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VIA E-MAIL ONLY

Mayor Craig Weaver and Town Council
The Town of Kiawah Island
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Re: Public Comments regarding the proposed revised ordinance (the “Proposed Ordinance”) of the current Kiawah Island, SC Municipal Code 9 (“Kiawah Code”), Article 15 General Offenses, Chapter 8 Rental Application and Regulations (the “Existing Ordinance”)

Dear Mayor Weaver and Kiawah Island Town Council:

I hope this finds everyone well. My firm represents Exclusive Resorts (“ER”). ER is a luxury destination club that has owned and operated homes on Kiawah Island (“Town”) since 2004. It currently has nine homes in its portfolio available to its members; four of which it owns and five of which it leases long-term. As a long-time member of the Kiawah Island community, ER is concerned about the potential negative impacts of the Proposed Ordinance on residents of and property values on Kiawah Island, and strongly objects to the provisions of the Proposed Ordinance that uniquely and adversely impact its ownership and operation of its properties. Therefore, ER respectfully requests that the Proposed Ordinance be rejected in its entirety or, in the alternative, revised substantially to reflect ER’s long history as a responsible owner and operator of accommodations for its club members on Kiawah Island.

As an initial matter, it is critical that sufficient studies and analysis be completed to determine if the Proposed Ordinance is necessary or advisable and to determine whether the impact on residents and property values would be positive or negative. The Frequently Asked Questions document (“FAQ”) published by the Town regarding the Proposed Ordinance makes a number of statements about the expected impacts without support. We believe a decision as important as this and with such far-reaching effects should be supported by detailed studies and analyses, none of which have been provided in connection with the Proposed Ordinance. To the extent such studies or analyses exist, we respectfully request that they be provided to the public for review. If there are no such studies or analyses, then the Proposed Ordinance should be

rejected entirely until such time as they are completed so residents can understand the risk to their properties.

ER prides itself on providing ultra-luxury residences and services to its members. This includes keeping its homes in excellent condition (both inside and out) and having dedicated on-site staff in each destination that is available 24/7 to assist members during their stays. ER has a team of local concierge, housekeepers, and maintenance staff who work hard to ensure that our homes and our members meet or exceed the high standards of Kiawah Island. In fact, we are not aware of a single citation for violation of the Kiawah Code in the more than 15 years that ER has been operating there.

The Proposed Ordinance, rather than acknowledging the conscientious manner in which ER has operated, instead singles it out for regulation far harsher than that applicable to other types of short-term accommodation providers. There is no justification for this unequal treatment. Therefore, the Proposed Ordinance should be amended to treat ER equitably with other short-term accommodation providers and to conform with other applicable laws. In particular, the Proposed Ordinance should be amended to (1) eliminate the unsupported position that ER's use of its homes is nonconforming under the Kiawah Code, (2) allow for reissued STR licenses for Destination Clubs or Private Vacation Clubs ("Clubs"), (3) allow ER to transfer its short term rental ("STR") licenses to subsequent purchasers, and (4) revise the tax requirements to follow relevant tax laws.

Club Use in Residential Zones is Not Nonconforming under the Kiawah Code

ER's homes on Kiawah Island are located in the R1 and R2 Zoning Districts and ER's use of its homes by its members is strictly residential. Section 15-805(c) of the Proposed Ordinance states that "Destination Clubs and Private Vacation Clubs are not permitted by the Town's zoning regulations in Residential Zones R1, R2, and R3" and Section 15-805(e) of the Proposed Ordinance states that "Destination Clubs and Vacation Clubs operating in zones R1, R2, and R3 are nonconforming use." There is no such provision in the zoning code contained in the Kiawah Code.

The Supreme Court of South Carolina has long held that zoning ordinances must be clear and unequivocal to be enforceable. *Purdy v. Moise*, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953) ("ordinances in derogation of natural rights of persons over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose. It follows that the terms limiting the use of the property must be liberally construed for the benefit of the property owner.")

Here, the Kiawah Code falls far short of providing that "Destination Clubs and Private Vacation Clubs are not permitted by the Town's zoning regulations in Residential Zones R1, R2, and R3." The only references under Chapter 12 of the Kiawah Code to clubs are in the definitions under Sec. 12-374 which defines "country club", "private club", and "social club". The Code Sec. 12-102 Table 3A, *Authorized Uses in Zoning Districts*, specifically lists country clubs under recreation and entertainment uses, however, "Country club means land area and buildings containing golf courses, recreational facilities, a clubhouse, and other customary accessory uses,

open only to members and their guests.” Sec. 12-374. Clubs, including ER, do not meet this definition.

Under Sec. 12-103, *Conditions of use*, mentions clubs including private clubs and social clubs under (j) Food and beverage services as it relates to (1) Bars, cocktail lounges, taverns; (2) Catering services; and (3) Restaurant, general. These provisions are specifically permitting services regarding food and beverage services at these types of clubs. ***There is not any other reference to clubs within the zoning ordinance and, hence, no provision making a Club’s residential use of a residential property nonconforming or in violation of the Kiawah Code.***

STR Licenses Issued to Clubs Should Be Eligible for Late Renewal or Reissuance

Section 15-804 of the Proposed Ordinance provides a process for a property owner to renew an STR license after the grace period or to obtain a reissued STR license through a waitlist process in the event the applicable cap is reached. Both Section 15-804(b)(5) and Section 15-805(c) specifically prohibit the late renewal or reissuance of an STR license issued to a Club that has expired or otherwise been terminated. The stated reason for this inconsistent treatment is that Club use is nonconforming. As set forth above, Club use in the R1 and R2 Zoning Districts is not nonconforming under the Kiawah Code. Therefore, there is no justification for the disparate and adverse treatment of Clubs with regard to reissuance of expired or terminated STR licenses.

STR Licenses Held by Clubs Should Be Transferable

Section 15-805(a)(4) of the Proposed Ordinance allows for the transfer of an STR license to a new owner in the event of the transfer of property ownership. Section 15-805(e) of the Proposed Ordinance specifically prohibits the transfer of any STR license held by a Club, regardless of the sale of the subject property, based on the statement that the Clubs use is nonconforming. Again, as set forth above, Club use in the R1 and R2 Zoning Districts is not nonconforming under the Kiawah Code. Therefore, there is no justification for the disparate and adverse treatment of Clubs with regard to the transfer of STR licenses to a new owner of the subject property.

The Proposed Ordinance Should Conform to Applicable Tax Laws

Section 15-804(c) provides that an STR license holder must “provide proof of ATAX payments for the previous year at the time of license renewal. Failure to pay all required accommodate taxes constitute grounds to not renew a rental business license.” The FAQ further states that owners must have an active account with the South Carolina Department of Revenue and Charleston County to submit ATAX. This is not included in the Proposed Ordinance as a requirement to obtain the STR license and if the owner rents the property on a long-term basis they would not have ATAX liability.

The Proposed Ordinance provisions regarding ATAX payments overstep the Town’s authority and impose an additional requirement for STR licenses that is not contemplated under the Kiawah Code. The local accommodations tax for Kiawah Island is governed by the provisions of Article 4, Chapter 1 Sec. 4-104. – *Accommodations Tax* and Chapter 7 – *Local Accommodations Tax* of the Kiawah Code under the authority of the SC Code of Laws. This Proposed Ordinance and the FAQ imply there is an initial requirement to establish accounts with

the state and county tax authorities in order to qualify for an STR license, which is not within the scope of the Town's authority.

The FAQ further implies that any lease entered into by a company, association, club, etc. or by an individual on behalf of multiple individuals would be subject to obtaining the STR license and providing proof of ATAX payments even if the use is for a long-term basis not subject to taxation. For example, if an owner leases a property to Joe Smith for 90 days, that lease would not require an STR license or be subject to ATAX. If Mr. Smith uses the property under the lease on the weekends but allows his friends to use the property during the week, Section 15-801(d) of the Proposed Ordinance implies that in this case both the owner and Mr. Smith would require an STR license, and both would have to provide proof of ATAX being paid for the previous year to renew their licenses. This is unrealistic, overly burdensome, and contrary to the applicable tax laws where neither party in this situation would be subject to ATAX.

The bottom line is that the Town cannot require, as a condition for licensure, the payment of inapplicable – and perhaps unlawful¹ – local taxes. This violates, among other things, the unconstitutional conditions doctrine. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594-97 (2013) (discussing the "unconstitutional conditions doctrine" and noting that "[e]xtortionate demands" that burden the exercise of constitutional rights may give rise to a takings claim).

The Proposed Ordinance Violates the Procedural and Substantive Requirements of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 and ER's Equal Protection Rights

The Town's formulation and development of the Proposed Ordinance violates the procedural requirements of the Planning Act. Because it overtly attempts to regulate land use, among other things, the Proposed Ordinance must undergo a public hearing and review by the Town's Planning Commission before Town Council consideration. S.C. Code Ann. § 6-29-760. This has not taken place.

In addition, the Proposed Ordinance violates the Planning Act's uniformity requirement. S.C. Code Ann. § 6-29-720(B) (zoning ordinances "must be uniform for each class or kind of building, structure, or use throughout each district"). ER's business model is certainly distinct from purveyors of traditional short-term rentals, but from a use perspective they are identical. By singling out ER and other Vacation Clubs for wildly disparate treatment, the Proposed Ordinance violates the Planning Act's uniformity requirement and ER's equal protection rights. The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment. *See, e.g., Weaver v. South Carolina Coastal Council*, 309 S.C. 368, 423 S.E.2d 340 (1992).

The Proposed Ordinance May Constitute a Taking

The Proposed Ordinance puts in place a cap for STR licenses for properties in the R1 and R2 Zoning Districts, as well as more onerous burdens on properties operated by Clubs in those

¹ The Town's accommodations tax may violate one or more provisions of S.C. Code Ann. §§ 6-1-510, *et seq.*

Zoning Districts. We believe these caps frustrate investment-backed expectations and are likely to negatively impact the property values and resale values of the homes within these zoning districts and, as such, would constitute a taking under the Takings Clause of the 5th Amendment.

The concern over property values and resale values likely already has caused a “run on the bank” where property owners apply for STR licenses regardless of whether they intend to rent their homes, thereby further adversely affecting other homes in the same zoning district.

The Proposed Ordinance is Internally Inconsistent, Inconsistent with the Kiawah Code, and Unclear

In addition to our objections and concerns regarding the specific foregoing issues in the Proposed Ordinance, there are several provisions that are internally inconsistent, that contradict established provisions of the Kiawah Code, and that are unclear. For example, the Proposed Ordinance arguably both requires long-term lessors to obtain an STR license and exempts them from the STR license requirement. There are uses of terms, such as the use of “Person”, that are used in a manner directly contrary to their definition in the Kiawah Code. And it is unclear as to whether owners and operators are both required to obtain an STR license for the same property in certain circumstances, if that is always required, or if it not permissible.

As a longstanding owner on Kiawah Island, ER welcomes the opportunity to work with the Town on the issue of short term accommodations and their impact on the community. We believe, however, that appropriate first steps are to study and analyze the issue and work with existing community members on all sides to determine if additional or revised regulations are necessary. If they are necessary, then we should work together to address the concerns of all in a manner that is fair, consistent, and clear.

We would much rather participate in a cooperative process than have to litigate to protect ER’s rights. To that end, we respectfully submit these comments to the Town of Kiawah Island to explicitly express our concerns and objections regarding the Proposed Ordinance. We also plan to have representatives appear at the hearings on the Proposed Ordinance and look forward to speaking with you in person.

Respectfully Submitted,

McCULLOUGH KHAN, LLC



Ross A. Appel

cc: Dwayne Green, Esq.
Stephanie Tillerson
John Taylor
Clients

From: Steve McClure <smmccclure1@gmail.com>
Sent: Tuesday, October 1, 2019 8:01 AM
To: Stephanie Tillerson <stillerson@kiawahisland.org>
Subject: Revised STR Ordinance Comment

Stephanie,

It was great to talk with you yesterday. As discussed, I am in favor of adding provisions surrounding enforcement, but strongly against a cap. Please make this part of the public record.

As discussed, I believe there is a great solution for both permanent residents and second home owners of all ages, if everyone takes a deep breath and gives it a shot. We should focus on a solution that fixes the problem, not create some new rule that takes property rights away from fellow homeowners.

I have a young family (kids age 7 and 4) and just bought a home on Bufflehead Dr. 3 months ago. My wife and I have been coming to Kiawah for over 17 years with one of our goals being to own a home on Kiawah one day. We wanted to find a place that we could escape as a family and put the stresses of work/school aside and just focus on family. Life is way too short. We started looking in earnest 2 years ago. While we could afford to buy a home on any of the Island communities in the Southeast (Sea Island, etc.), we chose Kiawah. I have read that the town council is worried about the "brand" of Kiawah. As a recent purchaser, in my mind and in my circles, the brand is as strong as it has ever been.

We have no desire and no plans to rent our home. That being said, having the flexibility to rent our home if our life situation changes or when we go to sell the home is critical to us. None of us can see into the future, so there is real value in flexibility. I believe it is even more important now than in the past. People pay for flexibility. Especially when in today's world more and more people are choosing to rent instead of buy and a smaller percentage of people plan to buy a second home. Why shrink the buyer pool more? If we knew that there was a chance, even a small one, that we would not be able to rent our place if life threw us a curveball, we would not have bought on the island. I believe a large percentage of my generation, which will be the buyers over the next 20 years, will all say the same thing. Not to be overly dramatic, but let's not remove an entire generation from owning a home on Kiawah.

From what I have heard and read, the real problem is with renters not following the rules or treating our incredible island with the respect it deserves. I wholeheartedly support enforcing the rules. I think a good portion of the new ordinance is spot on, but there is no need for caps. Let's get aggressive. If a renter (not just the homeowner) has 3 violations, put them on a do not rent list island wide. Let's try enforcement for 1 or 2 years and see how things improve. If we revisit, let's take the time to do it the right way. I would offer to lead or participate on a committee with representatives from each of the constituencies (resort, permanent resident, second home, developer, etc.) to better understand all of the issues and options moving forward. If Council wants to go ahead and create a committee to better understand what capping STRs would do (positive and negative), I volunteer for that as well.

Kiawah is a special place for all of us and we need to preserve the quality of life for those that call it home (or second home), but we need to do it in a way that does not hurt the island by pushing many great families (like mine) elsewhere and lowering all of our property values in the process.

Thanks.
Steve McClure
Bufflehead Dr.

From: Reed Baker <ReedBaker@advantageind.com>
Date: September 30, 2019 at 10:44:21 PM EDT
To: "stillerson@kiawahisland.org" <stillerson@kiawahisland.org>
Cc: "apbaker@comcast.net" <apbaker@comcast.net>
Subject: Short Term Rental Ordinance

Please include this in the public record:

My family has been coming to Kiawah for over 25 years. First when my parents owned a portion of a property in Inlet Cove. They sold their portion over 10 years ago and we continued to come as renters, primarily in Inlet Cove. We were fortunate enough 4 years ago to be able to purchase our own home in Inlet Cove. We currently rent our home through a local rental agency.

I was pleased to see that the council reconsidered putting a limit on rentals in Inlet Cove and similar neighborhoods in West Beach. I would hazard to guess that everyone or close to everyone that purchases a home in Inlet Cove, Sparrow Pond and similar neighborhoods did so with the understanding there would be a large percentage of rentals in their area.

I am in favor of having reasonable regulations that can be effectively policed. I understand that this will come with a cost. However if I understand correctly, the new ordinance would require an annual \$1500 fee with no consideration to the size of the property or the rental potential. Is it fair that a rental property that rents for \$2500 a week pays the same application fee as one that rents for \$6000 a week? I believe the puts an unfair burden on the smaller properties. I would ask that a sliding scale or % of the previous years rental be used to determine the cost of the annual fee.

Reed and Angie Baker
41 Sunlet Bend

From: Ellen Walkley <EWalkley@Kiawah.com>
Date: September 30, 2019 at 10:04:56 PM EDT
To: "ikiawah@googlegroups.com" <ikiawah@googlegroups.com>
Cc: "stillerson@kiawahisland.org" <stillerson@kiawahisland.org>
Subject: [iKiawah] Rental ordinance

Please make this part of the town record :

I have lived and sold real estate on Kiawah Island for 26 years, and I am very alarmed by the proposed STR ordinance. I don't believe the council has heard from anyone who actually shows and sells homes on Kiawah every day. I know for certain that this will have a very large negative impact on Kiawah values.

We have now reached a stable and mostly recovered market, and we simply cannot afford to remove a whole class of buyers from our prospects. Kiawah is a very emotional purchase, and it is very hard to sell what people don't "need." The ability to rent the property helps justify this discretionary decision, and a few people want to remove this right that will affect all of Kiawah's values.

We cannot take this risk as all owners become sellers one day. Owning a home on Kiawah is a big investment and when the time comes to sell, each owner hopes to maximize his investment. Shrinking our pool of buyers will shrink demand for Kiawah homes which can only result in lower values.

I have loved introducing new people to Kiawah and want only the best for our island. I know this is not in Kiawah's best interest, and I urge everyone to ask for better enforcement rather than taking this drastic step. No one can sell uncertainty, and getting a STR rental license is about to become complex and very uncertain..Why would we want to harm ourselves when there are many untried solutions?

Ellen Walkley
[574 Whimbrel Road](#)