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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S.C. SUPREME COURT

Ralph King Anderson, III, Administrative Law Judge

Appellate Case No. 2016-000707

Kiawah Development Partners, II, Respondent,

v.

South Carolina Department of Health and Environmental Control,
Appellant,

and

South Carolina Coastal Conservation League, Appellant,

v.

South Carolina Department of Health and Environmental Control
and Kiawah Development Partners, II, of whom South Carolina
Department of Health and Environmental Control is, Appellant, and
Kiawah Development Partners, II, is Respondent.

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 09-ALJ-07-0029-CC

Kiawah Development Partners, II,
Petitioner,

v.

South Carolina Department of
Health and Environmental Control,
Respondent.

South Carolina Coastal Conservation
League,

Petitioner,

v.

South Carolina Department of
Health and Environmental Control,
and Kiawah Development Partners,
II,

Respondents.

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HEARING

Thursday, June 25, 2015
10:02 a.m. - 12:33 p.m.

The hearing before the Honorable Ralph King
Anderson, III was taken at the Edgar A. Brown
Building, 1205 Pendleton Street, Suite 224, Columbia,
South Carolina, on the 25th day of June, 2015, before
Andrea R. Taylor, Court Reporter and Notary Public
and for the State of South Carolina.



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EXHIBITS

(There were no exhibits marked during this
 hearing.)



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1 **THE COURT:** All right. This is a hearing in the
2 matter of -- I'm going to just -- we'll say
3 Kiawah Development Partners II, Petitioners --
4 or Petitioner, South Carolina Department of
5 Health and Environmental Control, and then also
6 South Carolina Coastal Conservation League in
7 the other heading. The docket number is 09-
8 ALJ-07-0029-CC. I think y'all know what the
9 hearing is about. So who goes first, I assume
10 you?

11 **MR. WALKER:** Your Honor, I would think that
12 Petitioner, KDP would go first --

13 **THE COURT:** Yeah.

14 **MR. WALKER:** -- for a couple of reasons. But
15 primarily, because we have the burden of proof
16 --

17 **THE COURT:** Yeah.

18 **MR. WALKER:** -- and the Supreme Court has remanded
19 and said that you may need to make certain
20 decisions on particular issues, and on a couple
21 of them the Court said that there were findings
22 that did not show we carried the burden.

23 **THE COURT:** Uh-huh.

24 **MR. WALKER:** What we're going to do today, Your
25 Honor, is to present to you what we believe to



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1 be a substantial basis in the record to sustain
2 your decision, the result of your decision in
3 light of the Supreme Court ruling. When we
4 started this remand process a couple months
5 ago, you asked the parties to brief what they
6 thought were the issues on remand. And we're
7 going to stick to what we believe to be the
8 three issues that the Court pointed out to this
9 Court. Notably, the Supreme Court did not, the
10 majority, because it was a 3-2 decision, but
11 the majority of the Supreme Court did not get
12 into a number of your findings or your
13 conclusions. The Supreme Court didn't tamper
14 with your legal analysis or your findings
15 dealing with the application of all the
16 considerations in 30-11, except 30-11© which is
17 the cumulative impacts, and they didn't tamper
18 with the policies except with respect to 48-39-
19 30(D), which, of course, is folded into 30-11
20 and 48-39-150. They left those there. So we
21 consider, and I think the Supreme Court
22 considers, that those are intact. There are
23 three issues. One is the Supreme Court stated
24 that this Court did not make any findings of
25 public benefit; that the only findings were

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1 economic benefit to the applicant, KDP. And
2 that was not only not enough, and even though
3 they may be a member of the public, there has
4 to be public benefit to the public at large.
5 That was issue number one. Issue number two
6 was the application of 30-11(C)(1), which is
7 the cumulative impacts and whether the
8 cumulative impacts and the character of the
9 area included the upland, and the Court said
10 that it was legal error to conclude that it
11 didn't include the upland, and then it said
12 that your findings about minimal effect or no
13 effect, they said no effect on the upland were
14 incorrect and that the summary findings in your
15 conclusions were not sustained. And we're
16 going to address that. And the third issue
17 deals with feasible alternatives. The Court
18 stated that the order was incorrect because the
19 Court, Supreme Court, read your order, which we
20 didn't, to have shifted the burden to the
21 Conservation League and DHEC to show no
22 feasible alternatives. And they also said that
23 it was incorrect because you only considered
24 alternatives that stabilized the shoreline and
25 not a no-action alternative. What I've done is

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1 go through the record, and to facilitate the
2 review for everybody, I compiled a notebook of
3 excerpts from the transcript, as well as select
4 exhibits where I've highlighted what I'm going
5 to refer to to sustain your earlier findings
6 and conclusions when the correct legal standard
7 as dictated by the Supreme Court is applied.
8 So if I may, could I approach to provide
9 everybody a notebook?

10 **THE COURT:** Yes.

11 **MR. WALKER:** To keep things in a parallel manner,
12 Your Honor, I'm going to address the issues
13 just as the Supreme Court did, the first one
14 being public benefit. We submit, Your Honor,
15 that there was substantial evidence of public
16 benefit before you, and that in the order that
17 you prepare in response to the remand, you can
18 refer to and amplify upon this public benefit.
19 The most obvious public benefit, and it's one
20 we spent a lot of time talking about in the
21 trial, was the benefit to Charleston County
22 Park and Recreation Commission. The proof is
23 undisputed that the bank along the park is
24 eroding, that they've lost fences, that the
25 parking lot is jeopardized. Also, it's



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1 undisputed, Tom O'Rourke came in and testified
2 that the park supported the application, the
3 park had made an application a year or two
4 before to put in a bulkhead alone for 270 feet.
5 At the instigation and request of KDP, PRC
6 removed that application. I think it was
7 approved, but they basically withdrew it so
8 that we could have a holistic solution. That
9 solution included coming in with a revetment
10 bulkhead for a longer distance starting above
11 upriver from where they started and bringing it
12 down well beyond where the park was. We have
13 provided in the material, select materials I've
14 given you on the public benefit, the testimony
15 about the erosion at the park, the pictures
16 showing the fence and other improvements
17 falling into the river, and the testimony where
18 the park has endorsed the application. We've
19 also put in proof that the park is used by
20 50,000 people a year, that it's considered to
21 be one of the ten most popular parks by Dr.
22 Beach, who designated this area as one of the
23 ten best beach parks in the country and without
24 parking you don't really have a beach park.

25 **THE COURT:** All right. Can I stop you here?



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1 MR. WALKER: Yes.

2 THE COURT: Is it going to mess you up?

3 MR. WALKER: No.

4 THE COURT: Okay. So when we get to the -- talking
5 about the bulk -- are we talking about a
6 bulkhead and revetment at the park or a
7 revetment?

8 MR. WALKER: Bulkhead and revetment.

9 THE COURT: Okay. So the bulkhead is one thing.
10 The revetment, when the Supreme Court talked
11 about the pristine beaches, would that
12 revetment interfere with the enjoyment of the
13 public on the beaches at that area or whatever
14 -- it's not a sea -- it's a sandy shore along
15 the river, I guess.

16 MR. WALKER: Right. The sandy shoreline.

17 THE COURT: Yeah.

18 MR. WALKER: We maintain that they could still enjoy
19 it. The proof from other folks was that it
20 wouldn't be the same quality of use. I think
21 Your Honor found that it would impair the
22 quality of that use, but they would still have
23 access. The Court found that it would be a
24 substantial impairment of their use. And that
25 was the one factual finding where they actually



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1 reversed the Court. So I think the Court has
2 found that there's a substantial impairment of
3 their access, or that the access is impaired.
4 Basically what they said is substantial doesn't
5 matter. If there's impairment of access, then
6 you have to go to feasible alternatives. And
7 here it was clear that there was impairment of
8 access.

9 **THE COURT:** All right. So in analyzing this, we
10 need to consider bulkhead A and revetment B,
11 correct?

12 **MR. WALKER:** We would submit that it should be
13 considered as bulkhead and revetment because,
14 when we get to the efficiency of the structure,
15 the revetment is extremely important to
16 preventing erosion. A revetment at the toe of
17 the bulkhead helps eliminate, and, at a
18 minimum, reduces the erosion at the toe of the
19 bulkhead.

20 **THE COURT:** I remember that.

21 **MR. WALKER:** And that was a critical --

22 **THE COURT:** I remember that.

23 **MR. WALKER:** -- engineering feature and something we
24 put in testimony about when we get to feasible
25 alternatives that the bulkhead design is just



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1 a bulkhead, then the water is going to wash at
2 the bottom. And that's why when we get to
3 feasible alternatives things such as just
4 putting a rip-rap are not as effective and are
5 going to have a chronic problem or just using
6 geotubes.

7 **THE COURT:** And so refresh my memory on how far the
8 revetment would come out.

9 **MR. WALKER:** The revetment, as designed, would come
10 out 40 feet for the first 1,700 feet of it,
11 except near Beachwalker Park where portions of
12 Beachwalker Park, where it was designed, have
13 marsh in front of it and some of that marsh is
14 actually accomplishing what a revetment would
15 do. And I've got an exhibit that is -- it's
16 Exhibit 1 on public benefit. And if I might,
17 it's tab one and it was our Exhibit 1, and it
18 shows -- this is the length of the proposed
19 revetment --

20 **THE COURT:** Can you put it up on the ELMO, if you
21 don't mind?

22 **MR. WALKER:** Okay.

23 **THE COURT:** It's right over here.

24 **MR. WALKER:** Okay.

25 **THE COURT:** Just sit it down on there.



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1 MR. WALKER: And I hit power, it's doing a blink
2 thing. And then do I hit light?

3 THE COURT: No, it should be already working now.
4 Maybe it's two high. Do you have the whole
5 number up there?

6 MR. WALKER: Should I take the page out?

7 THE COURT: Yeah, let's just see if it will let you
8 do that. If not, then we've got a problem.
9 Oh, well, so much for that thought.

10 MR. WALKER: And the screen is supposed to come on?
11 Do I need to turn on the screen too?

12 THE COURT: No. Everything should be working
13 properly. Go ahead.

14 MR. WALKER: All right. So in response to your
15 question about the length of the revetment, I
16 think we hit the last 900 feet. It would only
17 be eight feet long, but for the first about
18 1,800 feet, it would be 40 feet long except
19 where there's marsh, and, as this diagram
20 shows, probably for the last 300 feet or so
21 there is marsh area. And that's where Your
22 Honor modified your order at the end and said
23 that in this area where the marsh is, that if
24 the marsh is providing adequate protection,
25 there wouldn't be any revetment.



1 THE COURT: All right.

2 MR. WALKER: To your larger question, Your Honor,
3 the particular regulation 30-120 sub (d) that
4 refers to public access being affected says
5 that if public access is being affected, there
6 can still be an erosion control structure, a
7 bulkhead or revetment, if there are no feasible
8 alternatives. So the way we see that, and I
9 think the way the Supreme Court saw it, is the
10 way the regulation is written, that if public
11 access is impaired, the project may still
12 proceed if there are no feasible alternatives.
13 Granted you still need to be weighing,
14 according to the Supreme Court, those policies
15 related to public benefit as to whether the
16 public benefit is there to warrant proceeding
17 with the project based on the majority opinion.

18 THE COURT: All right.

19 MR. WALKER: So --

20 THE COURT: I don't think you ever weighed -- well,
21 I'll ask you that later on the public benefit
22 analysis.

23 MR. WALKER: But -- so the first public benefit is
24 the protection of Beachwalker Park, which is a
25 huge public resource. And we also submit, and



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1 we'll talk about this more in feasible
2 alternatives, that the length of the revetment
3 bulkhead cannot be limited to 270 feet and
4 still protect Beachwalker Park. If the
5 bulkhead is just, and the revetment is isolated
6 in the high erosion zone and has endings within
7 the high erosion zone, then the erosion is
8 going to erode around the back of the
9 structure, and that was covered at trial. One
10 of the reasons the structures is so long is
11 because of this side erosion that can undermine
12 the effectiveness of the device if the end of
13 the erosion control structure is in the erosion
14 zone. The second, and very large, aspect of
15 public benefit is embedded within the
16 development agreement. And we did not spend a
17 tremendous amount of time on this in the
18 hearing, but it's certainly an important
19 feature. It was one that was obvious to us,
20 but we didn't go over it again and again. Mr.
21 Long testified to it, and I think Mr. Pomar
22 (ph) testified to it. But the development
23 agreement has embedded in it a conservation
24 easement and restrictive covenant. The
25 development agreement, which was Exhibit 2, and



1 we've attached that behind public benefit --
2 we've got just the development agreement here
3 and the pages that are pertinent from the
4 development agreement -- specifically refers to
5 the protection of all the land that's not going
6 to be part of the development. To refresh you,
7 Your Honor, there were some 120-plus acres that
8 had accreted to something like 150 by the time
9 of the trial. The development under the
10 development agreement can be no more than 20
11 acres deeded to other folks, plus whatever
12 roads are required and infrastructure to
13 service that development. When the development
14 agreement was negotiated, again to go back to
15 the testimony, the applicant had the right to
16 build a 325-room hotel just on the other side
17 of Beachwalker Park. The development agreement
18 negotiations resulted in the developer giving
19 up that right for a 325-room hotel in return
20 for the right to develop 20 acres in a
21 sensitive manner. In return for that right to
22 develop that 20 acres, the applicant agreed
23 that it would put a permanent restriction on
24 the rest of Captain Sam Spit that would forever
25 keep it in a natural state, except for say if

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1 there's a dune walkover. And that is
2 contained, Your Honor, in the development
3 agreement in Subsection 16(F) that we provided
4 behind tab two under public benefit. That's on
5 pages 22 and 23 of the development agreement.
6 This is a huge public benefit because, as Mr.
7 Eiser testified, there is a considerable desire
8 to preserve Captain Sam's in its natural state.
9 At this point, there are at least 31 acres more
10 -- a little over 31 acres between the critical
11 line and the setback part of the baseline that
12 could be subject to development. So what this
13 would do is forever preserve the remainder of
14 Captain Sam's in perpetuity. In fact, the
15 provision requires that there be a conservation
16 easement granted to the Kiawah Island Natural
17 Habitat Conservancy. That is a huge public
18 benefit. If this Spit continues to accrete as
19 Tim Kana said it was, and, in fact, as the
20 documentation and the benchmarks of OCRM
21 indicate, it could become enormous. It could
22 become 200 acres; it could become 300 acres.
23 I don't know. But forevermore, it will be
24 subject to the conservation easement, and that
25 conservation easement is the result of being



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1 able to develop, and it can only be developed
2 if there is a revetment. The testimony, and
3 you cited this in your order, was that, without
4 stabilization of the shoreline, it was
5 impractical to develop Captain Sam's, and if it
6 can't be developed, then the quid pro quo for
7 the conservation easement is not realized.
8 That's a huge, huge, huge public benefit to
9 forever preserve it. And it doesn't matter
10 what the legislature does with regard to the
11 baseline and the setback line, it would be
12 forever preserved once that 20 acres, up to 20
13 acres development is accomplished. And another
14 --

15 **THE COURT:** And that development agreement includes
16 the decision -- or the negotiated agreement not
17 to pursue or have a hotel?

18 **MR. WALKER:** That's in the testimony. That was
19 testified to by Mr. Pomar primarily.

20 **THE COURT:** Okay. But that hotel would not be on
21 Captain Sam's Spit; it would be next to it?

22 **MR. WALKER:** It would have been next to it. It
23 would have been just on the side of Beachwalker
24 Park, not the Captain Sam's side, on the island
25 side.



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1 **THE COURT:** And in building that hotel would -- the
2 hotel, if it was built, what access would the
3 people from the -- individuals who stay at the
4 hotel have to Captain Sam's Spit? I mean would
5 there be development, potential development for
6 them to --

7 **MR. WALKER:** Well, under the old development
8 agreement, Captain Sam's Spit was not going to
9 be developed and a hotel was going to be
10 developed.

11 **THE COURT:** Okay.

12 **MR. WALKER:** And so the exchange was you give up
13 your right, 325-room hotel, which many
14 considered to have substantial impacts because
15 of everything that goes with a hotel and the
16 number of people, versus the up to 50 lots.
17 And the testimony that you cited in your order
18 and that we covered with Mr. Long was that it
19 may take as much as ten or 15 years for any
20 houses to be built out there and to be realized
21 and the people who would buy these lots are
22 principally non-residents who would only be
23 there a portion of the year. Yes, there would
24 be physical structures sensitively planned and
25 placed in what is the maritime forest, but the



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1 impacts would be far less.

2 **THE COURT:** Well, what I'm trying to figure out from
3 a public benefit perspective is, if the hotel
4 was built, what resulting impacts -- because I
5 don't know -- if the whole thing falls through
6 as far as what -- developing Captain Sam's Spit
7 as currently negotiated, that all falls
8 through, and there is a hotel built, what is
9 the potentiality as far as developing Captain
10 Sam's Spit in any other area? In other words,
11 could there end up being some kind of park
12 built or --

13 **MR. WALKER:** Well, if --

14 **THE COURT:** -- for the motel?

15 **MR. WALKER:** Well if the --

16 **THE COURT:** Or is it going to remain pristine?

17 **MR. WALKER:** If the development is not realized,
18 there would still be no hotel.

19 **THE COURT:** Yeah, okay.

20 **MR. WALKER:** Because the property owner --

21 **THE COURT:** That's what I was trying to figure out.

22 **MR. WALKER:** -- gave up forever the right to have
23 the hotel.

24 **THE COURT:** Okay.

25 **MR. WALKER:** And that was relinquished in 2005 when



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1 they inked this replacement development.

2 **THE COURT:** Okay.

3 **MR. WALKER:** A final public benefit, and this is to
4 the community of Kiawah and everybody on
5 Kiawah, which would be the public, is that
6 under the development agreement, the property
7 owner is required to provide beach parking at
8 the west end of the road to the Spit. And this
9 is contained in two sections of the development
10 agreement that we've highlighted. They are
11 required under 15(B) to provide by quit claim
12 deed to the community association beach
13 parking, and also to provide beach access, if
14 necessary, and to quit claim that to the
15 association. So that appears on Exhibit 2 at
16 page 17 and 18 of the development agreement,
17 and also I believe it's embodied in the
18 separate provision under 16(F) on Captain
19 Sam's. So the beach parking itself brings a
20 considerable benefit because everyone on Kiawah
21 Island can come down to the end of Captain
22 Sam's, park there, and enjoy it; a public
23 benefit. Right here in the development
24 agreement, which was admitted into evidence, a
25 fourth public benefit would be the general



1 public benefit from the economic benefits and
2 tax revenues that would necessarily arise from
3 the development of the property, which is a
4 public benefit. And the last public benefit,
5 Your Honor, would be that it would benefit the
6 property owner. Even though in the body of the
7 opinion the majority talked about the property
8 owner not being equivalent to the general
9 public, in footnote five, they clarified and
10 said the property owner can be considered as a
11 member of the general public, but the general
12 public aside from the property owner has to
13 have benefit. Later, in the final two sections
14 of the opinion, they talk more about that
15 balancing between economic interests and public
16 benefit. But the first section of the opinion
17 was heavy on public benefit.

18 **THE COURT:** Was there any evidence in the record
19 concerning the economic benefit that would be
20 brought by taxpayers developing property on
21 Captain Sam's Spit?

22 **MR. WALKER:** It was not quantified, Your Honor. The
23 amount to the property owner was not quantified
24 and the tax revenues were not quantified. But
25 it is reasonable to infer, certainly, that



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1 property which is owned by non-resident
2 individuals, which is assessed at six percent,
3 would be a considerable source of revenue, even
4 if we didn't quantify it. I don't think that
5 requires a leap of faith. I don't think it
6 requires proof in the record as to what that
7 specific amount would be. But that is a
8 considerable public benefit. The first part of
9 the notebook titled "Public Benefit" has
10 excerpts from the record, plus the few exhibits
11 that we've highlighted that relate to public
12 benefit. Now, I'm going to turn to the second
13 aspect of the Court's opinion, which was its
14 interpretation of 30-11(C)(1); to require or at
15 least to disagree about the meaning of the area
16 to be considered for the cumulative impacts
17 analysis. The Court said that the cumulative
18 impacts analysis should include the upland, and
19 then in a footnote, the Court said that your
20 conclusion was summary and it was only, and
21 then it quoted from your conclusions of law.
22 The Court didn't refer to the extensive factual
23 findings that you made in your factual findings
24 as to the specific sensitive development
25 techniques that were going to be used. You not

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1 only enumerated those, Your Honor, in your
2 order, your amended order, but also when you
3 did the order denying the post-trial motions,
4 you went into even more detail on that with
5 factual findings as to what those sensitive
6 measures would be. We submit that there is a
7 ton of proof of the things that are to be done.
8 And if you look at the portion of your order
9 that the Supreme excerpted, they didn't even
10 refer to those specific steps that you had
11 identified. As we read their order, if you
12 were to go back and to enumerate in your
13 conclusions what those steps would be in terms
14 of the development and say there would be an
15 impact because this Spit would be transformed
16 from a natural state into a sensitive
17 residential development that would include the
18 following, and went through all those things,
19 the zero scaping, the pervious surfaces, the
20 shared driveways, the only one -- the
21 community, the two community docks, the one and
22 a half stories, the building in the tree line,
23 the setbacks, I could go on and on, the public
24 water and sewer, the all native plants, working
25 with the contours of the land, all those

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1 things; that would -- those were made. And
 2 that would satisfy the Court. But I think what
 3 would need to happen is, at the beginning of
 4 that discussion, the Court would need to
 5 recognize that there is a transformation, but
 6 that transformation is going to be done in a
 7 way where there are no significant negative
 8 upland impacts. And important here, Your
 9 Honor, is the specific wording of what the
 10 court said, because the Court didn't say that
 11 you have to -- that this can be a basis for
 12 denying the permit, even if you found that they
 13 were negative. What the Court said in the
 14 opinion, and I'm reading from page 16 of the
 15 opinion, at 411 South Carolina 16, "DHEC only
 16 has the power to grant or deny a permit for a
 17 project in the critical area and that decision
 18 may be based in part of the upland impacts that
 19 would result from the project." The Supreme
 20 Court definitely wants you to consider those
 21 upland impacts. There was a ton of testimony
 22 from Leonard Pomar about the sensitive approach
 23 that's going to be used. They also went into
 24 how Kiawah has sensitively developed other
 25 environmentally sensitive locations, islands,



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1 and we have pictures of those which I have
 2 included in the exhibits as 55. There are a
 3 number of pictures of these fingers that were
 4 developed and showing how the vegetation has
 5 been maintained and the houses blend in and
 6 everything has worked out fine. So there is a
 7 lot there in the record. I can't imagine more
 8 in the record to show that this development is
 9 going to be done in a way that honors the land.
 10 So we would submit on this that there was no
 11 proof challenging that. There's no proof that
 12 anything we said was incorrect. There was no
 13 proof, well, this is a better technique. We
 14 have the burden of proof. I'm not saying that
 15 DHEC and the League had to prove anything. But
 16 we carried our burden of proof, and once we
 17 carried our burden, we also met our burden of
 18 persuasion because they didn't put up anything
 19 in opposition. And that, to us, seems to be as
 20 clear as a bell in this case. The final area
 21 where the Court has remanded it is on feasible
 22 alternatives. The Court has said that Your
 23 Honor did not consider the no-action
 24 alternative. And when we come to feasible
 25 alternatives, I think what we're --



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1 THE COURT: And I'm also to give serious indication
2 or serious --

3 MR. WALKER: No, don't give short shrift to no-
4 action.

5 THE COURT: Serious consideration.

6 MR. WALKER: So here we're talking about really two,
7 a two-pronged feasible alternatives analysis.
8 The first prong would be no-action versus
9 stabilization of the bank. I think that is
10 what the Supreme Court has said. And that --
11 they read your opinion to say that you only,
12 considered alternatives for stabilization of
13 the bank and you did not consider a no-action
14 that would be nothing at all. The second
15 aspect would be, Your Honor, if you get beyond
16 that and you decide not to do the no-action,
17 then you need to engage in the feasible
18 alternatives analysis as to this particular
19 erosion control method. So I'm going to talk
20 first about the larger no-action alternative.
21 The Court in the opinion talked about policies
22 of the Coastal Zone Management Act that
23 referred to natural processes. Of course, the
24 Coastal Zone Management Act talks about a
25 number of things that impair those natural



1 processes. And as we showed at trial, the
2 natural processes are constantly being or
3 repeatedly being adjusted and tampered with on
4 this end of Kiawah Island. In 19- --

5 **THE COURT:** Adjusted and tampered with how?

6 **MR. WALKER:** In 1985, I think, in 1996, the same
7 agency here, DHEC OCRM permitted the moving of
8 Captain Sam's Inlet, it's going on right now,
9 for the third time; where the Inlet is not
10 allowed to proceed in a natural way. In fact,
11 what's happened is that, every ten or twelve
12 years, the Inlet is re-moved east towards
13 Kiawah Island. And as a result of that, the
14 sand -- when they recut the Inlet closer to
15 Kiawah, the sand on the opposite side of the
16 new Inlet gradually washes up on Seabrook, and
17 actually, it has proved to be a very effective
18 renourishment scene that Tim Kana talked about
19 that has averted having to do offshore dredging
20 and other things.

21 **THE COURT:** Would that be brought to an end if this
22 bulkhead revetment was placed?

23 **MR. WALKER:** No, it would not. And as Tim Kana
24 said, nothing that goes on in this bulkhead
25 revetment affects what goes on the front beach



1 or affects the location of the Inlet. Tim Kana
2 testified --

3 **THE COURT:** Well, what I'm asking is would you be
4 able to cut through it?

5 **MR. WALKER:** Yes. Yes. Because the area that is
6 subject to the development agreement is the
7 vegetative area that's still to the east of
8 where the new channel goes. So the new channel
9 is to the Seabrook side of the developable area.
10 And right now it's going on, and the places
11 where it's gone on in the past have been outside
12 and beyond the other side of baseline, the
13 seaward side of the baseline.

14 **THE COURT:** All right.

15 **MR. WALKER:** So it could still continue. And that
16 manmade adjustment to a natural process has
17 also, as Tim Kana testified, resulted in
18 considerable accretion on Captain Sam's. The
19 reason, as he explained, is because the offshore
20 shoals that come out of the Inlet on the ocean
21 side act as a trap, and they sweep sand over to
22 Captain Sam's, which is why it's grown so
23 quickly. So the notion that we don't tamper
24 with nature is a little bit skewed. But let's
25 say we don't -- we just forget about that and



1 say what about letting the natural process
2 proceed. We would say this -- that the only
3 benefit to having the natural process proceed is
4 the natural process. But, on the other hand, if
5 the natural process proceeds, then a couple
6 things happen. First, if the natural process
7 proceeds, as the testimony was at trial from Mr.
8 Long, Mr. Bohannon, and Mr. Pomar, then the
9 development that the town has planned and
10 approved and invested in KDP under the
11 development agreement can't proceed. Mr. Long
12 testified, Mr. Pomar testified that the astute
13 buyers are not going to be purchasing these lots
14 unless there is sufficient erosion control. Mr.
15 Bohannon, Mr. -- Dr. Kana all testified that
16 this revetment would stabilize the bank, and
17 we've got that testimony, in here. So it would
18 have the effect of defeating the comprehensive
19 plan in the zoning of the town. Now, the
20 Supreme Court said that OCRM does not trump the
21 town, and what the Supreme Court was saying is,
22 obviously, the agency doesn't engage in zoning
23 and land planning, but they can consider the
24 impact. But the effect of it would be to
25 defeat, not to trump through legal means, but to

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1 defeat practically the realization of the zoning
2 and the land plans.

3 **THE COURT:** That's a matter of semantics, but yeah.

4 **MR. WALKER:** We got into so many semantics in that
5 opinion, Your Honor. But that's the semantic
6 distinction the Court made, and we say no matter
7 what you call it, it still defeats it. The
8 second part of it is that the Coastal Zone
9 Management program document, and we excerpted
10 pages from chapter three, specifically
11 contemplates that there can be development on
12 barrier islands, there can be developments
13 behind the dune system if they're sensitively
14 planned, if they're reasonable precaution. It
15 goes through what the most obvious reasonable
16 precautions are. The Coastal Zone Management
17 program document talks about having public
18 sewer, trying to keep areas vegetated, being
19 mindful of wetlands. And they talked about a
20 number of things, all of which are going to be
21 realized and accomplished and done by KDP. So
22 another aspect of saying the no-action
23 alternative is that, even though this
24 development was planned by the owner, approved
25 by the town, and would be allowed, we would say



1 under the CZMP, which specifically contemplates
 2 it, it would have the effect of abrogating those
 3 provisions of the CZMP which said you can do
 4 this type of thing when it's done well. And I'm
 5 not talking about the revetment sticking out and
 6 the particular bulkhead, but in terms of no-
 7 action and saying we aren't going to allow this,
 8 the CZMP does allow that development to occur.
 9 So we believe that the no-action alternative,
 10 the benefit from the no-action alternative is
 11 outweighed by the detriment, and that we would
 12 ask the Court not to implement the no-action
 13 alternative. There's nothing really in terms of
 14 guidance other than the subjectivity, well we'll
 15 just do the no-action, and it would have
 16 considerable effect on the town and the property
 17 owner, and we think the public by defeating what
 18 the owner is willing to do with Captain Sam's in
 19 terms of building the bulkhead revetment next to
 20 the park, protecting the park, and protecting
 21 the area that would allow the conservation
 22 easement on Captain Sam's forever. Now, turning
 23 to feasible alternatives in terms of the erosion
 24 control structure.

25 **THE COURT:** I was about to ask about that.



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1 MR. WALKER: Yeah. And we submit, Your Honor, that
2 there was testimony and the question is is there
3 substantial evidence and, yes, there is
4 substantial evidence that both Leonard Long and
5 Mitchell Bohannon testified that other
6 alternatives were considered. And in
7 particular, Mr. Bohannon, and we highlighted
8 these pages in the 40 or so pages of testimony
9 we provided you, and this is on page 448, he
10 talked about what they did to investigate, and
11 they considered other alternatives; bulkhead,
12 rip-rap, geotubes, a number of things that could
13 have been used, and they recommended to go with
14 the bulkhead and the concrete, articulated
15 concrete block. And he explained that the
16 articulated concrete block prevents the erosion
17 at the toe, which these others didn't do, they
18 would be just a shear face and to handle the
19 velocity of the water and would erode at the
20 base. The other thing that Mr. Bohannon pointed
21 out, and Mr. Long pointed out, is that this
22 particular type of erosion control device also
23 has more aesthetic appeal. Granted, that's not
24 the most prominent consideration, it is still a
25 consideration, has the most aesthetic appeal



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1 because the color of the block can be modified
 2 and the block has the potential to vegetate.
 3 There was disputed testimony at the trial as to
 4 whether it would revegetate. Some witnesses
 5 said the velocity of the water was such it
 6 wouldn't. Others said it probably would. And
 7 somebody like Dr. Kana said it would certainly
 8 attract a suite of new organisms and would
 9 actually increase biodiversity there as opposed
 10 to the river shoreline. But we submit that
 11 there was proof that the bulkhead with the
 12 revetment was the best alternative, and really
 13 the only feasible alternative when feasibility
 14 includes having something within that erosion
 15 control structure to try to defeat or minimize
 16 the scour at the bottom of the vertical trace,
 17 be it a revetment -- excuse me, a bulkhead or
 18 rocks or something else. This particular method
 19 does that. And when we talk about feasible
 20 alternatives too, we need to consider what it's
 21 accomplishing. And the feasible alternatives
 22 here are necessary in order to accomplish the
 23 development because there needs to be
 24 stabilization of the bank. So if we -- we can't
 25 proceed unless there's stabilization of the



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1 bank. And this is the best approach, and we say
2 the most comprehensive approach for stabilizing
3 that bank, and the record supports it. We've
4 copied the pages, and I've highlighted much of
5 the testimony so that Your Honor doesn't have to
6 go back through the record. It's the same for
7 the other three aspects, to show you what you're
8 relying on rather standing up here and saying
9 this is what they said. I've actually provided
10 it and highlighted it so that you can see what
11 the evidence is in terms of why we've carried
12 our burden of proof on feasible alternatives
13 looking at Leonard Long, looking at Mitchell
14 Bohannon's testimony, the proof is there.

15 **THE COURT:** Well, can't your testimony or that you
16 argue have concerning feasible alternatives
17 with the presumption that something, an -- that
18 the development does occur, correct? So what
19 I'm trying --

20 **MR. WALKER:** Right. It goes back to the no-action
21 alternative.

22 **THE COURT:** Yeah. Well, how about the alternative
23 of not doing anything?

24 **MR. WALKER:** Well, the proof shows that the
25 alternative of not doing anything would



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1 significantly, jeopardize, if not make
2 impossible, the development based on the proof
3 of Leonard Long and Mark Pomar.

4 **THE COURT:** That's what I was trying to -- was
5 getting at, is your approach toward the no-
6 alternative analysis carries with it, to use
7 your phrase earlier, an embedded presumption
8 that there will be development.

9 **MR. WALKER:** I think Your Honor considers the
10 development versus the no-action alternative,
11 and if Your Honor were to go with the no-action
12 alternative, that that would defeat the
13 development ultimately based on this record.

14 **THE COURT:** All right.

15 **MR. WALKER:** But the no-action alternative is just
16 to leave it in a natural state. That calculus
17 that you would engage in includes, all right,
18 well what are the consequences.

19 **THE COURT:** That's what I'm trying to get at.

20 **MR. WALKER:** And the consequences are, based on Mr.
21 Pomar's and Mr. Long's testimony and what you
22 found earlier, that it's not going to be
23 reasonably capable of development if nothing is
24 done because the bank needs to be stabilized.
25 So I do think that the no-action alternative



1 consideration comes back to the first choice,
2 which is no-action, which will defeat the
3 development based on the proof, or allowing that
4 development for the reasons that we put forward
5 to be done in a sensitive way and that there is
6 considerable public benefit from that. And that
7 the only feasible way, or the feasible best way,
8 and the only feasible effective alternative
9 because it does so much to contain the erosion
10 is the combination bulkhead revetment.

11 **THE COURT:** What would be the benefit to the public
12 if there was no development?

13 **MR. WALKER:** The benefit to the public would be that
14 they could just -- they'd lose Beachwalker Park.
15 They could look at it as a natural thing. They
16 can't walk on the highland. They could have
17 their beach to land kayaks on instead of the
18 revetment because the revetment wouldn't be
19 there. They couldn't go on the highland of
20 Captain Sam's. It would be basically the status
21 quo as it is now.

22 **THE COURT:** Couldn't go on it because it's owned by
23 KDP, correct?

24 **MR. WALKER:** Right. That's right. That's right.
25 And it would only be the tidal area that the



1 state owns. So they could still use that tidal
2 area, but they could still use that tidal area
3 even if the bulkhead and revetment were
4 installed, except for the testimony that the use
5 would be compromised because they wouldn't be
6 inclined to use that area that is the
7 articulated concrete block. So I think the only
8 benefit is visual, and also the use of that
9 shoreline and the way that it's being used now.
10 The drawback to no-action is you don't have
11 anything going on at a county park which is
12 50,000 a year, 50,000 people, because the
13 parking lot is eroding. You don't have the
14 beach parking being realized for KICA, and
15 you've not accomplished the permanent protection
16 of Captain Sam's forever in a natural state.
17 Now, one may say, well, if you don't allow it,
18 it can't be developed, so why are we worrying
19 about it, you know, the conservation easement.
20 And what I'd say in response is that Spit is
21 accreting at such a rate that sometime in the
22 future, it very well may be that there could be
23 more development, there could be a much larger
24 area. Who knows about the next legislature, who
25 knows what nature is going to do. Many, many

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1 years ago on the Isle of Palms, people thought
 2 they were on the front beach because there was
 3 accretion, and nobody ever thought, well, this
 4 beach is going to be anything other than what it
 5 is. And because the owner owned the accretion,
 6 they found out they were on the second row. And
 7 here, permanently protecting this land means no
 8 matter what, no matter what nature does in the
 9 future, no matter what the legislature does, no
 10 matter what town council does, no matter what
 11 the owner wants to do, that land outside that 20
 12 acres, that right now 130/140 acres is going to
 13 be permanently protected in a natural state, and
 14 that's huge. And I think that is a significant
 15 public benefit to allowing this bulkhead and
 16 revetment. So I would look at you just have
 17 status quo, which I'm not minimizing, but I
 18 think when you look at everything that's
 19 accomplished through allowing the revetment, and
 20 the things that would be defeated through the
 21 natural process, I just don't see where it tips
 22 the scale substantially in favor of the no-
 23 action alternative. I think you should
 24 seriously consider it. Maybe I've not presented
 25 things you want to consider. I'm not minimizing



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1 it. The Court has said we need to focus on it.
2 And I want to bring forward what we submit would
3 be the considerations so when you go back there
4 you can consider all of it and not just feel
5 like you're under a mandate from the Supreme
6 Court. And that's one of the things that is the
7 most concern to me, Judge Anderson, is that
8 opinion was so -- parts of it were very
9 muscular, strident, if not strident in tone. I
10 know the consideration that you gave. I've been
11 through the orders, I went through them again
12 last night. Those were painstaking orders.
13 Much of what's in those orders was not even
14 recognized in the majority opinion. But we live
15 with where we are.

16 **THE COURT:** Uh-huh.

17 **MR. WALKER:** We have to accept that. That's what the
18 majority did, they gave their opinion. But what
19 the majority didn't do it they didn't take away
20 your discretion. At oral argument, we spent a
21 considerable amount of time discussing whether
22 the ALJ and de novo review really has de novo
23 review. The argument was made by CCL, and also
24 by the agency, that the factual determinations,
25 that the application of the regs by the staff



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1 should be given deference so that when the
2 matter comes to the Administrative Law Court,
3 the Administrative Law judge looks and sees
4 whether there was legal error, and that's it.
5 And we hotly debated that, this whole deference
6 issue. And the Court could have said you have
7 to defer to those findings, they could have said
8 that your de novo review is not really de novo.
9 As you said in your order denying the motions to
10 reconsider, to accept the argument that you have
11 to accept what staff did eviscerates de novo
12 review. You get to hear the evidence, and you
13 were so clear in this case that it didn't really
14 matter what went on in the agency record, we had
15 to prove our case here, the rules of evidence
16 apply. And it was a trial, fresh start, and
17 that remains the rule. And the Supreme Court
18 could have said, if it wanted to, and believe me
19 they certainly had -- by the time we got to the
20 third argument, the Court was so divided, it was
21 something, Your Honor. There were two on this
22 side and two on the other and there was one
23 person who was in the middle. And it was like
24 a boxing match. I haven't seen anything like
25 it.



1 MS. ARMSTRONG: More for me than for you. I'm
2 sorry.

3 MR. WALKER: No, but we both had our advocates on
4 the Court. There were two for the League
5 position, and there were two for KDP. And at
6 the end of the day, what did they do? What did
7 the majority do? They didn't like what
8 happened. Boy, Justice Hearn, she just -- she
9 raked me, but to her, she let her opinions be
10 known. But what she didn't do is she didn't say
11 in this record there is no reasonable evidence
12 to support these findings. She found it on one,
13 and that was that access was not -- was only
14 minimally impaired. But she sent it back to you
15 to make findings. She -- the Court could have
16 said as a matter of law there's no reasonable
17 inference of public benefit. They didn't say
18 that. They said we remand it because you didn't
19 make any findings as to benefit the public at
20 large. So they left that discretion to you.
21 When they came back to you on upland impacts,
22 they didn't say that the upland impacts are
23 negative or it should never be developed; they
24 said you need to look at the upland impact
25 separately and go through it in some measured



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1 way, and we find the conclusion -- and I can't
2 believe they did this because they took it from
3 your conclusions of law which is supposed to be
4 conclusions, not findings -- but they said your
5 findings are not sufficient, and you had a
6 finding that there's no impact, so you need to
7 address that. You have the discretion to do
8 that and there's a ton of proof there. And we
9 got to feasible alternatives, it's the same
10 thing, they sent it back to you to do the
11 analysis. So they have left you the fact
12 finder. They were tempted, I think, to become
13 the fact finder, but they backed off at the last
14 minute. They didn't say you don't have the
15 authority. They didn't say you need to defer to
16 the staff members, and the staff members are
17 very capable. They said you decide it, Judge
18 Anderson. And we think that the Court when it
19 -- the majority when it issued its opinion
20 overlooked a lot that was in the record, a
21 tremendous amount that supports what you did,
22 and I think would lead to a result in favor of
23 KDP even employing the legal standards that they
24 gave. And in this notebook we've tried to
25 identify, I'm not saying it's everything, but we



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1 tried to simplify this and say right here, this
2 is the substantial evidence that we're relying
3 on. It's here, and if the Court looks at it,
4 the Court can sustain the findings that they
5 found were inadequately done and can come to the
6 conclusions in the analysis that they said was
7 not made. So we would ask Your Honor, I know
8 you will consider it, I know you will study it,
9 I know that you have done all that, but we would
10 just ask you to look at it freshly outside the
11 --

12 **THE COURT:** Oh, I'm going to study it again.

13 **MR. WALKER:** -- the tone of that opinion.

14 **THE COURT:** I don't look forward to it. But it is
15 what it is.

16 **MR. WALKER:** Right.

17 **THE COURT:** Where the Supreme Court stated only
18 those benefits which enured to the public as a
19 whole may satisfy Section 48-39-30(D), you
20 didn't weigh in on that. What's your
21 interpretation of that?

22 **MR. WALKER:** My interpretation is that that is
23 qualified by footnote five, and footnote five
24 says contrary to the dissents characterization,
25 we do not exclude the developer from being



1 included in the people. Our point is that the
2 ALC erred in considering only the benefits to
3 the developer to the exclusion of the public as
4 a whole.

5 **THE COURT:** Okay. So I take footnote five and I --
6 in that light, I look at 48-39-30(D), how do I
7 interpret that statute?

8 **MR. WALKER:** I think you interpret it that you can
9 consider the benefits to the owner, but you have
10 to find benefits to the public at large other
11 than the owner. And we have put forward to you
12 what we submit to be proof of that through the
13 preservation of Beachwalker Park, the
14 conservation easement that's going to be put on
15 the land, the beach parking for the community
16 association, the economic benefits to the public
17 -- I mean to the owner, as well as the tax
18 benefits that necessarily will flow from this
19 development. Last comment, and I meant to say
20 this about the protection of Beachwalker Park,
21 I think I hit it but the diagram that is Exhibit
22 1 really shows it. If the Court were just to
23 grant the 270 feet of revetment, which is
24 identified, or a bulkhead, the 270 feet that was
25 subject to the staff's decision of approval,



1 that is not going to -- that may protect some
2 portion of Beachwalker, but ultimately, because
3 it terminates in the high erosion zone, that is
4 not going to be effective because of erosion
5 that will go around the end. That is the chief
6 problem that is stopping -- any type of shore
7 protection short of the end of the high
8 erosional zone is going to result in back
9 erosion and create a problem, and that's why we
10 think the feasible alternative includes the
11 bulkhead and revetment of the distance that was
12 designed, but it also includes, as Your Honor
13 modified it, no bulkhead for the last 900 feet
14 and a reduced map of only eight feet, and only
15 eight feet is I guess where I'm standing to your
16 bench, which is considerably less. But that is
17 a concern and something we think staff did not
18 consider but needs to be considered in looking
19 at feasible alternatives.

20 **THE COURT:** So you take the approach, where I can be
21 clear now then, that if I believe that
22 Beachfront -- is it -- what's the --

23 **MR. WALKER:** That's at Beachwalker.

24 **THE COURT:** -- Beachwalker Park is to be protected,
25 that I have to leave my decision intact just to



1 keep that park safe?

2 **MR. WALKER:** I believe that 270 feet is not going to
3 do it. And I'm not going to get -- I believe
4 that we could -- we've shown you why from an
5 engineering standpoint it makes sense to
6 continue. But I will leave that to you. I just
7 wanted to point that out to Your Honor.

8 **THE COURT:** Well, based on the evidence, how far
9 would it have to go to protect the park?

10 **MR. WALKER:** I think it would have to go at least to
11 that dynamic erosional zone, which is what Mr.
12 Bohannon testified is roughly 1,800 feet from
13 where it starts. Because it starts -- it
14 protects the park on the end.

15 **THE COURT:** Yeah.

16 **MR. WALKER:** So it would go I guess 1,100 or 1,200
17 feet beyond that, which is the highly dynamic
18 erosional zone. That's what I think would be
19 necessary to protect the park.

20 **THE COURT:** And is that the end?

21 **MR. WALKER:** I don't know. I mean you could stop it
22 somewhere else and just say well, it can -- it
23 can just erode back there and it will take ten
24 years to hit the park. I mean that --

25 **THE COURT:** I can't do anything that's not



1 supportive of the record.

2 **MR. WALKER:** Yeah. But I think that what Mr.
3 Bohannon says, and what you found, was that once
4 you get out of that highly dynamic erosional
5 zone, while there's an escarpment, it's a
6 smaller escarpment, doesn't even need a
7 bulkhead. And I suppose you could find that if
8 it doesn't need a bulkhead, it doesn't need a
9 map. But certainly in a dynamic area, I think
10 it requires developed suspenders of the bulkhead
11 and revetment so that we aren't having an
12 exacerbation of the erosion problem by
13 concentration of the erosion around the ends of
14 the structure.

15 **THE COURT:** How far in my order did I go?

16 **MR. WALKER:** In your order, you eliminated the
17 bulkhead for the last 900 feet, you found it was
18 not necessary, and you limited the map to eight
19 feet, and that was based on what Mr. Bohannon
20 said he felt would be adequate for the time
21 being because the erosion was so much less in
22 the last 900 feet. And he said that he thought
23 that that would do it. And in your order you
24 said if it turns out that the erosion is more
25 than we believe to be, and to what he testified



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1 it would be, then the applicant can come back to
2 OCRM with plans to extend the map and that that
3 should be considered. But you limited the 40
4 foot aspect of it to that 1,800 feet starting
5 above the park and coming around the bend and
6 stopping --

7 **THE COURT:** Okay.

8 **MR. WALKER:** -- where it dies off, I think it was
9 point F or something on the survey that was done
10 in pictures.

11 **THE COURT:** All right.

12 **MR. WALKER:** Thank you.

13 **THE COURT:** Thank you.

14 **MS. ARMSTRONG:** Your Honor --

15 **THE COURT:** I want to just start by telling, when I
16 ask about, and I still do, the Supreme Court's
17 statement that I read earlier about only the
18 benefits which enure to the public as a whole,
19 I thank y'all for taking a good attempt trying
20 to explain that to me. I may not agree with
21 what y'all -- everything that y'all argue, but
22 I'm really just trying in this case -- when I
23 asked y'all that and I think you understood my
24 problem -- I'm just trying to figure this thing
25 out in accordance with the law. What the



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1 Department did, in all deference to you, they
2 pretty much just blew me off, and I don't think
3 they caught the tone of what I was trying to do.
4 And I'm still trying to figure that out. I
5 can't do -- and I don't know about the rules of
6 statutory construction when it comes to the
7 Supreme Court, but my intent is to issue an
8 order that works in the future for all cases.
9 And so I just -- I thank you for the effort. I
10 don't even know where I'm going at this point,
11 but I mean I've got an interpretation of it that
12 I think is sound. But I'll just start by saying
13 that. But go ahead.

14 **MS. ARMSTRONG:** Your Honor, I have been in front of
15 you long enough to know that you don't want to
16 leave any stone uncovered or any legal issue
17 without analysis. But in this case, Your Honor,
18 here reading the opinion in its entirety from
19 the Supreme Court, it's clear that there isn't
20 a way to arrive at a different end result in
21 this case. Denial of the vast majority of the
22 bulkhead, that wouldn't change under any
23 analysis that would be consistent with the
24 Supreme Court's opinion because there's nothing
25 in the Court's opinion that would lead this



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1 Court to be able to conclude that there are any
2 benefits to the public. What the Court said is
3 that it's clear that only the developer, not the
4 public would benefit from construction of this
5 enormous bulkhead and revetment. I mean the
6 Court went on, it was very clear that the ALC
7 erred in finding that the public benefit
8 requirement was satisfied.

9 **THE COURT:** Let me make sure. The Court said that
10 only the developer and not the public would
11 benefit?

12 **MS. ARMSTRONG:** Yes. Do you want me to find that
13 cite? I don't know that -- I probably should
14 have -- oh, I've got it. It's on -- it's 766
15 S.E.2d page 716.

16 **THE COURT:** I just had the opinion up.

17 **MS. ARMSTRONG:** It's right under that Section I, the
18 Coastal Zone Management Act. And the Court
19 cites Section 48-39-30 --

20 **THE COURT:** Well, give me the language and I'll just
21 do a word search.

22 **MS. ARMSTRONG:** Sure.

23 **THE COURT:** It says only?

24 **MS. ARMSTRONG:** Yeah, quite to the contrary -- so I
25 think it's important --



1 THE COURT: Hold on a second.

2 MS. ARMSTRONG: -- to let's look at the whole thing.

3 THE COURT: Hold on a second, let me get there.

4 MS. ARMSTRONG: Okay. Only the developer. Quite to
5 the contrary.

6 THE COURT: All right.

7 MS. ARMSTRONG: So the Court talks about Section
8 30(D) and that it explicitly requires tidelands
9 to be used in a way that provides the maximum
10 public benefit, and the ALC made no findings of
11 public benefit. And I think, you know, at this
12 point, there's an implication that there is no
13 public benefit. But the Court goes on and says
14 that, they say quite to the contrary, it was
15 clear that only the developer, not the public,
16 would benefit from the construction of this
17 enormous bulkhead and revetment. So it's hard
18 --

19 THE COURT: Well, was that clear from -- when they
20 say it was clear, is that clear from my order or
21 clear from the record? Because it said, "The
22 ALC made no findings."

23 MS. ARMSTRONG: Well --

24 THE COURT: They're dealing with my findings and
25 then --



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1 MS. ARMSTRONG: Right.

2 THE COURT: -- at least that's the way I initially
3 read it was when it said, "Quite to the contrary
4 it was clear." That's it was clear from my
5 findings that only -- I didn't take that to mean
6 the entire record.

7 MS. ARMSTRONG: Well, I guess that's -- you and I
8 will diverge on that point because the Court did
9 look at the entire record.

10 THE COURT: Oh, we diverge, I just want you to
11 explain --

12 MS. ARMSTRONG: Yeah --

13 THE COURT: -- why I'm wrong.

14 MS. ARMSTRONG: Yeah. Well, I think --

15 THE COURT: Actually, that's my initial, so I'm not
16 wedded to that, I just --

17 MS. ARMSTRONG: Right. Well, so the Court looked at
18 the whole record, and it did find that there
19 were some errors in your findings. Mr. Walker
20 pointed out one of those errors is the one that
21 relates to the substantial nature of the impacts
22 on public access. There was another error, the
23 Court overturned a finding that leaving the site
24 as is in its eroding state does not provide a
25 public benefit, so that there was another place



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1 where the Court overturned your findings. So it
2 clearly looked at the record and made its own
3 determinations. And I think when it gets to
4 that point of saying, you know, clearly there's
5 a benefit to the developer but not to the public
6 from the construction of this structure, then
7 the Court's saying we're -- we're not -- we
8 don't agree based on the record that there's any
9 benefit to the public. And I think that that --
10 that fits with the evidence that was presented.
11 We talked a lot about the public use and access
12 of the area. I mean, this is talking about a
13 structure that's going to be covering two and a
14 half acres of tidelands. It lands below the
15 mean high water mark. They are public trust
16 lands; they're open to the public for their use
17 and enjoyment. They are used and enjoyed by the
18 public, and that there isn't any going to be any
19 -- once you cover that over, it would be a
20 substantial impairment. When we talk about --
21 there was a lot of discussion about what the
22 public benefit might be from construction of any
23 structure, and Mr. Walker talked about a benefit
24 to the park. Now, in the record, it was --
25 there was evidence in the record about how

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1 Charleston PRC applied for a 270-foot long
2 bulkhead structure to protect the parking lot.
3 We're talking about about two to five parking
4 spaces that -- so we're talking about parking
5 spaces, no structures, just parking places that
6 are threatened by erosion because they're right
7 along the bank. And PRC applied for that 270
8 feet of structure, and then the developer came
9 along and said let's -- why don't you withdraw
10 yours and we'll apply for one whole big
11 structure together. So at some -- at one point,
12 Charleston PRC believed, was confident enough
13 that this 270-feet structure was going to
14 protect its parking lot that it actually applied
15 and sought permission from the Department. But
16 it being able to fold it into a larger project
17 with KDP was of some -- enough benefit that it
18 determined it was going to withdraw its
19 application.

20 **THE COURT:** Right. Now, you're asking me to take a
21 presumption there that the Beachwalker Park and
22 Charleston could only seek a permit for that
23 which they had property interest to do so. So
24 --

25 **MS. ARMSTRONG:** There's no property interest, Your



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1 Honor. We're talking about land -- the
2 construction would occur on lands below -- at
3 the mean high water mark.

4 **THE COURT:** I was talking about the original request
5 for a 200 and something foot bulkhead. They
6 could not have requested beyond that, could
7 they?

8 **MS. ARMSTRONG:** Well --

9 **THE COURT:** I'm asking. I'm not --

10 **MS. ARMSTRONG:** You know, I don't know whether they
11 --

12 **THE COURT:** Y'all have got to --

13 **MS. ARMSTRONG:** I don't really know whether they
14 could or not and I haven't -- you know, I
15 haven't -- that's not something I've looked at.
16 I do know that they applied for 270 feet; they
17 believed that was sufficient.

18 **THE COURT:** Yeah.

19 **MS. ARMSTRONG:** So I think the other point about the
20 scour, if there is any scour from this 270-foot
21 structure, it's not going to be on park
22 property. The park, the wall would still be
23 protecting those parking spaces on the parking
24 lot. So any potential -- any scour that might
25 happen would be not to the parking lot area; it



1 would be down drift of it. So that really, you
2 know, the benefit to the public from having this
3 2,700-foot long structure that is being sort of
4 bootstrapped on to a 270-foot structure, which
5 is what the Department authorized, that's the --

6 **THE COURT:** Uh-huh.

7 **MS. ARMSTRONG:** -- you know, we believe -- the
8 League believes that the issue really before the
9 Court on remand is to decide -- what the Court
10 said is that your decision authorizing the
11 additional structure was in error because
12 there's no public benefit. And then it found
13 some other errors. And we contend that the
14 threshold inquiry is whether you meet that test
15 in 30(D) since it's a statutory requirement, and
16 once you conclude that there is no public
17 benefit, then the other regulations don't come
18 into play, although we're prepared to discuss
19 them if Your Honor would like to hear from the
20 League on those regulatory provisions.

21 **THE COURT:** I would like you to present your case
22 both from the standpoint of how you interpreted
23 that language that we just discussed and the
24 decision of how I initially viewed it so that I
25 can hear both sides.



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1 MS. ARMSTRONG: Okay. Well, I don't think --

2 THE COURT: So proceed ahead.

3 MS. ARMSTRONG: I don't think that there's anything
4 in the Court's language that says quite to the
5 contrary it was clear that only the developer,
6 not the public, would benefit from the
7 construction of the enormous bulkhead is not
8 constrained just to the findings in your Court's
9 order. That's -- the Court looked at the record
10 and made that determination and finally
11 concluded that there isn't a public benefit.
12 Now we've heard from Mr. Walker some ideas about
13 maybe how there might be some public benefit
14 that they're proposing in terms of protecting
15 the park, the public benefit that's related to
16 the development agreement and what kind of
17 construction may or may not occur at the Spit.
18 I think it just is important to recognize a few
19 things that are going on right now. The land as
20 it stands right now is in an unaltered natural
21 state. There's nothing on there. The idea that
22 it's better to have 50 homes and a conservation
23 easement ensuring that there's nothing that's
24 going to be on there is better than having the
25 whole site remain natural, open, having that two



1 and a half acres not covered by concrete still
2 accessible to the public, that that would be of
3 a greater benefit, I mean, to me that really
4 defies logic, because even the Court's opinion
5 talks about the natural processes that occur at
6 the Spit; that it's been breached, it's been
7 completely eroded, it's recovered, it's come and
8 gone over history. We can expect that that's
9 going to happen again. And so the idea that
10 you're protecting this ever dynamic, always
11 changing piece of land, it's doesn't -- it's not
12 really giving the public that much benefit. I
13 mean, it's going to be -- it's going to do what
14 it had always done over time.

15 **THE COURT:** I'd like -- in your argument, I'd like
16 to separate the public benefit from the general
17 people standpoint, and then also a little
18 different honing in on the natural process. You
19 were just talking about that. So I'm going to
20 start there. Now, unless you -- again, am I
21 interrupting you --

22 **MS. ARMSTRONG:** No.

23 **THE COURT:** -- and throwing you off because --

24 **MS. ARMSTRONG:** No.

25 **THE COURT:** All right. So let me just start in



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1 general. When we consider the natural process,
2 if it's to the public benefit -- and I have a
3 question that I was just thinking about -- if
4 the public benefits from the protection of
5 natural processes like cyclical erosion, and if
6 that ends the inquiry, then how could we have --
7 ever have bulkheads, revetments, or rip-rap?
8 So, in other words, I think -- I don't start
9 with the position that natural processes always
10 protect it, do I? Because you would never have
11 to do that if that was true.

12 **MS. ARMSTRONG:** Uh-huh.

13 **THE COURT:** So if that is -- I don't start there,
14 then where do I go in this case?

15 **MS. ARMSTRONG:** Well, in the Court's opinion, I know
16 the language that you're referring to, you know,
17 I highlighted it myself. The Court is looking
18 specifically at the Spit, what's happened at the
19 Spit. It's not just looking at, you know, one
20 lot on Isle of Palms, for example, that's got
21 some, you know, some erosional problem there,
22 maybe it's, you know, that's not -- I don't even
23 think we can compare that because we've got a
24 land mass that has been completely underwater,
25 I mean --



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1 THE COURT: We've got a balancing approach here.

2 MS. ARMSTRONG: Right.

3 THE COURT: Is that true?

4 MS. ARMSTRONG: I think that there's a balancing
5 approach. I think in this case --

6 THE COURT: Okay. What's the balance then? That's
7 what I'm getting at.

8 MS. ARMSTRONG: I mean, the Court doesn't tell us a
9 lot about what the balance is. It tells us in
10 this case --

11 THE COURT: Well, I'm asking you.

12 MS. ARMSTRONG: I think in this case when we've got
13 a land mass that has been completely eroded and
14 under water, when we know that it's not been
15 there at all, when the Spit has been breached,
16 it's been broken off, it's been under water,
17 it's migrated and moved, it's constantly
18 shifting, that those cyclical erosion, the
19 breach, and the accretion processes of the Spit,
20 those kind of processes, the Court cites an
21 article that talks about -- a Law Review article
22 that talks about four to five coasts come with
23 major financial, social, and ecological costs.
24 The Court recognized that there's actually costs
25 to armoring a coastline like this significantly.



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1 And so, I mean, the Court even, you know, in its
 2 opening talks about how the Spit is invaluable
 3 in terms of environmental, economic, and social
 4 values. So I think that the Court really looked
 5 at the Spit as something different than just
 6 your everyday lot where somebody's wanting to
 7 build, you know, a 150-foot bulkhead, or a dock
 8 or a boat lift or some of the other things that
 9 Your Honor asked about related to public
 10 benefit. We've got really a somewhat unique set
 11 of circumstances here because we're talking
 12 about one of three undeveloped bare, pristine,
 13 barrier islands that's in the entire state of
 14 South Carolina that the public has access to.
 15 And so the Court rightfully so treated this
 16 piece of land differently than it may look at
 17 some already developed areas along our coastline
 18 in making its determination that there's a
 19 benefit to leaving these natural processes as
 20 they are in an undeveloped, pristine, untouched
 21 area.

22 **THE COURT:** All right. Where I can understand, when
 23 you say that the public has access to it, Mr.
 24 Walker said, which I think is correct, but I
 25 want to hear if you agree with that, that they



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1 really don't have access to the island, they
2 have access to the shoreline.

3 **MS. ARMSTRONG:** Right. So --

4 **THE COURT:** But then that's what's being --

5 **MS. ARMSTRONG:** So their access -- I would agree
6 that they don't have access to the lands above
7 the mean highwater that's owned by KDP. That is
8 private property certainly above mean highwater
9 mark. They don't have access to that. But
10 lands below mean highwater mark, there's
11 testimony from Sophia McAlister, Greg
12 VanDerwerken, a number of people that live on
13 Kiawah Island that talk about how they kayak and
14 land on the Spit on the public trust critical
15 resources.

16 **THE COURT:** Yeah.

17 **MS. ARMSTRONG:** So they have access by water and
18 certainly that's one way that people access it.
19 They have access through Beachwalker Park. Yyou
20 can go to Beachwalker Park, you can park there,
21 you can walk down and you can, you know, and
22 access that area. I've been down there through
23 -- by way of Beachwalker Park. There are --
24 what I think Mr. Walker quoted 50,000 people
25 coming through there a year. Those people all



1 access the Spit that way, through public access.
2 And the access, at least to the river side and
3 being able to use that river side is going to be
4 eliminated. You know, there was some
5 disagreement with this Court and the Supreme
6 Court about what that -- how that access was
7 going to be -- how it was going to be impacted,
8 but I think that it was pretty clear from the
9 Court's decision that it felt that it was going
10 to be significant enough that it was going to
11 eliminate some important public uses of critical
12 area tidelands.

13 **THE COURT:** If I was to decide to protect -- that
14 Beachwalker Park was worthy from the public
15 standpoint of protection, then what do you think
16 the Court should do?

17 **MS. ARMSTRONG:** Well, I have a couple responses.
18 One, Your Honor, I think --

19 **THE COURT:** And I'm welcome to all of them.

20 **MS. ARMSTRONG:** Yeah. One is that really, you know,
21 whether this wall is actually necessary to
22 protect the park because there are structures --

23 **THE COURT:** The wall, the bulkhead, or the
24 revetment?

25 **MS. ARMSTRONG:** Both of them in combination.



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1 **THE COURT:** Okay.

2 **MS. ARMSTRONG:** I mean the park is still there.
3 People still are going there. They're still
4 using and accessing that resource. There are
5 some parking spaces that have been threatened.
6 I don't know where they are right now, and it's
7 not in the record. I think it was less than
8 five in the record that were actually at risk of
9 being lost. So when you look at the whole
10 scheme of the parking lot and how much they're
11 -- how many spaces there are, you're not going
12 to be losing very much parking spaces. So the
13 park isn't going to be lost. I mean the park is
14 really just the parking lot and some facilities
15 that allow people to get on to the Kiawah River
16 side or the beach side.

17 **THE COURT:** Well, maybe I misunderstood it, but I
18 thought from -- as I remember it, I don't think
19 I've read the transcript, that the ultimate
20 result of not having any infrastructure here
21 would be the potential that the river would
22 break through and come out through that area
23 where Beachwalker Park is.

24 **MS. ARMSTRONG:** Well, I think --

25 **THE COURT:** And that would pretty well destroy the



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1 whole thing, wouldn't it?

2 **MS. ARMSTRONG:** That is -- I mean, that was -- I
3 don't know that I remember the record quite the
4 way you do. I mean --

5 **THE COURT:** Well, I'm not -- I don't --

6 **MS. ARMSTRONG:** On cross-exam --

7 **THE COURT:** I don't know if I remember it
8 accurately.

9 **MS. ARMSTRONG:** I remember on cross-examination, Mr.
10 Walker asked our witness, Dr. Rob Young, about
11 how healthy that the neck of the Spit was and he
12 thought -- he said it's the healthiest it's ever
13 been. It's got very high dunes; it's 450-feet
14 wide. And if you look at the area where the
15 neck is -- where it's most likely to break, if
16 you look at the neck, I don't know if you want
17 to -- can we put this on ELMO?

18 **THE COURT:** Yeah, it's working now if you want to.

19 **MS. ARMSTRONG:** I mean, I think we're getting a
20 little bit outside the record to talk about what
21 might happen at the park if there were --

22 **THE COURT:** Well, if we get outside the record, I
23 don't want to do that.

24 **MS. ARMSTRONG:** I don't know -- I don't know where
25 --



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1 THE COURT: I thought there was testimony about
2 that.

3 MS. ARMSTRONG: Well, there was some testimony about
4 this 200 -- what will happen to the park if
5 there's -- if the neck breached. That's I think
6 what you were asking.

7 THE COURT: Yeah.

8 MS. ARMSTRONG: Here's the neck and the park is up
9 here.

10 THE COURT: Okay.

11 MS. ARMSTRONG: So I guess the other point that --
12 a couple of points to make about the park and
13 public benefits from the park are that there's
14 -- there was testimony that there have been
15 negotiations between PRC and the developer to
16 relocate the park to move it to an inland area.
17 There was a map that was admitted into evidence
18 that we submitted into evidence showing the
19 location of a -- of the proposed location of an
20 alternate site. And I'm going to represent to
21 the Court that there is a permit application
22 that --

23 THE COURT: That's outside the record though, isn't
24 it?

25 MS. ARMSTRONG: Well, it is outside the record.



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1 **THE COURT:** I don't want to step outside the record.
2 Y'all -- I think y'all opposed doing that, so I
3 don't want to start doing that now.

4 **MS. ARMSTRONG:** Okay. But there -- well there's a
5 lot of -- there is substantial evidence in the
6 record that the park is not actually going to be
7 in the location that it's at right now because
8 the road that would -- that the developer would
9 use to access Captain Sam's Spit would need to
10 go through that Spit in the area where the park
11 exists right now. So there is some evidence of
12 that in the record. So I think it's
13 questionable about whether or not the park is
14 even going to be there if the development
15 proceeds. And so that's why the League is --
16 one of the reasons why the League has taken the
17 position that the whole structure should be
18 denied, even the 270 feet. And Mr. Walker
19 pointed out one of the reasons that we've made
20 those arguments was that -- there is marsh grass
21 growing in front of the parking area that's
22 adequately serving as an erosion control. So
23 there's really not the extreme need for this
24 kind of a structure in front of the park, and
25 that's why the League asked for this Court to



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1 overturn that authorization. And we believe
 2 that the decision for the Court is really that.
 3 When the -- the Supreme Court said that you
 4 couldn't authorize this big long structure
 5 because there was no public benefit. And then
 6 what we're left with is does the DHEC decision
 7 stand at that point, because DHEC did make a
 8 decision that was challenged by both parties.
 9 And so this Court needs to decide what to do
 10 with that DHEC authorization; is it going to
 11 affirm the DHEC permit as written, or is it
 12 going to deny the structure in its entirety
 13 based on the rationale in the Supreme Court's
 14 decision.

15 **THE COURT:** Well, what I'm trying to figure out also
 16 is there a middle ground that I need to explore
 17 too.

18 **MS. ARMSTRONG:** Your Honor, I think that --

19 **THE COURT:** That's what I was asking you about.

20 **MS. ARMSTRONG:** I think that if there's any -- if
 21 there's any --

22 **THE COURT:** From the Beachwalker Park standpoint.

23 **MS. ARMSTRONG:** I'm not sure I'm following you on
 24 middle ground from the Beachwalker Park
 25 standpoint. I mean, a 270-foot wall would --



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1 would provide some level of protection for the
2 parking -- the parking lot that's there now.

3 **THE COURT:** Well, as Mr. Walker said, if it would
4 erode around it, then --

5 **MS. ARMSTRONG:** But does that -- there's no -- I
6 don't think that there's any basis for
7 concluding that that -- the scour around at the
8 edges is going to actually hurt the parking lot
9 or the park itself.

10 **THE COURT:** Okay.

11 **MS. ARMSTRONG:** And, Your Honor, there was also some
12 discussion about the tax benefits that would
13 flow from a development. And I think,
14 throughout the arguments, there's been a little
15 bit of an overlap of the discussion about the
16 construction of the bulkhead and revetment with
17 the actual development, because most of Mr.
18 Walker's arguments were based on a presumption
19 that there would be some sort of some -- some
20 sort of a -- some development. And when it
21 comes to the tax benefits, if you are going to
22 look at the actual development itself, you know,
23 there isn't really any evidence of what those
24 benefits might be, who to -- how they're going
25 to benefit the public at large. But if we're



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1 going to go down that road, and I think it's
 2 kind of speculative to go down and start
 3 reaching into looking at some sort of tax
 4 benefits to arrive at the conclusion that
 5 there's a public benefit, but then if we're
 6 going to go down that road, then we would also
 7 need to look at the evidence in the record that
 8 talks about what happens when the storm comes
 9 and blows these houses into the water. I mean,
 10 there's plenty of evidence about the cyclical
 11 processes of erosion, the natural erosion that
 12 happens and the breach, the fact that the Spit's
 13 been under water. And so looking at the burden
 14 on the taxpayers from having to clean up that
 15 mess once it happens would be sort of a
 16 countervailing, you know, taxpayer analysis that
 17 this Court could undertake because that evidence
 18 is also in the record. And I think KDP and Mr.
 19 --

20 **THE COURT:** Well, I will tell you, just to give you
 21 a shot at me, when I ask that question, I asked
 22 it from the standpoint of the record; but
 23 secondly the reason I asked that question in
 24 that way is I looked at 48-39-30(D), and it
 25 talks about combination of uses which would



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1 generate the maximum -- maximum -- or let's see,
 2 not necessarily the combination of uses which
 3 would generate maximum, measurable dollar
 4 benefits, so -- but when it says that phrase,
 5 the statute is indicating that there is a
 6 consideration of dollar benefits in some way,
 7 and also -- there was another one, oh, the CZ --
 8 CZ and A -- factors include -- they were in the
 9 order. But number seven in there -- well, I
 10 said the order, the decision of the Supreme
 11 Court. It said the extent of the economic
 12 benefits as compared with the benefits from
 13 preservation of the area in its unaltered state.
 14 So that's what started me asking that question,
 15 was that there appears to be a comparison that
 16 is to be performed in that regard, and I was
 17 trying to explore how I do that comparison.

18 **MS. ARMSTRONG:** And I --

19 **THE COURT:** But that exploration would be within the
 20 context of the record.

21 **MS. ARMSTRONG:** And I tried to explore that. I
 22 tried to do that in our most recent briefing on
 23 the public benefits by discussing that -- you
 24 know, the way that the League views it is that
 25 the Court has to look at what the uses are in



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1 its natural state of a critical area.

2 **THE COURT:** Uh-huh.

3 **MS. ARMSTRONG:** What kind of use -- what kind of
4 benefits are -- and uses are being made right
5 now. And then, with the proposed use, what kind
6 of benefits and uses would be made, and then,
7 also, how would the existing ones be affected.
8 So, I mean, I think that's how I would -- that's
9 I sort of pick apart that analysis. And in some
10 cases, and I think your dock question is a good
11 one, where if you don't have any, you know, real
12 public uses of the area where that particular
13 dock is going to go, and then you have a benefit
14 to the person who wants to construct it with no
15 -- no evidence of any harm to the public using
16 that area, then that would be a measurable
17 dollar benefit that actually would enure to the
18 applicant, but without having any harm to the
19 public benefit and public uses, then it would
20 not violate that provision.

21 **THE COURT:** Okay.

22 **MS. ARMSTRONG:** In this case, it's a lot different
23 because of the public uses of the area that
24 exists as they are right now and what the
25 impacts will be to those, and then with no



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1 offsetting public benefit from the structure
 2 being constructed. And I think I might wrap up
 3 by -- unless you have any other questions, by
 4 addressing Mr. Walker's characterization of the
 5 order as muscular and strident. And I -- I mean
 6 I would agree that it is. I think that's a good
 7 way to characterize the order. And I think that
 8 the message from that order, with its tone, is
 9 that the Court really wanted to put an end to
 10 this dispute. They didn't want to hear -- they
 11 don't want to hear this again. They were trying
 12 to resolve, finally, this issue. And what KDP
 13 is doing is asking you to resurrect your opinion
 14 to allow a structure that clearly is something
 15 that the Court did not see would be providing
 16 any public benefit and would violate Section
 17 30(D).

18 **THE COURT:** And I remember you stated something to
 19 that effect in your original briefing that the
 20 tone of the -- is the phrase you used, of the
 21 decision. I just hesitate to start -- I want to
 22 stick with the statements in the decision,
 23 because I think if the Court starts making
 24 judgments based on the tone of the decision,
 25 that gives me too much discretion in my opinion.



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1 MS. ARMSTRONG: Well --

2 THE COURT: So, I'll tell you that and then I'll
3 allow you to respond.

4 MS. ARMSTRONG: I think the only reason I referenced
5 the tone is the same reason that, you know, I
6 bring back that it's muscular, is that one --

7 THE COURT: I know, it's the same concept.

8 MS. ARMSTRONG: -- it's trying -- is trying to be be
9 decisive and say, you know, we -- this case, we
10 had a week-long trial. You had a very thorough
11 order. We filed motions for reconsideration.
12 We asked the Supreme Court to take this. They
13 heard it three times. I mean, they accepted two
14 petitions for rehearing. They heard this case
15 and they've made up their mind, and they -- they
16 wanted some finality to this case. And I think
17 that the way we achieve that is just deciding
18 whether the DHEC permit of 270 feet of bulkhead
19 stands or not given -- in light of the Court's
20 opinion.

21 THE COURT: Well, I would love to there have been
22 finality one way or the other in this case.
23 Could they -- they could have just given
24 finality by just -- by not reversing the
25 decision and ending it there; could they have



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1 not? That's why I'm -- and therein is where I
2 struggle with going down with, or pursuing the
3 path of muscular tone or all that other type
4 stuff. I do see your point, but I'm hesitant to
5 bite at that just because of the discretion that
6 I'm biting off the second time by following that
7 path.

8 **MS. ARMSTRONG:** Well, this Court, in essence, issued
9 a new permit. And so they said that the permit
10 that you -- you -- the permit that you issued
11 was in error; that it didn't meet the legal
12 requirements. And so we take that away, and
13 then what are we left with? And I would say
14 we're left with the DHEC permit, and the Court
15 needs to decide what -- how to handle that.
16 Because it's really -- there's really two
17 separate decisions, and your opinion didn't
18 address the 270 feet. It went beyond and issued
19 a new permit for more structure that was beyond
20 what the agency decided to authorize. And so
21 once you take away, reverse, in essence, the
22 permit that this Court issued, then you've got
23 the DHEC permit before you and that 270 feet,
24 and a determination of whether there's public
25 benefit, whether it meets the other regulatory



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1 requirements. You know, that was something
2 that the League briefed in our proposed order.
3 And I think we may have included it in our
4 motion for reconsideration. And that's really
5 what the Court meant by remanding it to you for
6 further consideration. I mean, they didn't say
7 further consideration. I don't -- I don't think
8 that there's much discretion at all. They, you
9 know, they remand for further consideration
10 consistent with this decision, and the decision
11 is very decisive on the questions of public
12 benefit.

13 **THE COURT:** Okay. From Beachwalker Park standpoint
14 and the record, if I was to find that that park
15 needs to be protected with a bulkhead and
16 revetment -- or no, not find, consider whether
17 it should be protected with a bulkhead and a
18 revetment, I remember there was evidence about
19 some people going to that park and utilizing the
20 river side of the beach. How would the
21 revetment affect that utilization?

22 **MS. ARMSTRONG:** The river side?

23 **THE COURT:** Yeah.

24 **MS. ARMSTRONG:** Well, tat's what we've been talking
25 about.



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1 THE COURT: I know. I'm just asking.

2 MS. ARMSTRONG: It would eliminate it. It would
3 eliminate the use. I mean, that's the testimony
4 from the people that use it is that they
5 wouldn't be able to use it anymore. It's a
6 concrete block structure. I mean, it's not like
7 -- you wouldn't -- I don't -- I couldn't imagine
8 that anybody would want to go to the beach if it
9 was just concrete blocks. I mean, you go
10 because it's a sandy, nice enjoyable surface to
11 be on. And the testimony from the witnesses --

12 THE COURT: Somebody who would be in wheelchairs
13 might like that idea.

14 MS. ARMSTRONG: Well --

15 THE COURT: It would be them.

16 MS. ARMSTRONG: -- they've got holes in them. I
17 mean, I don't know if you remember seeing them,
18 but they're the concrete blocks that have the
19 holes in it.

20 THE COURT: Okay.

21 MS. ARMSTRONG: It's not a flat surface by any
22 means. I mean, it's treacherous to walk on.
23 And Mr. Long even said it wouldn't really be
24 good for the little kid that wants to run around
25 the beach because it's just not safe. I mean,



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1 these are not solid blocks, they've got, you
2 know, holes in them. That's how the grass would
3 grow up. So it wouldn't -- it's not something
4 that any of the witnesses that actually use that
5 area testified that they would continue or be
6 able -- feel safe using. It would tear up your
7 boat to try and pull up on it. It would be no
8 fun and dangerous to even attempt to walk on.
9 And that's something that Justice Hearn, you
10 know, recognized right away. Your Honor, can I
11 have maybe just five minutes? I think that you
12 are aware that Professor Bachman filed a Notice
13 of Appearance in the case before the Supreme
14 Court.

15 **THE COURT:** Oh, yeah. I thought you were about to
16 say before here.

17 **MS. ARMSTRONG:** And if you don't mind, I'd just like
18 a minute or two to talk with him.

19 **THE COURT:** Any objection?

20 **MR. WALKER:** None at all. May use a second to talk
21 to my client as well.

22 **THE COURT:** I'll tell you what, I'll just take a
23 short break.

24 (Break from 11:34 a.m. until 11:51 a.m.)

25 **MS. ARMSTRONG:** Thank you, Your Honor. I think just



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1 summing up, I would agree that the tone of the
 2 opinion isn't really what matters but the depth,
 3 the breadth, and the extent of the opinion do.
 4 And the Court, the Supreme Court left -- they
 5 attempted to leave no stone unturned. It's a
 6 lengthy opinion. It gives very explicit
 7 directives, and it's interpretation is very
 8 clear. They're really -- and what the Court did
 9 was give you the guidelines to go back and
 10 consider the decision that's before the Court,
 11 the agency permitting decision, and consider it
 12 so that it's consistent with the Court's
 13 analysis of the law; not to go back and, you
 14 know, open the book and start looking at things
 15 anew. The Court was clear on what it wants this
 16 Court to do and that, essentially, that the
 17 final resolution of an agency permit decision
 18 needs to issue from this Court. But it gave
 19 clear guidelines that don't involve going back
 20 and re-analyzing evidence. Instead the remand
 21 is just to allow this Court to make the final
 22 resolution that would be consistent with the
 23 opinions expressed in the Supreme Court's
 24 decision.

25 **THE COURT:** All right. Mr. Churdar.



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1 MR. CHURDAR: Your Honor, before I -- before I begin
2 addressing some of the substantive issues,
3 there's two preliminary things that I wanted to
4 mention to the Court. The first one is as a
5 chief counsel for OCRM, we have wrestled with
6 what to do with this, but just I think I've come
7 down weighing on the side of transparency. And
8 what I'm about to tell you, I don't -- I do not
9 believe that this matter is certainly in the
10 record on appeal, it's certainly I don't believe
11 relevant to this, but I wanted to make the Court
12 aware of a coastal zone consistency
13 certification challenge involving a sheet pile
14 wall in this same area that is -- that will, I
15 don't know what the end result will be but, you
16 know, it's in the stage after the staff decision
17 before the final agency decision.

18 THE COURT: Okay.

19 MR. CHURDAR: And I'll leave it at that. I don't
20 think, as I mentioned that it's --

21 THE COURT: You don't really need to let me know as
22 long as the counsel's know.

23 MS. ARMSTRONG: Well I was going to -- I mean, we're
24 the ones who are challenging that.

25 THE COURT: Oh, okay.



1 MS. ARMSTRONG: That's what I was going to just
2 bring to light before Your Honor and you said
3 don't go outside the record, so I stopped.

4 THE COURT: Yeah, I would prefer to just -- unless
5 y'all think that that is something -- it's a
6 challenge; there's no decision made by the
7 appellate court regarding that. So, honestly,
8 as long as there's no -- I think about the rules
9 concerning me taking a position, but it doesn't
10 sound like that's a problem in this case, taking
11 a diverse position in one case versus another.
12 So unless there's something in that regard,
13 don't worry about that and let's keep moving.
14 Let's go to the next one.

15 MR. CHURDAR: Okay. I just wanted to mention that.
16 The other thing is, Your Honor, the Department
17 certainly meant no disrespect with --

18 THE COURT: Oh, I didn't take that.

19 MR. CHURDAR: -- regard to the --

20 THE COURT: Y'all are kind of getting short shrift.
21 And I understand the phrase you used, and I
22 don't even know what it was, but -- but I did
23 kind of -- it did appear it's more of a bottom
24 line is that I should trust the Department from
25 the findings of fact. You went into that. And



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1 let me see if I can find it. Yeah, there's no
2 significant countervailing public interest.
3 That didn't tell me a whole lot. I didn't quite
4 get -- I mean, I could ask a lot of questions
5 about that, which I don't think I am because
6 I've heard a good bit already on that. But I
7 just -- if that's the standard, I don't know
8 where I go with that, but it seems pretty wide
9 open. But go ahead.

10 **MR. CHURDAR:** Well, Your Honor, I would say that,
11 just in summary, at the beginning the area where
12 the League and the Department would diverge is
13 just obviously about the issue of the 270-foot
14 revetment and bulkhead that was actually issued.
15 As has been discussed previously, the Supreme
16 Court said that the ALC made no findings of any
17 public benefit that would result from the
18 bulkhead and revetment. And in the Court's
19 final order on page 15, the Court said this
20 Court said the construction of the revetment
21 will not necessarily eliminate public use and
22 access. And then on page 21, said neither the
23 bulkhead revetment nor the potential limited
24 residential development will result in any
25 significant harm to the public resources or



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1 marine or other plant or animal life nor
2 significantly impair public access to critical
3 areas. And so what I would contend that what
4 the Supreme Court has remanded it back down to
5 this Court to do is to make findings of fact
6 that are consistent with the testimony both of
7 Mr. Eiser, as well as Leonard Long, regarding
8 the public benefit of the 270-foot bulkhead. I
9 mean, I don't believe there is any argument from
10 that. In fact, that was -- from Mr. Walker that
11 was one of his --

12 **THE COURT:** Can I stop you? So you think that the
13 Supreme Court just wants to remand the case for
14 me to make findings of fact consistent with what
15 they want me to do? I mean, they don't need me
16 to do that. If you're going to -- if you're
17 going to remand it for a Court to make findings
18 of fact, you're remanding for the Court to
19 determine what the findings of fact should be;
20 otherwise, you don't need to remand it. So I'm
21 not quite following that if you could explain
22 that further.

23 **MR. CHURDAR:** Well, if the -- at the end -- they go
24 through in their conclusion, at the end they
25 say, "For all of these reasons, we reverse and



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1 remand for further consideration consistent with
2 this opinion." And what they have said is on
3 the -- on the -- with regard to the public
4 benefit, they said the ALC made no findings of
5 any public benefit that would result in the
6 bulkhead or the revetment. And what I'm -- what
7 I'm saying, Your Honor, is there needs to be
8 some findings as to the public benefit that is
9 consistent with what was presented by both Bill
10 Eiser and Leonard Long as far as how if there's
11 50,000 people a year that are benefitting from
12 this park, and that is different from the lack
13 of public benefit analysis that was -- no public
14 benefit analysis toward the remainder of the
15 bulkhead and the revetment. Mr. Walker has
16 testified that the first public benefit was to
17 the park, which obviously we would concur with.
18 But he had also talked about the public benefit
19 of the revetment as a way to forever preserve
20 Captain Sam's Spit. And I don't believe that
21 this -- I believe this may -- has inherent in it
22 an assumption that is -- that is incorrect.
23 From what Dr. Kana testified to, the accreting
24 side on the other side of the beach makes the
25 likelihood that this Spit would only be



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1 preserved with the benefit of a revetment and a
2 bulkhead just contrary to what the testimony was
3 regarding I believe it's more shifting, if you
4 will, than it is disappearing.

5 **THE COURT:** In other words, breaching is not the
6 issue?

7 **MR. CHURDAR:** In other words what?

8 **THE COURT:** Breaching is not the issue.

9 **MR. CHURDAR:** Breaching?

10 **THE COURT:** Yeah. Breaching the -- there was a good
11 bit of testimony about breaching through the
12 narrow area of Captain Sam's Spit.

13 **MR. CHURDAR:** Well, what I'm saying the issue -- the
14 issue is is not the public benefit. There is
15 not realistically a concern that the Spit is
16 going to disappear. I mean, the -- because it
17 is shifting -- he mentioned like five, four or
18 five, five or six different public benefits, and
19 I'm just saying that to say that that is a
20 public benefit in light of what the Supreme
21 Court said in terms of the public benefit
22 analysis and benefitting the public at large, I
23 don't think realistically that is a concern,
24 ergo, I don't believe that that is really a
25 public benefit as the Supreme Court defined that



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1 benefit to the people. Another factor that Mr.
2 Walker mentioned was this development agreement,
3 and it requires property owners to provide
4 parking and beach access. And I would just
5 simply say that, as far as a public benefit,
6 that is something that could be done at this
7 point with or without the -- a bulkhead and
8 revetment that extends beyond Beachwalker County
9 Park. Consequently --

10 **THE COURT:** Could be or will be?

11 **MR. CHURDAR:** Oh, I'm not saying it will be; I'm
12 just saying it could be. I mean --

13 **THE COURT:** There's a lot of things that could be.
14 I'm not going to go down a path of deciding this
15 case on what could be because, again, when I
16 said something about opening up my discretion,
17 I don't think I have that kind of discretion or
18 should.

19 **MR. CHURDAR:** Well, Your Honor, all I'm saying is
20 that it's -- the ability to provide extra
21 parking for people at Beachwalker County Park is
22 not limited to having a revetment and bulkhead,
23 or not on the remainder beyond what -- of the
24 bulkhead beyond what the Department permitted.
25 That can be done with or without regard to that



1 development agreement, is my point. And as a
2 result, what I'm saying is that is not -- excuse
3 me, that is not a public benefit that is tied to
4 the bulkhead and the revetment. And I think Ms.
5 Armstrong mentioned the benefit of, or addressed
6 the benefit -- the tax revenue benefit such that
7 I don't -- I don't really need to address that
8 any further. I believe it is important for this
9 Court to keep in mind a couple of things with
10 regard to the bulkhead and revetment as it was
11 permitted by the Department. Mr. O'Rourke
12 testified that -- what he said is on page 1128
13 of the trial transcript, that he hoped there
14 would be further discussion between KDP and the
15 Parks and Recreation Commission about relocating
16 Beachwalker County Park. But at this point
17 there -- first of all, there was nothing in the
18 record that there was any plan for relocating
19 it, and at this point -- well, I don't want to
20 go beyond the record. But there was simply
21 nothing that gave anything to provide the Court
22 with a concrete basis to determine that
23 Beachwalker County Park wasn't going to be there
24 in the future. And as far as the scouring that
25 was mentioned by Mr. Walker on the end, in other

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1 words, why do we need a revetment and a bulkhead
2 that's greater than 270 feet, I think it's worth
3 nothing that it was part of the record on appeal
4 that the Parks and Recreation Commission, when
5 they applied for a bulkhead and a permit to
6 protect -- the bulkhead and the revetment to
7 protect the parking lot at Beachwalker County
8 Park, they applied for the same one. I mean,
9 they were the ones that applied for the --
10 originally that applied for the permit that was
11 subsequently what was approved by the
12 Department, and then special conditioning out
13 the remainder of that bulkhead and revetment.
14 So to the extent that that is another basis or
15 another reason to find that there is public
16 benefit for what was already permitted, I
17 believe that that is, in fact, another factor
18 that this Court could consider, or not -- should
19 make a part of any future order in addition to
20 the other factors that I've mentioned. One
21 other factor that Mr. Walker mentioned in regard
22 to the feasible alternatives analysis, he had
23 talked about the no-action alternative. And I
24 believe, Your Honor, that to the -- underlying
25 the assumption of his argument is that there is

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1 an assumption that a no-action alternative means
2 that the Department is prohibiting development.
3 And as far as the CMP states with regard to
4 barrier islands, that's plainly not what the CMP
5 says. But I don't believe that a no-action
6 alternative with regard to a bulkhead and a
7 revetment is the same as a prohibition on
8 development. I mean, to assume that one means
9 the other I believe is an incorrect assumption.
10 So with regard to the other arguments that have
11 been made by the League, the Department believes
12 that those are correct, except to the extent
13 that this Court would approve the 270-foot
14 bulkhead and revetment that is originally
15 permitted. And the reason is because there is
16 plainly a public benefit for that.

17 **THE COURT:** All right.

18 **MR. CHURDAR:** So, thank you.

19 **THE COURT:** Ms. Armstrong, any response to his
20 arguments?

21 **MS. ARMSTRONG:** I think I definitely need to clarify
22 that the League does not agree with DHEC that
23 this Court should make any new findings. We
24 don't agree that any new findings are needed at
25 all. The Court, at the end of its opinion, said



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1 that it reversed for several -- due to several
2 errors of law. So this Court is not to make new
3 findings; it's to correct the errors of law in
4 light of the -- in light of the opinion. And
5 the Court's already said that there's no public
6 benefit. So I think that's probably the -- you
7 know, the area where we've got the largest
8 disagreement with the Department. And I think,
9 again, we're aligned on everything else except
10 the question of the 270 feet, and I've already,
11 you know, put in our brief evidence about the
12 fact that the park land is actually owned by the
13 developer. So, again, they don't own it,
14 they're under lease, there's been discussions to
15 move it. All of those things are pieces of
16 evidence. And whether the -- even if we knew
17 that the park was going to be there whether the
18 structure is actually needed to provide any
19 public benefit. Because if the park remains,
20 there's still going to be parking
21 infrastructure, and there wasn't any evidence
22 that it was not going to be used as parking if
23 the bulkhead and revetment are not constructed.
24 That's all I have. That's all in response to
25 DHEC. Thank you, Your Honor.



1 THE COURT: All right. Mr. Walker.

2 MR. WALKER: Thank you. The first place I'd like to
3 start is with the Supreme Court opinion and the
4 conclusion, because I think the conclusion
5 really says it all in terms of what is to be
6 done here on remand. The opinion found that you
7 did not make any findings as to the public
8 benefit to the public at large, but the Court
9 actually said we're remanding it so you could
10 look at the issue. The Court, in the conclusion
11 on the last page, says, "The ALC did not
12 consider whether and to what extent the public
13 would benefit from the proposed structure as
14 opposed to leaving the tidelands in a natural
15 state, their natural state." So the Court has
16 asked you to consider that. It has not said,
17 here's your conclusion. They've asked you to
18 look at the public benefits. And we've
19 enumerated the public benefits. So clearly by
20 saying that you're to consider that, they're
21 talking about findings. They haven't told you
22 what to do. They did not say we find as a
23 matter of law that the only reasonable inference
24 from this evidence is that there is no public
25 benefit. They just said you didn't look at it,



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1 and they've asked you to look at it. And that's
 2 what you're doing, and we've provided proof of
 3 that. And they also, in this conclusion, talk
 4 about the other two issues that we have talked
 5 about. So it is before you; it is before you to
 6 consider the entire record. It's not before you
 7 to be a puppet and just say there's no public
 8 benefit. They asked you to consider it. And
 9 that's what you're to do. And we brought out in
 10 the items in the record today, and we've
 11 highlighted it in our notebook to facilitate so
 12 you don't have to go through the 1,700 pages of
 13 the record, what we think are the key points on
 14 all three of those issues. I'd like for a
 15 second to clarify a few things about Beachwalker
 16 Park. The application that was put in by County
 17 PRC was for 270 feet of a flat out bulkhead with
 18 no revetment. And that was only for a limited
 19 portion, as we shown, of the bank. The only way
 20 that that bank is going to be protected based on
 21 the evidence at trial is if there is a more
 22 holistic solution. One, we know now that a
 23 bulkhead is going to scour at the bottom and
 24 increase erosion. Two, we know it's going to
 25 scour around the edges and that's not



1 accomplishing anything at all. There's a
2 serious problem there. We showed -- we put in
3 the evidence the pictures. There was some
4 statement, well, there's not much going on, but
5 our pictures -- and I'll just use one as an
6 example -- show just how bad this is. The
7 erosion has gotten all the way up to the fence.
8 And we have other pictures showing where the
9 fence has been undermined and has collapsed.
10 Mr. O'Rourke said that they had a gazebo there
11 they had to move or else it would have fallen
12 into the creek. Mr. O'Rourke was unequivocal,
13 and we've got his testimony copied and in the
14 record, he is in favor of the application, and
15 that is in the highlighted pages that we have,
16 1128 of the record, where he talks about have
17 you -- we asked him, Have you observed the
18 erosion? Yes. Has it been a chronic problem?
19 Yes, it's very chronic. We're losing part of
20 the actual parking lot. And then he goes into
21 what they've actually lost. The split rail
22 fence, we lost the land the gazebo was on; the
23 fence had to be moved. So I could go on, but
24 the point is they've got a serious problem
25 there, and now that more engineering has been

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1 and more study has been done, 270 feet is not
2 going to do it. Certainly a 270-foot bulkhead
3 is not going to do it. To protect the park
4 requires more than that. We'd also note that
5 the park is for the oceanfront, and the lease
6 from KRA to the park gives an easement not down
7 to the river, but to the beach. It's a
8 beachfront park. And right now, just from
9 looking at that picture that you saw, if
10 somebody wanted -- they have a fence, first of
11 all, they have a fence to keep people from going
12 down to the river, and if you tried to do it,
13 you would be going down a vertical escarpment.
14 So it isn't as though access from the parking
15 lot to the river is an issue. And with respect
16 to others that may be coming up in a kayak, that
17 deals with the river shoreline, not the county
18 park because the county park is that upland
19 improvement of the parking lot, the changing
20 rooms, the boardwalk to the beach.

21 **THE COURT:** All right. So there is no walkway from
22 the park down to the -- I heard river, I've
23 heard creek. What was the name of this place?

24 **MR. WALKER:** I don't -- I don't think there was. If
25 there was, it's no longer there. I'm not saying



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1 conclusively, I don't remember their testimony
2 that people go to the park and walk down. They
3 may shuffle down and try to get down the bank at
4 a less steep spot. But there's no -- they
5 aren't encouraged to go down there for --
6 they're encouraged to go to the beach, and
7 that's why people go. And the parking lot is
8 the key to Beachfront Walker Park (sic) because
9 that's where people come and park. There was
10 some testimony -- or not testimony, there was
11 some suggestion that I was presuming
12 development. Well, it's not just KDP. The Town
13 of Kiawah Island has a comprehensive plan that's
14 planned for 50 units. The Town of Kiawah Island
15 has zoning that will allow up to 50 units. So
16 it's local government which has anticipated and
17 planned for and approved conceptually, although
18 there's still subdivision plat approval and
19 everything else, but the government body has
20 said we've master planned it to have it. So
21 it's not just the developer who would like to do
22 it, it's the government who has said our
23 comprehensive plan and expression of a policy of
24 the municipality says we approve this
25 development and would like to see it done.

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1 Otherwise, they would have comp planned it for
2 a park, and they didn't do that. A couple of
3 just observations in response to Mr. Churdar.
4 I think there's some confusion. When we talk
5 about public benefit from the conservation
6 easement, we're talking about legal
7 preservation, legal restrictions that were never
8 allowed to be changed. We're not talking about
9 a relationship between the conservation easement
10 and the physical growth of the Spit. The Spit
11 may still accrete without the conservation
12 easement, but the legal protection afforded by
13 a conservation easement is significant. In
14 fact, the whole federal and state scheme in
15 favor of the conservation easements is because
16 they provide a public benefit, and you cannot
17 put a conservation easement on property unless
18 there is a public benefit because there have to
19 be conservation purposes that are furthered by
20 the conservation easement. And the Kiawah
21 Island natural habitat Conservancy, which is the
22 designee -- there's testimony to this effect in
23 the record -- excuse me, the grantee of the
24 conservation easement, they are an authorized
25 holder and steward of the land. So we say, and

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1 I think it's clear, that the conservation
2 easement is a big public benefit. I also think
3 there may have been some confusion about the
4 parking spaces. We have the parking spaces at
5 Beachwalker Park which are -- you know where the
6 Beachwalker Park parking lot is, but the parking
7 spaces we're talking about are the ones that are
8 committed in the development agreement that we
9 copied and highlighted, the Kiawah Island
10 Community Association for the benefit of
11 everybody on Kiawah Island. And those spaces
12 are to be on Captain Sam's beyond -- well beyond
13 Beachwalker County Park, and allow parking well
14 down the Spit so that the people who can go
15 there and access the beach farther down the
16 island. And those spaces are completely
17 separate from the spaces at Beachwalker Park.
18 Those spaces are not going to be created unless
19 the development, the minimal development is
20 allowed to go forward. And as we said already,
21 and as these experts show, the testimony from
22 Mr. Pomar and Mr. Long, that that development is
23 not going to proceed unless there's a
24 stabilization of the bank. It's just not going
25 to happen. There's some suggestion, well, they



1 could do it. Well, as a practical matter, the
 2 evidence is that it makes no sense for them to
 3 do it if there isn't some stabilization of the
 4 bank. Mr. -- in that respect or in a related
 5 respect, Mr. Churdar is right that denial of the
 6 revetment is not a prohibition of the
 7 development. The practical effect of the denial
 8 of the bank stabilization is that it makes
 9 development impractical and highly unlikely
 10 according to the testimony of the witnesses. So
 11 I'm not going to go back through everything in
 12 response to all the arguments because you've
 13 heard it. We would just ask to -- that you
 14 consider, and I know you will, what we've stated
 15 about the public benefits. The Supreme Court
 16 has said you are to consider, because they
 17 didn't think you considered the public -- the
 18 benefit to the public at large. Neither the
 19 Conservation League nor the Department has had
 20 much to say in terms of the upland impact
 21 because your order clearly addressed it, and it
 22 looks like that's merely an administrative
 23 matter of assembling the proof in a way that the
 24 Court would accept that you fully considered it
 25 and had -- supported your conclusion with all



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1 the testimony in the record about how sensitive
2 the development is going to be. The final issue
3 is the feasible alternatives that we've already
4 talked about. And there is a dramatic effect,
5 we say, in the no-action alternative. We think
6 it frustrates the local policy of the town. It
7 frustrates the development of the Spit. It may
8 tank the economic interest of the owner. And we
9 believe that if you look at that analysis, that
10 you should come down on the side of there needs
11 to be stabilization, and we would ask you to
12 consider that that stabilization needs to be
13 effective, and the bank stabilization should be
14 all or the greater part of what you approved in
15 the first instance. And we believe that to be
16 fully supported, and we're prepared to defend
17 that all the way.

18 **THE COURT:** As were you the first time I issued the
19 order.

20 **MR. WALKER:** I just didn't know it was going to take
21 six years. I think I still -- I may have six
22 years left in me, Your Honor.

23 **MS. ARMSTRONG:** Your Honor, can I just have about
24 two minutes.

25 **THE COURT:** If it's addressing something that he --



1 MS. ARMSTRONG: It is addressing, it is. I think
2 the first point is just whether or not the
3 comprehensive plan allows development is really
4 not relevant because a plan is just that, it's
5 a plan; it's not a requirement. There's no
6 requirement by the local government that the
7 Spit be developed. That's just the nature of
8 the comprehensive plan. And the other point is
9 about the conservation easement. Mr. Walker
10 never explains how the public benefits from a
11 conservation easement being in place. The
12 public still can't go out there and use it, it
13 is private property, it's still owned by the
14 developer. And so whether the land is left in
15 its natural state with legal protections of a
16 conservation easement or without is really a
17 distinction without difference to the public.
18 That doesn't matter to the public. It's either
19 in a natural state as it is or because of a
20 conservation easement. The benefit from the
21 conservation easement flow to the developer
22 because they are able to take a tax credit for
23 donating land as a conservation easement. So
24 the benefits are, again, to the developer and
25 not to the public.



1 MR. WALKER: May I respond?

2 THE COURT: Yeah, but I'm going to ask you a
3 question first. If there is a benefit that this
4 Spit maintain its pristine state, then would
5 there not be also an equivalent benefit to the
6 significant portion of the Spit to maintain its
7 pristine state?

8 MS. ARMSTRONG: Well, the only - the two options
9 that I've heard discussed today are the Spit
10 remain in its undeveloped state here, that they
11 don't have the revetment, that they're not going
12 to have a -- they're not going to do a
13 development, so there's nothing there. Or there
14 are 50 houses and a conservation easement there.
15 So -- and a wall that covers two and a half
16 acres of public trust tidelands.

17 THE COURT: Well, my question was to zero in on your
18 conservation easement argument, and that is
19 about there not being a benefit to the public at
20 large via the conservation easement. If there
21 is a conservation easement that results in a
22 portion of Captain Sam's Spit remaining
23 pristine, and the argument that you have given
24 me in this case is that a public benefit is that
25 the Captain Sam's Spit remain pristine, then it



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1 would logically flow that any portion of Captain
2 Sam's Spit that remains pristine would therefore
3 be a public benefit.

4 **MS. ARMSTRONG:** For Captain Sam's Spit to remain
5 pristine and undeveloped is, I believe, a public
6 benefit. I agree with there's a public benefit.
7 I think what the Court looked at and was very
8 explicit in is the public benefit to leaving the
9 area below the mean high water mark and the mean
10 low watermark that would be covered by the wall
11 in its pristine state.

12 **THE COURT:** Yeah. Okay. Mr. Walker?

13 **MR. WALKER:** I think you hit it, which was that the
14 Department's decision to deny the remainder of
15 this permit was based on its belief that the
16 public benefitted from the Spit being in a
17 natural state, even though the public didn't own
18 the Spit. So preserving the Spit in a natural
19 state, regardless of ownership, has been a
20 virtue, so to speak, to be considered in the
21 mix, that was pronounced by the Supreme Court.
22 It was, in large part, the reason for the
23 decision of the Department. So we know,
24 regardless of ownership, that their position is
25 there's a benefit. As far as the conservation



1 easement is concerned, the statutory -- the
2 South Carolina statutes recognize conservation
3 easements as furthering the public benefits,
4 public interest, as well as the federal. And
5 that public interest is not furthered simply by
6 whether or not the public has access and can go
7 all over the conserved property. It's a much
8 larger view. And the larger view that our
9 Congress and our State Legislature has endorsed
10 is that there is a per se public benefit that
11 the public can look on that land, even though it
12 doesn't own it. If it's preserved natural and
13 development rights are given up, that is to the
14 public benefit, and it doesn't matter who owns
15 it. And preserving this in a natural state, we
16 agree if we can preserve more than 80 percent of
17 Captain Sam's in its natural state forever, we
18 say that's a huge benefit, particularly
19 considering the accretion that's going on,
20 which, according to Dr. Kana, will continue, and
21 the beach, as we know, is growing at a
22 considerable rate. That is a huge public
23 benefit. Thank you.

24 **THE COURT:** All right. Unfortunately for y'all, I'm
25 going to think about this. I'm probably going



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1 to ask for proposed orders. I'm sorry. But if
2 I knew which way I was going for sure and how I
3 wanted to go, I wouldn't do it. But I'm going
4 to think about it before I ask for it. So I'm
5 not doing it right now. So with that said, this
6 hearing is adjourned.

7 **MR. WALKER:** Thank you, Your Honor.

8 **MS. ARMSTRONG:** Thank you.

9 (There being nothing further, the hearing was
10 concluded at 12:33 p.m.)
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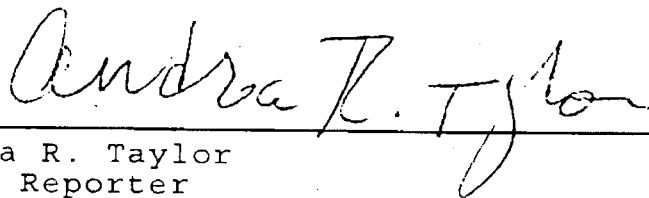
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CERTIFICATE

This is to certify that the within hearing consisting of One Hundred Three (103) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on July 7, 2016.



Andrea R. Taylor
Court Reporter

Notary Public for South Carolina
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Transcript of the Testimony of
KDP, II v. SCDHEC, ET AL

Date: August 24, 2009

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 09-ALJ-07-0029-CC
Kiawah Development Partners, II,)
Petitioner,)
v.)
SCDHEC Office of Ocean and Coastal)
Resource Management,)
Respondent.)
South Carolina Coastal Conservation)
League,)
Petitioner,)
v.)
SCDHEC Office of Ocean and Coastal)
Resource Management and Kiawah)
Development Partners, II,)
Respondents.)

ADMINISTRATIVE HEARING

Monday, August 24, 2009

1:04 p.m. - 5:37 p.m.

Tuesday, August 25, 2009

9:00 a.m. - 7:03 p.m.

Wednesday, August 26, 2009

9:00 a.m. - 7:28 p.m.

Thursday, August 27, 2009

9:00 a.m. - 6:00 p.m.

Friday, August 28, 2009

9:00 a.m. - 4:27 p.m.

The hearing before the Honorable Ralph King Anderson, III, was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 24th through 28th day of August, 2009 before Cassandra E. Vance, Court Reporter and Notary Public in and for the State of South Carolina.

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1 reasons they issued 270 feet, the evidence is
2 going to show, was to promote public access to
3 the beach. But they're asking to put the
4 concrete block revetment -- so you're going to
5 have stacked concrete blocks with the holes
6 coming up, on that 2,783 feet of shoreline,
7 which is currently dry, sandy beach -- well,
8 it's a sandy beach that's used by the public.
9 So, for those reasons and other reasons that
10 will come out in evidence, Your Honor, we're
11 going to ask that you affirm the Department's
12 decision.

13 THE COURT: All right. Mr. Walker?

14 MR. WALKER: Thank you. Our first witness is
15 Leonard Long.

16 (The witness was duly sworn by the court
17 reporter.)

18 THE COURT: Hopefully your testimony will not live
19 up to your last name.

20 THE WITNESS: I hope not. That would be sweet.

21 LEONARD LONG, having been duly sworn, testifies and
22 examines as follows:

23 MR. LONG - DIRECT EXAMINATION BY MR. WALKER:

24 Q: Leonard, what is your current occupation?

25 A: I am executive vice president of KRA, which is

1 Kiawah Resort Associates, that owns most of the
2 land at Kiawah and our companion entity is
3 KDP II, among others, that owns this land at
4 Kiawah.

5 Q: Have you always been in real estate
6 development?

7 A: No.

8 Q: Did you have a prior life?

9 A: I had one and I enjoyed it. I was a lawyer for
10 many years and I passed the bar in '69 and
11 practiced law, real estate law mainly, mostly
12 appellate work, if I could get it, that's what
13 I enjoyed, and representing governmental
14 entities. Did that for probably 15 years and
15 slowly got into developing historic houses
16 downtown, really restoring them and renovating
17 them and then finally --

18 Q: Downtown Charleston?

19 A: Downtown Charleston. And then subdivisions and
20 ultimately we had the chance of a lifetime to
21 buy Kiawah in '88 and to everybody's surprise,
22 the person who had it under contract let the
23 contract expire without closing, so we
24 fortunately were able to get in and meet with
25 the Kuwaitis who owned the island at the time

1 and acquired the property.

2 Q: Let's back up a few years so that the Judge
3 understands the development of Kiawah Island.
4 When was the island begun to be developed in
5 truth? When did that occur?

6 A: There were a few houses there when I first
7 started fishing on Kiawah in 1970 that were
8 built under the permission of Mr. Royal, Robert
9 Royal from Aiken, South Carolina, who at that
10 time owned the entire island. And he sold the
11 property -- his heirs actually sold the
12 property for about \$17 million in 1973 or '4 to
13 the Kuwait Investment Company. Kuwait
14 Investment Company hired Sea Pines Company at
15 the time, which was doing well in Hilton Head
16 and other places, to be their developer. And
17 they, among other things, developed a plan to
18 treat the island in certain ways and not treat
19 it in certain ways. And the sales began in
20 about '75 or '6 from the Kuwait companies.
21 Ironically, it's one of those curious twists,
22 I was the county attorney at the time and
23 negotiated with Sea Pines Company the PDD that
24 was alluded to, at least by Jimmy.

25 THE COURT: PDD or PUD?

1 THE WITNESS: They called it in Charleston Planned
2 Development District. Most people called it a
3 PUD.

4 THE COURT: Okay. Same thing as PUD?

5 THE WITNESS: PUD, uh-huh (affirmatively responds).

6 Yes, sir. It was the second one ever in
7 Charleston County.

8 Q: When the opportunity came along in 1988,
9 approximately how much of Kiawah Island had
10 been developed, roughly?

11 A: Trenholm, in '88, we closed in June, and the
12 Kuwaitis probably had built -- they were mostly
13 in the condominium sales; some homesites, some
14 other smaller units, but mostly condos. I
15 guess they probably had fifteen, 1800 units
16 sold and they had a couple of golf courses
17 built and opened. One golf course built but
18 never opened until we got there and a couple of
19 tennis centers. And that was about it. They
20 had a 150-room inn. They had a water and sewer
21 company and that was about their development
22 limit at the time.

23 Q: Were there still large undeveloped pieces of
24 the island?

25 A: Yes, there were and --

1 Q: Would you -- go ahead.

2 A: There were a couple thousand acres left of --
3 or more probably of developable highland.
4 Kiawah's ten miles long, as you alluded to.
5 It's about a mile wide, maybe a little bit
6 longer and wider in places and it's got about
7 10,000 acres, of which about maybe 5500 are
8 developable highland. Probably at least
9 that -- at least half of that was available, I
10 suppose, if I could correct my earlier
11 statement, when we got there in '88.

12 Q: What was the game plan? When the opportunity
13 came along and you closed, what was generally
14 the business plan moving forward? What were
15 you going to do?

16 THE WITNESS: Well, Your Honor, our game plan was
17 basically to do simple things you might not
18 say. We tried not to mess up what we knew,
19 just as citizens of Charleston, was a great
20 place. We'd seen it developed well for a
21 number of years by the Kuwaitis. They'd won a
22 lot of nice awards and they understandably were
23 kind of the "big elephant" that used to be
24 called in the market place. They set price up
25 and down the East Coast. They are the standard

1 for marketing. They had done a lot of things
2 really well and we didn't want to injure that.
3 So we decided right away that what we would try
4 to do is not do certain things.

5 We didn't do, for example, what they'd gotten
6 permitted from the Coastal Council, which was
7 an inland harbor development, because we
8 thought it would pollute the river and we'd
9 catch some grief. And so we deleted the third
10 village. There were to other villages at
11 Kiawah that I can mention later, but that was
12 part of the plan that the Kuwaitis had come to
13 honor and develop as they were moving along in
14 the seventies and eighties. But what we wanted
15 to do, Trenholm, was we wanted to not build
16 things. We'd rather have somebody else
17 reputable who really knows how to build houses
18 and condominiums and the like. So we have
19 never built product to sell. We sell
20 homesites. We try to create neighborhoods that
21 are attractive, environmentally correct, work
22 the infrastructure is top of the line in every
23 way.

24 **Q: How do you -- or do you maintain some esthetic**
25 **control, even if you allow the building?**

1 **A:** We do. We control -- and get a little grief as
2 you can imagine, but I think most people have
3 come around to understand that it's been very,
4 very positive to have the Architectural Review
5 Board, which controls architecture, but also
6 controls landscaping.

7 THE WITNESS: And Kiawah, which was a tree farm,
8 Your Honor, for about a hundred years, is extra
9 dense. It looks unlike any barrier island --
10 I live on Sullivan's Island and it has no
11 relation to Sullivan's Island or any of the
12 other barrier islands in South Carolina.
13 This island of Kiawah is massively dense. And
14 we wanted to keep it that way. We wanted to
15 have that natural privacy. We wanted to have
16 that increased sense of forested area right in
17 the middle of the Atlantic Ocean. There's only
18 one way on and one way off Kiawah and you start
19 at the western end and you go -- you know, the
20 Kuwaitis are marching east and we picked up
21 where they stopped, about mid island.
22 We, therefore, are very, very strict on
23 architecture. And probably 15 years ago, we
24 started doing some things that were fairly
25 innovative in our field.

1 Q: What about with respect to trees?

2 A: Well, with respect to trees, if you cut down --
3 if you absolutely can establish that there's no
4 way around it and if you have to cut down what
5 we consider a major tree or a grand tree, you
6 have to replace the caliber inches, and usually
7 more than you took down; sometimes double.

8 There's a lot of other things, though,
9 Trenholm, that we try to do. We try not to --
10 we try to eschew the development of typical
11 grass yards and instead focus on native
12 grasses, xeriscaping and all the rest of the
13 things that we started a long time ago that you
14 hear a lot about today.

15 Setbacks from the ocean, for example, I think
16 Kiawah is the leader and has been ever since
17 the Kuwaitis came along and we followed with it
18 very strictly on the oceanfront.

19 Q: And what, in particular, Leonard, are you
20 talking about when you talk about setbacks?
21 What is it that distinguishes the ocean
22 setbacks at Kiawah?

23 A: Well, I think everybody in the world probably
24 knows that setbacks are the most important
25 thing on an island, a barrier island. The

1 primary dunes and the secondary and tertiary
2 and other dunes that can be developed and
3 strengthened and enlarged and widened and made
4 taller over time by sand and vegetation are the
5 key, so it has a strength function and then it
6 has a visual function.

7 If you look down a beach in South Carolina,
8 you'll see on most beaches there's houses. And
9 we want you to be able to look down Kiawah's
10 beach and see the trees.

11 Q: Leonard, I'd like you to --

12 THE COURT: What are -- excuse me, what are the
13 setbacks on Kiawah versus other locations?

14 THE WITNESS: The Kiawah setback, Your Honor, is
15 basically that we might let you in the dunes
16 put a piece of a pool, for example, or a tiny
17 piece of a house, but basically you're in the
18 forest. The forest that is Kiawah's sort of
19 visual icon and you can't get proud of or
20 forward of, seaward of that forest line to any
21 measurable degree. We'll have some evidence
22 that can show you pictures of how that's worked
23 out.

24 Q: And I was going to ask you if you'd go to tab
25 number four in Exhibit Number One -- in book

1 number one. Is that book number one?

2 A: Yes, it is.

3 Q: Would you got to tab four and there's a series
4 of pictures and if you go about five pictures
5 in, there's a photograph that's Bates marked --

6 MR. WALKER: May I approach, Your Honor?

7 Q: -- 853. Do you see that Mr. Long?

8 A: I do.

9 Q: Is that illustrative of what you were talking
10 about?

11 A: It's somewhat; although, because from the air
12 you don't get the impact of the trees. The
13 trees actually -- if you were standing on the
14 beach and walking on the beach, they would
15 block most of the houses. From up top, you can
16 see the houses. You can see they're behind the
17 trees, however, and that's been the point.
18 There's usually four, five, or six rows from
19 the beach, the high watermark, to the house.

20 Q: At this point, how much of the beach has been
21 developed at Kiawah? Starting at the east
22 end -- if you start near the Stono Inlet and
23 come to the west end where we're talking about
24 Captain Sam's, has the entire beach been
25 developed, beachfront?

1 A: Probably 90 percent has been developed with
2 houses. The Ocean Course was two and a half
3 miles along the Atlantic and instead of putting
4 houses there, we put the golf course there.

5 Q: And which end is the Ocean Course?

6 A: East end.

7 Q: Has it received awards, as well?

8 A: It has. It's won a lot of awards for not only
9 its integrity as a golf course and playability
10 and degree of difficulty, but also for its
11 environmental approach.

12 Q: All right. And what happened there in 1991?

13 A: The Ryder Cup.

14 Q: All right. Now, let's move along to Captain
15 Sam's -- but before I do that, has your group
16 received any type of recognition for the
17 environmental sensitivity with which you've
18 approached development on Kiawah?

19 A: We have. We've won some nice accolades. Well,
20 since we're ticking them off, the only one that
21 really appeals to us the most because it was
22 from a group of our peers, called The Urban
23 Land Institute, which began about 1936 -- it
24 has 15,000 members internationally -- and
25 bestowed us the excellence award, which I think

1 they've only given to one or two other
2 developers in America for stewardship and also
3 for doing things that actually meet the market
4 demands at the same time.

5 Q: Now, what I'd like to do now is start to turn
6 our attention to Captain Sam's Spit. The first
7 picture that we have in this is section four,
8 would you turn to that?

9 A: The first picture in section four?

10 Q: In Exhibit Four that has the number 338 at the
11 bottom.

12 A: Yes.

13 Q: Ignore the lettering, but -- or the numbers.
14 What is that that we're looking at?

15 A: That's the spit that we've been referring to as
16 Captain Sam's Spit at the western end, extreme
17 western end of Kiawah, where you can see the
18 river running behind it, the ocean on the
19 front, and Seabrook Island to the left.

20 Q: Is the Kiawah River evident in this photograph?

21 A: It is. It's the last part of it where it meets
22 the Atlantic Ocean, goes behind the spit and
23 finally wraps around the spit and comes out
24 into the Atlantic.

25 Q: When was the first time that you set foot on

1 the spit?

2 **A:** **About 1970. I used to fish for bass in the**
3 **spring and fall before there were any houses on**
4 **Kiawah.**

5 THE COURT: If I could stop you. You're showing me
6 an exhibit. It's fine with me. It helps me
7 understand the testimony, but it's not been
8 admitted into evidence.

9 MR. WALKER: Well, I'll go over that with him, then,
10 Your Honor.

11 THE COURT: Well, if y'all don't have an objection
12 to him doing that, that's fine.

13 MR. WALKER: Do you have any objections to the
14 photographs that are --

15 MR. CHANDLER: We don't have any objections to these
16 photographs, Your Honor.

17 MR. WALKER: Your Honor, we would move the
18 photographs that are in Exhibit Four into
19 evidence.

20 THE COURT: Are they numbered?

21 MR. WALKER: They're all numbered with separate
22 Bates numbers. We haven't numbered them
23 separately, but I will count them out.

24 THE COURT: Give me the number, blank through blank.

25 MR. WALKER: Okay. 338 --

1 THE COURT: Through?

2 MR. WALKER: -- 848 --

3 THE COURT: No, I just need all the way to the end.

4 MR. WALKER: All right. There's some omissions.

5 THE COURT: Oh, okay.

6 MR. WALKER: So it's 338, then 848 through 869 and
7 1104.

8 MS. ARMSTRONG: Trenholm, you've got through 870 in
9 your exhibit list.

10 MR. WALKER: All right. We'll take out 1104 for
11 now. If you haven't seen it, I'll get it to
12 you.

13 MS. ARMSTRONG: No, I don't have a problem with --

14 MR. WALKER: Do you have any problem with 1104?

15 MS. ARMSTRONG: I don't think we have a problem with
16 1104. I was just saying that there is an 870
17 in there and you stopped --

18 THE COURT: You stopped at 869. What she's
19 saying --

20 MS. ARMSTRONG: Right.

21 MR. WALKER: Oh, it went to 870, I'm sorry.

22 THE COURT: She's giving you the option of getting
23 another one, so ...

24 MR. WALKER: Well, we would ask to move in 870, too,
25 and that was an error in our listing of the

1 exhibits.

2 THE COURT: All right. Any objection to those
3 exhibits?

4 MR. CHANDLER: No objection.

5 MR. WHITFIELD-CARGILE: No objection, Your Honor.

6 THE COURT: They're admitted.

7 (KDP's Exhibit Number Four was admitted into
8 evidence.)

9 Q: Leonard, what have you observed over the years
10 has occurred at Captain Sam's in terms of its
11 size and what it's doing?

12 A: Well, in the 40 years I've been familiar with
13 it, it's lengthened many hundreds of feet to
14 the west toward Seabrook and it's grown -- the
15 dunes -- I can remember going back in the dunes
16 and the maritime forest was really just some
17 shrubs and now it's starting to burgeon,
18 starting to grow. It's lengthened.

19 So the width -- as I understand it, Trenholm,
20 the width is now 1400 feet and it's probably
21 half that 40 years ago.

22 Q: Are you talking -- at which point, the widest
23 part?

24 A: At the widest part of the wishbone part, you
25 might say, of the spit.

1 Q: Have dune ridges built --

2 A: Yes.

3 Q: -- on --

4 A: There are now six or seven rows of dunes at the
5 last third, let's say, of the spit going west.

6 And there's probably four or five, at least,
7 even down to the spit neck.

8 Q: Are those illustrated here?

9 A: They are.

10 MR. WALKER: Your Honor, just to show you an
11 example. And I'm showing the Court --

12 THE COURT: If you can just ask him about 849.

13 Q: Is 849 a good illustration of what you were
14 just talking about, Leonard?

15 A: It is.

16 Q: And how about 869, from the other end?

17 A: Yes. That's taking it from the inlet looking
18 back east, all the way along Kiawah Island, and
19 it shows the tremendous number of dunes that
20 have grown up.

21 Q: There's been some discussion about the
22 migration of Captain Sam's Inlet toward
23 Seabrook. Has there been any alteration of
24 that inlet over the years, Leonard?

25 A: Yes.

1 **Q: Would you tell His Honor about that?**

2 THE WITNESS: Well, Your Honor, starting in the
3 eighties and again in the mid nineties,
4 Seabrook, which is the island next door, has an
5 erosional beach unlike Kiawah, at least in
6 major part, and they literally run out of sand
7 every dozen or so years. And they approached
8 Kiawah and the owners of Kiawah at the time
9 before we got there in the eighties and then
10 when we were there in the nineties and asked
11 could they experiment under the direction of
12 Dr. Tim Kana, a coastal geologist and will be
13 one of our witnesses, and literally create with
14 equipment and other ways a new channel through
15 the end, the far western end, of the highland
16 of Captain Sam's and allow the water to rush in
17 there where there was then highland and wash
18 the sand that's been moved, and the highland
19 between that channel, let it wash on down after
20 a tide cycle or two to nourish the beach at
21 Seabrook next door; move across the inlet onto
22 Seabrook's beach. It's worked well. The beach
23 here at Captain Sam's has blossomed, come right
24 back, and vegetated and the dunes have come
25 right back.

1 Q: To your naked eye, has the relocation of the
2 inlet those two times to cut the spit, has that
3 in any way had an adverse effect as far as you
4 can see on the sand accumulation on Captain
5 Sam's?

6 A: No, it hasn't and that's because of the massive
7 amount of sand that moves down Kiawah's Beach.
8 I think we are -- this beach at Kiawah is the
9 most accretional beach on the East Coast of
10 America and has been for many, many decades.

11 Q: What happened in 1999? Was there a change with
12 regard to the regulatory designation of Captain
13 Sam's?

14 A: Yes.

15 THE WITNESS: Until OCRM decided to change its
16 setback line, the setback line, Your Honor,
17 would come down Kiawah's beach moving from the
18 east to west and stop, essentially, at the neck
19 and just cut right over to the river. So there
20 wasn't a setback line for the last mile or so.

21 Q: And I don't know if this can be seen. Where
22 did the setback line go? Where did it --

23 A: It just cut right through the neck and just
24 ended (indicating). There wasn't any setback
25 line for the entire drumstick we call Captain

1 Sam's Spit. There was no authorization,
2 therefore, by the State to develop behind or
3 landward of the setback line.

4 Q: Can you point out, also -- and I apologize for
5 the scale -- where the county park parking lot
6 is on this Exhibit Four, 338?

7 A: Yeah. The county park is really about two or
8 three acres and it's just a parking lot, a
9 little changing area and a little tiny snack
10 bar and a walkway through the dunes to the
11 beach. It's a 99-year lease from now KRA. It
12 has about 60, 65 years to run, and that's the
13 entire width and breadth and length of the park
14 and its activities. It serves about 50,000
15 visitors a year.

16 Q: Is the white area on this photograph that is
17 evidenced -- that is evident here, is that the
18 location of the county park parking lot?

19 A: Yes.

20 Q: All right. Did your company lobby or argue for
21 or take any affirmative steps to change the
22 setback line in 1999?

23 A: No, we did not.

24 Q: Who made that decision?

25 A: The State of South Carolina and OCRM was the

1 effectuating agency.

2 Q: What did you understand the significance to be
3 of moving the setback line for almost -- or
4 placing it on Captain Sam's for almost the
5 entire length of the spit?

6 A: Well, the obvious one, which if you look up the
7 definition of "setback line" and what you can
8 do seaward and landward, it allows you to
9 develop landward of that line. And it allowed
10 that land to be developed. And why? Because
11 it's just like the rest of Kiawah. It's
12 accretional. It's stable. In fact, the State
13 reports describe it as stable. It's one of the
14 most stable areas of Kiawah, not just on the
15 East Coast.

16 Q: Well, there's a lot of talk about instability.
17 Do you understand that if something is
18 accretional that technically it might be
19 considered unstable and dynamic?

20 A: Well, certainly if something is moving, it's --
21 whether it's from erosion or accretion, it's
22 dynamic. It's changing. That doesn't mean
23 it's unstable. In this situation, the
24 accretion far surpasses the erosion over many
25 decades. I think the accretion level --

1 MR. CHANDLER: Your Honor, this witness has not been
2 qualified to give expert testimony about
3 erosion and accretion. I think I let this go
4 on too far. I object.

5 MR. WALKER: I'll rephrase the question.

6 THE COURT: Okay.

7 Q: From your own visual observations, have you
8 been able to observe any changes with respect
9 to sand accumulation or sand diminishment on
10 Captain Sam's?

11 A: I have. And it's been significant. It's been
12 significant up and down Kiawah.

13 Q: In 2005, did the Town of Kiawah Island enter a
14 development agreement with your company?

15 A: They did. We entered a development agreement
16 and changed the earlier 1994 development
17 agreement that had been the only other one we
18 ever had.

19 THE WITNESS: In '94, Your Honor, had replaced the
20 PDD ordinance that applied. The reason that
21 went away is the PDD for Kiawah was a
22 Charleston County ordinance allowing
23 development in a certain way, like a PUD, and
24 then the town came into existence the same year
25 we bought the rest of Kiawah in '88, and

1 obviously the town has to pass its own zoning.
2 And they did and then we entered a development
3 agreement a few years after the town came into
4 formal existence with the town in, I think,
5 '94.

6 MR. WALKER: We have made a copy of the development
7 agreement in 2005 as an exhibit that's marked
8 as Exhibit Number Two. It doesn't have all the
9 exhibits to the development agreement. It does
10 have the graphic exhibit of the development
11 agreement 16-2 that deals with Captain Sam's.
12 We offer that into evidence.

13 THE COURT: Where I can be clear before y'all
14 present is, you said the town passed its own
15 zoning in '94?

16 THE WITNESS: It passed its own zoning when they
17 became into existence in '88.

18 THE COURT: Okay.

19 THE WITNESS: And then in '94, we entered --

20 THE COURT: Yeah. Okay. You said y'all entered
21 into a development agreement and he just
22 referred to 2005.

23 THE WITNESS: Right. What I was trying to give you
24 was the continuum. We started with a PDD with
25 the county; then the town came in and they just

1 had a regular zoning ordinance; then we entered
2 into a development agreement under and pursuant
3 to the zoning ordinance in '94. Then in 2005,
4 we entered our second development agreement --

5 THE COURT: Okay.

6 THE WITNESS: -- because the first one was about to
7 expire.

8 THE COURT: I just want to be -- so the record will
9 be clear, because you're talking about '94 and
10 now we're going into --

11 THE WITNESS: I know. It's a little crazy.

12 THE COURT: All right. Any objection?

13 MR. CHANDLER: No objection.

14 THE COURT: Mr. Whitfield-Cargile?

15 MR. WHITFIELD-CARGILE: I would object on relevance,
16 Your Honor. I don't see how this is relevant
17 to whether or not they can utilize the critical
18 area for a revetment.

19 MR. WALKER: Your Honor, the development agreement
20 goes to the rights that are held by my client
21 that are somewhat at issue and implicated in
22 this case. This development agreement also
23 talks about the nature of the development that
24 can occur there.

25 THE COURT: All right. The objection is overruled.

1 (KDP's Exhibit Number Two was admitted into
2 evidence.)

3 Q: Are there particular provisions in the
4 development agreement that deal with Captain
5 Sam's, Leonard?

6 A: Yes, there are.

7 Q: And I'm going to direct you to page 21 of
8 Exhibit Two.

9 A: Tab two?

10 Q: Yes, sir.

11 A: Trenholm, what page? Because I started --

12 Q: I'm sorry, it's KDP71; 21 of the development
13 agreement but KDP71.

14 A: Got it.

15 Q: All right. Is that one of the provisions that
16 deal specifically with Captain Sam's?

17 A: It is. It's probably the main provision.

18 Q: Without reading it, could you explain to Judge
19 Anderson what that involves?

20 A: Yes.

21 THE WITNESS: Your Honor, basically, the town
22 council wanted to be assured that on this site,
23 which if you measure all the highland that we
24 own --

25 MR. CHANDLER: Your Honor, I want to object. He's

1 talking about what the town wanted based on
2 this document. The document speaks for itself.
3 This witness isn't qualified to speak to what
4 the town wanted.

5 MR. WHITFIELD-CARGILE: Same objection.

6 THE WITNESS: I think I probably know what the town
7 wanted since I negotiated it. But it's okay.
8 I'll just explain it in terms of a simple way
9 to look at the document. Forget about what the
10 town wanted.

11 THE COURT: This is interesting when you have a
12 lawyer for a witness.

13 MR. WALKER: He hasn't cited any cases yet, Your
14 Honor.

15 THE COURT: Okay. Well, you've modified your
16 answer, so proceed ahead.

17 THE WITNESS: All right. Your Honor, it basically
18 says that of the land out there -- and the
19 exhibit shows how much the land is -- there's
20 about 135 acres of highland that we own.
21 They said, "Well, listen, you can't develop all
22 that." Obviously, some of it is outside the
23 setback line and the critical line on the river
24 side. "We want you to go very low density," so
25 we did. We agreed to what this said, which is

1 that we can only sell of the 135 acres then --
2 which is now about 150 acres because of
3 accretion -- we can only sell 20 acres at the
4 most to -- at the most 50 homesite buyers
5 depending on our lot layout. We may layout
6 ten, 20, 30, up to 50.

7 Our land planner, that's a job for him. He'll
8 be one of the witnesses in this trial.

9 **Q: What's his name?**

10 **A: Mark Permar.**

11 **Q: All right.**

12 **A: It says that the structures to be sensitively**
13 **arranged.**

14 THE WITNESS: And our game plan, Your Honor, at
15 Kiawah for about 15 years has been -- and it
16 would be here -- that we only allow people to
17 build one and a half stories of -- on a house.
18 In other words, you can't go up one story and
19 then two story and then you start your roof.
20 The second story is always just dormer-type
21 story; very low type dwellings. And that's in
22 most all the subdivisions we've done that are
23 high-end like this.
24 The second thing is we would have the setbacks
25 so that houses would be in the trees.

1 Third, it's provided in here, that we should
2 try to use wherever practicable pervious
3 materials instead of, say, asphalt for
4 driveways and roads. Probably the main road,
5 because of fire trucks and whatnot, has to be
6 in part, at least, hard surface.

7 We need to carefully plan dune walkovers so
8 that we combine -- let's just say that there
9 were 20 houses on the front, 20 on the back,
10 but there would be only maybe three or four
11 paths to the beach across the six or eight rows
12 of dunes that are out there.

13 Q: Does the agreement address docks?

14 A: It does. Unlike parts of the Kiawah which
15 allow a lot of people to have docks, in some
16 places, at least, we are limited here to two
17 community docks along the mile-and-a-third
18 length of the river.

19 Q: Is there an exhibit that shows the -- attempts
20 to illustrate or does illustrate the area
21 behind the critical line -- excuse me, behind
22 the setback line and above the critical line?
23 And I'll direction your attention to the last
24 page of that exhibit. The Bates number was cut
25 off.

1 **A:** Yes, it is. It's -- you might want to put a
2 Bates number on there, but, yes, that's the
3 exhibit that shows the property.

4 **Q:** And the area in green is what area?

5 **A:** That's the area above the setback line on the
6 ocean side and above the critical line on the
7 river side.

8 THE WITNESS: And the critical line is denominated,
9 I'm sure Your Honor knows, by vegetation. The
10 setback line is, in this case, 20 feet from the
11 baseline and the baseline is determined by that
12 formula that was alluded to by somebody
13 earlier, that looks back at 40 years of the
14 highest high tide line in the last 40 years and
15 then they derive a formula for where the
16 baseline can go.

17 **Q:** Since we have the diagram in front of us, would
18 you tell us the area that we're talking about
19 that's really the area at issue, the revetment?

20 **A:** The area is -- yeah. For the revetment?

21 **Q:** Yes. For the river bend.

22 THE COURT: If you could step up here for that --

23 MR. WALKER: Yeah.

24 THE COURT: -- so I can be clear.

25 THE WITNESS: (Witness compiles.)

1 (Off the record.)

2 THE WITNESS: The revetment, Your Honor, is --
3 starts at the park property, which is over here
4 (indicating). It's delineated right there.

5 This is the park property. As you can see, it
6 stops well before it gets to the beach because
7 we just give them the right to walk to the
8 beach from the parking lot.

9 They noticed erosion starting here along the
10 river where I'm pointing, maybe even a little
11 bit north of there. And erosion continued to
12 exacerbate along here until you get opposite
13 this creek right here on Seabrook (indicating).

14 This is all Seabrook over here (indicating).
15 And it stops -- the revetment would stop about
16 right there (indicating).

17 Everything in green, which is labeled about
18 31.4 acres, is the size in 2005 of the land
19 between the critical and setback lines, within
20 which we can sell 20 acres.

21 Now, if you take all this land here, Your
22 Honor, that we own, it's about 150 acres.

23 **Q: Now, where is the access corridor? Where is**
24 **your concern about the access corridor that**
25 **people have alluded to?**

1 **A:** The access corridor is -- now, we would come
2 out at our property, which is right next to the
3 park property, and we'd have to get through the
4 neck here and the neck would be -- the corridor
5 would be about right where I'm pointing right
6 here (indicating). I think we have a better
7 exhibit.

8 **Q:** We do.

9 THE WITNESS: But basically, Your Honor, it's the
10 distance between the critical line and the
11 setback line.
12 In those days, that is in 2005 and '6, the
13 distance between those two lines was about 90
14 feet. You need about 50 feet to do an ideal
15 road, certainly 40 feet, for the utilities,
16 landscaping, driving surfaces, et cetera.
17 So we knew we had 90, but we knew that that
18 critical line on the river side was moving
19 significantly such that we now find, as of
20 today, that the distance is 66 feet.

21 **Q:** And what is -- under the development agreement,
22 Mr. Long, the area that's white, Leonard, the
23 remainder of the land is --

24 **A:** The remainder of the land is the land above the
25 mean high tide line.

1 Q: On the other side of the setback line, correct?

2 A: Yes.

3 Q: On the seaward side? And under the development
4 agreement, what is the future of that land? Is
5 it protected?

6 A: It can't be developed at all. It's -- and so
7 is the other 11.4 here (indicating). Actually,
8 it's a little bit more than that now because of
9 accretion.

10 THE COURT: 11.4?

11 THE WITNESS: 11.4 acres. The 31.4 I showed you a
12 minute ago -- I said we only could sell 20 of
13 it, so the other 11.4 from the 31.4 is -- can't
14 be developed, either, under the development
15 agreement.

16 THE COURT: Now, where I can back up so my notes
17 will be good, you said the access corridor is
18 now 66 feet; it was 90 feet when?

19 THE WITNESS: In 2006.

20 THE COURT: All right.

21 Q: I'd like to back up, too, to go back to the
22 development agreement. At the time of the
23 entry of the development agreement, did your
24 entity have to give up anything, so to speak,
25 in order to accomplish the development

1 agreement's development rights with respect to
2 Captain Sam's?

3 **A:** Yes. The way this began was, the town under
4 the '94 development agreement had allowed us to
5 have roughly where Parcel 13 is on this exhibit
6 map that we've been looking at.

7 THE WITNESS: It's about a 19-, 20-acre tract, Your
8 Honor, on which we had, I think, the only zoned
9 hotel site on the East Coast. And the town,
10 for reasons I don't know, to begin negotiations
11 asked that we give up that right to have a
12 hotel and related condominiums and other things
13 you might have near a hotel, commercial. And
14 we said, "Well, let us think about that." And
15 we came back and asked could we develop a
16 limited portion -- 20 of 150 acres today is
17 what it would amount to -- of Captain Sam's
18 Spit for no more than 50 homesites. And they
19 agreed.

20 We had obviously not had the right in the '94
21 agreement to ask for any development down there
22 because the State had yet to say that the
23 setback line extended to Captain Sam's. When
24 they did that, it was a new day.

25 **Q:** You earlier mentioned the adjoining parcel,

1 which is Beachwalker Park. What months is that
2 open?

3 A: It's open from, just roughly, Memorial Day to
4 Labor Day, except for special events. And
5 because it's relevant, I know this from
6 personal observation that they allow dogs on
7 leashes to come to the park. It's never been
8 a problem, but the leashes don't stay on very
9 much, but it's okay, too, because it hasn't
10 been a problem.

11 Q: Now, I'm going to ask you about your own
12 observations. Have you been to the Kiawah
13 River side of Captain Sam's in order to observe
14 what's happening on the shoreline there?

15 A: I have. I haven't been there in a couple of
16 months, but we'll have some pictures of it as
17 recently as yesterday and the day before.

18 THE WITNESS: It's escarpment, Your Honor. In other
19 words, it's a vertical piece of highland that's
20 being chopped by the wave action daily, such
21 that it is somewhere between three and four
22 feet high, up to 10 or 12 feet high, almost 90
23 degrees straight up.
24 The highland that was forested land and
25 vegetated land is now sloughing off and falling

1 into the river. Trees, shrubs, grasses ...

2 Q: I'm going to ask you to turn to Exhibit Five,
3 which is a series of pictures. Would you
4 please do that, Leonard?

5 A: Yes.

6 Q: What do those photographs behind tab five
7 constituting Exhibit Five illustrate?

8 A: These pictures -- you might want to show Your
9 Honor. These pictures are -- this first
10 picture, for example, is taken from the PRC
11 property looking west.

12 MR. WALKER: And before we get to that, do y'all
13 have any objection to entering the pictures
14 that are marked as Exhibit Five?

15 MR. WHITFIELD-CARGILE: One minute, Trenholm.

16 MR. WALKER: Sure.

17 MR. CHANDLER: Do you know when these pictures were
18 taken?

19 MR. WALKER: They were taken in November of last
20 year, I believe.

21 THE WITNESS: That's right.

22 MR. CHANDLER: No objection.

23 MR. WHITFIELD-CARGILE: One moment, Your Honor,
24 please. (Perusing.) No objection.

25 THE COURT: They're admitted.

1 MR. WALKER: Thank you.

2 THE COURT: Or Exhibit Five, I guess I should say.

3 MR. WALKER: Exhibit Five and those would be
4 pages --

5 THE COURT: So they're all Exhibit Five?

6 MR. WALKER: Yes, sir.

7 THE COURT: Then I'll just say Exhibit Five is
8 admitted.

9 MR. WALKER: It would be KDP -- the Bates numbers
10 are 563 through 587.

11 THE COURT: All right.

12 (KDP's Exhibit Number Five was admitted into
13 evidence.)

14 Q: You were just referring to the first
15 photograph, Leonard?

16 A: Yes. That photograph, as well as many of the
17 others, show the pine trees and the other
18 shrubs and vegetation that's falling into the
19 river.

20 Q: And you mentioned the vantage from which the
21 picture was taken. Where do you think this was
22 taken?

23 A: I believe it was taken at the -- you know, from
24 a seaward point of the parking lot of PRC
25 looking west.

1 Q: All right. And then what about the next
2 picture, which is marked 564?

3 A: Trenholm, that's looking at the sand fencing of
4 PRC that replaced their regular fence that they
5 had up there. You can see pieces of the
6 regular fence to the right of the picture. And
7 I think basically that fence keeps moving to
8 prevent people from falling down the
9 escarpment.

10 Q: Do the rest of the pictures here in this
11 exhibit illustrate various places along the
12 riverbank?

13 A: They do. They are representative of about a
14 year ago. If anything, it's a good deal worse.

15 Q: At some time around 2006, did Charleston County
16 PRC do anything with respect to the riverbank
17 that we're taking a look at here that's
18 eroding?

19 A: Yes, they did. They hired some engineers that
20 we were unfamiliar with it to come up with a
21 plan and actually submitted the plan to the
22 Corps of Engineers and to OCRM to put in a
23 certain type of revetment to stop the erosion
24 in front of the park.

25 And we asked them -- once we found out, we

1 asked them if they would be kind enough to stop
2 that and let us come up with a singular
3 solution for both their problem and ours and
4 engage the engineers that had been the only
5 engineers, really, for Kiawah for the last 40
6 years, Thomas & Hutton, to have one type of
7 erosion control structure, so that a lot of
8 things would happen that would be beneficial.
9 One would be, if they just put up their
10 revetment, the erosion would be exacerbated at
11 the extreme ends of their revetment.

12 Q: Did you consult with Thomas & Hutton about this
13 singular solution, as you described it?

14 A: We did.

15 Q: Did they have any recommendations or
16 suggestions as to other people who might be
17 involved?

18 A: Yes, they did. They recommended two gentlemen,
19 two eminent scientists that were at Old
20 Dominion College: Drs. David Basco and George
21 Oertel.

22 Q: Are they with us today?

23 A: They are. They are in the second row there,
24 the two gentlemen in the second row.

25 Q: All right.

1 **A:** They helped us come up with a design for a
2 revetment.

3 THE WITNESS: Your Honor, this is actually a
4 revetment and a bulkhead. The bulkhead, as you
5 probably know, is the vertical piece. It's
6 not -- it's oftentimes not combined with a
7 revetment. It oftentimes -- you would, you
8 know, be in your boat along a creek or looking
9 out at a creek bank where there's a revetment
10 in South Carolina, of which there are literally
11 hundreds and hundreds, a number at Kiawah, and
12 you'll see just the vertical piece.
13 What we wanted to have was a revetment that was
14 a good deal more expensive, as it happens, but
15 also a good deal better looking, more
16 functional, would provide habitat for a number
17 of species, and least interfere with the
18 environment.
19 I was interested in the comments that
20 Mr. Chandler said, because we could have a
21 vertical revetment and we would save millions.
22 It wouldn't serve the purposes that this one
23 will serve and we can get into those, if you
24 want.

25 **Q:** What was your decision based on the

1 recommendations of Thomas & Hutton with respect
2 to the type of material that you would put on
3 the slope portion of the shore, the revetment
4 portion?

5 A: On the slope portion of the shore, starting
6 from the vertical bulkhead (indicating),
7 angling down to hug the shoreline as it might
8 move a little bit as it reaches the water,
9 maybe a little bit beyond. It's called an ACB,
10 articulated concrete block. And each block has
11 holes in it, as we know, except these are a
12 good deal larger holes.
13 In the holes you would grow Spartina and other
14 grasses through. We could show you how that
15 looks in reality, because they are not brand
16 new, but they're not as often done because of
17 the price.

18 But what they do is they create a shoreline
19 with maturity, in a couple of years, looks like
20 grass, like marsh grass. It provides habitat.
21 Besides stopping the erosion, it provides an
22 attractive look. And that's -- that was their
23 recommendation amongst others. We could have
24 just put rocks, which is a typical revetment in
25 South Carolina's Lowcountry. You know, big

1 boulders and smaller ones and -- we could have
2 asked for just the vertical bulkheading of
3 various types and various materials. But the
4 recommendation of Thomas & Hutton, our own
5 internal team of engineers at KDP, as well as
6 Dr. Basco and Dr. Oertel, was to go with this
7 approach.

8 Q: Do you know whether or not articulated concrete
9 block is used on revetments in other locations
10 even on Kiawah?

11 A: It is. It's at Kiawah in considerable length.
12 It's at Daniel Island. It's at any number of
13 islands in South Carolina's coast and it's used
14 very, very handsomely and well. It's never
15 been turned down by OCRM.

16 Q: Would you please to turn to Exhibit Six?

17 THE COURT: If you could just stop for a second.

18 MR. WALKER: Yes, sir.

19 THE COURT: All right. So the benefit of the
20 articulated block are that it creates not only
21 a better look, but it also promotes the growth
22 of Spartina grass?

23 THE WITNESS: Yes, sir. And other grasses.

24 THE COURT: And other grasses?

25 THE WITNESS: Yes, sir.

1 THE COURT: Did I miss anything?

2 THE WITNESS: No, you didn't.

3 THE COURT: Go ahead.

4 Q: Would you please turn to Exhibit Six?

5 A: Got it.

6 Q: What does Exhibit Six contain? What are the
7 photos in Exhibit Six illustrate?

8 A: This is an example of some other applications
9 of the concrete block earlier on in the
10 introduction of it to the eroding shorelines
11 that are shown here. These are different
12 shorelines in different locales where OCRM has
13 authorized it and you can see in some of the
14 photographs where it's starting -- the grass is
15 starting to come through. We have others where
16 it's massively coming through and you can't
17 even see the block.

18 MR. WALKER: Is there any objection to our
19 introducing the four photographs that are
20 marked as Exhibit Six?

21 MR. CHANDLER: No objection.

22 THE COURT: Mr. Whitfield-Cargile?

23 MR. WHITFIELD-CARGILE: No objection, Your Honor;
24 although I've got five.

25 MR. WALKER: I do too, thank you.

1 MR. WHITFIELD-CARGILE: There's four.

2 MR. WALKER: We'll take off five, and those will
3 be KDP124 through 126; KDP342 and
4 KDP380.

5 THE COURT: But by and large, it's still
6 Petitioner's Six?

7 MR. WALKER: They're all behind, yeah, Petitioner's
8 Six.

9 THE COURT: All right. That's easier for me. It's
10 admitted.

11 (KDP's Exhibit Number Six was admitted into
12 evidence.)

13 Q: And you were talking about the incipient growth
14 of grasses. Is that illustrated in these
15 photographs?

16 A: It is. Better illustrated in some than others.

17 Q: Well, which would you like me to turn to?

18 A: Well, for example, in 125, you can see how it
19 works after a short period of time.

20 And we'll have others that I think Mr. Permar
21 took as recently as yesterday or the day
22 before, where you don't even see the concrete
23 block.

24 Q: All right. And if you go to 342 near the
25 end --

1 A: Yeah.

2 Q: -- does that illustrate anything with respect
3 to habitat?

4 A: Yeah. You can see that the oysters are
5 propagating and the sand has come to fill some
6 of the block. The oysters attach themselves to
7 the stacks and so forth of the concrete.

8 Q: In the times that you visited the sandy shore
9 of the riverbank on the Kiawah River at Captain
10 Sam's, have you seen any oysters in the sand?

11 A: (No response.)

12 Q: Do they propagate in the sand alone?

13 A: No, not usually.

14 Q: Based on the decision to move ahead with a
15 combined bulkhead/revetment, did you authorize
16 anything to be done on your behalf?

17 A: Yes. We asked Thomas & Hutton to prepare
18 drawings and the permit application to the
19 Corps, the OCRM. That was done. It was filed
20 in February '08.

21 Q: All right. I'm going to ask you whether or not
22 you remember signing written authorizations to
23 Thomas & Hutton to act on your behalf. Did
24 you?

25 A: Probably did.

1 Q: And I'll turn your attention to Exhibits Eight
2 and Nine.

3 A: (Witness complies.) Yes, you're right. I did.

4 Q: Who are the two entities you were representing
5 in your authorization of Thomas & Hutton?

6 A: Kiawah Resort Associates, LP, and KDP II, Inc.

7 MR. WALKER: These two letters are part of the
8 permit file. We'd offer them into evidence,
9 too. Is there any objection?

10 MR. CHANDLER: We don't see how they're relevant to
11 anything, Your Honor, so we would object on the
12 grounds of just relevance. We've got enough
13 stuff in this case without just putting in
14 random letters.

15 THE COURT: Mr. Walker?

16 MR. WALKER: Well, we're saying that Thomas & Hutton
17 was authorized on our behalf and you'll hear
18 from Mitchell Bohannon of Thomas & Hutton.

19 THE COURT: Well, do y'all dispute that Thomas &
20 Hutton --

21 MR. CHANDLER: We'll stipulate that they hired
22 Thomas & Hutton.

23 THE COURT: All right. I think I'll sustain that
24 objection to that stipulation.

25 Q: Did you receive a copy of the permit

1 application that was submitted by Thomas &
2 Hutton to OCRM and the Army Corps?

3 A: I did, but -- yes, I did.

4 Q: Would you please turn to Exhibit Ten?

5 A: (Witness complies.) Yes.

6 Q: What is Exhibit Ten?

7 A: What is it?

8 Q: Yes.

9 A: It's a letter from Thomas & Hutton to DHEC in
10 late February -- February 29, 2008. And it
11 says he's enclosing the administrative fee and
12 he's including the application form, the
13 project drawings, the letter naming Thomas &
14 Hutton as the agent, affidavit of ownership and
15 control; the affidavit of publication will be
16 submitted at a later date, Mr. Joyner was
17 advised.

18 Q: If you go two pages in, is there another
19 letter?

20 A: Yes. And that's essentially the same thing to
21 Ms. Tina Hadden at the Corps of Engineers.

22 Q: And behind those letters, is there a permit
23 application, a copy of it?

24 A: Yes, there is.

25 MR. WALKER: We offer Exhibit Ten into evidence. Is

1 there any objection?

2 MR. CHANDLER: Your Honor, that's the permit
3 application and transmittal letter. We don't
4 object to that. I will note it also includes
5 one of the letters we just excluded, so -- but
6 it was part of the package that was submitted
7 to the agency, so ...

8 THE COURT: Okay. Mr. Whitfield-Cargile?

9 MR. WHITFIELD-CARGILE: No objection, Your Honor.

10 THE COURT: This was Ten -- is admitted.

11 MR. WALKER: Thank you, Your Honor.

12 (KDP's Exhibit Ten was admitted into evidence.)

13 **Q: Aside from weighing in on the type of material**
14 **that would be used in the revetment, did you**
15 **make any determination as to the specific**
16 **location, height or any of that type of stuff**
17 **with regard to what was submitted?**

18 **A: No, although it was our understanding from**
19 **submitting -- I had our people calculate three**
20 **or 400 permits over the last 22 years to**
21 **OCRM -- that what the practice is, is you**
22 **submit your drawings and if they want to refine**
23 **them or you do with their concurrence, you do**
24 **that at a later date.**

25 **For example, the vertical piece, it's shown in**

1 the drawings that we just admitted into
2 evidence as being a certain height; whereas, we
3 all know, or they know certainly at OCRM, that
4 it will be curved to the lay of the land. The
5 land is not a flat piece of highland that's cut
6 by the river. It rolls.

7 MR. WHITFIELD-CARGILE: Your Honor, I'm going to
8 object. He's saying what the Department knows.

9 THE WITNESS: I'll rephrase that.

10 MR. WHITFIELD-CARGILE: Strike that.

11 THE WITNESS: It's not what the Department knows.

12 It's what has always been the practice.
13 I've overseen permitting there and done
14 permitting there before I was with KDP for 30
15 years through every permit administrator and
16 that's exactly what happens. You submit an
17 application and then you get with the permit
18 administrator and you make sure that it fits
19 his idea of what it should be and your idea and
20 as you can make improvements and jointly agree
21 on them, they're usually always satisfactory.

22 Q: Mr. Long, I would like you to turn in Exhibit
23 Number Ten to what is marked as 27, KDP-T&H27,
24 that's cut off part way.

25 A: I'm sorry, it's marked as ...

1 Q: Keep going. It's 27. It's the illustration
2 you were referring to. It would be page seven
3 of seven of the drawings.

4 A: Okay. Yes. Got it.

5 Q: All right. A minute ago you were referring to
6 the drawing that was submitted to the Agency.

7 MR. CHANDLER: Trenholm, can you give me just a
8 minute on this. The page 27 that we have is
9 part of a letter.

10 THE WITNESS: Page seven of seven on the drawings.

11 MR. WALKER: There it is.

12 MR. CHANDLER: All right. Thirty-seven.

13 MR. WALKER: Thank you.

14 Q: All right. Does this show what you were
15 talking about?

16 A: It does.

17 Q: Does this concept illustration show where the
18 articulated concrete block would go?

19 A: In concept, it does; although, I think
20 everybody understands that the beaches are not
21 perfect straight lines like that. The point of
22 the thing is that it is to hug the shore as it
23 might undulate down to low water and below.

24 Q: Is the vertical member what you understood to
25 be the bulkhead?

1 A: It is.

2 Q: And is it anchored in the ground?

3 A: It's anchored back into the highland.

4 Q: At some point, did a question arise as to
5 whether -- during the permitting process as to
6 whether the width of the mat was wide enough,
7 the ACB extending from the bulkhead?

8 A: It did.

9 Q: Can you tell us about that?

10 A: Yes. Drs. Oertel and Basco had studied the
11 river for a number of reasons and what was
12 going on, whether it had any impact on the
13 inlet, the erosion would have any impact on the
14 inlet, much less the -- excuse me, the
15 revetment, whether that would have any impact
16 on the inlet, on Seabrook, on other things, and
17 in the course of that, they also studied the
18 revetment solution that had already been
19 submitted to OCRM and the Corps. And they
20 suggested that it may be that in certain hot
21 spots, as they called them, particularly in the
22 bend of the river or the elbow in the river
23 where the erosion was occurring and the
24 revetment would be placed, that the revetment
25 might need to be lengthened in places because

1 they felt like the --

2 Q: When you say "lengthened," extend the width of
3 the mat?

4 A: Extend it down farther in places --

5 THE COURT: What phrase are you using? "Width of
6 the ..."

7 MR. WALKER: Of the articulated concrete block mat.
8 I should --

9 THE COURT: "Mat"?

10 MR. WALKER: Right. The articulated concrete block.
11 The width of the articulated concrete block
12 section.

13 THE WITNESS: It's connected, Your Honor, by sort of
14 a matting, you might say, at the bottom. And
15 it --

16 THE COURT: Hence the term "mat"?

17 THE WITNESS: Yes, sir.

18 THE COURT: All right.

19 THE WITNESS: And the concern that they had was that
20 it might need to be adjusted in those places.
21 We had a meeting with them, Thomas & Hutton,
22 and decided to take the recommendation of
23 Thomas & Hutton.

24 MR. WHITFIELD-CARGILE: Your Honor, I'm going to
25 object to what he's -- he's saying what Oertel

1 and Basco and all these other people said.

2 That's all hearsay.

3 THE COURT: There used to be an exception before the
4 advent of the new rules about if a witness is
5 present and available for cross-examination,
6 but I don't think that's survived State V.
7 Cauldwell, but --

8 MR. WALKER: I was offering it as background, not
9 for the truth of the matter discussed, but for
10 the reasons why he did what he did.

11 THE COURT: All right. It's not offered for the
12 truth of the matter; it's only offered as
13 background. Any objection in that regard?

14 MR. WHITFIELD-CARGILE: I think he can explain why
15 he did what he did without getting --

16 MR. WALKER: We'll do that, Your Honor.

17 MR. WHITFIELD-CARGILE: -- into all of this hearsay.

18 THE COURT: Go ahead.

19 Q: Let's just get to what you did.

20 A: We decided that the best course of conduct at
21 the time, which was like April or May of '08,
22 several months after the permit had been
23 submitted, and in anticipation that there was
24 a 30-day window already exceeded by OCRM to
25 make the decision under the statute and

1 regulation, that we would have a decision any
2 day. And so we decided to take the advice of
3 Thomas & Hutton, our engineers for 30 years,
4 and build exactly what they designed. And if
5 there were some monitoring, as we would always
6 do, and if it turned out that we needed to
7 slightly lengthen in places the matting
8 material, that we would come back and do what
9 was appropriate under the regulations and with
10 OCRM, and lengthen it if it was not retarding
11 all of our erosional occurrences on that
12 shoreline.

13 Q: Were you kept abreast of what was going on on
14 the permitting side, Mr. Long?

15 A: Pretty well, and I was somewhat active. Our
16 development director, Ray Pantlik, our engineer
17 on staff for the last 20 years we've been in
18 business was directly responsible and I more or
19 less oversee Ray, but I'm not an engineer,
20 obviously, and I certainly don't know it as
21 well as he might.

22 Q: Did you get a decision relatively quickly out
23 of the Army Corps of Engineers for its piece of
24 the approval?

25 A: We did. They decided in April, which was very

1 welcome, that we were entitled to the permit.
2 They issued a nationwide permit. They found
3 that there were no adverse impacts from the
4 revetment.

5 Q: Would you please turn to Exhibit Eleven?

6 MR. WHITFIELD-CARGILE: Your Honor, I'm going to
7 object to that last statement, the Corps found
8 there's no adverse impacts from the revetment;
9 that's hearsay, too.

10 MR. WALKER: Your Honor, the letter --

11 MR. CHANDLER: It's also not responsive to the
12 question.

13 THE COURT: All right. We've got two objections,
14 nonresponsive and hearsay. Any response?

15 MR. WALKER: My response is that this letter is part
16 of the OCRM records. It was received by OCRM
17 and under the exception to the hearsay rule
18 for --

19 THE COURT: Is that in evidence yet?

20 MR. WALKER: I'm about to introduce it.

21 THE COURT: Well, introduce it.

22 MR. WALKER: Your Honor, at this time we would
23 introduce Exhibit Number Eleven, which is a
24 copy of the Army Corps of Engineers' letter
25 dated April 4, 2008, with the determination of

1 All right. Proceed.

2 MR. WALKER: Thank you.

3 Q: Mr. Long, or Leonard, did the permit
4 application include the frontage of the county
5 park side on the Kiawah River?

6 A: It did.

7 Q: What was your intent with respect to PRC's
8 application? Did you intend to take care of
9 their bank?

10 A: What we agreed to do, informally really, just
11 a conversation with the PRC was we would -- if
12 they would forego and actually withdraw the
13 permit application that they had made, which we
14 didn't really know anything about until they
15 made it, and let us come up with one solution,
16 that we would pay for the one solution that
17 would be submitted to serve the park erosion
18 problem, as well. We would pay for the plans
19 and submittal and anything else to do with the
20 application, not the actual revetment.

21 Q: There, of course, has been plenty of discussion
22 about the potential houses that could be built
23 on the spit.

24 A: Yeah.

25 Q: What do you envision with regard to the

1 structures that would be there?

2 A: That they would be modest sizes, like we've
3 done in many subdivisions at Kiawah on parcels
4 much smaller, much smaller than this.
5 That they would -- for example, we sort of
6 pioneered low square footage caps, like 3500 to
7 4500 size homes so people don't have McMansions
8 moving in next to them in most of our best
9 subdivisions; limiting the square footage of an
10 outbuilding to maybe a thousand or 1500 feet,
11 depending on the size of the main building.
12 So I would say that the houses on the spit
13 would be studied and appropriately capped to be
14 cottages, you might say, on the ocean. We're
15 not in the business of allowing people to
16 injure a neighborhood's ambiance with tall or
17 too big or ugly structures. It just ruins
18 everybody else's appeal for a place and so why
19 do it. We didn't.

20 Q: I want to go back to comment letters, since
21 this was an ongoing process. When you learned
22 of a comment letter that raised a particular
23 concern, how would you respond?

24 A: We tried to, as proper as possible, to have a
25 report prepared if it was a technical,

1 He doesn't have to be an expert to say that
2 he's creating habitat.

3 And that goes to the cumulative impacts that
4 they constantly are arguing.

5 MR. WHITFIELD-CARGILE: Your Honor, I would disagree
6 that he doesn't have to be an expert to say
7 that he's creating habitat.

8 THE COURT: I'm going to let the exhibit in for
9 notice and inquiry in that area.
10 What exhibit number was that?

11 MR. WALKER: I'm sorry, this was Exhibit
12 Thirty-three.

13 THE COURT: Oh, okay.

14 (KDP's Exhibit Number Thirty-three was admitted into
15 evidence.)

16 **Q: Leonard, I don't believe you had finished**
17 **commenting on this letter.**

18 **A: Right.**

19 THE WITNESS: Your Honor, we said several things in
20 the letter that go to the plan.

21 A plan, by the way, that was being
22 thought about by our team.

23 We have 500 employees at Kiawah.

24 We have a lot of them devoted to
25 development planning, still

1 being obviously attended to in a big way.
2 But in this letter, what we said was, all but
3 30 acres will one day be placed under a no
4 development, quote, end quote, conservation
5 easement with the Kiawah Conservancy, and then
6 granted subject to that easement to the
7 community association as pure greenspace.
8 These moves, as well as the far-reaching master
9 plan, which we're working on with a number of
10 experts and scientists will enhance, restore,
11 and enlarge the amount of habitat available for
12 a variety of birds and animals.
13 Now, at no time ever did we have any idea --
14 this goes to the motion in limine, maybe --
15 that we were supposed to come forward and give
16 them a master plan in connection with a
17 revetment.

18 **Q: Mr. Long, did they ever ask you for a master**
19 **plan in response to your offers to meet and**
20 **provide information?**

21 **A: Never did. And we would have been delighted to**
22 **do that. We asked them repeatedly, "Don't you**
23 **want more information? Do you need any more**
24 **information? Call us." They never did. They**
25 **never even said, you know, "No, we don't."**

1 They just didn't answer it.

2 Q: Was there a -- did you, in fact, have a lot
3 layout or anything to that effect for what you
4 might be doing at Captain Sam's?

5 A: We had a like almost preschematic thing that
6 Mark, our land planner -- and before we came to
7 Kiawah had been Kiawah's land planner for many
8 years, Mark Permar -- that we had used in
9 connection with the development agreement in
10 2005. That might have been enhanced, improved,
11 you might say.

12 We could have -- we probably could have taken
13 two or three weeks, a month, month and a half
14 max, and given them, I am sure, all the
15 information they -- to their heart's content.
16 And they -- you know, we had no idea that you
17 had to plan 150 acres to get a revetment. It's
18 never been the case for any revetment permit
19 we've ever asked for or any permit.

20 Q: Even though you did not have a diagram to show
21 the location of lots, would you have been able
22 to respond to particular questions dealing with
23 the qualitative aspects or particular
24 development techniques that would have been
25 used?

1 **A:** **Absolutely. Because, as I alluded to earlier,**
2 **Captain Sam's --**

3 **MR. WHITFIELD-CARGILE:** **Object, Your Honor. This is**
4 **all speculation. He said they don't have a**
5 **plan.**

6 **THE WITNESS:** Qualitative aspects, I can respond to,
7 Your Honor. We have a game plan at Kiawah of
8 how we develop extra sensitive areas on water,
9 which is -- Kiawah, Your Honor, has almost 70
10 miles of perimeter water frontage. It also has
11 a number of islands that are only reachable by
12 causeways and bridges.

13 **THE COURT:** All right. Rephrase the question.

14 **Q:** **Mr. Long, would you please tell us about the**
15 **qualitative aspects of the development that**
16 **will occur on Captain Sam's when it does?**

17 **A:** **Yes. It will be -- as envisioned by the**
18 **development agreement, it will be of limited**
19 **numbers, with special provisions, such as the**
20 **use of pervious materials for roadways,**
21 **driveways. It will be sensitively done. It**
22 **will be within the forest canopy, generally, as**
23 **we've done on the other nine miles of Kiawah.**
24 **We will observe every regulation, as we've**
25 **always done.**

1 We have gotten something like almost 500
2 permits in 22 years and never had a violation,
3 never had a fine or a work stoppage from OCRM
4 or the Corps or anybody else. We'd be in
5 compliance with the law. We are adamant -- if
6 somebody violates the law on our team, they're
7 probably done. That will not happen. It has
8 never happened.

9 And so careful stewardship, observing the law
10 that OCRM -- if we have any wetlands -- there
11 aren't any to my eye, but if there are some
12 wetlands, we will get the permits for it or
13 apply for it. If we have to get the docks,
14 we'll get those.

15 Every -- the road requires a permit because of
16 the potential for runoff. We know that.
17 That's one of the reasons why we haven't
18 applied for it yet. We'll get that permit,
19 just like all the other roads that go through
20 little tiny areas of marsh to get to islands
21 now. It will be qualitatively, I am sure, just
22 as well done as anything we've ever done and as
23 I said, we've complied such that we've never
24 had a violation.

25 Q: You have mentioned certain areas where there's

1 causeways and small fingers. Have you had any
2 problems with OCRM dealing with buffers or any
3 other type of permit violations on those
4 sensitive areas?

5 A: Never. In fact, what we've generally done --
6 I haven't checked it in the last year or two,
7 but when I was day to day on oversight of
8 development, which was most of this time, we
9 would take the OCRM setbacks from, say, the
10 critical line on creeks and go farther for
11 setbacks. It's self-imposed setbacks, just to
12 make sure they wouldn't come out and say that
13 we did something wrong.

14 Q: Do you have a lot layout plan now?

15 A: We have a -- no, but we have a schematic that,
16 as I said earlier, might be called a
17 "preschematic" that Mr. Permar has done. We've
18 exhibited that to the other side in this case.

19 Q: Who prepared that?

20 A: Mark Permar. It was based on the habitats that
21 are on the spit of land and a lot of other
22 considerations, such as what's the most
23 sensitive, what's the least. He's an architect
24 and a land planner for 40 years.

25 Q: If there is a development of limited

1 residential single-family on Captain Sam's,
2 will there be public utility?

3 A: It will be private utilities. There'll be
4 water and sewer and, you know, media and other
5 lines to serve, underground, as required by the
6 code over there at Kiawah and --

7 Q: Will there be wells?

8 A: There will be no wells, no septic tanks.

9 Q: Will there be septic tanks?

10 A: No, no. We've never had a subdivision ever
11 with a septic tank or a well.

12 Q: Will you allow -- do you control the ARB?

13 A: We do. We're appointed --

14 Q: Will the ARB allow random cutting of
15 vegetation?

16 A: No. We fine people on a regular basis when we
17 learn of it. And I think the island's property
18 owners are to be applauded because they are
19 with us. We don't get all the -- maybe not
20 even most of the plaudits for that. The
21 island's property owners have bought into the
22 concept that man is existing with nature at
23 Kiawah in a very unusual, maybe unique for our
24 coast, manner.

25 Q: Do you, as a developer, based on what you know

1 in your experience, just doing what you do day
2 to day, do you foresee adverse impacts from
3 what you're going to do at Captain Sam's?

4 A: I don't. We have maximum 150 people or
5 probably about 120 people that would live in
6 ten -- excuse me, that would live in 50 homes
7 at the most. The average household has two and
8 a half people at Kiawah. Almost all of them at
9 Kiawah -- we're unusual, say, compared to
10 Seabrook or Isle of Palms or Sullivan's Island,
11 where I live. It's a second home community.
12 The people are generally from the Northeast and
13 the Midwest and they spend on average six to
14 eight weeks at Kiawah.

15 Q: What is the primary season they spend there?

16 A: Well, there's a couple of holidays in which
17 they are there: Christmas and the Fourth of
18 July; otherwise, they'll just pick a couple of
19 weeks here and there that they're allowed off
20 from their, you know, employment, et cetera.
21 Usually about six or seven weeks is what the
22 average homeowner or 89 percent of our
23 homeowners being second homeowners will spend
24 at Kiawah.

25 Q: Is there a difference between the island

1 population in the middle of summer and the
2 middle of winter?

3 A: Definitely. Being that it's a second home
4 community, they're there much more during the
5 summer, not all at the same time, but pieces of
6 the summer.

7 Particularly, we're gone unusually and not --
8 we didn't envision this, but our average age of
9 our buyers has gone down to in the high 40's
10 rather than the mid 50's. When we started out,
11 we thought it'd be just the reverse. So we
12 have people with children much more often now
13 than ten, 15 years ago.

14 Q: Let me ask you about the use of the beach. Do
15 the people on the island use the beach?

16 A: They do.

17 Q: Have you had -- do you ever go down to the
18 beach yourself to see what's going on?

19 A: Oh, of course, and --

20 Q: Have you been down to the area around Captain
21 Sam's Spit where the county park has its
22 walkover to the beach?

23 A: I've been plenty of times.

24 Q: All right. Is there anything on that beach
25 that prohibits persons coming from the east or

1 the north going down to Captain Sam's
2 peninsula?

3 A: No. People ride their bikes, they walk, they
4 jog, they fish, they go up and down the entire
5 length of the beach. They don't like it when
6 the wind's blowing one direction; maybe it's
7 tough to get home or whatever, but up and down
8 one of the prettiest beaches there is.

9 Q: Are there bike rentals on Kiawah?

10 A: There are. There's four or five different
11 companies including the resort, but -- the
12 Kiawah Island resort, which is a separate
13 entity that owns the hotel and the public golf.

14 Q: Are the bicyclists, if they have the
15 appropriate bike, allowed on the beach?

16 A: Absolutely. And we have generally estimated
17 about 5,000 to 6,000 people per day are at the
18 beach during the summer months.

19 Q: Based on what you have observed as far as
20 populations and the island in general and
21 seasonal shifts, do you anticipate that they're
22 going to be a lot of people on the beach from
23 these 50 houses?

24 A: First of all, we sell homesites; we don't build
25 houses. And our average build-out, from sell

1 of the homesite to building, is usually three
2 to four years before people actually build.

3 THE WITNESS: We don't release much property per
4 year, Your Honor. It might be surprising to
5 some people, but we only release about 20 to 30
6 homesites a year and usually at different price
7 points and different locations.

8 I can't see, even if we say -- decided this was
9 a 40-lot subdivision on Captain Sam's,
10 releasing more than six or eight at the most
11 per year. That would be very unusual to
12 release more than six or eight in any one
13 locale. It would be very atypical of our
14 20-year record of releasing property.

15 So if you consider that and you consider the
16 time it takes to finally build houses, to build
17 40 houses would probably take 20 to 30 years.
18 Even if you had them all today, two and half
19 people were there six weeks a year -- per
20 house, six weeks a year is not much of an
21 impact, compared to, say, the 50,000 visitors
22 right next door at the park or five or 6,000
23 visitors up and down the beach from the
24 existing 4500 property owners. That's how many
25 property owners there are. I think there's

1 3500 dwellings of one type or another: condos,
2 houses, villas.

3 Q: Back in 1975, when you mentioned this PDD was
4 adopted, was there a projection in it of when
5 build-out would occur?

6 A: Man, I'm sorry, I can't remember.

7 Q: I'll move on, I'm sorry.

8 A: Can't remember.

9 Q: Let's go to Captain Sam's, again.

10 A: Well, I'll tell you what. The cap was 7500 in
11 the PDD. There only could be 7500 sales of
12 some type of housing. We've gotten that
13 lowered to where the max is going to end up
14 being about 4500, I think. Mark can tell you
15 better.

16 Q: Is --

17 A: Excuse me, it's going to be about 5,000 --
18 yeah, about 500 left at Kiawah at the most.
19 Probably closer to 350 at the end of the day.

20 Q: How much of Captain Sam's peninsula, that over
21 mile-long peninsula, is public land and how
22 much is private land?

23 A: Well, all the land below the mean high
24 watermark in South Carolina is public. Nobody
25 at Kiawah, like any island, interferes with

1 somebody if they go above the mean high water
2 line, but that's the line where the State owns
3 below and they entrust it to the town and to
4 agencies such as OCRM to monitor the land below
5 mean high.

6 Q: The interior that we've seen in these
7 magnificent shots of Captain Sam's, who owns
8 the interior of Captain Sam's, the dune ridges
9 and everything to the critical line?

10 A: KDP II.

11 Q: Has that ever in any way been dedicated to the
12 public?

13 A: Never has. It's never been part of the park
14 and nobody could possibly think otherwise.
15 That doesn't mean that there isn't the
16 occasional person who goes up there. We
17 haven't stopped people from going on inland
18 properties, forested properties or Captain
19 Sam's in innocent ways. They've set no fires
20 that we know of and other things, so -- but
21 it's our land and everybody knows it.

22 Q: Leonard, I'm looking at one of the comment
23 letters and it raises another question. Did
24 KDP believe that it was asking for a revetment
25 of excessive length?

- 1 A: No. It was asking for a revetment to cover --
- 2 approximately coterminous with the erosion.
- 3 Q: Based on --
- 4 A: Could I just qualify that, slightly? It might
- 5 go "X" feet, a few feet past the erosion,
- 6 because we were informed if you don't that it
- 7 could -- if you stop short of the erosion, that
- 8 it will just continue on down the edge of the
- 9 river.
- 10 Q: Leonard, did you, in conjunction with Ray
- 11 Pantlik, put together some additional letters
- 12 to OCRM that specifically responded to
- 13 particular regulations --
- 14 A: Yes.
- 15 Q: -- such as cumulative impacts?
- 16 A: We did.
- 17 Q: Would you please turn to Exhibit Thirty-nine?
- 18 A: (Witness complies.)
- 19 Q: And while you're looking at that, let me ask
- 20 you, did you authorize the delivery to OCRM of
- 21 the reports that had been done by Drs. Oertel
- 22 and Basco?
- 23 A: I did.
- 24 Q: Why did you authorize that?
- 25 A: Well, because Dr. Oertel, in particular, had

1 addressed the issues raised to OCRM by people
2 who were commenting; such as, the Town of
3 Seabrook was concerned about the sand moving
4 down the river and onto their beach and there
5 was a concern about whether the inlet would be
6 impacted by the revetment. The plover had
7 arisen and there was concern about that and so
8 we wanted to address it in various ways.

9 Q: Did you think that information was important in
10 assessing the effects?

11 A: I did. I mean, it was interesting and useful
12 and actually reassuring to us to know that we
13 weren't going to be impacting Seabrook. We try
14 to cooperate in many different ways with
15 Seabrook. ~

16 THE WITNESS: The plover -- there's 3300 feet, Your
17 Honor, from the end of the revetment to where
18 the plovers come to Kiawah most.

19 Q: Are you referring to the inlet by "banks," the
20 inlet?

21 A: They're down at the end of Captain Sam's by and
22 large. Not that there isn't the occasional
23 plover that wanders the beach at the park, for
24 example, or other places. But the main
25 sightings on the -- all the data we have -- and

1 the town monitors it -- is that the revetment
2 is 3300 feet away from where the plovers
3 conDougate at the beach.

4 THE WITNESS: They stay on the hard sand, Your
5 Honor --

6 MR. WHITFIELD-CARGILE: Your Honor, I'm going to
7 object --

8 MR. WALKER: That's fine. We got it.

9 MR. WHITFIELD-CARGILE: -- to that testimony as far
10 as potential impacts on plovers. This witness
11 hasn't been noticed as an expert and ...

12 THE COURT: He's not testifying as an expert; he's
13 testifying as facts. I'll overrule objection.

14 Q: Now, going back to the letter of September 18
15 that's marked as Exhibit Thirty-nine that was
16 written by Ray Pantlik to Bill Eiser, did you
17 review that before it went out?

18 A: Yes, I did.

19 Q: In your estimation, did it fairly and
20 adequately address your position with respect
21 to whether there were adverse cumulative
22 effects?

23 A: Well, we hoped it did. As I said, there was
24 no -- unlike almost every other permit, there
25 was no back and forth. There was no effort by

1 OCRM to have a dialogue, to be collaborative,
2 to be polite, even. They just never
3 acknowledged anything. And I don't understand
4 it to this day.

5 Q: Well, on the second page of this letter, which
6 is Bates 204, there's a portion of the letter
7 that responds to Regulation 30-11(C) (2) about
8 whether a plan can be submitted together and
9 evaluated as a whole rather than submitted
10 piecemeal.

11 A: Right.

12 Q: Did you consider that your revetment
13 application was a piecemeal application?

14 A: No. We certainly tried to show the entire
15 revetment and we did. And we didn't piecemeal
16 anything. And if they had thought we had, they
17 could have said so, but they never did.

18 Q: To your knowledge, did anybody with OCRM during
19 this permitting process get back to you to say,
20 "It's submitted piecemeal and we need something
21 else to make it whole"?

22 A: No. As I have said several times, they never
23 got back to us to say anything, other than
24 they -- they did tell us a couple of times,
25 "Well, we'll get the decision next week. Next

1 **Monday looks like a pretty good day. Maybe**
2 **Tuesday."**

3 MR. WALKER: Your Honor, we would offer Exhibit
4 Thirty-nine into evidence, which is
5 Mr. Pantlik's letter of September 18.

6 MR. CHANDLER: Your Honor, again, same objection we
7 had to these other letters. If it's offered
8 simply for notice, you know, same deal as
9 before.

10 MR. WHITFIELD-CARGILE: Yeah. I would object, same
11 grounds, and it's replete with expert opinions,
12 the guy that -- opinions of guy that wasn't
13 noticed as an expert. So I don't think it's
14 admissible on those grounds, either.

15 MR. WALKER: Again, Your Honor, for the reasons we
16 stated earlier --

17 THE COURT: You're offering it for notice, inquiry
18 and --

19 MR. WALKER: Notice, inquiry. We gave them
20 information. We gave them expert reports.

21 THE COURT: It's admitted.

22 MR. WALKER: They said get back to us and we just
23 don't hear anything.

24 THE COURT: It's admitted for those purposes.

25 (KDP's Exhibit Number Thirty-nine was admitted into

1 evidence.)

2 Q: What ultimately was the decision of OCRM,
3 Leonard?

4 A: To deny all but 270 feet of the permit, the 270
5 being, as we understand it, in front of the
6 park land that we own, but which is leased for
7 another 65 years or so to Charleston County,
8 which by an informal agreement allows
9 Charleston County PRC to operate the park for
10 it. PRC is a separate legal governmental
11 entity.

12 Q: Would you turn to --

13 A: Under that lease, which I reviewed for many
14 years as county attorney, there is no provision
15 that allows it to be moved.

16 Q: Would you please to go to Exhibit Forty-four?

17 A: (Witness complies.)

18 Q: Do you have that in front of you?

19 A: I do.

20 Q: Is this a copy of the permit decision that was
21 provided to Kiawah Development Partners from
22 OCRM dated December 18?

23 A: It is. We got it in the mail three or four
24 days after the 18th and learned about the
25 decision, this decision, on the website that

1 somebody called our attention to.

2 So, again, they didn't call us or write us or,
3 I mean, e-mail us or anything. They put it in
4 the mail. And we found out from somebody at
5 the League, actually called us, were kind
6 enough to tell us that we'd been turned down.

7 MR. WALKER: We would move Exhibit Forty-four, a
8 copy of the conditional permit, into evidence.

9 MR. WHITFIELD-CARGILE: No objection, Your Honor.

10 MR. CHANDLER: No objection.

11 THE COURT: It's admitted.

12 (KDP's Exhibit Number Forty-four was admitted into
13 evidence.)

14 THE COURT: Been a while since we've had a clean one
15 like that.

16 MR. WALKER: And don't it feel good.

17 Q: Leonard, if you would go down to the
18 description of the project as authorized. Do
19 you see that in the middle of the page?

20 A: Yes.

21 Q: And if you go down to the second paragraph,
22 about halfway through, the Department says, "If
23 issued as requested, the permit will prevent
24 the shoreline movement in an area that
25 historically has seen inlet formation and

1 facilitate development in a pristine dune area
2 that is currently undeveloped."

3 Is the area where the development is planned,
4 which is landward of the setback line, a dune
5 area?

6 A: No. Well, excuse me --

7 MR. WHITFIELD-CARGILE: I'm going to object to that
8 question if he's calling for a legal conclusion
9 of whether or not that meets the definition of
10 dune area under the regulation or under the
11 program document. I realize Mr. Long is a
12 lawyer, but I still --

13 Q: Well, based on your observation, is the area
14 where the development would go landward of that
15 setback line, which is a considerable distance
16 from the ocean, is it a dune area based on your
17 walking it?

18 A: Well, landward of the setback line is a dune
19 area. But we don't build on dunes. As I've
20 said, for 22 years, we don't allow people to
21 build on dunes, except with the most minimal,
22 little pieces of, say, a pool, a boardwalk to
23 the beach, a little tiny piece of a house, and
24 usually they require vegetation to cover even
25 those things.

1 So we -- here, I know the plan is, and we've
2 shown it, that it will stay in the forested
3 area, almost entirely -- not entirely, but
4 almost entirely.

5 Q: Does the permit and the description of the
6 reasons state why OCRM is concerned about -- or
7 explain why OCRM is disapproving development in
8 an area that is behind its setback line that
9 it, itself, set?

10 A: I'm sorry.

11 Q: Does it --

12 A: I need you to repeat that. I have -- Jimmy and
13 I go back a long way, but I have a problem. I
14 can't hear two things at once and he was just
15 whispering, but it's still -- I only can hear
16 you or him, but I can't -- so I apologize.

17 Q: Let me start again.

18 MR. CHANDLER: Sorry.

19 Q: Who established the setback line in 1999 that
20 made the land landward of the setback line
21 developable?

22 A: OCRM.

23 Q: In this permit decision, it says that the
24 Agency -- one of the reasons it denied it was
25 it would allow development in what it describes

1 as a "pristine dune area". Is that the same
2 dune area that's behind the setback line they
3 established?

4 A: Right. That's the -- that's the area seaward
5 of the setback line that they said in '99 we
6 could build on.

7 Q: You said "seaward." Did you mean "landward"?

8 A: I mean landward of '99 -- landward of the
9 setback line in '99 they said was authorized
10 for building.

11 MR. WHITFIELD-CARGILE: Your Honor, I'm going to
12 object to this constant legal conclusion that
13 the setback line changed in 1999 was the State
14 saying you can build on that. I don't think
15 he's qualified -- I don't think that -- that's
16 a decision for the Court to decide. And the
17 constant characterization of that is -- I don't
18 think it's admissible, Your Honor.

19 THE COURT: Well, the problem you just said is the
20 constant characterization of that. Hasn't he
21 already testified to that point already?
22 If he's already testified to that point already
23 and now you're getting around to objecting to
24 it, isn't that --

25 MR. WHITFIELD-CARGILE: I don't know that the scope

1 of the testimony was the same. They said
2 that -- earlier they said that's what they
3 understood it to be. But what he understands
4 it to be is entirely different from what it is.
5 And now they're testifying -- he's testifying
6 and Trenholm's testifying -- Mr. Walker is
7 testifying in his questioning that this change
8 of the setback line is the State's
9 authorization of development.

10 That's just an inaccurate legal conclusion and
11 I don't think that by not objecting when he
12 said earlier what he understood it to be that
13 I've waived my objection to them testifying as
14 to what it is.

15 THE COURT: Mr. Walker, any response?

16 MR. WALKER: I think we've gone into it enough.

17 I'll move on. I think it's clear.

18 THE COURT: Okay. All right.

19 **Q: Why has KDP appealed the determination, the**
20 **final decision to deny the revetment except for**
21 **the 270 feet?**

22 **A: Because the erosion is continuing and because**
23 **it's so persistent. Apparently, it's been**
24 **going on for decades and it's been exacerbated**
25 **in the last decade and particularly in the last**

1 few years. It's not going to stop. It's not
2 like some process that we can sort of depend on
3 is going to come to a halt.

4 MR. WHITFIELD-CARGILE: I'm going to object to that
5 and ask that that be stricken. He's rendering
6 opinions as to whether or not that erosion is
7 going to stop.

8 Q: Based on your personal observation, have you
9 seen anything to indicate the erosion is going
10 to stop?

11 A: No. And if you have erosion on the back of --
12 or front, depending on how you look at it,
13 homesites, your burden of selling that homesite
14 is almost impossible. People would think you
15 were a shyster, I'm sure, if you were trying to
16 sell something to them and they wouldn't be
17 stupid enough to buy it from you if they were
18 worried about that erosion which is so
19 dramatic, ten, 12-foot-tall escarpments.

20 MR. WHITFIELD-CARGILE: Your Honor, I'm going to
21 object to this line of testimony. I don't
22 think he's been qualified as an expert in
23 marketing.

24 Q: Not going into opinions, what has been your
25 experience based on 20 years about customers

1 and how they react to different property?

2 A: I've been in charge of marketing for KDP and
3 KRA for 22 years and before that for other
4 entities that did subdivisions of two or 300
5 homesites in Charleston County that I was a
6 partner in.

7 And marketing is my first love. It was the big
8 draw that I really get up in the morning for.
9 When I got through practicing law, it was what
10 I really, really liked to do, more than
11 anything. I oversee legal, but I'm really
12 involved hands on with marketing and some
13 development activities.

14 So all the media buys, all the -- almost
15 everything that's ever been written about the
16 island in our media and advertising I do.

17 Either I do it personally or I edit it.

18 We have an in-house marketing team. We didn't
19 want to go to an agency. We have about 15
20 people, generally, now we have 20, and I'm the
21 partner/liaison for that in-house marketing
22 team, as well as the outside agency that places
23 our national media ads.

24 THE COURT: In-house marketing team for Kiawah?

25 THE WITNESS: Yes, sir.

1 THE COURT: Do you wish to have him qualified as an
2 expert?

3 Apparently, Mr. Whitfield-Cargile has an
4 objection if he's not.

5 MR. WALKER: Well, I would like to -- I have not --
6 all I want him to say is, based on all his
7 experience doing what he's doing does he think
8 it's marketable.

9 THE COURT: Oh, okay.

10 MR. WHITFIELD-CARGILE: Your Honor, he's rendering
11 an opinion as to the marketability of this --
12 of a property without a revetment and --

13 THE COURT: Based on his observations?

14 MR. WHITFIELD-CARGILE: I'm going to continue to
15 object, Your Honor.

16 THE COURT: All right. I overrule that.

17 THE WITNESS: Can I answer?

18 MR. WALKER: Yes.

19 THE WITNESS: Your Honor, what I would say is pretty
20 simple and I'm sure it's fairly common sense to
21 everybody. I've never seen, first of all --
22 and I'm familiar with practically every barrier
23 island in this state -- I've never seen a
24 successful subdivision, you might say,
25 oceanfront property, creek side, riverside

1 property, with significant, continuing decade's
2 long erosion occurring where somebody actually
3 tried to sell and market that property. I
4 don't think it's ever happened, but if it has,
5 fine. I know it can't happen at Kiawah where
6 we sell high-end buyers who are sophisticated,
7 mostly from the Northeast. They're not fools.
8 They're very smart. They kick every tire. And
9 if they have to drive onto Captain Sam's and
10 look down that river and see that escarpment,
11 it's obvious what they're going to think about
12 the property, that it's going to keep moving
13 towards the ocean, just like it's done.

14 **Q: Has KDP or KRA or one of your affiliated**
15 **companies or your affiliated companies in the**
16 **past applied for revetment permits or bulkhead**
17 **permits from OCRM?**

18 **A: Yes.**

19 **Q: Have any of them been denied?**

20 **A: No.**

21 **Q: Did you anticipate that you were going to be**
22 **denied?**

23 **A: Not in the slightest. It was so obviously**
24 **occurring and dramatic.**

25 **Q: Is there a mortgage on any part of this**

1 property?

2 A: Yes, there is. There's a \$50 million mortgage
3 that we took out a couple years ago to the Bank
4 of America, which has been our lead bank for
5 all these years. And that shows the level of
6 interest and maybe level of value we placed
7 in -- and the bank placed in the property.

8 Q: When the decision came out, what did you do?
9 Was it -- did you authorize an appeal?

10 A: I certainly did.

11 Q: That would have been to the DHEC board?

12 A: Yes.

13 Q: Did the DHEC board conduct a conference on your
14 appeal?

15 A: They didn't.

16 MR. WALKER: Your Honor, we have as Exhibit Seventy
17 a copy of the DHEC letter advising that it was
18 not going to conduct a review conference. We
19 would offer that in the record. It may already
20 be part of the administrative record, I'm not
21 sure, but I wanted to make sure it's in.

22 THE COURT: Any objection?

23 MR. CHANDLER: It should already be part of the
24 record. I understand it has to be attached to
25 the request for contested case hearing, so it's

1 already going to be part of the hearing record.

2 THE COURT: Just because it's in our file doesn't

3 mean it's in the record.

4 MR. CHANDLER: Well, I mean, I don't have any

5 objection to it coming in --

6 MR. WHITFIELD-CARGILE: No objection.

7 MR. CHANDLER: -- but it is part of the pleadings,

8 in effect.

9 THE COURT: Yeah. I think we've got a rule about

10 getting the Department's exhibit in -- or

11 Department's record into evidence. Just

12 because it's in the file doesn't mean it's in

13 there. So I offer that for your edification.

14 All right. It's admitted.

15 MR. WALKER: Thanks.

16 (KDP's Exhibit Number Seventy was admitted into

17 evidence.)

18 MR. WALKER: Excuse me, Your Honor, just one second.

19 (Off the record.)

20 MR. WALKER: Your Honor, that's all I have at this

21 time.

22 THE COURT: All right.

23 MR. CHANDLER: Your Honor, could we just take

24 another little short break? I need a personal

25 couple of minutes.

1 Q: Okay. Would it surprise you that in -- Tim
2 Kana in 1981, when he submitted a report to
3 what was then the South Carolina Coastal
4 Council, called this whole thing Beachwalker
5 Park?

6 A: I guess it would. You know, he'd be wrong, but
7 I guess.

8 Q: Okay. So one of your expert witnesses in this
9 case thought it was Beachwalker Park back at
10 least in 1981.

11 A: If that's what he thought 30 years ago, Jimmy,
12 that's what he thought. I don't know what
13 document you're referring to.

14 Q: Okay. And do you know whether Mr. Oertel or
15 Basco had referred to one of the benefits of
16 this thing as protecting this area because it's
17 Beachwalker Park?

18 A: I don't really recollect that, but, sure, it
19 would be a benefit to stop the erosion at a
20 public park that serves 50,000 people a year.

21 Q: And have you ever heard of Dr. Beach?

22 A: I have. I saw that -- a newspaper article a
23 while back about somebody that called himself
24 "Dr. Beach."

25 Q: Okay. And we're not talking about Dana Beach.

1 to back, east to west, but it's not a beach in
2 any normal sense of "beach."

3 Q: Okay. Is it sand? Is the surface there --
4 when the tide is out, can you pull up and walk
5 on sand?

6 A: Well, yes. I mean, you don't walk on anything
7 but sand at Kiawah Island. It's all there is.
8 But the beach, quote, end quote, which is not
9 a beach in my estimation, is like ten feet
10 between the high and low tide.

11 Q: Okay. But as it exists right now, somebody
12 who's got a little John boat or they've got a
13 canoe or a kayak, they can go out there at low
14 tide and they can pull up and they don't have
15 to worry about damaging their vessel by coming
16 up there. They're going to come up to a soft
17 surface, aren't they?

18 A: They are.

19 Q: And their kids can jump out and run around
20 barefooted out there, can't they?

21 A: I suppose they could.

22 Q: Okay. These pictures that were put into
23 evidence as part of Exhibit Number Six, can you
24 imagine any kids running around barefooted on
25 these rocks?

1 A: Well, the rocks to the left, Jimmy, are not
2 the -- number 0124 are not the articulated
3 concrete block. They're the ones to the right
4 side of that paragraph and they're in 0125.

5 Q: Okay. And when you go over to 0125 and you see
6 those rocks, can you imagine any kids or me or
7 you or anybody running around on that
8 barefooted?

9 A: Jimmy, I don't think people would run around on
10 it, but the point is to grow -- as we can show
11 you in other pictures that will come in
12 evidence, I hope, as recently as yesterday, how
13 this marsh grass completely takes over where
14 you can't even see -- these are a very new
15 revetment -- where you can't even see the
16 blocks. And it'd be like pulling up your boat
17 into marsh rather than onto what you
18 characterized as a beach or sand.

19 Q: Okay. So it's going to change the nature of
20 any public use to that area.

21 A: It's going to change the nature, but it will
22 hopefully improve it both in appearance and
23 habitat and it will stop the severe erosion
24 which is allowing upland, which is just as
25 valuable as lowland, to fall into the river

1 every day.

2 Q: Okay. Now -- I mean, if it ends up looking
3 like the picture that is part of that Exhibit
4 Six, that is KDP0342, and it grows a bunch of
5 oyster beds, you're certainly not going to be
6 able to get out and run around on that one
7 barefooted, either, are you?

8 A: Well, you couldn't go in any oyster beds in
9 South Carolina and, you know, run around;
10 that'd be the answer. If they happen to grow
11 on the articulated block down near low tide,
12 which is the only place they're going to grow,
13 no, you wouldn't. But there's thousands of
14 other beds in South Carolina you wouldn't run
15 around on. It's just -- I mean, that's where
16 oysters like to grow. So it's helping the
17 oysters but it might not help the kid who wants
18 to run around barefoot everywhere.

19 Q: Right. And around Kiawah, you've got a lot of
20 creeks with a lot of oysters.

21 A: We do.

22 Q: In fact, I think we were in a legal proceeding
23 once in which our experts said they were the
24 nicest oysters he's ever found in the State of
25 South Carolina.

1 be, but -- I last saw it along the forested
2 area.

3 MR. CHANDLER: Okay. Beg the Court's indulgence for
4 a moment.

5 Q: Now, Mr. Long, when KRA entered into the
6 agreement to buy this -- to buy basically up
7 all of Kiawah that hadn't been already sold off
8 to people as condominiums or lots, were you
9 aware of the mid seventies Environmental
10 Inventory that had been prepared by the Kuwaiti
11 company?

12 A: Was I aware of it in '88?

13 Q: Yes.

14 A: Yes.

15 Q: Okay. And you were aware of the fact that
16 certain areas were designated in that report as
17 unstable areas and there were recommendations
18 that houses should not be built in those areas?

19 A: I was.

20 Q: Okay. And one of those areas was down where
21 the Ocean Course was built and were talking
22 about that those would be good areas to build
23 things like golf courses so we didn't have
24 residences down there that would be threatened.
25 Do you remember that?

1 A: I do, but I also remember that the so-called
2 unstable areas have grown so much that our
3 highest-end subdivisions and most expensive
4 homes were built all along the beach in what
5 Miles Hayes described then almost 40 years ago
6 as unstable.

7 Q: Okay. Have you had to go in and do any
8 renourishment at the Ocean Course?

9 A: We didn't have to. We don't own the Ocean
10 Course, but the owner of the resort that owns
11 the Ocean Course applied for and was given a
12 permit by OCRM to renourish a length of dunes
13 in front of the Ocean Course.

14 Q: Okay.

15 A: It worked. And then the problem was the bar at
16 the Eastern end of the island had not broken
17 off. And when it finally broke off, it let a
18 lot of sand come down the beach and that cured
19 it.

20 Q: But at least at one point the 18th hole at the
21 Ocean Course was threatened enough that the
22 owner came in and got a permit to do
23 renourishment.

24 A: He did.

25 Q: Okay. As part of your marketing analysis for

1 a development of the spit, have you taken a
2 look at what kind of prices you would put on
3 those lots?

4 A: No.

5 Q: Okay. You filed a takings claim against the
6 State of South Carolina in the Court of Common
7 Pleas?

8 A: We did.

9 Q: Okay. And in that case, you're asking for
10 judgment in the amount of \$100 million?

11 A: Minimum of 100 million.

12 Q: How did you arrive at that figure?

13 A: Trenholm said we had to name a number under
14 some rule and we guesstimated that if we maxed
15 at 50 homesites, which certainly is not a
16 decision -- as I said, we almost always go
17 lower density than allowed -- in fact, always,
18 I'd say.

19 The homesites on the ocean and the homesites on
20 the river we guesstimated to average around
21 three million, maybe more, maybe less given
22 this crazy economy, and we just grabbed a
23 number and then went below that for the
24 purposes of the lawsuit. But an MAI appraisal,
25 et cetera, would have to get a number that made

1 some sense from the market, which has been
2 volatile, to say the least.

3 Q: Okay. Well, 50 lots at \$3 million is going to
4 be \$150 million. Are you figuring about \$50
5 million in development costs?

6 A: No, I really wasn't. I just arbitrarily
7 lowered it with Trenholm's advice to a number
8 that's at a minimum of a hundred and we'd
9 figure out -- if we had to go to trial, we'd
10 get it formally appraised by a couple of
11 appraisers and go through the exercise of
12 development costs, land cost, planning cost,
13 everything else, provision of utilities and
14 whatnot.

15 Q: Okay. Now, has KDP or KRA engaged the services
16 of a geologist or other expert to go back and
17 determine whether or not the pattern of
18 buildup, extension and then breach, that's
19 happened over the last 350 years, have you had
20 anybody go back and look and say that something
21 has changed and that's not going to happen
22 again?

23 A: Tim Kana will be our expert on that. We feel
24 like he's the leading expert in this part of
25 the county and we've engaged him recently to

1 be -- to testify to that exact point.

2 Q: Okay. And so he's going to say that he doesn't
3 think that's going to happen again.

4 A: He sees nothing cyclical, nothing regular,
5 nothing that portends the suggestion you just
6 made or that Miles made 40 years ago. You
7 know, the spit is enormously bigger. Even the
8 decision by OCRM said the whole island has
9 grown out a quarter of the mile into the
10 Atlantic Ocean from where it was in 1974.

11 Q: Okay. I mean, but are you aware of fact that
12 Dr. Kana in his own reports for the 1981 permit
13 and for 1991 permit went through and said that
14 that cycle has been demonstrated to come in 40-
15 to 80-year cycles for the last 300 years?

16 A: I wouldn't be aware of that. I'm sure if he
17 said that you'll be anxious to use that. But
18 I don't think he said that.

19 Q: Okay. Now, as a marketing matter, you're
20 worried that people are going to get out there
21 on that narrow point and they, in turn, are
22 going to be worried.

23 A: It's 1400 feet wide and it's almost 500 feet at
24 its narrowest, so it's not terribly narrow.
25 We've developed spits of land and islands of

1 land that are 150 to 300 feet wide over and
2 over and over with great success, bordering on
3 all sides by water.

4 Q: Okay. But it's got a pinch point that you said
5 is something less than a hundred feet.

6 A: About four or five hundred feet. Four or five
7 hundred feet.

8 Q: Four or five hundred feet at the narrowest
9 point?

10 A: Between the high tide line and the high tide
11 line. The problem in this case, which you know
12 as well I do, is that the corridor to get there
13 in which to put a legal road at Kiawah Island
14 is narrowing because the setback line on the
15 ocean is practically static irrespective of the
16 enormous accretion on the beach. And the
17 critical line on the river is moving towards
18 the ocean. And the difference between those
19 two lines is 66 feet. It was 90 feet just two
20 years ago, three years ago, so it's dropped by
21 a third.

22 And OCRM knows perfectly well that what they're
23 doing is they're delaying us until that narrows
24 and it becomes impossible to get legal access
25 to this land, even though it's much wider

1 than --

2 MR. WHITFIELD-CARGILE: I'd ask that that last
3 statement about what OCRM knows be stricken.
4 That's pure speculation, Your Honor.

5 THE COURT: I'll sustain that objection.

6 Q: Now, you talked about the setback line being
7 practically static. But --

8 A: It is.

9 Q: -- it's moved tremendously in the time since
10 you've purchased this property, hadn't it?

11 A: Well, there's only been a setback line in '99.
12 You're talking about generally for Kiawah or
13 the spit?

14 Q: The spit.

15 A: Well, it's only -- the first one was 1999.

16 Q: Okay. Well, there was before but it just cut
17 it off back there at the spit, didn't it?

18 A: Well, there wasn't one. It just went across
19 the spit to the river.

20 Q: Exactly.

21 A: So there wasn't one.

22 Q: Because that was the farthest point of erosion
23 in the last 40 years.

24 A: I can't tell you what the State considered, but
25 you might.

1 Q: Okay. But you just said that customers are
2 going to worry about this narrow area.

3 A: They're going to worry about the -- no, I
4 didn't. I said they're going to worry about
5 the 2700 feet of erosion, that absent a
6 bulkhead/revetment type structure is going to
7 continue and I think it would injure your
8 ability to sell tremendously.

9 Q: Okay. Now, if those customers saw the reports
10 that Dr. Kana and others put together in years
11 past, they might worry about something else,
12 wouldn't they?

13 A: I wouldn't know what reports you're referring
14 to. And I just know what he testified to last
15 Friday and what we talked to him about in our
16 office and it's 100 percent reassuring and I'd
17 like them to see what his current data is
18 today, not 30 years ago in some report you're
19 referring to.

20 Q: Okay. All right. Well, we'll have those other
21 reports. But, basically, your feeling is you
22 want to build this revetment to give your
23 potential customers some reassurance.

24 A: I want to build a revetment to stop the erosion
25 of our highland, which is so unnecessary, to

1 see good land being wasted every day and
2 allowed to just slough off into the river.
3 And, secondly, we'd like to develop the
4 property and you can't do that particularly
5 unless you can retard obvious and lengthy and
6 persistent erosion. And, third, you have to
7 understand that we have to get there. We can't
8 get there legally unless the line -- the
9 distance between the critical line and the
10 setback line is sufficient to put a road and
11 utilities.

12 Q: Okay. You can put your utilities within the
13 road right-of-way, aren't you?

14 A: Yes.

15 Q: And a road right-of-way is typically 50 feet.

16 A: Yes.

17 Q: So you've got at least 50 feet to go in there
18 and build a road and have the right-of-way to
19 put the utilities in.

20 A: Today, if we had a permit, you'd better believe
21 we'd be out there putting that road in and
22 utilities.

23 Q: Okay. And the beach side is building up, isn't
24 it?

25 A: It is.

1 Q: And so setback lines and baselines are adjusted
2 every five years or so, aren't they?

3 A: Every ten years.

4 Q: Every ten years. So that's going to be
5 adjusted outward, too, isn't it?

6 A: Yeah, it will. In ten more years, it might
7 move, like it did this time, like three feet.

8 Q: Okay. Well, it's going to -- we're going to
9 bring these people in and we're going to give
10 them a sense of security. Now, where is it you
11 want to build this structure? Do you want to
12 build it on your property?

13 A: The revetment?

14 Q: Yes, sir.

15 A: I want to build it in what's called the
16 "critical area," as you know.

17 Q: And the critical area is owned by who?

18 A: The State of South Carolina, the same area that
19 has been allowed by the General Assembly to be
20 available for docks and revetments and
21 bulkheads and dozens of other uses.

22 Q: Okay. And it's an area that is considered to
23 be part of the public trust.

24 A: It is.

25 Q: And the State holds title in trust for the

1 **people.**

2 **A:** **It does.**

3 **Q:** **Okay. And ...**

4 MR. CHANDLER: That's all I got.

5 THE COURT: I don't imagine you're going to get
6 through in ten minutes.

7 MR. WHITFIELD-CARGILE: Your Honor, I think you know
8 that I won't, as much as I'd love to.

9 THE COURT: Okay. Well, then, let's just break for
10 the day. Is it too early to get back at 9:00?

11 MR. CHANDLER: Let's do it.

12 MS. ARMSTRONG: 9:00 is fine with us.

13 MR. WALKER: That's fine.

14 THE COURT: He was just shaking his head. I said,
15 "Is it too early to get back at 9:00?"

16 MR. WALKER: No.

17 THE COURT: I didn't see -- I saw their --

18 MR. WALKER: Oh, I'm sorry, I was in the mode of
19 agreeing, but I was disagreeing.

20 THE COURT: Oh, okay.

21 MR. WALKER: I agree that we can get back by 9:00.

22 THE COURT: Okay. All right. Is that okay?

23 MS. ARMSTRONG: That's fine, Your Honor.

24 MR. WHITFIELD-CARGILE: No problem, Your Honor.

25 THE COURT: Okay. See you at 9:00.

1 MR. WALKER: Thank you, Your Honor.

2 (The proceedings adjourned at 5:37 p.m. and
3 reconvened Tuesday, August 25, 2009, at 9:00 a.m. as
4 follows:)

5 THE COURT: All right. Mr. Long, you're still under
6 oath.

7 THE WITNESS: Yes, sir.

8 MR. LONG - CROSS-EXAMINATION BY MR.

9 WHITFIELD-CARGILE:

10 Q: Mr. Long, you testified yesterday that you've
11 never had a permit denied -- or a revetment
12 denied. Do you recall that?

13 A: I do. I don't believe we have.

14 Q: Have you ever applied for a revetment that was
15 2,783 feet long?

16 A: Never.

17 Q: Have you ever applied for a revetment greater
18 than 2,000 feet?

19 A: No.

20 Q: Have you ever applied for one greater than 1500
21 feet?

22 A: I think that the longest one was probably seven
23 or 800 feet.

24 Q: Seven or 800 feet?

25 A: I can't remember.

1 Q: And this one's over three times that?

2 A: I think that's the math, yes.

3 Q: Do you have the exhibit notebook?

4 A: I don't.

5 Q: Here you go.

6 A: All right.

7 Q: Thanks. Can we look at Exhibit Four?

8 A: (Witness complies.) Okay.

9 Q: And if you look at Bates stamped 869 of that --

10 A: (Witness complies.)

11 Q: -- you can see sand -- this was taken -- where
12 was this taken?

13 A: I'm getting to the page, just a second.

14 Q: Sure.

15 A: This was taken at Captain Sam's from the air,
16 probably from a helicopter, at the far western
17 end.

18 Q: This is the far western end of the spit?

19 A: Yeah.

20 Q: And if you look down there, you can see sand,
21 a sandy beach along that, or a sandy riverbank
22 along the river all the way from the end of the
23 spit; is that right?

24 A: Are you talking about 0869?

25 Q: 0869. If you look along that riverbank where

1 the revetment would go, you can see the white
2 sand -- you can see the sand all the way from
3 here, can't you? All the way from the end of
4 the spit?

5 A: I can see a line that's probably about a
6 thirty-second or a sixty-fourth of an inch,
7 maybe, in width that probably is sand.

8 Q: And it's distinct from the characteristics that
9 you can see on the opposite bank where it is
10 marsh?

11 A: Yes.

12 Q: Okay.

13 A: But I wouldn't call it a "beach". I'd call it
14 a "shoreline."

15 Q: And this large aerial -- not large aerial, but
16 this aerial of the entire island --

17 A: Right.

18 Q: -- if you look on that, you can't -- how
19 many -- well, look at the end of the spit. You
20 can see the sand from the sky, right?

21 A: I can see the end of the spit. Is that what
22 you're asking me?

23 Q: Look at where the neck is where the revetment
24 is going to go.

25 A: Right.

1 Q: You can see the sandy shore from the sky,
2 right, of the river?

3 A: I can't really.

4 Q: Okay. Do you have -- you're wearing glasses.
5 Are those your good glasses?

6 A: You know what, they're good glasses but they're
7 not good eyes. I'm a little old, but I don't
8 think I really see a sandy shore, but --

9 Q: Okay. Do you see a lighter shore than all the
10 other shores along the Kiawah River?

11 A: Slightly, yes.

12 Q: This shore is unique in that there's no marsh
13 along it, right?

14 A: Well, there's no marsh until you get to the
15 last 2,000 feet.

16 Q: Well, right where the revetment is going to go,
17 there's no marsh.

18 A: No, there's no marsh today.

19 Q: Okay. But most of the Kiawah River has marsh
20 on either side of it. Would you agree with
21 that?

22 A: It has marsh, although there is a, you know,
23 dark soil, pluff muddy oyster banks in places,
24 piece of dirt between the marsh and the water.

25 Q: Do people walk on dark, sandy pluff mud with

1 oyster beds on them?

2 A: Only if you're collecting oysters or you're
3 just looking for shells.

4 Q: Let's flip to Exhibit Five. These are the
5 pictures, if I recall yesterday, you said show
6 the severity of the erosion, right?

7 A: Right.

8 Q: Do you know where the first page of this was
9 taken, 563?

10 A: It appears, as I said yesterday, to be taken
11 from somewhere along the parking lot because of
12 the fence on the left is the sand fence of the
13 parking lot.

14 Q: Okay. So that's right there at the parking
15 lot?

16 A: It's somewhere in the parking lot.

17 Q: 564, the next page, that's also the parking
18 lot, right?

19 A: I believe so. Well, I don't know, but it's
20 certainly PRC's property.

21 Q: Well, it's got that sand fence on it, right?

22 A: Yes.

23 Q: And that's indicative of -- the only place we
24 know that to be is at the parking lot, right?

25 A: Yes.

1 Q: The same fence?

2 A: Yes.

3 Q: Okay.

4 A: Although, I think it's actually proud or
5 forward of the parking lot, as well.

6 Q: And if you look just past the parking lot, the
7 sand fence, it's marsh, right?

8 A: Yes.

9 Q: And that marsh line is the end of -- just above
10 the end of the parking lot, right?

11 A: Yes.

12 Q: Okay. So we can use that as a landmark point
13 of reference as we look through these photos,
14 right?

15 A: Okay.

16 Q: So 564 is at the parking lot. 565.

17 A: Yes.

18 Q: Same sand fence?

19 A: Yes.

20 Q: Parking lot?

21 A: Well, the same fence.

22 Q: That's it. And near the parking lot, correct?

23 A: Yes.

24 Q: Do you know where 566 was taken?

25 A: It was probably taken a little bit farther

1 west.

2 Q: Well, if you look down, you can see the bend in
3 the neck farther on up, right?

4 A: Right. So I'm thinking it's a little farther
5 west than the previous ones.

6 Q: Okay. Do you know -- that tree that's fallen
7 down, is that right there near the parking lot?

8 A: Well ...

9 Q: You've been to the site.

10 A: I have, but I don't recall if it's by the
11 parking lot or a little bit little forward of
12 the parking lot, but it's certainly near it.

13 Q: Okay. 567, parking lot, right?

14 A: I believe so.

15 Q: That's the top end of the sandy shoreline where
16 it goes to marsh.

17 A: Probably.

18 Q: That's that point of reference we talked about,
19 right?

20 A: Yes.

21 Q: Okay. 568.

22 A: Right.

23 Q: You can see the bend in the neck down in the
24 distance if you look to the west, right?

25 A: You can, yes.

1 Q: So that indicates we're right there near the
2 parking lot, right?

3 A: We're probably leaving the parking lot.

4 Q: Okay. 569.

5 A: Right.

6 Q: You can still see that same sand fence and that
7 same point of reference. That's right there at
8 the parking lot, isn't it?

9 A: Right.

10 Q: 570, that's right there -- same picture, right
11 there at the parking lot, right?

12 A: I believe so.

13 Q: Okay. 571, do you know where that is?

14 A: Can't say I do.

15 Q: There's no point of reference, is there?

16 A: I don't see one.

17 Q: Okay. 572, no point of reference.

18 A: No. It's somewhere when it straightens out,
19 but I don't -- you know, around the bend to the
20 west, but I don't know where on the curve it
21 is.

22 Q: Well, if you look down towards the west in that
23 picture, you can see it's starting to -- you
24 still can't really see a bend, can you?

25 A: Not totally. It looks like it's curving to the

1 right.

2 Q: This is probably right there at the parking
3 lot, isn't it?

4 A: I really don't think so, but it might be.

5 Q: 573, we don't have a point of reference.

6 A: No.

7 Q: You can't even see erosion in that, can we?

8 A: (No response.)

9 Q: It's just a picture of a tree.

10 A: It just looks like a tree that's fallen.

11 Q: 574, you can see that same point of reference
12 where the marsh ends in the front of the
13 parking lot, right?

14 A: Right.

15 Q: This is right there near the parking lot, isn't
16 it?

17 A: It probably is, Davis, yes.

18 Q: Okay. 575, don't know where it is. No point
19 of reference.

20 A: Not sure where it is.

21 Q: 576, you can see that same point of reference
22 we were talking about. This might be -- this
23 is right near the parking lot, too, right?

24 A: This looks to be as you look -- this looks to
25 be coming on around the bend, probably past the

1 parking lot.

2 Q: Okay. A little bit farther to the west of the
3 parking lot?

4 A: Yes.

5 Q: Okay. In the immediate foreground, you don't
6 have the same sharp scarp line as you do
7 getting a little past towards the parking lot,
8 do you?

9 A: Well, I can't see everything to the right, but
10 the scarp just down the creek there is very
11 steep.

12 Q: Just down the creek there in front of the
13 parking lot?

14 A: Yes.

15 Q: Okay. 577, that's the same picture we were
16 just looking at, isn't it?

17 A: It seems to be slightly different but it's
18 generally the same.

19 Q: Well, it doesn't show that same -- in the
20 immediate foreground, which is beyond the
21 parking lot, it doesn't show that same scarp
22 that's directly in front of the parking lot,
23 does it?

24 A: It's essentially the same picture.

25 Q: Okay. 578, no point of reference. Don't know

1 where it was taken.

2 A: I don't.

3 Q: 579, no point of reference.

4 A: It's certainly along the river, if that's what
5 you're questioning, but 579 is, again, part of
6 the escarpment that's caused -- but I don't
7 know exactly where.

8 Q: Don't know where on that shoreline it's taken.

9 A: Not exactly.

10 Q: No point of reference. 580, no point of
11 reference.

12 A: Is that a question? I mean, are you
13 testifying?

14 Q: You don't know where 580 was taken, do you?

15 A: Not exactly, but it's certainly along the river
16 where the erosion is occurring.

17 Q: But we don't know where on that river it was
18 taken.

19 A: Exactly, no, I don't.

20 Q: Okay. 581, we're back to that same point of
21 reference right there in front of the parking
22 lot, right?

23 A: Back at the end again, yes.

24 Q: Okay. 582 --

25 A: Yes.

1 Q: -- that's in front of the parking lot. You can
2 see that sand fence and the gate, right?

3 A: Exactly. It's somewhere near the parking lot.

4 Q: 583, parking lot, right?

5 A: Yes.

6 Q: 584, parking lot, right?

7 A: Seems to be, yes.

8 Q: 585 --

9 A: Yes.

10 Q: -- parking lot.

11 A: Well -- or perhaps past it. I'm not sure.

12 Q: Okay. 586, parking lot.

13 A: Right.

14 Q: 587, parking lot.

15 A: Right.

16 THE COURT: Are we getting close to the end on this?

17 MR. WHITFIELD-CARGILE: We're done with all these,
18 Your Honor.

19 THE COURT: Okay.

20 Q: So all these photos in Exhibit Five which show
21 the severe erosion are right there at the
22 parking lot.

23 A: No, they're not right there. I think I said
24 some of them were past the parking lot and some
25 are on the bend, beginning to go around the

1 bend.

2 Q: All the ones that have a point of reference on
3 them are taken at the parking lot, correct?

4 A: Well, all the ones that have a fence, if that's
5 what you're talking about as the point of
6 reference, yes, but --

7 Q: Well, let me ask you --

8 A: They're obviously connected up going around the
9 bend from the PRC property.

10 Q: Well, show me which one that is beyond the end
11 of the parking lot.

12 A: (No response.)

13 Q: We just walked through every single one of them
14 and the only ones that had a point of reference
15 you said are at the parking lot, right?

16 A: You asked me did I know exactly where it was
17 and I don't, but I can tell you they're all
18 taken along the edge of the escarpment leading
19 along PRC's property and then -- which we own,
20 but it's leased -- and then past that going
21 west around the curve. And I didn't know
22 exactly where they were or exactly where the
23 line was between the leased property and ours,
24 but I knew they were along the river edge.

25 Q: Okay. The Department issued a permit, correct?

1 A: They did.

2 Q: And we authorized a revetment in front of the
3 parking lot.

4 A: You did.

5 Q: Where you have pictures to show that there is
6 severe erosion.

7 A: Yes.

8 Q: Okay. Let's look at Exhibit Six for a minute.
9 Flip to page 125, second page of this.

10 A: (Witness complies.)

11 Q: You see the first row of blocks on the river
12 separating from the ones prior to that?

13 A: The first row blocks closest to the water?

14 Q: Yes.

15 A: Yes.

16 Q: So there's a big -- a wide crack in between one
17 row of concrete blocks and the next ones,
18 right?

19 A: I'm not sure there is. Where are you
20 talking -- oh, you mean between the first row
21 that's linearly along the river and between
22 that and another row?

23 Q: Yes, yes.

24 A: Yes, there is.

25 Q: Okay. And you can see that same thing in page

1 380, correct?

2 A: Yes.

3 Q: Okay. Do you think that's hazardous if
4 somebody's going to try to walk on that?

5 A: That's not ours and that's somewhere else on
6 Daniel Island or somewhere.

7 Q: I realize that. But I'm asking you do you
8 think it's hazardous for somebody to walk on
9 that. You think they might twist their ankle?

10 A: I guess they could maybe if they weren't real
11 careful.

12 Q: Well, if there's marsh growing up all through
13 that, they wouldn't even be able to see that
14 big crack, will they?

15 A: Well, if they were laid like this, yes, they
16 probably would not be able to see the crack.

17 Q: You said, "If they're laid like this, you're
18 not going to be able to see the crack."

19 A: Right.

20 Q: On yours -- how differently are yours going to
21 be laid?

22 A: That's not something I know about. All I know,
23 Davis, is we try to use best practices and --

24 Q: Do you know who built this one?

25 A: I don't know who built this one.

1 Q: Do you know who gave you these photos?

2 A: Thomas & Hutton Engineers, I believe.

3 Q: And those are the folks that's going to build
4 yours?

5 A: They are designing ours, but I don't know that
6 they designed this one.

7 Q: Let's talk about your design for a minute. You
8 said in your letter, which is Exhibit Number --

9 MR. WHITFIELD-CARGILE: Beg the Court's indulgence
10 for just a moment.

11 Q: -- Thirty-three, I believe. Let me look to see
12 if that's right.

13 A: Exhibit Thirty-three?

14 Q: Yeah. In Exhibit Thirty-three you stated that,
15 in the second paragraph, KDP took over the
16 expenses so that one comprehensive solution and
17 one type of engineering approach to prevent
18 them from being stopped. So you're advertising
19 this to the Department as a comprehensive
20 erosion control structure, right?

21 A: I was telling the Department the reason why we
22 asked PRC to withdraw its permit application
23 from another engineering firm, and they did,
24 and they allowed us to put in one solution and,
25 of course, your client decided to piecemeal the

1 result by only issuing the permit for the
2 PRC.

3 Q: And Exhibit Eighteen -- let me make sure --
4 give me a second.

5 MR. WHITFIELD-CARGILE: Bear with me just a moment,
6 please.

7 Q: Turn to Exhibit Thirty-nine.

8 A: (Witness complies.) Can I read this for a
9 second?

10 Q: Sure.

11 A: (Reading.)

12 MR. WHITFIELD-CARGILE: Your Honor, while he's
13 reading that, I'm going to have the court
14 reporter mark this, if that's okay.

15 (Off the record.)

16 THE WITNESS: I saw this again. What's your
17 question?

18 Q: Okay. In Exhibit Thirty-nine, which is a
19 letter from Ray Pantlik to the Department, you
20 testified about this yesterday, and this is
21 where he attempts to persuade the Department
22 that y'all aren't piecemealing your approach,
23 right?

24 A: He suggested that we're in compliance with the
25 regulations that counsels against piecemeal

1 A: I don't follow you, Davis.

2 Q: Let's talk about the -- you said that the 2005
3 development agreement sets forth the standards
4 and shows that y'all do any development in an
5 environmentally sensitive manner yesterday. Do
6 you recall that?

7 A: It suggests in certain language that the
8 subdivision known as Captain Sam's, where they
9 allowed up to 50 homesites on 20 acres, that it
10 would be done in an environmentally sensitive
11 manner.

12 Q: Okay. And that was what the evidence you
13 submitted indicating that y'all would -- that
14 any development would be in an environmentally
15 sensitive manner; is that right?

16 A: That's right.

17 Q: Okay. Let's talk about the 1994 development
18 agreement. What uses did it authorize?

19 A: Well, it authorized mostly residential, some
20 commercial, some mixed use.

21 Q: Let me back up. What uses did it authorize on
22 Captain Sam's Spit?

23 A: Two uses were authorized there. Of course, at
24 that time there was no -- there was no setback
25 line established by the State, so you couldn't

1 build residentially.

2 Q: What two uses were authorized?

3 A: On the western roughly half of Captain Sam's,
4 we asked for and the town agreed to give us the
5 right to convey that to the community
6 association as greenspace one day, and on the
7 eastern half that we could sell it for park
8 purposes to, for example, Charleston County PRC
9 or other park entities or ...

10 Q: So your 1994 development agreement limited it
11 to park space and greenspace?

12 A: For the most part. I think Mark Permar is the
13 best answer of that '94 agreement, but that's
14 pretty close.

15 Q: Okay. And that was in 1994?

16 A: Yes.

17 Q: Okay. And 11 years later, you got a new
18 development agreement --

19 A: (Nods head affirmatively.)

20 Q: -- allowing residential development?

21 A: We did.

22 Q: Okay. But you want us to rely on the current
23 residential -- or the current development
24 agreement as your environmental standards and
25 what's going to bind you to that.

1 A: Well, that's the only one that applies.

2 Q: Okay. So we know development agreements can
3 change, right?

4 A: We do.

5 Q: Okay. We talked about the setback lines.
6 You're aware -- or are you aware that the
7 Department's required to revise the setbacks
8 lines every ten years?

9 A: I am so aware, yes.

10 Q: And are you aware that there's a specific
11 formula that they're required to use?

12 A: I know that there is a formula depending on
13 where you are on the beachfront.

14 Q: And do you agree that the existence of setback
15 lines themselves don't authorize construction?

16 A: What they authorize is construction subject to
17 the local zoning.

18 Q: The setback line is just a line in the sand
19 that shows where the landward-most point of the
20 shoreline over the last 40 years, right?

21 MR. WALKER: Objection. That's an incorrect
22 statement of law.

23 A: No, that's not correct.

24 THE COURT: Well, also, he's asking for a legal
25 conclusion, I think.

1 MR. WHITFIELD-CARGILE: Okay. I'll move on then,

2 Your Honor.

3 Q: But yesterday you made a big deal out of the
4 fact that no one at Kiawah requested that those
5 lines be changed. Do you remember that?

6 A: I said nobody with KDP did.

7 Q: That nobody with KDP did. And you kind of made
8 a big deal out of that, that OCRM just offered
9 that to you. But the statute requires --

10 A: I didn't know I was making a big deal out of
11 it, but I certainly thought it was relevant,
12 but go ahead.

13 Q: But the statute requires them to do that and
14 requires them to follow a formula, right?

15 A: Well, they didn't do it in any years before
16 that when they were changing the lines. All of
17 a sudden they had a setback line for a mile and
18 a third of property that had never had one, so
19 that was a little different.

20 Q: Let's look at the development agreement for a
21 minute. Is one of the reasons -- what you said
22 yesterday that -- let me back up. You said
23 yesterday that the road and any utilities would
24 be private?

25 A: Yes, they would.

1 Q: Okay. But in the development agreement on
2 page --

3 MS. ARMSTRONG: Two.

4 Q: -- Exhibit Two ...

5 A: Could you refresh my memory on what exhibit
6 number that was?

7 Q: Exhibit Two.

8 A: All right. What page?

9 Q: Page 22. It's Bates stamped 072.

10 A: Okay.

11 Q: The third paragraph on that page envisions that
12 the roadway and utilities will be transferred
13 to the Kiawah Island Community Association,
14 right?

15 A: Can I just read it for a second? (Reading.)
16 You are talking about the third paragraph on
17 0072?

18 Q: Yeah.

19 A: It talks about the conveyance of the property
20 and the assurance to the community association
21 about the right-of-way.

22 Q: Uh-huh (affirmatively responds)'.
23

A: And what's your question? I'm sorry.

24 Q: Before those -- before that roadway and the
25 right-of-way can be transferred to the

1 community association, you've got to get a
2 certification from a licensed civil engineer
3 with 20 years experience in South Carolina
4 coastal development that it won't be
5 unreasonably subject to tidal erosion from the
6 Kiawah River, right?

7 A: Right.

8 Q: So the purpose of this revetment is to help
9 facilitate getting that certification, right?

10 A: Among other things.

11 Q: Okay. So that y'all won't have to be -- so
12 that KDP won't have to be responsible for the
13 roadway.

14 A: No, I don't know that we'd be responsible or
15 not, but we'd transfer roads and infrastructure
16 as we build them out in each subdivision and
17 we'd transfer them to the community
18 association, which then maintains them.
19 And we've never -- we've never agreed to do
20 what this says, but we were willing to do it
21 here because there was concern about the river
22 erosion that everybody could see. And so we
23 said that we would make sure we got this
24 assurance from an engineer to the community
25 association and if there were a problem, I

1 wouldn't say that we would -- we weren't
2 getting indemnified or anything like that. We
3 may still have some liability if something
4 happened, as might the engineer, I suppose.

5 Q: But the plan is that KDP is not going to
6 maintain any roadway out there.

7 A: We don't maintain roads. We put in the capital
8 to build the roads, water, sewer and other
9 utilities --

10 Q: Okay.

11 A: -- and we warrant them or get warranties from
12 the contracting companies and pass those along.

13 Q: You said yesterday that y'all are going to --
14 under the development agreement, you're
15 required to only develop 20 out of the 150
16 acres of upland?

17 A: Right.

18 Q: But there's only 31 acres of upland that's
19 developable, according to your testimony
20 yesterday, right?

21 A: Well, today, there's actually about 35 acres
22 that could be developed that's between the
23 setback line and the critical line and
24 otherwise available for development.

25 Q: So in 2005, y'all amended the development

1 **agreement because more acreage came in behind**
2 **the setback line; is that right?**

3 MR. WALKER: Object to the form of the question.

4 That's an inaccurate statement of both
5 the facts and there's no evidence to that
6 effect.

7 **Q: You said the reason --**

8 THE COURT: He can ask the question.

9 MR. WALKER: It assumes facts that are not only not
10 in evidence but they're wrong.

11 THE COURT: Well, he didn't say "you said" or the
12 "evidence said."

13 He's asking the question. I overrule
14 that.

15 THE WITNESS: Could you rephrase -- could you just
16 repeat the question, I'm sorry?

17 **Q: Well, you said that -- you testified that --**

18 THE COURT: Well --

19 MR. WHITFIELD-CARGILE: I'm asking the question.

20 THE COURT: -- now you're telling him "you
21 testified" --

22 MR. WHITFIELD-CARGILE: Well, I'm asking him --

23 THE COURT: Okay. You're moving ...

24 THE WITNESS: Want her to read it?

25 MR. WHITFIELD-CARGILE: No, I'll rephrase it.

1 Q: In 2005, y'all changed the development
2 agreement based in part because more land came
3 in behind the setback line, right?

4 A: There had been accretion, but mainly the change
5 was that there had been authorization by reason
6 of there being a setback line.

7 Q: Because the setback line previously ended right
8 there at the neck of the spit at Beachwalker
9 Park.

10 A: It did.

11 Q: And then when they revised in 1999, it extended
12 farther down the spit --

13 A: All the way --

14 Q: -- because it got rid of the 1949 shoreline.

15 A: It went all the way to the end of the spit.

16 Q: Okay. And so you got some -- you got land
17 behind the setback line, so you amended the
18 development agreement.

19 A: Well, it wasn't quite like that, but, yes, it
20 occurred that we ended up getting an amendment
21 to the development agreement in exchange for
22 other things that we gave up to the town.

23 Q: And the beach is accreting on the front, right?

24 A: It is.

25 Q: So, in ten years, it's likely that the setback

1 line can move seaward, and you could gain
2 additional acreage, right?

3 A: We may gain a few feet. This time, despite the
4 accretion from '99 to 2009 and despite all the
5 years of steady accretion, the setback line
6 moved like three feet.

7 Q: Has the Department actually finalized the
8 decision on that?

9 A: No.

10 Q: Okay.

11 A: But they've told us, you know, informally,
12 unofficially it's going to be about, I don't
13 know, three feet, maybe three and a half.

14 Q: But you don't know that.

15 A: (Shakes head negatively.)

16 Q: Okay. Every ten years they're going to revise
17 that setback line.

18 A: They do.

19 Q: And if it keeps accreting, you could gain
20 additional acreage behind the setback line,
21 right?

22 A: If we still have a development agreement and
23 KDP is still around and they move it more than
24 a few feet like it is this time, you know,
25 yeah, everything will be lined up perfect.

1 Q: So are you going to amend the development
2 agreement then, too?

3 A: The develop agreement will be over, unless we
4 get it extended.

5 Q: Okay. Have you calculated the economic benefit
6 of the revetment?

7 A: No.

8 Q: So we don't know what the economic benefit of
9 the revetment is?

10 A: I haven't calculated it.

11 Q: Okay. Have you had anybody calculate it?

12 A: No.

13 Q: Okay. You said you had a \$50 million mortgage
14 on the property?

15 A: Yes.

16 Q: When did you get that mortgage?

17 A: In '06 or '07.

18 Q: '06 or '07? Is there an agreement with the
19 bank about what the money can be used for, the
20 \$50 million?

21 A: I don't remember if the -- there was a loan
22 agreement and I didn't handle the loan
23 transaction, as I think you know from our
24 deposition, but we used it, in fact, for our
25 investments in St. Kitts in the Carribean.

1 Q: Okay. So the mortgage on this property is
2 funding development in St. Kitts.

3 A: Yes.

4 Q: Okay. Is the bank asking you to get this
5 revetment?

6 A: No. The bank's had no comments on the
7 revetment.

8 Q: If that note gets foreclosed on -- well, if
9 that property get foreclosed on, is the bank
10 going to have the same environmental
11 sensitivity as KDP?

12 A: I don't know.

13 Q: Okay. And as far as economic return from the
14 revetment itself -- you were at Mark Permar's
15 deposition, right?

16 A: No, I wasn't.

17 Q: Were you not? Okay. Well, I'm going to
18 represent to you that he testified that they
19 really don't know if any houses will ever be
20 built out there.

21 A: He doesn't know if any houses are going to be
22 built out there?

23 Q: Right. And I'm paraphrasing.

24 A: Okay.

25 Q: Do you know if any houses are going to be built

1 out there?

2 A: On Captain Sam's?

3 Q: Yes.

4 A: If we get the revetment and can stabilize that
5 erosional shoreline, I'd hope the market would
6 be such that we could introduce some homesites.
7 We -- other people build the houses.

8 Q: Okay. The denial of the 2,513 feet of
9 revetment itself isn't prohibiting you from
10 developing the spit, though, is it?

11 A: Yes, it is.

12 Q: There's a law that says you can't develop that
13 spit without a revetment on it?

14 A: No, there's not a law. There's common sense.
15 There's market place interaction. There's
16 reticence of buyers who look at 2700 feet or
17 2400 feet of eroding shoreline for 20 to 40, 50
18 years and say that'd probably be a good place
19 for me to buy a homesite.

20 Q: So your marketing folks are telling you you
21 have to have a revetment out there?

22 A: I believe it and our president of our real
23 estate company believes it and all of our
24 marketing people we've consulted -- it's almost
25 self-evident and probably is self-evident.

1 Q: You don't think that revetment's going to stop
2 a breach during a major storm, do you?

3 A: I wouldn't know if it could stop a breach.

4 Q: We talked about this being a "top ten beach"
5 according to Dr. Beach?

6 A: Yeah.

7 Q: And you weren't familiar with the photo that he
8 has on the website --

9 A: No, I wasn't.

10 Q: -- showing the whole spit? Do you think this
11 would still be a "top ten beach" if there's a
12 2700-foot revetment right there at that parking
13 lot? That whole shoreline --

14 A: He was referring to the beach, not the river.

15 Q: Well, you get to Beachwalker Park by going
16 through the parking lot, right?

17 A: You do.

18 Q: And if you look out there and there's 2700 feet
19 of concrete block sitting on that shore, do you
20 think that's still a "top ten beach"?

21 A: Well, that's not a beach. The shoreline is not
22 the beach. And I don't think you're going to
23 look out and see that. If you'll see the
24 pictures that will be introduced, then you will
25 see that it becomes impossible to see the

1 concrete after a couple of years.

2 Q: Well, the exhibits you've shown us in Exhibit
3 Six looks like blocks to me. Do you not agree
4 with that?

5 A: Those were done in other places. When you see
6 what's at Kiawah, as we'll introduce with other
7 witnesses, you'll see what I mean.

8 Q: Look forward to that. You said that y'all have
9 a history of reducing the total number of
10 developable lots on the island, right?

11 A: We do.

12 Q: Up until 2005, there were zero lots on the
13 spit, right?

14 A: Exactly.

15 Q: You didn't reduce that, did you?

16 A: We haven't done anything about those lots. The
17 authorization there is up to 50 and we're still
18 at the authorization level. We haven't ever
19 topped out, say, 30 or 35, which would be a
20 reduction, obviously, from 50.

21 Q: But it would be an increase from zero that was
22 pre 2005, right?

23 A: Pre 2005? I'm sorry, yes, you're right.

24 Q: Okay. You bought it in 1988?

25 A: Yes.

1 Q: And up until 2005 you had no expectation to
2 develop out there, right?

3 A: We didn't.

4 Q: Your zoning limited you and your development
5 agreement limited you.

6 A: And the State of South Carolina.

7 Q: Are you familiar with any areas in South
8 Carolina that are developed without road
9 access?

10 A: Yes.

11 Q: Okay. You applied for a stormwater permit from
12 the Department, right?

13 A: We did.

14 Q: And that's pending for 340-foot sheet pile
15 wall?

16 A: Yes.

17 Q: And that's 340 feet that's going to be on the
18 neck of the spit, run parallel to the shore?

19 A: On the upland, no, on the critical area.

20 Q: Okay. And you only applied for 340 feet; is
21 that right?

22 A: That's right.

23 Q: Okay. You testified yesterday about dog leash
24 laws and you said that they don't keep dogs on
25 their leashes, right?

1 A: That's been my observation.

2 Q: It's been your observation that dog law leashes
3 are generally ineffective, right?

4 A: Well, I think most people let their dogs run
5 loose a bit when they get on the beach --

6 Q: Uh-huh (affirmatively responds).

7 A: -- but maybe some people don't.

8 Q: But most people let them run loose.

9 A: I would think so.

10 Q: You said you had a fellow named Folk submit a
11 letter to the Department to give them notice
12 there wouldn't be any adverse impacts to
13 plovers, or something like. Do you remember
14 that yesterday?

15 A: I do.

16 MR. WHITFIELD-CARGILE: Beg the Court's indulgence
17 for just a moment.

18 THE COURT: If you can keep moving,
19 Mr. Whitfield-Cargile, it would be appreciated.

20 MR. WHITFIELD-CARGILE: Yes, Your Honor. Can I beg
21 your indulgence for one moment?

22 Q: Do you remember learning that -- well, you
23 haven't retained Dr. Folk to testify here, have
24 you?

25 A: I don't believe so.

1 Q: You learned that he's not an expert on plovers,
2 didn't you?

3 A: I didn't learn anything but maybe Trenholm
4 worked with him.

5 Q: Y'all didn't even consider him an expert,
6 though, did you?

7 A: I did. I didn't -- I'm surprised to say he --
8 to suggest he isn't. I thought he was.

9 Q: Are you aware of any study comparable to the
10 1974 Environmental Inventory that takes a
11 cumulative look at and assesses the undeveloped
12 lands on Kiawah Island?

13 A: There was only one time when Kiawah was utterly
14 barren of development and that was in '73 when
15 the study was actually conducted and that's the
16 only one done.

17 Q: Okay. There's no other in-depth look at Kiawah
18 Island, right?

19 A: Not in terms of what you just asked. There's
20 been plenty of studies of the spit and the
21 erosion and we've submitted those to the
22 Department, and plovers and other things, but
23 those studies were piecemeal -- or I should say
24 pinpointed to not Kiawah Island, like you said,
25 but the "spit".

1 Q: But they weren't in-depth studies like the
2 Environmental Inventory was.

3 A: I would say they're far more in-depth than the
4 rather cursory treatment that Miles Hayes and
5 his students gave the spit in 1973.

6 Q: You hired two what you called "academics".

7 A: Well, they --

8 Q: The question is you hired two academics.

9 A: They've been teaching for 35 -- 25 and 35
10 years, respectively, at Old Dominion. They're
11 not in business to design and operate and
12 monitor things like revetments.

13 Q: You said yesterday you would gladly show the
14 Department some development plans if they had
15 asked for it.

16 A: Be happy to supply them whatever information
17 they wanted. Obviously, this is an essential
18 permit. We would -- we offered many times to
19 give them any other information they wanted.

20 Q: But you don't have any development plans, do
21 you?

22 A: We could have lived with whatever we could put
23 together, as I said, in six or eight weeks of
24 intense study and be willing to live with it
25 had the Department made clear that they wanted

1 to have a development plan for the entire spit.

2 Q: Well, it's August --

3 A: And our understanding.

4 MR. WALKER: Objection, Your Honor. He's
5 interrupting Mr. Long before he finishes his
6 explanation.

7 MR. WHITFIELD-CARGILE: I apologize.

8 A: Our understanding, Davis, was that the project
9 was the revetment. Your director and your
10 executive project director -- your project
11 director and his superior both said in their
12 depositions that the project is the revetment.
13 And with that in mind, we studied the revetment
14 and tried to give information on the revetment.

15 Q: You said yesterday you would gladly show them
16 details of this development.

17 A: Would be happy to. Had they even, you know,
18 like subliminally even told us they wanted to
19 know about the development that was occurring
20 landward of the revetment project.

21 Q: But you don't have any plans, do you?

22 A: We could have developed -- we certainly have a
23 lot of staff members. We have several
24 engineers, architects, land planners, people
25 that we can engage. We would have had whatever

1 the Department wanted had they asked.

2 Q: It's August 2009, right?

3 A: It is.

4 Q: Still no plans.

5 A: We have not put together the plans. We've --
6 the time to put those together and submit is
7 over.

8 Q: Didn't you testify at your deposition that the
9 spit's pristine?

10 A: It's pristine in the sense, as I told you then,
11 that there are no manmade structures or
12 impediments or changes to the lay of the land
13 that I know of.

14 Q: So would you call it "pristine and unfamiliar
15 with human development, human improvements"?

16 A: Unfamiliar with what now?

17 Q: Unfamiliar with human improvements, the spit
18 itself?

19 A: The spit has no human improvements on it that
20 I know of.

21 MR. WHITFIELD-CARGILE: Okay. I don't have any
22 further questions.

23 THE COURT: Redirect.

24 MR. LONG - REDIRECT EXAMINATION BY MR. WALKER:

25 Q: Mr. Long, you were asked about developing

1 Captain Sam's basically as an island without
2 road access. Is the Town -- is Captain Sam's
3 within the municipal limits of the town?

4 A: It is.

5 Q: What is the town?

6 A: The Town of Kiawah Island, South Carolina.

7 Q: Does the town have a subdivision ordinance?

8 A: It does.

9 Q: Does it have a road code?

10 A: Yes.

11 Q: Based on your working knowledge of the
12 governing ordinances, would it be possible to
13 have a subdivision on Captain Sam's if it was
14 separated by a body of water without a road?

15 A: I don't think so. You'd have to have a bridge
16 and, obviously, if we can't even get a road and
17 a revetment, we're never going to get a bridge
18 permit.

19 Q: Is that because those ordinances require that
20 there be access for emergency vehicles --

21 A: Yes.

22 Q: -- in subdivided areas?

23 A: It does.

24 MR. WALKER: That's all I have, Your Honor.

25 THE COURT: On those questions alone.

1 THE COURT: You'd move for --

2 MR. WHITFIELD-CARGILE: I move for the admission of
3 Exhibit Twenty. I apologize.

4 THE COURT: Okay.

5 MR. WALKER: Are you moving for the admission of
6 Exhibit Four, too, that you presented to the
7 witness and asked him questions about?

8 MR. WHITFIELD-CARGILE: Yes. Sure. I'll go ahead
9 and do that now, too.

10 MR. WALKER: No objection, Your Honor --

11 THE COURT: All right.

12 MR. WALKER: -- to Department's Exhibits Four and
13 Twenty.

14 THE COURT: Mr. Chandler or Armstrong?

15 MS. ARMSTRONG: No objection, Your Honor.

16 THE COURT: Okay. It's admitted.

17 (DHEC's Exhibit Numbers Four and Twenty were
18 admitted into evidence.)

19 MARK PERMAR, having been duly sworn, testifies and
20 examines as follows:

21 MR. PERMAR - DIRECT EXAMINATION BY MR. HOWE:

22 Q: Mr. Permar, tell us first what you do for a
23 living and where your business is located just
24 a little bit. What do you do right now?

25 A: I'm a principal in the firm of Permar, Inc.,

1 A: A little less than four years.

2 Q: And when you left the City of Savannah, where
3 did you go then?

4 A: Well, I got the opportunity of a lifetime to be
5 able to go to work at the Kiawah Island Company
6 in 1979 in the design and planning area. And
7 worked in that capacity, being a department
8 head and then vice president of planning and
9 design.

10 Q: Tell me a little bit about sort of how you got
11 the job and who you were working for and the
12 dynamics of what was going on at Kiawah at the
13 time, because it was a special time.

14 A: Well, I have to come clean. My wife was one of
15 the first employees. She headed up market
16 research for Sea Pines and she started work on
17 a project called "Kiawah" in the early to mid
18 seventies, '74 --

19 Q: What was the relationship between Sea Pines and
20 Kiawah?

21 A: Well, in 1974, a group representing the Kuwait
22 Investment Company identified Kiawah as a place
23 to reinvest petrol dollars. And they hired
24 under contract the Sea Pines Company to do the
25 due diligence process, then go through an

1 entitlement process, and then implement the
2 plan -- develop a master plan and implement the
3 plan. And my wife was involved in the
4 entitlement process and site assessment.

5 And in our business, you hear people talk about
6 a piece of property that's the most incredible
7 piece of property I've ever seen and usually
8 you go and it's beautiful, but it's not all
9 that incredible. Well, it was rare for my wife
10 to use that hyperbole, too, and I finally went
11 with her to visit Kiawah and she was right. So
12 I -- at that moment I said, "I got to be part
13 of this." And fortunately that --

14 Q: How did you become part of it?

15 A: Well, fortunately they hired both of us to move
16 to Kiawah from Savannah in 1979. And I started
17 a six-year period of heading up planning and
18 design in that period.

19 Q: Now, you said "planning and design" and in your
20 world that has sort of a bouquet of information
21 that doesn't necessarily flower in our minds.
22 Tell us a little bit about what that means.

23 A: Well, in the context of the Kiawah Island
24 company, at that point it involved long-range
25 planning for all the parcels yet to be

1 developed; site assessment, when you break it
2 down into specific parcels as to what would be
3 appropriate to do on the property; programming,
4 which is a brief that you prepare for
5 individual buildings or neighborhoods or
6 strategies dealing with specific areas; and
7 then we were usually responsible of hiring
8 outside consultants for specific needs to --
9 for example, architects or landscape architects
10 or engineers to begin the process of design
11 through the schematic phase and then that was
12 handed off to another department, the
13 development department.

14 Q: What does "schematic phase" mean?

15 A: You advance drawings to a level that you have
16 a better understanding of what -- for example,
17 if it's an individual building, what the nature
18 of the building is, size, its key dimensions,
19 massing, siting, that sort of thing.
20 And as a part of that package, we were
21 responsible for preparing an initial budget and
22 schedule for advancing the project.
23 So at that point, then there's an internal
24 decision as to whether to proceed with the
25 project or not. And if it is a decision to

1 proceed, we would hand it off to people that
2 had greater skill at contract documents and
3 construction.

4 Q: So you were the first planner for Kiawah?

5 A: No, no. When Kiawah initiated its planning
6 effort with the Sea Pines Company, there was a
7 gentleman by the name of Rob Hall who was the
8 senior planner.

9 Q: When did you start?

10 A: I started in '79; he started in '74.

11 Q: So except for the first five years, you've been
12 continuously associated with the conceptual
13 projects at Kiawah?

14 A: Except for a period when a group of us left the
15 employ of the Kiawah Island Company in 1985 and
16 we started a series of companies, one of which
17 was the consulting company that I spent most of
18 my time with. So for a period in 1985 to 1988,
19 I didn't do any work at Kiawah, although, our
20 offices were there and I live there.

21 Q: What happened in 1988?

22 A: Second miracle happened. I got a phone call
23 from Pat McKinney, who was a partner in a firm
24 called Brumley and McKinney, and formally he
25 was head of sales for the Kiawah Island

1 Company, called to indicate that he and several
2 other Charleston business entities had done the
3 impossible, which is to secure an option to
4 purchase the remaining -- the undeveloped
5 assets and existing resort facilities from the
6 Kuwaitis and asked if my wife and I would
7 participate in the due diligence effort,
8 because there was a tight two-month period to
9 assess whether to buy it or not.

10 Q: Did you do that?

11 A: Yes.

12 Q: And at the end of the two months or the due
13 diligence, the locals purchased Kiawah Island?

14 A: Actually, the option period was extended
15 another month, I believe, to a three-month
16 period and in June of 1988, they were
17 successful in purchasing the assets.

18 Q: And what did your role become?

19 A: Then, fortunately, I was asked to continue an
20 involvement with long-range planning and other
21 related planning and design matters with the
22 entity that purchased -- which I think was KRA
23 at the time -- purchased its assets.

24 Q: Does the island have a board of architectural
25 review?

1 A: Yes.

2 Q: And what is your role on the board of
3 architectural review?

4 A: I'm a member of that.

5 Q: You're a permanent member?

6 A: You'd need to ask Leonard, but I think I am a
7 permanent member.

8 Q: How long have you been a member?

9 A: Well, I chaired it for the six-year period with
10 the Kuwaitis and then I was appointed by the
11 partners to be a member, so it's 21, 22 years,
12 I guess.

13 Q: Give us a little -- what is a board of
14 architectural review?

15 A: Well, it's not an unusual entity as it relates
16 to community development such as Kiawah in that
17 at a point of sale to a person that's either
18 purchasing a lot, an existing house or an
19 existing condominium, part of the
20 requirement -- or imbedded within the covenants
21 and deeds is that any improvement on that
22 property of any sort has to go before the
23 architectural review board.

24 You know, guidelines are established as to the
25 process and in certain unique conditions, there

1 Court is the application for a 2,783-foot
2 revetment. The issue before the Court isn't
3 their background in developing Kiawah Island.
4 I think we've gotten kind of beyond background.

5 THE COURT: Okay. If the issue was that simple,
6 then -- if it was just the revetment, I would
7 sustain your objection, but I think you,
8 through OCRM, have introduced the issue of
9 cumulative impacts and have challenged the fact
10 of how this area will be developed, the
11 implications of once the revetment is
12 installed, the -- keep using the same word
13 again -- the implications down the road. So
14 you, yourself, are the ones that are making it
15 relevant, are you not?

16 MR. WHITFIELD-CARGILE: We're not making their past
17 development relevant. They said they're not
18 going to build on the spit.

19 THE COURT: I'll overrule your objection.

20 Q: So tell me a little bit about what additional
21 covenants might be put on a neighborhood and
22 why.

23 A: Well, an early example would be a neighborhood
24 called Terrapin Island, which is probably about
25 25 acres in size, which was a hummock attached

1 by a bridge.

2 Q: "Hummock" is a small island?

3 A: Right. And at that point, Leonard and I, in
4 particular, worked on what was unique about
5 that location that warranted greater detail in
6 terms of the standards. So, for example, there
7 was greater attention to height allowance.

8 There was --

9 Q: You mean restricting height --

10 A: Restricting height.

11 Q: -- beyond what was restricted in the general
12 covenants?

13 A: Right. Right. There was the beginnings of
14 establishing a piece of architecture could only
15 be a story and a half. By that, the second
16 floor was imbedded within the roof as opposed
17 to two full floors of exposure and then a roof.
18 Materials were narrowed. All other standards
19 to that date allowed for a broad range of
20 materials to be considered. In that location,
21 we narrowed the materials to wood shingle or
22 wood cladding.

23 We narrowed the spectrum to a much tighter
24 degree of color. Roofing materials were
25 narrowed to a short list of either wood shingle

1 or metal, preferably copper. Standards related
2 to ground coverage were more restrictive than
3 other areas. My point -- I can continue on,
4 but my point being, we were being more
5 attentive to the interrelationship of yet-to-be
6 designed architecture and site design with the
7 unique properties that existed on Terrapin
8 Island.

9 Q: And when you say "wood siding," you mean, for
10 example, you couldn't use cement?

11 A: Couldn't use stucco, you couldn't use hardy
12 material.

13 Q: Hardiboard?

14 A: Right. You'd have to use natural materials,
15 right.

16 Q: Now, how many different sets of covenants do
17 you think y'all have created? I mean, how many
18 times has that been done where you got more
19 specific and more restrictive?

20 A: I'm guessing it's probably maybe 12 to 15 by
21 now, something in that --

22 Q: That actually becomes part of the deed? I
23 mean, that is a restrictive covenant in the
24 deed of that property to that lot?

25 A: Yeah. I don't know if it's a deed or covenant,

1 but it's the legal agreement between the buyer
2 and the seller. The buyer fully understands
3 that prior to purchase.

4 Q: Now, again, your best estimate of how many of
5 these neighborhoods you've taken on Kiawah
6 Island from the beginning planning to
7 conclusion?

8 A: Of these special neighborhoods?

9 Q: Both. You can give me both.

10 A: Well, as it relates to these unique standards
11 per location, as I indicated -- and I might be
12 off -- I think it's in the neighborhood of 12
13 to 15. Some slightly larger; some slightly
14 smaller.

15 For example, Terrapin yielded -- you know, it
16 was about 15 homesites. The Preserve, which is
17 in an area adjacent to it, is probably in the
18 neighborhood of 150 homesites. And it spans
19 the gamut like that, varies in size from one to
20 the other.

21 But prior to that -- I'm not certain how to
22 measure the role. I mean, during the Kuwaiti
23 period, I think at that point they had sold
24 maybe 2600 or 2700 pieces of property in some
25 form or another because at that time it was

1 heavily oriented toward villas and
2 condominiums. I was involved in probably half
3 of those by the time I got on board. And then
4 after that -- I'm doing some quick math --
5 there's been about 4150 pieces of property sold
6 to date, so ...

7 Q: On these policies, do you have a policy to max
8 out, to build as many units and houses and lots
9 as you can?

10 A: No.

11 Q: What is the policy of KRA?

12 A: Well, the policy is to go through an analytical
13 assessment of it to determine what the
14 appropriate number is. So there's no --

15 Q: Do you have a motto?

16 A: Pardon me?

17 Q: Do you have a motto?

18 A: Well, I mean, the credo from the get-go has
19 been "designing with nature." I mean, that's
20 the title of our architectural guidelines.
21 But as it relates to the question of is there
22 a mission like some developers have to maximize
23 the entitlement allowance, in fact, it's the
24 contrary. There's no requirement to maximize.
25 The intent is to optimize a balance between

1 development in an area and what's appropriate
2 for it in relationship to market conditions, in
3 relationship to financial performance; all the
4 other disciplines involved, you optimize those.
5 And consistently that has been far less than
6 the entitlements allow for parcel by parcel.

7 Q: Can you give me a specific?

8 A: Well, Terrapin Island, the entitlement allowed
9 for approaching 30 some odd units on that; what
10 was appropriate in our assessment was 15. The
11 Settlement, which is an area where there's an
12 existing -- the fifth golf course that was
13 built, there's an entitlement for 675 units.
14 We're probably on a path of 140. Little Bear
15 Island is probably the extreme. At the east
16 end of the island, it had entitlements of 18
17 homesites and it ended up being zero because of
18 a conservation easement. It made more sense to
19 have a conservation easement there. So I can't
20 say that there's a formula for it because it
21 deals with what's unique about the specific
22 piece of property that you're evaluating at the
23 time.

24 Q: I'd like you to take us through and you can use
25 Hummock Island as an example. What is the

1 the land planning issues.

2 Similar exercise on architecture. You do a
3 similar sort of exercise. So you break it
4 apart, evaluate it, and begin to put it back
5 together in terms of the influences.

6 Q: Who is the final decision maker, who do you
7 report to and work on these things with?

8 A: Report to the partners of KDP.

9 Q: Okay. Now, are you familiar with Captain Sam's
10 Spit?

11 A: Yes.

12 Q: How and why are you familiar with it?

13 A: Well, in the first year I moved and had
14 responsibilities at Kiawah, that was the first
15 time -- in 1979, that's the first time I sort
16 of walked the beach.

17 I remember putting in at the east end of the
18 beach and walking the whole length and ending
19 at Captain Sam's. And off and on for a long
20 period of time, it wasn't uncommon for me to --
21 in terms of touching different pieces of the
22 island, being out there maybe once or twice a
23 year, typically on the beach side, but --

24 Q: Have you begun your planning process for the
25 development of Captain Sam's?

1 A: Yes. That probably started maybe, in terms the
2 beginnings of reassessing, six to nine months
3 ago.

4 Q: And what are the kinds of things you've done so
5 far?

6 A: Well, most of it is fieldwork. The expression
7 I used I think in the deposition was, you know,
8 a typical fashion, in a normal condition, you
9 usually spend about 20 or 30 percent of the
10 time at most out in the field and the balance
11 in the studio drawing.

12 With something like Captain Sam's and Terrapin
13 Island, you actually do the reverse. You spend
14 more time in the field fully assessing it and
15 less time in the studio, because you want to
16 become more familiar with the nature of it.

17 Q: And have you arrived at what you called a
18 "schematic" at this point?

19 A: No, no. I had put some ideas down in a sketch
20 of core ideas or structuring elements that
21 might be considered for a future plan, but I'd
22 say that we're well at the beginning of, you
23 know, creating even plan alternatives, which
24 would be the next stage.

25 Q: Have you brought some or do you have some

1 pictures, exhibits, that you could teach --
2 show the Court what you've done in your
3 approach so far?

4 A: Well, one of the approaches I use, because I do
5 a lot of photography, is to document the site.
6 So there are some exhibits that I think are
7 part of the array of exhibits that include some
8 aerial shots that I take sort -- which is sort
9 of the first perspective.

10 Q: I'm going to be referring to Exhibits Four,
11 Fifty-five and Fifty-eight in our case when we
12 move from one to the other. We're going to
13 start with the first one. You can talk from
14 down there or you can walk down here and point,
15 whichever one you think is the most effective.

16 THE COURT: Are all those Four, Fifty-five and
17 Fifty-eight in evidence?

18 MR. HOWE: Yes, sir.

19 MR. WHITFIELD-CARGILE: Your Honor, I don't -- I beg
20 the Court's indulgence. Your Honor, I don't
21 believe Fifty-five and Fifty-eight are in
22 evidence.

23 MS. ARMSTRONG: Your Honor, I've got a little
24 problem here. The exhibit list that I've got
25 does not have a page five. It's not got those

1 exhibits listed on them.

2 MR. WALKER: I'm sorry. Obviously a reproduction
3 error.

4 And here's one for you, Davis, a page five.

5 THE COURT: All right. So it's my understanding
6 that Fifty-five and Fifty-eight are not in
7 evidence?

8 MR. WHITFIELD-CARGILE: Right.

9 MS. ARMSTRONG: That's my understanding, Your Honor.

10 MR. HOWE: When we get to them, I'll just let him
11 identify them and then --

12 THE COURT: Okay.

13 Q: Go ahead.

14 A: One of the processes I use to document a site,
15 in addition to just walking it and seeing it,
16 is to photograph it intensely. And KDP
17 partners allowed me the luxury of hiring a
18 helicopter to go up to shoot in the air --

19 (Off the record due to construction noise.)

20 A: (Continued) -- is the luxury of going up in the
21 air and seeing it at sort of the equivalent of
22 30,000 feet. I'm not at 30,000 feet. In fact,
23 I'm less than 500 feet -- to see that way, in
24 addition to walking on the property.
25 So I have a series of images that sort of show

1 the context of the property. Because I tend to
2 look at a contextual relationship first before
3 I get myopic and get really telescopic on the
4 property.

5 This first image is of the west end and in the
6 distance is Captain Sam's right here
7 (indicating) represented with the laser. But
8 in the foreground is actually the first phase
9 of development on Kiawah from '75 through '78,
10 which is called West Beach Village. And the
11 important factor here that I wanted to reflect
12 on for myself was the relationship of proposed
13 structures, or existing structures for that
14 matter, to the beachfront. Because all of the
15 early phases of Kiawah, from '75 through the
16 late seventies were well in advance of
17 establishing any regulatory setback lines.
18 These were self-imposed on the part of the
19 developer as a result of analysis and the
20 assistance of a variety of people. And as you
21 can tell, without drawing a specific line, the
22 vertical structures are well behind the primary
23 dune right here. In fact, the existing base
24 and setback line of the State is still out in
25 this location right in here (indicating).

1 **Is it okay if I just keep going?**

2 **Q: Yes, that's right.**

3 **THE WITNESS:** Should I go up or down?

4 This image, again, at almost the same
5 altitude -- it's probably about 400 feet -- is
6 more over the top of Captain Sam's. So I'm
7 actually probably over the top of the neck, the
8 tightest area.

9 But what's interesting here, that is fairly
10 unique by Kiawah standards, even though we have
11 a beach that's ten and a half plus miles long,
12 this stretch of the beach, which is a little
13 over a mile -- I think it's about a mile and a
14 third from the Beachwalker Park to the tip
15 here -- has unusually high dunes and a much
16 broader dune field from this vegetation right
17 in here (indicating).

18 Now, again -- and I'm going to jiggle this --
19 but the State's setback line and baseline is
20 about in that position (indicating). And once
21 we get farther down here, it sort of wraps
22 around in this location (indicating).

23 But what I wanted to get a feel for at even
24 sort of the global level is the
25 interrelationship of the wet beach, the dry

1 beach, the broad dune field with these high
2 dunes. And these dunes are some of the -- with
3 the exception of the east end of Kiawah,
4 they're the highest dunes we have; close to
5 between 10 and 15 feet.

6 THE COURT: Do those exhibit primary and secondary
7 dunes?

8 THE WITNESS: That's correct. In fact, in this
9 stretch right in here, there are a row of four
10 dunes, and as you proceed down to the inlet, it
11 grows to the beginnings of actually a seventh
12 dune. It starts to feather out. And I think
13 I might have some images that would show that.

14 THE COURT: Okay.

15 THE WITNESS: But it varies considerably from other
16 stretches of Kiawah.

17 THE COURT: So the development would be well behind
18 the secondary dune?

19 THE WITNESS: Absolutely. It would be -- in this
20 stretch right here, it would be behind the
21 fourth dune and actually there's the beginnings
22 of another dune over here (indicating). So,
23 today, it would be behind the -- four dunes
24 systems behind the primary dune.
25 And we don't -- the proposed development

1 doesn't reach this area down in here
2 (indicating). So in an area right in there,
3 there's probably a row of five dunes before it
4 grows to be a greater dimension.

5 **Q:** Your ultimate thinking is, it's going to be
6 behind all five.

7 **A:** Yes. Right. And then you begin to see -- I
8 don't know if I can zoom in here. But you
9 begin to see what happens in the evolution of
10 the dunes to the vegetated area here
11 (indicating), is that you see traces of
12 vegetation -- they're starting to propagate
13 behind these dunes, because they're more
14 protected from the salt air and so forth.
15 That's the beginnings of what happened, you
16 know, many years ago with this (indicating).
17 So, by observation, that's, as I said, the
18 beginnings of a dune field that's propagating
19 as opposed to going the opposite direction.

20 **MR. WHITFIELD-CARGILE:** Your Honor, I'm going to
21 object to the extent that he's talking about
22 forming an opinion as to whether or not a
23 forest is going to grow in the dune area or if
24 that dune field's growing. He's not a -- he's
25 not been noticed as an expert in morphology or

1 in -- what is that, forestry? He's assessing
2 when the forest is going to grow.

3 MR. HOWE: He's stating what he saw when he went
4 there, Judge.

5 THE COURT: He can testify to his observations over
6 the years, so I'm going to --

7 MR. WHITFIELD-CARGILE: He can testify to his
8 observations, you know, but he can't testify
9 that -- he hasn't observed what's going to
10 happen in the future. And if he's predicting,
11 that's rendering an opinion, and that's not an
12 opinion he's qualified to give.

13 THE COURT: I'm not going to allow you to go into
14 predicting what's going to happen in the
15 future, but you can testify to what's occurring
16 at this point in time.

17 THE WITNESS: Yes, Your Honor.

18 A: The only other thing I'd like to point out that
19 will show up in other areas is, you can see the
20 shadow line of the escarpment on the river side
21 over here (indicating) that begins to feather
22 out and is not apparent the closer you get to
23 the end here.

24 Q: What is "escarpment" mean?

25 A: It's the face of a -- in my context, it's the

1 face of dune that is sheered through wind or
2 erosion or --

3 Q: In this instance erosion by the river.

4 A: I'm assuming it's by the river, right.

5 THE WITNESS: If you'd got to next slide.

6 MS. MURPHY: (Complies.)

7 THE WITNESS: Now, this image is obviously at the
8 extreme western end looking back. This is the
9 whole of Captain Sam's. You can see the neck
10 area here (indicating).
11 This is an area, Your Honor, that I was
12 answering your question about, the number of
13 dunes, where it's much greater in terms of the
14 sequence of dunes here, approaching probably
15 six, seven in terms of depth because this area
16 is building up (indicating).
17 You can see the vegetated area, the forested
18 area here, which is what I am considering an
19 emerging maritime forest back in here
20 (indicating). And the State setback line wraps
21 right up in here (indicating). It doesn't
22 extend out here (indicating). It goes way up
23 in here (indicating).
24 If we can go to the next image. This image
25 of --

1 THE COURT: Hold on a second. Go ahead.

2 THE WITNESS: This image now is farther to the east.

3 Beachwalker Park is -- the parking area is
4 immediately off the screen to the right here
5 and that boardwalk right there is how people
6 get to the beach from Beachwalker Park. Excuse
7 me. Excuse me, this one right here
8 (indicating). That's the boardwalk and this is
9 an emergency vehicular access way that the town
10 has to get emergency vehicles out on to the
11 beach.

12 And, again, it begins to reference the width of
13 the beach, both wet and dry, the width of the
14 dune field, the open dune field, and this more
15 dramatically shows where the neck area is. And
16 to a certain extent, you can see at this point
17 beyond the bend where the erosion has occurred.

18 If we can go to the next one. Just keep going.

19 MS. MURPHY: (Complies.)

20 THE WITNESS: Now, one of the other areas that we do
21 from a planning perspective is simultaneously
22 assessing things that we've done in the past.
23 So at the same time we're assessing a property
24 yet to be determined as to whether it should be
25 developed or not or what character should be

1 developed, we sort of do our homework on what
2 we've done in the past. And we have the luxury
3 of 20 plus years with KDP and I have a true
4 luxury of going back further than that of a lot
5 of lessons learned. And within the context of
6 living in a place like this, it's a 10,000-acre
7 laboratory of a full scale model.

8 Areas that are to the eastern end of the
9 island -- and maybe we can refer to an aerial
10 later on as to where the shot was taken -- but
11 this is an area where the existing private
12 beach club is right there in the foreground
13 (indicating) and you can see the reference to
14 the setbacks of the housing that has been
15 developed in an area called Osprey Beach.
16 This whole area right in here (indicating) was
17 initially indicated as "unstable" in the
18 original Environmental Inventory. It was an
19 area that was probably four miles in length,
20 because it goes well beyond the bottom of
21 screen, and the area that was shown as unstable
22 actually went back into this area where the
23 forested area is to about right there and back
24 (indicating).

25 Based upon information that we had, I believe,

1 with Tim Kana at the time in terms of assessing
2 potential development in this area, it was
3 determined that it was appropriate to be
4 considered for development for the density
5 levels that we're showing here in this aerial.
6 But there's another image that I think is even
7 more important that I want to share with you
8 that will help as when we're considering
9 limited development on Captain Sam's, which I
10 think is the next -- just keep going.

11 These are a series of shots. This is -- we can
12 just hold on to this. This is now over the
13 ocean looking back at the same location. And
14 you can see the relationship of, again, the wet
15 beach, the dry beach, the dune field and the
16 transition from the dune field to the maritime
17 forest. Again, we established our own setback
18 line back there (indicating). The State
19 setback line is out here (indicating).

20 But the lesson learned in this is, we were
21 starting to discover in the nineties that the
22 problem that we thought we would have in the
23 early years of people building too small a
24 house was not the problem. People were
25 building too large a house. So the early deeds

1 and covenants from '74 through the early
2 nineties always had minimum square footages
3 that people had to design to but no maximums.
4 And in this area, in a "wish we had known it
5 sooner," this is an area that would have to
6 constantly manage the expectations of
7 homeowners designing houses too big for their
8 settings. This was the beginnings of
9 reflecting on that and changing of philosophy.
10 The other one is, every one of these individual
11 lots, plus the second row of lots, has
12 individual boardwalks to the beach. Again, in
13 a "wish we had known it sooner," we see no
14 basis for that. We would want to consolidate
15 those into just a few that all would share that
16 so we didn't unnecessarily clutter the dune
17 field with a series of boardwalks.
18 We can keep going. Just keep going. Keep
19 going. Keep going. I think that's it.
20 Could I see the next one? Okay. If we could
21 go to the -- was it, the neighborhoods?

22 MS. MURPHY: Yeah.

23 THE WITNESS: If you could show a hundred percent.

24 MS. MURPHY: (Complies.)

25 MR. HOWE: This is Number Fifty-five? Are we still

1 on Fifty-five?

2 MS. MURPHY: Fifty-five.

3 MR. HOWE: This is Fifty-five?

4 **Q: All right. Tell us, these next series of**
5 **photographs, what they're photographs of and**
6 **who took them and what you intend to show of**
7 **them.**

8 **A: Once again, I took these photographs.**
9 **Actually, the ones from -- previously had shown**
10 **and these I took in April of this year.**
11 **Now, these are a series --**

12 THE COURT: Well, the next question should be, then,
13 are they a like representation of what you saw
14 that day? I know that may sound funny, but
15 think about it.

16 **Q: Do they accurately represent --**

17 THE COURT: Do all those pictures represent or a
18 like representation of what you saw that day?

19 THE WITNESS: Yes, Your Honor.

20 THE COURT: All right.

21 THE WITNESS: There's a series of images that I'd
22 like to go through now, which are, again, from
23 the air to show you areas at the east end of
24 the island, which have these unique
25 characteristics of unusual conditions that

1 warrant unique development and design
2 standards.
3 And I mentioned earlier Terrapin Island. This
4 is the island that I mentioned, about 25 acres
5 in size, which is a hummock attached to the
6 mainland via this bridge (indicating).
7 This is the beginnings of us being more
8 particular of what the development standards
9 were. So, to be crass, instead of thinking of
10 residential lots as a commodity which you just
11 stamp out, there was a more important
12 reflection on there are unique conditions that
13 would warrant variety and contrast in the
14 lotting or where you do and don't do things.
15 And we established those standards that I
16 already went through, so I don't need to repeat
17 them, but very unique standards in terms of
18 height, mass, open space requirements,
19 materials, color, amount of landscaping to
20 supplement indigenous landscaping with
21 indigenous landscaping.

22 **Q: And as far as Terrapin Island is concerned,**
23 **there's a separate set of covenants or an**
24 **additional set of covenants. You've got the**
25 **general covenants and then more specific**

1 covenants that make those a requirement to run
2 with the land.

3 **A: That's correct.**

4 MS. ARMSTRONG: Objection, Your Honor. I mean,
5 we've already established there are 15
6 different covenants for Kiawah Island. I mean,
7 he's already testified to that. He's already
8 testified about each area -- they have all
9 these unique design standards.
10 Now we've got a bunch of images that are from
11 other places on the island that are not at all
12 like -- they're not on inlets like Captain
13 Sam's, like what we're talking about, and I
14 just don't see how these are relevant. And I
15 think he's going back into areas that we've
16 already covered.

17 MR. HOWE: I think it goes to the lack of cumulative
18 effect.

19 MS. ARMSTRONG: I don't think --

20 THE COURT: I think we're getting further afield at
21 this point in time, but I'm just going to allow
22 this in at this point in time.

23 MR. WHITFIELD-CARGILE: And, Your Honor, I just want
24 to note for the record, same objection from the
25 Department.

1 THE COURT: Overruled.

2 Q: Is the way that Terrapin Island has been done
3 reflective of the way other development, more
4 recent developments have been done?

5 A: Yes.

6 Q: And I think we're going to be hooked and not
7 going to be able to use any more pictures. Is
8 there anything else you want to talk about from
9 this picture?

10 A: No.

11 Q: Okay. We'll move on.

12 THE WITNESS: If I can, I have two more images which
13 are idea sketches for Captain Sam's.

14 MS. MURPHY: Oh, I'm sorry.

15 Q: What is that?

16 A: This is one of two sketch studies that --

17 MR. WHITFIELD-CARGILE: Gedney, what exhibit is
18 this?

19 MR. HOWE: Number Fifty-eight.

20 Excuse me, I'd like to move to admit Number
21 Fifty-five that we just referred to.

22 THE COURT: Any objection?

23 MS. ARMSTRONG: Yes, Your Honor, objection, the same
24 as what I stated.

25 THE COURT: To relevance?

1 MS. ARMSTRONG: Yes.

2 THE COURT: Mr. Whitfield-Cargile?

3 MR. WHITFIELD-CARGILE: Same objection, relevance,
4 Your Honor. And if you're going to overrule,
5 I would -- the remaining -- there's five --
6 let's see. There's six exhibits in here and
7 five of them he didn't talk about at all.

8 MR. HOWE: Because you objected to them.

9 MR. WHITFIELD-CARGILE: Well, yeah, I'm going to
10 object on relevance to all of them, Your Honor,
11 but particularly the ones that he hasn't
12 discussed at all. I don't see how these are at
13 all relevant.

14 MR. HOWE: I just propose to introduce the ones that
15 he referred to.

16 THE COURT: Okay. Well, then I overrule the
17 objection and admit the photograph that was
18 referenced.

19 (KDP's Exhibit Number Fifty-five was admitted into
20 evidence.)

21 Q: Who drew this?

22 A: I drew this.

23 Q: With your very own hands?

24 A: Yes.

25 Q: What is it?

1 A: It's a sketch which represents a couple of core
2 ideas that I think could be considered for
3 , Captain Sam's.

4 Q: Okay. This is the beginning of the process?

5 A: Yes. You know, I mentioned early on that, you
6 know, it's a struggle in that you try to resist
7 as long as possible starting to draw things
8 because the moment you begin to draw things,
9 there's the risk of it starting to get fixed
10 prematurely to all the influences to the
11 creation of a plan. But it happens. You've
12 got to let it out.

13 So these two sketches -- which the base sketch
14 is similar in both; the color representations
15 are different to represent different ideas --
16 begin to represent that this is not a master
17 plan. It's not even a schematic plan. It's
18 just an idea sketch of certain principals that
19 might be considered going forward, which I can
20 go through.

21 Q: Yeah. Tell me what principles and planning are
22 embodied in that draft?

23 A: Let me zoom in.

24 THE COURT: Hold on just a second.

25 THE WITNESS: The beginnings of the idea here, which

1 I hope will show up on a couple of other
2 things, is, in no particular order -- it's less
3 about laying out lots and more about finding
4 building sites, homesites, where the buildable
5 area would be. And the intent would be to make
6 it as small as possible. Anticipating we
7 don't -- we haven't determined what the maximum
8 square footage is, but, for example, if the
9 maximum square footage of a house is 4500
10 square feet, it doesn't need to have a big
11 footprint.

12 In fact, in many of the other areas that I
13 mentioned earlier, we don't allow a single
14 structure to be any larger than a certain
15 number of square feet, that if you want to
16 reach the maximum, you need to break the house
17 apart. The idea is to break the scale of the
18 house down. Instead of a large mass, you might
19 have a collection of two smaller structures.

20 So what this is, is the beginnings of the idea
21 of small, little footprint areas. Those aren't
22 buildings. Those are buildable sites. And
23 then all the remaining land around it is less
24 about where lot lines are, but it's held in as
25 close an existing state as possible with the

1 natural vegetation is retained.
2 This is not an area where there are going to be
3 grass lawns or imported exotic plant material.
4 This should be about indigenous material that
5 exists there now.
6 The other concept is, instead of a whole row of
7 individual docks along here for all these lots
8 and homesites on the river side having such,
9 which we have in other locations, there would
10 be one -- possibly two, but one common dock
11 area where people could launch kayaks, canoes
12 and tie up a boat that they might have
13 elsewhere for day-tripping and so forth.
14 A more difficult thing to see in this sketch is
15 there are -- one, two -- three little orange
16 squiggles. This one shows up a little bit
17 more (indicating). They're about a thousand
18 feet apart. The idea there is instead of each
19 one of these homesites along the ocean having
20 an individual boardwalk, you consolidate those.
21 What's missing here is the roadway section. We
22 have yet to test it, but the idea is to have
23 pervious material for pavement, whether it's
24 pervious asphalt or pervious concrete --

25 Q: Why?

1 A: Well, the idea is to have a light touch. The
2 whole idea in terms of the balance of this is
3 to have a tight touch. If you err, err on the
4 side of less rather than more. Square footage,
5 less rather than more. The infrastructure
6 improvements, make them as narrow as practical
7 and still maintain emergency access, but make
8 them tight and narrow. And if you can have the
9 added effect of minimizing runoff by having
10 pervious material for the pavement, that would
11 be great.

12 So, for example, maybe the central location
13 could have that, but then these smaller spurs
14 might be shell-based.

15 The other concept that I'll share is the idea
16 of -- which is a little harder to see. Instead
17 of every one of these homesites having their
18 individual driveways, at a minimum, two
19 homesites would share one before you get to
20 your driveway -- let's see if I can pull that
21 up.

22 Q: Mark, you also told me about parking under the
23 house and height?

24 A: I was going to get to the architecture in just
25 a minute.

1 In this location, there are two homesites right
2 here, but one shared driveway (indicating).
3 Over here, there are -- one, two, three --
4 four. The idea, again, is a nod toward
5 minimal, how little can you do and still
6 accomplish the limited goal.

7 This sketch -- I don't know how many units I
8 would be proposing because, again, it's too
9 early to suggest: Is it 50? Is it 25? Is it
10 something else?

11 But this one suggested, I think, 44 or 45. I
12 can't remember exactly.

13 But the final point I'd make -- let me back up
14 here -- is you'll notice that it feels a little
15 bit more concentrated in certain areas in terms
16 of these homesites. And then the more you go
17 out on these sheneers (phonetic) that sort of
18 feather out, these areas become less dense.
19 And that's a result, again, of walking the
20 property and beginning to get a feel for to
21 what -- you know, technically, you could fit
22 more out there, but maybe it just doesn't make
23 sense because of the potential impact.

24 To the point where the setback lines actually
25 goes all the way out here (indicating) and at

1 this early sketch -- which I'm not certain
2 Leonard has actually seen yet -- I'm proposing
3 on this sketch study that we don't go out that
4 far in this location. That's an example of a
5 range of alternatives that might be considered
6 by the partners as we begin to proceed.
7 Now, the architecture, we're much further away
8 from that in terms of that, in terms of a
9 conceptual sketch. But, for example, the
10 question that you asked about the parking --
11 the flood plain requirements out here are such
12 that we want to keep the house, the first
13 floor, as close to natural grade as possible.
14 What typically happens is people jump up the
15 first floor a little bit to get parking under
16 it. Well, that might be good for the parking
17 exercise, but it's bad about a house being more
18 prominent. And what we want are homes and
19 structures be more background or less
20 prominent, so it's likely that we would
21 discourage parking under, which we have done in
22 probably four or five neighborhoods, where we
23 disallowed under -- unless there's an
24 extraordinary condition, like you're saving a
25 tree, to compress it -- we disallowed parking

1 under that would force a house to go up higher.

2 **Q:** Does that cover this string of --

3 THE WITNESS: I just have one more, Your Honor. Let
4 me back up here.

5 This is the same sketch. There's no difference
6 in the line representation and the road
7 representation, but -- and it's a little hard
8 to see with the color rendition here, but this
9 is a strategy that would suggest a hierarchy of
10 how property would be considered or managed, in
11 a sense. By far, the largest area outside of
12 the potential buildable area would be held in
13 a preservation state. I mean, we have no
14 intent of applying for any relief to the
15 standards to have structures seaward of any
16 setback lines, with the exception of these
17 consolidated boardwalks or potential docks.
18 The other strategy, though, is maybe more
19 aggressive in this sketch, which is instead of
20 people owning individual lots that bump up to
21 each other, there may be a system such that the
22 ownership position is much tighter confined to
23 the developed -- you know, like the improved
24 areas, and that there are -- there's a network,
25 a sort of fabric of areas that surround all

1 these and surround the infrastructure, which
2 is -- I entitle it "conservation". It's a
3 managed area that would be held in common. So
4 that everyone sort of buys in on the idea of
5 what this place could become.

6 I mean, rules that are self-compliant are
7 always the best. So if we establish a series
8 of standards where you have a responsibility
9 for a discreet part of your property, but then
10 you participate in the management, in a sense,
11 the conservation of the remaining that sort of
12 surrounds you, then, you know, our finding is
13 that people have a different attitude of what
14 they do on their property. They don't feel
15 like it's just them. They're in it together.
16 So then the final act would be the buildable
17 area, which would be a customized sort of the
18 street area, and it wouldn't look anything like
19 this.

20 I mean, when I mentioned doing the fieldwork,
21 we might simply walk around with a GPS and
22 feel -- you know, determine that this is an
23 appropriate site, beam that up, and then it
24 might be a checkerboard pattern that is very
25 irregular in terms of arrangement as opposed to

1 a rhythm, which is suggesting here
2 (indicating). So that's what this graphic is
3 tending to represent. It's a way of thinking.
4 This graphic, to me, is a way of thinking about
5 the project.

6 Q: For ID purposes, where would the park be and
7 where would the revetment --

8 A: The park on both -- this is the parking area,
9 parking lot right here (indicating), and the
10 boardwalk to the beach is right there
11 (indicating). The emergency access is right
12 there (indicating).

13 Q: And the revetment is ...

14 A: Well, I think the revetment starts generally in
15 this position and I believe it's somewhere in
16 here (indicating), I think.

17 Q: Okay. That's fine. Go ahead and sit down.

18 A: (Witness complies.)

19 MR. HOWE: Your Honor, we would move to introduce
20 these two drawings.

21 MS. ARMSTRONG: No objection, Your Honor.

22 MR. WHITFIELD-CARGILE: I object, Your Honor. It's
23 all speculation. None of it's relevant. He
24 said that it's all -- it's not even a
25 conceptual diagram. It's just something that

1 he did putting thoughts on paper.

2 THE COURT: Overruled.

3 (Off the record.)

4 (KDP's Exhibit Number Fifty-eight was admitted into
5 evidence.)

6 Q: You talked a little bit about your learning
7 curve. Do you see this piece of property
8 benefitting from the learning curve that you
9 had at Kiawah?

10 A: Yes.

11 Q: Do you see it getting more sophisticated
12 treatment as y'all's learning curve has
13 improved?

14 A: Yes.

15 Q: And the approaches that you've talked about,
16 additional restrictive covenants and the
17 concepts you've been discussing, would you see
18 those as all being applicable and imbedded in
19 this property?

20 A: That's -- yes.

21 MR. WHITFIELD-CARGILE: Object, Your Honor. That's
22 speculation.

23 MR. HOWE: Thank you very much.

24 THE COURT: Any response, Mr. Howe?

25 MR. HOWE: No, huh-uh (negatively responds).

1 THE COURT: He just objected.

2 MR. HOWE: Oh. He's just testifying to what he's
3 going to be doing. That's just direct
4 testimony. If he's the planner, those are the
5 things he's going to be doing.

6 THE COURT: I overrule that.

7 Ms. Armstrong or Chandler?

8 MS. ARMSTRONG: Thank you, Your Honor.

9 MR. PERMAR - CROSS-EXAMINATION BY MS. ARMSTRONG:

10 Q: Mr. Permar, we've been talking about an
11 Environmental Inventory a little bit today and
12 yesterday. Are you familiar with that
13 document?

14 A: Yes.

15 Q: I believe that has been marked as Exhibit One.

16 MS. ARMSTRONG: Do you have my exhibits up here?

17 THE COURT REPORTER: Yes.

18 MS. ARMSTRONG: If you wouldn't mind handing that to
19 Mr. Permar, please.

20 THE COURT REPORTER: (Complies.)

21 MS. ARMSTRONG: Your Honor, he's referring to --

22 THE COURT: Hold on. All right. Go ahead.

23 Q: You've got a copy of Exhibit One now. And that
24 is identified as Environmental Inventory of
25 Kiawah Island; is that right?

1 A: Yes.

2 Q: Okay. And that whole document's probably about
3 close to 700 pages; is that right?

4 A: Yes. It's a big book.

5 Q: Right. And what you've got in your hand right
6 now, is that the entire document?

7 A: (Reading.) I think it's just one section which
8 deals with -- it's G. I think it's the G
9 section.

10 Q: And do you know what the G section stands for?

11 A: Well, I'm just looking at the table of
12 contents. It's geology and coastal processes.

13 Q: Okay. All right. And you've read this
14 document in the past, haven't you?

15 A: A long time -- yeah, a long time ago.

16 Q: And you've been -- it's been around for a long
17 time, hasn't it?

18 A: I had dark hair then.

19 Q: Okay. And in making planning decisions on
20 Kiawah Island, you've used this document,
21 referred to this document in making planning
22 decisions; isn't that right?

23 A: Yes.

24 Q: In fact, the developer has won planning awards
25 related to this Environmental Inventory, hasn't

1 it?

2 A: It's won planning awards. I don't know if it's
3 relative to the Inventory, but it has won
4 awards, yes.

5 Q: And when it won those planning awards, the spit
6 was designated as open space and preservation;
7 isn't that right?

8 A: I think they were dated -- the awards were
9 dated during that period, yes.

10 Q: Okay. Now --

11 MS. ARMSTRONG: Give me just a moment, Your Honor.
12 Let me find the specific page.

13 Q: And are you familiar with one of the diagrams,
14 one of the drawings in the planning document --
15 it's on page G-63. If you'll turn to what's
16 identified as G-63.

17 A: (Witness complies.) Yes.

18 MS. ARMSTRONG: Your Honor, if Mr. Chandler could
19 hand you a copy. I've got a copy of our
20 exhibits for you. They're tabbed. This is
21 Exhibit One and we're looking at G-63.

22 MR. CHANDLER: (Tendering to the Judge.)

23 Q: Mr. Permar, this drawing identifies areas that
24 are -- were found to be stable and unstable;
25 isn't that right?

1 A: Yes.

2 Q: Okay. And included in the area that was
3 designated as "unstable" is the whole spit;
4 isn't that true?

5 A: Captain Sam's, yes.

6 Q: Okay. And, typically, you don't develop in
7 unstable areas, do you?

8 A: Typically not.

9 THE COURT: If I could stop you. You said G-63. I
10 don't see ...

11 MR. CHANDLER: It's Exhibit One.

12 THE COURT: What's the exhibit number?

13 THE COURT REPORTER: Exhibit One.

14 MR. CHANDLER: Exhibit Number One.

15 THE COURT: Oh, okay. I got you. I see it.

16 Q: And you were saying that you typically don't
17 develop in unstable areas like where the spit's
18 designated as unstable; isn't that right?

19 A: That's correct. But I also pointed out that
20 there are other areas that are shown as
21 unstable that we have developed.

22 Q: And those areas are closer to the middle of the
23 island; isn't that right?

24 A: Eastern end, yes.

25 Q: Okay. And those areas that you developed that

1 Island; is that accurate?

2 A: About?

3 Q: Your philosophies have changed as you've
4 learned more about the island.

5 A: I've learned by mistakes. I'm stumbling over
6 the "changing philosophy" part.

7 Q: Well, I'm just using your words --

8 A: Okay. Okay. All right.

9 Q: -- and you were talking about the big, very
10 large houses that were built on one part of
11 Kiawah Island and you said that you had a
12 change in philosophy and decided that you
13 needed to actually limit the size of house --
14 of square footage of those houses; isn't that
15 right?

16 A: Yes.

17 Q: Okay. And so in one instance, your changing
18 philosophy goes from decreasing impacts and
19 reducing actual size and development; isn't
20 that right?

21 A: To reducing the impact.

22 Q: Right.

23 A: Right.

24 Q: But when you look at the spit, your actual
25 philosophy is changing from leaving something

1 completely undeveloped to actually increasing
2 impacts because you're going to have some
3 development there; isn't that right?

4 A: Well, if I could answer the question this way.
5 When I look at the total of Kiawah Island and
6 what densities go where and impacts associated
7 with that, that's my first test is to impact,
8 as opposed to necessarily an isolated location,
9 whether it's Captain Sam's or Cougar Island or
10 something else.

11 Obviously, the transition from an area that
12 didn't allow for residential development prior
13 to the setback change that now allows for it
14 plays into a consideration of: How does that
15 relate to other decisions? And if I could use
16 an example.

17 Q: Go ahead.

18 A: Okay. At the end of Beachwalker Drive, a
19 parcel of land there that is, I think, 15 to 20
20 acres -- I can't remember exactly. In the
21 initial development agreement, 1994, that
22 allowed for a 325-room hotel.

23 In the discussions of changes attributed to the
24 2005 development agreement, there was a
25 combination of a concern by the community as to

1 some level of hotel development there, either
2 diminished or eliminating it -- that would be
3 their preference -- in addition to the
4 potential of the addition of up to 50
5 residential units.

6 So at that point in time, when I was asked to
7 consider that, I was sort of -- in my world, I
8 was sort of weighing the balance of the impact
9 of a large hotel, by any standards, being
10 eliminated, being taken off the table and its
11 impact on the area at the west end, with taking
12 that away and adding no more than 50
13 residential units.

14 And when I was considering that, aside from the
15 potential of, you know, eliminating an entitled
16 hotel on the East Coast, which is rare, if not
17 the only entitled hotel, I thought that that
18 was -- that benefitted everything in that area
19 to consider that, that change; eliminating an
20 intense use for something that is more modest
21 in terms of its impact.

22 Clearly, the difference between allowing for
23 development on Captain Sam's versus even modest
24 development is different. I mean, there's a
25 difference there. I really looked at the whole

1 west end when I was sort of considering it.

2 Q: But you could have taken -- those hotels could
3 have been off the table without adding 50
4 additional homes; isn't that true?

5 A: I don't know. It was considered -- it was
6 considered as a whole by the town council and
7 the partners. When they were considering it,
8 it was considered as a whole. It wasn't -- one
9 wasn't isolated from the other, in terms of
10 opportunities, impact issues, in my world, that
11 sort of thing. So I can't separate the two.

12 Q: But ultimately what it came down to is your
13 philosophy change from leaving an area that was
14 designated as conservation that was open space
15 to putting a development there; isn't that
16 right?

17 A: My philosophy didn't change. My work process
18 didn't change. The land use opportunity
19 changed. So philosophically, I haven't changed
20 in terms of how I would go about, you know,
21 assessing that. But consideration for an area
22 that would allow for development versus one
23 that didn't did change. That did change.

24 Q: You were talking about the Terrapin Island and
25 the development out there. You haven't done

1 Spit was zoned "couldn't be developed," right?

2 A: Well, it was zoned "park."

3 Q: It was zoned for park and greenspace?

4 A: Right.

5 Q: Okay. And that was under the PDD?

6 A: Yes.

7 Q: Okay. And then subsequently, when the Town of
8 Kiawah Island was formed, it was zoned pursuant
9 to the development agreement greenspace and
10 park.

11 A: Since Kiawah -- could you ask the question
12 again, I'm sorry?

13 Q: Sorry. I think that's it. I don't need to
14 belabor that point anymore. It's been zoned
15 park and greenspace from -- since the PDD was
16 formed all the way up until to 2005.

17 A: That's correct.

18 Q: Okay. And you talked about one of the reasons
19 that you supported the change in the zoning and
20 the development agreement was KDP's elimination
21 of the potential 350-room hotel; is that right?

22 A: 325.

23 Q: 325-room hotel? Okay. So KDP and the town
24 entered into an agreement where KDP gave up the
25 hotel for the 50 houses?

1 A: You asked me two questions. I didn't answer
2 the first one. We clarified the 350 to 325.
3 I think you were asking me a question.

4 Q: Yeah, I'm asking a question still.

5 A: I apologize. I'm sorry, what was the question
6 again?

7 Q: KDP entered into a contract to eliminate the
8 325-room hotel in exchange for the 50 houses.

9 A: I wouldn't deem it as that relationship. There
10 was a new agreement in 2005 between KDP or
11 whatever the entity was and the Town of Kiawah.

12 Q: Uh-huh (affirmatively responds).

13 A: It involved hundreds of aspects of the
14 agreement, so I wouldn't -- I wouldn't
15 characterize it as elimination of the 325 in
16 exchange for the 50. The agreement was a
17 comprehensive whole.

18 Q: Well, you testified that you supported rezoning
19 the spit for up to 50 houses based on the
20 elimination of the 325.

21 A: I said that entered into my assessment of
22 changes at the west end of Kiawah, of all the
23 properties. They own other properties in the
24 west end of Kiawah; that was one aspect of it.
25 But it was part of my recommendation to them to

1 be considered for the agreement changes.

2 Q: That they were eliminating the 325-room hotel?

3 A: Yes.

4 Q: Okay. So that contract between KDP and Kiawah
5 Island is the basis that you supported
6 developing the spit.

7 A: No. I just answered my question in a way that
8 I didn't view those as solely tied to each. I
9 viewed it as an assessment of the entire west
10 end, which included other properties.
11 My point being, though, that I did assess, you
12 know, my observational -- you know, looking at
13 what hotels -- what impact hotels have in terms
14 of occupancy and that sort of thing, comparing
15 that with the 50 units. But I also considered
16 potential changes to these other parcels at
17 that west end, too. It was a whole. It was a
18 comprehensive whole.

19 Q: Is that contract the basis then that justifies
20 using 2,783 feet of critical area for a
21 concrete block revetment?

22 A: I have no idea.

23 Q: Okay. Well, let me ask you this. It's
24 possible, isn't it, to build residential houses
25 on that spit without a 2800-foot revetment,

1 isn't it?

2 A: Yes, but I wouldn't recommend it.

3 Q: But it's possible.

4 A: It's possible, but I wouldn't recommend it.

5 Q: Okay. Why wouldn't you recommend it?

6 A: Because the access way is at risk.

7 Q: So you need that to have some sense of security
8 for the people that are going to be driving out
9 to those houses?

10 A: It would make sense that if you're going to
11 sell property and be responsible for the future
12 review of it that access would be, I would
13 think, a pretty important aspect of it.

14 Q: Did you hear Leonard Long testify yesterday and
15 today that if the Department had asked them
16 they would have given them a development plan?

17 A: Yes.

18 Q: You said you're in the wee, wee stages of that
19 process, right?

20 A: Yes.

21 Q: So if you would have given them a development
22 plan before last summer 2008, you wouldn't have
23 been able to go through your process, right?

24 A: Well, my process of the two years to three
25 years range?

1 Q: Uh-huh (affirmatively responds).

2 A: That's ideal and desirable. Architects and
3 planners want to use all the time possible to
4 create it. But if asked --

5 Q: If asked you would have just thrown something
6 on paper and given it to them?

7 A: I wouldn't -- no, I wouldn't have thrown
8 something on a paper. I would have give it due
9 consideration. I think it would be reasonable
10 to say you could -- along with other team
11 members. There are other players. If the
12 total focus is on providing sufficient
13 information to assess potential development,
14 you know, we could have something within 30 to
15 60 days.

16 Q: But --

17 A: If it's total focus.

18 Q: But you wouldn't be going through this
19 elaborate planning process that you describe.

20 A: It's not ideal. It's not ideal. What we would
21 do under that circumstance -- if I could
22 comment -- what we'd do under that circumstance
23 is develop parameters, performance standards
24 that would need to be met regardless of the
25 exactness of what goes where. And that would

1 inform, I would think, a reviewer as to the
2 nature of what could possibly happen there.

3 Q: But you still haven't done anything like that,
4 have you?

5 A: No.

6 Q: Okay. Let's look at Exhibit Fifty-eight.

7 A: Is this --

8 MR. WHITFIELD-CARGILE: And for the record, by my
9 question, I'm not withdrawing my objection to
10 Exhibit Fifty-eight's admissibility.

11 Q: It should be in that notebook.

12 A: Is it in one of these?

13 Q: Yes, it should be in the second one. There's
14 two volumes.

15 You said these two renderings, which are in
16 Exhibit Fifty-eight, those are -- there's no
17 plans that have been finalized, right?

18 A: Right.

19 Q: This isn't even a true conceptual drawing.

20 A: No. I think I used the term these are "sketch
21 ideas."

22 Q: Uh-huh (affirmatively responds). So these are
23 all just pure speculation as to what might
24 happen.

25 A: Speculation? These are possible ideas.

1 Q: Possible ideas.

2 A: Possible ideas.

3 Q: But you don't know what's going to happen.

4 A: Not yet.

5 Q: So this is all just speculation as to whether
6 or not this would actually occur.

7 A: Speculation? It's speculation.

8 Q: It's just a possibility.

9 A: It's a possibility.

10 Q: One of many possibilities.

11 A: It could be one of hundreds.

12 Q: Could be anything.

13 A: That's correct.

14 Q: In fact, could be nothing. Could be zero
15 houses.

16 A: At this stage, that's what I -- I don't have
17 any preconceived notion at this stage.

18 Q: At your deposition, you testified that you
19 might determine as a result of this process
20 that you go through that zero houses are
21 appropriate.

22 A: Right, which we've done before.

23 Q: And you're applying for a 2,783-foot structure
24 not knowing if any houses are going to be
25 built.

1 A: In a similar fashion to what we did at Cougar
2 Island.

3 Q: So if there's no houses out there, what's the
4 need for the revetment?

5 A: Well, the differential of where the critical
6 line is on the river side and the existing
7 setback line has changed since yesterday to
8 today and will continue to change if it
9 continues that pattern. So the concern is
10 sufficient dimension there to allow for
11 appropriate access.

12 Q: Are you aware -- are you familiar -- you've
13 been doing land use planning, real estate
14 planning in South Carolina since 1979?

15 A: In South Carolina, yes.

16 Q: Since '79?

17 A: Yeah.

18 Q: Okay. So are you aware of state laws and local
19 laws?

20 A: I'm aware of some local laws and some state
21 laws.

22 Q: Well, are you aware of any law that requires a
23 revetment out there before you can build a
24 road?

25 A: No.

1 Q: Okay. Are you aware that there's a process for
2 applying for special permits in DHEC's
3 regulation, critical area regulation?

4 A: Special permits for what.

5 Q: Special permit to get something seaward of the
6 setback line.

7 A: I'm familiar with one in particular at Kiawah,
8 yes.

9 Q: Okay. So you don't have to have this revetment
10 to have access out there, do you?

11 A: Today, you don't have to have that revetment,
12 but I wouldn't recommend it in terms of
13 advancing access.

14 Q: Okay. You talked about you weren't going to --
15 looking in page 1099 -- out on the left side of
16 that spit, where there's no indication of lots,
17 I guess that you didn't want to go into that
18 last curve; is that right?

19 A: This sketch suggests that, yes.

20 Q: Okay. Are you aware of any easement the
21 Seabrook Island Property Owners Association has
22 over the area -- in that area, rather?

23 A: That Seabrook property owners have an easement?

24 Q: Uh-huh (affirmatively responds).

25 A: No.

1 "one with nature"?

2 A: "Designing with nature."

3 Q: "Designing with nature." And the whole idea is
4 to have a light touch; is that right?

5 A: Yes.

6 Q: Do you think 2,783 feet of concrete block on
7 that shoreline is a "light touch"?

8 A: It needs to be a light touch.

9 Q: Is it a light touch?

10 A: To stabilize an eroding area, I would think it
11 needs to be a light touch.

12 MR. WHITFIELD-CARGILE: I beg the Court's
13 indulgences for just a moment, Your Honor.

14 Q: You said develop -- "design with nature"?

15 A: "Designing with nature."

16 Q: Is the spit -- do you consider the spit
17 pristine?

18 A: No.

19 Q: No?

20 A: I characterize it as undeveloped.

21 Q: Undeveloped?

22 A: Yes.

23 Q: No human development other than those
24 irrigation lines that have been draped on the
25 dunes?

1 now. We don't know -- he's not an expert
2 surveyor. He certainly hasn't been proffered
3 as one. I'm not aware of his background in
4 that regard as far as rectifying these images
5 and plotting them on a map, so it's also
6 objectionable on that ground.

7 THE COURT: Mr. Howe, at this point, he hasn't laid
8 a foundation to establish that he can produce
9 a document that would accurately reflect an
10 overlay of the -- what was originally unstable
11 areas.

12 MR. HOWE: I'll put him on the stand and see if I
13 can do that.

14 THE COURT: All right.

15 Q: Mr. Permar, you've told us sort of your
16 motivation on why you did this. Tell us how
17 you produced this document, this map.

18 A: Well, I took -- I had my copy of whatever this
19 exhibit is -- I don't know what it is -- from
20 the Environmental Inventory. I had that
21 scanned and digitized and then I had access to
22 the base aerial photo and the base plat map and
23 I was over the shoulder of the operator of
24 the -- you know, the computer that tried to
25 position this over the top of that. And it was

1 just my best attempt to try to locate -- it was
2 difficult.

3 Clearly, it was difficult because this is hand
4 done and there's some sketchy stuff over here
5 by Seabrook. But what I tried to do was to be
6 as accurate as possible for the lines
7 represented for the Kiawah River at the east
8 end and the channels and the various creeks and
9 so forth. I used that as sort of the control
10 point to position it and then I tried to pick
11 a comparable location at the west end and use
12 those two as the visual control points. And
13 then whatever happened is whatever happened.
14 I used those as the control points.

15 Q: And does this aerial photo with overlay
16 represent your best efforts at reflecting
17 those?

18 A: It was my best effort.

19 Q: And what is the information that's supposed to
20 be communicated?

21 A: Again, I just had a personal sort of interest,
22 following the deposition, of the relationship
23 of what was identified as unstable area on the
24 east end. Because I understood Captain Sam's,
25 but I wanted to understand with the

1 relationship at the east end for an area that
2 has clearly been developed. I wanted to
3 understand, you know, is it big -- a big
4 difference or a small difference or whatever.

5 Q: And that's the area that you have shown as
6 being dotted?

7 A: Yeah. Well, I mean, it's this information
8 (indicating). It's not changing this
9 information at all.

10 Q: What is this section that's dotted? What does
11 that show?

12 A: Well, that's an area known -- there a couple of
13 neighborhoods in that area. The largest is
14 called Osprey Beach and to, then, the west of
15 it is like Jacks Day, Forest Day, or something
16 like that.

17 Q: But the key of using dotting, where did that
18 come from?

19 A: Well, it was from the Environmental Inventory.
20 That was created in the Environmental
21 Inventory.

22 Q: And the white sheet, what is this?

23 A: Well, the overlay is the same overlay. It's
24 the same digital file. And what I tried to do
25 is a similar exercise over a document that

1 Thomas & Hutton has, which they keep. Every
2 time we have a new recorded plat or an
3 adjustment to a parcel, they update that. So
4 it's like a representation of all recorded
5 documents. And so I tried to do the same thing
6 with that.

7 Q: And this was done, I see, under your direction
8 and control. Did you --

9 A: Yeah, the same person. We did them
10 simultaneously.

11 Q: -- tell him exactly --

12 A: Yeah.

13 Q: And do you think this information assists you
14 in your testimony in terms of communicating to
15 the Court information about the island?

16 A: Well, as it relates to that area that had been
17 deemed unstable, that, in fact, has been
18 developed.

19 Q: That was what you were trying to show?

20 A: Well, yeah, I did it really for me, mostly.
21 But that's what I was trying to confirm. I
22 mean, I pretty much knew it, but this document
23 here (indicating) has a lot of -- it doesn't
24 have a lot of detail to it, so I was trying to
25 upgrade it, upgrade the relationship of it.

1 MR. HOWE: Your Honor, we think that's enough. We'd
2 move to admit them.

3 MR. WHITFIELD-CARGILE: I would object, Your Honor,
4 and I would ask to voir dire the --

5 THE COURT: Hold on just for a second.

6 At this point in time, and I'm going to say
7 this and allow you to respond with your
8 objection.

9 It appears to me that if the exhibit is offered
10 to assist his testimony, to explain his
11 understanding of the areas that are
12 undeveloped, the exhibit is admissible for that
13 purpose only, but not for the purpose of as an
14 accurate survey of the area as to where
15 specifically the lines are.

16 They are permitted to use an exhibit
17 demonstrative of whatever. And that's my --
18 where I'm having a little struggle is whether
19 we're -- I think he can absolutely use it for
20 demonstrative purposes. Whether it comes into
21 the record is what I'm cogitating upon now.
22 But I say all that, I'll allow you to respond,
23 Ms. Armstrong.

24 MS. ARMSTRONG: Well, I just -- if it's just -- he
25 said -- testified that he just used it as

1 A: I don't know.

2 Q: Duncan-Parnell is a copying --

3 A: Right.

4 Q: They do copies?

5 A: Copy, printing, production.

6 Q: Okay. And that image you said doesn't -- well,
7 let me back up. That image, Exhibit Fifty-six
8 and Fifty-seven, that doesn't have any bearing
9 on whether or not the spit's stable, does it?

10 A: Bearing on if the spit is stable?

11 Q: Yeah.

12 A: No. As I said, I was curious as to the
13 relationship of a document like G-63, which
14 sites stable or unstable areas. I wanted to
15 see what one of the unstable areas is like
16 right now and it's developed.

17 Q: Do you have any studies that indicate that the
18 spit's stable -- or unstable, rather?

19 A: Do I have any?

20 Q: Well, you agree that the spit's unstable, don't
21 you?

22 A: No, I didn't say that.

23 Q: Your experts did, Oertel and Basco did.

24 A: I defer to the experts on the answer to that
25 question.

1 **MR. WHITFIELD-CARGILE: I don't have any further**
2 **questions.**

3 THE COURT: Any further redirect?

4 MR. HOWE: No.

5 THE COURT: Okay. You were asked about whether you
6 intend to develop the area and build houses on
7 it. What is the intention, your current
8 intention of how many houses you intend to
9 build in the area?

10 THE WITNESS: Well, I don't build them, but the
11 assessment of building houses out there --

12 THE COURT: Maybe I should rephrase it. What is
13 your current intention as to the number of
14 homesites you intend to develop in the area?

15 THE WITNESS: Based upon the early assessment that
16 I've had that I shared earlier, I don't -- I
17 don't think it's 50 and I don't think it's less
18 than 25. I mean, I think it's in a zone that
19 is -- that's the best way I can answer it.

20 THE COURT: All right. Okay. You've asked all
21 about this. You want to ask more about the
22 question I've asked? I was asking about a
23 question you asked.

24 MR. WHITFIELD-CARGILE: Well, yeah, I would like to
25 ask a question about that, Your Honor, if the

1 DOUG DEWOLFF, having been duly sworn, testifies and
2 examines as follows:

3 MR. DEWOLFF - DIRECT EXAMINATION BY MR. WALKER:

4 Q: Mr. DeWolff, where do you currently live?

5 A: In Mount Pleasant.

6 Q: Where do you work?

7 A: At Southeastern Surveying.

8 Q: What's your occupation?

9 A: I'm a licensed surveyor.

10 Q: How long have you been with Southeastern?

11 A: Since 1982.

12 Q: When did you obtain your license as a surveyor?

13 A: In 1996.

14 Q: In the practice of your profession, what type
15 of things do you do?

16 A: Measure land, property corners, boundary
17 surveys, subdivisions, topographic surveys,
18 tree surveys, hydrographic surveys.

19 Q: I may have asked you this. If I did I
20 apologize. Are you licensed by the State of
21 South Carolina?

22 A: Yes, I am.

23 Q: At Southeastern Surveying, do you review plats
24 and surveys?

25 A: Yes, I do.

1 Q: Do you pass on plats and surveys to make sure
2 that they're in compliance with proper
3 surveying methods and the applicable statutes
4 and regulations?

5 A: Yes, I do.

6 Q: Do you actually stamp and certify surveys and
7 plats?

8 A: Yes.

9 Q: How long have you been doing that?

10 A: Since 1996.

11 Q: Let's talk about the involvement of
12 Southeastern Surveying and Kiawah Island.

13 A: (Nods head affirmatively.)

14 Q: How long has Southeastern Surveying been doing
15 surveys on Kiawah Island?

16 A: Since the company started under Joe Williams in
17 1980.

18 Q: And what is your position with Southeastern
19 Surveying?

20 A: I am the president.

21 Q: All right. Since 1980, approximately how many
22 plats and surveys, roughly, if you can estimate
23 it, has Southeastern done on Kiawah Island?

24 A: It's in the hundreds.

25 Q: To your knowledge, are you the surveyor for the

1 developer Kiawah Resort Associates and Kiawah
2 Development Partners?

3 A: Yes.

4 Q: You're their go-to surveying company.

5 A: Correct.

6 MR. WALKER: Your Honor, at this time we would ask
7 the Court to certify Mr. DeWolff to render
8 opinions in surveying, he's a surveyor, and
9 surveying matters.

10 THE COURT: Any objection?

11 MS. ARMSTRONG: No objection to that limited --

12 MR. WHITFIELD-CARGILE: No objection, Your Honor.

13 MR. WALKER: All right.

14 THE COURT: He's so qualified.

15 Q: Have you and your company performed various
16 surveys of Captain Sam's Spit over the years?

17 A: Yes, we have.

18 Q: All right. At our request, have you gone back
19 and taken a look at surveys of Captain Sam's to
20 determine what is the earliest monumented
21 survey that's recorded of Captain Sam's Spit,
22 what that would be?

23 A: Yes. There was a plat by Davis & Floyd in
24 1974.

25 Q: Is that a recorded plat?

1 **A:** **Yes, it is.**

2 **Q:** **From a surveyor's perspective, does that plat**
3 **contain sufficient coordinates and other**
4 **information that would help you identify**
5 **locations on the ground that were the reference**
6 **points in that survey?**

7 **A:** **Yes. The plat shows monuments all over the**
8 **plat with coordinates.**

9 **(Phone interruption.)**

10 MR. WALKER: Your Honor, my apologies. I thought it
11 was off. That's an insult to the Court and I
12 apologize and an insult to me.

13 THE COURT: Here's what I normally do. I always
14 give -- and I always tell everybody here and
15 all the lawyers and let you know by the next
16 witness -- I always give everybody one shot at
17 a telephone ringing and then after that, if
18 another one rings it becomes the property of
19 the Court, of which y'all have a chance to buy
20 it back.

21 MR. WALKER: Your Honor, you promise?

22 THE COURT: You're not losing it this time.

23 MR. WALKER: All right.

24 **Q:** **Now, at various times since 2000, have you been**
25 **asked by KDP to go out and do a boundary**

1 survey --

2 A: Yes, we have.

3 Q: -- of Captain Sam's?

4 A: Yes.

5 Q: Okay. And have you -- does Captain Sam's
6 involve -- is it adjacent to critical areas?

7 A: Yes, it is. It's, yes, along the Beachwalker
8 Park area.

9 Q: And that would be on which side of the -- are
10 you talking about the Kiawah River side?

11 A: Correct.

12 Q: Now, on the other side, on the south side, is
13 it adjacent to the ocean?

14 A: Yes, it is.

15 Q: All right. When your company goes out to
16 survey a line that abuts a critical area, if
17 you want to record that line, do you have to do
18 anything in order to get it recorded, if you
19 want to record a survey that depicts that line?

20 A: We have to locate the OCRM critical line and
21 label it as such on the plat before we submit
22 it for certification.

23 Q: Who do you submit it to for certification?

24 A: DHEC-OCRM.

25 Q: All right. Do you obtain DHEC-OCRM

1 certification on every boundary survey you do?

2 A: No, no.

3 Q: Would it only be on the ones you're getting --
4 that are recorded?

5 A: Typically, any survey that's getting recorded
6 or if the certification is no longer valid.
7 It's valid for a period of five years.

8 Q: How long have you and your company been
9 locating the critical line on properties
10 adjacent to the critical area?

11 A: Since the mid eighties, I believe.

12 Q: During that time, have you acquired the
13 experience, knowledge and training to know the
14 identifiers in the field of the critical line?

15 A: Yes.

16 Q: When you go to OCRM with a survey to get it
17 certified as to the critical line, how often,
18 if at all, does OCRM change your coordinates to
19 the critical line or make adjustments?

20 A: To my knowledge, they have not changed any of
21 ours. If we're not sure about a particular
22 area, we'll set up an appointment with somebody
23 from OCRM in the field for them to flag it.

24 Q: In this case, with respect to the boundary
25 surveys that you've done of Captain Sam's Spit,

1 for those surveys that were not recorded, did
2 you obtain a formal certification of the
3 critical line?

4 A: No, we didn't.

5 Q: Despite not obtaining a formal certification,
6 did you make sure that the location of what you
7 might have indicated the critical line was set
8 by the same criteria you've always used?

9 A: Yes, yes.

10 Q: Do you believe, based on your full experience
11 in doing this and your long record of doing it,
12 is you took those boundary surveys to OCRM to
13 get certified that there would be any problem
14 getting that boundary line -- or that line that
15 certifies the critical line?

16 A: Yeah, that is correct.

17 Q: Do you think there would be any problem?

18 A: No.

19 MR. WALKER: All right. Your Honor, at this time,
20 I'm going to --

21 MR. WHITFIELD-CARGILE: Your Honor, I'm going to
22 object to that last -- that's pure speculation.

23 Q: How many times has OCRM ever doubted your
24 designation of the critical line?

25 A: None that I can think of.

1 **Q: For how many?**

2 **A: For how many years or surveys?**

3 **Q: Yeah, how many surveys.**

4 **A: A couple hundred, at least.**

5 MR. WALKER: All right.

6 MR. WHITFIELD-CARGILE: My objection stands, Your
7 Honor, and ask that be stricken as pure
8 speculation.

9 THE COURT: I don't know if it would be pure
10 speculation, given the fact that he's had a
11 hundred of them agreed to, but I'll sustain the
12 objection. It is speculation, because he's
13 speculating about whether or not they will
14 sustain the objection -- whoa, whoa. I'm
15 sorry. He's been qualified as an expert.

16 MR. WALKER: That's correct.

17 THE COURT: But --

18 MR. WALKER: He can render an opinion on survey
19 matters.

20 **Q: Based on your experience --**

21 THE COURT: I overrule my objection -- overrule what
22 I decided and overrule your objection.

23 MR. WHITFIELD-CARGILE: Your Honor, I'd like to
24 preserve my objection.

25 THE COURT: Okay.

1 MR. WHITFIELD-CARGILE: I don't think qualifying him
2 as an expert --

3 THE COURT: It's preserved when you make an
4 objection, Mr. Whitfield-Cargile.

5 MR. WHITFIELD-CARGILE: Well, I don't think that his
6 qualification as an expert in surveying sets
7 him as an expert in identifying critical lines,
8 especially when he doesn't follow the procedure
9 that's in the statute for setting the critical
10 line.

11 THE COURT: Well, you can cross-examine him in that
12 regard, Mr. Whitfield-Cargile.

13 MR. WHITFIELD-CARGILE: Thank you, Your Honor.

14 **Q: I'm now going to be referring to three surveys**
15 **that were marked on Petitioner KDP's exhibit**
16 **list under Exhibit Forty-eight. These have**
17 **been produced in discovery. The first I'll**
18 **refer to is KDP1158 through 1161. And I'm**
19 **going to ask you, Mr. DeWolff, is this a survey**
20 **that was prepared by Southeastern?**

21 **A: Yes, it was.**

22 MS. ARMSTRONG: Trenholm, could we just see those
23 before you go through them with the witness, I
24 mean, rather than doing a shuffle?

25 MR. WALKER: They're in your notebook as

1 Forty-eight.

2 THE COURT: Well, if you can just let her see what's
3 in your hands.

4 MR. WALKER: (Tendering.)

5 MS. ARMSTRONG: (Reading.)

6 Okay. Thank you.

7 MR. WHITFIELD-CARGILE: Exhibit Forty-eight?

8 THE COURT: Also, I want to clarify something for
9 the record. Mr. Whitfield-Cargile made one
10 point but I disagree with his point.
11 He said that just because he's a surveyor
12 doesn't necessarily mean he's qualified to
13 be -- to assess critical lines.
14 But I'll state for the record I qualified him
15 as an expert and, also, based on his testimony
16 about his numerous instances of marking or
17 establishing critical lines.
18 I believe this particular expert is qualified
19 to testify about establishing critical lines,
20 so where the record will be clear.

21 **Q: Mr. DeWolff, what is this full page exhibit**
22 **that starts at KDP1158 marked, I think, as**
23 **Forty-eight?**

24 **A: That is a boundary survey that our company**
25 **prepared and it was -- of Captain Sam's and it**

1 was recorded in 2006.

2 Q: Who certified the survey?

3 A: It's certified by Fred Mallett of DHEC-OCRM.

4 Q: Well, I'm talking about --

5 A: I'm sorry.

6 Q: Slow down. Who certified the survey itself?

7 A: I did.

8 Q: Was the critical line certified?

9 A: Yes, it was.

10 Q: And who certified the critical line?

11 A: Those -- let me make sure. It looks like Fred
12 Mallett, but I can't be certain.

13 Q: Would he be a person at OCRM to your knowledge
14 who had the authority to certify critical
15 lines?

16 A: Yes.

17 Q: Was this survey approved by the Town of Kiawah
18 Island?

19 A: (Reading.) Yes, it was.

20 Q: Is this survey recorded in the OCRM office for
21 Charleston County?

22 A: Yes.

23 Q: When you and your crew went out there to locate
24 the points of reference around the perimeter of
25 this property, did you use the location methods

1 for determining the critical line that you've
2 testified to?

3 A: Yes, I did.

4 Q: Did you do those same -- or do that same
5 evaluation when you went out and located the
6 critical line for other boundary surveys of
7 Captain Sam's?

8 A: Yes.

9 Q: Are these yours?

10 A: Yes.

11 Q: Okay, next. In 2002, did your firm go out and
12 locate what it believed to be the critical line
13 along the Kiawah River on Captain Sam's?

14 A: Yes, we did.

15 Q: In 2005, did your firm go out and locate what
16 it believed to be the critical line along the
17 Kiawah River on Captain Sam's?

18 A: Yes.

19 Q: In February 2008, did your firm go out and
20 locate what it determined would be the critical
21 line on Captain Sam's and the Kiawah River?

22 A: Yes, we did.

23 Q: In August 2008, did your firm go out and locate
24 what it had already done in August 2008?

25 A: I think --

1 Q: October 2008, did your firm go out and locate
2 what it --

3 THE COURT: Wait a second. You've asked the
4 question did he do it in 2002, 2005, and 2008
5 without any reference to a month on the 2008
6 question.

7 Q: In September 2002, did your firm go to Captain
8 Sam's and locate, identify the critical line?

9 A: Yes, we did.

10 Q: September 2002?

11 A: Yes, we did.

12 Q: In April 2005, did your firm go out to Captain
13 Sam's and identify the critical line along the
14 Kiawah River?

15 A: Yes, we did.

16 Q: We've already hit your 2006 survey. In
17 February --

18 THE COURT: I don't know -- I don't remember any
19 questions about a 2006 survey.

20 MR. WALKER: This exhibit was a 2006 recorded
21 survey.

22 THE COURT: Oh.

23 Q: In February 2008, did your firm go out and
24 locate the critical line along the Kiawah River
25 at Captain Sam's?

1 A: Yes, we did.

2 Q: In October of 2008, did you do the same thing?

3 A: Yes.

4 Q: And, again, in August of 2009, earlier this
5 month, did your firm do the same thing?

6 A: Yes, we did.

7 Q: And did you review all of that for accuracy?

8 A: Yes.

9 Q: At my request, did you compile or do a
10 rendering of surveys of Captain Sam's that
11 shows the critical line in various locations at
12 some of the times that we've talked about for
13 the back side of Captain Sam's along the Kiawah
14 River?

15 A: Yes, I did.

16 Q: All right. Also --

17 MR. WHITFIELD-CARGILE: Trenholm, which one is this?

18 MR. WALKER: I'm referring now to, again, KDP1156.

19 Q: Also, at our request, did you go out in early
20 August of this year and locate the mean high
21 water line on the ocean side?

22 A: Yes. Yes, we did.

23 Q: And what is the criteria -- is there a commonly
24 accepted surveying benchmark for locating the
25 mean high water line of the Atlantic Ocean in

1 Coastal South Carolina?

2 A: For this particular area in Kiawah, the
3 elevation that we used is 3.2 based on NGBD
4 1929 data.

5 Q: Is that considered to be the proper reference
6 point in surveying?

7 A: For mean high water line in that area, yes.

8 Q: Does KDP1156 accurately represent the location
9 of the critical line on the Kiawah River, as
10 well as the mean high water line of the
11 Atlantic Ocean on Captain Sam's as of August
12 2009, early August?

13 A: Yes, it does.

14 Q: All right. And with your computer technology,
15 did you also insert on this exhibit, KDP1156,
16 the location of the mean high water line
17 September 2002 along the back side?

18 A: Yes.

19 Q: And the mean high water line April 2005?

20 A: Yes, we did.

21 Q: Did you also locate on this the critical line
22 as of September 2002 (indicating)?

23 A: Yes, we did.

24 Q: Did you also locate the DHEC-OCRM baseline?

25 A: Yes.

1 Q: Did you also locate the DHEC-OCRM setback line?

2 A: Yes, we did.

3 Q: Based on your many years of experience, your
4 professional training and everything else you
5 bring to the table, is this an accurate
6 representation of the location of the lines
7 around the perimeter of Captain Sam's for the
8 times indicated?

9 A: Yes, it is.

10 MR. WALKER: Your Honor, we would offer this
11 particular survey, KDP1156, into evidence.

12 THE COURT: Is it marked?

13 MR. WALKER: It's part of the Exhibit Forty-eight.
14 There were three.

15 MR. WHITFIELD-CARGILE: You're just admitting this
16 image?

17 MS. ARMSTRONG: 1156?

18 MR. WALKER: 1156.

19 MS. ARMSTRONG: And what number is this?

20 MR. WALKER: This is part of Forty-eight.

21 THE COURT: Well, if it's part of Forty-eight and
22 it's a book that you want to introduce, you'll
23 either have to remove the other exhibits,
24 because you're not offering them, or you're
25 going to be offering them at a later time.

1 MR. WALKER: I have one more on Forty-eight I'm
2 going to offer.

3 THE COURT: Well ...

4 MR. WALKER: I can make them separate Forty-eight-A,
5 Forty-eight-B and Forty-eight-C.

6 THE COURT: Here's what I suggest, and I'll hear
7 from the parties, is what you wish to offer
8 under Exhibit Forty-eight -- I'll rule on this
9 one and then whatever else comes in under
10 Exhibit Forty-eight, let's introduce or allow
11 those to stay. Anything that's not introduced,
12 if you could withdraw it from the Court's
13 notebook.

14 MR. WALKER: We will.

15 THE COURT: How about that?

16 MS. ARMSTRONG: There is an objection, Your Honor.

17 THE COURT: Well, I know -- I'm just saying.

18 MS. ARMSTRONG: Yeah, that makes sense to me.

19 THE COURT: Exhibit Forty-eight may end up being
20 empty, I guess.

21 MS. ARMSTRONG: Yeah.

22 THE COURT: Go ahead.

23 MS. ARMSTRONG: We do object, Your Honor, just
24 because this exhibit's got what's identified as
25 a DHEC-OCRM critical line September 2002 and it

1 MR. WHITFIELD-CARGILE: Your Honor, I apologize.

2 I'm not trying to push the envelope, but there
3 is a statute that sets forth the only agency is
4 the only entity that can set a critical line.

5 And I respect your decision. I'm not trying to
6 push the envelope, Your Honor, but I think that
7 leaving it "critical line" still --

8 THE COURT: He's testified that he can set one in
9 the field. Whether you want to make the
10 argument later on about the legal import of
11 that, that's something you can make later on.

12 MR. WHITFIELD-CARGILE: I understand.

13 THE COURT: All right. With that said, then over
14 lunch I'll allow you to redact the reference to
15 "OCRM."

16 MR. WALKER: We will do that, Your Honor --

17 THE COURT: Okay.

18 MR. WALKER: -- on the Court's copies and my copy.

19 THE COURT: All right. With that said --

20 MR. WALKER: Thank you, Your Honor.

21 Q: Now, referring again to 1156, which includes
22 the survey that was done in August of this
23 year, did you also along the riverbank record
24 elevations?

25 A: Yes, we did.

1 Q: Okay. There was a lawyer's error in the
2 numbering of the next exhibit. I incorrectly
3 noted that Forty-nine would be KDP1178. It
4 should be 1157. And Forty-eight I incorrectly
5 stated that it would include 1178, so I will
6 mark them accordingly.
7 I'll refer to them by Bates number, that was my
8 mistake, but I'm going to refer you to 1157,
9 which we're going to include as part of Exhibit
10 Forty-eight since it doesn't contain any
11 calculations of lost property.

12 Did I request that you locate -- well, did I
13 request that you do a consolidation of the 1974
14 Davis & Floyd survey, as well as later surveys
15 that Southeastern did?

16 A: Yes.

17 Q: And in doing that compilation of information
18 from 1974 to the later surveys, did you use
19 methods that are frequently relied upon by
20 surveyors in order to do such a comparison?

21 A: Yes, I did.

22 Q: Were there identified fixed points in the metes
23 and bounds of the Davis & Floyd plat that you
24 could identify and that you, too, used,
25 Southeastern used, in your later surveys?

1 **A:** **Yes. The Davis & Floyd plat had monuments show**
2 **on their plat with coordinates.**

3 **Q:** **Did you locate some of those monuments?**

4 **A:** **Yes, we have.**

5 **Q:** **It is reasonable and customary in the surveying**
6 **business when you're to compare to surveys to**
7 **take them back to a monument like you did here**
8 **and then to show the two based on those common**
9 **monument references?**

10 **A:** **Yes.**

11 MR. WALKER: Your Honor, based on that, we would
12 offer KDP1178 into evidence and we have a paper
13 copy of it and we will delete any reference to
14 the -- here it is, Amy. And as I said, I
15 misfiled them. But we will delete any
16 reference to "OCRM" next to critical line.

17 MS. ARMSTRONG: So I can understand, follow your
18 exhibits, we've got Exhibit Forty-eight. Does
19 that include 1157 or not?

20 MR. WALKER: There was a mistake. Forty-eight
21 should not include 1157. It should have been
22 1178. And Forty-nine should not be 1178; it
23 should be 1157.

24 MS. ARMSTRONG: Thank you.

25 THE COURT: The record's going to be so crystal

1 clear on all this.

2 MS. ARMSTRONG: Sort of like my exhibit sheet's got
3 scratches out on it.

4 MR. WALKER: And we will do a revised, corrected
5 exhibit sheet.

6 THE COURT: All right.

7 MR. WHITFIELD-CARGILE: You say Forty-nine is 1157?

8 MR. WALKER: Forty-nine is 1157. I had incorrectly
9 put Forty-nine as 1178; 1178 is -- replaces
10 1157 under Forty-eight.

11 MR. WHITFIELD-CARGILE: Oh, I got you. Thank you.

12 THE COURT: All right. You're offering it into
13 evidence --

14 MR. WALKER: Yes, sir.

15 THE COURT: -- with the assertion that "OCRM" will
16 be redacted.

17 MR. WALKER: Yes.

18 THE COURT: Ms. Armstrong?

19 MS. ARMSTRONG: No objection, just my same objection
20 about the DHEC-OCRM critical line, as long as
21 we're revising it.

22 THE COURT: That's pretty impressive. You heard me
23 and talked with Mr. Chandler at the same time.
24 All right. Any --

25 MR. WHITFIELD-CARGILE: Same objection as the last.

1 one, Your Honor.

2 THE COURT: Well, I don't remember it. I mean,
3 there's been so many, Mr. Whitfield-Cargile.

4 MR. WHITFIELD-CARGILE: Okay. Well, I would object.
5 I think that "DHEC-OCRM critical" would all
6 need to be redacted, Your Honor.

7 THE COURT: Oh, okay.

8 MR. WHITFIELD-CARGILE: So same objection, not a
9 continuing one.

10 THE COURT: Well, overruled on that one; admitted
11 under the previous statement.

12 (KDP's Exhibit Number Forty-eight is admitted into
13 evidence.)

14 Q: Now, what I want to do is to show the outline
15 of Captain Sam's in 1974 and then I want to
16 show the outline of Captain Sam's in 2009.
17 We're going to do that with two colored
18 markers.
19 The first thing I want you to do is take one of
20 these colored markers and highlight the '74
21 boundary to mean high water around Captain
22 Sam's so that we'll understand the outline and
23 be able to see the boundary as established in
24 the Davis & Floyd plat.

25 MS. ARMSTRONG: Your Honor, may we watch what the

1 witness is doing?

2 MR. WALKER: Yeah.

3 MS. ARMSTRONG: Thanks.

4 THE COURT: As a matter of fact, if you can just
5 step up here so I can see.

6 MR. WALKER: Why don't you just come right here.

7 THE WITNESS: (Witness complies.)

8 THE COURT: Come around the other side of

9 Ms. Armstrong, that way you can show it to me
10 and everybody else.

11 THE WITNESS: This is the mean high water --

12 MR. WALKER: '74.

13 THE WITNESS: -- 1974.

14 THE COURT: All right. So the record will be clear,
15 you're marking mean high water 1974 in green?

16 THE WITNESS: Correct. (Drawing.)

17 MR. WHITFIELD-CARGILE: Got a pretty steady hand.

18 THE WITNESS: You should see my son.

19 MR. WALKER: You're still on it (indicating).

20 THE COURT: Mr. Walker, you're not under oath.

21 THE WITNESS: Hard to tell once you get up into the
22 Beachwalker Park area.

23 **Q: Does it extend on the other side of Beachwalker**
24 **Park?**

25 **A: Yes.**

1 Q: Could you mark that?

2 A: I see it now. I see it. Goes on up into here
3 (drawing).

4 Q: All right. Now, I'll let you pick the color.

5 MR. WALKER: All right. Mr. DeWolff, the witness,
6 has picked a lighter shade of red --

7 MS. ARMSTRONG: That's pink.

8 MR. WALKER: -- pink to do the perimeter in August
9 of 2009.

10 THE WITNESS: (Drawing.)

11 THE COURT: Do you need somebody to hold the exhibit
12 steady for you?

13 MR. WALKER: Let me hold it for you.

14 THE WITNESS: (Drawing.)

15 Q: All right. Now, Mr. DeWolff, based on your
16 reconciliation of those plats, do they indicate
17 that the mean high water line of the Kiawah
18 River on the north side of Kiawah Island has
19 moved --

20 A: Yes, it has.

21 Q: -- since 1974?

22 A: Yes.

23 Q: Would that be depicted by the difference
24 between your pink line and your green line?

25 A: Yes, it would.

1 Q: Same question as to the mean high water line of
2 the beach. Does your compilation show that the
3 mean high water line on the beach has moved, I
4 guess that would be south --

5 A: Yes.

6 Q: -- from '74 to 2009?

7 A: Yes, it has.

8 Q: And would that movement be depicted on the
9 difference between --

10 THE COURT: Wait a second.

11 (Off the record.)

12 Q: Would that difference be reflected on the gap
13 between the green and the pink line on the
14 bottom part of this exhibit?

15 A: Yes, it does.

16 Q: All right. Thank you.

17 At our request, Mr. DeWolff, have you
18 calculated the distance between what you've
19 determined is the critical line boundary and
20 the setback line today, most recently --

21 A: Yes.

22 Q: -- August 2009?

23 A: Yes.. That distance --

24 Q: What is the distance?

25 A: That distance is 66 feet. Let me double check.

1 Yes, 66 feet.

2 Q: Have you also gone back at our request based on
3 the surveys to determine the distance at
4 earlier times?

5 A: Yes, I have.

6 Q: What two years or two times have you compared
7 to August 2009? Or what two -- I'm sorry, what
8 two lines have you measured to the setback line
9 at the neck, at the narrowest point?

10 A: April 2005, that distance was 90 feet; and then
11 on the September of 2002, it was 104 feet.

12 Q: So since 2002 to 2009, it has moved
13 approximately how many feet?

14 A: That would be 38 feet over a period of seven
15 years.

16 Q: All right. Have you also, at our request, made
17 a calculation of the square footage of -- a
18 portion of the square footage of upland above
19 the critical line that has been lost between
20 September 2002 and October 2008?

21 A: Yes. From September 2002 to October 2008, that
22 area was 49,856 square feet.

23 MR. WHITFIELD-CARGILE: Your Honor, I'm going to
24 object.

25 THE COURT: Whoa, hold on a second.

1 realize that we've admitted these -- that
2 you've admitted these exhibits in subject to
3 the "OCRM" being redacted. He's
4 calculating -- he's representing that these are
5 DHEC critical lines, that these are critical
6 lines. The statute says only the Department is
7 authorized to set the critical line. And if
8 he's calculating, you know, amounts of
9 land -- how much square footage of land is the
10 difference between those lines and he's
11 representing that those are the escarpment
12 lines or the critical lines, I'm going to
13 object to any calculations that he uses based
14 on those lines.

15 THE COURT: Mr. Walker, any response?

16 MR. WALKER: I think it's clear that he has stated
17 that the area that he located as the critical
18 line, his understanding of the critical line
19 based on all the criteria that he's trained to
20 use is -- are the criteria that he used here
21 and that the line was at that location when it
22 was set in 2002 and was set in 2008.

23 THE COURT: All right. I'll overrule the objection.

24 MR. WHITFIELD-CARGILE: Thank you.

25 Q: What was the square footage?

1 A: The square footage for that area was 49,856
2 square feet.

3 Q: And what happened to the land? Where did it
4 go?

5 A: Down into the river.

6 Q: Based on those same criteria that are used to
7 determine the critical line along the river,
8 how much distance did that critical line move
9 between February 2008 and October 2008 at that
10 narrow neck area?

11 MR. WHITFIELD-CARGILE: Your Honor, I'm going to
12 object and if it's easier, I can just object to
13 all this. I anticipate you're going to
14 overrule my objection on the same bases, but I
15 need to preserve my objection to his
16 testifying.

17 THE COURT: It's overruled. Just so the record will
18 be clear, I don't believe he's testifying about
19 a legally established critical line. He's
20 testifying to his understanding as a
21 professional surveyor how he establishes a
22 critical line or what it would be, so ...

23 THE WITNESS: Could you repeat the question?

24 Q: What was the distance, the differential, in
25 feet at the neck on the river side between the

1 OCRM to come out and flag that for us.

2 Q: Right before we took a break, Mr. Walker was
3 asking you about an erosion rate and I thought
4 I heard you say something about 38 feet of
5 erosion. Can you tell me where you are getting
6 that number from? Is there an exhibit with
7 that number on it or how did you ...

8 A: On the -- let's see. The mean high water line
9 September 2002 to the OCRM setback line was 104
10 feet. And then on our most recent survey, that
11 distance was 66 feet. So the difference
12 between those two was 38 feet.

13 Q: And that 104 foot number, where -- a lot of
14 these maps have a KDP number on the bottom
15 right hand corner. Can you tell me what map
16 you're looking that shows 104 feet?

17 A: Well, this is a distance that I had scaled. I
18 don't know if it's on any particular document
19 that you may have, but I scaled it off of one
20 that's dated August 6, 2009. It's titled an
21 "Erosion Study Survey of Captain Sam's Spit."

22 Q: And so the 38 feet was a rate between September
23 '02 and what date? October 2008, is that what
24 you said?

25 A: On this drawing I'm looking at, it's from April

1 **2005 and September 2002 to now.**

2 MS. ARMSTRONG: Your Honor, I'm not sure what map
3 he's looking at. I asked for a KDP number.
4 I'm not sure that I got one.

5 **Q: Is there a number on the bottom of that map?**

6 **A: (Tendering.)**

7 **Q: Okay. So you've actually got some handwritten**
8 **notes on this map.**

9 **A: Yes.**

10 **Q: Is that right? When did you write these, just**
11 **today?**

12 **A: Yes.**

13 **Q: So what you've calculated is 38 feet over seven**
14 **years, is that what you -- you roughed out this**
15 **just sitting here today in the courtroom?**

16 **A: That's what I calculated, yes.**

17 MS. ARMSTRONG: Do y'all have that one big foam
18 board?

19 MR. WALKER: Yeah, that's right up here. And, Amy,
20 I think the one you're referring to was
21 KDP1157.

22 MS. ARMSTRONG: Okay. All right. And did you have
23 other colored markers, Trenholm?

24 MR. WALKER: Yeah.

25 MS. ARMSTRONG: Your Honor, I'd like to have the

1 witness identify another line on this map
2 that's marked as KDP Exhibit Number Forty-eight
3 and it's got a Forty-eight-C sticker on it.

4 THE COURT: Y'all can step up here, if you want.

5 Q: Okay. Mr. DeWolff, if you would take that
6 orange pen/marker --

7 A: Yes.

8 Q: -- and outline the OCRM -- what you have
9 identified as the OCRM critical line October
10 2008.

11 THE COURT: Do you need somebody to hold the
12 exhibit?

13 THE WITNESS: I'm good. Thank you. (Drawing.)

14 Q: Okay. So on this exhibit, where you've got in
15 pink the August 2009 mean high watermark and
16 you've got the October 2008 critical area line
17 in the narrowest point of the spit. Those
18 lines are in the same location; isn't that
19 true?

20 A: (No response.)

21 Q: Except for one?

22 A: Yes.

23 Q: So there is actually one point where the 2008
24 critical line is more seaward than the 2009
25 mean high watermark. That's true, too, isn't

1 it?

2 A: It would appear so right there (indicating).

3 Q: So the August 2008 -- or August 2009 mean high
4 watermark line that you've got on this map is
5 in the same location or in some -- in at least
6 one area more landward than the 2008 October
7 2008 critical area line; isn't that right?

8 A: Yes, that's pretty -- it falls basically the
9 same line.

10 Q: So in that narrowest part of the neck, in the
11 last ten months there's been essentially no
12 change in that line; isn't that true?

13 A: Yes.

14 Q: While we're looking at this map, Mr. DeWolff,
15 you've identified the mean high watermark for
16 1974 as the green line; is that accurate?

17 A: Yes.

18 Q: Okay. And on the beach side, you've got
19 identified an area of accretion that occurred
20 between 1974 and 2009. How many acres of land
21 have accreted in that time period?

22 A: You're referring to this area (indicating)?

23 Q: Right.

24 A: Yeah, 63.24 acres.

25 Q: So on the ocean side, the spit has gained 62.34

1 acres?

2 A: 63.24 acres.

3 Q: 63.24 acres.

4 A: Yes.

5 Q: You can have a seat, Mr. DeWolff.

6 A: (Witness complies.)

7 Q: Now, have you ever calculated an erosion rate
8 before?

9 A: No, I have not.

10 Q: So this is the first time that you've ever
11 actually done these sort of calculations that
12 you've done for Kiawah Development Partners;
13 isn't that true?

14 A: Yes.

15 Q: Okay. And you haven't ever done any kind of
16 long-term erosion study, have you?

17 A: We've been surveying on this one for seven
18 years, so it depends what you define as "long
19 term."

20 Q: Have you been doing an erosion study long term
21 on Kiawah Island or the Captain Sam's Spit?

22 A: We've been working on this one for seven years.

23 Q: So you only went back to 2002; is that right?

24 A: With our surveys, yes. We did, of course, use
25 the Davis & Floyd from '74 as part of our work.

1 upland boundary line, the entire peninsula on
2 the Kiawah River and the Atlantic Ocean and the
3 inlet, is that critical area?

4 A: No.

5 Q: I'm saying is the boundary next to the river --
6 the perimeter -- no, keep the -- is the
7 boundary along the river and around the spit to
8 the ocean all critical area either tidelands or
9 ocean?

10 A: Oh, yes, yes.

11 Q: Okay. Now, did you and your crew set every one
12 of those location marks that are on page four?

13 A: These are calculated points.

14 Q: Did you and your team set every one of those
15 calculated points?

16 A: Set them, no, but we located them. We located
17 the points.

18 Q: Did OCRM take issue with any single one of
19 those at least, I don't know how many, hundreds
20 of reference points?

21 A: No, they did not.

22 Q: You were asked about 63.24 acres of beach that
23 has accreted -- have accreted since 1974. Is
24 that below the setback line?

25 And I'll show it to you. Is the area of beach

1 accretion since 1974 on Exhibit Forty-eight-C,
2 is that below the setback line?

3 **A:** Yes, it is.

4 MR. WALKER: All right. That's all I have, Your
5 Honor.

6 MS. ARMSTRONG: I don't have anything else.

7 THE COURT: All right. On those questions.

8 MR. WHITFIELD-CARGILE: Yes, Your Honor.

9 MR. DEWOLFF - RECROSS-EXAMINATION BY MR.
10 WHITFIELD-CARGILE:

11 **Q:** Mr. DeWolff, Forty-eight-C, the last page of
12 it --

13 **A:** Yes.

14 MR. WALKER: Forty-eight-A.

15 MR. WHITFIELD-CARGILE: Forty-eight-A? My
16 apologies.

17 **Q:** The last page of it. You've got it looks
18 like 350 different points on here; is that
19 right?

20 **A:** 475.

21 **Q:** 475 different points on here. Is this
22 something standard you do when you set a
23 critical line?

24 **A:** Yes.

25 **Q:** Where is this for September 2002?

1 and examines as follows:

2 MR. BOHANNON - DIRECT EXAMINATION BY MR. WALKER:

3 Q: Mr. Bohannon, what's your profession?

4 A: I'm a licensed professional engineer.

5 Q: How long have you been a licensed professional
6 engineer?

7 A: Since 1985.

8 Q: Are you licensed in the State of South
9 Carolina?

10 A: Yes, sir, I am.

11 Q: Any other states?

12 A: I'm licensed in South Carolina, North Carolina
13 and Georgia.

14 Q: Where do you work?

15 A: I work at Thomas & Hutton Engineering Company.

16 Q: How long have you worked for Thomas & Hutton?

17 A: Since November of 1975, which is, I guess,
18 what, almost 34 years.

19 Q: What's your position with Thomas & Hutton?

20 A: I'm currently the president and CEO of the
21 company.

22 Q: How many offices does Thomas & Hutton have?

23 A: We have five offices. We have an office in
24 Brunswick, Georgia; Savannah, Georgia;
25 Charleston or Mount Pleasant, South Carolina;

1 Hilton Head -- excuse me, I'm sorry, Myrtle
2 Beach; and Wilmington, North Carolina.

3 Q: Can you give us a quick sketch of the type of
4 engineering work that Thomas & Hutton does?

5 A: Well, we really do the whole gamut of
6 engineering. We design roads, sewer systems,
7 water systems. We have surveyors. We do GIS.
8 We do land planning, landscape architecture.
9 Predominantly, our business for the last
10 probably 30 years has been heavily dominated by
11 private residential development and a big
12 portion of that has been what I would consider
13 high-end, high-amenity residential development
14 similar to Kiawah. We've done probably 80,
15 90 percent of anything that's ever been
16 designed at Hilton Head, Dawtaw Island, Kiawah
17 Island. Worked for Sea Island Company out in
18 Georgia; Landings, Skidaway Island. We've had
19 Daniel Island in Charleston, so we've had
20 some -- been very fortunate to have some very
21 good clients doing some very large projects.

22 Q: Has your work over time included the design of
23 revetments and bulkheads?

24 A: Yes. We've done quite a number of revetments
25 and bulkheads and shore protection works all

1 over the last -- at least in my 34 years with
2 the company.

3 Q: Does the civil engineering work that you do
4 include walking permit applications through the
5 permitting process?

6 A: (No response.)

7 Q: "Walking" may be a bit -- but submitting the
8 applications and following those applications?

9 A: Yes. We've submitted lots of permits, both
10 through the Army Corps of Engineers and OCRM,
11 its predecessor, which was the Coastal Council.

12 Q: You've heard of this about -- or you're
13 familiar with the authorization of KDP for your
14 firm to act on its behalf. Is that typical
15 when you're working for a large property owner
16 like KDP?

17 A: Yes, that's pretty typical.

18 Q: Let's talk about Kiawah Island. How long has
19 Thomas & Hutton been doing these types of
20 engineering services that you've described on
21 Kiawah Island?

22 A: Well, we're very fortunate. Our firm started
23 working for the Sea Pines Company when Charles
24 Fraser went over to Hilton Head with the first
25 bulldozer and one of my -- my predecessor

1 actually rode in the dozer with him making
2 roads and so we had a long relationship with
3 Sea Pines Company. So we started from the very
4 beginning. We were involved in 1974. The firm
5 was involved in Kiawah -- I think my first
6 assignment was probably 1976. Actually, it was
7 Sparrow Pond Cottages, which is one of the
8 first things in West Beach Village!

9 Q: Can you think of any piece of major
10 infrastructure on Kiawah Island that Thomas &
11 Hutton has not designed?

12 A: I can. Actually there is one.

13 Q: What is it?

14 A: We did not design the Osprey Beach section. I
15 talked with Mark Permar at lunch. There were
16 a couple of things that went on. There was a
17 little section -- and it kind of coincides with
18 his absence. I think it was from like '85 or
19 '86 to '88. There was a group who was managing
20 for the Kuwaitis who decided to do things
21 differently than had done in the past.

22 Q: Except for one pocket, that little pocket you
23 just mentioned, that little time gap, has
24 Thomas & Hutton, to your knowledge, designed
25 all the major infrastructure at Kiawah?

1 A: Yes.

2 Q: Did you do the design for the water and sewer?

3 A: Yes, we have.

4 Q: Did you do the design for the roads?

5 A: Yes, we have.

6 Q: Did you do the design for the bridges that are
7 on the island?

8 A: Yes, we have.

9 Q: And we saw these pictures up here of various
10 fingers and islands. Did Thomas & Hutton
11 design those bridges and roads?

12 A: We've done all of that, yes, sir.

13 Q: Has Thomas & Hutton in the course of doing that
14 design work had to work in sensitive areas?

15 A: Yes. It's very sensitive and requires a little
16 bit of a unique approach. It's not typical.
17 We do a lot of things differently. We've gone
18 and designed special considerations to be able
19 to have trees closer to the roadway. We've
20 designed some pretty innovative things as far
21 as stormwater so that we have minimal impact on
22 the site and on the fingers, Rhett's Bluff,
23 lots of places.

24 Q: Based on your experience in working with KDP,
25 have you found them to be responsive on the

1 engineering side, being responsive to what's on
2 the ground, trees, contours, and that type of
3 thing, the natural blessings of a site?

4 A: I would say more than responsive. I would say
5 they are insistent that we take special care
6 with the land. I mean, they've been the
7 driving force and have been a great client
8 because we've created some things that, quite
9 frankly, typical highway engineers just
10 wouldn't do and aren't allowed to do. They've
11 created some really special places.

12 Q: Since you've worked for so many of these
13 high-end developers, where would you rank KDP
14 in terms of insisting on environmental
15 sensitivity and then blending with engineering
16 design in comparison to others?

17 A: Oh, they're at top of the list.

18 Q: All right. Now, let's talk about Captain
19 Sam's. Do you recall when you were first
20 contacted by KDP about any issue dealing with
21 erosion on Captain Sam's?

22 A: I think it was late 2006, maybe early 2007.

23 Q: And what was your specific understanding of
24 what you were to look into?

25 A: Well, there was concern that Charleston County

1 PRC had applied for a permit and had gotten a
2 permit to do a bulkhead along Beachwalker Park.

3 Q: Now, I'm going to stop you. You're saying
4 they -- had they actually gotten the permit?

5 A: I'm not sure chronologically about that.

6 Q: I don't want you to testify to anything you
7 aren't sure about.

8 All right. So there's an application by
9 Charleston PRC.

10 A: Correct.

11 Q: Was there any -- did you have any understanding
12 about an access corridor? Were there any
13 discussions about an access corridor in the
14 neck of the spit?

15 A: I think there were, yes. In kind of developing
16 that ongoing conversation, that the access
17 corridor to the spit became one of the
18 considerations. We certainly didn't want
19 anything to happen -- we were really concerned
20 about end conditions on the PRC permit. If
21 they put a bulkhead, there would have been
22 probably -- there are usually some -- if you
23 don't design it correctly and don't take --
24 aren't really careful, you'll have some adverse
25 end conditions and we were worried that adverse

1 end conditions would contribute to increased
2 erosion in that area and actually narrow the
3 spit even more.

4 Q: Did you make any recommendation to KDP about
5 involving other consultants to work with you?

6 A: Oh, yes, certainly. Again, I had grave concern
7 about the PRC bulkhead and then when we were
8 asked to design the bulkhead/revetment, I said,
9 "What do we need to do to protect that?" I was
10 concerned what would happen in -- not only in
11 that area, but also other impacts.

12 Q: Did you make any recommendations about
13 involving other consultants?

14 A: Yes, I did. I suggested they hire Dr. Oertel
15 and Dr. Basco.

16 Q: Did they do that?

17 A: Yes, they did.

18 Q: Did your firm work in conjunction with
19 Drs. Oertel and Basco in addressing the issues
20 there near the neck at the river bend on
21 Captain Sam's?

22 A: Yes. Yes, we did.

23 Q: Did Drs. Oertel and Basco provide you certain
24 information and opinions related to what they
25 believed to be the processes at work out there

1 at Captain Sam's?

2 A: Yes.

3 Q: At some point, taking into account those
4 recommendations, did you make a recommendation,
5 you, Thomas & Hutton, make a recommendation to
6 KDP about a suitable method to stabilize the
7 river bend?

8 A: We did. We looked at, I mean, a number of
9 alternatives investigated, bulkhead, riprap, to
10 geotubes, a number of things that could have
11 been used, and it was our recommendation that
12 they use the concrete mats.

13 Q: Why did you recommend that they use the
14 concrete mat as opposed to the other
15 alternatives you mentioned?

16 A: Well, from all the systems that we were aware
17 of, it seemed like that is the softest, most
18 compatible system out there. We can lay it on
19 the existing ground, follow the existing slope.
20 There's the opportunity, we believe, it could
21 fill in with sand. Once we put it down, it
22 could fill in with sand. We've seen them used
23 in other locations where they've become
24 completely naturalized. They might get filled
25 in with sediments and marsh grass start growing

1 through them or other vegetation.

2 So this articulated concrete block we felt like
3 was the best solution. It's kind of in keeping
4 with the whole essence of Kiawah where, you
5 know, we need engineering solutions to
6 problems, but we also need engineering
7 solutions that blend with the environment that
8 we're creating.

9 Q: Had Thomas & Hutton designed other bulkhead or
10 revetment projects using articulated concrete
11 block?

12 A: We have, yes.

13 Q: What was your experience with their use in
14 terms of performance?

15 A: We've had excellent results. I mean, the ones
16 that we've used, used them for a couple of
17 different applications, but we've had very good
18 results with them.

19 In fact, one is on Kiawah itself at Cinder
20 Creek where it's completed vegetated. You
21 can't even see -- can't even tell it's there.
22 One on Daniel Island, it's becoming totally
23 propagated with Spartina and other native
24 grasses. I mean, we've just had very, very
25 good results with them.

1 Q: Did KDP follow your recommendation?

2 A: Yes, they did.

3 Q: Who prepared the application that I believe is
4 Petitioner's Exhibit Ten? Did your firm
5 prepare the application?

6 A: Yes, our firm prepared the application.

7 Q: Was it a double application?

8 A: Yes, it was a joint application to OCRM and to
9 the Army Corps of Engineers.

10 Q: Is that typical?

11 A: That's very typical.

12 Q: Why do you have a joint application? Please
13 explain in simple layman's terms why you have
14 to go to two agencies, the Corps and OCRM.

15 A: Well, there's a federal permitting process and
16 a state permitting process and in order to
17 somewhat streamline the process, they agreed to
18 a joint application procedure several years
19 ago. And so that's -- I mean, that's just the
20 process. You submit a joint application. It
21 goes both to the Army Corps of Engineers and to
22 OCRM and they generally process them on a
23 parallel track.

24 Q: Yesterday, we took a look at some of the pages
25 of the application; in particular, we spent a

1 little bit of time on page seven of seven. If
2 you want to look at it, you can. And it would
3 be in the --

4 A: I remember. That was the one that showed the
5 schematic of the articulated concrete block mat
6 and the bulkhead.

7 Q: That's correct. And if you can answer this
8 question without looking at it, please do. Was
9 there anything unusual about that schematic
10 rendering in terms of what you would do
11 typically in seeking permitting for a structure
12 like this?

13 A: No, this is pretty typical. I mean, I -- you
14 know, we show in general terms pretty -- I
15 mean, they're somewhat schematic because it's
16 not a final design, but we show in general
17 terms what's -- to portray what we want to have
18 permitted to put in the critical area.

19 Q: In your many years of dealing with OCRM in
20 seeking permits, have you, on behalf of various
21 owners, submitted applications to OCRM for
22 similar projects with comparable detail?

23 A: Yes, lots of them.

24 Q: Is it typical to have construction drawings in
25 every instance for a project like this when you

1 put in the application?

2 A: I don't remember when we had construction
3 drawings beforehand. I mean, I think -- there
4 may be a case, but it is more typical that we
5 submit these schematic drawings and then once
6 we get a permit, then we do the final design
7 and final construction drawings.

8 Q: When you do the final construction drawings, is
9 that done in conjunction with OCRM?

10 A: Well, we usually send them a set of plans so
11 they know what's going on, yes, so -- you know,
12 occasionally, they'll be a slight tweak on the
13 permit. In fact, it's probably -- in this kind
14 of environment, it's as much a rule as it is
15 the exception that when you get a final design,
16 you'll tweak something a little bit different
17 than what you anticipated.

18 Q: In this instance, after you submitted the
19 application to OCRM on February 29, 2008, did
20 OCRM ever come back to you and ask for more
21 clarification over your drawings or
22 construction drawings or anything like that?

23 A: No, they did not.

24 Q: Did you believe that what you were proposing
25 constituted a comprehensive solution?

1 A: Well, we did. You know, we looked at lots of
2 things and we felt like it was a good
3 comprehensive solution, protecting all the way
4 from the park down through the neck area where
5 the zone of erosion was occurring.

6 MR. WALKER: At this point, Your Honor -- well, let
7 me qualify a little bit more.

8 Q: Mr. Bohannon, you're a licensed engineer. Does
9 your license include or would you have the
10 authority under your license to design
11 structures like this revetment?

12 A: Yes.

13 Q: Do you have people in your office who also
14 design structures, revetment structures?

15 A: Yes, we do.

16 Q: Are these competent, capable people?

17 A: Very competent, very capable.

18 Q: Have you, in your career, evaluated designs for
19 structures like this to determine whether they
20 are sufficient for their intended purpose?

21 A: I've been the project manager, project
22 principal on a number of these where we
23 evaluate them, yes. Now, the detail design, I
24 have not done, but in general, to make sure it
25 meets the intended purpose and -- yes.

1 Q: In this instance, before the application was
2 submitted, did you review those seven drawings
3 that were part of the application?

4 A: Yes.

5 Q: Did you consider them to be sufficient?

6 A: Yes, I did.

7 Q: Do you consider the design to be sufficient --
8 or, first, let me ask you, what do you
9 understand to be the purpose of this revetment?

10 A: It's to stop the erosion that's occurring on
11 that bank, which is contributing -- which is,
12 you know, the migration of the bank. It's sort
13 of two things. It's that erosion's occurring
14 primarily on the bank and then the migration of
15 the bank towards the -- or the bank of the
16 Kiawah River towards the ocean.

17 Q: In addition to designing bulkheads and
18 revetments, have you monitored bulkhead and
19 revetments that you've designed once they're in
20 place?

21 A: Our firm has done that, yes.

22 Q: Have you observed what's gone on with other
23 bulkheads and revetments?

24 A: Oh, yeah, we've seen lots of them.

25 Q: Does that assist you in determining what's an

1 appropriate solution for erosion control?

2 **A:** I believe it does, yes, sir.

3 MR. WALKER: Your Honor, we would ask the Court to
4 certify Mr. Bohannon and as an engineer to
5 render opinions about the engineering
6 sufficiency of this structure.

7 THE COURT: You said as an engineer. Do you mean as
8 an expert?

9 MR. WALKER: As an expert, Your Honor.

10 THE COURT: All right.

11 MS. ARMSTRONG: No objection, Your Honor.

12 MR. WHITFIELD-CARGILE: No objection, Your Honor.

13 THE COURT: All right. He's so qualified.

14 **Q:** At this point, Mr. Bohannon, I want to walk
15 through the project specific regulation dealing
16 with revetments and bulkheads. Do you have
17 that in front of you?

18 **A:** Yes, I do.

19 **Q:** And that's Regulation 30-12(C). Are you
20 familiar with that?

21 **A:** Yes, I am very familiar with it.

22 **Q:** Subpart (C) (1) specifies: "In an attempt to
23 mitigate certain environmental losses that can
24 be caused by these structures, the following
25 standards are adopted," and I'm going to go

1 qualified in that regard. Now, the question
2 that started all this, if would you repeat
3 that.

4 MR. WALKER: I'll break it in -- yes, sir.

5 The question was: Does the design that Thomas
6 & Hutton did for this revetment meet the
7 standard that's set forth in (1)(a) of
8 Regulation 30-12(C), that structures must
9 designed to conform to the critical area line,
10 upland boundary, to the maximum extent feasible
11 and constructed so that reflective wave energy
12 does not destroy stable marine bottoms or
13 constitute a safety hazard?

14 THE COURT: All right. I'll sustain her objection
15 as far as the way it's asked. I think that he
16 can testify, from an engineering standpoint,
17 whether the revetment meets the requisites
18 of -- that you're fixing to go through. So you
19 can ask the question in that regard.

20 MR. WALKER: I will.

21 THE COURT: But, now, what's your position on that?

22 MS. ARMSTRONG: I'm not sure I understand your
23 ruling exactly, Your Honor.

24 THE COURT: Well, his question simply was, did the
25 structure meet the requirements of the statute.

1 I don't know if he can just testify to the
2 legal conclusion of whether they meet the
3 requirements of the statute. He can testify
4 based on engineering principles whether the
5 structure is designed to conform with the
6 requisites of the statute. So that's what I'm
7 trying to limit his testimony to, that of his
8 expertise.

9 MS. ARMSTRONG: Okay. I would agree with the first
10 part, that he could -- would be qualified to
11 testify about whether the structure's designed
12 to conform to the critical area line. But when
13 we get to the part about whether it's designed
14 so that it doesn't destroy stable marine
15 bottoms with reflective wave energy, that
16 absolutely, I believe, calls for an opinion in
17 either hydrology, geology, some sort of, you
18 know, scientific -- or marine biology that
19 would -- I think he's not qualified to give an
20 opinion about what the marine bottom is and
21 whether it's going to be destroyed.

22 And we're also looking at, you know, wave
23 energy, which is something that KDP's got
24 experts in these other areas and I don't think
25 that this witness has been qualified in those

1 areas.

2 THE COURT: All right. Mr. Walker, what's your
3 response?

4 MR. WALKER: I'll rephrase the question, Your Honor.

5 THE COURT: All right.

6 MR. WALKER: I'll break it into pieces and then we
7 can fight about a piece.

8 THE COURT: Okay.

9 MR. WHITFIELD-CARGILE: Your Honor, I've got an
10 additional objection that might help.

11 THE COURT: It will help?

12 MR. WHITFIELD-CARGILE: No, I don't know
13 it -- sorry. It seems that Mr. Walker's going
14 to continue to draw his opinion.
15 Mr. Bohannon's testimony was that they haven't
16 designed the structure yet, and so it's all
17 speculation.

18 MR. WALKER: Your Honor, we don't have construction
19 drawings. The general concept of the structure
20 has been provided. We will come forward with
21 the construction drawings, but the concept is
22 sufficient.

23 THE COURT: I think he's already testified to that
24 pretty clearly that the schematics are typical
25 of what you draw when you don't submit the

1 construction drawings until a later date, so --
 2 at least that's the testimony I heard. If I'm
 3 wrong ...

4 MR. WHITFIELD-CARGILE: If on the one hand, Your
 5 Honor, he's going to argue that what's in the
 6 drawings aren't the plans, that they don't have
 7 the construction plans, and then on the other
 8 hand he's going to then render opinions as to
 9 whether or not this conceptual sketch is
 10 sufficient; it's a Catch 22.

11 THE COURT: That's where you can cross-examine him.

12 MR. WHITFIELD-CARGILE: I understand that, Your
 13 Honor. But if that's his testimony, I think
 14 it's all speculation.

15 THE COURT: All right.

16 MR. WHITFIELD-CARGILE: And I join in
 17 Ms. Armstrong's objection as to the expertise.

18 THE COURT: All right.

19 **Q: Mr. Bohannon, when you, as an engineer, and the**
 20 **engineers in your firm design a bulkhead or**
 21 **revetment, do you take into account the**
 22 **reflective energy of wave action?**

23 **A: Yes, sir, we do.**

24 **Q: Is that one of the essential considerations**
 25 **that you take into account?**

1 A: One -- yes, in fact, because that was one of
2 our concerns here.

3 Q: Is that something you're trained to take into
4 account?

5 A: Yes.

6 Q: Is it something from an engineering standpoint
7 you're capable of dealing with --

8 A: Yes, sir.

9 Q: -- and you deal with?

10 A: Yes, we're capable of doing that.

11 Q: Is that part of your engineering experience and
12 training?

13 A: Yes.

14 Q: Turning to the design that was submitted here,
15 did your firm design this bulkhead and
16 revetment to conform to the critical line?

17 A: Yes, we did.

18 Q: To the maximum extent feasible; is that
19 correct?

20 A: Yes, we sure did.

21 Q: Did your firm design the bulkhead and revetment
22 taking into account reflective wave energy?

23 A: Yes.

24 Q: Tell us about that, how it's taken into account
25 in this design.

1 A: Well, clearly, whenever you put a vertical face
2 against -- on a shoreline in any kind of
3 waterway, you're going to get some kind of wave
4 action up against that. And if you don't do
5 something to protect that toe against that
6 reflective energy, it's going to cause even
7 more exacerbated erosion. So that's just one
8 of the things --

9 Q: And when that happens --

10 A: -- you'd have to do.

11 Q: -- Mr. Bohannon, does that erosion occur on the
12 bottom?

13 A: Oh, yes.

14 Q: And it disrupts it?

15 A: Yes.

16 Q: In this particular design, does the revetment
17 part, which is the articulated concrete block
18 matted over the bank, play into reflective wave
19 energy?

20 A: Yes.

21 Q: How so?

22 A: Well, it prevents that reflected wave from
23 causing erosion on the bottom.

24 Q: With respect to the bottom, does it help
25 stabilize the bottom?

1 A: Yes.

2 Q: In this instance, was there anything that you
3 could perceive from an engineering standpoint
4 that would make the design you submitted a
5 safety hazard?

6 A: We didn't -- no, there's nothing that we saw
7 that would create a safety hazard.

8 Q: Mr. Bohannon, was the structure that you
9 designed to be constructed within 18 inches
10 from existing escarpments along the bank?

11 A: Yes, that's -- that regulation has been in
12 place as long as I can remember.

13 Q: Is there any of the proposed location for the
14 revetment where marshlands are adequately
15 serving as an erosion buffer?

16 A: Up next to the park, there's some of that where
17 there's an escarpment there and the marsh is
18 doing part of that. But it's still -- it needs
19 to be protected, even though there's some marsh
20 there. But the marsh is doing some of it, but
21 not a complete job and --

22 Q: Is it still eroding despite the marsh in front
23 of it?

24 A: Yes. Yes, it is.

25 Q: From an engineering standpoint, based on what

1 you could see and the design you came up with,
2 does the bulkhead -- combination bulkhead and
3 revetment prohibit -- or, excuse me, adversely
4 effect public access?

5 A: I don't think so. I don't know why people
6 couldn't still access that area if they wanted
7 to.

8 Q: Mr. Bulkhead -- not Mr. Bulkhead.

9 MR. WALKER: I think I should leave now, Your Honor.
10 That's a new Marvel superhero, Mr. Bulkhead.

11 Q: Mr. Bohannon, I'm looking at some of the other
12 considerations that must be taken into account
13 by the Department. From an engineering
14 standpoint, does the bulkhead/revetment, will
15 it contribute to erosion?

16 A: We don't believe so. We actually think it's
17 going to prohibit erosion.

18 Q: From an engineering standpoint, do you see
19 where this structure would cause shoaling of
20 channels or create stagnant water?

21 A: No. That's one of the things -- one of the
22 reasons we wanted Dr. Oertel and Dr. Basco
23 involved, make sure it wouldn't -- evaluate the
24 entire system and make sure it wasn't going to
25 be a problem.

1 Q: Have you been out and walked the site, the
2 specific location where it's proposed?

3 A: I have, yes.

4 Q: In the specific location where proposed, do you
5 see oysters on the bank in any particular spot
6 where it's proposed?

7 A: There were a few there, a couple of old dead
8 trees and stuff, an old rusty pipe. There was
9 some oysters growing on those.

10 Q: Have you gone out and seen these ACB mats after
11 they've been in the intertidal zone for a good
12 bit of time?

13 A: Yes, sir, I have.

14 Q: Do oysters often cling to them?

15 A: Oh, they generally propagate in that intertidal
16 zone, yes. I say that, if they're not covered
17 with marsh -- with mud. But the areas where
18 the ACB is exposed, the oysters will propagate.

19 Q: There's been some discussion about the length
20 of the revetment. How is the length and the
21 location of the revetment determined?

22 A: Well, we went out in the field. I mean, we've
23 had survey data and a number of studies done.
24 We've actually been in the field and located
25 kind of the beginning and end the erosion zones

1 and that's where the revetment -- we're asking
2 to put a revetment. It's pretty clear when you
3 go in the field where it starts and stops.

4 Q: And when you scaled it out, did it come to
5 whatever the distance is, 2,763 or 83 feet?

6 A: I think it's 2,783.

7 Q: Is that what the scaled distance was?

8 A: That was the scaled distance.

9 Q: Within the last two weeks, did you go out and
10 walk the site, again?

11 A: Yes, sir, I did. In fact, I was out there last
12 week.

13 Q: Who did you go out with?

14 A: I went with Mark Permar.

15 Q: Did you go from one end to the other?

16 A: We walked from one end to the other end and
17 then some.

18 Q: Did Mark take a series of pictures?

19 A: Yes, he did.

20 Q: Have you seen those pictures?

21 A: I have.

22 Q: Do those pictures fairly and accurately depict
23 what you saw when you went out there?

24 A: Yes, they do.

25 Q: Do they fairly and accurately depict the

1 **proposed location of the revetment?**

2 **A: Yes, they do.**

3 MR. WALKER: These are photographs that were
4 included on the disk that I gave you last
5 Thursday afternoon that said they were from
6 Permar.

7 MS. ARMSTRONG: Are you providing us copies of
8 these?

9 MR. WALKER: Yes. Well, I've already provided a
10 disk with all the pictures on them.

11 MS. ARMSTRONG: Right, three days ago or something
12 like that.

13 MR. WHITFIELD-CARGILE: Are these the ones -- let me
14 see if I can find these and pull these out.
15 Are these copies we can keep, Trenholm?

16 MR. WALKER: Excuse me?

17 MR. WHITFIELD-CARGILE: Are these the ones you're
18 using?

19 MR. WALKER: Yes.

20 MR. WHITFIELD-CARGILE: Okay.

21 MR. WALKER: (Tendering.)

22 **Q: The first thing I'd like for you to do,**
23 **Mr. Bohannon, is tell us whether you went**
24 **through all those pictures to select some**
25 **pictures that you thought were representative**

1 of the entire location.

2 A: Yes, sir, I did. There were quite a large
3 number but, again, I wanted to kind of portray
4 from beginning to end just a couple of
5 photographs, because I think there were 60 or
6 80 or -- a good number of them, but wanted to
7 pick some out that kind of were -- that were
8 representative of illustrating what's actually
9 in the field.

10 MR. WALKER: Your Honor, we would offer these
11 photographs as Petitioner KDP's Exhibit
12 Seventy-five?

13 MS. ARMSTRONG: No objection, Your Honor.

14 THE COURT: Mr. Whitfield-Cargile?

15 MR. WHITFIELD-CARGILE: No objection, Your Honor.

16 THE COURT: They're admitted.

17 (KDP's Exhibit Number Seventy-five-A through G was
18 admitted into evidence.)

19 Q: Mr. Bohannon, if you would step down and I'd
20 like for you to go through these photographs
21 with His Honor.

22 A: Sure.

23 Q: Why don't you use these and then you can
24 refer -- when you refer to a picture -- and let
25 the lawyers come over -- when you refer to a

1 picture, refer to the exhibit number in the
2 right corner, Seventy-five-A, and we'll hold it
3 up here.

4 A: Okay. This is picture number Seventy-five-A.
5 This is the very beginning of the revetment.
6 You can kind of see in the photograph there's
7 a fence post here. There's a fence by the
8 park. You can see how it's leaning out in the
9 photograph and kind of -- this is kind of
10 turning in towards Trenholm, if you will, which
11 reflects -- which is represented on the drawing
12 where the revetment turns at the very end. So
13 this is the very beginning on -- at the park
14 end of the revetment (indicating). And you can
15 see there's some marsh grass in front of that.
16 But, again, there's signs of erosion because
17 that post is leaning, that bank's continuing to
18 erode.

19 Q: Seventy-five-B.

20 A: This is Seventy-five-B. Again, following along
21 the park, you can see even more pronounced here
22 that erosion occurring and this vegetation is
23 falling off along this area (indicating). You
24 can see more of the fence and how it's leaning.

25 Q: All right. Seventy-five-C, is that in front of

1 the park?

2 A: No, that's much farther down. That's on down
3 that -- maybe even around where I called the
4 "bite."

5 The reason I took this photograph, I think it
6 was interesting because we were -- last week we
7 had some pretty high tides, about six, seven --
8 six to eight tides (sic). You can see a real
9 line here where that real high tide had caused
10 erosion even last week (indicating).

11 Q: And where's the escarpment on this? If you can
12 put your finger on Seventy-five-C.

13 A: Well, the escarpment is right here
14 (indicating). You can see right at the base of
15 that escarpment this line of erosion that's
16 occurring even last week.

17 Q: You said it's around the bend. Between this
18 location and the park, is there an escarpment
19 like the one that's shown in Seventy-five-C?

20 A: Oh, yes. Yes, this escarpment continues all
21 the way around. You'll see there's another
22 picture even farther down. It gets lower as we
23 get towards the very western end of it where
24 the terminus -- this escarpment becomes lower,
25 but it continues all the way around.

1 Q: What is Seventy-five-D? Is that farther down
2 the bank?

3 A: It's just farther down the bank. Again, you
4 can see the escarpment continuing right on
5 down. In fact, even this illustrates how it
6 begins this reveal much less here, maybe only
7 a couple of feet here, but you can see that's
8 probably four feet or so here (indicating).

9 Q: "Reveal" -- will you tell -- we don't know what
10 a "reveal" is. Will you tell me what a
11 "reveal" is?

12 A: The "reveal" is the height of the exposure of
13 escarpment. The height from the bottom -- from
14 the shoreline up to the top of the escarpment
15 is where I'm calling the "reveal". You can see
16 that erosion line continuing right on along,
17 all the way along there (indicating).

18 Q: How about Seventy-five-E?

19 A: Seventy-five-E I thought was interesting
20 because it shows --

21 Q: First, is this even farther down the shore?

22 A: This is almost at the terminus. We are
23 standing pretty close to the terminus on the
24 western end looking -- and it's interesting
25 because you can see how the marsh juts out here

1 (indicating) and the escarpment ends right
2 along here (indicating). That's the terminus
3 of the revetment at this point. I mean, it's
4 just so clear when you go out there where the
5 erosion -- this erosion ends.

6 THE COURT: Would the bulkhead be limited to the
7 height of the escarpment right there?

8 THE WITNESS: Yes. What we would do is to stop the
9 bulkhead actually short of the height is where
10 I'd like to have it, just below the top of
11 the -- if this is the escarpment (indicating),
12 I'd like to put the bulkhead just below it so
13 that we were right on the very edge of it, so
14 it would stop the erosion. But we don't want
15 it to be above the top edge of the erosion.

16 THE COURT: So the bulkhead there appears -- it
17 ? would only be about two or three feet?

18 THE WITNESS: Right. Correct. Yes, sir. Very,
19 very ...

20 THE COURT: How far would the block go out?

21 THE WITNESS: About 40 feet (indicating).

22 THE COURT: Well, if the block went out 40 feet, it
23 would pretty well cover all the sand that's in
24 that picture?

25 THE WITNESS: Yes. Yes, sir.

1 THE COURT: Why does the block have to go out that
2 far?

3 THE WITNESS: Well, because this is the zone of
4 erosion and we believe that the shoreline is
5 going to continue to erode. There's some
6 velocity erosion occurring along here, as well,
7 as the erosion's coming -- and that's part of
8 what's causing this whole phenomenon. You
9 remember that --

10 THE COURT: What kind of erosion?

11 MR. WALKER: Velocity.

12 THE WITNESS: Velocity erosion. What happens when
13 the velocity in the river gets high enough it
14 starts causing sediment transport, which causes
15 this to erode away, which then causes more and
16 more -- and it's not -- it's clearly not as
17 severe --

18 MR. WHITFIELD-CARGILE: Your Honor, I'm going to
19 object to that last bit of testimony about
20 velocity erosion and what's causing it. He's
21 an engineer. I don't think he's been at all
22 qualified -- in fact, he testified at his
23 deposition that he had no training geology,
24 geomorphology or any of that stuff. If he's
25 relying on his experts, that's all hearsay.

1 Q: As an engineer, do you consider these dynamic
2 principles that you just discussed in designing
3 a structure like this?

4 A: All the time.

5 THE COURT: Your objection is overruled.

6 Q: Now we're down to Seventy-five-F and there's a
7 picture of you in a blue shirt.

8 A: Yes.

9 Q: Now, where are you standing?

10 A: I'm standing at the terminus of this revetment.
11 You can see the slope (indicating), a pretty
12 significant slope here, but you can also see
13 the edge where this marsh clearly stops here,
14 which is the end of the revetment (indicating).

15 Q: Following up on Judge Anderson's question, how
16 high would the bulkhead part of the
17 revetment -- well, first let me ask, do you
18 think you, when you got to construction
19 drawings, you would have the vertical face of
20 a revetment -- excuse me, a vertical face of
21 the bulkhead where the escarpment tapers off?

22 A: Actually, what I want to do when we get in the
23 final design is, in these areas where there's
24 a shallow enough reveal, to actually just
25 lose -- just do away with the bulkhead and have

1 that revetment, just like we did Daniel Island
2 where we might just do a slight bit of fill
3 material in here so we can take it right up to
4 the very edge so it's just one continuous slope
5 instead of having this vertical face.

6 Q: If it's a vertical slope in that location and
7 if there were a creature trying to come up it,
8 assuming it -- if there's a creature that can
9 walk over the block, would there be anything to
10 step over when it got to the land under what
11 you're suggesting in these areas where there's
12 not much of an escarpment? Would it be level?

13 A: It would be basically level, right. You
14 wouldn't --

15 Q: Or uniform.

16 A: Uniform, yes. Level. Not level, because level
17 is level, but it would be uniform, without that
18 vertical face (indicating).

19 Q: And Seventy-five-G, being the final picture,
20 are you still standing in the same location?

21 A: Same location, just another shot showing how --
22 where that zone of erosion actually really
23 stops.

24 Q: I want to go back to Seventy-five-E, which is
25 one looking, I guess, west; the last two were

1 looking east. As you go beyond this area on
2 the bank, does the shoreline continue or does
3 it turn into something else?

4 A: It continues. It continues quite a ways.

5 Q: And then what happens? Where does the marsh
6 start?

7 A: Well, if I remember, some Spartina starts way
8 down here (indicating), which is -- we didn't
9 even walk that far. It was probably another
10 thousand, 1500 feet or so where the Spartina
11 is, I'm guessing, but it was a good ways from
12 where the end of the revetment would be.

13 Q: All right. Thank you. You mentioned or we
14 talked a little bit about what you would do in
15 the construction drawings to take into account
16 the very terminus or the last run of the
17 revetment. Do you have an estimation of the
18 length where you do not think it will be
19 necessary to have the vertical bulkhead part of
20 it, a plus or minus?

21 A: You know, I think it's about a thousand feet.
22 And, again, I'm just kind of guessing based on
23 my visit from last week, but there was a
24 fairly -- a good section of it where there was
25 a fairly shallow reveal or the escarpment was

1 very shallow.

2 Q: The first pictures we looked at show that there
3 was -- even though there was erosion going on
4 on the bank, there was some marsh grass in
5 front of the park where that bluff was.

6 A: Correct.

7 Q: When you got to construction drawings for that
8 particular run to reach that location, do you
9 anticipate that your construction drawings
10 would have the full 40 feet of the articulated
11 concrete block mat?

12 A: No. What I believe we would do, envision us
13 doing, is stopping it short of the marsh grass,
14 putting the bulkhead right at that escarpment
15 and then not putting the entire 40 feet there,
16 stopping it right at -- putting it right to the
17 edge of the marsh grass.

18 Q: When you do the construction drawings, is there
19 any location that you saw, having walked from
20 one end to the other, where you intend to put
21 articulated concrete block over existing marsh
22 grass?

23 A: No.

24 Q: If this permit is granted and assuming the
25 construction drawings are approved, does Thomas

1 & Hutton intend to monitor the performance of
2 the bulkhead/revetment system?

3 A: Yes, we would.

4 Q: Is that something that you routinely do?

5 A: We -- as a matter or course of record, we write
6 out sort of a maintenance plan for our clients
7 now on all these sorts of things.

8 THE WITNESS: One of the things that happens, Your
9 Honor, is when people build things that we
10 design, they think they build them and they
11 just last forever.

12 Like, for instance, people -- I don't know why,
13 but they think roads and things like that, you
14 build them, you never do anything and I think
15 you know the potholes that develop in roads and
16 things like that.

17 So in a revetment like this, there will be
18 maintenance that needs to be done. And several
19 years ago, because we had clients who weren't
20 really doing maintenance, we started routinely
21 writing a maintenance routine for our clients
22 because, you know, it's a built environment and
23 there just -- there will always be some
24 anomalies in the construction process,
25 anomalies in materials and there will be little

1 areas that have to be fixed or repaired.
2 And so we -- again, we did it as a defensive
3 measure on our part so that people would be
4 aware and know that they had to do maintenance
5 on these facilities. So, yes, there will be
6 some routine things that we will monitor. You
7 know, we would like to monitor it and we will
8 certainly ask the client to do so if he chooses
9 not to have us do it.

10 Q: Mr. Bohannon, to a reasonable degree of
11 engineering certainty, in your opinion, will
12 the bulkhead/revetment system as proposed most
13 probably stabilize the shoreline along the
14 river?

15 A: Yes, sir, I believe it will.

16 Q: At this point, Mr. Bohannon, I want us to go to
17 the permitting process itself. And I'm going
18 to ask you to get a notebook in front of you,
19 notebook number one.

20 Let me get my notebook number one.

21 MS. ARMSTRONG: Your Honor, we have a little bit of
22 a water spill that we might need to just
23 address.

24 THE COURT: You just want to take a break?

25 MS. ARMSTRONG: I mean, I hate to interrupt, but

1 in as inadmissible hearsay.

2 THE COURT: He didn't just admit the letter. He
3 just referenced it. I just overrule the
4 objection.

5 Q: Did you also at that time communicate to the
6 Agency that there had been a velocity study --
7 and I'm now referring to page three at the
8 top -- done by Applied Technology and
9 Management?

10 A: Yes, sir. Yes, sir, I did.

11 Q: And did you communicate in essence the
12 substance of what -- how that study did?

13 A: Yes. We, again, studied the velocities in the
14 river --

15 MR. WHITFIELD-CARGILE: Object, Your Honor. He's
16 talking about a study by ATM. That's hearsay.
17 Whatever ATM -- the ATM's study is all hearsay.
18 ATM's not here to respond.

19 THE COURT: Okay. Rephrase.

20 Q: Did you enclose graphics from the ATM study as
21 can be seen in the attached two graphics?

22 A: I think that I did. I'm pretty sure I did.

23 Q: All right. I'm going to ask you to go to page
24 28, at Exhibit Twenty-eight.

25 THE COURT: Petitioner's ...

1 MR. WALKER: Petitioner's Exhibit Twenty-eight. I

2 don't have the color version of it.

3 Twenty-eight is two illustrations.

4 Q: Are those the two scour potential illustrations
5 that you enclosed with your letter?

6 A: Yes.

7 THE COURT: Did you say Twenty-A?

8 MR. WALKER: Twenty-eight, I'm sorry.

9 THE COURT: So it's Petitioner's Twenty-eight, page
10 28.

11 MR. WALKER: I'm sorry, it's Petitioner's --

12 THE COURT: Twenty-eight.

13 MR. WALKER: -- Twenty-eight and it's --

14 THE COURT: Page --

15 MR. WALKER: It's page Bates stamped 287 and 288.

16 THE COURT: Okay.

17 MR. WALKER: It's Petitioner's Exhibit Twenty-eight.

18 THE COURT: All right.

19 Q: Did those two exhibits show the scour
20 potential, the hot spots?

21 MR. WHITFIELD-CARGILE: Object, Your Honor.

22 Q: As an engineer --

23 MR. WHITFIELD-CARGILE: That's hearsay, Your Honor.
24 That's a study prepared by ATM.

25 MR. WALKER: I'm asking him what they showed.

1 Q: Is this the type of material that you as an
2 engineer designing revetment structures
3 typically rely on in designing a revetment?

4 A: Yes, sir. We have to rely on a lot of other
5 professionals to provide us information.

6 Q: Do you take into account studies of velocity
7 that are done by firms such as ATM when they
8 look at water velocities adjacent or close to
9 the structure you're designing?

10 A: Yes, sir.

11 Q: Did you consider that in this case?

12 A: Yes, sir.

13 Q: Did you provide that information to OCRM?

14 A: Yes, sir, we did.

15 Q: Do you consider that information as an engineer
16 helpful to looking and analyzing the proposed
17 structure?

18 A: Yes, sir.

19 Q: Do those illustrations show the variations in
20 velocity that indicate where certain, quote,
21 hot spots are?

22 A: Yes, sir, they do.

23 Q: In this particular instance, for this
24 particular revetment, based on the materials
25 you received from ATM about the scour

1 potential, are the hot spots -- or, in other
2 words, is the water velocity the same
3 throughout the whole length of the revetment?

4 MS. ARMSTRONG: Objection, Your Honor.

5 Q: Is this something that you typically take into
6 account, relying on material -- findings of
7 velocity by entities such as ATM?

8 A: Yes, sir, it is.

9 THE COURT: You want to ask the question again?

10 Q: Mr. Bohannon, based on the information that you
11 received from ATM about water velocities, do
12 you have an opinion as to whether the water
13 velocity that would be against this structure
14 is the same at all locations along its length?

15 THE COURT: Did you have an objection,
16 Ms. Armstrong?

17 MS. ARMSTRONG: Your Honor, it's just if he's going
18 to be testifying about -- it sounds like he's
19 getting ready to cross into hearsay, to me.

20 THE COURT: Well, the Rules of Evidence set forth
21 that he's been laying the groundwork on that,
22 that an expert can rely upon hearsay if it's
23 commonly relied upon in the field of the expert
24 in order for them to reach an opinion in the
25 area of their expertise.

1 MS. ARMSTRONG: Right. But if he's just reciting
2 the opinion that's in these documents, that's
3 not him coming up -- using these documents to
4 formulate his own opinion.

5 THE COURT: Well, I said if he's used it to
6 formulate his own opinion.

7 MS. ARMSTRONG: Okay. If it's his own opinion, then
8 I'll withdraw the objection.

9 THE COURT: All right.

10 MR. WHITFIELD-CARGILE: Your Honor, I realize that
11 experts can rely upon hearsay in forming their
12 opinion, but I don't think you can -- this is
13 expertise beyond expertise of an engineer.
14 This is expertise of some type of hydrologist,
15 I think.

16 THE COURT: Well, he's already testified that he
17 commonly relies upon this in reaching his
18 opinion, so ...

19 MR. WHITFIELD-CARGILE: I think if you go beyond the
20 scope of his expertise to hearsay within
21 someone else's expertise, I don't think that
22 that rule's that broad, you know, so I'll
23 continue to object.

24 THE COURT: I think I'll let the Rules of Evidence
25 speak for themselves. If you could ask the

1 question again related to him reaching his
2 opinion.

3 Q: Do you have an opinion as to whether the water
4 velocity would be constant at all locations
5 across the length of this revetment?

6 A: Yes, I do.

7 Q: What's that opinion?

8 A: My opinion is that it will vary across the
9 length of this revetment.

10 Q: Do you have an opinion as to whether or not
11 most probably there would be concentrated areas
12 or hot spots at certain locations?

13 A: Yes, I do. And it is that there will be some
14 hot spots here or some areas of higher
15 velocity.

16 Q: Is that unusual in a river bend such as this on
17 an outer river bend of a tidal river such as
18 this?

19 A: No, I don't think it's unusual.

20 Q: Would you expect to find it?

21 A: You would expect to find varying velocities.

22 Q: Did you provide OCRM the information from ATM
23 indicating those hot spots?

24 A: Yes.

25 Q: Going back to your letter where we started this

1 A: Well, they didn't even express those. We just
2 heard they had a concern about those.

3 Q: Was there any animal that they got back to you
4 about stating that they had a concern that
5 there might be an adverse impact?

6 A: No, sir.

7 Q: Mr. Bohannon, in your many years of handling
8 applications like this for revetments and
9 bulkheads, has OCRM ever denied one in the
10 entirety like this -- I mean, denied one like
11 this where they only granted ten percent of the
12 requested revetment?

13 A: Not to my recollection, no, sir.

14 Q: To your knowledge, has OCRM ever denied a
15 revetment or bulkhead permit in any of -- that
16 you've handled in part of wholly for negative
17 cumulative impacts?

18 A: No, sir, I don't remember one.

19 Q: Mr. Bohannon, you mentioned that your firm has
20 done other revetments on Kiawah including one
21 that involved articulated concrete block?

22 A: Yes, sir.

23 Q: What would be the location of the articulated
24 concrete block revetment?

25 A: On Governor's Drive on the inland side of

1 Cinder Creek where Governor's Drive crosses --
 2 it abuts Cinder Creek on one side and one of
 3 the lakes -- I forget the name of it -- Egret
 4 Pond on the other side.

5 Q: Was the permit for that revetment approved by
 6 OCRM?

7 A: You know, I don't remember. It probably -- if
 8 the permit was required, it probably was. That
 9 was done a long, long time ago.

10 Q: All right. Are you familiar with what that
 11 looks like today?

12 A: Yes, sir, I am, very familiar.

13 Q: Has vegetation -- what has vegetation done?

14 A: It's completely covered it. If you didn't know
 15 that the revetment was there, you may not be
 16 able to find it.

17 Q: I'm going to hand you a series of photographs
 18 and ask you if you can identify those as
 19 photographs of the area where the revetment is
 20 on Cinder Creek at high side.

21 A: Yes, sir. This is KDP1281-A and -- yes, it
 22 is -- KDP1281-A, B, C, D, and E and F, yes.

23 Q: This is a high tide picture, so I need to ask
 24 you whether or not the articulated concrete
 25 block sticks above the high tide.

1 A: (Witness complies.)

2 Q: And you said that that structure is -- as y'all
3 designed it, it's going to be 40-feet wide; is
4 that right?

5 A: Right.

6 Q: Do you have a copy of DHEC Exhibit Twenty?

7 A: I don't know.

8 Q: It was admitted into evidence yesterday. I'm
9 not sure where that might be. It's a copy of
10 this PowerPoint presentation. This is what it
11 looks like on the front.

12 MS. ARMSTRONG: If it's all right with the parties,
13 I've got a copy of Exhibit Twenty. Can I just
14 hand him a copy?

15 MR. WALKER: That's fine.

16 MS. ARMSTRONG: Actually, I'd like to -- if you
17 don't mind, Your Honor, I'm going to share with
18 the witness since I've only got one copy.

19 Q: Now, you're -- I want you to look at Exhibit
20 Twenty. This was admitted yesterday as a study
21 by Dr. Oertel and Dr. Basco.

22 A: Okay.

23 Q: And their advice, they actually recommend that
24 the mattress be increased from 40 feet to 60
25 feet out into the river; isn't that true?

1 A: Yes.

2 Q: Okay. And don't they actually also recommend
3 that training jetties are installed to prevent
4 any toe scour from occurring?

5 A: Yes.

6 Q: Okay. And they actually designed some --
7 presented designs of what those training
8 jetties would look like, didn't they?

9 A: I would really call those concepts; I wouldn't
10 call those designs.

11 Q: So on the bottom of page seven on that exhibit,
12 when they've got structures that are extending
13 into the Kiawah River that are identified as
14 300 feet in length extending 125 feet out from
15 the river in one location and then another
16 structure, can you tell what the measurements
17 are on that structure?

18 A: It's 100 feet on one leg and 50 feet on the
19 other leg -- 150, excuse me, on the other leg.

20 Q: A those structures would be extending out into
21 the Kiawah River.

22 MR. WALKER: Objection, Your Honor.

23 Q: Isn't that right?

24 A: Yes.

25 THE COURT: Whoa. Let me deal with the objection.

1 A: Yes.

2 Q: Now, if one wanted to see the most detailed
3 drawing that Thomas & Hutton has made, would it
4 be the drawings in the permit application; is
5 that true?

6 A: I believe so, yes.

7 Q: So sheet seven of seven on the permit
8 application -- have you got that in front of
9 you? I believe it's Exhibit Number Eleven.

10 A: The Corps of Engineers permit?

11 Q: Wait just a minute to find that.

12 A: It is Corps of Engineers permit, yes.

13 THE COURT: You want him to talk about that?

14 MS. ARMSTRONG: No, not the Corps. It's actually
15 Forty-four, Exhibit Number Forty-four.

16 THE COURT: I kind of sensed a door opening there.

17 MS. ARMSTRONG: I'm closing it as quickly as I can,
18 Your Honor.

19 Q: So --

20 A: Forty-four?

21 Q: Yeah, Exhibit Forty-four. If you look on sheet
22 seven of seven -- it's identified as seven of
23 seven on the upper right-hand corner of your --

24 A: Yes, sheet nine of eleven of the permit?

25 Q: Right. That's right. And that actually shows

1 a vertical wall that would be extending up from
2 the revetment; is that right?

3 A: Yes, it does. It says -- actually what it
4 shows is a retaining wall and it says "top
5 elevation varies, to be determined by
6 topography and final engineering design," like
7 I described to the Judge earlier.

8 Q: Okay. But there would be -- you testified that
9 there might be about a thousand feet where
10 there wouldn't be a vertical bulkhead. That
11 leaves another 1800 feet where there would be
12 a vertical, straight up and down area between
13 the top elevation of the revetment and the
14 actual high ground; is that accurate?

15 A: Yes. In general terms, yes.

16 Q: Okay. Mr. Walker was asking you about whether
17 you've ever had a bulkhead permit applied for.
18 I just want to make sure it's clear. You've
19 never actually applied for a bulkhead permit,
20 revetment permit, that is anywhere near 2800
21 feet in length, have you?

22 THE WITNESS: Your Honor, we actually designed one
23 on Daufuskie that was pretty long at Melrose.
24 I don't know the exact length, but it was along
25 an entire fairway, which is three, 400 yards,

1 so it was, you know, in that range.

2 Q: What's the longest bulkhead permit application
3 you've ever applied for?

4 A: You know, I really don't know.

5 Q: What about the one that you were speaking about
6 on Cinder Creek, notwithstanding my objection
7 to the admission of those photographs, how long
8 was that structure?

9 A: I think it's a few hundred feet.

10 MS. ARMSTRONG: Beg the Court's indulgence for just
11 a minute.

12 Q: Mr. Bohannon, the structure being proposed is
13 2,783 feet; isn't that true?

14 A: Correct.

15 Q: Okay. And it would be 40 feet wide --

16 A: Right. Correct.

17 Q: -- out into the channel, right?

18 A: (Nods head affirmatively.)

19 Q: Can you calculate how many square feet that is
20 for me?

21 A: I could, but I don't have a calculator. I used
22 to be able to do it in my head a long time ago,
23 but --

24 Q: How about a pen and a piece of paper?

25 A: Sure. I could still do long multiplication.

1 I could turn my cell phone on and do it with my
2 calculator there, but it might ring.

3 THE COURT: You can go ahead and turn it on for
4 that.

5 MS. ARMSTRONG: I don't have a problem --

6 THE COURT: Go ahead and turn it on.

7 MS. ARMSTRONG: I don't have a problem with that at
8 all, Your Honor.

9 THE WITNESS: What was that number?

10 MS. ARMSTRONG: 2,783 feet in length by 40 feet in
11 width.

12 THE WITNESS: I got just a slight problem, Your
13 Honor. I don't use this thing very much.

14 THE COURT: Well, I think star is multiply.

15 THE WITNESS: Well, I keep mashing that and it
16 doesn't seem to want to do that for me for some
17 reason.

18 MS. ARMSTRONG: I mean, it's not --

19 THE WITNESS: I'm sorry.

20 Q: It's not too difficult. I mean, I think I can
21 give you a sheet of paper. I mean, being an
22 engineer, you work with numbers a lot, don't
23 you, Mr. Bohannon?

24 A: I do. Let me turn this back off. Sorry.
25 Okay. 2,783 times -- if I did that right, it's

1 111,320 square feet.

2 Q: Okay. And so that's the total amount of --
3 that's the area that will be taken up by the
4 revetment structure; is that right?

5 A: Pretty much.

6 Q: Okay. And how many square feet are there in an
7 acre?

8 A: Forty-two thousand two hundred and fifty.

9 Q: And so that's about how many acres? Can you --
10 I know the math is a little bit longer there,
11 but ...

12 A: A little less than three acres.

13 Q: A little less than three acres. So this
14 structure is actually going to be on a little
15 less than three acres of beach area that's
16 between the mean high watermark and mean low
17 watermark; is that true?

18 A: Of shoreline, yes.

19 MS. ARMSTRONG: I don't have any other questions,
20 Your Honor.

21 THE COURT: Mr. Whitfield-Cargile?

22 MR. WHITFIELD-CARGILE: Yes, Your Honor.

23 Oh, I'm sorry. Beg the Court's indulgence one
24 minute. Not as organized as I should and I
25 apologize.

1 THE COURT: I'll just ask, what's the purpose?

2 MR. WHITFIELD-CARGILE: I'll think about that, Your
3 Honor. I might not -- that might not be
4 necessary.

5 Q: You said you recommended hiring Drs. Oertel and
6 Basco?

7 A: Yes.

8 Q: Was that you specifically recommending them or
9 was that Patrick Rogers that made that
10 recommendation to you?

11 A: I believe it was me.

12 Q: Okay. Are you aware of Patrick Rogers is a
13 student of Dr. Basco?

14 A: He's a student of Dr. Basco?

15 Q: I'm asking if you're aware if he was at the
16 time y'all obtained Dr. Basco.

17 A: No, I was not.

18 Q: Okay.

19 A: I'm still not sure he was a student of
20 Dr. Basco.

21 Q: You said you came with the 2,783-foot figure by
22 looking at where there was a scarp line?

23 A: Yes.

24 Q: So if there's a scarp line, you want a
25 40-foot-wide revetment?

1 A: Yes, correct.

2 Q: Did you have any studies that said that you
3 need a 2,783-foot scarp line before you applied
4 for that?

5 A: There was some studies that Dr. Oertel and
6 Dr. Basco had done.

7 Q: But they didn't recommend 2,783 feet of
8 revetment, did they?

9 A: I don't think they made an exact recommendation
10 on the linear footage of it.

11 Q: All right. One of the reasons you say you need
12 a revetment where this site is, or the neck of
13 the river, is because of the velocities of the
14 river that are eroding the bank; is that right?

15 A: Right, and that was confirmed -- actually, the
16 exhibit that Ms. Armstrong objected to is the
17 one that actually graphically displays that
18 information.

19 MR. WHITFIELD-CARGILE: Well, I'm going to ask the
20 Court to strike his statements of what that
21 report said. That was nonresponsive to my
22 question. I was asking him if that was the
23 basis of the revetment and I'm going to take
24 that somewhere else.

25 THE COURT: I'll sustain that.

1 Q: You say that marsh grass can grow in the
2 concrete blocks?

3 A: I have seen evidence -- I've seen other of
4 these ACB mats we've put in where marsh grass
5 grows -- marsh grass, as well as other
6 vegetation grows in them.

7 Q: There's no vegetation on that sandy bank right
8 now, is there?

9 A: There is some down near the park, yes.

10 Q: But where you're proposing the revetment,
11 there's no vegetation, really.

12 A: We don't propose to put it on the vegetation,
13 but there -- in some of the area where the
14 revetment is proposed, there is marsh between
15 the edge of the escarpment and the creek.

16 Q: Well, let's look at -- do you have Exhibit
17 Seventy-five-C in front of you? It wasn't C.
18 Seventy-five-D, do you have that in front of
19 you?

20 A: Seventy-five-B, yes, sir, I do.

21 Q: And if we can kind of show this to the Judge.
22 There's no -- the revetment is going to go from
23 the scarp line all the way down to just below
24 mean low water, right?

25 A: That's correct.

1 Q: Okay. And there's no vegetation between the
2 scarp line and just below mean low water, is
3 there?

4 A: That's correct.

5 Q: And is one of the reasons there's no vegetation
6 is because of the velocities on that river? It
7 doesn't allow vegetation to grow, does it?

8 A: You know, I'm not absolutely certain whether
9 there is or not. You know, one of our hopes is
10 we're going to put this in and we believe that
11 very likely it will filled with sand and just
12 sand would cover it, just like in other places
13 marsh mud has covered it and Spartina has
14 covered it.

15 I mean, the great thing about this stuff is,
16 when we put it in, it's become naturalized.
17 And so we thought, in this instance, the
18 greatest opportunity we had to protect this
19 bank and to preserve as much of the natural
20 environment as we could is use this product.
21 That's why we selected it.

22 Q: But the concrete block sitting on the shore
23 isn't going to slow down the velocity of the
24 river, is it?

25 A: I'm sorry, I'm not sure what you said.

1 Q: The concrete block sitting on the shore isn't
2 going to slow down the velocity of the river,
3 is it?

4 A: No.

5 Q: Okay. So there's still going to be a problem
6 with trying to get something to grow in there,
7 concrete block or not.

8 A: But it could very well trap the sand. Again,
9 this thing is -- if you've ever seen one, it
10 has all these hollow voids in it and we believe
11 and hope that it's going to trap the sand.

12 Q: Well, there's sand there now, isn't there?

13 A: Yes.

14 Q: Okay. And there's nothing growing in that sand
15 now, is there?

16 A: Not in the picture you're referring to.

17 Q: Okay. You said that you've presented a
18 complete solution to the erosion problem here,
19 right?

20 A: Yes.

21 Q: But you've -- as Ms. Armstrong pointed out, you
22 haven't followed the advice of Drs. Oertel and
23 Basco and applied for training jetties and
24 lengthened the length of the mattress, right?

25 A: We have not applied for training jetties nor

1 have we applied to lengthen the mat.

2 Q: I think you said either today or in your
3 deposition that you can kind of take the
4 wait-and-see approach and see if you need them
5 later.

6 A: Yes.

7 THE WITNESS: Your Honor, if I could tell you what
8 we propose is, we think we should put it in --
9 again, this is what we do at Kiawah. We try to
10 take the minimal approach.
11 We believe based on all we've done this is --
12 has a high degree of success. We believe it's
13 going to be adequate. We also think there
14 could be some hot spots along there where we
15 have some accelerated erosion at the end of
16 that revetment. And we believe the proper
17 thing to do is to put this in, to monitor it.
18 If we have to come back in a few years and ask
19 for a permit to extend this -- and we think at
20 that time we could put riprap down at that end
21 because it will be a lot less expensive and
22 easier to do, but would by and large protect
23 it, that that would be a proper course of
24 action, not only for our client, because it
25 would be a good thing to do from an economical

1 standpoint, but also that we wouldn't armor any
2 more of the shore than we'd have to. That's
3 what we'd like to do and that's what we've said
4 all along; we've been consistent in that.

5 That's what -- you know, we want to protect the
6 bank, we want to do it in the best way we can.

7 **Q:** Taking a wait-and-see approach isn't exactly
8 putting forth a comprehensive solution to
9 erosion, is it?

10 **A:** Well, we could have asked for a permit to armor
11 the entire river, from one side to the other.
12 That would have been -- I mean, to an extreme,
13 that would have been a complete way to do that.
14 But, again, we believe based on the information
15 we had that we've taken the correct approach
16 and then we stand by that approach.

17 **Q:** Then you agree that training jetties is kind of
18 an extreme -- you said they're ugly.

19 **A:** You know, what I liken it to is that -- again,
20 I'll go back to that period from 1985 to 1988.
21 I was asked -- we were asked to design a bridge
22 at Kiawah. The folks who were in control then
23 wanted us to put a Jersey rail on the bridge.
24 I told my partners that we were going to get
25 fired over this job because we have somebody

1 A: I'm sorry, I didn't understand that.

2 Q: Your own experts have recommended training
3 jetties. And if you look at this in the
4 context of future erosion control structures
5 here, there's a high likelihood of these
6 training jetties coming in, right?

7 A: I don't know. They recommended geotubes, as
8 well. We didn't go with that alternative,
9 either. Again, the geotube is not appropriate
10 here at Kiawah. It's just not appropriate.

11 Q: Why?

12 A: If we have -- you know, if we have to get
13 there, we'll get there, but that's not what we
14 want -- that's not what we want to try, not
15 what we want to do.

16 Q: Why is a geotube inappropriate?

17 A: Gosh, it's ugly as sin. I mean, these things
18 are big old tubes, like six feet in diameter,
19 made out almost like of pantyhose material and
20 you pump them full of dirt and you put them on
21 the beach. If one gets ruptured, you've got
22 that scattered all up and down the beach.
23 They're very effective, but that's not what --

24 Q: So esthetics is important.

25 A: Sure it's important.

1 Q: You would agree with that, right?

2 A: Yes.

3 Q: Okay. Well, you're taking a wait-and-see
4 approach on these training jetties and
5 increasing the width of the mattress. Why
6 can't you take a wait-and-see -- you could take
7 a wait-and-see approach before you revet this
8 whole 2,783 feet, couldn't you?

9 A: You know, if the Department were willing to
10 condition a permit that we do a vast majority
11 of it --

12 Q: I'm not asking you that. I'm asking you --

13 THE COURT: Wait a second.

14 MR. WALKER: Your Honor, he was answering the
15 question.

16 THE COURT: Let him answer the question.

17 MR. WHITFIELD-CARGILE: I apologize, Your Honor.

18 A: I said if the Department were willing to issue
19 a permit with a condition -- in fact, if we had
20 been able to sit down with them and discuss it
21 and they had proffered that, "Mr. Bohannon, are
22 you willing to recommend to your client that we
23 armor the worst section of this and we'll put
24 a condition on the permit that if this erosion
25 continues we'll allow you to add some more of

1 it," I'd have said, "Absolutely. We'll move
2 ahead with that."

3 MR. WHITFIELD-CARGILE: I think I'm going to object
4 to that and ask that that that be stricken.
5 He's alluding to what could have been
6 settlement negotiations. Is that broad enough
7 to get in?

8 MR. WALKER: Your Honor, he was saying it in
9 response --

10 THE COURT: I overrule the objection. It was
11 responsive to the question.

12 Q: But you could take a wait-and-see approach
13 before you armor 2,783 feet, right?

14 A: We can -- under proper conditions from
15 the Agency, if they would allow us to do
16 that, we could not put in the entire
17 almost 3,000, yeah. We could put in, you
18 know, the vast majority of it. We could go
19 out, again, and look at the very, very
20 worst sections and maybe do some different
21 things.

22 Q: Well, your photos show that the park is the
23 very worst section, don't they?

24 A: No, it doesn't.

25 Q: At your deposition you agreed that the erosion

1 is most severe at the park, right?

2 A: I'm not sure exactly what -- if I said that's
3 the most severe. I think what I told you in my
4 deposition was the most severe erosion is
5 happening right in the bite where it's moving
6 about eight, ten feet a year. Now, the erosion
7 is severe at the park, if you look at it. I
8 mean, I showed you pictures where the fence is
9 falling in. It's certainly severe there. It
10 needs to be fixed.

11 Q: Well, if you got a permit for 270 feet right
12 there at the park where the erosion is most
13 severe, that doesn't prevent you from coming
14 in, you know, ten years down the road and
15 trying to get a erosion control structure, does
16 it? You don't have to have a condition on a
17 permit that says you can come back and try
18 again later, does it? Or do you?

19 A: I'm not sure I understand what you're asking.

20 MR. WHITFIELD-CARGILE: I beg the Court's indulgence
21 for just one moment, real quick.

22 (Off the record.)

23 Q: I'm going to show you what's been admitted as
24 Exhibit Four. It's right here beside you on
25 the ledge there.

1 A: Uh-huh (affirmatively responds).

2 Q: You said that you didn't hear anything back
3 from the Department whenever you submitted
4 information; is that right?

5 A: I said with the exception of notice about the
6 failure to provide the affidavit for
7 notification.

8 Q: Okay. Well, let's look at page -- one, two,
9 three -- four of Exhibit Four, September 25th
10 letter to Bill Eiser to Mr. Ray Pantlik.

11 A: (Reading.) Okay.

12 Q: And in that letter, he confirms receipt of your
13 information and tells you it will be
14 considered, doesn't he?

15 A: You're right. He did.

16 Q: Okay.

17 A: I stand corrected. I see I was even copied on
18 it. But I noticed he didn't ask for anything
19 else.

20 Q: And in October he sent you an e-mail notifying
21 you that PRC's withdrawal of its application
22 would be factored into their decision on your
23 permit, right?

24 A: Where is that?

25 Q: Sorry, it's the third page of this exhibit,

1 sent you an e-mail -- sent Patrick Rogers an
2 e-mail.

3 A: Yes.

4 Q: So you weren't just left out in the dark with
5 no communication from OCRM, were you? That's
6 not really a fair statement, is it?

7 A: You're right. Those two pieces of
8 correspondence did come. What I was
9 specifically referring to in terms of
10 correspondence from OCRM was we kept asking if
11 you needed additional information and we wrote
12 letters, we called asking if you needed
13 additional information in order to make a
14 decision and we never got a response to those
15 requests.

16 Q: Okay. You said that -- Ms. Armstrong asked you
17 if you'd ever applied for a permit this long
18 before. And the only one you could think of
19 was Melrose?

20 A: There was a permit at Melrose for --

21 Q: When was that?

22 A: Pardon me?

23 Q: When was that?

24 A: It was probably '85, '86, '87, somewhere along
25 in there, I'm guessing.

1 Q: Okay. Do you know how long that was?

2 A: It was the length of the fairway.

3 Q: Was there already a bulkhead down there?

4 A: Yes.

5 Q: Okay. So it wasn't a new structure.

6 A: It was a bulkhead that was driven behind the
7 critical line.

8 Q: So it wasn't even in the critical area.

9 A: Well, we ultimately had to do some permitting
10 in the critical area.

11 Q: But not for 2,783 feet.

12 A: I think not.

13 Q: Okay.

14 A: That's a pretty unique distance.

15 Q: Pretty unique distance?

16 A: (Nods head affirmatively.)

17 MR. WHITFIELD-CARGILE: No other questions, Your
18 Honor.

19 THE COURT: Redirect?

20 MR. BOHANNON - REDIRECT EXAMINATION BY MR. WALKER:

21 Q: There were questions about the location of the
22 revetment. Did Thomas & Hutton prepare an
23 illustration comparing the location along the
24 bank where it was requested and where it was
25 granted? And I'm going to refer you to

1 Plaintiff's -- excuse me, KDP's Exhibit One.

2 A: Yes.

3 Q: To your knowledge, does that constitute a fair
4 and accurate representation of what you
5 understand to be the permitted location versus
6 the location that's not permitted?

7 A: Yes, it does.

8 MR. WALKER: All right. We'd asked that that be
9 admitted.

10 THE COURT: That would be ...

11 MR. WALKER: It would be KDP's Exhibit One.

12 THE COURT: Any objection?

13 MS. ARMSTRONG: No objection, Your Honor.

14 MR. WHITFIELD-CARGILE: No objection, Your Honor.

15 THE COURT: It's admitted.

16 (KDP's Exhibit Number One was admitted into
17 evidence.)

18 Q: And questions about the training jetty, is
19 there any current intent to apply for training
20 jetties?

21 A: No current plan. No current intent.

22 Q: Does your opinion about the sufficiency of this
23 structure to stabilize the bank still stand
24 without training jetties?

25 A: Yes.

1 MR. WALKER: That's all I have, Your Honor.

2 MS. ARMSTRONG: Nothing on recross, Your Honor.

3 MR. WHITFIELD-CARGILE: Nothing, Your Honor.

4 THE COURT: All right. I've got a few questions for
5 you.

6 THE WITNESS: Yes, sir.

7 THE COURT: In the area where the -- what's the --
8 "rise"? You had a term.

9 THE WITNESS: The reveal?

10 THE COURT: Reveal. Where the reveal is not as
11 high, is that indicative of less of a need for
12 the revetment, or is it just simply an
13 indication of the lay of the land?

14 THE WITNESS: Well, the erosion certainly is not as
15 severe there. So, you know, my estimation is,
16 is it needed as badly there as the other
17 location? Certainly not, because, I mean, you
18 can even look at the cross slope of the beach
19 is different in that area. It's still eroding,
20 but it's not eroding as rapidly as it is down
21 in what we call the "bite."

22 THE COURT: Well, when you talked about the "hot
23 spots," is that what you mean by the "bite"?

24 THE WITNESS: Well, the bite is certainly one of
25 those, but if you look at the photograph that

1 was prepared that showed the velocity, they
2 kind of get scattered along that whole area
3 (indicating). And if you look at an aerial
4 photograph, it kind of extends from -- there's
5 a creek on Seabrook that comes in kind of
6 directly across from where we start and that's
7 where those areas of velocity started picking
8 up.

9 Now, if you ask me: Could we stand to shorten
10 it some and monitor it over time? You know,
11 that wouldn't -- that might not be a bad
12 solution. In fact, when this permit's issued,
13 I may recommend to my client that we actually
14 do that, turn it in and let's just put maybe
15 something along the very escarpment on that end
16 and then monitor this until the -- until we're
17 getting close to the end of the permit and then
18 if it's stabilized, we may as for -- what I
19 would do is ask for an extension of the permit,
20 so we don't lose our right to come back and do
21 that if the erosion exacerbates and begins to
22 accelerate in that area. But, you know, it
23 would be a way to, one, save money and not to
24 put it all out there at one time.

25 And, Your Honor, if you could -- you know, I'd

1 love to take you out there and show you. You
2 could see where the erosion -- I mean, it's
3 just so clear where it stops and starts. And,
4 again, where it's most severe, it's just so
5 apparent when you're on site.

6 THE COURT: Well, can you show me the exhibit where
7 you think the erosion -- step up here. I think
8 it was a poster board.

9 THE WITNESS: Well, the worst part --

10 MR. WALKER: We're referring to Exhibit Forty-eight-
11 C.

12 THE COURT: Yeah.

13 THE WITNESS: Again, the revetment, as planned and
14 where I showed you the photograph starts right
15 here (indicating) and goes all the way to right
16 there (indicating). The worst area is probably
17 from about midpoint of the park, from about in
18 here (indicating), to probably about right
19 along in here somewhere (indicating). And I'm
20 guessing based on that it's almost 3,000 feet
21 total, so it's about --

22 THE COURT: But you also referenced the channel. I
23 see that coming out. Is that --

24 THE WITNESS: This creek?

25 THE COURT: Is that the creek you're referring to?

1 THE WITNESS: Yeah. The creek -- this is the creek
2 off of Seabrook, which is immediately adjacent
3 to this area.

4 THE COURT: So immediately across from that, is that
5 where you're saying that the velocity's the
6 greatest?

7 THE WITNESS: Well, the velocity's going to be
8 greatest down in this area (indicating).

9 THE COURT: Okay.

10 THE WITNESS: Again, because this is the narrowest
11 part of the river, so the velocity is going to
12 be greatest where it's narrowest.

13 THE COURT: Well, is the revetment, based on your
14 expert opinion, needed -- when you said that
15 you would consider a wait-and-see approach for
16 some of the revetment, what area would you
17 think would be possible to do a wait-and-see
18 approach?

19 THE WITNESS: I think somewhere about this last
20 thousand feet down here (indicating).
21 Again, what I would -- if you so ruled that we
22 were entitled to the entire permit, what I
23 think I'm inclined to ask -- suggest to my
24 client is that he put it all in from about here
25 (indicating) to along in here somewhere

1 (indicating). It's about 2,000 feet. Probably
2 do a little softer approach down here
3 (indicating), again, because there's some trees
4 right on the edge that I would -- that we'll
5 try to figure out a way to maybe use -- go back
6 to OCRM, maybe put some stone or something to
7 stop the erosion, but then perhaps something a
8 little different, and then a little bit of the
9 articulated concrete block mat along here
10 (indicating), put the whole 40 feet along here
11 (indicating). That's just something to protect
12 that edge. We'll tuck this in and then we'll
13 monitor these areas (indicating), in case we
14 need to put more width here (indicating), and
15 we'll monitor this to make sure we do not cause
16 some adverse effect by stopping along in here
17 (indicating). That's -- again, I would suggest
18 that to him. I'd like to have the entire
19 permit. You know, if it continues to erode,
20 then we'll come back and quickly add this
21 (indicating), but I'd like to monitor it.

22 THE COURT: When you say it's something that -- what
23 was it? Something to ...

24 THE WITNESS: Something along that escarpment --

25 THE COURT: Yeah.

1 THE WITNESS: -- to stop the erosion on that
2 escarpment. And maybe take a couple of these
3 mats, do a little bit of fill just along that
4 edge. And, actually, where we've got about a
5 two-foot escarpment, we could come in with a
6 little bit of fill, place a couple of these
7 mats side to side. That would stop that
8 erosion and allow the grasses that are -- I
9 can't tell you the name of all the plants that
10 are growing up on the marsh.

11 THE COURT: It wouldn't go all the way down the
12 shoreline, is that what you're getting at?

13 THE WITNESS: No, no. Four to eight feet or
14 something, just enough to stabilize that
15 through this area (indicating). That would
16 seem to be a really -- I think that's what I
17 would want to recommend to our client.
18 There's one or two little areas where there's
19 some high dunes. We'd have to figure out
20 what -- maybe we might put a little bit of
21 bulkhead along where the dunes are, again, to
22 preserve the dunes from eroding away.

23 THE COURT: All right. Thank you.

24 THE WITNESS: Yes, sir.

25 THE COURT: Follow up on what I have asked?

1 MS. ARMSTRONG: I just have a couple, Your Honor.

2 THE COURT: Well, then let Mr. Walker go first if he
3 wants to ask.

4 MR. WALKER: I don't have any further questions.

5 THE COURT: Okay.

6 MR. BOHANNON - RECROSS-EXAMINATION BY MS. ARMSTRONG:

7 Q: Mr. Bohannon, your client, Mr. Long, was pretty
8 upset with you when he found out what the price
9 was going to be of that structure, wasn't he?

10 A: He wasn't happy.

11 MR. WALKER: Your Honor, this isn't responsive to my
12 redirect.

13 MS. ARMSTRONG: The very next question I'm getting
14 there, Your Honor.

15 THE COURT: Okay. You can ask -- I would think it
16 would be logical that nobody would be thrilled
17 to spend \$5 million, but go ahead.

18 MS. ARMSTRONG: Right.

19 Q: So part of what you just told the Court about
20 recommending only constructing part of this,
21 that would sort of get you out of the hole of
22 the expense and the anger that your clients got
23 with you because it wouldn't cost as much if
24 you didn't have to build the whole structure;
25 isn't that right?

1 A: No, I just threw that on him. I mean, he
2 didn't know I was going to say that today.

3 Q: He what?

4 A: He didn't know I was going to say this today.
5 I mean, that's -- you asked me my -- when you
6 asked my opinion, I gave the Judge my opinion.
7 I don't -- we hadn't even talked about that.

8 Q: But it would cost less if you didn't have to
9 install the whole structure, wouldn't it?

10 A: Well, certainly?

11 MS. ARMSTRONG: I don't have anything else, Your
12 Honor.

13 MR. WHITFIELD-CARGILE: Just a couple, Your Honor.

14 MR. BOHANNON - RECROSS-EXAMINATION BY MR.

15 WHITFIELD-CARGILE:

16 Q: Mr. Bohannon, you're an engineer, right?

17 A: Yes.

18 Q: You're not a geologist?

19 A: No.

20 Q: You're not a hydrologist?

21 A: No.

22 Q: You're not -- you don't have expertise in
23 geomorphology?

24 A: No.

25 Q: Okay. Or hydrodynamics? You don't have

1 expertise in hydrodynamics?

2 A: I know a little bit about it, but I'm not
3 expert in it.

4 Q: Know a little bit about it. So as an engineer,
5 you design structures, right?

6 A: We design structures.

7 Q: You don't assess the need for the structures.
8 You rely on other consultants for that, right?

9 A: I don't think I'd push it that far. It's
10 pretty obvious. I mean, you saw the
11 photographs. There's obviously a need for some
12 protection of that bank. I mean, even somebody
13 unskilled and -- you know, an English major
14 could go out and see there's erosion there.

15 Q: Well, why we're talking about alternatives,
16 y'all have filed an application for a sheet
17 pile project with the Department, didn't you?

18 A: We did.

19 Q: And in that application, you applied for a
20 340-foot sheet pile wall; is that right?

21 A: I think that's the dimension.

22 Q: Do you remember in e-mail communications to
23 Mr. Long where you say that that's going to
24 provide the level of protection you need?

25 A: I don't remember, but I -- perhaps I did that.

1 If you'll show me the e-mail, I can --

2 Q: Well, is that accurate with your recollection?

3 Do you recall --

4 A: I'd like to see the e-mail, if I could.

5 THE COURT: Mr. Whitfield-Cargile, is that

6 responsive to the questions I asked?

7 MR. WHITFIELD-CARGILE: Yes, Your Honor, I do think

8 it is. You were discussing alternatives and

9 alternative lengths.

10 THE COURT: Okay.

11 MR. WHITFIELD-CARGILE: And he suggested something

12 in excess of a thousand feet; I think closer to

13 1700 feet.

14 MR. WALKER: I object, Your Honor, because he's

15 mixing apples and oranges. As we talked about

16 on the various conference calls involving a

17 continuance and the discovery that they wanted

18 and we provided, what he's talking about

19 relates to the entirely separate application

20 that deals with --

21 THE COURT: I'll sustain the objection,

22 Mr. Whitfield-Cargile, because mine was

23 limiting it to the project at issue and you're

24 trying to go into another project. That

25 wasn't -- that's just not -- you had -- I mean,

1 you had your opportunity to cross-examine. You
2 could have gone into it then. I only brought
3 up a limited issue, so I sustain the objection.

4 MR. WHITFIELD-CARGILE: Okay. Well, I'd like to
5 proffer one more question, then, or I'd like to
6 ask one more question and I imagine it's going
7 to get the same objection, but I'm going to ask
8 it.

9 Q: It's entirely possible to build a deep-bed road
10 without any revetment, isn't it?

11 A: I'm sorry, I don't know what a deep-bed road
12 is.

13 Q: It's entirely possible to build a deep
14 foundation road, where the foundation is deeper
15 than mean low water, right?

16 A: (No response.)

17 Q: Essentially a bridge over land?

18 A: Is it possible to build a bridge over land?
19 Normally, a bridge means you're -- I mean,
20 you're bridging something.

21 Q: Okay.

22 A: So to build a bridge out at grade on land -- I
23 mean, you could build a structure. I don't
24 think it'd be called a "bridge," because you're
25 not really bridging anything. But I'm not sure

1 what you're asking.

2 Q: Well, you can build a road, a deep foundation
3 supported road, where you wouldn't need --
4 where if the river keeps eroding towards that
5 road, if it ever got underneath the road, you'd
6 have essentially a bridge in place, right?

7 A: In theory, I guess you could.

8 Q: You're an engineer, right?

9 A: Right.

10 Q: I bet you'd love to design that, wouldn't you?

11 A: Well --

12 Q: Engineers design structures.

13 A: Well, again, you know, you're hypothesizing
14 something -- if you go back to what I said
15 about the way we try to do things at Kiawah, I
16 mean, the last thing I think we want to see is
17 build some huge structure, to put a road on
18 that then becomes this thing you've got to look
19 at forever because we couldn't provide some
20 soft solution to it. So we could do it, but
21 it's certainly not in keeping with the
22 character of anything we've ever done there.

23 Q: Concrete blocks aren't a soft solution, are
24 they?

25 A: In this case, I believe they are.

1 wrong. So I'll come back to that, Your Honor.

2 THE COURT: All right. Then I rescind what I said
3 earlier.

4 MR. WALKER: I'll give you correct identification in
5 the morning.

6 THE COURT: Okay.

7 DR. TIM KANA, having been duly sworn, testifies and
8 examines as follows:

9 DR. KANA - DIRECT EXAMINATION BY MR. WALKER:

10 Q: Mr. -- is it Dr. Kana?

11 A: Yes, sir.

12 Q: Dr. Kana, where do you live?

13 A: (No response.)

14 Q: Where do you live?

15 A: In Columbia, South Carolina.

16 Q: And what do you do for a living?

17 A: I'm a consulting coastal geologist.

18 Q: Do you also teach?

19 A: Yes.

20 Q: Where do you teach?

21 A: University of South Carolina.

22 Q: What subject area do you teach in?

23 A: Coastal processes.

24 Q: If I were to try to come up with a label for
25 what you do, for a title for you, that describes

1 what you do, what would it be?

2 A: Coastal erosion consultant.

3 Q: How long have you been doing that?

4 A: About 30 years.

5 Q: Do you have graduate degrees in that field?

6 A: Yes, I do.

7 Q: Would you give the Court your educational
8 background, the degrees and what they're in,
9 please?

10 A: I have a Bachelor of arts in natural sciences
11 from the Johns Hopkins University in 1971; I
12 have a Master's of science in coastal geology
13 from the University of South Carolina in 1976;
14 and I have a Ph.D. in coastal processes and
15 coastal geology from the University of South
16 Carolina in 1979.

17 Q: Since 1979 when you obtained your Ph.D., have
18 you published papers dealing with coastal
19 geology and, in particular, coastal geology in
20 South Carolina?

21 A: Yes, I have.

22 Q: Since 1979, have you been almost continuously
23 involved, if not continuously involved, in
24 assessing, analyzing on a day-to-day basis
25 coastal processes in South Carolina?

1 A: Yes, I have.

2 Q: At my request, did you provide me a copy of a
3 resume that lists your credentials, as well as
4 publications that you have?

5 A: Yes, I did.

6 MR. WALKER: Your Honor, that is Exhibit Sixty-nine.

7 I can -- we offer his resume into evidence.

8 THE COURT: Any objection?

9 MS. ARMSTRONG: No objection, Your Honor.

10 THE COURT: Mr. Whitfield-Cargile?

11 MR. WHITFIELD-CARGILE: No objection.

12 THE COURT: It's admitted.

13 (KDP's Exhibit Number Sixty-nine was admitted into
14 evidence.)

15 Q: I'm going to start, when we talk about your
16 experience with the coast -- go ahead and pour
17 yourself some water -- with your giving us some
18 background on your beginning the first projects
19 you worked on on the South Carolina Coast,
20 because I think they're pertinent to what we're
21 here for today.

22 A: Yes, sir. One of the first projects as a
23 consultant I worked on in South Carolina was at
24 Seabrook Island for the Seabrook Island
25 Company, which at the time had control over all

1 of the development activities. We were
2 retained to study shoreline erosion and
3 evaluate the conditions of Seabrook Island from
4 the vicinity of the south end of Kiawah, or
5 that is the west end, near Beachwalker Park all
6 the way down to Deveaux Banks, which is an
7 offshore shoal associated with North Edisto
8 Inlet.

9 Q: Where is Seabrook in relation to Kiawah?

10 A: It is immediately south or west of Kiawah.

11 Q: I'm going to --

12 MR. WALKER: Could we go ahead and put up --

13 Nancy Jane, could you put up Exhibit Four, the
14 first photograph there which is an aerial?

15 MS. MURPHY: (Complies.)

16 Q: This is obviously an aerial of Captain Sam's
17 Spit. Where is Seabrook on this?

18 A: Seabrook Island proper is in the upper
19 left-hand corner including the small area of
20 land that's down where you're pointing along
21 the oceanfront (indicating).

22 Q: Are the beaches of Seabrook Island influenced
23 by the inlet?

24 A: Yes, they are.

25 Q: All right. And what were you specifically

1 engaged to do or what was your undertaking for
2 Seabrook?

3 A: Seabrook Island retained my former firm,
4 Research Planning Institute, Incorporated, to
5 determine as best we could what the causes of
6 erosion were along Seabrook Island. We
7 determined that there were three primary
8 causes, the first of which was migration of
9 Captain Sam's Inlet from an east to west
10 direction or north to south, depending on your
11 orientation. Northeast to southwest is the
12 truest alignment. That was the first cause of
13 erosion and the main problem at the time was
14 that the inlet, as it was migrating south, was
15 trapping sand and denying it to the oceanfront
16 of Seabrook Island.

17 Q: Where was that sound accumulating that was
18 being trapped?

19 A: In what's called the "ebb-tidal delta." Those
20 are the seaward shoals of the inlet immediately
21 seaward of the mouth of the inlet.

22 Q: Do you know how to work one of these as a
23 professor, because I don't? Let's do that.
24 Mark has a laser pointer, which is more user-
25 friendly. And when you talk about these

1 things, if you want -- let me get rid of that
2 pointer.

3 All right. So whenever you want, you can use
4 your laser. So you were talking about --

5 A: This is Captain Sam's Inlet. This is the mouth
6 of Captain Sam's Inlet and associated with the
7 inlet out in this area here (indicating) is
8 what we refer to as an ebb-tidal delta. It's
9 a series of sandbars and shallow areas where
10 sand has shifted from -- through the inlet out
11 into the ocean and deposited in this area
12 (indicating).

13 So that sand body is always present in the
14 position where the channel is. The channel
15 over time moves from this position (indicating)
16 in a westerly direction. So the inlet shoals
17 move with it.

18 As the inlet shoals get closer and closer to
19 Seabrook, they become trapped more and more in
20 this area and are not shifted farther downcoast
21 to the rest of Seabrook in this area way off
22 the photograph (indicating).

23 Q: Got it. Since we're getting into an area of
24 your expertise and you're going to be rendering
25 opinions --

1 MR. WALKER: I would offer Dr. Kana as an expert
2 capable of rendering opinions in coastal
3 geology.

4 THE COURT: Coastal geology and coastal erosion?

5 MR. WALKER: Coastal erosion and coastal morphology,
6 the formation of land mass --

7 Q: What is morphology?

8 A: Coastal geomorphology is the shape of the coast
9 and the processes that mold and shape the coast
10 into the configurations that we see in present
11 day.

12 MR. WALKER: Also in coastal geomorphology.

13 THE COURT: All right.

14 MS. ARMSTRONG: No objection, Your Honor.

15 THE COURT: Mr. Whitfield-Cargile?

16 MR. WHITFIELD-CARGILE: I'm sorry, I'm thinking,
17 Your Honor. No objection, Your Honor.

18 THE COURT: Very good. He's so qualified.

19 Q: With respect to this particular region, is
20 there a dominant direction or -- tell me about
21 sand flow on the coast in this particular
22 location.

23 A: The ultimate source of sand into this area here
24 (indicating) comes from the very east end of
25 Kiawah Island, about eight miles away. Sand

1 originating in Stono Inlet, which is 100 times
2 bigger than Captain Sam's Inlet, periodically
3 is released to the east end of Kiawah. It
4 migrates on shore under wave action and then
5 once it's attached to the beach, it spreads
6 laterally through the longshore transport
7 system, which is predominantly from east to
8 west in this locality, moving sand down the
9 beach over time. And that sand accumulates at
10 the inlet, forms these curvilinear ridges here
11 (indicating). You can see the signature right
12 along here where the edge of the tree line is
13 and then these dark and light bands here
14 (indicating).

15 As sand moves down and it reaches the inlet, a
16 portion of it will accrete on the spit and
17 gradually build up the high tide beach building
18 out features such as you see right here
19 (indicating). And through time, as that spit
20 builds up, it's also forcing the channel to
21 migrate in a downcoast direction.

22 So the principal process going on that is
23 controlling the inlet migration, based on the
24 studies that our group and many others have
25 done over the years, is that sand moving down

1 Kiawah Island from east to west is in excess of
2 sand that might be moving in the other
3 direction when the winds change.

4 So this net sand transport accumulates sand at
5 the spit and that sand accumulation forces the
6 channel to move in a westerly direction into
7 Seabrook foreshortening Seabrook Island as it
8 does that.

9 Q: Does the sand drift that you talked about --
10 that you're talking about along the coast also
11 have an impact on the beaches of Kiawah other
12 than the mere tip of the spit where you were
13 moving the pointer, primarily?

14 A: Yes. Kiawah is one of the healthiest beaches
15 in terms of its stability or tendency for
16 accretion, because it's getting an excess sand
17 supply of Stono Inlet. Hundreds and hundreds
18 of thousands of cubic yards of sand each year
19 on average bypass Stono Inlet onto Kiawah
20 Island. They do it in an episodic fashion, but
21 averaged over time, you can count on literally
22 hundreds of thousands of cubic yards of sand
23 coming on to Kiawah naturally and then
24 spreading from there downdrift. And the result
25 is that the shoreline along Kiawah, unlike many

1 other beaches in South Carolina or along the
2 East Coast, has actually accreted on average
3 over the last 100 years. Some parts of Kiawah
4 have actually built out nearly a mile at the
5 east end. The area down here has built seaward
6 by hundreds of feet forming multiple dune
7 ridges that you see right in this area along
8 the front of the spit.

9 Q: Dr. Kana, how many years have you been studying
10 this system; by "this system" I mean, studying
11 the system, the geomorphology, Stono Inlet to
12 Seabrook to North Edisto?

13 A: The first time I visited this site was in
14 September 1974 as a graduate student. We did
15 various student projects all through the mid to
16 late seventies. But as far as specific studies
17 of Kiawah, I myself didn't get involved until
18 around 1978 and since that time, more or less
19 continually since 1978, so 30-some-odd years.

20 Q: You mentioned a project with Seabrook back in
21 the early seventies. Have you been involved in
22 other projects with Seabrook Island dealing
23 with their beach --

24 A: Yes, I have.

25 Q: -- since then? Have you also been involved in

1 projects on Kiawah Island where you served as
2 a consultant to make recommendations with
3 respect to sediment and beach issues?

4 A: Yes, I have.

5 Q: In particular at Seabrook Island, were you
6 instrumental in deriving a solution to their
7 eroding beach?

8 A: Yes. I was involved in the original plan to
9 relocate Captain Sam's Inlet from its point in
10 1982 up to a point that was equivalent to where
11 it was in 1963. That project was completed in
12 1983. That was the first time -- it was
13 somewhat innovative at the time.

14 THE WITNESS: I think we just lost our image.

15 MR. WALKER: Our operator went to sleep.

16 A: The inlet in 1979, 1980, was way down here
17 (indicating). It's off the image.

18 Q: Okay.

19 A: I believe it's probably in an image that's been
20 entered by others.

21 Q: So you're now near the end of the flat screen
22 TV?

23 A: In 1979, the image was -- the inlet, rather,
24 was probably about 3,000 feet from this
25 position (indicating) -- I'm estimating --

1 somewhere down in here (indicating). In
2 1983 --

3 Q: What did your solution involve?

4 A: The solution involved cutting a new channel
5 right here (indicating) at the mouth of this
6 creek, which is called Captain Sam's Creek.
7 It's very clearly shown on the photograph where
8 it empties into Kiawah River at that point.
9 And right opposite the mouth of Captain Sam's
10 Creek was the alignment for the channel for the
11 new inlet in 1983.

12 Q: You mentioned it was done a second time. When
13 was it done a second time?

14 A: Yes, in 1996.

15 Q: Was that done with -- did you need to obtain
16 permits in order to accomplish that?

17 A: Yes, we did.

18 Q: Who were the permits obtained from?

19 A: From the Corps of Engineers and South Carolina
20 Coastal Council which is now called DHEC-OCRM.

21 Q: Was the relocation project -- did it obtain --
22 was it a successes?

23 A: In my opinion it was very successful and cost
24 effective and it was highlighted by the
25 National Academy of Science as one of the more

1 innovative erosion control solutions that's
2 environmentally sensitive.

3 Q: Is the Seabrook Island Property Owners
4 Association in the process of applying for a
5 third inlet relocation?

6 A: Yes, that's correct.

7 Q: Have you been -- are you involved in
8 spearheading that?

9 A: Yes. Our firm is the engineer for that
10 project.

11 Q: I want to ask you about the inlet relocations.
12 When the inlet is relocated back to the east,
13 in other words, if the inlet as you said in '79
14 was over here and it's relocated back to here
15 (indicating), what is the effect of moving the
16 inlet in terms of this ebb-tidal delta that we
17 were talking about? What is the effect on the
18 spit if the inlet is periodically moved back to
19 the east as you've done two times?

20 A: Well, each time the inlet is moved, a new
21 ebb-tidal delta will form seaward of the breach
22 point and these shoals then act as a trap or a
23 barrier to sand moving downcoast.
24 So just as you see in this image where there's
25 some sand sticking out here (indicating),

1 (indicating). Sand is drifting to the south or
2 west and so we refer to this as updrift of the
3 inlet and this direction is downdrift of the
4 inlet (indicating).

5 Q: You earlier were talking about Kiawah Island.
6 How would you rank Kiawah in terms of available
7 sediment and accretion in comparison to other
8 islands, barrier islands, on the South Carolina
9 Coast? Is it healthy?

10 A: Yes, it's exceedingly healthy compared to just
11 about any beach on the East Coast.

12 Q: So not just South Carolina.

13 A: That's correct.

14 Q: How long have you been studying -- let me
15 rephrase that. It's late in the day. For what
16 period of time have you studied the shoreline
17 trends of Kiawah? You've talked about the last
18 35 years or so. Have you gone back in order to
19 inform your opinions?

20 A: We've written annual monitoring reports for the
21 Town of Kiawah Island, for the Kiawah Island
22 Company, for other entities on Kiawah going
23 back to the early eighties. I don't know the
24 first date. And, of course, those shoreline
25 studies attempt to utilize all historical data

1 going back as far as it's available.

2 Q: Have you reviewed the historical data going
3 back as far it's available, to the best of your
4 knowledge?

5 A: Yes.

6 Q: And how long would you say that Kiawah has
7 enjoyed this positive sediment budget?

8 A: Well, for at least 150 years. There were some
9 fairly accurate coastal charts. I wouldn't
10 call them precise by today's standards, but
11 coastal charts of the 1850's, I believe, were
12 the earliest that were -- had been done by a
13 detailed survey. All the maps prior to that
14 were kind of sketch maps and not very reliable,
15 in my opinion.

16 Q: To a reasonable degree of geomorphological
17 certainty, will the beaches at Kiawah most
18 probably continue to enjoy accretion?

19 A: Yeah, certainly for the next couple of decades.
20 We've just monitored a five million cubic yard
21 sand bypassing event that occurred in the
22 nineties adding that much material, that much
23 sand to the east end of Kiawah. And that sand
24 is now making its way down the shoreline in the
25 longshore transport system.

1 observations I have seen from other images, has
2 not changed very much in the last 30 years
3 since I've been studying it.

4 Q: All right. And then when we get towards the
5 inlet, what type of system are we dealing with
6 there?

7 A: Well, then you have a point bar here
8 (indicating). See, you're on the outside of
9 the bend. On the other side it's Seabrook and
10 you're inside of the bend on the recurve spit,
11 so this is a depositional zone and it's
12 receiving sediment that is wrapping around the
13 spit from the ocean side and falling into the
14 channel right in this location (indicating).
15 It's just accreting a series of curvilinear
16 ridges as the spit builds.

17 Q: Is the inlet a dynamic area?

18 A: Yes.

19 Q: Is the bank stable in the inlet zone?

20 A: No.

21 Q: Will you tell us what's happening on the ocean
22 side bank of Captain Sam's in the inlet zone?

23 A: The ocean side, in this vicinity (indicating)?

24 Q: Yes, sir.

25 A: Well, this is accreting. You can see this from

1 a signature of these ridges that have
2 accumulated right here (indicating). This area
3 is accreting immediately updrift of the inlet,
4 as I just testified a few minutes ago, because
5 the ebb-tidal delta is trapping and holding
6 sand in that vicinity.

7 Q: In your --

8 A: Then there's accretion in this direction as the
9 spit grows and on the Seabrook side, there's
10 truncation of this area (indicating), because
11 of the meandering and migration of Captain
12 Sam's Inlet, itself. It's eating away this
13 segment of shoreline. It's actually eating it
14 away and throwing some of the sand in this
15 direction (indicating), that's what this spit
16 is formed from, and some of the sand is
17 shifting down that way (indicating).

18 Q: In your 35 years or more of going to this
19 location, have you observed anything with
20 respect to the formation of dunes on Captain
21 Sam's Spit?

22 A: On Kiawah Spit, yes.

23 Q: Kiawah Spit.

24 A: This entire area here has a series of dune
25 lines, beach -- sometimes they're referred to

1 as beach ridges -- that parallel the shoreline.
2 They represent old high tide marks where sand
3 has accumulated and a dune has begun to grow
4 and some of these dunes here have considerable
5 height, well above the high water inundation
6 line.

7 Q: Have the rows of dunes grown as you go down the
8 Kiawah Spit?

9 A: Yes. Grown in terms of number or grown in
10 terms of ...

11 Q: Well, let's talk in terms of number.

12 A: I can recall seeing about three rows of dunes
13 throughout the length of this spit, even at the
14 narrowest juncture point. Farther down,
15 there's probably about four or five rows of
16 dunes that have formed just within the last 30
17 years that I've been watching it, in some
18 places.

19 Q: Are those dunes healthy dunes?

20 A: In my opinion they're healthy, as evidenced by
21 lack of breaches or washovers on the dune.
22 Usually you can see a signature of an unhealthy
23 dune that's too low because high tide waves
24 during a storm would wash up and over and knock
25 out a portion of the dune and create a fan of

1 sand landward of the dunes and you'd see that
2 as a little signature. But we don't see that
3 here. We see a continuous vegetation line
4 without evidence of active washovers in this
5 area (indicating).

6 Q: Turning to this specific application and the
7 revetment, in your opinion, will the revetment,
8 if constructed, have any significant effect
9 whatsoever most probably on the inlet?

10 A: No. And I can say that with a reasonable
11 degree of confidence because the inlet forms
12 and migrates because of sand moving down the
13 oceanfront of Kiawah. And we've done some sand
14 budgets to quantify how much sand has to move
15 down and account for the buildup on the spit,
16 the migration rates of the inlet, and the
17 process that's going on here, which really
18 dominates Captain Sam's Inlet, is sand
19 transport moving down Kiawah Island. The more
20 sand that moves down Kiawah Island and the
21 faster it moves down, the faster Captain Sam's
22 Inlet migrates into Seabrook causing the
23 problem. We've been watching that very closely
24 for the last 30 years. We haven't paid much
25 attention to the back side of the spit because

1 it's pretty much -- it goes where the river
2 goes. It's independent of what's going on
3 along the oceanfront, in my opinion.

4 Q: Will the construction of the revetment, if it's
5 permitted, have any effect at all on the dune
6 ridges that we see on Captain Sam's Spit, the
7 sand accumulation along the beach?

8 A: No, sir, not in my opinion.

9 Q: Why not?

10 A: Well, those ridges accumulate because of the
11 sand that's brought down along the oceanfront
12 and some of that sand is deposited along the
13 way before it works its way all the way down
14 the inlet and that's what accounts for a
15 long-term growth of these ridges and the
16 formation of new dune lines over time.

17 Q: Dr. Kana, in your work, do you study the
18 effects of hurricanes on the coast?

19 A: Yes, we do.

20 Q: Were you involved in studying the effects of
21 Hurricane Hugo on the portions of the coast
22 most affected by it?

23 A: Yes, I was.

24 Q: And is that an area that you are highly
25 interested in?

1 A: Yes, I am.

2 Q: Is one of the things that you take into account
3 in that study and in your geomorphology the
4 susceptibility of particular places to breach
5 during a large storm?

6 A: Yes, we typically consider that in any study.
7 One of the interesting things about the South
8 Carolina Coast and a reason that we don't tend
9 to see very many breach inlets form, relative
10 to places like Texas, is that our coastline is
11 already adjusted to a higher tide range and we
12 also -- and because of that, we have more tidal
13 inlets to handle the flow in and out of the
14 marshes.

15 So instead of having inlets every 30 or 40
16 miles as you might have on the Texas Coast or
17 the North Carolina Coast, South Carolina has
18 inlets on average about every five miles. So
19 there are conduits to handle the flow during
20 any tides. A normal tide, a spring tide, a
21 syzygy tide, as it's called when all the moon
22 and stars line up, or a storm surge during a
23 hurricane.

24 So when a hurricane, such as Hazel or Hugo in
25 1989 comes along, what we see in South Carolina

1 is less of a tendency for spits to breach than
2 we have. I think there were only about three
3 breach points, four breach points, in South
4 Carolina during Hugo; whereas, if this had been
5 the Texas Coast, it probably would have been
6 formation of several full-size inlets in that
7 storm alone. So that's one thing that's very
8 different about South Carolina compared to many
9 other coasts.

10 Q: Does the large marsh area behind this island
11 have an effect, too? Does it play into
12 tendency to breach or propensity to breach?

13 A: Well, it absorbs the storm surge and then
14 you're getting into some subtle hydraulic
15 issues.

16 Q: Well, I don't want to -- well, go ahead, I'm
17 sorry.

18 A: So it has -- it certainly has some incremental
19 effects, but it's not the main thing that
20 controls that, in my opinion.

21 Q: Based on your experience, training, education,
22 all the work that you've done involving Kiawah
23 and Seabrook, in your opinion, is there -- to
24 a reasonable degree of geomorphological
25 certainty, is it likely that Captain Sam's Spit

1 would breach at the neck down there by that
2 pinch point?

3 **A:** Well, if there was going to be a breach -- I
4 mean, it's intuitively obvious that it will
5 take the shortest distance. But also you have
6 to look at the height of the dunes, because
7 it's been shown in a number of studies that
8 usually low points in the dunes are sort of the
9 trigger areas for a breach to form.
10 So if the dunes were completely wiped out and
11 they were very low, then, you know, the neck of
12 the spit could be the most vulnerable point for
13 a breach, without a doubt. But right now, the
14 dune lines along the neck are situated well
15 above the typical 25-year flood level.

16 **Q:** Over the last 35 years --

17 THE COURT: Hold on a second. So is the answer "no"
18 that it would likely cause a breach or "yes"?
19 I mean, you said the reasons why there wouldn't
20 be one, but you never specifically answered his
21 question.

22 THE WITNESS: Well, why don't you repeat the
23 question and maybe that will help me make it
24 more -- a clearer answer.

25 **Q:** All right. Well, I'm not sure -- I'm going to

1 paraphrase it. Based on everything, do you --
2 and by that I mean, education, experience,
3 background, your familiarity with this -- do
4 you reasonably expect or is it likely that
5 there would be a breach of Captain Sam's Spit
6 at the neck?

7 A: Yes, there is a chance, but I think it's a very
8 small chance based on the trends that we've
9 seen over the last 60 years in this area,
10 because it hasn't breached and because the
11 oceanfront is accreting at a rapid rate and
12 because there is such a large sand supply along
13 the front beach of Kiawah Island that continues
14 to feed this area. So each of these things
15 reduces the threat of a breach.

16 Q: In the highly unlikely event that there were a
17 breach, do you think an inlet would form there
18 or do you think it would heal fairly quickly?

19 MR. WHITFIELD-CARGILE: Object to the form of the
20 question.

21 MR. WALKER: I will break it down.

22 Q: In the event of a breach, would you -- let me
23 back up. Is there a difference between an
24 inlet and a washover breach?

25 A: Yes. You could have a washover that doesn't

1 effect -- doesn't create a viable inlet. In
2 fact, that's very common, because a lots of
3 these features form at the peak of the storm
4 when the surge, the higher -- the
5 super-elevated water level is higher than
6 normal. Of course, the dunes may breach, but
7 the -- whether or not you have an inlet forming
8 will depend on whether there's enough time to
9 scour that washover down to a level that
10 reaches mean sea level or at least the mean
11 tide level, so that the next normal tides that
12 come across can keep scouring that channel
13 open.

14 And, generally, that doesn't happen. We'll get
15 the washovers in most places, but not a full
16 breach. To get a full breach, it takes a --
17 you know, a longer duration of surge and you
18 have to have the breach in place well before
19 the tides peak on both sides of the breach
20 point so that you have the hydraulic head to
21 drive the flow through that breach and keep
22 cutting it down.

23 Q: We've been talking about the conditions that
24 might lead to the unlikely breach at that
25 location. If those conditions were to occur,

1 would a storm of that magnitude also affect the
2 remainder of Kiawah Island?

3 A: I would say if it's big enough to do a breach,
4 it's going to be big enough to do other damage
5 on Kiawah Island, yes.

6 Q: You've been talking about the dune ridges. Do
7 the dune ridges at Captain Sam's, are they a
8 protector against storm surge?

9 A: Yes, absolutely.

10 Q: The first line of defense?

11 A: The first line of defense is the beach. The
12 second line of defense is your foredune and the
13 successive ridges. And the more dune ridges
14 you have, the more protection you have,
15 obviously.

16 MR. WALKER: Nancy Jane, could you go to one of the
17 aerial photographs that shows in this exhibit
18 the dune ridges at end of the spit, please?

19 MS. MURPHY: (Complies.)

20 MR. WALKER: Go to the next one. It's near the end.

21 MS. MURPHY: (Complies.)

22 MR. WALKER: Yeah, go back to where you were.

23 MS. MURPHY: (Complies.)

24 MR. WALKER: Very good. There you are.

25 Q: Are those the dune ridges that you're talking

1 about?

2 A: Yeah, this is --

3 MR. WHITFIELD-CARGILE: Trenholm, what exhibit is
4 this?

5 MR. WALKER: This is part of Exhibit Four, aerial
6 paragraphs, admitted yesterday.

7 Q: Go ahead.

8 A: Generally, we see ridges being less vegetated
9 and the myrtles growing in the swales between
10 the ridges. I can't say that that happens all
11 the time, but that's normally the trend.
12 So let's assume that for a moment here --
13 without having a topographic map, I can't
14 testify to that -- but this is normally what we
15 expect. The myrtle -- this is wax myrtle, low
16 bushes and shrubs, that are growing in the
17 swale between successive ridges. They need
18 some sheltering from the winds and salt spray
19 and so on. So they propagate and a dune line
20 forms.

21 This dune line here -- we'll assume that's one
22 of the ridges -- that predates anything that's
23 seaward of that, because as the beach is
24 building out, the earliest dune line and beach
25 line would have been way back here

1 (indicating). Then you'd have a successive
2 ridge forming in this area (indicating), maybe
3 a few tens of feet seaward, and then another
4 one here (indicating). And in between you
5 have, again, a row of low shrubs pretty much
6 aligned in between those dune ridges.

7 So you can see -- you can count them. One,
8 two, three -- at least four down in the lower
9 part of the spit here, before you even get to
10 the edge of the present dry sand beach. The
11 edge of the dry sand beach is about there
12 (indicating). The edge of the wet sand beach
13 is off the figure. The wet sand beach is way
14 out here (indicating) off the --

15 Q: Would you say that those rows of dunes provide
16 good lines of defense for Captain Sam's?

17 A: Yes, I would.

18 Q: Are there other beaches, settled beaches, on
19 South Carolina (sic) that have less lines of
20 defense and less dune protection than Captain
21 Sam's?

22 A: Yes. I'll try not to be facetious, but there
23 are many.

24 Q: Could you give the Court some examples of fully
25 populated beachfronts where there is less dune

1 protection that Captain Sam's, including
2 Captain Sam's at the neck?

3 A: Well, let's start at Litchfield Beach, Pawley's
4 Island, Central DeBordieu Island, Folly Beach,
5 Edisto Beach, portions of Hilton Head Island.
6 Is that enough?

7 Q: That's fine.

8 MR. WALKER: Could we go back to where we were?

9 MR. WHITFIELD-CARGILE: Trenholm, could you tell me
10 what page --

11 MR. WALKER: Nancy Jane, could you tell him what
12 page that is?

13 MS. MURPHY: I can tell you what the Bates number
14 is.

15 MR. WHITFIELD-CARGILE: Which page of Exhibit Four
16 is it, so I can refer to it?

17 MS. MURPHY: 866.

18 MR. WHITFIELD-CARGILE: 866, thank you.

19 Q: Going back to the migration of the channel --
20 or let me ask you. Is the channel going to,
21 without any type of revetment, continue to
22 migrate -- the channel of the Kiawah River in
23 the river bend, is it going to continue to
24 migrate southerly towards what would be the
25 direction of the ocean?

1 A: In this area here (indicating)?

2 Q: Right.

3 A: Yes. In my opinion, it will as long as this
4 marsh keeps building up on the opposite side of
5 this pinch point here (indicating).

6 Q: You've discussed the accretion of the beach at
7 Kiawah. Is the beach accreting right at that
8 neck, too, on Captain Sam's?

9 A: Yes, it is. On the oceanfront side, it's
10 accreting here (indicating) and it's eroding on
11 the back side.

12 Q: From your observations of aerial photographs
13 and your studies, is the beach accreting
14 faster, slower or at about the same pace as the
15 riverbank is migrating towards the beach?

16 A: I'd have to say about the same pace, more or
17 less. It really depends on what time period
18 you're looking at, but more or less the same
19 pace.

20 Q: We talked about whether the revetment would
21 have an effect on the inlet or the dunes.
22 Would the revetment have any effect at all on
23 the marsh area that you pointed out between the
24 revetment and the inlet?

25 A: On this marsh?

1 Q: On that right reach right there.

2 A: I don't believe it would have a significant
3 impact. There might be some very localized
4 scours, Mr. Bohannon testified. But I believe
5 because you're getting into the straight
6 section of Kiawah River here, your tendency for
7 scour due to channel meander lessens
8 significantly. And, also, considering that
9 you're gaining sediment from the spit working
10 its way in -- this light sandy color, this is
11 sand that was working its way into the inlet at
12 this locality (indicating) -- further helps to
13 stabilize this portion of Kiawah Spit on the
14 back side.

15 Q: Will the revetment have an effect on the mud
16 banks and sand banks that we see near the
17 inlet, the tidal -- intertidal areas on either
18 side, the sandbars --

19 A: You'll have to show me where you're talking
20 about, please.

21 Q: I'm talking about the mud flats and sandbars in
22 this area of the inlet.

23 A: No.

24 Q: Will the revetment have any negative effect on
25 them?

1 **A:** **No.**

2 MR. WALKER: One moment, Your Honor.

3 That's all I have. Thank you, Your Honor.

4 MS. ARMSTRONG: Your Honor, I'll be glad to start
5 with Dr. Kana. It's 6:30. I'm probably going
6 to be at least an hour, I would imagine.

7 THE COURT: Well, go ahead and start.

8 MS. ARMSTRONG: Okay.

9 DR. KANA - CROSS-EXAMINATION BY MS. ARMSTRONG:

10 **Q:** **Dr. Kana, when Mr. Walker was asking you about**
11 **areas that are spits that you thought were more**
12 **susceptible than Captain Sam's, you mentioned**
13 **DeBordieu and Hilton Head. Those aren't spits,**
14 **are they?**

15 **A:** **No. I think I recall the question being, "Are**
16 **there any areas where there is development that**
17 **doesn't have that kind of protection?" I may**
18 **have misunderstood the question, but as far as**
19 **if you want to limit it to spits, I could say**
20 **South Litchfield Spit, Pawley's Spit along**
21 **Spring Street, Spring Avenue; those two in**
22 **particular have far less protection.**

23 **Q:** **Okay. What about Folly and Edisto, are**
24 **those -- would you consider those spit areas?**

25 **A:** **Well, certainly, the south end of Edisto is a**

1 spit of land growing into South Edisto River
2 Inlet. But I was referring to the entire
3 oceanfront of Edisto Beach not having a large
4 dune ridge seaward of the development.

5 Q: The last photograph that we looked at right
6 before this, I believe it's still in Exhibit
7 Four, it showed the tip, the southwestern end
8 of the island, of the spit. That image right
9 there.

10 A: Yes.

11 Q: And you said that there are about four or five
12 dune ridges there and that they give some
13 protection from storms; is that right?

14 A: Yes.

15 Q: Now, that's not the area where the proposed
16 revetment would go, though, is it?

17 A: No. This is at the south or west end of the
18 spit.

19 Q: So the area where the proposed revetment would
20 go doesn't have nearly the amount of dune
21 protection that this -- the western end has,
22 does it?

23 A: Well, it's certainly narrower, yes.

24 Q: Dr. Kana, how many days ago were you asked by
25 Mr. Walker to be an expert witness in this

1 case?

2 A: I can't recall offhand, but it was a few weeks
3 ago. I've been out-of-pocket and traveling and
4 quite a bit for the last month for a number of
5 reasons.

6 Q: Do you remember telling me last Friday at your
7 deposition that he had contacted you about
8 testifying in this case ten days ago?

9 A: Yes, I would seem to recall it was around ten
10 days ago, which of course was said on Friday,
11 but I can't recall the exact date. I'll have
12 to look back at my records.

13 Q: And this revetment structure as its proposed,
14 is it going to stop the movement of the spit on
15 the river side?

16 A: It should certainly slow or stop the erosion
17 where the structure is placed on the river side
18 of the spit. I believe that's its intended
19 purpose.

20 Q: All right. Let me back up a question here.
21 Right now, the river side of the spit is moving
22 towards the ocean; is that right?

23 A: Yes.

24 Q: Okay. And once we put a hard revetment
25 structure, you're going to stop that natural

1 movement of the spit; is that right?

2 A: I think that is the whole purpose of the
3 application.

4 Q: And when you talk about not having any impact
5 on Captain Sam's Inlet, what you're actually
6 talking about is the very specific area where
7 the river dumps out and terminates in the
8 ocean; isn't that right?

9 A: Yes.

10 Q: So you haven't considered the impacts of
11 actually where the revetment structure is going
12 to go itself, have you?

13 A: In what regard?

14 Q: Well, you've been to this area before, haven't
15 you?

16 A: Yes, I have.

17 Q: And are you aware that the public uses the
18 riverbank area of the spit where the proposed
19 revetment is going to go as a beach-like area
20 for recreation?

21 A: I really don't know what the public uses on the
22 back side of the spit. I know the public uses
23 the front side of the spit. I see the public
24 down at the inlet. I see them launching kayaks
25 from the Beachwalker Park, but I don't -- as

1 far as what they do on the back side of the
2 spit where the revetment is, I don't know that
3 that's a common landing area. Because, from my
4 experience, along those cut banks, there's not
5 much of a beach to work with there, certainly
6 at high tide, because there's an escarpment
7 right there.

8 Q: There's not much on the front -- not much beach
9 on the front -- not much on the front beach at
10 high tide, either, though, is there?

11 A: Well, there's considerably more because of the
12 flat slopes.

13 Q: Have you ever seen people kayaking, crabbing or
14 fishing in the river in that area?

15 A: I have from Beachwalker Park just in passing
16 and in driving over Kiawah bridge, which is
17 just upstream from there.

18 Q: And once a 40-foot-long, 40-foot-wide, almost
19 3,000-foot-long structure is on that sandy
20 beach where people fish and crab and kayak,
21 they're not going to be able to do that anymore
22 there, are they?

23 A: Not be able to do what?

24 Q: Stand on the beach and pull up their boat on a
25 hard structure, stand on a rocky structure and

1 fish and crab and do the other activities that
2 they do there right now.

3 A: Well, actually, you know, whenever you put in
4 a hard structure on the coast, and we don't
5 have a lot of hard structures on this
6 sedimentary coast of ours, oftentimes you have
7 a new suite of organisms attracted to it.
8 Certain fish like hard-bottom habitat and it
9 may change -- I'm not going to say it's going
10 to improve or change -- hurt things, because
11 I'm not an expert in that area, but I think
12 it's pretty well known in the popular
13 literature that when you place a hard structure
14 in the water, it attracts a new suite of
15 organisms. We see that through the barnacles
16 and oysters that attach to groins, jetties,
17 structures such as that.

18 So I would expect that this structure, at least
19 the underwater part, will create some different
20 type of habitat; whether that's good or bad,
21 that's not for me to judge, but it's different
22 habitat --

23 Q: Fair enough, but --

24 A: -- which offers different recreational
25 opportunities.

1 Q: But you hadn't done any look at what the impact
2 of this structure would be on public access,
3 have you?

4 A: No, I would -- I don't feel qualified to see
5 that. I don't know the specific plan in that
6 detail.

7 Q: We were talking about -- we talked a little bit
8 or you talked with Mr. Walker about the inlet
9 relocating itself. That inlet at Captain Sam's
10 Spit, it's relocated itself naturally in the
11 past, hasn't it?

12 A: Yes, it has, a number of times.

13 Q: Okay. It has a number of times. Since about
14 1661, we've got data that shows that that
15 inlet's breached, what, four times; is that
16 right?

17 A: I don't know the exact number, but it's
18 probably no more than four times in the record
19 up through around 1948, '49.

20 Q: And most recently when we had a breach or a
21 washover, that was in 1949, wasn't it?

22 A: We think it was around 1948 or '49, but we
23 can't be absolutely certain because the
24 inlet -- there's no data between the 1920's and
25 1949 when there was an aerial photograph. So

1 all you can do is go by what was there in 1949,
2 which was the last aerial image around the time
3 of the inlet. So, again, we don't know when it
4 happened and how it happened.

5 **Q:** Have you seen a recent photograph of the 1949
6 aerial photograph?

7 MR. WALKER: We have one right here. Show it to
8 him.

9 MS. ARMSTRONG: Okay. All right.

10 THE WITNESS: Sure. We've had this in our files at
11 my office for 30 years.

12 MS. ARMSTRONG: Okay. Could we show the Judge
13 exactly where -- what we're looking at here and
14 what's going on, where the inlet is right now.
15 If you don't mind stepping up.

16 THE WITNESS: Sure.

17 MS. ARMSTRONG: If you don't mind if we approach the
18 bench. I didn't even ask you, Your Honor.

19 THE COURT: That's fine.

20 MS. ARMSTRONG: Show the Court what's going on here.

21 THE COURT: Go ahead and step around.

22 MS. ARMSTRONG: Step around the other side.

23 THE WITNESS: (Complies.)

24 **Q:** So this is the 1949 aerial image; is that
25 right?

1 A: Yes. It was done in -- I think that's
2 March 11, 1949.

3 Q: Okay. And where is Captain Sam's Spit on this
4 map?

5 A: Captain Sam's Spit is this feature right here
6 (indicating).

7 Q: So it's on --

8 A: Beachwalker Park -- today's Beachwalker Park
9 would be situated right about this location
10 (indicating) and this would be Kiawah River
11 coming down to the south and bending.

12 Q: Okay. And so you're talking about the upper
13 right-hand corner is where the spit of sand
14 that's kind of coming out from that corner --

15 A: That's right.

16 Q: -- that's where Captain Sam's Spit. And
17 exactly -- can you use words to describe where
18 Beachwalker Park is? Is it where the
19 vegetation starts and vegetation ends?

20 A: Beachwalker Park would be the upper right-hand
21 corner where this dark vegetation terminates.
22 This would be approximately where the dune
23 walkover for the present day park is located
24 (indicating).

25 Q: And I'm looking at this image, I see what looks

1 like what I would describe as two inlets. Is
2 that kind of an accurate description?

3 A: Yeah, there are two small channels, one here
4 (indicating), which is the easternmost, and
5 then there's a second channel coming out
6 several hundred feet to the west; this being
7 the westerly direction (indicating).

8 Q: All right. And that easternmost channel, is
9 that cutting through -- the location of that
10 channel the approximate location of where
11 there's high ground and multiple dune ridges
12 and what we've been talking about as the spit
13 today?

14 A: No. Today's spit, of course, encompasses this
15 entire area (indicating), approximately here
16 extending at least down to somewhere in this
17 vicinity (indicating). This is the mouth of
18 Captain Sam's Creek, presently empties
19 somewhere around here (indicating).

20 Q: Okay. So where Captain --

21 A: So the spit proper today is basically in this
22 area (indicating).

23 Q: Okay. So where the spit is today, on this map,
24 if we're looking at -- if we were to
25 superimpose this map on where the spit is

1 today, there's actually two sort of inlets that
2 cut across that area of land; is that accurate?

3 **A:** **Yes, at that point in time.**

4 MS. ARMSTRONG: Okay. All right. Your Honor, I
5 don't -- this isn't marked, but I'd like to
6 introduce this into evidence. I've got my own
7 copy. I don't know, Trenholm, if you've got --

8 MR. WALKER: I put it on my list, too, and no
9 objection.

10 MS. ARMSTRONG: Okay. How do you want to --

11 MR. WALKER: If you want to mark yours, because it's
12 easier to go in the record, and we'll just use
13 my poster board for -- because it's easier.

14 MS. ARMSTRONG: Yeah, we'll mark this one -- let me
15 get the correct number for you.

16 MR. WALKER: No, I meant we'd mark the paper one and
17 we can refer to the poster board so the clerk
18 wouldn't have to carry around the poster board.

19 MS. ARMSTRONG: Okay.

20 THE COURT: Or the Court would have to store it.

21 MR. WALKER: Or the Court would have to store it.

22 MS. ARMSTRONG: We've got multiple copies of the
23 1949 one, Your Honor. This will be exhibit --
24 Coastal Conservation League Exhibit Three-A.

25 (Off the record.)

1 Q: Dr. Kana, when you first graduated, you started
2 working with Miles Hayes; is that true?

3 A: Yes, I did.

4 THE COURT: Wait a second.

5 MS. ARMSTRONG: Oh, I'm sorry.

6 THE COURT REPORTER: Was that admitted or just
7 marked?

8 MS. ARMSTRONG: I was offering it into evidence.

9 MR. WALKER: No objection.

10 MR. WHITFIELD-CARGILE: No objection, Your Honor.

11 THE COURT: It's admitted.

12 (CCL's Exhibit Number Three-A was admitted into
13 evidence.)

14 Q: You worked for Dr. Miles Hayes; is that
15 accurate?

16 A: Yes, I did.

17 Q: And what was the company that you worked with?

18 A: Research Planning Institute, Incorporated.

19 Q: And Miles Hayes has been doing coastal geology
20 work for a pretty long time around South
21 Carolina, hadn't he?

22 A: I consider him the father of coastal geology in
23 this state.

24 Q: Father of coastal geology, all right. Right
25 there to your right, there's an exhibit on the

1 A: Sure. "With reference to stability and
2 susceptibility to erosion, we consider this an
3 area that should not be developed for the
4 following reasons: One, this land has been
5 completely eroded and redeposited at least
6 twice during the past 200 years; two, the neck
7 of the spit is obviously susceptible to
8 overwash during hurricanes; and, three, if an
9 overwash were to develop, the inlet could be
10 relocated near Osprey Point (refer to figure
11 one)."

12 Q: And you don't disagree that the land's been
13 completely eroded and redeposited at least
14 twice during the past 200 years, do you?

15 A: No, no. There's evidence that that has
16 happened, yes.
17 But the one thing I would like to add here,
18 that I think is relevant, is there's a
19 reference to observations that the group made
20 back in -- this is 1974, the summer of '74,
21 just before I came to University of South
22 Carolina as a graduate student. The reason I
23 remember this summer quite well is, I joined
24 the University in 1974, and we heard a lot --
25 we did a lot of review of the Kiawah history in

1 the 1974, 1975 time period and that's what
2 gives me some familiarity with this.
3 There's a mention in this section on page G-116
4 to the evidence for overwash at the neck of the
5 spit during the past decade. That's on the
6 bottom of page 116. And the interesting point
7 I think that's relevant that should be brought
8 out here is that in the last 30 years, since
9 1975, there have not been washovers anywhere
10 along that portion of the neck of the spit and
11 there's much more that we know about the spit
12 growth and why it grows today than this group
13 knew back in 1974, in my opinion.

14 Q: And how many hurricanes have we had since then?

15 A: We had Hurricane David in 1979 that directly
16 impacted this area. It washed out a big
17 section of revetment on Seabrook Island, caused
18 extensive destruction of the revetment in front
19 of the Beach Club, and this is just three
20 miles, four miles downcoast. It caused some
21 dune recessions, scarping of the dunes along
22 Kiawah Island. I know that from firsthand
23 observations. It realigned one of the
24 secondary channels of Captain Sam's Inlet, and
25 that was reported in a study by Jerry Sexton

1 for his Master's thesis in 1982. And after
2 1979, the next hurricane was Hurricane Hugo,
3 which impacted the coast entering in the
4 vicinity of Sullivan's Island and Island of
5 Palms, which was to the north. So Kiawah
6 Island and Seabrook Island and Captain Sam's
7 Inlet did not sustain the same degree of storm
8 surge that places like Isle of Palms did;
9 nevertheless, they did have some very heavy
10 wave action.

11 Q: But Ivan was in Charleston.

12 A: Did I say Ivan?

13 Q: The eye of Hugo. The eye of Hugo --

14 A: The eye of Hugo, yes.

15 Q: -- was in Charleston. It wasn't down in --

16 A: It was north of Kiawah, that's correct.

17 Q: Right. Okay. If you could turn with me now to
18 page G-163. And just looking at the
19 "conclusions", the Environmental Inventory
20 study identified about -- under "conclusions"
21 number one, about the middle line, they
22 identified that there's a source of sediment
23 from Kiawah and they also say that -- at the
24 end of that paragraph, that major reversal in
25 the present depositional trends of sands from

1 Folly and up northeast is not expected to occur
2 within the next 50 years.

3 So we're still really within that 50-year time
4 period where Hayes said in '74 that we'd still
5 be experiencing accretion on Kiawah; isn't that
6 right?

7 A: And you're referring to what's said in the
8 first conclusion?

9 Q: Right.

10 A: Would you just give me a moment to read that?

11 Q: Sure.

12 A: It's a long paragraph. (Reading.) Okay.

13 Q: So you would agree that we're still within that
14 50-year time period that Hayes predicted we'd
15 experience continued deposition and accretion
16 on the spit?

17 A: Yes.

18 Q: All right. And so we've got still another 25
19 years or so that we can expect deposition,
20 according to this study.

21 A: If you took -- if you want to take that
22 literally.

23 Q: Okay.

24 A: I would testify, though, based on what I know
25 now, 30 years later, that you can expect

1 continued accretion even longer than the next
2 25 years.

3 The other thing that I would clarify here is
4 that the source of sand that's referred to by
5 Hayes, et al, is the erosion of Folly Beach and
6 Morris Island, the updrift islands immediately
7 to the east and north; however, much of the
8 sand that we're seeing coming onto Kiawah
9 Island originates in the present Stono Inlet
10 ebb-tidal delta.

11 Studies after, subsequent to this report, done
12 by the University of South Carolina and others
13 have shown that Stono Inlet holds and traps
14 upwards of 100 million cubic meters of sand or
15 about 120,000 cubic yards of sand in its
16 ebb-tidal delta complex. One hundred twenty
17 million cubic yards of sand.

18 A portion of that volume periodically breaks
19 free of the inlet and migrates ashore at the
20 east end of Kiawah, attaches to the beach and
21 then migrates down and accounts for the
22 accretion of Kiawah.

23 Now, whether or not that sand in the ebb delta
24 originated at Folly Beach, perhaps much of it
25 did, but erosion of Folly Beach alone would not

1 account for the accumulation of a hundred
2 million cubic meters of sand in that ebb delta.
3 There had to be some other sources earlier.
4 So that is a subtle change that I think we've
5 learned since this report was done. Remember,
6 this was one of the earliest reports of the
7 coastal geology of the South Carolina Coast.
8 It was done in -- fieldwork in 1974, two years
9 after Miles Hayes moved to South Carolina.

10 THE COURT: All right. We're going to take a break
11 now at this point.

12 So what time do y'all want to be back tomorrow
13 at?

14 MS. ARMSTRONG: I'd be good with 9:30, but it's up
15 to ...

16 THE COURT: I would prefer 9:00 just to make sure we
17 get him through tomorrow.

18 MR. WHITFIELD-CARGILE: What time is his class,
19 11:00?

20 THE WITNESS: Well, Your Honor, I have an
21 alternative for my class tomorrow where I can
22 get a substitute teacher.

23 (Off the record.)

24 THE COURT: I'd like to get this case through this
25 week. I don't know if it's going to happen,