

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge
Case No. 2013-CP-07-01341

Appeal Case No. 2017-001736

RECEIVED
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SC Court of Appeals

Road, LLC and Pinckney Point, LLC,

Of whom Road, LLC is the..... Appellant,

v.

Beaufort County, a political subdivision of the State of South Carolina,
..... Respondent.

RECORD ON APPEAL
VOLUME III of V

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1 BAILIFF: Hi. Left hand on the Bible. Raise your
2 right hand, and face the clerk.

3 MADAM CLERK: Do you solemnly swear or affirm that
4 the testimony you give to the Court in this case shall
5 be the truth, so help you God?

6 JOHN C. KUNKEL: I do.

7 MADAM CLERK: You may be seated.

8 BAILIFF: You want some water?

9 JOHN C. KUNKEL: Yes, please.

10 JOHN C. KUNKEL

11 DIRECT EXAMINATION BY MR. WALKER:

12 Q Mr. Kunkel, where do you live?

13 A Ponte Vedra, Beach, Florida.

14 Q And who do you now work for?

15 A Arendale Holdings.

16 Q And what's your position with Arendale Holdings?

17 A I'm the CEO of Arendale.

18 Q How long have you worked for Arendale Holdings?

19 A Arendale and the affiliated companies, for fifteen
20 years..

21 Q All right. What was your position before becoming
22 CEO?

23 A I was the chief operating officer, as well as the
24 CFO.

25 Q What does CFO stand for?

1 A Chief financial officer.

2 Q Okay. How long have you been doing this type of --
3 well, let me back up. What business were those
4 companies involved with?

5 A Each of the companies are involved in residential
6 land development, as well as country club communities.

7 Q How long have you been involved in working for
8 companies that were doing this?

9 A In addition to my time and involvement with
10 Arendale, for thirty years. And --

11 Q Could you give us that background, please.

12 A Sure. Prior to Arendale and its affiliates, I
13 worked with Pulte Home Corporation for fifteen years.

14 Q And before you went to Pulte Homes, what did you
15 do?

16 A I worked for the accounting firm Peat Marwick
17 Mitchell, which is now KPMG, for three years.

18 Q Do you have any -- what is your background? Would
19 you tell us your background in finance and accounting.

20 A Sure. I graduated with an accounting degree, and
21 immediately out of school, went to work with Peat
22 Marwick, always in an accounting and finance background,
23 mainly on the audit side.

24 From there, I joined Pulte as the controller of the
25 Houston division, and worked my way through Pulte in the

1 ranks, and ultimately became the chief financial officer
2 for the Florida division of Pulte.

3 Q Do you have any special certifications in the
4 accounting field?

5 A I do. I am a CPA. My license is now inactive,
6 because I don't publicly practice, but I am a CPA.

7 Q Do you exercise those CPA skills on a daily basis
8 in your work?

9 A Not quite the technical side in terms of the public
10 accountancy, but I do --

11 Q How about on the financial side?

12 A On the financial side, yes, I do.

13 Q And have you done this throughout your career, the
14 thirty years, the fifteen with Pulte and the fifteen
15 after that?

16 A I have.

17 Q When you came over from Pulte, what was the
18 operational arm you were working for, for Arendale?

19 A It was Stokes & Company, and later became -- called
20 Stokes Land Group.

21 Q And in these various jobs, do you deal on a day-to-
22 day basis with financial matters?

23 A I do.

24 Q Do you also deal with compiling projections?

25 A I do.

1 Q Financial projections?

2 A Yes.

3 Q And how many years have you been doing that with
4 respect to real estate projects?

5 A For thirty years.

6 Q When you're looking at a project, or when you're
7 looking at sort of costs and revenues, do you sometimes
8 prepare a spreadsheet or do an analysis?

9 A Yes. Either directly or indirectly, but yes. For
10 each project, we do prepare pro formas, just to schedule
11 out what the predicted revenues, expenditures, and
12 profits would be for an individual project.

13 Q When you were at Pulte, did you do that?

14 A Yes.

15 Q Did you provide those to management of the company,
16 so that they could review them?

17 A Absolutely. It was a very formal process at Pulte
18 to get each project approved, and that was, by and
19 large, the big thing that the controller would perform
20 for a brand new project.

21 Q Does Pulte do business in the market under
22 different names?

23 A Yes, they do.

24 Q And what would be some of the names that the jury
25 might be familiar with?

1 A Del Webb, for one. Divosta Homes, in Florida.
2 There are other brands that are offshoots, but those are
3 probably more prominent.

4 Q Is Centex one of them?

5 A Centex now is. Thank you for reminding me. Post-
6 my departure with Pulte, Centex was acquired.

7 Q When you moved over to Stokes Land Group, did you
8 do the same sort of thing in preparing the financial
9 analysis for management there?

10 A Yes. In Pulte's case, it was with respect to a
11 residential community, so it was not only land
12 development, budgeting, but also, the homebuilding. On
13 the Stokes side, it is almost exclusively horizontal
14 development for the community.

15 Q And when you say *horizontal development*, what do
16 you mean?

17 A That is putting in the streets, the utilities. We
18 pride ourselves sometimes in saying the highest thing we
19 develop is a fire hydrant.

20 Q You don't do the vertical construction?

21 A We now do some vertical construction with
22 amenities.

23 Q But --

24 A But -- but not for the homes.

25 Q All right. Thank you. Could you give us a rough

1 idea of a total dollar value of projects, residential
2 real estate projects, that you have worked on over the
3 years in your career.

4 A Over the past thirty years?

5 Q Yes.

6 A Are you speaking in terms of revenues?

7 Q Or however you would classify it. Whatever's
8 easiest for you.

9 A Yeah, revenue. Revenues would probably be easiest,
10 and if you give me just a moment. That one's a tougher
11 one to estimate. It would easily be above five billion
12 dollars, namely, because, within my career at Pulte, and
13 especially in the last four years with Pulte, we
14 annually have revenues in the 750 to 900 million dollars
15 a year.

16 Q All right. When you came over to Stokes Land
17 Group, did you start working with Taylor Bush, who was
18 here yesterday?

19 A Yes, I did.

20 Q How many years did you work with Taylor?

21 A For fourteen years.

22 Q And what was your role at Stokes Land Group, in
23 comparison to Taylor's role?

24 A As Taylor testified yesterday, he was one of our
25 local partners on the ground, and would be working for

1 the entitlement, or obtaining the permits and the
2 approvals, and the development of a project, as well as,
3 as he coined it, when he goes to his car, he's thinking
4 about how to dispose. He would be involved with the
5 sales of those lots.

6 My role was more of the back office, looking at the
7 deal structuring, contracting, the financial
8 implications; providing equity to the project, as well
9 as securing debt financing; and as well, just general
10 administrative duties.

11 Q You just mentioned equity and debt financing.
12 Would you please explain the difference between the two,
13 what those are.

14 A Yes, certainly. Our company would provide equity,
15 which Taylor testified yesterday, is cash that we would
16 invest into a project. Sometimes, we would make
17 advances. Those advances would be considered debt. But
18 they're still closer to the source, versus external
19 debt, which would be from a bank. And I would secure
20 the external financing for each of our projects.

21 Q Did you do any type of financial analysis for the
22 Pinckney Point property before the acquisition, before
23 it was purchased?

24 A Yes, I did.

25 Q And what were those projections, and what did they

1 show?

2 A That was some time ago. We first evaluated the
3 Pinckney tract in 2005, and as memory serves me, you
4 know, that's been quite some time, our immediate
5 knowledge base was to evaluate the property and evaluate
6 its marketability in terms of desirability of lots and
7 relative pricing. Secondly, to look at the costing
8 aspects of it. It's a relatively simple project to
9 develop, with one simple loop road around. And we
10 wanted to be environmentally sensitive, but still, it
11 was an easier development.

12 And if I recall correctly, and it's been quite a
13 while, I think we had lots that we were pricing in our
14 internal estimates at like 1.1 million dollars towards
15 the top end; and the bottom end was \$650,000.00 for a
16 lot. And that would be, as Taylor demonstrated on the
17 map yesterday, one of the interior lots within the
18 community.

19 Q Did study go into those estimates of lot pricing?

20 A Yes, it did, in two ways. We had an external
21 appraisal, and as well, we looked at and evaluated the
22 market viability of the lots through the local realty
23 community.

24 Q Do you also keep track of the industry information
25 on what's going on, say, in this market, South Carolina,

1 for a project like this?

2 A Yes, we do. It's more informally, but we do keep
3 tabs on what relative values and pricing are.

4 Q Did you do any assumptions as far as the time it
5 would take to accomplish the permits and approvals?

6 A When developing a pro forma, and sitting down with
7 our design and development team, we do map out what the
8 investment horizon will be, and what the entitlement
9 horizon -- horizon would be. And with Pinckney, our
10 expectations were that it would take roughly one year to
11 get all the permits and approvals. And I say that, only
12 because yesterday, Taylor testified, I believe, that, on
13 average, and it's tough to have an average project, but
14 on average, it would be one to two years to entitle, or
15 get all the permits and approvals for a project.

16 In the case of the Pinckney Point tract, this is a
17 relatively simple development. It's one lot to every,
18 actually, like four acres, which is very low-impact,
19 low-density project, environmentally sensitive property,
20 but still, we are mindful of the environment, and we are
21 trying to design it with minimal impacts. And it was an
22 old sod farm, and we thought we were taking a property
23 that was a farming-type project, and turning it into a
24 community.

25 Q Did you have any assumption as to when you might be

1 able to get to market with those lots, when you could
2 actually start selling them?

3 A Yes. I believe that our estimate was 21 months
4 from contracting, we would be able to get the
5 entitlements complete by the first phase of development,
6 and would be ready to sell and close on the first lots.

7 Q A minute ago, you mentioned an appraisal. Did you
8 actually have an independent appraiser appraise the
9 value of the property before you closed?

10 A Yes, we did.

11 Q Did you have any role in -- well, let me back up
12 before I ask you this. What was the plan for coming up
13 with the money to buy the property?

14 A The plan was, Stokes Land Group would be the equity
15 provider for the project, which we had a core investor
16 at Stokes Land Group; and as well, that we would get
17 external bank financing. I think you heard yesterday
18 that the bank was BB&T, and that's who, ultimately, we
19 got a development -- or excuse me -- an acquisition loan
20 for the project.

21 Q How much money did Stokes Land Group put in at the
22 very beginning of this?

23 A When we --

24 Q Sort of, their payment into it.

25 MR. ACHURCH: Your Honor, we need to -- I need to

1 raise an objection.

2 THE COURT: Okay. Basis?

3 MR. ACHURCH: Outside of the presence of the jury.

4 THE COURT: Okay. Ladies and gentlemen of the
5 jury, we're going to take a very brief recess. Again,
6 do not discuss the case. It wouldn't be appropriate.
7 We'll be right back with you.

8 JURORS LEAVE COURTROOM 12:04 P.M.

9 ON-THE-RECORD BENCH CONFERENCE, OUT
10 OF THE PRESENCE OF JURORS. PRESENT:

11 THE COURT, MR. WALKER, MS. MONOC,

12 MR. ACHURCH, MS. LOHR, MR. BENDLE:

13 BAILIFF: Jury is clear, your Honor.

14 THE COURT: Thank you. All right. Mr. Achurch.

15 MR. ACHURCH: Thank you, your Honor. I think,
16 certainly, they can say what they paid for the land.
17 That's already -- we've discussed that. But the monies
18 that were spent prior to our contract, I don't believe,
19 is relevant to their losses.

20 THE COURT: Why?

21 MR. ACHURCH: Well, because it was spent prior to
22 our contract time. If it's already spent, then, it
23 couldn't -- their loss couldn't be associated with our
24 breach -- alleged breach of contract.

25 THE COURT: Okay. You want to go ahead and answer

1 that, Mr. Walker?

2 MR. ACHURCH: For instance, they have -- as we go
3 on, and I know it's early on, and I hadn't heard the
4 question yet, but.

5 THE COURT: Right.

6 MR. ACHURCH: For instance, during Mr. Kunkel's
7 deposition, he -- and there have been documents that
8 have been provided to me about, well, we spent this much
9 money on attorneys' fees. And those are fees defending
10 this -- defending the road litigation.

11 THE COURT: Lawsuits, right.

12 MR. ACHURCH: The variance action, all those
13 things, and those all predated this contract. So, they
14 couldn't have been either in reliance on the contract,
15 or, as a result of the breach of the contract, because
16 they'd already been spent.

17 THE COURT: Okay.

18 MR. WALKER: Your Honor, the nature of our claim is
19 that the County deprived us of the opportunity to recoup
20 the monies that would have repaid these monies that were
21 put into the project. And there's no rule of law that
22 says only an expenditure after a contract is entered can
23 be recovered. The rule is that you can recover what is
24 damages directly caused by the breach. It doesn't
25 suggest what you spent afterwards. So, we don't think

1 there's any limitation on it. We have the burden of
2 proof to hook it up, certainly.

3 THE COURT: Right.

4 MR. WALKER: But we don't think it should be
5 excluded.

6 THE COURT: Okay. Well, I would agree with you. I
7 don't think it's from the time it's breached.
8 Obviously, you can claim just before that.

9 Does anyone have an extra copy of Mr. Kunkel's
10 deposition?

11 I am still concerned, and I will go ahead and tell
12 you this right now, about some of the damages that
13 you're claiming, whether or not they're speculative.
14 And then, I do have -- they raised that objection
15 originally, and it still and continues to be a question
16 in my mind. So, if I could have Mr. Kunkel's
17 deposition, I may be able to take a look at kind of
18 where he goes.

19 MR. WALKER: It primarily --

20 THE COURT: That said, I said I would give you some
21 leeway. Obviously, I'm going to let you go. I know
22 you've got to put up your case, but I'm just giving you
23 kind of the -- as I did --

24 MR. WALKER: I appreciate the heads up.

25 THE COURT: It's a hard one, and you know that, so.

1 MR. ACHURCH: We could probably give your Honor a

2 --

3 THE COURT: A condensed version would be wonderful,
4 if you have it. I don't care what version it's in, but
5 someone's got to --

6 MS. MONOC: I have two. Let me make sure I haven't
7 highlighted it.

8 THE COURT: Oh, I don't care. Unless you're
9 worried about giving me your copy, I don't care if it's
10 highlighted.

11 MS. MONOC: No, I just didn't want to --

12 MR. WALKER: We have to highlight it very
13 carefully.

14 THE COURT: Here you go. Thank you.

15 MS. MONOC: May I approach?

16 THE COURT: Please, sure.

17 MR. ACHURCH: Is that both of them?

18 MS. MONOC: Yes, it is. Thanks.

19 THE COURT: Okay.

20 MR. ACHURCH: And I think a lot of the damages,
21 just so you can go to it quicker, Judge, is in the
22 second deposition.

23 MR. WALKER: Right.

24 THE COURT: Okay.

25 MR. WALKER: It's about the last three pages of the

1 second deposition.

2 THE COURT: Thank you. Okay. I appreciate it.

3 MR. ACHURCH: Well, actually, some of it about the
4 speculation is in the first few pages.

5 THE COURT: Okay. All right. Well, you all, let's
6 -- since we took a quick break, we can take a five-
7 minute, and I mean a five-minute break. Be back by
8 12:15, because we've only got about thirty minutes to
9 run until this juror needs to go.

10 MR. WALKER: And I was just going to tell you, if
11 this helps at all, that, that's going to be the last
12 thing I'm going to ask him about.

13 THE COURT: Perfect. So, we don't have to worry
14 running over.

15 MR. WALKER: So, I was going to say, I can stop
16 when I get to that area.

17 THE COURT: Okay.

18 MR. WALKER: If you want to use the break to take a
19 look at it at lunch. And then, we can come back, --

20 THE COURT: Okay.

21 MR. WALKER: -- and I can take it up then, if that
22 makes it easier.

23 THE COURT: That would be great.

24 MR. WALKER: Okay.

25 THE COURT: That would be great. I also want to

1 talk about one other issue we may have. So, as you all
2 know, we have one gentleman that we're going to lose,
3 come Friday. He needs to be out of here by noon, at the
4 very latest, on Friday. So, we potentially lose him.
5 I'm a little concerned about my lady that's going to her
6 doctor's appointment today, and being emotional when she
7 comes back. Again, it's her mother, but she seems to be
8 incredibly close to her. So, I'm worried what kind of
9 state she's going to be.

10 So, my question is this. I know no one wants to
11 try this case a second time. So, my question to you all
12 is, is, can we agree that, if, somehow, we get down to,
13 you know, eleven or ten, that we can keep going, that
14 both will agree? I mean, like I said, my concern is
15 what happens. I don't think you want the man that wants
16 to leave on Friday to be forced to stay here. I think
17 that's just a bad juror. But I need to know if you all
18 can, for the record, get down to -- and again, I don't
19 know, you know, she may come back wonderful, because she
20 may get wonderful news. But in the off chance that she
21 is back there bawling, which, I'm going to tell you,
22 when she got put on this jury, she was crying, because
23 she was worried about this appointment, and I assured
24 her she would get to it, so. What's the plaintiffs'
25 position?

1 MR. WALKER: We don't want to try it a second time.
2 I would just need to talk to Mr. Kunkel and --

3 THE COURT: Okay.

4 MR. WALKER: -- Mr. Lanius at lunch to make sure
5 that's okay.

6 THE COURT: That's fine. And you all need to have
7 that powwow, too. And obviously, we want the more
8 jurors, the better, obviously, but the hope is that, I
9 mean, I just need some kind of agreement, if we get down
10 to ten, you all can go forward with ten. And I guess
11 you need to talk to Mr. Gruber about that, so.

12 MR. ACHURCH: Your Honor, my initial thoughts on it
13 are, I think we have two alternates.

14 THE COURT: Well, that's what we're going to do.
15 We're going to put the two alternates in, but you know,
16 it's a big weekend. When I say it's a big weekend, all
17 weekends are big. And I'm just saying, if we get down
18 to it, I don't want to be wasting our time. I agree.
19 Hopefully, it will be twelve, and it will be no problem.
20 This is just me anticipating, if that comes to that.

21 MR. ACHURCH: Your Honor, and I will talk to Mr.
22 Gruber, but my initial thoughts are, is, I think I'm
23 going to need to cross that bridge when we get to it. I
24 understand we have two alternates, and I certainly, if
25 someone has a family illness, I have no problem with

1 that.

2 THE COURT: Right.

3 MR. ACHURCH: Or this other gentleman, I don't have
4 any problem with that. And I think we're fixed by the
5 two alternates, but I won't be able to agree, your
6 Honor, ahead of time about eleven.

7 THE COURT: Okay. Okay. Well, let's just take a
8 quick five minutes, and. You are welcome to step down,
9 Mr. Kunkel. I apologize.

10 MR. JOHN C. KUNKEL: All right. No.

11 THE COURT: If anyone wants to take a quick five-
12 minute break, but literally, it will be five minutes.

13 MR. BENDLE: Judge?

14 THE COURT: Yes.

15 MR. BENDLE: The juror that spoke to you about
16 Friday, is he able to be here at all on Friday, or is
17 it --

18 THE COURT: 'Til noon on Friday.

19 MR. BENDLE: Okay.

20 THE COURT: That's what I'm told. That's through
21 the bailiffs.

22 MR. BENDLE: Okay.

23 THE COURT: I mean, they're the keeper of all
24 knowledge, so that's how I know. Okay? Right, Rick?
25 'Til noon, he can be here?

1 BAILIFF: Yes, ma'am.

2 THE COURT: Okay.

3 MR. ACHURCH: Judge, I think, just on Mr. Kunkel's
4 second deposition, --

5 THE COURT: Yes.

6 MR. ACHURCH: -- I think, from about 8 on down,
7 there are a number of questions about accuracy and other
8 problems.

9 THE COURT: Page 8.

10 MR. ACHURCH: Yes.

11 THE COURT: Okay. Thank you.

12 OFF THE RECORD 12:09 P.M.

13 BACK ON THE RECORD 12:14 P.M.

14 THE COURT: Okay. Can we go ahead and start, or do
15 we need to wait for co-counsel?

16 MR. WALKER: We can start.

17 THE COURT: Fabulous. Let's go ahead and bring
18 them in.

19 BAILIFF: Ready, your Honor?

20 THE COURT: Yes.

21 BAILIFF: Jury is entering the courtroom, your
22 Honor.

23 JURORS ENTER COURTROOM 12:16 P.M.

24 THE COURT: All right. You all may be seated. All
25 right. Mr. Walker.

1 MR. WALKER: Thank you, your Honor.

2 JOHN C. KUNKEL, CONTINUE

3 DIRECT EXAMINATION, BY MR. WALKER:

4 Q Mr. Kunkel, before we took a short break, we were
5 talking about the funding for the acquisition.

6 A Yes.

7 Q I'm going to reverse the order. Was a loan
8 obtained?

9 A Yes, there was.

10 Q From whom was the loan obtained?

11 A BB&T.

12 Q What was the amount of that loan?

13 A It's approximately eight-and-a-half million, in
14 total.

15 Q Did the Stokes Land Group put in money, too?

16 A Yes. And just for clarification, eight-and-a-half
17 million was not funded all at one time, but that was the
18 total limit on the loan.

19 Q All right. And what did Stokes Land Group put into
20 it?

21 A At the closing, we put in just shy of 5.7 million
22 dollars towards the acquisition.

23 Q I'm sorry, because of the coughing, could you
24 repeat that. I didn't hear that.

25 A Yes. At acquisition, we put in 5.7 --

1 MR. ACHURCH: Your Honor, this is -- your Honor, my
2 prior objection --

3 THE COURT: Okay. Okay. Well, again, I'll note,
4 for the record. Although, I will admit that I also had
5 a hard time hearing the question. I apologize, Ms.
6 Lohr, because of your coughing.

7 MS. LOHR: I'm sorry.

8 THE COURT: So, let's just start over, and repeat
9 the question again.

10 MS. LOHR: I'm good.

11 THE COURT: Okay.

12 BY MR. WALKER:

13 Q We better go for it while we can, Mr. Kunkel.

14 A I'll speak faster.

15 Q How much money --

16 MR. WALKER: And we understand there's an
17 objection, and we will honor running objections.

18 THE COURT: Thank you.

19 MR. WALKER: So that he does not have to have an
20 issue, preservation issue.

21 THE COURT: I appreciate that. The Court notes it,
22 for the record.

23 MR. ACHURCH: Thank you.

24 BY MR. WALKER:

25 Q How much money did Stokes Land Group put in at the

1 closing?

2 A At the closing, we funded just shy of 5.7 million
3 dollars.

4 Q And since all that money on the eight-and-a-half-
5 million-dollar loan was not drawn to pay for the
6 property, what was that money used for, the additional
7 part of the loan that had not been drawn down? What was
8 that to be used for?

9 A Once again, this was an acquisition loan, and we
10 were allowed to draw on the loan for some of the permits
11 and approvals that we would be obtaining.

12 Q And what was the term of that note with BB&T?

13 A It was a one-year loan.

14 Q Did that cause you any concerns at the time?

15 A We knew that one year would be tight with our
16 entitlement process, but we felt comfortable with it
17 that, if we were showing great progression, that we
18 would be able to extend the loan. And we had initial
19 conversations with the bank at the time along those
20 lines.

21 Q And did you believe that you would be able to
22 obtain an extension, if necessary?

23 A Yes.

24 Q Okay.

25 A And we did, by the way.

1 Q And what was your group's vision for Pinckney
2 Point?

3 A The vision for the project was to develop it into a
4 community. The lowest number of lots that I have seen
5 in the site plan was 72 lots. The highest number is 78.
6 But something within that range, which, as you saw in a
7 picture yesterday, was a community that was largely
8 waterfront lots, with a few lots on the interior. But
9 even those interior lots were around a large lake,
10 which, that lake also served for our storm water
11 retention.

12 Q Did the approval process go as expected? I know
13 that sounds like a dumb question now, but I have to ask
14 you. Did it go as expected?

15 A No, it did not.

16 Q Okay. What happened?

17 A We first had a challenge, which was, even though we
18 had obtained -- as part of our due diligence, we had a
19 title report that showed we had legal access for our
20 intended improvements. Mr. John David Pinckney put
21 fenceposts in the road, and that created a delay in
22 proceeding forward with the project. And that delay,
23 obviously, culminated into a court battle, and we needed
24 to get past that before we proceeded forward with
25 getting the remaining entitlements in place, so that we

1 would be fully permitted and approved for the
2 development.

3 Q I'm not going to go over with you all of the events
4 that occurred before that settlement as I did with Mr.
5 Bush.

6 A Thank you.

7 Q Were you able to keep up with the expenses of the
8 project?

9 A Yes, we were.

10 Q Were you able to keep up with the payments to BB&T?

11 A Actually, I am going to depart from testimony you
12 heard yesterday from Taylor. I think Taylor did mention
13 yesterday that he was the guy on the ground, and was
14 very good about the permits and approvals and
15 entitlements, and that John Kunkel was involved in the
16 financing. We did have, as our backbone investor for
17 Stokes Land Group, in 2009, mid-2009, investing in a
18 very terrible economy, and in our industry, it was
19 deplorable. They did suspend making investments, and we
20 did have to notify BB&T in particular that we would not
21 be making the interest payments on the loan. And that
22 was, I believe, in June of 2009. So, we technically
23 were in default of that loan.

24 Q I'm going to move forward to the settlement.

25 A Okay.

1 Q Was there a financial aspect of the global
2 settlement that was being reached with the other parties
3 in the road litigation?

4 A Was there a financial aspect for which party, or
5 for all parties?

6 Q A financial aspect of it, meaning that you were
7 going to have to find money to fund a settlement.

8 A Yes, there was a financial aspect for our entity.

9 Q What was that?

10 A That was, namely, to come up with 1.3 million
11 dollars, so that we could make payment for Agnes
12 Pinckney, pursuant to the settlement agreement, so that
13 we could settle on January of 2011.

14 Q Where did you first go to try to get that money?

15 A Our initial point of contact was BB&T, because it
16 made sense that the road parcel itself, and to get
17 outside of the logjam of the litigation, it made sense
18 for our bank to be the institution to put the funds in,
19 so that we could then have undisputed legal access to
20 the Pinckney Point tract, and be able to proceed forward
21 to develop it. Absent having that undisputed access, it
22 would greatly impair the value of the Pinckney tract,
23 because we would not necessarily be able to develop for
24 the intended improvements.

25 Q Was the bank that you were in default to receptive

1 to that?

2 A No, they were not.

3 Q Where did you go then?

4 A We then went -- and I mentioned that we had our
5 equity partner at Stokes Land Group suspend funding. We
6 did search the capital markets, and we have found a new
7 equity partner. That new equity partner is our core
8 investor for Arendale Holdings, and also, through
9 related entities that it owns, has provided project
10 financing for various Stokes-related projects.

11 Q Were you successful in negotiating the arrangement
12 that would allow the purchase of the road parcel?

13 A Could you ask that question again? I'm sorry.

14 Q Were you successful in negotiating arrangements
15 that would allow the funding to purchase the road
16 parcel?

17 A Yes.

18 Q Tell us about what you did to accomplish that.

19 A Okay. Taylor and I were mainly in discussions,
20 Taylor on the front end, working what the settlement
21 arrangement would be; I, on the back end, discussing
22 with our capital partner, the viability of the Pinckney
23 project, and the necessity of the 1.3 million dollars
24 needed to break the logjam. And so, I discussed with
25 our core investor the investment opportunity for the 1.3

1 million dollars.

2 Q Were you able to come to terms with that investor?

3 A Yes.

4 Q Would you tell us what the principal terms were, in
5 order to obtain the 1.3 million dollars.

6 A Sure. Our investor was very interested in,
7 obviously, being able to get the money back, and as
8 such, we had long discussions as to how to fund the 1.3
9 million dollars. It was important not to show it in any
10 form of an advance to Pinckney Point, and have Pinckney
11 acquire this road property; because if we did that, the
12 language within our mortgage with the BB&T loan, which
13 was presently in default, had triggers that, that
14 additional collateral would be swept in and under the
15 umbrella of Pinckney Point, and could be lost to the
16 bank. Therefore, it was a requirement for Arendale to
17 make the investment in a separate entity, hence the
18 develop -- or the creation of Road, LLC.

19 Secondly, it was a necessity on Arendale's part
20 that, even though Agnes Pinckney and Dot Gmann really
21 wished for the road to be a private road, it also was a
22 important aspect to Arendale for that to be a private
23 road, and not public.

24 Q Was there discussion about whether there would be
25 an easement in favor of Pinckney Point?

1 A Yes, there was.

2 MR. ACHURCH: Your Honor?

3 BY MR. WALKER:

4 Q What was ultimately worked out?

5 MR. ACHURCH: I'm just objecting to the hearsay
6 testimony about he and his investor. I don't know who
7 the investor is yet.

8 MR. WALKER: Well, I thought we went over that.

9 THE COURT: Okay.

10 BY MR. WALKER:

11 Q Who was the investor?

12 A Arendale Holdings.

13 THE COURT: Okay.

14 BY MR. WALKER:

15 Q What was worked out with respect to an easement?

16 A There remained a twenty-foot easement across the
17 property, which will allow legal access to the Pinckney
18 Point tract.

19 Q Was it sufficient to allow the development of the
20 Point parcel for the 76 lots?

21 A No, it was not. And the intention was, once
22 Pinckney Point, LLC, received the remaining permits and
23 approvals to develop the site, that, at that time,
24 Pinckney Point, LLC, would pay Road, LLC, and acquire
25 the road parcel, combining it back with Pinckney, and

1 then, have sufficient access, which was -- fifty feet is
2 necessary for the intended improvements for Pinckney
3 Point's project.

4 Q What I would like to do is present you with an
5 exhibit that was entered yesterday. It was Exhibit 3,
6 Defense Exhibit 3. Are you familiar with Defense
7 Exhibit 3?

8 A I am.

9 Q What is that?

10 A It's a purchase and sale agreement between Road,
11 LLC, and Pinckney Point, LLC.

12 Q What is subject to that purchase agreement? For
13 what?

14 A It is for the acquisition of the Road, LLC, tract.

15 Q Was there a price in that contract?

16 A Yes, there was?

17 Q How much was that for?

18 A Five million dollars.

19 Q What was the date of that contract?

20 A This contract.

21 Q And it was maybe on the signature page.

22 A Yep. January 14, 2011.

23 Q How was the five-million-dollar purchase price
24 arrived at?

25 A It was negotiated by the core investor.

1 Q Did you try to get it for less?

2 A Yes.

3 Q Could you?

4 A No.

5 Q At this point, was there still a period of time
6 between the settlement on January 14, 2011, and when the
7 sale might occur to Pinckney Point?

8 A Yes. There was actually a considerable amount of
9 time, because not only was there a date for the
10 contract, but I believe two, one-year extensions were
11 built in.

12 Q All right. There has been a description of the
13 arrangement between Road, LLC, and Pinckney Point, or
14 the sale or the easement as a poison pill. Did you
15 consider the arrangement to be a poison pill?

16 A I heard that testimony or that -- in the opening
17 arguments, that description. But no, it wasn't a poison
18 pill. It was a strategic investment, there is no
19 question about it. But it wasn't intended to be any
20 sort of a poison pill.

21 Q Would this arrangement have given Road, LLC, any
22 leverage or bargaining strength over another owner of
23 the Point parcel?

24 A Yes, it would.

25 Q Did that work to Road's benefit?

1 A It should have.

2 Q If there were another purchaser who desired to
3 develop the Point parcel as a residential subdivision,
4 what would you expect that they would do, have to do?

5 A Literally, all roads go over Road, LLC's, property,
6 and any acquirer of the Pinckney tract would need to
7 purchase or acquire the right-of-way across the Road,
8 LLC, tract.

9 Q Now, I'm going to move on to Equity Resource
10 Partners, which bought the note from BB&T. Were you
11 involved in negotiating an arrangement with Equity
12 Resource Partners?

13 A I was.

14 Q And who did you deal with?

15 A I dealt with John Irby and Lee Wooddall.

16 Q At the end of the day, what was the effect of those
17 discussions and arrangements on the foreclosure case
18 that had been filed by BB&T?

19 A Yes. When they acquired the note, they also
20 acquired the rights to continue the foreclosure suit.
21 In our discussions with Equity Resources, which were
22 always businesslike, the discussion quickly centered
23 around what was important to them and important to us.
24 In Equity Resources' case, they had purchased the loan
25 at a discount. It was important to them to be able --

1 MR. ACHURCH: Your Honor, I'm going to object --

2 THE COURT: Okay.

3 MR. ACHURCH: -- to what was important to Equity
4 Resources. I don't think he can talk about what was
5 important to them, so.

6 A Okay.

7 BY MR. WALKER:

8 A They requested ownership of the property.

9 MR. ACHURCH: Your Honor, I'm going to object again
10 to what they said.

11 THE COURT: Okay. He can say what he considered in
12 doing this dealing.

13 MR. ACHURCH: That's fine.

14 THE COURT: What he knew that he had to consider in
15 trying to get whatever done that he was attempting to
16 do.

17 A Okay.

18 BY MR. WALKER:

19 Q Right. I don't want you to say anything that
20 anybody said. Just, what did you understand the
21 objective, and what did you do in response?

22 A Thank you. I understood the objective to be
23 critical for them, ownership of the property; critical
24 for us, the ability to acquire the property back, if we
25 provided them the property through a deed in lieu of a

1 foreclosure. And so, it was a friendly arrangement
2 where we were deeding the property to Equity Resources,
3 and simultaneously providing an option agreement for us
4 to re-purchase.

5 Q Did you enter an option agreement?

6 A We did.

7 Q What was the purchase amount for you to buy the
8 property back?

9 A It was six-and-a-half million, plus, we had two
10 option payments that were contracted within the
11 agreement.

12 Q What was the amount of the first option payment?

13 A I believe it was \$125,000.00.

14 Q How long did that keep your right to purchase the
15 property back open to?

16 A If memory serves me correctly, it was eight months.

17 Q And at that time, had you not been in a position to
18 buy it back, could you pay money to get another six
19 months?

20 A It was contemplated within the agreement for an
21 additional \$375,000.00 payment, we would be able to
22 extend from August 31, 2012, to February 28, 2013.

23 Q Did that eventuality actually happen?

24 A Yes, it did.

25 Q Why?

1 A Because we needed additional time, because, as you
2 heard in previous testimony, we did not have all the
3 permits and approvals in place for the development of
4 the Pinckney tract.

5 Q Would that be by the end of the first option
6 period, August 31, 2012?

7 A Yes.

8 Q Was the \$375,000.00 paid?

9 A Yes, it was.

10 Q Mr. Kunkel, was there any time between when
11 Pinckney Point, LLC, purchased the property in March of
12 2006 and February 28, 2013, when the option expired,
13 when Pinckney Point either didn't own the land or have
14 the right to buy it back?

15 A No, there wasn't.

16 Q I now want to talk about --

17 MR. WALKER: Your Honor, I'm going to go into
18 something. It should be about five minutes, but if --
19 if you want to break. I see you looking. Are you --

20 THE COURT: No, no, no. I'm okay. We have five
21 minutes. So, as long as we're all okay, I'm still fine.

22 MR. WALKER: All right.

23 THE COURT: I just wanted to make sure.

24 MR. WALKER: You give me the signal.

25 THE COURT: I will give you the signal.

1 MR. WALKER: Okay.

2 BY MR. WALKER:

3 Q At this time, were you, as the financial person,
4 looking to find an investor? And when I talk about this
5 time, from -- during this option period, were you
6 looking for somebody to put some money in, so you could
7 buy the property back for six-and-a-half million?

8 A Earlier in the process, we were focused on getting
9 the permits and approvals so that we, then, through our
10 core investor at Arendale, would be able to put in the
11 cash necessary for the acquisition of the property, and
12 ultimately, the development. Towards the end of the
13 process. And I believe you saw in testimony yesterday,
14 that Equity Resources, in mid-February, had changed
15 their tune about an extension period, and it suddenly
16 put us in full alert that we needed to go to the capital
17 markets and find any investor, which we attempted to do
18 from the period of early February, early to mid-February
19 of 2013, to some time in early April of 2013.

20 Q And I would like to go back and explain that, have
21 you explain that a little more.

22 A Okay.

23 Q So, you said you had a primary investor, and who
24 was that? That you would go to.

25 A Within Arendale, our core investor is a company

1 called Reinet.

2 Q Were they capable of funding the money, either
3 investing it or making a loan, so that Pinckney Point
4 could buy the property back?

5 A Yes, they are. Reinet operates, however -- they
6 are a fund, and they have strict fund requirements, and
7 within their requirements, they did not wish to make the
8 investment for the --

9 MR. ACHURCH: Your Honor, I'm going to object to
10 that testimony about Reinet. There's no representative
11 of Reinet here to testify to that. That's hearsay.

12 MR. WALKER: Well, I am offering it to show why he
13 did what he did; and also, to show what he had to do, in
14 order to satisfy this source of capital. I will change
15 the question to that.

16 THE COURT: Okay. You need to rephrase it.

17 BY MR. WALKER:

18 Q Did you work on a periodic basis with Reinet?

19 A Yes.

20 Q Did you have an understanding of their guidelines
21 for investing?

22 A Yes.

23 Q What did you understand you had to demonstrate to
24 them in order to obtain the money you needed?

25 A I needed to have development permits and approvals

1 in place for acquisition of property.

2 Q Had you actually had discussions with them about
3 this particular property?

4 A Yes.

5 Q One? Many? How much?

6 A Many.

7 Q Was there a level of interest?

8 A Yes.

9 Q What was the holdup, then?

10 A Didn't have --

11 MR. ACHURCH: Your Honor, this is the same question
12 again.

13 MR. WALKER: All right.

14 MR. ACHURCH: Objection.

15 THE COURT: Okay.

16 BY MR. WALKER:

17 Q Now, you mentioned something different happened
18 when it became apparent in mid-February of 2013 that
19 there was going to be no more extension to get the
20 permits and approvals, and you had to go somewhere else.
21 You said the capital market. What are you talking
22 about?

23 A In the real estate business, if banks aren't
24 lending, especially without full permits and approvals,
25 there are sources of capital, and we did reach out to a

1 few firms who expressed an interest in evaluating this
2 investment.

3 Q And what did you find when you went out to the
4 capital markets? Without quoting anybody, what did you
5 confront when you went out?

6 A We still faced the resistance, because we didn't
7 have permits and approvals in place to attract the
8 necessary capital.

9 Q When you only had until March 11th to close, did
10 you, in any way, stop looking?

11 A No, we did not. It was our belief that, if we
12 continued to work on the project, that Equity Resources
13 would close with whomever was the first to be able to
14 close, and if we found capital with Pinckney, and we got
15 our one last entitlement, which was very close to
16 getting site plan approval, then, we would be able to
17 attract the necessary capital partner to invest in the
18 project with us, and we would be able to close on the
19 Point tract.

20 Q Do you believe that, if you had had 120 days more
21 from Equity Resources, that, that could have probably
22 been done?

23 MR. ACHURCH: Your Honor, I don't think his belief
24 is relevant.

25 THE COURT: I think he can testify. Go ahead.

1 BY MR. WALKER:

2 A Yes.

3 Q Why?

4 A Because, once again, we heard yesterday in
5 testimony, our engineers had indicated we were 95
6 percent complete with all engineering in December of
7 2012, and the engineering was the last component, just
8 to get the final plans in order for presentment for that
9 final site plan approval.

10 Q All right.

11 MR. WALKER: Your Honor, this is a break point for
12 us before we get to the subject that we talked about, if
13 your Honor would like.

14 BY THE COURT:

15 THE COURT: I think it's a very good time for us to
16 break for lunch, ladies and gentlemen.

17 Ladies and gentlemen, I am trying to have the
18 shortest amount of time possible that you're back
19 waiting. What I am going to ask you to do is this. If
20 you would be back in your jury room at 2:15, that should
21 give us some time. Don't you worry. If you're still
22 running on your appointment, I don't want anyone
23 concerned about it. We're going to wait for you. If
24 there's going to be an enormous delay, I am going to ask
25 you to call in. Okay? And I'm going to give you a

1 phone number to call directly, too, so that we don't
2 have to go through the clerk's office and five other
3 people before it gets to me. So, anyway, if you could.

4 Ladies and gentlemen, I need to remind you, you are
5 not to discuss this case. It wouldn't be appropriate to
6 do so. Go grab a bite to eat.

7 Mr. Foreperson, how late are you all willing to
8 work today?

9 FOREPERSON: The same, 5:30.

10 THE COURT: 5:30, roughly or so? All right. Very
11 well. And it might be a little bit earlier than that,
12 that we break today, but I just wanted to let you all
13 know that, so, for planning purposes. Okay? So, thank
14 you all. Please, you all are excused. Have a nice
15 lunch.

16 JURORS LEAVE COURTROOM 12:42 P.M.

17 THE COURT: You can step down, Mr. Kunkel. I'll
18 tell you, as far as I've gotten in this deposition,
19 basically, he's still talking in generalities. I
20 haven't seen any numbers yet, so. I didn't get a chance
21 to start looking at it. Does he get to numbers? I'm
22 assuming, somehow, we're getting to some numbers.

23 MR. ACHURCH: Yeah, later on in that, yes.

24 THE COURT: Okay. I assume. Okay.

25 MR. WALKER: The last thirty pages.

1 THE COURT: Last thirty pages in the numbers. He's
2 just kind of building up. Okay.

3 MR. WALKER: They're trying to create general
4 doubt, and in the end, they go over the pro forma.

5 THE COURT: Okay.

6 MR. WALKER: Your Honor, on planning purposes, just
7 so I can know for purposes of scheduling, as I said,
8 we're going to have John Kunkel, we're going to finish,
9 I assume we're going to come back at 2:00 and argue a
10 little law.

11 THE COURT: Yes.

12 MR. WALKER: All right. And then, we've got --
13 I'll finish up with him. And then, there'll be cross,
14 and our next witness is Tommy Hartnett right here.

15 THE COURT: Okay.

16 MR. WALKER: And I would expect him to take an
17 hour, and hour and a half or two hours.

18 THE COURT: Okay.

19 MR. WALKER: And the next live witness is Walter
20 Nester, and I told him I would let him know today. I
21 was -- I think that's going to take the day.

22 THE COURT: I think it is, too.

23 MR. WALKER: So, I was going to say for him to be
24 here bright and early tomorrow morning, if that's okay
25 with you.

1 THE COURT: I think it's fine, yes. I don't want
2 him to have to sit here and waste his time, so that
3 would be great.

4 MR. WALKER: All right. Thank you very much.

5 THE COURT: Yes. I'm going to work on my own
6 schedule, as well, because I need to be out of here by
7 about 5:15.

8 MR. WALKER: Okay. Okay.

9 THE COURT: So, I'm going to go see if I can take
10 care of that. And if I can take care of that, then, we
11 won't worry about it. But as you hear, the jury can
12 only work 'til 5:30-ish.

13 MR. WALKER: Okay.

14 THE COURT: So. And that's my plan right now.

15 MR. WALKER: Okay. Thank you very much.

16 THE COURT: Okay. But I know we need to get Mr.
17 Hartnett up and down today, correct?

18 MR. WALKER: We do.

19 THE COURT: Mr. Hartnett says -- he says that
20 every time I see him. So, yes. So, we'll work on it.
21 Okay? Thank you. All right. Have a nice lunch, you
22 all. We'll be back about 2:00 o'clock, argue a little
23 law. Okay? Thank you.

24 OFF THE RECORD 12:44 P.M.

25 BACK ON THE RECORD 2:46 P.M.

1 ARGUMENT AND RULING:

2 THE COURT: Thank you. Please be seated. All
3 right. Our Juror Number 261, Ms. Piper, I just met with
4 her briefly, because, apparently, when she came back
5 from her mother's doctor's appointment, she was in
6 tears. I just wanted to make sure she was okay to go
7 forward. The only thing I asked her was, do you want to
8 remain on this jury; if not, I, you know, will certainly
9 let you go if you're too upset. And she said, no, she
10 was fine; she wanted to stay on. So, she said that they
11 got the diagnosis ten months ago, so it's not like it's
12 a brand-new diagnosis, and she just says the treatment
13 isn't going as well as they had hoped. So, she really
14 wished and wanted to stay on, so. And she seems to be
15 fine now. So, just to report that back to you.

16 Secondly, over the lunch hour, did you all come up
17 with any case law? I can tell you that I have gone
18 through some of Mr. Kunkel's deposition. I can tell
19 you, I have not gone through every last bit of it.
20 Somewhere in there I saw -- I'm sure there was
21 prospectus done, obviously, for the bank. Was there
22 more than one done? Or just one? I don't know where
23 I --

24 MR. WALKER: Well, --

25 THE COURT: -- where I thought somehow there was

1 three somewhere out there, but that could just be that
2 was me just dreaming.

3 MR. WALKER: No. Actually, you turned out to be
4 right.

5 THE COURT: Okay.

6 MR. WALKER: I don't know if you're prophetic, but
7 --

8 THE COURT: Okay.

9 MR. WALKER: There was one that he did before the
10 investment. And then, near the end of the investment,
11 Exhibits 19 and 20, that we marked --

12 THE COURT: Okay.

13 MR. WALKER: -- were done in February, around the
14 time the option expired.

15 THE COURT: Right. Okay.

16 MR. WALKER: And 19 is a pro forma, basically, the
17 net cash flow. And the second one, 20, takes into
18 account what would have to be paid for an investor.

19 THE COURT: Okay.

20 MR. WALKER: And while the revenues are significant
21 revenues, the return that the investor would require is
22 significant, too.

23 THE COURT: Okay.

24 MR. WALKER: So, I think we would be focusing on
25 20, which, when present value comes back to lost net

1 profits of between five-and-a-half and eight million
2 dollars. So, yeah, there was one that he did. In fact,
3 it was not done for litigation.

4 THE COURT: Right.

5 MR. WALKER: It was done when he was out in the
6 market trying to find the investor.

7 THE COURT: Right.

8 MR. WALKER: And we will -- and we can go through
9 everything he did, in terms of where the assumptions
10 came forward, the reasonable basis for the assumptions,
11 that it's all done according to industry standards.

12 THE COURT: I'm not worried about that portion of
13 it. It's a prospectus. I'm sure it was done. I mean,
14 again, I mean, you know what my standard is. It's got
15 to be confident -- or competent evidence within a
16 reasonable certainty, and that's kind of the hurdle we
17 have to get past.

18 MR. WALKER: And he has prepared -- prepared to say
19 that.

20 THE COURT: To testify to that.

21 MR. WALKER: Yeah.

22 THE COURT: Okay. Okay.

23 MR. WALKER: And I'm going to turn it over to Ms.
24 Monoc, who has been deep into the case law, if you want
25 to hear anything about the case law. But it does come

1 down to that third reasonable certainty, as we see it.

2 THE COURT: Exactly. And that's the only thing
3 that, again, and I'm -- obviously, if he testifies, and
4 I don't feel like we've gotten to that point, you know,
5 I could, of course, tell the jury they can't consider
6 that for damages. I mean, I don't want to tie your
7 hands, obviously. I also don't want to give them an
8 appealable issue, as I'm sure -- you know, I think I
9 started off by saying this case will be appealed,
10 regardless. And so, you know, I know everybody takes a
11 gulp in this room, but that's, chances are, where we're
12 going. So, I'm kind of just sitting here weighing,
13 trying to have -- you know, to do it.

14 I mean, again, you know, this is -- it's obviously
15 an industry that's dependent on market conditions. You
16 know, obviously, it's big money. It's, you know, it can
17 also be a big chance. And so, I mean, go ahead, and you
18 can tell me. I think you've looked at the same case law
19 I have over the lunch, you know, hour. It's really --
20 my understanding is, it's very fact-determinative in
21 each case. And I have no doubt that your Mr. Kunkel,
22 with his qualifications, I have no doubt because of what
23 everyone else required, he probably tried to go out and
24 sell this, that it was done properly and according to
25 industry standards. I'm just more worried about just

1 the speculative nature of it, so.

2 MS. MONOC: Sure. Your Honor, if I may?

3 THE COURT: Yes.

4 MS. MONOC: There's a case, it's *Savings Bank*
5 *versus Thornton-Crosby Development Company*. The
6 citation is 1990 Lexis 155. It's a South Carolina Court
7 of Appeals case that was a foreclosure action with
8 various cross-claims and counterclaims between a
9 developer and a contractor. And in that case, the Court
10 held that -- it's very similar to our case, in that,
11 there was one party to the contract which breached the
12 contract, and it caused -- the Court found that it
13 caused the real estate development, or the condo
14 project, to fail. And there, just like here, the
15 defendant contests all angles of the deficiency of
16 damages. And in that case, they found that it was
17 foreseeable based on, you know, they brought in the
18 *Moore versus Moore*.

19 THE COURT: Right.

20 MS. MONOC: You know, all that good stuff. But it
21 was a natural consequence. There, it was but for the
22 breach the condo units would have sold. And they put up
23 forth testimony, expert testimony, that it would have
24 sold by, say, March, and the Court found that it would
25 have sold by July. Court of Appeals was satisfied with

1 that, based on the competency of the evidence that was
2 presented. And they said, but for the breach, they
3 would have sold, and then, they would have been able to
4 pay back the bank, and not been in foreclosure, and they
5 would have made some money.

6 THE COURT: Right.

7 MS. MONOC: So, they allowed both, the actual
8 damages and the lost profits, in that case.

9 THE COURT: But let me ask you, they still had,
10 with the hindsight, that they did eventually sell in,
11 you say, July. They just would have sold earlier? Is
12 that --

13 MS. MONOC: Oh, that was all based on the
14 predictions. I don't know what actually happened.

15 THE COURT: That's what I was wondering. If it
16 actually happened, that makes it a little easier to buy.

17 MS. MONOC: They did have a few pre-sales.

18 MR. WALKER: They lost it to foreclosure.

19 MS. MONOC: Yeah, they lost it to foreclosure, and
20 they just -- they had a few pre-sales, which, we don't
21 have that benefit, but we do have all the other things
22 that they did have.

23 So, and then, in here, you know, we believe our
24 predicament is a natural consequence of the County's
25 breach. You know, we've got evidence, as your Honor

1 knows, that we would have, most probably, had that 120-
2 day extension, because they were in the talks. And
3 then, I think that the County met with them, and then,
4 they -- it was off the table, because they had another
5 deal cooking.

6 MS. MONOC: And then, in addition to that, you
7 know, we've seen the emails about the 95 percent of the
8 engineering work being done, and there's going to be
9 more -- we haven't even gotten into the testimony yet.

10 THE COURT: And I understand that. Like I said, I
11 don't want to cut you off before we've gone into it, but
12 I was interested in seeing what he had in his
13 deposition.

14 MS. MONOC: Sure. And your Honor has already kind
15 of talked about the reasonable certainty aspect, which
16 we think we can show.

17 THE COURT: Okay.

18 MS. MONOC: You know, in several ways, so.

19 THE COURT: Okay. And Mr. Achurch, I understand
20 what your objection is going to be. It's very difficult
21 to unring a bell --

22 MR. ACHURCH: It's --

23 THE COURT: -- and pull a jury back, but I'm going
24 to tell you this. I have huge faith in the jury system.
25 And typically, they get it right. So, I truly think

1 this is a smart jury. I think that, if I ordered
2 certain things to be struck and certain testimony not to
3 be considered, if I had to do that at the back end, I
4 could.

5 MR. ACHURCH: I was just going to --

6 THE COURT: If you want to put anymore objections
7 on the record, you can keep coming.

8 MR. ACHURCH: No, I was just going to point out,
9 your Honor, that I agree, it is very fact-specific. And
10 while something involves a foreclosure, I don't know
11 what that actual testimony is about how they arrived at
12 their numbers. But Mr. Kunkel's testimony is going to
13 be -- and again, it's hard to unring the bell, and I
14 appreciate the Court taking the time to listen to this.
15 But this testimony is going to be that other projects
16 didn't go as planned; many, many reasons for that;
17 there's not enough money, but mostly, the market goes
18 bad; the lots don't sell as quickly as you want to.

19 Mr. Kunkel's had ten other properties foreclosed
20 on. There's no testimony from ERP that they could --
21 the testimony is ERP could have sold this to anyone
22 else, and there's no testimony that they wouldn't have
23 sold it to someone else. There's no testimony that they
24 got the development money to develop it out. And I
25 don't think anything's -- so, we know that, that didn't

1 happen.

2 ERP could have developed it. The apprai -- the
3 numbers that they base these numbers on, your Honor, the
4 total sellout, is based on an appraisal that, of course,
5 Mr. Kunkel didn't do the appraisal. That was done in
6 2005.

7 THE COURT: And that was my next question.

8 MR. ACHURCH: That was --

9 THE COURT: A lot has happened since 2005. We can
10 actually go up and down Bluffton, and look at so many
11 plantations and what occurred.

12 MR. ACHURCH: Right. I --

13 MR. WALKER: There was an update -- I'm sorry. go
14 ahead.

15 THE COURT: There was an update? That's what I'm
16 asking you.

17 MR. WALKER: It was updated in 2012.

18 THE COURT: That's what I thought. That's what we
19 talked about there being three prospectuses. Because
20 hindsight is genius.

21 MR. ACHURCH: Yeah, isn't it? The cost numbers are
22 based on estimates, not bids. They didn't come from
23 anyone else. Mr. Kunkel said that he's lost money on
24 thirty -- I don't know if you got to this part -- he
25 lost money on 35 percent of the projects that he's done.

1 Half of those were a complete loss, and his other
2 testimony was that you don't know anything with
3 certainty until you sell the lots. And so, I don't
4 think they can meet their objective standard of
5 reasonable certainty.

6 THE COURT: I appreciate that, and I'm glad you put
7 that on the record.

8 MR. ACHURCH: Thank you.

9 THE COURT: Because I want it on the record.

10 MR. ACHURCH: Yes, ma'am. Thank you.

11 THE COURT: So, thank you. So, I'm going to go
12 ahead and let him continue to testify. Certainly, as
13 the managing partner, he can do that.

14 MR. ACHURCH: Okay. And can we agree, your Honor,
15 that --

16 THE COURT: Yes.

17 MR. ACHURCH: -- I won't need to stand up --

18 THE COURT: You don't need to.

19 MR. ACHURCH: -- and object and do all that?

20 THE COURT: And you'll agree, for the record, that
21 he has a running objection as to lost profits.

22 MR. WALKER: Yes, running objection. And just so
23 we don't impose on the jury a second time, we have also,
24 since the Court may throw out the lost profits or the
25 jury reject it, the alternative of the expenses in the

1 project. And he has gone back and had that tabulated.
2 And I think that -- I don't think there's as much --
3 well, I don't know if there's any controversy over that,
4 but we have the total expenses. And then, we broke out
5 the expenses since the settlement agreement, --

6 THE COURT: Right. I saw that.

7 MR. WALKER: -- so that those could be separated.

8 THE COURT: Okay. And what was the actual damages
9 on it? Just as to the consequential?

10 MR. WALKER: The gross was around nine-five.

11 THE COURT: I saw that, between eight and nine.
12 And so, yeah.

13 MR. WALKER: Right, right.

14 THE COURT: Okay.

15 MS. LOHR: Your Honor?

16 THE COURT: Yes.

17 MS. LOHR: Just with regard to that, I know you
18 asked for jury instructions last night, but. So, the
19 jury's going to have lost -- they're going to have lost
20 profit numbers in front of them. They'll have cost
21 numbers in front of them. Just so that there is an
22 instruction, they can't give both cost and lost profit.
23 You know, you can't have it both ways, because --

24 MR. WALKER: We wouldn't --

25 THE COURT: We understand that.

1 MS. LOHR: Okay.

2 MR. WALKER: And I intend to present that in
3 argument, too.

4 THE COURT: Okay. Okay. All right.

5 MR. ACHURCH: And also, --

6 THE COURT: Yes.

7 MR. ACHURCH: -- I agree with Mr. Walker. So, if
8 they present testimony about damages prior to, or costs
9 prior to that settlement agreement, I don't need to
10 stand up and object to that. We'll agree that's
11 preserved.

12 MR. WALKER: I agree Mr. Achurch has an objection
13 to any expenses incurred before the settlement
14 agreement.

15 THE COURT: Absolutely. Okay. Noted, for the
16 record.

17 MR. ACHURCH: I also object to any of the expenses,
18 Judge, because I don't think they're related to the
19 breach. I think our -- my contention is certainly that
20 our obligations under the contract were to do two
21 things, and we did those things.

22 THE COURT: Right.

23 MR. ACHURCH: So, as long as we agree with -- if
24 he'll agree that I can preserve my objection to that.

25 MR. WALKER: Yeah. And we will agree that any

1 objection of any kind that he has is preserved, and we
2 will not raise any preservation issues. Because I think
3 he's made his position clear, and I don't want to impose
4 on him to have to do it every time.

5 THE COURT: Okay.

6 MR. ACHURCH: Thank you, Judge. And thank you,
7 Counsel.

8 THE COURT: Okay. All right. Let's bring the jury
9 in, Rick.

10 BAILIFF: You ready, your Honor?

11 THE COURT: Please.

12 BAILIFF: Jury is entering the courtroom, your
13 Honor.

14 THE COURT: Thank you.

15 JURORS ENTER COURTROOM 3:00 P.M.

16 THE COURT: You all may be seated. Ladies and
17 gentlemen, we're going to continue with Mr. Kunkel's
18 testimony.

19 MR. WALKER: Thank you, your Honor.

20 JOHN C. KUNKEL, CONTINUE

21 DIRECT EXAMINATION, BY MR. WALKER:

22 Q Mr. Kunkel, has Stokes Land Group been involved in
23 other projects in South Carolina?

24 A Yes, sir.

25 Q Could you give us an example of some of those.

1 A Over the past fifteen years, we've had projects in
2 the Charleston area, also, in Myrtle Beach, and as well,
3 here in Beaufort County.

4 Q In anticipation of this trial, Mr. Kunkel, did you
5 do a compilation of all the costs that were incurred by
6 Pinckney Point pursuant to this project or in
7 furtherance of this project?

8 A Yes, we have.

9 Q Did you check those?

10 A I have. Our controller actually produced the list,
11 but I did go through it.

12 Q Are the records that you keep reasonably accurate,
13 or accurate?

14 A Yes.

15 Q Was this derived directly from your cost records?

16 A From our accounting system and the cost records.

17 Q Did that include checking invoices?

18 A Correct.

19 Q I'm handing you Plaintiffs' Exhibit 18, which
20 should be in the exhibit notebook. Can you identify
21 that?

22 A Yes, I can. What is that?

23 Q What is that?

24 A This shows an investment analysis of all costs in
25 the project at Pinckney Point, LLC, from the inception

1 of the project through January 31, 2015.

2 Q Does it include any money at all put in by the
3 bank?

4 A Actually, we have specifically deducted out the
5 bank debt and accrued interest. As well, we deducted
6 out any litigation fees related to this trial.

7 Q And what does the net amount represent?

8 A Net amount is nine million --

9 Q No, don't say it, but is that all other costs?

10 A Yeah, all other costs, yes.

11 Q Would that be incurred through the expiration of
12 the option?

13 A Beyond the expiration of the option.

14 Q All right. And what expenses would be added that
15 were beyond the expiration of the option, for instance?

16 A Very few expenses were incurred beyond the
17 expiration of the option. By and large, once the option
18 period lapsed, there were fewer wrap-up items that we
19 had, because, very quickly after the lapse of the option
20 period, we had received word that the County was
21 approving and ultimately contracting the property, and
22 we stopped all work.

23 Q Does Exhibit 18 accurately reflect the expenditures
24 of Pinckney Point, gross expenditures, less those costs
25 you identified?

1 A Yes, it does.

2 MR. WALKER: We would move 18 into evidence,
3 subject to the objection.

4 THE COURT: Subject to the prior objection, it's in
5 evidence.

6 ITEM IDENTIFIED AS PINCKNEY POINT
7 INVESTMENT ANALYSIS FROM INCEPTION
8 OF PROJECT THROUGH JANUARY 31, 2015,
9 MARKED PLAINTIFFS' EXHIBIT NUMBER 18,
10 ADMITTED AS EVIDENCE.

11 BY MR. WALKER:

12 Q Mr. Kunkel, were you also asked to tabulate or
13 itemize expenses since the settlement agreement on
14 January 14, 2011?

15 A Yes, we were.

16 Q All right. What is Plaintiffs' Exhibit 17?

17 A This is a schedule of disbursements of funds by
18 Tideridge Investments, which is funding all our project
19 advances at this point, from January 2011 to the end of
20 our project investments at Pinckney Point, LLC.

21 Q So, to explain it, does the money go from Tideridge
22 to Pinckney Point?

23 A It goes from Tideridge to Pinckney Point as an
24 advance.

25 Q All right. And if we could, could you put up 18

1 again, please. And make that a little larger, so we can
2 all see.

3 On 18, which we just talked about, which is the
4 gross expenditures, you did those by category?

5 A Yes, we did.

6 Q All right. And is there a difference in the way
7 you have done 17 for the expenses that incurred after
8 the settlement agreement?

9 A In 17, we actually listed out chronologically by
10 expenditure. And at the very end, we re-tabulated,
11 based on vendor.

12 Q Very good.

13 MR. WALKER: Your Honor, at this time, we would
14 offer 17, subject to the Defense objection.

15 THE COURT: Subject to the prior objection, it's in
16 evidence.

17 ITEM IDENTIFIED AS PINCKNEY POINT,
18 LLC, SCHEDULE OF DISBURSEMENTS FUNDED
19 BY TIDERIDGE,
20 MARKED PLAINTIFFS' EXHIBIT NUMBER 17,
21 ADMITTED AS EVIDENCE.

22 BY MR. WALKER:

23 Q Do these basically show every check, every major
24 expenditure?

25 A Other than any legal fees associated with this

1 case, this shows all of the expenditures that we have
2 paid out of pocket.

3 Q And would it show, for instance, those expenses
4 that were paid to the McNair Law Firm, or to your
5 engineers and all these other vendors?

6 A That's correct. And it's fair to say that what's
7 in Exhibit 17 on the screen is a subset of the
8 expenditures in Exhibit 18.

9 Q I'd like, if we could, to go to Page 2. If you
10 could bring it down to the 375. And if you would, go
11 back to the top, please.

12 And on this, Mr. Kunkel, I'd like you to talk about
13 the fees to the engineering firm. Was there a point
14 where the fees were minimal, and then, they picked up
15 again?

16 A Yes, that's correct. And you might even wish to go
17 back to Page 1.

18 Q Okay.

19 A Where you see a pattern of activity, and it aligns
20 with the delay for how to handle -- or the approval for
21 the sewage treatment, which prompted us to halt all of
22 our engineering activities, other than small work.

23 Q All right. And we could focus on there, there's a
24 payment I see on August 22, 2011.

25 A Correct. And for the record, Ward Edwards --

1 Q Ward Edwards.

2 A -- is the engineer. So, the payments to Ward
3 Edwards are largely on a monthly basis.

4 Q And how much was the payment in August after the
5 conditional site plan approval?

6 A It is \$767.50.

7 Q Did I see there is a payment on September 27, Check
8 Number 1086?

9 A Correct. For \$1,458.75.

10 Q And I also see that there are some bills from the
11 McNair Law Firm, November 29th?

12 A Correct. \$8,615.00.

13 Q And how about at the bottom? How much is that?

14 A At 12/28, another \$5,052.06.

15 Q What was the primary issue they were working on?

16 A Basically, McNair was engaged in helping resolve
17 the dispute over the individual permitting process for
18 septic tanks on the lots, and we had to pull our
19 engineers off of the design and the develop -- or the
20 design of the community.

21 Q All right. And could we go to Page 2.

22 A Yes, we can.

23 Q We heard yesterday that there was a resolution
24 around February 2012. Do the expenses pick up to Ward
25 Edwards after that?

1 A Yes, they do. McNair drops off in January, and we
2 see Ward Edwards picking up, in particular, in May, we
3 have a \$6,000.00 payment to them.

4 Q All right. And that's 1120, Check 1120?

5 A That's correct.

6 Q All right.

7 A On June 14th, Check 1124, Ward Edwards was
8 receiving \$40,000.00.

9 Q All right.

10 A For the full engagement of the engineering.

11 Q And then, was there another check on July 11, 1126?

12 A That's correct, for 13,997.

13 Q And again.

14 A And again on 1130, on July 31st, \$16,339.00.

15 Q All right.

16 A August 29th, Check 1133, paid them \$32,500.16.

17 Q And then, we see a wire, and what is that?

18 A The wire was the extension fee for the second
19 option fee contemplated within the option agreement.

20 Q Okay. And if we could go down a little more.

21 A Okay.

22 Q Are you continuing to pay Ward Edwards?

23 A Yes, we are. Check 1139, September 26, \$5,576.25.
24 Check 1146, on October 26, \$8,031.60.

25 Q I think, and we can -- we've got the picture here.

1 What were these expenses going to pay for? What was
2 happening? What was Ward Edwards doing here?

3 A This was final engineering for the site plan, so
4 that we could get final site plan approval.

5 Q Very good. And the gross number, if you would get
6 to that, on the last page of these expenses. Just from
7 the settlement -- time of the settlement agreement to
8 the conclusion of activity on the project.

9 A Gross number in total, or gross number for Ward
10 Edwards?

11 Q No, the gross number in total.

12 A Is \$959,331.48.

13 Q Thank you. I also want to ask you about whether or
14 not you did any calculations as to any profits that may
15 have been lost.

16 A Yes, we did.

17 Q And before I get to that, I want to go over some of
18 your, again, your qualifications. We've talked about it
19 earlier. But have you been performing pro forma
20 calculations that calculate net revenues and profits for
21 awhile?

22 A For thirty years.

23 Q Do you follow standard accepted practices,
24 including those practices from accounting that may
25 apply?

1 A Yes. As well, external practices that banks have
2 seen the types of pro forma's, and have underwritten
3 loans based on this type of analysis.

4 Q Do you do anything to skew those?

5 A No.

6 Q Have your projections been accepted by banks in
7 their underwriting analysis?

8 A Yes, they have.

9 Q Okay. Were you preparing projections and looking
10 for an investor to give both the investor and you a
11 reasonably -- reasonable picture of what to expect if
12 the investor made the investment?

13 A Yes, we were.

14 Q When you went to prepare this pro forma, what did
15 you look to in terms of projecting revenues? Because
16 you're trying to go to the future, what did you rely on?

17 A Reliance is based on the external market, and we
18 look at two factors. The first is, we had an outside
19 appraiser, who we had engaged in 2005, and once again in
20 2012. We did a specific assessment of lot values for
21 the site plan for Pinckney Point. And secondly, we went
22 to the realty community, and just made sure that the
23 pricing was reasonable, as well as the absorption base,
24 or the speed in which we would sell lots.

25 Q Did you have any assumptions, in terms of either

1 the pricing or the absorption, meaning how many were
2 sold over a given period of time that weren't verified
3 by outside sources that you would rely on normally?

4 A No.

5 Q Now, let's talk about cost. So, there are two
6 parts of this. You've got revenues, which is money
7 coming in. And you've got costs, money going out. What
8 did you rely on for your assumption of costs?

9 A On the costs side, first of all, we relied on our
10 engineers, who had now designed the site, and had come
11 up with a qualified engineer estimates of costs, all the
12 way through a takeoff, meaning they had actually taken
13 the linear feet, the height, the actual cost of that,
14 like, if we're having utilities. And as well, we had a
15 contractor's estimate. It wasn't a full bid, but it was
16 an estimate from a contractor, based on the same
17 engineering data.

18 Q Did you consider that information reasonably
19 reliable, and at least reliable enough for you to do the
20 projection?

21 A Yes, we did.

22 Q Is that the type of information that is relied on
23 in your industry to come up with an accurate projection?

24 A Yes, it is. And more often than not, you're
25 obtaining financing at this stage, in advance of having

1 full contracts from a development contractor. And so,
2 engineering estimates, as well as contractors' estimates
3 of this nature, is generally accepted.

4 Q So, was there anything premature about the
5 information, or doing the calculation at this time, or
6 would this have been a normal time when you were going
7 out and looking for financing or an investment partner?

8 A We needed to have the engineering basically
9 completed, and that completion of the engineering was
10 right towards the end of the year, beginning of 2013.
11 And these estimates were put together after that
12 engineering was completed. So, that was the appropriate
13 time.

14 Q Were there other material assumptions in your
15 calculations that you did?

16 A We did assume an escalator on the lot pricing. And
17 that escalator was assumed at anywhere from a range --
18 there's a tolerance -- of 1.25 percent per quarter to
19 one-and-a-half percent per quarter on a simple interest
20 basis, not compounding.

21 Q What was the period that you projected for the
22 sellout?

23 A We projected that lots, if we were able to get our
24 final site plan approval, we'd start selling lots in
25 2014, and that we would sell out the project through

1 2019. And so, I believe we ended in the fourth quarter
2 of 2019 with the last lot sale.

3 Q Would that be six years?

4 A That would be six years.

5 Q And what did that come down to in terms of average
6 sales?

7 A There was a, what I call a flush set of lots
8 closing at the front end, because we would be able to
9 sell, but not close the lots until they were completed
10 on the front end; and I believe that we had six closing
11 in the first quarter. But basically, it worked out to
12 an average of one lot per month.

13 Q Was that assumption one that you could reasonably
14 make, based on your experience in projects like this?

15 A Yes.

16 Q Were there any other material assumptions that we
17 haven't covered that you can think of?

18 A Yes. We also assume a disposition cost.
19 Disposition, meaning, at the time of closing on a lot,
20 any fees paid to a broker to sell the lot, as well as
21 other customary seller closing costs, such as title
22 insurance and the like, and we assumed eight percent,
23 which is a full load of those costs.

24 Q Would that be considered an acceptable percentage
25 for closing costs?

1 A Yes, it -- yes, it would.

2 Q Anything else?

3 A We also assumed a management fee arrangement
4 between Arendale and Pinckney Point within it, but that
5 was just more in line to show or to demonstrate to the
6 outside investor that we were going to be the boots on
7 the ground developing this, and should be entitled to a
8 fee.

9 Q Did the projection include the cost that you were
10 going to have to absorb by having an investor come in?

11 A It did.

12 Q How did you do that?

13 A If you wish to go to the investor piece first,
14 that's great. Otherwise, if you want to continue
15 speaking of all of the costs --

16 Q Well, why don't we do this, because I think that is
17 one that you can best explain through the illustration.

18 A That might be better.

19 Q Did you consider all of what you consider to be
20 reasonable investor expenses in return to that investor?

21 A Yes.

22 Q Okay. Did the numbers that you calculated -- or
23 are the numbers that you calculated, ones that you feel
24 with reasonable certainty were accurate or reasonably
25 accurate?

1 A There's no absolute in accuracy, but it is a
2 reasonable standard, based on the efforts taken for the
3 cost of the development, for outside assessment of the
4 marketability and the value of the lots, as well as
5 making sure that we contained all of the costs. We, for
6 example, we had a cost for the land. We had a cost for
7 the road parcel being brought back in. We have other
8 soft costs, you know. Hard costs are the development
9 infrastructure that goes into the community. The soft
10 costs are more of the periodic carrying costs and
11 property taxes, and other things like that, as well as
12 paying engineers and the like.

13 Q Did you do your analysis with as much reasonable
14 certainty as you could bring to the analysis?

15 A Yes.

16 Q And do you believe that the numbers that you
17 calculated were reasonably certain, based on all the
18 assumptions that you took into account?

19 A Yes.

20 MR. WALKER: At this time, your Honor, subject to
21 objection, we'd move in Exhibits 19 and 20, which are
22 his two pro formas.

23 THE COURT: Okay. Subject to the prior objection,
24 they're in. For the record, they're in evidence.

25 ITEM IDENTIFIED AS PRO FORMA

1 (FUTURE CASE FLOW ANALYSIS EXPECTED)
2 MARKED PLAINTIFFS' EXHIBIT NUMBER 19,
3 ADMITTED AS EVIDENCE.
4 ITEM IDENTIFIED AS PRO FORMA
5 (FUTURE CASE FLOW ANALYSIS)
6 MARKED PLAINTIFFS' EXHIBIT NUMBER 20,
7 ADMITTED AS EVIDENCE.

8 BY MR. WALKER:

9 Q And what I'd like to do, Mr. Kunkel, is concentrate
10 on Exhibit 20, because that is the one that includes the
11 investor, I think?

12 A That would be correct.

13 Q But I guess the first thing we need to do is to
14 explain what this is.

15 And if, Dave, you could sort of feature the left
16 side of the screen there.

17 And you could go over the categories, explain
18 what's going on.

19 A Sure. In the very heading, it explains that this
20 pro forma was put together at a time where the option
21 period was lapsing. We had an option to purchase the
22 property for six-and-a-half million dollars, but given
23 the fact that the period was lapsing, we wanted to make
24 the assumption that we would have to pay an amount
25 higher than that. That was negotiable, and we were just

1 assuming that we were going to pay a higher amount. In
2 this --

3 Q Where does -- go ahead.

4 A In this assumption, we are assuming that, with the
5 payment to ERP, Equity Resource Partners, plus, a
6 payment to Dot Gnann at the time of development, we
7 would be funding roughly eight million dollars for that
8 cost. Hence, --

9 Q Where does that appear?

10 A Well, in the title, it's the \$8mm.

11 Q Okay.

12 A Okay? As well, this pro forma was put together,
13 assuming that we would have an investor. And we wanted
14 to protect the investor's interest, so that we would
15 give them preferential treatment, so that any dollars
16 that they invested into this project, we would have them
17 repaid from the project profits first, their investment;
18 plus, we would have a ten percent preferred return.
19 Meaning, for each dollar outstanding, on an average
20 daily balance for the time that the money was
21 outstanding, they would earn ten percent on that.

22 Q Were those terms that you expected to have to pay
23 to an investor?

24 A Preferred returns are largely paid at a range of
25 six to ten percent. In this case, we wanted to provide

1 the investor a more -- a higher preferred return, just
2 to make sure that we had an investor who could come to
3 the table.

4 And the last piece, the 55.5 percent is of the
5 residual profits. The investor would receive 55.5
6 percent of those profits.

7 Q And who would receive the other 44.5?

8 A Pinckney Point, LLC, would receive the other 44.5.

9 Q Why was it weighted to the investor?

10 A He who holds the gold rules.

11 Q Well, did you believe --

12 A Yeah.

13 Q -- to be, based on your conversations with Arendale
14 then, and other investors, it was going to -- you were
15 going to have to yield the profit?

16 A Yeah.

17 Q The majority of the profit to that investor?

18 A There are many ways to split the apple, but if we
19 made the investor wait on the back end for profits, they
20 would command a higher -- a higher back-end split. In
21 this case, by returning their capital first, plus, a ten
22 percent preferred return, we still were giving them 55.5
23 percent of the project, but it was still worthwhile to
24 us, as Pinckney Point, to do that.

25 Q And when you say *return their capital*, would they

1 get all their money back first, before Pinckney Point
2 got anything?

3 A I qualify that, in that, I'd mentioned earlier that
4 there was a management fee arrangement that we were
5 contemplating. And so, Pinckney would participate in
6 that management fee. But other than the management fee,
7 Pinckney would wait patiently until the investor got the
8 capital back and the preferred return before there's a
9 splitting of the profits afterwards.

10 Q So, they had to be made fully whole, plus, get
11 their preferred return before any splitting of the pot.

12 A That's correct.

13 Q And would you show us where this occurs. Or is
14 this -- and go down.

15 A Yeah.

16 Q Is this in the yellow at the bottom, the large
17 yellow right down here?

18 A Actually, if you want to see where --

19 Q Okay.

20 A -- where Pinckney Point receives its monies back,
21 if you take a look at the yellow bar at the very bottom.

22 Q The very bottom, right?

23 A Yes. And you'll notice that the Pinckney return --

24 Q Could you make that larger, please. Yes, correct.

25 A Actually, if we could, I want you to highlight from

1 the area that's two-thirds of the way down the page,
2 distribute -- *Distributable Cash Flow*, all the way to
3 the bottom.

4 Whoops, grabbed a little bit. And it actually
5 would be helpful if you could just highlight, say, two
6 years, which will give us --

7 Q Well, by the way, what is going across on the
8 horizontal axis? Is that time at the top?

9 A That is time, yeah. Each of the columns is a
10 different quarter.

11 Q All right.

12 A Okay. And I apologize, this is hard to see, but
13 there is a line towards the top. It's between two,
14 single-spaced yellow lines.

15 Q Where you're --

16 A And it says --

17 Q Maybe we should have you get the pointer and come
18 down.

19 A That would be great.

20 THE COURT: Okay.

21 BY MR. WALKER:

22 A If we look at this line here, which is the
23 management fee to Arendale/Pinckney Point, LLC, and
24 carry it across, it shows, on a quarterly basis.

25 Q Is each one of those columns a quarter?

1 A Each one of these is a quarter. And it shows the
2 management fee based upon lot sales. If we don't sell a
3 lot, we don't receive any sort of a management fee. The
4 emphasis is that we need to sell in order to produce a
5 management fee.

6 Now, if we could go, keeping this line still
7 highlighted, go to the bottom. What I wish to
8 demonstrate is, this management fee that's up here are
9 the only distributions that are showing on the bottom
10 line to Pinckney Point. Only when we get to 2018 have
11 we fully re-paid the investor, plus a preferred return,
12 and it's -- I believe it's the last 24 lots is when
13 Pinckney starts to participate in actual profits of the
14 project, beyond the management fees.

15 Q And while you're there, would you show us the
16 columns that relate to the totals for the investor that
17 are right above the bottom yellow line on the left. If
18 you could highlight that quadrant right there. Yes.

19 A Okay. In total, new investor. And we were
20 assuming new investor would invest not only in the
21 purchase of all of the remaining real estate, which was
22 the ERP land, the Dot Gmann sliver, as well as the road
23 tract.

24 Q Okay.

25 A And also, fund all of the infrastructure, as well

1 as the soft costs for the project. Our investor would
2 be asked to put in 26.2 million dollars. Now, not all
3 of that 26 million would be outstanding at any given
4 time. There's another part which shows kind of a high
5 water mark of this project, and I believe the high water
6 mark was 21 million and change for the investor. But
7 the investor would cumulatively put in 26 million, based
8 upon the time that, that money was outstanding, they
9 would earn preferred returns of 6.1 million, and they
10 would be paid the 6.1 million, plus the 26 million back,
11 before there's any profit-sharing. And this eight-and-
12 a-half million is the 55 percent that would be in --
13 they would be entitled to in the project.

14 Q All right. And if we could go back. Then, go down
15 to the bottom line again, where it says the amounts to
16 Pinckney.

17 A Okay.

18 Q And is that comprised of two sources of revenue to
19 Pinckney?

20 A That's correct.

21 Q All right. And what are those two sources?

22 A The management fee income, as well as the profit
23 distribution.

24 Q Okay. And when you get back on the stand in a
25 minute, I'll ask you to break it down. But before we do

1 that, what I'd like to do is to go back to the overall
2 spreadsheet to do that. And then, go up to the very
3 top, the top yellow line, so we can follow with you, and
4 so that the jury understands -- there you go -- do you
5 show the quarters up there again?

6 A Yes, we do.

7 Q Do you show any revenues those years?

8 A In 2013, no.

9 Q And when do you first show any revenues at all?

10 A We show six lots closing in Phase 1 of the project,
11 in the first quarter of 2014, and that was with the
12 expectation that, in March of 2014, we would have
13 completed development work and ready to close lots.

14 Q And then, is there a consistent absorption of about
15 three lots a quarter?

16 A Yes.

17 Q All right. And I see there's two there.

18 A Actually, what you see is a --

19 Q It's Phase 1.

20 A -- culmination of Phase 1 before we get to Phase 2.

21 Q All right. And tell us about Phase 1 and Phase 2.
22 Would you sell them in phases, develop them and sell
23 them in phases?

24 A Generally speaking. We may develop -- and in fact,
25 we show that the development in Phase 2 happens right

1 down here. And as soon as we have Phase 2 completed, we
2 would start closing lots in Phase 2. We may have a
3 residual lot or two in Phase 1, and that's okay, if we
4 have released Phase 2 while we had a lot or two in Phase
5 1.

6 Q I think that's it. You can go back to your seat.
7 Thank you.

8 Now, I want to ask -- get back to the question I
9 asked you a minute ago. That number at the bottom,
10 which was the Pinckney Point number, was the combination
11 of fees, plus profits. And if you broke that to profits
12 only, lost profits only, what would that be of that
13 fifteen million?

14 A That would be roughly 8.5 million. I'm just
15 guessing right now. And actually, it would probably be
16 a little less than that. Just --

17 Q Well, we can't --

18 A Yeah.

19 Q If you say you guessed, then, that doesn't work.

20 A Do you want me to get my calculator out?

21 Q Please.

22 A All right. It would be 6.8 million dollars.

23 Q That is profit, not fee.

24 A Without regard to any fee arrangement.

25 Q Is that profit realized over a period of time?

1 A That profit would generally be at the back end of
2 the project, because once again, we would need to
3 distribute the capital back, plus the ten percent
4 preferred return to our equity investor.

5 Q And what is the concept of present value?

6 A Present valuing is to take dollars that you receive
7 at a future point in time, and to discount that back to
8 today's value.

9 Q Has this 6.8-million-dollar profit been present
10 valued back to today?

11 A Actually, I have done a present value calculation
12 of the 6.8, plus, a reasonable portion of those
13 management fees, which was an internal allocation that
14 we had between Arendale and Pinckney. And I had present
15 valued the total of those numbers.

16 Q And what was the -- what was the difference in the
17 management fee to Pinckney from the one that you had on
18 the screen?

19 A Yeah.

20 Q The fifty percent.

21 A What we saw on the screen was 8.4 million dollars,
22 in total, for management fees. Pinckney would have
23 received 80 percent of that, or 12 percent. And that
24 would have been six million and change. I believe, in
25 total, the cash flows to Pinckney Point would have been

1 11.6 million. And discounting that back to today, we
2 used a range of values. Oftentimes, appraisers use a
3 range of values, and then, they settle in at one. And a
4 range of values, using a 15 to a 25 percent discount
5 rate, gives you a present value of Pinckney's future
6 profits in fees of 8.5 million, to as low as 5.7 million
7 dollars.

8 Q Is there anything else that you want to explain
9 about your calculations, that --

10 A I know it's mesmerizing.

11 Q Correct.

12 A Yeah. I think that should do it.

13 Q Could we go to Page 2, just to show the
14 continuation. Is Page 2 simply a continuation through
15 the end of the absorption period, absorption, the end of
16 the lot sales to fourth quarter of 2019?

17 A Yes, it is.

18 Q Are the numbers that appear, the line items, the
19 same -- the numbers may be different, but are the
20 categories the same as on the first page?

21 A Yes, they are.

22 Q And so, you're showing those distinct figures for
23 each fourth quarter period, each quarterly period?

24 A Yes.

25 Q And the totals were on the left-hand column of the

1 first page.

2 A That is correct. There is actually one other
3 notable item. These were internal analyses that we had
4 done at the time that we were trying to project what
5 would be required to provide to an equity partner. Many
6 of the partners that we were speaking to were
7 individuals. And so, even though our project was
8 entitled for 76 lots, and the site plan showed 76 lots,
9 we held one lot out for that investor. And so, all of
10 this is based on 75 lots.

11 Q Is that unusual to have a sweetener for an investor
12 like that?

13 A If we didn't have to provide it, we wouldn't, but
14 yes.

15 Q There was some testimony this morning about a
16 conversation with Mr. Keefer. To your knowledge, did
17 Pinckney Point ever authorize Mr. Keefer to talk about a
18 conservation solution with Garrett Budds at the Beaufort
19 County Land Trust?

20 A He did not make that contact with our knowledge,
21 and to my knowledge, I had no -- no knowledge of him
22 speaking to Mr. Budds.

23 Q The last item deals with the road. Have you gone
24 back occasionally to view the road?

25 A Every time I drive through South Carolina, which is

1 often; because we have, in total, with Arendale, as well
2 as in the Stokes portfolio, we have ten current projects
3 in South Carolina, I do drive by Pinckney Point, and do
4 just observe the condition of the road, as well as the
5 accessibility of the Pinckney tract. And without
6 exception, every time that I've driven by, I've been
7 able to drive into the Pinckney property, because the
8 gate's wide open, and the road is being well-maintained.

9 Q Is it in better or worse condition than when the
10 option was lost?

11 A It's in better condition.

12 Q Does it appear to have been maintained?

13 A It appears that it's well-maintained.

14 MR. WALKER: Thank you. Please answer any
15 questions Mr. Achurch would have.

16 MR. ACHURCH: Thank you. May it please the Court?

17 THE COURT: Yes, sir.

18 JOHN C. KUNKEL

19 CROSS-EXAMINATION BY MR. ACHURCH:

20 Q Afternoon, Mr. Kunkel.

21 A Good afternoon.

22 Q Did I hear your direct testimony earlier that you
23 did not begin searching for an investor until ERP
24 indicated they were not going to give you an extension
25 on the option?

1 A That's not correct. What I had indicated was,
2 internally, we wished to fund it with the Arendale
3 investor. But only when ERP had indicated they would
4 not extend for another 120 days, did it reach the point
5 where we needed to go to the outside market immediately,
6 just to find an investor.

7 Q Okay. But prior to that time, you were trying to
8 do it internally with your -- with Arendale Holdings.

9 A That's correct.

10 Q Okay. That was the first time you went outside,
11 was after ERP said we're not going to extend this
12 option.

13 A That's correct.

14 Q Okay. All right. Who owns Pinckney Point, LLC?

15 A Pinckney Point, LLC, is owned by Stokes Land Group.
16 As we heard yesterday in Taylor's testimony, SLG Bush,
17 SLG Barnes, and SLG Johnston.

18 Q Okay.

19 A Which were the three working partners on the
20 project.

21 Q Okay. And who owns Stokes Land Group?

22 A Stokes Land Group is owned by a company called
23 Stokes Holding, which is a holding company of all of the
24 Stokes-related entities.

25 Q Well, who is SLG Management?

1 A SLG Management is our payroll master. As you can
2 well imagine, you want your employees to be managed in
3 one operating entity. SLG Management Services, LLC, is
4 that management company.

5 Q Okay. And who was Mr. Bush employed by, or
6 receiving a paycheck from, at the time Pinckney Point,
7 LLC, was going on and you owned Pinckney Point, LLC?

8 A SLG Management Services is not only his employer,
9 but mine.

10 Q Now, who was the manager of the project, Pinckney
11 Point, LLC?

12 A Taylor Bush was the lead manager of the project.

13 Q Who paid his management fee?

14 A Who paid his salary?

15 Q Who paid the management -- his management fee?
16 Yeah, who paid his salary?

17 A His salary was paid by SLG Management Services,
18 LLC.

19 Q Okay. And who paid him a management fee? Or, if
20 you got a management fee from Pinckney Point, who was
21 going to pay that?

22 A If we had reconstructed with an outside investor,
23 he would have received an override from Pinckney Point,
24 but that was in a transaction that we would do later.

25 Q Okay. So, that never occurred?

1 A The override for Pinckney Point has not occurred.

2 Q Okay. And prior to getting the investor, there was
3 no arrangement for a management fee. Is that correct?

4 A There was a simple management fee arrangement,
5 where he would be able to participate in a portion of
6 management fees paid to the company.

7 Q Mr. Bush would?

8 A Mr. Bush would.

9 Q Okay. Well, who was Pinckney Point, LLC, paying to
10 manage the project?

11 A Pinckney Point did not pay anyone to manage the
12 project. SLG Management Services is the manager of the
13 limited liability company, Pinckney Point, LLC.

14 Q All right. So, SLG Management was the manager for
15 Pinckney Point, LLC.

16 A Correct.

17 Q All right. And that is -- and that's SLG
18 Management, LLC?

19 A SLG Management Services, LLC. I know it sounds
20 confusing, but it really is not.

21 Q Okay. So, that's a different company than Pinckney
22 Point, LLC.

23 A That is correct.

24 Q Okay. And so, the management fee would go to SLG
25 Management Services.

1 A We had not fully contracted where management fee
2 splits would happen.

3 Q Um-hmm.

4 A But what's contemplated in the pro forma analysis
5 that we were doing for an outside investor showed that
6 Pinckney Point would receive the management fee
7 directly.

8 Q Okay. That wasn't in any -- that wasn't the
9 arrangement at the present time. Present time was, SLG
10 Management Services received the fee.

11 A Present time being 2012? That's correct.

12 Q Right. Mr. Walker asked you about the lost
13 profits. I think you said, without the management fee,
14 that the total profits to Pinckney Point, LLC, would be
15 6.8 million dollars.

16 A That's correct.

17 Q And that's over a time of four -- well, you had a
18 six-year tie-in? Six year --

19 A I believe it's six years.

20 Q Okay. And did you do a number to discount that
21 back to today, the 6.8 number?

22 A I did not, and the reason I did not was because,
23 contemplated, always contemplated within our analysis,
24 was that the 15 percent management fee would be split 80
25 percent to Pinckney Point, and 20 percent to Arendale.

1 Q Okay. Well, why would Arendale get -- I mean, do
2 they manage anything?

3 A Arendale, at this time, was managing through its
4 core investor, coming to step in, potentially, and make
5 the investment, while we were looking in on the internal
6 side. But.

7 Q Well, does Arendale own some of Stokes Land Group?

8 A Arendale does not own any of Stokes Land Group.

9 Q Did Arendale put money in this project, Pinckney
10 Point, LLC?

11 A Arendale has not put any money in this project.

12 Q Okay. All right. They own Road, LLC.

13 A They own Road, LLC.

14 Q And you're the CEO of Arendale Holdings?

15 A That's correct.

16 Q And you work -- you're employed by Arendale
17 Holdings?

18 A I'm actually, technically employed by SLG
19 Management Services, LLC.

20 Q Okay.

21 A Once again, that is our payroll master. Arendale
22 does not have any employees. I am an officer of
23 Arendale, but not an employee.

24 Q Okay. And when we go to the expected profits, not
25 including management fees, according to your

1 calculations, the 6.8 million dollars, if we brought
2 that back to present value, you would agree that would
3 be a number significantly less than 6.8 million dollars.

4 A It would be less than 6.8, yes.

5 Q I mean, more than a million dollars. Two million
6 dollars less?

7 A Depends on what discount rate you wish to use.

8 Q So, using the same rate you use.

9 A It would be less than -- it would be more than a
10 two-million-dollar discount.

11 Q Okay. Is Arendale Holdings owned by Reinet? Is
12 that Reinet?

13 A Reinet.

14 Q Okay. And that's, I think you told me, that's a
15 Luxembourg company?

16 A It's a public company in Luxembourg. Yes, that's
17 correct.

18 Q Okay. And Arendale Holdings is who you were trying
19 to get the money from to buy this property back?

20 A That's correct.

21 Q You're vice president of SLG Management Services?

22 A That's also correct.

23 Q Okay. And Tideridge was paying some of the bills
24 on this?

25 A Tideridge Investments, yes, that's correct.

1 Q And that's owned by Mr. Hugh Connerty?

2 A That is not correct.

3 Q Well, who is it owned by?

4 A Reinet owns Tideridge Investments.

5 Q Right.

6 A And funds on projects of the old Stokes portfolio
7 that are worthy to make investments. They fund, through
8 Tideridge, advances to those projects.

9 Q There's a lot of common entities and individuals
10 within these multiple LLC's, correct?

11 A There is commonality, but at Pinckney Point, LLC,
12 Stokes Land Group, nor any of the SLG, with the partner
13 designation, are owned in any way, shape, or form by
14 Reinet.

15 Q Okay. Does Reinet own an interest in any of those
16 companies?

17 A It does not.

18 Q Okay. All right. Now, I'm going to go through
19 some of the stuff we talked about at your deposition
20 before.

21 A Okay.

22 Q At the time the County purchased this Pinckney
23 Point property, Pinckney Point, LLC, did not own it or
24 have an option on it, correct?

25 A That's correct.

1 Q Okay. And you would agree, in the forbearance
2 agreement that you signed with Equity Resource Partners
3 that, that agreement indicated that you agreed, at that
4 time that Pinckney Point, LLC, had no equity in the
5 property.

6 A You say that the forbearance agreement has that
7 provision in there, which I don't dispute that it does.
8 But Pinckney Point had a continuing interest in the
9 project, because, as part of the forbearance
10 arrangement, we were agreeing to deed the property back
11 to Equity Resource Partners at the same time as
12 receiving an option to re-purchase the property. So, we
13 never lost a tie to the property at that point in time.

14 Q Right. And my question was, simply, you would
15 agree, in that forbearance agreement, on the date it was
16 signed, that Pinckney Point, LLC, did not have any
17 equity in the property.

18 A Yeah. And John Irby, their attorney, drafted the
19 language in there, which is very common for bank
20 documents to have language that is forbearing or bearing
21 on us, that just has us waive away that there's any
22 equity rights. But we still had a continuing interest
23 in the property, and we had not lost our investment.

24 Q Right. But you agree, and you signed the
25 agreement, whoever drafted it, you agreed and signed,

1 and said, we don't have any equity in this property.

2 A I did sign and agree to that.

3 Q All right. And equity is -- you're an accountant,
4 right?

5 A I am.

6 Q Okay. So, equity, if I own a house that's worth
7 \$100,000.00, and there's an \$80,000.00 loan on it, do I
8 have \$20,000.00 of equity in that house?

9 A Assuming your home is fair valued today at
10 \$100,000.00, that's correct.

11 Q All right. Okay. And Road, LLC, doesn't own any
12 of Pinckney Point, LLC.

13 A That's also correct.

14 Q Okay. And we did this yesterday, but the contract
15 that Road had to sell to Pinckney Point, LLC, for five
16 million dollars, you would agree there is a provision in
17 there that, if Pinckney Point didn't buy it, the damages
18 to Road, LLC, were going to be \$10.00.

19 A That is a very common provision within real estate
20 contracts, where it is very hard to determine what loss
21 was caused if a contract doesn't happen. And so, it is
22 common just to say that, whatever is up for deposit is
23 washed, and that the seller gets to retain the deposit
24 as *liquidated damages*.

25 Q All right. And that's what was agreed to in that

1 contract.

2 A That's what the two parties agreed to.

3 Q Okay. And when Road bought the subject, the road
4 property, you would agree, it bought the property,
5 because -- Road, LLC, bought it instead of Pinckney
6 Point, because you did not want it to attach to the
7 bank's collateral, correct?

8 A That's correct.

9 Q And putting it in a separate LLC is important,
10 because that Road, LLC, it's a separate and distinct
11 entity from the Pinckney Point, LLC, correct?

12 A That's correct.

13 Q It's like another human.

14 A It is --

15 Q Or another entity.

16 A It is another entity.

17 Q And whoever bought road -- the road property wasn't
18 going to invest 1.3 million dollars in it, if they could
19 get foreclosed on, right?

20 A Said another way, it would be imprudent for any
21 investor to advance monies into Pinckney Point for
22 Pinckney to have acquired the road parcel, and be at
23 risk for losing it to BB&T.

24 Q Right. And speaking of that, when Road decided to
25 buy the property, Pinckney Point was either in the

1 foreclosure process, or had given a deed in lieu of
2 foreclosure by that time, hadn't they?

3 A That's incorrect.

4 Q Okay.

5 A It is correct about the foreclosure suit with BB&T.
6 It is incorrect that had provided a deed in lieu.

7 Q That's fine. I asked if it was one or the other.

8 A It was -- there was a foreclosure suit filed by
9 BB&T.

10 Q Right. And where -- okay. So, the deed in lieu
11 came after.

12 A The deed in lieu came in December of 2011.

13 Q Right. Okay. And Road bought the property in
14 January of '11.

15 A In January of 2011.

16 Q Well, Road bought the property, Pinckney Point,
17 LLC, was in the foreclosure proceedings.

18 A Correct.

19 Q All right. And to protect Road, LLC's, investment,
20 it was structured such that, if you wanted to develop
21 that property at the end of the tennis racket there, the
22 Pinckney Point property, you would have to buy an
23 easement or some kind of road access from Road, LLC.

24 A That's correct.

25 Q Okay. So, it was purposely done so that nobody

1 could develop the Pinckney Point property without going
2 through Road, LLC.

3 A Said another way, we were stymied with the lawsuit
4 that had been outstanding, and the judge, who was not
5 rendering an opinion --

6 Q Well, hold on. That's not really an answer to my
7 question. You're stating it another way.

8 A I believe it is.

9 THE COURT: Okay. Sir, you actually need to
10 answer, yes, no, I don't know.

11 A Okay. Okay.

12 THE COURT: And then, you can explain your question
13 -- or explain your answer.

14 A All right. I'm sorry..

15 THE COURT: That's okay.

16 BY MR. ACHURCH:

17 Q But the purpose of -- it was purposely done, so
18 that no one could develop Pinckney Point, LLC, unless
19 they paid Road for an access easement.

20 A Yes.

21 Q Okay.

22 A The reason we did that was because we were stymied
23 by a lawsuit that had been going on for three years, and
24 the judge asking all parties to settle it. And the only
25 way to resolve that was to come up with a comprehensive

1 six-party settlement that we ultimately settled upon.

2 And it --

3 Q Is it --

4 A -- it would --

5 Q I'm sorry.

6 A It was important to many of the parties to have a
7 private road, not the least of which is Road, LLC.

8 Because, in order for our investor to feel comfortable
9 making that investment, they wanted to have reasonable
10 protection that, that investment would be money-good.

11 And having that access and the importance of that
12 lawsuit was that, it provided the vehicle for which
13 Pinckney Point could then proceed forward, and get its
14 remaining entitlements, so that we could finally develop
15 the Pinckney tract. Sorry for the long answer.

16 Q Okay. And the purchase price actually paid for the
17 Pinckney Point parcel was 10.6, correct?

18 A That's correct.

19 Q All right. And the price had been, I think, 15.6
20 million dollars prior to that time.

21 A 15.5, 15.6, I'm not sure. If we can agree not to
22 debate on the hundred thousand, that's --

23 Q We can do that.

24 A Okay.

25 Q It was five million dollars difference.

1 A It was basically a five-million-dollar difference.

2 Q And that was -- the owner agreed to drop the price,
3 because it was going to delay the closing, correct?

4 A We had a contractual provision which allowed us not
5 to close until we had title resolved.

6 Q Okay. So --

7 A And the owner, at the owner's request, he asked
8 that we close, and offered up the discount.

9 Q Okay. He didn't want to be around for all that
10 litigation, did he?

11 A He did not. In retrospect, he may have been smart.

12 Q And part of the settlement agreement was to buy Dot
13 Gnann's land?

14 A That's correct. It was a small sliver. I think
15 0.11 acres of land.

16 Q Okay.

17 A Not critical to the development, but it was a
18 convenience.

19 Q Okay. And PPLLC did not buy Dot Gnann's land.

20 A That's correct.

21 Q Okay. And when I say, PPLLC, can we agree, that's
22 Pinckney Point, LLC?

23 A We did in the deposition, and we can do so today.

24 Q All right. And you would agree that, when the --
25 during the litigation over who owned the road or didn't

1 own the road, the County's position was to let the judge
2 decide.

3 A I don't know what the County's position was.

4 Q Okay. Well, --

5 A So, I can't agree to that.

6 Q All right. Let me get your deposition here.

7 THE COURT: While they're doing that, if anyone
8 wants to stand up, you're welcome to.

9 Why don't you give it to me to open? I have a
10 little more experience than the witnesses.

11 A Thank you.

12 Q Yeah. There are two different dates on them.

13 THE COURT: That one's May 28th.

14 A May 28th is the second one.

15 MR. ACHURCH: That's 15?

16 THE COURT: That's the second one.

17 A Yeah.

18 MR. ACHURCH: Yeah, that's --

19 THE COURT: You want the first one?

20 MR. ACHURCH: Yes, ma'am.

21 THE COURT: Okay. These are the exhibits. There
22 you go. Those are the exhibits that are attached.
23 They're not included.

24 A Thank you.

25 BY MR. ACHURCH:

1 Q All right. Let me know when you go -- will you go
2 to Page 37, please.

3 A Okay.

4 Q And on Line 18 -- I'm sorry -- sorry, it's Line 12.
5 And on Line 12, I ask, okay, do you know what Beaufort
6 County's position was, with regard to the road?

7 And will you read your answer, please.

8 A Ms. Monoc: Object to the form.

9 The Witness: It's my general understanding
10 that Beaufort County's position was, let's let
11 the judge decide.

12 Q Okay. So, the County's position was, whatever the
13 Court says is okay, correct?

14 A I think your original question was whether my
15 opinion of whether or not the County was indifferent.
16 I don't know whether or not the County was indifferent,
17 but the judge --

18 MR. ACHURCH: Now, that, your Honor, I'm -- that's
19 another question that I didn't ask, and he's answering
20 another question that I didn't ask.

21 A I'm sorry.

22 THE COURT: Okay. Unless it's within that
23 vicinity, and you're trying to put something in context,
24 you just need to answer his questions specifically.
25 Okay?

1 A Okay.

2 MR. ACHURCH: Yeah.

3 BY MR. ACHURCH:

4 Q And if the Court had decided that the road was
5 private, and it wasn't Pinckney Point's road, in other
6 words, Ms. Pinckney actually owned it, then, Pinckney
7 Point could not have developed that tract. Is that
8 correct?

9 A Pinckney Point, LLC, would not have been able to
10 develop the tract, but would have had a cause of action
11 against our title insurer.

12 Q Okay. Well, you couldn't have developed the tract
13 without it.

14 A That's correct.

15 Q I mean, I don't -- I understand you might have
16 taken some other action, sued somebody else over it, but
17 what that would have meant was, you couldn't develop it
18 without either it being public, or you own that private
19 road, correct?

20 A That's correct.

21 Q All right. And as far as what the County got out
22 of the settlement, you're not aware of any benefit or
23 detriments, other than stopping the legal fee clock
24 running. That's what we got -- Beaufort County got out
25 of that. Is that correct?

1 A I don't believe that's correct. I believe,
2 yesterday, we heard that the County had several
3 conditions that were favorable to the County.

4 Q Well, I'm asking you about what you previously
5 testified to.

6 A I think what I testified to, first of all, was, I
7 didn't have firsthand knowledge. In my testimony, I
8 believe, on several occasions, I said Taylor Bush was
9 more of our guy on the ground, and he had more of the
10 direct knowledge related to the settlement agreement.

11 Q Okay. And let me get you to look at Page 38 of
12 your deposition.

13 A Okay.

14 Q Tell me when you're there.

15 A I am there.

16 Q On Page 38, Line 11, the question is:

17 *Do you know of any benefit the County*
18 *derived from having the case settled, the*
19 *dispute over ownership of the road settled,*
20 *as opposed to having the judge rule on it?*

21 And what was your answer? Just read it into the
22 record, please.

23 A Other than saving legal fees, I'm not aware
24 at this time what benefits or detriments
25 there may have been to the County.

1 Q Okay. All right. And you do not contend that the
2 Pinckney Point tract could only be a residential
3 community, do you?

4 A Could you repeat that question. I think I
5 understood it, but repeat it one more time.

6 Q You don't contend that, in the settlement
7 agreement, the Pinckney -- it was agreed that the
8 Pinckney Point tract could only be used as a residential
9 community.

10 A I do not contend that it would only be a
11 residential community.

12 Q That it could only be.

13 A That it could only be a residential community.

14 Q Okay. You don't contend that?

15 A I do not.

16 Q All right. Thank you. I'm skipping some of these,
17 because Mr. Bush answered them. So, I'm trying to --

18 A I'm thankful he took the heat first.

19 Q That property, was your option was it fifteen
20 months long?

21 A I believe it was.

22 Q Okay. And you were in negotiations for some time
23 prior to that?

24 A See, if I may correct, I believe it was fourteen
25 months, because it was at the very tail-end of December

1 of 2011. And it -- the option period expired February
2 28th of 2013.

3 Q Okay. And the foreclosure proceedings started in
4 early 2010, correct?

5 A I believe that's correct.

6 Q Okay. Now, we asked for documents related to your
7 attempts to raise capital, and the response from Counsel
8 was that it was just as you testified to. Do you have
9 any documents related to any efforts to raise capital?

10 A Mr. Hugh Connerty, in our office had email traffic
11 with a Silver Point Capital --

12 Q Okay.

13 A -- out of New York.

14 Q Okay.

15 A And a lot of phone calls.

16 Q Okay.

17 A And we had visitation with Sherman Capital. But no
18 real definitive documents.

19 Q All right. And on this property, you had a closing
20 date set for March 11, 2013, correct?

21 A If everything had come together with the Silver
22 Point.

23 Q Okay.

24 A They were willing to work night and day.

25 Q All right.

1 A In order to have a closing happen in the first part
2 of March of 2013.

3 Q All right. Did they agree to give you the money?

4 A They provided some terms for our company that were
5 intolerable, and I would give you a provision. For
6 example, they wished to have an equity scrape, or a
7 residual interest in any project that we did in the
8 future, without any commitment to put monies into that
9 project.

10 Q Did Silver Point actually agree to give you the
11 money?

12 A No. They still needed to do underwriting.

13 Q Okay. Did you rebuff their offer to give you the
14 money?

15 A Yes, we did.

16 Q Okay. They were willing to do it; you didn't like
17 the terms of it. Is that correct?

18 A Their terms still were subject to due diligence on
19 their part, and had several outs on their part.

20 Q Who's Hugh Connerty?

21 A Hugh -- Hugh Connerty is one of our partners.

22 Q Okay. What do you mean? Who is -- is he another
23 LLC, or is he a human being, or who is he?

24 A He is a human being.

25 Q He's a -- what LLC does he work through?

1 A He is no longer with the company, but at the time,
2 he was employed by SLG Management Services.

3 Q Okay. You probably can't see that. I can't see
4 it. All right. Can you identify what's been marked as
5 Defendant's Exhibit Number 18, Mr. Kunkel?

6 A Not yet.

7 Q All right. I guess not.

8 A Yes, I can.

9 Q Okay. What is it?

10 A This is an email from me to Hugh Connerty, with a
11 copy to Taylor Bush.

12 Q Okay. And what's it discussing?

13 A It's discussing my conversation that I had with
14 Bruce Bunner, who is managing the investments for
15 Reinet.

16 Q Okay. So, why is Reinet -- what is Reinet trying
17 to get money for Pinckney Point, LLC?

18 A Reinet had a vested interest in Pinckney Point,
19 LLC, through the advances made by Tideridge Investment.

20 Q Okay.

21 A As well as its ownership interest indirectly in
22 Road, LLC.

23 Q Okay. Because Reinet also has some of Arendale,
24 right?

25 A It owns Arendale.

1 Q Okay. Then, it owns Arendale. Arendale owns Road,
2 and Reinet owned -- Reinet owns Arendale.

3 A That's correct.

4 Q And Arendale also -- Reinet also has a stake in
5 Pinckney Point, LLC, I guess.

6 A Has a stake in Tideridge Investments, which made
7 advances into Pinckney Point.

8 Q Okay. And when you say an advance, is that a loan?

9 A That is a loan.

10 Q All right.

11 A It is not an equity interest or ownership interest
12 in Pinckney.

13 Q Okay. Now, would you -- this top of the email here
14 --

15 A Um-hmm.

16 Q -- says from John Kunkel to Hugh Connerty, and it's
17 dated March 5, 2013, correct?

18 A That's correct.

19 Q And that's your email?

20 A That is my email.

21 MR. ACHURCH: Your Honor, I would move this into
22 evidence, please.

23 THE COURT: Okay.

24 MR. WALKER: No objection.

25 THE COURT: Without objection. Thank you. 18 is

1 in evidence.

2 ITEM IDENTIFIED AS EMAIL FROM JOHN
3 KUNKEL TO HUGH CONNERTY, DATED
4 MARCH 5, 2013
5 MARKED DEFENDANT'S EXHIBIT NUMBER 18,
6 ADMITTED AS EVIDENCE.

7 BY MR. ACHURCH:

8 Q And in this email to Mr. Connerty, you carbon
9 copied Taylor Bush in this, right?

10 A Yes, I did.

11 Q Okay. And this is referencing Silver Point?

12 A That is correct.

13 Q And did Hugh Connerty, did he get to make the
14 decision on getting the money or not getting the money?

15 A Hugh Connerty was the lead person speaking with
16 Silver Point.

17 Q Okay.

18 A In this case, if you read the email that I had to
19 Hugh, the reason and the relevance for speaking with
20 Bruce is, Bruce represents the investors who own
21 Arendale. And as it states in the email:

22 *Spoke to Bruce. He really hates the*
23 *terms and the term sheet as proposed. Just*
24 *by way of example, Silver Point is asking for*
25 *a right of first refusal in anything that*

1 Arendale does in the future, which is going
2 too far.

3 And so, it had high relevance to our investor that
4 Silver Point wanted to be able to leap in front of
5 Reinet for anything that we did in the future.

6 Q Right. And it goes on to say -- read the rest of
7 the last sentence, will you?

8 A Okay.

9 Bruce would rather have conversations
10 with John Irby, who is with Equity Resource
11 Partners, about raising equity elsewhere,
12 where it was more prudent, and then, close
13 later.

14 Q Okay. So, but the decision was made -- this money
15 was available, but a decision was made to, hey, let's
16 not get this; let's try to get another extension. Is
17 that right?

18 A I would caution just, the leap to a conclusion.
19 There was a decision that we would not go with Silver
20 Point, but --

21 Q Okay.

22 A -- but Silver Point had only offered us a term
23 sheet; had not had a firm commitment to invest anything.

24 Q Well, whether they offered a term sheet or not, you
25 weren't going to take it.

1 A That's correct.

2 Q Because you didn't like the terms.

3 A That's correct.

4 Q So, somebody out there is willing to give you this
5 money, even though you didn't have all your
6 entitlements. Right?

7 A That's correct.

8 Q All right. And this was on March 5, 2013, right?

9 A That's correct.

10 Q And by that time, the option had already expired,
11 hadn't it?

12 A That's correct.

13 Q Okay. And you knew ERP might not -- they might not
14 agree to extend it.

15 A That's correct.

16 Q All right. That's the chance you were willing to
17 take.

18 A That was the chance that we were taking.

19 Q All right. And at that point, you had 95 percent
20 of the approvals in place, correct?

21 A We had 95 percent of the engineering complete in
22 December of 2012. I don't know the exact status by
23 February of 2013, but we were very close to filing that
24 final submittal for the final site plan.

25 Q Okay. I thought I saw a letter yesterday that came

1 in about 95 percent of the approvals in place to go get
2 the final in '12. Do you remember that?

3 A I thought, and our memories may be different, and
4 your memory may be better than mine, and I'm sure that
5 you will remind me of that.

6 Q I've got this.

7 A That's right. But I thought what the email or the
8 testimony was, was that our engineering -- engineer was
9 saying that the engineering was 95 percent complete.

10 Q Okay. Now, you've had other projects that were not
11 developed as planned, correct?

12 A That's correct.

13 Q And you've had foreclosure proceedings initiated on
14 ten other projects.

15 A I believe in my deposition, we approximated it was
16 approximately ten. I didn't sit there and count them
17 up.

18 Q Okay.

19 A And please understand, those projects that were
20 either foreclosed, or that didn't go as planned, where
21 there was a complete loss, all happened within the time
22 period of 2007 through 2010, where, in our industry, was
23 one of the most historic downturn in the housing
24 industry.

25 Q Right. So, the market conditions really determine

1 whether you make money or not, don't they?

2 A Market conditions are important.

3 Q That's not something that you have any control over
4 whatsoever, do you?

5 A There -- you are mindful to market conditions, but
6 no one controls the market.

7 Q Right. You can be mindful of them, but you can't
8 do anything about them.

9 A You cannot control what the market does tomorrow.

10 Q Right. So, all the -- and you lost money on 35
11 percent of your projects, correct?

12 A In my deposition, you asked me to approximate, and
13 within the time frame that I had been at the Stokes Land
14 Group and at Arendale, approximately 35 percent of the
15 projects, once again, all within that time frame with
16 the historic collapse of the housing industry, we lost
17 money.

18 Q Okay. And that's when -- that's when this project
19 was going on, wasn't it?

20 A This project, but there were several projects that
21 were also going on in that same time period that we have
22 had the stability -- we've been fortunate to --

23 Q So, you have been.

24 A -- to get through to another day, and we are back
25 on solid footing again with those projects.

1 Q Right. And I just asked you, was this the time
2 when this project was going on?

3 A That's correct.

4 Q Okay. So, in the -- every one of the ones you ever
5 lost money on happened from the time the market went
6 bad, from 2006 or '07, to 2010.

7 A That's correct. And from the period of 2001
8 through 2006, all of the projects that we had made
9 money.

10 Q Okay. So, the 80 projects you've been involved in,
11 those all worked. So, actually, the ones that got --
12 lost money are actually not even those 80. They're
13 concentrated right here. So, many of the ones you were
14 doing in 2006 to 2010, they lost money. Even more than
15 35 percent of those projects lost money, didn't they?

16 A Actually, I believe -- and we can go back to my
17 deposition, and once again, you'll remind me, if I'm not
18 recalling correctly -- but I believe what I testified to
19 was that I had been involved in roughly 80 projects in
20 my 15 years with the Stokes family of companies, as well
21 as Arendale. And 35 percent of those 80, we've had a
22 loss in the project.

23 Q Right.

24 A Roughly ten of those, we've lost to a foreclosure.

25 Q And half of the 35 percent that lost money were a

1 total loss.

2 A Correct.

3 Q And you agree, with how much money you're going to
4 make, you don't know with any certainty at all until you
5 sell the lot.

6 A I wouldn't say that it's without any certainty.
7 Once again, it goes back to market conditions.

8 Q Okay. So, all of this revolves around market
9 conditions.

10 A Market conditions are important.

11 Q Okay.

12 A But so are engineers' estimates. Now, I --

13 Q Engineers' estimates are just for cost, right?

14 A For cost, that's right.

15 Q Yeah.

16 A So, in our business, we look at it from the
17 standpoint of, do we have entitlement risk, i.e., is it
18 going to be impossible to get all of the approvals in
19 place to develop a project? Do we have costing risk?
20 How highly confident are we on the costs to develop a
21 project? And then, the final risk is market -- or
22 marketing risks, which would be dependent upon market
23 conditions at the time.

24 Q In fact, the entitlements, there was a -- did you
25 see the email yesterday from Mr. Bush to you, suggesting

1 that, since he wasn't able to buy the project back, that
2 you could actually try to sell the entitlements, or make
3 some value on all these entitlements that you received?

4 A Actually, I believe the email that we saw yesterday
5 said that Mr. Bush was wishing to continue with some of
6 the entitlements, so that we could help improve the
7 value for Equity Resource Partners. Because, oddly
8 enough, if we improve the value, and if we have
9 intellectual properties at Pinckney Point, --

10 Q Right.

11 A -- that would be beneficial to Pinckney Point and
12 Road, LLC.

13 Q Right. And so, he was trying to make some use of
14 the entitlements that had been received.

15 A The only reason I disagree with you is that, if you
16 also recall, within our option agreement with Equity
17 Resource Partners, they owned the entitlements that
18 Pinckney Point had in its possession at the time.

19 Q You were required to continue on with these
20 entitlements, pursuant to your agreement with Equity
21 Resources, correct?

22 A That's correct. I believe the email that we read
23 yesterday from Taylor was after the option period
24 expired. But us trying to continue with the
25 entitlements, to continue to add value to the project.

1 Q And you were talking about, maybe, managing the
2 project, outside of Pinckney Point, LLC, managing the
3 project for whoever might develop it.

4 A That was a possibility.

5 Q Okay. And projects don't go well when you don't
6 have -- if you can't find funding, as well, correct?

7 A Funding sure helps.

8 Q Right. All right. And you would agree, Equity
9 Resources, after the option ran out, they were free to
10 sell that to whoever they wanted.

11 A I have no fault in them selling that to whomever
12 they chose.

13 Q Okay. Great. And if they -- and that would put
14 Pinckney Point in the same position they're in now,
15 right?

16 A I don't understand the question. Maybe you need to
17 clarify.

18 Q Okay. Thank you, and I'd have to agree with you.
19 If ABC Company, LLC, had bought the Pinckney Point
20 property, Pinckney Point, LLC, they would be in the same
21 position now. They would have lost their investment.

22 A Other than the fact that ABC may be a developer,
23 and there may be some intrinsic value and what Pinckney
24 knows about the project, as well as the road parcel with
25 Road, LLC, there would be value that could be created.

1 Q Right. And I'm just asking about Pinckney Point,
2 LLC. Pinckney Point, LLC, when they didn't exercise the
3 option --

4 A Um-hmm.

5 Q -- they lost all their investment, didn't they?

6 A When they didn't exercise the option, Equity
7 Resource -- Resource Partners had the right to sell the
8 property to whomever.

9 Q And when the option expired, Pinckney Point, LLC,
10 lost any right to purchase that property.

11 A I -- I -- didn't have the right to purchase.

12 Q Right.

13 A But to continue to work towards getting final
14 approvals, and ultimately stepping up to purchase;
15 because with Equity Resources, we tried to keep an open
16 door with them.

17 Q Right.

18 A And tried to be cordial.

19 Q And when you were doing your projections earlier --
20 I'm going to come back to them, but. There's never --
21 I'm going to make a statement. I don't think you're
22 going to agree with me. But there's never been a
23 project you started into, and made a decision to invest
24 in it, that you anticipated losing money, right?

25 A That's correct.

1 Q All right. And when Pinckney Point, LLC, spent
2 money on the options to extend it, you understood and
3 appreciated the fact that there was the risk that you
4 would not raise that capital, correct?

5 A That's correct.

6 Q All right. And was that Mr. Nester, the lawyer for
7 Pinckney Point, LLC, in the road litigation?

8 A Yes, he was.

9 Q And you agree that the settlement agreement does
10 not say that the road property can only be used for
11 ingress and egress to a residential development.

12 A The settlement agreement doesn't make it exclusive
13 to a residential community.

14 Q Okay. So, the settlement agreement does not make
15 it so that the road can only be used to service a
16 residential community. Do you agree with that?

17 A I believe I just answered that.

18 Q Okay. Thank you. I just wanted to make sure I had
19 that right. Thank you. And is Bruce Bunner president
20 of LLC?

21 A LLC?

22 Q I'm sorry. I'm LLC'd out. Is Bruce Bunner
23 president of Pinckney Point, LLC?

24 A I don't believe so.

25 Q All right. Well, let me --

1 A In fact -- in fact, let me correct. I'm just
2 thinking through in my mind.

3 Q Yeah.

4 A He is not.

5 Q He's not?

6 A No. And I read my deposition just recently.

7 Q Yes?

8 A And I believe that the error was that he is the
9 president of Road, LLC, at the time.

10 Q Okay.

11 A And in the deposition, it does say Pinckney Point,
12 and that's my apology.

13 Q Okay. And -- okay. That's all right. And in your
14 deposition, you agreed that Mr. Bunner was the president
15 of Pinckney Point, LLC?

16 A And that was not factually correct.

17 Q All right. And at the time the option expired,
18 Pinckney Point, LLC, did not have the money to exercise
19 its option, correct?

20 A It did not have the capital, that's correct.

21 Q Okay. And your best estimate as to when you could
22 get the money was July or August 2013?

23 A Hopefully, a little bit before then, but with
24 fuller confidence after final site plan approval, it
25 would take just a little bit of time to.

1 Q Okay. I think you -- did you previously testify
2 that you got the money as of July or August of 2013?

3 A I believe so.

4 Q All right. So, you actually got the money in July
5 or August of 2013. All right.

6 A You'll refresh my memory as to what --

7 Q All right.

8 A -- previous testimony was, but --

9 Q Okay. And you remember saying that now?

10 A I remember saying something about the July time
11 frame.

12 Q Okay. Well, I'll get you to look at it, since you
13 weren't a hundred percent sure. Look at Page 94 of your
14 deposition.

15 A All right.

16 Q See on Line 19 -- I'm sorry -- 18? It says:

17 Okay. Did you ever -- Pinckney Point,
18 LLC, ever raise the capital to buy the Pinckney
19 Point parcel?

20 And what was your answer?

21 A We have the capital available now.

22 Q And when did it become available?

23 A Post the County's purchase of the property.

24 Q And then, on Page 95, I asked you, how far, post-
25 purchase?

1 A *It's hard to say, because it's easy to have*
2 *parties interested, but I would imagine*
3 *probably in July/August time frame of last*
4 *year.*

5 Q Okay. So, by July or August, you got the money?

6 A Correct.

7 Q All right. And when you got the money in July or
8 August, you didn't have anymore permits than you had
9 before, did you?

10 A No, we didn't.

11 Q Does Quadrant manage on behalf of Reinet and
12 Vanterra?

13 A That is correct.

14 Q And who is Quadrant?

15 A Let me clarify. At the time that the deposition
16 was taken, that was correct.

17 Q Okay.

18 A Quadrant is who Bruce Bunner actually is employed
19 by.

20 Q Okay. Well, was it Mr. Bunner that decided not to
21 use the money from Silver Point?

22 A That is correct.

23 Q Well, how did he get to decide that for Pinckney
24 Point?

25 A If you recall in the email, it had indicated that

1 Silver Point wished to have an equity interest and a
2 right of first refusal in all future deals, and all of
3 our future deals were being done under the Arendale
4 banner.

5 Q And you have authority to speak on behalf of
6 Pinckney Point, LLC, and Road, LLC, correct?

7 A That's correct.

8 Q All right. And you would agree, if Pinckney Point
9 didn't -- Pinckney Point, LLC, didn't own Pinckney
10 Point, they wouldn't have any reason to buy the road
11 property, right?

12 A That's correct.

13 Q And Road purchased -- Road, LLC, purchased the road
14 property after foreclosure proceedings had begun against
15 Pinckney Point, LLC.

16 A That's correct.

17 Q And you mentioned earlier, you corrected us on Mr.
18 Bush's testimony that BB&T -- Pinckney Point, LLC, was
19 not paying its interest payments on time. And did the
20 equity partner also announce in 2009 that they were no
21 longer going to fund cash calls or equity infusions?

22 A They made that election at the very end of May
23 2009.

24 Q Okay.

25 A And so, starting in June of 2009, forward.

1 Q Okay. And when they made that election, did you
2 start looking for another equity partner?

3 A We did.

4 Q Okay. You didn't find one?

5 A We found one.

6 Q Who is that?

7 A That's Reinet and Vanterra.

8 Q Well, I thought they were involved from the
9 beginning.

10 A No, they were not.

11 Q Okay. And in 2009, when your equity partner cut
12 off cash calls and equity infusions, that was not
13 related to Beaufort County, correct?

14 A That would --

15 Q It wasn't related to anything Beaufort County had
16 done.

17 A That is correct.

18 Q And it was really because of the general economic
19 downturn, and specifically, residential real estate,
20 right?

21 A That is correct.

22 Q And you're the one who induced Road, LLC, to
23 purchase the road property.

24 A I was the one who recommended to Bruce Bunner that
25 we make that investment.

1 Q You said we make it.

2 A We, Arendale.

3 Q We, Arendale. Okay. So, you're the Pinckney Point
4 guy, trying to help the Pinckney Point thing, but you're
5 --

6 A I also have fiduciary responsibilities to Arendale,
7 as well.

8 Q Okay. And Bruce Bunner made a decision to buy the
9 road, based on representations that you made to him.

10 A That's correct.

11 Q Okay. And the decision to buy it, buy the road
12 property, was made in mid- to late December of 2010?

13 A That's also correct.

14 Q All right. And capital -- you agree, capital
15 markets are always challenging, and it's not easy to
16 raise capital.

17 A Some times are easier than others, but.

18 Q Right. In this particular time period was really a
19 particularly tough period.

20 A Particular, as in 2010? Yes.

21 Q Okay. And on March -- well. Let me go to --

22 I'm going to ask, if you wouldn't mind, would you
23 put up Number 19. 20. I think Plaintiff put it in
24 evidence already.

25 And I just -- and these are projections you put

1 together for an investor?

2 A Yes, that is correct.

3 Q Okay. And just put it on this part first.

4 Do you have it in front of you, Mr. Kunkel?

5 A I have it in front of me.

6 Q Okay. All right. This distributable cash flow,
7 you have 56 million dollars there?

8 A Yes.

9 Q And that was -- did you say you got a new appraisal
10 on that, on those lots?

11 A Yes, we did.

12 Q Okay. And then, minus the 15 percent fee, that
13 would give you the 47,698.

14 A That's correct.

15 Q Okay. And that's after a fee to Arendale/Pinckney
16 Point?

17 A That's correct.

18 Q Okay. And this is less five percent, so that's
19 supposed to be 15 percent?

20 A Yes.

21 Q All right. And could you go down to the bottom
22 one, please.

23 And this new investor is going to put in --

24 There you go. Thank you.

25 This new investor is going to put in 26.2 thousand

1 dollars -- two million dollars over the -- you said it's
2 up and down. It started off at 21, but then, they put
3 some other stuff back in?

4 A Yeah, their investment starts in the first quarter
5 of 2013.

6 Q All right.

7 A And they reach peak capital just before we sell
8 lots.

9 Q Right. And so, when you get -- sell the lots, you
10 got to pay -- just, I want to make sure, the preferred
11 return on payments, that's a ten percent on the
12 investment, that's a preferred return?

13 A That's correct.

14 Q And then, you've got to give them their principal
15 back, right? You've got to pay that back.

16 A That's correct.

17 Q That's what the 26 million is?

18 A That's correct.

19 Q And then, the profit-sharing is 55.5 percent of the
20 profit.

21 A Of the residual profits, that's correct.

22 Q Okay. All right. So, the total profits -- so,
23 that's 55.5 percent of the profits. The other profits
24 of Pinckney Point, LLC, would be the other forty-five-
25 and-a-half percent, correct?

1 A That's correct.

2 Q Have I got that right? Oh, forty-four and a half.

3 A Forty-four-and-a-half percent. I apologize, that's
4 correct.

5 Q -Okay. Well, the hard math, I had. I just couldn't
6 get the easy math. And then, the investor was going to
7 get 18.8 percent.

8 A Plus one lot.

9 Q Plus a lot. Okay. That's pretty darn attractive,
10 huh?

11 A It's pretty attractive investment.

12 Q And is this the kind of thing you put together to
13 entice an investor to invest in the property?

14 A Yes, we do.

15 Q Okay. And I think your lawyer asked you if you
16 fluffed it up a little bit, and you said, no, right?

17 A That's correct.

18 Q But you do -- this should be attractive to an
19 investor, right?

20 A It should be attractive to an investor. It's -- it
21 depends on the investor's return expectations and the
22 like.

23 Q Okay. And this profit-share at 8,507, that's not
24 discounted back, is it?

25 A That is not discounted back.

1 Q And you were asked a little bit about it, but
2 discounting it back, if I have -- if I'm going to get
3 eight-and-a-half million dollars six years from now,
4 that's not worth as much as eight-and-a-half million
5 dollars today, right?

6 A That's correct.

7 Q Okay. So, there's a time value in money?

8 A That's correct.

9 Q Okay. So, I could put that and I could invest it,
10 if I had eight and a half today, I could invest it, and
11 by six years from now, I'd have more, right?

12 A That's correct. However, in this case, based on
13 the investment with -- in a peak capital requirement of
14 21 million dollars and a fairly quick payback, the
15 investor not only receives eight-and-a-half million, but
16 an additional six million, one-fifty-one, as the
17 preferred return.

18 Q Right. Right.

19 A And so, it's those two numbers together which make
20 the return to the investor.

21 Q That's the 18.8 percent?

22 A That's correct.

23 Q And people weren't jumping all over that?

24 A The complication was, we still needed to get all of
25 our permits together for the project to be shovel-ready.

1 Q And by that -- you had your conceptual approval by
2 August of 2011, right?

3 A That's correct.

4 Q And maybe Mr. Bush is in charge of this, and I
5 don't know if you'd know this or not, but do you know,
6 once you get your conceptual approval, that you've got
7 to go to your other vendors and engineers, and get that
8 done, and just bring it back, and say, I did what I said
9 I was going to do; and then, you get your final
10 approval? Do you know if that's true?

11 A You're correct in saying that Mr. Bush is more
12 knowledgeable about that than I am. But generally, I do
13 believe that is also correct.

14 Q Okay.

15 A You also remember, though, in the testimony
16 yesterday, because of the issue with the individual
17 sewer -- septic system permits --

18 Q Right.

19 A -- we had a delay in the 2011-12 time frame.

20 Q Okay. And that was absolutely, positively resolved
21 by, at the latest, February of 2012, correct?

22 A That's correct. And we also saw in the accounting
23 of our investments, is that we were paying McNair, the
24 law firm --

25 Q Right.

1 A -- to resolve the issue, until about February of
2 2012, and immediately, we started paying our engineer
3 afterwards to engineer the site.

4 Q Okay. And so, after absolutely, positively
5 February of 2012, you had pretty much everything you
6 needed from the County.

7 A We needed to engineer the site, so that we could
8 check the box --

9 Q Right.

10 A -- of all of those issues, and get our final site
11 plan approval.

12 Q There's nothing holding you up from the County
13 after that.

14 A After we got our final site plan approved, --

15 Q Yes.

16 A -- there would be nothing further.

17 Q Okay. Coming into the home stretch.

18 A Thank you.

19 Q I know everybody else will be happy. And the
20 Pinckney Point, LLC, and Road, LLC, they're not the
21 same, right? That's kind of the purpose of it.

22 A That's correct.

23 Q Okay. And can you confirm that Pinckney Point,
24 LLC, also appealed the ruling, with regard to the DHEC
25 dock decision?

1 A I cannot confirm that.

2 Q You can't do -- was Mr. Bush in charge of that?

3 A Yes, sir.

4 Q Okay. Thank you.

5 Mr. Kunkel, let me ask you if you can identify
6 what's been marked as Defendant's Exhibit 19.

7 A 19?

8 Q 19, please.

9 A It's company resolutions of Pinckney Point, LLC.

10 Q All right. And was this a resolution to authorize
11 you to sign to borrow money on behalf of Pinckney Point,
12 LLC, to close the purchase of the Pinckney Point
13 property, from Equity Resource Partners, on March 11,
14 2013?

15 A Allow me to read it.

16 Q Sure.

17 A I believe that is correct, yes.

18 MR. ACHURCH: Your Honor, I would move that into
19 evidence.

20 THE COURT: Okay.

21 MR. WALKER: Your Honor, this is a draft of a
22 resolution. I don't know if it was ever signed, and
23 without more information, we object to its admission.

24 MR. ACHURCH: I'm pretty confident it wasn't
25 signed.

1 MR. WALKER: Right.

2 MR. ACHURCH: Because they wouldn't have forwarded
3 it.

4 THE COURT: Okay.

5 MR. ACHURCH: I'll ask him some additional
6 questions.

7 THE COURT: Okay. Thank you.

8 BY MR. ACHURCH:

9 Q And Mr. Kunkel, did you plan to move forward, and
10 close the transaction for six-and-a-half million
11 dollars, and borrow six-and-a-half million dollars on
12 March 11, 2013, to buy back the Pinckney Point property?

13 A This was drafted in anticipation of capital being
14 brought to the table, that we needed to make sure we had
15 a resolution in place, but it was never executed.

16 MR. ACHURCH: Okay. And I would move that into
17 evidence, your Honor.

18 THE COURT: Okay.

19 MR. WALKER: No objection.

20 THE COURT: Without objection, it's in evidence.

21 MR. ACHURCH: Thank you.

22 THE COURT: What number is that, Mr. Achurch?

23 MR. ACHURCH: 19, your Honor.

24 THE COURT: Thank you.

25 ITEM IDENTIFIED AS DRAFT OF RESOLUTION

1 MARKED DEFENDANT'S EXHIBIT NUMBER 19,
2 ADMITTED AS EVIDENCE.

3 BY MR. ACHURCH:

4 Q And Mr. Kunkel, it says Pinckney Point, LLC, was
5 going to borrow 6.5 million dollars from the FTC Group,
6 LLC, on March 11, 2013, correct?

7 A FTCP Group, yes, that's correct.

8 Q Okay. And who is that?

9 A I believe that's Silver Point Capital.

10 Q Well, that doesn't say Silver Point Capital. It
11 says FTC Group, LLC. Is this another entity that had
12 agreed to loan money, so that you could buy the property?

13 A No. This was actually the entity that Silver Point
14 was going to use for the investment.

15 Q Okay. And down at the bottom-left over there, it
16 says, *Hilton Head 8052*. Do you know if that's the
17 McNair Firm stamp?

18 A I'm not sure if it is.

19 Q Do you know why this was prepared if Mr. Bunner
20 would refuse to abide by the terms and conditions under
21 which they were going to advance this money?

22 A Perhaps, this was prepared in advance of the
23 discussion with Mr. Bunner.

24 Q Let me get you to -- see if you can identify what's
25 been marked as Defendant's Exhibit Number 20.

1 A It appears to be an email that I drafted to Bruce
2 Bunner.

3 Q Okay. And there was also one, looks like, from Mr.
4 Bunner to you, correct?

5 A Yes, that's correct.

6 Q Okay. And was this regarding efforts to purchase
7 back the Pinckney Point property?

8 A It appears that way, yes.

9 Q And it's dated March 10, 2013?

10 A Yes.

11 Q Okay.

12 MR. ACHURCH: Your Honor, I'd move that into
13 evidence.

14 THE COURT: Any objection?

15 MR. WALKER: No objection.

16 THE COURT: It's in evidence, without objection.

17 ITEM IDENTIFIED AS EMAIL FROM JOHN

18 KUNKEL TO BRUCE BUNNER, DATED

19 MARCH 10, 2013,

20 MARKED DEFENDANT'S EXHIBIT NUMBER 20,

21 ADMITTED AS EVIDENCE.

22 BY MR. ACHURCH:

23 Q Okay. And in this, could you read the email to you
24 from Mr. Bunner?

25 A Yes.

1 We reached out to Silver Point last
2 Thursday, and walked through our marks --

3 Q No, I apologize. The one below Mr. Bunner to you.

4 A Okay.

5 Q It says, what is the latest.

6 A What is the latest regarding Pinckney? Did
7 Stone Point come back, or did you have any
8 further discussions with Irby regarding the
9 extension?

10 Q Okay. And then, if you would, please, go ahead --
11 and is this your response above to them?

12 A This is my response above.

13 Q Okay.

14 A We reached out to Silver Point last Thursday,
15 and walked through our marks to their term
16 sheet, and specifically discussed eight
17 objections that they had with our marks.
18 The ball is in their court, but I don't think
19 they will respond. I'm considering them dead.

20 We spoke to Irby, also, on Thursday, and
21 he committed to have an answer to us that
22 evening about revised terms consistent with
23 what I mentioned to you Wednesday evening.
24 I know you wanted to ask Alan, but we needed
25 to keep this alive. Irby hadn't responded by

1 Friday, noon, so we reached out again, and he
2 said he was just having a tough time reaching
3 his partners due to spring break. Not sure
4 how they will respond, and Monday is the
5 extension deadline.

6 Q Okay. So, this is, again, discussing this loan.
7 They've said they would loan you the money. You
8 objected to their terms, and you went back to them with
9 a counter.

10 A I'm going to disagree again, because they provided
11 a term sheet, which is far different than a loan
12 commitment.

13 Q Um-hmm. Well, did you testify earlier they hadn't
14 given you a terms sheet?

15 A That we didn't have acceptable terms between the
16 two parties. What I -- I believe what I said was that
17 we had not had a commitment to any terms.

18 Q I thought you -- I thought you said you didn't have
19 a terms sheet, but okay. You don't remember saying
20 that.

21 A If I did, my apologies.

22 Q Okay.

23 A We were bouncing a terms sheet back and forth, but
24 there were never -- there never was a meeting of minds
25 between terms acceptable by both parties in a terms

1 sheet; and certainly, there was never a large
2 commitment.

3 Q Okay. We don't have to mark this one just yet.

4 I'm going to show you this, just to refresh your
5 recollection. It's an email from Mr. Bush from April 1,
6 2013, to you. You see that?

7 A Actually, I think it's to John Irby, with a copy to
8 me and Hugh Connerty.

9 Q Oh, I apologize. But have you seen this before?

10 A Yes, I have.

11 Q Okay. And it says in there -- in there, Mr. Bush
12 tells Mr. Irby:

13 *It's unfortunate we're not able to*
14 *secure the capital in time to meet the deadline.*
15 *I do want you to know, our efforts were genuine.*
16 *And it goes on to say:*

17 *We were not able to raise the funds due*
18 *to tightness in the capital markets right now.*

19 So, he says he can't raise the money because of the
20 tightness in the capital market. Was that true?

21 A That is true.

22 Q Okay. Thank you.

23 Actually, I'll go ahead and mark this.

24 MR. WALKER: Isn't that already an exhibit?

25 MR. ACHURCH: It might be. It might be marked as

1 -- if you don't object to it, I'll just mark it and put
2 it in.

3 MR. WALKER: That's fine.

4 MR. ACHURCH: It might be easier than yours.

5 MR. WALKER: Okay.

6 MR. ACHURCH: That's fine. We'll mark it.

7 MR. WALKER: 21?

8 THE COURT: Okay.

9 MR. WALKER: No objection.

10 MR. ACHURCH: Thank you.

11 ITEM IDENTIFIED AS EMAIL FROM TAYLOR
12 BUSH TO JOHN IRBY, DATED APRIL 1, 2013,
13 MARKED DEFENDANT'S EXHIBIT NUMBER 21,
14 ADMITTED AS EVIDENCE.

15 BY MR. ACHURCH:

16 Q Mr. Kunkel, this is -- Defendant's Exhibit 21, is
17 that the email we were just discussing?

18 A Yes, it is.

19 Q Okay. Thank you. And I'll show you this, but I
20 think this is marked, also, but I'll just give it to you
21 to look at.

22 I'm not going to mark this, but this is an email
23 from John Irby to Taylor Bush, and you got a copy, as
24 did Mr. Kunkel. And this is -- looks like, on April 3,
25 2013, Mr. Irby actually gave Pinckney Point, LLC,

1 permission to go take somebody out there to look at the
2 property, correct?

3 A That's correct.

4 Q So, Equity Resource were keeping all their doors
5 open, weren't they?

6 A They were keeping all their options open.

7 Q Right. You would do that, too, wouldn't you?

8 A A reasonable party would do that.

9 Q Okay. Thank you. And the numbers that you came up
10 with, that you gave your projections that you made, that
11 would include you'd have to raise the money, right? You
12 would have to raise the money to buy the property. You
13 would have to raise the money to invest in the property,
14 the horizontal -- the infrastructure and whatnot. And
15 you have to hold them, and you'd have to sell them, and
16 you'd have to do all that according to your projections,
17 without any significant market interruption, correct?

18 A Or market improvement. But otherwise, that's
19 correct.

20 MR. ACHURCH: Okay. Thank you. That's all the
21 questions I have. Thank you very much.

22 A Thank you.

23 THE COURT: Re-direct?

24 JOHN C. KUNKEL

25 RE-DIRECT EXAMINATION BY MR. WALKER:

1 Q You talked about a few projects where you had
2 losses. Were they bracketed in a certain time period?

3 A I believe I testified it was within the time period
4 where the housing market was in total collapse, and
5 generally speaking, 2007 through 2010 was that period of
6 time.

7 Q Do you consider this project, which was started in
8 2006, which made it through that, to fall in that
9 category?

10 A Well, not --

11 MR. ACHURCH: I object to the form, your Honor.

12 BY MR. WALKER:

13 Q Do you consider --

14 MR. ACHURCH: I don't think it made it through
15 that.

16 BY MR. WALKER:

17 A Not every project that we had that was within the
18 cusp of that time frame has been a total loss. We've
19 had several projects that were invested early in 2001,
20 2002, 2003, that have seen it through on the other side.
21 We've seen other projects that even invested in 2006 and
22 '07 that we still have an investment in, and are doing
23 fine.

24 Q I realize, at the time that you made this -- the
25 projection of pro forma, that you couldn't see the

1 future, but how has the market been that you were
2 projecting into?

3 A Since 2013, through today, the market has continued
4 to improve.

5 Q Given what the market has shown, do you feel that,
6 that was an achievable -- does that confirm in any way
7 your projections?

8 A That we would reasonably meet or exceed the
9 expectations within that pro forma.

10 Q Back on Silver Point, did they ever sign a firm
11 commitment?

12 A No, they never signed a firm commitment.

13 Q Would you do that present value exercise on the 6.8
14 million dollars that Mr. Achurch asked you about at some
15 part of your examination?

16 A Would I do it?

17 Q Could you do it? Could you do it?

18 A Yes, I could.

19 Q And would it take long?

20 A No, it would not.

21 Q Okay. Could you do it in a matter of less than
22 thirty seconds?

23 A Not less than thirty seconds.

24 Q Nineteen minutes?

25 A In nineteen minutes, yes.

1 Q No, I don't mean to be facetious, but is it
2 something that you can do on the stand, without imposing
3 on our jurors?

4 A May I have my computer?

5 Q Oh, oh. Okay. Well.

6 THE COURT: Well.

7 Q We'll leave it as it stands. So, you would roughly
8 estimate it to be a couple -- what would you roughly
9 estimate to be the difference between the 6.8 and the
10 present value?

11 A I would roughly estimate that it would be 2.9
12 million to 3.4.

13 Q Would be the adjusted amount?

14 A Yes.

15 Q All right.

16 A On just the 6.8 million dollars of residual profits
17 that Pinckney would earn, independent of the fee
18 arrangement.

19 Q And with the fee arrangement, you gave us what that
20 number would be.

21 A That number, I actually did not. I believe that
22 number is 8.4 million dollars.

23 Q Okay.

24 A And the 8.4 is the hundred percent number.

25 Pinckney was going to receive 80 percent of that.

1 Q All right.

2 MR. ACHURCH: And I object to that number, your
3 Honor, as irrelevant. Pinckney Point wasn't going to
4 receive the money. Move to strike.

5 BY MR. WALKER:

6 Q Would Pinckney Point have received its share of the
7 fee?

8 A Yes.

9 MR. WALKER: Thank you. Nothing more.

10 THE COURT: Anything more?

11 MR. ACHURCH: No. No, your Honor.

12 THE COURT: All right. You may step down, Mr.
13 Kunkel. Could I see the attorneys --

14 A Thank you.

15 THE COURT: -- up here while -- ladies and
16 gentlemen, you all stand up.

17 OFF-THE-RECORD BENCH CONFERENCE, OUT
18 OF HEARING OF JURORS. PRESENT: THE
19 COURT, MR. WALKER, MS. MONOC, MR.
20 ACHURCH, MS. LOHR, MR. BENDLE.
21 END BENCH CONFERENCE.

22 BY THE COURT:

23 THE COURT: All right. If you all want to stay
24 standing, you actually can, ladies and gentlemen. I
25 will tell you that, as the judge, I kind of have the

1 birds' eye seat here, and you all don't notice this, but
2 as the day goes on, everyone starts slumping in their
3 seats, at least the jury does. And while these lawyers
4 are all working and doing what they need to do, I watch
5 you the whole time, and I know this is difficult, and I
6 know it's a long day, sitting in your seats. So, with
7 that said, we're going to go and break for the evening,
8 ladies and gentlemen.

9 It's about 5:00 o'clock. I want to start again at
10 9:30 again tomorrow morning, if you all are amenable.
11 That seems to be working fine with everybody.

12 I need to remind you, do not discuss the case.
13 Don't do any independent research. Don't read anything
14 on it. Don't watch anything on it. Again, go home.
15 Get a good night's sleep. And whoever the juror is that
16 needs to leave by Friday at noon, I just want you to
17 confirm that with the bailiffs before you leave today
18 that, that's what's happening, and that's what we need
19 to do. Okay?

20 So, with that said, ladies and gentlemen,
21 goodnight, and we'll see you all at 9:30 in the morning.

22 JURORS LEAVE COURTROOM 4:59 P.M.

23 THE COURT: That reminds me of, Lionel Lofton used
24 to wear -- he wore this same tie, and I laughed, and I
25 said, I've seen that before. And he goes, yes, I wore

1 it the last time I didn't have a client, and they didn't
2 show up. And it's got so much going on, he goes, I'm
3 hoping they're looking at my tie, as opposed to, I have
4 no client sitting in the chair next to me.

5 So, you all okay? My understanding is, Mr.
6 Hartnett can come back in the afternoon tomorrow. So,
7 we're just --

8 MR. HARTNETT: I can come back in the afternoon.

9 THE COURT: Just absolutely. You all okay? And as
10 far as timing, kind of give me an idea. Obviously,
11 we're not going as quickly. I anticipate we're going to
12 lose the one juror at noon on Friday, but other than
13 that. We obviously have two alternates, which is the
14 reason we do. What do you think as far as -- are you
15 going to finish tomorrow?

16 MR. WALKER: Yes.

17 THE COURT: You are? Okay. Very good. So, you
18 have Mr. Hartnett left, and you have Walter Nester left?

19 MR. WALKER: Walter Nester, and then, Mr. Hartnett.
20 And if we get through with Walter before he gets here,
21 we can do a deposition.

22 THE COURT: Okay. Okay. Perfect.

23 MR. ACHURCH: We might be able to pare ours down to
24 two live witnesses and one read-in deposition testimony,
25 Judge.

1 THE COURT: Okay. Those two live witnesses, is it
2 something we can get done in --

3 MR. ACHURCH: Our witnesses will not be as long as
4 theirs.

5 THE COURT: Okay. Was Josh one of them? is my
6 question.

7 MR. ACHURCH: We don't necessarily know that we
8 need Josh.

9 THE COURT: Okay.

10 MR. ACHURCH: I haven't read what they're going to
11 read in yet.

12 THE COURT: Okay.

13 MR. ACHURCH: Frankly, I'm hoping we don't
14 necessarily need to call him.

15 THE COURT: Okay. I guess my question is --

16 MR. ACHURCH: It will be Mr. Kubic, Hillary Austin.

17 THE COURT: Okay.

18 MR. ACHURCH: And then, read in the deposition
19 transcript of Mr. Irby, not necessarily in that order.

20 THE COURT: So, is there still a chance that we can
21 finish Friday, or?

22 MR. ACHURCH: We can do ours in a day, that's for
23 sure.

24 THE COURT: Okay.

25 MR. ACHURCH: I mean, I don't --

1 THE COURT: Okay.

2 MR. ACHURCH: I don't know what kind of cross they
3 would have, but.

4 THE COURT: Okay.

5 MR. WALKER: Our cross will be very limited.

6 THE COURT: Okay.

7 MR. WALKER: And so.

8 THE COURT: Yes.

9 MR. WALKER: Yeah, I think we could finish all the
10 proof.

11 THE COURT: Okay.

12 MR. WALKER: By Friday, sure.

13 THE COURT: Okay.

14 MR. ACHURCH: But -- yeah.

15 THE COURT: Yes. Okay.

16 MR. ACHURCH: It took an hour and a half to open.
17 I don't know.

18 THE COURT: Yeah. I have to admit, that was --
19 okay.

20 MR. ACHURCH: It's just a lot.

21 THE COURT: We'll see. I know. Let me ask you
22 this. I haven't even asked the jury yet, and we haven't
23 even gotten to that point, but do you all have any kind
24 of preference that, if we had to argue and charge,
25 obviously, after Friday, would you all have a

1 preference? Jerri's in the back, and she's going to
2 send darts to me, obviously. If there is a preference
3 of Saturday versus Monday, or does anyone -- anyone have
4 a wedding, or something significant?

5 MR. WALKER: No. No, I was going to say Monday.
6 I'd prefer Monday.

7 THE COURT: Okay. And I mean, I know it's better
8 for the County. It's cheaper, so they don't have to pay
9 people overtime, so.

10 MR. ACHURCH: We might need that money.

11 THE COURT: Exactly. So, okay. I just want to
12 make sure we're all okay, and we're all kind of on the
13 same page, if that's what we end up doing. So, okay.

14 MR. ACHURCH: No, I'd rather have the time.

15 THE COURT: Yes. It actually works perfect. It's
16 a chambers week, so it's -- timing-wise, it's excellent,
17 so. And who knows? Maitè Murphy may be here with us,
18 so. It seems like their case is taking awhile, as well.
19 Okay.

20 All right.

21 MR. ACHURCH: I don't think I've -- I don't think
22 I've -- (1) this went a lot faster than we thought.

23 THE COURT: All right. Well, goodnight, you all,
24 and thank you. I do need to remind you --

25 MS. MONOC: I'm sorry. Can I put one thing on the

1 record?

2 THE COURT: Sure.

3 MS. MONOC: The Court of Appeals case that I cited
4 earlier was affirmed by the South Carolina Supreme
5 Court, and I wanted to give you -- the reason I think it
6 was unpublished is because it was -- it doesn't say that
7 it's unreported, but it was a substituted decision, and
8 I don't know if that's why.

9 THE COURT: Okay.

10 MS. MONOC: But the South Carolina Supreme Court
11 did affirm that decision, and that citation is 310 South
12 Carolina 232.

13 THE COURT: Okay. Perfect. Also, one other thing.
14 If you all need to send me anything, or try to send the
15 law clerk anything, Leigh Ellen, her little sister is
16 getting married this weekend, so that's why she's
17 leaving tomorrow. Sorry to tell them why. So, if you
18 need to send me anything, and you're worried about me
19 getting it, make sure you send it to cmullen@sc, per my
20 secretary, Jamie, and she'll make sure it gets put in
21 front of me, and that I, in fact, read it.

22 MS. MONOC: Thank you.

23 THE COURT: So, that's just to let you know. I
24 appreciate the requests to charge so far. Nothing is
25 surprising in the least bit from it. It's all pretty

1 standard, but if there's anything further you
2 contemplated for tonight, send it to me, if you would.
3 Okay?

4 MS. LOHR: Your Honor?

5 THE COURT: Yes.

6 MS. LOHR: One last thing. Oop. You go, Wanda.

7 THE COURT: You go, Wanda.

8 COURT REPORTER: Please.

9 MS. LOHR: One last thing. We do have some
10 objections to their designations in the two depositions.

11 THE COURT: Okay.

12 MS. LOHR: That's going to take not long, but a
13 little, you know, a little time with you, not --

14 COURT REPORTER: I'm sorry, I need to hear, please.

15 BAILIFF: Quiet in the Court, please.

16 MS. LOHR: So, I just wanted to bring that to your
17 attention.

18 THE COURT: How about you want to do it first thing
19 in the morning, obviously?

20 MS. LOHR: That's fine.

21 THE COURT: Okay. So, let's -- you all are close.
22 Let's all be here by 9:15, at the latest. I mean, how
23 long is it going to take me? I mean.

24 MS. LOHR: Twenty minutes, maybe?

25 THE COURT: Twenty minutes.

1 MS. LOHR: You're doing both depositions, still,
2 right?

3 MR. WALKER: Okay. Yeah. That's fine. Let's be
4 -- we'll be here at 9:15. Let's do both.

5 THE COURT: How about being a little bit before
6 that?

7 MR. ACHURCH: Are you going to do both? You need
8 to do them both?

9 MR. WALKER: Well, I don't -- no, I want to go
10 back, but I don't want to say I'm just going to do one
11 right now, so.

12 THE COURT: Okay. Okay. Well, let's do this,
13 then. Let's try to be here about 9:05, 9:10. I can
14 tell you, as soon as I'm here, I'll walk in, and we'll
15 do it.

16 MR. WALKER: Okay.

17 THE COURT: Is that okay with you all?

18 MR. WALKER: Very good.

19 THE COURT: Okay. Perfect. And which two
20 depositions are they?

21 MR. WALKER: They are Gary Kubic, and my friend,
22 Josh Gruber.

23 THE COURT: Okay.

24 MS. LOHR: You know, we might as well do Irby's at
25 the same time. You all have already got our

1 designations.

2 MR. WALKER: Okay.

3 MS. LOHR: So, I mean, it seems to me that --

4 THE COURT: Okay. Then, everyone be here at 9:00.
5 Okay?

6 MS. LOHR: We may as well get them all done, so we
7 can keep rolling.

8 MS. MONOC: I guess we'll send our counter-
9 designations tonight.

10 THE COURT: Okay.

11 MS. MONOC: Because we haven't had -- we just got
12 it this afternoon.

13 THE COURT: Okay. Well, let's try to do them all
14 at 9:00 a.m., if that's fine. Okay. Okay. All right.
15 I'll see you all at 9:00 a.m.

16 MR. WALKER: Thank you.

17 THE COURT: What do you need, Wanda?

18 COURT REPORTER: Number 21, I'm not sure if you
19 actually moved it in.

20 THE COURT: You know what, you didn't, but we
21 agreed, and I almost said to the jury, we're going to
22 move it in for a second time, we think. So, yes, 21 is
23 in. Is that fine?

24 MR. ACHURCH: Yes. And I think we agreed to move
25 it, yeah, we said --

1 THE COURT: It might be twice.

2 MR. ACHURCH: I'm going to move it in, and he said
3 -- I said I'm going to move it in. Trenholm said I
4 think we might have put it in.

5 COURT REPORTER: I wasn't sure if you -- I wasn't
6 sure you put it in.

7 MR. ACHURCH: I said, I'll tell you what I'm going
8 to move it in.

9 THE COURT: You didn't say anything, but I can tell
10 you what I do is, we enter it as an exhibit. When it
11 gets moved in, I actually circle it. And I circled it,
12 even though you forgot it. So, it's in, officially.
13 Okay.

14 COURT REPORTER: Okay. One more question. You
15 know the deposition you read from, Mr. Kunkel?

16 MR. ACHURCH: Yes.

17 COURT REPORTER: Should that be a court exhibit?

18 MR. A CHURCH: Yes, ma'am.

19 THE COURT: Yes. Yes.

20 MR. ACHURCH: Just do them both.

21 THE COURT: There's two.

22 THE COURT: Just do them both. They're the same
23 person.

24 THE COURT: Court's exhibits. They're the exhibits
25 to it.

1 MR. ACHURCH: Those are --

2 THE COURT: Those are exhibits to the deposition.

3 MR. ACHURCH: Those are deposition -- yeah, just
4 please keep them with the deposition. Thank you.

5 COURT REPORTER: Okay.

6 THE COURT: Goodnight, you all.

7 ITEM IDENTIFIED AS DEPOSITION OF

8 JOHN C. KUNKEL, DATED SEPTEMBER 25, 2014,

9 MARKED COURT'S EXHIBIT NUMBER 3.

10 ITEM IDENTIFIED AS DEPOSITION OF

11 JOHN C. KUNKEL, DATED MAY 24, 2015,

12 MARKED COURT'S EXHIBIT NUMBER 4.

13 END DAY THREE, WEDNESDAY

14 APRIL 27, 2016, 5:07 P.M.

15 BEGIN DAY FOUR, THURSDAY,

16 APRIL 28, 2016, 9:12 A.M.

17 DESIGNATIONS REGARDING DEPOSITION

18 OF JOSHUA ANDREW GRUBER:

19 MS. MONOC: Okay. Are we starting with Gruber?

20 THE COURT: Yes.

21 MS. LOHR: Okay. My -- your Honor, are you ready?

22 THE COURT: Yes.

23 MS. LOHR: My only objection is this, is that I
24 think it's confusing that little kind of mixed context.
25 Because it starts with, *okay, due diligence undertaken*

1 by the County.

2 THE COURT: Okay. Give me a page and line.

3 MS. LOHR: Oh, I'm sorry. The very beginning, 13,
4 11.

5 THE COURT: 13, Page 13, Line 11?

6 MS. LOHR: Yeah.

7 THE COURT: Okay.

8 MS. LOHR: It starts with:

9 *Okay, due diligence undertaken by the*
10 *County. Yes, I'm familiar with it, and the*
11 *County's consideration of the settlement*
12 *agreement, if at all, with respect to the*
13 *decision to purchase Pinckney Point, I'm*
14 *familiar with the settlement agreement.*

15 And it just -- it lacks -- it lacks a little
16 context. Other than that, I really don't have an
17 objection to it. It's just, I think it's a confusing
18 way to start.

19 THE COURT: And that's the very first beginning
20 that you all are --

21 MS. LOHR: That's -- yes, that's the very first
22 designation that the plaintiffs have.

23 MS. MONOC: Well, we were going through the
24 30(b)(6). We were going through the 30(b)(6) in the
25 deposition over the list of topics, and we're just

1 trying to show that he is familiar with these areas.
2 So, I'm not quite sure if that's why -- maybe we can
3 find a line that shows we're going through the 30(b)(6)
4 topics or something?

5 THE COURT: Yes, I think that's probably a good
6 idea.

7 MS. MONOC: Okay.

8 MS. LOHR: Your Honor, I was just concerned that it
9 seemed to be jumping in mid-way. They didn't really
10 know who that -- what they were talking about.

11 THE COURT: Is there any reason why you just can't
12 start with line 18? Well, it's kind of is an answer,
13 where he says:

14 *I'm familiar with the settlement agreement.*

15 *Question: Are you familiar with whether*
16 *the County considered it?*

17 MS. MONOC: Yes. That's perfect.

18 THE COURT: Is that okay with you?

19 MS. MONOC: That's a great solution.

20 THE COURT: Okay.

21 MS. LOHR: That's good.

22 THE COURT: Okay. So, let's do that. I think it
23 just makes more sense. Okay.

24 What's the next one?

25 MS. LOHR: The next objection is 29, and that's

1 because it starts with an answer.

2 THE COURT: And you're reading these, correct?

3 MS. MONOC: Yes.

4 THE COURT: You're reading these? Okay.

5 MS. MONOC: It starts with:

6 *I'm legal counsel to -- I'm legal*
7 *counsel to Beaufort County Council.*

8 And then, the question is, *so, what does that mean?*

9 THE COURT: I think that's fine. I think it's just
10 easier, if that's kind of where you're starting, in the
11 middle, you need to start by saying, answer by Josh
12 Gruber: *I'm legal counsel to Beaufort County.*

13 Question: *So, what does that mean?* And then, I think
14 -- you don't have to keep doing question and answer, but
15 I think, just get it rolling, so they understand what's
16 going on.

17 MS. MONOC: Great.

18 THE COURT: Who's saying what. Okay? So, I think
19 it's fine. It just -- it gives a little context.

20 MS. LOHR: All right. The next one is Gruber
21 deposition, 32, Line 12 through 33, 1. This is the same
22 objection that we've consistently been having, your
23 Honor, with regard to relevance, as it predates the
24 settlement agreement. Additionally -- I'll give you a
25 chance to read it -- but additionally, we had a hearsay

1 objection, as Mr. Gruber was not an employee at the
2 time, and he's giving information that someone else told
3 him.

4 MS. MONOC: I'm sorry, this was a 30(b)(6)
5 deposition, so I think that he's going to naturally have
6 to say -- he's not going to have the firsthand
7 experience.

8 MS. LOHR: Yeah, but that's okay for a 30(b)(6),
9 but that's not okay for trial. I mean, if you're going
10 to do it at trial, you're going to have to have someone
11 who can actually set -- he's testifying what someone
12 else told him.

13 MS. MONOC: Tell me exactly where you think that
14 is.

15 MS. LOHR: Okay.

16 THE COURT: Where he says on Line 20, he says, my
17 understanding is that the Trust, at one point in time
18 had approached Pinckney.

19 MS. LOHR: Yeah. I mean, he's not even saying what
20 his under -- where that understanding came from.

21 THE COURT: I think that's admissible. I think he
22 can say that. I mean, he's the 30(b)(6), and he's
23 speaking on behalf of the County, and. I think, I mean,
24 he answers the question, he says, yeah, they looked at
25 it, but the purchase price is too much, couldn't afford

1 it, and moved on. So, obviously, -- Wanda, are you
2 taking this down?

3 COURT REPORTER: Yes.

4 THE COURT: Thank you. Okay. So, subject to your
5 objection, I do think it's admissible, and I'm going to
6 let him testify to it.

7 MS. LOHR: Okay.

8 THE COURT: What next?

9 MS. LOHR: Next objection is 47.

10 THE COURT: What line?

11 MS. LOHR: I'm sorry, 47, Lines 2 through 7. This
12 lacks foundation. They're just getting in an exhibit,
13 and he says it's dated March 14th, and I have a
14 PowerPoint we can mark.

15 MS. MONOC: We'll scratch that. That's already in
16 evidence, so we don't need it.

17 THE COURT: Yes, I was going to say, he already
18 testified to it.

19 MS. MONOC: Right.

20 THE COURT: All the power points are already in.

21 MS. MONOC: Right.

22 THE COURT: Right.

23 MS. MONOC: And this was all done on Monday, so.

24 THE COURT: Got it. I understand. So, we just
25 scratch that portion of it.

1 MS. MONOC: Yes. Thank you.

2 MS. LOHR: 47, 16. It's the same -- it was the
3 same objection, having --

4 THE COURT: It's already testified -- it's already
5 testified to.

6 MS. LOHR: All right.

7 THE COURT: I think he did a great job, as far as
8 being the best witness, how it got in. It's his power
9 points.

10 MS. LOHR: All right. The next objection is --
11 hold on a second. 48, 10, it just doesn't have a
12 question. I mean, --

13 MS. MONOC: 48, 10, I don't think, is one.

14 MS. LOHR: 48, 10, yes, there is. 49, 10 to 49, 5.

15 MS. MONOC: You can scratch that. No, no, no, no,
16 no, not 48, 10 to -- I'm sorry. 48, 10, we can scratch
17 48. I think we should start at 24.

18 THE COURT: 48, 24?

19 MS. MONOC: 48, 24.

20 THE COURT: *Is public use taken into*
21 *consideration? Public use is implicitly*
22 *taken into consideration.*

23 MS. LOHR: All right. So, start at 24?

24 THE COURT: Yes.

25 MS. MONOC: Yeah, 48, 24.

1 MR. WALKER: Line 24.

2 MS. LOHR: All right. 51, 15 through 16 -- hold
3 on. We've got an exhibit, he's testifying who the --

4 THE COURT: There's a resolution already in
5 evidence. Did anyone put the resolution in evidence?

6 MS. MONOC: I don't think it is.

7 THE COURT: I don't think it is, either.

8 MS. LOHR: And then, yeah, the resolution, that's
9 right. And it's kind of three part. It's the next
10 three. There's no -- there's been no foundation to put
11 that in.

12 MS. MONOC: It was -- okay.

13 THE COURT: I don't -- I mean, I don't think you
14 need the resolution, because obviously, it passed.
15 Obviously, they bought it, you know.

16 MS. MONOC: Right. Okay. We'll withdraw it.
17 Thank you.

18 THE COURT: Okay. Okay.

19 MS. LOHR: So, that's the next three.

20 MS. MONOC: Wait, I'm sorry. I don't know if we're
21 ready to give up on three.

22 MS. LOHR: Well, because they're all questions
23 about the resolution.

24 MS. MONOC: Well, then, we might have to look over
25 it again.

1 Oh, yeah. The next one goes into -- the next one's
2 over -- is testimony over the course of several pages.
3 So, I don't think we can let that go without an
4 objection.

5 MS. LOHR: Well, I think they have to have
6 foundation.

7 MS. MONOC: Okay. I'm sorry. We're talking about
8 Page 52, Line 20, through Page 55, Line 9.

9 THE COURT: The hard part about this is that, when
10 you're talking -- and he's talking about the document,
11 and he's talking about the rules that go through it.
12 And unless you're actually showing it to them at the
13 same time, they have no context for it. I mean,
14 obviously, we'd want to publish it at the same time, I
15 think, to understand. Do you want to put in -- and I
16 guess that's my question is, are you going to put in the
17 guidelines that they use? Are you going to -- I know
18 you're going to object to it. I mean, it is what it is.

19 MS. LOHR: Well, your Honor, this is the problem
20 with using a deposition, I mean.

21 THE COURT: Exactly. Well, be careful. In one
22 minute, they're just going to call Mr. Gruber.

23 MS. LOHR: That's okay.

24 MS. MONOC: Well, could you reconsider putting in
25 the resolution? Could we reconsider putting that in?

1 Because that's what this whole section is talking about.

2 THE COURT: I mean, the resolution is what it is.
3 I mean, I think it's fine. I mean, all of it's -- isn't
4 all it's going to say is they agreed to buy it?

5 MS. MONOC: Right. It was a County Council
6 resolution.

7 THE COURT: Right.

8 MS. LOHR: Your Honor, I really don't see what the
9 relevance is to all this, whether this is a breach of
10 contract or not, but if they want to bog the jury down
11 further.

12 THE COURT: It's completely up to them. I mean, I
13 don't -- I see it as -- it is relevant, and if they want
14 to put it in, I think they absolutely can. It's up to
15 you all.

16 MS. LOHR: Well, I would specifically object, then,
17 if they do choose to put that in. I would object at
18 Page 54.

19 THE COURT: Okay. What line?

20 MS. LOHR: It says, at meeting Walter Nester had
21 after Council had approved the purchase. It talks about
22 the content of the meeting with Walter Nester. I don't
23 see how that could be relevant.

24 MS. MONOC: Oh, it's absolutely relevant, because
25 that's where they were absolutely put on notice that we

1 thought that there was a breach, and we were asking them
2 to not close, in order to prevent the breach from
3 happening.

4 MS. LOHR: Walter's opinion about whether there was
5 a breach or not isn't relevant to whether there was a
6 breach or not. I mean, he's going to testify.

7 MS. MONOC: This is notice to the County.

8 THE COURT: Yeah, this just puts them on notice.
9 But what I think he was trying to do was -- he was
10 saying that there was an access problem. He was trying
11 to -- he was trying to stop it.

12 MR. ACHURCH: Your Honor?

13 THE COURT: Yeah.

14 MR. ACHURCH: Could I just -- what is the
15 relevance, your Honor, to the fact that Mr. Nester
16 expressed his opinion that the County would violate the
17 terms of the contract, or whether the County breached it
18 or not? Is there --

19 THE COURT: It just --

20 MR. ACHURCH: I don't understand how notice --

21 THE COURT: This isn't him giving an opinion. This
22 is just him saying that there's an access problem; that,
23 that, just, is whether or not, in his opinion, he was
24 put on notice. And we've already got a thing in from
25 Weston Newton that there is a prescriptive easement over

1 the road. And apparently, we've got Mr. Herbkersman
2 also giving opinions, as well. But there's no problem.
3 It's all good.

4 So, I don't see this as an opinion. It says:

5 *At that meeting that Walter Nester had,*
6 *after County Council had approved the purchase,*
7 *that was the first that there was any indication*
8 *that somebody disagreed with the fact that*
9 *there was unfettered access.*

10 I mean, it just is they disagreed. I mean, we all
11 know this. A legal opinion is only as good as who's
12 giving it, and even, sometimes, if they're good, they're
13 wrong, so.

14 MS. MONOC: And also, there's testimony -- I'm
15 sorry to interrupt. There's, you know, there's other --
16 there's other emails that are in evidence where, you
17 know, they're questioning the access. And those emails
18 predate, you know, this meeting, so I think it's
19 relevant for that purpose.

20 THE COURT: I think it's relevant for your saying,
21 listen, this is the issue, so. I understand, you're
22 saying, what does that still have to do with the breach
23 of contract, but again.

24 MR. ACHURCH: Your Honor, if there were issues to
25 access, I mean, so, what?

1 THE COURT: Okay.

2 MR. ACHURCH: I mean, that's the relevant -- I
3 don't see -- I don't think it's relevant.

4 THE COURT: Okay. I mean, you can ask it.

5 MS. MONOC: Okay. Thank you.

6 THE COURT: It's fine. It's from his deposition,
7 so.

8 MS. MONOC: Okay. So, can we go back and agree
9 that it's going to be Page 51, Lines 15 and 16 are in,
10 to get in the resolution? And then, --

11 THE COURT: How long is -- how big is the
12 resolution? Is it like one page, or is it more than
13 that?

14 MS. MONOC: Well, it won't have a lot of context.

15 THE COURT: Yeah. I mean, I think you -- how long
16 is the resolution?

17 MS. MONOC: I don't think it's -- I don't think
18 it's super long.

19 THE COURT: Okay.

20 MS. MONOC: Oh, and I was just envisioning putting
21 it up on the screen and pointing, you know. Dave can
22 just highlight the portions as he's answering the
23 questions.

24 THE COURT: Okay.

25 MS. LOHR: Josh just raised the concern, is it a

1 certified copy? I don't really know what was used in
2 the deposition.

3 THE COURT: I don't, either. I don't, either. But
4 it begs the question, obviously, a resolution had to
5 have been passed to be able to acquire the land, so.

6 MS. LOHR: Right.

7 JOSHUA ANDREW GRUBER: And that's why I'm asking,
8 because there's typically not a resolution document.
9 It's a voice vote of Council.

10 THE COURT: Okay.

11 JOSHUA ANDREW GRUBER: So, if it's the resolution
12 they're talking about --

13 MS. MONOC: It's actually not about the purchase.
14 It's about the criteria.

15 MR. WALKER: Exactly.

16 MS. MONOC: The criteria for purchasing this land.

17 THE COURT: Oh, okay. Okay.

18 MS. MONOC: It's the criteria for Rural and
19 Critical.

20 JOSHUA ANDREW GRUBER: Of the program.

21 THE COURT: Of the program.

22 JOSHUA ANDREW GRUBER: And that's something that
23 would have been passed years before.

24 MS. MONOC: In 2006.

25 MR. JOSHUA ANDREW GRUBER: Yeah. Okay.

1 MS. MONOC: Right.

2 JOSHUA ANDREW GRUBER: And that's what I'm just
3 saying make sure that 2006 document is an accurate copy
4 of what was actually passed.

5 MS. LOHR: Again, I don't understand the relevance
6 of this, because I don't know that -- your Honor took
7 care of the question of the public use issue. I mean,
8 was it a correct use of public use? That cause of
9 action went away. So, I don't know what relevance the
10 guidelines for purchases could possibly have with -- I
11 think -- I mean, there is a resolution that gives
12 guidelines for it.

13 THE COURT: Okay.

14 MS. LOHR: I mean, I don't know what that was --

15 THE COURT: So, these are the guidelines for
16 purchasing property under this. It has nothing
17 specifically to do with Pinckney Point, is what you're
18 saying.

19 THE COURT: No, that's right.

20 THE COURT: I'm sorry, I was just wondering. I was
21 thinking it was like a County Council resolution.

22 MS. MONOC: Why don't we just -- you know, Mr.
23 Gruber didn't object to this -- or, no one objected to
24 this going in during the deposition.

25 THE COURT: Right.

1 MS. MONOC: But in light of their concerns right
2 now and to speed things up, I'm happy to see if we can
3 just cut this down to get to the part where they're
4 talking about the Nester meeting.

5 THE COURT: Okay.

6 MS. MONOC: How's that? If we say --

7 THE COURT: It's helpful.

8 MS. LOHR: I would assume Walter is going to
9 testify to that, so. Anyway, I don't know why -- I
10 don't know why we have to have it in this, but I mean,
11 you know, your Honor's ruled that, that's okay, so.

12 THE COURT: It's okay.

13 MS. MONOC: Maybe we'll start it:

14 *At the time that the presentation*
15 *was made, there was no indication there*
16 *was anything but unrestricted access to*
17 *the parcel.*

18 And then, the question is -- and we'll go again
19 like we did before.

20 THE COURT: Fine.

21 MS. MONOC: Gruber answer.

22 THE COURT: Okay.

23 MS. MONOC: Thank you.

24 THE COURT: All right. Anything more on Mr.
25 Gruber?

1 MS. LOHR: Well, hold on. 55, 12, are emails. And
2 he says, in the context of these emails, some of the
3 emails were not ones that Gruber was on. He came into
4 the chain later on, and I think he explains that in the
5 context. So, to the ex --

6 THE COURT: He says, *the first time I appear on*
7 *this email chain is on April 4.*

8 MS. LOHR: Right. So, I think those, to the -- I
9 mean, we've hashed out the hearsay issue, but seeing as
10 how he didn't appear on the email chain 'til mid-way
11 through, I don't think it's appropriate for the other
12 emails to come in.

13 MS. MONOC: We'll toss that. That's not a big
14 deal.

15 THE COURT: Okay.

16 MS. MONOC: It's already in evidence.

17 THE COURT: Okay. That's already in evidence?

18 MS. MONOC: I believe it is. Right?

19 MS. LOHR: And your Honor, this goes back over
20 here, they're asking the same question, *okay, so this is*
21 *the first time --*

22 THE COURT: Back over where? What line are you on?

23 MS. LOHR: I'm sorry. On 56, 1.

24 THE COURT: Thank you. Okay.

25 MS. LOHR: Sorry.

1 MS. MONOC: Didn't we just agree to --

2 MS. LOHR: *So, this is the first time you*
3 *were learning there was an access issue?*
4 *This would be the first time that, that*
5 *happened?*

6 THE COURT: Yeah. You'd already published these
7 emails. I mean, they're already in.

8 MS. MONOC: Right. I didn't just -- I just said
9 that we would -- we don't need it.

10 THE COURT: Okay.

11 MS. MONOC: So, I don't know why we're arguing
12 about it.

13 MS. LOHR: Oh. I'm sorry, I didn't --

14 THE COURT: Okay.

15 MS. LOHR: I didn't understand that. The next one
16 is 59, 21 to 60, 11. That's the same.

17 MS. MONOC: Okay. That actually does need to come
18 in. We're talking about Exhibit 6, which is an email
19 that -- let's see. I believe that's the email where
20 Josh Gruber is talking about -- but actually, let me
21 see.

22 MS. LOHR: Well, there's no foundation for it. I
23 mean, you can't just decide an email comes in, and mark
24 the exhibit, and not have any foundation for the email.

25 THE COURT: Apparently, you were having a baby

1 coming up during this time.

2 MS. MONOC: We'll withdraw that one.

3 THE COURT: Okay.

4 MS. LOHR: 63, 6 through 20. One second. I got to
5 get over there.

6 MS. MONOC: Oh, that's the press release, I think.

7 MS. LOHR: Yeah. This is hearsay. It's a press
8 release. It was drafted by the Land Trust, not the
9 County. He says -- she says:

10 *So, you have no recollection about*
11 *discussions concerning regional conservation*
12 *complex?*

13 *I don't recall that, no.*

14 THE COURT: I don't know how you get it in through
15 him, because he says he doesn't know what it is.

16 MS. MONOC: Right. It was the County 30(b)(6),
17 though, and it says, *Beaufort County* -- it was like a
18 release on behalf of Beaufort County.

19 THE COURT: Oh, okay.

20 MS. LOHR: Beaufort County Open Land Trust.

21 THE COURT: Okay.

22 MS. MONOC: Well, no, actually, let's pull up the
23 press release, because I don't think it says *Open Land*
24 *Trust*. It says --

25 MS. LOHR: Well, but he says, I didn't approve it.

1 He doesn't know about this. I mean, you have to find
2 either the person that authorized the press release, or
3 the person who published it.

4 THE COURT: That's it. I think we can take a look.

5 MS. MONOC: *Beaufort County Council announces.* And
6 you're also quoted in the paper. There's newspaper
7 articles as a result of the press release, so.

8 MS. LOHR: Again, that would be hearsay. I mean.

9 MS. MONOC: I know --

10 MS. LOHR: He clearly says in this, he doesn't know
11 anything about it.

12 THE COURT: Well, I think -- I mean, I think he
13 was, at the time, the attorney for -- so, someone's got
14 to be on behalf of Council. I mean, it's a media
15 release press release. Someone's got to come up with
16 it.

17 MS. LOHR: Well, I mean, the Open Land Trust could
18 have done it.

19 THE COURT: Someone on that press releases is
20 speaking for Beaufort County Council.

21 MS. LOHR: But that's the problem, your Honor. We
22 don't know who it is, and we had the County Attorney say
23 that he doesn't know anything about it. And he said he
24 didn't know anything about it in the deposition, which
25 meant they needed to keep digging, if they wanted to

1 find the person who put this out. It's not on Beaufort
2 County letterhead, which would be the normal course.

3 MS. MONOC: Your Honor, this is, we think, an
4 admission of an adverse party.

5 THE COURT: So then, we don't know who said it,
6 because Josh Gruber's saying he didn't do it. I mean,
7 so, is it either -- it's either Budds did it, or someone
8 from your office did it, is --

9 MR. JOSHUA ANDREW GRUBER: It would be Garrett
10 Budds.

11 THE COURT: Okay.

12 MR. JOSHUA ANDREW GRUBER: That would be part of
13 their contract.

14 THE COURT: Well, I can tell you, looking at it, it
15 is exactly what he testified to, which is talking about
16 the crown jewel and connecting --

17 MS. LOHR: Well, --

18 THE COURT: I mean, like I said, you know. Now,
19 I'm not sure how this gets in through Mr. Gruber.

20 MS. MONOC: And also, this was produced by the
21 County. I don't know if that makes a difference, but
22 this is a County Bates label, based on County document
23 production. So, the County is the one who gave this to
24 us.

25 THE COURT: Okay. Well, I don't know where you got

1 it from.

2 MS. LOHR: Well, I mean, it could have come from
3 Garrett Budds, again. But Josh doesn't know, so it's
4 not appropriate coming through Josh's deposition.

5 MS. MONOC: Garrett Budds, everything from the Land
6 Trust has a separate date for the Land Trust documents.

7 MS. LOHR: Yeah, but it could have been from us to
8 Garrett Budds, and then, to you.

9 MS. MONOC: Well, Tab might know, because Tab was
10 handling discovery at that time. I don't think you were
11 involved at that time, so.

12 MS. LOHR: Well, we can put it aside. But I still
13 don't think it's appropriate, because Josh says on this:
14 *I don't know who did this or where it came from.*

15 THE COURT: My question is this. Do we also have
16 -- you said you had newspaper articles where Josh Gruber
17 was quoted. So, where are those, because you definitely
18 should be able to use those, even if -- if he's quoted
19 in them.

20 MS. LOHR: I'm not sure.

21 MR. ACHURCH: In the newspaper?

22 MS. MONOC: It's Plaintiffs' Exhibit 31 in
23 everybody's notebooks is the newspaper article that
24 appears to stem straight from this press release, where
25 Josh Gruber was quoted in it.

1 MR. WALKER: Here it is, here.

2 THE COURT: Is Josh quoted in it?

3 MS. MONOC: He is. He is quoted several times.

4 THE COURT: And are you just trying to establish
5 that, from the get-go, they were going to say they were
6 going to use it as a park?

7 MS. MONOC: Yes.

8 THE COURT: I mean, that's what you're trying to
9 do, I assume?

10 MS. MONOC: Yes.

11 THE COURT: Okay.

12 MS. MONOC: And you know, and then, to say that
13 nobody seems to know about those conversations now, but
14 you know, that was what was being put out to the general
15 public then.

16 THE COURT: Well, of course. The County spent 6.95
17 million dollars. They got to give them some reason to
18 have spent the money.

19 MS. MONOC: And I think -- I think, frankly, that
20 the testimony, you know, to show that -- I think that
21 the testimony is contrary to, you know, that we're
22 getting from, you know, several --

23 THE COURT: Well, I think, actually, that's a
24 pretty good quote, Josh. It says, *there are a lot of*
25 *different opportunities for it.* Nothing is concrete.

1 MS. MONOC: And the next page.

2 MR. WALKER: Third paragraph from the bottom.

3 MS. LOHR: Well, is this designated in the
4 deposition?

5 THE COURT: I mean, we already have -- we already
6 heard that testimony yesterday, as well. I mean, I
7 don't see it as being objectionable. I mean, if it is
8 what, you know, if it is -- I mean, it is what it is. I
9 mean.

10 MS. LOHR: Well, I don't know what we're talking
11 about. Are we talking about this now, or are we talking
12 about the Open Land Trust --

13 THE COURT: No. We're talking about what's on the
14 board right here.

15 MS. LOHR: Oh. Well, that's not what we were
16 talking about in the deposition. I mean, what we were
17 talking about in the deposition is a press release that
18 we don't know where it came from. Maybe it came from
19 the Open Land Trust, so.

20 THE COURT: Again, my problem with that, though,
21 is, is that he doesn't have any knowledge of it. So, we
22 got to, somehow, get it in with some knowledge, if
23 that's what you're trying to do. But I think now, I
24 think we put that aside for a moment.

25 MS. MONOC: Well -- I'm sorry. May I -- I'm so

1 sorry.

2 THE COURT: Sure.

3 MS. MONOC: But there is one question here where I
4 ask Josh:

5 *So, you have no recollection about the*
6 *discussion regarding a regional conservation*
7 *park complex?*

8 And he says:

9 *I don't recall that, no.*

10 I think it's inconsistent.

11 THE COURT: I understand.

12 MS. MONOC: And I think the jury should see it.

13 THE COURT: It just would have been nice in the
14 deposition, if you had asked him, you don't remember
15 this presently; so, you don't remember this, where you
16 said this?

17 MS. MONOC: Well, that was coming from the press
18 release.

19 MS. LOHR: I don't think --

20 MS. MONOC: I didn't have those.

21 MS. LOHR: I don't think they can impeach him if he
22 wasn't impeached in the deposition, is my point. That's
23 what they're clearly trying to do. They've got to
24 figure out some other way to do it. They can't do it
25 by --

1 MS. MONOC: Well, he's the 30(b)(6) for the County.
2 And when I say, *who drafted it?* And he says, *the Open*
3 *Land Trust.* And then, I say:

4 *So, you have no recollection about the*
5 *discussion regarding a regional conservation*
6 *park complex.*

7 And he says, *I don't recall that, no.*

8 MS. LOHR: And at that time, he might not have, but
9 we don't know, because she didn't impeach him then.

10 THE COURT: So then, my question is, how are you
11 then getting this article in?

12 MS. MONOC: Well, we're -- that was -- you were
13 asking if there was somewhere else where the --

14 THE COURT: I know, but I'm figuring out -- I was
15 just trying to figure out how you get this article in.

16 MS. MONOC: We can probably -- I think that Walter
17 Nester saw it.

18 THE COURT: Okay.

19 MR. WALKER: Your Honor, we don't intend to put the
20 article in.

21 THE COURT: Okay.

22 MR. WALKER: But we were going to use it for
23 impeachment, because at a quote, and say didn't you say
24 --

25 THE COURT: Okay.

1 MR. WALKER: -- such and such, and weren't you
2 quoted? And back to the deposition, he disclaims any
3 knowledge of the press release. And then, we've got
4 some testimony it was going to be a regional park, and I
5 think it does raise some credibility issues about the
6 County. The fact that he says, I know nothing about the
7 press release, and the County is saying to the public,
8 hey, it might be a regional park, I think there is an
9 inconsistency there.

10 MS. LOHR: Well, if they wanted to get that in
11 through the designation -- I mean, through the 30(b)(6)
12 rule, they needed to do it then. They can't do it by --
13 they can't impeach him by piecing things together now.

14 MS. MONOC: But he was on notice of the topics, and
15 couldn't speak to all the topics. Okay. Okay.

16 MR. WALKER: Your Honor, we'll withdraw it. I
17 mean, I think where we are is that it was in the
18 PowerPoint presentation.

19 THE COURT: Okay.

20 MR. WALKER: He was there at Regional and Critical
21 Lands. He obviously saw it. And if he claims he didn't
22 remember anything about it, we'll just deal with it.
23 And we still have the opportunity to bring it up in
24 other ways.

25 THE COURT: I mean, you can always still call him

1 and ask him all day long about his deposition.

2 MR. WALKER: Correct. Yeah.

3 THE COURT: Okay. Okay.

4 MS. LOHR: All right. That was 63. Sixty -- my
5 concern here was the context --

6 MS. MONOC: What page and line? What page and
7 line?

8 MS. LOHR: I'm sorry 64, 24; to 66, 15. And I was
9 just concerned about the context being confusing.

10 THE COURT: It's talking about access. I don't
11 think that's confusing.

12 MS. LOHR: No, no. I mean, it --

13 THE COURT: Everyone more than knows there's a
14 problem with access.

15 MS. MONOC: And he also says the press release went
16 out. Page 66, Line 2.

17 THE COURT: Okay.

18 MS. LOHR: Well, this is the -- this is what my
19 issue was. *At the time of this meeting, what was the*
20 *County's understanding of public access?* But we don't
21 know what time -- we don't know what meaning we're
22 talking about, or what time we're talking about. I
23 think that was my concern there.

24 MS. MONOC: Well, we can go -- how about we start
25 at Line 18, Page 65, where he says, *I first became aware*

1 of the access could be or was being questioned --

2 MS. LOHR: And that's the same thing. I mean,
3 that's the same thing you were wanting to get in before
4 with regard to Walter Nester.

5 MS. MONOC: And then, he goes through a time line,
6 and says, you know, that, then, it went from Natural
7 Resources Council -- and then, I asked, so, it went from
8 Natural Resources Council? And he said, Council
9 approved it. And then, I said, approved it? And then,
10 you learned about it at the meeting with Walter Nester.

11 That's correct. Press release went out
12 authorizing the purchase. Walter contacted us
13 and asked us for a meeting.

14 So, that's just directly telling the sequence of
15 events.

16 THE COURT: I think it makes sense. I think it
17 puts it in context. Start it there.

18 MS. LOHR: Okay. That's fine. I would reserve my
19 objection again about Walter and the relevance to the
20 breach of contract, but I understand your Honor's ruling
21 on that.

22 THE COURT: I think it's not as to the breach of
23 contract. I think it's getting to the point of when the
24 County was put on notice that there was an issue.

25 Okay. What else?

1 MS. LOHR: All right. 67, 21. We're at -- hold on
2 a second. And again, I think I've looked at these,
3 maybe, before. This exhibit, I think, came in after I
4 looked at these.

5 THE COURT: That's okay.

6 MS. LOHR: 67, 21 to 69. I think when I marked
7 this, there was -- let's see. Exhibit 2, this is
8 referencing, is this in evidence now?

9 MS. MONOC: Where are you? Sorry.

10 MS. LOHR: The next -- very next one. 67, 21 to
11 69, 5. It's referencing Exhibit 2. My question is now,
12 is that document in evidence?

13 MS. MONOC: Let's see. Was that the proposal?
14 Yes, that one's in evidence.

15 MS. LOHR: Okay. So, I marked this originally when
16 it wasn't.

17 MR. WALKER: It's in.

18 MS. LOHR: All right. Going over to --

19 THE COURT: Are we on 69, or are you still on 67?

20 MS. LOHR: Ma'am?

21 THE COURT: Are we still on 67, or are we on 69?

22 MS. LOHR: I have moved on. I moved past that,
23 because that exhibit actually was in evidence. When I
24 marked this up, it wasn't.

25 THE COURT: Okay. So, which one are we on?

1 MS. LOHR: The next one is --

2 THE COURT: 73, Line 3?

3 MS. LOHR: 73, 3 to 74, 14. It's talking -- asking
4 about a memo that's not in evidence.

5 MS. MONOC: Your Honor, I think that, that's the --
6 sorry -- I think that, that's the proposal.

7 MS. LOHR: Okay. All right.

8 MS. MONOC: Because we're still talking about the
9 proposal. This picks up.

10 MS. LOHR: Okay.

11 MS. MONOC: I think it's talking about the proposal
12 here.

13 MS. LOHR: Okay. I just had a question, because I
14 wasn't certain that, that's what it was.

15 76, 6 to 17. It's the same thing about Walter
16 Nester warning. I preserved that objection. And then,
17 Walter followed up in a letter. That's the same thing.
18 The next one, 79, 15 to 21. Same objection. And then,
19 it says Exhibits 2 through 7.

20 MS. MONOC: We've already talked about those. They
21 were all -- those were the exhibits in the testimony, so
22 you can just ignore that, because we've already talked
23 about what's coming in and what's not coming in.

24 MS. LOHR: Okay.

25 THE COURT: So, is that everything?

1 MS. LOHR: That's everything in Josh.

2 THE COURT: Okay. Just so I'm clear as to the
3 other two, I know we're going to have Walter Nester
4 testify first. Do we have to go through Gary Kubic's
5 deposition before we start?

6 MR. WALKER: No. I would -- I think we'll be fine.

7 THE COURT: Okay.

8 MR. WALKER: And we can go with the next break or
9 after that.

10 THE COURT: Okay.

11 MR. WALKER: We can move the case along.

12 THE COURT: I just wondered for the jury. They
13 always wonder what we're doing in here, so.

14 MR. WALKER: I think I -- I agree that we should --

15 THE COURT: -- roll with some live testimony, if we
16 can.

17 THE COURT: Sounds good. Okay. Just so I know, at
18 the next break, should we do Gary Kubic?

19 MS. MONOC: Yes.

20 THE COURT: He should be next, or it should be John
21 Irby?

22 MR. WALKER: Gary Kubic, because he's the only
23 other one we're going to do in our case.

24 THE COURT: Got it. Okay.

25 MS. LOHR: I had it out, but now it's missing.

1 Gary's deposition, with the -- yep, got it. There
2 aren't as many objections to this, your Honor.

3 THE COURT: Pardon?

4 MS. LOHR: There aren't as many to this one.

5 THE COURT: Well, we're going to wait until the
6 next break. Okay?

7 MS. LOHR: Oh, are we? Okay.

8 THE COURT: We're going to wait until the next
9 break. We're going to start with some live testimony.
10 The jury's all here, I presume? I told them to be here
11 at 9:30? Okay. All right. So, your first witness is
12 going to be Walter Nester. Is that correct, this
13 morning?

14 MR. WALKER: That's correct, your Honor.

15 THE COURT: Perfect. Okay. All right. Are we
16 ready to go, bring them in? And we'll just take it up,
17 we'll just do Gary Kubic's at next break. Okay?

18 It also will give me a little bit of an opportunity
19 to look through it, so I know what's being said.

20 BAILIFF: You ready, your Honor?

21 THE COURT: Yes, sir. Thank you.

22 BAILIFF: Jury is entering the courtroom.

23 THE COURT: Thank you.

24 JURY ENTERS COURTROOM 9:50 A.M.

25 THE COURT: Good morning, ladies and gentlemen.

1 RESPONSES FROM JURORS.

2 THE COURT: Good to see you all today. At this
3 time, we're going to go ahead and continue with the
4 plaintiffs' case. Mr. Walker, if you would call your
5 first witness.

6 MR. WALKER: Plaintiffs call Walter Nester.

7 THE COURT: Come on forward, Mr. Nester.

8 WALTER J. NESTER III: Thank you, your Honor.

9 BAILIFF: Place your left hand on the Bible. Raise
10 your right hand, please.

11 MADAM CLERK: Do you solemnly swear or affirm that
12 the testimony you give to the Court in this case shall
13 be the truth, so help you God?

14 WALTER J. NESTER III: So help me, God.

15 WALTER J. NESTER III

16 DIRECT EXAMINATION BY MR. WALKER:

17 Q Mr. Nester, what do you do for a living?

18 A I'm an attorney with the McNair Law Firm.

19 Q And when did you start there?

20 A I started -- with the McNair Law Firm was in 2004,
21 but that was pursuant to a merger with a previous law
22 firm, Bethea, Jordan & Griffin. And I started with
23 Bethea, Jordan & Griffin in 1999.

24 Q Okay. Are you in a particular office at the McNair
25 Law Firm?

1 A I'm in our -- what we refer to as our Beaufort
2 County Unit, which would be our offices in Hilton Head
3 and in Bluffton.

4 Q Where did you go to law school?

5 A Went to law school at Western New England
6 University, in Springfield, Massachusetts.

7 Q Did you immediately go into private practice after
8 that?

9 A No, I joined the Marine Corps, and served as a
10 judge advocate in the Marines.

11 Q From there, did you go to private practice?

12 A Yes, I did.

13 Q And do you have a focus area of your practice at
14 the McNair Law Firm?

15 A Real estate.

16 Q And what particular aspect of real estate? If you
17 could just explain what that means.

18 A Sure. Real estate, real estate development. We
19 represent buyers and sellers of real estate, and
20 developers of real estate.

21 Q And what are some of the -- do you represent
22 persons like Pinckney Point and its principals who are
23 developing a piece of raw land?

24 A Yes. It's actually what I -- what I like to focus
25 my work on is helping purchasers or property owners get

1 what we refer to as land entitlements or permits, so
2 that they may develop their land.

3 Q Are you familiar with the Beaufort County
4 ordinances that govern the development of land within
5 the County?

6 A Yes.

7 Q And do you also work with the State regulator
8 agencies, too?

9 A That's typically part of the process, that you're
10 working with both the planning departments of the
11 various municipalities and the zoning departments, as
12 well as state regulatory agencies, to get the permits
13 and entitlements for the development of the real estate.

14 Q Does this type of work sometimes bring you in
15 contact with consultants who are working for the owners?

16 A Yes.

17 Q Do you collaborate with them, too?

18 A Absolutely.

19 Q Now, let's go over to this project in particular,
20 with Stokes Land Group. When do you recall first
21 getting involved on behalf of Stokes Land Group with
22 respect to the point parcel, Pinckney Point?

23 A It was in the spring of 2005, around April 2005,
24 that I was contacted by the Stokes Land Group,
25 represented as the Stokes Land Group, to assist them

1 with permitting and acquisition of the point, what we
2 refer to as the Point tract.

3 Q And what was their plan for the property?

4 A The plan --

5 Q Overall.

6 A. Overall. And it -- it evolved, but as a general
7 proposition, it -- I would suggest that it was a very
8 environmentally sensitive plan. And I think people look
9 at that with a great degree of criticism when we talk
10 about a developer developing land with environmental
11 sensitivity. But I believe, in this case, that it was.
12 The property was zoned rural, which is about the lease
13 dense, in terms of intensity, zoning classification that
14 can be developed. It's classified as rural, and the
15 capacity or the density that's available under the
16 ordinance as it existed at that time was one residential
17 unit for three acres. And so, the application, the
18 initial applications were seeking exactly that, one
19 residential unit for three acres.

20 Q Were they trying to up the density in any way from
21 what the zoning, existing zoning allowed?

22 A No. No, not at all.

23 Q Does that make your job easier, if no zoning change
24 is required for the project?

25 A Well, it might -- it might render my -- my -- the

1 need for me moot. Typically, if you're -- if you're
2 developing a property in the manner in which it's zoned,
3 you don't typically need an attorney. You need an
4 attorney to help acquire the property, but you shouldn't
5 need an attorney to develop it, because you're using or
6 employing the standards that are set forth in the
7 applicable development ordinances.

8 Q What were some of the first tasks that you worked
9 in, if you recall? First things that you did in this --
10 on this project.

11 A Well, throughout the eight years that I worked on
12 this project, what was being sought was, essentially, a
13 major subdivision, defined as a major subdivision, which
14 is a division of a parcel of land into five or more
15 lots. And all along, that's what the goal was. The
16 first step in that process is to get conceptual
17 approval, particularly when it's 76 lots, as was the
18 case here, the applicant, Stokes Land Group, needed to
19 get conceptual approval from the County, and that --
20 that's a fairly involved process when it's 76 lots, and
21 there are open spaces, and other aspects of the project.
22 But that's the first step, is getting conceptual
23 approval. Then, once you get conceptual approval, you
24 seek to get final approval.

25 Q What was the plan for water and sewer, initially?

1 A The plan for water and sewer initially was one that
2 was -- was four sewers, that the project would be --
3 have sewers, and the project would have water, as
4 opposed to well water. And in 2005, we negotiated with
5 the developer and the Property Owner's Association of
6 Berkeley Hall, as well as Beaufort-Jasper Water and
7 Sewer Authority, and secured an easement into Berkeley
8 Hall, to connect to their stor -- excuse me -- connect
9 to their sewer and water, so that potable water would
10 come from Beaufort-Jasper Water and Sewer Authority, and
11 we would be able to employ the use of sewers for the
12 project.

13 Q Would there be a connection there at Pinckney Point
14 Road, the road into the point parcel?

15 A There's a -- out of the, what I would refer to the
16 north side of Berkeley Hall, connects to a road, a
17 public road, that connects to Pinckney Colony Road. And
18 that's -- the easements were through to the road.
19 Starts with an L, Larson -- Lawson Drive, and then, that
20 would -- and then, that connected to Pinckney Colony
21 Road. And the plan was to run the water and the sewer
22 in the -- the feeder road, and then, down Pinckney
23 Colony Road to the Point tract.

24 Q Were you involved in the acquisition of those
25 easements that would have allowed the water and sewer

1 lines from Beaufort-Jasper?

2 A Wouldn't need the easements once you're in the
3 public right-of-way. You'd need permission from
4 Beaufort-Jasper Water and Sewer Authority. And we did
5 get easements in an agreement from Berkeley Hall and
6 from Beaufort-Jasper Water and Sewer Authority, to -- to
7 connect the water and the sewer to the Point project.

8 Q Did it turn out that, that was the way that the
9 project proceeded, with public sewer?

10 A No.

11 Q What happened? And I don't want you to give the
12 whole story, but just tell us when in the -- if there
13 was a change, when did that change happen?

14 MR. ACHURCH: Your Honor, just so I can have my
15 running objection to the relevance to this prior to the
16 contract.

17 THE COURT: Yes. We'll note your running objection
18 for the record.

19 MR. ACHURCH: Thank you, your Honor.

20 THE COURT: Okay.

21 MR. WALKER: There will be no issue preservation
22 problems, I assure you.

23 THE COURT: Okay.

24 MR. ACHURCH: Thank you.

25 THE COURT: Very good.

1 MR. WALKER: All right.

2 BY MR. WALKER:

3 A One of the first -- when -- when you make an
4 application for conceptual approval, there is a time
5 line that the staff, the development review team, is
6 called at the time, the DRT, we refer to it, is the
7 acronym. The DRT has a period of time through the
8 zoning development administrator of the zoning
9 department administrator, the ZDA, her name is Hillary
10 Austin, she would give comments back. And those
11 comments would be, this is what the DRT believes are
12 things that you need to address before you have your
13 meeting for conceptual approval.

14 And the -- in one -- the conceptual approval
15 response, Ms. Austin alerted the applicant, the
16 developer, Stokes Land Group, that the property could
17 not have -- well, they notified -- notified the
18 applicant that, under the Zoning and Development
19 Standards Ordinance, the ZDSO, property that is zoned
20 rural cannot connect to a sewer line, unless that sewer
21 line is within 300 feet of the project. Three hundred
22 feet is a football field. And unless a special
23 environmental condition exists, or a special health
24 condition exists, words to that effect. And so, they
25 asked, what condition exists, because zone -- because

1 sewers are not permitted or would not be approved for
2 the project.

3 Q And how far was the property line to the Point
4 tract from where you were going to connect in to the
5 sewer?

6 A It was far more than 300 feet. It's approximately
7 a mile.

8 Q All right. What happened as a result of the
9 County's position? Was there a change in plan as to how
10 the project would handle its wastewater and sewage?

11 A Yes. The applicant, or Stokes Land Group, Stokes
12 Barn -- I'll just call them the applicant, if that's all
13 right. My client, right, because.

14 So, the applicant took that advice to heart, and
15 hired other consultants to design a septic system to
16 permit septic tanks for the Point tract.

17 Q Was that a simple thing, or a considerable
18 exercise? Was there -- what was involved in the scope
19 of that work?

20 A Well, it's 70 -- 76 lots, and the engineers need to
21 decide whether or not the lots perk, is the -- which
22 means that it would support -- excuse me -- that DHEC,
23 Department of Health and Environmental Control, that
24 permit septic tanks, they had -- you had to prove that
25 each one of the proposed lots would be able to perk, and

1 support a septic tank. And so, that involves,
2 essentially, taking a small excavator, and going out
3 onto every single proposed lot, digging a hole, testing
4 to see whether or not that would perk. And then, those
5 that didn't perk, making adjustments, making adjustments
6 in the elevation, in terms of design. Not actually
7 physically making the adjustments, but designing, so
8 that the -- the proposed lots would perk.

9 Q What is the state agency that oversees septic
10 systems?

11 A DHEC, the South Carolina Department of Health and
12 Environmental Control.

13 Q Did Pinckney Point ultimately get approved by DHEC
14 for its septic system?

15 A They did.

16 Q Now, I want to talk about what is often referred to
17 as storm water. What's storm water?

18 A Storm water is water that's produced by rain.

19 Q Runoff?

20 A Runoff, correct.

21 Q What was the plan on this property to handle that
22 rain water?

23 A Well, the Point tract, and I don't know if photos
24 have been shown, but the Point tract is approximately
25 230 acres, and it's essentially denuded. There -- it's

1 been farmed for more than a hundred years, sod farm,
2 peanut farm, turf farm. The aerial photo that we always
3 use in our application showed the blimp from the
4 Heritage Golf Tournament, the blimp was sitting on. And
5 that was a photo that we obtained off of the Beaufort
6 County Assessor's website. That's a -- that's the Point
7 tract, and that's what it looks like, and you can
8 actually see areas where it has been -- there's sod, and
9 areas where the sod has been removed for agricultural
10 purposes.

11 Q Was that the existing use at the time it was
12 acquired by Pinckney Point, LLC?

13 A That's -- when it was acquired by Pinckney -- when
14 it was acquired by Pinckney Point, it was -- it was a
15 sod farm.

16 Q To your knowledge, was there any runoff, engineered
17 runoff system in place at Pinckney Point?

18 A Well, it was the engineered runoff system that was
19 -- that was in use a hundred years ago, which,
20 essentially, are ditches, and the ditches run into the
21 marsh. And my recollection is that there are five
22 outfalls that currently run from the Point tract, out
23 into the marsh. The applicant's plan, with respect to
24 storm water, was to create a system of lakes, and -- and
25 those lakes would retain up to a one hundred-year flood

1 event. The Beaufort County best -- oh, excuse me -- up
2 to a one hundred-year flood event, and all of the five
3 storm water outfalls would be closed. So, there would
4 be no longer any storm water outfall into the marshes of
5 the Okatie River or the Colleton Rivers. There was one
6 emergency outfall that was designed in the event that
7 there was a flood event that exceeded a hundred years.
8 Now, a hundred-year-flood event is three times the best
9 management practices for storm water --

10 MR. ACHURCH: Your Honor.

11 THE COURT: Okay.

12 BY MR. WALKER:

13 A -- under the Beaufort County ordinance.

14 THE COURT: Hold on, Mr. Nester.

15 MR. ACHURCH: I apologize, Mr. Nester. We're
16 really going far field with this, Judge. This is not
17 part of the issues involved in the case of whether we
18 breached our contract or not. I just don't think it's
19 relevant.

20 MR. WALKER: We --

21 MR. ACHURCH: And all this is prolonging --
22 prolonging this every day.

23 MR. WALKER: We believe it's relevant, but we will
24 move to the next issue.

25 THE COURT: Perfect.

1 MR. WALKER: All right.

2 BY MR. WALKER:

3 Q Mr. Nester, you didn't have the privilege of being
4 here for the first three days. We talked a lot about
5 the access. Would you -- did you get involved before
6 the closing in looking at the real estate records to
7 determine title issues, both related to the Point tract
8 and the access?

9 A Yes, I did.

10 MR. ACHURCH: Your Honor, I'm going to -- I'm going
11 to have to object to this, as well. Could we have a
12 side bar?

13 THE COURT: Sure. Come on over.

14 OFF-THE-RECORD BENCH CONFERENCE, OUT OF
15 HEARING OF JURORS. PRESENT: THE COURT,
16 MR. WALKER, MR. ACHURCH.
17 END BENCH CONFERENCE.

18 MR. ACHURCH: Thank you, your Honor.

19 THE COURT: Thank you.

20 MR. WALKER: Thank you.

21 THE COURT: Okay.

22 BY MR. WALKER:

23 Q First, I just want to talk about the Point tract.
24 Did you look at the title issues as a lawyer to
25 determine that title could be conveyed?

1 A Yes.

2 Q All right. And did you look at the question of
3 Pinckney Colony Road to see if there was access to the
4 property, legal access?

5 A Yes, we did.

6 Q Did you determine whether or not there had been a
7 plat or an easement for that road?

8 A I did determine that, and believed that there was
9 legal access to the Point tract.

10 Q Okay.

11 MR. ACHURCH: Well, that's a legal opinion, your
12 Honor. I would -- he's not been noticed as an expert.

13 THE COURT: I don't think it goes to the truth of
14 the matter asserted. I think it just goes to, that is
15 his legal --

16 MR. WALKER: Right.

17 THE COURT: -- that he came to that legal opinion.

18 BY MR. WALKER:

19 Q Was there -- was there --

20 MR. ACHURCH: That wasn't a hearsay objection, your
21 Honor.

22 THE COURT: I know. But it still goes to the same
23 thing.

24 BY MR. WALKER:

25 Q Was there a plat?

1 A It was a plat recorded in Plat Book 10, at Page --
2 or Plat Book 60, at Page 10.

3 Q What year?

4 A 1957. It was recorded by William E. Pinckney, Jr.

5 Q You get an A. Now, let's just talk about the road,
6 in general. Was Pinckney Colony Road paved the whole
7 way to the house?

8 A No, it was not. Pinckney Colony Road is State Road
9 7-50, and it is owned by the South Carolina Department
10 of Transportation. And the asphalt ends prior to the
11 boundary line with the Point tract.

12 Q Okay. We have heard a good bit of testimony about
13 some litigation that was over the road itself. Did your
14 firm represent Pinckney Point in that litigation?

15 A Yes. That was -- that litigation was prompted by
16 an adjacent property owner, the heir of William E.
17 Pinckney, Jr., installing stakes, fenceposts, down the,
18 what we referred to as the unimproved portion of
19 Pinckney Colony Road. And we complained to the County,
20 because that interfered with emergency vehicles. It
21 also interfered with the sod trucks that were attempting
22 to negotiate that unimproved portion of the road. And
23 so Pinckney Colony -- excuse me -- Beaufort County filed
24 the declaratory judgment action, and sought injunctive
25 relief to have the -- the posts moved. In a declaratory

1 judgment action, all the adjacent property owners are,
2 sued, and our client was sued.

3 Q All right. And we will come back to that. Now, I
4 want to move to the variance. At some point in 2007,
5 was there an application for a variance?

6 A Yes.

7 Q Would you tell us about that, and what prompted it?

8 A The -- what prompted it was a response, a second
9 response, I believe, from a second application for
10 conceptual approval that had been submitted to the
11 County. That second application was for conceptual
12 review. And one of the comments in that conceptual
13 review was that, to subdivide -- and this is pursuant to
14 the ordinance as I understand it -- the -- to subdivide
15 70 lots, you have to have a paved road. The Point tract
16 has -- you saw -- as you know, and we just saw, it looks
17 like a tennis racket. It's an island that's connected
18 by an isthmus. The isthmus is approximately 145, 150
19 feet wide. The zoning -- the ZDSO provides that you
20 have to have -- that there is a setback of a hundred
21 feet, and a buffer of a hundred -- of fifty feet from
22 the critical line. The critical line is a line that's
23 established by the Office of Coastal Resource
24 Management, which is a department of DHEC. And the
25 critical line is generally the high water line. And so,

1 the isthmus has approximately 150 feet.

2 The -- the zoning development -- the ZDA told us in
3 her comments that you can't pave a road, and you need a
4 variance. You can't pave a road within the buffer,
5 within the setback, and therefore, you need a variance.

6 So, we made an application to the Zoning Board of Appeal
7 for a variance. At that -- at that hearing, and we --

8 Q All right. And let's just -- okay. I'm going to
9 hit the pause button for one second. And if we could
10 take a look at Plaintiffs' Exhibit 9 and 10, please,
11 that are in evidence. And let's do 9 first. And it may
12 be that we only need to do 9. Do you recognize 9?

13 A Yes, I do.

14 Q And what does that depict?

15 A That's an exhibit that was part of the app -- my
16 application for a variance. The goal, the -- the yellow
17 -- excuse me -- the green is the critical area, what we
18 refer to as the critical area. That would be the buffer
19 in the setback. Those lines are identified. The yellow
20 is the road as it existed at the time. I believe it
21 exists that way today. You see, there is a jog moving
22 the road to the east as soon as possible, out of -- to
23 get it out of the critical area and onto -- well, to get
24 it out the critical area -- and there's some cross-
25 hatching there.

1 And I believe that what we'll see indicated is that
2 there was pervious paving that was to be installed in
3 the area that was still within the critical area. That
4 application also provided that the -- the yellow area
5 would be re-planted by the applicant, and all the storm
6 water that would be created by the -- the road in the
7 area of the critical area would be piped onto the Point
8 tract.

9 Q So, the water's going to the middle of it, rather
10 than off the property?

11 A That's correct.

12 Q Was the variance granted?

13 A The first time we went to -- before the Zoning
14 Board of Appeal, we were -- a discussion arose as to who
15 owned the road that we were seeking to move. There was
16 considerable discussion about that. The recommendation
17 of the Zoning Board of Appeals was that, before they
18 could rule, we needed to withdraw our application and
19 get permission from the County to move the road. So, we
20 withdrew the application, and then, proceeded to seek
21 approval from Beaufort County to move the road.

22 Q Was that approval granted?

23 A That -- that was not. We -- we first made -- there
24 wasn't really an app -- there's not an application
25 process that I could find, nor would anyone tell me what

1 the application process was. So, we sought the counsel
2 of the Beaufort County engineer, and I sent him a letter
3 describing it as an application, asking him for
4 permission to move the road. He advised that we needed
5 to go to the Public Services Committee of Beaufort
6 County Council. If it was their road, they would have
7 to first review it and give us their opinion, and make a
8 recommendation to Beaufort -- to the Beaufort County
9 Council.

10 So, we went before the Planning -- Public Services
11 Committee. They heard what we had to say about it. Mr.
12 Klink, the County engineer, recommended that --

13 Q And don't go into everything they recommended. And
14 probably what would be best is if you just told us
15 whether they granted the relief or not, if they went
16 along with it.

17 A The Public Services Committee, the first -- the
18 first time we were before them, they deferred a ruling.
19 Two months later, we were back before them, and they
20 told us that they -- that it was a matter to be decided
21 by the Zoning Board of Appeals, and we had to go back to
22 the Zoning Board of Appeals.

23 Q So, you're back where you started.

24 A Back where I started, that's correct.

25 Q And what happened there? What was the result

1 there?

2 A We went before the Zoning Board of Appeals again,
3 resubmitted our application, described where we had been
4 and what we had done, and they -- and the -- our request
5 for a variance to move the road was denied.

6 Q All right. And was that appealed?

7 A Yes, that was appealed.

8 Q Okay. Now, I want to jump back to the road
9 litigation. I'm not going to take you through
10 everything they wanted on the road litigation, but I
11 would like to pick up when negotiations started. Were
12 you involved in negotiations to resolve the road case?

13 A Yes. The -- the -- the trial was in the end of
14 June, beginning of July in 2008. There -- there was no
15 ruling that was forthcoming. And in the beginning of
16 2009, I started communicating with attorney Roberts
17 Vaux. Roberts Vaux represented John David Pinckney and
18 his -- and his wife, Agnes Pinckney. I started
19 negotiating with them, to see if we could come up with a
20 settlement to resolve the issue concerning the
21 unimproved portion of Pinckney Colony Road.

22 Q Were you able to reach a resolution --

23 A We --

24 Q -- with Mr. -- I mean, were you, on behalf of
25 Pinckney Point, LLC, and Mr. Vaux, on behalf of Agnes

1 Pinckney, able to reach a resolution?

2 A We did. And we -- we -- we -- our respective
3 clients executed a settlement agreement in November of
4 2009.

5 Q All right. And that is Plaintiffs' Exhibit 74.
6 Were you involved in the drafting of that agreement?

7 A Yes.

8 Q Okay. And I think we've got it. Here is
9 Plaintiffs' Exhibit 74. Mr. Bush has told us about the
10 provisions, and we've gone over those provisions in
11 court, so I won't go over them again. But were you also
12 involved in negotiations with one of the other property
13 owners, Dorothy Gnann, Dot Gnann?

14 A Yes. Ms. Gnann was represented by attorney Tom
15 Holloway. Those negotiations didn't really commence
16 until we -- until there was a settlement with Mrs.
17 Pinckney. Similarly, there weren't any negotiations
18 with Beaufort County until there was a settlement with
19 Mrs. Pinckney. But once we achieved settlement with
20 Mrs. Pinckney, then, I -- then, we had discussions, and
21 there was ultimately a settlement with Dot Gnann,
22 Dorothy Gnann and -- and Beaufort County.

23 Q And this is Plaintiffs' Exhibit 75, which is in
24 evidence. Did you draft that settlement?

25 A Yes.

1 Q Now, --

2 A And when you say *draft*, I mean, it's a negotiation
3 process with --

4 Q I mean, were you --

5 A There's two attorneys that are working to come up
6 with a document, but it started in my office, yes.

7 Q And was it -- and what is typical for an agreement
8 like this? You start it. If you start it, what happens
9 then?

10 A I -- I propose it to -- once -- once -- once there
11 are terms that have been discussed, business terms,
12 about the agreement, then, the lawyers put together a
13 piece of paper to reflect those terms. And then,
14 there's an exchange of that document until both lawyers
15 are happy with it and their clients are happy with it.
16 And then, the document is executed.

17 Q Were you also involved in discussions with the
18 County to try to resolve any differences with the
19 County, between Beaufort County and Pinckney Point, LLC?

20 A Yes.

21 Q All right. And who were those negotiations with?

22 A Mr. Achurch.

23 Q And what was worked out with the County?

24 A The County settlement came after a ruling in the --
25 in the appeal for the docks, because there was an appeal

1 that was heard by administrative law court over the
2 issue of docks and boat landings. And the discussions
3 really started in earnest with -- with the County once
4 there was a ruling in the dock case.

5 Q All right. Did you partake in those discussions?

6 A And I should -- I should add -- the answer to that,
7 yes, I did, but I should add, the reason why is that
8 there -- it was -- there was one lawsuit with Dot Gnann.
9 There was one lawsuit with Agnes Pinckney. There were
10 two lawsuit -- three lawsuits with Beaufort County. Two
11 of them involved the Point tract, and one of them
12 involved the appeal to -- on the docks. So, really,
13 while there could have been discussions about it in
14 advance, you need -- the settlement had to settle
15 everything. There wasn't -- there wasn't any benefit to
16 the applicant to settle the issues about the road, and
17 still have the docks outstanding, and be adverse to the
18 same people that you were adverse with in the road. So,
19 we really were looking for a global settlement.

20 Q Were you able to accomplish one?

21 A Yes.

22 Q And what were the primary principals of the
23 settlement with the County?

24 A Well, there are two settlement agreements with the
25 County, and the primary resolution with the County was

1 to -- with respect to the road, that it would be -- that
2 it would be deemed a private road.

3 Q Would it be implemented by a court order, too?

4 A I don't know the answer to that question
5 specifically. There was a court order with respect to
6 the settlement agreement.

7 Q Okay. And what happened over in the dock case?

8 A Again, there was a settlement in the -- in the dock
9 case that -- that provided for a number of -- a number
10 of resolutions. The -- when the -- when OCR first
11 issues the dock permit, it permitted three community
12 docks. The applicant had requested seven community
13 docks, with ten boat slip each, for seventy docks, and
14 did so, so that, instead of looking like a pincushion,
15 the tennis racket would just have a restricted number of
16 docks, as opposed to every single lot having a dock.
17 And the applicant sought seven docks. Received from
18 OCRM a permit to construct three docks. The applicant
19 appealed that to the South Carolina Administrative Law
20 Court, appealing the issuance of the permit. A number
21 of other property owners in the area also appealed the
22 issuance of the dock permit. Beaufort County then,
23 also, filed an appeal of the dock permit. After
24 Beaufort County filed its appeal, the other citizens
25 dropped their appeal, and the case was -- both Beaufort

1 County and Pinckney Point, LLC, seeking to modify the
2 permit issued by the administrative law court.

3 And there was a hearing that was held in 2009, and
4 the judge ruled that issued -- that there should have
5 been five docks issued. So, there were -- the judge
6 said five community docks. Beaufort County was
7 dismissed for lack of standing from that hearing. So,
8 Pinckney Point had five -- had five community docks.

9 The settlement agreement with Agnes Pinckney
10 provided less than that. It actually provided for four
11 community docks. And so, negotiations were undertaken
12 with Beaufort County, whereby Beaufort County -- we
13 would -- we, the successful app -- the successful party
14 in the -- in the appeal of the docks, was to remand --
15 excuse me -- to vacate the order that dismissed Beaufort
16 County for lack of standing. And Beaufort County -- and
17 the applicant -- Pinckney Point then entered into a
18 settlement agreement, whereby there would be four
19 community docks and a boat ramp, a day dock, and some
20 other features, with respect to the development of the
21 Point tract as a residential subdivision.

22 Q Was the variance appeal also resolved as part of
23 the global settlement?

24 A Yes, it was. That was in the first settlement
25 agreement, the one dealing with the road. And that --

1 and that settlement laid out the features of the
2 entrance area in an exhibit. The exhibit -- one of the
3 exhibits was shown previously, but --

4 Q Is it Exhibit 78?

5 A The goal, as I said earlier, with respect to a
6 global settlement, the goal was to never have to go to
7 any -- anyone else for permission, other than the
8 Planning Department, to permit any aspect the project.
9 So, when there was a settlement on the road, and all the
10 parties agreed that the road was a private road, we
11 still had the issue of moving the road out of the
12 critical area. And so, that had to be part of the
13 settlement, as well. And the -- the staff does not have
14 the approval to move a road, so the Zoning Board of
15 Appeals would have to be involved, or County Council
16 would have to be involved. And in fact, that was part
17 of the settlement agreement; that all those things that
18 we had sought as a part of the variance were made a part
19 of the settlement agreement with Beaufort County with
20 respect to the road.

21 Q We've got up on the screen Exhibit B to that
22 settlement agreement. Is that what you were referring
23 to, the ZBOA settlement? Or are you referring to the
24 diagram attached to it?

25 A Well, when I was referring, I was referring to the

1 picture, the diagram that was attached to it, just for
2 general reference of what it was. But the South
3 Carolina legislature has a -- there's a feature,
4 whereby, when you're appealing the action -- when a --
5 when a property owner is appealing the action of a
6 public body, --

7 MR. ACHURCH: Your Honor, I think he's getting into
8 opinions and lawyers and things.

9 MR. WALKER: All right. We will come back, your
10 Honor.

11 THE COURT: Okay.

12 MR. WALKER: All right?

13 MR. ACHURCH: Thank you.

14 BY MR. WALKER:

15 Q Was the settlement agreement, the four-party or the
16 six-party settlement agreement, handled among the
17 lawyers as you described for the other settlement
18 agreements? Was it circulated for comment and changes?

19 A Yes, it was.

20 Q Was it approved by the lawyers for the County?

21 A Yes.

22 Q Did this global settlement require -- make any
23 changes that required a change to the settlement with
24 Agnes Pinckney that you had talked about, that had been
25 done in November of 2009? Was there an amendment to

1 that settlement agreement?

2 A I don't recall the impetus, but there was an
3 amendment to that settlement agreement, and the initial
4 settlement agreement with Agnes Pinckney provided for an
5 easement, but subsequently, the acquisition of a piece
6 of property was negotiated instead. Dollar amounts were
7 essentially the same, as I recall, but instead of an
8 easement, there was the actual purchase of a parcel of
9 real estate.

10 Q And we have heard about that purchase for 1.3
11 million dollars. Did you handle that for the plaintiff,
12 Road, LLC?

13 A Yes.

14 Q Did you establish the limited liability company for
15 Road?

16 A Yes.

17 Q All right. And what was involved in that real
18 estate transaction? Did you have to get a survey of the
19 property?

20 A To subdivide the property, a survey was, in fact,
21 secured, and title would be conveyed, pursuant to the
22 survey. State law allows you to make reference to a
23 survey, but we had to lay out the property to be
24 subdivided. And, in fact, in this case, the road parcel
25 was subdi -- was surveyed, and then, subsequently

1 approved for subdivision.

2 Q Plaintiffs' Exhibit 87. Do you recognize
3 Plaintiffs' Exhibit 87?

4 A Yes. This is the subdivision survey that we were
5 just referring -- that I was just discussing.

6 Q Is this a recorded survey?

7 A Yes. The Beaufort County Registry of Deeds'
8 nomenclature for recording is on there, and recorded on
9 January 14, 2011, Plat Book 131, at Page 193.

10 MR. WALKER: Your Honor, we would move this into
11 evidence, Plaintiffs' Exhibit 87.

12 MR. ACHURCH: No objection, your Honor.

13 THE COURT: Without objection, it's in evidence.

14 ITEM IDENTIFIED AS SUBDIVISION

15 SURVEY RECORDED JANUARY 14, 2011,

16 (PLAT PROPOSED R/W PARCEL PINCKNEY

17 COLONY ROAD BY COOK)

18 MARKED PLAINTIFFS' EXHIBIT NUMBER 87,

19 ADMITTED INTO EVIDENCE.

20 BY MR. WALKER:

21 Q To be clear, did you have to have a survey
22 subdivide this road parcel out in order to be able to
23 convey it?

24 A You need to be able to describe the piece of real
25 estate to be conveyed, and my preference is to do it.

1 pursuant to a survey, and South Carolina state law
2 allows you to do it in that fashion.

3 Q Now, could you, please, Dave, just feature -- pull
4 in the area that we're talking about. That's it.

5 So, is that the right-of-way parcel, the road
6 parcel, that was conveyed by Agnes Pinckney to Road,
7 LLC?

8 A That's correct. That's the -- the dark-shaded
9 lines that are -- that have two dashes in the middle,
10 those are subdivision lines, so that's the parcel
11 description -- or the subdivision lines.

12 Q And we've referred to this earlier. This is just
13 for illustration. Does this show in color what we see
14 up there in black and white, the outlines of the
15 property conveyed?

16 A It appears to, yes.

17 Q All right. Did you prepare the deeds from Ms..
18 Pinckney to Road, LLC?

19 A I did.

20 Q Were those signed and recorded?

21 A Yes.

22 Q Was there more than one deed for this L-shaped
23 property?

24 A There was. There was a limited warranty deed and a
25 quitclaim deed. Those deeds, not unlike the settlement

1 agreement with Ms. Pinckney, were the result of
2 negotiations and discussions with Ms. Pinckney's
3 attorney, because they were pursuant to the settlement
4 agreement. So, in fact, there was an exchange of
5 documents, exchange of drafts of the deed. I asked,
6 also, for a quitclaim deed to con -- to ensure that we
7 had any, what we refer to as strips and gores, any
8 little pieces that might have been left out, that we get
9 everything that's shown in that document -- in that
10 survey.

11 Q Do you recognize Plaintiffs' Exhibit 88 and 89?

12 A Yes.

13 Q What are these?

14 A This is the limited warranty deed and the quitclaim
15 deed that I just referred to.

16 Q Were they recorded?

17 A They were recorded with the Beaufort County
18 Registry of Deeds. Nomenclature is in the upper right-
19 hand corner, indicating that these were recorded on
20 January 14, 2011; the limited warranty deed in Book
21 3,028, at Pages 993 to 998; and the quitclaim deed, same
22 book, 3,028, and Pages 999 through 1,002.

23 MR. WALKER: We would offer Exhibits 88 and 89 into
24 evidence.

25 MR. ACHURCH: No objection, your Honor.

1 THE COURT: Without objection.

2 ITEM IDENTIFIED AS LIMITED WARRANTY
3 DEED FROM AGNES PINCKNEY TO ROAD, LLC,
4 DATED JANUARY 14, 2011, RECORDED
5 IN BOOK 3,028, PAGES 993 THROUGH 998,
6 MARKED PLAINTIFFS' EXHIBIT NUMBER 88,
7 ADMITTED AS EVIDENCE.

8 ITEM IDENTIFIED AS QUITCLAIM DEED
9 FROM AGNES PINCKNEY TO ROAD, LLC,
10 DATED JANUARY 14, 2011, RECORDED
11 IN BOOK 3,028, PAGES 999 THROUGH 1,002,
12 MARKED PLAINTIFFS' EXHIBIT NUMBER 89,
13 ADMITTED AS EVIDENCE.

14 BY MR. WALKER:

15 Q If we go to the second page of Exhibit 88. If we
16 could have it on the screen, please.

17 When you do a deed like this, is it typical to
18 refer to any easements and restrictions?

19 A I think -- I believe it's better -- better practice
20 to refer to specific restrictions, typically title to
21 the land if the restriction that already exists doesn't
22 necessarily have to be called out. But I believe that
23 this one needed to be called out, because there wasn't
24 anything of any record that really showed that easement
25 that I referred to.

1 Q So, we were creating a new piece of property,
2 basically? A new parcel.

3 A Creating a new parcel. That's correct.

4 Q Did the County have to approve the subdivision for
5 that new parcel to create it?

6 A Yes.

7 Q All right. What I'd like to do is talk about the
8 first -- the top part of this, if they could highlight
9 the top half of the page here. Were these provisions
10 that we're looking at on the screen that were part of
11 the deed for the road parcel, also ones that were worked
12 out between you and Roberts Vaux, who represented Agnes
13 Pinckney?

14 A Yes.

15 Q All right. And he reviewed this before and
16 commented on it before it was signed?

17 A Yes.

18 Q Okay. Now, if we go down to --

19 A And if I -- if I could just -- and I'm sorry. If I
20 could just add.

21 Q Go ahead, please.

22 A Mr. Vaux is the notary --

23 Q Okay.

24 A -- on this deed.

25 Q Now, if we go down to the one, two, three -- I

1 think it's the fourth one, do you see an also subject to
2 a restriction?

3 A Yes.

4 Q All right. No, above that, please. And what does
5 that restriction say?

6 A Well, it describes the only uses of the -- of that
7 property.

8 Q Would you please --

9 MR. ACHURCH: Your Honor, --

10 BY MR. WALKER:

11 Q Without characterizing it, would you just tell us
12 -- read it to us, what the restriction says.

13 A And also, subject to a restriction that
14 the property conveyed herein may be used
15 only --

16 Q Slow down when you read.

17 A I'm sorry.

18 Q You tend to read very quickly, so.

19 A In my profession, you need to read fast, and I
20 apologize.

21 And also, subject to a restriction that
22 the property conveyed herein, may be used only
23 as a right-of-way, or other purpose associated
24 therewith, including but not limited to,
25 landscaping, parking, drainage, installation

1 of utilities, except, however, no gravity
2 sewers, or any other purpose necessary and
3 appropriate for an entrance area to a private
4 residential community.

5 And also, further subject to the
6 restriction that the portion of the property
7 conveyed herein that is known and described
8 as the private Hayfield Road (Hayfield Road
9 portion) as depicted in the plat, be subject
10 to the following.

11 Q All right. Could you just pause right there. Is
12 this part of the L. Hayfield Road that we're talking
13 about?

14 A That's correct.

15 Q All right. So, were there certain restrictions on
16 Hayfield Road? And you don't need to go over all of
17 them.

18 A Yes. The descriptions that are described here, and
19 those -- my recollection is, those are Mr. Vaux and his
20 clients' restrictions, because they were conveying to us
21 a portion of what's known as Hayfield Road, but it's a
22 private road.

23 Q Okay. There was a mention of a prohibition of
24 gravity sewer. Was that something that Pinckney Point
25 came up with, or was that something that Mr. Vaux, on

1 behalf of Ms. Pinckney, came up with?

2 A Initially, the discussions were that there would be
3 no sewers allowed.

4 MR. ACHURCH: Your Honor, --

5 BY MR. WALKER:

6 Q Just for the source of it, did it track back to an
7 earlier agreement?

8 A Yes. The settlement agreement with Agnes Pinckney
9 provided that there would be no gravity sewers. Or no
10 gravity sewers that would serve the property.

11 Q And while we're on the road itself, did the
12 settlement agreement contemplate that Road, as the new
13 owner of this section of Pinckney Colony Road, would
14 grant an easement to Pinckney Point, LLC, the owner of
15 the Point tract?

16 A Yes.

17 Q Was there an easement that was ultimately executed
18 and recorded --

19 A Yes.

20 Q -- to accomplish that?

21 THE COURT: Do I need to take a look at it?

22 MR. WALKER: Yes.

23 BY MR. WALKER:

24 Q If you would take a look at and go through
25 Plaintiffs' Exhibit 81.

1 A Yes.

2 Q Does this appear to be a true and accurate copy of
3 the access easement agreement between Road, LLC, and
4 Pinckney Point, LLC, that is recorded in the Records
5 Office for Beaufort County?

6 A This document does have the nomenclature for the
7 Beaufort County Register of Deeds, in the upper right-
8 hand corner; and it's recorded in Book 3110. That Pages
9 1662 through 1679, on January 6, 2012.

10 Q What is the date of the agreement itself, as
11 reflected in the first paragraph?

12 A December 29, 2011.

13 MR. WALKER: We'd offer Plaintiffs' Exhibit 81 into
14 evidence.

15 MR. ACHURCH: No objection, your Honor.

16 THE COURT: Without objection.

17 ITEM IDENTIFIED AS ACCESS EASEMENT,
18 ROAD, LLC, TO PINCKNEY POINT, LLC,
19 DATED DECEMBER 29, 2011, RECORDED
20 IN BOOK 3110, PAGES 1662 THROUGH 1679,
21 JANUARY 6, 2012,
22 MARKED PLAINTIFFS' EXHIBIT NUMBER 81,
23 ADMITTED AS EVIDENCE.

24 BY MR. WALKER:

25 Q When an easement like this is granted, is it

1 typical for the person granting the easement, the person
2 owning the property, to describe the use of the
3 easement, what the easement's for?

4 A Yes.

5 Q Does that occur in Paragraph 2 of -- in Part of --
6 Paragraph 2 of this Exhibit 81?

7 A Yes. That paragraph is titled *Grant of Easement*,
8 and describes the easement being granted.

9 Q Now, if we go down to the last sentence, what does
10 the last sentence of that grant of easement say?

11 A *The rights granted herein shall be for the*
12 *benefit of grantee and for the benefit of*
13 *any and all other occupants of grantee's*
14 *property, and for its respective subtenants,*
15 *licensees, customers, agents, employees,*
16 *invitees, mortgagees, successors, and*
17 *assigns.*

18 Q All right. And the last thing I want to hit on is
19 the conclusion of the road case through the order of
20 Judge Dukes, which is Plaintiffs' Exhibit 97. Did Judge
21 Dukes sign the order that was submitted to him, signed
22 by all the lawyers in the road litigation, dismissing
23 the case?

24 A Yes.

25 Q And what did he deem done in 1 and 2?

1 A *That all claims and counterclaims in the*
2 *above-captioned matter are hereby dismissed*
3 *with prejudice, and that the unpaved portion*
4 *of Pinckney Point Road is a private road.*

5 Q Was that consistent with the parties' agreement
6 that it was deemed a private road?

7 A Yes.

8 Q All right.

9 A Yes.

10 MR. WALKER: Your Honor, I'm getting ready to take
11 on a new issue right now.

12 THE COURT: Okay. You want to take a break?

13 MR. WALKER: No, I just wanted to check with the
14 jury.

15 THE COURT: You all need to take a break?

16 JUROR: I need to go to the bathroom.

17 THE COURT: All right. Well, we're going to go
18 ahead and take a break. Ladies and gentlemen, do not
19 discuss this case. It wouldn't be appropriate to do so.
20 As soon as you all are ready, Mr. Foreperson, knock on
21 the door, and we'll bring you right back out. All
22 right? Thank you.

23 JURORS LEAVE COURTROOM 10:42 A.M.

24 BAILIFF: Jury is clear.

25 THE COURT: Thank you, Rick. We'll be at ease for

1 about five minutes or so. Is that fine? You're welcome
2 to step down, Mr. Nester. Thank you.

3 WALTER J. NESTER III: Thank you.

4 OFF THE RECORD 10:43 A.M.

5 BACK ON THE RECORD 10:53 A.M.

6 THE COURT: No one has asked the question yet, who
7 drafted that dismissal?

8 MR. WALKER: Everybody. The litigants wanted it.

9 THE COURT: A very smart lawyer drafted that.

10 MR. ACHURCH: Thank you.

11 THE COURT: All right. Ready to go?

12 MR. WALKER: Plaintiff's ready, your Honor.

13 THE COURT: All right. We're ready to go. They're
14 not running back to get back here, the jury.

15 BAILIFF: Ready, your Honor?

16 THE COURT: Yes, come on in.

17 JURORS ENTER COURTROOM 10:57 A.M.

18 THE COURT: Be seated. All right. Let's continue
19 with Mr. Nester's testimony.

20 MR. WALKER: Thank you, your Honor.

21 THE COURT: Thank you.

22 WALTER J. NESTER III, CONTINUE

23 DIRECT EXAMINATION, BY MR. WALKER:

24 Q Mr. Nester, at some time in 2011, did you become
25 re-involved in septic/sewer issues on behalf of Pinckney

1 Point, LLC?

2 A Yes.

3 Q And without going into all the details, because I
4 am going to give you some correspondence along the way,
5 what was the nature of the dispute?

6 A The -- the -- another application for conceptual
7 approval had been submitted, now that the road
8 litigation had been resolved, and it wasn't -- and the
9 -- the ZBA's comments came back -- actually, I don't
10 know that there were comments, per -- necessarily.
11 There were conditions that were imposed on what
12 ultimately was approval, conceptual approval, of the
13 subdivision.

14 Q And I'm going to start a little earlier than that.
15 I'm going to hand you what's been marked as Plaintiffs'
16 Exhibit 115. And an extra copy for Judge Mullen. Do
17 you recall receiving this email? Did you receive this
18 email?

19 A Yes. This -- this came to my -- this is -- that's
20 my Internet address. Email address.

21 Q Do you have any reason to doubt its accuracy?

22 A No, no. I recall the discussion.

23 Q Okay.

24 MR. WALKER: Your Honor, we would move this into
25 evidence, and I understand it's without objection.

1 MR. ACHURCH: No objection.

2 THE COURT: Without objection.

3 ITEM IDENTIFIED AS EMAIL FROM
4 ANTHONY CRISCITIELLO TO WALTER NESTER
5 DATED JUNE 16, 2011
6 MARKED PLAINTIFFS' EXHIBIT NUMBER 115,
7 ADMITTED AS EVIDENCE.

8 BY MR. WALKER:

9 Q And this one, we're going to have to use the ELMO.
10 Who is Tony Criscitiello?

11 A The director of the Planning and Zoning Department
12 of Beaufort County.

13 Q Is this an email from him?

14 A Yes.

15 Q What is the date of this email?

16 A June 16, 2011.

17 Q And what is he talking about in this email? Well,
18 why don't you just go ahead and read it, because I think
19 that would say it all. Go ahead.

20 A *Walter, I'll defer to Lad and Josh, but here*
21 *is my frank reservation. The citizens --*

22 Q Go ahead. I'm sorry.

23 A It's in response to my request to him, whether or
24 not he'd had the opportunity to review information that
25 I had previously provided him. And his response was:

1 I'll defer to Lad and Josh, but here is
2 my frank reservation. The citizen homeowner
3 is coming in naive, and probably uninformed
4 about how difficult it may be to get a permit
5 for a lot that may or may not perk. The
6 property was a sod farm for many years, and
7 the water table may be inches from the surface.
8 They are going to pay a lot of money for each
9 lot, only to learn that the lot is challenging
10 and expensive to use, because of septic system
11 issues, should that not be taken care of up
12 front. Has your client considered the
13 extension of sewer? We support an amendment
14 to the ordinance to allow the extension of
15 sewer to the property. I even think that a
16 hardship variance is justified, given the
17 characteristics of the land. Food for thought.
18 Tony.

19 Q At this point, was there any realistic possibility
20 of switching back from septic tanks to sewer?

21 A It's a -- it would be a financial issue. I mean,
22 it's not a -- it's not a -- the ordinance hadn't been
23 changed. What -- what Mr. Criscitiello was proposing
24 was a change to the ordinance. The ordinance hadn't
25 been changed, so, there still was a prohibition in the

1 ordinance to the installation of sewers.

2 Q Is the position with respect to sewers at all
3 different from what the County's position was a few
4 years earlier on this issue?

5 A It's exactly opposite the earlier responses to the
6 efforts to install sewer, was that a special
7 environmental condition, or words to that effect, needed
8 to exist.

9 Q Were there provisions in the settlement agreements
10 with Ms. Pinckney and Gnann, Mrs. Pinckney and Gnann,
11 about sewer, too?

12 A Yes. There was a --

13 Q What was the specific prohibition?

14 A The prohibition was that no -- no gravity sewers
15 could be installed to service the property.

16 Q Now, I want to ask about the septic system and Mr.
17 Criscitiello's concern about portions of the property
18 not perking. Had this been addressed at all in the
19 studies that were done and the permit that was issued by
20 DHEC?

21 A DHEC had issued a permit after the applicant had
22 proved to DHEC that all of the proposed lots could perk.

23 Q Early on around this time, had the County taken a
24 position in response to the applications for site --
25 conceptual site plan approval about those septic tanks

1 and whether their individual permits would be required?

2 A My recollection is that -- that there had been a
3 change to the regulations to the ordinances or the laws
4 that govern DHEC; that there had been a change in the
5 regulations that differed from the permit that Pinck --
6 that the applicant had received. The applicant had
7 received a permit for septic for a subdivision. So, a
8 development permit, a permit for the development. The
9 regulations had subsequently changed after the issuance
10 of that permit, requiring individual permits, permits
11 for every single lot, as opposed to a permit -- one
12 permit that listed -- in this case, there was one permit
13 that listed 76 lots. DHEC changed its regulations after
14 they issued the permit to say you had to have 76
15 individual septic permits.

16 Q And what was your position, with respect to the
17 validity of the permit that was issued before the
18 regulation change?

19 A Well, it was still a valid permit for the project,
20 and DHEC agreed with that.

21 Q Did the County agree?

22 A Ultimately, the County agreed that it was -- that,
23 that permit was acceptable.

24 Q Was the County's agreement immediate?

25 A No. No, it was not immediate.

1 Q Did you become involved in attempting to convince
2 the County of the correctness of your position?

3 A Yes. Myself and other attorneys in my law firm
4 that deal more regularly with -- with DHEC, sought
5 clarification from DHEC, to ensure that we could
6 establish for the County that, in fact, the septic
7 permit for the entire development was a valid permit for
8 the purposes of developing the property, and for the
9 purposes of the conceptual -- approval of the conceptual
10 application.

11 Q Did you communicate by email and letter with the
12 County officials about your position?

13 A Yes.

14 Q Did you have meetings with them?

15 A Yes.

16 Q I'm providing you Plaintiffs' Exhibit 23, which is
17 a notebook of exhibits. Did you communicate with Lad
18 Howell.

19 A Yes, I did.

20 Q Who is he?

21 A Lad Howell previously was the Beaufort County staff
22 attorney.

23 Q Did you communicate with him by this memo of yours
24 dated June 29, 2011?

25 A Yes. I mis -- when I say *previously*, he -- at this

1 time, he was the Beaufort County staff attorney.

2 Q All right. And what did you -- and I don't want
3 you to read this, but just give us sort of the
4 *CliffsNotes*. What were you doing in this memo to him,
5 dated June 29, 2011?

6 A I was endeavoring to get the County staff attorney
7 to have the condition that was listed in the conceptual
8 approval by the County for subdivision to remove the
9 condition that individual septic -- or, that we had --
10 the applicant, or Pinckney Point, was required to get 76
11 individual septic tank permits.

12 MR. WALKER: Your Honor, we would move Plaintiffs'
13 Exhibit 23 into evidence.

14 THE COURT: Any objection?

15 MR. ACHURCH: I just think it's cumulative, your
16 Honor.

17 THE COURT: Okay. I'm going to allow it in,
18 subject to your objection.

19 ITEM IDENTIFIED AS MEMO FROM WALTER
20 NESTER TO LAD HOWELL, DATED JUNE 29,
21 2011, REGARDING PERMITTING,
22 MARKED PLAINTIFFS' EXHIBIT NUMBER 23,
23 ADMITTED AS EVIDENCE.

24 BY MR. WALKER:

25 Q You mentioned a conceptual site plan approval.

1 If we could have Plaintiffs' Exhibit 112, please,
2 which has been admitted into evidence. We do not have
3 this on the screen.

4 MR. ACHURCH: Your Honor, just so I have it on the
5 record, as well, we have our other prior objection.

6 THE COURT: Yes. Thank you. Subject to your prior
7 objection, it's preserved..

8 BY MR. WALKER:

9 Q It's Plaintiffs' Exhibit 111. If we could turn
10 back on the ELMO.

11 Did the applicant ultimately succeed in obtaining
12 site plan approval?

13 A Yes.

14 Q And when was that granted?

15 A By -- it was granted at a meeting that was held on
16 August 17, 2011. But the -- that letter of August 23rd
17 of 2011 describes that meeting and that fact that it was
18 -- that the Development Review Team had approved it,
19 with the following conditions, and the conditions are
20 enumerated in that letter.

21 Q Which of these five conditions is the one that you
22 are referring to? Would it be the bottom?

23 A Thank you. Yes, it would be the last condition.

24 Q And what is that? How is it stated in this letter?

25 A *At final review, the applicant shall submit*

1 *septic system permits from DHEC.*

2 Q What did you do in response to the condition being
3 maintained in the conceptual site plan approval?

4 A Well, the conceptual site plan approval contained
5 the project permit, the permit that we had obtained from
6 DHEC for septic for the entire project.

7 Q Did you have to continue your communications with
8 the County to try to get them to agree to your position
9 about the validity of that DHEC permit?

10 A Yes. That was -- that -- my correspondence to Lad
11 Howell, that's what that was all about. At final
12 review, that's final subdivision review. So, before --
13 what that's saying -- what that says is, to me, is that
14 prior to approval of the subdivision of all those lots,
15 each lot has to have a separate permit for that lot,
16 which the size of a septic system, that is dependent
17 upon how many bedrooms you have in the house. Bedrooms
18 and bathrooms.

19 So, there are 76 lots or seventy-some-odd lots that
20 were laid out in the proposed subdivision. What that
21 sentence asks is for the applicant to get a septic
22 permit for a structure that -- that the applicant
23 doesn't know the size of. Doesn't know if it's going to
24 be a four bedrooms, five bedrooms, six bedrooms. So, it
25 was well nigh impossible to -- to do that, or the

1 developer to say everything's going to be a four-
2 bedroom, and get a -- and then, obtain. And to obtain
3 that, that would have been repeating what the -- what
4 had already been obtained. It would have been re-
5 engaging an engineer to go out, complete an application,
6 and pay fees for every single lot in the subdivision; to
7 go ahead and dig another test pit; to get a perk; to get
8 it perked. And we didn't feel that, that was
9 appropriate, because we already had a permit that
10 permitted the entire project.

11 Q Did you review the county ordinances relating to
12 site plans and subdivisions to determine if there was a
13 requirement that would have imposed this obligation?

14 A I did.

15 Q What did you determine?

16 A I didn't find one.

17 Q Did you bring that to anybody's attention?

18 A To my recollection, I did.

19 Q Was there also a question about whether the septic
20 tanks might penetrate the hundred foot -- the fifty-foot
21 buffer or the hundred-foot setback?

22 A There was -- there was -- there was that concern.
23 There was a concern about the location of the ultimate
24 septic system. Again, you don't know in advance. When
25 you're just subdividing a lot, you don't know the size

1 of the structure or the layout of the structure. And
2 so, the County wouldn't necessarily know, nor would the
3 applicant know in advance where -- where the building --
4 the residence was going to be constructed and where the
5 septic tank and the tile, what's referred to as a tile
6 field, would be located.

7 Q Nonetheless, was Pinckney Point willing to do
8 something to make sure that the drain fields would not
9 be in that river buffer?

10 A Yes. We -- I communicated with the staff attorneys
11 office and we came up with language that would be --
12 language that would be essentially a restrictive
13 covenant, because that language would be placed in the
14 subdivision plat. Put everybody on notice. All the
15 prospective purchasers would know that they could --
16 where they could put their septic tank and their septic
17 system.

18 Q Did you convey your concerns and your position to
19 Hillary Austin, who was the zoning department
20 administrator?

21 A My recollection, frankly, is that I talked with
22 just about everybody I could, and Ms. Austin would have
23 been one of them.

24 Q I've handed you 26 from our exhibit notebook. Are
25 you familiar with Exhibit 26?

1 A Yes, I am.

2 Q What is this, generally?

3 A This is a letter that I sent to Ms. Austin in
4 response to the receipt of the -- the conditional
5 approval that was just shown up on the screen, objecting
6 to the inclusion of that -- that condition that
7 individual septic tanks be provided.

8 Q Did you go through in this letter all the things
9 that you've told us about this morning in terms of the
10 reasons why you did not think that condition was
11 appropriate?

12 A Well, in this letter, I would suggest that there
13 was more than what I talked about, because this -- this
14 letter's more comprehensive than just a number of pages,
15 but this is what I'm referring to, yes.

16 Q To use your term, was it a fairly comprehensive
17 study of the issue and your statement of your position?

18 A Yes.

19 MR. WALKER: Your Honor, we'd move 26 into
20 evidence. We don't intend to have him read it.

21 THE COURT: Thank you.

22 MR. ACHURCH: This with reserving our prior
23 objection, your Honor.

24 THE COURT: Reserving your prior objection, it's in
25 evidence.

1 ITEM IDENTIFIED AS LETTER FROM
2 WALTER NESTER TO HILLARY A. AUSTIN
3 MARKED PLAINTIFF'S EXHIBIT NUMBER 26,
4 ADMITTED AS EVIDENCE.

5 BY MR. WALKER:

6 Q When you said you talked to just about everybody,
7 did you ever talk to Mr. Achurch about this or
8 communicate to him about it?

9 A My recollection is that I did.

10 Q Why would you have communicated with him about it?

11 A The trial in the road litigation was in 2008. The
12 County had filed the lawsuit in 2006. We settled the
13 lawsuit. I thought we settled all issues pursuant to
14 the settlement agreements that were executed in 2011.
15 And then, after they were -- after those negotiations
16 were completed, signed, and the settlement agreements
17 were January of 2011, in September of 2011, I found
18 myself having to discuss something that I didn't think
19 was properly included as a condition for the
20 development. And so, I was going back to the attorney
21 that I had negotiated the settlement agreements with to
22 have a discussion whether or not it was appropriate for
23 the County to do that.

24 Q Did you have an email communication with Mr.
25 Achurch about this? I've handed you Plaintiffs' Exhibit

1 46, which is in our booklet of exhibits.

2 A Yes. Yes.

3 MR. WALKER: Your Honor, we would move 46 in.

4 THE COURT: Subject to your prior objection, are
5 you okay?

6 MR. ACHURCH: Yes, your Honor. Thank you.

7 THE COURT: Thank you. Okay.

8 ITEM IDENTIFIED AS EMAIL FROM

9 WALTER NESTER TO ROBERT ACHURCH

10 MARKED PLAINTIFF'S EXHIBIT NUMBER 46,

11 ADMITTED AS EVIDENCE.

12 BY MR. WALKER:

13 Q Is this one of the communications that you're
14 referring to?

15 A Yes.

16 Q Mr. Nester?

17 A Yes.

18 Q Did this email follow up a conversation you had had
19 with Mr. Achurch?

20 A Yes.

21 Q And if you would, please go over the first two
22 sentences of your email for us.

23 A Robert, thank you for taking the time this
24 morning to discuss my concerns regarding
25 Pinckney Point, LLC's application for

1 subdivision approval for Pinckney Point from
2 Beaufort County's DRT. As discussed, I thought
3 you should be aware of the action described in
4 the attached correspondence, because of the
5 recent settlement agreements with the County.

6 Q And did you go on to attach some of the
7 communications that we've already referred to about
8 these issues?

9 A Yes. It appear -- the September 16th
10 correspondence to Ms. Austin.

11 Q Thank you. Were you also continuing to work with
12 Mr. Gruber to work out language on this restrictive
13 covenant?

14 A My recollection is that language -- the workout of
15 language with Mr. Gruber was a resolution of the
16 condition.

17 Q All right. And just to re-state what you said,
18 were you finally reaching a resolution with the County?

19 A On this condition, we had reached a resolution.
20 Yes, sir.

21 Q Okay. I'm handing you Plaintiffs' Exhibit 28. Is
22 that a -- what is that?

23 A This is correspondence from me of December 15,
24 2011, to attorney Josh Gruber, who was either the
25 Beaufort County staff attorney -- clearly with the staff

1 attorneys' office at that time.

2 Q And this is a front-and-back copy, and if you go to
3 the back page, what is that?

4 A That's the language that I -- I had prepared, based
5 on conversations with, I believe, Josh for -- to include
6 on the subdivision plat for the subdivision of the lots.

7 MR. WALKER: We would move to enter Plaintiffs' 28
8 into evidence.

9 THE COURT: Subject to the prior objection.

10 ITEM IDENTIFIED AS CORRESPONDENCE
11 FROM WALTER NESTER TO JOSH GRUBER,
12 DATED DECEMBER 15, 2011,
13 MARKED PLAINTIFFS' EXHIBIT NUMBER 28,
14 ADMITTED AS EVIDENCE.

15 BY MR. WALKER:

16 Q Did you --

17 MR. ACHURCH: I don't object to that.

18 THE COURT: Okay.

19 BY MR. WALKER:

20 Q If we could, and we can just stick to the first
21 page. Were you seeking to move this along, this whole
22 question of the condition to the conceptual approval of
23 the site plan?

24 A Yes.

25 Q Why?

1 A Well, conceptual approval is conceptual approval.
2 The final approval requires -- there's much more to the
3 final approval, not in terms of the application, but in
4 terms of what the applicant must do. Conceptual
5 approval is, this is where the roads are going to be,
6 this is where the lots are going to be, this is where
7 the amenities are going to be. These are the
8 permissions and permits that you need.

9 Final approval, you have to put all that in motion.
10 You have to actually design the storm water system. You
11 have to have the engineers design the roads. You have
12 to have all that activity, and the -- the applicant
13 can't press the trigger to start engaging all those
14 consultants, those engineering consultants, until it
15 knows that it has conceptual approval, and that it knows
16 the things that it needs to do in the conceptual
17 approval.

18 So, in a perfect world, they would be moving at
19 simultaneous tracks, because you know you're getting
20 conceptual approval, so you can go ahead and engage your
21 engineers, but you can't. When you -- when you're --
22 when you don't have the conceptual approval to. So, my
23 efforts were to push it as quickly as possible, so you
24 can get the conceptual approval, so the engineers can be
25 engaged, and the land planners can be further engaged to

1 start finalizing the plans for final approval.

2 Q In this letter, did you seek to get a response?

3 And I'm going to get a direct you to the third sentence,
4 starting with, *assuming*.

5 A *Assuming that this is acceptable, please ask*
6 *Tony to send me some writing which removes*
7 *the condition for septic permits, prior to*
8 *final approval on the conceptual approval*
9 *for this project, provided by the DRT dated*
10 *August 23, 2011.*

11 Q And was that the letter we were just looking at,
12 that was projected on the screen?

13 A That's -- yes.

14 Q Okay. Did you end up having to follow up with
15 Josh?

16 A I believe so.

17 Q And ultimately, was it finally worked out after you
18 followed up?

19 A Yes. It was -- it was -- it was resolved.

20 MR. WALKER: Your Honor, the email that I would
21 like to refer to is 49-A in our book. It is also in
22 evidence as Defendant's Exhibit 7. And just for ease,
23 may I project 47-A? It's the same as Defendant's
24 Exhibit 6 [sic].

25 THE COURT: Sure.

1 MR. WALKER: All right. Could we have --

2 MR. ACHURCH: That's fine with me.

3 MR. WALKER: I meant, 49-A.

4 MR. ACHURCH: Is that 7?

5 MR. WALKER: Defendant's Exhibit 7, correct. Mr.
6 Achurch is absolutely right.

7 MR. ACHURCH: I just said it was fine.

8 MR. WALKER: Okay.

9 BY MR. WALKER:

10 Q. Yeah. If you could go over this, and I'll give it
11 to you, Walter, since you don't have it. Is that an
12 email exchange between you and Tony Criscitiello?

13 A Yes.

14 Q And if you'd go down to the bottom and start at
15 where we're -- right there, yeah. That email right
16 there.

17 A On February -- on Friday, February 23, 2012, I sent
18 an email to Mr. Criscitiello, forwarding a message that
19 my assistant had sent the previous month, regarding the
20 -- what I -- I say the reference project.

21 Mr. Criscitiello responded on Tuesday, February
22 7th:

23 *Walter, I apologize, because I thought*
24 *I had agreed to the wording. I think what*
25 *happened is that I said I agreed, if you add*

1 *in archeology in the wording, which you did.*

2 *So, I agreed to the wording, because you made*

3 *the correction. Tony.*

4 Q Then, did you get back to Mr. Criscitiello?

5 A I responded the next day, and said:

6 *Thank you, Tony. And therefore, is*

7 *the condition requiring individual septic*

8 *permits for each lot in the proposed*

9 *subdivision (save the four new lots, which*

10 *will require individual permits before*

11 *subdivision is approved) in the August 2011*

12 *conceptual approval of the DRT for this*

13 *project deemed satisfied?*

14 Q And did he close with requests?

15 A We need to have this affirmation in writing.

16 *Email will suffice. Please let me know.*

17 *And --*

18 Q How did he respond?

19 A On the next day, he responded:

20 *Walter, yes, it is. Please prepare*

21 *necessary documents for final approval, as*

22 *per County procedures.*

23 Q Did you do that?

24 A Yes.

25 Q Could the trigger now be pulled on the engineering

1 that you were talking about?

2 A This -- this is what we needed for the trigger to
3 be pulled.

4 Q All right. Let me get that back. Thank you.

5 Were you later contacted in February of 2013 about
6 a potential closing, the acquisition of the Point
7 parcel, through the exercise of the option that Pinckney
8 Point would pay an amount specified in the option
9 agreement to purchase the Point tract back?

10 A Yes. The beginning of '13, I believe.

11 Q All right. Did you undertake to prepare for a
12 closing?

13 A Yes, I did.

14 Q Did it come to pass?

15 A No, it did not.

16 Q Did you communicate with Mr. Irby as the attorney
17 for Equity Resource Partners about possibly extending
18 the time to close beyond March 11th?

19 A I contacted Mr. Irby, not nec -- I think, in his
20 capacity as a representative of Equity Resource Partners
21 III. I know he's an attorney. I don't know what
22 capacity he was --

23 Q Right.

24 A -- what role he was serving.

25 Q Plaintiffs' Exhibit 61, in the notebook. It

1 appears to be an email exchange between you and Mr.
2 Irby. I'd ask you to take a look, and see if you can
3 identify that.

4 A Yes. That's an email exchange between me and Mr.
5 Irby.

6 Q Is it an accurate copy of the email exchange?

7 A Yes.

8 Q Okay.

9 MR. WALKER: We would offer 61 into evidence.

10 MR. ACHURCH: No objection, your Honor.

11 THE COURT: Without objection.

12 ITEM IDENTIFIED AS EMAIL EXCHANGE
13 BETWEEN WALTER NESTER AND JOHN H. IRBY,
14 MARKED PLAINTIFFS' EXHIBIT NUMBER 61,
15 ADMITTED AS EVIDENCE.

16 BY MR. WALKER:

17 Q And I'd like to start on the 61. I'd like to start
18 on Page 2. That right there.

19 Now, the jury knows that March 11th was the
20 deadline for getting this done. Did you communicate
21 with Mr. Irby that day at 4:45 in the afternoon?

22 A Yes, I did.

23 Q What did you tell him?

24 A The -- I said:

25 *John, thank you for the message on*

1 Friday. I understand from that message that
2 you were on vacation last week, as were many,
3 if not all, of the other members of Equity
4 Resource Partners III, LLC. I hope you had
5 an enjoyable vacation. I am planning to be
6 out of the office, starting Wednesday, for
7 the same thing, and I am writing to see if
8 there has been an opportunity to discuss the
9 closing extension requested by Pinckney Point
10 with your partners. If helpful, I am glad
11 to set up a conference call to discuss. Please
12 let me know.

13 Q Does the front page of that email exchange follow
14 up on that request?

15 If we could go to his email right there. There you
16 go.

17 A Yes. Mr. Irby responds, *thanks, Walt. I will get*
18 *back as soon as I have some direction.*

19 Q And did he get back fairly soon after that? The
20 top of that email chain?

21 A Yes. The next morning, he responded:

22 *Walt, at this point, we are not*
23 *willing to commit further on the property.*

24 Q Thank you. When was the next time you heard of
25 anything dealing with the Point tract after that, since

1 you weren't going to have a closing?

2 A I believe it was the *Island Packet*, a newspaper
3 article I saw in the *Island Packet*.

4 Q Do you remember when that was?

5 A It was in -- it was either in late March or early
6 April. It was the first newspaper article printed by
7 the *Island Packet*. It was the day after -- it was a
8 Tuesday, the day after an announcement was made at the
9 conclusion of a County Council meeting by Council Member
10 Jerry Stewart, that Beaufort County had decided to
11 purchase the Point tract.

12 Q Had you known anything about the County's interest
13 in the property?

14 A No. Well, no.

15 Q What was your reaction?

16 A And I hesitated, I'm sorry, because I believe
17 Beaufort County had the property under contract in 2002.

18 Q But we're talking about current-day.

19 A Right. When I -- I was -- I was flabbergasted,
20 shocked, extremely surprised.

21 Q Did you consult with the client, Pinckney Point,
22 about this?

23 A Yes. Yes, I told them, immediately told them about
24 what was announced in the newspaper.

25 Q Did you take any action in response?

1 A I did a couple of things. I reached out to people
2 that I know that were in attendance at the meeting, to
3 find out what, in fact, had been said about the
4 announcement. I also reached out to Mr. Gruber, and
5 asked for a copy of the contract, which he provided.

6 Q Did you have a meeting?

7 A After -- after receiving the contract, I reviewed
8 it, and I asked Mr. Gruber to have a meeting to discuss
9 it.

10 Q Was the meeting set up?

11 A Yes, it was.

12 Q Do you recall when the meeting was, approximately?

13 A I believe it was still in March. I believe it was
14 still in March.

15 Q Well, without getting into the specifics of the
16 day, where was the meeting?

17 A It was held in Mr. Gruber's office.

18 Q Who attended the meeting?

19 A My -- my recollection is that Mr. Gruber was there,
20 Attorney Thomas Bendle was there. There were
21 representatives of the Beaufort County Open Land Trust..
22 I am uncertain if Mr. Achurch was there. But that's --
23 and Attorney Allison Coppage, who is an assistant staff
24 attorney, she may have been there. I don't specifically
25 recall.

1 Q What did you tell them?

2 A Well, when I -- when I read the article and then,
3 read the contract, I saw, (a) in the article, that
4 Beaufort County was proposing to use the property, the
5 Point tract, for things that I didn't believe that it
6 could use, based on -- well, for a variety of things.

7 First, I was surprised that they were proposing to
8 purchase it after the negotiations that we had
9 undertaken to have the property developed. I was
10 surprised that -- that -- I was surprised that they were
11 doing that. I was honestly surprised.

12 And so, I looked at that, and then, looked at what
13 we had put in place, so that, Pinckney Point, LLC,
14 could, in fact, develop the property. And that was what
15 I wanted to convey to Attorney Gruber, is that, I didn't
16 think that the things that were being listed in that
17 newspaper article were things that the Point tract could
18 be used for, given the limitations on access that had
19 been imposed through the negotia -- through the
20 documents that we had negotiated with Agnes Pinckney,
21 through the subdivision of what I refer to as the road
22 parcel, and the conveyance of that road parcel to a
23 separate entity. I didn't -- I didn't think that
24 Beaufort County could use -- use the Point tract, if
25 they purchased it for the things that they were

1 proposing.

2 Q Did you follow up the meeting with a letter?

3 A I did. I felt that it was important to summarize
4 the things that we had discussed at the meeting and the
5 information that I had provided at the meeting. And I
6 did, I sent a letter or a memo to Mr. Gruber.

7 Q I'm handing you Plaintiffs' Exhibit 32. Is that
8 the communication that you're talking about?

9 A Yes.

10 Q Does that date jog your memory about the dates that
11 this all happened?

12 A Yes. It -- April 15, 2013 was the meeting date,
13 and I list that in the reference. And this letter was
14 April 17, 2013.

15 Q What was your purpose in sending this letter?

16 A I worked on this project for eight years, and
17 worked very closely with representatives of the County,
18 and achieved a solution where we had conceptual
19 approval, and we could pull the trigger to go ahead with
20 the development. So, I -- I didn't think that it helped
21 the County -- I was surprised. I mean, I guess the
22 short story was, I was trying to prevent the County -- I
23 was trying to let the County know, before that it
24 acquired this property, that there were these things
25 that had been undertaken for eight years, that was

1 proposing for the property to be developed in a
2 different way. But regardless, that the County was
3 proposing to spend Open Land Trust money on a piece of
4 property that couldn't be used.

5 Also, importantly, I was astonished, because the
6 development that had been proposed, which was one that I
7 really feel was environmentally sensitive. I mean, it's
8 -- it's barren piece of real estate. It currently runs
9 -- it drains directly into the -- into the Okatie and
10 the Colleton River watershed. The development that had
11 been planned and conceptually -- and conceptually
12 approved was -- was a better treatment of the property.
13 People don't like to say that development actually
14 enhances the environmental quality of a piece of
15 property, but in this case, I really feel that the plan
16 did so. And -- and I also believe that Beaufort County
17 couldn't use the property for the things that -- that
18 were said in the newspaper, and I wanted to make certain
19 that the County -- that the County staff attorney and
20 the County were aware of those things.

21 Q Did you also refer to the road being a private
22 road, as set forth in the settlement agreement?

23 A I did. I don't believe Mr. Gruber was working with
24 the County at the time of those negotiations, but it was
25 certainly something that I wanted to point out, that

1 everybody involved in the litigation had agreed that, in
2 fact, it was a private road.

3 MR. WALKER: Your Honor, plaintiffs would move
4 Plaintiffs' Exhibit 32 into evidence.

5 MR. ACHURCH: Subject to our prior objections, your
6 Honor.

7 THE COURT: Okay. Subject to the prior objections.

8 THE COURT: Okay. Subject to the prior objections.

9 ITEM IDENTIFIED AS LETTER FROM
10 WALTER NESTER TO JOSH GRUBER, DATED
11 APRIL 17, 2013,
12 MARKED PLAINTIFFS' EXHIBIT NUMBER 32,
13 ADMITTED INTO EVIDENCE.

14 BY MR. WALKER:

15 Q Mr. Nester, is the projection the letter we're
16 talking about of April 17, 2013?

17 A Yes.

18 Q And since you have testified to the substance of
19 the letter, I'm not going to take you through every
20 chapter and verse of it. But did you go through the
21 things that you've just told us all about?

22 A Yes.

23 Q And in the third paragraph, do you refer to the
24 settlement agreement?

25 A Yes.

1 Q You refer to it being a private road.

2 A Yes. That's -- the entire portion, from the end of
3 the pavement, all the way to the homestead on the Point
4 tract, which is approximately seven-tenths of a mile.

5 Q And had you provided the County Attorney, Mr.
6 Bendle, a copy of the deed that we went over earlier
7 today from Agnes Pinckney, as well as a copy of that
8 easement access agreement that we were talking about
9 earlier?

10 A I believe all of those were exhibits to this, or
11 attached with this correspondence.

12 Q If we could please go to the second page.

13 A Actually, my reference in the agreement -- in the
14 correspondence is that I provided them at the meeting.

15 Q And then, going to the top. There you go.

16 Do you talk about the easement rights? At the top
17 of the second page.

18 A Yes, I do.

19 Q Do you refer to -- and would you please read the
20 first full sentence there.

21 A *The road parcel easement was intended to*
22 *serve a private residential development on*
23 *the Point tract.*

24 Q And then, if we can go down to the middle -- the
25 middle paragraph, please. And would you please start in

1 the middle of that middle paragraph, where it says, in
2 reliance upon?

3 A In reliance upon that four-party settlement
4 agreement, and for the specific purpose of
5 making the road private, Road, LLC, acquired
6 the road parcel, and granted the road parcel
7 easement to Pinckney Point, LLC. As we
8 discussed, it was never contemplated that
9 Beaufort County would be a potential purchaser
10 of the Point tract. Clearly, given the
11 limitations in the road parcel easement, the
12 use is limited. Furthermore, given the history
13 of the litigation regarding access and the
14 settlement, we believe that condemnation may
15 be a breach of the four-party settlement
16 agreement.

17 Q And finally, in the last paragraph. Is this the
18 paragraph where you go over your position that the
19 development itself was environmentally sensitive? And
20 you don't need to read it, but is that what this
21 paragraph is doing?

22 A Yes.

23 Q Thank you. I would like to show you -- you
24 mentioned a contract between the County and Equity
25 Resources, which is Plaintiffs' Exhibit 84.

1 Well, that's a warranty. I'm sorry. I must have
2 had -- I think I've got the wrong exhibit number. I
3 apologize. I'm sorry, it's --

4 I'm showing you what's been marked for
5 identification as Plaintiffs' Exhibit 82. In some of
6 your testimony, you refer to a contract of sale between
7 Equity Resource Partners and Beaufort County. Does that
8 refresh your recollection to the date?

9 A Yes.

10 Q Okay. What is the date?

11 A The date of the contract -- well, the first
12 paragraph indicates that the -- that the parties entered
13 into the agreement on the 24th day of April, 2013.

14 Q Was that before or after your meeting and your
15 letter?

16 A That was after.

17 Q Mr. Nester, how many years have you been working on
18 development applications like this?

19 A Since 2000. 1999, 2000.

20 Q Is the development of this property, would be
21 referred to, what they intended, as a by-right
22 development?

23 A Yes; and the by-right -- the terminology, by-right,
24 means that you have the legal right to develop the
25 property, based on what your putting forth in the

1 application.

2 Q Was the time that was spent on this and the hurdles
3 that you had to jump typical for this type of by-right
4 development?

5 A Not in my experience.

6 MR. WALKER: Thank you.

7 THE COURT: All right. Mr. Achurch?

8 MR. ACHURCH: Thank you, your Honor.

9 THE COURT: Ladies and gentlemen, we're going to
10 take a very brief recess. I need to tell you just,
11 sorry, before I get you going, again, do not discuss
12 this case. It wouldn't be appropriate to do so at this
13 time. We'll be right back with you. Okay? Thank you.

14 JURORS LEAVE COURTROOM 11:45 A.M.

15 BAILIFF: Jury is clear, your Honor.

16 THE COURT: Thank you, Rick. Five-minute recess.
17 Thank you.

18 A Thank you, your Honor.

19 OFF THE RECORD 11:46 A.M.

20 BACK ON THE RECORD 11:55 A.M.

21 THE COURT: All right. Mr. Achurch, are you ready
22 to go?

23 MR. ACHURCH: Yes, ma'am.

24 THE COURT: Are you ready, Mr. Walker?

25 MR. WALKER: Yes, ma'am.

1 THE COURT: All right. Let's bring the jury in.

2 BAILIFF: Are you ready, your Honor? Jury entering
3 the courtroom, your Honor.

4 THE COURT: Thank you.

5 JURORS ENTER COURTROOM 11:56 A.M.

6 THE COURT: All right. You may be seated. Mr.
7 Achurch.

8 MR. ACHURCH: Thank you.

9 WALTER J. NESTER III

10 CROSS-EXAMINATION BY MR. ACHURCH:

11 Q Good morning, Walter.

12 A Good morning.

13 Q Mr. Nester, all actions you took in this road
14 litigation and after the County was preparing to buy the
15 property, all those things you did in your capacity as
16 the attorney for Road, LLC, and Pinckney Point, LLC. Is
17 that correct?

18 A Yes.

19 Q Okay. And your efforts were all directed to trying
20 to do what was in the best interests of your client.

21 A That's my responsibility, yes.

22 Q Right. To be a zealous advocate. Isn't that
23 correct?

24 A Yes.

25 Q Okay. And when you talked with Josh after the

1 contract and wrote a letter, that was your effort to do
2 everything you could to benefit your client. Is that
3 correct?

4 A I'm not certain of the reference of what I was
5 doing when you say my communications with Josh.

6 Q When you communicated with Josh, and you said, I
7 don't think this is -- I don't think you should buy this
8 property, the things you just testified to moments ago.

9 A That --

10 Q You had those conversations and you wrote those
11 letters, and you did that in an effort to do everything
12 you could do to further the best interests of your
13 client.

14 A Yes.

15 Q Okay. And at this point, there's not been an
16 actual conclusion to your representation of Road, LLC,
17 or Pinckney Point, LLC, has there?

18 A Well, the work that I was doing for them was to
19 assist them with permitting and acquisition of this
20 property.

21 Q Right. And but, if they called you now, you would
22 represent them.

23 A If they called me to -- yes, I would.

24 Q And when -- when you wrote -- when you met with
25 Josh, and when you wrote Josh that letter, Pinckney

1 Point, LLC, no longer had an option on that property.

2 Is that correct?

3 A When you say *no longer had an option* --

4 Q The option had expired.

5 A I understood that the option was set to expire.
6 That it had expired, right, based on conversations I had
7 with Mr. Irby, correct.

8 Q Yeah. The option, just to refresh your
9 recollection, the option expired on February 28, 2012,
10 correct?

11 A I don't know that, specifically.

12 Q You don't know that. All right.

13 A I didn't -- I didn't negotiate the opt -- the
14 option agreement.

15 Q Okay.

16 A I -- I didn't negotiate, really, any of the
17 agreements with Equity Resource Partners III.

18 Q Did you know the option had expired when you met
19 with Josh and wrote him the letter?

20 A Yes. Yes.

21 Q You did? All right.

22 A I didn't know of any other conversations that may
23 have been underway between the parties.

24 Q Okay. And in this case, you referred the
25 plaintiffs to Mr. Walker. Is that correct?

1 A In this case?

2 Q Yes.

3 A That's not my recollection.

4 Q Did you provide Mr. Walker's name with some other
5 folks? One, with some other folks?

6 A Mr. Walker -- I referred Mr. Walker, as well as the
7 names of other attorneys, when the variance was denied.

8 Q Okay.

9 A And the next step when the variance is denied is to
10 file an action in circuit court.

11 Q Right.

12 A And I don't do that. And so, I referred the client
13 to a couple of attorneys, one of which was Mr. Walker's
14 office.

15 Q Okay. And you would agree that you would need --
16 to develop the Pinckney Point property, you would need
17 -- with a residential development, you would need fifty
18 feet of access to that property, public access to the
19 property.

20 A The property needs to abut at least fifty feet in
21 width of public right-of-way.

22 Q All right. A twenty-foot easement would not be
23 sufficient to allow development.

24 A No.

25 Q Okay. And you prepared this settlement agreement

1 that we're here about today. Is that correct?

2 A Yes. I -- the initial draft came out of my office,
3 and then, there were turns of the documents between the
4 respective attorneys.

5 Q Okay. And is that a copy of the settlement
6 agreement that you prepared, which is Plaintiffs'
7 Exhibit 78?

8 A I'm just looking for the signatures, but yes, this
9 is the document.

10 Q And I think I asked you earlier, you do not believe
11 the terms of the settlement agreement are all ambiguous,
12 do you?

13 A Do I believe that the terms are ambiguous?

14 Q Correct.

15 A No, I don't believe the terms are ambiguous.

16 Q And when you draft a document, you make every
17 effort to make it so it's not ambiguous, right?

18 A Certainly the goal, yes.

19 Q Okay. And in this settlement agreement, would you
20 look on Page 2? Let me know when you're there.

21 A Yes.

22 Q And it references settlement, and it says *recitals*.
23 And it says -- it refers to variance action. Do you see
24 that?

25 A Yes.

1 Q Okay. And it says:

2 Beaufort County and the Board and
3 Pinckney Point, LLC, agree to settle the
4 variance action in accordance with the terms
5 and conditions described in Exhibit B.

6 Which is the -- which is the attachment, correct?

7 A Well, you said that you were reading from a
8 recital, but are you reading from a recital, or are you
9 reading from --

10 Q I'm reading on Page 2. It says, *variance action*.

11 A Okay. So, Part 1, Paragraph 2, under *settlement*?

12 Q Correct.

13 A Yes.

14 Q Okay. And Beaufort County did grant the variance,
15 correct?

16 A Yes.

17 Q Okay. And then, it says, *road action*. It says:

18 Beaufort County; Pinckney, --

19 which is Agnes Pinckney;

20 -- Gnann; Pinckney Point, LLC; agree to settle
21 the road action.

22 And Beaufort County did settle the road action,
23 correct?

24 A Yes.

25 Q And you mentioned the trial of the road action.

1 Joe Barker, with your firm, tried that case, didn't he?

2 A Yes.

3 Q Okay. And you were there for it?

4 A Yes.

5 Q You were present. And I was there for it.

6 A Yes. I was behind the Bar.

7 Q That's right. Okay. I understand. You weren't --
8 you didn't participate in it. Isn't it true that Mr.
9 Barker and I sat at the same trial table during that
10 trial?

11 A I believe that's a true statement.

12 Q Okay. And didn't Beaufort County take the position
13 at the trial that Beaufort County had an easement?

14 A That was the allegation in the complaint.

15 Q Um-hmm. And Beaufort County put up evidence and
16 testimony to support that, correct?

17 A Yes.

18 Q And that was the same evidence and testimony, or
19 same position, that Pinckney Point, LLC, took in that,
20 right?

21 A In large part, a lot of the information and
22 evidence that I had provided to the -- the DRT.

23 Q Pardon me.

24 A It's a lot of the same information that I provided
25 to the DRT, in an effort to get the conceptual plan

1 approved.

2 Q Right. You would agree, the DRT can't legally
3 determine that a road is owned by the County or not,
4 right?

5 A No, but they can issue a conceptual permit with
6 conditions.

7 Q Let me ask you. You can explain it. You would
8 agree that the DRT doesn't have the authority to declare
9 who owns the road.

10 A Yes, I agree with that.

11 Q All right.

12 A That's correct.

13 Q And so, and isn't it true that, throughout that
14 litigation, Beaufort County, through me, took the
15 position that, once you and -- once Pinckney Point, LLC,
16 and Ms. Pinckney and Ms. Gnann made -- came to some kind
17 of resolution, the County would be happy with that, and
18 go along with it.

19 A Yes.

20 Q Okay. And in fact, we did. Right?

21 A Signed the settlement agreement, correct.

22 Q Yeah.

23 A Yes.

24 Q And the 2009 settlement with Agnes -- between
25 Pinckney Point, LLC, and Agnes Pinckney, that agreement,

1 Beaufort County wasn't involved in that at all.

2 A That's correct.

3 Q Right. So, that was something that was done
4 independent. Throughout the litigation, you were
5 working with Agnes Pinckney and Dot Gnann and their
6 lawyers, trying to come to some resolution.

7 A Correct.

8 Q And once --

9 A Oh, excuse me. You say throughout the litigation.
10 No. I mean, not throughout the litigation. Early on.
11 Once it went to trial. We were waiting for the judge.

12 Q Right.

13 A And then, we ended up negotiating a resolution.

14 Q Okay. All right. And but, well, prior to the
15 settlement agreement, you were working independently of
16 the County with those folks to try to come up with some
17 agreement.

18 A Yes.

19 Q And you were able to do that.

20 A I was able to do it with -- yes, with both, yes.

21 Q Okay. And the agreement -- and just in case you
22 need the settlement agreement, you can refer to it. The
23 agreement that Pinckney Point made with Agnes --
24 Pinckney Point, LLC, and Road, LLC, made with Agnes
25 Pinckney, they were separate, and not a part of this

1 settlement agreement. Is that correct?

2 A That's correct.

3 Q Okay. And the settlement agreement that -- okay.
4 I asked you about Gnann. That was true for Ms. Gnann's
5 settlement, as well. That was a separate agreement,
6 correct?

7 A That's correct.

8 Q Okay. And then, the agreement between Road, LLC,
9 and Pinckney Point, LLC, about Pinckney Point, LLC,
10 buying the property from Road, that was separate -- a
11 separate agreement from what the County was involved in,
12 as well, right?

13 A I'm sorry, I don't know what you're referring to.

14 Q Were you aware that Pinckney Point, LLC, had a
15 contract with Road, LLC, to buy the road property, at
16 some point?

17 A I was aware, yes.

18 Q Okay. And that was a separate agreement. The
19 County wasn't in that agreement, either.

20 A I wasn't in that agreement, so I didn't negotiate
21 that agree --

22 Q You weren't in it. Okay.

23 A Right.

24 Q All right. That's fine. Then, it couldn't have
25 been -- then, it's not in this settlement agreement, is

1 it?

2 A No.

3 Q All right. And look on Page 5. I'm sorry if I
4 asked you this, you drafted this settlement agreement,
5 right?

6 A This -- this document originally came from my
7 office. First draft was mine.

8 Q Okay.

9 A But I traded it with the attorneys involved.

10 Q Okay. And it says down there at the bottom-left,
11 *Hilton Head*, and there's a little number down there 717.
12 Is that the McNair number?

13 A That's our document management system nomenclature.
14 That's correct, and -- and that's why I say that this
15 document was originated in our office, so, there is a
16 turn of the document between the attorneys. And that --
17 what I mean when I say a *turn* is, I prepare a draft,
18 based on the discussions that we've had; send it to the
19 other attorney; then, the other attorney -- other
20 attorneys in this case, all have an opportunity to make
21 and propose revisions.

22 Q Okay.

23 A And that, the turn of the document, it keeps on
24 getting turned until it's to everybody's satisfaction.

25 Q Okay. And if you look on Page 5, it says, Part 4,

1 it says, releases. And did the parties to this
2 litigation give mutual releases to each other, and
3 release each other from all liability prior to that
4 time, or relating to this litigation, the road
5 litigation and the variance litigation?

6 A I'd prefer for that paragraph to speak for itself,
7 but it appears to be a fairly comprehensive release.

8 Q Okay. All right. And on Page 7, Paragraph 15,
9 will you look at that? Let me know when you're there.

10 A I'm sorry, Page 7? Yes, I'm there.

11 Q Yeah. It says, *complete understanding*?

12 A Yes.

13 Q And I agree that the document should speak for
14 itself, but this paragraph says this is a complete ,
15 understanding of the parties, and there's not anything
16 outside of this' agreement, correct? Why don't you just
17 read -- if you would, just read the first sentence of
18 that agreement that says, *complete understanding*.

19 A *The parties acknowledge that this agreement,*
20 *including all exhibits hereto, contains the*
21 *full and complete agreement between and among*
22 *them; and that there are no oral or implied*
23 *agreements or understandings which are not*
24 *specifically set forth, either in this*
25 *agreement, or in the exhibits hereto; and*

1 that this agreement may be amended,
2 supplemented, or modified, only by a written
3 agreement, signed by each of the parties
4 hereto.

5 Q Okay. And so, the parties who signed this agreed
6 there were no oral or implied agreements or
7 understandings which are not specifically set forth in
8 the agreement, correct?

9 A Yes.

10 Q That's what the language says?

11 A Yes.

12 Q All right. And as far as Paragraph -- Part 1,
13 Paragraph 3, the road action, you're not aware of any --
14 you're not aware of any facts that Beaufort County
15 violated the terms and conditions of Part 1, Paragraph
16 3, which related to the road action, correct?

17 MR. WALKER: Objection. That's the ultimate issue
18 for the jury, and he's not here to render an opinion
19 about whether they breached it or not.

20 MR. ACHURCH: I asked him if he was aware of any
21 facts. They put in evidence, your Honor, that he
22 believes that, somehow, we were in breach of the
23 agreement. So, they've opened the door to that.

24 THE COURT: I think he can testify.

25 MR. WALKER: All right.

1 BY MR. ACHURCH:

2 A Can you repeat the question, please.

3 Q Yeah. Are you aware of any facts or information
4 that Beaufort County violated the terms and conditions
5 of Part 1, Paragraph 3, which relates to the agreement
6 as to the road action?

7 A Well, without -- without spending an awful lot of
8 time on it, I -- I -- well, I'm not -- facts?

9 Q Yeah.

10 A The agreement that it's a private road.

11 Q Okay. Let's see. Now, do you remember testifying
12 that you didn't have or weren't aware of any facts that
13 supported the fact that Beaufort County violated the
14 road agreement? Did you previously testify to that?

15 A I did.

16 Q Okay.

17 A I did.

18 Q And your deposition was taken on -- well, if I can
19 find it.

20 A January.

21 Q January of this year, right?

22 A Yes.

23 Q I'll tell you, it was the 26th of January, 2016,
24 correct?

25 A It was in January.

1 Q All right. And at that time, you weren't aware of
2 any facts which supported the fact that Beaufort County
3 violated the road action.

4 A That's correct.

5 Q All right. And you would agree that this
6 settlement agreement did not constitute a full and final
7 approval of the development, correct?

8 A Correct.

9 Q So, Pinckney Point, LLC, was still going to move
10 forward with the development process.

11 A That's correct.

12 Q Okay. So, this settled the variance issue, and it
13 settled the road access issue, but they were still going
14 to have to go get their permits and do these other
15 things that are required, right?

16 A Pursuant to the ordinance, that's correct. Our
17 goal was to ensure that all the settlement agreements
18 were such that we would never have to be before a public
19 body, including a Zoning Board of Appeals, Planning
20 Commission, Beaufort County Council. Our goal was to
21 ensure that the approvals would be staff-level
22 approvals.

23 Q And your goal was to put all that in this
24 settlement agreement.

25 A In the settlement agreements with Beaufort County,

1 correct.

2 Q And you would agree that the dock appeal is not a
3 part of this settlement agreement.

4 A The dock appeal is not referenced in that
5 settlement agreement, correct.

6 Q Not a part of it at all, right?

7 A It's not referenced, so, it's not a part of it.

8 Q And you would agree that Pinckney Point, LLC, also
9 appealed the decision that DHEC made on the docks,
10 right?

11 A Pinckney Point appealed first, is my recollection.

12 Q Okay. So, Pinckney Point appealed it before
13 Beaufort County did?

14 A Beaufort County was the last one to enter an
15 appeal, as I understand it.

16 Q And Beaufort County got out before Pinckney Point,
17 LLC, right?

18 A Beaufort County was dismissed for lack of standing,
19 correct.

20 Q Beaufort County reached a settlement agreement with
21 Pinckney Point, LLC, before Pinckney Point, LLC, reached
22 a settlement with DHEC.

23 A That's correct. I believe that's a correct
24 statement.

25 Q All right. And you would agree that 2010 was a

1 dark time in lending in the real estate development
2 world.

3 A Well, dark time is a way to describe it. I'm not
4 -- that's kind of a *Star Wars* way to describe it, but it
5 was --

6 Q I wasn't -- those are -- I thought that -- I'm
7 quoting you.

8 A Oh, well, thank you. It could be. Yeah, it could
9 be the --

10 Q We can look at your deposition, if you want me to
11 refresh your recollection on that.

12 A No, no. If you were quoting me, it's probably -- I
13 was probably watching *Star Wars* with my son the night
14 before, so.

15 Q All right.

16 A It's -- but it's fair to say that 2010 was --
17 was the -- was the -- a very low, right, very
18 economically --

19 Q Right.

20 A -- difficult time for people who were in the real
21 estate business. It was also a difficult time for
22 banks.

23 Q Okay. Well, let me ask you this. You were asked
24 earlier about an email from Tony Criscitiello, about
25 septic tanks.

1 Do you have that? The email from Mr. Criscitiello.

2 COURT REPORTER: From Criscitiello to whom?

3 MR. ACHURCH: Criscitiello to -- well, actually, I
4 have it.

5 MR. WALKER: It's Plaintiffs' Exhibit 115.

6 MR. ACHURCH: Well, we'll see if we can do it by
7 recollection. Do you have it, Judge?

8 THE COURT: I have it, and he does, too.

9 MR. ACHURCH: Oh, okay. Thank you. Thank you.

10 BY MR. ACHURCH:

11 Q Let me ask you about this email that you referenced
12 from Mr. Criscitiello. You would agree that making sure
13 that somebody buys a piece of land is able to -- able to
14 get a septic tank on it, correct?

15 A I'm sorry, could you repeat the question.

16 Q You would agree it's important to a person buying a
17 piece of land to get a septic tank on it, correct?

18 A Well, I -- I would agree that's important for a
19 person who's buying a subdivided lot in a residential
20 subdivision to know that they had water and sewer
21 availability to that lot.

22 Q Right. So, they've got to be able to flush a
23 toilet, right?

24 A Correct.

25 Q All right. And in that email, Mr. Criscitiello

1 tells you that, if you wanted to consider sewer -- he's
2 not saying you had to do it, he's saying if you wanted
3 to consider sewer -- that he would support an amendment
4 to the ordinance, correct?

5 A That's what he's saying, yes.

6 Q Yeah. And that's not -- that's not a change of
7 position. The County always took the position it wasn't
8 permitted, and you would need a variance to do that,
9 right?

10 A That's not what we heard in the conceptual
11 application, the meetings with the DRT that we had
12 previously submitted.

13 Q Well, the previous -- the DRT previously told you,
14 you can't have a sewer, right?

15 A Correct.

16 Q Okay. And Tony's not telling you have -- you can
17 get one. He's just saying you would need a variance to
18 get one.

19 A Well, he's saying change the ordinance.

20 Q Right.

21 A He was -- he would support a change in the
22 ordinance.

23 Q And you would need to change the ordinance to do
24 that, right?

25 A I believe, or a variance.

1 Q Okay. One or the other, you would need to do all
2 those things.

3 A Correct.

4 Q Okay. So, that's not really a change of position.
5 He's just saying this is something else, right?

6 A I don't recall a time when we received any -- any
7 statement or information from the staff that they would
8 support the extension of a sewer line to Pinckney Point.

9 Q Okay. And until that letter there, he says.

10 A Correct.

11 Q Okay. And I agree with you. And so, when you --
12 the developer made the decision to go out and try to put
13 septic on this property, and went out and secured these
14 permits or easements through Berkeley -- was it Berkeley
15 Hall?

16 A Yes.

17 Q Okay. And that wasn't at the behest of the County,
18 then, was it?

19 A No, they did that in 2005.

20 Q Yeah, the developer did, right?

21 A The developer did, and I -- I believe that sewers
22 would be an appropriate way to handle sewage coming from
23 Pinckney Point.

24 Q All right. And you were their lawyer, right?

25 A Correct.

1 Q And you, as their lawyer, knew that the ordinances
2 don't allow that, right?

3 A But there's an opportunity for a variance.

4 Q Right.

5 A Or there's an opportunity that maybe a special
6 health condition existed.

7 Q Okay. And but, that's nobody from the County
8 suggesting. You did that, hoping to get a variance or
9 some other condition, correct?

10 A Well, I knew that the Okatie River watershed,
11 there's protected shellfish areas there.

12 Q Right. I understand. I'm just asking you if you
13 knew that you weren't entitled to that.

14 A I knew what the ordinance said, yes.

15 Q Okay. All right. And so, my point is, Pinckney
16 Point, LLC, went and got that done. Nobody from the
17 County told them to do it. That was something they did
18 as their -- it was their attempt to get sewer. Nobody
19 from the County said, go try to do this, right?

20 A I think it's responsible development.

21 Q Nobody from the County told them to go do that,
22 correct?

23 A Not that I'm aware of.

24 Q All right. And in fact, the -- this is already in
25 evidence. It's a letter. The letter dated October 10,

1 2005, from the DRT. In fact, in that letter, they tell
2 you, you're not going to be able to get sewer, correct?
3 Look at Number 2.

4 A I'm reading it, yes.

5 Q Is that correct?

6 A Excuse me. Yes. This is what I said earlier, that
7 no sewer, because it's rural, within 300 feet of the
8 site.

9 *Sewer extensions may only be permitted*
10 *when a documented health condition warrants*
11 *such an expansion, and not merely to*
12 *accommodate new development.*

13 And that's a reference to the --

14 Q Right.

15 A -- section in the Zoning Development Standards
16 Ordinance.

17 Q So, the first time that Pinckney Point, LLC, took
18 this to the DRT, they were told, yeah, you can't have
19 sewer.

20 A That's correct.

21 Q All right.

22 A Well, they were told that they couldn't have sewer
23 unless a special documented health condition warrants
24 the extension of sewer.

25 Q Right. Could you go get a documented health

1 condition?

2 A I wasn't involved in the -- the filing of this
3 conceptual application. This was filed by Edward
4 Pinckney & Associates, a gentleman by the name of John
5 Thomas, and I didn't participate in -- in the filing of
6 this conceptual application.

7 Q Okay. Well, if they'd have called you earlier, you
8 could have saved them the trouble, couldn't you?

9 A Well, again, I -- I -- I personally believe that
10 sewers are the way it should be, but I don't -- I don't
11 understand why the Zoning Development Standards
12 Ordinance has the limitation of 300 feet. And the fecal
13 coli forma is the issue.

14 Q Right, right. But you know what the ordinance
15 says.

16 A I do know what the ordinance says.

17 Q Just like you complained about being asked to put
18 septic tanks on lots, you complained about that, because
19 the ordinance doesn't say it, right?

20 A I don't -- I don't understand the question.

21 Q You mentioned earlier, you testified quite a bit
22 about your complaints about putting -- having to get
23 individual septic tanks. And your complaint was, the
24 ordinance doesn't say you have to have it.

25 A Well, the ordinance says that you have to show that

1 they perk, and we had already done that.

2 Q Right. And you would agree that DHEC changed the
3 rules, right?

4 A DHEC changed the permitting process, that's
5 correct.

6 Q Right. And the way you got -- way it was finally
7 resolved was, you basically got grandfathered under
8 that, right? You got to use the old permits. Even
9 though DHEC's laws changed, you got to use the old
10 septic permits.

11 A We complied with the regulations that the -- and
12 received the permit, and we complied with the
13 regulations based on the regulations as they existed at
14 the time of the issuance of the permit, yes.

15 Q At the time of the issuance of the permit. But
16 when you came back to DRT for your conceptual approval,
17 those DHEC regulations had changed.

18 A Correct.

19 Q Okay. And what was resolved was, the County says,
20 well, since you already had them, you can use them,
21 correct?

22 A That was the resolution, together with restrictive
23 covenants that were placed on the property.

24 Q Okay. And there were four lots that weren't
25 previously permitted for a septic tank, and you did have

1 to go get --

2 A That was the agreement, that there were four lots
3 that we would have to -- because those four lots weren't
4 part of the original -- the permit that had been secured
5 from DHEC.

6 Q Right. And so, those things you talked about, like
7 having to go get a septic permit on a lot, you don't
8 know how big the house is, and all those things, that is
9 actually what DHEC requires now, right?

10 A I don't -- the general understanding of what DHEC
11 requires. I mean, I -- I wouldn't want to say prose and
12 verse from DHEC regulations, but generally, yes.

13 Q But those -- okay. Yeah. And the four new lots
14 that weren't on the -- that weren't previously approved,
15 they did have to go and comply with those new DHEC regs,
16 right? /

17 A Yes. Those four new lots were part of the
18 settlement agreement, and they weren't initially lots
19 that had -- there was an initial -- there were early
20 conceptual plans prior to the settlements that were
21 submitted.

22 Q Um-hmm.

23 A And that was the concept that the applicant was
24 seeking. And so, when the applicant was -- received
25 information that said you can't have sewers, they

1 engaged engineers to go get a septic permit for all the
2 lots that they felt that they could develop by right.
3 These -- the four lots are lots that are generally
4 located around the area of two-tenths of a mile,
5 unimproved portion of the road, abutting the road
6 parcel. That's where these lots are. They were not
7 part of the initial conceptual plans. And so, they,
8 therefore, weren't permitted by that master permit.

9 Q Okay. And outside of -- outside of the septic
10 permits, you're not -- those are the only issues you had
11 with Beaufort County, with regard to this development.
12 Is that correct?

13 A I --

14 Q I understand there's litiga -- there's a variance
15 litigation; there was a road litigation; and there was a
16 dock appeal, right?

17 A That's correct.

18 Q But as far as the permitting through the DRT, the
19 only issue you had with them were these septic tanks,
20 right?

21 A The -- the issue that stands out in my mind that
22 was in the final concep -- the condition to the final --
23 the final conceptual approval that was issued in 2011, I
24 believe --

25 Q Yeah, August '11.

1 A So, the -- I -- I'd prefer to look at that letter
2 again, but I believe that this is the condition that --
3 that I was most involved in, in resolving --

4 Q Okay.

5 A -- the condition that individual permits have to be
6 obtained.

7 Q Okay. And you don't have any recollection about
8 writing to Mr. Gruber or me or Mr. Howell about any
9 other issue?

10 A That's correct.

11 Q All right. And you couldn't say that the County
12 held anything out because they had something in for
13 these developers, can you?

14 A No, I can't say that.

15 Q Okay. And you don't think it was the result of any
16 ill will on behalf of the County, do you?

17 A Well, the County encompasses an awful lot, so it's
18 impossible for me to answer the question.

19 Q Far as you know? And I already asked you this
20 question.

21 A No, I appreciate that. But I'm not aware -- no one
22 ever said to me that there was some issue -- yeah, I --

23 Q Okay.

24 A -- I stick with --

25 Q You can't cite any actions that would reflect any

1 ill will on behalf on the County staff?

2 A Ill will? No.

3 Q Okay. All right. Let me show you what was
4 previously marked -- well, it's 88. Eighty --

5 COURT REPORTER: 80?

6 MR. ACHURCH: 88.

7 MR. WALKER: I think Walter may have it.

8 BY MR. ACHURCH:

9 Q Do you know -- do you have it?

10 A What is it?

11 Q Number 88?

12 A No, but what is it?

13 Q It's --

14 THE COURT: Limited warranty deed? That's what I
15 have.

16 BY MR. ACHURCH:

17 Q I have it as a limited warranty deed.

18 A I've got it. Yes, I have it. Thank you, your
19 Honor.

20 Q Okay. And then, I think you identified this
21 earlier. This is a limited warranty deed from Agnes and
22 John Pinckney, to -- who is this to? This is to Road,
23 LLC?

24 A Yes.

25 Q Okay. And is this the deed that is conveying the

1 right-of-way parcel?

2 A Yes, although I believe it's referred to as the
3 road parcel.

4 Q Okay. Well, I was just looking at the description.
5 So, this is actually conveying the road parcel, then,
6 correct?

7 A Yeah, the -- the proposed right-of-way parcel is
8 the --

9 Q So, this is the document conveying the parcel,
10 which -- and the parcel is what?

11 A It's that shown in Plaintiffs' Exhibit 87, and it's
12 that -- that road.

13 Q Okay. Great. And I think Mr. Walker had a picture
14 of it with the red on there. Do you remember that?

15 A Yes.

16 Q Okay. And would you look at Page -- well, at the
17 bottom of the exhibit it has the book and page reference
18 and the recording information.

19 A On, I'm sorry, what page?

20 Q It's the second page. Are you with me?

21 A The bottom of Page 2 of the deed? Yes.

22 Q Right, right. And so, the property conveyed is the
23 road parcel, correct?

24 A That's correct.

25 Q And then, it says -- and then, Mr. Walker walked

1 you through about one, two, three, four paragraphs down.
2 There's a paragraph that starts with:

3 *And also subject to a restriction that*
4 *the property conveyed herein may only be used*
5 *as a right-of-way or other purpose associated*
6 *therewith.*

7 Do you have that? Are you with me on there?

8 A I'm sorry, I'm not, because I was look -- yeah.
9 I'm not trying to be difficult. I really don't --

10 Q I understand. Right here. Okay? Will you just
11 read that paragraph into the record again.

12 A *And also, subject to a restriction that the*
13 *property conveyed herein may only -- may be*
14 *used only as a right-of-way or other purpose*
15 *associated therewith, including but not limited*
16 *to landscaping, parking, drainage, installation*
17 *of utilities, except, however, no gravity sewers,*
18 *or any other purpose necessary and appropriate*
19 *for an entrance area to a private residential*
20 *community.*

21 Q And that says the property conveyed herein,
22 correct?

23 A Correct.

24 Q And the property, that's the whole thing.

25 A That's the proposed right-of-way parcel.

1 Q Okay. That's the right-of-way parcel, or we were
2 calling it the road parcel?

3 A Right. My -- my -- I typically always referred to
4 it as the road parcel. I apologize. But in the plat,
5 it's referred to as proposed right-of-way parcel, and
6 that's what's --

7 Q Okay.

8 A -- that's the term used in the deed.

9 Q And when you talk about the property conveyed,
10 that's the whole property, right?

11 A The property listed in the legal description,
12 that's right.

13 Q Right. So, this restriction on here is for the
14 whole property that's getting conveyed.

15 A Yes.

16 Q Okay. Now, I want you to go up a couple of
17 paragraphs, and it says -- where it says, *this*
18 *conveyance*. Could you read that.

19 A Yes.

20 Q It says:

21 *This conveyance is made subject to all*
22 *easements and restrictions of record and*
23 *otherwise affecting the property.*

24 Do you see that?

25 A Yes.

1 Q Okay. And would you read the next paragraph right
2 below that, and above the paragraph that restricts the
3 entire parcel. What's that paragraph? Let's read it
4 into the record, will you?

5 A And also subject to an easement for vehicular
6 access, ingress and egress, on, over, and
7 across the approximate twenty-foot private
8 road, extending to the north of Pinckney Colony
9 Road, as depicted in the plat referenced
10 above, (Pinckney Colony Road).

11 Q Okay. So, the property conveyed is subject to that
12 easement, right? That twenty-foot private dirt road
13 easement?

14 A Yes.

15 Q Okay. And are there any restrictions there in that
16 paragraph?

17 A Yes. It's an easement for vehicular access,
18 ingress and egress across an approximate twenty-foot
19 private road.

20 Q Any other restrictions in that paragraph?

21 A No.

22 Q All right. And then, again, the one that says
23 restrictions about using it. The other restriction,
24 that's really to the whole property conveyed, right?

25 A I'm sorry, I don't know which one you're referring

1 to.

2 Q The one we just read before, *also subject to a*
3 *restriction the property conveyed herein.*

4 A Yes. That's -- that's the proposed right-of-way
5 parcel.

6 Q Okay. All right.

7 *And the right-of-way parcel above is*
8 *subject to a easement for vehicular access,*
9 *ingress and egress, over and across the*
10 *approximately twenty-foot dirt road, extending*
11 *to the north of Beaufort Colony Road, as*
12 *depicted in the plat referenced above.*

13 Correct?

14 A Yes. Pinckney Colony Road, yes.

15 Q Will you look at Number 81? Do you have that
16 there?

17 A I'm sorry, I know the number. What is it?

18 Q Number 81. I'm sorry, it's an access easement
19 agreement.

20 A Thank you. Yes.

21 Q Okay. And do you see where it says, *grant of*
22 *easement?*

23 A Yes.

24 Q Okay. And it says, *grantor is.* And who is this
25 to, and who is it from?

1 A This is an access easement agreement by and between
2 Road, LLC, and Pinckney Point, LLC. Road being the
3 grantor, and Pinckney Point being the grantee.

4 Q Okay. And would you just read into the record that
5 paragraph, please.

6 A The Paragraph 2, *Grant of Easement*?

7 Q Yes.

8 A *Grantor has granted, bargained, sold, and*
9 *released, and by these presence, does hereby*
10 *grant, bargain, sell, and release unto grantee,*
11 *its successors and assigns, for the benefit of*
12 *grantee's property, a non-exclusive, perpetual*
13 *easement (a) over, on, and across a portion*
14 *of the grantor's property, constituting a*
15 *twenty-foot wide easement in the area*
16 *depicted as the private dirt road, (excluding*
17 *Hayfield Road) on Exhibit C, extending to*
18 *the north of Pinckney Colony Road, which area*
19 *is referred to as the 'easement area' for*
20 *purposes of vehicular and pedestrian ingress*
21 *and egress to and from grantee's property over*
22 *easement area; and (b) over, upon, and across*
23 *the grantor's property for the purposes of*
24 *maintenance and use (but not expansion) of*
25 *currently existing utilities, if any, within*

1 the grantor's property, which shall run with
2 the land and bind the interest of grantor,
3 its successors and assigns.

4 The rights granted herein shall be for
5 the benefit of grantee and for the benefit
6 of any and all other occupants of grantee's
7 property, and for its respective subtenants,
8 licensees, customers, agents, employees,
9 invitees, mortgagees, successors, and assigns.

10 Q Who is that -- what's successors and assigns? Do
11 you know what that means?

12 A Yes. The assigns is someone who gets an
13 assignment. And a successor is someone who's successor
14 -- successor in title.

15 Q Okay. If I get a property from you, I've succeeded
16 you?

17 A You're a successor, yes.

18 Q Successor. Okay. And so, this grant of an
19 easement, just the language of it, says you get a
20 perpetual easement over an A, and then, a B, correct?

21 A Yes.

22 Q All right. And down at the bottom, it says it's
23 for the benefit of any and all other occupants of the
24 grantee's property?

25 A Yes. A talks about the -- the ease -- the access;

1 and B talks about utilities.

2 Q All right.

3 THE COURT: If you all want to stand up for just a
4 quick moment, you are more than welcome to, to stretch.

5 BY MR. ACHURCH:

6 Q You ready?

7 A Yes. Thank you.

8 Q Can you identify that document, what it appears to
9 be?

10 A Yes. This is a limited warranty deed in lieu of
11 foreclosure, dated January 1, 2012 -- excuse me --
12 January 6, 2012; recorded in Book 3,110, at Page 1,680
13 through 1,691, of the Beaufort County Register of Deeds.
14 It's dated December 30, 2011, between Pinckney Point,
15 LLC, and Equity Resource Partners III, LLC.

16 MR. ACHURCH: And your Honor, I would move this
17 into evidence, please.

18 MR. WALKER: I have no objection. I think it's
19 already in.

20 THE COURT: It already is, too, but.

21 MR. ACHURCH: All right. Thank you.

22 THE COURT: Okay?

23 MR. WALKER: What number is this, Defendant's?

24 COURT REPORTER: Should be 22. Let me make sure.

25 THE COURT: Okay.

1 COURT REPORTER: 22.

2 ITEM IDENTIFIED AS LIMITED WARRANTY
3 DEED IN LIEU OF FORECLOSURE, DATED
4 JANUARY 6, 2012; BETWEEN PINCKNEY POINT,
5 LLC, AND EQUITY RESOURCE PARTNERS III,
6 RECORDED IN BOOK 3,110, PAGES 1,680
7 THROUGH 1,691, BEAUFORT COUNTY REGISTRAR
8 OF DEEDS,
9 MARKED DEFENDANT'S EXHIBIT NUMBER 22,
10 ADMITTED AS EVIDENCE.

11 BY MR. ACHURCH:

12 Q Mr. Nester, if you would, just go down to -- go to
13 the page that has the recording information, it's Page
14 Number 1,688.

15 A Yes.

16 Q You with me? And would you just read that, when it
17 says, *together with*. And would you just read that into
18 the record, please.

19 A The entire page?

20 Q No, no. I'm sorry. The --

21 A Because it starts with, *together with*.

22 Q There's another one that says, *together with*, about
23 one -- two-thirds of the way down the page.

24 A After *Parcel 3*?

25 Q. Yes.

1 A *Together, with all rights of grantor in and*
2 *to that certain twenty-foot (20 feet) wide*
3 *easement for access, ingress and egress, in*
4 *favor of grantor, its successors and assigns,*
5 *in Paragraph 3, entitled right-of-way, in*
6 *that certain first amendment to settlement*
7 *agreement, in that certain action entitled*
8 *Beaufort County v. Agnes Pinckney, et al,*
9 *being Case Number 05-CP-07-02337, in the Court*
10 *of Common Pleas, County of Beaufort, State of*
11 *South Carolina, and in any deeds, grants of*
12 *rights-of-way, easement agreements, or any*
13 *other document thereto reflecting grantor's*
14 *right to cross over, through, or under said*
15 *twenty-foot wide easement.*

16 Q Okay. Thank you. That's all for that.
17 Will you mark this.

18 COURT REPORTER: Next defendant's exhibit is 23.

19 BY MR. ACHUCH:

20 Q Mr. Nester, let me see if you can identify -- and I
21 know you didn't prepare it, but if you can identify
22 Defendant's Exhibit 23..

23 A And I didn't prepare the deed that I just --

24 Q I know.

25 A -- the last exhibit, as well.

1 Q I agree with you a hundred percent.

2 A Thank you. This is a limited warranty deed, dated
3 28 May, 2013, between Equity Resources III, as grantor,
4 and Beaufort County as grantee. Recorded on May 28,
5 2013, in the Beaufort County Register of Deeds Office,
6 at Book 3,242; Pages 2,216 through 2,225.

7 Q Okay.

8 MR. ACHURCH: And your Honor, I would move this
9 into evidence.

10 MR. WALKER: No objection.

11 THE COURT: Without objection, it's in evidence.

12 ITEM IDENTIFIED AS LIMITED WARRANTY
13 DEED, DATED MAY 28, 2013, BETWEEN
14 EQUITY RESOURCES III AND BEAUFORT COUNTY,
15 RECORDED IN BOOK 3,242, PAGES 2,216
16 THROUGH 2,225, BEAUFORT COUNTY REGISTRAR
17 OF DEEDS,
18 MARKED DEFENDANT'S EXHIBIT NUMBER 23,
19 ADMITTED AS EVIDENCE.

20 BY MR. ACHURCH:

21 Q And Walter, will you please go to the page
22 recording number 2,224 on that?

23 A Yes.

24 Q And will you -- and this appears to be the same
25 description. Will you read in the *together with*

1 paragraph again, same location on the page. Just read
2 that into the record, please.

3 A Yes. And this page appears to be a copy of the
4 page that I just read from.

5 Q It's exactly the same, isn't it?

6 A I believe so, but I'll read it into the record.

7 Q Okay. Thank you.

8 A *Together, with all rights of grantor to that*
9 *certain twenty-foot wide easement for access,*
10 *ingress and egress, in favor of grantor, its*
11 *successors and assigns, in Paragraph 3,*
12 *entitled right-of-way, in that certain first*
13 *amendment to settlement agreement, in that*
14 *certain action entitled Beaufort County v.*
15 *Agnes Pinckney, et al, being Case Number*
16 *05-CP-07-02337, in the Court of Common Pleas,*
17 *County of Beaufort, State of South Carolina,*
18 *and in any deeds, grants of right-of-way,*
19 *easement agreements, or other document thereto*
20 *reflecting grantor's right to cross over,*
21 *through, or under said twenty-foot wide*
22 *easement.*

23 Q Okay. Thank you. Now, are you aware of any legal
24 restrictions against the County's purchase of the
25 Pinckney Point tract?

1 A I'm not aware of any legal restrictions.

2 Q Okay. At the time Pinckney Point, LLC, purchased
3 the tract property, they were aware of access issues.

4 A At the time that they acquired the property, the
5 County had already filed its declaratory judgment
6 action.

7 Q Okay.

8 A Beaufort County filed its declaratory judgment
9 action in -- in seeking an injunction to have David --
10 or John David Pinckney remove the fenceposts. I believe
11 that was in November of 2005, and Pinckney Point, LLC,
12 acquired the property in the following spring.

13 Q Prior to that time, in October of 2005, were you
14 considering, on behalf of Pinckney Point, LLC, filing
15 your own action against Mr. Pinckney, John David
16 Pinckney?

17 A Well, I don't recall that. I don't recall that.

18 Q Let me show you --

19 COURT REPORTER: Next defendant's exhibit is 24.

20 BY MR. ACHURCH:

21 Q Mr. Nester, let me show you Exhibit Number 24, and
22 ask if you can identify that as emails between you and
23 Mr. -- Attorney Simon Fraser.

24 A Yes, it's a -- it is an email to that effect.

25 Q Okay. And did Mr Fraser also represent Pinckney

1 Point, LLC, at some point?

2 A No. Attorney Fraser represented John and Nancy
3 Pinckney. Their entity was, PPF, Pinckney Point Farms.
4 They sold the Point tract to -- to Pinckney Point, LLC.
5 I think that Mr. John Pinckney was a half-brother to
6 John David Pinckney.

7 Q Okay. All right.

8 MR. ACHURCH: Your Honor, I would move this into
9 evidence.

10 MR. WALKER: No objection.

11 THE COURT: Without objection.

12 ITEM IDENTIFIED AS EMAILS BETWEEN
13 WALTER NESTER AND ATTORNEY SIMON
14 FRASER, DATED OCTOBER 4, 2005,
15 MARKED DEFENDANT'S EXHIBIT NUMBER 24,
16 ADMITTED AS EVIDENCE.

17 BY MR. ACHURCH:

18 Q All right. And Mr. Nester, this email from you to
19 Mr. Fraser, it's dated October 24, 2005?

20 A Yes.

21 Q And you carbon-copied Lee Barnes, Taylor Bush,
22 Lydia Johnston, M.G. Holm, and Steve Carter on that?

23 A And Larry McManus.

24 Q Larry McManus? Okay. And would you read your
25 email to Mr. Fraser into the record, please.

1 A *Simon: Okay. Suggest we discuss in the*
2 *morning. If the County is not going to*
3 *take any action, do we need to send him*
4 *anything (he should have much of it, since*
5 *I met with him a few months ago on this issue)?*
6 *Is it more a matter of filing the action since*
7 *the County will not? As an aside - it is*
8 *pathetic that the County can get the information*
9 *submitted to the DRT on this matter to Dot*
10 *Gnann and her group, but they cannot get it*
11 *to their own attorney.*

12 Q And what was Mr. Fraser's response to your email?

13 A *Robert seemed agreeable to filing an action*
14 *if the information justified him doing so.*
15 *Yes, I think we should give him whatever we*
16 *have to at least get him on our side. Give*
17 *me a call this morning.*

18 Q Okay. So, in this email, you have conversations
19 and discussions about the possibility of taking some
20 action over the access road, correct?

21 A This is a two-page email. I don't know what the
22 other -- I don't know what -- I don't know what I was
23 responding to. I was responding to something.

24 Q Okay. It says, if you wrote -- it's more -- is it
25 more a matter of filing the action, since the County

1 will not. Do you recall what action you were going to
2 file?

3 A No. No, I -- I don't recall.

4 Q Okay.

5 A And Page 2 might help, but I -- because, again, I'm
6 responding to something.

7 Q Okay. I don't -- okay. Filing an action, that
8 means a lawsuit, right?

9 A That's -- that's the general -- yes. Generally,
10 that's a true statement.

11 Q Okay.

12 A I don't know who I'm talking about, though, when
13 I'm talking about filing an action.

14 Q Okay.

15 A I mean, I don't have any context for that.

16 Q Well, if you were copying Lee Barnes and -- Taylor
17 Bush was with Stokes Land Company, correct?

18 A These were all -- these were all parties. These,
19 were all Pinckney Point folks, Lee Barnes, Taylor Bush,
20 Lydia Johnston. Sadly, she's deceased. Ms. Holm was
21 with Stokes Land Company. I don't know if she still is.
22 Larry McManus was the real estate agent for John and
23 Nancy Pinckney. I believe he was also their son-in-law.
24 Steve Carter was an attorney who worked with our firm at
25 this time.

1 Q Okay. And Taylor Bush was always your contact for
2 Pinckney Point, LLC, correct?

3 A He was a primary contact, yes.

4 BY THE COURT:

5 THE COURT: Mr. Achurch, how much more time do we
6 have with Mr. Nester?

7 MR. ACHURCH: Probably -- this would probably be a
8 good time to break, Judge. Maybe thirty minutes.

9 THE COURT: Okay. So, now might be a good time?

10 MR. ACHURCH: I apologize to the Court. It's just,
11 they went through a lot, so. And to the jury.

12 THE COURT: Mr. Nester, are you okay time-wise? I
13 know that you would probably like to get on, but.

14 A Yes, your Honor.

15 THE COURT: If it's all right with you.

16 A Yes, ma'am.

17 THE COURT: Okay. All right.

18 Ladies and gentlemen, everyone seems to be sinking
19 in their seats. Again, do not discuss this case. It
20 wouldn't be appropriate to do so. Don't do any
21 independent research. Go get a bite to eat.

22 Ladies and gentlemen, I know we're trying to move
23 this along. Would you be amenable to being back at 2:00
24 o'clock? Is that okay? Gives you -- it's a little less
25 time than we normally have, but let's go get a bite to

1 eat. Let's get back here and keep going. All right? I
2 appreciate it. Thank you.

3 JURORS LEAVE COURTROOM 12:54 P.M.

4 BAILIFF: Jury is clear, your Honor.

5 THE COURT: Thank you. Everyone, I knew we were in
6 trouble when the only person that's here voluntarily,
7 Mr. McAdden, was starting to close his eyes. I knew I
8 was in trouble.

9 MR. ACHURCH: I'm sorry, your Honor.

10 THE COURT: He's the only one that doesn't have to
11 be here.

12 THE COURT: So, with that said, you all, is
13 everyone okay to take a lunch break? You all need to
14 watch, this gentleman back here is -- keeps falling.
15 And my one over here can't stop yawning, so.

16 MR. ACHURCH: I'll try not to take --

17 THE COURT: Try to get more lively. I don't know
18 what to tell you all. This is tough.

19 MR. ACHURCH: I'm blaming it on Walter.

20 THE COURT: Listen, you're reading deeds into the
21 record. That's rough by any stretch. So, with that
22 said, you all, we'll go ahead and take roughly an hour.
23 If you all will come back. Maybe when we get back Mary,
24 do you want to go through -- can we go through the --

25 MS. LOHR: And I promise that, that one won't take

1 nearly as long.

2 THE COURT: Okay. Okay.

3 MS. MONOC: If you want to tell me what they are,
4 we might be able agree on things.

5 MS. LOHR: That's fine.

6 THE COURT: Why don't you all try to agree to them
7 first.

8 MS. MONOC: Yeah.

9 THE COURT: And then, I'll do whatever. I'll come
10 back about ten minutes 'til. Okay?

11 MS. MONOC: Sounds good.

12 THE COURT: All right. Thank you. You all have a
13 good lunch.

14 MR. WALKER: Thank you.

15 A I tried to help by saying that this is a copy.

16 THE COURT: I know, but they made you read it into
17 the record anyway. All right.

18 OFF THE RECORD 12:55 P.M.

19 END AUDIO 802-1644 BEGIN AUDIO 802-1645

20 BACK ON THE RECORD 2:27 P.M.

21 BAILIFF: Ready, your Honor?

22 THE COURT: Yes, sir. Thank you.

23 BAILIFF: Jury's entering the courtroom, your
24 Honor.

25 MR. ACHURCH: Your Honor. I've worked to try to

1 pare this down so we can finish as quickly as we can.

2 WALTER J. NESTER III, CONTINUE

3 CROSS-EXAMINATION, BY MR. ACHURCH:

4 Q Are you ready, Mr. Nester?

5 A Yes, sir.

6 Q Is it true that one of the grounds upon which
7 Pinckney Point, LLC, alleged that Beaufort County had an
8 easement over that dirt road was that it was an easement
9 by dedication?

10 A You -- you said Pinckney Point alleged?

11 Q Yeah. Well, did Pinckney Point contend that
12 Beaufort County had an easement over that road by
13 dedication?

14 A Yes.

15 Q What is dedication?

16 A Well, there are a number of different ways that a
17 municipality can take title to private property and
18 rendering it public property. So, there is an actual
19 dedication whereby a private property owner, such as a
20 developer and a real estate development would give the
21 government a deed, here's a deed to the road.

22 Q Right.

23 A So, that's an actual dedication. Implied
24 dedication is a common law theory that's case-made law,
25 whereby cases over the years have established that

1 certain criteria take place, and if that criteria is
2 met, then, it's implied that, that property has been
3 dedicated to the public.

4 Q All right. So, sometimes the owner can be deemed
5 to have dedicated it when they didn't want to.

6 A I -- I guess that's a factual condition that can
7 occur.

8 Q I mean, that's -- okay. And when you get a -- when
9 you prepare the deeds for the road parcel into Road,
10 LLC, you would have made every effort to make sure that
11 there wasn't -- it couldn't be construed as a
12 dedication, correct?

13 A I believe it -- I believe that either the deed or
14 the settlement agreement talks about there not being a
15 dedication.

16 Q Okay. And you mentioned -- I'm just going back
17 through this. You mentioned when you went to the Public
18 Services Committee and asked for permission to change
19 the road, that's a County committee, right?

20 A The Public Services Committee is a subcommittee of
21 Beaufort County Council, yes.

22 Q Okay. When that was deferred, you would agree that
23 the road action was still ongoing. Ownership of the
24 road had not been determined, correct?

25 A That's my -- that's my understanding of the time

1 line, yes.

2 Q You mentioned that the letter, this Defendant's
3 Exhibit -- Plaintiffs' Exhibit Number 32, do you still
4 have it?

5 A I do not.

6 Q Let me ask. That was the letter you wrote to Josh
7 Gruber referencing your conversation with Mr. Gruber and
8 explaining that your position was that -- you talked
9 about the settlement, and you were encouraging the
10 County not to purchase the Pinckney Point tract. Do you
11 remember that?

12 A The summary of my meeting with Mr. Gruber, that's
13 correct.

14 Q Right. Let me show you -- I've already --

15 COURT REPORTER: Next Defendant's is 25.

16 MR. ACHURCH: Thank you.

17 BY MR ACHURCH:

18 Q Let me show you what's been marked as Defendant's
19 Exhibit Number 25. And that is a copy of a letter from
20 me to you dated April 23, 2013, indicating that I didn't
21 -- that your letter wasn't necessarily a memorialization
22 of our meeting, but more your opinion as to the
23 construction of the documents, and that we respectfully
24 would disagree with your interpretation. Do you
25 remember receiving that letter?

1 A I do not.

2 Q And I will say, it's not signed, because I copied
3 it off of our computer. Only the people that got it
4 would have received the signed copy. Do you remember
5 receiving that letter?

6 A No, and I -- and I -- we discussed it before, and
7 I'm sorry, I don't.

8 Q Okay.

9 A that's the only reason why I answer that quickly,
10 because I don't recall receiving this.

11 Q Okay. Do you see it was carbon copied to Josh
12 Gruber?

13 A I do. I'm not saying that it wasn't sent. I just
14 don't recall receiving it.

15 Q I appreciate that, and that's fine. We're going to
16 call Mr. Gruber, so we'll ask him.

17 In the time you wrote that letter in April, saying
18 the County shouldn't buy the Pinckney Point tract, to
19 your knowledge, the option agreement had expired,
20 correct?

21 A Well, two things. I'm not certain that my letter
22 -- my summary letter, I prefer that it speak for itself.
23 I don't want to keep on saying what that letter said.

24 Q Okay.

25 A So, I'd rather have that letter speak for itself.

1 Q And I'm going to ask you about the content of it.
2 I'm just saying that, on that day in April, you would
3 agree that the option expired, the option agreement had
4 already expired by about a month and a half.

5 A Yes. Well, it had expired. I don't know if it was
6 a month and a half. The calendar would know.

7 Q Would it be in April? You wrote it between then
8 and February 28, 2013. We can agree on that.

9 A Yes.

10 Q Okay.

11 COURT REPORTER: Defendant's Exhibit 26.

12 MR. WALKER: I'm sorry. I missed -- 25 was?

13 THE COURT: It was not admitted.

14 MR. WALKER: Okay.

15 MR. ACHURCH: 25 was not admitted.

16 COURT REPORTER: Oh, no.

17 THE COURT: 25 was not admitted.

18 COURT REPORTER: The next one is 26.

19 THE COURT: Yes.

20 BY MR ACHURCH:

21 Q And Mr. Nester, let me show you what's been marked
22 Defendant's Exhibit number 26. And is that a copy of a
23 letter from you to Roberts Vaux and Tom Holloway?

24 A It's an email.

25 Q Okay.

1 A I'm sorry.

2 Q Email dated May 26, 2009?

3 A Yes.

4 MR. ACHURCH: Okay. We'd move this into evidence,
5 your Honor.

6 THE COURT: Any objection?

7 MR. WALKER: No objection.

8 THE COURT: Without objection.

9 ITEM IDENTIFIED AS EMAIL FROM WALTER
10 NESTER TO ROBERTS VAUX AND TOM
11 HOLLOWAY, DATED MAY 26, 2009,
12 MARKED DEFENDANT'S EXHIBIT NUMBER 26,
13 ADMITTED AS EVIDENCE.

14 BY MR ACHURCH:

15 Q And Mr. Nester, let me get you to look in there in
16 the mid-way down the first paragraph, and it starts --
17 there's a sentence that starts off with, *it's important*
18 *to note*. And would you just read that sentence into the
19 record, please.

20 A I'm sorry. Please -- and this is a --

21 Q No problem.

22 A This is a -- this is a two-page email. But there's
23 only one. I'm sorry.

24 Q Well, it ends with *best regards*.

25 A Yeah, that's my sig -- that's me saying goodbye. ^

1 Q Okay.

2 A I just don't know what's on the other -- I don't
3 know if it's in response.

4 Q Well, these -- and these came from your records,
5 right?

6 A Um-hmm. Yes.

7 Q Okay. And what I want to ask you to do is just
8 read into the record here, it is important to note. If
9 you'll read that to the end of that paragraph.

10 A *It is important to note that our clients'*
11 *lender has not been willing to fund any*
12 *additional monies since 2007, and all*
13 *interest and soft costs has come directly*
14 *from our client and not their lender. The*
15 *only source for cash now would be a*
16 *development loan.*

17 *I may have indicated on our call that*
18 *the existing lender will not provide*
19 *additional cash without requiring*
20 *substantial additional collateral. I*
21 *have learned that statement was not*
22 *precise; that the fact is the existing*
23 *lender will not provide additional cash*
24 *under any circumstance. There is no*
25 *ability to draw down on the existing loan.*

1 It must be by way of a new development loan,
2 and our client has continued to stress that
3 they simply do not have the cash available
4 (a point I anticipate we all appreciate given
5 the current economic and lending climate).

6 Q Thank you. And would you agree that, in July of
7 2012, the conceptual plan approval was extended by the
8 Beaufort County DRT for an additional year?

9 A The conditional approval of the conceptual site
10 plan was extended for a year at our -- at the
11 applicant's request.

12 Q Okay. So, it was applied for, and the County
13 agreed to extend that additional approval for an
14 additional year.

15 A Yes.

16 Q All right. And you represent developers for a
17 living, pretty much?

18 A I represent real estate developers as a part of my
19 practice, yes.

20 Q Okay. And you testified to it earlier, so I'm
21 going to ask this opinion. What you would consider is,
22 is that construction of 74 homes and 53 boat slips on
23 that property is a more environmentally sensitive use of
24 the property than just preserving it.

25 A The property is currently -- doesn't have any --

1 very little vegetation. It's got five outfalls that
2 drain --

3 Q Well, you -- I'm sorry. You need to -- you need to
4 answer it, and then, you can explain it.

5 A Okay. I believe that it is -- that the development
6 of the property as proposed by the applicant, by my
7 client, is more environmentally sensitive than the way
8 the property exists today.

9 MR. ACHURCH: Okay. All right. Thank you. That's
10 all the questions I have. Thank you very much.

11 THE COURT: Okay.

12 WALTER J. NESTER III

13 RE-DIRECT EXAMINATION, BY MR. WALKER:

14 Q Mr. Nester, you were asked after lunch a question
15 about what dedication was, and was the road dedicated,
16 the contentions in the case, and I think you referred to
17 the settlement agreement; that there might be a
18 reference to that in the settlement agreement?

19 A Yes.

20 Q All right. Could we have Exhibit 78 on the screen,
21 please. And if you go to the third page. I think I can
22 help you get to the provision you may have been thinking
23 about.

24 And in this paragraph that you see, which is on
25 Page 2 above *Conveyances and Easements*, if you go down

1 about four lines, you see where it starts *further*.

2 A Yes.

3 Q You can take a second and take a look at it, and
4 let us know if that's the language that you were
5 thinking of.

6 A Yes, that's it.

7 Q All right. Why don't you go over it with us. Read
8 it, please.

9 THE COURT: Do you want my copy, or are you okay?

10 A No, ma'am. I can see it. Thank you.

11 *Further, that the parties hereto agree*
12 *that, notwithstanding any claim, allegation,*
13 *submission of testimony in either the road*
14 *action or the variance action, nor any*
15 *hearing or meeting related thereto, there is*
16 *no, nor has there been, any dedication of, or*
17 *intent to dedicate to the County the roadway*
18 *that is the subject of the actions.*

19 Q Now, what is the effect of that in terms of if
20 there's any dedication or not?

21 A That answers the question that there isn't any --
22 that there is no dedication.

23 Q And if we could go to the next page, please. And
24 this relates to some questions you were asked about the
25 County's agreements and Agnes Pinckney. If you would go

1 up to mid-way of the first paragraph. outside of the
2 provision where the road action is settled. And I'd ask
3 you if you would read for us the sentence starting right
4 there with *Beaufort County*. It's the second sentence.
5 And right on to the third sentence.

6 A *Beaufort County agrees that said right-of-way*
7 *provides sufficient access to and from the*
8 *Point tract for the development thereof in*
9 *accordance with the Beaufort County Zoning and*
10 *Development Standards Ordinance. PPLLC agrees*
11 *that such right-of-way is required for the*
12 *development of the Point tract as contemplated*
13 *herein.*

14 MR. WALKER: All right. That's all we have in re-
15 direct, your Honor.

16 THE COURT: Nothing further?

17 MR. ACHURCH: No, your Honor.

18 THE COURT: Sir, you're excused. Thank you.

19 A Thank you, your Honor.

20 THE COURT: Call your next witness.

21 MR. WALKER: Thomas Hartnett.

22 THE COURT: Come on forward, sir.

23 MADAM CLERK: Do you solemnly swear or affirm the
24 testimony you give to the Court in this case shall be
25 the truth, so help you God?

1 THOMAS HARTNETT: I do.

2 MADAM CLERK: You may be seated.

3 THOMAS HARTNETT: Thank you.

4 THOMAS HARTNETT

5 DIRECT EXAMINATION, BY MR. WALKER:

6 Q Mr. Hartnett. Mr. Hartnett, where did you start
7 your day today? Where do you live?

8 A I live on the Isle of Palms, in Charleston County.

9 Q What is your profession?

10 A I'm a professional real estate broker and real
11 estate appraiser.

12 Q Do you hold any licenses with respect to being a
13 real estate broker and/or appraiser?

14 A Yes, sir, I do. I hold a real estate broker's
15 license, and I hold what they call a certified -- a
16 certified appraiser's license, which is the highest
17 appraisal license you can have in -- in the state and in
18 the country.

19 STIPULATION THAT THOMAS HARTNETT

20 IS AN EXPERT APPRAISER.

21 MR. ACHURCH: Your Honor, I'll stipulate Mr.
22 Hartnett's an expert appraiser.

23 THE COURT: Okay.

24 MR. WALKER: I would like to get out some of his
25 qualifications.

1 THE COURT: Absolutely. Ladies and gentlemen, I
2 will just tell you, what that allows, Mr. Hartnett is
3 being designated as an expert in real estate appraisal.
4 That allows him to give his opinion and the reasons for
5 his opinion. And that's for you to use as you see
6 appropriate and as compared to the other evidence in the
7 case.

8 BY MR. WALKER:

9 Q How many years have you been appraising property?

10 A Fifty years.

11 Q Have you appeared in court before as a witness,
12 like you're appearing in court here?

13 A Yes, sir, I have.

14 Q And have you been qualified as an expert in federal
15 court?

16 A Yes, sir, I have.

17 Q In state court?

18 A Yes, sir.

19 Q Have you also, in addition to being an appraiser
20 and a real estate broker, done other things in the
21 public realm?

22 A Yes, sir, I have.

23 Q Would you tell us about those.

24 A Yes, sir. As a very young man, in 1964, -- excuse
25 me -- I was elected to the South Carolina House of

1 Representatives. Probably the youngest member ever
2 elected at that time. And in 19 -- I served there eight
3 years.

4 Q All right.

5 A And in 1972, I was elected to the South Carolina
6 State Senate, where I served for eight years. And then,
7 in 1980, I was elected to the United States Congress,
8 from the first congressional district of South Carolina,
9 which included, at that time, Beaufort County,
10 Charleston, Colleton, Hampton, Jasper, Dorchester,
11 Berkeley, and I think that's it.

12 Q In your work as a consultant, do you testify only
13 for property owners or only for government or only for
14 anybody?

15 A No, sir. It's whoever calls me and hires me to --
16 to work with them. Sometimes it's property owners.
17 Sometimes it's a condemning authority like a county or a
18 state or a city or a utility company. Certain
19 companies, utility companies, have a right to take your
20 property, just like the city, county, state, or other
21 governmental organization does, but they have to pay you
22 for it. So, I testify in cases like that.

23 Q Have you ever been engaged by Beaufort County?

24 A Yes, sir, I have.

25 Q Have you been engaged by my firm in other cases

1 where we've hired you to serve as a consultant --

2 A Yes, I have.

3 Q -- and give us an opinion on value? How about Mr.
4 Achurch's firm?

5 A Yes, sir, I have. In fact, I think I did Mr.
6 Achurch's office building some years ago when the
7 Highway Department was taking -- or widening 21 over on
8 Lady's Island, I believe.

9 Q Have you testified in this courthouse before?

10 A I have, yes, sir.

11 Q Were you asked by me to render an opinion of the
12 value on what's been referred to as the road parcel, the
13 .85 acre?

14 A Yes, sir, I was.

15 Q Were you provided certain information about the
16 road parcel?

17 A Yes, sir, I was.

18 Q And just to make sure everybody is aware of it, I
19 know they've seen this countless times, if I can get
20 this right, would that be this red, marked parcel that
21 was subject to that survey we heard about this morning?

22 A I think that's a fair depiction of it, yes, sir.

23 Q Who is the owner of that land now?

24 A It's a corporation, or limited liability company,
25 named Road, LLC.

1 Q Did you believe you had sufficient information to
2 arrive at an opinion of value?

3 A I think I did, yes, sir.

4 Q Did you come to an opinion of the value of the
5 Road, LLC, parcel?

6 A I did.

7 Q And what was your opinion?

8 A That it was worth at least five million dollars.

9 Q And what is that based on?

10 A Several things. First of all, that was agreed to
11 by Road, LLC, and Pinckney Point, LLC, because they had
12 to have it to develop the property. My understanding of
13 most governmental agencies, you have to have adequate
14 right of way to any subdivision that's going to have
15 numerous houses in it. You have to have it wide enough
16 for emergency vehicles to come and go, for automobiles
17 to pass, trucks to pass.

18 And my understanding is that Beaufort County
19 requires 50 feet for any legal access to a subdivision
20 like Pinckney Point. Pinckney Point needed it. Road
21 bought it in a settlement, with several residents of
22 Beaufort County. I'm not sure how that settlement was
23 reached, but it was reached. I'm not sure whether they
24 wanted more for it, or whether they would have accepted
25 less for it, but they accepted 1.3 million dollars.

1 That told you it was worth at least 1.3 million dollars
2 to someone.

3 In an agreement that Road had with -- Road, LLC,
4 had with the developers of Pinckney Point, it referenced
5 the fact that they would pay, that Pinckney Point would
6 pay Road, LLC, five million dollars for the right-of-way
7 to come and go to Pinckney Point.

8 If you haven't seen it, Pinckney Point is probably
9 as attractive sight as there is in all of Beaufort
10 County, and maybe all of the Lowcountry of South
11 Carolina. It's a very unique property to find that many
12 acres with that much waterfront frontage that's
13 undeveloped. There's a house on it, but it's basically
14 undeveloped.

15 Q And I just pause there for a second. Were you
16 familiar with the Point parcel that is part of this
17 case, as well, before I asked you to become a consultant
18 in this case?

19 A Yes, sir. I think some time in 2005-2006, a lady
20 lawyer in Charleston, her name is Sue Teschner, called
21 me. And said she represented Mr. and Mrs. Pinckney, who
22 were preparing their wills, or they're trying to get
23 their estate together, so that, when they passed way,
24 they could be -- pay as less taxes as they needed to
25 pay, I guess.

1 She needed an appraisal for estate planning
2 purposes. So, she called me. And I came down and met
3 with Mr. and Mrs. Pinckney. And Mr. Pinckney toured the
4 -- I toured the property with Mr. Pinckney. So, and I
5 did an appraisal of it then for the Pinckney's and for
6 their attorney, a tax lawyer, Mrs. Teschner, in
7 Charleston.

8 Q I just wanted you to get out that you knew this
9 property and this area before you had this assignment.

10 A Correct.

11 Q And continue on before I interrupted you.

12 A No, that was really it. I mean, I spent some time
13 there, and I've been back once since then. So, I'm
14 familiar with the property enough to know that it's
15 beautiful. You've probably seen the aerial photos of
16 it, or maybe plats of it. It's a beautiful piece of
17 property. And that's -- that's -- that has to do with
18 my familiarity with it. I knew --

19 Q Sure.

20 A -- the principals involved. I knew Mrs. Gnann. I
21 knew -- I had met Ms. Agnes -- I think her name's Agnes
22 Pinckney. So, I had met the people involved it in, and
23 had seen the property before.

24 Q How is it that this piece of property, this strip
25 of undeveloped land, the dirt tract, how can that be

1 worth that much money? How do you come up with that
2 figure?

3 A Well, let me answer the first question first, how
4 could it be worth that much money, and how I came -- and
5 second, how I came up with that figure. Everybody knows
6 a lot about real estate, but you've always heard
7 somebody say, well, the most of it, there's three things
8 important about real estate: location, location,
9 location. And that's true, but even more important than
10 that is highest and best use, highest and best use,
11 highest and best use.

12 And I say for an example, if one of you were maybe
13 a farmer, you owned a piece of property in the middle of
14 Allendale County, and you thought it would be a good
15 site for a Burgher King. Problem is, if there's no
16 major road there, no traffic going by, not many people
17 living in the area. So, the highest and best use was
18 not for Burgher King. Now, if they put crossroads out
19 there and had the interstate highway on that same
20 property ten years later, then, all of a sudden, it
21 might be. The property didn't move, but things have
22 changed around it. So, the highest and best use is what
23 brings the highest net return in terms of dollars to the
24 land, which is what makes it valuable.

25 This piece of property is a little bit less than an

1 acre. It's eighty-five hundreds of an acre. It's very
2 small, I guess, by standards. Not even one acre. But
3 it is the -- it is the bridge to, it is the key to the
4 lock, it is the front door of an incredibly beautiful
5 piece of property that, according to all preformers I
6 had seen, was going to be worth a lot of money when it
7 was developed.

8 So, I know if I -- and I can't put myself in the
9 minds of the jurors. But if I owned that piece of
10 property, and I knew that the people who wanted to buy
11 the property or who were buying the property to --
12 which, you had to pass my property for access, you could
13 get anything you wanted to get for it, I assume. I
14 mean, either that, or you would stifle the development.
15 Because, without that, it was my understanding they
16 really could not do the development as it was proposed
17 with the number of houses they had.

18 I came up with the number for several reasons.
19 There was a meeting of the minds between Road, LLC, and
20 Pinckney Point, LLC, that they would pay that much money
21 based on the preformer that I saw projected on the
22 screen and heard Mr. Kunkel testify that they were
23 considering that five million dollars as part of their
24 development cost or infrastructure cost, like you would
25 for roads and curbs and gutters and water and sewer and

1 street lights and whatever. That was the second thing.

2 Also, in the original contract between the Pinckney
3 family and I think Barnes and somebody else, --

4 Q That's correct. And that would have been in 2005.

5 A I don't -- I don't know the date.

6 Q Yeah.

7 A There somewhere in there that they agreed, that, if
8 the contract was not closed; that, if they didn't buy
9 the property by a certain date in March of 2006, I think
10 it was, that the price would go from fifteen [sic]
11 million to ten million. Five million dollars,
12 indicating it was worth -- somebody thought it was worth
13 at least five million dollars.

14 Q And was that an adjustment based on the access?

15 A I'm sorry, Mr. Walker?

16 Q Was that an adjustment based on the dispute over
17 this access?

18 A I assume it was. I -- I don't know that for sure,
19 Mr. Walker. But they were willing to pay that. And as
20 I said, if I owned that piece of land, and I knew that
21 you wanted it, and were buying it to build a subdivision
22 that was going to produce 55 or 56 million dollars of
23 gross sales in real estate lots, I sure would want five
24 million dollars. May have paid more for it. I'm not
25 sure. They certainly weren't being told they had to pay

1 less for it. They -- they volunteered to pay the five
2 million dollars that I assumed Road wanted for it.

3 So, you had a highest and best use now of -- of
4 that road being accessed to a proposed residential
5 development. That became the highest and best use. So,
6 it was no longer just a piece of dirt that somebody
7 could build a house or two on. That was no longer the
8 highest and best use. The highest and best use now was
9 this -- the entryway to -- and I put it this way. And I
10 was asked did I appraise it as a whole.

11 Q What do you mean by a whole?

12 A Well, did I include -- appraise that separately
13 from the entire tract.

14 Q The Point property.

15 A I did, because I was not asked to appraise the
16 entire tract, but it is part and parcel of that tract.
17 It would be like appraising your house and not
18 appraising the front steps. If you've ever seen a
19 mobile home out in the rural areas, sometimes they have
20 these concrete steps that they put so you can go to the
21 mobile home. Although they're not part of the mobile
22 home, if you take it away, and those were the only
23 concrete steps on the planet to get into your mobile
24 home, makes those concrete steps pretty valuable, and
25 they become part of your home. Because, if you can't

1 get into your home, your home doesn't have any value, or
2 very little.

3 Now, you can move a mobile home, but you couldn't
4 move Pinckney Point. The only way you can get into
5 Pinckney Point was up those concrete steps, like you get
6 into that mobile home. So, it had to be considered in
7 the overall value of Pinckney Point. And as I just
8 said, they included it in their development cost. They
9 expected it to be part of the cost of developing
10 Pinckney Point.

11 MR. WALKER: That's all I have at this time, your
12 Honor.

13 THE COURT: Okay. Mr. Achurch.

14 THOMAS HARTNETT

15 CROSS-EXAMINATION, BY MR. ACHURCH:

16 Q Good afternoon, Mr. Hartnett.

17 A Mr. Achurch, good afternoon to you, sir.

18 Q How are you today?

19 A Good to see you, sir.

20 Q All right. Ms. Pinckney must not have got enough
21 money for that property.

22 A You know, I don't know why she did settle for that,
23 because I think she could have gotten a lot more, but
24 maybe she already had a lot of money.

25 Q Maybe she did. And you believe that property is

1 still worth five million dollars today, as we sit here
2 today.

3 A Yes, sir, I do believe it, and I'll tell you --
4 I'll tell you why I believe that. My answer is yes, and
5 I'll tell you why. Because at some point in time, --
6 now, I understand that Beaufort County has bought the
7 property, but it's a private road, based on documents
8 that I've seen and the discussion that I've heard here
9 today.

10 Q Wait. You are a legal expert -- an appraisal
11 expert, right?

12 A Correct.

13 Q Do you agree with that? Now, you're not a legal
14 expert.

15 A That's correct.

16 Q Okay. Go ahead and tell me why. Sorry to
17 interrupt.

18 A But what I'm telling you, I'm not saying what --
19 I'm not saying what they meant, but I'm just saying what
20 it said in the judge's order, that it would be a private
21 road.

22 Q Okay. Fair enough.

23 A I'm not saying that's what it meant, but that's
24 what it said.

25 So, whoever wants to get to Pinckney Point has to

1 cross a private road. And if Pinckney Point, LLC,
2 doesn't buy it, -- now, Beaufort County has. I didn't
3 factor in the factor they can take with eminent domain
4 if they want to. But whoever wants to use Pinckney
5 Point has to cross over what I read said was a private
6 road.

7 Q Okay.

8 A And I assume if it's a private road, they can close
9 off access to Pinckney Point, which makes a beautiful
10 tract of land inaccessible, legally inaccessible.

11 Q And you don't know about what easements that exist
12 or don't exist, any of that, correct?

13 A No. I think there was a 20-foot easement that
14 existed before that.

15 Q Okay.

16 A But I think that's been incorporated into what now
17 is the --

18 MR. ACHURCH: Your Honor, I'm going to object to
19 him telling me what he thinks about easements being
20 incorporated.

21 THE COURT: Okay.

22 MR. WALKER: He was just responding to what the
23 question was.

24 THE COURT: You opened it.

25 MR. ACHURCH: I just asked him if he was a legal

1 expert, and I agree that the road says it's a private
2 road. And he's talking about mergers and things like
3 that. So, all right.

4 BY MR ACHURCH:

5 Q So, you assume it's a private road, correct?

6 A I do, yes, sir.

7 Q All right. Very good. And your appraisal assumes
8 these properties should be together, correct?

9 A Yes, sir, they should.

10 Q And but they're not together, correct? They're not
11 owned by the same people.

12 A No, sir, they're not.

13 Q Do you know why Pinckney -- why Road, LLC, bought
14 the property instead of Pinckney Point?

15 A Again, I'm going to have to interpret what I read
16 or what I've heard. And I understood that the lenders
17 who had loaned the money to Pinckney Point, LLC, to
18 purchase the property, were unwilling to put anymore
19 money into the project, and the road had not been
20 settled. It was still the dispute of the road. And
21 they were in a contract to buy this property, and all of
22 a sudden, there was a dispute on how you get there. So,
23 they needed to buy the property, but they didn't have
24 the money.

25 And I understand that Mr. Kunkel, or whoever the

1 developers were, found an investor who was willing to
2 pay the settlement price. Whether they knew what the
3 settlement price was going to be at the time, or whether
4 they just agreed to pay the settlement. But they --
5 they couldn't get anymore money to do what they were
6 doing to the property.

7 Q Okay. And you're talking to Mr. Kunkel trying to
8 help develop your opinions about value, correct?

9 A I did talk to Mr. Kunkel, yes, sir, while I was
10 doing my work.

11 Q That's what Mr. Kunkel told you?

12 A No, I think that's what I learned from Mr. Walker
13 when he was telling me about the case.

14 Q All right. Did Mr. Kunkel tell you that it was
15 purchased in the name of Road, LLC, because they didn't
16 want the bank to have that under their collateral?

17 A No, sir, he didn't tell me that.

18 Q Okay. And all right. And at the time Road, LLC,
19 agreed to buy from Pinckney Point, LLC, they knew
20 Pinckney Point, LLC, just paid 1.2 three million dollars
21 for it, right?

22 A Correct.

23 Q And Road, LLC, is going to get them a triple,
24 triple, return on their investment, right?

25 A Correct.

1 Q And that would -- would you agree that the return
2 somebody expects is reflective of the risk they're
3 taking?

4 A Correct.

5 Q Okay. So, that would be -- that would be
6 reflective of some amount of risk, then, wouldn't it?

7 A I would think so, yes, sir.

8 Q All right. And let me ask something, because I
9 forgot to get to this part. But you are -- you're being
10 paid for your time here today?

11 A Yes, sir, I am.

12 Q All right. And you got paid to do your appraisal?

13 A I did.

14 Q And you told me your fee is going to be somewhere
15 between 2,500 and \$5,000.00? You were kind of trying to
16 feel that out. Have you made a decision on how much
17 you're going to charge?

18 A Yes, sir. Including everything, I think it was
19 \$6,600.00. The fee was 4,500. And the other things
20 were deposition with you and other things at the time it
21 was taken. But it was \$6,000.00. \$6,600.00.

22 Q And part of the -- I think you said earlier, part
23 of the reason you came up with your value was that Ms.
24 -- the Pinckney's, who sold the property -- there are
25 several Pinckney's around there --

1 A Yeah.

2 Q -- the Pinckney's who sold the property to Pinckney
3 Point, they had to reduce their purchase price by five
4 million dollars because of the road access issue.

5 A Again, I'm not going to try to interpret what it
6 said, but there was a paragraph in the agreement to buy
7 between the Pinckney's and Bush, et al, that it would be
8 a reduction of five million dollars in the price if
9 legal access couldn't have been obtained by, I think it
10 was March the 1st, 2006 or something like that.

11 Q Okay. So, it was reduced because of access issue.

12 A That was my understanding from reading what it
13 said.

14 Q Okay. And the other part about one of the ways you
15 supported your number was that there was a contract
16 between Road, LLC, and Pinckney Point. That was to be
17 able to buy it back for \$5,000.00 [sic].

18 A Five million dollars, yes, sir.

19 Q Five million.

20 A Yes, sir.

21 Q I'm sorry. Five million dollars. All right. And
22 now, when you did your appraisal, that contract had
23 expired, hadn't it?

24 A That's correct, it had.

25 Q Okay. And do you know what the punishment was to

1 Pinckney Point, LLC, if they didn't buy the property
2 from Road, LLC?

3 A Do I know what the punishment?

4 Q Yeah, in the contract that you relied on, do you
5 know how much it was going to cost Pinckney Point, LLC,
6 if they didn't buy it?

7 A No, sir, I don't.

8 Q Okay. And there are many -- and you were asked --
9 you were asked to assume, when you valued the property,
10 that this will be used for it's highest and best use,
11 correct?

12 A Well, an appraiser, that's part of our job. We
13 have to determine what is the highest and best use for a
14 piece of property.

15 Q Okay.

16 A And I had determined that -- I think in my
17 deposition you asked me did Mr. Walker asked me to
18 assume that, and I went back and said, no, he did not
19 ask me to assume that. What he asked me to do was to
20 give him my opinion of the value of that property.

21 First paragraph of my letter to him -- and I just
22 read my deposition while you were cross-examining
23 Walter, and I think I said, now, wait a minute, let me
24 go back. Mr. Achurch, that's not what I was told to
25 assume; that's what I determined on my own, that, that

1 was the -- anybody could determine that. I mean, you
2 don't have to be an appraiser to determine the highest
3 and best use of that road, because it gets you to
4 Pinckney Point. You know.

5 Q Okay. And -- and okay. And the highest and best
6 use. I think you told me in your deposition, that's
7 always -- you need to have a demand for it, as well.

8 A That's correct.

9 Q All right. Now, there are a number of reasons why
10 developments don't make it, aren't there?

11 A Yes, sir, there is.

12 Q And many developments fail, don't they?

13 A Well, you asked me that in my deposition, too. And
14 I -- and a lot of it has to do (a) with the location,
15 (b) the economy, and the demand at the time. So, some
16 fail, obviously. I think you heard Mr. Kunkel, you
17 questioned him. He said about a third of his failed in
18 the 18 years that he's been in business. So, he knows
19 more about developing than I do. So, maybe that's a
20 good number. Maybe 30 percent do fail. Thirty-three
21 percent do fail.

22 Q And I think he said that 35 percent fail, and that
23 all started within 2006. Did you hear it?

24 A That was a tough time for real estate developers,
25 but most of the time, they're picked up --

1 COURT REPORTER: I'm so sorry. Start over your
2 answer.

3 Q Go ahead and start over again, Mr. Hartnett. Court
4 reporter didn't hear you.

5 A I'm sorry.

6 COURT REPORTER: Sorry.

7 A Did you ask me a question?

8 COURT REPORTER: Your answer. I am so sorry.

9 A Yes, 33 percent may be a good number that fails,
10 but generally, they're picked up by another developer
11 some years later, and they seem to make it after that.

12 Q Okay. And most of it depends on the market, right?

13 A Demand and the -- well, that's the market. I guess
14 demand would be the market. And location, and the
15 availability of money. And in this case, we found they
16 quit the money to Pinckney Point. They didn't want to
17 put anymore into it. So, they had to get money
18 elsewhere. But it has to do with the demand, with the
19 economy, with the availability of funds, and that type
20 of thing.

21 Q Sure. Sure. And oftentimes they fail. Or isn't
22 it true, oftentimes, the development might go bad; and
23 then, the next developer comes along; and then, they buy
24 it, and they make a go of it.

25 A Yeah. Sometimes it's poor management. You know,

1 it's poor marketing that causes it to fail.

2 Q It's like you ever heard of the second mouse gets
3 the cheese?

4 A Yeah, I have.

5 Q All right. And I know you just read through your
6 -- so, the present value of the property, as you're
7 standing by your appraisal, and the value of it today to
8 Road, LLC, is five million dollars.

9 A Well, most of our time, our appraisals are as of a
10 certain date, and I think I did mine of a certain date.

11 Q You did.

12 A But it's my contention and my opinion that, that
13 property is very valuable. It has at least -- at least
14 five million dollars. And if it's not five million
15 dollars what we paid for it today, it would be when the
16 second mouse came along to get the cheese, he'd have to
17 pay the five million dollars.

18 Q Okay. And you knew the County owned it at the time
19 you did your appraisal.

20 A Correct.

21 MR. ACHURCH: Okay. Thank you. That's all the
22 questions I have.

23 A Thank you, sir.,

24 MR. WALKER: No further questions, your Honor.

25 THE COURT: You are excused, sir. Thank you.

1 A Thank you, your Honor, for your patience.

2 MR. WALKER: Your Honor, the remaining testimony is
3 not live, and there -- we're just going to need to clear
4 one or two things with you --

5 THE COURT: Okay.

6 MR. WALKER: -- and then, we'll be ready to go. If
7 that's okay.

8 THE COURT: Perfect. Ladies and gentlemen of the
9 jury, we're going to take a brief recess. Again, do not
10 discuss this case. It wouldn't be appropriate to do so.
11 And we'll bring you right back. All right? Thank you.

12 JURORS LEAVE COURTROOM 3:09 P.M.

13 BAILIFF: Jury's clear, your Honor.

14 THE COURT: Okay. Does anyone need a break, or can
15 we jump right into --

16 MS. MONOC: I'm just confirming that we're on the
17 same page about the Gruber designations.

18 THE COURT: Okay.

19 MS. MONOC: And Mary's looking at it right now.

20 THE COURT: Okay.

21 MS. MONOC: And we just need to go over the Kubic
22 ones.

23 THE COURT: Okay. So, you want to just take five
24 minutes for you all?

25 MR. WALKER: Can we take five minutes --

1 THE COURT: Sure.

2 MR. WALKER: -- and then, we come back and look at
3 Kubic?

4 THE COURT: Absolutely.

5 OFF THE RECORD 3:10 P.M.

6 BACK ON THE RECORD 3:14 P.M.

7 JOSHUA ANDREW GRUBER AND GARY KUBIC

8 DEPOSITION DESIGNATIONS AND RULINGS:

9 THE COURT: All right. I think these are the only
10 ones I need, anyway, right? So, let's go. Are we on --
11 are you guys in agreement on Gruber?

12 MS. LOHR: We're in agreement with Gruber.

13 THE COURT: You've sorted out Josh, is what I was
14 going to say. Good news.

15 MS. LOHR: That's asking a lot, your Honor.

16 THE COURT: No kidding. All right. I've got Mr.
17 Kubic. So, what I don't have pulled up yet, though, is
18 designations. Hold on a second.

19 MS. LOHR: Okay. I will --

20 THE COURT: Go ahead and start.

21 MS. LOHR: At Ms. Monoc's request, I'm going to go
22 through all of the ones so that she can mark what's
23 acceptable --

24 THE COURT: Okay.

25 MS. LOHR: -- to us, also. All right. So, we

1 don't have any problem with Kubic deposition, Page --

2 MS. MONOC: Or actually, if you want to -- if you
3 want to just go ahead and start, I actually have it all
4 printed out for this. Sorry.

5 MS. LOHR: Okay. Okay. We object to Deposition
6 Page 8, Line 16 through Page 9, Line 15.

7 THE COURT: Okay.

8 MS. MONOC: And what was the ground of the
9 objection?

10 MS. LOHR: Oh, I'm sorry. I was waiting for her to
11 read it. Relevance and the -- relevance as the interest
12 that he's referring to predates the involvement of the
13 settlement agreement and the contract. It's the running
14 objection that we've had.

15 THE COURT: Okay. Well, I understand, because he
16 wasn't here at the time, but he said that he had heard.
17 And then, he echoes what sounds like it's a prime piece
18 of property, just because it's a prime piece of
19 property. I mean, obviously, it goes to the heart of
20 what they're saying, is that it has always been on the
21 County's radar, so. I'm going to allow it, subject to
22 your objection, so.

23 MS. LOHR: Okay. The next one is Deposition Page
24 25, Line 23 through Page 26, Line 2. 25 --

25 THE COURT: I'm sorry, what line?

1 MS. LOHR: I'm sorry. 25, Line 23 to Page 26, Line
2 2. And that's the running objection that we've had with
3 regard to the dock appeal.

4 THE COURT: Isn't that already in evidence?

5 MS. LOHR: Yes, but it's been coming in over our --
6 we've been objecting to the dock appeal.

7 THE COURT: Okay.

8 MS. MONOC: But this is where he just authenticates
9 it's his signature and things like that. And so, that's
10 why we're putting it --

11 MR. WALKER: We have it in evidence, and since it's
12 been already authenticated, it's in evidence, we don't
13 need that.

14 THE COURT: Okay.

15 MR. WALKER: So, we can take out that short
16 designation.

17 MS. MONOC: The only other thing is, he said it's
18 how he consulted with counsel before signing it.

19 THE COURT: 26, 19 through 23. No?

20 MS. LOHR: Well, then, that doesn't say that. 25,
21 26. 26 to further down it does.

22 MS. MONOC: I'm sorry. Okay.

23 MS. LOHR: And then, that's the same objection --

24 THE COURT: 19 through 23. Okay.

25 MS. MONOC: I'm sorry. So, the reason I was

1 lumping all this together is because they're all
2 referring back to the dock settlement.

3 THE COURT: Right.

4 MS. MONOC: We're going to talk about the dock
5 settlement later, then, that was -- I would want to keep
6 dock settlement as something that we're putting on the
7 jury's radar, that we're talking about the dock
8 settlement. Does that make sense?

9 THE COURT: Yes, but I've got to tell you, when you
10 ask questions, and you're reading this by deposition,
11 did you sign this exhibit, and they're not looking at
12 it, it makes --

13 MS. MONOC: We were going to put them up on the
14 screen as we went, but if -- it's okay. I understand.
15 We can take it out.

16 THE COURT: Okay.

17 MS. MONOC: That's fine. So, which ones are we
18 taking out? Pages?

19 MS. LOHR: I think it's 25, 23 and 26-2. And 26 --

20 THE COURT: 19 through 23.

21 MS. LOHR: 19 through 23, where he says, *that's my*
22 *handwriting*, would be part of that.

23 MS. MONOC: And then, 27, 7 through 12 we'll take
24 out.

25 MS. LOHR: Yeah. 27, 7 through 12.

1 MS. MONOC: Okay.

2 MS. LOHR: And then, 29, 3 to 32, 4 is the dock
3 appeal.

4 THE COURT: Give me a second. Hold on.

5 MS. LOHR: Sorry. Sorry. Sorry. Hold on. I
6 might be wrong about that. It does reference it.

7 Oh, it's --

8 THE COURT: Okay.

9 MS. LOHR: It talks about -- it's this running
10 objection we've had with regard to the permitting and
11 the dock.

12 THE COURT: Where is this? That's not what I'm
13 seeing.

14 MS. LOHR: Oh.

15 THE COURT: I'm on Page 29, Lines 3. Oh, I need to
16 go further than that. Okay.

17 MS. LOHR: Yeah, it goes -- it goes down -- what
18 approvals would have been necessary for the County in
19 order to subdivided property.

20 THE COURT: Okay. So, where are we objecting to
21 now? As I've read so far, it looks okay.

22 MS. LOHR: Specifically, where they're asking what
23 approvals would have been necessary for the County in
24 order to subdivide the property. And he says, *I don't*
25 *have those memorized, but here's zoning requirements.*

1 THE COURT: And it's your typical cross-exam,
2 where, basically, she tells him what the answer is, and
3 he agrees.

4 MS. LOHR: Right.

5 MS. MONOC: We can skip that little section. Could
6 we go --

7 THE COURT: Okay.

8 MS. MONOC: -- could we stop -- could we go to Page
9 29, 3. Page 29, 3 through Page 30, Line 7? And then,
10 we'll just cut out the approvals question.

11 MS. LOHR: Okay.

12 THE COURT: Okay.

13 MS. MONOC: And then, maybe we'll start back at
14 Page 31, Line 9, that talks about after the settlement
15 agreement.

16 THE COURT: Okay.

17 MS. LOHR: Okay.

18 MS. MONOC: And then, stop that at Page 32, Line 4.

19 MS. LOHR: That looks good.

20 THE COURT: 32, Line 4. Okay. Yeah.

21 MS. LOHR: All right. Okay. Just a couple more.

22 THE COURT: Okay.

23 MS. LOHR: The next one is 49, Lines 1 through 18.

24 MS. MONOC: If you're looking at the designation,
25 your Honor, we already reduced --

1 THE COURT: You've already got this. You've
2 already got this in.

3 MS. MONOC: We are -- so, 49, 1 through 18.

4 THE COURT: You're just going to take that out.
5 You don't need it. You've already gotten it in. Okay.

6 MS. LOHR: All right. And this is where Gary is
7 being asked about the meeting between Josh and Walter.
8 And then, -- it's not about the meeting. It's about the
9 letter between Josh and Walter.

10 THE COURT: I'm sorry, what page are you on?

11 MS. LOHR: 49, 1 to 18.

12 THE COURT: Okay.

13 MS. MONOC: Wait, we just took that out.

14 MS. LOHR: Oh, I'm sorry, your Honor.

15 THE COURT: We just took all that out. That was
16 just testified to through Walter Nester.

17 MS. LOHR: All right. Sorry, sorry. Sorry.

18 THE COURT: Okay.

19 MS. LOHR: I didn't keep up.

20 MS. MONOC: Then, you and I had started next at 52,
21 2. So, 52, 2.

22 MS. LOHR: And that was going to be -- that's about
23 that letter, so.

24 MS. MONOC: Well, --

25 MS. LOHR: It's just -- it's asking about a letter

1 that he's not party to.

2 MS. MONOC: But -- okay. If we could actually go
3 back. What Mary and I had discussed when we were in a
4 break was that, you know, Josh made him aware of this
5 letter. And then, so that's why I wanted Page 49 to
6 come in, was just that he was aware of that information.
7 And then, on Page 52, he says he has no concern about
8 the information.

9 MS. LOHR: Right.

10 MS. MONOC: And that is important, I think, for the
11 jury to hear, that he was not concerned.

12 MS. LOHR: Well -- well, let's see. You can -- you
13 could read Line 2, Line 9.

14 MS. MONOC: Which page number?

15 MS. LOHR: Line 2, Line 11. 49. I'm sorry.

16 THE COURT: Okay. Okay. I see what you're saying.
17 Yes. So, 49, 1 through 11. And then, --

18 MS. MONOC: 49, 1 through 11.

19 THE COURT: And then, you can even just start,
20 then, pick up at 52, Line 2.

21 MS. MONOC: That's right.

22 THE COURT: Line 2, and then, go through what
23 you're asking for.

24 MS. MONOC: That's right.

25 MS. LOHR: Right.

1 THE COURT: Okay. So, you weren't concerned. No.

2 MS. LOHR: And so, we're taking the letter again.

3 MS. MONOC: No, we had already took that out. We
4 took that out --

5 MS. LOHR: That's right. Okay. Yeah, that's
6 right. That's right.

7 THE COURT: Okay.

8 MS. MONOC: And I think the next one that you
9 objected to was 54, and we had agreed to cut that down.

10 MS. LOHR: Right. And then, that was --

11 THE COURT: So, what are we on?

12 MS. LOHR: 55, 15 to 21.

13 THE COURT: Okay.

14 MS. MONOC: I don't have it. Wait. No, no, no.
15 We offered to cut it down to 50. From 54, 15 to 56, 2.

16 MS. LOHR: Right.

17 MS. MONOC: -- down to 55, 22 to 56, 2.

18 MS. LOHR: You're right.

19 THE COURT: Yes. That's right.

20 MS. MONOC: We're on the same page?

21 MS. LOHR: That's right. I've got, like, eighteen
22 marks on this.

23 THE COURT: It's okay. All right.

24 MS. LOHR: That's right. That was it.

25 THE COURT: That's it? Okay. So, how are we

1 reading those, you all?

2 MR. WALKER: What is your preference, your Honor?

3 THE COURT: Any way you all want to.

4 MR. WALKER: Can I just read it? Do answer and
5 question, and do it that way? Or do you insist on role
6 play, where somebody gets on the stand? I'd prefer not
7 to have to do that, but if you like it, I'll do it.

8 THE COURT: I'm fine with you just reading it.

9 MR. WALKER: Thank you. And I will give out the --

10 THE COURT: Because --

11 MR. WALKER: -- the page and line numbers as I do
12 it, for the court reporter, if you need that, or she's
13 already got it.

14 THE COURT: Don't do that. They won't hear a word
15 you're saying.

16 MR. WALKER: Okay.

17 THE COURT: If you keep doing that, I don't think.
18 All I need to know is, if he starts saying something
19 that you all didn't agree to, you need to object and
20 stop him. Okay?

21 MS. LOHR: And I've actually reviewed the marked
22 copy that he's going to use.

23 THE COURT: Okay.

24 MS. LOHR: At least for Josh's.

25 THE COURT: Okay. So, you just object. Don't do

1 page and line.

2 MR. WALKER: Thank you.

3 MS. MONOC: I'll let you see -- I'm going to do
4 Kubic right now.

5 THE COURT: Okay.

6 MS. MONOC: Based on what we just talked about.

7 THE COURT: Okay. We good?

8 MR. WALKER: Very good.

9 THE COURT: Very good. All right.

10 MR. WALKER: And if --

11 THE COURT: I'm sorry.

12 MR. WALKER: I interrupted you, so I'm sorry.

13 THE COURT: No, no, no. Just, after this, are you
14 going to be done with your case?

15 MR. WALKER: Yes. We're just going to do these two
16 depositions, and that'll be it.

17 THE COURT: Okay. Okay. As far as your first
18 witness, what are you thinking? It's only 3:30.
19 Obviously, I need to hear motions.

20 MR. ACHURCH: Our first witness, your Honor, is
21 going to be Ms. Austin. That's who we're prepared to
22 call, but she's -- she was trying to go to another
23 meeting.

24 THE COURT: Okay.

25 MR. ACHURCH: We could call her back.

1 THE COURT: What do you think? I'm just asking
2 where we are, and as far as how long your testimony is
3 going to go, and -- let me tell you, just, my thoughts.
4 And I'm just always looking ahead, obviously, when this
5 goes to the jury. Obviously, it's a big case.
6 Obviously, you're asking for a lot of money. I don't
7 want to be throwing this to them at 4:00 o'clock on
8 Friday afternoon. Because regardless of what happens,
9 if there is a quick verdict either way, someone's going
10 to scream that we did this for a week, and you know, who
11 knows? And I don't know which way it's going to be, but
12 you understand what I'm saying. So, I just want to make
13 sure, you know, that we give them the time to go through
14 it. There's a lot of paper here, and it's going to take
15 them some time to go through it.

16 So, as far as your case is concerned, do you think
17 your case is going to take an entire day? Or do you
18 think it could take -- possibly, just, if we got one
19 witness up this afternoon, if it could take, maybe, 'til
20 lunch tomorrow?

21 MS. LOHR: No, it'll take an entire day, your
22 Honor.

23 THE COURT: Okay. And I'm fine with that. I just
24 need to know.

25 MR. ACHURCH: It'll take a solid day, I'm sure,

1 Judge.

2 THE COURT: Okay.

3 MR. ACHURCH: Because we've got --

4 THE COURT: So, you tell me what you want to do.

5 MS. LOHR: I think -- I think the best idea would
6 be to let us do directed verdict this afternoon, after
7 they close.

8 THE COURT: Let them go home?

9 MS. LOHR: And let them go home. Or, depending on
10 how long the deposition reading takes, --

11 THE COURT: Yes.

12 MS. LOHR: -- we can come in early tomorrow; do
13 directed verdict first thing in the morning; and then,
14 start with our first witness.

15 THE COURT: Get going. Okay. Either way.

16 MS. LOHR: I mean.

17 THE COURT: That sounds good. Okay. Either one is
18 fine with me. I just wanted to know.

19 MS. LOHR: Honestly, I would love to have the extra
20 day to get my voice a little bit more improved.

21 THE COURT: Okay. Okay.

22 MR. WALKER: Your Honor, we consent to that motion.

23 MR. ACHURCH: Yeah.

24 THE COURT: I can't believe they haven't community
25 brought you some cough drops at this point. Anyway.

1 MR. ACHURCH: Or wear a hospital mask.

2 THE COURT: Aww. It's okay. All right. So, I
3 just wanted to know where we're going. Okay. That
4 sounds good. You guys ready for me to bring the jury
5 back, or do you all need anymore time? No? We're good.
6 Let's bring the jury back in?

7 MS. MONOC: I'm highlighting this as fast as I can,
8 quickly. Hopefully, I can get it done before -- can we
9 have five more minutes?

10 THE COURT: Yes. Of course, you can.

11 MS. MONOC: I'm sorry. I should have stayed up and
12 done this.

13 THE COURT: No, of course you can. At least our
14 juror hasn't commented on your top today. So, we're
15 actually doing well.

16 MR. ACHURCH: I was going to say something, but I
17 didn't.

18 THE COURT: Well, I noticed that Mary wore a like
19 big necklace, so I was expecting that was going to be
20 today's comment.

21 MS. LOHR: I was trying to compete.

22 THE COURT: Wow. Okay. Well, let's just wait,
23 just five minutes or so. You all get settled.

24 OFF THE RECORD.

25 BACK ON THE RECORD.

1 BY THE COURT:

2 THE COURT: Okay. Are we ready to go?

3 MR. WALKER: I am, your Honor. And just one last
4 -- in terms of the presentation, do you want me to say
5 question, and then, answer, even though I'm not going to
6 go page and lines; or just read it like the question,
7 and then, with an answer?

8 THE COURT: Whichever you think.

9 MR. WALKER: How it goes? Okay.

10 THE COURT: Whatever sounds best. Exactly.

11 MR. WALKER: I'll do it.

12 THE COURT: And pull in all that acting ability
13 that you've got somewhere in the background. I don't
14 know where it comes from, but.

15 MR. JOSHUA ANDREW GRUBER: He answers in a British
16 accent.

17 MR. WALKER: I think I have, and the primary
18 principal is move. And do not bore.

19 THE COURT: Exactly. Okay. And I'm trying to
20 figure out when I'm going to tell this jury that they're
21 going to be here on Monday. I know I'm going to lose
22 the -- you know we're going to lose the one juror,
23 right? I just want to make sure everyone understands
24 that.

25 MS. LOHR: I think they would have -- I would think

1 that they would have the most of the day Monday to
2 deliberate.

3 THE COURT: I would think so, too. I mean, I would
4 hope that we would just get to come in and argue and
5 charge. And how long are our closings going to be,
6 again? And I know it's a long weekend, and you'll have
7 lots of time to think about it; but I also think it
8 gives you all the time in the world to cull it down.

9 MR. ACHURCH: I'm sorry, Judge.

10 THE COURT: Actually, I'm looking more at Mr.
11 Walker, because your opening was pretty long.

12 MR. WALKER: It was.

13 THE COURT: It was necessary, I understand. I
14 appreciate it.

15 MR. WALKER: You know, actually I think it can be
16 shorter in some ways.

17 THE COURT: Now that they've heard it all?

18 MR. WALKER: Because the whole story's been told,
19 and part of that was to tell the story.

20 THE COURT: Right.

21 MR. WALKER: And I would think an hour.

22 THE COURT: Okay.

23 MR. ACHURCH: I think about an hour, Judge.

24 THE COURT: Okay. Sounds good.

25 MS. LOHR: She was saying she doesn't want to close

1 at 4:00 o'clock on Friday.

2 THE COURT: That's my biggest concern. Okay.

3 MS. LOHR: That happened one time. We tried a case
4 in I think it was the same courtroom as the medical
5 malpractice case. And lots of parties, and it was a
6 week-long case, and it ended about 3:00 o'clock on
7 Friday afternoon. And we were sitting here with the
8 jury, at 11:00 o'clock on Friday night.

9 THE COURT: Oh, I've been here doing that.

10 MS. LOHR: And the jury came back hung.

11 THE COURT: They get so tired that they really get
12 bogged down, and that actually --

13 MS. LOHR: I would prefer not to go through that --
14 go through that experience again.

15 THE COURT: Okay. And I heard Buck James recently,
16 up in Horry actually had the attorneys to their closing
17 -- it was a seven-day trial. They did their closings,
18 and then, they came back and he charged them in the
19 morning. He just thought they were too tired. And of
20 course, it ended up in a hung jury, so I don't know how
21 smart that was. But it's always an idea.

22 MR. WALKER: Well, I can testify, that's a bad
23 idea.

24 THE COURT: Okay.

25 MR. WALKER: A very bad idea. Last time that

1 happened with me two years ago, I had the worst result
2 of my life.

3 THE COURT: Really?

4 MR. WALKER: So, no more will I ever, as a
5 defendant, argue to the jury at 6:30 at night.

6 THE COURT: Yeah.

7 MR. WALKER: Because the judge said, you must go
8 now.

9 THE COURT: Yes. Yes. I think, also, it causes a
10 problem. It diminishes the importance of what we're
11 doing. I mean, so. Okay.

12 All right, Rick. Let's bring them in. And you can
13 promise them jam tomorrow. I'll make the biscuits.

14 BAILIFF: Ready, your Honor?

15 THE COURT: Yes, sir.

16 BAILIFF: Jury is entering the courtroom, your
17 Honor.

18 THE COURT: Okay.

19 JURORS ENTER COURTROOM 3:37 P.M.

20 THE COURT: Thank you. You all may be seated.
21 Ladies and gentlemen, what my understanding the
22 plaintiffs are going to do at this point is read certain
23 deposition excerpts from two different witnesses. Just
24 to explain to you again what a deposition is, it is
25 testimony give, typically in a lawyer's office. There

1 is a court reporter there. The witness is sworn in, and
2 it's sworn testimony, and lawyers from both sides gets
3 to ask questions. All right? So, these are the
4 designations from the plaintiff in this case, so we're
5 going to go ahead and let Mr. Walker just go ahead and
6 read them into the record. All right?

7 MR. WALKER: Thank you, your Honor.

8 And the plaintiffs are going to read from the
9 deposition of Josh Gruber, as her Honor said, and he was
10 appointed as a testifying representative of Beaufort
11 County, the defendant in this case. And I'm only going
12 to be reading excerpts, starting with an answer.

13 READING EXCERPTS FROM THE DEPOSITION OF

14 JOSHUA ANDREW GRUBER, BY MR. WALKER:

15 A I'm familiar with the settlement agreement.

16 Q Are you familiar with whether the County considered
17 it?

18 A It was not part of the consideration for the
19 purchase.

20 Q Are there any services going out to Pinckney Point
21 right now?

22 A By services, you mean County services?

23 Q Uh-huh.

24 A No, I'm not aware of any.

25 Q Any maintenance, any security?

1 A We have a caretaker that's living on the property
2 who was on the property prior to our acquisition:

3 Q Has anyone else been on the property since then,
4 that you're aware of?

5 A Physically been on the property?

6 Q Um-hmm.

7 A Yes.

8 Q Like who?

9 A Myself, Patty Kennnedy, and Mr. Bendle.

10 Q So, when did you come on with Beaufort County?

11 A May of 2011.

12 Q And you were the county attorney?

13 A That is correct.

14 Q What does that involve?

15 A It was responsible for providing legal advice and
16 representation to the members of County Council, County
17 staff, County elected officials, and all of the boards,
18 agencies, and commissions, under the umbrella of
19 Beaufort County.

20 Q And you were the county attorney until?

21 A And I'm still the county attorney today, but I was
22 promoted to deputy county administrator in September of
23 2014.

24 Q All right. What does your job now involve?

25 A I'm the deputy county administrator of the county

1 attorney. So, on the deputy county administrator side,
2 all administrative agencies under county government,
3 outside of elected officials, I'm ultimately responsible
4 for managing, and then, subject to the controlling
5 authority of the county administrator. And then, as the
6 county attorney, it's the same function as before.
7 Representing County Council, County staff, the elected
8 officials, and all of the boards, agencies, and
9 commissions under the umbrella of the County.

10 Q Did that include the Rural and Critical Lands
11 Board?

12 A Yes.

13 Q So, you represented the County Council, and they
14 appoint the Rural and Critical Lands Board; and you also
15 represent the Rural and Critical Lands Board.

16 A That is correct.

17 Q So, would you often take questions from them?

18 A Yes, when they come up.

19 Q All right. And I guess that was the same for
20 whoever your predecessor was.

21 A Yes, that would have been the same.

22 Answer:

23 A I'm the legal counsel to Beaufort County Council.

24 Q So, what does that mean?

25 A I provide advice and representation to them in all

1 *matters in which the County is named, responsible for*
2 *researching, and advising them as to legal issues. I'm*
3 *also responsible for researching and drafting*
4 *legislation at their direction.*

5 Q *So, do you go to all the meetings?*

6 A *Yes.*

7 Q *Are you in on executive sessions?*

8 A *Yes.*

9 Q *Are you present at committee meetings?*

10 A *Yes.*

11 Q *Consistently?*

12 A *That's unless I have an outside obligation that*
13 *would take priority.*

14 Q *And tell me about your role as it relates to the*
15 *Rural and Critical Lands Board.*

16 A *As a Board in the County, I would be able to afford*
17 *them legal advice, should they so request it.*

18 Q *Do they?*

19 A *I cannot recall any instance where I was asked to*
20 *provide them with a legal opinion.*

21 Q *And it's my understanding that the Rural and*
22 *Critical Lands Board doesn't have its own staff. The*
23 *Trust is the agency which -- or the Trust is the entity*
24 *which institutes the program?*

25 A *The Trust is the main liaison between the Board and*

1 the County. I believe we also provide one, maybe two,
2 administrative staff people, for the purpose of keeping
3 minutes, publishing notices, et cetera. But other than
4 that, the Trust is the agency responsible for
5 interacting with the Rural and Critical Lands Board.

6 Q So, what is your interaction with it?

7 A They provide me updates on their status, and I'm
8 present whenever they make a presentation to either the
9 Natural Resources Committee or to County Council, Common
10 Council.

11 Q Okay. I just want to talk about the County's
12 interest in Pinckney Point historically. And I say that
13 because it's my understanding there was an interest
14 historically. Do you know who was initially interested
15 in Pinckney Point? Was it the Trust, or the County, or
16 both?

17 A My understanding is that the Trust, at one point in
18 time, had approached Pinckney Point about a possible
19 acquisition, but based upon the purchase price, declined
20 to move forward with further discussions.

21 Q When was that? Do you know?

22 A I don't.

23 Q Okay. When did you first learn about Pinckney
24 Point?

25 A I first learned about Pinckney Point when it came

1 before the Natural Resources Committee meeting.

2 Q When was that?

3 A I don't recall the date, specifically.

4 Q So, you heard about it a Natural Resources
5 Committee meeting? And what were they saying?

6 A I was there when the proposal was pre -- when the
7 presentation was made, as to the proposal.

8 Q So, did you have any knowledge of that coming in?
9 When was the first you learned about the 2011 lawsuit --
10 or the 2011 settlement? I'm sorry. Not the lawsuit,
11 the settlement.

12 A Yeah, the first that I believe I learned of it was
13 after Council -- County Council had approved the
14 purchase. Walter Nester, who is an attorney with the
15 McNair Law Firm requested a meeting to discuss the
16 County's actions, and I believe it was brought up at
17 that meeting. And that was the first that I learned of
18 the settlement agreement.

19 Q So, can we talk about the life cycle of the
20 proposals, proposals generally and specifically, this
21 one, as it relates to Pinckney Point as an example. What
22 -- after it was pitched, tell me, just take me through
23 the life cycle.

24 A Sure. The Rural and Critical, the Open Land Trust,
25 meets with the property owners and develops a proposal.

1 That proposal is then brought forward to the Rural and
2 Critical Lands Board. The Rural and Critical Lands
3 Board, as an advisory body, then, makes a recommendation
4 to the Natural Resources Committee. The Natural
5 Resources Committee reviews it, and if it approves it,
6 then, it goes to the full body of Council.

7 Q Is public use taken into consideration?

8 A Public use is implicitly taken into consideration.

9 Q And is access taken into consideration?

10 A Not necessarily. Access to the property is not a
11 condition for the County purchasing the property.

12 Q But is it something that they consider?

13 A Could be. It could be.

14 Answer:

15 MR. WALKER: And here, he's responding to some
16 guidelines:

17 A It appears to set up guidelines for purchasing the
18 property and fee simple interest.

19 Q It says here that public access is required or
20 desirable, and I'm wondering how this was applied at the
21 meeting.

22 A At the time that, that presentation was made, there
23 was no indication that there was anything but
24 unrestricted access to the parcel.

25 Q When did you learn otherwise?

1 A At that meeting that Walter Nester had after County
2 Council had approved the purchase. That was the first
3 time there was any indication that someone disagreed
4 with the fact that there was unfettered access.

5 Q Were there questions prior to that about access?

6 A No, there was not.

7 Q To your knowledge, or were there -- to your
8 knowledge, or there were no questions, to my knowledge.

9 A I first became aware that access could be or was
10 being questioned at that meeting that Walter Nester
11 requested after Council authorized the property
12 purchase.

13 Q So, it went from Natural Resources to Council;
14 Council approved it.

15 A Approved it.

16 Q And then, you learned about it at the meeting with
17 Walter Nester.

18 A That's correct. The press release went out
19 announcing the purchase. Walter contacted us and asked
20 for a meeting.

21 Q And what had you been relying on up to that point
22 to believe there was public access?

23 A I don't know that public access was ever in doubt
24 or ever questioned.

25 Q Okay.

1 A So, I was not relying on anything, specifically.

2 Q Were you aware of the access easement agreement at
3 that time.

4 A No. Typically, the due diligence occurs after
5 County Council has authorized the purchase.

6 Q Okay.

7 A Because we don't incur that expense until County
8 Council has approved that acquisition.

9 Q Okay. And when did you meet with Walter Nester?

10 A After the -- after County Council approved
11 purchasing the property, but prior to its closing.

12 Q Had it not closed yet? Excuse me.

13 Okay. Did you still have an out with the closing?

14 A It had not closed yet.

15 Q So, was there any penalty if you were to pull the
16 deal at that point?

17 A I don't recall. I'd have to refer to the purchase
18 agreement.

19 Q And did Walter follow up with you with a letter?

20 A I believe he followed up with a letter to Robert.

21 Q Okay. Did you have any concerns after that? Did
22 you just move on?

23 A Just moved on.

24 Q Closed?

25 A That is correct.

1 Q Proceeded?

2 A (Nods head.) And was sued.

3 MR. WALKER: That's all, your Honor.

4 THE COURT: Okay. Thank you.

5 MR. WALKER: We're conferring on the other one
6 right now.

7 Thank you, your Honor.

8 THE COURT: Okay.

9 MR. WALKER: There's one more. I hate to do this,
10 but we have one more witness by deposition, and that
11 will be our case.

12 THE COURT: Okay. Very good.

13 MR. WALKER: Your Honor, we're now going to publish
14 from the deposition of Gary Kubic, and that was taken on
15 February 17, 2016.

16 THE COURT: Thank you.

17 MR. WALKER: All right. Your Honor, this is Gary
18 Kubic's deposition.

19 READING EXCERPTS FROM THE FEBRUARY

20 17, 2016 DEPOSITION OF GARY KUBIC,

21 BY MR. WALKER:

22 Q All right. What is your current capacity? Where
23 are you employed?

24 A I'm employed for Beaufort County. My position is
25 county administrator.

1 Q How long have you been the county administrator?

2 A November of 2003.

3 Q All right. And what are your principal
4 responsibilities as the administrator for Beaufort
5 County?

6 A Very simply put, the implementation of county laws.

7 Q Okay. Are you involved in the day-to-day oversight
8 of any particular departments, or all departments, or?

9 A With the exception of the state agencies that are
10 associated with Beaufort County and the other elected
11 office holders, I'm responsible for everything else.

12 Q All right. Does Beaufort County have a Rural and
13 Critical Lands Program?

14 A Yes.

15 Q Is there a board associated with that?

16 A Yes.

17 Q And what is the relationship with that Rural and
18 Critical Lands Program to the County?

19 A Well, there's a program that is supplemented
20 through bond referendums. So, the people vote for the
21 bond referendum. They create a pool of funds. Council
22 set up a Rural and Critical Lands Advisory Board. Their
23 role is to rank potential purchasers, and then, they
24 make a recommendation. The recommendation goes to the
25 Natural Resources Committee and Council. Council hears

1 the recommendation. And then, it goes to Council for
2 final approval for purchase.

3 Q When did the County first become interested in
4 Pinckney Point?

5 A Well, I don't know prior to my coming on board, but
6 I do know that, that was always a prime piece of
7 property for the County. So, I'd have to say, ever
8 since I've been county administrator.

9 Q When you say 'a prime piece of property for the
10 County,' what do you mean?

11 A Well, it's an undeveloped piece of property that
12 has two rivers, and from an environmental point of view,
13 and from a scenic point of view, the County was always
14 interested in buying that property, and not to have
15 development on it.

16 Q Do you know whether or not the County approached
17 the owner many years ago about a potential acquisition?

18 A I -- I don't know. I have -- I have heard over the
19 years, and I think -- I don't -- I think Ulmer may have
20 owned it, or a name like that, but the question was the
21 cost of the property at the time. And the available
22 resources we had, basically, was that the property out-
23 priced our ability to pay.

24 Q Before 2013, were there any particular individuals
25 on Council, or in the county administration who were --

1 who you would identify as being advocates for the
2 acquisition of the Point property?

3 A Before '15? Yes. I would say, perhaps, it would
4 be as a group, maybe the elected representatives south
5 of the Broad.

6 Q Who have those representatives been over the years?

7 A Well, currently, there are Jerry Stewart. Of
8 course, it would be Brian Flewelling, Cynthia Bensch,
9 Tabor Vaux, Stu Rodman, Steve Fobes. And I'm missing
10 one -- Rick Caporale.

11 Now, I have to go back and see who replaced who.
12 Vaux replaced Weston Newton. So, Weston Newton would be
13 there. Jerry Stewart replaced Margaret Griffin. I
14 don't think Stu Rodman is on. Weston Newton moved from
15 Sea Pines, so I think he replaced Weston. Steve Fobes
16 replaced Steve Baer, and I don't know how long Rick --
17 there was somebody there before Rick Caporale, but I
18 can't remember who.

19 Q Would Weston Newton have been one of those? I
20 think you identified him.

21 A Yes, I think so.

22 Q Are you familiar with the litigation that was
23 brought by Beaufort County against Agnes Pinckney and
24 others regarding the road to Pinckney Point?

25 A Yes.

1 Q Were you involved in the decision as to whether or
2 not the County would bring suit or not?

3 A Yes.

4 Q Who were the decision-makers in the call as to
5 whether to file suit?

6 A I think it was probably Gary Kubic, myself.

7 Q Anybody else, that you can remember?

8 A No. I think it was in reaction to the fact that
9 they were putting up barricades across the road. And as
10 a matter of public safety, I needed to get those things
11 out of there.

12 Q Right.

13 A And so, as a result, the suit was filed to get an
14 injunction to get obstacles off the road.

15 Q So, in your estimation, it was a matter of public
16 safety, fire, life safety issues?

17 A Yes, sir.

18 Q Who were the County's attorneys in that suit?

19 A I believe the law firm of Howell, Gibson & Hughes.

20 Q Are they the same attorneys that are defending this
21 case?

22 A Yes, sir.

23 Q Were you kept informed along the way about the
24 status of the case?

25 A Yes, sir.

1 Q Were you kept informed along the way -- I mean,
2 excuse me -- were -- to the degree that it was still
3 ongoing?

4 A Yes.

5 Q At some point, did you learn that there were
6 negotiations to attempt to resolve that case?

7 A Yes.

8 Q And what did you understand those negotiations to
9 involve?

10 A That the dirt road would be determined to be
11 private versus public. I believe the variance, -- excuse
12 me -- I believe the variance issue was resolved, and I
13 think the development could occur. And there was, I
14 think, a series of conditions that were also part of it,
15 but there was no monetary exchange. It was just,
16 basically, the ability to get the County from having the
17 responsibility that it would be a public road, and I
18 think that was our primary interest at the time.

19 Q At some point, were you presented a settlement
20 agreement?

21 A Yes, sir.

22 Q And who presented that to you?

23 A I believe Attorney Lad Howell.

24 Q Do you know if you saw a draft?

25 MR. WALKER: Excuse me.

1 Q Did you look over the settlement agreement?

2 A Yes.

3 Q Did you have an opportunity to ask Mr. Howell or
4 any other lawyers that worked on behalf of the County
5 associated with the case, questions you might have about
6 the settlement agreement?

7 A Yes.

8 Q Did you have any questions?

9 A Yes.

10 Q What were those questions?

11 A What am I getting out of it for the County?

12 Q What did you understand the consideration to be?

13 A That I got a definitive answer that it would not
14 have ownership of the road as a public road.

15 I also remember that the private party -- there was
16 an issue of the request for variance, and that was
17 resolved, which I would -- I interpret would mean they
18 would have the ability to use the road, to have access
19 to that property.

20 Q In other words, there would no longer be an issue
21 as to the portion of the buffer that the owner wanted to
22 put the access road through or the driveway through?

23 A Right. Because I believe that a request for
24 variance would be to allow whatever parties were
25 associated on the private side to have enough room to

1 put a road in, or do whatever they had to do.

2 Q On behalf of the County, who made the final
3 decision as to whether to enter that settlement
4 agreement?

5 A I did.

6 Q Was that a decision that was also presented to
7 Council?

8 A Yes.

9 Q Did Council receive information on that settlement?

10 A Yes.

11 Q Did Council have either -- did Council have a
12 formal resolution to enter that settlement?

13 A No.

14 MR. WALKER: This is in reference to the settlement
15 agreement.

16 BY MR. WALKER:

17 Q Is that your signature on Page 9 of Exhibit 1?

18 A Yes, sir.

19 Q Was there any portion of this settlement agreement
20 that you did not understand?

21 A No.

22 Q I've marked as Exhibit 2 a copy of a follow-up
23 consent over in the road litigation, Case Number 05-CP-
24 07-02337. This was attached as -- an un-executed
25 version was attached as an exhibit to the settlement

1 agreement. Have you seen this consent order before?

2 A No.

3 Q The consent order was signed by Judge Dukes. And
4 if you look down the second numbered item on the cover
5 sheet, you'll see that it says:

6 'Now, therefore, it is hereby ordered,
7 , adjudged, and decreed that the unpaved portion
8 of Pinckney Point Road is a private road.'

9 Do you see that?

10 A Yes, sir.

11 Q And what did you understand private road to be --
12 to mean?

13 A That the ownership of the road was private.

14 Q Were you aware of certain provision in the
15 settlement agreement dealing with an access easement to
16 the Point parcel that talked about a twenty-foot access
17 easement?

18 A I don't remember, no.

19 Q Obviously, since the County signed the settlement
20 agreement, and its lawyer signed a consent order we just
21 looked at, Exhibit 2, the County did not have any
22 question or issue for the unpaved portion of Pinckney
23 Colony Road being deemed a private road, did it?

24 A No.

25 Q What did you understand to be my client, Pinckney

1 Point, LLC's, ultimate objective with respect to the
2 Point parcel?

3 A To develop the property for residential
4 development.

5 Q Were you -- and you know, this piece of property
6 has a lot of water edge, and so, it was a very nice
7 piece of property. Since this property was too pricey
8 for the County, it was bought by my clients. Would you
9 agree that my client spent millions on the acquisition
10 of the property?

11 A Well, I know we spent over a million. Sure, yes.

12 Q Millions. Would it surprise you that the
13 acquisition -- would it surprise you to know that they
14 put well over ten million into the property?

15 A No, it wouldn't surprise me.

16 Q Now, during this litigation, were you aware -- and
17 I'm talking about the road litigation, as well as the
18 dock litigation -- were you aware that my client was
19 proceeding to pursue development approval, so that it
20 could do its residential subdivision at Pinckney Point?

21 A Yes.

22 Q After the settlement was entered in January 2011 in
23 both the road case and the dock case, were you aware
24 that my client, Pinckney Point, LLC, continued to pursue
25 development approvals, including approval by the DRT?

1 A Yes.

2 Q At some point, did you become aware that the
3 mortgage holder, BB&T, was foreclosing on the mortgage
4 for Pinckney Point that my client had granted to at the
5 time of acquisition?

6 A Yes, but I'm not sure what it was. But yeah, I
7 heard there was a foreclosure action going on.

8 Q Who brought that to your attention?

9 A I don't know. It probably -- I don't know whether
10 I read it in the paper, or it came from my law office,
11 or some other staff member. I just don't know. It
12 could have even come from Council. I'm not sure.

13 Q Okay. After the settlement agreement was entered
14 in January of 2011, when is the first time you know that
15 anybody with the County or on behalf of the County had
16 discussions with Equity Resource Partners about
17 potentially acquiring the property?

18 A I don't think anybody in the County did that. I
19 think, if, when we get involved, is when it goes through
20 the processes, the process, of the Open Land Trust to
21 the Rural and Critical Lands. And then, they bring it
22 to us.

23 Q All right. Tell me about that process.

24 A That's how I got the information. Well, we have a
25 contract with the Open Land Trust. The contract is

1 similar to a contract with a real estate broker. They
2 act as our agent. They find prospects; they negotiate
3 with the owner; and they go through the various levels
4 of reviews.

5 Q I've marked as Exhibit 4 an agreement between
6 Beaufort County and Beaufort County Open Land Trust. Is
7 Exhibit 4 a copy of the contract that you were referring
8 to?

9 A Yes, sir.

10 Q I've marked as Exhibit 5 a letter dated June 21,
11 2012, to the Beaufort Open Land Trust -- County Open
12 Land Trust from Richard DeMonte, on behalf of the
13 Council renewing the contract. Are you familiar with
14 this letter?

15 A No.

16 Q Does that appear to be an extension of the contract
17 that is Exhibit 4, through June 30, 2013?

18 A Yes.

19 Q Now, back to where we were a couple minutes ago.
20 What is the arrangement between -- or what was the
21 arrangement from 2010, or the date of entry of the
22 contract, through this extension, June 30, 2013, between
23 the County and the Beaufort County Open Land Trust?

24 A Well, whatever the contract specifies service to
25 be, but in summary, they basically are an agent of the

1 County that interacts with the potential seller of the
2 property. Then, they work with the Rural and Critical
3 Lands Board. And then, if it passes muster through the
4 Rural and Critical Lands Board, we see them in our
5 office, usually, in executive session, describing the
6 terms and conditions of the potential purchased
7 property.

8 Q Do you know when the Beaufort County Open Land
9 Trust first started evaluating the Pinckney Point parcel
10 for purposes of determining whether to make a
11 recommendation to the Advisory Board and Council?

12 A No.

13 Q Did the Beaufort County Open Land Trust, in 2013,
14 make a presentation to Council in executive session,
15 like you've described, about acquiring the Pinckney
16 Point parcel?

17 A I'm not sure of the year, but I do know that they
18 did make that presentation. We could find it in the
19 record. But they did make the presentation. So,
20 whatever that -- whatever you have there, that's true.

21 Q I've marked as our Exhibit 6, a proposal for fee
22 simple acquisition, dated March 14, 2013. Does that
23 appear to be the proposal that was put together?

24 A Yes, sir.

25 Q In the normal order of things, do these proposals

1 go -- first go to the advisory board, and then, to
2 Council?

3 A Yes. If you mean the Rural and Critical Lands
4 Advisory Board, yes, sir.

5 Q Yes, I do. I've marked as Exhibit 7 a copy of the
6 minutes that were online from the Beaufort County Rural
7 and Critical Lands Preservation Board meeting, March 14,
8 2013. Do you see where that's dated the same day as the
9 proposal we looked at?

10 A Yes, sir.

11 Q Does that suggest to you that this was presented at
12 this meeting?

13 MR. ACHURCH: I object to the form.

14 A Yes.

15 Q Looking at these minutes, I was unable to see where
16 there was any description of the land, other than, as
17 you see on Page of the minutes, Parcel A, Parcel B,
18 Parcel D, Parcel F. Do you see that?

19 A Yes, I do.

20 Q Is that typical not to disclose which properties
21 are being talked about, and to use code descriptors?

22 A Yes.

23 Q Why?

24 A Because minutes are public. And in the negotiation
25 process for a real property purchase, disclosing the

1 terms and conditions could be, or nondisclosure could
2 be, a requirement of the potential seller, a requirement
3 of us, or a requirement of both. Or just common sense
4 would tell you that, if people know what we are doing,
5 the price could go up, because they could bring other
6 people involved in. So, it doesn't surprise me that we
7 use code names on economic development, too.

8 Q Exhibit 8 is a copy of the minutes that were online
9 for the Council meeting of April 8, 2013. It appears
10 that the reference to this parcel is on the last page,
11 15. Do you see that?

12 A Yes, sir.

13 Q Is this the documentation of Council's approval of
14 the acquisition of the Point parcel?

15 A This is -- this is the minutes of Council's
16 approval for the acquisition of that parcel, yes.

17 Q Was it necessary for Council to approve the
18 acquisition?

19 A Yes. A real property purchase.

20 Q Was there any discussion in open session about the
21 acquisition of this property, or was all the discussion
22 in the executive session?

23 A It could be both, but the videotape will tell you
24 if they had any discussion regarding this.

25 Q Who was floating the idea of having Pinckney Point

1 *serve as the headquarters for a regional park agency?*

2 A *Josh Gruber.*

3 Q *Well, Josh is the county attorney.*

4 A *But he was the one floating the idea, not me.*

5 Q *Did anybody within Council, any Council members,*
6 *suggest that?*

7 A *No, I don't remember any Council suggesting that,*
8 *and it was Josh who was quoted. So, I don't know why he*
9 *said that.*

10 Q *He also mentioned that it could be a nexus of a*
11 *maritime kayak trail. Had people been talking about*
12 *that potential use, too?*

13 A *I think the potential for kayaking is a common*
14 *generic suggestion for any property and fee simple*
15 *through the Rural and Critical Lands Program, to*
16 *encourage the use of the land. It's sort of a passive*
17 *process. So, whether it applies or has potential for*
18 *Pinckney Point, it has the potential for all our*
19 *property. We buy islands, and that's the same kind of*
20 *thing that we talk about when we buy an island. So,*
21 *it's not unusual.*

22 Q *Do you know whether or not, in executive session,*
23 *Council was told that the possibilities for the site are*
24 *virtually endless?*

25 A *Council knows that, if it buys property under the*

1 Rural and Critical Lands Program in fee simple, that it
2 allows them more latitude in terms -- for potential use
3 of a park, as long as it's not contrary to the terms and
4 conditions in the referendum. So, from a principal
5 point of view, the answer is yes. Whether or not they
6 talked about that specifically in executive session, I'm
7 not aware.

8 Q In reviewing some of the question -- in reviewing
9 some of the materials related to the Rural and Critical
10 Lands Program, I saw a discussion about properties,
11 where the County takes title in what's called a fee
12 simple acquisition. Is there a push for the County as
13 fee simple title, has used the funds to obtain fee
14 simple title, to have public access?

15 A Yes. As long as the use is commensurate with the
16 terms and conditions set forth by the acceptance of the
17 voters of the language in the referendum itself. So, we
18 don't do anything contrary to what -- what the rules
19 are.

20 Q I understand. So, the referendum itself would set
21 forth the purpose for which the funds could be used?

22 A That is correct.

23 Q Once the County has expended the funds, the County
24 can do what it wants, provided it stays within the
25 parameters of those purposes. Is that fair?

1 A Yes, sir.

2 Q I've marked as Exhibit 11 a letter from Walter
3 Nester, of the McNair Firm, to the very same Josh
4 Gruber, of the Beaufort County Legal Department, dated
5 April 17, 2013, about the acquisition of the Pinckney
6 Point -- or the then-intended acquisition of the
7 Pinckney Point property. Are you familiar with this
8 letter?

9 A It wasn't sent to me, but I do believe Josh told me
10 about this letter at some point. This comes from
11 Walter?

12 Q Right. When you read that, did that concern you at
13 all, since the County was in the process, had not
14 closed, but it was in the process of intending to close
15 on the acquisition?

16 A No.

17 Q Why not?

18 A Well, first of all, I think Walter is expressing
19 his point of view for the people he represents. So,
20 this is his opinion.

21 Q And did you have a contrary opinion?

22 A Not necessarily. You asked me if I was concerned
23 about it, and I wasn't concerned about it.

24 Q So, you weren't concerned?

25 A No.

1 Q Did you seek an evaluation of what Walter had to
2 say in the letter?

3 A No. I figured that was being done by the two
4 attorneys that were representing it -- me at the
5 meeting.

6 Q Did you go to the meetings?

7 A No.

8 Q Did you undertake to look at the road parcel
9 easement to determine the accuracy of what Mr. Nester
10 said?

11 A No.

12 Q Did you ask anyone to take a look at the road
13 parcel easement to determine the validity of what Mr.
14 Nester said?

15 A No.

16 Q I've marked as Exhibit 12 a copy of a recorded
17 access agreement dated December 29, 2011. Do I
18 understand your testimony to be that you did not look at
19 this recorded access agreement, or seek to obtain a copy
20 of it, to look at after receiving Mr. Nester's letter of
21 April 17, 2013?

22 A That's correct.

23 Q Did you ask anybody to do that for you or the
24 County?

25 A No.

1 Q Did Mr. Bendle ever indicate to you, before the
2 closing, in the presence of other persons who are not
3 County employees, that he had his fingers crossed about
4 the access?

5 A No.

6 Q Did you instruct anybody to make sure that the
7 access was granted within the easement access agreement
8 we marked as Exhibit 12, would allow access for the
9 County and the uses it might want to make of the Point
10 property?

11 A No.

12 Q I've marked as Exhibit 14 a copy of a purchase
13 agreement that's dated April 14, 2013, between Beaufort
14 County and Equity Resource Partners. Have you seen that
15 before?

16 A Yes.

17 MR. ACHURCH: It's April 24.

18 Q April 24th. Did you sign the purchase agreement
19 marked as Exhibit 14 on behalf of the County?

20 A Yes.

21 Q Exhibit 17 is a copy of the closing statement for
22 this transaction, the sale by Equity Resources to
23 Beaufort County.

24 A Okay.

25 Q Dated May 28, 2013. Did you sign this one, as

1 well, on Page 3?

2 A Yes, I did.

3 Q If you go to Page 2, you will see a line at the
4 top, 'Less Disbursements on Behalf of Seller.' Do you
5 see that, at the very top of Page 2?

6 A Yes.

7 Q And the first one is documentary stamps exempt.

8 A Uh-huh.

9 Q Two, consulting fee to 4-H Family Trust, LLC,
10 \$250,000.00. What is 4-H Family Trust, LLC?

11 A I don't know.

12 Q Did you ask any questions about that before?

13 A No.

14 Q Are you -- have you been informed that this is a
15 trust for Bill Herbkersman's family?

16 A No.

17 Q Do you have any knowledge whether or not he
18 approached any of your Council members about the
19 acquisition of this property?

20 A No.

21 Q Did the County consider that it was getting a
22 bargain in the sale, a good price, I mean?

23 A Yes.

24 Q Had the County had an appraisal done of this
25 property before agreeing to purchase it for

1 \$6,950,000.00?

2 A I believe the appraisal was done through the Open
3 Land Trust.

4 Q And do you know what number that was?

5 A No, but I can find out. I don't recall what it
6 was.

7 Q Would that have been typical to do that as part of
8 the presentation for approval?

9 A Standard procedure, yes.

10 Q Even though the County has not had an assessment
11 done for Pinckney Point property, is it fair to say tat
12 the County does not intend to use it as a residential
13 subdivision, to develop it as a residential subdivision?

14 A Yes, sir.

15 Q Would be contrary to the purposes for which the
16 funds could be expended?

17 A Yes, sir.

18 Q What has happened on the Pinckney Point tract since
19 it was acquired back in May of 2013?

20 A I don't believe anything.

21 Q Do you know whether or not the Building and Grounds
22 Division has done any work on the Pinckney Point tract?

23 A I'd say very little, if any.

24 Q Do you know whether or not the Building and Grounds
25 Division, or anybody else with the County, has altered

1 the dirt access easement that crossed my client?

2 A I don't believe we have. I don't know.

3 Q Do you know whether anybody with the County had
4 poured rock to fill up potholes?

5 A I don't know.

6 Q Is the -- is the Point tract gated?

7 A I don't know that, either.

8 Q Who would know that?

9 A Well, let's see. It used to be Andy Bellamy. He
10 retired about two weeks ago. David Wilhelm, our new
11 director of public works. Maybe Jerry Stanley, Mark
12 Roseneau. Or you could -- maybe even individuals from
13 the Open Land Trust. I'm not sure.

14 Q If it's not gated to anyone, any member of the
15 public, any taxpayer in Beaufort County, go down and
16 walk around the property?

17 A Yeah. They can access it by going that way or by
18 water.

19 Q Has the County put up any signs, to your knowledge,
20 on the property?

21 A I don't know that.

22 Q Who would know that?

23 A The same people that I stated.

24 Q Has the County attempted to keep any record of the
25 persons who may have gone on the property since the

1 County acquired it?

2 A I don't believe so.

3 Q To your knowledge, then, the County has done
4 nothing to restrict access to the Point parcel?

5 A That's correct.

6 Q Okay. Was the County's acquisition of the Pinckney
7 Point parcel the most that has been spent from the Rural
8 and Critical Lands Fund towards the acquisition of
9 property, or easement, or lease of property for the
10 program? The answer is no, correct?

11 A That's right.

12 Q Did the County seek any warranty from the seller,
13 Equity Resource Partners III, LLC, as to the sufficiency
14 of the access across the road parcel?

15 A I don't believe we did.

16 Q Was there discussion of doing that?

17 A Not to my knowledge. Or I was not included in -- I
18 don't know. There may have been, but I don't know. It
19 didn't involve me.

20 Q To your knowledge, was there a reason why the
21 County didn't insist on a warranty as to the access?

22 A No. My feeling is that we didn't care whether we
23 had access or not.

24 Q Would an absence of access restrict the available
25 uses of the property for the County?

1 A No.

2 Q Why not?

3 A Because I think the primary use that we wanted was
4 to prevent the development of the property.

5 MR. WALKER: That ends the excerpts.

6 THE COURT: Okay.

7 MR. WALKER: Your Honor, we have no more witnesses,
8 but may I just consult for one second with Ms. Monoc?

9 THE COURT: Certainly.

10 MR. WALKER: That concludes the Plaintiffs' case,
11 your Honor.

12 PLAINTIFF RESTS.

13 BY THE COURT:

14 THE COURT: Okay. Thank you.

15 Ladies and gentlemen, there are some matters of law
16 that I need to take up with the attorneys, and rather
17 than have you sit back there and wait for us, and then,
18 try to, maybe, put up a witness for five or ten minutes
19 before we start -- before we have to conclude, I'm
20 sorry, at 5:30 -- we're going to go ahead and break for
21 today.

22 Ladies and gentlemen, I would like to start back
23 with you tomorrow morning, if we could -- I'm sorry, I'm
24 just trying to figure out scheduling and how much time
25 I'm going to need. Let's start back tomorrow morning,

1 at 9:30, like we have been, ladies and gentlemen. We're
2 going to go ahead and continue with this case.

3 I've spoken with the attorneys, as far as
4 expectations and how long the case is going to take. We
5 are going to go into Monday. I'm going to go ahead and
6 tell you that right now. I don't think there's a
7 question about that, so. But we are hopeful that,
8 that's a potential that we will wrap it up. So, for
9 scheduling purposes, I just want you all to know that.
10 And obviously, we will not work through the weekend.
11 Whatever you're doing for the weekend is yours.

12 Ladies and gentlemen, I need to go ahead and tell
13 you, as I always do, do not discuss this case. It
14 wouldn't be appropriate to do so. Also, ladies and
15 gentlemen, not that I think it would be easy, but I
16 don't want anyone to do any drive-by's of this, as well,
17 which, I have to tell people, sometimes, in cases, to
18 not to.

19 Don't do any independent research, ladies and
20 gentlemen. If there happens to be anything in the
21 newspaper or in the news about this case, you are not to
22 read it in any way, shape, or form.

23 Ladies and gentlemen, simply come back tomorrow
24 morning, 9:30. We'll look forward to seeing you, and I
25 need to speak to my one juror, once you all go out, that

1 I understand needs to leave tomorrow. Okay? All right?
2 Thank you.

3 THE COURT: Could I just talk to the attorneys
4 while they walking out.

5 JURORS LEAVE COURTROOM 4:21 P.M.

6 OFF-THE-RECORD BENCH CONFERENCE, OUT OF
7 PRESENCE OF JURORS. PRESENT: THE COURT,
8 MR. WALKER, MS. MONOC, MR. ACHURCH.

9 END BENCH CONFERENCE.

10 THE COURT: I'm going to bring him out and excuse
11 him. And then, do you all want to take a few minutes,
12 or do you want to do motions, or would you rather do it
13 tomorrow morning?

14 MR. WALKER: Just in the interest of moving it --
15 we'll do whatever you want to do.

16 THE COURT: Okay. You don't have to do much.

17 MR. WALKER: They're the moving parties, and just
18 to make -- give us the best shot at getting all the
19 testimony tomorrow, but if you all think you can do your
20 motion and your testimony, whatever. It's your
21 pleasure.

22 MS. LOHR: I can go ahead and do the directed
23 verdict motion.

24 THE COURT: Okay.

25 MS. LOHR: You know, bear with me if I get --

1 THE COURT: It's only me. I'm okay.

2 MR. ACHURCH: And then, we won't even have to come
3 tomorrow.

4 THE COURT: There you go. Okay. Why don't you go
5 ahead and bring Mr. Solomon out for me, just really
6 quickly. Okay?

7 MS. LOHR: I'd rather go ahead and get it over
8 with.

9 JUROR NUMBER 310, ALTERNATE JUROR,
10 ENTERS THE COURTROOM.

11 RELEASING JUROR NUMBER 310, ALTERNATE:

12 THE COURT: Mr. Solomon, how are you, sir?

13 JUROR NUMBER 310: Fine. Thank you.

14 THE COURT: Good. My understanding is, you have to
15 go somewhere tomorrow. Is that correct?

16 JUROR NUMBER 310: Yes, ma'am.

17 THE COURT: At noon, I believe.

18 JUROR NUMBER 310: Yes, ma'am.

19 THE COURT: So, do you want me to go ahead and
20 excuse you from this jury? That's what I have to do. I
21 have to take you off of the jury to be able to allow you
22 to leave at noon tomorrow.

23 JUROR NUMBER 310: Yes, ma'am.

24 THE COURT: So, is that all right with you?

25 JUROR NUMBER 310: Yes, ma'am.

1 THE COURT: All right. I need to also tell you,
2 sir, that you are not to speak with any of the other
3 jurors, if you have become friends with them, until
4 they've heard all -- the entire case, and have reached a
5 verdict. So, what I am asking you to do is not to
6 contact them over the weekend or afterwards.

7 If you're interested in what the verdict is, if
8 it's not in the newspaper, you certainly can call to the
9 Clerk of Court's Office, and it will be -- just ask them
10 what it is, and they are happy to tell you, and let you
11 know what it is, if you have any interest. Okay?

12 JUROR NUMBER 310: Yes, ma'am.

13 THE COURT: All right. I appreciate it, sir.
14 Thank you for being her, and thank you for sitting
15 through this.

16 JUROR NUMBER 310: Yes, ma'am.

17 THE COURT: We appreciate it.

18 JUROR NUMBER 310: Yes, ma'am.

19 THE COURT: Thank you. Okay.

20 MR. WALKER: May we thank -- the lawyers, as well?

21 THE COURT: The lawyers thank you.

22 MR. WALKER: Thank you very much, sir.

23 THE COURT: Okay.

24 JUROR NUMBER 310, ALTERNATE, LEAVES
25 COURTROOM.

1 MOTION FOR DIRECTED VERDICT,

2 BY MS. LOHR:

3 THE COURT: Ms. Lohr, do you need -- okay.

4 MS. LOHR: Here.

5 THE COURT: Thank you. Let's definitely make it a
6 Court's exhibit. Can we do that?

7 MS. LOHR: Sure.

8 THE COURT: Okay.

9 COURT REPORTER: Mr. Walker? Mr. Walker? Those
10 deposition excerpts, does anything about that need to be
11 made an exhibit?

12 MS. MONOC: I think -- I think so. I have it in my
13 -- on my notes of things to talk about.

14 MR. WALKER: Did we put the exhibits in?

15 MS. MONOC: Yeah. There were a couple exhibits
16 that you reference that probably need to go in. Could
17 we talk about it right before their motion? Is that
18 okay?

19 MR. WALKER: Well, we've kind of closed our case,
20 but --

21 MS. MONOC: Yeah. I'm sorry.

22 MR. WALKER: But I forgot about -- we didn't
23 designated exhibits -- I'm sorry. We had designated the
24 exhibits, but we didn't -- I sat down and didn't --
25 forgot to --

1 THE COURT: Move them in?

2 MR. WALKER: Do the exhibits. So, if Ms. Monoc's
3 going to start with the directed verdict motion, and I
4 can look at those exhibits while she's going --

5 THE COURT: Okay. And see what isn't already in?

6 MR. WALKER: Right.

7 THE COURT: Okay. Perfect.

8 MR. WALKER: If that's okay.

9 THE COURT: That sounds good.

10 MS. MONOC: If it's okay with everyone if Trenholm
11 chimes in as necessary on the motion.

12 MS. LOHR: Excuse me. Your Honor, not that I need
13 to remind you, but directed verdict is appropriate when
14 the evidence yields only one inference. However, the
15 rule does not authorize consider you to allow the jury
16 to consider speculative or theoretical evidence. So,
17 that evidence should be thrown out during your
18 consideration.

19 Breach of contract. The evidence in this case
20 shows that the County fully complied with the specific
21 terms of the settlement agreement, that being the
22 variance was given, and the road was agreed to be
23 private.

24 There was no requirement in the settlement
25 agreement that all the permitting the County -- all

1 permitting to the County had to be approved. However,
2 it was only one singular issue of disagreement. That
3 was worked out fully by February 9, 2012.

4 Plaintiff had alleged settlement agreement language
5 required the property to be used as a residential
6 development. However, John Kunkel testified he did not
7 believe that to be the case.

8 With regard to the Plaintiffs' allegations of
9 implied covenant of good faith and fair dealing,
10 plaintiff has alleged breach of good faith and fair
11 dealing, and appears to be arguing that the entitlements
12 were held up by -- there's a two-prong argument, I
13 think, that they have. First being that the
14 entitlements were held up by the County, causing them to
15 be unable to get an investor.

16 Evidence, however, shows that the variance was
17 given immediately. The subject permit required was the
18 one issue -- that the subject permit requirement was the
19 one that applied to many other projects for years.
20 Sorry. Oh, I'm sorry. That evidence isn't in yet.

21 All right. The evidence was, we gave the variance
22 immediately, that we -- with regard to the subject
23 permit issue, that there was original disagreement, but
24 that we worked that out as of February 9, 2012. And
25 again, permitting specifically was not included in the

1 settlement agreement. It was the granting of the
2 variance and the agreement about the road.

3 No other entitlements were requested of the County
4 after that point. The County gave all the requirements
5 -- all the entitlements that it was asked to give. And
6 with the exception of about a four-and-a-half-month
7 period, everybody was in agreement about the
8 entitlements, so that's not at issue.

9 The County additionally gave an extension to
10 developer in order to go past that one-year period, into
11 another year. And so, it shows that the County was
12 working with this developer to -- in order for -- to
13 allow them to get any of the requirements for their
14 final submittal.

15 The evidence in the case additionally shows that
16 they never submitted for final approval. So, the
17 plaintiff cannot argue that the County, after the
18 settlement agreement -- because, again, all the
19 information that came in before the settlement agreement
20 was supposed to be for background.

21 But after the settlement agreement, the only
22 evidence that any entitlements were held up were for
23 about a four-and-a-half-month period between the
24 conditional approval and August -- I think it was August
25 23rd of 2012, 'til February 9th -- of 2011; to February

1 9th of 2012.

2 Furthermore, that alone wouldn't -- shouldn't have
3 held up. They could have been doing other things. They
4 had their conceptual approval. It was just those --
5 that one condition that they were trying to work out.
6 So, I don't think it could be said the County was doing
7 anything to hold up their project, particularly when
8 there was a year and two months remaining, where there
9 was nothing that the County could have given them,
10 except final approval, which they didn't ask for.

11 The second argument of breach of implied covenant
12 of good faith and fair dealing appears to be with regard
13 to the discussions the County had with ERP, Equity
14 Resource Partners, over the property and the purchase of
15 the property. Evidence in the case thus far is that
16 Budds was approached by ERP; that County -- Budds is a
17 county contractor. The County did not approach ERP, and
18 that no negotiations or discussions, except for Budds
19 going out to see the property, occurred until after the
20 option was lost by Pinckney Point, LLC, to purchase the
21 property.

22 Additionally, your Honor, I want to hand up *Swinton*
23 *Creek Nursery*. And I feel like I'm yelling, but that's
24 --

25 THE COURT: It's okay.

1 MS. LOHR: -- it's the only volume I've got right
2 now.

3 THE COURT: You're okay.

4 MS. LOHR: *Swinton Creek Farms* -- I'm sorry,
5 *Swinton Creek Nursery versus Edisto Farm Credit*.

6 THE COURT: Okay. Thank you.

7 MS. LOHR: This case stands for the proposition one
8 cannot pursue a claim for breach of contract or implied
9 covenant -- breach of implied covenant of good faith and
10 fair dealing, if he is in breach of the contract. He
11 has to show that the contract has been performed on his
12 part, or, at least, he was, at the appropriate time --

13 THE COURT: Ready, able.

14 MS. LOHR: -- able, ready, and wanting to perform.
15 Our argument would be, your Honor, that, at the
16 appropriate time in this case would mean while he had
17 the ability and interest -- and to have an interest in
18 the property. Here -- I'm sorry -- Taylor Bush admitted
19 that, when Pinckney Point lost its option, it could not
20 develop the property, and could not fulfill the
21 obligations it had under the settlement agreement.
22 That's almost a verbatim quote from Mr. Bush's
23 testimony. I wrote it down, because it seems to fit
24 directly into the *Swinton Creek/Farms* analysis. If you
25 cannot, at the appropriate time, -- if you lose the

1 ability to fulfill your obligations under the contract,
2 you cannot pursue a claim for breach of contract or
3 implied covenant -- breach of implied covenant of good
4 faith and fair dealing.

5 I could go on, if you'd like. If you have any
6 questions of me with regard to that aspect of it.

7 THE COURT: Keep going. You're fine.

8 MS. LOHR: Okay. With regard to damages for lost
9 profit, the evidence that the plaintiff has provided the
10 Court is too speculative. To support claim for lost
11 profit damages in a breach of contract case, plaintiff
12 cited the case yesterday, *South Carolina Federal Savings*
13 *Bank*, and that case was largely premised on the *Drews*
14 *Company* case, which is *Drews Company, Inc., versus*
15 *Ledwith-Wolfe Associates*. And I'm going to hand that
16 up.

17 THE COURT: Thank you.

18 MS. LOHR: This is a 1988 Supreme Court opinion.
19 The *Swinton Creek* case was, I think, in 1999. In the
20 *Drews* case, the Court sets forth the three-part test for
21 a claim for lost profit in a breach of contract case.
22 Profits must be caused by the natural consequence of the
23 breach; they have to be foreseeable; and they have to be
24 established to a reasonable certainty. And we've been
25 using this word *reasonable certainty* over and over in

1 this case. So, I know you're aware of it.

2 *Drews* goes into detail, however, as to how to
3 establish reasonable certainty, and it gives specific
4 examples of what would be an acceptable method to show
5 reasonable certainty. Comparisons -- the examples are
6 that comparisons with other similar businesses in the
7 location, and the same size business, same type of
8 business; market surveys and forecasts; owner's
9 expectations without applica -- and the case
10 specifically says that owner expectations without
11 applications with this background information, such as
12 market surveys, forecasts, and comparisons, is
13 insufficient.

14 Now, in the *Drews* case, specifically, what happened
15 was the information was just basically the owner's guess
16 of what he could have made, based on what he had made
17 before.

18 Now, while we have a plethora of numbers that were
19 provided by Mr. Kunkel yesterday, it's still based on
20 the owner's expectation, with no reference to the
21 specific market survey or other market forecasts or
22 similar local development profits.

23 In order to use his numbers, he needed to base --
24 he needed to show and base those numbers on information
25 that came specifically from comparisons to other local

1 developments, comparisons to the local market, market
2 forecasts. And he didn't give us any of that
3 information. He basically said, well, I know what the
4 market does, and I've been in this business for years.
5 But he didn't have that background supporting
6 information that's required under *Drew* -- in the *Drews*
7 case.

8 Not only that, that's the third prong, really the
9 third level in a multi-level, speculative showing by the
10 plaintiff of lost profit. The first thing you have to
11 accept is that the plaintiff could have gotten an
12 investor to come in and provide them with the money.
13 No, they had an investor on the hook, but they didn't
14 like the terms. So, I would -- going back to the breach
15 of contract argument, I would contend that, that would
16 be evidence alone that the County didn't stop them by
17 not giving them entitlements, because, clearly, they had
18 an investor. They just didn't like the terms that
19 investor was giving them.

20 However, with regard to getting an investor, it was
21 Taylor Bush's contention that they couldn't get an
22 investor without approvals. So, they still didn't have
23 the approvals at this point. Taylor Bush says you can't
24 get the investor without approvals. So, how in the
25 world can we -- but on the other hand, he says, oh, John

1 Kunkel would have gone out and found an investor.

2 That's complete speculation, and it's not even based on
3 what he says that the evidence in the case is, that is,
4 that the County was withholding entitlements, and you
5 can't get investment money without those entitlements.

6 Additionally, you have to -- once they have the
7 investor, the mythological investor that we don't know
8 who is, and they never told us a name of someone who
9 was, at the time, going to give them the money in the
10 next five, ten, fifteen, twenty days, you have to assume
11 that ERP, if they had given them an option, which they
12 didn't do, and specifically said they were interested in
13 doing, they were going to pursue other avenues, you'd
14 have to assume that ERP wouldn't have sold it to someone
15 else first.

16 And you heard Mr. Kunkel testify yesterday that
17 they would have sold it to whoever came along first with
18 the money, as any good businessman would do. So, again,
19 you're speculating, number one, they would have gotten
20 an investor, contrary to what Mr. Bush tells you is a
21 possibility; number two, ERP wouldn't have sold the
22 property to someone that came along, whether it was a
23 Ted Turner type who wants to have a plantation or
24 another land developer who wants to build exactly the
25 same thing at Pinckney Point.

1 And then, you have to get to the *Drews* analysis as
2 it applies to the testimony of Mr. Kunkel with regard to
3 the plaintiffs' numbers.

4 And your Honor, that is basically the directed
5 verdict motion on behalf of the County for the breach of
6 contract claim. I can go into the other ones, if you
7 want me to. Or we can wait and argue those issues.

8 THE COURT: Let's just wait on those. Let's just
9 keep our work focused on right here. Okay. Yes.

10 RESPONSE TO DIRECTED VERDICT MOTION

11 BY MS. MONOC:

12 MS. MONOC: Thank you, your Honor. May it please
13 the Court?

14 On behalf of the plaintiffs, we contend that the
15 evidence yields more than one reasonable inference, and
16 as such, it should be submitted to the jury. And we'd
17 ask that you would deny the County's motion.

18 First, on the breach of contract points that Mrs.
19 Lohr brought up, one point that I'd like to bring up is
20 that there are, clearly, different interpretations of
21 the language of the contract, and latent ambiguity
22 questions are for the jury. And we believe there is
23 more than a reasonable inference that the jury would
24 find that the County did, in fact, breach the settlement
25 agreement.

1 In terms of the implied covenant of good faith and
2 fair dealing, which is, you know, which is the thrust of
3 our argument, the evidence includes, but is not limited
4 to, you know, the one instance that we already pointed
5 out was that the County had agreement with ERP during
6 the option period. But I think that our case extends to
7 bad faith actions, including, but not limited to that,
8 but specifically, you know, the meeting with Walter
9 Nester and the county officials, where he even, like,
10 brings it straight, directly to their attention, as to,
11 you know, the intent of the parties and the rationale
12 behind the settlement agreement and everybody's
13 understanding. And there's been plenty of evidence that
14 the County understood that the purpose of the settlement
15 agreement was to allow a residential development.

16 For example, Mr. Kubic's testimony that Trenholm
17 just read a few minutes ago spoke to that point. And
18 so, I think that, you know, the fact that nothing was
19 even looked into after that meeting, and that the
20 settlement agreement was completely ignored, all of
21 those are different examples of bad faith that I think a
22 reasonable juror could have -- there were other
23 reasonable inferences beyond what the County is setting
24 forth. So, for that reason, I think the breach of
25 contract -- I think the jury could find the breach of

1 contract, based on all of the evidence.

2 In *Champion v. Whaley*, the Court said that:

3 *The defendant cannot take advantage of*
4 *the uncertainty created by his own wrongdoing.*
5 *If it were otherwise, then, it would be*
6 *virtually impossible for a plaintiff to prove*
7 *a case of prevention.*

8 I think that, that is how I would respond to the
9 County's allegations that we somehow breached the
10 contract first and that there is no real breach of
11 contract by the County.

12 In addition to that, I think -- and I haven't had a
13 chance to read Mary's brief, because she just handed it
14 to us, but I also wanted to point out that any
15 disagreements regarding -- the County's contentions
16 regarding our agreement with Dot Gnann, that's
17 completely separate and apart from our agreement with
18 the County, and think that there is a more than
19 reasonable inference to support that.

20 And on the *Swinton* case, I believe that, you know,
21 that *Champion v. Whaley* kind of responds to the
22 *Swinton* argument that you must show that the contract
23 has been performed on his part; or at least was, at the
24 appropriate time, ready and willing to perform. I think
25 that there is more than a reasonable inference that we

1 would have performed, but for all the reasons that, you
2 know, I must beat a dead horse with all the ways in
3 which we would have performed, if we had the
4 entitlements. And we think that, but for the County's
5 conduct, we would have gotten the permits in time.

6 You know, the County's actions forced the option to
7 expire. We would have gotten financing. There's plenty
8 of evidence and testimony that all of these things
9 probably would have happened. And in some instances, I
10 think there's an even higher likelihood than probably,
11 based on the evidence.

12 MS. LOHR: Your Honor, may I respond?

13 MS. MONOC: I'm sorry, I'm not done.

14 THE COURT: Just let her finish.

15 MS. LOHR: I'm sorry, I didn't realize that. My
16 apologies.

17 MS. MONOC: I disagree with the County's
18 interpretation of the testimony and the evidence,
19 especially as it relates -- specifically as it relates
20 to lost profits. I'd be happy to speak to each of those
21 elements. I do think there is more than one reasonable
22 inference that damages of our clients are the natural
23 consequence of the breach of contract. The intended
24 benefit of the bargain to Pinckney Point was that it
25 would be able to proceed with the development of the

1 Point parcel. I think the damages are foreseeable.

2 THE COURT: What about Ms. Lohr's questioning that
3 you didn't do anything as comparables, or anything; that
4 you could do something like that in South Carolina? I
5 mean, I heard Mr. Kunkel's testimony is that, you know,
6 he's been involved in many of these, over thirty years,
7 or at least the last fifteen, with this group. Thirty-
8 five percent have failed. But is he required to show
9 anything locally? And when I say *locally*, I mean, I
10 guess, even in South Carolina, would be nice, is what --
11 and I mean, you could compare it to something like a
12 Berkeley Hall, or whatever else is around there --

13 MS. MONOC: Sure.

14 THE COURT: -- that certainly has had its own
15 history of problems, so.

16 MS. MONOC: Yeah, I was actually going to go into
17 that next.

18 THE COURT: Okay.

19 MS. MONOC: Because we discussed that in our motion
20 in limine brief regarding -- and I cited it in *Moore v.*
21 *Moore*. And I'm not sure -- what year was the *Drews*
22 case?

23 MS. LOHR: *Drews* was 1988, and it was the case that
24 you cited yesterday, actually, you cited before.

25 THE COURT: Yeah. I'm not talking about that case.

1 I'm talking about *Moore v. Moore*, which is 360 South
2 Carolina 241. That would be talked about in our
3 pretrial motions, and I believe it has the same laundry
4 list of things that an expert test -- that an expert can
5 use to prove reasonable certainty.

6 THE COURT: Right.

7 MS. MONOC: And we actually used that as a
8 checklist when we were preparing his testimony.

9 THE COURT: Your case?

10 MS. MONOC: So, I don't -- I think Mary highlighted
11 some things that are helpful to the County's position,
12 but I think there are other ways in which you can prove
13 damages with reasonable certainty.

14 THE COURT: Do you have another copy of the *Moore v*
15 *Moore* case, or did you -- I don't know if you ever gave
16 me one.

17 MS. MONOC: I'd be happy to email it.

18 THE COURT: Just email it.

19 MS. MONOC: Sure.

20 THE COURT: That's fine. I'm sorry. Yes.

21 MS. MONOC: And it's just -- I only cite to it to
22 give this laundry list of the ways, and I'd be happy to
23 read it in right now, that proof can be established
24 through expert testimony; economic and financial data;
25 market surveys and analyses; business records of similar

1 enterprises; comparison of a profit performance of
2 businesses similar in size, nature, and location;
3 comparison with profit history of plaintiffs' successor;
4 comparison of similar businesses owned by the plaintiff
5 himself; and use of economic and financial data and
6 expert testimony.

7 So, I don't think, in any case, an expert would be
8 required to tick off every single one of those things,
9 but I believe we ticked off at least four of them.

10 THE COURT: Okay.

11 MS. MONOC: Three or four, so.

12 MR. WALKER: And in particular, other businesses
13 owned by the plaintiff.

14 THE COURT: Exactly.

15 MR. WALKER: Because Mr. Kunkel spoke to the
16 consistency of the analysis.

17 THE COURT: Right.

18 MR. WALKER: And the comparison to other similar
19 projects, too, so that it was not just stand-alone --

20 THE COURT: Right.

21 MR. WALKER: -- out of whole cloth.

22 COURT REPORTER: *Stand-alone* what?

23 MR. WALKER: Out of whole cloth. That was a bad
24 mixed metaphor.

25 THE COURT: Okay. All right. You're done? You're

1 good?

2 MS. MONOC: Is there anything else?

3 MR. WALKER: No, but we can come back, I think,
4 when Ms. Lohr is finished.

5 THE COURT: That's okay. Ms. Lohr.

6 RESPONSE TO PLAINTIFFS' RESPONSE

7 BY MS. LOHR:

8 MS. LOHR: With regard to the option, the County's
9 position would be that, when Pinckney Point, LLC, loses
10 the option, --

11 THE COURT: Okay.

12 MS. LOHR: -- they are not able at that point to
13 satisfy the obligations under the contract. And it's
14 interesting to me that the plaintiffs say, well, for
15 their purposes arguing here today, that Dot Gnann's
16 contract isn't part of it, and Agnes Pinckney's contract
17 is part of it, when it's either all part of one
18 contract, or it's not. You can't say Agnes' was part of
19 ours, but Dot's isn't part of ours. As far as I can
20 tell, it was all part of the same settlement agreement.

21 So, if you can't satisfy your obligations under the
22 contract, and you've lost the property, and you don't
23 have any ownership interest in the property, I don't see
24 how you can't be said to have breached the contract.
25 They were not ready, willing, and able at the

1 appropriate time. And at the appropriate time, in this
2 case, means when they had an interest in the property.
3 They weren't ready, willing, and able at the appropriate
4 time to perform under the contract. It becomes -- the
5 contract becomes a nullity, your Honor, at the point
6 that they can't perform under it anymore.

7 And as far as Walter Nester's conversation being
8 evidence of bad faith, that's occurring not only --
9 that's occurring a month and a half after they've lost
10 their option. They don't have any interest in the
11 property at that point. He's coming to the County and
12 saying, don't do this, because he's trying to stop the
13 County from purchasing the property, so that they can
14 still have some hope to go get this mythical investor,
15 who we still don't have the name of, who Taylor Bush
16 says that he can't get the money from, because he
17 doesn't have the entitlements at this point.

18 And your Honor, I'd also like to address, I cannot,
19 subsequent to the settlement agreement, figure out what
20 delay we caused, except for the four-and-a-half-month
21 period, I cannot figure out what delay it is that we
22 caused; because there was nothing else the County asked
23 for -- the County could ask for.

24 There were things they had to go do. They had to
25 go get water permits from Beaufort-Jasper Water and

1 Sewer. They had to go to DHEC to get the four lots that
2 we heard about, that was part of the agreement. And I
3 think, admittedly, those four lots didn't exist on the
4 original DHEC permit. I think we heard that. So, we
5 know that they weren't permitted by DHEC, so that wasn't
6 the County holding them up, either. They didn't get
7 that permitting until February of 2013.

8 So, I don't know how the County could have held
9 anybody up, except for during that four-and-a-half-month
10 period when the County was trying to work that issue out
11 with them. We worked it out, and we moved forward.

12 There was nothing that -- they applied in July of
13 2011. It usually is about a six-week period. They had
14 an answer by August. There was one condition, and it
15 got worked out verbally as of December of 2011, and was
16 worked out officially, on paper, to satisfy Walter,
17 according to Walter's testimony, as of February 9, 2012.

18 So, post-settlement agreement, I don't know what in
19 the world the delay could have been that was causing
20 them from getting their funding and being able to pursue
21 their development. The one thing that is preventing is,
22 is that they aren't making final approval. We can't
23 give them the entitlement until they ask us for it.

24 Additionally, the testimony with regard to the road
25 parcel, is that Road's not damaged. They have the same

1 thing today, according to Tommy Hartnett's testimony,
2 that they had then, and that's a piece of property worth
3 five million dollars. So, I don't really know how they
4 can claim damage, because Tommy Hartnett got up there
5 and said, property today is worth five million dollars.

6 So, anything else, in response?

7 Oh, also, the testimony of Taylor Bush, I believe,
8 was that there was tightness in the capital markets. I
9 think we saw that, maybe in some emails with Taylor
10 Bush. And they said that was the reason they weren't
11 getting their funding. They also said that BB&T was the
12 reason that they, you know, the bad acts of BB&T. It's
13 always the bad acts of everybody, your Honor. And in
14 this case, I don't see the proof that the County was
15 holding them up on anything, except for a four-and-a-
16 half-month period. They had a year and two -- or a year
17 and three months after that to move forward.

18 RESPONSE TO DEFENDANT'S RESPONSE

19 BY MR. WALKER:

20 THE COURT: Does someone want to address Road,
21 LLC's, damages?

22 MR. WALKER: I will.

23 THE COURT: Thank you.

24 MR. WALKER: And Mr. Hartnett's estimation of value
25 is based on the highest and best use as an access to a

1 residential subdivision. And through the acquisition of
2 this property, and through the testimony of Gary Kubic,
3 who has said it's never going to be that, that value has
4 been taken away from us. So, we would say the damages
5 are we've lost all that value in the property, because
6 that value is part of the whole, if the Point parcel is
7 used as a residential subdivision in the acquisition by
8 the County for conservation purposes, created the
9 damages.

10 THE COURT: Okay.

11 MR. WALKER: Turning -- going back and sort of
12 starting where she began. The obligations I think that
13 the defense has referred to, to Dot Gnann or to Agnes
14 Pinckney, are not obligations to the County. We are
15 saying it's a global settlement agreement, but the
16 County hasn't said we breached any obligations as to it.

17 And also, we would say that, by swooping down and
18 taking the property, that they've deprived us of the
19 ability to perform those obligations. As Ms. Monoc
20 said, they prevented that from happening. There's a
21 reasonable inference that, had there not been delays,
22 that we could have gotten along farther in the process.
23 There's a reasonable inference that Equity Resources was
24 interested in granting an extension and didn't, decided
25 not to. And the inference is that, during the same time

1 the County was negotiating the contract, there's proof
2 that we could have obtained the approvals if we had 120
3 days more; and there's proof from Mr. Kunkel that we
4 could have obtained financing.

5 We disagree with the defense's characterization of
6 the internal delay, where it was said that it was only
7 four months or five months. There was testimony that
8 suggests -- in fact, it was direct -- that this issue
9 about the septic tanks and requiring individual permits
10 occurred as early as May, maybe even March of 2011, and
11 wasn't resolved until February of 2012. There's plenty
12 of testimony that we could not pull the trigger on the
13 engineering, which was the fundamental to moving things
14 along during that time. So, there is a reasonable
15 inference the jury could come to that we were delayed
16 seven months, and we should have had seven months more;
17 and if we had seven months more, we could have
18 performed.

19 So, we are not moving for a directed verdict. We
20 just have to show, for obvious reasons, we just have to
21 show there is either evidence or a reasonable inference
22 from the evidence, and the elements of our case, and I
23 think we've done that.

24 Also, in terms of good faith and fair dealing and
25 unreasonableness, Mr. Nester testified that the County

1 was imposing a requirement on us that was not in its
2 ordinances, and we got wrapped around the axle on that,
3 and that DHEC was the body, the governmental body, that
4 regulated septic tanks.

5 So, your Honor, we're prepared to answer any other
6 questions the Court may have, but we believe that we
7 have created issues of fact on the essential elements of
8 the case, for both Pinckney Point, LLC, and Road, LLC.
9 Thank you.

10 BY THE COURT:

11 THE COURT: Okay. Okay. What I'm going to do is
12 this. I've had the opportunity since you all have been
13 talking to read both the *Swinton Creek Nursery* case and
14 the *Drews* case. I want to go back and re-look at the
15 *Moore versus Moore* case, which, I think, we both
16 simultaneously pulled up yesterday, over lunchtime. And
17 then, I also want to read, Ms. Lohr, your motion;
18 because I haven't had a chance, obviously, to go through
19 it, so. I mean, I don't want to say anything. I don't
20 want to prejudge anything. Let me just go through and
21 look at it again.

22 Anything else we need to do tonight?

23 MS. LOHR: With regard -- I need to move for a
24 directed verdict with regard to the equity claims,
25 unless the Court will take it on brief. I have those,

1 but that doesn't give them an opportunity to reply, so.

2 THE COURT: Could we just --

3 MS. LOHR: I do need to do it -- to do it.

4 THE COURT: I know. I think, can we just go ahead
5 and preserve it, or can we do it on brief? Is that
6 fine?

7 MR. WALKER: We're fine with preserving it, and we
8 understood that we were going to take the verdict, that
9 they can make any arguments. They aren't waiving
10 anything.

11 THE COURT: Right.

12 MR. WALKER: We will agree that the Court -- they
13 can make their arguments that they're entitled to a
14 directed verdict at some time after we get the verdict.

15 THE COURT: We were going to do it after we took
16 the jury, yes.

17 MR. WALKER: Then, we can schedule a hearing on
18 that, and I think what we -- the jury verdict could
19 inform what's going to happen there. Potentially, if we
20 have a remedy at law.

21 THE COURT: Okay.

22 MR. WALKER: And I just suggest that we wait and do
23 that, and I certainly don't want to cause any prejudice
24 to the County.

25 THE COURT: Yes.

1 MR. WALKER: They can make any motion they want
2 then, and we won't say it was incumbent on them to do it
3 now. Because we didn't understand they had to do it
4 now. What we're doing in this trial is presenting all
5 the proof related to the claims.

6 MS. LOHR: And I was -- to be honest with you, your
7 Honor, I was uncertain whether it needed to happen at
8 this point, or since your Honor was going to rule on
9 issues later, --

10 THE COURT: I think --

11 MS. LOHR: -- I wanted it preserved, any rights.

12 THE COURT: And I agree. I think we have preserved
13 it. So, I think we're fine, and we'll just do it later.
14 Okay.

15 MR. WALKER: All right.

16 THE COURT: But it's noted for the record. It is
17 preserved. There's no question, so. Okay. On the
18 equitable claims.

19 MR. WALKER: And if we have anything in response to
20 the brief we received, we will --

21 THE COURT: And you're welcome to do that as --
22 yes.

23 MR. WALKER: Get it to you tonight or in the
24 morning.

25 THE COURT: And just make sure -- yes. Will you

1 just make sure you email it to me, personally?

2 MS. MONOC: Sure.

3 THE COURT: I mean, I just don't want to have to go
4 through the channels of Jamie, so, as well. Thank you.

5 MS. MONOC: So, just if there's anything that we
6 didn't hit on, or --

7 THE COURT: Okay.

8 MS. MONOC: -- we need to -- thank you.

9 MR. WALKER: Thank you very much your Honor.

10 THE COURT: I appreciate it. Okay. All right.

11 MS. MONOC: Your Honor, did you also want the other
12 case I was talking about yesterday. Were you thinking
13 about *Moore v. Moore*, or were you thinking about the one
14 that was the Court of Appeals residential development
15 case?

16 MS. LOHR: That's the *Savings Bank*. I think
17 *Federal Savings Bank*.

18 MS. MONOC: Do you want me to send that, as well?

19 THE COURT: Sure. I'll look at it.

20 MS. MONOC: Okay.

21 THE COURT: I think that's the one I pulled up.
22 Okay.

23 MR. WALKER: Your Honor, we did have one exhibit
24 just to take up that loose end.

25 THE COURT: Sure.

1 MR. WALKER: I went through where you referred to,
2 one, two, three, four, five, six, seven, eight, nine,
3 ten, eleven, twelve exhibits in my publication of
4 Kubic's deposition. Most are already in evidence, and I
5 will toss the minutes. The only one that we would like
6 to admit is the closing statement that he identified,
7 which is Plaintiffs' Exhibit 38, that he signed. And
8 that's the closing statement for the acquisition of the
9 parcel. It will be 38 in our book.

10 THE COURT: Any objection from you all?

11 MR. ACHURCH: Pardon me, Judge?

12 MS. LOHR: Is there any objection?

13 MR. ACHURCH: Oh.

14 THE COURT: It's just the closing statement of the
15 sale from ERP to Beaufort County.

16 MR. ACHURCH: No, I don't -- we don't object.

17 THE COURT: Okay. So, 38's in evidence.

18 MR. WALKER: So, we just opened the record, just to
19 submit that one exhibit 38.

20 THE COURT: Thank you.

21 ITEM IDENTIFIED AS CLOSING STATEMENT
22 FOR ACQUISITION OF THE PARCEL
23 MARKED PLAINTIFF'S EXHIBIT NUMBER 38,
24 ADMITTED AS EVIDENCE.

25 THE COURT: Yes. Okay.

1 MR. WALKER: That's the end of our proof.

2 THE COURT: Okay. Okay. So, I just want to make
3 sure you all don't have any witness issues tomorrow, as
4 far as if anyone has to be anywhere, like Mr. Gruber,
5 or? No? We're good? Are we doing live witnesses?
6 Obviously, I heard you say you're calling Mr. Gruber
7 tomorrow, so obviously, you've made that decision. Who
8 else is --

9 MR. ACHURCH: Well, we were going to call Hillary
10 Austin, your Honor.

11 THE COURT: Oh, that's right. I apologize. Yes.

12 MR. ACHURCH: And then, probably read in the
13 deposition of John Irby.

14 THE COURT: Okay.

15 MR. ACHURCH: And Mr. Kubic. And we have an expert
16 designated. We may or may not call an expert.

17 THE COURT: What kind of expert?

18 MR. ACHURCH: It's a legal expert.

19 THE COURT: A legal expert.

20 MR. BENDLE: He's a real estate, Judge.

21 THE COURT: Pardon?

22 MR. BENDLE: He's a real estate conservation --
23 real estate expert. Expert in title and abstract
24 review.

25 THE COURT: Okay.

1 MR. BENDLE: Is how we were going to qualify him.
2 THE COURT: Okay.
3 MR. BENDLE: We may or may not call him.
4 MR. ACHURCH: Yeah.
5 THE COURT: Okay.
6 MR. WALKER: And just to give a head's up, I didn't
7 think they were going to call him, but the designation
8 was, he was going to testify to legal matters, and we
9 were going to object to him testifying to the legal
10 matters.
11 THE COURT: Legal.
12 MR. WALKER: But we'll wait and see, I guess,
13 whether they decide to call him or not.
14 MR. ACHURCH: Well, we'll huddle up. We're trying
15 our very best to go without him.
16 THE COURT: Okay. Okay. I mean, just
17 understanding, obviously, he can't testify, typically,
18 as to legal matters. But I guess if they tiptoe around
19 conservation and other things that are outside of my
20 purview. Judges don't like their toes stepped on when
21 someone's advising us on legal matters.
22 MR. ACHURCH: Yeah, I appreciate that.
23 THE COURT: As you well know.
24 MR. ACHURCH: I certainly appreciate that.
25 OFF-THE-RECORD DISCUSSION.

1 BACK ON THE RECORD.

2 MR. ACHURCH: Yeah, we're -- we're

3 THE COURT: Okay.

4 MR. ACHURCH: We're 90 percent we're not going to
5 attempt that, Judge.

6 THE COURT: Okay. Okay. Well, I mean, figure out.
7 If you can use him for something that, you know, you
8 need to, I mean, like I said, I just don't want him
9 giving me a legal opinion, but.

10 MR. BENDLE: We'll talk about this, but I'm pretty
11 sure we won't.

12 MR. ACHURCH: I was hoping he could just tell the
13 Court what this is.

14 THE COURT: What this is.

15 MR. BENDLE: Well, then, he can do them.

16 MS. LOHR: I think it's reasonable to think we'll
17 finish tomorrow.

18 THE COURT: Okay. You think so, but we won't argue
19 and charge tomorrow?

20 MS. LOHR: Hmm-um.

21 THE COURT: Okay. They seemed all right with me
22 saying we're going to be here Monday. They really -- I
23 didn't hear too much. You know, I've seen groaning
24 before by a jury, and they didn't. So, I think that was
25 positive.

1 MR. ACHURCH: Mr. Walker's already cross-examined
2 Mr. Gruber. He's double-cross-examined him.

3 THE COURT: Exactly. Okay.

4 MR. ACHURCH: A double cross.

5 MR. WALKER: Yeah, it is a double cross.

6 THE COURT: Okay.

7 END DAY FOUR, THURSDAY,

8 APRIL 28, 2016, 5:05 P.M.

9 BEGIN DAY FIVE, FRIDAY,

10 APRIL 29, 2016, 9:35 A.M.

11 BY THE COURT:

12 BAILIFF: Court is back in session. The Honorable
13 Carmen Mullen presiding.

14 THE COURT: Thank you. Good morning. Please be
15 seated.

16 MS. LOHR: Your Honor, before we kind of get
17 started, there was something that I neglected to mention
18 yesterday that I feel like I need to put on the record.

19 THE COURT: Sure.

20 MS. LOHR: And bring to the Court's attention. We
21 were talking about lost profit damages and the expert
22 testimony that would be required, and I want to point
23 out to the Court that Mr. Kunkel was never qualified as
24 an expert witness.

25 THE COURT: I agree, but I think he, as the owner

1 or their representative, can testify as to lost profits.
2 I mean, I did consider that just as well. I was
3 actually surprised he didn't qualify him as an expert,
4 but I figured strategically, maybe he didn't want to.
5 So, I just didn't know.

6 Yes?

7 MS. MONOC: We did list him as an expert in
8 discovery, and they deposed him as an expert and things
9 like that. I just wanted to point that out.

10 MS. LOHR: Well, I mean, just for the record, I
11 would like to take the position that he was never
12 qualified as an expert witness for the jury.

13 THE COURT: Okay. And I know that, as well. But
14 again, I think as the owner and as the managing partner
15 it sounds like, of the business, what he was testifying
16 to, that he can talk about their loss profits just as a
17 property owner can talk about their lost profits. So.

18 I thought the same thing. Yesterday.

19 Well, I've had overnight to think about it, and at
20 this time, I'm going to go ahead and just deny the
21 directed verdict motion. I do think there was evidence
22 put up by the plaintiffs from which this jury could
23 determine that there was a breach of contract. And
24 again, I've already found that there was a latent
25 ambiguity in the contract requiring a background to

1 allow some -- what we've gotten in with oral evidence.

2 So, let's hear the defense's case. Let's hear
3 defense's case today, and we'll go from there. Okay?

4 You all ready to go this morning?

5 MR. ACHURCH: Yes, your Honor.

6 THE COURT: Do we need to cover Mr. Irby first?

7 MR. ACHURCH: Judge, that's if it pleases the
8 Court, we would do that.

9 THE COURT: Please.

10 DESIGNATIONS, JOHN H. IRBY

11 DEPOSITION:

12 MR. ACHURCH: Your Honor, we've gone through a
13 number of the designations. We'll go first through --
14 the plaintiffs designated some matters. 70 -- I don't
15 know. Do I need to go through them, your Honor, or does
16 your Honor have them.

17 THE COURT: I just -- I need --

18 MR. ACHURCH: They designated some matters, 76,
19 Line 5, through 79, Line 2.

20 THE COURT: Give me one second to get there.

21 MR. ACHURCH: And we don't object to them, Judge.
22 That's the only reason I didn't know if you wanted to go
23 through them.

24 THE COURT: Oh. Well, if you don't object to them,
25 we're fine.

1 MR. ACHURCH: Yeah, okay. We're okay with that.

2 THE COURT: Just tell me what you object to on your
3 designations.

4 MR. ACHURCH: Okay. Naturally, we've agreed -- Ms.
5 Monoc added some additional ones last night, I think the
6 Court received. And we worked through those, and we
7 agreed. We're fine with those, as well.

8 THE COURT: So, you all are good.

9 MR. ACHURCH: We've consented to those, yes.

10 THE COURT: Okay.

11 MR. ACHURCH: The plaintiffs objected. Defendant
12 designated portions of Mr. Irby's deposition. They
13 objected to 40, Line 13 through 25.

14 THE COURT: Okay. I think she needs to go over her
15 objections and tell me why. I think it's --

16 MR. ACHURCH: Well, I was going to tell you, your
17 Honor. We've agreed to that.

18 THE COURT: Okay.

19 MR. ACHURCH: To move that to Page 41, Lines 9
20 through 25.

21 THE COURT: Mr. Achurch, the only thing I need to
22 hear is anything that you needed to work on.

23 MR. ACHURCH: Okay.

24 THE COURT: So, whatever you all have worked out,
25 I'm assuming you have good highlighted copies. That's

1 the only thing I need to hear.

2 MR. ACHURCH: Well, actually, if I could, your
3 Honor, let me go back and look. She did object to 40,
4 Line 13 through 25. And I might have had my pagination
5 wrong. So, we'll look. She objected to 40, Line 13
6 through 25.

7 MS. MONOC: I'm sorry, Robert. Page 41, it looks
8 -- I think it ends at -- I think that your designation
9 ended at Line 23, because 24 and 25 are a question.
10 Just so you know.

11 MR. ACHURCH: This says 40.

12 MS. MONOC: We took that off. That was the one we
13 just talked about.

14 MR. ACHURCH: Okay. All right. Okay. So, we
15 agreed to that one, so it's all annexed. And we moved
16 Page 41's designation to Line 9 through 25.

17 MS. MONOC: Line 9 through 23, which you had
18 already designated.

19 MR. ACHURCH: 9 through 23. So, we got rid of all
20 that objection.

21 MS. MONOC: Yeah.

22 MR. ACHURCH: So, the difference is, your Honor, we
23 moved 41 to Line 9 through 23. And now, we do have
24 objections, and Ms. Monoc can address those.

25 MS. MONOC: May it please the Court?

1 THE COURT: Yes.

2 MS. MONOC: Do you have a copy of the deposition?

3 THE COURT: I do.

4 MS. MONOC: Okay.

5 THE COURT: I've got the deposition, and I've got
6 your designations and your objections, too.

7 MS. MONOC: Great. So, on Page 66, Lines 1 through
8 25.

9 THE COURT: Okay.

10 MS. MONOC: There is a line where he says we
11 weren't sure about their integrity. And our objection
12 is that, that is inflammatory and prejudicial. Although
13 a witness can testify to the character of another
14 witness, the entity is not another witness. And so, we
15 would ask that the Court agree to take that out.

16 THE COURT: This is 66?

17 MS. MONOC: It's toward -- I think it's toward the
18 end where he says that.

19 THE COURT: So, you've agreed to take that out?

20 MR. ACHURCH: No, your Honor, we didn't.

21 MS. MONOC: At the very end, Line 24, it says:

22 *We weren't sure about their integrity*
23 *at that point, is my recollection.*

24 So, everything else is okay, but we think that,
25 that line is inflammatory and prejudicial, and against

1 Rule 404(a)(3).

2 THE COURT: Well, I can see the 403. I can see
3 saying -- you know, I think it's fair, and I don't
4 really think they were using -- I mean, I can be wrong
5 in the way I interpret this, but I mean, it says we
6 weren't sure about their integrity. I don't think it
7 meant really their integrity. I just think it meant
8 their ability to come up with the money. That's kind of
9 how I take it. So, that's kind of --

10 MS. MONOC: Okay.

11 THE COURT: I don't think it's slanderous on them.

12 MS. MONOC: Okay. Right.

13 THE COURT: I just think that they --

14 MS. MONOC: Well, it gets a little juicy, so, we'll
15 keep that.

16 THE COURT: Okay.

17 MR. ACHURCH: It does. Okay. So, keep that.

18 THE COURT: I don't know if that's a business term
19 you use for people who can't come up with the money.
20 Integrity? But it could be, I guess. So, in fairness,
21 I think -- I mean, it's really the heart of what we're
22 asking.

23 MS. MONOC: We appreciate it. Thank you.

24 THE COURT: So.

25 MS. MONOC: On Page 96, Lines 1 through 8.

1 Everything's okay until Line 12 when he says that:

2 *They were trying to pull a slick move*
3 *on us, which I think they did, actually.*

4 And we also -- that is, in addition to being
5 gratuitous and highly prejudicial, we don't think it's
6 responsive to the question, which was:

7 *Do you know --*

8 Let's see. Which is --

9 OFF-THE-RECORD DISCUSSION BRIEFLY.

10 BACK ON THE RECORD

11 MS. MONOC: Trenholm had asked:

12 *Did you come to the conclusion that*
13 *there was a prescriptive easement?*

14 And he's answering that it was a slick move. We
15 just don't think that, that's responsive.

16 THE COURT: As to the prescriptive easement?

17 MR. ACHURCH: Your Honor, this goes to why --

18 THE COURT: We've already had -- Weston Newton has
19 already testified, and with the full story of Bill
20 Herbkersman, which I'm not sure what he adds, that, yes,
21 he believes there is a prescriptive easement. So,
22 that's already been published.

23 MR. ACHURCH: Yes, sir. Yes, your Honor.

24 THE COURT: That's okay.

25 MR. ACHURCH: Your Honor, the importance to that

1 is, why -- one of the reasons ERP chose not to renew
2 this option. The plaintiff offered testimony, oh, they
3 were going to do it; we were going to do it, but for the
4 fact that you guys came in and bought it. And this is
5 another reason ERP didn't agree to renew their option.
6 And they didn't feel like they were getting the straight
7 talk from these people. And I think that definitely
8 goes to -- because there's no other person who's been
9 brought in here to say, oh, I would have bought it but
10 for this or any of that. And these are the -- ERP chose
11 to sell to the County. ERP chose not to renew this
12 option, and I think this is one of the reasons why they
13 chose not to do that. And I think it's completely
14 relevant.

15 THE COURT: I think it is, too. I think they
16 should be able to put it in.

17 MS. MONOC: Okay.

18 THE COURT: I mean, it is what it is.

19 MS. MONOC: That's fine. Moving to the next --

20 THE COURT: I call it good lawyering. I didn't
21 know it was Mr. Nester over here. It was good
22 lawyering, so.

23 MS. MONOC: The next one was Page 101. And at some
24 point, we've gotten into, you know, this was a slick
25 move, and I think the ones past that, then, would be

1 prejudicial because it's repetitive. On Line 16 through
2 22 of that next one.

3 THE COURT IS READING.

4 MS. MONOC: Do you think it's cumulative?

5 THE COURT: Well, it is kind of what it is. Well,
6 I guess you could say it's somewhat cumulative, But, if
7 you were sitting up here on the stand, I mean, you
8 always can beat a dead horse. So, I mean, I think it's
9 fair game.

10 MS. MONOC: That's fine. Thank you.

11 THE COURT: Sure.

12 MS. MONOC: On Page 102, Lines -- he's -- okay, the
13 objection was Lines 20, through 103, 8.

14 THE COURT: We're back to sneaky or slimy or
15 whatever.

16 MS. MONOC: Yeah. And I think that was just more
17 of the same, but, if -- you know, I think it's probably
18 fine, since Trenholm was just asking him to explain the
19 sneaky or slimly. He said that's probability fine.

20 But the only part is, is he says -- there is one
21 part that we object to still, where he says, on Page
22 103, Lines 6 through 8, he says:

23 *You bought a \$5,000.00 piece of property*
24 *for a million some odd dollars.*

25 And we don't think that he has -- he's qualified to

1 testify to the value of the road parcel. There's no
2 basis for that.

3 THE COURT: That's just an answer. I think he's
4 just commenting.

5 MS. MONOC: Okay. That's fine.

6 THE COURT: I think it's his comment.

7 MS. MONOC: Okay. Want me to go on to the next?

8 THE COURT: I don't think it's an opinion. I'm
9 pretty sure that's what the County's going to say it's
10 worth, so, 5,000.

11 MS. MONOC: Yeah, and that's fine. We'll withdraw
12 that one. That's fine. It's all good.

13 The next one, though, he says that -- the next one
14 was Page 127, Lines 10 through 16, and he says that:

15 *They could have bought it within the*
16 *past 365 days, or before 1.5 years of litigation,*
17 *or before foreclosure.*

18 And we just don't think that he has any capacity to
19 testify as to our client; doesn't know their means; and
20 he's providing inaccurate information because he wasn't
21 a party to any of those events.

22 THE COURT: I think it's all been testified to
23 already.

24 MR. ACHURCH: I'm sorry. What page are we on?

25 THE COURT: That's pretty much the testimony I've

1 heard. And it'd been in litigation since.

2 MS. MONOC: Page 127, 2 through 16.

3 THE COURT: I don't think it's anything that hasn't
4 already been testified to.

5 MS. MONOC: Okay. Okay. On Page 130, 15-25.
6 Again, we don't think he can testify as to the intent of
7 another, and that he doesn't have the capacity to speak
8 to this point.

9 THE COURT: I mean, it's the same thing we've been
10 talking about. I know it might be a little bit
11 cumulative, but.

12 MS. MONOC: Okay.

13 THE COURT: That's what they were trying to do. I
14 mean, they trying -- I mean, we'll see that the jury
15 determines it.

16 MS. MONOC: Okay. Thank you for letting me put
17 those on the record after submitting them.

18 THE COURT: Absolutely. Who's your first witness
19 this morning?

20 MS. MONOC: Hillary Austin.

21 THE COURT: Okay. And then, after that?

22 MS. MONOC: John Irby's deposition.

23 THE COURT: Okay. So, is this going to give us a
24 little time during Ms. Austin's deposition someone to
25 highlight this properly?

1 MS. MONOC: I'm getting ready to go do it.

2 THE COURT: Okay. And how do you want to read it?

3 MR. ACHURCH: We're going to have Mr. Bendle to be
4 Mr. Irby and the lawyer.

5 THE COURT: He'll read it in.

6 MR. ACHURCH: We'll just do it in the same fashion
7 Mr. Walker did.

8 THE COURT: That's all right.

9 OFF-THE-RECORD DISCUSSION.

10 THE COURT: Do you all need five minutes or? What
11 do you think?

12 MS. LOHR: Give us a couple minutes to get this
13 Irby thing sorted out.

14 THE COURT: Okay.

15 OFF THE RECORD 9:51 A.M.

16 BACK ON THE RECORD 9:58 A.M.

17 BY THE COURT:

18 THE COURT: All right. Are you ready?

19 MS. LOHR: Yes, ma'am.

20 THE COURT: Yes, you can go, Robert.

21 All right. Well, let's call the players back,
22 Rick. Let's bring this jury in.

23 JURORS ENTER COURTROOM 10:00 A.M.

24 THE COURT: Good morning, ladies and gentlemen.

25 You all may be seated. I hope everyone had a good

1 night's rest. I'm glad to see you all here. Mr.
2 Middleton, you are now an official part of this jury.
3 As you know, one of our jurors had to leave, so.
4 Welcome again.

5 Ladies and gentlemen, at this time, Beaufort
6 County, the defendant, is going to go ahead and put up
7 their case. So, if you'll call your first witness for
8 today.

9 MS. LOHR: Good morning, ladies and gentlemen of
10 the jury. May it please the Court? I'd like to call
11 Hillary Austin at this time.

12 THE COURT: Come on forward, Ms. Austin, and be
13 sworn, please.

14 MADAM CLERK: Do you solemnly swear or affirm the
15 testimony you give to the Court in this case shall be
16 the truth, so help you God?

17 MS. HILLARY ANGELA AUSTIN: I do.

18 MADAM CLERK: You may be seated.

19 HILLARY ANGELA AUSTIN

20 DIRECT EXAMINATION, BY MS. LOHR:

21 Q Good morning, Ms. Austin. Can you state your full
22 name for the record.

23 A My name is Hillary Angela Austin.

24 Q And Ms. Austin, can you tell us where you were
25 born.

1 A Saint Mary, Jamaica.

2 Q So, your accent, you're not from around here.

3 A No.

4 Q Tell me how you got to Beaufort.

5 A I was a United States Marine.

6 Q Okay. And how long have you been in Beaufort?

7 A About 25 years.

8 Q Okay. And where do you work?

9 A I work for Beaufort County Zoning and Development.

10 Q And how long have you been an employee of Beaufort
11 County?

12 A This June will be 21 years.

13 Q And what's your current position?

14 A I'm the zoning and development administrator.

15 Q And back in 2005, what was your position?

16 A 2005 I was the ZDA, the zoning and development
17 administrator.

18 Q Okay. And what are some of your job duties as the
19 zoning and development administrator?

20 A I administer the zoning ordinance that council
21 passes; receive applications for development; approve
22 applications in some cases; and just administer the
23 ordinance.

24 Q And do you work with developers on a daily basis?

25 A Yes, I did.

1 Q And are you familiar with the Pinckney Point parcel
2 we're here about today?

3 A Yes, I am.

4 Q When did you first become familiar with Pinckney
5 Point?

6 A Around 2005.

7 Q Okay. And what brought it to your attention?

8 A They applied for conceptual approval.

9 Q Okay. And at that time, do you recall the
10 application of Pinckney Point in 2005?

11 A I do. They submitted their application and all of
12 the conceptual plans, and a couple of paperwork that was
13 required per the application.

14 Q Okay. And what happened during that application
15 process?

16 A Well, according to the ordinance, it comes to my
17 office. We review it for completeness. Then, there are
18 four members of our Development Review Team. And from
19 my office, it gets farmed out to the four -- well, the
20 other three members. I'm a member of the Development
21 Review Team.

22 According to the ordinance, seven days before the
23 meeting we're supposed to send recommendations out to
24 the applicant, and this is our findings, what -- what's
25 in the -- what's in the -- does the application meet the

1 requirements of the ordinance. So, we send a letter out
2 to the applicant telling him yea or nay, or these are
3 the things you need to address.

4 Q Okay. I'm going to hand up to you what's
5 previously been marked as Defendant's Exhibit 2. And
6 what's that letter?

7 A This is a letter from my -- well, from myself. I
8 remember this letter. To the -- I guess he's the agent
9 for the applicant. And this is the letter we send out
10 with the recommendations to the applicant. And we
11 normally do this seven days before the meeting date.
12 so.

13 Q All right. And what does the -- what's contained
14 -- what's the point of that letter?

15 A This is to let the applicant know that we have
16 reviewed his application. And there are some things on
17 here that pertains to the application that we need for
18 him to address.

19 Q Okay. And what were the concerns in 2005 on the
20 letter that you gave the Pinckney Point developers?

21 A Well, the first issue was legal access to the -- to
22 the property. We thought that there was a problem with
23 the access. So, we wanted the applicant to clarify how
24 he was going to provide legal access to do a
25 subdivision.

1 And then, the second thing was, I think with this
2 application, he submitted that he wanted to do public
3 sewer. So, we wanted him to know that, according to the
4 ordinance, you have to be within 300 feet of an existing
5 sewer line to be able to tie into public sewer. So, we
6 wanted to put him on notice that his original plans
7 would not work, because it doesn't meet the ordinance.

8 Q Okay. You said the ordinance required you can only
9 tie in if you're within 300 feet.

10 A Yes.

11 Q Are you given any latitude to make a decision on
12 that?

13 A No. The DRT does not have the ability to override
14 the ordinance.

15 Q So, even if sewer's a great idea for the place.

16 A We cannot say you have to tie into sewer. If
17 you're outside of 300 feet, you would either have to
18 change the ordinance or get -- and I don't even think a
19 variance would have applied. County Council would have
20 had to make that decision.

21 Q Okay. What happened to that application at that
22 point?

23 A It was deferred because they had to address these
24 issues.

25 Q Okay. And what does defer mean?

1 A Well, go back, address the issues, and come back
2 when you have them, you know, addressed, so that we can
3 work it out and see if you can meet the ordinance.

4 Q When was the next time that you heard from the
5 developers at Pinckney Point?

6 A I think it was in 2007.

7 Q Okay. Tell me what you recall happening then.

8 A Well, the -- the issue with the road became -- it
9 got out of -- it got out of our hands. They went to
10 Zoning Board of Appeals for a variance to move the road.
11 And then, it became is it a county road, is it a public
12 road, who owns the road. ZBOA decided we're not going
13 to deal with it.

14 Q Okay. Let me stop you right --

15 A Oh, I'm sorry.

16 Q Tell the jury, please, who you're referring to when
17 you say ZBOA.

18 A Oh. The Zoning Board of Appeals. I'm sorry. I'm
19 so used to saying that.

20 Q Okay. And tell me who is on the Zoning Board of
21 Appeals.

22 A The Zoning Board of Appeals is made up of seven
23 members appointed by county counsel. They're regular
24 people, and they decide they want to serve on a board
25 for the County, and they, you know, require to be placed

1 on a board. And County Council from each district picks
2 someone. So, it's a quasi judicial board, and they hear
3 all the variances for the ordinance.

4 Q Okay. You said that it got out of your hands and
5 went to ZBOA. Was the developer seeking something that
6 you didn't have the authority to give them in 2007?

7 A Yes. The way the property was set up, there was a
8 dirt road that entered the property. Beaufort County
9 has a natural resource protection. And we consider
10 fifty feet from the OCR and Critical Office of Coastal
11 Resources Management Critical line, there's a fifty-foot
12 buffer. This road was contained within the buffer.

13 To do a subdivision of this magnitude, you have to
14 have a fifty-foot right-of-way with a paved road to
15 serve the lots. This dirt road could not serve the
16 lots. So, They had to move it out of the fifty-foot
17 buffer. To do that, because of the way the property's
18 so narrow, they -- they would not be able to meet any of
19 the requirements. So, they needed a variance to move
20 the road entirely -- well, not entirely, but sort of out
21 of the fifty-foot buffer, so that they could get the
22 road in for their development. That takes a variance.
23 And they applied.

24 Q Okay. So, that becomes the citizen board's
25 question.

1 A Yes.

2 Q Okay. And what did the citizen board ultimately
3 decide?

4 A Again, the question was who owned the road. Was it
5 a county road? Was it a private road? So, the Zoning
6 Board of Appeals decided we're not going to make the
7 decision to move the road; you need to go to Council;
8 because we were saying it was a county road; and only
9 the county can decide do we want to move our county
10 road.

11 So, the ZBOA decided they weren't going to deal
12 with it, so they sent them to Natural Resources or --
13 they sent them to County Council. So then, to get to
14 County Council you have to go through a series of
15 boards, and I think one was the Public Service, or
16 something like that, so.

17 Q Okay. So, ultimately, did they appeal that
18 decision of the ZBOA?

19 A They did.

20 Q Okay. Do you know -- do you have any information
21 -- what information do you have about litigation that
22 was going on over the road at that time?

23 A Well, we received a complaint that the owner of the
24 road had placed some bollards, or whatever you call
25 them, that would stop people from going down. So, that

1 was an issue that came up. The County got involved,
2 because I think we thought it was a county road, or it
3 was a county road. And it got all bogged down. I -- I
4 think --

5 Q Do you know what the position of the County was in
6 that?

7 A Was that they needed to open the road back. You
8 couldn't block the access to the property. And --

9 Q Why would that be a concern?

10 A Because I can't just go out, I guess, and say I
11 don't want you to go down. If you've been using this
12 road all the time, I can't just put up a fence and say
13 you can't use it. So, it had to be open.

14 Q Do you know what happened with this litigation?

15 A Well, yes. We received word after it was all
16 completed, the DRT received word that it was now a
17 private road. The County granted them the approval to
18 move the road, and they could come back and apply.

19 Q Okay. And about what time was this? What year?

20 A I think this was about 2011.

21 Q Okay.

22 A Yes.

23 Q As it -- okay. As it impacts your job, what was it
24 that the County agreed to do in this settlement?

25 A To allow them to move the road.

1 Q Okay. And I'm going to hand up to you a document,
2 and I want you to tell me what this document is.

3 A Okay. These are the documents they submitted for
4 conceptual review.

5 Q Okay. When did they make that -- the they meaning
6 the Pinckney Point developer?

7 A Yes.

8 Q Okay. And when did they submit that document?

9 A They submitted it to us July 26, 2011.

10 Q Is this document part of your file?

11 A Yes, it is.

12 Q And it's maintained in your office?

13 A Yes.

14 MS. LOHR: I would move at this time that this
15 document be entered as Defendant's Exhibit 27.

16 MR. WALKER: Your Honor, we have no objection to
17 it, but if Ms. Austin is able to look through it and
18 affirm that, that is the application.

19 BY MS. LOHR:

20 A Oh, I'm --

21 Q Can you -- can you -- for the record.

22 A Yes, this is the application document, yes.

23 MS. LOHR: Okay. I would move that.

24 THE COURT: It's in evidence. Defendant's Number
25 27.

1 ITEM IDENTIFIED AS APPLICATION
2 DOCUMENTS SUBMITTED BY PINCKNEY
3 POINT DEVELOPERS
4 MARKED DEFENDANT'S EXHIBIT NUMBER 27,
5 ADMITTED AS EVIDENCE.
6 BY MS. LOHR:

7 Q All right. Do discussions happen that predate this
8 document with developers sometimes?

9 A Yes. I think we did a pre-application with them
10 again. This ordinance required that a pre-application
11 be done for a major subdivision.

12 Q Okay. What would those discussions contain? I
13 mean, what would be a -- just generally?

14 A Generally, we talk about the setbacks, the width of
15 the lots, how -- how big the lot should be. This --
16 This property had a couple of wetlands and
17 archaeological sites, and we wanted to make sure those
18 things were protected, and we talk about all of that.
19 We told them they had to go to the state's Historic --

20 Q Preservation.

21 A -- Preservation to get those archeological sites
22 marked and preserved. They had to show us their open
23 space, their natural resources. They had to decide if
24 they were going to use, you know, septic systems, things
25 like that. So, we normally talk to a developer about

1 those things before they make their application.

2 Q Okay. Can you do anything -- do you take any
3 formal -- formal action prior to them submitting their
4 application?.

5 A No, we do not.

6 Q Following the submission of this application, how
7 long does it usually take for a conceptual permit
8 application to make its way to the DRT?

9 A Takes about four weeks, four-and-a-half weeks.

10 Q Okay. And I'm going to hand you another document.
11 Can you identify that document.

12 A Yes. These two, I guess, documents, one is our
13 action form. When someone comes to the Development
14 Review Team, we normally, at the meeting, present them
15 with an action form stating what was discussed and what
16 was approved. Then, after the meeting, about two days
17 later, I'll do a letter to the applicant telling them
18 after, you know, a unanimous vote by the members, this
19 is the outcome of your application.

20 So, this letter state that the project was approved
21 with the following conditions. And these conditions
22 were to be done for final approval.

23 Q Okay. And were there any problems that the
24 developer had that you heard about with regard to the
25 conditions on here?

1 A Yes, the last one.

2 Q Well, let me ask you first, did anybody address any
3 problems to you that they had with the initial form?

4 A No.

5 Q Okay. So, we're really just talking about that
6 very last -- that very last line -- or next-to-last line
7 as the condition.

8 A Yes.

9 Q Okay. And what -- can you read that for me.

10 A It said:

11 *At final review, the applicant shall*
12 *submit septic system permits from DHEC.*

13 Q Okay. Can you explain kind of where the County's
14 coming from with these septic permit approvals.

15 A The County, the ordinance has a requirement. When
16 someone is doing a subdivision that's on the water, that
17 has a OCR critical line, there is a setback for septic
18 systems of 100 feet. Can I give an example?

19 Q Yeah, you can give an example.

20 A I had a subdivision that came in. DHEC, at the
21 time, would give us a letter stating that they've gone
22 out and, yes, the site will perk. And we'll accept that
23 letter as it's okay, we're creating these lots, and the
24 buyers will be able to get a septic tank permit. Well,
25 I approved the subdivision and the lots were sold.

1 Couple months later the owner of the lots came in
2 and said, well, I have my septic tank permit, and the
3 only place the septic tank will be able to go is in the
4 fifty-foot buffer. I had a problem then, because I've
5 just created a lot that doesn't meet the ordinance, the
6 requirements. So, we have to go to the Zoning Board of
7 Appeals on a brand new lot for a variance for the septic
8 tank to be with almost in -- in the river. It's in the
9 fifty-foot buffer.

10 So, after that, I got with the Development Review
11 Team, and we decided -- well, we came up with a
12 procedure. Any lots that are located on the water will
13 have to bring us a septic tank permits, because we do
14 not want to create lots, even though DHEC said they will
15 perk, we don't know where, and we do not want to create
16 lots that don't meet the ordinance. So, this was in
17 2004. So, we started requiring all development, family
18 compounds, two-lot subdivisions, twenty-lot
19 subdivisions, if they don't have sewer, and they have to
20 get septic tanks, so we'll know exactly where they're
21 going to go. If they can't meet the ordinance, then,
22 the lots will not be created. So, that's where this
23 requirement came from.

24 Q Okay. What objection to this did the developer
25 raise?

1 A They said it was not in the ordinance, and they did
2 not want to go out and get 75 septic system permits for
3 their development.

4 Q Okay. Let me ask you. There was an issue about a
5 DHEC letter. Tell me about the DHEC letter.

6 A The DHEC letter, I think, before 2009, all
7 subdivisions or any project that's being done, people
8 would go to DHEC, and DHEC would write a letter saying
9 that it appears that the lots will perk. Where -- you
10 know, they don't say it'll perk here, there, and there.
11 They just do a boring, and they say, well, it appears
12 that these lots can support a septic system.

13 Q Okay.

14 A So, we have always accepted that letter.

15 Q Okay. And initially, was the DRT advised that they
16 could accept that letter in this case from DHEC?

17 A Yes.

18 Q Okay.

19 A They -- well, -- I'm trying to remember how this
20 thing came down. Letters started coming from Mr. Walter
21 Nester to other people outside of the DRT, the staff
22 attorney, Mr. Achurch, everybody got involved. The
23 planning director got involved. And the DRT just backed
24 off, you know, and waited to see what was going to
25 happen.

1 Q Okay. Did a resolution ever come over this septic
2 tank issue?

3 A Yes. We were told that we would have to accept the
4 DHEC letter since it was done, I guess, before 2011.
5 And apparently they had changed the layout of the
6 subdivision, so there were four lots that did not -- was
7 not addressed by the DHEC letter, so those four lots
8 would have to bring a septic system permit.

9 Q So, they would have to go and get the engineering
10 done for those four lots.

11 A Yes.

12 Q And they would have to come from the DHEC approval
13 for final.

14 A For final approval, yes.

15 Q But as for the other 70 -- nearly 70-some-odd lots,
16 --

17 A We accepted the letter.

18 Q Okay. So, as of February 2012, was there anything
19 that the County was doing with this developer or any
20 permits that they were requiring from your office?

21 A No.

22 Q Were you waiting for them to submit final approval?

23 A Eventually, we figured they would.

24 Q Okay. And if they met all of the -- those
25 conditions, --

1 A Yes.

2 Q -- and the requirements for other permitting that
3 everybody has for final approval, would you have given
4 them final approval?

5 A We would have accepted their application,
6 eventually, if everything was okay, give them final
7 approval.

8 Q But did they ever submit?

9 A They never submitted.

10 Q Okay. Let me ask you. Did you receive a letter
11 during 2012 from the developer?

12 A Yes, I remember that. They -- they required an
13 extension to the conceptual approval.

14 Q Okay. Conceptual approval is good for how long?

15 A One year.

16 Q And then, they submitted an application for an
17 extension, correct?

18 A Yes, they did.

19 Q Okay. And did you grant it?

20 A We did.

21 Q And was that immediate and as a matter of course?

22 A It's a matter of course, yes.

23 Q Okay. All right. Who owned the Pinckney Point
24 parcel when they submitted for the conceptual plan
25 application?

1 A Their applica --

2 MR. WALKER: Objection, unless there's a foundation
3 that she knows who owned it.

4 BY MS. LOHR:

5 Q Do you know who owned it?

6 A Well, their application states the owner is
7 Pinckney Point, LLC.

8 Q Okay. Did you have any information that Pinckney
9 Point, LLC, even lost that property?

10 A No, I did not know that.

11 Q Could you allow a development permit to be issued
12 to a developer who doesn't own or have any legal
13 interest in the property?

14 A No, we do not.

15 Q And tell the jury why you can't do that.

16 A Well, we cannot issue a permit to someone who
17 doesn't own the property. It's not theirs to apply.
18 So, normally, we'll check and we'll see, but this has
19 been ongoing, so we just assumed that Pinckney Point,
20 LLC, still owned the property.

21 Q Okay. What happens after you give final approval?
22 Is there a document that gets approved in final
23 approval?

24 A Yes, they receive a development permit. And this
25 permit allows them to go out, start clearing the land,

1 start putting in the infrastructure, start building the
2 subdivision.

3 Q And is there a plat?

4 A There is a plat that's approved at final that
5 eventually gets stamped, recorded, and lots are
6 available for sale.

7 Q And so, the plat would subdivide -- is what
8 subdivides legally the property.

9 A Yes.

10 Q Okay. And somebody who doesn't own the property
11 can't subdivide somebody else's property

12 A Exact -- right, yes.

13 Q If they were an agent of the owner, they could do
14 it, correct?

15 A With a letter from the owner stating they have
16 given them permission to do so.

17 Q Okay. But otherwise, you would never be able to
18 approve final approval if the person doesn't own that
19 property or have that letter.

20 A No, do not. We do not do that.

21 Q So, in this case, the testimony has been that
22 Pinckney Point lost ownership of the property, and lost
23 its option to by the property. If they didn't regain
24 that option or didn't re-purchase the property, would
25 you have been able to give them final approval after

1 that point, after losing the property?

2 A No, would not be able to.

3 MS. LOHR: That's all I have, your Honor. Please
4 answer any questions Counsel might have for you.

5 A Okay.

6 HILLARY ANGELA AUSTIN

7 CROSS-EXAMINATION, BY MR. WALKER:

8 Q Ms. Austin, good morning.

9 A Good morning.

10 Q To start where you just left off with the County's
11 attorney, my understanding is, if the applicant has the
12 written permission of the owner, then, the applicant can
13 proceed to get development approvals.

14 A Yes, with permission, yes.

15 Q Were you aware that, under the option agreement
16 between Equity Resource Partners III and Pinckney Point,
17 LLC, Pinckney Point, LLC, had the obligation to continue
18 to pursue permits, even after it had deeded the land
19 over to Equity Resource Partners?

20 A I did not know that it was deeded to --

21 Q Right.

22 A -- Equity Resource Partners. I had no idea.

23 Q So, you were unfamiliar with what the option may
24 have said about that.

25 A I was --

1 Q You're just not familiar with the option.

2 A With the option, yes.

3 Q Okay. Fair enough. When my client, Pinckney
4 Point, LLC, applied for these development approvals at
5 Pinckney Point, the zoning allowed that development,
6 didn't it?

7 A We approved the conceptual plan.

8 Q Right. There was nothing wrong with the zoning.
9 They weren't trying to do something the zoning didn't
10 allow on that property, were they?

11 A No, they weren't.

12 Q And doesn't the County have a land use plan that's
13 embodied in what's called a comprehensive plan that sets
14 forth the desired or aspirational uses for land around
15 the county?

16 A The conceptual plan does, and it opens the door for
17 the zoning --

18 Q Right.

19 A -- standard, yes.

20 Q The conceptual plan being what the County wants to
21 happen, and the zoning being the rules that actually
22 govern.

23 A To make it happen, yes.

24 Q The comprehensive plan of Beaufort County that was
25 in effect when Pinckney Point was seeking approvals,

1 that allowed this type of development, too, didn't it?

2 A I cannot speak for the comprehensive plan. I don't
3 enforce that. It's not enforceable by myself. I speak
4 for the zoning ordinance.

5 Q So, the zone -- we know the zoning did.

6 A The zoning was rural, and it allowed for
7 subdivision one per three. One unit per three acres.

8 Q I think you said about the concern you had, the
9 legitimate concern you had about the septic tanks and
10 whether they be located in the buffers, that the DRT
11 came up with a procedure that you would use to assure,
12 in your mind, that the septic tanks weren't located or
13 the drain fields weren't located in the river bottom.

14 A Yes, a procedure, yes.

15 Q That was a DRT procedure, not something that had
16 been adopted by council as an ordinance, correct?

17 A True, yes.

18 Q So, it really wasn't in the development
19 regulations, was it?

20 A No, it wasn't.

21 MR. WALKER: A moment, your Honor.

22 Ms. Austin, that was all I have. Thank you.

23 A Okay.

24 BY THE COURT:

25 MS. LOHR: No re-direct, your Honor.

1 THE COURT: All right.

2 A Do I give these to her?

3 THE COURT: Yes.

4 MS. LOHR: We have one quick question before the
5 deposition.

6 THE COURT: Sure. Sure. You know the last one
7 wasn't moved in. I know the one document was already in
8 evidence earlier.

9 MS. LOHR: I'm not sure, your Honor. Can we move
10 that into evidence now?

11 THE COURT: Absolutely.

12 MR. WALKER: Sure. It was 25 and 26, right?

13 MS. LOHR: Yeah.

14 MR. WALKER: No problem.

15 THE COURT: Wanda, did you mark those?

16 COURT REPORTER: The last two were 27 and 28.

17 MR. WALKER: Oh, okay.

18 THE COURT: Oh, I thought it was 28 and 29. Sorry.
19 I had 27.

20 MS. LOHR: 28 and 29 is what we have.

21 THE COURT: It was 28 and 29, yes. The 27 was the
22 conceptual permit approval.

23 ITEM IDENTIFIED AS LETTER FROM

24 HILLARY A. AUSTIN TO DANIEL P.

25 KEEFER, DATED 8-23-11

1 MARKED DEFENDANT'S EXHIBIT NUMBER 28,
2 ADMITTED AS EVIDENCE.

3 THE COURT: You all ready to go? Are we going to
4 read a deposition next?

5 MR. ACHURCH: Yes, your Honor.

6 THE COURT: Okay.

7 MR. ACHURCH: We're going to read the deposition of
8 Mr. Irby --

9 THE COURT: Okay. Okay.

10 MR. ACHURCH: -- before we asked him the questions.
11 And Mr. Bendle's going to be John Irby today.

12 THE COURT: Very good. All right. If anyone wants
13 to stand and take a stretch, you're welcome to, ladies
14 and gentlemen. Just as we did yesterday, we are going
15 to read in portions of a deposition testimony. I just
16 remind you again, it was taken probably at a lawyer's
17 office. A court reporter was there that took down
18 everything. And lawyers from both sides get to ask the
19 witness questions. So, and again, it's to be judged by
20 you just as if it was, in fact, Mr. Irby sitting up here
21 testifying. Okay?

22 MS. LOHR: Your Honor, this is the deposition of
23 John Irby.

24 THE COURT: Thank you.

25 READING THE DEPOSITION OF

1 JOHN H. IRBY. READING THE QUESTIONS

2 IS MS. LOHR. READING THE ANSWERS

3 IS MR. BENDLE:

4 Q I see you're a licensed attorney and practicing
5 attorney.

6 A I am.

7 Q All right. And where's your firm?

8 A My firm's in Atlanta, Georgia.

9 Q And what's the name of the firm?

10 A Wilson, Brock & Irby.

11 Q How many lawyers are in that firm?

12 A Roughly ten.

13 Q And when does your practice -- what does your
14 practice primarily consist of?

15 A Commercial real estate transactions and commercial
16 business representation and litigation.

17 Q All right. In this case, we're dealing with an
18 entity known as Equity Resource Partners III, LLC. Do
19 you have any direct or indirect interest in that LLC?

20 A I do. And just to clarify, it's Equity Resource
21 Partners, Roman numeral III, LLC.

22 Q Okay. And I just want to be clear, because there
23 are a whole lot of -- okay. Okay.

24 A ERP entities?

25 Q Okay.

1 A So, I just want to make sure we're --

2 Q All right. We're at Roman numeral III.

3 A Yes.

4 Q Do you have any direct or indirect interest in it?

5 A I do.

6 Q Okay. Tell me about that.

7 A I own a company called Tall Pine Properties, LLC.
8 One hundred percent. Tall Pine Properties, LLC, is a
9 33-and-a-third percent owner Equity Resource Partners
10 III, LLC.

11 Q Who are the owners of Equity Resource Partners III,
12 LLC?

13 A The other owners are Southwood Development Company,
14 LLC, and Piedmont Land Development, Incorporated, a
15 North Carolina corporation.

16 Q Tell me about just the general business thrust of
17 Equity Resource Partners. What does Equity Resource
18 Partners do? And I understand that you would have a
19 single-purpose LLC associated with individual
20 transaction, but what's the overall concept between and
21 behind?

22 A The overall concept is Equity Resource Partners is
23 a buyer of commercial real estate property and
24 commercial-backed real estate notes, but also does
25 residential properties, as well. But only developer-

1 owned, not individually owned properties.

2 Q Who did Equity Resource deal with at BB&T with
3 respect to the acquisition of the note?

4 A I don't recall.

5 Q Were you involved in those dealings?

6 A Yes.

7 Q Did you deal directly with BB&T?

8 A I dealt with BB&T's legal counsel.

9 Q So, we're talking about -- what time are we talking
10 about?

11 A Whatever the time frame is. It's when they wanted
12 to come get an extension to their option to buy the
13 property, and that's when I became aware that there had
14 been a settlement with the owner of -- who we thought
15 was the owner of the road regarding use of the road.
16 And I remember, because I was fairly shocked.

17 Q All right. Tell me about that. Why were you
18 fairly shocked?

19 A Because they had an option to enter and to just buy
20 the property, and didn't tell us about the access; that
21 they had resolved the access issue. I think I'm right.
22 I think that's --

23 MS. LOHR: Page 52.

24 MR. BENDLE: Okay. I'm sorry.

25 A I believe that we had discussions -- when I say

1 'we,' Equity Resource Partners, somebody had
2 conversations with -- and I'm going to use a loose term
3 here, because I don't remember who it is in particular
4 -- but the conservation people for the state or for the
5 county regarding the property from a very early -- from
6 the time we owned the note or about their interest in
7 the property, their potential interest in the property.

8 Q All right. Now, going back to what you said, that
9 you had a conversation with the conservation since very
10 early around the time you acquired the note. Tell me
11 about those conversations.

12 A It wouldn't have been with me or through me, so I
13 don't tell you.

14 Q What is your understanding of those?

15 A That the County had some interest in this property
16 for many years as something they would want to protect,
17 my -- or I'm sorry -- my recollection is.

18 Q Who did you learn that from?

19 A I believe Bill Herbkersman.

20 Q Did the County, to your knowledge, ever express an
21 interest in acquiring the people during the term of the
22 option agreement?

23 A During the term of the option agreement -- no --
24 before the option, I think everybody said that the
25 County or the Conservation or whoever it was, or the two

1 of them, or if they're one entity, I don't know, had
2 expressed interest. During the term of the option
3 agreement, you know, I don't believe that there were
4 communications ongoing.

5 Q What was the date of final extension or the
6 extension expired. Do you recall?

7 A If you've got it, I can look and tell you, but --
8 let's see. It's right here in front of me. So, the
9 option agreement, if I look at it, wasn't it like
10 February 2013, I think? August 31, 2012 was first. And
11 then, February 28, 2013 is my recollection. There it
12 is, yeah. February 28, 2013.

13 Q So, February 28, 2013 was the termination of the
14 extension, correct?

15 A Correct.

16 Q Were there discussions before that termination as
17 to whether your entity would agree to extend that for
18 some period of time?

19 A My recollection is that I was contracted by
20 business -- or I'm sorry -- contacted by business
21 people, and I don't think it was Mr. Herbkersman. I
22 think it was somebody else, whose name I can't recall
23 right this second, in about December, saying that they
24 didn't think that they could meet the -- they couldn't
25 exercise the option by the time period needed, and

1 wanted to talk to us, and they came up to Atlanta and
2 met with us wanting an extension.

3 Q What was the response of your firm, your entity?

4 A I think we met with them two or three times. They
5 made several proposals to pay money and get times, and
6 da, da, da, and we didn't. We just didn't like any of
7 those proposals and we didn't -- we didn't -- we weren't
8 -- we weren't sure about their integrity at that point,
9 is my recollection.

10 Q So, we're talking about the request by Pinckney
11 Point to obtain an extension. And in the first page of
12 that exhibit is an email from Taylor Bush, involves an
13 email at the bottom from Taylor Bush to you on February
14 22nd, in which he outlines a proposal for extending the
15 time and paying additional money. Do you see that?

16 A If I'm just looking at the first page in that first
17 email, I do see that, yes, sir.

18 Q Okay. Thank you. So, on the 22nd, you put
19 together a proposal -- or he made a proposal to you, and
20 that included several features. And in response, you
21 indicated that the entity was not interested, correct?

22 A I see this email and I agree this was a response.
23 I think there had been prior offers. I know there had
24 been, orally, there had been discussions. My
25 recollection is that they actually flew up one or two

1 times and talked to us.

2 Q Right.

3 A But answering the specific question -- you're
4 asking me two different questions, so I'm trying to be a
5 little cautious.

6 Q That's fine.

7 A To answer, is there an email where I declined to do
8 that? My recollection is that there is an email. My
9 recollection is that there is an email.

10 Q If you just go back to Page 1 and look at the very
11 top. Mr. --

12 A Oh, okay. There we go. There we go. Now I see it
13 in smaller print. Okay. That's ones -- that's ones --
14 is that one from me? You printed this. It's just a
15 little -- it's just a little foreign.

16 Q No, no, I agree. It's a -- yeah, it's from you.

17 A Okay.

18 Q And it's Saturday, February 23rd, at 11:56.

19 A Yes. Okay.

20 Q And a copy with John Kunkel.

21 A Yes.

22 Q 'Guys, we talked about it. I think we're going to
23 just let the option expire and stay in touch the next
24 couple weeks. Thanks for your effort.'

25 A Okay. Agreed.

1 Q Does that --

2 A I just -- I didn't see that small print.

3 Q Oh, that's fine.

4 A Yeah.

5 Q And then, rather than go through all the emails,
6 I'll just ask you. Did you then get -- did you then
7 give them until March 11th to try to raise the funds to
8 close after that email?

9 A I don't think it was that direct. I think we gave
10 them only until the time in which the option expired.
11 And then, I believe they tried to close on March -- on
12 February 28th, within the time. And I believe I sent
13 them documents to close, because they had been largely
14 negotiated ahead of time as to specifically what
15 documents would be in the transaction, so it was an easy
16 closing.

17 I waived the conflict for Walter Nester to be
18 involved. I sent -- I think now -- I may be wrong. I
19 may be wrong. So, on the record, I think I sent Walter
20 Nester those documents for execution on the 28th. We
21 were prepared. They said they wanted to close on the
22 28th, and they could not close on the 28th. They did
23 have the funds after having said they did have the
24 funds. And then, in the last second, they said, would
25 you please give us a little more time. And my

1 recollection is that I gave them a little more time
2 after they couldn't close the first time on February 28,
3 2013. And I believe you're right, that it was March 11
4 is when they wanted and when they were unable to close
5 again.

6 Q All right. This would just be to refresh your
7 recollection. This is Pinckney Point. It's hard to see
8 the page numbers here. I'm sorry. Because it's printed
9 over other things. But your email from February 28 to
10 Walter Nester refers to?

11 A All right. So, this is the same Exhibit. This is
12 Plaintiffs' Exhibit.

13 Q Yeah. That's in the middle of the ones. But
14 rather than go through --

15 Now, before March 11, had there been any
16 communications of any kind to your knowledge, between
17 either the Land Trust or the County and Equity Resource
18 Partners about the County or the Land Trust's potential
19 interest in acquiring the Pinckney Point parcel?

20 A Well, as I told you, we definitely had them before
21 the option agreement.

22 Q At some point, the channels of communications were
23 open again, I take it, since, ultimately, Equity
24 Resource Partners III ended up conveying the people to
25 the County. And I'm trying to find out, how did those

1 lines of communication open again.

2 A Well, --

3 Q To more --

4 MR. BENDLE: I'm sorry.

5 MS. LOHR: Okay. I think that's you.

6 MR. BENDLE: Yeah.

7 A Well, since the option agreement expired, I think
8 we probably felt open to talk to them again and started
9 to talk -- started to talking to them again, and whoever
10 else might have expressed interest, and thinking about
11 what we were going to do with the property more
12 earnestly.

13 Q You mentioned whoever else had expressed interest
14 in it. Who else had expressed interest in the property?

15 A It may be nobody. I don't know. I don't know.

16 Q Is the only entity you can think of that expressed
17 interest was the County or the Land Trust?

18 A It's the only one I can think of sitting here
19 today, yes.

20 Q Who made the first contact? Did somebody from your
21 firm get in touch with the County or the Land Trust, or
22 was it the other way around?

23 A I don't know that answer.

24 Q Who would know that answer? Who should we talk to,
25 to find out that answer?

1 A Lee Wooddall. I've got to imagine it was us
2 calling the County, but I couldn't a hundred and ten
3 percent tell you that answer, because I just don't know.

4 Q Would, to the best of your knowledge, those
5 communications have been initiated by Mr. Wooddall?
6 Would he have been the one with your entity to have done
7 that?

8 A Whether he contacted them or he contacted Bill
9 Herbkersman, and asked Bill Herbkersman to contact them,
10 I don't know, but it would have been something along
11 those lines. One of the two.

12 Q And why would he have gone to Bill Herbkersman,
13 rather than just going directly to the County or to the
14 Land Trust?

15 A Bill Herbkersman's a local guy who had the contact
16 and knew them.

17 Q He wasn't employed with the County, was he?

18 A I don't know that answer, but I don't think so.

19 Q He wasn't employed by the Land Trust, was he?

20 A I don't know that answer, but I don't think so.

21 Q Did he have any interest at all in the transaction?

22 A Yes.

23 Q What was his interest?

24 A Bill Herbkersman had potential participation
25 interest. He could have gotten -- he could have gotten

1 a participation fee related to the sale of his property.

2 Q And was there a written agreement as to that?

3 A Yes.

4 Q And who was the agreement between?

5 A It was between Equity Resource Partners III and an
6 entity -- I can't tell you the name of the entity, but
7 as I believe I'm correct when I say Bill Herbkersman had
8 some interest in that entity.

9 Q Okay. What is the participation interest fee?
10 Does that --

11 A I believe it was termed a participation agreement.
12 We do those sometimes, and it's terms in which somebody
13 might be able to participate on the upside of a
14 transaction.

15 Q Now, Mr. Herbkersman did not have an equity
16 interest in the property through any interest in the
17 entities that were members in the entity, did he?
18 You've mentioned participation. I wasn't -- was it as
19 an equity owner or?

20 A He had no ownership in Equity Resource Partners
21 III, no.

22 Q What was the fee that was provided for in the
23 participation agreement that his entity would have
24 received?

25 A To my recollection, is somewhere convoluted and

1 *complicated, and I don't recall.*

2 *Q Was it a percent or?*

3 *A I believe that is correct, but like I said, it was*
4 *kind of gray, you know, paragraphs long and I just don't*
5 *recall, and I don't think I could express it.*

6 *Q Who prepared the participation agreement?*

7 *A I probably did.*

8 *Q When did you prepare it?*

9 *A From the very early time when we were about to*
10 *acquire or acquired the note.*

11 *Q Did Equity Resource Partners III enter other*
12 *participation agreements with other individuals or*
13 *entities?*

14 *A As to this transaction?*

15 *Q Yes, sir.*

16 *A No.*

17 *Q Why did Equity Resource Partners III pick Mr.*
18 *Herbkersman's firm as the entity to enter into a*
19 *participation agreement with?*

20 *A I believe he helped us identify this note as*
21 *something we might be interested in buying.*

22 *Q Did he receive any fee at the time, or his entity*
23 *receive any fee at the time Equity Resource Partners III*
24 *acquired the note?*

25 *A I don't believe so, no.*

1 Q Was he the person who bought this note to your
2 entities attention?

3 A As I said earlier, I believe that is correct,
4 although we have a lot of ongoing relationship -- a lot
5 of ongoing relationship with BB&T.

6 Q You mentioned that the agreement was with an entity
7 rather than him personally.

8 A I told you I believed it was.

9 Q Okay.

10 A I don't recall specifically.

11 Q Do you know what the nature of that entity was?
12 Was it a real estate brokerage firm? Was it some other
13 --

14 A I don't recall it really was an entity. I just --
15 I don't recall.

16 Q And at this time, you don't recall the amount of
17 the compensation that it provided for, only that it was
18 probably a percentage.

19 A I recall it being somewhat of a -- you know, it has
20 to do with time and money, and it went on for a couple
21 of paragraphs or something like that. And I just don't
22 -- and -- correct.

23 Q What was the term of the participation agreement?

24 A Don't recall.

25 Q Do you recall any payment being made to him or his

1 firm as a result of the closing?

2 A I believe a -- and I'm pretty confident now I say I
3 believe -- that a payment was made to whoever the party
4 was. It was entered into with that after the property
5 was sold.

6 Q Who made the payment?

7 A Equity Resource Partners III.

8 Q Do you recall the amount?

9 A I do not.

10 Q Do you know whether or not this payment was reflect
11 on the closing statement?

12 A I do not. You asked me do I recall, correct?

13 Q Yeah.

14 A Yeah, I do not.

15 Q The closing statement refers to a consulting fee to
16 4-H Family Trust, LLC, of \$250,000.00.

17 A I think that's it.

18 Q Okay. That would have been it?

19 A I think that's it. I think that is it.

20 Q Did you have any conversations with Lee Wooddall
21 about Mr. Herbkersman acting as an intermediary again?

22 A I'm sure I did after the option -- excuse me -- I'm
23 sure I did after the option period expired, but I can't
24 tell you specifically.

25 Q What did you all talk about? Do you recall?

1 A Since my answer was, I'm sure I did, but I don't
2 recall specifically, I can't tell you what they were and
3 in general, but I mean, I'm pretty doggone confident
4 that I would have said, hey, let's get back to the
5 County ASAP.

6 Q Right. All right. So, you think that it probably
7 would have been some -- would have been something, let's
8 reach out to the County and see what's -- if they're
9 still interested or something like that?

10 A I think that is correct.

11 Q And would those communications have gone through
12 Mr. Herbkersman?

13 A I think that's very likely, yes.

14 Q Do you know whether or not Mr. Wooddall or Mr.
15 Herbkersman was dealing with anybody from the Land Trust
16 or the County other than Garrett Budds as of April 1st?

17 A I do not.

18 Q Of 2013.

19 A Were they dealing with anybody before April 1st?

20 Q Yeah, other than --

21 A My recollection is -- is the minute that option
22 agreement was over, we said contact the County. We got
23 on the phone, said let's contact. Being partners, got
24 on the phone, said contact the County. And what
25 happened between then and April 1st, I can't

1 specifically tell you. Because my role, as lawyer for
2 us, I'm not a business person, typically speaking, so I
3 think, as I stated earlier in the deposition, I think
4 there were probably conversations beginning the day that
5 option ended, through the day we closed, and I guess
6 through today. But I know -- but I know no specifics
7 regarding that whatsoever sitting here today.

8 Q Was Mr. Herbkersman Equity Resource Partners III
9 representative and primary point person in dealing with
10 the County and the Land Trust?

11 A I think you're probably overstating that a little
12 bit. I'm not sure I'd state it quite that way.

13 Q All right.

14 A He was the person who had some contact along the
15 way. Someone else may characterize it as our primary
16 point person. I'm not sure I'd feel comfortable doing
17 that, so.

18 Q Okay. Well, why did you pick his entity to enter a
19 participation agreement with? Why would you do that?
20 What did he bring to the table?

21 A My recollection is he identified the asset as
22 something we might be interested in buying.

23 Q You didn't pay his entity a fee at the time of the
24 acquisition. You paid him the fee at the time of the
25 disposition. Is that typical that the fee would be

1 earned upon disposition of the asset, as opposed to
2 acquisition of it?

3 A I would say probably, yes.

4 Q Did you ever come to the conclusion that there was
5 a prescriptive easement?

6 A I think, as I've answered before, I can't answer
7 that question specifically. I can tell you that, as
8 I've said a few times during this deposition, that we
9 studied access to this property extensively. Every
10 mention along the way. And my recollection is I had
11 title insurance from the -- as a lender, from the time I
12 bought it, and every time we needed to, we re-studied
13 it. And then, re-studied it again, because it gave us
14 angst that somebody was trying to pull a slick move on
15 us, which I think they did, actually.

16 Q What do you mean by that?

17 A Entered into an agreement with Road, LLC, after
18 we'd entered into the option agreement without telling
19 us, which I saw a slick, and I still see a slit -- or as
20 a slick.

21 Q Do you remember any concerns of Mr. Gunderson about
22 the ingress and egress of this parcel?

23 A Yes.

24 Q Around this time?

25 A I'll state again, and let me unequivocal this time,

1 because I think I've said it a number of times in this
2 deposition. Access was a constant focus in this
3 transaction.

4 Q Uh-huh.

5 A In the beginning, it was because it was ongoing
6 litigation, I think there was, between Pinckney and some
7 other people. And then, at some point, it came to our
8 knowledge that Pinckney had -- who owned the property,
9 who was our borrower, had gone out and negotiated a
10 deal, I believe, with some people from New York, the
11 plaintiffs in this case. I think they told us it was
12 some investors in New York. Whether that was accurate
13 or not, I have no idea. Road, LLC, acquired the road,
14 settled the litigation in what seems to me, in
15 hindsight, to be nothing but a sneaky, slimy attempt to
16 make access more difficult for other people to the
17 property, including its lender, which was ERP, Equity
18 Resource Partners.

19 Q In your mind, was the access issue ever fully put
20 to bed before the classing -- I think -- closing with
21 the County?

22 A I think it was always put to bed. Every time we
23 looked at it, we determined we had insurable, good
24 access to the property.

25 Q So, back to what you've described as sneaky or

1 slimy, or whatever, it sounds as though you think the
2 access agreement that we looked at earlier somehow
3 inhibited or restricted the owner's rights of access.

4 A I think there was some potential intent to do so.
5 I don't know that it accomplished it. I don't think it
6 did accomplish it, but I think it was probably an intent
7 to do so, yeah. I think it was an attempt to make it
8 more complicated. I mean, who wouldn't think so. You
9 bought a \$5,000.00 piece of property for a million some
10 odd dollars.

11 Q They couldn't perform on this option agreement?

12 A Could not perform on the option agreement.

13 Q Okay. And did they require that you give them an
14 option as a condition of waiting or dropping their
15 appeal on a foreclosure action?

16 A That was my recollection, yes.

17 Q Okay. If Pinckney Point had been able to or
18 willing to close on this Pinckney the -- what do you
19 call the property that's the 227 acres out there?
20 Pinckney Point property?

21 A Yeah, Pinckney Point.

22 Q If Pinckney Point, LLC, had been able to close and
23 fulfill their obligations under the option agreement,
24 would you have sold them that property?

25 A Absolutely. We tried to.

1 Q And was there a time where -- so, when the time
2 came to -- how much time did they have from the time of
3 the execution of the option agreement until they told
4 you they couldn't perform?

5 A It was right at a year.

6 Q Okay. And they could have now -- and that -- when
7 you have an option agreement, it's not just from the
8 deadline date, right? They could have bought it at any
9 time during that year. Is that right?

10 A I believe that is correct.

11 Q Okay. And all right. And did they at some point
12 finally tell you, look, we just can't close on this; we
13 can't get the money?

14 A My recollection is they -- they had a six-month
15 option, and then, a six-month option. And they --
16 somebody, I believe, Taylor Bush, maybe, wrote me some
17 time in July of 2012, and said that couldn't get it done
18 by the first option, and needed an extra. And gave us
19 about a month or six weeks heads up that they were going
20 to exercise the option, and wanted some confirmation on
21 the option date, which I gave him. And they exercised
22 it, so they said they couldn't do it then.

23 And then, I think they asked for a meeting. Then,
24 earlier, I think I got confused and said it was in
25 January, but it must have been in December of 2012 that

1 they asked for a meeting. And whenever that meeting
2 was, they said that they couldn't -- they didn't think
3 -- think that they could do it. And then, it needed
4 more time and wanted more time and all that.

5 Q And at that point, did you feel free to go ahead
6 and try to sell to someone else?

7 A No.

8 Q You did not? You waited until the dates were -- or
9 until the term expired?

10 A Correct.

11 Q And then, after the term expired, then, you felt
12 free to sell it to someone else?

13 A Yes.

14 Q And PPLLC, Pinckney Point, LLC, in this instance,
15 as long -- until the property actually gets foreclosed
16 on and the title transfers, Pinckney Point, LLC, can
17 come in and pay off that debt and the fees, and they
18 would actually own this land.

19 A Generally stated, yes.

20 Q Okay. In this instance, Equity Resource III had a
21 contact with Mr. -- had a contract with Mr. Herbkersman
22 or a company he owns.

23 A Correct. The participation agreement I referenced
24 earlier.

25 Q And why didn't the Equity Resource sell this

1 property to Pinckney Point, LLC?

2 A They didn't come up with the money to buy it.

3 Q Okay. And why did Equity Resource sell it to
4 Beaufort County?

5 A Because they did come up with the money to buy it.

6 Q And how many closing dates came and went before,
7 and how many closing dates were there set where Pinckney
8 Point could have purchased this property?

9 A I guess they could have purchased it for more than
10 365 different days if they had wanted to.

11 Q Okay.

12 A In addition to the year and a half of litigation,
13 in addition to any time before then with litigation with
14 BB&T during their foreclosure proceedings.

15 Q Do you know how long that was?

16 A Several years.

17 Q All right. Did you feel like purchase of the road
18 property in the name of Road, LLC, was a effort by
19 Pinckney Point or the principals of Road, LLC, to impede
20 access to the big property, the 227-acre property?

21 A Impede might -- I don't know that, that's the word
22 I would choose or not to make it more. And I think I
23 said this -- the exact same terms to earlier questions
24 by Mr. Walker that it made more complicated.

25 Q Okay.

1 A Impede, I think, I think probably is the answer,
2 yes. And I think that might be a word I'd choose, but
3 I'm not a hundred percent sure that's the word I'd
4 choose, but I just -- they were trying to make it more
5 complicated and trying to mess it up.

6 Q And that was when you were -- at the time you were
7 -- you or Equity Resource actually owned that subject
8 property.

9 A That would have been -- I don't recall.

10 Q Was either -- you either owned the property or the
11 note.

12 A Correct.

13 Q Okay. Did you feel like it was an effort to make
14 the subject property less appealing to any potential
15 purchaser?

16 A Yes, sir.

17 Q After the option between Equity Resource and
18 Pinckney Point, LLC, expired, did Pinckney Point ever
19 come to you and say, hey, we have the money now; we're
20 ready to buy this property?

21 A No. I think that they did come to me and say they
22 might have somebody who's interested in buying it or
23 they might have somebody else interested in buying it,
24 but -- but I'm not so sure. I think I'm right on that.

25 Q Was it already under contract with Beaufort County

1 at that time?

2 A No.

3 Q Okay. Have, at any point during your dealings with
4 Pinckney Point, LLC, after Equity owned the property,
5 did they -- did Pinckney Point ever say, we have the
6 money; we can buy this land?

7 A My recollection is yes. My recollection is they
8 said they did on February 28th. And then, they couldn't
9 close. And they said they'd have it March 11th. And
10 then, they couldn't close.

11 Q Okay.

12 A Both times they said that they had the money and
13 told us they were ready to close. And then, at the last
14 second, couldn't close. I may be wrong on the two
15 dates, but I -- my recollection is they did it twice.

16 Q Okay. But twice they told you they had the money,
17 and then, they still couldn't close?

18 A Correct.

19 Q You mentioned you questioned the integrity of LLC.
20 Tell me what that is -- why that is.

21 A Yeah, I'm not so sure if I said the word
22 'integrity.' I don't know if I did or not. I just --
23 the way we do business does not involve litigation that
24 is intended only to delay versus to be substantive. In
25 a fall-through litigation, defenses were to delay and

1 not substance in any way whatsoever.

2 I didn't like their actions. I didn't like that,
3 and I didn't like that -- and I think it's slimy. My
4 recollection sitting here today is that we didn't know
5 about their -- the way they handled the road with Road,
6 LLC, in a timely fashion, and I thought that was slimy,
7 given our relationship with them at that time. I
8 thought their threat of litigation, once we started
9 talking with the County, when they weren't able to buy
10 the property and we parted on, I think, good terms.
11 We'd given them the opportunity to buy it. We'd given
12 them the opportunity to buy it again. We'd given them
13 the opportunity to extend that, and they still couldn't
14 buy it. I thought that, that was slimy. And I think
15 this litigation before us here today is, once again, a
16 thwart. I don't see any merit. I can't see any merit.
17 I've never seen any merit in it. Does that answer the
18 question?

19 Q Okay. And then, you have -- if you understand it
20 correctly, even when that expired, they said they need
21 some time. You gave them some additional time over and
22 above that at no charge to try to get this property
23 closed and purchased. Is that right?

24 A That's correct, yes.

25 END READING JOHN H. IRBY DEPOSITION.

1 MS. LOHR: That's the end.

2 BY THE COURT:

3 THE COURT: All right, ladies and gentlemen, we're
4 going to take a real brief recess. Go refresh
5 yourselves. We'll bring you right back in. Okay?
6 Thank you. Do not discuss this case. It wouldn't be
7 appropriate to do so.

8 JURORS LEAVE COURTROOM 11:06 A.M.

9 BAILIFF: Jury's clear, your Honor.

10 THE COURT: All right. Let's just take five
11 minutes, quickly, if we can.

12 OFF THE RECORD 11:06 A.M.

13 BACK ON THE RECORD 11:18 A.M.

14 BY THE COURT:

15 BAILIFF: All rise. This Court is back in session.

16 THE COURT: Please be seated. All right. I think
17 we've got everybody. Let's go. Mr. Gruber, you ready?

18 MR. JOSHUA ANDREW GRUBER: Yes, ma'am.

19 THE COURT: All right. Home stretch.

20 MR. ACHURCH: Pardon?

21 THE COURT: Home stretch.

22 MR. ACHURCH: Yeah, you know, I don't know how long
23 Trenholm has, but I'm certainly trying to do a closing
24 argument -- well, get one ready.

25 MR. LOHR: Well, cross that bridge when you get