STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-08-47

Ronald Fitch,

Plaintiff,

v.

DECISION AND ORDER
(Motions for Summary Judgment)

Diamond Cove Homeowners Association, et al.,

Defendants

This matter is before the Court on the motions for summary judgment of Defendant City of Portland (the City), Defendants Diamond Cove Homeowners' Association (the Association) and Defendants Roger Blatty, John Burge, Richard McGoldrick, Richard Molyneux, and Robert Whelan (collectively Defendants).

Factual Background

I. The Parties

Plaintiff Ronald Fitch and his wife, Sandra Fitch, currently reside in a newly renovated building on Great Diamond Island (the Fitch property). The Association is a non-profit corporation that operates as the non-profit homeowners association for the Diamond Cove development located on Great Diamond Island. Defendants Roger Blatty, Richard McGoldrick, Richard Molyneux, and Robert Whelan, are four of the current directors of the 7-member Board of the Association; Defendant Philip Guarino's term on the Board expired, and John Burge is also a former member of the Board.

II. The Planning and Approvals Associated with the Diamond Cove development.

In 1985 and 1986, the old Fort McKinley area, which included the historic parade ground and surrounding property, was the subject of a plan for residential development. In general, the development at Diamond Cove occurred in two phases: Phase I consisted of the renovation of the existing historic buildings on the parade ground, and Phase II involved the development, mainly for new home construction, of other shoreline lots within Diamond Cove.

In 1985, in connection with the development of Diamond Cove, Diamond Cove Associates, the former record owner of the land and buildings on Diamond Cove, sought and received a conditional rezoning of the Fort McKinley property. The 1985 conditional zoning amendment allowed the property located on Great Diamond Island to be rezoned from the R-2 Residential Zone to the IR-3 Island Residential Zone, and limited the use and occupancy of the property to one hundred thirty-four (134) dwelling units and other permitted uses.[1] This amendment and rezoning contained several "Conditions and Restrictions", including the following entitled, "Restrictions on motor vehicles":

> Except for vehicles used primarily for construction, maintenance, service and the common transportation of goods and passengers, and fire protection, public safety and emergency vehicles, no motor vehicles, as defined by 29 M.R.S.A. § 1(7), but including snowmobiles, shall be operated or stored, temporarily or otherwise, on the Premises.

In addition to the conditional rezoning, both phases of the Diamond Cove development were subject to Site Plan Review and approval by the Board of Environmental Protection of the Maine DEP, pursuant to 38 M.R.S. §§ 474 & 483 and § 401 of the Federal Water Pollution Control Act. On December 10, 1986, the DEP issued the Site Location Order for Phase I of the Development, and on June 25, 1991, the Maine DEP approved Phase II for thirty-nine (39) residential lots.

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[1] City's Supporting Statement of Material Facts, ¶ 3. Although Plaintiff purports to qualify City's Supp. S.M.F. ¶ 3, because he supports his qualification with citation to 18 subsequent assertions of fact rather than to discrete record evidence clearly supporting his qualification, Plaintiff's citations do not comply with the requirements of M.R. Civ. P. 56. One of the purposes of Rule 56 and its requirement that statements of fact and any responses thereto be supported by citations to "record evidence," is to streamline the summary judgment process. By citing to a string of additional statements of fact rather than a single document or other specific evidence to support his qualification, Plaintiff is not in compliance with the Rule. Defendant's statement of fact 3 is, therefore, deemed admitted. *See* M.R. Civ. P. 56(h)(2) & (4)

The Phase I DEP Site Location Order specifically referenced the City of Portland's zoning condition restricting the use of certain types of vehicles within the IR-3 zone; the DEP added that a "shuttle-type transportation system will be instituted by the applicant and operated on an as-needed, on-call basis to serve the residents of the Diamond Cove project."[2] The Phase II Site Location Order also included various restrictions on vehicular traffic, which restrictions, in addition to permitting each lot owner to own and operate one golf cart within the project site, provides as follows:

> No automobiles, trucks, recreational vehicles, all-terrain vehicles, motorcycles, snowmobiles or other motorized vehicles will be parked or kept on the site except by the Association or its agents for maintenance or service purposes, including the common transportation of goods and passengers, fire protection, public safety and emergency purposes, or by contractors engaged in construction activities. The Association will operate a shuttle-type transportation system on an as-needed, on-call basis to service residents and guests.

III. The Declaration for Diamond Cove

The Diamond Cove development is governed by an Amended and Restated General Declaration of Covenants and Restrictions (the Declaration). The Declaration, which provided for the formation of the Association, sets forth covenants and restrictions for the real property that is part of the Diamond Cove development project.

Certain areas of the development designated as "common properties" under the Declaration were conveyed to the Association in accordance with Section 7 of the Declaration. Section 7.3.1 reads: "the Association will accept conveyance of the common properties which Declarant [i.e. the developer] is obligated to or may convey to it." The area at issue in this case, the so-called "barge landing," was conveyed to the Association as part of the "common properties."

The Declaration further provides:

> The Association will preserve and maintain for the common benefit of the owners all of the common properties which the Association hereafter shall own, or have rights to or interests in including without limitation the obligation to maintain streets, roadways and other common areas and facilities which may be conveyed to the Association as common properties, pay taxes thereon, keep the same in good and sightly appearance, maintain insurance thereon as provided in the Bylaws and comply with and enforce provisions of

[2] City's Supp. S.M.F. ¶ 5; Pl.'s Opp. City S.M.F. ¶ 5.

this Declaration. All areas designated as "Open Space Recreational Areas" within Phase II shall remain as open space and shall not be subdivided or built upon or otherwise altered from their natural character, except for such alteration reasonably necessary in order to maintain, repair and replace existing improvements and structures thereon, including above-ground and underground utilities, or to install new underground utilities across said areas, following which said areas will be restored as nearly as possible to their original condition. This restriction will not be amended or released without the consent of all lot owners in Phase II, Maine Audubon Society, Casco Bay Island Development Association and Island Institute and any attempted amendment or release thereof without such consent shall be void and of now effect.[3]

Section 4.7 of the Declaration provides:

Each owner shall have the right to own and operate one (1) golf cart on the properties. No automobiles, trucks, recreational vehicles, all-terrain vehicles, motorcycles, snowmobiles or other motorized vehicles will be parked or kept on the properties except by the Association or its agents for maintenance or service purposes, including the common transportation of goods and passengers, fire protection, public safety and emergency purposes, or by contractors engaged in construction activities. No motorized vehicles of any kind, including golf carts, shall pass south of the southerly boundary of the properties except for fire equipment, ambulances or public safety vehicles in the performance of their duties, and designated Association owned vehicles which transport persons and/or goods between the properties and the pier located at the southerly end of Great Diamond Island.

IV. The Barge Landing

The barge landing is located on the western shoreline of Great Diamond Island, on a lot adjacent to the Fitch property, and is in an area designated "Open Space Recreation" as that term is used in the Declaration. The ramp and roadway that lead to the shoreline, and the rocky shoreline area where barge operators land, were "existing improvements" on the land when Phase II was approved in 1991 and when the common properties were conveyed to the Association.[4] Defendants contend that "the road, the gravel ramp, and use of the barge landing area are depicted as part of" a "'30-foot wide utility easement" on the Phase II plan; as such, Defendants maintain, the barge landing area is also an 'above-ground

[3] Declaration § 7.3.2.

[4] Although Plaintiff attempts to deny that the barge landing was an "existing improvement" when Phase II was approved and/or when it was conveyed to the Association such that its maintenance was governed by the Declaration, his denials are not properly supported in the record(again he cites a series of his additional statements of material fact rather than record evidence), and they are in direct conflict with his own prior testimony. Compare Pl.'s Opp. S.M.F. ¶ 36; Pl.'s Opp. City S.M.F. ¶ 24; and Fitch Dep. at 135 (Q: ". . . has the use of the barge landing been an existing use of this property at the time that this declaration was written? A: When the declaration was written, it was.") & 290 (after explaining that the common meaning of improvement includes "[a]ny improvement, you know, driveway, septic style, anything" Mr. Fitch is asked: Q: 'So a barge landing would constitute an improvement in that sense of the word. A: In that sense of the word.")

utility' existing at the time of approval of Phase II and conveyance of the open space lot to the Association." Plaintiff disagrees with this assessment.

The City uses the barge landing for a variety of municipal services that it provides to Great Diamond Island for both the southerly and Diamond Cove sides of the island. In his Complaint and Statement of Additional Facts, Plaintiff alleges that "the use of the barge landing has now increased significantly and unreasonably with large equipment from the City, southern island residents and construction equipment and delivered supplies for their projects."[5] The City and the Defendants, however, deny that traffic on the barge landing has increased and, in support of their denial, cite Plaintiff's deposition testimony in which he concedes that barge landing traffic has declined in recent years due to the economy and the lack of construction projects.[6] Regardless of the volume of traffic, Plaintiff maintains that use of the landing by the City and by residents of the southern part of the island is contrary to the terms of the Declaration and the DEP Site Location Orders.

V. The Amendment to the Conditional Rezoning

In 2004, the Association, which owns the land in issue, applied to the City to amend the Conditional Rezoning to allow electric golf carts to be operated on the property. This application was the result of a protracted lawsuit in which certain owners of property on Great Diamond Island alleged that the City failed to enforce the conditional zoning requirements regarding traffic use on Great Diamond Island. In 2004, the City passed an Amendment to Conditional Zone Agreement for Fort McKinley (hereinafter the "Zoning Amendment") to address the issues raised in the lawsuit related to traffic management. Sections 9 and 13 of the original Contract Zone Agreement for Diamond Cove were amended to make clear that golf cart use would be allowed on the Fort McKinley site and to clarify the permissible traffic use on the Diamond Cove portion of the island. Section 9 now reads:

> Restrictions to motor vehicles. Except for vehicles used primarily for construction, maintenance, service and the common transportation of goods and passengers and fire

[5] Pl.'s Certified Compl. ¶ 63. *See also* Plaintiff's Statement of Additional Material Facts "I ASMF 62".
[6] *See* Defs.' Supp. S.M.F. ¶ 67 (citing Fitch Depo. at pp. 76:20-177:17).

> protection, public safety and emergency vehicles, no motor vehicles as defined in 29-A M.R.S.A. Section 101(42), but including snowmobiles and all-terrain vehicles, shall be operated or stored, temporarily or otherwise, on the premises; provided that nothing contained herein shall be deemed to restrict electrically powered golf cars, neighborhood electrical vehicles, electric personal assistive mobility devices (a/k/a human transporters), low-speed vehicles as current defined in 29-A M.R.S.A Section 101, or any similar vehicles.
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> Each unit is entitled to one vehicle (i.e. electrically powered golf cart, neighborhood electrical vehicle, electric personal assistive mobility device [a/k/a human transporter], low-speed vehicle as currently defined in 29-A M.R.S.A. § 101, or any similar vehicle) but in any event, the total number of such vehicles on the Site shall not exceed eighty-two (82).

The amendment to Section 9 further provided that within sixty days of the amendment's approval, the Association was to file with the City's Planning Authority a transportation management plan that included, but was not limited to:

> a description of the process for allocating vehicle permits; a description of the means and methods of providing transportation for the disabled on the island; a restriction that confines permitted vehicles to established roadways that are presently within the Association property; a description of available common transportation service vehicles and how they will be managed for the needs of residents and visitors; and a description of how construction, supply-delivery and service vehicles from outside the island including barge ingress and egress routes to the island are managed.[7]

In its Order, the Portland City Council included proposed conditions for restricting the use of Diamond Cove motor vehicles outside of Diamond Cove, which restrictions were to be implemented when the use of golf carts in the IR-3 zone was approved. The conditions required the management of flow through the "lower gate" on West Shore Drive so that only vehicles authorized by the Amendment could enter or exit Diamond Cove. [8]

The conditions also designated which vehicles could enter and exit the lower gate as follows:

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[7] Plaintiff contends that the City did not obtain Board approval from the Association nor did it receive approval from DEP, Audubon or the homeowners to amend the DEP Site Orders, the Declaration or the Audubon Agreement. *See* Pl.'s Opp. City S.M.F. ¶ 15. Plaintiff also asserts that, in connection with the Amendment, the City agreed that it would obtain a public barge landing for its use and the use by those on the public/southern side of Great Diamond Island. *Id.*

[8] Plaintiff argues that the City's "proposals exceed the City's authority because they did not comport with the D.E.P. Site Orders for Phase II, the Audubon agreements and the" Declaration. *See* Pl.'s Opp. City S.M.F. ¶ 16.

> Only vehicles used primarily for construction, maintenance, service and the common transportation of goods and passengers, and fire protection, public safety and emergency vehicles, (hereinafter sometimes referred to as "Exempted Vehicles") will be provided by DCHA with the means to open the lower gate and/or the upper gate and only these vehicles may pass to the southerly part of Great Diamond Island. DCHA will arrange to open the lower gate for these vehicles in order to use the barge landing on DCHA property from which these vehicles may pass to and from the southerly part of the Great Diamond Island or remain within the Cove pursuant to Cove regulations.

The Association submitted a traffic management plan to the City on or about March 2005. The City agreed with all but two conditions under section 6 of the traffic plan: the City expressly notified the Association that it did not agree with phasing out the use of the barge landing by non-Diamond Cove residents, and with limiting the number of new home projects on non-Diamond Cove property to three. The portion of the traffic plan submitted by the Association that was excluded from the Amendment reads as follows:

> Diamond Cove Barge Landing: the Barge Landing at Diamond Cove is part of the DCHA common grounds and is located on private property. In the spirit of being a good neighbor, and to allow the city time to establish an alternative barge landing site on public property, DCHA will permit the below described traffic to use the barge landing for a reasonable period of time. After that time, only Diamond Cove owned vehicles or vehicles providing services for DCHA will be allowed usage of the barge landing.

Procedural History

Plaintiff commenced this action by filing a Verified Complaint dated September 12, 2008. In his Complaint, Plaintiff seeks declaratory and injunctive relief under Count I. Specifically, Plaintiff seeks the following declarations:

1. The barge landing

A. that the barge landing is in an Open Space Recreational Area;
B. that the barge landing use is inconsistent with its proper designation as an Open Space Recreation Area;
C. declaring that Fitch is suffering continuous, irreparable and immediate harm which is substantial and not remedied by law;
D. requiring specific performance to designate the barge landing as Open Space Recreational Area and to enjoin its use for motor vehicle traffic and to preclude its use by non-Diamond Cove residents;

E. that provides equitable and other relief to enforce the Orders and Agreements necessary for Fitch to enjoy the benefits of those agreements;

2. The floating dock/pier

A. that the Phase II Agreement and subsequent agreements and orders requires building, service and maintenance of the floating dock/pier:
B. that the requirement of providing the floating dock/pier as required has not been complied with;
C. requiring the Association to comply with the obligations of the construction and maintenance of the floating dock/pier;
D. prohibiting the use of the pier by non-Diamond Cove residents except for the City of Portland Emergency vehicles and related service equipment;

3. Access to Diamond Cove

A. that non-Diamond Cove residents are prohibited from traveling in Diamond Cove with their vehicles and prohibited from operating their related service and construction vehicles in Diamond Cove;
B. prohibiting non-Diamond Cove residents from entering Diamond Cove except as provided for access to Fort McKinley Park, the Parade grounds and as approved for specific study and analysis of Diamond Cove;
C. prohibiting all motor vehicle traffic from the Diamond Cove side of the island to the southerly side, except by the City of Portland for emergency and maintenance vehicles;
D. prohibiting the use of motor vehicles from the Diamond Cove southerly section of the island to the northerly section of the island;

In Count II, Plaintiff alleges that the Association and the individual Defendants breached fiduciary duties owed to Plaintiff; in Count III, Plaintiff asserts trespass by all of the Defendants as the result of the continuous use of the barge landing; in Count IV, Plaintiff contends that the continued use of the barge landing is unreasonable and constitutes a nuisance. The Court previously dismissed the claims of negligence, trespass and nuisance that Plaintiff asserted against the individual Defendants.

Discussion

I. Standard of Review

M.R. Civ. P. 56(c) provides that summary judgment is warranted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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." M.R. Civ. P. 56(c)). For purposes of summary judgment, a "material fact is one having the potential to affect the outcome of the suit." *Burdzel v. Sobus*, 2000 ME 84, ¶ 6, 750 A.2d 573, 575. "A genuine issue of material fact exists when there is sufficient evidence to require a fact-finder to choose between competing versions of the truth at trial." *Lever v. Acadia Hosp. Corp.*, 2004 ME 35, ¶ 2, 845 A.2d 1178, 1179. If ambiguities in the facts exist, they must be resolved in favor of the non-moving party. *Beaulieu v. The Aube Corp.*, 2002 ME 79, ¶ 2, 796 A.2d 683, 685.

II. Count I: Declaratory Relief

As noted above, in Count I, Plaintiff seeks various declarations pursuant to the Maine Declaratory Judgment Act 14 M.R.S. §§ 5951-5963. "That Act allows courts to 'declare rights, status and other legal relations whether or not further relief is or could be claimed,' and issue a declaratory judgment whenever 'a judgment or decree will terminate the controversy or remove an uncertainty. *School Comm. of York v. York*, 626 A.2d 935, 942 (Me. 1993) (quoting 14 M.R.S. § 5953 & 5957).[9]

A. The Floating Dock/Pier.

The Declaration does not contain any language that can reasonably be construed to require the Association to construct a floating dock or pier. Accordingly, Defendants are entitled to summary judgment on that portion of Plaintiff's Count I relating to Defendants' purported obligation to build such a structure.

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[9] In his Complaint, Plaintiff makes a number of allegations based upon the DEP's 1986 and 1991 Site Location Orders. For instance, Plaintiff contends that the Association violated those Orders by failing to construct a floating dock/pier and by failing to limit motor vehicle traffic in Diamond Cove as required under the DEP's Orders. Plaintiff has conceded, however, that he lacks standing to enforce those Orders. Instead, Plaintiff's claims as well as his standing to sue are based upon the Declaration and the provisions that authorize individual homeowners to enforce the "covenant[s] and restriction[s]" of the Declaration. *See* Declaration at § 13.3. Given that Plaintiff's claims and his standing are based upon the terms of the Declaration, the Court will limit its review to the express terms of the Declaration, and will not assess whether Defendants are in violation of a DEP Order unless the conditions in the Order are expressly incorporated in the Declaration. Similarly, although Plaintiff cites a number of agreements entered into by the developer with, for example, the Maine Audubon Society, and contends that those agreements have been violated, Plaintiff has not demonstrated that he has standing to pursue those claims. Plaintiff was not a signatory to the agreement with the Maine Audubon Society. Indeed, neither was the Association. Further, while the Declaration provides that the consent of the Audubon Society is required before many amendments to the Declaration may be made and gives the Audubon Society authority to enforce the Declaration, nothing in the Declaration purports to give individual homeowners the authority to enforce the rights of the Audubon Society. Accordingly, to the extent that Plaintiff's claims are based upon alleged breaches of contracts between the Association or the developer and third parties, Plaintiff cannot assert those claims.

B. The Barge Landing.

i. Section 7.3.2 of the Declaration

Plaintiff seeks a declaration that the barge landing is located in an area designated as an Open Space Recreation Area. Insofar as the parties do not dispute this fact, and given that the record includes a depiction of the barge landing in such a designated area, Plaintiff is entitled the declaration that he requests.

Plaintiff also seeks a declaration that "[t]he barge landing use is inconsistent with its proper designation as an Open Space Recreation Area." That is, Plaintiff asks the Court to declare that the City's use of the barge landing to provide municipal and emergency services, and the increased traffic that has resulted from the actions of the Association and the individual Defendants are inconsistent with the Open Space Recreation Area designation. Further, in his summary judgment filings, Plaintiff maintains that Defendants have violated Section 7.3.2 of the Declaration because "elimination of the remnants of the coal pier, the addition of asphalt and the alteration of the road after 1993 is not reasonable maintenance but a violation of the open space requirement as it was a substantial alteration."[10]

Plaintiff's request regarding the barge landing focuses on the "use" of the landing. Not insignificantly, section 7.3.2 of the Declaration does not purport to restrict all "use" of "open space recreational areas." Rather, that section prohibits subdivision, building or alteration from the natural character of each area except as is necessary to maintain or replace existing improvements. Plaintiff's contention that the use of the barge landing as a point of ingress and egress from the Island violates Section 7.3.2 of the Declaration has no factual support in the record.[11] Furthermore, because Plaintiff did not allege in his Verified Complaint that the purported construction or alteration of the barge landing

[10] Pls.' Opp. at 2.

[11] Whether such use violates other provisions of the Declaration is a separate question, which the Court will address below.

constitutes a violation of Section 7.3.2, his recent arguments on that point are not properly before the Court.

Even if Plaintiff had expressly asserted a claim that Defendants violated Section 7.3.2 by removing the coal pier, constructing a road, or through other forms of "alteration," Plaintiff would not be entitled to the relief that he seeks. The record establishes that the barge landing was conveyed to the Association in 2006.[12] Under the Declaration, the developer expressly reserved to itself responsibility for the maintenance of open space recreation areas "prior to the conveyance of the common properties to the Association."[13] Because the record plainly reflects that the barge existed at the time of the conveyance in 2006, and because the barge landing constitutes an improvement that existed when Phase II was approved, there is no material fact in dispute as to the status of the barge landing area or the existence of any violation of Section 7.3.2.

ii. Traffic and Public Access

Plaintiff next requests that the Court determine that the Declaration prohibits (a) access to Diamond Cove by any non-Diamond Cove resident other than members of the public accessing Fort McKinley Park and the Parade Grounds, (b) all motor vehicle traffic from Diamond Cove to the southerly side of the island "except by the City of Portland for emergency and maintenance vehicles," and (c) the use of motor vehicles from the Diamond Cove southerly section of the island to the northerly section of the island.

As noted above, Section 4.7 of the Declaration provides:

> Each owner shall have the right to own and operate one (1) golf cart on the properties. No automobiles, trucks, recreational vehicles, all-terrain vehicles, motorcycles, snowmobiles or other motorized vehicles will be parked or kept on *the properties* except by the Association or its agents for maintenance or service purposes, including the common transportation of goods and passengers, fire protection, public safety and emergency purposes, or by contractors engaged in construction activities. No motorized vehicles of any kind, including golf carts, shall pass south of the southerly boundary of *the properties* except for fire equipment, ambulances or public safety vehicles in the

[12]Warranty Deed from McKinley Partners Limited Partnership to Diamond Cove Homeowners Association.
[13] Declaration at § 7.3.5.

> performance of their duties, and designated Association owned vehicles which transport persons and/or goods between *the properties* and the pier located at the southerly end of Great Diamond Island.

Declaration at § 4.3 (emphasis added). According to Plaintiff, the use of the barge landing by City vehicles and by non-Diamond Cove residents violates this provision of the Declaration. Conversely, Defendants maintain that Section 4.7 does not apply to the barge landing but, rather, only applies to "vehicles of each owner of the Association."[14]

Section 4.7 expressly provides that the limit on traffic and vehicle use on Diamond Cove applies to "the properties." Sections 2.13 and 3.1 of the Declaration define "properties" to mean "[t]he real property which is and shall be held, transferred, sold, conveyed and occupied subject to this Declaration" and as shown on the Plans showing Phase I and Phase II of the Diamond Cove project.[15] The property at issue in this case is depicted on the Plans for Diamond Cove, and is designated "Open Space Recreation." Contrary to Defendants' assertion, therefore, there is factual evidence to support Plaintiff's contention that Section 4.7 applies to the barge landing. Thus, at a minimum, a factual dispute exists as to the application of Section 4.7.

Furthermore, although the Defendants and the City contend that garbage trucks, other City vehicles and access by the public are permitted under the Conditional Rezoning Agreement negotiated by the City and the Board, Plaintiff disputes that the Agreement effectively amended the Declaration. While the City correctly notes that Mr. Fitch may not challenge the Conditional Rezoning Agreement because he failed to appeal from the decision to rezone the area, the lack of an appeal does not foreclose Mr. Fitch's ability to challenge the City's presence within Diamond Cove. As a homeowner within Diamond Cove, Mr. Fitch has standing to seek enforcement of the terms of the Declaration as well as a declaration as to its meaning. By its terms, the Declaration governs the types of vehicles that may be used on "the properties." To the extent that the Board does not enforce the Declaration on behalf of its

[14] Defs.' Reply A.S.M.F. ¶ 57.
[15] *See* Declaration at §§ 2.13 & 3.1.

members, Mr. Fitch is entitled to insist that it do so. Moreover, although the City may have rezoned Diamond Cove such that certain vehicles are permitted under the City's ordinances, the City's action does not necessarily require the Board, as the owner of private property, to permit those vehicles if it has not been authorized to do so by its members. Accordingly, a dispute exists as to whether the Board may permit non-Diamond Cove residents or the City to use the barge landing or to travel through Diamond Cove for reasons other than those expressly enumerated in Section 4.7.

In short, factual issues remain for trial, including issues that are relevant to the Court's determination as to the applicability of Section 4.7, and that are relevant to the Court's assessment as to the effect on the Declaration of the Conditional Rezoning Agreement.

III. Count II: Breach of Fiduciary Duty

In Count II, Plaintiff contends that the Board and the named individual members "had an obligation to conduct all Association business in a fiduciary relationship" and that they breached that duty.[16] Defendants move for summary judgment on Count II and argue that any fiduciary duty that Defendants owe is to the Association, not to Mr. Fitch as an individual. Defendants also contend that insofar as Mr. Fitch is purporting to enforce the rights of the Association, he has failed to point to any evidence that Defendants acted in bad faith, or other than "in a manner the director reasonably believes to be in the best interest of the corporation."[17]

In his opposition to Defendants' motion, Plaintiff states: "The Board of Directors acted in their own interest and with the desire to injure Fitch. This states a claim where the Board owes a duty to Fitch and where there is legal malice. The evidence of the witness establishes the elements of violation of fiduciary duty."[18] This is the entirety of Plaintiff's argument in opposition to summary judgment.

Simply stated, Plaintiff's brief and conclusory argument is not sufficient to survive summary judgment. Plaintiff has failed to identify the source of the duty, or to articulate the manner in which the

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[16] *See* Verified Complaint at ¶ 85.
[17] 13-B M.R.S. § 717(1)(A) & (C)).
[18] IV ASMF K. Tibbetts 14, 15, 16, 17, 18, 35, 36, 37, 39, 40, 41." Pl.'s Opp. at 11.

duty was breached.[19] The Law Court has previously explained that "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *York Hospital v. Dep't of Health & Human Servs.*, 2008 ME 165, ¶ 29, 959 A.2d 67, 73) (citing *Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290, 293) *See also Holland v. Sebunya*, 2000 ME 160, ¶ 9 n.6, 759 A.2d 205, 209. Consistent with the Law Court's admonition, the Court deems Plaintiff to have waived opposition to Defendants' motion as to Plaintiff's fiduciary duty claim.

IV. Count III: Trespass to Land

In Count III, Plaintiff asserted a claim for trespass against the City, the Board, and its individual members. The Court previously dismissed Plaintiff's claim as to the individual Defendants based on the immunity accorded them under 14 M.R.S. § 158-A(2). The City and the Association now move for summary judgment on Count III.

Under Maine law, "[a] person is liable for common law trespass 'irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally enters land in the possession of the other, or causes a thing or a third person to do so.'" *Medeika v. Watts*, 2008 ME 163, ¶ 5 957 A.2d 980, 982 (quoting RESTATEMENT (SECOND) OF TORTS § 158(a) (1965)). Further, "[t]he one who enters upon the land and the one who caused him to do so are [indeed] jointly and severally liable for the trespass." Simmons, Zillman & Gregory, *Maine Tort Law* § 5.11 at 5-20 (2004 ed.).

In support of its motion, the City contends that it cannot be liable for trespass based on its use of the barge landing because the owner of that property, the Association, permitted the City to use the landing. The Association argues that Plaintiff's claim fails because Plaintiff has presented no evidence to establish that either the Association, or its members, committed an unauthorized entry on *Plaintiff's* land, as distinct from the barge landing. Plaintiff asserts that the Association's grant to the City of

[19] The Court cited the Maine Condominium Act in its denial of Defendants' motion to dismiss. Because Plaintiff referenced the Condominium Act in Count II of his Verified Complaint, and because the Act contains provisions relating to fiduciary duties, given the standard of review on a 12(b)(6) motion, the Court denied the motion. In his response to the motion for summary judgment, Plaintiff has failed to reference the Act, or to articulate any basis for its applicability. Therefore, there is no record evidence on which the Court can rely to conclude that the fiduciary obligations included within the Act have any applicability in this case.

permission to use the barge is invalid, as the Association's members did not authorize the use. Plaintiff further contends that in its maintenance of the barge landing, the Association has caused a blockage of a drainpipe located on the barge, which blockage allegedly caused flooding of Plaintiff's home.

Plaintiff's trespass claim against the City is based on the City's use of the barge landing. The undisputed record evidence demonstrates that the Association, not the Plaintiff, owns the barge landing. Consequently, even if Plaintiff ultimately prevails on his claim that the Association has improperly allowed non-emergency City vehicles on the barge landing, Plaintiff does not have standing to assert a claim against the City for trespass to property not owned or possessed by Plaintiff.[20]

With respect to Plaintiff's claim against the Association and his allegations regarding a blocked drainage pipe and flooding, the Court notes that Plaintiff asserted this claim for the first time in response to the motion for summary judgment and did not articulate this theory of recovery or identify any supporting evidence when asked about his claims for damages during his deposition. Plaintiff cannot avoid summary judgment by introducing a new theory of recovery or by identifying evidence that should have been presented at an earlier stage of the case. *See, e.g., Blue Star Corp. v. CKF Properties, LLC*, 2009 ME 101, ¶¶31-34, 980 A.2d 1270, 1278.

V. Count IV: Nuisance

In Count IV, Plaintiff contends that the City's use of the barge landing to transport and park its municipal services trucks, and the City and the public's use of the barge landing as means of ingress and egress to the Island, as authorized by the Association, has resulted in actionable nuisance. He also alleges this conduct is in violation of Sections 4.16[21] and 4.20 of the Declaration.

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[20] Although the Declaration authorizes the Association's members to enforce the terms of the Declaration, the Court does not construe the Declaration as conferring upon its members the ability to enforce the Declaration as against a third party who was acting within the authority extended by the Association.

[21] Section 4.16 prohibits "noxious or offensive activity," including "any behavior which is inconsistent with both the reasonable pleasurable use of the properties b owners . . . and their reasonable expectations of vacationing, year-round living, studying, working, recreating, or enjoying sports free of excessively noisy behavior . . .." *Id. See also* Verified Complaint at ¶ 108.

Under Maine law, a "nuisance" is "an interference with the use and enjoyment of land." *Town of Stonington v. Galilean Gospel Temple*, 1999 ME 2, ¶ 15, 722 A.2d 1269, 1272 (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 87, at 619 (5th ed. 1984)). In order to establish actionable nuisance, a Plaintiff must prove that:

> (1) The defendant acted with the intent of interfering with the use and enjoyment of the land by those entitled to that use;
>
> (2) There was some interference with the use and enjoyment of the land of the kind intended, although the amount and extent of that interference may not have been anticipated or intended;
>
> (3) The interference that resulted and the physical harm, if any, from that interference proved to be substantial . . . The substantial interference requirement is to satisfy the need for a showing that the land is reduced in value because of the defendant's conduct;
>
> (4) The interference that came about under such circumstances was of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land. . . .

Charlton v. Town of Oxford, 2001 ME 104, ¶ 36, 774 A.2d 366, 377 (quoting *Prosser And Keeton On The Law Of Torts* § 87 at 622-23). In addition,

> a landowner is liable for a nuisance created by the activity of a third party on the land if (1) the possessor knows or has reason to know that the activity is being carried on and that it is causing or will involve an unreasonable risk of causing the nuisance, and (2) the possessor consents to the activity or fails to exercise reasonable care to prevent the nuisance.

Eaton v. Cormier, 2000 ME 65, ¶ 7, 748 A.2d 1006, 1008 (citations omitted). *See also* RESTATEMENT (SECOND) OF TORTS § 838 (1979).

In support of its motion, the City contends that although its use of the barge landing is intentional,[22] that use is not unreasonable given the utility of the City's services. The City further argues that any disturbance suffered by Plaintiff in his use of his land is minimal and does not rise to the level of annoyance contemplated by a nuisance action.

[22] City's Motion at 16.

In this case, given the Court's rejection of Plaintiff's claim as to the blocked drainage pipe, Plaintiff's nuisance claim is based upon the alleged annoyance. When a plaintiff's nuisance claim is based upon annoyance, a plaintiff must prove the unreasonable interference with the use of the property through evidence of a diminution in property value. *Charlton v. Town of Oxford*, 2001 ME 104, 774 A.2d 366. Here, while the record evidence of diminution of property value is limited, Plaintiff's sworn assertion of the diminution of value is sufficient to avoid summary judgment.

The Association requests summary judgment on the nuisance claim in part because Plaintiff has not and cannot prove that the Association intended to harm Plaintiff. In *Charlton*, the Law Court noted:

> In regard to the intentional interference requirement, it has been noted that "often the situation involving a private nuisance is one where the invasion is intentional merely in the sense that the defendant has created or continued the condition causing the interference with full knowledge that the harm to the plaintiff's interests are occurring or are substantially certain to follow."

2001 ME 104, ¶ 37 n.11, 774 A.2d at 377 (quoting Prosser And Keeton On The Law Of Torts § 87 at 624-25). In this case, particularly given Plaintiff's assertions that he repeatedly asked the Association to limit access to the barge, a factual question remains regarding the intent issue. Similarly, to the extent that Defendants argue that summary judgment is appropriate because Plaintiff has conceded the use of the barge has actually decreased thereby suggesting that any interference would not be unreasonable, a factual question exists as to the nature and extent of the alleged interference.

VI. Punitive Damages

Defendants have moved for summary judgment on any portion of Plaintiff's claim that seeks punitive damages. According to Defendants, punitive damages are not available in a declaratory judgment action. In addition, Defendants argue that to the extent that Plaintiff's trespass and nuisance claims survive, their alleged conduct is not sufficiently egregious to warrant punitive damages as a matter of law. Plaintiff has not offered any persuasive argument, nor cited any record evidence, to support his claims for punitive damages. Accordingly, Defendants are entitled to summary judgment on any portion of Plaintiff's claims that seek punitive damages.

Conclusion

Based on the foregoing analysis, the Court grants in part, and denies in part Defendants' motions for summary judgment as follows:

1. Judgment is entered in favor of Defendants on Plaintiff's request for a declaration that Defendants are obligated to build a floating pier/dock. The Court declares that Defendants are not obligated to build a floating pier/dock.

2. The Court declares that the barge landing is located in Open Space Recreation Area.

3. The Court declares that the location of the barge landing, its current use, and/or the any alterations or improvements of the barge landing area do not violate the terms of the Declaration.

4. Judgment is entered in favor of Defendants on Plaintiff's breach of fiduciary duty claim.

5. Judgment is entered in favor of Defendants on Plaintiff's trespass to land claim.

6. Judgment is entered in favor of Defendants on Plaintiff's claims for punitive damages.

7. The Court denies Defendants' motions for summary judgment as Plaintiff's other claims and requests.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 6/8/10

Justice, Maine Business & Consumer Docket

JUDGMENT ENTERED: 6/18/10