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VIA E-MAIL ONLY

G. Trenholm Walker, Esq.
Walker Gressette Linton, LLC
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**Re: Captain Sam's Spit
Demand for Specific Performance**

Dear Trenholm:

I hope this finds you well. My firm represents the Town of Kiawah Island (the "Town"). Reference is made to that certain Amended and Restated Development Agreement by and between the Town and Kiawah Resort Associates, L.P. ("KRA") dated December 5, 2013 (the "ARDA").

This letter confirms the Town's position regarding KDP II, LLC's ("KDP") conveyance and deed restriction obligations under the ARDA concerning real property commonly known as Captain Sam's Spit (the "Property"). The Property is further defined in the ARDA as Parcel 12B and visually depicted at Exhibit 16.2. KDP is the Property's owner of record and one of many affiliated entities included under the definition of "Property Owner" in the ARDA. It is my understanding that you represent both KRA and KDP.

Paragraph 13(B)(4)(b) of the ARDA states that the "Property Owner shall dedicate conservation open space as provided in Paragraph 16 of this Agreement." Paragraph 13(B)(4)(c) specifically identifies the Property as one of many "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."

Paragraph 16(f) reads, in relevant part and with respect to the Property, as follows:

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.

(Emphasis added). Paragraph 31 states that “[e]xcept as provided in Sec. 16(d) herein, all conveyances shall be tendered by the Property Owner so as to close during the duration of this Agreement.” Finally, Paragraph 34(j) confirms as follows:

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, 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.**

(Emphasis added).

The ARDA expired on December 4, 2023 (the “Termination Date”). Despite the passing of the Termination Date, KDP has yet to convey and deed restrict the Property as required by Paragraph 16(f). These obligations are mandatory and unconditional, as the above quoted language utilizes the word “shall” and is expressed in non-contingent terms.

The Town has reviewed KICA’s letter on this issue dated December 4, 2023 as well as KDP’s response letter dated December 14, 2023. The Town disagrees with KDP’s position concerning its Paragraph 16(f) obligations. *The Town views KDP’s failure to perform as required by Paragraph 16(f) as a material breach of the ARDA.*

KDP’s position appears to be that its obligations under Paragraph 16(f) are somehow contingent on the “development” of the Property. However, a plain reading of Paragraph 16(f) and the ARDA reveals no such contingency. “The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties’ intentions as determined by the contract language.” *Auto Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 143, 781 S.E.2d 137, 141 (Ct. App. 2015) (quoting *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012)). “Courts must enforce, not write, contracts . . . and their language must be given its plain, ordinary and popular meaning.” *Id.* (quoting *Whitlock*, 399 S.C. at 614, 732 S.E.2d at 628). “Where the contract’s language is clear and unambiguous, the language alone determines the contract’s force and effect.” *Id.* (quoting *Whitlock*, 399 S.C. at 615, 732 S.E.2d at 628). Had the intent of the Town and KDP been to so condition these transfers on the development of the Property, it would have

expressly stated as such in the text of the ARDA. This did not occur. The bottom line is that the ARDA does not condition KDP's conveyance and deed restriction obligations on any "development" of the Property.

For many decades, the Town and KRA have operated under the premise that the Property was to be conveyed and restricted upon the Termination Date, excepting certain limited development that may or may not occur. Some historical context is in order. Under the Development Agreement by and between the Town and KRA dated September 26, 1994 (the "Original Development Agreement"), the Property owner committed to conveying the entirety of the Property to KICA. The Original Development Agreement provided no development rights whatsoever with respect to the Property. Paragraph 16(g) therein reads 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.

(Emphasis added). The Development Agreement by and between the Town and KRA dated October 12, 2005 (the "Development Agreement"), in Paragraph 16(f), opens the door to limited residential development of the Property restricted to "no more than 20 acres," but retains KRA's unconditional obligation to convey and deed restrict the Property prior to the Termination Date. Substantially identical language was carried over in Paragraph 16(f) of the ARDA.

This history reflects the parties' recognition that the Property holds unique environmental and other public values. That is why the Original Development Agreement required the Property to be conveyed to KICA outright. The Development Agreement and ARDA opened the door to limited residential development, which never materialized, but never strayed away from KDP's ultimate obligation to convey the Property's lowlands and "all remaining highlands not devoted to the uses or purposes authorized herein." The Property owner had from October 12, 2005 to December 4, 2023 to develop the Property as contemplated by Paragraph 16(f), but that did not occur. As such, the clear intention of the parties is for the entirety of the Property to be conveyed and deed restricted as set forth in Paragraph 16(f).

In recognition of the importance of KDP's property conveyance obligations and to ward off disputes, such as the instant one, the Town insisted on the inclusion of Paragraph 31 which provides as follows:

The Property Owner hereby freely consents to such conveyances and waives any challenge 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.

Given the foregoing and pursuant to Paragraph 28, the Town demands specific performance of the KDP's Paragraph 16(f) obligations. There can be no question that the Town has standing to enforce these terms of the ARDA. In fact, the Town has a duty to do so for its citizens. KDP waived any and all rights to challenge the validity of its conveyance obligations under Paragraph 31. Until and unless these issues are resolved, pursuant to Paragraph 33(b)(iii) the Town objects to any conveyance of any portion of the Property to any third-party other than KICA including, but not limited to, governmental entities without the Town's consent.

The Town would appreciate a written response to this letter, confirming KDP's position regarding the matters set forth herein, no later than January 15, 2024. The Town reserves all rights. If you have any questions, please do not hesitate to contact me.

Sincerely yours,

McCULLOUGH KHAN APPEL



Ross A. Appel