THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Karl A. Folkens, Special Referee

Appellate Case No.: 2017-001646
Supreme Court Case No: 2020-001478

RECEIVED

Dec 04 2020

S.C. SUPREME COURT

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.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

COUNTER QUESTIONS PRESENTED

1. DID THE COURT OF APPEALS PROPERLY CONCLUDE AN ENCUMBRANCE IS NOT THE SAME AS A GOVERNMENTAL TAKING?

2. DID THE COURT OF APPEALS PROPERLY CONCLUDE THE ORDINANCE AND MAP CONSTITUTE A DEFECT AND ENCUMBRANCE?

3. DID THE COURT OF APPEALS PROPERLY CONCLUDE THE ORDINANCE AND MAP RENDERED TITLE TO THE PROPERTY UNMARKETABLE?

4. DID THE COURT OF APPEALS PROPERLY CONCLUDE POLICY EXCLUSION #1(A) DOES NOT APPLY?

5. DID THE COURT OF APPEALS PROPERLY CONCLUDE POLICY EXCLUSION #2 DOES NOT APPLY?

6. DID THE COURT OF APPEALS PROPERLY CONCLUDE NO PARTY REQUESTED A RULING ON WHETHER THE ORDINANCE CONSTITUTES A TAKING?

INTRODUCTION

Chicago Title Insurance Company's Petition for a Writ of Certiorari ("Petition") arises from a unanimous opinion of the Court of Appeals. It does not present any novel question, does not raise a substantial constitutional issue, and is not in conflict with any prior decision of this Court or the Court of Appeals.

Raised for the first time in its Petition for Rehearing, Chicago Title relies on a dramatic but legally flawed claim that the Court of Appeals, solely by concluding Chicago Title's insurance policies provide coverage for an encumbrance resulting from a county ordinance and official map, has somehow unwittingly declared each and every South Carolina official map law to be an unconstitutional governmental taking. To this end, Chicago Title contends, without legal support, that if an encumbrance exists, then a governmental taking has occurred. The Court of Appeals saw "several flaws in this logic, the fundamental one being the false equivalence between an encumbrance and a taking." In a strained effort to stoke fear and avoid contractual liability,

Chicago Title ignores decades of United States and South Carolina law and asks this Court to follow suit.

Beyond Chicago Title's misguided governmental taking argument, the Petition still provides no real basis for further review. The Court of Appeals applied well established South Carolina law to conclude the ordinance and maps, recorded in the Deed Books of Horry County, constituted a defect and encumbrance on the property covered by two title insurance policies. The ordinance "reserved" a portion of the insured property for a highway right-of-way and proscribed any use of the reserved land that would interfere with the county's future acquisition of it. Similarly, the Court of Appeals properly concluded there is no factual dispute the ordinance created a reasonable probability of litigation (a future eminent domain proceeding was a near certainty), and therefore it rendered title to the insured property unmarketable and a covered loss under the policies. Finally, the Court of Appeals properly construed the policies' exclusions "most strongly" against the insurer, concluding they did not apply because the ordinance was far more than a typical land use measure and because the ordinance itself is not an eminent domain proceeding.

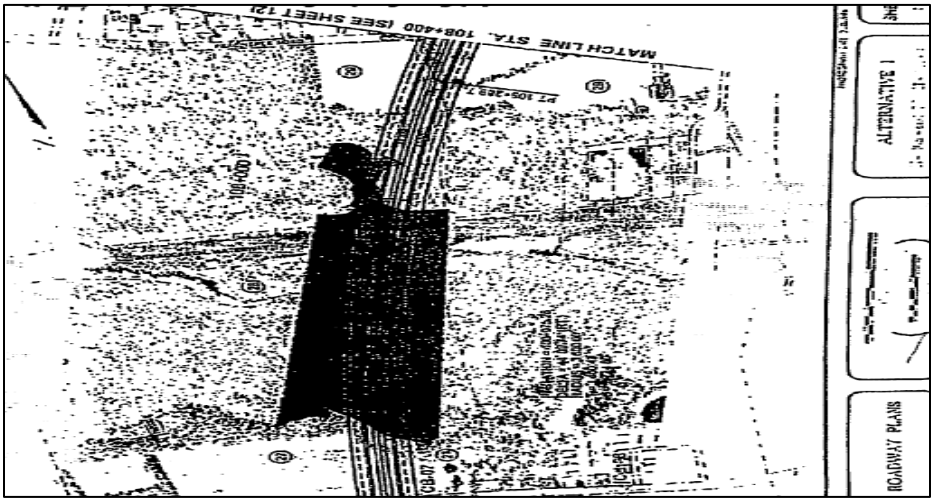
COUNTER-STATEMENT OF THE CASE AND FACTS

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]. The county specifically designates these locations by creating an Official Map. (R.p. 362). Prior to adopting the Official Map, the county sends a notification letter to property owners whose property lies within the "area to be reserved for public use." R. p. 365. After the Official Map is adopted and the land has been reserved for public use, the county prohibits any new construction "within the reservation area". [R.p. 363]. The county prohibits new construction in the reservation area as a means "to reduce future acquisition costs." [R.p. 373]. Horry County enforces its financial

interests in the reservation area with civil remedies and criminal penalties, up to and including imprisonment for any person improperly building on the reserved land. [R.p. 365].

On July 2, 2002, Horry County passed Ordinance 88-202 ("Ordinance") to amend the Official 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.[1] [R.p. 373]. One week later, the county gave public notice that it was enforcing its interests in the reserved land and highway right-of-way by recording the Ordinance and amended map at the office of the Horry County Register of Deeds in Deed Book 2497, Page 0986, indexed under Horry County. [R.p. 373].

The property in this case is known as Peachtree Plantation ("Property") and consists of 131 acres of raw land adjacent to the Intracoastal Waterway. As shown on Sheet 11 of the publicly recorded amended map, the reservation area and highway right-of-way runs through the middle of 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]

[1] Horry County's Official Map Ordinance defines "right-of-way" as "land reserved, used, or to be used for a road …" [R.p. 361].

Approximately four years later, Peachtree Properties of North Myrtle Beach, LLC ("Peachtree Properties"), purchased the Property for $22,520,000.00. [R.p. 413]. Peachtree Properties financed the purchase with two loans, resulting in a first mortgage to R.E. Loans, LLC, which was later assigned to Respondent Lynx Jericho, and a second mortgage to Respondent Jericho State. [R.pp. 424-440, 441-496].

At closing, Chicago Title issued a Loan Policy to each lender. [R.pp. 497-505, 506-515]. The Loan Policies provide coverage for, among others, (1) Any defect in or lien or encumbrance on the title, and (2) Unmarketability of the title of the property. Importantly, and central to this case, the Loan Policies do not except from coverage under Schedule B's "Exceptions from Coverage" the publicly recorded Ordinance and amended map. [R.pp. 505, 515].

At the time Chicago Title issued the Loan Policies, Jericho State did not know Horry County had established the "reservation area" for a highway right-of-way across the middle of the valuable waterfront property. [R.p. 794, lines 13-18; p. 802, lines 6-25; p. 823, lines 1-3; p. 872, line 1 through p. 873, line 17]. Instead, Jericho State completely relied on Chicago Title's Policy showing the only Exception to Coverage being a water and sewer easement. [R.p. 867, lines 6-16; p. 868, lines 18-19]. To be sure, had Chicago Title revealed the Ordinance on the Policies, or identified it as an Exception to Coverage, Jericho State would have never engaged in its $4.26 million 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, the landowner, Peachtree Properties, defaulted on both loans. Jericho State foreclosed on its Second Mortgage, thus taking title to the Property subject to the First Mortgage. [R.p. 516–532; R.p. 533-542].[2]

[2] Throughout this process, Jericho State remained unaware that Horry County had established the reservation area and highway right-of-way on the Property, 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]. Later, after Jericho State learned that Peachtree Properties previously agreed to donate the reserved right-of-way land to Horry County as part of a rezoning agreement, it filed suit to set aside the donation, but the lawsuit was dismissed as moot when the SCDOT filed to condemn the right-of-way land. [543-599; R.p. 844, lines 4-17; R.p. 848, lines 9-23; R.p. 864, lines 4-17; R.p. 562].

On December 15, 2009, the SCDOT filed its condemnation proceeding to take the reserved land to construct the highway, and four years later, the jury awarded Jericho State $2,100,000.00 in the condemnation case.[3] [R.pp. 600-605; 719-721; 1557-1559]. Thereafter, SCDOT began construction of a four-lane highway and bridge through the middle of the waterfront property.

[R.p. 225-227]

Respondents Jericho State and Lynx Jericho filed title insurance claims seeking coverage for the defect and encumbrance and unmarketability of title created by the Ordinance and maps

[3] Although not directly pertinent to this Petition, it is important to note the valuation date for a condemnation proceeding is set by statute (in this case, at the end of 2009 in the depths of the Great Recession), while Respondents' valuation date for damages under the Policies are set "as of Date of Policy" (during the economic boom).

Chicago Title denied both claims. Respondents filed separate lawsuits against Chicago Title alleging breach of contract and bad faith denial of benefits, to which Chicago Title answered denying liability. [R.pp. 24-70]. The cases were consolidated and referred to the Special Referee, and the parties ultimately filed reciprocal motions for summary judgment. The Special Referee denied Respondents' motion and granted, in part, Chicago Title's motion as to liability only. [R.pp. 5-23].

Respondents appealed and the Court of Appeals reversed in part, affirmed in part and remanded the case to the Special Referee, to which Chicago Title filed a petition for rehearing and suggestion for rehearing *en banc*. On October 7, 2020, the Court of Appeals granted the petition, denied rehearing *en banc*, and issued a revised opinion, again reversing the Special Referee as to coverage under the Loan Policies, affirming the Special Referee as to his summary judgment order on the bad faith claims, and remanding the case to the Special Referee for further proceedings.

ARGUMENT

1. THE COURT OF APPEALS PROPERLY CONCLUDED AN ENCUMBRANCE IS NOT THE SAME AS A GOVERNMENTAL TAKING.

Chicago Title's radical assertion that the Court of Appeals has declared each and every official map law in the state to be an unconstitutional governmental taking is not only designed to avoid contractual coverage for an encumbrance, it is fatally flawed for two reasons.[4]

First, Chicago Title argues, without citing to any legal authority, that if its insurance policies provide coverage for the encumbrance created by the Ordinance, then a governmental taking has occurred. This is incorrect as a matter of law, however, because while an encumbrance is burden on, or interest in, the land that diminishes its value, a taking is a much more grievous act,

[4] As more fully discussed below, Chicago Title's argument that an encumbrance is the same as a taking is new to this case. It is not an issue ruled on by the Special Referee, nor addressed by the Court of Appeals until Chicago Title raised it in its Petition for Rehearing.

requiring proof of a governmental regulation that is so overwhelmingly oppressive that it results in the total loss of all economically viable use of the property.

An encumbrance is "any weight" on the land that lowers its value without conflicting with the passing of fee. *Grice v. Scarborough*, 29 S.C.L. (2 Speers) (1844). It is "a burden on the land" or a "right or interest" in the land held by someone other than the owner which diminishes the value of the estate but does not defeat the owner's title. *Butler v. Butler*, 67 S.C. 211, (1903); *Truck South, Inc. v. Patel*, 339 S.C. 40 (2000). On the other hand, a taking by governmental regulation is an extreme act that arises when the action "denies all economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Agins v. Tiburon*, 447 U.S. 255 (1980)(zoning ordinance limiting land use to single family dwellings is not a taking because it does not prevent best use of land nor extinguish a fundamental attribute of ownership). Countless federal and state cases illustrate the excruciatingly detailed legal analysis and high burden of proof needed to support a taking. *See*, *e.g.*, *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528 (2005); *Columbia Venture, LLC v. Richland Cnty*., 413 S.C. 423 (2015); *Dunes W. Golf Club, LLC v. Town of Mt. Pleasant*, 401 S.C. 280 (2013).

The Court of Appeals saw through Chicago Title's distorted legal analysis, noting that the insurance company relies on "the false equivalence between an encumbrance and a taking." Indeed, Chicago Title's alleged concern that their contractual liability for an encumbrance will result in widespread inverse condemnation proceedings flies in the face of long standing, well-stablished United States and South Carolina law. Moreover, Chicago Title's argument ignores that its policies insure the entire 131 acres against encumbrances, not just the 10 acre reservation area. While only a small fraction of the property was reserved by the Ordinance, the encumbering interest adversely affected the substance and value of the *entirety* of the insured property by cutting

it in half. In other words, by improperly blending the meanings of encumbrance and taking, Chicago Title's flawed analysis is blind to the remaining 121 acres insured by its polices.

Second, Chicago Title's argument suggests that all official map laws are identical and therefore the legal effect of one is the legal effect for all. This too is erroneous, as Horry County's Ordinance contains encumbering provisions not found in the enabling statute and there is no evidence of record to suggest it is representative of any other local law. For that matter, there is nothing in the record that even indicates that any of South Carolina's other counties have adopted official maps.

The Court of Appeals expressly limited its decision to the specific circumstances of this case, namely its finding that Chicago Title's insurance policies provide protection for title defects created by the Ordinance. Notably, Horry County's Official Map Ordinance and Ordinance go well beyond the limited provisions of the official map statute in several respects, including, but not limited to (i) establishing a "reservation area", (ii) requiring a notification letter to be sent to property owners whose property lies within the "area to be reserved for public use", (iii) defining "right-of-way" to include "land reserved" for a road, (iv) creating a right-of-way for a highway, (v) imposing civil and criminal penalties for violations, and (vi) proscribing development of the property within the reservation area "as a means of reducing acquisition costs". These terms and provisions are nowhere to be seen in the official map statute, but all support the Court of Appeal's conclusion the Ordinance constituted a defect and encumbrance on the Property. Moreover, Chicago Title has pointed to no other local ordinance that similarly exceeds the bounds of the enabling statute and may be affected by the Court of Appeal's opinion.

Throughout its Petition, Chicago Title repeatedly tries to reshape this case into a takings case, blurring what should otherwise be a clear distinction between contractual insurance coverage for an encumbrance that affects the value of the entirety of the insured property and a governmental

taking. For example, Chicago Title cites to *Kiriakides v. Sch. Dist. Of Greenville Cty*., 382 S.C. 8 (2009) for the proposition that an expressed intent to take property, by itself, cannot result in a taking. This is true, but totally irrelevant to whether an encumbrance is a covered loss under a title insurance policy. Similarly, Chicago Title quotes *S.S.Kresge Co. v. City of New York*, 87 N.Y.S.2d 313 (1949) to argue that an official map does not, in and of itself, constitute a taking. This, however, only supports the obvious distinction between a covered loss for encumbrance and the extreme act of a governmental taking. Finally, Chicago Title baldly asserts the Court of Appeals concluded there was a taking by adopting the reasoning of *Kirby v. N.C. Dep't of Transp*., 786 S.E.2d 919 (N.C. 2016). If the Court of Appeals had believed this to be the case, then it would have said so, but instead, the court expressly rejected Chicago Title's "flawed" reasoning.

The Court of Appeals properly found the Ordinance constituted a defect and encumbrance, which is a covered loss under the Loan Policies. Chicago Title's contention that the Court of Appeals' opinion also has the effect of declaring the Ordinance and each and every official map law in the state to be an unconstitutional governmental taking is illogical and deeply flawed. This is not a substantial constitutional issue worthy of the Court's attention, instead it is a substantial effort to manufacture an issue where none exists.

2. THE COURT OF APPEALS PROPERLY CONCLUDED THE ORDINANCE AND MAPS CONSTITUTE A DEFECT AND ENCUMBRANCE.

Chicago Title's insurance policies provide coverage for "any defect in or lien or encumbrance on the title." South Carolina defines "encumbrance" as follows:

- "any weight" on the land that lowers its value. *Grice v. Scarborough*, 29 S.C.L. (2 Speers) (1844).
- "a burden on the land" adverse to the owner's interest that impairs the value of the land but does not defeat the owner's title. *Butler v. Butler*, 67 S.C. 211 (1903).
- "a right or interest in the land" to the diminution in value of the estate although consistent with the passing of the fee. *Truck South, Inc. v. Patel*, 339 S.C. 40 (2000).

Thus, properly focused, the true issue remains whether Horry County's Ordinance and maps resulted in "any weight" or a "burden" on the land, or some "right or interest", that diminishes or lowers the value of the Property without defeating the owner's title.

To be sure, it only takes a plain reading of the Ordinances to see the Court of Appeals properly concluded the Ordinance and maps result in a "weight" or a "burden" on the land, or some "right or interest", that diminishes or lowers the value of the Property. First, the Official Map Ordinance describes the nature of the county's encumbering interest as a reservation of land. In fact, it specifically establishes "reservation areas" and land "reserved for public use".[5] Second, the Ordinance identifies the character of Horry County's interest in the land as a "right-of-way", defining that term as "land reserved" for a road. In this case, the recorded maps show the exact location of the highway, including through the middle of the insured waterfront property. Third, the Ordinance emphasizes Horry County's economic interest in the land, as the county affirmatively bars any new improvements within the reservation area as a means "to reduce future acquisition costs". Finally, the Ordinance describes the very substantial degree to which Horry County protects and enforces its interest in the land reserved for public use with civil and criminal penalties. Indeed, Horry County is willing to send someone to jail to protect its economic interest in the reserved land.

Thus, the Ordinance, recorded in the Deed Books of Horry County, establishes a "reservation area" for a highway right-of-way that bisects the waterfront property, secures the County's interests in the land with restrictions, and enforces its economic interests with civil and criminal penalties. Clearly, these facts show the Ordinance is a "weight" or a "burden" on the land, and created "some right or interest" that diminished the value of the insured Property, and

[5] 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).

therefore, the Court of Appeals properly found the Ordinance and maps constitute a defect or encumbrance.

Chicago Title argues the Ordinance is nothing more than a zoning and planning tool and emphasizes the enabling statute's "land use control" language, as if these are magic words that somehow prove Horry County's Ordinance only regulated use of the land but did not encumber it. But Chicago Title ignores the Ordinance's several *additional* encumbering provisions that are not seen in the statute (as described above), and it side-steps the fact that it is the Ordinance and recorded maps that encumbered the insured property, not the state statute.

Chicago Title also attempts to minimize the encumbering effects of the Ordinance by pointing to its appeal process, whereby the affected property owner can appeal their property's inclusion on the map after which the county has 30 days to decide whether to exempt the land, issue permits with specific conditions, or initiate eminent domain proceedings. Again spinning away from an encumbrance analysis, Chicago Title argues an appeal must take place before a taking can even be considered. As noted by the Court of Appeals, with a proper focus on the true issue at hand, this actually "proves the Appellants' point that the Ordinance encumbered the Property." Indeed, absent affirmative action *by the property owner*, the county's encumbering land reservation and economic interest in the reserved land will exist indefinitely until the county's planned condemnation takes place.[6] Of course, as stated previously, the appeal process is only available to the owner of the property, not a mortgagee whose only knowledge of the property was limited to what was stated in the policies.

Finally, Chicago Title argues the Ordinance is not an encumbrance because it affects only use of the insured property. To this end, Chicago Title directs attention to several cases involving

[6] To a large degree, the practical effect of the Ordinance and maps is to grant the County a recorded option to purchase the reserved land - with no end date. See, *Adams v. Willis*, 225 S.C. 518 (1954)(a subsequent purchaser was subordinated to a prior recorded option to purchase).

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.[7] All of the cases cited by Chicago Title have two things in common: (1) none of them establish 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. Although land with wetlands is bought and sold every day, Chicago Title fails to point out any cases relating to land formally reserved for a road by an ordinance and map recorded in the deed books.

This Court's review of whether an encumbrance exists is unnecessary. The Court of Appeals recognized that it is the substance and effect of the Ordinance that matters, particularly in this Ordinance that is "so foreign from typical land use measures." Relying on South Carolina's long standing and well-established law on encumbrances, the Court of Appeal properly concluded the Ordinance related to and affected title to the property as a defect and encumbrance and, thus, a covered loss under the policies.

3. THE COURT OF APPEALS PROPERLY CONCLUDED THE ORDINANCE AND MAPS RENDERED TITLE TO THE PROPERTY UNMARKETABLE.

Respondents cannot say it any better than the Court of Appeals already has: "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." Even Chicago Title would likely balk at such a purchase.

[7] *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) *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).

As noted above, unmarketability of title is a separate type of covered loss under the Loan Policies.[8] A marketable title is one (1) free from defects and encumbrances, and (2) free from the reasonable probability of litigation. *Scalise Development, Inc., v. Tidelands Investments, LLC*, 392 S.C. 27 (2011); *Sales Int'l Ltd. v. Black River Farms, Inc*., 270 S.C. 391 (1978). Because the insured property suffered an encumbrance, as discussed above, the Respondents also suffered a covered loss for unmarketability of title under the policies.

The Court of Appeals also properly concluded the Property was not free from the reasonable probability of litigation, because "the right-of-way was reserved for acquisition, making future condemnation reasonably probable." In fact, notwithstanding the appeal process, the Ordinance reserved land for where the location of the highway "will occur", meaning that condemnation litigation was not only reasonably probable, it was a virtual certainty. Other than generally stating the government could conceivably condemn any property, Chicago Title's Petition fails to specifically address this important component of marketability, presumably because the government's future acquisition of the property is a stated purpose of the Ordinance, and the Ordinance's promise of future litigation actually came true in 2009. As such, this straightforward marketability issue does not require this Court's attention.

4. THE COURT OF APPEALS PROPERLY CONCLUDED POLICY EXCLUSION #1(a) DOES NOT APPLY.

The insurance company bears the burden of establishing an exclusion's applicability and these exclusions are construed "most strongly against the insurance company." *Owners Ins. Co. . Clayton*, 364 S.C. 555 (2005); *General Acc. Ins. Co. v. Safeco Ins. Companies*, 314 S.C. 63 (Ct.App 1994).

[8] The Loan Policies' definition is not helpful to this analysis. As the Court of Appeals noted, the policies' definition of unmarketability is opaque, circular and unenlightening, basically defining unmarketability of title as title that is not marketable.

Policy Exclusion #1(a) generally excludes from coverage governmental use restrictions, such as building codes, zoning laws and environmental regulations. Moreover, 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.

a. <u>Exclusion #1(a) Does Not Apply.</u>

On its face, Exclusion #1(a) applies to laws relating to land use only, and its language illustrates this limited intended scope by describing the types of excluded laws to include wetlands restrictions, occupancy limitations, subdivision requirements, and general zoning matters. To be sure, the Ordinance is not such a law, and, as aptly described by the Court of Appeals, is "so foreign from typical land use measures".

The unique nature of the Ordinance renders Exclusion #1(a) inapplicable. No doubt, common building and zoning laws and wetlands restrictions, as such are identified in Exclusion #1(a), do not establish land reserved for public use or other third party interests in the land, but the Ordinance clearly does. Similarly, those same common building and zoning restrictions as described in the exclusion 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(a) excludes laws that create an encumbrance or interest in land in favor of the government such as those created by the Ordinance.

Chicago Title takes issue with how the Court of Appeals construed Exclusion #1(a), arguing it should be construed more broadly to defeat coverage. In fact, Chicago Title asserts that "accurately construing the Ordinance as a zoning-like use restriction requires applying Exclusion #1." The obvious problem with this rationale is that the Ordinance is not a "zoning-like" use restriction as described in the exclusion, it is much more, reserving land for public use and acquisition and containing other encumbering provisions. Tellingly, Chicago Title cites to no cases that apply this or a similar exclusion to a law or ordinance that creates a similarly encumbering governmental interest in the land.[9] The Court of Appeals properly construed this exclusion "most strongly" against the insurance company, not most broadly as desired by Chicago Title.

Finally, Chicago Title argues that a right-of-way is an easement, and because an easement affects use or enjoyment but not title, any right-of-way created by the Ordinance must excluded by Exclusion #1(a). In support, Chicago Title cites to *Morris v. Townsend*, 253 S.C. 628, 635 (1970), which states "An easement gives no title to land on which the servitude is imposed. It is, however, a property or an interest in the land." Chicago Title's convoluted easement analysis, raised for the first time in this Petition, is fraught with errors. First, Respondents have never asserted Horry County took title to the insured land through the Ordinance, only that the law was an encumbrance and rendered title to the Property unmarketable. Second, the term right-of-way is uniquely defined by Horry County to include "land reserved" to be used as a road. Third, *Morris* clearly says an easement is an interest in the land, which meets the definition of encumbrance. Lastly, Chicago Title again ignores that the Ordinance is not merely a use restriction described in

[9] Before the Special Referee and Court of Appeals, Chicago Title cited to numerous cases from across the country that held common zoning laws and wetlands restrictions are excluded from title insurance coverage. None of them, however, referenced a publicly recorded "reservation for a road right-of-way." Nor do any of these cases suggest that a simple zoning ordinance permits the government to reserve private property to build its own structures in set-back areas, or to harvest timber located in a buffer zone, or to preserve wetlands with its own public nature park All such cases involve excluded laws that only regulate use by the Owners and nothing more.

Exclusion #1(a), instead it establishes a "reservation area" and protects the county's financial interests in the land to reduce acquisition costs.

Simply put, Chicago Title labels the Ordinance as "zoning-like" in a desperate effort to squeeze the Ordinance into an ill-fitting exclusion, that when construed "most strongly" against the insurance company, is simply inapplicable to the unique facts of this case. The Court of Appeals properly found that because the Ordinance related to and affected the title of the land, not just its use, Exclusion #1(a) does not apply.

b. <u>The Exception to Exclusion #1(a).</u>

Because Exclusion #1(a) does not apply, the exception to that exclusion is irrelevant. Even if Exclusion #1(a) does apply, which it does not, the exception renders the exclusion inapplicable "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."

Chicago Title argues the exception to the exclusion is not met because there has been no notice of violation or alleged violation. But this ignores the policies' alternative language that either a publicly recorded notice of enforcement **<u>or</u>** a notice of a violation or alleged violation meets the terms of the exception. No one contends there was a violation or alleged violation, but the record is clear that there is a "notice of enforcement" recorded in the public records.

Keeping in mind that Exclusion #1 (and its exception) is to be construed most strongly against the insurer, a reasonable interpretation of "notice of the enforcement thereof" includes a notice by the government that it is enforcing its rights and interest in the land as created by the law, ordinance or regulation. To be sure, simply enacting the Ordinance was not Horry County's only action in this regard, but importantly, the county also took the additional and subsequent, and in this case critical, step of recording the Ordinance in the deed books, which gave notice to all

that the government was enforcing its interests in the "reservation area".[10] Indeed, as argued above, Horry County enforced and protected its economic interest in the reserved land by publicly recording the Ordinance and maps and by immediately minimizing the value of the 131 acres by cutting it in half so the reserved land could be purchased at a cheaper price by imposing restrictions and criminal penalties.

Lastly, Chicago Title 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 but instead in the name of Horry County. The Loan 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 meet the policy definition. Truly, if something recorded in the Deed Books of Horry County is not a public record, what is?

Of course, Chicago Title's policy definition does not state that a public record is only a "public record" if indexed within the chain of title. Yet, that is what Chicago Title attempts to argue by bootstrapping a statute (S.C. Code 30-9-40) that is nowhere to be found in their policy. Indeed, not only is Chicago Title asking this Court to read Exception 1(a) overly broad rather than

[10] Chicago Title cites to *Haw River Land & Timber Co. v. Lawyers Title Ins. Corp*., 152 F.3d 275 (4th Cir. 1998), for the proposition that an ordinance standing alone is not a notice of enforcement. This case is distinguishable on several grounds: (i) unlike Horry County's Ordinance, the NC ordinance was only maintained in the minute books, and the town did not take the additional step of recording it in the deed books (which the court found critical), (ii) the court applies NC law, not SC law, (iii) the NC ordinance merely established a buffer zone to prohibit timbering for environmental reasons, but it did not create "reservation area" or other encumbering governmental interests in the property, (iv) because the NC town had no encumbering interest to enforce, there was no need to record the ordinance in the deed books to give notice of enforcement; and (v) the NC ordinance did not reserve property for acquisition and did not contain enforcement provisions such as civil remedies and criminal penalties as such are seen in Horry County's Ordinance.

most strongly against the insurance company, it is asking the Court to insert new terms and conditions into the Loan Policies. Under that theory, Chicago Title could ask the courts to do that in every case in which their policies omit critical language.

In *Whitlock v Stewart Title Guaranty Company*, 2011 WL 4549367 (D.S.C. 2011), the court addressed a very similar situation involving an unrecorded Horry County resolution that prevented the issuance of building permits for new construction. Similar to Exclusion #1(a) 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." 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 county resolution met the public records exception and the exclusion therefore did not bar coverage under the title insurance policy.

Chicago Title seems to confuse its role as an insurer with the role of a purchaser's title examiner. In so doing, Chicago Title ignores the very purpose of the title insurance policies it sells: to protect a policy holder from encumbrances and other matters that may affect or burden his title when he takes it, even if it is not revealed in a standard title search. As aptly quoted by the Court of Appeals:

> [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).

The Court of Appeals properly determined that Exclusion #1(a) does not apply in this case. Moreover, Chicago Title's arguments regarding the public records exception to the exclusion are without merit and unnecessary for this Court to review.

5. THE COURT OF APPEALS PROPERLY CONCLUDED POLICY EXCLUSION #2 DOES NOT APPLY.

Exclusion #2 excludes from coverage eminent domain proceedings. The Court of Appeals concluded this exclusion does not apply because Respondents are not making a claim for the 2009 condemnation proceeding. This is true and no further analysis is needed. Nonetheless, in a strained effort to make this exclusion somehow apply, Chicago Title reverts back to claiming that an encumbrance is the same as a taking, and then stretching even further, it claims a taking is the same as an eminent domain proceeding, which is excluded under Exclusion #2. Not only does Chicago Title's argument fail because an encumbrance is not the same as a taking, it fails because an eminent domain proceeding only occurs pursuant to the South Carolina Eminent Domain Procedure Act (the "Act"), which is clearly inapplicable to the Ordinance. The Court of Appeals correctly concluded Exclusion #2 does not apply.

6. THE COURT OF APPEALS PROPERLY CONCLUDED THAT NO PARTY REQUESTED A RULING ON WHETHER THE ORDINANCE CONSTITUTES A TAKING.

Chicago Title's argument that an encumbrance is the same as a taking was presented to the Court of Appeals for the first time in Chicago Title's Petition for Rehearing. In their Return, Respondents pointed out that Chicago Title had flip-flopped from its prior position that this issue was <u>not</u> before the court and Chicago Title was only raising it as a last ditch effort to avoid coverage under its policies. Nonetheless, the Court of Appeals specifically responded to Chicago Title's new argument, finding "several flaws" in Chicago Title's attempt to falsely equate an encumbrance and a taking.

Now, Chicago Title confuses its opportunity to raise "additional reasons" to affirm the lower court with a demand that the Court of Appeals should specifically rule on whether the Ordinance constitutes a taking. See, *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419 (2000)("the 'winner' in the lower court may raise on appeal any additional reasons the appellate court should affirm"). A careful reading of Chicago Title's Petition for Rehearing, however, reveals that it did not ask the Court of Appeals to specifically determine whether the Ordinance is a taking, instead Chicago Title argued that if the Ordinance constituted an encumbrance, then the court also concluded there was a taking. It was an attempt to defeat coverage *for an encumbrance* by instilling false fear of its consequences. The Court of Appeals did not preclude Chicago Title from making this argument and specifically addressed it.

Really, Chicago Title's demand that the Court of Appeals should have decided whether the Ordinance is a taking is another ploy to strong-arm the proceedings and send this Court down a rabbit hole. To be sure, the issue in this case is not whether the Ordinance is a taking of 10 acres, but instead whether the title insurance policies provide coverage for a defect and encumbrance and unmarketability of title affecting the entire 131 acres insured by Chicago Title, as such is alleged in the Complaints. While Respondents described in their lawsuits 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", the coverage claims were then, and remain today, limited to encumbrance and unmarketability of title.[11]

In its Answers to the lawsuits, Chicago Title raised as an affirmative defense that Exclusion #2 applied because no notice of the exercise of the rights of eminent domain was recorded in the

[11] During the entirety of the litigation of this case, Respondents have steadfastly maintained they are entitled to coverage for an encumbrance and unmarketability and that Exclusion #2 does not apply, but Respondents acknowledge they previously asserted, as a *secondary and alternate* argument that even if Exclusion #2 does apply, which is does not, then its exception for a taking may apply. Again, as to whether there was a covered loss under the policies, the issue always has been, and still is, whether the Ordinance constitutes an encumbrance or unmarketability of title, not whether it is a taking.

public records (rather than asserting a defense to a claim of inverse condemnation or an unconstitutional taking, as that was not alleged in the lawsuits). In fact, before the Court of Appeals, Chicago Title asserted the taking issue was not properly before the court. Now, at the tail end of 9 years of litigation, Chicago Title is changing its tune, seeking a specific ruling on an issue that no one asked for. Moreover, contrary to Chicago Title's arguments, the Special Referee did not conclude the Ordinance failed to act as a taking, he (erroneously) concluded Exclusion #2 applied because the Ordinance failed to meet the strict requirements of the South Carolina Eminent Domain Procedure Act (S.C. Code 28-2-10, et seq.). The Court of Appeals reversed the Special Referee's finding on this issue because all parties agree that Respondents are seeking coverage for the encumbering and unmarketability effects of the Ordinance and not the 2009 condemnation proceeding.

Simply put, the Court of Appeals most clearly allowed Chicago Title to argue its "additional reasons" in support the Special Referee's finding that the Ordinance did not constitute an encumbrance, and the court specifically responded to those reasons. As such, Chicago Title's preservation issue does not merit further review.

CONCLUSION

The Court of Appeals limited its opinion to the specific facts of this case and the uniquely encumbering aspects of the Ordinance and maps. Chicago Title's argument that their contractual liability for an encumbrance equates to an unconstitutional taking by all official map laws across the state is flawed, lacks any legal support, and is unworthy of this Court's attention. The Court of Appeals correctly determined the Ordinance constituted a defect and encumbrance and rendered title unmarketable to the insured property under the coverage terms of the polices and that the policy exclusions did not apply. For these reasons, the Petition should be denied.

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