STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

ADIRONDACK PARK AGENCY and
THE STATE OF NEW YORK,

Plaintiffs,

Index No.: 000301-06

-against-

Hon. Robert J. Muller

ARTHUR SPIEGEL and MARGARET SPIEGEL

Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT ORDERING AMELIORATION PURSUANT TO EXECUTIVE LAW 813(2)

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PRELIMINARY STATEMENT

On April 17, 2006, the Adirondack Park Agency and State of New York (collectively "the Agency") commenced this action against homeowners Arthur and Margaret Spiegel ("the Spiegels") to enforce Agency Permit No. 87-28 ("Permit"), which the Agency issued to a developer in 1987. The Permit allowed the developer to create the Fawn Ridge subdivision in the Town of North Elba, New York, near Lake Placid in the Adirondack Mountains and sell individual lots to homeowners.

The Spiegels purchased Lot 39 and commenced construction of their home in 2004. The home was substantially built when the Agency advised the Spiegels that they were in violation of the developer's Permit, which granted approval for that subdivision. On September 7, 2005, the Agency issued a Final Enforcement Order requiring the Spiegels to bring their home on Lot 39 into compliance with the Permit. That Permit, however, was never before monitored or enforced by the Agency. Notably, a significant number of existing homes in Fawn Ridge also violate the Permit, but none had been forced to comply with the Permit.

Accordingly, the Spiegels' commenced a federal action alleging that the Agency's enforcement action against them was unconstitutional selective enforcement. (*Spiegel v. Adirondack Park Agency, et al.*, United States District Court for the Northern District of New York, Case No. 8:06-CV-203, DRH/WKS). This action was voluntarily stayed pending the final judgment in a related federal court action that the Spiegels had commenced in February 2006.

On September 18, 2009, the United States District Court for the Northern District of New York (Hon. William K. Sessions III) issued a decision and final judgment in the federal action. The United States District Court determined that a reasonable jury could find that the Spiegels were similarly situated to some of the other Fawn Ridge homeowners and that the Agency

treated them differently, however, the difference in treatment was rationally related to the Agency's regulation of the development in the Adirondack Park, which takes visual impacts into consideration. Accordingly, the United States District Court granted summary judgment to the Agency and several of its officials dismissing the Spiegels' equal protection.

It is now time for this Court to finally decide this matter. In fact, the Spiegels welcome the opportunity for this Court to enter an order enforcing the Agency's Final Enforcement Order. The Spiegels seek the Court's guidance, intervention and fair consideration of the instant motion for summary judgment because (1) the Spiegels have not violated the Final Enforcement Order; (2) the Final Enforcement Order does not instruct the Spiegels how to bring their home into compliance with the Permit; and (3) New York law requires this Court's exercise of its equitable powers in fashioning a remedy in this case.

As the Agency readily admits, the essence of this action concerns the visual impact of the Spiegels' partially built home in the Fawn Ridge subdivision overlooking the village of Lake Placid. This Court must now make a determination and issue an order that effectively "ameliorates" the visual impact that the Agency finds offensive. As set forth more fully below, the resolution of this action requires this Court to exercise its broad equitable powers pursuant to Executive Law § 813 and fashion a remedy to "ameliorate" the Spiegels' violations of the Permit. Sitting in equity, this Court is bound only by fairness and justice.

In its pending motion for summary judgment, the Agency asks this Court to enter an order requiring the Spiegels to destroy their partially-built home and rebuild it in accordance with the terms of the Permit (i.e., 30 feet tall in a location approximately 25-30 feet upslope from its current location). However, the Agency has declined to provide this Court with any evidence demonstrating the effect that this would have on the visual impact of Lot 39.

Therefore, the Spiegels make this motion for summary judgment pursuant to CPLR 3212 and Executive Law § 813 seeking an order requiring them to "ameliorate" their violations of the Permit by lowering the current structure by nine (9) feet and planting various vegetative screening. The Spiegels support this motion by providing this Court with expert analysis comparing the visual impact of the Spiegels' current partially-built home with their proposed resolution and with that of the Agency. As demonstrated below, the Spiegels' motion for summary judgment should be granted (and the Agency's motion for summary judgment should be denied) because the Spiegels' proposed project will effectively "ameliorate" their inadvertent Permit violations, without the destruction of their home, as the Agency seeks.

FACTS

The facts pertinent to this action have been extensively briefed by both parties. (See Spiegels' Memo in Opposition to Agency's Motion for Summary Judgment, dated October 10, 2006, pp. 2-5; Agency's Memo in Support of Summary Judgment, dated August 11, 2006, pp. 1-14).[1] In addition, the United States District's Opinion and Order dismissing the Spiegels' equal protection claims against the Agency contained significant findings of fact that are now binding on the parties pursuant to the doctrines of *res judicata* and collateral estoppel.[2] Accordingly, the Spiegels will not seek to re-litigate any facts on this motion.

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[1] To the extent that there are discrepancies in the parties' previous recitations of fact, none are material to the scope of this action (i.e., this Court's order to "ameliorate" the violations pursuant to Executive Law § 813).

[2] "The doctrine of *res judicata*, or claim preclusion, is designed to 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.'" Insurance Co. of the State of Pa. v. HSBC Bank USA, 10 N.Y.3d 32, 38 (2008), *citing* Allen v. McCurry, 449 U.S. 90, 94 (1980). Similarly, the doctrine of collateral estoppel "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 or those in privity". Church v. N.Y. State Thruway Auth., 16 A.D.3d 808, 810 (3d Dep't 2005), *citing* Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500 (1984); see also Buechel v. Bain, 97 N.Y.2d 295, 303-04 (2001), *cert. denied* 535 U.S. 1096 (2002).

In its September 18, 2009 Opinion and Order ("Federal Order"), the United States District Court found several key facts that are pertinent to this motion for summary judgment. (A copy of the Federal Order is attached as Exhibit "D" to the Lamme Affirmation). The federal court found the following:

1. "Fawn Ridge is located within 1000 feet of an intensely developed commercial strip on New York State Route 86." (Federal Order, pg. 2).

2. The Permit recognizes that "[s]everal lots would be readily visible from adjoining residential and commercial establishments...Lots 39 and 40 were principally or entirely open field at the time, and dwellings on other lots might also be visible if their height were to exceed the tree canopy." (Federal Order, pp. 2-3).

3. The Permit contains several conditions that are binding on Lakewood Properties, Inc. ("Lakewood") and the Nettie Marie Jones Trust ("Trust"), as project sponsors and "permittees" of the Fawn Ridge subdivision. The Permit states that the project sponsor's failure to comply with any of the conditions voids the permit. (Federal Order, pp. 3-4).

4. Both Lakewood and the Trust conveyed deeds to dozens of lots in Fawn Ridge that did not contain the thirty foot building height restriction, in violation of the Permit. (Federal Order, pg. 4).

5. "The Agency has not taken action against Lakewood or the Trust for violating conditions of the Permit." (Federal Order, pg. 4).

6. "In 1994 the Spiegels acquired Lot 39, a premier lot in the subdivision. The deed to Lot 39 contained a thirty-five foot height limitation rather than the thirty foot restriction required by the Agency Permit." (Federal Order, pp. 5-6).

7. "Lot 39 was historically a ski slope, a wide open field of grass, small brush and blueberry bushes. In the late 1980's, about the time the Permit issued, Lot 39 contained open views of Lake Placid and Whiteface Mountain. The Permit expressly recognized the open character of the lot." (Federal Order, pg. 6).

8. Although the Permit contained a provision requiring homes for ridge line lots 39-41 and 50-54 to be located at least twenty feet back from the abrupt change in slope at the top of the hill, the Permit does not define the "abrupt change in slope". (Federal Order, pg. 4).

9. In 2004, the Spiegels obtained approval for the design and construction of their home on Lot 39 from the Town of North Elba and the Fawn Ridge Architectural Review Committee. (Federal Order, pg. 6).

10. The Agency opened an enforcement file on September 24, 2004, after the Spiegels' neighbor—"whose view would be impeded by construction on Lot 39"—complained to the Agency. (Federal Order, pg. 6). The Agency believed that the alleged violation was a "minor violation of the height restriction", so it sent a letter to the Spiegels and closed the file. (Federal Order, pp. 8-9).

11. The Spiegels' neighbors called the Agency several more times to complain about the construction on Lot 39. On February 3, 2005, the Agency re-opened the file and assigned an enforcement investigator. (Federal Order, pg. 9).

12. The Spiegels voluntarily agreed to stop construction on their home pending the Agency's investigation. (Federal Order, pg. 9).

13. "Between September 2004 and February 2005 the Spiegels had poured a foundation, commenced framing, and had incurred substantial construction costs." (Federal Order, pg. 9, n.2).

14. On April 15, 2005, the Agency commenced an enforcement proceeding to suspend the Permit with respect to Lot 39." The Notice of Intent alleged that the Spiegels violated the Permit by (i) failing to locate their house at least twenty feet back from the abrupt change in slope, (ii) failing to allow successional tree growth to occur, and (iii) building a house that exceeds the thirty foot height limitation. (Federal Order, pg. 11).

15. The Agency's administrative enforcement complaint "acknowledges that there may be other previously built homes in the Fawn Ridge subdivision that exceed the thirty foot height restriction." (Federal Order, pg. 11).

16. "The Agency remained concerned about the house's visibility; although Lot 39 is a former ski slope and the Permit's findings acknowledge the likelihood that a dwelling on Lot 39 would be readily visible..." (Federal Order, pg. 12).

17. "In response to the Notice of Intent, the Spiegels submitted a written request to modify the terms of the Permit as to their property, and waived an adjudicatory hearing. In support of their request the Spiegels argued:

a) their deed contained a building height restriction of thirty-five, not thirty feet as required by the Permit, and Lakewood never provided a copy of the Permit;

b) they had complied with all building and zoning requirements for the Town, had received the appropriate permits and passed several inspections;

c) they were never notified by the Town, the Fawn Ridge Architectural Review Committee, their contractors or the Agency that their building plans violated the Permit;

d) the Agency delayed notifying the Spiegels of the alleged violations until months after it received the complaint and the Spiegels began construction;

e) no vegetation had been removed from the lot that would have qualified as successional growth;

f) the facade of the building would blend into its surroundings once the exterior was finished and screening vegetation planted; and

g) the Spiegels' house was not the only dwelling out of compliance with the Permit." (Federal Order, pp. 12-13).

18. Nevertheless, on September 7, 2005, the Agency issued a Final Enforcement Order that found the Spiegels in violation of three Permit Conditions that were designed to reduce the visual impact of new construction. As such, the Agency declined to modify the Permit and suspended the Permit with respect to Lot 39. (Federal Order, pg. 14).

19. Thereafter, the Agency opened enforcement files on other ridge line homes in Fawn Ridge to determine their compliance with the Permit." (Federal Order, pg. 14). However, "[a]lthough the Agency opened investigative files on each of the alleged violations, no other Fawn Ridge homeowner has received a cease and desist order, and no other enforcement proceedings have been brought." (Federal Order, pg. 21).

20. The Spiegels did not appeal the Final Enforcement Order, and the matter was referred to the Office of the Attorney General on December 7, 2005. (Federal Order, pg. 14).

These twenty findings of fact, as to which there can be no dispute, are material to this Court's fair disposition of this case.

ARGUMENT

Standard of Review

The standard for summary judgment under CPLR 3212 is well-settled. The movant must establish its entitlement to judgment by tendering sufficient evidence to eliminate any material issues of fact from the case. Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 853 (1985). Once the movant satisfies its burden, it is incumbent upon an opposing party to come forward with admissible proof of a genuine issue of fact relative to the cause of action. Iseline &

Co. v. Landau, 71 N.Y.2d 420, 425 (1988); Ferber v. Sterndent Corp., 51 N.Y.2d 782, 783 (1980). Such issues of fact must be bona fide issues raised by evidence in admissible form. Spearmon v. Times Square Stores Corp., 96 A.D.2d 552 (2d Dep't 1983). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment. Zuckerman v. New York, 49 N.Y.2d 557, 562 (1980).

POINT I

THIS COURT SHOULD GRANT SUMMARY JUDGMENT TO THE SPIEGELS BY EXERCISING ITS STATUTORY POWERS TO ORDER AMELIORATION OF THE PERMIT VIOLATIONS IN THE INTEREST OF JUSTICE

This action is guided by Section 813(2) of the Park Act, which reads as follows:

> Alternatively or in addition to an action to recover the civil penalties provided by subdivision one of this section, the attorney general may institute in the name of the agency any appropriate action or proceeding to prevent, restrain, enjoin, correct or abate any violation of, or to enforce, any provision of this article or any rule or regulation promulgated by the agency, or the terms or conditions of any order or permit issued by the agency pursuant to this article. ***The court in which the action or proceeding is brought*** may order the joinder of appropriate persons as parties and ***may order the appropriate person or the person responsible for the violation to take such affirmative measures as are properly within its equitable powers to correct or ameliorate the violation, having regard to the purposes of this article and the determinations required by subdivision ten of section eight hundred nine.***

N.Y. Exec. Law § 813(2) (McKinney 2005) (emphasis supplied).

This section of the Park Act directs that once the Attorney General commences an action "to prevent, restrain, enjoin, correct or abate any violation" of an Agency's permit—as the Attorney General has done here—the Court then becomes empowered to order measures that it determines would best "ameliorate" (not correct) the violation. See N.Y. Exec. Law § 813(2). Merriam-Webster's dictionary defines "ameliorate" to mean "make better or more tolerable".[3]

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[3] See http://www.merriam-webster.com/dictionary/ameliorate (last visited November 1, 2009).

Any other reading of Executive Law § 813(2) would strip the Park Act of its plain, intended meaning. See Lewis Family Farm, Inc. v. Adirondack Park Agency, 64 A.D.3d 1009, 1013 (3d Dep't 2009) (affirming the annulment of an Agency determination that ignored the clear and unambiguous language of the Park Act and stating that "[t]he primary goal of statutory interpretation is to 'ascertain and give effect to the intention of the Legislature'").

This Court's equitable discretion is bounded only by reference to the general purpose of the Park Act and, more specifically, Executive Law § 809(10), which itemizes the factors that the Agency must consider in determining whether or not to grant a permit. As shown more fully below (see POINT II, *infra*), the Spiegels proposed amelioration project (see Spiegel Aff., Ex. F) is fully permit-able and consistent with the Park Act. Therefore, an order directing this amelioration is well within the bounds of this Court's equitable powers.

A. Legislative History

Here, the legislative history of this Park Act amendment supports the plain reading of the statute. In 1976, the Legislature amended the Park Act to bestow the courts with equitable power to "ameliorate" any violation. This amendment was necessary because the Park Act's original enforcement scheme had "proven to be unduly rigid". See 1976 N.Y. Sessions Laws, ch. 898, pg. 2403.[4] The legislative history of this statutory amendment reveals the following:

1. The Legislature sought to give courts the equitable power to order those responsible for violations "to take ***some*** affirmative measure to correct the violation." (See Assembly Bill No. 12604-A, June 11, 1976) (emphasis supplied).

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[4] When the Park Act was first enacted in 1973, all violations were classified as criminal misdemeanors punishable by a fine and/or imprisonment. See 1973 N.Y. Sessions Laws, ch. 348, pg. 587.

2. ***The Legislature intended for courts sitting in equity to define the corrective actions that must be taken to correct violations of the Park Act.*** (See Assembly Bill No. 12604-B, July 9, 1976).

3. The Executive Law § 813 amendment "would clarify the equitable powers of the court...That is, the court would be given the clear power to find other parties responsible for a violation (e.g., the subdivider vs. a current landowner), and to fashion a remedy agreeable and in the best interest of all parties." (See Assembly Bill No. 12604-B, July 9, 1976).

4. The Chairman of the Adirondack Park Agency issued a letter supporting the amendment of Executive Law § 813 and recognizing that the amendment will provide the courts with broad equitable powers to resolve violations of the Park Act. (See Letter of Chairman Flacke to the Governor's Counsel, July 2, 1976).

(See Bill Jacket to Executive Law § 813 amendment, 1976, ch. 898) (entire contents are attached as Ex. N to Lamme Aff.).

It is well settled that "once equity is invoked, the court's power is as broad as equity and justice require." Norstar Bank v. Morabito, 201 A.D.2d 545, 547 (2d Dep't 1994); Buteau v. Biggar, 65 A.D.2d 652, 653 (3d Dep't 1978); London v. Joslovitz, 279 A.D. 280, 282 (3d Dep't 1952). "The fact that there is no precedent for the precise relief sought is of no consequence" because a court sitting in equity is not constrained by any restrictive or inflexible rules. London, 279 A.D. at 282; Ripley v. Int'l Railways of Cent. Am., 8 A.D.2d 310, 328 (1st Dep't 1959) (stating that "the flexibility of equitable jurisdiction permits innovation in remedies to meet all varieties of circumstances which may arise in any case").

Thus, it is fair to infer that the Legislature was aware of this well-established body of law when it decided to amend the Park Act to give the courts broad authority to settle violations. Accordingly, this Court is empowered to resolve the Spiegels' violations of the Permit in any manner which it deems to be just, fair and equitable.

A. The Spiegels' Proposed Remedy Will Eliminate the Adverse Visual Impact

The Spiegels ask this Court to enter an order that "ameliorates" their inadvertent Permit violations, pursuant to Executive Law § 813, by requiring them to lower the height of their partially-built home by nine (9) feet and plant vegetative screening. (See Proposed Remedial Measures, attached as Ex. F to Spiegel Affidavit). According to the visual impact expert report by Environmental Design & Research, Landscape Architecture, Planning, Environmental Services, Engineering and Surveying, P.C. ("EDR"), this proposed remedy would substantially reduce the visual impact of the Spiegel home, which the Agency admits is its sole concern. (See Hecklau Aff., Ex. B). In fact, the Spiegels proposed remedy would:

- Make the Spiegels' home 10% lower than the average home in Fawn Ridge. (See Marvin Aff., ¶ 10).
- Make the Spiegels' home lower than all but two (2) homes on the ridge line. (See Lamme Aff., ¶ 19).
- Make the Spiegels' home lower than 23 existing homes in Fawn Ridge. (See Lamme Aff., ¶ 18).
- Have a quasi-penalty effect of requiring the Spiegels to incur approximately $115,000.00 in additional costs. (See Spiegel Aff., ¶¶ 18-21).

- Make the Spiegels' home no more visible than the other ridge line lots that are clearly visible from public vantage points. (See Spiegel Aff., ¶ 14, Exs. C, D and E).
- Effectively screen the Spiegels' home from visibility when viewed from Route 86, the main commercial street in Lake Placid, (see Hecklau Aff., Ex. B), which addresses the Agency's chief concern with the other Fawn Ridge homes that violate the Permit. (See Lamme Aff., Ex. M; see also Agency's Final Enforcement Order, Ex. E to Lamme Aff.).

Most importantly, according to the EDR visual impact expert, the Spiegels' proposed amelioration project will have the virtually the same visual impact as a "compliant" house (e.g., 30 feet tall, and 20 feet back from the "abrupt change in slope").[5] (See Hecklau Aff., ¶ 6 and Ex. B thereto).

While this proposed remedy eliminates the adverse visual impact of the Spiegels' Permit violations, it does not render the home invisible. Therefore, the Spiegels propose to implement an extensive vegetative screening and landscaping plan that requires the planting of forty-seven (47) trees and bushes in an effort to further reduce any remaining visual impact of the home on Lot 39. (See Spiegel Aff., ¶ 17 and Ex. F). However, as the Agency itself acknowledged in the Permit, a home on Lot 39 will have some visual impact because Lot 39 is "principally or entirely open field" and it will be "***readily visible***" from many commercial areas and portions of Lake Placid within two miles of the Fawn Ridge subdivision. (See Permit, Ex. 2 to Complaint, pp. 10-

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[5] Even though the United States District Court found that the Permit does not define where the "abrupt change in slope" is located (see Federal Order, pg. 4, Ex. D to Lamme Aff.), the Agency summarily claims that the "abrupt change in slope" occurs at elevation contour 1946. (See Compl., ¶ 88). For purposes of this motion, the Spiegels do not contest this claim, and EDR has performed its visual impact simulation of the Agency's idea of a "compliant" house based on this representation. (See Hecklau Aff., ¶ 5 and Ex. B).

11) (emphasis supplied). Therefore, the Spiegels' proposed remedy reduces the visual impact of the home beyond even what the Agency anticipated when it first issued the Permit.

B. The Agency's Proposed Remedy Is Unjust, Unfair and Inequitable

The Agency also asks this Court to utilize its equitable powers pursuant to Executive Law § 813(2), only the Agency seeks the drastic and unnecessary remedy of requiring the Spiegels' to destroy their partially-built home. (See Complaint, WHEREFORE clause, ¶ 2). Incredibly, the Agency admitted that it has not performed any analysis to determine the visual impact of the remedy that it seeks (i.e., a "compliant" house that is 30 feet tall, and at least 20 feet back from the "abrupt change in slope"). (See Lamme Aff., ¶ 23). Of course, EDR has concluded that the visual impact of the Agency's proposed remedy is virtually the same as the Spiegels' proposed remedy. (See Hecklau Aff., ¶ 6 and Ex. B). Thus, it would be unjust to require the Spiegels to destroy the $300,000 investment in their home to accomplish a result that can be achieved with less drastic means. (See Spiegel Aff., ¶¶ 13, 18-21).

1. The Agency Seeks a Civil Penalty in Violation of the Law

In addition to seeking an order requiring the Spiegels to destroy their home, the Agency the Agency also seeks to collect a civil penalty in the amount of $1,366,500.00.[6] (See Complaint, WHEREFORE clause, ¶ 2). This remedy is unsupported by the Park Act, given the procedural history of this case; and thus, this Court does not have jurisdiction to hold a hearing to impose a civil penalty.

Section 813(1) of the Park Act, which pertains to civil penalties for violations of the Park Act, reads as follows:

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[6] As of November 13, 2009, the Agency is asking this Court to enter an Order penalizing the Spiegels $1,500 per day ($500 per day x 3 violations) for 911 days. Because this action was stayed from February 2, 2007 until September 18, 2009, those 959 calendar days do not factor into the relief the Agency seeks.

> Any person who violates any provision of this article or any rule or regulation promulgated by the agency, or the terms or conditions of any order or permit issued by the agency pursuant to this article shall be liable to a civil penalty of not more than five hundred dollars for each day or part thereof during which such violation continues. The civil penalties provided by this subdivision shall be ***recoverable*** in an action instituted in the name of the agency by the attorney general on his own initiative or at the request of the agency.

N.Y. Exec. Law § 813(1) (McKinney 2005) (emphasis supplied). Notably, the statute only allows the Attorney General to "recover" civil penalties— not seek to impose them. Again, the plain language of the Park Act must prevail. See Friedman v. Connecticut Gen. Life Ins. Co., 9 N.Y.3d 105, 115 (2007) ("A court must consider a statute as a whole, reading and construing all parts of an act together to determine legislative intent, and...[give] effect and meaning...to the entire statute and every part and word thereof") (internal citations omitted); see also Lewis Family Farm, Inc. v. Adirondack Park Agency, 64 A.D.3d 1009, 1013 (3d Dep't 2009) (stating that "[t]he primary goal of statutory interpretation is to 'ascertain and give effect to the intention of the Legislature'").

To be sure, the Spiegels are not seeking to extinguish the Agency's authority to impose civil penalties. However, the Park Act clearly provides that if the Agency seeks to impose civil penalties, it must do so at the administrative level; and thereafter, the civil penalties are "recoverable" by the Attorney General in a subsequent civil action. See N.Y. Exec. Law § 813(1). The Agency's own enforcement regulations support this plain reading of the Park Act. See 9 NYCRR §§ 581-2.1 and 581-2.2 (leaving it to the discretion of the Agency and its Enforcement Committee to "decide on an appropriate disposition of any enforcement action").

Here, the Agency commenced its administrative proceeding against the Spiegels and chose not to seek a civil penalty. (See Lamme Aff., Ex. O). The Agency certainly could have sought impose a civil penalty against the Spiegels at the administrative level, as it has done in

similar cases. For example, the Agency relies on an order of judgment that it received in another civil enforcement case that it commenced in Herkimer County Supreme Court against a homeowner (*Adirondack Park Agency v. Noonan*, Index No. 2004-81431), apparently to demonstrate that it has achieved court-ordered compliance and penalties in the past.[7] (See Affirmation of Susan Taylor, dated August 10, 2006, Ex. 5). However, *Noonan* is materially different from this case because, in *Noonan*, the Agency specifically sought to impose civil penalties against the homeowner when it commenced its administrative action. (See Lamme Aff., Ex. P).

Finally, and most importantly, the Agency affirmed to the United States District Court that it was not seeking a penalty from the Spiegels. The Agency confirmed that its Final Enforcement Order "speaks for itself" and "contains no demand for a penalty or requirement for a penalty". (See Lamme Aff., ¶¶ 30-31 and Exs. Q and R).

Accordingly, a civil penalty cannot be imposed in this action.

C. The Balance of Equities Favors the Spiegels' Proposed Remedy

Both parties have asked this Court to issue a decision in equity, pursuant to Executive Law § 813(2), ordering the "amelioration" of the Spiegels' Permit violations. Since it has been established that both proposed remedies will have virtually the same visual impact (see Hecklau Aff., ¶ 6 and Ex. B), the Court's decision should be guided by a balance of the equities, which clearly tips in the Spiegels' favor. The Spiegels respectfully ask this Court to consider the following:

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[7] Even though the Agency sought to recover civil penalties of $500 per day, the Court in *Noonan* awarded nominal damages in the amount of $1 per day. (See Taylor Aff., dated August 10, 2006, Ex. 5).

1. The Spiegels have invested over $300,000 in their current partially-built home. (See Spiegel Aff., ¶ 13). Thus, the Agency's proposed remedy of destroying and rebuilding the home would cause the Spiegels to lose $300,000, *plus* incur hundreds of thousands of dollars in additional construction costs to build a "compliant" home. The implementation of the Spiegels' proposed amelioration project would cost approximately $115,000. (See Spiegel Aff., ¶¶ 18-21). Thus, destroying the house only wastes economic resources and inflicts a draconian remedy because a "compliant" home is just as visible as a shortened and screened Spiegel home.

2. Despite having knowledge of the Spiegels' Permit violations in September 2004, the Agency allowed them to construct their home for 4½ months before it investigated the violations. (See Federal Order, pg. 9, n.2) ("Between September 2004 and February 2005 the Spiegels had poured a foundation, commenced framing, and had incurred substantial construction costs."). Had the Agency made any effort to investigate sooner, the Spiegels would not have incurred such substantial construction costs and it would have been possible to move the location of the home.

3. The Agency has always known that a "readily visible" house would be constructed on Lot 39. Had the Agency wanted otherwise, it could have prohibited construction on Lot 39 altogether. It did not. The Permit recognizes that "[s]everal lots would be readily visible from adjoining residential and commercial establishments...Lot 39, which is principally or entirely open field, is "readily visible" from nearby residential and commercial establishments. (See Federal Order, pp. 2-3). Moreover, although the Agency is concerned about the house's visibility, "Lot 39 is a former ski slope and the Permit's findings acknowledge the likelihood that a dwelling on Lot 39 would be readily visible..." (See Federal Order, pg. 12). Nevertheless, even though the Permit acknowledges that the Spiegels' home will be visible from Route 86, the

Spiegels' proposed amelioration project will virtually eliminate the home's visibility from that vantage point. (See Hecklau Aff., Ex. B). The Agency expressly acknowledged this chief concern in its Final Enforcement Order. (See Lamme Aff., Ex. E). The Spiegels' proposed amelioration project will also implement an extensive vegetative screening and landscaping plan that further reduces the home's visibility from other vantage points, even though the Permit does not require it. (See Spiegel Aff., Ex. F).

4. The Agency investigated the seven (7) ridge line homes in Fawn Ridge and ***admitted*** that five (5) of those homes violate the Permit. (See Lamme Aff., ¶ 19 and Ex. L). Several of the ridge line homes violate the Permit's 30-foot building height restriction by 9-10 feet. (Id.). However, "[a]lthough the Agency opened investigative files on each of the alleged violations, no other Fawn Ridge homeowner has received a cease and desist order, and no other enforcement proceedings have been brought." (Federal Order, pg. 21). In addition, of the approximately 36 homes built in Fawn Ridge, only 6 comply with Permit's building height restriction, and the average height of all of the homes in Fawn Ridge is just shy of 40 feet. (See Lamme Aff., ¶ 18; Marvin Aff., ¶ 10). After the amelioration, the Spiegels' home will be ***15% lower*** than the tallest home on the ridge line and lower than 23 existing homes in Fawn Ridge.

5. The Project Sponsor of Fawn Ridge has conveyed deeds to dozens of lots that did not contain the thirty foot building height restriction, in violation of the Permit. (Federal Order, pg. 4). "The Agency has not taken action against Lakewood or the Trust for violating conditions of the Permit." (Federal Order, pg. 4). Further, the Agency has done nothing to see that the Project Sponsor's violations are corrected so that future homeowners do not inadvertently build homes in violation of the Permit.

6. The Permit is vague because it did not describe where a home on Lot 39 could or could not be constructed. According to the United States District Court, although the Permit contained a provision requiring homes for ridge line lots 39-41 and 50-54 to be located at least twenty feet back from the abrupt change in slope at the top of the hill, the Permit does not define the "abrupt change in slope". (See Federal Order, pg. 4). Moreover, many years before the Spiegels even purchased Lot 39, the Agency recognized that it may need to prohibit construction below certain contours, but it failed to do so. (See Lamme Aff., ¶ 11, Ex. K).

7. The Spiegels' violations of the Permit were wholly inadvertent. They dutifully obtained and complied with all applicable Town building permits. (See Spiegel Aff., Ex. B). They also relied on Robert Marvin, a well-known land surveyor in Lake Placid, to assist the builder in selecting the location and staking out the location of the foundation of their home on Lot 39. (See Spiegel Aff., ¶¶ 6-7; Lamme Aff., ¶¶ 14-15).

Based on these factors, the balance of the equities favors the Spiegels' proposed "amelioration" project over that of the Agency.

POINT II

THE SPIEGELS' PROPOSED AMELIORATION PROJECT HAS FULL REGARD TO THE GENERAL PURPOSES OF THE PARK ACT AND THE DETERMINATIONS REQUIRED BY EXECUTIVE LAW § 809(10).

The text of Executive Law § 813(2) states that as this Court exercises its "equitable powers to correct or ameliorate the violation", the Court should have "regard to the purposes of this Article and the determinations required by subdivision 10 of Section 809." N.Y. Exec. Law § 813(2); (see pp. 8-9, *supra*). Here, the Spiegels' proposed "amelioration" project is consistent with both objectives.

A. Lowering the Spiegel House as a Remedy for the Violations Has Full Regard to the Purposes of the Park Act

The Park Act "seeks to achieve sound local land use planning throughout the park." N.Y. Exec. Law § 801 ("Statement of Legislative Findings and Purposes"). The basic purpose of the Park Act is to "insure optimum overall conservation, protection, preservation, development and use of the unique scenic, aesthetic, wildlife, recreational, open space, historic, ecological and natural resources of the Adirondack Park. Id. Thus, the Act recognizes that, consistent with the Land Use Plan (which is the heart of the Park Act), development can take place and scenic resources can be used.

Here, after careful consideration and extensive findings, the Agency issued the Permit at issue in this case to Lakewood Properties, Inc., the project sponsor of Fawn Ridge. The Agency concluded that the development of Fawn Ridge was appropriate and allowable, consistent with the Park Act. The Agency acknowledged that the homes on the ridge may be visible, and specifically acknowledged that the development of the unique and valuable Lot 39, upon which the partially-built Spiegel home is located, would be visible for miles around. (See Federal Order, pp. 6, 12) (establishing that "Lot 39 was historically a ski slope, a wide open field of grass, small brush and blueberry bushes", that "the Permit expressly recognized the open character of the lot", and that the "Permit's findings acknowledge the likelihood that a dwelling on Lot 39 would be readily visible").

Thus, it is beyond argument that visibility of the Spiegel home is consistent with the Permit and fully consistent with the purposes of the Park Act. Moreover, "amelioration" of this visibility is also fully consistent with the Park Act and the Permit, since, under any result, the Agency has always acknowledged that a visible home will be built on Lot 39 on Fawn Ridge.

B. The Spiegels' Amelioration Project is Within the Determinations Required By Executive Law § 809(10)

The enforcement subsection at issue in this proceeding, Executive Law § 813(2), directs this Court to have "regard" for the determinations required by Executive Law § 809(10) because that section lies at the heart of the Agency's administration of the Park Act Land Use and Development Plan. Specifically, Executive Law § 809(10) provides as follows:

> The Agency shall not approve any project proposed to be located in any land use area not governed by an approved local land use program, or grant a permit therefor, unless it first determines that such project meets the following criteria:
>
> a. The project would be consistent with the Land Use and Development Plan.
>
> b. The project would be compatible with the character, description and purposes, policies and objectives of the land use area wherein it is proposed to be located.
>
> * * * *
>
> c. The project would be consistent with the overall intensity guideline for the land use area involved.
>
> * * * *
>
> d. The project would comply with the shoreline restrictions if applicable.
>
> * * * *
>
> e. The project would not have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the Park or upon the ability of the public to provide supporting facilities and services made necessary by the project taking into account the commercial, industrial, residential, recreational or other benefits that might be derived from the project. In making this determination, as to the impact of the project upon such resources of the park, the agency shall consider those factors contained in the development considerations of the plan which are pertinent to the project under review.

N.Y. Exec. Law § 809(10).

Clearly, the enforcement section of the Park Act directs this Court to Executive Law § 809(10) so the Court can determine whether the "amelioration" project under consideration would, essentially, be permit-able by the Agency in the first instance. Here, not only is the amelioration project permit-able, but essentially, it has already been permitted in sum and

substance. That is, the Fawn Ridge subdivision is fully consistent with the Land Use and Development Plan, a finding that has already been made by the Agency when it first issued to the Permit in 1987. Similarly, the project is consistent with the overall intensity guidelines for the land use area involved. And, of course, the Spiegels' "amelioration" project does not violate any shoreline restrictions set forth in the Park Act.

Therefore, of the five criteria set forth in Executive Law § 809(10), the proposed "amelioration" project for the Spiegels' home readily meets the first four criteria and determinations in this regard and cannot be reasonably contested by the Agency.

As to the fifth criteria, subsection (e), the visual simulation provided by EDR unequivocally demonstrates that the lowered and screened home that the Spiegels now propose will "not have an undue adverse impact" upon the resources of the Park. (See Hecklau Aff., Ex. B). Thus, subsection (e) is achieved as well, and a determination by this Court approving the Spiegels' "amelioration" project, is fully consistent with the Park Act. In this regard, and most importantly, the Agency already made a determination that any home on Lot 39 would be readily visible from a number of areas, and thus, already made a determination that a visible house on Lot 39 will not have an undue adverse impact upon the resources of the Park. (See Federal Order, pp. 2-3, 12).

Here, the Spiegels' proposed amelioration project essentially eliminates the visual impact of the home, even though it "is located within 1000 feet of an intensely developed commercial strip on New York State Route 86". (See Federal Order, pg. 2). The Spiegels' proposed amelioration project would make their home consistent with the other homes on Fawn Ridge, many of which are visible from public vantage points. (See Spiegel Aff., ¶ 14 and Exs. C, D and

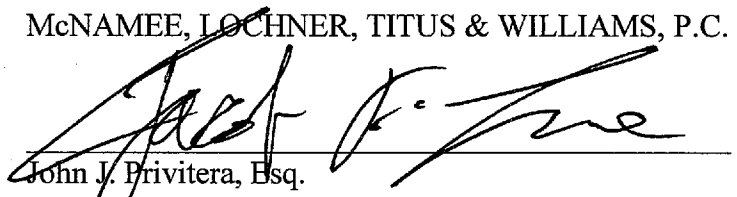
E). For all of these reasons, the Spiegels' proposed amelioration project is consistent with Executive Law § 809(10) and the overall purposes of the Park Act.

CONCLUSION

Based on the foregoing, the Spiegels respectfully ask this Court to enter an Order (i) granting summary judgment pursuant to CPLR 3212 and directing the equitable amelioration of the Spiegels' Permit violations pursuant to Executive Law 813(2); (ii) prohibiting the Agency from imposing a civil penalty from the Spiegels; and (iii) granting any other relief that this Court deems just and proper.

Dated: November 13, 2009
Albany, New York

McNAMEE, LOCHNER, TITUS & WILLIAMS, P.C.



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