

Comments on Informational Note

The Informational Note states that KICA received an opinion from its outside legal counsel. The reader will need to refer to the complete text of the bullet points attributed to KICA's counsel in the Informational Note to put the following comments in context.

KICA's attorney stated the assumption that land in a designated CBRS is more susceptible to storm damage "is not supported by the website for CBRS or Dr. Tim Kana, president of Coastal Science and Engineering."

There is no link to a CBRS (Coastal Barrier Resource System) website in the bullet point. However, the FEMA website states: "Congress recognized the vulnerability of coastal barriers to development by passing the Coastal Barrier Resources Act in 1982 (CBRA). By restricting Federal spending and financial assistance which have the effect of encouraging development of coastal barriers, Congress aimed to reduce the loss of human life, wasteful spending of Federal money, and damage to fish, wildlife, and other natural resources associated with coastal barriers along the Atlantic and Gulf of Mexico coasts. The CBRA, while not forbidding privately financed development, does not allow new Federal financial assistance, including flood insurance, within a designated Coastal Barrier Resources System (CBRS)."

<http://www.fema.gov/business/nfip/cbrs/cbrshist.shtm>

The U.S. Fish and Wildlife Service (fws) provides the following on its website www.fws.gov/habitatconservation/coastal_barrier.html "The law encourages the conservation of hurricane prone, biologically rich coastal barriers by restricting Federal expenditures that encourage development, such as Federal flood insurance through the National Flood Insurance Program. CBRA [the Coastal Barrier Resource Act] is a free-market approach to conservation. These areas can be developed, but Federal taxpayers do not underwrite the investments."

Based on the plethora of information available, one could reasonably assume that a CBRS designated unit is more susceptible to storm damage than a non-CBRS unit. For example, a 1949 aerial photo taken of CBRS unit MO8-Captain Sams Inlet shows a very different configuration of the Inlet than exists today. Google Earth shows the current configuration. Reference to the photo shows much of the area identified as Captain Sam's (sic) Spit in the 2005 Development Agreement with the Town of Kiawah to be underwater. Sixty years is a nanosecond in the life of South Carolina's coastline. See the 1949 photo at http://oceanica.cofc.edu/history/Kiawah/1949/web%20images/7f_184.htm

It is also interesting to note that Dr. Kana testified as an expert witness for Kiawah Island Partners, II (KDP) in the contested action to construct a 2783' bulkhead/revetment along the Kiawah River. (The permit to construct the bulkhead was approved by an Administrative Law Court judge on the terms and conditions provided in a January 22nd court order circulated to KICA Members via email.) In any event, there is no source for Dr. Kana's alleged non-support of the proposition that a designated CBRS is more susceptible to storm damage than a non-CBRS area.

The proposed amendment "would result in the loss of value of the land owned by others, likely making it incapable of development."

This appears to be an unsupported conclusion. It is especially speculative when there is precedent on Kiawah Island requiring homeowners in a particular development to pay for the repair and replacement of Common Properties. This sole responsibility of homeowners in The

Settlement was established before the sale of lots. Apparently, an additional assessment and responsibility for the Common Properties did not result in the devaluation of The Settlement or make it incapable of development.

If people refused to purchase homes in a CBRS unit because of the responsibility of repairing Common Properties damaged by natural events, that is the reason for the proposed amendment. Why put the burden on KICA Members who recognize the risk and want no part of it? KICA Members are no different from other potential purchasers who may shy away when confronted with the responsibility associated with a CBRS unit. Along these lines, it bears repeating that the federal government has refused to accept the responsibility. Thus, the purpose of the amendment is not to stop development of a CBRS. Assuming the issuance of necessary permits, private development is allowed in a CBRS. The purpose of the amendment is to ensure that KICA does not underwrite the re-construction of Common Properties located within a CBRS unit due to storm damage. Once developed, KICA inherits the responsibility to repair/replace Common Properties for generations to come and long after Kiawah Island is completely developed.

“Non-uniform amendments are generally unenforceable and subject to invalidation in court.”

There would be no benefits or burdens shifted on to owners in a CBRS unit. The construction of community roads and other improvements on Common Properties ultimately deeded to KICA would occur in anticipation of the sale of lots. By necessity, purchasers would buy CBRS unit homes/lots only after the construction of community roads. Thus, if the amendment is approved, owners would have notice of and accept the responsibility contained in the amendment before purchasing their home or lot. Purchasers would also be on notice that federal flood insurance was not available. Therefore, a homeowner wanting (or lender requiring) flood insurance would have to look to a private insurance company at a higher cost than for a home in a non-CBRS unit on Kiawah Island. Obviously, there may well be higher costs and risks associated with the decision to live in a CBRS unit.

The proposed amendment conflicts with Article VI, sections 3 and 4 of the Covenants. In addition, the covenants do not authorize the KICA board to assess the repair of Common Properties in a CBRS designated area to only the CBRS owners.

Article VI, sections 3 and 4 of the Covenants impose a duty on the Association to “maintain roadways and drainage facilities in a functional and acceptable condition.”

The proposed amendment recognizes KICA's responsibility for maintenance of roads and other infrastructure on Common Properties deeded to it. The Covenants provide for amendments, of which there have been several over the years. The proposed amendment provides that when and if development occurs within a CBRS unit and Common Properties serving the CBRS development are deeded to KICA, the costs of repairs or replacement of Common Properties caused by natural events will be paid by private property owners choosing to live in a CBRS unit. The federal government obviously believes that is a fair result. KICA Members will remain responsible for maintenance due to normal “wear and tear” of Common Properties in a development within a CBRS unit.

“The proposed amendment could be crafted to be both valid and enforceable only if (a) approved by 75% of the votes cast in favor by members at a meeting with the proper quorum, and (b) approved by all owners of the land within CBRS units.”

Subparagraph (b) applies only so long as the developer retains the right to approve amendments on the terms provided in the Covenants, i.e., the 80% transition formula. The Informational Note provides the developer still has approval rights, but the source for the statement and whether or not it has been independently verified is open to question. If the proposed amendment is approved in accordance with the Covenants, future owners would be on notice before purchasing CBRS unit property of their responsibility to repair Common Properties damaged by natural events. KICA would remain responsible for normal maintenance of the Common Properties the same as other Common Properties in non-designated CBRS areas on Kiawah Island.

(Opinion received from KICA's outside legal counsel included in Annual Meeting packet.)

Informational Note January 6, 2010

Regarding amendments to the covenants, Article VIII, Section 2 of the covenants, in part:

No amendment to this Declaration shall be made without the consent of the Company until such time as eighty percent (80%) of the cumulative maximum number of lots and dwelling units authorized in Kiawah Island by the Town of Kiawah Island have been sold and conveyed to Type A Members, or until the termination of the Development Agreement between Kiawah Resort Associates, LP and the Town of Kiawah Island entered Oct. 12, 2005, whichever occurs first. (as amended 6-1-2006)

This means that although an amendment may be approved by the required $\frac{3}{4}$ vote of the members at a meeting, it will not be binding or enforceable without the consent of the Company (KRA). Under the transition formula calculated as of Dec. 4, 2009, 77.8% of authorized properties have been sold. The board received a letter from the Company dated Jan. 5, 2010 that informed the board it will not consent to the proposed amendment if it is adopted by the members.

Even so, the member directors on the KICA Board of Directors voted to include this proposal on the annual meeting ballot to save the membership approximately \$20,000, which would be the cost of a special meeting of the members.

The KICA Board of Directors has received an opinion from its outside legal counsel, George Nowack, of Weissman Nowack Curry and Wilco. George is one of the nation's most respected community association attorneys and the board occasionally consults with him. He indicates:

- The amendment as written would be arbitrary since the assumption is that land in a CBRS Unit is more susceptible to storm damage. This assumption is not supported by the website for CBRS or Dr. Tim Kana, president of Coastal Science and Engineering.
- The amendment, if adopted by the members and consented to by the developer, would result in the loss of value of the land owned by others, likely making it incapable of development. The town, not KICA, has the authority to address development within CBRS Units. Such development is approved under town's 2005 Development Agreement.
- Amendment adoption by vote of the members does not validate the effect of the amendment if it shifts benefits or burdens from one member group to another. Non-uniform amendments are generally unenforceable and subject to invalidation in court.
- The proposed amendment conflicts with Article VI, sections 3 and 4, of the Declaration (the covenants). The association must maintain roadways and drainage facilities in a

functional and acceptable condition. In addition, the Declaration provides no authority for the board to assess the costs for repair for damages in a CBRS Unit to only those owners within the Unit.

- The proposed amendment could be crafted to be both valid and enforceable only if: (a) approved by 75% of the votes cast in favor by members at a meeting with the proper quorum, and (b) approved by all owners of the land within CBRS units.

KICA has asked the developer to create a Captain Sam's subassociation to pay for potentially extraordinary infrastructure in the individual property deeds. Still, it is important to remember that KICA cannot compel such action.

KICA would expect to report on vote results in *Digest* as soon as feasible following the meeting.