



**SOUTH CAROLINA
ENVIRONMENTAL
LAW PROJECT**

Lawyers for the Wild Side

PO Box 1380, Pawleys Island, SC 29585 | (843) 527-0078 | www.scelp.org

Executive Director & General Counsel
Amy E. Armstrong | amy@scelp.org

Special Counsel
Michael G. Corley | michael@scelp.org

Senior Managing Attorneys
Benjamin D. Cunningham | ben@scelp.org
Leslie S. Lenhardt | leslie@scelp.org

Staff Attorneys
Lauren Megill Milton | lauren@scelp.org
Emily S. Poole | emily@scelp.org

December 14, 2023

Via email and U.S. Mail

Mayor John Labriola
Town of Kiawah Island Council
4475 Betsy Kerrison Parkway
Kiawah Island, SC 29455

Re: 2013 Amended and Restated Development Agreement terms and obligations

Dear Mayor Labriola and Honorable Town Council Members:

My organization, the South Carolina Environmental Law Project, and I have provided legal advice and representation to several organizations and groups relative to the proposed development on Captain Sams Spit since 2008 when Kiawah Development Partners II, LLC submitted its first permit application to DHEC. Since that time, our representation has included challenging several state permits, intervening in a quiet title action, and appealing the extension of the preliminary plat approval. Several of these cases made their way to the South Carolina Supreme Court, which ultimately overturned the state authorizations sought by KRA and its affiliates to facilitate the development of Captain Sams Spit as contemplated in the 2013 Amended and Restated Development Agreement ("ARDA"). Through this extensive litigation, I have become intimately familiar with the terms of the ARDA, including certain requirements for the dedication of land.

I am writing to provide my legal opinion regarding the requirements placed upon Kiawah Resort Associates, LP, ("KRA" or "the developer") by and through the ARDA entered into between the Town of Kiawah Island (the "Town" or "TOKI") and Kiawah Resort Associates, LP.

The ARDA created a contractual relationship between the Town and KRA, establishing certain benefits and burdens among the parties, as well as designating benefits to the Kiawah Island Community Association ("KICA"). In identifying "Vested Rights," 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." Thus, while the agreement provides certain development rights with Property Owner, it also clearly provides certain rights to the beneficiaries in conservation open spaces.

Paragraph 15 explicitly acknowledges that KRA will make certain “reservations, conveyances, leases, easements and other agreements *for the benefit of KICA*,” squarely identifying KICA as a third party beneficiary. Indeed, the Court of Appeals specifically held that KICA is a third party beneficiary under the terms of the ARDA. Kiawah Resort Assocs., L.P. v. Kiawah Island Cmty. Ass'n, Inc., 421 S.C. 538, 808 S.E.2d 521 (Ct. App. 2017). As a third party beneficiary, KICA has the right to enforce the terms of the ARDA that were specifically designed for its benefit. Beverly v. Grand Strand Reg'l Med. Ctr., LLC, 435 S.C. 594, 869 S.E.2d 812 (2022) (if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person).

Paragraph 16(f) of the ARDA contains such provisions specific to Captain Sams Spit with which KRA is legally obligated to comply. In particular, Paragraph 16(f) provides that KRA may develop up to 20 acres of high ground, provided that it is “landward of the state’s setback line and/or critical area line.” Then, without limitation, the ARDA requires that “[o]n 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 shown 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.” This conveyance is not conditioned on the accomplishment of the development allowed under the terms of the ARDA; rather, the conveyance is an absolute requirement.

Paragraph 16(f) continues that “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.” This provision clearly contemplates that KRA may, for whatever reason, opt not to exercise its rights to undertake development of Captain Sams Spit as is authorized elsewhere under the ARDA. In such instance, KRA is legally required to place restrictive covenants on the developable highland on the Spit. This provision only exists because of the possibility that KRA might not develop the highlands of the Spit; otherwise such provision would be meaningless. Our Courts avoid constructing contracts to render provisions meaningless. Abel v. S.C. Dep't of Health & Env't Control, 419 S.C. 434, 798 S.E.2d 445 (Ct. App. 2017) (agreements interpreted so as to give effect to all of their provisions).

Importantly, the ARDA contains a provision in 33(j) entitled “Survival of Property Owners Obligation.” That section contemplates exactly the type of situation that exists here: if the Property Owner, KRA, “cancels, rescinds, repudiates, refuses, revokes or in any manner terminates or attempts to terminate this Agreement,” KRP has nonetheless agreed to provide “enumerated and extraordinary benefits,” which specifically include “Dedication of the conservation open space at Captain Sam’s Spit as set forth in section 16 of this agreement.” ARDA, para. 33(j). This “recapture clause” provides that, even if KRA revokes, refuses, or cancels *other* provisions of the ARDA, the requirement to dedicate Captain Sams Spit as open space

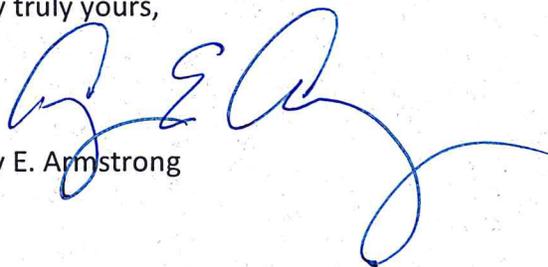
survives, and is enforceable notwithstanding any other provision of the ARDA.

For these reasons, our legal opinion is that the Town has a duty to demand specific performance of the clear and unambiguous terms of the ARDA, and to undertake an enforcement action, if necessary, to enforce its terms because it negotiated certain benefits for KICA as a third party beneficiary, which have not been accomplished.

Thank you for considering these comments and opinions as you contemplate the Town's next steps.

Very truly yours,

Amy E. Armstrong

A handwritten signature in blue ink, appearing to read 'Amy E. Armstrong', is written over the typed name. The signature is fluid and cursive, with a long horizontal stroke extending to the right.