THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY, COURT OF COMMON PLEAS

Mikell R. Scarborough, Master-in-Equity

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, Inc.,

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.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the Master err in dismissing KPOG and Inlet Cove for lack of standing?
2. As to KRA and KDP, did the Master err in weighing certain evidentiary matters including consideration of subsequent conduct, Exhibit 16.2 to the 1994 Development Agreement, the memo entitled "KDP Talking Points", etc.?
3. Did the Master err in applying the wrong legal standard for reformation in terms of consideration of parol evidence in reliance upon this Court's opinion in *Penza v. Pendleton Station, LLC*?

STATEMENT OF THE CASE

Respondent Kiawah Island Community Association, Inc. hereby incorporates by reference Appellants/Respondents Kiawah Resort Associates, L.P. and Kiawah Development Partners, II, Inc.'s and Respondents/Appellants Kiawah Property Owners Group, Inc. and Inlet Cove Club Homeowners Association, Inc.'s respective Statements of the Case and further states that such Statements of the Case are true and accurate reflections of the procedural history of the instant case leading up to this appeal.

I. STATEMENT OF FACTS

Kiawah Resort Associates, LP ("KRA") brought this action for declaratory judgment, reformation of deed, and specific performance relating to a 1995 deed for real property from KRA to the Kiawah Island Community Association, Inc. ("KICA"). (KRA Complaint, R. 55-269). The parcel of land at issue is a 4.62 acre tract of undeveloped land on the western end of Kiawah Island, herein "the Subject Property". (Final Order, p. 2 at R. p. 14, and more particularly described in Exhibit "A" to the Final Order at R. p. 38).

KRA was at all relevant times herein the real estate developer of a considerable portion of Kiawah Island. Certain transfers among affiliated companies have resulted in a transfer of KRA's claim of interest in the Subject Property to the later-joined Plaintiff, KDP II LLC ("KDP II"), such that KDP II is KRA's ultimate assignee with regard to KRA's claim of interest in the Subject Property. (R. pp. 14 and 354).

KICA serves and operates as the property owners' association for the majority of owners of property located within the Town of Kiawah Island, South Carolina. (*Id.*). In addition to statutes, regulations, ordinances, and other legislative authority, KICA is governed by a recorded Declaration of Covenants, Conditions, and Restrictions, as amended (the "KICA Covenants"). (*Id., see also* R. pp. 2206-2235 generally). KICA is directed by a seven-member Board of Directors, and at all times relevant to this case, those seven members of the KICA Board of Directors were comprised of four Directors appointed by KRA, who simultaneously were partners in KRA, and three independent homeowner Directors. (R. pp. 51 and 1213).

After the commencement of this action, two parties, the Kiawah Property Owners' Group, Inc. ("KPOG") and the Inlet Cove Club Homeowners' Association, Inc. ("Inlet Cove") intervened in the action alleging that, while members of KICA, the parties were nonetheless inadequately represented in this action by KICA. (R. p. 289). Inlet Cove is a 108-Lot neighborhood within Kiawah Island. (R. p. 335). The 108 Lot Owners are subject to an additional Declaration of Covenants and Restrictions and are members of the Inlet Cove Club Homeowners' Association, Inc., a South Carolina Not-for-Profit Corporation, a sub-association under the larger umbrella of KICA. (*Id.*). All members of Inlet Cove are also members of KICA; all members of KICA are not also members of the Inlet Cove. (*Id.*). The 4.62 acres at issue: (1) is not subject to the Inlet Cove Declaration; (2) is not subject to the control of the Inlet Cove; and (3) is not adjacent to any of the 108 Lots. (R. p. 336).

KPOG is a voluntary membership advocacy group. (*Id.*). Unlike KICA, which governs all of Kiawah Island subject to the KICA Covenants, and Inlet Cove, which governs just the 108 Lots subject to the Inlet Cove Declaration, KPOG has no official role in the governance of any part of Kiawah Island. (*Id.*). All members of KPOG who own property subject to the KICA Covenants are members of KICA. (*Id.*).

The trial court granted KPOG and Inlet Cove leave to intervene on the basis of KPOG's and Inlet Cove's representations that they would present evidence that KICA possessed an affirmative intent to receive the Subject Property as Common Property. (R. p. 14). Five days after the conclusion of the trial in this matter the Board of Directors of KPOG approved a plan to dissolve itself. (*Id.*).

A. Material Facts Pertaining to the Subject Property

In September 1994, KRA and the Town of Kiawah Island (the "Town") entered into a Development Agreement (the "1994 Development Agreement") to allow KRA to secure certain zoning and development entitlements for their real estate holdings on the Island. (Plaintiffs' Trial Ex. 5, R. pp. 1402-2117, generally). Section 16(b) of the 1994 Development Agreement required KRA, the "Property Owner" for purposes of the 1994 Development Agreement, to convey what was described as a ten-mile strip of beachfront property (the "Beachfront Strip") to KICA as Common Property on or before January 1, 1996, as follows:

> (b) 10 Mile Strip of Beachfront Property:
>
> It is understood and agreed that there is a strip of scenic dunes and high land owned primarily by the Property Owner (some of which is encumbered by the General Covenants, certain view and access easements and other agreements of record) which extends along the Kiawah Island beachfront for approximately 10 miles **as generally depicted** on Exhibit 16.2. This strip of high land varies in width, but often is 200′ to 300′ wide and is generally seaward of most residential, resort, or commercial property lines. It generally comprises the area of land abutting most seaward platted residential Lot lines and the mean high water mark of the Atlantic Ocean.
>
> The Property Owner hereby agrees that this strip of highland and dunes will, on or before January 1, 1996, be conveyed by quit claim deed to the KICA as Common Property, subject only to matters of record prior to the effective date of this Agreement and the right of the Property Owner and other nearby owners to enjoy ingress and egress, permitted boardwalks and gazebos, across same in appropriate locations to access the beach or for other lawful purposes. The conveyance shall be by deed at the Property Owner's election (for $1.00 consideration), and recorded in the Charleston County RMC office.
>
> Emphasis added. *(Id.,* at Sec. 16(b), R. pp. 1462-1463).

The 1994 Development Agreement defines "Common Properties" as "KICA Common Properties, Purchased Common Properties, and Restricted Common Properties as described under the KICA Covenants." (*Id.,* at Sec. 1(f), R. p. 1422). The 1994 Development Agreement further states the "'KICA Covenants' means and refers to the Declaration of Covenants and Restrictions of the Kiawah Island Community Association, Inc. recorded in the RMC Office for Charleston County in Book M 114, Page 407, and all amendments and supplements thereto...." (*Id.,* at Sec. 1(y), R. p. 1424).

KICA was not a party to the 1994 Development Agreement, but rather a third-party beneficiary by virtue of the 1994 Development Agreement's mandate that KRA convey various properties to KICA as Common Property. (Final Order, p. 4, R. p. 16). KICA did not have any direct involvement in the negotiation, drafting, or execution of the 1994 Development Agreement except through its execution of the Agreement for Conveyance, as further discussed below. (*Id.).*

Section 16(g) of the 1994 Development Agreement directed that the land known as Captain Sam's Spit, would be protected from development in perpetuity, as follows:

> Captain Sam's Spit. The Property Owner commits to the permanent reservation of the tract of land known as Captain Sam's Spit, shown in Exhibit 16.2 as active and/or passive open space, nature study, or parks. Property Owner agrees to convey Captain Sam's Spit to KICA, by quit claim deed by January 1, 2008; provided, however, that Property Owner may convey the eastern half of the spit to Charleston County Park & Recreation Commission prior to January 1, 2008.
>
> (Plaintiffs' Trial Ex. 5, Sec. 16(g). R. p. 1465).

Exhibit 16.2 to the 1994 Development Agreement, as referenced in both paragraphs 16(b) and 16(g) of the 1994 Development Agreement above, is a general graphic illustration of the entirety of Kiawah Island entitled "Future Beach Front

Dedication Area". (*Id.*, at Ex. 16.2, R. p. 1918). It is neither a survey nor an official plat of record. (Final Order, p. 13, R. p. 25). The original Exhibit 16.2 is a piece of 8.5 inch by 11 inch piece of paper depicting the entirety of Kiawah Island – such land being over ten miles wide. (Plaintiffs' Trial Ex. 5, Ex. 16.2, R. p. 1918). It contains no metes and bounds designations. Because of the informal nature of Exhibit 16.2 as a mere graphical illustration, the lack of precise measurements, and the sheer size of the land being depicted on a standard piece of copy paper, the trial court correctly found that that Exhibit 16.2 was not sufficiently detailed or specific to be anything other than an informal graphic illustration. (Final Order, p. 13-14, R. pp. 25-26).

Exhibit 16.2 depicts the Beachfront Strip as a hatch-marked strip of land beginning east of the extended boundary line of a 19.5-acre unplatted parcel identified as "Parcel No. 13" in the 1994 Development Agreement (the "Beachwalker Ocean Parcel"), extending east along the beachfront and ending at the northeastern tip of Little Bear Island at the eastern end of Kiawah Island. (Plaintiffs' Trial Ex. 5, Ex. 16.2, R. p. 1918). Exhibit 16.2 also contains a handwritten notation with a line and arrow pointing to the Captain Sam's Spit area denoting that area as "Area not included in Dedidication (sic) Area (Area of Captain Sam's Spit handled separately in Development Agreement) Section 16.(h)" and the area of Captain Sam's Spit is fully shaded in by hand to cover over the crosshatching which originally included that area. (*Id.*). According to the testimony presented at trial, both the hand shading in of Captain Sam's Spit and the handwritten note and arrow on Exhibit 16.2 were unilaterally performed by Mark Permar, a land planner under the employ of KRA after the initial preparation of Exhibit 16.2. (Final Order, p. 5 and 13-14, R. pp. 17, 25-26). Exhibit 16.2, as with every other

document contained within the 1994 Development Agreement, bears the initials of Charles Way for KRA and Mayor Mary Melvin, for the Town. (*Id.*, p. 5, R. p. 17).

An executed Agreement for Conveyance and draft quit-claim deed for conveyance of the Beachfront Strip to KICA were incorporated into the 1994 Development Agreement as Exhibit 16.7. (Plaintiffs' Trial Ex. 5 at Ex. 16.7, R. pp. 1944-1957 and 2024-2026). Both the Agreement for Conveyance and the Beachfront Deed were drafted by KRA's legal counsel. (Final Order, p. 5, R. p. 17). The Agreement for Conveyance is the only document related to the Subject Property signed by KICA. (*Id.*, R. pp. 17, 1944-1957). This document serves as the contract between KRA and KICA which obligated KRA to convey and KICA to receive various properties as Common Property, including the Beachfront Strip. (*Id.*). The Agreement for Conveyance was signed on behalf of KICA by Townsend Clarkson, the then President of KICA's Board of Directors, who was also a member of the KRA partnership at the time. (*Id.*).

The property descriptions contained in the Agreement for Conveyance and the draft quit claim deed included in the schedule to the Agreement for Conveyance that is part of Exhibit 16.7 of the 1994 Development Agreement are identical to the description used in the executed and recorded Beachfront Deed. (Final Order, p. 6, R. p. 18). In particular, the property description in all three of these documents is as follows:

> All that certain piece, parcel or strip of land, situate, lying and being in the Town of Kiawah Island, County of Charleston, State of South Carolina, approximately ten (10) miles in length, the westernmost boundary of which being an imaginary line having as its northern terminus, a point marked by a concrete monument having State Plane Coordinates N275, 327.0025/ E2, 267.801.5097 located at the southwestern most corner of a 2.067 acre tract located at the terminus of Beachwalker Road on Kiawah Island known generally as the "Employee Facility Tract" and as shown on a plat by Williams & Associates dated March 20, 1981, and

> recorded in Plat Book AS at page 85 in the R.M.C. Office for Charleston County, S.C. (the "R.M.C. Office"); thence running with said imaginary line from said point in a southerly direction S04°55'6"E to the mean high water mark of the Atlantic Ocean; said strip of land thence extending eastwardly to an imaginary line extending due south from point marked by a concrete monument numbered 27722 shown on Page 3 of 3 of a plat of the "Links Course Tract" by Davis & Floyd Inc. dated February 6, 1989, and recorded in Plat Book BV at page 38, in the R.M.C. Office to the mean high water mark of the Atlantic Ocean: said strip of land varies in width but is generally between 200' and 300' wide and extends from the seaward boundary lines of most beachfront residential, resort and commercial properties on Kiawah Island, as shown on plats of record in the R.M.C. Office to the mean high water mark of the Atlantic Ocean.
>
> (*Id.*).

The executed Beachfront Deed was dated December 29, 1995, and recorded on February 20, 1996. (*Id.*).

As shown in the quoted language above, the western boundary line of the Beachfront Strip was established by reference to the "Employee Facility Tract". That point of reference was used because it was the only plat of residential, resort, or commercial property on the far western end of Kiawah Island and was found to be the most representative depiction of the property in front of which the 1994 Development Agreement described the Beachfront Strip beginning. (R. pp. 26-27).

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

restrictions as are applicable to Common Properties as set forth in said KICA Covenants." (Emphasis supplied.) (R. pp. 18-19, 2254). This conveyance was made in accordance with Article II, Section 2(a) of the KICA Covenants which states, in pertinent part, that "Until January 1, 2016, the Company [KRA], its successors, and assigns, **shall have the right, without further consent of the Association**, to bring within the plan and operation of this Declaration any property which is contiguous or nearly contiguous to Kiawah Island if acquired by the Company prior to January 1, 2016...." (Emphasis supplied.) (R. p. 2213). As such, the KICA Covenants provide no mechanism by which KICA can refuse to accept any property conveyed to it by KRA. (R. p. 19).

On October 12, 2005, KRA and the Town entered into a second Development Agreement (the "2005 Development Agreement"), replacing and terminating the 1994 Development Agreement. (*Id.*). The 2005 Development Agreement eliminated the terms of Section 16(g) of the 1994 Development Agreement which had previously provided permanent protection from development for Captain Sam's Spit and replaced those terms with new provisions that granted KRA certain limited development rights on Captain Sam's Spit. (*Id.*).

In or around 1997, KRA discovered what it contends is an error within the property description in the Beachfront Deed. (R. p. 20). However, KRA did not bring this alleged error to KICA's attention until 2007. (*Id.*). The property description for the Beachfront Strip in both the Agreement for Conveyance and draft quit-claim deed attached as Exhibit 16.7 to the 1994 Development Agreement, as well as in the Beachfront Deed, states that the Beachfront Strip commenced at the southwesternmost corner of the 2.067 acre "Employee Facility Tract," which is designated as part of Parcel

13 (the "Beachwalker Ocean Parcel"), in the 1994 Development Agreement. (*Id.*). KRA contends the description of the Point of Beginning of the Beachfront Strip used in the Agreement for Conveyance and the Beachfront Deed was a "scrivener's error" that lead to the unintentional inclusion of 4.62 acres seaward of the Employee Facility Tract in the Beachfront Strip. (R. p. 646). That error, according to KRA, was that the Beachfront Deed should not have used the Employee Facility Tract as a point of beginning, but rather the easternmost boundary of Parcel No. 13 – an unplatted parcel.

Upon receipt of KRA's request in 2007 that KICA issue a deed conveying back the Subject Property, KICA rejected the request on the grounds that, regardless of whether the Subject Property was supposed to be included in the Beachfront Strip, the Subject Property had been conveyed as Common Property as required by the 1994 Development Agreement and, therefore, is now subject to the KICA Covenants. (R. p. 21). As such, KICA has no authority to execute such a deed without an affirmative vote of its membership. (*Id.*). Article IV, Section 1 of the KICA Covenants grants to every member of KICA, every guest and tenant an easement of enjoyment in and to the Common Properties which is appurtenant to and passes with the title to every Lot and Parcel. (*Id.*). Article IV, Section 6 of the KICA Covenants further provides those rights and easements referenced above shall be subject to the following:

> (h) The right of the Association to give or sell all or any part of the Common Properties and Restrictive Common Properties, including leasehold interests, to any public agency, authority, public service district, utility or private concern for such purposes and subject to such conditions as may be agreed to by the members, provided that no such gift or sale or determination as to the purposes or as to conditions thereof shall be effective unless dedication, transfers and determinations as to purposes and conditions shall be authorized by the affirmative vote of three-fourths (3/4) of the votes cast at a duly called meeting of the Association, subject to

> the quorum requirements established by Article III, Section 6 and unless written notice of the vote taken thereon shall be made and acknowledged by the President or Vice-President and Secretary or Assistant Secretary of the Association and such certificate shall be annexed to any instrument of dedication or transfer affecting the Common Properties or Restrictive Common Properties prior to the recording thereof. Such certificates shall be conclusive evidence of authorization by the membership.
>
> (R. pp. 2219-2220).

The Subject Property is, therefore, Common Property subject to the KICA Covenants and, as such, KICA lacks the ability to transfer the Subject Property or any other Common Property to KRA or KDP II unless the transfer is approved by the requisite vote of the members in accordance with Article IV, Section 6(h) of the KICA Covenants.

B. Evidence of Intent and Mistake

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

With respect to KRA's intent, KRA presented testimonial evidence that, at all times from the stages of negotiating and drafting the 1994 Development Agreement through present day, it was not KRA's intent to convey the Subject Property to KICA. However, KRA's intent is not solely determinative of the matter.

KRA also argued that Exhibit 16.2 to the 1994 Development Agreement, the 8.5 by 11 inch graphical illustration of Kiawah Island that contained a crosshatched area depicting the Beachfront Strip, was evidence of intent to exclude the Subject Property from the Beachfront Deed. However, the trial court accurately noted that when combined with the fact that there was no evidence that KICA had ever seen, considered, or approved this graphical illustration – much less viewed it after KRA's land planner added

his handwritten notes – it could not be sufficient evidence to refute the more precise written description contained in the Agreement for Conveyance and the Beachfront Deed. (R. pp. 25-26).

With regard to KICA's intent, KICA's Executive Director, Tammy McAdory, testified that at all times relevant to this litigation she has acted as the custodian of the official records of KICA. (R. p. 1210). Ms. McAdory could find no records from the 1995 period or prior that memorialized any discussion, much less intent, of KICA regarding the inclusion of the Subject Property in the Beachfront Strip. (R. pp. 1212-1215). Rather, KICA first heard of the supposed error was in 2007. (R. p. 1219). Furthermore, the only document bearing any signature by KICA is the Agreement for Conveyance signed by its President, Townsend Clarkson, in 1994, which does include the Subject Property as being part of the property to be conveyed to KICA. (R. p. 22).

KRA presented evidence of two illustrations maintained on KICA's website. The illustrations were of property presently included in KICA's dune management program as well as an illustration of KICA's Common Properties. (R. pp. 2190-2192). Neither illustration includes the Subject Property. (*Id.*). However, no testimony was offered as to how, when, or by whom these illustrations were created or by reference to what resources said illustrations were generated. (R. p. 23). Accordingly, it is impossible to derive any inference from these lay illustrations that have any bearing on the intent of KICA in 1994 or 1995. (*Id.*).

KRA also introduced a document entitled "Talking Points for KDP." Ms. McAdory testified this document was created in 2012 and were the notes of the then Chair of the KICA Board of Directors, Craig Weaver, created for the purpose of advising

new Directors of the history of the issues surrounding Subject Property. (*Id.*, R. pp. 23, 2166). The document states that the prior KICA Board in 2011 believed that the inclusion of the Subject Property was likely not the intent of the parties to the 1994 Development Agreement; i.e., the Town of Kiawah Island and KRA. (*Id.*). The memo makes no conclusions or statements as to KICA's intent. Mr. Weaver was not on the KICA Board during the 1994 or 1995 periods, nor was he affiliated with KRA or the Town during that time. (*Id.*).

KRA also called as witnesses three of the four KRA-appointed KICA Board members; these witnesses being Townsend Clarkson, Patrick McKinney, and Leonard Long - each also being members of the KRA partnership. (R. pp. 175-293 and 385-425, generally). Each witness testified that not only did KRA not intend to convey the Subject Property to KICA, but that it was his understanding in his capacity as a KICA Director that KICA did not intend to receive the Subject Property as part of the Beachfront Strip. (R. p. 23). However, upon cross examination, none of these witnesses could recall any discussion by the KICA Board of Directors prior to 2007 regarding the Beachfront Strip, much less whether the Beachfront Strip was specifically to include the Subject Property. (*Id.*). The only official action of the KICA Board taken on this issue is the execution of the Agreement for Conveyance which obligated KICA to receive from KRA the Subject Property as Common Property. (*Id.*).

The trial court found that given the lack of any evidence of KICA Board discussion of the Beachfront Strip prior to the execution of the Beachfront Deed, the only manifestation of KICA's intent during the relevant period of 1994 and 1995 is its President's execution of the Agreement for Conveyance. (*Id.*, p. 21, R. p. 33).

Furthermore, all evidence offered by KRA of KICA's intent was based on discussions or agreements which KICA was not a party to and which were in contravention of the only written manifestation of KICA's intent: the Agreement for Conveyance. (*Id.*, p. 15, R. p. 27). As such, there was not sufficient evidence to show that KICA did not intend for the Subject Property to be included in the Beachfront Deed as Common Property.

The Town was not a party to this litigation or to either the Agreement for Conveyance or the Beachfront Deed. However, the Town was a party to the 1994 Development Agreement which is the instrument by which KRA initially assumed the obligation to transfer certain properties to KICA as Common Property. The primary manifestation of intent by the Town is contained in the 1994 Development Agreement and its various incorporated exhibits. (*Id.*, p. 16, R. p. 28). The visual depiction of the Beachfront Strip contained in the Beachfront Dedication Area in Exhibit 16.2 with its handwritten markings which were never viewed by KICA and the written legal description used in the Agreement for Conveyance as Exhibit 16.7 are not consistent insofar as the former arguably does not include the Subject Property as part of the Beachfront Strip while the latter does include the Subject Property. (*Id.*, pp. 16-17, R. pp. 28-29). Dennis Rhoad, the Town's legal counsel, testified to clarify this apparent internal inconsistency between the Exhibits. Mr. Rhoad did not believe that there was any discussion by the Town that would have addressed with particularity the Subject Property or the western terminus of the Beachfront Strip. (R. pp. 916-917).

KRA also presented the Fifth Amendment to the 2005 Development Agreement as evidence of the Town's intent. On or about October 2, 2012, the Town of Kiawah Island and KRA as Property Owner entered the Fifth Amendment to the 2005

Development Agreement (the "Fifth Amendment"), where they agreed to and confirmed the following:

> (1) that the **Property Owner's intent** was that the western terminus-boundary of the Beachfront Strip be the eastern boundary and extended eastern boundary of Parcel 13 as described in the First [1994] Agreement and the [2005] Agreement, known as the Beachwalker Ocean Parcel (TMS No. 207-05-00-118), as illustrated on Ex. 16.2 to the First [1994] Agreement recorded at Book J248 Page 366 in the RMC Office for Charleston County; (2) that the **Property Owner did not intend** that the Beachfront Strip include the Additional Land, which is west of the intended western terminus-boundary of the Beachfront Strip; and, (3) that **the intent of the Property Owner at the time of entry of the 2005 Agreement** was that the Additional Land was part of Parcels 13 and 12A as described in the 2005 Agreement.
>
> (Emphasis supplied). (R. p. 2262).

Testimony presented at trial showed that as part of its adoption of the Fifth Amendment to the 2005 Development Agreement, the Town Council expressly rejected any inclusion of language that referenced the Town's intent with respect to whether the Subject Property was to be included in the Beachfront Strip, but rather limited the language to address only the Property Owner's (KRA's) intent. (R. pp. 1365-1372). As such, the Fifth Amendment to the 2005 Development Agreement is merely a reflection of the Town's agreement that KRA did not intend to convey the Subject Property, but is silent as to the Town's intent. No additional evidence was presented contradicting the Town's intent with respect to the Subject Property.

KRA and KDP II presented evidence at trial that in 1997 KICA signed a corrective deed over to KRA to convey back certain property which is unrelated to the Subject Property that the parties agreed was erroneously included in the Beachfront Deed. (R. p. 31). The trial court – withholding any opinion on the legitimacy of said deed

- rejected KRA's attempt to use this prior conveyance as establishing a precedent for conveyance of any property from KICA to KRA without subjecting said vote to the KICA membership as mandated by the KICA Covenants. (*Id.*).

II. ARGUMENT AND CITATION OF AUTHORITY

The appeal brought by KRA and KDP II, as well as by KPOG and Inlet Cove, does not cite as error the trial court's denial of KRA and KDP II's claim for specific performance or their post-trial claim of partition. Neither does any party appeal the trial court's grant of declaratory judgment that any property that was to be conveyed to KICA as part of the 1994 Development Agreement, the Agreement for Conveyance, or the Beachfront Deed was to be conveyed as Common Property and is, therefore, subject to the KICA Covenants. As such, the only issues before the Court are related to (1) KRA and KDP II's claims for reformation of the Beachfront Deed; and (2) the post-trial dismissal of the intervenors, KPOG and Inlet Cove. For the reasons discussed more fully below, this Court should affirm the trial court's holdings on these issues.

A. Standard of Review

An action for reformation of a solemn instrument is an action in equity. In an action in equity, findings of fact by the master will not be disturbed on appeal unless found to be without evidentiary support or against the clear preponderance of the evidence. *Ex parte Guaranty Bank & Trust Co.*, 255 S.C. 106, 177 S.E.2d 358 (1970). Furthermore, the appellate courts will accord clear deference to the master's evaluation of the credibility of witnesses who testified before the tribunal. *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 391 S.E.2d 538 (1989).

B. KRA and KDP II's Claim for Reformation Fails

1. The Alleged Error in the Beachfront Deed is Not a Scrivener's Error.

KRA and KDP II allege that the inclusion of the Subject Property in the Beachfront Deed was the result of a mere scrivener's error by the draftsman of the legal description of the Beachfront Strip, Beth Nimmons, a paralegal who worked for Tommy Buist, the attorney hired by KRA for representation in connection with the 1994 Development Agreement. (Trial Transcript, pp. 298-299, R. pp. 1081-1082). Ms. Nimmons is currently employed by Appellant KDP (*Id.*). In preparing the legal description for the Beachfront Strip, Ms. Nimmons decided to make reference to the Employee Facility Tract plat for purposes of describing the point of beginning and western terminus of the Beachfront Strip because it was the westernmost plat of record she could find for Kiawah Island. KRA claims that it was this decision by Ms. Nimmons that was in error. Rather, KRA claims that Ms. Nimmons should have instead used the eastern boundary of Parcel No. 13 as the point of beginning. KRA has not articulated how Ms. Nimmons could have described a point of beginning by reference to a parcel which had never been legally platted.

Regardless, the testimony is clear that Ms. Nimmons made an affirmative judgment in using the Employee Facility Tract as a point of reference and that her legal work was reviewed by her employer, Tommy Buist, KRA's legal counsel. Furthermore, the documents prepared by Ms. Nimmons, including the legal description incorporated into the Agreement for Conveyance and the Beachfront Deed were reviewed by KRA Partner Leonard Long, himself a real estate lawyer capable of reading and understanding legal descriptions, and KRA's land planner, Mark Premar. Ultimately, the documents

were also signed off by these individuals and by Mary Melvin, the Town of Kiawah Island's Mayor, Charles Wray, as principal for the KRA partnership, and finally as to the Agreement for Conveyance, KICA's then President, Townsend Clarkson.

The categorization of the inclusion of the Subject Property in the Beachfront Strip as "error", if indeed it was an error, does not constitute a scrivener's error. A scrivener's error is not merely *any* error made by a draftsman. Rather, it is a particular term of art with specific legal definitions and consequences. *Black's Law Dictionary* defines "scrivener's error" as a synonym for "clerical error." A "clerical error" is one "resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination." *Black's Law Dictionary* (7th ed. 1999). Examples of clerical or "scrivener's" errors include "omitting an appendix from a document; typing an incorrect number; mistranscribing a word; and failing to log a call." *Id.* To be a scrivener's error, the mistake must be one of transcription, not of legal judgment or analysis.

The Virginia Supreme Court has addressed a very similar fact pattern where a developer conveyed a large tract of land to a homeowner's association, submitting that property to the community's Declaration of Covenants, and then later claimed that he intended to exclude nearly one acre of land from the conveyance – i.e., that the conveyance to the Condominium Association was over inclusive. *Westgate at Williamsburg Condominium Ass'n, Inc., et al. v. Philip Richardson Co, Inc., et al.*, 621 S.E.2d 114, 270 Va. 566 (2005). Like in the case presently before this Court, the developer hired an expert in drafting real estate conveyance documents to prepare a legal description, giving directions for its preparation, and signed off on the prepared deed.

There, the Court held that a scrivener's error is one which can be "evidenced in the writing that can be proven without parol evidence." *Id.*, at 576.

The Court found it to be a significant distinction that the alleged error was not typographical or clerical in nature. It was not a case where "the scrivener...had transposed a call in the metes and bounds description, recited an erroneous deed book reference or similar error commonly recognized as a scrivener's error." *Id.* Rather, the error, like the one alleged by KRA in this case, was a mistake in judgment - not transcription - wherein the scrivener included acreage in the description which the developer did not intend to include. "[T]hat a party's intent was not fully reflected cannot be attributed to an error of the scrivener. Instead, the error lies with the party's inattention to the detail before him. [The developer] himself, admitted: "[He] didn't look at [the property description and plat] carefully enough. The error in this case was not that of the scrivener's transcription of the real estate description, but in the review process of the parties. Construing the term narrowly, as we must, we find there was no error by the scrivener...." *Id.*

Like in the case above, the principals of KRA, the attorney for KRA, KRA's land planner, and the Mayor of the Town of Kiawah Island all signed off on the documents which resulted in the conveyance of the Subject Property to KICA. The result being, KRA has conveyed the Subject Property to KICA which has been submitted to the KICA Covenants, thereby vesting rights of use and enjoyment in the KICA membership which rights have been utilized by the KICA membership. To argue nearly two decades later that the inclusion of 4.62 acres of beachfront property as Common Property that has been used and enjoyed by the KICA membership in those two decades was a mere scrivener's

error undermines the significance of the extraordinary relief that KRA is asking of this Court. That analysis cannot be undertaken lightly or dismissively. Examining the reformation case law discussed in detail below, such relief cannot be had without a clear and convincing showing of mutual mistake.

2. There Can Be No Reformation Under *Penza v. Pendleton Station, LLC* as the Beachfront Deed is Unambiguous.

During the pendency of the instant litigation, this Court issued an opinion in the case of *Penza v. Pendleton Station, LLC*, 404 S.C. 198, 743 S.E.2d 850 (2013), where it refined the analysis for a court to apply in deciding when it is appropriate to reform a deed. Acknowledging a mistake was made in the legal description of the property at issue, this Court in *Penza* did not look at the traditional analysis of the nature of the mistake. Rather, this Court articulated that in order to justify a judicial reformation, it must first determine that the instrument is ambiguous. Ambiguity is a question of law. The language in a deed is only ambiguous if it is reasonably susceptible to more than one interpretation.

If a deed is ambiguous, the reformation action is treated as a matter of equity, thus allowing the Court to consider extrinsic evidence to determine the parties' intent. If a deed is unambiguous, however, the reformation claim is handled as an issue of law and thus limits the Court's examination of intent to the terms of the deed itself. Accordingly, when a deed is unambiguous, any attempt to determine the parties' intent must be limited to the deed itself, and using extrinsic evidence to contradict the plan language of the deed is improper. *Id.*

In this case, KRA does not dispute that the Beachfront Deed is unambiguous. The Beachfront Deed is a self-contained document. While it was entered into pursuant to the 1994 Development Agreement and the Agreement for Conveyance, the Beachfront Deed itself makes no reference to either of these documents and does not seek to incorporate their terms by reference. The property description contained in the Beachfront Deed defines the area to be conveyed in a way that is ascertainable with certainty. The property description specifically identifies a point of beginning by reference to both a concrete monument and by reference to a recorded plat, and the description closes such that the conveyed premises are readily apparent, especially as to the western terminus that KRA seeks to reform. No testimony elicited at trial cast any doubt on what property the Beachfront Deed actually conveys.

The Beachfront Deed thus unambiguously shows that KRA conveyed the Subject Property as part of the Beachfront Strip to KICA as Common Property. No evidence within the Beachfront Deed itself infers a contrary intent. In fact, consistent with the principles raised in *Penza*, all terms expressed in the 1994 Development Agreement or the Agreement for Conveyance leading up to the execution of the Beachfront Deed are extinguished under the doctrine of merger. *See*, *Charleston & W. C. Ry. Co. v. Joyce*, 231 S.C. 493, 99 S.E.2d 187 (1957).

While KRA claims that reformation must be had to correct what it categorizes as a "scrivener's error", KRA does not claim that said error resulted in the Beachfront Deed being susceptible to more than one interpretation. As such, KRA's claim for reformation fails under the *Penza* test. Because the Beachfront Deed is unambiguous, the trial court did not have the ability to consider parol evidence and was thus required to limit its

examination to the four corners of the document seeking to be reformed – the Beachfront Deed. Because there is no question as to what the Beachfront Deed purported to convey, the claim for reformation must fail. Accordingly, this Court should affirm the trial court's ruling.

3. Reformation Requires Clear and Convincing Proof that the Beachfront Deed Fails to Conform to an Antecedent Agreement between the Parties due to Mutual Mistake.

While KRA claims that reformation must be had to correct what it categorizes as a "scrivener's error", KRA does not claim that said error created an ambiguity. Therefore, the trial court's analysis could have stopped at the conclusion of its *Penza* analysis as shown above. KRA argues on appeal that all subsequent review of evidence by the trial court flowed from an erroneous reliance on *Penza*. To the contrary, the trial court noted that, while it could have concluded its analysis upon a finding of unambiguity under *Penza*, it nonetheless undertook a wholly distinct and exhaustive review of the parol evidence presented to determine reformation as if the deed were ambiguous. In other words, the trial court separately evaluated Appellants' claims as if *Penza* had no bearing on the case at hand. As such, the trial court thoughtfully considered all evidence before it. The fact that the trial court found certain evidence as irrelevant or unpersuasive or did not accord such evidence with the weight Appellants would have liked does not mean that the trial court failed to consider it. Like the trial court below, KICA argues that *Penza* can be dispositive of this Court's analysis. Notwithstanding that, KICA, like the trial court below, will engage in a thoroughly separate analysis showing that regardless of the issue

of ambiguity, Appellants have not carried their burden of proof to entitle them to the high relief of reformation of the Beachfront Deed.

In order to reform an instrument one must demonstrate that "preceding the execution of the instrument, and as the inducement to its execution, the parties to the same had an understanding, an agreement, a contract; and, in the effort to reduce the evidence in writing of that contract, a mutual mistake was made, by which mistake, so made, the understanding, the agreement, the contract of the parties in relation to the subject-matter thereof was not carried into effect." *Brock v. O'Dell*, 44 S.C. 22, 21 S.E. 976, 979 (1895). "Before a court of equity will reform a solemn instrument, it must be shown by evidence which is the most clear and convincing, not simply it was a mistake on the part of one of the parties, but that it was a mutual mistake; that both parties intended a certain thing; and that by mistake in the drafting of the paper did not get what both parties intended." *Sullivan v. Moore*, 92 S.C. 305, 307, 75 S.E. 497 (1912). The Court cannot assume such an agreement; it must be proved. *Gowdy v. Kelley*, 185 S.C. 415, 194 S.E. 156 (1937).

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

KRA and KDP II were thus required to present evidence, not only of the agreement actually made, but of the mutuality of the mistake. That evidence must be clear and convincing, as courts of equity do not grant the high remedy of reformation upon a mere probability. *Gowdy*, 185 S.C. 415. "In the exercise of this jurisdiction to reform written instruments, courts of equity proceed with the utmost caution. It must appear that the precise terms of the contract had been orally agreed upon between the parties and that the written instrument actually signed fails to be, as it was intended, an execution of the previous agreement, but expresses a different contract; and that this is the result of a mutual mistake. If there is no antecedent agreement to which the writing can be conformed, it is clear that reformation on the ground of mistake must be refused." *Id.* As KICA will show below, KRA and KDP II's claim for reformation fails as Appellants cannot show either evidence of an antecedent agreement which is contrary to the terms of the Beachfront Deed or a mutuality of mistake.

a. There is No Evidence of Mutual Mistake Because There Is No Antecedent Agreement Contradicting the Terms of the Beachfront Deed Supporting a Claim for Reformation.

Here, the only written agreement which can be pointed to between the parties to the instrument KRA seeks to reform (KRA and KICA) other than the Beachfront Deed itself, is the Agreement for Conveyance. The Agreement for Conveyance obligated KRA to convey and KICA to accept a deed in precisely the same form as the Beachfront Deed. Because the terms of the two instruments are identical, the Agreement for Conveyance cannot be evidence of the different antecedent agreement between KRA and KICA as a basis to reform the Beachfront Deed.

South Carolina courts do recognize that a party seeking reformation is not required to show a written agreement as evidence of the mutual mistake. Under the *Gowdy* decision, the antecedent agreement which can be used as evidence of mutual mistake can be an oral agreement. But regardless of whether the antecedent agreement is written or oral, the evidence of the agreement must be clear and convincing to prove mutual mistake.

While KRA may not have intended to convey the Subject Property to KICA as part of the Beachfront Strip, as discussed in detail below, there is no competent evidence that KICA shared in that mistake. The only written manifestation of KICA's intent in 1994 and 1995 was the executed Agreement for Conveyance which does not contravene the Beachfront Deed. In addition, no evidence has been presented to show that the KICA Board and KRA had an oral agreement, or that the KICA Board was asked for or provided any input as to the terms of the Beachfront Deed, or specifically whether the Beachfront Strip was not to include the Subject Property. Thus, KRA and KDP II cannot prove by clear and convincing evidence the existence of any antecedent agreement – written or oral – with KICA that both KICA and KRA were mutually mistaken in the inclusion of the Subject Property in the Beachfront Deed.

b. KRA's Claim for Reformation Fails for Insufficient Showing of Mutual Mistake.

i. The Necessity of Showing KICA's Intent.

In the absence of an antecedent agreement, the intent of the parties must be the same to prove mutual mistake. KICA's intent, as manifested by the Agreement of Conveyance, was to accept the Beachfront Strip as Common Property as described in the

Beachfront Deed. This Court should resist any urging by KRA and KDP II to minimize or disregard the importance of KICA's intent to the reformation analysis.

One argument proffered by KRA and KDP II during the course of this litigation is that KICA's passive role as recipient of the Beachfront Strip makes the Beachfront Deed a gratuitous transfer or otherwise negates any importance of KICA's intent or independent agency. While not conceding that the Beachfront Deed is a gratuitous transfer, even if it was, KICA's intent still matters to the reformation analysis.

In the previously cited case of *Brock v. O'Dell*, Stephen Clayton deeded 400 acres as a gift to his son, Alfred Clayton, who thereafter deeded the property to William O'Dell. The first deed from the elder Clayton to the younger Clayton omitted the traditional language of devise to include the heirs of the younger Clayton which would be necessary to vest the grantee with fee simple title. Upon the death of the two Claytons, the remaining heirs of Stephen Clayton claimed title reverted to them. William O'Dell sought to reform the gratuitous deed between the Claytons to add the "heirs" language. In that case, the Court went through the traditional deed reformation analysis to look at the intent of the parties to the instrument to be reformed (i.e., both Stephen and Alfred Clayton). The Court did not find that Alfred's intent was irrelevant just because the transfer was gratuitous.

Similarly, the seminal reformation case of *Gowdy v. Kelley*, 185 S.C. 415 (1937) also considered the reformation of an intra-family deed given for "love and affection". Like in *Brock v. O'Dell*, the Court examined the intent of both parties and refused to reform the deed without a showing of clear and convincing evidence of mutual mistake. The Court held that when only one of the parties to an instrument is under a mistake,

equity will refuse its aid to reform an instrument except under very strong and extraordinary circumstances showing imbecility or something which would make it a very great wrong to enforce an agreement. Such evidence of the imbecility or very great wrong must be shown by competent testimony of the clearest kind. *Id.* In short, when presented with an equitable reformation claim, the courts of this State do not discount the intent of the grantee in gratuitous transfers. For this reason, the intent of KICA is relevant, regardless of whether the Beachfront Deed is a gratuitous transfer.

Not only is a showing of KICA's intent necessary for purposes of conducting a reformation analysis, KICA's intent must be independent from KRA's intent. Appellants assert that the intent of KICA can be inferred because, in 1994, for all practical purposes, "KRA was KICA" and that therefore KRA's intent must necessarily be KICA's intent, thus prohibiting KICA to have any separate intent or agency. The testimony justifying reformation of a deed must be clear, satisfactory, and cannot be based upon surmise, conjecture, and inference. *Id.*

Present before the Court is a written agreement – the Agreement for Conveyance – signed by the then-President of the KCIA Board with apparent authority, which obligates KICA to receive the Subject Property as Common Property for the use and benefit of its membership. This is plain evidence of KICA's intent which KRA is obligated to rebut by clear and convincing evidence in order to achieve reformation. Yet, in the intervening twenty years, KICA has never repudiated or disavowed the Agreement for Conveyance or its obligations thereunder or otherwise intimated that Clarkson's execution of the Agreement for Conveyance was an *ultra vires* act.

In 1994, the KICA Board of Directors was comprised of four KRA-appointed Directors (who were also partners in the KRA partnership) and three Owner Directors. KRA's primary "evidence" of KICA's mutual mistake is the testimony of three of the four KRA-appointed KICA Board members who were also partners in the KRA partnership. Their actual testimony shows the matter of the western terminus of the Beachfront Strip and the inclusion of the Subject Property in the Beachfront Strip was never discussed or otherwise considered by the KICA Board. Rather, each testified that it was his personal "understanding", both in his capacity as a KRA Partner and a KICA Board Member, that the Subject Property would not be included in the Beachfront Deed. Accordingly, KRA asserts that its intent and KCIA's intent were the same because of the presence of four KRA partners on the KICA Board and that at least three of the four KRA partners were both mistaken in their capacity as KRA Partners as to KRA's intent to convey the Subject Property and were also mistaken in their capacity as KICA Directors as to KICA's intention with respect to receiving the Subject Property. KRA thus surmises and infers the intent of KICA based on a personal understanding of three witnesses who could point to no KICA Board action showing that KICA considered the issue of the western terminus of the Beachfront Strip. Such an inference cannot be used as the basis for evidence of intent in a claim for reformation. *Gowdy v. Kelley*, 185 S.C. 415 (1937).

Furthermore, the testimony of Long, Clarkson, and McKinney cannot be considered competent evidence as required by *Gowdy.* As a non-profit corporation, KICA and its Board of Directors are subject to the South Carolina Non-Profit Corporation Act. Section 33-31-831 of the Act is titled "Director Conflict of Interest". The statute defines

"a conflict of interest transaction" as a transaction under consideration by a Board of Directors of a non-profit corporation in which any director has a direct or indirect interest. According to the Official Comment that accompanies the statute, Section 831 applies to a transaction where a director is a general partner in a partnership or a director, officer, or trustee of another entity that has an interest in the transaction. Such a board member is referred to as an "interested director". The Statute and Official Comment allow a non-profit corporation to transact business with an "interested director" and that person or persons are permitted to participate in discussions and can even vote on the transaction. So long as the transaction is approved by a majority of the disinterested directors, the transaction is approved.

Under the Non-Profit Corporation Act, the testimony of only interested directors to disavow a written agreement signed with apparent authority of the President of the KICA Board which has never been subsequently questioned by KICA fails to rise to the level of clear and convincing evidence of mutual mistake required to achieve reformation. For this reason, the testimony of Clarkson, McKinney, and Long cannot be considered as competent evidence of KICA's intent, both because the witnesses were "interested directors" and because their actual testimony shows the matter of the western terminus of the Beachfront Strip and inclusion of the Subject Property in the Beachfront Strip was never before the KICA Board for consideration.

ii. The Evidence of KICA's Intent.

Having determined that a showing of KICA's intent is required under the applicable reformation analysis, it becomes necessary to look at the evidence presented to the trial court for consideration. It is clear from the reformation cases discussed

previously herein that the burden of proof of mutual mistake is on the party seeking reformation. Such evidence must be clear and convincing, and the burden cannot be shifted to the defendant to prove up the intent of the original conveyance. Accordingly, KICA is not required to show that it possessed an affirmative intent to receive the Subject Property. Rather, the Beachfront Deed speaks for itself unless or until it is affirmatively disproven by KRA and KDP II.

Even though KICA is not required to put forth any evidence to disprove intent, there is nonetheless sufficient evidence for the trial court to find that KICA's subsequent acts are consistent with a claim of ownership. As stated above, KICA has at no time in the intervening twenty years sought to repudiate the Agreement for Conveyance as not being an official KICA Board action. Furthermore, KICA's Declaration obligates KICA to accept all conveyances of property it receives from KRA as Common Property, regardless of the existence of the Agreement for Conveyance. In short, even if KICA had no desire to receive certain property from KRA as Common Property, KICA nonetheless must accept it.

KRA and KDP II make much ado over there being no evidence of KICA maintaining the Subject Property and inferring that any lack of maintenance can be extrapolated to a lack of intent to claim ownership of the Subject Property. However, Appellants' assertion ignores the nature of the Subject Property itself and that the Beachfront Deed and Agreement for Conveyance stipulate that the conveyance of the property therein shall make the land Common Property subject to the KICA Covenants. The Subject Property, like the rest of the Beachfront Strip, is partially comprised of a natural dunes field and is protected in its undeveloped state for the recreational use and

enjoyment of the KICA membership. At trial, two KICA members, Peter Mugglestone and Wendy Kulick, testified to their active use and enjoyment of the Subject Property as KICA Common Property. At no time has any argument or evidence been made by KRA or KDP II that this use constitutes trespass on private property. Rather, the use of the Subject Property is precisely consistent with the designation of the Subject Property as KICA Common Property.

KRA and KDP II also argue that KICA's maps for their Dunesfield Management Program and KICA Common Property failure to depict the Subject Property is evidence of lack of intent by KICA to hold the Subject Property as Common Property. However, there is no evidence in the record which would indicate that KICA has treated the Subject Property – largely a natural dunesfield and extension thereof – any differently than the rest of the property conveyed to KICA by the Beachfront Deed.

Finally, Appellants will point to a document entitled "Talking Points for KDP" as evidence of KICA's intent. As Tammy McAdory, the long time KICA employee and custodian of records, testified, that document was created in 2012 by then Chair of KICA's Board of Directors. The purpose of the memo was to brief incoming KICA Board members on the history of the Beachfront Deed and assertion of KRA that the 4.62 acre Subject Property was included in the Beachfront Deed in error. As the "Talking Points" notes state and as Ms. McAdory testified, the KICA Board in 2011 had reviewed KRA's request to transfer the Subject Property back to KRA and reached the conclusion that it was likely that the parties to the 1994 Development Agreement, i.e., KRA and the Town of Kiawah Island, did not intend to include the Subject Property in the Beachfront Strip.

KRA wrongfully asserts the Talking Points for KDP memo proves the intent of the KICA Board in 1995. The Talking Points for KDP document does not say that the 2011 KICA Board had determined that the 1995 KICA Board had not intended to receive the Subject Property. Craig Weaver, the author of the "Talking Points" document was not a KICA Board member or employee during the 1994 and 1995 time period, nor was he affiliated with the Town of Kiawah Island or KRA to enable him to have any knowledge of the parties' intentions in 1995.

In short, no evidence exists that KICA intended to receive anything other than what the Beachfront Deed conveyed to KICA. Certainly any inferences drawn by Appellants fail to rise to the clear and convincing standard required by the reformation cases cited herein. As such, the trial court's holding that KRA's failure to prove the mutuality of the mistake by showing clear and convincing evidence that KICA's intent was not carried out by the Beachfront Deed should be affirmed.

iii. The Town of Kiawah Island's intent cannot be substituted for KICA's intent.

KICA was not a party to the 1994 Development Agreement, but rather a third-party beneficiary to the extent that the 1994 Development Agreement obligated KRA to convey certain properties, including the Beachfront Strip, to KICA as Common Property. Because KICA was not a party to the 1994 Development Agreement, and there is no indication that KICA ever saw or considered that document, or specifically Exhibit 16.2, they cannot be demonstrative of KICA's intent. However, KRA and KDP II argue that the intent of the Town of Kiawah Island, who was a party to the 1994 Development Agreement which obligated KRA to execute the Beachfront Deed but who was not a

party to the Beachfront Deed, is determinative of intent and mutual mistake of KRA and KICA with respect to the property description contained in the Beachfront Deed.

There is no legal authority authorizing, much less requiring, that a court consider or examine the intent of anyone who is not an immediate party to the instrument when determining intent for the purposes of proving mutual mistake in the context for reformation. 66 Am. Jur. 2d Reformation of Instruments § 60 (1973). Accordingly, the trial court correctly found that the Town of Kiawah Island's intent is not relevant to the reformation analysis and refused to depart from the long-standing rule asserted in *Brock v. O'Dell*, 44 S.C. 22, 21 S.E. 976, 979 (1895), that the intent relevant to the reformation analysis is only the intent of the parties to the instrument the claimant is seeking to reform.

There is no case found within the annals of the South Carolina appellate courts which directly addresses the highly particular facts of this case. The deeds of gift described in *Brock v. O'Dell* and *Gowdy v. Kelley* do not have a party occupying the Town of Kiawah Island's role of a third party at whose behest the grantor (KRA) gave the deed. However, this need not require any different result than found in a traditional reformation analysis.

The Florida case of *Antonelli v. Smith*, 556 So. 2d 1132 (1989)[1] has, however, a similar premise to the facts of this case which is instructive. In that case, the president of Key Colony Beach Golf Club, Inc. (Mr. Smith) was in negotiations with the State of Florida regarding its issuance of a dredge and fill permit to Key Colony. As a condition of the issuance of that permit, the State required Mr. Smith to deed certain canal bottom

[1] It should be noted that Florida's deed reformation law differs significantly from South Carolina's in that Florida does not allow reformation of gratuitous transfers at the behest of the grantee. South Carolina has no such prohibition.

land to the owners of the lots which were adjacent to three impacted canals. Mr. Smith, on behalf of Key Colony, executed and recorded the various deeds with no notice to or knowledge of the adjacent owners. The Antonellis were one of these owners.

Three years later, the Antonellis commenced development of their own parcel and in their development negotiations with the State learned of Mr. Smith's permit and the conveyance of the canal bottom land to them. The Antonellis worked cooperatively with Mr. Smith for use of his permit in continuing their development until such time that they lost their development to foreclosure. However, the foreclosure deed did not include the canal-bottom land. Two years later, the Antonellis discovered that the canal bottom deed to them from Key Colony was flawed in that the property was previously owned by Mr. Smith individually, not by Key Colony. The Antonellis brought suit to reform the canal-bottom deed to correct the name of the grantor. While the action was dismissed without prejudice for failure to join an indispensible party, prior to reaching that conclusion, the appellate court undertook a reformation analysis and at no time considered the intent or directives by the State of Florida as being controlling, much less informative, to its reformation analysis. Rather, the intent of the Antonellis as a mere passive recipient was examined along with their reliance on the transfer.

Like in the *Antonelli* decision, KICA received property from a developer at a governmental agency's direction. That same property, by virtue of the Beachfront Deed and Agreement for Conveyance, has caused the Subject Property to be subjected to the KICA Declaration as Common Property which has vested in each and every owner in the KICA regime an easement for use and enjoyment. Testimony was presented at the trial of this matter as to individual KICA members' use of that easement which has been in

existence for nearly two decades. To disturb those rights now with no consideration given to the holders of those rights would be unthinkable in light of no precedent authorizing such action.

Even if this Court were to introduce a new framework for reformation analysis which would make the Town of Kiawah Island's intent relevant, it would not necessarily result in a different conclusion. The evidence shows that while the Town's legal counsel testified that the Town did not intend to require KRA to convey any developable property to KICA, the Town nonetheless declined to go so far as to say that the form of the Agreement for Conveyance and the Beachfront Deed was contrary to the Town's intent in its passage of the Fifth Amendment to the 2005 Development Agreement. In fact, then Town Council Member Greg Vanderwerker testified that the Town Council refused to adopt or approve a version of the Fifth Amendment to the 2005 Development Agreement which would have stated that the Town joined in with KRA's intent to exclude the Subject Property from the conveyance to KICA. As such, even if the intent of the Town was relevant, the evidence of the Town's intent does not meet the clear and convincing standard required for a finding of mutual mistake.

4. Whether the Property is Developable or Considered to be Part of Captain Sam's Spit Does Not Impact the Determination that the Deed Cannot Be Reformed.

KRA and KDP II claim that a majority of the Subject Property is now developable due to the subsequent beach accretion and that the Subject Property is part of the land known as Captain Sam's Spit. KRA and KDP II assert that such facts should have changed the trial court's ruling. However, whether the Subject Property is or is not

developable and whether the Subject Property is or is not part of Captain Sam's Spit does not change the fact that KRA and KDP II did not meet their burden on their claim for reformation of the Beachfront Deed.

Whether land was developable apparently had an impact on KRA's intent as to whether any particular property was to be conveyed to KICA by virtue of the Beachfront Deed. A land's ability to be developed may have even been relevant to the Town's intent, although the evidence is far from conclusive on that matter. However, as shown above, there is absolutely no reliable evidence as to KICA's intent as to what criteria was used in determining the western terminus of the Beachfront Strip. As such, whether certain property could or could not be developed was not a factor shown to be considered by KICA in its execution of the Agreement for Conveyance or its acceptance of the Beachfront Deed. Certainly, an ability to develop the land has had no impact on the KICA's membership reliance on the Subject Property being Common Property and thereby conveying to them rights of use and enjoyment of the Subject Property. As such, there is no evidence that leads to even an inference that whether the Subject Property was considered developable or whether the Subject Property was considered to be part of Captain Sam's Spit impacted KICA's intent with regard to the land to be included in the Beachfront Deed.

5. The Court's Evaluation of Exhibit 16.2 of the 1994 Development Agreement was Proper.

KRA and KDP II also claim that the trial court attributed insufficient evidentiary weight to or otherwise misinterpreted Exhibit 16.2 of the 1994 Development Agreement. As fact finder in a bench trial, the Court has broad discretion to weigh and evaluate the

evidence presented. The Court's findings will be upheld unless no evidence is found to support that finding. *Waterpointe I Property Owners Assn, Inc. v. Paragon, Inc.*, 342 S.C. 454, 536 S.E.2d 878 (2000), *citing, Townes Associates, Ltd. v. City of Greenville,* 266 S.C. 81, 221 S.E.2d 773 (1976). Here, the Court carefully considered the evidence presented by the parties, including Exhibit 16.2, and determined that Exhibit 16.2 is not solely determinative of the reformation issue.

There are two problems with KRA's reliance on Exhibit 16.2 as evidence of intent. First, Exhibit 16.2 is a mere graphic illustration, being a single piece of standard sized copy paper attempting to depict the entirety of the ten mile long Kiawah Island. Exhibit 16.2 contains no calls of distances or metes and bounds designations. The beachfront dedication area that it attempts to depict in a general way is represented by a crosshatched area which also has no further descriptors. The handwritten shading and note attempting to exclude some land from the dedication area was unilaterally added by KRA's land planner sometime after the initial preparation of Exhibit 16.2. Given the highly general nature of the original Exhibit 16.2 and the subsequent handwritten alterations by KRA's land planner, the trial court correctly found that Exhibit 16.2 lacked the detail and specificity to constitute a survey or plat. Because of the generality of Exhibit 16.2 as a mere graphical illustration, it cannot be sufficient evidence to rebut the specific written property description found in the Agreement for Conveyance and the Beachfront Deed, which make reference to concrete monuments and plats of record on file with the Charleston County R.M.C. office.

The second problem with KRA's reliance on Exhibit 16.2 is the lack of evidence of KICA's knowledge of the document. As shown above, reformation can only be

granted by a clear showing that the Beachfront Deed does not accurately reflect the intent of both parties to that document (here, KRA and KICA). Exhibit 16.2 is an Exhibit to the 1994 Development Agreement which was a contract between KRA and the Town of Kiawah. Exhibit 16.2 is not referred to in either the Agreement for Conveyance or the Beachfront Deed, which are the only two documents to which KICA is a party. There is no testimony presented by any party that points to KICA having ever seen or approved Exhibit 16.2 prior to the receipt of the Beachfront Deed. As such, Exhibit 16.2, while perhaps demonstrative of KRA's intent, does nothing to bolster any inference that it is a reflection of KICA's intent. Without a showing that the Beachfront Deed inadequately represents KICA's intent, reformation cannot lie.

Accordingly, the trial court had ample reason to attribute little evidentiary weight to Exhibit 16.2 as being evidence of either an antecedent agreement or mutual mistake of the parties to the Beachfront Deed. Therefore, this Court should affirm the trial court's denial of Appellants' reformation claim.

C. Intervenors Do Not Have Standing.

Following the issuance of the trial court's Final Order, Appellants filed a motion to amend the final order on several grounds, mostly relating to the trial court's denial of their reformation claim. However, Appellants' motion to amend the final order also included a request that intervenors Inlet Cove Club Homeowners Association, Inc. and Kiawah Property Owners Group, Inc. be dismissed from this action for lack of standing. This was the only ground of Appellants' motion to amend that the trial court granted. Following that, the intervenors, Inlet Cove and KPOG, filed their own notice of appeal of that portion of the trial court's order. Their appeal has been consolidated into this case.

As demonstrated by KICA's Answer and Counterclaim filed on May 18, 2013, KICA had asserted a claim seeking a declaration from the trial court as to whether the Subject Property is Common Property under the KICA Covenants and, therefore, its conveyance is subject to a vote of the KICA membership. KPOG and Inlet Cove sought no different relief. Here, KICA and the intervenors seek the same outcome: an establishment of the Subject Property as Common Property subject to the KICA Covenants which require the approval of three-fourths (3/4) of the votes cast by the members of KICA before any Common Property can be conveyed to KRA or anyone else. Additionally, if this Court affirms the trial court's declaration that the Subject Property is KICA Common Property, then the members of Inlet Cove and KPOG, as mandatory members of KICA, have the right to vote on any potential future transfer of the Subject Property by KICA.

Not only are KPOG and Inlet Cove not charged with a public duty requiring them to intervene, they assert no separate or distinct claim from KICA's claims, much less any separate or distinct claim that has a question of law or fact in common with the existing claims. Thus, participation by these parties in no way brings any additional claims or defenses before the Court that have any bearing on the disposition of the Subject Property. Accordingly, KPOG and Inlet Cove should not have been allowed to intervene under SCRCP 24(a) or (b).

KPOG and Inlet Cove have not asserted any discrete claims that are separately derived from their membership in KICA. Rather the KPOG and Inlet Cove members' (who are also members of KICA) sole basis for asserting any claim against the Subject Property is rooted in their easement of use and enjoyment resulting from the Subject

Property being conveyed as Common Property and subject to the KICA Covenants. It is KICA who has the sole right and authority to prosecute or defend rights which arise under the KICA Covenants.

As such, KICA asserts that the Intervenors do not have standing separate from their capacity as KICA members and, therefore, the trial court was correct in dismissing them from the case as named parties.

III. CONCLUSION

Appellants have a remedy that does not require reformation. Both parties agree the remedy of reformation of a deed is appropriate only under very strong and extraordinary circumstances which must be proven by competent, clear, and convincing evidence of mutual mistake. The remedy the Appellants seek, the return of the Subject Property, can be achieved without reformation.

The KICA Covenants which the Subject Property has been subjected to, expressly allows KICA's Board to transfer Common Property if the transfer is approved by three-fourth of the members in attendance at a duly called meeting. KRA has not attempted to correct its mistake by calling a special meeting of the KICA members, nor has it requested the KICA Board to call such a meeting. Should this Court uphold the trial court's decision that it is not appropriate to reform the Beachfront Deed, KRA can still fix its mistake by obtaining the requisite vote of the members.

In summation, the instant case is one of equitable reformation of a deed which can only be granted upon the claimants' showing through clear and convincing evidence that the deed, through mutual mistake of the parties to that deed, failed to conform to an antecedent agreement between the parties. As a party to the deed which Appellants seek

to reform, KICA's intent is vital to the reformation analysis. Appellants sufficiently presented evidence of the failure of the Beachfront Deed to conform to their expectations. However, Appellants failed to show by clear and convincing evidence of the mutuality of the mistake and, therefore, their claim for reformation must fail.

KPOG and Inlet Cove, as intervenors, have no independent claims to the Subject Property outside of their membership in KICA and the easement rights of use and enjoyment conferred upon them as KICA members by the KICA Covenants. As such, their claims are more properly asserted by KICA and not as separate parties. For these reasons, KPOG and Inlet Cove have no standing to pursue claims in the instant litigation.

For these reasons, this Honorable Court should affirm the trial court's findings below on all counts.

Respectfully submitted this 14th day of December, 2015.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY, COURT OF COMMON PLEAS

Mikell R. Scarborough, Master-in-Equity

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, Inc.,

Appellants/Respondents,

v.

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

Respondent,

And

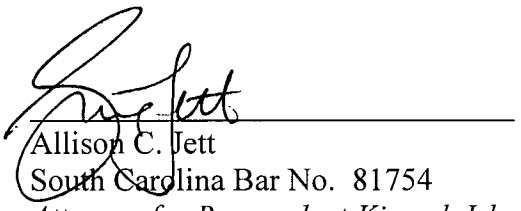
Kiawah Property Owners Group, Inc. and Inlet Cove Club Homeowners Association, Inc.,

Respondents/Appellants.

CERTIFICATE OF COMPLIANCE

I hereby certify that the Final Brief of Respondent complies with Rule 211(b).

This 14th day of December 2015.



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PROOF OF SERVICE

I hereby certify that on this date the Final Brief of Respondent was served on opposing counsel by depositing a copy of same in the U.S. Mail, postage prepaid, properly addressed as follows:

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