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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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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

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 4 OF 6)**

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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 II

DATE: DECEMBER 11, 2013

TIME: 9:30 AM

LOCATION: CHARLESTON COUNTY COURTHOUSE
CHARLESTON, SOUTH CAROLINA

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1 THE COURT: We are back on the record
2 in the KRA versus KICA case. Still the plaintiffs'
3 case.

4 Any matters I need to take up before we
5 get started this morning?

6 MR. LESEMANN: None from the plaintiff.

7 MS. JETT: No, Your Honor.

8 MS. ARMSTRONG: No, Your Honor.

9 THE COURT: Ms. Jett, are you feeling
10 better today?

11 MS. JETT: I am, Your Honor. Thank
12 you.

13 THE COURT: Glad of that.

14 Mr. Lesemann.

15 MR. LESEMANN: Thank you, Your Honor.
16 I would call Beth Nimmons.

17 THE COURT: Ms. Nimmons, come on up.

18 ELIZABETH NIMMONS,
19 having been first duly sworn, was examined and
20 testified as follows:

21 THE COURT: Would you state your full
22 name and address for the record for me

23 THE WITNESS: Elizabeth F. Nimmons.
24 640 Atlantic Street, Mount Pleasant.

25 THE COURT: All right. Thank you.

1 MR. LESEMAN: Thank you, Your Honor.

2 DIRECT EXAMINATION

3 BY MR. LESEMAN:

4 Q. Ms. Nimmons, I'd like to work a little bit
5 backwards with you. Obviously we will get back to
6 the events of 1994, but I want to talk about the
7 present for a brief moment.

8 Who is your current employer?

9 A. Kiawah Development Partnership.

10 Q. Is that employer affiliated and involved
11 with the developer?

12 A. Yes, it is.

13 Q. How long have you been employed with the
14 developer?

15 A. Since 1996.

16 Q. Okay. So would that be after the date of
17 the 1994 development agreement, the 1995 quit claim
18 deed, the 1994 agreement for conveyance?

19 A. Yes, it would be.

20 Q. And during the events that I just mentioned,
21 when those documents were prepared and executed,
22 who was your employer at that time?

23 A. I worked for Tommy Buist.

24 Q. Okay. So Mr. Buist is a real estate
25 attorney that worked here in Charleston for a

1 number of years?

2 A. He did.

3 Q. And was he the founding partner of the
4 Buist, Byars and Taylor Law Firm?

5 A. He was. Actually, his father handled the
6 initial sale of the -- from the Royals to the
7 Kuwaitis.

8 Q. Just to clarify then, in 1994 and 1995 you
9 were not working for the developer directly as an
10 employee?

11 A. I was not.

12 Q. Were you working for the law firm that was
13 providing legal services to the developer?

14 A. Yes.

15 Q. At this time do you serve as the custodian
16 of records for the developer with regard to its
17 land holdings on Kiawah Island?

18 A. I do.

19 Q. Does the developer maintain, and has the
20 developer historically maintained maps that
21 indicate the locations of its holdings on Kiawah
22 Island?

23 A. Yes.

24 Q. And do some of those maps show, for example,
25 the undeveloped lands as that term was recognized

1 under the 1994 development agreement?

2 A. Some of them do, yes.

3 Q. I want to show you what has been premarked
4 as Exhibit 27. It might take a moment to -- it's a
5 large file, so we will wait for it to show up.

6 Are you familiar with a land use designation
7 map that was prepared originally by Mr. Mark
8 Permar?

9 A. I am, yes.

10 Q. And is that a map that shows for example the
11 undeveloped lands, including parcels 12 and 13 that
12 are located toward the west end of the island?

13 A. Yes. It's a large map that represents the
14 parcels under the original 1994 development
15 agreement.

16 Q. When you say large, can you describe for the
17 Court what you mean?

18 A. Probably about six feet long, something like
19 that.

20 Q. Okay. One of the reasons why it took a lot
21 of megabits to save it as a file.

22 Ms. Nimmons, is this a -- is what has been
23 premarked as Exhibit 27 a true and accurate copy of
24 the land use designation map that's kept in the
25 files of the developer?

1 A. Yes, it appear to be.

2 Q. And is that record kept as part of the
3 developer's regular business activities?

4 A. Yes. Those were part of Leonard Long's
5 files.

6 Q. And this particular map actually dates back
7 to the 1994 era?

8 A. Yes, it does.

9 Q. And as we will wait for it to re-actualize.
10 Do you see on the west end of the island, does it
11 show the locations of parcels 12 and 13?

12 A. Yes, it does.

13 Q. And those parcels being the same -- are
14 those parcels the same as the ones that are
15 recognized in Exhibit 13.2 of the development
16 agreement that have residential and commercial
17 zoning rights?

18 A. Yes.

19 MR. LESEMAN: Your Honor, at this time
20 as a business record of the developer, plaintiffs
21 would ask for admission of Exhibit 27.

22 THE COURT: Okay. Any objection?

23 MS. JETT: No, Your Honor.

24 MS. ARMSTRONG: No, Your Honor.

25 THE COURT: No objections, very good.

1 Into evidence Exhibit 27.

2 (Plaintiffs' Exhibit No. 27 was
3 admitted into evidence.)

4 BY MR. LESEMANN:

5 Q. Does this map, Ms. Nimmons, also show the
6 eastern boundary of parcel 13?

7 A. Yes, it does.

8 Q. And am I indicating here the eastern
9 boundary of parcel 13 of what I call the R-shaped
10 parcel?

11 A. Right. Yes, that's correct.

12 Q. And so am I correctly showing the eastern
13 boundary of parcel 13 here?

14 A. Yes.

15 Q. And does that eastern boundary of the parcel
16 13 have significance with regard to Exhibit 16.2 in
17 the development agreement?

18 A. It does, yes.

19 Q. And what was that significance?

20 A. That should have been the beginning point to
21 the beachfront.

22 Q. And when you say the beginning point, that
23 it would begin from this eastern boundary of parcel
24 13 and then continue in a eastern direction down
25 the island?

1 A. Yes. All the way down to what was then
2 known as the Links Course, now the Ocean Course.

3 Q. So back to the present. Are you familiar
4 with -- and we talked -- let's see if I can make
5 this slightly larger.

6 You were here for Mr. Permar's testimony
7 when we talked about densities that were available
8 under the 1994 development agreement?

9 A. Yes, I was.

10 Q. Did those include both residential and
11 commercial density to your knowledge?

12 A. They did.

13 Q. Do you see indications on the map R and C
14 underneath parcels 12 and 13?

15 A. Yes.

16 Q. Hard to read?

17 A. Very hard.

18 Q. Are you able to read them?

19 A. No. Not from here, no.

20 Q. Okay. All right, well we have a --

21 MR. LESEMANN: Your Honor, there will
22 be a physical copy of the long map in evidence.

23 Sometimes technology only takes you so
24 far.

25 BY MR. LESEMANN:

1 Q. With the physical copy, Ms. Nimmons, are you
2 able to see the residential and commercial
3 densities that are reflected on those parcels?

4 A. I am.

5 Q. Okay. So for parcel 13, could you state
6 what the residential and commercial densities are?

7 A. R-12 and C-125.

8 Q. So what did the 12 signify for the R?

9 A. 12 units per acre is my understanding.

10 Q. And R for residential?

11 A. Right.

12 Q. Okay. And for commercial on parcel 13, what
13 is the indicated density?

14 A. It's 125 commercial.

15 Q. And that's 125,000 square feet?

16 A. Yes.

17 Q. So for parcel 12?

18 A. Parcel 12 is 12 units for residential and 25
19 commercial.

20 Q. Ms. Nimmons, are you aware of the developer
21 entity that is the current owner of the parcels
22 that surround the 4.62 acres that are in the --
23 that are the subject matter of this case?

24 A. Yes, that would be KDP II, LLC.

25 Q. And as a result of a recent transaction, is

1 that how KDP II came to be the owner of the
2 surrounding parcels?

3 A. Yes. I think that deed was recorded in May
4 31st of this year.

5 Q. Okay. So setting aside the property
6 description and the transfer that we assert was a
7 mistake and that we're seeking to have the Court
8 overturn, would the 4.62 acres have otherwise been
9 included as part of the lands that were transferred
10 to KDP II, LLC under the special warranty deed?

11 A. Yes, they were.

12 Q. Is the special warranty deed that I have
13 premarked as Exhibit 20, does this appear to be a
14 true and accurate copy of the special warranty deed
15 that implemented that transaction?

16 A. Yes, it does.

17 Q. Okay. Is this document a matter of public
18 record?

19 A. It is, yes.

20 Q. Is this document also a business record the
21 developer would maintain?

22 A. Yes, it is.

23 MR. LESEMANN: Your Honor, we would ask
24 at this time that the special warranty deed that
25 has been premarked as Exhibit 20 be admitted into

1 evidence.

2 MS. JETT: No objection.

3 MS. ARMSTRONG: No objection.

4 MR. LESEMANN: Your Honor, the purpose
5 here was to confirm that the current ownership that
6 was the subject of our additional claim.

7 THE COURT: KDP II?

8 MR. LESEMANN: Yes, sir.

9 THE COURT: All right.

10 (Plaintiffs' Exhibit No. 20 was
11 admitted into evidence.)

12 BY MR. LESEMANN:

13 Q. Ms. Nimmons, I want to draw your attention
14 to -- so let me ask you, these various sections FF,
15 GG, HH, et cetera, do those have sort of a term of
16 art designation NAD when you have these sort of
17 conditions or reservations or what they might be
18 called?

19 A. Yes. Those are basically the matters of
20 record or other matters to which the property is
21 being conveyed, subject to.

22 Q. Right. Let me get my finger to do this
23 correctly here. Sorry about that.

24 Is there a condition within the special
25 warranty deed that is indicated KK?

1 A. Yes.

2 Q. All right. And what is that condition? Are
3 you able to read the screen?

4 A. I am.

5 Q. Okay. What does this condition indicate?

6 A. Rights of tenants as tenants only under the
7 unrecorded lease agreement by and between Kiawah
8 Island Company Inc., and Charleston County dated
9 July 1, 1976.

10 Q. Does this in other words indicate that the
11 transfer of the land is subject to the Beachwalker
12 Park lease?

13 A. Yes.

14 Q. And again the Beachwalker Park lease, is
15 that something that's kept in the course of
16 business by the developer?

17 A. It is, yes.

18 Q. Now, was Kiawah Island Company the original
19 party that entered into that lease?

20 A. Yes, it was.

21 Q. And is KDP II ultimately the successor and
22 assigned of the Kiawah Island Company under this
23 Beachwalker lease?

24 A. It's the successor entitled to the land,
25 yes.

1 Q. Is this a 99-year lease?

2 A. Yes.

3 Q. And did it begin approximately July 1st,
4 1976?

5 A. It did.

6 Q. Is there an access that is provided under
7 this lease that allows for a boardwalk to go from
8 Beachwalker Park down to the beach?

9 A. Yes, there is.

10 Q. Okay. And does that boardwalk traverse some
11 part of the additional land, the 4.62 acres that
12 are subject of this case?

13 A. It is my understanding that it does, yes.

14 Q. Is there a paragraph in the lease relating
15 to the developer's obligation to provide
16 improvement and beachfront access?

17 A. Yes.

18 Q. Okay. Have I highlighted sections 2.2 and
19 2.3 which are those sections that would as a
20 contractual obligation indicate that the owner of
21 the property would provide certain improvements and
22 certain beachfront access?

23 A. Yes.

24 Q. So are you able to read -- I know this is a
25 1976 document. Let me ask you, maybe I'll read it

1 and see if you can tell me if you believe I read it
2 correctly.

3 Section 2.2, improvements. Landlord agrees
4 to provide and maintain the parking spaces set out
5 in section 4.3, outside shower and changing
6 facilities, restroom facilities, shaded picnic
7 area, boardwalk access to and from the beach, and a
8 limited snack bar facility.

9 A. That's correct.

10 Q. Did I read that correctly?

11 A. Yes.

12 Q. So under the lease then, does the landlord
13 agree to provide and maintain boardwalk access to
14 and from the beach?

15 A. It does.

16 Q. Is the beachfront access obligation further
17 explained in section 2.3?

18 A. I believe it is, yes.

19 Q. Okay. So does it indicate that those
20 members of the public permitted access to the
21 leased premises shall also be permitted access to
22 the beachfront area along walkways provided, and
23 also to the aforesaid bathhouses, picnic tables,
24 walks and bicycle path within the said improved
25 area?

1 A. Yes.

2 Q. So again is the -- is a boardwalk, or is a
3 beach access something that is a matter of a
4 contractual obligation of the owner of the land
5 pursuant to this 1976 lease?

6 A. Yes, it is.

7 Q. And would that obligation provide beachfront
8 access continued for so long as the 99-year lease
9 continues?

10 A. I believe it would, yes.

11 Q. And so if the Court were to grant the
12 reformation of the deed and to allow the 4.62 acres
13 to come back to the developer, would this lease in
14 your mind as the custodian of records and also as
15 the legal -- what is your exact title with the
16 developer?

17 A. Legal development manager.

18 Q. Legal development manager. Would this
19 contract continue to be in force?

20 A. It is my understanding, yes.

21 Q. So there would be a continuing obligation to
22 provide beach access?

23 A. Absolutely.

24 Q. Now, is it true that the lease doesn't
25 guarantee -- it guarantees beach access, but not a

1 specific precise location of the beach access?

2 A. That's my understanding as well, yes.

3 Q. But it does provide for the term of the
4 lease beach access?

5 A. We have to provide access. It doesn't
6 specifically say where. It just says we have to
7 provide access to and from those facilities.

8 Q. And is that a right that the landlord is
9 able to withdraw or discontinue before the end of
10 this lease term?

11 A. No.

12 MR. LESEMANN: I don't know that I had
13 asked for admission of the Beachwalker Park lease,
14 Your Honor. I believe we have laid the foundation
15 on this. I can show it to you.

16 Do you have the exhibit book before you?

17 No, I handed you up a map.

18 BY MR. LESEMANN:

19 Q. Ms. Nimmons, I'll hand you this notebook and
20 ask you to look through what has been premarked as
21 Exhibit 36. And ask you, once you have had a
22 second to review it, if you could confirm that it's
23 a true and accurate copy of the Beachwalker Park
24 lease dated July 1st, 1976.

25 A. Yes, it appears to be.

1 Q. Is this a document that's kept in the
2 developer's business records?

3 A. It is, yes.

4 Q. Is it a document that's kept in part because
5 the developer is the landlord under this lease?

6 A. True.

7 MR. LESEMAN: Your Honor, we would
8 move for admission of Plaintiffs' 36.

9 THE COURT: Any objection?

10 MS. JETT: No objection.

11 MS. ARMSTRONG: Just on relevance. I'm
12 not sure that that's clear why this lease is
13 relevant at all. I guess it could go to the weight
14 of the evidence.

15 THE COURT: I will allow it. Go ahead.

16 (Plaintiffs' Exhibit No. 36 was marked
17 for identification.)

18 MR. LESEMAN: Thank you, Your Honor.

19 BY MR. LESEMAN:

20 Q. So, Ms. Nimmons, we're going to talk about
21 the events of 1994 and the property description
22 that was prepared. And clearly the plaintiffs have
23 brought this case because do the plaintiffs believe
24 that this property description is in error?

25 A. (Affirmative head nod.)

1 Q. Well, let me back up. I want to ask a
2 couple questions about the boardwalk.

3 Approximately when was the boardwalk put
4 into place?

5 A. It is my understanding it was put in place
6 in the '70s, right about the time the lease was
7 entered.

8 Q. Now, did KICA build that boardwalk?

9 A. Not that I'm aware of, no.

10 Q. So in 1976, would that be approximately 19
11 years before the quit claim deed that involved the
12 transfer of additional land along with the
13 beachfront strip?

14 A. Yes.

15 Q. So the construction of the boardwalk would
16 not have been something that occurred after the
17 1995 quit claim deed?

18 A. Not to my knowledge.

19 Q. It occurred before, in the 1970s.

20 A. That is my understanding, yes.

21 Q. So as a demonstrative exhibit. Ms. Nimmons,
22 the error in the property description that we will
23 discuss, is that something that is fixable from the
24 standpoint of the legal description?

25 A. Yes, it is.

1 Q. And how would you -- how would you fix that
2 legal description?

3 A. I have actually discussed it with our real
4 estate counsel as well, and I think he talked to
5 the title company. And he believes that a
6 corrective master's deed would probably be the best
7 means of correcting it.

8 Q. Okay. And have you prepared a corrective
9 master's deed that we would -- that the developer
10 plaintiffs would respectfully request to be allowed
11 to submit to the Court in its consideration?

12 A. Yes, I have.

13 Q. And ultimately would that corrective deed
14 simply -- would it simply confirm the terminating
15 point of the beachfront strip that was intended to
16 be conveyed under the 1994 development agreement?

17 A. We are trying to confirm the western
18 boundary, yes, and the property to the west.

19 Q. Would it confirm that the westernmost
20 boundary of the beachfront strip should be that
21 eastern boundary of parcel 13?

22 A. Yes.

23 Q. As shown on the map of the land use
24 designation as shown on Exhibit 16.2 and various
25 documents that have been presented in the case?

1 A. Yes.

2 Q. So speaking of the maps, I would like to
3 review those briefly with you. And again I clicked
4 on Exhibit 27 first, so it will be up in just a
5 moment.

6 But the land use designation map that shows
7 the undeveloped lands, if I were to show you that
8 map, do you have a very good indication in your
9 mind of the location of the additional land, and so
10 if I showed you a map would you be able to tell me
11 whether it is included or is not included in a
12 particular depiction?

13 A. I would, yes.

14 Q. So, Ms. Nimmons, the 4.62 acres that were
15 conveyed, we believe mistakenly, as part of the
16 beachfront strip deed, are those 4.62 acres, would
17 they be located within the green shaded area
18 indicated as parcels 12 and 13?

19 A. Yes.

20 Q. And are those the same green shaded areas
21 that we discussed in which the developer was
22 granted residential and commercial zoning rights?

23 A. They are, yes.

24 Q. Take a moment, I will show you Exhibit 16.2.
25 Now, I understand this is not a document that you

1 had with you in 1994 when you prepared the property
2 description, was it?

3 A. I had not seen this in 1994.

4 Q. But looking at this document here in court
5 today, is the 4.62 acres located within the hatched
6 area that is indicated to be for -- the stipulated
7 location of the beachfront strip under the
8 development agreement?

9 A. No, it's not.

10 Q. Is it located outside of that area?

11 A. It is.

12 Q. Is it located several hundred feet outside
13 of that area?

14 A. Yes.

15 Q. Showing you an exhibit to the 2005
16 development agreement that was admitted by
17 stipulation. Would the 4.62 acres be shown on
18 Exhibit 4.1 to the 2005 development agreement as
19 being undeveloped land owned by the property owner?

20 A. Yes.

21 Q. And would all 4.62 acres be located within
22 this green shaded portion on the western end of the
23 island?

24 A. It is, yes.

25 Q. And does the designation undeveloped lands

1 owned by property owner indicate land that the Town
2 of Kiawah and the developer were agreeing were the
3 subject of further development by the developer?

4 A. Yes.

5 Q. Have you had occasion to look at documents
6 that are posted on the Kiawah Island Community
7 Association's website?

8 A. I have, yes.

9 Q. Have you seen a map attached to Appendix E
10 to the KICA dunes management guidelines?

11 A. I have, yes.

12 Q. Okay. Do these dunes management guidelines
13 have a legend indicating that the KICA dunes are in
14 yellow on a map?

15 A. Yes.

16 Q. When you look at the western end of the
17 island, are the 4.62 acres that are the subject
18 matter of this case shown by KICA on its map of its
19 dunes property, or are they excluded from that
20 graphical depiction of the dunes property?

21 A. They are excluded to the west.

22 Q. And again they would be several hundred feet
23 to the west?

24 A. From what I measured, yes, over 700 feet,
25 close to 800 feet.

1 Q. 700 to 800 feet?

2 A. Uh-hum.

3 Q. And again does the yellow portion of the
4 KICA's own dunes management guidelines dunes map
5 show that the termination point of that beachfront
6 strip of those dunes under management as the
7 eastern boundary of parcel 13?

8 A. Yes.

9 Q. Have you also had occasion to see a common
10 property map that is maintained by KICA on its
11 website?

12 A. Yes, I have.

13 Q. And is there a legend of this map indicating
14 that the lands of -- the common properties of KICA
15 are in green, and the common properties of the
16 developer are in a yellow, basically a brown, beige
17 colorish?

18 A. Right. Property of the developer is in a
19 different color.

20 Q. And these maps, these are available on
21 KICA's website today, correct?

22 A. Yes.

23 Q. And to your knowledge they have been on
24 KICA's website on a continuing basis?

25 A. I have seen them numerous times on the

1 website, yes.

2 Q. The 4.62 acres that are the subject of this
3 action, are they indicated in a brown coloration or
4 a green coloration on the KICA common property map?

5 A. Brown.

6 Q. Okay. And then according to the legend the
7 4.62 acres based on KICA's own map of its common
8 properties are indicated as being lands owned by
9 the developer?

10 A. Correct.

11 Q. And those are not in the green coloration,
12 correct?

13 A. No, they are not.

14 Q. So when KICA is representing its common
15 properties under management to the public, does
16 KICA include the 4.62 acres as a portion of its
17 common property?

18 A. No, it does not.

19 Q. In the course of your work, Ms. Nimmons,
20 have you also looked at zoning and land use maps of
21 the Town of Kiawah?

22 A. I have, yes.

23 Q. These have been admitted by stipulation
24 through the availability of the town clerk.

25 Are the 4.62 acres shown within the orange

1 shaded area with the red diagonal striping?

2 A. Yes, they are.

3 Q. And waiting for a moment for this, this is
4 not a large document.

5 Based on the 2010 Town of Kiawah Island
6 zoning map, does that orange shaded area with red
7 diagonal striping indicate properties that are
8 zoned as R-3 commercial?

9 A. Yes, it does.

10 Q. And so is that R-3 commercial designation
11 consistent with those densities that we spoke of
12 that were exhibited on Exhibit 27, the land use
13 designation map?

14 A. Yes.

15 Q. And so there are also conservation and park
16 designations on the zoning map; is that correct?

17 A. That's correct, yes.

18 Q. Can we confirm that the 4.62 acres are not
19 shown as conservation or park, but are shown again
20 as R-3 commercial zone?

21 A. Yes.

22 Q. Have you also looked -- had occasion to look
23 through your responsibilities with the developer at
24 the Town of Kiawah Island's future land use map?

25 A. I have, yes.

1 Q. Are the 4.62 acres -- how would you describe
2 that color there?

3 A. Kind of a gold, maybe, color.

4 Q. Good, thank you.

5 A. Mustard.

6 Q. I think mustard is good.

7 Are the 4.62 acres located within what is
8 shown in this mustard or gold coloration in the
9 Town of Kiawah Island future land use map?

10 A. Yes.

11 Q. And when looking at the legend, does that
12 gold or mustard coloration match what the legend
13 indicates that the intended future land use would
14 be of a mixed use?

15 A. Yes.

16 Q. And so mixed use means you can have both
17 residential and commercial development?

18 A. Yes.

19 Q. Is that consistent with the zoning
20 entitlements that have been granted on parcels 12
21 and 13 since 1994?

22 A. Yes.

23 Q. And continuing through the 2005 development
24 agreement?

25 A. Correct.

1 Q. And those land use entitlements for mixed
2 use, do those continue forward to this day?

3 A. They do.

4 Q. Ms. Nimmons, are you aware of, based on your
5 duties, as to the parcels upon which the developer
6 pays property taxes to Charleston County?

7 A. Somewhat, yes.

8 Q. Does the parcels that would envelop the 4.62
9 acres, does that developer pay property taxes to
10 Charleston County on the parcels that would envelop
11 those 4.62 acres?

12 A. Yes.

13 Q. Does KICA pay any property taxes on the 4.62
14 acres?

15 A. No.

16 Q. Has anybody from KICA ever contacted you to
17 ask that they be allowed to reimburse the developer
18 for the taxes paid on the 4.62 acres?

19 A. No.

20 Q. Has anyone from KICA contacted you to
21 indicate that they would like to change the tax map
22 parcels so that the 4.62 acres would be shown as
23 property owned by KICA and taxable to KICA?

24 A. No.

25 Q. On that point, based on your knowledge of

1 Kiawah Island zoning regulations, could the 4.62
2 acres actually be created as a parcel?

3 MS. ARMSTRONG: Objection, Your Honor.

4 THE COURT: Sustained.

5 MR. LESEMANN: Okay. Are you -- may I
6 establish a foundation, Your Honor, to show that
7 she has knowledge?

8 THE COURT: Nope.

9 MR. LESEMANN: Okay.

10 BY MR. LESEMANN:

11 Q. Is there access to the 4.62 acres that is --
12 legal access that is provided to KICA?

13 A. No.

14 Q. And is this essentially a landlocked parcel
15 that is -- is it actually a parcel, a standalone
16 parcel?

17 A. It is not a platted subdivided parcel, no.

18 Q. Does KICA own any adjoining property to the
19 4.62 acres?

20 A. Not immediately adjoining, no.

21 Q. Is there a road that directly connects to
22 the 4.62?

23 A. No.

24 Q. Does KICA have access to the 4.62 acres?

25 A. Legal access, no, I don't believe so.

1 MS. ARMSTRONG: Objection, Your Honor.
2 Legal access is a question for the Court to
3 determine.

4 THE COURT: Sustained.

5 MR. LESEMAN: Thank you, Your Honor.

6 BY MR. LESEMAN:

7 Q. Is such access as KICA has essentially no
8 different from the boardwalk access that is granted
9 under the 1976 -- the beach access that is granted
10 under the 1976 lease for Beachwalker Park?

11 MS. ARMSTRONG: Objection, Your Honor.

12 BY MR. LESEMAN:

13 Q. I mean is that essentially the one access
14 point to the 4.62 acres that's held by anyone other
15 than the developer?

16 A. There is a boardwalk that passes through the
17 property, yes.

18 Q. That is the beach access provided under the
19 1976 lease?

20 A. Yes, it is.

21 Q. And does the developer own the other lands
22 that bound the 4.62 acres?

23 A. Yes, it does.

24 Q. So any access issue, does the developer have
25 any access issue with regard to the 4.62 acres?

1 A. No.

2 Q. Ms. Nimmons, have there been prior instances
3 where issues related to the beachfront strip have
4 been addressed with KICA and the Town of Kiawah
5 Island and modifications have been made?

6 A. Yes.

7 Q. Does one of those include a 3.054-acre
8 parcel that is known as the mid-island and hotel
9 tract?

10 A. Yes.

11 Q. Could you explain briefly to the Court the
12 circumstances that related to that?

13 A. Yeah. It was I believe in 1997 we were in
14 the process of conveying some properties to the
15 resort. There was a 3-acre tract immediately
16 adjacent to the Sanctuary tract about mid-island.

17 And we didn't know it at the time, but it
18 had never been platted, so there was no boundary
19 line to establish the line between what had been
20 conveyed to KICA on the beachfront deed and what we
21 had retained.

22 So we went to KICA, explained to them what
23 happened. Ultimately agreed with KICA. The board
24 met, thought that they would execute a quit claim
25 deed back to KRA, they agreed it was an

1 administrative error.

2 We needed to confirm the boundary line. We
3 recorded the plat. We conveyed to KICA everything
4 on the seaward side of that line, and KICA conveyed
5 back to us everything on the landward side to
6 correct the title problems.

7 Q. Ms. Nimmons, I'd like you to confirm the
8 parcel that we are speaking of that was conveyed
9 back from KICA to KRA. To KRA from KICA if I
10 misspoke.

11 Again, looking at Exhibit 16.2 which is in
12 evidence, is the parcel that we just were speaking
13 of, the 3.054-acre parcel, is it shown in the
14 hatched designation as the beachfront strip to be
15 transferred under the 1994 agreement?

16 A. No.

17 Q. Is it shown in white?

18 A. It is, yes.

19 Q. And if I gave you a pointer, would you be
20 able to indicate the location of the 3.054-acre
21 parcel?

22 A. Yes. It's right there (indicating).

23 Q. Okay. So I will also -- is this rectangular
24 parcel located next to the large white parcel?

25 A. It is, yes.

1 Q. And this rectangular parcel, which is the
2 first small -- smallish rectangular parcel to the
3 immediate west of this large parcel --

4 A. Right.

5 Q. -- approximately, in terms of the document,
6 to the northwest of the legend?

7 A. Yes.

8 Q. And then to the immediate east of this
9 upward movement of the beachfront strip?

10 A. Yes.

11 Q. Okay. And so again the 1997 situation that
12 resulted in a corrective deed back from KICA to KRA
13 related to this parcel here shown in white, and not
14 shown in the hatched designation?

15 A. That was one of them, yes.

16 Q. Did you prepare a memo relating to this
17 mistake?

18 A. I did.

19 MS. ARMSTRONG: Objection, Your Honor.
20 I kind of let this go on trying to understand what
21 the relevance is to mistake that was made on
22 another portion of this very large property.

23 And I don't think just because a
24 mistake was made and somehow fixed by a corrective
25 deed is evidence that there was a mistake related

1 to the west end.

2 MR. LESEMANN: Your Honor, if I may
3 respond. It absolutely is relevant because what we
4 are showing is that the hatched area was the
5 stipulated area.

6 And these very parties, not the
7 intervenors, these very parties -- the Town of
8 Kiawah Island is not a party, but it's important to
9 the development agreement -- the Kiawah Island
10 Community Association and this developer agreed
11 that where an area was not shown in that hatched
12 area, it was not intended to be part of the
13 beachfront strip. And that is probative evidence,
14 absolutely.

15 Now, we have had some changes in the
16 legal opinions that have been provided to KICA, and
17 at this point they're not willing to do those
18 corrective deeds. But this is absolutely an
19 indication that the hatched area of the beachfront
20 strip, and the white areas and other areas are not.

21 And I believe it's probative evidence, Your
22 Honor. And the further questions that we have are
23 to show if we look at that deed itself, it
24 indicates language within it, which I'd like to
25 show the Court and the witness, and would ask for

1 admission of that deed.

2 It shows -- it has language related to
3 the intention of the parties which is a document
4 signed by KICA, consented to by the Town, and
5 accepted by KRA. And so the three parties that
6 actually had any involvement in those documents
7 have agreed that mistakes were made.

8 And absolutely when we look at how the
9 parties, the three of them agreed that this
10 property was not intended to be included because
11 it's not in the hatched area, it's probative that
12 this property not included in the hatched area was
13 also not included to be intended to be part of the
14 beachfront strip.

15 THE COURT: All right. I'm going to
16 allow it.

17 MR. LESEMANN: Thank you, Your Honor.

18 BY MR. LESEMANN:

19 Q. Do you have the exhibit book before you,
20 Ms. Nimmons?

21 A. I do.

22 Q. Can you look through the exhibit book to
23 Exhibit 13?

24 A. Okay.

25 Q. Are there various whereas clauses in this

1 document?

2 A. There are, yes.

3 Q. And do these whereas clauses speak to the
4 background of the situation, but also to the
5 intention of the parties to the development
6 agreement?

7 A. Yes.

8 Q. Does the confirmatory quit claim deed that
9 reconveyed the 3.054-acre beachfront parcel
10 indicate that it was not the intention of the
11 parties to the development agreement that title to
12 any portion of the property, meaning that
13 3.054-acre parcel, be included in the beachfront
14 deed?

15 A. Yes.

16 Q. And then does it indicate that KICA, in the
17 next paragraph, is binded to execute and deliver
18 within confirmatory quit claim deed to KRA in order
19 to avoid any possible future question or concern
20 regarding the title to the property being presently
21 vested in KRA, and remove any question as may have
22 arisen by the unintended possible inclusion of the
23 property or some portion thereof in the legal
24 description of the beachfront deed?

25 A. Yes.

1 MR. LESEMAN: Your Honor, I would move
2 for admission of this public record as Exhibit 13.

3 THE COURT: All right.

4 Same objection?

5 MS. ARMSTRONG: Same objection on the
6 relevancy, Your Honor.

7 THE COURT: All right. Noted but
8 overruled.

9 (Plaintiffs' Exhibit No. 13 was marked
10 for identification.)

11 BY MR. LESEMAN:

12 Q. So, Ms. Nimmons, I'd like to go to the
13 events of 1994 relating to the development
14 agreement.

15 THE COURT: Before we leave there, what
16 is this parcel today, this 3-acre parcel, what is
17 this now?

18 THE WITNESS: It's still just a -- I
19 don't think it has been developed yet, but it's
20 next to the Sanctuary Hotel and Resort.

21 THE COURT: Adjacent to the --
22 Sanctuary is the large tract to the right of it?

23 THE WITNESS: Right. Yes. Correct.

24 THE COURT: Okay. Thank you.

25 BY MR. LESEMAN:

1 Q. So in 1994 were you employed with Mr. Buist,
2 and did you provide legal services to the
3 developer?

4 A. Yes, we did.

5 Q. Can you explain how it came to be that you
6 were involved in the 1994 development agreement, or
7 its exhibit?

8 A. My involvement was strictly related to the
9 contract, preparation of the contract that was
10 attached in exhibits, all the legal descriptions,
11 and all the deeds.

12 Q. Showing you what has been marked as Exhibit
13 2. Were you asked to prepare the property
14 descriptions for the property to be transferred
15 from the developer to KICA under the development
16 agreement?

17 A. Yes.

18 Q. Did you undertake those duties?

19 A. Yes, I did.

20 Q. Is this document, which is the third page of
21 Exhibit 2, do you recognize this document?

22 A. Yes, I do.

23 Q. Can you describe for the Court what it is?

24 A. It was basically the bullet list of the
25 properties that we needed to describe that were

1 going to be conveyed.

2 Q. So just to be certain, were you the drafter
3 of the property descriptions that are the subject
4 of this case?

5 A. Yes.

6 Q. You understand that to be that you were the
7 scrivener of them?

8 A. Yes.

9 Q. And just to clarify, did you write them as
10 opposed to Mr. Buist?

11 A. Yes. I wrote them, I drafted them.

12 Q. And so was this the instruction that you
13 were provided with regard to the beachfront strip,
14 this section that I'm highlighting here?

15 A. That and just verbal instructions from
16 Leonard.

17 Q. Okay. Can you confirm what the verbal
18 instructions that you were provided were?

19 A. I was told to describe a strip of land 200
20 to 300 feet wide going from the west end of the
21 island to the east end of the island.

22 Q. Were you given Exhibit 16.2?

23 A. I was not, no.

24 Q. Where does Exhibit 16.2 indicate that the
25 beachfront strip should terminate?

1 A. It should have terminated at the western end
2 on the eastern boundary of parcel 13, which is what
3 I call the 16-acre Beachwalker parcel.

4 Q. As the scrivener of the property description
5 now let me ask, is the same property description
6 that was inserted in the quit claim deed, is that
7 the exact same property description that was
8 inserted in the agreement for conveyance.

9 A. Yes.

10 Q. And you prepared both?

11 A. I did, yes.

12 Q. And so did you paste the property
13 description into one and paste the property
14 description into the other?

15 A. My recollection is that I prepared the
16 property description when we were preparing the
17 contract and exhibits to the development agreement.

18 And then we just basically cut and pasted.
19 Took that quit claim deed and had that and we
20 recorded it.

21 Q. And so was the sum of the instructions that
22 you had, the verbal instructions that you just
23 indicated from Mr. Long and this page of bulleted
24 lists indicating that 16.(b) called for a
25 conveyance of a 10-mile beachfront strip of front

1 beach dunes?

2 A. Yeah, I mean we sat down and we had
3 discussions about it. And we, you know, we talked
4 about what needed to be described.

5 But we were not just focusing on the
6 beachfront deed, we were focusing on a lot of
7 different parcels of land.

8 And honestly, the beachfront was not one of
9 what we considered the tougher ones. We did talk
10 kind of in depth about how to describe it going
11 down the island because we hadn't done any
12 development really seaward of -- or east of like
13 around Flyway Drive. That was what he was more
14 concerned with.

15 But it was the beachfront strip. It was
16 dunes. It wasn't -- to us it wasn't developable
17 lands, so not a whole lot of emphasis was placed on
18 that particular description other than to make sure
19 that we had a 200- to 300-foot wide strip.

20 Q. So when you talk about working on the
21 development agreement, am I holding up the
22 three-volume set that constitutes the development
23 agreement?

24 A. Yes. It looks like a set, yes.

25 Q. And so they were -- all the property

1 descriptions on this page, plus all the other work
2 that's involved in preparing that three-volume set?

3 A. Yes.

4 Q. Was that a time pressure situation?

5 A. Yes, it was. And it was kind of Leonard and
6 the Town, Mark, Tren, they were all working on the
7 text and the agreements between the parties.

8 I -- Tommy and I were doing the legal
9 descriptions, and anything related to the real
10 estate. And trying to put that together at the
11 same time and, you know, as you know during
12 negotiations things change so we were just doing
13 our best to keep up.

14 Q. Okay. And so what decision did you make as
15 to what you should use as the western ending point
16 of the beachfront strip?

17 A. In 1994 I had been basically working on
18 Kiawah for 14 years with Tommy Buist preparing
19 deeds, preparing descriptions, easements,
20 background and development work.

21 And my recollection is that he told me west
22 end to the east end, beachfront strip, 200 to 300
23 feet wide. So knowing the island, knowing the
24 plats, I just picked the westernmost plat that I
25 could think of, which was the employee facility

1 tract, and I used that point, the southwestern
2 corner as my beginning point.

3 Q. Okay. The employee facility tract is
4 probably an exhibit at some level in the
5 development agreement?

6 A. I don't know if that's platted, as a
7 recorded plat.

8 Q. Okay. Is this a -- what I have shown, what
9 you could also view in Exhibit 26 in the book in
10 front of you, is this a true and accurate copy of
11 the survey of the employee facility tract?

12 A. That is, yes.

13 Q. Is this a document that the developer keeps
14 in its business records at this time relating to
15 its land holdings?

16 A. Yes.

17 Q. Are you the custodian of those records?

18 A. I am, yes.

19 MR. LESEMANN: Your Honor, we would
20 move for admission of Exhibit 26, the employee
21 facility tract.

22 MS. JETT: It's already admitted.

23 MR. LESEMANN: Is it already admitted?
24 Okay.

25 THE COURT: I think it's already in.

1 Go ahead.

2 MR. LESEMAN: Thank you, my apologies.

3 BY MR. LESEMAN:

4 Q. Did you utilize this document, Ms. Nimmons?

5 A. I did, yes.

6 MR. LESEMAN: So it's Intervenor's 5?

7 MS. JETT: I have it as 26.

8 MR. LESEMAN: Okay, got it. Thank
9 you.

10 BY MR. LESEMAN:

11 Q. So could you describe how you utilized this
12 parcel in the preparation of the property
13 description?

14 A. Yeah. I picked up the state plan
15 coordinates that are down on kind of the bottom
16 western corner.

17 Q. Here (indicating)?

18 A. Yes.

19 Q. Okay. So the southwestern corner. And I
20 believe that it has a numerical designation within
21 the document, this N-2753270025?

22 A. That's correct, yeah.

23 Q. Okay.

24 A. And then because there was no property line
25 that went down to mean high water, I just used an

1 extension of the property line on the other side,
2 and used those metes and bounds.

3 So basically from this point down to the
4 beach following this line. And it was an imaginary
5 line.

6 Q. Did anyone from the Town of Kiawah Island
7 instruct you to use this southwestern corner of the
8 employee tract as the western boundary?

9 A. Nobody instructed me to do that.

10 Q. Did anyone from KICA instruct you to use the
11 southwestern corner of the employee facility tract?

12 A. No.

13 Q. Did anyone from KRA instruct you to do that?

14 A. No.

15 Q. Did anyone from KDP II, LLC, if it existed
16 at the time, instruct you to do that?

17 A. It didn't, but no.

18 Q. Was the decision to use the southwestern
19 corner of the employee facility tract, was that
20 your decision?

21 A. That was my decision.

22 Q. And you were the scrivener?

23 A. I was.

24 Q. This area beneath, are there any other lands
25 shown, any setback lines, any indications of the

1 location of the Atlantic Ocean?

2 A. No.

3 Q. Did that have -- ultimately, looking back on
4 it, did that have some significance in this
5 situation?

6 A. Yeah. If I, number one -- if I had pulled
7 the plats. If I put them side by side.

8 Q. You can take a moment. Let me get you some
9 tissues.

10 THE COURT: We had some. Do you want
11 to take a minute? Are you all right?

12 A. If I had pulled the plats for everything
13 from the east to west, which is what I ended up
14 doing when I had to do the second corrective deed,
15 if I had done that, if I had 16.2, if I had even
16 seen the parcel map, I would have known that that
17 wasn't the starting point.

18 But I didn't. I didn't have the
19 information. And I didn't question it. I honestly
20 didn't question it because it was beachfront strip.
21 I mean, we were thinking dune fields. Nobody
22 realized that there was going to be undevelopable
23 land.

24 BY MR. LESEMANN:

25 Q. Ms. Nimmons, as a result of the property

1 description that you prepared and inserted into the
2 quit claim deed and the agreement for conveyance,
3 did you accurately reflect the intent of the
4 parties in Exhibit 16.2?

5 A. No, I didn't.

6 MR. LESEMAN: No further questions,
7 Your Honor.

8 THE COURT: Ms. Nimmons, you want to
9 take a break?

10 THE WITNESS: I'm fine.

11 MS. JETT: Could we take a break?

12 THE COURT: Let's take five minutes.

13 (A recess was taken.)

14 THE COURT: All right. Ms. Jett.

15 MS. JETT: Okay.

16 CROSS EXAMINATION

17 BY MS. JETT:

18 Q. Good morning, Ms. Nimmons.

19 A. Good morning.

20 Q. Mr. Lesemann got through actually most of
21 the questions I wanted to ask you, so I'm going to
22 try to be brief.

23 But you did a detailed explanation of what
24 documents you looked at and that went into the
25 preparation of the legal description that was used.

1 I would like a little bit more clarification on the
2 Buist Firm's role in this transaction.

3 As I understand it, you all were preparing
4 real estate documents only, you were not
5 representing KRA in its negotiations with the Town
6 in coming up with the development agreement or any
7 of it?

8 A. That's correct.

9 Q. Okay. So it would not have been within your
10 role at the time to be sitting in on any meetings
11 with people from the Town of Kiawah?

12 A. No. My meetings would have been with
13 Leonard, Tren, some of the parties that were
14 involved with the negotiations of the development
15 agreement, but not specifically the Town, no.

16 Q. Okay. Once you came up with a legal
17 description for property, whether it be the
18 beachfront strip or any of the other real estate
19 documents that you were preparing, what was the
20 internal process at the Buist Firm then for
21 reviewing the descriptions you came up with?

22 A. Tommy Buist would review any descriptions
23 that I did, and then he would go over them with
24 Leonard and Tren.

25 From there I'm assuming they sent them on,

1 at least I know they sent them on to the Town's
2 attorneys. And then if they had any comments they
3 would come back to us.

4 Q. Do you remember there being -- after you
5 came up with the legal description for the
6 beachfront strip, there being any subsequent
7 discussions about this description?

8 A. I don't. Not until '97.

9 Q. I saw somewhere in some documents that there
10 was an earlier version of that legal description
11 using instead of the employee facility tract as a
12 point of commencement, using I believe is was the
13 western boundary of the 16-acre hotel tract?

14 A. Right.

15 Q. And that would have been something that you
16 would have prepared?

17 A. I'm assuming that it was since I was the one
18 who was primarily working on those documents.

19 Q. Okay. And as I understood from your
20 deposition, you don't remember what happened to
21 cause that legal description to change from using
22 the 16 acre beachfront tract as a place for
23 starting as opposed to -- and then why it later
24 changed to the employee facility tract?

25 A. The only thing I can think of in my mind is

1 that I realized that there was another plat west of
2 that. That I was picking up the Beachwalker tract,
3 but there was another plat that was further west.

4 I didn't use the Beachwalker Park. I know
5 that's a park and it wasn't a commercial or
6 residential platted piece of property. I just went
7 to the next westernmost one which would have been
8 the employee facility tract.

9 Q. Okay. Can you tell me about the
10 circumstances that led to your discovery of there
11 being a problem with the legal description? I know
12 we have talked about the Sanctuary tract, and there
13 have been earlier discussions on Monday about the
14 east end. But specifically as to the western
15 tract, how you came to learn of that problem?

16 A. It came at the same time that I was doing
17 the corrective quit claim deed for not the 3 acres,
18 but when we were doing that exercise I realized
19 that there was a plat of record of the entire east
20 end of the island, and the seaward boundary line
21 was actually mean high water.

22 So from a theoretical standpoint, if the
23 boundary is mean high water and it was a recorded
24 plat, we didn't convey anything to KICA. So I went
25 back and started -- I talked to the partners about

1 it and they said, okay, we need to correct this.

2 Q. I am sorry to interrupt you, but when you
3 say this you are talking about the east end, right?

4 A. The east end. This is the big east end
5 issue that we had. Not just the 3 acre one, the
6 larger one for the whole east end.

7 And we decided that the best way to resolve
8 it was to literally look at every seaward boundary
9 plat of record and describe in front of there so
10 that we wouldn't inadvertently pick up property
11 that we didn't mean to pick up, and then we could
12 get the whole eastern beachfront to KICA.

13 We also discovered at that time there was
14 accretion and a big piece of land at the east end
15 that wasn't included and probably should have been
16 included. It ended up being about 200-something
17 acres actually seaward and around the Ocean Course
18 and up to Little Bear.

19 And we hired a surveyor to go out there with
20 a GPS and just kind of plug in the points that we
21 could come up with as a boundary exhibit that could
22 be attached to the quit claim deed.

23 During that whole process I started looking
24 at the rest of the island and looking at the -- you
25 know, when I pulled 16.2 and realized that there

1 was a mistake at the west end.

2 Q. Okay. And so once you -- and that discovery
3 was -- you said it was contemporaneous around the
4 same time as the other ones which would have been I
5 believe 1997?

6 A. '97, yes.

7 Q. Okay. And you alerted the KRA partners as
8 to the possibility of a problem on the west end at
9 that time?

10 A. I did, yes.

11 Q. Were there any further discussions about
12 taking the problems with the west end to KICA or
13 the Town of Kiawah at the time?

14 A. My recollection is that they didn't want to
15 throw that into the equation because we already had
16 presented proposed quit claim deeds to the KICA and
17 the Town, we had the Town's consent to the process.

18 So we were just focusing at the east end at
19 that point because we had both the closing of the
20 resort, which was a huge closing taking place.

21 Q. Okay. So do you recall then when the issue
22 with the western boundary, or the western terminus
23 issue was presented to KICA? When did it become
24 the issue that it is now?

25 A. It came up again in I think it was 2007 when

1 we were doing the Captain Sam's loan. And in the
2 process of that I was assisting another law firm
3 trying to put all the title stuff together.

4 And it clicked, I remember that there was an
5 issue with that one little piece in front of the
6 employee facility tract.

7 So I mentioned it to the title attorneys and
8 they actually went to their title insurance
9 carriers. And at that point that was when we --
10 they asked us to have Southeastern Surveying
11 actually depict it on a plat so they could see what
12 we are dealing with.

13 And that was when we realized that it was a
14 lot more than what we thought it was. That it was
15 four acres and not just a little bit

16 Q. Okay. Once that -- once, I guess, kind of
17 the magnitude of the issue came up and you did -- I
18 think you said it was 2007?

19 A. Right.

20 Q. What happened then? Like how -- who reached
21 out to who?

22 A. I know that I talked with Leonard and Buddy
23 about it. And I don't recall exactly how
24 everything happened. I remember some emails back
25 and forth with Tammy and then --

1 Q. These would have been emails with you and
2 Tammy?

3 A. Yeah. I had a couple of emails back and
4 forth with Tammy, but --

5 Q. And for the record you mean Tammy McAdory
6 who is the current executive director of KICA?

7 A. Correct. Although Leonard prepared --
8 Leonard prepared I think a letter that went to
9 Dennis Rhoad. And Mark Permar, sometime around
10 then, I think it was a little bit later, Mark
11 prepared a memo and went to Craig Weaver with KICA
12 to try to get it resolved.

13 Q. Okay, let's see. Ms. Nimmons, I think
14 that's all my questions.

15 THE COURT: Ms. Armstrong.

16 MS. ARMSTRONG: Thank you, Your Honor.

17 CROSS EXAMINATION

18 BY MS. ARMSTRONG:

19 Q. Ms. Nimmons, I understand that you didn't
20 play a role in the drafting of the actual text of
21 the development agreement; is that correct?

22 A. That's correct.

23 Q. So you were just -- and you didn't
24 participate in the actual negotiations of the
25 development agreement either, correct?

1 A. I did not.

2 Q. Okay. And you were the one, your role was
3 primarily in drafting the description of the
4 property, right?

5 A. Correct.

6 Q. And you were the only one who actually
7 drafted those property descriptions of the
8 beachfront strip; is that correct?

9 A. I am, yes.

10 Q. And the information you were given was, you
11 testified, I believe by Mr. Long primarily and some
12 from Mr. Buist?

13 A. Yeah. It was generally meetings with
14 Leonard, and Mr. Buist was there, yes.

15 Q. And some of those properties that were to be
16 conveyed under the development agreement, they were
17 not platted properties, correct?

18 A. That's correct, yes.

19 Q. And the beachfront strip itself wasn't
20 platted --

21 A. No, it was not.

22 Q. -- at that time? Okay. And because it
23 wasn't platted, you actually had to get the Town to
24 waive the requirement for recording a plat with the
25 deed; is that right?

1 A. That's my recollection, yes.

2 Q. And Captain Sam's Spit wasn't platted at
3 that time either, was it?

4 A. No, it wasn't.

5 Q. And you testified that what you did was went
6 to the easternmost platted lot and the westernmost
7 platted lot, right?

8 A. Correct.

9 Q. And that the employee facility tract, I
10 think it's Exhibit 26, Plaintiffs' Exhibit 26, that
11 was the employee facility tract, that's what you
12 used as the westernmost?

13 A. The employee facility tract, yes.

14 Q. I'm going to hand you -- well, actually
15 Exhibit No. 5 should be sitting right up there,
16 it's a plat. It's the oversized exhibit that's
17 right up there.

18 A. Okay.

19 Q. Can you identify that plat for me?

20 A. This is an exhibit of the 16-acre
21 Beachwalker ocean parcel.

22 Q. And what year was that plat created, the
23 date?

24 A. Created in 1988.

25 Q. So that plat was in existence at the time

1 that you were drafting the description of the
2 beachfront strip, correct?

3 A. Yes, it was. Yes.

4 Q. And you actually looked at that plat before
5 you had drafted your description that was
6 ultimately used in the development agreement,
7 correct?

8 A. I had, yes.

9 Q. Because Ms. Jett was asking you about this
10 and I'd like to hand you what is marked as Exhibit
11 No. 6.

12 MS. ARMSTRONG: The table and the
13 chair, I have a little bit of a difficult time
14 getting exhibits to the witnesses here.

15 THE COURT: We'll see if we can move
16 some of that for you.

17 BY MS. ARMSTRONG:

18 Q. So, Ms. Nimmons, Ms. Jett was asking you
19 about a draft agreement of conveyance. Is this
20 draft, Exhibit No. 6, dated July 7, 1994, is that
21 the correct date? Is that what you are looking at?

22 A. July 8th, '94.

23 Q. Okay.

24 A. That's what I have on mine.

25 Q. Okay. Are you talking about on the top

1 right corner?

2 A. Yes. Yes, here it is.

3 Q. Right under it it says --

4 A. 7/8, blank line, 7/7 changes, yes.

5 Q. All right. And so this would have been one
6 of the drafts that you were preparing for the
7 property description in connection with the
8 agreement for conveyance?

9 A. Yes. It looks like it, yes.

10 Q. And so on page 8 of Exhibit 6, can you read
11 the description under parcel 8 describing that 10
12 miles of beachfront property pursuant to 16.(b)?

13 A. I can. All the certain piece, parcel or
14 strip of land, situate, lying and being in the Town
15 of Kiawah Island, County of Charleston, State of
16 South Carolina, approximately ten miles in length
17 commencing at the westernmost boundary of the
18 16.088-acre tract of land east of Beachwalker Park,
19 which said 16.088-acre tract shown on the plat of
20 Southeastern Surveying recorded in the plat book AS
21 at page 50 in the R.M.C. Office.

22 You want me to keep going?

23 Q. That's fine to end right there. So this
24 plat that you are referring to as the westernmost
25 boundary of a line 16.088-acre tract of land east

1 of Beachwalker Road, that's the property that we
2 were just looking at in Exhibit 5 --

3 A. Yes.

4 Q. -- is that correct?

5 A. Uh-hum.

6 Q. The 16 acre -- did you call it the Ocean
7 Parcel?

8 A. Beachwalker Ocean, right.

9 Q. Beachwalker Ocean parcel.

10 A. Uh-hum.

11 Q. So you actually were aware of, had looked
12 at, have pulled and actually had drafted language
13 that would have had the east -- the western
14 boundary at the east end of this 16-acre parcel,
15 correct?

16 A. Yeah, that's correct.

17 Q. You actually testified that if you had
18 pulled that plat you would have questioned the
19 description that ultimately made it into the
20 agreement for conveyance and the deeds that were
21 executed?

22 A. I think if I had pulled everything and
23 looked at it carefully, yes, I would have.

24 Q. But you actually did pull it and you
25 actually included that language in one of the

1 drafts of the agreement for conveyance?

2 A. I did two months before the development
3 agreement was executed, yes.

4 Q. You actually testified in your deposition
5 that if you had pulled that plat and looked at it
6 you wouldn't have made this mistake; is that
7 correct?

8 A. If I had laid them side by side, or if I had
9 paid attention to it, yes. I shouldn't have made
10 this mistake.

11 I had 14 years of experience under my belt.
12 I should have known and seen that this was mean
13 high water and that by moving the line over to the
14 west, I would be creating a parcel that doesn't --
15 really has no access.

16 Q. I think you described the language in the
17 agreement of conveyance, which is Intervenor's
18 Exhibit No. 2, if you can put your hands on that
19 for me, please.

20 A. Okay.

21 Q. I think you described the language that was
22 used to describe the beachfront parcel. I think
23 it's on page nine.

24 Let me grab my copy as well. Are you with
25 me, page nine of Exhibit No. 2?

1 A. I am, yes.

2 Q. And can you go ahead and read to the
3 Atlantic Ocean, can you read that description of
4 the 10 miles of beachfront property into the
5 record, please?

6 A. All that certain piece, parcel, or strip of
7 land situate, lying and being in the Town of Kiawah
8 Island, County of Charleston, State of South
9 Carolina.

10 Approximately ten miles in length, the
11 westernmost boundary of which being an imaginary
12 line having as its northern terminus a point marked
13 by a concrete monument having State Plane
14 Coordinates N275,327.0025/E2,267,801.5097 located
15 at the southwesternmost corner of a 2.067-acre
16 tract of land located at the terminus of
17 Beachwalker Park on Kiawah Island known generally
18 as the employee facility tract as shown on the plat
19 by Williams and Associates dated March 20, 1981 and
20 recorded in plat book AS at page 85 in the R.M.C.
21 Office for Charleston County, South Carolina (the
22 R.M.C. Office), thence running with said imaginary
23 line from said point in a southerly direction
24 S04-degrees-55'16"E to the mean high water mark of
25 the Atlantic Ocean.

1 Q. The copy you were reading from that was
2 signed, there is a signature of Mr. Way and Mayor
3 Melvin; is that correct?

4 A. That's correct.

5 Q. And if you will turn with me to schedule P-8
6 in that same document. Can you tell me if this
7 description under schedule P-8, which is -- this is
8 the draft quit claim deed, correct?

9 A. Yes.

10 Q. And it was part of the agreement of
11 conveyance that was an exhibit to the development
12 agreement; is that right?

13 A. That's correct.

14 Q. Can you read that and tell me if that
15 language is identical to the language in the
16 agreement for conveyance, please?

17 A. It looks the same. Yes, it looks the same.

18 Q. Okay. Now, can you take Exhibit No. 3,
19 Intervenor's Exhibit No. 3 which is the executed
20 quit claim deed that's also -- have you located
21 that?

22 A. Uh-hum.

23 Q. That's the quit claim deed for the
24 beachfront strip, parcel 8?

25 A. Right.

1 Q. Can you also determine whether the language,
2 the description used in the quit claim deed is the
3 same language that was in -- the identical language
4 as what was in the agreement for conveyance and
5 draft quit claim deed, please?

6 A. It appears to be, yes.

7 Q. Now, you testified that your realization of
8 the mistake occurred when you looked at Exhibit
9 16.2. Is that what you testified?

10 A. That's -- yes.

11 Q. And when you first saw Exhibit 16.2 it was
12 exactly this size, wasn't it, it was on an
13 eight-and-a-half by 11 piece of paper, correct?

14 A. That's my recollection.

15 Q. So this is what you used, an
16 eight-and-a-half-by-11 sketch showing 10 miles east
17 -- over a 10-mile piece of property to make a
18 determination that you were incorrect?

19 A. Yes.

20 Q. Do you know what this sketch is intended to
21 reflect, Exhibit 16.2, do you know what's supposed
22 to be reflected in this sketch?

23 A. The beachfront dedication area.

24 Q. And what all is included in the beachfront
25 dedication area? What parcels?

1 A. What parcels?

2 Q. Are you familiar with paragraph 16 under the
3 development agreement?

4 A. Yes.

5 Q. Okay. What parcels under section 16 are to
6 be included in this Exhibit 16.2?

7 A. The beachfront dedication area.

8 Q. And what are you referring -- let me hand
9 you -- well, Exhibit No. 1 should be on the witness
10 stand there.

11 A. Okay.

12 Q. If you'll turn, I believe it's page 45 is
13 where the paragraph 16 starts. If you'll just tell
14 me what -- when you said the beachfront dedication
15 area, what specifically are you referring to?

16 A. It's 42, okay. I'm referring to the 10-mile
17 strip of beachfront property.

18 Q. Is there anything else in section 16 that
19 references Exhibit 16.2 as a reference point?

20 A. I believe subparagraph (g). Also that
21 references 16.2, yes.

22 Q. Okay. So the beachfront dedication area is
23 actually supposed to encompass both the property
24 describing 16.(b) and the 10-mile strip and 16.(g),
25 Captain Sam's Spit, correct?

1 A. That's -- no, not my understanding. My
2 understanding is that that was the exhibit of the
3 future beachfront dedication area, yet it also
4 shows over in the left-hand corner Captain Sam's
5 Spit.

6 Q. Okay. But section 16.(g), that specifically
7 describes Captain Sam's Spit says that it's shown
8 in Exhibit 16.2.

9 A. It says that it's shown in 16.2, yes.

10 Q. Right, okay. When you actually noticed the
11 mistake, you didn't think it was very much of a
12 problem when you first saw it, did you?

13 A. I didn't, no.

14 Q. And that was because it was beachfront and
15 it wasn't developable property, is that what you
16 test --

17 A. That was my understanding at the time, yes.

18 Q. Okay. I believe Mr. Lesemann was showing
19 you what he has introduced as Exhibit 20. It's the
20 warranty deed from KRA to KDP II.

21 A. Okay.

22 Q. Do you have that exhibit in front of you?

23 A. Yes.

24 Q. You were looking at some exceptions and
25 Mr. Lesemann was asking you about the exception to

1 Beachwalker Park, the easements.

2 A. Uh-hum.

3 Q. Could you look at, actually read into the
4 record, the exception listed in Y?

5 A. Rights, if any, of the Kiawah Community
6 Association, Inc., as to that portion of the
7 property described in that certain deed recorded in
8 Book N 265 page 406 in the R.M.C. Office, which
9 land is the subject to case number 2013-CP-10-1225,
10 Kiawah Resort Associates LP v Kiawah Community
11 Association, Inc., filed with the clerk of court in
12 the Charleston County Court of Common Pleas.

13 Q. So there is an exception with the actual
14 4.62 that we are talking about today, correct?

15 A. There was an exception as to rights of the
16 Community Association set forth in the case, yes.

17 Q. And you were talking a little bit about the
18 corrective deeds on the east end, and that 3-acre
19 parcel.

20 Now, the problem there was that there was no
21 plat showing where the beachfront land ended
22 because it went all the way down to mean high water
23 mark, correct?

24 A. Yeah. There was no plat, but -- no plat of
25 that tract. There was a plat above it, but there

1 was no plat of that tract.

2 So theoretically I think whatever was above
3 it would have been the boundary line. And that
4 wasn't intended.

5 Q. So you had no way to determine the seaward
6 boundary, the area that would define the area
7 between the mean high water mark and the KICA
8 property?

9 A. Like I said, there were plats above it. And
10 so that would have been the seaward most boundary
11 line. We needed something to establish a boundary
12 line of that 3-acre tract.

13 Q. Okay. I think Mr. Lesemann was also showing
14 you this map that is Exhibit No. 33. And we were
15 talking a little bit about the designation of this
16 parcel right -- right in this area right down in
17 here. And you called it sort of a mustardy color?

18 A. Right.

19 Q. And it's identified mixed use?

20 A. Uh-hum.

21 Q. Now, mixed use contains not only residential
22 and commercial uses, but also open space is part of
23 mixed use designations; isn't that true?

24 A. I'm not familiar enough. You'd have to ask
25 Mr. Permar about it.

1 Q. So you only know that mixed use for sure
2 contains residential and commercial, you don't know
3 whether it contains -- it would include open space?

4 A. I'm aware that it does contain residential
5 and commercial.

6 Q. You just don't know if it does also include
7 open space?

8 A. I'm afraid Mr. Permar is the expert on
9 zoning.

10 Q. So you actually don't consider yourself an
11 expert on what mixed use even means?

12 A. I know that it does mean residential and
13 commercial because I have had to deal with that
14 before, yes.

15 Q. And just to follow up on your initial
16 assessment that the mistake wasn't that important
17 because property wasn't seen as developable, nobody
18 expected Captain Sam's Spit to be developed in 1994
19 either; isn't that right?

20 MR. LESEMANN: Object to the form. I
21 don't know if the witness has foundation or whether
22 that would even be relevant to the issue of whether
23 there was an error on the western boundary of the
24 beachfront strip.

25 THE COURT: Overruled. You can answer

1 if you can.

2 A. Your definition of Captain Sam's Spit is
3 different than my definition of Captain Sam's Spit.
4 I understand that you're defining it as such
5 because it's -- this 4-acre piece is included in
6 the plat that we had to record by necessity.

7 To me this land is part of the developable
8 part of parcels 12 and 13, and it's not formally
9 Captain Sam's Spit.

10 Q. Okay. But the question was under the 1994
11 agreement, Captain Sam's Spit was going to be set
12 aside, correct?

13 A. We reserved the right, I believe, to convey
14 the eastern half to PRC, and the western half I
15 believe was supposed to go to KICA.

16 Q. Okay. So in 1994, what you think of as
17 Captain Sam's Spit was not going to be developed,
18 correct?

19 A. That's correct, yes.

20 Q. We were also looking at what has been
21 introduced as Exhibit No. 33. And you were talking
22 about what KICA has called its land -- the one I
23 have says, looked by by name. I don't know exactly
24 what that means. It was the one that was
25 introduced, actually said something more along the

1 lines of who owned the property.

2 But setting that aside, there is this green
3 strip following the oceanfront. Mr. Lesemann was
4 asking you specifically about this end, right?

5 A. Correct.

6 Q. I want to look a little bit about the east
7 end. That green area stops right where my finger
8 is pointing, well before the end of the eastern end
9 of Kiawah Island, correct?

10 A. Uh-hum.

11 Q. But the beachfront strip actually extends
12 around the east end of Kiawah Island, correct?

13 A. Yes. The strip that we conveyed by
14 confirmatory deed, correct.

15 Q. So this map that we are looking at, Exhibit
16 No. 32, doesn't actually show all of the beachfront
17 dedication area, even under your definition,
18 correct?

19 A. No. But I believe that's kind of property
20 maintained by KICA, and I don't know how much
21 maintenance they do up there. You'd have to ask
22 Tammy or somebody.

23 Q. So the area on the east end may be part of
24 the dedication, it's just KICA may not actively
25 manage its common property, but they still have

1 title to it, correct?

2 A. They do, yes.

3 Q. Now, Ms. Nimmons, do you receive the tax
4 notices from Charleston County for KRA property?

5 A. I don't receive them, no.

6 Q. Do you write the check to pay for the tax
7 notices in Charleston County?

8 A. I do not.

9 Q. Do you have any documentation at all that
10 KRA pays the taxes on the 4.62 acres in dispute?

11 A. I have actually looked at the tax records to
12 confirm how the ownership is shown. And I have
13 seen the tax bills.

14 Q. Did you provide any of that to your
15 attorney?

16 A. No, I don't believe I did.

17 MS. ARMSTRONG: Your Honor, if you
18 could indulge me for just a minute.

19 I don't have any further questions,
20 Your Honor. Thank you.

21 MR. LESEMANN: Thank you, Your Honor,
22 brief follow up.

23 REDIRECT EXAMINATION

24 BY MR. LESEMANN:

25 Q. Ms. Nimmons, I want to just -- don't want to

1 retread plowed ground. I always forget the exact
2 wording of that metaphor.

3 There was testimony that we talked about in
4 terms of when the error was first realized, why
5 some time passed before the issue came up, and
6 whether or not the developer considered the
7 property developable.

8 Am I correct that you testified that it was
9 uncertain due to the lack of surveying that was
10 available at the time of the particular area that
11 the extent in terms of acreage of the mistake was
12 not realized at the time?

13 A. That's correct, yes.

14 Q. And when was the extent of the acreage of
15 the mistake realized?

16 A. It had to have been 2007 to 2011, somewhere
17 in that period when we were doing the loan and we
18 actually got the surveyors to come up with an
19 exhibit.

20 Q. Was there a 2011 survey done by Southeastern
21 Surveying that exhibited the 4.62 acres?

22 A. Yes.

23 Q. Does that refresh your recollection as to
24 whether that may have been the time when you
25 learned about the 4.62 acres?

1 A. Yeah. Well, that's shown on the preliminary
2 plat. But again, in 2007 I think there might have
3 been some sort of an exhibit that they came up with
4 for the title company.

5 Q. Before 2011, did you -- when you were
6 employed with the developer at that time -- before
7 2011, did you realize that this developable portion
8 of parcel 13 was implicated by the mistaken
9 transfer?

10 A. You know, I -- whether it was --

11 MS. ARMSTRONG: Objection, Your Honor.
12 He is leading the witness.

13 BY MR. LESEMAN:

14 Q. Did you know the area that is shown in this
15 red box above the setback line, did you know that
16 that was implicated by the property description
17 that was in the quit claim deed?

18 MS. ARMSTRONG: Objection, Your Honor,
19 he is still leading the witness.

20 THE COURT: Restate it.

21 MR. LESEMAN: Okay. Thank you, Your
22 Honor.

23 BY MR. LESEMAN:

24 Q. Can you explain when you became aware of the
25 extent of developable property within parcel 13

1 that was implicated by the property description
2 that you prepared in the quit claim deed in the
3 agreement for conveyance?

4 A. I became aware of the extent and the fact
5 that the baseline and the setback line that there
6 was more property landward of that when
7 Southeastern did the plat.

8 The initial plat that they did was just like
9 a sketch. You know, it didn't show anything on it
10 like the preliminary plat that had been prepared.
11 It was just a sketch that showed the outline of the
12 property that had been conveyed.

13 When Southeastern did the preliminary plat,
14 they actually came in and they set the baseline and
15 the setback line and they showed the acreage below
16 and above. And I believe that's the first time
17 that I really, really realized what happened.

18 Q. Did the prior course of dealing between KICA
19 and the Town and KRA with regard to prior
20 corrective deeds, did that play any role in the
21 reaction to the realization of the mistake?

22 A. It did. I mean, in my mind, I know in the
23 minds of everybody at KRA, it was an error. It was
24 a mistake. If you look at 16.2 you know it wasn't
25 supposed to have been conveyed.

1 We just assumed that it would be a
2 no-brainer and an easy exercise to correct it and
3 it wasn't.

4 Q. Ms. Nimmons, there has been a lot of
5 discussion about Exhibit 16.2. Ms. Armstrong
6 showed you a July draft and then showed you the
7 quit claim deed in the agreement for conveyance?

8 A. Right.

9 Q. So both of those, the agreement for
10 conveyance and the quit claim deed, both of those
11 include the mistake that you've described?

12 A. They do.

13 Q. And both of those were your work product?

14 A. They were.

15 Q. In July do you know whether Exhibit 16.2 was
16 finalized?

17 A. Are you referring to the previous draft?

18 Q. Well, right. The previous draft. Do you
19 know whether the interaction between Mr. Permar and
20 the Town and the finalization of Exhibit 16.2, do
21 you --

22 MS. ARMSTRONG: Objection, Your Honor,
23 he's getting ready to lead the witness.

24 MR. LESEMANN: I'm getting ready to --
25 well, I can ask the question again.

1 THE COURT: Go ahead and get the
2 question out.

3 MR. LESEMAN: Thank you, Your Honor.

4 BY MR. LESEMAN:

5 Q. Do you know whether Exhibit 16.2 was
6 finalized at the time that you prepared the
7 property description?

8 A. I have no idea when Exhibit 16.2 was
9 finalized. I don't know. I know it was recorded
10 with the agreement.

11 Q. And it was signed?

12 A. It was signed, it was initialed. Every page
13 was initialed.

14 Q. So as it stands with the Court today to
15 determine the testimony to hear this matter, when
16 you prepared -- again, just to clarify, you didn't
17 have Exhibit 16.2 available to you?

18 A. No.

19 Q. Do you know when Exhibit 16.2 was finalized,
20 vis-à-vis when you prepared the property
21 description?

22 A. I have no idea.

23 Q. If you'd had the final version of 16.2,
24 would you have been able to draw a property
25 description that matched that western boundary

1 being the eastern boundary of parcel 13?

2 A. Absolutely.

3 MR. LESEMANN: No further questions,
4 Your Honor.

5 THE COURT: I got a couple of
6 questions. Any follow-up?

7 MS. ARMSTRONG: Not follow-up with the
8 witness, but I was asking the witness about Exhibit
9 No. -- Intervenor's No. 6, the draft agreement for
10 conveyance. I neglected to move it into evidence.

11 THE COURT: Okay. The draft of it?

12 MS. ARMSTRONG: The draft, correct.

13 THE COURT: Any objection to that?

14 MR. LESEMANN: Your Honor, again it is
15 a draft. We trust that you would give it the
16 weight to which it may be entitled.

17 THE COURT: All right. It's admitted,
18 Intervenor's No. 6.

19 (Intervenor's Exhibit No. 6 was
20 admitted into evidence.)

21 THE COURT: And I think that might be
22 one of my questions. Leave this Exhibit 29 up,
23 only because that's where my questions are going to
24 derive from. But y'all have to help me out with
25 the exhibit numbers, if you would.

1 Exhibit 26 I believe is the Beachwalker
2 Park?

3 MR. LESEMANN: 36, the lease, Your
4 Honor?

5 THE COURT: No, 26. I want to go over
6 some plats with Ms. Nimmons.

7 MR. LESEMANN: Is that what you were
8 intending?

9 THE COURT: Correct.

10 EXAMINATION

11 BY THE COURT:

12 Q. So, Ms. Nimmons, this is the plat from which
13 your legal description derived, is that correct?

14 A. That's correct, yes.

15 Q. And as I understand your instructions, they
16 were to get the westernmost boundary is what I
17 understood?

18 A. Yes.

19 Q. And so you took on this southwestern
20 boundary --

21 A. I did, yes.

22 Q. -- of the employee facility tract. Which is
23 -- it's on this plat. It's the courses, the
24 directions and the courses is where you started
25 your description, and you went south to the water

1 and then east some 10 miles, correct?

2 A. Yes, sir.

3 Q. All right. And that is dated -- that's
4 dated February of 1976, where that was in hand at
5 the time?

6 A. I'm not sure of the date, but, yes.

7 Q. Okay. I think that speaks for itself.

8 THE COURT: Mr. Lesemann.

9 MR. LESEMANN: Yes.

10 THE COURT: If you'll pull that up so
11 she can see it.

12 THE WITNESS: Yeah, it's '81.

13 THE COURT: It's '81?

14 THE WITNESS: Yes. The Beachwalker
15 lease was a lease.

16 THE COURT: Oh, that's a reference
17 plat, you're right. Okay. So the little date is
18 March of '81. So that was in hand at the time.
19 All right.

20 What is the plat reference on the
21 Beachwalker Ocean Parcel that we discussed, the
22 16.088 tract? What reference, what plat?

23 MR. LESEMANN: Your Honor, that is
24 likely -- that may be an exhibit to the development
25 agreement, but it was not an exhibit that -- I can

1 attempt to put it on the ELMO projector, but I
2 don't know that it's in evidence.

3 MS. ARMSTRONG: It's Intervenor's
4 Exhibit No. 5. It's in evidence.

5 MR. LESEMAN: Oh, excuse me, okay. I
6 don't have that on my iPad.

7 MS. ARMSTRONG: Ms. Nimmons has it.

8 THE WITNESS: I have got it, right.

9 THE COURT: You do have it. It's the
10 large-scale one. Okay.

11 All right. So we are talking about now
12 Intervenor's Exhibit 5?

13 MS. ARMSTRONG: Yes, Your Honor,
14 correct.

15 THE COURT: All right.

16 BY THE COURT:

17 Q. And that is the -- I think you made
18 reference to it as the Beachwalker Ocean Parcel?

19 A. Correct, yes.

20 Q. 16.088 acres. And the date on that plat is
21 what?

22 A. The date on this one is May 18th, 1988.

23 Q. '88, okay. All right. And I believe that's
24 what Ms. Armstrong was asking you about, you
25 started out with the western boundary on that and

1 the draft?

2 A. I did.

3 Q. And then based upon that plat it would be --
4 the line was drawn further to the west below the
5 employee beach facility?

6 A. Correct.

7 Q. Is that right?

8 A. Yes.

9 THE COURT: All right. And then
10 finally -- let me give you this one, Mr. Lesemann,
11 I have no idea what this is, but let me show you
12 this. This is the one I asked about yesterday when
13 we started.

14 MR. LESEMANN: Yes, sir.

15 THE COURT: Does that have an exhibit
16 or anything on it?

17 MR. LESEMANN: This is within Exhibit
18 P-10 to the agreement for conveyance which is
19 Exhibit 16.7 to the development agreement of '94.

20 THE COURT: Okay. Hand that to her and
21 show her that one as well.

22 BY THE COURT:

23 Q. And, Ms. Nimmons, is that -- I want to make
24 sure y'all know what I'm talking about here. This
25 appears to me to be -- and it's described as the

1 plat of Captain Sam's Spit.

2 A. Right.

3 Q. Divided into two parcels?

4 A. Yes.

5 Q. East and west?

6 A. Uh-hum. That's correct.

7 Q. And it picks up the -- where it starts on
8 the eastern boundary it picks up a line somewhere,
9 I don't know where that line is, but it's somewhere
10 near that employee facility lot; is it not?

11 A. It is, yes. I'm not sure exactly where, it
12 doesn't have any bearings, but, yes.

13 Q. Okay. And that's dated when?

14 A. This is 1994. July 14, 1994.

15 Q. So this would have been done somewhere
16 around the time that this whole process was
17 ongoing; is that right?

18 A. Yes.

19 Q. And at that time in 1994, Captain Sam's Spit
20 was planned to be open space and/or some of it was
21 going to be conveyed to -- possibly to the County?

22 A. To the County, yes.

23 Q. Is that what that diagram is depicting, or
24 is that something altogether different, do you
25 know?

1 A. That's my understanding was that this was
2 supposed to be a diagram to split the Spit to kind
3 of say which side was going to go to KICA, and
4 which side -- you know, approximately what would go
5 to PRC.

6 THE COURT: Okay. Put your Exhibit 29
7 back up on the board.

8 MR. LESEMAN: Yes, sir.

9 BY THE COURT:

10 Q. So that's what gets me to this exhibit.
11 This has been previously admitted into evidence.
12 I'm trying to figure out where this red box comes
13 from. I have been trying to figure that out since
14 this case began, before it began.

15 So if parcel 13 is to the right, and parcel
16 12 is to the left on this diagram, it looks to me
17 like the northern boundary of this red box is along
18 the line of the employee facility.

19 A. That's correct.

20 Q. Is that correct?

21 A. Yes, sir.

22 Q. Okay. So the western boundary of the red
23 box would I assume then be the extension that is
24 described in the quit claim deed to convey this
25 property to KICA?

1 A. Yes, sir.

2 Q. And I'm not sure what the eastern boundary
3 is, but basically it's an extension of the eastern
4 -- southeastern boundary of the employee facility
5 lot is that --

6 A. It should be an extension of the
7 southeastern boundary, but that is also the
8 boundary line of the 16-acre tract.

9 Q. The 16-acre tract.

10 A. Yes.

11 Q. Okay. So what was conveyed in the -- well,
12 the quit claim deed would have been from the
13 western boundary of the red box to the east for
14 some 10 miles correct?

15 A. Yes, sir.

16 Q. Okay. And the draft which was just put into
17 evidence as Exhibit 6 would have started at the
18 eastern boundary, that is what was originally
19 contemplated?

20 A. The western boundary of the -- the eastern
21 red line, yes.

22 Q. Right. The eastern red line. That's what I
23 was trying to figure out.

24 A. Right. Yes, sir.

25 THE COURT: Okay. I'm trying to figure

1 out, is that what the red box is designed to
2 purport to be?

3 MR. LESEMANN: Yes, Your Honor. And
4 Ms. Nimmons can speak to this. The other area
5 within the existing 16-acre parcel -- maybe I could
6 ask a question.

7 REDIRECT EXAMINATION

8 BY MR. LESEMANN:

9 Q. Was the 16-acre parcel a parcel of record?

10 A. Yeah. The 16-acre parcel is a parcel of
11 record and it extends to mean high water.

12 Q. Was there an exception within the quit claim
13 deed for matters of record?

14 A. It's platted properties. It's from the
15 seaward boundary line of platted properties to the
16 mean high water. So there essentially wasn't
17 anything to convey at the 16-acre parcel, which is
18 what created the box.

19 Q. And that creates a disconnect from the
20 remainder of the strip as it was shown stopping in
21 Exhibit 16.2?

22 A. Yes, correct.

23 MR. LESEMANN: And, Your Honor, one
24 question that I would have, if permissible, from
25 your follow-up is when you asked Ms. Nimmons about

1 her instructions.

2 THE COURT: Right.

3 MR. LESEMANN: The timing of those
4 instructions, if she knows, as compared to the
5 timing of the finalization of Exhibit 16.2 before
6 it was signed.

7 THE COURT: Do you know when that was
8 given? That was my other line of questions, but go
9 ahead if you can answer that.

10 BY MR. LESEMANN:

11 Q. Meaning, the timing of -- Judge Scarborough
12 asked you about, you know, what were your
13 instructions to sort of go from east to west?

14 A. Correct.

15 Q. And those instructions, and how do you know
16 how they related in time to the date when Exhibit
17 16.2 was finalized?

18 A. I don't know when 16.2 was finalized. I
19 just don't know.

20 Q. Do you recall the timing of the discussions
21 that you had where you would have received the east
22 to west instructions? Would those have been over
23 the summer of 1994?

24 A. I mean during our due diligence I have gone
25 back to emails from April where they started

1 writing and saying, this is what we are thinking we
2 are going to convey.

3 So I don't know exactly when the beachfront
4 strip came in because there were so many parcels.
5 I don't know when the first draft would have been
6 done, whether that was the first one, or whether
7 there may have been prior ones. I just don't know.
8 It was a huge monumental task.

9 EXAMINATION

10 BY THE COURT:

11 Q. That I understand. So what -- you would
12 have had each of -- each of these plats would have
13 been available, because they were plats of record
14 at the time that you were preparing the
15 description, correct?

16 A. Yes.

17 Q. To your knowledge there were no other plats?

18 A. No other plats of the west end?

19 Q. Yes, ma'am.

20 A. Just Beachwalker.

21 Q. Yeah. Just talking about this here. I'm
22 not really concerned about the eastern end.

23 A. Yes.

24 Q. But -- and you did not have Exhibit 16.2?

25 A. I did not.

1 Q. And in fact didn't see that for years?

2 A. I didn't see it until 1997 I believe.

3 Q. The first time this issue cropped up?

4 A. Yes.

5 Q. And then -- so you would have either had
6 these plats in hand, or they would have been
7 provided to you?

8 A. When I worked with Tommy Buist, we kept an
9 extensive filing, hard copies of all the plats of
10 Kiawah.

11 Q. Okay. So they were in your records?

12 A. They were in my records, yes.

13 Q. And you were the one that reviewed them, you
14 reviewed them with Mr. Buist?

15 A. I reviewed them with Mr. Buist. Whether I
16 reviewed them in detail, I don't know. Like I
17 said, we were going through so many different
18 descriptions.

19 Q. Okay. But once you had created the
20 description, you reviewed that with Mr. Buist?

21 A. I know that we gave documents. We probably
22 gave work product to Mr. Buist and to Leonard and
23 to Tren and to everybody to review.

24 Quite honestly they relied on me extensively
25 to get it right.

1 Q. Okay. I think Mr. Long testified that that
2 property just had never been platted before. So
3 therein lies part of the problem.

4 A. Well, the 4 acres has never been platted.
5 But the employee facility tract had been and the
6 Beachwalker.

7 Q. That brings up my next question. The
8 platting of that property came in only in 2011; is
9 that right?

10 A. It was shown on some sketches that we did,
11 but we didn't -- we don't have a recorded plat of
12 this. There is a preliminary plat that has been
13 submitted, and I think it has been approved by the
14 Town. But it's just preliminary, it's not
15 recorded.

16 Q. Okay.

17 A. That shows this piece.

18 THE COURT: And is that thing in
19 evidence as well? I think you put that in
20 evidence.

21 MR. LESEMAN: I believe the
22 intervenors entered that. It's the Seamon
23 Whiteside survey.

24 MS. ARMSTRONG: Right. Exhibit 15.

25 THE COURT: Intervenors' 15.

Deposition of hearing

1 MS. ARMSTRONG: Yes, Your Honor.

2 THE COURT: Have you seen that one?

3 THE WITNESS: I have, yes.

4 THE COURT: So it shows you can make
5 out the parcel 13, the parcel 12, and then the box
6 contained within that?

7 THE WITNESS: Yes.

8 THE COURT: Okay. But this is the
9 first time that's come to light?

10 THE WITNESS: The extent of it, yes,
11 2011.

12 THE COURT: Okay. That's all I have.
13 If y'all have follow-up, you can
14 certainly ask.

15 MS. ARMSTRONG: No follow-up, Your
16 Honor. Thank you.

17 THE COURT: Thank you, Ms. Nimmons.
18 You can step down. Appreciate your help.

19 Mr. Lesemann

20 MR. LESEMANN: Yes.

21 THE COURT: You ready to proceed?

22 MR. LESEMANN: Yes, sir, we are.

23 Our final witness will be Mr. Townsend
24 Clarkson.

25 THE COURT: Come on up, sir.

1 TOWNSEND CLARKSON,
2 having been first duly sworn, was examined and
3 testified as follows:

4 THE COURT: If you'll state your name
5 and address for the record, please.

6 THE WITNESS: My name is Townsend Pope
7 Clarkson. I live at 2057 Roper Lane, Charleston,
8 South Carolina.

9 THE COURT: Thank you, sir.

10 Mr. Lesemann.

11 MR. LESEMANN: Thank you, Your Honor.

12 DIRECT EXAMINATION

13 BY MR. LESEMANN:

14 Q. Mr. Clarkson, could you give the Court a
15 brief background in terms of your involvement with
16 KRA, the developer, as well as your involvement
17 with the Community Association, KICA?

18 A. Yes, sir. I started working with the
19 developer in 1988. Came on board as chief
20 financial officer.

21 Later took on the additional role as chief
22 operating officer. And currently now serve as the
23 chief operating officer of Kiawah Resort
24 Associates.

25 Q. Okay. And with regard to KICA, did you

1 serve as the president of KICA?

2 A. I was on the board of KICA from I think 1989
3 to 2001. Served as president from 2003 [sic] to
4 2007 [sic]. And served as vice president from 2007
5 [sic] to my retirement, resignation, whatever, in
6 2001.

7 Q. Okay. So the term president, did there come
8 a time when KICA made a modification of that
9 terminology to change it from president to
10 something else?

11 A. Yes. I think it is now called chairman.

12 Q. Okay. So at the time when you served as
13 president, was there a separate chairman?

14 A. No, there was not.

15 Q. Okay. Were you the one president while you
16 were president?

17 A. That's correct, yes.

18 Q. So there was no copresident for example.
19 Was there a president of the property owner
20 directors, and then a separate president of the
21 developer directors?

22 A. No. There was a president, a vice
23 president, and a secretary.

24 Q. Okay. In 1994, in April of 1994, was a
25 slate of officers for KICA recommended and approved

1 at a meeting over which you presided?

2 A. That is correct.

3 Q. And during that slate of officers approved
4 in April of 1994, was that done during a board of
5 directors meeting on Thursday, April 7th, 1994?

6 A. Yes, sir, it was.

7 Q. And was that a duly called meeting of the
8 board of directors for which minutes were kept?

9 A. That is correct.

10 Q. Is the document that I'm showing you, is
11 this a true and accurate copy of an excerpt of
12 those minutes indicating the officers and members
13 as they existed in 1994?

14 A. It appears to be, yes.

15 MR. LESEMAN: Your Honor, we move for
16 admission of Plaintiffs' Exhibit 1. This is just
17 to confirm the status of the individuals and the
18 offices that they held at the time when the
19 development agreement was finalized.

20 THE COURT: Okay. Any objection?

21 MS. ARMSTRONG: No objection.

22 MS. JETT: No objection.

23 THE COURT: Without objection. Thank
24 you.

25 (Plaintiffs' Exhibit No. 1 was admitted

1 into evidence.)

2 BY MR. LESEMANN:

3 Q. So, Mr. Clarkson, did you have regular
4 activity and regular involvement in your capacity
5 as a board member of and president of KICA?

6 A. Yes. We had -- some periods of time we had
7 board meetings every month. We attempted to try to
8 do them quarterly, ended up having them back --
9 having them every month.

10 Served on the finance committee and other
11 preparatory meetings that KICA would have relative
12 to budgets and procedures or operations.

13 Q. Were you involved with regard to the 1994
14 development agreement?

15 A. Yes, I was. I did not directly negotiate
16 those agreements.

17 Q. Did you sign the agreement for conveyance on
18 behalf of KICA?

19 A. I did, yes.

20 Q. And did you sign that in your capacity as
21 president?

22 A. I was president, yes, of KICA.

23 Q. And based on your involvement with KICA and
24 your status as its president, do you have an
25 understanding of the intent of KICA with regard to

1 the beachfront strip?

2 A. Yes, I do.

3 Q. And what is that?

4 A. That we transferred to them a 2- to 300-foot
5 beachfront dunes area that ran the length of the
6 10-mile beach that ended on the western end at the
7 eastern side of what you all been terminated parcel
8 13 along the western boundary of the Duneside
9 Villas.

10 Q. And when -- did you sign the agreement for
11 conveyance as KICA's president?

12 A. Yes, I did.

13 Q. Did you sign this document as KICA's
14 president?

15 A. That is my signature.

16 Q. There at the top?

17 A. That is my -- correct.

18 Q. On behalf of the Kiawah Island Community
19 Association, Inc.?

20 A. Yes, sir. As its president, and Leonard
21 Long as its secretary.

22 Q. When you signed the agreement for
23 conveyance, did you have any knowledge that the
24 property description in the agreement for
25 conveyance related to the beachfront strip, whether

1 it was consistent or inconsistent with Exhibit
2 16.2?

3 A. I would not have been able to interpret it
4 properly if I read it, but I did see 16.2 and that
5 was the basis of the transfer in my mind.

6 Q. As a member of KICA's board and KICA's
7 president at the time that the agreement for
8 conveyance was signed, was it KICA's intent to
9 receive and accept the beachfront strip as was
10 exhibited in Exhibit 16.2 to the development
11 agreement?

12 A. Yes, it was..

13 MS. ARMSTRONG: Objection, Your Honor.
14 He's leading the witness.

15 MR. LESEMANN: Your Honor, I can
16 rephrase.

17 THE COURT: All right.

18 BY MR. LESEMANN:

19 Q. Specifically with regard to KICA, and with
20 regard to your role as president of that
21 organization, and a member of its board of
22 directors, what was KICA's intent with regard to
23 the beachfront strip?

24 A. As I stated earlier, it was to accept a
25 strip of dunes land that ran from the western end

1 of the Duneside Villas, approximately 2- to 300
2 feet in width, and ran the length of the beach all
3 the way through to Bear Island.

4 Q. Did KICA intend to receive any properties
5 that were not included within the beachfront strip
6 as illustrated on Exhibit 16.2?

7 A. No, its intention was not.

8 Q. Did KICA intend to receive 4.62 acres
9 located to the west of that intended beachfront
10 strip?

11 A. No.

12 MS. ARMSTRONG: Objection, Your Honor.
13 I think he is leading the witness.

14 THE COURT: I will sustain that, yeah.

15 MR. LESEMANN: Okay.

16 BY MR. LESEMANN:

17 Q. Did KICA intend, with regard to the
18 beachfront strip, to receive anything other than
19 what is reflected on Exhibit 16.2?

20 MS. ARMSTRONG: Objection, he is still
21 leading the witness, Your Honor.

22 THE COURT: Sustained.

23 BY MR. LESEMANN:

24 Q. Did KICA have any intent with regard to any
25 other property insofar as whether it should or

1 should not be included as part of the beachfront
2 strip?

3 A. The intent of KICA was to receive the
4 hatched lines starting at the eastern side of
5 parcel 13, running the length of the beach eastward
6 to Bear Island.

7 Q. Is that what Exhibit 16.2 reflects?

8 A. That is what I am seeing on Exhibit 16.2,
9 which we would have seen prior to or at the time of
10 the execution of the transfer.

11 Q. In retrospect, if the property description
12 included within the agreement for conveyance, do
13 you believe that it's consistent with the depiction
14 in Exhibit 16.2?

15 MS. ARMSTRONG: Objection, Your Honor.

16 MR. LESEMANN: Can I ask him if he
17 believes it's consistent with that depiction?

18 THE COURT: Ask him, that's fine. Go
19 ahead.

20 BY MR. LESEMANN:

21 Q. Do you believe that the property description
22 and the quit claim deed and the agreement for
23 conveyance is consistent with the depiction on
24 Exhibit 16.2?

25 A. No. No, I do not.

1 Q. And how is it inconsistent?

2 A. It picks up a 4.2, I think, or 4.62-acre
3 parcel that really encompasses the western portion
4 of parcel 13 and the eastern portion of parcel 12,
5 which was not the intentions for KICA to receive it
6 at that time.

7 Q. Did KRA receive development rights with
8 regard to parcels 12 and 13 under the 1994
9 development agreement?

10 A. Yes, it did. Both parcels 12 and 13 were
11 part of the zoning approval at that time. We
12 received development of both of those parcels.

13 Q. To your knowledge, as a result has any
14 developable property been implicated as a result of
15 this error in the property description?

16 A. Yes, it has.

17 Q. Is it valuable property?

18 A. It's beachfront property, so it's definitely
19 very valuable property.

20 Q. Are you aware of any evidence, whether from
21 the Town, from KRA or from KICA that there was an
22 intention that any developable property be included
23 in that beachfront strip?

24 A. No, there was not.

25 Q. With regard to the 4.62 acres, are you aware

1 of any action undertaken by KICA to develop or
2 maintain that property?

3 A. Not while I was a member of the board. And
4 not to my knowledge since then.

5 Q. That's a good question. You were on the
6 board I think you mentioned for up until 2003; was
7 that correct?

8 A. 2001.

9 Q. 2001. So from 1995, December of 1995 when
10 the quit claim deed was signed to 2001 when you
11 would have rolled off the board of directors, can
12 you identify any actions of ownership, control or
13 maintenance that KICA undertook with regard to
14 those 4.62 acres?

15 A. Nothing was discussed at the board level,
16 nothing was discussed at the finance committee
17 levels that I'm aware of. And, no, there was not.

18 Q. Mr. Clarkson, you are essentially a finance
19 guy, you have worked as a CFO and worked in
20 accounting through your career?

21 A. And I was a CPA initially.

22 Q. So you've helped with budgets is one of your
23 areas of expertise is to help budgets and to follow
24 -- track money?

25 A. That fell under my responsibility, yes.

1 Q. Can you identify any expenditure of funds by
2 KICA relating to the 4.62 acres at any time while
3 you were a member of the board?

4 A. Not to my recollection.

5 Q. Are you aware of any activity that KICA may
6 have undertaken with regard to construction or
7 maintenance of that property?

8 A. There has been none on that.

9 Q. Are you aware of who pays the taxes for the
10 property that is represented by the 4.62 acres?

11 A. Yes, I am.

12 Q. And who is that?

13 A. That's KDP, KRA.

14 Q. Okay. As Ms. Nimmons indicated in her
15 testimony is that 4.62 acres, is it indicated on
16 any of KICA's own maps of its common properties?

17 A. Not that I'm aware of. Not that I have
18 seen.

19 Q. Okay. Have you had the opportunity to speak
20 with a subsequent chairman of the KICA board
21 relating to these circumstances?

22 A. Yes, I was on the conversation last year
23 relative to this parcel and resolution of this
24 parcel. And had --

25 Q. Who were you speaking with, Mr. Clarkson?

1 A. Craig Weaver, which was a board member
2 president, chairman of the board. And he
3 specifically stated that they recognize that this
4 was --

5 THE COURT: Let me stop you right
6 there. Is Mr. Weaver going to testify? Is he
7 present?

8 MR. LESEMANN: He is not, Your Honor,
9 But this is an admission by a party opponent. He
10 was the director -- the chairman at the time.

11 He was making a statement he was
12 authorized to make. And it is against whatever
13 interest that KICA may have in the property.

14 THE COURT: Well, why don't you lay a
15 little more foundation, then.

16 MR. LESEMANN: Yes, sir. Thank you,
17 Your Honor.

18 BY MR. LESEMANN:

19 Q. So at the time of your conversation is it
20 your specific -- do you have a specific
21 understanding as to whether Mr. Weaver was the then
22 chairman of the board of directors?

23 A. I believe he was the then chairman of the
24 board.

25 Q. And were you speaking with him in a

1 conversation that related specifically to an
2 interaction between the developer and KICA as
3 relates to these 4.62 acres?

4 A. We were. We were trying to figure out a way
5 to resolve this issue.

6 Q. Were you speaking with Mr. Weaver because he
7 was in fact a representative of KICA?

8 A. Yes, we were.

9 Q. And to your knowledge he was the -- was he
10 the highest ranking representative of KICA in his
11 capacity as the chairman of board of directors?

12 A. That's correct. And he was trying to work
13 with us to try to determine a means or a solution
14 that we could have in order to get that transferred
15 back, or reform the deed to transfer that back to
16 KRA.

17 Q. In the course of interacting with KICA, is
18 Mr. Weaver the type of person the developer would
19 interact with to have those discussions?

20 A. Yes.

21 Q. And in fact I think you overheard the
22 testimony, was there indeed a meeting between
23 Mr. Permar, Mr. Long, Ms. Nimmons and Mr. Weaver in
24 2011?

25 A. Correct, there was.

1 Q. Okay. And do you recall Mr. Permar saying
2 that Mr. Weaver had indicated that he would take
3 the matter under advisement?

4 A. That's correct.

5 MS. ARMSTRONG: Objection, Your Honor,
6 he's leading the witness.

7 THE COURT: I'm going to allow that.
8 Go ahead.

9 MR. LESEMANN: Thank you, Your Honor.

10 A. Yes. They -- I was not at that meeting, but
11 reported to us at our operation meetings they were
12 going to take is under advisement.

13 BY MR. LESEMANN:

14 Q. Was your conversation with Mr. Weaver, was
15 it -- to your knowledge, was it subsequent to that
16 meeting that was with Mr. Permar, Mr. Long and
17 Ms. Nimmons?

18 A. Yes, it was.

19 Q. And did it relate to the same subject of the
20 4.62 acres?

21 A. Yes, they all did.

22 Q. Okay. And what did Mr. Weaver tell you?

23 MS. ARMSTRONG: Objection, Your Honor,
24 hearsay.

25 MR. LESEMANN: Your Honor, it's an

1 admission by party opponent. It's an exception to
2 hearsay. I have laid every element of the
3 admission by party opponent standard.

4 MS. JETT: Your Honor, Mr. Weaver was
5 the chairman of the KICA board in 2012. He was not
6 on the board -- I think we have established who
7 were the board members in 1994 and 1995, and I
8 don't think that it -- I mean, also in addition to
9 hearsay, grounds of relevance.

10 Mr. Weaver's ability to admit on behalf
11 of KICA or not what KICA's intent was in 1994 and
12 1995, he can't. Mr. Townsend, and all the other
13 KICA board members are there testifying as to what
14 they believe that KICA's intent was then.

15 But I don't think even Mr. Weaver would
16 have the capacity to give any kind of statement as
17 to what KICA's intent was at the time these
18 documents were entered.

19 MS. ARMSTRONG: And the intervenors
20 would join in the objection to the extent that he
21 doesn't have the capacity because he is one person
22 on the board not authorized to speak on behalf of
23 the board and purporting to be giving an official
24 position of KICA that's not been voted on or
25 anything like that that's come before the board.

1 To the extent that it could be a
2 statement by Mr. Weaver, it's not at all
3 representative of KICA itself as a board.

4 MR. LESEMANN: Your Honor, we wouldn't
5 purport to say that it was binding on the entire
6 organization, it's just an admission by a party
7 opponent.

8 For example, if you have an accident
9 case and the party opponent says, yeah, you know,
10 we should have worked on those brakes and we
11 didn't. The fact that it's the highest ranking
12 official of KICA at the time makes an even stronger
13 admission.

14 And Your Honor will recall we had a
15 discussion about the 2012 parliamentary
16 deliberation of town council about the scrivening
17 of that amendment, and whether it should say this
18 or whether it should say that and Your Honor
19 admitted that evidence and I withdrew my objection.

20 And I think that this is a particularly
21 relevant admission because we have the party that
22 owns the property. And if I could offer a proffer
23 of the evidence, Mr. Clarkson will testify as to
24 what Mr. Weaver said, and it's a statement directly
25 against the interest of KICA as it relates to

1 whether this is a mistake, or whether this was
2 intended.

3 And it speaks directly to the heart of
4 the issue. And it's an admission by a party
5 opponent. I would agree that it doesn't mean that
6 the case is over and we should stop all the
7 evidence, but it's absolutely admissible.

8 THE COURT: I want to make sure that
9 Mr. Weaver was -- at that time, I'm not sure, was
10 he on the board at that time or not?

11 MS. JETT: In 2012 when the -- or 2011.
12 The period where this conversation happened he was
13 the chairman of the KICA board.

14 THE COURT: The conversation that you
15 are relating to was this year, 2013?

16 THE WITNESS: No, 2012.

17 THE COURT: 2012. So was he on the
18 board at the time?

19 MS. JETT: He was on the board at the
20 time.

21 MR. LESEMANN: And he was the chairman
22 at the time. He served two terms as chairman.

23 THE COURT: And you're speaking to him
24 in your capacity as COO of KRA?

25 THE WITNESS: Yes, sir. I was not on

1 the board at that time.

2 THE COURT: All right. Was he -- was
3 Mr. Weaver on there back in 1994?

4 THE WITNESS: No. Mr. Weaver was not.

5 THE COURT: Okay. All right. You
6 know, I think it's hearsay. I understand you're
7 trying to admit it as an admission against
8 interest. I don't know that he's got the authority
9 to act on behalf of the board.

10 MR. LESEMAN: Well, Your Honor, it's
11 not that it's an authority to act, it's an
12 admission by a party opponent.

13 And so it's a statement by someone who
14 was the chairman. And again, it doesn't have to be
15 a binding action on behalf of the board. What did
16 the chairman say when you discussed it? And that
17 is a relevant admission because that's the whole
18 idea of an admission.

19 And that corporate vice president might
20 have said, yes, we knew that that part in the Pinto
21 was harmful, as of such time. And there is really
22 no one else who can speak further on behalf -- and
23 what I'd like to do is just to turn, if I could,
24 quickly to the relevant portion of the rule.

25 THE COURT: All right.

1 MR LESEMANN: Your Honor, we already
2 have evidence, I would note too, that Ms. Armstrong
3 has highlighted to say, okay, you went to
4 Mr. Weaver and you asked him to sign a quit claim
5 deed and he didn't take any action, if you recall
6 that evidence.

7 THE COURT: Right.

8 MR. LESEMANN: That was introduced into
9 evidence, Your Honor, as some indication that maybe
10 KICA didn't -- maybe they didn't agree with our
11 position.

12 And this is a follow-up. And you'll
13 recall perhaps the discussion between Mr. Long and
14 Ms. Armstrong where she said, well, Mr. Weaver
15 didn't take any action, did he?

16 Well he did take some action, Your
17 Honor. He spoke directly to the COO of the
18 developer with regard to -- following that meeting,
19 while he was chair, as to what he believed the case
20 to be.

21 So we do have evidence in the case
22 already in terms of who -- what was thought on the
23 part of the Town later on. And we have evidence
24 relating to the meetings. And we also have -- I'm
25 finding it here, I had put it out.

1 MS. ARMSTRONG: Your Honor, if I may.
2 Now that Mr. Lesemann has characterized my
3 questions, I was very careful to ask a question,
4 did the KICA board take any action in response. I
5 didn't ask about Mr. Weaver in his personal
6 capacity.

7 The admission against the party
8 opponent has to be by the party. Mr. Weaver is not
9 a party to this case, KICA is the party to this
10 case. In his individual capacity, he doesn't have
11 the ability to make a statement on behalf of KICA.

12 MR. LESEMAN: Your Honor, that's
13 directly contrary to what -- I apologize for the
14 delay it took me to pull it up. Rule 801(d)(2),
15 statements which are not hearsay. Admission by a
16 party opponent. The statement is offered against a
17 party, KICA, and it's the party's own statement.
18 Either in an individual or a representative
19 capacity.

20 And we have established that Mr. Weaver
21 was the chairman of the board of directors at the
22 specific time that the statement was made. And
23 there is additional -- and it's not an and, it's an
24 or. A statement by a person authorized by a party
25 to make a statement concerning the subject, or a

1 statement by a party's agent or servant concerning
2 a matter within the scope of the agency or
3 employment made during the existence of the
4 relationship.

5 So, Your Honor, when we look at KICA,
6 KICA authorized is it -- authorized its chairman to
7 have meetings with the developer about this issue,
8 authorized him to speak with the developer about
9 this issue, authorized him to make statements about
10 the issue.

11 So under subsection (a) and (d), this
12 is clearly an admission by a party opponent. We
13 are not suggesting that it's a formal board action,
14 we are suggesting it's an admission by a party
15 opponent. It falls clearly within two subsections
16 of that rule.

17 And I think it's important based on the
18 evidence in the record regarding whether or not
19 there was any response ever by either Mr. Weaver or
20 the board, because we will get to that during Ms.
21 McAdory's testimony with regard to this issue.

22 MS. JETT: Your Honor, I don't think
23 that Mr. Lesemann has really laid a foundation as
24 to this specific conversation, whether this was a
25 social visit or where the conversation was, in what

1 capacity Mr. Weaver was speaking, and whether or
2 not he in fact had the authority, or he was -- if
3 he was speaking on behalf of this board or he was
4 just really giving his own personal --

5 THE COURT: All right. Let's put a
6 little more foundation on there.

7 MR. LESEMAN: Yes, sir, Your Honor.

8 BY MR. LESEMAN:

9 Q. So was this a conversation that you had with
10 Mr. Weaver directly?

11 A. It was. Myself and Buddy Darby, who was the
12 CEO of KRA, and Mr. Weaver over the telephone.

13 Q. Was it at the Christmas party or a cocktail
14 party?

15 A. No. We were in Buddy Darby's office calling
16 him. Whether we called him at his home or at KICA,
17 I do not remember.

18 Q. Again, he wasn't a full-time employee of
19 KICA, correct?

20 A. No, he was not.

21 Q. He was a property owner that served as its
22 chairman?

23 A. Right. He was not an employee at all.

24 Q. But he was its one chairman?

25 A. He was the one chairman.

1 Q. And you engaged in a series of conversations
2 -- did you engage in a series of conversations with
3 Mr. Weaver about various topics relating to KICA?

4 A. This was the one conversation I had with him
5 relative to this issue.

6 Q. I understand. But is this a course of
7 dealing he would have had on other subjects as they
8 may have come up?

9 A. Not typically. Buddy Darby at that point
10 was also on the board. So any conversations I had
11 with him would have been most likely with Buddy as
12 our conversations on KICA or KRA related activities
13 that had involvement with KICA.

14 Q. Understood. So the three of you would have
15 had various conversations about business matters
16 relating between KRA and KICA?

17 MS. ARMSTRONG: Objection, Your Honor,
18 he is leading the witness and that's not what he
19 said.

20 THE COURT: I'm trying to get to --
21 what I understood you to say was that you were in
22 Mr. Darby's office, y'all picked up the phone and
23 called Mr. Weaver; is that right?

24 THE WITNESS: That is correct.
25 Specifically about this.

1 THE COURT: All right. Okay.

2 MR. LESEMAN: And, Your Honor, I think
3 what I was just trying to say is -- just to correct
4 it --

5 BY MR. LESEMAN:

6 Q. Is I think you perhaps interpreted a
7 question I'd asked as whether just you and
8 Mr. Weaver had discussions.

9 Did you and Mr. Darby and Mr. Weaver have
10 other discussions other than this one phone call
11 about various matters, not just the 4.62 acres?

12 A. Not typically.

13 Q. All right. Was this a phone conversation
14 that you had with Mr. Weaver relating to a specific
15 point of business interest between KICA and KRA?

16 A. It specifically related to the mistaken
17 property.

18 Q. Okay. And called from your business office
19 and you contacted Mr. Weaver?

20 A. That is correct.

21 Q. And this was not a social conversation?

22 A. No.

23 Q. There wasn't alcohol involved or anything
24 like that?

25 A. No, sir, not on our end.

1 Q. Okay.

2 MR. LESEMANN: Your Honor, again it's
3 just plainly within the admission by a party
4 opponent rule. Because if Mr. Weaver were not the
5 chairman of the board of KICA, if he just were a
6 property owner, the issue would be different.

7 But he at the time had a conversation
8 with the developer specifically relating to the
9 topic while he was the chairman of the board of
10 directors.

11 THE COURT: All right. Y'all state
12 y'all's bases for the objection and I will rule.

13 Ms. Jett, once again.

14 MS. JETT: Your Honor, I don't think
15 that we have established that Mr. Weaver, as the
16 then 2012 chairman of the KICA board, had any
17 knowledge or authority to state what KICA's
18 position may have been a decade and a half prior.

19 THE COURT: All right. Ms. Armstrong.

20 MS. ARMSTRONG: I think just hearing a
21 little bit of this follow-up has just kind of
22 highlighted it for me. He said this is not
23 typically the kind of conversation that he -- that
24 Mr. Townsend would be involved in and engaged in
25 with Mr. Weaver.

1 So as far as whether it's within the
2 scope, this is outside the scope of the working
3 relationship between KRA -- or at least this
4 witness and Mr. Weaver.

5 MR. LESEMANN: An admission doesn't
6 have to be typical, Your Honor, it can be a
7 one-time occurrence.

8 THE COURT: Okay. Well, it's a
9 statement y'all are offering against the party, and
10 allegedly the party's own statement, either in an
11 individual or representative capacity, correct?

12 MR. LESEMANN: Yes, sir.

13 THE COURT: So he is speaking then in
14 his capacity as the chairman of the board of KICA;
15 is that right?

16 MR. LESEMANN: Yes.

17 BY MR. TOWNSEND:

18 Q. Is that correct, Mr. Clarkson?

19 A. You mean Mr. Weaver?

20 Q. Yes.

21 A. Yes.

22 THE COURT: All right. I'm going to
23 allow it. Go ahead.

24 MR. LESEMANN: Thank you, Your Honor.

25 BY MR. LESEMANN:

1 Q. Mr. Clarkson, just elaborate on the
2 conversation, and of course the important point
3 that we have been arguing about is what did
4 Mr. Weaver say?

5 A. Well, we had a -- can I go back in history?

6 THE COURT: No. Just tell me what he
7 said.

8 A. Okay. Mr. Weaver specifically said that he
9 recognized that this was a -- that this property
10 should not have been transferred; that it was a
11 mistake; and that their attorney, which I do not
12 remember his name, at that time had told them that
13 they -- the covenants required them to go to a
14 vote.

15 And we discussed with him the prior action
16 that was taken by the board, and the prior legal
17 advice that they had been given by Mr. Trenholm
18 Walker that since it was a transfer in error, or a
19 mistake in the transfer of error, that it really
20 wasn't transferred and the board had the right to
21 correct it, which is what happened in 1997.

22 But he said with this opinion that they had
23 from their current attorney on this issue that they
24 couldn't make a decision as they were concerned
25 about the board being sued.

1 MR. LESEMAN: No further questions,
2 Your Honor.

3 THE COURT: All right.

4 MS. JETT: Just a few.

5 CROSS EXAMINATION

6 BY MS. JETT:

7 Q. Mr. Clarkson, you had indicated -- you just
8 in your most recent response made a reference to
9 the 1997 corrective quit claim deed entered by
10 KICA?

11 A. Yes.

12 Q. And that it was your understanding from your
13 conversations with Mr. Weaver that the board issued
14 that 1997 corrective quit claim deed at the -- at
15 least in part based upon the advice from
16 Mr. Trenholm Walker that they could issue that?

17 A. That's my recollection, yes.

18 Q. Is it also your understanding that
19 Mr. Walker was representing KRA with various
20 matters relating to the development at that time?

21 A. Yes.

22 Q. Okay. All right. Let me go back then, if
23 we can, to the 1994 period.

24 Again putting on your director -- your
25 president of KICA hat, not your KRA hat. If you

1 can for me, think back to the maybe board meetings
2 or executive sessions that you might have sat in
3 with KICA and the property-owner directors, and do
4 you recall there being any discussions within the
5 board relating to the terms of the development
6 agreement or reviewing drafts of the various
7 documents?

8 A. There were no formal discussions that I can
9 remember from the KICA board meetings relative to
10 the development agreement that was between the Town
11 and the KRA at that time.

12 Q. Okay. But certainly the agreement for
13 conveyance, that is Exhibit 16.7 to the development
14 agreement, you would agree that that document is
15 between KICA and KRA?

16 A. That document, yes. But not the development
17 agreement.

18 Q. Okay. Was the agreement for conveyance ever
19 put before the board for discussion?

20 A. I do not recollect. I do not recollect that
21 there was a formal vote of the board to do that.

22 Q. Okay. So there didn't have to be any sort
23 of board action, or board vote to give you the
24 authority to sign the agreement for conveyance on
25 behalf of KICA?

1 A. To receive common properties there, I don't
2 think any board -- to my recollection, no board
3 action was required to do that. The developer had
4 the right to give to or to transfer over to KICA
5 common properties.

6 Q. Okay. Similarly, I know we are talking
7 about 10-mile beachfront conveyance, you don't --
8 let me back up. You don't recall there being any
9 discussions within the KICA board as to --

10 A. Not as formal actions of the board.

11 Q. Okay. Same question, but about Captain
12 Sam's Spit. Do you recall as far as KICA's ability
13 to at some point in the future receive a portion of
14 Captain Sam's from KRA pursuant to the development
15 agreement and the agreement for conveyance, do you
16 recall there being any KICA board discussions?

17 A. No, I do not.

18 Q. Okay. I think you testified earlier you
19 were on behalf of KRA, taking off your one hat and
20 putting on your other, you were not directly
21 involved in the negotiations with the Town as to
22 the terms of the development agreement?

23 A. I was not in the meetings negotiating
24 directly with the Town. But as the chief financial
25 officer, and as one of the executive team, it was

1 discussed frequently at our weekly meetings that we
2 had, and were discussed between Buddy Darby,
3 Leonard Long and myself as the negotiations went
4 on.

5 But I did not get directly involved in the
6 negotiations.

7 Q. Okay. So you would not have had any
8 discussions with any -- with the town mayor or any
9 town council members regarding what property, if
10 any, was supposed to go to KICA pursuant to the
11 development agreement?

12 A. Only from what I saw from the development
13 agreement. I did look at and review the
14 development agreement terms as they were being
15 negotiated, and did see Exhibit 16.2, and saw that
16 prior to my execution of the transfer.

17 Q. Okay. Do you recall in the 19973-acre tract
18 that was where KICA signed back that little
19 rectangular parcel back to the Sanctuary tract?

20 A. Correct.

21 Q. You were on the board at that time?

22 A. In 1997, yes, I was on the board.

23 Q. Okay. Do you recall whether or not there
24 was a board meeting or a board vote on prior to
25 issuance of that quit claim deed?

1 A. I'm sure the minutes would show that, but I
2 don't specifically remember one way or the other.

3 Q. Okay.

4 MS. JETT: No more questions.

5 THE COURT: Ms. Armstrong.

6 MS. ARMSTRONG: Thank you, Your Honor.

7 CROSS EXAMINATION

8 BY MS. ARMSTRONG:

9 Q. Mr. Clarkson, you did not play any role on
10 behalf of KICA as far as it relates to negotiating
11 the 1994 development agreement, correct?

12 A. No. Nobody on the board formally was
13 authorized or given authority to negotiate. There
14 were board members, in their capacity as property
15 owners, that didn't negotiate the agreement but did
16 talk to the Town about specifics that they wanted,
17 we'd like to see in the development agreement.

18 Q. And that leads really into my next question.
19 So you were a KRA developer-appointed member of the
20 KICA board?

21 A. Yes, I was.

22 Q. And but the property-owner members of the
23 KICA board, you were aware that they did actually
24 meet and negotiate with the Town?

25 A. They met with the Town. As to whether that

1 would be considered negotiations, I don't believe
2 that was it.

3 Q. Is it your understanding that the
4 property-owner members of KICA met with the Town to
5 discuss the 1994 development agreement?

6 A. I'm aware of that.

7 Q. Okay. And would you agree that the
8 property-owner directors of KICA may have a
9 different vision of what is in the best interest of
10 KICA than the KRA-appointed board members?

11 MR. LESEMANN: Your Honor, I don't know
12 if -- I object. I don't know if the foundation has
13 been established for a contrary view.

14 THE COURT: What relevance would that
15 have?

16 MS. ARMSTRONG: Well, I guess because
17 the property-owner members of the KICA board were
18 having discussions with the Town.

19 Mr. Townsend wasn't actually having
20 those discussions. He wasn't involved in the
21 negotiation. And to the extent that he is
22 purporting to have some understanding of what the
23 intent was of KICA, I think that's where this comes
24 in as probative.

25 MR. LESEMANN: But, Your Honor, there

1 is no information as to what the discussions could
2 have been or were.

3 THE COURT: I don't know if I want to
4 go down that road.

5 MS. ARMSTRONG: Okay.

6 THE COURT: Let me ask this question,
7 what's in my mind.

8 When did the KICA board transition from
9 developer controlled to property owner controlled?

10 THE WITNESS: It started transitioning
11 in I believe probably '95 or -- well, probably '95
12 or '96, and went through I believe 2001.

13 And then we had -- I believe after that
14 point we had one developer and one board member and
15 we had transitioned to majority of property-owner
16 members at that time.

17 THE COURT: When you left the board in
18 2001, that would have been about the time it
19 transitioned over?

20 THE WITNESS: I think that's when. But
21 it transitioned over time as agreed to by the
22 developer and KICA prior to the requirements of the
23 covenants.

24 THE COURT: Okay.

25 MR. LESEMANN: And, Your Honor, we

1 already checked. There are some provisions in the
2 development agreement relating to the transition
3 schedule. So that is in evidence.

4 THE COURT: All right.

5 BY MS. ARMSTRONG:

6 Q. We were talking a little bit about your role
7 in the negotiation. You testified in your
8 deposition, if you recall, that the purpose of the
9 beachfront strip was to prevent future development,
10 correct?

11 A. Well, I think that's a little bit out of
12 context. The purpose of the beachfront transfer
13 was to, one, protect the view easements of the
14 existing beachfront owners, and also to prevent
15 development from accretion really, as it happened
16 in Isle of Palms, from accretion and developing
17 properties in front of those owners, or in front of
18 those properties that were transferred as
19 beachfront properties.

20 It was again stipulated or said to be a 2-
21 to 300-foot strip running down the beach and the
22 high dunes area.

23 Q. And in 1994 when this development agreement
24 was executed and the agreement for conveyance, that
25 all it was described as was this 200, 300 --

1 approximately 200- to 300-foot strip running from
2 the west end to the east end, right?

3 A. And it was shown on an exhibit in the
4 development agreement which I have seen as part of
5 the development agreement.

6 Q. All right. And when I asked you about the
7 extent of the beachfront strip in your deposition,
8 you never identified a particular western boundary;
9 isn't that right?

10 A. I don't remember you asking specifically for
11 me to do that.

12 Q. But you did not give me --

13 MR. LESEMANN: Your Honor, objection.
14 And to the point that if Ms. Armstrong ask a direct
15 question, and then if it's inconsistent with prior
16 testimony, then I think the potential comparison of
17 the testimony would be appropriate.

18 THE COURT: If you'll limit your
19 testimony to he's here, he's now, he can tell me
20 what he said.

21 If it's material and it's inconsistent,
22 I will let you whip out the old deposition and try
23 to impeach him. But let's ask him about what he
24 knows today.

25 MS. ARMSTRONG: Okay.

1 BY MS. ARMSTRONG:

2 Q. So there isn't anywhere in 1994 that it was
3 written down the boundary, as you describe it, that
4 it should be on the western end of parcel -- I
5 believe you referred to it as 13?

6 A. I think it being shown pictorially on
7 Exhibit 16.2 is a form of writing. So I do believe
8 the intent was shown.

9 Q. Is there any text anywhere at all that would
10 reflect your recollection?

11 A. I believe in the development agreement it
12 says a 2- to 300-foot width strip of high dunes
13 running the length of the 10-mile beach.

14 That's not the exact words, but I believe
15 that is -- I believe that word is in there.

16 Q. But nothing identifying the western boundary
17 as you have just described it here today?

18 A. No. No. It refers to Exhibit 16.2, which
19 shows the western boundary.

20 Q. And at that time that the agreement for
21 conveyance was executed, you didn't go look at
22 parcel 13 that we were talking about, did you?

23 A. Did I walk down there and look at --

24 Q. Look at the boundaries of parcel 13?

25 A. No, ma'am, I did not. Let me ask this

1 question. Do you mean the legal description of the
2 boundaries or the physical walking of the
3 boundaries?

4 Q. I mean the legal description of the
5 boundaries.

6 A. No. I would not have understood them.

7 Q. On a plat?

8 A. Of parcel 13?

9 Q. A drawing of parcel 13.

10 A. Only on -- I only saw Exhibit 16.2 relative
11 to this, yes.

12 Q. So you didn't look at any plats or any
13 surveys or anything like that, other than Exhibit
14 16.2, when you signed the agreement for conveyance,
15 correct?

16 A. That is correct.

17 Q. How about have you seen the land use
18 designation map we have talked about today?

19 A. The one that has gone up, yes.

20 Q. The six-foot long map, you didn't look at
21 that before signing the agreement for conveyance,
22 did you?

23 A. Not to my recollection, I did not.

24 MS. ARMSTRONG: No further questions,
25 Your Honor.

1 MR. LESEMANN: No redirect, Your Honor.

2 THE COURT: All right. Mr. Clarkson,
3 thank you, sir, you may step down.

4 All right. May Mr. Clarkson be excused
5 as well? He may want to stick around.

6 MR. LESEMANN: Your Honor, that would
7 conclude the plaintiffs' witnesses in this matter.

8 THE COURT: All right, very good.
9 Plaintiffs rest?

10 MR. LESEMANN: Yes, Your Honor.

11 THE COURT: Ms. Jett.

12 MS. JETT: Your Honor, I have one
13 witness. Tammy McAdory is the executive director
14 for KICA.

15 THE COURT: Hold on before we get to
16 her. Any motions at this time from either you or
17 from Ms. Armstrong?

18 MS. ARMSTRONG: I don't, no, Your
19 Honor.

20 MS. JETT: No, Your Honor.

21 THE COURT: Very good. I'm assuming
22 that witness is going to take a little while?

23 MS. JETT: She might. And, Your Honor,
24 I did want to just mention that Ms. McAdory is
25 hearing impaired. And we might need a few minutes

1 before we get her started just to get her
2 comfortable and where people can speak.

3 THE COURT: All right.

4 Why don't we do that. You've got just
5 that one witness you plan.

6 MS. JETT: Yes.

7 THE COURT: And, Ms. Armstrong?

8 MS. ARMSTRONG: Four.

9 THE COURT: You've got four. I'd like
10 to finish today if possible.

11 MS. ARMSTRONG: I'd like to finish
12 today.

13 THE COURT: All right.

14 MR. LESEMAN: I do think that Ms.
15 Armstrong's witnesses will go more quickly.

16 MS. JETT: I think hers will be the
17 shortest.

18 THE COURT: Okay.

19 MS. ARMSTRONG: I'm not planning a long
20 direct. It depends on the cross-examination.

21 THE COURT: Very good. Let's just come
22 back at 2:00. You come back at quarter till and
23 we'll make sure the courtroom is open and you can
24 get situated. We'll plan to start right back at
25 2:00.

1 MS. JETT: Okay.

2 THE COURT: Thank you very much.

3 MS. ARMSTRONG: Your Honor, I'm sorry
4 to ask you this. But I am a little worried, we
5 have five witness and we are starting at 2:00.
6 Unless you're okay going until 7:00. And it's a
7 quarter after 12:00, could we be back 1:30?

8 THE COURT: We can.

9 MS. ARMSTRONG: Would that be a
10 problem?

11 THE COURT: Nope.

12 MR. LESEMANN: Thank you, Your Honor.

13 (A recess was taken.)

14 THE COURT: Okay. We've moved through
15 the plaintiffs' case, on to the defendant's and,
16 Ms. Jett.

17 MS. JETT: All right, Your Honor. We'd
18 like to call Tammy McAdory to the stand.

19 THE COURT: All right.

20 MS. JETT: Your Honor, as I mentioned
21 before, Ms. McAdory is hearing impaired. We had
22 her sitting on the witness stand a little earlier,
23 and it seems like from counsel's perspective that
24 she is able to hear us well from here.

25 THE COURT: Okay.

1 MS. JETT: I'd like her to see if she
2 can hear you.

3 THE COURT: All right. Well, let's try
4 that out.

5 TAMMY McADORY,
6 having been first duly sworn, was examined and
7 testified as follows:

8 THE COURT: Thank you very much. Could
9 you give us your name and address for the record?

10 THE WITNESS: Yes. Tammy McAdory.
11 3189 Donnelly Lane, Johns Island.

12 THE COURT: Okay. Ms. McAdory, if at
13 any time when we are going through your testimony
14 if you can't hear anyone for any reason, if you'll
15 just raise your hand I will keep an eye on that and
16 we will either repeat it or I'll make sure that we
17 are speaking directly to you so that you can hear
18 us, okay?

19 THE WITNESS: Yes, thank you.

20 THE COURT: Thank you.

21 Yes, ma'am.

22 DIRECT EXAMINATION

23 BY MS. JETT:

24 Q. All right. Tammy, can you tell me a little
25 bit, or tell the Court a little bit about your

1 history of employment with the KICA Island
2 Community Association?

3 A. Sure. I was hired full time in January of
4 1989 as the assistant to the general manager, which
5 is now the COO position.

6 Q. Okay. And what were your duties for KICA,
7 say, from the 1989 period maybe through 1996?

8 A. Through '96. As assistant to the general
9 manager, I was involved in all of the activities of
10 the association, from member services to covenant
11 compliance, to accounting, HR, and governance.

12 Which included attending board meetings and
13 taking minutes, recording the minutes after they
14 were approved, and maintaining all of the corporate
15 records.

16 Q. Okay. And are you still the custodian of
17 the KICA governance corporate records now?

18 A. Yes.

19 Q. Okay. During that period would you have
20 attended every KICA board meeting?

21 A. Most of them unless I was absent.

22 Q. Okay. But it would have still been your
23 responsibility, if you were not at a board meeting,
24 it would have still been your responsibility to
25 secure approval of the KICA minutes?

1 A. Correct.

2 Q. Okay. Was it also part of your employment
3 during that period to assist the KICA board members
4 with preparing for board meetings?

5 A. At the direction of the general manager I
6 would prepare board packets that would go out to
7 the directors in advance of board meetings.

8 Q. How would you describe a board packet?

9 A. A board packet would be an agenda, and any
10 materials that the general manager or a particular
11 board member requested accompany the agenda to
12 provide further details about a topic so that
13 directors could be prepared to make informed
14 decisions.

15 Q. So the materials might vary depending on
16 whatever issues were being discussed at a
17 particular meeting?

18 A. Sure.

19 Q. Okay. Specifically in the time period
20 leading up to the execution -- let me back up. You
21 are familiar with the 1994 development agreement --

22 A. Yes.

23 Q. -- for Kiawah?

24 A. Yes.

25 Q. From your recollection, was there any

1 official involvement by the KICA board in the
2 negotiations or preparation or drafting of the
3 development agreement?

4 A. No.

5 Q. Okay. Do you have any recollection as to
6 whether or not the KICA board was reviewing and
7 offering comments on drafts of documents?

8 A. To the development agreement?

9 Q. Correct.

10 A. The board of directors was not.

11 Q. Okay. Now, are you familiar with the
12 agreement for conveyance that was Exhibit 16.7 to
13 the development agreement?

14 A. Yes.

15 Q. That document -- to your recollection, is
16 KICA a party to that agreement?

17 A. I believe so. I need to see it.

18 Q. Okay. Well, if you'll look in the materials
19 in front of you. It is Exhibit --

20 MS. ARMSTRONG: Intervenors' 2.

21 BY MS. JETT:

22 Q. Intervenors' 2. Not in the binder, but in
23 the loose set of documents. No. 2, I think it's
24 the top document there.

25 A. Yes.

1 Q. You have seen that document before?

2 A. Yes.

3 Q. And you would agree that KICA is a party to
4 that document?

5 A. Yes.

6 Q. To your recollection, was the KICA board
7 presented with a draft of that document before its
8 execution?

9 A. Not that I recall.

10 Q. Do you recall whether or not there was a
11 board vote to authorize the execution of that
12 document on behalf of KICA?

13 A. In 1994?

14 Q. Yes, ma'am.

15 A. There was not.

16 Q. Okay. During the 1994 period, are you
17 familiar with the division of the KICA board
18 members as to how many were developer appointed and
19 how many were property owners?

20 A. Yes. There were four developer directors,
21 three elected property owner directors.

22 Q. Okay. This is, I guess, maybe a more
23 specific version of a question I just asked you
24 before. But to your recollection, was there any
25 board -- are any discussion in meetings of the KICA

1 board regarding specifically the 10-mile beachfront
2 strip conveyance?

3 A. No.

4 Q. Okay. Do you recall there being any
5 question or controversy during the say 1994 and
6 1995 period within the KICA board as to what the
7 dimensions of the beachfront conveyance was?

8 A. No.

9 Q. Do you recall whether or not the KICA board
10 had any discussion as to whether or not it was to
11 receive developable land as part of that 10-mile
12 beachfront strip?

13 A. I do not.

14 Q. Do you have any belief as to whether or not
15 the 10-mile beachfront strip that was deeded to
16 KICA was deeded as common property?

17 A. It was.

18 Q. You stated earlier that you were the
19 custodian of record as far as the governance
20 documents for KICA, correct?

21 A. Correct.

22 Q. In your review of those documents, were you
23 able to find any sort of written indication to you
24 that would manifest an intent by KICA during the
25 1994 and 1995 period as to what the legal

1 description of the beachfront strip conveyance was
2 supposed to be?

3 A. I do not.

4 Q. When did you first become aware of seeing
5 the 1995 quit claim deed?

6 A. When I received the recorded document.

7 Q. From KRA?

8 A. From KRA.

9 Q. Okay. And was that, to your knowledge,
10 sometime roughly after it was already recorded with
11 the R.M.C. Office?

12 A. Yes.

13 Q. Okay. Was the board asked to take any sort
14 of action on that deed?

15 A. They were not. No action was required.

16 Q. Okay. And do you have any understanding
17 about KICA's ability to refuse property that has
18 been deeded to it as common property?

19 A. Yes. The covenants do not provide an
20 ability for us to refuse common property from the
21 master developer, which KRA was at the time.

22 Q. Okay. You mentioned the covenants. I'm
23 going to hand you a document that we have marked as
24 Defendant's Exhibit 1.

25 Have you seen that document before?

1 A. Yes.

2 Q. Is this a document that is maintained by
3 your office?

4 A. It is.

5 Q. And these are the KICA covenants?

6 A. Yes.

7 Q. Okay. I'm going to ask you to turn to
8 article 2, section 2-A which I believe is on --
9 towards the bottom of page 4.

10 A. Okay.

11 Q. Okay. Can you read the first sentence of
12 subsection A for me.

13 A. Regarding addition. Until January 1st,
14 2016, the company, its successors and assigned
15 shall have the right without further consent of the
16 association to bring within the plan and operation
17 of this declaration any property which is
18 contiguous or nearly contiguous to Kiawah Island if
19 acquired by the company prior to January 1st, 2016.

20 Q. And is this the -- whenever you first
21 mentioned that it was your understanding that the
22 covenants do not allow for KICA to refuse property,
23 is this the provision that you were referring to?

24 A. It is.

25 Q. And is it your understanding that these

1 covenants are recorded in the R.M.C. Office and are
2 a matter of public record?

3 A. Yes.

4 MS. JETT: Your Honor, I'd like to
5 tender Defendant's Exhibit 1.

6 MR. LESEMAN: No objection, Your
7 Honor.

8 MS. ARMSTRONG: (Negative head shake.)

9 THE COURT: Without objection. Okay,
10 thank you.

11 (Defendant's Exhibit No. 1 was admitted
12 into evidence.)

13 BY MS. JETT:

14 Q. Similarly, while KICA's hands might be tied
15 with respect to what it can do in terms of refusing
16 property that is deeded, are there any sort of
17 related or similar restrictions from your
18 understanding of the covenants in KICA's ability to
19 deed out property that is common area?

20 A. Yes.

21 Q. Okay. Can I get you to look at article 4,
22 section 6(h) in the covenants, which I believe is
23 the bottom of page ten. Bottom of page 10. Sorry,
24 I had my chin buried in my chest.

25 THE COURT: 6?

1 MS. JETT: 6(h) .

2 THE COURT: Thank you.

3 BY MS. JETT:

4 Q. And if you could read that section for me.

5 A. The right of the association to give or sell
6 all or any part of the common properties and
7 restricted common properties, including leasehold
8 interest, to any public agency, authority, public
9 service district, utility or private concern for
10 such purposes and such conditions as may be agreed
11 to by the members provided that no such gift or
12 sale or determination as to the purposes or as to
13 the conditions thereof shall be effective unless
14 such dedication transfers and determination as to
15 purposes and conditions shall be authorized by the
16 affirmative vote of three-fourths of the votes cast
17 at a duly called meeting of the association.

18 Q. And when you were just making a reference to
19 the restrictions on KICA's ability to convey out
20 common property, is that the section that you were
21 referring to --

22 A. Yes.

23 Q. -- of the covenants? Okay.

24 We have talked a lot about there being
25 multiple problems with the -- that have arisen over

1 the years with respect to the 10-mile beachfront
2 strip.

3 Can you tell me about when you first learned
4 of the problem on the western end of the property
5 -- of the island, I'm sorry.

6 A. On the western end, 2007.

7 Q. Okay. And do you recall how you became
8 aware of that problem?

9 A. My COO at the time, Joe Bunting, made me
10 aware of it, a phone call that he had received.
11 And then subsequently I received an email from Beth
12 Nimmons explaining.

13 Q. Okay. And do you know if anybody was asking
14 KICA to do anything with respect to that western
15 error at the time?

16 A. At the time, no one asked that of me.

17 Q. Okay. Are you aware of whether or not the
18 issue for conveying this -- whenever I talk about
19 the western end, you know that I'm talking about
20 the 4.62 acres that have been shown on various
21 iterations on the screen here?

22 A. Yes.

23 Q. And you have sat through the entirety of the
24 trial thus far?

25 A. Yes.

1 Q. Okay. Maybe haven't understood everything
2 that was being said, but you have been here?

3 A. Yes.

4 Q. I'm going to show you --

5 MS. JETT: Can I make that --

6 MR. LESEMAN: Oh, yes.

7 BY MS. JETT:

8 Q. Can you see that from where you are?

9 A. Yes.

10 Q. Okay. With respect to this image, are you
11 familiar with where the 4.62 acres falls in this?

12 A. Yes.

13 Q. Okay. And we'll see if you can describe for
14 me where you believe it --

15 A. The yellow portion at the end of the green
16 portion on the far left.

17 Q. Okay. And this is a document -- is this a
18 document that is maintained by KICA on its website?

19 A. Yes.

20 Q. And is it supposed to be a depiction of the
21 property -- the common properties maintained by
22 KICA?

23 A. It is.

24 Q. Do you know specifically the color for the
25 properties that are supposed to be the common

1 properties on this property?

2 A. Green.

3 Q. Okay. Are you aware of there being any
4 properties colored in green on this map that are in
5 fact not KICA's common properties?

6 A. Yes.

7 Q. Would it help if I give you a pointer?

8 A. (Affirmative head shake.)

9 Q. Okay.

10 A. I'm in a difficult angle, but I can get it
11 generally.

12 Q. Okay.

13 A. If this is the security gate, if I'm in the
14 right area, the property outside of the security
15 gate called the Kiawah Island Parkway and
16 Beachwalker Drive no longer belongs to KRA.

17 Q. But they are currently represented in green
18 on that map; is that correct?

19 A. That's correct.

20 Q. Okay. So would it be your understanding
21 that that is an error on that map?

22 A. Yes.

23 Q. Similarly, on the eastern side of the
24 property, and you may have heard Ms. Armstrong
25 asking Ms. Nimmons a little bit about this, but is

1 it your understanding that the KICA common areas,
2 and specifically the beachfront strip, goes further
3 to the east than is depicted on this map?

4 A. Yes.

5 Q. Can you tell us a little bit about how this
6 map was generated, or who prepared it?

7 A. Yes. One of our IT staff who was
8 responsible for when we receive properties, he adds
9 it to our database and generates this map.

10 Q. Okay. I didn't cross this off my list. I
11 don't think I have asked it, but if it's a
12 duplication of a prior question, I apologize.

13 When this 4.62 acres was brought to the KICA
14 board's attention, was the KICA board asked to vote
15 on conveying it back to KRA?

16 A. The 4 acres on the west end?

17 Q. Yes, ma'am.

18 A. No.

19 Q. And do you know why that was?

20 A. Why they were not asked to vote?

21 Q. Yes.

22 A. I do not know.

23 Q. Okay. You have heard discussions about the
24 prior corrective quit claim deed that KICA did
25 issue for the 3-acre tract adjacent to the

1 Sanctuary Hotel, are you familiar with that
2 transaction?

3 A. Yes.

4 Q. To your knowledge, did the KICA board vote
5 to give that corrective deed?

6 A. Yes, they did.

7 Q. Okay. Is it -- did KICA seek legal advice
8 prior to making that decision?

9 A. No.

10 Q. No. Okay.

11 MS. JETT: I think that's all my
12 questions.

13 THE COURT: Okay, Mr. Lesemann.

14 MR. LESEMAN: Thank you.

15 CROSS EXAMINATION

16 BY MR. LESEMAN:

17 Q. Hi, Ms. McAdory.

18 A. Hi.

19 Q. You -- one of the final questions that
20 Ms. Jett had asked you is whether KICA had sought
21 legal advice prior to the 1997 transfer of the
22 3.054-acre hotel tract?

23 A. Yes.

24 Q. Do you recall?

25 A. Yes.

1 Q. Did you intend for your answer to be a
2 definitive statement that they -- that KICA did not
3 seek legal advice, or are you not certain?

4 A. I don't know that they did.

5 Q. Okay. Do you know who Tren Walker is?

6 A. Sure.

7 Q. Has Tren Walker served as an attorney for
8 KICA?

9 A. He has.

10 Q. Has KICA from time to time sought legal
11 advice from Mr. Walker?

12 A. Yes.

13 Q. Do you know whether Mr. Walker has ever
14 expressed an opinion to KICA with regard to whether
15 its board of directors could execute the 1997 quit
16 claim deed without a full vote of the membership?

17 A. Yes.

18 Q. Okay. Do you know if Mr. Walker did give an
19 opinion to that effect?

20 A. He did.

21 Q. So in 1997 -- was that in 1997 when the
22 opinion was given?

23 A. I'm not certain of that.

24 Q. Okay. If I showed you a document from
25 Mr. Walker to Mr. Nielson, might that help?

1 A. Yes.

2 Q. Okay. Could you identify for the record who
3 Mr. Nielson is?

4 A. Eric Nielson was president of the board some
5 years ago. Probably in that time period.

6 Q. So like Mr. Clarkson was president,
7 Mr. Nielson perhaps was the next succeeding
8 president after Mr. Clarkson?

9 A. Yes.

10 Q. I'm showing you page 7 of the letter from
11 Mr. Walker. Are you able to see it?

12 A. Yes.

13 Q. Okay. Is there a section of the letter
14 indicated, beachfront strip corrective deed?

15 A. Say it again, please.

16 Q. Is there a portion of the letter that
17 indicates a subject, beachfront strip corrective
18 deed?

19 A. Yes.

20 Q. Is item number one relating to the
21 beachfront strip corrective deed regarding the
22 3.054-acre tract, item number one?

23 A. Yes, it is.

24 Q. Okay. In the letter from Mr. Walker to
25 Mr. Nielson, does Mr. Walker indicate, in my

1 opinion no approval by the members is necessary
2 under the KICA covenants for the board to execute
3 this corrective deed?

4 A. Yes, he does.

5 Q. So to recap, KICA may have received a legal
6 opinion from Tren Walker indicating that the
7 corrective deed could be entered relating to the
8 hotel tract without a full vote of the board
9 membership?

10 A. Yes.

11 Q. Ms. McAdory, do you know Mark Permar who
12 testified yesterday?

13 A. Yes.

14 Q. Have you known him for some time?

15 A. I have.

16 Q. Have you worked together with him?

17 A. Yes.

18 Q. Has Mr. Permar actually done work for KICA
19 separate from his work for the developer?

20 A. He has.

21 Q. Do you believe that Mr. Permar is an
22 individual with high integrity?

23 A. I do.

24 Q. Do you consider him trustworthy?

25 A. Yes.

1 Q. If Mr. Permar, based on his involvement in
2 1994 with regard to the development agreement, if
3 he provided testimony regarding his belief and
4 understanding as to the intent of KICA, would you
5 contest or would you challenge what Mr. Permar
6 said?

7 A. No.

8 Q. Were you here when Mr. Pat McKinney
9 presented testimony?

10 A. Yes.

11 Q. Do you know Mr. McKinney?

12 A. I do.

13 Q. Did you interact with him while he was on
14 the board of directors for KICA?

15 A. Yes.

16 Q. Did he serve on the board of directors for
17 KICA?

18 A. Yes.

19 Q. If Mr. McKinney testified as to his belief
20 as a member of the board of directors regarding
21 KICA's intent as it relates to the beachfront
22 strip, Ms. McAdory, would you contest or would you
23 challenge Mr. McKinney's testimony on that point?

24 A. No.

25 Q. Were you here when Mr. Long testified?

1 A. Yes.

2 THE COURT: Mr. Lesemann, I'm going to
3 stop you right there.

4 MR. LESEMANN: Yes, sir.

5 THE COURT: I think you are just trying
6 to bolster other testimony. I don't think you are
7 trying to impeach, you're trying to bolster other
8 testimony. I don't think admissible.

9 MR. LESEMANN: Okay. Thank you, Your
10 Honor.

11 THE COURT: Pitting one witness against
12 another. She is agreeable with you. I'm going to
13 presume that everybody that comes in here and
14 testifies, testifies truthfully unless somebody
15 shows me otherwise.

16 MR. LESEMANN: Absolutely, Your Honor,
17 and I appreciate you stopping me.

18 Could I just explain briefly my point
19 was just that this will be the one witness that
20 KICA will present. And I want to -- obviously the
21 issue of intent is an operative issue.

22 THE COURT: Sure.

23 MR. LESEMANN: And I want to make sure
24 that with regard to -- maybe I could ask it in one
25 single question and perhaps that might be

1 acceptable in terms of did she --

2 THE COURT: If it's not objectionable
3 to me, I have not heard any other objections. Go
4 ahead.

5 BY MR. LESEMANN:

6 Q. Ms. McAdory, with regard to the testimony
7 that has been presented by individuals who served
8 on the board of directors of KICA, and who were
9 officers of KICA in 1994 and 1995, as the witness
10 presented by KICA in this action, do you contest or
11 challenge the testimony that any of those witnesses
12 gave with regard to their understanding of KICA's
13 intent as it relates to the beachfront strip?

14 A. I would not.

15 MS. WHITE: Objection, Your Honor.

16 THE COURT: Objection is what?

17 MS. WHITE: He is pitting her against
18 the other witnesses that have testified.

19 THE COURT: I'm going to allow this
20 one. Go ahead. She answered, but I'm sorry I
21 missed your answer. Your answer was?

22 THE WITNESS: I would not.

23 THE COURT: All right.

24 MR. LESEMANN: Thank you, Your Honor.

25 THE COURT: That's good enough.

1 BY MR. LESEMANN:

2 Q. Are you able to see the document I'm showing
3 on the screen?

4 A. Yes.

5 Q. Is this a copy of appendix E from the dunes
6 management guidelines published by KICA?

7 A. Yes.

8 Q. Is this a document that's maintained by KICA
9 and published on its website?

10 A. Yes.

11 Q. Could the document be found in the KICA
12 A-to-Z section of the website?

13 A. Yes.

14 Q. Does the document depict in yellow the dunes
15 area over which KICA exercises dunes management?

16 A. It does.

17 Q. Okay. Do you believe that there are any
18 errors in this document?

19 A. I'm not aware of any.

20 Q. Is this document maintained as a business
21 record by KICA?

22 A. Yes.

23 Q. Okay.

24 MR. LESEMANN: Your Honor, I would ask
25 that Exhibit 31 be entered into evidence as a

1 business record indicating KICA's maintenance
2 activities.

3 THE COURT: Any objection? Ms. Jett,
4 no?

5 MS. JETT: No.

6 MS. WHITE: No.

7 THE COURT: All right, without
8 objection. That's Exhibit 31?

9 MR. LESEMANN: Yes, Plaintiffs' 31,
10 Your Honor.

11 (Plaintiffs' Exhibit No. 31 was
12 admitted into evidence.)

13 BY MR. LESEMANN:

14 Q. I meant to ask you one other question.
15 Based on your knowledge of the location of the 4.62
16 acres that are the subject of this case, are those
17 4.62 acres shown in yellow on this diagram?

18 A. No.

19 Q. Are the 4.62 acres outside of the area that
20 KICA publishes as to being under management by
21 KICA?

22 A. Yes.

23 Q. Does KICA also maintain a common property
24 map that Ms. Jett has already reviewed with you?

25 A. Yes.

1 Q. And you indicated -- she indicated a couple
2 of issues to be corrected on that. Is this a
3 document that is also maintained as a business
4 record of KICA?

5 A. Yes.

6 Q. Is it published and made available to the
7 public on the KICA A-to-Z website?

8 A. Yes.

9 Q. Is it something that KICA maintains to
10 indicate the common property that it believes to be
11 under its ownership?

12 A. It is.

13 Q. And is the area that KICA believes and
14 understands to be under its ownership, are those
15 reflected in green on the document?

16 A. Yes.

17 Q. Now, we talked about the issue with where
18 the green strip stops here. Does this portion
19 running along the east end of the island, is that
20 an issue to your knowledge that was rectified by
21 way of the 1997 corrective deed that extended the
22 beachfront strip?

23 A. Yes.

24 Q. And is that area then shown on this portion
25 of the dunes management guidelines map?

1 A. Yes, it is.

2 Q. And it also indicates an east end Spit not
3 shown. Is it correct that this is the east end of
4 the island?

5 A. Yes.

6 Q. And what we have been discussing in this
7 case is the west end of the island; is that
8 correct?

9 A. Correct.

10 Q. Are the -- going back to the common property
11 map, this is a document that KICA maintains in the
12 course of its business?

13 A. Yes.

14 MR. LESEMANN: Your Honor, I would ask
15 that Exhibit 32 be admitted into evidence.

16 THE COURT: Is that one not already in
17 evidence?

18 MR. LESEMANN: It was discussed, Your
19 Honor, but I was holding it until the KICA witness.

20 THE COURT: Okay. No objection to that
21 one?

22 MS. JETT: No objection.

23 MS. ARMSTRONG: (Negative head shake.)

24 THE COURT: In evidence. Very good.

25 (Plaintiffs' Exhibit No. 32 was

1 admitted into evidence.)

2 BY MR. LESEMANN:

3 Q. Ms. McAdory, are the 4.62 acres that are the
4 subject of this case, are they shown in green as
5 common property owned by KICA?

6 A. I'm sorry, ask me again.

7 Q. Are the 4.62 acres that are the subject of
8 this case, are they shown in green on the map as
9 common property owned by KICA?

10 A. No.

11 Q. Are they shown in yellow as being property
12 of the developer?

13 A. I can't see it, I'm sorry.

14 Q. Okay.

15 A. Yes.

16 Q. Do you have any familiarity when we have
17 talked about parcel 13?

18 A. Yes.

19 Q. Does the green area indicating the
20 beachfront strip on KICA's common property map,
21 does it terminate at the eastern boundary of parcel
22 13 on the map?

23 A. Yes.

24 Q. With regard to the dunes management
25 guideline map, which is another publication by KICA

1 that has been admitted into evidence, does the
2 beachfront strip as shown on the KICA map also stop
3 at the eastern boundary of parcel 13?

4 A. Yes.

5 Q. If KICA wanted to correct or change these
6 maps to reflect the 4.62 acres, would KICA have the
7 ability to do that?

8 If KICA wanted to modify these maps in any
9 way would KICA be able to do so and to publish a
10 corrected map on its website?

11 A. Yes.

12 Q. Ms. McAdory, do you recall that during this
13 case -- I'm too far away from you. Let me find
14 something and I will be right back.

15 Do you recall that discovery requests were
16 exchanged in this case and requests for production
17 of documents?

18 A. Yes.

19 Q. Did you serve as the custodian and the
20 assembler of records on behalf of KICA?

21 A. Yes.

22 Q. Do you recall, did the request for
23 production that the plaintiffs issued to KICA
24 include a request for documents relating to any
25 exercise of ownership or control over the 4.62

1 acres that were in question?

2 A. Yes.

3 Q. And did you work to find whether there were
4 any documents indicating that KICA has exercised
5 any ownership or control over the property?

6 A. Of the 4 acres specifically?

7 Q. Yes.

8 A. Nothing that I could find, no.

9 Q. Okay. So to clarify, were there any
10 documents in KICA's files indicating that KICA has
11 exercised any ownership or control over the 4.62
12 acres?

13 A. No.

14 Q. Could you identify any particularized
15 expenses? Has KICA spent particular money, to your
16 knowledge, relating to these 4.62 acres?

17 A. Not that I found.

18 Q. Okay. Has KICA engaged in any construction
19 activity or construction projects on the 4.62
20 acres?

21 A. Not to my knowledge.

22 Q. Are you aware of any taxes being paid by
23 KICA? Did you find any documents indicating that
24 KICA has paid any taxes on the 4.62 acres?

25 A. I did not, no.

1 Q. Did you find any documents relating to any
2 activity of any kind by KICA on the 4.62 acres?

3 A. No.

4 Q. Within the documents -- are you able to see?
5 I can make it larger. Is that legible?

6 A. Yes.

7 Q. Did you find and produce a document from the
8 records of KDP -- excuse me, from the records of
9 KICA entitled talking points for KDP?

10 A. Yes.

11 Q. And can you identify for the record who the
12 author of this document was?

13 A. Craig Weaver.

14 Q. Is that the same Mr. Craig Weaver who served
15 as chairman of the board of KICA for two terms?

16 A. Correct.

17 Q. And is this a true and accurate copy of a
18 document that Mr. Craig Weaver prepared?

19 A. Yes.

20 Q. Okay. And is this a document that KICA has
21 kept in its governance documents?

22 A. Yes.

23 Q. In its records?

24 A. Yes.

25 Q. Does KICA maintain governance records as

1 part of its regularly scheduled business
2 activities?

3 A. Yes.

4 MR. LESEMAN: Your Honor, I would move
5 that this document be admitted into evidence as
6 Plaintiffs' 17.

7 THE COURT: Ms. Jett.

8 MS. JETT: Your Honor, I would agree
9 with Mr. Lesemann that this is a document that is
10 maintained by KICA, but I believe as -- not to say
11 where he is going to go with these questions, but
12 based on where I think he is going to go with these
13 questions, the accuracy of the statements in them
14 as being an official position taken by KICA, to the
15 extent he is trying to use it as that, we would
16 object to the truth of the statements in that.

17 But it is a document that exists and it
18 exists in the records of KICA.

19 THE COURT: Well, I need more
20 foundation. What are you talking about?

21 MS. JETT: Well, I don't really know
22 yet what he is attempting to use it for.

23 THE COURT: All right. Well so far, it
24 ain't coming in. You have to get somewhere into
25 it. I don't know where this came from.

1 Oh, executive session. Summary of
2 executive session from somewhere. I don't know if
3 there is any kind of claim of privilege to it or
4 anything like that.

5 MR. LESEMAN: No, it was produced --
6 Your Honor, may I ask further questions of this?

7 THE COURT: Sure.

8 BY MR. LESEMAN:

9 Q. Ms. McAdory, could you address the Court and
10 tell him where this document came from?

11 A. Yes. I pulled it from our records from
12 executive session of that meeting.

13 THE COURT: Okay. All right. Notes
14 from the executive sessions?

15 THE WITNESS: Sir?

16 THE COURT: Notes from the executive
17 session?

18 THE WITNESS: Yes, sir. They were
19 chair's speaking notes.

20 THE COURT: Okay. Was any action taken
21 at that meeting?

22 THE WITNESS: That is correct, there
23 was no action.

24 THE COURT: No action taken?

25 THE WITNESS: Correct.

1 MR. LESEMANN: So, Your Honor, we
2 wouldn't be presenting it as a formal declaration
3 of the board, but again it's a business record and
4 that foundation has been established. It's kept in
5 the governance documents.

6 It's consistent with Mr. Weaver's
7 admission, which was presented into the record by
8 Mr. Clarkson on his direct testimony. And as I
9 will get into the relevance of it, again it
10 reflects, as a proffer --

11 THE COURT: This is a 2012 document.
12 Is that what this is?

13 MR. LESEMANN: And so this document
14 actually, Your Honor, dates from May 7th, 2013.
15 Let me check that to make sure, but I believe that
16 that is the case.

17 Excuse me, I'm sorry. It's May 7th,
18 2012.

19 THE COURT: Just one second.

20 MS. JETT: I mean, Your Honor, it is
21 Mr. Weaver's --

22 THE COURT: It says what it says. I
23 understand that.

24 MS. JETT: Right.

25 THE COURT: I just don't think it's

1 admissible, okay? I just don't see how it's
2 admissible.

3 The document, you want the document to
4 talk and Mr. Weaver is not here. It's in their
5 records, but that doesn't mean it's an official
6 action of the body. It's something she says was
7 discussed at executive session.

8 MR. LESEMAN: Can I ask a follow-up
9 question?

10 THE COURT: Sure.

11 BY MR. LESEMAN:

12 Q. Is this kept in the official records of KICA
13 as to the events of the meetings that occurred on
14 May 7th, 2012.

15 A. Yes.

16 MR. LESEMAN: Your Honor, again I'm
17 not presenting it as a board action, but I'm
18 presenting it as an admission of party opponent and
19 also the business record. And I feel that it's --

20 THE COURT: All right. It's not coming
21 in. You can proffer it, you can mark it and you
22 can put it in the record that way. But it's not
23 going to be admissible evidence, okay?

24 MR. LESEMAN: Okay. Thank you, Your
25 Honor.

1 BY MR. LESEMANN:

2 Q. Was -- were you present at the meeting where
3 this was discussed?

4 A. Yes.

5 Q. Did Mr. Weaver make a statement as to
6 whether he believed that the transfer of the 4.62
7 acres was a mistake?

8 A. He did.

9 Q. Okay. What was his statement?

10 A. That he believed it was a mistake.

11 Q. Did Mr. Weaver also make a statement --

12 MR. LESEMANN: Your Honor, I will just
13 use the document demonstratively if that's okay
14 with the Court.

15 BY MR. LESEMANN:

16 Q. Did Mr. Weaver also indicate while he was
17 the chairman of the board, that KICA did not desire
18 to benefit from this unintended transfer of
19 property? Is that an accurate reflection of
20 Mr. Weaver's statement?

21 A. Yes.

22 MR. LESEMANN: So, Your Honor, I
23 believe that the substance came in, but this is a
24 formal proffer that we need to mark it as some kind
25 of --

1 THE COURT: It will be marked as an
2 exhibit for ID purposes and then it doesn't come
3 into evidence.

4 MR. LESEMANN: All right. Thank you,
5 Your Honor.

6 THE COURT: Do you have a number on
7 that?

8 MR. LESEMANN: It's 17.

9 (Plaintiffs' Exhibit No. 17 was marked
10 for identification.)

11 BY MR. LESEMANN:

12 Q. Ms. McAdory, was this document presented
13 because there was a change of some of the board
14 membership and a new board had been appointed?

15 A. That's correct.

16 Q. And did Mr. Weaver make a statement as to
17 the result of deliberations by the prior board?

18 A. Yes.

19 Q. And did he give a statement as to the prior
20 board having examined the documents dating from
21 1994?

22 A. Yes.

23 Q. And did he make a statement that he believed
24 that the prior board believed that the transfer of
25 the 4.62 acres, based on their review of the

1 documents, was a mistake?

2 A. That was the prior board's consensus, yes.

3 Q. And that KICA -- that that board of KICA did
4 not intend to benefit from the unintended transfer?

5 A. Correct.

6 Q. Okay.

7 MR. LESEMANN: Your Honor, we have no
8 further questions. Thank you.

9 THE COURT: All right.

10 I want to ask you, did you want Mr. --
11 the letter from Mr. Walker, do you want that in
12 evidence? Is that in evidence? I'm just asking.

13 MR. LESEMANN: I believe that the
14 letter from -- that Your Honor ruled that the
15 letter should not come in.

16 THE COURT: From Mr. Walker?

17 MR. LESEMANN: Oh, excuse me.

18 THE COURT: That was the talking point
19 memo there. I'm talking about --

20 MR. LESEMANN: Right, excuse me, I'm
21 sorry. I got Weaver and Walker confused.

22 THE COURT: I didn't catch a number and
23 I had just written notes about it.

24 MR. LESEMANN: Okay. Your Honor, I
25 don't know that the letter from Mr. Walker, I could

1 ask Ms. McAdory. Thank you.

2 THE COURT: I am just asking, did you
3 want it in?

4 MR. LESEMANN: It may or may not have
5 come -- I will show it on the screen.

6 BY MR. LESEMANN:

7 Q. The letter that we discussed, which was in
8 tab 11. Do you know whether a copy of this letter
9 exists in KICA's records?

10 A. Yes.

11 Q. Okay. Could you review the document and see
12 whether it appears to be a true and accurate copy
13 of the May 14th, 1997 letter from Mr. Walker to
14 Mr. Nielson?

15 A. Yes.

16 Q. And are these the types of records that KICA
17 would keep in the records of its business
18 activities?

19 A. Yes.

20 Q. Okay.

21 MR. LESEMANN: Your Honor, thank you.
22 We would move for admission of Plaintiffs' Exhibit
23 11.

24 MS. JETT: Your Honor, we did not
25 produce this document in discovery because we

1 believed it was attorney-client privileged
2 information.

3 I believe it came to KRA in its
4 capacity that there are KRA-appointed board members
5 who are cc'd on the letter and received it in their
6 capacity as KICA board members.

7 So I mean I have a problem on that.

8 THE COURT: Y'all take the position it
9 is privileged?

10 MS. JETT: Yes, sir.

11 THE COURT: And you are not waiving
12 that.

13 MS. JETT: Yes, Your Honor.

14 THE COURT: Okay. I just need to hear
15 that.

16 All right. So it's not going to come
17 in either. If you want to mark it for proffer for
18 ID purposes again you can. But it sounds like
19 it's --

20 MR. LESEMAN: Thank you, Your Honor.
21 For completion of the record, if we could mark this
22 for identification purposes as Plaintiffs' 11 with
23 the thought that -- Your Honor, could I ask just a
24 couple of brief follow-up question as part of the
25 proffer?

1 Again, Your Honor, I thank you. There
2 are some cc's on here that I'm not certain would be
3 within the attorney-client privilege. Diana
4 Permar.

5 THE COURT: All right.

6 A. She was a director.

7 BY MR. LESEMANN:

8 Q. She was a director. And Ron Rawl?

9 A. He was a director.

10 Q. Okay. And then yourself, Ms. McAdory.
11 Ms. Nimmons. Was Ms. Nimmons ever a director of
12 KICA?

13 A. No.

14 Q. Okay. And so would she have been, to your
15 knowledge, outside of the attorney-client privilege
16 that would exist between KICA and its attorney?

17 A. I don't know that.

18 Q. That's probably an unfair question to ask.

19 MR. LESEMANN: Your Honor, just for
20 proffer purposes, the publication of the letter did
21 extend outside of the attorney-client privilege
22 that would exist between KICA and its attorney.

23 THE COURT: Where did this document
24 come from again?

25 MR. LESEMANN: Well, Your Honor, we

1 have the document, we produced it in the discovery
2 process in this case. And Ms. McAdory has
3 indicated that the records of KICA also would
4 include a copy.

5 THE COURT: The document came out of
6 your records?

7 MR. LESEMAN: Well, it's in both, but
8 I'm the only one that produced it.

9 MS. JETT: We obviously withheld it
10 from production, Your Honor, because of the claim
11 of privilege.

12 THE COURT: It just depends on who's
13 faster. I don't even know if it needs to be
14 proffered. It should be privileged and that should
15 have been brought up before now, frankly, okay?

16 That's a problem. It's already in your
17 documents or it's not in -- is it in the books that
18 you have presented?

19 MR. LESEMAN: It is in the books, Your
20 Honor. This again, Ms. Nimmons has no capacity
21 with -- she's shown as a cc on the document.

22 THE COURT: I'm all right with that.
23 I'm trying to figure out if it's contained within
24 those volumes of documents.

25 MR. LESEMAN: It is. Yes, Your Honor.

1 THE COURT: Well, then.

2 MS. JETT: The volumes of documents
3 being -- it's certainly not a part of the
4 development agreement. But it is in plaintiffs'
5 binder, Your Honor, of the documents that he has --

6 THE COURT: Is plaintiffs' binder in
7 evidence? That's my question.

8 MR. LESEMAN: Oh, no, sir. They come
9 in exhibit by exhibit.

10 THE COURT: I think that one stays out.
11 It's privileged, it should stay out. We shouldn't
12 have even gone into that one. That one is going to
13 be a problem for everybody. All right.

14 MR. LESEMAN: Thank you, Your Honor.

15 THE COURT: That shouldn't be a
16 proffer. That shouldn't have even come in.

17 All right. Let's move on.

18 MR. LESEMAN: Yes, sir. Thank you,
19 Your Honor.

20 BY MR. LESEMAN:

21 Q. Ms. McAdory, were you able to find any
22 documents in your review indicating that KICA had
23 any intent that the beachfront strip would
24 terminate at the southwestern corner of the
25 employee facility tract as opposed to the eastern

1 boundary of parcel 13? Did you find any documents
2 suggesting any such intent on behalf of KICA?

3 A. No.

4 Q. And has KICA indicated through statements by
5 its chairman and otherwise that it believes that
6 the transfer of that property was a mistake?

7 A. The former chair has said that, yes.

8 Q. And that KICA did not intend to benefit from
9 that mistake?

10 A. He said that also.

11 MR. LESEMANN: Thank you, Your Honor.
12 No further questions.

13 THE COURT: Very good. Any questions?
14 All right, Ms. White, come on up.

15 CROSS EXAMINATION

16 BY MS. WHITE:

17 Q. Okay. Can you hear me okay?

18 A. Somewhat.

19 Q. Okay. You stated that KICA was not a party
20 to any of the negotiations regarding the actual
21 1994 development agreement; is that correct?

22 A. Correct.

23 Q. But it was a party to the agreement for
24 conveyance and the draft quit claim deed?

25 A. Correct.

1 Q. Okay. And do you have any reason to believe
2 that KICA received property other than as it was
3 described in that agreement of conveyance and draft
4 quit claim deed?

5 A. I don't.

6 Q. You mentioned that when the issue with the
7 4.62 acres came to your attention that it was your
8 boss, Joe Bunting, that brought it to your
9 attention?

10 A. Yes.

11 Q. And then in your deposition you had
12 testified that essentially KRA came to Joe Bunting
13 and told him that they believed there was a mistake
14 with the beachfront strip; is that correct?

15 A. That is my understanding, yes.

16 Q. Okay. And as a result of that issue coming
17 to KICA's attention, were you asked to do anything
18 in particular by Joe Bunting?

19 A. I was asked to pull whatever background
20 information I could find so that he could prepare
21 to discuss it with the board, bring it to their
22 attention.

23 Q. Okay. And did the board have a meeting to
24 discuss what to do about that issue with the 4.62
25 acres?

1 A. I'm sorry, in what year?

2 Q. I think you testified that it was around
3 2007?

4 A. 2007. The board had several discussions
5 about it. I can't recall if there was a specific
6 meeting the first time to talk about it, or how
7 that came about.

8 Q. Okay. Were you present for those
9 discussions?

10 A. Sometimes.

11 Q. Okay. Do you remember the board expressing
12 that they wanted to know what their options were
13 from a legal perspective?

14 A. I do.

15 Q. And did they ever come to a conclusion about
16 what their legal options were?

17 A. They concluded that they had no options
18 essentially. They could not convey it without the
19 vote of the members.

20 Q. Okay. And you testified that the vote of
21 the members is required under the KICA covenants;
22 is that correct?

23 A. Correct.

24 Q. And you also mentioned that you were aware
25 of two corrective deeds that were previously issued

1 with regard to the beachfront strip?

2 A. Yes.

3 Q. Did KICA use the mechanism that is provided
4 for by the covenants in resolving those issues with
5 the beachfront strip?

6 A. At the east end, the corrective deeds?

7 Q. Yes.

8 A. They did not.

9 Q. You also testified during your deposition
10 that some objections were voiced about giving up
11 the 4.62 acres without submitting it to a vote; is
12 that correct?

13 A. Correct.

14 Q. Okay. Back around 1997 when the corrective
15 deeds were issued and the issues with the east end
16 of the beachfront strip were being resolved, do you
17 recall whether Tren Walker was representing KRA at
18 that time?

19 A. It's my understanding that he was.

20 Q. Okay. You also stated that Mr. Weaver's
21 position and the prior board's position was that
22 there may have been a mistake with the 4.62 acres;
23 is that correct?

24 A. Correct.

25 Q. Is there a difference in opinions with the

1 current board of directors?

2 A. I don't know that.

3 Q. Have they adopted Mr. Weaver's
4 interpretation of the issue?

5 A. I don't know that.

6 Q. Okay. As far as you are aware, has the KICA
7 board taken any official action with regard to the
8 4.62 acres?

9 A. Not to my knowledge.

10 Q. Okay. Have you seen this document before
11 marked as Intervenor's Exhibit 11?

12 A. Yes. Just here.

13 Q. Here?

14 A. Here, this week.

15 Q. Okay. Did you produce this as part of your
16 records from KICA?

17 A. I don't think so. Though I may have, there
18 were a lot of materials I pulled. I don't
19 specifically recognize it.

20 Q. Okay. If this was something that we had
21 received from your attorney during the discovery
22 process when you were producing all the records or
23 all of the materials that you had, would it have
24 been part of KICA's regularly kept records?

25 A. I would assume so.

1 Q. Okay. So would it have been maintained in
2 the regular course of business as one of KICA's
3 records if it was something you produced to your
4 attorney?

5 A. Yes, I think so.

6 Q. Okay. Do you know where -- what, do you
7 know approximately where that is located on the
8 island?

9 A. I do.

10 Q. Can you describe generally whether it's on
11 the east end, the west end, what other areas it's
12 around?

13 A. It's on the west end towards the end of
14 Beachwalker Drive.

15 Q. And is it Beachwalker Park --

16 A. Beachwalker Park.

17 Q. -- as you recognize that?

18 A. Yes.

19 Q. And do you know what the line kind of coming
20 out of the parcel represents? Looks --

21 A. This line?

22 Q. Yes.

23 A. The boardwalk.

24 Q. Is that the boardwalk?

25 A. That's the boardwalk.

1 Q. Okay. Do you know what the boardwalk --
2 where the boardwalk enters when it leaves the
3 Beachwalker Park? Do you see that outline of red
4 near the bottom of the page?

5 A. I see the outline.

6 Q. Do you know what those red lines are
7 supposed to represent?

8 A. The 4 acres in question.

9 Q. Okay.

10 MS. WHITE: We'd like to move this into
11 evidence.

12 MR. LESEMANN: Your Honor, I think that
13 it's fine as demonstrative. I don't know that the
14 foundation has been laid for the document in terms
15 of where it came from, whether it actually was from
16 KICA's records or not.

17 But admit it as demonstrative, that it
18 could show what it shows. But I don't believe the
19 foundation has been laid that it's a business
20 record.

21 THE COURT: All right. This is
22 Intervenor's Exhibit No. 11; is that correct?

23 MS. WHITE: Yes.

24 THE COURT: I think you asked her, if
25 you got it from their counsel, so is this something

1 -- did this come out of -- to the best of your
2 knowledge is this in KICA's documents anywhere? Or
3 you just don't know?

4 THE WITNESS: I just don't know, Judge,
5 I'm sorry.

6 THE COURT: Okay.

7 Can you shed some light on that, Ms.
8 Jett?

9 MS. JETT: Your Honor, I did produce
10 that document. They were based on documents that I
11 had received from KICA's office.

12 THE COURT: All right. I'm going to
13 allow it then, Intervenor's 11.

14 MS. WHITE: Okay.

15 No further questions. Thank you.

16 THE COURT: Okay. I don't know that I
17 have any questions.

18 Let me revisit this letter from -- I
19 hate to do this, but the letter from Mr. Walker.

20 MR. LESEMANN: Yes, Your Honor.

21 THE COURT: He's writing that in the
22 capacity of KRA's attorney or KICA's attorney?
23 That's what I'm confused about now.

24 MS. JETT: Well, Your Honor, he was
25 both. And I was actually going to ask Ms. McAdory

1 a couple questions about that on redirect.

2 THE COURT: All right. Well, I tell
3 you what. I'm going to secret myself. I'm going
4 to let y'all talk. You all decide whether it's
5 privileged or not.

6 We have gone into it. There is a
7 concern about privilege being waived as a result of
8 that. Once waived it doesn't exist anymore. I
9 want y'all to discuss how you want to deal with
10 that.

11 That's going to be a hot potato, okay?
12 It is for me. And I just want y'all to clear that
13 up. So it either is or is not.

14 But I raised the issue because you were
15 going into it, you were using it demonstratively,
16 and I wasn't sure whether or not you wanted to go
17 into it any more, so.

18 MR. LESEMAN: Yes, Your Honor.

19 THE COURT: So I'm going to take five
20 minutes. I'm going to let y'all talk about that.

21 And then, Ms. McAdory, I'm going to
22 give you a five minute break. If you need to use
23 the restroom or whatever, you can do that. I'm
24 going to come back and put you back on the stand,
25 okay? But I didn't want to leave that issue. That

1 has been bothering me.

2 MR. LESEMAN: Thank you, Your Honor.

3 THE COURT: You all talk about that and
4 I will be right back in about five.

5 (A recess was taken.)

6 THE COURT: What are we going to do
7 with that letter?

8 MR. LESEMAN: Your Honor, I will make
9 an attempt to speak for the parties, subject to
10 correction again. This would be an issue between
11 KICA and KRA.

12 And in conference with Ms. Jett, and
13 she was able to speak to her client, we believe
14 that it was sent to both parties, including a
15 representative of KRA, Beth Nimmons, who has no
16 capacity whatsoever with KICA.

17 And so it is my understanding that KRA
18 and KICA would not assert a privilege with regard
19 to this document.

20 THE COURT: And may I say that you have
21 no objection to its admission?

22 MS. JETT: Your Honor, we believe that
23 it is a letter that was written by the lawyer for
24 both parties summarizing a discussion that was
25 held, a meeting that was held by representatives of

1 both parties.

2 THE COURT: All right. And in a
3 representative capacity for both parties, right?

4 MS. JETT: Correct.

5 THE COURT: And so any privilege to the
6 document is being waived?

7 MS. JETT: Correct.

8 THE COURT: All right. That's good
9 enough for me. It can come in.

10 MR. LESEMAN: Thank you, Your Honor.

11 MS. ARMSTRONG: Your Honor.

12 THE COURT: You have no say-so in that.
13 But if you want to object, you can object.

14 MS. ARMSTRONG: I think that -- I'm
15 going to let -- this is Ms. White's first time in
16 court.

17 THE COURT: Ms. White, you are doing
18 great.

19 MS. ARMSTRONG: I'm giving her a little
20 help here.

21 I think the intervenors would object.
22 Clearly this is kind of a complicated, tricky issue
23 here. It's in evidence that Mr. Walker represented
24 both parties. In the letter he is purporting to
25 give his legal opinions.

1 So I guess we question what the
2 probative value is of this, and its relevance. And
3 given the fact that it relates really to these
4 corrective deeds and how KICA should handle it from
5 a legal perspective, that's what he is telling
6 them.

7 So I guess we have those kinds of
8 problems on relevance, probative value, what really
9 this goes to show. And it being, you know,
10 potentially prejudicial to the intervenors for sure
11 because one of the things that the intervenors
12 raised in their motion was just the appearance of a
13 conflict, so that would be the objection.

14 THE COURT: All right. Well, my basis
15 for my earlier ruling was that it appeared to be a
16 privileged document, and on that basis I would keep
17 it out of evidence.

18 If it's no longer privileged, and
19 that's what I am hearing, then I think it's
20 admissible. I think it's relevant. I think it's
21 probative.

22 The weight that the Court should give
23 it is going to depend on what's in it. Ultimately
24 I think the decision is going to be mine as to what
25 that is. So I'm going to allow it into evidence if

1 that's what you prefer.

2 MR. LESEMANN: Yes, Your Honor, we
3 would. So we just would formally move to reflect
4 the record that move for Plaintiffs' 11 to be
5 admitted into evidence.

6 THE COURT: Okay. Thank you.

7 (Plaintiffs' Exhibit No. 11 was
8 admitted into evidence.)

9 THE COURT: Any follow-up with
10 Ms. McAdory?

11 MS. JETT: I have a little bit of
12 redirect.

13 THE COURT: Okay. Thank you.

14 Ms. McAdory, she's going to ask you
15 some more questions.

16 REDIRECT EXAMINATION

17 BY MS. JETT:

18 Q. Were you able to follow most of the
19 discussion?

20 A. Just now?

21 Q. Yes.

22 A. Not much.

23 Q. Okay. Mr. Walker was counsel for KICA
24 during the 1997 period; is that correct?

25 A. Yes.

1 Q. And it is also your understanding that he
2 was counsel for KRA at the time as well?

3 A. Yes.

4 Q. Okay. As to issues where there may be a
5 divergence of interests, I guess, between KRA and
6 KICA, did KICA some time after 1997 hire a separate
7 counsel to advise it on issues relating to dealings
8 with KRA?

9 A. Yes.

10 Q. And has KICA since changed its opinion since
11 1997 as to whether or not it can give, convey
12 common property without a vote of the members?

13 A. Yes.

14 Q. Okay.

15 MS. JETT: That's all my questions.

16 MR. LESEMAN: Your Honor, I have no
17 further questions, but I believe I have the Court's
18 copy of Exhibit 11.

19 THE COURT: Okay.

20 MR. LESEMAN: So I wanted to bring it
21 back and make sure that it --

22 THE COURT: It's properly admitted,
23 okay.

24 MR. LESEMAN: Yes.

25 THE COURT: Okay. Anything else?

1 MS. WHITE: No further questions.

2 THE COURT: Very good. Ms. McAdory,
3 thank you. You may step down.

4 Okay. Anything further then from the
5 Defendant KICA?

6 MS. JETT: No, Your Honor.

7 THE COURT: All right. For the
8 intervenors.

9 MS. ARMSTRONG: Thank you, Your Honor.
10 The intervenors call Bill Eiser to the witness
11 stand.

12 THE COURT: Mr. Eiser, come around,
13 sir.

14 WILLIAM EISER,
15 having been first duly sworn, was examined and
16 testified as follows:

17 THE COURT: If you would have a seat
18 and give us your full name and address. And spell
19 your last name for me.

20 THE WITNESS: My name is William Eiser,
21 last name is spelled E-I-S-E-R. I go by Bill. And
22 I live at 106 Manigault Drive in Summerville.

23 THE COURT: All right. Very good.

24 MS. ARMSTRONG: Your Honor, I'm going
25 to use a demonstrative exhibit, and I want to make

1 sure you can see it and the witness can see it.

2 I'm going to have to have the witness
3 come up and make markings on it.

4 THE COURT: Sure. That would be fine.

5 MS. ARMSTRONG: Where would be the best
6 place for you?

7 THE COURT: You can stay right there.
8 I can move. I can get up and move around.

9 MS. ARMSTRONG: I'm not going to use it
10 quite yet. We were just trying to get ourselves
11 positioned before we started.

12 THE COURT: Okay.

13 MR. LESEMANN: Your Honor, would it be
14 within your permission for when the exhibit is used
15 that Ms. Jett and I --

16 THE COURT: Any side can move around
17 here. I have no problem with that.

18 Is that chair still in your way, or is
19 it going to be okay where we are?

20 MS. ARMSTRONG: I'm just kind of
21 handing -- Anne has been very kind in helping me
22 hand exhibits to the witnesses. It's not the most
23 convenient, but I have made it work just fine.

24 THE COURT: Okay. Very good.

25 DIRECT EXAMINATION

1 BY MS. ARMSTRONG:

2 Q. Mr. Eiser, could you please tell -- give us
3 your educational background.

4 A. I have bachelor's and master's degree in
5 marine science from the University of South
6 Carolina.

7 Q. And what was your master's concentration?

8 A. Physical oceanography which has to do with
9 the waves, tides and currents of the ocean and how
10 they interact with land masses.

11 Q. Okay. And have you ever been qualified as
12 an expert in oceanography?

13 A. I believe it was actually in coastal
14 processes, yes.

15 Q. Okay. And that's in the State of South
16 Carolina Administrative Law Court?

17 A. Yes.

18 Q. What is your -- walk me through your
19 employment history after you graduated with a
20 master's degree.

21 A. Sure. I finished with my master's in 1984.
22 From '84 through '89 I worked for a private coastal
23 engineering company based in Columbia called
24 Coastal Science and Engineering.

25 And then in 1989 I went to work for the

1 State. At the time the agency was called South
2 Carolina Coastal Council, and the Coastal Council
3 was merged into DHEC in 1994.

4 But I have basically been doing the same job
5 for the State since 1989.

6 Q. Since 1989. So what position were you hired
7 for when you first joined Coastal Council?

8 A. Staff oceanographer.

9 Q. And is your position, is it called something
10 different today?

11 A. Technically I'm an environmental manager as
12 far as the DHEC job classifications go. But
13 informally I still serve as staff oceanographer.

14 Q. And what are your responsibilities today at
15 DRM? Or do you call it DHEC or DRM?

16 A. I say OCRM to distinguish my section of
17 DHEC, but obviously we are part of DHEC.

18 I work in what is called the wetland
19 permitting section. So I handle all sorts of
20 different permits in what we call the critical
21 areas of South Carolina.

22 That might be dock or marine permits,
23 dredging permits, beach renourishment.
24 Historically I have specialized in the agency's
25 beachfront jurisdiction, how we establish those

1 lines. And then serving as project manager for
2 beachfront permits.

3 Q. Okay. And is there some sort of statutory
4 authorization for OCRM to establish its
5 jurisdictional lines?

6 A. Yeah. It's a piece of legislation that was
7 originally passed back in 1988 that's commonly
8 referred to as the Beachfront Management Act. And
9 I can actually give you the citations for the
10 specific sections that have to do with how our
11 beachfront jurisdiction works.

12 Q. Okay. And what are those sections?

13 A. It's actually the section -- I'm looking at
14 the statute right now -- it's 48-39-280, and then
15 section A talks about how we establish the two
16 jurisdictional lines, the baseline and the setback
17 line.

18 Q. And can you just explain to us what the
19 baseline represents. And then -- well, I want to
20 talk about both of them, but we can start with the
21 baseline.

22 A. Sure. The baseline is one of two beachfront
23 jurisdictional lines that mark off where are what
24 we call critical area jurisdiction lines. The
25 baseline is the more seaward of the two, the

1 setback line is the more landward.

2 From a physical perspective for most of our
3 beaches or islands the middle sections are called
4 standard zones, and then the ends are called inlet
5 zones. And under the statute in the standard zone
6 the baseline is the crest or top of the primary
7 sand dune, which is the dune closest to the ocean.

8 And then for the ends of the islands, which
9 are referred to as inlet zones, there is a
10 completely different methodology called for in the
11 statute to establish the baseline location. It's
12 the most landward shoreline during the past 40
13 years.

14 Q. And are you familiar with Captain Sam's Spit
15 in the west end of Kiawah Island?

16 A. Yes.

17 Q. Would that be -- how would you describe that
18 when you were talking about these two different
19 zones?

20 A. Sure. Someplace around Beachwalker Park
21 that zone designation changes from being a standard
22 zone, which is more of the eastern end of
23 Beachwalker Park. And then on the western end of
24 Beachwalker Park it's one of these inlet zones.

25 So there's these two different methodologies

1 that we would use under the statute to determine
2 the baseline location.

3 Q. And are these lines used to help the
4 department in determining what activities can be
5 authorized?

6 A. That's correct, yes.

7 Q. And are you familiar with the section
8 48-39-290 of the Act?

9 A. Yes.

10 Q. Okay. What does that section 290 say about
11 construction seaward of the baseline?

12 A. Section 290(A) actually specifies how our
13 regulatory program will work for permitting seaward
14 of the baseline. And I have got the statute here,
15 if you'd like I can refer to it.

16 But I know that it specifically authorizes
17 certain types of activity that can be permitted
18 seaward of the baseline.

19 MR. LESEMANN: Your Honor, I just would
20 like to pose an objection at this point. We are
21 here, of course, on a deed reformation case
22 relating to the beachfront strip.

23 And I don't believe from the proffer
24 that has been shown so far that Mr. Eiser would
25 have any knowledge or information as to the intent

1 of KICA, the intent of the Town of Kiawah Island,
2 or the intent of KRA.

3 There is no indication that he had any
4 involvement with those parties in 1994. There is
5 no indication that he had any involvement with the
6 preparation of the development agreement, of the
7 quit claim deed or the agreement of conveyance.

8 And so with regard to the issues the
9 Court has before you as to whether the employee
10 facility tract, the southwestern corner was
11 intended to be the ending point, or whether Exhibit
12 16.2 and that eastern boundary was intended to be
13 the ending point, I believe this witness has
14 nothing to offer the Court with regard to the
15 issues that must be determined in order for you to
16 resolve the case.

17 THE COURT: Ms. Armstrong.

18 MS. ARMSTRONG: Sure. Well, KRA has
19 raised the fact that this land -- property that was
20 not developable was not -- or was developable was
21 not intended to be conveyed, right?

22 So the question of whether it's
23 developable has been an issue that KRA itself has
24 brought before this Court. And whether a land is
25 developable for residential construction, for

1 commercial construction is directly governed by the
2 Coastal Zone Management Act. It controls what kind
3 of construction activity can take place in areas
4 like this.

5 Mr. Eiser is going to be testifying
6 shortly that he is the one who set the beachfront
7 jurisdictional lines in 1991, the lines that would
8 have been applicable in 1994 that would have shown
9 what kind of activities would have been possible on
10 this 4.62 acres in dispute.

11 So it goes to really showing what the
12 parties at the time that they entered into the
13 agreement, what they knew about that property,
14 whether it would be developable or not.

15 And so I think it plays directly into
16 what -- how these parties conducted themselves in
17 1994 and why there was a change around 2007 when
18 this land -- the jurisdictional lines changed and
19 land became developable.

20 So I think it goes to show a course of
21 conduct of KRA, and when it suddenly arrived at
22 this conclusion that there was a mistake that
23 needed reformation.

24 MR. LESEMANN: Your Honor, it couldn't
25 speak to that because the Town of Kiawah Island and

1 KRA agreed that parcels 12 and 13 would be
2 developable. They agreed to development rights in
3 there.

4 And the opinion of -- and I will just
5 add for clarification that Mr. Eiser is involved in
6 the separate Captain Sam's case that is pending
7 before the South Carolina Supreme Court, which
8 again the Court's decision is was that beachfront
9 strip intended to stop at the eastern boundary as
10 expressed in 16.2, or at the southwestern corner of
11 the employee facility tract as Ms. Nimmons picked
12 up in her description.

13 This witness really can't offer
14 anything. He could edify us on a lot of things. I
15 can see that he knows a lot about his subject. But
16 it has nothing to do with the issue that's before
17 the Court.

18 THE COURT: All right. I'm going to
19 give him some latitude. I'm going to allow his
20 testimony.

21 I am interested in it historically,
22 okay? I'm less interested in it today, but you can
23 bring me up to the historical basis, okay?

24 BY MS. ARMSTRONG:

25 Q. So we were talking about the prohibitions in

1 290(A). What kinds of things are authorized
2 seaward of the baseline?

3 A. The statute specifically calls out wooden
4 walkways; small wooden decks; fishing piers; golf
5 courses; landscaping; pools, under certain
6 circumstances; and groins, which are those short
7 perpendicular rock walls, under certain
8 circumstances.

9 Q. And does that section start out with the
10 general prohibition on construction seaward of the
11 baseline --

12 A. Yes.

13 Q. -- except for those activities?

14 A. Yeah. The first sentence of (A) is, no new
15 construction or reconstruction is allowed seaward
16 of the baseline except, and then it goes on to list
17 exceptions.

18 Q. Now, Mr. Eiser, I want to talk a little bit
19 about your role in establishing the baseline and
20 the setback line. I sort of made a representation
21 to the Court, but I'd like the Court to hear from
22 you.

23 When were the first baseline and setback
24 line set pursuant to the Beachfront Management Act?

25 A. In 1988 when the law first passed, the State

1 was charged with developing what we refer to as
2 interim baselines.

3 Q. And what was your role in those interim
4 baselines?

5 A. I, at that time I was working for Coastal
6 Science Engineering, and under contract with the
7 South Carolina Coastal Council, that private
8 company developed the interim lines.

9 So I was working on that project as a
10 private contractor.

11 Q. And who was the principal or the president
12 of Coastal Science?

13 A. A guy named Tim Kana.

14 Q. Do you know whether Mr. Kana has done any
15 work for this particular developer?

16 A. When you say this particular developer?

17 Q. KRA, KDP?

18 A. I know that when I was working at Coastal
19 Science and Engineering we did several projects for
20 the developer of Kiawah at the time.

21 Q. All right. And then when you set those
22 interim lines, what was the next step as far as
23 setting final lines?

24 A. Well, under the original '88 version of the
25 law, the lines were to be finalized in 1990. But

1 the law was actually changed in 1990 shortly before
2 those lines were supposed to be finalized, in part
3 because of the effects of Hurricane Hugo on the
4 coast in 1989.

5 And so the version of the law that was
6 amended in 1990, which is what we are operating
7 under now, says that the line should become
8 finalized in 1991.

9 Q. Okay. And what was your role in final -- in
10 the 1991 lines?

11 A. Well in 19 -- in November of 1989 I came to
12 work for the Coastal Council, so I was involved on
13 that same project, but as a state employee now, in
14 finalizing those line positions.

15 So I was part of a group of people, but
16 primarily responsible for establishing where those
17 final line positions should be located.

18 Q. And would Kiawah Island have been included
19 in the 1999 lines that were set?

20 A. 1988 and 1991?

21 Q. 1988 and '91 lines?

22 A. Yes.

23 Q. And do you remember participating in setting
24 the lines on Kiawah Island?

25 A. Yes.

1 Q. And do you maintain copies of the aerial
2 maps that depict the beachfront lines in your
3 office?

4 A. My office does. And then I'm primarily
5 charged with maintaining those maps for historical
6 and present-day purposes.

7 Q. Okay. Mr. Eiser, I'm going to hand you --
8 this has been marked as Exhibit No. -- Intervenor's
9 Exhibit No. 20, and ask you if you can tell me what
10 that is?

11 A. Sure. This is actually an aerial photo map
12 that I provided to you as part of your subpoena for
13 me to be here today.

14 This is an aerial photograph that shows
15 Beachwalker Park. And it also shows the baseline
16 and the setback line and they were adopted as the
17 final lines in 1991.

18 Q. Okay. I have got a copy of this that has
19 been overlayed and put on the board here, and I
20 want the Judge to be able to see it.

21 Mr. Eiser, if you could walk up to this map
22 and tell me if this is the same map as Exhibit No.
23 19, the 1991 jurisdictional lines for Kiawah Island
24 that we are looking at?

25 A. Yes, it is.

1 Q. And if you could for the Court, Mr. Eiser,
2 just take this red highlighter because it's a
3 little bit difficult, I think, to see exactly where
4 the baseline and the setback line are and just use
5 that marker to follow the baseline from --

6 A. Okay. Originates?

7 Q. Originates on the map.

8 A. Sure. The baseline is this line that is
9 closer to the ocean of the two, baseline and
10 setback line.

11 Q. Okay.

12 A. So what I'm tracing now is the baseline. I
13 thought that's what you asked me to do.

14 Q. Okay. And then if you could go back and
15 trace the setback line as well.

16 A. Sure. Same color?

17 Q. Same color is fine.

18 A. Then right behind it, they are 20 feet
19 apart, that line is the 40-year setback line.

20 Q. Okay. And are there other provisions that
21 apply specifically to what kind of activity can
22 occur between the setback line and the baseline?

23 A. Yes.

24 Q. Mr. Eiser, if you could just stay there for
25 just a moment. I have got something that's marked

1 and actually been admitted as Exhibit No. 15, and
2 ask you if you can -- this has already been
3 admitted into evidence, but just ask you if you can
4 identify this plat, where it's located?

5 A. It's the same area, it's Beachwalker Park
6 and Captain Sam's Spit.

7 Q. Okay. And does this map appear to
8 represent -- does it look like it's in the correct
9 location on top of your 1991 jurisdictional map,
10 Exhibit 19?

11 If you can use that identifying marker as
12 the park and Beachwalker Road.

13 A. Yeah. I'm looking at the road and the
14 parking lot and it seems to match up fairly well.
15 So, yes, I would say that it's properly registered
16 on top.

17 Q. Okay.

18 MS. ARMSTRONG: Your Honor, I'd like to
19 move Exhibit 19 into evidence.

20 THE COURT: So 19 is the overlay?

21 MS. ARMSTRONG: 15 is the overlay, and
22 it's already in evidence. This is 19.

23 THE COURT: All right. 19 is the one
24 that he's drawn the lines on?

25 MS. ARMSTRONG: Correct.

1 THE COURT: Let me just ask you this so
2 I'm clear, Mr. Eiser, are there actually lines
3 there that you were tracing over?

4 THE WITNESS: Yes. If you get right up
5 on it you can see that there are some lines.

6 THE COURT: If you did that from
7 memory I was real impressed.

8 MS. ARMSTRONG: Your Honor, that's why
9 I asked him to do this because the lines are very
10 difficult to see, and I knew they would be
11 difficult for you to see.

12 THE COURT: The lines are on the map,
13 they just are dark and monochrome so the red shows
14 up, right. And the baseline is which one?

15 THE WITNESS: Closer to the ocean is
16 the baseline. And then further back is the setback
17 line.

18 THE COURT: Setback line, got you.
19 Okay. And that's 15 again? I'm sorry, 19 is the
20 one he has drawn on?

21 MS. ARMSTRONG: Correct.

22 THE COURT: All right. My
23 understanding your earlier objection?

24 MR. LESEMANN: Yes. Your Honor, again,
25 my objection would be to -- this is the one thing

1 that Ms. Armstrong did identify Mr. Eiser to speak
2 about would be the map that would show these lines.

3 And so I am going to object to scope,
4 anything that goes beyond the scope of that.

5 Again, while he has matched up the park, there is
6 accretion and other issues that come up.

7 I don't think it has anything to do
8 with the intent of the parties or whether there was
9 a mistake in the property description.

10 But to the extent it's an aerial photo,
11 and he's indicated where he believes the 1991
12 setback line and baseline were, we would not object
13 to that. Again, it's irrelevant. So we would
14 object to it, Your Honor, based on relevance.

15 THE COURT: All right. Well, I find it
16 relevant.

17 Do you have any objection?

18 MS. JETT: No, Your Honor.

19 THE COURT: All right. And I want to
20 make sure I'm clear on this. The map that you drew
21 on is the '91 map?

22 THE WITNESS: It's the map showing the
23 1991 baseline and setback line, yes.

24 THE COURT: Which would have been in
25 effect in 1994?

1 THE WITNESS: Correct.

2 MR. LESEMAN: May I ask a question,
3 Your Honor?

4 THE COURT: Yes.

5 MR. LESEMAN: What was the date of the
6 aerial?

7 THE WITNESS: 1993.

8 MR. LESEMAN: Okay. So it's a 1991
9 line on an 1993 aerial?

10 THE WITNESS: Yeah. And I can explain
11 that a little bit further if it would help the
12 Court.

13 THE COURT: Yeah, sure.

14 THE WITNESS: We started out with
15 photographs that were flown in 1988. We drew those
16 interim lines on it. And then when we finalized
17 the lines in 1991, we showed those same lines on
18 those 1988 photos.

19 It didn't accurately represent what the
20 ground looked like because of Hurricane Hugo. So
21 we reflew the coast in 1993, and we basically
22 showed those same 1991 lines on the newer 1993
23 photo.

24 So it seems a little tricky, like, how
25 can you have a 1991 line on a 1993 photo? The line

1 didn't move. We simply showed them on more recent,
2 more active aerial photos.

3 THE COURT: All right. Thank you.

4 MR. LESEMANN: Do you know if there was
5 any accretion between '91 and '93?

6 THE WITNESS: I can't answer that
7 question without actually looking at those two maps
8 and comparing them.

9 MS. ARMSTRONG: I think I might clear
10 up a little bit about --

11 THE COURT: Well, I'm going to admit it
12 over objection. You've laid the foundation for it,
13 so.

14 (Intervenors' Exhibit No. 19 was
15 admitted into evidence.)

16 BY MS. ARMSTRONG:

17 Q. So, Mr. Eiser, I'm going to represent to you
18 there are some markings on Exhibit 15 which say,
19 land titled in KICA Island Community Association
20 4.62 acres, which is this parcel identified on the
21 plat, Exhibit 15.

22 Can you tell how much of that 4.62-acre
23 parcel would have been landward of the setback line
24 in 1994 --

25 MR. LESEMANN: Your Honor, I object to

1 this testimony. This witness was not disclosed to
2 talk about this testimony, it merely talked about
3 that he was going to draw the setback and baselines
4 on a map.

5 And for him to give an opinion about
6 the developability of property without us having a
7 witness to, A, show that there are the ability to
8 apply for exceptions to these things, and, (b), to
9 have a counter expert to deal with those issues is
10 absolutely prejudicial.

11 And again, it's not of interest in the
12 facts that are before the Court. But it is
13 completely improper for the witness to come without
14 disclosure to declare something undevelopable that
15 the Town of Kiawah Island and KRA already agreed
16 would be developable, in addition to it's lack of
17 relevance.

18 MS. ARMSTRONG: Your Honor, I'm not
19 getting ready to ask him his opinion on whether
20 it's developable. I'm just asking him how much of
21 the parcel was -- is landward of the jurisdictional
22 lines that his agency set.

23 MR. LESEMAN: Well, I think with the
24 crude red show-through, I don't know that he would
25 even have the ability to state that with any

1 accuracy.

2 MS. ARMSTRONG: Well, to some extent,
3 Your Honor, this exhibit speaks for itself. Your
4 Honor can certainly see where the red line is in
5 relation to where the parcel is located.

6 THE COURT: Yeah, I will make the
7 finding. Where is the northern boundary on that?
8 I can see where the red comes through, where is the
9 northern boundary on the lot in question?

10 MS. ARMSTRONG: Right there, Your
11 Honor.

12 THE COURT: Okay. Yep, I see it.

13 MS. ARMSTRONG: Would you like me to
14 hand it to --

15 THE COURT: I can see it. What is the
16 -- it's like a line that runs -- like a white line
17 that runs right where your finger is. Come east,
18 come toward yourself.

19 What is that? Does that line represent
20 some dunes, or can you tell?

21 THE WITNESS: These very faint lines
22 right here, Your Honor?

23 THE COURT: No, I'm seeing a white,
24 almost like a dune line. There are trees behind it
25 and there are scattered trees in front of it.

1 THE WITNESS: Are you talking about
2 this piece right in through here on the left?

3 THE COURT: Right.

4 THE WITNESS: That's just an area that
5 doesn't have a lot of vegetation on it.

6 THE COURT: Okay. So it's sand?

7 THE WITNESS: Yeah.

8 THE COURT: All right. But it's
9 contained within the setback lines, right?

10 THE WITNESS: Well, this is sort of
11 answering Ms. Armstrong's question, so if I can
12 proceed.

13 Anything that is on this side of the
14 setback line is out of my state agency's critical
15 area jurisdiction. We don't regulate it if it's on
16 the landward side of that second red line.

17 THE COURT: It's outside your
18 jurisdiction?

19 THE WITNESS: Correct.

20 THE COURT: If it's on this side of the
21 line?

22 THE WITNESS: Then it's in.

23 THE COURT: Then it's in.

24 BY MS. ARMSTRONG:

25 Q. -- so to clarify, so if it's seaward, and

1 this area being seaward of the jurisdictional line,
2 it is within OCRM's jurisdiction?

3 A. That's correct.

4 THE COURT: All right. Okay.

5 MS. ARMSTRONG: Okay.

6 THE COURT: Based on that, I will make
7 the finding that the majority of that lot would be
8 seaward of the line, right? From what I can see.

9 MS. ARMSTRONG: I think that's an
10 obvious interpretation from looking at this.

11 BY MS. ARMSTRONG:

12 Q. Now, Mr. Eiser, I want to ask you a few more
13 questions. You said that this is a 1993 aerial.
14 And what we are looking at on top of it, can you
15 see the date down there on this plat that's laid on
16 top of it? Down in the lower right-hand corner.

17 A. It says date 5/15/13.

18 Q. Okay. So approximately 20 years has passed.
19 Do you know what happened on Kiawah Island that
20 would change this -- the line right on the ocean
21 side? It looks like there is a difference.

22 Do you understand? Can you explain what
23 that difference is, or what caused that difference?

24 A. Well, I know that this shoreline of the
25 Kiawah River is erosional. So I'm not too sure

1 what that line is representing that you are
2 pointing to.

3 But if you are asking about changes in this
4 area here (indicating), we know that that Kiawah
5 shoreline is eroding.

6 Q. Okay. And you'll also see that there is a
7 line way up here that appears to be out into the
8 ocean.

9 Do you have any understanding why that line
10 would be out much further in 2013 than it was when
11 we see the ocean in 1993?

12 A. I really don't. I mean the beachfront here
13 is generally accreting or building out. So it
14 seems that, you know, the property line a longer
15 time ago would have been further landward.

16 I don't really know why that property line
17 is shown way out to the ocean like that.

18 Q. But you are aware that the Kiawah beachfront
19 is accreting?

20 A. Yeah. The beachfront here is accreting.
21 The Kiawah River shoreline is erosional.

22 Q. Okay. All right. I think the next exhibits
23 I wanted to ask you about, I think I may ask you
24 one more about this because I'm going to hand you
25 -- well, one more question as it related to the

1 1991 lines.

2 Do you know where Captain Sam's Spit is in
3 relation to those lines?

4 A. Sure. I would refer to Captain Sam's Spit
5 as basically everything on the west side of
6 Beachwalker Park.

7 So this is a portion of Captain Sam's Spit,
8 but it extends much further towards the west of
9 what's shown on here.

10 Q. Okay. So in 1994 Captain Sam's Spit was
11 entirely seaward of your jurisdictional lines?

12 A. That's correct. Because the baseline
13 essentially wraps around here as a park, that means
14 that all of this land, all of Captain Sam's Spit
15 was seaward of the baseline.

16 Q. Okay. Mr. Eiser, this is marked as Exhibit
17 No. 20. And we also have problems because the
18 lines are dark, but I'm going to hold it up to the
19 Court to see.

20 What year is this map from?

21 A. The aerial photograph is the same photo from
22 1993, but the lines that are shown on it now are
23 the baseline and setback line, and it's actually
24 stamped here, that were adopted in March of 1999.

25 Q. Okay. And I think the Court might have a

1 difficult time also seeing the location of the
2 lines. So perhaps we can use a marker and mark
3 that location.

4 A. Sure. All right. There is the baseline and
5 the setback line, same as before. There is only 20
6 feet between them. And so now I'm tracing the
7 length of the baseline, and then coming back I'm
8 tracing the 40-year setback line.

9 I'm bobbling a little bit. But if you get
10 right up on these maps, you can see that there
11 definitely are two lines that are drawn on them.

12 Q. Okay. And this is -- so this is the same
13 map, just shows --

14 A. It's the same aerial photo image with the
15 different lines drawn on them.

16 Q. And then going back to this combined exhibit
17 of 19 and 15, can you see the location of the 1999
18 line on this map, Exhibit 15?

19 A. Well, I see a baseline and a setback line
20 here.

21 Q. Okay.

22 A. But I don't know if they're the 1999 lines,
23 or they could possibly be the ones from 2009.
24 Because these lines get updated every 8 to 10
25 years. So if they are labeled, I can tell you what

1 they are.

2 Actually I don't see any labels on them. So
3 I don't know if that's the 1999. If this plat was
4 prepared in 2013, they could very well be the 2009
5 baseline and setback line.

6 Q. And how did the 1999 lines change from the
7 1991 lines?

8 A. There was a pretty significant change from
9 Beachwalker Park on down. This is the breakpoint
10 between the standard zone way of drawing a baseline
11 on the crest of the dune from here back towards the
12 east, versus the inlet zone way of drawing the
13 baseline from this point on down.

14 That's why those earlier lines from 1991
15 kind of curve up like this, because at some point
16 during the past 40 years -- at some point during
17 the past 40 years when these lines were drawn in
18 1991, Captain Sam's inlet had pretty much cut
19 through right here (indicating).

20 So under the method called for in the law,
21 this was the more landward shoreline during the
22 past 40 years. Flash forward to the year 1999, and
23 this oldest shoreline has now dropped out of that
24 40-year window.

25 So under the method called for in the law,

1 we now have to use a different shoreline as the
2 most landward shoreline, and that turns out to be
3 the one that goes pretty much the entire length of
4 Captain Sam's Spit. So there's a big difference in
5 the baseline location.

6 Q. And so now is there land -- is any part of
7 Captain Sam's Spit, is it landward of the baseline
8 and the setback line?

9 A. Yes.

10 Q. Okay. And if you could just -- you were
11 pointing to the point where the inlet zone changes
12 from the -- I can't remember what you called it,
13 the other --

14 A. Standard zone versus inlet zone?

15 Q. Could you mark that with a blue X?

16 A. Can I circle it?

17 Q. Or circle it, that would be fine.

18 A. And I know that because that's where the
19 lines start to cut back a little bit.

20 Q. Okay. I think Exhibit 19 actually contains
21 two maps. The one that we were just looking at, as
22 well as this map, which can explain what we are
23 looking at on this map?

24 A. Certainly. This is sort of a continuation
25 of that same aerial photograph.

1 Q. Okay.

2 A. And, Your Honor, the baseline and the
3 setback line are right here (indicating). You
4 probably can't see them from the bench, but they're
5 located right there (indicating).

6 That means that all of this high ground back
7 in through here is now out of our beachfront
8 critical area jurisdiction.

9 Q. And these were the 19 --

10 A. These are the 1999 baseline and setback line
11 locations, stamped right there (indicating).

12 Q. Okay. And also these are maintained by you
13 in your office?

14 A. Yes.

15 MS. ARMSTRONG: Your Honor, we move
16 Intervenor's Exhibit 19 [sic] into evidence.

17 THE COURT: Okay.

18 MR. LESEMANN: No objection, Your
19 Honor.

20 THE COURT: Without objection.

21 (Intervenor's Exhibit No. 20 was
22 admitted into evidence.)

23 THE COURT: If you look on this one
24 thing, because I've looked at my hard copy. If you
25 look on that lot, which is either -- it's on the

1 overlay, right to the left. I'm not sure you are
2 going to be able to read it, but within that -- I
3 think it's within that 20-foot I see a notation --
4 look to the left of that. See if there is not
5 writing in there as to what year setback line that
6 is.

7 THE WITNESS: 2009.

8 THE COURT: Okay.

9 THE WITNESS: You are correct. So the
10 baseline and setback lines that are shown on this
11 overlay, which apparently was prepared in 2013,
12 these are the 2009 lines.

13 THE COURT: Okay. All right. And
14 again, those are the ones that run due west?

15 THE WITNESS: They go due west quite a
16 ways down Captain Sam's Spit.

17 THE COURT: Okay. And those lines
18 change every 8 on 10 years you said?

19 THE WITNESS: Yes, sir.

20 THE COURT: So the '90 --

21 THE WITNESS: So the lines that are
22 current right now for our jurisdictional purposes
23 are actually from the year 2009.

24 THE COURT: 2009, all right. That
25 would be a current description of the current

1 status.

2 THE WITNESS: At the time that this
3 plat was prepared, yes. And still today, yes.

4 THE COURT: Okay. All right. Very
5 good.

6 BY MS. ARMSTRONG:

7 Q. Mr. Eiser, you can sit down. Thank you.

8 THE COURT REPORTER: Ms. Armstrong, I
9 think you called No. 19, and you said 19 twice to
10 be admitted.

11 MS. ARMSTRONG: Yes, 19 and 20. Thank
12 you, Anne.

13 THE COURT: All right. And I want to
14 make sure I'm clear as well. The overlay here is
15 Exhibit 15, and that's placed over and what's 19
16 and 20; is that right? That what we were drawing
17 on was 19 and 20?

18 MS. WHITE: 19 is the 1991 lines. And
19 20 is the 1999 lines.

20 THE COURT: Okay. All right, thank
21 you.

22 MS. ARMSTRONG: I don't have any other
23 questions for this witness, Your Honor.

24 THE COURT: Mr. Lesemann.

25 MR. LESEMANN: Your Honor, may I take a

1 brief moment to confer with Mr. Brooks?

2 THE COURT: Sure.

3 CROSS EXAMINATION

4 BY MR. LESEMANN:

5 Q. Mr. Eiser, we have not met. My name is
6 Ellis Lesemann. I'm the attorney for the plaintiff
7 developers in this case.

8 And you actually -- are you familiar with
9 the plaintiff developers?

10 A. What this case is about?

11 Q. No. Well, yeah, we will get to that, you
12 are familiar with this case. But are you involved
13 in another piece of litigation involving KRA?

14 A. Yes.

15 Q. Okay. And is that the revetment dispute
16 relating to Captain Sam's Spit?

17 A. Yes.

18 Q. And are you opposed to the revetment? Did
19 you actually deny the permits?

20 A. Technically we issued it, but we only
21 approved the revetment to be built behind the
22 parking lot. So we denied the vast majority of
23 what had been requested.

24 Q. Okay. And so I know that the matter remains
25 pending, but did an ALJ reverse your determination?

1 A. Yes.

2 Q. Okay. So, Mr. Eiser, are you familiar --
3 we'll go to backup questions. You've never served
4 on town council of the Town of Kiawah Island,
5 right?

6 A. Correct.

7 Q. And you've never -- and it sounds like
8 you've got a long, long history in state service?

9 A. Yes.

10 Q. I just want to clarify a couple things. You
11 never had any involvement with the developer KRA in
12 terms of being an employee or officer of that
13 company?

14 A. Correct.

15 Q. And you have never been an employee of the
16 Town of Kiawah Island?

17 A. That's correct.

18 Q. Have you ever been involved through the
19 Kiawah Island Community Association in any way?

20 A. No.

21 Q. Have you ever owned property on Kiawah?

22 A. No.

23 Q. Did you have any involvement whatsoever in
24 the 1994 development agreement?

25 A. No.

1 Q. Did you have any involvement in the
2 preparation of the 1995 quit claim deed?

3 A. No.

4 Q. Did you have any involvement with the
5 preparation of the 1994 agreement for conveyance
6 that was entered into between KRA and KICA?

7 A. No.

8 Q. Do you have any knowledge whatsoever about
9 the intent of either the Town of Kiawah, Kiawah
10 Resort Associates or the Kiawah Island Community
11 Association with regard to the transfer of the
12 beachfront strip?

13 A. No.

14 Q. Do you have any knowledge as to whether
15 there was a mistake in a property description when
16 the beachfront strip was conveyed?

17 A. No.

18 Q. With regard to the west end of Kiawah
19 Island, if I used the phrases parcel 12, parcel 13,
20 through your work on the revetment permit, are you
21 familiar with those parcels at all?

22 A. I don't really know what parcel 12 and 13
23 are referring to.

24 Q. Okay. Do you know whether in 1994 the Town
25 of Kiawah Island approved parcel 13 for the

1 construction of a hotel?

2 A. I don't know.

3 Q. Okay. If someone were to build a hotel on
4 parcel 13, would -- hold on one second for me.

5 Mr. Eiser, I believe you mentioned that
6 within your jurisdiction it is permissible to build
7 walkways, patios, perhaps swimming pools and things
8 of that nature.

9 I do not mean to mischaracterize your
10 testimony. Can you restate what that was?

11 A. Sure. The statute actually specifically
12 calls out wooden walkways; small wooden decks;
13 fishing piers; golf courses; landscaping; pools,
14 under certain circumstances; and groins, under
15 certain circumstances.

16 Q. Okay. So if someone were to develop a
17 hotel, a beachfront hotel, those might be the types
18 of things that would be connected to that
19 development?

20 A. I would assume so, yes.

21 Q. Okay. So I will show you what has been
22 marked as an exhibit in this case, and it's
23 different from the map. But with regard to --
24 maybe what I could do is I could use the map that
25 -- this might be tricky.

1 Anyway, with regard to the area, Mr. Eiser,
2 that you had marked in these red lines, and
3 indicating that the land that is seaward of that
4 would be within your jurisdiction, within the
5 jurisdiction of OCRM; is that correct?

6 A. Yes.

7 Q. Okay. So seaward of that line, is this the
8 area in which potentially walkways, decks and
9 swimming pools and things of that nature could be
10 built?

11 A. Yes.

12 Q. Okay. And so if you were to build a hotel
13 for example in this area, there could be a use of
14 the area that would be seaward of the red lines
15 that you drew on this exhibit that would be in
16 connection with a beachfront hotel for example?

17 A. Yes.

18 Q. So there are uses, there are development
19 uses, although limited, there are development uses
20 that could be pursued on the seaward side of these
21 red lines that you've drawn?

22 A. The statute says we have the authority to
23 issue permits for those types of things. It
24 doesn't guarantee that those permits would be
25 issued, because every permit application is --

1 Q. Oh, understood. Understood.

2 A. But they're clearly called out in the
3 statute as things that can be permitted.

4 Q. Okay. And in your experience and your time
5 with the agency, has the agency approved projects
6 of that kind?

7 A. Yes.

8 Q. Do you have an understanding of local
9 zoning?

10 A. Not really, no.

11 Q. And do you understand whether acreage that
12 might be out -- potentially acreage that might be
13 within your jurisdiction, is that potentially
14 available under local zoning laws to calculate the
15 density of a given parcel?

16 A. That's sort of a local issue. And as a
17 state employee, I just implement the state statute
18 and regulations.

19 Q. Okay. So a local municipality could, for
20 example, choose to allow land that might be seaward
21 of the red line that you drew, as being calculated
22 in determining what the density, what the allowed
23 density and allowed total number of units would be
24 on a particular piece of property?

25 A. I don't know that I could even say yes or no

1 to that question. I think I don't have the
2 expertise to answer it.

3 Q. Understood. And so that was what I want to
4 confirm is you really don't know local zoning, do
5 you?

6 A. Correct.

7 Q. And so you are not certain about the impacts
8 of densities, and what acreages might be considered
9 by a municipality for densities?

10 A. Correct.

11 Q. Do you have any knowledge with regard to
12 Kiawah Island in terms of its rate of accretion as
13 compared to perhaps other beaches on either South
14 Carolina's coast or on the east coast?

15 A. Without being able to cite specific numbers
16 I can tell you that Kiawah Island in general is one
17 of our more stable beaches. Captain Sam's Spit
18 itself is a little more dynamic because of the fact
19 that the inlet moves, and has historically been in
20 separate locations.

21 But as a whole, the bulk of Kiawah Island is
22 one of our more stable islands.

23 Q. Understood. And so just to confirm, you
24 have no knowledge whatsoever regarding the intent
25 of any of the parties with regard to the transfer

1 of the beachfront strip?

2 A. That's correct.

3 Q. You have no knowledge whatsoever as to
4 whether the 4.62 acres that is the subject of this
5 case was intended to be part of that beachfront
6 strip or not, do you have any knowledge on that?

7 A. That's correct.

8 Q. Okay.

9 MR. LESEMAN: No further questions,
10 Your Honor.

11 MS. JETT: I don't have any questions
12 for this witness, Your Honor.

13 THE COURT: Okay.

14 MS. ARMSTRONG: I just have a couple of
15 redirect.

16 THE COURT: All right.

17 REDIRECT EXAMINATION

18 BY MS. ARMSTRONG:

19 Q. Mr. Lesemann was asking you about the
20 administrative appeal with the department of
21 permits division.

22 After the administrative law judge reversed
23 the agency, what happened next? Can you just tell
24 the Court where you are?

25 A. Yeah. It's actually been heard by the State

1 Supreme Court for the third time. It is my
2 recollection that the first time they reversed the
3 administrative law court and actually upheld the
4 department's decision.

5 And then the second time they heard it, they
6 reversed themselves. And now they have heard it
7 for a third time but we don't have a ruling from
8 them yet.

9 Q. Mr. Lesemann was also asking you about --
10 you were talking about Captain Sam's Spit. Can you
11 just tell us what you know about the history of the
12 inlet of Captain Sam's?

13 A. Sure.

14 MR. LESEMAN: Your Honor, I just would
15 object to relevance. It may be informative to you
16 of history, but again irrelevant to the issues
17 before the Court.

18 THE COURT: Tell me why we are going
19 into that.

20 MS. ARMSTRONG: Well, I think it
21 started coming out in redirect. But I can let it
22 go, Your Honor. I'm fine.

23 THE COURT: All right. Let's move on
24 from there.

25 MS. ARMSTRONG: I don't have any other

1 questions, Your Honor.

2 THE COURT: Very good. And I don't
3 have any questions, Mr. Eiser. Thank you very much
4 for coming.

5 MS. ARMSTRONG: Your Honor, may Mr.
6 Eiser be released from his subpoena?

7 THE COURT: Absolutely.

8 THE WITNESS: All right. Thank you.

9 THE COURT: Go on back to work.

10 MS. ARMSTRONG: Your Honor, the
11 intervenors call Wendy Kulick to the witness stand.

12 THE COURT: Ms. Kulick, come on up.

13 WENDY KULICK,
14 having been first duly sworn, was examined and
15 testified as follows:

16 THE COURT: Please state your name and
17 address for the record.

18 THE WITNESS: Wendy Ann Cramer Kulick.
19 38 Marsh Edge Lane, Kiawah Island.

20 THE COURT: And spell Kulick for me,
21 please.

22 THE WITNESS: K-U-L-I-C-K.

23 THE COURT: Thank you, ma'am.

24 DIRECT EXAMINATION

25 BY MS. ARMSTRONG:

1 Q. Ms. Kulick, how long have you lived on
2 Kiawah Island, the property you just mentioned?

3 A. Since June of 1989.

4 Q. Okay.

5 A. Excuse me. We moved to Kiawah then. We
6 lived on the western end of the island for a year
7 and a half while our house was being built.

8 Q. And what is your education and employment
9 history?

10 A. I have a bachelor's from Moss University in
11 English. A master's from Adelphi University in
12 English. A certificate in human resource
13 management from NYU.

14 My first professional job was as a junior
15 high English teacher on Long Island. I did that
16 from 1970 until March of 1984.

17 I had a summer internship in 1983 with
18 Skadden, Arps, Slate, Meagher and Flom, a large law
19 firm in New York City writing job descriptions.

20 And then I went to work for Skadden in April
21 of 1984, first running the proofreading department,
22 and then in September of 1985 managing the
23 secretarial department.

24 I did that until I moved to Kiawah, and then
25 I did consulting work for Skadden for a little over

1 a year again writing job descriptions.

2 In March -- April of 1990, I went to work
3 for Kerisons Department Store as the director of
4 human resources, and I did that until December of
5 1993.

6 And then from January of 1994 until May of
7 1995 I did consulting work, first through Star
8 Mountain, which is a consulting firm out of
9 Washington D.C., and then for the Department of the
10 Navy providing outplacement services at POMPFLANT
11 and then SUPSHIP, two naval installations that were
12 being closed down as a result of the 1985 Base
13 Closure Act.

14 And then in June of 1995 I went to work for
15 Ness, Motley, Loadholdt, Richardson and Poole as
16 the director of human resources. And then that
17 firm became Motley, Rice and I became the director
18 of administration. And I was there until December
19 of 2004.

20 Q. And is that when you retired?

21 A. (Affirmative head shake.)

22 Q. Okay. And so you have been permanently a
23 resident of Kiawah Island since 1989?

24 A. That's correct.

25 Q. Okay. And are you member of the Kiawah

1 Island Community Association?

2 A. Yes.

3 Q. Are you a member of the Kiawah Property
4 Owner's Group?

5 A. Yes.

6 Q. And what -- can you tell me a little bit
7 about KPOG, I'm going to call the Kiawah Property
8 Owner Group, we have been calling it KPOG.

9 Can you tell me a little bit about the
10 mission of KPOG, and particularly as it relates to
11 the issues in this case?

12 A. Well, generally it's to identify, examine
13 and communicate with property owners on issues of
14 significance. And as necessary, and as the board
15 determines, to advocate on behalf of property
16 owners.

17 More specifically, KPOG's job is to
18 represent the concerns of property owners, and
19 especially when it comes to its natural resources,
20 its natural resources and really environmental
21 policies.

22 Q. And do those interests and goals form part
23 of the basis for your membership in the KPOG?

24 A. Yes.

25 Q. Can you tell me a little bit about whether

1 -- or does -- do those interests and goals, are
2 they promoted by KPOG's intervention in this case?

3 A. Yes.

4 Q. What kind of recreational activities do you
5 enjoy on Kiawah?

6 A. Walking, biking, sitting on the beach and
7 reading. I find the ocean coming in and out very
8 cathartic.

9 Q. Are you familiar with the location of the
10 4.62-acre parcel that we have been discussing today
11 and Monday?

12 A. Yes.

13 Q. Were you in the courtroom on Monday?

14 A. Yes.

15 Q. Have you been in the courtroom all day
16 today?

17 A. Yes.

18 Q. And when do you see that 4.62-acre parcel?
19 Can you give me some context?

20 A. Sure. When we lived on the western end of
21 the island when we first moved to Kiawah, I did a
22 lot of walking on the beach in that area.

23 And then when we built our house, I would
24 walk on the beach, in a lot of cases, more
25 easterly. But I have a friend who moved to Kiawah

1 and lives right near there, so we go walking on the
2 beach together in that area quite bit on the
3 western end of the island.

4 Q. Okay. And can you describe what that parcel
5 looks like, the property, the 4.62 acres?

6 A. Well, first obviously you see the sand. And
7 then when you are looking, you see the maritime
8 forest as you go further inland.

9 Q. And is there anything special about this
10 area of Kiawah and this parcel in particular to
11 you?

12 A. First of all, it reminds me of the way --
13 you know, nothing stays the same, but it reminds me
14 of the way Kiawah was when we first moved to Kiawah
15 because there was a lot less development there.

16 You know, like we used to be able to go on
17 Jeep Safaris on the eastern end of the island.
18 Those have not been able to be done for a number of
19 years because the land has been developed.

20 So the area that we are talking about is one
21 of the few undeveloped and untouched areas where
22 you don't have really anything there.

23 Q. Okay. Do you derive any benefits from it
24 being in that state?

25 A. Aesthetically, emotionally, absolutely.

1 Q. And can you describe a little bit about
2 aesthetically and emotionally what those benefits
3 are?

4 A. Well, just like sitting on the beach, you
5 know, watching Mother Nature in action, and that
6 land being undeveloped is still Mother Nature in
7 action. It's a very cathartic, soothing
8 experience, especially getting away from craziness
9 of the real world.

10 Q. And if KRA were to prevail in this suit and
11 achieve reformation and take title to this 4.62
12 acres, how would that affect your use and enjoyment
13 of the 4.62 acres that right now is held as common
14 property?

15 MR. LESEMAN: Your Honor, I would
16 object. The witness would have no ability to
17 answer this question. She has no concept or what
18 would or wouldn't happen with the property, and I
19 think it's an improper question.

20 If the deed was reformed and they get
21 the property back, I don't know that she can
22 testify as to any impact that that would have. She
23 doesn't have any idea about what would happen with
24 the property or not.

25 MS. ARMSTRONG: Let me lay a little bit

1 more foundation, Your Honor.

2 THE COURT: All right.

3 BY MS. ARMSTRONG:

4 Q. Are you familiar with the term common
5 property?

6 A. Yes.

7 Q. What is common property under the KICA
8 covenants?

9 A. That's property which KICA owns, and which
10 all members of KICA have access to, and an
11 unfettered right of access to.

12 MR. LESEMANN: Your Honor, I would
13 object to the testimony. The KICA covenants are in
14 the record. To the extent we'd like to indicate
15 what common property is defined as, I think that
16 that would be provided.

17 A, it's not necessary. But, (b), what
18 someone's opinion about what common property is and
19 what it isn't, and how it's defined and how it
20 isn't I don't believe is relevant and it would
21 conflict with the documents in the record.

22 THE COURT: All right. I'm going to
23 overrule on that basis. Isn't she on the board?

24 MR. LESEMANN: No. She is not, Your
25 Honor.

1 MS. ARMSTRONG: No, Your Honor.

2 THE WITNESS: KPOG, not KICA.

3 THE COURT: KPOG, not KICA. All right.
4 What is the difference? One is an advocacy group,
5 and the other is the actual administrative body; is
6 that right?

7 MR. LESEMANN: One actually owns the
8 common property, and the other is sort of an ad hoc
9 association.

10 THE COURT: I will sustain the
11 objection. Okay.

12 BY MS. ARMSTRONG:

13 Q. All right. You stated that you are a member
14 of KICA?

15 A. That's correct.

16 Q. And what is your understanding about your
17 rights as a member of KICA to use common
18 properties?

19 A. My understanding is that all members of KICA
20 have the right to use KICA common property. There
21 are other KICA common properties, for instance at
22 Rhett's Bluff, on another part of the island, which
23 is also undeveloped.

24 As a member of KICA I can go walking on that
25 property and enjoy the natural scenery.

1 Q. And if the 4.62 acres, if this Court holds
2 that it is not common property, how will that
3 affect your use and enjoyment of the parcel?

4 A. Well, my understanding is that if it's
5 private property -- privately owned property, then
6 unless I have permission from the property owner I
7 don't have any authority to use -- be on that
8 property or use it in any way.

9 Q. Now, I want to talk a little bit about the
10 civic activities that you have been engaged in
11 since moving to Kiawah. Can you just tell the
12 Court about what kinds of things you have been
13 involved in?

14 A. I have been on town committees and boards,
15 on KICA committees, in addition to my involvement
16 with KPOG.

17 Q. And I want to talk a little bit about your
18 involvement with town council, and then a little
19 bit about your involvement with KICA.

20 As far as town council meetings, are those
21 things that you would -- how would you participate
22 when it came to the Town, its decision making?

23 A. When my husband and I first moved to Kiawah,
24 we started attending town council meetings, which
25 at that point were held in the evening, because it

1 was a way of meeting people.

2 And so for the most part, I attended --
3 unless we were out of town for some reason, I
4 attended all town council meetings.

5 At some point, and I don't remember the
6 exact year, town council began meeting during the
7 day. And then when I was still working full time,
8 there was a period of time where it was more
9 difficult to attend those meetings.

10 Q. So in 1994 where town council meetings held
11 -- when were they held?

12 A. I believe they were still held in the
13 evening at that point.

14 Q. And so did you attend those town council --
15 would you have attended those town council meetings
16 in 1994?

17 A. Yes, I did.

18 Q. And approximately how many of those meetings
19 in 1994 related to the 1994 development agreement
20 did you attend?

21 A. I don't know the exact number. Town council
22 meets once a month, and in addition to that, there
23 were town committees.

24 As the development agreement came closer to
25 fruition, the planning commission of the town.

1 council held open houses where property owners
2 could drop in and see maps of the various affected
3 properties. And there were members of town council
4 who were there to be able to explain to people the
5 various aspects of the development agreement.

6 Q. Can you describe your level of participation
7 when the Town was working on the 1994 development
8 agreement?

9 A. As I do today, I asked a lot of questions.

10 Q. And while at the town council meetings and
11 workshops and other various subcommittee meetings
12 that you attended, did the Town ever express any
13 intent that the beachfront strip should be limited
14 to the eastern boundary of parcel 13?

15 A. No.

16 Q. Did the Town ever express any concern that
17 there was ambiguity as to what section 16.(b) of
18 the development act [sic], the dedication of the
19 beachfront strip included?

20 A. No.

21 MR. LESEMANN: Your Honor -- I am sorry
22 to cut in at the end of your question,
23 Ms. Armstrong -- but this is just during the
24 meeting as opposed to not within the development
25 agreement itself or not all together since she

1 hasn't -- this is just during the meeting that she
2 attended that these questions relate to?

3 MS. ARMSTRONG: That's correct.

4 THE WITNESS: That's what I understand
5 it to be.

6 MR. LESEMANN: Okay. Did the Town ever
7 make any expressions about this, and the Town
8 didn't enter the development agreement. So I just
9 wanted to make sure the scope of what the questions
10 are.

11 THE WITNESS: It was my understanding,
12 the meetings I attended.

13 MR. LESEMANN: Okay.

14 BY MS. ARMSTRONG:

15 Q. And I'm going to ask you several more
16 questions related to your -- what you heard or what
17 you observed or witnessed when you were at any of
18 the town -- these public meetings that we discussed
19 that you tried to -- that you attended.

20 So getting back to that question as it
21 relates to 16.(b) and the description of the
22 beachfront strip. Did the Town ever express any
23 concern about ambiguity with that definition?

24 A. No.

25 Q. Did the Town ever express any intent that

1 the beachfront strip western boundary terminates
2 where the developer owned platted lots?

3 A. No.

4 Q. Did the Town ever express any intent to
5 exclude developable land from the conveyances that
6 would be authorized as part of the beachfront
7 strip?

8 A. No.

9 Q. And did the Town ever express any
10 distinction between the conveyances of the
11 beachfront strip and Captain Sam's Spit?

12 A. No.

13 Q. And as far as your Kiawah Island Community
14 Association, what was your level of involvement
15 with those board meetings and with the community
16 association in 1994?

17 A. In 1994 I would have been attending KICA
18 board meetings as often as I could. And in 1994 I
19 was still doing what Ms. McAdory had asked me to
20 start doing in 1990, which was organizing
21 volunteers for the annual meeting.

22 And then at that point in time, different
23 from today, the community association received
24 proxies directly from property owners. And then
25 before work and after work I would go and enter the

1 information on the proxies into the community
2 associations database.

3 And then there were two property owners, two
4 other property owners who would then audit what I
5 entered so that if I mis-entered something I could
6 go back and fix it.

7 Q. And when you were involved with the
8 community association in that fashion, as well as
9 attending the monthly board meetings, did the KICA
10 board ever express any concern about what lands it
11 was to receive pursuant to subsection 16.(b) or
12 paragraph 16.(b) of the development agreement?

13 A. No.

14 Q. Did KICA ever express, again in the
15 meetings, any of the public hearings that you
16 attended, any understanding that the beachfront
17 strip was to be limited to the eastern boundary of
18 parcel 13?

19 A. No.

20 Q. And did KICA -- has KICA ever expressed in
21 any public forum, or in any of your interactions
22 with KICA, that it did not want to take title to
23 any lands that had development potential?

24 A. No.

25 MS. ARMSTRONG: I don't have any other

1 questions for this witness, Your Honor.

2 THE COURT: All right.

3 MR. LESEMANN: Thank you, Your Honor.

4 CROSS EXAMINATION

5 BY MR. LESEMANN:

6 Q. Ms. Kulick, I'm Ellis Lesemann. We met last
7 week.

8 A. Uh-hum.

9 Q. Is it true that you do not have any evidence
10 of what the intent of the Town or KRA or what KICA
11 was with regard to what they intended to be the
12 beachfront strip other than what appears in the
13 development agreement?

14 A. Other than what appears in the development
15 agreement, or something had been said at a public
16 meeting.

17 Q. Okay. So I asked you a question in your
18 deposition, in sum, do you have any evidence or
19 knowledge that would speak to what the intent of
20 any of these three parties, KRA, KICA or the Town
21 of Kiawah was with regard to whether or not the
22 additional land was intended or not intended to be
23 conveyed as part of the beachfront strip?

24 So I have read the question right here.

25 A. Uh-hum.

1 Q. And can you identify what your answer is on
2 line 19?

3 A. Not specifically, no.

4 Q. And do you intend your testimony today to be
5 any different from what your sworn testimony was
6 last week?

7 A. No.

8 Q. So again, you have no specific evidence of
9 any intent on behalf of any of the parties?

10 A. I do not.

11 Q. Okay. With regard to the beachfront strip?

12 A. That's correct.

13 Q. I asked you, and I will ask you this way, is
14 there anything that you heard or observed during
15 the meetings of town council that you believe is
16 relevant to a determination as to whether KICA, KRA
17 and/or the Town of Kiawah Island intended the
18 additional land be included as part of the
19 beachfront strip?

20 A. No.

21 Q. And so just to confirm, you don't have any
22 evidence or knowledge or information to provide to
23 the Court relating to what the intent of KRA, KICA
24 or the Town of Kiawah was with regard to the
25 transfer of the beachfront strip?

1 A. No, I do not.

2 Q. Okay. You don't have any knowledge or
3 evidence or information to provide to the Court
4 with regard to whether there was a mistake in the
5 property description that resulted in the
6 additional land being included?

7 A. No, I do not.

8 Q. You were here, Ms. Kulick, in the courtroom
9 when we discussed the Beachwalker Park lease?

10 A. Yes.

11 Q. And were you aware that the Beachwalker Park
12 lease provides that boardwalk access will be
13 provided across the lands of the -- belonging to
14 the developer for a period of the 99-year lease?

15 A. Yes.

16 Q. So are you concerned during the period of
17 that 99-year lease, you know, are you satisfied
18 that access is being provided under that binding
19 contract?

20 A. It is.

21 Q. Okay. How much of the beach do you explore?

22 A. Depends on the day. Depends on how much --
23 how high the tide is, depends on how much time I'm
24 going to spend there.

25 Q. Does this area of the island include a

1 fairly vast expanse of undeveloped beach?

2 A. Absolutely. It's one of the beauties of
3 Kiawah.

4 Q. Are you able to enjoy the undeveloped beach
5 on this 7-mile stretch on the eastern end of the
6 island?

7 A. Uh-hum.

8 Q. Are you also able to enjoy this 10 miles of
9 beachfront strip that are under the dunes
10 management of KICA?

11 A. Uh-hum. Yes, I should say.

12 Q. Do you agree that your walking past the
13 property or being able to use common property
14 doesn't trump what the developer ought to be able
15 to do with its property?

16 A. I have no control over what a developer does
17 with its property.

18 Q. Okay. All right. And do you -- you have no
19 information as to whether there was -- what the
20 intent of any of the parties were on this
21 transaction?

22 Did you write a 1994 editorial actually
23 applauding the development agreement that was
24 entered by the parties?

25 A. Yes, I did. I was the editor of Kiawah

1 Island Talk at that time. I actually wrote two
2 versions of the editorial.

3 Fortunately we were able to print the one
4 congratulating both parties. I also had one that
5 said it was a shame they couldn't come to
6 agreement.

7 Q. Right. And do you have any reason to
8 indicate to the Court that this Exhibit 16.2 was
9 not part of the development agreement, and was not
10 signed by the Town of Kiawah, and doesn't indicate
11 that the beachfront strip would end there at the
12 eastern boundary of parcel 13?

13 A. I do not.

14 MR. LESEMAN: No further questions.

15 CROSS EXAMINATION

16 BY MS. JETT:

17 Q. I don't have much, Ms. Kulick. I think you
18 have been pretty clear in your recollection of the
19 KICA board meetings and the town council meetings
20 that you attended, and as I understood it that you
21 have no particular recollection of either KICA or
22 the Town of Kiawah expressing an intent one way or
23 another as to where the western terminus of the
24 beachfront would end; is that correct?

25 A. That's correct.

1 Q. Since that time, have you had any
2 conversations with any then KICA board members or
3 the then -- well, I will just ask the question.

4 Have you had any conversations with any
5 members who are on the KICA board at that time as
6 to what their intent was at the time regarding the
7 western terminus of the beachfront strip?

8 A. No.

9 Q. What about the then mayor of the Town of
10 Kiawah?

11 A. No.

12 Q. Okay. What about the then council members
13 of the Town of Kiawah, any communications with them
14 about what their intention may have been back in
15 1994 with regard to the dimensions of the
16 beachfront strip?

17 A. No.

18 Q. Okay.

19 MS. JETT: That's all.

20 THE COURT: Anything?

21 MS. ARMSTRONG: I have one redirect.

22 REDIRECT EXAMINATION

23 BY MS. ARMSTRONG:

24 Q. If there had been discussions at either town
25 council meetings, KICA meetings, any of these

1 public forums regarding the beachfront strip, is
2 that something that you think you would recall, or
3 would it have slipped your mind in the passage of
4 time?

5 A. I think I would recall it. I certainly
6 wouldn't swear to it.

7 Q. Okay.

8 MS. ARMSTRONG: I don't have any other
9 questions. Thank you.

10 MR. LESEMAN: No recross, Your Honor.

11 THE COURT: I don't have any questions.
12 Ms. Kulick, thank you for coming.

13 Okay.

14 MS. ARMSTRONG: The Intervenors call
15 Peter Mugglestone to the witness stand.

16 PETER MUGGLESTONE,
17 having been first duly sworn, was examined and
18 testified as follows:

19 THE COURT: State your full name and
20 address for the record, please.

21 THE WITNESS: My name is Peter R.
22 Mugglestone. My address is 1651 Roslyn Drive,
23 Columbia.

24 THE COURT: Spell Mugglestone for me.

25 THE WITNESS: M-U-G-G-L-E-S-T-O-N-E.

1 THE COURT: Thank you, sir.

2 Ms. Armstrong.

3 MS. ARMSTRONG: Thank you, Your Honor.

4 DIRECT EXAMINATION

5 BY MS. ARMSTRONG:

6 Q. It's actually Dr. Mugglestone; is that
7 correct?

8 A. It's actually Mister.

9 Q. Mister, okay. Well, you've got to tell me
10 about your educational background. I know you've
11 got some higher education.

12 A. I have a master's of science in mechanical
13 engineering issued by the UK Council for Academic
14 Awards. And I spent three years at Cambridge
15 University doing Ph.D. research.

16 Regretfully, the company that was sponsoring
17 me wanted me back to run their aerodynamic
18 department, and so I never quite finished my
19 thesis.

20 Q. Now, can you -- so you took a position and
21 didn't complete your thesis. And what was that?
22 Can you just walk us through a little bit of your
23 employment history?

24 A. Well, I had done an apprenticeship with
25 General Electric Company in the UK. And then was

1 involved in computer-aided design of water
2 turbines, gasification and the like, which is the
3 very, very early days of that subject.

4 The company sponsored me to go to Cambridge
5 to do further research on the -- on that, basically
6 on that topic. And then because they needed
7 someone to go and run their research department, I
8 was asked to return at the end of my three-year
9 stint and I spent time there.

10 Later joining a consulting group in
11 Cambridge and went with them to start a group in
12 Australia. And finally a group here in the United
13 States in Princeton.

14 And I also worked as director of research
15 and development for a bearing company, Precision
16 Bearing Company for 13 years. And vice president
17 of an engineering of a machine tool company for a
18 shorter period time.

19 Q. You indicated that your address is on Roslyn
20 Drive in Columbia?

21 A. That's our official address.

22 Q. That is pardon?

23 A. That is our official address.

24 Q. Okay. And do you own any other properties?

25 A. We own quite a few, one of which is on

1 Kiawah Island.

2 Q. Let's talk about the one on Kiawah Island.
3 What's the address of that property?

4 A. That is 8 Sundown Bend, Inlet Cove, Kiawah.

5 Q. And when did you purchase that property?

6 A. In March of 2006.

7 Q. Okay. March of 2006. And how much time do
8 you spend at that property?

9 A. Well, as of 2009 we ceased to rent it and
10 paid off the mortgage. So since that time we have
11 spent four days per week during the summertime, and
12 most of the time out of term.

13 Q. And are you -- you indicated that that
14 property is located in Inlet Cove?

15 A. It is indeed.

16 Q. Are you a member of Inlet Cove Club
17 Community Association?

18 A. Yes, I am. Homeowners Association.

19 Q. Homeowners Association as a party to this
20 case. And are you also a member of the Kiawah
21 Island Community Association?

22 A. Everybody is.

23 Q. Everybody is, okay. And are you familiar
24 with the 4.62 acres that's in dispute in this case?

25 A. Yes, I am.

1 Q. Okay. Can you describe where Inlet Cove is
2 in relation to the 4.62 acres?

3 A. You've got a map?

4 Q. I was just going to hold up --

5 A. I can basically explain. Inlet Cove is --
6 the first property of Inlet Cove is about a quarter
7 of a mile south, slightly east of the property that
8 we are talking about.

9 And the property that I live in is, by road,
10 is about .6 miles from the start of the 4.62 acres.

11 Q. Looking at Exhibit No. 19, can you identify
12 the location of Inlet Cove on this aerial image?

13 A. Yeah. I will walk over. Inlet Cove is this
14 area here (indicating).

15 Q. Okay. And can you point to where you
16 understand the 4.62 acres to be?

17 A. This here (indicating).

18 Q. Okay.

19 THE COURT: And Inlet Cove is in the
20 upper right of that Exhibit 19, right?

21 THE WITNESS: Yes.

22 BY MS. ARMSTRONG:

23 Q. And do you have occasion to see that 4.62
24 acres?

25 A. Regularly, yes.

1 Q. Can you give us the context for when you see
2 that property?

3 A. Typically I run every morning, or at least
4 80 percent of the mornings. And I, weather
5 permitting, run along the beach and leave the beach
6 at Beachwalker Park boardwalk and run right through
7 the middle of that property.

8 So I see it very regularly. And we often
9 walk in the afternoon, often out to the Spit, so we
10 go sort of through that boardwalk.

11 Q. Okay. And what does the 4.62 acres look
12 like?

13 A. It fundamentally starts off as grass, and it
14 has fairly good density of smaller bushes before we
15 get to the northern maritime forest. It has dunes,
16 basically three to four dunes.

17 Q. Is there anything in particular that is
18 special to you about this property?

19 A. Well, the nice thing is that further to the
20 west it's basically sand, you can't go on it
21 anyway. And further to the east it's very sandy.

22 This area seems to have more small
23 vegetation, more flora. I often see butterflies,
24 skippers and the like, take photographs of them.

25 It seems to be one of the more desirable

1 parts of that beachfront of the coast.

2 Q. And as a member of KICA, how have you
3 treated that parcel?

4 A. I can only walk through it because I didn't
5 know that KICA owned it until -- I actually don't
6 -- until recently.

7 Q. Okay. And do you derive any benefits from
8 walking through that parcel and observing the
9 wildlife, taking pictures and things like that?

10 A. Yeah, that is a benefit of retirement.

11 Q. Okay. And if KRA were to prevail in this
12 suit, how would that affect the uses that you are
13 talking about?

14 A. Again, undetermined. But one assumes if it
15 was developed then clearly there would be -- it
16 would be less desirable in general.

17 Q. And if the Court ruled that it was not
18 common property subject to the KICA covenants and
19 including the easement rights of access, how would
20 that affect you?

21 A. Clearly if the -- there would need to be, I
22 assume, an easement right for Beachwalker Park,
23 someone could walk through that clearly, but would
24 be trespassing if I went beyond that.

25 Q. I'm going to show you, we have been talking

1 about it a little bit earlier, it's marked and
2 introduced into evidence as Intervenors' Exhibit
3 No. 15, which is the overlay portion of this
4 diagram.

5 I just want to ask you if you had occasion
6 to see this plat. I just want to see if you can
7 identify that if that helps --

8 A. Yeah. I have seen this. This is a layout
9 of the plat in question, and the layout of the
10 proposed road coming from Beachwalker Road, or
11 Drive rather, out to the point.

12 Q. Okay. And so have you seen this plat before
13 just showing it to you today?

14 A. I have seen it before, yes.

15 Q. Okay. I'm going to hand you what has been
16 marked Intervenors' 22.

17 MS. ARMSTRONG: And, Your Honor, I'm
18 going to hand this to you after I hand it to the
19 witness and let him tell us what it is.

20 THE COURT: Okay.

21 BY MS. ARMSTRONG:

22 Q. Mr. Mugglestone, have you seen that -- have
23 you seen that document before?

24 A. Yes, I have.

25 Q. And can you tell me what that is?

1 A. This is a plat showing the Beachwalker Park
2 plat.

3 Q. Okay. And did you locate this plat?

4 A. I did.

5 Q. And where was it?

6 A. It was on the Charleston County database
7 system.

8 Q. Okay. And does it have a survey stamp on
9 it?

10 A. There is approval of the final plat at the
11 top, yes, March 15, 1977.

12 Q. Okay. If you could hand me that, I'd like
13 to hand it to the Judge so he can see a copy of
14 this.

15 MS. ARMSTRONG: Your Honor,
16 Intervenor's' would like to move Exhibit 22 into
17 evidence.

18 THE COURT: Intervenor's' Exhibit 22
19 references a plat of looks like 2.18 acres?

20 MS. ARMSTRONG: Correct. I think it's
21 the Beachwalker Park plat.

22 MR. LESEMANN: Your Honor, it appears
23 to be a public record, so we wouldn't have an
24 objection.

25 MS. JETT: Same, no objection.

1 THE COURT: Without objection. All
2 right.

3 (Intervenors' Exhibit No. 22 was
4 admitted into evidence.)

5 BY MS. ARMSTRONG:

6 Q. Now, I'm going to hand you what has been
7 marked as Exhibit No. 23.

8 MS. ARMSTRONG: And, Your Honor, I do
9 have an extra copy of that.

10 THE COURT: All right.

11 BY MS. ARMSTRONG:

12 Q. Can you tell me what that Exhibit No. 23
13 represents?

14 A. Yes, it represents an overlay of the two
15 previous documents that you have shown me, where
16 the outline in red is the outline of the
17 Beachwalker Park plat, and the remainder is the
18 proposed road for the Captain Sam's Spit
19 development.

20 Q. And did you create this exhibit?

21 A. Yes, I did.

22 Q. And what information did you use?

23 A. I used the two documents you have shown me
24 just previously.

25 Q. Okay. And how did you use the information

1 contained in those two documents to create Exhibit
2 No. 23?

3 MR. LESEMAN: Your Honor, we just
4 would object to the creation of an exhibit by this
5 witness who has not been indicated as a surveyor or
6 a land planner or anything of the type.

7 To the extent they want to use it as a
8 demonstrative exhibit, I think that that's fine.
9 But I don't believe it would be admissible when
10 it's not an expert, and it's not a document that
11 has been provided to -- was it provided this
12 morning?

13 MS. ARMSTRONG: It was provided
14 yesterday.

15 MR. LESEMAN: Yesterday. Again, Your
16 Honor, this is -- it's sort of a computer job done
17 by a layperson and would not be an admissible
18 document.

19 MS. ARMSTRONG: Just to respond that
20 Mr. Permar was allowed to create an exhibit. He
21 also similarly is not a surveyor, he wasn't
22 qualified with any sort of expertise. And I was
23 getting ready to have Mr. Mugglestone explain to
24 the Court how exactly he came about preparing this
25 exhibit.

1 THE COURT: All right. Well, lay a
2 little more foundation. I assume it's a
3 diagrammatic scheme similar to that Exhibit 29 we
4 have been looking at, isn't it? Is that the
5 number, with the green and the red box on it?
6 That's what you are using it for?

7 MS. ARMSTRONG: Yes, Your Honor.

8 THE COURT: Go ahead and lay a little
9 more foundation.

10 BY MS. ARMSTRONG:

11 Q. I think you were getting ready to explain,
12 Mr. Mugglestone, what information you used and how
13 you created this map, these details so the Court
14 can understand what information you used.

15 A. The red line which is the, I guess, the area
16 of contention was not produced using the
17 coordinates from the plat because you'll find that
18 they are usually unreadable, we would need to go to
19 the actual document, the original, to see that.

20 The copy that's on the website is
21 insufficiently detailed to show the small print of
22 the dimensions.

23 So, the outline is, however, very visible on
24 the document. And by rotating it to the correct
25 angle, which if you'll use the north pointer for

1 that, and scaling it to the correct length, one can
2 produce a diagrammatic representation of the
3 Beachwalker plat over the plat of the road.

4 It is a diagrammatic representation as you
5 can see. There are small errors in positioning of
6 the edge of the road and the red line. And very
7 small errors in the actual shapes, which would come
8 anyway from the fact that both were scans from
9 paper documents which will introduce errors anyway.

10 However, it demonstrates to a reasonable
11 accuracy, that of say two or three feet, the
12 position of the Beachwalker plat compared with the
13 proposed road through the -- to the Spit.

14 MR. LESEMAN: Your Honor, again we
15 renew our objection on the basis of relevance.
16 Again it has nothing to do with the selection of
17 the southwestern corner of the employee facility
18 tract. It has nothing to do with Exhibit 16.2, or
19 the eastern boundary of parcel 13.

20 The issue of the location of Captain
21 Sam's Road, which would be provided by easement, is
22 really not relevant to the Court's determination.

23 Beyond, you know, Mr. Permar, and
24 Ms. Armstrong brought that up, is somebody who
25 spent 30 years land planning on Kiawah Island.

1 Mr. Mugglestone is not even a full-time resident of
2 the island and has none of that capacity.

3 So on the issue of relevance, on the
4 issue of hearsay, on the issue of lack of
5 authenticity and reliability, on the issue of no
6 expertise for foundation upon which this document
7 should be created, and mainly for lack of probative
8 value as to the issues before the Court.

9 Again, fine for it to be used
10 demonstratively and for them to discuss what they
11 think it's about, but it's not an admissible
12 document for those six to seven reasons that I
13 mentioned.

14 THE COURT: Again, your purpose in this
15 is what?

16 MS. ARMSTRONG: Well, I think that the
17 purpose of this, I mean, I can address the specific
18 objections, but to let the Court know where we are
19 going with this is that the issue of whether this
20 4.62 acres, whether there was an error in the deed
21 really arose around 2007 when it really kind of
22 heated up, and has since become a larger issue.

23 And that was one that didn't really
24 become relevant until Captain Sam's Spit was
25 developable. And when the planning was occurring

1 for the access road to Captain Sam's Spit, and the
2 developer realized that it needed to either cross
3 through the 4.62 acres or the Beachwalker Park,
4 that's where this is going to show.

5 That the access road needs to cross
6 through one of those parcels. And so it just goes
7 to showing what we have argued all along that this
8 concern, this mistake has sort of been more of a
9 recent origin and not really until it affected the
10 possible development potential of Captain Sam's did
11 the alleged mistake really become something that
12 was an issue for the plaintiff.

13 MR. LESEMAN: Your Honor, it's
14 contrary to the record and remains irrelevant
15 because again it doesn't deal with what the
16 development agreement says where the beachfront
17 strip would end, or where there was a mistake in
18 property description indicated it would end.

19 And with regard to Captain Sam's, Cape
20 Charles is the formal name of the development, with
21 regard to where that road goes, as it is allowed to
22 go through Beachwalker Park or be allowed to go
23 through another area is irrelevant to the Court's
24 determination regarding 1994 intent.

25 THE COURT: Okay. Go back and lay more

1 foundation. I'm still a little unclear as to where
2 this came from.

3 You put Exhibit 22 in, and what was the
4 other one that you referenced to?

5 MS. ARMSTRONG: Exhibit 15, which is
6 the plat, the developer's -- the surveyed plat of
7 the parcel that also shows Beachwalker Park, but it
8 shows the boundaries of Beachwalker Park being
9 different than the boundaries identified in that
10 plat, Exhibit No. 11 that is a public record and
11 the Court has admitted into evidence.

12 So the developers own -- Plaintiffs'
13 own plat, 15, shows the location of Beachwalker
14 Park being in a different location than the
15 recorded plat in the County of Charleston.

16 THE COURT: Okay. All right.

17 MS. ARMSTRONG: And Exhibit 23
18 essentially shows that.

19 THE COURT: I think I'm following you
20 now. All right. You are taking issue with where
21 the -- where on Exhibit 15, right, isn't it 15, the
22 plat?

23 MS. ARMSTRONG: Correct, Your Honor.
24 Which I believe the Court does have a copy of
25 Exhibit 15.

1 THE COURT: Correct.

2 MS. ARMSTRONG: It shows the park in
3 the boundaries in essentially like a different
4 location than what is shown on that plat.

5 MR. LESEMAN: Your Honor, I don't know
6 if it shows that or not, Your Honor. I don't know
7 if the witness is qualified, he's not a surveyor,
8 and he is not capable of speaking to that.

9 I don't know that the boundaries of the
10 Beachwalker Park are specifically shown on this.
11 That line right there and that line right there is
12 the same one you are speaking of, crosses the road
13 then it comes out like that.

14 I believe that's the same as what you
15 are looking at. You have a little triangular
16 shape.

17 MS. ARMSTRONG: Right there on the
18 plat, that's the point it goes like that.

19 MR. LESEMAN: There's just not --
20 doesn't appear the line is there.

21 MS. ARMSTRONG: And I think part of the
22 point is that there's -- this doesn't actually show
23 Beachwalker Park on the plat and this is the
24 recorded plat and so.

25 MR. LESEMAN: Well, this is not the

1 recorded plat. This is an overlay. But the
2 recorded plat is in evidence and I think the Court
3 can probably make such comparison if it believed
4 that it needed to for relevance purposes.

5 MS. ARMSTRONG: Your Honor, we haven't
6 actually moved, but at this point I'm going to move
7 for Exhibit 23 to be admitted into evidence.

8 MR. LESEMAN: Your Honor, again I
9 think my objection was stated for the record. But
10 it's a hearsay document created by a lay witness
11 that's not -- that doesn't have the background and
12 expertise to do it.

13 And there's no offense to Mr.
14 Mugglestone, but it is what it is. And the various
15 surveys of record that show these matters, and that
16 it's not probative, relevant or reliable.

17 THE COURT: All right. So I'm going to
18 let it in. Very good. It's his handiwork. It's
19 an attempt to overlay Beachwalker Park onto Exhibit
20 15; is that right?

21 MS. ARMSTRONG: That's correct, Your
22 Honor.

23 THE COURT: I will let it in for that
24 purpose alone.

25 (Intervenors' Exhibit No. 23 was

1 admitted into evidence.)

2 MS. ARMSTRONG: I don't have any other
3 questions for this witness.

4 THE COURT: Mr. Lesemann, go ahead.

5 MR. LESEMANN: Thank you, Your Honor.

6 CROSS EXAMINATION

7 BY MR. LESEMANN:

8 Q. Mr. Mugglestone, have you ever served in any
9 capacity for the Town of Kiawah Island?

10 A. No.

11 Q. Either as the mayor or a member of town
12 council?

13 A. No.

14 Q. Have you ever been an employee of the Town?

15 A. No.

16 Q. When did you first buy this property in
17 Inlet Cove?

18 A. March of 2006.

19 Q. Okay. So was that approximately 12 years
20 after the 1994 development agreement was entered?

21 A. Yes.

22 Q. Did you own another property on Kiawah
23 Island prior to the Inlet Cove property?

24 A. No.

25 Q. So your first entry to Kiawah Island was in

1 2006?

2 A. Correct.

3 Q. Okay. So do you have any knowledge or
4 information or intent or evidence or anything that
5 you can provide to this Court relating to what the
6 intent of the parties, meaning the Town, KRA, KICA
7 were with regard to the 1994 development agreement?

8 A. No.

9 Q. Okay. Do you have anything to add to the
10 Court's -- to the record, evidence, conversations,
11 or anything that would be admissible that would
12 discuss where the intended boundary of the
13 beachfront strip was to be under the 1994
14 development agreement?

15 A. No.

16 Q. Would you have any evidence or ability to
17 contest that the boundary of the beachfront strip
18 is anything other than this eastern boundary of
19 parcel 13?

20 A. I don't.

21 Q. Do you have any knowledge about whether
22 there is a mistake in the property description such
23 that additional property was included?

24 A. Could you repeat that question?

25 Q. Yeah. Do you have any knowledge about

1 whether the property description in the quit claim
2 deed accurately reflects this depiction in the
3 development agreement?

4 A. I don't have that knowledge.

5 Q. Okay. Can you identify anything for the
6 Court that would indicate that the intention of the
7 parties was to utilize the southwestern corner of
8 the employee facility tract, instead of the eastern
9 boundary as indicated in Exhibit 16.2 as the
10 western termination point of the beachfront strip?

11 A. No.

12 Q. Mr. Mugglestone, I think I did recognize
13 that you're a runner because I think I have seen
14 some of your times on the internet from various
15 races. Do you run up the length of the island
16 ever?

17 A. Very occasionally these days.

18 Q. Okay. Do you enjoy the other parts of
19 Kiawah Island, including the undeveloped portions
20 on the east end?

21 A. I rarely go there except on the coastal
22 side, the end of the Spit there.

23 Q. It is your understanding that the developer
24 is required to provide an access for Beachwalker
25 Park so that you can get from Beachwalker Park to

1 the beach as part of the 99-year lease?

2 A. Yes, I do.

3 Q. And so that's the access that you use when
4 you would leave Inlet Cove to go running?

5 A. Return actually, but, yes.

6 Q. Do you -- in Inlet Cove there are tall trees
7 between you and where this additional land would be
8 located?

9 A. That is true.

10 Q. Okay. And so can you actually see the
11 property from Inlet Cove?

12 A. I don't believe so.

13 Q. Okay.

14 A. One would have to say perhaps you could see
15 the top of the trees, although I couldn't identify
16 it specifically.

17 Q. Mr. Mugglestone, Ms. Armstrong went through
18 with you a review of your educational background.
19 And are you a surveyor?

20 A. No.

21 Q. Are you land planner?

22 A. No.

23 Q. Have you done exhaustive research of the
24 easements and all plats and surveys of record with
25 regard to Beachwalker Park?

1 A. No.

2 Q. Do you know whether the plat that is on
3 record that has been admitted as Intervenor's 15
4 might in fact recently have been approved by the
5 County? Do you have any knowledge of that?

6 A. Which was 15?

7 Q. The Seamon Whiteside plat. Do you know if
8 that plat may be in the process of County approval?

9 A. I don't know anyway. I don't know which one
10 it is.

11 Q. Mr. Mugglestone, again can you provide any
12 evidence that indicated that the intended end of
13 the beachfront strip is anything other than is
14 indicated here on this map where the hatched area
15 ends?

16 A. No, I cannot.

17 MR. LESEMAN: No further questions,
18 Your Honor.

19 CROSS EXAMINATION

20 BY MS. JETT:

21 Q. Mr. Mugglestone, I think I have one
22 question. Have you had any communications with
23 anybody from the Town of Kiawah or the Kiawah
24 Island Community Association that has any
25 reflection on what their understanding or intent

1 was as to where the western terminus of the
2 beachfront strip would be?

3 A. No.

4 Q. Okay.

5 MS. JETT: That's all the questions I
6 have.

7 THE COURT: All right.

8 MS. ARMSTRONG: I have one question on
9 redirect.

10 REDIRECT EXAMINATION

11 BY MS. ARMSTRONG:

12 Q. Mr. Lesemann was asking you about the beach
13 access from Beachwalker Park being changed. If the
14 location of the beach access were changed to an
15 area that doesn't have the same qualities that you
16 described earlier in your testimony, how would that
17 affect you?

18 A. Obviously it would not be such an enjoyable
19 use of the environment if it was moved way off or
20 whatever. If it was returned within the cone of
21 the 4.62 acres, it probably would not make much
22 difference.

23 MS. ARMSTRONG: Thank you, Your Honor,
24 I don't have any other questions.

25 MR. LESEMAN: You Honor, just one on

1 recross.

2 RECROSS EXAMINATION

3 BY MR. LESEMANN:

4 Q. Do you think there might be some folks on
5 Kiawah Island who liked it better before Inlet Cove
6 was built, and when that property was in its native
7 state?

8 A. There were very few people on Kiawah Island
9 before that was built. That was one of the very
10 early developments, so I couldn't answer your
11 question thoroughly.

12 Q. Do you think with regard to when Inlet --
13 when any property is built, do you think there is
14 probably someone who wishes it was still trees and
15 not a house?

16 A. I'm sure that is true.

17 MR. LESEMANN: No further questions.

18 THE COURT: My only question is, what
19 number did we give this diagram?

20 MS. ARMSTRONG: I think that's Exhibit
21 23.

22 THE COURT: 23, all right. Thank you.
23 Thank you, Mr. Mugglestone, you may
24 step down.

25 MS. ARMSTRONG: Your Honor, I have one

1 more witness, but may I request a five-minute
2 break?

3 THE COURT: Sure. Let's take five and
4 we'll come back.

5 (A recess was taken.)

6 MS. ARMSTRONG: Intervenors call Greg
7 VanDerwerker to the witness stand.

8 GREG VANDERWERKER,
9 having been first duly sworn, was examined and
10 testified as follows:

11 THE COURT: If you would then give us
12 your full name and address for the record.

13 THE WITNESS: Yes, sir. It's Greg,
14 G-R-E-G, Alan, A-L-A-N, VanDerwerker, V-A-N,
15 capital D-E-R-W-E-R-K-E-R.

16 Address is 510 Ruddy, R-U-D-D-Y,
17 Turnstone, T-U-R-N-S-T-O-N-E, Kiawah Island.

18 THE COURT: Thank you, sir.

19 DIRECT EXAMINATION

20 BY MS. ARMSTRONG:

21 Q. And how long have you owned your property on
22 Ruddy Turnstone, Kiawah Island?

23 A. We bought the property in January of 1994.

24 Q. And did you move there permanently in 1994?

25 A. No, ma'am.

1 Q. When did you move there permanently?

2 A. Well, it became my permanent address on or
3 about December 31st, 2005.

4 Q. Okay. And can you just give us a little bit
5 of your background, your education and your
6 employment history and leading up to your final
7 permanent move to Kiawah?

8 A. Grade school in --

9 Q. We can go and skip that. Let's go to your
10 graduate work, and where you went after that.

11 A. After college?

12 Q. Sure.

13 A. After college was Emory University School of
14 Medicine, I received my medical degree. And then
15 University Hospital in Cleveland, which is the
16 affiliated hospital for Case Western University,
17 four years there as pathology training.

18 After which I accepted a one-year fellowship
19 at the Baptist Hospital which is an affiliate of
20 now called Wake Forest University School of
21 Medicine; then it was Bowman Gray School of
22 Medicine.

23 And after completing that, which was midyear
24 1982, I moved to Greenwood, South Carolina and
25 joined a partnership practice there in Greenwood.

1 So Memorial Hospital. And was there on the staff
2 until retirement at the end of 2005.

3 Q. Okay. And are you a member of the Kiawah
4 Island Community Association?

5 A. Yes, ma'am.

6 Q. Are you a member of Kiawah Island Property
7 Owner's Group?

8 A. Yes, ma'am.

9 Q. What kind of recreational activities do you
10 participate in on Kiawah?

11 A. Outdoor recreation? Indoor recreation?

12 Q. Outdoor recreation.

13 A. Outdoor recreation. Walking, jogging,
14 bicycling, beachcombing, a lot of kayaking. I do
15 not golf, and rarely play tennis.

16 Q. Are you familiar with the location of the
17 4.62-acre parcel --

18 A. Yes, ma'am.

19 Q. -- in dispute? And do you undertake any of
20 those recreational activities in or around that
21 4.62 acres?

22 A. Access to the beach from the boardwalk,
23 access from Beachwalker Park.

24 Q. Okay. And what is that -- can you describe
25 what that property looks like?

1 A. Well, it's -- it varies in its topography,
2 everything from underwater to tidal beach to early
3 dune formation to -- what do they call the scrub
4 thicket vegetation on to maritime forest as it
5 backs up to Beachwalker Park.

6 Q. Okay. And so do you make any uses of that
7 4.62 acres?

8 A. Access to the beach is my physical use. I
9 have other uses in that from the point of
10 protection from hurricanes, primary benefits of
11 island protection, coastal barrier islands, are
12 one, dunes, and two, the wooded area, cutting down
13 on water swell. So that benefits me.

14 All the land has benefit from wildlife,
15 birds. We have a good population of deer. We have
16 a good population of bobcats. They move around,
17 but I'm sure they use that area and the nature
18 observations is an important part for me.

19 Aesthetically, it's like the rest of the
20 island and is attractive.

21 Q. And as far as this 4.62-acre parcel in
22 particular, are some of these uses that you enjoy
23 the aesthetics, the observing the wildlife, are
24 those things that have -- you do with specific
25 relations on this property, this parcel?

1 A. Oh, yes. And actually it may be a stretch
2 but everybody is talking about money, value,
3 whatever. But the developers have advertised it
4 heavily as nature.

5 And the reason I came there, we have been to
6 a lot of beaches. And I had never had any interest
7 in beach property until we came to Kiawah. And I
8 think it's unique with all the forest it has, and
9 the native flora, the native animals.

10 And they said that actually beyond golf and
11 tennis, the number one reason people live there and
12 purchase property is for nature. So, in theory if
13 not in fact loss of nature would cause a loss in
14 value of property that people already own.

15 Q. And would that loss in value affect you
16 personally? Can you explain that?

17 MR. LESEMAN: Your Honor, I'm just
18 going to have to object to this testimony. He is
19 not an expert in the area. He is not a real estate
20 appraiser.

21 I understand that he has got a natural
22 aesthetic interest in the island, but to the extent
23 he's going to talk about an impact that this would
24 have on the value of his real estate, which is
25 located I think a mile-and-a-half away or so, I

1 will get into that, but that's just -- it can't be
2 reliable for him to talk about what potential
3 development of the 4.62 acres might have on the
4 value of his private property. This is too far
5 afield, Your Honor.

6 THE COURT: Is that where we are going?

7 MS. ARMSTRONG: I think that where I
8 was really going is I want him to explain how it is
9 of value to him right now in its natural state.
10 And that's sort of where I was going.

11 I can rephrase the question.

12 THE COURT: Let's try that.

13 MS. ARMSTRONG: Okay.

14 THE COURT: I'm not going to let him
15 get into value, land values, okay?

16 MS. ARMSTRONG: Okay.

17 BY MS. ARMSTRONG:

18 Q. What kind of value does the property have to
19 you personally? I'm not talking about financial
20 value to the land you own, but to you personally,
21 what kind of value do you derive from the parcel in
22 its current state?

23 A. Access, easement, and then whatever that
24 part of the island supports, wildlife, nature,
25 general aesthetics of the island.

1 Q. And how often do you either walk by or pass
2 through or observe that 4.62-acre parcel?

3 A. Walk by or pass through could be very
4 different, it depends on how I access the beach.
5 Mr. Lesemann asked me that question, how often I
6 use the boardwalk and I said -- in the last year,
7 and I said probably a couple dozen times.

8 But I probably pass by it on the beach more
9 additional times.

10 Q. Okay. And the use and the enjoyment that
11 you currently derive from the 4.62-acre parcel in
12 its current state, would that be affected in any
13 way if KRA were to prevail in this suit?

14 MR. LESEMAN: Your Honor, again I just
15 renew the objection. The witness has not indicated
16 that he has any knowledge regarding how the
17 property would be developed, or if it would be
18 developed. So I think any answer to that question
19 is speculative.

20 THE COURT: I'll sustain that.

21 BY MS. ARMSTRONG:

22 Q. What is your understanding of how that
23 property is currently held right now, the 4.62
24 acres?

25 A. My understanding is that it was conveyed in

1 the deed of conveyance, or whatever it's called,
2 from the 1994 development agreement to KICA as
3 common property.

4 Q. And as a member of KICA, do you have any
5 rights with regard to that property as it sits
6 today?

7 A. I have rights and responsibilities
8 throughout the island for various things as a
9 member of KICA.

10 Q. And what about those rights that
11 specifically relate to the 4.62-acre parcel?

12 A. Well, first and foremost, gives me access to
13 it. And I would have to look at the covenants or
14 whatever.

15 Q. If KRA owned the property, would you still
16 have those same access rights that you currently
17 have?

18 A. I would think not because my access rights
19 are for common property, not for other properties.

20 Q. Okay. Dr. VanDerwerker, have you seen what
21 has been talked about here today, as well as
22 Monday, Exhibit No. 28, which is Exhibit 16.2 to
23 the 1994 development agreement?

24 A. Yes, ma'am.

25 Q. Have you seen it before today, before this

1 hearing began?

2 A. Yes, ma'am.

3 Q. When did you first see this exhibit?

4 A. Probably in -- sometime around summer of
5 2012 when the fifth amendment to the development
6 agreement came under discussion in town council.

7 Q. Okay. And what size was this exhibit when
8 you saw it?

9 A. It was an -- it was 8 by -- a standard sheet
10 of paper size.

11 Q. So 8-and-a-half by 11?

12 A. 8-and-a-half by 11. And the majority of --
13 I mean and the diagram itself of a 10-mile island
14 comprises what, probably 20 percent of the whole
15 page.

16 So I mean, it's not even a full-page
17 diagram. It's limited in its size.

18 Q. And I was going -- you are sort of getting
19 it where I wanted you to go. But can you describe
20 what your reaction was to this exhibit when you
21 first saw it?

22 A. Well --

23 MR. LESEMAN: Your Honor,
24 Ms. Armstrong has asked the witness what his
25 reaction was to this exhibit when he first saw it.

1 He was not a member of council in 1994. He was not
2 affiliated with KRA. He was not affiliated with
3 KICA.

4 I think his reaction to the document is
5 irrelevant. I don't know how it could be probative
6 to the Court's determine of what the intent in 1994
7 was.

8 THE COURT: I tend to agree with that.

9 MS. ARMSTRONG: He said that it came
10 before him when he was on town council, and that's
11 how.

12 MR. LESEMAN: In 2012.

13 MS. ARMSTRONG: In 2012.

14 THE COURT: It's not relevant.

15 MS. ARMSTRONG: Okay.

16 THE COURT: Sustain the objection.

17 MS. ARMSTRONG: Okay.

18 BY MS. ARMSTRONG:

19 Q. What kind of activities did you become
20 involved in once you moved permanently to the town,
21 and specifically as it relates to the town?

22 A. I started attending community association
23 meetings, monthly meetings. And then from there
24 started attending town council meetings.

25 I was on several of the community

1 association committees, and therefore had
2 interaction to some degree with the Town. And then
3 as time went on, I became a more heavy follower of
4 the meetings.

5 Q. And did that lead you to any sort of
6 official role with the Town?

7 A. It led me to run for town council in 2010.

8 Q. And were you elected?

9 A. I was in 2010.

10 Q. And so what years did you serve on town
11 council?

12 A. It was December of 2010 to December of 2012.

13 Q. Were you here when Dennis Rhoad testified?

14 A. I was.

15 Q. Okay. And did you hear his testimony
16 related to the 2005 -- the fifth amendment to the
17 2005 development agreement?

18 A. Yes, ma'am.

19 Q. And he was -- was he the attorney for the
20 Town of Kiawah at the time you served on town
21 council?

22 A. Yes, ma'am.

23 Q. And do you recall the events surrounding the
24 Town's adoption of the fifth amendment to the
25 development agreement?

1 A. Yes. I cannot give you the date, hour, and
2 whatever how things developed unless you have town
3 documents from emails or correspondence or
4 whatever. But in general I have a pretty good
5 idea, yes.

6 Q. I want to walk through the events that you
7 do recall. And I think up on the witness stand
8 there should be Intervenor's Exhibit No. 8, which I
9 believe are the minutes from the September 11th,
10 2012 town council meeting?

11 A. Yes, ma'am.

12 Q. Now, how and when did you first learn of the
13 proposed fifth amendment to the development
14 agreement?

15 A. I would say probably in June of 2012.

16 Q. Okay. And what was the context? How did
17 you first learn about it?

18 A. It was an issue that was going to have to
19 be -- well, I don't know exactly. At some point
20 the town attorney said that there is a request for
21 a fifth amendment to the development agreement.

22 Q. And who would have made that request?

23 A. The attorney made that request.

24 Q. Which attorney? Who requested the fifth
25 amendment?

1 A. Oh. It was Tren Walker I believe.

2 Q. All right. So I didn't want to interrupt
3 your flow too much, but you were talking about how
4 you first learned of his proposed fifth amendment.

5 A. Well, we were told that this was coming up
6 as an issue. We had on the agenda for the July
7 meeting, I think it was July 3rd, there was a
8 scheduled meeting to have an executive session
9 concerning that fifth amendment.

10 And I know before that -- so I must have
11 received prior to that the proposal that was given
12 to us by -- or given to Mr. Rhoad by Mr. Walker
13 because I was sent a note of concern, an email.

14 And then when we -- when it came to the
15 point in July to go into executive session, it was
16 moved and seconded to go into executive session.
17 Before it was voted on, I questioned whether this
18 matter needed to be discussed in executive session
19 as opposed to open session.

20 And then Councilwoman Wermuth then said that
21 in her belief the noticing on the agenda for the
22 executive session was not sufficient according to
23 state law for how you are supposed to notice it.

24 I believe Mayor Orban appealed that question
25 to Dennis Rhoad, and he said he felt it would be

1 best not to hold the executive session then and
2 renote it. So it was decided to move it to the
3 next month's meeting.

4 We did not have a meeting in -- that was
5 July. We did not have a meeting in August because
6 of the PGA activities. And so then it fell to
7 September, and it was on the agenda to be dealt
8 with then.

9 Q. Okay. And is that reflected in Intervenor's
10 Exhibit No. 8?

11 A. There should be a section regarding that
12 agenda item.

13 Q. Do you see that agenda item in the minutes?

14 A. On page 6, paragraph (h), fifth amendment to
15 the development agreement clarifying and affirming
16 the terms of the development agreement, yes.

17 Q. And what do the minutes reflect occurred?

18 A. The amendment as proposed was -- and it was
19 attached to all of the -- it was presented to
20 Mr. Rhoad from Mr. Walker.

21 And the interval between when I first
22 learned of it and September, I had several email
23 communications with Dennis Rhoad, and cc'd the
24 direct -- probably to the mayor, and then cc'd the
25 other council members the concerns I had with the

1 wording as it was presented to us.

2 And I never really heard back satisfactorily
3 from anybody to be addressed. And so in advance of
4 that, I prepared a sort of a narrative of my
5 concerns intending to have it submitted as part of
6 the minutes so that my concerns would be noticed
7 and part of the record.

8 As it happened when the issue came up,
9 Mr. Lipuma, who then was Mayor Pro Tem, and
10 currently is the mayor, opened discussion and said
11 that he had, I presume as a result of my emails of
12 my concerns, he stated that -- and it's pretty
13 accurately reflected here -- that he had some
14 concerns too, and felt that it ought to be changed.

15 Q. Felt that what ought to be changed?

16 A. What was proposed to be passed needed some
17 alteration. What was -- the original one that was
18 given to Mr. Rhoad from Mr. Walker and then came to
19 us, and he, Mr. Lipuma, also felt that it needed
20 changing before adoption.

21 Q. Okay. And is the fifth amendment as it was
22 presented to the town council, is that attached to
23 Exhibit No. 8, the September minutes from 2012?

24 A. There is one. I would have to -- is it
25 exactly? Let's see.

1 It has a lot of the wording, the original
2 wording, so I presume it is the one that was
3 presented to us in September.

4 Q. And was the original one that was presented
5 to you in September, was that -- did that become
6 part of the minutes, is that your understanding?

7 A. Yeah. It was actually in the -- before each
8 council, the Town publishes an agenda, and they
9 also publish on the website the supporting
10 materials and packages material, you know, what the
11 council was dealing with. And that was on the
12 website at the time.

13 Q. And so I understand you raised some concerns
14 in writing, are those also part of the minutes?

15 A. It appears my -- yes.

16 Q. Can you just explain what your concerns were
17 when this proposed fifth amendment was presented to
18 you as a town council member?

19 A. It's best if you read it and get a better
20 understanding. But basically they were -- I had
21 concerns that the amendment as originally given to
22 us proposed for development -- for adoption
23 included language that I didn't think would have
24 been appropriate, and possibly not correct, in that
25 it said that the property owner and the Town did

1 this or wanted this or whatever.

2 And it was my understanding from having --
3 from reading the development agreement that the
4 conveyance of the property was not under the
5 auspices of the Town. That the development
6 agreement set forth what the developer was to do.
7 And then the developer made conveyance, but not
8 with any input from the Town. And --

9 MR. LESEMAN: Your Honor, I just would
10 object to the extent that the witness may be making
11 some characterization that's contrary to the
12 development agreement.

13 And I can cross him on that, but I
14 think he was talking about the legal effect of
15 things, and the development agreement is already in
16 evidence as to what the Town's directions were on
17 the issue.

18 And again, just with relevance and the
19 witness's foundation again not having been involved
20 at the time.

21 THE COURT: I will sustain as to that.

22 BY MS. ARMSTRONG:

23 Q. So you expressed some concerns in writing
24 about the fifth amendment itself. What happened
25 next after that town council meeting?

1 A. As I say, Mr. Lipuma brought his concerns
2 and his suggestions for revision. But it was the
3 first I had seen of that, and actually he didn't
4 even -- there were no copies of it. He expressed
5 it at council.

6 And not having seen what he was asking for,
7 I was leery of accepting it without having time to
8 study it. And Councilwoman Wermuth similarly felt
9 she needed some time to see what he was talking
10 about before we undertook it.

11 So as it says, Mr. Bernaford -- there was a
12 motion and a second to accept it as originally
13 proposed. Mr. Lipuma expressed his concerns. I
14 expressed my concerns. And Mr. Bernaford
15 amended -- amended his motion to include
16 Mr. Lipuma's edits.

17 But because of my concerns, not having had
18 time to read what he was talking about, and
19 Ms. Wermuth similarly, that motion didn't pass.
20 And then that fell back to the original motion of
21 the original, and that didn't pass. That was
22 unanimously rejected.

23 And then it moved to the next month.

24 Q. Okay. And then what happened over the
25 course of the next month leading up to the next

1 town council?

2 A. There were emails back and forth of
3 different iterations of what people wanted for
4 changes.

5 Q. Okay. And what was the nature of the
6 changes that were made?

7 I think we have got a copy of the -- you've
8 got a copy of the proposed fifth amendment to the
9 development agreement in front of you right now.

10 I think we have also got the executed fifth
11 amendment in evidence already. It should be up on
12 the witness stand, No. 9.

13 A. That's going to be difficult to do without a
14 mockup of before and after the strikeouts and the
15 additions and whatever.

16 Q. Can you describe sort of what the nature of
17 the changes were to the fifth amendment --

18 A. Let me put it this way --

19 Q. -- that town council passed?

20 A. -- and it's in the minutes. Mr. Lipuma
21 stated that the fifth amendment to the development
22 agreement is a reaffirmation of the original intent
23 of the 1994 development agreement where the Town
24 negotiated with Kiawah Resorts for conveyance of
25 the herein property shown in Exhibit 16.2, portions

1 of the property mistakenly deeded from KRA to
2 Kiawah Island Community Association. I expressed
3 concerns.

4 Mr. Lipuma stated the reaffirming any and
5 all language that states or infers that the Town
6 had prior knowledge of KRA's intent or mistakes
7 when deeded the property should be deleted. That
8 basically encompasses the changes.

9 Q. Okay. And then this issue, I understand,
10 came back up in the very next month's meeting?

11 A. It was brought again.

12 Q. October 2nd?

13 A. October, was it the 2nd? First Tuesday in
14 October?

15 MS. ARMSTRONG: Your Honor, a copy of
16 exhibit -- Intervenors' Exhibit No. 21.

17 BY MS. ARMSTRONG:

18 Q. Does that appear to be an accurate copy of
19 the town council minutes from October 2nd, 2012?

20 A. It does.

21 Q. Okay. And what do the minutes reflect
22 occurred under 7B? I think it's 7B at the bottom.

23 A. Yeah, 7B, fifth amendment to the development
24 agreement clarifying and affirming the intent to
25 the development agreement.

1 The posts back and forth edits were brought
2 back to council for adoption or for action. It was
3 moved and seconded to accept it.

4 There were a couple of items that still were
5 in there, but I didn't know they were mistakenly,
6 one or two things, so I suggested that those be
7 removed for conciseness and completeness.

8 My motions to make those edits were
9 seconded, and it was passed unanimously.

10 Q. Okay. When you say the word mistakenly, how
11 was that word used that concerned you?

12 A. I would have to --

13 Q. Would the word mistakenly, what does it
14 refer to that concerned you?

15 A. The Town being involved in the error.

16 Q. And if you look at Intervenor's Exhibit No.
17 9, the fifth amendment. Can you tell me if that --
18 does that appear to be the fifth amendment that was
19 passed by town council?

20 A. Yes, ma'am.

21 Q. Was the Town's 2012 action in passing the
22 fifth amendment consistent with the Town's reading
23 and understanding of the 1994 development
24 agreement?

25 A. I believe so.

1 Q. And does the executed fifth amendment
2 effectuate the 2012 town council's understanding of
3 the 1994 agreement?

4 A. I believe so since that was the purpose of
5 doing this.

6 Q. And to your knowledge has the Town of Kiawah
7 Island ever taken any official action or position
8 expressing its intention with regard to the
9 conveyance of the beachfront strip, other than the
10 1994 development agreement and this fifth amendment
11 to the 2005 development agreement?

12 A. Can you repeat that?

13 Q. To your knowledge has the Town of Kiawah
14 Island ever taken any official action or position
15 expressing its intention with regard to the
16 beachfront strip other than the 1994 development
17 agreement or this fifth amendment?

18 A. Not to my knowledge.

19 Q. And one last follow-up question, Mr.
20 VanDerwerker. Mr. Rhoad was present when these
21 issues were being discussed at town council?

22 A. He was not present in September.

23 Q. Okay.

24 A. His wife and law partner was present because
25 he was not available. But he was present in

1 October.

2 Q. Would he have had a copy of your letter
3 attached to this in September?

4 A. Yes. I sent him one. In fact, before the
5 September meeting, because he informed us that his
6 wife would be acting in his stead, I sent him and
7 his wife, Mrs. Rhoad, his partner, a reiteration of
8 my concerns so that she would be aware of them when
9 it came up in September.

10 Q. And did either Mr. Rhoad or his wife express
11 any disagreement with your concerns or your
12 conclusions about the intent?

13 A. No. No. I did not get any feedback.

14 MS. ARMSTRONG: Thank you. I don't
15 have any other questions for this witness.

16 MR. LESEMANN: Thank you, Your Honor, I
17 will be quick.

18 CROSS-EXAMINATION

19 BY MR. LESEMANN:

20 Q. Dr. VanDerwerker, was there a portion of
21 your letter that Ms. Armstrong was discussing where
22 you indicated that the provided illustration does
23 indeed appear to support the argument that a
24 portion of the area deeded to KICA was not required
25 by the 1994 development agreement to be part of the

1 dedication area?

2 A. Those are my words.

3 Q. Okay. And so meaning that when you say a
4 portion of the area deeded to KICA was not required
5 by the 1994 development agreement, would that refer
6 to the 4.62 acres, would that be the portion that
7 was outside of the provided illustration?

8 A. That seems to be the subject of discussion.

9 Q. Okay. And the provided illustration you are
10 referring to, again, is Exhibit 16.2, that was the
11 provided illustration, correct?

12 A. Yes, sir.

13 Q. Okay. And so is the Court to understand
14 your statement that dedication of this 4.62 acres
15 in this area indeed is outside of the area that was
16 required to be conveyed as part of the beachfront
17 strip? Is that a fair assessment of your
18 statement?

19 A. No, sir.

20 Q. Okay. Let's go back and look at it. What
21 portion outside of the beachfront strip were you
22 referring to?

23 A. The 4.62.

24 Q. Oh, okay. So then maybe I asked the wrong
25 question.

1 A. I think you did.

2 Q. Okay. Thank you for helping me out. So
3 just to clarify then, when you were speaking of
4 property that appeared to be included in the
5 conveyance that was outside of what was required in
6 Exhibit 16.2, you were speaking about the 4.62
7 acres?

8 A. Yes.

9 Q. Okay. And you were present in the courtroom
10 earlier when we talked about the Beachwalker Park
11 lease, correct?

12 A. Yes.

13 Q. All right. And is it your understanding now
14 that the access that you've talked about that you
15 enjoy -- you may have understood this already, but
16 did you understand that the Beachwalker Park lease
17 obligates the developer to provide the park with
18 beachfront access?

19 A. I would have to read it closely. What does
20 it say?

21 Q. Those members of the public permitted access
22 to the leased premises, which is a county park.

23 A. Right.

24 Q. Shall also be permitted access to the
25 beachfront area along walkways provided, and also

1 to the aforesaid bathhouses, picnic tables, walks
2 and bicycle paths within the said approved area.

3 A. That's what it says.

4 Q. Okay. And do you understand when you are
5 using that access way, that's the Beachwalker Park
6 access, correct?

7 A. That's -- I consider it to be Beachwalker
8 Park access.

9 Q. Do you know whether that's a KICA walkway,
10 or that's a county PRC walkway?

11 A. I believe it's a PRC walkway.

12 Q. All right. When Ms. McAdory was in court
13 testifying, you were here, correct?

14 A. Yes, sir.

15 Q. All right. And you heard her testify that
16 she was unable to find any documents indicating
17 that KICA has exercised any acts or maintenance or
18 ownership or control over the 4.62 acres. Were you
19 here when she said that?

20 A. That's right.

21 Q. Okay. Do you have any documents for us that
22 she may not have had from KICA that would shed any
23 further light on that subject?

24 A. No, sir.

25 Q. Again, you mentioned you purchased in 1994,

1 but you were still practicing medicine in Greenwood
2 at that time?

3 A. Yes, sir.

4 Q. And so just to establish for the record, you
5 didn't have any involvement in the 1994 agreement,
6 the 1994 agreement for conveyance, or the 1995 quit
7 claim deed?

8 A. I did not.

9 Q. On behalf of any party?

10 A. No.

11 Q. Okay. So you don't have any knowledge
12 regarding the intent, the actual intent at the time
13 of any of the parties to any of these instruments,
14 do you?

15 A. My knowledge is derived from the document
16 itself.

17 Q. Right. From reading it?

18 A. What I know is what I read.

19 Q. Exactly. So you have no indication of any
20 intent other than what would be stated in the
21 document itself?

22 A. That's correct.

23 Q. Okay. So do you have anything to add to the
24 Court as to what the intent -- you didn't have any
25 conversations, you had no involvement, you had no

1 evidence you can present to this Court as to what
2 the intent was or what the intent wasn't with
3 regard to the beachfront strip other than what you
4 would say by reading the document, which the Court
5 can do?

6 A. I read the document, and looked at the
7 exhibit, and none of it was really clear to me,
8 but.

9 Q. But you did indicate that the 4.62 acres are
10 outside of the area that is hatched indicating what
11 was the intended beachfront strip?

12 A. No. That's not what I said.

13 Q. Okay. I'm sorry, we must run into the same
14 issue twice.

15 A. Yeah. The issue is the copy of the
16 document, Exhibit 16.2.

17 Q. Right.

18 A. I had it at the time discussions were
19 undergoing.

20 Q. Right.

21 A. And at the time you deposed me it was much
22 smaller, and I think much less clear. And then
23 after having sat in this courtroom and hearing
24 testimony where the Exhibit 16.2 was basically
25 unmarked, or whatever, and then Mr. Permar stated

1 he came and cross-hatched the document, so.

2 Q. Right.

3 A. You know I think that's evidence of
4 uncertainty as to whether everybody was on the same
5 page or not.

6 Q. But you don't have any involvement, any
7 standing, you weren't here in 1994?

8 A. No, I wasn't. I just know what I read and
9 what I heard from his testimony.

10 Q. Okay. And you, again, indicated that you
11 said that the illustration does appear to support
12 the argument that a portion of the area deeded to
13 KICA was not required by the 1994 development
14 agreement to be part of the dedication area?

15 A. If you accept it shown in that
16 cross-hatching, and that's where we had the issue
17 in the deposition and where I had the issue in the
18 discussions. I don't think it's clear in that
19 small diagram.

20 Q. From your review of the document?

21 A. From my review. Other people have different
22 opinions.

23 Q. Right. Including people like Pat McKinney
24 who was there in 1994, right?

25 A. If that's correct.

1 Q. When you weren't?

2 A. I was not there.

3 Q. Right. Mr. Long, Mr. McKinney, Mr. Permar,
4 Mr. Rhoad, Ms. Nimmons.

5 A. Correct.

6 Q. All those folks were there at the time,
7 correct?

8 A. Correct.

9 Q. And Mr. Clarkson too.

10 And so do you have anything -- you can't
11 basically say anything regarding what those folks
12 thought, what they did, or anything other than when
13 you look at 16.2 maybe you say that you can't tell
14 that the hatched area ends at the eastern boundary.

15 As I show it to you now can you tell the
16 hatched area --

17 A. As you show it to me now is very different
18 from the way it was presented to me. I would
19 submit this is a totally different exhibit.

20 The image may be the same, but at that
21 magnification when you are talking about an area
22 that's probably less than one percent of an
23 8-and-a-half-by-11, when you blow it up a thousand
24 times --

25 Q. Okay. It's clear now? When it's bigger,

1 it's clearer? It's clearer now, right?

2 A. I see what I see.

3 Q. Okay. And you see the hatched area ending
4 at the eastern boundary of parcel 13, don't you?

5 A. But that's not what my decisions were made
6 on.

7 Q. But you mean your decision in scrivening the
8 fifth amendment to the 2012?

9 A. No. In my comments and assessments when the
10 development agreement, the fifth amendment to the
11 development agreement was presented to town
12 council.

13 Q. Right. So everything you are speaking of is
14 just relevant to your deliberations over that fifth
15 amendment?

16 A. Sure.

17 Q. And not relevant to what the parties thought
18 and did actually in 1994 when you weren't here?

19 A. I'm not sure. I don't know about whether
20 it's relevant or not.

21 Q. Okay, fair enough.

22 A. That's a legal decision I think.

23 Q. Fair enough.

24 MR. LESEMAN: No further questions.

25 Thank you, Your Honor.

1 MS. JETT: Your Honor, I don't have any
2 questions.

3 THE COURT: Ms. Armstrong.

4 MS. ARMSTRONG: I don't have any
5 redirect, Your Honor.

6 THE COURT: Very good. Thank you, sir.
7 You may step down.

8 MS. ARMSTRONG: Your Honor, the
9 intervenor doesn't quite rest, though. We'd like
10 to move the 30(b)(6) depositions of KRA into
11 evidence.

12 MR. LESEMANN: No, Your Honor. Those
13 witnesses all gave testimony. And we only
14 supplement the deposition testimony when the
15 witnesses were unavailable.

16 MS. ARMSTRONG: Not for 30(b)(6)
17 depositions, Your Honor, they can be used for any
18 purpose at all.

19 THE COURT: What's the purpose?

20 MS. ARMSTRONG: They're contradictory
21 evidence. I mean, I think these witnesses --

22 MR. LESEMANN: That's why you impeach a
23 witness with deposition testimony. The trial
24 transcript is not just summarily inflated by all
25 the prior depositions when those same witnesses

1 gave their testimony before the Court in court and
2 were subject to cross-examination.

3 THE COURT: Who was the witness that
4 was deposed for 30(b)(6)?

5 MR. LESEMANN: Mr. Clarkson. All of
6 the folks that were here, Your Honor. Mr. Long,
7 Mr. Permar, Mr. Clarkson and Ms. Nimmons.

8 MS. ARMSTRONG: Your Honor, if you give
9 me just a minute to find the rule, I've used it
10 before. I didn't put my finger on it.

11 MR. LESEMANN: I think things are
12 different before the Administrative Law Court in
13 terms of the way that they receive evidence and
14 things like that. And sometimes witnesses are just
15 waived so that people submit depositions instead.

16 But the use of depositions when the
17 witness is available and has testified would be
18 inappropriate.

19 THE COURT: Is it being offered for
20 impeachment purpose or for substantive testimony?

21 MS. ARMSTRONG: Your Honor, Rule 32(A),
22 the deposition of a party or anyone who at the time
23 of taking the deposition was an officer, director
24 or managing agent, or person designated under Rule
25 30(b)(6) or 31(A), to testify on behalf of a public

1 or private corporation, partnership, or association
2 or governmental agency which is a party, may be
3 used by an adverse party for any purpose.

4 MR. LESEMANN: May be used, but that
5 doesn't mean may be used for impeachment purposes,
6 but not may be used as an evidentiary exhibit.

7 Your Honor, these are discovery
8 depositions, and the witnesses gave their sworn
9 testimony here in Court.

10 So Ms. Armstrong did use, on occasion,
11 the testimony when she felt like it was
12 inconsistent. And that's the typical purpose. We
13 don't at the end of trial admit 8 to 10 deposition
14 transcripts.

15 And again being that they're used,
16 yeah, is when the witness is unavailable, the
17 witness is dead, et cetera. And the witnesses were
18 not unavailable, they were here.

19 MS. ARMSTRONG: Well, it says use for
20 any purpose.

21 MR. LESEMANN: It says use, it doesn't
22 say admitted into evidence. You can use it.

23 MS. ARMSTRONG: Well, the purpose is
24 for it to be admitted, for it to be taken into
25 evidence by this Court.

1 THE COURT: 30(b)(6) depositions?

2 MS. ARMSTRONG: Correct. 30 -- these
3 are 30(b)(6) depositions. But I mean under Rule
4 32(a)(2), it can be used for any purpose. And the
5 purpose here is for it to be considered as evidence
6 by this Court.

7 MR. LESEMANN: Your Honor, again that's
8 not admissibility, that's use.

9 THE COURT: One second. Have you -- is
10 this the first you've heard of this?

11 MR. LESEMANN: Yes, absolutely it's the
12 first. And I have a friend, and I know that
13 Ms. Armstrong does a lot in the ALJ Court, and I
14 have a friend, Will Thomas, a lifelong friend, who
15 does a lot as well.

16 They do all these things with
17 deposition designations, and it's a lot and it's
18 just a different situation.

19 THE COURT: Okay.

20 MR. LESEMANN: And this is, you know,
21 not something that is done in, you know, in civil
22 Court that I have ever seen that you just ad hoc,
23 just throw all the deposition transcripts into the
24 back of the record when these witnesses testified.

25 MS. ARMSTRONG: Well, in the ALC there

1 is no specific rule regarding these. They refer to
2 the Rules of Civil Procedure and we do admit them
3 under Rule 32(a)(2). I would say that the reason
4 that these are being offered is because Mr. Long
5 didn't have a whole lot of knowledge about a lot of
6 things when I deposed him last week.

7 Mr. Clarkson all of the sudden had a
8 lot more knowledge about a lot more things today
9 when we were taking his deposition. Specifically
10 about where the boundary terminated, and just
11 additional new knowledge that's inconsistent with
12 his deposition that I just took last week.

13 So certainly Mr. Clarkson and Mr. Long,
14 I think their testimony on the whole changed pretty
15 drastically in just a week's time. So I'd like the
16 Court to be aware of that.

17 THE COURT: Well, that's impeachment
18 material. So it would have been proper for
19 impeachment when they were testifying. I don't
20 know that it's substantive testimony in the form of
21 the deposition.

22 You're offering 30(b)(6) deposition of
23 the corporation KRA, correct?

24 MS. ARMSTRONG: Correct.

25 THE COURT: That's who they testified

1 for?

2 MS. ARMSTRONG: Yes. They were listed
3 as --

4 THE COURT: And in particular
5 Mr. Clarkson was here and testified under oath and
6 was subject to cross-examination, correct?

7 MS. ARMSTRONG: He was.

8 THE COURT: All right. Well, I'm going
9 to exclude it.

10 The other basis is if you are going to
11 submit aspects of the deposition, you are supposed
12 to provide that ahead of time, and the parties are
13 supposed to get a chance to review it ahead of time
14 and that's not been done, so.

15 I'm going to find that it's not
16 necessary for the Court's determination, one.
17 Number two, sounds like it's being offered for
18 impeachment purposes which would be proper on
19 cross-examination but not as subject to the
20 testimony. On that basis, I'm going to exclude it,
21 okay.

22 Subject to that, and your objection to
23 that, any other presentation by the intervenors?

24 MS. ARMSTRONG: Nothing, Your Honor.

25 THE COURT: All right. Anything from

1 the plaintiffs?

2 MR. LESEMAN: Nothing in rebuttal,
3 Your Honor.

4 THE COURT: Thank you. All right. Let
5 me tell you what I'm going to do, and what my
6 practice is, and give you all a little heads up and
7 I'll get y'all out of here by 6 o'clock, that's my
8 promise.

9 We won't be making closing arguments.
10 We did opening statements.

11 For the parties, it is the opinion of
12 this Court that y'all have got competent counsel,
13 and that they have done an excellent job. This is
14 a lot of information to get together in what
15 appears to me to be a relatively short period of
16 time.

17 So I want to thank you each and every
18 one of y'all for working hard to get to this point.
19 I know some worked harder than others.

20 But anyway, here we are. And it's of
21 great benefit and great interest to everybody, and
22 I will assure you I will give you each the
23 determination that its due.

24 It is my practice, unless I'm
25 absolutely clear on the law and the facts at the

1 time of trial, I do not rule at the time of trial.
2 I will not rule today. It is my practice to give
3 the parties 30 days in which to provide me with
4 proposed orders.

5 So my question to you first off,
6 counsel, is with the holiday coming up, does that
7 give you all sufficient time? Today is the 11th of
8 December, so we are talking about around the 10th
9 of January.

10 MS. ARMSTRONG: Your Honor, we would be
11 requesting a copy of the transcript for use in
12 preparing a proposed order. If we could have 30
13 days from the date of receipt of the transcript, if
14 that is possible, that gives us -- I don't want to
15 put pressure on the court reporter, I just want 30
16 days after the transcript.

17 MR. LESEMAN: We are good with
18 Ms. Armstrong's suggestion.

19 THE COURT: That will be fine. There
20 are lots of exhibits here. That's one of the
21 things we are going to cover before we get out of
22 here today.

23 So I understand that. I think that's
24 reasonable, so I just need to know when that's done
25 and you all can ship that out. I don't necessarily

1 need one, but you all want to request one, that
2 makes sense to me.

3 So that's my first order of business.
4 The second order of business is I generally then
5 will review those orders. I ask that you submit
6 them to me in Word format by email to my email
7 address, and I will manipulate them.

8 My email address is
9 master@charlestoncounty.org. You're best to send a
10 copy to my law clerk, Ms. Craig, and that email
11 is --

12 MS. CRAIG:
13 scraig@charlestgonscounty.org.

14 MR. LESEMAN: Okay. Not master
15 junior?

16 MS. JETT: Your Honor, do you want
17 everybody to copy opposing counsel on the proposed
18 orders?

19 THE COURT: Absolutely. So you all
20 agree on what date y'all want to commence, and then
21 30 days from that should be sufficient time. If
22 you need more time you just need to let me know.
23 But I will be looking forward to them.

24 And then it is my practice then to
25 review those. I seldom sign what I'm given. I

1 usually manipulate it somehow in some way, shape,
2 or form, that is just my modus operandi, I just
3 want you all to know.

4 Here is what I want you all to address
5 in your orders. I have been making notes. These
6 are what I see the issues for the Court are. And
7 you've got your causes of action, and everybody has
8 got their position.

9 Here's what I see the issues for the
10 Court, and essentially there are three. One, is
11 the deed ambiguous or not. That determines whether
12 or not this is an action in law or an action in
13 equity. It's presented to the Court as an action
14 in equity. I throw it out to you, that first
15 issue. Is the deed ambiguous or is it not.

16 The second issue really has nothing to
17 do with equity, can the Court reform the deed.
18 That's what's being asked of the Court. And what
19 is significant there is when and how the Court can
20 use parole evidence.

21 We have had an abundance of evidence
22 presented in the last two days of trial which is
23 parole evidence. I will tell you that the relevant
24 timeframe for this Court's inquiry is the 1994 to
25 1995 timeframe, whenever the deed was drafted. I

1 think that was December 29, 1995, okay?

2 To me that's the relevant timeframe for
3 the Court to look into this. Now, your case is
4 interestingly complicated by the fact that it was,
5 as Mr. Rhoad testified to, involved a development
6 agreement. And I think he said it was probably the
7 first development agreement in the state, the first
8 or second, he wasn't sure, but the case is
9 complicated by that fact.

10 I have not looked up that issue. I
11 will leave that to y'all. I will tell you that I
12 have looked up the issue of mistake, which is what
13 I see as your third issue. And there are a
14 plethora of cases on mistake. And for the Court's
15 determination what type of mistake is going to make
16 a difference in the determination.

17 Is it unilateral or is it mutual? If
18 it's mutual, who's it with? Who's the mutual
19 mistake with? That's going to make a difference as
20 well.

21 And we have talked about this before,
22 and that has to do with the burden of proof which
23 is by clear and convincing evidence if it's a
24 mutual mistake.

25 Let me cite you to two cases in

1 particular. I have looked at a lot more, but let
2 me cite you to two, and they run the gambit of
3 about a hundred years of law.

4 And the most recent one which touches
5 on this is from May of this year. It's from the
6 Court of Appeals and it's called Penza, P-E-N-Z-A,
7 versus Pendleton Station, LLC.

8 And that's from the Court of Appeals.
9 The cite on that is 404 S.C. 198; S.E.2d cite is
10 743, 850. Again this is Court of Appeals 1983,
11 excuse me, 2013.

12 The oldest case I found on point on the
13 issue of mistake is one called Forrester,
14 F-O-double-R-E-S-T-E-R versus Moon, M-double-O-N.
15 The case is from the Supreme Court back in 1915.
16 And its cite is 100 S.C. 157. 84 S.E. First 532.
17 Those are particularly on the issue of ambiguity
18 and mistake.

19 So you may put anything in the order
20 that you think will convince me, but those are the
21 issues that I'm looking to get answered. That's
22 what I need answers to in order for me to provide
23 you with what I think is the proper determination
24 of the case.

25 I want to thank you all for your

1 presentation. I want to thank y'all for your all's
2 civil behavior, that makes a big difference. I am
3 sorry some people are sick. And I will give you --
4 again I will give the answer that I think is --
5 what I have determined to be the right one when I
6 take a look at it.

7 I will look at your orders. If there
8 is any additional information or legal research or
9 whatever that you all need to provide, certainly
10 provide it, in the form of a memo, you can.

11 But what I like is a proposed order with
12 findings of fact and conclusions of law and some
13 basis upon which to make that ruling. That's how I
14 make my decisions.

15 And once I make my decision, then you
16 all go do what you do, okay? So with that I want
17 to thank you all. It's a little bit before 6:00.
18 We do need to discuss the exhibits and who's going
19 to keep those exhibits. We have been back and
20 forth about that. We have got a lot of exhibits
21 here, and I want to make sure everybody has got
22 what they need.

23 Have you all fully exchanged exhibits
24 and/or are you all comfortable keeping the
25 originals in your possession as opposed to the

1 court reporter? The court reporter -- my regular
2 court reporter is out for a period of 90 days, Anne
3 is kind enough to fill in for me.

4 I'm happy to keep them. I just want to make
5 sure we know where they are, so.

6 MR. LESEMANN: Your Honor, for the
7 plaintiffs, we would ask the Court keep the
8 exhibits and we can do what we can to make that
9 more convenient, we can give boxes and things like
10 that. And then we can work on, if we needed to
11 come down to make a copy of something, that we
12 could.

13 THE COURT: Very good. We will make
14 room for them. We will find a place for them. I
15 want to make sure we finish out of here, we know
16 what's in evidence and everybody agrees we've got
17 what we've got, so we don't have that problem later
18 on.

19 MR. LESEMANN: Yes, sir.

20 THE COURT: All right. Thank you very
21 much for coming. I will probably see you all
22 again, at least in writing. Thank you.

23 (The proceedings in this matter before
24 the Court concluded at 5:56 PM.)
25

1 CERTIFICATE OF REPORTER

2 STATE OF SOUTH CAROLINA
3 COUNTY OF CHARLESTON

4 I, Anne Bouley Meyer, Registered
5 Professional Reporter and Notary Public for the
6 State of South Carolina at Large, do hereby certify
7 that the said hearing was taken at the time and
8 location therein stated; that the testimony of the
9 witnesses and all objections made at the time of
10 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 examination.

11 I further certify that I am neither
12 related to nor counsel for any party to the cause
pending or interested in the events thereof.

13 Witness my hand, I have hereunto
14 affixed my official seal on the 4th day of January,
2014 at Charleston County, South Carolina.

15
16 Anne Bouley Meyer
17 NCRA
18 REGISTERED PROFESSIONAL REPORTER
My Commission expires
February 5, 2023
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