THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Master-In-Equity

Mikell R. Scarborough, Master-In-Equity for Charleston County

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Appellate Case No. 2015-001146
Trial Court Case No. 2013-CP-10-1225

Kiawah Resort Associates, L.P., a Delaware Limited Partnership, and Kiawah Development Partners II LLC, Appellants/Respondents,

v.

Kiawah Island Community Association, Inc., a South Carolina Not-for-Profit Corporation, Respondent,

and

Kiawah Property Owners Group, Inc., and Inlet Cove Club Homeowners Association, Inc. Respondents/Appellants

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APPELLANTS' FINAL BRIEF OF APPELLANTS/RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATEMENT OF ISSUES ON APPEAL

I. DID THE MASTER ERR IN REFUSING TO CONSIDER EVIDENCE OF SUBSEQUENT CONDUCT THAT WAS CLEAR AND CONVINCING EVIDENCE IN SUPPORT OF REFORMATION?

II. DID THE MASTER ERR IN HIS FINDINGS REGARDING KICA'S INTENT AND THE TOWN'S INTENT, WHERE HIS FINDINGS WERE INTERNALLY INCONSISTENT AND WERE BASED ON A MISPLACED LEGAL ANALYSIS?

III. DID THE MASTER ERR IN FAILING TO TREAT THE 1994 DEVELOPMENT AGREEMENT AND EXHIBIT 16.2 AS THE ANTECEDENT UNDERSTANDING TO WHICH THE QUIT-CLAIM DEED SHOULD BE REFORMED?

IV. DID THE MASTER ERR IN MAKING FINDINGS RELATING TO DEVELOPABILITY AND ITS RELATIONSHIP TO KICA'S INTENT, WHERE THE RECORD SHOWS THAT THE ADDITIONAL LAND WAS DEVELOPABLE AND NO PARTY INTENDED IT TO BE CONVEYED?

V. DID THE MASTER ERR IN MAKING A FINDING THAT THE INTENDED WESTERN BOUNDARY OF THE BEACHFRONT STRIP AS SHOWN IN EXHIBIT 16.2 COULD NOT BE RELIABLY DETERMINED, WHEN THE EVIDENCE SHOWS THAT IT WAS BASED ON A SURVEYED LINE?

VI. DID THE MASTER ERR BY FOCUSING HIS RULING UPON THE MISTAKEN PROPERTY DESCRIPTION ITSELF, PERPETUATNG THE SCRIVENER'S ERROR, WHEN THE NECESSARY ANALYSIS WAS TO DETERMINE IF THAT DESCRIPTION WAS INDEED WHAT THE PARTIES INTENDED?

VII. DID THE MASTER ERR BY CREATING AN IMPROPER DICHOTOMY OF EVIDENCE RELATING TO KICA'S INTENT, WHICH HE THEN APPLIED IN AN INCONSISTENT FASHION?

VIII. DID THE MASTER ERR BY FAILING TO ADMIT AND GIVE CONSIDERABLE WEIGHT TO THE "TALKING POINTS," WHICH WERE ADMISSIBLE AS A BUSINESS RECORD AND AS AN ADMISSION BY PARTY OPPONENT?

IX. CONSIDERING THE CUMULATIVE EFFECT OF THE ERRORS BY THE MASTER, UPON THIS COURT'S *DE NOVO* REVIEW, SHOULD REFORMATION HAVE BEEN GRANTED WHERE THE EVIDENCE IN SUPPORT OF REFORMATION IS CLEAR AND CONVINCING?

STATEMENT OF THE CASE

Appellant/Respondent Kiawah Resort Associates, L.P. ("KRA"), filed a civil action against Respondent Kiawah Island Community Association, Inc. ("KICA"), on March 1, 2013, asserting equitable claims for declaratory judgment, reformation of deed, and specific performance arising from a property transfer made pursuant and subsequent to the execution of the September 26, 1994 Development Agreement ("1994 Development Agreement") between KRA and the Town of Kiawah Island.

On April 17, 2013, the parties to the action joined in a Consent Order of Reference to Special Referee. Leonard Krawcheck, Esq., was designated Special Referee. On May 10, 2013, Respondents/Appellants Kiawah Property Owners' Group, Inc. ("KPOG"), and Inlet Cove Club Homeowners' Association, Inc. ("Inlet Cove"), filed a Motion to Intervene, causing the Special Referee to recuse himself due to his law partner's prior representation of Inlet Cove. On August 2, 2013, the prior Consent Order was vacated and the case was referred to the Master-in-Equity ("Master") for Charleston County. The Master granted the Motion to Intervene on November 5, 2013, over the objection of KRA and KICA.

On October 18, 2013, KRA filed a Motion to Join KDP II as an Additional Plaintiff and to Amend Complaint, which was granted. KRA and KDP II filed their Amended Complaint on November 19, 2013. In consultation with the parties, the Master scheduled a trial on the merits, which began on Monday, December 9, 2013, and reconvened on Wednesday, December 11, 2013, on which date it was completed. The Master issued his Final Order on June 4, 2014 ("Final Order"), denying the claims for reformation of deed, declaratory judgment, and specific performance by KRA and KDP II, while granting KICA's claim for a declaratory judgment.

On June 16, 2014, KRA and KDP II filed a Motion to Alter or Amend the Final Order. On May 7, 2015, the Master issued his Order on Motion to Alter or Amend the Final Order, whereby he reaffirmed his rulings in the Final Order, but dismissed KPOG and Inlet Cove as parties to the action due to lack of standing. On May 22, 2015, KRA and KDP II filed their Notice of Appeal in the Court of Common Pleas for Charleston County, received by this Court on May 27, 2015.

SUMMARY OF FACTS

This dispute arises from a transfer of property made pursuant and subsequent to the execution of the 1994 Development Agreement between KRA and the Town of Kiawah Island ("Town"). KRA, a principal owner and the developer of land on Kiawah Island, had acquired substantial undeveloped lands, assets, and resort amenities on Kiawah Island in 1988. The purpose of the 1994 Development Agreement was to create an enforceable contract between the Town and KRA with respect to the zoning, development, and entitlement rights relating to the undeveloped lands that KRA had acquired in 1988. KICA was not a party to the 1994 Development Agreement, but was ruled to be a third-party beneficiary of that document by the Master in the proceedings below, in light of a set of property conveyances from KRA to KICA that were required under the 1994 Development Agreement. Final Order (R. pp. 16, 17, and 34). KICA is a non-profit corporation that serves as the property owners' association for substantially all owners of property on Kiawah Island.

A. *The Beachfront Strip*

As set forth in Section 16(b) of the 1994 Development Agreement, one of the required conveyances to be made by KRA to KICA involved a "10-Mile Strip of Beachfront Property" (the "Beachfront Strip"). Pls. Ex. 5, Section 16(b) (R. pp. 1462-1463). This

transfer to KICA was to occur on or before January 1, 1996. The 1994 Development Agreement included the following description regarding the intended conveyance:

> 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.

Id. (emphasis added). The referenced Exhibit 16.2 is a graphical depiction of the Beachfront Strip that confirms the intended boundaries of the Beachfront Strip. *See* Pls. Ex. 28 (R. p. 2183). Both parties to the 1994 Development Agreement initialed Exhibit 16.2.

Exhibit 16.2 depicts the intended Beachfront Strip by using black and white diagonal hatchmarks. The hatchmarks stop at the eastern boundary of a 16.088-acre parcel reflected on Exhibit 16.2 that is also the subject property of an approved survey, which was entered in evidence. *See* Intvrs. Ex. 5 (R. p. 2258). This survey fixes the eastern boundary of the 16.088-acre parcel, and likewise delineates the intended western boundary of the Beachfront Strip shown in Exhibit 16.2, as the boundaries of Parcel 13 are shown on Exhibit 16.2. Parcel 13 is a 19.5-acre development parcel recognized within the 1994 Development Agreement that includes all of the 16.088-acre parcel and additional acreage to the west. Hence, the eastern boundary of Parcel 13 is identical to the surveyed eastern boundary of the 16.088-acre parcel reflected on the survey in evidence. (R. p. 894; R. pp. 1054-1055). The difference in acreage consists of the addition of the acreage within the Employee Facility Tract plus other acreage to the west. (R. p. 1054, line 25 – p. 1055, line 6). The combination of the 16.088-acre parcel on the east and the additional acreage on the west to form Parcel 13

is illustrated on the land use designation parcel map admitted in evidence. Pls. Ex. 27 (R. p. 2182).

The eastern boundary of Parcel 13 was intended to be the western boundary of the Beachfront Strip depicted on Exhibit 16.2. (R. p. 853, lines 14-19; R. p. 915, lines 17-21; R. p. 1054, line 18 – p. 1055, line 6). Exhibit 16.2 does not reflect any resumption of the intended Beachfront Strip to the west of Parcel 13, nor does it reflect that the disconnected 4.62 acres of additional land ("Additional Land"), which are the subject of this dispute, would be part of the Beachfront Strip. Rather, it shows that the Beachfront Strip terminates to the east of Parcel 13 and does not include the Additional Land. (R. p. 844, lines 18-22; R. p. 946, lines 8-13; R. p. 996, line 24 – p. 997, line 7; R. p. 1175, line 21 – p. 1176, line 6). The graphical depiction in Exhibit 16.2 is consistent with the testimony regarding the intent of the parties as to the location and western boundary of the Beachfront Strip, as was confirmed by five different witnesses at trial. (R. p. 836, lines 11-18; R. p. 915, lines 17-21; R. p. 967, lines 11-23; R. p. 1014, lines 7-20; and R. p. 1174, line 24 – p. 1175, line 10).

The witness testimony reflected not only KRA's intent, but also KICA's intent. Three of the witnesses presented were board members or officers of KICA at the time of the conveyance. Each testified that the Beachfront Strip was intended to stop at the eastern boundary of Parcel 13, as shown on Exhibit 16.2. Neither KICA nor the Intervenors presented a witness who testified that KICA had a contrary intent. The only witness called by KICA, Tammy McAdory, actually confirmed that she did not contest or challenge the testimony of these three witnesses relating to KICA's intent:

Q. Ms. McAdory, with regard to the testimony that has been presented by individuals who served on the board of directors of KICA, and who were officers of KICA in 1994 and 1995, as the witness presented by KICA in this action, do you contest or challenge the testimony that any of those witnesses gave with regard to their understanding of KICA's intent as it relates to the beachfront strip?

A. I would not.

(R. p. 1229, lines 6-14). McAdory is a long-standing employee of KICA who was employed by KICA at the time of the 1994 Development Agreement and thereafter.

The depiction of the Beachfront Strip in Exhibit 16.2 was intentional. It was specifically discussed, corrected and confirmed prior to the execution of the 1994 Development Agreement. (R. p. 823, lines 4-24; R. p. 832, line 13 – p. 836, line 21). The underlying purpose and intent of the transfer of the Beachfront Strip was not to gift KICA any developable oceanfront property, but merely the *undevelopable strip* of dune fields seaward of oceanfront properties already sold to third parties. (R. p. 834, lines 14-22; R. p. 910, line 25 – p. 911, line 4; R. p. 968, lines 10-21). The depiction of the Beachfront Strip on Exhibit 16.2 was consistent with this purpose and intent. (R. p. 836, lines 7-18; R. p. 967, line 11 – p. 968, line 21; R. p. 1014, lines 7-15). No party presented evidence or testimony that Exhibit 16.2 was inconsistent with the actual intent of the Town, KRA, or KICA.

The eastern boundary of Parcel 13, which was a surveyed boundary, is where the Beachfront Strip was intended to end. (R. p. 836, lines 11-18; R. p. 915, lines 17-21; R. p. 967, lines 15-23; R. p. 1019, lines 9-14; R. p. 1171, line 23 - p. 1172, line 9). However, as a result of a scrivener's error in the wording of the property description that was inserted into the "Agreement for Conveyance of Properties on Kiawah Island, SC," (Exhibit 16.7 to 1994 Development Agreement) and the Quit-Claim Deed for the Beachfront Strip, the mutually intended western boundary as depicted in Exhibit 16.2 was mistakenly not put into effect. (R.

p. 1027, line 22 – p. 1028, line 2; R. p. 1029, line 10 – p. 1030, line 2; R. p. 1034, lines 20-23).

B. *Preparation of the Agreement for Conveyance and Quit-Claim Deed*

The numerous quit-claim deeds needed to accomplish the required property transfers by KRA to KICA, and the property descriptions to be inserted in the quit-claim deeds, were prepared by Beth Nimmons. (R. p. 1115, lines 5-19). In 1994, Nimmons, who is now employed by a KRA affiliate, worked for Thomas Buist, a Charleston attorney who then served as outside real estate counsel for KRA. Nimmons was not involved in the preparation of the body of the 1994 Development Agreement or Exhibit 16.2, but was tasked with preparing the property descriptions to be inserted into the Agreement for Conveyance of Properties on Kiawah Island, SC ("Agreement for Conveyance") and all related deeds, including the Quit-Claim Deed for the Beachfront Strip ("Quit-Claim Deed") for review by Mr. Buist. (R. p. 1116, lines 2-11).

The Agreement for Conveyance specifically references and incorporates the 1994 Development Agreement. It was drafted and signed by KRA and KICA because KICA was not a direct signatory to the 1994 Development Agreement, but instead was merely a third-party beneficiary. Although this third-party beneficiary status would generally allow for KICA to enforce the benefit that the contracting parties intended to confer upon KICA, there was a desire that an agreement be entered directly with KICA to confirm the conveyances set forth within the 1994 Development Agreement in the event of a default by the developer. (R. p. 1010, line 17 – p. 1011, line 14). All agreed to this, including the Town, so the Agreement for Conveyance was prepared and added as an exhibit to the 1994 Development Agreement. The intention was that it would merely confirm the conveyances required in the body of the

1994 Development Agreement. The terms of the Agreement for Conveyance indicate that KRA and KICA considered the 1994 Development Agreement to be the prior understanding that they sought to confirm:

> WHEREAS, **under the terms of the Development Agreement**, KRA, L.P., has agreed to convey to the Kiawah Island Community Association, Inc., (the "KICA") **certain properties** located on Kiawah Island, S.C., prior to certain dates more particularly set forth in the Development Agreement, **the terms and provisions of which are incorporated herein by reference**;
>
> WHEREAS, **KRA, L.P., has agreed to enter into the within Agreement for Conveyance** of Properties on Kiawah Island, S.C. (the "Agreement") **to evidence its agreement to the conveyance of such properties in accordance with the terms and conditions of the Development Agreement.**

Intvrs. Ex. 2 (R. p. 2236) (emphasis added). In all, the Agreement for Conveyance includes 26 different incorporations and references to the 1994 Development Agreement. For each property conveyance described in the Agreement for Conveyance, KRA and KICA stipulated that the individual conveyance was to be either:

- "as set forth in [the] Development Agreement;" or
- "as more fully set forth in [the] Development Agreement;" or
- "all as more particularly set forth in [the] Development Agreement;" or
- "all in accordance with [the] Development Agreement;" or
- "pursuant to [the] Development Agreement."

Intvrs. Ex. 2 (R. pp. 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, and 2246).

The terms of the Agreement for Conveyance show a clear intention to confirm the conveyances under the 1994 Development Agreement, rather than to deviate from them. Moreover, the Agreement for Conveyance recites that the sole consideration for the various properties conveyed by KRA to KICA is Five Dollars and the Town's execution of the 1994 Development Agreement, indicating that the 1994 Development Agreement was the driving

force behind the Agreement for Conveyance. Unfortunately, the property description for the Beachfront Strip prepared by the scrivener and then inserted into the Agreement for Conveyance and the Quit-Claim Deed did deviate from both the description of the Beachfront Strip in Section 16(b) of the 1994 Development Agreement and the graphical depiction of the Beachfront Strip in Exhibit 16.2.

The property description that Nimmons prepared to describe the Beachfront Strip and that was inserted into the Agreement for Conveyance and Quit-Claim Deed, reads as follows:

> All that certain piece, parcel or strip of land, situate, lying and being in the Town of Kiawah Island, County of Charleston, South Carolina, approximately 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 southwesternmost corner of a 2.067 acre tract of land 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°55'16"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 a 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.

Intvrs. Ex. 2 (R. p. 2244) (emphasis added). The aspect of this property description that is relevant to this case is the provision indicating that the westernmost boundary of the Beachfront Strip would be an imaginary line beginning at the southwesternmost corner of the Employee Facility Tract, as opposed to the surveyed eastern boundary of the 16.088-acre parcel as graphically indicated in Exhibit 16.2. Therein lies the mistake.

The 1994 Development Agreement, through its direct incorporation of Exhibit 16.2, indicated that the Beachfront Strip would terminate at the eastern boundary of Parcel 13, not at the southwestern corner of the Employee Facility Tract. However, the property description drafted by Nimmons indicated that the Beachfront Strip would have its westernmost boundary at an imaginary line that started at a different point entirely. The point Nimmons picked was several hundred feet to the west of where it should have been per Exhibit 16.2, and resulted in an extra 4.62 acres of land being included. The same erroneous property description inserted in the Agreement for Conveyance was also inserted, by Nimmons, into the Quit-Claim Deed, as the two documents were prepared at the same time.

When preparing the property description for the Quit-Claim Deed, Nimmons did not have a copy of Exhibit 16.2. That document was kept at Town Hall along with the other exhibits to the 1994 Development Agreement pending execution. In order to prepare the relevant deeds, Nimmons was given a bullet list[1] of the properties that KRA was to convey, along with verbal instructions from Leonard Long, a principal of KRA and an officer and Board member of KICA, to put together a description of "the beachfront strip which is everything in front of sold lots and sold product for 10 miles." (R. p. 1057, lines 18-24). This instruction was meant to capture the underlying intent of the Beachfront Strip, which was to avoid a repeat of the "Isle of Palms situation,"[2] but was "never intended to include any

[1] The bullet list, along with a letter sent to KRA's lender to which it was attached, was entered into evidence as Plaintiffs' Exhibit 2. *See* Pls. Ex. 2 (R. pp. 1398-1400).

[2] The "Isle of Palms situation" related to a series of events occurring years prior. Owing to significant accretion of the southern end of the Isle of Palms, additional buildable oceanfront home sites were created and developed that were seaward of existing properties that had previously been sold as beachfront properties. (R. p. 911, lines 5-11; R. p. 965, lines 5-24; R. p. 1015, lines 5-18). The conveyance of the Beachfront Strip was intended to avoid any such scenario on Kiawah Island.

developable property." (R. p. 910, line 25 – p. 911, line 4; R. p. 1013, lines 20-25). The only description of the Beachfront Strip in the bullet list provided to Nimmons read "10 mile beachfront strip of front beach dunes." Pls. Ex. 2 (R. p. 1400). No formal plat or survey of the ten-mile long Beachfront Strip existed. Obtaining a survey would have required substantial time and would have cost hundreds of thousands of dollars (R. p. 1013, lines 10-15), burdens that were deemed avoidable at the time because the Beachfront Strip was to be limited only to the undevelopable dune fields in front of oceanfront lots that had already been sold to third parties. (R. p. 1017, lines 13-20).

Based on her own knowledge of Kiawah Island, but not upon specific instructions from the parties and without aid of reference to Exhibit 16.2, Nimmons decided that she would use the Employee Facility Tract in order to set the western boundary of the Beachfront Strip in the Agreement for Conveyance and the Quit-Claim Deed. (R. p. 1119, line 14 – p. 1120, line 2). Nimmons testified that she made this decision, based on her best judgment as how to craft the property description as being between sold lots and the mean high water mark. She testified that no one ever instructed her that the southwesternmost corner of the Employee Facility Tract was to serve as the western boundary of the Beachfront Strip, but that she made this determination herself. (R. p. 1122, lines 10-21). Nimmons further testified that, as a result of her use of the southwest corner of the Employee Facility Tract to form the western boundary of the property description for the Beachfront Strip, the property description she prepared did not match Exhibit 16.2 and, therefore, did not achieve the intent of the parties for whom she prepared the property description. (R. p. 1123, line 25 – p. 1124, line 5). Long confirmed, as did other witnesses, that Nimmons' property description did not match or implement the intent of KRA, the Town, or KICA. (R. p. 1012, lines 15-18; R. p. 1175, lines

21-25). No witness testified that the erroneous property description prepared by Nimmons was consistent with the intent of any party.

Nimmons further testified that if she had pulled all of the plats for all east to west parcels on Kiawah Island, or if she had been given Exhibit 16.2, or if she had seen the parcel map (Pls. Ex. 27 (R. p. 2182)), she would have known that she should not have used the southwesternmost corner of the Employee Facility Tract as the starting point for the western boundary of the Beachfront Strip. However, preparing the deeds was a "huge monumental task" as there were numerous other transfers in addition to the Beachfront Strip for which property descriptions had to be prepared. (R. p. 1164, lines 3-8). There was time pressure to get the process completed. (R. p. 1119, lines 4-13; R. p. 863, lines 19-23). Various portions and exhibits to the 1994 Development Agreement were being drafted and revised by different people. Various individuals, including Long and McKinney, separately reviewed the entire 1994 Development Agreement and the numerous deeds and exhibits thereto but did not catch the error in the property description inserted into the Agreement for Conveyance and Quit-Claim Deed. The witnesses were not merely reviewing a single Quit-Claim Deed, but rather a three-volume agreement covering thousands of pages of agreements, exhibits, deeds, and related documents.

After the property description was inserted, the Agreement for Conveyance was signed by Townsend Clarkson, KICA's President, and Leonard Long, KICA's Secretary. Intvrs. Ex. 2 (R. pp. 2236-2252). On December 29, 1995, KRA executed the Quit-Claim Deed that included the erroneous property description drafted by Nimmons. No one realized for years that anything other than the intended Beachfront Strip had been included in the legal description. In fact, the tax maps and zoning maps were never modified to show the

Additional Land as a separate parcel, even though it is subsumed by Parcels 12 and 13, which were owned by KRA and now by KDP II. (R. p. 841, lines 2-10); Pls. Ex. 15 (R. pp. 2134-2135); Pls. Ex. 33 (R. p. 2193). Even now, 20 years later, the Town's zoning and the County's tax maps continue to reflect KRA/KDP II as the owner of the Additional Land. KICA has never had the maps revised or requested them to be revised. KICA has never paid property taxes on the Additional Land, which have always been paid by KRA. (R. p. 1105, lines 4-24).

KICA does not hold itself out to its members or to the public as the owner of the Additional Land. On its website, KICA maintains and publishes maps indicating the location of its Common Properties and the area of beach dunes under its stewardship. KICA's Dunes Management Guidelines include a color map reflecting that KICA's dunes management activities stop at the eastern boundary of Parcel 13, consistent with Exhibit 16.2. Pls. Ex. 31 (R. pp. 2190-2191). The Beachfront Strip shown on the map does not extend westward to the disconnected area of Additional Land. (R. p. 1230, line 5 – p. 1231, line 22).[3] Also, KICA's map of its Common Properties does not reflect the Additional Land as being Common Property or being owned by KICA. The map actually reflects the Additional Land as being owned by KRA. Pls. Ex. 32 (R. p. 2192); (R. p. 1234, line 7 – p. 1235, line 4). This is also consistent with Exhibit 16.2.

In 2012, KICA's Board Chair acknowledged verbally and in writing that the relevant property description was a "mistake" and that KICA did not intend to benefit from an

[3] The western boundary of the KICA Dunes Property as reflected in Appendix E to KICA's Dunes Management Guidelines comports precisely with the western boundary reflected in Exhibit 16.2 of the 1994 Development Agreement, indicating accord as to the intended western boundary. *Compare* Pls. Ex. 28 (R. p. 2183) with Pls. Ex. 31 (R. pp. 2190-2191).

"unintended transfer of property." (R. p. 1194, lines 8-11; R. p. 1242, lines 5-21). Two witnesses, Clarkson and McAdory, corroborated his admissions. None contested them. The witnesses called by Intervenors had no relevant input on the issue, as they each admitted a lack of personal knowledge regarding the intent of the Town, KRA, or KICA. (R. p. 1298, lines 8-13; R. p. 1321, lines 8-12; R. p. 1345, lines 3-8; R. p. 1377, lines 11-22).

C. *The Additional Land*

As a result of the erroneous property description in the Quit-Claim Deed, the Additional Land, a large area totaling 4.62 acres of valuable oceanfront property, was mistakenly transferred to KICA. The Additional Land is physically disconnected from the remainder of the Beachfront Strip. It sits outside and apart from the area that was depicted as the intended Beachfront Strip on Exhibit 16.2 and straddles the boundary between Parcels 12 and 13, both of which were designated and entitled for development in the 1994 Development Agreement. Dennis Rhoad, who was the Town's Attorney in 1994, testified that neither the Town nor KRA intended for the Additional Land to be included in the Beachfront Strip. (R. p. 912, lines 3-11; R. p. 946, lines 8-13). The Additional Land includes developable land. No developable land was intended to be required as part of the conveyance of the Beachfront Strip. *Id.* A portion of the Additional Land sat above the then-existing OCRM setback line. This portion could be subdivided and sold as two or three oceanfront lots, which are developable and highly valuable. (R. p. 977, line 16 – p. 978, line 18). Even the portions that lie seaward of the OCRM baseline or critical line may, with regulatory approval, be used for pools, gazebos, decks, walkways, and similar improvements in connection with a hotel or other form of oceanfront development. (R. p. 1299, line 5 – p. 1300, line 17). The 4.62 acres are also significant for development purposes as they count

toward the number of density units that the developer is entitled to build on Parcels 12 and 13 under the terms of the 1994 Development Agreement, regardless of whether the acres sit landward or seaward of the OCRM jurisdictional lines. (R. p. 969, line 22 – p. 970, line 14).

The testimony presented at trial was consistent and uncontroverted that KRA did not intend to convey, and KICA did not intend or expect to receive, the Additional Land. Pat McKinney, a KICA board member in 1994 and 1995, confirmed that KICA did not intend nor expect to receive the 4.62 acres as part of the Beachfront Strip. (R. p. 973, lines 7-21). Leonard Long, a KICA board member in 1994 and 1995 and Secretary of KICA in September 1994, corroborated that KICA's intent was that the Beachfront Strip would terminate at the eastern boundary of Parcel 13. (R. p. 1019, lines 9-14). Townsend Clarkson, a KICA board member and President of KICA in September 1994, also confirmed that KICA did not intend for the Additional Land to be conveyed as part of the Beachfront Strip. (R. p. 1175, line 21 – p. 1176, line 6). If there were any witnesses that might have disagreed with this evidence, KICA did not call them to testify.

D. *Additional Evidence Relevant to Intent*

After the Quit-Claim Deed was recorded, KICA never assumed control of the Additional Land or maintained it as Common Property, even though KICA would otherwise be obligated to do so under the KICA covenants if the Additional Land were KICA's Common Property. The Quit-Claim Deed required that the Beachfront Strip being conveyed be maintained and utilized as a Common Property:

> **This conveyance is made further 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 the Kiawah Island Community Association, Inc., recorded in Book M114, page 407 in the R.M.C. Office, as amended, (the "KICA

> Covenants") and shall be made subject to such rights and restrictions as are applicable to the common properties as set forth in said KICA covenants.

Intvrs. Ex. 3 (R. pp. 2253-2257). KICA has never maintained or treated the Additional Land as Common Property. (R. p. 849, lines 10-13; R. p. 850, lines 3-6; R. p. 1178, lines 5-8). However, KICA has maintained, utilized and asserted control over the entire portion of the Beachfront Strip as depicted on Exhibit 16.2, *i.e.*, the area to the east of Parcel 13. No witnesses were able to identify *any* actions of maintenance or control that KICA had ever undertaken relating to the Additional Land. (R. p. 1235, line 15 – p. 1236, line 13; R. p. 1178, lines 1-18). There is also no record of KICA ever incurring any expense relating to the Additional Land. (R. p. 1236, lines 14-17). No activities or investments have been undertaken by KICA relating to the Additional Land. (R. p. 848, line 21 – p. 850, line 6; R. p. 852, lines 18-22).

The Additional Land is surrounded by property owned by KRA and KDP II and is reflected in KRA and KDP II's maps and records as developable property belonging to KRA. Pls. Ex. 29 (R. p. 2184); Pls. Ex. 27 (R. p. 2182). Zoning and land use maps maintained by the Town continued to reflect that the Additional Land was owned by KRA and KDP II and continued to carry the zoning classifications and entitlements that KRA had negotiated through the 1994 Development Agreement. Pls. Ex. 33 (R. pp. 2193-2194). The 1994 Development Agreement shows the Additional Land as belonging to KRA as part of Parcel 12, the "Beachwalker Park" Parcel (TMS No. 207-05-00-001) and Parcel 13, the "Beachwalker Ocean" Parcel. When the 1994 Development Agreement was renewed in 2005, exhibits to the 2005 Development Agreement continued to reflect the Additional Land as part of the undeveloped, but developable, parcels on Kiawah Island owned by KRA and entitled for further residential development. Pls. Ex. 30 (R. p. 2185).

On prior occasions, KRA and KICA have cooperated to correct mistaken conveyances of property that occurred following the 1994 Development Agreement. In June 1997, KICA executed a confirmatory quit-claim deed returning a separate 3.054 acre parcel to KRA on the basis that, although the property description in the Quit-Claim Deed might have included the parcel, neither KRA nor KICA intended for the parcel to be included within the Beachfront Strip or for the parcel to become Common Property:

> **KICA**, by the execution, delivery and recordation of the within Confirmatory Quit-Claim Deed, **does hereby agree and confirm that** (i) **the Property was not, nor was it ever intended to be included in the Beachfront Deed conveyance**; (ii) that any and all reservations, limitations or restrictions purportedly imposed on or implied by, through, or under the Beachfront Deed to be on the Property are hereby declared null, void, and of no further force or effect if ever in effect; and (iii) that **no portion of the Property is, or ever was intended to be maintained and utilized as a "Common Property"** as such term is defined in the KICA Covenants.

Pls. Ex. 13 (R. p. 2126) (emphasis added). KICA thus confirmed that the property description of the Beachfront Strip included in the Agreement for Conveyance and the Quit-Claim Deed was not consistent with the intended scope of the Beachfront Strip. In the process of working with KICA to make other corrective exchanges of property, KRA first learned of the mistake relating to the western boundary of the Beachfront Strip in 1997. KRA did not know the actual extent of the mistake until 2011, when a survey was obtained indicating that the Additional Land was 4.62 acres. The previously available survey of the Employee Facility Tract that Nimmons utilized did not reflect the location of that tract relative to mean high water, such that the extent of the mistake was not discernable from that document.

In 2011, KRA engaged in discussions with KICA in an effort to correct the mistake relating to the Additional Land, a mistake that KICA's 2012 Board Chair acknowledged.

However, unlike the prior instances in which other mistakes were remedied through corrective deeds, KICA acknowledged the mistake relating to the Additional Land, but took the position, upon advice of counsel, that it should not execute a corrective deed and the mistake could only be corrected by a vote of KICA's full membership or the filing of a reformation action. (R. p. 1034, lines 16-19); Pls. Ex. 17 (R. p. 2166). The prior corrections of mistaken conveyances, one that benefitted KRA and another that benefitted KICA, were implemented without a vote of KICA's members and without legal action. Believing that the Quit-Claim Deed should be reformed to exclude the Additional Land and that no vote of KICA's membership was needed, KRA brought this action to obtain reformation.

STANDARD OF REVIEW

A claim for reformation of a written instrument arises in equity. Because the underlying action arises in equity, this Court reviews the Master's determination of the rights of the parties *de novo*. *See, e.g., Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 429, 673 S.E.2d 448, 454 (2009) This Court also has jurisdiction to find facts in accordance with its own view of the preponderance or greater weight of the evidence and may reverse a factual finding by the lower court in such cases when the appellant satisfies this Court that the finding is against the preponderance of the evidence. *Lewis v. Lewis*, 392 S.C. 381, 385, 709 S.E.2d 650, 652 (2011).

It has long been the law of this state that where a written contract does not conform to the intention of the parties, equity will reform the contract. *Shaw v. Aetna Cas. & Sur. Ins. Co.,* 274 S.C. 281, 285, 262 S.E.2d 903, 905 (1980). A written instrument may be reformed on the ground of mistake when the mistake is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations

of the contract, inconsistent with those of the parol agreement which necessarily preceded it. *Id.* Before equity will reform an instrument, it must be shown by evidence which is most clear and convincing not simply that it was a mistake on the part of one of the parties but that it was a mutual mistake. *Commercial Union Assur. Co. v. Castile*, 283 S.C. 1, 4, 320 S.E.2d 488, 490 (Ct. App. 1984). A mutual mistake is one whereby both parties intended a certain thing and by mistake in the drafting did not get what they intended. *Id.*

ARGUMENTS

I. THE MASTER ERRED BY REFUSING TO CONSIDER EVIDENCE OF SUBSEQUENT CONDUCT THAT CONSTITUTED CLEAR AND CONVINCING EVIDENCE OF MUTUAL MISTAKE

KRA and KDP II presented clear and convincing evidence arising before and after the 1995 conveyance that the imaginary line created and inserted by Nimmons into the property description constitutes a mutual mistake. This included clear and convincing evidence relating to the subsequent conduct of the parties. The evidence was admitted, but the Master indicated in the Final Order that he declined to give the evidence any consideration. By disregarding the evidence, the Master analyzed the record in a manner inconsistent with legal precedent and issued a ruling based only on a subset of the evidence. In a prior deed reformation case, the South Carolina Supreme Court found evidence of subsequent conduct to be "clear and convincing" evidence of intent. *See Sims v. Tyler*, 276 S.C. 640, 642, 281 S.E.2d 229, 230 (1981) (payment of taxes since the date of purchase, construction of a doghouse after purchase, planting of a garden after purchase on disputed property and purchase price paid were "clear and convincing evidence" relating to intent and whether reformation on the basis of mutual mistake should be granted). However, the Master erred by disregarding all evidence presented by KRA and KDP II relating to subsequent conduct of the parties. The error was not harmless, as all of this evidence supported reformation.

In the Final Order, the Master found that "[a]ll evidence of intent presented by Plaintiff came from events, not at the time of the conveyance was made, but from after the fact." Final Order, at R. p. 34.[4] By rejecting this evidence as not worthy of consideration, the Master erred. The Master's treatment of evidence of subsequent conduct appears to have been rooted in his reliance on this Court's decision in *Penza v. Pendleton Station, LLC*, 404 S.C. 198, 743 S.E.2d 850 (Ct. App. 2013), as "controlling authority" in this case.[5] In *Penza*, the parties disputed the meaning of certain terms in a mortgage, each urging the Court to construe the instrument according to their own interpretation. No party in that action filed a claim or counterclaim for reformation of a written instrument, and on appeal, this Court specifically declined to address the issue. The evidentiary standard applicable to construction of unambiguous deeds is very different from the evidentiary standard applicable to reformation of unambiguous deeds, but the Master considered them to be identical. This was error.

In actions to construe a contract, the court may not look beyond the four corners of the disputed document unless it first finds that the terms are ambiguous. Quite to the

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[4] The characterization is erroneous. KRA and KDP II presented testimony from six witnesses with personal knowledge and contemporaneous involvement with the events surrounding the 1994 Development Agreement and the conveyance of the Beachfront Strip. One was the scrivener who committed the scrivener's error. Three were officers or Board members of KICA at the time and were also principals or employees of KRA. One was the attorney for the Town and one was a land planner on Kiawah Island, Mark Permar, who worked together with KICA, KRA, and the Town both at the relevant time and continuously for more than 30 years.

[5] This Court, in *Penza*, explicitly did not address reformation, and instead stated the following: "Penza asserts the master's order essentially reforms Penza's first mortgage so it does not encumber Tract A. Penza maintains this was error because equity did not permit the master to do this without Penza's consent. Our decision that the master erred in granting summary judgment because there are issues of material fact is dispositive. Thus, we need not address this issue." *Id.*, 404 S.C. at 205, 743 S.E.2d at 853-54.

contrary, reformation actions by their very nature require that the plaintiff show that the document in question failed to reflect the agreement of the parties as a result of mutual mistake, which can only be shown through extrinsic evidence. Whether or not the terms of a contract are ambiguous is irrelevant in the analysis of a claim for reformation. A document which fails to enact the intent of the parties as a result of mutual mistake will most always appear on its face to be unambiguous in its terms. It is only by parol evidence that a party can prove that an instrument, though appearing unambiguous on its face, failed to give effect to the parties' intent and should be reformed.

KRA and KDP II seek reformation, not construction of the terms of a deed. *Penza* is, therefore, completely inapplicable. Under South Carolina law, "ambiguity or uncertainty has nothing to do with the reformation of a written instrument, but rather reformation is adjudged because the instrument, by reason of mistake or fraud, does not embody the true agreement of the parties." *Southern Realty & Constr. Co. v. Bryan*, 290 S.C. 302, 310, 350 S.E.2d 194, 198 (Ct. App. 1986). A contract may be clear and unambiguous as far as it goes and yet may not express the agreements of the parties, by reason of mutual mistake, allowing it to be reformed as equity may require. *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 49, 747 S.E.2d 178, 185 (2013). As these cases indicate, the Master also committed legal error by finding that, once the Quit-Claim Deed was signed, the doctrine of merger precluded consideration of any prior evidence. Order on Motion to Alter or Amend, at R. p. 48. If the parol evidence rule and the doctrine of merger were applicable in a reformation case, there would be no such thing as a reformation case.

In the Order on the Motion to Alter or Amend, the Master suggested that his reliance on *Penza* was ultimately academic because he undertook an alternative analysis that

considered extrinsic evidence. However, by incorrectly framing a case seeking reformation as a case seeking construction of an unambiguous written instrument, and then engaging in an alternative analysis that considered a fraction of the evidence, the decision below was flawed from its outset. The Master should have considered all evidence and paid particular attention to extrinsic evidence, setting aside the parol evidence rule and the doctrine of merger as inapplicable. The scrivener testified that she made the decision to create an imaginary line without input from the Town, KRA, or KICA as to the point used to create a western boundary of the Beachfront Strip. (R. p. 1122, lines 3-23). The Master was to consider all evidence that would bear on whether she failed to put the true intention of the parties into effect. This Court is requested to engage in a *de novo* review without deference to Master's findings, as the Master did not consider all of the evidence in the record.

When the South Carolina Supreme Court gave significant weight to evidence of the subsequent conduct of the parties in *Sims*, it was not breaking new ground. In reformation actions, courts of varied jurisdictions have given consideration to *all* facts or events which bear upon the intention of the parties, specifically including subsequent conduct. *See, e.g., Darst v. Lang*, 367 Ill. 119, 122, 10 N.E.2d 659, 661 (1937) (affirming reformation where parties' subsequent conduct in the years after the conveyance indicated their belief that plaintiffs conveyed more by the deed than either they or defendant intended); *Tidwell v. Bassett*, 271 Ga. App. 867, 869, 611 S.E.2d 123, 125-26 (2005) (affirming reformation of deed based on a scrivener's error where party seeking reformation paid taxes and insurance on property subsequent to the conveyance); *De Simone v. Kramer*, 77 Wis.2d 188, 196, 252 N.W.2d 653, 656 (1977) (stating that trial court is entitled to consider the conduct of the parties and the negotiations which took place, both before and after the execution of the

documents and to consider all related documents in determining intent). However, the Master confirmed that he did not consider evidence of subsequent conduct in this case, resulting in error.

As shown during the trial, KICA has never acted in a manner consistent with an intention or expectation of being the owner of the Additional Land. KICA has not maintained the Additional Land as Common Property, even though a condition of the Quit-Claim Deed was that all property conveyed must be maintained and utilized by KICA as Common Property. Intvrs. Ex. 3 (R. p. 2254). Although KICA has undertaken this duty with regard to the dunes area *eastward* of Parcel 13, i.e., the intended Beachfront Strip depicted in Exhibit 16.2, it has never done so with regard to the Additional Land. (R. p. 1235, line 15 – p. 1237, line 3). KICA's subsequent conduct proves the dispositive issue: KICA has at all times acted consistent with the boundary set forth in the 1994 Development Agreement and Exhibit 16.2, but inconsistent with the boundary created by the defective Nimmons property description that resulted in a different conveyance than what was intended.

When asked, no witness was able to identify a single act of maintenance or control that KICA had ever undertaken relating to the Additional Land. (R. p. 1235, line 15 – p. 1236, line 13; R. p. 1178, lines 1-18). If KICA believed that it owned the Additional Land, it would have maintained and controlled it consistent with its obligation as the steward of all Common Property on Kiawah Island. Instead, KICA has conducted no any activity of any kind on the Additional Land. (R. p. 849, line 10 – p. 850, line 6). KICA admits that it has no record of ever incurring a single expense relating to the Additional Land, which spans 4.62 acres in size. (R. p. 1236, lines 14-17). This, again, is inconsistent with an intention or belief of ownership.

The evidence of subsequent conduct covers not only what KICA has not done, but also what it has done. When communicating the specific locations of Common Property to KICA members and the public, KICA shows that the Beachfront Strip stops precisely where the 1994 Development Agreement and Exhibit 16.2 indicate it stops, which is at the surveyed eastern edge of Parcel 13 just below the Duneside Villas, rather than the imaginary line that Nimmons inserted. Pls. Ex. 32 (R. p. 2192); (R. pp. 1234-1235). KICA's affirmative representation regarding the location of its Common Property excludes the Additional Land, actually denoting the Additional Land as being owned by KRA. (R. pp. 1234-1235). A separate map created by KICA also shows that the Beachfront Strip stops at Parcel 13 and does not include the Additional Land. The map in KICA's Dunes Management Guidelines shows that the Beachfront Strip stops at the very location where the parties intended it to stop, unmistakably excluding the Additional Land from the area indicated as maintained by KICA. Pls. Ex. 31 (R. pp. 2190-2191). The Master disregarded all of this evidence, reasoning that they were not definitively created in 1994 or 1995 and, therefore, merited no attention.

KRA has paid the property taxes on the Additional Land since 1994, a specific indicia of intent previously highlighted in *Sims*. (R. p. 1105, lines 13-19). KICA has never attempted to pay property taxes on the Additional Land, nor contacted KRA to discuss reimbursement of the property taxes KRA has paid on the Additional Land. (R. p. 1105, lines 13-19). It would be reasonable to expect KICA to have done these things if it believed or intended that the property belonged to KICA. Similarly, KICA has never requested or caused applicable tax maps to be redrawn in order to reflect that the Additional Land is part of the Beachfront Strip or is owned by KICA. (R. p. 1105, lines 20-24). Even after the defective

Quit-Claim Deed was executed, the Additional Land remained a part of TMS No. 207-05-00-0011 on the real property tax records of Charleston County, which indicates that the Additional Land is owned by KRA. The Master did not address this evidence.

Although this evidence of conduct is already clear and convincing, there is more. KICA, through its subsequent Board Chair, Craig Weaver, acknowledged that the conveyance of the Additional Land was the result of a "mistake" and that KICA did not intend to benefit from an "unintended transfer of property." (R. p. 1194, lines 8-11). The Master disregarded this evidence as well, and refused to allow an authenticated business record into evidence that corroborated the admission. Pls. Ex. 17 (R. p. 2166). The evidence relating to the admission of mistake was given no weight or consideration by the Master. The Master initially refused to allow admission of the Talking Points exhibit, but addressed it in the Final Order as if it had been admitted. *See* Final Order, at R. p. 23. The Talking Points should have been admitted, and the error in excluding them was not harmless.

The unique facts of this case heighten the importance of evidence of subsequent conduct, because the subsequent conduct manifests the mutual mistake created by the scrivener's error. *See, e.g., Kaiser v. Carolina Life Ins. Co.,* 219 S.C. 456, 468, 65 S.E.2d 865, 870 (1951) ("each suit for reformation stands on its own peculiar facts"). The property description under review was prepared by a scrivener who made independent decisions where to place the western boundary of the Beachfront Strip. How the parties have conducted themselves, and their beliefs as to the nature and extent of their interests, is probative whether the scrivener succeeded. However, the Master's analysis became circular. The mistaken property description was declared to reflect the intent of the parties because the Master declined to consider all of the evidence proving otherwise.

Ultimately, this Court must, through *de novo* review, determine whether KICA's intent is reflected by the western boundary described in the Nimmons property description or, conversely, if there is clear and convincing evidence that the parties intended to give effect to the western boundary shown in Exhibit 16.2. Consider a contrary state of facts: If KICA had maintained the Additional Land, had communicated itself as the owner of the Additional Land, had paid taxes on the Additional Land, had disagreed with the testimony of KICA's former board members that the inclusion of the Additional Land was unintended, and had disagreed rather than admitted that the property description was a "mistake," the facts would be different. However, this case must stand on its peculiar facts as they do exist, and these facts call for the Quit-Claim Deed to be reformed on the basis of mutual mistake. When a defendant has conceded that a mistake has occurred, and has conducted itself consistent with that concession, equity should intervene and correct the mistake.

II. THE MASTER ERRED IN ALL OF HIS FINDINGS REGARDING KICA'S INTENT AND THE TOWN'S INTENT

In the Order on the Motion to Alter or Amend, the Master found that "[t]he Agreement for Conveyance is the only manifestation of KICA's intent that exists in the record of this case." Order on Motion to Alter or Amend, at R. p. 43. This is incorrect. It was the only thing the Master ultimately considered. The finding that KICA's intent may only be discerned through the Agreement for Conveyance is error in a reformation action. It was also undermined by the Master's other findings. In the Final Order, the Master found that "[b]oth the Agreement for Conveyance and the Beachfront Deed were drafted by KRA's legal counsel," not by KICA, and also found that:

> 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.

Final Order, at R. p. 17. Based on the Master's findings of fact, the execution of the Agreement for Conveyance was a unilateral action taken without approval from KICA's Board. Following the logic set out in the Final Order, KICA cannot be said to have had any intent whatsoever with respect to the terms of the Agreement for Conveyance. It was signed by Clarkson without vote or discussion.

Evidence of the contemporaneous intent of KICA was presented at trial. However, in the Order denying the Motion to Alter or Amend, the Master discounted the testimony of Clarkson, McKinney, and Long relating to intent on the basis that they were "interested directors" under the South Carolina Nonprofit Corporation Act. The Master explained that, in order for a conflict of interest transaction involving a non-profit corporation to be approved (which apparently includes the Agreement for Conveyance), the transaction must be approved by a majority of the disinterested directors. Order on Motion to Alter or Amend, at R. p. 52. Given the Master's findings that no such vote or approval was obtained, the Master undermined his finding that the Agreement for Conveyance should be considered as the sole manifestation of KICA's intent. By disregarding the intent of the then-officers and directors of KICA, the Master also disregarded KICA's concession to the testimony these witnesses provided. What was remarkably not even contested at trial ended up not even being considered by the finder of fact.

There is inherent inconsistency in the Master's approach. Clarkson's testimony relating to contemporaneous intent was disregarded, but his unauthorized execution of the Agreement for Conveyance containing a property description that KICA did not prepare was declared the "only manifestation of KICA's intent that exists in the record" and "the only

official action of the KICA Board" relevant to the issue of intent. Order on Motion to Alter or Amend, at R. p. 43; Final Order, at R. p. 23. It was neither of these things. The Master then reasoned that the Agreement for Conveyance must be reflective of KICA's intent because "[i]n the intervening twenty years, KICA has never repudiated or disavowed the Agreement for Conveyance." Order on Motion to Alter or Amend, at R. p. 52. This finding added inconsistency to the error. In every other instance, the Master had refused to consider evidence of subsequent conduct. However, the fact that the Agreement for Conveyance had not, in his view, been subsequently repudiated or disavowed was considered probative.

This finding was not just inconsistent, but also itself erroneous. KICA has disavowed the relevant portion of the Agreement for Conveyance and the Quit-Claim Deed, which is the Nimmons property description. In 1997, when KICA signed the Confirmatory Quit-Claim Deed returning three acres of oceanfront property to KRA, KICA disavowed the property description by taking action to correct a mutual mistake that the property description had created. Pls. Ex. 13 (R. pp. 2125-2133). All of KICA's other subsequent conduct also represents disavowal of the property description, such as: (1) not maintaining the Additional Land; (2) not treating it or indicating it as Common Property; (3) not paying taxes on it; (4) representing to the public that KRA actually owns it; and (5) admitting in 2012 that the inclusion of the Additional Land as part of the Beachfront Strip was a mistake and indicating that it did not intend to benefit from an unintended transfer of property. KICA has continuously disavowed the property description in the Agreement for Conveyance and Quit-Claim Deed, but the Master did not apprehend the various ways in which this has occurred.

In the Final Order, the Master also made a finding that the Town's intent was irrelevant, even though the Town was a signatory party to the document that bestowed third-

party beneficiary status on KICA relative to the intended transfer of the Beachfront Strip. This was error. However, the Master then articulated an alternative analysis that was itself incorrect and inconsistent. In the alternative analysis, where he did examine the Town's intent, he gave no consideration to the testimony regarding the Town's contemporaneous intent provided at trial by the Town's Attorney. Instead, the Master focused solely upon the Fifth Amendment to the 2005 Development Agreement, which the Town signed in 2012. The Master found that the Town "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." Final Order, at R. p. 34.

The Master erred, as the intent of the Town is relevant. He also failed to remain consistent in his treatment of evidence of subsequent conduct. Moreover, the Master misapprehended the terms of the Fifth Amendment, which clearly support exactly what KRA and KDP II have asserted in support of their claim:

> WHEREAS, **Exhibit 16.2 to the First Agreement was a graphic illustration of the location of the Beachfront Strip that established the western terminus of the Beachfront Strip as the eastern boundary and extended eastern boundary of Parcel 13** of the First Agreement, known as the Beachwalker Ocean Parcel (TMS No. 207-05-00-118) in the First Agreement; [and]
>
> WHEREAS, **this Fifth Amendment is intended to be a reaffirmation of what is clearly shown on Exhibit 16.2 of the First Agreement** and Exhibit 1.3 of the Agreement;

Intvrs. Ex. 9 (R. pp. 2261-2262). The Town affirmed that Exhibit 16.2 "established the western boundary of the Beachfront Strip as the eastern boundary of and extended eastern boundary of Parcel 13." The Town also reaffirmed what is "clearly shown on Exhibit 16.2," which is that the Additional Land was not intended to be part of the Beachfront Strip. Other

evidence of the Town's intent, including subsequent conduct, was also introduced into evidence, but not given any consideration by the Master. The zoning maps maintained by the Town, and the relevant exhibits to the 2005 Development Agreement reflect that the Additional Land is zoned for development and remains property of the developer, not Common Property owned by KICA. This is the evidence, and the reading of the evidence, that should prevail upon this Court's review. The conduct of the parties is consistent and supports reformation on the basis of mutual mistake.

Both KICA and the Town have acted in a manner that manifests they never intended for the Additional Land to be conveyed to KICA. KICA has acted in a manner manifesting that it never has conducted or believed itself to be the owner of the Additional Land. KICA's actions, admissions, and concession to the testimony of Long, McKinney, and Clarkson are manifestations of its intent, not the imaginary line that Nimmons inserted into the property description upon which the Master placed all of his reliance. The evidence of the Town's intent is relevant and also indicative of mutual mistake. When the evidence of KICA's intent and the Town's intent are given due consideration under the correct legal framework, clear and convincing evidence supporting reformation is seen.

III. THE MASTER ERRED IN FAILING TO TREAT THE 1994 DEVELOPMENT AGREEMENT AND EXHIBIT 16.2 AS THE ANTECEDENT UNDERSTANDING OF THE PARTIES

The Master did not give proper weight to Section 16(b) and Exhibit 16.2 of the 1994 Development Agreement, which should be treated as the antecedent understanding of the parties as to the intended boundaries of the Beachfront Strip. The principle upon which reformation is based is that, preceding the execution of the instrument, the parties had an understanding of their intentions but the understanding was frustrated through mutual

mistake. *See, e.g., Brock v. O'Dell*, 44 S.C. 22, 21 S.E. 976, 979 (1895). Both parties to the 1994 Development Agreement testified that they considered Exhibit 16.2 to be the governing reflection of their intent. KRA confirmed Exhibit 16.2, and three former Board members of KICA confirmed it represented KICA's intent, and has been fully corroborated by KICA's subsequent conduct. The also Town confirmed Exhibit 16.2, as Mr. Rhoad testified under oath that Exhibit 16.2 reflected the Town's intent. The Town and KRA executed the 1994 Development Agreement, which described Exhibit 16.2 (not the Agreement for Conveyance or the Quit-Claim Deed) as the depiction of the intended boundaries for the Beachfront Strip. The Agreement for Conveyance indicates that its intention is to confirm and effectuate the conveyances as set forth in the 1994 Development Agreement and would have but for the scrivener's error.

The evidence that the 1994 Development Agreement and Exhibit 16.2 constitute the antecedent understanding of KRA and KICA is clear and convincing. Since the conveyance was made, KICA has maintained only those dunes that are within the Beachfront Strip as shown on Exhibit 16.2. KICA's Map of Common Property depicts the western boundary of the Beachfront Strip in exactly the same location as it is depicted on Exhibit 16.2. The Agreement for Conveyance, signed by Clarkson on KICA's behalf, states no fewer than 26 different times that each conveyance was to be "in accordance with the terms of [the] Development Agreement," or other very similar language. Also, in 1997, KICA returned a valuable parcel to KRA because the transfer of that parcel as part of the Beachfront Strip was not intended by the parties to the 1994 Development Agreement, thereby declaring that the intent of those parties was also KICA's intent. Also, through his finding that KICA was a third-party beneficiary of the 1994 Development Agreement, the Master himself recognized

the clear nexus between the intention of the Town, KRA, and KICA with regard to the intended boundaries of the Beachfront Strip. It all originated in the 1994 Development Agreement and the discussions leading thereto.

Equity should be flexible, rather than rigid. In this case, the "contract" between KRA and KICA (i.e., the Agreement for Conveyance) cannot be reasonably characterized as the origin of the mutual intention of KRA and KICA to convey the Beachfront Strip. As the record reflects, the origin of the conveyance was in the terms of the 1994 Development Agreement. The concept of the Agreement for Conveyance was hatched for the sole purpose of creating an ability on the part of KICA to enforce the conveyance without relying solely upon its third-party beneficiary status under the 1994 Development Agreement. (R. p. 1011, lines 3-14). An error was then made by the scrivener in translating the required conveyance described in Section 16(b) and depicted on Exhibit 16.2 of the 1994 Development Agreement into a technical legal description appropriate for an instrument of conveyance. This was a mutual mistake that should be corrected in order for the true intention of the parties to be given effect.

There is no evidence showing that KRA and KICA intended to deviate from what KRA and the Town had agreed. The hiccup came as a result of the property description, which Nimmons prepared by making a choice while under pressure to get a significant, time-sensitive task completed, and without a copy of Exhibit 16.2 at her disposal:

Q. Did anyone from the Town of Kiawah Island instruct you to use this southwestern corner of the employee tract as the western boundary?

A. Nobody instructed me to do that.

Q. Did anyone from KICA instruct you to use the southwestern corner of the employee facility tract?

A. No.

Q. Did anyone from KRA instruct you to do that?

A. No.

Q. Did anyone from KDP II, LLC, if it existed at the time, instruct you to do that?

A. It didn't, but no.

Q. Was the decision to use the southwestern corner of the employee facility tract, was that your decision?

A. That was my decision.

Q. And you were the scrivener?

A. I was.

(R. p. 1122, lines 6-23). There is no evidence suggesting that KRA and KICA intended to deviate from Exhibit 16.2 in order to convey the Additional Land to KICA. In fact, the entirety of the record is to the contrary, as proven by the wide body of extrinsic evidence. The deviation in the Nimmons property description was an honest mistake on the part of the scrivener, which constitutes mutual mistake and justifies reformation.

The Master should not rely solely on the very Property Description that all witnesses and parties concede to be a mistake when the record is replete with evidence that Exhibit 16.2 manifests the actual intent and understanding intended to be given effect. Furthermore, the Master's finding that there was no discussion or vote amongst the KICA Board to authorize the Agreement for Conveyance, and no action on the part of KICA with regard to the Quit-Claim Deed, only heightens the importance of Section 16(b) and Exhibit 16.2, and calls for the property description to not viewed as self-fulfilling. If, as the Master posits, KICA was merely acted upon with regard to the size, shape or location of the lands to be conveyed to it, then the intention of the parties to the 1994 Development Agreement should control as the antecedent understanding as to how the third-party beneficiary was to be benefitted. The fully gratuitous portion of the transfer, which was the Additional Land,

should be returned through reformation while the intended and expected portion of the Beachfront Strip east of Parcel 13 remains in KICA's stewardship.

However, the Master rejected Exhibit 16.2, noting that it "is neither a survey nor an official plat of record." Final Order, at R. p. 15. He also found it to have been "unilaterally altered," which was also erroneous, as Mark Permar confirmed with the Town Mayor that Exhibit 16.2 needed to be modified. The Town and KRA subsequently executed the modified version. The finding of unilateral alteration is also totally inconsistent with the trilateral conduct of the parties, which comports and has always comported with the depiction in Exhibit 16.2. The Master also incorrectly stated that "the accuracy of the boundaries [in Exhibit 16.2] lack reliability and are of limited value in determining the intent of the parties with regard to the conveyance of the Beachfront Strip." Final Order, at R. p. 26. This finding is not supported in the record, as each relevant witness who had first-hand knowledge of the parties' intent confirmed that it was readily determinable from Exhibit 16.2 that the Beachfront Strip was to stop at the eastern edge of Parcel 13, which is a surveyed boundary line.

The Master's finding that Exhibit 16.2 is unreliable undercuts the 1994 Development Agreement. It also disregards the testimony provided by witnesses. At the time Exhibit 16.2 was prepared and the 1994 Development Agreement was executed, the eastern boundary of Parcel 13 was shown on a recorded plat and could further be delineated by reference to the adjoining parcels, which had already been developed and platted of record. Pls. Ex. 5 (R. p. 1596; R. p. 1600). As set forth below, these findings are also contradicted by the Fifth Amendment to the 2005 Development Agreement, in which the Town and KRA specifically reaffirmed what is clearly shown on Exhibit 16.2, which established that the western

terminus of the Beachfront Strip was the "eastern boundary and extended eastern boundary of Parcel 13." Intvrs. Ex. 9 (R. p. 2260; R. p. 2262). The maps maintained by KICA reflect this boundary. When the intended boundary is shown to be clear to all parties, it is error for the Master to interject a determination that it is unclear.

There is specific evidence, and indeed affirmation by KICA, that the 1994 Development Agreement and the intention of the parties to that agreement was the antecedent understanding of KRA and KICA relating to the Beachfront Strip. When KICA entered the Confirmatory Quit-Claim Deed in 1997, the explanation as to why the property was being returned was that: "it was not the intention of the parties to the Development Agreement that title to any portion of the Property be included in the Beachfront Deed." Pls. Ex. 13 (R. p. 2125). As a result, KICA "agreed and confirmed" in a solemn, recorded instrument that "the Property was not, nor was it ever intended to be included in the Beachfront Deed conveyance," and that "no portion of the Property is, or ever was intended to be maintained and utilized as a 'Common Property' as such term is defined in the KICA covenants." Pls. Ex. 13 (R. p. 2126). As this affirmative voluntary act demonstrated, KICA did take actions that disavowed the Agreement for Conveyance and specifically indicated that it was the 1994 Development Agreement that KRA and KICA were adopting and intending to implement in connection with the conveyance of the Beachfront Strip.

IV. THE MASTER ERRED IN HIS ANALYSIS OF DEVELOPABILITY OF THE ADDITIONAL LAND AND ITS RELATIONSHIP TO KICA'S INTENT

In the Final Order, the Master made a conclusion "as a matter of fact and law, that at the time of the 1994 conveyance, the subject property was not developable." Final Order, at R. p. 29. The issue of developability was initially significant to the Master, as he declared it

to be the "relevant inquiry." Final Order, at R. p. 29. The Master's conclusion regarding developability is contrary to the evidence. (R. p. 912, lines 3-11; R. pp. 977-978). Numerous witnesses testified as to both the developability and the development value of the Additional Land, as it is part of two development parcels that were the underlying purpose for the Town and KRA to enter into the 1994 Development Agreement.

The Master's findings regarding developability stemmed from another erroneous finding that "[t]he intervenors, KPOG and Inlet Cove, presented evidence pertaining to KICA's intent ... by presenting evidence of the developable status of the subject property during the relevant 1994 time frame." Final Order, at R. p. 23. This was based on testimony provided about the 1991 location of the OCRM jurisdictional lines. There is no evidence in the record showing that anyone affiliated with KICA knew or considered the location of the 1991 OCRM jurisdictional lines at the time of the conveyance. More importantly, there is no connection between those lines and the independent decision made by Nimmons regarding the imaginary line that she created and inserted into the property description.

The mere fact that a portion of the 4.62 acre parcel is within DHEC/OCRM jurisdiction was not a basis for the Master to declare that the tract, in whole or in part, is "not developable." Final Order, at R. p. 29. Even on the portions of the Additional Land that are within OCRM jurisdiction, there are a broad range of improvements and uses that can occur that would be particularly applicable in the context of oceanfront development on Kiawah Island.[6] Furthermore, an appreciable portion of the Additional Land is landward of the 1991

[6] KRA and KDP II presented a full itemization of types of development uses that would have been possible in 1994. Pls.' Motion to Alter or Amend Final Order, at R. p. 637. These were also in evidence as part of the 1994 Development Agreement and are a matter of judicial notice to the extent they are based on state law regarding permitted coastal development.

Setback Line, zoned "R-3, C," and fully "developable" as residential or commercial property. As Dennis Rhoad testified, and all witnesses corroborated, neither the Town, nor KRA, nor KICA intended for the Additional Land to be included in the Beachfront Strip, as the Additional Land includes developable land. (R. p. 912, lines 3-11; R. p. 946, lines 8-13). KRA and the Town clearly thought the Additional Land was developable because the Town granted KRA specific rights to develop Parcels 12 and 13, which encompass the Additional Land. The Master's finding that the Additional Land is not developable was erroneous, as was his finding that the OCRM jurisdictional lines were evidence of KICA's intent.

These findings had material significance to the Master's analysis in the Final Order, and therefore cannot be deemed harmless. *See Wells v. Halyard,* 341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct. App. 2000) ("[a]n alleged error is harmless if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict"). Of course, the fundamental question that was presented to the Master was whether the creation of the imaginary line by Nimmons was a mutual mistake that resulted in the unintended inclusion of the Additional Land in the conveyance of the Beachfront Strip, when Nimmons prepared a property description that was materially inconsistent with Section 16(b) and Exhibit 16.2 of the 1994 Development Agreement. However, the issue of developability is important, as the Town did not intend to require, KRA did not intend to convey, and KICA did not intend to receive, developable oceanfront property disconnected from the intended Beachfront Strip.

KRA and KDP II brought these erroneous findings to the Master's attention in the Motion to Alter or Amend. The Master reversed his prior findings relating to KICA's intent having some relationship to the DHEC/OCRM jurisdictional lines, indicating that "nothing

that leads to even an inference that whether the [p]roperty was considered developable ... impacted KICA's intent." Order on Motion to Alter or Amend, at R. p. 42. Of course, by KICA, it is difficult to know what the Master meant as he gave no regard to the three officers and Board members of KICA who testified, nor to the fact that (the current) KICA did not contest their testimony. The Master also found that "whether the [p]roperty is or is not developable and whether the [p]roperty is or is not part of Captain Sam's Spit does not impact the [c]ourt's ultimate conclusion that Plaintiffs did not meet their burden on their claim for reformation of the Beachfront Deed." Order on Motion to Alter or Amend, at R. p. 40.

However, the Master did not reverse his findings relating to developability. Instead, he reversed his position on whether it was the "relevant inquiry." Ultimately, the Master decided that there was no evidence that KICA considered the issue of developability. As noted above, "KICA," in 1994, was under developer control, and its then-Board members and officers testified at trial that KICA did not intend to receive developable property. Also, it is clear from the record that developability was an issue when the intended boundaries of the Beachfront Strip were established in the 1994 Development Agreement, which is the acknowledged antecedent understanding of the parties under the terms of the Agreement for Conveyance, which continually refers to and incorporates the 1994 Development Agreement. This is also why Exhibit 16.2 specifically and intentionally included none of the property within the developable parcels being recognized under the 1994 Development Agreement, because that property was stipulated by KRA and the Town to be developable.

As the record reflects, the underlying purpose and intent of KRA's transfer of the Beachfront Strip was to grant to KICA only the undevelopable strip of dune fields that were

seaward of oceanfront properties already sold to third parties. (R. p. 834, lines 14-22; R. p. 910, line 25; R. p. 968, lines 10-21). The parties' intent was for the Beachfront Strip to end at the eastern boundary of Parcel 13, as depicted by Exhibit 16.2. (R. p. 836, lines 11-17; R. p. 915, lines 17-21; R. p. 967, lines 15-23; R. p. 1019, lines 9-14; R. p. 1171, line 23 – p. 1172, line 9). As reflected on Exhibit 16.2 of the 1994 Development Agreement and several other maps attached to the 1994 Development Agreement, the westernmost oceanfront property, which had been platted and sold to third parties (Duneside Villas), lies directly to the east of Parcel 13, which is why the Beachfront Strip, as intended, terminated at the eastern boundary of Parcel 13. All parties, KRA, the Town and KICA, either directly confirmed this or made admissions to this effect and have acted consistent with this boundary since 1994. No witnesses or relevant documents contest this fact.

As Exhibit 16.2 should be treated as the antecedent understanding of the parties, this Court should engage in a *de novo* review without deference to the Master's findings. The inquiry should focus on Section 16(b) and Exhibit 16.2 of the 1994 Development Agreement, direct evidence of contemporaneous intent on the part of each party involved, evidence of subsequent conduct that speaks to the issue of intent, KICA's admission that the inclusion of the Additional Land was a mistake, and the testimony of the scrivener that the Property Description was in error. When the proper scope of evidence is considered, reformation is supported by clear and convincing evidence of mutual mistake.

V. THE MASTER ERRED IN FINDING THAT THE INTENDED WESTERN BOUNDARY OF THE BEACHFRONT STRIP AS SHOWN IN EXHIBIT 16.2 COULD NOT BE RELIABLY DETERMINED

Additionally, the Master improperly refused to grant reformation and give Exhibit 16.2 proper weight on the alleged basis that the intended western boundary of the Beachfront

Strip could not be reliably determined. The record is full of evidence that allows the location of the intended western boundary of the Beachfront Strip to be determined with precision. Intervenors' Exhibit 5 is a recorded survey, that existed in the public records at the time the 1994 Development Agreement was drafted and Exhibit 16.2 was prepared, that includes the relevant boundary line with precision, and all parties agreed that Exhibit 16.2 to the 1994 Development Agreement was "clear" in and of itself. Exhibits 1.1 and 1.3 of the 1994 Development Agreement very clearly show the location of Parcels 12 and 13 with respect to the existing residential developments surrounding those parcels. A mere glance at the exhibits leaves no room for disagreement on this point. The Additional Land, which straddles Parcels 12 and 13, was very clearly marked as a development parcel, not part of the Beachfront Strip. As established in the record, the eastern boundary of Parcel 13 is the same as the eastern boundary of the parcel shown in Intervenors' Exhibit 5. Intvrs. Ex. 5 (R. p. 2258); (R. pp. 891-894). Where the parties agree that the issue is clear, and the record includes a recorded survey of the relevant boundary line, it is error for the court to deny the relief sought on the basis that the boundary cannot be reliably determined. The western terminus can absolutely be reliably determined, such that reformation to return the Additional Land should be granted.

VI. THE MASTER ERRED BY CENTERING HIS ANALYSIS UPON THE MISTAKEN PROPERTY DESCRIPTION ITSELF

The Master improperly relied and focused on the consistency between the legal description in the Agreement for Conveyance and the Quit-Claim Deed, which would be expected to be consistent because the property description in each was drafted by the same person who created an imaginary line that was not consistent with the antecedent understanding. The Master placed improper weight on his finding that, "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," in concluding that the Agreement for Conveyance and Quit-Claim Deed is clear and plainly unambiguous. Final Order, at R. pp. 27-28 (emphasis added). The consistency of the two documents is not evidence of intent under the circumstances. There is no reason to expect that the simultaneous cut and paste of the property description into both documents would have failed to result in identical property descriptions. The salient issue is the obvious disconnect between the admittedly unambiguous description of the western boundary of the Beachfront Strip in the Quit-Claim Deed prepared by Nimmons and the unambiguous depiction of the western boundary of the Beachfront Strip in Exhibit 16.2 of the 1994 Development Agreement. This disconnect compels reformation. It is the lack of ambiguity in the property description that renders the mutual mistake all the more clear.

Furthermore, KICA's third-party beneficiary status under the 1994 Development Agreement causes the 1994 Development Agreement to serve as an antecedent agreement, as opposed to the property description that KICA had no role in preparing. The Master improperly disregarded the testimony of Ms. Nimmons that the description was in error, and failed to address why her uncontroverted testimony does not establish mutual mistake. Ms. Nimmons testified that she made the decision to use the Employee Facility Tract in order to set the westernmost boundary of the Beachfront Strip. (R. p. 1119, line 14 – p. 1120, line 2). As a result, the property description she prepared for the Beachfront Strip did not match Exhibit 16.2 and, therefore, did not reflect the intent of the parties. (R. p. 1123, line 25 – p. 1124, line 5). Notably, Ms. Nimmons testified that neither the 1991 Baseline nor Setback Line had any relationship to her preparation of the Property Description, although that is

precisely what the Master used to make his decision that KICA intended to receive the Additional Land. (R. p. 1151, lines 13-17).

The courts of other jurisdictions have held that an inadvertent mistake by a scrivener, unknown to the parties, is a mutual mistake as between the parties. *See, e.g., Sherman v. Woerner Magnolia Farms, Inc.*, 565 So. 2d 601 (Ala. 1990); *Edmiston v. Wilson*, 146 W. Va. 511, 512, 120 S.E.2d 491, 492 (1961) ("Generally, to warrant equity to reform a deed for mistake the mistake must be mutual; but the mistake of a scrivener in preparing a deed is regarded as the mistake of both parties, he being regarded as the agent of both"). An error in drafting establishes mutuality of mistake and it is immaterial to the reformation analysis which party employed the draftsman. *See, e.g., Clemons v. Mallett*, 445 So. 2d 276, 279 (Ala. 1984). "Where a contract is explained by the parties, and he is directed to prepare a deed in accordance with such explanation, he may be properly regarded as agent of both parties, and his mistake in preparing the instrument will be deemed the mistake of both, or, rather, proof of his instructions will be proof of the precedent agreement, and the discrepancy between these instructions and the instrument as drawn will be evidence of the mistake." *Ferrell v. Ferrell*, 53 W. Va. 515, 44 S.E. 187, 189 (1903). Almost no one would have understood the legal description in the Agreement for Conveyance and Quit-Claim Deed. It is a very technical legal description. It is understandable that the parties would have relied on the drafter to capture the intention of the 1994 Development Agreement as expressed in Exhibit 16.2. What is clear is that Nimmons, not KRA or KICA or the Town, created and inserted the imaginary line into the property description. It deviated from what was intended and therefore constitutes a mutual mistake from which equity should grant relief.

VII. THE MASTER ERRED BY CREATING AN IMPROPER DICHOTOMY OF THE EVIDENCE REGARDING KICA'S INTENT

The Master disregarded the testimony of the Board Members of KICA, even though they had contemporaneous involvement and personal knowledge with the underlying events. McKinney, a KICA board member in 1994 and 1995, confirmed that KICA did not intend nor expect to receive the 4.62 acres as part of the Beachfront Strip. (R. p. 973, lines 7-9; R. p. 973, lines 19-21). Long, a KICA board member in 1994 and 1995 and Secretary of KICA in September 1994, corroborated that KICA's intent was that the Beachfront Strip would terminate at the eastern boundary of Parcel 13. (R. p. 1019, lines 9-14). Clarkson, a KICA board member and President of KICA in September 1994, also confirmed that KICA did not intend for the Additional Land to be conveyed as part of the Beachfront Strip. (R. p. 1175, line 21 – p. 1176, line 6). As KICA Board Members and Officers, these witnesses were competent to provide testimony regarding KICA's intent. The uncontroverted evidence is that the conveyance of the Additional Land was a mutual mistake, as confirmed by KICA's Board members in 1994 and as admitted by KICA's Board Members in 2012.

In the Order denying the Motion to Alter or Amend, the Master engaged in a "conflict of interest" analysis relating to the KICA Board members and officers who were affiliated with KRA, who were the only KICA Board members or officers who testified and who represented a controlling super majority of the KICA Board at the time in question. The purpose of the Master's analysis is unclear, but appears to be a rationalization for the Master to disregard their collective testimony, even though KICA's sole witness did not contest their testimony. This was error. Even if the KICA Board members and officers affiliated with KRA could be viewed as "interested" in the transaction for purposes of the South Carolina Nonprofit Corporation Act, this does not mean that the testimony of the witnesses relating to

intent is to be disregarded. Although the issue does not appear to have been addressed in a reported decision under South Carolina law, the Maryland Court of Appeals reversed a lower court decision denying reformation where evidence provided by an interested director was disregarded. *See, e.g., Kishter v. Seven Courts Cmty. Ass'n, Inc.*, 96 Md. App. 636, 642, 626 A.2d 993, 996 (Ct. Spec. App. 1993) (reversing judgment of trial court in deed reformation case for failure to consider evidence of mutual intent provided by a witness who had legal capacity on behalf of both developer and property association).

The Master also made improper findings that the intent of KICA was somehow different than the intent of KRA. This is not possible under the circumstances, as KICA was under developer control at the time. Four of the seven directors on the KICA Board were appointed by KRA. Simply put, the intention of the KRA Board members was the intention of KICA, as the remaining Board members could not have overruled the members appointed by, and affiliated with, KRA. There is no evidence in the record to show that any Board member had any contrary intention as to the Beachfront Strip, and it is not reasonable to infer a contrary intention in light of KICA's subsequent conduct. The Final Order acknowledges that KRA controlled KICA's Board, and therefore controlled KICA, but fails to give heed to the inevitable conclusion of that finding: KRA's intent and KICA's intent as of 1994 and 1995 cannot be divorced from one another. It also should not be divorced when all of the witness testimony relating to the organization's intent was consistent, and KICA declined to contest it. While KICA is now under the control of its "property owner" members, this was not the case in 1994 and 1995.

To the extent that the testimony was considered in the Order Denying the Motion to Alter or Amend, the Master stated that the testimony from "interested" Board members

during 1994-1995 failed to rise to the level of clear and convincing evidence of mutual mistake required for reformation. Order on Motion to Alter or Amend, at R. p. 52-53. This presents another overriding problem with the Master's approach. It was piecemeal, rather than collective. The determination should be made on the record as a whole.

Ultimately, the Master's analysis became focused on "Board action," which should cause the testimony of the witnesses who were in the developer-controlled majority in 1994 and 1995 to be afforded significant weight. The lack of Board action does not mean that an organization cannot have an intent; it means that the other indicia of intent are of increasing importance. Admissions of mistake, conduct, and uncontested testimony regarding intent are not Board action, but they are probative. The Master deviated from this approach only with regard to the Agreement for Conveyance and the Quit-Claim Deed. These were also not Board action, but were elevated by the Master's adherence to a legal framework appropriate in an action at law seeking construction of an unambiguous written instrument. The Master's insistence on Board action was applied inconsistently, discounting evidence proving mutual mistake while elevating evidence plagued by the property description that itself was an admitted mistake. The decision below should be reversed and relief provided in the form of reformation following this Court's *de novo* review.

VIII. THE MASTER ERRED BY FAILING TO ADMIT AND GIVE CONSIDERABLE WEIGHT TO THE "TALKING POINTS," WHICH WERE ADMISSIBLE AND PROBATIVE

At trial, KRA and KDP II attempted to admit a document entitled "Talking Points for KDP." (R. p. 1237, line 7 – p. 1243, line 10). The Talking Points exhibit was prepared by KICA's Board Chair and states, *inter alia*, that: (1) the property description at issue is a "mistake;" (2) the transfer of the Additional Land was "not intended by the original parties"

to the 1994 Development Agreement; (3) "KICA does not desire to benefit from this unintended transfer of property[;]" and (4) should the developer seek reformation, "KICA would not be inclined to take action to prevent or overturn such remedy." *See* Pls. Ex. 17 (R. p. 2166). The Talking Points for KDP were authenticated at trial as a business record by KICA's records custodian and constitute an admission by party opponent. S.C. R. Evid. 803(6); S.C. R. Evid. 801(d)(2). However, the Master refused to allow the Talking Points exhibit to be admitted into evidence on the basis that it was not an "official action" of KICA. (R. p. 1240, line 25 – p. 1241, line 7). The Master's exclusion of the Talking Points was erroneous and prejudicial.

The Master excluded the evidence at trial, but then addressed the evidence in the Final Order as having been "introduced" by KRA. Final Order, at R. p. 23. To the extent this means that the Master decided that the Talking Points should be considered part of the record, the Master failed to give this evidence the considerable weight it deserved. As the apparent reasoning for why the Talking Points exhibit was not deemed probative, the Master indicated that the author of the Talking Points, Craig Weaver, was not on the KICA Board during the 1994 or 1995 time period. Of course, this reasoning is inconsistent with the Master's rejection of the testimony provided by the three witnesses who were on the KICA Board during that time period. KICA's one witness at trial, Tammy McAdory, did not indicate any disagreement with the Talking Points, any disagreement with Craig Weaver's separate verbal admissions, or any disagreement with the testimony of intent provided by the three witnesses who were board members and directors of KICA in 1994 and 1995.

Statements by a party that are inconsistent with the party's position in litigation are admissible as admissions when offered by an opposing party. *State v. Nichols*, 325 S.C. 111,

481 S.E.2d 118 (1997); *State v. Plyler*, 275 S.C. 291, 270 S.E.2d 126 (1980). By denying certain allegations in KRA and KDP II's Amended Complaint seeking reformation, KICA took a position in litigation that was contrary to the position set forth in the Talking Points. KICA conceded that the document was a business record. (R. p. 1237, line 7 – p. 1238, line 3). Admissions can be found in business records. *See, e.g., JKT Co., Inc. v. Hardwick*, 274 S.C. 413, 419, 265 S.E.2d 510, 513 (1980). Furthermore, unlike most other evidence, a party does not have to have personal knowledge of the underlying facts for his or her statement to be an admission. *Player v. Thompson,* 259 S.C. 600, 609, 193 S.E.2d 531, 535 (1972). Also, admissions can be made after the event in question. *See, e.g., Matthews v. Matthews*, 207 S.C. 170, 179, 35 S.E.2d 157, 160 (1945).

For these reasons, the evidence was admissible and probative, both as a business record and as an admission by party opponent. The statement was authenticated and conceded to be a business record, and was furthermore made by the party (through its duly elected Board chair), was against the party's position in the litigation, and was offered against the party at trial. However, the Master erred in refusing to admit the Talking Points exhibit and in refusing to give it appropriate evidentiary weight when he considered it. The evidence of admission and subsequent conduct presented in this case was clear and convincing, but consistently disregarded.

IX. UPON *DE NOVO* REVIEW OF ALL EVIDENCE, IT IS CLEAR THAT THE MASTER ERRED IN DENYING REFORMATION

This case embodies the principle that "each suit for reformation stands on its own peculiar facts." *Progressive,* 405 S.C. at 51, 747 S.E.2d at 186. The facts involve a development agreement, a municipality, a developer and a third-party beneficiary that was under developer control at the time of the conveyance. The Final Order and Order Denying

the Motion to Alter or Amend make one issue clear: the Master considered far less than the whole record. His findings were based on a subset of the evidence. That subset was viewed in a manner that was erroneous and inconsistent.

Upon *de novo* review, this Court should find that clear and convincing evidence in support of reformation of the Quit-Claim Deed exists, and reverse the decision of the Master with instructions that the Master execute the Confirmatory Deed returning the Additional Land. Under South Carolina law, clear and convincing evidence is an elevated standard of proof, which lies between the lesser standard of "preponderance of the evidence," used in most civil cases, and the higher standard of "beyond a reasonable doubt," which is required in criminal cases. *Wise v. Broadway*, 315 S.C. 273, 282, 433 S.E.2d 857, 862 (1993). The requirement that the evidence be clear and convincing does not require that it be unanimous or undisputed in all details. Instead, clear and convincing evidence is simply that degree of proof which produces in the fact finder a "firm belief" as to the allegations sought to be established. *Satcher v. Satcher*, 351 S.C. 477, 483, 570 S.E.2d 535, 538 (Ct. App. 2002) Such measure of proof is intermediate, more than a mere preponderance, but less than is required for proof beyond a reasonable doubt; it does not mean "clear and unequivocal." *Id.* The evidence reflects a firm belief on the part of KICA that, following the execution of the Agreement for Conveyance and the Quit-Claim Deed, it did not intend or consider itself to be the owner of the Additional Land, which should produce the same belief in the finder of fact.

To the extent that, in the Order Denying the Motion to Alter or Amend, the Master indicates that he would also decline to allow reformation because of purported easement rights held by members of KICA in Common Property, this is also error. KICA has never treated the Additional Land as Common Property, nor communicated to its members that it

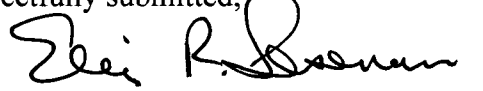
was Common Property. To the extent that it has been traversed by beachcombers as open space, KRA and KDP II demonstrated that this passive use is protected by the 99-year lease between the developer and Charleston County relating to Beachwalker Park. *See* Pl. Ex. 36 (R. p. 2197); (R. pp. 1090-1093). The permissive and passive use predated the Quit-Claim Deed, and was not in reliance on it. Furthermore, there is 10-mile long strip of dunes that has been used and treated as Common Property, which would be unaffected by reformation. There is no evidence of any use or reliance on the mistaken property description. In fact the opposite is true, as KICA's conduct has been in conformance with the intended boundary, not the imaginary line created by the scrivener.

The dispositive question is whether the Property Description correctly implemented the parties' intent with regard to the description and location of the western boundary of the Beachfront Strip. Six witnesses indicated that it did not, and a seventh witness declined to contest that testimony. Zero witnesses testified that KICA intended to receive the Additional Land. The record in this case is remarkable in that the Respondent, KICA, has made concessions that the transfer of the Additional Land was a mistake. Significant evidence of subsequent conduct should have been considered, but was not considered. When the entire record is considered, there is clear and convincing evidence of disconnect between the Property Description and the mutual intentions of the parties. This is the exact set of circumstances where equity can and should intervene to correct mistake.

CONCLUSION

KRA and KDP II request that the Master's Orders be reversed, that reformation be granted, and that this matter be remanded to the Master with instructions to execute the Proposed Corrective and Confirmatory Deed or otherwise effect the requested reformation.

Respectfully submitted,

By: 

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December 14, 2015
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Master-In-Equity

Mikell R. Scarborough, Master-In-Equity for Charleston County

Appellate Case No. 2015-001146
Trial Court Case No. 2013-CP-10-1225

Kiawah Resort Associates, L.P., a Delaware Limited Partnership, and Kiawah Development Partners II LLC, — Appellants/Respondents,

v.

Kiawah Island Community Association, Inc., a South Carolina Not-for-Profit Corporation, — Respondent,

and

Kiawah Property Owners Group, Inc., and Inlet Cove Club Homeowners Association, Inc. — Respondents/Appellants

CERTIFICATE OF COUNSEL

The undersigned certifies that this Appellants' Final Brief of Appellants/Respondents complies with Rule 211(b), SCACR.

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THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I hereby certify that I have this date served (via federal express overnight delivery) a true and correct copy of **Appellants' Final Brief of Appellants/Respondents** to the following counsel of record:

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