UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Greenbelt)

WEBB TRACT, LLC, et. al.	*	
Plaintiffs	*	
v.	*	
UNITED STATES OF AMERICA, *et al*.	*	
Defendant	*	Case No.: 8:07-cv-02685-RWT

* * * * * * * * * * * * *

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

This memorandum of law is submitted in support of the Plaintiffs' motion for summary judgment.

I. Overview.

This case is grounded in the United States' sale of real property adjacent to the land of the Plaintiffs that is burdened by a safety easement imposed upon Plaintiffs' lands in 1955. In the language of real property law, the Defendant United States owns the "dominant tenement," and the Plaintiff owns the "servient tenement." Through this action, the Plaintiffs sue for a declaration that the easement burdening the servient tenement is no longer validly enforceable because the Government has affirmatively abandoned the easement through its disposition of predominately all the dominant tenement.

Alternately, and if the safety easement remains a valid burden on the land, the Plaintiffs seek a reasonable interpretation of the use restrictions set forth in the language of the safety easement. The Defendants seek to narrowly construe a limit on "habitation" within the area of the safety easement to bar any and all commercial activity by the Plaintiffs. The plain meaning of this restriction does not reach commercial or light industrial activity.

The Plaintiffs seek summary judgment against the Defendants that removes the use restriction on its lands, or in the alternative, for an order declaring that the limitation on "habitation" and "gatherings of more than 25 people" do not preclude the light industrial and commercial uses intended by the Plaintiffs.

II. The summary judgment standard.

Summary judgment is appropriate where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-323, 106 S.Ct. 2548 (1986); *See* Fed. R. Civ. P. 56. The motion must inform the district court of the factual and legal basis for granting judgment. *Id*. at 323. The movant must present evidence either supporting its claim or negating the opponent's claim. *Id*. In considering the evidence, the Court views the facts and all reasonable inferences in the light most favorable to the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505 (1986).

The evidence can consist of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any". Celotex Corp., 477 U.S. at 323. Admissions pertinent to the Court's consideration include those facts admitted in the pleadings. *See* Lucas v. Burnley, 879 F.2d 1240, 1242 (4th Cir. 1989); Korangy v. United States Food & Drug Admin., 498 F.3d 272, 275 (4th Cir. 2007) (stating that facts admitted in the Answer may not later be challenged). The Court should also consider stipulations entered by the parties. *See* Rice v. Paladin Enterprises, Inc., 128 F.3d 233 (4th Cir. 1997). If the evidence shows that the facts are not genuinely in dispute, the court can enter judgment as a matter of law. *See* Celotex Corp., 477 U.S. at 322-324.

III. The material facts that are not credibly disputed.

By Order dated December 7, 1955 in the condemnation case styled as United States of America v. 72.71 Acres of Land, in the United States District Court for the District of Maryland,

Civil No. 8628, and for the sum of $26,500, the Defendants acquired a fee interest in land, and easements in surrounding parcels for the purpose of operating a missile launch facility. A true copy of the Judgment On The Declaration Of Taking is attached as Exhibit 1. *See* Plaintiffs' Amended Complaint ¶5 (Aug. 18, 2008)[1].

The December 7, 1955 Order describes two fee parcels taken by the Government for use as a Nike-Ajax missile site. Missile silos and buildings were erected on the two fee parcels. The fee parcels are identified as A-101-1 and A-100-1. *See* Pl.s' Amend. Compl. ¶6.[2]

The December 7, 1955 Order describes a ring of "safety easements" surrounding the Government fee, like the donut around its hole. The portion of the donut-around-the-hole easement at issue in this case is known as A-100-E-1. A true and correct diagram of A-100-E-1 is attached hereto as Exhibit 2.

A demonstrative aid depicting the Government's two fee parcels, and their relative position adjacent to the A-100-E-1 safety easement, as established by the 1955 Order, is attached at Exhibit 3.

By deed dated April 26, 2001, Webb Tract, LLC took title to most of the land encumbered by safety easement A-100-E-1. *See* Pl.s' Amend. Compl. ¶8.[3]

By deed dated February 19, 2008, Center Park West, LLC acquired a portion of the land burdened by safety easement A-100-E-1. *See* Pl.s' Amend. Compl. ¶9.[4]

A demonstrative aid, depicting the areas of the safety easement owned by the two Plaintiffs, as of the February 19, 2008 deed, is attached as Exhibit 4.

[1] Paper No. 25-3.
[2] Admitted, Defendants' Answer to Amended Complaint ¶6 (Sep. 10, 2008) (Paper No. 30).
[3] Admitted, Def.s' Ans. to Amend. Compl. ¶8.
[4] Admitted, Def.s'Ans. to Amend. Compl. ¶9.

The full fee interest of the Plaintiffs in land adjacent to the Government's fee is approximately 134 acres. Safety easement A-100-E-1 encumbers approximately 18.6 acres along the northernmost border of the Plaintiffs' fee. *See* Pl.s' Amend. Compl. ¶10.[5]

The December 7, 1955 Order created safety easement A-100-E-1 as follows:

> [a] perpetual and assignable easement for the establishment, operation, maintenance and use **of a safety area in, on, over, under and across said land and, consisting of the right to prohibit human habitation; the right to remove buildings presently or hereafter being used for human habitation; the right to prohibit gatherings of more than twenty-five (25) person*;*** the right to post signs indicating the nature and extent of the Government's control; and the right of ingress and egress over and across said lane for the purpose of exercising the other rights set forth herein;
>
> RESERVING, HOWEVER, to the landowners, their heirs, executors, administrators, successors and assigns all right, title, interest and privileges as may be exercised and enjoyed without interference with or abridgment of the easement and rights hereby taken for said public uses. [*emphasis supplied*]
>
> *See* Pl.s' Amend. Compl. ¶11.[6]

Defendant Unites States Department of the Army used the fee as a missile launch facility from 1956 through 1962. The Department of the Navy used the site as a command research facility from 1962 through 1968. The site was used by the Harry Diamond Laboratories as a radar research facility from 1968 through 1979. *See,*Amended Complaint, Paper No. 27, ¶12.[7]

On June 30, 2003, the Department of the Army published its "Notice of Availability Real Property Exchange," announcing to the general public that the fee formerly used as the missile site was available for private ownership and development. Through this publication, the Department of the Army further announced an "Open Site Visit and Pre-Proposal Conference"

[5] Admitted, Def.s' Ans. to Amend. Compl. ¶10.
[6] Admitted, Def.s' Ans. to Amend. Compl. ¶11.
[7] Admitted, Def.s' Ans. to Amend. Compl. ¶12.

for July 16, 2003. *See* Pl.s' Amend. Compl. ¶14.[8] A true and correct copy of the document is attached as Exhibit 5.

On or about August 14, 2006, the Government published a "Finding of Suitability to Transfer" its fee. Through this publication the Government made clear the intent to cease all military uses for the entire former missile site, and to transfer a majority of the site to private developers. *See* Pl.s' Amend. Compl. ¶15. A true and correct copy of the document is attached as Exhibit 6.

By deed recorded on May 12, 2008, and recorded at Liber 3561, folio 465, the Defendant United States deeded its fee interest in A-101-1, and a portion of A-100-1, including other fee and easement parcels not at issue in this case. A true copy of the instrument is attached as Exhibit 7. Through this deed, the Government deeded away a substantial portion of the fee area it had advertised for exchange in 2003.

Exhibit B to the May 12, 2008 deed, labeled with Bates Number Webb000388, depicts the areas granted by the Defendants. *See* Exhibit 7. The fee and easement areas involved in the exchange are shown in the black shading. The Defendants' remaining fee is not shaded, and is labeled as "Tract A-100-1." The small sliver of land accepted by the United States in exchange for its fee is shaded in black, and is adjacent to the parcel labeled "Lot 10."

The land of the Plaintiffs that remains encumbered by safety easement A-100-E-1 is depicted in Exhibit B to the May 12, 2008 deed as lots numbered 6 through 10. *See* Exhibit 7. They are located along the right and top edges of the drawing. If one takes the schematic drawing of safety easement A-100-E-1, attached as Exhibit 2, and lays it over this drawing, it will cover the lots numbered 6 through 10.

[8] Admitted, Def.s' Ans. To Amend. Compl. ¶14.

The deed recorded on May 12, 2008, and recorded at Liber 3561, folio 465 was "…in furtherance of the Exchange Agreement dated 1 May 2008…" Through the Exchange Agreement, the Grantee of the May 12, 2008 deed must construct, at its own expense, a new "Organizational Maintenance Shop and Unheated Storage Building" for the United States. The details of that required construction are found in the "Project Description and Specifications" from the Exchange Agreement, and attached as Exhibit 8[9]. The building will be located, in whole or in part, on the portion of Lot 10 traded to the Government, which is shaded in black and depicted on Exhibit B to the May 12, 2008 deed. *See* Exhibit 7.

IV. Argument.

A. Summary of Plaintiffs' argument.

The Government has recently divested itself of substantially all the former NIKE missile site. The process began with its 2003 public offering, and culminated with the recorded 2008 deed into a third-party. The Plaintiffs contend that these discrete events constitute the unequivocal actions required by law to evidence a clear intent to abandon the appurtenant safety easements burdening the Plaintiffs' property. The facts demonstrating the unequivocal act of abandonment serve to satisfy both the limitations requirement of the Quiet Title Act and the Maryland law on abandonment of express easements.

B. The Safety Easement is Appurtenent to the Government's fee.

The real property vocabulary associated with this motion is fairly straightforward. The order from the 1955 condemnation case created a "…perpetual and assignable easement for the establishment, operation, maintenance and use **of a safety area** in, on, over, under and across said land..." [emphasis supplied]. It was created as a burden on the Plaintiffs' land at the same time as the adjoining property was condemned, in fee, for use by the United States as a missile

[9] At Bates Nos. Webb000284-000310.

site. The easement at issue in this case was part of a ring of easements created at the same time to buffer the military operations on the Government's fee.

An easement is deemed to be "appurtenant" when it is created to benefit and does benefit the possessor of the land in his use of the land. Supervisor of Assessments of Anne Arundel county v. Bay Ridge Properties, Inc., 270 Md. 216, n.7, 310 A.2d 773 (1973); *quoting Restatement of Property* §453 (1944). An easement appurtenant exists for the benefit of the owner of a "dominant" tenement. Rau v. Collins, 167 Md. App. 176, 891 A. 2d 1175, 1179 (2006). In this case, it is the Government's NIKE missile site, owned in fee by the United States, that is benefited by the ring of safety easements. The ring acts to buffer the military from the intrusions of the civilian world, and similarly shields the civilian world from the potential harms of a missile launch.

The property burdened with the easement is called the "servient" tenement. The owner of the dominant tenement is entitled to use the servient tenement in accordance with the terms of the easement's express grant. In this case, it is the land of the Plaintiffs that is burdened with the safety easement's buffer. Within the buffer area, and for the benefit of the Government's fee, the easement restricts "habitation," and large gatherings of people.

An easement appurtenant remains irrevocably attached to the dominant tenement "whether it is mentioned or not mentioned in subsequent conveyances of the dominant tenement." Zehner v. Fink, 19 Md. App. 388, 346, 311 A. 2d 477 (1973). In short, as the dominant tenement goes, so goes the appurtenant easement. In the context of this case, it is the disposal of substantially all the former NIKE missile site that demonstrates abandonment of the appurtenant easement.

C. **The Quiet Title Act**.

The Plaintiffs' claims are grounded in the Quiet Title Act, 28 USC § 2409a ("QTA"). The QTA allows the United States to be named as a defendant in this civil action to adjudicate a disputed interest in real property. It was only upon passage of the QTA in 1972 that the United States waived its immunity with respect to private lawsuits involving disputed title to land in which the sovereign claimed an interest. Block v. North Dakota, 461 U.S. 273, 280, 103 S.Ct. 1811 (1983). This waiver includes claims that the United States has abandoned a recorded easement. *See* Deakyne v. Dept. of the Army Corps of Engineers, 701 F.2d 271 (3rd Cir. 1983)[10]. This qualified waiver of sovereign immunity requires that:

> [a]ny civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.
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> 28 U.S.C. §2409a(g).

1) **The Court must apply Maryland substantive law to determine when Plaintiffs' claims for abandonment accrued**.

While the overall construction of the QTA is a matter of federal law, it is the law of Maryland that will guide this court's determination of when the Plaintiffs' claims for abandonment "accrued" under the QTA. Fulcher v. United States, 696 F.2d 1073 (4th Cir. 1982).

In Fulcher, the Court of Appeals determined when a QTA claim "accrued" for purposes of the threshold limitation issue. The lower court found that Mr. Fulcher's 1977 lawsuit against the United States arising from a 1959 condemnation of North Carolina property owned by him was timely. *Id*. at 1074. The United States condemned the real property in 1959 and paid

[10] Mr. Deakyne's claim for abandonment of a recorded easement failed because the Court found that his predecessor in interest had notice of the facts of abandonment as early as 1912, leaving him with no remedy under the QTA, which was enacted in 1972 with a limited grandfather provision.

compensation to the wrong person. Fulcher, 696 F.2d at 1075. Mr. Fulcher, who lived in California, argued that his cause of action for compensation did not immediately accrue because he never had actual or constructive knowledge of the 1959 condemnation proceedings, and he never knew that a campground had been constructed on the land in the early 1960's. *Id.*

The Magistrate agreed, and held that Mr. Fulcher's cause of action accrued within 12 years of his 1977 court filing, or no later than 1965. *Id*. The Magistrate found that Mr. Fulcher had no actual or constructive knowledge of the government's condemnation and construction of a campground because he lived in California, the land was remote and had no visible boundary markers, and its location was unknown to Mr. Fulcher. *Id*. The Magistrate held that Mr. Fulcher therefore could not have reasonably known that he had a claim against the United States. *Id*. The Magistrate then entered an award of damages in favor of Mr. Fulcher. *Id*.

The Court of Appeals reversed, finding that North Carolina's doctrine of constructive knowledge is rigorously applied to situations concerning limitations periods in actions involving real property.[11] *Id*. at 1076. The appellate court held that the Magistrate's determination "was based upon misapprehension or misapplication of controlling legal principles of constructive notice as found in the land law of the situs state…" *Id*. at 1078.

The lesson of the Fulcher case is that Maryland's substantive real property law must guide this Court on the issue of when the Plaintiffs' claim for abandonment accrued under the QTA. This Court must first determine when the Plaintiffs "knew or should have known" that the state law claim for abandonment had ripened.

[11] The key distinction between Fulcher and this case is the nature of the claim. Mr. Fulcher's claim for compensation arose from the Government's 1959 condemnation proceeding. The United States took his land, but paid compensation to the wrong party. In this case, the Plaintiffs' claim arises not from the 1959 condemnation that created the missile site and ring of safety easements, but from the later abandonment of the easements through actions taken in 2003 and 2008.

2) The Plaintiffs' claim for abandonment accrued no earlier than 2003.

Maryland's substantive law on the abandonment of express easements is collected in Chevy Chase Land Co. v. United States, 355 Md. 110, 733 A.2d 1055 (1999), a case arising from questions certified to the Maryland Court of Appeals from a federal appellate court. The Chevy Chase Land Company sued the United States and Montgomery County in the Court of Federal Claims, alleging a taking of its property by operation of a federal law that converted railroad rights of way to hiking and biking trails. Chevy Chase Land Co., 355 Md. at 117. Prior determination of several Maryland property law questions were necessary to permit federal determination of whether an uncompensated taking of private property had occurred in violation of the Fifth Amendment of the United States Constitution. *Id*.

The Maryland appellate court was asked to answer three questions relating to deeded easements. One question asked "…has the easement been abandoned as a matter of law since its conveyance and, if so, when?" *Id*. at 118. The answer to this question required the appellate court to collect and distill the Maryland cases on abandonment. *Id*. at 159-162:

> It is now very well settled, by authorities of the highest character, that a party entitled to a right of way or other mere easement in the land of another may abandon and extinguish such right by acts *in pais*, and without deed or other writing. The act or acts relied on, however, to effect such result, must be of a decisive character; and while a mere declaration of an intention to abandon will not alone be sufficient, the question, whether the act of the party entitled to the easement amounts to an abandonment or not, depends upon the intention with which it was done, and that is a subject for the consideration of the jury. A cesser of the use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect as an express release of the easement, with out any reference whatever to time.
>
> *Id*. at 159; *quoting* Vogler v. Geiss, 51 Md. 407 (1879).

The trigger for the claim of abandonment is the manifestation of the intent to abandon. Where non-use, alone, is not sufficient, "…*there must be an act or a combination of acts that unequivocally demonstrate an intention to abandon.*" *Id*. at 159. Maryland law looks for an

"overt act" to trigger a claim for abandonment of an express easement. This element is stated in various ways by the collected authorities, including "[w]here a right of way is acquired by grant…it cannot be lost by mere non-user, for however long a time, unless such non-user is accompanied by some act indicating clearly and unequivocally an intention of the grantee to abandon it." *Id*. at 160, citing, Knotts v. Summit Park Co., 146 Md. 234, 240, 126 A. 280, 282 (1924). Within the context of easements, the Maryland courts have found unequivocal intent and action where a railroad had removed its tracks from a deeded right-of-way four years after it was constructed, and after it had begun using another route. *See* Hagerstown & F. Rwy. Co. v. Grove, 141 Md. 143, 118 A. 167 (1922).

For purposes of deciding the certified question, the Maryland appellate court was asked to examine "…whether there has been a sufficiently 'decided and unequivocal act of the owner inconsistent with the continued existence of the easement.'" Chevy Chase Land Co., 355 Md. at 161. The same question guides the Court's determination in this case.

The Plaintiffs contend that the earliest trigger of the QTA's twelve year limitations period was June 30, 2003. This is the date of the Department of the Army's "Notice of Availability Real Property Exchange," announcing to the general public that the fee formerly used as the missile site was available for private ownership and development. *See* Exhibit 5. By its terms, the document offers to exchange the fee parcels with private owners, in return for property of equal or higher value. More specifically, the offering declares that:

> …in this Notice of Availability for Exchange (hereinafter "Notice"), the government is offering to convey fee title to the approximately 23-acre Hunton Memorial U. S. Army Reserve Center 8791 Snouffers School road, Gaithersburg, County of Montgomery, MD." (hereinafter "Exchange Parcel") in exchange for real property and/or "in-kind" real property improvements of equal or greater value provided to the Government at a location to be negotiate by the Government and selected Offeror.
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> Exhibit 5 p. 4.

The Notice later identifies the parcel as "an old air defense artillery site." It also discloses that "[a]lthough the Government is exempt from local zoning requirements, the property is currently zoned I-4, low-intensity, light industrial use." Exhibit 5 p. 5-6. This is an unequivocal statement that the fee parcel is no longer to be used as a missile site, and that, by implication, the appurtenant easements are being abandoned.

In connection with the exchange of its fee, the United States prepared a written "Environmental Assessment," dated July 18, 2006. *See* Exhibit 9. This document, bearing the approving signatures of two commanding military officers, summarizes the Government's view of the impending exchange agreement:

> The action consists of the proposed exchange of approximately 12.58 acres at the Benjamin L. Hunton memorial USAR Center for a 0.7 acre-parcel currently owned by Concrete General, Inc. and M&D Real Estate, LLC, that is located east (adjacent) of the existing USAR Center. As part of the proposed action, the 12.58 –acres transferred to Concrete General, Inc., and M&D Real Estate, LLC, would be incorporated into the surrounding AirPark North Business Park development (currently owned by Concrete General, Inc., and M&D Real Estate, LLC) and would be developed for commercial and light industrial use. The 0.7 –acre parcel to be acquired by the USAR would be used along with the remaining Benjamin L. Hunton Memorial USAR facility to construct a new Organizational maintenance Shop (OMS), office, shop yard, unheated storage area and additional parking area.
>
> The 12.58-acre USAR property currently contains the remnants of the former Gaithersburg NIKE Missile Launch facility, and its associated waste water treatment facility and septic field….
>
> Exhibit 9 p. 1-2.

The Government next published its "Finding of Suitability to Transfer," dated August 14, 2006. *See* Exhibit 6. Like the Environmental Assessment, the document makes simple declarations of the Government's intent behind the deal. Specifically, this document declares that:

> [t]he property is intended to be transferred as a commercial and light-industrial site and would be incorporated into an adjacent commercial/light industrial development. Future use of the property is presumed to be commercial/light industrial. This planned use is consistent with the Maryland-National Capitol Park and Planning Commission, Gaithersburg Vicinity Master Plan…
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> Exhibit 6 p. Webb000315.

Finally, by deed recorded on May 12, 2008 the Defendant United States granted its fee interest in A-101-1, and a portion of A-100-1 to M&D Real Estate, LLC. Two of the three empty missile silos are now owned by a private party. This simple act forever barred any potential use of the real property as a missile site. There can be no equivocation on this point.

3) The Government's public declarations of intent, and actual grant of the fee to another constitutes abandonment of the safety easement.

The discussion of limitations and the substance of the Plaintiffs' claim are inextricably woven together. The cases already discussed describe the type of affirmative, overt action that grounds a claim for abandonment. Plaintiffs contend that if the Court finds the evidence supports the conclusion that the QTA claim accrued no earlier than 2003 or 2008, then the Court must also conclude that the safety easement has been abandoned.

Like the railroad that has torn up its tracks in Hagerstown & F. Rwy. Co. v. Grove, 141 Md. 143, 118 A. 167 (1922), the United States has divested itself of two of its three missile silos. The land is no longer susceptible to the use for which it was condemned in 1955. By extension and implication, there is no further benefit to the remaining fee interest of the Government to prevent habitation or gatherings of twenty-five or more persons. There is no longer a danger of explosion or launch, and there is no longer any reason to continue the use restrictions on the servient estate owned by the Plaintiffs.

4) <u>If the use restrictions remain valid, they must be reasonably construed.</u>

The Plaintiffs also seek relief under the Declaratory Judgment Act, 28 U.S.C. §2201. In pertinent part, the Act provides that:

> [i]n a case of actual controversy within its jurisdiction…any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
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> 28 U.S.C. §2201(a).

If the Court decides that the safety easement remains a valid use restriction on the Plaintiffs' fee, then the Plaintiffs seek a declaration as to the reasonable meaning of the restrictions. It is within this Court's authority to declare the intent of the safety easement language created by the 1955 Order. <u>Narramore v. United States</u>, 852 F. 2d 485, 490 (9th Cir. 1988) (in a case involving flowage easements created by condemnation, "[i]t is the responsibility of the reviewing court to construe a judgment so as to give effect to the intention of the issuing court, not to that of the parties.").

This claim is well within the limitations period of the QTA. The facts of this case are analogous to <u>Poverty Flats Land & Cattle Co. v. U.S.</u>, 706 F.2d 1078 (10th Cir. 1983). The plaintiff sought a declaration as to the validity of the United States' interpretation of its mineral rights in the plaintiff's land. <u>Poverty Flats</u>, 706 F.2d at 1079. The case turned on the interpretation of the term "mineral," and whether it included "caliche[12]." *Id*. at 1079-1080. Though "caliche" was not listed in the reservation, the United States claimed ownership of "caliche" as a "mineral." *Id*. The Court stated that if the plaintiff had been seeking to invalidate

[12] "According to Webster's Third New International Dictionary, caliche is 'a crust or succession of crusts of calcium carbonate that forms within or on top of the stony soil of arid or semiarid regions.' Caliche is apparently used in road building along with sand and gravel." <u>Poverty Flats</u>, 706 F.2d at n.1.

the government's reservation, its claim would have been time barred. *Id*. However, the plaintiff sought only to challenge the scope of the reservation to include caliche within the term "minerals." *Id*. The Government did not notify the plaintiff that it claimed "caliche" under the reservation until well after the Government's original taking. *Id*. The *Poverty Flats* Court held that it was notice to the plaintiff of the Government's expanded claim to "caliche," not the original creation of the original easement that simply defined "mineral" that began the limitations period under the QTA. *Id*. Within the context of its discussion of the QTA, the appellate court went on to say that "mineral" is "not per se a term of art," and does not have a definite meaning. *Id*. at 1080; *quoting* Bumpus v. U.S., 325 F.2d 264, 266 (10th Cir. 1963). The claim was found to be timely, and within the 12 year QTA limitations period because there is a "special need for certainty and predictability where land titles are concerned," and the federal courts have been "unwilling to upset settled expectations to accommodate some ill-defined" power of the government. Poverty Flats Land & Cattle Co. v. U.S., 788 F.2d 676, 683 (10th Cir. 1986).

This case turns on the interpretation of the term "human habitation." Here, as in *Poverty Flats*, there is a dispute as to the government's interpretation of the scope of its interest in land. It was not until 2007 that the Defendants made it apparent that they interpreted "human habitation" to mean **any** human activity or presence on the Property. "Human habitation" is not expressly defined in the subject easement. The 1955 Order at issue proscribes:

> **…**a safety area in, on, over, under and across said land and**, consisting of the right to prohibit human habitation; the right to remove buildings presently or hereafter being used for human habitation; the right to prohibit gatherings of more than twenty-five (25) persons…**

It is the Plaintiffs' contention that a reasonable interpretation of this language does not prohibit use of the portion of the fee encumbered by this restriction for light industrial and

commercial activity, consisting of parking, warehousing, offices and the like. It is the Government's contention that this restriction goes beyond homes and groups of protestors, and that it bars even light industrial and commercial activity.

"The interpretation of the language of an easement is a matter of state law." Vacation Village, Inc. v. Clark County, 497 F.3d 902, 917 (9th Cir. 2007). There are a number of Maryland cases, statutes, and county codes which define "human habitation" directly, indirectly, or by analogy. While discussing an excise tax, the Maryland Court of Appeals defined "habitation" as a home or shelter of the type that is necessary for life itself. *See generally* Weaver v. Prince George's County, 281 Md. 349, 362, 379 A.2d 399 (1977). The Maryland Court of Appeals specifically stated that a place for carrying on an "occupation or a business" is *not* a "habitation." *Id*. This is consistent with other Maryland decisions addressing whether a structure was suitable for "human habitation." *See e.g.* Benik v. Hatcher, 358 Md. 507, 750 A.2d 10 (2000) (discussing whether lead paint made a dwelling unsuitable for "human habitation"); Givner v. Commr. Of Health, 207 Md. 184, 113 A.2d 899 (1955) (discussing whether bathing facilities were required to make a dwelling suitable for "human habitation"); Williams v. Hous. Auth. Of Baltimore City, 361 Md. 143, 760 A.2d 697 (2000) (discussing whether certain conditions such as rodent infestation made a dwelling unsuitable for "human habitation."). These cases specifically considered whether a *dwelling unit* was suitable for "human habitation."

The Baltimore City Code, cited in a number of the cases, defines a "dwelling unit" as "a single unit that provides or is designed or intended to provide complete, independent living

facilities for 1 or more persons, including permanent provisions for *living, sleeping, eating, cooking, and sanitation*." Baltimore City Bldg. Code §202.2.17[13].

In Maryland, the concept of "human habitation" is inextricably linked to humans actually living in a specified area. Maryland does not consider a place of business or commercial building to fall under the definition of of "human habitation." *Id*.; *See also* Weaver, 281 Md. at 362. Similarly, light industrial and commercial uses in office buildings, warehouses and parking lots, should not be shoe horned into an expanded definition of "human habitation."

Hawaii's Intermediate Court of Appeals wrote an excellent discussion about the term "human habitation." *See* State v. Sturch, 921 P.2d 1170, 82 Hawaii 269 (1996). The case involved a Hawaiian statute prohibiting vehicles from being used as places of human habitation from 6 pm to 6 am. The Court found that evidence sufficient to show that the defendant was "living" in his vehicle was sufficient to show a breach of the statute. *Id.* at 1175. Discussing "human habitation" in the context of constitutional "void for vagueness" analysis, the Court stated that a place of "human habitation" is one of inhabitation, occupancy, residence, or dwelling. *Id*. at 1176. Finally, considering the meaning of "sleeping place," the Court found that "sleeping place" could be subject to multiple interpretations. *Id.* However, when considered in conjunction with "human habitation," "sleeping place" is sufficiently defined to "connote occupancy of a vehicle" for habitation as to be "sufficiently definite to be understood by a person of ordinary intelligence." *Id*.

A federal district court, in U.S. v. Zorger, 407 F. Supp. 25, 30 (W.D. Pa., 1976), interpreted the term "habitable structure" in the context of a safety easement for flowage. The

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[13] *See e.g.* Montgomery County Code, Zoning Ordinance §59-A-2.1 (defining "Dwelling Unit" as: A building or portion thereof providing complete living facilities for not more than one family, including, at a minimum, facilities for cooking, sanitation and sleeping.

Court found that the purpose of such a term in a safety easement was to prevent people from living, sleeping, or residing in the dangerous area. The use restriction in this case is analogous to the Zorger protection against people drowning in water. The safety easement in this case was created in 1955 to protect non-military observers from incineration in a missile launch.

The term has also been construed in the context of state and federal criminal law. In Wallace v. State, 63 Md. App. 399, 405, 492 A.2d 970 (1984), the word "'dwelling" was found to mean a "human habitation." The defined crime against "habitation" was meant to prevent the invasion of a man's house, which is "his castle." The federal courts use a similar definition. *See*, U.S. v. Murillo-Lopez, 444 F. 3d 337, 343-345(5th Cir. 2006) (stating that in order to invade the right of *habitation*, the structure must be a dwelling where a person lives, even temporarily). In coming to that definition, the *Murillo-Lopez* Court considered Texas Penal Code §30.01(1), which states that "'[h]abitation means a structure or vehicle that is adapted for overnight accommodation of persons . . ." *Id*. at 342; *See also* Md. Crim. Law Code Ann. §6-101(b)(1) (defining "dwelling" as "a structure any part of which has been adapted for overnight accommodation of an individual"); *Cf.* Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98 (1954) (stating that a department store is not a dwelling or place of habitation).

The Courts have repeatedly held that "habitation" means a place where one lives and resides. The Defendants' interpretation of "human habitation" to include all buildings and all uses makes the easement far broader than its plain language or its purpose permits. The right to prohibit "human habitation" through a safety easement is not the right to prohibit all human activity. *See* Mackay v. People, 75 N.Y. Misc. 2d 851 (N.Y. App. Div., 1973). The language of the Defendants' reservation must so clearly grant to Defendants the right to prohibit all human

activity that it would have been unreasonable for Plaintiff to think otherwise. Poverty Flats, 706 F.2d at 1079.

Buildings for "human habitation" mean houses, homes, residences, and dwellings. The language of the safety easement does not clearly grant to Defendants the right to prohibit all construction and human activity on the property. The Plaintiffs request that the Court declare that the term "human habitation" does not prohibit light industrial and commercial activity within the limits of the safety easement.

Likewise, the limit on gatherings of twenty-five (25) or more persons is unreasonable. It no longer serves a purpose that benefits the remaining Government fee, and it is inconsistent with the reasonable interpretation of the "human habitation" limitation.

5) The United States intends light industrial and commercial activity within or adjacent to the safety easement area.

The Government will conduct light industrial and commercial activity within or adjacent to the area of land it is acquiring in the land exchange. The developer is required to construct, at its expense, two buildings for the Government. One is a 4,352 square foot Organization Maintenance Shop. The other is a 1,560 square foot unheated storage building. The specifications for these buildings are included in Exhibit 8.

The specifications also require construction of a parking lot containing seventy-six (76) parking spaces. It is thus conceivable that on any given day, and assuming only one person per car, that at least 76 persons will be gathered within the two buildings.

Equity and good conscience say that the Government cannot seek to enforce restrictions against "habitation," broadly defined to prohibit commercial and light industrial activity, when it is intending to engage in exactly the same activity within and adjacent to the safety easement area. Similarly, it should not be permitted to limit "gatherings" of twenty-five (25) people when

it makes allowance for no less than seventy-six (76) persons at any one time within or adjacent to the same area.

The safety easement restrictions were created to protect the public from dangerous military activities involved in a missile launch during the Cold War. They were not created to give the Government a competitive advantage when acting as a private developer.

V. Conclusion.

The removal of the Berlin Wall provided unequivocal evidence to the world that the Cold War was over. The NIKE missile site in Gaithersburg was a lingering vestige of the Cold War era. The exchange of the NIKE missile site between the United States and a private developer is unequivocal evidence of abandonment of the appurtenant safety easements. Whether the Court finds the unequivocal act evidencing this intent in the publications of 2003, or the actual deed in 2008, it should conclude that the safety easement burdening Plaintiffs' fee has been abandoned.

And if the Court deems that the safety easement remains a burden on Plaintiffs' land, it should not be so broadly construed to bar light industrial, commercial and warehousing activity.

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Certificate of Service

I HEREBY CERTIFY that on February 23, 2009, a copy of the foregoing was mailed, via first class delivery, postage prepaid, and was filed by e-mail and thus sent electronically to the following person:

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