UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ARTHUR AND MARGARET SPIEGEL,

Plaintiffs,

-against-

ADIRONDACK PARK AGENCY; MARK SENGENBERGER, in his official capacity as Acting Executive Director of the Adirondack Park Agency; RICHARD LEFEBVRE, in his official capacity as Executive Director of the Adirondack Park Agency; and PAUL VAN COTT, in his official capacity as Enforcement Officer for the Adirondack Park Agency,

Defendants.

06-CV-0203
WKS-DRH

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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MISCELLANEOUS

PRELIMINARY STATEMENT

Plaintiffs have failed to adduce admissible, uncontroverted evidence with respect to material facts sufficient to entitle them to summary judgment on their federal equal protection claim, which is the only claim that the Court has not dismissed or that plaintiffs have not abandoned.

Plaintiffs have not demonstrated that the Agency treated them differently than others similarly situated, that the Agency bore them malice or that it had improper political motivations. They have also failed to demonstrate that the Agency's actions were irrational in the face of the Spiegels' three undisputed and egregious violations of Agency Permit No. 87-28.

Petitioners' untimely collateral attacks on the Permit and on the Agency's wholly rational determinations are unavailing. Advised by experienced counsel, petitioners waived their right a full adjudicatory hearing and did not challenge the Agency's September 2005 Final Enforcement Order in New York state court.

After three years of discovery, plaintiffs have no evidence to support their claims. Consequently, they resort to sleight of hand with irrelevant facts, personal attacks and a baseless claim that the Agency "spoliated" two electronic messages, each generated more than a year after the filing of the Amended Complaint. Because plaintiffs have failed to adduce admissible evidence of disputed material facts they are not entitled to summary judgment.

COUNTERSTATEMENT OF FACTS

In September 2004, Arthur and Margaret Spiegel began framing a house on Lot 39 in the Fawn Ridge subdivision. The subdivision was authorized by Adirondack Park Agency Permit No. 87-28 (Permit), issued in April 1988 following a vote by the full Agency. In the 21-page Permit, the Agency carefully set forth detailed conditions intended to minimize adverse environmental impacts. Because the subdivision that the Permit authorized was located, in part, on a prominent ridgeline, the Agency limited the height of all of the houses to 30', required that any houses constructed on 8 ridgeline lots be set back at least 20' from the abrupt change in slope at the top of the hill, and required that all landowners allow successional vegetative growth. Final Enf. Order. Each of these three conditions was aimed at screening the houses and minimizing their visibility from off-site. *Id.* at 1-3; APA SMF ¶¶ 57-60.

In late September 2004, the Spiegels' across-the-street neighbors complained by telephone to the Agency. They first complained that the house would exceed by a couple of feet the height limit set in the Permit. In early February 2005, the neighbors complained again through their lawyer, who wrote the Agency a letter claiming that, in addition to being too high, the house was also too close to a 20' setback provision that applied to the eight ridgeline lots. The Agency immediately investigated the February complaint and discovered that the house was substantially taller than the 30' limit set in the Permit, that it was also not set 20' feet back from "the abrupt change in slope at the top of the hill," and that successional vegetation had not been allowed to grow, as the Permit required. APA SMF ¶¶ 65-85.

Settlement talks between staff and the Spiegels' attorney had not been productive and the Spiegels had indicated their intention to seek a full adjudicatory hearing. APA SMF ¶¶ 238-252; 2009 Banta Response Aff. ¶ 17. Accordingly, in April 2005, the Agency served a Notice of Intent pursuant to 9 NYCRR Part 581. APA SMF ¶ 107. The Notice of Intent advised the Spiegels that the Agency intended to revoke, modify or suspend the Permit based upon allegations by Agency staff that the Spiegels' house violated three material conditions in the Permit (relating to height, setback and successional vegetation). *Id.* ¶¶ 107-118. The Spiegels responded with a written Response to Notice of Intent, asked the Agency to modify (rather than suspend the Permit), and waived their right to a trial-type hearing, available pursuant to 9 NYCRR Part 581 (subpart 4). *Id.* ¶¶ 119-120. Consequently, the Agency made findings of fact at a public meeting held on July 7 and 8, 2005, based on written submissions by Staff and the Spiegels. *Id.* ¶¶ 125-126. The record before the Agency included the Agency Notice of Intent and supporting affidavits, the Spiegels' Response to the Notice of Intent (RNOI) and supporting affidavits, and written submissions by other interested parties. *See* 2009 Sengenberger Aff. Exh. 17 (Final Enf. Order). In their response, the Spiegels claimed, among other things, that other houses in the Fawn Ridge neighborhood also exceeded 30' in height. RNOI ¶ 32. Agency staff opened investigative files and began looking into the Spiegels' complaints about their neighbors. APA SMF ¶ 187.

After reviewing the parties' written submissions, the full Agency found that the Spiegels' house violated Permit Conditions 15(g), (i) and (j). APA SMF ¶¶ 144, 147; Final Enf. Order at 2. The Agency also specifically found that the Spiegels' house was the only one in Fawn Ridge that created the adverse visual impacts against which the

Permit was trying to protect. *Id.* The Agency gave the Spiegels the opportunity to submit additional documentary evidence in support of their petition for a permit modification, but suspended the Permit as to Lot 39. After finding that the record, including a supplemental submission following the July Order, "contain[ed] insufficient information to support the permit holder's request for modifications of the noted permit conditions with respect to Lot 39," the Agency issued a Final Enforcement Order suspending the Permit until such time as the Spiegels came into compliance with Conditions 15(g), (i), and (j). APA SMF ¶ 150. The Agency's Final Enforcement Order imposed no penalty, although New York law contemplates a penalty of up to $500 per day per violation. *Id.* ¶ 230. The Spiegels did not challenge the September 7, 2005 Final Enforcement Order in New York State Court. August 9, 2006 Banta Aff. ¶ 6.

The Agency referred the matter to the New York State Attorney General for judicial enforcement in December 2005. In response to a January 31, 2006 letter from the Office of the Attorney General seeking to determine whether the case could be settled in lieu of a state court enforcement action, the Spiegels commenced this action on February 15, 2006.

LEGAL STANDARDS

Summary Judgment

"Summary judgment is appropriate if the record demonstrates that 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 14 (2d Cir. 1999) (*quoting* Fed. R. Civ. P. 56). All inferences must be drawn in favor of the nonmovant. *Harlen Assocs. v. Village of Mineola*, 273 F.3d 494, 499(2d Cir. 2001).

Supporting and opposing affidavits must be made on personal knowledge, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated therein. Attorney affidavits not made on personal knowledge are not sufficient to support or oppose a motion for summary judgment. *Local 282, I.B.T. v. JJP Realty Holding Corp.*, 111 F.3d 123 (2d Cir. 1997); *see also* Local Rule 7.1(a)(3). Rule 702 permits witnesses qualified as experts to provide their "scientific, technical, or other specialized knowledge" to shed light on the evidence or a "fact in issue." Fed. R. Evid. 702. The witness will be qualified as an expert if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." *Id.*

Expert Evidence

A party that may use an expert must provide notice. Fed. R. Civ. P. 26(a)(2)(B); Local Rule 26.3. "In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present

evidence under Federal Rule of Evidence 702, 703, or 705." Fed. R. Civ. P. 26(a)(2). In most instances, a proposed expert must also prepare and sign a written report. Fed. R. Civ. P. 26(a)(2)(B). Failure to identify a witness as required by Rule 26(a) or (e) precludes use of the witness "on a motion, at hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1).

Judicial Notice of Adjudicative Facts

Federal Rule of Evidence 201 allows a court to take judicial notice of a fact "not subject to reasonable dispute" because it is either generally known within the trial court's territorial jurisdiction, or it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201.

Equal Protection Claims Brought Pursuant to § 1983

A plaintiff suing a government entity, or its staff in their official capacities, pursuant to § 1983 must show that the entity itself was a "'moving force'" behind the deprivation." *Kentucky v. Graham,* 473 U.S. 159, 166 (*quoting Polk County v. Dodson*, 454 U.S. 312, 326 (1981) (*in turn quoting Monell v. Department of Soc. Servs.*, 436 U.S. 658, 694 (1978)). In "an official-capacity suit[,] the entity's 'policy or custom' must have played a part in the violation of federal law." *Id.*

The Second Circuit recognizes "selective enforcement" claims by individuals who allege "invidious discrimination at the hands of government officials." *Harlen Assocs.*, 273 F.3d at 499.

> In order to establish a violation of equal protection based on selective enforcement, the plaintiff must ordinarily show (1) "the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person."

Lisa's Party City, 185 F.3d at 16; *see also Cobb v. Pozzi*, 363 F.3d 89, 110 (2d Cir. 2004); *Harlen Assocs.*, 273 F.3d at 499. A "class of one" claim, by contrast, requires a showing of (1) intentional (2) different treatment from (3) others similarly situated with (4) no rational basis for the difference in treatment. *Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000) (*per curiam*); *Harlen Assocs.*, 273 F.3d at 499.

Collateral Estoppel

Collateral estoppel, or issue preclusion, 'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . ., whether or not the tribunals or causes of action are the same.'" *Parker v. Blauvelt Vol. Fire Co.,* 93 N.Y.2d 343, 349 (1999). The doctrine serves the dual purposes of "conserving limited judicial resources and preventing a losing party from getting a second bite at the apple by merely choosing a new forum in which to litigate." *Howard v. Town of Bethel*, 481 F. Supp.2d 295, 301 (S.D.N.Y. 2007). Collateral estoppel applies to civil rights actions brought pursuant to 42 U.S.C. § 1983. *Burkybile v. Board of Ed. of Hastings-on-Hudson Union Free Sch. Distr.*, 411 F.3d 306, 310 (2d Cir. 2005).

In determining whether issue preclusion bars relitigation of issues in a second proceeding, federal courts apply the "preclusion law of the State in which judgment was rendered." *Howard,* 481 F. Supp.2d at 301. New York applies preclusive effect to "quasi-judicial" administrative determinations "rendered pursuant to adjudicatory authority of an agency to decide issues brought before its tribunals employing procedures substantially similar to those used in a court of law." *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 496 (1984); *Burkybile*, 411 F.3d at 310. "The proponent must establish that

the issue in the second proceeding is identical to an issue that was raised, necessarily decided and material in the first proceeding, in which the plaintiff had a full and fair opportunity to litigate the issue." *Parker*, 93 N.Y.2d at 349. "'[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identicality and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in [the] prior action or proceeding.'" *Id.* (*quoting Ryan*, 62 N.Y.2d at 501).

ARGUMENT

I

COLLATERAL ESTOPPEL BARS RELITIGATION OF THE DETERMINATIONS NECESSARILY MADE IN THE AGENCY'S FINAL ENFORCEMENT ORDER

The Spiegels' motion challenges the validity of the Permit, the Agency's focus on aesthetic issues, and, apparently, the Agency's factual findings that they violated Conditions 15(g), (i) and (j). *See* Pls.' Memo. of Law in Supp. of Motion for Summ. J'ment (Spiegels' Memo) at 3 ("The Defendant claims that the Plaintiffs' house violates the Permit"). These precise issues were material and necessary to the administrative enforcement proceeding, and the Agency actually decided them. The Spiegels had the opportunity to fully and fairly litigate those issues, although they elected to waive an actual hearing. Accordingly, plaintiffs are collaterally estopped from arguing now that the Permit is not valid, that the Agency's focus on aesthetics is irrational, that the Permit contains no measurement methodology applicable to landowners, or that the house does not violate Permit Conditions 15(g) (height), (j) (setback), and (i) (successional vegetative conditions).

The issues presented to the Agency are identical to those presented here, to the extent the Spiegels seek to challenge the Agency's findings that they violated Conditions 15(g), (i), and (j). In its detailed April 15, 2005 Notice of Intent, the Agency set forth the allegations against the Spiegels. Those issues included the allegations that the Spiegels had violated Conditions 15(g), (i) and (j) of Permit No. 87-28. Notice of Intent ¶¶ 34-38 (Condition 15(g)), ¶¶ 50-60 (Condition 15(i)), and ¶¶ 39-49 (Condition 15(j)). In response, the Spiegels alleged that the Agency was selectively enforcing the Permit against them because other Fawn Ridge houses also violated the Permit's height condition. RNOI ¶ 32.

In the Final Enforcement Order, the Agency found, as a matter of fact, that the Spiegels had violated Conditions 15(g), (i), and (j), which the full Agency expressly found had been included in the Permit to protect against adverse visual impacts. Final Enforcement Order at 2 (Findings 1-3). In response to the Spiegels' allegation that they were being singled out, the Agency also determined that the Spiegels' house alone was highly visible, an adverse impact caused by plaintiffs' violations of the Permit. *Id.* at 2 (Finding 2); July 8 Enf. Order at 2. The Spiegels cannot challenge those findings now.[1]

The Spiegels also had a full and fair opportunity to litigate these issues. The Agency's regulations specify the contents of a Notice of Intent, including the right to a

[1] As a threshold matter, the Agency necessarily determined that Permit No. 87-28 was valid and that Condition 7(g) directly applied to lot owners, not merely the developer. These issues were material in the Agency's enforcement proceeding, whose purpose was to determine whether, as alleged, plaintiffs had violated Conditions 15(g), (i) and (j). *See, e.g., Howard*, 481 F. Supp.2d at 302 ("In the present case, the validity of the ordinances at issue was necessarily adjudicated implicitly at the 1998 proceeding and explicitly as the 2006 preliminary injunction hearing"); *Parker v. Blauvelt Vol. Fire Co.*, 93 N.Y.2d 343, 350 (1999) ("The present complaint is virtually a verbatim repetition of the due process and free speech claims in the prior petition. Thus, all of the factual issues dispositive of the constitutional claims being raised in the instant action were necessarily decided in the prior Article 78 proceeding"). The Agency did not address the Spiegels' claim, asserted in 2005, that they were being selectively treated and the State does not seek to preclude them from litigating that issue in this forum.

hearing. 9 NYCRR § 581-3.2. Should an alleged violator seek a hearing, "the Executive Director shall appoint a hearing officer and a hearing shall be held and an Agency determination shall be made in accordance with the hearing procedures set forth under Subpart 581-4." *Id.* § 581-3.4(a). Subpart 4 sets forth hearing rights and procedures for a hearing before a hearing officer and including: the right to be represented by an attorney, to discovery (but not bills of particular), to subpoena the production of witnesses and evidence, to present evidence, to cross-examine witnesses, to present argument on issues of law and fact, and to a full record. 9 NYCRR § 581 subpart 4. In addition, alleged violators possess all of the rights and privileges accorded under the New York State Administrative Procedure Act. *Id.* § 581-4.5(c). These procedures provide a full and fair opportunity to litigate claims and defenses. *See Burkybile,* 411 F.3d at 312 (education law laid out "extensive litigation procedures for hearings, including motion practice, bills of particulars, mandatory disclosure, discovery, subpoena power, right to counsel, cross-examination, testimony under oath and a full record").

That the Spiegels waived their right to a full hearing would not stop a New York court from applying the doctrine of collateral estoppel. *See, e.g., Parker*, 93 N.Y.2d at 350 ("Nothing prevented him from fully litigating the constitutional grounds he advanced for invalidating the disciplinary determination against him"). *Accord Curry v. City of Syracuse*, 316 F.3d 324, 332 (2d Cir. 2003) ("Curry had the opportunity to call witnesses, to testify himself, to present evidence, and to cross-examine Lynch and Officer Yarema; the fact that he chose not to testify, and that his counsel conducted only a limited cross-examination, is beside the point. The opportunity was clearly there").[2] Plaintiffs had a

[2]During the administrative enforcement proceeding, plaintiffs had the benefit of competent and experienced counsel. Mr. Ulasewicz was the Agency's Executive Director for three years, APA SMF ¶ 159, and has

full and fair opportunity to litigate the Permit's validity, the Agency's concern with aesthetic issues, and their violations of Conditions 15(g), (i), and (j). A New York court would bar the relitigation of those issues here.

II

"CLASS OF ONE" ANALYSIS DOES NOT APPLY TO THE DEFENDANTS' DISCRETIONARY ACTIONS

Regulatory enforcement decisions turn on a variety of discrete factors and the exercise of discretion, making them ill-suited to the "class of one" analysis set out by the Courts and by plaintiffs. *Engquist v. Oregon Dep't of Agric.*, _ U.S. _, 128 S. Ct. 2146, 2150-2152 (June 9, 2008); Defs.' Memo in Supp. of Mot. for Summ. J'ment (Defs.' Memo) at 33-34. Since the State submitted its motion for summary judgment, the Central District of California has joined other districts courts in extending *Engquist* outside the public employment context. *See Garber v. Heilman*, 2009 WL 409957 (C.D. Cal. Feb. 18, 2009) (discretionary acts of police officers in ticketing homeless plaintiff and not others, similarly situated, did not give rise to equal protection claim). For the reasons set forth at pages 33-34 of Defs.' Memo, and in *United States v. Moore*, 543 F.3d 891, 901 (7th Cir. 2008), the Court should dismiss plaintiffs' remaining claim on the ground that it is not viable under *Engquist*.

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subsequently represented many private clients before the Agency. *See, e.g., APA v. Bucci*, 2 A.D.3d 1293 (4th Dep't 2003) (T. Ulasewicz represented respondents); *Aubin v. State of New York*, 282 A.D.2d 919 (3d Dep't 2001) (same); *Campion v. APA*, 188 A.D.2d 877 (3d Dep't 1992) (same). *See Zanghi v. Village of Old Brookville*, 752 F.2d 42, 46 (2d Cir. 1985) ("plaintiff was represented by counsel who we assume was competent to advise plaintiff of the adverse effect of the administrative findings"). Mr. Ulasewicz plainly understood the risk entailed in waiving a hearing and took pains to ensure the creation of a full record. 2009 Banta Aff. Exh. 2 (July 6, 2005 letter from Ulasewicz to Banta, urging that all letters from the public be "incorporated into the record in case the matter results in litigation, especially since the respondents have waived a public hearing").

III

THE SPIEGELS HAVE SHOWN NEITHER SELECTIVE ENFORCEMENT NOR A CLASS-OF-ONE VIOLATION

A. The Spiegels Have Adduced No Competent Evidence

In a 42-page attorney affidavit, Mr. Privitera acts as the narrator for the Spiegels' tale, beginning "[i]n the mid-1980s" and continuing to the present. Privitera Aff. ¶¶ 17-134.[3] Mr. Privitera was not personally involved in the permitting, planning, or building of the Fawn Ridge subdivision, or in the building of the Spiegels' non-compliant house. He had no personal involvement in the formation of the Fawn Ridge Homeowners Association or with the subdivision's developer, Lakewood Properties. Likewise, he had no involvement in the Agency's enforcement action against the Spiegels and did not represent them during that process. He has no personal knowledge of the events he recounts in ¶¶ 17-107, 110-129 of his affidavit, which cannot, therefore, support defendants' motion. *Cf. United States v. Alessi*, 599 F.2d 513, 514-15 (2d Cir. 1979) (*per curiam*) (paragraphs in affidavit made by AUSA and not based on personal knowledge were inadmissible and properly stricken). The many paragraphs that contain argument are also inadmissible.[4] Local Rules 7.1(a)(2) ("An affidavit must not contain legal

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[3]For his recitation of "facts," Mr. Privitera relies on documents produced by the Agency during the discovery process, Privitera Aff. ¶ 15, along with documents not produced by the Agency during the discovery process, *e.g.* Privitera Aff. Exh. CC (deeds to 19 of 54 lots in Fawn Ridge produced to the State by plaintiffs). The Spiegels lay no foundation for these documents. To the extent a foundation was not laid by the State on its motion for summary judgment or this response, the documents are inadmissible. 2009 Taylor Response Aff. ¶ 48s and Exh. 33 at 3 (October 22, 2008 letter from Taylor to Privitera stating Agency's willingness to authenticate particular documents as identified by plaintiffs in anticipation of State's summary judgment motion).

[4]*See, e.g.*, Privitera Aff. ¶ 2 (claiming that Agency's jurisdiction over Fawn Ridge flows from the subdivision's location "inside the Adirondack Park"); *id.* at 2 (characterizing the Agency's actions as "punitive" and "irrational[]"; *id.* ¶ 26 (asserting the Agency's findings of fact are "incontrovertible;" *id.* ¶ 29 (arguing that the Agency approved building envelope locations); *id.* ¶ 33 (arguing that Agency delegated permit compliance authority to ARC); *id.* ¶ 39 (arguing that Permit conditions are binding on Developer); *id.* ¶¶ 40-46 (arguing that the Permit is void); *id.* ¶ 59 (arguing that Marvin placed house in its present location for reasons having to do with "stockpiled soil" even though Marvin's testimony is to the contrary);

argument"). The Privitera attorney affirmation is not admissible evidence on this motion for summary judgment. *See* Local Rule 7.1(a)(2), (3).

The 2006 affidavit and subsequent deposition testimony of surveyor Bob Marvin upon which plaintiffs also rely is likewise inadmissible to the extent it is offered as expert testimony. *See* Privitera Aff. ¶¶ 30, 57-58, 108-109, 115-116; *see also* October 6, 2006 Marvin Affidavit ¶¶ 8, 11-14 (offering his opinions).[5] The Marvin opinion testimony and 2006 affidavit are not admissible because Mr. Marvin is not competent and because the Spiegels failed to disclose that they intended to use him as an expert. *See* Fed. R. Civ. P. 26(a)(2), 37(c)(1).[6]The Spiegels missed the deadline set in the Scheduling Order for identifying experts and submitting expert reports. 2009 Taylor Response Aff. ¶ 33-41. The Spiegels acknowledge that the failure occurred as the result of inadvertence. *Id.* ¶ 36 and Exh. 25. Moreover, the failure is not harmless. Because the Spiegels did not designate Mr. Marvin as an expert, the State neither treated him as an expert nor retained its own expert. 2009 Taylor Response Aff. ¶ 33-41. The basis for Mr. Marvin's opinions and testimony (not to mention his qualifications)[7] is not clear from his October 6, 2006

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id. ¶ 63 (arguing that location of house "conforms to the Agency's overall visual impact analysis for Fawn Ridge"); *id.* (arguing that Agency has "failed to implement a system to monitor compliance with the permits that it issues"); *id.* ¶¶ 66-68 (arguing that the Agency has a rigid standard protocol); *id.* ¶¶ 69-90 (arguing that the Agency intentionally deviated from its alleged rigid protocol); *id.* ¶ 98 (arguing, without elaboration, that 6 Agency settlements with other violators are "no different" from the allegations in this case.

[5]The Spiegels rely on Mr. Marvin to establish the heights of 38 other houses in the subdivision as well as in support of various irrelevant facts. *See, e.g.*, Privitera Aff. ¶¶ 57-58 ("Marvin is knowledgeable about Agency permits and the permitting process" and "understood that the Fawn Ridge ARC's job was to assure compliance with the Lot Development Control Notes"); *id.* ¶ 30; *id.* ¶¶ 108-109 (purporting to show "precise building heights" of 35 Fawn Ridge houses), ¶¶ 115-16 (alleged heights of other Fawn Ridge house); *id.* ¶ 108 (allegation regarding steep slopes not at issue); *id.* ¶ 109 (speculating that Agency relied on a measurement method involving averaging to establish height at the time the Permit was issued).

[6]The Hanrahan and Politi affidavits are also inadmissible, offered to support statements that the affiants are not competent to make, and often do not stand for the proposition for which cited. *See* 2009 Taylor Response Aff. ¶¶ 42-47.

[7]Mr. Marvin candidly admits that he was not involved with the development of the subdivision but avers that he has spent time walking, fishing and skiing there. Marvin Aff. ¶ 3. He also has done undefined

Affidavit or from the Map itself. 2009 LaLonde Response Aff. ¶¶ 9-15. The State had no reason to expect the Spiegels' deposition of Mr. Marvin on May 21, 2007 to cover expert topics, objected, and did not have the chance to prepare for an expert deposition or to use an expert witness itself. 2009 Taylor Response Aff. ¶¶ 33-41. The proposed expert testimony is not reliable. 2009 LaLonde Response Aff. ¶¶ 1-8. Because the State will be prejudiced by the plaintiffs' failure, which was not substantially justified, plaintiffs may not rely on Mr. Marvin on this motion (or at any subsequent trial).

B. The Spiegels Have Not Established That They Are Similarly Situated To Other Fawn Ridge Homeowners

After agreeing that summary judgment is appropriate with respect to whether they are "similarly situated" to others, the Spiegels give short shrift to establishing that there are, in fact, others to whom they are "prima facie" identical. Spiegels' Memo at 8. In fact, they do not allege it in their Statement of Material Facts. In their Memo, the Spiegels assert that they are similarly situated to all of the other homeowners in Fawn Ridge because "the Permit would apply equally to each Fawn Ridge homeowner." *Id.* at 8. The Spiegels explain that each Fawn Ridge homeowner is similarly situated because "for example," the Permit's height, tree cutting and slope restrictions would apply equally to all homeowners, including "the Richters on Lot 36, the Hanrahans on Lot 16, the

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survey work at "many" unidentified Fawn Ridge lots. *Id.* The State does not object to Mr. Marvin's testimony on the factual issues as to which he has firsthand knowledge, which is limited to work he did for the Spiegels in 2004, 2005 and 2006, which generally has to do with the location of the Spiegel house on Lot 39. *See* Marvin Depo. Tr. at 23, 25, 108-111 (he did the boundary recovery and house stakeout for Spiegel lots 35 and 39 and some other work for lot 38; he also did work after the house on lot 39 was built "to locate the as-built house after it was constructed" and after the stop work order was issued). Mr. Marvin also helped determine, after the Cease and Desist Order, how tall the Spiegel house was. Marvin Depo. Tr. at 128.

Stewarts on Lot 15, and so on." *Id.* at 8.[8] They thus conclude that all Fawn Ridge homeowners are similarly situated. They are not. APA SMF ¶¶ 185-212.

"In order to prevail on their claim, the Spiegels must establish that they were 'treated differently than someone who is prima facie identical in all relevant respects.'" Spiegels' Memo at 7 (*quoting Prestopnik v. Whelan*, 249 Fed. Appx. 210, 213 (2d Cir. 2007) (in turn *quoting Neilson v. D'Angelis*, 409 F.3d 100, 104 (2d Cir. 2005), *overruled to the extent it conflicts with* Engquist v. Oregon Dep't of Agric., *128 S. Ct. 2146 (2008)*, Appel v. Spiridon, *531 F.3d 138 (2d Cir. 2008)*). Indeed, "[t]he 'similarly situated' requirement must be enforced with particular rigor in the land-use context because zoning decisions 'will often, perhaps almost always, treat one landowner differently from another.'" *Cordi-Allen v. Conlon*, 494 F.3d 245, 251-52 (1st Cir. 2007) (*quoting Olech*, 528 U.S. at 565 (Breyer, J., concurring)). An "extremely high level of similarity" is required because the comparators are proffered to support the "inference that the plaintiff was intentionally singled out for reasons that lack any reasonable nexus with a legitimate governmental policy." *Neilson*, 409 F.3d at 104.

1. The Non-Ridgeline Lots

Lots 15, 16 and 36, which plaintiffs identify as similarly situated, are not located on the ridgeline from which the subdivision takes its name. Permit Cond. 15(j)

[8]Found in Permit Conditions 15(b), (c), (d) and (h), the tree cutting and steep slope restrictions that the Spiegels vaguely reference are also straw men. The Agency suspended the Permit with respect to Lot 39 because the Spiegels violated Permit Conditions 15(g), (i) and (j) – not (b), (c), (d) or (h). APA Exh. 17 (Final Enforcement Order finding that the Spiegels had violated Conditions 15(g) (height), (i) (successive vegetative growth) and (j) (setback from abrupt change in slope); *see also* APA Exh. 9 (Notice of Intent) ¶¶ 34-38 (alleging violation of Condition 15(g), ¶¶ 39-49 (15(j)), ¶¶ 50-62 (15(i)). The Agency neither alleged nor found that the Spiegels had violated Conditions 15(b), (c), or (d) (all relating to tree cutting) or Condition 15(h) (prohibiting construction on slopes greater than 25%). The Spiegels' many statements of fact averring their alleged compliance with Conditions 15(b), (c), (d) and (h) are immaterial and legally irrelevant because the State did not allege that they violated these conditions. *See, e.g.*, Privitera Aff. ¶¶ 51-53, 60-61 and 93; Spiegels' SMF ¶¶ 49, 51, 103, 104, 111, 113.

(identifying the ridgeline lots by number). It is undisputed that only the ridgeline lots are subject to Permit Condition 15(j), which requires a house to be constructed "at least 20 ft. back from the abrupt change in slope at the top of the hill." Permit Cond. 15(j). The Agency took special precautions to prevent the houses eventually built on the ridgeline lots from being highly visible.

> The Agency finds that Permit Condition 15(j) applying specifically to Lot 39 and six adjoining lots on the ridge line has, among several objectives, screening new construction on these lots from vantage points on Route 86 and Lake Placid lake through design, terrain and natural vegetation. The basis for this and related Conditions 15(g) and (i) is as set forth in Findings of Fact 15 and 17, pages 10 and 11.

Final Enf. Order at 2 (APA Exh. 17). Their potential visibility makes the ridgeline lots akin to a construction zone on a highway: The Agency posted a lower "speed limit" to make sure that foreseeable harm did not occur. Indeed, plaintiffs acknowledge that the ridgeline houses are set apart from the other houses. Spiegels' Memo at 8 n. 3 (arguing that they are "identically situated" to the other ridgeline homeowners but only "similarly situated" to remaining 46). Because the 46 Fawn Ridge lots that are not located on the ridgeline are not subject to Condition 15(j), and are therefore not in the "work zone," they cannot be *prima facie* identical to Lot 39. *See, e.g., Lakeside Builders, Inc. v. Planning Bd. of the Town of Franklin,* 2002 WL 31655250 at *3 (D. Mass. March 21, 2002) (Appx. 1) (suggestion that all applicants for waivers of dead-end street length regulation were similarly situated was "so broad a definition of 'similarly situated' that it is not useful for equal protection analysis"). *Cf. Nasca*, 2008 WL 4426906, *12.

2. The Ridgeline Lots

Plaintiffs are also not "identically situated" to the other owners of the 8 other ridgeline lots. Spiegels' Memo at 8 n. 3. As set forth in the Defendants' Memo, and as

expressly found by the Agency, Final Enf. Order at 2, only the Spiegels' house violates Conditions 15(g), (i), and (j). Only the Spiegels' house is skylighted and visible during leaf-on seasons from off-site vantage points. Agency Memo at 19-24. Plaintiffs cannot collaterally challenge those findings here. Moreover, compared to the 6 other ridgeline houses, only the Spiegels' violates the Permit's Conditions so egregiously. Although four other houses exceed the 30' limit set in Condition 15(g), two violate by 17%, one violates by 17-33%, and the fourth by 30%.

By contrast, the Spiegels' partially-constructed house is 72% over the height set in Condition 15(g). And, although one other house also violates the setback requirement, that house's deck, located within 5' of the abrupt change in slope, constitutes only a 25% violation. Here, the Spiegels have poured a foundation (not built a deck) on top of (not 5' back from) the abrupt change in slope. In short, the Spiegels alone violate Permit Condition 15(j) by 100%. Moreover, only the Spiegels' house generated complaints from neighbors and requests from a municipal planning board that the Agency enforce the Permit against them. Accordingly, the Spiegels have not shown that they are so similarly situated to even their ridgeline neighbors as to require the inference that defendants "intentionally singled [them] out for reasons that lack any reasonable nexus with a legitimate governmental policy." *Neilson*, 409 F.3d at 104. No rational jury could find that a lot not subject to Condition 15(j) is *prima facie* identical to a ridgeline lot. *See Lamar Adv. of Penn, LLC v. Pitman*, 573 F. Supp.2d 700, 708 (N.D.N.Y. 2008) ("Plaintiff's evidence that there are other billboards in the vicinity is meaningless without proof regarding whether each particular billboard is located within the Village boundaries, and if so, in what district it is located, its size and height, whether it was in

compliance with the Zoning Ordinance when it was erected, whether a variance was applied for an granted, and what other action, if any was taken by the Village"); *Pansy Road, LLC v. Town Plan & Zoning Comm'n of the Town of Fairfield*, 2007 WL 2889456 (D. Conn. 2007) (5-lot residential subdivision on a cul-de-sac located near an entrance to a school was not similarly situated to 2 other subdivisions also located on cul-de-sacs serviced by roads near schools because dissimilar rules applicable to traffic flow constituted "significant differences); *R-Goshen, LLC v. Village of Goshen*, 289 F. Supp.2d 441 (S.D.N.Y. 2003) (plaintiff's attempt to develop property owned by a third party was distinguished from comparator's by "set-back, which was the critical issue").

This is especially true in the context of a governmental enforcement action. *E.g., United States v. Armstrong,* 517 U.S. 456, 463-64 (1995); *Gonzalez v. City of New York,* 38 Fed. Appx. 62, 64 (2d Cir. 2002) (affirming summary judgment because plaintiff could not show that other drivers on Lexington Avenue were driving erratically with the passenger door open). Because of the scale of their violations, no rational jury could find that other ridgeline lot owners who violated the Permit were similarly situated to the Spiegels. *See, e.g., Strickland v. Alderman*, 74 F.3d 260, 265 (11th Cir. 1996) ("Because Strickland presented no evidence indicating that other property owners violated the standing water ordinance as egregiously as he did, we conclude that Strickland has not made a prima facie showing that he was similarly situated"); *Shekhem el-Bey v. City of New York*, 419 F. Supp.2d 546, 551 (S.D.N.Y. 2006) (plaintiff's "misconduct so far surpassed that of his co-workers" who were not fired). By analogy, the Spiegels were driving both at high speed and erratically in a construction zone. Their driving triggered complaints to the police and a plea from neighbors and the Town to enforce the speed

limit applicable in the construction zone. APA SMF ¶ 133. The Court cannot grant summary judgment to plaintiffs because they have failed to adduce evidence of others similarly situated (in fact, there are none).

C. The Agency Has Not Treated the Spiegels Differently

The Spiegels have adduced no proof that the Agency has intentionally treated others differently. Without factual support, the Spiegels allege that "the Agency – lead by Agency staff attorney Van Cott – continued in its malicious crusade against the Spiegels and left the other Fawn Ridge homeowners alone." Spiegels Memo at 9. In fact, as the Spiegels later concede, the Agency opened five enforcement files against other Fawn Ridge homeowners in September 2005. *Id.* at 10. The Agency opened 4 more cases in 2006 and 17 in 2007. 2009 Van Cott Response Aff. ¶ 20. In other words, the Spiegels do not deny that the Agency pulled several other drivers over, including several others in the work zone. Instead, they can object only that the Agency has not yet ticketed the other drivers. *See* Spiegels' Memo at 10. It is undisputed, however, that the Agency became aware of the other potential violations only after it had already commenced investigating the Byrnes's allegations about the Spiegels' house. APA SMF ¶¶ 175, 177. Once it became aware of the other alleged violations, the Agency began making notes and opened enforcement files, which remain open pending resolution of this lawsuit. APA SMF ¶¶ 180-181. Thus, the Agency treated the other "drivers," including those in the work zone, exactly as it treated the Spiegels.[9]

[9]Moreover, under the circumstances, the Agency's decision to await the outcome of this collateral challenge to the Permit, the Agency's method of measuring height, the Agency's assessment of penalties, the Agency's motives, and, in essence, its entire enforcement program, before proceeding with respect to the other Permit violations is entirely justified. *Lisa's Party City*, 185 F.3d at 17; 2009 Banta Response Aff. ¶¶ 19-20.

Because the Agency did not treat others, similarly situated, differently, and because there is no evidence that the Agency knew about and ignored other violations when it opened its file on the Spiegels' house, plaintiffs simply cannot establish their right to summary judgment. *LaTrieste Rest. v. Village of Port Chester,* 188 F.3d 65, 69-70 (2d Cir. 1999) (selective enforcement claim ordinarily requires proof of conscious application of different enforcement standard to similarly situated entities); *LaVoie-Francisco v. Town of Coventry,* 581 F. Supp.2d 304, 313 (D. Conn. 2008) (comparator agreed to arbitrate claims against contractor defendants while plaintiffs did not, which was "sufficient to justify Callahan's decision to issue a violation notice only to the plaintiffs"); *Payne v. Huntington Union Free Sch. Distr.*, 219 F. Supp. 2d 273, 281 (E.D.N.Y. 2002); *Gottlieb v. Village of Irvington*, 69 F. Supp.2d 553, 559 (S.D.N.Y. 1999).

D. Even If The Spiegels Could Show Intentional Disparate Treatment Compared To Others Similarly Situated, They Cannot Show That The Agency Lacked A Rational Basis

The Court should deny summary judgment to plaintiffs because they have not raised a material issue of fact with respect to whether defendants acted rationally. In light of the Spiegels' three indisputable Permit violations, and the scale of each, the Agency's enforcement actions were rational. Nonetheless, the Spiegels now claim that (1) the Agency delegated its authority to enforce the Permit to the Fawn Ridge Architectural Review Committee (this claim is not set forth in the Amended Complaint); and (2) the Agency's concern with "visual aesthetics" is irrational. Spiegels' Memo at 21-24.

A government entity acts irrationally only when it acts "with no legitimate reason for its decision." *Harlen,* 273 F.3d at 500. Rational basis review is not an invitation for

courts (or plaintiffs) "to judge the wisdom, fairness or logic of legislative choices," nor does it grant license "to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *Zeigler v. Town of Kent*, 258 F. Supp.2d 49, 58-59 (D. Conn. 2003) (internal punctuation and citations omitted). "*Olech* does not empower federal courts to review government actions for correctness. Rather, an *Olech*-type equal protection claim focuses on whether the official's conduct was rationally related to the accomplishment of the work of their agency." *Bizzarro v. Miranda*, 394 F.3d 82, 88-89 (2d Cir. 2005). "A decision can only be considered arbitrary for federal constitutional purposes where, unlike the one made here, it has no basis in fact." *Harlen Assocs*, 273 F.3d at 501. There is no obligation on the government even to produce evidence in support of legislative rationality. *See Garcia v. SUNY Health Servs. Ctr.*, 280 F.3d 98, 109 (2d Cir. 2001).

The Adirondack Park Agency Act "is charged with an awesome responsibility and the Legislature has granted it formidable powers to carry out its task." *Long v. Adirondack Park Agency,* 76 N.Y.2d 416, 421 (1990).

> The statute creating and empowering the APA is aimed at establishing a superagency to regulate development in the Adirondack Park region, which the Legislature has singled out for special protection because of its unique environmental significance. The agency's powers and goals thus resemble those of both a local planning board and a local zoning entity.

Hunt Bros. v. Glennon, 81 N.Y.2d 906, 909 (1993).

The Act and the Agency's regulations require the Agency to enforce the Act, and "the terms and conditions of any permit or order issued by the Agency." 9 NYCRR § 581-1.1. *See, e.g., Adirondack Park Agency v. Bucci*, 2 A.D.3d 1293 (4th Dep't 2003); *Adirondack Park Agency v. Hunt Bros.*, 234 A.D.2d 737 (3d Dep't 1996); *Adirondack*

Park Agency v. Ton-Da-Lay Assocs., 61 A.D.2d 107 (3d Dep't 1978). *Cf. Grinspan v. Adirondack Park Agency*, 106 Misc. 2d 501 (Warren Co. Sup. Ct. 1980) (setback requirement did not exceed Agency's powers under the Rivers Act).

Pursuant to its "formidable powers," the Agency enforced the terms of Agency Permit No. 87-28, which is "functional equivalent of a zoning law." May 8 Oral Arg. Tr. at 29. Plaintiffs' violations of that Permit are not disputed (and could not be, for the reasons set forth at Point I, *supra*). *See* Spiegels' SMF ¶¶ 1-131; *see also* APA SMF ¶ 163-164 (height violation); ¶ 166-167 (setback violation); ¶ 168 (Condition 15 (successive vegetation violation)). Nor can the scale of the Spiegels' violations be disputed. The partially-constructed house on Lot 39 is 51.7 feet tall when measured in conformity with the Permit (and 42 feet tall as the Spiegels measure). Even taking plaintiffs' measurement, the Spiegels' house violates the 30' height restriction in the Permit by 40%. Likewise, the Spiegels' house violates the setback restriction by 100% and, because it is placed in the area where the Agency expected screening growth to occur, it violates the successional growth restriction, as well. In light of the Spiegels' undisputed violations and their scale, the Agency's actions in enforcing the Permit against the Spiegels were rational. *See, e.g., Bizzarro*, 394 F.3d at 88-89 (defendants' intention "to punish plaintiffs for refusing to assist in the investigation and to deter other officers from similarly refusing to assist in investigations" was rationally related to accomplishing Department's work); *Palmieri v. Town of Babylon,* 2006 WL 1155162 (E.D.N.Y. Jan. 6, 2006) ("Town had every right to seek to enforce" its law "against Plaintiff, who admitted he was never in compliance with it"); *Merry Charters, LLC v. Town of Stonington*, 342 F. Supp.2d 69, 75 (D. Conn. 2004).

Seeking to sidestep their own responsibility, the Spiegels claim that the Agency delegated its authority to enforce the Permit to the Fawn Ridge Architectural Review Committee (ARC) and, therefore, any Permit violations by the Spiegels are the fault of the ARC (the very same ARC that Mr. Spiegel served on for 3 years, including the time period when his house was "approved," Counterstatement ¶ 24). Spiegels' Memo at 21-22.[10] They do not state precisely how this indicates irrationality on the part of the Agency, but presumably the Spiegels mean to suggest that the Agency should be enforcing the Permit against the developer, not them.

As a factual matter, the Agency did not "defer[] the responsibility of ensuring Permit compliance" to the ARC. *See id.* at 21. APA Response to SMF ¶¶ 19, 20 and 2009 Sengenberger Aff. ¶¶ 17-23. Notably, plaintiffs cite no authority for the proposition that the ARC's alleged failures somehow exonerate them.[11] They do not even claim that the ARC's alleged failures somehow caused them to violate the Permit. The Agency's decision in this case to enforce the Permit against homeowners in the subdivision, rather than the developer, is consistent with New York law and entirely rational. *See* 9 NYCRR §§ 581-1.1, 1.2(i); 2009 Sengenberger Aff. ¶¶ 26-28.

The Spiegels next claim that the Agency's concern with visual impacts is irrational. Spiegels' Memo at 21-24. They are collaterally estopped from making this argument, which the Agency necessarily addressed and decided in 2005. Even if they are

[10]The Spiegels are, at least, consistent. In the administrative enforcement proceeding before the Agency, they blamed their surveyor, their realtor and their builder for failing to alert them to the Permit's requirements. Now, they seek to add the ARC to the list of those who are to blame for their own failures.

[11]Mr. Spiegel served on the ARC for 3 years, offering advice to homeowners, talking to their builders, and approving site plans. Zdrahal Depo. Tr. at 102-103, 124 (establishing Mr. Spiegel's service from 2001-September 2004). His service on the ARC included the time period when his house on Lot 39 was approved. *Id.* Mr. Spiegel has also constructed and sold several other houses in Fawn Ridge, including two on speculation, A. Spiegel Depo. Tr. at 22-31, and one that violated a deed restriction that prohibited log homes, *id.* at 127-128, 152-155. He and Ivan Zdrahal also contemplated purchasing the undeveloped portion of Fawn Ridge and developing it as a second phase. *Id.* at 45-48.

not estopped, the argument is meritless. ."It has been the law for decades in New York that "aesthetics is a valid subject of legislative concern and that legislation aimed at promoting the governmental interest in preserving the appearance of an area is a permissible exercise of the police power." *McCormick v. Lawrence*, 54 A.D.2d 123, 125 (3d Dep't 1976). "Unquestionably, municipalities can 'enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city.'" *Trustees of Union College in Town of Schenectady in State of New York*, 91 N.Y.2d 161 (1997) (*quoting Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 129 (1976)). The Agency's jurisdiction over aesthetic issues was resolved long ago.

> Before the Agency approves a project or grants a permit therefore, it is required to find that the project would not have an adverse impact upon the natural, scenic or aesthetic resources of the park. In making these determinations the Agency is required to consider the aesthetics of scenic vistas and natural and man-made travel corridors. In our opinion, the Legislature has provided sufficient standards to guide the Agency in its review of projects and thus we find no unconstitutional delegation of power to the Agency.

McCormick, 54 A.D.2D at 125 (*citing* Exec. L. 805(4)(a)(7)(a), (b); 809(10)(e)); *Grinspan*, 106 Misc. 2d at 503 ("preservation of the aesthetic quality of a project site constitutes a valid exercise of the police power").[12]

The Spiegels also fault the Agency for its unwillingness to condone their Permit violations on the audacious ground that their house will be better than one that complied with the Permit. Spiegels' Memo at 22-24. They complain that the Agency has "not done any visual impact analysis as to what a 30 foot high house would look like on Lot 39 if the Spiegel home were destroyed and a new 30 foot tall house was build, upslope

[12] Permit No. 87-28 contains the Agency's finding that the Fawn Ridge subdivision would "not have an undue adverse impact pursuant to Section 809(10)(c) of the . . . Act provided that . . . the amount of cut and fill and removal of tree vegetation for road construction, driveways and homesites is minimized." Permit at 12.

and closer to Algonquin Drive." *Id.* at 22.[13] In essence, the Spiegels argue that the Agency must justify the work zone speed limit it set in 1988. There is no such obligation. *Garcia*, 280 F.3d at 109.

As set forth in the properly recorded 1988 Permit, and reiterated by the full Agency in its 2005 Final Enforcement Order, Permit Conditions 15(g), (i), and (j) are aimed at preventing erosion and adverse visual impacts.[14] Permit at 10-11 (Findings of Fact 15 and 17); Final Enf. Order at 2. Even if they could challenge the 1988 Permit's conditions, plaintiffs have adduced no competent evidence to suggest that the Permit's conditions are not rational.

Next, the Spiegels complain about the Agency's method of measuring height. Each of the Spiegels' several complaints about the Agency's method of measuring is immaterial. The Spiegels do not allege that they or the professionals they hired did not know how to measure the height of their house. They have not alleged that they were confused by the Agency's height measurement methodology. Spiegels' SMF ¶¶ 1-131; Spiegels' Memo at 22-23.[15] To the contrary, Mr. Spiegel has conceded in sworn

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[13] Plaintiffs also distort the Permit and the testimony of Agency employees, stating over and over again that "The Agency admits that any dwelling on Lot 39 will be readily visible from Route 86." Spiegels' Memo at 13; *see also id.* at 3, 4, 9, 12. They thus attempt to cast the Agency's lower speed limit applicable to the ridgeline lots as just the opposite: permission to go very fast. Repetition does not make the claim any more convincing. *See* 2009 Parker Aff. Exh. 1 (Permit).

[14] The Spiegels' attempt to make the Agency defend the terms of the 1988 Permit as a defense to their claim of selective enforcement is also entirely untimely. The Permit is "the functional equivalent of a zoning law." May 8, 2008 Oral Arg. Tr. at 29. It was issued "upon a majority vote of Agency members on April 22, 1988." Permit at 20. Rather than challenging the terms of the Permit, the sponsor recorded it on May 4, 1988. Permit at 21. The opportunity to challenge the Permit's terms expired more than 20 years ago. Exec. L. § 818(1) (60-day statute of limitations).

[15] The Spiegels' claim that the home of the Agency's counsel violates the "Adirondack Park's overall building height limit," reveals the depth of the Spiegels' misapprehension of the Act. *See* Spiegels' Memo at 23 and n.10. There is no overall building height limit. 2009 Banta Aff. ¶ 24; Exec. L. § 810 (Class A projects). Moreover, as set forth in his affidavit, Mr. Banta's house existed before 1973 and is therefore grandfathered under the Act. 2009 Banta Response Aff. ¶¶ 22-23; *see* 9 NYCRR § 573.6.

statements that he always thought his house measured only 42 feet: a clear Permit violation. *See* APA SMF ¶ 142.

The Spiegels' specific "measurement" complaints are also meritless. The Spiegels claim that the Agency's methodology has changed over the years. *Id.* at 23. It has not. 2009 LaLonde Response Aff. ¶ 16; 2005 LaLonde Reply Aff. ¶¶ 6-7. Shaun LaLonde has explained clearly (and repeatedly) how the Agency measures height,[16] an explanation that is provided in a flyer published by the Agency and made available on its website. APA SMF ¶¶ 118-119; 2005 LaLonde Reply Aff. ¶¶ 6-7. The Permit establishes the starting and ending points for the application of the Agency's measurement method. Permit Cond. 7(g); 2009 Sengenberger Response Aff. ¶¶ 43-45.

Finally, the Spiegels attack the Agency for allegedly erroneous findings of facts in the Final Order. Specifically, they challenge the Agency's purported findings regarding "tree cutting" and steep slopes. Spiegels' Memo at 23-24. Again, the Spiegels may not collaterally attack the Final Enforcement's findings in this forum. *See* Point I, *supra; see also Cahill v. Harter*, 277 A.D.2d 655, 656 (3d Dep't 2000) (failure to timely challenge either 1991 consent order or 1995 administrative order foreclosed "collateral attack [on] the propriety of the orders in this enforcement proceeding"). Even if they could, this claim is a "straw man." The Agency neither alleged nor found that the Spiegels violated any Conditions other than 15(g), (i) and (j). Counterstatement ¶ 111. The Spiegels' assertion that they did not pass a school bus, even if true, is irrelevant and constitutes no evidence of Agency irrationality.

[16]It is undisputed that the Agency measures height differently from most Adirondack municipalities, which also measure differently from one another. This is appropriate because the various measurement methods serve different purposes. *See, e.g.*, Privitera Aff. Exh. M (LaLonde Depo. Exh. 10 at 7).

Because the Spiegels cannot establish that there are others to whom they are similarly situated or compared to whom they were intentionally treated differently, and because they also cannot establish that the Agency's actions were irrational, they are not entitled to summary judgment.

E. There Is No Evidence Of Malice

"[C]ases predicating constitutional violations on selective treatment motivated by ill-will, rather than by protected-class status or an intent to inhibit the exercise of constitutional rights, are lodged in a murky corner of equal protection law in which there are surprisingly few cases and no clearly delineated rules to apply." *Bizzarro*, 394 F.3d at 86. Frequently alleged, *LeClair* claims *(LeClair v. Saunders*, 627 F.2d 606, 608 (2d Cir. 1980)) are rarely proven. *Bizzarro,* 394 F.3d at 86 (collecting cases). "[W]holly speculative" claims of malice are insufficient on a motion for summary judgment. *Harlen Assocs.*, 273 F.3d at 503. "To prevail, plaintiffs must prove that the disparate treatment was *caused by* the impermissible motivation. They cannot merely rest on a showing of disparate treatment." *Bizzarro*, 394 F.3d at 87 (emphasis original).

(1) Political Animus

First, the Spiegels again assert the existence of a "political animus" stemming from nothing more than the difference in the political party affiliations of defendant Van Cott and plaintiff Arthur Spiegel. Spiegels' Memo at 12. After a dozen depositions and nearly three years of paper discovery, plaintiffs have added to the naked allegations in the Amended Complaint two "facts" in support of Mr. Van Cott's alleged animus: He once had a conversation with the Chairwoman of the Essex County Democratic Party about

this lawsuit after it was filed and defense counsel asked plaintiff Margaret Spiegel to state her political affiliation at her deposition. *See* Spiegels' Memo at 13; Privitera Aff. ¶ 99.

Both of these "facts" took place as a direct result of the filing of the Complaint in February 2006. Accordingly, neither could establish that the Agency or Mr. Van Cott had improper motives in 2004 or 2005. The Spiegels provide no authority for the astonishing proposition that a question asked in a deposition by a defendant's attorney could constitute "proof" of anything, much less of a client's motives during events that occurred 3 years previously. In this case, of course, the Spiegels made their political affiliations an issue. Am. Compl. ¶¶ 13-16 (stating the Mr. Spiegel is a Republican; alleging on information and belief that Mr. Van Cott is a Democrat; and alleging that "this political tension created a political animus toward Plaintiffs").

Even if Mr. Van Cott's post-Complaint conversation with a friend could prove that he acted with improper motive, the Spiegels distort Mr. Van Cott's testimony about the conversation at issue. In response to a question about whether he had ever talked to anyone who held "an official position in the Democratic party," Mr. Van Cott testified that he had talked to Sue Montgomery Corey, a friend who is also the Chair of the Essex County Democratic Party. He testified that he spoke with Ms. Corey "after the filing of a federal complaint in this matter." Van Cott Depo. Tr. at 99. There is simply no basis for plaintiffs' claim that Mr. Van Cott could not remember the timing of the conversation. Spiegels' Memo at 13. Likewise, plaintiffs mislead the Court to the extent that they imply that Mr. Van Cott had more than one conversation with Ms. Corey or that he spoke to "others in the Democratic Party." *Id.* The Spiegels do not even suggest that the substance of the conversation (the allegations in their Complaint) was improper; they

merely hope the Court will infer impropriety from the fact that it occurred (while obfuscating the fact that it occurred after the filing of the Complaint). There is no dispute that the Complaint's inflammatory allegations were the subject of much media attention. *See* Van Cott Depo. Tr. at 99-100; May 8, 2006 Oral Arg. Tr. at 4 (Mr. Privitera: I expected to have to approach side bar with [a preliminary matter] because *I expected the press to be here. There's been a lot of interest*) (emphasis added). Both of these alleged "facts" occurred years after the Agency enforcement proceeding and could provide no evidence of Paul Van Cott's motive in 2004 and 2005. Instead, it was the Spiegels' own very public accusation that triggered the conversation and the deposition question.

In *B&B Coastal Enterp., Inc. v. Demers*, 276 F. Supp.2d 155 (D. Me. 2003), the District of Maine found insufficient slightly more substantial claims. There, a plaintiff alleged that a Town Code Enforcement Officer enforced a town sign ordinance with malice, which was manifested in a comment allegedly directed at the restaurant's table umbrellas, some of which bore the legend "Hebrew National."

> Plaintiff has not shown to the satisfaction of the Court that Mr. Demers and the Town's enforcement of the ordinance was based *at all* upon any sort of religious animus or bias or upon any form of speech discrimination. At most, Plaintiff has shown that Mr. Demers inspected the premises of Bartley's Dockside Restaurant, found them to be in violation of the ordinance for good reason, and continue in his efforts to see that Bartley's complied with the sign ordinance because of the numerous complaints he had received from neighbors regarding the excessive number of signs Bartley's had on its premises. Such a motive on the part of Mr. Demers or the Town is not equivalent to an unconstitutional religious bias or to speech discrimination, nor does it show malicious or bad-faith intent to injure, as is required to make out a selective enforcement claim.

276 F. Supp.2d at 171-172. Even less is presented here. Mr. Spiegel's deposition testimony makes clear that the Spiegels' allegations are supported by nothing more than his feeling that "there's something wrong with what's going on here." APA SMF ¶ 226

(A. Spiegel Depo. Tr. at 81-82). When pressed for details, Mr. Spiegel relied on a newspaper article that, like the smoking gun conversation and the smoking gun deposition question, post-dated the filing of the Complaint. *Id.* (A. Spiegel Depo. Tr. at 81-83). Unsubstantiated, speculative assertions regarding the enforcing agency are not evidence of malice.

(2) Alleged Violations of Protocol

As evidence of malice, the Spiegels also rely heavily on the Agency's alleged violations of the rigid protocol they have conjured out of whole cloth. Spiegels' Memo at 13-18; Privitera Aff. ¶¶ 65-89.

To the extent that there is a general enforcement protocol, it is not rigid. 2009 Banta Aff. ¶¶ 6-7; APA Counterstatement ¶¶ 58, 75, 83, 123, 125, 127. In fact, the guidelines that form the basis for the general protocol that exists expressly state that they "are not intended to create any substantive or procedural rights, [e]nforceable by any party in administrative or judicial litigation with the State of New York." APA Counterstatement ¶ 58. The Guidelines further state that the Agency has the right to act at variance with the Guidelines and to evaluate each case based on its "particular facts and circumstances." *Id.* And, even if the Agency had a rigid protocol that it failed to follow, it would not establish a constitutional violation. Absent some underlying constitutional wrong, a violation of procedure would not give rise to an actionable claim pursuant to 42 U.S.C. § 1983. *See United States v. Cáceres*, 440 U.S. 741, 749-57 (1979); *Cotz v. Mastroeni*, 476 F. Supp.2d 332, 373 n.44 (S.D.N.Y. 2007) (alleged violation of town police department policy gives rise to no cognizable claim under § 1983). Claims that an agency failed to follow its internal rules typically sound in due

process, not equal protection. *See, e.g., Schweiker v. Hansen,* 450 U.S. 785, 789-90 (1981) (Social Security field representative's failure to follow Agency's claims manual did not violate the Constitution); *Howard*, 481 F. Supp.2d at 305-06 (Planning Board's failure to follow its own regulations did not state a due process violation). The district court has already dismissed plaintiffs' due process claims.

Moreover, the Agency did not deviate from its general practices. 2009 Banta Response Aff. ¶¶ 6-18; 2009 Van Cott Response Aff. ¶¶ 9-19. But even if it had, it would not prove malice. To make out a *LeClair* claim, the Spiegels must have "proof of disparate treatment *and* impermissible motivation." 394 F.3d at 87 (emphasis added). Alleged disparate treatment itself does not supply the requisite evidence of malice. *Bizzarro*, 394 F.3d at 87. The Spiegels' cobbled list of discrete instances in which they claim to have been treated differently from all other Fawn Ridge homeowners fails even to state a claim under *LeClair,* much less to satisfy the summary judgment standard. *Id.*

(3) The Agency's Defense Of Its Permit

Plaintiffs also claim that malice is obvious because "the Agency refuses to acknowledge that the Permit [] is void." Spiegels' Memo at 17. The Permit is not void. Sengenberger Response Affidavit ¶¶ 20-25. Plaintiffs' claim that the Permit is "void" is both a legal argument and brand new. In 2005, plaintiffs asked the Agency to modify the Permit (which presumes its validity), not to declare it void. *See* RNOI (Exh. WWto Privitera Aff.); Am. Compl. ¶¶ 4, 67. Even the Amended Complaint does not allege that the Permit is void. Am. Compl. ¶¶ 1-153. Plaintiffs' "newly minted" theory that the

Permit is invalid, never presented to the Agency, cannot constitute evidence of the Agency's alleged malice in 2004 and 2005.[17]

The Agency's position on a legal argument cannot provide proof of malice. A New York Supreme Court judge recently rejected precisely the same argument made against the Agency and defendant Van Cott. In *Harrington v. APA*, Index No. 2008-1278 (Franklin Co. Sup. Feb. 25, 2009), petitioners alleged that Mr. Van Cott's "prejudice is demonstrated by his biased interpretation and application of regulatory provisions." Supreme Court held that

> As an employee of the Adirondack Park Agency, serving as its Enforcement Attorney, interpretation and application of regulations as well as appearing before that Agency's Enforcement Committee to argue Notices of Apparent Violation[s] . . . constitute his job duties. Absent specific factual allegations or proof of bias which served to effect the Enforcement Committee's determination in this matter, the fact that family members own nearby lake property is insufficient to demonstrate personal bias. Without more, general suspicions of VanCott's personal bias will not affect the outcome of this case.

Harrington, Index No. 2009-1278 at 11 (Appx. 2). The Agency's unwillingness to adopt plaintiffs' legal argument is not evidence of malice.

(4) The Smoking Gun "Emails"

Finally, because they have no actual evidence of malice, the Spiegels plead for an inference of malice based on the alleged destruction of electronic evidence. First, the Spiegels cannot wield an eleventh hour spoliation claim as a sword on a motion for summary judgment, especially where they have not collaborated or even conferred with

[17]Factually, even if the Agency's legal position that the Permit is not void could constitute evidence of malice, it would constitute evidence of the Agency's malice toward all Fawn Ridge residents, not just the Spiegels. It would provide no evidence that the Agency had singled them out from among all Fawn Ridge owners and would not support their selective enforcement claim.

opposing counsel, availed themselves of the tools available to them in the discovery process, or sought the Court's assistance through a motion to compel.

Spoliation claims are ordinarily advanced by motion to compel during or immediately following discovery. *See, e.g., Tri-County Motors, Inc. v. American Suzuki Motor Corp.*, 301 Fed. Appx. 11, 14 (2d Cir. 2008) (district court did not abuse its discretion in denying motion for sanctions). A spoliation claim can also assist a party resisting a summary judgment motion. *See, e.g., Byrnie v. Town of Cromwell Bd. of Ed.*, 243 F.3d 93, 107 (2d Cir. 2001). "In borderline cases, an inference of spoliation, in combination with 'some (not insubstantial) evidence' for the plaintiff's cause of action, can allow the plaintiff to survive summary judgment." *Byrnie*, 243 F.3d at 107 (*quoting Kronisch v. United* States, 150 F.3d 112, 128 (2d Cir. 1988)). But what the plaintiff has thus achieved is "a jury trial," where plaintiff then "may rely on circumstantial evidence to suggest the contents of destroyed evidence," in an effort to persuade the jury "based on the strength of the evidence presented, whether the documents likely had such content." *Byrnie*, 243 F.3d at 110. In other words, plaintiff has succeeded in raising a question of fact, not establishing one. The State is aware of no cases, and plaintiffs have cited none, where a party used a surprise eleventh-hour spoliation allegation as a sword on a motion for summary judgment months after the close of discovery.

Moreover, there was no destruction of evidence. 2009 Kreider Response Aff. ¶¶ 1-14; 2009 Brenner Response Aff. ¶¶ 1-10. The two 2006 "blank emails" are not blank, are not emails, and were not tampered with. One contains text and is not blank. *See* Privitera Aff. Exh. JJJ. Both are appointments. 2009 Kreider Aff. ¶ 6. The metadata indicating that the messages had been "modified" referred to the date on which Agency

IT personnel extracted the messages for privilege review and production to plaintiffs. 2009 Kreider Response Aff. ¶ 12; 2009 Brenner Response Aff. ¶¶ 8-9. Agency staff cannot modify emails. 2009 Brenner Response Aff. ¶ 9; 2009 Kreider Response Aff. ¶¶ 9, 13-14.

Plaintiffs knew in the summer of 2008 that the messages were probably appointments and they failed to follow up with counsel or in depositions. 2009 Taylor Response Aff. ¶¶ 20-21 and Exhs. 19, 20. Nor have they raised the "modification" issue during the past two years. *Id.* ¶ 21, 30. The "spoliation" claim has no merit.[18]

F. Judicial Notice of Adjudicative Facts

Because they cannot establish their entitlement to selective enforcement on the facts or the law, plaintiffs' last Hail Mary pass is a request that the Court take "judicial notice" of the current conditions at the site "and the actual visual impact of Fawn Ridge and its homes." Spiegels' Memo at 24.[19] The Spiegels revealingly assert that "the critical adjudicative fact in this proceeding" is the "observable conditions concerning Fawn Ridge." *See* Spiegels' Memo at 24.[20] This amounts to a confession that this case is not, in fact, about "invidious discrimination" or even irrationality in 2004 or 2005 but, instead, about whether the Agency's findings in the Final Enforcement Order were correct. They ask the Court to substitute its judgment for that of the Agency.

Plaintiffs' opportunity to challenge the Agency's findings was within 60 days of the September 7, 2005 Final Enforcement Order and the proper forum was New York

[18] Because the State disputes the factual basis for the spoliation claim with relevant and admissible evidence, it cannot, in any event, advance plaintiffs' motion for summary judgment. *Byrnie*, 243 F.3d at 109 (party seeking to benefit from an inference must "make out the usual elements of a spoliation elaim").
[19] Because the Spiegels withheld the photos now attached to the 2009 Affidavit of Arthur Spiegel, they cannot use them on this motion. *See* 2009 Taylor Response Aff. ¶¶ 49-51.
[20] The Spiegels again make accusations not based in fact. By letter dated December 21, 2005, defense counsel advised the Spiegels' attorney of the Agency's intention to visit the site. 2009 Taylor Response Aff. ¶ 52 and Exh. 35 (December 21, 2005 letter).

State Supreme Court. *See Bizzarro*, 394 F.3d at 88-89 (*Olech* does not empower federal courts to review for correctness). Although the Agency has no objection to the Court making a visit, Federal Rule of Evidence 201 is not properly invoked for the purpose proposed by the plaintiffs.

CONCLUSION

For the reasons set forth in this memorandum, in the accompanying affidavits and exhibits, and in the Agency's papers submitted in support of its motion for summary judgment, the Court should deny the plaintiffs' motion for summary judgment.

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