THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Karl A. Folkens, Special Referee
Fifteenth Judicial Circuit

Case Nos. 2015-CP-26-1084 / 2013-CP-26-5535 (combined)
Appellate Case No. 2017-001646

Supreme Court Case No. 2020-001478

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.

BRIEF OF AMICUS CURIAE PALMETTO LAND TITLE ASSOCIATION IN SUPPORT OF PETITION FOR WRTI OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

The Palmetto Land Title Association ("PLTA") is a non-profit organization established in 1977. PLTA members include individuals and organizations involved in the title insurance industry and the real estate field, and many real estate attorneys. Among the objects and purposes of the PLTA are (1) to promote the safe and efficient transfer of ownership and interest in real property within the free enterprise system; (2) to provide information and education to consumers, to those who regulate, supervise, or enact legislation affecting the land title evidencing industry, and to its members; (3) to maintain liaison with users of the products and services provided by its members and with government; and (4) to maintain high professional standards and ethics in real estate transactions.

The PLTA is interested in this case because of the far-reaching effects that the Court of Appeals' erroneous opinion (the "Opinion") will have on the practice of real estate law in South Carolina. In particular, the Court of Appeals wrongly found a property right in favor of Horry County where one did not exist; it failed to enforce the unambiguous terms of the subject title insurance policy; and it confused the concepts of property title and property use. The alleged governmental property right—an ordinance reserving a possible future road for condemnation—was not recorded in the chain of title of the affected owners, including the predecessor in title to the Respondents. In other words, the Court of Appeals' decision recognizes an alleged adverse property right that is not recorded in the chain of title and which would not be located in a traditional title search. If the Opinion is not reviewed and reversed by this Court, real estate closing attorneys, (who also serve as issuing title insurance agents), will be subjected to retroactive liability for failing to search governmental ordinances and future infrastructure plans that are **not in the sellers' chain of title**. The Opinion also creates confusion as to where the title search may end,

as the ordinance at issue is just one example of the many ways a governmental entity projects its future development intentions.

Further, the Court of Appeals' Opinion—by mistakenly finding that the question was not before it—held that the subject ordinance created a property right, but left open the question of whether it is an unconstitutional taking. Because this issue, which concerns important questions of insurance law and constitutional inverse condemnation, was indeed preserved by Chicago Title, PLTA supports Chicago Title's *Petition for Writ of Certiorari*. Moreover, because the finding that the subject ordinance constitutes a property right, the taking question is a "matter of significant public interest," due to its ramifications for the property rights of numerous South Carolinians, PLTA urges this Court to review the Opinion and decide this issue. *See State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012) (noting narrow exception to issue preservation rules where issue raised by amicus curiae is a question of significant public interest) (citing *Ex parte Brown*, 393 S.C. 214, 711 S.E.2d 899 (2011)).

QUESTIONS PRESENTED FOR CERTIORARI REVIEW

Pursuant to Rule 213, SCACR, PLTA limits its arguments to the issues that Petitioner urges this Court to review. However, PLTA has slightly re-formatted those issues, to divide Petitioner's Issue No. 1 into two separate questions.

1. Did the Court of Appeals err in finding that the Ordinance vested Horry County with a property interest, which would amount to an unconstitutional taking?
2. 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, and therefore covered by the Policies, when the Ordinance merely affected use of the property and did not affect title?
3. 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?
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?
5. Did the Court of Appeals err by holding Exclusion 2 of the Policies does not bar coverage for the claims when the 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?

STATEMENT OF THE CASE

The PLTA incorporates herein the Statement of the Case and Statement of the Facts that are contained in the *Petition for a Writ of Certiorari* filed by Chicago Title Insurance Company on November 9, 2020. Three particular items are worth restating:

(1) the subject Ordinance is not a property right as determined by the Court of Appeals;

(2) it would not be found within the chain of title for the property at issue; and

(3) the title insurance policies at issue specifically excluded loss or damage arising from governmental regulations affecting the property for which there was no record constructive notice.

INTRODUCTION

The Court of Appeals' Opinion carries with it a new and unprecedented burden on attorneys practicing real estate law in South Carolina, one which would require them to alter their long-established mechanism for conducting title searches, and which precariously leaves open the question of where and when such a search might now conclude. Further, the Opinion finds a property interest in a governmental entity that did not previously exist under South Carolina law, and it thereby impacts the ownership interest of numerous South Carolinians in their real property.

A. Title insurance.

A title insurer is generally liable for loss or damage caused by defects in the property's title. Defects for which title insurance policies provide coverage may generally be defined as liens and encumbrances that result in a loss in the title's value. *Stanley v. Atl. Title Ins. Co.*, 377 S.C. 405, 411, 661 S.E.2d 62, 65 (2008) (citing 946 C.J.S. *Insurance* § 1736 (2007)). However, title value and property value are distinct concepts. Indeed, "[t]he fact that property may be useless or may be put to only limited use does not mean that the property is not marketable." *Id.* (*citing* 43 Am. Jur. 2d § 528). Importantly, like any other contract, unambiguous title insurance policies are

to be interpreted as written, and their plain language is to be enforced by the courts. *Williams v. Gov't Ins. Co. (Geico)*, 409 S.C. 586, 594, 762 S.E.2d 705, 709 (2014).

B. Process for issuance of title insurance.

In South Carolina, title insurance is issued by title insurance agents who are also closing attorneys. This is because, under South Carolina law, the preparation of title abstracts and the closing of real estate is the practice of law. *See State v. Buyers Service Co., Inc.*, 292 S.C. 426, 357 S.E.2d 15 (1987). In the course of performing their role in real estate closings, attorneys in South Carolina must research title, or supervise the title search, thus acting both as closing attorneys and title agents. Ethics Advisory Opinion 92-03 ("It also is a common practice for the lawyer to act as agent for the title insurer which is issuing a policy of title insurance protecting the interests of the lender or buyer or both."). It necessarily follows that the act of searching or certifying title is also the practice of law. *Doe v. McMaster*, 355 S.C. 306, 312-313, 585 S.E.2d 773, 776 (2003). It is therefore critical that there must be predictable title search methods in South Carolina.

Governmental regulations, such as zoning ordinances and land use regulations, are not part of a typical title search. J. Bush Nielsen, Title and Escrow Claims Guide 11-2 (Ed. 2020). Rather, the closing attorney searches the public land records of the jurisdiction where the property is located and determines the matters recorded in the chain of title affecting title to the insured property, along with a search of the tax and judgment rolls. Claire T. Manning, *Handbook for South Carolina Dirt Lawyers* pp. 13-25 (2d ed. 2008). When issued, the title policy lists the recorded instruments from the chain of title affecting title as exceptions to coverage, eliminating those matters as covered risks under the title insurance policy. Because governmental ordinances that are not recorded in the chain of title are not part of the typical title search, those ordinances

constitute specific exclusions in a title insurance policy. J. Bush Nielsen, *Title and Escrow Claims Guide* 11-2 (2020).

C. Summary of issues before the Court of Appeals.

At issue before the Court of Appeals was whether Horry County Ordinance 107-98 and the later amending Ordinance 88-202 (collectively, the "Ordinance"), which designated the future path of the Carolina Bays Parkway and restricted use in the designated areas, created a property right in favor of Horry County such that it created an encumbrance on the Respondent's real property and rendered title unmarketable. Clearly, the Ordinance does no such thing. Instead, pursuant to the statutory scheme in which it is included, and its own unambiguous language, the Ordinance regulates land use and expresses a potential future intent by Horry County to acquire property by condemnation.

In an unprecedented decision, the Court of Appeals held that the Ordinance, by reserving a potential future right of way and restricting use of the reserved area, created a vested property right on behalf of Horry County in the subject property. The Opinion then leapt to the unsupported conclusion that the Ordinance diminished the owner's bundle of rights and therefore affected title in an undescribed manner that is not distinguished from zoning ordinances. In so holding, the Court of Appeals improperly found insurance coverage where the claim clearly excluded by the policy.

ARGUMENT

The Court of Appeals' error appears to arise from an effort to impose its own policy concerns on the parties. In its desire to find insurance coverage, the Court of Appeals misconstrued South Carolina law, misapplied this Court's precedent, and disregarded the plain language of the insurance contract at issue, which was deliberately drafted to exclude from coverage the very

scenario before the court. If left to stand, the Court of Appeals' Opinion will have grave ramifications for purchasers of property in South Carolina, as well as on the attorneys who search and certify title and perform real estate closings.

1. The Ordinance is a land use regulation that does not create a governmental property right akin to an unconstitutional taking.

The crux of the Court of Appeals' error lies in this finding: "[Respondents] assert that the Ordinance . . . created a third-party interest in the Property in favor of the County, which burdened the land and depreciated its value. We agree." (Rev. Op. at 8, *see also* p. 10 (reiterating, "the Ordinance here went beyond regulating use and created a third-party interest in the property in favor of the County.").) Critically, **if** the Ordinance indeed created a governmental property interest, then it inevitably follows that that property interest constitutes a taking—of the land of each and every property owner depicted on the map—without due process. This Court should review the Court of Appeals' decision to find that the Ordinance did not create a vested property interest in favor of Horry County (which would amount to a governmental taking in conflict with the South Carolina Constitution). Instead, the Ordinance establishes the mechanism for **a potential *future* taking**, and it restricts the use of property in the same manner as a zoning ordinance.

A. This issue is preserved for appellate review.

While implicitly ruling on this issue by finding that the Ordinance vested Horry County with a tangible property interest capable of encumbering Respondent's title, the Court of Appeals strangely found that the question was not preserved for its review. (Rev. Op. at 11 ("The issue of whether an Ordinance reserving a right of way on an official county map adopted pursuant to § 6-7-1220 constitutes a taking has not been decided in South Carolina and is not before us now.").) This is too great a question for this Court to leave in procedural limbo. For the reasons set forth

below, PLTA urges this Court to grant certiorari, hold that the question is before it, and overrule the Court of Appeals' implicit finding that the Ordinance created a property right and was covered under the Policies. *See Langford*, 400 S.C. at 433, 735 S.E.2d at 477 (noting narrow exception to issue preservation rules where issue raised by amicus curiae is a question of significant public interest); *Ex parte Brown*, 393 S.C. 214, 216, 711 S.E.2d 899, 900 (2011) (considering arguments raised only by an amicus because it concerned a "matter of significant public interest").

B. The Ordinance does not create a property interest, which would constitute a taking.

In reaching its incorrect conclusion that the Ordinance creates a third-party property interest in favor of Horry County, the Court of Appeals ignored this Court's rules of statutory construction and derived an unintended meaning from the plain language of the Ordinance. "The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *See Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 525-26, 642 S.E.2d 751, 754 (2007). Further, "a statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.'" *State v. Baker*, 310 S.C. 510, 512, 427 S.E.2d 670, 672 (1993). "As with statutes, the lawmakers' intent embodied in an ordinance 'must prevail if it can be reasonably discovered in the language used.'" *Cricket Store 17, LLC v. City of Columbia Bd. of Zoning Appeals*, 428 S.C. 270, 276, 834 S.E.2d 209, 212 (Ct. App. 2019) (*quoting Charleston Cty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995)).

When viewed within the statutory scheme, there is no question that the Ordinance does not trigger an immediate taking by Horry County. The Ordinance derives its power and purpose from Title 6, Chapter 7 of the South Carolina Code of Laws, which encourages local governments to

establish comprehensive plans for the development of land in order "to prevent or minimize such future problems as may be foreseen":

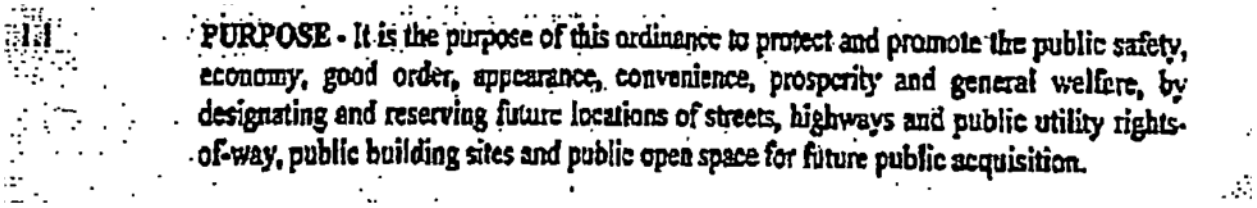
> To accomplish this intent local governments are encouraged to plan for **future** development; to prepare, adopt, and from time to time revise, a comprehensive plan to guide **future** local development; and to participate in a regional planning organization to coordinate local planning and development with that of the surrounding region. As aids in the implementation of the comprehensive plan local governments are encouraged to adopt and enforce appropriate land use controls, and cooperate with other governmental authorities.

S.C. Code Ann. § 6-7-10 (emphasis added). The intent of the statute is thus to thwart potential future development problems by imparting predictability to government planning through land use controls and comprehensive planning. The specific statutory authority for the Ordinance and Horry County's map is set forth in S.C. Code Ann. § 6-7-1220. The language of that section unambiguously terms it a land **use** statute:

> 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. This authority is declared necessary in order 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 statute explains that counties may use official maps as a means of controlling land use in advance of implementing their future planning scheme. This is precisely what the Ordinance at issue did—it is "An Ordinance Providing for an Official Map for the Incorporated Sections of Horry County." (A. p. 361).

The Ordinance and Official Map look toward the future, depicting and describing Horry County's projected development plan:


1.1 PURPOSE - It is the purpose of this ordinance to protect and promote the public safety, economy, good order, appearance, convenience, prosperity and general welfare, by designating and reserving future locations of streets, highways and public utility rights-of-way, public building sites and public open space for future public acquisition.

(*Id*). The official map shows the location of "***proposed*** public streets, highways and utility right-of-ways, public building sites and public open spaces." (*Id*. at p. 363) (emphasis added). Importantly, the plain language of the Ordinance in no way manifests an intent to effectuate an immediate governmental taking of the property at issue. Instead, the Ordinance establishes the framework under which the affected land *can be used*, in anticipation of a potential *future* taking.

Also importantly, not only does the Ordinance **not** vest Horry County with any property interest in the mapped land, but it only conditionally restricts the use of that land. A plain reading of Section 5, "Regulation," makes it clear that an affected property owner, denied a particular use, may appeal to the local Planning Commission. The Planning Commission must ("shall") review the appeal in light of only three specified alternatives: (a) the land may be exempted from the map's restrictions; (b) the use sought may be conditionally permitted; or (c) the County may initiate condemnation proceedings to acquire the property. (*Id*. at p. 365, §§ 5.2.1, 5.2.2). This Section makes two things clear: (1) property owners have a path to the free use of their property; and (2) if free use is not to be permitted, the County must move forward to acquire the property from the owner.

The language of this Section leaves no doubt that the intent of the Ordinance is not to confer a property right on Horry County and effect a present taking of the land. Otherwise, the deliberate expectation that "the County Council shall within one hundred (100) days . . . [e]ither enter into an agreement to acquire or institute condemnation proceedings to acquire the affected property" would be superfluous. (*Id*. at p. 365, § 5.2.2 (c)). In other words, the fact that the Ordinance

expressly anticipates the potential for future condemnation proceedings evidences that the County did not intend the Ordinance to vest an immediate property interest in the County. The Court of Appeals' decision amounts to a tortured construction of the Ordinance, which greatly expands its intended operation. *See State v. Dickinson*, 339 S.C. 194, 199, 528 S.E.2d 675, 677 (Ct. App. 2000) ("In interpreting a statute, 'the court must give the words their plain and ordinary meaning without resorting to a tortured construction which limits or expands the statute's operation.'").

The Court of Appeals' entire reasoning for finding affirmative coverage under the Policies is based on its improper conclusion that the Ordinance is something more than a land use regulation, despite the fact that it was enacted pursuant to a land use statute and clearly precludes land use. In addition, although the Court of Appeals' decision does not plainly state it, the Opinion transforms future governmental infrastructure and public works projects into title defects. The effect of that implication is enormous, and it significantly alters South Carolina real property law in a manner which creates unnecessary retroactive risk to the South Carolina Bar. Specifically, the Court of Appeals decision opens a Pandora's box of encumbrance and marketability concerns that would require real estate attorneys to identify and disclose planned, but not executed, governmental infrastructure projects that are not in the property's chain of title because such projects constitute a title defect. Given that there are 46 counties and 270 municipalities in South Carolina, with records and documents maintained in nonconforming manners, this would be a vast undertaking and liability risk.

2. Because the Ordinance is merely a land use regulation, it does not affect title and is not covered by the Policies.

The insurance Policies provide that "[s]ubject to the Exclusions from Coverage . . . the Company insures, as of the Date of Policy shown in Schedule A, against loss or damage . . . sustained or incurred by reason of . . . (2) Any defect in or lien or encumbrance on the title; [or]

(3) Unmarketability of the title." (A. pp. 498, 508.) Examining those provisions, the Court of Appeals decided that the Policy afforded coverage for the Respondent's claim because the Ordinance constituted an encumbrance and rendered title unmarketable. Both holdings turn entirely on the Court of Appeals' incorrect determination that the Ordinance went beyond the scope of a land use restriction and instead created a newly-recognized and undefined future governmental property interest in favor of Horry County that significantly devalued the Property. In addition, this finding was in error because the cited cases do not support the decision that the Ordinance created an encumbrance or affected the title's marketability. The Court of Appeals should have followed long-established South Carolina law to properly find no affirmative coverage.

A. The Court of Appeals erred in finding that the Ordinance created an encumbrance on title.

The Court of Appeals erroneously ruled that "the Ordinance caused a defect in or encumbrance on the title because it created a third-party interest in the Property in favor of the County, which burdened the land and depreciated its value." (Rev. Op. at 8.) In so holding, the Court of Appeals found that the Policy does not define "encumbrance" and looked to the definitions set forth in *Truck S., Inc. v. Patel*, 339 S.C. 40, 48, 528 S.E.2d 424, 428-29 (2000) and *Butler v. Butler*, 67 S.C. 211, 45 S.E. 184, 185 (1903). Those decisions define an encumbrance generally as a right or interest held by a third party that diminishes the value of the estate but does not defeat the owner's title. However, those decisions, along with the precedent that they cite, are not factually analogous to the Ordinance; they merely provide common examples of encumbrances, none of which are similar to the Ordinance. The Opinion cites purportedly favorable language for soundbites, but fails to explain context, which would have easily demonstrated that the cited decisions do not support the Court of Appeals' holding.

In order to contextualize the cited cases defining encumbrance, one must first look to what the alleged encumbrance in this matter actually **is** (*i.e*. the Ordinance). The Court of Appeals states that the Ordinance "declared its **intention to 'reserve' future locations** of highways and proscribed any use of the Property that would interfere with the County's **future acquisition** of the highway parcel." (Rev. Op. at *9 (emphasis added).) Thus, according to the Court of Appeals' own decision, the Ordinance is not a present right to do anything—it is a reservation of the right to condemn at a future date, (a power already conferred to Horry County), and a proscription of land uses. The Court of Appeals repeatedly calls the Ordinance a third-party interest, but it never defines the interest as a lien or otherwise. Instead, the Court of Appeals side-stepped the issue and contradicted itself by holding that the "policy coverage turns not on whether the Ordinance created a legal right-of-way but whether it created a defect or encumbrance." (*Id*. at 10.) In other words, the Court of Appeals determined the type of property right the Ordinance ***was not***, without finding what type of property right the Ordinance ***is***. In effect, the Court of Appeals created a new type of property interest that has not yet been, (and should not be), recognized in South Carolina.

The alleged and undefined right found by the Court of Appeals differs greatly from the particular types of interests discussed in the holdings in the text of the cases cited by the Court of Appeals. In *Patel*, the Supreme Court of South Carolina held that a federal designation of the property as wetlands (thus restricting its use) was not a "third party interest" or encumbrance. *Patel*, 339 S.C. at 48, 528 S.E.2d at 428-29. In so holding, *Patel* cited *Black's Law Dictionary* for the proposition that an encumbrance is "[a] claim or liability that is attached to property or some other right that may lessen its value, ***such as a lien or mortgage***; any property right that is not an ownership interest." *Id.* (*citing* BLACK'S LAW DICTIONARY 547 (7th ed. 1999) (emphasis added)). The *Butler* case held that an encumbrance is "a burden on the land depreciative of its

value, ***such as a lien, easement or servitude***, which though adverse to the interest of the landowner does not conflict with his conveyance of the land fee." *Id.* at 216, 185 (emphasis added). In the *Martin v. Floyd* case, cited by *Patel*, the Court of Appeals held that conveyance of lots consisting of marsh and water that could not be developed are a "burden upon property" but "***certainly not a lien, easement, or a right existing in a third party***" that violated the covenant of freedom from encumbrances. *Martin v. Floyd*, 282 S.C. 47, 51, 317 S.E.2d 133, 136 (Ct. App. 1984) (emphasis added). Likewise, the Court of Appeals cited *Pres. Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 316, 751 S.E.2d 256, 260 (2013), for the proposition that "defects for which title insurance policies provide coverage may generally be defined as liens and encumbrances that result in a loss in the title's value," but *Pres. Capital Consultants* involves a competing claim for **present** ownership of the property, which is clearly a third-party interest.

Although the Ordinance and its impact may diminish the value of the Property, that alone does not signify an encumbrance. Under South Carolina law, an encumbrance does not arise unless and until there is a present third-party interest that attaches to the property and impairs the title. As set forth in *Patel*, use restrictions are insufficient—there must be a claim of right attached to the Property. The cases cited by the Court of Appeals provide common examples such as liens, easements, mortgages, servitudes. However, none of the examples is analogous to the Ordinance. Indeed, the only potentially analogous example—the federal designation of wetlands in *Patel*—was determined ***not*** to be an encumbrance.

The Ordinance gives nothing more to Horry County than an inchoate future possibility of a property interest in the Respondent's land, along with the ability to restrict its use until such time as the county does (or does not) exercise its condemnation power. This is not a third-party property

interest, and this Court should grant certiorari to review the Court of Appeals' Opinion, which has dangerously recognized a new property interest for the purpose of finding insurance coverage.

B. The Court of Appeals erred in finding that the Ordinance rendered the title to the Property unmarketable.

In determining that the Ordinance created a third-party interest in the Property and rendered the title unmarketable, the Court of Appeals held that a "reasonable probability of litigation" makes title unmarketable and found that the Ordinance creates a reasonable probability of litigation as a matter of law.[1] In doing so, the Court of Appeals made the common mistake of confusing the concept of title with the concept of use, and it failed to support its finding that the Ordinance creates a reasonable probability of litigation as to **ownership** of the Property. This misunderstanding is most succinctly described in *McMaster v. Strickland*, a case in which the Court of Appeals found that a governmental wetlands designation did not render the title unmarketable:

> It is clear the trial judge confused the concepts of title and marketability with use and value. That is, there is no evidence that the sellers do not own the property, therefore they have title.

305 S.C. 527, 530, 409 S.E.2d 440, 442 (Ct. App. 1991). Likewise, in *Haw River Land & Timber Co. v. Lawyers Title Ins. Corp.*, 152 F.3d 275 (1998), a case in which the court determined that governmental ordinances that completely precluded the harvesting of timber pursuant to a timber deed did not render the title unmarketable, the Fourth Circuit Court of Appeals recognized this basic definition of marketable title and the distinction with use restrictions:

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[1] Of note, the Court determined that "[t]here is no factual dispute the Ordinance created a ***reasonable*** probability of litigation, thereby making the title unmarketable ***as a matter of law***." (*See* Rev. Op. at 14-17 (emphasis added).) However, the determination of reasonableness is typically not a matter of law; it is a matter for the jury. *State v. Cooney*, 320 S.C. 107, 111, 463 S.E.2d 597, 599 (1995) ("The determination of reasonableness depends upon the facts of the case and is a question for the jury unless there is no evidence to support a finding of reasonableness.").

> Title refers to the legal ownership of a property interest so that one having title to a property interest can withstand the assertion of others claiming a right to that ownership. But title to property does not characterize the property itself as valuable, merchantable, or even usable.

Id. at 278.

Without analogizing any cases in support of its decision, the Court of Appeals differentiated the established South Carolina case law of *Patel*, *McMaster*, and *Martin* by again referencing the undefined property right given to Horry County by virtue of the Ordinance. After acknowledging that the Ordinance has an uncanny resemblance to zoning and other land use tools that do not impact marketability of title, the Court of Appeals distinguished the Ordinance with a simple conclusory statement: "In substance, though, the Ordinance created a third party interest in the property and is so foreign from typical land use measures that there is no genuine issue of material fact that it rendered Appellant's title unmarketable." (Rev. Op. at 15.) Perhaps recognizing that this unsupported statement was not sufficient, the Court of Appeals then went on to "conclude, however, that the Ordinance interferes with the insured's title because it limits the rights and incidents of ownership." (*Id.* at 16.) The Court further held 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." (*Id.* at 16-17.) This is no distinction at all from typical land use measures, which similarly diminish the owner's bundle of rights. *See Polenz v. Parrott*, 883 F.2d 551, 556 (7th Cir. 1999) ("The attribute of ownership at issue in the zoning cases is the right of use—one of the bundle of rights attendant to ownership under the laws of property in all states.").

The Court of Appeals' attempt to support its decision by distinguishing South Carolina cases rather than citing South Carolina cases in support also highlights the problem of recognizing an undefined and previously unrecognized property interest—reservation of a right-of-way—that

is clearly not a lien, a servitude, or an actual right of way.[2] It is just a reservation, no different than zoning or land use ordinances that preclude or limit building on private property. These are all use restrictions, and do not impact the ownership of the Property. Therefore, the Ordinance does not impact **title** under South Carolina law and cannot render title unmarketable under the Policy.

3. Exclusion 1(a) applies to preclude coverage of the Respondent's claim.

PLTA urges this Court to review the Opinion's treatment of the Policies' Exclusion 1(a), which allocates certain risks that cannot be identified in a typical title search, between the title insurer and the insured. In its effort to find coverage, the Court of Appeals improperly disregarded this Court's precedent on contract interpretation and thereby overrode the express intention of the parties.

A. The clear language of Exclusion 1(a) operates to bar coverage for the Ordinance.

As noted by the Court of Appeals, the court must enforce plain and unambiguous language as written, giving the words their common meaning. *Williams v. Gov't Ins. Co. (Geico)*, 409 S.C. 586, 594, 762 S.E.2d 705, 709 (2014). This rule extends to unambiguous policy exclusions. "Exclusions are required to be read independently of each other, they are not to be read cumulatively, and if any one exclusion applies, there should be no coverage." *Laidlaw Environmental Services (TOC), Inc. v. Aetna Cas. & Sur. Co.*, 338 S.C. 43, 524 S.E.2d 847 (Ct. App. 1999).

Exclusion 1(a) of the Policy is intentionally designed to shift the burden of investigation and compliance with local ordinances onto the insured.[3] It provides:

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[2] The Court made it clear that the Ordinance did not establish an actual right of way. (Rev. Op. at 10.)

[3] As discussed in more detail below, Exclusion 1(a) contains an exception for matters of record, which should be discovered in the course of a proper title search. Again, this is a deliberate

> The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:
>
> Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances or regulations) restricting, prohibiting, or relating to (i) the occupancy, use, or enjoyment of the land . . . 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 of or alleged violation effecting the land has been recorded at Date of Policy.

(A. pp. 499, 509.) When broken down further, grammatically, the exclusion bars coverage for "[a]ny . . . ordinance . . . restricting, prohibiting or relating to . . . use . . . of the land."

There is no question that the Ordinance restricts, prohibits ***and*** relates to the use of the Property. Section 5.0 of the Ordinance provides:

> **CONSTRUCTION OR ENLARGEMENT OF IMPROVEMENTS PROHIBITED-**
> **After adoption of any Official Map by the county, no building, structure, or other improvement shall hereafter be erected, constructed, enlarged or placed within the reservation area, or setbacks beyond such area, without prior exemption or exception as established by this ordinance or amendments thereto.**

(A. p. 364). The Official Map was established in 1999 and amended in 2002, such that the Ordinance precluded the Respondent from building any improvement in the reserved area. (Rev. Op. at 2-3.) This is a clear restriction on use.

Significantly, the Court of Appeals itself noted that the Ordinance "proscribed any **use** of the Property that would interfere with the County's future acquisition of the highway parcel." (*Id.* at 6 (emphasis added).) The Court of Appeals also implied that the Ordinance is a direct use restriction when it stated that "[i]t is true that matters that affect only the use of land are not title

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allocation of risk between the insured and the insurer. Importantly, the Ordinance is not a public record as defined by South Carolina's recording act and other law applicable to title abstractors.

matters, but it does not follow that a matter that affects use cannot also affect title." (*Id*. at 8.) Moreover, when directly discussing Exclusion 1(a), the Court of Appeals recognized that the "Ordinance related to and affected the title of the land, ***not just its use***." (*Id*. at 9 (emphasis added).)

Because it repeatedly acknowledged that the Ordinance affects the use of the property, the Court of Appeals should have found that Exclusion 1(a)—which expressly bars coverage for "[a]ny . . . ordinance . . . restricting, prohibiting or relating to . . . use . . . of the land"— applies in this instance. Exclusion 1(a) does not state that the ordinance in question must relate *only* to use. Instead, a plain reading of the Policy makes it clear that the ordinance simply must restrict, prohibit, or relate to the use of the land. By its own descriptions, the Court of Appeals confirmed that the Ordinance related to the use of the Property, and so the exception clearly The Court of Appeals fails to address this glaring inconsistency within its own Opinion.

B. The Court of Appeals' disregard of the intentional language of Exclusion 1(a) poses a threat to real estate attorneys in South Carolina.

The purpose behind Exclusion 1(a) is to exclude certain risks that would not be discovered in the course of an ordinary title examination. In South Carolina, title insurance policies are typically issued by closing attorneys, who have performed or supervised the title search. The closing attorney's function in this regard is to search the public land records of the jurisdiction where the property is located, and to determine which recorded matters within the chain of title affect title to the insured property. When it is issued, the title insurance policy lists those recorded instruments affecting title as specific exceptions to coverage, since the purchaser is taking title subject to them. Governmental regulations, such as zoning ordinances and land use regulations—which would not be found within a property's chain of title—**are not part of a typical title search**.

> Also, most of the permits, approvals and enforcement documents pertaining to land use regulations are not found in the real estate records; they are not searched by title insurers. This is not happenstance, but evidence that the statutory scheme is to

> separate land title documents from land use records. Because land use records do not affect title, title insurers do not examine them.

J. Bush Nielsen, *Title and Escrow Claims Guide* at 109 (Ed. 2020). For this reason, title insurance policies contain specific exclusions, like that contained in Exclusion 1(a), barring coverage for government ordinances that might restrict land use.

The plain language of Exclusion 1(a) makes it obvious that the intent is to place the risk of researching and verifying use restrictions on the insured. Specifically, the exclusion contains an exception that is designed to maintain the risk of improper title examination, (which would be out of the grantee's control), on the title insurance company. The exception states that "[ordinances restricting or relating to use are excluded from coverage] **except to the extent that a notice of the enforcement thereof . . . has been recorded in the public records at the Date of the Policy.**" (A. pp. 499, 509) (emphasis added).) This exception must be read in conjunction with the Policies' definition of "public records," which notably ties the exception to title examination of the chain of title. "Public records" are defined as "**records established under state statutes** at Date of Policy for the purpose of imparting constructive notice of matters relating to read property to purchasers for value and without knowledge." (A. pp. 499, 509) (emphasis added).) Thus, the South Carolina recording act, and related State statutes, provide what items can constitute constructive notice for real estate conveyances. Under the applicable State law, the Ordinance at issue would <u>not</u> constitute a public record as defined by the Policies.

South Carolina has had a recording act since 1698. *See Epps v. McCallum Realty Co.*, 139 S.C. 481, 497, 138 S.E. 297, 302 (1927). The purpose of the recording act is "to protect subsequent creditors and purchasers for value without notice." *Id.*

The current version of the recording act provides as follows:

> All deeds of conveyance of lands, tenements, or hereditaments, either in fee simple or for life, all deeds of trust or instruments in writing conveying estate, creating a trust in regard to the property, or charging or encumbering it, all mortgages or instruments in writing in the nature of a mortgage of any real property, all marriage settlements, or instruments in the nature of a settlement of a marriage, all leases or contracts in writing made between landlord and tenant for a longer period than twelve months, all statutory liens on buildings and lands for materials or labor furnished on them, all statutory liens on ships and vessels, all certificates of renunciation of dower, all contracts for the purchase and sale of real property, all assignments, satisfactions, releases, and contracts in the nature of subordinations, waivers, and extensions of landlords' liens, laborers' liens, sharecroppers' liens, or other liens on real property created by law or by agreement of the parties and generally all instruments in writing conveying an interest in real estate required by law to be recorded in the office of the register of deeds or clerk of court in those counties where the office of the register of deeds has been abolished or in the office of the Secretary of State delivered or executed after July 31, 1934, except as otherwise provided by statute, are valid so as to affect the rights of subsequent creditors (whether lien creditors or simple contract creditors), or purchasers for valuable consideration without notice, only from the day and hour when they are recorded in the office of the register of deeds or clerk of court of the county in which the real property affected is situated. In the case of a subsequent purchaser of real estate, or in the case of a subsequent lien creditor on real estate for valuable consideration without notice, the instrument evidencing the subsequent conveyance or subsequent lien must be filed for record in order for its holder to claim under this section as a subsequent creditor or purchaser for value without notice, and the priority is determined by the time of filing for record.

S.C. Code Ann. § 30–7–10.

Notably—for understanding the impact of the Court of Appeals' error—zoning laws, regulations, ordinances, and county resolutions are **not** contained within the recording act. For this reason, they are not found within a properly conducted title search, and they are expressly excluded from coverage by title insurers in an exception such as 1(a).

Besides the recording act, other statutes dictate what public records affect title to real property, and all of which lead a title examiner or real estate attorney to the places where such records affecting title to the property he or she is searching are located. A common theme among those statutes is the requirement that some indexing procedure under the property owner's name or a tax map number exists to allow those documents to be found and tied to the property being

searched. The Ordinance was not recorded with one of those descriptors, and therefore would not be found in the search.

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

Generally, someone searching title in South Carolina would visit the Register of Deeds, Clerk of Court, and tax assessor's office to find documents affecting title to real property. [4]

i. The Register of Deeds or real estate records of the Clerk of Court.

The Register of Deeds[5] houses numerous documents, all set forth explicitly by the recording act and other similar statutes set forth below:

- Deeds § 30–7–10;
- Deeds of Trust § 30–7–10;
- Mortgages § 30–7–10, § 30-5-130 (involving mortgages of leaseholds and other interests in real estate);

[4] One exception is that records related to certain public rights-of-way are recorded in the SCDOT's office in Columbia. *See* S.C. Code Ann. § 57-5-550 (directing all rights-of-way and records of condemnation actions for state highways be filed at SCDOT "in its offices at Columbia, and a direct index of all such deeds, instruments and records shall be made and kept by the department"); *see also Fuller-Ahrens Partnership v. S. C. Dept. of Highways and Pub. Transp*., 311 S. C. 177, 180, 427 S.E.2d 920, 922 (Ct. App. 1993) ("The Pattersons' deed and the other documents, as required by statute, were filed [in the SCDOT's] offices in Columbia. . . . The filing of these instruments provided a record sufficient 'to impart notice,' albeit constructive notice, to Fuller-Ahrens of the deed and its contents, including the deed's reference to the Department's plans . . ."). Because the subject Ordinance did not actually create a right-of-way, it was not recorded in the SCDOT's office.

[5] Some counties do not have a Register of Deeds, but instead real estate records are maintained in the real estate records of the Clerk of Court. S.C. Code Ann. § 30-5-10.

- Marriage Settlements § 30–7–10; § 30-5-90.

- Leases longer than twelve months § 30–7–10; § 27-33-30 ("[i]n order to give notice to third persons any lease or agreement for the use or occupancy of real estate shall be recorded in the same manner as a deed of real estate.");

- Statutory liens on buildings and lands for materials or labor furnished on them. § 30–7–10; § 29-5-90 (mechanic's liens);

- certificates of renunciation of dower § 30–7–10; § 30-5-90.

- contracts for the purchase and sale of real property § 30–7–10;

- all assignments, satisfactions, releases, and contracts like subordinations, waivers, and extensions of landlords' liens, laborers' liens, sharecroppers' liens, or other liens on real property created by law or by agreement of the parties § 30–7–10; § 30-7-20 (manner and form of recordation of contract affecting recorded lien on real property); § 30-7-30 (release or satisfaction of lien affecting title to real estate) § 30-7-40 (manner of recordation of assignment or transfer of mortgage); § 30-7-60 (assignment, satisfaction, or release of lien); § 29-3-100 (validity of certain assignments of rents, issues, or profits); § 29-3-350 (entry of cancellation on mortgages on indexes);

- All instruments in writing conveying an interest in real estate § 30–7–10;

- Federal tax liens § 12-57-30; § 12-57-40;

- State tax liens § 12-54-122 (G)(1); § 12-54-122; § 30-5-16; and

- Proceedings in bankruptcy § 30-5-190.

Not only must these documents be recorded to affect title to property, the register of deeds must also index the documents, so they can be found by title examiners. S.C. Code Ann. § 30-9-40 provides that indexing constitutes an "integral, necessary and inseparable part of the recordation of the deed, mortgage or other written instrument" and that "[t]he entries in the indexes required to be made are notice to all persons sufficient to put them upon inquiry as to the purport and effect of the deed, mortgage or other written instrument so filed for record, but the recordation of a deed, mortgage or other written instrument is not notice as to the purport and effect of the deed, mortgage, or other written instrument unless the filing of the instrument for record is entered as

required in the indexes." *See also Thomas v. Thomas*, 286 S.C. 294, 298, 333 S.E.2d 76, 78 (Ct. App. 1985) ("The clear construction of Section 30-9-40 is that proper indexing supplies inquiry notice of an instrument, while recordation without proper indexing supplies no notice at all.").

ii. The Clerk of Court.

After visiting the Register of Deeds and reviewing the title records contained therein, an attorney or title abstractor would then visit the Clerk of Court to review various matters filed therein that affect title to property. Such matters include, but are not limited to, the following:

- Judgments: S.C. Code Ann. § 15-35-810—State and federal court judgments are "liens upon the real estate of the judgment debtor situate in any county in this State in which the judgment or transcript thereof is entered upon the book of abstracts of judgments and duly indexed."

- Lis Pendens: S.C. Code Ann. § 15-11-10 and § 15-11-20 specifically provide that a properly filed lis pendens provides constructive notice.

The Clerk of Court is statutorily required to keep an index of judgments, for the purpose of the public checking title to real property so judgments can be found. *See* S.C. Code Ann. § 15-35-520 (titled "Entries in abstract of judgments; index to judgments"); *Thomas v. Thomas*, 286 S.C. 294, 298, 333 S.E.2d 76, 78 (Ct. App. 1985) (addressing a divorce decree which, though filed with the Clerk of Court for the Court of Common Pleas, was not properly indexed under the husband's name in the judgment indexes and holding that "[t]he failure to index the judgment as required by [Section 15-35-520] deprived its recordation of its effectiveness as notice to subsequent purchasers."); *Plyler v. Robertson (In re Graham)*, 54 S.C. 163, 32 S.E. 67 (1899) (noting that "a subsequent purchaser is affected with such notice as the index entries afford").

iii. Tax Assessor's Records.

A real estate attorney or title abstractor also reviews the tax assessor's records because all taxes, assessments and penalties legally assessed are a first lien upon the property taxed, with the lien attaching at the beginning of the fiscal year during which the tax is levied. S.C. Code

Ann. § 12-49-10; *Taylor v. Mill*, 310 S.C. 526, 528, 426 S.E.2d 311, 312 (1992). The lien attaches as of December 31st to real property for taxes to be assessed and paid during the ensuing year. S.C. Code Ann. § 12-49-20. No further action is needed to perfect the statutory lien. *Taylor v. Mill*, *supra.* Tax records are simply found either under the name of the owner of the property or by parcel number.

Unlike all of the examples above, there is no indexing procedure that would result in the Ordinance being discovered in the course of a title examination. The Court of Appeals acknowledged this reality, but brushed it off by holding that "[t]he coverage the policy promises is not limited to what a title examination reveals." (Rev. Op. at 12.) However, the Court of Appeals did not address the fact that Exclusion 1(a) *does* limit certain documents that would not be revealed by a traditional title search, specifically to include ordinances that are not in the chain of title to the property. Therefore, in form and substance, Exclusion 1(a) unambiguously bars coverage for the Ordinance. By disregarding the clear intent of the Policies' exclusion, the Court of Appeals has altered the conventional allocation of risk, and it has imposed that risk onto real estate practitioners in South Carolina. This Court should grant Chicago Title's *Petition for a Writ of Certiorari* to correct this critical error.

4. This Court should grant certiorari to decide the question of whether the Ordinance's reservation of a future right-of-way is a property right and therefore constitutes a taking.

The PLTA adopts the arguments set forth in the Petitioner's brief and reply concerning the preservation of the issue concerning whether the Ordinance is a taking if it is deemed to be a property right vested in Horry County. South Carolina law clearly provides that the respondent, as the prevailing party in the lower court, may raise any grounds that support affirmance of the lower court's decision. *Dreher v. S.C. Dep't of Health & Envtl. Control*, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015) ("Moreover, because an appellate court may affirm the lower court's

decision for any reason appearing in the record, the prevailing party may—but is not required to—raise additional sustaining grounds to support the lower court's decision.").

As set forth above, the Court of Appeals failed to define the alleged property right conferred on Horry County by virtue of the Ordinance and the Ordinance is not, in fact, a property right. However, if the Ordinance is determined to be a property right, then the Court must determine whether it is a taking. Indeed, the Ordinance impacts every parcel of real property in the path of Carolina Bays Parkway, and the Court of Appeals' decision holds that Horry County has an existing property right in each of those parcels. As applied, the decision may entitle each of those property owners to compensation as a regulatory taking. *Lucas v. S.C. Coastal Council*, 112 S. Ct. 2886, 2901, 505 U.S. 1003, 1030 (1992) ("When, however, a regulation that declares 'off-limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.").

5. In the event that the Ordinance is a property right, Exclusion 2 applies to preclude coverage for Respondent's claims.

The PLTA adopts the arguments set forth in the Petitioner's brief and reply concerning the applicability of Exclusion 2 if the Ordinance is deemed to give rise to a property right vested in Horry County. Rights of eminent domain are clearly excluded unless notice of the exercise of those rights has been recorded in the public records at the Date of Policy. (A. pp. 499, 509.) As set forth herein, the Ordinance is not a "public record" as contemplated by the Policies. Therefore, if the Ordinance is a property right, and it is plainly excluded from coverage.

CONCLUSION

The decision of the Court of Appeals could have far reaching effects on the manner and means by which real property in South Carolina is conveyed and title insurance policies issued.

For the foregoing reasons, *amicus curiae* PLTA respectfully requests the Court grant the pending petition for writ of certiorari.

Respectfully submitted,

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