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.

REPLY 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)

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PRELIMINARY STATEMENT

Defendants New York State Adirondack Park Agency, Mark Sengenberger, Richard LeFebvre and Paul Van Cott (collectively "Defendants") have submitted a scattered opposition to the motion for summary judgment of plaintiffs Arthur and Margaret Spiegel ("the Spiegels") that fails to raise a material issue of fact that would preclude judgment in favor of the Spiegels. Relying on immaterial facts and ignoring material facts, Defendants have failed to carry their burden in opposing the Spiegels' summary judgment motion.

The Spiegels established that (i) Defendants intentionally treated the Spiegels differently from the other Fawn Ridge homeowners, twenty-nine (29) of whom have violated Defendants' interpretation of Agency Permit No. 87-28 ("the Permit"); (ii) Defendants selectively enforced the Permit against the Spiegels with malicious intent, as demonstrated by Defendants' violation of standard enforcement protocol, manipulation of the administrative record, and destruction of evidence; and (iii) there is no rational basis in the difference in treatment between the Spiegels and the other similarly situated Fawn Ridge homeowners. Defendants presented no evidence to disturb this *prima facie* showing.

FACTUAL BACKGROUND

Defendants, relying on immaterial facts and ignoring material facts, have presented the Court with a Counterstatement of Material Facts that fails to raise any issues of fact with respect to the material factual assertions made by the Spiegels. As such, Defendants' opposition to this motion must fail. The material and indisputable facts of this case are:

1. Defendant is a regional, combined zoning and land use board, created in 1971, that issued a permit in 1988 to Lakewood Properties, Inc. ("Developer") for the Fawn Ridge subdivision. (See Pl. Statement of Material Facts, ¶ 9; Def. Counterstatement of Material Facts, ¶ 9).[1]

[1] Hereafter, Plaintiffs' Statement of Material Facts is referenced as ("Pl. SMF ¶ ___"), and Defendants' Counterstatement of Material Facts is referenced as ("Def. CMF ¶ ___").

2. The Fawn Ridge Permit allows a 54-lot subdivision on a visible ridge above Lake Placid. A portion of the ridge was used as a ski slope prior to development, and thus, was open. The Permit states that any home on this open slope, which is Plaintiffs' Lot 39, would be "readily visible" for miles around. (See Pl. SMF, ¶¶ 10-11, 38; Def. CMF, ¶¶ 10-11, 38).

3. The Permit states that no structure may exceed 30 feet in height or be built on a slope greater than 25%. (See Pl. SMF, ¶ 11; Def. CMF, ¶ 11).

4. From 1992 through 2001, the Developer violated the Permit at least nineteen (19) times by granting deeds to Fawn Ridge lot purchasers that allowed homes of 35 feet height. Defendants have done nothing about these violations. (See Ex. CC; Pl. SMF, ¶¶ 25-33, 116; Def. CMF, ¶¶ 25-33, 116). These violations voided the Permit by its own terms. (See Permit, Ex. Z, pg. 13).

5. In 2004, prior to commencing construction, Plaintiffs retained a builder who had previously built in, and a surveyor who had surveyed most of the lots in, Fawn Ridge; openly showed their building plans to neighbors; obtained a building permit from the Town; and obtained approval from the Developer. The surveyor decided where to locate Plaintiffs' house. (See Pl. SMF, ¶¶ 45-47, 54; Spiegel Aff., ¶ 24, Ex. B and C; Def. CMF, ¶¶ 45-47, 54).

6. Plaintiffs' neighbors complained directly to Defendant in August and September of 2004 that Plaintiffs' home, then under construction, violated the Permit. Plaintiffs built their home for six months in plain view. Defendants took no action until February 2005. (See Pl. SMF, ¶¶ 61-72; Def. CMF, ¶¶ 61-72).

7. In April 2005, Defendant initiated an enforcement action against Plaintiffs. Prior to that action, Defendant had never monitored or enforced any term of the Permit as against the Developer or any other homeowner on Fawn Ridge. (See Pl. SMF, ¶¶ 56, 75; Def. CMF, ¶¶ 56, 75).

8. Twenty-nine (29) homes in Fawn Ridge, including Plaintiffs' home, exceed 30 feet in height, usually on the downhill side. Defendant has acted only as against Plaintiffs. (See Ex. DDD; Pl. SMF, ¶ 104; Def. CMF, ¶ 104).

9. Six (6) of the homes in Fawn Ridge, not including Plaintiffs' home, are built on slopes greater than 25%. (See Ex. DDD; Pl. SMF, ¶ 104; Def. CMF, ¶ 104). Defendant has not taken any enforcement action against these six homes. Plaintiffs' home is built on a slope of 20.55%. (See Pl. SMF, ¶¶ 49-51; Def. CMF, ¶¶ 49-51).

10. At least nine (9) homes on Fawn Ridge are readily visible to the public. (See Spiegel Aff., ¶ 53 and Ex. F, G and H).

11. Five witnesses swear that, because Plaintiffs' lot was an open slope, no trees were cut on the lot in violation of the Permit. (See Spiegel Aff., ¶¶ 7-9; and Affidavits presented as Ex. FF, JJ, LL, and PP to Pl. Motion for Summary Judgment). Defendants' present one employee, who is not qualified as an expert, who vaguely concludes—based upon speculative interpretation of aerial photographs—that trees of undetermined size, quantity, or quality were cut on Plaintiffs' lot. [See Grisi Aff. (Docket No. 85-59)].

12. In enforcing the Permit solely against Plaintiffs, Defendant actually suspended the Permit as it applies to Plaintiffs. This procedure had never before or since been used by Defendant against anyone. (See Pl. SMF, ¶¶ 76, 89; Def. CMF, ¶¶ 76, 89; Banta Aff. ¶ 18).

13. During the enforcement proceeding, Defendant created a "Notice" of its enforcement actions against Plaintiff, which is not authorized by law or regulations, and hand-served it on Plaintiffs' neighbors and solicited their views. (See Pl. SMF, ¶¶ 82-83; Def. CMF, ¶¶ 82-83).

14. Defendants have demanded that Plaintiff raze their home and pay a $200,000 fine. (See Pl. SMF, ¶ 91; Def. CMF, ¶ 91).[2]

15. Defendants have refused to accept Plaintiffs' offer to lower their home by nine (9) feet, which would make their home among the lowest in Fawn Ridge. (See Pl. SMF, ¶ 80; Spiegel Aff., ¶ 37; Def. CMF, ¶ 80).

16. Defendants have not analyzed the visual impact of a house on Plaintiffs' lot that is compliant with Defendants' current interpretation of the Permit. A compliant house will be more visible to the public than Plaintiffs' current house. (See Pl. SMF, ¶ 86; Def. CMF, ¶ 86).[3]

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[2] In December 2005, prior to the commencement of both this action and the State's still-pending enforcement action against the Spiegels, Defendants—through counsel—demanded a $200,000 penalty. See Spiegel Aff. ¶ 48. Defendants' counsel appears to have construed this as *carte blanche* to submit settlement correspondence emblazoned as confidential pursuant to FRE 408. (See Affirmation of Susan L. Taylor, dated April 1, 2009, Exs. 17-18). Although not admissible, this correspondence bolsters the Spiegels' position that Defendants have been unreasonable and irrational from the very beginning of this matter when the administrative proceeding was commenced in April 2005. The Spiegels have offered to (i) lower the height of their home by nine (9) feet, making it one of the shortest homes in Fawn Ridge; (ii) implement an extensive—and expensive—vegetative screening plan to screen Lot 39, even though the Permit acknowledges that the home would be "readily visible"; and (iii) pay the largest penalty that a homeowner has ever paid in the Agency's 38-year existence. Seeking an additional *24-inch* reduction of the height of the home, which would make it an infeasible one-story home, Defendants have refused this offer.

Similarly, contrary to the explanation offered by Defendants' counsel, a letter written in December 2005—three months before this action even was commenced—does not give Defendants *carte blanche* to conduct a site visit to the Spiegels' property a year later without serving a Notice of Inspection. (See Taylor Aff., ¶ 52).

[3] Defendants do not deny that the Agency has not determined the visual impact analysis as to what a 30-foot home (according to the Agency's measurement guideline) would look like on Lot 39 if it were built closer to Algonquin

Based on the foregoing facts, the Spiegels are entitled to summary judgment on their equal protection claim.

ARGUMENT

POINT I

DEFENDANTS HAVE FAILED TO RAISE A MATERIAL ISSUE OF FACT ON ANY ELEMENT OF PLAINTIFFS' EQUAL PROTECTION CLAIM

The parties are in general agreement as to the proper legal standard that applies to the Spiegels' federal equal protection claim. This Court set forth the proper standard as follows:

> 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); see also Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000); Harlen Assocs. v. Inc. Village of Mineola, 273 F.3d 494, 499 (2d Cir. 2001).[4]

A. Defendants Have Not Disturbed the Spiegels' *Prima Facie* Showing that They are "Similarly Situated" to the Other Fawn Ridge Homeowners

The Spiegels are "similarly situated" to the other homeowners in the Fawn Ridge subdivision. In situations involving land use, the required showing is simply that the comparative parties are engaged in the same type of land use. See Clubside, Inc. v. Valentin, 468 F.3d 144, 160 (2d Cir. 2006) (citing Campbell v. Rainbow City, 434 F.3d 1306, 1314-15 (11th Cir. 2006)); see also Cine Sk8, Inc. v. Town of Henrietta, 507 F.3d 778, 791 (2d Cir. 2007)

Drive. Rather, Defendants state merely that they have no obligation to do so, thereby bolstering the irrationality of their actions. Pursuant to Local Rule 7.1, Defendants silence is deemed an admission.

[4] However, Defendants' apparent concern that the Spiegels have met this test is revealed in their argument to extend Engquist rather than apply the test. See POINT IV, *infra*.

(stating that evidence indicating that similar landowners had special use permits would be sufficient to fulfill the "similarly situated" requirement). Thus, the proper inquiry is whether the plaintiff homeowner is similarly situated to other homeowners that are permitted in a certain area. See Congregation Kol Ami v. Abington Township, 309 F.3d 120, 137 (3d Cir. 2007).

The "similarly situated" requirement in equal protection cases "should not be applied mechanically or inflexibly." Humphries v. CBOCS West, Inc., 474 F.3d 387, 404 (7th Cir. 2007) (citing Hull v. Stoughton Trailers, LLC, 445 F.3d 949, 952 (7th Cir. 2006)). "The similarly situated inquiry is a flexible one that considers all relevant factors, the number of which depends on the context of the case. Id. (internal citations omitted) (applying the flexible standard to a discrimination case under 42 U.S.C. § 1981).

In Mikeska v. City of Galveston, the plaintiffs commenced an equal protection action pursuant to 42 U.S.C. § 1983 against a city based on the city's selective, irrational treatment of the plaintiff homeowners with regard to the city's failure to reconnect plaintiffs' utilities following a tropical storm. Mikeska v. City of Galveston, 451 F.3d 376 (5th Cir. 2006). The Fifth Circuit necessarily found that the plaintiffs were "similarly situated" to other homeowners whose utilities had been reconnected. Id. at 381. Additionally, the circuit court reversed the district court's summary judgment dismissal of the "class of one" equal protection action because the defendant city—like Defendants here—had failed to provide evidence concerning the rationality of the difference in treatment between the similarly situated homeowners. Id.

Defendants cite several cases for the proposition that the Spiegels cannot be similarly situated to the other homeowners in Fawn Ridge. (Def. Memo in Opposition, pg. 18). Defendants' reliance on these cases is misplaced. In Pansy Road, LLC, the central issue raised concerned the rationality of the defendant planning board's decision to deny a permit to a

subdivision developer based on traffic considerations. Pansy Road, LLC v. Town Plan & Zoning Comm'n of the Town of Farfield, 2007 U.S. Dist. LEXIS 72592 (D. Conn. Sept. 29, 2007). The court found that the plaintiff was not similarly situated to the other subdivisions described by the plaintiff because the traffic patterns were substantially different. Id. Pansy Road, LLC is inapplicable to this case, where 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, which would apply equally to each Fawn Ridge homeowner if it were not void by its own terms. Accordingly, the Spiegels are similarly situated to each homeowner in Fawn Ridge.

Further, Defendants' reliance on Strickland does not alter the Spiegels' *prima facie* showing that they are similarly situated to the other Fawn Ridge homeowners. (Def. Memo in Opposition, pg. 18). In Strickland, the court found that the plaintiff, who violated a city's standing water ordinance by letting water stand on his property for months, was not similarly situated to other homeowners whose violations of the ordinance were temporary after a rain storm. Strickland v. Alderman, 74 F.3d 260, 265 (11th Cir. 1996). Thus, the court's determination turned on the timeframe of the violations. Here, Defendants admit that many of the other ridge line lots are in violation of the Permit. (See Defendants' Memorandum of Law in Support of Summary Judgment, Docket No. 85-3, pg. 19-20) (displaying a chart of the seven (7) homes that are allegedly subjected to same three Permit conditions). Unlike in Strickland, these other admitted violations are not temporary in nature. Thus, despite its argument to the contrary, Defendants *concede*—at the very least—that the Spiegels are similarly situated to the six (6) homeowners of the other ridge line lots.

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

B. Defendants Have Not Disturbed the Spiegels' *Prima Facie* Showing that They were Treated Differently From Similarly Situated Homeowners

Defendants' unsupported contention that they did not treat the Spiegels differently from the similarly situated homeowners must fail. Defendants claim that "the Agency opened five enforcement files against the other Fawn Ridge homeowners in September 2005." (Def. Memo in Opposition, pg. 19) (emphasis added). This is not true. Defendants have never commenced any enforcement actions against any of the other Fawn Ridge homeowners. Rather, the Agency opened investigation files against five other Fawn Ridge homeowners in September 2005. Since then, many additional homeowner violations have been documented along with many violations by the Developer. (See e.g., Def. CMF, ¶¶ 30, 112). Only the Spiegels have been prosecuted. (See Def. CMF, ¶ 115) ("Admit that the Agency has not served a Notice of Intent or Notice of Apparent Violation on any other Fawn Ridge homeowner").

Further, Defendants appear to concede that the Spiegels will prevail on this motion upon a showing that "the Agency knew about and ignored other violations when it opened its file on the Spiegels' house". (Def. Memo in Opposition, pg. 20). The Spiegels have already made this showing. 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 made during the administrative enforcement case, Plaintiffs informed the Defendant 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 Ex. WW). Nevertheless, Defendants continued their malicious and irrational crusade against the Spiegels and left the other Fawn Ridge homeowners alone.

Notably, Defendants do not dispute—and therefore concede—that they did not treat the Richters on Lot 36 the same way that they treated the Spiegels. (See Def. CMF, ¶¶ 96-98). Defendants knew that the Richter home was under construction and did not issue a cease and desist order like it did to the Spiegels. Even though 83% of the homes in Fawn Ridge violate Defendants' interpretation of the Permit, only the Spiegels' home is actually being treated as a violation of the Permit. Accordingly, it is undeniable that Defendants intentionally treated the Spiegels differently from the way they treated the similarly situated homeowners of Fawn Ridge.

C. Defendants Have Not Disturbed the Spiegels' *Prima Facie* Showing that There is No Rational Basis For Defendants' Difference in Treatment Between the Spiegels and the Other Homeowners in Fawn Ridge

The primary, fundamental and fatal flaw of the Defendants' position in this matter is that they assume the right and power under a void Permit to insist that the Spiegels' home not be visible from Lake Placid, even though the Permit states that it will be visible for miles.[5] This irrational usurpation of power must not be condoned. The core of Defendants' irrationality is that Defendants have focused their entire enforcement power, seeking destruction of a $300,000 investment plus a $200,000 penalty as to just one home among many without any rational reasoning.

[5] Defendants raise no material issues of fact as to the irrational demand for a $200,000 penalty where the record is clear that the Defendants' pattern and practice is to leave structures in place and collect low three or four-figure penalties. (See Pl. SMF, ¶¶ 121-27, Exs. ZZ, HHH and III).

Defendants admit that they did not determine the visual impact as to what a 30-foot home (according to the Agency's interpretation of the Permit) would look like on Lot 39 if it were built closer to Algonquin Drive, and but further claim that they had no obligation to do so. (Def. CMF, ¶ 86). While Defendants may not have been obligated to undertake this analysis pursuant to their regulations, Defendants were certainly required to rationally do so when their entire enforcement case hinged on the alleged adverse visual impacts of the Spiegels' home. Thus, Defendants' admitted irrationality renders summary judgment appropriate in favor of the Spiegels.

D. Defendants Have Not Disturbed the Spiegels' *Prima Facie* Showing that Defendants Selectively Enforced the Void Permit Against the Spiegels With Malicious Intent to Injure Them

Defendants attempt to distort the Spiegels' *prima facie* showing of malice by focusing on political animus. (See Def. Memo in Opposition, pp. 27-30). As the Spiegels stated originally, Defendants 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"). However, although the Spiegels need not prove it in order to succeed in this case, they believe that Defendant Van Cott's political animus toward and desire "to get" plaintiff Arthur Spiegel manifested itself into the unconstitutional enforcement action described herein.

> "[B]ecause discriminatory animus is insidious and a clever pretext can be hard to unmask . . . it may be overly mechanistic to hold [a plaintiff] to strict proof of the subjective intentions of a numerical majority of council members." Scott-Harris v. City of Fall River, 134 F.3d 427, 438 (1st Cir. 1997), *rev'd on other grounds sub nom.* Bogan v. Scott-Harris, 523 U.S. 44, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1998); see also Hunter v. Underwood, 471 U.S. 222, 228, 105 S. Ct. 1916, 85 L. Ed. 2d

222 (1985) (recognizing that "[p]roving the motivation behind official action is often a problematic undertaking" when the action is undertaken by a multi-member government body).

Cine SK8, Inc. v. Town of Henrietta, 507 F.3d 778, 786 (2d Cir. 2007).

Despite the recognized difficulty in proving malice, the Spiegels have still managed to uncover sufficient evidence to establish a *prima facie* showing of malice. The Spiegels have established malice by (i) showing that Defendants purposely failed to abide by their own Enforcement Guidelines by furtively opening and closing the Spiegels' investigation file and creating an extra-judicial, unauthorized "Notice" designed to prejudice the administrative record; and (ii) destroying evidence. An adverse inference of malice is reasonable here. Defendants have not raised a material issue of fact as to either of these malicious undertakings.

1. Defendants Admittedly Failed to Follow Enforcement Protocol

Defendants do not deny that the Agency's standard enforcement protocol was repeatedly violated throughout the administrative enforcement proceeding against the Spiegels. Instead, Defendants claim that their enforcement protocol is not rigid. (Def. Memo in Opposition, pg. 30; Banta Aff., ¶ 6). Nevertheless, Defendants do not provide adequate reasons for their irrational and malicious actions.

Defendant Agency's general counsel, John Banta, swears that "[t]he large volume of cases and limited staff resources necessarily require prioritization of the enforcement work of the Agency". (Banta Aff., ¶ 7). The Spiegels' administrative enforcement case was assigned a Priority 2 ranking, meaning that delay may create economic hardship for the Spiegels. (Ex. RR). Defendant Van Cott's attempt to explain that the Priority 2 ranking was assigned after the enforcement investigation file was re-opened in February

2005, instead of when the case was opened in September 2004, is of no consequence and is unsupported by anything other than his bare assertion. (See Van Cott Aff., ¶¶ 9-10). The operative Enforcement Guidelines state that "Investigations ***will*** be prioritized". (Ex. QQ) (emphasis added). Thus, even if his statements are true, Van Cott admits to violating protocol by not assigning the Spiegels' enforcement investigation file with a priority ranking as soon as it was opened in September 2004. (See Van Cott Aff., ¶ 10) ("there was no need to give the case any priority ranking").

Moreover, Defendants admit that, aside from this case, the Agency has never prepared an extra-judicial "Notice" to the public concerning any particular enforcement matter. (Def. CMF, ¶ 83). Further, Defendants silently admit that the "Notice" is not authorized by the State Administrative Procedure Act or any regulations, and that the solicitation of public comment violates the Agency's standard protocol. (Pl. SMF, ¶ 82; Def. CMF, ¶ 82). Defendants imply that the "Notice" was authorized by the Spiegels' administrative counsel. (See Banta Aff., ¶¶ 9-12). However, none of the evidence provided corroborates this assertion. The "Notice" was dated and circulated to the public on or about June 24, 2005. (See Ex. VV and Ex. B to Lamme Aff.). The letters presented by Mr. Banta are dated ten (10) days after the "Notice" was created. These letters cannot possibly be used to establish that the Spiegels agreed to this extra-judicial, prejudicial "Notice". Defendants have not produced any evidence to support their claim that the improper "Notice" was authorized by the Spiegels' counsel. Banta's decision to inject himself as a fact witness at this procedural hour does not raise material issues of fact.

2. Defendants Destroyed Evidence and Failed to Offer Evidence of a Proper Litigation Hold

Instead of offering proof of compliance with their obligation to undertake a proper litigation hold, Defendants state "[t]here is no evidence that there was no litigation hold in place." (Taylor Aff., ¶ 18). This double negative does not raise an issue of fact. The Spiegels have provided the testimony of the Defendant Agency's computer specialist establishing that the Agency (i) has a suspect information back-up system, (ii) repeatedly failed to hold electronic evidence for years after this litigation arose, and (iii) modified e-mails. The Spiegels are entitled to an adverse inference. See e.g., Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003). If Defendants had instigated a proper litigation hold, then they should have produced evidence of it. Defendants silence on this issue is quite revealing.

Defendants attempt to explain the modified electronic evidence must also fail. First, Defendants' explanation that the blank e-mails (Exs. JJJ and KKK) are appointments rather than e-mails is patently false. Defendants' computer specialist differentiated e-mails from appointments. (See Kreider Tr., pp. 43-44; Lamme Reply Aff., ¶¶ 11-13 and Ex. B thereto). Second, Defendants' claim that e-mails cannot be modified is also false. (See Kreider Aff., ¶ 12; Lamme Reply Aff., ¶¶ 15-16). Third, Defendants' claim that the modification of the e-mails occurred during the production process is a revisionist falsehood because Defendants already testified that it is impossible to know what the modification was since the Agency's flimsy electronic storage policy does not allow us to see the evidence saved in its original form. (*Compare* Kreider Aff., ¶ 12 *with* Kreider Tr., pg. 39).

Thus, because Defendants have failed to raise a material issue of fact concerning their failure to institute a proper litigation hold and destruction of evidence, the Spiegels are entitled to an adverse inference.

POINT II

THE SPIEGELS ARE NOT COLLATERALLY ESTOPPED FROM ARGUING THAT THE PERMIT IS VOID

Rather than raising the issue three (3) years ago on their motion to dismiss, Defendants focus their opposition to the Spiegels' motion for summary judgment on the doctrine of collateral estoppel, or claim preclusion, which is inapplicable in this case. The Spiegels acknowledge that the doctrines of collateral estoppel and *res judicata* bar this Court from reversing the administrative "Final Order". Indeed, the Spiegels do not ask this Court to do this. Rather, the Spiegels seek an order barring the enforcement of the irrational and selective "Final Order".

The doctrine of collateral estoppel is a "narrow doctrine" which applies only where each of the following two elements are present: (i) the issue in question was actually and necessarily decided in a prior proceeding, and (ii) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue. Colon v. Coughlin, 58 F.3d 865, 869 (2d Cir. 1995). "Issue preclusion will apply only if it is quite clear that these requirements have been satisfied, least a party be 'precluded from obtaining at least one full hearing on his or her claim.'" Id. (citing Gramatan Home Investors Corp. v. Lopez, 46 N.Y.2d 481, 485 (1979)).

According to the Second Circuit, a judicious application of the doctrine "is well-suited to achieve the goals of collateral estoppel without sacrificing a claimant's access to justice."

> New York courts have on numerous occasions stressed the importance of an analysis of each case's unique circumstances, rather than the rigid application of bright-line rules, in deciding the preclusive effect of a prior judgment. See Schwartz, 24 N.Y.2d at 73 (collateral estoppel should not be applied "rigidly"); Ryan, 62 N.Y.2d at 501 ("full and fair opportunity" analysis "requires

> consideration of the realities of the [prior] litigation" (quotation omitted)); Gilberg v. Barbieri, 53 N.Y.2d 285, 292, 441 N.Y.S.2d 49, 423 N.E.2d 807 (1981) ("full and fair opportunity" analysis "cannot be reduced to a formula"). This approach, one that we have followed here, is well-suited to achieve the goals of collateral estoppel without sacrificing a claimant's access to justice.

Giakoumelos v. Coughlin, 88 F.3d 56, 61 (2d Cir. 1996).

Defendants bear the burden of showing that the identical issue was raised and necessarily decided in a previous proceeding. Colon, 58 F.3d at 869; LaFleur v. Whitman, 300 F.3d 256, 272 (2d Cir. 2002); see also Church v. New York State Thruway Auth., 16 A.D.3d 808, 810 (3d Dep't 2005) (holding that the prior determination of an issue will not be given preclusive effect or be deemed "necessarily decided" unless resolution of the issue was "essential" to the decision in the first action and finding that "a case-by-case analysis of the realities of the prior litigation" is the only way to determine if the party had a full and fair opportunity to contest the issue in the prior action). Defendants have failed to carry their burden.

Defendants wrongly assert that the Spiegels were prohibited from commencing this federal action five (5) months after the Defendant Agency issued its September 7, 2005 "Final Order" and raising issues concerning validity of the Permit and the rationality of the Defendants' actions. Nevertheless, instead of asserting a collateral estoppel defense, have admitted several material facts pertaining to the validity of the Permit. (See Def. CMF, ¶¶ 27-30). The issues raised in this federal equal protection action were never "raised and necessarily decided" in the administrative proceeding before the Defendant Agency's land use board. Indeed, this action marks the first and only time that the Spiegels have had their day in court; thus, the Spiegels are entitled to a "full and fair opportunity" to litigate their claims.

It is well-settled in the Second Circuit that claim preclusion does not apply to bar a Section 1983 action where a plaintiff has previously brought an Article 78 proceeding in New

York state court since the full measure of relief available in a Section 1983 action is not available in the state special proceeding. See Colon, 58 F.3d at 870 n.3; Davis v. Halpern, 813 F.2d 37, 39 (2d Cir. 1987); Davidson v. Capuano, 792 F.2d 275, 278-82 (2d Cir. 1986); Brenes v. City of New York, 2009 U.S. App. LEXIS 6270, *7-8 (2d Cir. March 23, 2009); Dorsett-Felicelli, Inc. v. County of Clinton, 2008 U.S. App. LEXIS 25572, *4 (2d Cir. Dec. 18, 2008). Thus, if collateral estoppel does not apply in a Section 1983 action occurring even after an Article 78 proceeding, then it certainly does not apply here where the Spiegels have never raised the issues in any court.[6]

Accordingly, the doctrine of collateral estoppel does not prohibit the Spiegels from raising issues concerning the Permit's validity and the rationality of Defendants' actions in selectively enforcing a void permit against the Spiegels, which directly relate to the Spiegels' federal equal protection claim.

POINT III

DEFENDANTS' ATTEMPT TO STRIKE MARVIN'S FACTUAL TESTIMONY MUST FAIL

Defendants endeavor to distract this Court with an inarticulate attempt to strike the factual testimony of Robert Marvin, the surveyor hired by the Spiegels and many of the other Fawn Ridge homeowners to stake out and survey their lots in Fawn Ridge. Defendants' claim

[6] Defendant Agency admits that it never served the September 7, 2005 "Final Order" upon the Spiegels in accordance with the applicable regulation, which requires service upon the party – not the party's attorney. See 2006 Banta Aff., Docket No. 93-5, ¶ 5. The regulation governing service of a final Agency determination requires "a copy of the final determination and order shall be served on the *parties*." 9 NYCRR § 581-4.16(8) (emphasis supplied). Defendant Agency cannot claim that it complied with the regulation when it only served a purported "Final Order" on the Spiegels' attorney for the administrative proceeding because the regulations governing the Agency routinely differentiate between service upon a party and attorney. Compare 9 NYCRR § 581-4.16(8) ("a copy of the final determination and order shall be served on the *parties*") (emphasis supplied) with 9 NYCRR § 580.18(e) ("[a] copy of the decision, determination or order shall be delivered or mailed to each party *and* to his attorney of record") (emphasis supplied). The Agency admits that it did not serve its purported "Final Order" upon the Spiegels as required by 9 NYCRR § 581-4.16(8). Therefore, because the Spiegels have never been properly served, the 60-day statute of limitations to challenge the "Final Order" in a CPLR Article 78 proceeding has not yet begun. See N.Y. Exec. Law § 818 ("application for such review must be made not later than sixty days *from the effective date of the order*") (emphasis supplied).

that Marvin's testimony and Map should be stricken because they are "prejudicial" and "not harmless" is ridiculous. Marvin is a fact witness.

Pursuant to FRE 702, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," then a qualified expert witness will be able to offer testimony. Fed. R. Evid. 702. Marvin's testimony concerning building height is not based on "specialized knowledge". The Map (Ex. DDD) demonstrates the height of the Fawn Ridge homes as a matter of fact – not based on Marvin's opinion. The reliability of this factual evidence is corroborated by Defendants' admission that some of their height measurements match those on the Map. (See Pl. Ex. DDD; Pl. SMF, ¶ 112; Hanrahan Aff., ¶ 8; Def. Memo in Support (Docket No. 85-3), pg. 20).

However, even if the Court deems Marvin as an expert, his testimony, affidavits and the Map should still be considered. Pursuant to FRCP 37(c)(1), this Court has broad discretion to allow the evidence if the failure to designate Marvin as an "expert" was substantially justified or the effect was harmless. "Exclusion is an extreme sanction. In weighing whether to exclude evidence under Rule 37(c), the Court should consider 'the importance of the testimony to the case, the prejudice to the party inconvenienced, and the administrative difficulty which the court itself would face." GU Markets, LLC v. Supermarket Equip. Resale, Inc., 2003 U.S. Dist. LEXIS 20539 (D. Vt. June 16, 2003) (citing Outley v. City of New York, 837 F.2d 587, 590 (2d Cir. 1988)); see also Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co., 318 F.3d 592, 597-98 (4th Cir. 2003) [stating that a court's exclusion analysis should be guided by (i) surprise to the other party, (ii) ability of the other party to cure, (iii) extent to which evidence would disrupt trial, (iv) importance of the evidence, and (v) nondisclosing party's explanation for failure to disclose the evidence].

Here, Defendants have known that Robert Marvin is a material witness and the substance of his testimony from the very beginning of this case. (See Lamme Reply Aff., ¶ 5 and Ex. A therto). On June 30, 2006, the Spiegels' informed Defendants through their FRCP 26(a)(1) initial disclosure that Marvin would provide evidence concerning "Permit intent; historic fill; slope; survey; visual impact; and house placement". (Id.). In October 2006, Marvin submitted an affidavit (Ex. PP) and the Map depicting the building heights in Fawn Ridge (Ex. DDD) in Defendant Agency's still-pending state court action to enforce the "Final Order" against the Spiegels. In February 2007, the Spiegels informed Defendants that "[Marvin] is a fact witness, but since he is a licensed professional I guess he is also an expert."[7] (See Ex. 27 to Def. Opposition). This was merely a belt and suspenders approach. In May 2007, Defendants' counsel deposed Marvin for two days and asked him questions specifically relating to his October 2006 affidavit and the corresponding Map. Moreover, Defendants have conceded that Marvin can testify as to "factual issues as to which he has firsthand knowledge". (Def. Memo in Opposition, pg. 14, n.7). Thus, Marvin can offer evidence concerning the Map of which he has firsthand knowledge. Finally, Defendants expressly rely upon Marvin's "opinion" testimony concerning height in their own motion for summary judgment. (See Def. Statement of Facts, ¶ 164) (Docket No. 85-2).

Therefore, Defendants cannot seriously claim that the use of Marvin's factual testimony prejudices or harms them in any way. Because the Spiegels have not retained Marvin as an expert, (see Lamme Reply Aff., ¶ 6), a written expert report pursuant to FRCP 26(a)(2)(B) is not

[7] Pursuant to the Amended Uniform Pretrial Scheduling Order, expert disclosure was to occur 90 days prior to the end of discovery on April 15, 2007. The discovery cut-off date was extended multiple times throughout the pendency of this case, including several extensions while the parties awaited this Court's ruling on Defendants' appeal of Magistrate Judge David Homer. The final discovery deadline was October 31, 2008. (Docket No. 79). Thus, the Spiegels' "disclosure" of Marvin as an "expert" on February 9, 2007 was well before the expert disclosure deadline on July 31, 2008, as keyed to the Amended Uniform Pretrial Scheduling Order.

necessary. Nevertheless, the information that would be in such a report can be found in Marvin's lengthy deposition transcript, affidavits, and the Map, all of which Defendants have possessed for approximately two years.

Further, Defendants claim that they did not treat Marvin as an expert and have not hired an expert in response is a red herring. Defendants are relying on the purported expertise of Shaun Lalonde, an Agency employee who was not properly disclosed as an expert, for height and slope issues. [See generally Lalonde Aff. (Docket No. 85-11), Lalonde Aff. (Docket No. 93-7), Lalonde Aff. (Docket No. 85-61), Lalonde Reply Aff. (Docket No. 85-62)]. If the measurement of buildings is deemed an expert issue, then both parties have failed to disclose experts. Thus, it is reasonable to allow both Marvin's and Lalonde's evidence since neither party would be surprised or prejudiced.

POINT IV

DEFENDANTS CONCEDE DEFEAT UNLESS THE *ENGQUIST* RATIONALE IS EXTENDED HERE

In 2000, the Supreme Court blessed "class of one" equal protection claims where the plaintiff demonstrates (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). Last summer, the Supreme Court revisited "class of one" claims and concluded that this type of equal protection claim "does not apply in the public employee context". Engquist v. Oregon Dep't of Agric., __ U.S. __, 128 S. Ct. 2146, 2150-52, 170 L.E.2d 975 (2008).

Defendants attempt to persuade this Court into manipulating the holding in Engquist to bar a variety of "class of one" claims. (See Def. Memo in Support of Summary Judgment, Docket No. 93-56, pg. 33). Defendants imply that these rulings somehow overrule Olech. This

must not be tolerated. If the Supreme Court in Engquist had intended to overrule Olech, or bar anything more than public employment "class of one" claims, it certainly would have done so.

Defendants now ask this Court to "extend the rationale of *Engquist* to the exercise of discretion by an administrative agency charged with administering a statutory enforcement scheme." (See Defendants' Memo in Support of Summary Judgment, pg. 36) (emphasis supplied). Courts in this circuit have declined to extend Engquist, as Defendants beg this Court to do, because the Second Circuit has not yet decided the issue outside of the public employment context. See e.g., Vassallo v. Lando, 591 F.Supp.2d 172, 189 (E.D.N.Y. 2008); Conyers v. Rossides, 2009 U.S. App. LEXIS 4123, *42 (2d Cir. March 3, 2009) (holding only that "class of one" claims are "explicitly disapproved by the Supreme Court, at least in the employment context"); Ponterio v. Kaye, 2009 U.S. App. LEXIS 7923, *4 (2d Cir. April 16, 2009) (reiterating only that "the class-of-one theory does not apply in the public employee context").

Even if the discretion element of Engquist is deemed to apply here, the Spiegels are still entitled to summary judgment because Defendants lacked any discretion with regard to manner in which the Permit was enforced against the Spiegels.[8] First, Defendant Agency has no discretion to enforce a void Permit. Second, Defendant Agency is nothing but a regional land use planning board with the obligation to act fairly, rationally and impartially to every land owner. See Hunt Brothers v. Glennon, 81 N.Y.2d 906, 909 (1993) (explaining that the Agency is the functional equivalent of a "local planning board and a local zoning entity"). As such, Defendant Agency has adopted standard Enforcement Guidelines and a standard protocol that its staff deviated from during the investigation and prosecution of the Spiegels. (See Pl. SMF, ¶¶

[8] The Spiegels are also entitled to summary judgment because they have already provided evidence establishing a traditional selective enforcement claim (i.e., by proving evidence that Defendant Agency selectively prosecuted the Spiegels with malicious intent to injure them). See Harlen Assocs. v. Inc. Vill. of Mineola, 273 F.3d 494, 499 (2d Cir. 2001); LeClair v. Saunders, 627 F.2d 606, 608-10 (2d Cir. 1980).

56-58). Defendants have admitted that they violated nearly every aspect of their standard protocol for opening and investigating a potential violation when it prosecuted the Spiegels. (See Pl. SMF, ¶¶ 61-69, 75, 82-83). Thus, Defendants have forfeited any alleged discretion they may have had by exhibiting this knowing and willing disregard of Agency rules and policies.

Accordingly, Defendants desperate plea for this Court to extend Engquist in order for them to defeat summary judgment must be ignored.

CONCLUSION

The Spiegels have established that (i) Defendants intentionally treated the Spiegels differently from the other Fawn Ridge homeowners, twenty-nine (29) of whom have violated Defendants' interpretation of Agency Permit No. 87-28 ("the Permit"); (ii) Defendants selectively enforced the Permit against the Spiegels with malicious intent, as demonstrated by Defendants' violation of standard enforcement protocol, manipulation of the administrative record, and destruction of evidence; and (iii) 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: April 22, 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