

22308

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Master-In-Equity

Mikell R. Scarborough, Master-In-Equity for Charleston County

Appellate Case No. 2015-001146
Trial Court Case No. 2013-CP-10-1225

RECEIVED

DEC 15 2015
SC Court of Appeals

Kiawah Resort Associates, L.P., a Delaware
Limited Partnership, and Kiawah
Development Partners II LLC.,

Appellants/Respondents,

v.

Kiawah Island Community Association, Inc.,
a South Carolina Not-for-Profit Corporation,

Respondent,

and

Kiawah Property Owners Group, Inc., and
Inlet Cove Club Homeowners Association, Inc.

Respondents/Appellants

RECORD ON APPEAL
(VOLUME 3 OF 6)

Ellis R. Lesemann, Esq.
Michelle A. Matthews, Esq.
Lesemann & Associates LLC
80 Alexander Street, Second Floor
Charleston, SC 29403
(843) 724-5155
Attorneys for Appellants/Respondents

Allison C. Jett, Esq.
Weissman, Nowack, Curry & Wilco, P.C.
One Alliance Center, Fourth Floor
3500 Lenox Road
Atlanta, GA 30326
(404) 926-4500
Attorney for Respondent

Amy E. Armstrong, Esq.
Jessie A. White, Esq.
S.C. Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585
(843) 527-0078
Attorneys for Respondents/Appellants

INDEX

Volume 1 of 6

Orders

Order Granting Intervention (<i>November 1, 2013</i>).....	1
Order on Motion for Relief from the Order Granting Intervention (<i>June 4, 2014</i>)	12
Final Order (<i>June 4, 2014</i>)	13
Order on Motion to Alter or Amend the Final Order (<i>May 7, 2015</i>)	39

Pleadings

Summons and Complaint (<i>March 1, 2013</i>).....	55
Defendant's Answer and Counterclaim (<i>May 8, 2013</i>)	270
Motion to Intervene of Inlet Cove Homeowners Association and Kiawah Island Property Owners Group (<i>May 28, 2013</i>).....	283
Plaintiff's Reply to Defendant's Counterclaim (<i>June 21, 2013</i>).....	330
Defendant's Brief in Opposition to Motion to Intervene (<i>October 18, 2013</i>)	334
Proposed Intervenor's Reply to Defendant's Brief in Opposition to Motion to Intervene (<i>October 28, 2013</i>)	343

Volume 2 of 6

Plaintiffs' Amended Complaint (<i>November 19, 2013</i>)	353
Intervenor's Answer to Amended Complaint (<i>December 12, 2013</i>)	580
Plaintiffs' Motion for Relief from the Order Granting Intervention (<i>March 27, 2014</i>).....	589
Defendant's Response to Plaintiffs' Motion for Relief from the Order Granting Intervention (<i>April 7, 2014</i>)	608
Intervenor's Response to Plaintiff's Motion for Relief from the Order Granting Intervention (<i>April 17, 2014</i>)	611
Plaintiffs' Reply to Intervenor's Opposition to Motion for Relief from the Order Granting Intervention (<i>May 27, 2014</i>)	630
Plaintiffs' Motion to Alter or Amend Final Order (<i>June 16, 2014</i>).....	635
Intervenor's Response to Plaintiffs' Motion to Alter or Amend Final Order (<i>July 14, 2014</i>)	699
Defendants' Response to Plaintiffs' Motion to Alter or Amend Final Order (<i>August 4, 2014</i>)	725
Plaintiffs' Reply in Support of its Motion to Alter or Amend Final Order (<i>August 8, 2014</i>)	738

Transcripts

Hearing Transcript, Plaintiff's Motion to Alter or Amend Final Order (August 11, 2014)	757
--	-----

Volume 3 of 6

Trial Transcript, Vol. 1 (<i>December 9, 2013</i>)	784
--	-----

Volume 4 of 6

Trial Transcript, Vol. 2 (<i>December 10, 2013</i>)	1078
---	------

Volume 5 of 6

Exhibits

Plaintiffs' Exhibit 1	1397
Plaintiffs' Exhibit 2	1398
Plaintiffs' Exhibit 3	1401
Plaintiffs' Exhibit 5	1402

Volume 6 of 6

Plaintiffs' Exhibit 5 (<i>continued</i>)	1875
Plaintiffs' Exhibit 11	2118
Plaintiffs' Exhibit 13	2125
Plaintiffs' Exhibit 15	2134
Plaintiffs' Exhibit 16	2160
Plaintiffs' Exhibit 17 (<i>marked for identification purposes</i>)	2166
Plaintiffs' Exhibit 20	2167
Plaintiffs' Exhibit 25 (<i>not admitted; submitted with Plaintiffs' Proposed Final Order</i>)	2177
Plaintiffs' Exhibit 26	2181
Plaintiffs' Exhibit 27	2182
Plaintiffs' Exhibit 28	2183
Plaintiffs' Exhibit 29	2184
Plaintiffs' Exhibit 30	2185
Plaintiffs' Exhibit 31	2190
Plaintiffs' Exhibit 32	2192
Plaintiffs' Exhibit 33	2193
Plaintiffs' Exhibit 36	2195
Defendant's Exhibit 1	2206

Intervenors' Exhibit 2	2236
Intervenors' Exhibit 3	2253
Intervenors' Exhibit 5	2258
Intervenors' Exhibit 9	2259
Intervenors' Exhibit 15	2268
Intervenors' Exhibit 19	2269
Intervenors' Exhibit 20	2270
Intervenors' Exhibit 22	2272
Intervenors' Exhibit 23	2273

Other

Email from counsel for Intervenors to Judge Scarborough with attached Proposed Order Granting Intervention (<i>October 31, 2013</i>)	2274
Letter from counsel for Plaintiffs to Judge Scarborough regarding Order Granting Intervention (<i>November 5, 2013</i>)	2286
Plaintiffs' Proposed Final Order (<i>submitted February 14, 2014</i>)	2287
Plaintiffs' Proposed Order Granting Motion to Alter or Amend the Final Order (<i>submitted September 19, 2014</i>)	2326
Certificate of Counsel	2358

BEFORE THE MASTER-IN-EQUITY
FOR THE STATE OF SOUTH CAROLINA
CHARLESTON COUNTY

KIAWAH RESORT ASSOCIATES, L.P., a Delaware Limited
Partnership, and KDP II, LLC, a South Carolina
Limited Liability Company,
Plaintiffs,

vs.

CASE NO. 2013-CP-10-1225

KIAWAH ISLAND COMMUNITY ASSOCIATION, INC., a South
Carolina Not-for-Profit Corporation,
Defendant,

and

INLET COVE HOMEOWNERS ASSOCIATION, INC., a South
Carolina Not-for-profit Corporation, and KIAWAH
ISLAND PROPERTY OWNERS GROUP, an unincorporated
association,

Third-Party Intervenors.

BEFORE THE HONORABLE MIKELL R. SCARBOROUGH
VOLUME I

DATE: DECEMBER 9, 2013

TIME: 9:00 AM

LOCATION: CHARLESTON COUNTY COURTHOUSE
CHARLESTON, SOUTH CAROLINA

REPORTED BY: Anne Bouley Meyer, RPR
CLARK & ASSOCIATES, INC.
P.O. Box 73129
Charleston, SC 29415
843-762-6294
WWW.CLARK-ASSOCIATES.COM
Anne@clark-associates.com

A P P E A R A N C E S

ON BEHALF OF PLAINTIFFS:

HARVEY & VALLINI
BY: ELLIS R. LESEMAN
497 Bramson Court, Suite 200
Mount Pleasant, SC 29464

ON BEHALF OF DEFENDANT:

WEISSMAN NOWACK CURRY & WILCO
BY: ALLISON C. JETT
One Alliance Center, 4th Floor
3500 Lenox Road
Atlanta, GA 30326

ON BEHALF OF THIRD-PARTY INTERVENORS:

S.C. ENVIRONMENTAL LAW PROJECT
BY: AMY E. ARMSTRONG
P.O. Box 1380
Pawley's Island, SC 29585

INDEX

WITNESSES

MARK PERMAR

DIRECT EXAMINATION BY MR. LESEMAN	36
CROSS EXAMINATION BY MS. JETT	70
CROSS EXAMINATION BY MS. ARMSTRONG	75
REDIRECT EXAMINATION BY MR. MR. LESEMAN	100

DENNIS RHOAD

DIRECT EXAMINATION BY MR. LESEMAN	126
CROSS EXAMINATION BY MS. JETT	133
CROSS EXAMINATION BY MS. ARMSTRONG	135
REDIRECT EXAMINATION BY MR. LESEMAN	158
RECROSS EXAMINATION BY MS. ARMSTRONG	163

PATRICK McKINNEY

DIRECT EXAMINATION BY MR. LESEMAN	175
CROSS EXAMINATION BY MS. JETT	196
CROSS EXAMINATION BY MS. ARMSTRONG	201
REDIRECT EXAMINATION BY MR. LESEMAN	208
EXAMINATION BY THE COURT	214

LEONARD L. LONG

DIRECT EXAMINATION BY MR. LESEMAN	218
CROSS EXAMINATION BY MS. JETT	252
CROSS EXAMINATION BY MS. ARMSTRONG	262
REDIRECT EXAMINATION BY MR. LESEMAN	283
EXAMINATION BY THE COURT	287

CERTIFICATE OF REPORTER

294

ELIZABETH NIMMONS

DIRECT EXAMINATION BY MR. LESEMAN	298
CROSS EXAMINATION BY MS. JETT	341
CROSS EXAMINATION BY MS. ARMSTRONG	348
REDIRECT EXAMINATION BY MR. LESEMAN	365
EXAMINATION BY THE COURT	372
REDIRECT EXAMINATION BY MR. LESEMAN	379
EXAMINATION BY THE COURT	381

TOWNSEND CLARKSON

DIRECT EXAMINATION BY MR. LESEMAN	385
CROSS EXAMINATION BY MS. JETT	412
CROSS EXAMINATION BY MS. ARMSTRONG	416

Deposition of Hearing

1		
2		
3	TAMMY McADORY	
	DIRECT EXAMINATION BY MS. JETT	426
4	CROSS EXAMINATION BY MR. LESEMAN	440
	CROSS EXAMINATION BY MS. WHITE	467
5	REDIRECT EXAMINATION BY MS. JETT	479
6	WILLIAM EISER	
	DIRECT EXAMINATION BY MS. ARMSTRONG	482
7	CROSS EXAMINATION BY MR. LESEMAN	513
	REDIRECT EXAMINATION BY MS. ARMSTRONG	520
8	WENDY KULICK	
9	DIRECT EXAMINATION BY MS. ARMSTRONG	522
	CROSS EXAMINATION BY MR. LESEMAN	537
10	CROSS EXAMINATION BY MS. JETT	541
	REDIRECT EXAMINATION BY MS. ARMSTRONG	542
11	PETER MUGGLESTONE	
12	DIRECT EXAMINATION BY MS. ARMSTRONG	544
	CROSS-EXAMINATION BY MR. LESEMAN	561
13	CROSS-EXAMINATION BY MS. JETT	565
	REDIRECT EXAMINATION BY MS. ARMSTRONG	566
14	RECROSS EXAMINATION BY MR. LESEMAN	567
15	GREG VANDERWERKER	
	DIRECT EXAMINATION BY MS. ARMSTRONG	568
16	CROSS-EXAMINATION BY MR. LESEMAN	590
17	CERTIFICATE OF REPORTER	613

18
19
20
21
22
23
24
25

EXHIBITS

Plaintiffs' Exhibit Nos. 5 and 28	48
Plaintiffs' Exhibit No. 16	61
Intervenors' Exhibit No. 15	92
Intervenors' Exhibit Nos. 1 and 14	93
Plaintiffs' Exhibit No. 26	108
Intervenors' Exhibit No. 5	110
Plaintiffs' Exhibit No. 29	120
Intervenors' Exhibit Nos. 8 and 9	124
Plaintiffs' Exhibit Nos. 23, 30 and 33	124
Plaintiffs' Exhibit No. 3	178
Plaintiffs' Exhibit No. 2	223
Plaintiffs' Exhibit No. 15	250
Intervenors' Exhibit Nos. 2 and 3	290
Plaintiffs' Exhibit No. 27	302
Plaintiffs' Exhibit No. 20	306
Plaintiffs' Exhibit No. 36	312
Plaintiffs' Exhibit No. 13	331
Intervenors' Exhibit No. 6	371
Plaintiffs' Exhibit No. 1	387
Defendant's Exhibit No. 1	434
Plaintiffs' Exhibit No. 31	448
Plaintiffs' Exhibit No. 32	450
Plaintiffs' Exhibit No. 17	460
Plaintiffs' Exhibit No. 11	479
Intervenors' Exhibit No. 19	500
Intervenors' Exhibit No. 20	510
Intervenors' Exhibit No. 22	552
Intervenors' Exhibit No. 23	561

1 THE COURT: Okay. All right. So this
2 morning we have got the Kiawah Resort Associates
3 versus Kiawah Island Community Association.

4 We added -- help me out, what's the new entity?

5 MR. LESEMANN: Your Honor, Inlet Cove
6 Homeowners Association and the Kiawah Property
7 Owners Group represented by Ms. Armstrong and
8 Ms. White.

9 THE COURT: As intervenors. But the
10 new owners are --

11 MR. LESEMANN: Oh, yes, sir. KDP II,
12 LLC.

13 THE COURT: Thank you very much.

14 All right. So let me do a little
15 housekeeping before we start, and I will do
16 introductions and we will get rolling. But what I
17 plan to do is run from now until -- I usually take
18 lunch between 12:30 and 1:00. So that will be sort
19 of our break time.

20 We usually start back at about 2:00,
21 depending on when we break. And then we will just
22 roll as much as we can today, okay? And to get
23 through -- I think the plan is to get through today
24 if at all possible. So we will go from there.

25 Let me get, just for the record, the

1 appearances. I think you've probably already done
2 that. But, Mr. Lesemann, let me start with you and
3 Ms. Jett, and then Ms. Armstrong.

4 MR. LESEMAN: Thank you, Your Honor.
5 Ellis Lesemann on behalf of the plaintiffs.

6 MS. JETT: Your Honor, Allie Jett here
7 on behalf of the defendants Kiawah Island Community
8 Association.

9 MS. ARMSTRONG: Amy Armstrong on behalf
10 of the intervenors. All right.

11 MS. WHITE: Jessie White on behalf of
12 the intervenors as well.

13 THE COURT: Thank you very much.

14 All right, do we have any motions or
15 any matters that we need to take up before we get
16 started this morning?

17 MR. LESEMAN: None for plaintiffs,
18 Your Honor.

19 MS. JETT: No, Your Honor.

20 MS. ARMSTRONG: Your Honor, I don't
21 have any motions that need to be taken up, but I
22 did want to ask if it might be possible that -- I
23 have got a witness from the Town that is under
24 subpoena. She is only here to authenticate
25 documents.

1 I know it's a little unusual to be
2 taken out of order. I don't know how -- I should
3 have -- I really just talked to the town clerk now.
4 I don't know if anyone would have any objection to
5 that.

6 MR. LESEMANN: To the extent that it's
7 just to authenticate documents, we actually have
8 some documents from the Town of Kiawah that we
9 would wish to authenticate. So we will work with
10 the Court's wishes on that.

11 THE COURT: Okay. Very good. You want
12 to do a short little introduction and just sort of
13 do the layout and we will get started.

14 Want to do that?

15 MR. LESEMANN: Okay.

16 THE COURT: Let's do that. And we will
17 work with whoever that witness is and accommodate
18 their schedule, okay?

19 MR. LESEMANN: Okay. Certainly, Your
20 Honor.

21 Your Honor, the plaintiffs are here to
22 ask the Court in Equity to reform a deed. The
23 basis for the reformation that we are seeking is
24 that a mutual mistake resulted in 4.62 acres of
25 valuable beachfront property, and also areas within

1 the setback line, being mistakenly conveyed as part
2 of a 1995 quit claim deed that was entered between
3 KRA and KICA.

4 So, Your Honor, to go back, in 1993 and
5 1994 the Town of Kiawah and KRA, the primary
6 developer of Kiawah Island, entered into
7 negotiations to enter into a development agreement.

8 It is my understanding it was only the
9 second development agreement that was entered into
10 pursuant to the statute and adopted by the South
11 Carolina General Assembly.

12 As part of that development agreement,
13 Your Honor, KRA was given development rights in
14 multiple parcels around the island, including, for
15 example, parcels 12 and 13. Those parcels are
16 recognized as mixed-use parcels, and KRA was given
17 the rights to develop as much as 12 residential
18 units per acre, as well as thousands of square feet
19 of commercial space.

20 Another part of the development
21 agreement was that the parties and that KRA agreed
22 that it would convey a 10-mile beachfront strip.
23 The 10-mile beachfront strip, Your Honor, was
24 ultimately reflected in an exhibit to the
25 development agreement, Exhibit 16.2.

1 And to show Your Honor, the dedication
2 area that was intended to be the beachfront strip
3 is shown in those diagonal hatched lines. As Your
4 Honor will see, and as the evidence will show,
5 that's the terminating point in terms of the intent
6 of the parties, Kiawah Island and KRA, and that
7 KICA's intent is essentially borrowed from those
8 two parties that entered into this development
9 agreement, that the terminating point of the
10 beachfront strip would be here (indicating). That
11 is parcel 13 there, and parcel 12 is here
12 (indicating).

13 So, Your Honor, mutual mistake is based
14 upon where the intent of the parties is not met due
15 to a mistake in drafting. And that's exactly what
16 has happened here.

17 Due to a mistake in drafting, the
18 ending point of the beachfront strip was not where
19 it was intended to be, the ending point of the
20 beachfront strip is picked up at the southwestern
21 corner of this area here, which is the employee
22 facility tract.

23 As a result, these 4.62 acres, as the
24 evidence will show, were included in the quit claim
25 deed in an agreement for conveyance. And there is

1 not any evidence whatsoever to indicate anything
2 other than exactly what the parties to the
3 development agreement stipulated, which is that the
4 termination point should be here and not here
5 (indicating).

6 As a result, these 4.62 acres were
7 mistakenly transferred due to a mistake in drafting
8 that caused the intent of the parties to be
9 frustrated.

10 Your Honor, the evidence from multiple
11 sources will show, for example, that -- if you look
12 at a map that KICA maintains of its dunes property,
13 you'll see that it stops at the intended point here
14 (indicating), and does not include the additional
15 land which would be located there (indicating).

16 KICA also maintains a common property
17 map. And I hit on the -- and so this common
18 property map, Your Honor, you see the color -- the
19 color coding indicating the land in beige is owned
20 by the KRA.

21 You can see KICA's own map, which is
22 available on the KICA agency website, indicates
23 that this property is believed to be owned by KRA,
24 and that the beachfront strip again would stop at
25 that eastern boundary of parcel 13, as exhibited in

1 Exhibit 16.2 to the development agreement.

2 And, Your Honor, I can go on but there
3 is just a number of points, including the tax --
4 the County. The County, as the evidence will show,
5 indicates that the beachfront strip, as parcel 029,
6 stops at this easternmost boundary of parcel 118
7 and does not include the additional land, which is
8 this parcel, is shown as part of parcel 11.

9 KRA and its affiliates pay the taxes on
10 this parcel (indicating), they pay the taxes on
11 this parcel (indicating), KICA is responsible for
12 this parcel (indicating).

13 Your Honor, also a document that I
14 briefly showed, and that we would ask the town
15 clerk to confirm as part of her testimony, are
16 zoning maps for the Town of Kiawah.

17 Here you can see again parcels 12 and
18 13. And that will -- the resolution will fix in
19 just a moment. Parcels 12 and 13, again they're
20 mixed-use parcels that under which KRA was granted
21 development rights under the development agreement.

22 So, Your Honor, we have six witnesses
23 today. We have Mr. Permar, who worked diligently
24 on the development agreement and who actually
25 prepared the correction to Exhibit 16.2, and is

1 going to testify about his working together on that
2 exhibit, together with Mayor Melvin and the
3 relevant folks at the Town of Kiawah, to make a
4 clear indication as to where that exhibit was
5 supposed to stop.

6 Mr. Permar can also speak about the
7 lack of any activity, ownership or reliance of any
8 kind that KICA has made on this property which KICA
9 itself, through its own documents, indicates that
10 it doesn't believe that it owns. It's doesn't pay
11 taxes on it, et cetera.

12 We have Mr. Dennis Rhoad available who,
13 as you know, has served at the Town of Kiawah
14 Island -- I hesitate to state the date, but I know
15 it has been a very long time. It's been at least
16 20 or 25 years.

17 And he will testify regarding the
18 intent of the Town of Kiawah Island with regard to
19 this strip, and the Town of Kiawah's belief that
20 this, due to a scrivener's error, resulted in 4.62
21 acres in this area, a very far distance, hundreds
22 of feet distant from the intended end of Exhibit
23 16.2.

24 And also, and I believe it's important,
25 Your Honor, in an area where KRA and the Town were

1 agreeing that specific development rights would be
2 given, it would be nonsensical for the Town and KRA
3 to be agreeing that there will be development
4 rights in an area if the Town had intended, no,
5 that's actually supposed to be part of the
6 beachfront strip you should be conveying.

7 And then, Your Honor, we will also have
8 testimony from Mr. Leonard Long, who works for KRA,
9 and was a managing partner in KRA for a number of
10 years and was involved in this process.

11 But also, Your Honor, importantly, he
12 served as the secretary of KICA, the defendant in
13 this action, and also was a board member of KICA
14 for many years, and signed documents on behalf of
15 KICA, and has testimony and knowledge relating to
16 KICA's intent.

17 Your Honor, we have also brought forth,
18 and will bring forth with the Court's blessing,
19 Ms. Beth Nimmons who is the scrivener in this case.
20 And who can testify as to -- for one, the fact that
21 she did not have Exhibit 16.2 available to her,
22 this exhibit, and she did not look at it before
23 preparing the quit claim deed property description,
24 and the property description that was also inserted
25 into the agreement for conveyance which is where

1 the mistake was born.

2 And as a result of that mistake, that a
3 -- the southwest corner of this, Your Honor, is the
4 map of the employee facility tract. And you'll
5 see, Your Honor, as Ms. Nimmons will testify, there
6 is no indication of the relationship of this tract
7 to mean high water or to the Atlantic Ocean.

8 Ms. Nimmons will testify that she --
9 her belief, to not realize that there was
10 developable high land that was subject to parcels
11 12 and 13 under the development agreement that were
12 located in this area, and that by her error, that
13 this was used as the ending point of the beachfront
14 strip as opposed to what the Town and KRA agreed
15 would be the beachfront strip, which is here
16 (indicating).

17 So, Your Honor, we would continue for
18 Ms. Nimmons to also testify and have testimony from
19 Pat McKinney, who was also a member of the board of
20 directors and was an officer and managing partner
21 of KRA for many years. But he was also a member of
22 the board of directors at KICA at the time, Your
23 Honor, and can speak to their intent.

24 At one point, that Mr. McKinney will
25 add in his testimony, Your Honor, is that the

1 intention of the beachfront strip was to avoid the
2 situation that happened on the -- what I will call
3 the west-southwest end of Isle of Palms, where due
4 to accretion on that opposite side of Palm
5 Boulevard, that an additional row of houses was
6 then later able to be built.

7 And in the course of being able to
8 market valuable property on Kiawah, the testimony
9 of the partnership of KRA will show that the
10 intention was that -- that the beachfront strip
11 would stop in front of these properties that had
12 been sold to third parties for this very reason,
13 Your Honor.

14 That we wouldn't want to be selling
15 property to these folks here, only to have in 20
16 years another house go in front of them. And so
17 from a marketing standpoint, and from a governance
18 standpoint, because my witnesses and my clients
19 were responsible for the stewardship of KICA, that
20 the intention would be that with regard to the
21 beachfront strip that ran in front of these
22 pre-developed properties, that that would be
23 conveyed to KICA.

24 But conversely, Your Honor, as will be
25 indicated by the testimony, KRA had no such need or

1 desire to do that to itself on property that
2 developers still owned.

3 There would be no reason to give over
4 beachfront strip, because as this property
5 continues to accrete and continues to accrete, the
6 developer would have the right to develop all
7 developable property.

8 But again, for purposes of maintaining
9 the expectations of folks who had bought on a
10 beachfront basis, that strip was to be conveyed.
11 And again, consistent with that testimony and
12 consistent with that intention, Your Honor, you'll
13 see these are the Duneside Villas here, which is
14 the western-most development on the island.

15 You'll see the beachfront strip, as
16 intended in the agreement, stops right there. Your
17 Honor, by way of pointing out, Inlet Cove, one of
18 the intervenors, is located here (indicating). And
19 you'll see, it's separated by some distance that I
20 would say it's probably 1,400 feet, 1,600 feet of
21 marsh bank here, and also high trees.

22 The testimony will show, Your Honor,
23 that Inlet Cove doesn't -- this property cannot be
24 viewed from Inlet Cove due to the density of the
25 forest and the other topographical features.

1 And also you'll note that this parcel
2 is a standalone parcel that doesn't have
3 independent access. The testimony will show that
4 that, in itself, creates what would be an illegal
5 subdivided parcel under the Town of Kiawah
6 regulations because it has no access and it's
7 disconnected from the remainder of the beachfront
8 strip.

9 And, Your Honor, we also would present
10 testimony from Mr. Townsend Clarkson, who signed
11 the agreement for conveyance on behalf of KICA as
12 its president, and also served on the board of
13 directors, and is a long-time officer of KRA.

14 Again to present his understanding and
15 evidence of the intent of the Town, the intent of
16 KRA, and the intent of KICA. And that intent, as
17 stipulated in the agreement -- because again, once
18 this agreement is made, Your Honor, the parties
19 really weren't at liberty to change that. Once the
20 Town and KRA agreed to what would be conveyed, KICA
21 -- excuse me -- KRA wasn't at liberty, for example,
22 to stop it here (indicating), or stop it here
23 (indicating), or to stop it there (indicating), or
24 any other point on the beach. This was the agreed
25 upon strip that would be conveyed.

1 However, as the evidence will show, due
2 to a mistake in drafting, that trilateral intent
3 was frustrated as a result of a mistake made in
4 drafting due to the document not being allowed to
5 be the governing document, and Ms. Nimmons
6 operating under a misunderstanding that she should
7 use this point here, creating 4.62 acres of
8 property that the evidence will show KICA has built
9 no structures on it, KICA don't show it as its own
10 common property, KICA doesn't maintain it, KICA
11 doesn't pay taxes on it.

12 And so, Your Honor, we believe that
13 equity supports the transfer of this property back
14 to its intended owner and its rightful owner, which
15 at this point, based on the transfer, is KDP II,
16 LLC, which is why we sought for them to be added as
17 a party.

18 And we thank Your Honor, and we look
19 forward to presenting our case.

20 THE COURT: Thank you. Ms. Jett

21 MS. JETT: Your Honor, the plaintiffs'
22 complaint has three counts in it. The first being
23 one for declaratory judgment seeking to establish
24 that in fact the legal description in the 1995 quit
25 claim deed is in error.

1 And the second count being for
2 reformation of that deed. I'm sorry, let me back
3 up. The declaratory judgment action is to seek
4 that the agreement for conveyance is in error. And
5 that the reformation action being that there was an
6 error in the legal description for the 1995 quit
7 claim deed.

8 And then, thirdly, that there should be
9 an account for specific performance to force the
10 association to sign a deed to convey that 4.62
11 acres back to, I guess in this situation, KDP II,
12 LLC.

13 Your Honor, I think it's important to
14 note that the development agreement, which is, you
15 know, the document that started all of this, was,
16 you know, executed in 1994. And it is a
17 development agreement between the Town of Kiawah
18 and KRA.

19 The evidence will show that there were
20 some prior drafts of the document contemplating
21 making KICA a party to that -- the community
22 association a party to that development agreement.
23 And that was ultimately decided not to be necessary
24 because KICA had no authority as it regards to
25 KRA's zoning of the property.

1 Rather, as the complaint sets out, KICA
2 was a third-party beneficiary of that development
3 agreement insofar as section 16 of the development
4 agreement obligated KRA to convey certain property
5 to KICA, including the 10-mile beachfront strip
6 which is obviously the subject of this litigation.

7 Your Honor, there will be no evidence I
8 believe presented to you today, or for however long
9 this hearing lasts, that will show that KICA has
10 any presence at the negotiations for the
11 development agreement. So they had no input in the
12 drafting, preparing, execution or negotiation of
13 the development agreement.

14 And that because they were a
15 third-party beneficiary, they were supposed to get
16 whatever they were supposed to get. KICA certainly
17 doesn't want to be in a position of an unfair land
18 grab in getting land that they were not supposed to
19 get, but in terms of their ability to have an
20 intent, the only document that we will find in this
21 case that was signed by KICA was the agreement for
22 conveyance, which is Exhibit 16.7 to the
23 development agreement, that stipulates that several
24 tracts were to be conveyed to KICA by KRA. And
25 that that document, being the only document signed

1 by KICA, has the exact same legal description that
2 was ultimately used on the quit claim deed.

3 So KICA just -- and that's the only
4 manifestation that we will be able to find of their
5 intent. We will have the executive director of
6 KICA, Tammy McAdory, here to testify today as being
7 the only employee that's still with KICA that was
8 on staff with KICA during the relevant times for
9 the development agreement.

10 That she has searched the records.
11 That she was responsible for keeping board minutes.
12 And that there was no official action taken by KICA
13 during the 1993 to 1995 period that was relevant to
14 negotiating the dimensions of the beachfront strip
15 that would have any sort of bearing on what exactly
16 KICA's intent was.

17 In terms of the development agreement,
18 I believe that the -- the only intent that can be
19 derived from that is the intent of the parties to
20 that agreement, which would be the Town and KRA.

21 I understand Mr. Lesemann's use of the
22 word trilateral intent, but I don't believe you'll
23 find any documents that will show all three of
24 those parties were actually in agreement on any
25 particular document.

1 And so specifically as to the specific
2 performance count, as the agreement for conveyance
3 being the only document signed by KICA, and it
4 matching word for word the legal description that
5 was used in the quit claim deed, I don't believe
6 you'll find any contract from KICA that would
7 support a claim to force it to give a deed on any
8 property.

9 But as for the reformation, the
10 standard, as you know, Your Honor, is clear and
11 convincing evidence of mutual mistake of the
12 parties..

13 And I don't believe that there will be
14 anything that Your Honor will see today that will
15 manifest any intent by KICA other than its
16 signature on that agreement for conveyance which
17 uses the same description as the quit claim deed

18 THE COURT: Okay. Thank you, Ms. Jett.
19 Ms. Armstrong.

20 MS. ARMSTRONG: Thank you, Your Honor.
21 I didn't know a lot about deed reformation when I
22 got into this case. And I recall that it's exactly
23 what Ms. Jett described as the clear and convincing
24 standard.

25 And part of the reason clearly is

1 because the deed is a written document, and it's
2 executed, something that's reduced to writing.

3 So when you are going to go to look for
4 evidence of intent that would refute a deed, you --
5 the first thing that the Court would want to look
6 at is other written instruments that evidence the
7 intent of the parties, such as a contract.

8 And so what we have here in very clear
9 language in the deed, we have got this 1994
10 development agreement that has got an agreement for
11 conveyance that's attached and incorporated into
12 the development agreement, that also has the exact
13 same language contained in the deed that was
14 signed.

15 The development agreement refers
16 specifically and incorporates the agreement of
17 conveyance. So that when the Town and KRA entered
18 into that 1994 development agreement, they also
19 agreed that this is the description in the
20 agreement for conveyance. There was a draft quit
21 claim deed attached to the development agreement
22 that was incorporated into the development
23 agreement, agreed upon by the parties, and that
24 language is identical throughout all of the
25 documents.

1 Now, I want to put all of this into a
2 little bit of a context. In 1994 there were
3 oceanfront setback lines, beachfront setback lines
4 maintained by the Department of Health and
5 Environmental Control. We will have a witness
6 that's going to testify regarding those setback
7 lines.

8 And in 1994, the setback lines were
9 drawn that cut off the entirety of the Captain
10 Sam's Spit on this west end of Kiawah Island. In
11 fact what you'll see is that the setback lines, as
12 they existed in 1994 at the time of this agreement,
13 cut off practically all of this 4.62 acres that we
14 are talking about.

15 In other words, all of that land was
16 seaward of the setback lines. So, in other words,
17 it's not developable because if you are seaward of
18 the setback line, it's not considered buildable.

19 So at that time in 1994 not only was
20 the beachfront strip not considered buildable,
21 neither was any portion of Captain Sam's Spit. And
22 the 4.62 acre simply was seaward of the setback
23 line.

24 So at that point, the intent of the
25 parties is pretty clear, based on the setback

1 lines, that you couldn't do anything, you couldn't
2 build, that was not buildable land.

3 And so there were two separate
4 conveyances under the development agreement. One
5 was for the beachfront strip, and one was for
6 Captain Sam's Spit that was going to be dedicated
7 and conveyed at a later date.

8 Now, what ended up happening is in 1999
9 the setback lines were redrawn. And they were
10 redrawn to allow -- to make some of Captain Sam's
11 Spit and this 4.62 acres landward of the setback
12 line, in other words buildable.

13 So the status of the property changed
14 between the time that -- between now and when the
15 1994 development agreement was entered into.

16 And what happened as a result of those
17 setback lines changing is that in 2005 a new
18 development agreement was entered that authorized
19 development on Captain Sam's Spit.

20 So it changed. One of the sections of
21 the dedication section of the 1994 agreement was
22 changed. Development rights on Captain Sam's Spit
23 were authorized.

24 And we believe the evidence is going to
25 show it's not until Captain Sam's Spit became

1 developable, developable property as a result in
2 the change in setback lines, that this concern
3 about the 4.62 acres actually became -- rose to the
4 level of catching the attention of the plaintiff
5 and prompting some seeking to reform the deed.

6 And so all of the evidence, we believe,
7 is going to show it's really of recent origin that
8 this alleged mistake has cropped up. And at the
9 time KRA intended to deed all of the Captain Sam's
10 Spit, as well as the beachfront property, which
11 included this 4.62 acres.

12 We also believe that whether -- I think
13 it's a question for the Court as to KICA's intent.
14 We believe that once KICA accepted the deed, they
15 didn't take any action and say, no, we don't want
16 this property. We don't think we should have
17 gotten this property.

18 There is no formal action by the KICA
19 board at any time, nothing from any board meeting
20 minutes, no recorded action, no official action at
21 all from KICA saying, we think we got more than
22 what we should have gotten.

23 There just isn't any documentary
24 evidence to reflect that. And similarly with the
25 Town, the Town's course of conduct since 1994 has

1 been that the beachfront strip included exactly
2 what the deed said it included, exactly what the
3 agreement of conveyance and the draft quit claim
4 deed said that it included.

5 The Town took later action. There has
6 been testimony from a member of town council from
7 2010 to 2012 that is going to testify about how the
8 developer asked the Town to sign an amendment to
9 the 2005 development agreement agreeing that there
10 was a mistake in the conveyance. The Town refused
11 to do so.

12 The Town took action acknowledging that
13 KRA said that they made a mistake, but the Town
14 itself never acknowledged that there was any intent
15 to convey that property or that it actually made a
16 mistake.

17 So the course of conduct of the Town is
18 consistent with the '94 development agreement that
19 it entered into in which the beachfront strip was
20 dedicated, including the 4.62 acres.

21 THE COURT: Okay. Thank you very much.

22 Mr. Lesemann, while you got that up
23 there and before we start taking testimony. Help
24 me out again, I'm looking at this Exhibit 29 on the
25 screen.

1 MR. LESEMANN: Yes, sir.

2 THE COURT: Tell me how we got to the
3 red box, which is 4.62?

4 MR. LESEMANN: So the 4.62 acres, Your
5 Honor, is also reflected in another document that I
6 might show you to see if it will all be -- well, I
7 will just explain it.

8 THE COURT: I know those two yellow
9 boxes, one is 13 and one is 12, correct?

10 MR. LESEMANN: Right. And so, Your
11 Honor, those are there mainly to show when we are
12 talking about the intent of the town and the intent
13 of KRA, specific mixed-use development rights were
14 granted in these two parcels; this parcel being 8.7
15 acres, this parcel being 19.5 acres.

16 So, Your Honor, the suggestion that the
17 testimony is something other than that this
18 property was intended for development is incorrect.

19 Now, it's true that while this property
20 here is capable of ownership, it may not be capable
21 of development, but it is capable of ownership.
22 This property located in this area is capable of
23 ownership and capable of development, Your Honor.

24 So what these green lines represent is
25 an overlay, as Mr. Mark Permar will testify, of the

1 recognized entitled parcels that were in the 1994
2 agreement, and were also in the 2005 agreement.

3 And so, Your Honor, what has happened
4 to -- to clarify where the red box is, is that
5 rather than stopping here -- and again, we will go
6 over Exhibit 16.2 in detail. And it's clear that
7 Exhibit 16.2 stops at this easternmost boundary of
8 parcel 13.

9 And that makes sense, Your Honor,
10 because again since this was an entitled parcel
11 under the development agreement, the beachfront
12 strip shouldn't continue. And then -- so that's
13 where it should stop.

14 But due to the mistake in drafting --
15 and again when we talk about mutual mistake, the
16 mistake itself doesn't have to be mutual, Your
17 Honor, just that the intent of the parties is not
18 reached.

19 Typically, it is going to be whoever
20 drafted the legal description is going to be the
21 person that made the mistake. So the term mutual
22 mistake, while it is a term of art given, it's a
23 bit of a misnomer because really there is a mistake
24 made by somebody that caused the intent of the
25 parties not to be realized.

1 And so, Your Honor, as a result, this
2 southwestern corner, this is the employee facility
3 tract here, in light black the lines are shown, it
4 would be enveloped in what was historical parcel
5 13.

6 Ms. Nimmons picked up the southwestern
7 corner of that tract here. And then the
8 north-south orientation -- if you see, Your Honor,
9 the differentiation between the aerial and where
10 the aerial stops and where it just goes to a black
11 and white outline drawing, that's a north-south
12 orientation. And then here is the east-west
13 orientation.

14 So the mistake in the property
15 description was to pick up this corner and then
16 create an imaginary line heading in a southerly
17 direction. So you see there the property tracks
18 that diagonal created by the portion of the aerial
19 and the gridline. And that was the mistake.

20 So this box ends up being created
21 because since this property, within these lines,
22 was separately platted as a 16-acre parcel. One of
23 the exceptions in the beachfront deed was that
24 there be no strip in front of properties where they
25 already were platted to mean high water.

1 So since this tract is already platted
2 to mean high water, there is no beachfront strip in
3 this area. However, this area here had not been
4 platted to mean high water, in fact it had not been
5 surveyed at the time which is why the mistake
6 arose.

7 Again, as I mentioned, when you look at
8 the employee facility tract, which Ms. Nimmons
9 mistakenly used as the ending point, there is not a
10 clear indication of what is below this, and what is
11 -- where the developable land stops, where is the
12 baseline, where is the mean high water, et cetera.

13 THE COURT: All right. Go back to
14 where you just were.

15 MR. LESEMANN: To the survey, Your
16 Honor?

17 THE COURT: To Exhibit 26, yeah, that
18 survey.

19 So what you are telling me is that the
20 lines were drawn southerly from the two points on
21 the most southern points of this --

22 MR. LESEMANN: From this one,
23 southwestern point, Your Honor. From this point
24 here.

25 THE COURT: Well, how was the eastern

1 boundary determined then? I'm trying to get at how
2 this red line came to exist.

3 MR. LESEMANN: Oh, the eastern boundary
4 is the --

5 THE COURT: And I'm not sure it does
6 exist legally, but I understand --

7 MR. LESEMANN: I understand, Your
8 Honor. So there is a survey of a 16-acre parcel
9 which is part of this Beachwalker ocean parcel,
10 which is this (indicating).

11 So the parcel -- this is recognized
12 under the development agreement, Your Honor --
13 differs from the one on the survey of record that
14 showed this line here (indicating) going all the
15 way down to mean high water.

16 So since this was separately platted --
17 and, Your Honor, I'll show you a little bit what
18 I'm speaking of here. If you go -- this is Exhibit
19 7, the quit claim deed itself.

20 There is a provision in here indicating
21 that where a parcel has already been granted down
22 to mean high water, that it would not -- yeah, the
23 saving and excepting, Your Honor. Beth Nimmons
24 would have been able to pick this up much sooner
25 than I would.

1 So the described beachfront property
2 having been previously conveyed to third parties by
3 instruments recorded in the RMC office prior to the
4 execution or recordation hereof. So, what we have
5 there is that saving and excepting clause that is
6 why the beachfront strip is not running underneath
7 that -- is not running under this parcel here
8 (indicating).

9 And also again, Your Honor, going back
10 to the point on Exhibit 16.2 which -- also, Your
11 Honor, if you'll recall that the hatched area was
12 to show the intended location of the beachfront
13 strip, and the area underneath that parcel is not
14 hatched.

15 It's shown in dark with the remainder
16 of this area is. And the testimony will show that
17 Mr. Permar had to correct the original version of
18 this, but that this version here -- which I believe
19 as Mr. Rhoad will testify, and it can be confirmed,
20 is the initial version by Mayor Mary Melvin, now
21 deceased, but the lady who on behalf of the Town
22 signed the development agreement, entered into the
23 development agreement so again has it being clear
24 that that was not included, and also it being clear
25 that that was platted down to mean high, that this

1 area here, that's what creates the red box in the
2 location where it is.

3 THE COURT: Okay. All right.

4 In my short vernacular it's the two
5 southern boundaries of what's the employee facility
6 lot towards the water, right?

7 MR. LESEMANN: Oh, yes, sir, Your
8 Honor. I think I misunderstood your point before,
9 that's correct. Those two points are correct.

10 This here (indicating), the one that
11 created the ending point. And this one here
12 (indicating), which would have been sort of the
13 northwestern point that was not separately platted
14 by this 16-acre parcel here which forms a portion
15 of the 19-and-a-half-acre parcel on which the
16 development rights were given.

17 And Mr. Long will indicate this was
18 actually intended as a hotel site that at the time
19 was the one undeveloped beachfront hotel site on
20 the east coast indicating the value and importance
21 ultimately of the parcel.

22 THE COURT: Okay. All right. I just
23 wanted to figure out where that came from.

24 Okay. Very good. Are you ready?

25 MR. LESEMANN: I'm ready, Your Honor.

1 THE COURT: All right. Why don't you
2 call your first witness.

3 MR. LESEMANN: Your Honor, plaintiffs
4 will call Mr. Mark Permar.

5 THE COURT: Mr. Permar, come on up,
6 sir.

7 MARK PERMAR,
8 having been first duly sworn, was examined and
9 testified as follows:

10 THE COURT: Give us your full name and
11 address for the record.

12 THE WITNESS: Mark Alan Permar. 81
13 Dungannon Hall on Kiawah Island.

14 THE COURT: Thank you, sir.

15 DIRECT EXAMINATION

16 BY MR. LESEMANN:

17 Q. Mr. Permar, I think that you mentioned to me
18 that you may have appeared in front of Judge
19 Scarborough, or worked together with him when he
20 was part of the planning commission?

21 A. If I'm not mistaken, he was chairman of the
22 planning commission. I would make presentations
23 for either rezonings or plats.

24 Q. Okay. To the extent that he may not have
25 heard your background, could you take a moment to

1 provide some information on your background,
2 specifically as it relates to Kiawah Island?

3 A. Educated as an architect and planner.
4 Registered architect in the state of Georgia.

5 Most of my experience has been in planning,
6 though; long-range planning, strategic planning
7 related to early concept development and
8 entitlements.

9 I was hired by the Kiawah Island Company in
10 the early part of 1979 to head up planning. Later
11 vice president of planning and design for about six
12 years.

13 And left the company in 1985 to start a
14 series of companies with several other people. And
15 then reengaged with the developers at Kiawah in the
16 spring of 1988 during a due diligence period when
17 they placed the Island under contract. And have
18 been involved in long-range planning ever since.

19 Q. And to this day are you engaged as a
20 consultant and on retainer with KRA?

21 A. Yes.

22 Q. Okay. I want to clarify. Do you have any
23 direct financial stake in the outcome of this
24 litigation as to whether the Court would reform
25 this deed or not?

1 A. No.

2 Q. So in total, how many years have you been
3 working in land planning and related areas on
4 Kiawah Island?

5 A. Well, six. Six years during the late '70s
6 and early '80s, plus whatever 1988 on is. 30, a
7 lot.

8 Q. Right, 30-plus years?

9 A. I believe so, yes.

10 Q. Is there another land planner that you can
11 think of that would have 30-plus years of
12 experience on Kiawah Island?

13 A. No.

14 Q. Were you involved and are you familiar with
15 the 1994 development agreement?

16 A. Yes.

17 Q. Between the Town of Kiawah Island and KRA?

18 A. Yes.

19 Q. Can you describe a bit about that process
20 and what your involvement was with the development
21 agreement?

22 A. I was part of the team of people that
23 included partners and legal counsel. Most of my
24 area of focus would have involved the development
25 standards for future development in terms of

1 setback type standards of the space requirements,
2 off-street parking, land use types, densities, that
3 sort of thing.

4 Q. Were you extensively involved with the
5 preparation of the development agreement?

6 A. Yes.

7 Q. Did you interact with the Town?

8 A. Yes.

9 Q. Did you interact with KRA?

10 A. Yes.

11 Q. Did you interact with Mr. Long, Mr. Leonard
12 Long?

13 A. Yes.

14 Q. Did you interact with Mr. Pat McKinney?

15 A. Yes.

16 Q. Did you interact with Mr. Buddy Darby?

17 A. Yes.

18 Q. Okay. Mr. Townsend Clarkson?

19 A. Yes.

20 Q. Okay. Those four individuals I mentioned,
21 did you understand that they also were members of
22 the board of directors of KICA in the 1994
23 timeframe?

24 A. Yes.

25 Q. And so did you have interaction ultimately

1 with the Town, KRA and KICA through those
2 individuals as a result of this process?

3 A. Yes.

4 Q. Did you have sufficient interaction with
5 those different parties to where you feel like you
6 have an understanding of what the intent was with
7 regard to the beachfront strip?

8 A. Yes.

9 Q. Okay. Could you describe that for the Court
10 to what you understand the intent of the parties to
11 have been.

12 A. During the discussions of the development
13 agreement, one of the issues was potential
14 development or nondevelopment seaward of properties
15 that were held by third parties.

16 And there was early on a discussion and
17 language that attempted to verify that there would
18 not be future development on land that the company
19 owned seaward of those properties, which then led
20 to not only language but an exhibit.

21 Q. Okay. The exhibit that you are indicating,
22 would it be Exhibit 16.2 to the development
23 agreement?

24 A. Yes.

25 Q. Okay. And who was the initial preparer of

1 this document?

2 A. The Town prepared all of the exhibits like
3 this.

4 Q. Okay. And where were those documents kept?

5 A. In town hall.

6 Q. In order for you as a land planner involved
7 in the process of the development agreement, what
8 would you have to do in order to be able to view a
9 document of this type?

10 A. We would either receive the document, a hard
11 copy of it, or they would have exhibits like this
12 in town hall. And we were notified as to when they
13 were ready to be reviewed.

14 Q. Okay. Mr. Permar, is this a true and
15 accurate copy of Exhibit 16.2?

16 A. I believe it is, yes.

17 Q. And do you see the book and page number in
18 the upper left-hand corner?

19 A. Yes.

20 Q. And there might be a hole punch, but there
21 was a reference to Exhibit 16.2 at one time up in
22 the right-hand corner?

23 A. That's correct.

24 Q. Okay. And you see the initials of Mr. Way
25 and Mayor Melvin on the document?

1 A. Yes.

2 MR. LESEMANN: Your Honor, this
3 document would be a portion of the entire
4 development agreement, which is the three-binder
5 set. We would be intending to admit the entire
6 binders as Exhibit 5.

7 But this particular document, due to
8 its relevance, I have also pulled out and included
9 in part of your exhibit list where all our maps and
10 surveys are shown.

11 THE COURT: Okay.

12 MR. LESEMANN: So, Your Honor, I would
13 ask at this time that this document, Exhibit 16.2
14 to the development agreement of 1994 be admitted as
15 Plaintiffs' Exhibit 28.

16 THE COURT: Okay. Any objection?

17 MS. ARMSTRONG: Yes. The intervenors
18 object, Your Honor. We don't object to it coming
19 in as a matter of public record, it's a recorded
20 document.

21 But as far as it coming in as to the
22 truth of the matter asserted, that's where we have
23 a real problem. This is hearsay. We don't know --
24 we took Mr. Permar's deposition last week. He said
25 the Town made it.

1 We don't know who at the Town made it.
2 We don't know what information they used when they
3 were creating this map. They have no information.
4 There is not even a date on when it was created.

5 We don't know anything about it other
6 than Mr. Permar himself made some handwritten notes
7 on it. Aside from his handwritten notes, we don't
8 have any -- there is no foundation for it and it's
9 hearsay. So we would object for it coming in for
10 the truth of the matter.

11 THE COURT: Let me hear from Ms. Jett.

12 MS. JETT: I join with the intervenors.
13 Excuse me, I'm coming down with a cold. I would
14 echo the intervenors' objection.

15 THE COURT: Okay.

16 MR. LESEMANN: Your Honor, it's a
17 public record so the hearsay analysis is over at
18 that point. Since it's a public record, it has a
19 book and page number on it. Once it's in, it's in.
20 A public record is to be viewed by you for its
21 truth.

22 There is no hearsay exception that
23 survives the admission of a document.

24 THE COURT: Well, let me ask this
25 question because this is the one that's got the

1 handwritten notes on it.

2 MR. LESEMANN: Well, it's in the
3 original form as recorded, Your Honor.

4 THE COURT: It is recorded with that on
5 it?

6 MR. LESEMANN: Yes. Exactly. And,
7 Your Honor, I could show you the three-volume set
8 as well. And I can also -- maybe perhaps that
9 would be appropriate, I can show Mr. Permar the
10 Exhibit 16.2 that is in the full set. And then he
11 can confirm that the copy shown as Exhibit 28 is
12 the same as Exhibit 16.2.

13 THE COURT: Sure, go ahead. I got a
14 question about that.

15 BY MR. LESEMANN:

16 Q. Mr. Permar, could you just flip to Exhibit
17 16.2, please.

18 MR. LESEMANN: Your Honor, if I may
19 approach?

20 THE COURT: Okay.

21 MR. LESEMANN: I have a copy for you as
22 well. This is the first of two exhibit volumes.

23 THE COURT: Okay.

24 MR. LESEMANN: And you are looking at
25 Exhibit 16.2.

1 THE COURT: These are the Town's
2 records is what these are?

3 MR. LESEMANN: Yes. These are public
4 records with the RMC office, these are within the
5 Town's records, and they're within KRA's records.
6 This is a full and accurate copy.

7 This is the exact replica of Exhibit
8 16.2 to the development agreement which indicates
9 the stipulation between the Town of Kiawah and KRA
10 as to the terminus of the beachfront strip.

11 BY MR. LESEMANN:

12 Q. Mr. Permar, other than the yellow sticker in
13 the lower right-hand corner, is the document that's
14 being shown on the screen a replica of Exhibit 16.2
15 as it's shown in the development agreement itself?

16 A. Yes.

17 MR. LESEMANN: Your Honor, at this time
18 since I have pulled out the three exhibits of the
19 development agreement --

20 BY MR. LESEMANN:

21 Q. Mr. Permar, I will also ask you to take a
22 moment to look through the development agreement,
23 which again is a public record, and the texts lines
24 one in volume two and let me know if this appears
25 to be a true and accurate copy of the entirety of

1 the 1994 development agreement along with the
2 amendments.

3 A. It does.

4 Q. Okay.

5 MR. LESEMAN: Your Honor, I would move
6 for admission of the three-volume set of the 1994
7 development agreement as Plaintiffs' Exhibit 5.

8 THE COURT: Okay.

9 Mr. Permar, just for my edification.
10 The handwritten note at the bottom drawn toward
11 where Captain Sam's Spit is, is that your
12 handwriting?

13 THE WITNESS: Yes, Your Honor.

14 THE COURT: All right. Read that for
15 me, if you would.

16 THE WITNESS: Area not included in
17 dedication area, in parens, area Captain Sam's Spit
18 handled separately in development agreement section
19 16.(h).

20 THE COURT: Okay. All right. And
21 you've not initialed that, the initials at the top
22 are who, Mr. Way?

23 THE WITNESS: That's Mr. Way's
24 signature. And Mayor Melvin's initials at the
25 lower left.

1 THE COURT: Down there by the notation?

2 THE WITNESS: Yes, Your Honor.

3 THE COURT: Okay. Back to the
4 objection. Y'all still objecting to the document?

5 MS. ARMSTRONG: We would like to know
6 who made the document. It's not a plat, it's not a
7 survey. You know, things that are normally
8 recorded with, you know, a deed or something that
9 has some indicia of reliability. And that's what
10 this document is lacking.

11 THE COURT: All right. So it's your
12 testimony that it was prepared by the Town; is that
13 right?

14 THE WITNESS: This document was
15 prepared by the Town. Yes, Your Honor.

16 MR. LESEMANN: Your Honor, if I may.
17 This document is the actual document. It's the
18 public record. So, I mean, we probably could go
19 through several pages and see we are not sure
20 exactly who prepared what.

21 But this -- and Mr. Permar at the next
22 point of his testimony will be to explain the
23 conversation that he actually had directly with
24 Mayor Melvin about the handwritten note that Mayor
25 Melvin told him that he should add because he

1 indicated to her that the exhibit was correct.

2 So, again the entire document is of
3 record, it's a public record. It isn't hearsay
4 because it can be authenticated by the Town. It
5 can be authenticated by KRA. And it doesn't really
6 need to be authenticated to him once we've
7 established that it is a public record.

8 This is a complete copy of the set.
9 And, Your Honor, it's the operative document in the
10 case.

11 THE COURT: I'm going to stop you
12 there.

13 Y'all don't dispute that it's in the
14 Town records, do you?

15 MS. JETT: No.

16 MS. ARMSTRONG: No, Your Honor.

17 THE COURT: All right. I am going to
18 allow it in on that basis.

19 MR. LESEMAN: Thank you, Your Honor.

20 (Plaintiffs' Exhibit Nos. 5 and 28 were
21 admitted into evidence.)

22 BY MR. LESEMAN:

23 Q. So, Mr. Permar, what I wanted to go back to
24 is could you explain the -- did you go to town hall
25 to look at the various exhibits to the development

1 agreement?

2 A. Yes.

3 Q. Okay. And did you notice that there was an
4 error with Exhibit 16.2 as it had been initially
5 prepared?

6 A. Yes.

7 MS. ARMSTRONG: Objection, leading the
8 witness.

9 THE COURT: Overruled. Go ahead.

10 When it starts to hurt let me know, all
11 right?

12 BY MR. LESEMAN:

13 Q. What was your -- when you looked at the
14 Exhibit 16.2 as it had been initially prepared,
15 what was your belief or finding as to its accuracy?

16 A. Well, the documents presented at that time
17 showed the representation of crosshatching, that is
18 shown in the legend, for the entirety of the
19 beachfront starting at the Stono Inlet, wrapping
20 around the Stono Inlet all along the beach,
21 inclusive of Captain Sam's Spit.

22 Q. And was that an error?

23 A. That was not per the discussions that we
24 were having at the time as to what would be
25 conveyed.

1 Q. And did you indicate this to the Town?

2 A. Yes. I indicated that to Mayor Melvin, and
3 she indicated, well, mark up what you think it
4 should be and we will have it corrected.

5 Q. Okay. And did you do so?

6 A. Yes.

7 Q. Okay. And do you -- in fact I think you
8 mentioned an anecdote to me at one point you went
9 and got a pencil and came back and corrected the
10 document, correct?

11 A. My office is in the same building as the
12 town hall, so I went next door to my office to get
13 a pencil to show the correction as represented on
14 this.

15 Q. Okay. And that was before anyone had signed
16 it?

17 A. No. It was before anyone had signed it,
18 yes.

19 Q. And so Mayor Melvin and Mr. Way entered
20 their initials on this document, as well as the
21 other documents that constitute the development
22 agreement after you made this correction?

23 A. After I made the correction, yeah.

24 Q. So does the development agreement itself
25 include a provision about the beachfront strip?

1 A. Yes. There is a narrative within the text
2 of the smaller document.

3 Q. Okay. So at page 42 of the development
4 agreement.

5 Mr. Permar, again, if we could talk about
6 what was the purpose of the beachfront strip?

7 A. Again, the types of discussions we had early
8 in terms of the formation of the development
9 agreement, the working sessions, there was some
10 level of concern by the council members that were
11 in the discussions of potential development seaward
12 of property that had been conveyed to third
13 parties.

14 And I remember early on the attempt was to
15 have language that clearly stated that no
16 development would take place seaward of those
17 properties that had already been conveyed.

18 Q. Right.

19 A. So this section was added over the life of
20 the discussions of the development agreement. And
21 then it also led to the addition of a graphic to
22 reinforce what the nature of that area was.

23 Q. Okay. And so in the area where I have
24 highlighted on page 42 here, does the development
25 agreement indicate that the beachfront strip is to

1 be conveyed as is generally depicted on Exhibit
2 16.2?

3 A. Yes.

4 Q. Is there any reference here to the agreement
5 for conveyance or the quit claim deed as being the
6 controlling depiction?

7 A. No, I don't think so.

8 Q. Okay. Is the one reference to a depiction
9 of the beachfront strip as in Exhibit 16.2?

10 A. Is the exhibit, right.

11 Q. Okay. And that is the exhibit that we have
12 already discussed and I believe that we have
13 entered as part of Exhibit 5, and perhaps
14 separately as Exhibit 28.

15 Again showing a termination point of the
16 beachfront strip on the western boundary?

17 A. Yes.

18 Q. Okay. And where does the beachfront strip
19 terminate as per Exhibit 16.2?

20 A. There is generally a line that forms what
21 was to be parcel 13 that generally runs
22 perpendicular to the water line of Kiawah, of the
23 beach.

24 Q. Okay. And is this termination point -- what
25 is your understanding as to the -- what was at that

1 time the -- let me see if you can do this, I know
2 you are at a bit of an angle.

3 But can you point to me where the Duneside
4 Villas would be located on that?

5 A. The Duneside Villas are within that parcel
6 right there (indicating).

7 Q. Okay. So at the time was that the
8 westernmost oceanfront property that had been
9 conveyed to third parties?

10 A. Yes.

11 Q. Okay. And based on your working together
12 with representatives of the Town, Kiawah, the Town
13 of Kiawah Island, KRA and KICA, was it your
14 understanding that the intent was that the
15 beachfront strip would stop as indicated in front
16 of the Duneside Villas and at the easternmost
17 boundary of parcel 13?

18 A. Yes.

19 Q. And does Exhibit 16.2 directly reflect that
20 intention?

21 A. Yes.

22 Q. So can you explain a bit more about parcels
23 12 and 13?

24 A. They were two parcels at the extreme western
25 end of Kiawah that were defined as parcels 12 and

1 13. They were contiguous to each other, and
2 generally at the end of Beachwalker Drive.

3 Q. And so does this graph -- did you prepare
4 this graph, Mr. Permar?

5 A. Yes.

6 Q. All right. Does this show -- does this show
7 parcels 12 and 13?

8 A. Yes.

9 Q. Okay. And is it bound in the green lines?

10 A. Yes.

11 Q. Okay. And what was the -- what were the
12 zoning types that were granted in those parcels?

13 A. It was a combination of two assigned
14 classifications: R-3, I believe, and C which is
15 commercial.

16 The R-3 classification allowed for 12 units
17 per acre. The C classification allowed for a range
18 of commercial uses, and the elements were
19 established by what is known as FAR, floor air
20 ratio.

21 Q. Was there an Exhibit 13.2 to the development
22 agreement that included the parcel-specific
23 development standards?

24 A. Yes.

25 Q. Okay. And are parcels 12 and 13 listed on

1 Exhibit 13.2?

2 A. Yes.

3 Q. Have I highlighted the area where they are
4 listed?

5 A. Yes.

6 Q. And are the green outline that is shown on
7 the overlay exhibit that we have been looking at,
8 do those correspond to the parcels as indicated as
9 12 and 13 on Exhibit 13.2?

10 A. Yes, with the exception of where the mean
11 high water line is.

12 Q. Okay. Because that changes over time?

13 A. That changes over time, correct.

14 Q. As the beach is accreted in that area?

15 A. Yes.

16 Q. So meaning that over time there is
17 potentially more developable property than there
18 was at one time?

19 A. Well, the mean high water changes that in
20 terms of area because the beach is propagating.

21 Q. Okay. Very good. So with regard to the
22 relationship of these columns, I think what I might
23 do is reduce that out and then just bring this up
24 closer.

25 So are there approximate acres that are

1 shown for parcels 12 and 13 on this Exhibit 13.2?

2 A. Yes.

3 Q. Okay. And those are 8.74 for parcel 12, and
4 then 19.5 for the Beachwalker ocean parcel?

5 A. Yes.

6 Q. All right. And this next column, maximum
7 gross density, what does that relate to?

8 A. You take the allowable density, which in
9 this case is 12 units per acre, times the
10 approximate acres.

11 Q. Okay. And so 8.7 times 12 is 104?

12 A. I believe it is.

13 Q. Okay. Let's see. So 8.7 -- okay. Did I do
14 that math right, 8.7 times 12 is equal to 104?

15 A. Yes.

16 Q. Okay. And then round it down. So if the
17 Town of Kiawah had intended for some portion of
18 that parcel to be granted away to KICA as the
19 beachfront strip, would that have affected the
20 number of total units allowed on the property?

21 A. It would have affected the area, which would
22 then have affected the number of units allowable.

23 Q. Okay. So is there any deduction of the 4.62
24 acres of additional land this case is about? Are
25 these numbers, 8.7 and 19.4, are those net of the

1 4.62 acre? Meaning has the 4.62 acres been
2 deducted from these?

3 A. It hasn't been reflected in those numbers,
4 no.

5 Q. Okay. In your 30-plus years as a land
6 planner on Kiawah Island, would the fact that
7 entitlement rights had been given on the entirety
8 of the entire acreage of parcels 12 and 13 be
9 inconsistent with the suggestion that the Town had
10 intended that some portion of these parcels be
11 transferred to KICA?

12 A. Would you ask that again, please?

13 Q. The fact that there are development rights
14 being granted on the 8.7 acres, the 19.5 acres,
15 would that indeed be inconsistent with any
16 assertion that the Town might have intended for
17 4.62 of those acres to be transferred to KICA?

18 A. Yes. I mean, it would have been subtracted
19 from those acreages.

20 Q. And was it?

21 A. No.

22 Q. In fact on the zoning and land use maps that
23 are utilizing by the Town of Kiawah -- and I assume
24 that you utilize these in connection with your
25 work?

1 A. Yes.

2 Q. Are parcels 12 and 13 still indicated in the
3 orange and red striped area indicating that they
4 have R-3, commercial rights?

5 A. Yes.

6 Q. Okay. And is there any carveout relating to
7 any area that -- to suggest that the Town ever
8 intended that those 4.62 acres be conveyed as part
9 of the beachfront strip?

10 A. There is no indication of that parcel.

11 Q. Okay. Are the 4.62 acres that we are
12 speaking of in this case, are they indeed shown on
13 the zoning map as having R-3 mixed-use development
14 rights?

15 A. No. Well, the portion of the 4.62 is
16 represented as a combination of the R-3 and the C
17 classifications.

18 Q. Okay.

19 A. Correct.

20 Q. And there might be a small strip underneath
21 it?

22 A. There would be a small strip on the beach
23 side of these areas representative of the zoning
24 ordinance.

25 Q. Okay. So then when we talk about the

1 employee facility tract, is that indeed here?

2 A. Yes.

3 Q. Okay. And so this area, when we talked
4 about the four-sided shape, does it run across it
5 like this (indicating)?

6 A. Yes.

7 Q. Okay. And so these zoning rights exist over
8 what would appear to be, let's call it 90 percent
9 or so, 95 percent of that area?

10 A. Yes.

11 Q. Okay. Mr. Permar, was there a scrivener's
12 error that arose in the process of taking Exhibit
13 16.2 and having it put into a property description
14 that was included in the quit claim deed and
15 agreement for conveyance?

16 MS. ARMSTRONG: Objection, Your Honor.

17 MS. JETT: I object, Your Honor.

18 THE COURT: Sustained.

19 BY MR. LESEMAN:

20 Q. Are you aware of any error in the property
21 description that exists in the quit claim deed and
22 in the agreement for conveyance?

23 A. I'm aware of an error, yes.

24 Q. Okay. Could you describe that for the
25 Court?

1 A. The error?

2 Q. Yeah. I'm going to pull up a memo that you
3 prepared in 2011. And Mr. Permar, do you recognize
4 this memorandum?

5 A. Yes.

6 Q. Is this a memorandum that you wrote to
7 Mr. Craig Weaver and Mr. Joe Bunting?

8 A. Yes.

9 Q. And who are Mr. Weaver and Mr. Bunting?

10 A. At the time that this memorandum was
11 composed, Craig Weaver was president of the
12 community association, and Joe Bunting I believe
13 was -- the title is executive director.

14 Q. Okay. And in this memo do you explain to
15 them -- is this a memo that you created in the
16 course of your business, Permar, Inc.?

17 A. Yes.

18 Q. And is this a memorandum that you maintain
19 in the business records of your company?

20 A. Yes.

21 MR. LESEMANN: Your Honor, I would move
22 for admission of Plaintiffs' Exhibit 16.

23 MS. ARMSTRONG: No objection, Your
24 Honor.

25 MS. JETT: No.

1 THE COURT: Without objection. All
2 right.

3 (Plaintiffs' Exhibit No. 16 was
4 admitted into evidence.)

5 MR. LESEMANN: Thank you, Your Honor.
6 BY MR. LESEMANN:

7 Q. So, Mr. Permar, just to the extent that you
8 can, can you describe your understanding of what
9 the error in the description is?

10 A. Well, the intent of this memorandum was to
11 outline what the error was, and to what degree it
12 -- in terms of describing it, where it is, the
13 amount, and the implications of it.

14 Q. Okay. And so do you describe again that the
15 4.62 acres of additional land was, in your
16 understanding, not intending to be conveyed?

17 A. Yes.

18 Q. And did you indicate in this memo, and is it
19 your belief that it's clear from Exhibit 16.2 that
20 the 4.62 acres lie outside of that intended
21 beachfront strip?

22 A. Yes.

23 Q. And would the outcome of your meeting with
24 KICA, is it your understanding that ultimately they
25 believe, based upon a legal opinion, that they were

1 not able to simply return the property to KRA
2 through a corrective deed?

3 A. Yes.

4 Q. However, are you aware of prior instances
5 where exactly that had happened, where a mistake
6 that had been made with regard to the beachfront
7 strip, with regard to the mid-island hotel site?

8 A. I understood that there were other locations
9 along the strip that errors had taken place and
10 were corrected.

11 Q. All right. And in 1997 it's your
12 understanding that a quit claim deed was executed
13 by KICA to which the Town consented that allowed
14 for the 3.045 acre mid-island hotel site to be
15 returned from KICA to KRA without any membership
16 vote amongst the KICA members?

17 A. I don't remember the particulars, but I
18 remember it was corrected.

19 Q. Okay. So was there also a 2005 development
20 agreement?

21 A. Yes.

22 Q. Okay. And were there changes with regard to
23 the Captain Sam's Spit and the treatment of Captain
24 Sam's Spit in the 2005 agreement?

25 A. Yes.

1 Q. However, was -- were parcels 12 and 13
2 recognized as part of the 2005 development
3 agreement?

4 A. Yes.

5 Q. All right. And so was there an Exhibit 4.1
6 to the development agreement?

7 A. Yes.

8 Q. Of 2005?

9 A. Yes.

10 Q. And does it include a description of real
11 property owned by the property owner included as
12 Exhibit 4.1?

13 A. Yes.

14 Q. Okay. And then do you see now the
15 designations have changed slightly in terms of 12A.
16 But -- so historical parcel 12, does it have a
17 different designation on this?

18 A. It's represented as 12A.

19 Q. Okay. But is the name of the parcel
20 description the same?

21 A. Yes.

22 Q. And is the acreage the same?

23 A. Yes.

24 Q. Parcel 13, does that also -- or does that
25 relate to the previous parcel 13 that we have

1 discussed that was recognized under the 1994
2 development agreement?

3 A. Yes.

4 Q. And is the description the same?

5 A. Yes.

6 Q. And is the acreage the same?

7 A. Yes.

8 Q. So with regard to any changes that may have
9 happened with Captain Sam's between the 1994
10 development agreement and the 2005 development
11 agreement, were there any changes with regard to
12 parcels 12A and 13?

13 A. There were no changes.

14 Q. Okay. So the entitlement rights granted on
15 parcels 12 and 13 in the 1994 agreement continued
16 forward through the 2005 development agreement?

17 A. That's correct.

18 Q. Okay. And those parcels, to this day, at
19 those acreages, are recognized as being available
20 by the Town of Kiawah for mixed-use development,
21 including residential and commercial uses?

22 A. Yes.

23 Q. I should have had you describe this before,
24 but could you describe for His Honor the 4.62 acres
25 in terms of its topography in its current state?

1 A. The natural state?

2 Q. Yeah. And I'll use your overlay.

3 A. Well, starting at the mean high water mark
4 it's a combination of open beach, sand. Then a
5 dune field approximately where the asterisk is
6 represented. And then a transition to low
7 vegetation, and then dense maritime forest at the
8 extreme northern end.

9 Q. Do you -- am I -- is this Inlet Cove located
10 in this area (indicating)?

11 A. Yes.

12 Q. Okay. And this road that runs along here,
13 this is how you get to Beachwalker Park
14 (indicating)?

15 A. That's Beachwalker Drive, yes, the terminus.

16 Q. All right. Is this property visible from
17 Beachwalker Drive or from Inlet Cove?

18 A. No.

19 Q. Okay. And is that -- why is that?

20 A. It's dense maritime forest there.

21 Q. Okay. And are you aware of any activity by
22 KICA on this property in terms of any structures of
23 any kind, or having built any -- has KICA built any
24 structures on this property?

25 A. No.

1 Q. To your knowledge, would KICA be allowed to
2 build any structures on this property?

3 A. No.

4 Q. Okay. Would this parcel, if you apply --
5 would this parcel be a permissible parcel under --
6 the 4.62 acres -- would it be permissible under
7 Kiawah guidelines for subdivision of parcels?

8 A. No. It's not contiguous to an existing
9 platted roadway.

10 Q. Okay. Are there any signs on the property
11 indicating that it's common property maintained by
12 KICA?

13 A. No.

14 Q. Are you aware of any, you know, activities
15 or, you know, member events, luaus or anything like
16 that that KICA organizes and holds on the property?

17 A. No.

18 Q. Same question for what we will call KPOG,
19 the Kiawah Property Owners Group. Are you familiar
20 with that organization?

21 A. Yes.

22 Q. Are you familiar with the Inlet Cove HOA?

23 A. Yes.

24 Q. Have you, in your knowledge of the property,
25 seen any indication of any structures or activities

1 of any of these three parties on the 4.62 acres?

2 A. No.

3 Q. Are you aware of any maintenance or
4 stewardship undertaken with regard to the 4.62
5 acres by KICA?

6 A. No.

7 Q. If I showed you a map from the KICA website
8 of their common properties, would you be able to
9 indicate whether the additional property is located
10 within the common property that KICA believes that
11 it maintains?

12 A. Yes.

13 Q. Okay. So I'm showing you the map from
14 KICA's website here. Do you see the beachfront
15 strip in green?

16 A. Yes.

17 Q. Does it terminate, does the green color
18 terminate consistent with Exhibit 16.2 of the
19 development agreement?

20 A. Yes.

21 Q. And it terminates at the eastern boundary of
22 parcel 13?

23 A. Yes.

24 Q. And it terminates underneath the Duneside
25 Villas property?

1 A. Yes.

2 Q. And it does not include any portions of what
3 would be the parcels 12 and 13 as they're
4 recognized and drawn under the development
5 agreement?

6 A. Yes.

7 Q. It does not?

8 A. It does not.

9 Q. Okay. And looking at the legend, what color
10 is the properties owned by KRA? What color is
11 indicated on this map?

12 A. Like a beige.

13 Q. Okay. And is the additional land located in
14 the beige coloration?

15 A. Yes.

16 Q. And not in the green coloration indicating
17 common property owned by KICA?

18 A. That's correct.

19 Q. All right. I'll also show you a map from
20 the dunes management guidelines of KICA. Similar
21 to what we have discussed, this dunes management
22 guidelines map where the dunes property is shown in
23 yellow -- and let me go down to see the legend --
24 does it indicate in yellow, KICA dunes?

25 A. Yes.

1 Q. All right. And that phrase east end Spit
2 not shown?

3 A. Yes.

4 Q. The additional land that we are talking
5 about, and what's the subject of this case, is that
6 the east end or the west end of the property?

7 A. It's the west end.

8 Q. Okay. So the east end Spit would be here on
9 the opposite end of the island (indicating)?

10 A. That's correct.

11 Q. So with regard to this dunes management
12 guidelines exhibit, again is the additional land
13 shown as part of the KICA dunes property?

14 A. No.

15 Q. Is any portion of parcels 12 or 13 shown as
16 a portion of the KICA dunes property?

17 A. No.

18 Q. As a land planner with 30-plus years
19 experience, have you seen any actions undertaken by
20 KICA that would indicate that they have invested in
21 this 4.62 acres in any specific way?

22 A. No.

23 Q. Mr. Permar, you've indicated from your
24 workings with the parties that you had an
25 understanding as to what the intent of the parties

1 were with regard to the 1994 development agreement?

2 A. The parties being the Town of Kiawah Island,
3 yes.

4 Q. Okay. And KRA?

5 A. Yes.

6 Q. Did you also have interactions with KICA
7 through its board members?

8 A. Yes.

9 Q. Okay. Has anyone ever indicated to you from
10 KICA that, no, they affirmatively did intend for
11 those 4.62 acres to be part of the beachfront
12 strip?

13 A. No.

14 Q. Is it your understanding of the intent of
15 all relevant parties was that the beachfront strip
16 again would stop at the eastern boundary of parcel
17 13, and would not include this area here, the 4.62
18 acres (indicating)?

19 A. That's correct.

20 MR. LESEMAN: No further questions,
21 Your Honor.

22 THE COURT: All right.

23 Ms. Jett, let me start with you.

24 MS. JETT: That's fine.

25 CROSS EXAMINATION

1 BY MS. JETT:

2 Q. Ms. Permar, I just have a few questions.
3 I'm going to raise my voice.

4 You had indicated earlier that you had had
5 some conversations regarding the language of the
6 development agreement and the drafting of the
7 development agreement with Leonard Long, Townsend
8 Clarkson, Buddy Darby and Pat McKinney; is that
9 correct?

10 A. Yes.

11 Q. And all of these individuals, to your
12 knowledge, were also not only partners of KRA, but
13 also serving on the board of directors for KICA?

14 A. Yes.

15 Q. Okay. And of those, are you -- do you have
16 any knowledge of how many board members on KICA
17 there were during this relevant period?

18 A. At that time?

19 Q. Yes.

20 A. I believe there were seven at the time of
21 the '94 agreement.

22 Q. Okay. And those four individuals were all
23 KRA appointed members of the KICA board?

24 A. Yes.

25 Q. Okay. Do you have any memory in your

1 conversations with Mr. Long, Clarkson, Darby and
2 McKinney whether they were expressing the wishes or
3 desires of KICA as to what might be included in the
4 development agreement?

5 A. No.

6 Q. Okay. You had also mentioned -- or
7 Mr. Lesemann had shown you your September 9th, 2011
8 memorandum to Craig Weaver and Joe Bunting
9 outlining your understanding of the -- of what you
10 all are calling the error of the additional land on
11 the western end of the beachfront strip.

12 Was there any further communications with
13 Mr. Weaver and Mr. Bunting after you sent this
14 memo?

15 A. Yes.

16 Q. Can you tell me a little bit about this?

17 A. We had a meeting at the Ocean Course
18 Clubhouse. I believe the attendees were
19 Mr. Weaver, Mr. Bunting, Leonard Long, Beth Nimmons
20 and myself.

21 Q. Okay. And was the sole purpose of that
22 meeting to discuss this issue?

23 A. Yes.

24 Q. Okay. And did either Mr. Weaver or
25 Mr. Bunting indicate to you whether KICA had

1 investigated what the intent of its board members
2 were back in 1994 relevant to the beachfront strip?

3 A. No. They were just trying to understand
4 what the content of the memorandum was.

5 Q. Okay. So this was more you giving a
6 presentation of like further elaborating the points
7 in your memo?

8 A. Yes. I wanted to ensure that what I had
9 written was understood.

10 Q. Okay. And did you come away from that
11 meeting believing that they did understand?

12 A. Yes.

13 Q. Okay. You had also -- you were shown
14 Exhibit 28, being the 16.2 of the development
15 agreement with your handwritten notes that
16 indicated -- I'll just read it for you.

17 Well, I guess let me back up. You had
18 previously testified that you did the darker
19 shading on the area that I'll just call Captain
20 Sam's Spit, from the end of the crosshatched area
21 on in through the Spit; isn't that correct?

22 A. Yes. The notations I made were the
23 corrections on the crosshatching and the
24 handwritten note.

25 Q. So what did this, prior to you marking it

1 up, what did this area that is now darkened, was
2 that all -- the whole Spit was just crosshatched
3 beforehand?

4 A. The entirety of the beachfront was
5 crosshatched, inclusive of Captain Sam's.

6 Q. Okay. And so whenever you marked it up you
7 did the shading, and you did this arrow, and these
8 handwritten notes were all your work product?

9 A. Yes.

10 Q. And I note that you mentioned, area of
11 Captain Sam's Spit handled separately in
12 development agreement section 16.(h)?

13 A. Yes.

14 Q. Can I get you -- do you have the development
15 agreement in front of you?

16 Did you find it?

17 A. Which page?

18 Q. Page 45 of the development agreement.

19 A. Yes.

20 Q. I believe -- well, I know that your note
21 references 16.(h), but I believe that we are
22 looking at 16.(g)?

23 A. That's correct. If I had to reflect, there
24 were multiple versions of the text and different
25 section numbers than the final definition.

1 So at that time I was probably referring to
2 an earlier draft that is now represented by (g).

3 Q. Okay. But you would agree that under the
4 final version of 16.(g), that Captain Sam's Spit,
5 albeit by separate conveyance, was supposed to be
6 conveyed to KICA at a later time?

7 A. Yes.

8 Q. And then is it your understanding that the
9 reason that was not ultimately deeded to KICA was
10 pursuant to the 2005 development agreement that
11 changed what was going to happen with Captain Sam's
12 Spit?

13 A. That's correct.

14 MS. JETT: That's all I have.

15 THE COURT: Ms. Armstrong.

16 CROSS EXAMINATION

17 BY MS. ARMSTRONG:

18 Q. Mr. Permar, with regard to the memo that you
19 sent to Mr. Bunting and Mr. Weaver, no action was
20 taken by KICA as a result of that memo; is that
21 correct?

22 A. That's correct.

23 Q. And you didn't play any role in the drafting
24 of the text of the development agreement, right?

25 A. No, I did play a role in it.

1 Q. In the drafting of the text of the
2 development agreement?

3 A. The '94 agreement, I participated in that.

4 Q. And what portions of the text did you
5 personally draft or write yourself?

6 A. Most were involved with the Exhibits 13.2,
7 and I believe the 13.1 which was a listing of
8 permitted uses.

9 Q. So you -- but you didn't play any role in
10 the drafting of the language in paragraph 16 which
11 deals specifically with the conveyances that we are
12 talking about today?

13 A. I reviewed it and offered comments, but I
14 didn't draft it.

15 Q. Okay. And you didn't draft any portion of
16 the agreement for conveyance either?

17 A. No.

18 Q. And you did not also play a role in the
19 drafting of the quit claim deed, right?

20 A. No.

21 Q. Now, you said that you -- you testified that
22 the whole purpose of conveying that beachfront
23 strip was to ensure that there wasn't going to be
24 additional future development seaward of the line,
25 the plots that had already been deeded out; is that

1 correct?

2 A. Yes.

3 Q. How many oceanfront properties had actually
4 been conveyed in 1994?

5 A. I have no idea.

6 Q. Can you give me like a rough percentage? I
7 mean 1994, how many of the oceanfront lots
8 approximately had sold?

9 A. I would guess that the combination of
10 individual homesites and condominium sites with
11 villas within them probably would have resulted in
12 maybe 600, 700 units.

13 Q. And how many total units are there on the
14 oceanfront?

15 A. I don't know.

16 Q. Would you estimate it's more than 50 percent
17 that were platted to third parties, deeded to third
18 parties in 1994, or less than 50 percent?

19 A. More than 50 percent of what?

20 Q. How about more than 75 percent or less than
21 75 percent were deeded out?

22 A. I'm sorry, more than what? 75 percent of
23 what?

24 Q. Of the total oceanfront parcels.

25 A. More than 75 percent had been deeded out.

1 Q. Okay. But you all knew that there was some
2 possibility that there could be development seaward
3 of the furthest out, most ocean-ward lots, and
4 that's why you went ahead and deeded the beachfront
5 strip; is that accurate?

6 A. The State's baseline and setback line was
7 seaward of the seaward property lines of the third
8 parties that had already been conveyed.

9 So there is land mass between the
10 oceanfront, most oceanfront where property lines of
11 the third parties and where the State's baseline
12 would be.

13 Q. But if that line ever changed, then the land
14 seaward of the platted lots, the oceanfront platted
15 lots, could become developable at some point; is
16 that accurate?

17 A. From the standpoint of the State's
18 allowance, yes.

19 Q. The Exhibit 16.2 that we have been talking a
20 little bit about, you don't know who actually
21 prepared that sketch, do you?

22 A. I don't know who prepared the base drawing,
23 no.

24 Q. And it's not a plat, is it?

25 A. No.

1 Q. It's not a survey document either, is it?

2 A. No.

3 Q. Do you know what information was used in
4 preparing this sketch?

5 A. By the Town?

6 Q. Right.

7 A. No.

8 Q. And I believe you testified during your
9 deposition that there were lines on the sketch that
10 you didn't know what they represented. Do you
11 recall that testimony?

12 A. No.

13 Q. Okay. I'm going to read my question and
14 your answer and you can tell me if it sounds
15 familiar since you don't recall testifying in that
16 regard.

17 I'm reading from page 25, starting at line
18 11. Okay, so your understanding was that there was
19 some beachfront area seaward of the 16-acre parcel
20 that would be included with the transfer of Captain
21 Sam's Spit?

22 Mr. Lesemann: Object to form.

23 Answer: No, I was just reacting to this
24 graphic prepared by others that represented a line
25 out on the beach. I didn't know what that line

1 was. I didn't know if it was mean high water or
2 whatever. But I started shading part of the
3 eastern boundary line on parcel 13 right here.

4 From that point over, everything is
5 represented suggesting that that line out there was
6 a limit of some sort. I shaded that whole area.

7 Do you recall that testimony?

8 A. Yes, I do. The line that I couldn't define
9 was an apparent water line represented that ran the
10 entire length of the beachfront.

11 And what I was referring to was I didn't
12 know whether that was the mean high water line, or
13 just a general representation of a water line.

14 Q. But you used that line and just shaded the
15 whole thing?

16 A. Yes. Because it was a line that was part of
17 the definition of the crosshatching further to the
18 east.

19 Q. And at the time you made those handwritten
20 marks on Exhibit 16.2, you were under a little bit
21 of time pressure to get this development agreement
22 executed, right?

23 A. All of us were.

24 Q. Right. And so you went over to the Town
25 office and you looked at the map, and you went back

1 and got a pencil and came back and sketched it in;
2 is that right?

3 A. That's correct.

4 Q. Okay. And you saw that -- let me back up.
5 You didn't actually consult with anybody before you
6 made those marks; is that accurate?

7 A. No. I made the marks first because I had a
8 clear understanding of what was represented.

9 And then what was my normal pattern was --
10 and I'm guessing there were other exhibits I was
11 reviewing at the time -- was to contact probably
12 Leonard as to the status of my review of the
13 exhibits.

14 Q. So that occurred after you already made
15 marks on the Exhibit 16.2, right?

16 A. Yes.

17 Q. So before you made those marks, you didn't
18 refer to the development agreement, did you?

19 A. Refer to the --

20 Q. Did you go back -- did you look at the
21 development agreement before you started marking up
22 Exhibit 16.2?

23 A. The development agreement was a work in
24 progress. So there was no formal development
25 agreement at that point which is represented on the

1 table here.

2 So I made those marks based upon my clear
3 understanding of what was agreed to.

4 Q. Did you look at the draft language in
5 existence at the time that Exhibit 16.2 was created
6 to determine -- did you look at it just to inform
7 your decision before you marked on it?

8 A. No. I was already aware of the language.

9 Q. Was the agreement of conveyance in existence
10 at the time that you marked up Exhibit 16.2?

11 A. No.

12 Q. And just to clarify, I know you said you
13 talked to Mr. Long, but that was after you had
14 already made the marks on Exhibit 16.2?

15 A. Yes.

16 Q. Okay. I want to look at the development
17 agreement together with you. And it's marked as
18 Intervenor's Exhibit No. 1.

19 MS. ARMSTRONG: May I approach?

20 THE COURT: Sure.

21 BY MS. ARMSTRONG:

22 Q. Mr. Permar, I'm going to try and hand you --
23 there you go.

24 MS. ARMSTRONG: Your Honor, I also have
25 got a copy of the exhibit for the Court.

1 THE COURT: Thank you.

2 MS. ARMSTRONG: For your convenience.

3 THE COURT: Very good.

4 BY MS. ARMSTRONG:

5 Q. Now, Mr. Permar, if you'll turn with me to
6 page 42 in the development agreement. Now, under
7 16.(b) at the bottom of the page it actually says
8 that 16.2 is -- generally depicts the 10-mile
9 strip, correct?

10 A. Yes.

11 Q. And then if you'll flip over with me to page
12 45, and look at section (g). And if you just would
13 read into the record the very first sentence of
14 section 16.(g).

15 A. Under the heading of Captain Sam's Spit.
16 The property owner commits to the permanent
17 reservation of the tract of land known as Captain
18 Sam's Spit shown in Exhibit 16.2 as active and/or
19 passive open space, nature study or parks.

20 Q. Okay. So section 16.(g) also indicates that
21 that conveyance will be depicted on Exhibit 16.2,
22 correct?

23 A. Yes.

24 Q. Okay. So the sketch by whoever prepared it
25 at the Town was simply reflecting that it

1 encompassed both 16.(b), the beachfront strip, and
2 16.(g) Captain Sam's Spit, correct?

3 A. The intent of the exhibit was to represent
4 all of the beachfront and the status of --

5 Q. Are you disagreeing that 16.(g) also
6 indicates that Captain Sam's Spit is supposed to be
7 shown on 16.2?

8 A. No. It later outlines the date of potential
9 conveyance of that.

10 Q. Okay. But it does refer to 16.2 and says
11 Captain Sam's Spit is on 16.2?

12 A. Yes. Yes, it does.

13 Q. And that Exhibit 16.2 is called the
14 beachfront dedication area, correct?

15 A. Future beachfront dedication area.

16 Q. It's not a beachfront -- it doesn't identify
17 itself as a beachfront strip area?

18 A. No.

19 Q. Okay. And so if you read 16.(b) and 16.(g)
20 together and looking at 16.2, your handwritten
21 marks aren't really consistent with displaying what
22 was intended under those two section, was it?

23 A. With the exception of the reference to (h)
24 versus (g), I believe I was trying to be clear.

25 Q. Well Captain Sam's Spit is beachfront area,

1 isn't it?

2 A. Yes.

3 Q. Okay. So if it was required to be included
4 in an exhibit that is representing beachfront area,
5 it would make sense that the Town actually hatched
6 in Captain Sam's Spit, wouldn't it?

7 A. Yes.

8 Q. And I think Mr. Lesemann was showing you
9 what was part of a larger exhibit, I think you said
10 it was about a 12-foot long map that had different
11 parcels and they were colored in green.

12 Do you remember that?

13 A. During the deposition?

14 Q. During the deposition.

15 A. Yes.

16 Q. And then I think you created a map that
17 shows parcels 12 and 13?

18 A. Yes.

19 Q. And you refer to those in your deposition as
20 future hypothetical areas of development; is that
21 accurate?

22 A. Yes.

23 Q. So as it stood in 1994, there was no
24 concrete plan to develop any of the areas on that
25 map, including parcels 12 and 13; isn't that

1 accurate?

2 A. Right.

3 Q. Okay. And let's kind of talk about some of
4 the specific parcels and the use designations that
5 were given to them.

6 Now, just because something is allowed under
7 a use classification, that doesn't mean it's
8 mandatory that that use be made of that parcel,
9 correct? Isn't that right?

10 A. That's correct.

11 Q. Okay. And in fact when you were looking at
12 Exhibit 13.2 -- I think I'm going to go ahead and
13 hand that to you actually.

14 Intervenors' Exhibit No. 14, is this the
15 document that we were just referring to with land
16 designation on it?

17 A. This is Exhibit 13.2, parcel-specific
18 development standards.

19 Q. But the little sticker on the bottom says?

20 A. I'm sorry, 14, yes.

21 Q. All right. And when you look at that there
22 are a couple of parcels I want to point your
23 attention to.

24 For example, parcel number 17, Rhett's
25 Bluff, that's identified as a residential use, but

1 actually some of Rhett's Bluff is actually conveyed
2 as dedication area under the agreement; isn't that
3 right?

4 A. That's correct.

5 Q. And the same with parcel number 43, Cougar
6 Island. That's designated as R-2 for residential
7 designation, but part of Cougar Island has been set
8 aside and dedicated; isn't that correct?

9 A. No.

10 Q. None of Cougar Island has been --

11 A. At the time of the '94 agreement there had
12 not been any conveyance to third parties.

13 Q. But as it stands today, part of Cougar
14 Island has been conveyed?

15 A. Portions of it have.

16 Q. Despite its designation as R-2?

17 A. Despite?

18 Q. Yeah. My point is that it may be designated
19 as a residential, but that doesn't prevent it from
20 being used as a park space or an open space,
21 correct?

22 A. No. Park uses are permitted as a matter of
23 right in the R-2 district.

24 Q. Okay. Well, then let's talk about parcel
25 number 12, Beachwalker Park. That's a park,

1 currently used as a park, correct?

2 A. A portion of it is, yes.

3 Q. Right. And that's got the zoning
4 designation of R-3 and commercial?

5 A. Yes. As I said, it's permitted use within
6 both classifications.

7 Q. Right. So just because parcels 12 and 13
8 have permitted uses doesn't mean that that's
9 mandatory that they be used for those purposes;
10 isn't that true?

11 A. It only limits the nature of uses to those
12 permitted as a matter of right or with special
13 conditions.

14 Q. Okay. Let's look at parcel number 30, the
15 Blue Heron parcel. And that's designated as R to
16 allow for potential residential development, right?

17 A. That's correct.

18 Q. And under the 1994 development agreement and
19 agreement for conveyance, KRA was required to
20 convey a portion of parcel 30 to KICA as a park,
21 right?

22 A. Yes.

23 Q. And that conveyance included highlands that
24 were designated as having the potential to be
25 developed, right?

1 A. Yes.

2 Q. And parcel 43, we talked about -- we talked
3 about parcel 43. And under the 1994 agreement, KRA
4 actually was to convey a portion of parcel 43 to be
5 used as part of a park; isn't that --

6 A. A two-acre park.

7 Q. A two-acre park. And that conveyance
8 included highlands that were designated as having
9 development potential, correct?

10 A. Yes.

11 Q. Parcel 51, Bear Island residential. That's
12 also designated for residential development?

13 A. At that time it was, yes.

14 Q. Okay. And parcel 51 under the 1994
15 development agreement KICA was -- or KRA was
16 supposed to convey part of parcel 41 as common
17 property, correct?

18 A. I'm sorry. Could you ask the question
19 again? I'm sorry.

20 Q. That whether under the '94 agreement part of
21 parcel 51, Bear Island, zoned residential, was to
22 be conveyed to KICA as common property?

23 A. I believe so, yes.

24 Q. I'm going to hand you Exhibit -- it's got a
25 mark of 15 on it. I have got an oversized that I'd

1 like to use later.

2 But for right now I'm going to hand you what
3 has been marked as Exhibit 15 and ask you if you
4 have seen this survey?

5 A. I believe I have, yes.

6 Q. Okay. And can you tell me about the nature
7 of this survey? Do you know?

8 A. This was a plat prepared in May of 2013 of
9 an area at the end of Beachwalker Drive.

10 Q. Okay. Who was the plat prepared for?

11 A. Kiawah Partners.

12 Q. Okay. So you've seen this before?

13 A. Yes.

14 Q. You are familiar with it.

15 MS. ARMSTRONG: Your Honor, I have got
16 an oversized copy of this exhibit, and it's
17 mounted. How does the Court -- I'm going to have a
18 later witness that is going to be making markings
19 on the exhibit.

20 So it would be my preference that I
21 introduce the large, oversized one into evidence if
22 it's not too burdensome on the Court to handle an
23 oversized exhibit.

24 THE COURT: You can have it in, but if
25 you've got a smaller version -- you are looking to

1 present something that the witness can mark on?

2 MS. ARMSTRONG: Correct.

3 THE COURT: But then you've got a
4 smaller format?

5 MS. ARMSTRONG: It's in a large format.
6 It's sort of an overlap. It's got an overlay on
7 it. It's a two-part exhibit.

8 THE COURT: All right. Okay.

9 Any objection? How do you want to deal
10 with that?

11 MR. LESEMAN: Yeah, either is fine for
12 us, Your Honor.

13 MS. ARMSTRONG: I think I'm going to
14 have the marking of the original and have that
15 introduced into evidence.

16 I guess actually it was a document that
17 we received from the Town, but this witness seems
18 to be able to authenticate it.

19 I would like to go ahead and move for
20 Exhibit 15 to be admitted into evidence.

21 THE COURT: Okay.

22 And, Mr. Permar, you said that was
23 something you were familiar with, right, Exhibit
24 15?

25 THE WITNESS: Yes.

1 THE COURT: Okay. Any objection?

2 MR. LESEMANN: No, Your Honor.

3 THE COURT: Without objection. Thank
4 you.

5 (Intervenors' Exhibit No. 15 was
6 admitted into evidence.)

7 BY MS. ARMSTRONG:

8 Q. Ms. Permar, I'm going to show you what has
9 been marked as Exhibit 15. And can you tell me,
10 does that appear to be a replica of the smaller map
11 that I just handed you?

12 A. Yes.

13 MS. ARMSTRONG: Your Honor, before I
14 forget. I know we have got a couple of exhibits
15 that I just used that are actually part of the
16 development agreement. But just for convenience
17 I'd like to go ahead and have those admitted into
18 evidence as well.

19 And those were Exhibit No. 14, the
20 Intervenors' Exhibit No. 14. And Intervenors' No.
21 1.

22 THE COURT: So 1, 14, and 15 is into
23 evidence; is that correct?

24 MS. ARMSTRONG: Yes, Your Honor.

25 MR. LESEMANN: No objection, Your

1 Honor.

2 MS. JETT: No objection.

3 THE COURT: Without objection, okay.

4 So those are in evidence.

5 (Intervenors' Exhibit Nos. 1 and 14
6 were admitted into evidence.)

7 BY MS. ARMSTRONG:

8 Q. Mr. Permar, we briefly talked about
9 baselines and setback lines. Are you familiar with
10 those terms?

11 A. Yes.

12 Q. Do you use those terms in your land use and
13 planning work?

14 A. Yes.

15 Q. Can you tell the Court what those two terms
16 mean?

17 A. The State establishes a combination of
18 baselines and setback lines off the baseline along
19 the entirety of the South Carolina coast. It's
20 based upon criteria that they use.

21 Q. And can you identify the baseline and the
22 setback line on this drawing?

23 A. Yes.

24 Q. Do you see the notation about how much land
25 is below seaward of the setback line? Actually,

1 the area below the baseline.

2 A. I see the one for below.

3 Q. And can you tell us how many acres are below
4 the setback line?

5 A. I believe it says nine -- excuse me -- 2.922
6 acres below.

7 Q. And how much land is identified as being
8 land above the setback line? I believe it says
9 high land at the top?

10 A. I can't see it.

11 Q. Maybe look at the larger map, it might be
12 easier to see it. Right in front of you.

13 A. Is it to the left of the parcel?

14 Q. No. It's right within the boundaries of the
15 parcel at the very top. You can see it better
16 here.

17 A. Oh, yeah. It indicates 1.698 acres of high
18 land.

19 Q. Okay. So as it stands today, is the
20 4.62-acre tract only 1.69 would actually be
21 something that is buildable, correct?

22 A. That's the area behind the baseline.

23 Q. Do you remember telling me in your
24 deposition that you thought it was about three
25 acres that was above it?

1 A. Yes. I misspoke, yes.

2 Q. So you were off by about an acre and a half
3 almost?

4 A. Yes.

5 Q. And the setback line and baseline as they
6 exist today on this parcel and on the west end of
7 Kiawah are in a different location than they were
8 in 1994; isn't that correct?

9 A. That's correct.

10 Q. In 1994 the entirety of Captain Sam's Spit
11 was seaward of the baseline and setback line; isn't
12 that correct?

13 A. The area west of parcel 12 is what I know as
14 Captain Sam's, and that was seaward of the
15 baseline.

16 Q. Okay. Do you know whether any portion of
17 this 4.62-acre tract was similarly seaward of the
18 baseline and setback line in 1994?

19 A. I believe portions of it were seaward of the
20 baseline.

21 Q. All right. Now, have you been involved in
22 the proposed development of Captain Sam's Spit?

23 A. Yes.

24 Q. And between the time that the 1994
25 development agreement was entered and today, what

1 has changed with regard to Captain Sam's Spit?

2 A. What has changed for?

3 Q. Within the context -- well, how KRA views
4 that piece of property?

5 A. Well, in 1999, the State revised the
6 baseline and setback lines for Kiawah, as they did
7 for most of the coast. And those lines now allowed
8 for consideration for development on portions of
9 Captain Sam's.

10 Q. Okay. So this drawing actually indicates,
11 shows a road passing through -- well, passing
12 alongside the 4.62 acres from Beachwalker Drive.

13 Is that the road that is going out towards
14 the proposed development on Captain Sam's Spit?

15 A. That's correct.

16 Q. Now, there was some prior drawings that
17 shows the access road actually going through that
18 4.62 acre; isn't that correct?

19 A. There were multiple alternatives about the
20 position of the road, some of which passed over
21 portions of the 4.6.

22 Q. And it would actually be KRA's preference if
23 it could have the road pass through the 4.62 acres
24 rather than skirting it; isn't that accurate?

25 A. That hasn't been determined yet.

1 Q. Bear with me. I thought I recall you
2 telling me something a little bit different during
3 your deposition.

4 Looking on page 16 starting at line 15. I
5 asked you, has the 4.62 acres ever posed an
6 obstacle to the road or related infrastructure for
7 development of Captain Sam's Spit?

8 Answer: It hasn't proven to be an obstacle,
9 but there are portions that would be preferred to
10 have the road pass through.

11 A. That's correct.

12 Q. Okay. So there are portions of the road
13 that you would rather have pass through Captain
14 Sam's Spit?

15 A. That may be considered for the road to pass
16 through.

17 Q. Okay.

18 MS. ARMSTRONG: I don't have any other
19 questions. Thank you.

20 MR. LESEMAN: I have a few follow-up.

21 THE COURT: Sure.

22 MR. LESEMAN: Thank you.

23 Your Honor, as a housekeeping item. We
24 had Exhibit 5, which was the three-volume set of
25 the development agreement, and we also had Exhibit

1 28, which was just Exhibit 16.2.

2 Could Madam Court Reporter clarify,
3 were both Exhibit 5 and Exhibit 28 admitted into
4 evidence?

5 THE COURT REPORTER: That was my
6 understanding.

7 THE COURT: Mine too. The objections
8 are on the record.

9 MR. LESEMAN: Thank you, Your Honor.

10 Your Honor, we also had previously
11 reviewed this exhibit, which I presented the Rule
12 1006 summary of the extent of the beachfront strip
13 as shown in Exhibit 16.2, combined with the
14 location of the 4.62 acres, along with the
15 historical survey lines of parcels 12 and 13.

16 So it's impossible to have one
17 photograph to show all of those different items.
18 Plus also it shows the state of the land, and also
19 it shows the location of Inlet Cove, Duneside
20 Villas, et cetera. And also, you know, it even
21 shows the road that Ms. Armstrong and Mr. Permar
22 were speaking of.

23 So I didn't admit this during the prior
24 direct, but would ask that -- as it was an
25 oversight -- would ask that this be -- this

1 document was prepared by Mr. Permar as he indicated
2 in his testimony based upon the relevant surveys
3 and documents of record.

4 So we'd ask that Plaintiffs' Exhibit 29
5 be admitted into evidence.

6 MS. ARMSTRONG: Objection, Your Honor.
7 We received this document yesterday. We took
8 Mr. Permar's deposition last week. I examined him
9 on a lot of different documents, including ones
10 that he purported to have a role in creating.

11 And now to see a document that I can't
12 examine him on, I can't learn about, I can't figure
13 out how I'm going to handle his testimony on this
14 in cross. I feel this is a little bit of trial by
15 ambush to not have the advantage of being able to
16 ask this witness about an exhibit just last week.
17 Like I said, we got it yesterday.

18 MR. LESEMANN: Your Honor, the exhibit
19 was prepared on Friday.

20 THE COURT: Let me ask this question.
21 Do you have a survey on those underlying yellow
22 blocks, which would be 12 and 13? Is there a
23 survey which forms the basis for this?

24 MR. LESEMANN: There is a survey of
25 portions of them. And, Your Honor, I may ask the

1 question of Mr. Permar.

2 REDIRECT EXAMINATION

3 BY MR. MR. LESEMANN:

4 Q. Mr. Permar, can you indicate what you relied
5 upon to prepare Exhibit 29?

6 A. It was based upon one of the series of plats
7 that had been prepared for Captain Sam's as an
8 indication.

9 Q. Okay. Of the location of the 4.62 acres?

10 A. Of the 4.62, yes.

11 Q. Okay. And, for example, this will take a
12 moment to load up, but the historical shapes of
13 parcels 12 and 13 are recognized on the large land
14 use exhibit that we mentioned, that was the one
15 that was particularly wide, it had the beige
16 background and the green?

17 A. That's correct.

18 Q. Okay.

19 THE COURT: That's not a survey though?

20 MR. LESEMANN: No, it's not a survey.

21 And then we also have the zoning maps, Your Honor.

22 THE COURT: Let me repeat my request.

23 Did we have a survey that creates parcels 12 and
24 13?

25 BY MR. LESEMANN:

1 Q. Are you aware of a survey of those
2 development parcels?

3 A. There is no survey of the clear definition
4 of the 12 and 13.

5 Q. All right.

6 MR. LESEMANN: Your Honor, we can use
7 it as demonstrative. But we also indicated that
8 this is an exhibit that Mr. Permar has created --
9 so, Your Honor, of course before I move on any
10 further.

11 BY MR LESEMANN:

12 Q. Mr. Permar, did you use this document, did
13 you prepare this document which is indicated as
14 land use designation?

15 A. Yes.

16 Q. Is it something you prepared in the course
17 of your work as a land planner on Kiawah Island?

18 A. Yes.

19 Q. Is it a document that you maintain in your
20 business records to this day?

21 A. Yes.

22 Q. Are these outlines of the basis upon which
23 parcels 12 and 13 and their acreages were
24 determined? Again, them being approximate, were
25 they determined as approximate in the

1 parcel-specific development standard?

2 A. It is approximate, yes.

3 Q. Okay. Is this drawing part of the basis for
4 those approximate acreages?

5 A. Yes.

6 Q. And is this what the Town of Kiawah and KRA
7 utilized in order of determining the approximate
8 acreages of the various parcels that are recognized
9 as developable parcels in the development
10 agreement?

11 A. Yes.

12 Q. Okay.

13 MR. LESEMANN: So, Your Honor, with
14 that proffer, again, Mr. Permar has prepared this
15 document; it's a business record which would be
16 admissible; it has been produced to the parties.

17 The overlay document is just one for
18 the convenience of the parties. Yes, it was
19 provided to the parties over the weekend.

20 BY MR. LESEMANN:

21 Q. Mr. Permar, when did you prepare -- when did
22 you complete this document and provide it to me?

23 A. The end of last week.

24 Q. Okay. On Friday?

25 A. Yes.

1 Q. Okay. And as indicated by the date?

2 A. Yes.

3 Q. Okay.

4 MR. LESEMANN: And so, Your Honor,
5 again, I mean it's a picture of the island, and
6 it's a picture of parcels 12 and 13, it's a picture
7 of the beachfront strip, and it's a picture of the
8 4.62 acres all overlaid. So there is no ambush.
9 All of these things are what they are.

10 It's just a document which shows them
11 all in relation to each other for the assistance of
12 the finder of fact.

13 THE COURT: Okay.

14 MR. LESEMANN: We would ask again, we
15 would renew our request that Exhibit 29 be
16 admitted.

17 THE COURT: All right. Well, I'm going
18 to reserve ruling on it.

19 I'm holding in my hand a plat that's
20 from Southeastern Survey of a 16-acre tract of land
21 I found in y'all's pleadings.

22 Take a look at this and tell me where
23 this is in your exhibit.

24 MR. LESEMANN: Yes. So, Your Honor, as
25 you'll see --

1 THE COURT: I'm not sure where it is,
2 but it is somewhere in y'all's records.

3 MR. LESEMANN: It is. And this may not
4 be in the exhibit book -- do you have the pointer,
5 Mr. Permar?

6 THE WITNESS: Yes.

7 MR. LESEMANN: So, Your Honor, as you
8 noticed, this document -- I might be holding your
9 copy -- but it's notated as a 16.088 parcel.

10 THE COURT: Right.

11 MR. LESEMANN: And that is that line
12 that runs there (indicating). And so the
13 difference is for it to be a 19.5-acre parcel is
14 the additional property is not included, again,
15 with that being an estimated acreage.

16 And so the parcels as they were
17 recognized for development purposes in the
18 development agreement did not follow specifically
19 surveys of record.

20 But they followed lines that were
21 agreed upon by the parties as indicated in the land
22 use designation document.

23 So the survey line on the document that
24 you've handed to me, and this line here, do not
25 match exactly, but that's what makes this parcel

1 19.5 acres, and this one 16.5 acres.

2 BY MR. LESEMANN:

3 Q. My back was to you, but is that essentially
4 your understanding?

5 A. Yes.

6 THE COURT: Let me ask you this
7 question. Is that not a plat of record?

8 MR. LESEMANN: This is. I believe so.
9 Your Honor, it says, approved plat, director of
10 planning, Charleston County Planning Commission,
11 June 17, 1988.

12 THE COURT: All right. The only place
13 I would have gotten that would have been out of
14 your pleadings.

15 MR. LESEMANN: No, Your Honor, you're
16 right.

17 THE COURT: All right. So I'll let you
18 put that in.

19 MR. LESEMANN: Okay.

20 THE COURT: Let's figure out what
21 exhibit it is in your documents. If it's not in
22 your documents, then it's attached to your
23 complaint.

24 MR. LESEMANN: And, Your Honor, again,
25 this is a demonstrative summary.

1 THE COURT: I fully understand that.
2 But I asked you right in the opening statement how
3 we came to the red box, we got the red box
4 overlaying the two yellow boxes.

5 So now I'm asking you to support the
6 yellow boxes. That document in your hand doesn't
7 fully do that. It's a different line than what
8 you've got.

9 But I'm willing to let you present to
10 me how you get to the yellow box before you get --
11 the demonstrative aspect of this is the red box,
12 okay. But establish that you've got a basis for it
13 with the yellow boxes in the record and I may allow
14 it in.

15 But as it stands right now, it ain't
16 coming in.

17 MR. LESEMANN: Thank you, Your Honor.
18 And, Your Honor, I would ask you when I was
19 speaking in opening statement it was my
20 understanding of Mr. Permar's exhibit.

21 BY MR. LESEMANN:

22 Q. So, Mr. Permar, could you explain for the
23 Court the source of the green lines and how you
24 came to make that overlay exhibit?

25 THE COURT: He doesn't need to do that.

1 You just find me the plats, okay? If y'all can
2 find me the plats for it, then I'm going to let it
3 in. If not, I'm not going to let it in.

4 MR. LESEMANN: Okay.

5 BY MR. LESEMANN:

6 Q. Are you aware whether there is a plat of the
7 -- of a map to the 19-acre parcel?

8 A. No.

9 Q. Okay. But there is a -- but this line here
10 (indicating) does exist on the survey of the
11 employee facility tract; is that correct?

12 A. Yes.

13 Q. All right. And so then this line here
14 (indicating), would that be an extension of that
15 line?

16 A. That line is a translation of the line
17 established on the large archival piece that you
18 referenced.

19 Q. So the orientation is slightly different,
20 but is that -- is this a survey of the employee
21 facility tract?

22 A. Yes.

23 MR. LESEMANN: So, Your Honor, with
24 this, this is Exhibit 26 is one that I intend to
25 review with Ms. Nimmons.

1 BY MR. LESEMANN:

2 Q. Mr. Permar, you view this to be a true and
3 accurate copy of a survey of the employee facility
4 tract?

5 A. Yes.

6 MR. LESEMANN: Your Honor, I would move
7 for admission of Exhibit 26.

8 MS. ARMSTRONG: No objection.

9 THE COURT: No objection to 26?

10 MS. JETT: No.

11 (Plaintiffs' Exhibit No. 26 was
12 admitted into evidence.)

13 MR. LESEMANN: Okay.

14 BY MR. LESEMANN:

15 Q. So, Mr. Permar, are these lines established
16 by the exhibit that the Court had handed to me and
17 that I'll hand to you of the 16-acre parcel?

18 A. Portions of the lines represented in the
19 day-glow color are from this plat.

20 Q. Okay. And so this line here (indicating) is
21 a -- is basically a topographical line; is that
22 correct? Mean high water?

23 A. Mean high water.

24 Q. Right. So this is not one that is marked by
25 iron stakes or anything of that nature?

1 A. No.

2 Q. Okay. And so is this line (indicating)
3 reflected in the survey that you have before you of
4 the 16.088 acres?

5 A. Yes.

6 Q. Okay. And as I'm following with the
7 pointer --

8 A. Yes.

9 Q. -- is this line (indicating) Duneside
10 Villas?

11 A. There's a right-of-way there. That's above
12 the right-of-away.

13 Q. Okay. And then is this line (indicating)
14 established by the plat that's in your hand?

15 A. Yes.

16 Q. Okay. And then this line here (indicating)?

17 A. Yes.

18 Q. All the way over to here (indicating)?

19 A. Yes.

20 Q. Okay. And then down to here (indicating)?

21 A. That's on the other plat.

22 Q. Okay.

23 A. The employee tract.

24 Q. Okay.

25 MS. ARMSTRONG: Ellis, what exhibit are

1 you looking at?

2 MR. LESEMAN: Well, I --

3 MS. ARMSTRONG: Is Mr. Permar looking
4 at?

5 MR. LESEMAN: He is reviewing an
6 exhibit of a 16-acre survey that was provided to
7 you when the development agreement was provided.

8 THE COURT: I'm assuming it's somewhere
9 in the development agreement.

10 MS. ARMSTRONG: If this is what it is
11 that you're referring to, it would help us a lot to
12 know.

13 MR. LESEMAN: Yeah, it's what the
14 Court handed to me, yes.

15 MS. ARMSTRONG: Okay. If you want to
16 go ahead and use this, this is Intervenor's No. 5,
17 marked as 5. You can get the full size.

18 MR. LESEMAN: Okay. So is there any
19 objection to it being admitted?

20 MS. ARMSTRONG: No, there's no
21 objection to No. 5.

22 THE COURT: Okay.

23 (Intervenor's Exhibit No. 5 was
24 admitted into evidence.)

25 BY MR. LESEMAN:

1 Q. So, Mr. Permar, is that a larger version of
2 the small exhibit that the Court had provided to
3 us?

4 A. Yes.

5 Q. And is that a true and accurate copy of the
6 survey of the 16.088-acre parcel?

7 A. Yes.

8 Q. Okay. And are the survey lines as
9 documented on the 16.088-acre parcel what you used
10 to establish the eastern boundary and the northern
11 boundary of that parcel?

12 A. Yes.

13 Q. Okay. And then is the -- was the employee
14 facility tract considered part of parcel 13 in
15 terms of the development parcel recognized under
16 the development agreement of 1994?

17 A. Yes.

18 Q. Okay. So you utilized that western boundary
19 of the employee facility parcel?

20 A. To a point, yes.

21 Q. Okay. And then this point here where the
22 southwestern corner of the employee facility parcel
23 exists and where that addition land begins, what is
24 the line that runs from that point down to mean
25 high water?

1 A. That's a line that I placed that is roughly
2 perpendicular to the mean high water line.

3 Q. Okay. And is that your understanding based
4 on the land use designation map that you put
5 together as the intent of parcel 13?

6 A. Yes.

7 MR. LESEMANN: So, Your Honor, we have
8 a survey to this point (indicating), and at this
9 point to the water it would follow the land use
10 designation map that Mr. Permar had prepared and
11 has maintained as a business record.

12 THE COURT: The same goes true for the
13 western parcel, 12?

14 MR. LESEMANN: And the western parcel I
15 believe is reflected on this survey that has been
16 admitted into evidence.

17 BY MR. LESEMANN:

18 Q. Would the lines that you've drawn on the
19 parcel correspond with the designated parcel 12A on
20 Exhibit 15?

21 A. The lines that I used for the designation of
22 parcel 12 there, which now is known as 12A, is as
23 represented on this plat (indicating).

24 Q. Okay.

25 MR. LESEMANN: So, Your Honor,

1 Mr. Permar's testimony would be that these lines
2 are based upon the plat that has been admitted into
3 evidence, the designation now as 12A now that 12B
4 is Captain Sam's Spit.

5 So, Your Honor, the only -- well, does
6 that -- actually, does that establish a --

7 THE COURT: Those aren't survey lines.
8 Those are represented as dash lines.

9 MR. LESEMAN: Right. But --

10 THE COURT: That's the one from SWA
11 that's relatively recent?

12 MS. ARMSTRONG: Yes, Your Honor, 2013.

13 MR. LESEMAN: Yes.

14 BY MR. LESEMAN:

15 Q. So does the remaining line on your overlay,
16 Exhibit -- correspond to this boundary line between
17 parcel 12A and parcel 13?

18 A. Yes.

19 Q. And so is that line itself indicated on a
20 parcel of record?

21 A. No.

22 Q. Is it -- so this survey, that has been
23 admitted into evidence, has not been made a parcel
24 of record yet? This document here?

25 A. I don't know if it's of record.

1 Q. Okay. But it is a survey?

2 A. It is a survey.

3 Q. And am I holding the same survey that is
4 before you that has been marked as Exhibit 5 into
5 evidence?

6 A. Yes.

7 MR. LESEMAN: So, Your Honor, with
8 those surveys we will establish the entirety of the
9 boundaries.

10 THE COURT: Okay. That's what I was
11 trying to get at, how we got there.

12 I think these were your exhibits, it
13 turned out to be, Ms. Armstrong, any objection
14 then?

15 What I needed was some basis for the
16 creation of the diagram. What he is proposing into
17 evidence is nothing but a summary.

18 MS. ARMSTRONG: Right. And I still --
19 I think -- but I still have a problem like that
20 these were created without the basis of any kind of
21 a survey or a -- there is no plat of them.

22 There is a plat of the 16 acres, sure.
23 But there is nothing including the employee
24 facility tract with the 16-acre tract. There is
25 nothing that joins and combines those two. So

1 that's one problem.

2 And then wherever this line comes --
3 came from, it's just going right through the middle
4 of the red parcel, there is no survey of that
5 either. And so how that was kind of created seems
6 to be based on general things that Mr. Permar
7 created to assist in the land use designations.

8 And while he is not a registered
9 surveyor, he just kind of has marked these out on a
10 big map where he thinks that the land use
11 designations should occur.

12 And I don't think that they're really
13 probative of when you get down to the exact
14 boundary of a surveyed parcel.

15 So I don't have any problem with any of
16 these deed exhibits, but when it comes to the one
17 that Mr. Permar created, that's -- we maintain our
18 objection.

19 THE COURT: All right.

20 MR. LESEMANN: Your Honor, if I may.
21 Sorry. It's to combine the aerial aspect, Your
22 Honor, with the additional land, with these parcel
23 lines indicated in the yellow. We actually have
24 established all the lines as Your Honor indicated.

25 And we believe it's helpful because it

1 shows some things that the other exhibits do not.

2 And that is --

3 THE COURT: All right. Let me stop you
4 right there.

5 MR. LESEMAN: Yes, sir.

6 THE COURT: I've got one more plat I
7 have been trying to locate. And I'm going to hand
8 you this and let you look for it.

9 Let's take a break right now. Let's
10 come back in about five to ten minutes. See if you
11 can find this plat.

12 This is an exhibit. I didn't look at
13 this exhibit one that you got. And that plat
14 there. I have not seen that plat. I have been
15 looking for that plat.

16 Let's take about a ten minute break and
17 we will come back and press on.

18 (A recess was taken.)

19 THE COURT: Did you find some stuff?

20 MR. LESEMAN: Yes, Your Honor, we did.
21 And it's already admitted into evidence, actually.
22 It's within the binders, Your Honor, of the
23 exhibits to the development agreement. And so I
24 have got a copy for you here --

25 THE COURT: Excellent.

1 MR. LESEMANN: -- of the July 17, 1994
2 survey of Captain Sam's Spit.

3 THE COURT: That's just sort of the
4 extension is what that shows?

5 MR. LESEMANN: Yes, sir.

6 MS. ARMSTRONG: Which exhibit are you
7 referring to?

8 MR. LESEMANN: It's a portion of
9 Exhibit 5. It's behind 16.2 of the development
10 agreement.

11 THE COURT: Okay.

12 MR. LESEMANN: Behind the agreement for
13 conveyance are all the surveys as they were
14 available of the various portions.

15 And that is a portion of what has been
16 already admitted, Your Honor, as Exhibit 5.

17 THE COURT: All right. The one that
18 you -- your Exhibit 5.

19 MR. LESEMANN: Yes, Your Honor.

20 It's part of 16.7, yes. So, Your
21 Honor, I have here -- I don't know if you would
22 want it -- but the entire three-volume set. I have
23 a Court copy, it's here. And that document comes
24 from --

25 THE COURT: Out of here?

1 MR. LESEMAN: Yes.

2 THE COURT: I couldn't find it in
3 volume one, it must be in volume two.

4 MR. LESEMAN: That's right. 16.7 is
5 in volume two, Your Honor.

6 THE COURT: All right. Now, this
7 doesn't show -- this shows me Beachwalker Park,
8 which I think is included in the top portion of
9 parcel 12. But I don't see anything else that
10 creates parcel 12.

11 Do we have any plats?

12 MR. LESEMAN: Well, we have, Your
13 Honor, the exhibit that has been previously
14 admitted. Your Honor, the intervenors' exhibit
15 that has been admitted, the Seamon Whiteside -- the
16 Seamon Whiteside plat.

17 I just traced the outlines of it. What
18 is now 12A was 12.

19 THE COURT: Got you. Okay. And that's
20 the recent one from 2013?

21 MR. LESEMAN: Yeah, updated as of
22 2013. Yes, Your Honor.

23 THE COURT: That is or is not recorded?

24 MR. LESEMAN: This one is not -- it's
25 signed, but it is not recorded.

1 THE COURT: Okay.

2 MR. LESEMANN: But it's got that 2013.

3 THE COURT: Seal it's an official plat?

4 MR. LESEMANN: Yes.

5 THE COURT: All right.

6 So, Ms. Armstrong, still objection to
7 the diagram, Exhibit 26 [sic]?

8 MS. ARMSTRONG: I guess at this point
9 not to the lines but to the text that's drawn in
10 there just as far as it's -- I'm not sure exactly
11 what it says because I don't have it in front of
12 me, but I remember that there was some --

13 MS. JETT: There was land mistakenly
14 conveyed. To the narrative description indicating
15 that it's a mistake, that would be KICA's only
16 objection.

17 MS. ARMSTRONG: Yes.

18 THE COURT: Okay. So the asterisk and
19 the writing you're talking about?

20 MS. ARMSTRONG: The text.

21 THE COURT: The text, okay.

22 MR. LESEMANN: And, Your Honor, we
23 would consent to striking through -- I think we all
24 can agree the additional land. But, you know, the
25 Court can take notice so we can physically strike

1 through that additional language, whatever you felt
2 was appropriate.

3 THE COURT: Okay. We'll admit it.
4 Just draw a line through it. It's Exhibit 29 is
5 what this is.

6 I'm going to allow it now that we have
7 been able to piece it together. I'm not sure I got
8 all of 13, but I have the dimensions of it from the
9 one plat we looked at. And then clearly you have
10 the employee beach line, or whatever that's called.

11 MR. LESEMAN: Yeah, the surveys out
12 there to provide the boundary of 13.

13 THE COURT: And I'll find it's helpful
14 to the Court and therefore it's admissible.

15 MR. LESEMAN: Thank you, Your Honor.

16 THE COURT: Thank you.

17 (Plaintiffs' Exhibit No. 29 was
18 admitted into evidence.)

19 MR. LESEMAN: And we will just be very
20 brief.

21 BY MR. LESEMAN:

22 Q. Mr. Permar, you had discussed in your
23 testimony previously about a conversation with
24 Mayor Melvin about Exhibit 16.2 and the changes
25 that were made to it?

1 A. Yes.

2 Q. I just wanted to clarify for the record,
3 prior to making the handwritten, was your
4 conversation with Mayor Melvin and her allowance
5 for you to take that action, did you do that before
6 you penciled in on -- before you made the change or
7 after?

8 A. Before.

9 Q. So you spoke with Mayor Melvin, the Mayor of
10 the Town of Kiawah Island, about the specific
11 change that you wished to make before making the
12 change?

13 A. Yes.

14 Q. And she authorized the change?

15 A. She just indicated, make the change as you
16 believe it to be.

17 Q. And then she initialed the document?

18 A. No. She didn't initial the document.

19 Q. Well, later is what I mean to say. Do you
20 recognize her initials on the document as --

21 A. Yes.

22 Q. -- as the final exhibit?

23 A. Yes.

24 Q. But she did not initial it at the time is
25 what you're saying?

1 A. That's correct.

2 Q. But she did initial it in connection with
3 the ratification of the development agreement?

4 A. All of the documents.

5 Q. Okay. And when you were asked about whether
6 these parcels, parcels 12 and 13 are hypothetical,
7 now from the standpoint of zoning entitlements were
8 those actual, or were those --

9 A. Those were defined as specific parcels in
10 the development agreement.

11 Q. Okay. So by hypothetical did you mean that
12 we may build on them in the future, but we are not
13 certain what the plans are, is that what the --

14 A. That's correct.

15 Q. But the parcels themselves and the zoning
16 rights given in them were actual?

17 A. Yes.

18 Q. Okay.

19 MR. LESEMAN: No further questions,
20 Your Honor.

21 THE COURT: All right. Any follow-up
22 at all?

23 MS. JETT: No.

24 MS. ARMSTRONG: No, Your Honor.

25 THE COURT: Mr. Permar, thank you, sir.

1 You may step down. Thanks for your help.

2 All right. What is your -- it's 10
3 after 12:00. Who is your next witness? How long
4 you think -- somebody wanted to take somebody out
5 of order. And I don't know if that's going to be
6 quick or not.

7 MS. ARMSTRONG: We did want to, and I
8 think we may have it resolved. I have the town
9 clerk, Town of Kiawah Island clerk here under
10 subpoena.

11 And just in the break Mr. Lesemann and
12 I were able to work out an agreement on the Town
13 records. So if it's all right with you, we'll just
14 read those into the record. And then if you'll
15 release the town clerk from the subpoena so we can
16 get --

17 MR. LESEMAN: Your Honor, that is
18 correct. I have the exhibit numbers that I can
19 read into the record.

20 Our intention would be to call
21 Mr. Dennis Rhoad next for a very brief 10- to
22 15-minute direct, maybe 10-minute direct
23 examination.

24 And I know that he has got some matters
25 he needs to attend to as well, with the Court's

1 permission.

2 THE COURT: Okay. Let's do that.

3 MR. LESEMANN: Okay. So first we could
4 -- would you like for the parties to read their
5 stipulation into the record while Mr. Rhoad is
6 coming up?

7 THE COURT: Okay. Sure.

8 MR. LESEMANN: So, Your Honor, the
9 parties have stipulated that the documents that
10 would otherwise be authenticated and entered
11 through the town clerk of the Town of Kiawah
12 Island, which include Intervenor's Exhibits 8 and
13 9, and Plaintiffs' Exhibits 23, 30, and 33 can be
14 admitted by stipulation without the requirement of
15 calling Ms. Reynolds.

16 THE COURT: All right. Ms. Reynolds,
17 thanks for being here. You may be excused.

18 All right, that takes care of that.

19 (Intervenor's Exhibit Nos. 8 and 9 were
20 admitted into evidence.)

21 (Plaintiffs' Exhibit Nos. 23, 30 and 33
22 were admitted into evidence.)

23 THE COURT: Come on up, Mr. Rhoad.

24 DENNIS RHOAD,
25 having been first duly sworn, was examined and

1 testified as follows:

2 THE COURT: Your full name and address
3 for the record, please.

4 THE WITNESS: Dennis James Rhoad. 29
5 Charlotte Street, Charleston.

6 THE COURT: R-H-O-A-D, correct?

7 THE WITNESS: Yes.

8 DIRECT EXAMINATION

9 BY MR. LESEMAN:

10 Q. Mr. Rhoad, can you briefly explain your
11 background with the Town of Kiawah, and the status
12 that you would have held with the Town of Kiawah at
13 1994 and at other times?

14 A. Was asked to be the attorney in December of
15 1988, remained in that position until December 31st
16 of 2002. And then again in May of 2003 until the
17 present.

18 Q. So my estimation of 25 years of service was
19 not far off?

20 A. Close enough.

21 Q. Mr. Rhoad, were you involved directly in the
22 negotiation and preparation of the 1994 development
23 agreement?

24 A. I was, as well as the 2005 development
25 agreement.

1 Q. Were you assisted in the 1994 development
2 agreement by Mr. Dick Carlisle?

3 A. Yes. The Town retained a land planning
4 consultant by the name of Dick Carlisle and his
5 firm.

6 Q. And so was he a land planner and not an
7 attorney?

8 A. He was both.

9 Q. Very good. Okay. Mr. Rhoad, was the
10 beachfront strip, as you have been listening to
11 testimony here in court today, was the beachfront
12 strip a subject of the 1994 development agreement?

13 A. It was.

14 Q. Okay. Did the Town of Kiawah Island and KRA
15 enter into an exhibit that would form an agreement
16 as to what the scope of the beachfront strip was to
17 be?

18 A. An exhibit as well as part of the text of
19 the development agreement itself.

20 Q. Okay. Mr. Rhoad, when Exhibit -- what has
21 been entered into evidence as Exhibit 28, would you
22 recognize that document shown on the screen?

23 A. If that's Exhibit 16.2, yes.

24 Q. And does it indicate an area where the
25 beachfront strip would terminate toward the western

1 end of the island?

2 A. Yes.

3 Q. And can you identify where that western
4 termination point of the beachfront strip was
5 intended to be?

6 A. It would be -- I don't remember whether
7 that's parcel 12A or parcel 12B, but right where
8 the beachfront hatch mark terminates at that point.

9 Q. Okay. So if this is parcel 13, on the
10 eastern boundary of parcel 13 is where it would
11 terminate?

12 A. Yes.

13 Q. And if these are the Duneside Villas here
14 that I'm indicating, indicate that it would
15 terminate at the western boundary of the property
16 owned by the Duneside Villas Horizontal Property
17 Regime?

18 A. Yes.

19 Q. And are you able to distinguish between the
20 dark area here and the hatched area that stops at
21 this point (indicating)?

22 A. To be honest with you, based on the
23 testimony I heard from Mr. Permar, yes. Without
24 having studied it prior to that, no.

25 I base my answer largely upon the intent of

1 the Town of Kiawah Island and the developer to
2 convey a generally described 10-foot -- excuse me
3 10-mile beach strip along the beach that was never
4 intended to include any developable property.

5 The history of why that was an important
6 issue, based upon my specific involvement in the
7 case, was what has already been alluded to, which
8 is the situation that happened on the Isle of Palms
9 and the I think probably unrealistic, but
10 nevertheless real fear in a lot of people's minds
11 that that strip may somehow be developed.

12 The property owner was willing to convey it
13 with a conservation easement I believe on it to
14 KICA.

15 And I base my testimony on the intent of
16 that beachfront strip to include no developable
17 property based upon my recollection in that area as
18 opposed to specific review of these exhibits.

19 But I can identify where it ends based upon
20 your exhibit.

21 Q. Understood. And so what has been marked as
22 Exhibit 29, would this again reflect what would be
23 that eastern boundary of parcel 13?

24 A. Yes. And here again it would be because
25 anything further west of that, that would include

1 whatever those parcels have been referred to as,
2 would include developable property.

3 Q. And so would it be your testimony,
4 Mr. Rhoad, that the area that's marked in red on
5 Exhibit 29, that 4.62 acres, did the Town of Kiawah
6 intend that that be included as part of the
7 beachfront strip?

8 A. Based on my specific involvement in the
9 negotiations with the property owner and the Town,
10 that would be my opinion that it was not intended
11 to include any of that developable strip.

12 Q. From having worked with the developer, the
13 Town, did you also have interactions with the board
14 of directors at KICA?

15 A. I did not have any direct interaction with
16 the board of directors of the Town of Kiawah Island
17 -- or excuse me, the board of directors of KICA.

18 I believe most of that was done between the
19 then current mayor and council. Whether Dick
20 Carlisle did or not, I don't recall. But as you
21 know, the community association was not a party to
22 the development agreement.

23 And my recollection is they never
24 participated in any negotiated meetings or anything
25 like that. There were communications back and

1 forth. I think most of that communication came by
2 way of my client.

3 Q. Okay.

4 A. The Town.

5 Q. But the Town and KRA were agreeing that
6 there would be a beachfront strip conveyed that
7 would terminate at this point below the Duneside
8 Villas, and to the east of parcel 13?

9 A. Yes. That is my testimony.

10 Q. All right. And then KICA -- do you have an
11 understanding whether Mr. Townsend Clarkson would
12 have served on the board of directors of KICA at
13 the time?

14 A. Not independent of Mark Permar's testimony.

15 Q. Okay. Understood. Did you give a
16 presentation to a recent assembly of town council
17 relating to the 1994 development agreement and the
18 2005 development agreement in -- I think it was
19 September of 2013?

20 A. I can't really see that agenda.

21 Q. Well, did the town council meet on September
22 13, 2013 where there was an executive session to
23 discuss the 2005 Kiawah Partners development
24 agreement and receive legal advice on the same?

25 A. There was an executive session, I'm not sure

1 what the rules are as far as being subpoenaed to
2 testify. I know that the rules are I'm not
3 supposed to disclose what was discussed in
4 executive session.

5 But I can tell you that as a result of the
6 discussion in executive session the -- we came out
7 of executive session the Town instructed me to
8 assist with the preparation of -- if it was not
9 already proposed in draft form -- to assist with
10 either drafting it or revising it in certain ways.

11 And that's what resulted in the fifth
12 amendment to the development agreement of the 2005
13 development agreement. Fifth amendment to the 2005
14 development agreement.

15 And as I told I think both you and the
16 attorney for KPOG, that in my opinion that clearly
17 reflects the Town's intent of the beachfront mile
18 strip portion of the development agreement which
19 was not to convey any developable property to KICA,
20 but just the undevelopable 10-foot [sic] mile
21 beachfront strip.

22 Q. Is it your understanding, Mr. Rhoad, that a
23 property description was prepared that resulted in
24 the inclusion of this area marked in red as part of
25 the beachfront strip?

1 A. I became aware of that at some point I
2 believe subsequent to it being prepared and being
3 conveyed. And I was not a party -- I was not a
4 part -- I played no part in preparing the deed.

5 Q. And just to clarify -- this will be my final
6 question, Mr. Rhoad -- the area marked and bounded
7 in red on the exhibit marked as Exhibit 29, did the
8 Town of Kiawah Island have any intent that this be
9 included in the beachfront strip, which according
10 to 16.2 would terminate at the eastern boundary of
11 parcel 13?

12 A. In my opinion, based upon what I testified
13 to earlier, it did not intend to include the
14 developable property or anything in front of the
15 developable property down to -- I don't know if
16 that's the mean water mark or what at the bottom.

17 Q. And the intent again was to stop at the
18 point as indicated on Exhibit 16.2, this eastern
19 boundary of parcel 13?

20 A. Correct. Which I believe includes no
21 developable property.

22 Q. Okay. Thank you, Mr. Rhoad.

23 MR. LESEMANN: No further questions.

24 THE COURT: Any questions, Ms. Jett?

25 MS. JETT: Maybe just one or two.

CROSS EXAMINATION

BY MS. JETT:

Q. Mr. Rhoad, my name is Allie Jett. I don't know if we have met before, but I'm here on behalf of the community association.

A. Nice to meet you.

Q. Nice to meet you as well. I know that you were -- you have been very clear in your testimony that you believe that it was the Town's intent not to convey, by virtue of this dedication of the beachfront strip, any developable land to KICA.

Did you have a specific understanding, or do you believe -- do you recall any discussions around the development of -- or I guess around the negotiations of the development agreement as to where, specifically how far west the terminus of that beach mile strip was supposed to be?

A. There was no deed prepared at the time of the 1994 or 2005 development agreement. So my testimony would be that there was no exact line of demarcation because I don't believe there was a survey, as to that deed, I don't believe there was a survey prepared.

Again, I can just say that based upon my being there, being a part of the process, the

1 intent was not to convey any developable property.

2 And the line that Mr. Lesemann has indicated
3 would certainly seem to demark where the
4 developable property began and where the
5 developable property ended.

6 To sit here today and say that was the line
7 in 1994, I think we'd have to assume there was a
8 survey and I don't believe there was one.

9 Q. Okay. So there was not -- or taking out the
10 portion of developable land, which I guess would
11 probably be -- would bring into question properties
12 more towards the north when you get into the
13 vegetated areas, but in terms of the horizontal
14 conveyance, how far west it can be, you don't
15 recall, as you are sitting here, any discussion
16 from the mid-'90s time period of there being any
17 controversy or question that was raised by your
18 client as to how far west it would extend?

19 A. You mean subsequent to the execution of the
20 1994 development agreement?

21 Q. No, prior to. Were there any negotiations
22 or discussions that brought to people's mind how
23 far west?

24 I know that there was a provision in the
25 development agreement that indicated that KRA was

1 supposed to transfer certain property in Captain
2 Sam's Spit to KICA. And that there was a separate
3 provision in the development agreement about the
4 dedication of the 10-mile strip.

5 To your mind, was there any discussion
6 within the Town of Kiawah as to where the division
7 line between those two parcels were supposed to be?

8 A. I would have to testify again that my
9 recollection is that at the time of 1994 until the
10 10-foot beach mile strip -- or 10-mile beachfront
11 strip was surveyed and the deed was prepared, it
12 was just a general description.

13 Q. Okay.

14 A. And a general purpose not to convey any
15 developable property. So I think I'd have to say
16 no, because I don't think any specific line existed
17 based upon a survey at the time.

18 Q. Okay.

19 MS. JETT: No further questions. Thank
20 you.

21 THE COURT: Ms. Armstrong.

22 CROSS EXAMINATION

23 BY MS. ARMSTRONG:

24 Q. Mr. Rhoad, how do you define developable?

25 A. Well, in the context of the 10-mile

1 beachfront strip you have a lot of oceanfront
2 properties that were platted as developable, or if
3 not platted certainly could be platted and
4 developable to build houses or, in the case of the
5 Sanctuary, a hotel.

6 And those properties were developable in
7 that sense to build something upon. Seaward of
8 that was the 10-foot mile -- excuse me -- the
9 10-mile beachfront strip, and that's how I use the
10 word developable.

11 Q. So is it a term that you use only in
12 speaking about the beachfront strip, or does it
13 have broader applicability to all of Kiawah Island?

14 A. In my testimony today, since I was asked
15 specifically about the strip, I was explaining it
16 in that context.

17 Q. So in that context is the land developable
18 if it's high ground? What makes it developable?

19 A. Well, if the land is subject to being
20 developed under the development agreement, and has
21 certain uses as of right based upon tables and
22 permitted uses, then in that sense you can use --
23 or I would use the word developable.

24 Q. Okay. So you understand that we are here
25 today arguing about what the development agreement

1 authorized for this particular parcel, correct?

2 A. Which particular parcel?

3 Q. The 4.620 acres as outlined in red.

4 A. I mean, I haven't been asked a question
5 about the 4.620 acres outlined in red. I have been
6 asked a question about the 10-mile beachfront
7 strip, and where I believe it ended on the west end
8 of the island.

9 Q. So if the beachfront strip as you just
10 described it, your understanding of the intent of
11 the boundaries of the beachfront strip were placed,
12 and say in a hundred years, or say 20 years land
13 accretes and it's high ground and you could
14 actually build a house on it, would that be
15 developable to you or not?

16 A. Well, I believe in this case there is a
17 conservation easement of record that would prevent
18 that from happening, so I would say no.

19 Q. Okay. Do you have Exhibit No. 1 in front of
20 you? Petitioners' [sic] Exhibit No. 1? It's the
21 1994 development agreement. Intervenors' No. --

22 A. I have a copy of the 1994 development
23 agreement.

24 Q. Let's take a look at that together. Will
25 you look at paragraph six for me, please?

1 A. Paragraph six?

2 Q. Yeah.

3 A. What page? You mean section six?

4 Q. Paragraph six on page nine.

5 You testified you played a role in the
6 drafting of this agreement, correct?

7 A. Yes.

8 Q. And paragraph six speaks to the intent of
9 the parties. It says, the Town and the property
10 owner agree that the burden of this agreement bind,
11 and the benefits of this agreement inure to each of
12 them and their successors in interest.

13 That's an accurate reflection of what you
14 agreed to on behalf -- negotiated on behalf of the
15 Town, correct?

16 A. Yes.

17 Q. Okay. And when we talk about the section
18 16.2 which starts on page 42 of the development
19 agreement, under 16.(b) on page 42, it's actually
20 referred to as a general depiction on Exhibit 16.2,
21 correct?

22 A. 16.(d)?

23 Q. (b).

24 A. 16.(b). And your question is what?

25 Q. It says that it's generally depicted on

1 Exhibit 16.2. That's correct, right?

2 A. Yes. I mean, that's what it says.

3 Q. Okay. So in the development agreement
4 itself it recognizes that Exhibit 16.2 is a general
5 description, it's not a plat, it's not a survey,
6 correct?

7 A. Correct.

8 Q. And then if you turn to page 45 and look at
9 16.(g), Captain Sam's Spit. In addition to the
10 beachfront strip, the development agreement also
11 says that Captain Sam's Spit is a dedication area,
12 correct?

13 A. Under the exhibit 1994 -- or the 1994
14 development agreement before it was amended under
15 the 2005 development agreement, that's what it
16 says. Yes.

17 Q. Okay. So the development agreement proposed
18 or instructed that both Captain Sam's Spit, as well
19 as the beachfront strip, would be areas that would
20 be, in your terms, undevelopable because they were
21 going to be dedicated and conveyed to KICA?

22 A. If that provision had been carried forth as
23 opposed to amended in 2005, yes, that's what it
24 says. But it was changed under the 2005
25 development agreement.

1 Q. I understand that. But we're talking about
2 what happened in 1994, where the parties were in
3 1994.

4 A. Well, that's what it says in the 1994
5 development agreement, yes.

6 Q. Okay. And if you'll look at page 61 of the
7 development agreement with me. I just want to back
8 up a little bit.

9 When you and I spoke, you seemed to indicate
10 that you thought that Captain Sam's Spit was
11 somehow different or treated differently under the
12 development agreement as far as it being a
13 dedicated parcel. Do you recall that?

14 A. I recall telling you when you called me at
15 -- I don't know what time it was, 4:00 or 5:00,
16 after I had just gotten through six or seven
17 depositions that I didn't remember exactly what the
18 1994 development agreement said with regard to
19 Sam's Spit.

20 Q. Okay. We are just kind of looking at it
21 together now then.

22 A. Right.

23 Q. So this is paragraph 34.J that I want you to
24 look at. And if you could just read into the
25 record the -- sort of the middle of the first

1 paragraph, third line down that starts with, the
2 parties.

3 A. Where it says the parties agree?

4 Q. Right.

5 A. That property owner is obligated to provide
6 to the Town and/or KICA the following enumerated
7 extraordinary and significant benefits.

8 Q. Uh-hum.

9 A. Even if the -- you want me to keep reading?

10 Q. Yes. All the way through little i.

11 A. Okay. Property owner is obligated to
12 provide to the Town and/or KICA the following
13 enumerated extraordinary significant benefits, even
14 if the property owner cancels, rescinds,
15 repudiates, refuses, revokes, or in any manner
16 terminates or attempts to terminate this agreement.

17 And subparagraph one, dedication of the
18 conservation of open space and Captain Sam's Spit
19 as set forth in paragraph 16.(b) and (h) of this
20 agreement.

21 Q. Okay. Now, we were just looking at 16.(g).
22 And it appears that 16.(h) is referenced on 16.2
23 and it's referenced in this section too. But it
24 appears that they're talking about Captain Sam's
25 Spit, which was actually 16.(g).

1 Would you agree that that looks like a
2 mistake in the actual reference to 16.(h) instead
3 of 16.(g)?

4 A. I mean I think whatever the subparagraph is
5 under section 16 that occurs in Captain Sam's Spit
6 is what that's meant to refer to.

7 Q. Okay. So that would be 16.(g). So this
8 section actually in talking about the survival of
9 owners -- property owners' obligation, treat these
10 as kind of important, they call them -- they use
11 the words extraordinary and significant areas, and
12 treat really the beachfront strip and Captain Sam's
13 Spit as one, right?

14 MR. LESEMAN: Object to the form.
15 Excuse me, Your Honor. I was objecting in terms of
16 the document, it would speak for itself on that
17 basis.

18 THE COURT: Restate your question.

19 MS. ARMSTRONG: Judge, I'm asking the
20 witness whether according to these terms, whether
21 the beachfront strip and Captain Sam's Spit are
22 treated together in this section.

23 THE COURT: You can answer that.

24 A. The (b) and (h) refer to the beach strip,
25 one refers to the beachfront strip and one refers

1 to Captain Sam's Spit in that narrow context, yes.

2 However, based upon my extensive involvement
3 in the drafting and negotiation of both the '94 and
4 2005 development agreement, Captain Sam's Spit was
5 never discussed in connection with the 10-mile
6 beachfront strip.

7 Q. And I think Ms. Jett asked you this. But
8 you don't recall any specific conversations that
9 you had with any town council member about the
10 property descriptions in paragraph 16.(b), do you?

11 A. The property description in paragraph?

12 Q. 16.(b), the beachfront strip.

13 A. 16.(b).

14 Q. Page 42.

15 A. Only to the extent that it's described in
16 paragraph 16.(b), and as it would have been
17 generally depicted in Exhibit 16.2 as I told you
18 when we talked.

19 My specific recollection is that the Town
20 was negotiating on behalf of KICA as a third-party
21 beneficiary to receive an undevelopable strip of
22 beachfront property.

23 And when I say undevelopable meant that they
24 couldn't build anything on it. In other words, we
25 had asked KRA to give KICA certain pieces of

1 property that were developable; parks, I think a
2 fire station, some other things.

3 So in that context too I guess I distinguish
4 between developable and undevelopable.

5 Q. And you just referenced Exhibit 16.2 to the
6 development agreement?

7 A. Whatever the exhibit was up there with the
8 crosshatched marks --

9 Q. Right.

10 A. -- that was signed by Lib Melvin. I mean, I
11 was present when the document was signed. And I
12 think I may have had the honor of turning every
13 page while Charlie Way and Lib Melvin, the then
14 mayor, signed the document.

15 Q. And you wouldn't disagree that the
16 development agreement, under paragraph 16.(g) also
17 calls for Captain Sam's Spit to be reflected on
18 Exhibit 16.2 of the development agreement, would
19 you?

20 A. I don't believe that's what it says in that
21 paragraph dealing with Sam's Spit.

22 Q. I want to talk a little bit about the 2005
23 action that Mr. Lesemann was asking you about.

24 A. I'm sorry, action?

25 Q. The action that the Town took in 2000 -- I'm

1 sorry, 2012. Mr. Lesemann was asking you about the
2 fifth amendment to the development agreement --

3 A. Right.

4 Q. -- in 2012. And I'm going to hand you what
5 has been admitted into evidence as Exhibit No. 8.

6 And you said that you received -- well,
7 actually, you received a draft of the proposed
8 fifth amendment from Mr. Trenholm Walker; is that
9 correct?

10 A. Yeah. I think my testimony was I couldn't
11 recall whether I had received a draft, or whether
12 the Town instructed me to prepare a draft. But
13 whatever the minutes would reflect I'm sure would
14 be accurate.

15 Q. Okay. And so what you are looking at right
16 now is Exhibit No. 8. Can you tell us what that
17 exhibit is?

18 A. No. 8?

19 Q. Correct.

20 A. It looks like a copy of the minutes from the
21 September 11, 2012 council meeting.

22 Q. Okay. And do you remember the fifth
23 amendment being submitted to the town council at
24 the time?

25 A. I mean, I don't have an independent

1 recollection. If that's referred to in these
2 minutes, I would defer to the minutes.

3 Q. Do you know whether there were any changes
4 to the draft fifth amendment that was initially
5 presented to town council?

6 A. Without going back and reviewing my files,
7 no, I don't know. I don't remember.

8 Q. Well, let's go ahead and walk through this a
9 little bit. Attached to this Exhibit No. 8 is what
10 is an unsigned version of what's called the fifth
11 amendment.

12 Can you flip through that to see where the
13 fifth amendment is attached to the end of Exhibit
14 8?

15 A. Yes, I see it.

16 Q. Okay. Now, let's turn to page three of that
17 exhibit for the draft development agreement. In
18 that very first paragraph do you see where it says
19 -- first sentence of the second full paragraph,
20 whereas it comes to the attention of the property
21 owner and the Town that the property description
22 and the deed mistakenly encompassed land -- do you
23 see that?

24 A. Yes.

25 Q. And you see the fourth paragraph where it

1 says, whereas the property owner and the Town
2 desire to confirm their intent under the first
3 agreement that they did not intend the beachfront
4 strip to include additional land?

5 A. I see that.

6 Q. And then see on page number four where it
7 says, the second full paragraph, whereas the
8 property owner and the Town desire to amend the
9 agreement to clarify and state their mutual intent.

10 A. I see that.

11 Q. And then right under that, now therefore the
12 Town and property owner confirm and agree that
13 their mutual intent was the western terminus
14 boundary of the beachfront strip to be the eastern
15 boundary, and extend the eastern boundary of parcel
16 13.

17 Do you remember any concerns being raised by
18 town council members regarding the language
19 purporting to -- for the Town to assume some sort
20 of intent or acceptance of the mutual mistake?

21 MR. LESEMANN: Your Honor, I would like
22 to object for the record. Again, we are reviewing
23 the 1994 intent of the parties.

24 And what the 2012 members of council
25 may have thought about that in terms of revising a

1 document is not relevant to what the 1994 intent
2 was.

3 The document, in terms of it being a
4 final record, the fifth amendment was entered.
5 Again, these discussions and these conversations
6 have nothing to do with what Mayor Melvin and
7 Mr. Rhoad and the others that were there in '94 had
8 as their intent when they entered the agreement.

9 THE COURT: So would you like me just
10 to take anything post-1994 and just throw it out?
11 What's your preference?

12 MR. LESEMANN: Well, Your Honor, I mean
13 I think that there could be an admission by a
14 party's opponent, but I think as we do this, when
15 they're looking at the wording of a 1994 -- I think
16 some conduct after '94 can be important, like, for
17 example, did KICA exercise any ownership or control
18 over this property.

19 THE COURT: I don't know that it is,
20 but.

21 MR. LESEMANN: Right. Thank you, Your
22 Honor.

23 THE COURT: Isn't that what we are
24 trying to figure out, what happened in 1994?

25 MR. LESEMANN: In part. And I'm not

1 trying to hold anything out. What I'm trying to
2 say is that the 2012 town council members weren't
3 there in 1994. So them scrivenering over, well, we
4 want it to say this, we want it to say that in
5 terms of a fifth amendment to a subsequent
6 development agreement.

7 This wasn't an amendment to the 1994
8 development agreement, it was an amendment to a
9 subsequent one. I just think that the nuts and
10 bolts of it, yes, there was a fifth amendment and
11 it's in evidence. But I think that it goes far
12 afield, it's irrelevant because it doesn't speak to
13 the intent of the parties in '94.

14 MS. ARMSTRONG: Your Honor, if I may.
15 Mr. Lesemann sort of opened the door on course of
16 conduct. Looking at how the parties acted after
17 the agreement as evidence.

18 I mean he raises the tax issue, whether
19 they use it, all of these things go to the course
20 of conduct of the parties and how they treated --
21 how they treated the agreement and how they treated
22 the intent of the parties.

23 And so what -- you know, it's pretty
24 evident from our perspective that the whole purpose
25 of this fifth agreement [sic], all it's talking

1 about is the beachfront strip, and the dedication
2 that was authorized under the 1994 agreement.

3 And here's the developer asking the
4 Town to agree to a certain sort of intent. And the
5 evidence, what I'm going to show, is that the Town
6 said, wait, we can't do this.

7 And we are not going to agree that
8 there is a mutual mistake. And we are not going to
9 agree that the Town's intent was what you think it
10 was.

11 So, I mean, that's what this evidence
12 is going to.

13 THE COURT: All right.

14 MR. LESEMAN: Your Honor, I can
15 withdraw the objection. Thank you.

16 THE COURT: I'll give you some leeway
17 on this. Go ahead.

18 THE WITNESS: Your Honor, I need the
19 question again.

20 THE COURT: Yeah.

21 MS. ARMSTRONG: I think that he
22 answered the question and then there was an
23 objection raised.

24 BY MS. ARMSTRONG:

25 Q. Because I sort of walked through with you --

1 well, actually, I think there is a question.

2 A. I don't think I ever got a chance to answer.

3 Q. You're right, you didn't. The question was
4 do you recall any questions being raised by any of
5 town council members about language that directly
6 said anything about what their intent was, or they
7 acknowledged any sort of a mutual mistake?

8 A. This is my recollection, and I have to give
9 you a little bit of background. There was
10 discussions between various members of town council
11 and KICA board members, who they were, I don't
12 know.

13 What I was told by my client is that KICA
14 board members knew a mistake had been made in the
15 deed, they had hired an attorney in Atlanta.

16 The attorney in Atlanta said that since the
17 conveyance had been made, the covenants required
18 that everybody who is a property owner vote on it.
19 And they came to the Town asking the Town to help
20 clarify.

21 And it is my understanding from various
22 comments, I can't tell you which council member, I
23 can't tell you whether it was the mayor or some of
24 the council members, that they would like for us to
25 consider amending the development agreement to

1 clarify the intent.

2 Now, whether there were changes made from
3 this version that is attached to Exhibit 8, and a
4 final version was adopted, I do not remember
5 without -- I wouldn't be able to answer without
6 comparing the final with this as to whether this is
7 the final or whether this is one of the changes.

8 And I do also remember there being some
9 concern expressed by some of the council members at
10 the time about getting involved in this. And as I
11 recall, ultimately council voted three to two to
12 pass the fifth amendment.

13 Now, whether or not this is the final fifth
14 amendment or not, I don't know. But I hope that
15 answers your questions. I do remember some
16 discussion from some of the council members. I
17 don't want to say specifically who, I think I
18 remember who, about whether or not we should get
19 involved in this.

20 Q. Well, let me -- I think that that was not
21 exactly answering my question and giving a lot more
22 sort of your take on things is what it sounded
23 like.

24 A. Well, I thought you wanted my take on
25 things.

1 Q. No. I guess my very, very specific question
2 was, were there any council members when there was
3 a first reading of this proposed development -- of
4 the fifth amendment to the 2005 development
5 agreement being discussed, were there any council
6 members that expressed concern that the Town maybe
7 should not be signing something that agreed that it
8 made a mutual mistake in --

9 A. Okay. I'll try to answer your question
10 specifically. I don't remember whether that was a
11 discussion made by a council member or council
12 members in executive session.

13 It could have been made in public session.
14 And the best place to answer that question with
15 accuracy would be the minutes. I have no
16 independent recollection of that discussion taking
17 place in open session.

18 Q. I'm going --

19 A. And only a general memory of that taking
20 place in executive session.

21 Q. Was Mayor Orban the mayor at the time the
22 development agreement --

23 A. Yes.

24 Q. I'm going to hand you what has been marked
25 as Exhibit No. 9. Intervenors' No. 9.

1 Would you flip to the back page of that
2 Exhibit No. 9 and tell me if this looks to be the
3 executed copy of the fifth amendment?

4 A. It appears to be an executed but unrecorded
5 copy of the fifth amendment to the development
6 agreement.

7 Q. Okay. Let's -- we were looking at the draft
8 that was attached to the September 11, 2012 minutes
9 as part of Exhibit No. 8, and I had you start on
10 page number three.

11 Let's look at page -- start on page number
12 three and compare that side by side with Exhibit
13 No. 9.

14 A. Starting at the top?

15 Q. Yeah. I'm going to tell you where to -- I'm
16 going to direct you where to go. The first
17 sentence of the second paragraph.

18 We read that, says the property owner and
19 the Town, and this executed agreement version, then
20 the Town is deleted there; isn't that correct?

21 A. I'm sorry, which paragraph?

22 Q. Second paragraph. The executed agreement
23 says, whereas it has come to the attention of the
24 property owner that the property description and
25 the deed encompass land beyond the intended western

1 terminus.

2 The draft language has the Town in there and
3 the Town has been deleted, correct?

4 A. The Town was in what's been attached to 8,
5 it's not in what has been attached to 9? Is that
6 what you are asking me?

7 Q. Yes.

8 A. It appears to be. And pointing that out to
9 me, my recollection is since the Town obviously
10 didn't sign the deed, that that language should not
11 be included in the fifth amendment to the
12 development agreement.

13 Now, who said that or how they came about
14 that change, I don't know. I don't recall
15 specifically.

16 Q. Let's look at some things that talk about
17 the agreement rather than the actual deed.

18 If you go down to the fourth paragraph. It
19 says, whereas -- on the executed version -- whereas
20 the property owner desires to reconfirm the intent
21 under the first agreement that the beachfront strip
22 does not include additional land.

23 And when you compare that to the draft
24 version that was before the town council, it
25 included the Town as wanting to desire an intent

1 that the beachfront strip didn't include the
2 additional lands; is that correct?

3 A. I see that. Obviously that was an edit that
4 was made from what was presented earlier to the
5 Town.

6 Q. Okay. Let's flip over to page four on both
7 of those documents, please.

8 Now, on the Exhibit No. 8, it would be the
9 second whereas. It says, whereas the property
10 owner and the Town desire to amend the agreement to
11 clarify and state their mutual intent with respect
12 to the beachfront strip.

13 In the executed version we are on page four,
14 and it's the same paragraph, and I think that
15 shifted a little bit, but it's the third whereas.
16 It says, the property owner desires to amend the
17 agreement to clarify and state their mutual intent
18 with respect to the beachfront strip.

19 So again the Town has intentionally removed
20 itself from a mutual intent with respect to the
21 beachfront strip, correct?

22 A. That change was apparently made to the draft
23 that was presented, yes.

24 Q. Okay. Then looking at the very next
25 sentence, the now therefore starts in the draft,

1 Exhibit 8, the Town and property owner confirm and
2 agree that their mutual intent was the western
3 terminus boundary of the beachfront strip to be the
4 eastern boundary, and extended eastern boundary of
5 parcel 13.

6 And then the executed version says, now,
7 therefore, the Town and the property owner confirm
8 and agree that the property owner's intent was the
9 western terminus boundary of the beachfront strip.

10 So again, the Town removed itself from any
11 sort of mutual intent or mutual mistake in what was
12 executed, finally executed by the town council of
13 Kiawah Island, correct?

14 A. I mean, that is what paragraph two says,
15 yes.

16 Q. Okay. Mr. Rhoad, have you ever been
17 sanctioned for attempting to mislead a client?

18 A. By the Supreme Court?

19 Q. By the Supreme Court of South Carolina.

20 A. I have in 2003. I was sanctioned by the
21 Supreme Court for two reasons.

22 One of them was for asking my secretary at
23 the time not to -- or to inform my client that I
24 was away working on a big case, when in fact I was
25 receiving medical treatment. And I was sanctioned

1 for that.

2 MS. ARMSTRONG: I don't have any other
3 questions.

4 MR. LESEMANN: Your Honor, just in
5 brief follow-up.

6 REDIRECT EXAMINATION

7 BY MR. LESEMANN:

8 Q. Mr. Rhoad, did any of the deliberations,
9 permutations and scrivings relating to the fifth
10 amendment to the 2005 development agreement, did
11 anything change what the Town's intent was with
12 regard to the beachfront strip?

13 A. Not as I have testified here today under
14 oath.

15 Q. As being an exhibit initialed by both the
16 Town and KRA, and I mean Exhibit 16.2, which
17 reflected an ending point of the beachfront strip,
18 does this document reflect the intent of the Town
19 of Kiawah as of September 1994 when it entered into
20 the binding development agreement?

21 A. I'm sorry, would you repeat the question?

22 Q. Does the document, which is Exhibit 16.2 to
23 the development agreement, reflect the intent of
24 the Town of Kiawah Island with regard to
25 terminating point of the beachfront strip?

1 A. Based upon what I know and my opinion, the
2 answer to that question is yes.

3 Q. Okay. And does it stop at the eastern
4 boundary of parcel 13?

5 A. Yes.

6 Q. Okay. And you were there in 1994, correct?

7 A. '94, 2005, and most recently when we amended
8 it yet again last Tuesday.

9 Q. Okay. So the members of council in 2012 may
10 or may not have been around in 1994?

11 A. The members of --

12 Q. Yeah, the 2012 council.

13 A. There is no question, none of them from 2012
14 were there in 1994.

15 Q. Okay. So their discussions about what they
16 -- they weren't actually there at the time of 1994
17 when the development agreement was negotiated and
18 signed?

19 A. Correct.

20 Q. And you were there?

21 A. None of the mayor and council were there in
22 1994 and I was. And I think that's why they were
23 interested in what I remembered and what I had to
24 say.

25 Q. Okay. Mr. Rhoad, at the bottom of the

1 document that was shown to you as the final version
2 of the beachfront strip, let me know if I read this
3 out correctly.

4 Whereas property owner and Town desire to
5 confirm their intent under the agreement, as well
6 as their intent and belief at the time the
7 agreement was entered, that the land comprising
8 parcels 12A and 12B as depicted on Exhibit 1.3 to
9 the agreement, including the additional land, was
10 owned by the property owner and subject to the
11 agreement by virtue of such ownership.

12 Did I read that correctly?

13 A. Yes, sir.

14 Q. Does this indicate a belief that the
15 additional land was owned by the property owner and
16 subject to the agreement?

17 A. Is this the --

18 Q. This is the agreement, the agreement being
19 2005.

20 A. Is this the final amendment, final fifth
21 amendment to the agreement?

22 Q. It is.

23 A. If that's the one that was signed and
24 recorded, then the answer is, yes, sir.

25 Q. Okay. And that the land comprising parcels

1 12A and 12B was owned by the property owner,
2 correct, which is KRA?

3 A. I mean --

4 Q. I'm reading it right?

5 A. Yeah. I mean that's clear from looking at
6 1994.

7 Q. Right. And the property owner meaning --

8 A. So, yes.

9 Q. Sorry, thank you. Meaning owned by the
10 property owner and not owned by KICA, correct?

11 A. As it relates to 12A and 12B?

12 Q. Yes.

13 A. Yes, sir.

14 Q. Okay. And so I'll show you -- it has been
15 admitted through the town clerk and through
16 stipulation whereby we were able to not have to
17 call the town clerk.

18 But so exhibit -- the exhibits to the
19 development agreement, again do they show parcel
20 12A, Beachwalker Park, as an 8.7-acre parcel?

21 A. Acreage above mean high water mark, yes,
22 sir.

23 Q. Okay. And also parcel 13, Beachwalker Ocean
24 Parcel, shown as a 19.5-acre parcel?

25 A. Yes, sir.

1 Q. Was there a map of additional lands also
2 attached, or a map -- excuse me -- of the real
3 property owned by the developer attached to the
4 2005 development agreement as Exhibit 4.1?

5 A. Yes, there was.

6 Q. And does it indicate in green the
7 undeveloped land owned by the property owner?

8 A. Yes, sir.

9 Q. Okay. And meaning these are areas in which
10 under the 2005 agreement the developer is obtaining
11 development rights?

12 A. If it's a numbered parcel, and then you can
13 take this exhibit and look to the applicable table
14 and it will tell you what development rights apply
15 to that parcel.

16 So, yes. I mean I can't tell you what the
17 development rights are by looking at that exhibit.
18 But if you look at the table, you can know what
19 specific development rights are assigned to it.

20 Q. And so the green starts at this eastern
21 boundary of parcel 13, does it not?

22 A. According to Exhibit 4.1, yes.

23 Q. And it continues on through parcel 12A and
24 parcel 12B, including Captain Sam's Spit?

25 A. Correct.

1 Q. And do you see any carveout here indicating
2 that any 4.62 acres located in this general
3 direction were anything other than undeveloped
4 lands owned by the property owner subject to
5 development in accordance with the 2005 development
6 agreement?

7 A. Not from Exhibit 4.1, no, sir.

8 Q. Final question, Mr. Rhoad. The property
9 bound in red, was it the Town's intent that that be
10 provided as part of the beachfront strip under the
11 1994 development agreement?

12 A. Based upon what I have testified to earlier
13 today, no, sir.

14 MR. LESEMAN: No further questions.

15 MS. ARMSTRONG: I have a few quick
16 follow-ups.

17 THE COURT: Go ahead.

18 RECROSS EXAMINATION

19 BY MS. ARMSTRONG:

20 Q. Mr. Rhoad, could you tell us if Exhibit No.
21 2 is up on the witness stand, it was at some point.
22 It's the agreement for conveyance which was Exhibit
23 16.7 to the 1994 development agreement.

24 It's sort of a big --

25 A. I don't believe you asked me any questions

1 about it.

2 Q. I didn't. But there were other witnesses
3 discussing that exhibit. So I thought perhaps it
4 would be up there.

5 A. I don't think so. I see No. 5.

6 Q. Here it is. Thank you.

7 If you could turn with me to page nine on
8 Exhibit No. 2.

9 A. Are you talking about Bear Island?

10 Q. Page nine.

11 A. Oh, page nine, I'm sorry, parcel 8.

12 Q. Parcel 8, approximately 10 miles of
13 beachfront property.

14 A. Okay. I'm sorry, may I ask what this is?

15 Q. If you look on the front of this document,
16 it's Exhibit 16.7 to the 1994 development
17 agreement.

18 A. Okay.

19 Q. Does that look familiar to you?

20 A. I mean, I'll take your word.

21 Q. Are you aware that there was an agreement
22 for conveyance --

23 A. Oh, yeah.

24 Q. -- that was attached --

25 A. I think this is also an exhibit to the 2005,

1 but I'm not sure of that.

2 Q. I'm not sure of that either, Mr. Rhoad. But
3 I know it was to the 1994 --

4 A. I know there was 16.7, and I'll accept your
5 representation that it was to the 1994 development
6 agreement.

7 Q. And looking at that, I was going to put it
8 up on the screen for convenience, but we can just
9 read and look at it together.

10 A. Sure.

11 Q. Were you here for Mr. Permar's testimony
12 when we were discussing the employee facility
13 tract?

14 A. Yes.

15 Q. Are you familiar with where that tract is
16 located?

17 A. Generally.

18 Q. Okay. And in this description, parcel 8,
19 approximately 10 miles of beachfront property
20 pursuant to paragraph 16.(b) of the development
21 agreement.

22 Does that description -- and you can just
23 take a moment to look at it -- does it --

24 A. I'm sorry, you started somewhere other than
25 from the beginning. Let me get to where you are.

1 Q. I'm on page nine.

2 A. All right, I'm there.

3 Q. Okay. And parcel 8 at the top.

4 A. I'm there.

5 Q. And it says, approximately 10 miles of
6 beachfront property pursuant to paragraph 16.(b) of
7 the development agreement.

8 A. Okay.

9 Q. And there's a description under that,
10 correct? A property description?

11 A. Marked by concrete monuments -- yes.

12 Q. And does that description contain -- use the
13 employee facility tract as a boundary for this
14 property description?

15 A. You know, I got to be honest with you. It
16 has been a long time since I have done any real
17 estate drafting.

18 I mean, I see it mentions employee facility
19 tract. Whether it uses it as a boundary or not, I
20 mean, I can't answer that by just glancing at this.
21 I mean, I don't know.

22 Q. I guess my question is just, is the employee
23 facility tract a plat that is referenced in the
24 description for the beachfront strip and if you --
25 I'll take as long as you need to read this.

1 A. Well, I mean, okay. It seems to say, known
2 generally as the employee facility tract, and as
3 shown on plat by Williams and Associates dated
4 March 20th, and recorded in Plat Book AS-85.

5 So I mean it would appear that the employee
6 facility tract, in quotation marks, would appear on
7 that recorded plat.

8 Q. Okay. And in the very beginning of the
9 description starting with the third line.

10 The westernmost boundary, of which is being
11 an imaginary line, having a northern terminus of
12 point marked by a concrete monument, having State
13 claimed coordinates which are identified, located
14 at the southwesternmost corner of a 2.06-acre tract
15 of land located at the terminus of Beachwalker Park
16 on Kiawah Island known generally as the employee
17 facility tract.

18 So that was the language that was in the
19 agreement of conveyance. And you knew where the --
20 approximately where the employee facility tract
21 was, correct?

22 A. Back in 1994, yes. And that appears to be
23 the language that was used in Exhibit 16.7, yes.

24 Q. Okay. And in the very bottom right-hand
25 corner, is that Mayor Melvin's signature? Did she

1 sign off on that language on that page?

2 A. Charlie Way and Mary Melvin.

3 Q. Okay. And then if you would flip over with
4 me, in the same exhibit there are a number of
5 schedules. And I am -- we are looking for schedule
6 P8?

7 A. I'm sorry, what?

8 Q. It's schedule P, as in Paul, 8, as in a
9 figure 8. At the bottom of the page it says,
10 schedule P8 page one.

11 THE COURT: Which exhibit number are we
12 referring to?

13 MS. ARMSTRONG: We are still in Exhibit
14 No. 2.

15 A. P-8, page one?

16 BY MS. ARMSTRONG:

17 Q. P-8, page one, correct.

18 A. Okay. I'm there.

19 Q. And what is this document that's schedule
20 P-8?

21 A. It appears to be a quit claim deed for the
22 10-mile beachfront property.

23 Q. And would this quit claim deed, would the
24 draft of the quit claim deed that was attached to
25 the agreement of conveyance -- do you recall this?

1 A. I mean I recall this exhibit, yeah. Whether
2 I recall the specific deed, I mean, I knew there
3 were a bunch of things they were conveying.

4 So, I mean, I'm presuming back in '94 I knew
5 it was one of those and it was presumed it would
6 have been in one of those, so, yeah.

7 Q. Okay. So this was also part of the 1994
8 development agreement, correct?

9 A. It was an exhibit to the 1994, so, yes, part
10 of the development agreement.

11 Q. Okay. And looking at the language, the
12 description of the property, if you could just
13 confirm to me -- flip back to page nine if you need
14 to -- whether that description of the westernmost
15 boundary of the beachfront strip being --

16 A. I'm sorry.

17 Q. -- being the employee facility tract, if you
18 could just confirm that that language is the same,
19 would you, please?

20 A. I mean, I see southwesternmost and then
21 westernmost in the other one. I mean, without
22 comparing the two I don't know whether it's exactly
23 the same.

24 I mean, it refers to the employee facility
25 tract as shown on the plat. I presume that's the

1 same plat recording information. So to that extent
2 it seems to be the same.

3 Q. Okay. And this draft quit claim deed was
4 also signed off on by Mayor Melvin; is that
5 correct?

6 A. Yes. The initials on every page are from
7 Charlie Way and Mayor Lib Melvin.

8 Q. Okay. And there isn't anything in this
9 property description referencing Exhibit 16.2 to
10 the development agreement, is there?

11 A. In the quit claim deed?

12 Q. Correct.

13 A. I mean, just looking at it right here, I
14 don't see anything that references Exhibit 16.2.

15 MS. ARMSTRONG: I don't have any other
16 questions.

17 A. Well --

18 BY MS. ARMSTRONG:

19 Q. I'm sorry, I didn't want you to be --

20 A. No. No. I was going to say -- but I mean
21 this is an exhibit. And typically --

22 Q. And the draft quit claim deed is three pages
23 long.

24 A. Right.

25 Q. And I want you to assure yourself that 16.2

1 is not referenced in the quit claim deed.

2 A. I do not see Exhibit 16.2 referenced in the
3 quit claim deed form that appears on page P-8, page
4 one of your Exhibit 2, nor would I expect it to be
5 found in a legal description of property.

6 Q. Okay. All right, thank you Mr. Rhoad.

7 THE COURT: All right. Anything
8 further?

9 MR. LESEMANN: No, Your Honor.

10 THE COURT: Very good.

11 THE WITNESS: May I be excused?

12 THE COURT: Just one second. All
13 right. Any need further for Mr. Rhoad?

14 MR. LESEMANN: No, Your Honor.

15 MS. JETT: No, Your Honor.

16 THE COURT: All right. Mr. Rhoad, you
17 may be excused. Thank you, sir.

18 Very good. We have gone a little past
19 1:00, it's 1:15. Let's start back at 2:30. That
20 will give us time for lunch.

21 We have only done two and you had six.
22 So did we dispense with one of your witnesses as
23 well?

24 MR. LESEMANN: That was --

25 MS. ARMSTRONG: It was one of my

1 witnesses.

2 THE COURT: Okay.

3 MR. LESEMANN: But I did expedite
4 things through admission of those documents.

5 THE COURT: All right. Very good.

6 I'm concerned about the time for
7 y'all's case. I'll tell you that I -- when we were
8 on the break I had a case -- I know we want to get
9 through this thing.

10 Tomorrow I'm fairly busy, but Wednesday
11 and Thursday have freed themselves up. I don't
12 know if it works for y'all's calendar, but those
13 are days. I'm willing to go as long as y'all need
14 to go today to get this done, which would be my
15 preference.

16 But I'm just telling you that I don't
17 want y'all to feel rushed to get through today, so.

18 MS. ARMSTRONG: I cannot imagine that
19 we are going to finish today because we have four
20 witnesses. And you still have four more to go
21 through.

22 We will make every effort. You know,
23 I'm fine, Wednesday is wide open for me.

24 THE COURT: Y'all check your calendars.
25 Wednesday just freed up at the break today at noon.

1 And then Thursday I think already is free, that
2 just happened.

3 So y'all talk about that on the break.
4 Let's come back at 2:30. Thank you.

5 (A recess was taken.)

6 THE COURT: Mr. Lesemann.

7 MR. LESEMANN: Thank you, Your Honor.
8 One housekeeping. Were you hoping to hear back
9 from us about the Wednesday versus Thursday in
10 terms of continuation?

11 THE COURT: Whatever works best for
12 y'all.

13 MR. LESEMANN: Your Honor, it appears
14 that Wednesday was the request of the parties
15 between those two days.

16 THE COURT: All right, that will be
17 great.

18 MR. LESEMANN: And we will see where we
19 get, of course, but I thought I would mention that
20 while it was open topic.

21 THE COURT: Sure.

22 MR. LESEMANN: Your Honor, we would
23 call Pat McKinney, if you are ready for us to call
24 our next witness.

25 THE COURT: Sure. Come on up,

1 Mr. McKinney.

2 PATRICK McKINNEY,
3 having been first duly sworn, was examined and
4 testified as follows:

5 THE COURT: Thank you, sir. Please
6 have a seat. If you'd state your full name and address
7 for the record, I'd appreciate that.

8 THE WITNESS: Patrick W. McKinney. 44
9 Wentworth Street, Charleston.

10 DIRECT EXAMINATION

11 BY MR. LESEMAN:

12 Q. Mr. McKinney, could you describe for the
13 Court your background as it relates to Kiawah
14 Island, KRA, Kiawah Island Real Estate?

15 A. Certainly. I graduated from college in 1971
16 and went into the real estate business at Hilton
17 Head. And in 1975, as part of the Sea Pines team
18 that was hired by the Kuwait Investment Company.

19 I came to Kiawah Island and I headed up
20 sales there from 1975 through 1979. I then left
21 Kiawah, went to Wild Dunes and was there for five
22 years.

23 And then in 1988, along with some other
24 Charleston folks, we put together a partnership and
25 purchased Kiawah from the Kuwait Investment

1 Company. From 1998 until 2006 I was president of
2 Kiawah Island Real Estate, and remained a partner
3 in the development company until its sale this
4 year.

5 Q. Did you serve as the broker in charge of
6 Kiawah Island Real Estate?

7 A. Yes, I did.

8 Q. During that same timeframe that you
9 mentioned?

10 A. Yes.

11 Q. So during that timeframe, you potentially
12 saw hundreds of transactions involving real estate
13 on Kiawah Island?

14 A. Yes, several hundred a year.

15 Q. So, Mr. McKinney, you were there in 1994
16 when the development agreement was negotiated,
17 prepared and executed?

18 A. Yes, I was.

19 Q. Okay. Describe your role and involvement.
20 You may have had a role different, for example,
21 from Mr. Long or from other partners.

22 Could you describe for the Court how you
23 interacted with the partners, and how -- what sort
24 of role you would have played in the 1994
25 development agreement?

1 A. I would have been part of some of the
2 discussions as to strategy. I did not take part as
3 part of the primary team negotiating that, which as
4 I recall was primarily Mr. Long, Mr. Darby,
5 Mr. Permar and Mr. Walker, another attorney.

6 But as a partner, would have participated in
7 our weekly meetings and discussing various aspects
8 of the development agreement. Certainly because it
9 has a dramatic impact upon real estate sales as far
10 as the future of the island, I was very keenly
11 interested in it.

12 Q. Okay. One organization I didn't ask you
13 about yet, Mr. McKinney, is KICA. Did you have a
14 capacity with KICA, the community association, as
15 of 1994?

16 A. I did. I was on the board of directors as a
17 company-appointed director.

18 Q. Did you have a vote like other board of
19 directors had a vote?

20 A. Yes.

21 Q. And at that time prior to where there were
22 later transitions in voting formulas and things
23 like that, was it essentially one man one vote on
24 the board at that time in 1994?

25 A. Yes. As I recall there were seven

1 individuals on the board, and each vote counted as
2 one vote out of seven.

3 Q. Okay. So to your knowledge and
4 understanding you were a member of the board of
5 directors of a South Carolina nonprofit
6 corporation?

7 A. Yes.

8 Q. That being KICA?

9 A. Correct.

10 Q. And there was no asterisk or limitation in
11 your mind relating to your power and involvement as
12 a board of director at that time, meaning 1994 when
13 the development agreement was signed?

14 A. That is correct.

15 Q. Mr. McKinney, you have been present in the
16 court while we have talked about a number of items,
17 but including the beachfront strip. And what I
18 think that -- what I may do is ask you whether you
19 recognize a document that I have put on the screen
20 here, a letter dated September 14, 1994.

21 A. Yes.

22 Q. Okay. There we go. Is that better? Can
23 you see it?

24 A. I can.

25 Q. Okay.

1 A. I can barely.

2 Q. Okay. And I'll -- Mr. McKinney, do you
3 recall whether you wrote a letter to Mr. Todd Brown
4 at Nations Bank on or about September 19, 1994?

5 A. Yes, I do.

6 Q. Okay. And is that letter written on the
7 letterhead of Kiawah Island Real Estate?

8 A. Yes.

9 Q. And is this a document that you prepared in
10 connection with your involvement and duties with
11 what I'll call KIRE, Kiawah Island Real Estate?

12 A. Yes.

13 Q. Are these sorts of records kept by KIRE of
14 its business activities?

15 A. Yes.

16 MR. LESEMAN: Your Honor, move for
17 admission of this document as Plaintiffs' Exhibit
18 3.

19 THE COURT: All right. Any objection?

20 MS. JETT: I have no objection, Your
21 Honor.

22 MS. ARMSTRONG: No objection.

23 THE COURT: Without objection. Very
24 well. Good. Thank you.

25 (Plaintiffs' Exhibit No. 3 was marked

1 for identification.)

2 BY MR. LESEMANN:

3 Q. Mr. McKinney, do you recall some
4 interactions with Bank of America prior to the
5 entry of the development agreement relating to some
6 of the intended transfers of common property to
7 KICA?

8 A. I do remember some interactions with them,
9 yes.

10 Q. Okay. So why would Nations Bank have been
11 concerned, involved or someone you would have
12 needed to confer with about that?

13 A. Nations Bank was our primary lender. And in
14 the parlance of our development company, they
15 basically had a lien on everything anywhere on the
16 island that wasn't owned by somebody else.

17 And that would have included the oceanfront
18 lands that were seaward of land that had been
19 deeded to others. So they would have had to
20 acquiesce to any change in ownership of that.

21 Q. And so I'll back up just a moment so that we
22 can go through the letter.

23 Are you able to see the text there in the
24 first paragraph?

25 A. Yes.

1 Q. Were you indicating to Mr. Brown that you
2 have been asked to give your professional opinion
3 as to the effect on both future development and
4 sales of three specific items that have been
5 negotiated in the development agreement that you
6 were about to sign?

7 A. Yes.

8 Q. And is item number one relating to the
9 beachfront strip?

10 A. Yes.

11 Q. And what do you call the beachfront strip in
12 your letter to Mr. Brown?

13 A. I call it the oceanfront dune fields.

14 Q. Okay. And you indicated it's the area
15 between the seaward property lines of oceanfront
16 lots and it goes to the high water mark?

17 A. That's correct.

18 Q. Do you believe that was important for you to
19 be truthful in your communications with Mr. Brown
20 at Nations Bank relating to potential transfers of
21 property that may have been subject to a mortgage
22 with Nations Bank?

23 A. Yes. Absolutely.

24 Q. Okay. So when you used the phrase
25 oceanfront dune fields, is that what you understood

1 the beachfront strip to involve?

2 A. Yes.

3 Q. Was that your understanding when you wrote
4 this letter on behalf of KIRE?

5 A. Yes.

6 Q. Was that your understanding as a managing
7 partner of KRA?

8 A. Yes.

9 Q. Was that your understanding as a member of
10 the board of directors of KICA?

11 A. Yes.

12 Q. Could you explain to the Court, later on in
13 the letter you continue on to say -- do you see the
14 last paragraph there, in summary?

15 A. I see no negative effects to Kiawah on real
16 sale or Kiawah Resort Associates of the action
17 contemplated with regard to these areas. In fact,
18 I see many positive benefits.

19 Q. There has been some testimony on this point
20 perhaps already, but as an individual with decades
21 of experience in the real estate business, what I
22 was hoping to do, Mr. McKinney, is to ask you about
23 what would be the benefit to the developer and to
24 KIRE about conveying these dune fields, these
25 oceanfront dune fields in front of the oceanfront

1 lots?

2 What would be the advantage to do that from
3 the standpoint that you were speaking of in your
4 letter?

5 A. Well, one of the main reasons, and I heard
6 it alluded to in testimony earlier today, as I
7 indicated, I had previous experience on the Isle of
8 Palms at Wild Dunes.

9 And there was a fairly significant case
10 there back in the 1980s that involved accreted land
11 in front of platted oceanfront lots that was
12 ultimately allowed by the State Supreme Court to be
13 sold to other owners.

14 And while I did not think that was a
15 possibility at Kiawah, based on the way the Island
16 was set up, it was a question that came up from
17 time to time.

18 And I felt that it would be beneficial to us
19 as both the developer to show our good stewardship
20 of land as well as eliminate -- in sales you try to
21 eliminate as many objections as possible. And
22 dealing with your most valuable property, which is
23 the oceanfront, wanted to eliminate as many
24 obstacles as possible.

25 So therein lies where some of the

1 discussions began about how do we answer that
2 question when it would come up, not every day, but
3 it would come up from time to time as to how that
4 land would be protected, and what would prevent
5 someone in the future, not us, but a subsequent
6 owner or a subsequent municipality, or some other
7 entity being able to go seaward of oceanfront land
8 that had already been sold and build something that
9 would in fact detract from its value.

10 Q. So, for example, if you are speaking to
11 someone who might be considering buying an
12 oceanfront lot on Eugenia Avenue -- is that Eugenia
13 Avenue that my dot is running along there?

14 A. Yes, it is.

15 Q. If you were speaking to someone who was
16 interested in buying an oceanfront lot in that
17 area, was this an essence how you could help that
18 person have assurance that, yes, this is oceanfront
19 lot now, and it will be an oceanfront lot in 50
20 years because we won't build a Beverly Avenue in
21 front of Eugenia Avenue, for example, and put you
22 as second row where you thought you were buying the
23 first row, for lack of a better explanation?

24 A. That is correct. Again, in the way Kiawah
25 in the original master plan that was begun in 1974,

1 we took great pains to protect the oceanfront.

2 And one of the things we did was not to deed
3 property all the way down to the legal deedable
4 point on the beach, and maintain that dune field.
5 And it was always intended that dune field would be
6 protected property.

7 And how we ended up being able to -- as I
8 said I guess last week in a deposition -- put the
9 belt and suspenders on it to answer any and all
10 questions and be protected in perpetuity.

11 Q. Yes, sir. And you were present in the Court
12 when Exhibit 16.2 to the development agreement was
13 entered into evidence I believe?

14 A. Yes, I was.

15 Q. And do you recall and can you affirm, in
16 your status as a managing partner of KRA that KRA
17 did intend that the beachfront strip would end at
18 the point indicated on the map where the hatched
19 area ends at the eastern boundary of parcel 13?

20 A. Yeah. Or as I refer to it, the western
21 boundary of the Duneside Villa.

22 Q. Is that here (indicating)?

23 A. Yes.

24 Q. Okay. I'd like to go to another exhibit on
25 your point. You led me to my next question.

1 Are you able to locate -- I'm going to hand
2 you a pointer, Mr. McKinney. I know you are
3 shooting from an angle. But can you, with the
4 pointer, identify where the Duneside Villas are
5 located?

6 A. These are the Beach Townhouses (indicating).
7 Duneside would start about here (indicating) and go
8 up in a general V-shape, and the small V would end
9 about right there (indicating).

10 Q. Okay. And so when you speak about the
11 intent being to convey the dune fields in front of
12 the oceanfront lots, where would that conveyance
13 stop in order to achieve that purpose?

14 A. It would stop right there (indicating).

15 Q. Okay. Below the Duneside Villas?

16 A. Correct.

17 Q. At the western boundary of Duneside Villas
18 Horizontal Property Regime, correct?

19 A. Yes.

20 Q. And at the eastern boundary of parcel 13?

21 A. That's correct.

22 Q. All right. So were parcels 12 and 13
23 themselves land owned by the developer in 1994 that
24 were considered capital due undeveloped lands?

25 A. Yes.

1 Q. Meaning that -- or did that mean that under
2 the 1994 agreement, the development rights were
3 being given in those undeveloped lands?

4 A. Yes.

5 Q. And these lands outlined in green in the
6 exhibit marked as Exhibit 29, do those correspond
7 to your knowledge as to parcels 12 and 13 under the
8 1994 development agreement?

9 A. Yes.

10 Q. And those were owned by the developer?

11 A. Yes.

12 Q. Did you -- and again this goes back to the
13 deposition, but we talked about the dune fields and
14 conveying them in front of properties that were
15 conveyed to third parties versus conveying the dune
16 fields in front of the property that was still
17 under ownership of the developer.

18 A. Correct.

19 Q. Do you understand the distinction that I
20 made?

21 A. I do.

22 Q. Okay. Could you explain to the Court, what
23 was KRA's intent with regard to its own property in
24 terms of any strip or any dune field?

25 A. Well, with regard to our own property, we

1 certainly did not want to deed away anything until
2 we had established our development opportunity,
3 whether it was to sell it to a third party for
4 future development, or to develop it for our own
5 account.

6 That land would be counted in for density
7 purposes and for development rights, and so it was
8 very important that we not do anything that would
9 encumber its value.

10 Q. And so those density rights, for example,
11 being the ability to build 12 residential units per
12 acre based on the approximate acreage of the
13 parcels?

14 A. That's correct.

15 Q. As we reviewed, it was in Exhibit 13.2 of
16 the 1994 agreement?

17 A. Yes.

18 Q. Would the land shown in red, Mr. McKinney,
19 would this be an example of an area that would be
20 beyond KICA's intend -- excuse me -- beyond KRA's
21 intent to convey as part of the beachfront strip
22 since it was part of developable lands owned by the
23 developer?

24 A. Part of the undevelopable lands owned by the
25 developer?

1 Q. A part of the undeveloped lands owned by the
2 developer?

3 A. That's correct.

4 Q. And again did KRA negotiate hard, for lack
5 of a better word, in order to obtain the
6 development rights that it obtained on parcels 12
7 and 13, and the other parcels around the island?

8 A. Yes, we did.

9 Q. And are these parcels particularly valuable
10 based on their location?

11 A. Yes.

12 Q. And more valuable on a per-acre basis than
13 some of the parcels that may have been in other
14 portions of the island?

15 A. Primarily because of their oceanfront
16 orientation, both beachfront as well as property
17 that's near the beach, which also carries a high
18 value.

19 Q. When the acquisition occurred in 1998, were
20 you required to sign a personal guarantee of any
21 kind?

22 A. No.

23 Q. Do you recall?

24 A. I was not.

25 Q. When the acquisition occurred, were the

1 lands comprising parcels 12 and 13, were those
2 within the lands purchased from the Kuwaitis as
3 part of the 1988 acquisition?

4 A. Yes, they were.

5 Q. Was fair market value paid to the Kuwaitis
6 for those properties and the others on the island?

7 A. We certainly think so, yes.

8 Q. Was a significant amount of money paid?

9 A. \$105 million.

10 Q. So the properties that were acquired from
11 the Kuwaitis included parcels 12 and 13, correct?

12 A. Correct.

13 Q. And the purchase price that was paid in 1988
14 dollars was 105 million?

15 A. That's correct.

16 Q. And did you consider these to be some of the
17 valuable lands that were within those parcels that
18 you purchased?

19 A. Yes.

20 Q. And in fact did parcel 13, was that a parcel
21 that was -- even dating back to the Kuwaitis -- is
22 that a parcel that was viewed as having development
23 potential?

24 A. Yes, it was. And in fact, as I recall,
25 parcel 13 was the one we used to refer to as the

1 potential for a third hotel site, which made its
2 value even potentially greater.

3 Q. Are you aware of any intent on the part of
4 the Town of Kiawah that this 4.62 acres be included
5 as part of the beachfront strip?

6 A. No. I'm not aware of any intent.

7 Q. Was it KRA's intent that this 4.62 acres be
8 included as part of the beachfront strip?

9 A. No.

10 Q. Now, you've served as a board -- a member of
11 the board of directors at KICA, correct?

12 A. Correct.

13 Q. And you attended the board meetings and you
14 participated in KICA's affairs?

15 A. Yes.

16 Q. And do you believe that you upheld your
17 duties as a board member?

18 A. Yes.

19 Q. Did KICA have the intent that these 4.62
20 acres be included as part of the beachfront strip?

21 A. No.

22 Q. And when we discussed the termination point
23 of the Exhibit 16.2, again does it terminate in the
24 point that we discussed that was consistent with
25 the intent of KRA?

1 A. Yes.

2 Q. And do you believe that that was also
3 consistent with the intent of the Town of Kiawah
4 and of KICA that the parcel of the beachfront strip
5 would end below the Duneside Villas, and at the
6 eastern boundary of parcel 13?

7 A. To the best of my knowledge, yes.

8 Q. Okay. Mr. McKinney, through your -- there
9 might be a bell that y'all had in KRA for when you
10 sold an oceanfront lot. Do you recall being
11 involved in the sales of some oceanfront --
12 undeveloped oceanfront lots on Kiawah Island?

13 A. We called -- by the time we sold them to
14 individuals, they were part of what we, quote,
15 referred to as developed lands and not undeveloped
16 lands.

17 Q. Right.

18 A. If they didn't have a house on them, then
19 you would call them undeveloped.

20 Q. Yes. So what would you refer to a house
21 that was an ocean -- was a lot. So I guess that
22 would probably cover it?

23 A. We would call it a developed lot.

24 Q. Okay. Did you participate in the sale of
25 developed lots?

1 A. Yes.

2 Q. And from your experience as a broker in
3 charge and as the president of KIRE, do you have
4 sense for the approximate value of -- well, let me
5 ask another question first.

6 What is the typical frontage on the ocean of
7 a developed lot that would be -- that would have
8 been sold during your experience on the island?

9 A. The vast majority of them were in the range
10 of 100 feet of width, plus or minus a couple of
11 feet.

12 Q. So, do you see this scale that appears in
13 the bottom of the box here (indicating)?

14 A. Yes.

15 Q. And 200 feet. And then would the measuring
16 point for purposes of beachfront lots be
17 approximately where I'm drawing that line there
18 (indicating)?

19 A. Yes.

20 Q. And what does that line signify? Is that
21 sort of a setback?

22 A. I'm not sure what it signifies on that, but
23 that would be the approximate location of what we
24 would call our self-imposed beachfront setback
25 line.

1 Q. Right. And so from viewing it -- obviously
2 we can pull out a ruler -- but would you say that
3 based on the scale on the document that has been
4 admitted as Exhibit 29, showing 200 feet, would you
5 say that the area at the setback line, what we will
6 call the northern edge of that setback line, would
7 that appear to be somewhere between 2- to 300 feet?

8 A. Yes.

9 MS. ARMSTRONG: Objection, Your Honor.
10 He is leading the witness. And I'm also wondering
11 where this is going on relevancy grounds.

12 MR. LESEMAN: Well, I'll show you --
13 basically what we will show Your Honor is that the
14 developable lots, or the developed lots had an
15 average width of about 100 feet.

16 That this property is -- when you look
17 at that you can use the scale and you can see it's
18 between 2- and 300 feet wide. With the use of
19 property records of recent sales on Eugenia Avenue,
20 which is just to the right, developed lots on the
21 beach are selling in the range of \$4 million.

22 So what I wanted to do, Your Honor, is
23 with the broker, the prior broker in charge and
24 president of KIRE would be to establish that
25 approximately two, and perhaps three developed lots

1 could potentially fit in this area, which then
2 simply allows us to have an understanding of the
3 approximate value of the property.

4 Again not from an appraisal standpoint,
5 but just trying to establish that this is valuable
6 property and important property.

7 MS. ARMSTRONG: Right. And that brings
8 up my objection even sharper into focus.

9 THE COURT: Right. How is that
10 relevant as to whether or not it was deeded out as
11 part of the process?

12 MR. LESEMANN: Can I ask a question of
13 the witness?

14 THE COURT: Sure.

15 BY MR. LESEMANN:

16 Q. Mr. McKinney, was there any intention
17 whatsoever on the part of the developer to transfer
18 property that could be conveyed ultimately to third
19 parties as oceanfront lots?

20 A. No.

21 Q. Would the developer -- did the Town of
22 Kiawah ask, or did the agreement require that any
23 of these potential oceanfront lots or oceanfront
24 properties exhibited in this red shape be
25 transferred over to KICA?

1 A. No.

2 Q. Okay. Would the developer have agreed to
3 transfer such valuable property? Was its intent to
4 ever transfer any such valuable property as part of
5 a beachfront strip of dune fields in front of
6 properties that had been sold to third parties?

7 A. What was the question again?

8 Q. Was it your intent to include any of this
9 type of potentially -- of developable -- you
10 already had -- through parcels 12 and 13, you had
11 the right to develop residential units in this
12 area, correct?

13 A. Correct.

14 Q. Okay. And so was it ever the intent of KRA
15 to convey any of these properties, which in our
16 current dollars could be sold for more than \$4
17 million per oceanfront lot?

18 A. There was never any intent to convey that.

19 MR. LESEMANN: Your Honor, as a proper
20 and indeed I believe that he is an appropriate
21 witness to discuss this. I think that point is
22 probably made. The point is probably not lost on
23 Your Honor either. Your Honor knows Kiawah well.

24 THE COURT: It's not, it's valuable
25 property. I grant you that.

1 I don't think what value it has is
2 really relevant. At least today's value is not.
3 But I understand it's valuable property, okay.

4 MR. LESEMANN: Thank you, Your Honor,
5 that was that point that I was seeking to make.

6 BY MR. LESEMANN:

7 Q. Do you have knowledge of KICA's intent with
8 regard to the beachfront strip?

9 A. I have knowledge of KICA's intent as a board
10 member of KICA at the time, yes.

11 Q. Correct. And was the intent of KICA, in
12 your understanding as a board member of the
13 nonprofit corporation that is KICA, would be that
14 the beachfront strip that would be accepted by KICA
15 and would be received by KICA was consistent with
16 that which was reflected on Exhibit 16.2 of the
17 1994 development agreement?

18 A. Yes.

19 MR. LESEMANN: I have no further
20 questions, Your Honor.

21 THE COURT: Ms. Jett, you okay?

22 MS. JETT: Yeah. I think I am. Thank
23 you for your patience.

24 THE COURT: All right.

25 CROSS EXAMINATION

1 BY MS. JETT:

2 Q. Hi, Mr. McKinney, how are you? I have a
3 blank sheet of paper in front of me.

4 A. That's the way I feel a lot of mornings when
5 I wake up.

6 Q. I have a few questions that will revolve
7 mostly around your service on the board of KICA.
8 As I understand from the testimony earlier today,
9 it was a seven-member board of KICA, and there were
10 four KRA appointees.

11 Well, I guess first let me back up. Can you
12 tell me what years you served on the board of KICA?

13 A. You know, I was trying to remember that the
14 other day. I feel confident I went on the board
15 either concurrent with our acquisition of the
16 property in 1988, or very shortly thereafter.

17 And I served on that board until sometime
18 around the turn of the century. I do not remember
19 the exact year at this point.

20 Q. So like currently property-owner directors
21 have a three -- I believe a three-year term for the
22 board. Developer-appointed directors on the board
23 do not have any sort of finite term?

24 A. I don't think so, but I don't recall one way
25 or the other.

1 Q. Okay. Do you recall any time during the
2 mid-'90s when the development agreement was being
3 negotiated and ultimately executed? Do you have
4 any memory of KICA board meetings where the terms
5 of the development agreement were discussed?

6 A. I don't recall them being discussed
7 specifically in board meetings. Again, I would
8 have to go back and refer to the minutes to that
9 effect.

10 Q. But there were official meetings that were
11 being had with the board, minutes were being taken
12 of those meetings?

13 A. Yes.

14 Q. And I guess, well, specifically you don't
15 recall whether there were any discussions of
16 specifically the beachfront strip?

17 A. I don't recall specific discussions at the
18 board meetings. Any discussions I would have had
19 would have probably been individually with property
20 -- what we would call property-owner elected
21 members of the board, one or two at a time.

22 And would have taken place outside the board
23 meeting itself. Again, as I recall the -- whatever
24 group of property-owner board members were -- was
25 meeting with the Town to discuss things relative to

1 the development agreement that might benefit KICA,
2 that was being done outside of the board meetings
3 themselves, and was not done with our involvement.

4 Q. Okay. But you do -- so there was no
5 official dialogue that you are aware of between the
6 KICA board and the town council wherein officially
7 on behalf of KICA anybody, whether it be developer
8 directors or property-owner directors, were going
9 to the town council to formally petition for
10 certain provisions to get put into the development
11 agreement?

12 A. It was my clear recollection that it was
13 common knowledge that some of those meetings were
14 taking place, but we were not a part of those.

15 Q. We being --

16 A. We being --

17 Q. -- the KRA directors?

18 A. -- the KRA directors or the KRA partners
19 were not a part of those meetings. Our dealings
20 were directly with the Town of Kiawah.

21 Q. Okay. That gets rid of a bunch of my
22 questions.

23 This is redundant, but just to be clear.
24 There was no official action that the KICA board
25 was asked to take in terms of providing feedback or

1 ratification of the development agreement?

2 A. Again I don't recall that one way or the
3 other. I probably would have to refer to the
4 minutes.

5 Q. Okay. Now KICA was a party to the agreement
6 for conveyance that is on 16.7 to the development
7 agreement?

8 A. Yes.

9 Q. Do you recall that?

10 A. Yes.

11 Q. Do you recall whether or not that document
12 was put before the board for a vote or any sort of
13 approval or requested for revisions or any sort of
14 comments?

15 A. I do not recall.

16 Q. Okay. Similarly with the 1995 quit claim
17 deed, and I know that KICA wasn't required to sign
18 it since it was just the grantee of the deed, but
19 there was -- a draft of the deed was not submitted
20 to the board for approval or comments prior to its
21 execution by KRA?

22 A. I do not recall that either.

23 Q. Okay. Well, I don't mean to make you sound
24 like a broken record.

25 A. I wish I didn't.

1 Q. Well, it is what it is, so I understand.

2 MS. JETT: I think that's all my
3 questions. Thank you.

4 THE COURT: Ms. Armstrong.

5 MS. ARMSTRONG: Thank you.

6 CROSS EXAMINATION

7 BY MS. ARMSTRONG:

8 Q. Mr. McKinney, there is a distinction between
9 property-owner members of the KICA and KRA or
10 developer members of KICA, right?

11 A. Correct.

12 Q. And I'm not sure if I'm clear in
13 understanding you, but I thought that you indicated
14 that there were meetings between the property-owner
15 KICA board members and the Town. Is that correct?

16 A. It was my understanding that some of those
17 meetings were kind of taking place in private as
18 concurrent with our negotiations with the Town --
19 our being the KRA partners -- concurrent with our
20 negotiations with the Town over the development
21 agreement.

22 Q. Okay. So in your capacity as a KICA board
23 member, you didn't participate in any separate
24 negotiations with the Town on behalf of KICA; is
25 that correct?

1 A. That is correct, to the best of my
2 recollection.

3 Q. Now, I think you also sort of described your
4 relationship as the property-owner directors were
5 sort of the watchdogs for the developer, and yet
6 you were the developer that was being watched. Is
7 that an accurate --

8 A. That's how I described it in the deposition,
9 yes.

10 Q. Now, I also wanted to make sure I understand
11 whether you make a distinction between property
12 transferred -- being transferred. Does it matter
13 if it's high land or upland or developable or
14 developable [sic]? Is that a distinction that you
15 make when you think about the transfer of the
16 beachfront strip?

17 A. Well, the beachfront strip, and I'm not sure
18 exactly what the question is, but my understanding
19 of it would be that if the beachfront strip, if it
20 was part of land that we still intended to develop,
21 the beachfront strip would have been very important
22 to us because it could be calculated in to allow
23 more density.

24 Once the land had been sold to someone else
25 and that density established, the beachfront strip

1 that would remain seaward of the property line that
2 had been conveyed, then that strip would have what
3 I would refer to in my letter as oceanfront dune
4 fields.

5 Q. Okay. Were you in the courtroom when
6 Mr. Rhoad was testifying?

7 A. Yes. I might have stepped out briefly, but
8 I was in for most of it.

9 Q. Did you hear him describe the conveyance of
10 beachfront land as not -- as undevelopable land?
11 Do you recall that?

12 A. I do.

13 Q. Is that a distinction that you -- do you
14 agree with that, that it would only be
15 undevelopable lands that have been conveyed under
16 the beachfront strip deed?

17 A. I would probably say by and large. Now,
18 would that apply to every square foot, I'm honestly
19 not sure. But generally, the intent was lands that
20 we had no more development use for.

21 Q. All right. So when you and I discussed this
22 last week, I asked you whether you made a
23 distinction between the property being developable
24 in the future or not, and you said that it wouldn't
25 really matter one way or another as far as

1 inclusion in the beachfront strip. Does that sound
2 familiar?

3 A. It does sound familiar.

4 Q. Now, you described the land that was going
5 to be conveyed, in your belief, is that -- in your
6 understanding was that that land was going to be
7 the dune fields that were to be conveyed under the
8 beachfront strip, correct?

9 A. Correct.

10 Q. And that the dune fields certainly extend
11 beyond the Duneside Villas; isn't that true?

12 A. True, absolutely.

13 Q. They extend actually all the way down to
14 Captain Sam's Spit on the west end; isn't that
15 right?

16 A. Yes.

17 Q. Okay. So do you have anything in writing to
18 support your belief that Duneside Villas was the
19 western terminal boundary?

20 A. The only thing I have seen has been the
21 exhibit that has been shown several times. I don't
22 personally have anything in my writings, no.

23 Q. And do you know whether the map that we were
24 looking at earlier that shows parcel 12 and 13, you
25 recall the location of parcels 12 and 13 we have

1 been discussing, don't you?

2 A. Yes, I do.

3 Q. Do you know whether any or part of parcel 12
4 or 13 was seaward of the setback line in 1994?

5 A. I don't have specific knowledge of that, but
6 my general knowledge would be that it would have
7 been.

8 Q. Would have been seaward of the setback line?

9 A. Some of that land would have been seaward of
10 the setback line, yeah.

11 Q. So some of that land -- some of parcel 12
12 and 13 in 1944, you wouldn't have been able to
13 develop that property at that time, correct?

14 A. Might not have been able to develop it, but
15 it would be included in acreage for calculation of
16 density on the high ground that would be developed.

17 Q. Right. Because right now all of Captain
18 Sam's Spit is oceanfront property, correct?

19 A. Well, it depends on how far back you
20 describe oceanfront property. The whole island is
21 oceanfront.

22 Q. Well, we could pull the map back up, but
23 Captain Sam's does contain a long stretch of land
24 on the oceanfront that's not developed right now,
25 is that --

1 A. That is correct.

2 Q. And in 1994, you were going to convey all of
3 that beachfront property to KICA, correct?

4 A. I believe that's the case from what I
5 listened to this morning.

6 Q. Okay. So your intent in 1994 was actually
7 to convey some oceanfront property, correct?

8 A. Our intent was what was in the development
9 agreement.

10 Q. And we discussed the Captain Sam's Spit does
11 contain oceanfront property.

12 A. Yes.

13 Q. And it was going to be conveyed under the
14 1994 development agreement. You don't disagree
15 with that?

16 A. No, I don't.

17 Q. Okay. You're very familiar with Kiawah
18 Island and the properties on Kiawah Island, aren't
19 you?

20 A. Generally, yes.

21 Q. Generally. All right. And you know where
22 the employee facility tract is located on the
23 island?

24 A. Yes, I do.

25 Q. You read the language in the development

1 agreement prior to its execution, didn't you?

2 A. I would as part of my general review of the
3 agreement, yes. I would not -- as I said the other
4 day when we talked -- I would not have read it with
5 an eye toward dotting every i and crossing every t.

6 Q. Okay. And as far as the exhibits, and
7 specifically the agreements for conveyance, it
8 talks about the actual parcels and the descriptions
9 of the parcels, is that something you also reviewed
10 at that time?

11 A. Yes. I would have read over it, yes.

12 Q. But you didn't raise any questions at that
13 time you were reviewing it about the specific
14 language that describes the beachfront strip, did
15 you?

16 A. Not that I recall.

17 Q. Okay. So at that time you didn't have any
18 concerns about the language used in describing the
19 beachfront strip and using the employee facility
20 tract as the western terminal boundary, did you?

21 A. No.

22 MS. ARMSTRONG: I don't have any other
23 questions for this witness, Your Honor.

24 MR. LESEMANN: Brief follow-up, Your
25 Honor.

1 Your Honor, sometimes you ask questions
2 of witnesses. Did you have any?

3 THE COURT: I got one.

4 MR. LESEMAN: Okay. Did you want to
5 wait until I was -- do you want to go before me?

6 THE COURT: Usually.

7 MR. LESEMAN: Yes, sir.

8 THE COURT: Go ahead.

9 MR. LESEMAN: Thank you.

10 REDIRECT EXAMINATION

11 BY MR. LESEMAN:

12 Q. So, were there -- Mr. McKinney, were there
13 changes regarding the developability of Captain
14 Sam's Spit that came as a result of regulatory
15 action?

16 A. Yes.

17 Q. And so did those -- did that ultimately
18 change the character of the Captain Sam's Spit from
19 undevelopable property to developable property?

20 A. Yes.

21 Q. As part of the 2005 development agreement,
22 did KRA and the Town of Kiawah Island essentially
23 change equation with regard to Captain Sam's Spit?

24 A. Yes.

25 Q. Was that a pure gift, or did the developer

1 give up some rights in exchange for the development
2 agreement that recognized those additional rights
3 on Captain Sam's Spit?

4 A. As I recall, and again I was not part of the
5 day-to-day detailed negotiation of that development
6 agreement, but as I recall from discussions within
7 our partnership, we relinquished rights and in
8 effect down-zoned the allowable use of the parcel
9 13 Spit as a potential for a third hotel site.

10 We gave up those more intense development
11 rights in return for being granted rights to
12 develop a very small portion of what is called
13 Captain Sam's, or what was called Captain Sam's.

14 Q. And we have a lot of talk about Captain
15 Sam's, but again just to clarify, was the
16 beachfront strip as exhibited in the 1994
17 development agreement to end at this point that we
18 have discussed below the Duneside Villas and to the
19 east of parcel 13?

20 A. That's correct.

21 Q. And were parcels 12 and 13, not as shown on
22 this map but as shown on, for example, Mr. Permar's
23 exhibit, are those two parcels in which KRA was
24 given valuable development rights?

25 A. Yes.

1 Q. And did KRA intend to give away any of the
2 property which it had been given valuable
3 development rights?

4 A. Well, again, I believe in the case of parcel
5 13 we reduced our development rights in parcel 13.

6 Q. Later.

7 A. Okay.

8 Q. Yes, sir. Right.

9 A. And -- but we certainly did not intend to
10 give away any developable land.

11 Q. In 1994?

12 A. That's correct.

13 Q. Or --

14 A. Or in 2005.

15 Q. Or in 2005 as it relates to this strip?

16 A. Right.

17 Q. But the beachfront strip itself was
18 determined in 1994, correct?

19 A. Correct.

20 Q. And does this show, again, on your belief
21 where the green line meets the hatched area of the
22 beachfront strip, is that your understanding is the
23 intent of all the parties as to where that
24 beachfront strip would end?

25 A. Yes.

1 Q. And that's consistent with Exhibit 16.2?

2 A. Yes.

3 Q. And Captain Sam's, in your mind, is that a
4 separate issue from the beachfront strip?

5 A. Yes.

6 MS. ARMSTONG: Objection, Your Honor.
7 He is leading the witness.

8 THE COURT: All right. Just go ahead
9 and rephrase it, please.

10 BY MR. LESEMAN:

11 Q. Do you believe that the beachfront strip and
12 Captain Sam's are separate issues? The beachfront
13 strip as in the 1994 --

14 A. I believe the beachfront strip is envisioned
15 in the 1994 development agreement ended at the
16 Duneside Villas. And did not go further down the
17 beach, and would not go further down the beach
18 until such time as we sold or developed those
19 properties.

20 Q. Now, from KRA's perspective, is there an
21 error in the property description that's included
22 in the agreement for conveyance and the quit claim
23 deed that is utilized as the southwest corner of
24 the employee facility tract as the termination
25 point for the beachfront strip?

1 A. Yes.

2 Q. As a result of that error in description I
3 would ask you, are you a title examiner?

4 A. No, sir.

5 Q. A certified title examiner?

6 A. No, sir.

7 Q. Are you a real estate attorney?

8 A. No, sir.

9 Q. When you reviewed the documents that
10 Ms. Armstrong had asked you about, the agreement
11 for conveyance and quit claim deed, were you aware
12 that the property description in that document did
13 not match the termination point as shown in Exhibit
14 16.2?

15 A. No, I was not aware of that.

16 Q. If you had been aware of that, is that
17 something that would have caused you concern?

18 A. Absolutely.

19 Q. And again in your work as a KICA board
20 member, is it your belief that KICA had any
21 intent -- now, again, we talked about whether KICA
22 had an intent or not, and we have discussed the
23 agreement for conveyance.

24 I'm showing what -- has this been marked as
25 an exhibit yet? Or, it's included as an exhibit to

1 the development agreement.

2 MS. ARMSTRONG: It's also an
3 Intervenor's exhibit.

4 MR. LESEMAN: Okay. This signed copy
5 is part of our exhibit.

6 BY MR. LESEMAN:

7 Q. Does the development agreement, as you see
8 the agreement for conveyance, this whereas clause
9 at the end, does it include a sentence indicating
10 that the terms and provisions of the development
11 agreement are incorporated herein by reference?

12 A. Yes.

13 Q. Okay. And in terms of the development
14 agreement proper, and the description of the
15 beachfront strip, is the one reference -- is the
16 one reference in the textual description of the
17 beachfront strip to Exhibit 16.2?

18 A. Okay. Ask that question again, please?

19 Q. Is the one reference to the location of the
20 beachfront strip that's included within the text of
21 the development agreement a reference to Exhibit
22 16.2?

23 A. Yes.

24 Q. Okay. And we have all seen Exhibit 16.2
25 before, but you believe that that is again

1 sufficiently clear as to where it stops?

2 A. Yes.

3 Q. And that was it was to stop at that point
4 below Duneside and to the east of parcel 13, in
5 your belief, in the intent of the Town, the intent
6 of KRA and the intent of KICA?

7 A. Yes.

8 MR. LESEMANN: No further questions.

9 THE COURT: Anything?

10 MS. ARMSTONG: I don't have anything,
11 Your Honor.

12 EXAMINATION

13 BY THE COURT:

14 Q. And, Mr. McKinney, my only question has to
15 do with the formation of KICA. Was KICA formed at
16 this time, was that when it first came into
17 development?

18 A. KICA was formed I believe in 1976, which
19 would have preceded our purchase of the island in
20 '88. But I was there as director of real estate,
21 and we would have formed it as part of the initial
22 sales.

23 Sales began on Kiawah in April of 1976, and
24 KICA was formed at that time. And again, the
25 developer rights would have been set forth. And it

1 was formed concurrent with the imposition of the
2 covenants and restrictions on the property at that
3 time.

4 Q. And it was basically a developer-controlled
5 body for a period of time?

6 A. It was developer-controlled. And I think
7 the language that occurred at the time was until 80
8 percent of maximum allowable density on the island
9 had been conveyed to others.

10 So the developer would control it for a
11 significant period of time.

12 Q. And the purpose behind the creation of the
13 community association was what?

14 A. The purpose was to provide for common area
15 maintenance, lagoons, mosquito control, private
16 roads, maintenance of the private roads, the
17 drainage easements, provided security at the gate.

18 All of what we would call municipal
19 services. Since it was a private island, those
20 services had to be provided through some entity.
21 And the community association was that entity.

22 Q. And so all of the property owners on the
23 island pay into the Kiawah Island Community
24 Association; is that right?

25 A. Yes. There was a formula by which

1 undeveloped lots -- well, unimproved lots, lots
2 without houses paid one amount. A house or a
3 condominium paid another amount.

4 And then commercial properties were based on
5 square footage. And then even undeveloped acreage
6 had a formula attached to it for assessments.

7 Q. Okay. All that for assessment purposes?

8 A. Yes.

9 Q. And then each little neighborhood would have
10 its own little association?

11 A. Not each neighborhood, but some could. If
12 you had a condominium association, it would be a
13 sub-association, but it would be its own entity.
14 It would not be a subsidiary, so to speak, of the
15 community association. But it would be --

16 Q. Its own standalone entity?

17 A. That's correct.

18 Q. And that's how we get to Inlet Cove, and I'm
19 assuming Duneside Villas?

20 A. Duneside Villas. Wherever there was a
21 collection of either townhouses or condominiums or
22 cottages where they were very close proximity, we
23 would set up -- it would either be a homeowners
24 association, or if it was a collection or fee
25 simple, or it would be a horizontal property regime

1 if it was organized under a condominium law.

2 THE COURT: Got you. Okay. That's the only
3 question I had.

4 All right. Anything further for
5 Mr. McKinney?

6 MR. LESEMAN: Nothing further, Your
7 Honor.

8 THE COURT: Mr. McKinney, thank you,
9 sir. You may step down.

10 MS. ARMSTRONG: Your Honor, could we
11 take a five-minute break?

12 THE COURT: Sure. Let's take five
13 minutes, then we'll call your next witness.

14 (A recess was taken.)

15 LEONARD L. LONG,
16 having been first duly sworn, was examined and
17 testified as follows:

18 THE COURT: Your full name and address
19 for the record, please.

20 THE WITNESS: Leonard L. Long, Jr. I
21 live at 239 Beauty Berry Court. Part of our
22 development at Kiawah.

23 THE COURT: Thank you, sir.

24 Mr. Lesemann.

25 DIRECT EXAMINATION

1 BY MR. LESEMANN:

2 Q. Mr. Long, first I want to clarify, are you
3 currently affiliated with the -- or are you
4 currently an officer of either of the plaintiffs,
5 KRA or KDP II, LLC?

6 A. No, I'm not.

7 Q. Okay. Are you currently serving those
8 entities in a consulting capacity?

9 A. Yes, I am.

10 Q. Okay. Is that as a result of the
11 transaction involving the sale that was completed
12 with South Street Partners this past June?

13 A. Yes. On May 31st all the partners, Pat
14 McKinney and all the other partners and I sold to
15 South Street Partners.

16 Q. Okay. And so I asked that because I just
17 wanted to confirm before we got into questions,
18 with regard to the outcome of this litigation with
19 whether Judge Scarborough would reform the deed
20 with regard to these 4.62 acres, do you have any
21 direct financial outcome or stake in the outcome of
22 the litigation?

23 A. No, I don't.

24 Q. Could you describe the background of your
25 historical involvement with KRA and the related

1 entities?

2 A. Yes. I was one of the partners who
3 initially, at least, helped put together all the
4 partners for the team that ended up buying Kiawah
5 from the Kuwaitis in June of 1988.

6 And we had a couple of New York partners;
7 and we had the Way family and the Normie family and
8 Frank Brumley and Pat McKay, who were partners in
9 town but came with us as the partners in Kiawah;
10 and my family and my brothers and sisters.

11 Q. And going forward from that time, did you
12 serve in varying capacities with KRA through the
13 '90s and continuing on?

14 A. Yes. Basically I was a partner. Sometimes
15 we were called the managing directors, you know,
16 other names like that.

17 But after June -- well, January 1, 1997 I
18 became known as the executive vice president, and
19 that was my title until the end. I was never --
20 though I was a lawyer, I was never general counsel,
21 I didn't want to be. Trenholm Walker was our
22 lawyer.

23 Q. In 1994 then were you serving in a -- were
24 you a managing partner or a managing director of
25 KRA?

1 A. I was.

2 Q. Were you involved in the day-to-day activity
3 of KRA?

4 A. Yes.

5 Q. In 1994 were you also a member of the board
6 of directors of KICA?

7 A. I was.

8 Q. Were you also serving during that year as
9 secretary of KICA?

10 A. Yes. Yes.

11 Q. Prior to the execution of the development
12 agreement, did you also participate in any
13 correspondence with Mr. Todd Brown at Nations Bank?

14 A. I did. I think that letter there was
15 prepared by Trenholm. But I did participate a
16 little bit indirectly. I would oversee the legal.

17 Thankfully I didn't have to practice law for
18 the partnership. We had a lot of lawyers who were
19 handling the closing aspects in different ways, and
20 Trenholm helped me with things like that.

21 Tommy Buist was our real estate lawyer, and
22 we had a lawyer from New York who handled the
23 entire closing details, which were pretty myriad
24 for us at the time.

25 And we had other lawyers do smaller things

1 that we were pulling together.

2 Q. And what was the purpose of corresponding
3 with Mr. Brown at Nations Bank on this point?

4 A. Well, I think Mr. McKinney explained. I
5 might need to read the letter, and I can't really
6 read it too well right here.

7 We had a mortgage for \$117 million, they
8 loaned us more than we paid, but the extra 12 was
9 an interest reserve.

10 We needed to assure the bank, and we met
11 with Todd and his boss about the upcoming
12 transaction. And we wanted to make sure they knew
13 what we were doing with respect to some of the
14 conveyancing that was required by the development
15 agreement, that they approved it. And that we were
16 going to be giving quit claim deeds to certain
17 properties.

18 Q. Okay.

19 A. Do you want me to read that for a second?

20 Q. Yeah. I can bring you a paper copy if it's
21 difficult for you to --

22 A. Can you flip it down and give me the date
23 one more time? Yeah, okay.

24 Q. All right. Then as indicated in the letter
25 where it says, attached is a list of the parcels,

1 was there also a list of parcels with paragraph
2 numbers corresponding to the paragraphs in the
3 development agreement where those parcels were
4 discussed?

5 A. There were. That's the list.

6 Q. Okay. And scrolling down, is there a
7 section of the list that discussed the beachfront
8 strip that we have been discussing here today?

9 A. Yes. You've highlighted it. Obviously it's
10 16.(b), the 10-mile beachfront strip. Front beach
11 dunes is the shorthand description had to be
12 conveyed by January 1, 1996 and it was.

13 Q. Okay. To back up for -- well, first, now
14 that we have looked at the letter and the
15 attachment, is this a true and accurate copy of the
16 letter that went under your signature to Mr. Todd
17 Brown at Nations Bank?

18 A. Yes, it is.

19 Q. On or about September 9th, 1994?

20 A. Yes.

21 MR. LESEMAN: Your Honor, we move at
22 this time for admission of Plaintiffs' Exhibit 2.

23 MS. JETT: No objection.

24 MS. ARMSTRONG: No objection.

25 THE COURT: Without objection.

1 (Plaintiffs' Exhibit No. 2 was admitted
2 into evidence.)

3 BY MR. LESEMANN:

4 Q. So, Mr. Long, as I had asked Mr. McKinney,
5 was it important to you to be truthful and frank in
6 your discussions with Mr. Brown, him being your
7 primary lender?

8 A. Yes, it was. I think somebody said that we
9 didn't have -- some of our partners didn't have any
10 liability, but some of us did. Some of us owed a
11 security for an LC that was gotten from another
12 bank and given to what's now Bank of America, it
13 was NCNB then, and that was for about \$30 million.

14 So we had liability to the extent of \$30
15 million, or recourse, whatever you want to call it.
16 It might have been 35, can't really recall.

17 So, we definitely wanted to be truthful and
18 we didn't want to have any mixups with the bank,
19 even small mixups when that much money was at
20 stake. That was a lot money for the ones who
21 posted the security.

22 Q. And so that recourse would trace back to you
23 personally in the event of default?

24 A. Yes, it did. And then we put up properties
25 to secure our agreements, to pay our pro rata

1 shares of that.

2 Q. So not only would that -- would it also make
3 you concerned in terms of the disposition of the
4 developable properties that were being purchased?

5 A. It would. And just to kind of hit the nail
6 on the head, it would -- you know, the last thing
7 in the world that we would have done would be to
8 knowingly convey developable, valuable property by
9 mistake. But, we did.

10 And we did it in part, and maybe major part,
11 Your Honor, because probably the partners, like me,
12 because I was negotiating a lot of the document,
13 didn't supply Tommy Buist's firm and his paralegal,
14 Beth Nimmons, with sufficient information.

15 In fact in retrospect I learned that this
16 was basically the outline of parcels or areas to be
17 conveyed at some differing points in time to KICA.

18 We should have had 16.2 at least to give
19 some guidance to Beth Nimmons and Tommy Buist, who
20 was our real estate lawyer from '88 onward, and we
21 probably didn't bring that to his attention very
22 much, if at all.

23 And I don't. recollect 20 years ago if we
24 brought it to his attention, but I'm told that we
25 probably didn't. And there is no indication in my

1 file that we did.

2 So I'd be happy to stand up and take the
3 blame for that. But it would have been stupid to
4 at the same time and with simultaneity give rights
5 to develop property as a hotel, for example, or a
6 multi-family or any other way that we were allowed
7 under the development agreement in '94, and at the
8 same time give away parts of it to KICA.

9 We found out some years later that we had in
10 fact unknowingly and inadvertently done that with
11 the rush to get the closing done. And we didn't
12 check the description, and we didn't supply the
13 person who was the describer with sufficient
14 information.

15 Q. And who was the person ultimately, your
16 understanding, working with Tommy Buist that
17 prepared the actual legal description, or the
18 property description?

19 A. Well, I think it -- I know it was Beth
20 Nimmons who was Tommy's paralegal at the time, his
21 chief paralegal. She had been working with Kiawah
22 matters since 1980, eight years before we even
23 walked on the island.

24 And she is -- this is going to embarrass
25 her, but I've told her a million times I think she

1 is the smartest person we've ever had in our
2 partnership employ.

3 And she just missed the description
4 slightly. But, some acreage was obviously not
5 intended to have been conveyed to KICA.

6 Q. Right. And when you are talking about
7 Kiawah Island, a slight discrepancy can result in a
8 pretty significant amount of property, and also a
9 pretty significant amount of dollars; is that fair
10 to say?

11 A. That's true, yes.

12 Q. So, Mr. Long, we are looking here at an
13 exhibit that has been admitted into evidence as
14 Exhibit 29.

15 Did you have an understanding as a secretary
16 of KICA and a board member of KICA as to where the
17 development agreement indicated that the beachfront
18 strip would terminate?

19 A. Yes. In the discussions, Your Honor, it was
20 not like it was a matter for any debate.

21 The concept that some people had on the
22 island that they brought to the attention of KICA's
23 other developers, non-KRA developers, as well as
24 the town council members who brought it to our
25 attention, was that the 1978 case involving the

1 Isle of Palms was somehow analogous to this
2 island's future development, in that people who had
3 acquired properties from the Kuwaitis and/or us
4 along the ocean, or are thinking they were along
5 the ocean, didn't want to one day be disappointed
6 and wake up and find that there would be
7 development seaward of their lots.

8 And so we didn't have any interest in that
9 either. In fact we wanted to quell any such
10 understanding that might be prevalent in the
11 community. And so for that reason marketing-wise,
12 sales-wise we wanted to do it, as well as we wanted
13 to ameliorate and answer and respond very
14 positively to the Town's request and seeming
15 initial concern, as well as KICA's other directors'
16 initial concerns, so we did that.

17 In fact, all of the things that KICA wanted,
18 except to be a party to the development agreement,
19 as far as I know we agreed to. They went to the
20 Town. It was a political decision by the Town to
21 not include them as a party to the development
22 agreement.

23 I don't think the statute allowed for it
24 anyway. It would have been very odd to have, for
25 example, two heads, two Indian chiefs in charge of

1 the development agreement who were entirely
2 unrelated.

3 And so the Town properly turned down their
4 request to be a party. But they agreed to come to
5 us and ask us, would we sign an agreement, a
6 separate agreement as an exhibit to the '94
7 development agreement which would be of a contract
8 of sale that would be enforceable irrespective of
9 any default on the part of the developer so that
10 they could at KICA know for sure that they could
11 sue for performance to acquire the properties that
12 we were required to convey, despite maybe
13 bankruptcy or other problems that we might have and
14 that could have resulted in a default.

15 Q. Right. Mr. Long, was outside counsel,
16 Mr. Buist and his paralegal Ms. Nimmons, did they
17 prepare the property description that was inserted
18 into the agreement for conveyance and to the 1995
19 quit claim deed?

20 A. They did. It was identical to the one in
21 the quit claim deed that, you know, was derivative
22 from the agreement. And the agreement was -- and
23 the quit claim deed were obviously wrong. But we
24 -- I didn't check the description.

25 If I tried to get down in what you might say

1 is the weeds, but it's very tough going to read
2 those legal descriptions. If I tried to do that
3 and do the other things, I probably wouldn't have
4 succeeded very much. So I relied on the
5 descriptions to be correct.

6 And again, I will be happy to take the blame
7 for not clarifying to the attorney and the
8 paralegal what exactly should have been the correct
9 description.

10 Q. Is there an error in the property
11 description that was prepared -- let me back up.

12 Were Mr. Buist and Ms. Nimmons in use of the
13 term the scriveners?

14 A. Yes, they were.

15 Q. Okay. And is there, in your belief, an
16 error in the work of the scriveners?

17 A. No question about it. That's why we are
18 here.

19 Q. Okay. And what is the error?

20 A. The error is that -- and Ms. Nimmons can
21 state how she made it because she has been back
22 over and been pained and emotionally upset by it
23 for some years -- but it was to take the point that
24 you've mentioned innumerable times today in the
25 employee tract and tacked from there generally

1 southward on an imaginary line thinking that that
2 would be the right and appropriate place to go
3 eastward from that line that she cut. And that
4 would cover everything that should be covered.

5 But it definitely doesn't do that, Your
6 Honor. Because what it does is it includes high
7 land, developable land, and includes land that, as
8 I said, we would have never have conveyed had we
9 known it.

10 We didn't have a plat. We should have had a
11 plat. But on the other hand, doing a plat of 10
12 miles of oceanfront property is hundreds of
13 thousands of dollars, even then. And it would have
14 taken Lord knows how long to get Southeastern
15 Survey to do that.

16 We thought we could do it generally. We
17 knew it was going to be loosey-goosey, but we
18 thought we could do it. I thought that they had
19 sufficient data to do it.

20 And the concept that I tried to get into a
21 minute ago, probably I stopped short was, the
22 concept was simple. And it was from the Town and
23 the Town's lawyers and Dick Carlisle, who was their
24 expert, was we do not want a repeat of the Isle of
25 Palms situation.

1 That meant that the last property conveyed
2 by the Kuwaitis or us, we'd go to that property on
3 the west, and everything from their western
4 property line eastward along the beachfront,
5 seaward of all the beachfront parcels and lots
6 conveyed to that point would be part of the strip.

7 Q. And was that captured, was that intent
8 captured on Exhibit 16.2?

9 A. Right. And Exhibit 16.2 I think is what
10 gave us the comfort to think that we didn't have a
11 problem, Your Honor, because that is the only prose
12 description, and it is the only depiction in terms
13 of a graphic in the entire development agreement
14 that shows what the parties intended to be the
15 beachfront strip.

16 There isn't any other. You can't go to what
17 should have been derivative documents, seeing the
18 agreement or the quit claim deed, the parties
19 agreed -- and the parties are us and the Town -- on
20 what it was. And it was 16.2.

21 Q. Okay. And so I'm going to ask you to point,
22 Mr. Long. Again, that is -- is that why the
23 development agreement refers to Exhibit 16.2 in the
24 portion of paragraph 16.(b) relating to the 10-mile
25 strip of beachfront property?

1 A. Exactly. Pretty sure -- it might be
2 unartful now 20 years later -- but pretty sure I
3 drafted that. If not all of that, most of that
4 section.

5 And as Your Honor probably knows, I had some
6 touch with the case at Isle of Palms. But it was a
7 different case because there it was a road that ran
8 along the ocean. And land on the other side of the
9 road was the land that grew by accretion.

10 And here we were talking about protecting
11 people whose lot lines didn't go to the mean high
12 water mark, but who we wanted to protect
13 nevertheless from any accretion buildup that would
14 possibly stir the owner of the accreted land to try
15 to find a way to develop it and block the views of
16 the people along the 10 miles of Kiawah's front.

17 We didn't want to do that. So we were
18 willing to give the strip.

19 Q. Did you mention that the Kuwaitis perhaps --
20 well, were there sales of oceanfront lots by the
21 Kuwaitis where the lot did not extend to mean high
22 water?

23 A. The Kuwaitis generally did not extend deeds
24 to their property owners to mean high water where
25 it sits. It's not atypical at a lot of islands.

1 They didn't at Kiawah. They did it sometimes, and
2 we did it occasionally.

3 But mostly they ended on an upland area of
4 dune fields usually. And sometimes it was immature
5 maritime forest land. But it was still -- there
6 was still land between the seaward property line
7 and the mean high water mark that was easily
8 accretion-oriented land.

9 In fact, Kiawah has grown 15 feet a year
10 seaward from accretion for the last 60 years.

11 Q. So based on the lines that the Kuwaitis were
12 often using in those conveyances, this concern
13 would have been appropriate in that there could be
14 accreting land that was below what the Kuwaitis had
15 conveyed to someone who believed that they were
16 ultimately buying oceanfront property?

17 A. Yeah, exactly. And if there be land there,
18 you know, generally the law was that if you have a
19 metes and bounds description that ends above the
20 high water mark, you don't go out with the tide.
21 If you have a boundary that's on the mean high
22 water mark, you go out with the tide and go in with
23 erosion.

24 Well, that still meant somebody was going to
25 own the land out there in front of these metes and

1 bounds property lots. But that fear that there
2 would be accretion is what led to the provision in
3 the agreement that was raised with us and we
4 quickly said we would be happy to do that strip.

5 Q. So, Mr. Long, with regard to a survey of the
6 beachfront strip, is it correct that a survey did
7 not exist at the time?

8 A. Did not exist.

9 Q. Do you know if a survey of the beachfront
10 strip has ever been prepared as we sit here in
11 2013?

12 A. I don't think it has.

13 Q. Okay. And did you indicate some of the
14 reasons, were there concerns about expense and
15 timing and burden that related to that decision to
16 proceed without a survey?

17 A. And necessity. If they had had a little bit
18 more information, the lawyers who were extra
19 confident that Buist's firm, as well as Beth
20 Nimmons, would have gotten the description right.

21 Q. But as it stands, where the Exhibit 16.2 of
22 the development agreement, would it cause the
23 beachfront strip to stop at the eastern boundary of
24 parcel 13 marked by this green line in Exhibit 29?

25 A. It would. And parcel 13 is seemingly

1 extended there. I have not been up close to that,
2 what you are pointing to which is Exhibit 29. But
3 it looks like they extended the eastern property
4 line a little bit more seaward than maybe was
5 surveyed, but I'm not sure.

6 Q. As mean high water continues?

7 A. Yeah.

8 Q. Okay. So as mean high water continues to
9 move, a boundary drawn as mean high water, was that
10 what your testimony just was? That you could
11 follow mean high water oceanward as mean high
12 water?

13 A. No, I'm sorry if I said that. What I meant
14 to say was that the eastern property line of parcel
15 13 looks to be in the green color extended more
16 seaward than it actually was in the plat. But I'm
17 just going from recollection if that's true.

18 Q. Understood. So -- but would this create a
19 north/south line essentially, a termination point
20 which could serve as the western boundary of the
21 beachfront strip?

22 A. Right, yes. That was the place where it
23 should have.

24 Q. And is that what -- based on your
25 negotiations with the Town and your work on the

1 development agreement, was that your understanding
2 of the Town's intent?

3 A. No question. There was never any doubt. In
4 fact, we never got in writing or orally anything
5 from the Town or the other KICA directors, who were
6 not reticent or shy about voicing concerns, that
7 suggested that, for example, the paragraph you read
8 a few minutes ago was in any way insufficient.

9 Q. Right. And in your capacity as the
10 secretary of KICA and a board member of KICA, was
11 it your understanding that KICA's intent would be
12 that the termination of the beachfront strip would
13 be on this eastern boundary of parcel 13?

14 A. Yes.

15 Q. Okay. Was --

16 A. The way we described it as being seaward of
17 the condominiums and the properties that Pat
18 described being the last built by the Kuwaitis,
19 built structures or development you might say going
20 westward on Kiawah, Kiawah runs east-west
21 obviously, along the island.

22 Q. Okay. Mr. Long, were there other instances
23 of discrepancies, whether you call them mistakes,
24 errors, discrepancies or what have you, but were
25 there other instances of discrepancies with the

1 beachfront strip that arose and were dealt with
2 after 1995?

3 A. There were.

4 Q. And were you personally involved in some of
5 those discussions?

6 A. I was. Again mostly Tren would discuss
7 things with Dennis. I wrote the letter you are
8 looking at now, March 10, '97. But Tren, for the
9 most part, prepared that.

10 It was the type thing where the lawyer to
11 lawyer discussions and getting with Beth and Mark
12 Permar in particular to explain those situations of
13 what led to Dennis understanding it, agreeing or
14 not agreeing to be supportive of a cure.

15 The cure was typically what you have in the
16 RMC office when you have a mistake by a scrivener,
17 it's most often cured by a quit claim deed back
18 from the party who mistakenly got some land or an
19 easement.

20 Q. Okay. Based on a plat of record that based
21 on the seaward boundary of the plat of record, was
22 the circumstance that the dune fields in front of
23 the Ocean Course were ultimately not conveyed to
24 KICA?

25 A. Yes. That was one of the two that really

1 come to my mind from many years ago. It was a
2 mistake. And by mistake, KICA did not get a good
3 deal of the beachfront strip down at the eastern
4 end of Kiawah, which the last part of Kiawah is
5 basically two miles or so of the Ocean Course being
6 the most seaward development, quote, end quote,
7 down at that end and they didn't get it.

8 The other thing was a few acres, two or
9 three acres mid-island that belonged to us, as I
10 recollect, we got a deed back from KICA for when we
11 brought out to them the mistake that had given them
12 title to land not intended to have been given to
13 them in the beachfront strip quit claim deed.

14 Q. So, Mr. Long, Mr. Walker may have helped you
15 with this memo, but ultimately is this a memo that
16 you signed and transmitted to Mr. Dennis Rhoad?

17 A. I did.

18 Q. Did you do that in connection with your
19 duties with KRA?

20 A. Yes.

21 Q. Was the memo sent on or about March 10,
22 1997?

23 A. It was.

24 MR. LESEMANN: Your Honor, we would ask
25 for admission at this time of Plaintiffs' Exhibit

1 9.

2 MS. JETT: No --

3 MS. ARMSTRONG: Your Honor, I almost
4 objected earlier, but I think I'm going to have to
5 object to this because I'm not sure what the
6 relevance is to other -- if there was another
7 mistake or an error, that's not on trial. We are
8 not in trial about that today. We are talking
9 specifically about the western end terminus.

10 And so I'm not sure that I see what the
11 relevance is to other corrected deeds that were
12 executed in relation to this property.

13 THE COURT: I note that.

14 Help me out with the relevance of this.
15 Well, first of all, I don't see anything in here
16 that talks about reconveyance, but maybe I'm not
17 reading it close enough.

18 MR. LESEMANN: Well, Your Honor, this
19 is regarding the oceanfront strip. And we have not
20 prepared the corrective deed because we were
21 awaiting the plat by Southeastern.

22 So what ended up happening is that a
23 confirmatory -- a corrective and confirmatory deed
24 relating to a portion of the beachfront strip on
25 the end of the island was ultimately conveyed.

1 And, Your Honor, just to refer to
2 Exhibit 16.2 for a moment.

3 BY MR. LESEMANN:

4 Q. Mr. Long, is the beachfront strip as shown
5 in front of the Ocean Course, is that within the
6 hatched area on Exhibit 16.2 as part of the
7 intended beachfront strip?

8 A. It is.

9 Q. Okay.

10 MR. LESEMANN: So, Your Honor, what we
11 are establishing through this is again a course of
12 conduct whereby this isn't the only issue that has
13 come up with the beachfront strip, there now have
14 been three.

15 And as Mr. Long just indicated, KRA actually
16 advocated for KICA.

17 BY MR. LESEMANN:

18 Q. And my work may not be exact, but, Mr. Long,
19 is again the oceanfront strip, would the Ocean
20 Course, would it be running along this eastern end
21 of the island here?

22 A. It would, yes.

23 MR. LESEMANN: And so, Your Honor, just
24 to show that in that instance KRA advocated work
25 with the Town to make sure that that portion of the

1 beachfront strip was conveyed due to a plat of
2 record which eliminated it because again with the
3 clarity of Exhibit 16.2 that was intended to be
4 included.

5 Your Honor, there is another instance
6 of --

7 THE COURT: Let me stop you right
8 there.

9 MR. LESEMAN: Oh, yeah.

10 THE COURT: So, I'm sorry. I'm trying
11 to clear up in my mind, because I don't know that
12 it is relevant. But was that strip then ultimately
13 conveyed to KICA?

14 THE WITNESS: Yes, sir.

15 THE COURT: Okay. All right. And
16 that's on the eastern side, right?

17 THE WITNESS: Yes, sir.

18 THE COURT: And then there is another
19 one happening in the middle somewhere?

20 THE WITNESS: Happened in the middle.
21 And that one the mistake was not that we didn't
22 convey something to KICA by mistake, but that we
23 had misdescribed the property such that a parcel of
24 several acres went to KICA that shouldn't have, it
25 should never have come out of our ownership, and

1 KICA deeded it back to us.

2 THE COURT: All right. I'm with you
3 now.

4 Why can't we just do that by
5 stipulation, that that's just what happened. I
6 don't know if I need exhibits and all that.

7 MR. LESEMAN: Okay. Your Honor, would
8 just having the public records, the two deeds,
9 would that be helpful?

10 THE COURT: I don't even know if I need
11 that. There is no dispute that this has happened
12 before and there's been something that went on,
13 right?

14 MS. ARMSTRONG: Yeah.

15 THE COURT: I don't even know if we
16 need to muddy up the record with that.

17 MR. LESEMAN: Okay, Your Honor, that's
18 fair.

19 And would Your Honor mind me asking for
20 just perhaps an extension of that stipulation, I
21 can ask the parties, that the one that Mr. Long
22 just mentioned whereby we received the three acres
23 back, that was achieved by a confirmatory quit
24 claim deed which is being shown to you as Exhibit
25 13, which was accomplished without a board vote,

1 which was accomplished with the consent of the Town
2 and was corrected by a confirmatory quit claim deed
3 without need for an action in equity for
4 reformation of the deed.

5 THE COURT: Any objection to that?

6 MS. JETT: It happened.

7 THE COURT: That apparently happened.
8 You want to give me a little basis for why that
9 happened? You said something, it was erroneously
10 conveyed?

11 BY MR. LESEMANN:

12 Q. Mr. Long, would you be able to provide the
13 Court with some more information?

14 A. I just know it was mistakenly described as
15 within the property that was conveyed to KICA. And
16 without not just a board vote, but without a
17 property owner vote, it was conveyed back to us
18 once we called it to their attention by a quit
19 claim deed, back to KRA.

20 MR. LESEMANN: And, Your Honor, Ms.
21 Nimmons would perhaps be able to testify to this
22 about this as well.

23 BY MR. LESEMANN:

24 Q. But, Mr. Long, do you recall whether the
25 issue may have been the absence of -- while the

1 parcel might have been surrounded by other surveyed
2 parcels, that it was not a surveyed parcel itself
3 so there was no seaward boundary. And did the lack
4 of the seaward boundary, that could create the
5 discrepancy as to the beachfront strip that was
6 supposed to basically lie below the seaward
7 boundaries of the oceanfront parcels in essence?

8 That may have been roundabout, but is that
9 in essence what your understanding was?

10 A. I honestly don't recall that part.

11 I thought you were going to get Amy to get
12 you on leading questions because that's one of the
13 great ones.

14 MS. ARMSTRONG: You were looking at me,
15 and I was looking at you.

16 THE COURT: He's worried about the
17 objections.

18 Is this property that was conveyed
19 pursuant to the 10-mile strip, is that what this
20 was?

21 THE WITNESS: Yes, sir.

22 The one at the far eastern end. And
23 the other one was property that we conveyed
24 pursuant to the strip document, or deed and
25 agreement to do so. But we mistakenly included

1 some lands in one way or another that shouldn't
2 have been included.

3 And I think Beth needs to say exactly
4 how that happened.

5 THE COURT: Okay. That would have been
6 outside of the 2- to 300 foot strip?

7 THE WITNESS: Yes, sir.

8 THE COURT: Okay. And that came back.
9 All right, I'm clear on that.

10 MR. LESEMANN: Great, Your Honor. But
11 I think that -- and Beth can help.

12 BY MR. LESEMANN:

13 Q. Mr. Long, do you recall you were educating
14 me the other day about the island. Do you recall
15 whether this might be the approximate location?

16 A. That was it.

17 Q. Okay.

18 MR. LESEMANN: So, Your Honor, just the
19 final point being that the circular parcel, which
20 is hard for me to identify for purposes of the
21 transcript, but next to this large --

22 BY MR. LESEMANN:

23 Q. Is this the Sanctuary parcel here, Mr. Long?

24 A. It is.

25 Q. Okay.

1 MR. LESEMANN: So, Your Honor, again,
2 with this parcel falling outside clearly of the
3 hatched area, again this conveyance having occurred
4 essentially as an acknowledged mistake and being
5 corrected by a corrective deed by KICA without a
6 vote of the full membership was the point of the
7 analysis.

8 THE COURT: Okay, got you.

9 BY MR. LESEMANN:

10 Q. Mr. Long, as a result of the error in the
11 proper description, were the intent of the parties
12 met with regard to the terminating point of the
13 beachfront strip on the west end of the island?

14 A. No. I think the intent was frustrated as
15 far as that point is concerned.

16 As I said, nobody at KICA, nobody in the
17 community association membership, that was a couple
18 of thousand people at the time, nobody of the Town,
19 no lawyer caught it that we had inadvertently
20 conveyed some land that turned out to be 4.6 acres.

21 I mean, I had no idea when Beth first told
22 me I thought it was some de minimis little tiny
23 thing and so we didn't do anything about it for a
24 bit and just put it off.

25 But it was a frustration of our intent

1 completely to mistakenly convey 4.6 acres, at least
2 a good part of which was usable and it was growing.
3 And it didn't just have a density assistance to us
4 to keep title to it, though that was important,
5 okay. But it also took away the right if you had
6 conveyed the beachfront strip, it would take away
7 your flexibility to go out with accretion, to
8 convey to people to the mean high water mark or
9 some other point, or to give more land to people by
10 easements or deeds and give them direct protection
11 from being on the ocean and knowing no one could
12 build in front.

13 So a lot of flexibility would have been --
14 will be gone if this is not corrected. And besides
15 the value that will go out the window.

16 Q. And the agreement for conveyance, did you
17 actually sign that document as the secretary?

18 A. I think I did. I'm sure.

19 Q. And did the agreement for conveyance itself,
20 although it included the erroneous error in the
21 property description that you described, did the
22 agreement for conveyance indicate that the purpose
23 was to evidence the agreement to the conveyance of
24 such properties in accordance with the terms and
25 provisions of the development agreement?

1 A. It did. In the second, third whereas clause
2 as, Your Honor, we referenced the terms and
3 provisions of the development agreement, among
4 which are 16 that we read earlier, 16.(b) is it?

5 Q. Right. And also, and as you mentioned about
6 the development agreement itself, because while
7 this is an exhibit, is this also a separate
8 agreement for conveyance?

9 A. It is. And it is a separate agreement
10 because they wanted to be able to know they had the
11 right to acquire certain properties that the Town
12 and we had negotiated over a year's time that
13 became the first development agreement on Kiawah.

14 Q. Mr. Long, based on your knowledge both
15 working with the Town, from your knowledge of
16 development agreement, and from your working as a
17 board member and secretary of KICA, is it your
18 belief that the parties -- the intent of those
19 parties was also frustrated by the error in the
20 description?

21 A. Yeah. I mean, are you talking about those
22 parties being --

23 Q. Meaning the Town and KICA, yes.

24 A. Yeah, I think so. Because I don't think
25 KICA has any interest in trying to do -- trying to

1 accept properties that aren't intended to go its
2 way.

3 And it knows perfectly well that it wasn't
4 ever entitled to receive this property. And it
5 never received any property. In fact, it has no
6 rights under the covenants and restrictions and
7 documents that created KICA to develop any
8 property.

9 So even if it had developable property, it
10 just has to sit there.

11 Q. Did you write a letter to Dennis Rhoad on
12 about July 22nd, 2011 relating to -- particularly
13 to the beachfront strip issue?

14 A. I did.

15 Q. Okay. And did you include various exhibits
16 in that letter?

17 A. Yes.

18 Q. As we go through, does this appear to be a
19 true and accurate copy of that letter and those
20 exhibits?

21 A. Yes, they do.

22 Q. Okay.

23 MR. LESEMANN: Your Honor, we would ask
24 for admission of Mr. Long's letter to Dennis Rhoad.
25 And it would be admitted as Plaintiffs' Exhibit 15.

1 THE COURT: And that's to Mr. Rhoad?

2 MR. LESEMANN: Mr. Dennis Rhoad, yes,
3 sir. Sent by Mr. Long.

4 THE COURT: What's the date on that?

5 MR. LESEMANN: July 22nd, 2011.

6 THE COURT: All right. Any objection?

7 MS. ARMSTRONG: Your Honor, we did
8 locate it. And to the extent that it's being
9 asserted -- I mean, the witness is on the stand.

10 So I get that he did send this letter.
11 He said that he sent it, but it does contain
12 arguments in it. So to the extent that it's being
13 admitted for the truth of the matter contained
14 within the letter, that's what we would object to.

15 MR. LESEMANN: Your Honor, it is a
16 business record.

17 THE COURT: I'm going to allow it. He
18 is subject to cross. He is here. He can talk
19 about it.

20 MR. LESEMANN: Thank you, Your Honor.

21 (Plaintiffs' Exhibit No. 15 was
22 admitted into evidence.)

23 BY MR. LESEMANN:

24 Q. Mr. Long, can you just read this paragraph I
25 have highlighted real quick?

1 A. Yes. We approached KICA in the summer of
2 2007 in an effort to correct the inadvertent
3 conveyance.

4 The board acknowledged that the property was
5 conveyed in error, but either a corrective or
6 confirmatory deed to correct the conveyance made in
7 error did not require property owner/member
8 approval, and pointing out that the precedent set
9 by a prior board when it signed the 1997
10 confirmatory deed referenced above.

11 The then existing KICA board was reluctant
12 to sign without an affirmative vote from the
13 membership.

14 Q. Was this a truthful and accurate statement
15 you read in your letter to Mr. Rhoad?

16 A. It was. Their attorney at the time from
17 Atlanta said that they, out of an abundance of
18 caution, they ought to get a vote of the
19 membership, despite it being a complete mistake.

20 Q. So was anybody disputing with you that there
21 was a mistake that was made relating to the 4.62
22 acres?

23 A. No.

24 MR. LESEMANN: No further questions,
25 Your Honor.

1 THE COURT: Okay. Ms. Jett.

2 CROSS EXAMINATION

3 BY MS. JETT:

4 Q. Mr. Long, I have a couple of questions. You
5 may have stated this whenever Mr. Lesemann was
6 asking you questions. But can you tell me what
7 years you served on the board for KICA?

8 A. I'm pretty sure from the time that we bought
9 -- I'm not sure, I'm pretty sure from the time we
10 bought in 1988 until probably a couple years after
11 1994. But I don't have that handy, I can't
12 recollect.

13 Q. You do not know whether or not you were on
14 the board in 1997 when the two confirmatory quit
15 claim deeds were sent between the parties?

16 A. I don't. Whatever your records would show,
17 I'd be happy to say that's correct.

18 Q. Okay. When you were discussing -- is it
19 your testimony that the information that
20 Ms. Nimmons used to create the legal description
21 that was used in the agreement for conveyance in
22 the 1995 quit claim deed were materials that she
23 received from you?

24 A. I don't know if she got them from me. But
25 remember the list of documents and paragraphs in

1 the development agreement that we went over with --

2 Q. That were attached to the letter to
3 Mr. Brown?

4 A. Yes.

5 Q. Okay, sure.

6 A. Well, I know Ms. Nimmons got that, and she
7 couldn't recollect for me when I have asked her,
8 you know, a few times what else she had. But she
9 knew she had that. And she knew she didn't have
10 16.2.

11 Q. The graphic illustration?

12 A. Yeah, she didn't have that. And she was
13 just doing her best, like we often do, to describe
14 something without a plat.

15 And, you know, you still get in the Hall of
16 Fame, somebody said, if you bat 300. And she was
17 batting about 999. She's very, very good and we
18 just figured it was right.

19 Q. Okay, fair enough. Well, in the we figured
20 it was right territory, can you kind of tell me
21 what sort of instructions you would have given her
22 on how to describe it, or would those instructions
23 have come from you?

24 A. I don't know if I recall the instructions.
25 But she and I worked together on a lot of things,

1 being a lawyer, and somewhat of a real estate
2 lawyer.

3 I remember discussing with Beth generally
4 before and after the development agreement
5 discussions began trying to find a way to tackle
6 the elephant of that enormously long parcel, and
7 how best to do it.

8 And couldn't we just -- I remember saying,
9 couldn't we just say, you know, it's below all the
10 lot lines that are of record, and surely that would
11 cover it.

12 We looked at the Kiawah map that we give our
13 sales agents, which is about the only one that
14 pulled it all together, a few others in the DVD
15 that we had before. And it looked like that would
16 just about cover it, if we could just say that.

17 And then we got with the Town and we decided
18 that we were obligated only to convey to points
19 east and west as were seaward of developed things
20 for the reasons that I have said.

21 And I think Beth knew that. I just think it
22 didn't kind of get into writing in a couple of
23 places and that led to the three mistakes, if you
24 will, that you might call those.

25 You know, I think there is other little

1 errors here and there. And it's lucky that in a
2 huge document with three volumes and an enormous
3 amount of legal work that there weren't scores more
4 errors. I think we are all just really lucky.
5 This is not a hard case to me. This is like you
6 know and I know this was a mistake. And so.

7 Q. Okay, fair enough. Well, once the
8 description was generated, can you tell me -- I
9 mean would you have personally reviewed the legal
10 description that Ms. Nimmons came up with?

11 A. No. I don't think I ever reviewed any of
12 her deeds. She prepared all of the deeds for the
13 company for what we call a company product.

14 You know, we didn't sell, Your Honor, houses
15 and condos ever. No multi-family, no houses. We
16 sold homesites. And so we would describe
17 homesites.

18 And Beth would do every deed we did. And we
19 did a lot. And we did homesite descriptions for
20 people who listed their homesites with us for
21 resales.

22 If I tried to go behind her and see if she
23 dotted every i and crossed every t, I wouldn't have
24 time to do anything else.

25 So that's why we hired -- I went and hired

1 Beth from Tommy Buist's firm right after the
2 closing, or not long after the closing. And
3 luckily he agreed, with no hard feelings or
4 anything, she could come with our firm as an
5 in-house paralegal.

6 Q. Okay. As to your role in KICA -- and I
7 asked Mr. McKinney some of these questions, but
8 since his memory was hazy I thought I'd try another
9 pass at you and see if your memory was a little
10 more clear.

11 Do you recall there being any board meetings
12 or executive sessions of the KICA board prior to
13 the execution of the development agreement wherein
14 KICA might have been reviewing draft documents or
15 strategizing on maybe like a wish list of things
16 they wanted to put before the Town or KRA for the
17 development agreement?

18 A. Well, there were several people who were you
19 might say activists, property-owner members of the
20 KICA board, and/or KICA property-owner group. And
21 those people made their wishes known generally
22 through Tug Greer, who was a retired general and
23 property owner at Kiawah, a very outspoken vice
24 president of the board for KICA.

25 And they would meet with the Town. And I

1 would sometimes get Tug to debrief me on what their
2 concerns were.

3 And he did have a wish list, and he had a
4 fairly long list. And we tried to accomplish
5 almost everything we wanted. Insofar as this issue
6 is concerned, I'm confident we accomplished
7 everything he wanted.

8 Now, he had a lawyer. And his lawyer was
9 provided copies of the documents, including the
10 agreement of conveyance and the quit claim deed and
11 the development agreement drafts.

12 And his lawyer was with an outstanding firm,
13 the White's Firm in Greenville and Columbia. His
14 name was Larry Estridge. I believe he was a
15 property owner.

16 And he reviewed the documents for Tug's
17 group which was basically KICA non-KRA board
18 members. And Larry had no comments about this. He
19 had other comments, but not about this at all.

20 Q. Okay. To your knowledge, was there any
21 discussion -- I know that earlier we had discussed,
22 I believe it was Mr. Permar, about the development
23 agreement having a -- in section 16, the subsection
24 (b) as the 10-mile strip, and subsection (g)
25 dealing with Captain Sam's Spit that would also be

1 a subsequent conveyance to KICA.

2 And I understand that that didn't happen
3 because of the revisions in the 2005 development
4 agreement. But was there any discussions that you
5 are aware of or that you can recall about basically
6 the beachfront that was all coming to KICA at some
7 point, but whether some should be through the
8 beachfront strip versus what was coming in through
9 the Captain Sam's Spit?

10 A. Were there discussions about the
11 differences, if any, between those types of
12 conveyances that were called for by the development
13 agreement?

14 Q. Yes, sir.

15 A. I don't remember any discussions about
16 those.

17 Now, you know, one thing that I am not sure
18 has been given all the weight it should, is the
19 development agreement of '94 gave the prerogative
20 to us, as the developer, to sell the eastern half
21 of Captain Sam's Spit for a park.

22 So one of the things that we thought about
23 doing in general, it didn't ever approach doing it,
24 but we had the right to do it under the development
25 agreement, was sell for example half of Captain

1 Sam's, which would have been maybe 75 or 100 acres,
2 to Charleston County Park and Recreation Commission
3 for -- I was their lawyer for 25 years. They were
4 paying very big prices for --

5 Q. Charleston County's lawyer?

6 A. Yes. And Charleston County PRC's lawyer.
7 And they were paying big prices for acreage for
8 their excellent parks.

9 So we had negotiated in '94 to do that. We
10 didn't do it because the line got changed, the
11 setback line got changed utterly unrelated to our
12 company -- we didn't make any lobbying effort or
13 anything like that -- it got changed so that all of
14 Captain Sam's became developable.

15 And the Town, when they wanted to come sit
16 down, do a 2005 development agreement, the number
17 one objective was to get rid of the hotel rights
18 that we had on the western end of Kiawah on parcel
19 13. And that was a big surprise.

20 And we came back and said, well, if you're
21 going to do that, then we want the right to at
22 least develop about 20 or 25 acres or so of low
23 density development at Captain Sam's. And that was
24 basically the trade.

25 Q. Earlier when -- were you here for

1 Mr. Permar's testimony earlier this morning?

2 A. Yes, ma'am.

3 Q. He had mentioned that shortly after your
4 group realized the magnitude of the 4.62 acres,
5 that he had issued a memo to Joe Bunting and Craig
6 Weaver of KICA describing or presenting his
7 understanding of what your group is calling the
8 error of the additional land.

9 And he mentioned that he met with Mr. Weaver
10 and Mr. Bunting, and I believe he said that you
11 were also present at that meeting to discuss his
12 presentation of the error. Do you recall that
13 meeting?

14 A. I do. That was in like 2010 or '11. And I
15 recall meeting.

16 Q. Okay. At that time do you recall whether or
17 not you asked Mr. Weaver or Mr. Bunting to take any
18 action on behalf of KICA in regards to --

19 A. We first of all wanted to educate Mr. Weaver
20 and the others there. So Mark took the lead on
21 that with Beth.

22 One or more of us asked naturally that in
23 light of what we thought was the truth of the
24 matter that we spread out on the table and explain
25 in some detail for an hour and a half or so.

1 We asked him to consider if we were right or
2 wrong. If we were right, can we correct it like we
3 corrected the other mistakes that I alluded to
4 earlier. He said he'd take it under advisement.

5 Q. And he was Mr. Weaver?

6 A. I think it was Craig Weaver. It's the only
7 time I ever met with him about anything.

8 Q. Okay. And he was the then president of the
9 board of KICA?

10 A. I think he was. I'm pretty sure he was. Do
11 you think he was?

12 Q. I believe he was. That's my understanding.

13 A. Okay.

14 Q. And I believe you testified that you signed
15 the agreement for conveyance on behalf of KICA; is
16 that right?

17 A. Pretty sure I signed with Townsend Clarkson
18 being the president.

19 Q. I think you are correct. You're right.

20 Prior to your execution and Mr. Clarkson's
21 execution of that document, was it presented to the
22 KICA board for any sort of vote or approval?

23 A. The document itself of course had had
24 several public hearings. The board members
25 naturally came.

1 It was the first real business of theirs to
2 make sure they had reviewed it prior to the
3 meetings, prior to the hearings. They were well
4 aware of what it said. We had no interest in
5 having them feel slighted and not knowing what was
6 in it.

7 To my knowledge they had no concerns other
8 than Tug had some things on his wish list he
9 probably didn't get, and I have no idea what they
10 were, but they didn't relate to this.

11 Q. Okay.

12 MS. JETT: I think that's all my
13 questions.

14 THE WITNESS: Thank you.

15 THE COURT: Ms. Armstrong.

16 CROSS EXAMINATION

17 BY MS. ARMSTRONG:

18 Q. Mr. Long, you were pretty intimately
19 involved in the drafting of the development
20 agreement on behalf of KRA, weren't you?

21 A. I tell you, Trenholm drafted most of it with
22 Mark on our side of the fence. I would review
23 and/or suggest things after review of pieces of it.
24 It took a year with lots of breaks in the action of
25 weeks and months.

1 So, yes, intermittently I was involved from
2 time to time.

3 Q. So you drafted and edited portions of the
4 development agreement over the course of
5 approximately a year; is that right?

6 A. I helped draft it. I would say most of the
7 actual wording was either Mark's or Trenholm's.

8 Q. Is it safe to say that you've read multiple
9 iterations of the development agreement, the 1994
10 development agreement?

11 A. I have not read it since about 1994, you
12 know, in its entirety.

13 Q. And that's the time period I'm referencing.
14 While you were going through the negotiations
15 before it was executed, you read multiple
16 iterations of the development agreement?

17 A. I think I probably did read most of the
18 iterations, yes.

19 Q. And prior to -- it was executed by Buddy
20 Darby?

21 A. Charlie Way.

22 Q. Charlie Way. And prior to Charlie Way
23 executing the '94 development agreement, you read
24 that entire development agreement; is that
25 accurate?

1 A. I think I read most of it is what I said.

2 Q. And paragraph 16 specifically requires
3 conveyances of environmentally sensitive
4 properties; is that right?

5 A. Yes. I think it does.

6 Q. Okay. Now, are you familiar with the terms
7 setback line and the baseline?

8 A. Oh, just generally.

9 Q. Okay. And generally what do those lines
10 represent?

11 A. Well, generally the baseline is defined for
12 islands off the coast of our state as the line that
13 is -- it used to be in the trough of the primary
14 dune.

15 And it got moved around. And then there's a
16 different kind of definition of where it is. And
17 when you get to inlets -- and I am not going to
18 tell you I can remember what it was, but it was
19 such that you would then have the setback line only
20 be like 20 feet above that.

21 The setback line was basically, even though
22 you might own it, you couldn't use it beyond the
23 setback except for certain limited things.

24 Q. And in 1994, where was the setback line in
25 relation to Captain Sam's Spit?

1 A. Well, if you think about the Spit as a
2 peninsula of land, the very easternmost neck of
3 that peninsula, as it begins to curve back towards
4 the park property, I consider that kind of the end
5 of the peninsula Captain Sam's Spit/neck.

6 And the line that was the baseline/setback
7 line came down the beach from the east to the west.
8 And when it got near that neck, it kind of went up
9 into the, as I recollect, around where the park is.

10 Q. Okay. That's what I think a later exhibit
11 is going to show us when Mr. Eiser is here on the
12 witness stand. I wanted to make sure we were kind
13 of clear on where the setback line was.

14 And so seaward of that line, there was no
15 development allowed, correct?

16 A. Very little things could be -- very few
17 things could be done out there.

18 Q. And do you -- are you familiar with a
19 document called the environmental inventory of
20 Kiawah Island?

21 A. I think I recall it. It was a document that
22 Hayes put together, Miles Hayes?

23 Q. Correct. I think Miles Hayes is a coastal
24 geologist in the state of South Carolina?

25 A. Yes. And he did that in connection with the

1 planned development district ordinance that Frank
2 Brumley presented to the county council to get the
3 first zoning for Kiawah.

4 And they acquired, the Kuwaitis with Sea
5 Pines assisting, acquired the property. Then Frank
6 came in for the zoning.

7 Q. And was that environmental inventory
8 something that was commissioned by the Kuwaitis, or
9 was it commissioned by --

10 A. The Kuwaitis paid for it. They had engaged
11 Sea Pines Company to be their developer.

12 Q. And do you recall whether that document was
13 as a result of a collaboration of scientists from
14 around the state addressing all aspects of Kiawah
15 Island? Would that be a fair statement?

16 A. They addressed a lot of aspects of the
17 island.

18 Q. And do you recall that the recommendation
19 for Captain Sam's Spit to be that it was used for
20 open space under that inventory?

21 A. I think they recommended limited to no
22 development down there. Of course that coincided
23 with the State's view of the things at the time.

24 Can I have a little bit more water, please?

25 MR. LESEMAN: Sure.

1 Your Honor, I wanted to also provide
2 the same leeway that was provided to me, but I
3 don't know that we have a copy of the environmental
4 inventory document. And so I think we are in a
5 hearsay realm.

6 THE COURT: I hope we don't need it, do
7 we?

8 MR. LESEMANN: Your Honor, I'm just
9 asking.

10 MS. ARMSTRONG: The next question
11 should clarify everything.

12 THE COURT: Okay.

13 MS. ARMSTRONG: And I just wanted the
14 witness to have a sip of water before I asked it.

15 BY MS. ARMSTRONG:

16 Q. So the 1994 development agreement basically
17 reflects that use as an open space, doesn't it?

18 A. I think it did, Amy. But honestly, whatever
19 it says, it says.

20 Q. Right. Well, it does say in the 1994
21 development agreement, you would agree it does say
22 Captain Sam's Spit is going to be dedicated to
23 KICA?

24 A. No, I wouldn't say that. I will say it
25 could be sold or used, half of it could, for park

1 purposes. And it could have been -- half of it
2 could have been sold to an entity like PRC.

3 Q. Now, something changed with regard to
4 Captain Sam's, and that's was the setback lines
5 changed in 1999. Do you recall that?

6 A. I do. The State changed their line.

7 Q. Okay. And when they changed the line, that
8 allowed development to occur on Captain Sam's Spit,
9 whereas it couldn't have occurred in 1994, correct?

10 A. That's right. It allowed development its
11 entire length. It's about a mile and a half, the
12 highest dunes in Kiawah, as you know.

13 Q. Were you present when Beth Nimmons gave her
14 deposition? I cannot remember.

15 A. No.

16 Q. I'm going to represent to you that
17 Ms. Nimmons indicated that you were the one who
18 gave her instructions as far as drafting the
19 agreement of conveyance, and the draft quit claim
20 deed.

21 MR. LESEMANN: Your Honor, I object. I
22 think that he could be asked as a question, but
23 crossing a witness on another witness's
24 deposition --

25 THE COURT: Put that in the form of a

1 question if you would.

2 BY MS. ARMSTRONG:

3 Q. Mr. Long, would anyone other than you have
4 given Beth Nimmons direction in drafting the
5 property description for the beachfront strip?

6 A. Well, I think I made it clear. If I hadn't,
7 I'm going to say it again. I will be happy to take
8 responsibility, if I was as inadequate as I suspect
9 I was, in providing data to Beth and Tom Buist, her
10 employer.

11 We engaged that firm. She was the head
12 paralegal. She was the one who drafted our
13 documents like this. Tommy would look them over.
14 And I would sometimes look them over.

15 But he would look them over in detail in
16 terms of the descriptions. I would just look them
17 over just to see they generally seemed in the right
18 form.

19 And if her recollection is I'm the one that
20 was giving her instructions, that's fine with me.

21 Q. Now, what I asked you, and I tried to
22 rephrase it, would anyone to your knowledge, anyone
23 other than you, have given Ms. Nimmons directions
24 in drafting the property descriptions?

25 A. I'm sorry. The only people that would have

1 discussed things like this would have been me,
2 Mark, and Tommy Buist.

3 Q. And are you aware if Mark gave Beth any
4 instructions on the property descriptions to your
5 knowledge?

6 A. No, nor Tommy Buist. I don't know if they
7 did or they did not.

8 Q. So you didn't give Ms. Nimmons any
9 directions as far as the specific end, western
10 terminus of the beachfront strip; is that correct?

11 A. Well, I know this seems anomalous and maybe
12 crazy, but we had plenty of discussions, you know,
13 several I'd say, about the fact that we were trying
14 to meet the objection. The objection was the Isle
15 of Palms case. The Beach Company case that went to
16 the Supreme Court.

17 And the objection was what happens in front
18 of people who paid good money for lots on the
19 ocean, or parcels. Beth I think understood that
20 concept. I think she totally bought into trying to
21 describe the lands that fit it. And it didn't
22 happen on the legal description.

23 We didn't know magnitude of the description
24 error until years later.

25 Q. So I guess to ask my question again, because

1 I'm not sure I heard the answer in there. Did you
2 give her any specific direction as to what the
3 western terminal boundary should be of the
4 beachfront strip?

5 A. I told her as we discussed this often,
6 several times at least, I told her that it was
7 generally to be in front of other property owners
8 so that they couldn't get blocked.

9 And that was what we heard from the Town was
10 the concern -- some town council members, and some
11 members of KICA. And we had no problem protecting
12 against that happening, as well as being on the
13 affirmative and not wanting it to be a black mark
14 against our real estate and sales efforts.

15 Q. Have you been in the courtroom all day
16 today?

17 A. Most of the day.

18 Q. Most of the day. Have you heard other
19 witnesses testify about perhaps parcel 13 being the
20 -- I guess that eastern boundary of parcel 13 being
21 the boundary?

22 A. There is no question about the boundary.
23 You can just look at the only draft in the
24 development agreement.

25 Q. And parcel 13 was actually the 16-acre --

1 what we have called 16-acre tract. I believe it's
2 in evidence as Exhibit No. 5. Is that the same
3 parcel?

4 A. It's 16, depending on whether you pick up
5 the land to its west. Then it become 19.5. And so
6 it's parcel 13 in any event.

7 And parcel 13 and parcel 12 are the two
8 parcels that were given the prerogatives under the
9 charts you saw of how many units per acre they
10 could have, and what height they could have, and
11 all the other stuff in that chart.

12 Q. And that parcel was identified, there were
13 no boundaries to that parcel in 1994 when you
14 entered that development agreement; is that
15 accurate?

16 A. If I'm not mistaken there was a plat that
17 showed parcel -- I don't know if it showed parcel
18 13, it showed the 16-acre tract.

19 Q. Correct. And that plat was in existence
20 prior to you executing the 1994 agreement, right?

21 A. I think it was. I don't have in my mind the
22 R.M.C Office, but I think it was.

23 Q. But you didn't put any language in the
24 development agreement that said that the east end
25 of that parcel is going to be the terminal --

1 western terminal boundary, right?

2 A. No. We did better than that, you're right,
3 we didn't do that. But we did better than that, we
4 showed it. It's unmistakable. You can't mistake
5 it.

6 It's the eastern side of parcel 13. There
7 is no way to say it's the western side of parcel
8 13. It's the eastern side on the graphic.

9 Q. Mr. Long, I think we are going to have to
10 disagree about that --

11 A. Okay.

12 Q. -- what's clear and what's not clear. And
13 you didn't ask or tell Ms. Nimmons that she should
14 use the east end of parcel 13 as the boundary, did
15 you?

16 A. No. I said go in front of platted
17 properties that have been sold by us and the
18 Kuwaitis for 10 miles. And try to capture the
19 varying-width land as you go along 10 miles.

20 Q. And did you hear Mr. McKinney testify that
21 he believes that the west end of the Beach Dune
22 [sic] Villas would have been the terminal boundary,
23 which is basically the same thing as parcel 13,
24 it's just the other side of that line?

25 A. I think he liked to describe it in terms of

1 product.

2 Q. Okay. And you didn't give any instructions
3 to Ms. Nimmons that that should be the boundary,
4 the Beach Dune -- the west end of Beach Dune
5 Villas?

6 A. I may have because -- see, that's what I was
7 trying to get at, Amy. I was trying to tell her,
8 and she totally understood I think, she just made a
9 mistake where she started her description.

10 I told her to accomplish the objection [sic]
11 of the Town and the appointment of the Town; which
12 is go in front of the Villas and every other lot,
13 whether built on or not, that had been sold. And
14 make sure we get that land all the way along.

15 Q. So now I'm hearing you say something a
16 little bit different. You think you may have given
17 her a specific terminal boundary?

18 A. I didn't namely say the name of the Villas
19 there, I know I said what I've told you, which
20 would be the same thing which is, check to make
21 sure that we get a description of the beachfront
22 strip which is everything in front of sold lots and
23 sold product for 10 miles. Don't leave anything
24 out.

25 Q. So you didn't give her very specific

1 instructions on precisely where that western
2 boundary was when she was drafting the property
3 description for the beachfront strip; isn't that
4 right?

5 A. I gave her the description I just told you.

6 Q. Okay.

7 A. I honestly don't know how the mixup
8 occurred, but it occurred despite me thinking that
9 I had given her sufficient instructions and I maybe
10 did not.

11 Q. And now as we sit here today you have a very
12 clear picture of what your intent was trying to --

13 A. No question in my mind I would see 16.(b),
14 or whatever it is, the graphic, I would see that
15 because Mark brought back a copy to show me of his
16 penciled over slash lines where he caught the
17 mistake by the Town's drafter of the graphic.

18 And he penciled over those lines starting at
19 the eastern side of parcel 13. I knew that. I
20 guess I didn't give that to Beth. If she had seen
21 that, we wouldn't be here. And so maybe that --
22 that was shame on me.

23 Q. When did you become aware that there was a
24 problem with the information that was given to
25 Beth?

1 A. Beth wrote a letter to the partners some
2 years after '94, and I don't remember when, to
3 advise us that there were several things that had
4 cropped up that were mistaken descriptives in her
5 quit claim deed description.

6 The ones that seemed the most dramatic were,
7 you know, two, two-and-a-half miles of the Ocean
8 Course which goes around the bend past the Ocean
9 Course which would be another half mile or mile.
10 And that was just a total omission apparently, so
11 we cured that.

12 And the other one had to do with the
13 misdescription down near the hotel, and I have to
14 leave it to her to tell you exactly how that
15 occurred. And I thought and she thought that we
16 were just talking about nothing to speak of at this
17 other misdescription.

18 I don't know why we both thought that. I
19 didn't study it, maybe she didn't, or give it a
20 total going over. But, it wasn't cured then and we
21 put it off and got into other development
22 agreements. We got into St. Kitts and Doonbeg and
23 other things and got busy and we didn't get back to
24 it until some years ago.

25 Q. So was that about 1997 when she let you know

1 that there was some problems that she thought --

2 A. I think it was in '97, or '98 certainly.

3 Q. Okay. Now, but you didn't take any action
4 for a decade. It was not until 2007 that KRA
5 actually raised the question of a problem with the
6 western terminal boundary of the beachfront strip,
7 correct?

8 A. Well, we took the action that we thought was
9 the most obvious and the most land involved. I
10 mean several miles is pretty significant out of 10
11 miles. And it was the one KICA wanted us to really
12 get busy on, so we did right away in a matter of
13 months I think maybe.

14 The other one was no problem, KICA gave us
15 the deed. We got back some land that was mistaken.
16 The other one we didn't have a plat still. We
17 didn't think it was anything to speak of. I
18 thought it was a speck of land, it wasn't, it was
19 4.6 acres.

20 And it was an honest mistake. Let me just
21 tell you, though, Amy, there has been no prejudice
22 to KICA. They have taken no steps in reliance on
23 this mistake that would cause them any harm.

24 To my knowledge they have never written to
25 us and said they had a bit of a problem with

1 dispossessing themselves of land they shouldn't
2 have gotten. And they -- I think it's in internal
3 records that you haven't mentioned show that they
4 totally acknowledged internally that this was our
5 property and we should get it back.

6 Q. Now, well, you don't have anything from the
7 KICA board, there's nothing written from the KICA
8 board that says that they agree that there is any
9 kind of a mistake or error, is there?

10 A. Yeah. I think there is from -- not when I
11 was on the board, but subsequent.

12 Q. There is a formal statement from KICA that
13 you are aware of?

14 A. I think there is a memo to the file. I
15 wouldn't say it's a formal statement of the KICA
16 board, but honestly that --

17 Q. We'll see if that comes in.

18 A. Maybe that would be helpful.

19 Q. Now, you, in the letter, Exhibit No. 15, the
20 letter that you wrote, I believe it was to
21 Mr. Rhoad that Mr. Lesemann was asking you about?

22 A. Yeah.

23 Q. Now, Mr. Weaver, who was the chair of the
24 KICA board, president of the KICA board at the
25 time, he actually told you that he would take it

1 under advisement, didn't he? He didn't actually
2 say that they agreed that there was any sort of an
3 error; isn't that right?

4 A. He didn't say anything then at the meeting
5 at the Ocean Course except that he would take it
6 under advisement. He understood. He asked some
7 questions of Mark, and I think we answered all his
8 questions.

9 He didn't say anything about what steps he
10 would then take at that time.

11 Q. And as far as KICA and how they handle
12 common properties, right now KICA holds some of its
13 common properties as open space, doesn't it?

14 A. I'm sure they do hold it -- you mean like
15 the strip for example?

16 Q. Like Sandcastle, for example. That's a
17 piece of common property that KICA holds and its
18 open space. Nothing is on it. It's not developed,
19 correct?

20 A. The Sandcastle?

21 Q. Yes.

22 A. No. It's got a pool and a clubhouse.

23 Q. There are some common properties that KICA
24 does hold as open space though, correct?

25 A. I think there are probably some. And I

1 think the strip is open space. Don't you think it
2 is?

3 Q. I would agree with you that it's open space,
4 yes. What year was the -- you testified that
5 Ms. Nimmons notified you in '97 that there may be a
6 mistake. When did you actually learn of the extent
7 of the mistake?

8 A. I don't think I saw a plat of the mistake,
9 or survey that led to a plat until two or three
10 years ago. I'm not sure when that survey was done.
11 But two or three years ago would be my first
12 recollection.

13 I resigned from KRA on September 11th. So I
14 didn't keep up with things after that.

15 Q. Mr. Long, do you have Intervenors' Exhibit
16 No. 1, which is the '94 development agreement?

17 A. Yes.

18 Q. If you could turn with me to page 55 of
19 Exhibit 1, the 1994 development agreement.

20 A. Okay.

21 Q. I'm looking at paragraph number 31 that is
22 entitled conveyances.

23 A. Right.

24 Q. Okay. What does this section address?

25 A. Conveyances.

1 Q. Okay. And this is conveyances that were to
2 take place under this development agreement,
3 correct?

4 A. I'm sure it was.

5 Q. Okay. And it describes how the conveyances
6 are to occur; is that accurate?

7 A. Let me just read it.

8 Q. Okay.

9 A. All right. I probably hadn't read this in a
10 good many years, but go ahead.

11 Q. Okay. Can you go ahead and read that first
12 -- that second paragraph which is just one sentence
13 starting with the conveyances into the record,
14 please.

15 A. Starting with the first paragraph?

16 Q. No, the single sentence that's the second
17 paragraph.

18 A. The conveyances required herein shall be in
19 accord with Exhibits 14.2, 15.1A, 15.11, and 16.7
20 hereto.

21 Q. Okay. And 16.7 is the agreement for
22 conveyances, correct?

23 Do you recall whether Exhibit 16.7 to the
24 development agreement --

25 A. I think it is. I just want to double-check.

1 Q. Okay.

2 A. I think you are right.

3 Q. So the section directing the reader as to
4 what documents it would need to reference in
5 conducting these conveyances doesn't reference the
6 Exhibit 16.2 that we have been talking about, does
7 it?

8 A. 16.2 is not mentioned.

9 Q. Okay. Now, if you could go up about to the
10 middle of the paragraph, the first paragraph under
11 conveyances. I think it's about the ninth line
12 down.

13 A. What paragraph was that?

14 Q. The very first one, under conveyances.
15 Starts, all conveyances. If you go down about nine
16 lines you'll see owners' expense. And then there
17 is a sentence that starts with the property owner.

18 If you could just please read that first
19 sentence --

20 A. Starting with the property owner?

21 Q. Correct. -- into the record, please.

22 A. The property owner hereby freely consents to
23 such conveyances and waives any challenges it may
24 otherwise have to the validity of said conveyances
25 as its actions or otherwise.

1 Q. Okay. So Charlie Way, on behalf of KRA,
2 signed a page agreeing to waive any challenge it
3 may have to the validity of any conveyances as part
4 of that agreement, correct?

5 A. Right.

6 Q. Okay.

7 A. Validity wouldn't be accuracy.

8 MS. ARMSTRONG: If you would give me
9 just a moment, Your Honor.

10 THE COURT: Okay.

11 MS. ARMSTRONG: Thank you for indulging
12 me. I don't have any other questions.

13 MR. LESEMAN: Your Honor, just one
14 follow-up.

15 THE COURT: Sure.

16 REDIRECT EXAMINATION

17 BY MR. LESEMAN:

18 Q. Mr. Long, we were just looking at paragraph
19 31. And Ms. Armstrong was having you read portions
20 of it. And am I accurate -- are you still on the
21 same page there?

22 A. Yes, sir.

23 Q. So is the first sentence, all conveyances or
24 transfers of any portion of the real property to
25 the Town or KICA, except for the exchange described

1 in 16.(b) of the agreement?

2 A. Yes.

3 Q. And is Exhibit 16 -- if you go to page 42.

4 A. Can I go back to one answer I gave to
5 Ms. Armstrong, possibly?

6 MR. LESEMANN: Your Honor, with the
7 Court's indulgence, the witness -- I don't know how
8 to handle it. How would Your Honor like to handle
9 that?

10 THE COURT: I don't want to but I guess
11 I will.

12 Mr. Long, go ahead.

13 MR. LESEMANN: I could ask him an
14 open-ended question, but.

15 THE COURT: Mr. Long, go ahead while
16 it's on your mind. But it may subject you to some
17 more cross-examination, I'm just telling you. Go
18 ahead.

19 THE WITNESS: Well, it's a term of art,
20 Your Honor, and you are probably totally aware of
21 it as a planner and a lawyer. But validity of that
22 time had to do with the fact that we had a lot of
23 threats to the constitutionality of the so-called
24 contract zoning that development agreements were
25 all about.

1 Validity had to do -- and Dennis Rhoad
2 wanted us to put that in there because it's in the
3 old statute as I recollect, and you're subject to
4 its action, and you are subject to other things
5 that you have to do in order to get what you get in
6 the way of entitlements.

7 And he did not want us to be able to
8 sue as a result of claims of unconstitutionality,
9 or its actions were wrongful, things like that.
10 That's why that sentence was in there. I know it
11 because I negotiated it with him.

12 THE COURT: That was the last one she
13 asked about on consenting on the conveyances and
14 waiving challenges?

15 THE WITNESS: Yes, sir.

16 THE COURT: Okay. Very good.

17 Go ahead, Mr. Lesemann.

18 MR. LESEMAN: Thank you, Your Honor.

19 BY MR. LESEMAN:

20 Q. So on page 42, Mr. Long, within the body of
21 the development agreement, which is describing
22 these, also the conveyances that are discussed on
23 page 55. Again, within the body of the development
24 agreement itself, on page 42 is 16.(b). Is the one
25 reference to the depiction or to the scope of the

1 beachfront strip Exhibit 16.2?

2 A. Yes, sir.

3 Q. Okay. And so are the conveyances being
4 discussed in paragraph 31, in part, is that the
5 same with respect to the beachfront strip as the
6 conveyance being described in 16.(b)?

7 A. Yes.

8 Q. Okay. And the conveyance as described in
9 16.(b), does it limit itself as reflected in
10 Exhibit 16.2?

11 A. It does.

12 Q. Okay. And you believe 16.2 is clear?

13 A. I think it's crystal clear.

14 Q. But, again, to recap your testimony, was
15 there -- in your mind, was there an error in
16 drafting that resulted in the frustration of the
17 intent of the various parties?

18 A. I think there was.

19 MR. LESEMAN: Thank you. No further
20 questions, Your Honor.

21 THE COURT: Okay. All right. I have
22 got one question I'm to going ask you.

23 You want some more water?

24 THE WITNESS: No, sir. I'm fine.

25 THE COURT: On the -- I want to go to

1 the legal description itself.

2 MR. LESEMANN: In the quit claim deed,
3 Your Honor?

4 THE COURT: In the quite claim deed
5 that we are talking about. I'm trying to figure
6 out where the lines are supposed to be drawn, or at
7 least per this description. I still haven't
8 figured that out.

9 MR. LESEMANN: Is that legible for you,
10 the Court, and for the witness?

11 THE COURT: Yes. I can read that.
12 Can you read that, Mr. Long?

13 THE WITNESS: Yes, sir.

14 THE COURT: All right.

15 EXAMINATION

16 BY THE COURT:

17 Q. So the general description is the 10 miles
18 of length of the strip of land. The northern
19 terminus is a point on a concrete monument located
20 at the southwesternmost corner of the 2-acre tract
21 of land located at the terminus of the Beachwalker
22 Road.

23 That's the southwest corner of what we have
24 seen as the employee facility tract; is that
25 correct?

1 A. Yes, sir.

2 Q. All right. And with that, we have our
3 dispute. But we have got that -- we do have that
4 plat, the employee facility tract, it's plat book
5 AS page 85, and I think I have seen that in the
6 record as well.

7 MS. ARMSTRONG: It is in the exhibits,
8 Your Honor.

9 THE COURT: All right.

10 BY THE COURT:

11 Q. So it then runs south to the mean high water
12 mark of the Atlantic Ocean. Then it extends
13 eastwardly extending due south of a point marked by
14 a concrete monument on page three of three of the
15 plat of Links Course tract by Davis and Floyd?

16 I don't know that I have seen that. Is that
17 nearby? Or is that way over on the eastern portion
18 of the island?

19 A. What she attempted to do was go from the
20 initial touching of the imaginary line and the mean
21 high water mark of the ocean all the way roughly 10
22 miles east to what's called Links Course in the
23 plat but was the Ocean Course tract.

24 Q. Okay. Links Course is Ocean Course?

25 A. Yes, sir.

1 Q. All right. So we are back over at that end
2 over there where we had the other issue?

3 A. Right. And so she was trying to accomplish
4 in a very few words an enormous amount of property.
5 And was very ambitious and it just didn't quite get
6 there.

7 Q. Of varying width, but generally 2 to 3 feet
8 wide of the seaward boundary lines of most
9 beachfront residential properties to the mean high
10 water mark.

11 Okay. So this picks the western boundary as
12 being the southwestern starting point at the
13 employee facility tract, and then runs east?

14 A. Yes. Runs to the ocean and then it goes
15 east.

16 THE COURT: Okay. All right.

17 MS. ARMSTRONG: Your Honor, if I may.
18 We have marked the quit claim deed. It's not in
19 evidence, it's Intervenor's Exhibit No. 3. If we
20 could go ahead and get that admitted.

21 THE COURT: This document?

22 MS. ARMSTRONG: That document. As well
23 as the agreement for conveyance which is Exhibit
24 No. 2. It's a part of the development agreement.
25 I think it's going to be easier for us to locate a

1 document that's got its own exhibit number.

2 So I would move to have Exhibit 2 and
3 3, Intervenors', into evidence.

4 MR. LESEMAN: No objection. We have
5 those marked as exhibits as well, Your Honor.

6 THE COURT: Okay. So Intervenors'
7 Exhibits 2 and 3. I'm sure they're contained
8 within those volumes of books we have got, right?

9 MR. LESEMAN: They are.

10 THE COURT: All right.

11 (Intervenors' Exhibit Nos. 2 and 3 were
12 admitted into evidence.)

13 THE COURT: Okay. I'm just trying to
14 get my head around the description, okay?

15 THE WITNESS: Yeah, it's tough.

16 THE COURT: Okay.

17 Y'all got any follow-up to that?

18 MR. LESEMAN: Nothing further from the
19 plaintiffs, Your Honor.

20 THE COURT: All right, very good.

21 All right, thank you, sir.

22 All right. It's a little after 5:00.

23 What do you want to do?

24 MR. LESEMAN: Your Honor, our next
25 witness would be Beth Nimmons as the scrivener, so

1 I think that there could be some length to that
2 testimony.

3 Again, I'm trying to go as quickly as
4 we could, but.

5 THE COURT: All right. Well, I've
6 already set y'all up for Wednesday. We have agreed
7 to Wednesday.

8 I'm concerned about Ms. Jett being able
9 to reappear in court on Wednesday.

10 MS. JETT: I think I'm heading in the
11 right direction, Your Honor, but thank you for your
12 concern.

13 THE COURT: Okay. Why don't we do
14 that, and that pretty much brings the plaintiffs'
15 case to an end.

16 MR. LESEMAN: We would have, Your
17 Honor, Ms. Nimmons and Mr. Clarkson.

18 THE COURT: Okay. And then from --

19 MS. JETT: One witness, Your Honor.

20 THE COURT: And you have?

21 MS. ARMSTRONG: Four witnesses.

22 THE COURT: You mentioned four before.
23 All right. We ought to be able to get this done.
24 I can give you the whole day. Why don't we just
25 plan to start back at 9:30 on Wednesday.

1 I'm assuming you're traveling here?

2 MS. JETT: I'm staying locally.

3 THE COURT: Okay, you will be here
4 locally. It was a little foggy this morning.

5 MS. ARMSTRONG: It was painful this
6 morning, Your Honor.

7 THE COURT: Let's leave it at that. We
8 are going to be in here tomorrow. If you want to
9 leave something, if you just want to leave it on
10 the desk or somewhere underneath that desk, you
11 may. But you may want to take your stuff, take it
12 back up again.

13 Anything else we need to take up before
14 we --

15 MR. LESEMANN: Nothing formal. I
16 wanted to ask what your preference would be with
17 this audiovisual table. Should we disassemble
18 everything, move it to the side? What would be
19 your preference?

20 THE COURT: I think if we just move it
21 over we will be fine. You can leave that screen
22 for sure. Let's move that over. That has been a
23 big help today, I appreciate that.

24 MR. LESEMANN: Thank you.

25 THE COURT: Very good. Then I'll look

Deposition of Hearing

1 to see most of you all on Wednesday, all right?

2 Thank you very much.

3 (The proceedings in this matter before
4 the Court were adjourned at 5:12 PM.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

I, Anne Bouley Meyer, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the said hearing was taken at the time and location therein stated; that the testimony of the witnesses and all objections made at the time of the hearing were recorded stenographically by me and were thereafter transcribed by computer-aided transcription; that the foregoing is a full, complete and true record of the testimony of the witnesses and of all objections made at the time of the hearing.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal on the 3rd day of January, 2014 Charleston County, South Carolina.

Anne Bouley Meyer
NCRA
REGISTERED PROFESSIONAL REPORTER
My Commission expires
February 5, 2023