

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

KIAWAH RESORT ASSOCIATES, L.P., a
Delaware Limited Partnership, and KIAWAH
DEVELOPMENT PARTNERS II, INC.,

Plaintiffs,

vs.

KIAWAH ISLAND COMMUNITY
ASSOCIATION, INC., a South Carolina Not-
for-Profit Corporation,

Defendant,

and

KIAWAH PROPERTY OWNERS GROUP,
INC. and INLET COVE CLUB
HOMEOWNERS ASSOCIATION, INC.,

Intervenors.

BEFORE THE MASTER-IN-EQUITY

Case No. 2013-CP-10-01225

RECEIVED

MAY 27 2015

SC Court of Appeals

FINAL ORDER

BY _____

JULIE J. ARMSTRONG
CLERK OF COURT

2014 JUN -4 PM 2:38

FILED

This action came before me by consent of the parties to ascertain and determine the validity, nature or extent of Plaintiff's title and interest in the subject of this action, a 4.62 acre tract of land, known as Captain Sam's Spit, located on Kiawah Island. Based upon the record, I make the following Findings of Fact and Conclusions of Law as the Order of this Court.

FINDINGS OF FACT

This action was initiated by Kiawah Resort Associates, LP ("KRA") as an action for declaratory judgment, reformation of deed, and specific performance arising out of a 1994 and 1995 transaction between KRA and the Kiawah Island Community Association, Inc. ("KICA"). The parcel of land this action concerns is a 4.62 acre tract of undeveloped land which has been

identified as "the Additional Land" or "the Subject Property," as more particularly described in Exhibit "A" attached hereto and incorporated herein by reference.

I find this Court has jurisdiction of this action and that venue is proper.

The Parties and Procedural History

KICA serves and operates as the property owners' association for the majority of owners of property located within the Town of Kiawah Island, South Carolina. In addition to statutes, regulations, ordinances, and other legislative authority, KICA is governed by a recorded Declaration of Covenants, Conditions, and Restrictions, as amended (the "KICA Covenants").

Plaintiff KRA was the developer of Kiawah Island, and at all pertinent times hereto was the "Company" for purposes of and, as defined in, the KICA Covenants. Certain transfers among affiliated companies have resulted in a transfer of KRA's ownership and related interests in the Subject Property to the later-joined Plaintiff, KDP II LLC ("KDP II"), such that KDP II is KRA's ultimate assignee with regard to KRA's interest in the Subject Property.

After the commencement of this action, two parties, the Kiawah Property Owners' Group, Inc. ("KPOG") and the Inlet Cove Club Homeowners' Association, Inc. ("Inlet Cove") sought to intervene in the action alleging that, while members of KICA, the parties were inadequately represented in this action by KICA. This Court granted KPOG and Inlet Cove leave to intervene on the basis of their representations that they would present evidence as to the parties' intent to convey and receive the Additional Land as Common Property.¹

The 1994 Development Agreement

On or about September 26, 1994 KRA and the Town of Kiawah Island (the "Town") entered into a Development Agreement (the "1994 Development Agreement") that was recorded

¹ Five days after the conclusion of the trial in this matter the Board of Directors of KPOG enacted a plan to dissolve itself and is thus in the process of winding down its operations. The effect of such dissolution, upon its completion, will render KPOG incapable of maintaining or prosecuting any affirmative claims to the Subject Property.

on September 30, 1994, in Book J248, page 001, in the R.M.C. Office for Charleston County, S.C. ("R.M.C. Office"). Section 16(b) of the 1994 Development Agreement required KRA, the "Property Owner" for purposes of the 1994 Development Agreement, to convey what was described as a 10 mile strip of beachfront property (the "Beachfront Strip") to KICA as Common Property on or before January 1, 1996. The language is as follows:

Section 16(b) 10 Mile Strip of Beachfront Property:

It is understood and agreed that there is a strip of scenic dunes and high land owned primarily by the Property Owner (some of which is encumbered by the General Covenants, certain view and access easements and other agreements of record) which extends along the Kiawah Island beachfront for approximately 10 miles as generally depicted on Exhibit 16.2. This strip of high land varies in width, but often is 200' to 300' wide and is generally seaward of most residential, resort, or commercial property lines. It generally comprises the area of land abutting most seaward platted residential Lot lines and the mean high water mark of the Atlantic Ocean.

The Property Owner hereby agrees that this strip of highland and dunes will, on or before January 1, 1996, be conveyed by quit claim deed to the KICA as Common Property, subject only to matters of record prior to the effective date of this Agreement and the right of the Property Owner and other nearby owners to enjoy ingress and egress, permitted boardwalks and gazebos, across same in appropriate locations to access the beach or for other lawful purposes. The conveyance shall be by deed at the Property Owner's election (for \$1.00 consideration), and recorded in the Charleston County RMC office.

The 1994 Development Agreement defines "Common Properties" as "KICA Common Properties, Purchased Common Properties, and Restricted Common Properties as described under the KICA Covenants." The 1994 Development Agreement further states the "KICA Covenants means and refers to the Declaration of Covenants and Restrictions of the Kiawah Island Community Association, Inc. recorded in the RMC Office for Charleston County in Book M 114, Page 407, and all amendments and supplements thereto, including those recorded at

Book O-125 at page 163, Book K-139 at page 58, Book R-210 at page 748, Book W-243 at page 271, and Book W-243 at page 258.”

KICA was not a party to the 1994 Development Agreement. Rather, KICA was a third-party beneficiary of the 1994 Development Agreement by virtue of the Agreement’s mandate that KRA convey various properties to KICA as Common Property. According to the testimony presented at trial, KICA did not directly have any involvement in the negotiation, drafting, or execution of the 1994 Development Agreement except through its execution of the Agreement for Conveyance, as further discussed below.

KICA is directed by a seven member Board of Directors. At the time of the negotiation, drafting and execution of the 1994 Development Agreement, the execution of the Agreement for Conveyance, and the execution, recordation and delivery of the Beachfront Deed, the seven members of the KICA Board of Directors were comprised of four Directors appointed by KRA (who simultaneously were also partners in KRA) and three homeowner Directors.

Section 16(g) of the 1994 Development Agreement addressed the land known as Captain Sam’s Spit, which is also depicted on Exhibit 16.2 to the 1994 Development Agreement but was not then assigned a Parcel Number, as follows:

Captain Sam's Spit. The Property Owner commits to the permanent reservation of the tract of land known as Captain Sam's Spit, shown in Exhibit 16.2 as active and/or passive open space, nature study, or parks. Property Owner agrees to convey Captain Sam's Spit to KICA, by quit claim deed by January 1, 2008; provided, however, that Property Owner may convey the eastern half of the spit to Charleston County Park & Recreation Commission prior to January 1, 2008.

Exhibit 16.2 to the 1994 Development Agreement, as referenced in both paragraphs 16(b) and 16(g) of the 1994 Development Agreement, is a graphic illustration of the entirety of Kiawah Island entitled “Beachfront Dedication Area.” Exhibit 16.2 depicts the Beachfront Strip as a hatch-marked strip of land beginning east of the extended boundary line of a 19.5-acre parcel

identified as Parcel No. 13 in the 1994 Development Agreement (the "Beachwalker Ocean Parcel"), extending east along the beachfront and ending at the northeastern tip of Little Bear Island at the eastern end of Kiawah Island. Exhibit 16.2 also contains a hand-written notation with a line and arrow pointing to the Captain Sam's Spit area denoting that area as "Area not included in Dedication (sic) Area" and the area of Captain Sam's Spit is fully shaded in. According to the testimony presented at trial, both the hand shading in of Captain Sam's Spit and the handwritten note and arrow on Exhibit 16.2 were performed by Mark Permar, a land planner under the employ of KRA. Exhibit 16.2, as with every other document contained within the 1994 Development Agreement, bears the initials of Charles Way for KRA and Mayor Mary Melvin for the Town.

An executed Agreement for Conveyance and draft quit-claim deed for conveyance of the Beachfront Strip to KICA were attached to the 1994 Development Agreement as Exhibit 16.7. Both the Agreement for Conveyance and the Beachfront Deed were drafted by KRA's legal counsel. The Agreement for Conveyance is the only document related to the Subject Property that is signed by KICA. This document serves as the contract between KRA and KICA which obligated KRA to convey, and KICA to receive, various properties as Common Property, including the Beachfront Strip. The Agreement for Conveyance was signed on behalf of KICA by Townsend Clarkson, then President of KICA's Board of Directors, who was also a partner of KRA. Mr. Clarkson testified that he had no evidence that the KICA Board had reviewed or was asked to comment on the draft of the Agreement for Conveyance prior to his execution of the document on KICA's behalf, and that no vote of the KICA Board was had to authorize his execution of the Agreement for Conveyance. Accordingly, I find that KICA was a third-party beneficiary of the 1994 Development Agreement.

The property descriptions contained in the Agreement for Conveyance and the draft quit claim deed attached in the schedule to the Agreement for Conveyance that is part of Exhibit 16.7 of the 1994 Development Agreement are identical to the description used in the executed and recorded Beachfront Deed. In particular, the property description in the Beachfront Deed is as follows:

All that certain piece, parcel or strip of land, situate, lying and being in the Town of Kiawah Island, County of Charleston, State of South Carolina, approximately ten (10) miles in length, the westernmost boundary of which being an imaginary line having as its northern terminus, a point marked by a concrete monument having State Plane Coordinates N275, 327.0025/ E2, 267.801.5097 located at the southwestern most corner of a 2.067 acre tract located at the terminus of Beachwalker Road on Kiawah Island known generally as the "Employee Facility Tract" and as shown on a plat by Williams & Associates dated March 20, 1981, and recorded in Plat Book AS at page 85 in the R.M.C. Office for Charleston County, S.C. (the "R.M.C. Office"); thence running with said imaginary line from said point in a southerly direction S04°55'6"E to the mean high water mark of the Atlantic Ocean; said strip of land thence extending eastwardly to an imaginary line extending due south from point marked by a concrete monument numbered 27722 shown on Page 3 of 3 of a plat of the "Links Course Tract" by Davis & Floyd Inc. dated February 6, 1989, and recorded in Plat Book BV at page 38, in the R.M.C. Office to the mean high water mark of the Atlantic Ocean: said strip of land varies in width but is generally between 200' and 300' wide and extends from the seaward boundary lines of most beachfront residential, resort and commercial properties on Kiawah Island, as shown on plats of record in the R.M.C. Office to the mean high water mark of the Atlantic Ocean.

This quit-claim deed was dated December 29, 1995, and recorded February 20, 1996, in Book N265, page 406, in the R.M.C. Office.

Pursuant to Section 16(b) of the 1994 Development Agreement, the Beachfront Deed conveyed the Beachfront Strip to KICA as Common Property "subject to the covenant, condition, and restriction that the Property shall be maintained and utilized as a Common Property as defined in the Declaration of Covenants and Restrictions of Kiawah Island Community Association, Inc. recorded in Book M114, Page 407 in R.M.C. Office, as amended,

(the "KICA Covenants") and shall be made subject to such rights and restrictions as are applicable to Common Properties as set forth in said KICA Covenants." This conveyance was made in accordance with Article II, Section 2(a) of the KICA Covenants which states in pertinent part that "Until January 1, 2016, the Company [KRA], its successors, and assigns, shall have the right, without further consent of the Association, to bring within the plan and operation of this Declaration any property which is contiguous or nearly contiguous to Kiawah Island if acquired by the Company prior to January 1, 2016...." As such, the KICA Covenants provide for no mechanism by which KICA can refuse to accept any property conveyed to it by KRA.

The 2005 Development Agreement

October 12, 2005, KRA and the Town entered into a second Development Agreement (the "2005 Development Agreement"), replacing and terminating the 1994 Development Agreement. The 2005 Development Agreement was recorded in Book Z558, page 004 in the R.M.C. Office. The 2005 Development Agreement eliminated the terms of Section 16(g) of the 1994 Development Agreement for Captain Sam's Spit and replaced them with new provisions that granted KRA certain limited development rights on Captain Sam's Spit.

On or about October 2, 2012, the Town of Kiawah Island and KRA as Property Owner entered the Fifth Amendment to the 2005 Development Agreement (the "Fifth Amendment"), that is recorded at Book 0290 at Page 99 in the R.M.C. Office. In the Fifth Amendment to the 2005 Development Agreement, the Town of Kiawah Island and KRA as Property Owner agreed to the following:

(1) that the Property Owner's intent was that the western terminus-boundary of the Beachfront Strip be the eastern boundary and extended eastern boundary of Parcel 13 as described in the First [1994] Agreement and the [2005] Agreement, known as the Beachwalker Ocean Parcel (TMS No. 207-05-00-118), as illustrated on Ex. 16.2 to the First [1994] Agreement recorded at Book J248 Page 366 in the RMC Office for

Charleston County; (2) that the Property Owner did not intend that the Beachfront Strip include the Additional Land, which is west of the intended western terminus-boundary of the Beachfront Strip; and, (3) that the intent of the Property Owner at the time of entry of the 2005 Agreement was that the Additional Land was part of Parcels 13 and 12A as described in the 2005 Agreement.

As part of this Fifth Amendment to the 2005 Development Agreement, the Town expressly rejected any inclusion of language that referenced the Town's intent with respect to whether the Additional Land was to be included in the Beachfront Strip, but rather limited the language to address only the Property Owner's (KRA's) intent.

Material Facts Pertaining to the Subject Property

In or around 1997, Plaintiffs discovered what they contend is an error within the property description in the Beachfront Deed; however, KRA did not bring this alleged error to KICA's attention until 2007 - 12 years after the deed of conveyance. Contrary to the visual depiction of the Beachfront Strip in Exhibit 16.2 to the 1994 Development Agreement, the property description for the Beachfront Strip in both the Agreement for Conveyance and draft quit-claim deed attached as Exhibit 16.7 to the 1994 Development Agreement as well as in the Beachfront Deed state that the Beachfront Strip commenced at the southwesternmost corner of the 2.067 acre "Employee Facility Tract," which is designated as part of Parcel 13 (the "Beachwalker Ocean Parcel"), in the 1994 Development Agreement.

Plaintiffs contend the description of the Point of Beginning of the Beachfront Strip used in the Agreement for Conveyance and the Beachfront Deed was an error that lead to the unintentional inclusion of 4.62 acres seaward of the Employee Facility Tract in the Beachfront Strip. The Employee Facility Tract and the area seaward of that tract including the Subject Property are portions of Parcels 12 and 13, the "Beachwalker Park" Parcel and "Beachwalker

Ocean" Parcel under the 1994 Development Agreement, and Parcels 12A and 13 under the 2005 Development Agreement.

Upon receipt of the Plaintiffs' request in 2007 that KICA issue a deed conveying back the Subject Property, KICA rejected the request on the grounds that, regardless of whether the Subject Property was supposed to be included in the Beachfront Strip, the Subject Property had been conveyed as Common Property as required by the 1994 Development Agreement so that KICA had no authority to execute such a deed without an affirmative vote of its membership.² Article IV, Section 1 of the KICA Covenants grants to every member of KICA, every guest and tenant, an easement of enjoyment in and to the Common Properties which is appurtenant to and passes with the title to every Lot and Parcel. Article IV, Section 6 of the KICA Covenants further provides those rights and easements referenced above shall be subject to the following:

(h) The right of the Association to give or sell all or any part of the Common Properties and Restrictive Common Properties, including leasehold interests, to any public agency, authority, public service district, utility or private concern for such purposes and subject to such conditions as may be agreed to by the members, provided that no such gift or sale or determination as to the purposes or as to conditions thereof shall be effective unless dedication, transfers and determinations as to purposes and conditions shall be authorized by the affirmative vote of three-fourths (3/4) of the votes cast at a duly called meeting of the Association, subject to the quorum requirements established by Article III, Section 6 and unless written notice of the vote taken thereon shall be made and acknowledged by the President or Vice-President and Secretary or Assistant Secretary of the Association and such certificate shall be annexed to any instrument of dedication or transfer affecting the Common Properties or Restrictive Common Properties prior to the recording thereof. Such certificates shall be conclusive evidence of authorization by the membership.

² Some testimony was presented at trial regarding one prior "corrective deed" from KICA to KRA to convey back certain property that the parties agreed was erroneously included in the Beachfront Deed. However, this Court has not been asked to opine on the legitimacy of said conveyance and finds that conveyance to have no precedential weight in the determination of the claims actually pending before the Court.

KICA contends the Additional Land is Common Property and subject to the KICA Covenants. As such, KICA lacks the ability to transfer to KRA or KDP II unless the transfer is approved by the requisite vote of three-fourths (3/4) of the members in accordance with Article IV, Section 6(h) of the KICA Covenants. Consequently, KICA filed a counterclaim for a declaratory judgment seeking this court's ruling on whether the Additional Land is Common Property and therefore only able to be transferred upon a vote of the KICA membership.

Evidence of intent and mistake

The parties presented extensive testimony regarding the intent of various parties as to whether KRA in fact meant to convey the Subject Property to KICA.

With respect to KRA's intent, KRA presented evidence that, from the time of negotiating and drafting the 1994 Development Agreement through present day, it was KRA's, and now KDP II's, intent that the Additional Land was not to be conveyed to KICA.

With regard to KICA's intent, KICA's Executive Director, Tammy McAdory, testified that at all times relevant to this litigation she has acted as the custodian of the official records of KICA. Ms. McAdory could find no records from the 1995 period or prior that memorialized any discussion, much less intent, of KICA regarding the inclusion of the Additional Land in the Beachfront Strip. Rather, KICA's first knowledge of the Additional Land's inclusion as a potential error was in 2007. Furthermore, the only document bearing any signature by KICA is the Agreement for Conveyance signed by its President, Townsend Clarkson, in 1994, which does include the Additional Land as being part of the property to be conveyed to KICA.

~~KRA presented evidence of two illustrations maintained on KICA's website. The illustrations were of property presently included in KICA's dune management program as well as an illustration of KICA's Common Properties. Neither illustration includes the Additional~~



Land. However, no testimony was offered as to when these illustrations were created sufficient to derive any inference from them as to the intent of KICA in 1994 or 1995.

KRA also introduced a document from KICA entitled "Talking Points for KDP." Ms. McAdory testified this document was created in 2012 and were the notes of then Chair of the KICA Board of Directors, Craig Weaver, created for the purpose of advising new Directors on the history of the issues surrounding the Additional Land. The document states that the prior Board in 2011 believed that the inclusion of the Additional Land was likely not the intent of the parties to the 1994 Development Agreement, i.e., the Town of Kiawah Island and KRA; however, Mr. Weaver was not on the KICA Board during the 1994 or 1995 periods.

KRA also called as witnesses three of the four KRA-appointed KICA Board members, these witnesses being Townsend Clarkson, Patrick McKinney, and Leonard Long. Each of these witnesses were also members of the KRA partnership. Each witness testified that not only did KRA not intend to convey the Additional Land to KICA, but that it was their understanding in their capacity as KICA Directors that KICA did not intend to receive the Additional Land as part of the Beachfront Strip. However, upon cross examination, none of these witnesses could recall any discussion by the KICA Board of Directors prior to 2007 regarding the Beachfront Strip, much less whether the Beachfront Strip was specifically to include the Additional Land.

Significantly, the only official action of the KICA Board taken on this issue is the execution of the Agreement for Conveyance which obligated KICA to receive from KRA the Additional Land as Common Property.

~~The intervenors, KPOG and Inlet Cove, presented evidence pertaining to KICA's intent,~~
with respect to the inclusion of the Additional Land in the Beachfront Deed, by presenting evidence of the developable status of the subject property, during the relevant 1994 time frame,

as the property was subject to the S.C. Beachfront Management Act at the time of the 1994 Development Agreement.

The SC Beachfront Management Act & the 1994 Development Agreement

Pursuant to the Coastal Tidelands and Wetlands Act, as amended, §§ 48-39-250 through 48-39-360 (the "Beachfront Management Act"), the Department of Health and Environmental Control's Office of Coastal Resource Management ("DHEC/OCRM") establishes the location of the beachfront jurisdictional lines – the baseline and setback line – along South Carolina's coastline and maintains jurisdiction over all development occurring seaward of the setback line, which in this case is located twenty (20) feet landward of the baseline. (Tr. 485-486, 495, 503; S.C. Code Ann. § 48-39-290).

The Beachfront Management Act generally prohibits development seaward of the jurisdictional lines subject to very limited exceptions. (Tr. 487, 491, 503; S.C. Code Ann. § 48-39-290).

In 1989, interim jurisdictional lines were established. In 1991, DHEC/OCRM's staff oceanographer, Bill Eiser, established the final jurisdictional lines on Kiawah Island. (Tr. 493). Mr. Eiser also re-established the 1999 and 2009 jurisdictional lines in accordance with the Beachfront Management Act. (Tr. 493).

Moving from east to west, the 1991 jurisdictional lines along Kiawah Island's beachfront generally continued along the crest of the primary dunes closest to the ocean until reaching the western end of the island around Beachwalker Park, at which point the lines wrapped up and back around the park, placing all of the property seaward and westward of those lines, including the majority of the 4.62 acre parcel, as well as Captain Sam's Spit, within DHEC/OCRM's

jurisdiction and subject to the general prohibition on development. (Tr. Tr. 508-510; see Intervenor's Ex. 19; S.C. Code Ann. § 48-39-290).

On September 26, 1994, pursuant to the S.C. Code §§ 6-31-10 through 6-31-160, the Town and KRA entered into the Development Agreement ("the 1994 Development Agreement") that established the extent of KRA's development rights and obligations on Kiawah Island. (See Plaintiff's Trial Ex. 5).

The 1994 Development Agreement included Section 16, entitled "Environmentally Sensitive Areas of Protection." Section 16 required, in part, that KRA convey what was described as a ten (10) mile strip of beachfront property (the "Beachfront Strip") to KICA as Common Property before January 1, 1996. (Plaintiff's Trial Ex. 5, pp. 42-43, Section 16(b)). Section 16 also obligated KRA to commit the tract of land known as Captain Sam's Spit to permanent dedication and to convey Captain Sam's Spit to KICA by quitclaim deed by January 1, 2008. (Plaintiff's Trial Ex. 5, p. 45, Section 16(g)). Both Sections 16(b) and 16(g) make reference to Exhibit 16.2 as generally depicting those two dedication areas.

During the negotiations and drafting of the 1994 Development Agreement, the properties intended to comprise the Beachfront Strip and Captain Sam's Spit were not surveyed or formally platted due, in part, to the time and expense of such an undertaking on tracts of land that are both dynamic in nature, and which were to constitute conveyances of undevelopable property. (Tr. 230, 254, 271, 335-337; Plaintiff's Trial Ex. 5, p. 42).

Exhibit 16.2 is the only general illustration depicting the property on Kiawah Island within the 1994 Development Agreement. (See Plaintiff's Trial Ex. 28). However, Exhibit 16.2 is neither a survey nor an official plat of record. Additionally, Exhibit 16.2 was unilaterally altered by Mark Permar, a representative of KRA, to reflect something other than what the

Town's original version depicted. (Tr. 48-50, 73-74, 81-82). Accordingly, while Exhibit 16.2 is referenced in both Sections 16(b) and 16(g) as intending to depict both the beachfront strip and Captain Sam's Spit, the accuracy of the boundaries are lack reliability and are of limited value in determining the intent of the parties with regard to the conveyance of the Beachfront Strip.

"Parcel 13" does not exist as a platted property of record on Kiawah Island, but rather it was created by KRA's land use planner for development purposes and generally incorporates the Employee Facility Tract and the 16-acre tract. (Tr. 101, 107-109, 272). Similarly, "Parcel 12" is not a platted property of record and generally includes the property known as Beachwalker Park. (See Intervenors' Trial Ex. 14). Therefore, the accuracy of property boundaries by reference to those numbered parcels is not sufficiently reliable.

The westernmost plats of record of Kiawah Island used during the drafting of the 1994 Development Agreement, and specifically the drafting of the legal description of the Beachfront Strip, included (from east to west): a plat of a 16.088 acre tract, dated May 16, 1988 (the "16-acre tract") (see Intervenors' Trial Ex. 5); a plat of the Employee Facility Tract, dated March 20, 1981 (the "Employee Facility Tract") (see Plaintiff's Trial Ex. 26); a plat of the property known as Beachwalker Park, dated February 12, 1976 (the "Beachwalker Park Plat") (see Intervenors' Trial Ex. 22); and a depiction of the property known as Captain Sam's Spit on "An Exhibit of Captain Sam's Spit and Beachwalker Park," dated July 14, 1994 (the "Exhibit of Captain Sam's Spit") (see Plaintiff's Trial Ex. 5, p. Schedule P-10).

The Employee Facility Tract was ultimately used in drafting the western boundary in the legal description of the Beachfront Strip because it was the only plat of "residential, resort, or commercial" property on the far west end of Kiawah Island and it was most representative of the property in front of which the 1994 Development Agreement envisioned the Beachfront Strip

beginning. (Tr. 231-232, 254, 273, 274, 333, 335-339, 343-344; Plaintiff's Trial Ex. 5, pp. 42-43).

The legal description of the Beachfront Strip was derived from and commenced at the southwestern corner of the Employee Facility Tract. (See Intervenor's Trial Exs. 2, p. 9 & 3, p. 1). The western boundary of the Beachfront Strip is an imaginary line extending south of the southwestern corner of the Employee Facility Tract to the mean high water mark; the eastern boundary of the Beachfront Strip is an imaginary line extending south to the mean high water mark from the southeasternmost point on a plat of record on the east end in 1994; the southern boundary of the Beachfront Strip runs along the mean high water mark from the west boundary line to the east boundary line; and the northern boundary of the Beachfront Strip generally abuts the seaward property lines of platted oceanfront lots. (Tr. 338-339; Intervenor's Trial Exs. 2, p. 9 & 3, p. 1).

The only document related to the Beachfront Strip that was formally executed by KICA is the Agreement for Conveyance, which was incorporated as an exhibit to the 1994 Development Agreement. Therefore, the evidence KRA offered in support of the alleged mistake of the Beachfront Strip is based on discussions or agreements, which KICA was not privy to, and which is contrary to the clear language in the Agreement for Conveyance.

The legal description of the Beachfront Strip in the Beachfront Deed is identical to the legal description of the Beachfront Strip in the Agreement for Conveyance.

On December 29, 1995, KRA formally executed the quitclaim deed (the "Beachfront Deed"), recorded in Book N265, page 406, in the R.M.C. Office for Charleston County, conveying the Beachfront Strip to KICA as Common Property in accordance with the 1994

Development Agreement, subject to all applicable covenants, conditions, restrictions and easements of record. (See Intervenor's Trial Ex. 3).

The Plaintiff's surveyor was able to take the property description contained in the deed and create a survey of the property in dispute. (Intervenor's Trial Ex. 15). I therefore find that the legal description in the Agreement of Conveyance and Quitclaim Deed is clear and plainly unambiguous.

The Weight of the Evidence

The court finds that whatever evidence exists of KRA's intent not to convey the Beachfront Strip to KICA is only relevant to the extent the court finds the deed and Agreement for Conveyance to be ambiguous.

It is the courts responsibility to weigh the evidence. While there is some conflicting evidence, the Master is persuaded that given the lack of any evidence of KICA Board's discussion of the Beachfront Strip prior to the execution of the Beachfront Deed, that the best evidence of KICA's intent during the relevant period of 1994 and 1995 is its President's execution of the Agreement for Conveyance. Accordingly, the court finds that there is clear evidence to show that KICA intended for the property to be included in the Beachfront Deed as Common Property.

As to the Town's intent, the Town was not a party to this litigation or to either the Agreement for Conveyance or the Beachfront Deed. However, the Town was a party to the 1994 Development Agreement which is the instrument by which KRA initially assumed the obligation to transfer certain properties to KICA as Common Property.

The court finds that the relevant manifestation of intent by the Town is contained in the 1994 Development Agreement and its various incorporated exhibits. The visual depiction of the

Beachfront Strip contained in the Beachfront Dedication Area in Exhibit 16.2 and the written legal description used in the Agreement for Conveyance as Exhibit 16.7 are not consistent insofar as the former does not include the Additional Land as part of the Beachfront Strip while the latter does include the Additional Land.

Dennis Rhoad, the Town's legal counsel, was called by KRA as a witness to provide testimony to clarify this inconsistency between the Exhibits and to shed light on the Town's intent. Mr. Rhoad did not believe that there was any discussion by the Town that would have discussed with particularity the Additional Land or the western terminus of the Beachfront Strip. However, Mr. Rhoad testified that he believed the Town did not intend to obligate KRA to convey any "developable property" to KICA as part of the Beachfront Strip.

KRA also presented the Fifth Amendment to the 2005 Development Agreement as evidence of the Town's intent. However, as previously stated, the Fifth Amendment is merely a reflection of the Town's agreement that KRA did not intend to convey the Additional Land, but is silent as to the Town's intent.

While evidence was presented that the Town did not intend to obligate KRA to convey developable property to KICA, the court finds that is **not** the relevant inquiry here. If intent is the issue, the relevant inquiry is:

"Was the property developable at the time it was conveyed to KICA?"

The court finds, as a matter of fact and law, that at the time of the 1994 conveyance, the subject property was not developable. Therefore, the court finds the conveyance of the ~~Additional Property is consistent with the 1994 Development plan to convey the common~~ property to KICA.

CONCLUSIONS OF LAW

In this action Plaintiffs allege three causes of action:

(1) A declaratory adjudication that the inclusion of the Additional Land in the legal description in the Beachfront Deed to KICA as Common Property was unintentional, in error, and a mistake, and contrary to the intent of the parties to the two Development Agreements of which KICA was a named third-party beneficiary for certain purposes, including receipt of the Beachfront Deed;

(2) Reformation of the property description of the Beachfront Deed deleting the Additional Land and correcting the property description so that it provides for a corrective description of the western terminus of the Beachfront Strip; and

(3) Alternatively, a claim for specific performance compelling KICA to execute a deed to KDP II for the Additional Land without encumbrance except for those matters of encumbrance at the time of the conveyance of the Beachfront Deed.

(4) In addition, KICA asserted a counterclaim seeking an adjudication that the Additional Land is Common Property and subject to the KICA Covenants such that it may only be conveyed by KICA with the requisite approval of the members in accordance with Article IV of the KICA Covenants.

KRA and KDP II's Claim of Mistake and for Reformation Fails

The Court finds that while the Plaintiff pled its claims for declaratory judgment and reformation as two distinct causes of action, the issues of intent and mistake are so interwoven with the elements of reformation that a claim for declaratory judgment cannot stand independently from the claim for reformation. As such, the Court issues this consolidated analysis on the two claims.

Prior to undertaking a reformation analysis, the Court must first determine whether the deed is ambiguous. Ambiguity is a question of law. If a deed is ambiguous, the reformation action is treated as a matter of equity thereby allowing the Court to look at extrinsic evidence to determine the parties' intent. If a deed is unambiguous, however, the reformation claim is handled as an issue of law and thus limits the Court's examination of intent to the terms of the deed itself. Penza v. Pendleton Station, LLC, 404 S.C. 198, 743 S.E.2d 850 (2013).

The Beachfront Deed is a self-contained document. While it was entered into pursuant to the 1994 Development Agreement and its Exhibit 16.7, the Agreement for Conveyance, the Beachfront Deed itself makes no reference to either of these documents and does not seek to incorporate their terms by reference. While the property description contained in the 1995 Beachfront Deed is not as precise as one would get if the property had been surveyed, it nonetheless clearly defines the area to be conveyed in a way that is ascertainable to a degree of reasonable certainty, especially considering the property was to be conveyed as Common Property and not intended to be used for development purposes.

The property description specifically identifies a point of beginning by reference to both a concrete monument and by reference to a recorded plat and the description "closes" such that the conveyed premises are readily apparent, especially as to the western terminus that KRA seeks to reform. No testimony elicited at trial cast any doubt on what property the Beachfront Deed actually conveys. As such, the deed unambiguously shows that KRA conveyed the Subject Property as part of the Beachfront Strip to KICA as Common Property and no evidence within the Beachfront Deed itself infers a contrary intent. As such, KRA's claim for reformation must fail, under the Penza test.

This Court's analysis could stop there since the Plaintiff cannot pass the threshold issue of proving ambiguity. However, for the reasons stated below, even if the Beachfront Deed was ambiguous and the Court could examine extrinsic evidence, reformation still does not apply.

This analysis starts with the guiding principle that in order to reform an instrument, "preceding the execution of the instrument, and as the inducement to its execution, the parties to the same had an understanding, an agreement, a contract; and, in the effort to reduce the evidence in writing of that contract, a mutual mistake was made, by which mistake, so made, the understanding, the agreement, the contract of the parties in relation to the subject-matter thereof was not carried into effect." Brock v. O'Dell, 44 S.C. 22, 21 S.E. 976, 979 (1895).

"Before a court of equity will reform a solemn instrument, it must be shown by evidence which is the most clear and convincing, not simply it was a mistake on the part of one of the parties, but that it was a mutual mistake; that both parties intended a certain thing; and that by mistake in the drafting of the paper did not get what both parties intended." Sullivan v. Moore, 92 S.C. 305, 307, 75 S.E. 497 (1912).

The Court cannot assume such an agreement; it must be proved. Gowdy v. Kelley, 185 S.C. 415, 194 S.E. 156 (1937). Sims v. Tyler, 276 S.C. 640, 281 S.E.2d 229 (1981).

Mistake

The court will reform an instrument on the ground of mistake where, at the time the contract is entered into, (1) there is a mutual mistake as to the facts upon which it is based, or as to the terms and stipulations embraced therein; or (2) one of the parties only is under such mistake, either of the facts or the stipulations, and such mistake has been occasioned by the fraud, deceit, or imposition in any form of the other." Kennerty v. Etiwan Phosphate Company, 21 S.C. 226, 231 (1884); see also, Forrester v. Moon, 100 S.C. 157, 84 S.E. 532 (1915). No fraud, deceit, imbecility or imposition by any party is alleged in the case before the Court and so the only grounds upon which reformation can be found is through a showing of mutual mistake.

Plaintiffs must present evidence, not only of the agreement actually made, but of the mutuality of the mistake. That evidence must be clear, convincing, and satisfactory, for courts of equity do not grant the high remedy of reformation upon a mere probability.

“In the exercise of this jurisdiction to reform written instruments, courts of equity proceed with the utmost caution. It must appear that the precise terms of the contract had been orally agreed upon between the parties and that the written instrument actually signed fails to be, as it was intended, an execution of the previous agreement, but expresses a different contract; and that this is the result of a mutual mistake. If there is no antecedent agreement to which the writing can be conformed, it is clear that reformation on the ground of mistake must be refused.” Gowdy, 185 S.C. 415.

In the matter *sub judice*, the only agreement which can be pointed to between the parties to the Beachfront Deed, i.e., KRA and KICA, other than the Beachfront Deed itself, is the Agreement for Conveyance. The Agreement for Conveyance obligated KRA to convey and KICA to accept a deed in precisely the same form as the Beachfront Deed. As such, Plaintiff cannot rely on the Agreement for Conveyance as evidence of an antecedent agreement between KRA and KICA as a basis to reform the Beachfront Deed.

Plaintiff is not required to show a written agreement as evidence of the mutual mistake. Under the Gowdy decision, the antecedent agreement which can be used as evidence of mutual mistake can be an oral agreement. But regardless of whether the antecedent agreement is written or oral, the evidence of the agreement must be clear and convincing to prove mutual mistake. Here, the Court is persuaded that KRA did intend to convey the Subject Property to KICA as part of the Beachfront Strip at the time of the conveyance. Further, there is no evidence that KICA shared in that mistake. The only written manifestation of KICA's intent in 1994 and 1995 was the executed Agreement for Conveyance which does not contravene the Beachfront Deed.

No evidence has been presented to show that the KICA Board was asked for, or provided, any input into the terms of the Beachfront Deed or specifically whether the Beachfront Strip was to include the Subject Property. As such, ~~Plaintiffs cannot prove the existence of an antecedent agreement with KICA that proves that both KICA and KRA were mutually mistaken in the~~

inclusion of the Subject Property in the Beachfront Deed. All evidence of intent presented by Plaintiff came from events, not at the time the conveyance was made, but from after the fact.

The parties accurately demonstrated that KICA was not a party to the 1994 Development Agreement, but rather was a third party beneficiary of that document to the extent that it obligated KRA to convey certain properties, including the Beachfront Strip, to KICA as Common Property. The question arises whether the intent of the Town of Kiawah Island, as a party to the 1994 Development Agreement which obligated KRA to execute the Beachfront Deed but who was not a party to the Beachfront Deed, is either relevant or controlling as to the determination of intent and mutual mistake of KRA and KICA with respect to the property description contained in the Beachfront Deed. The Court has found no guiding legal authority to authorize, much less require, that it weigh or examine the intent of anyone who is not an immediate party to the instrument, or at least in privity thereto when determining intent for the purposes of proving mutual mistake in the context for reformation. 66 Am. Jur. 2d Reformation of Instruments § 60 (1973). Accordingly, this Court finds that the Town of Kiawah Island's intent is not relevant to the reformation analysis.

Even if the Town of Kiawah Island's intent were relevant, the evidence shows that, while the Town's legal counsel testified that the Town did not intend for KRA to convey any developable property to KICA, the Town nonetheless declined to go so far as to say that the form of the Agreement for Conveyance and the Beachfront Deed was contrary to the Town's intent in its passage of the Fifth Amendment to the 2005 Development Agreement. As such the evidence of the Town's intent does not meet the clear and convincing standard required for a finding of mutual mistake. Accordingly, regardless of whether the Beachfront Deed is ambiguous or unambiguous, the claim for reformation fails for lack of mutual mistake.

KRA and KDP II's Claim for Specific Performance Fails

KRA and KDP II have asked the Master to compel KICA to issue a deed conveying the Additional Land to KDP II. In order to prevail on a specific performance claim, this Court must find: "(1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract." Ingram v. Kasey's Associates, 340 S.C. at 106, 531 S.E.2d at 291 (2000). Additionally, the specific act requested by the complaining party must be stated with certainty and definiteness in the contract. See generally, White v. Felkel, 222 S.C. 313, 72 S.E. 531 (1952); Yawkey v. Lowndes, 150 S.C. 493, 148 S.E. 554 (1929); Masonic Temple, Inc. v. Ebert, 199 S.C. 5, 18 S.E.2d 584 (1942); Anthony v. Eve, 109 S.C. 255, 95 S.E. 513 (1918).

There is only one contract between KICA and the Plaintiffs related to the Additional Land: the Agreement for Conveyance attached as Exhibit 16.7 to the 1994 Development Agreement. By the terms of that contract, KRA was obligated to execute and KICA was obligated to accept the Beachfront Deed, which was attached as a schedule to the Agreement for Conveyance. KRA in fact executed the Beachfront Deed in the exact form that was called for by the Agreement for Conveyance and KICA accepted delivery of the deed. In short, both parties complied with the express terms of the Agreement for Conveyance and no breach is found.

That KRA contends that the contract is erroneous is not a basis to find KICA in breach or to entitle KRA to force KICA into an act that is contrary to the express terms of the contract. As such, the court concludes that the Plaintiffs are not entitled to a decree of specific performance.

“Courts only have the authority to specifically enforce contracts that the parties themselves have made; they do not have the authority to alter contracts or to make new contracts for the parties.” Lowcountry Open Land Trust v. Charleston Southern University, 376 S.C. 399, 656 S.E.2d 775 (Ct. App. 2007).

KICA holds the Additional Land as Common Property Subject to the KICA Covenants

KICA’s sole counterclaim sought a judicial declaration of whether the Subject Property was in fact Common Property and therefore subject to the provisions of Article IV of the KICA Covenants limiting KICA’s ability to convey the Subject Property only upon an affirmative vote of three-fourths (3/4) of the votes cast at a duly called meeting of the Association. The issue of the classification of the Subject Property as Common Property is not disputed by any of the parties. Indeed, each of the relevant documents - 1994 Development Agreement, the Agreement for Conveyance, and the Beachfront Deed – state that the conveyed premises, including the Subject Property, are considered as Common Property subject to the KICA Covenants.

Some testimony was given at trial relating to a single prior conveyance where KICA, while still under KRA control, executed a quit claim deed conveying to KRA an approximately three acre tract of land that was included in the Beachfront Deed which the parties agreed was conveyed to KICA in error. KRA claims that this prior conveyance is evidence that KICA is not bound by the provisions of the KICA Covenants. However, the Court finds that this single instance of deviation from the KICA Covenants is not persuasive of proper procedure or otherwise has any precedential value in this Court’s analysis.

~~The KICA Covenants are clear in their terms as to the method by which Common~~
Property may be conveyed. As such, this Court concludes that the Additional Land is subject to

the KICA Covenants as Common Property and can only be conveyed upon an affirmative vote of three-fourths (3/4) of the votes cast at a duly called meeting of the Association.

CONCLUSION

IT IS THEREFORE ORDERED:

1. The Plaintiffs' claim for Reformation of the Deed is denied;
2. The Plaintiffs' claim for Specific Performance is denied;
3. The "Additional Property," the 4.62 Acres of property which is the subject of this action and which includes the area described as "Captain Sam's spit" is owned by KICA; and
4. The "Additional Property" is subject to the KICA covenants which require an affirmative vote of three-fourths (3/4) of the votes cast at a duly called meeting in order to transfer title to the property.

IT IS SO ORDERED!

June 4 2014

Charleston, SC

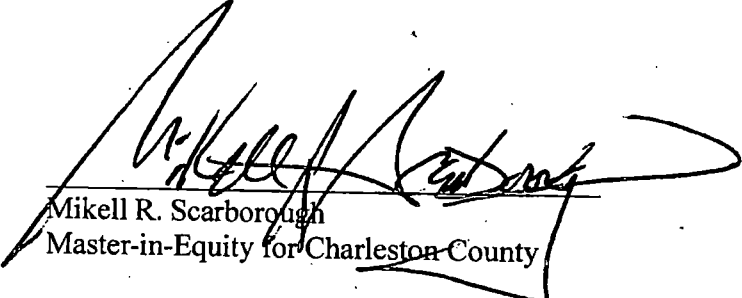

Mikell R. Scarborough
Master-in-Equity for Charleston County

EXHIBIT "A"

All that certain piece, parcel or tract of land situate, lying and being in the Town of Kiawah Island, Charleston County, South Carolina, lying generally (i) south/southwest of the 2.067 acre Employee Facility Tract located at the terminus of Beachwalker Road on Kiawah Island, S.C., shown on a plat by Williams & Associates dated March 20, 1981, and recorded in Plat Book AS at page 85 in the RMC Office, and (ii) west of the 16.088 Acre Beachwalker Ocean tract shown on a plat by Southeastern Surveying, Inc. dated May 18, 1988, having latest revision dated June 28, 1988 and recorded in Plat Book BS at page 60 in the RMC Office, said parcel containing 4.620 acres, more or less.