THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. 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.

PETITIONER CHICAGO TITLE INSURANCE COMPANY'S REPLY TO THE RETURN OF RESPONDENTS

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I. INTRODUCTION

Petitioner Chicago Title Insurance Company ("Chicago Title") seeks this Court's review of the South Carolina Court of Appeals' decision reversing the Special Referee's grant of summary judgment in favor of Chicago Title on coverage under two lender's title insurance policies ("Policies"). Respondents Jericho State Capital Corp. of Florida and Lynx Jericho Partners, LLC ("Respondents") and the Court of Appeals misconstrue how the Policies apply to the Horry County map ordinance ("Ordinance") at issue. Simply, the Ordinance is either not a covered matter or is excluded from the Policies' coverage because:

1. The Ordinance did not give Horry County a real property interest in the affected land but instead only restricted the use of the affected land, and the Ordinance falls within Exclusion from Coverage 1(a) as it would result in loss or damage that arises by reason of any "ordinance . . . restricting, regulating, prohibiting or relating to . . . the occupancy, use, or enjoyment of the land" or "the location of any improvement now or hereafter erected on the land"; OR

2. The Ordinance gave Horry County a real property interest in the affected land, which would render the enabling statutes and the Ordinance unconstitutional as a taking without just compensation by Horry County, and would be excluded from the Policies' coverage by Exclusion from Coverage 2, the eminent domain exclusion.

Seeking to avoid the two Exclusions from Coverage that block Respondents' path to recovery, Respondents contend the Ordinance is something more than an encumbrance affecting use but something less than a property right acquired through eminent domain. However, Respondents and the Court of Appeals are wrong for several reasons.

II. ARGUMENT IN REPLY

A. THE COURT OF APPEALS ERRONEOUSLY HELD THE ORDINANCE CONSTITUTES A DEFECT AND ENCUMBRANCE ON TITLE AND RENDERS TITLE TO THE PROPERTY UNMARKETABLE.

The Policies cover title defects, encumbrances, and other matters rendering title to the land unmarketable. The Court of Appeals incorrectly found that the Ordinance created a defect or

encumbrance on title to the Property or rendered title unmarketable when the Ordinance is merely a land use planning tool as the enabling statutes expressly state and as Chicago Title has consistently asserted.

At the outset, commentators recognize that use restrictions are nearly always *not* encumbrances unless a violation occurred, which is not asserted here:

> For purposes of encumbrances, a distinction is made between the existence of a zoning ordinance and an existing violation of a zoning ordinance, with the former usually not getting encumbrance status and the latter qualifying as an encumbrance. This distinction is well-settled in the literature. The determination that the existence of a zoning ordinance, standing alone, does not encumber real property has several bases: 1) that the exercise of a municipality's police power in designating and enforcing zoning ordinances does not affect marketab[ility] of title; 2) an encumbrance, in its traditional sense, is an interest in the property held by a third party which is not the case of the government's interest in a zoning ordinance and 3) adding zoning ordinances to the list of things that encumber property would cause confusion in the law of conveyances since neither a title search nor an examination of the property would necessarily reveal the zoning ordinance. Since the existence of a zoning ordinance does not encumber real property and does not impact marketable title, it is not customary for a closing attorney to search the zoning records as part of a title search.

Dorothy D. Nachman, *Neighborhood Conservation Districts: A New Planning Tool Demands the Evolution of The Covenant Against Encumbrances*, 41 N.C. CENT. L. REV. 1, 13 (2018).

Likewise, Chicago Title cited analogous cases where courts have recognized title was not affected by regulations or ordinances limiting an owner's use of property. *See, e.g., Haw River Land & Timber Co. v. Lawyers Title Ins. Corp*, 152 F.3d 275 (4th Cir. 1998); *Truck South, Inc. v. Patel*, 339 S.C. 40, 528 S.E.2d 424 (2000); *McMaster v. Strickland*, 305 S.C. 527, 409 S.E.2d 440 (Ct. App. 1991); *Martin v. Floyd*, 282 S.C. 47, 51, 317 S.E.2d 133, 136 (Ct. App. 1984).

The series of statutes enabling official maps (the "Enabling Statutes") expressly state official maps are necessary "to promote and preserve the public safety, economy, good order, appearance, convenience, prosperity, and general welfare and is *one of the several instruments of*

land use control *authorized by this chapter for the implementation of comprehensive plans,* or parts thereof, adopted in accordance with the provisions of this chapter." S.C. Code Ann. § 6-7-1220 (emphasis added). The Enabling Statutes define an official map as "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). Further, "[c]ounties 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 created an official map for Horry County in the manner provided by the Enabling Statutes.

The Enabling Statutes and the Ordinance limit development in an area affected by an official map and are precisely the kind of land use regulations that fall squarely within Exclusion 1(a). The Ordinance, enacted pursuant to the Enabling Statutes, is not like the map statute found to be a taking in *Kirby v. N.C. Dep't of Transp.*, 786 S.E.2d 919 (N.C. 2016), which limited use for three years without a way to lift the restrictions. *See also* 8 Zoning and Land Use Controls § 46.05 ("In contrast to the North Carolina statute struck down in *Kirby v. N.C. DOT*, the map statutes that have been held not to constitute a taking (1) limit the duration of the reservation and (2) allow the owner an opportunity to develop the mapped lands by obtaining a variance. These types of safeguards satisfy some courts' concerns that the reservation is a reasonable regulation of private property."). The Enabling Statutes and the Ordinance allow a landowner with property covered by the official map to apply to the planning commission to either appeal the denial of a permit or exempt the property from the official map. *See* S.C. Code Ann. §§ 6-7-1270 and 1280.

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 id.*; *see also* Ordinance 107-98 §§ 5.2.1, 5.2.2. The governing authority must decide promptly how it will proceed regarding the property, and the use restrictions either go away or the county must initiate eminent domain proceedings.

The unambiguous plain language of the Enabling Statutes and the Ordinance require interpreting them as a zoning regulation or use restriction and rejecting any interpretation that results in vesting a property interest in a governmental entity, which would create a taking without just compensation. The stated purpose in the Enabling Statutes is to create a method of "land use control." *See* S.C. Code § 6-7-1220. Even if Respondents had asserted an alternative reasonable construction of the Enabling Statutes, this Court's doctrine of constitutional avoidance requires construing the Enabling Statutes to avoid unconstitutional takings. *See S.C. Human Affairs Comm'n v. Zeyi Chen*, 430 S.C. 509, 528, 846 S.E.2d 861, 871 (2020) ("All statutes are presumed constitutional and will, if possible, be construed so as to render them valid."); *State v. Neuman*, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009) ("A possible constitutional construction must prevail over an unconstitutional interpretation.").

To avoid the clear intent of the Enabling Statutes, Respondents assert the Ordinance goes beyond what the Enabling Statutes authorize based on several incorrect or irrelevant statements:

> 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.

Respondents' Return at 8.

Respondents erroneously assert the Ordinance "establish[es] a reservation area" beyond what the Enabling Statutes allow when in fact S.C. Code § 6-7-1220 provides, "[c]ounties 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." (emphasis added).

Respondents assert that requiring a notification letter to be sent to property owners whose property lies within the "area to be reserved for public use" is beyond what the statutes allow. While the Ordinance requires the letter and the Enabling Statutes do not, this requirement is not material to this case. The letter simply provides a benefit to the landowner and does not in any manner affect title or grant Horry County an interest in the Property.

Respondents also incorrectly assert the Ordinance exceeds the authority under the Enabling Statutes, stating that the Ordinance differs by defining "right-of-way" to include "land reserved" for a road and therefore the Ordinance creates a highway right-of-way. S.C. Code § 6-7-1220 expressly provides for reserving rights-of-way for *future*, not immediate, acquisition: "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." (emphasis added). At most, official map ordinances, like the Ordinance, merely express an intention to take property in the future, which this Court recognizes is not a taking. *See Kiriakides v. Sch. Dist. of Greenville Cty.*, 382 S.C. 8, 14, 675 S.E.2d 439, 442 (2009).

Respondents also assert the Ordinance differs from the Enabling Statutes by imposing civil and criminal penalties for violations. However, as Chicago Title has previously argued in this case,

counties enforce zoning ordinances with a variety of civil and criminal penalties. For example, S.C. Code Ann. § 6-29-950 gives counties a variety of remedies for violations of zoning ordinances:

- Violations of a zoning ordinance are misdemeanors;
- "[C]ounties may provide for the enforcement of any ordinance . . . by means of 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";
- Counties may stop a zoning use violation with stop orders; and
- A "county . . . may in addition to other remedies, institute injunction, mandamus, or other appropriate action or proceeding to prevent the unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use, or to correct or abate the violation, or to prevent the occupancy of the building, structure, or land."

The penalties and remedies provided by the Ordinance are the same penalties and remedies zoning officials ordinarily may obtain for other building, zoning, and use violations.

Respondents also assert the Ordinance exceeds the statutory authority under the Enabling Statutes by proscribing development of property within the reservation area "as a means of reducing acquisition costs." While the Enabling Statutes do not expressly identify the benefit of reduced acquisitions costs to Horry County, reducing future acquisition costs is clearly within the scope of the stated purposes of S.C. Code Ann. § 6-7-1220: "to reserve future locations . . . for future public acquisition" and 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." Horry County should benefit from reduced acquisition costs in those areas identified in the official map because the Enabling Statutes restrict building permits in those areas. *See* S.C. Code Ann. §§ 6-7-1270, -1280. The Enabling Statutes also provide a means of requiring a county to either take the property or exempt the property and allow uses desired by landowners. The Ordinance merely

recognizes one benefit consistent with the stated purposes of the Enabling Statutes ("public safety, economy, good order, appearance, convenience, prosperity, and general welfare") rather than a difference or overreach from the Enabling Statutes.

Finally, Respondents vastly understate the broad significance of the opinion by the Court of Appeals by asserting "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." *Respondents'* Return at 8. If any other county follows the Enabling Statutes by enacting an official map like Horry County enacted through the Ordinance, the end result would be the same: those ordinances would create a taking without just compensation according to the Court of Appeals. The Ordinance fully complies with the Enabling Statutes, and all other planning map ordinances are affected if the opinion by the Court of Appeals is left in place, which highlights the need for a writ of certiorari from this Court.

Accordingly, the Ordinance, properly construed, does not create a defect or encumbrance on title or render title unmarketable, but rather is a method of land use control permitted by the Enabling Statutes.

B. THE COURT OF APPEALS ERRONEOUSLY CONCLUDED EXCLUSION 1(a) DID NOT APPLY.

Respondents incorrectly assert the interest created by the Ordinance is more than a use restriction and therefore is not excluded from the Policies' coverage by Exclusion 1(a). As shown above, the Ordinance regulates land use and accordingly falls squarely within Exclusion 1(a).

Exclusion 1(a) bars coverage under the Policies, even if the Ordinance were a defect or encumbrance on title to the Property or caused the title to be unmarketable. The Policies expressly and unambiguously 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).

Exclusion 1(a) applies to matters that would otherwise be covered by the Policies. No construction of the exclusion language is necessary because it is unambiguous. The Ordinance is without question an "ordinance . . . restricting, regulating, prohibiting or relating to . . . the occupancy, use, or enjoyment of the land . . . [or] the character, dimensions or location of any improvement now or hereafter erected on the land." Rather than limiting the fee interest, the Ordinance restricts certain uses of the property. Like *Kiriakides*, it asserts, at most, an intent to take a parcel in the future, and then restricts what can be done in the identified area, subject to certain steps discussed above. Even if the Ordinance's limitation on future use of the Property gave Horry County an interest in the Property, that interest is one that falls within Exclusion 1(a), which expressly extends to ordinances restricting or prohibiting the use of the land or the location of any improvement on the land.

Respondents assert the Ordinance regulates more than just use of the Property and created a property interest. Although there is no authority under South Carolina law for this in-between property right, regardless of how the Enabling Statutes and Ordinance are characterized, they fall within the express terms of this broad and unambiguous exclusion. Accordingly, the Ordinance is excluded from the Policies' coverage by Exclusion 1(a) and, as discussed below, the exception to Exclusion 1(a) does not apply.

C. EXCLUSION 2 APPLIES IF THE ORDINANCE AFFECTED MORE THAN USE BECAUSE A PROPERTY RIGHT WOULD HAVE BEEN CREATED.

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, which 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.

Any property right created in Horry County could only be acquired by purchase, statutory eminent domain authority, or inverse condemnation. Indisputably, there was no purchase or statutory proceeding related to the area reserved by the Ordinance before the date of the Policies. If the Ordinance created a property right, then it was a taking like *Kirby v. N.C. Dep't of Transp*., 786 S.E.2d 919 (N.C. 2016) (planning map statute with long restriction period) and *Byrd v. City of Hartsville*, 365 S.C. 650, 661–63, 620 S.E.2d 76, 82 (2005) (potential for taking through inverse condemnation and regulatory takings). Respondents characterize the Ordinance in the language of a taking, and specifically describe the Ordinance as having "created 'some right or interest,'" having "secured the County's interest in the land with restrictions," and describe the Ordinance as "not a zoning-like use restriction . . . [but] much more, reserving land for public use and acquisition." *Respondents'* Return at 10, 15.

A taking falls under Exclusion 2's "rights of eminent domain," and therefore the Policies do not provide coverage for the Ordinance. *See, e.g.*, *Kirby,* 786 S.E.2d at 854–56 (holding highway maps filed pursuant to the North Carolina planning map statute constituted a taking through eminent domain). Moreover, as discussed below, the exception to Exclusion 2 does not apply.

D. RESPONDENTS ERRONEOUSLY ASSERT THE ORDINANCE IS AN ENCUMBRANCE BUT NOT A TAKING, HIGHLIGHTING THE ERROR BY THE COURT OF APPEALS.

Respondents principally adopt the same error made by the Court of Appeals, which held in its revised opinion that the Ordinance gave some property interest in Horry County that is more than a use restriction but less than a taking. *See* Rev. Op. at 10 ("the Ordinance related to and affected the title of the land, not just its use").

Respondents, like the Court of Appeals, misconstrue the effect of the Ordinance. Simply, the Ordinance either created a property interest in Horry County or it did not; it did not create some hybrid interest unrecognized by South Carolina law. As Chicago Title demonstrated above, the Ordinance is properly construed as a land use control ordinance that is excluded from coverage by Exclusion 1(a). If the Ordinance did create a right-of-way as Respondents assert, then there was a taking through Horry County's right of eminent domain excluded by Exclusion 2. Either way, the Policies exclude the Ordinance from coverage.

Respondents also fail to adequately address the case law establishing that an encumbrance or a right-of-way is an interest in land, such that if the Ordinance created an encumbrance or right-of-way in favor of Horry County, then there was a taking of property by Horry County. *See Morris v. Townsend*, 253 S.C. 628, 635, 172 S.E.2d 819, 822 (1970) (recognizing "[a]n easement . . . is, however, property or an interest in the land."). *Morris* cannot be squared with the analysis by Respondents and the Court of Appeals, which both adopt a takings analysis without recognizing the taking.

Moreover, if Horry County created a property interest in itself with the Ordinance, then proper application of the law requires declaring the Ordinance to be a taking. The implications of recognizing the Ordinance as a taking are substantial—similar ordinances, the enabling map-

ordinance statutes, and the Ordinance itself would be unconstitutional takings like those recognized in North Carolina by *Kirby v. N.C. Dep't of Transp.*, 786 S.E.2d 919 (N.C. 2016). Respondents refuse to acknowledge that by following the analysis in *Kirby*, and by finding the Enabling Statutes and the Ordinance vested Horry County with an interest in the property, the Court of Appeals effectively found that a taking without just compensation had occurred.

Respondents now find themselves disavowing their own theory. Respondents first raised the takings theory as a basis for coverage under the Policies and urged the Court of Appeals to find a taking. Respondents raised the takings issue in their pleadings, R. pp. 24–31 (complaint); at summary judgment, R. pp. 250–51 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) and stating "[i]n this case the Ordinance deprived the owner of the Peachtree Property all economically beneficial use of the portion designated within the right of way"); and then to the Court of Appeals, App. pp. 2015–17 ("The Appellants found themselves in a situation similar to the plaintiffs in *Kirby*").

Rather than following Respondents and the Court of Appeals, Chicago Title asserts this is a straightforward case determined by the plain terms of the Enabling Statutes and the Ordinance, and the application of Exclusion 1(a). But even if this Court agrees with Respondents and the Court of Appeals regarding the Ordinance and *Kirby*, the Ordinance is still excluded by Exclusion 1(a) and Exclusion 2 for the reasons set forth above. Either way, this Court should not allow the erroneous revised opinion by the Court of Appeals to stand.

E. THE ORDINANCE DID NOT APPEAR IN THE PUBLIC RECORDS AS DEFINED UNDER THE POLICIES, AND THE EXCEPTIONS TO EXCLUSIONS 1(A) AND 2 DO NOT APPLY.

The exceptions to Exclusion 1(a) and Exclusion 2 do not apply because there was no notice of enforcement or violation issued or filed, no notice of the exercise of eminent domain recorded, and the Ordinance was not filed in the "public records" (as that term is defined by the Policies)

because it was not indexed as required by statute in a manner that it could be found in a title search of the Property.

The exception to Exclusion 1(a) prohibits application of the exclusion "to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy." The exception to Exclusion 2 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." Neither of these exceptions is implicated here.

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." One of the "state statutes" that is critical to this analysis is § 30-9-40, which provides the indexing of documents constitutes an "integral, necessary and inseparable part of the recordation of the deed, mortgage, or other written instrument" and that recordation "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**." S.C. Code Ann. § 30-9-40 (emphasis added).

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 and "not entered as required in the indexes" in violation of § 30-9-40. The record is clear the Ordinance would not be found in the chain of title in a title search of the Property. R. p. 1025–26 (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, and a person searching and examining title to the Property would not find the Ordinance in the chain of title to the Property); *see also* 11 *Thompson on Real Property* § 92.09(c)(2)(A), at 184 (3rd ed. 2015). An improperly indexed document, like the Ordinance, cannot provide constructive notice, and it is not a public record as defined in the Policies. *See Manchester Fund, Ltd. v. First American Title Ins. Co.*, 753 A.2d 740 (N.J. Super. 1999); *see also 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.").

Conversely, in arguing the exceptions to the exclusions have been met, Respondents rely on *Whitlock*, a non-binding federal district court case in which the court granted partial summary judgment, the case was settled, and never went to judgment. *See Respondents'* Return at 18 (citing *Whitlock v Stewart Title Guaranty Company*, 2011 WL 4549367 (D.S.C. 2011)). The "public records" definition in the Policies requires that the matter be recorded to provide constructive notice, and the South Carolina indexing statute requires proper indexing before a filed document will provide constructive notice, an issue not raised or discussed in *Whitlock*. *Whitlock* is therefore not persuasive. Here, the definition of "public records" is capable of only one reasonable interpretation. Accordingly, the exceptions to Exclusion 1(a) and Exclusion 2 do not apply.

F. THERE IS NO QUESTION THE COURT OF APPEALS ERRED IN ITS APPLICATION OF THIS COURT'S PRESERVATION RULES TO CHICAGO TITLE.

The Court of Appeals erred by holding, "[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)). This holding disregards this Court's preservation rules, which do not require the winner below to preserve arguments for review. *See I'On, L.L.C.*

v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). Moreover, the Special Referee ruled on the Exclusion 2/eminent domain argument and found in Chicago Title's favor, and Chicago Title clearly raised the issue on appeal. *See* R. p. 16–18; *see also* App. p. 2065–74 (Respondent's Brief); App. p. 2112–16 (Respondent's petition for rehearing).

For the Court of Appeals to be correct, then a party winning at the trial level must file a motion to alter or amend the judgment and have the trial court rule on arguments related to alternative theories raised by the losing party even when the trial court rejected those alternative theories in favor of the winning party. Here, this would have required Chicago Title, after being granted summary judgment, to file a motion to alter or amend to have the Special Referee make a finding that, even though he found the Ordinance only affected use, that, to the extent he found that it did more and created a third-party right, that it would constitute a taking. This is not in accord with our error preservation caselaw, and it is not something that a seasoned appellate practitioner would advise is necessary.

III. CONCLUSION

For all of the foregoing reasons, Chicago Title requests that this Court grant its petition for a writ of certiorari and reverse the ruling by the Court of Appeals concerning the coverage provided by the Policies.

Respectfully submitted,

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