

*The following was provided by KICA member Greg VanDerwerker as a request for a non-advisory motion to be submitted to the members for vote. It is provided verbatim as submitted.*

## PROPOSAL FOR 2010 KICA ANNUAL MEETING [PV-10-1]

**AN AMENDMENT TO THE COVENANTS WHEREIN FUNDING FOR REPAIR OR REPLACEMENT OF INFRASTRUCTURE LOCATED WITHIN A COASTAL BARRIER RESOURCES SYSTEM (CBRS) UNIT THAT IS NOW, OR IN THE FUTURE MAY BECOME, THE RESPONSIBILITY OF KICA AND THAT IS CAUSED BY EROSION, OR TROPICAL STORMS, HURRICANES, WINDS, WAVES, FLOODING, STORM SURGE, OR OTHER CATASTROPHIC NATURAL EVENT(S) SHALL BE DERIVED SOLELY FROM ASSESSMENT OF THE OWNER(S) OF PROPERTY LOCATED WITHIN THE AFFECTED CBRS UNIT.**

### **Proposal Summary:**

This proposal seeks (1) to protect all current and future members of the Kiawah Island Community Association ("KICA") whose property is not located within a Coastal Barrier Resources System ("CBRS") unit from potential extraordinary costs and/or special assessments for the repair and/or replacement of certain infrastructure within the CBRS units on Kiawah Island (the "Island") as a result of loss due to catastrophic natural event(s), and (2) to establish a requirement for assessment of the owner(s) of property within the affected CBRS in order to fund any such loss.

There are two CBRS units on the Island, one at the west end, Unit M08 (Captain Sams Inlet), and the other at the east end, Unit M07 (Bird Key - around Cougar and Little Bear Islands). See the "Background and Justification" section below for more detail.

KICA could incur financial responsibility for infrastructure within these two units as a consequence of the proposed development of Captain Sams Spit and possible future development on the eastern end of the Island.

The 2005 Development Agreement, and the KICA Covenants (Article II, Section 1, and Article IV, Sections 4 and 7) govern the transfer of properties from the Developer to KICA and detail the circumstances under which the Developer can convey properties to KICA. In general, the Developer has the right at any time to convey to KICA any infrastructure that is deemed "functionally complete" and KICA must accept it. After its conveyance, all future infrastructure maintenance and repair costs are transferred to KICA.

If this proposed covenant amendment passes and "the Company" consents to the amendment, in accordance with KICA Covenant Article VIII, Section 2, thereafter, if development occurs within a CBRS unit and if that associated infrastructure is deeded to KICA, then any repair or replacement costs resulting from loss due to catastrophic natural event(s) will be financed solely by assessment of the owner(s) of property located within the affected unit.

## **Specific Covenant Amendment to be Implemented by the Proposal:**

The following provision shall be added to Article V of the Kiawah Island Community Association Covenants:

"Annual assessments, special assessments, contribution to reserve funds, or major repair/replacement funds shall not be used to pay for the repair of damage caused by erosion or by tropical storms, hurricanes, winds, waves, flooding, storm surge or other catastrophic natural events within a federally designated Coastal Barrier Resources System (CBRS) Unit.

Any expenditure by KICA for such damage shall be funded exclusively by means of Assessment, as described in Article V, Section 4, and Section 5 (a), that will be borne solely by Owner(s) of property within the affected CBRS Unit.

Any existing structure built prior to November 1, 2009 shall be exempt from this provision."

## **Background and Justification:**

Located southwest of Beachwalker County Park, Captain Sams Spit (the "Spit") is wedged between the Atlantic Ocean and the Kiawah River and lies entirely within Coastal Barrier Resources System Unit M08. Building on the spit greatly increases the Kiawah Island Community Association's ("KICA") potential financial liability for major repair and replacement of roads and other infrastructure. The possibility of significant special assessments in excess of regular annual fees could have long-term negative consequences for all Kiawah Island property owners.

When the island was first planned in the 1970s, a multi-disciplinary team of scientists produced "An Ecological Study of Kiawah Island," an exhaustive and detailed analysis that became the guiding document for development in a manner that maintains the environmental integrity of the island and protects, as much as possible, the Island from catastrophic natural events.

One of the authors of the study, Dr. Miles Hayes, a respected coastal geologist and past Professor and Head of The Department of Geology at the University of South Carolina, analyzed where development was appropriate on Kiawah and where it should not occur.

Captain Sams Spit and parts of the east end of Kiawah were identified as being too unstable for development. Dr. Hayes' analysis describes how the Spit has entirely eroded and re-deposited several times during the past 300 years. Storms have over washed or cut through the narrow neck of the spit numerous times near Beachwalker County Park, where the Kiawah River makes a 90-degree turn. The most recent total breach occurred in 1949. See photo online at:

[http://oceanica.cofc.edu/history/Kiawah/1949/web%20images/7f\\_184.htm](http://oceanica.cofc.edu/history/Kiawah/1949/web%20images/7f_184.htm)

The following were among Dr. Hayes' conclusions:

- "The east end of Kiawah and the west end of Seabrook are extremely unstable areas. These areas are subject to rapid and drastic changes in erosion and deposition; hence, they are the worst possible places to develop at the present time.
- "The Kiawah River recurved spit system is also considered to be unstable, especially the neck area, which has apparently been overwashed by storms during the past decade. This area should not be developed either, inasmuch as the end of the spit could be cut off by the formation of a new tidal channel through the present neck. This would isolate the entire end of the spit."

Reference: Environmental Inventory of Kiawah Island, 1974, Environmental Research Center, Inc. Columbia, SC, Page G-163.

In 1982 the U.S. Congress enacted the Coastal Barrier Resources Act (CBRA).

"The Coastal Barrier Resources Act (CBRA) of 1982 established the John H. Chafee Coastal Barrier Resources System (CBRS), comprised of undeveloped coastal barriers along the Atlantic, Gulf, and Great Lakes coasts.

"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 is a free-market approach to conservation. These areas can be developed, but Federal taxpayers do not underwrite the investments. CBRA saves taxpayer dollars and encourages conservation at the same time. CBRA has saved over \$1 billion and will save millions more in the future. Approximately 3.1 million acres of land and associated aquatic habitat are part of the CBRS."

From: U.S. Fish and Wildlife Service, online at:

[http://www.fws.gov/habitatconservation/coastal\\_barrier.html](http://www.fws.gov/habitatconservation/coastal_barrier.html)

Unlike most other areas on Kiawah, federal flood insurance is not available within a CBRS Unit. In addition, in the event of a federally declared disaster there will be no federal funding for repair and replacement of homes or infrastructure located within a CBRS Unit.

In 1982 Captain Sams Spit and the marsh islands behind the spit were designated as part of CBRS Unit M08, and the designation was reaffirmed in the Coastal Barrier Improvement Act of 1990. When Kiawah Resort Associates ("KRA"), the predecessor of Kiawah Development Partners ("KDP"), purchased Kiawah Island in its entirety in 1988, no objection was raised, nor was any attempt made to change this designation.

The 1994 Development Agreement between the Town of Kiawah Island and KRA stipulated the "permanent preservation of the tract of land known as Captain Sam's (sic) Spit." Further, KRA agreed "to convey Captain Sam's (sic) Spit to KICA, by quit claim deed by January 1, 2008." However, the 2005 Development Agreement

changed that compact consequent to the Town of Kiawah Island allowing the Developer to construct up to 50 homes on up to 20 acres of the Spit.

In 2008 Kiawah Development Partners sought to have Captain Sams Spit and the marsh islands behind the spit removed from the Coastal Barrier Resources System (CBRS). On June 26, 2008 S.C. Congressman Henry Brown introduced legislation [H.R. 6389] "To modify Captain Sam's (sic) Inlet Unit M08 ... ." The change would have removed Captain Sams Spit and the adjacent marsh islands from the CBRS Unit so that structures built there would be eligible for federal flood insurance and emergency assistance.

In a September 6, 2008 article in Charleston's *Post and Courier* Dr. Miles Hayes, the geologist who 35 years ago concluded the property should remain undeveloped, stated, "I'm appalled that they want to develop that spit. Ridiculous. Stable? It's one of the most unstable places on the East Coast."

[http://www.postandcourier.com/news/2008/sep/06/man\\_against\\_nature53303/](http://www.postandcourier.com/news/2008/sep/06/man_against_nature53303/)

Congressman Brown's office received so many letters and phone calls from angry taxpayers throughout the Charleston area opposing the change that he withdrew the legislation. The public did not want to fund emergency road repair or subsidize flood insurance in this dynamic and unstable inlet.

There is potential for significant long-term costs to all Kiawah property owners if development occurs within a CBRS unit.

As required by the KICA Covenants and the 2005 Development Agreement, KICA must accept, maintain, and replace any roads or other infrastructure built on Captain Sams Spit if the Developer (KDP/KRA) deeds them to KICA. At that point the Developer will have no further financial responsibility for the infrastructure.

If, after being deeded to KICA, a major storm event over washes and/or breaches Captain Sams Spit, as it has multiple times in the past, then KICA will have to bear the entire cost of repair and replacement of the roads, infrastructure, and possibly also the proposed Kiawah River revetment and/ or sheet pile project without any expectation of receiving federal funds to assist with disaster repair.

Although KICA's reserve fund has increased over the years, current economic conditions have limited its growth. Having to bear the costs associated with infrastructure losses within the Island's CBRS Units could become overwhelming.

Adoption of this amendment to the KICA Covenants will protect property owners who are not located in either of Kiawah Island's CBRS units from having to underwrite the costs of repair and replacement of infrastructure in these units due to catastrophic natural events. The costs will be borne solely by owner(s) of the property within the affected CBRS units.

*[Motion ends here.]*