

22308

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

RECEIVED
DEC 15 2015
SC Court of Appeals

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

**RECORD ON APPEAL
(VOLUME 2 OF 6)**

Ellis R. Lesemann, Esq.
Michelle A. Matthews, Esq.
Lesemann & Associates LLC
80 Alexander Street, Second Floor
Charleston, SC 29403
(843) 724-5155
Attorneys for Appellants/Respondents

Allison C. Jett, Esq.
Weissman, Nowack, Curry & Wilco, P.C.
One Alliance Center, Fourth Floor
3500 Lenox Road
Atlanta, GA 30326
(404) 926-4500
Attorney for Respondent

Amy E. Armstrong, Esq.
Jessie A. White, Esq.
S.C. Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585
(843) 527-0078
Attorneys for Respondents/Appellants

INDEX

Volume 1 of 6

Orders

Order Granting Intervention (<i>November 1, 2013</i>).....	1
Order on Motion for Relief from the Order Granting Intervention (<i>June 4, 2014</i>)	12
Final Order (<i>June 4, 2014</i>)	13
Order on Motion to Alter or Amend the Final Order (<i>May 7, 2015</i>)	39

Pleadings

Summons and Complaint (<i>March 1, 2013</i>).....	55
Defendant's Answer and Counterclaim (<i>May 8, 2013</i>)	270
Motion to Intervene of Inlet Cove Homeowners Association and Kiawah Island Property Owners Group (<i>May 28, 2013</i>).....	283
Plaintiff's Reply to Defendant's Counterclaim (<i>June 21, 2013</i>).....	330
Defendant's Brief in Opposition to Motion to Intervene (<i>October 18, 2013</i>)	334
Proposed Intervenor's Reply to Defendant's Brief in Opposition to Motion to Intervene (<i>October 28, 2013</i>).....	343

Volume 2 of 6

Plaintiffs' Amended Complaint (<i>November 19, 2013</i>).....	353
Intervenor's Answer to Amended Complaint (<i>December 12, 2013</i>)	580
Plaintiffs' Motion for Relief from the Order Granting Intervention (<i>March 27, 2014</i>).....	589
Defendant's Response to Plaintiffs' Motion for Relief from the Order Granting Intervention (<i>April 7, 2014</i>)	608
Intervenor's Response to Plaintiff's Motion for Relief from the Order Granting Intervention (<i>April 17, 2014</i>)	611
Plaintiffs' Reply to Intervenor's Opposition to Motion for Relief from the Order Granting Intervention (<i>May 27, 2014</i>)	630
Plaintiffs' Motion to Alter or Amend Final Order (<i>June 16, 2014</i>).....	635
Intervenor's Response to Plaintiffs' Motion to Alter or Amend Final Order (<i>July 14, 2014</i>)	699
Defendants' Response to Plaintiffs' Motion to Alter or Amend Final Order (<i>August 4, 2014</i>).....	725
Plaintiffs' Reply in Support of its Motion to Alter or Amend Final Order (<i>August 8, 2014</i>).....	738

Transcripts

Hearing Transcript, Plaintiff's Motion to Alter or Amend Final Order (August 11, 2014)	757

Volume 3 of 6

Trial Transcript, Vol. 1 (<i>December 9, 2013</i>)	784

Volume 4 of 6

Trial Transcript, Vol. 2 (<i>December 10, 2013</i>)	1078

Volume 5 of 6

Exhibits

Plaintiffs' Exhibit 1	1397
Plaintiffs' Exhibit 2	1398
Plaintiffs' Exhibit 3	1401
Plaintiffs' Exhibit 5	1402

Volume 6 of 6

Plaintiffs' Exhibit 5 (<i>continued</i>)	1875
Plaintiffs' Exhibit 11	2118
Plaintiffs' Exhibit 13	2125
Plaintiffs' Exhibit 15	2134
Plaintiffs' Exhibit 16	2160
Plaintiffs' Exhibit 17 (<i>marked for identification purposes</i>)	2166
Plaintiffs' Exhibit 20	2167
Plaintiffs' Exhibit 25 (<i>not admitted; submitted with Plaintiffs' Proposed Final Order</i>)	2177
Plaintiffs' Exhibit 26	2181
Plaintiffs' Exhibit 27	2182
Plaintiffs' Exhibit 28	2183
Plaintiffs' Exhibit 29	2184
Plaintiffs' Exhibit 30	2185
Plaintiffs' Exhibit 31	2190
Plaintiffs' Exhibit 32	2192
Plaintiffs' Exhibit 33	2193
Plaintiffs' Exhibit 36	2195
Defendant's Exhibit 1	2206

Intervenors' Exhibit 2	2236
Intervenors' Exhibit 3	2253
Intervenors' Exhibit 5	2258
Intervenors' Exhibit 9	2259
Intervenors' Exhibit 15	2268
Intervenors' Exhibit 19	2269
Intervenors' Exhibit 20	2270
Intervenors' Exhibit 22	2272
Intervenors' Exhibit 23	2273

Other

Email from counsel for Intervenors to Judge Scarborough with attached Proposed Order Granting Intervention (<i>October 31, 2013</i>)	2274
Letter from counsel for Plaintiffs to Judge Scarborough regarding Order Granting Intervention (<i>November 5, 2013</i>)	2286
Plaintiffs' Proposed Final Order (<i>submitted February 14, 2014</i>)	2287
Plaintiffs' Proposed Order Granting Motion to Alter or Amend the Final Order (<i>submitted September 19, 2014</i>)	2326
Certificate of Counsel	2358

STATE OF SOUTH CAROLINA)

BEFORE THE MASTER-IN-EQUITY)

COUNTY OF CHARLESTON)

MIKELL R. SCARBOROUGH)

KIAWAH RESORT ASSOCIATES, L.P., a)
Delaware Limited Partnership, and KDP II,)
LLC, a South Carolina Limited Liability)
Company,)

Case No. 2013-CP-10-1225)

Plaintiffs,)

AMENDED COMPLAINT)

vs.)

**(Declaratory Judgment/Reformation of)
Deed/Specific Performance)**)

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

Defendant,)

and)

INLET COVE HOMEOWNERS)
ASSOCIATION, INC., a South Carolina)
Not-for-Profit Corporation, and KIAWAH)
ISLAND PROPERTY OWNERS GROUP,)
an unincorporated association,)

Third-Party Intervenors.)

FILED
2013 NOV 19 PM 3:46
JULIE J. ARMSTRONG
CLERK OF COURT

COME NOW the Plaintiffs, Kiawah Resort Associates, L.P., and KDP II LLC, complaining of the Defendant, Kiawah Island Community Association, Inc., and allege and state their Amended Complaint as follows:

1. Plaintiff Kiawah Resort Associates, L.P. ("KRA") is a Delaware limited partnership with its principal place of business in Charleston County.
2. Plaintiff KDP II LLC ("KDP II") is a South Carolina limited liability company with its principal place of business in Charleston County.

3. Defendant Kiawah Island Community Association, Inc. ("KICA"), is a South Carolina not-for-profit corporation that serves and operates as the property owners' association for all owners of property located within the Town of Kiawah Island, South Carolina.
4. 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") hereinafter more specifically described, and Bylaws, as amended.
5. KRA is, and at all pertinent times hereto was, the "Company" for purposes of and as defined in the KICA Covenants. As set forth more fully below, certain transfers among affiliated companies have resulted in a transfer of KRA's ownership and related interests in the subject property to KDP II, such that KDP II is KRA's ultimate assignee with regard to its ownership and related interests in the subject property. Through this action, KRA and KDP II request relief from the Court on a joint basis relating to the same transaction, occurrence and property. In addition, all questions of law and fact necessary and arising in this action are common between Plaintiffs.
6. There is a controversy between Plaintiffs and KICA over their respective rights and obligations with regard to a deed from KRA to KICA and whether Plaintiffs are entitled to relief to correct an error in that deed, as more fully set forth herein.
7. This Court has jurisdiction of this matter and venue is proper in this Court.

FACTS

8. On or about September 26, 1994 KRA and the Town of Kiawah Island (the "Town") entered into a Development Agreement (the "1994 Development Agreement") that was recorded September 30, 1994, in Book J248, page 001, in the R.M.C. Office for Charleston County, S.C. ("R.M.C. Office"). Attached hereto as Exhibit A is a true and

accurate copy of the body of the 1994 Development Agreement, including the particular exhibits thereto that are relevant to the deed in question described in more detail below.

9. Section 16(b) of the 1994 Development Agreement required KRA, the "Property Owner" for purposes of the 1994 Development Agreement, to convey what was described as a 10 mile strip of beachfront property (the "Beachfront Strip") to KICA 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.

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

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

11. Exhibit 16.2 to the 1994 Development Agreement is a graphic illustration that depicts the Beachfront Strip as a strip of land beginning east of the extended boundary line of the 19.5-acre parcel (identified as Parcel No. 13 in the 1994 Development Agreement) (the “Beachwalker Ocean Parcel”), extending east along the beachfront and ending at the northeastern tip of Little Bear Island at the opposite end of Kiawah Island.
12. Section 16 (g) of the 1994 Development Agreement addressed the land known as Captain Sam’s Spit, which is also depicted on Exhibit 16.2 to the 1994 Development Agreement but was not assigned a Parcel No., 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.

13. Exhibit 16.2 to the 1994 Development Agreement also contains a hand-written notation with a line and arrow pointing to the Captain Sam’s Spit area denoting that area as “Area not included in Dedication Area.”
14. A draft contract and draft quit-claim deed for conveyance of the Beachfront Strip to KICA were attached to the 1994 Development Agreement as Exhibit 16.7.
15. Pursuant to section 16 (b) of the Development Agreement, KRA executed the deed of conveyance to KICA for what it believed to be the Beachfront Strip by quit-claim deed in the same form as the quit-claim deed attached as Exhibit 16.7 to the 1994 Development Agreement, before the January 1, 1996 deadline. This quit-claim deed was dated

December 29, 1995, and recorded February 20, 1996, in Book N265, page 406, in the R.M.C. Office for Charleston County. (the "Beachfront Deed"). Attached hereto as Exhibit B is a true and accurate copy of the Beachfront Deed.

16. Pursuant to Section 16 (b) of the 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."
17. The Beachfront Strip had not been separately platted as a distinct TMS parcel at the time of the execution of the Beachfront Deed.
18. Because the property conveyed by the Beachfront Deed was not described in its entirety on plats of record, the legal description of the property conveyed in the Beachfront Deed was described generally as an area extending from a specific point located at the western end of Kiawah Island to a point located at the eastern end thereof, generally between 200 and 300 feet in width, extending 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.
19. The property description in the Beachfront Deed is identical to the property description in the draft quit-claim deed that was attached to the contract that is part of Exhibit 16.7 of the 1994 Development Agreement.

20. Subsequent to the date when the Beachfront Deed was executed, the parties have discovered and cooperated to resolve multiple mutual mistakes within the Beachfront Deed. For example, in 1997, KRA discovered the first error in the property description in the Beachfront Deed. The property description inadvertently included a beachfront development tract owned by KRA in the middle of the island identified as Parcel No. 20, in the 1994 Development Agreement — an approximately 3.1 acre beachfront parcel located south of the then location of Sea Forest Drive on Kiawah Island, east of Windswept Villas (the “East Beach Ocean Parcel”).
21. The Beachfront Deed inadvertently and erroneously conveyed the East Beach Ocean Parcel to KICA because there was no plat of record that established the seaward boundary line of the East Beach Ocean Parcel, nor was it a separate TMS parcel at the time the Beachfront Deed was executed and recorded.
22. KRA obtained a plat of survey dated March 11, 1997, which established the southern or seaward boundary line of the East Beach Ocean Parcel, prepared by Southeastern Surveying, Inc. and recorded in Plat Book EB, at page 679, in the R.M.C. Office.
23. With the Town’s approval, KICA executed a confirmatory quit-claim deed to KRA returning record title to KRA to the East Beach Ocean Parcel adjacent to the center island Sanctuary Hotel tract (the “Confirmatory Quit-Claim Deed”). The Confirmatory Quit-Claim Deed was recorded at book Y285, page 763 in the R.M.C. Office and re-recorded at book O288, page 790 in the R.M.C. Office. Attached hereto as Exhibit C is a true and accurate copy of the Confirmatory Quit-Claim Deed.
24. In accordance with the intent of Section 16.2 of the 1994 Development Agreement, KRA executed a corrective and confirmatory deed conveying to KICA the beachfront strip seaward of the East Beach Ocean Parcel (the “Corrective and Confirmatory Deed”),

recorded at book Y285, page 772 and re-recorded in book 0288, page 799 in the RMC Office for Charleston County. Attached hereto as Exhibit D is a true and accurate copy of the Corrective and Confirmatory Deed.

25. Near the time of the above two conveyances, it was determined that there was another error that needed correction in the property description of the Beachfront Deed that pertained to the eastern end of the Beachfront Strip, which the parties also acknowledged and cooperated to resolve by way of corrective deed. Specifically, a 1988 plat of the entire east end of Kiawah established the seaward boundary line as the mean high water mark and left no land between the seaward boundary of the dunes and the ocean. Thus, the only property conveyed to KICA by the Beachfront Deed at the east end of the island was the beachfront area, if any, lying between the old mean high water mark shown on the 1988 Davis & Floyd plat, and the then-current mean high water mark, contrary to the intent of the parties to convey a “a strip of scenic dunes and high land owned primarily by the Property Owner ... which extends along the Kiawah Island beachfront for approximately 10 miles ... [that] varies in width, but often is 200’ to 300’ wide.”
26. To accomplish the intent of the conveyance described in Section 16(b) of the 1994 Development Agreement, KRA prepared and executed a second corrective and confirmatory deed (the “Second Corrective and Confirmatory Deed”) to convey this portion of the beachfront strip to KICA in 6 separate tracts—including a 245.045 acre beachfront parcel at the easternmost tip of the island conveyed by reference to an exhibit plat prepared by Southeastern Surveying at KRA’s request. This Second Corrective and Confirmatory Deed was recorded at book L304, page 459 in the R.M.C. Office. Attached hereto as Exhibit E is a true and accurate copy of the Second Corrective and Confirmatory Deed.

27. This is an additional example of how the parties to the Beachfront Deed, KRA and KICA, have historically acknowledged mutual mistakes in the Beachfront Deed and resolved them through corrective deeds, which includes instances where KICA was provided substantial property as a result of a corrective deed. Going all the way back to 1997, in multiple prior instances, KRA and KICA have acknowledged and resolved mutual mistakes without resort to requiring votes to be taken among KICA's Board of Directors or its Membership.
28. More recently, however, KICA has declined to resolve an additional mutual mistake that has been discovered relating to the Beachfront Deed, although the parties have consistently acknowledged and cooperated to resolve such issues through corrective deeds in the past. The inconsistency is heightened by the fact that both sides have acknowledged the existence of the additional mutual mistake that relates to the Additional Land, as more fully defined and described in the paragraphs below. Furthermore, the conduct of the parties relating to the Additional Land underscores the fact that the Beachfront Deed indeed includes a mutual mistake relating to the Additional Land that must be corrected.
29. The relevant background relating to the Additional Land is as follows. On October 12, 2005, KRA and the Town entered into the second Development Agreement (the "2005 Development Agreement"), replacing and terminating the 1994 Development Agreement. The 2005 Development Agreement was recorded in Book Z558, page 004 in the R.M.C. Office. Attached hereto as Exhibit F is a true and accurate copy of the body of the 2005 Development Agreement and its pertinent exhibits.
30. The 2005 Development Agreement eliminated the terms of Section 16(g) of the 1994 Development Agreement for Captain Sam's Spit and replaced them with new provisions

that granted the Property Owner certain limited development rights on Captain Sam's Spit.

31. On or around 2007, Plaintiffs discovered an additional error within the property description in the Beachfront Deed. In particular, the property description in the Beachfront Deed stated, in part, 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."

32. Contrary to the visual depiction of the Beachfront Strip in Exhibit 16.2 to the 1994 Development Agreement and the terms of the 1994 and 2005 Development Agreements, the property description for the Beachfront Strip in both the draft contract and draft quit-claim deed attached as Exhibit 16.7 to the 1994 Development Agreement as well as in the Beachfront Deed mistakenly state that the Beachfront Strip commenced at the south westernmost 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. ("Point of Beginning").
33. Because of the error in the Point of Beginning, the property description in the Beachfront Deed unintentionally included an area of 4.62 acres seaward of KRA's more than two acre "Employee Facility Tract" on Beachwalker Road ("the Additional Land"). The Employee Facility Tract, and the area seaward of that tract including the Additional Land are portions of Parcels 12 and 13, the "Beachwalker Park" Parcel and "Beachwalker Ocean" Parcel under the 1994 Development Agreement, and Parcels 12A and 13 under the 2005 Development Agreement, and the Additional Land was not meant to be conveyed, and was erroneously and mistakenly conveyed, as part of the Beachfront Strip. An illustration of the Additional Land mistakenly conveyed is attached hereto as Exhibit G.
34. The 1994 and 2005 Development Agreements both treat the Additional Land as the land of the Property Owner. The 1994 Development Agreement shows the Additional Land as belonging to the Property Owner as part of Parcel 12, the "Beachwalker Park" Parcel (TMS No. 207-05-00-001) and Parcel 13, the "Beachwalker Ocean" Parcel. The 2005 Development Agreement shows the Additional Land as belonging to the Property Owner

as part of Parcel 12A, the "Beachwalker Park" Parcel (TMS No. 207-05-00-001) and Parcel 13, the "Beachwalker Ocean" Parcel under the 2005 Development Agreement.

35. Even after the Beachfront 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 and reflected there as owned by Property Owner and has never been formally subdivided into a separate TMS parcel. KICA has never undertaken control or ownership over the Additional Land nor treated the Additional Land as Common Property, which manifests the fact that the inclusion of the Additional Land within the description of the Beachfront Deed was a mutual mistake and otherwise in error.

36. On or about October 2, 2012, the Town of Kiawah Island and KRA as Property Owner entered the Fifth Amendment to the 2005 Development Agreement (the "Fifth Amendment"), that is recorded at Book 0290 at Page 99 in the R.M.C. Office, a copy of the recorded Fifth Amendment is attached hereto as Exhibit H.

37. In the Fifth Amendment to the 2005 Development Agreement, the Town of Kiawah Island and KRA as Property Owner 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.

38. Plaintiffs have requested the Board of Directors of KICA ("KICA Board") to authorize the President and Secretary of KICA to execute a corrective quit-claim deed conveying

title to the Additional Land back to KRA since the Additional Land was unintentionally included in the property description in the Beachfront Deed, and the parties to the Development Agreements never intended that the Additional Land be included as a part of the Common Property conveyed to KICA.

39. However, contrary to the historical and consistent manner in which issues regarding the Beachfront Deed have been resolved, the current KICA Board has declined to authorize the President and Secretary to execute a corrective quit-claim deed in light of the fact that the mistakenly conveyed Additional Land was conveyed to KICA as Common Property and, based on the interpretation given by the Board of Directors, Common Property cannot be conveyed without an affirmative vote of the members of KICA under Article IV, Section 6(h) of the KICA Covenants, although prior issues relating to Common Property had been handled in this matter. Also, the conduct of both KICA and KRA (along with KRA's assignees) make clear that the Additional Land has never been treated as or considered to be Common Property.
40. Plaintiffs assert that they are entitled to judicial reformation of the property description in the Beachfront Deed to delete the Additional Land from the Beachfront Strip by changing the Point of Beginning and to establish the western terminus of the Beachfront Strip along the eastern boundary of the Beachwalker Ocean Parcel, and/or to an order authorizing and requiring the President and the Secretary of KICA to execute a corrective quitclaim deed for the Additional Land on the ground that the inclusion of the Additional Land in the legal description in the Beachfront Deed to KICA as Common Property was a mistake caused by the error in the "Point of Beginning" of the legal description which was and continues to be contrary to the intent of the parties.

41. As noted above, a set of transfers among affiliates of resulted in the transfer of KRA's original ownership and related interests in the Additional Land to KDP II. A copy of the Special Warranty Deed reflecting the ultimate transfer to KDP II is attached as Exhibit I. As a result of the Special Warranty Deed, KDP II is KRA's ultimate assignee with respect to ownership and related interests in the Additional Land. Through this action, KRA and KDP II request relief from the Court on a joint basis relating to the same transaction, occurrence and property. In addition, all questions of law and fact necessary and arising in this action are common between Plaintiffs.

FOR A FIRST CAUSE OF ACTION

42. Plaintiffs reallege their previous allegations as if fully set forth herein.

43. Plaintiffs are entitled to a declaratory adjudication that the inclusion of the Additional Land in the legal description in the Beachfront Deed to KICA as Common Property was unintentional, in error, and a mistake, and contrary to the intent of the parties to the two Development Agreements of which KICA was a named third-party beneficiary for certain purposes, including the recipient of the Beachfront Deed.

FOR A SECOND CAUSE OF ACTION

44. Plaintiffs reallege their previous allegations as if fully set forth herein.

45. Plaintiffs are entitled to an order of this Court directing reformation of the property description of the Beachfront Deed deleting the Additional Land and correcting the property description so that it provides for an accurate and correct description of the western terminus of the Beachfront Strip and the recording of the reformed Beachfront Deed in the RMC Office for Charleston County.

FOR A THIRD CAUSE OF ACTION

46. Plaintiffs reallege their previous allegations as if fully set forth herein.

47. In the alternative, Plaintiffs are entitled to an order of specific performance compelling the duly authorized representative(s) of KICA to execute a deed to KDP II for the Additional Land without encumbrance except for those matters of encumbrance at the time of the conveyance of the Beachfront Deed.

WHEREFORE, Plaintiffs pray for the relief against Defendant as set forth above and for such further and other relief as the Court deems just and proper.

Respectfully submitted,

By: 
Ellis R. Lesemann
HARVEY & VALLINI, LLC
497 Bramson Court, Suite 200
Mount Pleasant, SC 29464
Phone: (843) 388-8883
Fax: (843) 388-8884
ellis1@hvlawsc.com

Attorneys for Plaintiffs

November 18, 2013
Mount Pleasant, South Carolina

13-1025

CERTIFICATE OF SERVICE

I hereby certify that I have this date, mailed, postage prepaid, a true and correct copy of
the **Amended Complaint** to the following counsel of record:

Allison C. Jett, Esquire
Weissman Nowack Curry & Wilco
One Alliance Center, 4th Floor
3500 Lenox Road
Atlanta, GA30326
Attorneys for Defendant

Amy E. Armstrong, Esquire
S.C. Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585
Attorneys for Third-Party Intervenors

FILED
2013 NOV 19 PM 3:46
JULIE J. ARMSTRONG
CLERK OF COURT

By: AJ Stair
Alden J. Stair

This 19th day of November, 2013
Mount Pleasant, South Carolina

EXHIBIT A

EXH A

DEVELOPMENT AGREEMENT
BY AND BETWEEN KIAWAH RESORT ASSOCIATES, L.P.
AND THE TOWN OF KIAWAH ISLAND

THIS DEVELOPMENT AGREEMENT is entered into this 26th day of September, 1994, by and between KIAWAH RESORT ASSOCIATES, L.P., a limited partnership organized and existing under the laws of Delaware, and the TOWN OF KIAWAH ISLAND, a municipal corporation organized and existing under the laws of the State of South Carolina.

RECITALS

This Agreement is predicated upon the following facts:

1. The Code of Laws of South Carolina §§ 6-31-10 through 6-31-160, inclusive, authorize the Town to enter into binding development agreements with persons or entities intending to undertake any development on real property containing twenty-five acres or more of highland and having a legal or equitable interest in the real property to be developed;
2. Under Code § 6-31-30, the Town Council of the Town has established procedures and requirements for considering and entering development agreements;
3. Under Code § 6-31-50(A), the Town Council conducted a public hearing regarding its consideration of this Agreement on May 3, 1994, June 2, 1994, June 28, 1994, July 7, 1994, July 14, 1994, and September 26, 1994, after publishing and announcing notice of its intent to consider this Agreement, all in satisfaction of provisions Code § 6-31-50(B) and any other notice requirements;
4. Under Code § 6-31-60(A)(7), the Town Council of the Town found on September 26, 1994, that this Agreement is consistent with the Town's Comprehensive Plan and Land Development Regulations; and
5. Under Code § 6-31-30, the Town Council of the Town adopted Ordinance No. ____ on ____ 19__, approving this Agreement with the Property Owner.

NOW THEREFORE, the parties agree:

1. Definitions. In this Agreement, unless the word or phrase is non-capitalized:
 - (a) "Adjacent" means next to or within 100 feet. Adjacent properties include those properties which abut a property, as well as properties with any portion being located within 100 feet of any boundary of the subject property.



- (b) "Agreement" means this Development Agreement, including the recitals and exhibits attached hereto.
- (c) "ARB" is the Kiawah Architectural Review Board that is currently operational under the auspices of the Property Owner and/or as it may later function under the Declaration of Rights, Restrictions, Affirmative Obligations and Conditions Applicable to all Property in Kiawah Island (recorded in the Charleston County RMC office in Book M114 Page 406, and amended by instrument recorded in Book Z-124, Page 305).
- (d) "Bridge" or "Causeway" means a raised roadway crossing naturally wet ground or water features.
- (e) "Building Development Standards" means minimum standards for the area, width, building coverage, building setback and yard requirements for Lots or Development Parcels.
- (f) "Common Properties" means KICA Common Properties, Purchased Common Properties, and Restricted Common Properties as described under the KICA Covenants.
- (g) "Comprehensive Plan" means the master plan adopted pursuant to S.C. Code §§ 6-7-510, et seq., 5-23-490 et seq., 6-29-310 et seq., or 4-27-600 and the official map adopted pursuant to § 6-7-1210, et seq.
- (h) "Density" means the number of Dwelling Units per acre. Parcel Density equals the number of Dwelling Units divided by the gross acreage above mean high water, excluding Fresh Water and Salt Water Wetlands.
- (i) "Developed Lands" means and refers to all Real Property (as shown on the map attached as Exhibit 1.1), excluding all lands included in the Definition of "Undeveloped Lands".
- (j) "Development" means the planning for or carrying out of a building activity or mining operation, the making of a material change in the use or appearance of any structure or property, or the dividing of land into three or more parcels, and is intended by the Parties to include all uses of, activities upon or changes to the Real Property as are authorized by the Agreement.

"Development," as designated in a land or development permit, includes the planning for and all other activity customarily associated with it unless otherwise specified. When appropriate to the context, "Development" refers to the planning for or the act of developing or to the result of development. Reference to a specific operation is not intended to mean that the operation or

activity, when part of other operations or activities, is not development. Reference to particular operations is not intended to limit the generality of this item.

- (k) "Development Parcel" means any tract of land on which Development may occur, including platted Lots and unplatted parcels, but excluding street rights-of-way.
- (l) "Development Permit" includes a building permit, zoning permit, subdivision approval, rezoning certification, special exception, variance, certificate of occupancy or any other official action of Local Government having the effect of permitting the Development or use of property.
- (m) "Dwelling Unit" means one or more rooms, designed, occupied or intended for occupancy as a separate living quarter, with cooking, sleeping and sanitary facilities provided within the dwelling unit.
- (n) "Facilities" means major capital or community improvements including, but not limited to, transportation, sanitary sewer, solid waste, drainage, and potable water. The Property Owner is specifically exempted from any Town requirement for the provision of facilities relating to public education, public health systems and facilities, libraries, public housing, jails and other detention sites, courts, police and trash or garbage disposal sites.
- (o) "Finished Grade" means the average elevation of a Lot after construction; provided, however, that Finished Grade shall not be more than 6 feet above Natural Ground elevation, and provided further that the Town may approve more than 6 feet.
- (p) "Fresh Water and Salt Water Wetlands" means those properties with elevations below the mean high water line, and properties within a pond, lagoon or other Water Bodies.
- (q) "General Covenants" means and refers to the Declaration of Rights, Restrictions, Affirmative Obligations and Conditions Applicable to All Property on Kiawah Island (recorded in the Charleston County RMC Office in Book M114, Page 406, and amended by instrument recorded in Book Z124, Page 305.)
- (r) "Ground Floor Level" means Natural Ground or the lowest floor elevation for structures as set forth in the Town of Kiawah's floodplain management ordinance, (as found in § 14-101 of the Municipal Code), as amended, whichever is higher; provided, however, that Ground Floor Level shall not exceed 14 feet above Natural Ground. This definition shall not be construed to



prevent an owner from constructing his first finished floor higher than Ground Floor Level, provided, however, Height is measured from Ground Floor Level.

- (s) "Gross Leasable Area" (GLA) means total floor area for which the tenant pays rent and that is designed for the tenant's occupancy and exclusive use. GLA does not include public or common areas, such as utility rooms, stairwells and malls.
- (t) "Guest Rooms" means a resort hotel room or suite designed for occupancy as a single unit by no more than four (4) persons in a single unit.
- (u) "Height" means elevation from Ground Floor Level as measured in feet and stories. Building height does not include chimneys, antennae or ventilation pipes. Height in stories is the number of habitable floors (stories) exclusive of the area below the first finished floor. One-half story is a habitable floor which has heated square footage that is no greater than one-half the heated square footage of the largest story.
- (v) "Hotel Rooms and Support Space" means any Guest Rooms, public lobby, food and beverage, meeting and banquet, administrative service and mechanical areas attributable to hotel operation. Hotel and Support Space permitted under ¶ 19 is limited to 325 Guest Rooms and 52,000 square feet of floor area for support area, including lobbies, administrative space, eating areas, meeting rooms and service areas. This definition does not prohibit the development of commercial space permitted in ¶ 13.B.2. from being developed on a hotel site, provided that any support space in excess of 52,000 square feet shall be counted towards the space permitted in ¶ 13.B.2.(b).
- (w) "Kiawah Island" means the area within the Town of Kiawah Island, including its surrounding marshes and nearby islands and includes all lands and areas encompassed within the boundaries of the low lands, high lands, marsh lands, and waterways depicted on Exhibit 1.2.
- (x) "KICA" means the Kiawah Island Community Association, Inc.
- (y) "KICA Covenants" means and refers to the Declaration of Covenants and Restrictions of the Kiawah Island Community Association, Inc. recorded in the RMC Office for Charleston County in Book M 114, Page 407, and all amendments and supplements thereto, including those recorded at Book O-125 at page 163, Book K-139 at page 58, Book R-210 at page 748, Book W-243 at page 271, and Book W-243 at page 258.
- (z) "Land Development Regulations" means ordinances and regulations enacted by the appropriate governing body for the regulation of any aspect of

Development and includes Local Government zoning, rezoning, subdivision, building construction, occupancy or sign regulations or any other regulations controlling the Development or use of property.

- (aa) "Laws" means all ordinances, resolutions, regulations, comprehensive plans, Land Development Regulations, policies and rules, custom and usage (formal or informal) adopted by a Local Government affecting the Development of property and includes laws governing permitted uses of the property, governing density, and governing design, improvement, and construction standards and specifications, except as provided in § 6-31-140(A).
- (ab) "Local Government" means any county, municipality, special district, or governmental entity of the State, county, municipality, or region established pursuant to law which exercises regulatory authority over, and grants Development Permits for land Development or which provides public Facilities.
- (ac) "Lot" means Development Parcel identified in a Subdivision Plat recorded in the Charleston County, RMC office.
- (ad) "Natural Ground" means the average elevation of a Lot or Development Parcel prior to Development activity.
- (ae) "Parties" are the Property Owner and Town.
- (af) "Parcel" means any of those tracts of the Real Property constituting the Undeveloped Lands that are numbered and identified in Exhibits 1.3 and 13.2.
- (ag) "Pervious Cover" means land which permits the absorption of stormwater into the ground. This may include walkways and driveways which are pervious to stormwater.
- (ah) "Private Club" means a privately-owned, by-invitation-only association of two or more members who may have the use of land and facilities owned or leased by the club and made available to members, their guests, and others as the club owner(s) may allow from time to time; membership may be for social, civic, recreational, and/or other lawful purposes with such membership conditioned upon the receipt of dues, fees, or other charges as are levied by the club owners.
- (ai) "Project" is the Development that has occurred and will occur on Kiawah Island.
- (aj) PDD1a shall refer only to the Zoning Ordinance originally adopted by Charleston County and adopted by the Town on April 6, 1989, as a part of the

Town's Planning and Zoning regulations in 1989, as amended prior to the date hereof.

- (ak) "Property Owner" means Kiawah Resort Associates, L.P., a limited partnership organized and existing under the laws of Delaware, together with all subsidiaries thereof and other entities, which have a legal interest on the date of execution hereof in any of the Real Property as described in paragraph (4) and includes Kiawah Resort Associates, L.P.'s successors in interest or successors in title and/or assigns by virtue of assignment or other instrument pursuant to ¶ 33 hereof. Additionally, Property Owner shall mean Beachwalker Partners, L.P., Kiawah Island Real Estate, Inc., Kiawah Island Utility, Inc., The Beach Company, Earle E. Long Trust, and DIECI, Inc. and their successors and assigns in accord with ¶ 33 herein, solely for purposes of the property owned by them that is submitted under this Agreement. Property Owner warrants that there are no other legal or equitable owners of the Real Property.
- (al) "Real Property" is the real property referred to in paragraph 4 and includes any improvements or structures customarily regarded as part of real property.
- (am) "Sight Triangle" means a triangular-shaped portion of land established at street intersections in which nothing is permitted which limits or obstructs the sight distance of motorists entering or leaving the intersection. The sides of the triangle measure twenty-five (25) feet from the intersection of the projected pavement lines.
- (an) "Single Family Detached Dwelling" means a building containing one Dwelling Unit that is not attached to any other Dwelling Unit and is surrounded by yards or open space.
- (ao) "Single Family, Patio Homes and Multi-Family Covenants" means and refers to the Declaration of Covenants and Restrictions applicable to Single Family Housing at Kiawah Island recorded at Book T-108 at page 339 in the RMC office for Charleston County; the Declaration of Covenants and Restrictions applicable to Patio Homes at Kiawah Island recorded at Book T-108 at page 341 in the RMC office for Charleston County; and the Declaration of Covenants and Restrictions applicable to Multi-Family Housing at Kiawah Island recorded at Book T-108 at page 340 in the RMC office for Charleston County.
- (ap) "Subdivision Plat" means a recorded graphic description of property prepared and approved in compliance with Article 12B, Subdivision Regulations of the Municipal Code, Town of Kiawah Island, South Carolina, as amended.

mem



- (aq) "Town" is the Town of Kiawah Island, South Carolina, a municipal corporation organized and existing under the laws of the State of South Carolina.
- (ar) "Traffic Mitigation Measures" means improvements and/or transportation management strategies to restore or maintain acceptable levels of service for a roadway segment or segments, including, but not limited to: turn lane additions, acceleration/deceleration lanes, a new off-island reception center/security checkpoint, other road widening alternatives, vanpools, and other alternatives to decrease traffic volume or increase roadway capacity.
- (as) "Traffic Mitigation Plan" means a plan to restore or maintain acceptable levels of service for a roadway segment or segments.
- (at) "Type E" and "Type A" Members are as defined in the KICA Covenants. The "Type A Directors" are those directors on the board of KICA who are elected by the KICA Members.
- (au) "Undeveloped Lands" in existence on the date of execution of this Agreement is the Real Property indicated on Exhibit 1.3. Undeveloped Lands shall, during the term of this Agreement, include only Real Property that either (i) has not received any plat approval or (ii) has received preliminary, conditional or final plat approval but fewer than 100% of the Lots or parcels depicted thereon have been sold to Type A members under the Covenants and fewer than 90% of the potential houses on such platted Lots or parcels (or less than 95% of the buildable commercial square footage on a plat of commercial property) have been constructed. Also included within the definition of Undeveloped Lands is the Real Property made subject to a recorded master deed after the date hereof but fewer than 90% of the condominium units shown thereon have been sold to Type A members under the KICA Covenants.
- (av) "Vested Units" means the new single family Lots and new non-single family Dwelling Units which may be approved for all Undeveloped Lands. Such new Lots and Dwelling Units constituting Vested Units include those which receive preliminary subdivision plat approval for the first time after January 28, 1994 and any Dwelling Units approved after January 28, 1994, for Development in the Undeveloped Lands.
- (aw) "Water Bodies" means property determined to be under water no less than eleven (11) months of the year and under such standing water for a continuous period of no less than nine (9) months of the year.
- (ax) "Zoning Board of Adjustment" or "ZBA" means the duly-appointed Zoning Board of Adjustment for the Town of Kiawah Island.

MAM

7



2. Parties. Parties to this Agreement are the Property Owner and the Town.
3. Relationship of the Parties. This Agreement creates a contractual relationship between the Parties. This Agreement is not intended to create, and does not create, the relationship of master/servant, principal/agent, independent contractor/employer, partnership, joint venture, or any other relationship where one party may be held responsible for the acts of the other party. Further, this Agreement is not intended to create, nor does it create, a relationship whereby the conduct of the Property Owner constitutes "state action" for any purpose.
4. Legal Description of the Real Property. The Real Property which is the subject of this Agreement is described as follows:

- (i) All Real Property on Kiawah Island currently owned by the Property Owner.
- (ii) A legal description of the Real Property is set forth in the schedules and maps attached as Exhibit 4.1: Description of Real Property.

The Real Property currently consists of approximately 2058 acres of highland and approximately 5,000 acres of marshlands and low lands.

The Property Owner may notify the Town from time to time of property proposed to be added to the legal description of Real Property by the filing of a legal description of subsequently acquired properties with the Town Clerk; provided, however, that no other property shall be added to the Agreement unless the same is duly amended by mutual agreement of the parties and after compliance with §§ 6-31-10 et seq.

- (iii) The Parties have endeavored to identify by description and location all existing holdings of Real Property of the Property Owner on Kiawah Island. Despite the Parties' best efforts, there may be other acreages or parcels of the Property Owner that have inadvertently not been identified. If and when such acreage or parcels are discovered, the Parties agree to consent to add same, by amendment, in good faith to this Agreement as part of the Undeveloped Lands. In such event, the densities, uses and other Building Development Standards as described in Section 13 and the tables therein for such newly added parcel shall be consistent with other similar Parcels in the Undeveloped Lands already subject to this Agreement; provided, however that the limitation of 1,974 Vested Units established in ¶ 13.B.1.(b), the limitation of 300,000 square feet of commercial floor area established in ¶ 13.B.2(b), and the limitation of 325 new Hotel/Inn Rooms and 52,000 square feet of Support Space established in ¶ 19 shall not change unless this Agreement is amended, by major modification, in accordance with the provisions of ¶ 22, infra.



5. Identity of the Property Owner. "Property Owner" means Kiawah Resort Associates, L.P., a limited partnership organized and existing under the laws of Delaware, together with all subsidiaries thereof and other entities, which have a legal interest on the date of execution hereof in any of the Real Property as described in paragraph (4) and includes Kiawah Resort Associates, L.P.'s successors in interest or successors in title and/or assigns by virtue of assignment or other instrument pursuant to ¶ 33 hereof. Additionally, Property Owner shall mean Beachwalker Partners, L.P., Kiawah Island Real Estate, Inc., Kiawah Island Utility, Inc., The Beach Company, Earle E. Long Trust, and DIECI, Inc. and their successors and assigns in accord with ¶ 33 herein, solely for purposes of the property owned by them that is submitted under this Agreement. Property Owner warrants that there are no other legal or equitable owners of the Real Property.

Kiawah Resort Associates, L.P. represents that it has a legal interest in the Real Property and that all other entities now holding legal or equitable interests in the Real Property are to be bound by this Agreement. By execution hereof Beachwalker Partners, L.P., Kiawah Island Real Estate, Inc., Kiawah Island Utility, Inc., DIECI, Inc., the Beach Company, and Earle E. Long Trust confirm their being bound by the terms hereof solely for purposes of the properties owned by them submitted under this Agreement and are responsible only for the obligations associated with properties owned by them.

6. Intent of the Parties. The Town and the Property Owner agree that the burdens of this Agreement bind, and the benefits of this Agreement shall inure, to each of them and to their successors in interest and, in the case of the Property Owner, its successors in title and/or assigns pursuant to paragraph 33 hereof.
7. Benefits and Burdens. The Town and the Property Owner enter this Agreement in order to serve benefits and burdens referenced in § 6-31-10 *et seq.*
8. Consistency with the Town's Comprehensive Plan and Land Development Regulations. This Agreement is consistent with the Town's Comprehensive Plan and Land Development Regulations, as adopted on September 26, 1994.

Whenever express or implied substantive provisions of this Agreement are inconsistent with the applicable standards set forth in the Zoning Code, the standards set forth in the Zoning Code and the standards set forth in this Agreement shall, to the extent possible, be considered in pari materia to give effect to both the Zoning Code and this Agreement; provided, however, that in the event of a conflict, and subject to the provisions of § 6-31-80, the standards set forth in this Agreement shall govern. Nothing is intended herein to limit application of administrative or procedural or similar provisions of the Zoning Code nor limit the Town of Kiawah in amending provisions of the Zoning Code in accordance with law and any development agreement. In the event of a dispute between the parties to this Agreement as to

whether a provision in the Comprehensive Plan or Zoning Code is inconsistent with express or implied substantive provisions of this Agreement, the parties must first submit such disputed interpretation to Town Council and must wait seven days after such submittal before invoking the remedies afforded them under this Agreement.

9. Legislative Act. Any change in the standards established by this Agreement or to Laws pertaining to the same shall require the approval of the Town Council, subject to compliance with applicable statutory procedures and consistent with § 10(a). This Agreement constitutes a legislative act of the Town Council of the Town. The Town Council adopted this Agreement only after following procedures required by S.C. Code § 6-31-10 et seq. This Agreement shall not be construed to create a debt of the Town as referenced in § 6-31-145.

10. Applicable Land Use Regulations.

- (a) Applicable Laws and Land Development Regulations. Except as otherwise provided by this Agreement or by § 6-31-10 et seq., the Laws applicable to Development of the Real Property, subject to this Agreement, are those in force at the time of execution of this Agreement. The Town shall not apply subsequently adopted Laws and Land Development Regulations to the Real Property or the Project unless the Town has held a public hearing and has determined: (1) the proposed, subsequent Laws or Land Development Regulations are not in conflict with the Laws or Land Development Regulations governing the Agreement and do not prevent the Development set forth in this Agreement; (2) the proposed, subsequent Laws or Land Development Regulations are essential to the public health, safety, or welfare and the proposed, subsequent Laws or Land Development Regulations expressly state that they apply to a development that is subject to a development agreement; (3) the proposed, subsequent Laws or Land Development Regulations are specifically anticipated and provided for in this Agreement; (4) the Town demonstrates that substantial changes have occurred in pertinent conditions existing at the time of approval of this Agreement which changes, if not addressed by the Town, would pose a serious threat to the public health, safety, or welfare; or (5) this Agreement is based on substantially and materially inaccurate information supplied by the Property Owner.
- (b) Vested Rights. Subject to the provisions of subparagraph (a) above, all rights and prerogatives accorded the Property Owner by this Agreement shall immediately constitute vested rights for the Development of the Real Property.

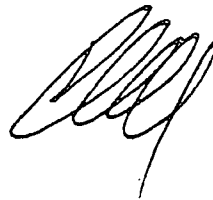
Paragraph 10(a) of this Agreement does not abrogate any rights either preserved by S.C. Code § 6-31-140 or that may have vested pursuant to common law and otherwise in the absence of a development agreement.



mem

- (c) Dock Permitting. The provisions of the Key Location Ordinance (Town of Kiawah Island Ordinance 91-2 as amended by Ordinance 92-1) shall apply to the Real Property. All Town permits necessary for dock construction shall be issued expeditiously by the Town upon compliance with the Key Location Ordinance.
- (d) Road Codes and Subdivision Regulations.
- (i) The Road Code and Subdivision Regulations of the Town ("Municipal Code, Town of Kiawah Island, South Carolina" Art. 12B and 12C) shall apply to the Real Property except that in lieu of any potential obligation to "four lane," all of the bridges, overpasses, or roads comprising the Kiawah Island Parkway, the Property Owner shall plan and implement Traffic Mitigation Measures in accordance with Exhibit 10.1, if required by it.
 - (ii) In the event that Property Owner conveys a Dwelling Unit, Lot or Development Parcel to third parties on Parcels 18, 29, 32, and 35, all such conveyances of Dwelling Units, Lots or Development Parcels as are on KICA streets to any successor in interest (including lessees) to Property Owner, shall contain a covenant running with the land requiring the third parties, by both contract and covenant, to pay 150% of the annual assessment behind the Vanderhorst gate in lieu of 100% of such annual assessment.
11. Building Codes and Laws Other Than Land Use Regulations. The Property Owner, notwithstanding any provision which may be construed to the contrary in this Agreement, must comply with any building, housing, electrical, plumbing and gas codes subsequently adopted by the Town or other governmental entity, as authorized by Chapter 9 of Title 6 of the South Carolina Code. This Agreement shall not be construed to supersede or contravene the requirements of any building, housing, electrical, plumbing and gas codes subsequently adopted by the Town or other governmental entity, as authorized by Chapter 9 of Title 6 of the South Carolina Code. The provisions of this Agreement are not intended, nor should they be construed in any way, to alter or amend in any way the rights, duties and privileges of the Town to exercise governmental powers and pass laws not applicable to Development of the Real Property including, but not limited to, the power of eminent domain and the power to levy and collect taxes; provided, however, that Laws applicable to the Development of the Real Property shall be subject to Section 10.(a).
12. Local Development Permits and Other Permits Needed. The Parties anticipate that the following local Development Permits and other regulatory permits will be needed to complete the Development of the Project:

mem



Zoning permits, plat approvals (preliminary, conditional or final), roads and drainage construction plan approvals, building permits, and certificates of occupancy.

The failure of the Agreement to address a particular permit, condition, term, or restriction does not relieve the Property Owner of the necessity of complying with the law governing the permit requirements, conditions, terms, or restrictions.

13. Vested Rights Governing the Development of the Real Property.

A. DEVELOPED LANDS AND UNDEVELOPED LANDS. For purposes of this Agreement, the property on Kiawah Island has been divided into two categories: Developed Lands and Undeveloped Lands.

- (i) The Undeveloped Lands are entitled solely to the vested rights for the Undeveloped Lands and the Developed Lands are entitled solely to the vested rights for the Developed Lands.
- (ii) The Property Owner at any time may elect to convert Undeveloped Lands to Developed Lands by notifying the Town in writing of such election and providing the Town at such time with a legal description of the Real Property subject to the election.

B. VESTED RIGHTS GOVERNING THE DEVELOPMENT OF THE UNDEVELOPED LANDS.

1. RESIDENTIAL USES

(a) Permitted Uses

Except as further limited by the provisions of this Agreement, all uses listed on Exhibit 13.1, Table of Permitted Uses, attached hereto, under the heading "Residential" shall be vested as to those Parcels on Exhibit 13.2 with the designation "R". Parcels designated as R-1 on Exhibit 13.2 permit single family detached dwellings at a Density of three (3) or fewer Dwelling Units per acre. Parcels designated as R-2 permit any permitted type of attached and/or detached residential unit with up to four (4) dwellings per building. The maximum Density of R-2 development shall not exceed six (6) Dwelling Units per acre for any given development or result in a higher Parcel Density than specified on Exhibit 13.2. Parcels designated as R-3 may include any permitted type of residential development listed on Exhibit 13.1 as limited by Parcel Density, Height and other provisions of this Agreement.

man



(b) New Dwelling Units

- (i) The total number of new single family residential Lots and non-single family residential Dwelling Units, herein collectively referred to as "Vested Units" to be vested by this Agreement and to be located solely on Undeveloped Lands owned by the Property Owner, shall not exceed 1,974 Vested Units, commencing with such residential Lots as are given preliminary plat approval for the first time after January 28, 1994, non-single family residential Dwelling Units approved after January 28, 1994, and such condominium Dwelling Units shown on a recorded master deed for the first time after January 28, 1994.

The purpose and effect of this provision is to provide an absolute limit upon Lots or Dwelling Units to a Development total of 1,974 new, additional single family residential Lots and non-single family residential Dwelling Units on the Real Property. This limit or "cap" shall be in addition to those Lots or units which have received preliminary, conditional, or final plat approval or which appear on a recorded condominium master deed prior to January, 28, 1994. [This limit on dwelling units does not include rooms in inns or hotels. See ¶ 19, infra.]

- (ii) The maximum Density limits per acre for each Undeveloped Land Parcel as provided on Exhibit 13.2 are used to establish the maximum number of Dwelling Units per Parcel. The maximum number of Dwelling Units per Parcel shall be as provided in Exhibit 13.2, but in no event shall Vested Units exceed the 1,974 total established by the preceding paragraph.

(c) Building Development Standards

The ARB shall prescribe and determine Lot area, Lot width, Lot depth, Lot coverage, setback and yard requirements, and may adjust the following criteria:

- (i) LOT AREA: Minimum Lot areas required for each dwelling unit are as follows:
- a. 8,000 square feet in Lots shown with a density of 3 Dwelling Units per acre;

man



- b. 6,000 square feet in Lots shown with a density between 3 Dwelling Units per acre and 6 Dwelling Unit residential condominium units per acre;
 - c. 4,000 square feet in Lots shown with a density between 6 Dwelling Units per acre and 12 Dwelling Units per acre;
 - d. Lot area required for each Dwelling Unit may be reduced to 2,000 square feet provided that open space is provided equivalent to the amount by which each Lot is reduced. Such equivalent open space shall be provided within 1,000 feet of each such Lot so reduced.
- (ii) LOT WIDTH: The Lot width may be reduced to a minimum of 15 feet at the street right of way, provided that the Lot width at the building line (as indicated on the plat) shall be no less than:
- a. 60 feet for Lots over 8,000 square feet;
 - b. 50 feet for Lots between 4,000 square feet and 8,000 square feet;
 - c. 20 feet for Lots between 2,000 square feet and 4,000 square feet.
- (iii) LOT COVERAGE: All buildings on any lot, including accessory buildings shall not cover more than:
- a. 33% of the area of Lots with more than 6,000 square feet per Lot; and
 - b. 60% of the area of Lots with less than 6,000 square feet per Lot.
- (iv) SETBACK AND YARD REQUIREMENTS: Negative or "Zero" Lot lines are permitted at the discretion of the ARB.
- a. FRONT YARDS: Each Lot shall have a front yard as follows:
 - 25 feet on Lots with more than 8,000 square feet.
 - 10 feet on Lots between 4,000 square feet and 8,000 square feet.

- No front yard is required on Lots between 2,000 square feet and 4,000 square feet provided all such units shall front on a common open space or street with a minimum width of 30 feet.
- b. INTERIOR (SIDE) YARDS: Each Lot shall have two side yards whose sum shall be no less than 14 feet such that one required side yard shall be no less than three (3) feet (provided that there shall be no openings of the house into a side yard which is less than five (5) feet) and that the other required side yard be no less than eleven (11) feet, provided, however, that all houses on adjoining Lots shall have a minimum of thirteen (13) feet between them. the minimum distance between buildings may be reduced to eight (8) feet (and the required yards likewise) provided that the corners of the buildings overlap not more than fourteen (14) feet; that there are no openings in one of such walls at such a location; that there shall be no more than four adjacent units with the side yards so reduced; and that no side yard shall be less than three (3) feet. However, in instances in which two adjacent Lot owners mutually covenant and agree to utilize a common Lot line as a zero Lot line, no setbacks shall conform to these regulations.
- c. CORNER (SIDE) YARDS: Each corner Lot shall have a side yard of not less than twenty-five (25) feet except in cases in which the side Lot line of a Lot abuts common open space which has a minimum width adjacent to the Lot of twenty-three (23) feet, then the corner side yard of such Lot may be reduced to three (3) feet.
- d. REAR YARDS: Each Lot shall have a rear yard of not less than twenty-five (25) feet except in cases in which the rear Lot line abuts open space (either as a buffer between tracts or within the tract) which has a minimum width adjacent to the Lot of thirty (30) feet if wooded or fifty (50) feet if non-wooded area, then the rear yard of such Lot may be reduced to fifteen (15) feet.

(d) Off-Street Parking

The number of off-street parking spaces for any use shall be as outlined in Exhibit 13.5. The design of parking areas shall meet the minimum dimensional standards of Exhibit 13.6.

(e) Building Height

Residential Height is limited to a number of habitable floors (i.e., stories) exclusive of the area below the Ground Floor Level. One-half story is a habitable floor which has square footage that is no greater than one-half the square footage of the largest story. Single family residential buildings shall not exceed the stories specified in Exh. 13.2 or 45 feet in height from Ground Floor Level, regardless of the Height limits specified in Exhibit 13.2. Other residential structures shall not exceed the number of habitable floors or the Height (measured in feet from Ground Floor Level) shown in Exhibit 13.2.

Furthermore, except as noted below, no portion of a residential building (excluding fireplaces, chimneys and vents) may be taller than 30 feet from Ground Floor Level within 15 feet of any property line, nor taller than 35 feet from Ground Floor Level within 20 feet of any property line. These setbacks do not apply to internal property lines in condominium or townhouse development. The Town may grant exceptions to these setbacks for interior property lines as identified through the platting process, provided that such exceptions do not adversely impact existing Development.

(f) Buffers, Fencing, and Signage

The ARB shall prescribe and determine and may adjust, subject to the provisions of Section 13.B.6., natural vegetative buffers between either Development Parcels of differing density residential lands or residential and non-residential lands and may adjust the following criteria: The buffer shall be a landscaped or naturally vegetated area not less than 30' wide, or a golf course, or other non-wooded area not less than 50' wide or a change in topography, or any other natural or architectural transition feature which may be within the boundaries of a parcel.

The ARB shall approve fencing that is limited to landscaped hedgerows of dense plant material and/or wooden, masonry or wrought iron material which is architecturally integrated with other Development on the Lot or Development Parcel. Fencing shall not exceed five (5) feet in height from grade for residential Development. The ARB shall not

approve solid wood fences in front yards. Fencing (excluding the use of plant materials) within five (5) feet of side and rear property lines is prohibited. Fences taller than three (3) feet from pavement of adjacent streets shall not be located within the Sight Triangle without Town approval.

Signage allowed within parcels that permit residential, commercial or utility/community support uses shall meet and comply with the Kiawah Island Graphics Standards, as updated by the ARB from time to time, (current edition, Exh. 13.7); however, at such time as the Lots or Development Parcels on a Subdivision Plat become part of the Developed Lands, Property Owner agrees that signage shall be in the discretion of the KICA. Temporary signs for special events may be approved by the ARB provided the signs do not have moving parts, blinking or flashing lights, glaring lights, neon or extensive use of bright, offensive colors, and further provided that any temporary sign shall be permitted for a maximum of fifteen (15) days. Signs shall be located to avoid obstructing traffic visibility. No sign, excepting traffic signs, which is taller than three (3) feet above the pavement of the adjacent streets shall be permitted within the Sight Triangle of any street intersection without Town approval.

(g) Tree Replacement Guidelines

The Tree Replacement Guidelines, as currently promulgated by the ARB in the June, 1992 edition of Designing With Nature, shall continue to be applied by the ARB throughout all Real Property; provided, however, they may be adjusted, modified, and updated from time to time by the ARB with the approval of the Town.

All new Development projects shall be designed so that building areas, streets and utilities are located to minimize the loss of oak trees and other trees with a diameter (caliper) of eight (8) inches or more, as measured 3' above grade. Such Development shall not result in the loss of any trees with a caliper of twenty-four (24) inches or more measured at three (3) feet above grade except where the ARB finds that tree density, topography, or other geographic constraints, either preclude saving or allow the removal of such trees. Where such trees are removed, the ARB may require replacement with oak trees of at least two (2) inches caliper and having combined caliper equal to the removed specimen.

On individual Lots or Development Parcels, architects must take great care in designing buildings with an eye towards preserving all oak trees,

especially those that are larger than twenty-four (24) inch caliper. If there is no reasonable design solution that would save these large trees, mitigation shall be required by planting trees in which the sum of the caliper is equal to or greater than the caliper of the trees which are being removed.

Town approval will be necessary for the removal of live oak trees with thirty inch (30") or greater caliper (measured 3' feet above grade) from any single family Lots. If a single family Lot owner can reasonably demonstrate to the Town that there is no practical alternative for placement of a house, then the tree may be removed with Town approval, provided there is ample mitigation that, in the aggregate, is equal to the caliper of tree cut. On single family Lots, the Property Owner must provide the Town a survey of live oak trees with 30" or greater caliper (measured 3' above grade) before obtaining a building permit.

The ARB's tree replacement guidelines as set forth in the June 1992 edition of Designing with Nature shall govern the removal of trees from street rights-of-way and Lots or Development Parcels other than single family Lots. Town approval shall not be necessary for the removal of these trees from other Lots or Development Parcels and street rights-of-way. However, if a live oak of 30" or greater caliper (measured 3' above grade) is removed, then Property Owner shall submit to the Town evidence of mitigation required by the provisions of this section, including either a survey or sworn certification as to the live oak trees of 30" of greater caliper (measured 3' above grade) in the impacted area.

(h) Aesthetics

Except as otherwise provided herein, including, but not limited to, paragraphs 10, 11, 12 and 13, the ARB shall have sole and exclusive jurisdiction with regard to the standards and guidelines set forth in Exhibit 13.8, "Designing with Nature," attached hereto and other matters within its jurisdiction under Article II, Sections 1 and 2, of the General Covenants (excluding the introductory paragraph to them). In the event of any inconsistency between either Exhibit 13.8 or the General Covenants and the provisions of this Agreement, this Agreement governs.

The Town agrees that it will not establish an architectural review body during the term of this Agreement which replaces or duplicates the jurisdiction of the ARB as reserved to it under this subsection.

2. COMMERCIAL USES

(a) Permitted Uses

All uses presently shown on Exhibit 13.1 under the heading "Commercial" shall be vested as a matter of right on all parcels in the Undeveloped Lands with the designation "C" on Exhibit 13.2.

(b) Size Limitations

Total island wide commercial square footage on all Real Property (including any leasable, non-residential building square footage, but excluding Hotel Rooms and Support Space) shall not exceed 300,000 square feet of floor area on both Developed and Undeveloped Lands.

The maximum commercial square footage allowable for each parcel shall not exceed the totals provided on Exhibit 13.2.

(c) Building Development Standards

Building setback standards shall be as established by the ARB and administered, varied and adjusted as necessary or appropriate for all Lots or Development Parcels in the Undeveloped Lands.

For non-residential uses, the minimum Lot area is 20,000 sq.ft., the minimum Lot depth is 120 ft., and the minimum Lot width is 150 ft.

The ARB shall establish limitations for total ground coverage of all impervious surfaces including building footprint, decks, walkways, parking and circulation areas, etc. In no event shall these limitations provide for more than seventy (70) percent impervious surfaces on any commercial Lot or Development Parcel without Town approval.

(d) Off-Street Parking

The number of off-street parking spaces for any use shall be as outlined in Exhibit 13.5. The design of parking areas shall meet the minimum dimensional standards of Exhibit 13.6.

(e) Building Height

Height shall not exceed the number of commercially habitable floors (i.e., stories) exclusive of the area below the finished first floor or the maximum elevation from Ground Floor Level established in Exhibit

13.2. One-half story is a habitable floor which has square footage that is no greater than one-half the square footage of the largest story.

No portion of a building may be taller than the Height above Ground Floor Level specified in Exhibit 13.9, "Commercial Bulk Standards."

(f) Buffers, Fencing and Signage

The ARB shall prescribe and determine and may adjust, subject to the provisions of Section 13.B.6., natural vegetative buffers between either Development Parcels of differing density residential lands or residential and non-residential lands and may adjust the following criteria: The buffer shall be a landscaped or naturally vegetated area not less than 30' wide, or a golf course, or other non-wooded area not less than 50' wide or a change in topography, or any other natural or architectural transition feature which may be within the boundaries of a parcel.

The ARB shall approve fencing that is limited to landscaped hedgerows of dense plant material and/or wooden, masonry or wrought iron material. Fencing shall not exceed 10 feet in height for commercial or utility development. Fencing (excluding the use of plant materials) within fifteen (15) feet of any property line is prohibited. Fences taller than three (3) feet from pavement of adjacent streets shall not be located within the Sight Triangle without Town approval.

Signage allowed within parcels that permit residential, commercial or utility/community support uses must meet and comply with the Kiawah Island Graphics Standards, as updated by the ARB from time to time, (current edition, Exh. 13.7); however, at such time as the Lots or Development Parcels on a Subdivision Plat become part of the Developed Lands, Property Owner agrees that signage shall be in the discretion of the KICA. Temporary signs for special events may be approved by the ARB provided the signs do not have moving parts, blinking or flashing lights, glaring lights, neon or extensive use of bright, offensive colors, and further provided that any temporary sign shall be permitted for a maximum of fifteen (15) days. Signs shall be located to avoid obstructing traffic visibility. No sign which is taller than three (3) feet above the pavement of the adjacent streets shall be permitted within the Sight Triangle of any street intersection without Town approval.

(g) Tree Replacement Guidelines

The Tree Replacement Guidelines, as currently promulgated by the ARB in the June, 1992 edition of Designing With Nature, shall continue to be applied by the ARB throughout all Real Property; provided, however, they may be adjusted, modified, and updated from time to time by the ARB with the approval of the Town.

All new Development projects shall be designed so that building areas, streets and utilities are located to minimize the loss of oak trees and other trees with a diameter (caliper) of eight (8) inches or more, as measured 3' above grade. Such Development shall not result in the loss of any trees with a caliper of twenty-four (24) inches or more measured at three (3) feet above grade except where the ARB finds that tree density, topography, or other geographic constraints, either preclude saving or allow the removal of such trees. Where such trees are removed, the ARB may require replacement with oak trees of at least two (2) inches caliper and having combined caliper equal to the removed specimen.

On individual Lots or Development Parcels, architects must take great care in designing buildings with an eye towards preserving all oak trees, especially those that are larger than twenty-four (24) inch caliper. If there is no reasonable design solution that would save these large trees, mitigation shall be required by planting trees in which the sum of the caliper is equal to or greater than the caliper of the trees which are being removed.

The ARB's tree replacement guidelines as set forth in the June 1992 edition of Designing with Nature shall govern the removal of trees from street rights-of-way and Lots or Development Parcels other than single family Lots. Town approval shall not be necessary for the removal of these trees from other Lots or Development Parcels and street rights-of-way. However, if a live oak of 30" or greater caliper (measured 3' above grade) is removed, then Property Owner shall submit to the Town evidence of mitigation required by the provisions of this section, including either a survey or sworn certification as to the live oak trees of 30" or greater caliper (measured 3' above grade) in the impacted area.

(h) Aesthetics

Except as otherwise provided herein, including, but not limited to, paragraphs 10, 11, 12 and 13, the ARB shall have sole and exclusive

jurisdiction with regard to the standards and guidelines set forth in Exhibit 13.8, "Designing with Nature," attached hereto and other matters within its jurisdiction under Article II, Sections 1 and 2, of the General Covenants (excluding the introductory paragraph to them). In the event of any inconsistency between either Exhibit 13.8 or the General Covenants and the provisions of this Agreement, this Agreement governs.

The Town agrees that it will not establish an architectural review body during the term of this Agreement which replaces or duplicates the jurisdiction of the ARB as reserved to it under this subsection.

3. UTILITY AND SUPPORT SERVICES

(a) Permitted Uses

All uses as shown as "Utility" on Exhibit 13.1, shall be vested as a matter of right on all Undeveloped Lands indicated as U on Exhibit 13.2.

(b) Building Development Standards

Building setback standards shall be as established by the ARB.

For non-residential uses, the minimum Lot area is 20,000 sq.ft., the minimum Lot depth is 120 ft., and the minimum Lot width is 150 ft.

The ARB shall establish limitations for total ground coverage of building footprint, decks, walkways, parking and circulation areas, etc.

(c) Off-Street Parking

Off-street parking standards shall be as provided by ¶ 13.B.1.(d).

(d) Building Height

Building Height limitations shall be as described in Exhibit 13.2. Building Height of non-habitable structures (antennas, towers, communication structures, utility structures, etc.) shall be as determined by the ARB unless it is proposed to exceed Heights of the same proposed structures existing on the date of execution of this Agreement, as specified in Exhibit 13.10 attached hereto. Town approval shall be required to exceed these specified Heights.

(e) Buffers, Fencing, and Signage

The ARB shall prescribe and determine and may adjust, subject to the provisions of Section 13.B.6., natural vegetative buffers between either parcels of differing density residential lands or residential and non-residential lands and may adjust the following criteria: The buffer shall be a landscaped or naturally vegetated area not less than 30' wide, or a golf course, or other non-wooded area not less than 50' wide or a change in topography, or any other natural or architectural transition feature which may be within the boundaries of a parcel.

The ARB shall approve fencing that is limited to landscaped hedgerows of dense plant material and/or wooden, masonry or wrought iron material. Fencing shall not exceed 10 feet in height for commercial or utility development. Fencing (excluding the use of plant materials) within fifteen (15) feet of any property line is prohibited. Fences taller than three (3) feet from pavement of adjacent streets shall not be located within the Sight Triangle of any street intersection without Town approval.

Signage allowed within parcels that permit residential, commercial or utility/community support uses shall meet and comply with the Kiawah Island Graphics Standards, as updated by the ARB from time to time, (current edition, Exh. 13.7); however, at such time as the Lots or Development Parcels on a Subdivision Plat become part of the Developed Lands, Property Owner agrees that signage shall be in the discretion of the KICA. Temporary signs for special events may be approved by the ARB provided the signs do not have moving parts, blinking or flashing lights, glaring lights, neon or extensive use of bright, offensive colors, and further provided that any temporary sign shall be permitted for a maximum of fifteen (15) days. Signs shall be located to avoid obstructing traffic visibility. No sign which is taller than three (3) feet above the pavement of the adjacent streets shall be permitted within the Sight Triangle of any street intersection without Town approval.

(f) Tree Replacement Guidelines

The Tree Replacement Guidelines, as currently promulgated by the ARB in the June, 1992 edition of Designing With Nature, shall continue to be applied by the ARB throughout all Real Property; provided, however, they may be adjusted, modified, and updated from time to time by the ARB with the approval of the Town.

All new Development projects shall be designed so that building areas, streets and utilities are located to minimize the loss of oak trees and other trees with a diameter (caliper) of eight (8) inches or more, as measured 3' above grade. Such Development shall not result in the loss of any trees with a caliper of twenty-four (24) inches or more measured at three (3) feet above grade except where the ARB finds that tree density, topography, or other geographic constraints, either preclude saving or allow removal of such trees. Where such trees are removed, the ARB may require replacement with oak trees of at least two (2) inches caliper and having combined caliper equal to the removed specimen.

On individual Lots or Development Parcels, architects must take great care in designing buildings with an eye towards preserving all oak trees, especially those that are larger than twenty-four (24) inch caliper. If there is no reasonable design solution that would save these large trees, mitigation shall be required by planting trees in which the sum of the caliper is equal to or greater than the caliper of the trees which are being removed.

The ARB's tree replacement guidelines as set forth in the June 1992 edition of Designing with Nature shall govern the removal of trees from street rights-of-way and Lots or Development Parcels other than single family Lots. Town approval shall not be necessary for the removal of these trees from other Lots or Development Parcels and street rights-of-way. However, if a live oak of 30" or greater caliper (measured 3' above grade) is removed, then Property Owner shall submit to the Town evidence of mitigation required by the provisions of this section, including either a survey or sworn certification as to the live oak trees of 30" or greater caliper (measured 3' above grade) in the impacted area.

(g) Aesthetics

Except as otherwise provided herein, including, but not limited to, paragraphs 10, 11, 12 and 13, the ARB shall have sole and exclusive jurisdiction with regard to the standards and guidelines set forth in Exhibit 13.8, "Designing with Nature," attached hereto and other matters within its jurisdiction under Article II, Sections 1 and 2, of the General Covenants (excluding the introductory paragraph to them). In the event of any inconsistency between either Exhibit 13.8 or the General Covenants and the provisions of this Agreement, this Agreement governs.

The Town agrees that it will not establish an architectural review body during the term of this Agreement which replaces or duplicates the jurisdiction of the ARB as reserved to it under this subsection.

4. OPEN SPACE

- (a) Parcel open space is defined as land with Pervious Cover. The percentage of Parcel open space is determined by dividing the area of Pervious Cover by the gross area of a Parcel exclusive of Fresh Water and Salt Water Wetlands. Exhibit 13.2 provides the minimum required percentages of Parcel open space for each Parcel.
- (b) The Property Owner shall dedicate conservation open space as provided in Paragraph 16 of this Agreement.
- (c) The Property Owner shall provide and dedicate the following active or passive open space Facilities:

Active or Passive Recreation Sites

The following list includes active or passive park sites and open space which have been and/or shall be dedicated to KICA in accordance with Paragraphs 15 and 16 of this Agreement

Existing Parklands/Open Space

Glossy Ibis Mini Park
Marshview Tower Overlook
Willet Pond Mini Park
Marsh Island Park
Rhett's Bluff Boat Landing
Canvasback Pond Mini Park
Master Leisure Trail System
Internal Crabbing/View Stands

Future Parklands/Open Space

Bear Island (except as provided in Paragraph 16(d) of this Agreement)
Captain Sam's Spit (subject to reservations in ¶ 16(h))
Blue Heron Mini Park/View Tower
Cougar Island Park

Trails

The Property Owner shall determine the specific alignments of all trails, including access to the trail system from new Development areas; provided that the existing trail system shall be extended, at Property Owner's cost, along Flyway Drive to Glen Abbey.

In the event a road is constructed to Bear Island for regular automobile traffic to serve one or more Dwelling Units there, Property Owner agrees that the trail system shall be extended along this road to Bear Island (this survives the Agreement), provided the owner of the Ocean Course consents to such trail use.

Dedication of trail segments to KICA shall occur in conjunction with plat approval for adjacent subdivisions or rights-of-way.

- (d) The Town agrees that the above future facilities and open spaces specified in this Agreement, in conjunction with existing facilities, open spaces, parks, marshes, natural and man made features and recreational amenities of Kiawah Island, shall satisfy all current and future obligations of the Property Owner relating to the same for monetary exactions and/or the provision or dedication of parks, parklands, community recreational facilities, open spaces and recreational areas on Kiawah Island.

5. MIXED USE DEVELOPMENT

- (a) If more than one designation - "R-1," "R-2," "R-3," "C" and "U" - applies to a parcel in Exhibit 13.2, any permitted land use within a single land use type (e.g., Residential, Commercial or Utility) may be established on the parcel. A mixed use development with more than one type of use shall be permitted with Town approval of the requested mix, arrangement and Building Development Standards for such uses, which approval shall not be unreasonably withheld. The maximum residential, non-residential and hotel square footage for mixed use development on any parcel shall not exceed the FAR established in Exhibit 13.2. Mixed use FAR's shall be calculated by dividing the total floor area of all use types (e.g., Residential, Commercial, Hotel and Utility) by the gross site area above mean high water, excluding Fresh Water and Salt Water Wetlands. Residential units in mixed use developments will be counted towards the maximum number of Vested Units as provided in ¶ 13.B.1.(b)(i). Non-Residential floor area will be

counted towards the maximum square footage as provided in ¶ 13.B.2.(b). Hotel Rooms and Support Space will be counted towards the maximums as provided in ¶ 19.

6. COMPATIBILITY STANDARDS

- (a) Compliance. Notwithstanding any other provision of this Agreement to the contrary (including, but not limited to, certain provisions of this paragraph 13) the ARB and the Property Owner shall comply with the Compatibility Standards set forth in ¶ 13.B.6.(c) and ¶ 13.B.6.(d).
- (b) Adjustment. The compatibility standards set forth in ¶ 13.B.6.(c) shall be subject to adjustment only by the proper exercise of discretion or authority, as delegated to the Zoning Board of Adjustment or the Town Council by the South Carolina Code.
- (c) Compatibility Standards

The intent of these compatibility standards is to provide the ARB with broad discretion to establish or modify Building Development Standards on Undeveloped Lands, while providing adequate protection to consumers by ensuring that the use and design of new Development will be compatible with that of Lots and Development Parcels sold to third parties.

The proposed land use for each Lot or Development Parcel will be defined on the Subdivision Plat for all new Lots. Land use changes that change the overall classification of use, as specified in Table 13.2, must be approved by the Town. Any change to Building Development Standards shown on a Subdivision Plat for Lots located Adjacent to any Lot or Development Parcel under contract to a Type A Member shall comply with ¶ 13.B.6. of this Agreement. However, these compatibility standards, including Town approval for a change to a Building Development Standard, shall not be necessary for single family Lots on Subdivision Plats that were approved in any form by the Town before January 28, 1994.

New Development of Undeveloped Lands which is Adjacent to Lots included in a Subdivision Plat or Development Parcels is subject to the following compatibility standards. New Development located Adjacent to previously platted Lots or Development Parcels shall:

- (i) Have an equal or lower Density than Adjacent Lots or Development Parcels;

- (ii) Be designated for the same or a less intensive use than Adjacent Lots or Development Parcels; and
- (iii) Comply with the Building Development Standards and Height established for Adjacent Lots or Development Parcels.

If proposed Development does not meet conditions (i), (ii) and (iii), then the following bufferyards shall be required:

Required Bufferyards(1)

Existing Development	Proposed Development(1)				
	R-1	R-2	R-3	Commercial Office or Resort	Other Uses
R-1	none(2)	A	B	C	(3)
R-2	A	none	A	B	(3)
R-3	B	A	none	A	(3)
Commercial, Office or Resort	C	B	A	none	(3)
Other Uses	(3)	(3)	(3)	(3)	(3)

Notes for Required Bufferyards Table

- (1) Bufferyards and open spaces shall be provided on the site of the new Development, regardless of existing setbacks, bufferyards or open space otherwise provided on the existing developed site, except that existing golf courses or dedicated open space areas may be counted towards bufferyard requirements. Bufferyards do not include required building setbacks. Natural bufferyards are those for which the vegetation has been permitted to grow through natural succession to include trees which are at least twenty (20) feet tall with thickly vegetated understory growth. Densely planted bufferyards shall include a variety of trees and understory plantings which will mature to create an opaque bufferyard within five (5) years of planting. Open bufferyards include golf courses, Water Bodies, and other areas where vegetation does not completely visually screen Adjacent land uses. Design and plant material shall be determined by ARB; provided, however, that the Town shall reasonably determine whether or not the specific planting criteria of this paragraph for vegetative bufferyards have been met by Property Owner.
- (2) If new Development located Adjacent to previously platted Lots does not comply with Building Development Standards and Height established for Adjacent Lots, a type "A" bufferyard must be provided.
- (3) Type of bufferyard to be determined by the Town based on impact of use, but shall not exceed 60 feet in width for natural or densely planted bufferyard or 120 feet for open bufferyard.

Bufferyard Definitions

Design and plant materials shall be determined by the ARB.

Bufferyard Type	Minimum Requirement
A	30 ft. wide with natural or densely planted vegetation or 50 feet of open buffer yard.
B	40 ft. wide with natural or densely planted vegetation or 70 feet of open buffer yard.
C	60 ft. wide with natural or densely planted vegetation or 120 feet of open buffer yard.

(d) Consumer Reliance/Consumer Consent

- (i) Subject to the provisions of ¶ 13.B.6.(c), at the time of conditional and final plat submittal, the Property Owner may on the plat indicate such Building Development Standards as the Property Owner shall determine to be appropriate. If no Building Development Standards are described on the conditional or final Subdivision Plat, then the Building Development Standards for the platted Lots shall be as determined by the ARB.
- (ii) If a conditional or final Subdivision Plat indicates an applicable Building Development Standard, then a buyer or seller of a Lot (including the Property Owner) may elect to agree in writing that no reliance will be placed on such Building Development Standards as may apply (directly on the plat and/or by ARB adjustment) to any Adjacent Lot or Development Parcels and/or such buyer may waive enforcement of such Standards.
- (iii) The owner of a Lot or Development Parcel who seeks to deviate from such Building Development Standards as appear on the conditional or final plat which includes his Lot or Development Parcel, may avoid seeking a variance from the Zoning Board of Adjustment only if the Type A owners of Adjacent Lots execute a consent (as described in subparagraph (ii)). A copy of the consent must be provided the ZBA and ARB.

mom



(e) Replatting

- (i) Town, subject to compliance with applicable Laws, may approve re-platting or re-configuration of Lots or Development Parcels contained in Subdivision Plats approved prior to January 28, 1994. Any increase in the number of Lots from such re-platting or re-configuration shall be counted toward the 1,974 cap in Section 13.A.(b)(i).

C. VESTED RIGHTS FOR THE DEVELOPED LANDS.

The Lots and Development Parcels constituting a portion of the Real Property on Exhibit 4.1 not designated as numbered Parcels are the Developed Lands as of the date hereof, and the Town agrees, subject to the provisions of paragraph 10(a), not to enact setback standards any more restrictive than those shown on Exhibit 13.11: Kiawah Island Property Setback Requirements, attached hereto. Modification of the setback standards for Developed Lands shall require approval of the ARB and the Town's Zoning Board of Adjustment.

1. RESIDENTIAL USES

(a) Permitted Uses

In order to foster the utmost compatibility and cohesion in existing residential neighborhoods, all land of the Property Owner in the Developed Lands that is designated "R" on Exhibit 13.12 "Existing Residential Lots and Condominium Units", shall only be used for residential purposes. For those Developed Lands of the Property Owner that are currently bound by covenants prescribing a particular type of residential use, the residential uses shall be limited to those permitted under those existing covenants. For those Developed Lands of the Property Owner that are not currently bound by covenants prescribing a particular residential use, the residential use must be single family.

Residential unit types within Developed Lands are limited to those as outlined in the Single Family, Patio Homes, and Multi-family Covenants.

(b) Density

Subject to ¶ 15(a)(ii), the total number of Dwelling Units in Developed Lands shall not exceed the total number of existing single family residential Lots and residential condominium Dwelling Units as shown

mem



on Exhibit 13.12: Existing Residential Lots and Residential Condominium Units.

(c) Building Development Standards

The Building Development Standards for setback and yard requirements are as described in Exhibit 13.11. Variances to these standards will require Town of Kiawah Island Zoning Board of Adjustment approval and ARB approval.

Building coverage (i.e., building foot print) shall not exceed the following:

- (i) 33% of the area of Lots or Development Parcels with more than 6,000 square feet per Lot; and
- (ii) 40% of the area of Lots or Development Parcels with less than 6,000 square feet.

(d) Off-Street Parking

The number of off-street parking spaces for any use shall be as outlined in Exhibit 13.5. The design of parking areas shall meet the minimum dimensional standards of Exhibit 13.6.

(e) Building Height

Building Height is limited to 2.5 stories for single family structures or 3 stories for other residential structures. The Height of single family structures shall not exceed 35 feet from Ground Floor Level. The Height of other residential structures shall not exceed 40 feet from Ground Floor Level, except as approved by the Board of Zoning Adjustment. This maximum Height of 35' for single family structures shall not apply to the Lots described on Exh. 13.15 in the Osprey Beach Subdivision, which shall have a maximum permissible Height of 45' from Ground Floor Level, a maximum elevation that is compatible with existing, established structures in this subdivision along the beachfront.

Height is the number of habitable floors (i.e., stories) exclusive of the area below the finished first floor. One-half story is a habitable floor which has heated square footage that is no greater than one-half the heated square footage of the largest story.

(f) Buffers, Fencing, and Signage

Buffers, fencing and signage shall comply with ¶ 13.B.1.(f) of this Agreement.

(g) Tree Replacement Guidelines

The Tree Replacement Guidelines, as currently promulgated by the ARB in the June, 1992 edition of Designing With Nature, shall continue to be applied by the ARB throughout all Real Property; provided, however, they may be adjusted, modified, and updated from time to time by the ARB with the approval of the Town.

On individual Lots or Development Parcels, architects must take great care in designing buildings with an eye towards preserving all oak trees, especially those that are larger than twenty-four (24) inch caliper, as measured 3' above grade. If there is no reasonable design solution that would save these large trees, mitigation shall be required by planting trees in which the sum of the caliper is equal to or greater than the caliper of the trees which are being removed.

Town approval shall be necessary for the removal of live oak trees with twenty-four inch (24") or greater caliper (measured 3' above grade) in the Developed Lands. If an owner can reasonably demonstrate to the Town that there is no practical alternative to removing such tree, then the tree may be removed with Town approval provided there is ample mitigation that, in the aggregate, is equal to the caliper of tree cut. On single family Lots, the Property Owner must provide the Town a survey of live oak trees with 30" or greater caliper (measured 3' above grade) before obtaining a building permit.

(h) Aesthetics

Except as otherwise provided herein, including, but not limited to, paragraphs 10, 11, 12 and 13, the ARB shall have sole and exclusive jurisdiction with regard to the standards and guidelines set forth in Exhibit 13.8, "Designing with Nature," attached hereto and other matters within its jurisdiction under Article II, Sections 1 and 2, of the General Covenants (excluding the introductory paragraph to them). In the event of any inconsistency between either Exhibit 13.8 or the General Covenants and the provisions of this Agreement, this Agreement governs.

The Town agrees that it will not establish an architectural review body during the term of this Agreement which replaces or duplicates the jurisdiction of the ARB as reserved to it under this subsection.

2. COMMERCIAL USES

(a) Permitted Uses

All uses presently shown on Exhibit 13.1 under the heading "Commercial" shall be permitted as a matter of right on all parcels of the Property Owner in the Developed Lands designated "C" on Exhibit 13.13.

(b) Size Limitations

Total island wide commercial square footage on all Real Property (including any leasable, non-residential building square footage, but excluding Hotel Rooms and Support Space) shall not exceed 300,000 square feet of floor area on both Developed and Undeveloped Lands.

(c) Building Development Standards

Building setback standards are established by Exhibit 13.14 and shall be subject to variance only if approved by the ARB and the Zoning Board of Adjustment.

Building coverage standards shall be established by Exhibit 13.14. Limitations for total ground coverage of all impervious surfaces, including building footprint, decks, walkways, parking and circulation areas, etc., shall be subject to variance only if approved by the ARB and the Zoning Board of Adjustment.

(d) Off-Street Parking

The number of off-street parking spaces for any use shall be as outlined in Exhibit 13.5. The design of parking areas shall meet the minimum dimensional standards of Exhibit 13.6.

(e) Building Height

Height is the vertical distance from Ground Floor Level to the top of a non-residential or mixed use building. Building Height shall not exceed 35 feet from Ground Floor Level unless otherwise approved by the Town.

mem



(f) Buffers, Fencing and Signage

Buffers, fencing and signage shall comply with ¶ 13.B.1.(f).

(g) Aesthetics

Except as otherwise provided herein, including, but not limited to, paragraphs 10, 11, 12 and 13, the ARB shall have sole and exclusive jurisdiction with regard to the standards and guidelines set forth in Exhibit 13.8, "Designing with Nature," attached hereto and other matters within its jurisdiction under Article II, Sections 1 and 2, of the General Covenants (excluding the introductory paragraph to them). In the event of any inconsistency between either Exhibit 13.8 or the General Covenants and the provisions of this Agreement, this Agreement governs.

The Town agrees that it will not establish an architectural review body during the term of this Agreement which replaces or duplicates the jurisdiction of the ARB as reserved to it under this subsection.

(h) Tree Replacement Guidelines

The Tree Replacement Guidelines, as currently promulgated by the ARB in the June, 1992 edition of Designing With Nature, shall continue to be applied by the ARB throughout all Real Property; provided, however, they may be adjusted, modified, and updated from time to time by the ARB with the approval of the Town.

On individual Lots or Development Parcels, architects must take great care in designing buildings with an eye towards preserving all oak trees, especially those that are larger than twenty-four (24) inch caliper, as measured 3' above grade. If there is no reasonable design solution that would save these large trees, mitigation shall be required by planting trees in which the sum of the caliper is equal to or greater than the caliper of the trees which are being removed.

Town approval shall be necessary for the removal of live oak trees with twenty-four inch (24") or greater caliper (measured 3' above grade) in the Developed Lands. If an owner can reasonably demonstrate to the Town that there is no practical alternative to removing such tree, then the tree may be removed with Town approval provided there is ample mitigation that, in the aggregate, is equal to the caliper of tree cut. On non-residential Lots, the Property Owner must provide the Town a

survey of live oak trees with 30" or greater caliper (measured 3' above grade) before obtaining a building permit.

14. **Facilities and Services.** Although the nature of this long term Project prevents the Property Owner from now providing exact completion dates, the Property Owner certifies that the following services and Facilities will be in place (or if not fully in place, the cost of their construction fully bonded or letter of credit posted pursuant to the Town Subdivision Regulations) at the times provided below and as to roads, sewer, and water infrastructure, at the times Lots or Dwelling Units in subdivided real property or condominium units on recorded master deeds are offered for purchase to the public. Subject to compliance with applicable Laws and with all provisions of this Agreement, the Town hereby authorizes the Property Owner, on its own or through its affiliated companies, to install the Facilities. Notwithstanding any provision herein to the contrary, the Property Owner hereby assures the Town that adequate Facilities (as defined in Section 1.(n)) shall be available concurrent with the impacts of Development. Nothing in this Agreement shall be construed to create an obligation for the Town to construct Facilities or on Property Owner to pave the currently unpaved sections of Eugenia Avenue.
- (a) **Rights-of-Way.** The Property Owner shall at its expense develop and provide roads and other related infrastructure, and pursuant to and at such times required by the KICA Covenants, transfer same to the KICA if they are intended to be KICA Common Properties or Purchased Common Properties or Restricted Common Properties.
 - (b) **Water and Sewer.** The service and Facilities for water and sewer shall be provided by the Kiawah Island Utility, Inc. (currently owned by the Property Owner) or its successor.
 - (c) **Second Fire Station.** The Property Owner shall, at no cost, no later than June 30, 1996, dedicate to the St. John's Fire Department fee simple title for the land necessary for a second fire substation, to be located at one of the sites designated in Exhibit 14.1, such site being of a size and configuration approved by the Property Owner and St. John's Fire Department prior to the execution of this Agreement.
 - (d) **Conveyance of Existing Parkway.** The Property Owner agrees that its directors on the board of the KICA will support and vote for the conveyance of an option to acquire fee simple title (for a nominal consideration for both the option and fee simple title of not to exceed \$1) to the Town (by execution of the contract attached hereto as Exhibit 14.2) of the existing Kiawah Island Parkway from Bohicket Road to the first gate as shown in Exhibit 14.3. This transfer may take the form of a conveyance from KICA to Property Owner who shall simultaneously make a conveyance to the Town.

This conveyance shall be voted on by the KICA members, as with any other conveyance of Common Property, by April 1, 1995. The Town and Property Owner agree to actively support such KICA referendum.

- (e) Addition of Entrance Road and Location of New Security Gate. The Town and the Property Owner recognize that certain shopping, office, convenient travel and other benefits shall accrue to Kiawah property owners if (i) additional, aesthetically-pleasing safe and well designed ingress and egress between a point northwest of the Kiawah Island Bridge and Bohicket Road is provided and (ii) if an additional Kiawah security checkpoint is added on the Kiawah Parkway as it crosses the Andell tract shown on Exhibit 14.4. In furtherance of such goals, the Town agrees that it will consent to construction of an additional entrance road to Kiawah Island for ingress and egress from Bohicket Road, provided the final plan, including adjoining uses, is essentially compatible with the schematic drawing that is shown on Exhibit 14.4; provided, however, any such agreement is conditioned upon the existing Kiawah Island Parkway, from Bohicket Road to where it will merge with the new parkway, not being obstructed or impeded in any material fashion and being constructed as shown in Exhibit 14.4 attached hereto. Town shall allow curb cuts on the Kiawah Island Parkway, as expressly designated on Exhibit 14.4. The Kiawah Island Parkway will remain accessible to two-way traffic for its entire distance except as shown on Exhibit 14.4. The Kiawah Island Parkway will not be connected to the new entrance road in any manner other than the merging of the two as indicated on Exhibit 14.4.

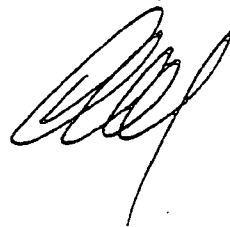
The Betsy Kerrison Parkway Extension Road will be designed in accordance with the above agreement and constructed entirely by the Property Owner or others. All such planning and construction of the new extension and related improvements shall be paid for either by the Property Owner or others, but not by the Town. Provided, the new extension shall be put in active use once construction of the mixed use shopping area has commenced.

- (f) Exactions. In return for the provision of the facilities and services set forth in this section, the Town agrees that it will not seek further property or monetary exactions or impact fees related only to the facilities and services described in this section, subject to S.C. Code §§ 6-31-80 and 6-31-100 (Cum.Supp. 1993); provided, however, the Town is not the facilities and services provider.

15. Reservations, Conveyances, Leases, Easements, and Other Agreements.

- (a) For Benefit of KICA. The Property Owner shall make the following reservations, conveyances, leases, easements, and other agreements for the benefit of the KICA:

mem



(i) Rhett's Bluff Landing:

The Rhett's Bluff Landing property consists of approximately 6 acres as shown on the plat attached hereto and made part hereof as Exhibit 15.1. The Landing consists of undeveloped acreage, developed parking areas, an entry road and gate, a pavilion, and two L-shaped piers (for, respectively, tying up of boats and fishing and crabbing purposes, the former dock having a smaller pavilion for viewing), a boat ramp, lighting and electrical service, bollards, signage and other improvements.

The Property Owner further agrees to convey no later than March 1, 1995, all of the above mentioned land and the then existing improvements thereon to the KICA as Common Property with the reservation being that the Property Owner and its guests, shall have the right in perpetuity, without charge, to use and reserve the Rhett's Bluff Landing as shown in Exhibit 15.1 for parties, special events, and other similar functions, and for fishing, boating, crabbing, etc. The Property Owner shall, however, be fully responsible for preparation and cleanup of the site and for payment for all KICA security, cleanup and other expenses (including all repairs) as may be generated as a result of such Property Owner usage. Property Owner party usage of Rhett's Bluff Landing shall be limited to 15 days per year; and, Property Owner shall give KICA reasonable written notice of its desire to reserve usage. Property Owner shall not be entitled, as a matter of right, to party use on more than two consecutive days.

Pending such conveyance, the annual License Agreement dated July 31, 1993, from the Property Owner to the KICA shall be annually renewed for \$1.00/year provided KICA agrees to be responsible for maintenance repairs except those indicated in the previous paragraph as shall remain entirely the Property Owner's responsibility. The Property Owner shall execute and record the Termination of Declaration of Covenants and Restrictions for Rhett's Bluff Landing, Exhibit 15.1a, contemporaneously with its conveyance to KICA.

(ii) Beach Parking:

In addition to the nine spaces recently conveyed to the KICA on Ocean Marsh Road and the 110 spaces at the new Kiawah Island Beach Club facility, the Property Owner commits to convey (by quit claim deed), the following additional beach parking facilities inside and east of the Vanderhorst Gate: no later than January 1, 2000, the Property Owner will improve with coquina shell or better and any landscaping it deems

tasteful and appropriate, a 30 space parking area generally seaward of The Ocean Course clubhouse for restricted use during daylight hours of the summer months, except during tournaments or special events. The parking spaces created as aforesaid shall be on land over which the Property Owner has an easement or other rights and privileges. Such rights and privileges shall be conveyed to the KICA no later than January 1, 2000. Property Owner shall not interfere with the Ghost Run Emergency Vehicular Access Point.

No later than June 1, 1995, the Property Owner shall convey by quit claim deed to KICA inside and east of the Vanderhorst gate, one or more off-street locations having a combined total of at least 50 beach parking spaces and shall construct the spaces with coquina shell or better. These 50 spaces shall be on Parcel 40 and are likely to be adjacent to the second fire station site (See, Exhibits 14.1 and 15.2) in Osprey Beach. Property Owner shall also include in its conveyance of the property for these beach parking spaces sufficient space that would allow the placement of a future bathroom facility. Town shall support the location of beach parking at this site.

No later than March 1, 1995, the Property Owner will convey to KICA, by quit claim deed, the western $\frac{1}{2}$ of David Street, as shown on Exh. 15.3. To the extent parking spaces in the former David Street are included in the plan for the renovation of the KICA members' pool tract, Property Owner shall also reimburse KICA for the construction of up to 35 parking spaces to be located therein, which are to be constructed in the same manner as those spaces on Ocean Marsh Drive.

No later than March 1, 1995, Property Owner shall also convey to KICA an enlarged pool parcel site down to the critical line on the ocean side of the current KICA members' pool parcel, as described in Exhibit 15.3 attached hereto.

In return for these conveyances to KICA, the Town would agree to view favorably the subdivision of the lot on the southeast corner of Eugenia Avenue and David Street and permit adding 40 ft. of David Street to such subdivided lot, so long as no houses are permitted on the western-most 40' of the new, western-most lot.

(iii) Fishing and Crabbing Piers/Observation Towers:

At least one Observation Tower and one fishing/crabbing pier shall be constructed at the Property Owner's sole cost on or before January 1, 2000 at sites selected by the Property Owner along Blue Heron pond.

Such structures are to be conveyed by quit claim deed to the KICA as Common Property at such time as the other Common Property serving the approved and platted Lots around Blue Heron pond, is conveyed by the Property Owner to the KICA.

(iv) New Blue Heron Park:

The Property Owner hereby commits to provide, plan, and develop a passive park adjacent to the fishing/crabbing pier or the Wildlife Observation Tower mentioned in ¶ 15(a)(iii) above; the new park shall consist of at least 2 acres of highlands located in the area shown on Exhibit 15.4 and in addition shall have provision for access (this does not require Property Owner to provide a bike trail) and 3-4 parking spaces improved with coquina shell or better prior to conveyance.

(v) New Cougar Island Park:

The Property Owner shall provide, plan, and develop an active park (e.g. fishing and crabbing dock, interpretative nature trails, picnic areas, and/or nature overlooks) on Cougar Island, Parcel 43, to consist of at least 2 acres located in the area shown on Exhibit 15.10. The Property Owner shall also provide five parking spaces of coquina shell or better for the use of this park. This park shall be developed and conveyed by quit claim deed for one (\$1.00) Dollar, to the KICA no later than January 1, 2000.

(vi) Golf Courses/Tennis Courts Covenant:

The Property Owner reaffirms it placed in 1989 certain matters of record in the Charleston County RMC office which require -- among other things -- the current and future owners of Marsh Point, Turtle Point, Osprey Point, and The Ocean Course, as well as the two Resort Tennis Centers to use the lands currently devoted to golf and tennis purposes to only such golf course and tennis center purposes (and reasonable, related retail and commercial activities) for a period of approximately 95 years from the date hereof. The purpose and effect of such restrictive covenants was and is to prevent the conversion of these amenities that are available to Kiawah property owners to other uses, such as residential or other purely commercial purposes, for such period. So long as the essential purposes of such covenants are fulfilled, the Property Owner may consent to minor alterations or to correct boundaries, etc.

(vii) Existing Park Facilities:

The Property Owner hereby commits to convey by deed to the KICA the following park land and park facilities described in Exhibit 15.5 no later than January 1, 1996, unless such parklands and park facilities are already subject to a 99 year Lease to KICA:

Glossy Ibis Minipark	Marsh View Tower Overlook
Marsh Island Park	Willet Pond Minipark
Canvasback Pond Minipark	
Master Leisure Trail System	
Internal Crabbing/View Stands	

(viii) Sora Rail Tract:

On or before March 1, 1996, the Property Owner will convey the Sora Rail Road maintenance tract shown in Exhibit 15.9 by quit claim deed to KICA for \$1.00 for maintenance purposes.

(b) Exchange of The Town's Kiawah River Commons Property

(i) Conveyance of Town's Property. If the Town desires to convey its Lot at Kiawah River Commons to the Property Owner, free of all liens and encumbrances except those that may have existed at the time the Property Owner originally conveyed the Lot to the Town, then the Property Owner hereby agrees to provide the Town a 100% credit in the amount of the Town's Kiawah River Commons Lot purchase price (less any transfer tax due from the Property Owner) which credit shall be utilized as full compensation for purchase of any one of the 3.5 acre Beachwalker parcel or the 3.0 acre Andell Reception Center parcel, both identified on Exhibit 15.6 attached hereto. Property Owner, upon receiving notice from the Town of the Town's intent to exchange property, shall convey the same by quit claim deed free of all covenants and encumbrances except those set forth in subsection (iii) herein within sixty (60) days of receipt of said notice.

(ii) Kiawah Reception/Civic Center. The Town and the Property Owner are desirous of actively participating in the creation of and operation of a new Kiawah Reception Center and Town of Kiawah Island Civic Center to be located along the Kiawah Island Parkway approximately one-half (1/2) mile northwest of the Kiawah Island Bridge on a parcel containing approximately 8-10 acres on the west side of the Parkway and currently forming part of what is known as the "Andell Tract" as is depicted on Exhibit 15.7.

The Property Owner (with or without other partners) intends to seek to acquire and develop the Reception Center Tract and Kiawah Island Civic Center if it can be acquired at a fair market price from its current owners. Upon receipt of any required permits and upon such sale and development commencing, the Property Owner will make every reasonable and good faith effort to provide the Town an opportunity to exchange the current site for three (3) acres of high ground at the above-referenced site on an even exchange basis.

The location of the subparcel to be conveyed to the Town shall be as reasonably determined by the parties; however, the conveyance of such subparcel must be accomplished no later than January 1, 1995.

In the event that the above-referenced subparcel is not made available on or before the referenced date, the Town, at its sole discretion, shall have the option of exchanging its current Civic Center site, on an even exchange basis, as provided in ¶ 15(b)(i).

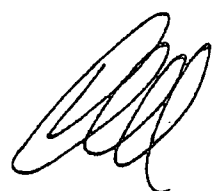
- (iii) Other Conditions. If the Andell Reception Center Parcel is selected, the design must be approved by ARB, whose consent would not be unreasonably withheld and whose changes or objections would be justified. If the Town selects the Beachwalker site, any building the Town may erect there shall substantially conform to the design standards attached as Exhibit 15.8 "Beachwalker Town Hall Design Standards".

If the right to exchange is exercised, the Town will agree (as to either parcel) to a permanent restrictive covenant prohibiting real estate sales or rentals activities, a covenant giving the Property Owner the right-of-first refusal, and (if the Andell site is chosen) the grant of permission for parking to Property Owner, its guests, and other permittees provided this parking does not materially interfere with the parking necessary for the Town.

The Town shall exercise this right to exchange by June 30, 1996. The Town shall exercise its right to exchange as to a particular tract within 90 days if Property Owner presents Town with a legitimate purchase offer from a third party.

The failure or inability of Property Owner to purchase the proposed Andell Reception Center parcel shall not be a breach of this provision or the Agreement.

mem



16. Environmentally-Sensitive Property Protection. The Property Owner shall make the following reservations, conveyances, leases, easements, and other agreements related to the protection of environmentally sensitive property as follows:

(a) Preservation of Marsh Lands Acreage:

There are approximately 4,000 to 5,000 acres of low lands and marsh lands contiguous to Kiawah Island, including those lands below mean high water and isolated lands above mean high water which are not specifically identified as Parcels in Exhibit 1.3 of this agreement, identified on Exhibit 16.1. On or before the expiration of the term of this Agreement, all such land identified in Exhibit 16.1, except as further set forth herein, shall be conveyed by the Property Owner by quit claim deed (for \$1.00) to the KICA as additional Common Property subject to subpart (d) below.

The conveyance of all marshes and lowlands (as lie below mean high tide) shall be subject to a reservation in favor of Property Owner, its successors and assigns, across the property conveyed for access by walkways, docks, bridges, etc., to any highlands, hummocks or the like for active and passive recreational uses, and subject to all rights for dock usage under the Town's Key Location Ordinance, and subject to the right to grant a conservation easement to a qualified organization under 26 U.S.C. § 501(c)(3) in a form required by state or federal law before transfer to KICA. Property Owner shall also convey isolated lands above mean high water in the marsh that are not specifically identified as Parcels, by quit claim deed, to KICA by 2008; subject to all the same reservations, except for "undevelopable" highlands and isolated highlands as shown on Exh. 16.1 (KRA to provide description of undevelopable highland near or adjacent to developable highland). As for these "undevelopable" highlands and isolated highlands shown on Exh. 16.1 to be retained by Property Owner, Property Owner shall not be required to convey the same to KICA and may deed the same to purchasers; provided the deed imposes permanent restrictions that prevent all construction (provided that said restrictions shall not prohibit active or passive recreational uses, access, and recreational structures such as docks, bulkheads, walkways, and gazebos) on such "undevelopable" highlands.

(b) 10 Mile Strip of Beachfront Property:

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

residential, resort, or commercial property lines. It generally comprises the area of land abutting most seaward platted residential Lot lines and the mean high water mark of the Atlantic Ocean.

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

The protective ocean front building setback guidelines voluntarily imposed in the mid-1970's by the predecessors in title of the Property Owner as well as the Property Owner with respect to the ocean front dunes for the purposes of setting back residential building structures, shall be continued by the ARB respecting its regulation of usage and placement of such structures on ocean front Lots at Kiawah Island. The strict customs and usages of the ARB shall likewise be continued in regard to such house structure setbacks.

Property Owner hereby acknowledges that certain License/Access Agreement dated December 31, 1993, as set forth in Exh. 31.1 to be in full force and effect. Any covenants or deed reservations recorded prior or subsequent to the License Agreement by Property Owner and contrary thereto shall be deemed ineffective.

The emergency beach accesses identified in the License/Access Agreement shall not be obstructed in any manner inconsistent with the rights of the Town as set forth in the License/Access Agreement. The Town shall have the absolute right to access the beach at those emergency beach access points pursuant to the License/Access Agreement.

Property Owner further acknowledges that the Town shares concurrent jurisdiction with the South Carolina Coastal Council and federal agencies in accord with state and federal law, including the Town's jurisdiction and authority as set forth in Section 48-39-10, et. seq., of the South Carolina Code of Laws, 1976, as amended.

(c) Marshes:

The Property Owner will limit its use of the marshes in and surrounding Kiawah Island to only such uses as are allowed by Subpart 16.(a) herein, the

mem



Town's Key Location Ordinance 91-1 as amended by Ordinance 92-1 (Exhibit 16.3, attached hereto), and other local, state or federal laws.

(d) Bear Island:

Bear Island (AKA Little Bear Island) is located at the far eastern end of Kiawah Island, and is partially contiguous to the 5th hole of The Ocean Course. [See Exhibit 16.4.] The Property Owner (i) agrees and commits to Bear Island being primarily devoted to passive recreational activities as herein provided and (ii) hereby agrees, subject only to the exceptions listed below, to convey same on or before January 1, 2016 to the KICA as additional Common Property under the Covenants.

Such conveyance (by quit claim deed) shall be subject to the right on the part of the Property Owner to use that portion of Bear Island identified on Exhibit 16.4 as needed to replace any of the holes of The Ocean Course as may in whole or part be damaged by any future storm, natural disaster, natural changes in either the channel or ocean front or dunes, or by any other causes. [For example, if the 5th or 6th holes were entirely destroyed by the creation of a new Stono inlet channel resulting from a hurricane, but portions of Bear Island remained that could be used to create a new, replacement golf hole, then, in such event, it is understood and agreed that such portions of Bear Island may, in the Property Owner's discretion, be so used, added to or made permanently available to the then owner of The Ocean Course property either before or after the year 2016. All consideration for such sale to the owner of The Ocean Course shall belong to the Property Owner, its successors and assigns.] Such portion of Bear Island as shown on Exhibit 16.4 that is subject to use for construction of destroyed holes of the Ocean Course shall not be available or used for an expansion of the Ocean Course, unless land is not available for reconstruction at the site of the Ocean Course.

In addition, of the approximately 207 highland acres estimated to comprise the northeast part of Bear Island, as shown on Exhibit 16.4, the Property Owner shall have the limited right to subdivide no more than 20% of such acres for construction of up to 18 small cottage sites and may convey the same as with other Kiawah lots, to 3rd parties; in addition the Property Owner, its successors and assigns, may erect limited active recreational facilities within the said 20% of such Bear Island acreage. (e.g., tennis facilities, par 3 golf hole, etc.) Private roads, maintained by the Property Owner or an association created by the Property Owner, its successors or assigns, shall be used to access these cottage sites.

Indy



A master plan for Bear Island shall be submitted by the Property Owner for Town approval prior to any activities being undertaken thereon. The Town shall not unreasonably withhold approval of any such master plan.

Except as provided above, Bear Island shall remain permanently in its natural state as habitat for animals and birds; provided, the Property Owner and/or Kiawah property owners and/or their invitees (under the auspices of and/or regulations and supervision of the KICA) may enter on to such natural areas of the Bear Island property for camping, nature viewing, wildlife expeditions, and other similar activities. Access for such purposes may have to be by boat.

- (e) Ocean Course Perimeter Properties. There currently exists, surrounding The Ocean Course, approximately 96 acres of dunes, lagoons, wetlands, creeks, low lands, and other environmentally sensitive areas. The same shall, pursuant to the schematic plan attached as Exhibit 16.5, be made subject to a permanent restriction of the type to be approved by the Audubon Society of New York State or a similar 501(c)(3) entity designated by the Property Owner. The purpose of the restriction shall be to assure that environmentally sound practices are maintained at all times respecting use of such surrounding property; provided, however, that no such restriction shall supersede or replace the jurisdiction or authority of any governmental entity, including Town.
- (f) Archeological Studies. Subject to the provisions of § 6-31-80, the Programmatic Agreement heretofore entered between the Property Owner and the State Department of Archives and certain other state and federal entities shall govern all matters dealing with archeology at Kiawah Island. A copy of such Agreement is attached as Exhibit 16.6: Programmatic Agreement.
- (g) 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.
- (h) Town's Wildlife Committee. The ad hoc Wildlife Committee that presently exists shall be abolished no later than January 1, 1995.

The Town may appoint a Wildlife Committee to be composed of _____ members, all of whom shall be appointed by Town Council.

The Wildlife Committee shall be funded primarily by the Town and shall be responsible for providing various wildlife services and maintenance, including



but not limited to turtle program, management of critical habitat areas, fisheries, etc.; provided however, that Town shall coordinate with all appropriate State and Federal agencies, Associations and the Kiawah Island Community Association and the Property Owner in carrying out its functions through the Wildlife Committee.

17. Historic Structure Preservation and Restoration. The Property Owner shall protect and preserve the historic Vanderhorst Mansion.

It is further agreed that Exhibit 17.1, Vanderhorst Development Plan, attached hereto, reflects a Development Plan for the overall Vanderhorst tract that is satisfactory to the Town respecting subdivision, architectural elements, infrastructure and other Development of this 6 acre tract.

It is further agreed that the plans heretofore approved by the State Archives Department, the Preservation Society of Charleston, the Historic Charleston Foundation and others as are included are likewise satisfactory to the Town and will be approved whenever presented by the Property Owner and/or others for all permitting, subdivision or other purposes.

All restoration expenses of the Vanderhorst Mansion as well as all road, water, sewer and any other infrastructure indicated on Exhibit 17.1 shall be the sole responsibility of the Property Owner or its successors in title, successors in interest or assigns.

18. Kiawah Island Community Association, Inc.

(a) Transition and Reserve Funds

- (i) Property Owner Responsibility. Once the Initial Transition described in subsection (ii) occurs, Property Owner shall voluntarily forego exercising two of its votes under the circumstances described below. If, and only if, the "Type A" Directors do not all abide by the Dispute Resolution Procedures outlined herein on a particular issue, then Property Owner shall have the right to exercise all four of its votes on the particular issue in question and shall not be required to abide by such Dispute Resolution Procedures. This paragraph shall be construed so as to allow Property Owner to act, when necessary, so as to avoid a breach of this Agreement caused by the acts of third parties, not subject to control of the Property Owner.
- (ii) Initial Transition. Starting March 1, 1996, there shall be Initial Transition by division of control of the board of KICA between the directors controlled by the Property Owner and the Type A Directors based on different KICA functions. This division of control shall be

implemented through a Weighted Vote System. Subject to the provisions of vi, infra, Property Owner shall continue to have the right to appoint four directors, the Type A owners three.

Under the Weighted Vote System, Property Owner shall continue to exercise all four of its votes solely on questions relating to landscaping, lakes and lagoon maintenance, and Facilities maintenance. Facilities maintenance shall not include expenditures from reserve funds; provided, however, that at the time of execution of this Agreement, \$273,000 shall be escrowed from the reserve funds to resurface Governor's Drive if requested by the directors appointed by Property Owner. Resurfacing shall be completed by January 1, 1996, or said escrowed funds shall be taken out of escrow and returned to reserve funds.

With regard to the KICA board's decisions on the expenditure of the Major Repair and Replacement Fund (sometimes referred to as "reserve funds" or "reserves"), the directors appointed by the Property Owner shall have 3 votes and the Type A elected directors shall have 3 votes. During Final Transition, the expenditure of reserve funds shall be determined by voting where the vote of each Type A Director counts as 1/6 and the vote of the Property Owner appointed directors counts as 1.

On all issues (including, but not limited to, election of officers, beach parking and Rhett's Bluff Landing) other than landscaping, lakes and lagoon maintenance, Facilities maintenance, and expenditure of reserve funds, Property Owner shall only exercise two of its four votes, subject to the provisions of this Agreement pertaining to Dispute Resolution Procedures, reserve funds, and those decisions that require a dual majority under subsection v. A vote by three of the Type A Directors, with two other directors voting nay and the remaining two directors not voting or abstaining shall be deemed a majority vote. In the event that Roberts Rules of Order or any covenant requires four votes for any matter to be deemed to have a majority, then Property Owner agrees to record one vote with the majority under the Weighted Vote System. If this Agreement is terminated prior to the expiration of its term as established by § 21 of said Agreement, then Property Owner shall be entitled to appoint four directors and exercise its four director votes on all matters.

- (iii) KICA Authority. Starting March 1, 1996, the board of the KICA shall make decisions related to the operation of KICA (e.g., security; continued access by KRA's guests, potential buyers, invitees, and licensees; easements (utilities, drainage, and access); landscaping;



Facilities maintenance; relationship with the Town; employee benefits; operation and staffing of the Property Owners' pool; replacement and acquisition of equipment; staffing; increases in annual assessments) pursuant to the Standards Manual, attached hereto as Exhibit 18.1, where applicable.

Said Standards Manual shall contain a provision stating that the board shall use its best efforts to add a minimum of \$100,000 per year to the reserve funds, to be moved to said funds from the operating budget at the beginning of each fiscal year. Directors appointed by Property Owner shall not unreasonably withhold their approval of said annual addition to the reserve funds. The Standards Manual sets forth the existing standards as established by the historic operation, policies and practices of the KICA. The Standards Manual will be in effect for the duration of the Agreement, regardless of whether the Agreement is terminated before its expiration date. Access rights granted to Property Owner by the Standards Manual shall exist in perpetuity. The Standards Manual shall establish the pro rata allocation of funds within the KICA budget, based on past years' budgets, between functions over which Property Owner may exercise its four votes and those that the Type A Directors have majority control under the Weighted Vote System.

This Agreement shall not be understood as amending the KICA Covenants or changing rights thereunder. Except as expressly provided in this Agreement, the rights granted the Property Owner as the "Company" under the KICA Covenants are not intended to be lessened or abrogated, and any consensual relinquishment herein of rights provided to the Property Owner by the KICA Covenants shall not be deemed or construed to be permanent waivers of its rights under the KICA Covenants. The Property Owner voluntarily refrains from asserting certain rights under the KICA Covenants only so long as this Agreement is in effect and the Type A Directors abide by the dispute resolution procedures provided by this Agreement and the Standards Manual. On January 1, 2008, KRA will sign a permanent waiver of its right to appoint a majority of the KICA board, if board-control transition has not yet occurred under the KICA Covenants.

- (iv) Dispute Resolution. A dispute resolution procedure shall be implemented through the Standards Manual that would allow members of the KICA board of directors to obtain the prompt resolution of disputes over whether a mandatory provision of the Standards Manual has been violated. The Dispute Resolution Procedure shall provide for



the implementation of the decision obtained within such period of time as specified in the Arbitration Order.

The dispute Resolution Procedure shall be by binding arbitration by a single arbitrator selected from the U.S. District Court's list of attorneys serving as mediators (if the parties cannot agree, then the name shall be blindly selected and that person shall act as the arbitrator unless both sides reject the name, in which event another name will be selected; provided, however, that the parties shall not reject more than 5 names). The decision of the arbitrator, by Arbitration Order, shall specifically state in writing the precise action to be taken (or not taken). The Arbitration Order shall be enforceable and may be confirmed as a judgment under S.C. Code § 15-48-120 (Cumm.Supp. 1992). The Parties agree to waive the requirement of the printed notice provision described in S.C. Code § 15-48-10(a) (Cumm.Supp. 1992).

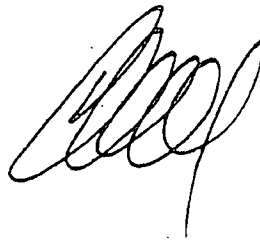
- (v) Dual Majorities Required. Dual majorities (i.e., a majority of the Type A Directors and a majority of the Property Owner appointed directors) shall be necessary:
- (a) To hire and fire the administrator, provided Bob Cowan shall be designated as initial administrator at the time of execution of this Agreement.
 - (b) To hire and fire counsel, provided Trenholm Walker shall be designated as initial counsel at the time of the execution of this Agreement. If the legal representation of KICA involves a transaction or matter directly between Property Owner and KICA in which Property Owner and KICA have a conflict of interest or potential litigation between Property Owner and KICA, KICA shall, at KICA's cost, be represented in such transaction or matter by counsel selected per Exhibit 4 to the Standards Manual.
 - (c) To propose changes to the KICA Covenants.
 - (d) To relocate the KICA offices and/or maintenance/storage areas.
 - (e) To change the Standards Manual.
 - (f) To hire and fire the head of security, provided Bill Westberg shall be designated the head of security at the time of execution of this Agreement.

- (vi) Interim Transition/Final Transition. Interim Transition shall occur on December 31, 2000, when Property Owner shall give up control over one of its current four director positions. Property Owner shall after Interim Transition appoint three directors on the KICA board until Final Transition shall occur on January 1, 2004, when Property Owner shall give up control over three of its current four director positions. Property Owner shall appoint one director on the KICA board thereafter. During Interim and after Final Transition, the Weighted Vote System shall not be used.

Upon Interim Transition, the Property Owner shall grant permission to the Type A Members to elect a fourth director who shall be deemed to be serving in one of the four directorships reserved to Property Owner under the KICA Covenants. Likewise, upon Final Transition, the Property Owner shall grant permission to the Type A Members to elect a fourth, fifth, and sixth director who shall be deemed to be serving in three of the four directorships reserved to Property Owner under the KICA Covenants. If and only if the Type A Directors do not abide by the Dispute Resolution Procedures herein on a particular issue after Interim or Final Transition, then Property Owner shall have the right to revoke its authorization of the one or three Type A Directors, respectively, deemed to be serving in the directorships reserved to Property Owner under the KICA Covenants and to appoint one or three directors, respectively, in their places, on the particular issue in question, and shall not be required to abide by such dispute resolution procedures.

- (vii) Limits to KICA Board Member Authority. KICA board members shall not interfere with the day-to-day operation of the KICA staff. No individual board member shall have the separate authority to hire or fire, or otherwise separately supervise or direct the affairs of the KICA.
- (viii) Extension of Covenants. Any agreement to submit any property west of the Main Gate located next to the General Store, except for Parcels 1, 2, 3, 4, 5, 6, 9, 10, 11, 12 and 13, (which may contain a residential structure of any type) to the KICA Covenants after the effective date of this Agreement shall require six out of seven director votes on a non-weighted basis.
- (ix) Access. KICA shall grant access across private roads on the Common Properties to members of Private Clubs on Kiawah Island and their guests.

may



- (x) KICA Officer Selection. The officers of the KICA shall be elected by the Weighted Vote System after Initial Transition and by majority vote after Interim Transition.
 - (xi) Property Owner Votes. Property Owner, during the term of this Agreement, agrees to abstain from casting any or all of its votes as a Type A Member and any proxies it may hold from other Type A Members for the election of Type A Directors.
 - (xii) Directors Approval Not Required. The provisions of this Agreement shall not require approval of the current Type A Directors as a condition precedent to the effectiveness of this Agreement.
 - (xiii) Severability. Notwithstanding any provision of this Agreement to the contrary including, but not limited to, ¶ 25, infra, the provisions of this ¶ 18(a) shall not be severable.
- (b) The Security Gate. The Town and the Property Owner recognize and respect the fundamental importance and value of the Security Gate, private rights-of-way and private amenities to the Town, the Property Owner and the owners of property on Kiawah Island and to the enhancement and preservation of every property owner's land values. If a judicial challenge is brought seeking to make one or more of the roads on the island open to the general public and the challenging party prevails based, in whole or in substantial part, on the expenditure of public funds by the Town and/or an ordinance passed by the Town and/or other conduct or ownership of facilities of the Town, the Town agrees that it will immediately cease such expenditures, repeal such ordinance, and refrain from owning such facilities (as are inside the current first security gate) or continuing such conduct. This paragraph shall be subject to the provisions of § 6-31-80 and shall not be construed to prevent the performance or enforcement of the specific provisions of this Agreement.
19. Hotel/Inn Zoning. It is understood and agreed between the Town and the Property Owner that unlike other resort and residential communities, the Real Property is intended to be and shall remain free of a proliferation of hotels or inns. The Property Owner is agreeable to limiting the parcels available for such purposes to Parcels 12, 13, and 20 on Exhibit 19.1. All hotels or inns on the Real Property shall not exceed a total of 325 Hotel Guest Rooms and Support Space, provided that any support space floor area (as described in Section 1.(v)) in excess of 52,000 square feet shall be counted toward the 300,000 square feet gross cap on commercial square footage.

20. Development Schedule for The Project.

- (a) Commencement date. The Project commenced in the mid-1970's, and has been ongoing since then.
- (b) Interim completion date. The Property Owner projects that in the following years after the execution and adoption of this Agreement, the following percentages of the Undeveloped Lands within the Real Property will be developed:

<u>YEAR</u>	<u>% COMPLETE</u>
5	15
10	32
15	45
20	65
25	85
30	100

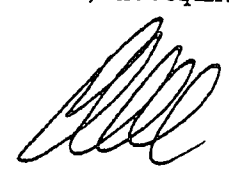
- (c) Completion date. The Property Owner projects that by the year 2030 the Project should be complete (i.e., all recreational amenities erected, commercial structures built, and essentially all structures erected on building Lots and all necessary infrastructure in place). Nothing in this paragraph shall be interpreted to extend the term of this Agreement.

21. Term of the Agreement. This Agreement shall expire on January 1, 2008 (the "Termination Date"). Nothing in this Agreement shall be interpreted to preclude the Parties from extending the Termination Date by mutual agreement or from entering into subsequent development agreements.

22. Amending or Canceling The Agreement. Subject to the provisions of § 6-31-80, this Agreement may be amended or canceled in whole or in part only by mutual consent of the Parties in writing or by their successors in interest and, in the case of the Property Owner, its successors in title who, by virtue of assignment or other instrument become the "Company" under the KICA Covenants.

If the Property Owner is a partner or shareholder in the entity that purchases the Ocean Course, whose legal description is attached as Exhibit 22.1, then the Town agrees to consent to add the Ocean Course to the Real Property by amendment to this Agreement (which consent shall not unreasonably be withheld). The Ocean Course shall be treated and designated as Parcel 45, as further set forth herein. Upon such acquisition, the partnership or other entity acquiring the Ocean Course shall immediately notify the Town Clerk in writing of the acquisition and the submittal of the Ocean Course for amendment of this Agreement; the acquiring partnership or other

man



entity shall, within 30 days notice from the Clerk, sign an addendum making it a signatory to this Agreement.

If the Property Owner is a partner or shareholder in an entity that purchases all or a portion of the acreage, whose legal description is attached as Exhibit 22.2 (now part of what is popularly called the Andell tract) for purposes of establishing a Kiawah Reception Center; then the Town, upon annexation complying with the provisions of § 6-31-110, agrees to consent to add the Reception Center acreage to the Real Property by amendment to this Agreement (which consent shall not be unreasonably withheld). The Reception Center tract shall be treated and designated as Parcel 50, as further set forth herein. Upon such acquisition, the partnership or other entity acquiring the Reception Center tract shall immediately notify the Town Clerk in writing of the acquisition and the submittal of the Reception Center tract for amendment of this Agreement; the acquiring partnership or other entity shall sign an addendum making it a signatory to this Agreement upon 30 days notice from the Clerk.

Any amendment to this Agreement shall comply with the provisions of § 6-31-10 et seq. Any requirement of this Agreement requiring consent or approval of one of the Parties shall not require amendment of this Agreement unless the text expressly requires amendment. Wherever said consent or approval is required, the same shall not be unreasonably withheld. The Town and the Property Owner agree to cooperate in accomplishing the annexation of the Reception Center tract into the Town. Upon annexation, the Reception Center tract shall be subject to this Agreement and designated as Parcel 50. A major modification of this Agreement shall occur only after public notice and a public hearing by the Town.

23. Modifying Or Suspending The Agreement. In the event state or federal laws or regulations prevent or preclude compliance with one or more provisions of this Agreement, the pertinent provisions of this Agreement shall be modified or suspended as may be necessary to comply with the such state or federal laws or regulations.
24. Periodic Review. The Zoning Administrator of the Town, or, if the Town has no Zoning Administrator, an appropriate officer of the Town, shall review the Project and this Agreement at least every twelve months, at which time the Property Owner shall demonstrate good faith compliance with the terms of this Agreement.

If, as a result of its periodic review, the Town finds and determines that the Property Owner has committed a material breach of the terms or conditions of this Agreement, the Town shall serve notice in writing upon the Property Owner setting forth with reasonable particularity the nature of the breach and the evidence supporting the finding and determination, and providing the Property Owner a reasonable time in which to cure the material breach.

If the Property Owner fails to cure any material breach within the time given, then the Town unilaterally may terminate or modify this Agreement; provided, that the Town has first given the Property Owner the opportunity: (1) to rebut the Town's finding and determination; or (2) to consent to amend this Agreement to meet the concerns of the Town with respect to the findings and determinations.

25. **Severability.** Subject to the provisions of § 6-31-150 and of ¶ 18(a), supra, if any word, phrase, sentence, paragraph or provision of this Agreement shall be finally adjudicated to be invalid, void, or illegal, it shall be deleted and in no way affect, impair, or invalidate any other provision hereof.
 26. **Merger.** This Agreement, coupled with its Exhibits which are incorporated herein by reference, shall state the final and complete expression of the Parties' intentions. In return for the respective rights, benefits and burdens undertaken by the Parties, the Property Owner shall be, and is hereby, relieved of obligations imposed by PDD1a, including but not limited to obligations relating to providing an elementary school site, except those which may be specifically carried forward herein.
- The parties hereto agree to cooperate with each other to effectuate the provisions of this Agreement and to act reasonably and expeditiously in all performances required under the Agreement.
- In the event of any legal action instituted by a third party or other governmental entity or official challenging the validity of any provision of this Agreement, the Parties hereby agree to cooperate in defending such action.
27. **Conflicts of law.** This Agreement shall be construed and enforced in accordance with the laws of the State of South Carolina.
 28. **Remedies.** Each Party recognizes that the other Party would suffer irreparable harm from a material breach of this Agreement and that no adequate remedy at law exists to enforce this Agreement. Consequently, the Parties agree that any nonbreaching Party who seeks enforcement of the Agreement is entitled to the remedies of injunction and specific performance but not to any other legal or equitable remedies including, but not limited to, damages; provided, however, that Property Owner shall not forfeit its right to just compensation for any violation by Town of Property Owner's Fifth Amendment rights. The Town will look solely to the Property Owner as to any rights it may have against the Property Owner under this Agreement, and hereby waives any right to assert claims against limited partners of the Property Owner, and further agrees that no limited partner or agent of the Property Owner has any personal liability under this Agreement. Likewise, Property Owner agrees to look solely to the Town's assets as to any rights it may have against the Town under this Agreement, and hereby waives any right to assert claims for personal liability against individuals acting on behalf of the Town, its Town Councilmembers, agencies, boards, or commissions.

29. Recording. Within fourteen days after execution of this Agreement, the Property Owner shall record the agreement with the Charleston County Register of Mesne Conveyance. The burdens of this Agreement are binding upon, and the benefits of this Agreement shall inure to, all successors in interest and assigns of the Parties to this Agreement.
30. Third Parties. Notwithstanding any provision herein to the contrary, this Agreement shall not be binding and shall have no force or effect as to persons or entities who are not Parties or Successors and Assigns to this Agreement.
31. Conveyances. All conveyances or transfers of any portion of the Real Property to the Town or KICA, except for the "exchange" described in Section 16.(b) of this Agreement, are to be by quit claim deed and for nominal consideration not to exceed one dollar (\$1.00). Except as provided in § 16(d) herein, all conveyances shall be tendered by the Property Owner so as to close during the duration of this Agreement; and, such conveyances shall preserve the Town's rights of beach access existing on the date of execution of the License Agreement dated December 31, 1993, attached hereto as Exhibit 31.1. All improvements prior to conveyance shall be at the Property Owner's expense. The Property Owner hereby freely consents to such conveyances and waives any challenges it may otherwise have to the validity of said conveyances (as exactions or otherwise). Property Owner further agrees to waive any challenges to Town ordinances (regardless of when enacted) passed so as to limit Property Owner's use of Real Property to be conveyed to the Town or KICA (or some 501(c)(3) organization) in order to protect and preserve the purposes of the conveyances. Such waiver shall include, but not be limited to all state laws and local zoning and subdivision regulations prohibiting all development of any portion of the Real Property so conveyed, it being agreed to by the Property Owner that said restrictions do not restrict the totality of the Real Property and that the same are reasonable restrictions in time, place and manner.
- The conveyances required herein shall be in accord with Exhibits 14.2, 15.1a, 15.11, and 16.7 hereto.
- Notwithstanding the foregoing, the Property Owner shall be entitled to grant easements, access, and recreational uses for the properties to be conveyed, consistent with and not prohibited by Sections 14, 15, 16, and 33(b)(iii) herein.
32. Town Determinations Relating to the Project.

Approval of Agreement. The Town Council has approved the Project under the process set forth in ¶ 6-31-50 of the Act and the Development Agreement procedures set forth in Paragraph _____ of the Ordinance on the terms and conditions set forth in this Development Agreement.

33. Successors and Assigns.

- (a) Binding Effect. This Agreement shall be binding on the successors and assigns of the Property Owner in the ownership or Development of any portion of the Real Property or the Project. A purchaser, lessee or other successor in interest of any portion of the Real Property shall be responsible for performance of Property Owner's obligations hereunder as to the portion of the Real Property so transferred. In addition, unless the Town gives its written consent (which consent shall be deemed given if the Town does not respond after thirty (30) days written notice and which consent shall not be unreasonably withheld) to transfer or assignment, Property Owner shall remain jointly and severally liable to Town under this Agreement. The Town's determination whether to give its written consent shall be based on the ability of the purchaser/transferee to perform the obligations of this Agreement associated with the tract transferred. Such written consent will not be unreasonably withheld if such ability is demonstrated.

This paragraph shall not be construed to prevent Property Owner from obtaining indemnification of liability to the Town from third parties. Further, Property Owner shall not be required to notify the Town or obtain the Town's consent with regard to the sale of Lots in single family residential subdivisions or Lots in commercial areas which have been platted and approved in accordance with the terms of this Agreement. Property Owner shall be released from obligations as to sale of individual Lots in single family subdivisions and individual pad sites in commercial areas.

This Agreement shall also be binding on the Town and all future Town Councils for the duration of this Agreement, even if the Town Council members and/or mayor change.

- (b) Transfer of Project. Property Owner shall be entitled to transfer any portion or all of the Real Property to a purchaser(s), subject to the following exceptions:
- (i) Notice of Property Transfer. If the Property Owner intends to transfer all or a portion of the Real Property to a purchaser who, by virtue of assignment or other instrument, becomes the "Company" under and within the meaning of the KICA Covenants, Property Owner shall notify the Town by thirty days prior written notice and provide it a copy of the assignment of such status as the "Company."
- (ii) Transfer of Facility and Service Obligations. If the Property Owner transfers any portion of the Real Property on which the Property Owner is required to provide and/or construct certain Facilities or provide certain services, distinct from those provided throughout the Project and

which are site-specific to the portion of the Real Property conveyed, then the Property Owner shall be required to obtain a written agreement from the purchaser expressly assuming all such separate responsibilities and obligations with regard to the parcel conveyed and the Property Owner shall provide a copy of such agreement to the Town.

- (iii) Transfer of Property Committed to Transfer to Third Parties. Property Owner shall not be entitled to transfer to third parties Real Property which Property Owner is required to transfer to KICA, Town or other third parties by reason of the terms of this Agreement. Notwithstanding the foregoing, the Property Owner shall be entitled to grant easements, access, and recreational uses for the properties to be conveyed, consistent with and not prohibited by Sections 14, 15, 16, and 33(b)(iii) herein.
- (iv) Assignment of Development Rights. Any and all conveyances of any portion of the Real Property subject to the "cap" set forth in § 13.B.1.(b)(ii) herein shall, by contract and covenant running with the land, assign a precise number of Vested Units, commercial square footage, and Hotel Rooms and Support Space (in reduction of the 1,974 Vested Units, 300,000 non-residential square footage, 325 Hotel Guest Rooms, and 52,000 sq.ft. Support Space referred to in ¶ 1(v), 13.B.1.(b), 13.B.2.(b), 13.C.2.(b), and 19 hereof).
- (v) Mortgage Lenders. Notwithstanding anything to the contrary contained herein, the exceptions to transfer contained in this ¶ 33(b) shall not apply: (i) to any mortgage lender either as the result of foreclosure of any mortgage secured by any portion of the Real Property or any other transfer in lieu of foreclosure; (ii) to any third party purchaser at such a foreclosure; or (iii) to any third party purchaser of such mortgage lender's interest subsequent to the mortgage lender's acquiring ownership of any portion of the Real Property as set forth above. Furthermore, nothing contained herein shall prevent, hinder or delay any transfer of any portion of the Real Property to any such mortgage lender or subsequent purchaser. Except as set forth herein, any such mortgage lender or subsequent purchaser shall be bound by and shall receive the benefits from this Agreement as the successor in title to the Property Owner in accordance with ¶ 6 hereof.
- (c) Release of Property Owner. In the event of consent by Town to the sale or other conveyance of all or a portion of the Real Property and compliance with the conditions set forth therein, the Property Owner shall be released from any further obligations with respect to this Agreement as to the portion of the Real Property so transferred, and the transferee shall be substituted as the Property

Owner under the Agreement as to the portion of the Real Property so transferred.

- (d) Estoppel Certificate. Upon request in writing from an assignee or the Property Owner to the Town sent by certified or registered mail or publicly licensed message carrier, return receipt requested, the Town will provide a certificate in recordable form that solely with respect to the portion of the Real Property described in the request, there are no violations or breaches of this Agreement, except as otherwise described in the Certificate. The Town will respond to such a request within ninety (90) days of the receipt of the request, and may employ such professional consultants, municipal, county and state agencies and staff as may be necessary to assure the truth and completeness of the statements in the certificate. The reasonable costs and disbursements of private consultants will be paid by the person making the request.

The certificate issued by the Town will be binding on the Town in accordance with the facts and statements contained therein as of its date and may be relied upon by all persons having notice thereof. No claim or action to enforce compliance with this Agreement may be brought against the Property Owner or its assignees properly holding rights hereunder, alleging any violation of the terms and covenants affecting such portion of the Real Property except as otherwise described in the Certificate.

If the Town does not respond to such request within ninety (90) days of the time of its receipt, the portion of the Real Property described in the request will be deemed in compliance with all of the covenants and terms of this Agreement. A certificate of such conclusion may be recorded by the Property Owner, including a copy of the request and the notice of receipt and it shall be binding on the Town as of its date. Such notice shall have the same effect as a Certificate issued by the Town under this ¶ 33.(d).

34. General Terms and Conditions.

- (a) Agreements to Run with the Land. This Agreement shall be recorded against the Real Property as described in Exhibit 4.1 hereto and shown on Exhibits 1.1 and 1.3 attached hereto. The agreements contained herein shall be deemed to run with the land. The burdens of this Agreement are binding upon, and the benefits of the Agreement shall inure to, all successors in interest to the Parties to the Agreement.
- (b) Construction of Agreement. This Agreement should be construed so as to effectuate the public purpose of settlement of disputes, while protecting the public health, safety and welfare, including but not limited to ensuring the

adequacy of Facilities and compatibility between Developed and Undeveloped Lands.

- (c) Mutual Releases. At the time of, and subject to, (a) the expiration of any applicable appeal period with respect to the approval of this Agreement without any appeal having been filed or (b) the final determination of any court upholding this Agreement, whichever occurs later, and excepting the parties' respective rights and obligations under this Agreement, Property Owner, on behalf of itself and Property Owner's partners, officers, directors, employees, agents, attorneys and consultants, hereby releases the Town and the Town's council members, officials, employees, agents, attorneys and consultants, and the Town, on behalf of itself and the Town's council members, officials, employees, agents, attorneys and consultants, hereby releases Property Owner and Property Owner's partners, officers, directors, employees, agents, attorneys and consultants, from and against any and all claims, demands, liabilities, costs, expenses of whatever nature, whether known or unknown, and whether liquidated or contingent, arising on or before the date of this Agreement in connection with the Real Property or the application, processing or approval of the Project; provided, however, that each party shall not be released from its continuing obligation to comply with law, including Town's Land Development Regulations, as amended.
- (d) State and Federal Law. The Parties agree, intend and understand that the obligations imposed by this Agreement are only such as are consistent with state and federal law. In the event state or federal laws or regulations prevent or preclude compliance with one or more provisions of the development agreement, the provisions of this Agreement shall be modified or suspended as may be necessary to comply with state or federal laws or regulations. The Parties further agree that if any provision of this Agreement is declared invalid, this Agreement shall be deemed amended to the extent necessary to make it consistent with state or federal law, as the case may be, and the balance of the Agreement shall remain in full force and effect.
- (e) No Waiver. Failure of a Party hereto to exercise any right hereunder shall not be deemed a waiver of any such right and shall not affect the right of such Party to exercise at some future time said right or any other right it may have hereunder. Unless this Agreement is amended by vote of the Town Council taken with the same formality as the vote approving this Agreement, no officer, official or agent of the Town has the power to amend, modify or alter this Agreement or waive any of its conditions as to bind the Town by making any promise or representation not contained herein. Any amendments are subject to § 22 herein.

- (f) Entire Agreement. This Agreement constitutes the entire agreement between the Parties and supersedes all prior agreements, whether oral or written, covering the same subject matter. This Agreement may not be modified or amended except in writing mutually agreed to and accepted by both Parties to this Agreement.
- (g) Attorneys Fees. Should any Party hereto employ an attorney for the purpose of enforcing this Agreement, or any judgment based on this Agreement, for any reason or in any legal proceeding whatsoever, including insolvency, bankruptcy, arbitration, declaratory relief or other litigation, including appeals or rehearings, the prevailing Party shall be entitled to receive from the other party thereto reimbursement for all attorneys' fees and all costs and expenses. Should any judgment or final order be issued in that proceeding, said reimbursement shall be specified therein.
- (h) Notices. All notices hereunder shall be given in writing by certified mail, postage prepaid, at the following addresses:

To the Town:

Mayor of Kiawah Island
Town Hall
7A Beachwalker Office Park
Johns Island, SC 29455

With copies to:

Planning Director
2 Courthouse Square
Charleston, SC 29401

Dennis J. Rhoad, Esq.
127 1/2 King Street
Charleston, SC 29402

To the Property Owner:

Charles S. Way, Jr.
Chairman of the Board
Kiawah Resort Associates, L.P.
200 Meeting Street, Suite 401
P.O. Box 242
Charleston, South Carolina 29402

Leonard L. Long, Jr.
Managing Director
Kiawah Resort Associates, L.P.
92 Broad Street
P.O. Box 419
Charleston, SC 29402

With Copies to:

G. Trenholm Walker, Esq.
Wise & Cole, P.A.
151 Meeting Street, Suite 200
P.O. Drawer O
Charleston, S.C. 29402

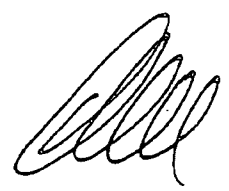
- (i) Execution of Agreement. This Agreement may be executed in multiple parts as originals or by facsimile copies of executed originals; provided, however, if executed and evidence of execution is made by facsimile copy, then an original shall be provided to the other party within seven (7) days of receipt of said facsimile copy.
- (j) Survival of Property Owner's Obligations. Notwithstanding any provision of this Agreement, or of law to the contrary and as a partial consideration for the parties entering into this Agreement, the Parties agree that Property Owner is obligated to provide to the Town and/or KICA the following enumerated extraordinary and significant benefits even if the Property Owner cancels, rescinds, repudiates, refuses, revokes, or in any manner terminates or attempts to terminate this Agreement:
- (i) Dedication of the conservation open space and Captain Sam's Spit as set forth in ¶ 16(b) and (h) of this Agreement;
 - (ii) Construction of Facilities covered by a recorded plat;
 - (iii) Conveyance of Rhett's Bluff Landing;
 - (iv) Conveyance of marshes and lowlands;
 - (v) Conveyance of Bear Island to the KICA, exclusive of those portions that may have previously been developed pursuant to this Agreement. However, such conveyance after the expiration or termination of this Agreement shall still be subject to reservation of the quit claim deed that makes portions of Bear Island available for replacement holes on the Ocean Course if existing holes are destroyed by natural disasters,

etc., mentioned in ¶ 16(d), and the Property Owner's right to receive the proceeds from any such conveyance to the owner of The Ocean Course and further subject to the reservation of title by Property Owner to no more than 20% of the approximately 208 highland acres on the northeast part of Bear Island that may be subdivided and developed per ¶ 16(d) herein.

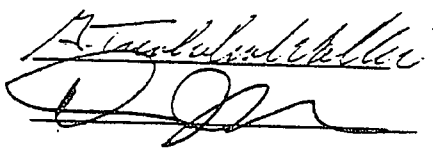
Additionally, in the event this Agreement is terminated as a result of an uncured material breach by the Property Owner, as finally determined at the conclusion of all available legal appeals, the following additional performances shall survive:

- (i) All conveyances to KICA as set forth in Exhibit 16.7; and
- (ii) The provisions of § 18 herein, titled Kiawah Island Community Association, Inc.

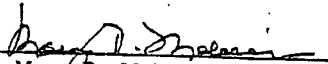
man

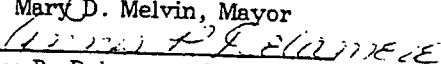


IN WITNESS WHEREOF this Agreement has been executed by the Parties on the day and year first above written.



TOWN OF KIAWAH ISLAND (Town)

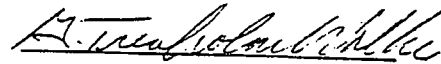
By:  (Seal)
Mary D. Melvin, Mayor

Attest: 
Annice P. Delamere, Clerk of Council
(Property Owner)

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

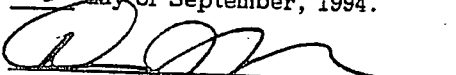
PROBATE

PERSONALLY appeared before me the undersigned witness who, being duly sworn, deposes and says that (s)he saw the within named TOWN OF KIAWAH ISLAND, by Mary D. Melvin, its Mayor, and Annice P. Delamere, its Clerk of Council, sign and seal the within written DEVELOPMENT AGREEMENT, and as the act and deed of TOWN OF KIAWAH ISLAND deliver the same, and that (s)he with the other witness subscribed above witnessed the execution thereof.



SWORN to before me this

26th day of September, 1994.


Notary Public for South Carolina

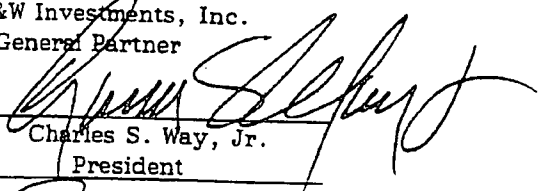
My Commission Expires: 2/16/98

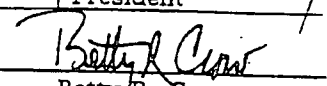
man



KIAWAH RESORT ASSOCIATES, L.P.
(Property Owner) (seal)

BY: D&W Investments, Inc.
Its General Partner

By: 
Charles S. Way, Jr.
Its: President

By: 
Betty R. Crow
Its: Secretary

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

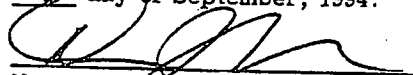
PROBATE

PERSONALLY appeared before me the undersigned witness who, being duly sworn, deposes and says that (s)he saw the within named KIAWAH RESORT ASSOCIATES, L.P., by D&W Investments, Inc., a South Carolina corporation, its General Partner, by Charles S. Way, Jr., its President, and by Betty R. Crow, its Secretary, sign and seal the within written DEVELOPMENT AGREEMENT, and as the act and deed of the limited partnership deliver the same, and that (s)he with the other witness subscribed above witnessed the execution thereof.



SWORN to before me this

26th day of September, 1994.


Notary Public for South Carolina

My Commission Expires: 2/10/98

mem



BK J 248PG071

BEACHWALKER PARTNERS, L.P. (seal)

BY: D&W Investments, Inc.

Its General Partner

By:

Charles S. Way, Jr.

Its:

President

By:

Betty R. Crow

Its:

Secretary

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

PROBATE

PERSONALLY appeared before me the undersigned witness who, being duly sworn, deposes and says that (s)he saw the within named BEACHWALKER PARTNERS, L.P., by D&W Investments, Inc., a South Carolina corporation, its General Partner, by Charles S. Way, Jr., its President, and by Betty R. Crow, its Secretary, sign and seal the within written DEVELOPMENT AGREEMENT, and as the act and deed of the limited partnership deliver the same, and that (s)he with the other witness subscribed above witnessed the execution thereof.

SWORN to before me this

26th day of September, 1994.

Notary Public for South Carolina

My Commission Expires: 2/10/98

[Signature]
[Signature]

KIAWAH ISLAND UTILITY, INC. (seal)

By: *[Signature]*
 Charles S. Way, Jr.

Its: Chairman of the Board

By: *[Signature]*
 Betty R. Crow

Its: Secretary

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

PROBATE

PERSONALLY appeared before me the undersigned witness who, being duly sworn, deposes and says that (s)he saw the within named KIAWAH ISLAND UTILITY, INC., by Charles S. Way, Jr., its Chairman of the Board, and by Betty R. Crow, its Secretary, sign and seal the within written DEVELOPMENT AGREEMENT, and as the act and deed of KIAWAH ISLAND UTILITY, INC. deliver the same, and that (s)he with the other witness subscribed above witnessed the execution thereof.

[Signature]

SWORN to before me this

26th day of September, 1994.

[Signature]
 Notary Public for South Carolina

My Commission Expires: 2/6/98

man

[Signature]

GX J 248PG073

WITNESSES:

Justicia Y. Smith
L. [unclear]

EARLE E. LONG TRUST

By: [Signature]
Leonard L. Long, Jr.
Trustee

Man

67

[Signature]

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

PROBATE

PERSONALLY appeared before me the undersigned witness who, being duly sworn, deposes and says that (s)he saw the within named EARLE E. LONG TRUST, by Leonard L. Long, Jr., its Trustee, sign and seal the within written DEVELOPMENT AGREEMENT, and as the act and deed of EARLE E. LONG TRUST deliver the same, and that (s)he with the other witness subscribed above witnessed the execution thereof.

A. T. Campbell

SWORN to before me this

21st day of September, 1994.

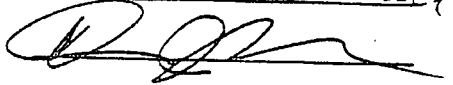
Justin Y. Smith
Notary Public for South Carolina

My Commission Expires: 11/28/00

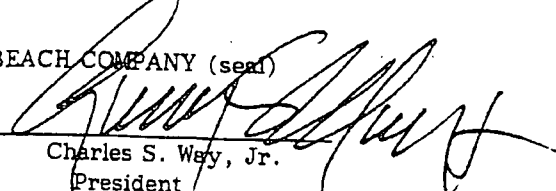
man

[Signature]

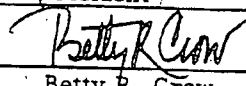
BX J 248PG075

H. Trumbull Walker


THE BEACH COMPANY (seal)

By: 
Charles S. Way, Jr.

Its: President

By: 
Betty R. Crow

Its: Secretary

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

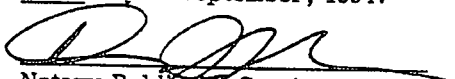
PROBATE

PERSONALLY appeared before me the undersigned witness who, being duly sworn, deposes and says that (s)he saw the within named THE BEACH COMPANY, by Charles S. Way, Jr., its President, and by Betty R. Crow, its Secretary, sign and seal the within written DEVELOPMENT AGREEMENT, and as the act and deed of THE BEACH COMPANY deliver the same, and that (s)he with the other witness subscribed above witnessed the execution thereof.

H. Trumbull Walker

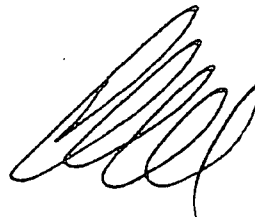
SWORN to before me this

26th day of September, 1994.


Notary Public for South Carolina

My Commission Expires: 2/10/98

man



WITNESSES:

Donna J. Smith

Wendy Roach

DIECI, INC.

By:

Charles P. Darby, III
Vice President

By:

Lisa C. Bryant
Secretary

mem

[Signature]

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)

PROBATE

PERSONALLY appeared before me the undersigned witness who, being duly sworn, deposes and says that (s)he saw the within named DIECI, INC., by Charles P. Darby, III, its Vice President, and by Lisa C. Bryant, its Secretary, sign and seal the within written DEVELOPMENT AGREEMENT, and as the act and deed of DIECI, INC. deliver the same, and that (s)he with the other witness subscribed above witnessed the execution thereof.

Anthony J. Smith

SWORN to before me this

26th day of September, 1994.

Katherine M. Brown
 Notary Public for South Carolina

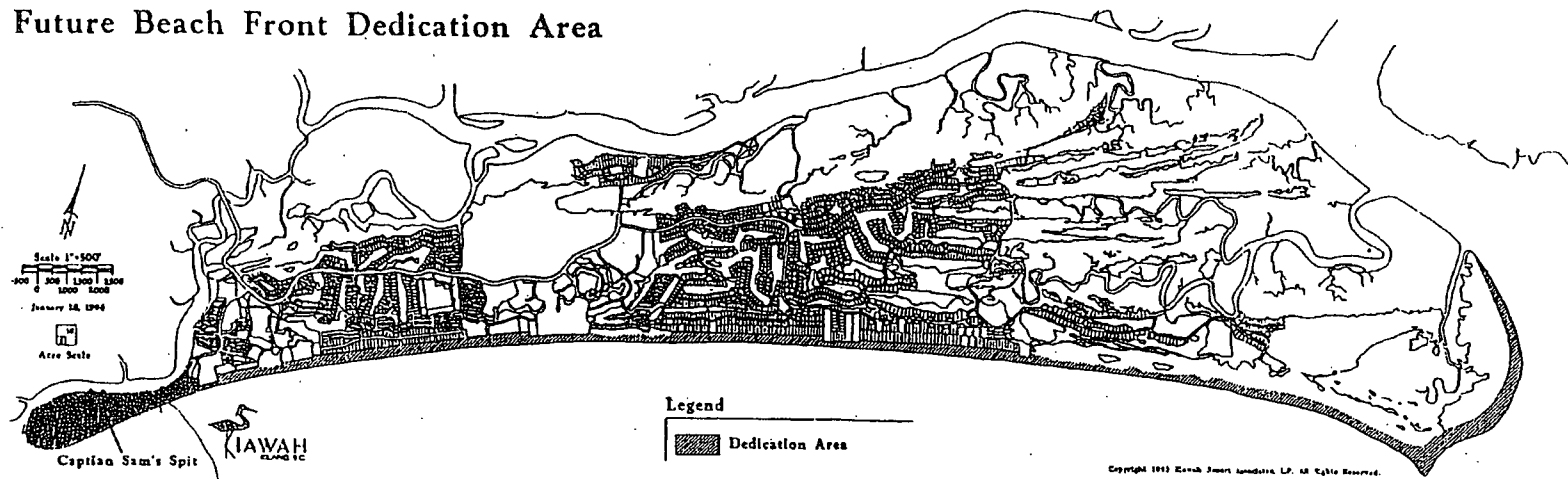
My Commission Expires: 12/31/97

Wm

[Signature]

Handwritten scribble

Future Beach Front Dedication Area



Legend
Dedication Area

Copyright 1993 Knoch Smart Landcare, LP. All Rights Reserved.

Area not included in Dedication Area
(Area of Captain Sam's Spit handled
separately in Development Agreement)
Section 16.1(n)

Handwritten note

OK J 248PG106

Exhibit 13.2: Parcel-Specific Development Standards

Parcel #	Parcel Description	Use Type (1)	Approx. Acres (2)	Maximum Gross Density (3)	Total Units (4)	Existing Units (5)	Cap on New Units (6)	Maximum F.A.R. w/ Transfer (7)	Height Stories/Feet (8)	Parcel Open Space (9)
1	Mingo Point	R-2, C	11.50	4	46	0	46	0.25	4/50	30
2	Mingo North	R-2, C	4.00	3	12	0	12	0.20	2.5/35	30
3	Mingo South	R-2, C	4.40	3	13	0	13	0.20	2.5/35	30
4	Little Rabbit	R-2, C	4.50	4	18	0	18	0.25	2.5/35	30
5	Rabbit North	R-2, C	6.20	3	19	0	19	0.20	2.5/35	30
6	Kiawah River Commons	R-2, C	6.16	6	37	0	37	0.25	4/50	30
7	Sales Center	C	2.37			0	0	0.25	4/50	30
8	Parkway Gate	C	1.20			0	0	0.25	4/50	30
9	Beachwalker Office Park	R-2, C	1.75	6	10	0	10	0.20(10)	4/50	30
10	Marsh Point Residual	R-2, C	0.66	6	4	0	4	0.20	2.5/35	30
11	Beachwalker Lagoon	R-3, C	9.44	10	94	0	94	0.25	4/50	30
12	Beachwalker Park	R-3, C (20)	8.70	12	104	0	104	0.20	6/70(16)	30
13	Beachwalker Ocean	R-3, C	19.50	12	234	0	234	0.20	6/70(16)	30
14	Strawmarket	C	1.19			0	0	0.25(10)	2.5/35	30
15	Utility Tracts	U	34.36			0	0	0.25	2.5/35(22)	30
16	Base Pond	R-2, C (17)	289.60	3	869	0	869		4/50	40
17	Rhett's Bluff	R-1	64.22	1.5	96	83	13		2.5	40
18	Captain Maynards	R-1	11.38	1.5	17	6	11		2.5	40
19	Heron Park Grille	C	1.79		0	0	0	0.20(10)	2.5/35	40

[Handwritten signature]
7/18/2011



OK J 248PG107

Parcel #	Parcel Description	Use Type (1)	Approx. Acres (2)	Maximum Gross Density (3)	Total Units (4)	Existing Units (5)	Cap on New Units (6)	Maximum F.A.R. w/ Transfer (7)	Height Stories/Feet (8)	Parcel Open Space (9)
20	East Beach Ocean	R-3	3.10	12	37	0	37	0.25	6/70	30
21	East Beach Lagoon	R-3	3.30	8	40	0	40		4/50	40
22	East Beach Interior	R-2	33.22	6	199	0	199		4/50	40
23	Governor's Marsh	R-2	12.73	6	76	0	76		2.5	40
24	Ocean Green 2	R-2	6.04	6	36	20	16		2.5	40
25	Vanderhorst Mansion	R-1	18.34	1.5	28	11	17		(11)	50
26	Flyway/Glen Abbey	R-1	2.79	2	6	0	6		2.5	40
27	Marsh Cove	R-1	9.87	2	20	19	1		2.5	50
28	Osprey Entry	R-1	3.70	3	11	0	11		2.5	50
29	Terrapin Island	R-1	22.04	1	22	15	7		2.5	60
30	Blue Heron	R-1	278.30	2	557	0	557		2.5	50
31	Eagle Point	R-1	18.32	1.5	27	0	27		2.5	50
32	Eagle Point	R-1	14.96	1.5	22	0	22		2.5	50
33	Falcon Point	R-1	84.15	1.25	106	0	106		2.5	50
34	Three Loons Island	R-1	30.96	1	31	0	31		2.5	50
35	Cormorant Island	R-1	10.53	1	11	0	11		2.5	50
36	Bufflehead Point	R-2 (19)	4.93	4	20	0	20		2.5	50
37	Club Cottage Lane	R-2 (19)	8.20	4	33	11	22		2.5	50
38	Osprey Finger	R-2 (19)	3.79	4	15	0	15		2.5	50
39	Marsh Cottage	R-2 (19)	6.17	4	25	0	25		2.5	50
40	Osprey Beach 3	R-2	15.80	6	95	0	95		4/50	40
41	Osprey Beach 2	R-1, C	21.73	2	43	25	18	(12)	2.5/35	40

[Handwritten signature]

DX J 240PG108

Parcel #	Parcel Description	Use Type (1)	Approx. Acres (2)	Maximum Gross Density (3)	Total Units (4)	Existing Units (5)	Cap on New Units (6)	Maximum F.A.R. w/ Transfer (7)	Height Stories/Feet (8)	Parcel Open Space (9)
42	Otter Island	R-1	109.10	1	109	100	9			
43	Congar Island	R-2 (21)	250.30	1.5	375	41	334		2.5	50
44	Hear Island	R-2 (21)		(13)			18		2.5	50
45	Ocean Course	R-2, C (21)	180.67	(14)			20	(15)	2.5/3.5	
46	Snowy Egret	R-1	19.85	2	40	39	1			
47	Whimbrell Road	R-1	9.76	2	20	20	0		2.5	50
48	Piping Plover	R-1	9.81	2	20	20	0		2.5	50
49	Golden Eye	R-1	16.53	2	33	20	13		2.5	50
50	Andell	C							2.5	50
51	Bear Island Residential							(18)		
52	91 Surfong	R-1		2	1	0	1			
53	189 Bailey Union	R-1		2	1	0	1		2.5	30
									2.5	30

For [Signature]

Notes Governing Exhibit 13.2, Parcel Specific Development Standards

1. Parcels with more than one use designation may be appropriate for either type of land use indicated in the above table. All uses shall comply with the appropriate standards for the use type as defined in this agreement. Development consisting of more than one use shall be subject to approval of the Town in accordance with ¶ 13.B.5, Mixed Use Development.
2. Acreage figures are approximate and may vary somewhat over time.
3. Gross Density equals the number of potential Dwelling Units (existing and future) divided by the gross residential acreage of the parcel above mean high water, excluding Fresh Water and Salt Water Wetlands. Gross Density limits are not intended to discourage or limit the development of higher density types or clusters of residences within a parcel; provided, however, that maximum density limits are used to establish an absolute cap on the total number of Dwelling Units on a parcel. The above maximum Densities can not be obtained for every parcel; as each parcel is platted or sold, the Property Owner shall clearly establish the maximum number of dwelling units which may be permitted on a parcel. In no instance shall the maximum number of Vested Units established after the execution of this agreement exceed 1,974. In the event that density is limited by physical constraints, a bridge permit or other regulatory constraint beyond the Town's jurisdiction, said limits are not intended to be superseded by this agreement.
4. The total number of single family Lots and non-single family Dwelling Units permitted in the parcel at maximum permitted densities.
5. The number of single family Lots with preliminary plat approval and the number non-single family dwelling units approved by the Town as of January 28, 1994.
6. The maximum number of Vested Units which may be approved on any one parcel, subject to the limit of 1,974 total Vested Units. The total for this column is 3,220 units, plus a total of 38 additional units on Bear Island and the Ocean Course. Where existing units are indicated in the previous column, resubdivision may be required prior to establishing any Vested Units.
7. Maximum floor area ratio (FAR) equals the building floor area divided by the non-residential or mixed use acreage above mean high water, excluding Fresh Water and Salt Water Wetlands. This column shows the maximum floor area ratio which may be developed on an individual parcel. In no event shall the total amount of non-residential development, exclusive of Hotel Rooms and Support Space, exceed 300,000 square feet for the Real Property.
8. No development shall exceed the maximum number of stories or the maximum height in feet listed in this column, subject to the bulk limitations described in ¶ 13.B.1.(e), provided however, that by reason of floodplain regulations, and the need for innovative design for view-shed and hurricane safety purposes, the absolute height limit on single family residences is forty-five (45) feet from Ground Floor Level. Listed height in feet applies to non-single family development.
9. Parcel open space as described in ¶ 13.B.4. of this Agreement, is the minimum percentage requirement of Pervious Coverage for a Parcel.
10. Existing development which is modified is subject to compliance with provisions of this Development Agreement.
11. Height of structures on this Parcel shall comply with Exhibit 13.3: Vanderhorst Height Limitations, attached hereto. No structure on this Parcel shall be higher than the eave height of the Vanderhorst Mansion.

 you

- 12 Non-residential uses shall be limited to the Beach Club and associated uses, including dining, kitchen/food preparation areas, public lobby, meeting rooms, lounge, club administrative/ operations offices, service and mechanical areas, locker rooms, restrooms, retail store for beach/pool sundries and other uses normally associated with beach club operations and/or restaurant/snack bar facilities. Total building floor area for non-residential habitable structures on this Parcel not to exceed 25,000 square feet and shall be limited to the area designated on Exhibit 13.4.
- 13 See ¶ 16(d), *infra*.
- 14 Up to 20 dwelling units may be permitted in the area to the west of the Ocean Course Club House shown in Exhibit 13.4.
- 15 Non-residential uses shall be limited to the Ocean Course Country Club and associated uses, including dining, kitchen/food preparation areas, public lobby, meeting rooms, lounge, club administrative/operations offices, service and mechanical areas, locker rooms, restrooms, retail store for beach/pool sundries and other uses normally associated with golf club operations and/or restaurant/snack bar facilities. Total building floor area for non-residential habitable structures on this Parcel shall not exceed 25,000 square feet.
- 16 This Height may be permitted for hotel development on Parcel 13 only if Parcel 12 is permanently reserved or dedicated for open space/recreational purposes, otherwise the Height shall be limited to four (4) stories and a maximum of fifty (50) feet.
- 17 Non-residential uses shall be limited to golf country club uses including golf pro shop, tennis pro shop, locker rooms, restrooms, dining, kitchen/food preparation, public/lobby area, meeting rooms, lounge, swimming pool, tennis courts, golf course, practice range, maintenance facilities, club administrative/operations offices, service and mechanical areas, maintenance and other uses normally associated with golf country club operations. Total building floor area for non-residential habitable structures on this Parcel shall not exceed 40,000 square feet for club operations and 15,000 square feet for golf course/grounds maintenance.
- 18 Commercial allowance for Parcel 50 shall not be applied to the overall limit established in ¶ 13.B.2(6).
- 19 Currently there are three residential housing structures used by guests of Property Owner and/or Kiawah Island Club, Inc., and located on Parcel 37. The Property Owner agrees on behalf of Kiawah Island Club, Inc. that the Club will not lease more than 20 such housing structures, including those currently existing at any one time, and further agrees that these structures will be limited to Parcels 16, 36, 37, 38 and 39.
- 20 Development subject to provisions of ¶ 16(h).
- 21 Dwelling unit types limited to single family detached units, including patio homes and zero Lot line developments.
- 22 Height provision for towers and non-habitable utility structures shall be as provided in ¶ 13.B.3.(d).
- 23 Access to East Beach Interior is limited to Green Dolphin Way and Turtle Point Lane. Existing tunnel connection between Parcels 16 and 22 to remain.



STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)

AGREEMENT FOR CONVEYANCE
 OF
 PROPERTIES ON KIAWAH ISLAND, S.C.

WHEREAS, Kiawah Resort Associates, L.P., a Delaware limited partnership, (hereinafter sometimes referred to as "KRA, L.P."), and the Town of Kiawah Island, a municipal corporation organized and existing under the laws of the State of South Carolina (hereinafter sometimes referred to as the "Town"), entered into that certain Development Agreement regarding aspects of the overall development of Kiawah Island, S.C., which is dated the 26th day of September, 1994 (the "Development Agreement"); and

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 provisions of the Development Agreement,

NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that for and in consideration of the sum of Five and No/100 (\$5.00) Dollars to it in hand paid by the KIAWAH ISLAND COMMUNITY ASSOCIATION, INC., and in further consideration of the execution by the Town of Kiawah Island of the Development Agreement, KIAWAH RESORT ASSOCIATES, L.P. agrees to convey, and the KICA agrees to accept, by Quit-Claim deed (unless otherwise provided,) the following described real estate upon the terms and conditions set forth below:

Parcel 1
Rhett's Bluff Boat Landing
 {Paragraph 15.(a)(i)}

All that certain piece, parcel or lot of land situate, lying and being in the Town of Kiawah Island, County of Charleston, State of South Carolina, known generally as the "Rhett's Bluff Boat Landing" containing 6.430 Acres, more or less, and shown and designated as "6.430 ACRES" on a plat by Southeastern Surveying, Inc., entitled "A PLAT OF A 6.430 ACRE TRACT OF LAND LOCATED IN RHETT'S BLUFF SUBDIVISION OWNED BY KIAWAH RESORT ASSOCIATES, L.P. LOCATED IN THE TOWN OF KIAWAH ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA", dated June 22, 1994, and recorded in Plat Book _____, page _____, in the R.M.C. Office for Charleston County, South Carolina, said parcel having such location, butts and bounds, metes, courses and distances as will by reference to said plat more fully appear.

TMS Number: 209-11-00-040

Page 1

Parcel 1 shall be conveyed to the KICA no later than March 1, 1995, together with all improvements existing thereon at the time of this Agreement, plus any additional improvements which may be added between the time of this Agreement and the time of such conveyance, including developed parking areas, an entry road and gate, a pavilion, two L-shaped piers (for, respectively, tying up of boats and fishing and crabbing purposes, the former dock having a smaller pavilion for viewing), a boat ramp, lighting and electrical service, bollards, signage and any other improvements existing thereon at the time of such conveyance, all as more particularly set forth in Paragraph 15 (a)(i) of the Development Agreement. Such conveyance shall be made by Quit-Claim deed, for a nominal consideration not to exceed One and No/100 (\$1.00) Dollar, and said deed shall be in substantially the same form and content, and subject only to the covenants, conditions, rights, easements, restrictions, and reservations as are set forth in Schedule P-1 attached hereto and incorporated herein by reference.

Parcels 2a and 2b
Beach Parking Areas
 {Paragraph 15.(a)(ii)}

Parcel 2a

50 Space Parking Area at Ocean Course Drive

(Description to Follow)

(Note: Description to include enough land for KICA to build
 a small restroom facility at KICA's sole expense)

Parcel 2a shall be conveyed to the KICA no later than March 1, 1995, together with all improvements existing thereon at the time of this Agreement, plus any additional improvements which may be added between the time of this Agreement and the time of such conveyance, all as more particularly set forth in Paragraph _____ of the Development Agreement. Such conveyance shall be made by Quit-Claim deed, for a nominal consideration not to exceed One and No/100 (\$1.00) Dollar, and said deed shall be in substantially the same form and content, and subject only to the covenants, conditions, rights, easements, restrictions, reverts, and reservations as are set forth in Schedule P-2a attached hereto and incorporated herein by reference.

KRA, L.P. further agrees, prior to the conveyance of said Parcel 2a to the KICA, to make improvements, at its sole expense, to a 50 space parking area within Parcel 2a, with coquina shell or better. Such obligation is more particularly set forth in Paragraph _____ of the Development Agreement.

Parcel 2b

Western 1/2 of David Street next to Property Owners' Pool Tract

All that certain piece, parcel or tract of land situate, lying and being in the Town of Kiawah Island, Charleston County, State of South Carolina, containing .687 acres, more or less, known generally as the "Western Half of David Street", and shown and designated as "0.687 AC." on a plat by Southeastern Surveying, Inc., entitled "A SUBDIVISION PLAT OF LOTS 1A & 1B TRACT 13 BLOCK 7 SUBD. 411 SURFSCOTER LN., LOTS 1A & 1B BLOCK A EUGENIA AVE. AND A PORTION OF DAVID ST. CONTAINING 2.014 ACRES OWNED BY KIAWAH RESORT ASSOCIATES, L.P. LOCATED IN THE TOWN OF KIAWAH ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA", dated February 22, 1994, last revised on June 2, 1994, and recorded in Plat Book EA at page 67, in the R.M.C. Office for Charleston County, South Carolina, said tract having such location, butts and bounds, metes, courses and distances as will by reference to said plat more fully appear.

Parcel 2b shall be conveyed to the KICA no later than March 1, 1995, together with all improvements existing thereon at the time of this Agreement, plus any additional improvements which may be added between the time of this Agreement and the time of such conveyance, all as more particularly set forth in Paragraph 15.(a)(ii) of the Development Agreement. Such conveyance shall be made by Quit-Claim deed, for a nominal consideration not to exceed One and No/100 (\$1.00) Dollar, and said deed shall be in substantially the same form and content, and subject only to the covenants, conditions, rights, easements, restrictions, and reservations as are set forth in Schedule P-2b attached hereto and incorporated herein by reference.

Parcel 2c

Tract for Proposed Extension of Members' Pool Parcel

All that certain piece, parcel or tract of land situate, lying and being in the Town of Kiawah Island, Charleston County, South Carolina, located seaward of the KICA Members' Pool Parcel, lying within the southerly extensions of the two side lot lines of the property shown as the "Residents' Beach Club Parcel" on a plat by Gifford, Nielson & Williams entitled "A PLAT OF: RESIDENTS' BEACH CLUB PARCEL OWNED BY KIAWAH ISLAND COMPANY, LIMITED LOCATED ON KIAWAH ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA", dated January 16, 1985, having latest revision dated February 4, 1985, and recorded in Plat Book BD at page 101, in the R.M.C. Office, and extending from the southernmost boundary line of said tract to the mean high water mark of the Atlantic Ocean, as the same may vary from time to time.

Parcel 2c shall be conveyed to the KICA no later than March 1, 1995, together with all improvements existing thereon at the time of this Agreement, plus any additional improvements which may be added between the time of this Agreement and the time of such conveyance, all as more particularly set forth in Paragraph 15.(a)(ii) of the Development Agreement. Such conveyance shall be made by Quit-Claim deed, for a nominal consideration not to exceed One and No/100 (\$1.00) Dollar, and said deed shall be in substantially the same form and content, and subject only to the covenants, conditions, rights, easements, restrictions, and reservations as are set forth in Schedule P-2c attached hereto and incorporated herein by reference.

Parcel 2d

Parking Area Seaward of the Ocean Course Clubhouse

All that certain piece, parcel or tract of land situate, lying and being in the Town of Kiawah Island, Charleston County, State of South Carolina, located at the eastern end of Kiawah Island, south of the Ocean Course Clubhouse, and shown and designated as "KIAWAH RESORT ASSOCIATES EASEMENT AREA" on a plat by Southeastern Surveying, Inc., entitled "A PLAT OF A 30' ACCESS EASEMENT CROSSING THE LANDS OF KIAWAH RESORT ASSOCIATES AND LANDMARK LAND COMPANY OF CAROLINA, INC. LOCATED IN THE TOWN OF KIAWAH ISLAND CHARLESTON COUNTY, SOUTH CAROLINA", dated April 17, 1991, SAVING AND EXCEPTING THEREFROM, that portion of the aforesaid Easement Area lying between the S.C.C.C. (n/k/a OCRM) Interim Baseline and the "revised" southernmost boundary line of the Ocean Course Tract, as shown on a plat by Southeastern Surveying, Inc., entitled "A COMBINATION PLAT OF A 22.075 ACRE TRACT AND A 1.784 ACRE TRACT OWNED BY KIAWAH RESORT ASSOCIATES ABOUT TO BE CONVEYED TO LANDMARK LAND COMPANY OF CAROLINA, INC. LOCATED IN THE TOWN OF KIAWAH ISLAND CHARLESTON COUNTY, SOUTH CAROLINA", dated August 20, 1991, copies of which said plats are attached hereto as Schedule P-2d-("A") and incorporated herein by reference.

TOGETHER WITH a non-exclusive, perpetual, permanent, assignable, transmissible and commercial easement for pedestrian and vehicular access, ingress and egress, to and from the southernmost terminus of Ocean Course Drive to the southernmost property line of the Ocean Course Tract, and shown and designated as "30' ACCESS EASEMENT" on a plat by Southeastern Surveying, Inc., entitled "A PLAT OF A 30' ACCESS EASEMENT CROSSING THE LANDS OF KIAWAH RESORT ASSOCIATES AND LANDMARK LAND COMPANY OF CAROLINA, INC. LOCATED IN THE TOWN OF KIAWAH ISLAND CHARLESTON COUNTY, SOUTH CAROLINA", dated April 17, 1991, and designated as "30' ACCESS EASEMENT" lying between the S.C.C.C. (n/k/a OCRM) Interim Baseline and the "revised" southernmost boundary line of the Ocean Course Tract, as shown on a plat by Southeastern Surveying, Inc., entitled "A COMBINATION PLAT OF A 22.075 ACRE TRACT AND A 1.784 ACRE TRACT OWNED BY KIAWAH RESORT ASSOCIATES ABOUT TO BE CONVEYED TO LANDMARK LAND COMPANY OF CAROLINA, INC. LOCATED IN THE TOWN OF KIAWAH ISLAND CHARLESTON COUNTY, SOUTH CAROLINA", dated August 20, 1991, copies of which said plats are attached hereto as Schedule P-2d-"A") and incorporated herein by reference.

Parcel 2d shall be conveyed to the KICA no later than January 1, 2000, together with all improvements existing thereon at the time of this Agreement, plus any additional improvements which may be added between the time of this Agreement and the time of such conveyance, all as more particularly set forth in Paragraph 15.(a)(ii) of the Development Agreement. Such conveyance shall be made by (a) Quit-Claim deed, for a nominal consideration not to exceed One and No/100 (\$1.00) Dollar, for that portion of the parcel lying seaward of the southernmost boundary line of the Ocean Course tract, which said deed shall be in substantially the same form and content, and subject only to the covenants, conditions, rights, easements, restrictions, and reservations as are set forth in Schedule P-2d attached hereto and incorporated herein by reference; and (ii) Assignment of Non-Exclusive Easement as to that portion of the parcel running generally in a southerly direction from the southernmost terminus of Ocean Course Drive, to the southernmost boundary line of the Ocean Course tract. Said Assignment of Non-Exclusive Easement shall be in substantially the same form and content, and subject only to the covenants, conditions, rights, easements, restrictions, and reservations as are set forth in Schedule P-2d attached hereto and incorporated herein by reference.

KRA, L.P. further agrees, prior to the conveyance of said Parcel 2d to the KICA, to make improvements, at its sole expense, to a 30 space parking area within the southernmost portion of Parcel 2d, generally seaward of the Ocean Course Clubhouse, with coquina shell or better and any landscaping it deems tasteful and appropriate. Such obligation is more particularly set forth in Paragraph 15(ii) of the Development Agreement.

Parcel 3
Fishing and Crabbing Pier/Observation Tower
 {Paragraph 15.(a)(iii)}

Parcel 3 consists of one or more small tracts of land (the exact size, location, shape, and boundaries, to be in KRA, L.P.'s discretion), whereupon at least one Observation Tower and one fishing/crabbing pier are to be constructed by KRA, L.P., its successors and assigns, at no cost to the KICA, its successors and assigns, all to be located at a point or points along Blue Heron Pond which is located south/southwest of Terrapin Island, and is shown on a plat by Davis & Floyd, Inc., surveyors, entitled "PLAT SHOWING EAST END KIAWAH ISLAND PROPERTY OF KIAWAH ISLAND COMPANY, LIMITED LOCATED CHARLESTON COUNTY, S.C." dated May 5, 1988, and recorded in Plat Book BS, pages 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, and 53 in the R.M.C. Office, and being a portion of the property included in the records of the Charleston County, S.C. Assessor's Office as Tax Map Number 207-00-00-015.

BK J 248PG401

Nothing herein is intended to lessen or curtail any other rights or privileges as Grantor may enjoy, either as a Kiawah property owner or the Company, under any of the recorded Kiawah Covenants, including rights or easements to use and enjoy Common Property and allowing guests or others to do so.

This is a portion of the property conveyed to the Grantor herein by deed of conveyance of Kiawah Resort Associates, a South Carolina joint venture, dated June 26, 1992, and recorded in Book L215, page 486 in the R.M.C. Office.

TOGETHER with, all and singular, the rights, members, hereditaments, and appurtenances to the said premises belonging or anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned unto the said Kiawah Island Community Association, Inc., its successors and assigns, forever.

IN WITNESS WHEREOF, Kiawah Resort Associates, L.P., has caused these presents to be executed in its name by its General Partner thereunto duly authorized, and its seal to be hereunto affixed, this _____ day of _____, in the year of our Lord One Thousand Nine Hundred and Ninety-Five, and in the Two Hundred and Nineteenth year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

KIAWAH RESORT ASSOCIATES, L.P.
(SEAL)

By: D&W Investments, Inc.,
a South Carolina corporation

(CORP. SEAL)

Its: General Partner

By: Charles S. Way, Jr.

Its: President

By: Betty R. Crow

Its: Secretary

Parcel 3, as ultimately composed and located by KRA, L.P., in its discretion, shall be conveyed to the KICA no later than January 1, 2000, together with all improvements existing thereon at the time of this Agreement, plus any additional improvements which may be added between the time of this Agreement and the time of such conveyance, as set forth in Paragraph 15.(a)(iii) of the Development Agreement. Such conveyance shall be made by Quit-Claim deed, for a nominal consideration not to exceed One and No/100 (\$1.00) Dollar, and said deed shall be in substantially the same form and content, and subject only to the covenants, conditions, rights, easements, restrictions, and reservations as are set forth in Schedule P-3 attached hereto and incorporated herein by reference.

Parcel 4

New Blue Heron Park
{Paragraph 15.(a)(iv)}

Parcel 4 consists of at least two (2) acres of highland adjacent to the fishing/crabbing pier and Observation Tower described above as "Parcel 3", located along Blue Heron Pond which is located south/southwest of Terrapin Island, and is shown on a plat by Davis & Floyd, Inc., surveyors, entitled "PLAT SHOWING EAST END KIAWAH ISLAND PROPERTY OF KIAWAH ISLAND COMPANY, LIMITED LOCATED CHARLESTON COUNTY, S.C." dated May 5, 1988, and recorded in Plat Book BS, pages 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, and 53 in the R.M.C. Office, and being a portion of the property included in the records of the Charleston County, S.C. Assessor's Office as Tax Map Number 207-00-00-015, to be provided, planned and developed by KRA, L.P., its successors and assigns, at its sole expense, as a passive park, TOGETHER with a non-exclusive easement for access, ingress and egress to and from said areas and roads owned by the KICA.

Parcel 4 shall be conveyed by KRA, L.P. to the KICA simultaneously with the conveyance to the KICA of such other Common Properties serving the approved and platted lots surrounding Blue Heron Pond, all as more particularly set forth in Paragraph 15.(a)(iv) of the Development Agreement. Such conveyance shall be made by Quit-Claim deed, for a nominal consideration not to exceed One and No/100 (\$1.00) Dollar, and said deed shall be in substantially the same form and content, and subject only to the covenants, conditions, rights, easements, restrictions, and reservations as are set forth in Schedule P-4 attached hereto and incorporated herein by reference.

KRA, L.P. further agrees to provide three to four parking spaces and improve the same, at its sole expense, with coquina shell or better, prior to such conveyance.

Parcel 5

Existing Park Facilities
{Paragraph 15.(a)(vi)}

Glossy Ibis Mini-Park

All that certain, piece, parcel and tract of land situate, lying and being in the Town of Kiawah Island, Charleston County, South Carolina, known generally as the "Glossy Ibis Mini-Park," and shown and designated as "Residual 1.091 Ac." on a plat by Southeastern Surveying, Inc. entitled "A Final Plat of Lots 700 - 713 and 749 - 768 Glossy Ibis Tract 48 Phase 1 Egret/Pintail Subdivision (428) owned by Kiawah Resort Associates, L.P. LOCATED IN THE TOWN OF KIAWAH ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA" dated September 1, 1992, bearing latest revision date of September 24, 1992, and recorded in Plat Book CK at page 21, in the office of the Register of Mesne Conveyances for Charleston County, S.C., (hereinafter the "R.M.C. Office"), said lot having such location, butts and bounds, metes, courses and distances as will by reference to said plat more fully appear.

Canvasback Pond Minipark

All that certain piece, parcel or tract of land situate, lying and being in the Town of Kiawah Island, County of Charleston, State of South Carolina, located at the intersection of Flyway Drive and Governor's Drive, containing _____ Acres, more or less, and shown and designated as " _____ " on a plat by Southeastern Surveying, Inc., entitled " _____ " dated _____, 1994, a copy of which said plat is attached hereto as Exhibit P-5 ("A"), and incorporated herein by reference, said tract having such location, butts and bounds, metes, courses and distances as will by reference to said plat more fully appear.

Master Leisure Trail System

All those certain pieces, parcels or tracts of land situate, lying and being in the Town of Kiawah Island, County of Charleston, State of South Carolina, which are utilized by property owners on Kiawah Island, S.C., and maintained by the KICA as part of the "Master Leisure Trail System" on Kiawah Island, S.C., but which, at the time of execution of the Development Agreement, have not been leased, assigned, or otherwise conveyed to the KICA.

Internal Crabbing/View Stands

All those certain pieces, parcels or strips of land situate, lying and being in the Town of Kiawah Island, County of Charleston, State of South Carolina, which are utilized by property owners on Kiawah Island, S.C., and maintained by the KICA as community crabbing piers and/or view stands.

Willet Pond Minipark

All that certain piece, parcel or tract of land situate, lying and being in the Town of Kiawah Island, County of Charleston, State of South Carolina, known generally as the "Willet Pond Minipark," and shown and designated as "RESIDUAL 0.373 AC." on a plat by Southeastern Surveying, Inc. entitled "A FINAL PLAT OF OTTER ISLAND SUBDIVISION (430) TRACT 57, BLOCK 2, LOTS 15 THRU 54 AND COUGAR ISLAND SUBDIVISION (431) TRACT 58, BLOCK 1, LOTS 100 THRU 110 OWNED BY KIAWAH RESORT ASSOCIATES, L.P. LOCATED IN THE TOWN OF KIAWAH ISLAND CHARLESTON COUNTY, SOUTH CAROLINA", dated June 27, 1991, having latest revision dated August 12, 1991, and recorded in Plat Book CE at page 35, in the office of the Register of Mesne Conveyances for Charleston County, S.C., said tract having such location, butts and bounds, metes, courses and distances as will by reference to said plat more fully appear.

The several areas comprising Parcel 5 shall be conveyed by KRA, L.P. to the KICA no later than January 1, 1996, together with all improvements existing thereon at the time of this Agreement, plus any additional improvements which may be added between the time of this Agreement and the time of such conveyance, as more particularly set forth in Paragraph 15.(a)(vi) of the Development Agreement.

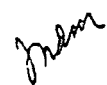
The conveyance of the Glossy Ibis Mini-Park, Canvasback Pond Minipark, and Willet Pond Minipark shall be made by Quit-Claim deed, for a nominal consideration not to exceed One and No/100 (\$1.00) Dollar, and said deed shall be in substantially the same form and content, and subject only to the covenants, conditions, rights, easements, restrictions, and reservations as are set forth in Schedule P-5 attached hereto and incorporated herein by reference.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

PERSONALLY appeared before me the undersigned witness, who made oath that (s)he saw the within named Kiawah Resort Associates, L.P., by D&W Investments, Inc., a South Carolina corporation, its General Partner, by Charles S. Way, Jr., its President and by Betty R. Crow, its Secretary, sign and seal the within written instrument, and as the act and deed of the limited partnership deliver the same, and that (s)he with the other witness appearing above witnessed the execution thereof.

Sworn to before me this
____ day of _____, 1995.

_____(SEAL)_____
Notary Public for South Carolina
My commission expires:



Schedule P-1, Page 6

Portions of the Master Leisure Trail System and any Internal Crabbing/View Stands that are currently being maintained by the KICA that (i) were not included in the 99 year lease from Kiawah Resort Associates to the KICA; or (ii) have not been heretofore included in a conveyance to the KICA, will be conveyed by amendment to the 99 year lease by and between KRA, L.P. and the KICA, which said Amendment to Lease shall be completed and a memorandum thereof recorded no later than January 1, 1995.

In future subdivisions, where roads or other improvements or areas are to be conveyed to KICA and become "Common Property" (within the meaning of the recorded Kiawah covenants), as the final plat of such subdivisions are recorded and the roads therein are completed and conveyed by KRA, L.P. to the KICA, such leisure trails and/or Internal Crabbing/View Stands or other future Common Property shall also be conveyed to the KICA, by, in KRA, L.P.'s discretion, either: (i) Quit-Claim deed, for a nominal consideration not to exceed One and No/100 (\$1.00) Dollar, and subject to all applicable covenants, conditions, rights, easements, restrictions, and reservations of record; or (ii) Assignment of a non-exclusive easement if such areas either cannot be accurately described to convey title or if title is held by a third party and KRA, L.P. is vested with a non-exclusive easement, or (iii) by amendment of the KICA 99 year lease.

Parcel 6
Sora Rail Tract
 {Paragraph 15.(a)(vii)}

All that certain piece, parcel or tract of land situate, lying and being in the Town of Kiawah Island, County of Charleston, State of South Carolina, located at the Kiawah Island "Utility Tract", containing 1.00 acre, more or less, west of property of Kiawah Island Utility, Inc.; north of the Cable Television Building; and east of an unnamed 50' road right-of-way, and shown on a plat by Southeastern Surveying, Inc., entitled "AN EXHIBIT OF A 1.000 ACRE TRACT OWNED BY KIAWAH RESORT ASSOCIATES, L.P. LOCATED IN THE TOWN OF KIAWAH ISLAND CHARLESTON COUNTY, SOUTH CAROLINA", dated July 14, 1994, a copy of which said plat is attached hereto as Exhibit P-6 ("A"), and incorporated herein by reference, said tract having such location, butts and bounds, metes, courses and distances as will by reference to said plat more fully appear.

TOGETHER WITH a non-exclusive, perpetual, permanent, assignable, transmissible and commercial easement for pedestrian and vehicular access, ingress and egress, to and from the southern right-of-way line of the Kiawah Island Parkway, to the above-described property, over, upon and across (i) Sora Rail Road, as shown on a plat by Coastal Surveying, Inc., recorded in Plat Book AM at page 96, in the R.M.C. Office; and (ii) an unnamed 50' Right-of-Way leading from Sora Rail Road to the above-described property, as shown on a plat by Davis & Floyd, Inc., entitled "Plat Showing Telephone Office Building Property of Kiawah Resort Associates Located in Utility tract Town of Kiawah Island Charleston County, SC" dated February 6, 1989, and recorded in Plat Book BU at pages 160 and 161, in the R.M.C. Office.

Parcel 6 shall be conveyed by KRA, L.P. to the KICA no later than January 1, 1996, together with all improvements existing thereon at the time of this Agreement, plus any additional improvements which may be added between the time of this Agreement and the time of such conveyance, as more particularly set forth in Paragraph 15.(a)(vii) of the Development Agreement. Such conveyance shall be made by Quit-Claim deed, for a nominal consideration not to exceed One and No/100 (\$1.00) Dollar, and said deed shall be in substantially the same form and content, and subject only to the covenants, conditions, rights, easements, restrictions, and reservations as are set forth in Schedule P-6 attached hereto and incorporated herein by reference. This conveyance shall be subject to the restriction that use of the tract be limited to those uses associated with the maintenance of Kiawah Island "Common Properties."



IN WITNESS WHEREOF, the Kiawah Island Community Association, Inc. has caused these presents to be executed in its name by its officer(s) thereunto duly authorized, and its seal to be hereunto affixed, this _____ day of _____, in the year of our Lord One Thousand Nine Hundred and Ninety-Five, in the Two Hundred and Nineteenth year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

James Watson

KIAWAH ISLAND COMMUNITY
ASSOCIATION, INC. (SEAL)

By: *[Signature]*

Its: *[Signature]*

By: _____

Its: _____

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

PERSONALLY appeared before me the undersigned witness, who made oath that (s)he saw the within named Kiawah Island Community Association, Inc., by its officers thereunto duly authorized, sign and seal the within written instrument, and said corporation by said officers did deliver the same, and that (s)he with the other witness appearing above witnessed the execution thereof.

Sworn to before me this
_____ day of _____, 1995.

(SEAL)
Notary Public for South Carolina
My commission expires:

BUIST/BN/KRALP/DEVEXH.1-4

[Signature]

man

Parcel 7

Approximately 4,000-5,000 acres of lowlands and marshlands as set forth
in Paragraph 16.(a) of the Development Agreement

For purposes of this description,
the term "Kiawah Island" shall and does hereby include
its adjacent islands within the marshes bordered by Stono Inlet,
the Kiawah River, Captain Sam's Inlet and the Atlantic Ocean,
which islands include but are not limited to "Cougar Island", "Eagle Point",
"Bear Island", "Three Loons Island", "Captain Maynard's Island",
"Cormorant Island", "Otter Island", "Terrapin Island", and "Willet Island".

All those certain pieces, parcels and tracts of lowland and marshlands as lie below mean high water (as the same may vary from time to time), surrounding Kiawah Island, S.C., (illustrated generally on Exhibit 16.1 to the Development Agreement which is incorporated herein by reference,) and which lie generally outside an area located approximately three hundred (300) feet away from Kiawah Island proper, and which extend to the mean low water marks of the Kiawah River, Stono River, the Atlantic Ocean, the westernmost part of Captain Sams Inlet, and other navigable waters of the United States, if any, on which said lowlands and marshlands border, together with beds of navigable and non-navigable creeks or streams where the same surround the aforesaid lowlands and marshlands.

Where the perimeter highland property of Kiawah Island is shown on subdivision plats of record in the R.M.C. Office, such lowland and marshland area described above shall commence at a point in the lowlands and marshlands three hundred (300') feet away from or seaward of the perimeter boundary line(s) of such tracts of highland on Kiawah Island as shown on such subdivision plats of record in the R.M.C. Office.

TOGETHER WITH any highlands, hummocks and any small islands bordered in whole or in part by the aforesaid marshland and lowland property, as lie beyond said 300' mark surrounding Kiawah Island.

SAVING AND EXCEPTING THEREFROM, however, any highlands or hummocks adjacent to and/or near Kiawah Island, and any small islands bordered in whole or in part by the aforesaid marshland and lowland property conveyed to third parties by instruments recorded in the R.M.C. Office prior to January 1, 2008.

It is the intention of KRA, L.P. to convey to the KICA only a portion of the lowlands and marshlands surrounding Kiawah Island, and certain undevelopable and isolated highlands and hummocks and small islands where the same have not been conveyed to third parties by instruments of record in the R.M.C. Office prior to January 1, 2008, subject to such permanent restrictions and limitations on use as set forth in the "form" deed attached hereto as Schedule P-7(a)(i), and incorporated herein by reference.

TMS Number: 207-00-00-002

Parcel 7 shall be conveyed by KRA, L.P. to the KICA no later than January 1, 2008, as more particularly set forth in Paragraph 16 (a) of the Development Agreement. Such conveyance shall be made by Quit-Claim deed, for a nominal consideration not to exceed One and No/100 (\$1.00) Dollar, and said deed shall be in substantially the same form and content, and subject only to the covenants, conditions, rights, easements, restrictions, and reservations as are set forth in Schedule P-7 attached hereto and incorporated herein by reference.



Parcel 8

Approximately 10 Miles of Beachfront Property
pursuant to Paragraph 16(b) of the Development Agreement

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 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.

SAVING AND EXCEPTING THEREFROM, however, so much of the above-described beachfront property having been previously conveyed by KRA, L.P. or its predecessors in title to third parties by instruments recorded in the R.M.C. Office prior to the execution hereof.

Parcel 8 shall be conveyed by KRA, L.P. to the KICA no later than January 1, 1996, as more particularly set forth in Paragraph 16(b) of the Development Agreement. Such conveyance shall be made by Quit-Claim deed, for a nominal consideration not to exceed One and No/100 (\$1.00) Dollar, and said deed shall be in substantially the same form and content, and subject only to the covenants, conditions, rights, easements, restrictions, and reservations as are set forth in Schedule P-8 attached hereto and incorporated herein by reference.

Parcel 9

Bear Island, a/k/a Little Bear Island, subject to rights of KRA, L.P.,
its successors and assigns, to replace any holes of The Ocean Course,
See paragraph 16(d) of the Development Agreement

All that certain piece, parcel or tract of land, being the far eastern end of Kiawah Island, Charleston County, South Carolina, known generally as "Bear Island" or "Little Bear Island," and shown and designated on a sketch attached hereto as Schedule P-9-("A"), which said sketch is incorporated herein by reference.

Parcel 9 shall be conveyed by KRA, L.P. to the KICA no later than January 1, 2016, as more particularly set forth in Paragraph 16(d) of the Development Agreement. Such conveyance shall be made by Quit-Claim deed, for a nominal consideration not to exceed One and No/100 (\$1.00) Dollar, and said deed shall be in substantially the same form and content, and subject only to the covenants, conditions, rights, easements, restrictions, and reservations as are set forth in Schedule P-9 attached hereto and incorporated herein by reference.

In addition to the above, that portion of Parcel 9 as is designated "area available for golf replacement" (the "Golf Replacement Area") on Schedule P-9-("A") hereto, is made subject to the following terms and conditions:

Should a portion of The Ocean Course, which is located to the southwest of Bear Island, become damaged, in whole or in part, by any future storm, natural disaster, natural change in either the channel or oceanfront or dunes, or by any other causes and there is no property available on such damaged Ocean Course site for the replacement of such holes, then, in such event, KRA, L.P., its successors or assigns, may, in its or their sole discretion, convey to the then owner of The Ocean Course property, so much of the Golf Replacement Area as may be necessary to reconstruct such golf areas of The Ocean Course as may be so damaged by such causes listed above. Should the property on Bear Island as is needed for such purposes be then titled in KICA or its successors or assigns, then such then owner, by acceptance of the deed to the Bear Island property, agrees to forthwith convey to the then owner of The Ocean Course, such lands as are so designated by KRA, L.P., its successors or assigns. The full sale consideration (other than \$1.00) shall be paid solely to KRA, L.P., its successors or assigns. It is understood and agreed that such damage from such causes may occur more than once and from time to time and this condition and conveyance requirement shall continue.

The parties agree that there are approximately 207 acres of highland located within the Bear Island parcel. Once the exact amount of highland acreage within the Bear Island parcel is determined (which such determination shall be made by KRA, L.P. at its sole expense), KRA, L.P. shall have the limited right to subdivide up to twenty (20%) percent of such highland acreage for the construction of up to eighteen (18) small cottage sites, and may convey the same as with other Kiawah Island lots, to third party purchasers. Such 20% area shall be located within the southern half of the Bear Island parcel, as delineated on Schedule P-9-("A") hereto (the aforesaid 20% of the highland acreage within the Bear Island parcel as set forth above is hereinafter referred to as the "Cottage Area"). In addition, KRA, L.P., may construct limited active recreational facilities within the Cottage Area, including, but not limited to tennis facilities, par 3 golf holes, etc. KRA, L.P. and KICA further agree that access to the Cottage Area shall be by means of private roads which will be constructed and maintained by KRA, L.P., and/or an association created by KRA, L.P., its successors and assigns, and KRA, L.P. shall have the right, in its sole discretion, to maintain title to such private access road and/or convey it to a homeowners association.

Prior to the commencement of such construction and improvement of any portion of Bear Island, KRA, L.P. shall submit to the Town of Kiawah Island for approval, a master plan for Bear Island, all in accordance with Paragraph 16(d) of the Development Agreement.

Except as provided above, Bear Island shall remain permanently in its natural state as a habitat for animals and birds; provided, however, that nothing contained herein shall prohibit KRA, L.P., and/or Kiawah property owners and their invitees (under the auspices of and/or regulations and supervision of the KICA), from entering onto such natural areas of Bear Island for camping, nature viewing, wildlife expeditions, and other similar activities. (Access may have to be by boat)

Parcel 10

Conveyance of Captain Sam's Spit pursuant to
Paragraph 16.(h) of the Development Agreement

All that certain piece, parcel or tract of land being the westernmost portion of Kiawah Island, Charleston County, S.C., lying generally south of Beachwalker Park and southwest of the "Employee Facility Tract", more particularly delineated on a plat by Southeastern Surveying, Inc., entitled "AN EXHIBIT OF CAPTAIN SAM'S SPIT AND BEACHWALKER PARK OWNED BY KIAWAH RESORT ASSOCIATES, L.P. LOCATED IN THE TOWN OF KIAWAH ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA", dated July 14, 1994, attached hereto as Exhibit "A" and incorporated herein by reference; said tract being bounded on the north by the Kiawah River, a small tract of land west of Beachwalker Park, and Beachwalker Park; on the east by property of Grantor; on the South and Southeast by the Atlantic Ocean and on the west by the Kiawah River and Captain Sam's Inlet.

Parcel 10 shall be conveyed by KRA, L.P. to the KICA no later than January 1, 2008, as more particularly set forth in Paragraph 16(h) of the Development Agreement. Such conveyance shall be made by Quit-Claim deed, for a nominal consideration not to exceed One and No/100 (\$1.00) Dollar, and said deed shall be in substantially the same form and content, and subject only to the covenants, conditions, rights, easements, restrictions, and reservations as are set forth in Schedule P-10 attached hereto and incorporated herein by reference. Such conveyance shall be made subject to specific reservations by KRA, L.P., for itself and its successors and assigns, of a non-exclusive easement for pedestrian and vehicular access, ingress and egress, and all recreational uses, including boat landing or dock uses.

KRA, L.P. reserves the right, in its sole discretion, to convey the eastern half of Parcel 10, more fully depicted on Schedule P-10(a) hereof, to Charleston County and/or the Charleston County Parks and Recreation Commission, at any time prior to January 1, 2008, pursuant to Paragraph 16.(h) of the Development Agreement. However, such conveyance shall contain a restriction that the property shall be used only for active and/or passive open space, nature study, beach recreation or parks.

Parcel 11

Cougar Island Park
{Paragraph _____}

Parcel 11 consists of no more than two (2) acres of highland located on Cougar Island at a site to be selected by KRA, L.P., its successors and assigns, which is north of The Ocean Course, and is shown on a plat by Davis & Floyd, Inc., surveyors, entitled "PLAT SHOWING EAST END KIAWAH ISLAND PROPERTY OF KIAWAH ISLAND COMPANY, LIMITED LOCATED CHARLESTON COUNTY, S.C." dated May 5, 1988, and recorded in Plat Book BS, pages 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, and 53 in the R.M.C. Office, and being a portion of the property included in the records of the Charleston County, S.C. Assessor's Office as Tax Map Number 207-00-00-015, to be provided, planned and developed by KRA, L.P., its successors and assigns, at its sole expense, as a passive park, TOGETHER with a non-exclusive easement for access, ingress and egress to and from said areas and roads owned by the KICA.

Parcel 11 shall be conveyed by KRA, L.P. to the KICA no later than March 1, 1995, together with all improvements existing thereon at the time of such conveyance, all as more particularly set forth in Paragraph _____ of the Development Agreement. Such conveyance shall be made by Quit-Claim deed, for a nominal consideration not to exceed One and No/100 (\$1.00) Dollar, and said deed shall be in substantially the same form and content, and subject only to the covenants, conditions, rights, easements, restrictions, and reservations as are set forth in Schedule P-11 attached hereto and incorporated herein by reference.

KRA, L.P. further agrees to provide five parking spaces and improve the same, at its sole expense, with coquina shell or better, prior to such conveyance.

THE ABOVE-DESCRIBED PARCELS ARE HEREINAFTER
SOMETIMES COLLECTIVELY REFERRED TO AS THE "PROPERTIES"

MORTGAGE LIEN

The Properties shall be conveyed by KRA, L.P. to the KICA either (i) free and clear of any mortgage liens or (ii) the lien of such mortgages shall be subordinated to the conveyances contemplated hereby.

COMMON PROPERTIES

The Properties described herein shall be conveyed to the KICA by quit-claim deeds, subject to the covenants, conditions, rights, easements, restrictions, provisions, and reservations set forth herein; and subject further to the condition and restriction that the Properties shall be maintained and utilized as Common Properties 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, and shall be made subject to such rights and restrictions as are applicable to Common Properties as set forth in said Declaration.

ROLLBACK TAXES

KRA, L.P. hereby represents to the KICA that it has no knowledge of any pending Roll-Back taxes assessed against the Property and agrees that in the event Roll-Back taxes are assessed against the Property, KRA, L.P. shall assume liability for their payment, and does hereby indemnify the KICA from and against payment thereof.

SURVIVAL

KICA and KRA, L.P. acknowledge and agree that the obligations set forth herein shall survive to the extent called for in paragraph 34(j) of the Development Agreement.

APPLICABLE LAW

This Agreement shall governed by the laws of the State of South Carolina.

NOTICES

Any notice, demand or other instrument or written communication required or permitted to be given, served, made or delivered hereunder may be given in such manner and to such addresses as are set forth in Paragraph 34.(h) of the Development Agreement.

SUCCESSORS AND ASSIGNS

The covenants and agreements in the within Agreement shall apply to, inure to the benefit of, and be binding upon the parties hereto, their successors and assigns, their respective successors in interest, their heirs, personal representatives and assigns.

ENTIRE AGREEMENT

This Agreement shall constitute the entire agreement between the parties hereto and neither this Agreement nor any provision thereof may be changed, waived, discharged or terminated orally, but only by an instrument in writing signed by the party against whom enforcement of the change, waiver, discharge or termination is sought.

IN WITNESS WHEREOF, Kiawah Resort Associates, L.P., has caused these presents to be executed in its name by its General Partner thereunto duly authorized, and its seal to be hereunto affixed, this 26th day of September, in the year of our Lord One Thousand Nine Hundred and Ninety-Four, in the Two Hundred and Nineteenth year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

KIAWAH RESORT ASSOCIATES, L.P.
(SEAL)

By: D&W Investments, Inc.,
a South Carolina corporation

Its: General Partner

By: Charles S. Way, Jr.
Its: President

By: Betty R. Crow
Its: Secretary

H. Trudola Waller
[Signature]

[Signature]

Page 13

[Signature]

IN WITNESS WHEREOF, the Kiawah Island Community Association, Inc. has caused these presents to be executed in its name by its officer(s) thereunto duly authorized, and its seal to be hereunto affixed, this _____ day of September, in the year of our Lord One Thousand Nine Hundred and Ninety-Four, in the Two Hundred and Nineteenth year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Anne Watson
[Signature]

KIAWAH ISLAND COMMUNITY
ASSOCIATION, INC. (SEAL)

By: [Signature]
Its: [Signature]
By: [Signature]
Its: Secretary

BUIST/BN/KRALP/DEVELOPM.COM

[Signature]

[Signature]

September 14, 1994

Schedule P-1

BK J 248PG397

Parcel 1
Rhett's Bluff Boat Landing

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

INDENTURE QUIT-CLAIM DEED

KNOW ALL MEN BY THESE PRESENTS, that Kiawah Resort Associates, L.P., (a Delaware limited partnership), (hereinafter sometimes referred to as "KRA, L.P." and/or the "Grantor"), in the State aforesaid, for/and in consideration of the sum of One and No/100 (\$1.00) Dollar, to it in hand paid at and before the sealing of these presents by the Kiawah Island Community Association, Inc., (hereinafter sometimes referred to as the "KICA" and/or the "Grantee"), in the State aforesaid, the receipt whereof is hereby acknowledged, has subject to the reservations herein, remised, released and forever quit-claimed, and by these presents does remise, release and forever quit-claim unto the said Kiawah Island Community Association, Inc., the following described property, to-wit:

All that certain piece, parcel or lot of land, together with the buildings and improvements located thereon, and associated with or extending therefrom (e.g., piers, boat access landing, etc.,) situate, lying and being in the Town of Kiawah Island, County of Charleston, State of South Carolina, known generally as the "Rhett's Bluff Boat Landing" containing 6.430 Acres, more or less, and shown and designated as "6.430 ACRES" on a plat by Southeastern Surveying, Inc., entitled "A PLAT OF A 6.430 ACRE TRACT OF LAND LOCATED IN RHETT'S BLUFF SUBDIVISION OWNED BY KIAWAH RESORT ASSOCIATES, L.P. LOCATED IN THE TOWN OF KIAWAH ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA", dated June 22, 1994, and recorded in Plat Book _____, page _____, in the R.M.C. Office for Charleston County, South Carolina, said parcel having such location, butts and bounds, metes, courses and distances as will by reference to said plat more fully appear (the highland and all improvements, whether or not depicted on the aforesaid plats, hereinafter referred to as the "Property").

TMS Number: 209-11-00-040

Address of Grantee: One Kiawah River Circle
Kiawah Island, SC 29455

This conveyance is made subject to the following:

- (a) Charleston County, S.C. ad valorem taxes for 1995, not yet due and payable, and ad valorem taxes for all subsequent years.
- (b) Title to that portion of the property, if any, lying below the mean high water mark of abutting tidal waters.

Schedule P-1, Page 1



(c) Rights reserved unto Ronald D. Royal, a/k/a Ronald David Royal, Dennison A. Royal, Alice Royal Smith, formerly Pamela Alice Royal, a/k/a Pamela Royal Smith, Michael F. Royal, Sandra Royal Olsberg and Nancy Royal Schomaker, formerly Nancy Royal Mims, and their respective assigns, and obtained through and tied to the ownership of a lot or lots subdivided from the property described in the "Saving and Excepting Also" clause found on pages 4 and 5 of the deed hereinafter referred to, to become a member of any association of Kiawah property owners or other such organization; the right of ingress and egress over any platted public and private streets, roads and ways; the right to connect and use utility and other services on the same basis as those services are offered to other lot owners on Kiawah Island and the right to use recreational facilities on the same basis as those facilities are offered to other such lot owners, said rights being more fully set forth in subparagraph "(d)" on page 5 of the deed of conveyance from Ronald D. Royal, et al., to Coastal Shores, Inc., dated February 15, 1974, and recorded in Book U103, page 265 in the R.M.C. Office.

(d) Unrecorded easements, if any, for utility lines and facilities existing at the time of the conveyance from Ronald D. Royal, et al. to Coastal Shores, Inc., dated February 15, 1974, and recorded in Book U103, page 265 in the R.M.C. Office, as set forth in paragraph "(c)" on page 7 thereof.

(e) Declaration of Rights, Restrictions, Affirmative Obligations and Conditions Applicable to All Property in Kiawah Island executed by Kiawah Island Company, Inc. dated February 19, 1976, and recorded February 19, 1976, in Book T108, page 338 in the R.M.C. Office, as from time to time may be amended by instruments of record.

(f) Declaration of Rights, Restrictions, Affirmative Obligations and Conditions Applicable to All Property in Kiawah Island executed by Kiawah Island Company Limited dated December 21, 1977, and recorded December 29, 1977, in Book M114, page 406 in the R.M.C. Office.

(g) Declaration of Covenants and Restrictions of The Kiawah Island Community Association, Inc., executed by Kiawah Island Community Association, Inc. and by Kiawah Island Company, Inc. dated February 19, 1976, and recorded February 19, 1976, in Book T108, page 337 in the R.M.C. Office as may from time to time be amended by instruments of record.

(h) Declaration of Covenants and Restrictions of The Kiawah Island Community Association, Inc. executed by Kiawah Island Community Association, Inc. and Kiawah Island Company Limited dated December 21, 1977, and recorded December 29, 1977, in Book M114, page 407 in the R.M.C. Office.

(i) Addendum to the Declaration of Covenants and Restrictions of the Kiawah Island Community Association, Inc. dated March 28, 1981, and recorded in Book O125, page 163 in the R.M.C. Office.

(j) Second Addendum to Declaration of Covenants and Restrictions of the Kiawah Island Community Association, Inc. dated July 30, 1984, and recorded August 14, 1984, in Book K139, page 58 in the R.M.C. Office.

(k) Third Addendum to Declaration of Covenants and Restrictions of the Kiawah Island Community Association, Inc., dated January 30, 1992, and recorded in Book R210, page 748 in the R.M.C. Office.

Schedule P-1, Page 2



- (l) Fourth Addendum to Declaration of Covenants and Restrictions of the Kiawah Island Community Association, Inc., dated May 20, 1994, and recorded June 3, 1994, in Book W243, page 258, in the R.M.C. Office.
- (m) First Amendment to the By-Laws of the Kiawah Island Community Association, Inc., dated January 30, 1992, and recorded in Book R210, page 759 in the R.M.C. Office.
- (n) Supplementary Declaration of Covenants and Restrictions of the Kiawah Island Community Association, Inc., and Supplementary Declaration of Rights, Restrictions, Affirmative Obligations and Conditions Applicable to All Property in Kiawah Island executed by Kiawah Island Company Limited dated March 23, 1981, and recorded March 26, 1981, in Book Z124, page 305 in the R.M.C. Office.
- (o) Second Supplementary Declaration of Covenants and Restrictions of the Kiawah Island Community Association, Inc., executed by the Kiawah Island Community Association, Inc., dated May 20, 1994, and recorded June 3, 1994, in Book W243, page 271, in the R.M.C. Office.
- (p) Assignment and Assumption of Developer's Rights and Easements executed by Kiawah Island Company Limited in favor of Kiawah Resort Associates, dated June 28, 1988, and recorded June 29, 1988 in Book Z175, page 561 in the R.M.C. Office, assigning certain rights under the aforesaid restrictions, as certain rights have been further assigned by that certain Agreement and Assignment of Rights, Restrictions, Affirmative Obligations and Conditions Applicable to All Property on Kiawah Island, SC", dated March 31, 1989, a Memorandum of which Agreement is recorded in Book F183, page 307 in the R.M.C. Office, as amended by that certain Amendment to Memorandum for Recording recorded in Book J198, page 623, and as further amended by that certain Second Amendment to Memorandum for Recording recorded in Book X204, page 601 in the R.M.C. Office.
- (q) Assignment and Assumption of Developer's Rights and Easements executed by Kiawah Resort Associates in favor of Kiawah Resort Associates, L.P., dated June 26, 1992, and recorded June 26, 1992, in Book N215, page 11, in the R.M.C. Office, assigning the rights referred to in the preceding subparagraph to Kiawah Resort Associates, L.P.
- (r) Declaration of Special Covenants and Restrictions (Non-Competition) executed by KRA, dated March 31, 1989, and recorded in Book E183, page 345 in the R.M.C. Office, as amended by instrument dated May 10, 1989, and recorded in Book H184, page 338 in said R.M.C. Office, and as further amended by instrument September 8, 1989, and recorded in Book M191, page 671 in said R.M.C. Office.
- (s) Agreement entered into by and between Kiawah Resort Associates and Edgar A. Buck and Margaret B. Buck dated February 10, 1989, and recorded in Book W181, page 643 in the R.M.C. Office.
- (t) Declaration of Special Covenants and Restrictions (Bass Pond), declared by Kiawah Resort Associates, dated March 31, 1989, and recorded in Book E183, page 411 in the R.M.C. Office.
- (u) Non-Exclusive Easement for Access, Ingress and Egress and for Effluent Lines executed by Kiawah Resort Associates in favor of Landmark Land Company of Carolina, Inc., dated March 31, 1989, and recorded March 31, 1989, in Book E183, page 138 in the R.M.C. Office.

Schedule P-1, Page 3

(v) Agreement by and between St. John's Water Company, Inc. and Kiawah Island Utility, Inc., dated April 12, 1978, and recorded in Book O121, page 365, in the R.M.C. Office.

(w) Any lawful, constitutional interest in either the State of South Carolina or Federal Government created, or limitations on use imposed, by the Federal Coastal Management Act or other Federal law or by S. C. Code Sections 48-39-10 through 48-39-220, as amended, and Sections 48-39-250 through 48-39-360, as amended, or any regulations promulgated pursuant to said State or Federal laws, inclusive of the DHEC - Office of Ocean and Coastal Resource Management, and U. S. Army Corps of Engineers regulations, and such rights as the public may enjoy to the use of property lying below the mean high water mark.

(x) Easements, construction/improvement setbacks and other building/use criteria as shown on the aforesaid plat recorded in Plat Book _____, at page _____, in the R.M.C. Office.

(y) Memorandum of Utility Service Agreement executed by and between Kiawah Resort Associates, L.P. and Kiawah Island Utility, Inc., dated July 29, 1994, and recorded in Book _____, page _____, in the R.M.C. Office.

(z) This conveyance is made subject to the express covenant, condition and restriction that the Property shall be used only as a private Kiawah Island community boat landing with related facilities, for the use of Kiawah Island property owners and others as either allowed for or reserved herein or by KICA, its successors and assigns, and the Property shall be maintained and utilized as a Common Property as defined in the aforesaid Declaration recorded in Book M114, page 407 in the R.M.C. Office, as amended, and is subject to such rights and restrictions as are applicable to Common Properties as set forth in said Declaration.

Notwithstanding any other provision hereof, there is hereby reserved unto the Grantor, for itself and its invitees, successors, successors in title and assigns, the non-exclusive, perpetual, permanent, assignable, transmissible and commercial right and easement, in perpetuity, to use and reserve the Rhett's Bluff Boat Landing (i.e., the Property), including all improvements thereon, without charge, for parties, special events, and other similar functions, and for fishing, boating, crabbing, etc. Grantor, its successors and assigns, shall be fully responsible for the preparation and cleanup of the site and for payment for all KICA security, cleanup and other expenses (including all repairs) as may be generated as a result of Grantor's such usage. Grantor's party usage shall be limited to 15 days per year, and Grantor, its successors and assigns, shall give KICA reasonable written notice of its desire to reserve such usage; these party usage rights shall be further limited, as a matter of right, to periods of no more than two consecutive days.

The non-exclusive usage rights and easements herein reserved shall be for the benefit of Grantor, its invitees, successors, successors in title and assigns, shall be and are hereby deemed to be integral to, inhering in and essential to Grantor's commercial purposes as developer of Kiawah Island and/or the "Company" under the Kiawah Island Covenants, are enforceable only by Grantor, its successors as such developer or the "Company" under the Kiawah Island Covenants, and its assigns, or its designee, and shall benefit and run with the title to the Grantor's remaining properties on Kiawah Island, S.C. (including but not limited to its Sales Center Property on the Kiawah Island Parkway and Cougar Island).

Schedule P-1, Page 4



EXHIBIT B

Parcel 8

Approximately 10 Miles of Beachfront Property

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON) QUIT-CLAIM DEED

KNOW ALL MEN BY THESE PRESENTS, that Kiawah Resort Associates, L.P., (a Delaware limited partnership), (hereinafter sometimes referred to as "KRA, L.P." and/or the "Grantor"), in the State aforesaid, for/and in consideration of the sum of One and No/100 (\$1.00) Dollar, to it in hand paid at and before the sealing of these presents by the Kiawah Island Community Association, Inc., (hereinafter sometimes referred to as the "KICA" and/or the "Grantee"), in the State aforesaid, the receipt whereof is hereby acknowledged, has remised, released and forever quit-claimed, and by these presents does remise, release and forever quit-claim unto the said Kiawah Island Community Association, Inc., all of its right, title and interest, of, in and to the following described property, to-wit:

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 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.

SAVING AND EXCEPTING THEREFROM, however, so much of the above-described beachfront property having been previously conveyed to third parties by instruments recorded in the R.M.C. Office prior to the execution and recordation hereof.

(The above-described property is hereinafter referred to as the "Property")

TMS Number:

029
207-00-00-002

Address of Grantee:

One Kiawah River Circle
Kiawah Island, SC 29455

This conveyance is made subject to all applicable covenants, conditions, restrictions and easements of record as of September 16, 1994, the date of the Development Agreement executed by and between Kiawah Resort Associates, L.P., and the Town of Kiawah Island, and all applicable governmental and zoning ordinances and regulations.

This conveyance is made subject further 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 Common Properties as set forth in said KICA Covenants.

Notwithstanding any other provision hereof, there is hereby reserved unto the Grantor, for itself and its invitees, successors, subsidiaries, successors in title and assigns, a non-exclusive, perpetual, permanent, assignable, transmissible, and commercial right and easement for ingress and egress, for the construction and maintenance of permitted walkways, boardwalks, and gazebos, and to use the Property for other lawful purposes.

Further reserving unto the Grantor, for itself, its invitees, successors, subsidiaries, successors-in-title and assigns, a non-exclusive, perpetual, permanent, assignable, transmissible, and commercial right and easement for access, ingress and egress for the installation and maintenance of utilities and for all other necessary, useful, or convenient utility purposes and activities of every kind and description, over, upon, across, and under, the Property, which said easement is necessary for Grantor's commercial purposes as developer of Kiawah Island, and those of its successors, assigns, and subsidiaries.

Nothing herein is intended to lessen or curtail any other rights or privileges as Grantor may enjoy, either as a Kiawah property owner or the Company, under any of the recorded Kiawah covenants, including rights or easements to use and enjoy Common Property and allowing guests or others to do so.

Portions of the Property hereby conveyed may be located in part seaward of the interim Setback Line as established by the South Carolina Coastal Council (n/k/a DHEC - Office of Ocean and Coastal Resource Management) as of January 20, 1989, and South Carolina Code Sections 48-39-270 through 48-39-360, as amended, effective July 1, 1988 (the "Beach Protection Act"). The following information concerning the location and circumstances of the Property is hereby disclosed:

The proximity and location of the interim Setback Line and the Interim Baseline areas are shown on plats of record in the R.M.C. Office for Charleston County, South Carolina. There are no habitable structures on the Property seaward of the setback line. The most recently published annual erosion rate for the Property is not set forth herein because the Property shown on such plats has over the 40 year period prior to July 1, 1988, been determined to not have an erosion rate. Reference must be had to the Beach Protection Act itself regarding the significance of these disclosures as well as the potential for movement and relocation of the lines in the future.

This is a portion of the property conveyed to the Grantor herein by deed of conveyance of Kiawah Resort Associates, a South Carolina joint venture, dated June 26, 1992, and recorded in Book L215, page 486 in the R.M.C. Office.

TOGETHER with, all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned unto the said Kiawah Island Community Association, Inc., its successors and assigns, forever.

IN WITNESS WHEREOF, Kiawah Resort Associates, L.P., has caused these presents to be executed in its name by its General Partner thereunto duly authorized, and its seal to be hereunto affixed, this 29th day of December, in the year of our Lord One Thousand Nine Hundred and Ninety-Five, and in the Two Hundred and Nineteenth year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

KIAWAH RESORT ASSOCIATES, L.P.
(SEAL)

By: D&W Investments, Inc.,
a South Carolina corporation

(CORP. SEAL)

Its: General Partner

By: Charles S. Way, Jr.
Charles S. Way, Jr.

Its: President

By: Betty R. Crow
Betty R. Crow
Its: Secretary

Rinda M. Badiali

Elizabeth J. Duxons

[illegible]

Sworn to before me this
29th day of December, 1995.

Linda M. Badiali (SEAL)
Notary Public for South Carolina
My commission expires: 5-24-2004

Elizabeth J. Sumner

BUIST/BN/KRALP/TOWN/PARCEL8:DED

Page 4

RETURN TO
THOMAS G. DUIST
P.O. BOX 316
29402

6X N 265PG410

Y/Chair
10.12.15

FILED

FILED Verified
CTRL # 12
Int 11B
2-20-96

N265-406
96 FEB 20 PM 4:38
CHIEF OF POLICE
CHARLESTON COUNTY SC

(AFF)

TH
2-23-96

Recorded this 20 day of Feb Year 96
On Property Record Card
Roger A. Mosley
Auditor Charleston County

EXHIBIT C

BK Y285PG763

Re-Recorded
BK 0 288PG790
I/T

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) CONFIRMATORY QUIT-CLAIM DEED
(3.054 Acre "Beachfront Parcel" on Sea Forest Drive
Town of Kiawah Island, S.C.)

WHEREAS, Kiawah Resort Associates, L.P. (a Delaware limited partnership hereinafter sometimes referred to as "KRA, L.P." and/or the "Grantee") and the Town of Kiawah Island entered into that certain Development Agreement in connection with the development of Kiawah Island, S.C., which agreement is dated as of September 26, 1994, and recorded September 30, 1994, in Book J248, page 1, in the R.M.C. Office for Charleston County, S.C., as amended (the "Development Agreement"); and

WHEREAS, pursuant to the provisions of Section 16.b. of the Development Agreement, KRA, L.P. conveyed several miles of beachfront property on Kiawah Island, Charleston County, S.C., to the Kiawah Island Community Association, Inc. (hereinafter sometimes referred to as the "KICA" and/or the "Grantor") by Quit-Claim Deed dated the 29th day of December, 1995, and recorded in Book N265, page 406, in said R.M.C. Office (the "Beachfront Deed"); and

WHEREAS, the property conveyed by the Beachfront Deed was not shown in its entirety on plats of record, thus requiring that the legal description of the property conveyed be described generally as an area extending from a specific point located at the western end of Kiawah Island to a point located at the eastern end thereof, generally between 200' and 300' in width, extending from the seaward boundary lines of "most beachfront residential, resort and commercial properties on Kiawah Island as shown on plats of record" in said R.M.C. Office, to the mean high water mark of the Atlantic Ocean; and

WHEREAS, it has come to the attention of KRA, L.P. that at the time of said conveyance, there was no plat of record which would establish the seaward boundary line of an approximately 3.054 acre beachfront parcel located south of the easternmost terminus of Sea Forest Drive on Kiawah Island, east of Windswept Villas, and west of the "Center Island Hotel Tract;" and

WHEREAS, KRA, L.P. has now obtained a plat of survey dated March 11, 1997, which establishes the southern or seaward boundary line of the said 3.054 acre beachfront parcel, which plat was prepared by Southeastern Surveying, Inc., has been duly approved by the proper governmental authorities, and is recorded in Plat Book EB, at page 679, in said R.M.C. Office, and the said 3.054 acre beachfront parcel is more particularly described according to said plat in the legal description thereof set forth on Exhibit "A" attached hereto and incorporated herein by reference (the "Property"); and

WHEREAS, 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; and

WHEREAS, KICA is minded to execute and deliver the within Confirmatory Quit-Claim Deed to the said KRA, L.P. in order to (i) avoid any possible future question or concern regarding the title to the Property being presently vested in KRA, L.P.; and (ii) remove any question as may have arisen by the unintended possible inclusion of the Property or some portion thereof in the legal description in the Beachfront Deed; and

Page 1

**This deed is being re-recorded to add the Tract designation (Tract "F") and correct the name of the plat in the Property Description on Exhibit "A".

BK

Y285PG764

Re-Recorded
BK 0 288PG791

WHEREAS, at a duly called meeting of the Board of Directors of the Kiawah Island Community Association, Inc., held the 27th day of May, 1997, it was unanimously resolved that the execution and delivery of the within Confirmatory Quit-Claim Deed is an administrative function of such corporation to clarify an ambiguity created by the language contained in the Beachfront Deed, and pursuant to the powers and authority vested in said Board of Directors under the Declaration of Covenants and Restrictions of the KICA recorded in Book M114, page 407, in the R.M.C. Office, as amended (the "KICA Covenants"), Eric H. Nielsen, its President, and Nicholas Mihalas, its Secretary, were authorized and directed to execute the same on behalf of the corporation,

NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that KIAWAH ISLAND COMMUNITY ASSOCIATION, INC., by and through its undersigned officers thereunto duly authorized, in the State aforesaid, for and in consideration of the Premises and the sum of One and No/100 (\$1.00) Dollar, to it in hand paid at and before the sealing of these presents by KIAWAH RESORT ASSOCIATES, L.P., in the State aforesaid, the receipt whereof is hereby acknowledged, has remised, released, and forever quit-claimed, and by these presents does remise, release and forever quit-claim unto the said KIAWAH RESORT ASSOCIATES, L.P., all of its right, title and interest of, in and to the below described property, to-wit:

SEE ATTACHED EXHIBIT "A" FOR PROPERTY DESCRIPTION
OF THE 3.054 ACRE BEACHFRONT PARCEL
(hereinafter sometimes referred to as the "Property")

This conveyance is made subject to any and all applicable covenants, conditions, restrictions, and easements of record.

TMS Number: 209-07-00-126
Tax District: 5-4

Address of Grantee: Post Office Box 12001
Charleston, SC 29422

AND 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 and 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.

TOGETHER with, all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned unto the said KIAWAH RESORT ASSOCIATES, L.P., its successors and assigns, forever.

Kiawah Resort Associates, L.P. has joined in the execution of the within Confirmatory Quit-Claim Deed to evidence of record its consent and agreement to said deed and the terms, provisions, and conditions set forth herein.

BK Y285PG765

BK Re-recorded
0 288PG792

IN WITNESS WHEREOF, the Kiawah Island Community Association, Inc. has caused these presents to be executed in its name by its officer(s) thereunto duly authorized, and its seal to be hereunto affixed, this 23 day of June, in the year of our Lord One Thousand Nine Hundred and Ninety-Seven, in the Two Hundred and Twenty-First year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

[Signature]
[Signature]
[Signature]

KIAWAH ISLAND COMMUNITY
ASSOCIATION, INC. (SEAL)

By: [Signature]
Eric H. Nielsen
Its: President
By: [Signature]
Nicholas Mihalas
Its: Secretary

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

THE FOREGOING INSTRUMENT was acknowledged before me by the Kiawah Island Community Association, Inc., by Eric H. Nielsen, its President, this 23rd day of June, 1997.

[Signature] (SEAL)
Notary Public for South Carolina
My commission expires: 8-8-99

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

THE FOREGOING INSTRUMENT was acknowledged before me by the Kiawah Island Community Association, Inc., by Nicholas Mihalas, its Secretary, this 23rd day of June, 1997.

[Signature] (SEAL)
Notary Public for South Carolina
My commission expires: 8-8-99

BK Y285PG766 Re-Recorded
BK 0 288PG793

IN WITNESS WHEREOF, Kiawah Resort Associates, L.P., has caused these presents to be executed in its name by its General Partner thereunto duly authorized and its seal to be hereunto affixed, this 15th day of April, in the year of our Lord One Thousand Nine Hundred and Ninety-Seven, in the Two Hundred and Twenty-First year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

KIAWAH RESORT ASSOCIATES, L.P.
(SEAL)

By: D&W Investments, Inc.,
a South Carolina corporation
(CORP. SEAL)

Its: General Partner

By: Charles P. Darby, III
Charles P. Darby, III
Its: President

Allison L. Bell
Dean C. Bryant

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

THE FOREGOING INSTRUMENT was acknowledged before me by Kiawah Resort Associates, L.P., by D&W Investments, Inc., a South Carolina corporation, its General Partner, by Charles P. Darby, III, its President, this 15th day of April, 1997.

Dean C. Bryant (SEAL)
Notary Public for South Carolina
My commission expires: 8-8-99

efn/wpdocs/town/4acreded.lev

Re-Recorded
BK 0 288PG794

BK Y285PG767

Exhibit "A"

Description of 3.054 Acre Tract

*as Tract "F" All that certain piece, parcel or tract of land situate, lying and being in the Town of Kiawah Island, Charleston County, State aforesaid, containing 3.054 acres, more or less, and shown on a plat prepared by Southeastern Surveying, Inc., entitled "A BOUNDARY PLAT OF TRACT F BEING 3.054 ACRES OWNED BY KIAWAH RESORT ASSOCIATES, L.P. LOCATED IN THE TOWN OF KIAWAH ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA" dated March 11, 1997, and recorded in Plat Book EB, at page 679, in the R.M.C. Office for Charleston County, S.C., said property having such location, butts and bounds, metes, courses and distances as will by reference to said plat more fully appear.

Re-Recorded
BK 0 288PG795

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

BK Y285PG768
CONFIRMATORY
(Confirmatory Quit-Claim Deed)

WHEREAS, Kiawah Resort Associates, L.P. (a Delaware limited partnership hereinafter sometimes referred to as "KRA, L.P.") and the Town of Kiawah Island (the "Town") entered into that certain Development Agreement in connection with the development of Kiawah Island, S.C., which agreement is dated as of September 26, 1994, and recorded September 30, 1994, in Book J248, page 1, in the R.M.C. Office for Charleston County, S.C., (the "R.M.C. Office"), as amended (the "Development Agreement"); and

WHEREAS, pursuant to the provisions of Section 16.b. of the Development Agreement, KRA, L.P. attempted to convey approximately 10 miles of beachfront property on Kiawah Island, Charleston County, S.C., to the Kiawah Island Community Association, Inc. ("KICA") by Quit-Claim Deed dated the 29th day of December, 1995, and recorded in Book N265, page 406, in the R.M.C. Office (the "Beachfront Deed"); and

WHEREAS, (i) the 10 mile beachfront strip to be conveyed to KICA by the Beachfront Deed was not shown on a plat of record; (ii) certain of the properties landward of the beachfront strip to be conveyed were either shown on numerous plats of record or were not platted at all; and (iii) the seaward boundary lines of certain parcels as shown on plats of record is the mean high water mark of the Atlantic Ocean, thereby creating an uncertainty as to exactly what property was conveyed to KICA by the Beachfront Deed, and what property was retained by KRA, L.P.; and

WHEREAS, KRA, L.P. is the owner of a 3.054 acre beachfront parcel located south of the easternmost terminus of Sea Forest Drive on Kiawah Island, east of Windswept Villas, and west of the "Center Island Hotel Tract," which 3.054 acre tract is more particularly described on Exhibit "A" on the attached Confirmatory Quit-Claim Deed from KICA to KRA, L.P. (the "3.054 Acre Tract") but which parcel was not shown on a plat of record in the R.M.C. Office at the time of recordation of the Beachfront Deed,

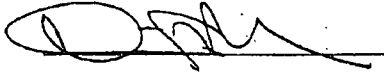
NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that after a careful review of the Development Agreement; and due consideration and consultation by and among the Mayor, Council members, and legal representatives of the Town, the Town of Kiawah Island, as a party to the Development Agreement, is minded to execute the within Consent to evidence of record its acknowledgment that the 3.054 Acre Tract as shown on a plat by Southeastern Surveying, Inc., recorded in Plat Book EB, at page 679, in the R.M.C. Office, and more particularly described on Exhibit "A" to the attached Confirmatory Quit-Claim Deed from KICA to KRA, L.P. never was intended to be included in the Beachfront Deed; and to consent to the execution, delivery, and recordation of the said Confirmatory Quit-Claim Deed by KICA to KRA, L.P. as a confirmatory action, which shall not be construed as contrary to or in violation of the terms and provisions of Paragraph 16.b. of the Development Agreement.

BK Y285PG769

Re-recorded
BK 0 288PG796

IN WITNESS WHEREOF, the Town of Kiawah Island has caused these presents to be executed
this 21st day of April, 1997.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:



TOWN OF KIAWAH ISLAND
(CORP. SEAL)

By:

Ralph A. Magnotti
Ralph A. Magnotti, Mayor

Attest:

Rita Moran
Clerk of Council

OK Y285P6770

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

AFFIDAVIT

Re-Recorded
OK 0 288P6797

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. Certain property located within the Town of Kiawah Island, Charleston County, S.C., being a 3.054 acre tract of land, bearing Charleston County Assessor's Office TMS #209-07-00-126, was transferred by Kiawah Island Community Association, Inc. to Kiawah Resort Associates, L.P. by Confirmatory Quit-Claim Deed dated April 15, 1997.

2. The transaction was (Check One):

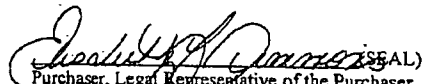
_____ an arm's length real property transaction and the sales price paid or to be paid in money or money's worth was a nominal consideration of Five and No/100 (\$5.00) Dollars, as the conveyance is a transfer of roads and other related facilities.

_____ not an arm's length real property transaction and the fair market value of the property is \$ _____

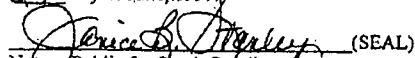
XX The above transaction is exempt, or partially exempt from the recording fee as set forth in S.C. Code Ann. Section 12-24-10, et seq. because said transaction is a Confirmatory Quit-Claim Deed, and meets the requirements of Exemption #14.

As requested by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as Legal Planning Assistant for the Grantee, Kiawah Resort Associates, L.P.

I further understand that a person required to furnish this affidavit who wilfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.


Purchaser, Legal Representative of the Purchaser,
or other Responsible Person connected with the
transaction.

Sworn to before me this
24 day of June, 1997.


Notary Public for South Carolina (SEAL)
My commission expires: 08-01-05

Return to:

BK Y285PG771

Elisabeth F. Nimmons
Legal Planning Assistant
Kiawah Resort Associates, L.P.
Post Office Box 419
Charleston, SC 29402

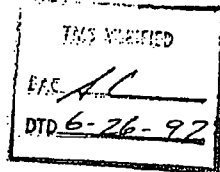
FILED

Y285-763
97 JUN 24 PM 2:25

CHARLIE LYBRAND
REGISTER
CHARLESTON COUNTY SC

Recording Fee 14.00
State Fee
County Fee
Postage
TOTAL 14.00
conf.
EXEMPT
A

del I Re-recorded
BK 0 288PG798



Recorded this 24 day of Jun Year 97
On Property Record Card

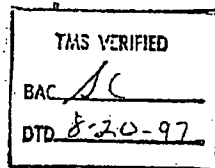
Reggie A Mosley
Auditor Charleston County

Re-Recording Fee 14.00
State Fee
County Fee
Postage
TOTAL 14.00
EXEMPT
C

Re-Recorded
FILED

0288-790
97 AUG 15 PM 4:01

CHARLIE LYBRAND
REGISTER
CHARLESTON COUNTY SC



Recorded this 15 day of Aug Year 97
On Property Record Card

Reggie A Mosley
Auditor Charleston County

COLUMBIA, SOUTH CAROLINA
CHARLESTON, SOUTH CAROLINA
CHARLOTTE, NORTH CAROLINA

HARVEY & VALLINI, LLC

ATTORNEYS AND COUNSELLORS AT LAW

487 BRAMSON COURT, SUITE 201
MT. PLEASANT, SC 29464-4224

PHONE: (843) 385-8882 FAX: (843) 385-8884
WWW.HVLAWS.COM

LAKE CAROLINA, SOUTH CAROLINA
LEXINGTON, SOUTH CAROLINA
SUMMERVILLE, SOUTH CAROLINA

LISTING AGENT WORKSHEET

TO: Gary Short, Keller-Williams VIA EMAIL: gshort@palmettost.com

DATE: 11/14/2013

FROM: Christina M. Douglas EXT. NO.: 1608

RE: 1412 Clancy Rd., Mt. Pleasant, SC 29466 (Lot 57; PH 3; Waverly; Hamlin Plantation; Chas. Co.)

OUR FILE NO.: 13-55635MTP

Closing Scheduled for 12/5/13 at 10AM in our MT PLEASANT Office

INFORMATION NEEDED FOR CLOSING:

Seller(s) Name: 1. Frank Murphy SSN: 059-40-0998

2. Debbie Murphy SSN: 073-54-0805

***Please list any name variations used in the last 10 years (ie: full middle name, maiden name, etc.)

Forwarding/New Address: 3740 Hobcreek Circle Mt. Pleasant, SC 29466

Seller(s) Phone #'s and/or Email: (803) 457-2719 (cell) - frank-rm@comcast.net

IF SELLER(S) IS (ARE) OUT OF STATE RESIDENT(S)

WILL SELLER(S) FILE SC Income Tax Return for current year? (Year of sale of property) _____

WHAT GAIN (IF ANY) WILL BE REPORTED ON SC DOR-2957 NO Gain

WILL SELLER(S) ATTEND CLOSING? NO If No: POA or remote document delivery? POA

1. Payoff Mortgage #1: Company: Ocean Loan Services LLC
Acct No.: 714024 0768 Phone #: 800-746-2936

2. Payoff Mortgage #2: Company: _____
Acct No.: _____ Phone #: _____

Commission: Selling Co. 2.5 % Listing Co. 2.5 %

Homeowners Assoc: N/A Phone #: _____

Home Warranty Co.: N/A Amount: \$ _____

Please provide Warranty prior to closing as most lenders now require it them up front

ADDITIONAL COMMENTS:

PLEASE RETURN WITHIN 48 HOURS OF RECEIPT

cc: [unclear]

EXHIBIT D

BK Y285PG772

Re-Recorded
BK 0 288PG799
I/T

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
CORRECTIVE
AND
CONFIRMATORY DEED

WHEREAS, Kiawah Resort Associates, L.P. (a Delaware limited partnership hereinafter sometimes referred to as "KRA, L.P." and/or the "Grantor") and the Town of Kiawah Island entered into that certain Development Agreement in connection with the development of Kiawah Island, S.C., which agreement is dated as of September 26, 1994, and recorded September 30, 1994, in Book J248, page 1, in the R.M.C. Office for Charleston County, S.C., (the "R.M.C. Office"), as amended (the "Development Agreement"); and

WHEREAS, pursuant to the provisions of Section 16.b. of the Development Agreement, KRA, L.P. conveyed approximately 10 miles of beachfront property on Kiawah Island, Charleston County, S.C., to the Kiawah Island Community Association, Inc. (hereinafter sometimes referred to as the "KICA" and/or the "Grantee") by Quit-Claim Deed dated the 29th day of December, 1995, and recorded in Book N265, page 406, in the R.M.C. Office (the "Beachfront Deed"); and

WHEREAS, the property conveyed by the Beachfront Deed was not separately platted. Accordingly, the property description was recited generally as an area extending from a specific point located at the western end of Kiawah Island to a point located at the eastern end thereof, generally between 200' and 300' wide, extending 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; and

WHEREAS, it has come to the attention of KRA, L.P. that at the time of said conveyance, there was no plat of record which would establish the seaward boundary line of an approximately 3.054 acre beachfront parcel located south of the easternmost terminus of Sea Forest Drive on Kiawah Island, east of Windswept Villas, and west of the "Center Island Hotel Tract," which 3.054 acre tract is more particularly described on Exhibit "A" attached hereto and incorporated herein by reference (the "3.054 Acre Tract;") and

WHEREAS, KRA, L.P., the Town of Kiawah Island, and KICA did not intend to include any portion of the 3.054 Acre Tract in the Beachfront Deed; and

WHEREAS, in order to avoid any possible future title questions or concerns with regard to the 3.054 Acre Tract, KRA, L.P. has heretofore obtained a plat of survey which establishes the southern or seaward boundary line thereof, which plat has been duly approved by the proper governmental authorities, and is recorded in Plat Book EB, at page 679, in the R.M.C. Office; and

WHEREAS, KRA, L.P. is minded to execute and deliver the within Corrective and Confirmatory Deed to clarify and confirm the description of the beachfront property seaward of the 3.043 Acre Tract which was conveyed to KICA by the aforesaid Beachfront Deed,

**This deed is being re-recorded to (i) reflect the correct TMS Number; and (ii) add the Tract designation (Tract "F") and correct the name of the plat in the Property Description on Exhibit "A".

Page 1

NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that KIAWAH RESORT ASSOCIATES, L.P., in the State aforesaid, for/and in consideration of the Premises and the sum of One and No/100 (\$1.00) Dollar, to it in hand paid at and before the sealing of these presents by KIAWAH ISLAND COMMUNITY ASSOCIATION, INC., in the State aforesaid, the receipt whereof is hereby acknowledged, has remised, released, and forever quit-claimed, and by these presents does remise, release and forever quit-claim unto the said KIAWAH ISLAND COMMUNITY ASSOCIATION, INC., all of its right, title and interest of, in and to the below described property, to-wit:

SEE ATTACHED EXHIBIT "B" FOR PROPERTY DESCRIPTION
OF BEACHFRONT PROPERTY SEAWARD OF THE 3.054 ACRE TRACT

(hereinafter sometimes referred to as the "Property")

TMS Number: 207-00-00-029
Tax District: 5-4
Address of Grantee: 23 Beachwalker Drive
Kiawah Island, SC 29455

This conveyance is made subject to any and all applicable covenants, conditions, restrictions, and easements of record as of September 16, 1994, the date of the Development Agreement, as amended, and all applicable governmental and zoning ordinances and regulations.

This conveyance is made subject further 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 Common Properties as set forth in the KICA Covenants.

Notwithstanding any other provision hereof, there is hereby reserved unto the Grantor, for itself and its invitees, successors, subsidiaries, successors-in-title, and assigns, a non-exclusive assignable, transmissible, and commercial right and easement for ingress and egress, for the construction and maintenance of permitted walkways, boardwalks, and gazebos, and to use the Property for other lawful purposes.

Further reserving unto the Grantor, for itself, its invitees, successors, subsidiaries, successors-in-title, and assigns, a non-exclusive, assignable, transmissible, and commercial right and easement for access, ingress, and egress for the installation and maintenance of all utilities, and for all other necessary, useful, or convenient utility purposes and activities of every kind and description over, upon, across, and under the Property, which easement is necessary for Grantor's commercial purposes as developer of Kiawah Island, S.C., and those of its successors, assigns, and subsidiaries.

Nothing herein is intended to lessen or curtail any other rights or privileges as Grantor may enjoy, either as a Kiawah property owner or the Company under any of the recorded Kiawah covenants, including rights or easements to use and enjoy Common Property and allowing guests or others to do so.

By the execution and recordation of the within Corrective and Confirmatory Deed, KRA, L.P. does hereby declare and confirm that (i) the 3.054 Acre Tract was not, nor was it ever intended to be included in the Beachfront Deed; (ii) that any and all reservations, limitations or restrictions purportedly imposed or inferred on the 3.054 Acre Tract by, through, or under the Beachfront Deed are hereby declared null, void, and of no further force and effect; and (iii) that no portion of the 3.054 Acre Tract is, or ever was intended to be maintained and utilized as a "Common Property" as defined in the KICA Covenants.

Re-recorded
BK 0 288PG801

Portions of the Property hereby conveyed may be located in part seaward of the interim Setback Line as established by the South Carolina Coastal Council (n/k/a DHEC - Office of Ocean and Coastal Resource Management) as of January 20, 1989, and South Carolina Code Sections 48-39-270 through 48-39-360, as amended, effective July 1, 1977 (the "Beach Protection Act"). The following information concerning the location and circumstances of the Property is hereby disclosed:

The proximity and location of the interim Setback Line and the Interim Baseline areas are shown on plats of record in the R.M.C. Office. There are no habitable structures on the Property seaward of the setback line. The most recently published annual erosion rate for the Property is not set forth herein because the Property shown on such plats has over the 40 year period prior to July 1, 1988, been determined to not have an erosion rate. Reference must be had to the Beach Protection Act itself regarding the significance of these disclosures as well as the potential for movement and relocation of the lines in the future.

This is a portion of the property conveyed to the Grantor herein by deed of conveyance of Kiawah Resort Associates, a South Carolina joint venture, dated June 26, 1992, and recorded in Book L215, page 486, in the R.M.C. Office, and a portion of the property conveyed by KRA, L.P. to KICA by the Beachfront Deed.

TOGETHER with, all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned unto the said KIAWAH ISLAND COMMUNITY ASSOCIATION, INC., its successors and assigns, forever.

IN WITNESS WHEREOF, Kiawah Resort Associates, L.P., has caused these presents to be executed in its name by its General Partner thereunto duly authorized and its seal to be hereunto affixed, this 15th day of April, in the year of our Lord One Thousand Nine Hundred and Ninety-Seven, in the Two Hundred and Twenty-First year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Allison L. Beale
Prison C. Pappat

KIAWAH RESORT ASSOCIATES, L.P.
(SEAL)

By: D&W Investments, Inc.,
a South Carolina corporation

(CORP. SEAL)

Its: General Partner

By: Charles P. Darby, III
Charles P. Darby, III

Its: President

BK Y285PG775

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Re-Recorded
BK 0 288PG802

THE FOREGOING INSTRUMENT was acknowledged before me by Kiawah Resort Associates, L.P., by D&W Investments, Inc., a South Carolina corporation, its General Partner, by Charles P. Darby, III, its President, this 15th day of April, 1997.

Dean C. Bryant (SEAL)
Notary Public for South Carolina
My commission expires: 8-8-99

Page 4

BK Y285PG776

Exhibit "A"

Re-recorded
BK 0 288PG803

Description of 3.054 Acre Tract

*as Tract "F" All that certain piece, parcel or tract of land situate, lying and being in the Town of Kiawah Island, Charleston County, State aforesaid, containing 3.054 acres, more or less, and shown on a plat prepared by Southeastern Surveying, Inc., entitled "A BOUNDARY PLAT OF TRACT F BEING 3.054 ACRES OWNED BY KIAWAH RESORT ASSOCIATES, L.P. LOCATED IN THE TOWN OF KIAWAH ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA" dated March 11, 1997, and recorded in Plat Book EB, at page 679, in the R.M.C. Office for Charleston County, S.C., said property having such location, butts and bounds, metes, courses and distances as will by reference to said plat more fully appear. #11

BK Y285PG777

Exhibit "B"

Re-recorded

The "Property"

BK 0 288PG804

All that certain piece, parcel or tract of land situate, lying and being in the Town of Kiawah Island, Charleston County, State aforesaid, lying within an area having as its western boundary, an imaginary line being the southerly extension of the westernmost property line of the 3.054 Acre Tract (as shown on a plat prepared by Southeastern Surveying, Inc., dated March 11, 1997, and recorded in Plat Book EB, at page 679, in the R.M.C. Office), and as its eastern boundary, an imaginary line being the southerly extension of the easternmost property line of the 3.054 Acre Tract, to the mean high water mark of the Atlantic Ocean, as the same may vary from time to time.

Page 6

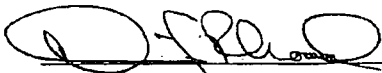
BK Y285PG779

Re-Recorded

BK 0 288PG806

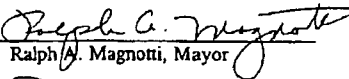
IN WITNESS WHEREOF, the Town of Kiawah Island has caused these presents to be executed
this 29 day of April, 1997.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

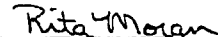


TOWN OF KIAWAH ISLAND
(CORP. SEAL)

By:


Ralph A. Magnotti, Mayor

Attest:


Clerk of Council

BK Y285PG780

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

AFFIDAVIT

Re-Recorded
BK 0 288PG807

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. Certain property located within the Town of Kiawah Island, Charleston County, S.C., consisting of the beach area seaward of a 3.054 acre tract of land, being a portion of TMS 207-00-00-029, was transferred by Kiawah Resort Associates, L.P. to the Kiawah Island Community Association, Inc. by Corrective and Confirmatory Deed dated April 15, 1997.

2. The transaction was (Check One):

_____ an arm's length real property transaction and the sales price paid or to be paid in money or money's worth was a nominal consideration of Five and No/100 (\$5.00) Dollars, as the conveyance is a transfer of roads and other related facilities.

_____ not an arm's length real property transaction and the fair market value of the property is \$ _____

XX The above transaction is exempt, or partially exempt from the recording fee as set forth in S.C. Code Ann. Section 12-24-10, et seq. because said transaction is a corrective and confirmatory conveyance and meets the requirements of Exemption #14.

As requested by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as Legal Planning Assistant for the Grantor, Kiawah Resort Associates, L.P.

I further understand that a person required to furnish this affidavit who wilfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

Joseph J. Amerson (SEAL)
Purchaser, Legal Representative of the
Purchaser, or other Responsible Person
connected with the transaction.

Sworn to before me this
24 day of June, 1997.

Janice B. Hardy (SEAL)
Notary Public for South Carolina

My commission expires: 08-01-05

BK Y285PG781

Return to:

Elisabeth F. Nimmons
Legal Planning Assistant
Kiawah Resort Associates, L.P.
Post Office Box 419
Charleston, SC 29402

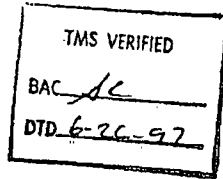
FILED

Y285-772
97 JUN 24 PM 2:24

CHARLIE LYBRAND
REGISTER
CHARLESTON COUNTY SC

Re-Recorded
BK 0 288PG808

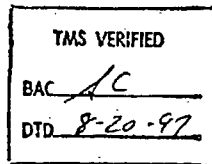
DATE
CHK



Re-Recorded
FILED

0288-779
97 AUG 15 PM 4:01

CHARLIE LYBRAND
REGISTER
CHARLESTON COUNTY SC



Recording Fee	15.00
State Fee	
County Fee	
Postage	
TOTAL	15.00

Recorded this 24 day of Jun Year 97
On Property Record Card

Reggie A Mosley
Auditor Charleston County

Re - Recording Fee	15.00
State Fee	EXEMPT
County Fee	
Postage	
TOTAL	15.00

Recorded this 15 day of Aug Year 97
On Property Record Card

Reggie A Mosley
Auditor Charleston County

EXHIBIT E

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

**CORRECTIVE
AND
CONFIRMATORY DEED**

WHEREAS, Kiawah Resort Associates, L.P. (a Delaware limited partnership hereinafter sometimes referred to as "KRA, L.P." and/or the "Grantor") and the Town of Kiawah Island entered into that certain Development Agreement in connection with the development of Kiawah Island, S.C., which agreement is dated as of September 26, 1994, and recorded September 30, 1994, in Book J248, page 1, in the R.M.C. Office for Charleston County, S.C., (the "R.M.C. Office"), as amended (the "Development Agreement"); and

WHEREAS, pursuant to the provisions of Section 16.b. of the Development Agreement, KRA, L.P. attempted to convey approximately 10 miles of beachfront property on Kiawah Island, Charleston County, S.C., to the Kiawah Island Community Association, Inc. (hereinafter sometimes referred to as the "KICA" and/or the "Grantee") by Quit-Claim Deed dated the 29th day of December, 1995, and recorded in Book N265, page 406, in the R.M.C. Office (the "Beachfront Deed"); and

WHEREAS, that while the Development Agreement has a sketch of the 10 miles of beachfront property attached (Exh. 16.2), the property actually conveyed by the Beachfront Deed was not separately platted. Accordingly, the property description was recited generally as an area extending from a specific point located at the western end of Kiawah Island to a point located at the eastern end thereof, generally between 200' and 300' wide, extending 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; and

WHEREAS, it has come to the attention of KRA, L.P. that there is of record in said R.M.C. Office (and was at the time of the Beachfront Deed) a plat of much of the eastern end of Kiawah Island which delineates as the seaward boundary line thereof, the mean high water mark of the Atlantic Ocean, and as a consequence, the description in the aforesaid deed as it pertains to the eastern end of Kiawah Island is ambiguous; and

WHEREAS, KRA, L.P. is minded to execute and deliver the within Corrective and Confirmatory Deed based upon more recent surveys and plats of the eastern end of Kiawah Island, so as to clarify and confirm the description of such beachfront property at the east end of Kiawah Island as was intended to be conveyed to KICA by the Beachfront Deed,

NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that KIAWAH RESORT ASSOCIATES, L.P., in the State aforesaid, for/and in consideration of the Premises and the sum of One and No/100 (\$1.00) Dollar, to it in hand paid at and before the sealing of these presents by KIAWAH ISLAND COMMUNITY ASSOCIATION, INC., in the State aforesaid, the receipt whereof is hereby acknowledged, has remised, released, and forever quit-claimed, and by these presents does remise, release and forever quit-claim unto the said KIAWAH ISLAND COMMUNITY ASSOCIATION, INC., all of its right, title and interest of, in and to the below described property, to-wit:

SEE ATTACHED EXHIBIT "A" FOR PROPERTY DESCRIPTION
OF BEACHFRONT PROPERTY AT THE EAST END OF KIAWAH ISLAND, S.C.

(hereinafter sometimes referred to as the "Property")

Page 1

TMS Number: 207-00-00-029

BK L 304 PG 460

Tax District: 5-4

Address of Grantee: 23 Beachwalker Drive
Kiawah Island, SC 29455

This conveyance is made subject to any and all applicable covenants, conditions, restrictions, and easements of record as of September 16, 1994, the date of the Development Agreement, as amended, and all applicable governmental and zoning ordinances and regulations.

This conveyance is made subject further 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 Common Properties as set forth in the KICA Covenants.

Notwithstanding any other provision hereof, there is hereby reserved unto the Grantor, for itself and its invitees, successors, subsidiaries, successors-in-title, and assigns, a non-exclusive assignable, transmissible, and commercial right and easement for ingress and egress, for the construction and maintenance of permitted walkways, boardwalks, and gazebos, and to use the Property for other lawful purposes.

Further reserving unto the Grantor, for itself, its invitees, successors, subsidiaries, successors-in-title, and assigns, a non-exclusive, assignable, transmissible, and commercial right and easement for access, ingress, and egress for the installation and maintenance of all utilities, and for all other necessary, useful, or convenient utility purposes and activities of every kind and description over, upon, across, and under the Property, which easement is necessary for Grantor's commercial purposes as developer of Kiawah Island, S.C., and those of its successors, assigns, and subsidiaries.

Nothing herein is intended to lessen or curtail any other rights or privileges as Grantor may enjoy, either as a Kiawah property owner or the Company under any of the recorded Kiawah covenants, including rights or easements to use and enjoy Common Property and allowing guests or others to do so.

Portions of the Property hereby conveyed may be located in part seaward of the interim Setback Line as established by the South Carolina Coastal Council (n/k/a DHEC - Office of Ocean and Coastal Resource Management) as of January 20, 1989, and South Carolina Code Sections 48-39-270 through 48-39-360, as amended, effective July 1, 1977 (the "Beach Protection Act"). The following information concerning the location and circumstances of the Property is hereby disclosed:

The proximity and location of the interim Setback Line and the Interim Baseline areas are shown on plats of record in the R.M.C. Office. There are no habitable structures on the Property seaward of the setback line. The most recently published annual erosion rate for the Property is not set forth herein because the Property shown on such plats has over the 40 year period prior to July 1, 1988, been determined to not have an erosion rate. Reference must be had to the Beach Protection Act itself regarding the significance of these disclosures as well as the potential for movement and relocation of the lines in the future.

Page 2

This is a portion of the property conveyed to the Grantor herein by deed of conveyance of Kiawah Resort Associates, a South Carolina joint venture, dated June 26, 1992, and recorded in Book L215, page 486, in the R.M.C. Office.

TOGETHER with, all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned unto the said KIAWAH ISLAND COMMUNITY ASSOCIATION, INC., its successors and assigns, forever.

IN WITNESS WHEREOF, Kiawah Resort Associates, L.P., has caused these presents to be executed in its name by its General Partner thereunto duly authorized and its seal to be hereunto affixed, this 15th day of May, in the year of our Lord One Thousand Nine Hundred and Ninety-Seven, in the Two Hundred and Twenty-First year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

KIWAH RESORT ASSOCIATES, L.P.
(SEAL)

By: D&W Investments, Inc.,
a South Carolina corporation
(CORP. SEAL)

Its: General Partner

By: Charles P. Darby, III
Charles P. Darby, III

Its: President

Katherine M. Brown
Anna C. Bryant

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

THE FOREGOING INSTRUMENT was acknowledged before me by Kiawah Resort Associates, L.P., by D&W Investments, Inc., a South Carolina corporation, its General Partner, by Charles P. Darby, III, its President, this 15th day of May, 1997.

Anna C. Bryant (SEAL)
Notary Public for South Carolina
My commission expires: 8-8-99

wpdocs/town/banchofront.ded

Exhibit "A"

BK L 304PG462

The "Property"

All that certain piece, parcel or tract of land situate, lying and being in the Town of Kiawah Island, Charleston County, State aforesaid, being a portion of the Kiawah Island beachfront, varying in width, and lying generally within an area having as its western boundary, an imaginary line being the southerly extension of the westernmost property line of Lot 100 Flyway Drive, in Osprey Beach Subdivision, in the Town of Kiawah Island, S.C., and as its eastern boundary line, a point located at the northeast end of "Bear Island" in the Town of Kiawah Island, S.C., said property being more particularly described as follows:

Parcel 1

(Area Seaward of "Flyway Drive" Properties)

All that certain piece, parcel or tract of land situate, lying and being in the Town of Kiawah Island, Charleston County, State aforesaid lying seaward of certain lots now or formerly known as Lots 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 112, 113, 121, 122, 123, 126, 127, 128, 129, 133, 134, 135, 138, 139, 140, 141, 144, 145, 147, 150, 151, 152, 153, 156, 157, 158, 163, 164, 165, 168, 169, 170, 171, 174, 175, 176, and 177 (Lot 177 being now known generally as "Bally Bunion" Subdivision), a "20' Utility, Pedestrian/Beach Access and Drainage Easement" lying between Lots 113 and 121, Flyway Drive, a "20' Utility, Pedestrian/Beach Access and Drainage Easement" lying between Lots 158 and 163 Flyway Drive, as said lots are shown on a plat prepared by Precision Land Surveying Co., Inc., dated August 31, 1990, and recorded in Plat Book CA at pages 194, 195, and 196, in the R.M.C. Office, between the seaward boundary lines of said lots and easement areas as shown on aforesaid plat, and the mean high water mark of the Atlantic Ocean, as the same may vary from time to time.

Grantor is aware that certain of the "Flyway Drive" lots shown on the aforesaid plat recorded in Plat Book CA at pages 194, 195, and 196, in the R.M.C. Office, may have been re-platted, subdivided, and/or combined to create larger lots. However, it is Grantor's intent to convey hereby any and all beachfront property currently owned by Grantor lying within the southerly extension of the eastern and western property lines of the above-described lots and easement areas as shown on the aforesaid plat, between the seaward boundary lines thereof and the mean high water mark of the Atlantic Ocean as the same may vary from time to time.

ALSO

Parcel 2

(Area Seaward of "Sand Fiddler Court" Lots)

All that certain piece, parcel or tract of land situate, lying and being in the Town of Kiawah Island, Charleston County, State aforesaid lying seaward of certain lots now or formerly known as Lots 203, 204, 205, 206, 207, and 208, Sand Fiddler Court, and a "10' Pedestrian Beach Access Easement Area and Drainage Easement" east of Lot 208, in Osprey Beach Subdivision, Phase IIA, as said lots are shown on a plat prepared by Southeastern Surveying, Inc., entitled "A FINAL PLAT OF LOTS 200-211 SAND FIDDLER COURT OSPREY BEACH SUBDIVISION 429 TRACT 51 OWNED BY KIAWAH RESORT

Page 4

ASSOCIATES, L.P., LOCATED IN THE TOWN OF KIAWAH ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA" dated September 23, 1993, last revised on December 15, 1993, and recorded in Plat Book CO, at page 169, in the R.M.C. Office, between the seaward boundary lines of said lots and "10' Pedestrian Beach Access Easement Area and Drainage Easement" as shown on aforesaid plat, and the mean high water mark of the Atlantic Ocean, as the same may vary from time to time.

Grantor is aware that certain of the "Sand Fiddler Court" lots shown on the aforesaid plat recorded in Plat Book CO, at page 169, in the R.M.C. Office, may have been re-platted, subdivided, and/or combined to create larger lots. However, it is Grantor's intent to convey hereby any and all beachfront property currently owned by Grantor lying within the southerly extension of the eastern and western property lines of said lots and the "10' Pedestrian Beach Access Easement Area and Drainage Easement" as shown on the aforesaid plat, between the seaward boundary lines thereof and the mean high water mark of the Atlantic Ocean as the same may vary from time to time.

ALSO

Parcel 3

(Area Seaward of "5.720 Ac. Future Development" Area on Ocean Marsh Road)

All that certain piece, parcel or tract of land situate, lying and being in the Town of Kiawah Island, Charleston County, State aforesaid lying seaward of a tract of land shown and designated as "FUTURE DEVELOPMENT 5.720 Ac." on Ocean Marsh Road, in Osprey Beach Subdivision, Phase IIB, as shown on a plat prepared by Southeastern Surveying, Inc., entitled "A FINAL PLAT OF OCEAN MARSH ROAD & LOT 225 BEING A PORTION OF OSPREY BEACH PHASE IIB SUBDIVISION 429 TRACT 51 OWNED BY KIAWAH RESORT ASSOCIATES, L.P., LOCATED IN THE TOWN OF KIAWAH ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA" dated March 22, 1993, last revised on May 19, 1993, and recorded in Plat Book CM at page 133, in the R.M.C. Office, between the seaward boundary lines of said tract as shown on aforesaid plat, and the mean high water mark of the Atlantic Ocean, as the same may vary from time to time.

It is Grantor's intent to convey hereby any and all beachfront property currently owned by Grantor lying within the southerly extension of the eastern and western property lines of said 5.720 Ac. Future Development tract as shown on the aforesaid plat, between the seaward boundary lines thereof and the mean high water mark of the Atlantic Ocean as the same may vary from time to time.

ALSO

Parcel 4

(Area Seaward of the Beach Club site)

All that certain piece, parcel or tract of land situate, lying and being in the Town of Kiawah Island, Charleston County, State aforesaid lying seaward of The Beach Club, which tract is located at the southeasternmost terminus of Ocean Marsh Road, in Osprey Beach Subdivision, Phase IIB, and is shown and designated as Lot "225 COMMERCIAL SITE 4.005 Ac." on a plat prepared by Southeastern Surveying, Inc., entitled "A FINAL PLAT OF OCEAN MARSH ROAD & LOT 225 BEING A PORTION

Page 5

8X L 304PG464

OF OSPREY BEACH PHASE IIB SUBDIVISION 429 TRACT 51 OWNED BY KIAWAH RESORT ASSOCIATES, L.P., LOCATED IN THE TOWN OF KIAWAH ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA" dated March 22, 1993, last revised on May 19, 1993, and recorded in Plat Book CM at page 133, in the R.M.C. Office, between the seaward boundary lines of said tract as shown on aforesaid plat, and the mean high water mark of the Atlantic Ocean, as the same may vary from time to time.

It is Grantor's intent to convey hereby any and all beachfront property currently owned by Grantor lying within the southerly extension of the eastern and western property lines of The Beach Club tract hereinabove described, between the seaward boundary lines thereof and the mean high water mark of the Atlantic Ocean as the same may vary from time to time.

ALSO

Parcel 5

(Area Seaward of Westernmost Portion of The Ocean Course)

All that certain piece, parcel or tract of land situate, lying and being in the Town of Kiawah Island, Charleston County, State aforesaid lying seaward of the westernmost portion of the Ocean Course, within an area having as its western terminus, a line extending in a generally southeasterly direction along a bearing of S09°20'54"E, from a point marked by a concrete monument having State Plane Coordinates N283643.33/E2294652.82, at the southwesternmost corner of The Ocean Course as shown on Sheet 2 of 8 of a plat of The Ocean Course prepared by SouthStar Surveying, Inc., dated June 29, 1995, and recorded in Plat Book EA at pages 731 - 738, in the R.M.C. Office (the "Western Terminus"), and as its eastern terminus, a line extending in a generally southeasterly direction along a bearing of S04°53'19"E, from a point marked by a concrete monument having State Plane Coordinates N284500.74/E2301915.17, said point being southwest of the "Clubhouse" on Sheet 5 of 8 of the aforesaid plat prepared by SouthStar Surveying, Inc., dated June 29, 1995, and recorded in Plat Book EA at pages 731 - 738, in the R.M.C. Office (the "Eastern Terminus").

It is Grantor's intent to convey hereby any and all beachfront property currently owned by Grantor lying within the Western Terminus and the Eastern Terminus, and extending from the seaward boundary line of The Ocean Course as shown on Sheets 2 of 8, 3 of 8, 4 of 8, and the easternmost approximately 298.43' of Parcel 4 herein described is shown on Sheet 5 of 8, on the aforesaid plat prepared by SouthStar Surveying, Inc., dated June 29, 1995, and recorded in Plat Book EA at pages 732 - 735, in the R.M.C. Office, to the mean high water mark of the Atlantic Ocean, as the same may vary from time to time.

Page 6

ALSO

Parcel 6

(Area Seaward of Easternmost Portion of The Ocean Course, extending to
a point at the Northeasternmost Tip of Bear Island)

All that certain piece, parcel, or tract of land situate, lying and being in the Town of Kiawah Island, Charleston County, South Carolina, being the easternmost portion of the Kiawah Island beachfront, containing 245.045 acres, more or less, and shown on the attached exhibit prepared by Southeastern Surveying, Inc., entitled "An Exhibit of a 245.045 Acre Beachfront Parcel at the East End of Kiawah Island, S.C., Owned by Kiawah Resort Associates, L.P., in the Town of Kiawah Island, Charleston County, South Carolina" dated April 24, 1997, attached hereto as Exhibit "B" and incorporated herein by reference, said beachfront parcel having such location, butts and bounds, metes, courses and distances as will by reference to said plat more fully appear.

SAVING AND EXCEPTING from the foregoing descriptions of Parcels 1, 2, 3, 4, 5, and 6, so much of the above-described beachfront property having been previously conveyed to third parties by instruments recorded in the R.M.C. Office prior to December 29, 1995, being the date of the Beachfront Deed.

Page 7

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

BOOK L 304PG466
CONSENT
(Corrective and Confirmatory Deed
for Beachfront Property at the East End
of Kiawah Island, SC)

WHEREAS, Kiawah Resort Associates, L.P. (a Delaware limited partnership hereinafter sometimes referred to as "KRA, L.P.") and the Town of Kiawah Island (the "Town") entered into that certain Development Agreement in connection with the development of Kiawah Island, S.C., which agreement is dated as of September 26, 1994, and recorded September 30, 1994, in Book J248, page 1, in the R.M.C. Office for Charleston County, S.C., (the "R.M.C. Office"), as amended (the "Development Agreement"); and

WHEREAS, pursuant to the provisions of Section 16.b. of the Development Agreement, KRA, L.P. attempted to convey approximately 10 miles of beachfront property on Kiawah Island, Charleston County, S.C., to the Kiawah Island Community Association, Inc. ("KICA") by Quit-Claim Deed dated the 29th day of December, 1995, and recorded in Book N265, page 406, in the R.M.C. Office (the "Beachfront Deed"); and

WHEREAS, (i) the 10 mile beachfront strip to be conveyed to KICA by the Beachfront Deed was not shown on a plat of record; (ii) certain of the properties landward of the beachfront strip to be conveyed were either shown on numerous plats of record or were not platted at all; and (iii) the seaward boundary lines of certain parcels as shown on plats of record is the mean high water mark of the Atlantic Ocean, thereby creating an uncertainty as to exactly what property, if any, was conveyed to KICA by the Beachfront Deed, and what property was retained by KRA, L.P.; and

WHEREAS, KRA, L.P. has executed and delivered the attached Corrective and Confirmatory Deed to clarify and confirm by way of reference to more recent plats, the description of the beachfront property at the east end of Kiawah Island which was intended to be conveyed to KICA by the Beachfront Deed,

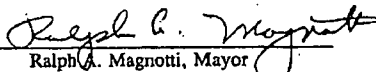
NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that after a careful review of the Development Agreement, and due consideration and consultation by and among the Mayor, Council members, and legal representatives of the Town, the Town of Kiawah Island, as a party to the Development Agreement, is minded to execute the within Consent to evidence of record its consent to the execution, delivery, and recordation of the said Corrective and Confirmatory Deed by KRA, L.P. to KICA as a confirmatory action, which shall not be construed as contrary to or in violation of the terms and provisions of Paragraph 16.b. of the Development Agreement.

IN WITNESS WHEREOF, the Town of Kiawah Island has caused these presents to be executed this 15 day of April, 1997.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:



TOWN OF KIAWAH ISLAND
(CORP. SEAL)

By: 
Ralph A. Magnotti, Mayor

Attest: 
Clerk of Council

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

AFFIDAVIT

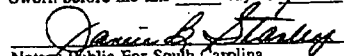
8K L 304PG468

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this Affidavit and I understand such information.
2. Certain property located within the Town of Kiawah Island, Charleston County, S.C., being a portion of a 10 mile strip of beach having TMS Number: 207-00-00-029, was transferred by Kiawah Resort Associates, L.P. to the Kiawah Island Community Association, Inc. by Corrective and Confirmatory Deed dated May 15, 1997 and being recorded simultaneously herewith.
3. Check one of the following: The DEED is
 - a) ☐ Subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
 - b) ☐ Subject to the deed recording fee for a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
 - c) ☒ The above transaction is exempt, or partially exempt from the recording fee as set forth in S.C. Code Ann. Section 12-24-10, et seq. because said transaction is a corrective and confirmatory conveyance and meets the requirements of Exemption #14.
4. Check one of the following if either item 3a or item 3b above has been checked.
 - a) ☐ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of \$ _____
 - b) ☐ The fee is computed on the fair market value of the realty which is \$ _____
 - c) ☐ The fee is computed on the fair market value of the realty as established for property tax purposes which is \$ _____
5. Check YES ☐ or NO ☐ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement or realty after the transfer. If "YES," the amount of the outstanding balance of this lien or encumbrance is \$ _____.
6. The DEED Recording Fee is computed as follows:
 - a) ☐ the amount listed in item 4 above
 - b) ☐ -0- the amount listed in item 5 above (no amount place zero)
 - c) ☐ Subtract line 6b from Line 6a and place the result.
7. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: Legal Planning Assistant
8. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

 (SEAL)
Elisabeth F. Nimmons, Legal Planning Assistant for Grantor

Sworn before me this 9 day of June, 1998.

 (SEAL)
Notary Public For South Carolina
My Commission Expires: 8-1-2000

Elizabeth F Nimmons

NKw-I
Jal ✓

BK L 304PG469

FILED

L 304-459

98 JUN -9 PM 3:44

CHARLIE LYBRAND
REGISTER
CHARLESTON COUNTY SC

Recording Fee 16.00
State Fee —
County Fee —
Postage —
TOTAL 16.00
B

PID VERIFIED	
ASSR	<u>103</u>
DTD	<u>6-11-98</u>

Recorded this 9 day of June Year 1998
On Property Record Card

Robert A. Manning
Auditor Charleston County

EXHIBIT F

**DEVELOPMENT AGREEMENT
BY AND BETWEEN KIAWAH RESORT ASSOCIATES, L.P.
AND THE TOWN OF KIAWAH ISLAND**

THIS DEVELOPMENT AGREEMENT (the "Agreement") is entered into this 12th day of October, 2005, (the effective date) by and between KIAWAH RESORT ASSOCIATES, L.P., a limited partnership organized and existing under the laws of Delaware, and the other persons defined and described as Property Owner and the TOWN OF KIAWAH ISLAND, a municipal corporation organized and existing under the laws of the State of South Carolina.

RECITALS

WHEREAS, the Town of Kiawah Island (the "Town") and Kiawah Resort Associates, L.P. (one of the Property Owners herein) and other persons entered a Development Agreement effective September 26, 1994 (the "Initial Agreement") (recorded in the RMC Office for Charleston County at Book J248, Page 001); and

WHEREAS, the Town and Kiawah Resort Associates, L.P. entered and recorded the First through Ninth Amendments to the Initial Agreement in the RMC Office for Charleston County, with the Ninth Amendment being recorded at Book D 537, Page 223; and,

WHEREAS, the Property Owner and the Town desire to terminate the Initial Agreement and replace it with this Development Agreement; and,

WHEREAS, the Property Owner and the Town desire that this Development Agreement shall take precedence and control to the extent that there is a conflict between the terms of this Development Agreement and the Initial Agreement or the Nine Amendments to the Initial Agreement; and

WHEREAS, under § 6-31-50(a) the Town Council conducted public hearings regarding its consideration of this Development Agreement on September 7, 2005, and on September 9, 2005, after publishing and announcing notice of intent to consider this Development Agreement was advertised in a newspaper of general circulation in Charleston County, setting forth the date of the first public hearing, with such notice specifying the location of the property subject to this Development Agreement as well as the other information required under § 6-31-50(B)(2); and

WHEREAS, under S.C. Code § 6-31-60(A)(7) the Town Council of the Town determined on October 12, 2005 that this Development Agreement is consistent with the Town's Comprehensive Plan and Land Development Regulations; and

WHEREAS, under S.C. Code § 6-31-30, the Town Council of the Town adopted Ordinance No. 2005-6 on October 12, 2005, approving this Development Agreement.

NOW THEREFORE, the Parties agree:

1. **Definitions.** In this Development Agreement, capitalized words or phrases shall be defined and have the meaning set forth in Exhibit 1.1.
2. **Parties.** Parties to this Agreement are the Property Owner and the Town.

CH

2. **Parties.** Parties to this Agreement are the Property Owner and the Town.
3. **Relationship of the Parties.** This Agreement creates a contractual relationship between the Parties. This Agreement is not intended to create, and does not create, the relationship of master/servant, principal/agent, independent contractor/employer, partnership, joint venture, or any other relationship where one party may be held responsible for the acts of the other party. Further, this Agreement is not intended to create, nor does it create, a relationship whereby the conduct of the Property Owner constitutes "state action" for any purpose.
4. **Legal Description of the Real Property.** The Real Property which is the subject of this Agreement is described as follows:
 - (i) All real property on Kiawah Island currently owned by the Property Owner and the subsequent owners of this real property as provided for in Section 33 herein.
 - (ii) A legal description of the Real Property now owned by Property Owner is set forth in the schedules and maps attached as Exhibit 4.1: Description of Real Property.

The Real Property currently consists of approximately 993 acres of highland and thousands of acres of marshlands and low lands.

5. **Identity of the Property Owner.** "Property Owner" means Kiawah Resort Associates, L.P., a limited partnership organized and existing under the laws of Delaware, together with all subsidiaries thereof and other entities which have a legal interest on the date of execution hereof in any of the Real Property as described in Section 4 and includes Kiawah Resort Associates, L.P.'s successors in interest and successors in title and/or assigns by virtue of assignment or other instrument pursuant to ¶ 33 hereof. Additionally, Property Owner shall mean Kiawah Development Partners, Inc., Kiawah Land Development, LLC, Kiawah Island Utility, Inc., Lodema R. Adams as Trustee of Bear Island Holding Trust, Charles P. Darby, III and John C.L. Darby as Trustees of the Charles P. Darby, Jr. Issue Trust, and Vanderhorst, LLC and their successors in interest or successors in title and/or assigns by virtue of assignment or other instrument in accord with ¶ 33 herein, solely for purposes of the property owned by them that is submitted under this Agreement. Property Owner warrants that there are no other legal or equitable owners of the Real Property.

Kiawah Resort Associates, L.P. represents that it has a legal interest in the Real Property and that all other entities now holding legal or equitable interests in the Real Property are to be bound by this Agreement. By execution hereof, Kiawah Development Partners, Inc., Kiawah Land Development, LLC, Kiawah Island Utility, Inc., Lodema R. Adams as Trustee of Bear Island Holding Trust, Charles P. Darby, III and John C.L. Darby as Trustees of the Charles P. Darby, Jr. Issue Trust, and Vanderhorst, LLC, confirm their

being bound by the terms hereof solely for purposes of the properties owned by them submitted under this Agreement and are responsible only for the obligations associated with properties owned by them.

6. Intent of the Parties. The Town and the Property Owner agree that the burdens of this Agreement bind, and the benefits of this Agreement shall inure, to each of them and to their successors in interest and, in the case of the Property Owner, its successors in title and/or assigns pursuant to paragraph 33 hereof.
7. Benefits and Burdens. The Town and the Property Owner enter this Agreement in order to serve benefits and burdens referenced in § 6-31-10 *et seq.*
8. Consistency with the Town's Comprehensive Plan and Land Development Regulations. This Agreement is consistent with the Town's Comprehensive Plan and Land Development Regulations.

Whenever express or implied substantive provisions of this Agreement are inconsistent with the applicable standards set forth in the Zoning Code, the standards set forth in the Zoning Code and the standards set forth in this Agreement shall, to the extent possible, be considered in pari materia to give effect to both the Zoning Code and this Agreement; provided, however, that in the event of a conflict, and subject to the provisions of § 6-31-80, the standards set forth in this Agreement shall govern. Nothing is intended herein to limit application of administrative or procedural or similar provisions of the Zoning Code nor limit the Town of Kiawah in amending provisions of the Zoning Code in accordance with law and any development agreement. In the event of a dispute between the parties to this Agreement as to whether a provision in the Comprehensive Plan or Zoning Code is inconsistent with express or implied substantive provisions of this Agreement, the parties must first submit such disputed interpretation to Town Council and must wait seven days after such submittal before invoking the remedies afforded them under this Agreement.

9. Legislative Act. Any change in the standards established by this Agreement or to laws pertaining to the same shall require the approval of the Town Council, subject to compliance with applicable statutory procedures and consistent with Paragraph 10 (A) of this Agreement. This Agreement constitutes a legislative act of the Town Council of the Town. The Town Council adopted this Agreement only after following procedures required by Code Section 6-31-10 *et seq.* This Agreement shall not be construed to create a debt of the Town as referenced in Section 6-31-145.
10. Applicable Land Use Regulations.
 - (a) Applicable Laws and Land Development Regulations. Except as otherwise provided by this Agreement or by Section 6-31-10 *et seq.*, the Laws applicable to the Development of the Real Property, subject to this Agreement, are those in force at the time of the execution of this Agreement. The Town shall not apply

subsequently adopted Laws and Land Development Regulations to the Real Property or the Project unless the Town has held a public hearing and has determined: (1) the proposed, subsequent Laws or Land Development Regulations are not in conflict with the Laws or Land Development Regulations governing the Agreement and do not prevent the Development set forth in this Agreement; (2) the proposed, subsequent Laws or Land Development Regulations are essential to the public health, safety, or welfare and the proposed, subsequent Laws or Land Development Regulations expressly state that they apply to a development that is subject to a development agreement; (3) the proposed, subsequent Laws or Land Development Regulations are specifically anticipated and provided for in this Agreement; (4) the Town demonstrates that substantial changes have occurred in pertinent conditions existing at the time of approval of this Agreement which changes, if not addressed by the Town, would pose a serious threat to the public health, safety, or welfare; or (5) this Agreement is based on substantially and materially inaccurate information supplied by the Property Owner.

- (b) Vested Rights. Subject to the provisions of subparagraph (a) above, all rights and prerogatives accorded Property Owner by this Agreement shall immediately constitute vested rights for the Development of the Real Property.

Further, vested rights created by the Initial Agreement in the Real Property as defined by the Initial Agreement for land that was previously transferred by the Property Owner under the provisions of Section 33 of the Initial Agreement and is not included in the Undeveloped Lands as defined in this Agreement shall continue and remain vested until January 1, 2008. The purpose and intent are that vested rights created under the Initial Agreement for lands not now owned by the Property Owner under this Agreement shall remain vested through January 1, 2008. No later than November 1, 2005, Property Owner shall provide the Town a schedule of such conveyances to third persons under the Initial Agreement that identifies the land involved, the grantee, and number of potential Dwelling Units assigned by Property Owner for conveyances other than individual Lots. This schedule is subject to the Town's approval, which shall not be unreasonably withheld.

Paragraph 10 (a) of this Agreement does not abrogate any rights either preserved by S.C. Code Section 6-31-140 or that may have vested pursuant to common law and otherwise in the absence of a development agreement.

- (c) Dock Permitting. The provisions of the Key Location Ordinance (Town of Kiawah Island Ordinance No. 2003-5) shall apply to the Real Property. A copy of this Ordinance is attached as Exhibit 10.2. The Town shall support (not to include financial support) the amendment of the Key Locations Ordinance to allow up to two community docks on Parcel 12B to include up to 200 feet (in length, single side) of floating docks. All Town permits necessary for dock construction shall be issued expeditiously by the Town upon compliance with the Key Location

(d) Road Codes and Subdivision Regulations.

- (i) The Road Code and Subdivision Regulations of the Town ("Municipal Code, Town of Kiawah Island, South Carolina" Art. 12B and 12C) shall apply to the Real Property except that in lieu of any potential obligation to "four lane" all of the bridges, overpasses, or roads comprising the Kiawah Island Parkway (the "Parkway"), Property Owner shall plan and implement Traffic Mitigation Measures in accordance with Exhibit 10.1, if required by the provisions of the same.
- (ii) Notwithstanding the provisions of Section 10 (d)(i), the Property Owner agrees to pay ten (10%) percent of the cost to improve the Parkway, including possibly adding two additional lanes, from the roundabout to the entrance security gate as well as ten (10%) percent of the cost of an adjacent bike path, provided such total contribution shall not exceed \$250,000 even if ten (10%) percent of the combined total cost exceeds \$250,000. This obligation of the Property Owner does not survive the Termination Date.
- (iii) The Town agrees to support the addition of a professionally engineered street access intersecting the Parkway to and from the Settlement/River Course at the approximate location depicted on the Final Subdivision Plat of The Settlement Phase IIIA, copy attached as Exhibit 10.3.

11. Building Codes and Laws Other Than Land Use Regulations. The Property Owner, notwithstanding any provision which may be construed to the contrary in this Agreement, must comply with any building, housing, electrical, plumbing and gas codes subsequently adopted by the Town or other governmental entity, as authorized by Chapter 9 of Title 6 of the South Carolina Code. This Agreement shall not be construed to supercede or contravene the requirements of any building, housing, electrical, plumbing and gas codes subsequently adopted by the Town or any other governmental entity, as authorized by Chapter 9 Title 6 of the South Carolina Code. The provisions of this Agreement are not intended, nor should they be construed in any way, to alter or amend in any way the rights, duties, and privileges of the Town to exercise governmental powers and pass laws not applicable to Development of the Real Property including, but not limited to, the power of eminent domain (including the power to exercise eminent domain over Kiawah Island Utility, Inc. in accordance with the laws and constitution of South Carolina) and the power to levy and collect taxes; provided, however, that Laws applicable to the Development of the Real Property shall be subject to Section 10 (a).

12. Local Development Permits and Other Permits Needed. The Parties anticipate that the following local Development Permits and other regulatory permits will be needed to complete the Development of the Project:

Zoning permits, plat approvals (preliminary, conditional or final), roads and drainage construction plan approvals, building permits, and certificates of occupancy.

The failure of the Agreement to address a particular permit, condition, term, or restriction does not relieve the Property Owner of the necessity of complying with the law governing the permit requirements, conditions, terms or restrictions.

13. Vested Rights Governing the Development of the Real Property

- A. REAL PROPERTY UNDER THE INITIAL AGREEMENT NOT INCLUDED IN THE UNDEVELOPED LANDS. The lands included in the definition of the Real Property under the Initial Agreement that are not included in the Undeveloped Lands under this Agreement as described on Exhibit 1.3 shall have the vested rights and Vested Units described in Section 10(b) of this Agreement.
- B. VESTED RIGHTS GOVERNING THE DEVELOPMENT OF THE UNDEVELOPED LANDS AS DESCRIBED ON EXHIBIT 1.3.

1. RESIDENTIAL USES

(a) Permitted Uses

Except as may be further limited by the provisions of this Agreement, all uses listed on Exhibit 13.1, Table of Permitted Uses attached hereto, under the heading "Residential" shall be vested as to those Parcels on Exhibit 13.2 with the designation "R". Parcels designated as R-1 on Exhibit 13.2 permit Single Family Detached Dwellings at a Density of three (3) or fewer Dwelling Units per acre. Parcels designated as R-2 permit any permitted type of attached and/or detached residential unit with up to four (4) dwellings per building. The maximum Density of R-2 development shall not exceed six (6) Dwelling Units per acre for any given development or result in a higher Parcel Density than specified on Exhibit 13.2. Parcels designated as R-3 may include any permitted type of residential development listed on Exhibit 13.1 as limited by Parcel Density, Height and other provisions of this Agreement, with a Density not to exceed twelve (12) Dwelling Units per acre.

(b) New Dwelling Units

- (i) The total number of *new* single family residential Lots and *new* non-single family residential Dwelling Units on the Undeveloped Lands of the Real Property which receive preliminary subdivision plat approval for the first time after the effective date of this Agreement and the new non-single family Dwelling Units within the Undeveloped Lands that receive approval for the first time after the effective date of this Agreement, shall not exceed in the entirety 1,184.

The purpose and effect of this provision is to provide an absolute limit upon the new Lots or Dwelling Units to a Development total of 1,184 *new*, additional single family residential Lots and non-single family residential Dwelling Units on the Undeveloped Lands of the Real Property. This limit or "cap" shall be in addition to those Lots or Dwelling Unit approved prior to the effective date of this Agreement. This limit on Lots and Dwelling Units shall not include Hotel Rooms and Support Space previously approved by the Town or that was previously transferred by the Property Owner pursuant to the Initial Agreement.

- (ii) The maximum Density limits per acre for each Undeveloped Land Parcel as provided on Exhibit 13.2 are used to establish the maximum number of Dwelling Units per Parcel. The maximum number of Dwelling Units per Parcel shall be as provided in Exhibit 13.2 but in no event shall the new Lots and non-single family Dwelling Units exceed the 1,184 total established by the preceding paragraph.

Each Lot and condominium Dwelling Unit shown on a recorded master deed that is subdivided or created after the effective date of this Agreement on land now known as Cassique adjacent to Kiawah Island that is being developed by the Property Owner or its affiliated entities shall count against this cap of 1,184 *new*, additional single family residential Lots and non-single family residential Dwelling Units on the Real Property as described herein.

(c) Building Development Standards

The ARB shall apply the Building Development Standards in Exhibit 13.2 and shall prescribe and determine Lot area, Lot width, Lot depth, Lot coverage, setback and yard requirements, and may adjust the criteria set

forth in the Table of General Lot Standards attached as Exhibit 13.3 provided the ARB determines that exceptional circumstances exist with respect to a particular Lot based on unusual configuration, topography, tree cover, or other material considerations. The ARB approved deviation from a particular standard in Exhibit 13.3 shall not exceed the percentage allowance specified for that standard in Exhibit 13.3.

(d) Off-Street Parking

The number of off-street parking spaces for any use shall be as outlined in Exhibit 13.4. The design of parking areas shall meet the minimum dimensional standards of Exhibit 13.5.

(e) Building Height

Residential Height is limited to a number of habitable floors (i.e., stories) exclusive of the area below the Ground Floor Level. One-half story is a habitable floor which has square footage that is no greater than one-half the square footage of the largest story. Buildings shall not exceed the number of stories and Height specified in Exhibits 13.2 and 13.3.

Furthermore, except as noted below, no portion of a residential building (excluding fireplaces, chimneys and vents) may be taller than 30 feet from Ground Floor Level within 15 feet of any property line, nor taller than 35 feet from Ground Floor Level within 20 feet of any property line. These setbacks do not apply to internal property lines in condominium or townhouse development. The Town may grant exceptions to these setbacks for interior property lines as identified through the platting process, provided that such exceptions do not adversely impact existing Development.

(f) Buffers, Fencing, and Signage

The ARB shall prescribe and determine and may adjust, subject to the provisions of Section 13.B.6., natural vegetative buffers between either Development Parcels of differing density residential lands or residential and non-residential lands and may adjust the following criteria: The buffer shall be a landscaped or naturally vegetated area not less than 30' wide, or a golf course, or other non-wooded area not less than 50' wide or a change in topography, or any other natural or architectural transition feature which may be within the boundaries of a parcel.

The ARB may approve fencing that is limited to landscaped hedgerows of dense plant material and/or wooden, masonry or wrought iron material which is architecturally integrated with other Development on the Lot or

Development Parcel. Fencing shall not exceed five (5) feet in height from grade for residential Development. The ARB shall not approve solid wood fences in front yards. Fencing (excluding the use of plant materials) within five (5) feet of side and rear property lines is prohibited. Fences taller than three (3) feet from pavement of adjacent streets shall not be located within the Sight Triangle without Town approval.

Signage allowed within parcels that permit residential, commercial or utility/community support uses shall meet and comply with the Kiawah Island Graphics Standards, as updated by the ARB from time to time, (current edition, Exhibit 13.6), however, at such time as the Lots or Development Parcels on a Subdivision Plat are no longer part of the Undeveloped Lands, Property Owner agrees that signage shall be in the discretion of the KICA. Temporary signs for special events may be approved by the ARB provided the signs do not have moving parts, blinking or flashing lights, glaring lights, neon or extensive use of bright, offensive colors, and further provided that any temporary sign shall be permitted for a maximum of fifteen (15) days. Signs shall be located to avoid obstructing traffic visibility. No sign, excepting traffic signs, which is taller than three (3) feet above the pavement of the adjacent streets shall be permitted within the Sight Triangle of any street intersection without Town approval.

(g) Tree Replacement Guidelines

The Tree Replacement Guidelines, as currently promulgated by the ARB in the latest edition of Designing With Nature, copy attached as Exhibit 13.7, shall continue to be applied by the ARB throughout all Real Property; provided, however, they may be adjusted, modified, and updated from time to time by the ARB with the approval of the Town, whose approval shall not be unreasonably withheld or delayed.

(h) Aesthetics

Except as otherwise provided herein, including, but not limited to, paragraphs 10, 11, 12 and 13, the ARB shall have sole and exclusive jurisdiction with regard to the standards and guidelines set forth in the latest edition of "Designing With Nature," copy attached as Exhibit 13.7 (as may be amended by the Property Owner), the granting of "variances" from the Building Development Standards for the Undeveloped Lands described in this section and Exhibit 13.2 for residential uses, and other matters within its jurisdiction under Article II, Sections 1 and 2, of the General Covenants (excluding the introductory paragraph to them). In the event of any inconsistency between either Exhibit 13.7 or the General Covenants and the provisions of this Agreement, this Agreement governs.

The Town agrees that it will not establish an architectural review body during the term of this Agreement which replaces or duplicates the jurisdiction of the ARB as reserved to it under this subsection.

Property Owner shall allow the board of KICA to appoint one member of the ARB if the board of KICA so desires. When the Property Owner decides to turn over control of the ARB to KICA as allowed under the General Covenants and/or KICA Covenants, the Property Owner shall cooperate with the board of KICA to accomplish an orderly and staged transition of the ARB to KICA. This orderly and staged transition is in addition to and not to the exclusion of any prerogatives of the Property Owner with respect to the ARB under the General Covenants.

For so long as it controls the ARB, Property Owner shall cause the ARB to transmit to the Town and KICA a copy of the agenda of upcoming meetings of the ARB in a timely manner.

(i) Additional Building Standards For Multiple Lot Combinations.

In instances where construction is to occur where more than one Lot has been combined with another Lot, the standards set forth on Exhibit 13.9, attached hereto, shall apply.

2. COMMERCIAL USES

(a) Permitted Uses

All uses presently shown on Exhibit 13.1 under the heading "Commercial" shall be vested as a matter of right on all parcels in the Undeveloped Lands with the designation "C" on Exhibit 13.2.

(b) Size Limitations

Total commercial square footage on the Real Property (including any leasable, non-residential building square footage) shall not exceed 219,000 square feet of floor area in total.

The maximum commercial square footage allowable for each parcel shall not exceed the totals provided on Exhibit 13.2.

(c) Building Development Standards

The provisions of Section 13.B.1 (c) control.

(d) Off-Street Parking

The number of off-street parking spaces for any use shall be as outlined in Exhibit 13.4. The design of parking areas shall meet the minimum dimensional standards of Exhibit 13.5.

(e) Building Height

Height shall not exceed the number of commercially habitable floors (i.e., stories) exclusive of the area below the finished first floor or the maximum elevation from Ground Floor Level established in Exhibit 13.2. One-half story is a habitable floor which has square footage that is no greater than one-half the square footage of the largest story.

No portion of a building may be taller than the Height above Ground Floor Level specified in Exhibit 13.8, "Commercial Bulk Standards."

(f) Buffers, Fencing and Signage

The provisions of Section 13.B.1 (f) control.

(g) Tree Replacement Guidelines

The provisions of Section 13.B.1 (g) control.

(h) Aesthetics

The provisions of Section 13.B.1 (h) control.

3. UTILITY AND SUPPORT SERVICES

(a) Permitted Uses

All uses as shown as "Utility" on Exhibit 13.1, shall be vested as a matter of right on all Undeveloped Lands indicated as U on Exhibit 13.2.

(b) Building Development Standards

Building setback standards shall be as established by the ARB.

For non-residential uses, the minimum Lot area is 12,000 sq.ft., the minimum Lot depth is 120 ft., and the minimum Lot width is 100 ft.

The ARB shall establish limitations for total ground coverage of building

footprint, decks, walkways, parking and circulation areas, etc.

(c) Off-Street Parking

Off-street parking standards shall be as provided by ¶ 13.B.1.(d).

(d) Building Height

Building Height limitations for all structures other than the existing towers shall be as described in Exhibit 13.2.

(e) Buffers, Fencing, and Signage

The provisions of Section 13.B.1 (f) control.

(f) Tree Replacement Guidelines

The provisions of Section 13.B.1 (g) control.

(g) Aesthetics

The provisions of Section 13.B.1 (h) control.

4. OPEN SPACE

- (a) Parcel open space is defined as land with Pervious Cover. The percentage of Parcel open space is determined by dividing the area of Pervious Cover by the gross area of a Parcel exclusive of Fresh Water and Salt Water Wetlands. Exhibit 13.2 provides the minimum required percentages of Parcel open space for each Parcel.

- (b) The Property Owner shall dedicate conservation open space as provided in Paragraph 16 of this Agreement.

- (c) The Property Owner shall provide and dedicate the following active or passive open space Facilities.

Active or Passive Recreation Sites

In addition to the passive and active open space that the Property Owner has previously dedicated to KICA, the following list includes active or passive park sites and open space which have been and/or shall be dedicated to KICA in accordance with Paragraphs 15 and 16 of this Agreement

21
Z558PG020

Future Parklands/Open Space

Bear Island (except as provided in Section 16(d) of this Agreement)

Captain Sam's Spit (subject to reservations in Section 16(g))

Parking Area for Captain Sam's Spit
Cougar Island Park

Trails

The Property Owner shall determine the specific alignments of all trails, including access to the trail system from new Development areas. Dedication of trail segments to KICA shall occur in conjunction with plat approval for adjacent subdivisions or rights-of-way.

(d) The Town agrees that the above future facilities and open spaces specified in this Agreement and those that have been previously constructed and conveyed under the terms of the Initial Agreement (including but not limited to Glossy Ibis Mini Park, Marshview Tower Overlook, Willet Pond Mini Park, Marsh Island Park, Rhett's Bluff Boat Landing, Canvasback Pond Mini Park, Master Leisure Trail System, Internal Crabbing/View Stands, Blue Heron Mini Park/View Tower, Eagle Point Boat Landing, and Cinder Creek Boathouse), in conjunction with existing facilities, open spaces, parks, marshes, natural and man made features and recreational amenities of Kiawah Island, shall satisfy all current and future obligations of the Property Owner relating to the same for monetary exactions and/or the provision or dedication of parks, parklands, community recreational facilities, open spaces and recreational areas on Kiawah Island.

5. MIXED USE DEVELOPMENT

- (a) If more than one designation - "R-1," "R-2," "R-3," "C" and "U" - applies to a parcel in Exhibit 13.2, any permitted land use within a single land use type (e.g., Residential, Commercial or Utility) may be established on the parcel. A mixed use development with more than one type of use shall be permitted with Town approval of the requested mix, arrangement and Building Development Standards for such uses, which approval shall not be unreasonably withheld. The maximum residential and non-residential square footage for mixed use development on any parcel shall not exceed the FAR established in Exhibit 13.2. Mixed use FAR's shall be calculated by dividing the total floor area of all use types (e.g., Residential, Commercial, and Utility) by the gross site area above mean high water, excluding Fresh Water and Salt Water Wetlands. Residential units in mixed use developments will be counted towards the maximum number of Vested Units as provided in ¶ 13.B.1.(b)(i). Non-Residential floor area will be counted towards the maximum square footage as provided in ¶ 13.B.2.(b).

6. COMPATIBILITY STANDARDS.

The Compatibility Standards of the Land Development Regulations of the Town at the time of the effective date of this Agreement shall apply.

(a) Replatting

The Town, subject to compliance with applicable Laws, may approve replatting or re-configuration of Lots or Development Parcels contained in Subdivision Plats approved prior to the effective date of this Agreement. The Town shall notify the Property Owner when a person applies for replatting. Any increase in the number of Lots from such re-platting or re-configuration shall be counted toward the 1184 cap in Section 13.B.1 (b)(i).

14. Facilities and Services. Although the nature of this long term Project prevents the Property Owner from now providing exact completion dates, the Property Owner certifies that the following services and Facilities will be in place (or if not fully in place, the cost of their construction fully bonded or letter of credit posted pursuant to the Town Subdivision Regulations) at the times provided below and as to roads, sewer, and water infrastructure, at the times Lots or Dwelling Units in subdivided real property or condominium units on recorded master deeds are offered for purchase to the public. Subject to compliance with applicable Laws with all provisions of this Agreement, the Town hereby authorizes the Property Owner, on its own or through its affiliated companies, to install the Facilities. Notwithstanding any provision herein to the contrary, the Property Owner hereby agrees that adequate Facilities (as defined in the definition of "Facilities" in Exhibit 1.1) shall be available concurrent with the impacts of Development. Nothing in this Agreement shall be construed to create an obligation for the Town to construct Facilities or on Property Owner to pave the currently unpaved sections of Eugenia Avenue.

- (a) Rights-of-Way. The Property Owner shall at its expense develop and provide roads and other related infrastructure, and pursuant to and at such times required by the KICA Covenants, transfer same to the KICA if they are intended to be KICA Common Properties or Purchased Common Properties or Restricted Common Properties.

(b) Water and Sewer.

- (i) Provider. The service and Facilities for water and sewer shall be provided by the Kiawah Island Utility, Inc. (currently owned by the Property Owner) or its successor. If however the Town were to exercise its right to eminent domain over Kiawah Island Utility, Inc. in accordance with the statutes and constitution of South Carolina, it would become the provider.

JP

(ii) First Offer. In the event the Property Owner decides to sell the assets of or stock in Kiawah Island Utility, Inc., Property Owner shall negotiate first with the Town and allow the Town to make the first purchase offer, if it so desires, before seeking purchase proposals from other persons. The Town shall have ninety (90) days after written notice from the Property Owner to provide notice to Property Owner that it intends to exercise its right of first offer and shall make its proposal no later than one hundred twenty (120) days after the initial written notice of the Property Owner. If the Town does not notify the Property Owner of its intent to exercise its right to first offer within the required time, or if the Town does not make an offer within the required time, or if such offer is rejected by the Property Owner, Property Owner may seek purchase proposals from others.

(iii) Service Area. Property Owner shall not cause Kiawah Island Utility, Inc. to expand its services beyond its existing service area, Kiawah Island, without obtaining the written approval of the Town.

(iv) Donations. Property Owner will install and contribute to Kiawah Island Utility, Inc. (or reimburse Kiawah Island Utility, Inc. for the cost of installation thereof) all water and sewer facilities and infrastructure physically installed after September 1, 2005, on the Parcels owned by the Property Owner as shown on Exhibit 4.1 (with the exception of Parcel 15) or their adjacent rights of way, to serve such Parcels. Such facilities and infrastructure include but are not limited to, distribution and transmission lines, hydrants, pumps, and lift stations. If an additional, new above-ground water storage facility is needed to serve the Parcels owned by the Property Owner as shown on Exhibit 4.1 (with the exception of Parcel 15), the Property Owner shall pay for it without charge to Kiawah Island Utility, Inc. and donate it to Kiawah Island Utility, Inc. Notwithstanding the foregoing, the Property Owner shall not be obligated to construct and donate or pay for aquifer storage and recovery ("ASR") systems or any related facilities or components of ASR systems, including but not limited to pipes, pumps, and above ground storage required and necessary to operate an ASR system. In addition, Property Owner will donate to Kiawah Island Utilities any real property underlying any above ground storage constructed.

The Town and the Property Owner acknowledge that binding decisions rendered in prior rate proceedings (and appeals thereof) of Kiawah Island Utility, Inc. have held that the Property Owner does not have a legal obligation to donate all the infrastructure facilities described in (iv) above and that such donation will be made in discharge, and in lieu, of possible future exactions and donations that the Town might otherwise try to recover from the Property Owner in the absence of this Agreement. Town and Property Owner agree that the donations specified in this section shall not, and do not, constitute a waiver of the Property Owner's right to seek payment for other transmission and related facilities that it may construct for Kiawah Island Utility, Inc. or may construct for it in the future.

- (v) Capacity Analysis. The Town shall have the right to have the Town's consulting engineers perform an analysis of Kiawah Island Utility, Inc. to determine (a) whether the water and sewer capacity of Kiawah Island Utility is sufficient to handle existing customers, and (b) whether the existing plant and facilities of Kiawah Island Utility are being maintained and repaired in good condition. This assessment maybe done up to three times during the term of this Agreement at times to be determined by the Town but in no event closer than three years apart, except that an examination may be performed within the last twelve months before the Termination Date of this Agreement or prior to the triggering of subsection 14 (b)(ii) above. Kiawah Island Utility, Inc. agrees to grant the consulting engineers access to such records (excluding proprietary financial information) and its personnel as necessary to complete the report. The Town agrees that the information disclosed to its consulting engineers is confidential and shall be treated by it and its engineers as being confidential. The Town shall pay for the expense of the engineer associated with this analysis. The Town and Property Owner agree to use Thomas &Hutton or a mutually agreed substitute to perform this analysis.
- (vi) Rate Applications. Before intervening in future applications for rate adjustments by Kiawah Island Utility, Inc., the Town shall meet with representatives of Kiawah Island Utility, Inc. and the Property Owner to go over the proposed rate application, in an effort to avoid unnecessary expenditure of revenues of the Town and Kiawah Island Utility, Inc. on the litigation of rate applications. In consideration of the Property Owner entering this Agreement, the Town shall not expend any funds towards the expenses of a third party to assist a third party in intervening in any action before the South Carolina Public Service Commission ("PSC") involving a proposed rate increase applied for by Kiawah Island Utility, Inc. or any appeal thereof. The Town reserves the right to intervene in PSC proceedings initiated by Kiawah Island Utility, Inc. seeking a rate increase.
- (c) New Entrance and Roundabout. The Town shall be responsible for the maintenance, including landscaping and drainage, of the roundabout for the reconfiguration of the intersection of the Kiawah Island Parkway with the Betsy Kerrison Parkway, and associated areas. In the event that Property Owner believes the Town is not providing adequate maintenance, the Property Owner shall notify the Town specifying the nature of the deficiency. If the Town does not respond in writing to the Property Owner within 30 days and does not implement the correction of the deficiency within 30 days, the Property Owner shall have the right to accomplish the corrective measures, at its expense, unless the Town objects. If the Town objects, the Town and Property Owner shall attempt to arrive at a reasonable resolution. The Town recognizes that the donation of land by Atlantic Partners, an entity affiliated with Property Owner, to the Town to accomplish the roundabout constitutes a valuable contribution towards the Facilities, even though the roundabout is not located on Kiawah

Island.

- (d) Exactions. In return for the provision of the facilities and services set forth in this section 14 of this Agreement and the same section of the Initial Agreement, the Town agrees that it will not seek further property or monetary exactions or impact fees related only to the facilities and services described in this section 14, subject to S.C. Code §§ 6-31-80 and 6-31-100 (Cum.Supp. 2004); provided, however, the Town is not the facilities and services provider, except in the event that it exercises its power of eminent domain over Kiawah Island Utility, Inc, in accordance with the statutes and constitution of South Carolina.

15. Reservations, Conveyances, Leases, Easements, and Other Agreements.

- (a) For Benefit of KICA. The Property Owner shall make the following reservations, conveyances, leases, easements, and other agreements for the benefit of the KICA:

(i) Beach Parking:

A. Ocean Course. Within a reasonable time after the effective date of this Agreement, the Property Owner shall make a non-exclusive assignment to the Town of its easement rights and interests under that certain Grant of 30' Easement and Amendment of Easement and Beachfront Property Agreement from Landmark Land Company of Carolina, Inc. to Kiawah Resort Associates, a South Carolina joint venture dated July 26, 1991, and recorded in the RMC Office for Charleston County at Book X204, page 613, and any amendments thereto and assumptions thereof (collectively the "Landmark Easement."). Upon such assignment, Town assumes the responsibility of coordinating with The Ocean Course Golf Club, LLC (and its successors) and KICA the implementation of the beach parking at the Ocean Course including obtaining the necessary permits for such construction, as set forth in the Initial Agreement and the amendments thereto. Property Owner shall cooperate with the Town in seeking such permits. Property Owner shall pay for and construct the parking spaces within a reasonable time after the permits are obtained. Upon completion of construction, the Town and Property Owner shall make an assignment (which at their respective elections may be non-exclusive of their respective interests) to KICA of their rights and interests under the Landmark Easement

B. Captain Sam's Spit. If the Property Owner should develop Parcel 12B as allowed by this Agreement, Property Owner shall construct a parking area of coquina shell or better for eight (8) cars at or near the west end of the road to such spit (which may be conveyed to KICA) and convey to

CP

KICA by quitclaim deed such parking area, at a location in the discretion of the Property Owner, to allow KICA members access to the beach. If necessary, the Property Owner shall convey by quitclaim deed a pedestrian path to KICA for pedestrian access of its members from the parking area to the beach.-

(ii) New Cougar Island Park:

The Property Owner shall provide, plan, and develop an active park (e.g. fishing and crabbing dock, interpretative nature trails, picnic areas, and/or nature overlooks) on Cougar Island, Parcel 43, to consist of at least 2 acres located in the area shown on Exhibit 15.1. The Property Owner shall also provide eight (8) parking spaces of coquina shell or better for the use of this park. This park shall be developed and conveyed by quit claim deed for \$1.00 to KICA no later than one year after recording the final plat for Cougar Island that includes the proposed park and amenities.

(iii) Sora Rail Tract:

On or before December 31, 2005, the Property Owner will convey to KICA by quitclaim deed for one (\$1.00) dollar the tract adjacent to the Sora Rail Road KICA maintenance facility, shown on Exhibit 15.2, for its use in KICA's maintenance operations. The conveyance by the Property Owner shall be in conformance with the draft quitclaim deed attached as Exhibit 15.3.

(iv) KICA Boat Storage:

The Property Owner shall continue to lease the two current boat storage areas to KICA under the terms of the existing leases.

(v) Golf Courses/Tennis Courts Covenant:

The Property Owner reaffirms it placed in 1989 certain matters of record in the Charleston County RMC office which require -- among other things -- the current and future owners of Cougar Point, Turtle Point, Osprey Point, and The Ocean Course, as well as the two Resort Tennis Centers to use the lands currently devoted to golf and tennis purposes to only such golf course and tennis center purposes (and reasonable, related retail and commercial activities) for a period of approximately 83 years from the date hereof, absent consent of the Property Owner. The purpose and effect of such restrictive covenants was and is to prevent the conversion of these amenities that are available to Kiawah property owners to other uses, such as residential or other purely commercial purposes, for such period. If the Property Owner shall assign its rights under these restrictive covenants to

an entity not controlled or owned by Property Owner, the Property Owner will limit in such assignment the assignee's right to consent to changes to only those for minor alterations or to correct boundaries, etc., absent Town approval.

16. **Environmentally-Sensitive Property Protection.** The Property Owner shall make the following reservations, conveyances, leases, easements, and other agreements related to the protection of environmentally sensitive property as follows:

(a) **Preservation of Marsh Lands Acreage:**

There are approximately 4,000 to 5,000 acres of low lands and marsh lands contiguous to Kiawah Island, including those lands below mean high water and isolated lands above mean high water which are not specifically identified as Parcels in Exhibit 4.1 to this Agreement, identified on Exhibit 16.1 to this Agreement. On or before the Termination Date, all such land identified in Exhibit 16.1, except as further set forth herein, shall be conveyed by the Property Owner by quit claim deed (for \$1.00) to the KICA as additional Common Property subject to subpart (d) below.

The conveyance of all marshes and lowlands (as lie below mean high tide) shall be subject to a reservation in favor of Property Owner, its successors and assigns, across the property conveyed for access by walkways, docks, bridges, etc., to any highlands, hummocks or the like for active and passive recreational uses, and subject to all rights for dock usage under the Town's Key Location Ordinances, and subject to the right to grant a conservation easement to a qualified organization under 26 U.S.C. § 501(c)(3) in a form required by state or federal law before transfer to KICA. Property Owner shall also convey isolated lands above mean high water in the marsh that are not specifically identified as Parcels, by quit claim deed, to KICA by the Termination Date as defined in Section 21 herein, subject to all the same reservations, except for "undevelopable" highlands and isolated highlands as shown on Exh. 16.1 (KICA to provide description of undevelopable highland near or adjacent to developable highland). As for these "undevelopable" highlands and isolated highlands shown on Exh. 16.1 to be retained by Property Owner, Property Owner shall not be required to convey the same to KICA and may deed the same to purchasers; provided the deed shall impose permanent restrictions that prevent all construction (provided that said restrictions shall not prohibit active or passive recreational uses, access, and recreational structures such as docks, bulkheads, walkways, and gazebos) on such "undevelopable" highlands.

(b) **Beachfront Property.**

The protective ocean front building setback guidelines voluntarily imposed in the mid-1970's by the predecessors in title of the Property Owner as well as the

Property Owner since June 1988 with respect to the ocean front dunes for the purposes of setting back residential building structures, shall be continued by the ARB respecting its regulation of usage and placement of such structures on ocean front Lots at Kiawah Island. The strict customs and usages of the ARB shall likewise be continued in regard to such house structure setbacks and shall be adjusted by the ARB for each oceanfront site or it deems best and most appropriate.

Property Owner hereby acknowledges that certain License/Access Agreement dated December 31, 1993, and that Grant of Exclusive License dated April 15, 1997, as set forth in Exhibits 31.1 and 31.2, respectively, to be in full force and effect. Any covenants or deed reservations recorded prior or subsequent to the License Agreements by Property Owner and contrary thereto shall be deemed ineffective.

The emergency beach accesses identified in the License/Access Agreements shall not be obstructed in any manner inconsistent with the rights of the Town as set forth in the License/Access Agreements. The Town shall have the absolute right to access the beach at those emergency beach access points pursuant to the License/Access Agreements. Provided, however, the Parties agree that the Property Owner may re-locate the Beachwalker Park beach access to allow the Development authorized under this Agreement so long as a new beach access for Town vehicular use is provided by Property Owner nearby, in addition to the cooperation or rights that are specified in Exhibits 31.1 and 31.2.

Property Owner further acknowledges that the Town shares concurrent jurisdiction with the South Carolina DHEC's Department of Ocean and Coastal Resource Management ("OCRM") and federal agencies in accord with state and federal law, including the Town's jurisdiction and authority as set forth in Section 48-39-10, *et. seq.*, of the South Carolina Code of Laws, 1976, as amended.

(c) Marshes:

The Property Owner will limit its use of the marshes in and surrounding Kiawah Island to only such uses as are allowed by Subpart 16.(a) herein, the Town's Key Location Ordinances (Exhibit 10.2 hereto), and other local, state or federal laws.

(d) Bear Island:

Bear Island (AKA Little Bear Island) is located at the far eastern end of Kiawah Island, and is partially contiguous to the 5th hole of The Ocean Course. [See Exhibit 16.3.] The Property Owner (i) agrees and commits to Bear Island being primarily devoted to passive recreational activities as herein provided and (ii) hereby agrees (subject only to the permitted exceptions, conveyances, reservations, and site Development referenced below and/or of record in the

conservation easement herein mentioned) to convey same on or before the Termination Date to the KICA as additional Common Property under the Covenants.

Such conveyance to KICA (by quit claim deed) shall be subject to the right on the part of the Property Owner (of the approximately 152 highland acres estimated to comprise Bear Island (as depicted on Exhibit 16.3) to undertake limited Development, as is permissible and/or reserved in the deed of conservation easement recorded in the RMC Office for Charleston County at Book F340, page 421 to Wetlands America Trust, Inc.

Further, a master plan for Bear Island shall be submitted by the Property Owner for Town approval prior to any Development activities being undertaken thereon. The Town shall not unreasonably withhold or delay approval of any such master plan and agrees to facilitate, as needed, such limited Development and sale of 1 or 2 small Lots or Single Family Detached Dwellings and associated improvements (including roads providing access thereto) and related uses/activities as are allowed and/or reserved in said conservation easement.

Except as so provided herein, Bear Island shall remain permanently in its natural state as habitat for animals and birds; provided, the Property Owner and/or Kiawah property owners and/or their invitees (under the auspices of and/or regulations and supervision of the KICA) may enter on to the natural undeveloped areas of the Bear Island property for camping, nature viewing, wildlife expeditions, and other similar activities. (Access for such purposes may have to be by boat.)

- (e) Archeological Studies. Subject to the provisions of § 6-31-80, the Programmatic Agreement heretofore entered between the Property Owner and the State Department of Archives and certain other state and federal entities shall govern all matters dealing with archeology at Kiawah Island. A copy of such Agreement is attached as Exhibit 16.4: Programmatic Agreement.

- (f) Captain Sam's Spit - Parcel 12B.

This parcel is known as Captain Sam's Spit and is shown on Exhibit 16.2. It comprises approximately 118.3 acres of highland of which the Property Owner may plat, Develop, and convey: (a) fee simple title to no more than 20 acres for Single Family Detached Dwelling residential purposes and any uses as are authorized for Parcel 12B as authorized by this Agreement; (b) and utilize additional Parcel 12B highland acreage as may be needed for infrastructure/Development including, but not limited to, road rights-of-way, utilities, beach access easements, paths, trails, green space, community recreation serving Parcel 12B, dock access, parking, etc., with any such Development to comply with this Agreement including but not limited to Exhibits 13.1 and 13.2.

Provided however, only highland landward of the setback line and/or critical line set by OCRM may have structures built thereon (lot lines and boardwalks permitted by OCRM from time to time may, however, irrespective of the foregoing, extend seaward of the setback line and critical line).

Such developable acreage shall be based on environmentally-sensitive approaches to Development, including limited and careful infrastructure construction. The Town will assist Property Owner in facilitating provision of access strategies that minimize impacts with narrow rights-of-ways to 20' widths or less and narrower road profiles to 16', provided such access is appropriate for emergency vehicles. Property Owner may use pervious material for same.

Notwithstanding any other provision of this Agreement, Property Owner agrees that prior to any conveyance to KICA of rights, title, or interests in any roadway and adjacent right-of-way leading to developable property appearing on recorded plats at Captain Sam's Spit (i.e., on Parcel 12B), the Property Owner shall first obtain and provide to the board of directors of KICA, a certification from a licensed civil engineer with at least 20 years experience in South Carolina coastal development, that such roadway/right-of-way, in such engineer's considered professional opinion, will not unreasonably be subject to tidal erosion from the Kiawah River or the Atlantic Ocean.

When and if such roadway/right-of-way improvements are completed by Property Owner and such certification obtained from the licensed civil engineer, as aforesaid, is so delivered, then the roadway/right-of-way may, with all such improvements as are herein or otherwise authorized or provided for, be conveyed pursuant to the Kiawah Island General Covenants and/or the KICA Covenants, to KICA in such form as Property Owner has heretofore customarily conveyed rights in other roads and rights-of-way at Kiawah Island to KICA.

Property Owner may construct up to 2 community docks (with OCRM permitting approval) serving parcel 12B with flexibility for placement per Exhibit 16.2. The Key Location Ordinance shall be amended by the Town to accommodate same as and when the dock(s) are ready to be Developed by Property Owner.

The Town will assist Property Owner's implementation of the Development authorized on parcel 12B, including supportive assistance with state, federal, and local regulatory or governmental authorities or agencies.

Should the baseline/setback and/or critical lines move (including adjustments as result from periodic measurements by OCRM), allowances and locations for structure placement shall be adjusted accordingly by the parties and confirmed by amendment(s) hereto upon request of either party.

Property Owner shall provide to KICA (by quitclaim deed conveyance) 8 parking

spaces at the western end of the road access authorized above upon completion of same and shall improve the spaces with pervious material. An easement to KICA shall be limited to its members' use for access along the road to the 8 parking space area. A beach access path from such parking area shall also be granted by Property Owner to KICA by quitclaim deed for its members' convenient usage.

On or before the Termination Date of this Agreement, Property Owner shall convey to KICA (for nominal consideration by quitclaim deed) such areas of highland depicted in light green and cream on Exhibit 16.2 as are then seaward (as to land on the ocean side of Parcel 12B) of the crest of the primary oceanfront dune, less only such areas/lots as may have been encumbered by easements or conveyed to third parties (e.g., lot owners, KICA, etc. pursuant to the authorizations hereinabove noted).

Prior to the Termination Date, Property Owner also agrees to restrict all remaining highlands not devoted to the uses or purposes authorized herein, to non-developable, passive green space by restrictive covenant recorded in the Charleston County RMC office. Property Owner shall grant an easement to KINHC (provided KINHC accepts) for any acreage not subject to Development, including such acreage as is to be conveyed, ultimately, to KICA.

The Town has requested that the Property Owner consider the possibility of establishing a temporary site on the Kiawah River for KICA members to launch kayaks and canoes before further Development of Captain Sam's Spit. Property Owner agrees to study the issue and consider the request in good faith.

17. Historic Structure Preservation and Restoration. The Property Owner shall protect and preserve the historic Vanderhorst Mansion.

It is further agreed that Exhibit 17.1, Vanderhorst Development Plan, attached hereto, reflects a Development Plan for the overall Vanderhorst tract that is satisfactory to the Town respecting subdivision, architectural elements, infrastructure and other Development of this 6 acre tract.

It is further agreed that the plans heretofore approved by the State Archives Department, the Preservation Society of Charleston, the Historic Charleston Foundation and others as are included are likewise satisfactory to the Town and will be approved whenever presented by the Property Owner and/or others for all permitting, subdivision or other purposes.

All restoration expenses of the Vanderhorst Mansion as well as all road, water, sewer and any other infrastructure indicated on Exhibit 17.1 shall be the sole responsibility of the Property Owner or its successors in title, successors in interest or assigns.

18. Kiawah Island Community Association, Inc.

(a) Waiver.

As of the effective date of this Agreement, Property Owner permanently and irrevocably waives its right to appoint a majority of the KICA board except for a specific reservation of certain rights including those under Article VIII, Section 2 of the KICA Covenants to approve all amendments to the KICA Covenants until the Termination Date, or the occurrence of board-control transition under the KICA Covenants, whichever occurs first, as set forth in the copy of the waiver attached as Exhibit 18.1, which shall be executed and recorded by Property Owner within thirty (30) days after the effective date.

(b) KICA Authority.

This Agreement shall not be understood as amending the KICA Covenants or changing rights thereunder. Except as expressly provided in this Agreement, the rights granted the Property Owner as the "Company" under the KICA Covenants are not intended to be lessened or abrogated, and any consensual relinquishment herein of rights provided to the Property Owner by the KICA Covenants shall not be deemed or construed to be permanent waivers of its rights under the KICA Covenants except as expressly set forth in Exhibit 18.1.

(c) The Security Gate.

The Town and the Property Owner recognize and respect the fundamental importance and value of the Security Gate, private rights-of-way and private amenities to the Town, the Property Owner and the owners of property on Kiawah Island and to the enhancement and preservation of every property owner's land values. If a judicial challenge is brought seeking to make one or more of the roads on the island open to the general public and the challenging party prevails based, in whole or in substantial part, on the expenditure of public funds by the Town and/or an ordinance passed by the Town and/or other conduct or ownership of facilities of the Town, the Town agrees that it will immediately cease such expenditures, repeal such ordinance, and refrain from owning such facilities (as are inside the current main security gate) or continuing such conduct. This paragraph shall be subject to the provisions of § 6-31-80 and shall not be construed to prevent the performance or enforcement of the specific provisions of this Agreement.

- (d) Extension of Covenants. Property Owner agrees that it will not exercise its rights under the KICA Covenants to submit contiguous or nearly contiguous properties to the KICA covenants unless there has been prior approval by a simple majority vote of the members present at a duly called meeting of the membership under the KICA Covenants. Parcels 2, 3, 4, 5, 6, 11, 12A, and 12B are excluded from this requirement of approval by the KICA membership.

BK # Z558PG032

- (e) Property Owner Votes. Property Owner, during the term of this Agreement, agrees to abstain from casting any or all of its votes as a Type A Member and any proxies it may hold from other Type A Members for the election of Type A Directors.

19. Hotel/Inn Zoning. It is understood and agreed between the Town and the Property Owner that unlike other resort and residential communities, the Real Property is intended to be and shall remain free of a proliferation of hotels or inns. No Hotel Rooms and Support Space are allocated to the Undeveloped Lands as defined in this Agreement.

20. Development Schedule for The Project.

- (a) Commencement date. The Project commenced in the mid-1970's, and has been ongoing since then.
- (b) Interim completion date. The Property Owner projects that in the following years after the execution and adoption of this Agreement, the following percentages of the Undeveloped Lands within the Real Property will be developed:

<u>YEAR</u>	<u>% COMPLETE</u>
5	10
10	20
15	35
20	60
25	85
30	100

- (c) Completion date. The Property Owner projects that by the year 2030 the Project should be complete (i.e., all recreational amenities erected, commercial structures built, and essentially all structures erected on building Lots and all necessary infrastructure in place). Nothing in this paragraph shall be interpreted to extend the term of this Agreement.

21. Term of the Agreement. This Agreement shall expire on August 1, 2015. If the Property Owner shall provide to the Town a certification that highland within the Real Property owned by the Property Owner as of January 1, 2008, is 250 acres or greater, the Town and the Property Owner shall enter an amendment to this Agreement extending the term to January 1, 2018. The date of the expiration of the term of this Agreement is the "Termination Date."

Property Owner and the Town agree that the Initial Agreement shall be terminated at the time of the effective date of this Agreement except the following which shall not be extinguished and shall survive the termination: (1) the rights and obligations of the Ocean Course Golf Club, LLC, with respect to beach parking at the Ocean Course as set forth in sixth and eighth amendments to the Initial Agreement, and (2) those vested rights of third

persons specifically preserved herein under Section 10(b). All rights and obligations under the Initial Agreement that are preserved by this Agreement shall be deemed to have been continuous and without interruption despite the termination of the Initial Agreement.

22. Amending Or Canceling The Agreement. Subject to the provisions of § 6-31-80, this Agreement may be amended or canceled in whole or in part only by mutual consent of the Parties in writing or by their successors in interest and, in the case of the Property Owner, its successors in title who, by virtue of assignment or other instrument become the "Company" under the KICA Covenants.
23. Modifying Or Suspending The Agreement. In the event state or federal laws or regulations prevent or preclude compliance with one or more provisions of this Agreement, the pertinent provisions of this Agreement shall be modified or suspended as may be necessary to comply with such state or federal laws or regulations.
24. Periodic Review. The Zoning Administrator of the Town, or, if the Town has no Zoning Administrator, an appropriate officer of the Town, shall review the Project and this Agreement at least every twelve months, at which time the Property Owner shall demonstrate good faith compliance with the terms of this Agreement.

If, as a result of its periodic review, the Town finds and determines that the Property Owner has committed a material breach of the terms or conditions of this Agreement, the Town shall serve notice in writing upon the Property Owner setting forth with reasonable particularity the nature of the breach and the evidence supporting the finding and determination, and providing the Property Owner a reasonable time in which to cure the material breach.

If the Property Owner fails to cure any material breach within the time given, then the Town unilaterally may terminate or modify this Agreement; provided, that the Town has first given the Property Owner the opportunity: (1) to rebut the Town's finding and determination; or (2) to consent to amend this Agreement to meet the concerns of the Town with respect to the findings and determinations.

25. Severability. Subject to the provisions of § 6-31-150 and of ¶ 18(a), *supra*, if any word, phrase, sentence, paragraph or provision of this Agreement shall be finally adjudicated to be invalid, void, or illegal, it shall be deleted and in no way affect, impair, or invalidate any other provision hereof.
26. Merger. This Agreement coupled with the Exhibits hereto which are incorporated herein by reference shall state the final and complete expression of the Parties' intentions. In return for the respective rights, benefits and burdens undertaken by the Parties, the Property Owner shall be, and is hereby, relieved of obligations imposed by PDD1a, including but not limited to obligations relating to providing an elementary school site, except those which may be specifically carried forward herein.

The parties hereto agree to cooperate with each other to effectuate the provisions of this Agreement and to act reasonably and expeditiously in all performances required under the Agreement.

In the event of any legal action instituted by a third party or other governmental entity or official challenging the validity of any provision of this Agreement, the Parties hereby agree to cooperate in defending such action.

27. **Conflicts of law.** This Agreement shall be construed and enforced in accordance with the laws of the State of South Carolina.
28. **Remedies.** Each Party recognizes that the other Party would suffer irreparable harm from a material breach of this Agreement and that no adequate remedy at law exists to enforce this Agreement. Consequently, the Parties agree that any non-breaching Party who seeks enforcement of the Agreement is entitled to the remedies of injunction and specific performance but not to any other legal or equitable remedies including, but not limited to, damages; provided, however, that Property Owner shall not forfeit its right to just compensation for any violation by Town of Property Owner's Fifth Amendment rights. The Town will look solely to the Property Owner as to any rights it may have against the Property Owner under this Agreement, and hereby waives any right to assert claims against limited partners of the Property Owner, and further agrees that no limited partner or agent of the Property Owner has any personal liability under this Agreement. Likewise, Property Owner agrees to look solely to the Town's assets as to any rights it may have against the Town under this Agreement, and hereby waives any right to assert claims for personal liability against individuals acting on behalf of the Town, its Town Council members, agencies, boards, or commissions.
29. **Recording.** Within fourteen days after execution of this Agreement, the Property Owner shall record the agreement with the Charleston County Register of Mesne Conveyance. The burdens of this Agreement are binding upon, and the benefits of this Agreement shall inure to, all successors in interest and assigns of the Parties to this Agreement.
30. **Third Parties.** Notwithstanding any provision herein to the contrary, this Agreement shall not be binding and shall have no force or effect as to persons or entities who are not Parties or Successors and Assigns to this Agreement.
31. **Conveyances.** Except as otherwise provided herein, all conveyances or transfers of any portion of the Real Property to KICA are to be by quit claim deed and for nominal consideration not to exceed one dollar (\$1.00). Except as provided in § 16(d) herein, all conveyances shall be tendered by the Property Owner so as to close during the duration of this Agreement; and, such conveyances shall preserve the Town's rights of beach access existing on the date of execution of the License Agreement dated December 31, 1993, attached hereto as Exhibit 31.1, and as of the date of the execution of the Grant of Exclusive License between Kiawah Resort Associates, LP and the Town for vehicular

1993, attached hereto as Exhibit 31.1, and as of the date of the execution of the Grant of Exclusive License between Kiawah Resort Associates, LP and the Town for vehicular beach access from Beachwalker Park, attached hereto as Exhibit 31.2, recorded in the RMC Office for Charleston County at Book Z 282, Page 737. All improvements prior to conveyance shall be at the Property Owner's expense. The Property Owner hereby freely consents to such conveyances and waives any challenges it may otherwise have to the validity of said conveyances (as exactions or otherwise). Property Owner further agrees to waive any challenges to Town ordinances (regardless of when enacted) passed so as to limit Property Owner's use of Real Property to be conveyed to KICA (or some 501(c)(3) organization) in order to protect and preserve the purposes of the conveyances. Such waiver shall include, but not be limited to all state laws and local zoning and subdivision regulations prohibiting all development of any portion of the Real Property so conveyed, it being agreed to by the Property Owner that said restrictions do not restrict the totality of the Real Property and that the same are reasonable restrictions in time, place and manner.

Notwithstanding the foregoing, the Property Owner shall be entitled to grant easements, licenses, access, and recreational uses for the properties to be conveyed, consistent with and not prohibited by Sections 14, 15, 16, and 33(b)(iii) herein.

32. Town Determinations Relating to the Project.

Approval of Agreement. The Town Council has approved the Project under the process set forth in ¶ 6-31-50 of the Act and the Development Agreement procedures set forth in Ordinance 2005-6 on the terms and conditions set forth in this Development Agreement.

33. Successors and Assigns.

- (a) Binding Effect. This Agreement shall be binding on the successors and assigns of the Property Owner in the ownership or Development of any portion of the Real Property or the Project. A purchaser, lessee or other successor in interest of any portion of the Real Property shall be responsible for performance of Property Owner's obligations hereunder as to the portion of the Real Property so transferred. In addition, unless the Town gives its written consent (which consent shall be deemed given if the Town does not respond after thirty (30) days written notice and which consent shall not be unreasonably withheld) to transfer or assignment, Property Owner shall remain jointly and severally liable to Town under this Agreement. The Town's determination whether to give its written consent shall be based on the ability of the purchaser/transferee to perform the obligations of this Agreement associated with the tract transferred. Such written consent will not be unreasonably withheld if such ability is demonstrated.

This paragraph shall not be construed to prevent Property Owner from obtaining indemnification of liability to the Town from third parties. Further, Property Owner shall not be required to notify the Town or obtain the Town's consent with

commercial areas which have been platted and approved in accordance with the terms of this Agreement. Property Owner shall be released from obligations as to sale of individual Lots in single family subdivisions and individual pad sites in commercial areas.

This Agreement shall also be binding on the Town and all future Town Councils for the duration of this Agreement, even if the Town Council members and/or mayor change.

(b) Transfer of Project. Property Owner shall be entitled to transfer any portion or all of the Real Property to a purchaser(s), subject to the following exceptions:

(i) Notice of Property Transfer. If the Property Owner intends to transfer all or a portion of the Real Property to a purchaser who, by virtue of assignment or other instrument, becomes the "Company" under and within the meaning of the KICA Covenants, Property Owner shall notify the Town by thirty days prior written notice and provide it a copy of the assignment of such status as the "Company."

(ii) Transfer of Facility and Service Obligations. If the Property Owner transfers any portion of the Real Property on which the Property Owner is required to provide and/or construct certain Facilities or provide certain services, distinct from those provided throughout the Project and which are site-specific to the portion of the Real Property conveyed, then the Property Owner shall be required to obtain a written agreement from the purchaser expressly assuming all such separate responsibilities and obligations with regard to the parcel conveyed and the Property Owner shall provide a copy of such agreement to the Town.

(iii) Transfer of Property Committed to Transfer to Third Parties. Property Owner shall not be entitled to transfer to third parties Real Property which Property Owner is required to transfer to KICA or other third parties by reason of the terms of this Agreement. Notwithstanding the foregoing, the Property Owner shall be entitled to grant easements, access, and recreational uses for the properties to be conveyed, consistent with and not prohibited by Sections 14, 15, 16, and 33(b)(iii) herein.

(iv) Assignment of Development Rights. Any and all conveyances of any portion of the Real Property subject to the "cap" set forth in § 13.B.1.(b)(ii) herein shall, by contract and covenant running with the land, assign a precise number of Vested Units and commercial square footage. (in reduction of the ----new Vested Units, and 219,000----- non-residential square footage)

(v) Mortgage Lenders. Notwithstanding anything to the contrary contained

herein, the exceptions to transfer contained in this ¶ 33(b) shall not apply: (i) to any mortgage lender either as the result of foreclosure of any mortgage secured by any portion of the Real Property or any other transfer in lieu of foreclosure; (ii) to any third party purchaser at such a foreclosure; or (iii) to any third party purchaser of such mortgage lender's interest subsequent to the mortgage lender's acquiring ownership of any portion of the Real Property as set forth above. Furthermore, nothing contained herein shall prevent, hinder or delay any transfer of any portion of the Real Property to any such mortgage lender or subsequent purchaser. Except as set forth herein, any such mortgage lender or subsequent purchaser shall be bound by and shall receive the benefits from this Agreement as the successor in title to the Property Owner in accordance with ¶ 6 hereof.

- (c) Release of Property Owner. In the event of consent by Town to the sale or other conveyance of all or a portion of the Real Property and compliance with the conditions set forth therein, the Property Owner shall be released from any further obligations with respect to this Agreement as to the portion of the Real Property so transferred, and the transferee shall be substituted as the Property Owner under the Agreement as to the portion of the Real Property so transferred.
- (d) Estoppel Certificate. Upon request in writing from an assignee or the Property Owner to the Town sent by certified or registered mail or publicly licensed message carrier, return receipt requested, the Town will provide a certificate in recordable form that solely with respect to the portion of the Real Property described in the request, there are no violations or breaches of this Agreement, except as otherwise described in the Certificate. The Town will respond to such a request within ninety (90) days of the receipt of the request, and may employ such professional consultants, municipal, county and state agencies and staff as may be necessary to assure the truth and completeness of the statements in the certificate. The reasonable costs and disbursements of private consultants will be paid by the person making the request.

The certificate issued by the Town will be binding on the Town in accordance with the facts and statements contained therein as of its date and may be relied upon by all persons having notice thereof. No claim or action to enforce compliance with this Agreement may be brought against the Property Owner or its assignees properly holding rights hereunder, alleging any violation of the terms and covenants affecting such portion of the Real Property except as otherwise described in the Certificate.

If the Town does not respond to such request within ninety (90) days of the time of its receipt, the portion of the Real Property described in the request will be deemed in compliance with all of the covenants and terms of this Agreement. A certificate of such conclusion may be recorded by the Property Owner, including

ul

a copy of the request and the notice of receipt and it shall be binding on the Town as of its date. Such notice shall have the same effect as a Certificate issued by the Town under this ¶ 33 (d).

34. General Terms and Conditions.

- (a) Agreements to Run with the Land. This Agreement shall be recorded against the Real Property as described in Exhibit 4.1 attached hereto. The agreements contained herein shall be deemed to run with the land. The burdens of this Agreement are binding upon, and the benefits of the Agreement shall inure to, all successors in interest to the Parties to the Agreement.
- (b) Construction of Agreement. This Agreement should be construed so as to effectuate the public purpose of settlement of disputes, while protecting the public health, safety and welfare, including but not limited to ensuring the adequacy of Facilities and compatibility between Undeveloped Lands and the other Development on Kiawah Island.
- (c) Mutual Releases. At the time of, and subject to, (a) the expiration of any applicable appeal period with respect to the approval of this Agreement without any appeal having been filed or (b) the final determination of any court upholding this Agreement, whichever occurs later, and excepting the parties' respective rights and obligations under this Agreement, Property Owner, on behalf of itself and Property Owner's partners, officers, directors, employees, agents, attorneys and consultants, hereby releases the Town and the Town's council members, officials, employees, agents, attorneys and consultants, and the Town, on behalf of itself and the Town's council members, officials, employees, agents, attorneys and consultants, hereby releases Property Owner and Property Owner's partners, officers, directors, employees, agents, attorneys and consultants, from and against any and all claims, demands, liabilities, costs, expenses of whatever nature, whether known or unknown, and whether liquidated or contingent, arising on or before the date of this Agreement in connection with the Real Property or the application, processing or approval of the Project; provided, however, that each party shall not be released from its continuing obligation to comply with law, including Town's Land Development Regulations, as amended.
- (d) State and Federal Law. The Parties agree, intend and understand that the obligations imposed by this Agreement are only such as are consistent with state and federal law. In the event state or federal laws or regulations prevent or preclude compliance with one or more provisions of the development agreement, the provisions of this Agreement shall be modified or suspended as may be necessary to comply with state or federal laws or regulations. The Parties further agree that if any provision of this Agreement is declared invalid, this Agreement shall be deemed amended to the extent necessary to make it consistent with state or federal law, as the case may be, and the balance of the Agreement shall remain

in full force and effect.

- (e) No Waiver. Failure of a Party hereto to exercise any right hereunder shall not be deemed a waiver of any such right and shall not affect the right of such Party to exercise at some future time said right or any other right it may have hereunder. Unless this Agreement is amended by vote of the Town Council taken with the same formality as the vote approving this Agreement, no officer, official or agent of the Town has the power to amend, modify or alter this Agreement or waive any of its conditions as to bind the Town by making any promise or representation not contained herein. Any amendments are subject to § 22 herein.
- (f) Entire Agreement. This Agreement constitutes the entire agreement between the Parties and supersedes all prior agreements, whether oral or written, covering the same subject matter, except for the survival and extension of certain rights and obligations established under the Initial Agreement and the amendments thereto as explicitly described herein. This Agreement may not be modified or amended except in writing mutually agreed to and accepted by both Parties to this Agreement.
- (g) Attorneys Fees. Should any Party hereto employ an attorney for the purpose of enforcing this Agreement, or any judgment based on this Agreement, for any reason or in any legal proceeding whatsoever, including insolvency, bankruptcy, arbitration, declaratory relief or other litigation, including appeals or rehearings, the prevailing Party shall be entitled to receive from the other party thereto reimbursement for all attorneys' fees and all costs and expenses. Should any judgment or final order be issued in that proceeding, said reimbursement shall be specified therein.
- (h) Notices. All notices hereunder shall be given in writing by certified mail, postage prepaid, at the following addresses:

To the Town:

Mayor of Kiawah Island
Town Hall
21 Beachwalker Drive
Kiawah Island, SC 29455

With copies to:

County Planning Director
Lonnie Hamilton Public Services Building
4045 Bridge View Drive
N. Charleston, SC 29405

Dennis J. Rhoad, Esq.
PO Box 1059
Charleston, SC 29402 - 1059

To the Property Owner:

Charles P. Darby, III
Kiawah Development Partners
Two North Adgers Wharf
Charleston, SC 29401

Leonard L. Long, Jr.
Kiawah Development Partners
Two North Adgers Wharf
Charleston, SC 29401

With copies to:

G. Trenholm Walker, Esq.
P. O. Box 22247
Charleston, SC 29403-2247

- (i) Execution of Agreement. This Agreement may be executed in multiple parts as originals or by facsimile copies of executed originals; provided, however, if executed and evidence of execution is made by facsimile copy, then an original shall be provided to the other party within seven (7) days of receipt of said facsimile copy.
- (j) Survival of Property Owner's Obligations. Notwithstanding any provision of this Agreement, or of law to the contrary and as a partial consideration for the parties entering into this Agreement, the Parties agree that Property Owner is obligated to provide to the Town and KICA the following enumerated extraordinary and significant benefits even if the Property Owner cancels, rescinds, repudiates, refuses, revokes, or in any manner terminates or attempts to terminate this Agreement:
 - (i) Dedication of the conservation open space at Captain Sam's Spit as set forth in Section 16 of this Agreement;
 - (ii) Construction of Facilities covered by a recorded plat;
 - (iii) Conveyance of marshes and lowlands;
 - (iv) Conveyance of Bear Island to the KICA, exclusive of those portions that may have previously been Developed pursuant to deed of conservation

may have previously been Developed pursuant to deed of conservation easement recorded in the RMC Office for Charleston County at Book F340, page 421 to Wetlands America Trust, Inc. However, such conveyance after the expiration or termination of this Agreement shall still be subject to reservation of the quit claim deed that makes portions of Bear Island available for Development as permitted in the deed of conservation easement recorded in the RMC Office for Charleston County at Book F340, page 421 to Wetlands America Trust, Inc and further subject to the reservation of title by Property Owner as set forth in this Agreement.

- (k) **Disputes in Interpretation.** If the Town and the Property Owner disagree as to the interpretation and/or meaning of this Agreement, they agree that they shall have their respective attorneys meet over the course of a week in an effort to resolve such difference. If their attorneys are unable to agree, these attorneys shall within a week select a third person to arbitrate the dispute. The arbitration shall be held promptly (no later than one week after the arbitrator is selected) and include a hearing conducted by the arbitrator in which the Parties shall have the right to make their arguments, present evidence, cross examine witnesses and to invoke such other procedures as normally attend an arbitration proceeding. The arbitrator's award shall be final and binding. The Parties hereby waive the statutory notice of arbitration on the front of this Agreement as specified in South Carolina's Uniform Arbitration Act, S.C. Code § 15-48-10(a).

IN WITNESS WHEREOF the Parties hereto have executed and delivered this Amended and Restated Development Agreement, and by their seals do affirm such execution and delivery, on the day and year first above written.

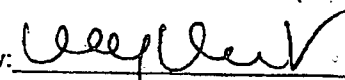
TOWN OF KIAWAH ISLAND

SIGNED, SEALED, AND DELIVERED
IN THE PRESENCE OF:


Elizabeth C. Pelt

Elizabeth C. Pelt

TOWN OF KIAWAH ISLAND (Town)
(SEAL)

By: 
William G. Wert, Mayor

By: 
Alan L. Burnaford

BR 7558PG042

62
E. M. C. P. C.
E. M. C. P. C.
E. M. C. P. C.
E. M. C. P. C.
E. M. C. P. C.

By: Charles R. Lipuma
Charles R. Lipuma

By: Donald H. McIver, Jr.
Donald H. McIver, Jr.

By: G. Steven Orban
G. Steven Orban

Attest: Allison B. Harvey
Allison B. Harvey, Administrator

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

ACKNOWLEDGMENT
(TOWN)

THE FOREGOING INSTRUMENT was acknowledged before me by the TOWN OF
KIAWAH ISLAND, by William G. Wert, its Mayor, and Allison B. Harvey, its Town
Administrator, this 12 day of October, 2005.

Thomas Rucker (SEAL)
Notary Public for South Carolina

My Commission Expires: 11-27-2011

11-27-2011

DL 002558PG043

PROPERTY OWNER

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

KIAWAH RESORT ASSOCIATES, L.P.
(SEAL)

By: D&W Investments, Inc.,
a South Carolina corporation
(CORP. SEAL)

Its: General Partner

By: Charles P. Darby, III

Its: President

By: TWD Investments, LLC
(a South Carolina limited liability company)
(SEAL)

Its: General Partner

By: Charles P. Darby, III

Its: Manager

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON .)

THE FOREGOING INSTRUMENT was acknowledged before me by Kiawah Resort Associates, L.P., by D&W Investments, Inc., a South Carolina corporation, its General Partner, by Charles P. Darby, III, its President, this 12 day of October, 2005.

Terriko Rucker (SEAL)
Notary Public for South Carolina
My commission expires: 11-27-2011

40
BK 7558PG044

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

THE FOREGOING INSTRUMENT was acknowledged before me by Kiawah Resort Associates, L.P., by TWD Investments, LLC (a South Carolina limited liability company), its General Partner, by Charles P. Darby, III, its Manager, this 12 day of October, 2005.

Timothy Rucker (SEAL)
Notary Public for South Carolina
My commission expires: 11-27-2011

W
BK # Z558PG045

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:


Allen Blauvelt

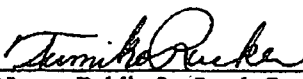
KIAWAH DEVELOPMENT PARTNERS,
INC. (SEAL)

By: 
Charles P. Darby, III

Its: President

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

THE FOREGOING INSTRUMENT was acknowledged before me by Kiawah
Development Partners, Inc., by Charles P. Darby, III, its President, this 12 day of
October, 2005.

 (SEAL)
Notary Public for South Carolina
My commission expires: 11-27-2011

100

BA 7 Z558PG046

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

KIAWAH LAND DEVELOPMENT, LLC
(SEAL)

By: Kiawah Development Partners II, Inc.
Its: Manager

(CORP. SEAL)



Allen B. Harvey

By: 
Charles P. Darby, III

Its: President

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

THE FOREGOING INSTRUMENT was acknowledged before me by Kiawah Land Development, LLC, by Kiawah Development Partners II, Inc., its Manager, by Charles P. Darby, III, its President, this 12 day of October, 2005.

 (SEAL)
Notary Public for South Carolina
My commission expires: 11-27-2011



W
BK # Z558PG047

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

[Signature]

Allin Portaway

KIAWAH ISLAND UTILITY, INC.
(CORP. SEAL)

By: [Signature]
Charles P. Darby, III

Its: President

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

THE FOREGOING INSTRUMENT was acknowledged before me by Kiawah Island
Utility, Inc., by Charles P. Darby, its President, this 12 day of October, 2005.

[Signature] (SEAL)
Notary Public for South Carolina
My commission expires: 11-27-2011



册号 Z558P6048

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

John C. Bryant

Elizabeth Adams

BEAR ISLAND HOLDING TRUST
(SEAL)

By:

Lodema R. Adams
Lodema R. Adams, Trustee

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

THE FOREGOING INSTRUMENT was acknowledged before me by Bear Island
Holding Trust by Lodema R. Adams, Trustee, this 12th day of October,
2008.

Elizabeth Adams (SEAL)
Notary Public for South Carolina

My commission expires: 1-19-11

W

BK Z558PG049

CD

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

CHARLES P. DARBY, JR. ISSUE TRUST
(SEAL)

Charles P. Darby, Jr.
Charles P. Darby, III

By: Charles P. Darby, III
Charles P. Darby, III, Co-Trustee
By: John C.L. Darby
John C.L. Darby, Co-Trustee

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

THE FOREGOING INSTRUMENT was acknowledged before me by the Charles P. Darby, Jr. Issue Trust by Charles P. Darby, III and John C.L. Darby, Co-Trustees of said Trust, this 12th day of October, 2005.

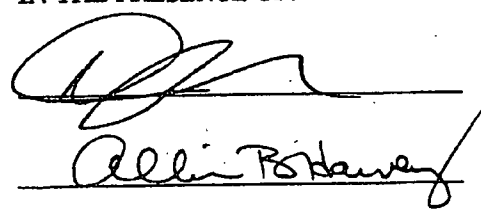
Charles P. Darby, III (SEAL)
Notary Public for South Carolina
My commission expires: 1-19-11

W

BK # Z558PG050

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

VANDERHORST, LLC (SEAL)

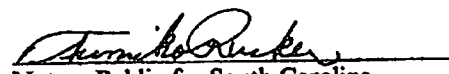

Allin R. Harvey

By: 
Charles P. Darby, III

Its: Manager

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

THE FOREGOING INSTRUMENT was acknowledged before me by Vanderhorst, LLC,
by Charles P. Darby, III, its Manager, this 12 day of October, 2005.

 (SEAL)
Notary Public for South Carolina
My commission expires: 11-27-2011



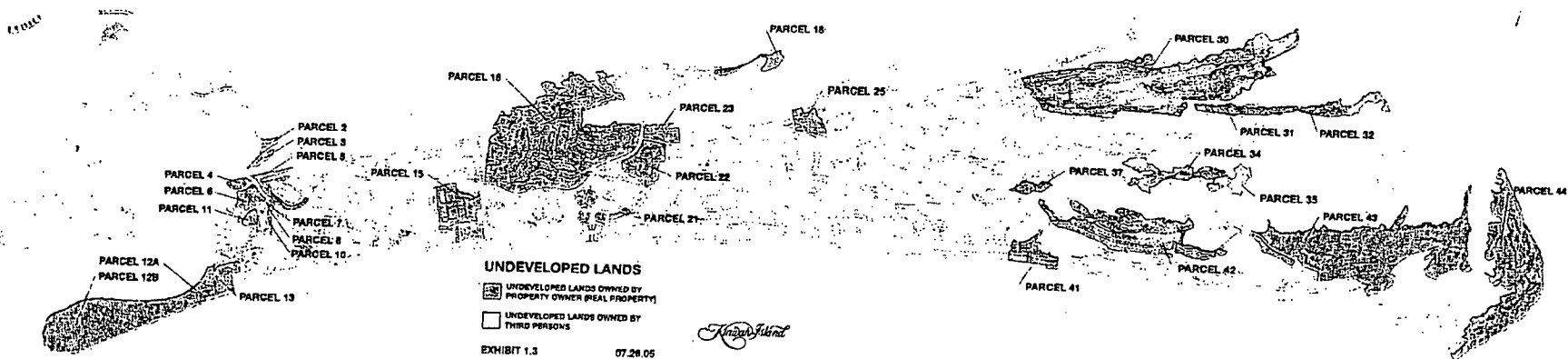


Exhibit 4.1: Description of Real Property
Owned by Property Owner
07.29.05

PARCEL NO.	PARCEL DESCRIPTION	ACREAGE (ABOVE M.H.W.)
2	Mingo North	8.27
3	Mingo South	4.40
4	Little Rabbit	4.50
5	Little Rabbit North	6.20
6	Kiawah River Commons	6.16
7	Sales Center	2.37
8	Parkway Gate	1.20
10	Marsh Point Residual	0.66
11	Beachwalker Lagoon	5.94
12A	Beachwalker Park	8.70
12B	Captain Sam's Spit	118.03
13	Beachwalker Ocean	19.50
15	Utility Tract	34.36
16	Settlement (Bass Pond) (includes lots 1-9, 28-31, 54, 166 + golf)	255.41
18	Captain Maynards	11.38
21	East Beach Lagoon	3.00
22	East Beach Interior	33.22
23	Governors Marsh	12.73
25	Vanderhorst Mansion	18.34
30	Preserve (Blue Heron)	20.19
41	Osprey Beach 3/Beach Club	8.21
43	Cougar Island (includes lots 100-110 + land)	240.42
44	Little Bear Island	149.05
SUBTOTAL		972.14
MISCELLANEOUS DESCRIPTION (within parcel)		
A	Oyster Rake (549-570, 530)	10.48
B	Oceanwoods (421-423)	0.35
C	Preserve/Eagle point (Parcels 30,31,32) ' Lots (107, 239, 242, 323) ' Boat Landing	5.24
D	Club Cottage (1, 7-9) (Parcel 37)	2.76
E	Royal Subdivision (30)	0.34
F	326 Glen Eagle	0.34
G	Fire Station #2 Residual (Parcel 40)	0.29
H	Down Island Storage (Parcel 30)	1.85
SUBTOTAL		21.65
TOTAL		993.79

W

CW

Grass

553

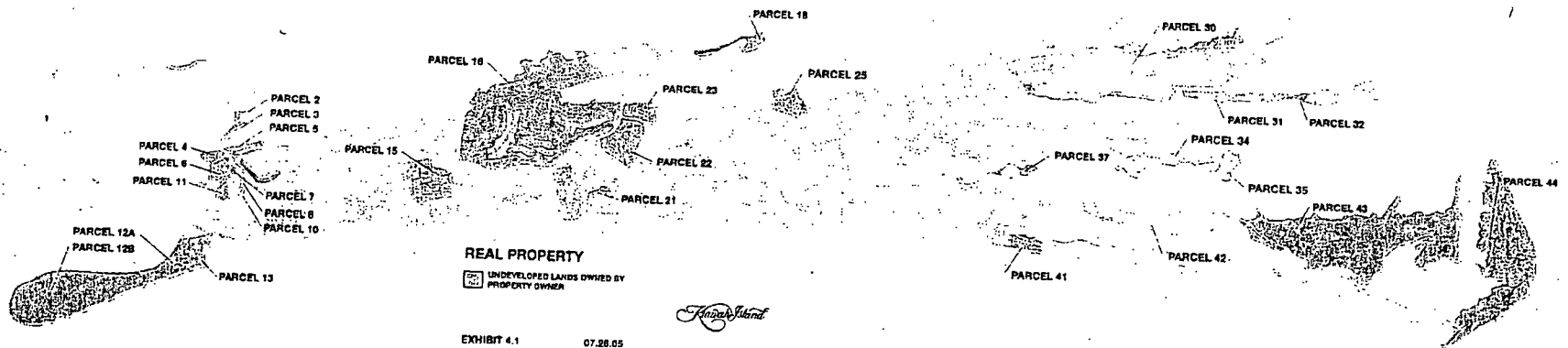


Exhibit 13.2: Parcel-Specific Development Standards
08.31.05

Parcel #	Parcel Description	Use Type (1)	Approx. Acres(2)	Maximum Gross Density (3)	Total Units (4)	Existing Units (5)	Maximum New Units (6)	Maximum F.A.R. W/Transfer (7)	Maximum Height Stories/Feet (8)	Parcel Open Space (9)
2	Mingo North	R-2, C	8.27	3	12	0	12	0.20	2.5/35	30
3	Mingo South	R-2, C	4.40	3	13	0	13	0.20	2.5/35	30
4	Little Rabbit	R-2, C	4.50	4	18	0	18	0.25	2.5/35	30
5	Rabbit North	R-2, C	6.20	3	19	0	19	0.20	2.5/35	30
6	Kiawah River Commons	R-2, C	6.16	6	37	0	37	0.25	4/50	30
7	Sales Center	C	2.37	-	-	-	-	0.25	4/50	30
8	Parkway Gate	C	1.20	-	-	-	-	0.25	2.5/35	30
10	Marsh Point Residual	R-2, C	0.66	6	4	0	4	0.20	2.5/35	30
11	Beachwalker Lagoon	R-3, C	5.94	10	60	0	60	0.25	4/50	30
12A	Beachwalker Park	R-3, C (15)	8.70	12	104	0	104	0.20	4/65 (10)	30
12B	Captain Sam's	R-1 (15) (16)	118.30 (20)	2.5	50	0	50	-	2.5/40	40
13	Beachwalker Ocean	R-3, C (15)	19.50	12	234	0	234	0.20	4/65 (10)	30
15	Utility Tracts	U	34.36	-	-	-	-	0.25	2.5/35	30
16	Settlement	R-2, C (14) (15)	289.60	3	869	85	784	-	4/50	40
18	Captain Maynards	R-1	11.38	1.5	17	6	11	-	2.5	40
21	East Beach Lagoon	R-3	3.00	8	24	0	24	-	4/50	40
22	East Beach Interior (19)	R-2 (15)	33.22	6	199	0	199	-	4/50	40
23	Governor's Marsh	R-2 (15)	12.73	6	76	0	76	-	2.5/40	40
25	Vanderhorst Mansion	R-1	18.34	1.5	28	1	27	-	(11)	50
30	Preserve	R-1	278.30	2	557	154	403	-	2.5/40	50
31	Eagle Point	R-1	18.32	1.5	27	10	0	-	2.5/40	50
32	Eagle Point	R-1	14.96	1.5	22	8	0	-	2.5/40	50
34	Summer Islands	R-1	30.96	1	31	19	0	-	2.5/40	50

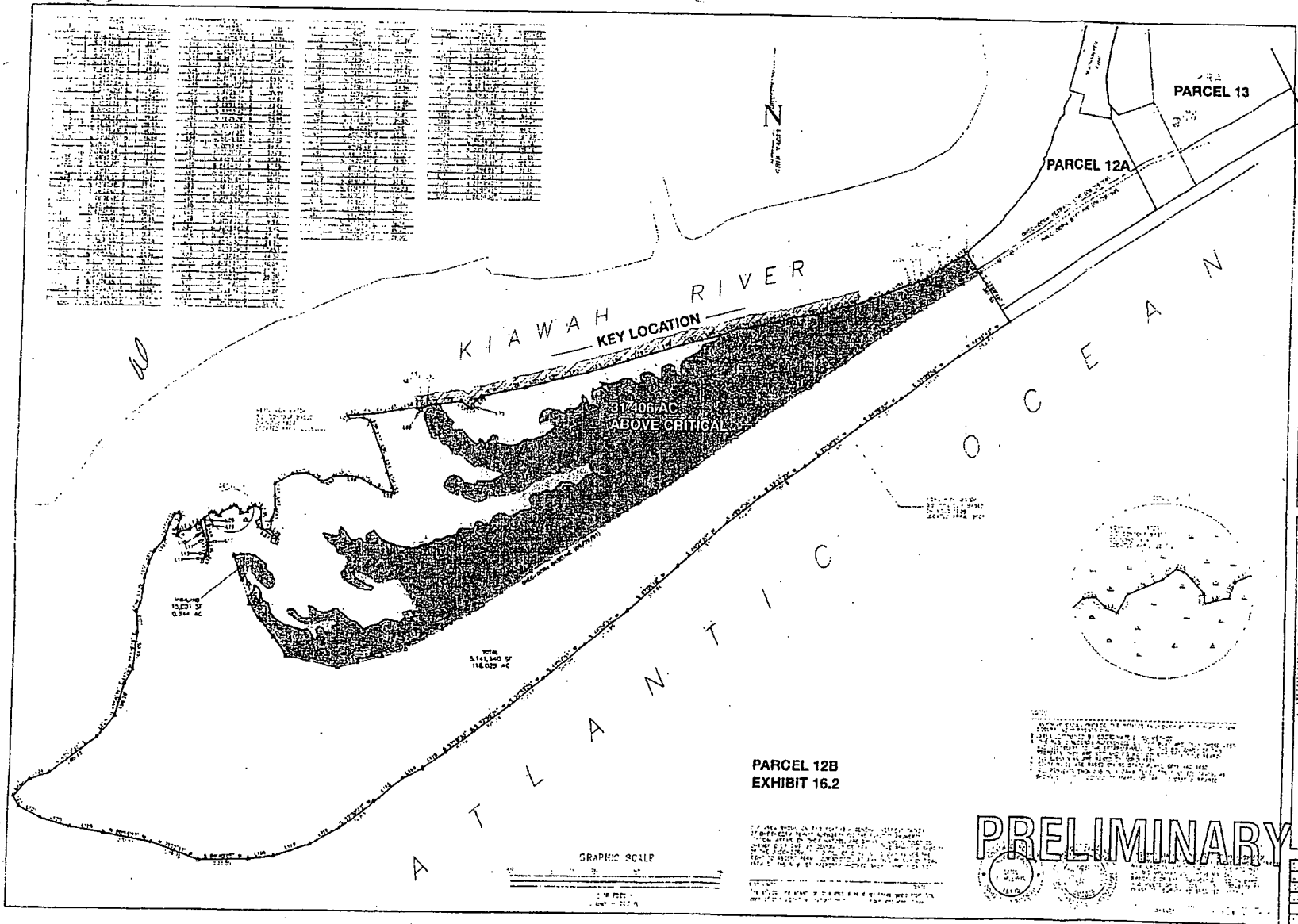
Parcel #	Parcel Description	Use Type (1)	Approx. Acres(2)	Maximum Gross Density (3)	Total Units (4)	Existing Units (5)	Maximum New Units (6)	Maximum F.A.R. W/Transfer (7)	Maximum Height Stories/Feet (8)	Parcel Open Space (9)
37	Club Cottage Lane	R-2 (15)	8.20	4	33	11	0	-	2.5/40	50
41	Osprey Beach 2	R-1, C (15)	21.73	2	43	19	24	(12)	2.5/45	40
42	Otter Island	R-1	109.10	1	109	100	0	-	2.5/40 (21)	50
43	Cougar Island	R-2 (17) (15)	240.42	1.5	360	0	360	-	2.5/40 (21)	50
44	Bear Island	R-2 (17)	149.05	(13)	2	0	2	-	2.5/40	50

Notes Governing Exhibit 13.2: Parcel Specific Development Standards

- 1 Parcel with more than one use designation may be appropriate for either type of land use indicated in the above table. All uses shall comply with the appropriate standards for the use type as defined in this agreement. Development consisting of more than one use shall be subject to approval of the Town in accordance with ¶ 13.B.5. Mixed Use Development.
- 2 Acreage figures are approximate and may vary somewhat over time.
- 3 Gross Density equals the number of potential Dwelling Units (existing and future) divided by the gross residential acreage of the parcel above mean high water, excluding Fresh Water and Salt Water Wetlands. Gross Density limits are not intended to discourage or limit the development of higher density types or clusters or residences within a parcel; provided, however, that maximum density limits are used to establish an absolute cap on the total number of Dwelling Units on a parcel. The above maximum Densities can not be obtained for every parcel; as each parcel is platted or sold, the Property Owner shall clearly establish the maximum number of Dwelling Units which may be permitted on a parcel. In no instance shall the maximum number of Vested Units established after the execution of this agreement exceed 1,184. In the event that density is limited by physical constraints, a bridge permit or other regulatory constraint beyond the Town's jurisdiction, said limits are not intended to be superseded by this agreement.
- 4 The total number of single family Lots and non-single family Dwelling units permitted in the parcel at maximum permitted densities.
- 5 The number of single family Lots with preliminary plat approval and the number non-single family dwelling units approved by the Town as of July 23, 2005.
- 6 The maximum number of Vested Units which may be approved on any one parcel, subject to the limit of 1,184 total Vested Units. The total for this column is 2,461 units. Where existing units are indicated in the previous column, resubdivision may be required prior to establishing any Vested Units.
- 7 Maximum floor area ratio (FAR) equals the building floor area divided by the non-residential or mixed use acreage above mean high water, excluding Fresh Water and Salt Water Wetlands. This column shows the maximum floor area ratio which may be Developed on an individual parcel. In no event shall the total amount of non-residential development, exceed 219,000 square feet for the Real Property.
- 8 No development shall exceed the maximum number of stories or the maximum height in feet listed in this column, subject to the bulk limitations

described in ¶ 13.B.1.(e), provided however, that by reason of floodplain regulations, and the need for innovative design for view-shed and hurricane safety purposes, the height limit on single family residences is forty (40) feet from Ground Floor Level. A maximum height of 45 feet from Ground Floor level is permitted on Parcels 12A, 13, 41, 42 and 43 for single family. Listed height in feet applies to non-single family development.

- 9 Parcel open space as described in ¶ 13.B.4. of this Agreement, is the minimum percentage requirement of Pervious Coverage for a Parcel.
- 10 Height allowance of 65 feet from Ground Floor level is to allow for alternative forms and configurations of massing to minimize the impact of 4 habitable floors. This would include but not be limited to increased roof pitches, dormers, and innovation in overall massing.
- 11 No structure on this Parcel shall be higher than the upper eave height of the Vanderhorst Mansion.
- 12 Non-residential uses shall be limited to the Beach Club and associated uses, including dining, kitchen/food preparation areas, public lobby, meeting rooms, lounge, club administrative/operations offices, service and mechanical areas, locker rooms, restrooms, retail store for beach/pool sundries and other uses normally associated with beach club operations and or restaurant/snack bar facilities. Total building floor area for non-residential habitable structures on this Parcel not to exceed 25,000 square feet.
- 13 See ¶ 16(d), *infra*.
- 14 Non-residential uses shall be limited to golf country club uses including golf pro shop, tennis pro shop, locker rooms, restrooms, dining, kitchen/food preparation, public/lobby area, meeting rooms, lounge, swimming pool, tennis courts, golf course, practice range, maintenance facilities, club administrative/operations offices, service and mechanical areas, maintenance and other uses normally associated with golf country club operations. Total building floor area for non-residential habitable structures on this parcel shall not exceed 40,000 square feet for club operations and 15,000 square feet for golf course/grounds maintenance.
- 15 Currently there are three (3) Membership Lodge structures used by guests of Property Owner and/or Kiawah Island Club, Inc. and located on Parcel 37. The Property owner agrees on behalf of Kiawah Island Club, Inc. that the Club will not lease more than 20 Membership Lodge structures, including those currently existing at any one time, and further agrees that these structures will be limited to Parcels 12A, 12B, 13, 16, 22, 23, 41 and 43.
- 16 Development subject to provisions of ¶ 16(g).
- 17 Dwelling unit types limited to single family detached units, including patio homes and zero Lot line developments.
- 18 Intentionally omitted.
- 19 Access to East Beach Interior is limited to Green Dolphin Way and Turtle Point Lane. Existing tunnel connection between Parcels 16 and 22 to remain.
- 20 No greater than 20 acres of land may be Developed for residential use plus land for Infrastructure (roads, utilities, trails, paths, community recreation, etc.)
- 21 Maximum building height for parcels 42 (Otter Island lots 1-41) and 43 (Cougar Island) shall be increased to 45' for lots on the water side of the road and are oriented to the ocean or Penny Creek, as determined by ARB.



210

PARCEL 13

PARCEL 12A

S S Southeastern Surveying, Inc.

11100 Highway 101, Suite 102
Charleston, South Carolina 29405

A SURVEY OF
CAPTAIN SAMUEL R. R. R.
CONTAINING A TOTAL OF 111,029 ACRES
OWNED BY RURAL RESORT ASSOCIATES, LP
LOCATED IN THE TOWN OF KIAWAH ISLAND
CHARLESTON COUNTY, SOUTH CAROLINA

DATE: 11/11/01

BY: [Signature]

CHECKED: [Signature]

APPROVED: [Signature]

EXHIBIT G

EXHIBIT H



BP0290099

RMC BK 0290 Pg 099 : pg 1 *

**FIFTH AMENDMENT TO THE
DEVELOPMENT AGREEMENT
BY AND BETWEEN
KIAWAH RESORT ASSOCIATES, L.P., ET AL AND
THE TOWN OF KIAWAH ISLAND**

WHEREAS, the Town of Kiawah Island and Kiawah Resort Associates, L.P. (respectively referred to as "Town" and "Property Owner"), entered a Development Agreement on October 12, 2005 (hereinafter the "Agreement"), effective that same date, recorded in the RMC Office for Charleston County at Book Z 558, Page 004; and

WHEREAS, the Town and the Property Owner entered and recorded the First Amendment to the Agreement in the RMC Office for Charleston County at Book C 570, Page 595 that was effective December 13, 2005; and,

WHEREAS, the Town and the Property Owner entered and recorded the Second Amendment to the Agreement in the RMC Office for Charleston County at Book 0212, Page 088 that was effective August 2, 2011; and,

WHEREAS, the Town and the Property Owner entered and recorded the Third Amendment to the Agreement in the RMC Office for Charleston County at Book 0212, Page 089 that was effective August 2, 2011; and,

WHEREAS, the Town and the Property Owner entered and recorded the Fourth Amendment to the Agreement in the RMC Office for Charleston County at Book 0244, Page 565 that was effective March 6, 2012; and,

WHEREAS the Agreement replaced, according to its terms, a previous Development Agreement, as amended, between the Town and the Property Owner effective September 26, 1994 (hereinafter the "First Agreement") that is recorded in the RMC Office for Charleston County at Book J248, Page 001; and

WHEREAS in Section 16(b) of the First Agreement, titled "10 Mile Strip of Beachfront Property," the Property Owner agreed to convey to Kiawah Island Community Association, Inc. ("KICA") by quitclaim deed before January 1, 1996, a strip of highland and dunes described in the Section 16(b) as:

"... 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."

(Hereinafter referenced as the "Beachfront Strip"); and,

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, to implement the transfer of the Beachfront Strip to KICA, Property Owner executed a deed to KICA recorded at Book N265, Page 406, and Corrective and Confirmatory Deed recorded at Book No. L304, Page 459, in the RMC Office for Charleston County (hereinafter, the "Deed"); and

WHEREAS the Agreement (entered in 2005) listed and described Parcel 12A as Beachwalker Park, Parcel 12B as Captain Sam's, and Parcel 13 as Beachwalker Ocean; and

WHEREAS Exhibit 1.3 to the Agreement is an illustration of the location of the Parcels owned by the Property Owner at the time of entry of the Agreement and shows that the Property Owner owned all the land to the high water mark, including the dunes and beachfront, west of the eastern boundary and extended eastern boundary of Parcel 13; and,

WHEREAS it has come to the attention of the Property Owner that the property description in the Deed encompassed land beyond the intended western terminus of the Beachfront Strip described in the First Agreement including land that is seaward of the Parcel known as Beachwalker Park that was listed and identified as Parcel 12 under the First Agreement and Parcel 12A under the Agreement that was not required to be included in the property description nor conveyed to KICA (all land so described and conveyed hereinafter shall be referred to as the "Additional Land"); and,

WHEREAS the Additional Land has remained a part of TMS No. 207-05-00-0011 on the real property tax records of Charleston County and reflected there as owned by Property Owner, and has never been formally subdivided into a separate TMS parcel; and,

WHEREAS Property Owner desires to reconfirm the intent under the First Agreement that the Beachfront Strip does not include the Additional Land; and

WHEREAS Property Owner and Town desire to confirm their intent under the Agreement as well as their intent and belief at the time the Agreement was entered that the land comprising Parcels 12A and 12B as depicted on Exhibit 1.3 to the Agreement, including the Additional Land, was owned by the Property Owner and subject to the Agreement by virtue of such ownership; 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; and,

WHEREAS, the Agreement provides in Section 22 that the Agreement may be amended; and,

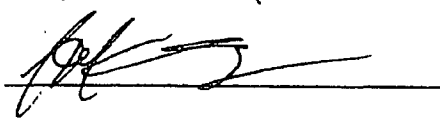
WHEREAS, the Property Owner desires to amend the Agreement to clarify and state their mutual intent with respect to the Beachfront Strip and the real property subject to both the First Agreement and the Agreement;

NOW, THEREFORE, the Town and Property Owner confirm and agree (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 Agreement and the Agreement, known as the Beachwalker Ocean Parcel (TMS No. 207-05-00-118), as illustrated on Exh. 16.2 to the First 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 Agreement was that the Additional Land was part of Parcels 13 and 12A as described in the Agreement.

All other terms, conditions, and provisions of the Agreement, as duly amended, shall remain in full force and effect.

IN WITNESS WHEREOF, this Fifth Amendment to the Agreement has been entered and enacted this 2nd day of October, 2012.

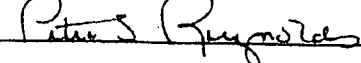
SIGNED, SEALED, AND DELIVERED
IN THE PRESENCE OF:

TOWN OF KIAWAH ISLAND (Town)
(SEAL)

By:  10/10/2012

G. Steven Orban, Mayor

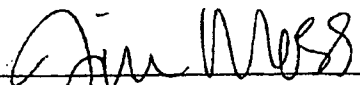
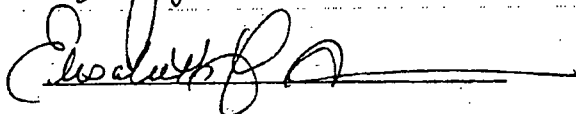
Attest: 

Petra Reynolds, Clerk of Council

RMC BK 0290 Pg 099 pg 5 *

SIGNED, SEALED, AND DELIVERED
IN THE PRESENCE OF:

(CORP. SEAL)

KIAWAH RESORT ASSOCIATES, L.P.
(Property Owner) (Seal)

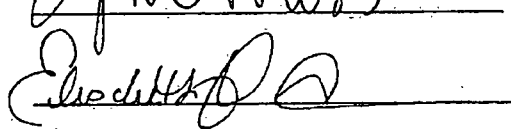
By: D&W Investments, Inc.,
(a South Carolina corporation)

2 North Adger's Wharf
Charleston, SC 29401
Its: General Partner

By: 
Charles P. Darby, III
Its: President

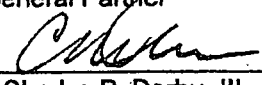
AND

(CORP. SEAL)

By: TWD Investments, LLC
(A South Carolina limited liability
Company)

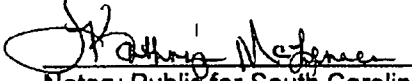
2 North Adger's Wharf
Charleston, SC 29401
Its: General Partner

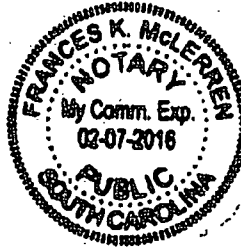
By: 
Charles P. Darby, III
Its: Manager

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

**ACKNOWLEDGMENT
(TOWN)**

THE FOREGOING INSTRUMENT was acknowledged before me by the TOWN
OF KIAWAH ISLAND, by G. Steven Orban, its Mayor, and Petra Reynolds, its Clerk of
Council, this 16 day of October, 2012.

 (SEAL)
Notary Public for South Carolina
My Commission Expires: 2/7/2016



STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

ACKNOWLEDGMENT
(Property Owner - D&W)

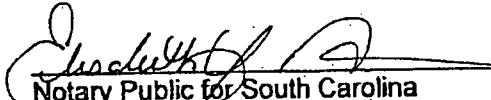
THE FOREGOING INSTRUMENT was acknowledged before me by KIAWAH RESORT ASSOCIATES, L.P., by D&W Investments, Inc., (a South Carolina corporation), its General Partner, by Charles P. Darby, III, its President, this 26th day of October, 2012.

 (SEAL)
Notary Public for South Carolina
My Commission Expires: 12-10-2020

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

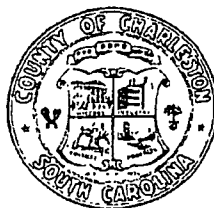
ACKNOWLEDGMENT
(Property Owner - TWD)

THE FOREGOING INSTRUMENT was acknowledged before me by KIAWAH RESORT ASSOCIATES, L.P., by TWD Investments, LLC, (a South Carolina limited liability company), its General Partner, by Charles P. Darby, III, its Manager, this 26th day of October, 2012.

 (SEAL)
Notary Public for South Carolina
My Commission Expires: 12-10-2020

RECORDER'S PAGE

NOTE: This page MUST remain
with the original document



Filed By:

PRATT-THOMAS, & WALKER, P.A.

POST OFFICE DRAWER 22247
CHARLESTON SC 29413-2247

RECORDED		
Date:	November 8, 2012	
Time:	2:32:02 PM	
Book	Page	DocType
0290	099	Misc/Amend
Charlie Lybrand, Register Charleston County, SC		

MAKER:

KIAWAH ISLAND ETC

RECIPIENT:

KIAWAH RESORT ASSOCS

Original Book:

Z558

Original Page:

004

of Pages: 9
of Sats: # of References:

Note:

Recording Fee	\$ 10.00
Extra Reference Cost	\$ -
Extra Pages	\$ 4.00
Postage	\$ -
Chattel	\$ -
TOTAL	\$ 14.00

DRAWER Drawer 2
CLERK SLW



0290
Book



099
Page



11/08/2012
Recorded Date



9
Pgs



Z558
Original Book



004
Original Page



D
Doc Type



14:32:02
Recorded Time

EXHIBIT I

to B

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

CORRECTIVE AND
CONFIRMATORY QUIT-CLAIM DEED
(Captain Sam's and Beachwalker Park Parcels)

GRANTORS: KIAWAH RESORT ASSOCIATES, L.P. and KIAWAH LAND DEVELOPMENT, LLC

WHEREAS, the property described on Exhibit "A" attached hereto and incorporated herein by reference (the "Property") was conveyed by KIAWAH RESORT ASSOCIATES, L.P. (a Delaware limited partnership hereinafter sometimes referred to as "KRALP") to KIAWAH LAND DEVELOPMENT, LLC (a South Carolina limited liability company hereinafter sometimes referred to as "KLD") by (i) deed of conveyance dated October 11, 2005, and recorded in Book S557, page 226, (the "Initial Deed") in the R.M.C. Office for Charleston County, S.C. (the "R.M.C. Office"); (ii) deed of conveyance dated October 11, 2005, and recorded in Book S557, page 234 in the R.M.C. Office; and (iii) Confirmatory Quit-Claim Deed dated March 2, 2007, and recorded in Book M623, page 509, in the R.M.C. Office; and

WHEREAS, after the recording of the Initial Deed, on October 12, 2005, the Town of Kiawah Island approved and entered into a development agreement that allowed certain residential development and other limited development and, either contemporaneously or soon thereafter, adopted zoning for the Property consistent with the development agreement; and

WHEREAS, it has been determined by KRALP and KLD that the consideration paid for and recited in the Initial Deed did not take into account the effect of the development agreement and change in zoning, and, as a result, the consideration in the Initial Deed recited only a portion of the consideration to be paid for the Property; and

WHEREAS, KRALP has several related and affiliated entities that include but are not limited to KLD and **KIAWAH DEVELOPMENT PARTNERS II, INC.** (a South Carolina corporation hereinafter sometimes referred to as “KDPPII” and/or the “Grantee”); and

WHEREAS, KLD is constructively owned by KDPII and it has been determined by KRALP, KLD, and KDPII, that through administrative or clerical error, the Property was conveyed to KLD and should have been conveyed to KDPII; and

WHEREAS, the parties have agreed to enter into this Corrective and Confirmatory Quit-Claim Deed (i) to state correctly the full consideration for the conveyance by KRALP of the Property in the Initial Deed recorded in Book S557, page 226, to reflect the increase in market value resulting from the development agreement and zoning changes as well as the installment sale to KDPII, and (ii) to convey the Property to the correct affiliated entity as originally intended,

NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS, THAT for and in consideration of the above recitals and the additional sum of Seventeen Million Five Hundred Thousand and No/100 (\$17,500,000.00) Dollars (which, when combined with the \$2,500,000.00 previously paid and referenced in the Initial Deed, totals the complete consideration of Twenty Million and No/100 (\$20,000,000.00) Dollars), to **KIAWAH RESORT ASSOCIATES, L.P.** in hand paid at and before the sealing of these presents by **KIAWAH DEVELOPMENT PARTNERS II, INC.**, in the County and State aforesaid, the receipt whereof is hereby acknowledged; and in further consideration of the sum of One and No/100 (\$1.00) Dollar to **KIAWAH LAND DEVELOPMENT, LLC**, in hand paid at and before the sealing of these presents by **KIAWAH DEVELOPMENT PARTNERS II, INC.**, in the County and State aforesaid, the receipt whereof is hereby acknowledged, the said **KIAWAH RESORT ASSOCIATES, L.P.** and **KIAWAH LAND DEVELOPMENT, LLC** have remised, released and forever quit-claimed, and by these presents does hereby remise, release and forever quit-claim, subject to the covenants, conditions, obligations, restrictions, exceptions, reservations, encumbrances, easements, and plats hereinafter set forth, unto the said **KIAWAH DEVELOPMENT PARTNERS II, INC.**, the following described property, to-wit:

See Exhibit "A" attached hereto and incorporated herein by reference
for a description of the "Beachwalker Park" and "Captain Sam's" Parcels

Portions of the Property hereby conveyed may be located in part seaward of the interim Setback Line as established by the South Carolina Coastal Council (n/k/a DHEC - Office of Ocean and Coastal Resource Management) as of January 20, 1989, and South Carolina Code Sections 48-39-270 through 48-39-360, as amended, effective July 1, 1977 (the "Beach Protection Act"). The following information concerning the location and circumstances of the Property is hereby disclosed:

The proximity and location of the interim Setback Line and the Interim Baseline areas are shown on plats of record in the R.M.C. Office. There are no habitable structures on the Property seaward of the setback line. The most recently published annual erosion rate for the Property is not set forth herein because the Property shown on such plats has over the 40 year period prior to July 1, 1988, been determined to not have an erosion rate. Reference must be had to the Beach Protection Act itself regarding the significance of these disclosures as well as the potential for movement and relocation of the lines in the future.

This conveyance is made subject to all applicable covenants, conditions, restrictions, easements and limitations of record in the R.M.C. Office and in addition thereto, the following:

(a) Easements, construction/improvement setbacks, and other building/use criteria as shown on the Plat, and the DHEC-OCRM Critical Line, Setback Line and Baseline as the same may vary from time to time.

(b) Any lawful, constitutional interest in either the State of South Carolina or Federal Government created, or limitations on use imposed, by the Federal Coastal Management Act or other Federal law or by S. C. Code Sections 48-39-10 through 48-39-220, as amended, and Sections 48-39-250 through 48-39-360, as amended, or any regulations promulgated pursuant to said State or Federal laws, inclusive of DHEC - Office of Ocean and Coastal Resource Management and U. S. Army Corps of Engineers regulations, and such rights as the public may enjoy to the use of the Property, if any, lying below the mean high water mark.

(c) Zoning ordinance of the Town of Kiawah Island.

(d) Assessments as may become due and payable.

(e) Charleston County, S.C. ad valorem taxes for the year 2007, and ad valorem taxes for all subsequent years.

The said Kiawah Development Partners II, Inc. has joined in the execution of the within Corrective and Confirmatory Quit-Claim Deed to evidence its concurrence with the recitals referenced herein and acknowledge that it was the intended grantee under the previous deeds.

This is a portion of the property conveyed (i) to KRALP by deed of conveyance of Kiawah Resort Associates, South Carolina joint venture, dated June 26, 1992, and recorded in Book L215, page 486 in the R.M.C. Office, (ii) by KRALP to KLD by deed of conveyance dated October 11, 2005, and recorded in Book S557, page 226, in the R.M.C. Office, deed of conveyance dated October 11, 2005, and recorded in Book S557, page 234 in the R.M.C. Office, and Confirmatory Quit-Claim Deed dated March 2, 2007, and recorded in Book M623, page 509, in the R.M.C. Office

TMS Numbers: 207-05-00-001 and 001-1

Tax District: 5-4

Address of Grantee: P.O. Box 12001
Charleston, SC 29422

TOGETHER with, all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned unto the said KIAWAH DEVELOPMENT PARTNERS II, INC., its successors and assigns, forever.

SUBJECT TO all applicable covenants, conditions, restrictions, easements, and limitations of record and/or as set forth herein, the said KIAWAH RESORT ASSOCIATES, L.P. and KIAWAH LAND DEVELOPMENT, LLC do hereby bind themselves and their successors and assigns, to warrant and forever defend, all and singular, the highland portion of the said premises, above the mean high water mark of abutting tidal waters, unto the said KIAWAH DEVELOPMENT PARTNERS II, INC., its successors and assigns, against themselves, their successors and assigns, and all other persons whomsoever lawfully claiming or to claim the same or any part thereof.

IN WITNESS WHEREOF, Kiawah Resort Associates, L.P., has caused these presents to be executed in its name by its General Partners thereunto duly authorized and its seal to be hereunto affixed, this 28th day of December, 2007.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

J. E. Moss
Charles P. Darby, III

J. E. Moss
Charles P. Darby, III

KIAWAH RESORT ASSOCIATES, L.P.
(SEAL)

By: D&W Investments, Inc.,
a South Carolina corporation
(CORP. SEAL)

Its: General Partner

By: Charles P. Darby, III

Its: President

By: TWD Investments, LLC
a South Carolina limited liability company
(SEAL)

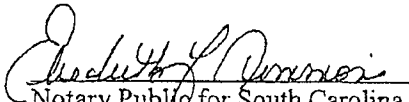
Its: General Partner

By: Charles P. Darby, III

Its: Manager

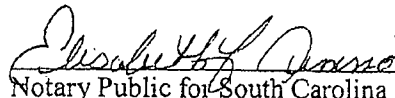
STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)

THE FOREGOING INSTRUMENT was acknowledged before me by Kiawah Resort Associates, L.P., by D&W Investments, Inc., a South Carolina corporation, its General Partner, by Charles P. Darby, III, its President, this 28th day of December, 2007.

 (SEAL)
 Notary Public for South Carolina
 My commission expires: 1-19-11

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)

THE FOREGOING INSTRUMENT was acknowledged before me by Kiawah Resort Associates, L.P., by TWD Investments, LLC, a South Carolina limited liability company, its General Partner, by Charles P. Darby, III, its Manager, this 28th day of December, 2007.

 (SEAL)
 Notary Public for South Carolina
 My commission expires: 1-19-11

IN WITNESS WHEREOF, Kiawah Land Development, LLC has caused these presents to be executed in its name by its Manager thereunto duly authorized, and its seal to be hereunto affixed, this 28th day of December, 2007.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

KIAWAH LAND DEVELOPMENT, LLC
(SEAL)

By: Kiawah Development Partners II, Inc.
Its: Manager

(CORP. SEAL)

J. C. Moss
Elizabeth J. Johnson

By: Charles P. Darby, III
Charles P. Darby, III

Its: President

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

THE FOREGOING INSTRUMENT was acknowledged before me by Kiawah Land Development, LLC, by Kiawah Development Partners II, Inc., its Manager, by Charles P. Darby, III, its President, this 28th day of December, 2007.

Elizabeth J. Johnson (SEAL)
Notary Public for South Carolina
My commission expires: 1-19-11

OK L 647PG299

IN WITNESS WHEREOF, Kiawah Development Partners II, Inc. has caused these presents to be executed in its name by its officer thereunto duly authorized, and its seal to be hereunto affixed, this 28th day of December, 2007.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

[Signature]
Charles P. Darby, III

KIAWAH DEVELOPMENT PARTNERS II, INC.
(SEAL)

By: [Signature]
Charles P. Darby, III
Its: President

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

THE FOREGOING INSTRUMENT was acknowledged before me by Kiawah Development Partners II, Inc. by Charles P. Darby, III, its President, this 28th day of December, 2007.

[Signature] (SEAL)
Notary Public for South Carolina
My commission expires: 1-19-11

EXHIBIT "A"

BK L 647PG300

Description of the "Property"

All that certain piece, parcel, or tract of land situate, lying and being at the west end of Kiawah Island proper, in the Town of Kiawah Island, Charleston County, South Carolina, containing 133.490 acres, more or less, known generally as the "Beachwalker Park" and "Captain Sam's" Parcels and shown on a plat prepared by Southeastern Surveying of Charleston, Inc., entitled "A BOUNDARY SURVEY OF CAPTAIN SAM'S SPIT CONTAINING A TOTAL OF 133.490 ACRES OWNED BY KIAWAH LAND DEVELOPMENT, LLC LOCATED IN THE TOWN OF KIAWAH ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA" dated July 17, 2006, last revised on August 9, 2006, and recorded in Plat Book EK at pages 031-034, (the "Plat"), in the office of the Register of Mesne Conveyances for Charleston County, S.C., said tracts having such location, butts and bounds, metes, courses, and distances as will by reference to said plat more fully appear.

BK L 647PG302

RECORDER'S PAGE

NOTE: This page MUST remain
with the original document



FILED

December 28, 2007

2:23:01 PM

BK L 647PG293

Charlie Lybrand, Register
Charleston County, SC

Filed By:

Kiawah Development Partners, Inc

Two North Adger's Wharf

Charleston

SC 29401

Number of Pages:

10

AMOUNT

DESCRIPTION	Corr/Con
Recording Fee	\$ 15.00
State Fee	\$ 45,500.00
County Fee	\$ 19,250.00
Postage	

TOTAL \$ 64,765.00

\$ Amount (in thousands): 17500

DRAWER:

C - slw

AUDITOR STAMP HERE

JAN 3 2008

PID VERIFIED BY ASSESSOR

REP

JAN - 3 2008

DATE

DO NOT STAMP BELOW THIS LINE

STATE OF SOUTH CAROLINA	)	BEFORE THE MASTER-IN-EQUITY
	)	
COUNTY OF CHARLESTON	)	MIKELL R. SCARBOROUGH
	)	
Kiawah Resort Associates, L.P., a Delaware	)	C/A No. 2013-CP-10-01225
Limited Partnership, and KDP II, LLC, a South	)	
Carolina Limited Liability Company	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
Kiawah Island Community Association, Inc., a	)	
South Carolina Not-for-Profit Corporation,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
Inlet Cove Club Homeowners Association, Inc., a	)	
South Carolina Not-for-Profit Corporation, and	)	
Kiawah Island Property Owners Group, an	)	
unincorporated association,	)	
	)	
Intervenors.	)	

**ANSWER OF
INTERVENORS**

BY JS
JULIE J. ARMSTRONG
CLERK OF COURT

2013 DEC 12 PM 2:15

FILED

COMES NOW the Intervenors, Inlet Cove Club Homeowners Association, Inc. ("Inlet Cove") and Kiawah Island Property Owners Group ("KPOG"), who by and through their undersigned attorney herein and hereby file their Answer to the Plaintiffs', Kiawah Resort Associates, L.P. ("KRA") and KDP II, LLC ("KDP II") Amended Complaint, and would respectfully show unto the Court the following:

FOR A FIRST DEFENSE
General Denial

1. Each and every allegation of Plaintiff's Amended Complaint that is not specifically admitted or qualified herein is expressly denied.

FOR A SECOND DEFENSE
Specific Denial

2. Intervenor incorporate by reference the above allegations as if set forth verbatim herein.
3. The allegations contained in Paragraphs 1, 2, 3, and 4 of the Amended Complaint are admitted.
4. Intervenor lack knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5 of the Amended Complaint and therefore deny same. Moreover, the allegations call for legal conclusions and therefore do not require a response. To the extent a response is required, the paragraph is denied.
5. Intervenor dispute that there is a question with regard to the deed as described in Paragraph 6 of the Amended Complaint and, therefore, the allegations contained in the paragraph are denied.
6. The allegations contained in Paragraphs 7, 8, 9, and 10 of the Amended Complaint are admitted.
7. Intervenor admit that Exhibit 16.2 to the 1994 Development Agreement referenced in Paragraph 11 of the Amended Complaint is titled "Future Beachfront Dedication Area;" however, Intervenor deny that Exhibit 16.2 accurately reflects the boundaries of the Beachfront Strip and deny all remaining allegations contained in the paragraph.
8. The allegations contained in Paragraph 12 of the Amended Complaint are admitted.
9. Intervenor admit that Exhibit 16.2 to the 1994 Development Agreement referenced in Paragraph 13 of the Amended Complaint contains a hand-written notation stating "Area not included in Dedication Area," as well as a hand-drawn arrow pointing toward some property

contained therein; however, Intervenor deny any and all remaining allegations and/or implications contained in the paragraph.

10. The allegations contained in Paragraphs 14, 15 and 16 of the Amended Complaint are admitted.
11. Intervenor lack knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 17 of the Amended Complaint, therefore the paragraph is denied.
12. Intervenor admit the legal description of the property conveyed in the Beachfront Deed describes the area as extending from a specific point located at the western end of Kiawah Island to a specific point located at the eastern end thereof, generally between 200 and 300 feet in width, extending from the seaward boundary lines of most beachfront properties on Kiawah Island to the mean high water mark of the Atlantic Ocean as set forth in Paragraph 18 of the Amended Complaint; however, Intervenor lack knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in the paragraph and, therefore, any and all remaining allegations are denied.
13. The allegations contained in Paragraph 19 of the Amended Complaint are admitted.
14. Intervenor lack knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 20, 21 and 22 of the Amended Complaint, therefore the paragraphs are denied.
15. Intervenor admit the allegations contained in Paragraph 23 of the Amended Complaint to the extent that a confirmatory quitclaim deed regarding what is referred to as the East Beach Ocean Parcel was executed and recorded; however, Intervenor lack knowledge and

information sufficient to form a belief as to the truth of any remaining allegations contained in the paragraph and, therefore, any and all remaining allegations are denied.

16. Intervenor's admit the allegations contained in Paragraph 24 of the Amended Complaint to the extent that a corrective and confirmatory deed regarding what is referred to as the East Beach Ocean Parcel was executed and recorded; however, Intervenor's lack knowledge and information sufficient to form a belief as to the truth of any remaining allegations contained in the paragraph and, therefore, any and all remaining allegations are denied.
17. Intervenor's admit the allegations contained in Paragraph 25 of the Amended Complaint to the extent that a strip of scenic dunes and high land extending along the Kiawah Island beachfront for approximately 10 miles and varying in width often between 200 and 300 feet was intended to be conveyed to Defendant; however, Intervenor's lack knowledge and information sufficient to form a belief as to the truth of any remaining allegations contained in the paragraph and, therefore, any and all remaining allegations are denied.
18. Intervenor's admit the allegations contained in Paragraph 26 of the Amended Complaint to the extent that a second corrective and confirmatory deed regarding a portion of the Beachfront Strip on the eastern end of Kiawah Island was executed and recorded; however, Intervenor's lack knowledge and information sufficient to form a belief as to the truth of any remaining allegations contained in the paragraph and, therefore, any and all remaining allegations are denied.
19. The allegations contained in Paragraphs 27 and 28 of the Amended Complaint are expressly denied.
20. Intervenor's admit the allegations contained in Paragraph 29 of the Amended Complaint to

the extent that a second Development Agreement was entered into and recorded in 2005; however, Intervenor's lack knowledge and information sufficient to form a belief as to the truth of any remaining allegations contained in the paragraph and, therefore, any and all remaining allegations are denied.

21. The allegations contained in Paragraph 30 of the Amended Complaint are admitted.
22. Intervenor's admit the allegations contained in Paragraph 31 of the Amended Complaint to the extent that they state, in part, the property description contained in the Beachfront Deed; however, Intervenor's lack knowledge and information sufficient to form a belief as to the truth of any remaining allegations contained in the paragraph and, therefore, any and all remaining allegations are denied.
23. The allegations contained in Paragraphs 32, 33 and 34 of the Amended Complaint are expressly denied in entirety.
24. Intervenor's lack knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 35 of the Amended Complaint regarding tax records; however, Intervenor's expressly deny the remaining allegations contained in the paragraph regarding course of conduct in relation to the 4.62 acres in dispute and, therefore, deny the paragraph in entirety.
25. The allegations contained in Paragraph 36 of the Amended Complaint are admitted.
26. Intervenor's admit the allegations contained in Paragraph 37 of the Amended Complaint to the extent that they state, in part, language contained in the Fifth Amendment to the 2005 Development Agreement; however, Intervenor's deny any and all remaining allegations and/or implications contained therein.

27. Intervenor lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 38 of the Amended Complaint, therefore the paragraph is denied.
28. Intervenor admit the allegations contained in Paragraph 39 of the Amended Complaint to the extent that the Beachfront Strip, including the 4.62 acres in dispute, was conveyed to Defendant as Common Property and, accordingly, cannot be conveyed without an affirmative vote of the members of Defendant; however, Intervenor expressly deny any and all remaining allegations and/or implications contained in the paragraph.
29. The allegations contained in Paragraph 40 of the Amended Complaint call for legal conclusions to be determined by the Court and therefore do not require a response; however to the extent a response is required, the paragraph is denied.
30. Intervenor admit the allegations contained in Paragraph 41 of the Amended Complaint to the extent that a deed purporting to reflect some transfer of property between Plaintiffs is attached as an exhibit; however, Intervenor lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the paragraph and, therefore, those allegations are denied.

FOR A THIRD DEFENSE
Unclean Hands

31. Intervenor incorporate by reference the above allegations as if set forth verbatim herein.
32. Plaintiffs' claims are barred in whole or in part by the equitable doctrine of unclean hands.

FOR A FOURTH DEFENSE
Laches

33. Intervenor's incorporate by reference the above allegations as if set forth verbatim herein.
34. Plaintiffs' claims relate to a contractual agreement of conveyance and quitclaim deed executed approximately twenty years ago.
35. Plaintiffs have been or should have been aware of any rights with regard to the above-referenced conveyance and quitclaim deed due to the multiple instances where Plaintiffs previously raised claims, which also occurred nearly twenty years ago.
36. Plaintiffs had more than a reasonable amount of time to assert rights or claims to the above-referenced conveyance and quitclaim deed but failed to take such action until a substantial period of time passed.
37. Plaintiffs' claims are barred in whole or in part by the doctrine of laches.

FOR A FIFTH DEFENSE
Stale Demand

38. Intervenor's incorporate by reference the above allegations as if set forth verbatim herein.
39. Plaintiffs waited a great length of time before bringing this action such that a presumption arose that the claims were abandoned or satisfied.
40. Plaintiffs' claims are barred in whole or in part by the defense of stale demand.

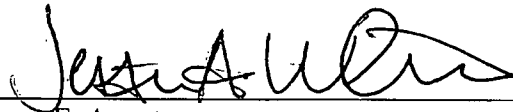
FOR A SIXTH DEFENSE
Waiver

41. Intervenor's incorporate by reference the above allegations as if set forth verbatim herein.
42. Section 31 of the 1994 Development Agreement, which relates, in part, to all conveyances or transfers of property to Defendant, provides: "The Property Owner hereby freely consents to such conveyances and waives any challenges it may otherwise have to the validity of said

conveyances.”

43. Plaintiffs’ claims are barred in whole or in part by virtue of the above provision contained in the 1994 Development Agreement.

WHEREFORE, having fully answered, the Intervenor prays that Plaintiffs’ Amended Complaint be dismissed in whole or in part; and that this Honorable Court grant such other and further relief as may be deemed just and proper.



Amy E. Armstrong

Michael G. Corley

Jessie A. White

SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

Mailing address: Post Office Box 1380
Pawleys Island, SC 29585

Office address: 430 Highmarket Street
Georgetown, SC 29440

Telephone (843) 527-0078

FAX (843) 527-0540

Attorneys for the Intervenor, Inlet Cove and KPOG

Georgetown, South Carolina
December 6, 2013

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Kiawah Resort Associates, L.P., a Delaware
Limited Partnership, and KDP II, LLC, a South
Carolina Limited Liability Company

Plaintiffs,

vs.

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

Defendant,

and

Inlet Cove Homeowners Association, Inc., a South
Carolina Not-for-Profit Corporation, and Kiawah
Island Property Owners Group, an unincorporated
association,

Intervenors.

) BEFORE THE MASTER-IN-EQUITY

) MIKELL R. SCARBOROUGH

) C/A No. 2013-CP-10-01225

) **CERTIFICATE OF SERVICE**

2013 DEC 12 PM 2:15
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

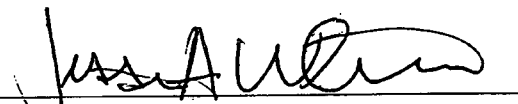
I hereby certify that on this date I served copies of the Intervenors Inlet Cove Club Homeowners Association and Kiawah Island Property Owners Group's Answer to Plaintiffs' Amended Complaint on counsel for all parties by placing copies of same in the United States Mail, first-class postage prepaid, addressed to:

Robert L. Brooke, Esq.
2 N. Adgers Wharf
Charleston, SC 29401

Ellis Lesemann, Esq.
497 Bramson Court, Suite 201
Mt. Pleasant, SC 29464

Allison C. Jett
One Alliance Center
3500 Lennox Road, 4th Floor
Atlanta, GA 30326

December 6, 2013
Georgetown, South Carolina



Jessie A. White
Attorneys for Intervenors

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

KIAWAH RESORT ASSOCIATES, L.P., a)
Delaware Limited Partnership, and KDP II)
LLC, a South Carolina Limited Liability)
Company,)

Plaintiffs,)

vs.)

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

Defendant,)

and)

INLET COVE HOMEOWNERS)
ASSOCIATION, INC., a South Carolina)
Not-for-Profit Corporation, and KIAWAH)
ISLAND PROPERTY OWNERS GROUP,)
an unincorporated association,)

Third-Party Intervenors.)

BEFORE THE MASTER-IN-EQUITY

MIKELL R. SCARBOROUGH

Case No. 2013-CP-10-1225

**PLAINTIFFS' MOTION FOR
RELIEF FROM THE ORDER
GRANTING INTERVENTION**

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2014 MAR 27 AM 10:04

FILED

COME NOW Plaintiffs Kiawah Resort Associates, L.P. ("KRA") and KDP II LLC ("KDP II"), by and through counsel, and file this Motion for Relief from Order Granting Intervention pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure.

The Court has the matter under advisement after having conducted a full hearing on the merits on December 9 and 11, 2013. In the short time period since the record was closed, however, one of the Intervenors, Kiawah Property Owners Group, Inc. ("KPOG"), has legally dissolved. Plaintiffs believe that this newly discovered evidence justifies reconsideration of the Court's ruling that permitted intervention in this action by KPOG.

Furthermore, in light of the clarification of the applicable legal standard for associational standing by the South Carolina Supreme Court in its recent decision *Carnival Corporation d/b/a Carnival Cruise Lines, et al. v. Historic Ansonborough Neighborhood Association, et al.*, 407 S.C. 67, 753 S.E.2d 846 (January 22, 2014), *neither* Intervenor meets the test for associational standing. Therefore, neither Inlet Cove Homeowners Association, Inc. (“Inlet Cove”) nor KPOG should continue as Intervenors. As a result of these developments, Plaintiffs respectfully request that the Court reconsider its Order Granting Intervention and the Intervenors be dismissed.

LEGAL STANDARD

The applicable standard under Rule 60(b) for the Court to grant relief from a prior judgment or order is as follows:

On a motion and upon such terms are just, the Court may relieve a party or his legal representation from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, or excusable neglect; (2) **newly discovered evidence by which due diligence could not have been discovered in time to move for relief under Rule 59(b)**; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

S.C. R. Civ. P. 60(b) (emphasis added). As the moving parties, Plaintiffs have the burden of proof necessary to entitle them to relief. *See, e.g., Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991).

STATEMENT OF FACTS

Earlier in this action, Inlet Cove and KPOG moved to intervene on the basis that they had a distinct “interest” in the property that is the subject of this action that would not be represented adequately by any existing party. *See Motion to Intervene*, filed May 28, 2013. Inlet Cove and KPOG also moved to intervene due to the existence of common questions of fact or law between

their claims and defenses and those involved of the main action. *Id.* On November 1, 2013, the Master-in-Equity signed an order granting Inlet Cove and KPOG's motion to intervene, finding that they met the test for intervention under both SCRCF 24(a)(2) and 24(b). In so doing, the Court relied expressly upon the affirmative representations made by KPOG regarding its continuing role and purpose:

KPOG acts to: represent the combined interests of membership on issues that may affect the fundamental character of Kiawah Island; support the preservation of the natural resources and beauty of Kiawah Island and appropriate environmental conservation policies and/or methods; work with local government units in support of property owners' shared perspectives, concerns and investments, and foster and support economic growth that is consistent with the preservation of the natural beauty of Kiawah Island and the quality of life which forms the basis for members' original and continuing attraction to Kiawah Island.

See Order Granting Intervention, at p. 3. On December 9, 2013 and December 11, 2013, the Master-in-Equity heard two days of testimony and evidence during the hearing on the merits. On December 16, 2013, *three business days after the hearing was concluded*, KPOG's Board of Directors adopted a formal plan of dissolution, which was announced shortly thereafter on KPOG's website and in a letter circulated to KPOG members on January 6, 2014. *See Exhibit A.*

The website announcement indicated that the plan of dissolution would be presented to KPOG's membership at its upcoming annual meeting. On February 22, 2014, KPOG held their annual meeting. This meeting took place at the KICA's community center, which is commonly referred to as "The Sandcastle." *See Affidavit of William J. Hindman*, attached as Exhibit B. The main item on the agenda for this annual meeting was to hold a vote on KPOG's plan of dissolution, which was adopted by the KPOG Board of Directors at its December 16, 2013 board meeting. At the February 22 meeting, KPOG's members duly voted in favor of dissolution of KPOG. There were 1036 votes in favor of dissolution and 16 votes against. On March 5, 2014,

KPOG was formally dissolved, according the records of the South Carolina Secretary of State. See Exhibit C.

During the hearing on the merits on December 9 and 11, the only member of Inlet Cove who testified, Peter Mugglestone, admitted that it was “undetermined” if reformation of the 1995 Quitclaim Deed would have any impact upon him. Trial Tr. at 549:14. The two member witnesses presented by KPOG, Wendy Kulick and Greg Vandewerker, were not allowed to testify as to their speculative belief regarding how the granting of deed reformation might impact them, as the witnesses has no reliable basis to formulate any admissible testimony on the issue. Trial Tr. at 528:10-530-11; 574:10-20.

ARGUMENT AND AUTHORITIES

A. KPOG’S DISSOLUTION IS NEWLY DISCOVERED EVIDENCE THAT REMOVES ITS STANDING AS AN INTERVENOR.

To be granted relief based on newly discovered evidence, a movant must establish that the newly discovered evidence (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching. *Lanier v Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct. App 2005). KPOG’s recent dissolution removes the basis upon which it obtained intervention, which was its claim that it serves as an ongoing environmental steward of Kiawah Island. Because KPOG did not announce its plan of dissolution until just after the evidentiary hearing, and the dissolution became effective on March 5, 2014, the dissolution is newly discovered evidence that mandates dismissal of KPOG as an Intervenor in this action.

Plaintiffs were not aware of KPOG’s plan to dissolve until six weeks after the Order Granting Intervention was filed November 5, 2013, long after the 10-day window for Plaintiffs to

seek relief under Rule 59(b) had expired. KPOG's dissolution plan bears directly on the issue of standing and whether KPOG should continue as an Intervenor. Hence, it is a material issue. Had the Court been aware that KPOG's dissolution was imminent, its ruling on KPOG's intervention would likely have been different. Now that KPOG has dissolved, any associational standing it may have asserted previously has now dissolved along with it.

An association may possess standing by virtue of associational standing on behalf of its members. *See, e.g., Beaufort Realty Co. v. Beaufort Cnty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). To establish associational standing, however, the association must have suffered a particularized injury or its members must have suffered a particularized injury and the other elements of associational standing must be satisfied. *Carnival Corp.*, Case No. 27355, 2014 WL 229894 at 3 (S.C. Jan. 22, 2014). Furthermore, in order to have associational standing, it is only logical that an association must be continuing in its operation. KPOG's dissolution was effective March 5, 2014. Upon dissolution, it does not, and cannot, continue its normal operations. The South Carolina Non-Profit Corporations Act provides that, upon dissolution, a dissolved non-profit corporation "continues its corporate existence but may not carry on any activities except those appropriate to wind up and liquidate its affairs." *See* S.C. Code 33-31-1406.¹ These events preclude KPOG from having any argument that it has ongoing associational standing and, as a result, undermine the basis for KPOG's intervention.

¹ Although the non-profit corporation statutes provide that dissolution does not automatically abate or suspend a proceeding involving the dissolved entity (*see* S.C. Code § 33-31-1406), KPOG can no longer claim associational standing as its legally allowable activities are limited to winding up and liquidating its affairs.

**B. IN LIGHT OF THE SOUTH CAROLINA SUPREME COURT'S
DECISION IN *CARNIVAL CORPORATION* AND THE EVIDENTIARY
RECORD, INLET COVE LACKS ASSOCIATIONAL STANDING AND
SHOULD NOT CONTINUE AS AN INTERVENOR.**

As clarified in a recent decision of the South Carolina Supreme Court, and based on the admissions at the hearing on the merits in this matter, the Intervenor's lack standing to continue as intervening parties in this case. Regardless of the basis for intervention, the Intervenor's may intervene on behalf of the members only to the extent that they have associational standing to intervene. However, Intervenor's failed to adduce any evidence of a legally cognizable injury-in-fact to them that is actual or imminent, such that Intervenor's have failed to meet the "irreducible constitutional minimum of standing." Therefore, the Court should deny continuing intervention to these parties through a reconsideration of the Order Granting Intervention.

As confirmed in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the United States Supreme Court enunciated a stringent standing test. *Lujan* set forth the "irreducible constitutional minimum of standing," which consists of the following three elements:

First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical'. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Lujan, 504 U.S. at 559-61, cited by *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S. Carolina Dep't of Natural Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001).

In this case, Inlet Cove presented only one of its members as a witness: Peter Mugglestone. The associational standing of Inlet Cove, as a result, rises and falls with its sole witness. When asked to speculate regarding the impact that reformation of the 1995 Quitclaim

Deed would have upon him, Mr. Mugglestone testified that whether there would even be any impact at all was “undetermined.” Trial Tr. at 549:14. An organization can only have associational standing “if one or more of its members will suffer an individual injury by virtue of the contested act.” *Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n*, 407 S.C. 67, *5, 753 S.E.2d 846, 850 (2014). As established in *Lujan*, this individual injury must be an “injury in fact.” It must be concrete, particularized, actual and imminent. It cannot be “conjectural or hypothetical,” or in this case, “undetermined.”

The record in this case shows no injury in fact to Mr. Mugglestone.² Therefore, Inlet Cove did not introduce any evidence of a causal connection between Mr. Mugglestone’s non-existent injury and the conduct of which Inlet Cove has complained, i.e., reforming and correcting the 1995 Quitclaim Deed to reflect the intended boundaries of the Beachfront Strip as shown in Exhibit 16.2 to the 1994 Development Agreement. Absent proof of injury in fact, the Court cannot conclude that an injury in fact would likely be redressed by a favorable decision. Inlet Cove fails to meet *any* of three required elements contained within the “irreducible constitutional minimum of standing.” The Court should, therefore, reconsider its decision granting standing to Inlet Cove and dismiss Inlet Cove as an Intervenor.

As a separate basis for reconsidering intervention, the *Carnival* case decided recently by the South Carolina Supreme Court demonstrates that Inlet Cove (and KPOG) lacks standing to continue as an Intervenor. In the *Carnival* case, the Supreme Court itemized the allegations that

² If the Court finds that KPOG can claim associational standing at a time when it no longer exists as an entity, KPOG’s continuing intervention should still be revoked as it too fails to present evidence of a concrete injury in fact that is actual rather than hypothetical. In fact, the Court twice sustained Plaintiffs’ objection to KPOG’s witnesses speculating as to any hypothetical injury due to the inherently unreliable and speculative nature of the proposed testimony. Trial Tr. at 528:10-530-11; 574:10-20. Hence, *neither* Intervenor presented admissible evidence of a concrete, particularized, actual and imminent injury, which precludes associational standing under applicable precedent by either Intervenor.

various associations tried to use as a basis for claiming injury and standing to challenge the presence of cruise ships in Charleston Harbor:

- “The crowds, pollution, and traffic associated with these unlawful operations create a nuisance for Charleston citizens. This lawsuit aims to protect Charleston's neighborhoods, families and the environment by having Defendant Carnival play by the longstanding rules and norms that have made—and make—Charleston a wonderful place to work, live, and visit.”
- “[T]he *Fantasy* visually disrupts the historic skyline.”
- “The influx of thousands of passengers, crew, and support personnel (and associated traffic) ... cause major traffic congestion downtown and the closure of public roads.”
- “The vessels emit noise pollution, including broadcast announcements and music, and the burning of diesel fuel emits visible particulate soot from ship funnels—all adjacent to the Old and Historic District.”
- “Home-porting cruise operations at an industrial scale could jeopardize the integrity, setting, and context that led to National Register designation and place maintenance of National Register status at risk.”
- “On *Fantasy* embarkation and debarkation days, portions of Concord and Washington Streets—which are public streets—are closed for cruise business. Because of those closures, displacement of traffic, and the concentration of cruise traffic in a limited area for a limited time, cruise embarkations and debarkations cause increased congestion along the east side of the downtown Peninsula.”
- “Cruise ships such as the Defendant's *Fantasy* also emit visible particulate soot and other pollutants, including nitrogen and sulfur oxides, which are harmful to human health when inhaled and are deposited into the surrounding waters and land.”
- “Defendant's actions including noncompliance with zoning and environmental laws have injured the above Plaintiff organizations and their members by among other things reducing their use and enjoyment of the local environment and Charleston's historic assets, including their homes, neighborhoods and protected structures.”
- “Cruise operations downtown and ineffective management of them cause, among other things, traffic congestion, pollution emissions, road closures, large crowds, loud noises, and obstructed views that are incompatible with the area's historic setting, scale, and residential character and impact health and the environment.”

Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, *6, 753 S.E.2d 846, 851 (2014). The allegations, in comparison to those provided by Inlet Cove, are concrete,

specific, known and actual. Nonetheless, the South Carolina Supreme Court specifically rejected the notion that the foregoing allegations supported a finding that the associations whose members asserted these alleged injuries had standing. For this reason, the Court should reconsider its Order Granting Intervention and dismiss the Intervenor from this proceeding.

CONCLUSION

Neither Intervenor should be allowed continuing intervention in this case due to a clear lack of standing. KPOG has been dissolved and is limited by law to winding up and liquidating its affairs. As a result, KPOG cannot have continuing associational standing. In addition, neither Intervenor presented any evidence as to a concrete, particularized, actual and imminent injury to its members. The only admitted testimony was that any impact of the Court's granting deed reformation was "undetermined." The member witnesses presented by KPOG were not allowed to provide testimony due to the inherently speculative and unreliable nature of the intended testimony. Therefore, based on the newly discovered evidence, recently decided precedent, and factual record, neither Intervenor qualifies for continuing intervention in this action. Plaintiffs respectfully request that the Court reconsider its Order Granting Intervention and grant Plaintiffs appropriate relief from that Order by dismissing the Intervenor.

Respectfully submitted,

By: 

Ellis R. Lesemann
Lesemann & Barks LLC
80 Alexander Street, Second Floor
Charleston, SC 29403
Phone: (843) 724-5155
erl@lb-lawfirm.com

Attorneys for Plaintiffs

March 27, 2014
Charleston, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that I have this date, mailed, postage prepaid, a true and correct copy of
**PLAINTIFF'S MOTION FOR RELIEF FROM THE ORDER GRANTING
INTERVENTION** to the following counsel of record:

Allison C. Jett, Esquire
Weissman Nowack Curry & Wilco
One Alliance Center, 4th Floor
3500 Lenox Road
Atlanta, GA30326
Attorneys for Defendant

Amy E. Armstrong, Esquire
S.C. Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585
Attorneys for Third-Party Intervenors

By: _____

Michelle A. Matthews

March 27, 2014

Charleston, South Carolina

BY _____

JULIE J. ARMSTRONG
CLERK OF COURT

2014 MAR 27 AM 10:04

FILED

EXHIBIT A

KPOG LETTER DATED JANUARY 6, 2014

Kiawah Property Owners Group, Inc.
130 Gardeners Circle
PMB 304
Johns Island, SC 29455
January 6, 2014

Dear KPOG Member:

After 33 years of dedicated service to the Kiawah community, it is with great regret that we announce the dissolution of the Kiawah Property Owners Group, Inc. (KPOG).

As with other public service and charitable organizations, filling leadership positions has become increasingly difficult. The Presidency is, indeed, a very big job and we have been unable to identify someone willing and able to serve in this position going forward. Without a President, there is no Board of Directors. Without a Board of Directors, there is no organization. Thus, the current Board of Directors has voted to dissolve KPOG.

WE NEED ALL KPOG MEMBERS TO READ THIS ENTIRE LETTER AND RESPOND BY COMPLETING THE ATTACHED PROXY AS REQUESTED AS SOON AS POSSIBLE.

Since our founding in 1981, KPOG has worked diligently to keep its membership informed about key events, issues and decisions of interest to Kiawah property owners.

2013 has been a typical year, with a number of significant activities affecting Kiawah property owners. KPOG has reported on highlights such as the change in ownership of Kiawah Partners (KP, the Developer), the Town's annexation of Freshfields Village, the adoption of a revised Development Agreement between the Town and KP, the lawsuit filed by the Developer against the Kiawah Island Community Association (KICA), and three major fires on the Island.

In January 2013 the general public could not have foreseen many of these issues; we would expect similar, unanticipated events and announcements going forward. It is difficult to predict what 2014 and future years will hold in store for this Island we all love. We encourage our members to continue to follow closely the work of the Town of Kiawah Island and KICA and to attend the public meetings of both.

The February issue of Kiawah Island TALK will be our last. It is the tenth issue for the 2013-14 membership year and fulfills our commitment to you, our members. The only agenda item at our Annual Meeting to be held on Saturday, February 22, 2014, at 9:00 a.m. at the Sandcastle will be the formal dissolution of KPOG.

Enclosed you will find the legal plan for dissolution adopted by the KPOG Board of Directors at its December 16, 2013 board meeting. South Carolina statutes require any remaining financial assets to be donated to one or more 501(c)(3) organizations. The KPOG Board has voted to donate any remaining assets to the Kiawah Island Natural Habitat Conservancy (the Kiawah Conservancy), which is currently the only Kiawah Island organization that is designated as a 501(c)(3) by the IRS.

Our By-Laws require approval by 2/3 of the **entire** membership – **not** just those attending the meeting or voting by proxy – to fulfill the legal requirements for dissolution. If we do not achieve this 2/3 majority, the organization will be dissolved by the Court. Were that to occur, there would be added expense and KPOG would lose control of the disposition of our remaining financial assets.

To conclude the dissolution of KPOG and enable us to direct the funds to the Kiawah Conservancy, we need **your** approval, either by voting using the enclosed ballot, voting in person at the Annual Meeting, or by assigning your proxy to me, the KPOG President.

AFTER READING THIS LETTER, PLEASE DO NOT DELAY. IMMEDIATELY COMPLETE THE ENCLOSED PROXY AND RETURN IT TO US IN THE STAMPED, SELF-ADDRESSED ENVELOPE.

In closing, whether you are a new member or a member since KPOG's inception, it has been our privilege to represent you and advocate on your behalf. Our heartfelt thanks for your membership, your support, and your encouragement.

Sincerely yours,



Marilyn Green Larach
President, KPOG

attachments

EXHIBIT B

AFFIDAVIT OF WILLIAM J. HINDMAN

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

KIAWAH RESORT ASSOCIATES, L.P., a
Delaware Limited Partnership, and KDP II,
LLC, a South Carolina Limited Liability
Company,

Plaintiffs,

vs.

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

Defendant,

and

INLET COVE HOMEOWNERS
ASSOCIATION, INC., a South Carolina
Not-for-Profit Corporation, and KIAWAH
ISLAND PROPERTY OWNERS GROUP, an
unincorporated association,

Third-Party Intervenors.

BEFORE THE MASTER-IN-EQUITY

MIKELL R. SCARBOROUGH

Case No. 2013-CP-10-1225

AFFIDAVIT OF WILLIAM J. HINDMAN

PERSONALLY APPERARED before me William J. Hindman who being duly sworn
deposes and says, based on his own personal knowledge, as follows:

1. My name is William J. Hindman. I am an independent Public Relations Consultant
for Kiawah Development Partners, Inc. I reside on Kiawah Island, South Carolina.

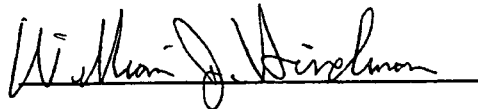
2. On February 22, 2014 at 9:00 a.m., I attended the annual meeting of Kiawah
Island Property Owners Group ("KPOG"). This meeting took place at the Kiawah Island

Community Association's ("KICA") community center, which is commonly referred to as "the Sandcastle."

3. The main item on the agenda for this annual meeting was to hold a vote on the plan of dissolution of KPOG. The plan of dissolution was adopted by its Board of Directors at their December 16, 2013 board meeting and was presented to KPOG's full membership at the Annual Meeting for a vote.

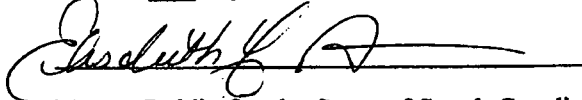
4. The vote on the plan of dissolution was conducted. The result of the vote among the members of KPOG was to approve dissolution, with more than 99% of the votes cast being in favor of dissolution. In total, there were 1036 votes in favor of dissolution and 16 votes against the dissolution. As a result of this vote, the members of KPOG formally approved the plan of dissolution and it was announced that the plan of dissolution would proceed.

FURTHER AFFIANT SAYETH NOT.



William J. Hindman

SWORN to and subscribed before me
on this 10th day of March, 2014

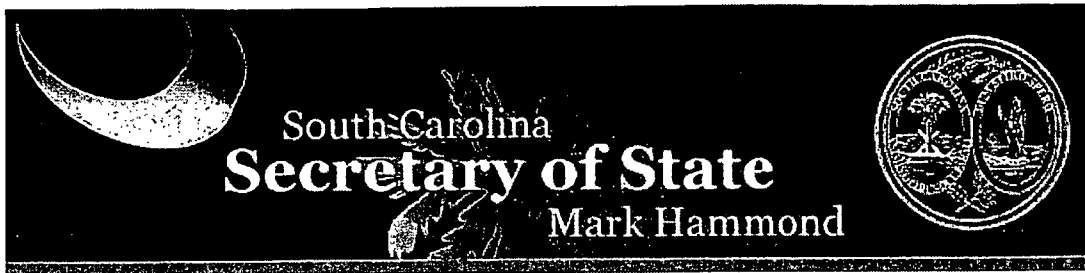


Notary Public for the State of South Carolina

My commission expires: 12-10-2020

EXHIBIT C

**PROOF OF DISSOLUTION FILED WITH SOUTH CAROLINA SECRETARY OF
STATE**



KIAWAH PROPERTY OWNERS GROUP, INC.

Note: This online database was last updated on 3/20/2014 6:01:49 PM.
See our Disclaimer.

DOMESTIC / FOREIGN:	Domestic
STATUS:	Dissolved
STATE OF INCORPORATION	SOUTH CAROLINA
/ ORGANIZATION:	Non Profit

REGISTERED AGENT INFORMATION

REGISTERED AGENT NAME:	PRINCIPLE OFFICE
ADDRESS:	78 BITTERN CT JOHN'S ISL
CITY:	
STATE:	
ZIP:	
SECOND ADDRESS:	
FILE DATE:	04/01/1985
EFFECTIVE DATE:	04/01/1985
DISSOLVED DATE:	03/05/2014

Corporation History Records

CODE	FILE DATE	COMMENT	Document
Eleemosynary Dissolution	03/05/2014	NP DISSOLUTION	
Agent	06/09/2006	CHANGE OF PRINCIPLE OFFICE ADDRESS FROM 78 BITTERN CT. TO 306 PALM WARBLER RD.	
Eleemosynary Amendment	06/09/2006	CHANGE NAME FROM KIAWAH RESIDENTS GROUP, INCORPORATED	
Eleemosynary Amendment	12/14/1992	AMENDMENT	Image
Incorporation	04/01/1985	Chtr [20521] ELE CHARTER	Film

Disclaimer: The South Carolina Secretary of State's Business Filings database is provided as a convenience to our customers to research information on business entities filed with our office. Updates are uploaded every 48 hours. Users are advised that the Secretary of State, the State of South Carolina or any agency, officer or employee of the State of South Carolina does not guarantee the accuracy, reliability or timeliness of such information, as it is the responsibility of the business entity to inform the Secretary of State of any updated information. While every effort is made to insure the reliability of this information, portions may be incorrect or not current. Any person or entity who relies on information obtained from this database does so at his own risk.

Physical Address: Edgar Brown Building - 1205 Pendleton Street Suite 525 Columbia, SC 29201

Mailing Address: SC Secretary of State's Office 1205 Pendleton Street Suite 525 Columbia, SC 29201

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

Plaintiffs,

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

Intervenors,

vs.

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

Defendant.

BEFORE THE MASTER-IN-EQUITY

MIKELL R. SCARBOROUGH

Case No. 2013-CP-10-01225

**DEFENDANT KIAWAH ISLAND
COMMUNITY ASSOCIATION, INC.'S
RESPONSE TO PLAINTIFFS' MOTION
FOR RELIEF FROM THE ORDER
GRANTING INTERVENTION**

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2014 APR -7 PM 1:55

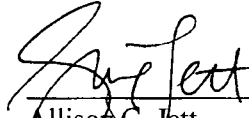
FILED

COMES NOW Defendant Kiawah Island Community Association, Inc. ("KICA" hereinafter) and makes this, its response to Plaintiffs Kiawah Resort Associates, L.P. and Kiawah Development Partners II, Inc.'s Motion for Relief from the Order Granting Intervention as follows:

Defendant KICA does not dispute any fact stated by Plaintiff in its motion and believes the facts stated therein to be true and correct as to the best knowledge of KICA. As such, KICA has no objection to the Court ruling on Plaintiff's motion based on the merits of the arguments presented therein.

This Defendant does not request a hearing on Plaintiff's motion for relief.

Respectfully submitted this 4th day of April, 2014.



Allison C. Jett

South Carolina Bar No. 81754

Attorney for Defendant Kiawah Island
Community Association, Inc.

WEISSMAN, NOWACK, CURRY & WILCO, P.C.
One Alliance Center, 4th Floor
3500 Lenox Road
Atlanta, Georgia 30326
(404) 926-4500

14251.002; 11011997

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

Plaintiffs,

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

Intervenors,

vs.

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

Defendant.

BEFORE THE MASTER-IN-EQUITY

MIKELL R. SCARBOROUGH

Case No. 2013-CP-10-01225

CERTIFICATE OF SERVICE

BY _____

JULIE J. ARMSTRONG
CLERK OF COURT

2014 APR -7 PM 1:55

FILED

The undersigned certifies that on this date Defendant Kiawah Island Community Association, Inc.'s Response to Plaintiffs' Motion for Relief from the Order Granting Intervention was served upon opposing counsel by depositing a copy of same in the United States Mail, postage prepaid, and properly addressed as follows:

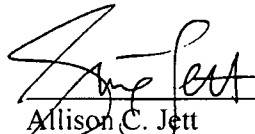
Ellis Lesemann, Esquire
Lesemann & Barks, LLC
80 Alexander Street, 2nd Floor
Charleston, SC 29401
Attorneys for Plaintiffs

Amy E. Armstrong, Esq.
South Carolina Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585
Attorneys for Intervenors

This 4th day of April 2014.

WEISSMAN, NOWACK, CURRY & WILCO, P.C.
One Alliance Center, 4th Floor
3500 Lenox Road
Atlanta, Georgia 30326
(404) 926-4500

14251.002; 100426679



Allison C. Jett
South Carolina Bar No. 81754
Attorney for Defendant Kiawah Island
Community Association, Inc.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Kiawah Resort Associates, L.P., a Delaware
Limited Partnership,

Plaintiff,

vs.

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

Defendant,

vs.

Inlet Cove Club Homeowners Association, Inc., a
South Carolina Not-for-Profit Corporation, and
Kiawah Island Property Owners Group, an
unincorporated association,

Intervenors.

BEFORE THE MASTER-IN-EQUITY

MIKELL R. SCARBOROUGH

C/A No. 2013-CP-10-01225

**RESPONSE TO
PLAINTIFF'S MOTION FOR
RELIEF FROM ORDER
GRANTING INTERVENTION**

FILED
2014 APR 17 PM 1:30
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

TO: HONORABLE MIKELL SCARBOROUGH AND ALL PARTIES AND THEIR
ATTORNEYS

Inlet Cove Club Homeowners Association, Inc., and Kiawah Island Property Owners Group
(the "Intervenors") hereby respond to Kiawah Resort Associates, L.P. ("KRA") and KDP II, LLC's
Motion for Relief from Order Granting Intervention.

INTRODUCTION

The crux of the Plaintiff's motion is that the Intervenors do not have standing¹ based on: (1)
KPOG's dissolution; and (2) its interpretation of a recent ruling of the South Carolina Supreme

¹ As described more fully throughout this response, the Plaintiff's motion fatally confuses a party's standing
and intervention and misstates the requisite inquiries thereunder.

Court. As the party seeking to set aside a judgment pursuant to South Carolina Rules of Civil Procedure (SCRCP) Rule 60(b), the Plaintiff has the burden of presenting evidence entitling it to the requested relief. Perry v. Heirs at Law of Gadsden, 357 S.C. 42, 590 S.E.2d 502 (Ct. App. 2003).

While it is entirely unclear what effect, if any, the requested relief would have on this case—particularly given that the Court has already heard the matter with the participation of Intervenor—this response demonstrates: (1) that KPOG’s dissolution is irrelevant to the standing inquiry; (2) that Rule 60(b) relief is not appropriate at this stage in the case; and (3) that Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n, 407 S.C. 67, 753 S.E.2d 846, 851 (2014), does nothing to defeat Intervenor’s ability to meet the well-established test for standing.

As a preliminary matter the Intervenor contends that a Rule 60(b) motion is not appropriate here for two reasons. First, the Order Granting Intervention is interlocutory and thus does not fall within the ambit of SCRCP Rule 60(b). Second, the Plaintiffs’ motion challenges standing, rather than whether the standard for intervention was properly met and thus does not appear to be ripe since the Court has yet to issue its final order and make a final ruling on standing. If Plaintiff is proposing a new trial – without the participation of Intervenor, which it has not explicitly requested – then the Plaintiff has not carried its burden of presenting evidence warranting a new trial. If it is not seeking a new trial, then the question before the Court is not ripe.

I. POST-TRIAL DISSOLUTION IS IRRELEVANT TO STANDING

A. Post-Complaint Events Do Not Affect Standing

The Intervenor does not dispute the statement of facts as set forth in the Plaintiffs’ motion; however those facts are irrelevant to the inquiry before the Court.

Whether a party has Article III standing presents the question of whether the Court has

subject matter jurisdiction. It is a "longstanding rule that jurisdiction is to be assessed under the facts existing when the complaint is filed." Lujan v. Defenders of Wildlife, 504 U.S. 555, 569 n.4 (1992). While jurisdiction may be challenged well into the litigation, those defects must exist at the time the complaint is filed. Id. And as a jurisdictional matter, a party's standing is assessed as of the time of the filing of the complaint. Davis v. FEC, 554 U.S. 724, 734, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008) ("While the proof required to establish standing increases as the suit proceeds, the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed.") (internal citations omitted).

Further, events occurring later in time are irrelevant for purposes of determining a party's standing in bringing or defending an action. Smith v. Sperling, 354 U.S. 91, 93, 77 S.Ct. 1112, 1 L.Ed.2d 1205 (1957) ("It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that *after vesting, it cannot be ousted by subsequent events.*") (emphasis added); Freeport-McMoRan, Inc. v. K N Energy, Inc., 498 U.S. 426, 428, 111 S.Ct. 858, 112 L.Ed.2d 951 (1991) ("We have consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events."); see also Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc., 528 U.S. 167, 189–92, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (comparing standing with the doctrine of mootness, which is affected by subsequent events). As Justice Scalia stated in his concurring opinion in Gwaltney of Smithfield v. Chesapeake Bay Foundation: "Subject matter jurisdiction 'depends on the state of things at the time of the action brought'; if it existed when the suit was brought, 'subsequent events' cannot 'oust[]' the court of jurisdiction." 484 U.S. 49, 69, 108 S. Ct. 376 (1987). Thus, *post-complaint events are irrelevant to standing.*

Here, the inquiry into Intervenor's standing relates back to the commencement of their involvement in this case with the filing of the motion to intervene, which was filed close in time to the complaint. Accordingly, this Court's determination of whether Intervenor had standing at the time the complaint was filed, or at least at the time the motion to intervene was filed, is not affected by subsequent events, including KPOG's dissolution.

B. Dissolution Does Not Extinguish Existing Obligations

The Plaintiff claims that it is "*only logical*" that an association must be continuing in its operation" and that since KPOG has dissolved "any associational standing it may have asserted previously has now dissolved with it." Motion, 5 (emphasis added). However, Plaintiff points to no legal authority in support its argument based on "logic." In fact, Plaintiff's "logic" is directly disputed by the case law as described above and plainly contrary to both statutory law and KPOG's specific Plan of Dissolution and Complete Liquidation, attached as **Exhibit A**.

As Plaintiff points out, South Carolina Code Section 33-31-1406 states that a dissolved organization "continues its corporate existence" to carry on activities "appropriate to wind up and liquidate its affairs[.]" S.C. Code Ann. § 33-31-1406(a). Moreover, it explicitly provides that **dissolution does not** "prevent commencement of a proceeding by or against" the organization or "*abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution[.]*" S.C. Code Ann. § 33-31-1406(b)(4)-(5) (emphasis added). In addition, KPOG's Plan of Dissolution and Complete Liquidation expressly sets forth that:

On and after the Effective Date, *KPOG shall be continued* as a body corporate solely *for the purposes of prosecuting and defending suits, actions, proceedings, and claims of any kind or character by or against it*, and of enabling it gradually to settle

and close its business, to collect and discharge obligations, to dispose of or convey its property, and to distribute its assets.

Exhibit A, 2 (emphases added).

Therefore, the filing of dissolution does not automatically strip an organization of its ability to litigate, defend claims and maintain standing in an action, but indeed directs that an organization begin winding up its affairs and finish carrying out its existing obligations. KPOG's existence and standing in this case were not extinguished by virtue of its dissolution. Rather, KPOG's standing, which is adjudged as of the time of filing, is clearly maintained under the relevant law and its own plan of dissolution.

II. A MOTION FOR RELIEF PURSUANT TO SCRPC RULE 60(b) IS NOT APPROPRIATE AT THIS STAGE

A. Rule 60(b)(2) is Not Applicable to an Interlocutory Order

Rule 60(b) allows a party to seek relief from a "*final* judgment, order or proceeding" and arises within the context of a request for a new trial or other relief from such final judgment. SCRPC Rule 60(b) (emphasis added); *See, e.g., Lanier v. Lanier*, 364 S.C. 211, 215-16, 612 S.E.2d 456, 458 (Ct. App. 2005); *Jamison v. Ford Motor Co.*, 373 S.C. 248, 272, 644 S.E.2d 755, 767 (Ct. App. 2007). KPOG's dissolution is certainly new factual information that has arisen since this Court's Order Granting Intervention; however, it simply does not constitute "new evidence" effecting a "final judgment, order or proceeding" under Rule 60(b)(2).

Moreover, a "motion for relief from judgment has no application to interlocutory judgments, orders or proceedings of the trial court but, rather, by its express terms applies only to final judgments." *NationsBank of N.C., N.A. v. Parsons*, 324 S.C. 506, 477 S.E.2d 735 (Ct. App. 1996). Interlocutory is defined as:

[S]omething intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy. An interlocutory order or decree is one which does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.

Black's Law Dictionary, 6th Edition, West Group; see also Bone v. U.S. Food Serv., 399 S.C. 566, 733 S.E.2d 200 (2012) (final judgments defined as those where the order disposes of the whole subject matter of the action or terminates the action); Good v. Hartford Accident and Indemnity Co., 201 S.C. 32, 21 S.E.2d 209 (1942) (noting an order that determines issues of law while leaving open questions of fact is not a final order).

Even if KPOG's dissolution were relevant to standing, this Court's Order Granting Intervention is interlocutory and not subject to a Rule 60(b)(2) motion for relief from final judgment.

B. A Motion for Relief from the Order Granting Intervention Is Not the Proper Mechanism to Challenge Standing

The Plaintiff seeks relief from this Court's Order Granting Intervention, which specifically assessed whether KPOG and Inlet Cove met the standard for intervention under the SCRCP.² Notably, however, the Plaintiff's motion does not contain any allegations that the Court improperly applied the standard for intervention, and instead treats the Order Granting Intervention as a final judgment on standing.

² Intervention as of right is governed by SCRCP Rule 24(a), which provides for intervention: "(1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

Permissive intervention is governed by SCRCP Rule 24(b), which provides for intervention: "(1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common."

Even to the extent that the Order Granting Intervention is construed as a final affirmative ruling on standing, the standing inquiry has changed as this case has progressed. “At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we ‘presum[e] that general allegations embrace those specific facts that are necessary to support the claim.’” Lujan v. National Wildlife Federation, 497 U.S. 871, 889, 110 S.Ct. 3177, 3189, 111 L.Ed.2d 695 (1990). In the case cited by the Plaintiff, Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, the question of standing arose on a motion to dismiss, at which point the court looked only to the “complaint” to determine whether the Plaintiffs alleged a particularized injury. 407 S.C. 67, 753 S.E.2d 846, 851 (2014). This case has moved past a review of the allegations. This Court heard live testimony during the trial of the matter, at which point a party bears the burden of **proving** (as opposed to alleging) the elements of standing. Thus an ultimate ruling on standing will be either contained in a final order on the merits or determined by way of a Rule 59(e) motion.³

Plaintiff could have filed a motion to dismiss the Intervenor's for lack of standing or a motion for summary judgment on the question of standing, but it did not. Instead, months after the two-day trial and submission of the parties' proposed orders for this Court's final decision, Plaintiff seeks relief from the preliminary Order Granting Intervention arguing that “newly discovered evidence” demonstrates that the Intervenor's lack standing. Contesting the Order Granting Intervention for lack of standing is plainly misplaced. While the Order Granting Intervention does provide preliminary determinations regarding the Intervenor's standing – at this stage in the case, the Court's standing

³ The Intervenor's proposed order contains the necessary factual findings and legal conclusions necessary to conclude that Intervenor's proved standing at the trial of this case, see Section III of this response

inquiry includes consideration of the evidence and live testimony presented at trial, which bolster the pre-trial allegations upon which the Order Granting Intervention touched. Therefore, any challenge to Intervenor's standing should be appropriately directed to the Court's Final Order on the merits.

III. THE EVIDENCE PRESENTED AT TRIAL AND THE AFFIDAVITS FILED WITH THE MOTION TO INTERVENE SUFFICIENTLY ESTABLISH STANDING

A. The Standard for Standing

In Sea Pines Association v. SC Dept. of Natural Resources, 345 S.C. 594, 550 S.E.2d 287 (2001), the South Carolina Supreme Court adopted the basic legal test for standing announced in Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130 (1992).⁴ See also Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (2003). The three-pronged test arising from Lujan is as follows:

First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Lujan, 112 S. Ct. at 2136 (internal citations omitted).

⁴ The South Carolina Supreme Court's rulings on standing in environmental cases have consistently followed the rulings of the United States Supreme Court and other federal courts. See, e.g., Sea Pines Association for the Protection of Wildlife, Inc. v. S.C. Department of Natural Resources, 345 S.C. 594, 550 S.E. 2d 287 (2001), citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) and Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); Energy Research Foundation v. Waddell, 295 S.C. 100, 367 S.E.2d 419 (1988), citing Sierra Club, supra., United States v. SCRAP, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973), and Conservation Council of North Carolina v. Costanzo, 505 F.2d 498 (4th Cir.1974). Accordingly, decisions of the federal courts are pertinent to this case.

In Pye v. U.S., the Fourth Circuit reaffirmed the principle that “aesthetic and environmental injuries can constitute an injury in fact sufficient to support a plaintiff’s standing.” 269 F.3d 459, 469 (4th Cir. 2001) (citing Friends of the Earth, Inc. v. Laidlaw Envt. Servs. (TOC), Inc., 528 U.S. 167, 120 S.Ct. 693 (2000); Sierra Club v. Morton, 405 U.S. 727, 735, 92 S.Ct. 1361 (1972); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 73-4, 98 S.Ct. 2620 (1978)).

Our courts have long held that precisely the type of aesthetic and recreational interests at stake here are sufficient to confer standing. In Smiley the Supreme Court held that a plaintiff must make claims as to “use and enjoyment” of an affected area. Smiley v. S. Carolina Dept. of Health & Envtl. Control, 374 S.C. 326, 333, 649 S.E.2d 31 (2007); see also, Pye v. U.S., 269 F.3d 459, 469 (4th Cir. 2001); Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); Friends of the Earth, Inc. v. Laidlaw Envt. Servs. (TOC), Inc., 528 U.S. 167, 120 S.Ct. 693 (2000); American Canoe Assn. v. Murphy Farms, 326 F.2d 505 (4th Cir. 2003). An interest in the use and enjoyment of property is a cognizable, legally protected interest. S.C. Wildlife Federation v. S.C. Coastal Council, 296 S.C. 187, 190, 371 S.E.2d 521, 523 (1988); Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision), 332 S.C. 551, 505 S.E.2d 598 (Ct. App.1998) (rev’d on other grounds).

The United States Supreme Court has stated that the injury required for standing purposes need not be a substantial injury:

“Injury in fact” reflects the statutory requirement that a person be “adversely affected” or “aggrieved,” and it serves to distinguish a person with a direct stake in the outcome of a litigation – even though small – from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, . . . a \$5 fine and costs, . . . ; and a \$1.50 poll tax [W]e see no reason to adopt a more restrictive interpretation of “adversely affected” or “aggrieved.” As Professor Davis

has put it: “The basic idea that comes out in numerous cases is that **an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.**” Davis, *Standing: Taxpayers and Others*, 35 U.Chi.L.Rev. 601, 613. See also K. Davis, *Administrative Law Treatise* ss 22.09--5, 22.09--6 (Supp. 1970).

United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 93 S.Ct. 2405, 37 L. Ed. 2d 254 (1973) (Internal citations omitted) (emphasis added).

The “identifiable trifle” standard was re-affirmed by the Fourth Circuit. Friends of the Earth, Inc. v. Gaston Copper, 204 F.3d 149 (4th Cir. 2000): “the claimed injury ‘need not be large, an identifiable trifle will suffice.’” 204 F.3d 149, 156, quoting Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 557 (5th Cir. 1996) (internal quotation marks omitted). See also, Conservation Council of North Carolina v. Costanzo, 505 F.2d 498, 501 (4th Cir. 1974). In Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision), 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998), the plaintiff had standing where she alleged an injury to her use and enjoyment of a wetland adjacent to her home, even though the wetland was owned by a private developer.

Moreover, an organization has representational standing when: (1) at least one of its members would have standing to sue in his own right; (2) the organization seeks to protect interests germane to the organization's purpose; and (3) neither the claim asserted nor the relief sought requires the participation of individual members in the lawsuit. Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 155 (4th Cir. 2000) (citing Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)).

In this case, the Intervenor has asserted far more than the “identifiable trifle” required to establish injury, United States v. Students Challenging Regulatory Agency Procedures (SCRAP),

412 U.S. 669, 93 S.Ct. 2405, 37 L. Ed. 2d 254 (1973); Friends of the Earth, Inc. v. Gaston Copper, 204 F.3d 149 (4th Cir. 2000); as well as satisfied the elements of the Lujan three-prong test as described in greater detail below.

Wendy Kulick testified as a resident of Kiawah Island since 1989, a member of KICA and a member of KPOG. (Tr. 524-525). Ms. Kulick testified that KPOG's mission is to identify and communicate issues of particular importance, especially in relation to natural resources and the environment, to property owners and to advocate on their behalf in protecting those interests. (Tr. 525). Ms. Kulick testified that she shares KPOG's interests and goals; that they form part of the basis for her membership in the organization; and that they are promoted by KPOG's intervention in this case. (Tr. 525-526). Ms. Kulick testified that she often walks along the area of the beach in, on and around the 4.62 acre parcel; that the 4.62 acre parcel is special in that it remains one of the few pristine areas left on Kiawah Island and a reminder of what attracted her to move to the island; and that by experiencing the 4.62 acres in its current state, she derives aesthetic enjoyment as well as an escape from the daily stressors of life. (Tr. 526-528, 539-540). As a member of KICA, Ms. Kulick has the right to use, access and enjoy KICA's Common Properties, but if the 4.62 acres were no longer Common Property as part of the Beachfront Strip, then she would no longer be able to use, access or enjoy that property as she currently does, thereby diminishing her aesthetic and recreational interests. (Tr. 530-531).

Peter Mugglestone testified as a property owner on Kiawah Island, a member of KICA and a member of Inlet Cove. (Tr. 546). Mr. Mugglestone is familiar with the 4.62 acre parcel and he regularly uses and enjoys the 4.62 acre parcel in conjunction with his morning runs along the beach,

afternoon walks out to Captain Sam's Spit, and general use of the access boardwalk from Beachwalker Park that crosses the 4.62 acres. (Tr. 546-548). Mr. Mugglestone described the 4.62 acre parcel as transitional from dunes and grass to dense maritime forest and testified that it is one of the more desirable areas along the Kiawah Island beachfront and particularly special in the amount of small vegetation, flora and wildlife it sustains. (Tr. 548-549).

Mr. Mugglestone is able to use the 4.62 acres as a member of KICA; he derives benefits from the 4.62 acres by walking through the parcel, by observing the scenery and wildlife, and by taking photographs. (Tr. 549). If KRA prevails in this case, and if the 4.62 acres were no longer Common Property, then his use and enjoyment would be adversely affected because the parcel would most likely be developed, lose its unique desirability and his access would be eliminated without trespassing. (Tr. 549).

Dr. VanDerwerker testified as a member of KPOG and KICA. He provided testimony related to the recreational activities he enjoys on Kiawah Island, which include walking, jogging, bicycling, beachcombing and kayaking. (Tr. 570). Dr. VanDerwerker testified that he is familiar with the 4.62 acre parcel; that it remains in its natural state of beach dunes and maritime forest; that he regularly uses the 4.62 acres for beach access; and that he derives aesthetic enjoyment from the 4.62 acres through observation of the natural scenery and wildlife as well as physical benefits in the form of hurricane protection. (Tr. 570-572). One of the most attractive features that drew him to move to Kiawah Island was the unique beach landscape that supported forests and various native flora and wildlife, and which is exhibited on the 4.62 acres. (Tr. 572).

Dr. VanDerwerker has access rights to the 4.62 acres because it is held by KICA as Common Property, but he would lose his access rights if KRA were deemed to own that parcel, thereby lessening his use and enjoyment of the area in dispute. (Tr. 575).

In its Order Granting Intervention, the Court found that “Inlet Cove and KPOG hold aesthetic and recreational interests in viewing, using and enjoying the 4.62 acres and surrounding wildlife in its natural state” and that those types of interests provide a basis for standing. Order, p. 8. As explained above, where the evidence presented at trial elaborated upon such aesthetic and recreational interests, any preliminary determination on the sufficiency of such interests is further supported.

B. The Carnival Cruise Lines Case Does Nothing to Defeat Intervenor’s Standing

First and foremost, the Supreme Court’s Opinion in Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n, 407 S.C. 67, 753 S.E.2d 846 (2014), does nothing to overturn or even limit the well-established standard on standing which has been applied by South Carolina courts for decades. The Court’s Opinion applies the identical legal standards set forth above and Plaintiff simply misconstrues and misapplies that ruling.

It is important to note that the case was before the Court on a motion to dismiss, thus the standing analysis was undertaken based on allegations of a complaint: “Reviewing Plaintiffs’ complaint, we conclude Plaintiffs fail to allege a concrete, particularized harm to a legally protected interest.” Id. at 850. The outcome of that case was based on insufficient allegations as the Court concluded that the Plaintiffs had not alleged “a particularized injury either to themselves or their members. Rather, they assert only generalized grievances suffered by the public as a whole which

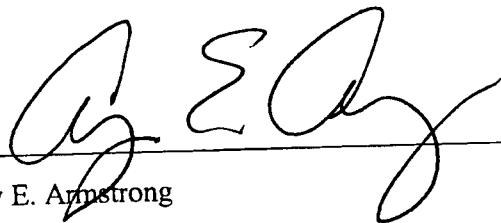
are insufficient to establish standing.” Id. at 851.

By contrast, this Court’s determination in granting intervention – which also touched upon elements of standing that were then bolstered by live testimony at trial – was based on affidavits and allegations that sufficiently demonstrated the Intervenor’s interests in this case. But more importantly, the Intervenor presented evidence of concrete and particularized injuries to specific individuals. Ms. Kulick, Dr. Mugglestone and Dr. VanDerwerker all provided testimony as to their individual uses and how those uses would be adversely affected if the Plaintiff prevails in this action. Thus, the Intervenor have met the burden of establishing the individualized injury that the Court found lacking in Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n.

CONCLUSION

For the reasons set forth above, the Plaintiff’s Motion for Relief from the Order Granting Intervention pursuant to SCRCF Rule 60(b)(2) should be denied.

Respectfully submitted,



Amy E. Armstrong

Michael Corley

Jessie A. White

SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

Mailing address: Post Office Box 1380
Pawleys Island, SC 29585

Office address: 430 Highmarket Street
Georgetown, SC 29440

Telephone: (843) 527-0078

FAX: (843) 527-0540

Attorneys for Intervenors

Georgetown, South Carolina

April ____, 2014

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Kiawah Resort Associates, L.P., a Delaware
Limited Partnership,

Plaintiff,

vs.

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

Defendant.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
)

Case No. 2013-CP-10-01225

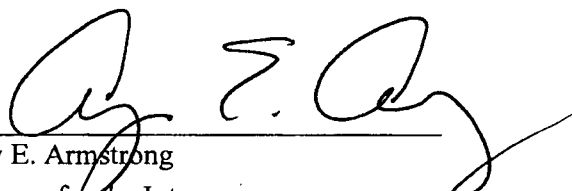
**CERTIFICATE
OF
SERVICE**

FILED
2014 APR 17 PM 1:38
JULIE J. ARMSTRONG
CLERK OF COURT

I hereby certify that on this date I served copies of the Inlet Cove Homeowners Association and
Kiawah Island Property Owners' Group's Response to Plaintiffs' Motion for Relief From the
Order Granting Interventin on counsel for all parties by placing copies of same in the United
States Mail, first-class postage prepaid, addressed to:

Ellis Lesemann, Esq.
497 Bramson Court, Suite 201
Mt. Pleasant, SC 29464

Allison C. Jett
One Alliance Center
3500 Lennox Road, 4th Floor
Atlanta, GA 30326



Amy E. Armstrong
Attorney for the Intervenors

April 14, 2014

Georgetown, South Carolina

Exhibit A

PLAN OF DISSOLUTION AND COMPLETE LIQUIDATION OF KIAWAH PROPERTY OWNERS GROUP, INC.

This **PLAN OF COMPLETE LIQUIDATION** (the "**Plan**") of KIAWAH PROPERTY OWNERS GROUP, INC. ("**KPOG**") was adopted by the Board of Directors of KPOG (the "**Board**") on the 16th day of December, 2013. The Board has determined that it is desirable and for the benefit of both KPOG and the members thereof that KPOG be completely liquidated in accordance with § 331 of the Internal Revenue Code of 1986. As soon after the liquidation of KPOG as is practicable, KPOG shall be dissolved in accordance with the South Carolina Nonprofit Corporation Act and the provisions of this Plan.

1. Effective Date. This Plan shall be effective on the date on which it is approved by the members of KPOG (the "**Effective Date**").

2. Adoption of Plan. This Plan shall be submitted to the members of KPOG for approval and adoption at the Annual Meeting of the Membership of KPOG. The Plan shall be deemed adopted and shall become effective upon its approval at the Annual Meeting of the Membership by the affirmative vote of at least a two-thirds (2/3) of the membership.

3. Effect of Adoption of Plan. From and after the Effective Date, KPOG shall cease all of its business activities except as are necessary for the sale of any of its assets as provided for by this Plan and the winding up of KPOG's business and affairs.

4. Payment of Liabilities. Prior to any final distribution of its assets, KPOG shall pay and discharge or make adequate provision for the payment and discharge of all of its debts, expenses, taxes and other liabilities.

5. Distributions of remaining assets. Subject to the foregoing, all of KPOG's residual assets shall be distributed to Kiawah Island Natural Habitat Conservancy, Inc., which qualifies as an exempt organization pursuant to § 501(c)(3) of the Internal Revenue Code of 1954, as amended.

6. Intent to Completely Liquidate. This Plan is intended to accomplish the complete liquidation and dissolution of KPOG in accordance with § 331 of the Internal Revenue Code of 1986, as amended, and the regulations thereunder.

7. IRS Filings. Within thirty (30) days after the date of the meeting at which the members approve this Plan, KPOG shall file Form 966 with the appropriate Internal Revenue Service Center, together with a certified copy of the resolutions adopting this Plan. In addition, KPOG shall timely file its final tax return(s).

8. Amendment or Termination of the Plan. Notwithstanding approval of or consent to this Plan and the transactions contemplated hereby by the members, the Board of Directors may

modify, amend, or abandon this Plan and the transactions contemplated hereby without further action by the members.

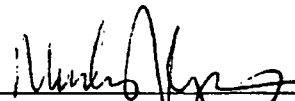
9. Authority of Officers and Directors. The Board is hereby authorized, without further action by the members, to do and perform, or cause KPOG's Officers to do and perform, any and all acts, and to make, execute, deliver or adopt any and all agreements, resolutions, conveyances, certificates and other documents of every kind which are deemed necessary, appropriate or desirable, in the absolute discretion of the Board, to implement this Plan and the transactions contemplated hereby, including, without limiting the foregoing, all filings or acts required by any state or federal law or regulation to wind up KPOG's business affairs.

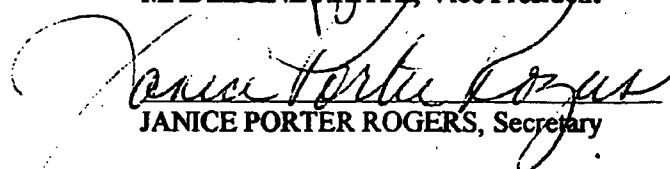
10. Continuation of Corporate Status After Dissolution Date for Certain Purposes. On and after the Effective Date, KPOG shall be continued as a body corporate solely for the purposes of prosecuting and defending suits, actions, proceedings, and claims of any kind or character by or against it, and of enabling it gradually to settle and close its business, to collect and discharge obligations, to dispose of and convey its property, and to distribute its assets.

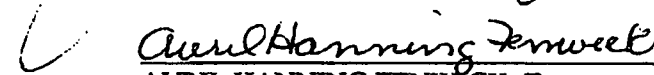
[INTENTIONALLY LEFT BLANK]
[SIGNATURES ON NEXT PAGE]

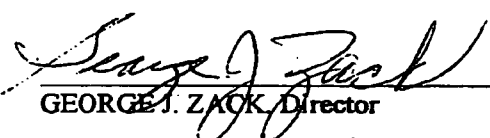
ADOPTED: December 16, 2013

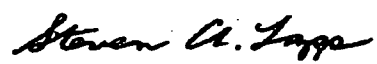

MARILYN GREEN LARACH, President

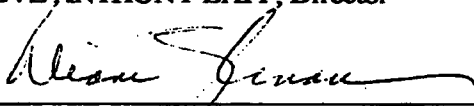

MADELEINE J. KAYE, Vice President


JANICE PORTER ROGERS, Secretary


AVRIL HANNING FENWICK, Treasurer


GEORGE J. ZACK, Director


STEVE ANTHONY LAPP, Director


DIANE Z. LEHDER, Past-President
(ex-officio)

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
KIAWAH RESORT ASSOCIATES, L.P., and
KDP II LLC,

Plaintiffs,

vs.

KIAWAH ISLAND COMMUNITY
ASSOCIATION, INC.,

Defendant,

and

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

Third-Party Intervenor.

BEFORE THE MASTER-IN-EQUITY

MIKELL R. SCARBOROUGH

Case No. 2013-CP-10-1225

**PLAINTIFFS' REPLY TO
INTERVENORS' OPPOSITION TO
MOTION FOR
RELIEF FROM ORDER GRANTING
INTERVENTION**

FILED
2014 MAY 27 PM 2:49
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

COME NOW Plaintiffs Kiawah Resort Associates, L.P. ("KRA") and KDP II LLC ("KDP II"), by and through counsel, and file this Reply to Intervenor's Opposition to Motion for Relief from Order Granting Intervention to Inlet Cove Homeowners Association, Inc. ("Inlet Cove") and Kiawah Island Property Owners Group ("KPOG").

Plaintiffs filed their Motion for two reasons. First, KPOG announced a pre-planned dissolution just three business days after the hearing on the merits.¹ KPOG is now dissolved. Under South Carolina law, a dissolved non-profit corporation "may not carry on any activities except those appropriate to wind up and liquidate its affairs[.]" S.C. Code § 33-31-1406. The efforts of KPOG (and the South Carolina Environmental Law Project) to litigate against reformation of the 1995 Quitclaim Deed is not an activity that can be pursued lawfully in KPOG's name after KPOG's

¹ KPOG did not notify the Court or the parties to this action that it has dissolved.

dissolution. As presented at the hearing, there is clear, convincing and binding evidence that the relevant municipality, community association and developer all concede that the deeding of the 4.62 acres over to KICA was a mistake.² KPOG opposes reformation of the 1995 Quitclaim Deed and has intervened in this action on the basis of environmental activism, which is not an activity “appropriate to wind up and liquidate [KPOG’s] affairs” following KPOG’s formal dissolution. For this reason, KPOG’s continuing intervention is improper due to changed circumstances.

Whether Plaintiffs’ Motion is best styled as a motion under Rule 60(b), a rule to show cause, a motion to reopen the record, or a motion calling upon the inherent powers of the Court, the fact remains that KPOG has dissolved, and its standing to participate in this lawsuit has dissolved as well. Pursuant to the South Carolina Code, KPOG may not legally dissolve itself yet continue its intervention in this case. Due to the importance of this issue, Plaintiffs have presented this issue to the Court prior to its final ruling, as opposed to waiting until the Court ruled.

In its Opposition, KPOG’s counsel argues incorrectly that standing is only measured at the outset of an action. The United States Supreme Court has made it clear that the burden of establishing standing rests on the moving party, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. at 342, n.3 (2006), and that the moving party must carry its burden of establishing standing at every stage of the litigation – from the initial pleading, through summary judgment, trial and appeal. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992); *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 47 (D.C. Cir. 1999) (courts of appeal are obliged to examine standing under all circumstances); *see also Diamond v. Charles*, 476 U.S. 54, 62 (1986) (dismissing appeal due to lack of standing on the part of intervenor-defendant); *Davis v. Fed. Election Comm.*, 554 U.S. 724, 734 (2008) (standing must exist on the date the complaint is filed and

² See, e.g., Tr. at 53:11-17; Tr. at 132:17-21; Tr. at 128:3-4; Tr. at 131:19-21; Tr. at 163:8-13; Tr. at 184:15-23; Tr. at 229:15-18; Tr. at 236:9-14; Tr. at 388:23-389:9; Tr. at 392:21-25; Tr. at 411:8-11; Tr. at 446:6-14; and Tr. at 459:5-21.

throughout the action). Standing is an “indispensable part” of the case and must be supported in the same way as any other matter on which the party bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the “successive stages of the litigation.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The arguments provided by KPOG in support of standing evaporated when KPOG swiftly dissolved itself after the close of evidence. Although KPOG attests that its legal dissolution has no significance, its argument fails because associational standing cannot exist in the absence of an association.

The second basis for Plaintiffs' Motion is that the record, taken as a whole, fails to identify any basis for standing on the part of the remaining Intervenor, Inlet Cove, in light of the South Carolina Supreme Court's decision in *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 753 S.E.2d 846 (S.C., Jan. 22, 2014), a recent case that addresses the issue of standing in the context of environmental activism and associational standing. An organization can only have associational standing “if one or more of its members will suffer an individual injury by virtue of the contested act,” which requires a showing of injury that is particularized and concrete. *Carnival Corp.*, 738 S.E.2d at 850. However, the only member of Inlet Cove to testify, Peter Mugglestone, admitted that the effect on him of reforming the 1995 Quitclaim Deed is “undetermined.” This admission precludes the existence of a “concrete, particularized harm and actual or imminent invasion of a legally protected interest,” which is necessary for Inlet Cove to have standing. *Id.* Mr. Mugglestone's candor spotlights the fact that Inlet Cove lacks standing under South Carolina law.

Furthermore, the repeated theme of Intervenor's at trial is that reformation of the 1995 Quitclaim Deed subjects them to hypothetical prosecution by the developer for “trespassing” on the Additional Land. This is simply implausible. The evidence shows that the only pathway through the Additional Land that is currently in use (the boardwalk to Beachwalker Park) remains available due to lease provisions binding the developer. Also, there are more than 10 miles of beach, dune fields and maritime forest, amounting to thousands of acres, where the Intervenor's can walk, run or play on

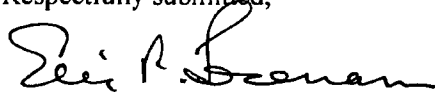
land owned by the Kiawah Island Community Association. For these reasons, Intervenor lack continuing standing in this action, as they have shown no injury that is real, particularized and concrete.

CONCLUSION

As shown in Plaintiffs' Motion and reiterated in this Reply, neither Intervenor qualifies for continuing intervention in this action. For this reason, Plaintiffs respectfully request that the Court reconsider its Order Granting Intervention.

Respectfully submitted,

By: _____



Ellis R. Lesemann
Lesemann & Barks LLC
80 Alexander Street, Second Floor
Charleston, SC 29403
Phone: (843) 724-5155
erl@lb-lawfirm.com

Attorneys for Plaintiffs

May 27, 2014
Charleston, South Carolina

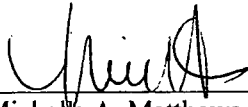
CERTIFICATE OF SERVICE

I hereby certify that I have this date, mailed, postage prepaid, a true and correct copy of
**PLAINTIFFS' REPLY TO INTERVENORS' OPPOSITION TO MOTION FOR RELIEF
FROM ORDER GRANTING INTERVENTION** to the following counsel of record:

Allison C. Jett, Esquire
Weissman Nowack Curry & Wilco
One Alliance Center, 4th Floor
3500 Lenox Road
Atlanta, GA30326

Attorneys for Defendant

Amy E. Armstrong, Esquire
S.C. Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585
Attorneys for Third-Party Intervenor

By: 

Michelle A. Matthews

BY _____

JULIE J. ARMSTRONG
CLERK OF COURT

2014 MAY 27 PM 2:49

FILED

May 27, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

BEFORE THE MASTER-IN-EQUITY

MIKELL R. SCARBOROUGH

KIAWAH RESORT ASSOCIATES, L.P., a)
Delaware Limited Partnership, and KDP II)
LLC, a South Carolina Limited Liability)
Company,)

Case No. 2013-CP-10-1225

Plaintiffs,)

**PLAINTIFFS' MOTION TO ALTER
OR AMEND FINAL ORDER**

vs.)

(Hearing Requested)

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

Defendant,)

and)

INLET COVE HOMEOWNERS)
ASSOCIATION, INC., a South Carolina)
Not-for-Profit Corporation, and KIAWAH)
ISLAND PROPERTY OWNERS GROUP, a)
dissolved South Carolina Not-for-Profit)
Corporation,¹)

Third-Party Intervenors.)

FILED
CLERK OF COURT
2014 JUN 16 PM 4:30
BY

COME NOW Plaintiffs Kiawah Resort Associates, L.P. ("KRA") and KDP II LLC ("KDP II"), by and through counsel, and file this Motion to Alter or Amend Final Order, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. Without question, the parties and the Court have given this matter significant thought and attention, culminating in the Court's issuance of a Final Order on June 4, 2014. However, further attention is needed, as the Final Order should be altered and amended to correct findings and conclusions that are

¹ Intervenor Kiawah Property Owners Group, Inc. dissolved itself several months prior to the Court's issuance of the Final Order. The caption should be adjusted accordingly.

erroneous. When these issues are considered and corrected, the result is that the 1995 Quitclaim Deed should be reformed. The grounds for this Motion are as follows:

A. The Court Should Withdraw its *Sua Sponte* Opinion that the Additional Land was “Not Developable,” as This Ruling is Inconsistent with the Record, and Should Return the Additional Land to Plaintiffs.

In the Final Order, the Court made a conclusion “as a matter of fact and law, that at the time of the 1994 conveyance, the subject property was not developable.” The genesis of the Court’s opinion was a *sua sponte* factual finding made by the Court during the testimony of William Eiser. When Plaintiffs objected to a question posed to Mr. Eiser, the Court made a *sua sponte* finding relating to the relationship between the Additional Land and the location of the 1991 Setback Line:

“Based on that, I will make the finding that the majority of that lot would be seaward of the line.”

See Hearing Tr. at 504:6-8 (emphasis added). Mr. Eiser was not asked or allowed to provide an opinion as to the developability of the Additional Land, as he would have no legal or factual basis to have done so.

In the Final Order, the Court included its earlier finding that a “majority of the 4.62 acre parcel” was within DHEC/OCRM’s jurisdiction. *See* Final Order at p. 12. However, the Court then used this finding as the sole apparent basis for a much broader *sua sponte* conclusion that the entirety of the Additional Land was “not developable.” *See* Final Order at p. 17. This conclusion is inconsistent with the evidentiary record, the Court’s own findings, and the applicable law. No witnesses provided such testimony. In fact, numerous witnesses testified as to the development value of the Additional Land and the fact that it included developable land, but the Court provided neither weight nor reference to this testimony in reaching its own conclusion that the entirety of the Additional Land was undevelopable.

The mere fact that a portion of the 4.62 acre parcel is within DHEC/OCRM jurisdiction is not a basis for the Court to declare that the tract, in whole or in part, is "not developable." On the contrary, numerous improvements and uses can occur on the Additional Land and would be particularly applicable in the context of oceanfront development on Kiawah Island:

AREA	POSSIBLE DEVELOPMENT USES AS OF 1994 ²
Portion of Additional Land <u>Seaward of 1991 Baseline</u> S.C. Code § 48-39-290(A)	1. Wooden Walkways; 2. Small Wooden Decks; 3. Fishing Piers and Associated Amenity Structures open to the public; 4. Golf Courses; 5. Normal Landscaping 6. Structures Permitted by Special Permit; 7. Reconstructed Pools; and 8. Reconstructed Groins
Portion of Additional Land <u>Between 1991 Baseline and 1991 Setback Line</u> S.C. Code § 48-39-290(B)	1. New Habitable Structures (≤5,000 s/f heated space and not "on" primary oceanfront dune); 2. Erosion Control Devices; 3. Pools (if landward of an Erosion Control Device); 4. Wooden Walkways; 5. Small Wooden Decks; 6. Golf Courses; and 7. Normal Landscaping
Portion of Additional Land <u>Landward of 1991 Setback Line</u> <i>(No OCRM Jurisdiction; Statute Inapplicable)</i>	1. Detached One-Family Dwellings and Attached Dwellings;³ 2. Two-Family Dwellings and Multi-Family Dwellings; 3. Dwelling Groups; 4. Transportation, Communication and Utility Facilities; 5. Automobile Parking; 6. Sports Activities, Playgrounds and Athletic Areas, such as Tennis Courts; 7. Other Cultural Entertainment and Recreational Activities; 8. Hotels; 9. Retail Businesses and Restaurants; 10. Pools; 11. Wooden Walkways; 12. Small Wooden Decks; 13. Golf Courses; and 14. Normal Landscaping

² The allowable uses applicable to the Additional Land are shown in bold type. The information included in this table is set forth, as applicable, in S.C. Code § 48-39-290 for the portion(s) of the Additional Land that is subject to OCRM jurisdiction, and in the 1994 Development Agreement for the portion of the Additional Land landward of the 1991 Setback Line and is not subject to OCRM jurisdiction.

³ This is only a partial list of the allowed uses for this portion. For a complete list of the uses of the Additional Land sitting above the 1991 Setback Line, zoned "R-3, C," refer to the 1994 Development Agreement, Exhibit 13.2 (Def. Exh. 5)

Based on the allowable improvements that can occur on each of the three portions of the Additional Land, it is error for the Court to declare that the Additional Land was “not developable.” On Kiawah Island, areas where a developer could construct wooden walkways, small wooden decks, golf courses, normal landscaping, pools and even habitable structures are “developable,” even if they might not be developed at the same intensities or to the same range of uses of land located further inland. Furthermore, an appreciable portion of the Additional Land is landward of the 1991 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 it includes developable land. Tr. at 129:3-11 and 163:8-13. The Court’s finding that the Additional Land is not developable cannot be sustained within the evidentiary record. An illustration indicating the relationship between the Additional Line, the 1991 Baseline, and the 1991 Setback Line is attached as Exhibit A.

This issue could not be more significant to the outcome of the case, as the Court stated that the developability of the Additional Land was “the relevant inquiry” to determine whether the 1995 Quitclaim Deed should be reformed. *See* Final Order at p. 17. Because the Additional Land includes developable land, was included within Development Parcels 12 and 13 as established in the 1994 Development Agreement, and all witnesses agreed that the Additional Land includes land that is capable of development, the Court should alter the Final Order to withdraw the opinion that the Additional Land was not developable. Next, the Court should refocus its inquiry upon the specific question whether the Additional Land was intended to be conveyed as part of the Beachfront Strip, as the same is described in Section 16(b) and Exhibit

16.2 of the Development Agreement. When this is done, the evidence is clear and convincing that the inclusion of the Additional Land as part of the Beachfront Strip was a mutual mistake arising from a scrivener's error, such that the 1995 Quitclaim Deed should be reformed. The mistake was mutual under South Carolina law, and therefore justifies reformation, as the ultimate conveyance was contrary to what any party had intended.

B. The Final Order Erroneously Conflates the Conveyances of Captain Sam's Spit and the Beachfront Strip, and Should be Altered to Confirm that all of the Additional Land Shall be Returned to Plaintiffs.

As noted above, the Court should focus solely upon whether the Additional Land was intended to be part of the Beachfront Strip, not whether the Additional Land might have been part of the separate intended conveyance of Captain Sam's Spit. By virtue of a later agreement, as ratified by KRA, the Town and KICA in 2005, the conveyance of Captain Sam's Spit never occurred. If the Court believes that the Additional Land was intended to be later conveyed as part of the Captain Sam's Spit, then it must amend the Final Order as all parties agreed that the later conveyance of Captain Sam's Spit would not occur. Otherwise, the Court improperly denies Plaintiffs the benefit of the 2005 Development Agreement, which involved a valuable exchange of consideration by KRA and the Town that was ratified by KICA. The Court must focus its analysis on Section 16(b) and Exhibit 16.2 of the Development Agreement and whether the Additional Land was intended as part of the Beachfront Strip. If the Court finds that the land was intended to be part of the completely separate conveyance addressed in Section 16(g), which the Final Order suggests is the case, then the denial of reformation of the 1995 Quitclaim Deed is error.

The Court was encouraged by the Intervenor to conflate the Additional Land together with Captain Sam's Spit, rather than deciding the specific question presented, which is whether the parties intended the Additional Land to be conveyed to KICA **before December 31, 1995** as

part of the Beachfront Strip. As set forth in the proposed Order submitted by Plaintiffs, which is attached and incorporated into this Motion to Alter or Amend as Exhibit B, the evidence is clear and convincing that none of the parties intended that the Additional Land would be included as part of the Beachfront Strip. All admitted evidence of intent shows that the Additional Land was not intended to be part of the Beachfront Strip, but was included only as a result of a scrivener's error. For this reason, the Final Order should be amended to grant reformation.

C. The Court Should Withdraw its *Sua Sponte* Finding that Exhibit 16.2, which is an Integrated part of the 1994 Development Agreement, Should Be Disregarded.

The Court did not give proper weight to Exhibit 16.2 of the Development Agreement. KRA confirmed Exhibit 16.2. More importantly, the Town confirmed Exhibit 16.2, as Mr. Rhoad testified under oath that Exhibit 16.2 reflected the Town's intent and the initials of the Town's Mayor within an inch of Mr. Permar's handwritten notations confirm this fact. When the parties to the agreement concur that Exhibit 16.2 reflects their intent, it is error for the Court to make a *sua sponte* finding that the exhibit should be disregarded or marginalized. As the Court noted in the Final Order, the court is not free "to alter contracts or to make new contracts for the parties." However, by refusing to treat Exhibit 16.2 as a binding part of the 1994 Development Agreement, the Court has made a new contract and has committed error.

If all parties to the Development Agreement consider Exhibit 16.2 as the governing reflection of their intent, it is error for the Court to refuse to accept it as such. The Court's finding that KICA was a third-party beneficiary of the 1994 Development Agreement requires that KICA's rights and intentions be drawn from Exhibit 16.2, as Plaintiffs and the Town mutually confirm the significance and clarity of that exhibit. The Court should not elevate the very Property Description that all witnesses and parties conceded to be a mistake when there is a document manifesting the original intent. Furthermore, the Court'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 1995 Quitclaim Deed only heightens the importance of Section 16(b) and Exhibit 16.2.

The Court disregarded Exhibit 16.2, noting that it “is neither a survey nor an official plat of record.” Final Order at p. 3. The Court also stated that “the accuracy of the boundaries [. . .] lack reliability and are of limited value in determining the intent of the parties with regard to the conveyance of the Beachfront Strip⁴.” Final Order at p. 14. 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. The Court’s finding that Exhibit 16.2 is unreliable undercuts the 1994 Development Agreement, disregards the testimony provided by witnesses, and marginalizes the single most relevant and probative piece of evidence in the case. As set forth below, these findings are also precluded 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.” See Fifth Amendment at p. 2 and 4. The Court should amend these findings, as the Court cannot conclude that Exhibit 16.2 is unclear when both parties confirm that it is clear. Otherwise, the Court is making an agreement other than the one that the parties entered.

⁴ Note, the Court later finds, “[w]hile the property description contained in the 1995 Beachfront Deed is not as precise as one would get if the property had been surveyed, it nonetheless clearly defines the area to be conveyed in a way that is ascertainable to a degree of reasonable certainty. . .” See Final Order at p. 19.

D. The Court's *Sua Sponte* Finding that the Intended Western Boundary of the Beachfront Strip as Shown in Exhibit 16.2 Could not be Reliably Determined is Contrary to the Record and Contrary to Admissions by KRA, the Town and KICA that Exhibit 16.2 Is Clear.

Additionally, the Court also 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. Intervenor's Exhibit 5 is a recorded survey that includes the relevant boundary line with precision, and all parties agreed that Exhibit 16.2 to the Development Agreement was "clear" in and of itself. As established in the record, the eastern boundary of Parcel 13 is the same as the eastern boundary of the parcel shown in Intervenor's Exhibit 5. Tr. at 108-111. 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.

E. The Court Misapprehended the Fifth Amendment to the 2005 Development Agreement, Which Specifically States that Exhibit 16.2 "Established the Western Terminus of the Beachfront Strip as the Eastern Boundary of Parcel 13" and that the Fifth Amendment "Is Intended to be a Reaffirmation of What Is Clearly Shown on Exhibit 16.2."

Although the Court rejected significant evidence relating to KICA's intent that arose after 1994, which is not consistent with binding South Carolina precedent regarding reformation for mutual mistake, the Court did place significant weight on a document signed in 2012, the Fifth Amendment to the 2005 Development Agreement, to serve as evidence of the Town's intent that might contradict the clear evidence of intent provided by Exhibit 16.2 and the testimony of

Dennis Rhoad. In doing so, the Court not only took an inconsistent approach to evidence of intent, but made findings relating to the Fifth Amendment that are contradicted by the actual the language of the document itself. This was error, as the Fifth Amendment to the 2005 Development Agreement does nothing to vary the mutual intent that Exhibit 16.2 reflected the intended scope and boundaries of the Beachfront Strip. In fact, the Fifth Amendment specifically confirms this fact, notwithstanding the varying drafts or parliamentary wrangling that may have occurred in 2012.

In the Fifth Amendment, as executed, the Town and KRA specifically confirm that Exhibit 16.2 “established” the boundaries of the Beachfront Strip and that the Fifth Amendment was intended to be a “reaffirmation of what is clearly shown on Exhibit 16.2:”

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;

* * *

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;

See Fifth Amendment to the Development Agreement, at p. 3-4. It is error for the Court to interpret this document as stating something other than what it states in its plain terms. The Fifth Amendment does not hinder Plaintiffs’ claim for reformation. It bolsters the claim. In the Fifth Amendment, the Town specifically affirms that Exhibit 16.2 “established” the western boundary of the Beachfront Strip as the eastern boundary of Parcel 13, and specifically “reaffirmed” in 2012 what was clearly shown on Exhibit 16.2 since 1994, which is that the Additional Land was not intended to be part of the Beachfront Strip.

The Fifth Amendment also underscores the Court's related erroneous findings that Exhibit 16.2 is unreliable. In the Fifth Amendment, both the Town and KRA agree that Exhibit 16.2 is clear. If the parties to the 1994 Development Agreement both affirm that Exhibit 16.2 is clear and establishes the western boundary of the Beachfront Strip, the Court is not at liberty to find otherwise. However, that is exactly what the Court has done. The other fact established by this later affirmation of Exhibit 16.2 is that the Court's findings that Exhibit 16.2 was altered by Mark Permar are untenable. If the Town had any argument or belief that Exhibit 16.2 was altered without its permission and did not reflect the Town's intent, it is not possible to reconcile such findings with the Town's specific affirmation of Exhibit 16.2 and the intended western boundary, which was the specific adjustment that Mark Permar made. The Court's findings relating to the Fifth Amendment are erroneous, and the terms of the Fifth Amendment preclude the Court's findings or inferences that Exhibit 16.2 was altered, was unclear, or was unreliable.

F. The Court's Recognition of KICA as a Third-Party Beneficiary of the 1994 Development Agreement Should Result in the 1994 Development Agreement Serving as the "Antecedent Agreement" for Purposes of Confirming Mutual Mistake.

By recognizing that KICA was a third-party beneficiary of the 1994 Development Agreement, the Court makes an implicit finding that the 1994 Development Agreement, and specifically Section 16(b) and Exhibit 16.2, should be determinative of intent. Under South Carolina law, "a third party beneficiary is a party that the contracting parties intend to directly benefit." *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 341, 611 S.E.2d 485, 488 (2005). On this basis, the manner in which the parties intended to benefit KICA cannot be bifurcated from the manner in which KICA intended to be benefitted. Section 16(b) is perfectly clear that "it is understood and agreed that there is a strip of scenic dunes and high land [. . .] as generally depicted in Exhibit 16.2." Exhibit 16.2 clearly shows a "strip," which is variously defined as "a

long, narrow piece of something,” including a “long, narrow piece of land” or a “long, narrow area of land.”⁵ There is no reading of Exhibit 16.2 that would allow for a conclusion that the Additional Land was intended as part of the Beachfront Strip, as the Additional Land is completely disconnected from the Beachfront Strip and is within two parcels that were specifically approved for development. Including the Additional Land contradicts the clear intention that the shape of the conveyance would be a strip. The Court should alter its Final Order to correct this error.

G. The Final Order Should be Amended to Remove Reliance on *Penza v. Pendleton Station, LLC*, 404 S.C. 198, 743 S.E.2d 850 (Ct. App. 2013), as *Penza* has no Applicability to this Case.

The Court's reliance on *Penza v. Pendleton Station, LLC*, 404 S.C. 198, 743 S.E.2d 850 (Ct. App. 2013), as controlling authority in a case involving mutual mistake is misplaced. In *Penza*, the plaintiff sought a foreclosure of a mortgage as written. No party filed a claim for reformation of a written instrument in *Penza*. In this case, however, reformation was the specific remedy sought. Clearly, this case is different, as Plaintiffs pled and pursued a claim for reformation that calls upon the Court to accept parol evidence to determine whether the written instrument correctly captured the intent of the parties. Therefore, *Penza* is inapplicable.

As set forth in Plaintiffs' proposed Order and Final Judgment, 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

See, e.g.,: <http://www.merriam-webster.com/dictionary/strip>;
<http://www.oxforddictionaries.com/us/definition/american-english/strip#strip-2>;
http://www.macmillandictionary.com/dictionary/british/strip_19

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). The Court should amend its analysis to reflect the fact that the claims presented relate to reformation on the basis of mutual mistake, not construction of an unambiguous instrument.

H. The Court Failed to Consider the Uncontroverted Evidence that the Property Description in the Agreement for Conveyance and the 1995 Quitclaim Resulted from the Same Scrivener's Error.

The Court improperly relied and focused on the consistency between the legal description in the Agreement for Conveyance and the 1995 Quitclaim Deed, which would be expected to be consistent because they were drafted by the same person using the same Property Description. The Court placed improper weight on its finding that, "the legal description on 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 Quitclaim Deed is clear and plainly unambiguous. *See* Final Order at p. 15-16. The consistency of the two documents is not evidence of intent under the circumstances. It is the obvious disconnect between the admittedly unambiguous description of the western boundary of the Beachfront Strip in the Quitclaim Deed and the unambiguous depiction of the western boundary of the Beachfront Strip in Exhibit 16.2 of the 1994 Development Agreement that compels reformation, along with the other clear and convincing evidence. The lack of ambiguity in the description renders the mutual mistake all the more clear.

Furthermore, KICA's third-party beneficiary status under the Development Agreement causes the Development Agreement to serve as an antecedent agreement. The Agreement for Conveyance, which specifically incorporates the 1994 Development Agreement, was signed by

KRA and KICA and provides that the 1994 Development Agreement is a prior or "antecedent" agreement that the Agreement for Conveyance is intended to evidence. *See* Plaintiffs' Proposed Order at p. 6-7. The property description of the Beachfront Strip in the Agreement for Conveyance was inconsistent with the agreed-upon boundaries set forth in the 1994 Development Agreement and Exhibit 16.2.

The Court improperly disregarded the testimony of Beth Nimmons that the description was in error, and fails 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. Tr. at 336:14-337:2. 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. Tr. at 340:25-341:5. *See* Plaintiffs' Proposed Order at p. 9. Notably, Ms. Nimmons did not say that the 1991 Baseline or Setback Line had any relationship to her preparation of the Property Description, although that it is precisely what the Court used to make its decision that KICA intended to receive the Additional Land.

I. The Court Improperly Disregarded Evidence Relating to KICA's Intent Provided by Its Board Members and Failed to Recognize that the Intent of KICA could not differ from the Intent of KRA in 1994 with Regard to the Intended Western Terminus of the Beachfront Strip.

The Court improperly disregarded the testimony of the Board Members of KICA. 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. Tr. at 190:7-9; 190:19-21. 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. Tr. at 236:9-14. 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. Tr. at 392:21-393:6. As KICA Board Members and Officers, these witnesses were competent to provide testimony regarding KICA's intent. The Final Order should be amended, as 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. However, the Court 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. The Final Order acknowledges that KRA controlled KICA's Board, and therefore controlled KICA, but fails to recognize that this precludes KICA from having any intent relative to the Beachfront Strip that is different from KRA's intent on that same issue.

J. The Court Erred by Disregarding Evidence of Intent Arising After the Conveyance.

Plaintiffs presented substantial evidence arising after the conveyance reflecting that KICA did not believe that the Additional Land was intended to be conveyed or that the Additional Land was indeed KICA's Common Property. The Court summarily disregarded all of this evidence. In doing so, the Court disregarded binding precedent of the South Carolina Supreme Court. *See Sims v. Tyler*, 276 S.C. 640, 642, 281 S.E.2d 229 (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" that justified reformation of deed on the basis of mutual mistake).

It is not disputed that KICA has never maintained the Additional Land as Common Property, as it would be required to do under the 1995 Quitclaim Deed as a condition to the conveyance. The Court failed to address this fact. However, KICA confirmed that it could not provide any evidence that it had maintained or utilized the Additional Land as its Common

Property. When asked, no witnesses could identify any acts of maintenance or indicia of control KICA had undertaken. Tr. at 452:15-453:13; 395:1-18. Nor is there any record of KICA ever incurring expenses relating to the Additional Land. Tr. at 453:14-17.

Furthermore, KICA's Map of its Common Property does not reflect the Additional Land as being Common Property owned by KICA, but rather reflects the Additional Land as being owned by KRA. Pl. Exh. 32; Tr. 451-452. The Court disregarded this evidence. KICA's Dunes Management Guidelines also omit the Additional Land. The Court disregarded this evidence as well. The basis for placing no weight on the evidence was that the Court was uncertain whether the maps were prepared before or after the conveyance of the Additional Land. Under binding precedent, this was error.

In the Final Order, the Court did not address other significant indicia of intent, including the fact that KRA (not KICA) has paid the property taxes on the Additional Land since 1994. Tr. at 322. This was one of the specific indicia of intent that the Supreme Court cited in *Sims v. Tyler*. However, the Final Order does not even mention this fact. KICA has never contacted KRA to discuss reimbursement of the property taxes paid (Tr. at 322:16-19), which would be a reasonable expectation if KICA had any intent or belief that it owned the Additional Land. 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 owned by KICA. Even after the incorrect Quitclaim 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 and has never been formally subdivided into a separate tax map parcel.

The evidence of KICA's intent is not circumstantial, but rather is a binding admission by party opponent. However, the Court disregarded KICA's admission that the conveyance of the evidence of intent arising after 1994, which confirms that KICA acknowledged that the conveyance was an unintended mistake. The record includes evidence that KICA, through its subsequent Board Chair Craig Weaver, later 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." Tr. at 411:8-11. The Court disregarded evidence of intent after 1994, even though there is evidence that KICA admitted that the inclusion of the Additional Land was not the intent of the parties to the 1994 Development Agreement and was a "mistake." Under applicable law, this evidence is entitled to substantial weight, but none was given.

All of these facts are inconsistent and irreconcilable with the Court's finding that KICA intended to receive the Additional Land. The Court should alter or amend the Final Order to address this evidence, as the Court can and should consider this sort of evidence of intent arising after the transaction.

K. There is No Basis in the Record or the Law for Determining "Intent" relating to the Additional Land by Reference to 1991 OCRM Jurisdictional Lines.

No party, witness or exhibit at trial suggested that the Town's intent, KRA's intent, or KICA's intent should be determined by the location of the 1991 Baseline or Setback Line on the Additional Land. The Town and Plaintiffs confirmed that Exhibit 16.2 reflected their intent, and KICA was the third-party beneficiary of Exhibit 16.2. Neither Exhibit 16.2 nor Section 16(b) of the Development Agreement contain any reference to the Baseline or Setback Line. Furthermore, the evidence presented by Ms. Nimmons relating to the manner in which the erroneous property description was drafted does not allow for a connection to be drawn between

the Property Description and the location of the Baseline or Setback Line. These items are simply unrelated.

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, without regard to the specific location of DHEC/OCRM jurisdictional lines. Tr. at 51:14-22; 127:25; and 185:10-21. The parties' intent was for the Beachfront Strip to end at the eastern boundary of Parcel 13, as depicted by Exhibit 16.2. Tr. at 53:11-17; 132:17-21; 184:15-23; 236:9-14; 388:23-389:9. All parties, KRA, the Town and KICA, either directly confirmed this or made binding admissions to this effect. No witnesses or relevant documents contest this fact. Furthermore, no witness or documents suggest that the 1991 Baseline and/or 1991 Setback Line played any role in shaping the underlying intent regarding the intended boundaries of the Beachfront Strip. The Court should amend its ruling to remove its *sua sponte* finding that the underlying intent is determinable in whole or in part by reference to the 1991 Baseline or Setback Line, and should return its inquiry to Section 16(b) and Exhibit 16.2 of the 1994 Development Agreement, direct evidence of intent, additional evidence regarding indicia of intent, KICA's admissions that the inclusion of the Additional Land as part of the Beachfront strip was a mistake, and the uncontroverted testimony of Ms. Nimmons that the Property Description was in error. When the emphasis is returned to this evidence, reformation is supported by clear and convincing evidence of mutual mistake.

L. The Final Order Treats Certain Evidence Relating to KICA's Intent as Having Been Admitted when the Court Refused to Allow the Evidence to be Admitted.

In the Final Order, the Court reviews the "Talking Points for KDP," which constituted an admission by party opponent under S.C. R. Evid. 801(d)(2) on the part of KICA that the conveyance of the Additional Land was a mistake and that KICA did not intend to benefit from

the mistake. However, the Court specifically refused to admit the document into evidence. Tr. at 458. As a result, the document was marked as Exhibit 17 for identification purposes only. In light of the fact that the Court refused admission of the document, it is unclear why the Final Order includes an analysis of the document as if it were admitted into evidence. Plaintiffs believe the document should have been admitted, and that the Court committed error in excluding it, as the same was clearly an admission by party opponent. It is rare in a case of mutual mistake that the defendant would concede the issue of mistake. However, that is exactly what the "Talking Points to KDP" do. However, until the document is admitted into evidence, Plaintiffs are uncertain whether it should be addressed as admitted evidence. The Court should either re-open the record to admit the document as an admission by party opponent or should amend the Order to remove the discussion of the Talking Points, as the Court refused their admission into evidence.

M. The Final Order Should be Amended to Address Conflicting Factual Findings that the Agreement for Conveyance Either Was or Was Not a Board Action By KICA.

The Final Order contains inconsistent findings regarding whether Mr. Clarkson's execution of the Agreement for Conveyance can be considered a "board action" on the part of KICA. On page 5 of the Final Order, the Court states that Mr. Clarkson "had no evidence that the KICA Board has 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," suggesting that his execution of the document could not be considered official board action on the part of KICA. However, on page 11 of the Final Order, the Court describes the Agreement for Conveyance as "the only official action of the KICA Board taken on this issue[.]"

As a result, the Final Order contains inconsistent findings relating to the Agreement for Conveyance and whether it is, or is not, an official board action on the part of KICA. The Final Order should be altered to clarify whether the Court believes that the Agreement for Conveyance constitutes an official action of the KICA Board or was signed by Mr. Clarkson without discussion or vote. Otherwise, the Court has made contradictory findings as to the same fact. This is important, as the Court states that the “best evidence” of KICA’s intent is the Agreement for Conveyance. Plaintiffs disagree with this finding, as KICA had no role in the preparation of the Property Description, which the evidence unanimously establishes was the result of mutual mistake. KICA only intended, and could only have intended, to receive what KRA intended to the convey.

N. The Court’s Use of the Term “Captain Sam’s Spit” to Refer to the Additional Land is Erroneous and Should be Amended.

In several places in the Final Order, the Court utilizes the term “Captain Sam’s Spit” when it intends to make reference to the Additional Land. The Final Order should be amended to correct these references. As the Court notes, the Additional Land is limited to 4.62 acres and is the only property that is involved in this case. However, within the Conclusion, and in other locations within the Final Order, the Court improperly substitutes the term “Captain Sam’s Spit” when referring to the Additional Land. These references should be amended to make them correct, consistent, and clear. Referring to the Additional Land as “Captain Sam Spit” is factually incorrect, as established by the record.

O. For the Reasons Set Forth in Plaintiffs’ Motion for Relief from the Order Granting Intervention, the Court Should Dismiss the Intervenors for Lack of Standing and Grant Reformation to Plaintiffs.

Neither Intervenor should be allowed continuing intervention in this case due to a clear lack of standing. KPOG has been dissolved and is limited by law to winding up and liquidating

its affairs. As a result, KPOG cannot have continuing associational standing. In addition, neither Intervenor presented any evidence as to a concrete, particularized, actual and imminent injury to its members. The only admitted testimony was that any impact of the Court's granting deed reformation was "undetermined." The member witnesses presented by KPOG were not allowed to provide testimony due to the inherently speculative and unreliable nature of the intended testimony. The Final Order should be altered or amended to dismiss the Intervenor, whether under Rule 59(e) or Rule 60 of the South Carolina Rules of Civil Procedure.

P. As an Alternative Ground, the Court Should Amend its Final Order to Return the Additional Land that is Developable to Plaintiffs.

Plaintiffs firmly believe that the entirety of the Additional Land should be returned under a reformed deed. However, as an alternative ground for relief, to the extent that the Court continues in its finding that developability of the Additional Land is the relevant inquiry, then the Court should amend the Final Order in order return the developable portion of the Additional Land to Plaintiffs. As set forth above, the portion of the Additional Land that is landward of the 1991 Setback Line is inarguably "developable," as DHEC/OCRM does not even have critical area jurisdiction over that portion, which is zoned "R-3, C." Furthermore, the swath of land area between the 1991 Setback Line and 1991 Baseline is also "developable," in light of the fact that residential or commercial structures of up to 5,000 heated square feet, pools, golf courses, gazebos, walkways, and other development uses are permitted within this portion, and are allowed under the Town's zoning of Development Parcels 12 and 13. Finally, even the area below the 1991 Baseline has development uses that are valuable in connection with an overall development plan.

The Final Order should be amended in light of the fact that there is a significant amount of Additional Land that is developable. Specifically, the Court should amend this finding and

return the developable portion to Plaintiffs, as determined by reference to the evidence in the record and the commission of a surveyor to create a plat to implement the return of the developable land, similar to what the Court has done in prior partition cases. None of the parties intended for developable property to be conveyed as part of the Beachfront Strip. Therefore, based on the evidence in the record, the Court should issue a ruling reforming the 1995 Quitclaim Deed in order to return the developable portion of the Additional Land to Plaintiffs.

CONCLUSION

For the reasons set forth above, the Court should alter or amend the Final Order to reform the 1995 Quitclaim Deed and return the Additional Land to Plaintiffs, as the decision to deny reformation is based on findings and conclusions that are not supported in the record and are inconsistent with the clear and convincing evidence of mutual mistake.

Respectfully submitted,

By: 

Ellis R. Lesemann
Lesemann & Barks LLC
80 Alexander Street, Second Floor
Charleston, SC 29403
Phone: (843) 724-5155
erl@lb-lawfirm.com

Attorneys for Plaintiffs

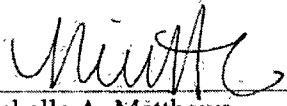
June 16, 2014
Charleston, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that I have this date, mailed, postage prepaid, a true and correct copy of
PLAINTIFFS' MOTION TO ALTER OR AMEND to the following counsel of record:

Allison C. Jett, Esquire
Weissman Nowack Curry & Wilco
One Alliance Center, 4th Floor
3500 Lenox Road
Atlanta, GA30326
Attorneys for Defendant

Amy E. Armstrong, Esquire
S.C. Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585
Attorneys for Third-Party Intervenors

By: 
Michelle A. Matthews

2014 JUN 16 PM 4:30
JUL 16 2014
CLERK OF COURT
BY _____

June 16, 2014

Charleston, South Carolina

EXHIBIT A

GRAPHIC OF ADDITIONAL LAND

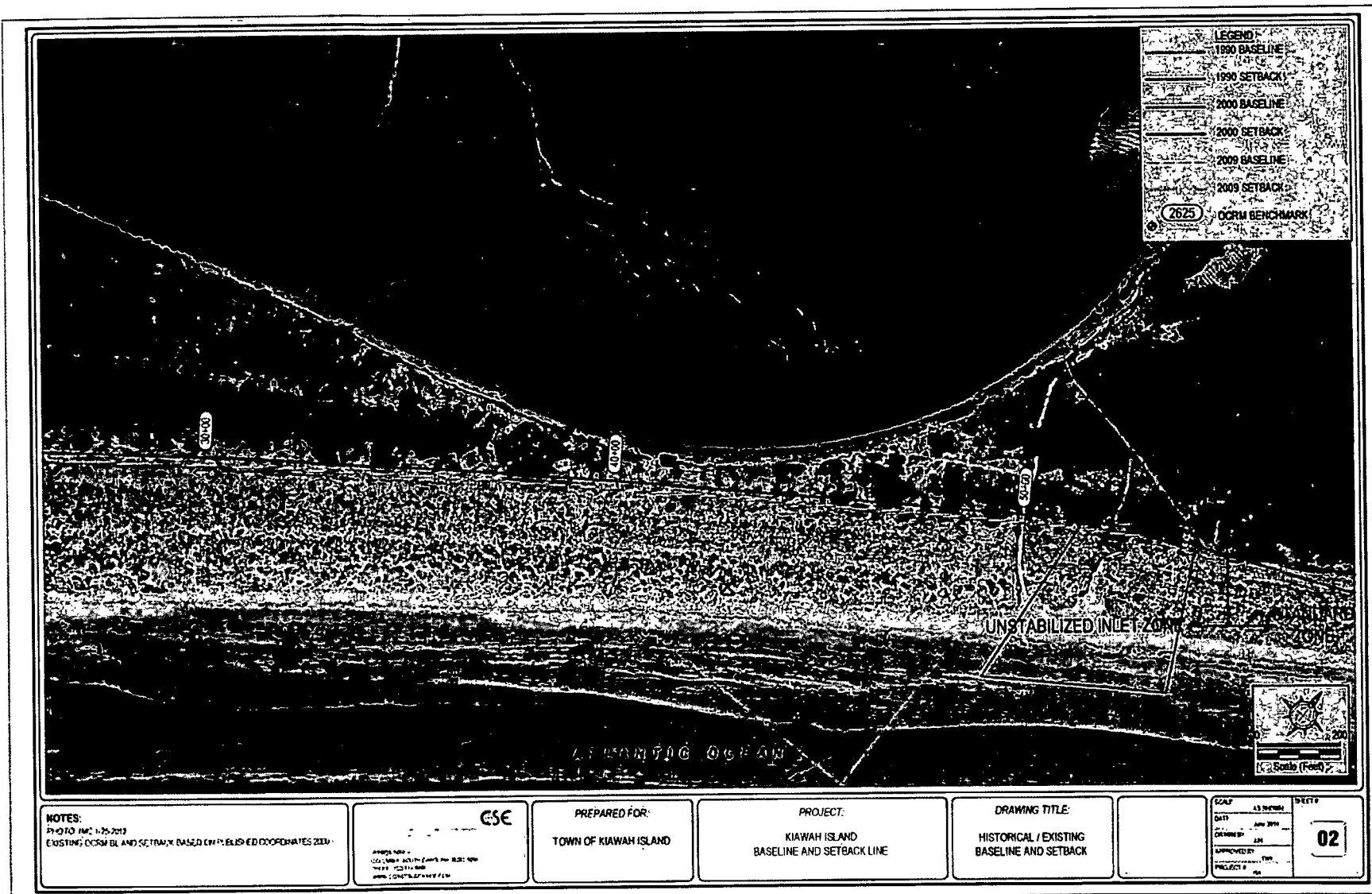


EXHIBIT B

PLAINTIFFS' PROPOSED ORDER AND FINAL JUDGMENT

STATE OF SOUTH CAROLINA	)	BEFORE THE MASTER-IN-EQUITY
COUNTY OF CHARLESTON	)	MIKELL R. SCARBOROUGH
KIAWAH RESORT ASSOCIATES, L.P., a	)	
Delaware Limited Partnership, and KDP II	)	Case No. 2013-CP-10-1225
LLC, a South Carolina Limited Liability	)	
Company,	)	
	)	ORDER AND
Plaintiffs,	)	FINAL JUDGMENT
	)	
vs.	)	
	)	
KIAWAH ISLAND COMMUNITY	)	
ASSOCIATION, INC., a South Carolina Not-	)	
for-Profit Corporation,	)	
	)	
Defendant,	)	
	)	
vs.	)	
	)	
INLET COVE HOMEOWNERS	)	
ASSOCIATION, INC., a South Carolina Not-	)	
For Profit Corporation, and KIAWAH	)	
ISLAND PROPERTY OWNERS GROUP, an	)	
unincorporated association.	)	
	)	
Intervenors.	)	
	)	

In this action, Plaintiffs Kiawah Resort Associates, L.P. ("KRA") and KDP II LLC ("KDP II")¹ assert equitable claims for declaratory judgment, reformation of deed, and specific performance against Defendant Kiawah Island Community Association, Inc. ("KICA").² In its Answer, KICA asserted a counterclaim for declaratory judgment. After the parties conducted

¹ KRA and KDP II, KRA's assignee with regard to the Additional Land as the current owner of the surrounding property, will be referred to collectively as "KRA" for sake of efficiency and ease of reference.

² On May 10, 2013, the Inlet Cove Homeowners Association, Inc. ("Inlet Cove") and Kiawah Island Property Owners Group ("KPOG") filed a Motion to Intervene in this action. The Court granted the Motion on October 31, 2013.

discovery, the Court conducted a final hearing on the merits on December 9 and 11, 2013. After having considered the evidence, the submissions of counsel, and the applicable law, the Court enters judgment in favor of Plaintiffs consistent with the findings of fact and conclusions of law that are set forth below, and shall execute a Corrective Master's Deed implementing the relief sought.

FINDINGS OF FACT

This dispute arises from a transfer of property made pursuant and subsequent to the execution of the September 26, 1994 Development Agreement (the "1994 Development Agreement") between KRA and the Town of Kiawah Island (the "Town"), recorded on September 30, 1994, in Book J248, page 001, in the R.M.C. Office for Charleston County, S.C. ("R.M.C. Office").³ KRA, a principal owner and the developer of land on Kiawah Island, had acquired substantial undeveloped lands, assets, and resort amenities from the Kuwaiti-owned Kiawah Island Company 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. However, in exchange for certain rights and obligations agreed to by the Town and KRA, KRA agreed to the transfer of several specific parcels to KICA, a non-profit corporation that serves as the property owners' association for all owners of property located within the Town of Kiawah Island, South Carolina. It is thus the steward of common properties, such as roads and beachfront areas, conveyed it by the developer, KRA.

³ The 1994 Development Agreement, covering three volumes, was admitted into evidence in this case as Pl. Exh. 5. The 1994 Development Agreement was the second comprehensive development agreement ever adopted in South Carolina. KRA is with related entities denominated as the "Property Owner" in the 1994 Development Agreement.

A. The Beachfront Strip.

Section 16(b) was the portion of the 1994 Development Agreement where KRA agreed to transfer the Beachfront Strip, which was described as a “10-Mile Strip of Beachfront Property.”⁴ See Development Agreement, Pl. Exh. 5, Section 16(b), at 42. The transfer to KICA was to occur on or before January 1, 1996. The 1994 Development Agreement included the following written description of the intended Beachfront Strip:

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). Exhibit 16.2 to the 1994 Development Agreement is a graphical depiction of the Beachfront Strip depicting the noted “general” boundaries and location of the Beachfront Strip (i.e., dunes between seaward lot lines and the mean high water mark). Both parties to the 1994 Development Agreement initialed Exhibit 16.2.⁵

Exhibit 16.2 depicts the Beachfront Strip by using black and white diagonal hatchmarks, which cease at the eastern boundary of Parcel 13, indicating the western terminus or boundary of the Beachfront Strip. Specifically, the western boundary line of the Beachfront Strip starts at the southwestern corner of the parcel containing the Duneside Villas and then runs along the eastern

⁴ Kiawah Island runs east-west and the Atlantic Ocean is on the southern boundary for approximately ten miles of shoreline.

⁵ Mayor Mary D. “Lib” Melvin (“Mayor Melvin”) signed the 1994 Development Agreement on behalf of the Town. Charles S. Way, Jr., signed on behalf of KRA.

boundary of Parcel 13 until it reaches mean high water mark of the Atlantic Ocean.⁶ Parcel 13 is adjacent and to the immediate west of the Beachfront Strip. Through this diagram, the specific location of the western boundary of the Beachfront Strip can be determined.

The description of the Beachfront Strip in Exhibit 16.2 also provides that the Beachfront Strip “generally comprises the area of land abutting most seaward platted residential Lot lines and the mean high water mark of the Atlantic Ocean.” See Development Agreement, Pl Exh. 5, Section 16(b), at p. 42. The westernmost seaward platted residential Lot lines existing in 1994 were those for the Duneside Villas. Consistent with the description and the intent of the parties to the 1994 Development Agreement, Exhibit 16.2 indicated that the Beachfront Strip terminated at the westernmost point of the seaward residential lot lines of the Duneside Villas. Trial Transcript (“Tr.”) at 52:11-53-18. Exhibit 16.2 does *not* show that the Beachfront Strip resumes to the west of Parcel 13, but rather shows that it terminates to the east of Parcel 13.

The graphic depiction on Exhibit 16.2 was therefore consistent with the intent of the parties regarding the location and western boundary of the Beachfront Strip that was presented at the hearing. Tr. at 53:11-53:17; 132:17-21; 184:11-23; 196:7-18; 231:7-20 and 391:24-392:14. Neither KICA nor the Intervenor presented any witnesses who testified that KICA, or the Town, had some contrary intent.⁷ Further, through consistent testimony from several witnesses called by KRA, the depiction of the Beachfront Strip in Exhibit 16.2 was no accident. It was

⁶ This is the 19.5-acre parcel identified as Parcel No. 13 in the 1994 Development Agreement and often referred to as the “Beachwalker Ocean Parcel.” The Employee Facility Tract, which is a portion of Parcel 13 for purposes of the 1994 Development Agreement (Tr. at 111:13-17), is several hundred feet to the west of the point where the Beachfront Strip, as depicted on Exhibit 16.2, ends.

⁷ The sole trial witness called by KICA, Tammy McAdory (“McAdory”), confirmed that she did not contest or challenge the testimony of Mark Permar (“Permar”), Leonard L. Long, Jr. (“Long”), Patrick W. McKinney (“McKinney”), or Townsend P. Clarkson (“Clarkson”) relating to the intent of KICA as it relates to the Beachfront Strip. Tr. at 446:6-14. McAdory is a long-standing employee of KICA and from 1989 to 1996 served as the Assistant to the General Manager. Each witness called by Intervenor conceded that he or she had no independent knowledge or evidence of the relevant intent of the Town, KRA, or KICA. Tr. 515:8-13; 538:8-12; 562:3-8; and 594:11-22.

specifically discussed, corrected and confirmed prior to execution of the Development Agreement. Tr. at 40:4-24 and 49:13-53:21. Importantly, the underlying purpose and intent of KRA's transfer of the Beachfront Strip was not to grant KICA any of its developable oceanfront property, but merely the *undevelopable strip* of dune fields that were seaward of oceanfront properties already sold to third parties. Tr. at 51:14-22; 127:25-4; and 185:10-21. The underlying objective was to avoid a possible recurrence of the situation that had arisen years before on the Isle of Palms when, owing to significant accretion, additional buildable oceanfront home sites were created and developed that were seaward of existing properties that had previously been beachfront properties. Tr. at 128:5-11; 182:5-25 and 232:5-18.

The conveyance by KRA of the intended Beachfront Strip, as depicted on Exhibit 16.2, would have accomplished this objective as the Beachfront Strip would run from the eastern tip of Kiawah Island all the way to the point that was seaward of the westernmost property that had been sold as beachfront property to third parties, i.e., the Duneside Villas. Tr. at 53:7-18; 184:11-185:21 and 231:1-231:15. The parties did not intend what occurred – for the Beachfront Strip property description in the Quitclaim Deed to extend westward through or in front of Parcels 12 and 13, which are to the west of the Duneside Villas (Tr. at 128:15-129:2). Parcels 12 and 13 were still owned by the Developer, had not been sold to third parties, and were “particularly valuable” based on their location and the development rights that the Town had granted in the 1994 Development Agreement for these parcels. Tr. at 128:21-129:2; 186:5-14 and 188:9-11. For this reason, the Beachfront Strip as depicted on Exhibit 16.2 ended at the eastern boundary of Parcel 13. Based on the consistent testimony of the witnesses who were directly involved back in 1994 on behalf of the Town,⁸ KRA or KICA, this is where the

⁸ Dennis J. Rhoad (“Rhoad”) has served as the Town Attorney for Kiawah from 1998 to 2002 and from 2003 through the present, and was serving in this capacity when the 1994 Development Agreement

Beachfront Strip was intended to end. Tr. at 53:11-17; 132:17-21; 184:15-23; 236:9-14; 388:23-389:9. The testimony provided on this was clear, as neither KICA nor the Intervenor called any witness who testified that Exhibit 16.2 did not reflect the intended western boundary of the Beachfront Strip.

B. Preparation of the Agreement for Conveyance and Quitclaim Deed.

In connection with the execution of the 1994 Development Agreement, the various quitclaim deeds that would accomplish the intended transfers by KRA to KICA, and the property descriptions therein, were prepared by Beth Nimmons. Tr. at 332:5-19. 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 Agreement for Conveyance of Properties on Kiawah Island, SC (the "Agreement for Conveyance") and all related deeds, including the Quitclaim Deed for the Beachfront Strip for review by Mr. Buist. Tr. at 333:2-11.

The Agreement for Conveyance, which specifically references and incorporates the 1994 Development Agreement, was signed by KRA and KICA because KICA was not a signatory to the 1994 Development Agreement. KICA, however, sought to have the Beachfront Strip obligation be enforceable by it and not merely the Town. All agreed to that. The Agreement for

was negotiated and executed. Mr. Rhoad testified that the Town and KRA "never intended" the Beachfront Strip to include any developable property, but rather just the "undevelopable" 10-mile strip. Tr. at 128:3-4; 131:19-21. Mr. Rhoad confirmed that the Town did not intend for the Additional Land, as outlined in red on Pl. Exh. 29, to be part of the Beachfront Strip. Tr. at 163:8-13. Although some emphasis was given by Intervenor to the Fifth Amendment to the Development Agreement (Interv. Exh. 8), there is nothing in that document that is contrary to the testimony of the Town's intent regarding the Beachfront Strip that was provided by the witnesses and as manifested by Exhibit 16.2 to the 1994 Development Agreement.

Conveyance provides that the 1994 Development Agreement is a preceding, or "antecedent," agreement that the Agreement for Conveyance is intended to evidence according to its terms:

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.

Agreement for Conveyance, Interv. Exh. 2, at p. 1 (emphasis added). In this regard, it is apparent that the Agreement for Conveyance was intended to confirm, not modify, the transfers outlined in the 1994 Development Agreement.

Although the Agreement for Conveyance was intended simply to confirm the conveyances outlined in the 1994 Development Agreement, the property description of the Beachfront Strip that Nimmons prepared and inserted into the Agreement for Conveyance was erroneous. It was inconsistent with the conveyance that was agreed upon the 1994 Development Agreement and was specifically in conflict with Exhibit 16.2, which indicated the intended western boundary. The property description that Nimmons prepared to describe the Beachfront Strip 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.

Agreement for Conveyance, Interv. Exh. 2, at p. 9 (emphasis added).

The 1994 Development Agreement, through its direct reference to Exhibit 16.2, graphically 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 in the Agreement for Conveyance indicates that the Beachfront Strip would have its westernmost boundary at a line that extended in a southerly direction from a concrete marker at the southwesternmost corner of the "Employee Facility Tract." That point was several hundred feet to the west of where it should have been per Exhibit 16.2. The same inconsistent property description inserted in the Agreement for Conveyance was also inserted, by Nimmons, into the Quitclaim Deed that would convey the Beachfront Strip (the "Quitclaim Deed").

When preparing the property description for the Quitclaim Deed, Nimmons did not have a copy of Exhibit 16.2. The document was kept at Town Hall and, as indicated through the testimony of Mark Permar, was revised in order to correct an erroneous depiction of the Beachfront Strip. In order to prepare the relevant deeds, Nimmons was given a bullet list of the properties that KRA was to convey, along with verbal instructions from Mr. Leonard L. Long, Jr. ("Long") of KRA to get a description of "the beachfront strip which is everything in front of sold

lots and sold product for 10 miles.” Tr. at 274:18-23. This instruction was meant to capture the underlying intent of the Beachfront Strip, which as the Town’s attorney confirmed at the hearing was “to avoid a repeat of the Isle of Palms situation” but was “never intended to include any developable property.” Tr. 127:25-128:4 and 230:20-25. The only description for the Beachfront Strip in the bullet list given to Nimmons read “10 mile beachfront strip of front beach dunes.” Pl. Exh. 3 at 4. No plat 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 (Tr. at 230:10-15), 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.

Based on her own knowledge of Kiawah Island, but not upon specific instructions from KRA and without aid of reference to Exhibit 16.2, Nimmons decided that she would use the Employee Facility Tract in order to set the westernmost boundary of the Beachfront Strip. Tr. at 336:14-337:2. Nimmons testified that she made this decision, based on her best judgment as how to develop 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, but that she made this determination herself. Tr. at 339:10-21. 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 reflect the intent of the parties. Tr. 340:25-341:5. Long confirmed, as did other witnesses, that Nimmons’ property description did not match or implement the intent of KRA, the Town, or KICA. Tr. at 229:15-18; 392:21-25. No one contradicted this crucial evidence.

Nimmons further testified that if she had pulled all of the plats for all east to west parcels, or if she had Exhibit 16.2, or if she had seen the parcel map (Pl. Exh. 27), 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 “monumental task” as there were numerous other transfers in addition to the Beachfront Strip for which property descriptions had to be prepared. Tr. at 381:3-8 and 352:15-18. The parties noted time pressures to get the process completed. 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 Nimmons error in the Agreement for Conveyance and Quitclaim Deed. In this regard, the witnesses were not merely reviewing the single Quitclaim Deed, but rather a three-volume agreement with numerous agreements, exhibits, deed, and related documents.

On December 29, 1995, KRA executed the Quitclaim Deed that included the property description drafted by Nimmons. The Quitclaim Deed conveyed the Beachfront Strip to KICA “subject to the covenant, condition, and restriction that the Property shall be maintained and utilized as a Common Property” as defined in the KICA Declaration of Covenants and Restrictions, recorded in Book M114, Page 407 in R.M.C. Office, as amended, (the “KICA Covenants”). The tax maps and zoning maps were never modified to show the additional area mistakenly included within the property description as a separate parcel, even though it is surrounded by Parcels 12 and 13, which are owned by KRA. Tr. at 58:2-10; Interv. Exh. 8 at 3 and Pl. Exh. 33. In fact, the evidence indicated that such a parcel would not even be permissible under applicable guidelines because, standing alone, it was not contiguous to an existing platted roadway. Tr. at 66:4-9.

C. The Additional Land.

As a result of the incorrect property description in the Quitclaim Deed, a large area of land totaling 4.62 acres (the "Additional Land") physically disconnected from the remainder of the Beachfront Strip was transferred to KICA that is not within the depiction of the Beachfront Strip on Exhibit 16.2. Rhoad testified that neither the Town nor KRA intended for the Additional Land to be included in the Beachfront Strip, as it includes developable land. Tr. at 129:3-11 and 163:8-13. The portion of the Additional Land above the setback line could, as the testimony showed, be subdivided and sold as 2 or 3 oceanfront lots, which are developable and highly valuable. Tr. at 194-195. Even the portions that lie seaward of the State of South Carolina's beachfront setback line can, with regulatory approval, be used for pools, gazebos, decks, walkways, and similar improvements in connection with a hotel or another oceanfront development. Tr. at 516:5-517:17. As several witnesses corroborated, the 4.62 acres of the Additional Land are also significant as they all count toward the number of units the Property Owner is entitled to build on Parcels 12 and 13 pursuant to the entitlements negotiated for these parcels. These parcels are among the valuable parcels of property purchased by KRA from the Kuwaitis in 1988 for \$105,000,000.00. Tr. at 189:10-19.

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. Tr. at 190:7-9; 190:19-21. 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. Tr. at 236:9-14. 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. Tr. at 392:21-393:6. Clarkson's and Long's testimony

of intent is particularly probative as they signed the Agreement for Conveyance on behalf of KICA. Tr. at 388:17-119; Interv. Exh. 2. As noted above, the sole witness called by KICA did not “contest or challenge the testimony” given by McKinney, Long, and Clarkson of KICA’s intent as it relates to the Beachfront Strip. Furthermore, the record includes evidence that KICA, through its subsequent Board Chair Craig Weaver, later acknowledged that the conveyance of the Additional Land indeed was the result of a “mistake” and that KICA did not intend to benefit from an “unintended transfer of property.” Tr. at 411:8-11 and 459:5-21.⁹ No witnesses were called by any party that contested the evidence of KICA’s intent as provided by McKinney, Long, and Clarkson, and ultimately corroborated by McAdory.

D. Subsequent Conduct and Indicia of Intent.

Moreover, since the Quitclaim Deed was recorded, KICA has never assumed control of the Additional Land or ever maintained it as Common Property, even though KICA is obligated is obligated under its covenants to do so. The Quitclaim Deed required that the property 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.

Interv. Exh. 2. KICA has not maintained or utilized the Additional Land as its Common Property and has no records indicating otherwise. Further, no witnesses could identify any actions of maintenance or control KICA had undertaken. Tr. at 452:15-453:13; 395:1-18. There is no record of KICA ever incurring any expense relating to the Additional Land. Tr. at 453:14-

⁹ Neither KICA nor the Intervenors called Craig Weaver as a witness. As a result, there is no dispute with Clarkson’s in-court testimony regarding KICA’s admission of mistake, which McAdory herself also heard and confirmed. Tr. at 459:2-21.

17. Mark Permar, who is closely familiar with land planning activities on Kiawah Island, was not aware of any actions or investments undertaken by KICA relating to the Additional Land. Tr. at 18:21; Tr. at 69:18-22. KICA's Dunes Management Guidelines reflect that KICA's dunes management activities stop at the eastern boundary of Parcel 13, seaward of the Duneside Villas, and do not extend to the Additional Land. Tr. at 447:5-448:22.¹⁰ Also, KICA's Map of its Common Property does not reflect the Additional Land as being Common Property owned by KICA, but rather reflects the Additional Land as being owned by KRA. Pl. Exh. 32; Tr. at 451-452.

The Additional Land is surrounded by property owned by KRA (Pl. Exh. 29) and is reflected in KRA's maps and records as developable property belonging to KRA. Pl. Exh. 27. Zoning and land use maps maintained by the Town continued to reflect that the Additional Land was owned by KRA and continued to carry the zoning classifications and entitlements that KRA had negotiated through the 1994 Development Agreement. Pl. Exh. 33. 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. Exhibits to the 2005 Development Agreement reflect the Additional Land as part of the undeveloped, but developable, parcels on Kiawah Island owned by KRA. Pl. Exh. 30.

KRA has paid the property taxes on the Additional Land. Tr. at 322. KICA, on the other hand, has never paid property taxes on the Additional Land and has never contacted KRA to discuss reimbursement of the property taxes paid. Tr. at 322:16-19. Similarly, KICA has never requested or caused the applicable County tax maps to be redrawn in order to reflect that the

¹⁰ The western boundary of the 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 Development Agreement. Compare Pl. Exh. 28 with Pl. Exh. 31.

Additional Land is part of the Beachfront Strip or owned by KICA. Even after the incorrect Quitclaim 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 and has never been formally subdivided into a separate tax map parcel. See Fifth Amendment to 2005 Development Agreement, Interv. Exh. 8. Although some emphasis was given by Intervenor to the Fifth Amendment to the Development Agreement, there is nothing in that document that conflicts with the clear testimony of the Town's intent regarding the Beachfront Strip that was provided by the witnesses and manifested by Exhibit 16.2 to the 1994 Development Agreement that the Additional Land was not intended to be part of the Beachfront Strip.

E. *Additional Mistaken Property Descriptions and Discovery of the Mistake*

Separate from the current issue relating to the Additional Land, KRA and KICA have discovered and corrected at least three other mistakes relating to conveyances made pursuant to the 1994 Development Agreement. The first was in 1997, when KRA discovered that the property description in the Quitclaim Deed may have caused a beachfront development tract owned by KRA in the middle of Kiawah Island to be mistakenly included as part of the Beachfront Strip due to the lack of a seaward boundary on a plat of record for that particular tract. The beachfront development tract, identified as Parcel No. 20 in the 1994 Development Agreement, is approximately 3.1 acres and is referred to as the "East Beach Ocean Parcel." In 1997, a survey was issued that established the southern or seaward boundary line of the East Beach Ocean Parcel, and brought the issue to KRA's attention. With the Town's approval, KICA then executed a confirmatory quit-claim deed to KRA returning record title to KRA to the

East Beach Ocean Parcel adjacent to the center island Sanctuary Hotel tract. A noteworthy portion of the Confirmatory Quit-Claim Deed reads as follows:

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.

Confirmatory Quit-Claim Deed, Pl. Exh. 13.¹¹ This document confirms a prior course of conduct whereby KICA and KRA confirmed the intent relating to intended scope and boundaries of the Beachfront Strip, albeit relating to a different portion. Another jointly corrected mutual mistake related to the far *eastern* end of the ten-mile long Beachfront Strip, which the parties also acknowledged and cooperated to resolve by corrective deed. Tr. at 344:16-348:12. This correction brought the eastern end of the Beachfront Strip into conformance with the depiction of the Beachfront Strip in Exhibit 16.2.

In the process of these other corrections, KRA first learned of the mistake relating to the western boundary of the Beachfront Strip in 1997, but 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 and included valuable, developable high land. The previously available survey of the Employee Facility Tract did not reflect the location of the tract relative to mean high water, such that the extent of the issue was not known. However, KICA has taken no identifiable actions and had no identifiable involvement with the Additional Land during this time frame. From that time

¹¹ Also, the Confirmatory Quit-Claim Deed notes that it was intended to "clarify an ambiguity created by the language contained in the Beachfront Deed." Pl. Exh. 13. To this extent, the parties have agreed that some aspects of the description in the subject Quitclaim Deed were in fact ambiguous. However, the Court believes that this case presents a case for reformation of an unambiguous provision of the Quitclaim Deed, which was the mistaken use of the southwestern corner of the Employee Facility Tract as the western boundary point for the Beachfront Strip.

forward, KRA has engaged in discussions with KICA in an effort to address the issue. Unlike the prior instances, when the mistakes relating to the East Beach Ocean Parcel and the Beachfront Strip on the eastern end of Kiawah Island were remedied through corrective deeds, KICA acknowledged the mistake relating to the western boundary of the Beachfront Strip but took the position, upon the advice of counsel, that the mistake could not be corrected without a vote of KICA's full membership approving the action. The prior corrections, one which benefitted KRA and one which benefitted KICA, were implemented without a vote of KICA's members. Believing that the Quitclaim Deed should be reformed to exclude the Additional Land and that no vote of the KICA's membership was needed, KRA brought this action to obtain reformation of the deed.

CONCLUSIONS OF LAW

I. Although the Relevant Portion of the Property Description in the Quitclaim Deed is Not Ambiguous, It is Nonetheless Subject to Reformation on the Basis of Mutual Mistake.

The parties agree that the property description that Ms. Nimmons prepared and inserted into the Quitclaim Deed is not ambiguous as it relates to the Additional Land. The lack of ambiguity in the property description, however, does on these facts limit the Court's equitable power to reform that property description on the basis of mutual mistake. 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) (reforming unambiguous note for annual payments of \$12,000 through parol evidence indicating parties intended that annual payments would be \$12,500), *citing* 66 Am.Jur.2d Reformation of Instruments § 6 (1973). It is well-

established that “[a] contract may be clear and unambiguous as far as it goes and yet may not express the agreement 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).

The question here 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. The Court may determine this issue, and invoke equity to correct mistake, whether the property description is ambiguous or unambiguous. If the mistake alleged is in the deed’s description and the description is unambiguous, extrinsic evidence may be resorted to “for the purpose of reforming the deed so as to make it express the real intention of the parties and correct a mutual mistake of fact.” *See, e.g., Amin v. Guruom, Inc.*, 280 Ga. 873, 874, 635 S.E.2d 105, 106 (2006) (vacating judgment where trial court refused to consider reformation of an unambiguous property description), *citing Miller v. Rackley*, 199 Ga. 370, 375, 34 S.E.2d 438 (1945). In this case, the obvious disconnect between the unambiguous description of the western boundary of the Beachfront Strip in the Quitclaim Deed and the unambiguous depiction of the western boundary of the Beachfront Strip in Exhibit 16.2 of the 1994 Development Agreement supports reformation. The lack of ambiguity renders the mutual mistake all the more clear.

It is not necessary, as a prerequisite to the reformation of an instrument to conform to the intention of the parties, that the instrument on its face be ambiguous. *See Rosen v. Westinghouse Elec. Supply Co.*, 240 F.2d 488, 491 (8th Cir. 1957) (reversing lower court’s decision and granting a new trial where trial court erroneously refused to admit parol evidence in a case involving allegations of mutual mistake relating to an unambiguous written instrument). This principle, which is confirmed to be the law in South Carolina by *Southern Realty* and

Progressive Max, stands to reason. The parties are not disputing the correct construction or meaning of the language of the deed, but rather whether the language correctly reflects their intent, which intent in this case was expressed in Exhibit 16.2 of the 1994 Development Agreement. Tr. at 132:17-21; 184:11-23; 231:7-20 and 391:24-10. Neither KRA, nor the Town, nor KICA intended that the western boundary of the Beachfront Strip would extend eastward from the southwestern corner of the Employee Facility Tract. All parties to the 1994 Development Agreement, the Agreement for Conveyance, and the Quitclaim Deed concede that the property description in the Quitclaim Deed conflicts with the graphical depiction Exhibit 16.2. The property description was, and is, inconsistent with the intent of the parties. Therefore, it is neither the existence nor absence of ambiguity in the property description that is the Court's focus. The fundamental question is whether "both parties intended a certain thing but because of a mistake in drafting did not get what they intended."

II. Parol Evidence is Admissible to Determine Whether the Quitclaim Deed should be Reformed on the Basis of Mutual Mistake.

While the Court would not consider parol evidence in connection with the *construction* of an unambiguous deed,¹² this is a case for *reformation* of an unambiguous deed based on a mistake in the property description. In an action for reformation, parol evidence is admissible, and indeed essential, to determine whether the written instrument Deed should be reformed on the basis of mutual mistake:

Although the clear and unambiguous language of the contract is controlling in contract construction cases, our jurisprudence has recognized that different

¹² See, e.g., *Penza v. Pendleton Station, LLC*, 404 S.C. 198, 743 S.E.2d 850 (Ct. App. 2013) (the *construction* of an unambiguous deed is a question of law for the court). In *Penza*, the plaintiff sought a foreclosure of a mortgage as it was written. No party filed a claim for reformation in *Penza*, which is different from this case as KRA has pled and pursued a claim for reformation that calls upon the court to accept parol evidence to determine whether the written instrument correctly captured the intent of the parties.

considerations apply where a party seeks reformation of a contract. In such circumstances, the rules of construction, such as the ban on extrinsic evidence, do not apply. [. . .] Both the parol evidence rule and the doctrine of merger¹³ are rules governing the construction of written documents. However, where the parties conceded that the document in question did not contain certain desired language, they did not seek its construction, but rather, reformation to accord with their true intent. The essential question becomes the parties' intent, and [p]arol evidence is admissible to show mistake.

Progressive Max Ins., 405 S.C. at 50-51, 747 S.E.2d at 185-186 (2013) (internal quotations and citations omitted); *Southern Realty*, 290 S.C. at 310, 350 S.E.2d at 198 (reforming note on the basis of mutual mistake and clarifying that “parol evidence is admissible to show mistake”); *see also Yarn Indus., Inc. v. Krupp Intern., Inc.*, 736 F.2d 125, 129 (4th Cir. 1984) (reversing lower court for failing to allow admission of parol evidence in reformation action because “parol evidence [is] freely admissible to establish allegations of fraud, mistake or other equitable grounds for relief”).

This legal principle is long-standing. *See, e.g., Hunt v. Rousmanier's Adm'rs*, 21 U.S. 174, 182-83 (1823) (“wherever the intention of the parties will be defeated by a defect in the instrument, that defect may be proved and corrected by parol evidence, whether it arises from omission or addition, or from insufficient and inapt language and terms of the instrument”); *see also Garner v. Garner's Ex'rs*, 1 S.C. Eq. 437, 440 (S.C. Ct. of Chancery 1795) (“[p]arol evidence admissible to explain a deed or to correct a mistake in it”). Recognition of this exception to the parol evidence rule is also noted in relevant treatises and has even been described as a “universal rule of equity.” *See* 27 Richard A. Lord, *Williston on Contracts* § 70:52 (4th ed. 2003) (parol evidence rule “is inapplicable in a suit for reformation on the basis of mutual mistake” and noting jurisdiction that had remarked “[i]t is practically a universal rule that

¹³ None of the parties raised the issue of merger by deed, but the Court notes its lack of applicability in a case for reformation on the basis of mutual mistake.

in suits to reform written instruments ... parol evidence is admissible to establish the fact of fraud or of a mistake" (citation omitted); *see also Rosen v. Westinghouse Elec. Supply Co.*, 240 F.2d 488, 491 (8th Cir. 1957) ("[i]t is a universal rule of equity in suits to reform written instruments that parol evidence is admissible to establish mutual mistake and to show how the instrument should be corrected to reflect the actual intent of the parties thereto").

This rule stands to reason, as it "would be virtually impossible to prove mutual mistake as a ground for reformation without parol evidence." *Southern Realty*, 290 S.C. at 309, 350 S.E.2d at 198; *see also Walden v. Skinner*, 101 U.S. 577, 585 (1879) ("[e]vidence of fraud or mistake is seldom found in the instrument itself, from which it follows that unless parol evidence may be admitted for that purpose the aggrieved party would have as little hope of redress in a court of equity as in a court of law"). While there are certainly cases where parol evidence is refused when offered to vary the terms of an unambiguous deed, those cases do not involve claims for reformation of the deed on the basis of mistake.¹⁴ This case does not involve a construction of the Quitclaim Deed, but rather a determination whether both parties intended a certain thing but because of a mistake in drafting did not accomplish what they intended. There is clear and convincing parol evidence indicating that the property description did not match what the parties intended. Therefore, upon this foundation of authority and to resolve this issue justly and equitably, the Court allowed the admission of parol evidence during the hearing and will consider parol evidence in resolving Plaintiffs' claim for reformation.

¹⁴ *See, e.g., Walker v. Harris*, 291 S.C. 454, 354 S.E.2d 56 (Ct. App. 1987) (noting that "**where reformation of a deed is not sought** and the description of the property transferred is unambiguous, parol evidence as to mistake in the description is not admissible" and specifically noting that action was not one for reformation but rather to quiet title) (emphasis added).

III. Plaintiffs' Claims for Reformation of Deed, Specific Performance and Declaratory Judgment Are All Equitable Claims, as is KICA's Counterclaim for Equitable Relief.

South Carolina law, "through long-established precedent, has recognized that an action alleging mistake is in equity." *See, e.g., DuPont v. Southern Nat. Bank of Houston, Tex.*, 288 S.C. 312, 313, 342 S.E.2d 590 (1986) (affirming trial court's denial of request for transfer of case to jury trial roster due to equitable nature of action asserting mistake). Where a mutual mistake is "made to appear by clear and competent testimony, equity will unhesitatingly afford the necessary relief, either by reforming the paper or cancelling it as the case may require." *Kaiser v. Carolina Life Ins. Co.*, 219 S.C. 456, 467, 65 S.E.2d 865, 869 (1951) (granting reformation of insurance policy on the basis of mutual mistake notwithstanding failure on the part of the party seeking reformation had "overlooked" the absence of the intended endorsement). "Where an instrument is drawn and executed which professes or is intended to carry a prior agreement into execution, whether in writing or by parol, which by mistake violates or fails to fulfill the manifest intention of the parties, equity, if the proof is clear, will correct the mistakes, so as to produce a conformity of the written instrument to the agreement of the parties." *Jumper v. Queen Mab Lumber Co.*, 115 S.C. 452, 106 S.E. 473, 477 (1921) (granting reformation on the basis of mutual mistake where scrivener's error arose due either to a "lack of information" or a "misunderstanding of directions" on the part of the attorney).

Similarly, KRA's claim for declaratory judgment is equitable in nature based on the nature of the relief sought. *See, e.g., Lowcountry Open Land Trust v. State*, 347 S.C. 96, 101, 552 S.E.2d 778, 781 (Ct. App. 2001) (suit for declaratory judgment may be legal or equitable, and is characterized as such by the nature of the underlying issue outlined in the complaint). An action for specific performance would arise in equity as well, although the Court believes that the

essence of this action is an equitable claim for reformation. *Aiken Mortgage Co. v. Jones*, 197 S.C. 245, 15 S.E.2d 119, 120 (1941) (“[s]pecific performance is an action of ancient equity jurisdiction). Therefore, the Court is proceeding in this case as an equitable action, as opposed to an action at law.

IV. Plaintiffs are Entitled to Reformation of the Quitclaim Deed on the Basis of Mutual Mistake.

Plaintiffs seek to reform the Quitclaim Deed by way of a Corrective and Confirmatory Deed that fixes the western boundary of the Beachfront Strip in accordance with the graphic depiction in Exhibit 16.2. “Each suit for reformation stands on its own peculiar facts,” and the facts of this case are certainly unique. *Kaiser*, 219 S.C. at 468, 65 S.E.2d at 870. The original agreement by KRA to transfer of the Beachfront Strip to KICA arose under the 1994 Development Agreement with the Town, which is the antecedent agreement from which the derivative documents (the Agreement for Conveyance and the Quitclaim Deed). Yet the controlling, antecedent agreement was unintentionally, but significantly, modified as a result of the property description of the Beachfront Strip drafted and inserted by Nimmons into the Agreement for Conveyance and Quitclaim Deed. The parties agreed unanimously that the depiction of the Beachfront Strip in Exhibit 16.2 was not captured by Nimmons’ property description, which caused the Beachfront Strip to exceed its intended boundary, go further westward, and create the orphaned tract of Additional Land.

The discord between the intent of the parties and the Quitclaim Deed is exactly the type of situation in which reformation is appropriate. “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, 262 S.E.2d 903, 905 (S.C.1980). Before equity will reform an instrument, however it must be shown by clear and convincing

evidence not simply that there was a mistake on the part of one of the parties, but that there was a "mutual mistake." *Timms v. Timms*, 290 S.C. 133, 137, 348 S.E.2d 386, 389 (S.C. Ct. App. 1986). It is important to note that the doctrine "mutual mistake" not mean, or require, that both parties be found to have committed a blunder. Rather, under South Carolina law, a mutual mistake occurs when "both parties intended a certain thing but because of a mistake in drafting did not get what they intended," regardless of who "made" the mistake *Timms*, 290 S.C. at 137, 348 S.E.2d at 389, citing *Commercial Union Assurance Co. v. Castile*, 283 S.C. 1, 320 S.E.2d 488 (Ct.App.1984); see also *Chapman v. Cassels Co.*, 180 Ga. 349, 179 S.E. 91, 93-94 (1935) ("[i]n every case under this head of the law, the *only* inquiry is, does the instrument contain what the parties intended it should, and understood that it did? Is it their agreement? If not, then it may be reformed by aliunde proof, so as to make it the essence of what was the true bargain . . . between the parties. And it is wholly immaterial from what cause the defective execution of the intent of the parties originated").

Although KRA must show mutual mistake by clear and convincing evidence, the legal authorities are clear that this does not require KRA to prove that KICA engaged in any form of error or blunder of its own making. Rather, the right to relief is triggered if KRA shows that it was the mutual intent of the parties that the Beachfront Strip would terminate at the point shown in Exhibit 16.2, but that this intent was not carried into effect due to a mistake in drafting, without necessity of any finding that KICA failed or erred in some way. The Court finds that Plaintiffs have made this showing and have made it through evidence that is clear and convincing and indeed overwhelming.

A. *The Property Description in the Agreement for Conveyance and the Quitclaim Deed Is the Result of Mutual Mistake as it Failed to Implement the Intention of the Parties with Regard to the Western Boundary of the Beachfront Strip.*

There is no evidence that any party intended the Beachfront Strip to be as it is described in the Quitclaim Deed. Under South Carolina law, “[w]here an instrument is drawn and executed which professes or is intended to carry a prior agreement into execution, whether in writing or by parol, which by mistake violates or fails to fulfill the manifest intention of the parties, equity, if the proof is clear, will correct the mistakes, so as to produce a conformity of the written instrument to the antecedent agreement of the parties.” *Jumper*, 115 S.C. at 452, 106 S.E. at 477, citing *Ivinson v. Hutton*, 98 U. S. 79, 83 (1878). The evidence indicates that this is what occurred here, and equity should correct the mistake.

The Agreement for Conveyance and the Quitclaim Deed, without question, were prepared for the purpose of implementing the transfer of the Beachfront Strip as set forth in Section 16(b) of the 1994 Development Agreement, but failed to do so due to Nimmons’ decision to use the southwestern corner of the Employee Facility Tract as the point in beginning for the Beachfront Strip, instead of the eastern boundary of Parcel 13 as clearly shown in Exhibit 16.2. This is not to cast doubt of Nimmons’ expertise, as the testimony is consistent that she is highly skilled. The point is simply that an error was made in drafting that caused the property description to conflict with the intended scope of the Beachfront Strip. The conflict was not a trivial one as 4.62 acres of valuable property to the west of the intended boundary were mistakenly ensnared through the erroneous property description.

As indicated by precedent binding upon the court, “[w]here the agreement as reduced to writing omits or contains terms or stipulations contrary to the common intention of the parties, the instrument will be corrected so as to make it conform to their real intent” and “[t]he parties

will be placed as they would have stood if the mistake had not occurred.” *Jumper*, 115 S.C. at 452, 106 S.E. at 477. A reformation of the Quitclaim Deed in order to return the Additional Land to KRA places the parties in the place they would have stood if the mistake has not occurred, consistent with equity, and without harm or prejudice to any party.

Although the intent of the parties at the time is obviously significant, the intent of the parties can also be gleaned through subsequent conduct. An illustrative example is the case of *Sims v. Tyler*, 276 S.C. 640, 281 S.E.2d 229 (1981), where the Court noted that the payment of taxes since the date of purchase, the construction of a doghouse and the planting of a garden on a disputed adjacent lot were considered by the Court in determining that the purchasers indeed intended to purchase both lots as opposed to just one. When this method of analysis is applied here, the result is compelling. KRA has paid the taxes and the applicable tax maps have continued to reflect the Additional Land as being owned by KRA without objection or “correction” by any party. Reference to zoning maps, land use maps, and common property maps yields the same conclusion that the Additional Land has remained KRA’s property. KICA *admits* that a mistake occurred and that it did not intend to receive the Additional Land, as corroborated by the fact that KICA has never used or maintained the Additional Land nor made any improvements to it.

The probative value of such evidence is best understood if, hypothetically, the facts were reversed. In other words, if KICA had paid taxes on the Additional Land, if KICA had used and maintained it as Common Property, if KICA had constructed improvements on it, and if KICA had exercised any indicia of intent to have ownership and control over the Additional Land, then the situation presented to the Court would be different. Indeed, the fact that KICA is obligated to

maintain Common Properties, but has undertaken no efforts to maintain or control the Additional Land, is strong evidence that the Additional Land was not intended to be conveyed.

The record supports reformation in this case and is in sharp contrast with prior cases in which reformation has been refused. An example is the case of *Forrester v. Moon*, 100 S.C. 157, 84 S.E. 532 (1915). In *Forrester*, an owner of lands in Greenville County that abutted a railroad right of way subdivided her property into lots in order to market them for sale. A plat was obtained but soon replaced by a second plat, which changed the lot numbers and removed an intended street that would have run along the railroad right of way. The owner recorded only the second plat, which omitted the street indicated on the prior plat such that the lots themselves would abut the railroad right of way without a street. The owner marketed the lots as they were numbered and shown on the second plat, soon finding a purchaser of Lot 21. The owner directed her attorney to draw up a deed in accordance with the second plat, which the attorney did. The transaction was commenced and the deed was recorded.

The purchaser went into possession of the land and actively cultivated it up to the railroad right of way. Thereafter, the original owner attempted to claim that Lot 21 did not go all the way to the railroad right of way, but instead ran only to the hypothetical location of the undeveloped street that was not shown on the recorded plat, which was the plat that the attorney "had before him" when he prepared the deed "in the presence of the plaintiff and the defendant." The original owner brought a claim for reformation. Upon these facts, the trial judge refused to reform the deed and found that "it is clear under the testimony that the defendant was bargaining for the lot which he actually got" and so "it was not a case of mutual mistake." *Forrester*, 100 S.C. at 157, 84 S.E.2d at 533. In this sense, *Forrester* is instructive as, unlike the defendant in that case, KICA makes no claim that it intended to get the Additional Land. KICA has never

exercised possession of the Additional Land or used it in any way. Furthermore, the scrivener in *Forrester* prepared the deed precisely as directed, in accordance with the recorded plat, and in the physical presence of both parties. The decision by Nimmons to use the southwestern corner of the Employee Facility Tract as a point for the western boundary for the Beachfront Strip was her own and is in clear conflict with the stipulated boundary indicated in Exhibit 16.2. Reformation is proper to correct the mistake.

Ultimately, the mutual mistake at issue is between KRA and KICA, as the parties to the Quitclaim Deed, but the evidence calling for reformation is bolstered even further by the fact that the Quitclaim Deed also is inconsistent with the Town's intent. In this regard, no matter which combination of intents that the Court considers, the property description in the Agreement for Conveyance and the Quitclaim Deed conflicts with all of them. It is acknowledged that the tripartite nature of the relationship between the Town, as the zoning authority, KRA, as the developer, and KICA, as the property association, makes this case unique in comparison to other reformation cases. However, "equity looks to substance rather than form." *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 253, 715 S.E.2d 348, 354 (Ct. App. 2011). This maxim applies by "dispensing with pure formalities which would otherwise defeat the equity." After a party establishes an equitable right, the court may dispense with pure formalities which would otherwise defeat the equity. *Id.* The case is reformation is clear and should not be avoided simply because the situation presented is somewhat atypical.

Furthermore, competent and uncontroverted testimony regarding KICA's intent, and the Town's intent, was presented at trial. In other words, no document or witness suggests that KICA or the Town affirmatively intended that the Additional Land be transferred to KICA. To the extent KICA or the Intervenor would allege that such an alternative intent existed, the

hearing was their opportunity to present their witnesses or testimony. No such witnesses, and no such testimony, were presented.

In a typical dispute seeking reformation of a deed for mistake, it is expected that the defendant would take the position that the challenged deed reads as he intended. Therefore, it is of particular significance that the evidence in this case shows, uniformly, that KICA did not intend to receive the Additional Land as part of the Beachfront Strip. The Court heard the testimony of 11 witnesses. Four witnesses provided admitted testimony about KICA's intent. All four testified affirmatively that KICA did not intend to receive the Additional Land and that KICA intended that the Beachfront Strip would stop at the eastern boundary of Parcel 13. *See Tr.* at 53:11-17 (Permar); 190:19-21 (McKinney); 236:9-14 (Long); and 391:24-392:10 (Clarkson). Two of these witnesses were officers of KICA in 1994, and three were Board Members of KICA. *See Pl. Exh. 1.* The sole witness called by KICA, Tammy McAdory, specifically confirmed that she did not contest or challenge the testimony of the four witnesses who testified regarding KICA's intent. *Tr.* 446:6-14. The evidence of KICA's intent rises to the level of "clear and convincing" because it is consistent and uncontested.

The testimony provided by McKinney, Long and Clarkson is competent evidence of the KICA's intent, as each individual had a specific legal capacity with KICA at the time in addition to his capacity with KRA. *See, e.g., Kishter v. Seven Courts Community 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 witness who legal capacity on behalf of both developer and property association). The facts in *Kishter* are so similar to this case that further discussion is warranted.¹⁵ In *Kishter*, the developer of a

¹⁵ The Court also notes that certain key facts in *Kishter* are distinctly dissimilar, as the property association in *Kishter* asserted that it had maintained and improved the contested parcel and that it had

townhouse project executed a deed to the property association during the developer's control period transferring several parcels that were to be held by the property association as common properties. However, due to a scrivener's error, the deed also included a parcel that the developer intended to reserve for future development. The developer did not detect the error before signing the deed. Eleven years later, the developer sought to reform the deed on the basis of mutual mistake, and presented evidence of the property association's intent through Herbert Kishter, who was the general partner of the developer and the chief executive officer of the association at the time that the Kishter signed the deed on behalf of the developer.

The trial court rejected Kishter's evidence of intent and reasoned that the mistake could not be mutual because Kishter was one in the same person. The Court of Special Appeals reversed the judgment that had been entered for the property association and remanded the case for a new trial, and stating that the both parties to the deed "were capable of forming an intent through their officers or partners" even though the deed had been signed by the developer only. *Kishter*, 96 Md. at 642, 626 at 993. The Court believes that this same reasoning holds true under this very similar set of facts. The officers and board members of KICA are competent to testify as to KICA's intent, and have done so with clarity and consistency. Indeed, if the officers and board members of KICA were not allowed to speak to KICA's intent, then no one could.

B. *The Right to Reformation is Not Precluded by any Negligence on the Part of KRA in Failing to Detect the Error in the Property Description or By Waiver.*

While it is true that the error in the property description was not caught prior to the execution of the Agreement for Conveyance and the Quitclaim Deed, this does not defeat an equitable claim for deed reformation even if the conduct were to rise to the level of negligence.

paid taxes on the disputed parcel. KICA concedes that it has not done these things with respect to the Additional Land.

South Carolina law provides that “[n]egligence is not in itself a defense, else there would be no ground for reformation for mistake, as mistakes nearly always presuppose negligence.” *Kaiser*, 219 S.C. at 466, 65 S.E.2d at 869 (affirming trial court’s reformation of life insurance policy), citing *Columbian Nat. Life Ins. Co. v. Black*, 35 F.2d 571, 575 (10th Cir. 1929) (“[m]ere negligence, not amounting to the violation of a positive legal duty, does not prevent reformation, and especially if it appears that the other party has not been prejudiced thereby”); *Shaw*, 274 S.C. at 286, 262 S.E.2d at 905-06 (1980) (noting that “[n]ormally, persons who make a mistake prior to seeking reformation of a contract have been negligent”); see also *Jumper*, 115 S.C. 452, 106 S.E. 473 (1921) (citing authorities that “relief based upon mutual mistake is not to be refused on the ground that the party claiming it had the means of knowledge at the time of the mistake”). This principle is well-recognized:

It has often been said that mere negligence in executing or accepting a written instrument is not a bar to reformation where the ground for relief is mutual mistake. Mistakes nearly always presuppose negligence, and so it must be evident that the rule which permits reformation on the ground of mutual mistake does not contemplate that mere negligence will bar reformation.

66 Am.Jur.2d, Reformation of Instruments, § 79, at 601, 602. The negligent failure of a party to know or to discover the facts, as to which both parties are under a mistake does not preclude rescission or reformation on account thereof. See, e.g., *Lippire v. Eckel*, 178 Neb. 643, 649, 134 N.W.2d 802, 806-07 (1965), citing Restatement of Contracts § 508, p. 977.

In this regard, the failure of KRA (or any other party) to detect the error in the property description prior to execution is not the point in focus. The most essential question is whether the Quitclaim Deed reflected the intention of the parties correctly with regard to the western boundary of the Beachfront Strip. If it does not, then the mistake is “mutual” without regard to who failed to catch the error, who prepared the Quitclaim Deed, or the party by whom the

preparer of the Quitclaim Deed was employed. *See, e.g., Unified Gov't of Wyandotte County/Kansas City v. Trans World Transp. Servs., L.L.C.*, 43 Kan. App. 2d 487, 490, 227 P.3d 992, 995-96 (2010) (reforming deed on basis of mutual mistake to conform to antecedent agreement and finding that mutual mistake may be shown even if parties did not carefully examine deed to ascertain whether it expressed their agreement).

In a reformation case, it is not the source of the mistake but instead the fact a mistake was made that empowers the court of equity to act. *Elton v. Davis*, 123 S.W.3d 205, 213 (Mo. Ct. App. 2003). Equity is flexible in providing relief, as “[t]he chancellor is not shackled by the rigid rules of the common law relating to negligence and contributory negligence if they stand in the way of justice and equity under the facts presented.” *Kaiser*, 219 S.C. at 468, 65 S.E.2d at 870. In light of the surrounding circumstances, the fact that the error was not caught prior to the execution of the Quitclaim Deed will not bar the application of the appropriate remedy. *See, e.g., Jumper*, 115 S.C. at 452, 106 S.E.2d at 477 (reformation proper where there is discord in a material particular between the mutual intent of the parties and the written agreement as prepared by the scrivener “irrespective of the cause of the discord”).

It is recognized that “[w]here the parties entrust to an attorney or scrivener the duty of preparing a deed or other document in accord with their agreement, and he, by his own mistake or fraud, embodies in it stipulations and conditions other than those agreed upon, the party against whom it is sought to be enforced may have it reformed, although he signed it without reading it.” 66 Am.Jur.2d *Reformation of Instruments* § 85 (1973), *cited by Wehner v. Schroeder*, 354 N.W.2d 674, 679 (N.D. 1984). Furthermore, the right to reformation is not precluded because Nimmons was employed by Buist, KRA’s counsel, and prepared the Quitclaim Deed at KRA’s instruction. The fact that the attorney was retained or paid by one of the parties and not

both does not render the mistake “unilateral.” *See, e.g., Hoffman v. Chapman*, 182 Md. 208, 213, 34 A.2d 438, 441 (1943) (“[the] mistake in this case was not unilateral. Here the draftsman of the deed was acting as the agent of the parties. His mistake in the description of the real estate became the mistake of all the parties.”). The evidence, again, is clear as to the disconnect between the intended conveyance and the property description in the Quitclaim Deed. Nimmons testified that she was the source of the discord based on a well-intentioned, but incorrect decision that she made in preparing the property description. This is a situation that calls for reformation of the Quitclaim Deed, particularly in light of the lack of prejudice, reliance, or any disagreement as to the relevant intent.

The issue of waiver was also raised in the pleadings and briefly at the hearing. The Court also finds that reformation is not precluded by the provision in the 1994 Development Agreement indicating that KRA waived its right to challenge the “validity” of the conveyances of the various properties that were conveyed to KICA. First, waiver is the “voluntary and intentional relinquishment or abandonment of a known right.” *See, e.g., Strickland v. Strickland*, 375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007). The evidence shows that KRA did not realize that the property description in the Quitclaim Deed was incorrect at the time that the Quitclaim Deed was executed. Second, by seeking reformation, KRA has not challenged the validity of the Quitclaim Deed, but rather the *accuracy* of the portion of the property description relating to the western boundary. KRA does not seek rescission and reconveyance of the entire Beachfront Strip. Rather, KRA seeks, and should receive, reformation of the Quitclaim Deed so that the property description is corrected to conform to the intent of the parties.

C. Reformation of the Quitclaim Deed is Not Precluded by Laches or Stale Demand.

KICA and the Intervenor raised laches in their pleadings. "Delay alone is not enough to constitute laches; it must be unreasonable, and the party asserting laches must show prejudice." *Brown v. Butler*, 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct. App. 2001) (emphasis added); *see also Bailey v. Lyman Printing & Finishing Co.*, 245 S.C. 13, 22, 138 S.E.2d 410, 414 (1964) ("[d]elay alone in the assertion of a right does not constitute laches [. . .] [i]t must be shown in addition that such delay has resulted in material prejudice to the defendant"), *citing Grossman v. Grossman*, 242 S.C. 298, 309, 130 S.E.2d 850, 855 (delay of seven years did not constitute laches due to lack of prejudice to defendant); *see also Gibbs v. Kimbrell*, 311 S.C. 261, 269, 428 S.E.2d 725, 730 (Ct. App. 1993) ("delay alone in the assertion of a right, without injury to the adversary, does not constitute laches"). It is the complete absence of any prejudice to KICA (or the Intervenor) that precludes any application of laches in this case.

The Quitclaim Deed was executed in 1995. Since that date, KICA is unable to identify a single expense it has incurred relating to the Additional Land. KICA has not paid taxes on the Additional Land. KRA has not made improvements to the Additional Land. It has not changed its position in any demonstrable way relating to the Additional Land. KICA omits the Additional Land from its maps of Common Property. It has not placed any signage on the Additional Land nor made any identifiable use of the Additional Land, other than the general use by members of the public of the boardwalk that traverses the Additional Land. The boardwalk, which is owned by KRA and which connects Beachwalker Park with the beach, has been in place since the 1970s, well prior to December 1995 when the Quitclaim Deed was executed. Tr. at 313:19-20. The boardwalk was not constructed in detrimental reliance upon KICA's unwitting ownership of the Additional Land. As KRA demonstrated at trial, continuing public access via a boardwalk is

guaranteed for the duration of the Beachwalker Park lease, which has a 99-year term including the option periods. See Pl. Exh 36, at Sections 2.2, 2.3, 3.1 and 3.2. Therefore, a reformation of the Quitclaim Deed would not affect the use of the boardwalk.

In the specific context of reformation actions, there is precedent of allowing reformation in cases involving delays substantially longer than occurred here. See, e.g., *Timms*, 290 S.C. at 138-140, 348 S.E.2d at 389-390 (granting reformation of deed 46 years after party seeking reformation first believed mutual mistake existed). Other cases have allowed for specific performance in time frames that are similar to this case. See *Wall v. Huguenin*, 305 S.C. 100, 103, 406 S.E.2d 347,449 (1991) (holding the failure to exercise an option to purchase land for thirteen years was not unreasonable and laches did not apply to prevent exercise of option). While the mistake was discovered initially in 1997, its magnitude was not known until 2011. Since that time, KRA has taken ongoing efforts in an attempt to rectify the issue.

In any event, for laches to apply, the party asserting it *must* show prejudice. This requirement makes resolution of the issue simple. There can be no application of laches as there has been no prejudice to KICA. Although laches was raised as an affirmative defense, no evidence was presented to suggest that KICA (or any party) has made a change in their position in detrimental reliance upon the Quitclaim Deed. The record shows that KICA does not use or maintain the Additional Land as Common Property. The only specific use¹⁶ of the Additional Land has been the use of the boardwalk that connects the County's Beachwalker Park with the beach area by traversing maritime forest, high land and dune fields. As noted by Plaintiffs, the

¹⁶ Witnesses for the Intervenor also testified that they derive some general aesthetic and emotional benefits from the Additional Land being in an undeveloped state. Assuming *arguendo* that Intervenor have standing to assert laches, this evidence does not approach the nature of prejudice necessary for the Court to bar equitable relief due to laches or otherwise refuse reformation where mutual mistake has been shown.

boardwalk is an obligation on the part of KRA under its Lease with Beachwalker Park. A return of the Additional Land to KDP II will not cause the boardwalk to be closed.

The Court also finds that the doctrine of stale demand is inapplicable in this case. A stale demand is "one that has for a long time remained unasserted; one that is first asserted after an unexplained delay of such great length as to render it difficult or impossible for the court to ascertain the truth of the matters in controversy and to do justice between the parties, or as to create a presumption against the existence or validity of the claim, or a presumption that it has been abandoned or satisfied." *All Saints Parish, Waccamaw v. Protestant Episcopal Church in the Diocese of S. Carolina*, 358 S.C. 209, 236, 595 S.E.2d 253, 268 (Ct. App. 2004). At the hearing, KRA called six witnesses, each of whom were directly involved with the 1994 Development Agreement and gave testimony regarding their direct and contemporaneous personal knowledge of the underlying facts and circumstances. McAdory has been employed with KICA continuously since 1989 and provided testimony regarding various issues. A full copy of the three-volume 1994 Development Agreement was introduced into evidence along with other correspondence, maps, and documents. The Quitclaim Deed is available as are the documents and testimony that provide probative parol evidence. It is, therefore, not "difficult or impossible" for the Court to ascertain the truth of the matters in controversy, so the doctrine of stale demand does not apply.

D. *Intervenors' Argument Relating to Captain Sam's Spit Is Unavailing.*

The primary argument that Intervenors have presented is that, because KRA also agreed to make a future, separate conveyance of Captain's Sam Spit under a separate section of the 1994 Development Agreement, that the Additional Land was "intended" to remain undevelopable open space.

First, the argument is irrelevant as there is no testimony on the record that the parties intended for the Additional Land to be conveyed as part of the Beachfront Strip through the Quitclaim Deed, which is ultimately the fundamental issue that has been put before the Court. The clear and convincing evidence indicates that the Additional Land was not intended to be part of the Beachfront Strip, but was included as a result of a mistake in drafting that caused the Quitclaim Deed to be inconsistent with the intent of the parties. Ultimately, that is the end point of the Court's analysis.

A substantial portion of the Additional Land sits within what was recognized and designated as Parcel 13 under the Development Agreement, the "Beachwalker Ocean Parcel," that consisted of 19.5 acres as stipulated in Exhibit 13.2 of the 1994 Development Agreement. *See Development Agreement, Pl. Exh. 5*, at Exhibit 13.2. The overlap of the Additional Land and Parcel 13 (as Parcel 13 was shaped and configured for purposes of the 1994 Development Agreement) is shown in the graphic prepared by Permar that was admitted into evidence as *Pl. Exh. 29*. The overlapping area consists of highly valuable, developable oceanfront property that KRA did not intend to convey and KICA did not intend to receive. *Tr.* 194:16-195:13. *See Pl. Exh. 27* and *Pl. Exh. 29*.

Although Intervenor's witness, William Eiser, indicated that some of the Additional Land lies below the critical line and has only limited approvable uses. However, that does not affect the right of KRA to own the Additional Land or to reform a deed to recover it when it was conveyed through mutual mistake. Furthermore, Eiser admitted that even the portion of the Additional Land that is in the critical area can, with regulatory approval, be used for pools, walkways, gazebos and similar types of improvements. This would certainly heighten the use and value of the portion of the Additional Land sitting inland of the critical area. Finally, as was

noted during trial, this area of the Kiawah Island beachfront has undergone continuous accretion. With each revision to the critical line, more of the Additional Land shifts landward of the critical line, underscoring KRA's right to receive a reconveyance of the Additional Land.

Finally, Intervenor's position is essentially an effort to reargue the results of the negotiations between the Town and KRA that were memorialized in the 2005 Development Agreement. In the 2005 Development Agreement, KRA specifically gave up certain valuable development rights in exchange for the Town's agreement to allow KRA to retain and pursue limited development of Captain Sams Spit. Any portion of the Additional Land that this modification would allow KRA to keep should be KRA's to keep. It would be a derogation of equity to deny KRA a return of any portion of the Additional Land because of a superseded, nullified obligation that has no legal effect. Intervenor's were afforded a means to oppose the 2005 Development Agreement through voicing their opinions to their elected representatives, the Town Council. This is neither the time nor the forum for Intervenor's to revisit their objection to the 2005 Development Agreement or the potential future development of Captain Sams Spit.

E. *The Court Will Grant Reformation of the Quitclaim Deed by Executing and Entering a Corrective Master's Deed.*

As indicated above, the Court is satisfied that mutual mistake has been proven by clear and convincing evidence. The Quitclaim Deed can and should be reformed in order to correct the erroneous inclusion of the Additional Land as a result of the mistaken property description. In 2013, the parcels in which the Additional Land sits were sold to KDP II, a limited liability company that joined this action as a plaintiff on the basis of the change in ownership. A copy of the Special Warranty Deed reflecting the ultimate transfer to KDP II was entered into evidence. Pl. Exh 20. As a result of the Special Warranty Deed, KDP II is KRA's ultimate assignee with respect to ownership and related interests in the Additional Land, which the Court has adjudged

should be returned. Therefore, the Court will sign a Corrective Master's Deed that vests title in the Additional Land to KDP II.

V. **KRA is Entitled to Declaratory Judgment that the Additional Land is Not Common Property and Should be Returned.**

Ultimately, the case presented is one for reformation, and the Court has determined that reformation is proper. Plaintiffs are entitled to reformation of the legal description in the Quitclaim Deed as the inclusion of the Additional Land was unintentional, in error, and a mistake, and contrary to the intent of the parties to the 1994 Development Agreement of which KICA was a named third-party beneficiary for certain purposes, including a recipient of the Quitclaim Deed, and was contrary to the intent of the Agreement for Conveyance, which was intended to memorialize the transfer of the Beachfront Strip as depicted in the 1994 Development Agreement.

Based on its finding that the Quitclaim Deed should be reformed, the Court declares that the Additional Land is not Common Property of KICA and should be conveyed to KRA's assignee, KDP II, LLC. The reformation of the Quitclaim Deed relates back to the initial date when the Quitclaim Deed was executed, such that the Additional Land never was Common Property as a result of the reformation being granted. *See, e.g., Aames Funding Corp. v. Henderson*, 275 Ga. App. 323, 620 S.E.2d 503 (2005) (reforming deed and re-prioritizing security interests even after foreclosure was already completed) following. Furthermore, as the record shows, KICA has never utilized or maintained the Additional Land as Common Property. This resolves KICA's claim for declaratory judgment, with the Court resolves in favor of KRA.

The relief needed to correct the mutual mistake is within the Court's equitable powers. Furthermore, under the South Carolina Uniform Declaratory Judgments Act, "[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper." *See*

S.C. Code § 15-53-120; *see also Bank of Augusta v. Satcher Motor Co.*, 249 S.C. 53, 60, 152 S.E.2d 676, 679 (1967) (same), *citing* 22 Am.Jur.2d, Declaratory Judgments, Section 100 (“[u]nder these provisions, a court, in a proceeding for declaratory relief, may grant consequential or incidental relief, that is, it may enter a judgment granting both declaratory and coercive relief, where the proper grounds for such relief appear from the pleadings and proof”). Based on the entirety of the record, the Court declares that the Additional Land is not Common Property of KICA and was not intended to be transferred, as the intended scope of the Beachfront Strip was depicted in Exhibit 16.2 to the 1994 Development Agreement, which is the relevant antecedent agreement of which KICA was a third party beneficiary.

To correct the scrivener’s error and restore ownership of the Additional Land to KRA’s current assignee, KDP II, LLC, the Court will exercise its equitable powers to reform the Quitclaim Deed by executing a Corrective Master’s Deed that shall implement the relief to which the Court believes that Plaintiffs are fully entitled.

IT IS SO ORDERED.

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

_____, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Kiawah Resort Associates, L.P., a Delaware
Limited Partnership, and KDP II, LLC, a South
Carolina Limited Liability Company,

Plaintiffs,

vs.

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

Defendant,

and

Inlet Cove Club Homeowners Association, Inc., a
South Carolina Not-for-Profit Corporation, and
Kiawah Island Property Owners Group, Inc., a
South Carolina Nonprofit Corporation,

Intervenors.

BEFORE THE MASTER-IN-EQUITY

MIKELL R. SCARBOROUGH

C/A No. 2013-CP-10-01225

**RESPONSE TO PLAINTIFF'S
MOTION TO ALTER
OR AMEND**

FILED
2014 JUL 14 PM 3:27
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

TO: HONORABLE MIKELL SCARBOROUGH AND ALL PARTIES AND THEIR
ATTORNEYS

Inlet Cove Club Homeowners Association, Inc., and Kiawah Property Owners Group (the
“Intervenors”) hereby respond to Kiawah Resort Associates, L.P. (“KRA”) and KDP II, LLC’s
Motion to Alter or Amend the Final Order.

The Plaintiffs’ motion is littered with sweeping conclusory statements claiming that an
abundance of clear and convincing evidence on certain points exists in the record and that this
evidence is further agreed upon and corroborated by all of the witnesses who appeared at trial. See
Plaintiffs’ Motion to Alter or Amend (“Motion”), pp. 4, 5, 6, 8, 10, 16, 17. Yet, throughout the
motion, Plaintiffs evade identification and explanation of what evidence was so clear, convincing

and agreed upon or why this Court's findings are incorrect as a result. Plaintiffs continue to refer to certain evidence as clear and uncontested when not only was contrary evidence on these points presented, but more importantly, it is the role of the Court to weigh the evidence and make a final determination.

The Plaintiffs' motion effectively boils down to mere disagreement with the weight this Court gave to the evidence presented at trial. The bulk of the Plaintiffs' complaints dispute the Court's factual findings rather than claim some misunderstanding of the evidence or misapplication of the law. Notably, Plaintiffs cite no legal support for how this Court's findings of fact and law are wrong, the motion simply disagrees with the probative value the Court assigned to certain evidence.

Further, on several occasions throughout the motion, Plaintiffs take issue with what they refer to as "sua sponte" findings by the Court. See Motion, pp. 2, 5, 6, 7, 8, 10. Plaintiffs appear to be calling into doubt the Court's ability to look at exhibits, hear live testimony and make findings accordingly. This Court is undoubtedly competent and authorized to make findings based on the evidence before it and the applicable law. That is just what this Court did by presiding over this case by rule of law and as the trier of fact.

Accordingly, for the reasons set forth below, the arguments in the Plaintiffs' motion must fail and this Court's Final Order should remain intact.

I. The Court Properly Found the Majority of the 4.62-acre Parcel to be Undevelopable and Appropriately Considered the Conveyance of Captain Sams Spit under the 1994 Development Agreement

Plaintiffs are incorrect in disputing the fact that the majority of the 4.62 acres was undevelopable during the time period surrounding the 1994 Development Agreement and 1995 Beachfront Deed, in which KRA conveyed to KICA the Beachfront Strip as Common Property.

See Motion, p. 2. The Court's finding on the developable status of the 4.62 acres has a sound basis in both fact and law, respectively: the overlay of Invertenors' Exhibits 15 and 19 showing the location of DHEC/OCRM's 1991 beachfront jurisdictional lines for the West End of Kiawah Island, which included the 4.62 acres and Captain Sams Spit; and the Coastal Tidelands and Wetlands Act, as amended, §§ 48-39-250 through 48-39-360 (the "Beachfront Management Act"). See Final Order, dated June 4, 2014 (the "Final Order"), pp. 12 – 13.

Plaintiffs claim that the Court treated the "developability" of the 4.62 acres too broadly, citing to the limited exceptions in the Beachfront Management Act that allow for some very low-impact construction activities seaward of DHEC/OCRM's beachfront jurisdictional lines, such as wooden walkways, small wooden decks, fishing piers, pools, normal landscaping and golf courses. Motion, p. 2 – 3; S.C. Code Ann. § 48-39-290. However, this argument is derived from a newly characterized use of the word "developability," which is contradictory to the use of the word that is supported by the evidence.

None of the Plaintiffs' witnesses referenced the limited construction activities provided for under the Beachfront Management Act when testifying about the developability of property on Kiawah Island in general or the 4.62 acres in particular. Rather the testimony and evidence presented at trial regarding "developability" clearly contemplated the word in terms of property entitlements. The record supports an understanding of property that is "developable" to be largely interchangeable with property that KRA is "entitled to develop." There is no evidence that KRA held entitlements to develop wooden walkways, decks, pools or landscaping; nor would it make sense for KRA to hold such entitlements since those "development" uses provide little potential for a profit. These uses only become relevant if KRA is able to develop homes, hotels and other habitable structures on the property.

Further, the utilization of the word “developability” in reference to property entitlements is consistent with the dictionary definition of the word “develop.” See Develop Definition, Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/develop> (last visited July 11, 2014) (“to make suitable for commercial or residential purposes”). Moreover, this understanding of “developability” is consistent with the plain language and underlying purposes of the 1994 Development Agreement in establishing the extent of KRA’s development rights and obligations, including the requirement to convey to KICA as Common Property certain properties which were considered undevelopable for residential and commercial purposes, such as the Beachfront Strip and Captain Sams Spit. Even to the extent the record contains some conflicting evidence regarding the word “developability,” it was readily apparent from the testimony and evidence relied upon by KRA’s witnesses that the developer differentiated between properties on which it held entitlements to develop for residential and commercial purposes and properties that it was willing to convey to KICA because it was neither entitled to develop nor in a position to gain any value from that land.

The Plaintiffs’ characterization of the developability of the 4.62 acres² of late does not square with the unambiguous terms contained in the 1994 Development Agreement or the testimony presented by the parties to that agreement at trial. As this Court properly determined, DHEC/OCRM’s 1991 beachfront jurisdictional lines on Kiawah Island ran generally along the crest of the primary dunes closet to the ocean, with twenty (20) feet existing between the baseline and setback lines. Final Order, p. 12. In obligating KRA to convey the Beachfront Strip to KICA, Section 16(b) of the 1994 Development Agreement describes the property as highland and dunes varying in width and “generally seaward of most residential, resort, or commercial property lines.” Thus, KRA clearly intended to, and did in fact, convey to KICA property that may allow for those

limited construction activities excepted from the general prohibition of development seaward of the jurisdictional lines under the Beachfront Management Act, including the Beachfront Strip and 4.62 acres.

The Court's conclusion that a majority of the 4.62 acre parcel was within DHEC/OCRM's jurisdiction and thus "not developable" goes to the parties' intent with regard to the conveyances required under 1994 Development Agreement and carried into effect by the Beachfront Deed. Neither the fact that Section 48-39-290 of the Beachfront Management Act allows for some low-impact development uses nor the fact that KRA holds entitlements and the ability to derive value from the development of certain properties gets Plaintiffs where they need to go in order to prove by clear and convincing evidence that a mutual mistake exists in the conveyance of the Beachfront Strip. To the contrary, the evidence supports an intent to transfer certain undevelopable properties, such as the Beachfront Strip, to KICA as Common Property in return for the assignment of entitlement rights to develop certain properties for residential and commercial purposes. The 4.62 acres was unambiguously conveyed as part of the Beachfront Strip according to the plain language of the executed Agreement for Conveyance under the 1994 Development Agreement and Beachfront Deed and Plaintiffs failed to provide any clear and convincing evidence otherwise.

Even if this Court were to accept the Plaintiffs' newly characterized use of the word "developability," it would find that the entirety of the property conveyed as the Beachfront Strip, including the 4.62 acres, as well as the entirety of Captain Sams Spit, fall under that definition as "developable" property. This is blatantly contradictory to the evidence and testimony presented in this case. There is nothing to support the Plaintiffs' attenuated theory that the "developability" of the 4.62 acres somehow differentiated it from the remainder of the Beachfront Strip such that the parties would have intended to convey the latter but not the former. Both the Beachfront Strip and

the 4.62 acres contained property that was subject to DHEC/OCRM's jurisdiction, which generally prohibited any development except for some very limited low-impact uses under the Beachfront Management Act. Therefore, KRA undoubtedly conveyed property to KICA as Common Property notwithstanding that portions of that property could theoretically support wooden walkways, docks, pools and other such limited construction activities. Accordingly, the Plaintiffs' argument must fail. The Court's conclusion upon examination of the applicable factual evidence and law that the majority of the 4.62 acres was not developable during the drafting and execution of the 1994 Development Agreement and subsequent Beachfront Deed was correct.

Contrary to the Plaintiffs' argument, the Court also appropriately addressed the conveyance of Captain Sams Spit under Section 16(g) of the 1994 Development Agreement. See Motion, p. 5. The Court's consideration of this factual evidence was within the context of determining the intent of the parties with regard to the conveyance of the Beachfront Strip as required under the same section of the 1994 Development Agreement, specifically Section 16(b). The Court treats these conveyances together only to the extent that they are both categorized under Section 16 of the 1994 Development Agreement, entitled "Environmentally Sensitive Areas of Protection," and that both paragraphs make reference to the graphic illustration of Kiawah Island found in Exhibit 16.2. Final Order, p. 13. The Court never treated the 4.62 acres as part of the conveyance of Captain Sams Spit pursuant to 16(g) of the 1994 Development Agreement. Rather its discussion of and reference to Captain Sams served to help identify the location of the 4.62 acre parcel and shed light on the intent behind the conveyances agreed to under the 1994 Development Agreement in general.

Plaintiffs are also mistaken in asserting that the Court denied them the benefit of the 2005 Development Agreement. See Motion, p. 5. The Final Order expressly acknowledged that "[t]he 2005 Development Agreement eliminated the terms of Section 16(g) of the 1994 Development

Agreement for Captain Sam's [sic] Spit and replaced them with new provisions that granted KRA certain limited development rights on Captain Sam's [sic] Spit." Final Order, p. 7. Additionally, the Plaintiffs' accusation that the Intervenor distracted this Court from the pertinent issue in dispute is inaccurate and unwarranted. See Motion, p. 5. The Court's consideration of the relevant evidence concerning the original conveyance of Captain Sams Spit under Section 16(g) of the 1994 Development Agreement, its relation to the conveyance of the Beachfront Strip under Section 16(b) of the 1994 Development Agreement, the change to that conveyance that occurred pursuant to the 2005 Development Agreement and the import such conveyances bear on the intent of the parties with regard to the 4.62 acres was undoubtedly proper.

Finally, the Court's inquiry into the developability of the 4.62 acres does not support the Plaintiffs' alternative argument in favor of being awarded the "developable portion" of that property. See Motion, p. 20. As explained above, the inquiry into the developable status of the 4.62 acres helped provide relevant context to what the parties agreed KRA would convey to KICA as Common Property under the 1994 Development Agreement. However, the fact that the Court found that a majority of the 4.62 acres was "undevelopable" does not automatically entitle KRA to receive the portion of that parcel that may be considered "developable." The Court correctly found that the 4.62 acres was conveyed to KICA as Common Property as part of the Beachfront Strip; that the 4.62 acres is subject to KICA's governing documents the Declaration of Covenants, Conditions, and Restrictions (the "KICA Covenants"); and that the Plaintiffs claim for reformation failed.

II. The Court Properly Found Exhibit 16.2 Lacking in Accuracy and Reliability

The Plaintiffs are clearly dissatisfied with the weight this Court assigned to Exhibit 16.2; however, mere disagreement with the findings of the Court does not justify the Plaintiffs' elaborate

claims of error. The unsubstantiated conclusory opinions contained in the Plaintiffs' motion regarding the import of Exhibit 16.2 are representative of their flawed recollection and misconstruction of the evidence presented at trial. See Motion, pp. 6 – 8. Despite the Plaintiffs' relentless attempts to elevate the significance of Exhibit 16.2, it remains an irrefutable fact that Exhibit 16.2 is neither a survey nor an official plat of record and so inherently lacks reliability and precision to a degree of certainty. As the Court correctly concluded, Exhibit 16.2 is a *general illustration* of Kiawah Island that depicts the dedication of beachfront property to KICA pursuant to Sections 16(b) and 16(g) of the 1994 Development Agreement. Final Order, pp. 4, 13.

Plaintiffs brashly defend Exhibit 16.2, asserting as fact certain controversial and unsubstantiated details of this case and unduly skewing what was a proper treatment of the evidence by this Court. The Court acknowledged that Exhibit 16.2, along with every other page of the 1994 Development Agreement, bore the initials of the respective representatives of KRA and the Town and that Exhibit 16.2 depicted the Beachfront Strip as a hatch-marked strip of land, going so far as to even state that such depiction begins “east of the extended boundary line of a 19.5-acre parcel identified as Parcel No. 13 in the 1994 Development Agreement[.]” Final Order, pp. 4 – 5. Yet, in spite of those determinations, the Court correctly concludes that the accuracy of the boundaries of Exhibit 16.2 are unreliable and “of limited value in determining the intent of the parties with regard to the conveyance of the Beachfront Strip” because, in addition to the fact that the document is neither a survey nor an official plat of record, the evidence and testimony presented at trial showed that it was unilaterally altered by a representative of KRA “to reflect something other than what the Town’s original version depicted.” Final Order, pp. 5, 13 – 14.

Further, the Court correctly concluded that the location of the western boundary of the Beachfront Strip by reference to the illustration in Exhibit 16.2 was imprecise and unreliable. Final

Order, p. 14. Plaintiffs argue that the 4.62 acres were mistakenly conveyed as part of the Beachfront Strip. The fact that the clear language describing the conveyance of the Beachfront Strip in Section 16(b) of the 1994 Development Agreement, the Agreement for Conveyance and the Beachfront Deed is unambiguous is not contested. Thus, in order to prevail, Plaintiffs must point to the existence of some other manifestation of the parties' intent to evidence that it was something other than what is stated in plain terms in those documents. Plaintiffs continue to insist, despite evidence to the contrary, that Exhibit 16.2 provides affirmative proof that the parties intended the Beachfront Strip to commence to the east of Parcel No. 13 and that, therefore, the parties did not intend for the 4.62 acres to be included in that conveyance. However, the Court not only questioned the accuracy and reliability of Exhibit 16.2 on its face, as set forth above, but also called into doubt an underlying component relied upon by Plaintiffs in proclaiming Exhibit 16.2 as evidence of a differing intent from the unambiguous language of the 1994 Development Agreement and Beachfront Deed – the accuracy of the boundaries by reference to Parcel No. 13.

Although Parcel No. 13 may be generally identified by reference to other platted properties of record, this falls short of compensating for the absence of an official plat or survey for the entirety of Parcel No. 13 itself or correcting the inherent evidentiary imperfections and unreliability of the parcel's property boundaries that result. The Court properly determined that the accuracy of the property boundaries of the Beachfront Strip by reference to Parcel No. 13 is not sufficiently reliable because Parcel No. 13 "does not exist as a platted property of record on Kiawah Island, but rather it was created by KRA's land use planner for development purposes[.]" Final Order, p. 14. Moreover, there is absolutely no reference to Parcel No. 13 in relation to the conveyance of the Beachfront Strip in Section 16(b) of the 1994 Development Agreement, the Agreement for Conveyance, the Beachfront Deed or even Exhibit 16.2. The only evidence that

such a correlation exists between the property boundaries of the Beachfront Strip and Parcel No. 13 came from the testimony of KRA witnesses at trial.

Plaintiffs cannot ignore or correct the deficiencies that exist within Exhibit 16.2 with after-the-fact, self-serving testimony. It is the Court's role and responsibility to weigh the evidence and the Plaintiffs' disagreement and persistent claim that Exhibit 16.2 is "the single most relevant and probative piece of evidence" and that it should govern and determine the parties' intent is not only easily refuted by the bulk of the evidence presented, but is also irrelevant. See Motion, p. 6. The Court properly treated Exhibit 16.2 for exactly what it is — an exhibit to the 1994 Development Agreement containing a general illustration of the property that KRA was obligated to convey to KICA under Sections 16(b) and (g). The Plaintiffs' extraordinary accusation that the Court's findings with regard to Exhibit 16.2 somehow improperly created a new contract between the parties grossly exaggerates the significance that Exhibit 16.2 bears on this case and the Court's determination of the parties' intent with regard to the conveyance of the Beachfront Strip. Id.

Plaintiffs try but simply cannot rest their case on Exhibit 16.2. Plaintiffs were unable to overcome the plain text of the 1994 Development Agreement and Beachfront Deed, which unambiguously included the 4.62 acres in the conveyance of the Beachfront Strip to KICA. Ultimately, as this Court correctly concluded, Plaintiffs failed to meet their burden in proving the existence of a mutual mistake by clear and convincing evidence.

III. The Court Properly Found that KRA was a Third-Party Beneficiary to the 1994 Development Agreement

The Plaintiffs' arguments regarding KICA as a third-party beneficiary to the 1994 Development Agreement are fundamentally unsound. See Motion, p. 10. By virtue of being a third-party beneficiary to an agreement, the intent of that party is irrelevant. As cited by Plaintiffs, "a third party beneficiary is a party that *the contracting parties intend* to directly benefit." Helms

Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 341, 611 S.E.2d 485, 488 (2005) (emphasis added).

The Town and KRA were the contracting parties to the 1994 Development Agreement and clearly intended, in part, to directly benefit KICA through the conveyance of certain properties as Common Property. The Court properly concluded that KICA was a third-party beneficiary to the 1994 Development Agreement because KICA had no direct involvement in the negotiation, drafting or execution of the 1994 Development Agreement other than execution of Exhibit 16.7, the Agreement for Conveyance, which formally obligated KRA to convey, and KICA to receive, the parcels described in the body of the 1994 Development Agreement, including the Beachfront Strip and Captain Sams Spit. Final Order, pp. 4 – 5.

The Court's finding was also based on the absence of any evidence that the KICA Board reviewed, deliberated or took any action on the content contained in the Agreement for Conveyance prior to its execution. Final Order, p. 5. Moreover, in finding that KICA was a third-party beneficiary, the Court appropriately took into consideration the provision in the KICA Covenants stating that KRA has the sole right and discretion to convey property to KICA without any mechanism by which KICA can refuse to accept such property. Final Order, 7. Accordingly, Plaintiffs are incorrect in arguing that KICA "intended to be benefitted" in any particular way under the 1994 Development Agreement due to the fact that KICA was a third-party beneficiary to that agreement.

In an abrupt shift in argument, Plaintiffs again try to draw blood from a stone by fixating upon Exhibit 16.2 when that document is not only unreliable and unconvincing, but also does not prove what Plaintiffs claim it to prove. See Motion, pp. 10 – 11. Plaintiffs stretch to the extreme the text describing and the illustration depicting the Beachfront Strip in Section 16(b) and Exhibit 16.2 to the 1994 Development Agreement. The argument awkwardly claims that Exhibit 16.2

shows that the parties did not intend the 4.62 acres to be conveyed with the Beachfront Strip because the depicted shape of the Beachfront Strip in that document comports with the definition of the word “strip” to mean something long and narrow. Motion, pp. 10 – 11. However, the evidence clearly supports an understanding that Section 16(b) and Exhibit 16.2 to the 1994 Development Agreement were intended to be *general* in describing and illustrating the conveyance of the Beachfront Strip and that the Agreement for Conveyance and draft quit claim deed, which is identical to the Beachfront Deed, were intended to be *specific* in providing the legal description of the Beachfront Strip to be actually conveyed. Plaintiffs ignore the clear, specific and unambiguous language governing these documents. This Court properly found KICA to be a third-party beneficiary and properly weighed the evidence with regard to Section 16(b), Exhibit 16.2, the Agreement for Conveyance and the Beachfront Deed.

IV. The Court Applied the Proper Legal Standard to the Evidence Presented at Trial

This Court’s reliance on Penza v. Pendleton Station, LLC, 404 S.C. 198, 743 S.E.2d 850 (Ct. App. 2013) as controlling authority in deciding whether to grant reformation in this case was proper. The Plaintiffs’ attempt to distinguish Penza as a foreclosure action rather than an action for reformation is futile — both require an initial determination by the Court as to whether an ambiguity exists in the language of the written instrument in order to ascertain the parties’ intent. See Motion, p. 11. Plaintiffs bear the burden of proof by clear and convincing evidence in seeking reformation and are not automatically entitled to the Court’s consideration of extrinsic evidence unless and until the Court determines an ambiguity exists. Here, this Court properly concluded that the Beachfront Deed was unambiguous and that the Plaintiffs’ claim for reformation failed under the Penza test accordingly. Final Order, p. 19.

This Court's consideration of the consistency between the legal description in the Agreement for Conveyance and Beachfront Deed was also properly placed under the applicable legal standard. The law is clear that before granting the high remedy of reformation, the Court must "proceed with the utmost caution," Gowdy v. Kelley, 185 S.C. 415, 194 S.E. 156 (1937), and must be convinced "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); see Final Order, pp. 20 – 21. Accordingly, the burden is set high and rests solely with the Plaintiffs.

The Plaintiffs' arguments suffer from confusion of their initial burden of proving the existence of an ambiguity in the language of the deed with their subsequent burden of proving the existence of a mutual mistake that conflicts with the plain language of an unambiguous deed. Plaintiffs failed to follow through in meeting their burden and, instead, now attempt to rely upon a counterintuitive theory that the identical language used to describe the Beachfront Strip in both the Agreement for Conveyance and Beachfront Deed somehow evidences a mistake in that conveyance. See Motion, p. 12.

The existence of an antecedent agreement stating something other than what is contained in an unambiguous deed cannot be assumed, but rather must be *affirmatively proved* by the party claiming a mistake. Gowdy v. Kelley, 185 S.C. 415, 194 S.E. 156 (1937). Plaintiffs failed to provide evidence of an antecedent agreement between KRA and KICA showing that both parties intended the conveyance of the Beachfront Strip to be something different than what was described in plain and unambiguous terms in the Beachfront Deed. The testimony by KRA's paralegal claiming that she made a mistake in drafting the legal description of the Beachfront Strip is not

sufficient to meet this burden. Moreover, the testimony by KRA's paralegal is not enough to outweigh the evidence to the contrary that she drafted the description according to the instruction of her KRA superiors and by reference to both Section 16(b) of the 1994 Development Agreement and the existing plats of record on Kiawah Island.

This Court properly considered the only relevant documents bearing on any intent of both KRA and KICA with regard to the conveyance of the Beachfront Strip: the Agreement for Conveyance and the Beachfront Deed. Final Order, p. 21. The consistency between the unambiguous language in both documents supports the *lack* of any mutual mistake. Therefore, the Court correctly concluded that the Plaintiffs failed to prove existence of an antecedent agreement between KRA and KICA showing a mutual mistake.

Further, the Court treated the testimony provided by the KRA witnesses, who also testified to having served as KICA board members, appropriately. Again, Plaintiffs may not meet their burden of proving mutual mistake by merely relying on after-the-fact testimony by witnesses claiming the ability to speak to the intent of either of their dual capacities as KRA partners and developer-appointed KICA board members during the 1994 time period. This Court astutely observed that "the evidence KRA offered in support of the alleged mistake of the Beachfront Strip is based on discussions or agreements, *which KICA was not privy to*, and which is *contrary to the clear language* in the Agreement for Conveyance." Final Order, p. 15 (emphasis added).

The Court properly weighed the KRA witnesses' testimony allegedly speaking on behalf of KICA's intent against the fact that none of those witnesses could substantiate their claims with evidence of any actual discussions or involvement by KICA during the 1994 Development Agreement process. Moreover, the Court properly weighed the KRA witnesses' testimony against the clear and unambiguous Agreement for Conveyance – the only document related to the

Beachfront Strip that was formally executed by KICA. Based on its determinations, this Court correctly concluded that the Agreement for Conveyance was the best evidence of KICA's intent and that Plaintiffs' claim for reformation failed for lack of proof of mutual mistake.

V. The Court Properly Granted Intervention and Appropriately Considered the Evidence Presented by the Intervenor at Trial

As fully set forth in Intervenor's Response in opposition to the Plaintiff's prior motion for relief pursuant to SCRCP Rule 60(b), as well as the hearing on that motion before this Court, intervention was properly granted in this case and neither of the Intervenor should be dismissed. The statutory law governing dissolution, as well as KPOG's specifically adopted plan for dissolution, both allow for KPOG's continued participation in this case as it continues the "winding up" of its affairs and obligations. South Carolina Code Section 33-31-1406 explicitly provides that **dissolution does not** "prevent commencement of a proceeding by or against" the organization or *"abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution[.]"* S.C. Code Ann. § 33-31-1406(b)(4)-(5) (emphasis added). The Plan of Dissolution and Complete Liquidation of Kiawah Property Owners Group, Inc. ("KPOG's Plan of Dissolution") expressly sets forth that:

On and after the Effective Date, *KPOG shall be continued* as a body corporate solely *for the purposes of prosecuting and defending suits, actions, proceedings, and claims of any kind or character by or against it*, and of enabling it gradually to settle and close its business, to collect and discharge obligations, to dispose of and convey its property, and to distribute its assets.

Dissolution is a gradual and potentially lengthy process and KPOG has only initiated this process; it is not completely dissolved. See Affidavit of Marilyn Green Larach, attached as Exhibit 1. The KPOG Board was aware of this case when it adopted KPOG's Plan of Dissolution and has not taken any steps to withdraw KPOG from remaining as a party. Id. Rather, in accordance with Section 33-31-1406, KPOG's Plan of Dissolution entitles KPOG to continue its existence in order

to wind up its affairs and obligations, which includes continuing its participation as a party in this case. Until KPOG has been completely dissolved, it retains its standing and ability to participate in this case.

Additionally, witnesses for both KPOG and Inlet Cove sufficiently established standing in this action and presented relevant evidence to this Court regarding intent of the conveyance of the Beachfront Strip and the inclusion of the 4.62 acres. The Final Order should not be amended to dismiss the Intervenor or to grant Plaintiffs reformation.

In addition, the Court properly considered the evidence presented by Intervenor regarding the location of the DHEC/OCRM jurisdictional lines during the 1994 Development Agreement. The Plaintiffs' overly broad statements regarding "all parties" being in agreement with regard to the intended conveyance of the Beachfront Strip are completely inaccurate. Motion, p. 17. Plaintiffs miss the point by disputing the relevancy of the Intervenor's evidence. See Motion, p. 16. It is not necessary in order to be relevant or probative that the 1994 Development Agreement or Beachfront Deed explicitly reference the baseline or setback lines. The existence and location of these beachfront jurisdictional lines are indisputable facts that derive from the Beachfront Management Act.

The Beachfront Management Act and the location of DHEC/OCRM's jurisdictional lines may not have overtly dictated the intent of the parties to the 1994 Development Agreement and Beachfront Deed; however, as this Court accurately found, this evidence places the negotiations, drafting and execution of the 1994 Development Agreement and Beachfront Deed into context during the relevant time period. This evidence further helped shed light on which properties the parties to those documents could have and did in fact intend to be developed for residential and

commercial purposes or to be conveyed as Common Property, such as the Beachfront Strip and Captain Sams Spit.

VI. The Court Properly Considered Evidence Subsequent to the 1994 Development Agreement and the Final Order Does Not Contain Inconsistent Findings

Plaintiffs improperly accuse this Court of having “summarily disregarded” the “substantial evidence” that they presented related to events and circumstances arising after the execution of the 1994 Development Agreement and conveyance of the Beachfront Strip. See Motion, p. 14. The Plaintiffs’ dissatisfaction or disagreement with the weight assigned by the Court to their after-the-fact evidence is immaterial. Simply put, Plaintiffs failed to satisfy their burden in this case. Moreover, the Court’s Final Order actually does address specific events occurring subsequent to the 1994 Development Agreement. See Final Order, pp. 7 – 8, 10 – 11, 17.

Plaintiffs misconstrue the Court’s treatment of the Fifth Amendment to the 2005 Development Agreement. See Motion, pp. 8 – 9. This Court gave the proper weight and consideration to evidence of intent that arose after 1994, including the Fifth Amendment. Plaintiffs narrowly maintain focus on a few select words and phrases in the introductory paragraphs of the Fifth Amendment while failing to reconcile either the context surrounding the execution of the document—where the Town expressly removed itself from the question of intent regarding the conveyance of the Beachfront Strip and inclusion of the 4.62 acres—or the controlling language finally agreed upon—which only references KRA’s intent and is silent on the intent of the Town. Final Order, pp. 7 – 8, 17.

It is the Plaintiffs, not this Court, who attempt to force an interpretation of the Fifth Amendment that conflicts with the document’s plain terms. See Motion, p. 9. It is purely not true that the Fifth Amendment memorialized a shared belief of intent between both the Town and KRA with regard to the conveyance of the Beachfront Strip. There was evidence presented

demonstrating that the Town was unwilling to enter into the Fifth Amendment without first amending its language to clarify that the Town acknowledged KRA's belief that there was a mistake in the conveyance of the Beachfront Strip but that the Town did not share in that belief. This Court properly took into consideration the evidence of the events leading up to the execution of the Fifth Amendment as well as the document's plain language in making a determination on the intent of the parties with regard to the conveyance of the Beachfront Strip as required under the 1994 Development Agreement.

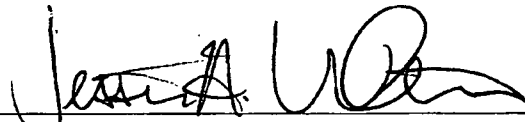
In addition, the Final Order does not incorrectly treat certain evidence as having been admitted; contain inconsistent evidentiary findings regarding the Agreement for Conveyance, or otherwise; or improperly lump Captain Sams Spit and the 4.62 acres together. See Motion, pp. 17, 18, 19. As previously stated, the Court properly concluded that the Agreement for Conveyance was the only formal document executed by—or officially acted upon by—KICA with regard to the conveyance of the Beachfront Strip and, as a result, represents the best evidence of KICA's intent. The Plaintiff's disagreement with this finding is irrelevant. Also as previously explained, the Court properly addressed the conveyance of Captain Sams Spit pursuant to Section 16(g) of the 1994 Development Agreement individually, as well as in relation to the conveyance of the Beachfront Strip as referenced under Section 16 and in Exhibit 16.2.

Ultimately, the Court appropriately considered and weighed all of the evidence and testimony presented at trial and made proper findings of fact and law accordingly.

CONCLUSION

For the reasons set forth above, the Plaintiffs' Motion to Alter or Amend the Final Order pursuant to SCRCF Rule 59(e) should be denied.

Respectfully submitted,



Amy E. Armstrong

Michael Corley

Jessie A. White

SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

Mailing address: Post Office Box 1380
Pawleys Island, SC 29585

Office address: 430 Highmarket Street
Georgetown, SC 29440

Telephone: (843) 527-0078

FAX: (843) 527-0540

Attorneys for Intervenors

Georgetown, South Carolina
July 11, 2014

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Kiawah Resort Associates, L.P., a Delaware
Limited Partnership,

Plaintiff,

vs.

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

Defendant,

vs.

Inlet Cove Club Homeowners Association, Inc., a
South Carolina Not-for-Profit Corporation, and
Kiawah Island Property Owners Group, Inc., a
South Carolina Nonprofit Corporation,

Intervenors.

BEFORE THE MASTER-IN-EQUITY

MIKELL R. SCARBOROUGH

C/A No. 2013-CP-10-01225

CERTIFICATE OF SERVICE

BY

JULIE J. ARMSTRONG
CLERK OF COURT

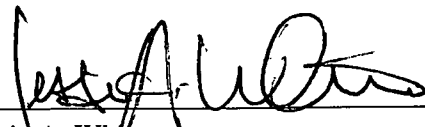
2014 JUL 14 PM 3:27

FILED

I hereby certify that on this date I served copies of the Inlet Cove Homeowners Association and Kiawah Property Owners' Group's Response to Plaintiffs' Motion to Alter or Amend the Final Order on counsel for all parties by placing copies of same in the United States Mail, first-class postage prepaid, addressed to:

Ellis Lesemann, Esq.
497 Bramson Court, Suite 201
Mt. Pleasant, SC 29464

Allison C. Jett
One Alliance Center
3500 Lennox Road, 4th Floor
Atlanta, GA 30326



Jessie A. White

July 11, 2014
Georgetown, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Kiawah Resort Associates, L.P., a Delaware
Limited Partnership, and KDP II, LLC, a South
Carolina Limited Liability Company,

Plaintiffs,

vs.

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

Defendant,

and

Inlet Cove Club Homeowners Association, Inc., a
South Carolina Not-for-Profit Corporation, and
Kiawah Island Property Owners Group, Inc., a
South Carolina Nonprofit Corporation

Third-Party Intervenor.

BEFORE THE MASTER-IN-EQUITY

MITCHELL R. SCARBOROUGH

C/A No. 2013-CP-10-01225

**AFFIDAVIT OF MARILYN GREEN
LARACH**

PERSONALLY APPEARED before me Marilyn Green Larach who being duly sworn

deposes and says:

I am a citizen and resident of Kiawah Island, South Carolina. My permanent residence is located on Kiawah Island with a postal address of 1082 Terrapin Court, Johns Island, SC 29455.

I am a member of the Kiawah Island Community Association ("KICA").

I have been a member in good standing of Kiawah Property Owners Group, Inc. ("KPOG") for more than two decades. I became the President of KPOG on March 1, 2013 and retain this position to date.

On December 16, 2013, the KPOG Board of Directors (the "Board") adopted a Plan of Dissolution and Complete Liquidation of Kiawah Property Owners Group, Inc. (the "Plan of

Exhibit 1

Dissolution") a copy of which is attached as Exhibit A. The Plan of Dissolution did not become effective until KPOG's members formally approved it at the KPOG Annual Meeting on February 22, 2014 (the "Effective Date").

Under the Plan of Dissolution, the existence of KPOG is allowed to continue after the Effective Date in order for KPOG to complete the process of winding up its business and affairs. Article 10 of the Plan states:

On and after the Effective Date, KPOG shall be continued as a body corporate solely for the purposes of prosecuting and defending suits, actions, proceedings, and claims of any kind or character by or against it, and of enabling it gradually to settle and close its business, to collect and discharge obligations, to dispose of and convey its property, and to distribute its assets.

KPOG's corporate dissolution is an on-going process. Although that process has been initiated, KPOG has not completely dissolved. KPOG's legal counsel for the dissolution process advised the Board that it could take at least two years from the Effective Date, and possibly longer, before KPOG would be finished winding up its business and affairs and become completely dissolved.

The Board had not even considered the Plan of Dissolution when KPOG sought intervention in this case; when it was granted intervention in this case; or when it participated in the trial of this case. KPOG has still not completely dissolved as a corporate entity and currently remains in the process of winding up its business and affairs.

The Plan of Dissolution adopted by the Board allows for KPOG's continued participation as a party in this case. The Board has not voted or taken any action towards withdrawing KPOG from participating in this case.

SWORN TO before me this

11 day of July, 2014.

Amelia T. Williams (SEAL)
Notary Public for South Carolina

My Commission Expires: 8/13/2022

Marilyn Green Larach
Marilyn Green Larach



Exhibit A

PLAN OF DISSOLUTION AND COMPLETE LIQUIDATION OF KIAWAH PROPERTY OWNERS GROUP, INC.

This **PLAN OF COMPLETE LIQUIDATION** (the "Plan") of KIAWAH PROPERTY OWNERS GROUP, INC. ("KPOG") was adopted by the Board of Directors of KPOG (the "Board") on the 16th day of December, 2013. The Board has determined that it is desirable and for the benefit of both KPOG and the members thereof that KPOG be completely liquidated in accordance with § 331 of the Internal Revenue Code of 1986. As soon after the liquidation of KPOG as is practicable, KPOG shall be dissolved in accordance with the South Carolina Nonprofit Corporation Act and the provisions of this Plan.

1. Effective Date. This Plan shall be effective on the date on which it is approved by the members of KPOG (the "Effective Date").

2. Adoption of Plan. This Plan shall be submitted to the members of KPOG for approval and adoption at the Annual Meeting of the Membership of KPOG. The Plan shall be deemed adopted and shall become effective upon its approval at the Annual Meeting of the Membership by the affirmative vote of at least a two-thirds (2/3) of the membership.

3. Effect of Adoption of Plan. From and after the Effective Date, KPOG shall cease all of its business activities except as are necessary for the sale of any of its assets as provided for by this Plan and the winding up of KPOG's business and affairs.

4. Payment of Liabilities. Prior to any final distribution of its assets, KPOG shall pay and discharge or make adequate provision for the payment and discharge of all of its debts, expenses, taxes and other liabilities.

5. Distributions of remaining assets. Subject to the foregoing, all of KPOG's residual assets shall be distributed to Kiawah Island Natural Habitat Conservancy, Inc., which qualifies as an exempt organization pursuant to § 501(c)(3) of the Internal Revenue Code of 1954, as amended.

6. Intent to Completely Liquidate. This Plan is intended to accomplish the complete liquidation and dissolution of KPOG in accordance with § 331 of the Internal Revenue Code of 1986, as amended, and the regulations thereunder.

7. IRS Filings. Within thirty (30) days after the date of the meeting at which the members approve this Plan, KPOG shall file Form 966 with the appropriate Internal Revenue Service Center, together with a certified copy of the resolutions adopting this Plan. In addition, KPOG shall timely file its final tax return(s).

8. Amendment or Termination of the Plan. Notwithstanding approval of or consent to this Plan and the transactions contemplated hereby by the members, the Board of Directors may

modify, amend, or abandon this Plan and the transactions contemplated hereby without further action by the members.

9. Authority of Officers and Directors. The Board is hereby authorized, without further action by the members, to do and perform, or cause KPOG's Officers to do and perform, any and all acts, and to make, execute, deliver or adopt any and all agreements, resolutions, conveyances, certificates and other documents of every kind which are deemed necessary, appropriate or desirable, in the absolute discretion of the Board, to implement this Plan and the transactions contemplated hereby, including, without limiting the foregoing, all filings or acts required by any state or federal law or regulation to wind up KPOG's business affairs.

10. Continuation of Corporate Status After Dissolution Date for Certain Purposes. On and after the Effective Date, KPOG shall be continued as a body corporate solely for the purposes of prosecuting and defending suits, actions, proceedings, and claims of any kind or character by or against it, and of enabling it gradually to settle and close its business, to collect and discharge obligations, to dispose of and convey its property, and to distribute its assets.

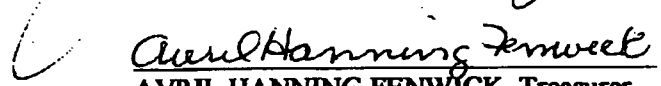
[INTENTIONALLY LEFT BLANK]
[SIGNATURES ON NEXT PAGE]

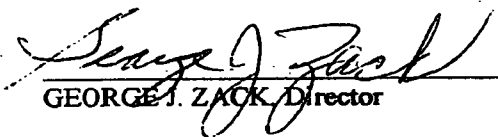
ADOPTED: December 16, 2013


MARILYN GREEN LARACH, President

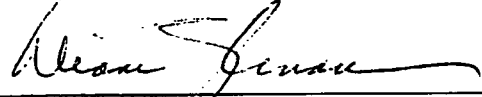

MADELEINE J. KAYE, Vice President


JANICE PORTER ROGERS, Secretary


AVRIL HANNING FENWICK, Treasurer


GEORGE J. ZACK, Director


STEVE ANTHONY LAPP, Director


DIANE Z. LEHTER, Past-President
(ex-officio)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

Plaintiffs,

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

Intervenors,

vs.

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

Defendant.

BEFORE THE MASTER-IN-EQUITY

MIKELL R. SCARBOROUGH

Case No. 2013-CP-10-01225

**DEFENDANT KIAWAH ISLAND
COMMUNITY ASSOCIATION, INC.'S
RESPONSE TO PLAINTIFFS' MOTION
TO ALTER OR AMEND FINAL ORDER**

FILED
AUG - 4 PM 3:44
JULIE J. ARMSTRONG
CLERK OF COURT



COMES NOW Defendant Kiawah Island Community Association, Inc. ("KICA"

hereinafter) and makes this, its response to Plaintiffs Kiawah Resort Associates, L.P. and Kiawah Development Partners II, Inc.'s Motion to Alter or Amend Final Order.

This Honorable Court, after conducting a bench trial and hearing evidence and argument from the parties, issued its twenty-six page Final Order on June 4, 2014, wherein the Court denied Plaintiffs' claims for reformation and specific performance, and declared the 4.62-acre tract which is the subject of this litigation ("the Property") is owned by Defendant KICA and is subject to the KICA Declaration of Covenants and Restrictions which require that any conveyance of Common Property by KICA be approved by a three-fourth's vote of the KICA membership. Plaintiffs' Motion sets out sixteen separate grounds for altering or amending this Court's Final Order. KICA asserts that Plaintiffs' various grounds for amending or altering the

Final Order are without merit or otherwise would not impact the final ruling in this case. For ease of reference, KICA responds to the various grounds for alteration or amendment argued by Plaintiffs in the order they were raised in Plaintiffs' Motion as follows:

I. 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.

Plaintiffs' first enumerated ground for alteration of the Final Order pertains to the Court's finding that a majority of the Property is developable, and their second ground related to the Court's finding that the Property is part of the land known as Captain Sam's Spit. However, KICA maintains that both the arguments on whether the Property is developable and whether the Property is part of Captain Sam's Spit are red herrings that distract from the central and controlling test of whether Plaintiffs satisfied their burden to achieve reformation. Whether the Property is or is not developable and whether the Property is or is not part of Captain Sam's Spit does not impact the Court's ultimate conclusion that Plaintiffs did not meet their burden on their claim for reformation of the Beachfront Deed.

To reform a deed, "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). “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. This is a challenging standard to meet.

In the instant case, the following facts are undisputed:

- that KICA had no representative present in the negotiation, drafting, or execution of the Development Agreement between Plaintiff KRA and non-party the Town of Kiawah Island;
- that the only document signed by any representative of KICA is the Agreement for Conveyance, signed by the then-President Townsend Clarkson, who was also a member of the KRA partnership at the time;
- that the Agreement for Conveyance unambiguously states that the 4.62 acres be conveyed by KRA to KICA by virtue of the Beachfront Deed, which also unambiguously describes the 4.62 acres in the described premises;
- that the Agreement for Conveyance and Beachfront Deed were incorporated into the 1994 Development Agreement executed by KRA and the Town of Kiawah Island;

- that KICA's Declaration obligates KICA to accept whatever property is conveyed to it by Plaintiffs and offers KICA no ability reject any conveyance.

In order to achieve reformation, Plaintiffs were required to present clear and convincing evidence that KICA had an affirmative intent to have the 4.62 acres excluded from the Beachfront Deed. The Court found that Plaintiffs did not present sufficient evidence to reach this high standard. No evidence present in the record of this case leads to even an inference that if the Property was considered developable or if the Property was considered to be part of Captain Sam's Spit that KICA would have affirmatively intended to not receive the Property through the Beachfront Deed.

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

In their third, fourth and fifth grounds for alteration of the Final Order, Plaintiffs claim that the 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 correctly determined that Exhibit 16.2 is not determinative of the reformation issue. Again, as demonstrated 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 incorporated in or otherwise 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 assisting Plaintiffs' case in being 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. Therefore, as with the two prior argued grounds for altering the Final Order, this argument about the weight attributed to Exhibit 16.2 is a distraction and does nothing to change the Court's denial of Plaintiffs' reformation claim.

III. KICA's Role as a Third-Party Beneficiary does not Change the Analysis of Plaintiffs' Reformation Claim.

In their sixth ground for amendment of the Final Order, Plaintiffs state that KICA was not a party to the 1994 Development Agreement, but was rather a third-party beneficiary of that Agreement. KICA does not dispute that characterization. Plaintiffs' claim that "the manner in which the parties [KRA and the Town of Kiawah Island] intended to benefit KICA cannot be bifurcated from the manner in which KICA intended to be benefited." *See, Plaintiffs' motion, page 10*. Essentially, Plaintiffs are advocating that this Court 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 the intent of the parties to the instrument the claimant is seeking to reform. Plaintiffs are encouraging the Court to substitute the Town of Kiawah's intent for KICA's intent which is in direct contravention to the controlling law. Plaintiffs cite to no case

law which supports a conclusion that in a third-party beneficiary reformation action that the third-party beneficiary grantee's intent is somehow irrelevant.

Furthermore, this argument ignores the existence of the Agreement for Conveyance which is signed by KICA's then-President wherein KICA agreed to accept the land described in the Beachfront Strip, including the Property. The Agreement for Conveyance is the only manifestation of KICA's intent that exists in the record of this case. The Court cannot, and correctly did not, disregard this fact.

IV. The Holding in Penza v. Pendleton Station, LLC, 404 S.C. 198, 743 S.E.2d 850 (2013) is Dispositive of this Matter.

Plaintiffs claim that the Court erred by following the Court of Appeals' holding in the Penza decision in their seventh enumerated ground for amendment. Penza requires that prior to undertaking a reformation analysis, the Court must first determine as a matter of law whether the deed is ambiguous. If a deed is ambiguous, the reformation action is treated as a matter of equity thereby allowing the Court to look at extrinsic evidence to determine the parties' intent. If a deed is unambiguous, however, the reformation claim is handled as an issue of law and thus limits the Court's examination of intent to the terms of the deed itself.

This Court held that 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 made no reference to either of the Agreements and did not otherwise seek to incorporate their terms. 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 presented at trial called into question what property the Beachfront Deed conveys and therefore unambiguously shows that KRA conveyed the Property to KICA as Common Property. No evidence within the Beachfront Deed itself infers a contrary intent. As such, the Court denied KRA's claim for reformation, finding that it failed the Penza test.

However, Plaintiffs overlook that while the Court could have concluded its analysis at this stage and thereby exclude any examination of any parol evidence, the Court went on to analyze the case as if the facts did not pass the Penza test. On the contrary, the Court undertook a thorough analysis which did take into consideration all extrinsic evidence presented by the parties and still came to the conclusion that Plaintiffs did not meet their evidentiary burden to prove mutual mistake for the purposes of reformation. As such, even if the Court were to remove any reference to the Penza decision, it would still not change the Court's analysis of the extrinsic evidence or otherwise affect its denial of Plaintiffs' claim for reformation.

V. The Court Properly Considered All Evidence Presented.

Plaintiffs' eighth through thirteenth grounds for altering or amending the Final Order all assert that the Court erred in its consideration – or alleged lack of consideration – of certain pieces of evidence presented by the parties. Specifically, Plaintiffs claim that the Court did not give sufficient weight or consideration to:

- the testimony of Beth Nimmons, paralegal for Plaintiffs' legal counsel, regarding her drafting of the legal descriptions used in the Beachfront Deed and Agreement for Conveyance (ground eight);

- the testimony of certain KRA partners who were also on the KICA Board of Directors in 1994 as to their understanding of what land was to be included in the Beachfront Deed (ground nine); and
- testimony as to what acts KICA has or has not undertaken with respect to maintenance or possession of the Property after the conveyance (ground ten).

Furthermore, Plaintiffs claim that the Court

- improperly used the placement of the 1991 Baseline and/or Setback Line as an indicator of intent (ground 11). This argument appears to be a way to rephrase the first ground argued by Plaintiffs as it relates to the Court's determination of whether the Property was developable – to the extent that the 1991 lines dictated what could or could not be built on the Property and whether a parties' intent could be derived from the Property's ability to be developed. *See, Section I, supra.*
- mentioned in the Final Order a document tendered by Plaintiffs which was not admitted into evidence because the document consisted of statements made by a Chairperson of KICA many years after the conveyance of the Property who could have had no personal knowledge of the events surrounding the 1994 Development Agreement, the Agreement for Conveyance or Beachfront Deed (ground 12). The Court correctly held that the relevant point of inquiry when determining intent for purposes of reformation is the time of the execution of the instrument in question.

In their thirteenth ground, Plaintiffs make the somewhat perplexing argument that the Court did not give weight to “conflicting factual findings” as to whether the Agreement for Conveyance was an official KICA Board action. At no point either at the trial or in any other stage of this litigation was there ever an allegation made by any party that Townsend Clarkson's

execution of the Agreement for Conveyance in his capacity as the President of KICA was somehow an *ultra vires* act. Certainly, KICA has not disavowed the Agreement for Conveyance. While no witnesses at the trial could recall whether there was an official KICA Board meeting to discuss the Agreement for Conveyance and Mr. Clarkson's execution thereof during the 1994 time period, some twenty years ago, 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 Plaintiffs as Common Property, regardless of the existence of the Agreement for Conveyance.

As to all seven of the grounds (eight through thirteen) addressed in this section, the Court, as fact finder in a bench trial, has broad discretion in its evaluation and consideration of the evidence presented at trial and such findings are held to an "any evidence" standard on appeal. There is no indication that the Court did anything but thoughtfully consider each piece of evidence presented by the parties. That the Court assigned less weight to certain pieces of testimony than Plaintiffs would desire is entirely within the Court's purview as fact finder. It is not grounds for amending the Final Order.

VI. The Categorization of the Property as Captain Sam's Spit does not Impact this Court's Reformation Analysis.

Defendant KICA has no objection to Plaintiffs' fourteenth request for alteration or amendment of the Final Order to the extent that the Final Order refers to the Property as Captain Sam's Spit. The Property is discretely and specifically defined in the Final Order's Exhibit "A". Therefore, whether the Property is or is not considered to be part of Captain Sam's Spit has no

bearing on the ultimate findings of this Court with respect to its denial of Plaintiffs' reformation claim.

VII. Intervenor Do Not Have Standing.

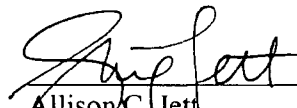
KICA also agrees with Plaintiffs that neither intervening entity has standing to argue on KICA's behalf, nor have they asserted any discrete claims that are separately derived from their membership in KICA. In fact, the Intervenor have not asserted any additional claims other than those asserted by KICA and merely serve as a redundant echo chamber for KICA's arguments. That being said, while KICA may agree with Plaintiffs on the issue of Intervenor's standing, as with most other grounds articulated by Plaintiffs in their Motion, whether the Court agrees to amend its Final Order in compliance with this request by Plaintiffs would in no way impact or alter the Court's ultimate rulings on the claims asserted in this case.

VIII. Partition Is Procedurally Improper.

Plaintiffs' final grounds for amendment or alteration of this Court's Final Order requests as an alternative claim for relief that the Court award Plaintiffs all portions of the Property which is landward of the 1991 Setback Line. Plaintiffs' motion, some sixteen months after the filing of the original Complaint and seven months after the trial of the case, is the first time Plaintiffs have articulated what amounts to a claim for partition of the Property. Such a claim is procedurally improper at this late stage and should be denied. Furthermore, no evidence was submitted in the trial of this case which would lead to the conclusion that KICA intended to receive some, but not all, of the 4.62 acres which is the subject of this litigation. Again, clear and convincing affirmative proof of KICA's intent to receive something other than what is described in the Agreement for Conveyance and Beachfront Deed is what is required to reform the Beachfront Deed. Plaintiffs are incapable of producing such evidence because that evidence does not exist.

WHEREFORE, for the foregoing reasons, Plaintiffs' Motion should be denied with the exception that the Final Order may be amended to remove any characterizations of the Property as being Captain Sam's Spit and declare that Intervenor has no standing. However, such amendments should not impact the Court's denial of Plaintiffs' reformation, declaratory judgment, and specific performance claims or its grant of KICA's declaratory judgment claim

Respectfully submitted this 1st day of August, 2014.



Allison C. Jett
South Carolina Bar No. 81754
Attorney for Defendant Kiawah Island
Community Association, Inc.

WEISSMAN, NOWACK, CURRY & WILCO, P.C.
One Alliance Center, 4th Floor
3500 Lenox Road
Atlanta, Georgia 30326
(404) 926-4500

14251.002;

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

Plaintiffs,

vs.

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

Defendant,

and

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

Intervenors.

BEFORE THE MASTER-IN-EQUITY

MIKELL R. SCARBOROUGH

Case No. 2013-CP-10-01225

CERTIFICATE OF SERVICE

FILED
2014 AUG -4 PM 3:44
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

The undersigned certifies that on this date Defendant's Response to Plaintiffs' Motion to Alter or Amend Final Order was served upon opposing counsel by depositing a copy of same in the United States Mail, postage prepaid, and properly addressed to the following parties:

Ellis R. Lesemann, Esq.
Lesemann & Barks, LLC
80 Alexander Street, 2nd Floor
Charleston, South Carolina 29401
erl@lb-lawfirm.com

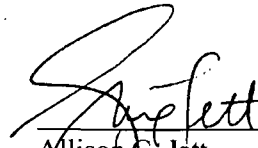
Courtesy Copy to:

The Honorable Mikell R. Scarborough
Master-in-Equity
100 Broad Street, Suite 266
Charleston, SC 29401-2243

Amy E. Armstrong, Esq.
Michael Corley, Esq.
Jessie A. White, Esq.
South Carolina Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585
amy@scelp.org

This 1st day of August 2014.

WEISSMAN, NOWACK, CURRY & WILCO, P.C.
One Alliance Center, 4th Floor
3500 Lenox Road
Atlanta, Georgia 30326
(404) 926-4500



Allison C. Jett
South Carolina Bar No. 81754
Attorney for Defendant Kiawah Island
Community Association, Inc.

100415797; 14251.002

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

BEFORE THE MASTER-IN-EQUITY

MIKELL R. SCARBOROUGH

KIAWAH RESORT ASSOCIATES, L.P., a)
Delaware Limited Partnership, and KDP II)
LLC, a South Carolina Limited Liability)
Company,)

Case No. 2013-CP-10-1225

Plaintiffs,)

**PLAINTIFFS' REPLY IN SUPPORT OF
MOTION TO ALTER OR AMEND
FINAL ORDER**

vs.)

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

Defendant,)

and)

INLET COVE HOMEOWNERS)
ASSOCIATION, INC., a South Carolina)
Not-for-Profit Corporation, and KIAWAH)
ISLAND PROPERTY OWNERS GROUP, a)
dissolved South Carolina Not-for-Profit)
Corporation,)

Third-Party Intervenors.)

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2014 AUG - 8 PM 3: 08

FILED

Viewing the entirety of the record, the basis for reformation of the 1995 Quitclaim Deed to exclude the Additional Land can be stated plainly – no party involved with the conveyance of the Beachfront Strip took the position at trial that it affirmatively intended for the Additional Land to be included and conveyed to KICA as part of the Beachfront Strip. Rather, each of the three parties involved in the conveyance has acknowledged through testimony, admission or conduct that the conveyance of the Additional Land was not intended.

This case has a peculiar set of facts, and applicable law recognizes that “each suit for reformation stands on its own peculiar facts.” *Progressive Max Ins. Co. v. Floating Caps, Inc.*,

405 S.C. 35, 51, 747 S.E.2d 178, 186 (2013). As a direct result of a property description that was cut and pasted into both the Agreement for Conveyance and the 1995 Quitclaim Deed by the same draftsman, KICA received an unintended windfall of 4.62 acres of valuable property owned by KRA that was unintended. KICA has not acted as if it owned the Additional Land or had any intention of owning it, even after the mistake was brought to KICA's attention. KICA does not maintain the Additional Land, does not pay taxes on the Additional Land, and has never otherwise undertaken any indicia of ownership or control of the Additional Land.

There is evidence that KICA admits a mistake occurred. Moreover, no party brought forward any witness to claim that KICA affirmatively intended to receive the Additional Land. The collective testimony of the competent witnesses is to the opposite effect. There is evidence that all three parties to the conveyance have referred to and considered Exhibit 16.2 as the controlling depiction and understanding of the intended Beachfront Strip. However, the property description, due to mistakes in drafting, did not implement the understanding and intention of the parties. This set of facts, although unique and peculiar, compels reformation, as it is the exact type of case when reformation should be allowed.

A. The Evidence is Clear and Convincing that Neither the Town, Nor KICA, nor KRA Intended for the Additional Land to be Conveyed to KICA in 1995 as Part of the Beachfront Strip.

The legal standard to be followed in a case seeking reformation is as follows: “[i]t 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, 262 S.E.2d 903, 905 (S.C.1980). Before equity will reform an instrument, however it must be shown by clear and convincing evidence not simply that there was a mistake on the part of one of the parties, but that there was a “mutual mistake.” *Timms v. Timms*, 290 S.C. 133, 137, 348

S.E.2d 386, 389 (Ct. App. 1986). Under South Carolina law, a mutual mistake occurs when “both parties intended a certain thing but because of a mistake in drafting did not get what they intended,” regardless of who “made” the mistake *Timms*, 290 S.C. at 137, 348 S.E.2d at 389, citing *Commercial Union Assurance Co. v. Castile*, 283 S.C. 1, 320 S.E.2d 488 (Ct.App.1984)

Plaintiffs brought this litigation because KICA, although it has acknowledged the mistake, received legal advice that it could not engage in additional voluntary reconveyances to Plaintiffs as it had done in prior instances without a vote of its membership. Plaintiffs did not include the Town of Kiawah Island as a defendant in this case because it was entirely unnecessary to do so. The Town has already affirmed that Exhibit 16.2 “clearly shows” the intended location of the Beachfront Strip and specifically that the Beachfront Strip was intended to stop at the eastern boundary of Parcel 13. The Town has also continued to treat the Additional Land as if it was still owned by Plaintiffs, and KICA and KRA have behaved in this same fashion as is evidenced by their respective conduct. To confirm the Town’s intent on the record at trial, Plaintiffs called the Town’s attorney, who testified that Exhibit 16.2 reflects the intended location of the Beachfront Strip and, furthermore, that the inclusion of the Additional Land as part of the Beachfront Strip was not intended.

Numerous officers and board members of KICA have acknowledged that the conveyance of the Additional Land was a mistake. The admissions by KICA’s 2012 Board Chairman were corroborated not only by Plaintiffs at trial, but also by “KICA’s witness.” An important item of evidence on this issue is the “Talking Points for KDP,” prepared by KICA’s 2012 Board Chairman. Although the Court indicated at trial that the Talking Points would not be admitted, they appear to be treated as admitted for purposes of the Final Order. The Talking Points,

prepared by KICA's Board Chair but reflecting deliberations among KICA's entire board, state in relevant part:

- "The legal description is not an error, it is a mistake."
- "[T]he board is satisfied that the transfer of the property to KICA was not intended by the original parties to the Agreement."¹
- "KICA does not desire to benefit from this unintended transfer of property."
- Should KDP, preferably with the support of the Town of Kiawah Island, pursue other lawful remedies ["judicial reformation of the Deed"], KICA would not be inclined to take action or overturn such remedy.

See Talking Points for KDP (emphasis added). If KICA believed that the mistaken property description were correct, and that it had intended the mistaken property description to read as it did, then these admissions would simply not exist. The KICA board was not under developer control at the time these admissions were made. These admissions, combined with the other evidence in the record, present a unique set of facts supporting reformation. After researching the legal principles underlying this case, Plaintiffs have yet to find a reformation case in which there is evidence that the defendant admits mistake, much less a case involving admission of mistake where the admission was not given evidentiary weight and reformation was refused.

KICA's concession of mistake should be given the utmost weight rather than no weight. Testimony relating to the concession was not introduced solely through "Plaintiffs' witnesses," several of whom served as officers and board members of KICA. Tammy McAdory, the witness KICA presented, corroborated the admission of mistake made by KICA's 2012 Board Chairman

¹ The Talking Points indicate that the review of the issue by the KICA Board and the stated conclusion that the transfer was a mistake that was unintended is "evidenced by both the original documents at the time of the 1994 agreement, and subsequent documents related to the 2005 agreements, tax records, and other material which reflects the perceived ownership of this property by KDP." The same evidence leading KICA to indicate that the transfer was a mistake is admitted in the record.

and reflected in the Talking Points. She also did not contest the testimony regarding KICA's intent provided by Clarkson, Long, McKinney, and Permar. A trial is an adversary process in which parties present conflicting positions. When the parties agree on a point as vital as the fact that a mistake has resulted in an unintended transfer of land, it is difficult to understand why reformation would be refused. The admission and the Talking Points are not the only evidence on these points. The Court was presented with testimony regarding KICA's intent from several other witnesses. The testimony of Clarkson, Long and McKinney appears to have been disregarded because the witnesses had dual capacities, which is error. *See, e.g., Kishter v. Seven Courts Community 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 witness who had legal capacity on behalf of both developer and property association). The dual capacity of these witnesses makes their testimony more probative, rather than less. The fact that KICA was under developer control in 1994 and 1995 should preclude a finding that KICA's intent could be different from that of the developer and the principals that were governing KICA.

It is also significant that the only board members and directors of KICA called to testify were those who were called by Plaintiffs. Neither KICA (nor the Intervenor) brought forward any KICA officers or board members to provide evidence of intent that was contrary to the consistent evidence Plaintiffs presented through multiple witnesses. The evidence of KICA's intent is ultimately not in conflict, but the Court did not give it weight, choosing instead to imply KICA's intent via the 1990 OCRM jurisdictional lines even though ample, consistent and direct evidence of KICA's intent exists in the record.

Plaintiffs assembled and presented evidence in this case that is clear and convincing. The Final Order states that Plaintiffs have fallen short of their burden, which is what has led Plaintiffs to ask the Court to alter or amend the Final Order. The evidence supporting reformation is clear and convincing:

<i>Document or Witness</i>	<i>Evidence Supporting Reformation</i>	<i>Whose Intent is Reflected?</i>
1994 Development Agreement, Section 16(b)	The sole description of the boundaries of the Beachfront Strip contained within the body of the Development Agreement is that the Beachfront Strip is " <u>as generally depicted on Exhibit 16.2.</u> " Exhibit 16.2 excludes the Additional Land from the Beachfront Strip.	The Town, KRA, and KICA, as the third party beneficiary
1994 Development Agreement, Exhibit 16.2	The Town and KRA initial and affirm Exhibit 16.2 as the depiction of the intended Beachfront Strip, a depiction which specifically excludes the Additional Land by both distinctive crosshatching and handwritten notation immediately adjacent to Mayor Melvin's initials.	Same as above.
Fifth Amendment to 2005 Development Agreement	"Exhibit 16.2 was a graphic illustration of the location of the Beachfront Strip that <u>established the western terminus of the Beachfront Strip as the eastern boundary and extended eastern boundary of Parcel 13</u> of the First Agreement, known as the Beachwalker Ocean Parcel (TMS No. 207-05-00-118) in the First Agreement." (emphasis added). "Property Owner and Town desire to confirm their intent under the [2005] Agreement as well as their intent and belief at the time that the [2005] Agreement was entered that the land comprising Parcels 12A and 12B as depicted on Exhibit 1.3 to the Agreement, including the Additional Land, was owned by the Property Owner and subject to the [2005] Agreement by virtue of such ownership." "This Fifth Amendment is intended to be a reaffirmation of what is <u>clearly shown on Exhibit 16.2</u> of the First Agreement and Exhibit 1.3 of the Agreement[.]" (emphasis added).²	The Town and KRA

² In light of the Town's own reaffirmation of Exhibit 16.2, the Court should amend its findings that Exhibit 16.2 is unclear or unreliable. When the evidence is such that both parties to the 1994 Development Agreement, the Town and KRA, agree that Exhibit 16.2 "clearly shows" that the eastern boundary of Parcel 13 is western boundary of the Beachfront Strip, the Court should not disregard the interpretation that is held by both parties to the document. Furthermore, there is no basis for an implication that Exhibit 16.2 was not representative of the Town's intent when the evidence shows that the Town entered the Fifth Amendment of the 2005 Development Agreement in order to create a specific "reaffirmation" of Exhibit 16.2. Furthermore, the Town's legal counsel, Dennis Rhoad, who was the only witness who testified at trial that had a capacity with the Town in 1994, testified that Exhibit 16.2 correctly

<i>Document or Witness</i>	<i>Evidence Supporting Reformation</i>	<i>Whose Intent is Reflected?</i>
"Town Council Workshop" Memorandum	"Fifth Amendment – simply clarified the intent of the Town and the Property Owner with regard to the conveyance of the "10 Mile Strip of Beachfront Property" to KICA did not intend to include [any] high land or developable land (this was an attempt by the Town to help KICA with its predicament that while the beachfront strip conveyance erroneously included some unintended high land or developable land, KICA has received some legal advice that requires lengthy and expensive litigation to correct the mistake)[.]"	The Town
Testimony of Legal Counsel for the Town (Dennis Rhoad)	Tr. at 158:22-159:5: Q. Does the document, which is Exhibit 16.2 to the development agreement, reflect the intent of the Town of Kiawah Island with regard to the terminating point of the beachfront strip? A. Based upon what I know and my opinion, the answer to that question is yes. Q. Okay. And does it stop at the eastern boundary of Parcel 13? A. Yes. Tr. at 163:8-13: Q. Final Question, Mr. Rhoad. The property bound in red [the Additional Land as shown on Pl. Exhibit 29], was it the Town's intent that it be provided as part of the Beachfront Strip under the 1994 Development Agreement? A. Based on what I have testified to earlier today, no, sir.	The Town
Testimony of former President and Board Member of KICA (Townsend Clarkson)	Tr. 391:4-7: Q. Did KICA intend to receive any properties that were not included within the beachfront strip as illustrated on Exhibit 16.2? A. No, its intention was not.	KICA
Admission by former Chairman of KICA, Craig	Tr. 411:1-11: Q. Mr. Clarkson, just elaborate on the conversation, and of	KICA

reflected the Town's intent. See Tr. at 132:17-21; Tr. at 158:22-159:5. When Exhibit 16.2 is given proper evidentiary weight, reformation on the basis of mutual mistake should be allowed.

<i>Document or Witness</i>	<i>Evidence Supporting Reformation</i>	<i>Whose Intent is Reflected?</i>
Weaver (Townsend Clarkson)	course the important point that we have been arguing about is what did Mr. Weaver [KICA's Chairman] say? A. Okay. Mr. Weaver specifically said that he recognized that this was a – that this property should not have been transferred; that it was a mistake[.]	
Testimony of 1994-95 Secretary and Board Member of KICA (Leonard Long)	Tr. at 236:9-14: Q. Right. And in your capacity as the secretary of KICA and a board member of KICA, was it your understanding that KICA's intent would be that the termination of the beachfront strip would be on this eastern boundary of parcel 13? A. Yes.	KICA
Testimony of 1994-95 KICA Board Member (Pat McKinney)	Tr. at 190:7-9: Q. Was it KRA's intent that this 4.62 acres be included as part of the beachfront strip? A. No.	KICA
Testimony of Tammy McAdory, employed with KICA from 1989 to the present	Tr. 446:6-14: Q. If Mr. Permar, based on his involvement in 1994 with regard to the development agreement, if he provided testimony regarding his belief, and understanding as to the intent of KICA, would you contest or would you challenge what Mr. Permar said? A. No. Q. Ms. McAdory, with regard to the testimony of the individuals who served on the board of directors of KICA [Clarkson, Long and McKinney], and were who officers of KICA [Clarkson and Long] in 1994 and 1995, 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.	KICA

<i>Document or Witness</i>	<i>Evidence Supporting Reformation</i>	<i>Whose Intent is Reflected?</i>
Testimony of Tammy McAdory (includes proffer relating to Plaintiff's Exhibit 17, which appears to be treated as admitted in the Final Order)	Tr. at 459:5-461:5: Q. Where you at the meeting where this was discussed? A. Yes. Q. Did Mr. Weaver [KICA's former Chairman] make a statement as to whether he believed that the transfer of the 4.62 acres was a mistake? A. He did. Q. Okay. What was his statement? A. That he believed that it was a mistake. Q. And did Mr. Weaver make a statement as to the result of deliberations by the prior [KICA] board? A. Yes. Q. And did he give a statement as to the prior board having examined the documents dating from 1994? A. Yes. Q. And did he make a statement that he believed that the prior board believed that the transfer of the 4.62 acres, based on their review of the documents, was a mistake? A. That was the prior board's consensus, yes. Q. And that KICA – that the board of KICA did not intend to benefit from the unintended transfer? A. Correct.	KICA
Testimony of Tammy McAdory	Tr. 466:21 - 467:10: Q. Ms. McAdory, were you able to find any documents in your review indicating that KICA had any intent that the beachfront strip would terminate at the southwestern corner of the Employee Facility Tract as opposed to the eastern boundary of Parcel 13? Did you find any such documents on behalf of KICA? A. No.	KICA

Document or Witness	Evidence Supporting Reformation	Whose Intent is Reflected?
	Q. And has KICA indicated through statements by its chairman and otherwise that it believes the transfer of that property was a mistake? A. The former chair has said that, yes. Q. And that KICA did not intend to benefit from that mistake? A. He said that also.	

The documents and testimony cited above constitute actual evidence of intent provided by documents created at the time of the mistaken conveyance, or involve the testimony of witnesses who were personally involved at the time of the mistaken conveyance on behalf of the Town, KRA, and/or KICA. There is no evidence to support a finding or conclusion that KICA's intent should be derived from the 1990 location of the OCRM jurisdictional lines. In fact, there is evidence to show that this was not the intent, as KICA officers and board members have testified or made admissions that the conveyance of the Additional Land was a mistake. Moreover, the boundaries of the Additional Land do not in any way conform to the location of the OCRM jurisdictional lines.

B. The Legal Analysis in the Final Order Should Be Amended.

The Court should not cite or use *Penza v. Pendleton Station, LLC*, 404 S.C. 198, 743 S.E.2d 850 (S.C. Ct. App. 2013) as legal authority relating to the law of reformation on the basis of mutual mistake. Within the four-sentence section of the *Penza* opinion entitled "Reformation of the Mortgage," the Court of Appeals specifically states that it declines to address the issue of reformation because it had already determined that the lower court's decision should be reversed on the basis that questions of fact precluded summary judgment:

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.** See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

See *Penza v. Pendleton Station, LLC*, 404 S.C. 198, 205, 743 S.E.2d 850, 853-54 (Ct. App. 2013) (emphasis added). In the Final Order, the Court cites to *Penza* as controlling authority on an issue that the *Penza* Court states that it declined to address. Again, *Penza* was a mortgage foreclosure action in which the only issue decided on appeal was that summary judgment was improperly granted. None of the parties in *Penza* even asserted a claim for reformation.

This issue is not academic. The Court cites to *Penza* as standing for a legal rule that reformation of a written instrument on the basis of mutual mistake can only be granted when the underlying instrument is ambiguous. This is not the law, but rather is the result of blurring the important distinction between the *construction* of a written instrument and *reformation* of a written instrument. The South Carolina Court of Appeals has articulated this distinction, which remains binding on the Court as *Penza* cannot be read to have changed the law in an area that the Court of Appeals specifically declined to address.

As cited in Plaintiffs' Proposed Order and in Plaintiffs' Motion to Alter or Amend, in the case of *Southern Realty and Const. Co., Inc. v. Bryan*, 290 S.C. 302, 350 S.E.2d 194 (Ct. App. 1986), the Court of Appeals provided a thorough explanation of the distinction between construction and reformation of a written instrument:

Southern also takes exception to the introduction into evidence of the contract of sale claiming the contract in fact contradicted the terms of the note in violation of the parol evidence rule and the rule of merger. There is no merit to this argument. Both the parol evidence rule and the doctrine of merger are rules governing **construction** of written documents. Here, Bryan and Brandon do not seek a construction of the note. Indeed, they concede that the note does not provide for a

minimum payment of \$12,500.00. Instead, they ask the court to **reform** the note to reflect their agreement with Southern to pay a minimum of \$12,500.00 per year on the note. The distinction between the **construction** of a written instrument and **reformation** of it is set forth in 66 Am.Jur.2d *Reformation of Instruments* Section 6 (1973):

When a court **construes** a written instrument, it is assumed that the instrument reflects the actual agreement of the parties, and the language calls for construction because it is uncertain or ambiguous. **On the other hand, 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.** A contract may be clear and unambiguous as far as it goes and yet may not express the agreement of the parties, by reason of mutual mistake.

Parol evidence is admissible to show mistake. *McGrath & Byrum v. Barnes*, 13 S.C. 328 (1879). **Besides, it would be virtually impossible to prove mutual mistake as a ground for reformation without parol evidence.** See *Commercial Union Assurance Company v. Castile*, 283 S.C. 1, 320 S.E.2d 488 (Ct.App.1984).

See *Southern Realty & Const. Co., Inc. v. Bryan*, 290 S.C. 302, 308-09, 350 S.E.2d 194, 197-98 (Ct. App. 1986) (emphasis added). The South Carolina Supreme Court reaffirmed this principle in *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 747 S.E.2d 178 (2013), when it stated that “[although the clear and unambiguous language of the contract is controlling in contract construction cases, our jurisprudence has recognized that different considerations apply where a party seeks reformation of a contract. In such circumstances, the rules of construction, such as the ban on extrinsic evidence, do not apply.” See *Progressive Max Ins.*, 405 S.C. at 49, 747 S.E.2d at 185.

In the Final Order, the Court used legal rules applicable only to the construction of instruments in a case relating to reformation of instruments, such as the Court’s conclusion of law that lack of ambiguity in the deed precludes reformation because the intent must be determined from the document itself. As set forth in *Southern Realty*, “ambiguity or uncertainty

has nothing to do with the reformation of a written instrument.” The Final Order should be amended to follow a deed reformation analysis rather than a deed construction analysis. KICA concedes in its response to Plaintiffs’ Motion to Alter or Amend that the legal standard applied by the Court in the Final Order is incorrect and acknowledges that the appropriate standard for a reformation action should be applied.

Although the Final Order does continue to provide an alternative analysis, and indicates that even if all parol evidence is considered the Court’s decision would be the same, the Court does not analyze all of the evidence in the record. Furthermore, by treating the mistaken property description (that no competent witness claims is correct) as the best evidence of KICA’s intent, the Court circles right back to a construction analysis, rather than a reformation analysis. There is ample, clear and convincing evidence that no one intended that the Additional Land be transferred to KICA, which goes back to the negotiations leading up to the 1994 Development Agreement and the stipulated graphical representation that exists in the form of Exhibit 16.2. There is no evidence, other than the mistaken property description itself, that anyone affirmatively intended for KICA to receive the Additional Land. In fact, KICA (through officers, board members and conduct) has admitted that this was a “mistake” and was “unintended.” In addition, the evidence relating to the conduct of the parties is compelling. KICA excludes the Additional Land from its common property maps and reflects it as being owned by KRA. To this day, KRA pays the taxes. The tax maps continue to show the Additional Land as being owned by KRA/KDP II. KICA has never undertaken any ownership, control, maintenance or investment in the Additional Land. The Town continues to consider, treat and show the Additional Land as being owned by Plaintiffs, and recognizes that Plaintiffs

have specific development entitlements in the Additional Land. These facts are direct and relevant, and they compel reformation.

C. The “Antecedent Agreement” Rule Has Been Misapprehended and Does Not Lessen the Propriety of Reformation in this Case.

The Final Order, and the submissions of KICA and the Intervenor, suggest that the remedy of reformation on the basis of mutual mistake is unavailable in this case unless Plaintiffs establish an “antecedent agreement” that the Additional Land would not be part of the Beachfront Strip. Plaintiffs have shown an antecedent agreement in the form of Exhibit 16.2, which all parties agree excludes the Additional Land from the Beachfront Strip. All three relevant parties have also treated Exhibit 16.2 as the original expression of the intended conveyance of the Beachfront Strip. Based on the Court’s finding that KICA was a third-party beneficiary of the 1994 Development Agreement, Plaintiffs believe that Exhibit 16.2 provides evidence of an antecedent agreement.

Furthermore, it is important to note what is required, and what is not required, to show that the instrument sought to be reformed is inconsistent with the “parol agreement,” the “understanding,” or the “antecedent agreement,” as the concept has been stated in various cases. A review of the relevant cases indicates that proof of an “understanding” for purposes of reformation does not require proof of a signed contract. For example, in the case of *Commercial Union Assur. Co. v. Castile*, 283 S.C. 1, 320 S.E.2d 488 (Ct. App. 1984), the Court of Appeals affirmed the reformation of an insurance policy on the basis of a telephone conversation that the plaintiff alleged had occurred and the defendant did not remember but did not outright deny to have occurred. In that case, an insurance policy was to reflect that the insured vehicle was a 1977 Ford (which the plaintiff alleged was discussed during the telephone conversation) instead

of a 1972 Chevrolet (the vehicle upon which the policy was written because the wrong registration card was delivered to the insurance agent by the insured's mother).

In a case involving reformation of deeds, *Timms v. Timms*, 290 S.C. 133, 348 S.E.2d 386 (1986), the Supreme Court granted reformation of deeds without evidence of a formal contract. In that case, back in 1937, two brothers divided a tract of land in Fairfield County in accordance with a subdividing line marked by a surveyor the brothers had hired for that purpose. The subdividing line was added to a plat of the undivided tract that the same surveyor had created 39 years earlier. The brothers signed deeds implementing the subdividing line and divided the property into two parcels. It was later discovered that the original survey was mistaken in terms of the total acreage, which resulted in an unequal division of the property based on the location where the boundary was placed. The heirs of the brother receiving less acreage brought a claim for reformation of the deeds in 1983, which was 46 years after the brothers had signed and recorded the deeds. The trial court rejected the claim, but the Supreme Court, finding facts in accordance with its own review of the evidence, reversed the trial court and granted reformation of the deeds.

Notably, in *Timms*, there was no specific written agreement that each brother would receive equal acreage. The evidence of the intention that the division be equal was that the plat prepared by the surveyor reflected that each parcel would have 121 ½ acres. However, the plat was not a contract, it was a plat. The Court granted reformation without proof of a written contract that each brother was intended or guaranteed to receive equal acreage, and instead based their ruling upon the fact that "the record fails to disclose any evidence that Charles intended for his brother Grady to have less acreage than he in the partition."

If South Carolina law indeed required the existence of a formal written antecedent contract that was inconsistent with the terms of the deed, reformation would not and could not have been granted in *Timms*. Reformation would have also not been granted in *Castile*. These examples are important as they reflect the flexible nature of when reformation can be granted and that a formal signed writing is not required before reformation can be allowed. Again, “each case for reformation stands on its own peculiar facts.” It is also noted that reformation was granted in *Timms* without necessity of a finding that the deeds were ambiguous in and of themselves. Also, an important aspect of this case that is unique is that the original understanding is Exhibit 16.2, the only depiction referred to in the 1994 Development Agreement, and the depiction that the relevant parties have referred to time and time again when confirming intent. The Court should recognize this as the original understanding, because the Town, Plaintiffs and KICA, as evidenced at trial, accept it as such. To preclude reformation in a situation where the grantee was a third party beneficiary, as opposed to a signatory party, is an inappropriate constraint upon the otherwise flexible powers of equity.

The underlying purpose for requiring evidence of a prior understanding is to provide a court with something that it can use as a basis to reform the mistaken instrument. Evidence of a prior understanding exists in this case, as there is evidence of an understanding that the Beachfront Strip was intended to stop at the point reflected in Exhibit 16.2, and the Additional Land was not to be included. The Town confirms that understanding, as did two KICA officers (Clarkson and Long) and three KICA board members (Clarkson, Long, and McKinney). KICA did not present any officers, board members, or witnesses providing any contrary testimony. In fact, when Ms. McAdory, the one witness presented by KICA at the hearing, was asked whether she contested the testimony of Permar, Clarkson, Long, and McKinney regarding KICA’s intent,

she stated that she did not contest, i.e., did not disagree, with their testimony. Furthermore, evidence was presented at trial that KICA's Chairman admitted that the conveyance of the Additional Land was a mistake. There is mutual admission that the inclusion of the Additional Land was an unintended mistake. There is evidence of the original intent and understanding of the intended conveyance to which the Court could confirm the 1995 Quitclaim Deed. The evidence justifies equitable relief, and the Final Order should be amended to grant the equitable relief requested.

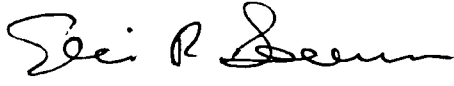
D. The Grounds for the Court to Alter or Amend the Final Order are Not Rebutted by the Submissions of KICA or the Intervenor.

For sake of relative brevity, Plaintiffs will not restate the remaining arguments made in the Motion to Alter or Amend, but rather reincorporate them and note that neither KICA nor the Intervenor have shown that the issues outlined by Plaintiffs do not compel an amendment of the 1995 Quitclaim Deed in order to allow for reformation. At trial, KICA did not claim to have an affirmative intent to receive the Additional Land. On the contrary, the only evidence in the record was that this was not KICA's intention. The Court's findings and conclusions that the Additional Land is "undevelopable," that Exhibit 16.2 is unreliable, and that KICA's intent is evidenced by 1990 OCRM jurisdictional lines are not supported by the record. Furthermore, the evidence supporting reformation is clear and compelling, such as the testimony provided by former officers and board members of KICA, the testimony by KRA and the Town, the 1994 and 2005 Development Agreements, the admission by KICA that the transfer of the Additional Land was a mistake, that all of the relevant parties have continuously treated the Additional Land as property of Plaintiffs, and the uncontroverted testimony of Beth Nimmons as to the nature of the mistake and how it arose. Although the evidentiary burden to obtain reformation is high, it has been met.

CONCLUSION

For the reasons set forth above, and as set forth in Plaintiffs' Proposed Order and Motion to Alter or Amend, the Court should alter or amend the Final Order to reform the 1995 Quitclaim Deed and return the Additional Land to Plaintiffs.

Respectfully submitted,

By: 

Ellis R. Lesemann
Lesemann & Barks LLC
80 Alexander Street, Second Floor
Charleston, SC 29403
Phone: (843) 724-5155
erl@lb-lawfirm.com

Attorneys for Plaintiffs

August 8, 2014
Charleston, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that I have this date, mailed, postage prepaid, a true and correct copy of
PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO ALTER OR AMEND to the
following counsel of record via U.S. Mail and E-mail:

Allison C. Jett, Esquire
Weissman Nowack Curry & Wilco
One Alliance Center, 4th Floor
3500 Lenox Road
Atlanta, GA30326
Attorneys for Defendant

Amy E. Armstrong, Esquire
S.C. Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585
Attorneys for Third-Party Intervenor

BY _____

JULIE J. ARMSTRONG
CLERK OF COURT

2014 AUG - 8 PM 3:08

FILED

By: _____

Michelle A. Matthews

August 8, 2014

Charleston, South Carolina

1 1 STATE OF SOUTH CAROLINA 2 COURT OF COMMON PLEAS 3 COUNTY OF CHARLESTON 4 Kiawah Resort Associates, L.P., 5 a Delaware Limited Partnership, 6 and KDP, II, LLC, a South Carolina 7 Limited Liability Company, 8 Plaintiffs, 9 10 vs. CASE NO. 2013-CP-10-1225 11 Kiawah Island Community 12 Association, Inc., a South Carolina 13 Not-for-Profit Corporation, 14 Defendant. 15 16 and 17 Inlet Cove Homeowners Association, 18 Inc., a South Carolina Not-for-Profit 19 Corporation, a Kiawah Island Property 20 Owners Group, a dissolved South Carolina 21 Not-for-Profit Corporation, 22 Third-Party Intervenor. 23 24 ----- 25 Hearing before the Honorable Mikell R. Scarborough, reported by Christine A. Smith, Court Reporter and Notary Public, at 2:22 p.m. on August 11, 2014 at 100 Broad Street, Charleston, South Carolina. Christine A. Smith, Court Reporter Master-in-Equity P O Box 30276 Charleston, South Carolina, 29417 (843) 958-5071 csasmith@charlestoncountycourt.org	3 1 P R O C E E D I N G S 2 3 THE COURT: We are back on the record. 4 This is the case of Kiawah Resort Associates, 5 LP which is a/k/a, Kiawah Development 6 Partners? 7 MR. LESEMANN: Your Honor, two separate 8 entities, and one is the assignee of the 9 other with regard to the surrounding 10 property. KDP, II, LLC, Your Honor, is 11 officially the entity name. 12 THE COURT: KDP, II versus Kiawah 13 Island Community Association also known as 14 KICA, and Inlet Cove HOA and Kiawah Island 15 Property Owner's Group, third party 16 intervenors, Case No. 2013-CP-10-1225. This 17 is the Plaintiffs' Motion to Alter or Amend 18 pursuant to Rule 59(e). 19 For the Plaintiffs, Mr. Lesemann; 20 Ms. Jett for KICA, Ms. White, and 21 Ms. Armstrong for the intervenors, correct? 22 MR. LESEMANN: Thank you, Your Honor. 23 THE COURT: I know you have an 24 audiovisual presentation. Do you have or 25 have you had a chance to go through the
2 1 APPEARANCES OF COUNSEL: 2 ATTORNEYS FOR THE PLAINTIFF: 3 Ellis R. Lesemann, Esq. 4 Lesemann & Barks, LLC 5 80 Alexander Street 6 Second Floor 7 Charleston, SC 29403 8 (843) 724-5155 9 erl@lb-lawfirm.com 10 11 ATTORNEYS FOR THE DEFENDANT: 12 Allison C. Jett, Esq. 13 Weissman Nowack Curry & Wilco 14 One Alliance Center, 4th Floor 15 3500 Lenox Road 16 Atlanta, GA 30326 17 (404) 926-4530 18 alliejett@wncwlaw.com 19 20 Jessie A. White, Esq. 21 South Carolina Env. Law Project 22 P.O. Box 1380 23 Pawley's Island, SC 29585 24 (843) 527-0078 25 jessie@scelp.org	4 1 documents that you wanted to see, the blowups 2 or anything like that? 3 MR. LESEMANN: Oh, Your Honor, with 4 regard to the order that I presented to ask 5 for the additional exhibits? 6 THE COURT: Right. 7 MR. LESEMANN: Yes, sir. That's all 8 been handled with your staff's assistance. 9 Thank you very much. 10 THE COURT: You've had a chance to see 11 what you needed? Thank you, sir. 12 MR. LESEMANN: Yes, sir. Your Honor, 13 thank you for the opportunity to be before 14 you for a hearing on a Motion to Alter or 15 Amend. I know that that's not always the 16 case, and it's not always the case that the 17 parties have the benefit of the Court having 18 spent as much time and attention as you and 19 your staff already have on this. 20 Your Honor, we bring this motion, and 21 there's a lot of grounds that we brought 22 forth in the motion, not for an academic 23 exercise, but because we earnestly believe 24 that in light of the fact and the law that 25 the Court should alter or amend its decision.

5 1 Your Honor, there's numerous grounds in 2 the motion. We would incorporate all of 3 those. What I would want to do -- meaning 4 assert all of them. What I want to try to do 00 02 16 5 is streamline the hearing because I think 6 that I can go through the four points that 7 would provide the Court with satisfaction 8 that the law prevents what we ask, that the 9 Court has jurisdiction to grant what we ask, 00 02 34 10 and that what we ask is at base level the 11 right thing for the Court to do. 12 Your Honor, in part that's recognition 13 of what we believe is the appropriate legal 14 standard, and perhaps making the amendment of 00 02 45 15 the legal standard that the Court has 16 articulated. Part of that is also, in our 17 mind, giving Exhibit 16.2 the proper weight 18 as the antecedent understanding of the 19 parties to which the Court can relate back 00 02 54 20 again to grant reformation. 21 The Court has to have something to 22 reform the deed to. So we have to provide 23 that. Exhibit 16.2 does provide that. Your 24 Honor, the other thing that I would ask is, I 00 03 16 25 believe in the order that the Court has tied	7 1 Your Honor, as I pointed out in the 2 reply that we filed Friday, none of those 3 parties stated that it was their infirmative 4 intent that the additional land, this 4.62 00 04 43 5 acres be part of the beachfront strip. In 6 looking at reformation and the proper legal 7 standard the Court should not apply rules of 8 construction of the deed. It should apply 9 rules of reformation of the deed, and it 00 05 02 10 shouldn't look to that language itself, in 11 light of the evidence that's mistaken, and in 12 light of the fact that we have an affirmative 13 claim for reformation the Court should not 14 use that language itself as the best 00 05 12 15 evidence. 16 It should not focus its analysis on 17 whether the deed is ambiguous or not. What 18 it should do is go back and say, Is there 19 something prior to this language that 00 05 22 20 Ms. Nimmons -- who is in the Court with us 21 today -- she wrote and it's identical in both 22 that agreement for conveyance and that 23 beachfront deed -- is there something prior 24 where the parties expressed what they 00 05 34 25 intended for that beachfront strip to be,
6 1 its own hands in terms of the evidence of 2 intent that it considered. I think that the 3 law permits the Court, and would indeed 4 compel the Court to have a broader view of 00 03 29 5 the evidence of intent and to not restrict it 6 to just intent of 1994 and 1995, not just 7 constrict it to intent that is in the form of 8 an official board action and consistent with 9 cases like Sims v. Tyler and other cases. 00 03 47 10 If you broaden that view of intent and 11 allow for that conduct to speak to the 12 parties -- we think that when the Court may 13 amend that legal standard, when the Court 14 recognized Exhibit 16.2 for what the parties 00 03 59 15 understand and believe it to be, and when the 16 Court opens its analysis to a broader scope 17 of evidence of intent that reformation is 18 proper. 19 I'll admit, and I'll be the first to 00 04 10 20 admit, Your Honor, that reformation is not 21 freely granted. It is rare. In a case like 22 this, this case itself is rare in that we 23 presented six witnesses. We touched on each 24 one of the three parties: The Town, KRA and 00 04 37 25 KICA.	8 1 separate from developability and separate 2 from all other issues except from Captain 3 Sams, separate from the 2005 development 4 agreement -- is there something that the 00 05 48 5 Court can trace back to to say, Here's where 6 the parties evoked an understanding. That 7 understanding, Your Honor can be informal. 8 Your Honor, I brought the case of Penza 9 v. Pendleton Station. I believe the order 00 06 08 10 should be modified to reflect that Penza has 11 no bearing ultimately on a case for 12 reformation because in the order itself in 13 the decision from the Court, the Supreme 14 Court, this section on reformation is very 15 short. It indicates that the Court is 16 deciding that the Master already granted 17 summary judgment, and because there are 18 issues of material fact that are dispositive 19 of the appeal thus we need not address the 00 06 43 20 issue of reformation of the mortgage. So 21 Your Honor, I think that the discussion, the 22 use of Penza, should have no place in this 23 decision. I think by using it, I think it 24 may have skewed the analysis respectfully 00 06 54 25 back towards something that was discussed in

9 1 Penza, which was construction of the deed, 2 not reformation. 3 So Your Honor, where the Court itself 4 is saying that they're not addressing the 00 07 05 5 issue of reformation and where neither Penza 6 nor the party opposing foreclosure actually 7 asserted a claim for reformation, I think 8 that that decision has no place. 9 Again, it's not to make this academic. 00 07 20 10 It's to get us to a proper analysis because 11 when I think that the Court refocuses, and 12 the Court did in the alternative. The order 13 does include an analysis to say, well, even 14 if we do look at intent then I think the 00 07 35 15 decision -- I'm paraphrasing but the decision 16 would come out the same way, but in doing 17 that it goes back to my point. The Court did 18 tie its own hands in terms of the evidence of 19 intent that it considered and still did so -- 00 07 48 20 the rules of construction still crept into 21 the analysis, and it wasn't -- in the case of 22 Progressive Max v. Floating Caps -- let's go 23 to Page 8 of that decision. 24 What the Court is saying there -- Your 00 08 12 25 Honor, thank you for your patience in letting	11 1 the evidence shows the Court is that the 2 decision to pick up that corner of the 3 employee facility tract was made by 4 Ms. Nimmons. It was made in her judgment, 00 09 27 5 but it was not made based upon instructions 6 that were given to her from any party. 7 There's testimony, and I'll flash it up in a 8 moment. There's testimony. I asked her. I 9 said, Ms. Nimmons, did the Town tell you to 00 09 40 10 pick up the employee facility tract? No. 11 Did KRA tell you to do that? No. Did KICA 12 tell you to do that? No. Was the decision 13 yours? Yes. Is that what you thought you 14 were supposed to do? Yes, but no one told me 00 09 48 15 to do that. If I had had Exhibit 16.2 I 16 could have easily made the beachfront deed. 17 Correct. I could have easily conformed it to 18 the eastern boundary of Parcel 13, and I 19 could have avoided the issue, but I made a 00 10 05 20 mistake, as she testified on the stand. No 21 one told me to make that mistake. That 22 decision was mine. 23 So what I believe respectfully is that 24 the Court's analysis ends up picking the 00 10 17 25 construction of deed standards from these
10 1 me present these to the Court visually. I 2 think it's the best way to do it. Your 3 Honor, what the Court said in this 4 Progressive Max Insurance case, and this is 00 08 25 5 one where the parties were arguing that a 6 covenant not to execute should be amended so 7 that one of the parties could seek 8 contribution, but since the underlying 9 document did not release one of the other 00 08 38 10 parties from liability that party remains 11 subject to liability so a contribution action 12 was improbable. The parties went back to try 13 and reform that document. 14 While the Court did undergo a 00 08 49 15 construction analysis it also underwent a 16 reformation analysis, and it made clear about 17 the distinction between the two. It talked 18 about a contract may be clear and ambiguous 19 as far as it goes, but may not express the 00 09 02 20 agreement of the parties by reason of mutual 21 mistake. This is what we're presenting. We 22 don't argue that the language, the identical 23 language in those two documents, doesn't pick 24 up that corner of the employee facility 00 09 15 25 track. It does, Your Honor. What we believe	12 1 cases but not the reformation of deed. And 2 again, the way that the Court would determine 3 whether the instrument itself does embody a 4 true agreement of the parties is to consider 00 10 33 5 parole evidence. It is to throw out the 6 doctrine of merger. 7 Those are rules governing the 8 construction of instruments not the 9 reformation of them. So I think this last 00 10 42 10 sentence is interesting. However, when the 11 parties conceded that the document in 12 question did not contain the desired language 13 they did not seek its construction but rather 14 reformation to accord with their true intent. 15 Your Honor will recall that there was 16 an instance where Ms. McAdory was the one 17 witness presented by KICA that was on the 18 stand. I said, Ms. McAdory, you've known 19 Mr. Permar for years. You've know Mr. Long, 20 Mr. Clarkson, et cetera. I put a lot of 21 power in Ms. McAdory's hands. 22 I said, Do you dispute what they said 23 regarding KICA's intent? Your Honor, if she 24 had answered that question to say, yes, I 00 11 25 25 absolutely dispute it, here's the reason why,

1 we intend the employee facility tract be in
2 the corner, not Exhibit 16.2. The Court
3 would have been faced with conflicting
4 evidence of intent.

00 11:37 5 I asked that question because again, if
6 KICA had said, no, our intent was exactly as
7 it was reflected in that deed, our intent was
8 to pick up to the employee facility tract.
9 If she had said that, if she had said, no,
00 11:55 10 these gentlemen are not -- I discount. I
11 disagree with their testimony. I wasn't
12 trying to get anybody to be called a liar. I
13 asked that question because I thought it was
14 most important to show this Court the rare
00 12:05 15 reformation case that we had.

16 Even the cases where reformation has
17 been granted, the Defendant has said, oh,
18 well, that's not what I meant. So even in
19 cases where there's actually been conflict
00 12:18 20 where one party is saying that's what they
21 meant, and the other party is saying, that's
22 not what I meant. I meant just what the
23 thing says.

24 What I wanted to clarify for the record
00 12:25 25 and for this Court is that KICA did not take

1 that position, and the one witness that they
2 presented as their sort of active employee
3 not only said, I don't contest the testimony
4 that's given by the former board of directors
00 12:37 5 and the former president and the former
6 secretary. I don't contest the testimony
7 that's give by Mr. Permar.

8 In fact, yes, a later board shared that
9 it reviewed this issue, when it was brought.
00 12:50 10 to KICA's attention, admitted that he
11 believed it was a mistake. So we actually
12 have a case to where, from our view of this
13 evidence KICA did not come to this Court and
14 say, no. We affirmatively intended that deed
00 13:03 15 to read exactly like it did.

16 There's evidence in the record saying,
17 no, we concede that that's a mistake, but we
18 don't contest what these individuals said,
19 that it was a mistake. So Your Honor, that's
00 13:13 20 why although reformation is rare and the
21 cases are determined on the peculiar facts,
22 this case has peculiar facts and it has
23 peculiar facts because KICA didn't disagree
24 with those standards.

00 13:28 25 THE COURT: Your position here is that

1 ambiguity and uncertainty are irrelevant on
2 the issue of mistake and reformation?

3 MR. LESEMANN: Exactly. An expertly
4 written deed that contains no ambiguity
00 13:29 5 whatsoever is subject to reformation. Your
6 Honor, in my own thoughts on this case, I
7 would say that's actually even a more
8 appropriate case for reformation because if a
9 deed is riddled with ambiguity it would be
00 13:57 10 harder to know, what did the parties mean,
11 and did they reflect it in this document or
12 not? We can't really ascertain that. The
13 fact that the deed itself is clear and it
14 picks up a point that is an obvious
00 14:13 15 disconnect with Exhibit 16.2 that employee
16 facility tract existed at the time that
17 Exhibit 16.2 was drawn yet the parties had
18 intended for that -- if the Town and KRA had
19 intended for the employee facility tract to
00 14:25 20 be the point, that point could have been
21 used. They very intentionally used a
22 different point. They used Exhibit 16.2, and
23 they picked up on that eastern boundary of
24 Parcel 13 which I'll discuss in a bit.

00 14:41 25 Your Honor, a little bit more on -- so

1 the case of Gowdy versus Kelley, it is
2 presented to the Court as requiring that
3 there be an understanding or an agreement,
4 and what I want to make sure is that my
00 14:49 5 impression and my belief with the Court that
6 that can be formal or informal.

7 The principle upon which Courts
8 enforce -- this is a 1937 case -- enforce a
9 reformation of an instrument is that
00 15:12 10 preceding the execution of the instrument and
11 as the inducement to his execution the
12 parties to the same had an understanding, an
13 agreement, a contract, so I highlight this,
14 Your Honor, just so that we can focus on --
00 15:25 15 you don't have to look for a written document
16 to be the antecedent agreement. It can be
17 much less informal than that.

18 As an example, the case of Castile --
19 Commercial Union Assurance Company versus
00 15:35 20 Castile, in this case the antecedent
21 agreement that allowed for reformation was no
22 contract, no written agreement. It was a
23 telephone call.

24 Mr. Castile was in the military and he
00 16:02 25 called his mother and asked her to call the

17 1 agency to obtain automobile insurance. She 2 testified that she talked by telephone with 3 Carol Garris, an agent of the Garris 4 Insurance Agency who requested information 00:16:12 5 for the 1977 Ford. She claims she was quoted 6 a premium price. Garris does not remember 7 the telephone conversation with Ms. Castile, 8 but does not deny the conversation could have 9 occurred. 00:16:24 10 We have evidence there of a telephone 11 call which one party says happens and the 12 other party says, well, I don't recall it, 13 but I'm not going to deny that it happened. 14 What happened, Your Honor, is that when 00:16:35 15 Ms. Castile went down to the agency she took 16 the registration card for a Chevrolet, a 17 different vehicle. 00:16:48 18 When Mr. Castile came back from the 19 military he got in a wreck in the Ford, and 20 under the belief that they were obtaining 21 insurance on the Ford rather than the 22 Chevrolet the policy was reformed. The rare, 23 rare doctrine of reformation was invoked. 24 That was on the basis of a telephone 00:17:06 25 conversation which one side didn't remember	19 1 The last case that I want to talk about 2 before I talk about 16.2 is the case of Sims 3 versus Tyler. 00:18:30 4 Now, in this case the Court declined 5 reformation. I think what's important is the 6 reason why it declined reformation. That is 7 because -- what happened in this case, Your 8 Honor, is the developer -- there was a deed 9 conveyed to two lots. 00:18:43 10 The purchaser indicated that they did 11 intend to buy those lots. The developer 12 later sold the second lot to somebody else 13 and said, wait. Wait. Wait. Hold on. Hold 14 on. I didn't mean to sell you two. I just 00:18:54 15 meant to sell you one. 00:19:05 16 What the Court did in that case, and 17 this is one that I think is important because 18 it goes to this issue of the Court opening 19 the door to further evidence of intent. What 20 the Court focused on was what happened -- one 21 thing that happened at the time, the purchase 22 price, but the other two items were that the 23 buyer paid the taxes on the additional lot, 24 and then they also built a doghouse and 00:19:21 25 planted a garden on it.
18 1 but the other side said it happened. 2 So Your Honor, this antecedent 3 agreement that can form the basis for 4 reformation -- what I wanted to do is I 00:17:16 5 wanted to talk about how that can be 6 something like Exhibit 16.2. 00:17:28 7 In the case of Timms versus Timms, a 8 significant case in which reformation was 9 granted involved a parcel lot in Fairfield 10 County, the survey that the brothers had done 11 ended up being erroneous. There was no 12 contract, Your Honor, that the brothers were 13 going to receive equal acreage, just a 14 presumption. 00:17:43 15 In this case, the Court granted 16 reformation based not on any agreement, but 17 upon their review of the record they said, 18 well, we don't see anything that Charles, one 19 of the brothers, intended for Grady to have 00:18:03 20 less acreage than he got. So Your Honor, the 21 antecedent understanding is not something 22 that has to be a formal contract. It is 23 something that can be inferred. 24 Your Honor, in this case, it can easily 00:18:17 25 be and should be inferred from Exhibit 16.2.	20 1 2 So these obviously weren't things that 3 happened at the time that the deed -- under 4 which reformation was sought had happened. 00:19:28 5 They happened later. So Your Honor, I think 6 when you look at that evidence, I think that 7 it really opens the door to seeing the 8 reformation is appropriate because the 9 evidence of intent is very clear. I'll get 00:19:40 10 to that as the large part. I appreciate the 11 time the Court is providing. 00:19:53 12 THE COURT: Let's go back to the Sims 13 case. Was part of their analysis then based 14 on the fact that, in fact, the Defendants had 15 used the property? Had taken title to it, 16 gotten title to it, and then used the 17 property? 00:20:02 18 MR. LESEMANN: Yes. There was use, but 19 there was evidence of use in terms of 20 building a doghouse and paying taxes. I 21 think the evidence -- if I can just sort of 22 springboard off to bring that back to our 23 facts, there was some suggestion by the part 24 of the intervenors that as members of KICA 00:20:17 25 that they liked the land, that it reminds

1 them of how Kiawah once was, but Your Honor,
2 that sort of permissive use is not the type
3 of investment and active maintenance and
4 active indicio ownership. It's very
5 passive.

00 20:29

6 It was treated in that sense like the
7 remainder of the ten miles. So you are
8 correct, Your Honor. That is what they
9 found. They found the payment of taxes was
10 significant. In this case it's undisputed
11 that my clients have paid the taxes
12 continuously. It's undisputed that KICA
13 hasn't. It's undisputed that KICA has never
14 requested to reimburse my client or to take
15 on the taxes. It's undisputed that every map
16 that's been prepared -- yes, Your Honor.

00 20:40

00 20:51

17 THE COURT: Go ahead. I'm with you. I
18 was trying to make the analysis as to why
19 you --

00 20:59

20 MR. LESEMANN: Yes, absolutely. I
21 think use is significant, and you would weigh
22 that evidence that was presented to you by
23 all the parties obviously, but I think when
24 you look at that and you see that KICA hasn't
25 maintained it, they don't act like they

00 21:12

1 maintained it, they don't purport to maintain
2 it, no insurance, no taxes, no payments, no
3 investment, no activity other than passive
4 beach related use which is the same as what
5 they might do on Captain Sams proper, the
6 entire Spit. They walked out on that, and
7 that's not any indication of any ownership
8 there, but it's the same type of use.

00 21:25

9 So Your Honor, to go back to what I
10 believe is the antecedent agreement, because
11 we do have a unique set of facts, and we
12 don't have a two-party situation. We have a
13 three-party situation. So we've got the Town
14 and KRA, but while we have those two parties
15 entered in the development agreement we also
16 have KICA under developer control. So the
17 ability for KICA to have a different intent
18 really than the party controlling it I think
19 is questionable as a matter of law.

20 Rather than just rest on that and just
21 say that by fiat, Your Honor, we presented
22 witness after witness: Mr. Clarkson,
23 Mr. Long, Mr. McKinney, who all testified as
24 an officer and as a director of KICA what
25 their intent was, and there is not a case on

1 point in South Carolina.

2 I've cited the Kishter case from
3 Maryland where in a reaffirmation case where
4 the developer gave more property than
5 intended to the community associations is
6 right on all fours, and where the developer
7 controlled the community association. The
8 trial court rejected the evidence presented
9 by the folks sort of wearing both hats so to
10 speak. The folks that were both part of the
11 developer and part of the property
12 association while it was under developer
13 control.

14 The Appellate Court reversed the trial
15 court and said, you need to consider -- just
16 because these folks had capacities with both
17 you need to consider the evidence that they
18 have given, and it was an error for the Court
19 to not consider it.

20 So Your Honor, again, I go back to the
21 point of not only did we present those
22 witnesses, but what they said was not
23 controverted by KICA. There are other --
24 Mr. Weaver, for example, if he didn't believe
25 that the conveyance was a mistake he could

00 23:32

1 have been brought forward and he wasn't.

2 Mr. Greer was listed as a witness by
3 the interveners. He was one of the property
4 owner directors back in the 1990s. He wasn't
5 brought forward to testify. If anybody
6 believed that KICA, in fact, had a different
7 intent from what we said that it had then
8 those witnesses obviously could have been
9 brought forward. The fact that they weren't
10 and the fact that the evidence all relates
11 back to Exhibit 16.2 is clear. It makes it
12 clear and convincing, Your Honor, and we
13 satisfy that burden.

00 23:32

14 So Your Honor, I come back to the
15 operative document just to show that the
16 reference is not to the employee facility
17 tract. It's not to developability, Your
18 Honor. The reference is to Exhibit 16.2.
19 Your Honor, that document we spent a lot of
20 time looking at it.

00 24:07

21 THE COURT: The last was 16(b), was it
22 not?

23 MR. LESEMANN: Yes, sir. Section 16(b)
24 of the 1994 development agreement which
25 identifies Section 16.2 specifically and

00 24:20

1 doesn't identify the agreement for conveyance
2 or the quit claim deed or the employee
3 facility tract. It doesn't reference
4 relative developability. It goes back to
00 24 36 5 this document.

6 Your Honor, this document is clear and
7 it's sufficient, and I think the fact that
8 the Town and KRA have both not only adopted
9 the document but reaffirmed the document and
00 24 49 10 all of KICA's maps of this property conformed
11 to this same iteration of the western
12 boundary of the beachfront strip shows that
13 all parties have adopted it.

14 Now, one of the issues that was brought
15 up in the final order is that perhaps
16 Exhibit 16.2 by ending its boundary at
17 Parcel 13 was not sufficiently definite in
18 order for the Court to treat it as being
19 reliable, in order for it to serve as a
20 boundary.

21 Your Honor, intervenors in Exhibit 5,
22 we went ahead and admitted their copy of it.
23 It shows these old concrete monuments that
24 were in place. There is sufficient document
00 24 58 25 of record to tell exactly what that boundary

1 meant. That's the eastern boundary of
2 Parcel 13. That was the intended western
3 boundary of the beachfront strip.

4 There are the Duneside Villas, Your
5 Honor, that we heard about and talked about
6 at the trial, and there are three concrete
7 monuments that can be used with a surveyors
8 precision to know where the beachfront strip
9 was supposed to stop.

00 26 08 10 THE COURT: They're all along that line
11 that you've just highlighted?

12 MR. LESEMAN: Yes, sir. Yes, sir.
13 And just to back out you'll see that our
14 shaped parcel that we spent a lot of time and
00 26 13 15 attention on, and the testimony in the record
16 confirms that Parcel 13, that R-shaped parcel
17 does pick up that survey line. That is the
18 line where it was intended to stop.

19 Again, as Mr. McKinney testified,
00 26 23 20 because the Duneside Villas is where the
21 property conveyed the third parties stopped.
22 We didn't want to give the beachfront strip a
23 way in front of ourselves. We wanted it to
24 stop where we sold property to third parties.

00 26 39 25 That shows the Court, in this record, can

1 determine that it was sufficient in order for
2 that to be a boundary.

3 Ms. Nimmons testified, when I asked and
4 said, well, if you had had this version of
00 26 52 5 Exhibit 16.2, would you have been able to
6 draw a description that masked the western
7 boundary? Her testimony was, absolutely she
8 would.

9 And so Your Honor, Exhibit 16.2 is
00 27 08 10 clear. It was adopted by the parties in
11 several ways. One, in the agreement for
12 conveyance itself -- whereas under the terms
13 of the development agreement KRA has agreed
14 to convey to KICA certain properties located
00 27 29 15 on Kiawah Island, et cetera. Prior to
16 certain dates more particularly set forth in
17 the development agreement, the terms and
18 provisions of which are incorporated here in
19 my reference.

00 27 45 20 So Your Honor, they are -- when
21 Townsend Clarkson signs this on behalf of
22 KICA this document itself does incorporate
23 the development agreement which specifically
24 mentions Exhibit 16.2 as the one depiction of
00 27 59 25 it. So by incorporating this for conveyance

1 I believe, Your Honor, the parties themselves
2 clarify, we do have an antecedent agreement.
3 We do have an antecedent understanding.

4 It's the development agreement. Here's
00 28 12 5 what we're trying to do. We're trying to
6 make these conveyances basically in
7 accordance with the development agreement,
8 and we're incorporating those terms and
9 provisions hereto.

00 28 23 10 Your Honor, I think that when we talked
11 about the testimony about Mr. Permar and how
12 he did make a change to Exhibit 16.2, but he
13 mentioned that he had told Mayor Melvin, the
14 mayor of Kiawah, about that change, and the
00 28 38 15 evidence in the record was that she
16 authorized that and okayed that.

17 So Your Honor, what I want us to do is
18 put aside any suggestion or any belief that
19 the parties don't consider Exhibit 16.2 to be
00 28 54 20 governing because in the 5th Amendment to the
21 2005 development agreement -- although there
22 were some changes and we did go through with
23 Dr. VanDerwerker about some different
24 iterations of the 5th Amendment and how it
00 29 14 25 changed from time-to-time the parties are

1 agreeing that this 5th Amendment is intended
2 to be a reaffirmation of what is clearly
3 shown on Exhibit 16.2 of the first agreement,
4 and Exhibit 1.3 of the agreement. Now that
00 29 23 5 refers to the 2005 agreement, which reflects
6 that this property is still part of the
7 property owner to be owned, and it's suggest
8 to development by the developer.

9 Again, Your Honor, with regard to the
00 29 39 10 Court's analysis and developability the Town
11 and KRA, which should be the parties that
12 matter, they both considered this property
13 developable because they kept treating it as
14 part of these developable parcels.

00 29 51 15 They kept on giving rights based on
16 density, and when we look at those zoning
17 maps that are in the record, they clearly
18 show that the additional land is located
19 right within these parcels marked R3C,
20 residential 3 and commercial. So much so
21 that on a portion of the additional land it
22 was so developable, if that's a proper word,
23 that you could build a hotel on it, because
24 they actually had hotel zoning for that
25 portion of the island and so a portion of the

1 additional land that the order would indicate
2 was not developable as a whole actually could
3 have been a hotel site.

4 So it's one of the issues that we're
5 asking the Court to remove that analysis and
6 return back the analysis of, did the parties
7 themselves have an antecedent understanding
8 that the Court can come back to? Is there
9 clear and convincing evidence that that's
10 what they meant? And there is, Your Honor.
11 When we look through the evidence of intent I
12 believe it's clear, and Your Honor, in the
13 order we're limited in intent to the issue of
14 developability and to whether intent existed
15 in the 1994 and 1995 time frame.

16 Your Honor, going through -- and I want
17 to speed up because I've probably already
18 taken too much time, but each witness -- I
19 had each witness. I had an outline. I had
20 Mr. Permar, Mr. Long, Mr. Clarkson, I had
21 every witness -- Mr. McKinney, and Mr. Rhoad.
22 I had every witness specifically affirm
23 Exhibit 16.2. The Town and KRA specifically
24 affirmed Exhibit 16.2, and not only did they
25 affirm it, but they agreed that it showed

1 that the intended western boundary was
2 supposed to be that eastern boundary of
3 Parcel 13 as we've shown.

4 So each witness testified to that.
5 KICA's witness did not contest it. In fact,
6 Mr. Weaver, as board chair admitted it, not
7 only in front of Ms. McAdory, which she
8 testified, he admitted it to Mr. Clarkson,
9 and that testimony was also admitted.

10 Your Honor, we struggled with a couple
11 of items of evidence at the trial. One was a
12 letter and its potential privilege made sure
13 by Trenham Walker where there were parties on
14 both sides, and there were a lot of cc.'s on
00 32 17 15 that letter, but the Court was troubled with
16 that.

17 The Court also put a lot of thought and
18 attention into the talking points to KDP. I
19 believe from the language in the order the
00 32 25 20 Court may have ultimately decided that it
21 wanted to consider that evidence. The
22 suggestion at trial was perhaps that it would
23 only be marked for identification purposes.

24 Your Honor, I believe it should be
00 32 34 25 admitted because I think it's key. Again,

1 it's such a rare case of reaffirmation where
2 the Defendant says, well, yeah, we can see
3 that the mistake happened. At that point the
4 concerns that you're taking something away
00 32 48 5 from someone and said, no. No. No. That's
6 exactly what I meant. They can say what they
7 want all day. I don't contest that this was
8 a mistake. It was a mistake, and the talking
9 points go on to say, we don't intend to
00 33 03 10 benefit from this mistake, but we've gotten a
11 legal opinion that we can't just give it back
12 to you.

13 So we understand that you can seek
14 reaffirmation and it says, we're not really
00 33 16 15 inclined to opposed reaffirmation. So we've
16 got this special situation, obviously hard
17 fought by excellent counsel for all parties.
18 We've got the legal standard that required
19 the Court to come back and to try to find an
00 33 32 20 antecedent agreement. To not reject
21 reformation because the deed is itself
22 unambiguous but to go back and say, well, we
23 have an admission of the estate, and we have
24 the Scribner admitting, and admitting with
25 some contrition and that was her decision.

33 1 No one told her to make that decision. She 2 can see now that it didn't match. If she had 3 the documents before her, that ultimately 4 reflect the agreement then the mistake would 00:34:03 5 never would have been made. When we have 6 that sort of evidence from every party and 7 the intent that rolls forward, not just from 8 '94 but all the way up to the present, the 9 maps, the treatment, the behavior, the 00:34:14 10 payment of taxes, all that evidence, Your 11 Honor -- although this burden is high, I 12 think we met that burden. 13 When the Court looks at the analysis 14 again -- when the Court looks at Exhibit 16.2 00:34:25 15 again, when the Court looks at the evidence 16 of intent again, I believe or would ask that 17 the Court allow for reformation to be 18 granted. 19 THE COURT: Mr. Lesemann, you believe 00:34:34 20 the relevant timeframe would be the '94-'95 21 time frame? 22 MR. LESEMAN: Respectfully, Your 23 Honor, I disagree. When looking at that 24 case, Sims versus Tyler, which was a Supreme 00:34:44 25 Court case, that doghouse wasn't built at the	35 1 I disagree with it or not, I think the law 2 does indicate that that later occurring 3 evidence of intention be considered. What I 4 think it does, it really solidifies the 00:35:59 5 mistake. 6 Your Honor, we were the party that 7 brought forth the 1994 intent, and it doesn't 8 refer to developability in terms of 16.2 9 although there was clearly testimony from 00:36:09 10 Mr. Rhoad that they didn't intend for the KRA 11 to give up developable land. Our witnesses 12 said, they didn't intend to give up 13 developable land. 14 So if that's the analysis the 00:36:24 15 additional land includes developable land. 16 So if we're going there it should come back. 17 We think that Exhibit 16.2 is probably the 18 clearest indication since it's in the 19 development agreement and since it was 00:36:34 20 reaffirmed, and since all parties have mapped 21 the property in accordance with it, we think 22 that's where the Court should come back. 23 So Your Honor, thanks again for the 24 tremendous amount of effort. These cases 00:36:54 25 don't come around often. I know they're
34 1 time. The taxes that they paid weren't paid 2 at the time. 3 The Court looked forward. It said, 4 well, one of the ways for us to tell if this 00:34:53 5 is a mistake is how are the parties acting? 6 Well, you've got the Town, KICA, and KRA all 7 mapping this property as being KRA's 8 property. Everyone's handling the taxes like 9 it's KRA's property. Everyone's handling the 00:35:09 10 zoning like it's KRA's property. 11 Your Honor, we submitted the Sims v. 12 Tyler case in a notebook to the Court, but 13 I'll submit it again, too. If you look at 14 that it actually does allow for it to go 00:35:22 15 beyond, which I recognize opens the door. 16 There could be some indicia of intent perhaps 17 that might go against our position, but I 18 really don't know that there are. 19 I don't think that the 5th Amendment to 00:35:32 20 the development agreement hurts our case. I 21 think it helps our case. It shows that the 22 parties reaffirmed Exhibit 16.2. 23 THE COURT: And that was in 2012? 24 MR. LESEMAN: '12, yes, Your Honor. 00:35:43 25 And so I think that the law really -- whether	36 1 complicated. Everyone's worked hard. We're 2 not seeking a second bite of the apple. We 3 think that if the Court considers the issues 4 that we presented, the Court may and we 00:37:05 5 believe should, consider that reaffirmation 6 and that the burden was met and reformation 7 should be granted. 8 THE COURT: All right. I have a couple 9 more questions. We wouldn't be here if I 00:37:15 10 didn't think your motion had merit. I wanted 11 to tell you that. That's why sometimes I 12 don't grant these. 13 MR. LESEMAN: Thank you, Your Honor. 14 THE COURT: I was going to ask you 00:37:24 15 about that, but I think you've covered that, 16 so on the question of intent and 17 developability, because when I first got your 18 motion I read it to be because it's not 19 developable then it's not included, but that 00:37:36 20 was just a question of intent. That was -- 21 at least this Court's ruling was if it's not 22 developable then what business do we have 23 maintaining it. Okay? 24 So the first thing I've caught on to 00:37:53 25 what you're saying is, some of it is

1 developable. I think that was covered in
2 your initial brief.

3 What I want to look at is a timing
4 question on some of these exhibits.

00 38.01 5 Exhibit 16.2, my recollection to Mr. Permar
6 was that he drew his line on there -- not
7 included or whatever it was -- at the time
8 the document was submitted to the Town; does
9 that sound right?

00 38.14 10 MR. LESEMANN: Your Honor, my
11 recollection obviously the record will set us
12 all free, but my recollection to Mr. Permar's
13 testimony is that the exhibits to the
14 development agreement were available for
00 38.27 15 public view at the Town. So in his capacity
16 he went to the Town. In his capacity he's
17 been involved in that process, and yes it is
18 retained by the KRA.

00 38.44 19 He went and reviewed those exhibits,
20 noticed that Exhibit 16.2 in his belief,
21 based on his personal interaction incorrectly
22 reflected what the intentions were. He
23 relates a conversation with Mayor Melvin, and
24 then he indicates that he obtained an
00 39.06 25 implement to color in this area, and then it

1 was part of the exhibits that were later
2 adopted and incorporated as to part of the
3 exhibit and part of the development hearing.

00 39.26 4 Your Honor, this is what I think is
5 key. If any of that behavior, had been
6 improper, unauthorized, there is no
7 explanation for the Town of Kiawah in 2012 to
8 have reaffirmed Exhibit 16.2. If they didn't
9 want to reaffirm that document they wouldn't
00 39.38 10 have reaffirmed that document.

11 If they didn't believe -- Kiawah didn't
12 believe that it clearly showed what they said
13 it clearly showed then the 5th Amendment
14 wouldn't have included that language. They
00 39.49 15 would have come and said, oh, no. No. No.
16 No.

17 We're not going to do that.
18 Mr. Permar, he went in there and he messed
19 that thing up. That's not what we meant.
00 40.01 20 Mr. Rhoad, who with the exception of the year
21 and a half time period, for the past 25 years
22 has served as the Town's attorney. He
23 adopted 16.2.

24 He agreed that it reflected the Town's
00 40.17 25 intent and the intent of the parties. So

1 Your Honor, you are right. There was some
2 testimony about Mr. Permar having a hand in
3 changing that document, but it was
4 significant and it was correct. All the
00 40.30 5 parties involved have affirmed what he did.

6 THE COURT: So my next question there
7 in looking at that, that's a blow up of
8 what's shown as Exhibit 28, but it's Exhibit
9 16.2.

00 40.39 10 MR. LESEMANN: Oh, yes, Your Honor. It
11 was marked as Exhibit 28, but it's also part
12 of Exhibit 5 as part of the trial binder.

13 THE COURT: What has also become very
14 apparent to me is that small letter "R"
15 that's on there. That's your Parcel 13? Is
16 this a representation of that?

17 MR. LESEMANN: Yes, sir.

18 THE COURT: You had a blow up of that.
19 I wanted to see that.

20 MR. LESEMANN: The actual survey?

21 THE COURT: That survey as well.

22 MR. LESEMANN: This Your Honor, was
23 admitted as Intervenor's Exhibit 5. Is that
24 sufficiently large?

25 THE COURT: That's Intervenor's 5.

1 What is the date on that one as well?

2 MR. LESEMANN: 1988, Your Honor. It's
3 got some -- oh, I'm sorry. Your Honor, it
4 looks like there's some revision dates. I'm
00 41.26 5 seeing the 16th of May, 1988. It has some
6 revision dates taking it through June.
7 Again, that's kind of blurred, but it looks
8 like those all state 1988.

9 THE COURT: Okay. And that's Parcel 13
00 41.42 10 is what that was called, correct?

11 MR. LESEMANN: Yes, sir. And that is
12 the -- Parcel 13 does pick up some extra
13 acreage, Your Honor, but that line is the
14 line of Parcel 13. Parcel 13 in the
00 41.58 15 development agreement, Your Honor, is treated
16 as having 19 acres, and so that comes along
17 as to whether -- the purpose I was showing is
18 that it identifies those concrete monuments.

19 Where Parcel 13 is modified between 16
00 42.22 20 and 19 acres is in this area over here
21 (indicating). This is uniform as can be
22 referred to by the concrete monument points,
23 and also the location of the Duneside Villas,
24 and you'll see, Your Honor, that our parcel
00 42.37 25 to Your Honor's point carries through on all

1 sorts of maps: Maps prepared by KICA, maps
2 prepared by the Town of Kiawah. Some of
3 these maps are large.

00 43:16 4 You can see, obviously if I can get
5 that larger, that's sort of a high mag map.

6 Your Honor, those were admitted in
7 evidence and continue to show that R-shaped
8 parcel. I think, Your Honor, at this point
9 actually -- this one shows it in the aeration

00 44:02 10 right as it's shown on that intervenor's
11 Exhibit 5. This one shows it as the 16-acre
12 parcel. Where there is not -- there is
13 not -- the additional acreage on the back of
14 the "R", and again, that western or the

00 44:21 15 eastern boundary is very consistent. It
16 always goes to that survey line that is in
17 intervenor's Exhibit 5.

18 THE COURT: Which is the western
19 boundary of the Duneside Villas, right?

00 44:37 20 MR. LESEMAN: Exactly, Your Honor.

21 THE COURT: And then due south to the
22 ocean?

23 MR. LESEMAN: Yes, sir.

24 THE COURT: This is the zoning map?

00 44:40 25 MR. LESEMAN: That's the zoning map,

1 Your Honor. That was Exhibit 33. There were
2 two. There was a zoning map and a future
3 land use map. So all this property -- the
4 Town's records as being subject to R3C
00 44:57 5 development.

6 THE COURT: All right.

7 MR. LESEMAN: Thank you, sir.

8 THE COURT: Ms. Jett, let me hear from
9 you.

00 45:13 10 MS. JETT: Your Honor, I would agree
11 with both you and Mr. Ellis (sic). This was
12 a complicated case. We don't have a lot of
13 details that -- I would have loved to have
14 found more guidance from the Appellate Court
00 45:24 15 to help on some of the finer legal issues
16 here. I think the standards that we're given
17 in the Brock versus O'Dell case, the Gowdy
18 versus Kelley Case and the Penza versus
19 Pendleton Station cases, they set up a tough,
00 45:33 20 tough standard.

21 Mr. Lesemann has done yeoman's work
22 trying to marshall the evidence there
23 especially the lapse of 20 years and the
24 death of some of the non-developer members of
00 45:57 25 the KICA board. Since then -- it was a real

1 challenge, I think to come up here.

2 In looking at Mr. Lesemann's motion and
3 the 16 grounds, I kept on whenever I was
4 looking at it, about coming back to the --
00 46:12 5 okay. What are we talking about? We're
6 talking about a reformation case. I don't
7 think anybody disputes the Court's denial of
8 the specific performance count or the Court's
9 granting of the declaratory damage that KICA
00 46:21 10 is required to follow the declaration
11 provisions regarding the 3/4 vote for any
12 property then it has as common property. If
13 KICA does own this property that it is common
14 property.

15 So looking at just the reformation
16 count, and the cases that I just cited, in
17 looking at each of these grounds I would say,
18 okay. Well, so what if we did change the
19 order to reflect what KRA was asking for
20 here? Would that ultimately change the
21 Court's ruling on reformation? For most of
22 them I don't think it does.

23 I think that there are details that one
24 could say, well, Your Honor, if I was
00 47:06 25 rewriting your order maybe I would have

1 phrased it a different way, but I don't think
2 that in taking the step back that it changes
3 the ultimate conclusion. I think the Brock
4 versus O'Dell case is clear that you've got
00 47:25 5 to have a mutual mistake. The Gowdy versus
6 Kelley case, as Mr. Lesemann brought up
7 showed that you have to have an antecedent
8 agreement. I would agree with him that it
9 does not have to be a written, formal
00 47:32 10 document. Gowdy versus Kelley is very clear
11 that the antecedent agreement cannot be
12 assumed. It has to be proven.

13 That is what I think makes this case so
14 very difficult, especially because we do have
00 48:03 15 a third-party beneficiary situation here.
16 There is the evidence that was elicited at
17 our trial was clear that the development
18 agreement was between the Town and the
19 developer. Everybody agreed that KICA, while
00 48:06 20 a third-party beneficiary for that
21 development agreement had no hand in the
22 negotiating, the drafting or the execution of
23 that agreement.

24 I understand Mr. Lesemann's point that
00 48:19 25 Mr. Clarkson, Mr. McKinney and Mr. Long were

1 KRA partners but also KICA board members, and
2 that each of those individuals testified that
3 it was their understanding that this property
4 not be included in the beachfront deed.

00 48:36 5 Also on cross examination each of those
6 witnesses could not point to any instance of
7 a board discussion or consideration of where
8 the western permanence of the beachfront deed
9 was supposed to have.

00 48:49 10 Because you have to prove an antecedent
11 agreement, and it cannot be assumed, there's
12 frankly, just a lack of intent. I've looked
13 in every place I could to find an issue that
14 addresses reformation actions in cases of
00 49:06 15 third-party beneficiaries and seeing if there
16 is some sort of situation where you could
17 substitute in the Town's intent for the
18 grantees of the instrument you're actually
19 looking to reform's intent. I can't find any
00 49:21 20 evidence of this. This is one of the things
21 that I think makes this case so very
22 difficult for the parties and for Your Honor.

23 I know that you spent a lot of time
24 struggling with this. You gave us a lot of
00 49:35 25 good tips on -- at the end of the trial on

1 what you wanted us to address in our orders,
2 and I know that the Penza case especially
3 caught your attention early on and troubled
4 you.

00 49:46 5 With that case being a 2013 case we
6 don't have the benefit of the Appellate Court
7 reviewing that case and determining whether
8 or not there's any limitations on applying
9 the ambiguity standard. Certainly Penza
00 50:04 10 itself doesn't give us any limitations on
11 when you can and cannot apply that ambiguity
12 standard. It certainly seems pretty broad to
13 me that it's in all cases that they look at
14 that.

15 Again, as I stated in our response
16 brief to Mr. Lesemann's motion, you went
17 above and beyond and did not end your
18 analysis there. So then going to the --
19 assuming that you can take in all of this
20 extra evidence that we submitted over a
21 two-day trial, looking at that I don't have
22 any dispute that KRA apparently did not
23 intend to include that property in the
24 acreage.

25 The problem that we get hung up on is

1 KICA's intent. There's no evidence
2 Ms. McAdory, who has been on the staff since
3 that time and ever since as the custodian of
4 records, has scoured KICA's records trying to
5 find any evidence of discussion or
6 contemplation or consideration of what the
7 meets and bounds are of the area that would
8 be conveyed by a beachfront deed. There's
9 just a lack of evidence.

10 Ms. McAdory testified that certainly
11 she didn't attend every board meeting or
12 executive session, but she certainly attended
13 a lot. Granted, we're all trying -- all the
14 witnesses were trying to scratch their head
15 and call up 20-year-old memories, and that's
16 a long time. I'll leave it at that. It's a
17 hard thing to do.

18 So looking at the written evidence, all
19 we have is a written evidence of KICA's
00 51:41 20 intention is that agreement for conveyance.
21 So we have to find something that would rebut
22 that. And while there may be some testimony
23 about the individual board members, I think
24 it's real hard to say, well, I recognize that
00 51:55 25 my KRA cap -- but I can specifically take off

1 my KRA hat and put on my KICA cap and say
2 that KICA, as a corporate entity intended not
3 to receive that deed.

4 I don't think, other than their
00 52:09 5 personal understanding as KRA members having
6 KRA partner meetings, was there any sort of
7 independent evidence that showed that KICA,
8 the group, had contemplated that issue.

9 KICA at the end of the day wants to do
00 52:31 10 what's right. They have an obligation to
11 their membership to follow the declaration,
12 and that declaration very much ties their
13 hands as to what they can do with common
14 property and not attempting to be
15 obstructionist or anything to KRA's intent.
16 I just think that reformation is hard. The
17 case law here is clear on the actual proof of
18 an antecedent agreement, and I just don't
19 think that the facts in this case allow for
20 that.

21 The same thing as to whether or not --
22 there was some discussion by Mr. Lesemann now
23 and in his motion about the importance of
24 whether or not the land was developable and
25 the importance of whether or not the land

1 was -- more of whether or not it was part of
 2 Captain Sams Spit or not, whether it was on
 3 what side of the line, whether it was above
 4 or below the OCRM lines, and how those would
 5 have some sort of impact on intent. Well,
 6 there's no evidence or testimony that was
 7 given that KICA looked at any of those issues
 8 because KICA was not involved. KICA's sole
 9 definition under the declaration is to accept
 10 whatsoever property is given to them. Since
 11 they didn't have any hand in the negotiations
 12 or in the drafting of those documents, other
 13 than authorizing that its precedence to sign
 14 the agreement for conveyance which gave a
 15 very specific legal description, there is no
 16 evidence.

17 There was no evidence that any member
 18 of KICA or that KICA separately looked other
 19 than the agreement for conveyance in the
 20 deed, that KICA would have necessarily
 21 examined Exhibit 16.2. Certainly KRA's own
 22 brassman (sic) of the deed was not given that
 23 to look at.

24 I understand that it was available for
 25 inspection at the Town of Kiawah town hall,

1 but there's no indication that there would
 2 have been confusion or another understanding
 3 of KICA other than the conversations that
 4 happened in the KRA partnership meetings that
 5 may or may not have been relayed to the other
 6 non-developer members of the KICA board.

7 That's where we've struggled. We've
 8 tried -- this issue has been raised between
 9 KRA and KICA for many, many years prior to
 10 the initiation of this lawsuit, and it always
 11 came down to the same thing of, we wish we
 12 could help you, but there's just no evidence
 13 here to allow KICA to come to any other
 14 analysis other than they were supposed to get
 15 what the deed was drafted.

16 THE COURT: Is it your position then
 17 that it's not an unusual mistake but a
 18 unilateral one?

19 MS. JETT: Correct. For the mutual
 20 mistake you have to prove that antecedent
 21 agreement required by Gowdy versus Kelley,
 22 and we can't point to an agreement that KICA
 23 and KRA had a meeting of the minds and that
 24 they both agreed that the western permanens
 25 was the end of the Duneside Villas.

1 There's no indication that there was
 2 ever a discussion of any sort that KICA was
 3 involved in that would have established that
 4 western boundary. Without that -- the
 5 standard for reformation is so high that you
 6 just can't get there. It's not just -- you
 7 can't just say, well, there's an absence of
 8 evidence so we're going to do that. You have
 9 to actually affirmatively prove a contrary
 10 agreement than what is reflected in the
 11 documents. That just doesn't exist.

12 That's been KICA's position from the
 13 very, very beginning is that KICA has tried
 14 for years to look through its documents to
 15 find something to assist it either one way or
 16 the another as a flat-out rejection saying
 17 that yes, we agree. We should have received
 18 that or we can agree and put it to our
 19 members that we didn't and encourage the
 20 membership to vote for that. We can't take
 21 that position because there is just nothing
 22 there.

23 So I think each of the -- Mr. McKinney,
 24 Mr. Clarkson, and Mr. Long each testified
 25 that there was nothing in their memory that

1 the KICA board ever met to discuss this. I
 2 just don't think that we're there. It's a
 3 tough, tough case.

4 THE COURT: Thank you. Ms. White?

5 MS. WHITE: We would echo a lot of what
 6 Ms. Jett just said about it's a very
 7 difficult burden that the Plaintiffs have in
 8 affirmatively proving the case with
 9 reformation by clear and convincing evidence
 10 and that they cannot simply assume the
 11 existence of an antecedent agreement.

12 Just a couple of points that I wanted
 13 to touch on that Mr. Lesemann brought up:
 14 The survey that Your Honor was looking at in
 15 reference to Parcel 13 is actually a survey
 16 of a 16-acre tract. So there's no survey and
 17 there's no plat of record for the entirety of
 18 Parcel 13. That just does not exist.

19 THE COURT: That was one of the
 20 problems with the whole drafting, was it not,
 21 that we didn't have a survey of the strip?

22 MS. WHITE: Right. And what
 23 Mr. Lesemann did was show how you can take
 24 parts of Parcel 13 and sort of piece it
 25 together by reference to other surveys, but

53 1 there's just nothing that exists to reliably 2 mark those boundaries. I believe that's why 3 in your order Your Honor found that the 4 boundaries by reference to Parcel 13 were 00 58 43 5 just not sufficiently reliable. 6 Also, just the language in the 7 beginning of the agreement for conveyance, it 8 incorporates the entirety of the 1994 9 development agreement as somehow evidence 00 59 07 10 that KICA agreed or considered that 11 Exhibit 16.2 was reflective of its intent is 12 a very attenuated argument and falls far 13 short of being proof that Exhibit 16.2 is an 14 antecedent agreement when there's no proof 00 59 28 15 that KICA saw it, KICA didn't initial it, and 16 it just cannot serve as that as much as the 17 Plaintiffs might argue that it should. 18 Also, the fact that Ms. Nimmons may 19 have testified that she used the employee 00 59 56 20 facility tract as the western beginning point 21 for the beachfront strip, and that no one 22 told her to do so but it was her doing, 23 that's not exactly the right question. 24 The point is that the Plaintiffs have 01 00 13 25 to prove -- there's no question that that was	55 1 evidence beyond the 1994, 1995 time period, 2 which this Court identified early on as being 3 the relevant time period for determining 4 intent. 01 02 02 5 The Court was the finder of fact in 6 this case to have brought discretion and the 7 findings in the order supported by 8 substantial evidence, disagreement with the 9 weight that was assigned to some of the 01 02 18 10 competing evidence in the case. It's not 11 necessarily a basis to alter or amend the 12 final order. 13 There's a strong presumption per 14 written agreement such as the deed that they 01 02 29 15 reflect the true intent of the parties, which 16 is why there is such a high standard in 17 requiring proof by clear and convincing 18 evidence before a deed can be reformed, and 19 that requires proof that the parties intended 01 02 46 20 something other than what's contained in that 21 deed. 22 The Plaintiffs motion simply boils down 23 to a disagreement with the weight this Court 24 assigned to some of the evidence which it 01 03 00 25 finds compelling. We would argue that the
54 1 the point that was used in the legal 2 description, the point of the beginning for 3 the beachfront strip. 01 00 25 4 The Plaintiffs were supposed to, if 5 they wanted to prevail on reformation, they 6 would have had to provide evidence that the 7 parties intended -- affirmatively intended 8 something other than that employee facility 9 tract southwestern most corner as the point 01 00 39 10 of beginning. 11 The only agreement that there is look 12 to between the parties who are relevant in 13 reformation is the agreement for conveyance, 14 and that's the only document that KICA has 01 00 59 15 signed. They weren't involved in any of the 16 discussions, the drafting, or the execution 17 of the 1994 development agreement other than 18 signing and executing that agreement for 19 conveyance which is identical to the 01 01 11 20 beachfront deed, and the beachfront strip. 21 I think that in going a step further, 22 it seems that the Plaintiffs are trying to 23 shift their burden onto KICA and others to 24 prove what they are unable to prove by 01 01 39 25 looking at after-the-fact testimony and	56 1 Court properly determined that the deed is 2 unambiguous and no one disputes that. The 3 Plaintiffs concede that the deed is 4 unambiguous. 01 03 22 5 The language is clear and the 6 description of the beachfront strip closes in 7 the legal description. In fact, the 8 Plaintiffs' surveyor was able to take a legal 9 description of the beachfront strip and 01 03 34 10 create a survey of the 4.62 acres that's in 11 dispute. 12 So after determining that the deed was 13 unambiguous the Court still conducted a 14 thorough analysis and determined or looked to 01 03 51 15 see whether there was any evidence of a 16 mutual mistake, and the findings in the final 17 order all support this Court's ultimate 18 conclusion that reformation must be denied 19 for lack of mutual mistake. 01 04 09 20 There was no evidence of any 21 discussions by the KICA board with regard to 22 the conveyance or between KICA and KRA other 23 than the agreement or conveyance during the 24 relevant time periods. There was no evidence 01 04 19 25 of mutual mistake between KRA and KICA that

1 would allow for a reformation of the deed and
2 there was no clear and convincing evidence
3 that was presented that would dispute that
4 the intent of the parties was anything other
01:04:36 5 than what's contained in the unambiguous
6 deed.

7 THE COURT: Okay. Ms. White, thank
8 you. Mr. Lesemann?

9 MR. LESEMAN: Very briefly,

01:04:48 10 Your Honor. Your Honor, the point about
11 board action keeps coming up. The reason
12 that there's not a tremendous amount of any
13 board action on the part of KICA is because
14 KRA controlled KICA. When you're looking at
15 a third-party beneficiary situation then the
16 intent of that third-party beneficiary should
17 be presumed from what the parties to the
18 operative document were doing.

19 How did they intend to benefit KICA?
20 They intended to benefit KICA by giving it a
21 beachfront strip that was exhibited in
22 Exhibit 16.2. So KICA can't have a different
23 intent. I didn't stop there.

24 We presented evidence from the
01:05:27 25 office -- the same fellow that signed the

1 agreement for conveyance that ultimately
2 itself wasn't the subject of any board
3 action, and the property description didn't
4 come from any board action. The property
01:05:38 5 description came from Ms. Nimmons.

6 So we are sort of inflating all of this
7 supposed importance into this property
8 description that's an admitted mistake. Your
9 Honor, that's one of the reasons why the
01:05:56 10 other evidence of conduct is so important.
11 It's because -- I'm not saying that there's
12 an absence of evidence regarding KICA's
13 intent. I'm saying that Mr. Long as its
14 secretary can give it. Mr. Clarkson as its
01:06:05 15 president can give it. Mr. McKinney as its
16 former board member can do it. Ms. McAdory
17 as a 25-year employee can give it.
18 Mr. Weaver as its board chairman can give it
19 when he admitted mistake. It can come
01:06:15 20 through the fact that they don't pay taxes
21 and they never had it remapped.

22 They've never acted as if they owned
23 it, so that goes back to show, Your Honor,
24 when we look at mutual versus unilateral
25 mistake, we don't have to show that both

1 sides goofed up. That's not what mutual
2 mistake means. Mutual mistake just means
3 that as a result of the manner in which the
4 document was drafted it didn't turn out like
5 anybody intended.

6 So I am showing, the Plaintiffs are
7 bringing evidence to show that Exhibit 16.2
8 is the understanding. It's in the operative
9 document. The parties have reaffirmed it.
10 KICA has consistently governed itself in
11 accordance with what Exhibit 16.2 says.
12 That's what it treated as the stopping point.
13 It never acted as the owner.

14 Its officers and directors say this was
01:07:07 15 a mistake, and they're entitled to testify.
16 I would think at the end of the day maybe the
17 legal question is, Your Honor, any
18 third-party beneficiary setup is reformation.
19 foreclosed. Is reformation impossible where
01:07:21 20 there's a third-party beneficiary.

21 So maybe that's the legal question for
22 me to ask. I think under this -- whatever
23 the answer to that question might be in this
24 particular case since that third-party
01:07:31 25 beneficiary was controlled by my clients I

1 don't think that we actually have to go so
2 far as that legal question.

3 One of the great things about being the
4 Master in Equity I think must be that you get
01:07:46 5 to do equity. That while you have legal
6 standards and while the evidentiary burdens
7 are there, you can recognize to where I can
8 see that this employee facility tract, the
9 southwestern point, is not what any of the
01:07:57 10 parties intended and all of the conduct of
11 the parties is consistent with what they
12 considered in Exhibit 16.2 to be the
13 governing depiction.

14 You, as the Master in Equity, you can
01:08:09 15 order reformation because there is clear and
16 convincing evidence from every party, and you
17 can see the mistake. Unless and until we
18 have KICA saying, the Town saying, or KRA
19 saying, No, that point of the employment
01:08:25 20 facility tract is exactly what we intended,
21 although it included some of our hotel tract,
22 et cetera, et cetera, all of the evidence
23 points the other way which allows this to be
24 a mutual mistake.

01:08:35 25 KICA's intent can be inferred, but it's

1 also been shown by its own conduct. So
2 Your Honor, none of the points that are
3 brought up should defeat your wide ability
4 once the evidence is there to grant
01:08:49 5 reformation.

6 THE COURT: Have you been able to
7 locate any cases that talk about that, about
8 the third-party beneficiary?

9 MR. LESEMANN: Not in South Carolina,
01:08:57 10 Your Honor. What I've noted in some other
11 states is that there is a different standard
12 relating to gifts. How can a mistaken gift
13 be corrected? I don't know that the rule is
14 even consistent through the different states,
01:09:11 15 but I think that that's somewhat perhaps
16 analogous, and this was sort of a gift to
17 KICA. So in that situation where someone
18 gives a windfall gift, is it foreclosed for
19 reformation? Is the recipient of the
01:09:31 20 windfall just entitled to receive it because
21 of this three-party situation.

22 So Your Honor, I think that it is an
23 interesting question, but it doesn't show
24 that you lack the jurisdiction or the power
01:09:48 25 to grant this relief because there is

1 evidence of KICA's intent, and it is clear
2 and there's no conflict that any KICA member
3 actually intended for the mistaken property
4 description to be the operative one because
01:09:59 5 the witnesses and all the documents show that
6 it's not.

7 The one thing that can defeat
8 reformation is if we elevate the mistake. If
9 we take the mistake itself and either through
01:10:14 10 Penza say, well, it's so clear that we can't
11 consider anything else or we ultimately don't
12 go and really try to see what is the
13 depiction that the parties intended for KICA
14 to receive, and KRA and KICA being the same
01:10:29 15 for this purpose that you actually can grant
16 reformation in those circumstances, and
17 reformation is proper because it's proven,
18 and it's only if the mistake is elevated that
19 reformation should fail.

01:10:46 20 If the parties look to see, was there
21 an error in drafting? Did things turn out in
22 a way different from any party indicated that
23 it intended the reformation is proper, and
24 that's the facts that are presented in this
01:11:00 25 case.

1 THE COURT: So when you talk to them
2 about that the two areas of the law that come
3 to mind -- I'm not aware of any on this
4 third-party beneficiary. The one that comes
5 to mind -- at least that comes before this
6 Court is the resulting trust doctrine.

7 The other that comes to mind is really
8 the Probate Court, and that's the inter vivos
9 gifts, that theory. What I'm going to ask
01:11:30 10 that you-all do is to submit to me proposed
11 orders. I want you-all to look into those
12 areas to see if there's some statement of
13 policy, some ramification.

14 Clearly this is an unusual case.
01:11:41 15 There's no doubt about this. I find that
16 this Court has the jurisdiction. If it's
17 going to be granted I think the Court clearly
18 has the jurisdiction to do that, so I don't
19 think that's an issue. The question is
01:11:55 20 whether or not under these facts or these
21 circumstances it should be granted. That's
22 clearly it.

23 MR. LESEMANN: Yes, sir. Would the
24 Court see any benefit from if other states
01:12:03 25 attack the third-party beneficiary?

1 THE COURT: Sure. I'm certainly
2 willing to entertain that. Those are the
3 only areas that -- the one comes into me
4 regularly. That's the resulting trust. I
01:12:14 5 don't really think that's applicable here. I
6 don't think that's what this is.

7 Then the other one that jumped out at
8 me legally is the thought of the inter vivos
9 gift. This is a gift between -- it's clearly
01:12:23 10 a gratuitous -- there's a gratuitous
11 beneficiary here.

12 I think the better analysis is probably
13 to go outside the state to see what other
14 states have done. I think that's what our
01:12:44 15 Appellate Court's probably going to do.
16 Okay? So I would be glad to hear that.

17 MR. LESEMANN: When would you like
18 those, Your Honor?

19 THE COURT: Well, I always like them in
20 30 days. I don't know if you-all can do it
21 in that time frame or not, but that's my
22 preference. Okay? It's soon enough for me
23 to get it. I want to tell you-all as I
24 indicated earlier, we wouldn't be here if I
01:12:55 25 didn't think this motion had merit.

1 I read your motion. I've gotten the
2 responding briefs, and I've had a chance to
3 read those, and so I think we've at least
4 narrowed the focus from that standpoint. So
5 I'm just looking for some guidance in the way
6 of the law. Okay?

7 MR. LESEMAN: Thank you, Your Honor.

8 THE COURT: Thank you-all for coming
9 today.

10 (The proceedings were concluded at
11 3:35 p.m.)

12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 State of South Carolina)

)

2 County of Charleston)C E R T I F I C A T E

3

4 I, Christine A. Smith, Court Reporter
5 and Notary Public for the State of South
6 Carolina at Large, do hereby certify that the
7 foregoing transcript is a true, accurate, and
8 complete record.

9 I further certify that I am neither
10 related to nor counsel for any party to the
11 cause pending or interested in the events
12 thereof.

13 Witness my hand, I have hereunto affixed
14 my official seal this 3rd day of June, 2015
15 at Charleston, Charleston County, South
16 Carolina.

17
18
19
20

Christine A. Smith
Notary Public
My Commission Expires
May 12, 2021

21
22
23
24
25

	- 1:6, 3:16 2014 [1] - 1:18 2015 [1] - 66:14 2021 [1] - 66:22 25 [1] - 38:21 25-year [1] - 58:17 28 [2] - 39:8, 39:11 29403 [1] - 2:5 29417 [1] - 1:23 29585 [1] - 2:14 2:22 [1] - 1:18	absence [2] - 51:7, 58:12 absolutely [3] - 12:25, 21:20, 27:7 academic [2] - 4:22, 9:9 accept [1] - 49:9 accord [1] - 12:14 accordance [3] - 28:7, 35:21, 59:11 accurate [1] - 66:7 acreage [5] - 18:13, 18:20, 40:13, 41:13, 46:24 acres [4] - 7:5, 40:16, 40:20, 56:10 act [1] - 21:25 acted [2] - 58:22, 59:13 acting [1] - 34:5 action [6] - 6:8, 10:11, 57:11, 57:13, 58:3, 58:4 actions [1] - 45:14 active [3] - 14:2, 21:3, 21:4 activity [1] - 22:3 actual [2] - 39:20, 48:17 additional [8] - 4:5, 7:4, 19:23, 29:18, 29:21, 30:1, 35:15, 41:13 address [2] - 8:19, 46:1 addresses [1] - 45:14 addressing [1] - 9:4 admission [1] - 32:23 admit [2] - 6:19, 6:20 admitted [10] - 14:10, 25:22, 31:6, 31:8, 31:9, 31:25, 39:23, 41:6, 58:8, 58:19 admitting [2] - 32:24 adopted [5] - 25:8, 25:13, 27:10, 38:2, 38:23 aeration [1] - 41:9 affirm [2] - 30:22, 30:25 affirmatively [4] - 14:14, 51:9, 52:8, 54:7 affirmed [2] - 30:24, 39:5 affixed [1] - 66:13 after-the-fact [1] -	54:25 agency [2] - 17:1, 17:15 Agency [1] - 17:4 agent [1] - 17:3 agree [4] - 42:10, 44:8, 51:17, 51:18 agreed [6] - 27:13, 30:25, 38:24, 44:19, 50:24, 53:10 agreeing [1] - 29:1 agreement [56] - 7:22, 8:4, 10:20, 12:4, 16:3, 16:13, 16:16, 16:21, 16:22, 18:3, 18:16, 22:10, 22:15, 24:24, 25:1, 27:11, 27:13, 27:17, 27:23, 28:2, 28:4, 28:7, 28:21, 29:3, 29:4, 29:5, 32:20, 33:4, 34:20, 35:19, 37:14, 40:15, 44:8, 44:11, 44:18, 44:21, 44:23, 45:11, 47:20, 48:18, 49:14, 49:19, 50:21, 50:22, 51:10, 52:11, 53:7, 53:9, 53:14, 54:11, 54:13, 54:17, 54:18, 55:14, 56:23, 58:1 ahead [2] - 21:17, 25:22 Alexander [1] - 2:4 Alliance [1] - 2:9 alliejett@wncwlaw.com [1] - 2:11 Allison [1] - 2:8 allow [6] - 6:11, 33:17, 34:14, 48:19, 50:13, 57:1 allowed [1] - 16:21 allows [1] - 60:23 alter [2] - 4:25, 55:11 Alter [2] - 3:17, 4:14 alternative [1] - 9:12 ambiguity [5] - 15:1, 15:4, 15:9, 46:9, 46:11 ambiguous [2] - 7:17, 10:18 Amend [2] - 3:17, 4:15 amend [3] - 4:25, 6:13, 55:11 amended [1] - 10:6 amendment [1] - 5:14 Amendment [5] - 28:20, 28:24, 29:1,	34:19, 38:13 amount [2] - 35:24, 57:12 analogous [1] - 61:16 analysis [20] - 6:16, 7:16, 8:24, 9:10, 9:13, 9:21, 10:15, 10:16, 11:24, 20:13, 21:18, 29:10, 30:5, 30:6, 33:13, 35:14, 46:18, 50:14, 56:14, 64:12 answer [1] - 59:23 answered [1] - 12:24 antecedent [17] - 5:18, 16:16, 16:20, 18:2, 18:21, 22:10, 28:2, 28:3, 30:7, 32:20, 44:7, 44:11, 45:10, 48:18, 50:20, 52:11, 53:14 apparent [1] - 39:14 appeal [1] - 8:19 APPEARANCES [1] - 2:1 Appellate [4] - 23:14, 42:14, 46:6, 64:15 apple [1] - 36:2 applicable [1] - 64:5 apply [3] - 7:7, 7:8, 46:11 applying [1] - 46:8 appreciate [1] - 20:10 appropriate [3] - 5:13, 15:8, 20:8 area [3] - 37:25, 40:20, 47:7 areas [3] - 63:2, 63:12, 64:3 argue [3] - 10:22, 53:17, 55:25 arguing [1] - 10:5 argument [1] - 53:12 armstrong [1] - 3:21 articulated [1] - 5:16 ascertain [1] - 15:12 aside [1] - 28:18 assert [1] - 5:4 asserted [1] - 9:7 assigned [2] - 55:9, 55:24 assignee [1] - 3:8 assist [1] - 51:15 assistance [1] - 4:8 Associates [2] - 1:3, 3:4 association [2] - 23:7, 23:12 Association [3] -
12 [1] - 34:24 '94 [1] - 33:8 '94-'95 [1] - 33:20				
1		3		
1.3 [1] - 29:4 100 [1] - 1:18 11 [1] - 1:18 12 [1] - 66:22 13 [16] - 11:18, 15:24, 25:17, 26:2, 26:16, 31:3, 39:15, 40:9, 40:12, 40:14, 40:19, 52:15, 52:18, 52:24, 53:4 1380 [1] - 2:13 16 [2] - 40:19, 43:3 16(b) [2] - 24:21, 24:23 16-acre [2] - 41:11, 52:16 16.2 [39] - 5:17, 5:23, 6:14, 11:15, 13:2, 15:15, 15:17, 15:22, 18:6, 18:25, 19:2, 24:11, 24:18, 24:25, 25:16, 27:5, 27:9, 27:24, 28:12, 28:19, 29:3, 30:23, 30:24, 33:14, 34:22, 35:8, 35:17, 37:5, 37:20, 38:8, 38:23, 39:9, 49:21, 53:11, 53:13, 57:22, 59:7, 59:11, 60:12 16th [1] - 40:5 19 [2] - 40:16, 40:20 1937 [1] - 16:8 1977 [1] - 17:5 1988 [3] - 40:2, 40:5, 40:8 1990s [1] - 24:4 1994 [7] - 6:6, 24:24, 30:15, 35:7, 53:8, 54:17, 55:1 1995 [3] - 6:6, 30:15, 55:1	3 [1] - 29:20 3/4 [1] - 43:11 30 [1] - 64:20 30276 [1] - 1:22 30326 [1] - 2:10 33 [1] - 42:1 3500 [1] - 2:9 3:35 [1] - 65:11 3rd [1] - 66:14	absent [2] - 51:7, 58:12 absolutely [3] - 12:25, 21:20, 27:7 academic [2] - 4:22, 9:9 accept [1] - 49:9 accord [1] - 12:14 accordance [3] - 28:7, 35:21, 59:11 accurate [1] - 66:7 acreage [5] - 18:13, 18:20, 40:13, 41:13, 46:24 acres [4] - 7:5, 40:16, 40:20, 56:10 act [1] - 21:25 acted [2] - 58:22, 59:13 acting [1] - 34:5 action [6] - 6:8, 10:11, 57:11, 57:13, 58:3, 58:4 actions [1] - 45:14 active [3] - 14:2, 21:3, 21:4 activity [1] - 22:3 actual [2] - 39:20, 48:17 additional [8] - 4:5, 7:4, 19:23, 29:18, 29:21, 30:1, 35:15, 41:13 address [2] - 8:19, 46:1 addresses [1] - 45:14 addressing [1] - 9:4 admission [1] - 32:23 admit [2] - 6:19, 6:20 admitted [10] - 14:10, 25:22, 31:6, 31:8, 31:9, 31:25, 39:23, 41:6, 58:8, 58:19 admitting [2] - 32:24 adopted [5] - 25:8, 25:13, 27:10, 38:2, 38:23 aeration [1] - 41:9 affirm [2] - 30:22, 30:25 affirmatively [4] - 14:14, 51:9, 52:8, 54:7 affirmed [2] - 30:24, 39:5 affixed [1] - 66:13 after-the-fact [1] -	54:25 agency [2] - 17:1, 17:15 Agency [1] - 17:4 agent [1] - 17:3 agree [4] - 42:10, 44:8, 51:17, 51:18 agreed [6] - 27:13, 30:25, 38:24, 44:19, 50:24, 53:10 agreeing [1] - 29:1 agreement [56] - 7:22, 8:4, 10:20, 12:4, 16:3, 16:13, 16:16, 16:21, 16:22, 18:3, 18:16, 22:10, 22:15, 24:24, 25:1, 27:11, 27:13, 27:17, 27:23, 28:2, 28:4, 28:7, 28:21, 29:3, 29:4, 29:5, 32:20, 33:4, 34:20, 35:19, 37:14, 40:15, 44:8, 44:11, 44:18, 44:21, 44:23, 45:11, 47:20, 48:18, 49:14, 49:19, 50:21, 50:22, 51:10, 52:11, 53:7, 53:9, 53:14, 54:11, 54:13, 54:17, 54:18, 55:14, 56:23, 58:1 ahead [2] - 21:17, 25:22 Alexander [1] - 2:4 Alliance [1] - 2:9 alliejett@wncwlaw.com [1] - 2:11 Allison [1] - 2:8 allow [6] - 6:11, 33:17, 34:14, 48:19, 50:13, 57:1 allowed [1] - 16:21 allows [1] - 60:23 alter [2] - 4:25, 55:11 Alter [2] - 3:17, 4:14 alternative [1] - 9:12 ambiguity [5] - 15:1, 15:4, 15:9, 46:9, 46:11 ambiguous [2] - 7:17, 10:18 Amend [2] - 3:17, 4:15 amend [3] - 4:25, 6:13, 55:11 amended [1] - 10:6 amendment [1] - 5:14 Amendment [5] - 28:20, 28:24, 29:1,	34:19, 38:13 amount [2] - 35:24, 57:12 analogous [1] - 61:16 analysis [20] - 6:16, 7:16, 8:24, 9:10, 9:13, 9:21, 10:15, 10:16, 11:24, 20:13, 21:18, 29:10, 30:5, 30:6, 33:13, 35:14, 46:18, 50:14, 56:14, 64:12 answer [1] - 59:23 answered [1] - 12:24 antecedent [17] - 5:18, 16:16, 16:20, 18:2, 18:21, 22:10, 28:2, 28:3, 30:7, 32:20, 44:7, 44:11, 45:10, 48:18, 50:20, 52:11, 53:14 apparent [1] - 39:14 appeal [1] - 8:19 APPEARANCES [1] - 2:1 Appellate [4] - 23:14, 42:14, 46:6, 64:15 apple [1] - 36:2 applicable [1] - 64:5 apply [3] - 7:7, 7:8, 46:11 applying [1] - 46:8 appreciate [1] - 20:10 appropriate [3] - 5:13, 15:8, 20:8 area [3] - 37:25, 40:20, 47:7 areas [3] - 63:2, 63:12, 64:3 argue [3] - 10:22, 53:17, 55:25 arguing [1] - 10:5 argument [1] - 53:12 armstrong [1] - 3:21 articulated [1] - 5:16 ascertain [1] - 15:12 aside [1] - 28:18 assert [1] - 5:4 asserted [1] - 9:7 assigned [2] - 55:9, 55:24 assignee [1] - 3:8 assist [1] - 51:15 assistance [1] - 4:8 Associates [2] - 1:3, 3:4 association [2] - 23:7, 23:12 Association [3] -
2		4		
20 [1] - 42:23 20-year-old [1] - 47:15 2005 [3] - 8:3, 28:21, 29:5 2012 [2] - 34:23, 38:7 2013 [1] - 46:5 2013-CP-10-1225 [2]	4 [2] - 7:4, 56:10 404 [1] - 2:10 4th [1] - 2:9	5		
	5 [6] - 25:21, 39:12, 39:23, 39:25, 41:11, 41:17 527-0078 [1] - 2:14 59(e) [1] - 3:18 5th [5] - 28:20, 28:24, 29:1, 34:19, 38:13	7		
	724-5155 [1] - 2:5	8		
	8 [1] - 9:23 80 [1] - 2:4 843 [3] - 1:23, 2:5, 2:14	9		
	926-4530 [1] - 2:10 958-5071 [1] - 1:23	A		
	a/k/a [1] - 3:5 ability [2] - 22:17, 61:3 able [3] - 27:5, 56:8, 61:6			

1:7, 1:10, 3:13 associations [1] - 23:5 assume [1] - 52:10 assumed [2] - 44:12, 45:11 assuming [1] - 46:19 Assurance [1] - 16:19 Atlanta [1] - 2:10 attack [1] - 63:25 attempting [1] - 48:14 attend [1] - 47:11 attended [1] - 47:12 attention [5] - 4:18, 14:10, 26:15, 31:18, 46:3 attenuated [1] - 53:12 attorney [1] - 38:22 ATTORNEYS [2] - 2:2, 2:7 audiovisual [1] - 3:24 August [1] - 1:18 authorized [1] - 28:16 authorizing [1] - 49:13 automobile [1] - 17:1 available [2] - 37:14, 49:24 avoided [1] - 11:19 aware [1] - 63:3	38:5 belief [4] - 16:5, 17:20, 28:18, 37:20 below [1] - 49:4 beneficiaries [1] - 45:15 beneficiary [11] - 44:15, 44:20, 57:15, 57:16, 59:18, 59:20, 59:25, 61:8, 63:4, 63:25, 64:11 benefit [6] - 4:17, 32:10, 46:6, 57:19, 57:20, 63:24 best [2] - 7:14, 10:2 better [1] - 64:12 between [8] - 10:17, 40:19, 44:18, 50:8, 54:12, 56:22, 56:25, 64:9 beyond [3] - 34:15, 46:17, 55:1 binder [1] - 39:12 bit [2] - 15:24, 15:25 bite [1] - 36:2 blow [2] - 39:7, 39:18 blowups [1] - 4:1 blurred [1] - 40:7 board [18] - 6:8, 14:4, 14:8, 31:6, 42:25, 45:1, 45:7, 47:11, 47:23, 50:6, 52:1, 56:21, 57:11, 57:13, 58:2, 58:4, 58:16, 58:18 boils [1] - 55:22 boundaries [2] - 53:2, 53:4 boundary [15] - 11:18, 15:23, 25:12, 25:16, 25:20, 25:25, 26:1, 26:3, 27:2, 27:7, 31:1, 31:2, 41:15, 41:19, 51:4 bounds [1] - 47:7 Box [2] - 1:22, 2:13 brassman [1] - 49:22 brief [2] - 37:2, 46:16 briefly [1] - 57:9 briefs [1] - 65:2 bring [2] - 4:20, 20:22 bringing [1] - 59:7 Broad [1] - 1:18 broad [1] - 46:12 broaden [1] - 6:10 broader [2] - 6:4, 6:16 Brock [2] - 42:17, 44:3	brothers [3] - 18:10, 18:12, 18:19 brought [12] - 4:21, 8:8, 14:9, 24:1, 24:5, 24:9, 25:14, 35:7, 44:6, 52:13, 55:6, 61:3 build [1] - 29:23 building [1] - 20:20 built [2] - 19:24, 33:25 burden [6] - 24:13, 33:11, 33:12, 36:6, 52:7, 54:23 burdens [1] - 60:6 business [1] - 36:22 buy [1] - 19:11 buyer [1] - 19:23	42:18 cases [12] - 6:9, 12:1, 13:16, 13:19, 14:21, 35:24, 42:19, 43:16, 45:14, 46:13, 61:7 casmith@charlestoncounty.org [1] - 1:24 Castile [5] - 16:18, 16:20, 17:7, 17:15, 17:18 castile [1] - 16:24 caught [2] - 36:24, 46:3 cc.'s [1] - 31:14 Center [1] - 2:9 certain [2] - 27:14, 27:16 Certainly [2] - 46:9, 49:21 certainly [4] - 46:12, 47:10, 47:12, 64:1 certify [2] - 66:6, 66:9 cetera [4] - 12:20, 27:15, 60:22 chair [1] - 31:6 chairman [1] - 58:18 challenge [1] - 43:1 chance [3] - 3:25, 4:10, 65:2 change [4] - 28:12, 28:14, 43:18, 43:20 changed [1] - 28:25 changes [2] - 28:22, 44:2 changing [1] - 39:3 Charles [1] - 18:18 Charleston [6] - 1:19, 1:23, 2:5, 66:2, 66:15 CHARLESTON [1] - 1:2 Chevrolet [2] - 17:16, 17:22 Christine [4] - 1:16, 1:21, 66:4, 66:20 circumstances [2] - 62:16, 63:21 cited [2] - 23:2, 43:16 claim [3] - 7:13, 9:7, 25:2 claims [1] - 17:5 clarify [2] - 13:24, 28:2 Clarkson [8] - 12:20, 22:22, 27:21, 30:20, 31:8, 44:25, 51:24,	58:14 clear [21] - 10:16, 10:18, 15:13, 20:9, 24:11, 24:12, 25:6, 27:10, 30:9, 30:12, 44:4, 44:10, 44:17, 48:17, 52:9, 55:17, 56:5, 57:2, 60:15, 62:1, 62:10 clearest [1] - 35:18 clearly [9] - 29:2, 29:17, 35:9, 38:12, 38:13, 63:14, 63:17, 63:22, 64:9 client [1] - 21:14 clients [2] - 21:11, 59:25 closes [1] - 56:6 color [1] - 37:25 coming [3] - 43:4, 57:11, 65:8 commercial [1] - 29:20 Commercial [1] - 16:19 Commission [1] - 66:21 COMMON [1] - 1:1 common [3] - 43:12, 43:13, 48:13 community [2] - 23:5, 23:7 Community [2] - 1:7, 3:13 Company [2] - 1:4, 16:19 compel [1] - 6:4 compelling [1] - 55:25 competing [1] - 55:10 complete [1] - 66:8 complicated [2] - 36:1, 42:12 concede [2] - 14:17, 56:3 conceded [1] - 12:11 concerns [1] - 32:4 concluded [1] - 65:10 conclusion [2] - 44:3, 56:18 concrete [4] - 25:23, 26:6, 40:18, 40:22 conduct [4] - 6:11, 58:10, 60:10, 61:1 conducted [1] - 56:13 confirms [1] - 26:16 conflict [2] - 13:19,
C				
cannot [5] - 44:11, 45:11, 46:11, 52:10, 53:16 cap [2] - 47:25, 48:1 capacities [1] - 23:16 capacity [2] - 37:15, 37:16 Caps [1] - 9:22 Captain [3] - 8:2, 22:5, 49:2 card [1] - 17:16 Carol [1] - 17:3 CAROLINA [1] - 1:1 Carolina [12] - 1:4, 1:7, 1:11, 1:12, 1:19, 1:23, 2:13, 23:1, 61:9, 66:1, 66:6, 66:16 carries [1] - 40:25 case [58] - 3:4, 4:16, 6:21, 6:22, 8:8, 8:11, 9:21, 10:4, 13:15, 14:12, 14:22, 15:6, 15:8, 16:1, 16:8, 16:18, 16:20, 18:7, 18:8, 18:15, 18:24, 19:1, 19:2, 19:4, 19:7, 19:16, 20:13, 21:10, 22:25, 23:2, 23:3, 32:1, 33:24, 33:25, 34:12, 34:20, 34:21, 42:12, 42:17, 43:6, 44:4, 44:6, 44:13, 45:21, 46:2, 46:5, 46:7, 48:17, 48:19, 52:3, 52:8, 55:6, 55:10, 59:24, 62:25, 63:14 CASE [1] - 1:6 Case [2] - 3:16,				
B				
Barks [1] - 2:3 base [1] - 5:10 based [5] - 11:5, 18:16, 20:13, 29:15, 37:21 basis [3] - 17:24, 18:3, 55:11 beach [1] - 22:4 beachfront [18] - 7:5, 7:23, 7:25, 11:16, 25:12, 26:3, 26:8, 26:22, 45:4, 45:8, 47:8, 53:21, 54:3, 54:20, 56:6, 56:9, 57:21 bearing [1] - 8:11 become [1] - 39:13 beginning [5] - 51:13, 53:7, 53:20, 54:2, 54:10 behalf [1] - 27:21 behavior [2] - 33:9,				

62:2 conflicting [1] - 13:3 conformed [2] - 11:17, 25:10 confusion [1] - 50:2 consider [8] - 12:4, 23:15, 23:17, 23:19, 28:19, 31:21, 36:5, 62:11 consideration [2] - 45:7, 47:6 considered [6] - 6:2, 9:19, 29:12, 35:3, 53:10, 60:12 considers [1] - 36:3 consistent [4] - 6:8, 41:15, 60:11, 61:14 consistently [1] - 59:10 constrict [1] - 6:7 construction [7] - 7:8, 9:1, 9:20, 10:15, 11:25, 12:8, 12:13 contain [1] - 12:12 contained [2] - 55:20, 57:5 contains [1] - 15:4 contemplated [1] - 48:8 contemplation [1] - 47:6 contest [5] - 14:3, 14:6, 14:18, 31:5, 32:7 continue [1] - 41:7 continuously [1] - 21:12 contract [5] - 10:18, 16:13, 16:22, 18:12, 18:22 contrary [1] - 51:9 contribution [2] - 10:8, 10:11 contrition [1] - 32:25 control [2] - 22:16, 23:13 controlled [3] - 23:7, 57:14, 59:25 controlling [1] - 22:18 controverted [1] - 23:23 conversation [4] - 17:7, 17:8, 17:25, 37:23 conversations [1] - 50:3 convey [1] - 27:14 conveyance [14] - 7:22, 23:25, 25:1,	27:12, 27:25, 47:20, 49:14, 49:19, 53:7, 54:13, 54:19, 56:22, 56:23, 58:1 conveyances [1] - 28:6 conveyed [3] - 19:9, 26:21, 47:8 convincing [6] - 24:12, 30:9, 52:9, 55:17, 57:2, 60:16 copy [1] - 25:22 corner [4] - 10:24, 11:2, 13:2, 54:9 corporate [1] - 48:2 Corporation [3] - 1:8, 1:11, 1:12 correct [6] - 3:21, 11:17, 21:8, 39:4, 40:10, 50:19 corrected [1] - 61:13 COUNSEL [1] - 2:1 counsel [2] - 32:17, 66:10 count [2] - 43:8, 43:16 COUNTY [1] - 1:2 County [3] - 18:10, 66:2, 66:15 couple [3] - 31:10, 36:8, 52:12 court [2] - 23:8, 23:15 COURT [35] - 1:1, 3:3, 3:12, 3:23, 4:6, 4:10, 14:25, 20:12, 21:17, 24:21, 26:10, 33:19, 34:23, 36:8, 36:14, 39:6, 39:13, 39:18, 39:21, 39:25, 40:9, 41:18, 41:21, 41:24, 42:6, 42:8, 50:16, 52:4, 52:19, 57:7, 61:6, 63:1, 64:1, 64:19, 65:8 Court [78] - 1:17, 1:21, 4:17, 4:25, 5:7, 5:9, 5:11, 5:15, 5:19, 5:21, 5:25, 6:3, 6:4, 6:12, 6:13, 6:16, 7:7, 7:13, 7:20, 8:5, 8:13, 8:14, 8:15, 9:3, 9:11, 9:12, 9:17, 9:24, 10:1, 10:3, 10:14, 11:1, 12:2, 13:2, 13:14, 13:25, 14:13, 16:2, 16:5, 18:15, 19:4, 19:16, 19:18, 19:20, 20:11, 23:14, 23:18, 25:18, 26:25, 30:5,	30:8, 31:15, 31:17, 31:20, 32:19, 33:13, 33:14, 33:15, 33:17, 33:25, 34:3, 34:12, 35:22, 36:3, 36:4, 42:14, 46:6, 55:2, 55:5, 55:23, 56:1, 56:13, 63:6, 63:8, 63:16, 63:17, 63:24, 66:4 Court's [8] - 11:24, 29:10, 36:21, 43:7, 43:8, 43:21, 56:17, 64:15 Courts [1] - 16:7 Cove [2] - 1:10, 3:14 covenant [1] - 10:6 covered [2] - 36:15, 37:1 create [1] - 56:10 crept [1] - 9:20 cross [1] - 45:5 Curry [1] - 2:8 custodian [1] - 47:3	DEFENDANT [1] - 2:7 Defendants [1] - 20:14 definite [1] - 25:17 definition [1] - 49:9 Delaware [1] - 1:3 denial [1] - 43:7 denied [1] - 56:18 density [1] - 29:16 deny [2] - 17:8, 17:13 depiction [3] - 27:24, 60:13, 62:13 description [10] - 27:6, 49:15, 54:2, 56:6, 56:7, 56:9, 58:3, 58:5, 58:8, 62:4 desired [1] - 12:12 details [2] - 42:13, 43:23 determine [2] - 12:2, 27:1 determined [3] - 14:21, 56:1, 56:14 determining [3] - 46:7, 55:3, 56:12 developability [7] - 8:1, 24:17, 25:4, 29:10, 30:14, 35:8, 36:17 developable [11] - 29:13, 29:14, 29:22, 30:2, 35:11, 35:13, 35:15, 36:19, 36:22, 37:1, 48:24 developer [11] - 19:8, 19:11, 22:16, 23:4, 23:6, 23:11, 23:12, 29:8, 42:24, 44:19, 50:6 Development [1] - 3:5 development [20] - 8:3, 22:15, 24:24, 27:13, 27:17, 27:23, 28:4, 28:7, 28:21, 29:8, 34:20, 35:19, 37:14, 38:3, 40:15, 42:5, 44:17, 44:21, 53:9, 54:17 different [10] - 15:22, 17:17, 22:17, 24:6, 28:23, 44:1, 57:22, 61:11, 61:14, 62:22 difficult [3] - 44:14, 45:22, 52:7 director [1] - 22:24 directors [3] - 14:4, 24:4, 59:14	disagree [4] - 13:11, 14:23, 33:23, 35:1 disagreement [2] - 55:8, 55:23 disconnect [1] - 15:15 discount [1] - 13:10 discretion [1] - 55:6 discuss [2] - 15:24, 52:1 discussed [1] - 8:25 discussion [5] - 8:21, 45:7, 47:5, 48:22, 51:2 discussions [2] - 54:16, 56:21 dispositive [1] - 8:18 dispute [5] - 12:22, 12:25, 46:22, 56:11, 57:3 disputes [2] - 43:7, 56:2 dissolved [1] - 1:12 distinction [1] - 10:17 doctrine [3] - 12:6, 17:23, 63:6 document [22] - 10:9, 10:13, 12:11, 15:11, 16:15, 24:15, 24:19, 25:5, 25:6, 25:9, 25:24, 27:22, 37:8, 38:9, 38:10, 39:3, 44:10, 54:14, 57:18, 59:4, 59:9 documents [7] - 4:1, 10:23, 33:3, 49:12, 51:11, 51:14, 62:5 doghouse [3] - 19:24, 20:20, 33:25 done [3] - 18:10, 42:21, 64:14 door [3] - 19:19, 20:7, 34:15 doubt [1] - 63:15 down [3] - 17:15, 50:11, 55:22 Dr [1] - 28:23 drafted [2] - 50:15, 59:4 drafting [5] - 44:22, 49:12, 52:20, 54:16, 62:21 draw [1] - 27:6 drawn [1] - 15:17 drew [1] - 37:6 due [1] - 41:21 Duneside [5] - 26:4, 26:20, 40:23, 41:19, 50:25

D

damage [1] - 43:9
date [1] - 40:1
dates [3] - 27:16, 40:4, 40:6
days [1] - 64:20
death [1] - 42:24
decided [1] - 31:20
deciding [1] - 8:16
decision [12] - 4:25, 8:13, 8:23, 9:8, 9:15, 9:23, 11:2, 11:12, 11:22, 32:25, 33:1
declaration [4] - 43:10, 48:11, 48:12, 49:9
declaratory [1] - 43:9
declined [2] - 19:4, 19:6
deed [34] - 5:22, 7:8, 7:9, 7:17, 7:23, 9:1, 11:16, 11:25, 12:1, 13:7, 14:14, 15:4, 15:9, 15:13, 19:8, 20:3, 25:2, 32:21, 45:4, 45:8, 47:8, 48:3, 49:20, 49:22, 50:15, 54:20, 55:14, 55:18, 55:21, 56:1, 56:3, 56:12, 57:1, 57:6
defeat [2] - 61:3, 62:7
Defendant [3] - 1:8, 13:17, 32:2

during [1] - 56:23	42:23, 44:14, 46:2	29:3, 29:4, 30:23,	36:17, 36:24	Gowdy [5] - 16:1,
E	Esq [3] - 2:3, 2:8,	30:24, 33:14, 34:22,	flash [1] - 11:7	42:17, 44:5, 44:10,
early [2] - 46:3, 55:2	2:12	35:17, 37:5, 37:20,	flat [1] - 51:16	50:21
earnestly [1] - 4:23	established [1] -	38:8, 39:8, 39:11,	flat-out [1] - 51:16	Grady [1] - 18:19
easily [3] - 11:16,	51:3	39:12, 39:23, 41:11,	Floating [1] - 9:22	grant [6] - 5:9, 5:20,
11:17, 18:24	estate [1] - 32:23	41:17, 42:1, 49:21,	Floor [2] - 2:4, 2:9	36:12, 61:4, 61:25,
eastern [5] - 11:18,	et [4] - 12:20, 27:15,	53:11, 53:13, 57:22,	focus [3] - 7:16,	62:15
15:23, 26:1, 31:2,	60:22	59:7, 59:11, 60:12	16:14, 65:4	granted [10] - 6:21,
41:15	events [1] - 66:11	exhibited [1] - 57:21	focused [1] - 19:20	8:16, 13:17, 18:9,
echo [1] - 52:5	evidence [66] - 6:1,	exhibits [5] - 4:5,	folks [3] - 23:9,	18:15, 33:18, 36:7,
effort [1] - 35:24	6:5, 6:17, 7:11, 7:15,	37:4, 37:13, 37:19,	23:10, 23:16	47:13, 63:17, 63:21
either [2] - 51:15,	9:18, 11:1, 12:5, 13:4,	38:1	follow [2] - 43:10,	grantees [1] - 45:18
62:9	14:13, 14:16, 17:10,	exist [2] - 51:11,	48:11	granting [1] - 43:9
elevate [1] - 62:8	19:19, 20:6, 20:9,	52:18	FOR [2] - 2:2, 2:7	gratuitous [2] -
elevated [1] - 62:18	20:19, 20:21, 21:22,	existed [2] - 15:16,	Ford [3] - 17:5,	64:10
elicited [1] - 44:16	23:8, 23:17, 24:10,	30:14	17:19, 17:21	great [1] - 60:3
Ellis [1] - 2:3	28:15, 30:9, 30:11,	existence [1] - 52:11	foreclosed [2] -	greer [1] - 24:2
ellis [1] - 42:11	31:11, 31:21, 33:6,	exists [1] - 53:1	59:19, 61:18	grounds [4] - 4:21,
embody [1] - 12:3	33:10, 33:15, 35:3,	expertly [1] - 15:3	foreclosure [1] - 9:6	5:1, 43:3, 43:17
employee [14] -	41:7, 42:22, 44:16,	Expires [1] - 66:21	foregoing [1] - 66:7	Group [2] - 1:12,
10:24, 11:3, 11:10,	45:20, 46:20, 47:1,	explanation [1] -	form [2] - 6:7, 18:3	3:15
13:1, 13:8, 14:2,	47:5, 47:9, 47:18,	38:7	formal [3] - 16:6,	group [1] - 48:8
15:15, 15:19, 24:16,	47:19, 48:7, 49:6,	express [1] - 10:19	18:22, 44:9	guidance [2] - 42:14,
25:2, 53:19, 54:8,	49:16, 49:17, 50:12,	expressed [1] - 7:24	former [4] - 14:4,	65:5
58:17, 60:8	51:8, 52:9, 53:9, 54:6,	extra [2] - 40:12,	14:5, 58:16	
employment [1] -	55:1, 55:8, 55:10,	46:20	forth [3] - 4:22,	H
60:19	55:18, 55:24, 56:15,	F	27:16, 35:7	half [1] - 38:21
encourage [1] -	56:20, 56:24, 57:2,	faced [1] - 13:3	forward [5] - 24:1,	hall [1] - 49:25
51:19	57:24, 58:10, 58:12,	facility [13] - 10:24,	24:5, 24:9, 33:7, 34:3	hand [4] - 39:2,
end [5] - 45:25,	59:7, 60:16, 60:22,	11:3, 11:10, 13:1,	fought [1] - 32:17	44:21, 49:11, 66:13
46:17, 48:9, 50:25,	61:4, 62:1	13:8, 15:16, 15:19,	four [1] - 5:6	handled [1] - 4:8
59:16	evidentiary [1] - 60:6	24:16, 25:3, 53:20,	fours [1] - 23:6	handling [2] - 34:8,
ended [1] - 18:11	evoked [1] - 8:6	54:8, 60:8, 60:20	frame [3] - 30:15,	34:9
ending [1] - 25:16	exactly [7] - 13:6,	fact [17] - 4:24, 7:12,	33:21, 64:21	hands [4] - 6:1, 9:18,
ends [1] - 11:24	14:15, 25:25, 32:6,	8:18, 14:8, 15:13,	frankly [1] - 45:12	12:21, 48:13
enforce [2] - 16:8	41:20, 53:23, 60:20	20:14, 24:6, 24:9,	free [1] - 37:12	hard [5] - 32:16,
entered [1] - 22:15	Exactly [1] - 15:3	24:10, 25:7, 31:5,	freely [1] - 6:21	36:1, 47:17, 47:24,
entertain [1] - 64:2	examination [1] -	53:18, 54:25, 55:5,	Friday [1] - 7:2	48:16
entire [1] - 22:6	45:5	56:7, 58:20	front [2] - 26:23, 31:7	harder [1] - 15:10
entirety [2] - 52:17,	examined [1] - 49:21	facts [8] - 14:21,	future [1] - 42:2	hat [1] - 48:1
53:8	example [2] - 16:18,	14:22, 14:23, 20:23,	G	hats [1] - 23:9
entities [1] - 3:8	23:24	22:11, 48:19, 62:24,	GA [1] - 2:10	head [1] - 47:14
entitled [2] - 59:15,	excellent [1] - 32:17	63:20	garden [1] - 19:25	hear [2] - 42:8, 64:16
61:20	except [1] - 8:2	fail [1] - 62:19	Garris [3] - 17:3,	heard [1] - 26:5
entity [2] - 3:11, 48:2	exception [1] - 38:20	Fairfield [1] - 18:9	17:6	hearing [3] - 4:14,
Env [1] - 2:13	execute [1] - 10:6	falls [1] - 53:12	gentlemen [1] -	5:5, 38:3
equal [1] - 18:13	executing [1] - 54:18	far [3] - 10:19, 53:12,	13:10	Hearing [1] - 1:15
Equity [3] - 1:22,	execution [4] -	60:2	gift [5] - 61:12,	help [2] - 42:15,
60:4, 60:14	16:10, 16:11, 44:22,	fellow [1] - 57:25	61:16, 61:18, 64:9	50:12
equity [1] - 60:5	54:16	fiat [1] - 22:21	gifts [2] - 61:12, 63:9	helps [1] - 34:21
erl@lb [1] - 2:6	executive [1] - 47:12	filed [1] - 7:2	given [7] - 11:6,	hereby [1] - 66:6
erl@lb-lawfirm.	exercise [1] - 4:23	final [3] - 25:15,	14:4, 23:18, 42:16,	hereto [1] - 28:9
com [1] - 2:6	exhibit [1] - 38:3	55:12, 56:16	49:7, 49:10, 49:22	hereunto [1] - 66:13
erroneous [1] -	Exhibit [44] - 5:17,	finder [1] - 55:5	glad [1] - 64:16	high [4] - 33:11,
18:11	5:23, 6:14, 11:15,	findings [2] - 55:7,	goofed [1] - 59:1	41:5, 51:5, 55:16
error [2] - 23:18,	13:2, 15:15, 15:17,	56:16	governed [1] - 59:10	highlight [1] - 16:13
62:21	15:22, 18:6, 18:25,	finer [1] - 42:15	governing [3] - 12:7,	26:11
especially [3] -	24:11, 24:18, 25:16,	first [4] - 6:19, 29:3,	28:20, 60:13	HOA [1] - 3:14
	25:21, 27:5, 27:9,			
	27:24, 28:12, 28:19,			

hold [2] - 19:13 Homeowners [1] - 1:10 Honor [91] - 3:7, 3:10, 3:22, 4:3, 4:12, 4:20, 5:1, 5:12, 5:24, 6:20, 7:1, 8:7, 8:8, 8:21, 9:3, 9:25, 10:3, 10:25, 12:15, 12:23, 14:19, 15:6, 15:25, 16:14, 17:14, 18:2, 18:12, 18:20, 18:24, 19:8, 20:5, 21:1, 21:8, 21:16, 22:9, 22:21, 23:20, 24:12, 24:14, 24:18, 24:19, 25:6, 25:21, 26:5, 27:9, 27:20, 28:1, 28:10, 28:17, 29:9, 30:10, 30:12, 30:16, 31:10, 31:24, 33:11, 33:23, 34:11, 34:24, 35:6, 35:23, 36:13, 37:10, 38:4, 39:1, 39:10, 39:22, 40:2, 40:3, 40:13, 40:15, 40:24, 41:6, 41:8, 41:20, 42:1, 42:10, 43:24, 45:22, 52:14, 53:3, 57:10, 58:9, 58:23, 59:17, 61:2, 61:10, 61:22, 64:18, 65:7 Honor's [1] - 40:25 Honorable [1] - 1:15 hotel [4] - 29:23, 29:24, 30:3, 60:21 hung [1] - 46:25 hurts [1] - 34:20	improbable [1] - 10:12 improper [1] - 38:6 Inc [2] - 1:7, 1:11 inclined [1] - 32:15 include [2] - 9:13, 46:23 included [5] - 36:19, 37:7, 38:14, 45:4, 60:21 includes [1] - 35:15 incorporate [2] - 5:2, 27:22 incorporated [2] - 27:18, 38:2 incorporates [1] - 53:8 incorporating [2] - 27:25, 28:8 incorrectly [1] - 37:21 indeed [1] - 6:3 independent [1] - 48:7 indicate [2] - 30:1, 35:2 indicated [3] - 19:10, 62:22, 64:24 indicates [2] - 8:15, 37:24 indicating [1] - 40:21 indication [4] - 22:7, 35:18, 50:1, 51:1 indicia [1] - 34:16 indictio [1] - 21:4 individual [1] - 47:23 individuals [2] - 14:18, 45:2 inducement [1] - 16:11 inferred [3] - 18:23, 18:25, 60:25 infirmative [1] - 7:3 inflating [1] - 58:6 informal [3] - 8:7, 16:6, 16:17 information [1] - 17:4 initial [2] - 37:2, 53:15 initiation [1] - 50:10 Inlet [2] - 1:10, 3:14 inspection [1] - 49:25 instance [2] - 12:16, 45:6 instructions [1] - 11:5 instrument [4] - 12:3, 16:9, 16:10, 45:18	instruments [1] - 12:8 insurance [3] - 17:1, 17:21, 22:2 Insurance [2] - 10:4, 17:4 intend [7] - 13:1, 19:11, 32:9, 35:10, 35:12, 46:23, 57:19 intended [21] - 7:25, 14:14, 15:18, 15:19, 18:19, 23:5, 26:2, 26:18, 29:1, 31:1, 48:2, 54:7, 55:19, 57:20, 59:5, 60:10, 60:20, 62:3, 62:13, 62:23 intent [45] - 6:2, 6:5, 6:6, 6:7, 6:10, 6:17, 7:4, 9:14, 9:19, 12:14, 12:23, 13:4, 13:6, 13:7, 19:19, 20:9, 22:17, 22:25, 24:7, 30:11, 30:13, 30:14, 33:7, 33:16, 34:16, 35:7, 36:16, 36:20, 38:25, 45:12, 45:17, 45:19, 47:1, 48:15, 49:5, 53:11, 55:4, 55:15, 57:4, 57:16, 57:23, 58:13, 60:25, 62:1 intention [2] - 35:3, 47:20 intentionally [1] - 15:21 intentions [1] - 37:22 inter [2] - 63:8, 64:8 interaction [1] - 37:21 interested [1] - 66:11 interesting [2] - 12:10, 61:23 intervener's [1] - 41:17 interveners [1] - 24:3 Intervenor's [2] - 39:23, 39:25 intervenor's [1] - 41:10 Intervenors [1] - 1:13 intervenors [4] - 3:16, 3:21, 20:24, 25:21 investment [2] - 21:3, 22:3 invoked [1] - 17:23	involved [6] - 18:9, 37:17, 39:5, 49:8, 51:3, 54:15 irrelevant [1] - 15:1 Island [6] - 1:7, 1:11, 2:14, 3:13, 3:14, 27:15 island [1] - 29:25 issue [11] - 8:20, 9:5, 11:19, 14:9, 15:2, 19:18, 30:13, 45:13, 48:8, 50:8, 63:19 issues [7] - 8:2, 8:18, 25:14, 30:4, 36:3, 42:15, 49:7 items [2] - 19:22, 31:11 iteration [1] - 25:11 iterations [1] - 28:24 itself [14] - 6:22, 7:10, 7:14, 8:12, 9:3, 12:3, 15:13, 27:12, 27:22, 32:21, 46:10, 58:2, 59:10, 62:9	12:17, 13:6, 13:25, 14:13, 14:23, 20:24, 21:12, 21:13, 21:24, 22:16, 22:17, 22:24, 23:23, 24:6, 27:14, 27:22, 34:6, 41:1, 42:25, 43:9, 43:13, 44:19, 45:1, 48:1, 48:2, 48:7, 48:9, 49:7, 49:8, 49:18, 49:20, 50:3, 50:6, 50:9, 50:13, 50:22, 51:2, 51:13, 52:1, 53:10, 53:15, 54:14, 54:23, 56:21, 56:22, 56:25, 57:13, 57:14, 57:19, 57:20, 57:22, 59:10, 60:18, 61:17, 62:2, 62:13, 62:14 KICA's [12] - 12:23, 14:10, 25:10, 31:5, 47:1, 47:4, 47:19, 49:8, 51:12, 58:12, 60:25, 62:1 kind [1] - 40:7 Kishter [1] - 23:2 known [2] - 3:13, 12:18 KRA [26] - 6:24, 11:11, 15:18, 22:14, 25:8, 27:13, 29:11, 30:23, 34:6, 35:10, 37:18, 43:19, 45:1, 46:22, 47:25, 48:1, 48:5, 48:6, 50:4, 50:9, 50:23, 56:22, 56:25, 57:14, 60:18, 62:14 KRA's [5] - 34:7, 34:9, 34:10, 48:15, 49:21									
I	identical [3] - 7:21, 10:22, 54:19 identification [1] - 31:23 identified [1] - 55:2 identifies [2] - 24:25, 40:18 identify [1] - 25:1 II [3] - 1:4, 3:10, 3:12 impact [1] - 49:5 implement [1] - 37:25 importance [3] - 48:23, 48:25, 58:7 important [4] - 13:14, 19:5, 19:17, 58:10 impossible [1] - 59:19 impression [1] - 16:5	improbable [1] - 10:12 improper [1] - 38:6 Inc [2] - 1:7, 1:11 inclined [1] - 32:15 include [2] - 9:13, 46:23 included [5] - 36:19, 37:7, 38:14, 45:4, 60:21 includes [1] - 35:15 incorporate [2] - 5:2, 27:22 incorporated [2] - 27:18, 38:2 incorporates [1] - 53:8 incorporating [2] - 27:25, 28:8 incorrectly [1] - 37:21 indeed [1] - 6:3 independent [1] - 48:7 indicate [2] - 30:1, 35:2 indicated [3] - 19:10, 62:22, 64:24 indicates [2] - 8:15, 37:24 indicating [1] - 40:21 indication [4] - 22:7, 35:18, 50:1, 51:1 indicia [1] - 34:16 indictio [1] - 21:4 individual [1] - 47:23 individuals [2] - 14:18, 45:2 inducement [1] - 16:11 inferred [3] - 18:23, 18:25, 60:25 infirmative [1] - 7:3 inflating [1] - 58:6 informal [3] - 8:7, 16:6, 16:17 information [1] - 17:4 initial [2] - 37:2, 53:15 initiation [1] - 50:10 Inlet [2] - 1:10, 3:14 inspection [1] - 49:25 instance [2] - 12:16, 45:6 instructions [1] - 11:5 instrument [4] - 12:3, 16:9, 16:10, 45:18	12:3, 16:9, 16:10, 45:18 instruments [1] - 12:8 insurance [3] - 17:1, 17:21, 22:2 Insurance [2] - 10:4, 17:4 intend [7] - 13:1, 19:11, 32:9, 35:10, 35:12, 46:23, 57:19 intended [21] - 7:25, 14:14, 15:18, 15:19, 18:19, 23:5, 26:2, 26:18, 29:1, 31:1, 48:2, 54:7, 55:19, 57:20, 59:5, 60:10, 60:20, 62:3, 62:13, 62:23 intent [45] - 6:2, 6:5, 6:6, 6:7, 6:10, 6:17, 7:4, 9:14, 9:19, 12:14, 12:23, 13:4, 13:6, 13:7, 19:19, 20:9, 22:17, 22:25, 24:7, 30:11, 30:13, 30:14, 33:7, 33:16, 34:16, 35:7, 36:16, 36:20, 38:25, 45:12, 45:17, 45:19, 47:1, 48:15, 49:5, 53:11, 55:4, 55:15, 57:4, 57:16, 57:23, 58:13, 60:25, 62:1 intention [2] - 35:3, 47:20 intentionally [1] - 15:21 intentions [1] - 37:22 inter [2] - 63:8, 64:8 interaction [1] - 37:21 interested [1] - 66:11 interesting [2] - 12:10, 61:23 intervener's [1] - 41:17 interveners [1] - 24:3 Intervenor's [2] - 39:23, 39:25 intervenor's [1] - 41:10 Intervenors [1] - 1:13 intervenors [4] - 3:16, 3:21, 20:24, 25:21 investment [2] - 21:3, 22:3 invoked [1] - 17:23	involved [6] - 18:9, 37:17, 39:5, 49:8, 51:3, 54:15 irrelevant [1] - 15:1 Island [6] - 1:7, 1:11, 2:14, 3:13, 3:14, 27:15 island [1] - 29:25 issue [11] - 8:20, 9:5, 11:19, 14:9, 15:2, 19:18, 30:13, 45:13, 48:8, 50:8, 63:19 issues [7] - 8:2, 8:18, 25:14, 30:4, 36:3, 42:15, 49:7 items [2] - 19:22, 31:11 iteration [1] - 25:11 iterations [1] - 28:24 itself [14] - 6:22, 7:10, 7:14, 8:12, 9:3, 12:3, 15:13, 27:12, 27:22, 32:21, 46:10, 58:2, 59:10, 62:9	J								
J	Jessie [1] - 2:12 jessie@scelp.org [1] - 2:15 JETT [2] - 42:10, 50:19 Jett [3] - 2:8, 42:8, 52:6 jett [1] - 3:20 judgment [2] - 8:17, 11:4 jumped [1] - 64:7 June [2] - 40:6, 66:14 jurisdiction [4] - 5:9, 61:24, 63:16, 63:18	Jessie [1] - 2:12 jessie@scelp.org [1] - 2:15 JETT [2] - 42:10, 50:19 Jett [3] - 2:8, 42:8, 52:6 jett [1] - 3:20 judgment [2] - 8:17, 11:4 jumped [1] - 64:7 June [2] - 40:6, 66:14 jurisdiction [4] - 5:9, 61:24, 63:16, 63:18	J	Jessie [1] - 2:12 jessie@scelp.org [1] - 2:15 JETT [2] - 42:10, 50:19 Jett [3] - 2:8, 42:8, 52:6 jett [1] - 3:20 judgment [2] - 8:17, 11:4 jumped [1] - 64:7 June [2] - 40:6, 66:14 jurisdiction [4] - 5:9, 61:24, 63:16, 63:18	J								
K	KDP [4] - 1:4, 3:10, 3:12, 31:18 keeps [1] - 57:11 Kelley [5] - 16:1, 42:18, 44:6, 44:10, 50:21 kept [3] - 29:13, 29:15, 43:3 key [2] - 31:25, 38:5 Kiawah [14] - 1:3, 1:7, 1:11, 3:4, 3:5, 3:12, 3:14, 21:1, 27:15, 28:14, 38:7, 38:11, 41:2, 49:25 KICA [63] - 3:14, 3:20, 6:25, 11:11, 12:17, 13:6, 13:25, 14:13, 14:23, 20:24, 21:12, 21:13, 21:24, 22:16, 22:17, 22:24, 23:23, 24:6, 27:14, 27:22, 34:6, 41:1, 42:25, 43:9, 43:13, 44:19, 45:1, 48:1, 48:2, 48:7, 48:9, 49:7, 49:8, 49:18, 49:20, 50:3, 50:6, 50:9, 50:13, 50:22, 51:2, 51:13, 52:1, 53:10, 53:15, 54:14, 54:23, 56:21, 56:22, 56:25, 57:13, 57:14, 57:19, 57:20, 57:22, 59:10, 60:18, 61:17, 62:2, 62:13, 62:14 KICA's [12] - 12:23, 14:10, 25:10, 31:5, 47:1, 47:4, 47:19, 49:8, 51:12, 58:12, 60:25, 62:1 kind [1] - 40:7 Kishter [1] - 23:2 known [2] - 3:13, 12:18 KRA [26] - 6:24, 11:11, 15:18, 22:14, 25:8, 27:13, 29:11, 30:23, 34:6, 35:10, 37:18, 43:19, 45:1, 46:22, 47:25, 48:1, 48:5, 48:6, 50:4, 50:9, 50:23, 56:22, 56:25, 57:14, 60:18, 62:14 KRA's [5] - 34:7, 34:9, 34:10, 48:15, 49:21	K	K	KDP [4] - 1:4, 3:10, 3:12, 31:18 keeps [1] - 57:11 Kelley [5] - 16:1, 42:18, 44:6, 44:10, 50:21 kept [3] - 29:13, 29:15, 43:3 key [2] - 31:25, 38:5 Kiawah [14] - 1:3, 1:7, 1:11, 3:4, 3:5, 3:12, 3:14, 21:1, 27:15, 28:14, 38:7, 38:11, 41:2, 49:25 KICA [63] - 3:14, 3:20, 6:25, 11:11, 12:17, 13:6, 13:25, 14:13, 14:23, 20:24, 21:12, 21:13, 21:24, 22:16, 22:17, 22:24, 23:23, 24:6, 27:14, 27:22, 34:6, 41:1, 42:25, 43:9, 43:13, 44:19, 45:1, 48:1, 48:2, 48:7, 48:9, 49:7, 49:8, 49:18, 49:20, 50:3, 50:6, 50:9, 50:13, 50:22, 51:2, 51:13, 52:1, 53:10, 53:15, 54:14, 54:23, 56:21, 56:22, 56:25, 57:13, 57:14, 57:19, 57:20, 57:22, 59:10, 60:18, 61:17, 62:2, 62:13, 62:14 KICA's [12] - 12:23, 14:10, 25:10, 31:5, 47:1, 47:4, 47:19, 49:8, 51:12, 58:12, 60:25, 62:1 kind [1] - 40:7 Kishter [1] - 23:2 known [2] - 3:13, 12:18 KRA [26] - 6:24, 11:11, 15:18, 22:14, 25:8, 27:13, 29:11, 30:23, 34:6, 35:10, 37:18, 43:19, 45:1, 46:22, 47:25, 48:1, 48:5, 48:6, 50:4, 50:9, 50:23, 56:22, 56:25, 57:14, 60:18, 62:14 KRA's [5] - 34:7, 34:9, 34:10, 48:15, 49:21	K	K	KDP [4] - 1:4, 3:10, 3:12, 31:18 keeps [1] - 57:11 Kelley [5] - 16:1, 42:18, 44:6, 44:10, 50:21 kept [3] - 29:13, 29:15, 43:3 key [2] - 31:25, 38:5 Kiawah [14] - 1:3, 1:7, 1:11, 3:4, 3:5, 3:12, 3:14, 21:1, 27:15, 28:14, 38:7, 38:11, 41:2, 49:25 KICA [63] - 3:14, 3:20, 6:25, 11:11, 12:17, 13:6, 13:25, 14:13, 14:23, 20:24, 21:12, 21:13, 21:24, 22:16, 22:17, 22:24, 23:23, 24:6, 27:14, 27:22, 34:6, 41:1, 42:25, 43:9, 43:13, 44:19, 45:1, 48:1, 48:2, 48:7, 48:9, 49:7, 49:8, 49:18, 49:20, 50:3, 50:6, 50:9, 50:13, 50:22, 51:2, 51:13, 52:1, 53:10, 53:15, 54:14, 54:23, 56:21, 56:22, 56:25, 57:13, 57:14, 57:19, 57:20, 57:22, 59:10, 60:18, 61:17, 62:2, 62:13, 62:14 KICA's [12] - 12:23, 14:10, 25:10, 31:5, 47:1, 47:4, 47:19, 49:8, 51:12, 58:12, 60:25, 62:1 kind [1] - 40:7 Kishter [1] - 23:2 known [2] - 3:13, 12:18 KRA [26] - 6:24, 11:11, 15:18, 22:14, 25:8, 27:13, 29:11, 30:23, 34:6, 35:10, 37:18, 43:19, 45:1, 46:22, 47:25, 48:1, 48:5, 48:6, 50:4, 50:9, 50:23, 56:22, 56:25, 57:14, 60:18, 62:14 KRA's [5] - 34:7, 34:9, 34:10, 48:15, 49:21	K	K	KDP [4] - 1:4, 3:10, 3:12, 31:18 keeps [1] - 57:11 Kelley [5] - 16:1, 42:18, 44:6, 44:10, 50:21 kept [3] - 29:13, 29:15, 43:3 key [2] - 31:25, 38:5 Kiawah [14] - 1:3, 1:7, 1:11, 3:4, 3:5, 3:12, 3:14, 21:1, 27:15, 28:14, 38:7, 38:11, 41:2, 49:25 KICA [63] - 3:14, 3:20, 6:25, 11:11, 12:17, 13:6, 13:25, 14:13, 14:23, 20:24, 21:12, 21:13, 21:24, 22:16, 22:17, 22:24, 23:23, 24:6, 27:14, 27:22, 34:6, 41:1, 42:25, 43:9, 43:13, 44:19, 45:1, 48:1, 48:2, 48:7, 48:9, 49:7, 49:8, 49:18, 49:20, 50:3, 50:6, 50:9, 50:13, 50:22, 51:2, 51:13, 52:1, 53:10, 53:15, 54:14, 54:23, 56:21, 56:22, 56:25, 57:13, 57:14, 57:19, 57:20, 57:22, 59:10, 60:18, 61:17, 62:2, 62:13, 62:14 KICA's [12] - 12:23, 14:10, 25:10, 31:5, 47:1, 47:4, 47:19, 49:8, 51:12, 58:12, 60:25, 62:1 kind [1] - 40:7 Kishter [1] - 23:2 known [2] - 3:13, 12:18 KRA [26] - 6:24, 11:11, 15:18, 22:14, 25:8, 27:13, 29:11, 30:23, 34:6, 35:10, 37:18, 43:19, 45:1, 46:22, 47:25, 48:1, 48:5, 48:6, 50:4, 50:9, 50:23, 56:22, 56:25, 57:14, 60:18, 62:14 KRA's [5] - 34:7, 34:9, 34:10, 48:15, 49:21	K	K	KDP [4] - 1:4, 3:10, 3:12, 31:18 keeps [1] - 57:11 Kelley [5] - 16:1, 42:18, 44:6, 44:10, 50:21 kept [3] - 29:13, 29:15, 43:3 key [2] - 31:25, 38:5 Kiawah [14] - 1:3, 1:7, 1:11, 3:4, 3:5, 3:12, 3:14, 21:1, 27:15, 28:14, 38:7, 38:11, 41:2, 49:25 KICA [63] - 3:14, 3:20, 6:25, 11:11, 12:17, 13:6, 13:25, 14:13, 14:23, 20:24, 21:12, 21:13, 21:24, 22:16, 22:17, 22:24, 23:23, 24:6, 27:14, 27:22, 34:6, 41:1, 42:25, 43:9, 43:13, 44:19, 45:1, 48:1, 48:2, 48:7, 48:9, 49:7, 49:8, 49:18, 49:20, 50:3, 50:6, 50:9, 50:13, 50:22, 51:2, 51:13, 52:1, 53:10, 53:15, 54:14, 54:23, 56:21, 56:22, 56:25, 57:13, 57:14, 57:19, 57:20, 57:22, 59:10, 60:18, 61:17, 62:2, 62:13, 62:14 KICA's [12] - 12:23, 14:10, 25:10, 31:5, 47:1, 47:4, 47:19, 49:8, 51:12, 58:12, 60:25, 62:1 kind [1] - 40:7 Kishter [1] - 23:2 known [2] - 3:13, 12:18 KRA</

Law [1] - 2:13 law [9] - 4:24, 5:8, 6:3, 22:19, 34:25, 35:1, 48:17, 63:2, 65:6 lawfirm.com [1] - 2:6 lawsuit [1] - 50:10 least [3] - 36:21, 63:5, 65:3 leave [1] - 47:16 legal [15] - 5:13, 5:15, 6:13, 7:6, 32:11, 32:18, 42:15, 49:15, 54:1, 56:7, 56:8, 59:17, 59:21, 60:2, 60:5 legally [1] - 64:8 Lenox [1] - 2:9 LESEMANN [29] - 3:7, 3:22, 4:3, 4:7, 4:12, 15:3, 20:18, 21:20, 24:23, 26:12, 33:22, 34:24, 36:13, 37:10, 39:10, 39:17, 39:20, 39:22, 40:2, 40:11, 41:20, 41:23, 41:25, 42:7, 57:9, 61:9, 63:23, 64:17, 65:7 lesemann [1] - 44:6 Lesemann [9] - 2:3, 2:3, 3:19, 33:19, 42:21, 48:22, 52:13, 52:23, 57:8 Lesemann's [3] - 43:2, 44:24, 46:16 less [2] - 16:17, 18:20 letter [3] - 31:12, 31:15, 39:14 letting [1] - 9:25 level [1] - 5:10 Liability [1] - 1:4 liability [2] - 10:10, 10:11 liar [1] - 13:12 light [3] - 4:24, 7:11, 7:12 limitations [2] - 46:8, 46:10 limited [1] - 30:13 Limited [2] - 1:3, 1:4 line [8] - 26:10, 26:17, 26:18, 37:6, 40:13, 40:14, 41:16, 49:3 lines [1] - 49:4 listed [1] - 24:2 LLC [3] - 1:4, 2:3, 3:10	locate [1] - 61:7 located [2] - 27:14, 29:18 location [1] - 40:23 look [16] - 7:10, 9:14, 16:15, 20:6, 21:24, 29:16, 30:11, 34:13, 37:3, 46:13, 49:23, 51:14, 54:11, 58:24, 62:20, 63:11 looked [5] - 34:3, 45:12, 49:7, 49:18, 56:14 looking [15] - 7:6, 24:20, 33:23, 39:7, 43:2, 43:4, 43:15, 43:17, 45:19, 46:21, 47:18, 52:14, 54:25, 57:14, 65:5 looks [5] - 33:13, 33:14, 33:15, 40:4, 40:7 loved [1] - 42:13 LP [1] - 3:5	37:23 mayor [1] - 28:14 McAdory [6] - 12:16, 12:18, 31:7, 47:2, 47:10, 58:16 McAdory's [1] - 12:21 McKinney [6] - 22:23, 26:19, 30:21, 44:25, 51:23, 58:15 mean [2] - 15:10, 19:14 meaning [1] - 5:3 means [2] - 59:2 meant [9] - 13:18, 13:21, 13:22, 19:15, 26:1, 30:10, 32:6, 38:19 meeting [2] - 47:11, 50:23 meetings [2] - 48:6, 50:4 meets [1] - 47:7 Melvin [2] - 28:13, 37:23 member [3] - 49:17, 58:16, 62:2 members [7] - 20:24, 42:24, 45:1, 47:23, 48:5, 50:6, 51:19 membership [2] - 48:11, 51:20 memories [1] - 47:15 memory [1] - 51:25 mentioned [1] - 28:13 mentions [1] - 27:24 merger [1] - 12:6 merit [2] - 36:10, 64:25 messed [1] - 38:18 met [3] - 33:12, 36:6, 52:1 might [4] - 22:5, 34:17, 53:17, 59:23 Mikell [1] - 1:16 miles [1] - 21:7 military [2] - 16:24, 17:19 mind [4] - 5:17, 63:3, 63:5, 63:7 minds [1] - 50:23 mine [1] - 11:22 mistake [32] - 10:21, 11:20, 11:21, 14:11, 14:17, 14:19, 15:2, 23:25, 32:3, 32:8, 32:10, 33:4, 34:5, 35:5, 44:5, 50:17, 50:20, 56:16, 56:19,	56:25, 58:8, 58:19, 58:25, 59:2, 59:15, 60:17, 60:24, 62:8, 62:9, 62:18 mistaken [3] - 7:11, 61:12, 62:3 modified [2] - 8:10, 40:19 moment [1] - 11:8 monument [1] - 40:22 monuments [3] - 25:23, 26:7, 40:18 mortgage [1] - 8:20 most [3] - 13:14, 43:21, 54:9 mother [1] - 16:25 Motion [2] - 3:17, 4:14 motion [11] - 4:20, 4:22, 5:2, 36:10, 36:18, 43:2, 46:16, 48:23, 55:22, 64:25, 65:1 MR [29] - 3:7, 3:22, 4:3, 4:7, 4:12, 15:3, 20:18, 21:20, 24:23, 26:12, 33:22, 34:24, 36:13, 37:10, 39:10, 39:17, 39:20, 39:22, 40:2, 40:11, 41:20, 41:23, 41:25, 42:7, 57:9, 61:9, 63:23, 64:17, 65:7 MS [4] - 42:10, 50:19, 52:5, 52:22 must [2] - 56:18, 60:4 mutual [9] - 10:20, 44:5, 50:19, 56:16, 56:19, 56:25, 58:24, 59:1, 60:24 Mutual [1] - 59:2	Nimmons [6] - 7:20, 11:4, 11:9, 27:3, 53:18, 58:5 NO [1] - 1:6 non [2] - 42:24, 50:6 non-developer [2] - 42:24, 50:6 none [2] - 7:2, 61:2 Not-for-Profit [3] - 1:8, 1:11, 1:12 Notary [3] - 1:17, 66:5, 66:21 notebook [1] - 34:12 noted [1] - 61:10 nothing [3] - 51:21, 51:25, 53:1 noticed [1] - 37:20 Nowack [1] - 2:8 numerous [1] - 5:1
O				
O'Dell [2] - 42:17, 44:4 obligation [1] - 48:10 obstructionist [1] - 48:15 obtain [1] - 17:1 obtained [1] - 37:24 obtaining [1] - 17:20 obvious [1] - 15:14 obviously [6] - 20:2, 21:23, 24:8, 32:16, 37:11, 41:4 occurred [1] - 17:9 occurring [1] - 35:2 ocean [1] - 41:22 OCRM [1] - 49:4 OF [4] - 1:1, 1:1, 1:2, 2:1 office [1] - 57:25 officer [1] - 22:24 officers [1] - 59:14 official [2] - 6:8, 66:14 officially [1] - 3:11 often [1] - 35:25 okayed [1] - 28:16 old [1] - 25:23 once [2] - 21:1, 61:4 one [41] - 3:8, 6:24, 10:5, 10:7, 10:9, 11:14, 11:21, 12:16, 13:20, 14:1, 17:11, 17:25, 18:18, 19:15, 19:17, 19:20, 24:3, 25:14, 27:11, 27:24, 30:4, 31:11, 33:1, 34:4, 40:1, 41:9, 41:11, 43:23, 45:20,				
N				
name [1] - 3:11 narrowed [1] - 65:4 necessarily [2] - 49:20, 55:11 need [3] - 8:19, 23:15, 23:17 needed [1] - 4:11 negotiating [1] - 44:22 negotiations [1] - 49:11 never [5] - 21:13, 33:5, 58:21, 58:22, 59:13 next [1] - 39:6				

50:18, 51:15, 52:19, 53:21, 56:2, 58:9, 60:3, 62:4, 62:7, 63:4, 64:3, 64:7 One [1] - 2:9 opening [1] - 19:18 opens [3] - 6:16, 20:7, 34:15 operative [4] - 24:15, 57:18, 59:8, 62:4 opinion [1] - 32:11 opportunity [1] - 4:13 opposed [1] - 32:15 opposing [1] - 9:6 order [19] - 4:4, 5:25, 8:9, 8:12, 9:12, 25:15, 25:18, 25:19, 27:1, 30:1, 30:13, 31:19, 43:19, 43:25, 53:3, 55:7, 55:12, 56:17, 60:15 orders [2] - 46:1, 63:11 ourselves [1] - 26:23 outline [1] - 30:19 outside [1] - 64:13 own [6] - 6:1, 9:18, 15:6, 43:13, 49:21, 61:1 owned [2] - 29:7, 58:22 owner [3] - 24:4, 29:7, 59:13 Owner's [1] - 3:15 Owners [1] - 1:12 ownership [2] - 21:4, 22:7	part [17] - 5:12, 5:16, 7:5, 20:10, 20:13, 20:23, 23:10, 23:11, 29:6, 29:14, 38:1, 38:2, 38:3, 39:11, 39:12, 49:1, 57:13 particular [1] - 59:24 particularly [1] - 27:16 parties [48] - 4:17, 5:19, 6:12, 6:14, 6:24, 7:3, 7:24, 8:6, 10:5, 10:7, 10:10, 10:12, 10:20, 12:4, 12:11, 15:10, 15:17, 16:12, 21:23, 22:14, 25:13, 26:21, 26:24, 27:10, 28:1, 28:19, 28:25, 29:11, 30:6, 31:13, 32:17, 34:5, 34:22, 35:20, 38:25, 39:5, 45:22, 54:7, 54:12, 55:15, 55:19, 57:4, 57:17, 59:9, 60:10, 60:11, 62:13, 62:20 partner [1] - 48:6 partners [1] - 45:1 Partners [1] - 3:6 Partnership [1] - 1:3 partnership [1] - 50:4 parts [1] - 52:24 party [28] - 3:15, 9:6, 10:10, 11:6, 13:20, 13:21, 17:11, 17:12, 22:12, 22:13, 22:18, 33:6, 35:6, 44:15, 44:20, 45:15, 57:15, 57:16, 59:18, 59:20, 59:24, 60:16, 61:8, 61:21, 62:22, 63:4, 63:25, 66:10 Party [1] - 1:13 passive [2] - 21:5, 22:3 past [1] - 38:21 patience [1] - 9:25 Pawley's [1] - 2:14 pay [1] - 58:20 paying [1] - 20:20 payment [2] - 21:9, 33:10 payments [1] - 22:2 peculiar [3] - 14:21, 14:22, 14:23 pending [1] - 66:11 Pendleton [2] - 8:9, 42:19 Penza [9] - 8:8, 8:10, 8:22, 9:1, 9:5, 42:18,	46:2, 46:9, 62:10 per [1] - 55:13 performance [1] - 43:8 perhaps [5] - 5:14, 25:15, 31:22, 34:16, 61:15 period [3] - 38:21, 55:1, 55:3 periods [1] - 56:24 permanence [1] - 45:8 permanens [1] - 50:24 Permar [7] - 12:19, 14:7, 28:11, 30:20, 37:5, 38:18, 39:2 Permar's [1] - 37:12 permissive [1] - 21:2 permits [1] - 6:3 personal [2] - 37:21, 48:5 phrased [1] - 44:1 pick [6] - 10:23, 11:2, 11:10, 13:8, 26:17, 40:12 picked [1] - 15:23 picking [1] - 11:24 picks [1] - 15:14 piece [1] - 52:24 place [4] - 8:22, 9:8, 25:24, 45:13 PLAINTIFF [1] - 2:2 Plaintiffs [10] - 1:5, 3:19, 52:7, 53:17, 53:24, 54:4, 54:22, 55:22, 56:3, 59:6 Plaintiffs [2] - 3:17, 56:8 planted [1] - 19:25 plat [1] - 52:17 PLEAS [1] - 1:1 point [22] - 9:17, 15:14, 15:20, 15:22, 23:1, 23:21, 32:3, 40:25, 41:8, 44:24, 45:6, 50:22, 53:20, 53:24, 54:1, 54:2, 54:9, 57:10, 59:12, 60:9, 60:19 pointed [1] - 7:1 points [7] - 5:6, 31:18, 32:9, 40:22, 52:12, 60:23, 61:2 policy [2] - 17:22, 63:13 portion [3] - 29:21, 29:25 position [6] - 14:1, 14:25, 34:17, 50:16,	51:12, 51:21 potential [1] - 31:12 power [2] - 12:21, 61:24 precedence [1] - 49:13 preceding [1] - 16:10 precision [1] - 26:8 preference [1] - 64:22 premium [1] - 17:6 prepared [3] - 21:16, 41:1, 41:2 present [3] - 10:1, 23:21, 33:8 presentation [1] - 3:24 presented [12] - 4:4, 6:23, 12:17, 14:2, 16:2, 21:22, 22:21, 23:8, 36:4, 57:3, 57:24, 62:24 presenting [1] - 10:21 president [2] - 14:5, 58:15 presumed [1] - 57:17 presumption [2] - 18:14, 55:13 pretty [1] - 46:12 prevail [1] - 54:5 prevents [1] - 5:8 price [2] - 17:6, 19:22 principle [1] - 16:7 privilege [1] - 31:12 Probate [1] - 63:8 problem [1] - 46:25 problems [1] - 52:20 proceedings [1] - 65:10 process [1] - 37:17 Profit [3] - 1:8, 1:11, 1:12 Progressive [2] - 9:22, 10:4 Project [1] - 2:13 proof [5] - 48:17, 53:13, 53:14, 55:17, 55:19 proper [8] - 5:17, 6:18, 7:6, 9:10, 22:5, 29:22, 62:17, 62:23 properly [1] - 56:1 properties [1] - 27:14 property [30] - 3:10, 20:15, 20:17, 23:4, 23:11, 24:3, 25:10, 26:21, 26:24, 29:6,	29:7, 29:12, 34:7, 34:8, 34:9, 34:10, 35:21, 42:3, 43:12, 43:13, 43:14, 45:3, 46:23, 48:14, 49:10, 58:3, 58:4, 58:7, 62:3 Property [2] - 1:11, 3:15 proposed [1] - 63:10 prove [6] - 45:10, 50:20, 51:9, 53:25, 54:24 proven [2] - 44:12, 62:17 provide [4] - 5:7, 5:22, 5:23, 54:6 providing [1] - 20:11 proving [1] - 52:8 provisions [3] - 27:18, 28:9, 43:11 Public [3] - 1:17, 66:5, 66:21 public [1] - 37:15 purchase [1] - 19:21 purchaser [1] - 19:10 purport [1] - 22:1 purpose [2] - 40:17, 62:15 purposes [1] - 31:23 pursuant [1] - 3:18 put [5] - 12:20, 28:18, 31:17, 48:1, 51:18
P				
p.m [2] - 1:18, 65:11 P.O [2] - 1:22, 2:13 Page [1] - 9:23 paid [4] - 19:23, 21:11, 34:1 paraphrasing [1] - 9:15 Parcel [16] - 11:18, 15:24, 25:17, 26:2, 26:16, 31:3, 39:15, 40:9, 40:12, 40:14, 40:19, 52:15, 52:18, 52:24, 53:4 parcel [6] - 18:9, 26:14, 26:16, 40:24, 41:8, 41:12 parcels [2] - 29:14, 29:19 parole [1] - 12:5				
Q				
questionable [1] - 22:19 questions [1] - 36:9 quit [1] - 25:2 quoted [1] - 17:5				
R				
R-shaped [2] - 26:16, 41:7 R3C [2] - 29:19, 42:4 raised [1] - 50:8 ramification [1] - 63:13 rare [7] - 6:21, 6:22, 13:14, 14:20, 17:22, 17:23, 32:1 rather [3] - 12:13, 17:21, 22:20 read [4] - 14:15, 36:18, 65:1, 65:3 reaffirm [1] - 38:9 reaffirmation [6] - 23:3, 29:2, 32:1,				

32:14, 32:15, 36:5 reaffirmed [6] - 25:9, 34:22, 35:20, 38:8, 38:10, 59:9 real [2] - 42:25, 47:24 really [10] - 15:12, 20:7, 22:18, 32:14, 34:18, 34:25, 35:4, 62:12, 63:7, 64:5 reason [4] - 10:20, 12:25, 19:6, 57:11 reasons [1] - 58:9 rebut [1] - 47:21 receive [4] - 18:13, 48:3, 61:20, 62:14 received [1] - 51:17 recipient [1] - 61:19 recognition [1] - 5:12 recognize [3] - 34:15, 47:24, 60:7 recognized [1] - 6:14 recollection [3] - 37:5, 37:11, 37:12 record [12] - 3:3, 13:24, 14:16, 18:17, 25:25, 26:15, 26:25, 28:15, 29:17, 37:11, 52:17, 66:8 records [3] - 42:4, 47:4 refer [1] - 35:8 reference [7] - 24:16, 24:18, 25:3, 27:19, 52:15, 52:25, 53:4 referred [1] - 40:22 refers [1] - 29:5 reflect [5] - 8:10, 15:11, 33:4, 43:19, 55:15 reflected [4] - 13:7, 37:22, 38:24, 51:10 reflective [1] - 53:11 reflects [1] - 29:5 refocuses [1] - 9:11 reform [2] - 5:22, 10:13 reform's [1] - 45:19 reformation [56] - 5:20, 6:17, 6:20, 7:6, 7:9, 7:13, 8:12, 8:14, 8:20, 9:2, 9:5, 9:7, 10:16, 12:1, 12:9, 12:14, 13:15, 13:16, 14:20, 15:2, 15:5, 15:8, 16:9, 16:21, 17:23, 18:4, 18:8, 18:16, 19:5, 19:6, 20:4, 20:8, 32:21,	33:17, 36:6, 43:6, 43:15, 43:21, 45:14, 48:16, 51:5, 52:9, 54:5, 54:13, 56:18, 57:1, 59:18, 59:19, 60:15, 61:5, 61:19, 62:8, 62:16, 62:17, 62:19, 62:23 reformed [2] - 17:22, 55:18 regard [4] - 3:9, 4:4, 29:9, 56:21 regarding [3] - 12:23, 43:11, 58:12 registration [1] - 17:16 regularly [1] - 64:4 reimburse [1] - 21:14 reject [1] - 32:20 rejected [1] - 23:8 rejection [1] - 51:16 relate [1] - 5:19 related [2] - 22:4, 66:10 relates [2] - 24:10, 37:23 relating [1] - 61:12 relative [1] - 25:4 relayed [1] - 50:5 release [1] - 10:9 relevant [4] - 33:20, 54:12, 55:3, 56:24 reliable [2] - 25:19, 53:5 reliably [1] - 53:1 relief [1] - 61:25 remainder [1] - 21:7 remains [1] - 10:10 remapped [1] - 58:21 remember [2] - 17:6, 17:25 reminds [1] - 20:25 remove [1] - 30:5 reply [1] - 7:2 reported [1] - 1:16 Reporter [3] - 1:17, 1:21, 66:4 representation [1] - 39:16 requested [2] - 17:4, 21:14 required [3] - 32:18, 43:10, 50:21 requires [1] - 55:19 requiring [2] - 16:2, 55:17 residential [1] - 29:20 Resort [2] - 1:3, 3:4	respectfully [3] - 8:24, 11:23, 33:22 responding [1] - 65:2 response [1] - 46:15 rest [1] - 22:20 restrict [1] - 6:5 result [1] - 59:3 resulting [2] - 63:6, 64:4 retained [1] - 37:18 return [1] - 30:6 reversed [1] - 23:14 review [1] - 18:17 reviewed [2] - 14:9, 37:19 reviewing [1] - 46:7 revision [2] - 40:4, 40:6 rewriting [1] - 43:25 Rhoad [3] - 30:21, 35:10, 38:20 riddled [1] - 15:9 rights [1] - 29:15 Road [1] - 2:9 rolls [1] - 33:7 Rule [1] - 3:18 rule [1] - 61:13 rules [4] - 7:7, 7:9, 9:20, 12:7 ruling [2] - 36:21, 43:21	respectfully [3] - 8:24, 11:23, 33:22 responding [1] - 65:2 response [1] - 46:15 rest [1] - 22:20 restrict [1] - 6:5 result [1] - 59:3 resulting [2] - 63:6, 64:4 retained [1] - 37:18 return [1] - 30:6 reversed [1] - 23:14 review [1] - 18:17 reviewed [2] - 14:9, 37:19 reviewing [1] - 46:7 revision [2] - 40:4, 40:6 rewriting [1] - 43:25 Rhoad [3] - 30:21, 35:10, 38:20 riddled [1] - 15:9 rights [1] - 29:15 Road [1] - 2:9 rolls [1] - 33:7 Rule [1] - 3:18 rule [1] - 61:13 rules [4] - 7:7, 7:9, 9:20, 12:7 ruling [2] - 36:21, 43:21	60:8, 60:17, 62:12, 62:20, 63:12, 63:24, 64:13 seeing [3] - 20:7, 40:5, 45:15 seek [3] - 10:7, 12:13, 32:13 seeking [1] - 36:2 sell [2] - 19:14, 19:15 sense [1] - 21:6 sentence [1] - 12:10 separate [4] - 3:7, 8:1, 8:3 separately [1] - 49:18 serve [2] - 25:19, 53:16 served [1] - 38:22 session [1] - 47:12 set [4] - 22:11, 27:16, 37:11, 42:19 setup [1] - 59:18 several [1] - 27:11 shaped [3] - 26:14, 26:16, 41:7 shared [1] - 14:8 shift [1] - 54:23 short [2] - 8:15, 53:13 show [10] - 13:14, 24:15, 29:18, 41:7, 52:23, 58:23, 58:25, 59:7, 61:23, 62:5 showed [5] - 30:25, 38:12, 38:13, 44:7, 48:7 showing [2] - 40:17, 59:6 shown [5] - 29:3, 31:3, 39:8, 41:10, 61:1 shows [7] - 11:1, 25:12, 25:23, 26:25, 34:21, 41:9, 41:11 sic [1] - 49:22 sic [1] - 42:11 side [3] - 17:25, 18:1, 49:3 sides [2] - 31:14, 59:1 sign [1] - 49:13 signed [2] - 54:15, 57:25 significant [4] - 18:8, 21:10, 21:21, 39:4 signing [1] - 54:18 signs [1] - 27:21 simply [2] - 52:10, 55:22 Sims [5] - 6:9, 19:2,	20:12, 33:24, 34:11 site [1] - 30:3 situation [8] - 22:12, 22:13, 32:16, 44:15, 45:16, 57:15, 61:17, 61:21 six [1] - 6:23 skewed [1] - 8:24 small [1] - 39:14 Smith [4] - 1:17, 1:21, 66:4, 66:20 sold [2] - 19:12, 26:24 sole [1] - 49:8 solidifies [1] - 35:4 someone [2] - 32:5, 61:17 sometimes [1] - 36:11 somewhat [1] - 61:15 soon [1] - 64:22 sorry [1] - 40:3 sort [13] - 14:2, 20:21, 21:2, 23:9, 33:6, 41:5, 45:16, 48:6, 49:5, 51:2, 52:24, 58:6, 61:16 sorts [1] - 41:1 sought [1] - 20:4 sound [1] - 37:9 SOUTH [1] - 1:1 south [1] - 41:21 South [12] - 1:4, 1:7, 1:11, 1:12, 1:19, 1:23, 2:13, 23:1, 61:9, 66:1, 66:5, 66:15 southwestern [2] - 54:9, 60:9 special [1] - 32:16 specific [2] - 43:8, 49:15 specifically [5] - 24:25, 27:23, 30:22, 30:23, 47:25 speed [1] - 30:17 spent [4] - 4:18, 24:19, 26:14, 45:23 Spit [2] - 22:6, 49:2 springboard [1] - 20:22 staff [2] - 4:19, 47:2 staff's [1] - 4:8 stand [2] - 11:20, 12:18 standard [11] - 5:14, 5:15, 6:13, 7:7, 32:18, 42:20, 46:9, 46:12, 51:5, 55:16, 61:11 standards [4] -

11:25, 14:24, 42:16, 60:6 standpoint [1] - 65:4 state [2] - 40:8, 64:13 State [2] - 66:1, 66:5 STATE [1] - 1:1 statement [1] - 63:12 states [4] - 61:11, 61:14, 63:24, 64:14 Station [2] - 8:9, 42:19 step [2] - 44:2, 54:21 still [4] - 9:19, 9:20, 29:6, 56:13 stop [4] - 26:9, 26:18, 26:24, 57:23 stopped [1] - 26:21 stopping [1] - 59:12 streamline [1] - 5:5 Street [2] - 1:19, 2:4 strip [13] - 7:5, 7:25, 25:12, 26:3, 26:8, 26:22, 52:21, 53:21, 54:3, 54:20, 56:6, 56:9, 57:21 strong [1] - 55:13 struggled [2] - 31:10, 50:7 struggling [1] - 45:24 subject [4] - 10:11, 15:5, 42:4, 58:2 submit [2] - 34:13, 63:10 submitted [3] - 34:11, 37:8, 46:20 substantial [1] - 55:8 substitute [1] - 45:17 sufficient [3] - 25:7, 25:24, 27:1 sufficiently [3] - 25:17, 39:24, 53:5 suggest [1] - 29:7 suggestion [3] - 20:23, 28:18, 31:22 summary [1] - 8:17 support [1] - 56:17 supported [1] - 55:7 supposed [7] - 11:14, 26:9, 31:2, 45:9, 50:14, 54:4, 58:7 Supreme [2] - 8:13, 33:24 surrounding [1] - 3:9 survey [10] - 18:10, 26:17, 39:20, 39:21, 41:16, 52:14, 52:15, 52:16, 52:21, 56:10	surveyor [1] - 56:8 surveyors [1] - 26:7 surveys [1] - 52:25 T taxes [10] - 19:23, 20:20, 21:9, 21:11, 21:15, 22:2, 33:10, 34:1, 34:8, 58:20 telephone [5] - 16:23, 17:2, 17:7, 17:10, 17:24 ten [1] - 21:7 terms [7] - 6:1, 9:18, 20:19, 27:12, 27:17, 28:8, 35:8 testified [11] - 11:20, 17:2, 22:23, 26:19, 27:3, 31:4, 31:8, 45:2, 47:10, 51:24, 53:19 testify [2] - 24:5, 59:15 testimony [15] - 11:7, 11:8, 13:11, 14:3, 14:6, 26:15, 27:7, 28:11, 31:9, 35:9, 37:13, 39:2, 47:22, 49:6, 54:25 THE [36] - 2:2, 2:7, 3:3, 3:12, 3:23, 4:6, 4:10, 14:25, 20:12, 21:17, 24:21, 26:10, 33:19, 34:23, 36:8, 36:14, 39:6, 39:13, 39:18, 39:21, 39:25, 40:9, 41:18, 41:21, 41:24, 42:6, 42:8, 50:16, 52:4, 52:19, 57:7, 61:6, 63:1, 64:1, 64:19, 65:8 themselves [2] - 28:1, 30:7 theory [1] - 63:9 thereof [1] - 66:12 they've [1] - 58:22 third [14] - 3:15, 26:21, 26:24, 44:15, 44:20, 45:15, 57:15, 57:16, 59:18, 59:20, 59:24, 61:8, 63:4, 63:25 Third [1] - 1:13 third-party [11] - 44:15, 44:20, 45:15, 57:15, 57:16, 59:18, 59:20, 59:24, 61:8, 63:4, 63:25 Third-Party [1] - 1:13 thorough [1] - 56:14 thoughts [1] - 15:6	three [4] - 6:24, 22:13, 26:6, 61:21 three-party [2] - 22:13, 61:21 throw [1] - 12:5 tie [1] - 9:18 tied [1] - 5:25 ties [1] - 48:12 time-to-time [1] - 28:25 timeframe [1] - 33:20 timing [1] - 37:3 Timms [2] - 18:7 tips [1] - 45:25 title [2] - 20:15, 20:16 today [2] - 7:21, 65:9 together [1] - 52:25 took [1] - 17:15 touch [1] - 52:13 touched [1] - 6:23 tough [4] - 42:19, 42:20, 52:3 towards [1] - 8:25 town [1] - 49:25 Town [16] - 6:24, 11:9, 15:18, 22:13, 25:8, 29:10, 30:23, 34:6, 37:8, 37:15, 37:16, 38:7, 41:2, 44:18, 49:25, 60:18 Town's [4] - 38:22, 38:24, 42:4, 45:17 Townsend [1] - 27:21 trace [1] - 8:5 track [1] - 10:25 tract [14] - 11:3, 11:10, 13:1, 13:8, 15:16, 15:19, 24:17, 25:3, 52:16, 53:20, 54:9, 60:8, 60:20, 60:21 transcript [1] - 66:7 treat [1] - 25:18 treated [3] - 21:6, 40:15, 59:12 treating [1] - 29:13 treatment [1] - 33:9 tremendous [2] - 35:24, 57:12 Trenham [1] - 31:13 trial [9] - 23:8, 23:14, 26:6, 31:11, 31:22, 39:12, 44:17, 45:25, 46:21 tried [2] - 50:8, 51:13 troubled [2] - 31:15, 46:3 true [4] - 12:4, 12:14,	55:15, 66:7 trust [2] - 63:6, 64:4 try [4] - 5:4, 10:12, 32:19, 62:12 trying [9] - 13:12, 21:18, 28:5, 42:22, 47:4, 47:13, 47:14, 54:22 turn [2] - 59:4, 62:21 two [11] - 3:7, 10:17, 10:23, 19:9, 19:14, 19:22, 22:12, 22:14, 42:2, 46:21, 63:2 two-day [1] - 46:21 two-party [1] - 22:12 Tyler [4] - 6:9, 19:3, 33:24, 34:12 type [2] - 21:2, 22:8 U ultimate [2] - 44:3, 56:17 ultimately [6] - 8:11, 31:20, 33:3, 43:20, 58:1, 62:11 unable [1] - 54:24 unambiguous [5] - 32:22, 56:2, 56:4, 56:13, 57:5 unauthorized [1] - 38:6 uncertainty [1] - 15:1 under [8] - 17:20, 20:3, 22:16, 23:12, 27:12, 49:9, 59:22, 63:20 undergo [1] - 10:14 underlying [1] - 10:8 underwent [1] - 10:15 undisputed [4] - 21:10, 21:12, 21:13, 21:15 uniform [1] - 40:21 unilateral [2] - 50:18, 58:24 Union [1] - 16:19 unique [1] - 22:11 unless [1] - 60:17 unusual [2] - 50:17, 63:14 up [28] - 10:24, 11:2, 11:7, 11:10, 11:24, 13:8, 15:14, 15:23, 18:11, 25:15, 26:17, 30:17, 33:8, 35:11, 35:12, 38:19, 39:7, 39:18, 40:12, 42:19,	43:1, 44:6, 46:25, 47:15, 52:13, 57:11, 59:1, 61:3 V VanDerwerker [1] - 28:23 vehicle [1] - 17:17 version [1] - 27:4 versus [14] - 3:12, 16:1, 16:19, 18:7, 19:3, 33:24, 42:17, 42:18, 44:4, 44:5, 44:10, 50:21, 58:24 view [4] - 6:4, 6:10, 14:12, 37:15 Villas [5] - 26:4, 26:20, 40:23, 41:19, 50:25 visually [1] - 10:1 vivos [2] - 63:8, 64:8 vote [2] - 43:11, 51:20 vs [1] - 1:6 W wait [3] - 19:13 walked [1] - 22:6 Walker [1] - 31:13 wants [1] - 48:9 ways [2] - 27:11, 34:4 wearing [1] - 23:9 Weaver [2] - 31:6, 58:18 weaver [1] - 23:24 weigh [1] - 21:21 weight [3] - 5:17, 55:9, 55:23 Weissman [1] - 2:8 western [10] - 25:11, 26:2, 27:6, 31:1, 41:14, 41:18, 45:8, 50:24, 51:4, 53:20 whatsoever [2] - 15:5, 49:10 whereas [1] - 27:12 WHITE [2] - 52:5, 52:22 White [1] - 2:12 white [3] - 3:20, 52:4, 57:7 whole [2] - 30:2, 52:20 wide [1] - 61:3 Wilco [1] - 2:8 willing [1] - 64:2 windfall [2] - 61:18, 61:20

wish ^[1] - 50:11 Witness ^[1] - 66:13 witness ^[11] - 12:17, 14:1, 22:22, 24:2, 30:18, 30:19, 30:21, 30:22, 31:4, 31:5 witnesses ^[7] - 6:23, 23:22, 24:8, 35:11, 45:6, 47:14, 62:5 word ^[1] - 29:22 wreck ^[1] - 17:19 written ^[7] - 15:4, 16:15, 16:22, 44:9, 47:18, 47:19, 55:14 wrote ^[1] - 7:21
Y
year ^[1] - 38:20 years ^[5] - 12:19, 38:21, 42:23, 50:9, 51:14 yeoman's ^[1] - 42:21 you-all ^[5] - 63:10, 63:11, 64:20, 64:23, 65:8
Z
zoning ^[6] - 29:16, 29:24, 34:10, 41:24, 41:25, 42:2