UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CITIZENS FOR SQUIRREL POINT,	)	
	)	
Plaintiff	)	
	)	
v.	)	
	)	
SQUIRREL POINT ASSOCIATES, et al.,[1]	)	
	)	
Defendants	)	
		Docket No. 03-193-P-H
	)	*(Consolidated)*
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
v.	)	
	)	
SQUIRREL POINT ASSOCIATES,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON DEFENDANT SQUIRREL POINT ASSOCIATES' MOTION TO DISMISS AND MOTIONS OF CITIZENS FOR SQUIRREL POINT AND THE UNITED STATES FOR SUMMARY JUDGMENT AND MEMORANDUM DECISION ON MOTION OF UNITED STATES TO SUPPLEMENT

Squirrel Point Associates moves to dismiss the complaint in the first of these two consolidated actions (Docket No. 03-193-P-H). I recommend that the motion be denied. The plaintiff in each of the actions moves for summary judgment. I recommend that the motions be granted. Finally, I find that the motion of the United States for leave to supplement its statement of material facts is moot.

[1] Two of the four defendants originally named in Docket No. 03-193-P-H, Leonard Picotte and Sandra Whiteley, have been dismissed. Docket No. 30.

I. The Motion to Dismiss

The defendant in both actions, Squirrel Point Associates ("SPA"), moves to dismiss the action brought by Citizens for Squirrel Point ("Citizens") (Docket No. 03-193-P-H), asserting that it has been mooted by the filing of the second of the consolidated actions by the United States Coast Guard (Docket No. 04-58-P-C). Squirrel Point Associates' Motion Pursuant to F.R.Civ.P. Rule [sic] 12(h)(3) to Dismiss Complaint, etc. ("Motion to Dismiss") (Docket No. 54) at 1. SPA contends that this court lacks subject matter jurisdiction over Citizens' claims because they have been mooted by the action brought by the Coast Guard, which "constitutes complete relief for Citizens." *Id.* at 2.

> [A] case becomes moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome of the controversy.
>
> A party can have no legally cognizable interest in the outcome of a case if the court is not capable of providing any relief which will redress the alleged injury. Thus, if an event occurs while a case is pending that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the action must be dismissed.

Gulf of Maine Fisherman's Alliance v. Daley, 292 F.3d 84, 87-88 (1st Cir. 2002) (citations and internal punctuation omitted). The party invoking the mootness doctrine bears "a heavy burden in attempting to establish its applicability." *Conservation Law Found. v. Evans*, 360 F.3d 21, 24 (1st Cir. 2004).

Citizens has not been divested of its legally cognizable interest in the outcome of this controversy merely by the appearance of another plaintiff seeking purportedly identical relief. If that were an appropriate basis for dismissal, defendants could choose which of multiple plaintiffs to dismiss from any action merely because those plaintiffs all sought identical relief. Citizens has no control over the Coast Guard's prosecution of its similar or identical claim or claims. Theoretically, the Coast Guard could decide to settle with the defendant for relief that is less than or different from the relief sought by Citizens. Citizens cannot be stripped of its claim to the specific relief which it

seeks merely by the presence of another party which also seeks that relief. It is just as possible now as it was when Citizens filed the first action for this court to grant effectual relief to Citizens.

The defendant also argues that Citizens has "change[d] its position" by contending that court action is necessary in order for the reversion of title which it seeks to occur, when it contends in its complaint that the reversion has already occurred due to a clause in the deed to the property at issue providing for automatic reversion upon the happening or absence of certain events. Defendant Squirrel Points [sic] Associates' Reply to Objection of Citizens for Squirrel Point to Motion to Dismiss (Docket No. 62) at 2. It contends that Citizens must have made this "change" because "it knows that its original request for relief in the Complaint is now moot." *Id.* To the contrary, unless the defendant has agreed that its title to the property has in fact reverted to the United States, an unlikely circumstance given its vigorous opposition to the summary judgment motions filed by Citizens and the United States, discussed below, Citizens' claim for relief has not changed one bit. It seeks a declaration that the title has reverted. Only a court can make and enforce such a declaration. None has been made yet. The defendant takes nothing by this circular argument, which would allow a property owner with an automatic reversion clause in his deed to evade any court action to enforce that clause.

Much of the defendant's argument, and most of the case law cited therein, addresses Citizens' standing to pursue this action rather than mootness. That issue has already been decided in Citizens' favor. The motion to dismiss should be denied.

II. Motions for Summary Judgment

A. Applicable Legal Standard

1. Federal Rule of Civil Procedure 56. Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.'" *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Santoni*, 369 F.3d at 598. Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

2. Local Rule 56. The evidence the court may consider in deciding whether genuine issues of material fact exist for purposes of summary judgment is circumscribed by the Local Rules of this District. *See* Loc. R. 56. The moving party must first file a statement of material facts that it claims are not in dispute. *See* Loc. R. 56(b). Each fact must be set forth in a numbered paragraph and supported by a specific record citation. *See id.* The nonmoving party must then submit a responsive "separate, short, and concise" statement of facts in which it must "admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts[.]" Loc. R. 56(c). The nonmovant likewise must support each denial or qualification with an appropriate record citation. *See id.* The nonmoving party may also submit its own additional statement of material facts that it contends are not in dispute, each supported by a specific record citation. *See id.* The movant then must respond to the nonmoving party's statement of additional facts, if any, by way of a reply statement of material facts in which it must "admit, deny or qualify such additional facts by reference to the numbered paragraphs" of the nonmovant's statement. *See* Loc. R. 56(d). Again, each denial or qualification must be supported by an appropriate record citation. *See id.*

Failure to comply with Local Rule 56 can result in serious consequences. "Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted." Loc. R. 56(e). In addition, "[t]he court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment' and has "no independent duty to search or consider any part of the record not specifically referenced in the parties' separate statements of fact." *Id.*; *see also, e.g., Cosme-Rosado v. Serrano-Rodriguez*, 360 F.3d 42, 45 (1st Cir. 2004) ("We have consistently upheld the enforcement of [Puerto Rico's similar local] rule, noting repeatedly that parties ignore it at their peril and that failure to present a statement of disputed facts, embroidered with specific citations

to the record, justifies the court's deeming the facts presented in the movant's statement of undisputed facts admitted." (Citations and internal punctuation omitted.)).

B. Factual Background

The following undisputed material facts relevant to the motions of both plaintiffs are appropriately submitted and supported in the summary judgment record.

The property at issue in this case is known as the Squirrel Point Lighthouse ("the property"), located in Arrowsic, Maine, situated on the east bank of the Kennebec River at a point known as Squirrel Point. Statement of Undisputed Facts in Support of United States' Motion for Summary Judgment ("Coast Guard SMF") (Docket No. 64) ¶ 2; Defendant Squirrel Point Associates' Response to Statement of Material Facts Submitted by Plaintiff United States ("SPA Coast Guard Responsive SMF") (Docket No. 73) ¶ 2. Leon S. Trenholm is the incorporator, president, treasurer and sole active director of Squirrel Point Associates, Inc. ("SPA"), *id.* ¶ 3, the defendant in both of these actions. SPA is a Maine non-profit corporation with no shareholders. Plaintiff Citizens for Squirrel Point's Statement of Material Facts, etc ("Citizens' SMF") (Docket No. 56) ¶ 1; Defendant Squirrel Point Associates' Response to Statement of Material Facts Submitted by Plaintiff Citizens for Squirrel Point ("SPA Citizens' Responsive SMF") (Docket No. 74) ¶ 1. Since 1995, Trenholm has been the sole manager of all of SPA's activities. *Id.* ¶ 4. SPA acquired Squirrel Point Lighthouse in 1998. Coast Guard SMF ¶ 5; SPA Coast Guard Responsive SMF ¶ 5.[2]

From approximately 1995 through 1998, SPA had a license for use of the property. *Id.* ¶ 6.[3] The license included the following restrictions:

7. Historic Property Restrictions

[2] SPA objects to this paragraph of the Coast Guard's statement of material facts as irrelevant. SPA Coast Guard Responsive SMF ¶ 5. That objection is overruled.

[3] SPA objects to this paragraph of the Coast Guard's statement of material facts as irrelevant. SPA Coast Guard Responsive SMF ¶ 6. That objection is overruled.

> a. Licensee (SPA) shall ensure that all of its activities involving the licensed facility are in compliance with the National Historic Preservation Act (including, but not limited to, Section 106 of the act) and with the requirements [sic] part 800 of Title 36 of the Code of Federal Regulations. The following is a list of the known historic [sic] on the licensed facility: property known and listed as the Squirrel Point Lighthouse in the National Register of Historic Places.
>
> b. The Licensee agrees that no work of any nature will be done on any part of the licensed facility, unless the Licensee has the written approval of the Local Government representative and the appropriate State Historic Officer.

Id. On or about November 18, 1997 Trenholm signed a letter to Kirk Mohoney of the Maine Historic Preservation Commission, which states, in part, that the letter was

> an effort to bring you up to date of progress at Squirrel Point Lighthouse . . . within a complete understanding of the license. It was with out full knowledge that the purpose of this license entailed us to provide security for the lighthouse and to provide routine maintenance and non-structural repairs to the structures involved — exclusive of the lighthouse itself. Other purposes are to conduct educational and historic tours and hold fund raising events and such other uses consistent with the preservation of historic properties.

Id. ¶ 7.[4] The letter also lists various repairs made or planned since 1995 and closes with the statement: "We hope this information will facilitate your sending a letter of consultation to the Coast Guard (CEV Providence, RI) and to our receiving the deed to the property at Squirrel Point." *Id.* On January 8, 1998 Trenholm received a fax from the Coast Guard enclosing copies of a December 17, 1997 letter sent to the Coast Guard by Earle Shettleworth, the State Historic Preservation Officer ("SHPO"), and a draft deed to the property. *Id.* ¶ 8.[5] Shettleworth has served as Maine's SHPO from

[4] SPA objects to this paragraph of the Coast Guard's statement of material facts as irrelevant. SPA Coast Guard Responsive SMF ¶ 7. That objection is overruled.

[5] SPA objects to this paragraph of the Coast Guard's statement of material facts as irrelevant. SPA Coast Guard Responsive SMF ¶ 8. That objection is overruled.

1976 to the present. Citizens' SMF ¶ 11; SPA Responsive SMF ¶ 11.[6] The SHPO's December 17, 1997 letter stated, in part:

> I am writing in response to a letter addressed to the Commission from Leon Trenholm, Director of Squirrel Point Associates regarding work that has been undertaken and is planned by the Associates on the subject property....
>
> Prior to Mr. Trenholm's letter, there has been no consultation with our office either from the Coast Guard or the lessee about any proposed repairs or alterations of the property....
>
> Mr. Trenholm's letter... raise[s] concerns about changes that may have been made to the interior and the replacement of windows. These are activities that normally should be reviewed by the Commission and carried out in accordance with the *Secretary of the Interior's Standards for the Treatment of Historic Properties.*
>
> Although the failure to adhere to Section 106 consultation procedures on this property is of great concern, the Commission is prepared to issue a conditional finding of no adverse effect for the proposed transfer of the Squirrel Point Light Station to the Squirrel Point Associates. The conditions are as follows: 1) that the quitclaim deed shall contain historic preservation related stipulations and a covenant identical to those which will be used to transfer properties through the Maine Lights Program, and; 2) that the Coast Guard will assure that Squirrel Point Associates fully understands its obligations under the terms of the deed.

Coast Guard SMF ¶ 8; SPA Coast Guard Responsive SMF ¶ 8. A letter from the Coast Guard to Shettleworth, which Trenholm "must have" reviewed on or about January 8, 1998, states, in part:

> In accordance with the terms of your letter (requiring historic preservation consultation), we have provided Squirrel Point Associates a copy of the draft deed that will be used for the transfers under the Maine Lights Program and have reviewed each of the covenants of the deed with Mr. Trenholm. Because of the review, the Coast Guard is assured that Squirrel Point Associates fully understands its obligations under the terms of the deed.
>
> Additionally, we have discussed in detail, the workings and steps to be taken under the terms of the National Historic Preservation Act so that Squirrel Point Associates will be in full compliance with the terms thereof. Further, the terms and procedures set forth in the Secretary of the Interior's Standards

[6] SPA objects to this paragraph of Citizens' statement of material facts as immaterial. SPA Citizens' Responsive SMF ¶ 11. The objection is overruled.

> for the Treatment of Historic Properties have been reviewed and discussed with Mr. Trenholm.
>
> Mr. Trenholm has given us his full assurance that Squirrel Point Associates will abide by and comply with all of the historic preservation covenants contained in the deed as well as comply with all terms of the National Historic Preservation Act, the Secretary of the Interior's [S]tandards for the Treatment of Historic Properties as well as any other standards promulgated by your office.

Id. ¶ 9.[7] On February 12, 1998 the United States executed and delivered the deed conveying the property to SPA pursuant to the Coast Guard Authorization Act ("the Act"). *Id.* ¶ 10. The property was conveyed to SPA for no cash consideration and subject to the terms and conditions set forth in the Act and the deed. *Id.* ¶ 11.[8] SPA admits that it is bound by the terms of the deed and that all of the restrictions set forth in the deed applied at all times after the date of the conveyance of the property from the United States to SPA. *Id.* ¶ 13.

The deed provides, in part, as follows:

> 10. Pursuant to the Historic Preservation Covenant set forth below, the Grantee shall rehabilitate, preserve and maintain the Property in accordance with the provisions of the National Historic Preservation Act of 1966 (16 U.S.C. § 470 et[] seq.)[.]
>
> 11. Historic Preservation Covenant. The Grantee covenants, at all times, as follows:
>
> (a) Grantee shall rehabilitate, preserve and maintain the Property in accordance with plans approved in writing by the State of Maine's SHPO in order to preserve and enhance those qualities that make the Property eligible for inclusion in the National Register of Historic Places. Such rehabilitation, preservation and maintenance shall be in accord with the Secretary of the Interior's Standards for Rehabilitation, see 36 C.F.R. part 67;
>
> (b) No construction, alteration, remodeling, changes of color or surfacing, or any other thing shall be undertaken or permitted to be undertaken on the Property which would affect the structural integrity, the appearance, the cultural use, or archeological value of the Property without the express prior

[7] SPA objects to this paragraph of the Coast Guard's statement of material facts as irrelevant. SPA Coast Guard Responsive SMF ¶ 9. That objection is overruled.

[8] SPA objects to this paragraph of the Coast Guard's statement of material facts as "[a]rgumentative conclusions of law drawn from documents that speak for themselves." SPA Coast Guard Responsive SMF ¶ 11. That objection is overruled.

written permission of the SHPO, signed by a fully authorized representative, thereof;

(c) the SHPO shall be permitted at all times to inspect the Property in order to ascertain if the above conditions are being observed;

* * *

(h) the covenants set forth in this paragraph 11 shall constitute a binding servitude upon the Property and shall be deemed to run with the land.

* * *

13. Pursuant to section 1002(b)(4) of Public Law 104-324, all right, title, and interest in and to the Property shall immediately revert to the Grantor if the Property, or any portion thereof, ceases to be (a) used for educational, historic, recreational, cultural, and wildlife conservation programs for the general public and for such other uses as the Commandant, United States Coast Guard, determines to be not inconsistent or incompatible with such uses, (b) maintained in a manner that ensures its present or future use as a Coast Guard aid to navigation; or (c) maintained in a manner consistent with the provisions of the National Historic Preservation Act of 1966 (16 U.S.C. § 470, et[] seq.).

Id. ¶ 15.[9] The deed also states that the United States, in conveying title to the property to the SPA, was acting pursuant to the Coast Guard Authorization Act of 1996, Public Law 104-324 (the "Authorization Act"). Citizens' SMF ¶ 26; SPA Citizens' Responsive SMF ¶ 26.[10]

SPA claims that "[t]here was no scheduled pattern to the work that was done [on the property] from 1995 through June 2000." Coast Guard SMF ¶ 19; SPA Coast Guard Responsive SMF ¶ 19. SPA contends that it made various repairs to the keeper's cottage, including repairs to the interior walls, installing a new furnace, paneling the kitchen, repairing and painting the ceiling, installing new light fixtures, sanding and painting floors and stair treads, replacing the floor in the upstairs bath, replacing wooden gutters, installing plumbing and wiring and replacing the toilet. *Id.* These repairs were not approved in writing by the SHPO. Citizens' SMF ¶ 40; SPA Citizens' Responsive SMF ¶ 40. SPA admits that virtually all work at the property ceased in June 2000. Coast Guard SMF ¶ 20;

[9] SPA objects to this paragraph of the Coast Guard's statement of material facts as "[a]rgumentative. Not a statement of fact." SPA Coast Guard Responsive SMF ¶ 15. The objection is overruled.

[10] SPA objects to this paragraph of Citizens' SMF as argumentative and a conclusion of law. SPA Citizens' Responsive SMF ¶ 26. (*continued on next page*)

SPA Coast Guard Responsive SMF ¶ 20. Work in the last four years has been limited to sporadic efforts such as mowing the lawn from time to time. *Id.* Trenholm has not visited the property since June 2000, after he suffered at least two strokes and his health deteriorated. *Id.* ¶ 21.

In order to obtain information from SPA about its written work plan for the property, the SHPO and the Mane Historic Preservation Commission forwarded Historic Preservation Covenant Review Sheets to SPA in the spring of 2000, 2001 and 2002. Citizens' SMF ¶ 43; SPA Citizens' Responsive SMF ¶ 43. As early as October 8, 2002 the SHPO informed SPA and Trenholm that SPA was in violation of the terms of the deed and applicable laws governing the restoration and use of the property. Coast Guard SMF ¶ 23; SPA Coast Guard Responsive SMF ¶ 23. In a letter dated October 8, 2002 the SHPO detailed at least the following violations:

> ? SPA had made numerous changes and modifications to the exterior and interior of the buildings on the Property that were inconsistent with the Secretary of the Interior's *Standards for Rehabilitation*;
> ? SPA had failed to obtain any prior approval (written or otherwise) for any of the work that it had performed at the site — including specifically the changes that were inconsistent with the Standards for Rehabilitation;
> ? SPA had failed to provide the SHPO or any other entity with a plan for scheduled improvements or other work that SPA planned to undertake in order to meet its obligations under the terms of the Deed and Coast Guard Authorization Act;
> ? SPA had failed to make any progress on work that SPA told the SHPO it had planned to undertake in year [sic] 2000 and 2001;
> ? In addition to the above violations, the SHPO detailed 12 projects that SPA was required to undertake in order to remedy some of the most serious violations of the terms of the Deed, the Authorization Act and the *Standard for Rehabilitation* and Historic Preservation Act;
> ? Finally, the SHPO requested that SPA submit a plan to the SHPO on or before December 15, 2002 describing how SPA planned to complete the required tasks.

Id. ¶ 24. In this letter, the SHPO outlined requests for restoration of portions of the property that had been altered by SPA in a manner that did not comply with applicable standards, as well as separate

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The objection is overruled.

requests for repairs and/or maintenance of the property. Citizens' SMF ¶ 45; SPA Citizens' Responsive SMF ¶ 45. SPA has accomplished none of the tasks specifically required and set forth in the SHPO's October 8, 2002 letter. Coast Guard SMF ¶ 27; SPA Coast Guard Responsive SMF ¶ 27.

On February 6, 2003 the SHPO again wrote to SPA. *Id.* ¶ 28. In this letter, the SHPO confirmed that Trenholm has left a telephone message for the SHPO on December 13, 2002 indicating that SPA would supply the information requested in the October 8, 2002 letter. *Id.* In this letter, the SHPO confirmed that SPA had not submitted any plan or other information in response to the SHPO's October 8, 2002 letter and advised SPA that unless SPA submitted the requested plan on or before February 21, 2003, legal action would be taken. *Id.* ¶ 29.[11] In a February 20, 2003 letter to the SHPO, Michael Kilbride, on behalf of SPA, stated the following:

> ? "Not as much progress has been made as [Mr. Trenholm] had hoped for" with respect to the work that needed to be done and which was outlined in the SHPO's October 8, 2002 letter;
> ? "[i]t was time to renew efforts to rehabilitate and restore the site . . .;"
> ? missing siding on one of the buildings was "an eyesore" and it needed to be addressed and would be once the site "becomes accessible in the spring;"
> ? an answer to problems with the septic system for the site was anticipated "within a few months" and SPA would fix the deck and the septic system entirely;
> ? SPA agreed that "more work needs to take place once the weather improves."

Id. ¶ 32. SPA did not undertake any of the work detailed in Kilbride's letter or the SHPO's October 8, 2002 letter and never submitted any plan to the SHPO for the completion of the work. *Id.* ¶ 33. Other than hiring a one-time contractor to remove old siding during the winter of 2003-2004, SPA has not conducted any work efforts at the property since June 2000. Citizens' SMF ¶ 50; SPA Citizens' Responsive SMF ¶ 50.

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[11] SPA objects to this paragraph of the Coast Guard's statement of material facts as argumentative, irrelevant and immaterial. SPA Coast Guard Responsive SMF ¶ 29. Those objections are overruled. Since SPA provides no further response to the paragraph, it is deemed admitted because it is supported by the citation given to the summary judgment record. *See* Exh. J to Declaration of Brian W. (*continued on next page*)

In a letter from CDR T. W. Jones to SPA dated June 6, 2003 the Coast Guard, aware of SPA's lack of progress in rehabilitating the property and of SPA's violations of the terms of the deed and applicable legislation, informed SPA that unless SPA took appropriate action (*i.e.* submission of an approved plan for completion of the work outline in the SHPO's October 8, 2002 letter and establishment of a nonprofit center for the interpretation and preservation of maritime history) on or before June 30, 2003, the Coast Guard would seek enforcement of the reversionary interest provided in Section 1001 of Public Law 104-324 and the deed. Coast Guard SMF ¶ 35; SPA Coast Guard Responsive SMF ¶ 35.[12]

On or about October 2003 SPA erected large "No Trespassing" signs on the property in an effort to prevent the SHPO and any other third parties from entering the property. *Id.* ¶ 40. SPA continues to block public access to the property and intends to maintain the "no trespassing" signs at the property. Citizens' SMF ¶ 58; SPA Citizens' Responsive SMF ¶ 58. According to the SHPO, the property has fallen into general disrepair and is in an overall unsatisfactory condition. *Id.* ¶ 60. Also according to the SHPO, SPA has engaged in construction on and alteration of the property that has altered the structural integrity, appearance, cultural use and /or archaeological value of the property. *Id.* ¶ 61. According to the SHPO, SPA has never observed the formal process for consultation with the SHPO in connection with SPA's work efforts at the property. *Id.* ¶ 62. According to the SHPO, SPA has not met and currently does not meet the conditions and/or restrictions set forth in the deed, the Authorization Act, the National Historic Preservation Act and/or any implementing regulations. *Id.* ¶ 63. According to the SHPO, SPA has not managed the property for the public benefit in a manner consistent with the restrictions in the deed, the National Historic Preservation Act and/or its

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Robinson in Support of United States' Motion for Summary Judgment (submitted with Docket No. 64).

[12] SPA objects to this paragraph of the Coast Guard's statement of material facts as argumentative, irrelevant and immaterial. SPA Coast Guard Responsive SMF ¶ 35. The objections are overruled.

corresponding regulations, the Authorization Act and/or its corresponding regulations, and lighthouse and other historic preservation projects in Maine generally that are also required to adhere to the standards promulgated by the Secretary of the Interior. *Id.* ¶ 65. According to the SHPO, SPA's responses to his concerns regarding the rehabilitation, preservation and/or maintenance of the property to date have been insufficient. *Id.* ¶ 67. The Coast Guard looks to the SHPO as having a primary role in the preservation of the property as required by the deed. Defendant Squirrel Point Associates' Additional Statement of Material Facts in Opposition to Motions for Summary Judgment (Docket No. 75) ¶ 2; Citizens for Squirrel Point's Reply to Squirrel Point Associates' Additional Statement of Material Facts (Docket No. 79) ¶ 2; United States' Response to Squirrel Point Associates' Additional Statement of Material Facts, etc. (Docket No. 84) ¶ 2.

On November 25, 2003 Captain Dale Walker of the Coast Guard wrote to SPA, care of its counsel, to inform SPA of its various breaches, defaults and violations of the terms and covenants of the deed and the Authorization Act. Coast Guard SMF ¶ 41; SPA Coast Guard Responsive SMF ¶ 41. The Coast Guard again warned SPA that it would take action to initiate legal proceedings to effect the reversion of the property to the United States. *Id.* Captain Walker offered SPA a means of avoiding the controversy if, by December 31, 2003, SPA "provides [the Coast Guard] with a fully developed plan for meeting the statutory and deed requirements, including proof of financial resources adequate to carry out the plan." *Id.*

SPA has never undertaken an effort to conduct the public programs or create the center for the preservation of maritime history required by the deed and the Authorization Act. *Id.* ¶ 45. Trenholm agreed that although "the intent was there," SPA never conducted any type of program for the public or initiated any event for historic, cultural or educational purposes. *Id.* ¶ 48. Since June 202 SPA has had no responsible person to monitor any public use of the property. *Id.* ¶ 49. The only use that the

SPA has made of the property from 1995 to the present has been to allow the Light to be viewed by the public, either from the water, or at the site before public access was prohibited in 2003, and to conduct restorative work efforts. Citizens' SMF ¶ 32; SPA Citizens' Responsive SMF ¶ 32. SPA has not had any active budget for the property for the past several years. Citizens' SMF ¶ 56; SPA Citizens' Responsive SMF ¶ 56.

SPA has been engaged in efforts to sell the property since at least as early as 2002. Coast Guard SMF ¶ 50; SPA Coast Guard Responsive SMF ¶ 50.[13] After Trenholm suffered a stroke, he determined that he needed to sell the property because, "[g]iven the lack of any interest by anyone in providing active assistance in the restoration, it was concluded that no one was available to take [Mr. Trenholm's] place at Squirrel Point Associates." *Id.* ¶ 51. SPA listed the property for sale in or about June 2002 for $500,000. *Id.* ¶ 52. SPA entered into a purchase agreement with Leonard F. Picotte and his spouse for the purchase of the property at a price of less than $300,000. *Id.* ¶ 53. In connection with the contemplated sale, Picotte asked that the Coast Guard amend the deed to specify: (a) that use of the property for a residence would not be prohibited; and (b) opening the property for one day per month for public visits and for a four to five day period for summer or fall workshops would be deemed in full compliance with the provisions of paragraph 13(a) of the deed. *Id.* ¶ 54. The Coast Guard circulated a copy of the proposed addendum to the deed to various interested parties, soliciting comments regarding the proposal. *Id.*¶ 55. After receiving the responses, the Coast Guard determined that it would not agree to the proposed addendum to the deed. *Id.* ¶ 57.

C. Discussion

1. Citizens' Motion. Citizens seeks summary judgment on Counts I-III of its complaint. Plaintiff Citizens for Squirrel Point's Motion for Summary Judgment, etc. ("Citizens' Motion") (Docket No.

[13] SPA objects to this paragraph of the Coast Guard's statement of material facts as immaterial. SPA Coast Guard Responsive SMF (*continued on next page*)

55) at 1. Those counts seek a declaratory judgment that title to the property has reverted to the Coast Guard by virtue of, respectively, the Authorization Act, the terms of the deed and the National Historic Lighthouse Preservation Act. Complaint (Docket No. 1) ¶¶ 19-36. The defendant responds to three of the five arguments advanced by Citizens and relies, apparently in the alternative, on the affirmative defenses of the doctrine of prevention or hindrance and the equitable aversion to forfeiture. Defendant Squirrel Point Associates' Objection to Motions for Summary Judgment ("Opposition") (Docket No. 72) at 12-16.[14]

Citizens first contends that title has reverted to the Coast Guard because the SPA has not used the property for educational, historic, recreational, cultural or wildlife preservation programs, nor for the interpretation and preservation of maritime history, as required by the deed and the Authorization Act. Citizens' Motion at 14. SPA responds that the deed provides for reverter only if it ceases to use the property for such purposes, and, since the property has never been used for such purposes, it cannot have ceased to do so; that "[w]hat and when such programs would be put in place was left to Squirrel Point's discretion;" that such use of the property would expose the public to unsafe conditions; and that it has made sufficient attempts to provide such programs. Opposition at 8-12.

Construction of a deed to real property is governed by state law. *Clarke v. Clarke*, 178 U.S. 186, 191 (1900). Maine law provides that "[t]he ordinary rule that a deed is construed most strictly against the grantor and in favor of the grantee does not apply when the grant is from the sovereign and is not purely a commercial transaction." *Cushing v. State*, 434 A.2d 486, 500 (Me. 1981) (citation

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¶ 50. The objection is overruled.

[14] SPA's answer to Citizens' complaint cannot reasonably be read to raise the doctrine of prevention or hindrance as an affirmative defense, and only by the most generous of readings may the answer be construed to assert the particular equitable defense on which SPA now relies. Defendant Squirrel Point Associates' Answer to Complaint (Docket No. 32) at 5. The defenses are raised in SPA's answer to the Coast Guard's complaint, Answer to Complaint (Docket No. 5 in case No. 04-58-P-C) at 2, but assertion of those defenses against the Coast Guard cannot be extended to constitute their assertion against Citizens. However, Citizens chooses to respond to SPA's argument based on these defenses on the merits rather than relying on SPA's failure to plead such affirmative defenses.

omitted). There can be no question in this case that the conveyance of the property from the Coast Guard to SPA was not purely a commercial transaction or that the grant was from the sovereign. Accordingly, "[t]he general rule is that public land grants are to be construed favorably to the government." *Id.* The interpretation of a deed is a question of law; if no ambiguity exists in the language of the deed, "those words alone determine the parties' intent." *Wentworth v. Sebra*, 829 A.2d 520, 524 (Me. 2003). If the terms are ambiguous, the court may look to extrinsic evidence to determine the parties' intent. *Id.*

Citizens relies on paragraph 13 of the deed, Citizens' Motion at 14, which provides that all right, title and interest in the property

> shall immediately revert to the Grantor if the Property, or any portion thereof, ceases to be (a) used for educational, historic, recreational, cultural, and wildlife conservation programs for the general public . . . or (c) maintained in a manner consistent with the provisions of the National Historic Preservation Act of 1966 . . . .

Citizens' SMF ¶ 25. With reference to clause (a), SPA responds that "[c]learly, there has been no such use other than making it possible for the public to view an old abandoned light house from the water,[15] by not preventing people from landing boats and walking the property, and by not preventing access from the 1/3 mile rough path through a bird sanctuary." Opposition at 11. None of these inactions can reasonably be construed to constitute any of the specified uses. SPA then argues that "[o]ne cannot **cease** doing that which did not exist in the first place." *Id.* (emphasis in original). This argument would render the deed language a nullity. Even if, as SPA also contends, the "Coast Guard has established no guidelines and had no agreement with Squirrel Point when such programs should be put in place whatever they may be," *id.* at 9, Maine law recognizes the rule that a reasonable time should be implied for the period in which a condition subsequent in a deed must be satisfied,

[15] The SPA asserts that "[t]he Coast Guard has said clearly that this viewing opportunity may be sufficient," Opposition at 10, but the (*continued on next page*)

Independent Congregational Soc. v. Davenport, 381 A.2d 1137, 1139 (Me. 1978). A reasonable time has passed since SPA acquired title under the deed in February 1998, yet SPA has not provided any of the required programs or uses. Construing the deed language in favor of the sovereign, SPA cannot be allowed to escape its responsibilities under the deed merely because it has never begun to do what it was required to do by the language of the deed.

The only evidence of the existence of unsafe conditions in the summary judgment record cited by SPA concerns 2003. Opposition at 11; Citizens' SMF ¶¶ 57, 60. Assuming *arguendo* that this is sufficient evidence of safety concerns to bar all of the uses called for in the deed, it does not remedy SPA's failure to undertake any such activities in the preceding five years. Finally, SPA's reliance on invitations to three entities in 1995-97 "to create programs," which were declined and an invitation to a state agency in 1995 or 1996 "to participate with SPA in providing introductory fishing opportunity for children," an event which did not take place, Opposition at 9-10, is insufficient to meet its obligations under the deed as a matter of law.

With respect to the deed requirement that the property be maintained in a manner consistent with the National Historic Preservation Act of 1966, Citizens contends that SPA was required to adhere to the SHPO's recommendations and requirements ant that its failure to do so also triggers the reversion clause. Citizens' Motion at 18-19. SPA concedes that the deed requires it to preserve and maintain the property in accordance with plans approved by the SHPO. Opposition at 4. It contends that it complied with this requirement by requesting guidance "on numerous occasions" from the SHPO, by submitting "[a] lengthy written plan" in 1997, and by submitting annual reports "in 2000-2001 describing work to be done at the site in the coming year." *Id.* at 5. Only one of the citations to the summary judgment record given by SPA in support of these contentions actually addresses any of

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authority cited for this statement, paragraph 12 of SPA's statement of material facts, provides no factual support for the assertion.

them: that SPA submitted annual reports to the SHPO in 2002 and 2001.[16] SPA's SMF ¶ 14. There is no evidence that any plans were approved by the SHPO. Indeed, SPA has admitted that the SHPO has determined that (i) SPA "has not and does not currently meet the conditions and/or restrictions set forth in the Deed [or] the NHPA . . . ," Citizens' SMF ¶ 63; SPA's Citizens' Responsive SMF ¶ 63; (ii) since SPA obtained title to the property, it "has not rehabilitated, preserved and/or maintained the Light in a manner consistent with (1) the conditions and restrictions contained in the Deed, [or] (2) the provisions of NHPA," *id.* ¶ 64; and (iii) any efforts undertaken by SPA "to improve the Light have been inadequate to meet the various Deed and statutory conditions and restrictions on the preservation, maintenance, rehabilitation, renovation, reconstruction and general use of the Light," *id.* ¶ 66. SPA does not suggest that the SHPO is not the appropriate authority to make these determinations under either the deed or the National Historic Preservation Act. The SHPO does in fact have that role under applicable law and regulations. 16 U.S.C. § 470w-7(c)(1)(D); *see generally Narragansett Indian Tribe v. Warwick Sewer Auth.*, 334 F.3d 161, 163-68 (1st Cir. 2003) (relying on findings of SHPO in case under National Historic Preservation Act); *Brehmer v. Planning Bd. of Town of Wellfleet*, 238 F.3d 117, 123 (1st Cir. 2001) (SHPO conclusion sufficient to demonstrate compliance with National Historic Preservation Act).

Given SPA's established failure to comply with the terms of the deed and the National Historic Preservation Act, there is no need to address Citizens' additional arguments. It is only necessary to consider SPA's asserted affirmative defenses.

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[16] SPA may actually have intended to rely on the information included in its denials of the cited paragraphs of the statements of material facts submitted by the Coast Guard and Citizens. In order to rely on that information in support of its own arguments, as distinct from merely disputing information on which the moving parties might otherwise be able to rely, SPA was required to submit that factual material in its own statement of material facts, so that the other parties would have had an opportunity to respond to it. SPA did not do so. In any event, none of the material in SPA's denials of the cited paragraphs — paragraphs 36 and 49 of Citizens' statement of material facts and paragraph 31 of the Coast Guard's statement of material facts — can reasonably be read to show that any of the "plans" referenced therein were approved in writing by the SHPO, as required by the terms of the deed, Citizens' SMF ¶ 22.

SPA apparently contends that it could not comply with the terms of the deeds and applicable statutes after its principal suffered a series of strokes in June 2000 and that its only alternative was to sell the property to an individual or entity that was capable of carrying out the requirements of the deed and applicable statutes. Opposition at 12-13. It contends that this alternative was stymied by the SHPO, Citizens and the Coast Guard. *Id.* at 13. Specifically, it asserts that the SHPO's October 8, 2002 letter demanding performance, unspecified demands for performance by the Coast Guard and the instant lawsuits "prevented Squirrel Point from exercising its right to sell and from resolving the impasse." *Id.*[17] None of this argument addresses SPA's failures to comply with the terms of the deed and applicable statutes between February 1998, when the deed was executed and recorded, and June 2000. SPA fails to suggest why that period of failure, standing alone, is not sufficient to warrant reversion of title. In addition, the first of the two lawsuits at issue here was not filed until August 18, 2003, and accordingly could not have affected SPA's ability to comply with its obligations for the first five years during which it held title to the property. SPA asserts that

> [t]he publicity created by the offer to sell brought a quick and aggressive response from the local citizens who eventually organized Citizens to force reversion of the property. See, *Additional Fact 15*. Commencing as early as August 2002, letters were written to SHPO, the Coast Guard, Senator Snowe (who chairs the Coast Guard appropriations committee) and others. *Ibid.* Publicity was rampant that Mr. Trenholm was trying to make an egregious profit on a property that he got for "free." *Ibid.*

Id. at 12-13. None of these assertions is supported by paragraph 15 of SPA's statement of material facts, and therefore none of them may be considered by the court.

SPA cites no authority in support of its contention that its apparent organizational difficulties resulting from its dependence upon a single individual to accomplish its purposes excuses it from

[17] In a stunning display of circular reasoning, SPA goes on to assert that "[s]ince the Plaintiffs have claimed since August 2002 that Squirrel Point owns nothing, they cannot now hold Squirrel Point responsible for the failure to continue working on the project." Opposition at 13.

compliance with the terms of the deed and applicable statutes. My own research has located none. SPA wisely does not rely solely on this argument but uses it as the asserted reason why its only alternative was to sell the property, a plan which it contends that Citizens and the Coast Guard unfairly blocked. However, that premise cannot be sustained. SPA does not suggest why it could not have attempted to donate the property to an organization willing to, and capable of, satisfying the requirements of the deed and applicable statutes. SPA does not contend, nor could it, that the Coast Guard acted outside its authority or in bad faith when it declined to amend the deed in the manner requested by the potential buyer located by SPA. SPA cites only a Maine case discussing the doctrine of prevention or hindrance and a comment to section 225 of the Restatement (Second) of Contracts as authority for its position. *Id.* at 13.

The case cited by SPA, *Diversified Foods, Inc. v. First Nat'l Bank of Boston*, 605 A.2d 609 (Me. 1992), dealt with contract claims concerning a loan agreement and notes between a bank and borrowers. The borrowers contended that their defaults on the notes "were occasioned by the Banks' breaches of the agreement and the duty of good faith." *Id.* at 616. The Maine Law Court observed that "[t]he doctrine of prevention or hindrance excuses a borrower's breach of its duties," and held that, "[b]ecause the Banks violated no duty (contractual or implied), the entry of summary judgment in their favor on [claims based on the doctrine] was appropriate." *Id.*[18] In this case, there is no borrower, nor is any breach by Citizens of a contractual or implied duty alleged by SPA. In addition, no contract is at issue here; the deed is not a contract. My research has located no authority for the proposition that compliance with the terms of a statute may be excused by the doctrine of prevention or hindrance. Finally, and most important, the evidence offered by SPA would not allow a reasonable factfinder to

[18] The only case cited by the Law Court with respect to the doctrine, *Motel Servs., Inc. v. Central Maine Power Co.*, 394 A.2d 786, 788 (Me. 1978), merely states that "[w]here the offeree of a unilateral contract is prevented from completing performance by the actions of the offeror, such failure will not be a defense to an action by the offeree on the contract." Here, there is no action by SPA (*continued on next page*)

conclude that its compliance with the terms of the deed and the applicable statutes was prevented by either Citizens or the Coast Guard.[19]

Section 225 of the Restatement (Second) of Contracts provides:

> Effects Of The Non-Occurrence Of A Condition
>
> (1) Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.
> (2) Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.
> (3) Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.

Restatement (Second) of Contracts (1981) § 225. Comment b to this section provides:

> *b. Excuse.* The non-occurrence of a condition of a duty is said to be "excused" when the condition need no longer occur in order for performance of the duty to become due. The non-occurrence of a condition may be excused on a variety of grounds. It may be excused by a subsequent promise, even without consideration, to perform the duty in spite of the non-occurrence of the condition. . . . . It may be excused by acceptance of performance in spite of the non-occurrence of the condition, or by rejection following its non-occurrence accompanied by an inadequate statement of reasons. . . . It may be excused by a repudiation of the conditional duty or by a manifestation of an inability to perform it. . . . . It may be excused by prevention or hindrance of its occurrence through a breach of the duty of good faith and fair dealing . . . . And it may be excused by impracticability.

SPA does not mention the words "good faith and fair dealing" in the portion of its memorandum of law discussing its invocation of the doctrine of prevention or hindrance, nor could its arguments fairly be read to assert that such a duty existed on the part of Citizens and the Coast Guard and that the duty was breached. Even if the deed could properly be considered a contract, therefore, SPA has not provided any basis on which the cited section of the Restatement and its comment b could apply to the claims of Citizens or the Coast Guard for reversion.

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and there is no contract.

[19] Since SPA does not contend that the actions of the SHPO may legally be attributed to either Citizens or the Coast Guard, I do not consider further its contention that the SHPO somehow prevented its compliance.

As a final argument, SPA asserts that "Maine law disfavors forfeiture of interests in real estate," and that equity will excuse the non-occurrence of a condition that would otherwise cause a disproportionate forfeiture. Opposition at 14-16. Since neither Citizens nor the Coast Guard sought to avail themselves of "an alternative remedy" which "[t]he Deed clearly makes available," authorizing the SHPO to seek injunctive relief for violation of the preservation covenants, SPA contends that the "unjust enrichment" of the Coast Guard that would follow from reversion should not be allowed. *Id.* at 15. This "unjust enrichment" is presumably the value bestowed on the property by SPA's investment of an "estimated $150,000" in "this project." *Id.* at 14. SPA again relies on contract law in support of its position. *Id.* at 14-15.

From all that appears in the summary judgment record, neither Citizens nor the Coast Guard could "avail themselves" of a remedy made available to the SHPO, an independent entity not a party to either lawsuit. The fact that such a remedy may exist does not bar the Coast Guard from seeking or obtaining reversion by any term of the deed cited by SPA; SPA cites no statutory language in support of this argument.[20] Equity provides a remedy where the law provides none; in this case, SPA appears to have a legal remedy for any damage that may be caused by the reversion. Remedies for any "unjust enrichment" that may have been bestowed on the Coast Guard by SPA if reversion occurs are, as far as it appears from the summary judgment record, available to SPA; it has chosen not to plead any counterclaim in the Coast Guard action.[21] Finally, the authority cited by SPA does not bar the relief sought by Citizens and the Coast Guard in these actions.

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[20] Contrary to SPA's assertion, Opposition at 14, nothing in 16 U.S.C. § 470w-7(1)(c) "makes reversion an optional course of action for the Coast Guard." Even if the statutory language did specifically refer to reversion as an option, however, the existence of that option would not bar the Coast Guard from seeking reversion, nor could equity be employed to bar one of the statutory options on any basis asserted by SPA.

[21] SPA asserts that "[t]he Coast Guard does not acknowledge the deeded right of Squirrel Point to cure its own inadequacies and limitations by finding a successor of its choosing on terms it decides." Opposition at 14. It provides no citation to the deed in support of this assertion. Such a "right" would conflict with 16 U.S.C. § 470w-7(c)(1)(F), which provides that the entity to which a historic light station is conveyed shall not sell or convey it without the approval of the Secretary of the Interior.

SPA cites *United Feldspar & Minerals Corp. v. Bumpus*, 142 Me. 230, 49 A.2d 473 (1947), in support of its assertion that "Maine law disfavors forfeiture of interests in real estate." *Id.* at 14. In that case, the language on which SPA relies was included in the Law Court's recitation of the reasons given by the lower court and was not part of the Law Court's holding. 142 Me. at 231.[22] In any event, such general language would not prevail over the specific language of the Law Court's later decision in *Cushing*, holding that a grant of public land is to be construed favorably to the government. *Cushing*, 434 A.2 at 500. Neither of the two sections of the Restatement of Contracts cited by SPA, if applicable at all to a case involving interpretation of a deed and statutory language, supports its argument that equity bars the reversion of title sought by the plaintiffs. Section 227 provides that "[i]n resolving doubts as to whether an event is made a condition of an obligor's duty . . . an interpretation is preferred that will reduce the obligee's risk of forfeiture." Restatement (Second) of Contracts (1981) § 227(1). SPA must be casting itself as the obligee with respect to the deed or the statutes at issue here, because it is asserting that the reversion would constitute a forfeiture of its interest in the property. In this case, the Coast Guard has no "duty" of which any event is made a condition. Section 229 provides: "To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange." *Id.* § 229. In this case, it is clear that SPA's obligations under the deed were a material part of the conveyance of title to the property. SPA cites *Aetna Cas. & Sur. Co. v. Murphy*, 538 A.2d 219 (Conn. 1988), in support of its contention that the "forfeiture" resulting from reversion would be "disproportionate." Opposition at 15. That issue does not arise because SPA's obligations were a material part of the conveyance.

[22] Interestingly, the full phrase in which the language on which SPA relies appears provides: "[F]orfeitures and cancellations are not favored at law or in equity but rest within the discretion and conscience of the court." 142 Me. at 231. Here, the Coast Guard and Citizens are seeking reversion by judgment of this court.

Citizens is entitled to summary judgment on Counts I-III of its complaint.[23]

2. Coast Guard Motion. The Coast Guard seeks summary judgment on essentially the same grounds as those asserted by Citizens. United States' Motion and Memorandum for Summary Judgment (Docket No. 63) at 9-20. SPA submitted a single memorandum of law in opposition to the motions filed by Citizens and the Coast Guard and did not suggest that any of its arguments applied only to one motion or the other. The Coast Guard's motion for summary judgment on the single count in its complaint should be granted for the reasons discussed above in connection with Citizens' motion.

3. Motion for Leave to File. The United States has filed a motion for leave to file a supplement to its statement of material facts to address SPA's hearsay objection to paragraphs 34, 38 and 39 of that document. United States' Motion for Leave to File a Supplement to Statement of Undisputed Facts in Support of United States' Motion for Summary Judgment (Docket No. 85) at 1. SPA objects to the motion, which objection is notable for its hyperbole. Objection by Squirrel Point Associates to United State's [sic] Motion for Leave to File Supplement, etc. (Docket No. 87) at 2-3. Because I do not rely on the paragraphs of the Coast Guard's statement of material facts that are the subject of this motion in reaching my recommended decision, the motion is moot.

III. Conclusion

For the foregoing reasons, I recommend that the plaintiff's motion to dismiss (Docket No. 54) be **DENIED** and that the motions of the plaintiffs for summary judgment (Docket Nos. 55 and 63) be **GRANTED**.

NOTICE

[23] The sole count of Citizens' complaint not addressed by its motion, Count IV, seeks declaratory relief barring the Coast Guard from amended the deed in a manner inconsistent with federal law. Complaint ¶¶ 38-39.

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 13th day of January, 2005.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge