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.

MEMORANDUM OF LAW 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

Of Counsel:
Jacob F. Lamme, Esq.
(Bar Roll No. 513680)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

APPENDIX

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." Wo v. Hopkins, 118 U.S. 356, 369-70 (1886).

"If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court." Esmail v. Macrane, 53 F.3d 176, 179 (7th Cir. 1995).

PRELIMINARY STATEMENT

This action is the first judicial scrutiny of a punitive administrative decision made by Defendant Adirondack Park Agency against Plaintiffs Arthur Spiegel and Margaret Spiegel ("Spiegels"). The Spiegels respectfully submit this Memorandum of Law in support of their motion for summary judgment pursuant to Rules 56 and 57 of the Federal Rules of Civil Procedure ("FRCP"), seeking judgment in this 42 U.S.C. § 1983 action, which arises out of violations of the Spiegels' constitutional rights that occurred in the context of enforcement activity by Defendants New York State Adirondack Park Agency, Mark Sengenberger, Richard LeFebvre and Paul Van Cott (collectively "Defendants," "Agency" or "Board").

The Board took administrative enforcement action to bar Plaintiffs from constructing their family home on a lot they purchased in a residential subdivision called "Fawn Ridge" in the Town of North Elba, New York, on the edge of the Village of Lake Placid in the Adirondack Mountains. In 1988, Lakewood Properties, Inc. ("Developer") received approval from the Agency to build the Fawn Ridge project in the form of Agency Permit No. 87-28 (the "Permit"). The Permit remained dormant for sixteen (16) years. The Developer promptly violated its terms. The Agency did not monitor Permit compliance or enforce any aspect of the Permit prior to the Spiegels' residential activity that was fully permitted by the Town and the Developer's review committee, as described more fully in this motion.

In 2004, the Spiegels commenced construction of their home, and during the early stages of the construction, the Agency received a complaint from a neighbor about a potential permit violation. The Agency waited nearly six (6) months until Plaintiffs had completed 70% of the structure of their home before advising them that the construction of the home may violate the Permit that had been granted to the Developer many years before the Spiegels even purchased their lot. The Developer's violation of the Permit rendered it void by its own terms, yet the Board still enforced it against the Spiegels. Notably, the Board has not enforced the Permit against the Developer or the twenty-nine (29) other similarly situated homeowners in Fawn Ridge whose homes also violate the Permit under the Agency's newly-minted and skewed reading if it were not void. Even though eighty-three percent (83%) of the homes are in violation, only the Spiegels have been prosecuted.

Because the discovery process uncovered an overwhelming amount of evidence against the Agency, the Spiegels now move for summary judgment in this Section 1983 action. The Spiegels ask this Court to enter an order allowing them to complete their home in Fawn Ridge, as it is and where it is. For the reasons set forth herein, this motion should be granted.

BACKGROUND FACTS

This case is about a residential home that is partially complete, built in accordance with approved plans on an approved lot in a residential subdivision. Plaintiffs' home was fully approved by the Town and by the Fawn Ridge Architectural Review Committee ("ARC"), which was endowed with responsibility by the Defendant Agency to administer the terms of the Permit. There are several readily visible homes on this low ridge line on Fawn Ridge on the edge of Lake Placid (the "Village"), each one of which is readily seen. (See Spiegel Aff., ¶ 53 and Ex. F, G and H). The Spiegel home, now a tarpaper shell, is a bit more visible than the other homes on

the ridge because it is located on a portion of the ridge that was an open ski slope for many decades. The Defendant Agency documented that the home would be visible when it granted the Permit. Yet after several months of open construction visible from the main road in the Village, in compliance with the issued building permit and ARC approval, the Defendant Agency ordered the halt to construction, destruction of the home, and payment of a $200,000 fine. This punitive administrative action is unprecedented in the history of the Defendant Agency. The Defendant claims that the Plaintiffs' house violates the Permit, but if Defendant is correct, so do the vast majority of the other homes in Fawn Ridge—all of which have been known to the Agency for years, but none of which has been the subject of any enforcement action. The Agency ordered the Spiegels to halt construction and allowed other similar homes to be built. The shell of the Spiegels' house has now stood, deteriorating, for over four years. A more detailed discussion of the relevant facts is set forth in the Statement of Material Facts and affidavits presented by Plaintiffs in support of this motion.

The Agency is a creature of statute with limited jurisdiction and power as constrained by New York Law. Foy v. Schechter, 1 N.Y.2d 604, 136 N.E.2d 883, 154 N.Y.S.2d 927 (1956). The Board's limited sphere of power was defined by the New York Legislature in 1971, when it determined that the 3,000,000 acres of private land inside the Adirondack Park needed a regional land use law. The New York Court of Appeals has spoken as to the Agency's powers, and regards the Board as the functional equivalent of a combined "local planning board and a local zoning entity". Hunt Brothers v. Glennon, 81 N.Y.2d 906, 909, 613 N.E.2d 549, 597 N.Y.S.2d 643 (1993). Like any other land use board, its members are appointed and meet once a month.

The crux of the Adirondack Park Agency Act, set forth in Article 27 of the New York Executive Law, is a land use and development plan that imposes intensity controls on

development beyond the hamlets. Village and Town centers, such as Lake Placid, are defined as "hamlets" and the Agency essentially has no powers over development in these areas. The Fawn Ridge subdivision is partly within the unregulated hamlet and partly within a moderate intensity use area, where residences are deemed compatible and there can be as many as 500 buildings per square mile. See generally, New York Executive Law § 805. In accordance with law, the Defendant Agency granted the Permit to the Developer for the subdivision, which includes the allowance of a highly visible home on the Spiegels' lot.

Thus, the Spiegels' single family residence is generally consistent with and compatible with the Adirondack Park land use plan as defined by New York law.

STANDARD OF REVIEW

The summary judgment standard is well-established and has been succinctly stated by Chief Judge William K. Sessions III as follows:

> "Summary judgment should be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). This standard places the initial burden on the moving party to identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Once the moving party has demonstrated the absence of any genuine issue of material fact, the nonmoving party "may not rest upon the mere allegations or denials of the [nonmoving] party's pleading, but the [nonmoving] party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)....
>
> Importantly, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson, 477 U.S. at 247-48. A dispute is considered genuine only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248. While the Court must draw all inferences from the facts in the

light most favorable to the non-moving party, that party may not "rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." Knight v. United States Fire Ins. Co., 804 F.2d 9, 12 (2d Cir. 1986)."

Fonda Group v. Lewison, 162 F. Supp. 2d 292, 298 (D. Vt. 2001) (Sessions, J.).

ARGUMENT

DEFENDANTS VIOLATED PLAINTIFFS' RIGHT TO EQUAL PROTECTION BY SELECTIVELY ENFORCING A VOID PERMIT ONLY AS AGAINST PLAINTIFFS

The Equal Protection Clause of the Fourteenth Amendment "requires that all persons subjected to...legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." Engquist v. Oregon Dep't of Agric., ___, U.S. ___, 128 S.Ct. 2146, 2153, 170 L.Ed.2d 975, 986 (2008) (citing Hayes v. Missouri, 120 U.S. 68, 71-72 (1887)). The purpose of the Equal Protection Clause is to protect people from intentional and arbitrary discrimination by a State government. Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (citing Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923)). The law must not be "administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances." Wo v. Hopkins, 118 U.S. 356, 373-74 (1886). Thus, when it appears that a State government is irrationally singling out an individual, "the specter of arbitrary classification is fairly raised" and an equal protection claim will arise. See Engquist, 128 S.Ct. at 2153 (citing Olech, 528 U.S. at 564).

The Supreme Court has recognized that a successful equal protection claim may be stated by a "class of one" where the plaintiff establishes (i) that he or she has been intentionally treated differently from others similarly situated, and (ii) that there is no rational basis for the difference in treatment. Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d

1060 (2000). Under the *Olech* standard, "the plaintiff uses the existence of persons in similar circumstances who received more favorable treatment than plaintiff...to provide an inference that the plaintiff was intentionally singled out for reasons that so lack any reasonable nexus with a legitimate governmental policy that an improper purpose—whether personal or otherwise—is all but certain." Prestopnik v. Whelan, 2007 U.S. LEXIS 19612, *3 (2d Cir. 2007) (internal citations omitted); see also Bizzarro v. Miranda, 394 F.3d 82, 88-89 (2d Cir. 2005) (stating that "an *Olech*-type equal protection claim focuses on whether the official's conduct was rationally related to the accomplishment of the work of their agency").

Notably, in Olech, the Supreme Court held that a plaintiff with a "class of one" equal protection claim need not allege any subjective motivation (i.e., malice or bad faith), and that proof of "irrational and wholly arbitrary" governmental action is sufficient. Olech, 528 U.S. at 565. The Second Circuit embraces the "class of one" standard without requiring a showing of subjective motivation. See Jackson v. Burke, 256 F.3d 93, 97 (2d Cir. 2001) (stating "[t]o be sure, proof of subjective ill will is not an essential element of a 'class of one' equal protection claim"); Deegan v. City of Ithaca, 444 F.3d 135, 146 (2d Cir. 2006) (stating that a successful selective enforcement claim demonstrates that laws were not applied to the plaintiff as they were applied to similarly situated individuals and that the difference was intentional and unreasonable); Clubside, Inc. v. Valentin, 468 F.3d 144, 159 (2d Cir. 2006) (reciting the "class of one" standard without requiring a showing of subjective motivation); Prestopnik, 2007 U.S. LEXIS 19612 at *5, n.1 (specially noting that this Circuit did not impose a subjective motivation requirement in the recitation of the "class of one" standard in Clubside).

In a Memorandum Opinion and Order dated July 15, 2008, this Court aptly set forth a standard, which completely and accurately embraces the Second Circuit's interpretation of Olech. (See Docket # 72, pg. 7 n.2):

> "Plaintiffs alleging selective enforcement must show that the defendants (1) intentionally treated them differently from other similarly situated people, (2)(a) because of an impermissible consideration like race, religion or the intent to inhibit or punish the exercise of constitutional rights, (b) because of a malicious intent to injure them, ***or*** (c) with no rational basis for the difference in treatment. *See Bizzaro v. Miranda*, 394 F.3d 82, 86 (2d Cir. 2005)."

(See Docket # 72, pg. 7 n.2) (emphasis added).

This is the proper standard by which the Spiegels will prove that they are entitled to summary judgment on their equal protection claim.[1]

A. The Spiegels Are Similarly Situated To the Other Lot Owners in the Fawn Ridge Subdivision

In order to prevail on their claim, the Spiegels must establish that they were "treated differently than someone who is prima facie identical in all relevant respects." Prestopnik, 2007 U.S. App. LEXIS 19612 at *4-5 (quoting Neilson v. D'Angelis, 409 F.3d 100, 104 (2d Cir. 2005)). This requires the Spiegels to show that: (1) no rational person could regard their circumstances as different from those of a comparator to such a degree that would justify differential treatment on the basis of a legitimate government policy; and (2) the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the Agency acted on the basis of mistake. Id. (citing Neilson, 409 F.3d at 104-05).

In situations involving land use, the comparative parties must be engaged in the same type of land use. Clubside, Inc. v. Valentin, 468 F.3d 144, 160 (2d Cir. 2006) (citing Campbell

[1] As will be demonstrated on this motion, Plaintiffs can satisfy both the *LeClair* Standard, which requires malice, *LeClair v. Saunders*, 627 F.2d 606; 608-610 (2d Cir. 1980), and the *Olech* standard because they have sufficient proof that the Agency acted with malicious or bad faith intent to injure them.

v. Rainbow City, 434 F.3d 1306, 1314-15 (11th Cir. 2006)). Thus, a residential land owner can only be similarly situated, if at all, to other residential land owners.

Although the determination of whether a party is similarly situated with others is typically an inquiry for the fact finder, this Court has discretion to decide the issue on summary judgment. See Clubside, Inc. v. Valentin, 468 F.3d 144, 159 (2d Cir. 2006); Harlen Assocs., 273 F.3d at 499, n.2; Sloup v. Loeffler, 2008 U.S. Dist. LEXIS 65545, *53-54 (E.D.N.Y. Aug. 21, 2008); Cine SK8, Inc. v. Town of Henrietta, 507 F.3d 778, 790-91 (2d Cir. 2007).

Here, the Fawn Ridge subdivision itself is a closed neighborhood of homeowners that are similarly situated to the Spiegels. Fawn Ridge is a 54-lot subdivision authorized to exist by virtue of the Agency's Permit. Approximately thirty-six homes have been built. And, if it were not void, the Permit would apply equally to each Fawn Ridge homeowner.[2] Thus, the similarities between the Spiegels and the other homeowners are so great that a reasonable person could only find that the Spiegels are similarly situated with the other Fawn Ridge homeowners.[3] For example (and assuming the Permit were not void by its own terms), the Permit's height terms would equally apply to the Spiegels on Lot 39 as it would to the Richters on Lot 36, the Hanrahans on Lot 16, the Stewarts on Lot 15, and so on. Similarly, the Permit's tree cutting and slope restrictions would also apply equally to all Fawn Ridge homeowners.[4]

Thus, a reasonable person necessarily must find that the homeowners in Fawn Ridge are "similarly situated" for purposes of examining the Agency's readily apparent difference in treatment between the Spiegels and the other homeowners.

---

[2] The Permit contains twenty-one (21) conditions, most of which apply directly to the Developer. However, Condition #15 contains a list of lot development standards that apply to each individual lot owner. (See Privitera. Aff., ("Priv. Aff.") ¶ 27).

[3] The Spiegels are identically situated to the seven other homeowners on the ridge line (i.e., Wagle, Lansing, McKillip, Sheft, Gengel and Davis), and similarly situated to the remaining homeowners in Fawn Ridge.

[4] The Spiegels did not cut trees on their lot in violation of the Permit (see Priv. Aff., ¶¶ 51-53, 61, 93) and the Spiegel house is on a slope that is allowed by the Permit (see Priv. Aff., ¶ 60).

B. The Agency Intentionally Treated the Spiegels Differently From the Other Similarly Situated Homeowners in the Fawn Ridge Subdivision

The Permit states that the Spiegels' lot, an open, cleared hillside that used to be a ski slope, will have a home on it that will be clearly visible. (See Politi Aff., ¶¶ 8-9; Priv. Aff., ¶ 26 and Ex. Z). The Defendant Agency ordered destruction of the home, but has not evaluated the visual impact of a compliant home on the lot. A professional surveyor testified that a 'compliant' home would be more visible. (See Priv. Aff., ¶ 63) The Agency action is irrational on its face.

Nonetheless, the Agency treated the Spiegels differently from the other similarly situated Fawn Ridge lot owners, and the difference in treatment was clearly intentional. In February 2005—several months before the Agency commenced its administrative enforcement action against the Spiegels—the Agency had knowledge that other Fawn Ridge lot owners had likely violated the Permit. (See Ex. A to Lamme Aff.). Rather than opening investigations of these other Fawn Ridge homes pursuant to its standard protocol and policies, the Agency blindly sought to punish the Spiegels instead of accepting the fact that the entire Fawn Ridge subdivision is full of alleged violations, according to the Agency's twisted reading of the Permit. Indeed, in June 2005, in a submission in their enforcement case, plaintiff Arthur Spiegel informed the Agency that there were at least a dozen of the other homes in Fawn Ridge that were also in violation of the Agency's skewed reading of the Permit, including the Richter home on Lot 36, which was under construction at the same time as the Spiegels' home. (See Priv. Aff., Ex. WW). Nevertheless, the Agency—lead by Agency staff attorney Van Cott—continued its malicious crusade against the Spiegels and left the other Fawn Ridge homeowners alone.

The Agency's appearance of impropriety was so apparent during the Spiegels' enforcement case that Bernadette Hanrahan, another Fawn Ridge lot owner who was at risk of being subjected to enforcement of the Permit, cautioned the Agency to treat everyone fairly and

enforce the Permit as against everyone rather than only against the Spiegels. (See Ex. B to Lamme). However, the Agency brazenly ignored that warning.

Even though the Richters were constructing their home a few properties away from the Spiegels, the Agency did not issue a cease and desist order to the Richters like it did to the Spiegels. (See Priv. Aff., ¶ 103). In fact, no enforcement activity occurred at all with respect to the Richter home or any other home on Fawn Ridge. (Id.). The Agency admittedly knew the Richter house exceeded the Permit's height limitation and failed to take any action. (See Priv. Aff., ¶ 103 and Ex. WW thereto; see also Amended Compl., ¶¶ 67-72).

In September 2005, several days after issuing a "final order" in the Spiegels' enforcement case, the Agency opened five (5) investigation files against other Fawn Ridge homeowners, but the Agency failed to take any enforcement action. (See Priv. Aff., ¶ 105). Agency staff attorney and Defendant Paul Van Cott even informed John Banta, his supervisor and the Agency Board's general counsel, that the Wagel, Gengel, McKillip and Davis homes on Fawn Ridge all exceeded the Permit's 30-foot building height limitation according to the interpretation of the Permit that the Agency minted in the Spiegel case. (See Priv. Aff., Ex. CCC). The Agency even scrambled to "investigate" these files several days after this Court denied the Agency's motion to dismiss the selective enforcement claim. (See Priv. Aff., ¶ 107). However, more than three years later, the Agency has failed to commence enforcement proceedings against these other lot owners.

Moreover, in October 2006, Robert Marvin, the licensed surveyor who staked out the locations of many of the Fawn Ridge homes, submitted an affidavit in support of the Spiegels establishing that at least thirty of the then thirty-six homes in Fawn Ridge would violate the Permit if it were uniformly applied to all homes as it was applied to the Spiegels. (See Priv. Aff., ¶ 108 and Ex. DDD). However, even though the Agency attempted to create the appearance of

fairness by opening investigation files, no enforcement activity has occurred with respect to these other Fawn Ridge homes, despite the Agency having found that many of the homes in Fawn Ridge violate the Permit. For example, the Agency has measured the Wagel home on Lot 41 at 39.5 feet high and deems the house within the "abrupt change in slope" in violation of the Permit. (See id. at ¶ 115). Further, the Agency measured the Dodson home on Lot 19 at 42.0 feet high—the same height that Marvin attributed to the home in his affidavit. (See id.). 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 against Dodson. (See id.).

Even though ***30 of the 36 homes in Fawn Ridge exceed 30 feet in height***, including several homes that are taller than Plaintiffs' home, only the Spiegel home is actually being treated as a violation of the Permit. This includes the home of Ivan Zdrahal, P.E., whose home measures 37.9 feet in height. (See Priv. Aff., ¶ 109, *supra*, Lot 8). Since Ivan Zdrahal actually negotiated the Permit on behalf of the Developer, chaired the Architectural Review Committee that monitored compliance with the Permit on behalf of the Developer for nearly 20 years and approved the specifications on every home in Fawn Ridge, the height limitations set forth in the Permit have not been interpreted the way they now are as against Plaintiffs. (Id.) Although downslope trees on Fawn Ridge grow over time to progressively screen older homes, just as they will with respect to Plaintiffs' house if it is allowed to stand, Dr. Wagle's house, a couple of doors down from the Plaintiff's house is taller than Plaintiffs, and the Agency has failed to act. (Id.).

In a completely arbitrary and unreasonable manner, the Agency did not measure or otherwise investigate the Sheft home on Lot 52—even though Marvin pegged its height at 44.6 feet and established that it is situated on slopes greater than 25%—because Sheft informed the Agency enforcement investigator that he "embraced" the Agency. As a result, the investigator's

notes indicate—without even measuring the house height or relation to the "steep slope"—that Sheft's home is "in compliance" with the Permit. (See Priv. Aff., ¶ 116 and Ex. EEE).

The Agency's enforcement investigator assigned to the Fawn Ridge files testified that the Agency is merely concerned with aesthetics, and that visibility from off-site locations is the Agency's primary focus in the Fawn Ridge investigations. (See Priv. Aff., ¶ 112). However, this enforcement position is not supported by the terms of the Permit. This confirms that the Agency's malicious prosecution of the Spiegels is completely arbitrary and irrational because the Permit expressly acknowledges that a home built on Lot 39 would be "readily visible" from public areas. (See Priv. Aff., Ex. Z, pp. 10-11). Thus, the Agency must not be allowed to arbitrarily and irrationally punish the Spiegels for building a home in accordance with the aesthetic vision that the Agency set forth in the Permit.

Astoundingly, even though the Fawn Ridge investigation files represent 10% of the Agency's entire slate of open enforcement cases, the Agency has not sought to enforce the Permit as against any other Fawn Ridge homeowner other than the Spiegels. (See Priv. Aff., ¶ 117). Moreover, even though the Agency admits that the Developer—the original permitee—violated the Permit, it has failed or refused even to open an investigation against the Developer or its successor. (See Priv. Aff., ¶ 118).

Based on the foregoing, it is undeniable that the Agency intentionally treated the Spiegels differently from the way it treated the similarly situated homeowners of Fawn Ridge.

C. The Agency Selectively Enforced the Void Permit Against the Spiegels With Malicious Intent to Injure Them

Although not required under Olech, the Spiegels can show that the Agency's actions were done out of "spite, or malice, or a desire to 'get' [them] for reasons wholly unrelated to any legitimate state objective." Bizzarro v. Miranda, 394 F.3d 82, 82 (2d Cir. 2005); see also Esmail

v. Macrane, 53 F.3d 176, 179 (7th Cir. 1995) (Posner, J.) (stating that a person has a claim "[i]f the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him").

Plaintiff Arthur Spiegel is a well-known figure in the New York's North Country, having served on the Board of Directors of a variety of corporate, municipal and charitable organizations. (Spiegel Aff., ¶ 50; Amended Compl., ¶ 13). Starting with the Rockefeller campaign, Mr. Spiegel has been active in the New York State Republican Party. (Id.). He was appointed by Governor George E. Pataki to the Board of Directors of the Olympic Regional Development Authority, based in Lake Placid, New York. (Id.). In 2005, Governor Pataki appointed Mr. Spiegel as a commissioner on the "Task Force for Health Care in the 21st Century." (Id.). Mr. Spiegel's political affiliations are well-known in the North Country. (Id.). The Agency inquired about the Spiegels' political affiliation during depositions. (See Priv. Aff., ¶ 99). 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 id.). Although he says 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.). Although the Spiegels need not prove it in order to succeed in this case, they believe that Van Cott's political animus toward plaintiff Arthur Spiegel manifested itself into the unconstitutional enforcement action described herein. (See id.).

The Agency's General Enforcement Guidelines—which were adopted before the Agency opened the Spiegel investigation file—require, among other things, the following:

(i) Agency staff must investigate each complaint of an alleged violation based on a priority ranking;

(ii) Each case will be assigned to an enforcement officer to investigate;

(iii) Every effort should be made to resolve each case by means of a settlement agreement before an administrative action is commenced; and

(iv) Enforcement staff is precluded from relying on public comment when presenting a case to the Agency Board for an administrative decision.

(See Ex. QQ to Priv. Aff.). Moreover, the Agency has established a standard protocol that it follows when it receives a complaint about a possible violation. (See Priv. Aff., ¶ 67). During their depositions, Van Cott and other Agency staff members admitted that the Agency violated nearly every aspect of its standard protocol for opening and investigating a potential violation when it prosecuted the Spiegels. (See Priv. Aff., ¶¶ 75-77, 83, 88-89). This knowing and willing disregard of Agency rules and policies is prima facie evidence of maliciousness.

The Agency first received a complaint about the Spiegels' alleged Permit violation from Mr. Byrne in August 2004, prior to the commencement of construction on Lot 39. (See Priv. Aff., ¶ 70). Rather than opening an investigation file in accordance with its standard policies, the Agency did nothing. (See id.). Instead, the Agency waited over a month, until September 24, 2004, when Mrs. Byrne called Van Cott to lodge a second complaint. (See id. at ¶ 71). Van Cott asked Mrs. Byrne whether the Spiegels had started construction yet, to which Mrs. Byrne answered in the negative. Van Cott told her that he "would look into it". (See id.). Then, rather than investigating the potential violation per the Agency's standard protocol, Van Cott admits that he drafted (and typed without secretarial help) a letter addressed to plaintiff Arthur Spiegel and copied to the Town of North Elba Building Inspector in which Van Cott purports to inform Plaintiffs of the potential Permit violation. (See Priv. Aff., ¶ 73). However, neither Arthur

Spiegel nor the Town of North Elba Building Inspector ever received the letter. (See Spiegel Aff., ¶¶ 26-27; Morganson Aff., Ex. A, pg. 34) The Agency admits that the letter did not come back as "undeliverable" from the post office. (See Priv. Aff., ¶ 74). Thus, it is beyond doubt that the letter was never mailed, and it is fair to conclude that the letter is a falsehood, designed to pretend that Plaintiffs had knowledge of the investigation. (See Priv. Aff., ¶ 75).[5]

Strangely, even though Van Cott's phantom initial contact letter seeks proof from the Plaintiffs that the home on Lot 39 complies with the Permit, Van Cott abruptly closed the enforcement file on the same day in which he opened it, likely to avoid seeing the file properly investigated by Agency staff. (See Priv. Aff., ¶ 76). There was absolutely no reason for him to take such furtive action. 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 and sent out the initial contact letter. (See Priv. Aff., ¶ 77). The case was assigned a Priority 2 ranking, meaning that delay may create economic hardship for the Spiegels. (Priv. Aff. ¶ 67 and Ex. RR). But Van Cott failed to follow standard protocol with respect to that ranking because a site visit was never performed and the case was summarily closed. Thus, Van Cott and the Agency allowed the Spiegels to continue building their home on Lot 39 knowing full well that they were spending hundreds of thousands of dollars on the construction. Id.

Meanwhile, Mrs. Byrne continued speaking with Van Cott at the Agency in order to follow up with the Agency's phantom investigation of the Spiegels' home. Mrs. Byrne estimates

[5] The credibility of Susan Parker, the primary witness during the Agency Administrative proceedings, was destroyed in the process of covering up the falsehood. Parker signed an affidavit swearing that the phantom Van Cott letter was sent. (See Priv. Aff. ¶ 75; Lamme Aff., Ex. C). But, Parker had no knowledge of the case at the time, 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. Under the circumstances, it is fair to infer that Parker was set up to cover up the falsehood.

that she may have called Van Cott up to ten (10) more times after her initial phone call on September 24, 2004. (See Priv. Aff., ¶ 78). However, the Agency did not take any action.

In early 2005, the Byrnes grew tired of the Agency's inaction and hired counsel. (See Priv. Aff., ¶ 79). 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 Plaintiffs and assigned Susan Parker as the enforcement investigator. (See id.). Parker was unaware that Van Cott had opened and closed the file several months earlier. (See id.). That same day, plaintiff Arthur Spiegel received a telephone call from Van Cott about possible "minor" violations of the Permit, which was the first time that the he became aware of the complaints about the potential violation of the Permit. (See Spiegel Aff., ¶ 29).

The Spiegels, who had been building their home in plain sight of Highway 86 for six months, voluntarily halted construction on their home and tried to settle all outstanding issues. On April 15, 2005, while settlement discussions were ongoing, the Agency commenced an enforcement proceeding by issuing a Notice of Intent to suspend the Permit as against the plaintiffs, even though they were not the original permitee. (See Priv. Aff., ¶ 83). This violated the Agency's standard protocol because the Spiegels were never presented with a proposed settlement agreement. Moreover, a Notice of Intent to suspend the Permit was such an "unusual" procedure, that the Chair of the Agency Board's Enforcement Committee had never seen it done before and it has not been done since. (See Priv. Aff., ¶ 84).

The Agency's malicious approach to the Spiegels' enforcement case continued when the Agency Board's general counsel, John Banta, instructed an Agency staff member to create a "Notice" of the Agency's July 7, 2005 enforcement hearing, which was furtively designed to look like an official document, and provide it to the Fawn Ridge residents. (See Priv. Aff., ¶ 88).

This "Notice" sought public comment on the Spiegels' enforcement matter in direct violation of the Agency's Enforcement Guidelines. (See id.). Susan Parker was instructed to walk through the Fawn Ridge neighborhood and hand this inflammatory, prejudicial "Notice" to Plaintiffs' neighbors, something she had never done before. (See id., ¶ 89).

Importantly, the Agency has not prepared a notice like this before or since, and further admitted that the "Notice" violated the Agency's standard protocol for enforcement cases and that such notices are not authorized by the Agency's regulations. (See id.). Banta's officious meddling in the Agency staff's preparation of the case to be presented to the Agency Board can only be viewed as malicious since his job is to advise the Board as its general counsel—not involve himself in the Agency staff's enforcement matters.[6]

Finally, and perhaps most importantly, the Agency's malicious approach to prosecuting the Spiegels is evident in the fact that the Agency refuses to acknowledge that the Permit it is void. In 1988, the Agency issued the Permit to the Developer with explicit instructions that each and every finding of fact and condition must be strictly followed or the Permit would automatically become void: "*Failure to comply with either the findings of fact or conditions voids the permit.*" (See Permit, Ex. Z to Priv. Aff., pg. 13) (emphasis supplied). The Agency itself drafted the Permit, so it cannot deny or explain away the meaning of this language.

The Spiegels have established that the Developer and its successor have violated the conditions of the Permit since at least August 18, 1992 by failing to include proper restrictions in the deeds to Fawn Ridge, including the Spiegels' deed. (See Priv. Aff., ¶¶ 41-42). Moreover, the Permit became void when the Developer failed to provide all lot purchasers, supervising engineers, and contractors who were building in Fawn Ridge with copies of the Permit and

[6] These malicious actions appear to meet the elements of an independent cause of action for abuse of process under New York law. See Curiano v. Suozzi, 63 N.Y.2d 113, 116, 480 N.Y.S.2d 113, 469 N.E.2d 1324 (1984); Minasian v. Lubow, 49 A.D.3d 1033, 856 N.Y.S.2d 255 (3d Dep't 2008).

maintain records that it furnished such copies. (See Priv. Aff., ¶ 44; Spiegel Aff., ¶ 6).[7] Finally, 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 Priv. Aff., ¶ 46). Accordingly, since the Trust failed to place a 30-foot building height limitation in each of the deeds to the 54 lots and provide the Agency with written confirmation that it had done so, Permit Condition #7(a) was violated, thereby voiding the Permit, by its own terms.

There is absolutely no legitimate objective that would allow the Agency to embarrass and punish the Spiegels for allegedly violating the void Permit while it blatantly ignored the other violations of the Developer and other similarly situated Fawn Ridge homeowners.

1. The Spiegels Are Entitled to an Adverse Inference of Maliciousness Based on the Agency's Destruction of Evidence During This Litigation

It is well-settled that parties in litigation have an affirmative duty to preserve evidence. Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (citing Fujitsu Ltd. v. Federal Express Corp., 247 F.3d 423, 436 (2d Cir. 2001)). Once a party anticipates litigation, it *must* suspend its routine document retention/destruction policy and institute a "litigation hold" to retain all relevant documents. Zubulake, 220 F.R.D. at 218. Backup tapes of electronic data are included in the things subjected to the mandatory litigation hold. Id. The remedy is an adverse inference. Id. at 216-219.

Spoliation of evidence occurs when a party (i) destroys, (ii) significantly alters, or (iii) fails to preserve evidence in pending or reasonably foreseeable litigation. Zubulake, 220 F.R.D. at 216 (citing West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779) (2d Cir. 1999)). When lost evidence is germane, the prejudiced party is entitled to have the finder of facts draw an

[7] A subpoena issued to the Developer's successor, the Nettie Marie Jones Trust, did not yield any documents suggesting that it had complied with the Permit.

inference that the evidence was unfavorable to the responsible party. Zubulake, 220 F.R.D. at 216.

Importantly, "Courts must take care not to hold the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed or unavailable evidence, because doing so would subvert the purposes of the adverse inference, and would allow parties who have destroyed evidence to profit from that destruction." Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99, 109 (2d Cir. 2002) (citing Kronisch v. United States, 150 F.3d 112, 127-28 (2d Cir. 1998)) (internal quotations omitted).

The Agency produced only a current snapshot of electronic files three years after the dispute arose, and over two years after this case was filed. (See Priv. Aff. ¶ 131). Here, the Agency's lack of a document retention policy is highly suspicious. The Agency's Information specialist admitted at a FRCP 30(b)(6) deposition that the Agency lacks an electronic document retention policy. (See Kreider Tr., Ex. M to Priv. Aff., pg. 23). 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 id., 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.).

Incredibly, the Agency does not backup its e-mail system. (See id., pg. 21). Rather, an e-mail received by an Agency employee is automatically archived from the e-mail system (Groupwise) 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 id., pp. 8, 21-26).

During discovery, the Spiegels uncovered two Agency e-mails bearing the subject line "Fawn Ridge" that were mysteriously blank, thus establishing within the four corners of the documents themselves that evidence material to this case is missing. The first e-mail was sent by enforcement officer Miller to Van Cott on May 12, 2006 (hereafter "E-mail #1").[8] 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). (See E-mail #1, attached as Ex. JJJ to Priv. Aff.). The second e-mail was sent by Van Cott to Miller on September 1, 2006 (hereafter "E-mail #2"). (See E-mail #2, attached as Ex. KKK to Priv. Aff.). The metadata contained in these two electronic files establishes 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. (See Ex. JJJ to Priv. Aff.). Similarly, E-mail #2 (sent on September 1, 2006) was modified on December 1, 2006. (See Ex. KKK to Priv. Aff.). These e-mails were "modified" well before the date on which they were produced to the Spiegels in discovery, and presumably, before the Agency even turned them over to its counsel.[9]

Incredibly, 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 explained that the Agency's electronic document retention policy prevents the Spiegels from knowing anything more about these e-mails. (See Priv. Aff., ¶ 135).

---

[8] E-mail #1 purports to be a forward of a message sent by former enforcement officer Susan Parker to Douglas Miller concerning Fawn Ridge that was sent a day earlier on May 11, 2006. E-mail #1 was produced in electronic format in February 2007. Another e-mail from Douglas Miller to Paul Van Cott dated May 12, 2006 is listed on the Agency's Privilege Log #7 (PE-269), which was also provided to the Spiegels in February 2007. A version of the May 11, 2006 Parker e-mail appears to have been produced in discovery on September 4, 2008 (D9897). Thus, we appear have received three versions of this e-mail: (i) E-mail #1, (ii) PE-269, and (iii) D9897, at least one of which was modified by an Agency employee before it was turned over to its counsel for production in discovery.

[9] To be clear, the Spiegels are in no way suggesting that the Agency's counsel knew about or had anything to do with the modification of the evidence in this case. The Agency's counsel produced E-mail #1 to the Spiegels on or about February 7, 2007 (several months after it was modified), and recently produced E-mail #2 on September 4, 2008 (several years after it was modified).

The elements of spoliation are easily fulfilled here. The Agency had a duty to preserve all documents when it reasonably knew that this matter may be headed to litigation, which was in the Spring of 2005. Since the e-mails were generated after the Spiegels commenced this lawsuit, the Agency clearly had an obligation to preserve them. See Zubulake, 220 F.R.D. at 216.

The destruction occurred "with a culpable state of mind" element because the documents were destroyed or modified either knowingly or negligently. See Residential Funding Corp., 306 F.3d at 108 (citing Byrnie v. Town of Cromwell, 243 F.3d 93, 109 (2d Cir. 2001)). Moreover, it is clear that either (i) the Agency's counsel did not instruct the Agency to institute a litigation hold, or (ii) the Agency's counsel instructed a litigation hold, but the Agency refused or negligently failed to obey it. Either way, the Agency has undoubtedly allowed for the destruction of documents "with a culpable state of mind" because the e-mail modification would not have occurred if a litigation hold was properly implemented and reasonably followed.

The modified e-mails were unquestionably relevant to the Spiegels' equal protection claim because they were emblazoned with a "Fawn Ridge" subject line.

Therefore, the Spiegels are entitled to an adverse inference that the Agency destroyed or modified evidence that, among other things, would have established that the Agency was selectively enforcing the void Permit against the Spiegels with malicious intent to injure them.

D. There is No Rational Basis For the Agency's Difference in Treatment Between the Spiegels and the Other Homeowners in Fawn Ridge

The Agency's deliberate decision to treat the Spiegels differently from the other similarly situated homeowners in Fawn Ridge was arbitrary and irrational. During the Permit review process, the Agency, upon request of the Developer, deferred the responsibility of ensuring Permit compliance to the Fawn Ridge Architectural Review Committee ("ARC"). (See Priv. Aff., ¶¶ 33-34). As such, the Fawn Ridge homeowners did not look beyond local and ARC

review when seeking approval to construct their homes. (See Spiegel Aff., ¶ 22). Thus, even if the Permit were not void, any violation thereof would be strictly the fault of the Developer, who is in charge of administering the ARC. The Agency admits that it has not opened an investigation file or commenced enforcement proceedings against the Developer. (See Priv. Aff., ¶ 46).

Similarly, the Agency lacked valid discretion to selectively single out the Spiegels among the thirty (30) Fawn Ridge homeowners whose homes would fall prey to the Agency's skewed interpretation of the Permit because the Permit was void by its own terms at the time the Agency sought to enforce it against the Spiegels.

E. Defendant Agency's Punitive Administrative Enforcement Against Plaintiffs Based on "Visual Aesthetics" is Completely Irrational

1. The Height of the Spiegel Home is Immaterial

If the Spiegel house were to be destroyed and replaced with a 30 foot tall house built closer to Algonquin Drive on the Spiegel Lot, Lot 39, the new structure would be more visible than the Spiegels' house now. (See Priv. Aff., ¶ 63). The Agency, to this day, declines to evaluate Marvin's testimony in this regard. Indeed, the Agency has not done any visual impact analysis as to what a 30 foot high house would look like on Lot 39 if the Spiegel home were destroyed and a new 30 foot tall house was built, upslope and closer to Algonquin Drive. (See Priv. Aff., ¶ 92). The Defendant Agency's "visual impact expert" agrees that any home on Lot 39 will be readily visible since it is an open field. (See id.). Indeed, the Defendant Agency has not even evaluated the visual impact of the Spiegels' settlement proposals (see e.g., Morganson Aff., Ex. A pg. 20), including an offer to lower the house by several feet, at considerable expense. (See Priv. Aff., ¶ 92). The Agency admits that any dwelling on Lot 39 will be readily visible from Route 86, but has no data, analysis, information or knowledge as to what a "compliant" house would look like on Lot 39. (See Priv. Aff., ¶ 92).

Further, the Agency has selectively prosecuted the Spiegels using an evolving Agency "guideline" since it does not have a regulation—or even a policy—on how to properly measure the height of a building. (See Priv. Aff., ¶ 121). Indeed, the Agency even admits that its guideline is "confusing", and Agency Board Members have suggested a regulation setting forth a height measurement standard, but none has emerged. (See id.).[10]

Finally, when the Agency drafted and issued the Permit in 1988, it did so without including a condition requiring homeowners to abide by a specific height measurement standard. Rather, the Permit merely requires the Developer to issue deeds with a 30-foot building height limitation and standard, which the Developer violated many times over. (See Priv. Aff. ¶¶ 41-42). Thus, the Spiegels cannot be deemed to have violated the Permit by building a home that complies with the approval granted by the Town and ARC. To be sure, no Permit height measurement standard exists that can be directly applied to Fawn Ridge homeowners.

2. No Trees Were Cut by the Spiegels In Violation Of The Permit

The Permit makes findings that Lot 39 "will likely be readily visible from Route 86" and that Lot 39 is "principally or entirely open field". (See Priv. Aff., ¶ 26 and Ex. Z). The Defendant Agency has no idea what if any trees were cut on Lot 39 and never compared the multitude of existing trees on Lot 39 to the extensive Permit conditions that allow a 5,000 square foot clearing for each house and, far many other trees to be cut in order to command a view from each house. (See Priv. Aff., ¶ 93). Lot 39 was always an open slope. (See Priv. Aff., ¶¶ 47, 51, 61; Politi Aff., ¶ 8). Indeed, the Agency admits that the Permit recognizes the open areas associated with the former ski slope. (See Priv. Aff., ¶ 28). Not only is Defendant Agency's "Final Order" determination that Plaintiff cut trees on Lot 39 in derogation of the Permit lacking

[10] As further proof that the Agency's height measurement guideline is confusing, the Agency's own reference materials suggest that the home of the Agency Board's general counsel appears to be 45 feet tall and in violation of the Adirondack Park's overall building height limit. (See Priv. Aff., Ex. FFF).

any foundation in fact or proof, the Agency has selectively determined not to have its forester evaluate any other homeowner in Fawn Ridge regarding tree cutting. (See Priv. Aff., ¶ 114).

3. The Slope at the Spiegel Home is Immaterial

The Spiegels' home 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 Priv. Aff., Ex. Z, pg. 19). 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 Priv. Aff., ¶ 60).

Thus, not only is the Defendant Agency's findings in the "Final Order" that Plaintiffs violated the slope provisions of the Permit contrary to the Agency's own findings, the Agency has selectively declined to take any measurements of the actual slope upon which other homes in Fawn Ridge have been built. (See Priv. Aff., ¶ 114). This is so even though Marvin established over two years ago that several homes in Fawn Ridge, other than the Spiegel home, are on 25% or greater slopes. (See Priv. Aff., ¶ 108-09).

F. Plaintiffs' Request for Judicial Notice of Adjudicative Facts

Pursuant to FRE 201, Plaintiffs hereby request that this Court take judicial notice of the current onsite conditions of the Spiegel home and the actual visual impact of Fawn Ridge and its homes from highway Route 86, Algonquin Drive, and indeed, from inside the Spiegel home.[11] There can be no doubt that the observable conditions concerning Fawn Ridge are the critical adjudicative fact in this proceeding. Plaintiff Arthur Spiegel has already provided testimony that photographs of Fawn Ridge from the highway, Route 86 and of the highway from the Spiegel home, are fair and accurate depictions of existing conditions. However, this Court can see for

[11] Defendants improperly made a similar inspection in January 2007 without serving Plaintiffs' counsel with an appropriate Notice of Inspection or otherwise informing Plaintiffs. (See Priv. Aff., Ex. K, pg. 79 thereto).

itself the existing conditions. For purposes of providing the Court with the necessary information under Rule 201(d), a Howard Johnson's motel sits on the Route 86 highway just opposite of where Algonquin Drive meets the highway. The Spiegel home is unmistakable on Algonquin Drive because it is covered with tattered tar paper, as it has been for four years. Driving up Algonquin Drive, the Spiegels' home is on the right hand side before Ahmek Drive, near the star on the street map attached as Exhibit LLL to the Privitera Affidavit.

CONCLUSION

A reasonable trier of fact could not return a verdict for the Agency. Plaintiffs have established that (1) the Agency intentionally treated the Spiegels differently from the other Fawn Ridge homeowners, twenty-nine (29) of whom have violated the Agency's interpretation of the Permit; (2) the Agency selectively enforced the Permit against the Spiegels with malicious intent because it violated its standard enforcement protocol, manipulated the administrative record, and destroyed evidence; and (3) there is no rational basis in the difference in treatment between the Spiegels and the other similarly situated Fawn Ridge homeowners.

Thus, based on the foregoing, Plaintiffs Arthur and Margaret Spiegel respectfully seek judgment allowing them to finish building their home as and where it is and granting such other and further relief that the Court deems just and proper.

Dated: February 14, 2009
Albany, New York

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

/s/ *John J. Privitera*

John J. Privitera, Esq. (Bar Roll No. 102399)
Jacob F. Lamme, Esq. (Bar Roll No. 513680)
Attorneys for Plaintiffs Arthur and Margaret Spiegel
677 Broadway
Albany, New York 12207
Tel. (518) 447-3200
Fax (518) 426-4260