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

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PRELIMINARY STATEMENT

Unfortunately, the Adirondack Park Agency and State of New York (collectively "the Agency") have disregarded both the letter and spirit of Executive Law § 813 by assiduously refusing to recognize this Court's equitable power to "ameliorate" the Spiegels' relatively minor and inadvertent violations of Agency Permit No. 87-28 ("Permit") relating to the aesthetics of their home.

Instead of addressing the primary issue of this case (i.e., the visual impact of the Spiegels' home), the Agency opposes this motion by improperly offering evidence concerning past settlement negotiations[1] and dredging up inconsequential facts in an effort to create a material issue of fact to defeat the Spiegels' entitlement to summary judgment. The Agency has failed. Nowhere in its opposition papers does the Agency provide any admissible, relevant evidence to challenge the expert analysis of John D. Hecklau, which concludes that the Spiegels' proposed amelioration project would remedy the "skylight" issue that concerns the Agency so greatly. (See Hecklau Aff., ¶ 6).

Instead, the Agency characterizes the Spiegels' proposed amelioration project as a plea for "absolution" (see Affirmation of Susan L. Taylor, dated January 5, 2010, ¶¶ 3-4), despite the fact that the Spiegels' proposed remedy would (i) completely ameliorate the adverse visual impact caused by the violations; (ii) cost the Spiegels approximately $115,000; and (iii) make the

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[1] The Agency has presented the Court with a slanted recitation of the Spiegel Family's multiple attempts to settle this case, in violation of CPLR § 4547, which prohibits admission of compromises and offers to compromise. While these discussions were relevant to the claims in the related federal case, they are not pertinent here. As such, all references to prior settlement talks between the parties—including the section in the Agency's counsel's affirmation entitled "***The Spiegels' History of Weak Settlement Proposals***"—should be stricken and disregarded. (See e.g., Taylor Aff., ¶¶ 20-27). If the Court nonetheless decides to consider this evidence, then it is worth noting that the Agency now admits that it had been prepared to leave the Spiegels' house in its current location. (See Taylor Aff., ¶ 38; Sengenberger Aff., ¶ 35). Thus, the Agency finally acknowledges that the Permit conditions are not as religious as they now maintain.

Spiegel home lower and more compliant than several of the homes on the ridgeline and many in Fawn Ridge, as to which visual impacts remain. (See Spiegel Aff., ¶ 21). That is not absolution.

Incredibly, the Agency is deathly silent about the multitude of other homes in Fawn Ridge that violate the Permit. The Agency does not deny that it has treated other Fawn Ridge homeowners differently than it has treated the Spiegels.[2] Since the Agency has involved this Court's jurisdiction, and the Legislature has commanded that this Court sit in equity to ameliorate the violation, these matters of fairness must be considered in the balance of decision making.

Instead of acknowledging the law, the Agency—continuing to ignore the host of other Permit violators—attempts to convince the Court that the Spiegels commenced the federal constitutional selective enforcement action merely because the Agency sought a civil penalty from the Spiegels. (See Agency's Memorandum in Opposition, pp. 18-19). Not only is the Agency's revisionist recitation inaccurate (see Lamme Reply Aff., ¶ 6), but it is completely irrelevant to this motion for summary judgment.

The Spiegels ask 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. Regardless of whether the Agency wants to recognize it, this Court's equitable power is bound only by fairness and justice. The Spiegels have supported this motion with expert analysis proving that their proposed "amelioration" project will adequately reduce the visual impact of the Spiegels' home. Indeed, if the Spiegels are ordered by this Court to destroy their home, the next owner of the Spiegels' lot will be permitted to build a home that will have essentially, the same

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[2] The Agency has 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). According to the United States District Court, "[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, Ex. D to Lamme Aff., pg. 21).

visual impact as the Spiegels' proposed amelioration project. (See Hecklau Aff., Ex. B). Because the Agency has failed to offer any justifiable challenge to this expert proof, the Spiegels' motion for summary judgment should be granted.

ARGUMENT

POINT I

THE AGENCY FAILS TO RAISE A MATERIAL ISSUE OF FACT NEGATING THE SPIEGELS' *PRIMA FACIE* SHOWING THAT THEIR PROPOSED AMELIORATION PROJECT WILL ELIMINATE THE ADVERSE VISUAL IMPACT

"It is incumbent upon a [party] who opposes a motion for summary judgment to assemble, lay bare and reveal his proofs, in order to show that the matters set up in his [pleadings] are real and are capable of being established upon a trial." Spearmon v. Times Square Stores Corp., 96 A.D.2d 552, 553 (2d Dep't 1983). Suffice it to say that the Agency has fallen woefully short of meeting its burden in this regard. See Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985); Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986).

The Spiegels presented this Court with an expert visual impact report by Environmental Design & Research, Landscape Architecture, Planning, Environmental Services, Engineering and Surveying, P.C. ("EDR") indicating that the Spiegels' proposed remedy would substantially reduce the visual impact of the Spiegel home, which the Agency has repeatedly admitted is its sole concern. (See Hecklau Aff., Ex. B). The only "proof" offered by the Agency in opposition to this thorough submission is a terse affidavit of Agency engineer Shaun Lalonde, which essentially contains nothing more than another recitation of the Agency's disputed measurements of the Spiegels' house. (See Lalonde Aff. ¶¶ 2-13). Essentially, Mr. Lalonde's only concern with the EDR expert report is that Section 2.0, which is merely a recitation of the factual background

of the dispute between the parties, provides a tape-measure reading of the house (i.e., it did not account for the adjacent "fill" that the Agency has added to its measurement of the house). (See Lalonde Aff., ¶ 7). Mr. Lalonde states that the Spiegels' house is 51.7 feet tall, as if this fact has any bearing on the instant motion.[3] What the Agency fails to recognize is that—by its own admission—the visual impact of the Spiegels' home, when viewed from public vantage points such as Route 86, is the sole issue in this case. (See Lamme Aff., Ex. M; see also Agency's Final Enforcement Order, Ex. E to Lamme Aff.).[4] The Spiegels acknowledge that the height of their home violates the Permit. Thus, it makes no difference whether the home is 43.7 feet, 51.7 feet or even 100 feet tall. The only factor that matters to this Court's equitable determination pursuant to Executive Law § 813(2) is the visual impact of the Spiegels' home.

Mr. Lalonde's affidavit is most significant for what it omits, rather than what it contains. Notably, the Mr. Lalonde does not challenge the methodology or conclusions contained in the EDR expert report. (See Hecklau Aff., Ex. B). The key operative (and unchallenged) fact is that a 9-foot reduction of the Spiegels' home as it currently exists—regardless of its exact height—

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[3] The Agency's Final Enforcement Order in this case finds only that the Spiegels' home is more than 30 feet tall. (see Lamme Aff., Ex. E), but so are 29 other houses in Fawn Ridge. (See Marvin Aff., ¶ 10 and Ex. C). As the United States District Court for the Northern District of New York has previously found, "an Agency engineer calculated the height of the house at 43.7 feet". (See Federal Order, Ex. D to Lamme Aff., pg. 10). The federal court went on to explain that the Agency added 8 feet to the measurement to account for fill, and noted that the parties dispute this measurement. (Id.; see also Marvin Tr., Ex. F to Lamme Aff., pg. 170) (providing the testimony of Robert Marvin, Surveyor, who indicated that the Spiegels' home is not built on fill). In addition, although it does not matter for purposes of this motion, Mr. Lalonde admits that his measurement of the home is inconsistent with the method of measurement required by the Permit. *Compare* Lalonde Aff. ¶ 6 ("I measured from the highest point of the house to the lowest point of original existing grade adjacent to the house.") *with* Permit, Ex. 2 to Complaint, Condition 7(a) (Requiring houses to be "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") (emphasis supplied).

[4] The record indicates that of the approximately 36 homes built in Fawn Ridge, only 6 comply with Permit's 30-foot building height restriction, with the average height of all of the homes in Fawn Ridge just shy of 40 feet. (See Lamme Aff., ¶ 18; Marvin Aff., ¶ 10). Despite this slew of violations, the Agency is only concerned with violations that have an adverse visual impact from the public road. See Hanrahan Aff., Ex. M to Lamme Aff.; see also Agency's Feb. 13, 2009 Memorandum of Law, Ex. L to Lamme Aff.) (admitting that the Spiegels' ridgeline neighbors' houses also violate the Permit, but downplaying the violations because those homes allegedly cannot be seen during the several months per year when leaves are on the trees).

would sufficiently eliminate the adverse visual impact of the home. (See Hecklau Aff., ¶ 6 and Ex. B). ***Again, the Agency does not challenge this conclusion***.

Finally, the Agency is tellingly silent about its failure to perform 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).

Accordingly, this Court should accept and rely upon the EDR report because the Agency has either failed or declined to challenge its substance.

POINT II

THE AGENCY REFUSES TO RECOGNIZE THIS COURT'S STATUTORY POWER TO ORDER AMELIORATION OF THE PERMIT VIOLATIONS

The Agency claims that this Court lacks the power to order the amelioration of the Spiegels' Permit violations. (See Agency's Memorandum in Opposition, pp. 8-13). This distortion of the law is completely without precedent or merit because the Adirondack Park Agency Act ("the Park Act") expressly authorizes this Court to "order the appropriate person or the person responsible for the violation to take such affirmative measures as are properly within [the Court's] 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) (emphasis supplied).

As the Agency is well aware, it cannot ignore the plain language of the Park Act. 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'"). Every word of a statute must be given its plain meaning and not a single word can be regarded as surplussage. See id. The Agency's attempt to stifle this Court's equitable power ignores the language of the Park Act and must not prevail.

The Agency's reliance on Sohn v. Calderon does not save its effort to rewrite the Park Act in order to avoid this Court's scrutiny of the equities in the Spiegel amelioration project. That case, which involved a preliminary injunction to stop the demolition of a rent-controlled building, is inapplicable because the statute at issue contained express language giving an agency—not courts—jurisdiction to resolve rent control disputes. See Sohn v. Calderon, 78 N.Y.2d 755 (1991). Here, of course, the Park Act expressly gives this Court broad equitable power to order the amelioration of permit violations. See N.Y. Exec. Law § 813(2). Therefore, Sohn has no relevance to this case.

The Agency also cites Adirondack Park Agency v. Hunt Bros. Contractors, 244 A.D.2d 849 (3d Dep't 1997), to establish that it did not relinquish its jurisdiction by commencing an enforcement action. (See Agency's Memorandum in Opposition, pp. 11-12). That case, which involved the Agency's ongoing jurisdiction in noise abatement, is also inapplicable here. By commencing this enforcement action under Executive Law § 813, the Agency cannot claim that it retains jurisdiction of the matter. The mere filing of the Complaint gave this Court the power to exercise its statutory power under Executive Law § 813(2) to order the amelioration of the Spiegels' Permit violations.

Likewise, the Agency's claim that the Spiegels have "unclean hands"—even if true (which it is not)—does not prohibit this Court from exercising its statutory power under Executive Law § 813(2). Indeed, the provision of the Park Act establishing the Court's equitable power to ameliorate permit violations was created precisely for situations like this. (See Assembly Bill No. 12604-B, July 9, 1976) (recognizing that the Legislature intended for courts sitting in equity to define the corrective actions that must be taken to correct violations of the Park Act and that the law "would clarify the equitable powers of the court...That is, the court would be given the clear power to...fashion a remedy agreeable and in the best interest of all parties").

Despite the Agency's ardent opposition, this Court's power to ameliorate the Spiegel's Permit violations "is as broad as equity and justice require." See N.Y. Exec. Law § 813(2); 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).

POINT III

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

A. The Park Act

The Park Act requires that this Court have "regard to the purposes of this Article and the determinations required by subdivision 10 of Section 809" when it orders amelioration of the Spiegels' Permit violations. N.Y. Exec. Law § 813(2). Recognizing that its effort to deprive this Court's equitable power pursuant to Executive 813(2) is not likely to succeed, the Agency argues, in the alternative, that the Spiegels proposed amelioration project does not comport with Executive Law § 809(10). (See Agency's Memorandum in Opposition, pp. 15-17).

Essentially, the Agency claims that it alone has the power to determine if a project complies with Executive Law § 809(10).[5] (Id.). Again, the Agency ignores the clear and unambiguous legislative directive in its interpretation of the Park Act, its enabling statute. See Lewis Family Farm, Inc., 64 A.D.3d at 1013; see also Gerdts v. State, 210 A.D.2d 645, 648-49 (3d Dep't 1994) (warning that "the APA cannot operate outside its lawfully designated sphere, with the propriety of its actions often depending upon the nature of the subject matter and the breadth of the legislatively conferred authority"); Flynn v. State Ethics Comm'n, 208 A.D.2d 91, 93 (3d Dep't 1995) (recognizing that "administrative agencies, as creatures of statute, are without power to exercise any jurisdiction beyond that conferred by statute").

The Park Act specifically and unequivocally provides this Court with the equitable power to order amelioration of the Spiegels' Permit violations, and further instructs this Court to engage in its own inquiry, with regard for Executive Law § 809(10), when exercising that power. See N.Y. Executive Law § 813(2). Thus, it is beyond argument that the Legislature wanted the Court—and not the Agency—to have the sole equitable power to determine whether an amelioration project complies with Executive Law § 809(10). Here, it does. (See Spiegels' Memorandum of Law, pp. 19-22).

B. The Permit

Although the Park Act does not require it, the Spiegels' proposed amelioration project also has full regard for the Permit, both by its terms and its practical application. The Agency

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[5] The Agency also appears to argue that the Spiegels' proposed amelioration project does not comply with Executive Law § 809(10) because, at 42.7 feet high (34.7 feet + the Agency's unsubstantiated allegation that the home is built on 8 feet of fill), the Spiegel home would be considered a "Class A" regional project. (See Agency's Memorandum in Opposition, pg. 16). However, this is a red herring because the Park Act directs the Court to Executive Law § 809(10) so it can determine whether the amelioration project under consideration would, essentially, be permit-able by the Agency in the first instance. Of course, as the Agency admits, "Class A" regional projects are permit-able under the Park Act. (Id.).

has always known that a "readily visible" house would be constructed on the Spiegels' land. The Permit recognizes that Lot 39, which is "principally or entirely open field", is "readily visible" from nearby residential and commercial establishments. (See Federal Order, Ex. D to Lamme Aff., pp. 2-3). Moreover, although the Agency is concerned about the visibility of the Spiegels' home, "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..." (Id., pg. 12).

Additionally, the Agency is fully aware that the Permit has been violated tens (and probably hundreds) of times prior by the original developer and other homeowners. The Agency admits that Lakewood Properties, Inc., which was the developer of the subdivision and original permitee, and several contractors have violated the Permit. (See e.g., Taylor Aff., Ex. 4). The Agency has also investigated the seven (7) ridge line homes in subdivision and ***admitted*** that the heights of five (5) of those homes violate the Permit, several by 9-10 feet. (See Lamme Aff., ¶ 19 and Ex. L; see also Marvin Aff., Ex. C). The Agency has also investigated and confirmed that many other homes in Fawn Ridge violate the Permit. (See Hanrahan Aff., Ex. M to Lamme Aff.; see also Lamme Aff., ¶ 18; Marvin Aff., ¶ 10) (demonstrating that the average height of all 36 homes in Fawn Ridge is just shy of 40 feet – which is 10 feet taller than the Permit allows). It is undisputed that the Agency has declined to enforce the Permit against anyone other than the Spiegels.

Clearly, the Spiegels' proposed amelioration project is within the scope of the Agency's practical application of the Permit in general, and more specifically, the Agency's intention for a "readily visible" home to be built on Lot 39.

POINT IV

THIS COURT LACKS SUBJECT MATTER JURISDICTION TO ENTERTAIN THE AGENCY'S UNLAWFUL CIVIL PENALTY DEMAND

It is axiomatic that a court has no power to decide a matter on which it lacks subject matter jurisdiction. Wells Fargo Bank Minn., N.A. v. Mastropaolo, 42 A.D.3d 239, 243 (2d Dep't 2007) (quoting the Court of Appeals as stating "[t]he question of subject matter jurisdiction is a question of judicial power"). Moreover, subject matter jurisdiction defenses are not waivable. See Gager v. White, 53 N.Y.2d 475, 488 (1981). Thus, the Agency cannot seriously claim that it is "surprised" by the Spiegels' argument that the Court is without power to impose a penalty here, much less that this argument is somehow waived. (See Agency's Memorandum in Opposition, pp. 18-19).

The Agency's Complaint fails to contain language in any numbered allegation affirmatively stating that the Agency is entitled to a civil penalty. The Agency merely states that the matter was referred to the Attorney General's office to enforce the Permit and seek a civil penalty after the administrative final enforcement order was issued. (See Complaint, ¶ 95). The Spiegels' denied information sufficient to form a belief as to this allegation. (See Answer, ¶ 41). In any event, the Spiegels' First Affirmative Defense (failure to state a claim) is broad enough to encompass the notion that the Agency failed to state a claim upon which it is entitled to a civil penalty. (See Answer, ¶ 48).

The gravamen of the Agency's Complaint seeks judicial enforcement of the Agency's Final Enforcement Order. The Agency cannot recreate the Order to go beyond itself. The Order assiduously avoids imposition of penalties. Thus, the Agency is flat wrong in assuming that it can demand a penalty from the Spiegels given the administrative procedural history of this

dispute. Nothing in the Park Act suggests that this Court has jurisdiction to hold a penalty hearing in this case.

Under the Park Act, the Agency has the choice of commencing an administrative enforcement action or referring the matter directly to the Attorney General for enforcement. See N.Y. Exec. Law § 813. However, once the Agency chooses to commence an administrative enforcement action and issue a final enforcement order, any subsequent enforcement action by the Attorney General is limited to enforcement of the Agency's administrative order. See N.Y. Exec. Law § 813(1) (providing that civil penalties are "recoverable" by the Attorney General in a civil case originally commenced by him). N.Y. Exec. Law § 813(1). The Agency is not entitled to two bites at the apple. The Agency alone must decide what remedies it seeks in enforcing the Park Act or terms of a permit. 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"). Once the Agency issues an enforcement order and declines to issue a civil penalty, the Attorney General cannot swoop in with the Sword of Damocles and demand a penalty, as it has done to the Spiegels here.

It is important to bear in mind that the Agency chose a peculiar administrative enforcement path in this case. It did not proceed by a traditional Notice of Apparent Violation. (See 9 NYCRR § 581-2.6). Rather, the Agency decided to proceed by a Notice of Intent to Suspend the Fawn Ridge Subdivision Permit as it relates to the Spiegels' Lot 39 only. (See 9 NYCRR 581-3.2). Penalties were not demanded, litigated or imposed. (See Agency's Notice of Intent, Ex. O to Lamme Aff.). The Agency's Final Enforcement Order merely directs the precise result we have here: the Spiegels' home is frozen in time. (See Lamme Aff., Ex. E). The

Spiegels have not violated the terms of the Administrative Order in this case because no timeline was imposed. That is, the Agency's Final Enforcement Order states only as follows:

> Now, therefore, be it ordered, that Permit 87-28 be suspended with respect to Lot 39 (tax parcel 42.10-1-45) until the residential structure under construction is brought into compliance with Permit 87-28.

(See Lamme Aff., Ex. E). Indeed, it cannot even be said that the Spiegels have violated the Final Enforcement Order, much less be exposed to penalties through the Agency.

The Agency has provided the Court with a hypothetical[6] and an irrelevant, eighteen year old settlement offer from the Agency in the *Bucci* case to demonstrate that its procedural course of demanding a civil penalty after the Agency has made a final enforcement determination is authorized.[7] (See Agency's Memorandum in Opposition, pp. 21-22) It is not.

Conversely, the Agency's procedural enforcement scheme is more properly demonstrated in a recent case, Harrington v. Adirondack Park Agency, 24 Misc.3d 550 (Franklin County Sup. Ct. 2009). There, the Agency commenced an administrative enforcement case against a homeowner who had illegally constructed a rock wall on shoreline property, which culminated in the Agency issuing an administrative order requiring remedial measures by a certain date or a

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[6] The Agency provides a hypothetical and argues that it would not be able to penalize recalcitrant or willful violations of an Agency order. (See Agency's Memorandum in Opposition, pg. 22). This is not true. The Agency's own Civil Penalty Guidelines provide that suspended penalties can be used when a violator fails to comply with an order or settlement agreement. (See Taylor Aff., Ex. 5, Sec. VI(1), pg. 7). In that situation, the Agency would have imposed the penalty and the Attorney General would recover it in an enforcement case. See e.g., Harrington v. Adirondack Park Agency, 24 Misc.3d 550 (Franklin County Sup. Ct. 2009) (whereby the Agency's final enforcement order required the homeowner to undertake certain remedial measures or pay a suspended penalty of $15,000).

[7] Citing Adirondack Park Agency v. Bucci, 2 A.D.3d 1293 (4th Dep't 2003), the Agency proclaims that courts have previously imposed civil penalties in cases commenced by the Attorney General where the Agency had issued a final administrative order that did not impose a penalty. (See Agency's Memorandum in Opposition, pg. 21). However, a cursory review of the "administrative order" that the Agency provided to the Court indicates that there was, in fact, no final administrative enforcement order at all. (See Taylor Aff., Ex. 8). Rather, the document is a settlement agreement, and is treated as such by the Agency. Thus, once the matter was referred to the Attorney General's office, the Attorney General was free to commence an action pursuant to either Executive Law §§ 813(1) or 813(2) and seek penalties for violation of the agreement.

$15,000 civil penalty. Id. at 553. The homeowner declined to perform the remedial measures and commenced an Article 78 proceeding to challenge the Agency's administrative order. Id. The Attorney General, as counsel for the Agency, counterclaimed (pursuant to Executive Law § 813(1)) seeking to recover the $15,000 civil penalty that the Agency had imposed at the administrative level. Id. The Agency's counterclaim was granted and the homeowner was required to pay the $15,000 civil penalty. Id. at 558. No additional penalties were demanded or imposed, notwithstanding the passage of time.

Here, the Agency commenced its administrative proceeding against the Spiegels, choosing to seek suspension of the Permit and declining to seek a penalty. (See Lamme Aff., Ex. O). The Agency certainly could have sought to impose a civil penalty against the Spiegels at the administrative level through a traditional enforcement proceeding rather than a "permit suspension," as it had done in Harrington and *Noonan*. (See Lamme Aff., Ex. P). But, as the Agency confirmed to the United States District Court, it did not seek a penalty from the Spiegels. (See Lamme Aff., ¶¶ 30-31 and Exs. Q and R).

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

A. Even if the Court Determines that a Civil Penalty is Proper, the Agency Has Grossly Overstated the Amount it Would be Entitled to Recover

The Agency has voluntarily limited the civil penalty that it is seeking to recover from the Spiegels to $50 per violation, per day. (See Taylor Aff., ¶ 75). Since the Agency found that that the Spiegels violated three (3) conditions of Agency Permit 87-28 ("the Permit") (see Agency's Final Enforcement Order, Ex. E to Lamme Aff.), the Agency now, for the first time, arbitrarily demands a penalty in the amount of $273,450 [$150 per day from February 8, 2005 until February 4, 2010 (1,823 days)]. (See Taylor Aff., ¶ 75).

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

> 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.

N.Y. Exec. Law § 813(1) (McKinney 2005) (emphasis supplied). Clearly, the plain language of the statute dictates that a homeowner who violates the "terms or conditions" (plural) of an Agency permit is liable for a single violation of the Park Act. (Id.). The Agency ignores this plain language and attempts to parlay the Spiegels' single violation of the Permit into three (3) separate violations, based on the fact that the Agency's Final Enforcement Order found that the Spiegels violated three conditions of the Permit. (See Taylor Aff., ¶ 75). The Agency fails to provide any support for its demand that it is entitled to a civil penalty that is multiplied by the number of Permit conditions that the Spiegels' home violates. A home that violates an Agency permit is—and ought to be recognized as—a single violation of the Park Act pursuant to Executive Law § 813(1).

Moreover, the Agency acknowledges, as it must, that this action was stayed for 990 days (from February 2, 2007 until October 19, 2009). (See Stipulation, Ex. C to Lamme Aff.). However, the Agency is now refusing to honor the stipulation in which it agreed to stay the matter. (See Taylor Aff., ¶ 59). The Agency claims that that the clock continues to run based on the existence of the violation itself, not on the litigation. (Id.). This argument flies in the face of the Agency's own logic in computing the sought-after penalty based on the oral argument date of February 4, 2010 – not to mention basic notions of fairness and justice.

Thus, based on the Agency's unilateral consent to limit the penalty to $50 per day, the maximum civil penalty that the Spiegels might be facing, if any penalty at all, is $41,650 [(1,823 days – 990 stayed days) x $50 = $41,650].

B. The Court Should Consider the Agency's History and Practice of Collecting Civil Penalties and Hold a Hearing if Any Penalty is to be Set

If the Court is to impose a civil penalty at all, despite the Spiegels' argument that the Agency is without power to seek a penalty at this stage of the dispute, the Court should consider the fact that the Agency has a history of seeking and collecting relatively small penalties from homeowners with similar permit violations.

For example, the Agency routinely collects civil penalties from private homeowners alleged to have built homes without an Agency permit or in violation of an existing permit, while allowing the house or structure to stand. (See Lamme Reply Aff., Ex. A) [presenting six (6) Agency settlement agreements that require private homeowners to pay penalties ranging from $100 to $5,000 for violations that are no different from those in the Spiegels' enforcement case (i.e., building in violation of a permit, house located on slopes)].[8]

Moreover, in *Adirondack Park Agency v. Noonan*, Herkimer County Index No. 2004-81431, the Agency sought to recover civil penalties of $500 per day from a homeowner, but was only awarded nominal damages in the amount of $1 per day. (See Taylor Aff., dated August 10, 2006, Ex. 5). There, the Court set a civil penalty of $715, despite the Agency's request for a $71,500 penalty. (Id.; see also Lamme Reply Aff., ¶ 13). Under this precedent, the Spiegels would be facing a civil penalty in the amount of $833. But, *Noonan* was different because, in

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[8] The Agency would argue that these homeowners received lower penalties because they chose not to litigate against the Agency, unlike the Spiegels, who have challenged the Agency's actions in federal and state courts. However, the Spiegels should not be punished for standing up the Agency and exercising their constitutional rights to due process.

that case, the homeowner was the original permittee. Here, a developer was the permittee, not the Spiegels; the developer-permittee violated the Permit on countless occasions in deeding lots with a 35 foot height restriction, not 30 feet as the Permit required; most of the homes in Fawn Ridge violate the Permit and have been allowed to stand; the Permit itself states that the Spiegel home would be visible for miles around because it is on a steep ski slope; and, the Spiegels got permission from their surveyor, Robert Marvin, the Town of North Elba's building inspector, and the Fawn Ridge Architectural Review Committee to build the home as is and where is. Thus, in exercising this Court's equitable power if a penalty hearing is to be held at all, only a nominal penalty, such as that in *Noonan*, is fair.

In Harrington v. Adirondack Park Agency, the Agency commenced an administrative enforcement case against a homeowner who had illegally constructed a rock wall on shoreline property, which culminated in the Agency issuing an administrative order requiring remedial measures by a certain date or a $15,000 civil penalty. Harrington v. Adirondack Park Agency, 24 Misc.3d 550, 553 (Franklin County Sup. Ct. 2009). The violation existed for four (4) years prior to when the Agency issued its administrative order. Id. Although the Court upheld the civil penalty, it noted that $15,000 is a "substantial" civil penalty for an infraction that is of an aesthetic nature. Id. at 558. Here, no administrative penalty was imposed.

The Agency's totally arbitrary $273,450 civil penalty demand for a similar aesthetic infraction, is irrational (if not vindictive) because it declined to seek a penalty at the administrative level. Thus, the Agency seeks a civil penalty more than 18 times greater than a penalty that the Harrington court described as "substantial" for an infraction that merely presents an adverse visual impact. This certainly shocks one's sense of fairness. See Kreisler v. N.Y. City Transit Auth., 2 N.Y.3d 775 (2004) ("An administrative penalty must be upheld unless it 'is

so disproportionate to the offense . . .as to be shocking to one's sense of fairness,' thus constituting an abuse of discretion as a matter of law"), *citing* Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 237 (1974).[9]

Notably, the Agency also has a history of favoring its insiders. In 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 the hotel golf course, in open view, visible from wilderness areas, without obtaining an Agency permit. (See Lamme Reply Aff., ¶¶ 14-16 and Ex. B). Arthur Lussi, *who is and was an active Commissioner of the Agency*, was only required to pay a meager $2,500 fine after the Agency's enforcement staff created 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 id. and Ex. E). The Agency then allowed the monstrosity that Mr. Lussi built on the golf course—which is visible for miles around—to remain without any remediation whatsoever. (See id. and Ex. D). This established precedent must be considered if a fair penalty is to be imposed at all.

Finally, according to the Agency's own Civil Penalty Guidelines, the Agency is required "to assure that penalties are set in a consistent way in all cases". (See Taylor Aff., Ex. 5, pg. 3). Moreover, the Civil Penalty Guidelines "also recognize that there may be cases in which the imposition of a penalty may be inappropriate or unjust given the specific facts of the case".[10] (Id.).

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[9] Of course, an administrative penalty can only be upheld by a court if one was imposed at the administrative level. That did not occur in this case.

[10] Here, if the Agency succeeds and this Court orders the destruction of the Spiegels' home, then the Spiegels will essentially be penalized $300,000 by losing the value of the cost of their home. (See Spiegel Aff., ¶ 13). Likewise,

Although the Agency goes on and on in its opposition papers suggesting that this Court ought to consider the Agency's own Civil Penalty Guidelines (see Taylor Aff., ¶¶ 53-75), these were already considered by the Agency. That is, the Civil Penalty Guidelines have been in place for many years, and the Agency made a deliberate decision in 2005 to suspend the Fawn Ridge Permit with respect to the Spiegels' Lot 39 rather than impose any penalties at all. This is fully consistent with the applied Civil Penalty Guidelines of the Agency, which allow it to take into consideration all of the factors cited above with respect to the Spiegels' home and the circumstances under which the violations were allowed to occur. Having once applied the Agency's own Civil Penalty Guidelines in determining that no penalty was due, the Agency cannot now point to corners of the guidelines that it previously sidestepped and distinguished in the interest of fairness, to impose a draconian penalty on the Spiegels.

Based on the foregoing, it is clear that the Agency's demand that the Spiegels pay a civil penalty in the amount of $273,450 not only violates all reasonable notions of fairness and justice, but the demand is also completely out of whack compared to the Agency's established pattern and practice of collecting civil penalties for permit violations under the Park Act.

Accordingly, if this Court is inclined to impose a civil penalty against the Spiegels, it should take these factors into consideration and set a nominal penalty.

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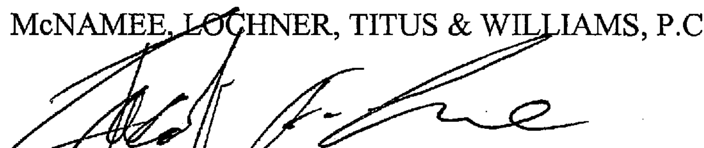
even if this Court orders the amelioration of the Spiegels' Permit violations, the Spiegels will also essentially be penalized $115,000, which represents the approximate cost of the remediation project. (See Spiegel Aff., ¶ 21). In either scenario, any further civil penalty would be inappropriate and unjust given the facts of this case.

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 proposed 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: January 15, 2010
Albany, New York

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



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