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Client Alert: What does the recent SC Court of Appeals case *Jericho State Capital Corp. of Florida v. Chicago Title Insurance Company* mean for the future of title searching, land purchases, title insurance, and land use planning in SC?

Download Client Alert: What does the recent South Carolina Court of Appeals case *Jericho State Capital Corp. of Florida v. Chicago Title Insurance Company* (CTIC) mean for the future of title searching, land purchases, title insurance, and land use planning in South Carolina?

If you live in Charleston, South Carolina, for most of your life you have been hearing about the plans for I-526. A portion of “526,” as locals call it, was built in the 1990s – it linked West Ashley with North Charleston and Mount Pleasant, and James Island with downtown. A big part of it has not been built yet – although the completion of 526 has certainly been a part of just about every candidate for office platform in the last 20 years or more. Setting aside any funding or other controversies which continue

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Wendy M. Byrne
wbyrne@shumaker.com

to be an issue with 526, this article will discuss what the *Jericho v. CTIC* case potentially means for the future of land that lies within the path of roadway plans like 526. More generally, this article will discuss the impact on land use planning – specifically the anticipation of the building of roads by municipalities and counties, and what that means for title searchers and closing lawyers who handle land purchases anywhere roads may be planned.

The *Jericho State Capital Corp. of Florida v. Chicago Title Insurance Company* case was released by the South Carolina Court of Appeals on October 7, 2020 (2020 WL 6018786). In it, the Court of Appeals delved into the role of title insurance and the impact of an ordinance and official county map in Horry County that purported to show the anticipated route of the Carolina Bays Parkway. This map had been filed in the Registry of Deeds (ROD) Office for Horry County, and the accompanying ordinance designated land as a future location for a highway. A parcel of land that sold for over \$22 million dollars (after the ordinance was passed and map filed) for the construction of a residential real estate development happened to also be within this highway path. Ultimately, a claim was made against the policy issued by CTIC when the land was originally purchased, which CTIC denied under the exclusion for ordinances relating to the use of the land, for the exclusion for defects, liens, encumbrances, adverse claims, or other matters **subsequent** to the date of the policy, and for the exclusion for condemnations.

The Court held that none of exclusions applied – first, because the ordinance did not just regulate use, but instilled a third-party (County) right to the land. Second, because the title defect occurred at the time the ordinance was passed, which was many years prior to the policy date, not subsequent to it. And third, the exclusion for condemnation did not apply because the claim against the title policy was for loss of value of the title, not for condemnation. The Court also noted the whole point of title insurance – to cover and protect owners from unknown defects at the time of purchase.

The Court went into an in depth discussion of the difference between zoning ordinances and the roadway ordinance. As part of the holding, the Court defined what an encumbrance is – a burden on the land that is adverse to the landowner's interest and impairs the value of the land but does not defeat the owner's title. The debated roadway ordinance not only rose to the level of an encumbrance; in fact, according to the Court, the ordinance went beyond this, and rendered the title to the property in question unmarketable because of the probability of condemnation litigation concerning the land. The map and ordinance set out the county's intent clearly, and this was enough for the Court to consider the "bundle of sticks" we all learned about in property class to be negatively impacted: "to the extent that an ordinary and prudent purchaser would not buy the title, or only buy it at a discount reflecting the defect." (Id., quoting 1 Palomar, Title Ins. Law § 5.7 (2019 ed.).

So back to the original questions posed: obviously, this case has huge ripples throughout the real estate closing world. It is an open question currently whether CTIC will appeal this decision to the South Carolina Supreme Court, and an even more open question on whether the Supreme Court will reverse the Court of Appeals. If the Supreme Court takes this case, practically there will be an interim period where transactional

lawyers will need to shore up their potential liability here. Title searchers do not look at County or Municipal ordinances that may impact parcels when they do their searches. Even in the case above, the ROD had indexed the ordinance and accompanying map under Horry County, not under the names of the owners of the land parcels in question – so the title searcher would not have found the ordinance or map under the current search methods. Should title searchers also talk to the Planning and Zoning, Road Building and Maintenance Departments, or some other county or municipal official who can advise on where roads will be built in the future? Is this information obtainable through an internet search? Is it part of the comprehensive plan that each jurisdiction in the State of South Carolina must maintain? Will title insurance companies draft new exclusions? Or should closing lawyers draft language to be signed at the table that address these possibilities? All of these are open questions that should be addressed now by lawyers, title searchers, and title insurance companies.

And as for 526: I do not know if there was a Charleston County Ordinance that originally addressed 526, although I do know that there was an agreement with the State Infrastructure Board, and there have been many on-the-record – discussions about 526, both in Municipal and County Council meetings, as well as in the State House. There have been advocates for many possibilities: an interstate type road, a parkway type road with lower speed limits, for no 526 completion to occur at all. There has been a gauntlet of hurdles to clear – environmental, financial – and some are ongoing. Ultimately, there are published pathway alternatives. A pamphlet is easily and readily available on the internet on the official Charleston County webpage that shows where 526 will go. In the meantime, how many houses have been built in its path? How many communities on James Island and John's Island have been planned, zoned, cleared, and constructed? This is a hypothetical question that is not so far-fetched – just take a look at the development around Central Park Road and Riverland and Maybank on James Island, and within the outskirts of Rushland Landing on John's Island...and look at the press coverage in the Post and Courier of houses that the South Carolina Department of Transportation (SCDOT) has already purchased to the tune of multiple millions of dollars that sit empty.

What role does government have now that this case has been decided? Should Planning Commissions go on record as to where roads will be located? Should Councils go ahead and condemn land that they anticipate needing for road construction now and into the future? It could be land-banked and sold later if plans change. But, at what cost to taxpayers? Infrastructure is one of the crucial questions for South Carolina, as more and more people relocate here and roads and transit plans are hatched at the planning and government stages. Will the test that stems from this case be that an ordinance and filed map are what is needed to rise to the level of unmarketable title? Is condemnation the result? The Court of Appeals declined to go so far as to say. Will public knowledge of a road plan be enough?

What duty do we, as real estate lawyers and land use lawyers in South Carolina, now owe our clients in light of this case? It has the potential to cause a chilling impact anywhere road projects are planned, across our state. 526 is but one, somewhat infamous example. I am sure there are many, many more. This Pandora's box will not be closed for a while, so in the meantime, talk to your title insurance company, your County and City Council and Planning Commission representative, your malpractice insurer, and your title searcher. Perhaps some uniformity of approach will result from the ensuing conversations if we all share the outcomes.