

## Executive Summary of Who Gets What in the 2005 Development Agreement

The items below were among issues identified in KPOG's September 30 mailing to all property owners. This summary groups major points the same way they were in KPOG's September 30 matrix. Items in **bold type** reflect changes made after the Development Agreement (DA) was first posted on 8/23. Whether changes since the September 7 version of the DA (the version on which KPOG's analysis was based and the most current version available to the public at that time) were already in progress or resulted from our analysis is unimportant. What counts most is that **significant** changes were made since the first draft was released, and these changes result in a better agreement than what was first unveiled to the public on August 23. Whether the improved DA passed Oct. 12 is good enough is for each property owner to decide. To read KPOG's complete, updated analysis, go to [www.kiawah.org](http://www.kiawah.org). For a hard or electronic copy, contact KPOG at P.O. Box 807, Johns Island, SC 29457 or [kpog@kiawah.org](mailto:kpog@kiawah.org).

### KICA ISSUES

#### The Developer Gets

- Extends control of Covenants (p24; Exh. 18.1)
- Must approve KICA legal counsel (Exh. 18.1)

-KRA retains right to determine when properties are functionally complete and can be conveyed to KICA; KICA must still accept all properties conveyed by KRA

#### Property Owners Get

- If majority of PODs determine counsel has conflict of interest, can replace counsel for that matter (Exh. 18.1)**
- KRA permanently waives right to appoint majority of Board (p24; Exh. 18.1) when DA signed, not 30 days later**
- Property Owner referendum required to bring off-island properties under Covenants (p24)**
- KRA cannot vote for PODs (p25)**
- Access Agreement between KRA and KICA to be amended to reflect required reduction of maximum allowable dwelling units by number of lots sold at Cassique**
- No dual majority to appoint GM or Dir. of Security
- Gains right to control operations, relocate KICA offices and approve MR&R expenditures
- Receives .15 acre for maintenance (p.18)

#### Discussion

KRA, with only 1 Director and paying only 5% of KICA assessments, retains control over amending Covenants and choice of KICA lawyer. Therefore, for next 13 years, KRA – rather than PODs who comprise majority of KICA Board – determines whether any amendments can be made to KICA Covenants. • KRA's waiver of appointing Board majority effective with signing of DA, instead of 1/1/2008 per '94 DA or 30 days after effective date of '05 DA, as originally proposed in 8/23 draft. • Referendum requirement only partial win; Board not required to recommend extending covenants, and KRA can vote its own Type A votes and any proxies it receives. • With the Access Agreement between KRA and KICA signed in 9/2000, Cassique property owners received KICA decals to access Kiawah Island Club facilities inside the security gates, using KICA roads. In exchange, Cassique property owners are required to pay half the annual KICA assessment. Further, the Access Agreement required KRA to reduce the maximum allowable dwelling units on Kiawah by the number of platted properties sold at Cassique. • KRA can donate any property it chooses to KICA, and KICA must accept it, once property is deemed to be functionally complete. "Functionally complete" remains undefined. In the past, KICA PODS have questioned whether property conveyed by KRA to KICA is sufficiently complete for acceptance. At times, donated properties have required substantial remediation by KICA. One such example is property at Cinder Creek which was eroded and required costly mitigation. In addition, there have been questions in the past about the condition, design and/or quality of some property conveyed to KICA, e.g., bridges to Summer Islands, as they relate to remediation and maintenance KICA then has to conduct.

## LAND USE AND PLANNING ISSUES

### The Developer Gets

- Lot coverage for lots over 6000 sq. ft. increased 7-17%, from 33% to as much as 50% (Exh. 13.3)
- Right to build 50 single dwelling units on Captain Sam's Spit (Exh. 13.2)
- Approval of 2 floating docks for exclusive use by Captain Sam's Spit owners, and Town assists KRA with government/regulatory permitting (pp4,22)
- Private clubs permitted on Captain Sam's, Beach-walker Park, Beachwalker Ocean, the Settlement, Osprey Beach II, and Cougar Island Parcels (Exh. 13.1)

## TRAFFIC MITIGATION ISSUES

### The Developer Gets

- KRA relieved of obligation to 4-lane KI Pkwy (p5)
- KRA's portion of KI Pkwy improvements limited to 10% of project cost or \$250,000, whichever is less (p5)
- Gains new access to Settlement and River Course from KI Pkwy near Night Heron Park (Exh. 10.3)

## THE UTILITY (KIU) ISSUES

### The Developer Gets

- Town agrees not to "seek further property or monetary exactions or impact fees" (p15)
- Specifically excludes KRA construction and donation of aquifer storage and recovery systems (p15)
- Town cannot provide financial support for third party rate interventions (p16)
- Controls choice of engineer to conduct Town inspection of KIU system and facilities (p16)

### Property Owners Get

- Town gains control of Undeveloped Lands sooner than under '94 DA (Exh. 1.1, p6)
- Maximum number of new dwelling units (1184) will be reduced by lots sold at Cassique (p7)**
- ARB can grant only 10% variance in lot coverage and/or 20% variance in setbacks. (Exh. 13.3)
- No hotel at Captain Sam's Spit, and no hotel rooms or support space allocated to Undeveloped Lands as defined in '05 DA (p25)

### Property Owners Get

- KRA must provide traffic mitigation on KI Pkwy when "Near Capacity Traffic Volumes" reached (Exh. 10.1)
- Town gains commitment of \$250,000 toward improvements on KI Pkwy (p5)
- Only one more street into the Settlement from KI Pkwy can be added, rather than the 3 allowed in earlier versions of '05 DA (Revised Exh. 13.5)**

### Property Owners Get

- Right of first offer to purchase KIU if KRA wishes to sell (p15)
- Limits service area to "Kiawah Island" unless Town consents to extend area (p15)
- KRA donates future infrastructure (e.g., hydrants and transmission lines) on undeveloped parcels and their adjacent rights of way to KIU (p15)
- KRA donates land for future above-ground water storage (p15)

### Discussion

Town gains control of undeveloped properties sooner than under '94 DA, but transfer of zoning control only occurs when 75% of lots in neighborhood are sold and 75% of dwelling units are constructed. • 1974 was maximum number of new dwelling units permitted by '94 DA. 790 units have been sold since then, leaving 1184, maximum number of new units under new DA. Only real reduction in maximum number of new units from '94 to '05 comes from 54 Cassique lots sold to date (included in 790). Going forward, KRA required to subtract future Cassique lots sold from 1184 maximum. • Limiting ARB to 10% variance on lot coverage offset by increased lot coverage limits on lots over 6,000 sq. ft. • KRA exchanged right to build hotel at Captain Sam's Spit for right to build 50 homes there. • KRA can also build private clubs on 6 properties. No requirement that club members be Kiawah Island property owners

### Discussion

The DA defines Near Capacity Traffic Volume as 1330 vehicles per hour in one direction. National Safety Council recommends 3 second minimum between vehicles, regardless of speed at which they're traveling. 60 seconds, divided by 3 seconds/car=20 cars/minute. This translates to 1200 VPH, the maximum safe number of vehicles/lane in one hour. Compare this to total traffic northbound on Route 17 at Folly Rd. from 8 to 9 a.m. on Monday, 9/26/2005 — 1946 VPH. This total is for both in-bound lanes, with each lane averaging 973 VPH. It is unlikely traffic on KI Pkwy will ever reach the point at which KRA is required to pay for mitigation (1330 VPH), even though drivers may experience congestion at numbers below 1330 VPH.

### Discussion

Nothing in right of first offer prevents KRA from selling to 3<sup>rd</sup> party for less than Town offer or requires KRA to offer Utility to Town at 3<sup>rd</sup> party's price. Language no longer ambiguous regarding time frame for giving notice of intent and submitting a purchase offer for Utility. Town now has to make its purchase offer within 30 days after deadline for announcing intent to exercise right of first offer. • Limiting KIU service to geographic Kiawah Island and donation of infrastructure is significant win for property owners. But, Town's inability to seek impact fees, property or monetary exactions, coupled with Town's forfeiture of right to fund 3<sup>rd</sup> party rate interventions, limits Town's options for protecting property owner interests. DA essentially puts Town's KIU issues to rest without having the State's Public Service Commission (PSC) conduct an independent management audit. • Town's lack of control over inspection process and choice of engineer could compromise outcome of inspection.

## **OPEN SPACE, LAND DONATION AND CONVEYANCE ISSUES**

### **The Developer Gets**

–Donation of facilities and open spaces limited to those already conveyed or promised under '94 DA (p13)

–KRA does not convey “undevelopable” highlands or isolated highlands and may deed them to purchasers for docks, bulkheads, walkways and gazebos (p19)

### **Property Owners Get**

–**KICA not required to accept road/right of way at Captain Sam’s Spit without certification about potential erosion from both Kiawah River and Atlantic Ocean (p22)**

–**KIGR Golf Courses/Tennis Centers Covenant added back to '05 DA, but wording different from '94 DA (p18) (Covenant continues to bar residential or commercial uses on these properties for 83 years.)**

### **Discussion**

With exception of land for future park on Cougar Island, if the island is developed, all land donations are at risk for significant maintenance costs. • A clause was added regarding Captain Sam’s Spit requiring KRA, before conveying roadway and right of way to KICA, to submit a licensed engineer’s certification stating they “will not unreasonably be subject to tidal erosion from the Kiawah River or the Atlantic Ocean.” • The section regarding “undevelopable” highlands or isolated highlands is confusing. The question remains as to what KRA is giving and what it is retaining. It is also unclear if this excludes these properties from zoning or other restrictions. • Issues on open space do not include any of the properties KRA was already committed to convey to KICA under the terms of the '94 DA (e.g., Bear Island and Cougar Island Park). •The 9/30 KPOG mailing listed the Golf Course/Tennis Centers Covenant in KRA’s column, because this covenant was not included in the proposed DA. Since it was added back in, it has been moved to the Property Owners’ column. This “win” for property owners is qualified, however, because (1) wording of the covenant changed from the '94 DA to the '05 DA and (2) it is unclear exactly what the new wording means. The phrase “absent consent of Property Owner” [KRA] was added to the 10/11/05 Final DA approved 10/12/05 without any opportunity to ask for clarification.

## **ARB (ARCHITECTURAL REVIEW BOARD) ISSUES**

### **The Developer Gets**

–KRA retains control of ARB – Town agrees it will not establish an architectural review body during term of '05 DA (pp9,10)

–ARB given greater leeway with beachfront property and building setback guidelines (pp19,20)

–ARB retains “sole and exclusive jurisdiction with regard to the standards and guidelines ... and granting of ‘variances’” (p9)

### **Property Owners Get**

–KICA can appoint one member of ARB “if the Board so desires” (p10)

### **Discussion**

Transition of control of ARB to KICA requires analysis of a number of issues, including the cost of ARB operation and timeline for transition. None of these issues are addressed in the DA. • New language in '05 DA allows ARB to deviate from strict customs and usages regarding ocean-front setbacks on a case by case basis. • Under KICA covenants, KICA has always had right to appoint entire ARB.

## **MISCELLANEOUS ISSUES**

### **The Developer Gets**

–'05 DA automatically extended from 8/15/2015 to 1/1/2018 if 250 or more acres remain undeveloped as of 1/1/2008 (p25)

–If any third party or any other governmental official institutes legal action challenging the validity of any provision of this Agreement, “the parties agree to cooperate in defending such action.” (p27)

### **Property Owners Get**

–**Binding arbitration clause for disputes over interpretation of language in DA (p34)**

### **Discussion**

State statute authorizing development agreements sets guidelines for length of agreements as they relate to amount of property to be developed. KRA qualifies for automatic extension provided that, on 1/1/2008, 250 or more of the 993 acres of Undeveloped Lands covered by '05 DA (p25) are still to be developed. According to the projected Development Schedule (p25), by 1/1/2008 KRA will almost certainly have sufficient land yet to be developed to extend the DA to 2018. • Agreeing to cooperate in defending DA appears to say, for example, that if the State were to bring an action against KRA for violating State regulations by building on Captain Sam's Spit, the Town would be required to join and support KRA in its defense. • Before a property owner questioned missing dispute resolution provision; nothing in DA addressed how to resolve differences in interpretation of language, short of going to court.