scope by describing the types of excluded laws to include wetlands restrictions, occupancy limitations, subdivision requirements, and general zoning matters.

Rather than exercising his duty to interpret Exclusion #1 "most strongly" against the insurance company as required by law, the Special Referee instead *broadens* its scope of exclusion and fails to account for those provisions of the Ordinance that go far beyond simple land use regulation. Of course, common building and zoning laws and wetlands restrictions, as such are identified in Exclusion #1, do not create third party rights and interests in the land, but the Ordinance clearly does. Similarly, those same common building and zoning restrictions as described in Exclusion #1 do not regulate land use solely for the purpose of minimizing the government's acquisition costs and protecting its economic interests in the land, but the Ordinance

most certainly does. Indeed, nothing in Exclusion #1 excludes laws that create an encumbrance or a right or interest in land in favor of the government such as those created by the Ordinance.

The Special Referee erred by concluding Exclusion #1 applied to the Ordinance and further erred by failing to construe the Exclusion in favor of the insured and most strongly against the insurance company, and therefore his decision to grant the Respondent's motion for summary judgment on the breach of contract action should be reversed. To the extent that Exclusion #1 is ambiguous as to its scope, the Special Referee failed to interpret it in favor of coverage.

2. The Ordinance Meets the "Public Records" Exception to Exclusion #1.

To the extent Exclusion #1 applies to the Ordinance, which Appellants deny, the exclusion still does not bar coverage because the Ordinance and its amended Index Map is recorded in the public records, which clearly meets the exception to the exclusion.

As stated above, Exclusion #1 does not apply "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." 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." S.C. Code § 30-7-10 identifies these established records to include the Deed Books of Horry County, and therefore the Ordinance and accompanying maps, recorded in Deed Book 2497 at Page 0986, squarely meets this definition. Truly, if something recorded in the Deed Books of Horry County is not a public record, what is?

Nonetheless, the Special Referee flatly rejects Appellant's contention that the recorded Ordinance and amended Index Map is a public record. [Order, p. 17]. Appellants' expert witness title examiner, David Turner, who has examined titles in Horry County for over 50 years, provided an affidavit confirming the Ordinance and its amended Index Map are recorded in the Deed Books

and "are parts of the public records of Horry County, South Carolina and are freely accessible by both the general public and title examiners." [R.p. 1069-1070]. While such an opinion is seemingly obvious on its face, the Special Referee nonetheless rejects this because the Ordinance is not indexed under property owner names. [R.p. 17]. This defies common sense and confuses the distinction between a public record and chain of title. Moreover, the Special Referee's conclusion is contrary to the Policies' public records definition and is contrary to the purpose of title insurance to include coverage for defects not normally found in a title examination.

Notably, the Policies' definition of public records does not contain any indexing or chain of title requirements where they easily could have. By adding this requirement where it does not exist in the Policy definition, the Special Referee improperly broadens the scope of the Exclusion #1 rather than construing it most strongly against the insurer. To the extent that Respondent asserts the Policies' definition of public records should be interpreted by this Court to implicitly exclude public records that are recorded in the Deed Books *but* are not indexed within the chain of title, despite the complete absence of any such limiting language in the Policies, this ambiguity must be construed most strongly against Respondent.

In *Whitlock v Stewart Title Guaranty Company*, 2011 WL 4549367 (S.C.D. 2011)[2], the court addressed a very similar factual situation involving an Horry County resolution that prevented the issuance of building permits for new construction. Notably, the resolution was not recorded at the Horry County Register of Deeds. Similar to Exclusion #1 in the instant case, the Stewart Title policy excluded governmental regulations affecting land use, while the public records exception to the exclusion provided that the "exclusion does not apply to violations or the enforcement of these matters which appear in the public records at Policy Date." The insurer claimed the public records exception did not apply because the resolution was not a public record

[2] The Special Referee mistakenly identified this an unpublished decision, when in fact it is an unreported decision with a Westlaw citation rather than F.Supp.2d citation.

since it was not publically recorded at the Register of Deeds. After considering the policy's definition of public records (which is very similar to Chicago Title's definition), the court determined the term "public records" was ambiguous. Interpreting the terms against the drafter and in favor of coverage, the court concluded the resolution met the public records exception and the exclusion therefore did not bar coverage under the title insurance policy.

The facts of this case clearly show the Ordinance meets the public records exception to the Exclusion #1. First, the facts of this case mirror the facts of *Whitlock*. They also mirror the facts of *Lyons v. Fidelity Nat. Title Ins. Co*, 415 S.C. 115 (Ct. App. 2015), which, as correctly noted by the Special Referee, was vacated due to a settlement while the parties' summary judgment motions in this case were pending. Second, 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 Loan Policy's "public records" definition and it provides notice to the world of its enforcement provisions for any violation.

The Special Referee erroneously concludes the public records exception does not apply because "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." [R.p. 19]. In this regard, the Special Referee failed to consider the Official Map Ordinance's definition of "right-of-way", which includes "land reserved, used, or to be used for a road". Moreover, the Appellants do not contend, and have never contended, that the Ordinance transferred title, but instead have maintained only that the Ordinance created a defect or encumbrance on the Property and rendered the Property unmarketable, thus triggering coverage.

The Special Referee further erred by concluding the public records exception does not apply because the Ordinance is not "a notice of a violation or alleged violation of the Ordinance" and because there is no evidence of an enforcement proceeding. [R.p. 19]. The Special Referee

misreads the exception by limiting its application only to violations of the Ordinance, as the exception also applies to public records providing "notice of the enforcement thereof", which is very similar to the public records exception discussed in *Whitlock*. As stated above, the publically recorded Ordinance provides ample notice to the world that Horry County began immediate and unequivocal enforcement of its rights and economic interests to the land by imposing restrictions and criminal penalties. To the extent that "notice of the enforcement thereof" is ambiguous or capable of multiple meanings, it must be construed in favor of the insured and against the insurance company, which the Special Referee failed to do.

The Special Referee failed to interpret the public records exception to the exclusion most strongly against the insurer and in favor of coverage and further failed to find the exception was applicable to the publically recorded Ordinance, and therefore his decision granting Respondent's motion for summary judgment on this issue should be reversed.

D. <u>THE COVERED LOSS IS NOT EXCLUDED BY POLICY EXCLUSION #2</u>

The Exclusion #2 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."

The Special Referee concludes Exclusion #2 bars the Appellants' claims and that the exception to the exclusion does not apply because the Ordinance is not a condemnation proceeding under the South Carolina Eminent Domain Procedure Act ("Act"). [R.p. 18-19].

This is erroneous for several reasons. First, Appellants do not contend the Ordinance is a condemnation proceeding under the Act and do not seek coverage for the 2009 condemnation lawsuit. Instead, Appellants assert the Ordinance created an encumbrance and rendered the title unmarketable as of the Policies' date of July 25, 2006. In this regard, the Special Referee erred by

improperly applying an eminent domain exclusion to Appellants' pre-existing encumbrance and unmarketability claim.

Second, Exclusion #2 can only apply if the Ordinance is considered to be an act of eminent domain. If it is not, then Exclusion #2 is completely irrelevant to the facts of this case. If it is, then Exclusion #2 still does not apply because the Ordinance and maps were recorded in the public records as of the Date of Policy.

Finally, the exception to Exclusion #2 applies because there is evidence that the Ordinance constitutes a "taking which has occurred prior to the Date of Policy". The Special Referee erroneously treats an eminent domain proceeding under the Act to be synonymous with a taking, but those terms are not synonymous under South Carolina law. To be sure, a "taking" can occur when a government agency takes private property without formally exercising its power of eminent domain through a condemnation lawsuit and may exist by physical appropriation or government-imposed limitations on the use of private property. *Carolina Chloride, Inc. v. S.C. Dep't. of Transp.*, 391 S.C. 429 (2011); *Byrd v. City of Hartsville*, 365 S.C. 650 (2005). "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." *Lucas v SC Coastal Council*, 505 US 1003 (1992)(emphasis in original). In this case, since the insured Property is vacant, the Ordinance and maps had the effect of depriving the owners of all economically beneficial use of that land reserved for acquisition by Horry County, thus rendering the entire 131 acre tract unmarketable. This deprivation continued until the reserved land was condemned and taken through legal force by the SCDOT.

The Appellants found themselves in a situation similar to the plaintiffs in *Kirby v. North Carolina Dept. of Trans.*, 368 N.C. 847, 786 S.E.2d 919 (2016), in which the North Carolina Supreme Court evaluated the effect of a Roadway Corridor Official Map that describes land

identified by the NCDOT for acquisition for future use as a highway. The official map in the *Kirby* case has many characteristics similar to Horry County's Ordinance, such as its recordation at the county register of deeds and prohibition of any improvements on the future highway land for an indeterminate period of time. The N.C. Supreme Court concurred with the analysis of the lower court finding that the maps allowed the government to "foreshadow which properties will eventually be taken for roadway projects and in turn, decrease the future price the state must pay to obtain those affected parcels." Although the NCDOT asserted the official map was a mere planning tool, The *Kirby* Court concluded that the adverse effect of the official maps constituted a "taking" and remanded the case for a determination of damages. While *Kirby* does not address whether North Carolina's Roadway Corridor Official Map constitutes an encumbrance or rendered title unmarketable under a title insurance policy, the case is instructive on those issues as well, fully analyzing the government's physical and economic interests in the affected land.

Based on the above, Exclusion #2 does not apply because the Ordinance is not an eminent domain proceeding under the Act, the Ordinance and maps are recorded in the public records as of the Date of Policy, and there is evidence that the Ordinance constitutes a taking and meets the exception to Exclusion #2. Because the Special Referee improperly applied the exclusion to the Appellant's claims and failed to interpret the exclusion most strongly against the Respondent and in favor of coverage, his order granting summary judgment on this issue should be reversed.

E. <u>THE COVERED LOSS IS NOT EXCLUDED BY POLICY EXCLUSION #3(d)</u>

Exclusion #3(d) excludes coverage for "defects, liens, encumbrances, adverse claims or other matters ... attaching or created subsequent to the Date of Policy".

The Special Referee concludes Appellants' claims are excluded by Exclusion #3(d) because the condemnation lawsuit took place subsequent to the effective dates of the Policies. [R.p. 21]. Again, Appellants do not seek coverage for the 2009 SCDOT condemnation lawsuit.

Instead, Appellants assert the 2002 Ordinance creates an encumbrance and renders the title unmarketable. Because the Ordinance was filed nearly four years prior to the Policies' effective date, Exclusion #3(d) is wholly inapplicable to the facts of this case. The Special Referee's conclusion that Exclusion #3(d) excludes coverage is clearly erroneous because the Ordinance predates the date of policy, and therefore his decision granting Respondent's motion for summary judgment on this issue should be reversed.

F. THE SPECIAL REFEREE ERRED BY FINDING THERE WAS NO EVIDENCE OF BAD FAITH DENIAL OF INSURANCE BENEFITS.

"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 the particular facts of the case. *Mixson v. American Loyalty Ins. Co.*, 348 S.C. 394 (2002).

The Special Referee granted Respondent's summary judgment motion on the bad faith cause of action because "Chicago Title had a reasonable, good faith basis for contesting the claims and has succeeded in contesting coverage." [R.p. 22]. However, as set forth below, there is ample evidence of record that shows the Respondent did not act in good faith and therefore summary judgment is improper, especially if all inferences are to be interpreted in a light most favorable to the Appellants.

Respondent denied Appellant Jericho State's claim on two grounds. The first basis for denial is under Exclusion #1 because "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." [R.p. 722-723]. This basis is faulty on its face, as the Ordinance was publically recorded at the Horry County Register of Deeds and contradicts the Respondent's own definition of public records in its policy. Moreover, as discussed above, the Ordinance is self-effectuating and the county's enforcement of its rights began immediately upon recording the Ordinance and maps because the landowners are instantly enjoined from use of the land. Appellants contend this constitutes some evidence of bad faith and unreasonableness that precludes summary judgment on this issue.

The second ground given by Respondent is an alleged failure by Jericho State to provide proof of loss. [R.p. 722-723]. However, this is not a valid reason to deny the claim because S.C. Code 38-59-10 provides that if the insurer fails to provide the insured with a proof of loss form within 20 days of the claim, then the insured is deemed to have complied with any requirement to provide a proof of loss. Because Chicago Title did not provide such a form, Jericho State is deemed, as a matter of law, to be in compliance with this requirement. Chicago Title is presumed to know the law, and as such, denying the claim on this improper basis is evidence of bad faith and unreasonableness that precludes summary judgment on this issue.

Respondent denied Appellant Lynx Jericho's claim on several different grounds, none of which serve as a basis in their previous letter denying Jericho State's claim. First, Respondent denied the claim asserting 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. [R.p. 724-731]. As argued previously, denial on this basis is inconsistent with a plain reading of the Ordinance, as Horry County designates its interest in the Property as a "right-of-way" for acquisition that will occur, and to protect the County's economic interests, the Ordinance stops the landowner from any use of the undeveloped Property. The denial is also inconsistent with South Carolina law defining encumbrance as a third party's interest in the land that does not require an assertion of ownership. *Martin v. Floyd*, 282 S.C. 47 (S.C. App. 1984); *Truck South v. Patel*, 339 S.C. 40 (2000). Respondent'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 ownership, is at least some evidence of unreasonableness and bad faith that precludes summary judgment on this issue.

Second, Respondent denied Lynx Jericho's claim asserting the Ordinance is not a public record as defined in the Policy because it is not indexed to the property owner or property. [R.p. 724-731]. In doing so, Respondent ignores its own definition of public records and manufactures a new indexing requirement that is not present in its own policy. Appellants contend denial on this ground is at least some evidence of unreasonableness and bad faith that precludes summary judgment on this issue.

Third, Respondent denies the claim asserting that "at most, the ordinance is notice that the county may, in the future, bring a condemnation action" which is excluded by Exclusion #2. [R.p. 724-731]. In this regard, Respondent takes the improper position that a notice of a future condemnation triggers Exclusion #2 despite the exclusion being clearly limited to only actual eminent domain proceedings under the Act. Moreover, Respondent again asserts the Ordinance, which is publically recorded in the Deed Books at the Register of Deeds Office, is not a public record. Appellants contend denial on this ground is at least some evidence of unreasonableness and bad faith that precludes summary judgment on this issue.

Fourth, Respondent denies the claim asserting Lynx Jericho has already been fully compensated for the diminution of value of the property through the condemnation process. [R.p. 724-731]. However, Respondent fails to use the proper standard regarding valuation dates for the two types of claims: a plaintiff's loss in a condemnation proceeding is measured from the date of condemnation, while a loss under the Loan Policies is measured from the date of policy. *See*, S.C. Code §28-2-440 (in all condemnation actions, the date of valuation is the date of the filing of the condemnation notice); *Stanley v. Atl. Title Ins. Co.*, 377 S.C. 405 (2008)(the purpose of title insurance is to place the insured in the position that he thought he occupied when the policy was first issued). It should be noted that the condemnation action used a valuation date in 2009, during the depths of the "Great Recession" while the date of the policies is 2006, arguably the height of the "boom." While Appellants concede that the condemnation proceeds may act as an offset to the claimed damages under the Policies, Respondent ignores its own policy language and uses the wrong measurement of damages to deny the claim, which is at least some evidence of unreasonableness and bad faith that precludes summary judgment on this issue.

Fifth, Respondent denied Lynx Jericho's claim under Exclusion 3(b), which excludes any defect not known to Company and not recorded in the public records, because it again asserts the Ordinance is not a public record. [R.p. 724-731]. Respondent's reason again ignores the fact that the Ordinance was publically recorded at the Register of Deeds and further ignores Respondent's own definition of public records, and therefore this is at least some evidence of unreasonableness and bad faith that precludes summary judgment on this issue.

Finally, Chicago Title denied Lynx Jericho's claim based on Exclusion 3(a), which excludes any defect that was created, suffered, assumed or agreed to by the insured, because Lynx Jericho purchased the First Mortgage with knowledge of the Ordinance. [R.p.724-731].

This basis also ignores the plain language of the Loan Policy, as the Policy insures risks "as of the Date of Policy", and nothing in the Policy suggests that a particular 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 discovered and 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); *Firstland Village Associates v. Layer's Title Ins. Co.*, 277 S.C. 184 (1981)(Title insurance is unique in that it is retrospective, not prospective).

Importantly, Lynx Jericho is the assignee of the First Mortgage, and as assignee, it "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 the Policy's Conditions and Stipulations Sections 1(a)(i), Respondent can only apply this exclusion to Lynx Jericho by proving that REL, the assignor and predecessor insured, assumed or agreed to the defect as of the Date of Policy. Because Respondent's basis contradicts the plain terms of its own Loan Policy, this is at least some evidence of unreasonableness and bad faith that precludes summary judgment on this issue.

CONCLUSION

The Ordinance created a third party interest in, and burden upon, the insured Property by reserving a right-of-way through the middle of it and enforcing the government's interests by immediately prohibiting new construction to suppress land values and reduce acquisition costs in the inevitable condemnation proceeding. Thus, the Ordinance and maps created an encumbrance and unmarketability of title that are covered losses under the Policies. The Special Referee's conclusion that the term "public records" does not include items publically recorded in the Deed

Books of Horry County's Register of Deeds is not only illogical but also improperly adds new indexing and chain of title requirements that do not exist in the Policies. Exclusion #1 does not apply to the Ordinance, and even if it did, the exception to the exclusion applies because the Ordinance and its enforcement provisions were recorded in the public records. Exclusions #2 and #3(d) are inapplicable to this case because they could only apply to the 2009 eminent domain proceeding which is not the basis of Appellants' claims. Indeed, Appellants assert damages arising as of the date of policy in 2006 due to the title defect created by the Ordinance, not the date of condemnation during the depths of the Great Recession. Finally, there is sufficient evidence of record creating a genuine issue of fact as to whether Respondent engaged in bad faith denial of Appellants' claims. Based on the above arguments, the Special Referee's Order for summary judgment should be reversed.

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May 4, 2018

THE STATE OF SOUTH CAROLINA

IN THE SOUTH CAROLINA COURT OF APPEALS

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS

Karl A. Folkens, Special Referee

Appellate Case No.: 2017-001646

Jericho State Capital Corp. of Florida.....Plaintiff,

v.

Chicago Title Insurance Company.....Defendant,

AND

Lynx Jericho Partners, LLC.....Plaintiff,

v.

Chicago Title Insurance Company.....Defendant.

Of whom Jericho State Capital Corp. of Florida and Lynx Jericho Partners, LLC are the Appellants,

And Chicago Title Insurance Company is the Respondent.

RULE 211 CERTIFICATION

The undersigned hereby certifies that the final Brief of Appellants and final Reply Brief of Appellants comply with Rule 211(b), SCACR.

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AND

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Of whom Jericho State Capital Corp. of Florida and Lynx Jericho Partners, LLC are the Appellants,

And Chicago Title Insurance Company is the Respondent.

PROOF OF SERVICE

As an employee of Newby Sartip & Masel, LLC, attorneys for the Appellant, I certify that I have served a copy of the final **Brief of Appellants**, final **Reply Brief of Appellants**, and Rule 211 Certification in the above case upon counsel for the Respondent via U.S. Mail, addressed as follows:

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Erika Noland
Date served:

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Karl A. Folkens, Special Referee
Fifteenth Judicial Circuit

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Chicago Title Insurance Company, ... Defendant

Of whom Jericho State Capital Corp. of Florida and Lynx Jericho Partners, LLC are the ..... Appellants

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

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

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

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

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

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

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

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

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

STATEMENT OF THE CASE

On July 29, 2011, Appellant Jericho State Capital Corp. ("Jericho State") filed an action against Respondent Chicago Title Insurance Company ("Chicago Title") asserting causes of action entitled Breach of Contract-Recovery of Insurance Benefits; Breach of Contract-Breach of the Covenant of Good Faith and Fair Dealing; and Tortious Bad Faith Refusal to Pay Insurance Benefits and Bad Faith Failure to Investigate an Insurance Claim. Chicago Title filed its answer on February 16, 2012, denying the material allegations and asserting defenses therein.

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

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

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

STATEMENT OF FACTS

1. The Property.

The subject property is approximately 131.40 acres located in Socastee Township, Horry County, South Carolina ("the Property"). The Property borders the Intracoastal Waterway. The McClam family owned the Property for decades until it sold the Property in July 2006. (R. pp. 413-423; R. p. 990).

2. **The Ordinance.**

On July 2, 2002, the Horry County Council adopted Ordinance 88-202 ("the Ordinance"), which amended the official map of Horry County to show the future locations of a proposed highway to provide opportunities for Horry County or other governmental entities to purchase property and to reduce acquisition costs. (R. pp. 373-374). The Ordinance added to the official map "the right-of-way identified as Alternative 1 for the proposed Carolina Bays Parkway from Highway 501 to Highway 17 By-pass as shown in the document entitled 'Carolina Bays Parkway, Phase V FEIS Conceptual Roadway Plans.'" The conceptual roadway plan is attached to the Ordinance.

The Ordinance does not mention the property affected by the possible future construction of the Carolina Bay Parkway. The Ordinance does not contain a list of property owners who may be affected in the future. The conceptual roadway plan attached to the Ordinance does not identify the property that may be affected in the future by the name of the owner or by tax map number. The McClam family, owners of the Property at that time, are not mentioned in the Ordinance or in the conceptual plans attached thereto.

On July 9, 2002, the Ordinance, which was neither witnessed nor notarized, was recorded with the Horry County Register of Deeds. It is indexed under the name of Horry County. The Ordinance was not indexed under the names of the property owners who may be affected by the possible future construction of the Carolina Bays Parkway or under the names of any McClam family members, who owned the Property on the date the Ordinance was recorded.

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

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

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

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

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

Peachtree gave an $18,520,000.00 first mortgage covering the Property to REL ("REL Mortgage."). (R. pp. 424-440). Chicago Title issued a loan policy of title insurance to REL. The policy date is July 25, 2006, and the insured amount is $17,071,873.33 ("REL Policy"). (R. pp. 497-515).

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

4. **The Bridge and Zoning Letter.**

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

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

the municipality not to build a bridge." On July 17, 2006, Peachtree's attorney asked Jericho State and its attorneys to remove that item from the checklist. *Id.* The item was removed from the checklist. (R. pp. 1110-1115).

Another item on the checklist was the receipt of a zoning verification letter. On July 19, 2006, Peachtree's attorney sent to Jericho State's attorney a zoning verification letter stating the Property is "currently zoned R-1 on the Horry County Zoning Maps." The zoning verification letter said nothing about a possible future highway or any use restriction. (R. pp. 1116-1118).

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

According to a verified complaint filed by Jericho State in another action, described below as the Zoning Rescission Action, and supporting documentation attached to the verified complaint, the agreement to construct and fund the applicable part of the Carolina Bays Parkway was entered into by and between Horry County and the SCDOT on June 20, 2007, almost one year after the Policies were issued. (R. pp. 543-599). In other words, funding for the project was not in place until after the effective dates of the Policies and almost five years after the Ordinance.

6. Rezoning of the Property.

On May 15, 2007, Horry County Council adopted Ordinance 76-07, which rezoned the Property as the Peachtree Plantation Planned Development District (the "PDD Ordinance"). (R. pp. 561-571). The PDD Ordinance approved development of the Property as a mixed-use development with numerous residential parcels. The PDD Ordinance states it was adopted based on an application submitted by Peachtree and that Peachtree agreed to donate part of the Property to Horry County:

> The property owner ***has agreed to donate*** to Horry County at no cost, property sufficient to construct that portion of the 300 ft. wide Highway 31 (Carolina Bays

Parkway) right-of-way that traverses the property in issue. ***The property will be conveyed*** to Horry County by general warranty deed, free of all encumbrances within 120 days of third reading of this ordinance. (emphasis added)

The PDD Ordinance set forth other agreements between Horry County and Peachtree about the land Peachtree agreed to donate and convey (the "Parkway Parcel"). The PDD Ordinance was recorded May 17, 2007. *Id.*

7. **Foreclosure of the Jericho State Mortgage.**

On June 8, 2007, Jericho State filed a foreclosure action seeking to foreclose the Jericho State Mortgage and a mortgage it held on other property. (R. pp. 1119-1136). At the foreclosure hearing held October 30, 2007, Jericho State's attorney testified:

> [W]e have conducted a title examination of the public records maintained by Horry County pertaining to the Defendants and to the mortgaged property, ***and we find no other parties holding or claiming any interest of record*** in and to any of [the Property] . . . as described in the [Jericho State] Mortgage . . .. We therefore advise the Court that the [Jericho State] Mortgage is and remains a valid second mortgage lien upon the Peachtree Property . . . subject only to the . . . interests of the [REL Mortgage]. (emphasis added) (R. p. 1148).

The court entered a foreclosure order on November 7, 2007, ordering the Property be sold subject to the REL Mortgage and finding $7,490,000 was due under the note secured by the Jericho State Mortgage. (R. pp. 516-532). Jericho State was the successful bidder with a bid of $9,000,000, a bid exceeding the amount due under the note. Jericho State received a master's deed for the Property recorded February 26, 2008. (R. pp. 533-542). Thus, on February 26, 2008, the Property was owned by Jericho State subject to the REL Mortgage.

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

On October 12, 2009, Jericho State filed a verified complaint against Horry County and the SCDOT seeking an order finding the PDD Ordinance was not binding, rescinding the rezoning

granted by the PDD Ordinance, and terminating the obligation to donate the Parkway Parcel ("Zoning Rescission Action"). (R. pp. 543-599).

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

On March 18, 2010, the parties dismissed the Zoning Rescission Action. The Stipulation of Dismissal states that "[i]nsofar as the South Carolina Department of Transportation, as agent for Horry County, South Carolina, has filed an eminent domain action bearing Civil Action Number 2009-CP-26-11956, and which action resolves the issues raised in the present declaratory judgment matter," Jericho State desired to dismiss the Zoning Rescission Action. (R. pp. 1154-1157).

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

The eminent domain action referenced in the dismissal of the Zoning Rescission Action was filed by the SCDOT on December 15, 2009, against Jericho State, REL, and Mortgage Fund '08, LLC, and it was amended on April 20, 2011, (the "Condemnation Action"). (R. pp. 1167-1189). The SCDOT alleged Jericho State was the owner of the Property and condemned 10.18 acres of the Property—the Parkway Parcel—for highway purposes, as part of the Carolina Bays Parkway project. The SCDOT alleged "[t]he property *sought herein is to be acquired for public purposes*, more particularly for the construction of a section of SC Route 31 (Carolina Bays Parkway)." (emphasis added). [*Id.*].

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

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

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

10. Assignment of the REL Mortgage to Lynx Jericho.

REL assigned the REL Mortgage to Mortgage Fund '08, LLC by instrument recorded July 28, 2011. (R. pp. 672-673). Mortgage Fund '08, LLC filed for bankruptcy in 2011. With approval of the bankruptcy court in 2012, the REL Mortgage was assigned to Susan L. Uecker as trustee of the Mortgage Fund '08 Liquidating Trust ("Liquidating Trust"). (R. pp. 1158-1162). The Liquidating Trust assigned the REL Mortgage to Lynx Jericho by instrument recorded May 22, 2013. (R. pp. 716-718).

11. Jericho State's Title Insurance Claim.

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

12. Lynx Jericho's Title Insurance Claim.

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

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

13. **Jericho State and Lynx Jericho's lawsuits.**

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

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

STANDARD OF REVIEW

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

ARGUMENT

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

A. Insuring provisions of the Policies.

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

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

> SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS, AND STIPULATIONS, CHICAGO TITLE INSURANCE COMPANY, a Missouri corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:
>
> *****
>
> 2 Any defect in or lien or encumbrance on the title;
> 3 Unmarketability of the title;

Appellants have the burden of showing a claim falls within coverage of an insurance contract. *Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 103, 160 S.E.2d 523, 525 (1968). Appellants contend the Ordinance falls under insuring provision 2, "[a]ny defect in or lien or encumbrance on the title," and provision 3, "[u]nmarketability of the title."

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

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

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

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

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

According to the South Carolina statutory framework for Official Maps, upon which the Ordinance is based, an official map is "a map or maps showing the location of existing or ***proposed public street, highway***, and public utility rights-of-way, public building sites and public open spaces adopted by the governing authority of a municipality or county." S.C. Code Ann. § 6-7-1210 (emphasis added). "Counties and municipalities may establish official maps to ***reserve future locations*** of any street, highway, or public utility rights-of-way, public building site or public open space for ***future public acquisition*** and to regulate structures or changes in **land use** in such rights-of-way, building sites or open spaces." S.C. Code Ann. § 6-7-1220 (emphasis added).

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

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

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

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

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

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

ii. Horry County Ordinance 107-98

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Title insurance policies indemnify for loss related to title to property, not physical defects or government regulations which inhibit the use of property. R. Cunningham, W. Stoebuck & D. Whitman, *The Law of Property* § 11.14 at 274 (1984). "[A] title insurer does not make any representation or assume any liability with respect to whether the insured will be able to procure government permits authorizing the insured to use the land in any particular manner; title insurance policy provides protection against defects in, or liens or encumbrances on, title rather than against governmentally imposed impediments on use of land or for resulting impairments in the value of the land." 11A COUCH ON INS. § 159:48. Furthermore, even though "title 'defect' and title 'marketability' are both used to describe the peril against which title insurance offers protection, it is important to understand that only that decreased marketability which stems from the condition of title is within title insurance." 11A COUCH ON INS. § 159:7

The Policies define "unmarketability of title" as "an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A or the insured mortgage to be released from the

obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title."

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

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

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

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

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

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

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

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

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

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

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

Id. at 279.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. 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 from coverage loss or damage, costs, attorneys' fees or expenses which arise by reason of:

> 1 (a) *Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part*; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy. (emphasis added).[7]

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

[7] Appellants state this exclusion, on "its face . . . applies to laws relating to land use only, and its language illustrates this limited scope by describing the types of excluded laws to include wetlands restrictions, occupancy limitations, subdivision requirements, and general zoning matters." Appellants, in an attempt to lessen the broad provisions of Exclusion 1, omit in their characterization of Exclusion 1 that this exclusion covers "*[a]ny law, ordinances, or government regulation. . .* restricting, regulating, prohibiting or relating to (i) occupancy, use, or enjoyment of land." (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The exception to Exclusion 1 does not apply.

Exclusion 1(a) contains an exception "to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance *resulting from a violation or alleged violation* affecting the land has been recorded in the public records at Date of Policy."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Policies defines "public records" as "records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge."[9] Because a document not indexed properly cannot provide constructive notice, like the Ordinance at issue, it does not constitute a public record as defined in the Policies. *See Manchester Fund, Ltd. v. First American Title Ins. Co.*, 753 A.2d 740 (N.J. Super. 1999) (finding an improperly indexed lis pendens was not part of the public record,

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

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

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

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

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

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

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

"a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land." Only if the Court finds that the Ordinance itself is a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land does the Court need to consider the next step, whether it is "recorded in the public records at Date of Policy."

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

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

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

apply to violations or the enforcement of these matters which ***appear in the public records*** at Policy Date." Here, the exception to Exclusion 1(a) in the Policies provides: "except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the ***land has been recorded in the public records*** at Date of Policy."

Some context is necessary to understand the holdings in these cases and whether they are appropriate to follow. The Policies unambiguously define "public records." There is simply no statute providing that either a zoning designation or an ordinance, like the ordinance in this case, are "records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge."

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

Therefore, the exception to Exclusion 1 does not apply.

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[12] **Appellants argue that if Chicago Title "wanted to limit covered defects and encumbrances to only those items fully indexed with the chain of title, it should have said so in the Policies." However, as to the exception to the exclusion, Chicago Title did exactly that by requiring either a notice of enforcement or notice of defect resulting from a violation be "recorded in the public records," with public records being defined as "records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge."**

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

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

> 2 Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to the Date of Policy which would be binding on the rights of a purchaser for value without knowledge.

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

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

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

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

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

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

The eminent domain exclusion contains an exception when "notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to the Date of Policy which would be binding on the rights of a purchaser for value without knowledge."

The only way for the government to exercise its right of eminent domain is under the South Carolina Eminent Domain Procedure Act (the "Act"). The Act provides that a "condemnor may commence an action under this chapter for the acquisition of an interest in any real property necessary for any public purpose." S.C. Code Ann. § 28-2-60. Most importantly, "[t]he provisions of [the Act] shall constitute the exclusive procedure whereby condemnation may be undertaken in [South Carolina]." *Id.*

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

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

The condemnation notice must contain certain information to be effective to cause a transfer of title. A condemnation notice must be captioned "CONDEMNATION NOTICE, TENDER OF PAYMENT," must designate the condemning authority and all owners of the land being condemned, contain a legal description of the land being taken, state the basis for the right to take the land, attach a map or sketch, state where the owner may go to inspect the plans for the project, and contain a detailed notice promulgated by S.C. Code Ann. § 28-2-280. The Ordinance contains none of this.

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

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

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

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

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

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

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

> The master additionally observed his conclusion was supported by public policy, namely, the construction of public projects would be severely impeded if the government incurred liability for inverse condemnation as a result of merely announcing plans to condemn, citing *National By–Products, Inc. v. City of Little Rock*, 323 Ark. 619, 916 S.W.2d 745, 749 (1996) ("Construction of public-works projects would be severely impeded if the government could incur inverse condemnation liability merely by announcing plans to condemn property in the future."); *Santini v. Connecticut Hazardous Waste Management Service*, 251 Conn. 121, 739 A.2d 680, 691 (1999) ("[I]f the government were to be considered as having accomplished a compensable taking as a result of mere planning that,

> because of its publicity, harmed the value of property, public planning would be discouraged...."); *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 321 N.Y.S.2d 345, 269 N.E.2d 895, 903–04 (1971) (stating the threat of condemnation generally does not constitute a taking and any changes in value are incidents of ownership). The master stated that Kiriakides's arguments, "if accepted, would have a devastating impact on government and its citizens."
>
> We agree with the master's determination that Kiriakides did not establish a claim for inverse condemnation. We find no merit to his arguments that the mere threat of a condemnation suit stigmatized his property and that the School District's alleged delay in bringing this action entitled him to damages for an inverse condemnation. *Id.*[15]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Bad faith is "a knowing failure on the part of the insurer to exercise an honest and informed judgment in processing a claim. . . . [A]n insurer acts in bad faith where there is no reasonable

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

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

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

Appellants argue "there is ample evidence of record that shows [Chicago Title] did not act in good faith and therefore summary judgment is improper, especially if all inferences are to be interpreted in a light most favorable to the Appellants." Most of Appellants' arguments regarding bad faith center on Appellants' claims that Chicago Title misinterpreted the Policies or was wrong in asserting various coverage defenses. On most of these issues, the Special Referee agreed with

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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May 9, 2018

CERTIFICATE OF COUNSEL

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

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ATTORNEYS FOR RESPONDENT

May 9, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Karl A. Folkens, Special Referee
Fifteenth Judicial Circuit

Case Nos. 2015-CP-26-1084 / 2013-CP-26-5530 (combined)
Appellate Case No. 2017-001646

Jericho State Capital Corp. of Florida, ... Plaintiff

v.

Chicago Title Insurance Company, ... Defendant

AND

Lynx Jericho Partners, LLC, ... Plaintiff

v.

Chicago Title Insurance Company, ... Defendant

OF WHOM:

Jericho State Capital Corp. of Florida and Lynx Jericho Partners, LLC are the ..... APPELLANTS

and

Chicago Title Insurance Company is the ..... RESPONDENT.

CERTIFICATE OF SERVICE

I, Kathleen S. Romero, an employee of Callison Tighe & Robinson LLC, Attorneys for the Respondent, do hereby certify that, on this date, I caused to be served a copy of the **Final Brief of Respondent** upon Appellants' counsel, by depositing a copy of the same in the United States mail, with proper first-class postage affixed thereon, addressed as follows:

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May 9, 2018

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THE STATE OF SOUTH CAROLINA

IN THE SOUTH CAROLINA COURT OF APPEALS

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS

Karl A. Folkens, Special Referee

Appellate Case No.: 2017-001646

Jericho State Capital Corp. of Florida.....Plaintiff,

v.

Chicago Title Insurance Company.....Defendant,

AND

Lynx Jericho Partners, LLC.....Plaintiff,

v.

Chicago Title Insurance Company.....Defendant.

Of whom Jericho State Capital Corp. of Florida and Lynx Jericho Partners, LLC are the Appellants,

And Chicago Title Insurance Company is the Respondent.

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TABLE OF AUTHORITIES

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

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

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

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

Again, the real question is whether Horry County had any interest in the affected land to the diminution in value of the estate although consistent with the passing of the fee. *Martin v. Floyd*, 282 S.C. 47 (S.C. App. 1984); *Truck South v. Patel*, 339 S.C. 40 (2000). Respondent directs attention to numerous cases involving environmental restrictions or zoning laws that are dissimilar to the facts of this case and pertain more to marketability issues – a separate type of covered loss under the Policies – rather than encumbrances.[1] All of the cases cited by Respondent have two things in common: (1) none of them concern a reservation of land designated as a right-of-way for a governmental acquisition that will occur, and (2) none of them create a governmental interest in the land by suppressing its value so the government can more cheaply acquire it. Because the Ordinance and Amended Index Map create a defect or encumbrance, the Special Referee's Order finding there was no covered loss under the Policies should be reversed.

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

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

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

B. POLICY EXCLUSION #1 DOES NOT BAR COVERAGE.

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

Respondent also argues the exception to Exclusion #1 has not been met as there has been no "notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy." Appellants do not contend there was a violation or alleged violation, so the issue is whether there was a "notice of enforcement" recorded in the public records. The Policies do not

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. PRESERVATION OF ISSUES ON APPEAL.

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

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

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

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

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

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

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

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

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

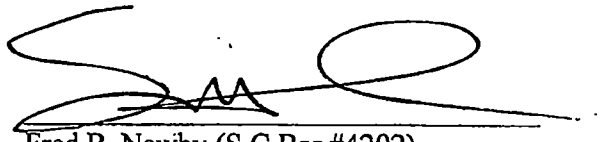
[6] R.pp. 250-251; pp.282-285; p.300; pp. 328-332; p. 342; p. 166, line 13 – p.169, line 23; p. 208 lines 6 – 12.

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

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

CONCLUSION

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



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May 4, 2018

THE STATE OF SOUTH CAROLINA

IN THE SOUTH CAROLINA COURT OF APPEALS

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS

Karl A. Folkens, Special Referee

Appellate Case No.: 2017-001646

Jericho State Capital Corp. of Florida.....Plaintiff,

v.

Chicago Title Insurance Company.....Defendant,

AND

Lynx Jericho Partners, LLC.....Plaintiff,

v.

Chicago Title Insurance Company.....Defendant.

Of whom Jericho State Capital Corp. of Florida and Lynx Jericho Partners, LLC are the Appellants,

And Chicago Title Insurance Company is the Respondent.

RULE 211 CERTIFICATION

The undersigned hereby certifies that the final Brief of Appellants and final Reply Brief of Appellants comply with Rule 211(b), SCACR.

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And Chicago Title Insurance Company is the Respondent.

PROOF OF SERVICE

As an employee of Newby Sartip & Masel, LLC, attorneys for the Appellant, I certify that I have served a copy of the final **Brief of Appellants**, final **Reply Brief of Appellants**, and Rule 211 Certification in the above case upon counsel for the Respondent via U.S. Mail, addressed as follows:

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Erika Noland
Erika Noland
Date served:

THE STATE OF SOUTH CAROLINA
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Appellate Case No. 2017-001646

Appeal From Horry County
Karl A. Folkens, Special Referee

Opinion No. 5731
Heard February 6, 2020 – Filed June 10, 2020

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Fred B. Newby, Sr., and C. Scott Masel, both of Newby Sartip & Masel LLC, of Myrtle Beach, for Appellants.

Demetri K. Koutrakos, of Callison Tighe & Robinson, LLC, of Columbia, for Respondent.

HILL, J.: We are presented with the question of whether a reservation of a right-of-way on an official county map—as authorized by section 6-7-1220 of the South Carolina Code (2004) and a county ordinance—constitutes a defect in or encumbrance on the title to the affected land or renders its title unmarketable so as to come within the coverage of two title insurance policies. Based on the specific circumstances of this case, we hold it does. We further conclude none of the policies' coverage exclusions apply. We therefore reverse the order of the special referee granting Chicago Title Insurance Company (Chicago Title) summary judgment as to Jericho State Capital Corporation of Florida's (Jericho's) and Lynx Jericho Partners, LLC's (Lynx Jericho's) (collectively Appellants) claims for breach of contract and breach of the covenant of good faith and fair dealing. We affirm, however, the order granting summary judgment to Chicago Title on Appellants' bad faith claim.

I. FACTS

South Carolina law allows counties and municipalities to "establish official maps to reserve future locations of any street, highway, or public utility rights-of-way, public building site or public space open for future public acquisition and to regulate structures or changes in land use in such rights-of-way, building sites or open spaces." § 6-7-1220. In 1999, the Horry County Council established an official map by passing Ordinance 107-98 or the Official Map Ordinance (Ordinance).

The Ordinance created the official map to "show the location of existing or proposed public streets, highways and utility right-of-ways, public building sites and public open spaces." The Ordinance further provided that after the official map was adopted, "no building, structure, or other improvement, shall hereinafter be erected, constructed, enlarged or placed within the reservation area . . . without prior exemption or exception . . . ." The purpose of the Ordinance and the official map was to provide for the public welfare and Horry County's financial convenience by "designating and reserving" such locations. The Ordinance established a procedure for landowners to appeal land use restrictions and provided a criminal penalty for violating the Ordinance. Later in 1999, Horry County

created the index map, which included the proposed locations for segments of the Carolina Bays Parkway.

In 2002, Horry County Council adopted Ordinance 88-202 (the 2002 Amendment), which amended the official map to add "the right-of-way identified as Alternative 1 for the proposed Carolina Bays Parkway . . . as shown in the document entitled 'Carolina Bays Parkway, Phase V FEIS Conceptual Roadway Plans.'" The roadway plan was attached to the 2002 Amendment, and the amended index map showed the Parkway bisecting the property at issue in this appeal and crossing the intracoastal waterway. Both the Ordinance and the 2002 Amendment were recorded with the Register of Deeds and indexed under Horry County.

In 2006, Peachtree Properties of North Myrtle Beach, LLC (Peachtree) purchased 131.40 acres in Horry County (the Property), which it planned to develop as a residential subdivision along the waterway, from the McClam family for $22,500,000. Peachtree financed the purchase with two mortgage loans, granting a first mortgage to R.E. Loans, LLC (REL) and a second mortgage to Jericho. Both REL and Jericho received title insurance from Chicago Title. The title insurance policies are printed on the 1992 standard form of the American Land Title Association and contain the following identical language and provisions:

> SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE . . . AND THE CONDITIONS AND STIPULATIONS, CHICAGO TITLE INSURANCE COMPANY . . . insures, as of Date of Policy . . . against loss or damage . . . 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 . . . .

In 2007, Peachtree defaulted on its loans. Jericho foreclosed, successfully bid on the Property at sale, and received a master's deed subject to the REL mortgage. In 2009, the South Carolina Department of Transportation (SCDOT) filed an eminent domain action against Jericho to take 10.18 acres of the Property for the Carolina Bay Parkway. Meanwhile, for reasons not pertinent here, the REL mortgage was assigned to Lynx Jericho. In 2014, a jury awarded Jericho and Lynx Jericho $2.1 million as just compensation for the taking. During the five-year condemnation

litigation, Jericho and Lynx Jericho submitted title insurance claims to Chicago Title, which Chicago Title denied.

In response to the denial of coverage, Jericho and Lynx Jericho sued Chicago Title for breach of contract, breach of the covenant of good faith and fair dealing, and bad faith refusal to pay insurance benefits. The cases were consolidated and referred to the special referee, who heard arguments on the parties' cross motions for summary judgment and conducted the proceedings expertly. The special referee denied Appellants' motion for summary judgment and granted Chicago Title summary judgment, ruling: 1) the Ordinance did not create a defect or encumbrance on the Property; 2) the Ordinance did not make title to the Property unmarketable; 3) exclusions 1, 2 and 3(d) barred coverage; and 4) Chicago Title did not act in bad faith by contesting Appellants' claims. This appeal followed.

II. STANDARD OF REVIEW

We review grants of summary judgment using the same yardstick as the trial court. *Woodson v. DLI Props., LLC*, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014). We view the facts in the light most favorable to Appellants, the non-moving parties, and draw all reasonable inferences in their favor. *NationsBank v. Scott Farm*, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995). Chicago Title is entitled to summary judgment only if "there is no genuine issue as to any material fact". Rule 56(c), SCRCP. Summary judgment is a drastic remedy to be invoked cautiously and must be denied if Appellants demonstrate a scintilla of evidence in support of their claims. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

III. COVERAGE UNDER THE TITLE INSURANCE POLICIES

A. General considerations regarding title insurance policy coverage

Title insurance is designed to protect a real estate purchaser or mortgagee against defects in or encumbrances on the title; the purpose of title insurance is to "place the insured in the position he thought he occupied when the policy was issued." *Pres. Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 316, 751 S.E.2d 256, 260 (2013). "Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it." *Firstland Vill. Assocs. v. Lawyer's Title Ins. Co.*, 277 S.C. 184, 186, 284 S.E.2d 582, 583 (1981) (quoting *Nat'l Mortg. Corp. v. Am. Title Ins. Co.*, 261 S.E.2d 844, 847–48 (N.C.

1980)); *see also Loflin v. BMP Dev., LP*, 427 S.C. 580, 595–96, 832 S.E.2d 294, 302 (Ct. App. 2019). One court has well explained:

> The sole object of title insurance is to cover possibilities of loss through defects that may cloud the title. . . . Some defects will be disclosed by a search of the public transfer records; others will be disclosed only by a physical examination or a survey of the property itself. Often the existence of title defects will depend upon legal doctrines and judicial interpretations of various applicable statutes. Since the average purchaser has neither the skill nor the means to discover or protect himself against the myriad of defects, he must rely upon an institution holding itself out as a title insurer.

United States v. City of Flint, 346 F. Supp. 1282, 1285 (E.D. Mich. 1972).

As a leading commentator notes:

> [T]itle insurance policies usually cover risks arising from errors in title examination, some known defects, defects that would be disclosed by examination, and some undisclosed defects that would remain hidden even after competent examination of public records . . . . In that sense, title insurance is "all-risks" coverage, under which a loss must fall within the basic description of the covered peril—such as a "defect in or a lien or encumbrance on the title"—and not be within any explicit exclusions.

11A Maldonado et al., *Couch on Ins.* § 159:20 (3d ed. 2019) (footnotes omitted).

We interpret the language of title insurance policies like other contracts and enforce plain and unambiguous language as written, giving the words their common meaning. *Williams v. Gov't Ins. Co. (Geico)*, 409 S.C. 586, 594, 762 S.E.2d 705, 709 (2014). Whether coverage exists under an insurance policy is a matter of law. *Id.* at 593, 762 S.E.2d at 709. The insured bears the burden of proving its claim falls within the policy's coverage. *Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 103, 160 S.E.2d 523, 525 (1968).

B. Defect, lien, or encumbrance

The policies insure Appellants from damages incurred by any "defect in or lien or encumbrance on title." Appellants assert the Ordinance caused a defect in or encumbrance on the title because it created a third-party interest in the Property in favor of the County, which burdened the land and depreciated its value. We agree.

The policies do not define the term "encumbrance," but we have. An early case, noting encumbrance was a catch-all term found in English conveyances, defined it as any weight on the land that lowers its value without conflicting with passing of the fee. *Grice v. Scarborough*, 29 S.C.L. (2 Speers) 649, 652–53 (1844). More recent decisions have said the same thing in different ways, defining an encumbrance as "a right or interest in the land granted 'which may subsist in third persons to the diminution in value of the estate although consistent with the passing of the fee.'" *Truck S., Inc. v. Patel*, 339 S.C. 40, 48, 528 S.E.2d 424, 428–29 (2000) (quoting *Martin v. Floyd*, 282 S.C. 47, 51, 317 S.E.2d 133, 136 (Ct. App. 1984)); *see also Pres. Capital Consultants, LLC*, 406 S.C. at 316, 751 S.E.2d at 259 ("[D]efects for which title insurance policies provide coverage may generally be defined as liens and encumbrances that result in a loss in the title's value."). An encumbrance is a burden on the land that is adverse to the landowner's interest and impairs the value of the land but does not defeat the owner's title. *Butler v. Butler*, 67 S.C. 211, 45 S.E. 184, 185 (1903); *see* 21 C.J.S. Covenants § 18 (2020) ("[A]n 'encumbrance' is any right or interest held by someone other than the grantee or grantor which diminishes the value of the estate but not so much that it leaves the grantee with no title at all. That is, an 'encumbrance,' within the meaning of a covenant against encumbrances, is any interest in a third person consistent with a title in fee in the grantee, if such outstanding interest injuriously affects the value of property or constitutes a burden or limitation upon the rights of the fee title holder." (footnotes omitted)).

The Ordinance described the location of the highway as a "right-of-way," and defined "right-of-way" as "land reserved . . . for a road." The Ordinance declared its intention to "reserve" future locations of highways and proscribed any use of the Property that would interfere with the County's future acquisition of the highway parcel, and the Ordinance and amended map showing the location of the proposed highway were publicly recorded. As Chicago Title argues, the Ordinance allowed

affected property owners to appeal their property's inclusion on the map, but that proves Appellants' point that the Ordinance encumbered the Property.

Ordinances may regulate land use without encumbering title, but the Ordinance here went beyond regulating use and created a third-party interest in the property in favor of the County. The enabling statute separates the concept of right-of-way from land use. *See* § 6-7-1220 (noting one purpose of official map is to "regulate structures or changes in land use in such rights-of-way"). We agree with Appellants that the Ordinance, including its provisions regarding the appeal procedures and penalties for violations, constituted an encumbrance within the meaning of the policy coverage. Although Chicago Title is correct that the Ordinance did not create a right-of-way, the policy coverage turns not on whether the Ordinance created a legal right-of-way but whether it created a defect or encumbrance.

We find the Ordinance similar to the acquisition map at issue in *Ascot Homes, Inc. v. Lawyers Mortgage & Title Co.*, 237 N.Y.S.2d 179, 180–81 (N.Y. Sup. Ct. 1962). There, a 1949 county map marked a strip of certain land for public acquisition. When Plaintiff purchased the land in 1960, he applied to the zoning authority for a building permit. The permit was denied because, without the marked strip, plaintiff's lot was not large enough to meet setback requirements. When plaintiff then tried to sell the land, a purchaser refused to close, citing the map. Plaintiff's title insurer denied his claim, pointing to the exclusion from coverage for "[z]oning restrictions or ordinances imposed by any governmental body." The court, however, held plaintiff's loss was covered because the acquisition map qualified as a lien or encumbrance not excepted by the policy.

We conclude the Ordinance constituted a defect and an encumbrance. We therefore reverse the special referee's grant of summary judgment to Chicago Title as to this issue.

C. 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 coverage, which would entitle . . . the insured mortgage to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title." This opaque definition—a model of circularity—is unenlightening. We are confident, though, that a purchaser who discovered a portion of the real estate he was about to buy purportedly in fee simple absolute had been reserved by ordinance in favor of a governmental right-of-way may be entitled to rescind the

sale. "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. It is a title which a reasonable purchaser, well-informed as to the facts and their legal significance, is ready and willing to accept." *Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993).

Delivery of marketable title requires title be free of not only defects and encumbrances but also the reasonable probability of litigation. *Sales Int'l Ltd. v. Black River Farms, Inc.*, 270 S.C. 391, 398, 242 S.E.2d 432, 435 (1978) (providing a "reasonable probability of litigation" renders title unmarketable). The Ordinance created a reasonable probability of litigation concerning the title because the right-of-way was reserved for acquisition, making future condemnation reasonably probable.

The Ordinance differs from land use and zoning regulations, which can restrict development and impose an economic burden on the owner but do not create a third-party interest in property. *See McMaster v. Strickland*, 305 S.C. 527, 530, 409 S.E.2d 440, 442 (Ct. App. 1991) (holding wetlands designation did not render title unmarketable); *Patel*, 339 S.C. at 49, 528 S.E.2d at 429 ("Because the wetland designation does not render the title unmarketable, Patel cannot rescind the contract based upon an encumbrance."); *Martin*, 282 S.C. at 52, 317 S.E.2d at 136 ("While marsh or water might be a burden upon property, it is certainly not a lien, easement, or a right existing in a third party."). We recognize the Ordinance resembled zoning and other land use tools, given it was to be enforced by the zoning administrator and the enabling statute described the official maps as "instruments of land use control." § 6-7-1220. In substance, though, the Ordinance created a third party interest in the property and is so foreign from typical land use measures that there is no genuine issue of material fact that it rendered Appellant's title unmarketable.

A marketable title is one free from doubt and any reasonable threat of litigation. Unmarketability cannot be based on just any doubt or defect, for almost any title can be flyspecked. But if the doubt is an objectively reasonable one concerning a material defect, then the title is unmarketable. A material defect is one that interferes or conflicts with the rights and incidents of title—the insured's fee simple absolute's "bundle of rights"—to the extent that an ordinary and prudent purchaser would not buy the title, or only buy it at a discount reflecting the defect. 1 Palomar, *Title Ins. Law* § 5.7 (2019 ed.). This meshes with the policy definition of marketability, which explains coverage extends to any "alleged or apparent" matter affecting title.

Chicago Title argues the Ordinance did not affect marketability of the title because it only regulates use of the Property. We conclude, however, that the Ordinance interferes with the insured's title because it limits the rights and incidents of ownership. It is true that matters that affect only the use of land are not title matters, but it does not follow that a matter that affects use cannot also affect title. *Id.* No one would contend, for example, that a covenant restricting use does not also affect title and, therefore, marketability. Because the Ordinance created an interest in the land by reserving a right-of-way and restricting use of the reserved land, we conclude it diminished the owner's bundle of rights and, consequently, affected title. And the diminishment was enough to cause a reasonable buyer to decline or discount a sale for a price less than what an unclouded title would demand on the market.

There is no factual dispute the Ordinance created a reasonable probability of litigation, thereby making the title unmarketable as a matter of law. The Ordinance, which, again, was publicly recorded, reserved the future site of the highway and took steps to minimize the County's future acquisition costs. Although we agree with Chicago Title that in general all landowners are at risk of eminent domain proceedings at any given time, the County's intent and preliminary steps set forth in the Ordinance foreshadowed a reasonable probability of condemnation. *Black River Farms, Inc.*, 270 S.C. at 398, 242 S.E.2d at 435 (mere possibility or remote probability of litigation is not sufficient to make title unmarketable). Therefore, we hold the Ordinance rendered Appellants' title unmarketable and reverse the special referee's grant of summary judgment to Chicago Title.

IV. EXCLUSIONS FROM COVERAGE

In deciding whether a policy exclusion bars coverage, the burden of proof flips: the insurer must prove the exclusion applies. *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005) ("Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability.").

A. Exclusion 1

In relevant part, Exclusion 1 bars coverage for losses arising by reason of:

> Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating,

> prohibiting or relating to (i) the occupancy, use or enjoyment of the land . . . .

In granting Chicago Title summary judgment, the special referee ruled Exclusion 1 excluded coverage because the Ordinance merely affected the use of the land. As we have just discussed, the Ordinance related to and affected the title of the land, not just its use. Exclusion 1 therefore does not apply as a matter of law. We reverse the special referee's grant of summary judgment to Chicago Title as to this issue.

B. Exclusion 2

Exclusion 2 bars coverage for losses arising by reason of:

> Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to the Date of Policy which would be binding on the rights of a purchaser for value without knowledge.

Neither Appellants nor Chicago Title claim the Ordinance constitutes an eminent domain action, and Appellants are not seeking coverage for the 2009 condemnation action, which began after the effective date of the policies. The special referee noted the exclusive procedure for eminent domain in this state is the Eminent Domain Procedure Act, S.C. Code Ann. §§ 28-2-10 to -510 (2007 & Supp. 2018). But this misses the mark. Appellants are not seeking recovery of loss for the 2009 condemnation action but for loss the Ordinance caused to the value of their title when they took it in 2007. Appellants contend these losses exceed and are different in kind from those sought in the condemnation action. Therefore, Exclusion 2 does not apply, and the special referee erred in granting Chicago Title summary judgment based on Exclusion 2.

C. Exclusion 3(d)

Exclusion 3(d) excludes coverage for "[d]efects, liens, encumbrances, adverse claims or other matters . . . attaching or created subsequent to Date of the Policy." The Ordinance and the 2002 Amendment were filed years before the effective date of the policies, and therefore clouded the title as of the Date of the Policy. The special referee therefore erred in finding this exclusion applied.

Parties to title insurance contracts are free, within the bounds of public policy, to allocate risks as they see fit. Chicago Title's inability to pigeonhole this unique Ordinance into an exclusion to coverage is unsurprising. Real estate investors buy title insurance to protect against such unforeseen "off the record" risks. Old soldiers say it is the bullet you never hear that kills you, and the fundamental idea behind title insurance is to cover rather than exclude unforeseen and unknown risks; otherwise, title insurance would not provide the peace of mind it touts.

V. BAD FAITH

The special referee ruled Chicago Title had a reasonable, good faith basis for contesting Appellants' claims. We agree.

Appellants' bad faith cause of action fails because they did not demonstrate Chicago Title acted unreasonably in denying Appellants' claims. *See Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 359, 415 S.E.2d 393, 396–97 (1992) ("The elements of a cause of action for bad faith refusal to pay first party benefits under a contract of insurance are: (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."). The unusual nature of the Ordinance presented close policy interpretation issues. Chicago Title had a reasonable basis for denying the claims, and we affirm summary judgment to them as to this issue. *BMW of N. Am., LLC v. Complete Auto Recon Servs., Inc.*, 399 S.C. 444, 453, 731 S.E.2d 902, 907 (Ct. App. 2012) ("[W]here an insurer has a reasonable ground for contesting a claim, there is no bad faith.").

VI. CONCLUSION

Accordingly, we affirm the special referee's grant of summary judgment to Chicago Title on Appellants' cause of action for bad faith, but we reverse the grant of summary judgment to Chicago Title on Appellants' remaining claims and remand to the special referee for proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WILLIAMS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Karl A. Folkens, Special Referee
Fifteenth Judicial Circuit

Case Nos. 2015-CP-26-1084 / 2013-CP-26-5530 (combined)
Appellate Case No. 2017-001646

Jericho State Capital Corp. of Florida, ... Plaintiff
v.
Chicago Title Insurance Company, ...Defendant

AND

Lynx Jericho Partners, LLC, ... Plaintiff
v.
Chicago Title Insurance Company, ...Defendant

Of whom Jericho State Capital Corp. of Florida and Lynx Jericho Partners, LLC are the ..... Appellants

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

ARGUMENT

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

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

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

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

> SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS, AND STIPULATIONS, CHICAGO TITLE INSURANCE COMPANY, a Missouri corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:
>
> *****
>
> 2 Any defect in or lien or encumbrance on the title;
> 3 Unmarketability of the title;

An encumbrance is a right or interest in the land granted "which may subsist in third persons to the diminution in value of the estate although consistent with the passing of the fee." *Martin v. Floyd*, 282 S.C. 47, 51, 317 S.E.2d 133, 136 (Ct. App. 1984). The Policies define "unmarketability of title" as "an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A or the insured mortgage to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title."

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

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

The South Carolina General Assembly determined the authority to establish official maps is necessary "to promote and preserve the public safety, economy, good order, appearance, convenience, prosperity, and general welfare and is one of the several instruments of **land use control** authorized by this chapter for the implementation of comprehensive plans, or parts thereof, adopted in accordance with the provisions of this chapter." S.C. Code Ann. § 6-7-1220 (emphasis added). An official map is "a map or maps showing the location of existing or ***proposed public street, highway***, and public utility rights-of-way, public building sites and public open spaces adopted by the governing authority of a municipality or county." S.C. Code Ann. § 6-7-1210

(emphasis added). "Counties and municipalities may establish official maps to ***reserve future locations*** of any street, highway, or public utility rights-of-way, public building site or public open space for ***future public acquisition*** and to regulate structures or changes in **land use** in such rights-of-way, building sites or open spaces." S.C. Code Ann. § 6-7-1220 (emphasis added).

The ordinance setting forth Horry County's right to adopt an official map, Ordinance 107-98 (R. pp. 360-367), known as the "Official Map Ordinance of Horry County," follows the above-referenced statutes.

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

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

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

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

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

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

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

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

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

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

In *Truck South, Inc. v. Patel*, 339 S.C. 40, 528 S.E.2d 424 (2000), the South Carolina Supreme Court held a declaration that part of the property was federally-protected wetlands, which prevented the purchaser from constructing a hotel on the property, was not an encumbrance. It did not render the title unmarketable. *Id.* at 49, 528 S.E.2d at 429. It followed earlier holdings by this Court reaching the same conclusion—a wetlands restriction did not encumber title or affect marketability. *McMaster v. Strickland*, 305 S.C. 527, 409 S.E.2d 440 (Ct. App. 1991); *Martin v. Floyd*, 282 S.C. 47, 51, 317 S.E.2d 133, 136 (Ct. App. 1984).

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

> While it is true that the ... ordinances have effectively frustrated [timbering], thereby substantially reducing the economic value of the interest purchased, Haw River Timber raises no issue about whether it received legal title to the timber from the grantors. And the Lawyers Title policy insuring marketable title under the timber deed only guarantees Haw River Timber a title that could be enforced in a

> suit for specific performance, not the economic value of the timber purchased. Indeed, the explicit definition of marketable title provided in the policy limits any more expansive notion by insuring against only those title defects that would entitle a purchaser "to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title." The ordinances on which Haw River relies as a title defect do not impair the grantor's ability to convey a timber deed.

Id. at 279. The restriction on harvesting in *Haw River* was enacted by county ordinance.

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

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

Id. at 182.

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

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

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

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

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

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

Finally, these cases also show title marketability is not affected by some restriction. Here, there is no allegation or fact indicating title to the subject property was threatened. Rather, only use of the property was restricted. Certainly, all real property is subject to eminent domain powers of the sovereign, and mere preliminary steps or plans for the future appropriation of property, or of a portion thereof, do not constitute a defect or encumbrance rendering title unmarketable. *See Creative Living, Inc. v. Steinhauser*, 355 N.Y.S.2d 897 (N.Y. Sup. Ct. 1974), *aff'd*, 365 N.Y.S.2d

987 (1975); *see also* 77 Am. Jur. 2d *Vendor and Purchaser* § 121 (2017) ("Marketability of title, however, is not affected where preliminary plans for future appropriation of property are made prior to the close of escrow.").

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

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

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

In *Kiriakides,* the Supreme Court rejected the notion that planning activities constitute a taking. *Kiriakides* involved a notice and tender of condemnation by a school district that was served but not filed. Nine months later, the school district decided not to take the property. Even though the school district had targeted the property by serving an unfiled condemnation action, the Supreme Court did not find merit in the landowner's arguments "that the mere threat of a condemnation suit stigmatized his property and that the School District's alleged delay in bringing this action entitled him to damages for an inverse condemnation." *Id.*; *see also Byrd v. City of*

Hartsville, 365 S.C. 650, 661-63, 620 S.E.2d 76, 82 (2005) (finding an eleven-month delay in evaluating the rezoning of certain property did not result in a regulatory taking and inverse condemnation); *City of Chicago v. Loitz*, 295 N.E.2d 478, 480 (Ill. Ct. App. 1973) (observing "the weight of authority in other states and in the Federal courts, is that mere planning by a governmental body in anticipation of the taking of land for public use and preliminary steps taken to accomplish this, without the filing of proceedings and without physically taking or actual invasion of the real estate, is not actionable by the owner of the land").

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

North Carolina courts addressed a similar issue and held a much differently drafted land use planning statute was unconstitutional by causing a taking of the identified property. *See Kirby v. N.C. Dep't of Transp.*, 786 S.E.2d 919 (N.C. 2016). The statute had a three-year period in place before the governing authority was forced to do anything, unlike the Ordinance here. The North Carolina Supreme Court found the North Carolina Map Act's indefinite restraint on fundamental property rights was squarely outside the scope of the police power. *Id.* at 855, 786 S.E.2d at 925. Thus, the court held that, by recording the corridor restricting the landowners' "rights to improve,

develop, and subdivide their property for an indefinite period of time, NCDOT effectuated a taking of fundamental property rights." *Id.* at 925–26.[4]

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

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

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

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

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

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

The Policies clearly, unambiguously, and broadly exclude from coverage losses arising from laws, ordinances, or governmental regulations relating to the occupancy, use, or enjoyment of the land and rights of eminent domain. The Policies clearly allocated risk of these matters on the insured, not the insurer. This Court erred in concluding otherwise. *See Aldrich v. Hawrylo*, 656 A.2d 1304, 1309 (N.J. Super. Ct. App. Div. 1995) (finding zoning ordinances and resolutions are not title matters and the title policy at issue "squarely places on the prospective purchaser and his attorney the burden of investigation and compliance with local ordinances and land use resolutions as they may affect a particular property").

Accordingly, loss related to the Ordinance is excluded from coverage by Exclusions 1 and 2 even under the Court's analysis holding the Ordinance affected title and not just use.

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

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

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

> *Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part*; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy. (emphasis added).

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

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

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

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

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

Therefore, Exclusion 1 applies.

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

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

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

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

> Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to the Date of Policy which would be binding on the rights of a purchaser for value without knowledge.

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[5] Jericho alleged "[t]he recorded Ordinance is notice of the county's intent to exercise its power to condemn the Property; therefore, the claim is properly evaluated under the exclusion found in the Title Policy relating specifically to eminent domain, rather than the exclusion relating to governmental Regulation cited by the Defendant, which clearly related to land-use regulations." (R. pp. 24-31).

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

Therefore, Exclusion 2 applies.

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

The exception to Exclusion 1, barring the application of the exclusion "to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy," does not apply because the Ordinance, as mentioned below, was not indexed in a manner that can ever be found in a title search.

Exclusion 2 also contains an exception, which bars its application if "a notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to the Date of Policy which would be binding on the rights of a purchaser for value without knowledge." Any taking by the Ordinance would have occurred outside the public records and "a purchaser for value without knowledge" would not have constructive notice of the Ordinance.

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

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

indexed under the name of Horry County. (R. p. 1025). He unequivocally testified a person searching and examining title to the Property would not find the Ordinance in the chain of title to the Property. (R. p. 1026); *see also* 11 *Thompson on Real Property* § 92.09(c)(2)(A), at 184 (3rd ed. 2015) ("[P]urchasers of an interest are bound to search the records pertaining to that interest," but are "in general, only bound to search in the direct chain of title for the interest being purchased," and "the purchaser is not bound to search all public records that may contain information about claims or interests in real estate.").

No constructive notice is provided by a document that cannot be found when checking title because the document is not indexed properly. *See Thomas v. Thomas*, 286 S.C. 294, 333 S.E.2d 76 (Ct. App. 1985) ("proper indexing supplies inquiry notice of an instrument, while recordation without proper indexing supplies no notice at all."); *Liberty Loan Corp. of Darlington, S.C. v. Mumford*, 283 S.C. 134, 322 S.E.2d 17 (Ct. App. 1984) ("because Liberty's lien was not properly recorded until April 22, 1977, HUD became a bona fide purchaser for value without notice when it received its title on February 28, 1977.").

Here, it is undisputed the Ordinance was only indexed under the name of Horry County, not the name of the owners of property who may be affected by the Ordinance. The Ordinance was therefore not in the chain of title to the Property and could not be found in a title search. S.C. Code Ann. § 30-9-40 (the indexing of documents constitutes an "*integral, necessary and inseparable part of the recordation of the deed, mortgage, or other written instrument*" and that "the recordation of a deed, mortgage or other written instrument is not notice as to the purport and effect of the deed, mortgage, or other written instrument unless the filing of the instrument for record is entered as required in the indexes.").

The Policies define "public records" as "records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge." Because a document not indexed properly cannot provide constructive notice, like the Ordinance at issue, it does not constitute a public record as defined in the Policies. *See Manchester Fund, Ltd. v. First American Title Ins. Co.*, 753 A.2d 740 (N.J. Super. 1999) (finding an improperly indexed lis pendens was not part of the public record, did not provide constructive notice under the recording act, and was not a public record under an agreement to issue a title insurance policy). [6]

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

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

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

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

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

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

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

III. CONCLUSION

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

[signature page immediately following]

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

June 25, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
Jun 25 2020
SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Karl A. Folkens, Special Referee
Fifteenth Judicial Circuit

Case Nos. 2015-CP-26-1084 / 2013-CP-26-5530 (combined)
Appellate Case No. 2017-001646

Jericho State Capital Corp. of Florida, ... Plaintiff
v.
Chicago Title Insurance Company, ... Defendant

AND

Lynx Jericho Partners, LLC, ... Plaintiff
v.
Chicago Title Insurance Company, ... Defendant

Of whom Jericho State Capital Corp. of Florida and Lynx Jericho Partners, LLC are the ..... Appellants

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

PROOF OF SERVICE

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

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(Attorneys for Appellants)

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

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

s/ Demetri K. Koutrakos
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ATTORNEYS FOR RESPONDENT

June 25, 2020

Kathy Romero

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

Dear Mr. Masel and Mr. Newby,

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

With kind regards,

Kathy Romero
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The South Carolina Court of Appeals

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 which Jericho State Capital Corp. of Florida and Lynx Jericho Partners, LLC are the Appellants,

and Chicago Title Insurance Company is the Respondent.

Appellate Case No. 2017-001646

ORDER

After careful consideration of Respondent's petition for rehearing, the Court grants the petition for rehearing, dispenses with further briefing, and substitutes the attached opinion for the opinion previously filed in this matter.

_____ J.

_____ J.

D. Garfinkel J.

Columbia, South Carolina

FILED
Oct 07 2020

cc:
C. Scott Masel, Esquire
Demetri K. Koutrakos, Esquire
Fred B. Newby, Sr., Esquire
Karl A. Folkens, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jericho State Capital Corp. of Florida, Plaintiff,

v.

Chicago Title Insurance Company, Defendant,

AND

Lynx Jericho Partners, LLC, Plaintiff,

v.

Chicago Title Insurance Company, Defendant,

Of whom Jericho State Capital Corp. of Florida and Lynx Jericho Partners, LLC are the Appellants,

and Chicago Title Insurance Company is the Respondent.

Appellate Case No. 2017-001646

Appeal From Horry County
Karl A. Folkens, Special Referee

Opinion No. 5731
Heard February 6, 2020 – Filed June 10, 2020
Withdrawn, Substituted, and Refiled October 7, 2020

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Fred B. Newby, Sr., and C. Scott Masel, both of Newby Sartip & Masel LLC, of Myrtle Beach, for Appellants.

Demetri K. Koutrakos, of Callison Tighe & Robinson, LLC, of Columbia, for Respondent.

HILL, J.: We are presented with the question of whether a reservation of a right-of-way on an official county map—as authorized by section 6-7-1220 of the South Carolina Code (2004) and a county ordinance—constitutes a defect in or encumbrance on the title to the affected land or renders its title unmarketable so as to come within the coverage of two title insurance policies. Based on the specific circumstances of this case, we hold it does. We further conclude none of the policies' coverage exclusions apply. We therefore reverse the order of the special referee granting Chicago Title Insurance Company (Chicago Title) summary judgment as to Jericho State Capital Corporation of Florida's (Jericho's) and Lynx Jericho Partners, LLC's (Lynx Jericho's) (collectively Appellants) claims for breach of contract. We affirm, however, the order granting summary judgment to Chicago Title on Appellants' bad faith claim.

I. FACTS

South Carolina law allows counties and municipalities to "establish official maps to reserve future locations of any street, highway, or public utility rights-of-way, public building site or public space open for future public acquisition and to regulate structures or changes in land use in such rights-of-way, building sites or open spaces." § 6-7-1220. In 1999, the Horry County Council established an official map by passing Ordinance 107-98 or the Official Map Ordinance (Ordinance).

The Ordinance created the official map to "show the location of existing or proposed public streets, highways and utility right-of-ways, public building sites and public open spaces." The Ordinance further provided that after the official map was adopted, "no building, structure, or other improvement, shall hereinafter be erected, constructed, enlarged or placed within the reservation area . . . without prior exemption or exception . . . ." The purpose of the Ordinance and the official map was to provide for the public welfare and Horry County's financial convenience by "designating and reserving" such locations. The Ordinance established a procedure for landowners to appeal land use restrictions and provided a criminal penalty for violating the Ordinance. Later in 1999, Horry County created the index map, which included the proposed locations for segments of the Carolina Bays Parkway.

In 2002, Horry County Council adopted Ordinance 88-202 (the 2002 Amendment), which amended the official map to add "the right-of-way identified as Alternative 1 for the proposed Carolina Bays Parkway . . . as shown in the document entitled 'Carolina Bays Parkway, Phase V FEIS Conceptual Roadway Plans.'" The roadway plan was attached to the 2002 Amendment, and the amended index map showed the Parkway bisecting the property at issue in this appeal and crossing the intracoastal waterway. Both the Ordinance and the 2002 Amendment were recorded with the Register of Deeds and indexed under Horry County.

In 2006, Peachtree Properties of North Myrtle Beach, LLC (Peachtree) purchased 131.40 acres in Horry County (the Property), which it planned to develop as a residential subdivision along the waterway, from the McClam family for $22,500,000. Peachtree financed the purchase with two mortgage loans, granting a first mortgage to R.E. Loans, LLC (REL) and a second mortgage to Jericho. Both REL and Jericho received title insurance from Chicago Title. The title insurance policies are printed on the 1992 standard form of the American Land Title Association and contain the following identical language and provisions:

> SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE . . . AND THE CONDITIONS AND STIPULATIONS, CHICAGO TITLE INSURANCE COMPANY . . . insures, as of Date of Policy . . . against loss or damage . . . 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 . . . .

In 2007, Peachtree defaulted on its loans. Jericho foreclosed, successfully bid on the Property at sale, and received a master's deed subject to the REL mortgage. In 2009, the South Carolina Department of Transportation (SCDOT) filed an eminent domain action against Jericho to take 10.18 acres of the Property for the Carolina Bay Parkway. Meanwhile, for reasons not pertinent here, the REL mortgage was assigned to Lynx Jericho. In 2014, a jury awarded Jericho and Lynx Jericho $2.1 million as just compensation for the taking. During the five-year condemnation litigation, Jericho and Lynx Jericho submitted title insurance claims to Chicago Title, which Chicago Title denied.

In response to the denial of coverage, Jericho and Lynx Jericho sued Chicago Title for breach of contract, breach of the covenant of good faith and fair dealing, and bad faith refusal to pay insurance benefits. The cases were consolidated and referred to the special referee, who heard arguments on the parties' cross motions for summary judgment and conducted the proceedings expertly. The special referee denied Appellants' motion for summary judgment and granted Chicago Title summary judgment, ruling: 1) the Ordinance did not create a defect or encumbrance on the Property; 2) the Ordinance did not make title to the Property unmarketable; 3) exclusions 1, 2 and 3(d) barred coverage; and 4) Chicago Title did not act in bad faith by contesting Appellants' claims. This appeal followed.

II. STANDARD OF REVIEW

We review grants of summary judgment using the same yardstick as the trial court. *Woodson v. DLI Props., LLC*, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014). We view the facts in the light most favorable to Appellants, the non-moving parties, and draw all reasonable inferences in their favor. *NationsBank v. Scott Farm*, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995). Chicago Title is entitled to summary judgment only if "there is no genuine issue as to any material fact". Rule 56(c), SCRCP. Summary judgment is a drastic remedy to be invoked cautiously and must be denied if Appellants demonstrate a scintilla of evidence in support of their claims. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

III. COVERAGE UNDER THE TITLE INSURANCE POLICIES

A. General considerations regarding title insurance policy coverage

Title insurance is designed to protect a real estate purchaser or mortgagee against defects in or encumbrances on the title; the purpose of title insurance is to "place the insured in the position he thought he occupied when the policy was issued." *Pres. Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 316, 751 S.E.2d 256, 260 (2013). "Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it." *Firstland Vill. Assocs. v. Lawyer's Title Ins. Co.*, 277 S.C. 184, 186, 284 S.E.2d 582, 583 (1981) (quoting *Nat'l Mortg. Corp. v. Am. Title Ins. Co.*, 261 S.E.2d 844, 847–48 (N.C. 1980)); *see also Loflin v. BMP Dev., LP*, 427 S.C. 580, 595–96, 832 S.E.2d 294, 302 (Ct. App. 2019). One court has well explained:

> The sole object of title insurance is to cover possibilities of loss through defects that may cloud the title Some defects will be disclosed by a search of the public transfer records; others will be disclosed only by a physical examination or a survey of the property itself. Often the existence of title defects will depend upon legal doctrines and judicial interpretations of various applicable statutes. Since the average purchaser has neither the skill nor the means to discover or protect himself against the myriad of defects, he must rely upon an institution holding itself out as a title insurer.

United States v. City of Flint, 346 F. Supp. 1282, 1285 (E.D. Mich. 1972).

As a leading commentator notes:

> [T]itle insurance policies usually cover risks arising from errors in title examination, some known defects, defects that would be disclosed by examination, and some undisclosed defects that would remain hidden even after competent examination of public records . . . . In that sense, title insurance is "all-risks" coverage, under which a loss must fall within the basic description of the covered peril—such as a "defect in or a lien or encumbrance on the title"—and not be within any explicit exclusions.

11A Maldonado et al., *Couch on Ins.* § 159:20 (3d ed. 2019) (footnotes omitted).

We interpret the language of title insurance policies like other contracts and enforce plain and unambiguous language as written, giving the words their common meaning. *Williams v. Gov't Ins. Co. (Geico)*, 409 S.C. 586, 594, 762 S.E.2d 705, 709 (2014). Whether coverage exists under an insurance policy is a matter of law. *Id.* at 593, 762 S.E.2d at 709. The insured bears the burden of proving its claim falls within the policy's coverage. *Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 103, 160 S.E.2d 523, 525 (1968).

B. Defect, lien, or encumbrance

The policies insure Appellants from damages incurred by any "defect in or lien or encumbrance on the title." Appellants assert the Ordinance caused a defect in or encumbrance on the title because it created a third-party interest in the Property in favor of the County, which burdened the land and depreciated its value. We agree.

The policies do not define the term "encumbrance," but we have. An early case, noting encumbrance was a catch-all term found in English conveyances, defined it as any weight on the land that lowers its value without conflicting with passing of the fee. *Grice v. Scarborough*, 29 S.C.L. (2 Speers) 649, 652–53 (1844). More recent decisions have said the same thing in different ways, defining an encumbrance as "a right or interest in the land granted 'which may subsist in third persons to the diminution in value of the estate although consistent with the passing of the fee.'" *Truck S., Inc. v. Patel*, 339 S.C. 40, 48, 528 S.E.2d 424, 428–29 (2000) (quoting *Martin v. Floyd*, 282 S.C. 47, 51, 317 S.E.2d 133, 136 (Ct. App. 1984)); *see also Pres. Capital Consultants, LLC*, 406 S.C. at 316, 751 S.E.2d at 259 ("[D]efects for which title insurance policies provide coverage may generally be defined as liens and encumbrances that result in a loss in the title's value."). An encumbrance is a burden on the land that is adverse to the landowner's interest and impairs the value of the land but does not defeat the owner's title. *Butler v. Butler*, 67 S.C. 211, 45 S.E. 184, 185 (1903); *see* 21 C.J.S. Covenants § 18 (2020) ("[A]n 'encumbrance' is any right or interest held by someone other than the grantee or grantor which diminishes the value of the estate but not so much that it leaves the grantee with no title at all. That is, an 'encumbrance,' within the meaning of a covenant against encumbrances, is any interest in a third person consistent with a title in fee in the grantee, if such outstanding interest injuriously affects the value of property or constitutes a burden or limitation upon the rights of the fee title holder." (footnotes omitted)).

The Ordinance described the location of the highway as a "right-of-way," and defined "right-of-way" as "land reserved . . . for a road." The Ordinance declared its intention to "reserve" future locations of highways and proscribed any use of the Property that would interfere with the County's future acquisition of the highway parcel, and the Ordinance and amended map showing the location of the proposed highway were publicly recorded. As Chicago Title argues, the Ordinance allowed affected property owners to appeal their property's inclusion on the map, but that proves Appellants' point that the Ordinance encumbered the Property.

Ordinances may regulate land use without encumbering title, but the Ordinance here

went beyond regulating use and created a third-party interest in the property in favor of the County. The enabling statute separates the concept of right-of-way from land use. *See* § 6-7-1220 (noting one purpose of official map is to "regulate structures or changes in land use in such rights-of-way"). We agree with Appellants that the Ordinance, including its provisions regarding the appeal procedures and penalties for violations, constituted an encumbrance within the meaning of the policy coverage. Although Chicago Title is correct that the Ordinance did not create a right-of-way, the policy coverage turns not on whether the Ordinance created a legal right-of-way but whether it created a defect or encumbrance.

We find the Ordinance similar to the acquisition map at issue in *Ascot Homes, Inc. v. Lawyers Mortgage & Title Co.*, 237 N.Y.S.2d 179, 180–81 (N.Y. Sup. Ct. 1962). There, a 1949 county map marked a strip of certain land for public acquisition. When Plaintiff purchased the land in 1960, he applied to the zoning authority for a building permit. The permit was denied because, without the marked strip, plaintiff's lot was not large enough to meet setback requirements. When plaintiff then tried to sell the land, a purchaser refused to close, citing the map. Plaintiff's title insurer denied his claim, pointing to the exclusion from coverage for "[z]oning restrictions or ordinances imposed by any governmental body." The court, however, held plaintiff's loss was covered because the acquisition map qualified as a lien or encumbrance not excepted by the policy.

Ascot Homes is cited in a standard title insurance law treatise. Palomar, *Title Insurance Law* §§ 5.9, 6.3, 6.9 (2020 ed.). It has also been analyzed in a work published by the drafter of the policy forms and language at issue here. Nielsen, *Title and Escrow Clams Guide* § 11.1.5 (American Land Title Association, 2020). The analysis describes the import of *Ascot Homes* in detail and contends the decision prompted a 1970 change in the standard title insurance policy language to allow coverage for eminent domain as long as the "notice of the exercise thereof" appeared in the public records as of the date of the policy (this same language appears in Exclusion 2 of the policy here, as we later discuss in section IV.B). Yet, as the author points out, the acquisition map in *Ascot Homes* "did not 'exercise' the condemnation power," so its relationship to eminent domain coverage is inapposite. *Id.* Like the map in *Ascot Homes*, the Ordinance here is a different creature than an eminent domain proceeding, but it is still a defect or encumbrance triggering coverage.

Chicago Title also argues the policies provide no coverage to Appellants because a title examination of the subject property would not have revealed the Ordinance or map. We can find no support for this position in the policy. The coverage the policy promises is not limited to what a title examination reveals. The policy does not

define a covered defect, lien, or encumbrance as something that can only exist if it resides in the chain of title.

According to Chicago Title, a ruling that the Ordinance constitutes a defect, lien, or encumbrance will saddle real estate lawyers and title abstractors with the risk of liability for title defects that cannot be found in the chain of title. We are confident real estate practitioners know how to draft explanations of and exceptions to their title opinions. And this appeal is not about the scope of title opinions but the scope of coverage of a title insurance policy. Chicago Title may wish to shift the risk of loss to real estate lawyers or others, but that is not where the policy here places it.

The special referee warned that if the map and Ordinance constituted a defect, lien, or encumbrance, the entire world of warranty deeds would be upended. We find no justification for such a dystopian view. When Appellants bought the Property, the sellers presumably had notice of the map and the Ordinance showing the county's plan to build a highway through the Property, for the Ordinance declared that a "letter of notification" of the public hearing would be sent to all "property owners whose property lies within an area to be reserved for public use." Whether the sellers had a duty to disclose this knowledge to Appellants—and whether, if they did not disclose it, their silence violated any warranties they gave in the deed—are not questions before us.

We conclude the Ordinance constituted a defect and an encumbrance. We therefore reverse the special referee's grant of summary judgment to Chicago Title as to this issue.

C. 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 coverage, which would entitle . . . the insured mortgage to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title." This opaque definition—a model of circularity—is unenlightening. We are confident, though, that a purchaser who discovered a portion of the real estate he was about to buy purportedly in fee simple absolute had been reserved by ordinance in favor of a governmental right-of-way may be entitled to rescind the sale. "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. It is a title which a reasonable purchaser, well-informed as to the facts and their legal significance, is ready and willing to accept." *Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993).

Delivery of marketable title requires title be free of not only defects and encumbrances but also the reasonable probability of litigation. *Sales Int'l Ltd. v. Black River Farms, Inc.*, 270 S.C. 391, 398, 242 S.E.2d 432, 435 (1978) (providing a "reasonable probability of litigation" renders title unmarketable). The Ordinance created a reasonable probability of litigation concerning the title because the right-of-way was reserved for acquisition, making future condemnation reasonably probable.

The Ordinance differs from land use and zoning regulations, which can restrict development and impose an economic burden on the owner but do not create a third-party interest in property. *See McMaster v. Strickland*, 305 S.C. 527, 530, 409 S.E.2d 440, 442 (Ct. App. 1991) (holding wetlands designation did not render title unmarketable); *Patel*, 339 S.C. at 49, 528 S.E.2d at 429 ("Because the wetland designation does not render the title unmarketable, Patel cannot rescind the contract based upon an encumbrance."); *Martin*, 282 S.C. at 52, 317 S.E.2d at 136 ("While marsh or water might be a burden upon property, it is certainly not a lien, easement, or a right existing in a third party."). We recognize the Ordinance resembled zoning and other land use tools, given it was to be enforced by the zoning administrator and the enabling statute described the official maps as "instruments of land use control." § 6-7-1220. In substance, though, the Ordinance created a third party interest in the property and is so foreign from typical land use measures that there is no genuine issue of material fact that it rendered Appellant's title unmarketable.

A marketable title is one free from doubt and any reasonable threat of litigation. Unmarketability cannot be based on just any doubt or defect, for almost any title can be flyspecked. But if the doubt is an objectively reasonable one concerning a material defect, then the title is unmarketable. A material defect is one that interferes or conflicts with the rights and incidents of title—the insured's fee simple absolute's "bundle of rights"—to the extent that an ordinary and prudent purchaser would not buy the title, or only buy it at a discount reflecting the defect. 1 Palomar, *Title Ins. Law* § 5.7 (2019 ed.). This meshes with the policy definition of marketability, which explains coverage extends to any "alleged or apparent" matter affecting title.

Chicago Title argues the Ordinance did not affect marketability of the title because it only regulates use of the Property. We conclude, however, that the Ordinance interferes with the insured's title because it limits the rights and incidents of ownership. It is true that matters that affect only the use of land are not title matters, but it does not follow that a matter that affects use cannot also affect title. *Id.* No one would contend, for example, that a covenant restricting use does not also affect title and, therefore, marketability. Because the Ordinance created an interest in the land by reserving a right-of-way and restricting use of the reserved land, we conclude

it diminished the owner's bundle of rights and, consequently, affected title. And the diminishment was enough to cause a reasonable buyer to decline or discount a sale for a price less than what an unclouded title would demand on the market.

There is no factual dispute the Ordinance created a reasonable probability of litigation, thereby making the title unmarketable as a matter of law. The Ordinance, which, again, was publicly recorded, reserved the future site of the highway and took steps to minimize the County's future acquisition costs. Although we agree with Chicago Title that in general all landowners are at risk of eminent domain proceedings at any given time, the County's intent and preliminary steps set forth in the Ordinance foreshadowed a reasonable probability of condemnation. *Black River Farms, Inc.*, 270 S.C. at 398, 242 S.E.2d at 435 (mere possibility or remote probability of litigation is not sufficient to make title unmarketable). Therefore, we hold the Ordinance rendered Appellants' title unmarketable and reverse the special referee's grant of summary judgment to Chicago Title.

IV. EXCLUSIONS FROM COVERAGE

In deciding whether a policy exclusion bars coverage, the burden of proof flips: the insurer must prove the exclusion applies. *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005) ("Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability.").

A. Exclusion 1

In relevant part, Exclusion 1 bars coverage for losses arising by reason of:

> Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use or enjoyment of the land . . . .

In granting Chicago Title summary judgment, the special referee ruled Exclusion 1 excluded coverage because the Ordinance merely affected the use of the land. As we have just discussed, the Ordinance related to and affected the title of the land, not just its use. Exclusion 1 therefore does not apply as a matter of law. We reverse the special referee's grant of summary judgment to Chicago Title as to this issue.

B. Exclusion 2

Exclusion 2 bars coverage for losses arising by reason of:

> Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any takingwhich has occurred prior to the Date of Policy which would be binding on the rights of a purchaser for value without knowledge.

Neither Appellants nor Chicago Title claim the Ordinance constitutes an eminent domain action, and Appellants are not seeking coverage for the 2009 condemnation action, which began after the effective date of the policies. The special referee noted the exclusive procedure for eminent domain in this state is the Eminent Domain Procedure Act, S.C. Code Ann. §§ 28-2-10 to -510 (2007 & Supp. 2018). But this misses the mark. Appellants are not seeking recovery of loss for the 2009 condemnation action but for loss the Ordinance caused to the value of their title when they took it in 2007. Appellants contend these losses exceed and are different in kind from those sought in the condemnation action. Therefore, Exclusion 2 does not apply, and the special referee erred in granting Chicago Title summary judgment based on Exclusion 2.

Chicago Title maintains that if the Ordinance constitutes a "defect, lien, or encumbrance" then it necessarily also constituted a taking for which Exclusion 2 excludes coverage. We see several flaws in this logic, the fundamental one being the false equivalency between an encumbrance and a taking. We doubt Chicago Title means that every encumbrance is also a taking, but that is the cul-de-sac where its argument leads.

The issue of whether an Ordinance reserving of a right of way on an official county map adopted pursuant to § 6-7-1220 constitutes a taking has not been decided in South Carolina and is not before us now. The special referee did not rule on the issue. Neither Appellant nor Chicago Title filed a motion to reconsider requesting the Special Referee to make such a ruling, nor have they appealed on this ground. Accordingly, this issue is not preserved for our review. *See Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.").

C. Exclusion 3(d)

Exclusion 3(d) excludes coverage for "[d]efects, liens, encumbrances, adverse claims or other matters . . . attaching or created subsequent to Date of the Policy." The Ordinance and the 2002 Amendment were filed years before the effective date

of the policies, and therefore clouded the title as of the Date of the Policy. The special referee therefore erred in finding this exclusion applied.

Parties to title insurance contracts are free, within the bounds of public policy, to allocate risks as they see fit. Chicago Title's inability to pigeonhole this unique Ordinance into an exclusion to coverage is unsurprising. Real estate investors buy title insurance to protect against such unforeseen "off the record" risks. Old soldiers say it is the bullet you never hear that kills you, and the fundamental idea behind title insurance is to cover rather than exclude unforeseen and unknown risks; otherwise, title insurance would not provide the peace of mind it touts.

V. BAD FAITH

The special referee ruled Chicago Title had a reasonable, good faith basis for contesting Appellants' claims. We agree.

Appellants' bad faith cause of action fails because they did not demonstrate Chicago Title acted unreasonably in denying Appellants' claims. *See Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 359, 415 S.E.2d 393, 396–97 (1992) ("The elements of a cause of action for bad faith refusal to pay first party benefits under a contract of insurance are: (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."). The unusual nature of the Ordinance presented close policy interpretation issues. Chicago Title had a reasonable basis for denying the claims, and we affirm summary judgment to them as to this issue. *BMW of N. Am., LLC v. Complete Auto Recon Servs., Inc.*, 399 S.C. 444, 453, 731 S.E.2d 902, 907 (Ct. App. 2012) ("[W]here an insurer has a reasonable ground for contesting a claim, there is no bad faith.").

VI. CONCLUSION

Accordingly, we affirm the special referee's grant of summary judgment to Chicago Title on Appellants' cause of action for bad faith, but we reverse the grant of summary judgment to Chicago Title on Appellants' remaining claims and remand to the special referee for proceedings consistent with this opinion. Appellants have not appealed, and we therefore do not address, the grant of summary judgment to Chicago Title on Appellants' breach of covenant of good faith and fair dealing claim.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WILLIAMS and KONDUROS, JJ., concur.