

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

---

ARTHUR and MARGARET SPIEGEL,

Plaintiffs,

-against-

No. 8:06-CV-203  
(WKS/DRH)

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.

---

**AFFIDAVIT OF JOHN J. PRIVITERA  
IN SUPPORT OF PLAINTIFFS' MOTION  
FOR SUMMARY JUDGMENT**

McNAMEE, LOCHNER, TITUS  
& WILLIAMS, P.C.  
John J. Privitera, Esq. (Bar Roll No. 102399)  
*Attorneys for Plaintiffs*  
677 Broadway  
Albany, New York 12207  
Tel. No. (518) 447-3200  
Fax No. (518) 426-4260

## TABLE OF CONTENTS

Exhibit Index.....	i
Procedural History of This Action.....	2
Discovery.....	3
Fawn Ridge Development.....	5
Findings and Terms of the Developer's Permit.....	7
Developer Creates Fawn Ridge Architectural Review Committee .....	11
The Permit Has Been Void Since at Least August 18, 1992 .....	13
The Purchase and Development of Lot 39.....	15
The Agency's Standard Enforcement Protocol .....	19
The Agency Intentionally Deviated From Standard Protocol in Prosecuting Plaintiffs' Enforcement Case.....	22
The Agency Has Ignored Many Other Fawn Ridge Violations.....	31
The Defendant Agency's Height Measurement Methodology and Evolving Height "Guidelines" are Irrational.....	37
The Agency Has a History of Favoring its Insiders.....	38
The Agency Improperly Destroyed Evidence In This Case .....	40
Location of Fawn Ridge.....	41
Conclusion .....	42

## EXHIBIT INDEX

<u>Exhibit</u>	<u>Description</u>
A	Amended Complaint Ex. A – Agency Permit No. 87-28 Ex. B – Plaintiffs' Deed to Lot 39 Ex. C – Agency's March 30, 2005 Cease & Desist Order Ex. D – Agency's April 15, 2005 Notice of Intent
B	Answer to Amended Complaint
C	Agency's Summons and Complaint in New York State's Essex County Supreme Court Action Against Plaintiffs (Index No. 301-06)
D	Plaintiffs' Verified Answer to Agency's State Complaint
E	Stipulation to Stay State Court Action
F	Arthur Spiegel Deposition Transcript (Portions)
G	Margaret Spiegel Deposition Transcript (Portions)
H	Robert Marvin Deposition Transcript (Portions)
I	Ivan Zdrahal Deposition Transcript (Portions)
J	Paul Van Cott Deposition Transcript (Portions)
K	Mark Sengenberger Deposition Transcript (Portions)
L	Cecil Wray Deposition Transcript (Portions)
M	Shaun Lalonde Deposition Transcript (Portions)
N	Brian Grisi Deposition Transcript (Portions)
O	John Quinn Deposition Transcript (Portions)
P	Douglas Miller Deposition Transcript (Portions)
Q	Susan Parker Deposition Transcript (Portions)
R	Robert Kreider Deposition Transcript (Entire Transcript)
S	Dr. Eugene Byrne Deposition Transcript (Portions)
T	Kathleen Byrne Deposition Transcript (Portions)

U	Developer's January 1987 Permit Application to Agency
V	Agency's February 26, 1987 Additional Information Request to Developer
W	Agency's May 13, 1987 Memorandum Regarding Fawn Ridge Site Visit
X	Developer's December 2, 1987 cover letter and proposed deed restrictions
Y	Developer's December 1987 General Development Map of Fawn Ridge
Z	Agency Permit No. 87-28 ("the Permit")
AA	Developer's June 13, 1988 cover letter and Final Subdivision Plan Map
BB	Agency's July 11, 1988 Approval Letter
CC	Deeds to 19 of the 54 lots in Fawn Ridge
DD	Developer's December 22, 1987 letter to Agency explaining ARC
EE	ARC's Lot Development Control Notes
FF	Affidavit of Ivan Zdrahal, sworn to October 6, 2006
GG	Memorandum of William Edgerton, dated November 23, 1988
HH	Four (4) letters between ARC and Lot 54 owner Gene Davis, dated October 19, 2000 to March 11, 2001
II	June 30, 2005 letter from Patricia Jones Edgerton, Trustee, to the Agency confirming that the Trust is the successor to the Developer of Fawn Ridge
JJ	Affidavit of Gregory Ruppert, sworn to October 5, 2006
KK	Internal memorandum of Developer detailing the June 16, 1988 meeting
LL	Affidavit of Norman Harlow, sworn to October 4, 2006
MM	Plaintiffs' September 24, 2002 Letter to ARC
NN	ARC's June 8, 2004 Approval Letter of Lot 39 Design Plans
OO	Surveyor Robert Marvin's Profile Map of Lot 39
PP	Affidavit of Robert Marvin, sworn to October 6, 2006

QQ	Agency's General Enforcement Guidelines
RR	Agency's Enforcement Priority Guidelines
SS	Agency's 2004 Confidential Enforcement Presentation Outline
TT	Van Cott's purported September 24, 2004 letter to Plaintiffs
UU	Agency's Master Action Database ("MAD") printout for Plaintiffs' Case
VV	Agency's June 24, 2005 "Notice" to Fawn Ridge Homeowners
WW	Plaintiffs' Response to the Notice of Intent, Memorandum of Law, and Attorney Affidavit submitted to the Agency on or about June 27, 2005
XX	Agency's July 8, 2005 Enforcement Order
YY	Agency's Purported "Final Order" of September 7, 2005
ZZ	Six (6) Agency settlement agreements—executed by Van Cott—that require private homeowners to pay penalties ranging from \$100.00 to \$5,000.00.
AAA	Agency's Nicola enforcement file (#E90-010)
BBB	Agency's MAD printout for its Fawn Ridge enforcement files
CCC	Van Cott's September 15, 2005 Map/Note to Banta
DDD	Marvin Map from October 2006 Affidavit
EEE	Doug Miller's May 18, 2006 Field Notes for the Lot 52 Site Visit
FFF	Agency's 2006 Public Presentation on Height Measurement
GGG	Agency's MAD printout for Placid Gold, LLC/Arthur Lussi (#E2007-152)
HHH	Agency's June 7, 2007 e-mail and spreadsheet for Lussi penalty
III	Placid Gold, LLC Settlement Agreement
JJJ	E-mail #1 (sent on May 12, 2006) & modified on November 2, 2006
KKK	E-mail #2 (sent on September 1, 2006) & modified on December 1, 2006
LLL	Fawn Ridge Google Map Location

STATE OF NEW YORK     )  
  ) ss.:  
COUNTY OF ALBANY     )

**JOHN J. PRIVITERA**, being duly sworn, states:

1. I am duly licensed and admitted to practice law in the State of New York and in the United States District Court, Northern District of New York (Bar Roll No. 102399). I am a principal with the law firm of McNamee, Lochner, Titus & Williams, P.C., attorneys for Plaintiffs Arthur and Margaret Spiegel in this action. As such, I am fully familiar with the pleadings and proceedings had in this action, and with the matters set forth herein.

2. This is an action, pursuant to 42 U.S.C. § 1983, against defendants Adirondack Park Agency, Mark Sengenberger, Richard Lefebvre and Paul Van Cott (collectively "Agency" or "Defendant") for violations of Plaintiffs' constitutional rights, which occurred in the context of the Agency's enforcement activity against the Plaintiffs, who are attempting to construct a single family home in the Fawn Ridge subdivision in Lake Placid, New York. The Agency, which is a regional planning and zoning board, has jurisdiction over the Fawn Ridge subdivision project because it is located inside the Adirondack Park.

3. Plaintiffs make this motion for summary judgment because there is no genuine issue of material fact as to the following matters:

- a. The Agency intentionally treated the Plaintiffs differently from other similarly situated homeowners in the Fawn Ridge subdivision;
- b. The Agency selectively enforced a void Agency Permit against the Plaintiffs with malicious intent to injure them; and
- c. There is no rational basis for the Agency's difference in treatment between the Plaintiffs and the other similarly situated homeowners in Fawn Ridge.

### Procedural History of This Action

4. Plaintiffs commenced this action by service of a Complaint dated February 15, 2006, alleging that the Agency violated the Plaintiffs due process and equal protection rights.

5. On or about April 6, 2006, the Agency moved to dismiss the Complaint. (See Docket No. 7).

6. By Opinion and Order dated May 8, 2006, Senior Judge Thomas J. McAvoy denied the Agency's motion, in part, by finding that the Plaintiffs had stated a claim for selective enforcement. The Court dismissed the due process claim. (See Docket No. 13).

7. On May 9, 2006, Plaintiffs filed an Amended Complaint, a true and correct copy of which is annexed hereto as **Exhibit "A"**.

8. On May 17, 2006, the Defendant filed its Answer to the Amended Complaint, a true and correct copy of which is attached hereto as **Exhibit "B"**.

9. Prior to this Court's decision on the Agency's motion to dismiss, on April 17, 2006, the Agency commenced a civil action against the Plaintiffs in New York State's Essex County Supreme Court (Index No. 301-06) seeking, among other things, an Order requiring them to demolish their home and rebuild it in strict compliance with the Agency's understanding of the terms of Agency Permit 87-28 ("Permit"). Copies of the Summons and Complaint (minus exhibits) in the State case are attached hereto as **Exhibit "C"**.

10. On or about June 12, 2006, the Plaintiffs served their Verified Answer to the Complaint in the State case. A copy of the Verified Answer is attached hereto as **Exhibit "D"**.

11. In October 2006, several months after this Court denied the Agency's motion to dismiss the Complaint (see Docket #13), the Agency moved for summary judgment in the State

case. Plaintiffs opposed that motion and cross-moved to stay the State case pending the outcome of this federal action.

12. On February 2, 2007, the Hon. James P. Dawson, J.S.C., Essex County Supreme Court, authorized a stipulation between the parties that stayed the State case pending a final judgment in this case pursuant to Rule 54(a) of the Federal Rules of Civil Procedure. A copy of the Stipulation is attached hereto as **Exhibit "E"**. Thus, this action is the first judicial review of the Defendant Agency's punitive administrative action against the Plaintiffs, in which the Agency irrationally found that the Plaintiffs violated the Permit (while the Agency ignored other Fawn Ridge violations) and ordered that Plaintiffs' partially constructed house be torn down and relocated.

#### Discovery

13. From May 2006 until October 2008, the parties engaged in substantial discovery, which included production of tens of thousands of pages of documents, third-party subpoenas duces tecum, answers to interrogatories, and fifteen (15) party and non-party depositions.

14. I have conducted numerous depositions of the Agency and its employees in this case, and the Agency's counsel has conducted the Plaintiffs' depositions. In addition, the attorneys for both parties have also conducted non-party witness depositions of several witnesses. Annexed hereto as the following designated exhibits are true and correct copies of the designated excerpts of the transcripts of depositions of the following witnesses who provided testimony relevant to this motion:

<u>Exhibit</u>	<u>Name</u>	<u>Pages</u>	<u>Title</u>
"F"	Arthur Spiegel	96-98, 101, 106-08, 112-13	Plaintiff
"G"	Margaret Spiegel	33, 34, 47	Plaintiff



"H"	Robert Marvin	20, 28, 51-54, 60-62, 128-33, 167-69, 189, 195-97	Non-party witness
"I"	Ivan Zdrahal	19, 23, 30, 36, 45, 46, 52, 108- 117, 142-49, 171-73, 223, 247-49	Non-party witness
"J"	Paul Van Cott	40-61, 75-85, 88, 92-97, 105-09, 116-18, 124, 126-128, 132	Agency Enforcement Attorney
"K"	Mark Sengenberger	30-31, 39-40, 66-69, 79, 86-88, 95-96	Agency's Acting Executive Director
"L"	Cecil Wray	44-47, 58-59, 67, 70-71, 78	Chair of Agency Board's Enforcement Committee
"M"	Shaun Lalonde	6, 9, 10, 38-39, 52-53, 74-77, 95-96	Agency Staff
"N"	Brian Grisi	12-15, 41-46, 54-57	Agency Staff
"O"	John Quinn	34, 37, 44-48, 61	Agency Staff
"P"	Douglas Miller	20-24, 39-40, 44-49, 51, 61-64, 85-87, 102, 116-122, 126-135	Agency Enforcement Officer
"Q"	Susan Parker	30-32, 34, 39, 46, 47, 51-54, 94, 99-109	Agency Enforcement Officer
"R"	Robert Kreider	1-46 (entire transcript)	Agency IT Staff
"S"	Dr. Eugene Byrne	29-31, 35-37	Non-party witness
"T"	Kathleen Byrne	12-14, 18	Non-party witness

15. In this affidavit, I refer to specific passages of the testimony of the foregoing witnesses. This testimony, along with the other evidence obtained in discovery offered as exhibits on this motion, conclusively shows that the Agency violated the Plaintiffs' constitutional right to equal protection.

16. The discovery process has shed light on the Agency's role in the development of the Fawn Ridge subdivision.

**Fawn Ridge Development**

17. In the mid-1980s, Lakewood Properties, Inc. ("Developer") commenced a project to develop 264.6 acres of land on the edge of the Village of Lake Placid that previously contained ski trails and the 1980 Olympic housing complex into a new 54-lot subdivision named "Fawn Ridge". In January 1987, the Developer submitted a permit application to the Agency seeking approval for the Fawn Ridge subdivision. A copy of the Developer's Permit Application is attached hereto as **Exhibit "U"**.

18. Fawn Ridge is located in very close proximity and just above the main commercial street in the Village, Route 86, a highway, which is intensely developed with a series of retail stores, motels, commercial signage and restaurants. (See Affidavit of Arthur Spiegel, sworn to February 4, 2009, ¶ 4).

19. Civil engineer Ivan Zdrahal was hired by the Developer as a project leader to assist the Developer in obtaining the necessary governmental approval for the subdivision from the Agency and local authorities. He also designed the subdivision by determining the positions of the roads, lots and utilities. Zdrahal recognized the topographical constraints of building a subdivision on a ridgeline, but still managed to design Fawn Ridge without substantially transforming the land. (See Zdrahal Tr., Ex. I, pp. 19, 23, 36).

20. Shortly after the Developer submitted the application, the Agency issued an "Additional Information Request" seeking, among other things, information concerning the visual impact of the project and the deed restrictions that would govern the individual lots in the

subdivision. A copy of the Agency's February 26, 1987 Additional Information Request is attached hereto as **Exhibit "V"**.

21. In May 1987, the Agency and Zdrahal performed a site inspection of Fawn Ridge to address the Agency's concerns with the project, which include slope and visual impact. An internal Agency memorandum reveals that the Agency informed Zdrahal that while it "discourage[d] development on slopes greater than 25%...some of the building lots may be on slopes greater than 25%." The Agency memorandum indicates that having the Town perform site specific plan review on some of the steep lots may be an acceptable solution to addressing the difficulty of building on the lots containing steep slopes. A copy of the Agency's May 13, 1987 Memorandum is attached hereto as **Exhibit "W"**.

22. The Agency also informed Zdrahal that the nearest public area from which Fawn Ridge should be visible is Grand Union Plaza, Howard Johnson's and other commercial properties along the heavily-used Route 86 in the Village of Lake Placid. Moreover, the Agency informed Zdrahal that it "would probably prohibit construction below certain contours...and that he should consider locating building sites that would allow the existing hill to serve as a backdrop." (See Ex. W). This would tend to push construction on the ridgeline down the slopes. The Agency admits that it told the Developer to use the hill as a backdrop for houses on the ridge line. (See Sengenberger Tr., Ex. K, pg. 66).

23. On or about December 2, 1987, the Developer submitted additional information to the Agency in order to obtain approval for the Fawn Ridge subdivision. Pursuant to the Agency's February 1987 request, the Developer provided the Agency with a list of proposed deed restrictions that would govern the 54 lots in Fawn Ridge. One of these proposed restrictions prohibited all buildings in Fawn Ridge from exceeding "thirty five (35) feet in height

as measured from the center of the house at natural grade to the top of the roof." A copy of the December 2, 1987 cover letter and proposed deed restrictions are attached hereto as **Exhibit "X"**.

24. As part of the December 2, 1987 submission, the Developer provided the Agency with a General Development Map that depicted the proposed lot layout and elevations in the Fawn Ridge subdivision. A copy of the General Development Map, which shows lots on slopes, (stamped received by the Agency) is attached hereto as **Exhibit "Y"**.

25. On or about April 22, 1988, the Agency authorized the Developer's application and issued Project and Permit No. 87-28 ("Permit") to the Developer, granting it approval to commence construction of the Fawn Ridge subdivision. A copy of the Permit is attached hereto as **Exhibit "Z"**.<sup>1</sup>

#### **Findings and Terms of the Developer's Permit**

26. The Permit contains twenty-one (21) findings of fact, which the Agency claims it verified, thereby making these findings of fact incontrovertible. (See Sengenberger Tr., Ex. K, pg. 30). The Permit states, in pertinent part, as follows:

#### **FINDINGS OF FACT**

\* \* \*

14. Slopes on the project site vary from 0 to 65%, but are predominantly 5 to 10% on the residential lots...About 75 acres or 28% of the entire property contains slopes in excess of 15%. Portions of Lots 1, 2, 8, 9, 11-13, 15, 18, 32-34, 39-42 and 50-54 contains slopes from 15 to 25%. However all lots have suitable sites with slopes less than 15% for a homesite and driveway. Careful siting and construction should be required to avoid excess cut and fill, soil erosion and removal of existing vegetation on lots containing slopes exceeding 15%.

\* \* \*

---

<sup>1</sup> A true and correct copy of the Permit is also attached to the Amended Complaint as Exhibit "A" thereto, however, this version is more legible.

17. The project site is located within 1000 ft. of an intensely developed commercial strip on Route 86 to the north and 500 ft. west of the Village of Lake Placid and its densely populated center area. It has been used in the past as a ski center and campground and the treed slopes of the hillside have been partially cut for a long period of time. \* \* \*

***Lots 10-15 and 39-41 will likely be readily visible from Route 86, Hillcrest Avenue, commercial establishments north of Route 86, Mount Whitney and the east central portion of Lake Placid, all within two miles of the project site. Lots 39 and 40 are principally or entirely open field.*** Dwellings on other lots may also be visible from off-site if their height exceeds that of the tree canopy.

(See Permit, Ex. Z, pp. 10-11). (emphasis supplied).

As described in the accompanying Affidavit of Plaintiff Arthur Spiegel, Lot 39 is where the house at issue in this case stands, incomplete.

27. The Permit also contains twenty-one (21) conditions, most of which require the Developer to affirmatively ensure that future Fawn Ridge residents comply with the terms of the Permit. The Permit conditions, in pertinent part, are as follows:

#### CONDITIONS

\* \* \*

2. This permit authorizes only 54 residential lots and 1 single family dwelling on each, construction of the public road, extension of the public water system, extension of the sewage system, storm drainage system, and underground utilities as described herein, subject to the following conditions. ***Failure to comply with either the findings of fact or conditions voids the permit.***

5. The project sponsor [i.e., Developer] shall notify all prospective lot purchasers of the conditions of this permit by providing them with copies of this permit, the sheets of the subdivision plans showing the appropriate lot and proposed deed restrictions. The project sponsor shall maintain records that it furnished copies of the permit and subdivision plans to all prospective lot purchasers. The sponsor shall also provide the permit and approved plans to the supervising engineer and contractors and ensure compliance with the same.

7. Prior to the commencement of construction, the sponsor shall provide the Agency with documentation of, and receive its written agreement that the following are acceptable:

- a. Final deed restrictions including express reference to this permit and provision that lot owners will abide by it. ***Deed restrictions shall include a 30 ft. building height limitation, measured from the highest point of the structure (excluding fireplace chimney) and the lowest point of either existing or finished grade adjacent to the structure.***

\* \* \*

- e. Copy of the final subdivision plat and all final drawings which shall incorporate requirements of this permit...The final plat plan shall include the Town of North Elba sideyard and rearyard requirement and delineate lot areas containing slopes greater than 25%.

10. ...The existing topsoil shall be stripped and stockpiled from road construction and used for loaming during revegetation.

15. Development on individual residential lots shall comply with the following standards:

\* \* \*

- b. For all lots, not more than 5,000 sq. ft. of existing tree vegetation shall be cleared for the authorized single family dwelling, and accessory use structures....
- c. For all lots, for a distance of 50 ft. down slope from each dwelling or accessory use structure, for the entire width of the lot, no more than 50% of all trees 4 inches or more at breast height shall be cut. In no event shall a clearing for a view be greater than 20 ft. wide.
- d. In addition to the restrictions described in b and c above, no more than 50% of all trees 6 inches or more in diameter at breast height shall be cut on any lot.

\* \* \*

- g. No structure shall exceed 30 ft. in height.
- h. Single family dwelling[s] shall not be constructed on existing slopes greater than 25% (measured over a 50 ft. horizontal distance) and shall comply with Town of North Elba setback requirements. On Lots 1 and 2 no structures, development or tree cutting shall be allowed within 55 ft. of the 1808 ft. elevation line or the mean high water mark of Cold Brook and the boundaries of the wetland.
- i. Successional tree growth shall be allowed to occur except that limited cutting may occur to maintain existing trails within the

designated common or open space areas as indicated on the map referred to in findings of fact number five a.

- j. Dwellings and accessory structures for lots 39-41 and 50-54 shall be located at least 20 ft. back from the abrupt change in slope at the top of the hill.
- k. Cuts and fills for driveways and homesites shall not exceed four ft. in depth without mechanical structures such as retaining walls.

(See Permit, Ex. Z, pp. 12-13, 15, 17-19) (emphasis supplied).

28. On June 13, 1988, Zdrahal, as the Developer's agent, complied with Permit Condition #7(e) (see Permit, Ex. Z, pg. 15) by providing the Agency with a map of the final subdivision plan. Notably, this map is the same map as the one the Developer submitted to the Agency in December 1987 (Ex. Y, *supra*). However, this new map provided the Agency with the suitable building envelope for each lot in the subdivision. The building envelope for Lot 39 includes much of the cleared slope where the skiing area used to be located. A copy of Zdrahal's June 13, 1988 cover letter and Final Subdivision Plan Map (stamped received by the Agency) is attached hereto as **Exhibit "AA"**. The Agency admits that the Permit contains findings of fact that Lot 39 includes "areas of field grasses associated with the previous ski center." (See Sengenberger Tr., Ex. K, pp. 30-31).

29. On July 11, 1988, the Agency responded to the Developer's June 13, 1988 submission of the Final Subdivision Plan Map as follows: "We acknowledge Ivan Zdrahal's June 8, 1988 revised development plans. *We find the updated plans acceptable.*" Thus, the Agency approved the building envelope locations on the Final Subdivision Map. A copy of the Agency's July 11, 1988 approval letter is attached hereto as **Exhibit "BB"** (emphasis supplied).

30. The Permit fails to define the "steep slope" discussed in Condition 15(j), and the Agency never made a determination as to where the "steep slope" referenced in the Permit was

located. (See Marvin Tr., Ex. H, 167-68). Moreover, the Permit references over 12 acres of open area on the Fawn Ridge slopes, but the Agency never defined these areas. (See generally Ex. Z).

#### **Developer Creates Fawn Ridge Architectural Review Committee**

31. The Developer created the Fawn Ridge Architectural Review Committee ("ARC") to essentially ensure that the Permit is complied with by requiring the ARC to review lot plans and designs. Like the Agency, the ARC's purpose is to assure Permit compliance and preserve the natural appearance of the subdivision. (See Zdrahal Tr., Ex. I, pp. 45-46).

32. Each deed in Fawn Ridge, including Plaintiffs' deed for Lot 39, states, in pertinent part, as follows:

"No building, structure, wall, fence, TV antenna or satellite dish or accessory residential feature or installation shall be erected, placed, constructed or maintained on the Property *until and unless complete and adequate plans, specifications, exterior color and site location have been filed with, reviewed and approved in writing by the Architectural Review Committee* established by the party of the first part (the "ARC"), and/or its agents, successors and assigns. The ARC shall have the right to refuse to approve any plans, specifications, or building locations which are not suitable or desirable, provided that such refusal shall not be deemed unreasonable."

(See Deeds to nineteen (19) of the fifty-four (54) Fawn Ridge Lots, copies of which are attached hereto as **Exhibit "CC"**) (emphasis added).

33. In a December 22, 1987 letter written to the Agency during the Permit application process, the Developer explained that the ARC—using the conditions set forth in the Permit—would function as the development and aesthetic control authority of Fawn Ridge. A copy of the December 22, 1987 letter is attached hereto as **Exhibit "DD"**).

34. Thereafter, the Agency expressly approved the deed restriction concerning the ARC's powers and responsibilities. (See Ex. BB, *supra*).



35. To facilitate the ARC's review of Fawn Ridge lot development, Zdrahal created "Lot Development Control Notes" as a guide for lot owners. (See Zdrahal Tr., Ex. I, pp. 108-17). Among other things, the Lot Development Control Notes remind lot owners of their requirement to obtain ARC approval for their site plans and building plans prior to the beginning of construction. Among other things, the ARC would focus on site plans, building location and tree cutting. (See Zdrahal Tr., Ex. I, pg. 52). A copy of the ARC's Lot Development Control Notes is attached hereto as **Exhibit "EE"**.

36. Beginning in November 1988, Ivan Zdrahal, the Developer's agent who designed Fawn Ridge, served as a member of the ARC with Patricia Jones Edgerton and William Edgerton, who were principals of the Developer. (See Affidavit of Ivan Zdrahal, sworn to October 6, 2006 ¶ 5, a copy of which is attached hereto as **Exhibit "FF"**).<sup>2</sup> (See also Memorandum of William Edgerton, dated November 23, 1988, a copy of which is attached hereto as **Exhibit "GG"**).

37. As an example of the ARC's role in lot development in Fawn Ridge, four (4) letters between Zdrahal and Lot 54 owner Gene Davis, dated October 19, 2000 to March 11, 2001, are attached hereto as **Exhibit "HH"**. After receiving Davis's house plans, Zdrahal provided Davis with the Lot Development Control Notes and relevant sections of the Permit. (See Ex. EE, *supra*). Zdrahal also specifically reminded Davis that the Permit limited building height to 30 feet. Eventually, the ARC approved the site plan and building plans for the Davis's development of Lot 54. (See Zdrahal Tr., Ex. I, pp. 142-49). [According to the Agency's measurement method used against the Spiegels, the Davis home is 38.7 feet high. See ¶ 109, *infra*].

---

<sup>2</sup> The Zdrahal Affidavit was submitted in opposition to the Agency's motion for summary judgment in a related state court action (Essex County Index No. 301-06), which was stayed pending the outcome of this federal case.

38. The Plaintiffs went through a similar process and received ARC approval for their home on Lot 39, which is the subject of this case. (See Spiegel Aff., ¶¶ 10-16).

**The Permit Has Been Void Since at Least August 18, 1992**

39. The Permit terms set forth above are not only binding on the Developer, but they are also binding on the Developer's successors. (See Permit, Ex. Z, pg. 20). The Nettie Marie Jones Trust ("Trust") succeeded Lakewood Properties, Inc. as the Project Sponsor of Fawn Ridge. (See Zdrahal Tr., Ex. I, pp. 30, 171-73, 247-49). A copy of a June 30, 2005 letter from Patricia Jones Edgerton, Trustee, to the Agency confirming that the Trust is the successor to the Developer of Fawn Ridge is attached hereto as **Exhibit "II"**. Thus, the Trust is also obligated to follow the conditions set forth in the Permit.

40. The Agency issued the Permit with explicit instructions that the twenty-one (21) findings of fact and twenty-one (21) conditions must be strictly followed. If the Developer or its successor failed to adhere to any of the findings of fact or conditions, then the Permit automatically becomes void by its own terms: "*Failure to comply with either the findings of fact or conditions voids the permit.*" (See Permit, Ex. Z, pg. 13) (emphasis supplied).

41. The Developer and Trust have violated the conditions of the Permit since at least August 18, 1992 because, as mentioned above, the Permit required the Developer and its successor to place a 30-foot building height restriction in each deed issued for the Fawn Ridge lots. (See Permit, Ex. Z, pg. 15). Both the Developer and the Trust failed to comply with this condition.

42. Many of the deeds to the 54 lots in the Fawn Ridge subdivision—including the deed to the Spiegels' property—contain a 35-foot limitation rather than the required 30-foot

limitation. Specifically, the Essex County Clerk's records indicate that the Trust has granted the following nineteen (19) deeds without including the required 30-foot height restriction:

<u>Grantor</u>	<u>Grantee</u>	<u>Lot #</u>	<u>Date</u>
Nettie Marie Jones Trust	Merritt	29	August 18, 1992
Nettie Marie Jones Trust	Wagle	41	September 15, 1992
<b>Nettie Marie Jones Trust</b>	<b>Spiegel</b>	<b>39</b>	<b>August 2, 1994</b>
Nettie Marie Jones Trust	McKillip	51	May 6, 1996
Nettie Marie Jones Trust	Sheft	52	February 24, 1998
Nettie Marie Jones Trust	Lampeter	30	March 22, 1999
Nettie Marie Jones Trust	Gengel	53	April 29, 1999
Nettie Marie Jones Trust	Ledger	37	November 22, 1999
Nettie Marie Jones Trust	Wilkins	27	January 27, 2000
Nettie Marie Jones Trust	Ulrich	45	June 2, 2000
Nettie Marie Jones Trust	Gallagher	26	August 18, 2000
Nettie Marie Jones Trust	Davis	54	October 30, 2000
Nettie Marie Jones Trust	Richter	36	February 25, 2001
Nettie Marie Jones Trust	McKillip	20	May 17, 2001
Nettie Marie Jones Trust	Dodson	19	May 22, 2001
Nettie Marie Jones Trust	Bowman	21	August 2, 2001
Nettie Marie Jones Trust	Foster	47	August 30, 2001
Nettie Marie Jones Trust	Morgan	42	October 26, 2001
Nettie Marie Jones Trust	Wilcox Trust	46	January 27, 2002

(See copies of the nineteen (19) Fawn Ridge deeds attached hereto as Ex. CC, *supra*).

43. The Agency acknowledges that Fawn Ridge deeds issued without the 30-foot height limitation would violate the Permit (see Miller Tr., Ex. P, pg. 61), and admits that, in fact, the Developer issued Fawn Ridge deeds in violation of the Permit. (See Van Cott Tr., Ex. J, pg. 116).

44. Moreover, the Permit is also void because, pursuant to Permit Condition #5, the Developer was obliged to provide all prospective lot purchasers, supervising engineers, and contractors who were building in Fawn Ridge with copies of the Permit and maintain records that it furnished such copies. (See Permit, Ex. Z, pg. 14). Plaintiff Arthur Spiegel has purchased

three lots in Fawn Ridge (i.e., Lots 35, 38 and 39), and the Developer never provided him with a copy of the Permit. (See Art Spiegel Tr., Ex. F, pg. 98; Spiegel Aff., ¶ 6).

45. In addition, Ruppert Construction Corporation, which built five homes in the Fawn Ridge subdivision, never received copies of the Permit or subdivision plans from the Developer. (See Affidavit of Gregory Ruppert, sworn to October 5, 2006 ¶¶ 2, 9, a copy of which is attached hereto as **Exhibit "JJ"**).<sup>3</sup> Accordingly, the Developer voided the Permit when it failed—on at least eight occasions—to provide copies of the Permit to Arthur Spiegel and Ruppert Construction Corporation in accordance with Permit Condition #5.

46. The Agency has not complied with the terms of its own Permit because it has taken no action against the Developer, nor treated the Permit as void, in the face of these dozens of known violations by the Developer and its successor. (See Van Cott Tr., Ex. J, pg. 118; Miller Tr., Ex. P, pp. 62-64; Parker Tr., Ex. Q, pg. 94).

### **The Purchase and Development of Lot 39**

47. Lot 39 in Fawn Ridge is generally recognized as a special lot in the subdivision because of the stunning, unobstructed views of Lake Placid and Whiteface Mountain that it offers. (See Affidavit of Robert Politi, sworn to February 9, 2009, ¶¶ 7-8). Lot 39 is also clearly visible from the Howard Johnson motel and Route 86 in the Village of Lake Placid between the commercial signage and other structures on the highway. Lot 39 was historically a ski slope and, as such, was a wide open field comprised primarily of grass, small brush, and occasional blueberry bushes. (See Marvin Tr., Ex. H, pp. 168-69; Zdrahal Tr., Ex. I, pg. 223). The Byrnes used it to go sledding. (E. Byrne Tr. Ex. S, pp. 30-31).

---

<sup>3</sup> The Rupert Affidavit was submitted in opposition to the Agency's motion for summary judgment in a related state court action (Essex County Index No. 301-06), which was stayed pending the outcome of this federal case.

48. Lot 39 was the premier lot in Fawn Ridge and one of the most expensive because it contained open field views of Lake Placid and Whiteface Mountain, which were used by the Developer to promote sales on Fawn Ridge. (See Politi Aff., ¶ 8 and Ex. A thereto).

49. The Permit expressly recognizes the open character of Lot 39: "Lots 10-15 and 39-41 will likely be readily visible from Route 86, Hillcrest Avenue, commercial establishments north of Route 86, Mount Whitney and the east central portion of Lake Placid, all within two miles of the project site. *Lots 39 and 40 are principally or entirely open field.*" (See Permit, Ex. Z, pp. 11) (emphasis supplied).

50. On June 16, 1988, shortly after the Agency issued the Permit, the Developer's agents met to discuss various aspects of the project and agreed that all suitable topsoil will be stockpiled in the subdivision for future use. A copy of a memorandum detailing the June 16, 1988 meeting is attached hereto as **Exhibit "KK"**. This agreement complied with Permit Condition #10, which required the Developer to stockpile all suitable topsoil. (See Permit, Ex. Z, pp. 10-11).

51. Beginning in 1989, Harlow Excavating and Contracting, Inc. began constructing the roads, utilities and other infrastructure for Fawn Ridge. Norman Harlow stockpiled significant amounts (i.e., 200 cubic yards) of topsoil on Lot 39 because it was "wide open and virtually lacked any trees whatsoever, [and] because it was previously developed and maintained as a ski slope" and thus, did not require any clearing. (See Affidavit of Norman Harlow, sworn to October 4, 2006 ¶¶ 1-4, a copy of which is attached hereto as **Exhibit "LL"**).<sup>4</sup>

52. On or about August 2, 1994, the Plaintiffs purchased Lot 39 in the Fawn Ridge subdivision with the intention of building a single-family home upon it. (See Spiegel Aff., ¶ 5).

---

<sup>4</sup> The Harlow Affidavit was submitted in opposition to the Agency's motion for summary judgment in a related state court action (Essex County Index No. 301-06), which was stayed pending the outcome of this federal case.

53. In the summer of 1999, the Plaintiffs hired Ruppert Construction Corp. to grade and seed a 50' x 100' area of the upper portion of Lot 39 near the road for the purpose of setting up a tent for a family wedding party. (See M. Spiegel Tr., Ex. G, pp. 33-34). The area—like the entire lot—was an overgrown field with brush and a few scattered scrub trees that were 1 to 4 inches in diameter. No significant trees were removed, and no dirt or any other fill was brought onto the site. (See Ruppert Aff., Ex. JJ, *supra*, ¶¶ 3-6).

54. In September 2002, the Plaintiffs decided to build a home on Lot 39 and began the process of seeking ARC approval for the home. (See September 24, 2002 Letter to Zdrahal, a copy of which is attached hereto as **Exhibit "MM"**).

55. On June 8, 2004, the Fawn Ridge ARC approved the design plans for the proposed residence on Lot 39. (See ARC's June 8, 2004 Approval Letter, a copy of which is attached hereto as **Exhibit "NN"**).

56. Thereafter, the Plaintiffs hired Robert Marvin, a well-known land surveyor in Lake Placid, to assist the builder of their home in selecting the location and staking out the location of the foundation on Lot 39. (See Spiegel Aff., ¶¶ 17-20).

57. Marvin, who is highly regarded as "the" surveyor of Lake Placid, has surveyed or staked out the lots of at least twenty-five (25) homes in Fawn Ridge. (See Marvin Tr., Ex. H, pg. 20). Further, not only has he regularly performed work for clients seeking Agency permits, but Marvin also has worked for the Agency itself when its staff surveyor was unavailable. (Id. at 28). Therefore, Marvin is knowledgeable about Agency permits and the permitting process.

58. Like everyone else, Marvin understood that the Fawn Ridge ARC's job was to assure compliance with the Lot Development Control Notes, which specifically mention the Permit. (See Marvin Tr., Ex. H, pg. 51-54). Thus, in choosing the location for the house on Lot

39, Marvin relied on the Fawn Ridge ARC's Lot Development Control Notes and relied on the ARC to assure Permit compliance with respect to each Fawn Ridge house. (Id. at 54).

59. Marvin was aware that the Developer stockpiled topsoil obtained from the excavation of other Fawn Ridge projects on Lot 39. (See Marvin Tr., Ex. H, pp. 60-62). As such, Marvin staked out the house on the "rough grade" that existed on the lot at the time when he was hired. (See id.). The foundation was situated on "original grade" because it was cut into the slope, which is expressly allowed under the terms of the Permit. The Spiegel home is not built on fill. (See id. at 130; see also Permit, Ex. Z, pg. 19). Thereafter, some fill was used around the house. (See Art Spiegel Tr., Ex. F, pg. 101).

60. Marvin determined that the Plaintiff's partially constructed house on Lot 39 is situated on a slope of 20.55%, which complies with the Permit's prohibition of construction on slopes of 25% or greater (see Permit, Ex. Z, pg. 19). (See Marvin Tr., Ex. H, pg. 128-33; a reduced copy of Marvin's Profile Map of Lot 39, which is referred to in the testimony, is attached hereto as **Exhibit "OO"**). The Defendant Agency now admits that the Spiegel home complies with the Condition of the Permit that prohibits construction of homes on slopes greater than 25%, because the slope where the Spiegel home exists is less than that. (See Lalonde Tr., Ex. M, pp. 52-53; 95-96).

61. When Marvin arrived at the Spiegels' Lot 39 to stake out the foundation, there was no evidence of any trees having been cut. The view was the same as it had been when Marvin used to ski on the slope. He described the vegetation on Lot 39 as "all small brush". (See Marvin Tr., Ex. H, pg. 189). Lot 39 was such a wide open hillside that the Spiegels' neighbor took his family sleigh riding there during the winter. (See E. Byrne Tr., Ex. S, pp. 30-31).

62. Thereafter, Building Inspector Morganson inspected and approved the location of the foundation on Lot 39. (See Art Spiegel Tr., Ex. F., pp. 112-13).

63. The location of the house was moved further downslope in order to reduce the ridgeline visual impact (i.e., placing the house higher up the slope near the road would greatly increase the house's visibility since the ridgeline would not serve as a backdrop for the home). (See Marvin Tr., Ex. H, pg. 123, 195-96; see also Affidavit of Robert Marvin, sworn to October 6, 2006, ¶ 7, a copy of which is attached (without exhibits) hereto as **Exhibit "PP"**).<sup>5</sup> Thus, the location of the house on Lot 39 conforms to the Agency's overall visual impact analysis for Fawn Ridge. (See ¶ 21, Ex. W, *supra*).

64. Building Inspector Morganson subsequently inspected the lot, approved the application and issued Building Permit No. 4211 on September 16, 2004. (See Art Spiegel Tr., Ex. F, pp. 112-13; see also Spiegel Aff., ¶ 21).

### **The Agency's Standard Enforcement Protocol**

65. Despite being charged with the responsibility of granting and enforcing permits for development of the three million acres of private land inside the Adirondack Park, the Agency has failed to implement a system to monitor compliance with the permits that it issues. Instead, the Agency's Acting Executive Director characterized the Agency's permit monitoring system as "catch as catch can". (See Sengenberger Tr., Ex. K, pp. 39-40).

66. The Agency's General Enforcement Guidelines, adopted in January 2003, state in pertinent part as follows:

#### **V. Enforcement Procedures**

##### **Investigation**

---

<sup>5</sup> The Marvin Affidavit was submitted in opposition to the Agency's motion for summary judgment in a related state court action (Essex County Index No. 301-06), which was stayed pending the outcome of this federal case.



The Agency received complaints about possible violations from the public and staff. ***Complaints will be investigated*** by staff and no determination of violation will be made unless and until there is sufficient proof. ***Investigations will be prioritized*** according to the potential for significant environmental damage and the need for prompt action.

***Agency enforcement officers will undertake the investigation*** of the alleged violations assigned to them, including obtaining information to determine the legal and factual history of the site and its use, whether a violation has in fact occurred, and options for resolution. ***A staff attorney is assigned to each case to ensure legal guidance.*** Agency project review and resource analysis staff are consulted on issues which require more expertise. Once all the necessary legal and factual information has been obtained, and if a violation has been demonstrated, the enforcement officer and assigned attorney will prepare a recommendation for resolution of the violation.

#### Administrative Resolution of Violations by Staff

The Executive Director or his designee will make all reasonable efforts to resolve violations with the voluntary cooperation and/or consent of the violator(s) and landowners. ***Almost all violations should be resolved at this level of the enforcement process*** to ensure the most efficient use of staff resources, and timely compliance and/or remediation of environmental damage...***Resolutions of violations should be generally consistent in similar cases***, while also taking into account the specific facts and circumstances of each case.

\* \* \*

Moreover, ***enforcement staff will not have the benefit of the public comment*** provided for in the project review process.

\* \* \*

When violations cannot be resolved at the staff level, they may be referred to the Enforcement Committee for resolution or, in the case of violations of the Freshwater Wetlands Act or of an Agency permit, to the Agency for a determination and order.

A copy of the Agency's General Enforcement Guidelines is attached hereto as **Exhibit "QQ"** (emphasis supplied).

67. Thus, based on the General Enforcement Guidelines, the Agency has established a standard protocol that it follows when it receives a complaint about a possible violation. The Agency's standard protocol is as follows:

- The Agency employee who received the complaint fills out a potential violation report and gives it to the Enforcement Program secretary, who makes a file and gives it to Enforcement Attorney Paul Van Cott.
- Van Cott then assigns the case with one of the following priority rankings:
  - Priority 1: "Any report involving ongoing or increasing significant environmental damage, such as: ongoing wetland fills, construction, shoreline cutting; anything being built or in progress; any situation worthy of a Cease and Desist Order or Request to Redress."
  - Priority 2: "Any case where continued delay may create significant legal problems or economic hardship for the landowner..."
  - Priority 3: "Any case involving environmental damage that is neither increasing nor currently in progress, where the site has been stabilized and immediate restoration is not required."
  - Priority 4: All other cases.
- Van Cott then gives the file to the enforcement investigator, who is automatically assigned based on the region in the Park where the alleged violation is located.
- The enforcement investigator sends out an initial contact letter to the alleged violator.
- The enforcement investigator investigates the alleged violation, then reports back to Van Cott with a recommendation as to how the case should be handled.
- If the investigation reveals a violation, one of the Agency's two staff attorney (either Van Cott or Sarah Reynolds) will draft a proposed settlement agreement and present it to the alleged violator.
- If settlement is not reached, Van Cott discusses the case with the Agency's Executive Director, who decides whether or not to refer the case to the Agency Board's Enforcement Committee.

(See Van Cott Tr., Ex. J, pp. 40-60; see also Agency's Enforcement Priority Guidelines, a copy of which is attached hereto as **Exhibit "RR"**).

68. Sometime in or around 2004, Van Cott gave a presentation to the Agency Board's Enforcement Committee informing it that the Agency's enforcement program must focus on

Priority 1 and 2 cases and suggesting that site visits should be performed in all Priority 1 and 2 cases. (See Van Cott Tr., Ex. J, pp. 60-61; see also Confidential Enforcement Presentation Outline, a copy of which is attached hereto as **Exhibit "SS"**).

**The Agency Intentionally Deviated From Standard Protocol  
in Prosecuting Plaintiffs' Enforcement Case**

69. In June 2004, Arthur Spiegel showed the Lot 39 design plans to Eugene Byrne, his across-the-street neighbor who had used Lot 39 for sledding, months before he broke ground. (See Art Spiegel Tr., Ex. F, pp. 106-08). Plaintiff did this just to be neighborly, because the Byrnes were about to lose their view. Byrne commented that the proposed home was beautiful, but also that it was a big house. (See id.; E. Byrne Tr., Ex. S, pg. 29; M. Spiegel Tr., Ex. G, pp. 47).

70. In mid-August 2004, Byrne called the Agency and informed an Agency staff member that the design plans for the house on Lot 39 may not comply with the applicable land restrictions. Byrne does not know the name of the Agency employee with whom he spoke, but he was told by that person that the Agency "would look into it". (See E. Byrne Tr., Ex. S, pp. 35-37). However, the Agency failed to take any action prior to the commencement of construction on Lot 39.

71. On September 24, 2004, after construction of the Plaintiffs' home began, Mrs. Byrne called the Agency to lodge a second complaint since the Agency had failed to act on her husband's earlier complaint. At first, Mrs. Byrne spoke with Agency staff member Brian Ford, who filled out the requisite potential violation report. Ford then transferred her call to Van Cott. (See Van Cott Tr., Ex. J, pp. 40-41; K. Byrne Tr., Ex. T, pg. 12).

72. During their September 24, 2004 telephone call, Van Cott asked Mrs. Byrne whether or not a structure had been erected on Lot 39, to which Mrs. Byrne answered in the negative. Van Cott told her that he "would look into it". (See K. Byrne Tr., Ex. T, pg. 13-14).

73. Van Cott immediately opened a file, assigning the Spiegel case a Priority 2 ranking, (see ¶ 67, *supra*) meaning any "Continued delay may create significant legal problems or economic hardship for the landowner." Notwithstanding this proper classification, Van Cott declined to assign an enforcement investigator to investigate the potential violation per the Agency's standard protocol. Later, when the obvious, deliberate delay in informing Plaintiff of the complaint was identified, Van Cott claimed that he drafted (and typed without secretarial help) a letter addressed to Arthur Spiegel and copied it to Town Building Inspector Morganson, in which Van Cott purports to inform the Plaintiffs of the potential Permit violation. (See Van Cott, Tr., Ex. J, pg. 94). A copy of Van Cott's purported September 24, 2004 letter is attached hereto as **Exhibit "TT"**.

74. Van Cott now claims that he then gave the purported September 24, 2004 letter to the Enforcement Program secretary to mail. (See Van Cott, Tr., Ex. J, pp. 96-97). However, neither Arthur Spiegel nor Building Inspector Morganson received the purported letter. (See Spiegel Aff., ¶¶ 26-27; Affidavit of James Morganson, sworn to October 22, 2008 – pg. 34 of Exhibit A, thereto). The Agency admits that the letter did not come back as "undeliverable" from the post office. (See Parker Tr., Ex. Q, pp. 104-05).

75. Inexplicably, Van Cott later drafted an affidavit for Agency enforcement investigator Susan Parker to sign, even though she lacked personal knowledge, swearing that the phantom Van Cott letter was mailed. (See Parker Tr., Ex. Q, pp. 99-109; see also Lamme Aff., Ex. C). Parker never even saw the letter before it was sent and does not even know if it was

mailed, notwithstanding her sworn statement to that effect. (Id.). Indeed, Parker was not even assigned to the Spiegel case until six months later. (See Van Cott Tr., Ex. J, pg. 92-93; Parker Tr., Ex. Q, pp. 34).

76. Strangely, even though this phantom initial contact letter seeks proof that the home on Lot 39 complies with the Permit, Van Cott closed the enforcement file against Plaintiffs on the same day in which he opened it. (See Agency's Master Action Database ("MAD") printout, including referenced to this Priority 2 categorization, for Enforcement Case #2004-252, which provides an overview of the Agency's enforcement action against the Plaintiffs, attached hereto as **Exhibit "UU"**). (See also Van Cott Tr., Ex. J, pg. 92).

77. Susan Parker, then the Agency's enforcement investigator for the portion of the Park that includes Fawn Ridge, testified that she could not think of another single case where Van Cott—rather than the enforcement investigator—opened a file on a potential violation by sending out the initial contact letter. (See Parker Tr., Ex. Q, pp. 30-32, 107-08).

78. Meanwhile, Mrs. Byrne continued speaking with Van Cott at the Agency in order to follow up with the Agency's investigation of the Spiegels' home. Mrs. Byrne estimates that she may have called Van Cott up to ten (10) more times after her initial phone call on September 24, 2004. (See K. Byrne Tr., Ex. T, pg. 14). However, the Agency did not produce any records in discovery pertaining to these phone calls between Mrs. Byrne and Van Cott, and there was no activity on the Agency's closed file on Plaintiffs.

79. In early 2005, the Byrnes—having grown tired of the Agency's inaction—hired counsel to assist them in getting the Agency to act on their complaints. (See K. Byrne Tr., Ex. T, pg. 18). On February 3, 2005, the Byrnes's counsel contacted Van Cott and advised him that the Byrnes had retained counsel. That same day, Van Cott re-opened the Agency's enforcement file

against the Plaintiffs and assigned Susan Parker as the enforcement investigator. (See Ex. UU; Van Cott Tr., Ex. J, pg. 92-93; Parker Tr., Ex. Q, pp. 34). Parker was unaware that Van Cott had opened and closed the file several months earlier. (See Parker Tr., Ex. Q, pg. 39).

80. That same day, on February 3, 2005, Arthur Spiegel received a telephone call from Van Cott about possible "minor" violations of Permit 87-28. That was the first time that the Plaintiffs became aware of the complaints about the potential violation of the Permit. (See Spiegel Aff., ¶¶ 29; Art Spiegel Tr., Ex. F, pp. 96-97).

81. A few weeks later, Plaintiff Arthur Spiegel and his builder met with the following Agency staff members at the site of construction on Lot 39: Susan Parker, Brian Grisi, John Quinn and Shaun Lalonde. (See Lalonde Tr., Ex. M, pp. 9-10; Grisi Tr., Ex. N, pp. 12-15; Quinn Tr., Ex. O, pg. 34). One of the Agency staff members remarked that there were a number of homes in Fawn Ridge that appeared to be built in violation of the Permit. (See Spiegel Aff., ¶ 32).

82. On March 30, 2005, the Agency issued a Cease and Desist Order prohibiting the Plaintiffs from continuing the construction of their home on Lot 39, even though Plaintiffs had voluntarily halted construction upon receiving Van Cott's telephone call on February 3, 2005. A copy of the Agency's Cease and Desist Order is attached as Exhibit "C" to the Amended Complaint. (See Ex. A, *supra*).

83. While negotiations were ongoing, the Agency commenced an enforcement proceeding by issuing a Notice of Intent on April 15, 2005. This hearing was intended to suspend the Permit as against the Plaintiffs, even though they are not the original permittee. The Developer was not a party to this proceeding. A copy of the Agency's Notice of Intent is attached as Exhibit "D" to the Amended Complaint. (See Ex. A, *supra*). This violated the

Agency's standard protocol because the Plaintiffs were never presented with a proposed settlement agreement in accordance with the Agency's policies. (See ¶¶ 62-63, *supra*; Van Cott Tr., Ex. J, pg. 128).

84. Van Cott's selective filing of the Notice of Intent to suspend Permit is another major deviation from protocol because it is a procedure that has never been done in any other case in the history of the Defendant Agency. (See Wray Tr., Ex. L, pp. 58-59).

85. The Agency's Notice of Intent alleges that the Plaintiffs violated the Permit by: (i) failing to locate their house "at least 20 ft. back from the abrupt change in slope" on Lot 39, which is not defined in the Permit; (ii) failing to allow successional tree growth to occur on Lot 39, notwithstanding the extensive tree cutting allowed in the Permit; and (iii) constructing a house that exceeds the Permit's 30-foot height limitation. (See Ex. A, *supra*).

86. Notably, Paragraph 31 of the Notice of Intent states, "initial investigation by Agency staff indicates that there may be other homes that have been previously built in the subdivision exceeding the 30 foot height limit," which establishes the APA's contemporaneous knowledge of similar alleged violations among similarly situated homeowners in Fawn Ridge. (See Ex. A, *supra*).

87. The Agency's Notice of Intent scheduled an enforcement hearing before the Agency Board on July 7, 2005. (See Ex. A, *supra*). Prior to the enforcement hearing, the Plaintiffs made several settlement submissions, complete with engineering drawings and maps, offering to resolve the enforcement action by reducing the height of the Plaintiffs' home as much as feasible and by planting additional vegetation on the property to screen the views of the structure. These settlement offers pointed out that the height of the Plaintiffs' lowered house would be among the lowest of all homes in Fawn Ridge. (See Spiegel Aff., ¶ 37). In response,

the Agency irrationally and arbitrarily rejected anything less than strict compliance with the Agency's skewed reading of the Permit, with which the Agency had never monitored compliance, and never before sought to enforce. (See Amended Compl., Ex. A, ¶¶ 73-76).

88. On or about June 24, 2005, the Agency Board's general counsel, John Banta, instructed Enforcement Investigator Parker to create a "Notice" of the Agency's July 7, 2005 enforcement hearing and provide it to other Fawn Ridge residents. (See Van Cott Tr., Ex. J, pp. 105-06; Parker Tr., Ex. Q, pp. 52-54). This extra-legal "Notice," not authorized by the State Administrative Procedure Act, solicited public comment in direct violation of the Agency's standard protocol. (See ¶¶ 66-67, *supra*). A copy of the "Notice" is attached hereto as **Exhibit "VV"**.

89. Importantly, the Agency has not even prepared a Notice like this before or since. (See Van Cott Tr., Ex. J, pg. 109; Parker Tr., Ex. Q, pp. 52-54). Further, the Agency admits that providing neighbors with notice of the initiation of an enforcement proceeding violates the Agency's standard protocol for enforcement cases. (See Van Cott Tr., Ex. J, pp. 106-07; see also ¶¶ 66-67, *supra*). Such notices are not authorized by the Agency's regulations. (See Van Cott Tr., Ex. J, pp. 106, 109).

90. In response to the notice of intent to revoke the Permit, the Plaintiffs made a request pursuant to the Agency's regulations (9 N.Y.C.R.R. § 581-3.1, et seq.) to modify the terms of the Permit, as applied to their property. In support of their request, Plaintiffs made six (6) principal arguments:

- (i) Plaintiffs complied with all building and zoning requirements for the Town of North Elba, the sole permitting authority, and were granted two separate permits – one to pour the foundation and one to build their house, in addition to passing several inspections initiated by the Town of North Elba Building Department;



- (ii) Plaintiffs were not notified by the Town of North Elba, the Fawn Ridge ARC, their building contractors, or the Agency that their building plans for which they sought approval exceeded the 30-foot height limitation set forth in the Permit;
- (iii) The Agency, with full knowledge that construction was ongoing, waited approximately six (6) months before taking any action in response to the complaints lodged by the Byrne family. During this time, the Plaintiffs invested a substantial amount of time, effort and money in the construction of the residence, all in plain view of the Agency staff;
- (iv) The Permit specifically recognizes that Lot 39 had previously been denuded of tree cover, characterizing same as "principally or entirely open field," that would be "readily visible" from several locales. Therefore, the Agency's conclusions regarding adverse visual impacts and allegations of illegal tree cutting were irrational;
- (v) Plaintiffs reasonably relied on the 35-foot height restriction in their deed;
- (vi) Plaintiffs' home is one of many in Fawn Ridge that has not complied with the 30-foot building height restriction of the Permit, and a home measuring at least 40 feet in height was then being built three properties away from Plaintiffs' home. The Agency took no action against that home.

(See Amended Compl., Ex. A, ¶¶ 67-72; see also Plaintiffs' Response to the Notice of Intent, Memorandum of Law, and Attorney Affidavit submitted to the Agency on or about June 27, 2005, attached hereto as **Exhibit "WW"**).

91. On July 8, 2005, the Agency denied the Plaintiffs reasonable request to modify the Permit to reflect existing conditions in Fawn Ridge, entered an Enforcement Order suspending the Permit as against the Plaintiffs, and instructed the Plaintiffs to submit revised plans and drawings demonstrating compliance with the Agency's understanding of the terms of the Permit. A copy of the Agency's July 8, 2005 Enforcement Order is attached hereto as **Exhibit "XX"**.

92. Despite this directive, the Agency itself has never determined the visual impact analysis as to what a 30-foot home (according to the Agency's measurement guideline) would

look like on Lot 39 if it were built closer to Algonquin Drive. (See Quinn Tr., Ex. O, pp. 44-48; Wray Tr., Ex. L, pp. 44-47). Moreover, the Defendant Agency's Executive Director, a landscape architect, never engaged in any visual impact analysis concerning what a compliant house on Lot 39 would look like. (See Sengenberger Tr., Ex. K, pp. 68-69). Indeed, the Agency has not even evaluated the visual impact of the Spiegels' significant settlement proposals, including an offer to lower the house by several feet, according to the Agency's height measurement guideline. (See Quinn Tr., Ex. O, pg. 61).

93. Similarly, the Agency has no idea what, if any, trees were cut on Lot 39 and never compared the multitude of existing trees currently on Lot 39 (see Spiegel Aff., ¶¶ 8-9) to the many Permit conditions that allow extensive cutting for a 5,000 square foot clearing for each house and other cutting to command a view from each house. (See Permit Condition 15, Ex. Z, *supra*; Grisi Tr., Ex. N, pp. 41-43, 54-57).

94. In accordance with the Agency's July 8, 2005 Enforcement Order, the Plaintiffs made a third settlement offer, which further reduced their house's profile and offered additional screening techniques that went far beyond the Permit. This settlement offer was summarily rejected by the Agency. (See Spiegel Aff., ¶ 38).

95. On September 7, 2005, the Agency purports to have issued and served a "Final Order" requiring Plaintiffs' home to come into compliance with the Permit. Given the Defendant Agency's finding that the house violated the Agency's newly-minted slope theory, this meant destruction of the house. A copy of this Final Order is attached hereto as **Exhibit "YY"**.

96. In November 2005, the Agency referred the underlying enforcement case to the New York State Attorney General's Office for purposes of commencing a civil action against the Plaintiffs seeking, among other things, an Order requiring the Plaintiffs to demolish their home

and rebuild it, if at all, in strict compliance with the Agency's understanding of the terms of the Permit. (See Ex. UU, *supra*).

97. In December 2005, even though the Agency's "Final Order" did not contain or authorize a demand for a penalty against Plaintiffs (see Van Cott Tr., Ex. J, pg. 127; Wray Tr., Ex. L, pp. 70-71), the Agency (through counsel) demanded that the Plaintiffs pay a \$200,000.00 penalty. (See Spiegel Aff., ¶ 48).

98. The Agency's refusal to negotiate in good faith and exorbitant penalty demand is shocking, especially since the Agency routinely settles with private homeowners alleged to have built homes without an Agency permit or in violation of an existing permit, allowing the house to stand, along with a small penalty. Attached hereto as **Exhibit "ZZ"** are six (6) Agency settlement agreements—executed by Van Cott—that require private homeowners to pay penalties ranging from \$100.00 to \$5,000.00. The alleged violations in these cases are no different from those that the Agency alleged in the Plaintiffs' enforcement case (i.e., building in violation of a permit, house located on slopes).

99. Plaintiff Arthur Spiegel believes that Van Cott's animosity towards his family is politically motivated. (See Spiegel Aff., ¶ 50; Spiegel Tr., Ex. F to Privitera Aff., pp. 69-83). Indeed, the Agency inquired about the Spiegels' political affiliation during depositions. (See M. Spiegel Tr., Ex. G to Privitera Aff., pp. 53-54). Plaintiffs are Republicans. (See *id.*; Spiegel Aff., ¶ 50). Conversely, Defendant Van Cott is an active participant in the New York State Democratic Party, and he has discussed the Spiegels' enforcement matter with people holding official positions in the Democratic Party. (See Van Cott Tr., Ex. E to Privitera Aff., pp. 98-104). Although he could not remember the details and timing of the conversations, Van Cott

admits that he discussed the Spiegels' case with the Chair of the Essex County Democratic Committee and others in the Democratic Party. (See Id.).

100. On February 15, 2006, after many months of good-faith efforts to resolve these issues with the Agency, the Plaintiffs were compelled to commence the instant action pursuant to 42 U.S.C. § 1983 against the Agency; Acting Executive Director Mark Sengenberger, Executive Director Richard Lefebvre, and Enforcement Officer Paul Van Cott, for violations of Plaintiffs' constitutional rights which occurred in the context of the Agency's enforcement activity. (See Docket No. 1).

#### **The Agency Has Ignored Many Other Fawn Ridge Violations**

101. The Agency investigated a Fawn Ridge home for an alleged Permit violation in 1990, shortly after the subdivision was created. On January 19, 1990, the Agency received a complaint that Michael Nicola's house on Lot 9 exceeds the Permit's 30-foot building height limitation by more than 10 feet. The Agency opened an enforcement file (#E90-010), conducted a field investigation, and concluded that the house was 30 feet tall and complied with the Permit. On January 23, 1990, the Agency closed its enforcement file on Nicola's property. Copies of documents from the Agency's Nicola enforcement file (#E90-010) are attached hereto as **Exhibit "AAA"**. [According to the Agency's measurement method used against the Spiegels, the Nicola home is 37 feet tall. See ¶ 109, *infra*].

102. During the Agency's investigation of the Plaintiffs' home in February and March of 2005, Agency enforcement investigator Parker noticed that many of the other Fawn Ridge homes contained likely violations of the Permit. Parker informed Van Cott about these other possible violations. (See Parker Tr., Ex. Q, pg. 46-47).

103. On July 5, 2005, several days before the Plaintiffs' enforcement hearing before the Agency Board, the Agency opened an enforcement file against Mary Richter (#E2005-154), who owned Lot 36 and was then constructing a home much like Plaintiffs'. (See Parker Tr., Ex. Q, pg. 51). Even though Richter's house was known by the Agency to be under construction, the Agency did not issue a cease and desist order as they did in Plaintiffs' enforcement case. (See Van Cott Tr., Ex. J, pg. 124). In fact, no enforcement activity occurred at all with respect to the Richter home. (See Parker Tr., Ex. Q, pp. 51-52). The Agency admittedly knew the Richter house exceeded the Permit's height limitation and failed to take any action. (See Miller Tr., Ex. P, pp. 116-122). (See also Amended Compl., Ex. A, ¶¶ 67-72; Plaintiffs' Response to the Notice of Intent, Ex. WW).

104. Agency records also show that Richter contacted the Agency on July 27, 2005 and told them that she had no knowledge of the Permit and that—like Plaintiffs—she commenced construction of her home relying on local and, presumably, ARC approval. A copy of the Agency's MAD printout for its Fawn Ridge enforcement files is attached hereto as **Exhibit "BBB"** (Richter's file summary is on Page 2, thereof).

105. On September 12, 2005, three days after the purported "Final Order" was issued in Plaintiffs' administrative enforcement case, the Agency opened five (5) more enforcement investigation files against other Fawn Ridge homeowners: Wagle (#E2005-246), Gengel (#2005-247), McKillip (#2005-248), Hanrahan (#E2005-249), and Davis (#E2005-250). (See Ex. BBB). Other than the Hanrahan home, each of the other Fawn Ridge homes is situated on the ridge line visible from and facing the Village of Lake Placid's Route 86. (See Spiegel Aff., ¶¶ 39, 53 and Ex. F, G and H, thereto).

106. On September 15, 2005, Van Cott sent John Banta, the Agency Board's general counsel, a map of Fawn Ridge with a note indicating that the Wagel, Gengel, McKillip and Davis homes all exceeded the Permit's 30-foot building height limitation. Notably, Van Cott opined, without data, that all of the other Fawn Ridge homes appear to comply with the Permit. A copy of Van Cott's September 15, 2005 Map/Note is attached hereto as **Exhibit "CCC"**.

107. On May 11, 2006, three days after the Agency lost its motion to dismiss the Complaint herein, Van Cott suddenly instructed Agency enforcement investigator Miller to investigate these other homes in Fawn Ridge. (See Miller Tr., Ex. P, pp. 20-24).

108. In October 2006, as part of Plaintiffs' opposition to the Agency's motion for summary judgment in the State case, Robert Marvin submitted an Affidavit with a map that he created showing the precise building heights of thirty-five (35) of the thirty-eight (38) homes built in Fawn Ridge at that time. (See Marvin Aff., Ex. PP, *supra*). According to Marvin, only six (6) homes in Fawn Ridge would comply with the Permit's 30-foot building height limitation under the Agency's measurement standard. (See Ex. PP, ¶ 10). Moreover, of the ten (10) Fawn Ridge lots containing "steep slopes" of 25% or greater, seven (7) have homes constructed on those slopes. (*Id.*, ¶ 12). The maximum slope covered by Plaintiffs' house is 20.55%. (See ¶ 60, *supra*). The Marvin Map is attached hereto as **Exhibit "DDD"**.

109. The information contained in the Marvin Affidavit and Marvin Map, as of the Fall of 2006, is accurately characterized as follows:

**FAWN RIDGE SUBDIVISION BUILDING HEIGHTS  
AND PROXIMITY TO 25% SLOPE**

<u>Lot #</u>	<u>Name</u>	<u>Building Height</u>	<u>On Slope &gt; 25%?</u>
1	Friedman	No building	
2	Friedman	No building	
3	MacLennan	No building	

4	Lautenschuetz	31.0	
5	Schrader	29.5	
6	Baker	No building	
7	Cooney	38.5	
8	Zdrahal	37.9	
9	Nicola	37.0	
10	Poorman	No building	
11	Kelly	No building	
12	Morton	28.6	
13	Fava	31.2	Yes
14	Kelly	38.6	
15	Stewart	39.9	
16	Hanrahan	37.9	
17	Kelly	No building	
18	Nowicki	42.8	
19	Dodson	42.0	
20	McKillip	39.5	
21	Bowman	No building	
22	Mandelcorn	31.1	
23	Booth Dev. Corp.	36.2	
24	Harwood	No building	
25	Harwood	30.0	
26	Gallagher	37.4	
27	Wilkins	26.6	
28	McGraw	No building	
29	Merritt	40.6	
30	Lampeter	No building	
31	Preston	30.1	
32	Hock	No building	
33	Hackett	35.1	
34	Salnick	No building	
35	Spiegel	No building	
36	Richter	(No Marvin data)*	
37	Ledger	35.8	
38	Hallowell	33.3	
39	Spiegel	44.5	
40	Sieg	No building	
41	Wagle	45.4	Yes
42	Donatello	No building	
43	Criscuolo	40.9	
44	Krawczyk	34.9	
45	Ulrich	23.5	
46	Wilcox	No building	
47	Foster	No building	

---

\* Marvin did not measure the Richter home, but the Agency admits the Richter home is well over height. (See Miller Tr., Ex. P, pp. 122-23).

48	Gordon	32.7	
49	Byrne	27.6	
50	Lansing	43.3	Yes
51	McKillip	38.1	Yes
52	Sheft	44.6	Yes
53	Gengel	38.5	Yes
54	Davis	38.7	

The average height of the homes in Fawn Ridge is just shy of 40 feet (see Ex. PP at ¶ 10) according to the Agency's current height guidelines. But the guidelines have changed. Historically, when a permit stated that one may measure from "finished or existing grade adjacent to the structure", and nothing more, the only fair and reasonable reading, and the applied understanding by the Fawn Ridge ARC for nearly twenty years, had been that one may measure from finished grade. (See Ex. FF at ¶ 17). Moreover, the only practical application of height limitations in existence in 1988, when the Permit was issued, allowed a homeowner to *average the height of the structure to finished grade*. (See Ex. PP at ¶ 13).

110. The Agency re-opened a new enforcement investigation file against Michael Nicola (#E2007-094), based on the Marvin Map's listing his home on Lot 9 at 37.0 feet, even though it had previously determined in 1990 that his house complied with the Permit's 30-foot building height limitation. (See Ex. AAA, *supra*).

111. No enforcement activity or investigation has occurred with respect to these other Fawn Ridge homes. In fact, Bernadette Hanrahan was told by Agency Enforcement Investigator Douglas Miller at a site visit to her home in April 2008 that nothing is going to happen with respect to her enforcement file. (See Affidavit of Bernadette Hanrahan, sworn to February 5, 2009, ¶ 10).



112. Agency enforcement investigator Miller testified that the Agency is concerned with "aesthetics", and that visibility from off-site locations is the Agency's primary focus in the Fawn Ridge investigations. (See Miller Tr., Ex. P, pp. 44-47).

113. Defendant Agency maintains that the crux of its enforcement position in Fawn Ridge relates to visibility from off-site locations, yet it is unable to identify where in the Permit such considerations are set forth. (See Miller Tr., Ex. P, 46-47). The Agency also maintains that visibility of Fawn Ridge homes from state lands and public hiking trails is important, but it has not viewed Fawn Ridge from any hiking trails or state land. (See Miller Tr., Ex. P, pp. 47-49).

114. The Agency has selectively determined not to have its forester evaluate any other homeowner in Fawn Ridge regarding tree cutting. (See Grisi Tr., Ex. N, pp. 45-46). Moreover, the Agency has selectively declined to take any measurements of the actual slope upon which other homes in Fawn Ridge have been built even though Marvin established over two years ago that several homes in Fawn Ridge, other than the Spiegel home, are on "steep slopes". (See Miller Tr., Ex. P, pp. 39-40).

115. The Agency has found that many of the homes in Fawn Ridge violate the Permit, yet it has decided not to enforce the Permit as against any other homeowner. For example, the Agency has measured the Wagle home on Lot 41 at 39.5 feet high and deems the house within the "abrupt change in slope" in violation of the Permit, but nothing has been done. (See Miller Tr., Ex. P, pp. 85-87). Further, the Agency measured the Dodson home on Lot 19 at 42.0 feet high—the same height that Marvin measured the Dodson home at on the Marvin Map. (See Miller Tr., Ex. P, pg. 102). Dodson's counsel even admitted to Van Cott that Dodson's home was over 40 feet high, yet the Agency failed to enforce the Permit. (See Van Cott Tr., Ex. J, pg. 132).

116. The Agency did not measure or otherwise investigate the Sheft home on Lot 52—even though the Marvin Map pegs its height at 44.6 feet and establishes that it is situated on slopes greater than 25%—because Sheft informed Agency enforcement investigator Miller that he "embraced" the Agency. As a result, Miller's notes indicate—without measuring the house height or measuring the "steep slope"—that Sheft's home is "in compliance" with the Permit. (See Miller Tr., Ex. P, pp. 126-35; see also Doug Miller's May 18, 2006 Field Notes for the Lot 52 Site Visit, attached hereto as **Exhibit "EEE"**).

117. Even though the Fawn Ridge enforcement investigation files represent 10% of the Agency's open enforcement cases, the Agency has not sought to enforce the Permit as against any other Fawn Ridge homeowner other than Plaintiffs. (See Van Cott Tr., Ex. J, pg. 126).

118. Moreover, even though the Agency admits that some of the deeds to Fawn Ridge lots were conveyed in violation of the Permit (see Ex. CC, *supra*), it has failed to open an investigation against the Developer or its successor. (See Van Cott Tr., Ex. J, 116-18; Miller Tr., Ex. P, pp. 62-64).

119. The Agency Board's Enforcement Committee Chair does not know the status of any other Fawn Ridge investigation since no other case involving Fawn Ridge has been sent to the Enforcement Committee for a decision. (See Wray Tr., Ex. L, pg. 67).

**The Defendant Agency's Height Measurement Methodology  
and Evolving Height Guidelines are Irrational**

120. In 1990, the Agency measured the Nicola home in Fawn Ridge during a field investigation and determined that it was less than 30 feet high, even though it is 37 feet high. (See Ex. AAA; Ex. DD and ¶ 101, *supra*). Clearly, the Defendant Agency previously measured homes by some sort of perimeter average to finished grade, as the Town does. (See Marvin Tr., Ex. H, pp. 196-97).

121. The Defendant Agency lacks a regulation—and even a policy—regarding building height measurement; rather it has a height measurement "guideline", which admittedly differs from the height measurement language contained in the Permit. (See Sengenberger Tr., Ex. K, pp. 86-88, 95-96; Lalonde Tr., Ex. M, pp. 38-39). Further, the Agency characterizes its own guideline as "confusing". (See Lalonde Tr., Ex. M, pp. 74-77). Indeed, Agency Board members acknowledge the need for a regulation to correct this confusing guideline, but have not yet promulgated one. (See Wray Tr., Ex. L, pg. 78).

122. The Agency's height measurement guideline is accurately portrayed in the Agency's Structure Height Presentation, which was presented in the Summer of 2006. (See Agency Structure Height Presentation, attached hereto as **Exhibit "FFF"**).

#### **The Agency Has a History of Favoring its Insiders**

123. On May 31, 2007, the Agency opened an investigation file against Placid Gold, LLC and Arthur Lussi, who own and/or operate the Crown Plaza Hotel in Lake Placid, because Lussi intentionally built a large wooden pavilion on its golf course, in open view, without obtaining an Agency permit. Like the Plaintiffs' investigation file, this case was given a Priority 2 ranking. (See Agency's MAD printout for Placid Gold, LLC / Arthur Lussi (#E2007-152), attached hereto as **Exhibit "GGG"**).

124. Arthur Lussi serves as a Commissioner on the Agency Board. (See Van Cott Tr., Ex. J, pg. 75).

125. Rather than following its standard protocol in Mr. Lussi's case (see ¶¶ 66-67, *supra*), Van Cott and the other enforcement attorney, Sarah Reynolds, worked vigilantly to resolve the matter in two weeks, during which time the Agency conducted a site visit, investigated the situation, referred the case to the enforcement attorney, compiled a complex

penalty analysis to justify a small fine and completed settlement negotiations. (See Van Cott Tr., Ex. J, pp. 76-81).

126. The Agency admits that even though it conducted a site visit, it did not study the visual impact of the pavilion from any public areas. (See Van Cott Tr., Ex. J, pg. 84). Although Van Cott testified that enforcement investigator Douglas Miller was involved in the visual impact analysis of the pavilion (see Van Cott Tr., Ex. J, pp. 84-85), Miller testified that he had no knowledge about the matter. (See Miller Tr., Ex. P, pg. 51).

127. The Agency further violated its standard protocol by having enforcement attorney Reynolds create a spreadsheet comparing Mr. Lussi's enforcement case to 48 other cases so that it could justify fining Mr. Lussi a small amount for constructing the pavilion without a permit. (See Sarah Reynolds' June 7, 2007 e-mail and spreadsheet, attached hereto as **Exhibit "HHH"**).

128. On June 14, 2007, a mere two weeks after the file was opened, the Agency and Mr. Lussi executed a settlement agreement whereby Mr. Lussi was fined \$2,500.00 for building a structure without a permit. (See Placid Gold, LLC Settlement Agreement, attached hereto as **Exhibit "III"**). The settlement agreement authorized the illegal pavilion and did not require an after-the-fact permit, screening, environmental remediation, or other such conditions. (See Van Cott Tr., Ex. J, pp. 82-83). The Agency claims the discretionary power to authorize structures without even issuing a permit, as it did for its Board Member, Mr. Lussi. (See id.).

129. The Agency admits that its handling of Mr. Lussi's enforcement case—particularly the determination of the penalty—violated the Agency's standard protocol for handling enforcement cases. (See Van Cott Tr., Ex. J, pg. 88).

### The Agency Improperly Destroyed Evidence In This Case

130. The Agency's IT specialist admitted at a FRCP 30(b)(6) deposition that the Agency lacks a electronic document retention policy. (See Kreider Tr., Ex. R, pg. 23).

131. The Agency's electronic data back-up tape system only allows a weekly "snapshot" view of documents saved onto the Agency's network going back four weeks. (See Kreider Tr., Ex. R, pp.18-20). Thus, an Agency employee can delete a document on the Agency's network and there will be no trace of its creation or deletion after four weeks since the back-up tapes are recycled every four weeks. (Id.).

132. Further, the Agency does not backup its e-mail system. (See Kreider Tr., Ex. R, pg. 21). Rather, an e-mail received by an Agency employee is automatically archived from the e-mail system onto each user's computer (locally and not on a network) sixty (60) days after the e-mail is received. The Agency admitted that these archived e-mails can easily and undetectably be deleted or modified because all Agency employees have unfettered access to his or her own archived e-mails. (See Kreider Tr., Ex. R, pp. 8, 21-26).

133. During discovery, the Plaintiffs received two Agency e-mails bearing the subject line "Fawn Ridge" the bodies of which were blank. The first e-mail was sent by enforcement officer Douglas Miller to enforcement program supervisor Paul Van Cott on May 12, 2006. (See May 12, 2006 e-mail, hereafter "E-mail #1"). Interestingly, E-mail #1 was sent a mere four days after this Court denied the Agency's motion to dismiss the Spiegels' equal protection claim. (See Docket #13). The second e-mail was sent by Van Cott to Miller on September 1, 2006 (hereafter "E-mail #2").

134. The metadata contained in these two electronic files establish that they were "modified" by Agency employees several months after they were sent—and well into the

discovery phase of this case. E-mail #1 (sent on May 12, 2006) was modified on November 2, 2006. A copy of E-mail #1 with a printout of its "Properties" tab is attached hereto as **Exhibit "JJJ"**. Similarly, E-mail #2 (sent on September 1, 2006) was modified on December 1, 2006. A copy of E-mail #2 with a printout of its "Properties" tab is attached hereto as **Exhibit "KKK"**.

135. The Agency's own IT (computer) specialist admitted that E-mail #1 and E-mail #2 were, in fact, modified by someone inside the Agency, but the Agency's electronic document retention policy prevents the Spiegels from knowing anything more about these e-mails or any others that were modified or destroyed because the Agency failed to preserve electronic evidence during this dispute. (See Kreider Tr., Ex. R, pp. 38-40).

#### **Location of Fawn Ridge**

136. Fawn Ridge is located in the Town of North Elba, near the Village of Lake Placid, State of New York. Attached hereto as **Exhibit "LLL"** is a map accurately portraying the location of Fawn Ridge.

**Conclusion**

137. For the reasons set forth herein, and for the reasons set forth in the accompanying affidavits and memorandum of law submitted herewith, the Plaintiffs Arthur and Margaret Spiegel respectfully request that this Court enter an Order granting summary judgment in favor of the Plaintiffs because there are no questions of fact about the Defendant Agency's irrational selective enforcement of the Permit against the Plaintiffs, thereby allowing the Plaintiffs to complete the construction of their home without Agency interference, and scheduling this matter for an inquest into damages and/or attorneys' fees that are recoverable pursuant to 42 U.S.C. §§ 1983 and 1988.

*/s/ John J. Privitera*

\_\_\_\_\_  
John J. Privitera

Sworn to before me this  
14th day of February, 2009.

*/s/ Jacob F. Lamme*

\_\_\_\_\_  
Notary Public