THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Karl A. Folkens, Special Referee
Fifteenth Judicial Circuit

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

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

v.

Chicago Title Insurance Company, ...Defendant

AND

Lynx Jericho Partners, LLC, ... Plaintiff

v.

Chicago Title Insurance Company, ...Defendant

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

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

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for the Petitioner certifies there was a published opinion of the Court of Appeals in this matter filed June 10, 2020, a Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 7, 2020, and a revised published opinion issued on October 7, 2020.

QUESTIONS PRESENTED

1. **Did the Court of Appeals err by holding the Ordinance was a defect in or lien or encumbrance on title and a title marketability issue—effectively finding an unconstitutional taking that created a property right in Horry County—and therefore covered by the Policies when the Ordinance merely affected use of the property and did not affect title?**

2. **Did the Court of Appeals err by holding Exclusion 1(a) of the Policies did not apply to the Ordinance when that exclusion plainly and unambiguously excludes coverage for "any . . . ordinance . . . restricting, regulating, prohibiting or relating to . . . the occupancy, use, or enjoyment" of the property?**

3. **Did the Court of Appeals err by holding Exclusion 2 of the Policies does not bar 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?**

4. **Did the Court of Appeals err by holding Petitioner failed to preserve an argument where Petitioner was the Respondent in the Court of Appeals and the trial court ruled in Petitioner's favor on that argument?**

INTRODUCTION

The questions presented in this case involve substantial novel and constitutional issues and matters of significant public interest.[1]

In its revised opinion, the Court of Appeals:

- held that ordinances enacted under South Carolina's planning map statutes, S.C. Code Ann. §§ 6-7-1210, *et. seq.*, are takings because they create a property right

[1] The opinion by the Court of Appeals will have a significant impact on real estate transactions and the professionals involved, just as the special referee held, (R. pp. 16–17), and Chicago Title asserted on appeal, *see* App. p. 2052, n.6 (Respondent's Brief) and App. p. 2111 (Respondent's petition for rehearing).

in the local government, and that those ordinances constitute an encumbrance on title and make the title unmarketable;

- applied its own policy concerns and disregarded settled insurance contract interpretation law in holding applicable policy exclusions did not apply; and
- held that Petitioner waived an argument as the Respondent in the Court of Appeals when the issue was in fact preserved and Respondent, as the prevailing party, had no obligation to appeal the issue.

In so holding, the Court of Appeals turned on its head the South Carolina General Assembly's carefully and constitutionally crafted land-use planning statute, and its implementing local ordinance, by erroneously ruling the ordinance creates a property right in Horry County. This conclusion results in an unconstitutional taking of private property without just compensation and erroneously creates coverage under the title policies at issue where there is none.

Further, by reallocating the risks between the Petitioner and Respondents based on its own views about the purpose of title insurance, the Court of Appeals ignored this Court's long-standing admonition to enforce unambiguous insurance policies in accordance with their express terms.

Finally, in its revised opinion, the Court of Appeals ignored this Court's issue preservation rule that when the lower court rules in one party's favor, it is not necessary for that party to return to the court and ask for a ruling on remaining issues and arguments in order to preserve those arguments for use in an appeal.

These broad and significant constitutional, legal, and procedural errors require this Court's review and correction.

STATEMENT OF THE CASE

On July 29, 2011, Respondent Jericho State Capital Corp. ("Jericho State") filed an action against Petitioner 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. These cases were consolidated and referred to Karl A. Folkens as Special Referee.

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

Respondents appealed. On June 10, 2020, the Court of Appeals issued an opinion that affirmed in part, reversed in part, and remanded the case to the Special Referee. On June 25, 2020, Chicago Title timely filed a petition for rehearing with a suggestion for rehearing *en banc*. On October 7, 2020, the Court of Appeals granted the petition for rehearing, rejected rehearing *en banc*, and substituted a revised opinion that also affirmed in part, reversed in part, and remanded the case to the Special Referee. Chicago Title now petitions this Court for a writ of certiorari to review the final decision of the Court of Appeals.

STATEMENT OF FACTS

1. The Ordinance.

On July 2, 2002, the Horry County Council adopted Ordinance 88-202 ("Ordinance"), which amended the official map of Horry County to show 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. 373–74). 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 subject property when the Ordinance was passed, are not mentioned in the Ordinance or in the conceptual plan attached thereto.

On July 9, 2002, the Ordinance, which was neither witnessed nor notarized, was recorded with the Horry County Register of Deeds. It is indexed under the name of Horry County. The Ordinance was not indexed under the names of the property owners who may be affected by the possible future construction of the Carolina Bays Parkway or under the names of any McClam family members, who owned the subject property on the date the Ordinance was recorded. The Ordinance was not indexed by the Register of Deeds in the grantor-grantee indices under the name of the owners of the subject property, but instead is indexed under the name of Horry County. (R. p. 1025). A person searching and examining title to the subject property would not find the Ordinance in the chain of title to the Property. (R. p. 1026).

2. <u>The Property, the Purchase, the Mortgages, and the Policies.</u>

The subject property is approximately 131.40 acres located in Socastee Township, Horry County, South Carolina ("the Property"). The Property borders the Intracoastal Waterway. In July 2006, Peachtree Properties of North Myrtle Beach, LLC ("Peachtree") purchased the Property from the McClam family for $22,500,000. (R. pp. 413–23; R. p. 990).

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. 424–40). 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 also gave a $4,263,888.00 second mortgage covering the Property to Jericho State ("Jericho State Mortgage"). (R. pp. 441–96). 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. 506–15).[2]

As part of the Jericho State closing, zoning and a potential bridge through the Property were discussed by the attorneys for the lender and purchaser. (R. pp. 982–83, 1110–18). In addition, according to the closing checklist agreed upon by the parties, zoning matters were the responsibility of borrower's counsel and not the responsibility of the title insurance company. (R. pp. 982–83, 985).

3. Rezoning of the Property and Funding of the Project.

On May 15, 2007, Horry County Council rezoned the Property as a mixed-use development with numerous residential parcels named Peachtree Plantation Planned Development District (the "PDD Ordinance"). (R. pp. 561–71). The PDD Ordinance was adopted based on an application submitted by Peachtree stating Peachtree agreed to donate part of the Property to Horry County for the Carolina Bay Parkway (the "Parkway Parcel"). *Id.* Funding for the Carolina Bays Parkway was not approved until June 2007, after the Policies were issued. (R. pp. 543–99).

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[2] The Jericho State Policy and the REL Policy will be collectively referred to at times as "the Policies." Respondent Lynx Jericho ultimately acquired the REL Mortgage and the rights to the REL Policy. *See infra* at 7.

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

In June 2007, Jericho State filed a foreclosure action seeking to foreclose the Jericho State Mortgage and a mortgage it held on other property. (R. pp. 1119–36). At the foreclosure hearing, Jericho State's attorney testified, "we 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 . . . ." (R. p. 1148) (emphasis added).

The court entered a foreclosure order on November 7, 2007, ordering the Property to 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. 516–32). 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. 533–42). Thus, on February 26, 2008, the Property was owned by Jericho State subject to the REL Mortgage.

5. **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. 543–99). The Zoning Rescission Action does not reference the Ordinance. Jericho State alleged it owned the Property, including the Parkway Parcel.

The parties dismissed the Zoning Rescission Action because the SCDOT filed a condemnation action on December 15, 2009, to take the Parkway Parcel. The SCDOT alleged Jericho State was the owner of the Property and condemned 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, 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). A jury ultimately awarded $2,100,000 as just compensation for the taking of the Parkway Parcel to Jericho State and Lynx Jericho. (R. p. 1553; R. pp. 1557–61). Later, Lynx Jericho acquired the REL first mortgage. (R. pp. 672–73, 716–18, 1158–62).

6. The Title Insurance Claims and Litigation.

Jericho State and Lynx Jericho submitted claims to Chicago Title based on the assertion that the Jericho State Policy protected against the condemnation, (R. pp. 1562–65), which Chicago Title denied, (R. pp. 722–31). After the claims were denied, Respondents filed this lawsuit.

ARGUMENT

A. THE ORDINANCE DID NOT CREATE A THIRD-PARTY PROPERTY RIGHT IN HORRY COUNTY AND IS NOT A TAKING, IT AFFECTED ONLY USE OF THE PROPERTY, AND THEREFORE IT IS NOT COVERED BY THE POLICIES.

The Court of Appeals erred in concluding that the Ordinance created a property right in Horry County and therefore constituted a defect or an encumbrance on title and rendered title unmarketable within the insuring provisions of the Policies. If the decision of the Court of Appeals is upheld, the third-party interest Horry County has been held to have acquired can be nothing other than a taking without just compensation. If the Court of Appeals is correct, every proposed road under the official map statute or a corresponding ordinance would create a taking without just compensation and an inverse condemnation claim. However, this holding is error because the

Ordinance did not create a property right in a third party under South Carolina law, but instead was a use restriction, akin to a zoning regulation. Furthermore, as only a use restriction, the Ordinance is excluded from the Policy's coverage by Exclusion 1(a), which excludes coverage for an "ordinance . . . . (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to . . . use . . . of the land."

1. The Ordinance and enabling statutes did not take property by creating a property right because the Ordinance only restricts use.

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. Rather, the Ordinance created a procedure that could ultimately result in a future eminent domain action. As spelled out by the Legislature in the statute and by the Ordinance, further steps were necessary before the county could acquire any interest in the Property.

The South Carolina General Assembly's statutory scheme sets forth a plan for land use management. *See* S.C. Code Ann. § 6-7-1220 (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.") (emphasis added). Moreover, 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. 360–67), known as the "Official Map Ordinance of Horry County," follows the above-referenced statutes.

While the statutes allow government entities to limit a property owner's use of property in the area affected by the official map—just like zoning laws and regulations do—the statute and the Ordinance require additional steps before a taking occurs. In fact, a landowner with property covered by the map can apply to the planning commission to exempt the property or issue a permit. The planning commission 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 (requiring action within 100 days); -1280 (requiring action within 75 days); Ordinance 107-98 §§ 5.2.1, 5.2.2 (describing these procedures). 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. Horry County thus does not and cannot acquire a property right until it takes the property in question through appropriate eminent domain proceedings. Accordingly, the Ordinance and the statutes on which it is based do not vest Horry County with a property right, contrary to the holding by the Court of Appeals that the Ordinance

limited the "bundle of rights" in the Property.[3]

There is no dispute the Ordinance complied with the enabling statutes. Nor is there any dispute that the Parkway Parcel was actually acquired through a condemnation action in 2009. In the face of these facts, the Court of Appeals held that the Ordinance created a third-party right in favor of Horry County, making the Ordinance a taking without just compensation in violation of S.C. Const. art. I, § 13 and U.S. Const. amend. V.[4] This holding disregards settled rules of statutory construction requiring courts to construe a statute in a manner that renders it constitutional rather than unconstitutional. *See 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.").

This Court has rejected attempts to turn an expressed intent to condemn into a taking. In *Kiriakides v. Sch. Dist. of Greenville Cty.*, 382 S.C. 8, 14, 675 S.E.2d 439, 442 (2009), the Court rejected an inverse condemnation claim where a school district served, but did not file, a notice and tender of condemnation, and later decided not to take the property. *Id.*; *see also Byrd v. City*

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[3] It is axiomatic that zoning matters and ordinances reduce the landowner's bundle of rights by depriving the uses to which the land can be put. *See, e.g., 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, use restrictions by local ordinances do not mean that title is affected by an ordinance and does not mean coverage is provided under title insurance policies. Contrary to the Court of Appeals' viewing coverage under the Policies through the lens of the "bundle of rights," title insurance policies do not reference the bundle of rights and they do not insure the landowner's so-called bundle of rights will be unimpaired. In fact, Exclusion 1(a) in the Policies acknowledge that certain limitations on the bundle of rights— by "any law, ordinance or governmental regulation"—are not covered.

[4] "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).

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). Importantly, the school district in *Kiriakides* went far beyond what the Ordinance does here in both preparing and serving a condemnation notice. Yet *Kiriakides* held no taking occurred.

In contrast, the Ordinance is part of a carefully designed land use planning tool, drafted with the takings clauses of the South Carolina and United States Constitutions 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 by 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. 543–99).

Moreover, other states with less carefully drafted statutes have caused takings problems through planning maps. For example, in *Kirby v. N.C. Dep't of Transp.*, 786 S.E.2d 919 (N.C. 2016), a case cited by Respondents but not mentioned by the Court of Appeals in its opinion, the North Carolina Supreme Court addressed a similar issue and held a much differently drafted land use planning statute was unconstitutional by causing a taking of the identified property.

The statute involved in *Kirby* 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 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.[5]

In citing *Kirby* in its brief to the Court of Appeals, Respondents argued:

> 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.

Without citing *Kirby*, the Court of Appeals effectively adopted the reasoning of the *Kirby* court and agreed with the Respondents' argument that the official map constitutes a taking. This was error because, unlike the North Carolina corridor maps, the enabling statutes and Ordinance at issue here allow South Carolina landowners who want to use the property to request the issuance of building permits or exemption of the property from the official map. The governing authority must act upon the request quickly, within 75 to 100 days, not in three years like North Carolina's Map Act. If the governing authority grants the permit request or exempts the property, no one can claim a taking has occurred.

In sum, no right is acquired by Horry County through the Ordinance or the official map until the governing authority takes property through a condemnation action. Accordingly, the Court of Appeals erred by holding the Ordinance created a property right in Horry County.

2. Because the Ordinance did not create a right in a third party through a taking, it only restricted or regulated use and is not a covered matter under the Policies.

As the Court of Appeals held, title policies contain insuring provisions, and the insured has the burden of proving its claim falls in one of the policies' insuring provisions. *See Gamble v.*

[5] The end result of *Kirby* is not surprising—affected landowners brought an inverse condemnation action against North Carolina Department of Transportation. *See Chappell v. North Carolina Department of Transportation*, 841 S.E.2d 513 (N.C. 2020).

Travelers Ins. Co., 251 S.C. 98, 103, 160 S.E.2d 523, 525 (1968).

The Policies 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 . . . insures . . . 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;

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."

This Court and the South Carolina Court of Appeals have held use restrictions like the Ordinance do not affect title. In *Truck South, Inc. v. Patel*, 339 S.C. 40, 528 S.E.2d 424 (2000), this 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 and did not render the title unmarketable. *Id.* at 49, 528 S.E.2d at 429. *Truck South* followed earlier holdings by the Court of Appeals reaching the same conclusion—that 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*, 282 S.C. at 51, 317 S.E.2d at 136.

Other courts have held use ordinances did not affect title and were not covered under title

policies. 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. *Id.* at 279 ("[t]he ordinances on which Haw River relies as a title defect do not impair the grantor's ability to convey a timber deed."). Like this case, the restriction on harvesting in *Haw River* was enacted by county ordinance.

Conversely, in finding a planning map could be a defect, the Court of Appeals relied heavily on *Ascot Homes, Inc. v. Lawyers Mortgage & Title Co.*, 237 N.Y.S.2d 179, 180–81 (N.Y. Sup. Ct. 1962),[6] but that reliance was misplaced. In *Ascot Homes*, 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. In denying the parties' motions for summary judgment, the New York trial court did not reference the underlying statute authorizing the acquisition map and did not make a final determination as to whether the acquisition map was a lien. *Id.* at 182 ("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.").

Another New York trial court addressed an official map and 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*

[6] The Court of Appeals is the only court in the country to have cited this New York trial court opinion.

> *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 court found that only when a building permit was denied did the map ordinance's interference with use and enjoyment of the property amount to a taking. The South Carolina General Assembly considered this scenario in adopting the applicable enabling statutes with which the Ordinance complied.

These cases also show title marketability is not affected by land-use planning mechanisms such as the Ordinance. Here, there is no allegation or fact indicating title to the Property was threatened. Rather, the Ordinance only addresses the potential use of the Property, providing the property owner the ability to force Horry County to either allow the use to which the owner wanted to put the Property (either issue a building permit or exempt the Property from the Map Ordinance) or proceed to condemn the Property for public use. 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, e.g., 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.").

Accordingly, the Ordinance does not fall within the insuring provision in the Policies, and the Court of Appeals erred by holding otherwise.

3. Even if the Ordinance were a covered matter, the Ordinance is "an ordinance . . . restricting, regulating, prohibiting or relating to . . . use" and excluded from coverage by Exclusion 1(a) of the Policies.

The Court of Appeals held Exclusion 1(a) did not apply despite recognizing the Ordinance affected use and instead substituted its own policy preferences for this Court's rules of insurance contract interpretation. *Compare* Rev. Op. at 12 (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.") *with Williams v. Gov't Ins. Co. (Geico)*, 409 S.C. 586, 594, 762 S.E.2d 705, 709 (2014) ("Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning."). This holding was error.

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).

Through Exclusion 1(a), 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—even if the Ordinance was a defect, a lien or encumbrance, or created a title marketability issue. As the Court of Appeals correctly noted, "[pa]rties to title insurance contracts are free, within the bounds of public policy, to allocate risks as they see fit." However, the Court of Appeals failed to recognize that Exclusion 1(a) clearly

allocated the risk of these matters directly on the insured, not the insurer. *See, e.g., Aldrich v. Hawrylo*, 656 A.2d 1304, 1309 (N.J. Super. Ct. App. Div. 1995) (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").

If the Ordinance did not create a property right in Horry County, then it did not affect title but only regulated the use of the Property. Accurately construing the Ordinance as a zoning-like use restriction requires applying Exclusion 1(a) because the Ordinance is an "ordinance . . . . (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating . . . use . . . of the land." The Court of Appeals erred by holding otherwise.

4. The exception to Exclusion 1(a) does not apply.

Exclusion 1(a) 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." However, as shown below, the exception to Exclusion 1(a) does not apply because there was no notice of enforcement or violation issued or filed, and the Ordinance was not indexed in a manner that it could ever be found in a title search of the Property.

First, S.C. Code Ann. § 6-29-950 allows local zoning administrators to enforce ordinances through the "withholding of building or zoning permits, 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." Horry County enacted Ordinance 1300 to allow a zoning administrator to take these actions on behalf of the county. *See* (R. p. 224). There is no evidence in the record that there was any violation

of the Ordinance. Because there was never an alleged or actual violation of the Ordinance, there cannot be a notice of a violation or alleged violation. The Ordinance itself is not a notice of a violation or alleged violation. *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.").

Second, the Ordinance was not indexed in a manner that someone could find the Ordinance in the Property's chain of title. 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 of the Property. 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.").

Moreover, the evidence in the record is conclusive on this issue. Respondents' 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.").

A document not indexed properly, like the Ordinance, cannot provide constructive notice, and it does not constitute a public record[7] 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). Accordingly, the exception to Exclusion 1(a) does not apply in this case.

B. EVEN IF THE ORDINANCE CREATED A PROPERTY RIGHT IN HORRY COUNTY THROUGH A TAKING, EXCLUSIONS 1 AND 2 BOTH APPLY.

1. Exclusion 1(a) applies because a right-of-way is a right to use and affected enjoyment under South Carolina law.

Even if the Ordinance did create a right-of-way in favor of Horry County, Exclusion 1(a) would apply because a right-of-way is a right to use Property and the Ordinance would be an "ordinance . . . restricting, regulating, prohibiting or relating to . . . use, or enjoyment . . . of the land."

[7] 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."

A right-of-way is an easement. *Brasington v. Williams*, 143 S.C. 223, 141 S.E. 375, 382 (1927) ("An easement, or right of way, in gross is a mere personal privilege to the owner of the land and incapable of transfer by him, and is not, therefore assignable or inheritable."). An easement is a right to use property, *Steele v. Williams*, 204 S.C. 124, 28 S.E.2d 644, and is a property right that does not affect title, *Morris v. Townsend*, 253 S.C. 628, 635, 172 S.E.2d 819, 822 (1970) ("An easement gives no title to the land on which the servitude is imposed. It is, however, property or an interest in the land.").

If the Ordinance created a right-of-way, then it is a use right under South Carolina law and Exclusion 1(a) applies. The Court of Appeals was unclear what property right the Ordinance created, holding both 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," and also that "Chicago Title is correct that the Ordinance did not create a right-of-way." Rev. Op. pp. 9–10. The Court of Appeals also held, "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." Rev. Op. at 9. However, *Morris* makes clear that a right-of-way is a property right that does not affect title. Accordingly, even if the Ordinance created a right of way, it is an "ordinance . . . restricting, regulating, prohibiting or relating to . . . use . . . of the land."

Furthermore, if the Ordinance created a right-of-way, then the Ordinance also was an "ordinance . . . restricting, regulating, prohibiting or relating to . . . enjoyment" of the Property. Generally, "enjoyment" comes up 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). Accordingly, the Ordinance, if construed as creating a right-of-way, affected the enjoyment of the Property because the Ordinance disturbed the landowner's possession of the Property.

Accordingly, Exclusion 1(a) applies even if the Ordinance did create a property right and cause a taking, and the Court of Appeals erred by holding otherwise.[8]

2. Exclusion 2 applies because the Ordinance would be a taking.

If the Court of Appeals is correct that the Ordinance reserved a right-of-way affecting title, then a property right was created, a taking occurred, and coverage is excluded by Exclusion 2. Exclusion 2 excludes coverage for:

> 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.

As explained above, any right created in Horry County as a third party could only be acquired by purchase, statutory eminent domain authority, or inverse condemnation. Indisputably, there was no purchase or statutory proceeding when the Ordinance was enacted. If the Ordinance created a property right, then it was a taking like *Kirby*, at 847 786 S.E.2d at 919 and *Byrd*, at 661-63, 620 S.E.2d at 82 (potential for regulatory takings). A taking falls under Exclusion 2's "rights of eminent domain," and therefore the Policies would not provide coverage for the Ordinance

[8] The exception to Exclusion 1(a) would not apply for the same reasons set forth *supra* at § A. 4.

because the exception to Exclusion 2 does not apply.

3. The exception to Exclusion 2 does not apply.

Exclusion 2 contains an exception that bars its application if "a notice of the [rights of eminent domain] 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 record is clear there was no notice of eminent domain recorded in the public records until after the effective dates of the Policies. Furthermore, the Ordinance was not filed in the public records prior to the Date of Policy such that "a purchaser for value without knowledge" would have constructive notice of the Ordinance. 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." As discussed above, the Ordinance was not filed in such a way as to impart constructive notice and is not a "public record" under the Policies. *See supra* § A. 4 (the Ordinance was not indexed where anyone could find so it did not impart constructive notice). Accordingly, the exception to Exclusion 2 does not apply.

C. THE COURT OF APPEALS DISREGARDED CLEAR PRECEDENT BY HOLDING THE TAKING ISSUE WAS NOT PRESENTED AND CHICAGO TITLE FAILED TO PRESERVE THE TAKING ISSUE WHEN CHICAGO TITLE WAS THE PREVAILING PARTY IN THE TRIAL COURT AND THE SPECIAL REFEREE RULED IN CHICAGO TITLE'S FAVOR ON THE ISSUE.

The Court of Appeals held, "[n]either Appellants nor Chicago Title claim the Ordinance constitutes an eminent domain action" and "[t]he 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" was not preserved for their review. *See* Rev. Op. at 11 (citing *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006)). However, this was error because Chicago Title was not required to preserve this issue as the prevailing party at the trial court and the issue was in fact raised, ruled

upon, and asserted by Chicago Title on appeal.

First, *Pye* addressed error preservation by an appellant, which clearly required the asserted error be raised and ruled upon. However, this Court has recognized,"[u]nder the present rules, a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). Accordingly, "when the lower court rules in one party's favor, it is not necessary for that party to return to the court and ask for a ruling on remaining issues and arguments in order to preserve those arguments for use in an appeal." *See id.* at 423, 526 S.E.2d at 725. Chicago Title prevailed in the lower court and could have raised the takings issue under the current rules even if the Special Referee had not actually ruled on it.

Further, the record is clear Jericho State did in fact allege a taking in its Complaint.[9] Moreover, the Special Referee ruled in Chicago Title's favor on Exclusion 2, holding "I reject Plaintiffs' contention that the purpose of the Ordinance is not to regulate use but rather to designate a right-of-way and transfer title." (R. p. 16). Moreover, the Special Referee held that ruling in favor of Respondents would mean "counties and municipalities would be subject to inverse condemnation actions by simply expressing a desire to one day consider acquiring rights-of-way to various tracts." (R. p. 17) (citing *Kiriakides v. Sch. Dist. of Greenville Cty.*, 382 S.C. 8, 14, 675 S.E.2d 439, 442 (2009) in support of the holding). And the Special Referee was clear "Plaintiffs claimed losses are excluded . . . by Exclusion 2 which eliminates coverage for condemnation or

[9] 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).

eminent domain." (R. p. 18). Furthermore, Chicago Title was clear in its briefing before the Court of Appeals that Exclusion 2 should apply if the court were inclined to find the Ordinance created a property right. *See* App. p. 2065–74 (Respondent's Brief); App. p. 2112–16 (Respondent's petition for rehearing).

Accordingly, "[t]he 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" was properly before the Court of Appeals, and it erred by concluding Chicago Title failed to raise or preserve this issue.

CONCLUSION

For these reasons, Chicago Title requests that this Court grant the petition for a writ of certiorari and reverse the ruling by the Court of Appeals.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

November 6, 2020

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.

PROOF OF SERVICE

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

C. Scott Masel, Esquire
Fred B. Newby, Esquire
Newby, Sartip, Masel & Casper, LLC
4593 Oleander Drive, Suite #100
P. O. Box 808
Myrtle Beach, SC 29578

Kathleen S. Romero

November 6, 2020

1020.566\Appeal\SupremeCt\POS-Petition

COPY

CALLISON TIGHE

Demetri "Jim" K. Koutrakos – MEMBER
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November 6, 2020

VIA HAND DELIVERY
The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201

RE: Jericho State Capital Corp. of Florida vs. Chicago Title Insurance Company
Lynx Jericho Partners, LLC vs. Chicago Title Insurance Company
SCCA Opinion No.: 5731 (Filed: 6/10/2020, Substituted and Refiled 10/7/2020)
Appellate Case No. 2017-001646

Dear Mr. Shearouse:

Enclosed herewith please find an original and six (6) copies of the Petition for a Writ of Certiorari in the above-referenced matter, for filing on behalf of the Petitioner, Chicago Title Insurance Company, together with an original and two (2) copies of the Proof of Service. Also enclosed is this firm's check in the amount of $250 in payment of the required filing fee.

Also enclosed for filing are two (2) copies of the Appendix (Volumes 1-5, one copy being unbound). Per Rule 242, SCACR, copies of the Appendix are not being provided to counsel of record.

Kindly file the enclosed documents and return a clocked-in copy of each to the undersigned via my courier. By copy of this letter, the enclosed Petition for a Writ of Certiorari is being served upon counsel for the Respondents.

Thank you for your courtesies and assistance.

With kind regards, I am

Sincerely yours,

CALLISON TIGHE & ROBINSON, LLC

Demetri "Jim" K. Koutrakos

DKK:ksr
Enclosures
cc (w/enc.): Clerk, SC Court of Appeals
C. Scott Masel, Esquire
Fred B. Newby, Esquire
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