No. 15-

IN THE

Supreme Court of the United States

STEPHEN J. DIBBS,

Petitioner,

v.

HILLSBOROUGH COUNTY, FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit's decision conflicts with this Court's decision in Village of Willowbrook v. Olech, 528 U.S. 562 (2000), recognizing class-of-one equal protection claims for landowners, or negates a landowner's rights under Olech?

2. Whether the Eleventh Circuit's decision conflicts with decisions of other courts of appeal, including Tapalian v. Tusino, 377 F.3d 1 (1st Cir. 2004), Loesel v. City of Frankenmuth, 692 F.3d 452 (6th Cir. 2012), cert. denied, 133 S.Ct. 878, 904 (2013), and Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, 927 F.2d 1111 (10th Cir. 1991)?

3. Whether the Eleventh Circuit's decision conflicts with decisions of other courts of appeal, including Paterek v. Village of Armada, 801 F.3d 630 (6th Cir. 2015), and Swanson v. City of Cheter, 719 F.3d 780, 784 (7th Cir. 2013), that the "similarly situated" standard should be relaxed where, as here, there is substantial evidence of animosity or vindictiveness between the government and the class-of-one plaintiff?

4. Whether this Court should provide lower federal courts and state courts guidance concerning when class-of-one comparators, landowners or development projects are "similarly situated" in connection with a class-of-one equal protection claim?

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PETITION FOR A WRIT OF CERTIORARI

Dibbs respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Eleventh Circuit, reported at 625 Fed.Appx. 515, is reprinted at Appendix (App.) 1a. The decision of the Eleventh Circuit denying rehearing is reprinted at App. 53a. The district court's order, reported at 67 F.Supp.2d 1340, is reprinted at App. 22a.

JURISDICTION

The Eleventh Circuit entered its judgment on September 17, 2015 (App. 1a), and denied a petition for rehearing on October 29, 2015 (App. 53a). On January 14, 2016, this Court granted Dibbs' application to extend time through March 12, 2016, to file a petition for writ of certiorari.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

The district court below had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides in material part:

"No State shall. . . deny any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 provides in material part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State. . .subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

INTRODUCTION[1]

On February 23, 2000, this Court decided Village of Willowbrook v. Olech, 528 U.S. 562 (2000), recognizing a claim pursuant to the Equal Protection Clause for "class-of-one" plaintiffs in the land use context.

The decision and standards of the Eleventh Circuit below effectively preclude a class-of-one claim.

Further, the decision and standards of the Eleventh Circuit below conflict with decisions and standards of other courts of appeal in recognizing class-of-one claims.

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1. All emphasis has been supplied unless otherwise noted. Internal citations within quotations have sometimes been omitted.

At least one court of appeal has explicitly recognized that further guidance from this Court is needed to assist courts in recognizing and applying class-of-one claims.

STATEMENT OF THE CASE

This case is about whether a person is precluded from bringing a class-of-one claim if he or she cannot identify at least one "identical" comparator.

Petitioner Dibbs is the owner of several properties within Hillsborough County. After a prolonged lawsuit against the County in the 1990s, Dibbs won the right to relocate a wetland system (Doc. 53-2 at 2). The relocated wetland was pristine, and Dibbs won multiple local environmental awards and even a national award for the tremendous environmental benefits he achieved (Doc. 53-2 at 2). Today, the wetland continues to thrive and is an impressive demonstration of successful environmental achievement (Doc. 37 at 20-21). However, this encounter left a bitter taste in the County's mouth and in the years subsequent to the court battle Dibbs has faced an onslaught of vitriol.

Despite record evidence of demonstrably disparate treatment by the County over 10 years, including evidence of animus, the district court and the Eleventh Circuit refused to allow Dibbs to present his class-of-one equal protection claim to a finder of fact because he did not bring forward "identical" comparators.

In December 2012, Dibbs filed a five-count complaint against the County (Doc. 1), including as-applied equal protection claims (Count IV). Dibbs alleged, inter alia, that

his often-expressed viewpoints and regular petitioning for changes in land use rules and regulations have been ill-received by the County, that the County has become increasingly hostile toward him, and has developed a pattern of purposefully discriminating against him, treating him differently than similarly-situated persons (Doc. 1 at 2-3). Count IV alleged that the County has regularly discriminated against Dibbs for reasons of vindictiveness, maliciousness, animosity, spite or other reasons unrelated to any legitimate governmental interest (Doc. 1 at 30), including allowing other landowners to opt out of community plans and delaying Dibbs in obtaining approvals for sand excavation (Doc. 1 at 6-7, 9-11, 29-31).[2]

On April 2, 2013, the County filed a motion to dismiss the complaint, including Count IV (Doc. 5). The County claimed that Dibbs had failed to allege comparators to underly his as-applied equal protection claims (Doc. 5). Dibbs responded by pointing out that he alleged similarly-situated comparators, specifically persons who were permitted to opt out of community plans, persons who were granted waivers from community plans, and persons who were not similarly delayed in obtaining sand excavation permits (Doc. 8 at 11-12).

On October 30, 2013, the district court found that Count IV was a "shotgun pleading," and directed Dibbs to amend Count IV (Doc. 16).

On November 11, 2013, Dibbs filed an amended complaint (Doc. 17). Count IV alleged as-applied "class-of-

2. The County has divided the County into 21 geographic subdivisions, each one of which has a community plan.

one" equal protection claims against the County, alleging various similarly-situated comparators who were treated more favorably than Dibbs (Doc. 17 at 7, 16, 30-37, ¶¶ 26, 58, 117, 118.a, 118.b, 118.c, 118.d, 118.e, 118.f). Dibbs again alleged that the County has discriminated against him because of vindictiveness, maliciousness, animosity, spite or other reasons unrelated to any legitimate government interest, and has treated him differently than other similarly-situated persons (Doc. 17 at 30-31). Dibbs again alleged that the County had allowed other landowners to opt out of community plans and had delayed Dibbs' sand excavation permit (Doc. 17 at 31-32).[3]

On November 22, 2013, the County answered the amended complaint, admitting that the County-wide comprehensive plan contains 21 community plans , one of the 21 plans being the Keystone Odessa Community Plan in which Dibbs' property involved here lies (Doc. 18). The County claimed that Dibbs has failed to allege "sufficient comparators" for a class-of-one equal protection claim (Doc. 18 at 23).

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3. Olech itself involved a landowner who was delayed three months in providing the properly-sized easement. The government in Olech demanded a 33-foot wide easement for three months prior to agreeing to accept a 15-foot wide easement just like it had "normally" done for other landowners within Willowbrook. Here, the County delayed Dibbs' sand excavation permit **almost two years**, far beyond the two and one-half to five and one-half months for other sand excavation permits within the County. Just as Willowbrook's delays damaged Olech, the County's delays damaged Dibbs, precluding Dibbs from selling sand for use in construction of a high school just yards from Dibbs' property.

On December 27, 2013, the County filed a motion for judgment on the pleadings as to Count IV of the amended complaint (Doc. 19). The motion for judgment on the pleadings claimed that Count IV was a shotgun pleading (Doc. 19 at 2-3). The motion for judgment on the pleadings did not challenge any supposed failure to sufficiently plead comparators for the class-of-one claim. (On May 13, 2014, the district court would deny the County's motion for judgment on the pleadings against Count IV (Doc. 55)).

On April 18, 2014, the County moved for summary judgment against Dibbs' as-applied equal protection claims (Doc. 29). The County cited one pre-Olech case (GJR Investments v. County of Escambia, 132 F.3d 1359 (11th Cir. 1998)), and argued in one 12-line paragraph that "Plaintiff has not met his burden of presenting an applicable comparator. . . ." (Doc. 29 at 20-21).

On May 2, 2014, Dibbs responded to the County's motion for summary judgment, pointing to the County's pattern of singling Dibbs out for especially oppressive treatment, and pointing to multiple similarly situated comparators with evidentiary support and specifics (Doc. 53).

To wit, 11 other sand excavation permits approved in far less time (Dibbs' application taking 21 months compared to all of the other applications taking less than five and one-half months), and multiple landowners who were permitted to amend community plans, to develop inconsistently with community plans, or to opt out of community plans (Doc. 53 at 2, 16-17). Dibbs cited case law indicating that whether a plaintiff was sufficiently "similarly situated" to comparators was a genuine issue

of material fact inappropriate for summary judgment (Doc. 53 at 17).

On December 12, 2014, the district court granted the County's motion for summary judgment against Count IV (App. 21a; Doc. 73). The district court quoted Campbell v. Rainbow City, 434 F.3d 1306, 1314 (11th Cir. 2006), that "[t]o be considered similarly situated, comparators must be *prima facie* **identical in all relevant aspects**'" (App. 49a). The district court also cited to Crystal Dunes Owners Ass'n v. City of Destin, 476 Fed. Appx. 180, 184-185 (11th Cir. 2012), where the Eleventh Circuit also had noted the "**identical in all relevant aspects**" standard (App. 49a),

Notwithstanding Dibbs' recitations of landowners who were able to opt out of community plans and of landowners who were able to obtain approvals for borrow pits in far shorter times than Dibbs, the district court summarily dismissed the comparators in light of Campbell and Crystal Dunes:

> "[Dibbs] points to lists of people who have made applications to opt out of community plans in the past. He also identifies other borrow pits that have been approved in a shorter time period than his approval. . . .The 'comparators' identified in Dibbs' Second Affidavit, landowners who were allegedly permitted to opt out of community plans, are outside the Keystone area. Dibbs does not know of any landowners in the Keystone area that were permitted to opt out of the Plan. Thus, Plaintiff has not presented any similarly situated landowners who have been treated differently" (App. 49a, 50a; Doc. 73 at 20-21).

On appeal to the Eleventh Circuit, Dibbs argued that there was at least a genuine issue of material fact whether the comparators Dibbs had identified were "similarly situated" to Dibbs, especially when "'view[ing] the evidence and all factual inferences therefrom in the light most favorable to [Dibbs as] the party opposing the [summary judgment] motion,' Edwards v. Fulton County, 509 Fed. Appx. 882, 885 (11th Cir. 2013)" (Dibbs Initial Brief 47).

At summary judgment, Dibbs had identified 11 other borrow pits for sand excavation, including their available applications and approvals to show their size, scope, and similarity to Dibbs' borrow pit. Each of the 11 other borrow pits, which included pits much larger, pits smaller, and pits almost identically sized to Dibbs' borrow pit, were approved within two and one-half to five and one-half months, approximately 10 percent to 25 percent of the 21 months the County took prior to approving Dibbs' application for sand excavation. Further, the County's four times to 10 times greater delay in approving Dibbs' application was coupled with record evidence that the borrow pit reviewers were conspiring against Dibbs and refusing to let him perform activities for which he was permitted (Doc. 53 at 2-3).

Dibbs' sand excavation application was for the removal of 2.5 million (amended from 4.5 million) cubic yards of sand, to construct a lake for a planned residential subdivision (Doc. 53-2 at 11, 26). Application SU 00-0502 by Donald Fraser was for the removal of 3.0 million cubic yards of sand to construct a lake (Doc. 53-2 at 25, 34-40). Fraser's application was for property near an interstate (I-75), and had opposition—Dibbs' application was for

property near an interstate (the Suncoast Expressway), and had opposition (Doc. 53-2 at 17, 25-26, 39). Thus, in the relevant aspects of the type of application made, the scale of the proposed development, the location of the project relevant to the road system, and opposition, these two applications were highly comparable. Yet, Fraser's application took three and one-half months and included no condition requiring all traffic to immediately travel to the interstate, prohibiting other travel routes (Doc. 53-2 at 25, 34). Dibbs' application took six times longer and included a condition requiring all traffic to immediately travel to the interstate, prohibiting other travel routes (Doc. 53-2 at 5-6 ¶¶ 21-26, 26).

Also, application SU 06-0156 sought approval for the removal of 11,000,000 yards of sand (Doc. 53-2 at 69-75). At more than four times the size of Dibbs' sand excavation, with a location near no major roads, and with opposition, one would expect even more scrutiny of this application. Yet, it was approved in just three short months (seven times quicker) with no conditions restricting direction of travel. *Id.*

As one of these borrow pits was approved before Dibbs and the other after Dibbs, it was apparent that there is no relevant time component influencing the approval. Rather, it seems the odd factor was Dibbs owning the property.

Dibbs also listed several comparators that were allowed to opt out of community plans (Doc. 53-2 at 8-9 ¶ 40). More specifically, Dibbs listed a comparator who applied after the community plan was in place to connect to water and sewer and increase the density, the same as Dibbs (Doc. 53-2 at 9; Doc. 40 at 24). Just as in Dibbs'

case, the opposition said it must be denied because of inconsistency with the community plan, but Dibbs was denied whereas the comparator was approved.

In response, the County argued on appeal that Dibbs' as-applied equal protection claim lacks sufficient comparators concerning opting out from community plans (County Answer Brief 28-34). The County's answer brief did not argue at all that there were no similarly-situated comparators concerning the approval of the applications for sand excavation. Rather, the County's brief closed, arguing only that Dibbs "failed to present evidence in support of a comparator, which would be another property owner (besides Dibbs), residing within the Keystone-Odessa Community Plan boundaries, which was allowed to opt out ot the Keystone-Odessa Community Plan after the Plan was enacted. . . ." (County Answer Brief 34).

Dibbs' reply brief pointed out that the County had not argued that there were no similarly situated comparators for the permit for sand excavation and that Dibbs had identified comparators who were permitted to "opt out" of community plans once the community plans were adopted and who were permitted to opt out of the community plan for Keystone (Dibbs Reply Brief 20-29).

On September 17, 2015, the Eleventh Circuit affirmed (App. 1a, 625 Fed. Appx. 515 (11th Cir. 2015)). Like the district court, the Eleventh Circuit relied on Campbell, supra, 434 So.2d at 1314. The Eleventh Circuit disposed of Dibbs' class-of-one claim in one operative paragraph,

> "As the district court correctly explained, Dibbs's Equal Protection claim fails because he

> has not met his burden in identifying 'similarly situated' individuals. For instance, although he claims that he was treated disparately in relation to others who succeeded in opting out of the Community Plan, he conceded in his deposition that he was not aware of anyone in the Keystone area who was able to opt out. We find no error in the district court's grant of summary judgment. . . . ." (App. 6a, 625 Fed. Appx. at 518).

The Eleventh Circuit did not address Dibbs' equal protection claim concerning obtaining the permit for sand excavation.

Dibbs moved the Eleventh Circuit for panel rehearing, pointing out that even accepting the premise that only properties "in the Keystone area" could be similarly situated, Mr. Zucchini was permitted to opt out of the Keystone community plan. Dibbs' motion for rehearing also pointed out that not only had the panel decision failed to mention the sand excavation comparators, but that the County's answer brief made no attempt to negate the sand excavation comparators as being "similarly situated."

On October 29, 2015, the Eleventh Circuit denied the motion for panel rehearing (App. 53a).

ARGUMENT

REASONS FOR ALLOWANCE OF THE PETITION

I. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN VILLAGE OF WILLOWBROOK V. OLECH, 528 U.S. 562 (2000), RECOGNIZING CLASS-OF-ONE EQUAL PROTECTION CLAIMS FOR LANDOWNERS, AND NEGATES A LANDOWNER'S RIGHTS UNDER OLECH.

In Olech, this Court held that a landowner has a "class-of-one" equal protection claim where she

> "alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. In so doing, we have explained that '[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents'." Olech, 528 U.S. at 564.

This Court held that Olech's allegations that the Village attempted to require a 33-foot wide easement from Olech prior to relenting to a 15-foot wide easement, like it had demanded from "other similarly situated property owners," stated a class-of-one claim "under traditional equal protection analysis." This Court did not reach "the

alternative theory of 'subjective ill will' relied on by [the Seventh Circuit]." [4]

Neither the per curiam in Olech nor Justice Breyer's concurring opinion in Olech defined "similarly-situated." Olech did not require that the similarly-situated comparators be located within the same zoning district. Indeed, a reading of the district court's, the Seventh Circuit's and this Court's decisions in Olech indicates that the landowners who were permitted to provide 15-foot wide easements were located throughout Willowbrook, just like the comparator landowners Dibbs identified were located throughout the County.

Although Olech did not define "similarly situated," it is clear from other decisions from this Court and from other courts of appeal that "similarly situated" means "similarly," rather than "identically." See, e.g., Cleburne v. Cleburne Living Center, 473 U.S. 432, 447-450 (1985) (holding that requiring special permit for proposed group home for the mentally retarded violated equal protection and noting that the "city does not require a special use permit in an R-3 zone for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals,

4. Justice Breyer would require "an extra factor," such as "vindictive action," "illegitimate animus," or "ill will." But, as has been pointed out at pages 4-5 above, Dibbs has pointed to record testimony of vindictive action, animosity, and ill will. Further, the County challenged Dibbs' equal protection claim only on grounds that there were no similarly-situated comparators and the district court's and the Eleventh Circuit's decisions concerning the equal protection claim were founded only on there supposedly being no similarly-situated comparators (see pages 6, 7, 10-11, above).

sanitariums, nursing homes for convalescents or the aged"). See also Third Church of Christ v. New York City, 626 F.3d 667, 670 (2d Cir. 2010) (holding that hotels' catering businesses were "similarly situated" to church's catering); Lighthouse Institute for Evangelism v. Long Branch, 510 F.3d 253, 264 (3d Cir. 2007) (noting in affirming permanent injunction for church that a secular institution need not engage in precisely "the same combination of uses" as a church to be a valid comparator); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 471 (8th Cir. 1991) (reversing summary judgment for town on equal protection claim because church's non-commercial activities were "similarly situated" to American Legion's, Veterans of Foreign Wars', Alcoholics Anonymous' and Masonic Lodge's non-commercial activities).

The Eleventh Circuit's refusal to recognize a "class of one" claim where 11 sand excavation permits were approved in two and one-half to five and one-half months compared to the almost two years it took to obtain approval for Dibbs' sand excavation permit negates citizens' rights under the equal protection clause and under Olech especially where there was no indication that the County had ever taken more than five and one-half months to approve a sand excavation permit.

The Eleventh Circuit's refusal to recognize a "class of one" claim where other landowners, even within the Keystone community plan, were permitted to opt out of community plans, but Dibbs was forced to remain within the community plan, likewise negates citizens' rights under the equal protection clause and under Olech.[5]

5. The Keystone community plan has been used as a weapon against Dibbs to prevent him from connecting to water and sewer despite environmental experts demonstrating the danger this poses

The Eleventh Circuit has been particularly hostile to class-of-one claims, consistently and expressly using the "identical in all relevant respects" standard. See, e.g.,

- Foley v. Orange County, 2016 WL 361399 (11th Cir. 2016), quoting Grider v. City of Auburn, 618 F.3d 1240, 1263-1264 (11th Cir. 2010) (affirming summary judgment against a landowner's "class-of-one" claim; noting that "'[t]o be similarly situated, the comparators must be prime facie identical in all relevant respects'");

- Crystal Dunes, supra, 476 Fed. Appx. 180 (citing "identical in all relevant respects" standard in affirming dismissal of landowners' class-of-one claim; "beachfront property is different than non-beachfront property");

- Maverick Enterprises, LLC v. Frings, 456 Fed. Appx. 870, 872-873 (11th Cir. 2012) (affirming summary judgment against landowner's class-of-one claim because comparator was not "identical in all relevant aspects");

- Campbell, supra, 434 F.3d at 1314, 1315, 1316 n. 9 (noting in reversing a jury verdict for a class-of-one plaintiff that "similarly situated" comparators "must be prima facie identical in all

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to the County drinking water (Keystone has multiple public potable water wellheads), to prevent him from being able to widen and improve roads, and to artificially suppress his development potential (Dibbs' neighbors are allowed to develop at 500% to 2,000% greater densities than Dibbs). See Dibbs' Initial Brief in the Eleventh Circuit at 12, 40-41; Doc. 40 at 8; Doc. 42 at 19; Doc. 45 at 1; Doc. 50 at 6.

relevant respects"; holding that to be "similarly situated" with a residential apartment project the comparators would be a plan to build residential apartments, rather than a commercial or mixed use plan, would be essentially the same size, would have an equivalent impact on the community, and would require the same zoning variances);

- Eggleston v. Bieluch, 203 Fed. Appx. 257, 265 (11th Cir. 2006) (noting in affirming summary judgment against a class-of-one claim that "[u]nder [Eleventh Circuit law a valid comparator must be 'nearly identical'").[6]

Since Olech, the Eleventh Circuit has sustained only one class-of-one complaint, and appears to have never upheld any judgment for a class-of-one plaintiff. See Lexra, Inc. v. City of Deerfield Beach, 593 Fed. Appx. 860 (11th Cir. 2014) (reversing dismissal of a class-of-one claim which alleged that the city exempted one bar from a 2 a.m. deadline for selling alcoholic beverages).

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6. For examples of other cases where the Eleventh Circuit has held that a class-of-one plaintiff had failed to state a claim because it failed to sufficiently allege "similarly situated" comparators, see, e.g., Thorne v. Chairperson Florida Parole Comm'n, 427 Fed. Appx. 765, 771 (11th Cir. 2011), Leib v. Hillsborough County Public Transportation Comm'n, 558 F.3d 1301, 1306 (11th Cir. 2009), Douglas Asphalt Co. v. Qore, Inc., 541 F.3d 1269, 1274 (11th Cir. 2008), Griffin Industries, Inc. v. Irvin, 496 F.3d 1189, 1206-1207 (11th Cir. 2007), or where the Eleventh Circuit has upheld summary judgment against a class-of-one claim, see, e.g., Metropolitan Atlanta Task Force for the Homeless v. City of Atlanta, 503 Fed. Appx. 867 (11th Cir. 2013), Grider, supra, 618 F.3d at 1264-1266.

To read "similarly situated" as narrowly as the Eleventh Circuit did would effectively eliminate any class-of-one claims. As the Federal Circuit noted in defining "similarly situated" in the whistleblower context in Whitmore v. Department of Labor, 680 F.3d 1353, 1373 (Fed. Cir. 2012),

> "[w]e cannot endorse the highly restrictive view of Carr [v. Social Security Administration, 185 F.3d 1318, 1323 (Fed. Cir. 1999)] factor three adopted by the [administrative judge] in this case. One can always identify characteristics that differ between two persons to show that their positions are not 'nearly identical,' or to distinguish their conduct in some fashion. Carr, however, requires the comparison employees to be 'similarly situated'—not identically situated—to the whistleblower. To read Carr factor three so narrowly as to require virtual identify before the issue of similarly situated non-whistleblowers is ever implicated effectively reads this factor out of our precedent."

Other courts of appeal have applied substantially less circumscribed standards than the Eleventh Circuit's "identical" standard. See, e.g., Tapalian v. Tusino, 377 F.3d 1, 6-7 (1st Cir. 2004) ("[t]he test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent. . . .Exact correlation is neither likely nor necessary"); Bible Believers v. Wayne County, 805 F.3d 228, 256-257 (6th Cir. 2015) ("whether individuals are 'similarly situated,' a court should not demand exact correlation, but should instead seek 'relevant similarity'"); Bench Billboard Co. v. City of Cincinnati, 675 F.3d 974,

987 (6th Cir. 2012) ("[i]n determining whether individuals are 'similarly situated,' a court should 'not demand exact correlation, but should instead seek relevant similarity'"); Coleman v. Donahoe, 667 F.3d 835, 846 (7th Cir. 2012) ("[w]e are looking for comparators, not 'clone[s].' So long as the distinctions between the plaintiff and the proposed comparators are not 'so significant that they render the comparison effectively useless,' the similarly-situated requirement is satisfied").

No two properties and no two development projects are ever "identical." For that matter, neither are individuals. To apply an "identical" standard negates a landowner's or any class-of-one plaintiff's rights under the Equal Protection Clause and under Olech.

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEAL, INCLUDING TAPALIAN V. TUSINO, 377 F.3D 1 (1ST CIR. 2004), LOESEL V. CITY OF FRANKENMUTH, 692 F.3D 452 (6TH CIR. 2012), CERT. DENIED, 133 S.CT. 878, 904 (2013), AND JACOBS, VISCONSI & JACOBS, CO. V. CITY OF LAWRENCE, 927 F.2D 1111 (10TH CIR. 1991).

The Eleventh Circuit's rejection of an opting out comparator because the comparator was involved in a community plan other than the Keystone Odessa Community Plan and the Eleventh Circuit's rejection of the sand excavation comparators also conflicts with decisions from the other courts of appeals, including but not being limited to Jacobs, Visconsi, supra, 927 F.2d 1111, Frankenmuth, supra, 692 F.3d 452, and Tapalian, supra, 377 F.3d 1.

In Jacobs, Visconsi, supra, 927 F.2d at 1118-1119, the Tenth Circuit, although ultimately rejecting an equal protection claim because of a rational basis, held that the properties in different districts were "similarly situated."

> "[The landowners] claim that the commission's application of Plan '95, the city's comprehensive land use plan, treats those developers who seek to develop shopping malls at suburban locations differently than those who seek to develop property in the downtown area.
>
> "The district court dismissed [landowners'] equal protection claim after it concluded that [landowners] failed to allege the existence of two identifiable groups whom the city treated differently. It reasoned that developers are treated equally because they all are allowed to develop high density commercial uses in the downtown area and all are forbidden to develop such uses in the city's edge. . . .
>
> "We believe that [landowners'] complaint sufficiently alleges facts demonstrating unequal treatment of two similarly situated persons. As alleged by [landowners], the city is favorably disposed to those developers seeking to rezone property in the downtown area as a result of the city's comprehensive plan. It is only the location of the proposed development that creates a different result for a developer wishing to develop property in the outskirts of the city. That those developers with an interest in developing on the outskirts of the city could

> change characteristics to receive favorable treatment is of no consequence. At the time of the application process, the sole difference between two developers is the location of their planned development. 'A state cannot deflect an equal protection challenge by observing that in light of the statutory classification all those within the burdened class are similarly situated. The classification must reflect pre-existing difference, it cannot create new ones that are supported by only their bootstraps.' Williams v. Vermont, 472 U.S. 14, 27 (1985). . . ."

In Tapalian, supra, 377 F.3d at 6-7, a jury returned a verdict that town officials had denied a developer equal protection because the town's required specifications treated the developer's road, Davis Street in Pembroke Estates, in 2000, less favorably than another developer's road, Murphy Street in "the nearby Middlemarch subdivision." The town officials appealed, claiming that the plaintiff developer had produced no evidence that the Davis Street project was "similarly situated in all relevant aspects" to Murphy Street. Indeed, the developer's own investigator testified that there was "no comparison" between the two developments. Notwithstanding the town officials' claim that Davis Street required heightened specifications because the public would use Davis Street more extensively, "the Town itself had upgraded and widened Davis Street [three years earlier], yet had not considered it necessary, in the interests of public safety, that it upgrade Davis Street to the more stringent standards. . . ." Further, there was evidence that the town official had ordered the developer to cease wintertime construction, but had permitted the contractor to proceed

with wintertime construction on Murphy Road. In upholding the jury verdict, the First Circuit rejected the town official's claim that the projects had to be "similarly situated in all relevant respects" and noted that "the jury could directly compare an apple to an apple." Rather the First Circuit cited the test from Dartmouth Review that "[t]he test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated. . . .Exact correlation is neither likely nor necessary. . . ."

In Frankenmuth, supra, 692 F.3d 452, a jury had found that Frankenmuth's zoning ordinance limiting commercial developments to 65,000-square feet on lands (where a Wal-Mart was to be built) denied a landowner equal protection because it did not apply to similarly-situated properties (where Bronner's Christmas Wonderland and Kroger's were located). On appeal, the City claimed that the comparators were not "similarly situated" because Bronner's and Kroger's sell different products, because Wal-Mart's, Bronner's and Kroger's properties are zoned differently, because Bronner's and Kroger's had already been built whereas the Wal-Mart was only planned for construction, and because Main Street is five lanes wide at Bronner's and Kroger's but only three lanes wide at the would-be Wal-Mart site. The Sixth Circuit held that "there is a genuine issue of material fact as to whether the three properties are similarly situated," and thus the district court did not err in denying the City's motion for judgment as a matter of law.

As will be detailed below, various other decisions from the courts of appeals also conflict with the Eleventh Circuit's "identical" comparator standard which was used below.

A. First Circuit

Probably the most cited standard for determining whether comparators are "similarly situated" comes from Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir. 1989), that

> "[t]he test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated. Much as in the lawyer's art of distinguishing cases, the 'relevant aspects' are those factual elements which determine whether reasoned analogy supports or demands, a like result. Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples."

Accord, Tapalian, supra, 377 F.3d at 6; Barrington Cove Limited Partnership v. Rhode Island Housing & Mortgage Finance Corp., 246 F.3d 1, 8 (1st Cir. 2001).

In accord with Dartmouth Review in reversing the dismissal of a landowner's equal protection claim is SBT Holdings, LLC v. Town of Westminster, 547 F.3d 28, 34 (1st Cir. 2008), where the First Circuit noted that

> "[t]o determine whether two or more entities are 'similarly situated,' we ask 'whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated. Barrington Cove, 246 F.3d at 8 (quoting Dartmouth Review

> v. Dartmouth Coll., 889 F.2d 13, 19 (1st Cir. 1989)). 'Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, applies should be compared to apples.' Id. (quoting Dartmouth Review, 889 F.2d at 19). Here, the relevant comparison is between the plaintiffs, who developed the condominiums, and the purchasers of the newly developed condominiums, who were the new owners of the property. . . . .
>
> "The purchasers were. . .subject to the same environmental obligations. Nonetheless, the Commission selectively chose not to enforce those obligations against those who acquired the real estate. . . ."

This "roughly equivalent" standard, not requiring "exact correlation" is in direct conflict with the Eleventh Circuit's exacting "identical in all relevant aspects" standard.

B. Second Circuit

To be "similarly situated," the Second Circuit has indicated that "[t]he plaintiff's and comparator's circumstances must bear a 'reasonably close resemblance,' but need not be 'identical'." Brown v. Daikin America, Inc., 756 F.3d 219, 229 (2d Cir. 2014), quoting Graham v. Long Island R.R., 230 F.3d 34, 39 (2d Cir. 2000).

In Fortress Bible Church v. Feiner, 694 F.3d 208, 221-224 (2d Cir. 2012), the Second Circuit affirmed a district court's summary judgment that a municipality

had denied a church and its pastor equal protection. The Second Circuit rejected the municipality's claim that the church's evidence "was not sufficient to establish [an equal protection] claim because it did not provide a single comparator similarly situated in all respects, but instead presented evidence of multiple projects that were each treated differently with regard to a discrete issue." In doing so, the Second Circuit noted that,

> "[t]he Church's use of multiple comparators is unusual. . . .We conclude, however, that the Church's evidence of several other projects treated differently with regard to discrete issues is sufficient. . .to support a class-of-one claim. . . .[T]he Church has presented overwhelming evidence that its application was singled out by the Town for disparate treatment. Though each of the comparator projects involved features unique to that proposal, the Town has not explained how those other features could have influenced discrete issues like the adequacy of parking, the safety of retaining walls, or increased traffic. . . .[W]here, as here, a decision is based on several discrete concerns, and a claimant presents evidence that comparators were treated differently with regard to those specific concerns without any plausible explanation for the disparity such a claim can succeed. . . .We affirm the district court's conclusion that the Church has adequately established a class-of-one Equal Protection claim. . . ."

Similarly here, neither the County nor the district court nor the Eleventh Circuit attempted to "explain how . . . other factors" could have explained why it took the County almost two years to approve Dibbs' applications for sand excavation when every other permit for sand excavation was granted in five and one-half months or less.

C. Sixth Circuit

The Sixth Circuit has indicated that "[i]n determining whether individuals are 'similarly situated,' a court should 'not demand exact correlation, but should instead seek relevant similarity'." Bench Billboard, supra, 675 F.3d at 987. Accord, Frankenmuth, supra, 692 F.3d 452 at 462.

In holding that a government deprived certain evangelists of equal protection at a festival, the Sixth Circuit noted that "whether individuals are 'similarly situated,' a court should not demand exact correlation, but should instead seek 'relevant similarity'." Bible Believers, supra, 805 F.3d at 256-257, quoting Bench Billboard, supra, 657 F.3d at 987. The Sixth Circuit (en banc) noted that

> "[t]he Festival included a number of other religious organizations that came to share their faith by spreading a particular message. There are several distinctions between the Bible Believers and these other groups. Mainly, the Bible Believers chose, as was their right, not to register for an assigned table under the information tent. Instead, they paraded through the Festival and proselytized, as was also their right, while carrying signs and a

> severed pig's head. Although these actions set them apart from the other speakers and religious organizations at the Festival, they do not do so in any relevant respect. Any speaker could have walked the Festival grounds with or without signs if they chose to do so. The Bible Believers, like other religious organizations at the Festival, sought to spread their faith and religious message. Although they declined to utilize the tent set aside for outside groups, their conduct was at all times peaceful while they passionately advocated for their cause, much like any other religious group. . . ."

D. Seventh Circuit

In reversing a summary judgment against a class-of-one equal protection claim in Swanson v. City of Cheter, 719 F.3d 780, 784 (7th Cir. 2013), the Seventh Circuit characterized "similarly situated" as where "all principal characteristics of the two individuals [are] the same."

As the Seventh Circuit noted in reversing a summary judgment in a Title VII claim, "[o]f course, employees may be similarly situated to the plaintiff even if they have not engaged in conduct identical to that of the plaintiff. '[T]he law is not this narrow; the other employees must have engaged in similar—not identical—conduct to qualify as similarly situated'." Peirick v. Indiana University-Purdue University Indianapolis Athletics Department, 510 F.3d 681, 689 (7th Cir. 2007), quoting Ezell v. Potter, 400 F.3d 1041, 1050 (7th Cir. 2005). Peirick held that a hourly paid women's tennis coach was "similarly situated" to coaches for men's soccer and for men's tennis. even though those coaches were fulltime employees.

In Ezell, supra, 400 F.3d at 1050, the Seventh Circuit noted in reversing summary judgment in an employee's discrimination claim against the postal service that

> "[t]he district court [required] Ezell [to] produce a non-Caucasian who committed exactly the same infraction and was treated more favorably. But the law is not this narrow; the other employees must have engaged in similar—not identical—conduct to qualify as similarly situated."

In Goodwin v. Board of Trustees, 442 F.3d 611, 619 (7th Cir. 2006), the Seventh Circuit reversed a summary judgment because the events giving rise to a foreman's demotion and claim under Title VII and 42 U.S.C. § 1983 were "similarly situated" to the events where another employee was not demoted:

> "'the other employees must have engaged in similar – not identical – conduct to qualify as similarly situated.' We believe that Northway's comment was both vulgar and potentially threatening, which is the essence of the chargers against Goodwin. Although the two situations are not identical, they are sufficiently similar. . . ."

In Coleman, supra, 667 F.3d at 846, the Seventh Circuit reversed a summary judgment against a Title VII plaintiff, noting that "[w]e are looking for comparators, not 'clone[s].' So long as the distinctions between the plaintiff and the proposed comparators are not 'so significant that they render the comparison effectively useless,' the similarly-situated requirement is satisfied."

Finally in Good v. University of Chicago Medical Center, 673 F.3d 670, 675 (7th Cir. 2012), the Seventh Circuit held that an African-American lead technologist was similarly situated to plaintiff white lead technologist and that non-white managerial employees were similarly situated to plaintiff white lead technologist in Title VII claim; "[s]o long as the distinctions between the plaintiff and the proposed comparators are not 'so significant that they render the comparison effectively useless,' the similarly situated requirement is satisfied").

E. Ninth Circuit

The Ninth Circuit has consistently held that "similarly situated" should be construed as requiring the comparators to be "similar," rather than "identical." See, e.g., Rollins v. Mabus, 627 Fed. Appx. 618 (9th Cir. 2015), quoting Earl v. Nielsen Media Research, Inc., 658 F.3d 1108, 1114 (9th Cir. 2011) (noting in reversing summary judgment in a Title VII claim that "[c]omparator 'employees need not be identical, but must be similar in material respects'"); Vasquez v. County of Los Angeles, 349 F.3d 634, 641 (9th Cir. 2003) (holding that "individuals are similarly situated when they have similar jobs and display similar conduct").

F. Tenth Circuit

In Christian Heritage Academy v. Oklahoma Secondary School Activities Ass'n, 483 F.3d 1025, 1031-1032 (10th Cir. 2007), the Tenth Circuit reversed a summary judgment for a state high school activities association against a private school's equal protection claim and directed the district court to enter summary judgment for a private school against the activities

association. The private school's complaint arose out of an activities association rule that automatically admitted public schools to membership, but required a majority vote to admit private schools to membership. In holding that the rule denied equal protection, the Tenth Circuit

> "conclud[ed] that Christian Heritage is similarly situated to at least some public schools that have been admitted to OSSAA. It is uncontroverted that OSSAA's Constitution and rules, including its transfer rule and the prohibition on athletic scholarship and recruiting, apply equally to public and nonpublic schools. Further, it is uncontroverted that Christian Heritage agreed to comply with OSSAA's rules if admitted. Thus, we define public schools similarly situated to Christian Heritage as having comparable average daily membership and being located near large cities. . . ."

In Rocky Mountain Christian Church v. Board of County Commissioners, 613 F.3d 1229, 1237 (10th Cir. 2010), the Tenth Circuit affirmed an injunction stemming from a finding that the county had violated the equal terms provisions of the Religious Land Use and Institutionalized Persons Act. The Tenth Circuit held that there was sufficient evidence that the church's application was "similarly situated" to a prior non-religious school application even though the non-religious school's application was nine years earlier, even though the expansion of the non-religious school would be less than half the square footage of the church's school, gymnasium and related structures, even though the non-religious school had proposed multiple small buildings rather than

larger structures, and even though the church's expansion would increase traffic 10 times more than the non-religious school. In affirming the finding that the church's proposal was "similarly situated" to the nonreligious school's proposal, the Tenth Circuit noted that "[a]lthough the two proposed expansions were not identical, the many substantial similarities allow for a reasonable jury to conclude that RMCC and Dawson School were similarly situated."

III. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS FROM OTHER COURTS OF APPEAL, INCLUDING THE SIXTH AND SEVENTH CIRCUITS, THAT THE SIMILARLY SITUATED STANDARD SHOULD BE RELAXED WHERE, AS HERE WITH THE COUNTY AND DIBBS, THERE ARE SHOWINGS OF ANIMOSITY.

Dibbs presented evidence that the County was intentionally singling him out—scheming against him to slow down or stop his sand excavation. County Commissioner Brian Blair testified that he overheard a County reviewer state, "I think we can stop this project by calling sand a mineral" (Doc. 29-2 at 2). Other witnesses echoed a strong suspicion of bias against Dibbs (Doc. 53-12 at 13; Doc. 40 at 21, 46-48).

Notwithstanding such evidence, the courts below applied the exacting "identical" standard. In doing so, the decision below conflicts with cases from the Sixth and Seventh Circuits.

In Paterek v. Village of Armada, 801 F.3d 630, 649-650 (6th Cir. 2015), the Sixth Circuit reversed a summary judgment against a business owner's class-of-one equal protection claim.

> "To succeed on this type of claim, a plaintiff must allege either disparate treatment from similarly situated individuals and that the government actors had no rational basis for the difference, or that the 'challenged government action was motivated by animus or ill will.'
>
> "'Similarly situated' is a term of art—a comparator business must be similar in 'all relevant respects.' Plaintiffs point to a number of incidents concerning businesses that were allowed to operate without a [certificate of occupancy] or were issued a [certificate of occupancy] after a failed inspection, or were not subjected to inspection prior to being granted a [certificate of occupancy] when the business had previously been operated under different ownership. Plaintiffs also submit Larry's Automotive, which, like PME, required a [special approval of land use] but was treated more favorably. Delecke's explanation for treating Plaintiffs less favorably was that he had a 'personality conflict' with John Paterek. A jury could find, on this admission alone, that PME was treated differently, not on account of any rational basis, but instead due to animus."

In reversing a summary judgment against a class-of-one equal protection claim in Swanson, supra, 719 F.3d at

784, the Seventh Circuit noted that "similarly situated" may be relaxed where there is personal animosity toward the plaintiff, such as here toward Dibbs.

> "In most class-of-one cases, the comparison of similarly situated individuals will be used to show animus. However, this case presents the opposite circumstance: animus is easily demonstrated but similarly situated individuals are difficult to find. Below, the magistrate judge found animus due to the overt actions of Whitworth. Whitworth bore Swanson ill will, caused an investigation against him, interrupted meetings of the plaintiffs and building inspectors and angrily informed building inspectors that no permit should be granted. The magistrate judge concluded at the summary judgment stage that the facts supported the notion that Whitworth abused his powers as mayor in order to pursue his vendetta against plaintiffs. However, the magistrate judge held that because the proffered similarly situated individual, Eberle, was sufficiently different from plaintiffs, their claim must fail. The magistrate judge erred in this conclusion of law.
>
> "If animus is readily obvious, it seems redundant to require that the plaintiff show disparate treatment in a near exact one-to-one comparison to another individual. . . .
>
> "This case is similar to Geinosky v. City of Chicago, in which Geinosky received twenty-

four bogus parking tickets within a year, all written by officers of Unit 253 of the Chicago Police Department. 675 F.3d 743, 745 (7th Cir. 2012). Geinosky brought a class-of-one discrimination claim. However, because Geinosky failed to identify a similarly situated individual, the district court granted judgment for the City. Id. at 749. We reversed, explaining that

> "'requiring Geinosky to name a similarly situated person who did not receive twenty-four bogus parking tickets in 2007 and 2008 would not help distinguish between ordinary wrongful acts and deliberately discriminatory denials of equal protection. . . .On these unusual facts—many baseless tickets that were highly unlikely to have been a product of random mistakes—Geinosky's general assertion that other persons were not similarly abused does not require names or descriptions in support. . . .

"If anything, Swanson presents a stronger argument for animus than in Geinosky. . . .It would be oddly formalistic to then demand a near identical, one-to-one comparison to prove the readily-apparent hostility.

> "[W]here the direct showing of animus was very strong, Swanson's pointing to Michele Eberle as a similarly situated individual was helpful in indicating the norm governing the regulation of fences in Cheter. . . ." 719 F.3d at 784-785.

IV. THIS COURT SHOULD PROVIDE LOWER FEDERAL COURTS AND STATE COURTS GUIDANCE CONCERNING WHEN CLASS-OF-ONE COMPARATORS, LANDOWNERS OR DEVELOPMENT PROJECTS ARE "SIMILARLY SITUATED" IN CONNECTION WITH A CLASS-OF-ONE EQUAL PROTECTION CLAIM.

In Del Marcelle v. Brown County Corp., 680 F.3d 887 (7th Cir. 2012), the Seventh Circuit, en banc, affirmed a district court dismissal because the circuit court was evenly split, five judges voting to affirm and five judges voting to remand. The Seventh Circuit acknowledged that

> "[a]lthough it is customary not to issue opinions when an appellate court affirms on a tie vote, there are occasional departures. A majority of the judges of the court have concluded that this is an appropriate occasion for such a departure. The law concerning 'class of one' equal protection claims is in flux, and other courts faced with these cases may find the discussion in the three opinions in this case helpful."

Judge Posner, writing for four of the five judges who voted to affirm the dismissal, noted that

> "[i]n deciding to hear the case en banc, the court had hoped that the judges might be able to agree on an improved standard for this difficult class of cases. We have not been able to agree. The court has split three ways, but by a tie vote has affirmed the dismissal of the suit." 680 F.3d at 889.

Judge Posner went on,

> "[o]ne hears frequent laments that modern Supreme Court opinions are too long, but the opinion in Olech is too short. It leaves the key words 'irrational' and 'wholly arbitrary' undefined in the class-of-one context. . . ." 680 F.3d at 890.

Judge Posner wrote that since Olech

> "lower-court judges. . . .couldn't and still can't agree on what those principles [concerning a class-of-one claim] should be. Eight years ago a concurring opinion in Bell v. Duperrault, 367 F.3d 703, 709-13 (7th Cir. 2004), noted the lack of clarity concerning the standard for deciding such cases, echoing scholarly commentary. . . .And since then scholarly complaint about the lack of clarity in class-of-one case law has mushroomed. . . . ."

Judge Posner then noted that the Seventh Circuit has attempted, albeit unsuccessfully, to "formulate a standard that we hoped would be both consistent with Olech and operable." 890 F.3d at 891. Judge Posner observed that

"[t]he picture in other circuits (in ours too, alas, continuing to this day) is very mixed. . . ."

Judge Wood, writing for the five judges who would have remanded to the district court to permit the plaintiff to proceed, also lamented the 12 years' confusion in applying Olech to class-of-one claims, pointing to "the unsettled state of the law." 890 F.3d at 918. Earlier in her opinion, Judge Wood had noted that .

> "[e]ver since the Supreme Court confirmed in [Olech] that the Equal Protection Clause of the Constitution extends to 'class of one' cases, courts have been grappling with what a plaintiff must plead, and ultimately show, to prevail in such an action. The full court decided to hear the case en banc in the hopes that we might bring some clarity to the matter. . . .Five judges have concluded that Del Marcelle's complaint not only fails to meet the standard for pleading a class-of-one case, but that it cannot be salvaged. Five other judges, myself included, believe that his current complaint is legally insufficient, but that he should be given a chance to replead under the correct standard. Beyond that bottom-line disagreement, there is a more fundamental difference of opinion about the proper standard in this kind of case . . . . Because we are equally divided, none of these opinions has precedential significance . . . ." 890 F.3d at 905.

The Seventh Circuit's plea for better guidance in applying class-of-one cases concerned "the role of motive or intent . . .in such suits," but Olech also did not define

"similarly situated" for class-of-one cases. This case squarely presents both the role of intent and the definition of "similarly situated," both of which are needed to provide guidance and resolve circuit conflict.

CONCLUSION

Based on the foregoing, Dibbs respectfully requests this Court to grant the petition for writ of certiorari. Certiorari is warranted in this case (a) to resolve the conflicts between the Eleventh Circuit's decision and this Court's decision in Olech, (b) to resolve the conflicts between the Eleventh Circuit's decision and other circuit courts of appeals' decisions in class-of-one cases, (c) to resolve the conflicts between the Eleventh Circuit's circumscribed "identical" standard and other circuit courts' much broader standards in determining what is "similarly situated," (d) to resolve the conflicts between the Eleventh Circuit's decision and decisions from other court of appeals applying a lesser "similarly situated" standard where there is record of evidence of vindictiveness and animosity between the government and the class-of-one plaintiff, and (e) to provide guidance to the lower federal courts and state courts in determining "class of one" cases.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED SEPTEMBER 17, 2015

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-10152
Non-Argument Calendar

D.C. Docket No. 8:12-cv-02851-CEH-TGW

STEPHEN J. DIBBS,

Plaintiff-Appellant,

versus

HILLSBOROUGH COUNTY, FLORIDA,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

(September 17, 2015)

Before HULL, MARTIN and ROSENBAUM, Circuit Judges.

PER CURIAM:

Appendix A

Stephen J. Dibbs appeals the district court's grant of summary judgment to Hillsborough County in this 42 U.S.C. § 1983 suit. Dibbs contends that the county's Community Plan, which governs various aspects of land-use and development, is unconstitutional. After careful review, we affirm.

I.

Almost fifteen years ago, Hillsborough County adopted the Community Plan to guide development in the Keystone-Odessa area in the northwestern part of that county. The Plan was intended to preserve the "predominant[ly] rural residential character" of the community as an "area of lakes, agricultural activities, and homes built on varied lot sizes and in a scattered development pattern." And consistent with this purpose, it sets out guidelines for the use of land in that area, including for the density of new residential developments, construction of streets and roadways, and use of natural resources.[1]

After the Plan had been adopted, Dibbs purchased three pieces of real property in the Keystone area: one piece near Lake LeClare, one piece near Gunn Highway and North Mobley Road, and one piece near Lutz Lake

1. Under Florida law, "all development undertaken by, and all actions taken in regard to development orders by, governmental agencies . . . shall be consistent" with an adopted community plan. Fla. Stat. § 163.3194(1)(a). Further, all of the county's land development regulations must be consistent with the plan. *See id.* § 163.3194(1)(b).

Fern Road and the Suncoast Expressway. The county rejected several of Dibbs's proposals for these properties as inconsistent with its Community Plan. For instance, Dibbs unsuccessfully applied to re-zone his Lake LeClare property so that he could build a golf course. Similarly, he unsuccessfully applied to opt out of the Plan altogether and join the Lutz Community Plan, which would have permitted him to build a denser residential development.

Citing these grievances and others, Dibbs brought this § 1983 suit against Hillsborough County, raising both facial and as-applied Due Process and Equal Protection claims, as well as claims under Florida law. In a thorough, well-reasoned order, the district court granted Hillsborough County's motion for summary judgment as to each federal claim, and dismissed the remaining state law claims without prejudice so that they could be resolved in state court. On appeal, Dibbs contends that the district court erred in its resolution of his facial and as-applied substantive Due Process claims, and his as-applied Equal Protection claim.[2]

We review *de novo* the district court's grant of summary judgment, "considering all evidence and reasonable inferences drawn therefrom in the light most favorable to the non-moving party." *OSI, Inc. v. United States*, 525 F.3d 1294, 1297 (11th Cir. 2008). We address each of Dibbs's arguments in turn.

---

2. Dibbs's complaint also raised a procedural Due Process claim. Because he advances no argument regarding this claim on appeal, the issue is waived. *See Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 n.6 (11th Cir. 1989).

Appendix A

II

We first consider Dibbs's argument that the Community Plan is unconstitutional, both on its face and as applied to him, because it violates his substantive Due Process rights. We analyze his challenges under the rational basis standard. *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1214 (11th Cir. 1995). As a result, the Plan will be upheld if it "has a rational relationship with a legitimate general welfare concern." *Id.*

We use a two-step procedure for determining whether the Community Plan is constitutional. "The first step . . . is identifying a legitimate government purpose—a goal—which the enacting government body could have been pursuing." *Id.* "The second step . . . asks whether a rational basis exists for the enacting government body to believe that the legislation would further the hypothesized purpose." *Id.*

Dibbs's substantive Due Process claims fail under this framework. First, the Community Plan's goals are evident from the document itself. They include preserving natural areas and resources, maintaining ecological balance, improving design aesthetics, and protecting the area from suburban and urban sprawl. There is no serious question that these are all legitimate government goals. *See id.* ("It is well settled that the maintenance of community aesthetics is a legitimate government purpose."). Second, there exists a rational basis for Hillsborough County to believe that its adoption of the Community Plan—and the Plan's application to Dibbs's property—furthers these

goals.[3] For instance, there is a rational relationship between the county's goal of maintaining ecological balance and its refusal to allow Dibbs to construct a golf course on his Lake LeClare property. Similarly, the county's refusal to allow Dibbs to build a dense residential development on his Lutz Lake Fern Road property is rationally related to the its goal of protecting the area from urban sprawl. These are "plausible, arguably legitimate purpose[s]" for both the Community Plan and its application to Dibbs. *Haves v. City of Miami*, 52 F.3d 918, 923 (11th Cir. 1995). Thus, we affirm the district court's grant of summary judgment to Hillsborough County on Dibbs's Due Process claims.[4]

III

We next consider Dibbs's as-applied Equal Protection claim. The crux of his argument is that Hillsborough County has singled him out for disparate treatment because of "vindictiveness, maliciousness, animosity, spite or other reasons unrelated to a legitimate government interest." He specifically points a number of decisions the county made pursuant to the Community Plan, such as denying his application for rezoning or delaying his applications for land excavation.

---

3. Dibbs does not dispute that his property falls within the area governed by the Community Plan.

4. The district court held that Dibbs's facial Due Process claim was time-barred. Because we may affirm "for any reason supported by the record," *United States v. Chitwood*, 676 F.3d 971, 976 (11th Cir. 2012), we need not reach the issue of whether Dibbs's claim was timely.

To succeed on his Equal Protection Claim, Dibbs "must show (1) that [he was] treated differently from other similarly situated individuals, and (2) that Defendant unequally applied a facially neutral ordinance for the purpose of discriminating against [him]." *Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1314 (11th Cir. 2006). Because Dibbs does not allege discrimination against a protected class, we apply the "similarly situated" requirement rigorously. *Leib v. Hillsborough Cnty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1306 (11th Cir. 2009) ("With respect to the first prong, we have frequently noted that the 'similarly situated' requirement must be rigorously applied in the context of 'class of one' claims.").

As the district court correctly explained, Dibbs's Equal Protection claim fails because he has not met his burden in identifying "similarly situated" individuals. For instance, although he claims that he was treated disparately in relation to others who succeeded in opting out of the Community Plan, he conceded in his deposition that he was not aware of anyone in the Keystone area who was able to opt out. We find no error in the district court's grant of summary judgment to Hillsborough County on Dibbs's Equal Protection Claim.

AFFIRMED.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE
COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303
Amy C. Nerenberg
Acting Clerk of Court

September 17, 2015

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 15-10152-DD

Case Style: Stephen Dibbs v. Hillsborough County, Florida

District Court Docket No: 8:12-cv-02851-CEH-TGW

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing *en banc* is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate

filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir. R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. *See* 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en Banc. *See* 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the CRIMINAL JUSTICE ACT must file a CJA voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for a writ of certiorari (whichever is later).

Pursuant to Fed.R.App.P. 39, costs taxed against appellant.

The Bill of Costs form is available on the Internet at www.call.uscourts.gov

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Elora Jackson, DD at (404) 335-6173.

Sincerely,

AMY C. NERENBERG, Acting Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6161

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION, FILED FEBRUARY 19, 2015

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

Case No: 8:12-cv-2851-T-36TGW

STEPHEN J. DIBBS,

Plaintiff,

v.

HILLSBOROUGH COUNTY, FLORIDA,

Defendant.

ORDER

This cause comes before the Court on the Motion to Alter or Amend Judgment (Doc. 79)[1], filed by Plaintiff Stephen J. Dibbs ("Dibbs" or "Plaintiff") and the response to that motion (Doc. 83) filed by Defendant Hillsborough County, Florida. For the reasons that follow, the Court will deny the motion.

1. Plaintiff's motion fails to comply with the certification requirements of Local Rule 3.01(g). Since a notice of appeal has been filed, the Court will address the merits of the motion. Plaintiff's counsel is advised, however, that failure to comply with this local rule may result in an automatic denial of future motions.

Appendix B

I. Introduction

Plaintiff's motion requests that the court alter the judgment entered on December 15, 2014 as a result of the Court's Order granting in part and denying in part Defendant's Motion for Summary Judgment. The two page motion appears to be requesting the Court to reverse its decision on an as-applied due process challenge under 42 U.S.C. § 1983, presented in Count III of the Amended Complaint. Plaintiff claims that the deposition testimony of Melissa Zornitta[2] establishes that the County's decision to deny Dibbs' "request to remove his Lake Fern property from the Odessa Plan, allow water and sewer connections, and increase the development potential" was a legislative decision.

II. Federal Rules of Civil Procedure 59 and 60

Dibbs states that he is seeking relief under Rules 59(e) and 60 of the Federal Rules of Civil Procedure. Rule 59(e) states that "a motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Here, the judgment was entered on December 15, 2014 and the instant motion was filed twenty-five days later, on January 9, 2015, making it timely.

Motions made pursuant to Rule 59 are often referred to as "motions for reconsideration." There are three

2. In his Motion, Plaintiff cites to Doc. 30 for this testimony. However, Doc. 30 was deleted by the Clerk because it was incorrectly filed. Thus, Zornitta's testimony is accessible at Doc. 38.

bases for reconsidering an order under Rule 59: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *Sussman v. Salem, Saxon & Nielsen, P.A.*, 153 F.R.D. 689, 694 (M.D. Fla. 1994) (citations omitted); *see also Lamar Adver. of Mobile, Inc. v. City of Lakeland,* 189 F.R.D. 480, 489 (M.D. Fla. 1999). However, a Rule 59 motion is not an appropriate vehicle "to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Michael Linet, Inc. v. Vill. of Wellington,* 408 F.3d 757, 763 (11th Cir. 2005). *See also USA Certified Merchs., LLC v. Koebel,* 273 F. Supp. 2d 501, 503 (S.D.N.Y. 2003) ("A Rule 59(e) motion is not intended to be a vehicle for a party dissatisfied with a court's ruling to advance new theories that the movant failed to advance in connection with the underlying motion, nor to secure a rehearing on the merits with regard to issues already decided.").

Plaintiff also cites Rule 60, which provides, in pertinent part:

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;

> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Plaintiff does not indicate which provision of Rule 60 he is moving under, but based on the argument presented it seems that only Rule 60(b)(6) could be potentially applicable. "Relief under this clause is an extraordinary remedy which may be invoked only upon a showing of exceptional circumstances. The party seeking relief has the burden of showing that absent such relief, an 'extreme' and 'unexpected' hardship will result." *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984) (citation omitted).

III. Discussion

This Court's grant of partial[3] summary judgment to Defendant on Count III was dictated by *Flagship Lake County Dev. Number 5, LLC v. City of Mascotte, Fla.*, 559 Fed. Appx. 811 (11th Cir. 2014). In that case, the plaintiff challenged a City's denial of its application for approval of the "Second Amendment to Heron's Glen Planned Development Agreement, which was memorialized in Ordinance 2011-09-500" ("the Ordinance"). The Eleventh Circuit found that this denial did not implicate a fundamental right and was not a legislative function. *Id.* at 815-816.

Here, in 2008 and 2009 Dibbs made applications to opt out of the Keystone Community Plan and join the Lutz Community Plan. Doc. 37 at 113:10-14. Under the Lutz plan, Dibbs would have had more freedom to densely develop his property. *Id.* at 113:10-14. Dibbs' requests were denied on April 2, 2009. *Id.* at 114:5-17; Doc. 17 at ¶ 15. Dibbs did not seek judicial review of these denials. Doc. 37 at 115:13-23. In the instant motion Plaintiff refers to these applications as CPA 08-09 and CPA 09-01.[4] Doc. 79 at ¶ 4. According to the record before this Court, CPA 08-09 was a request to change the land use category of 36.5 acres and CPA 09-01 requested the removal of the same 36.5 acres from the Keystone-Odessa Community Plan. Doc. 41 at p. 84. Just like the actions at issue in *Flagship,* the

3. Count III also included a state law claim over which this Court declined to exercise jurisdiction.

4. Copies of these applications do not appear in the record.

denials of these applications were not legislative because they only impacted Dibbs' property and did not involve policy-making. *Flagship,* 559 Fed. Appx. at 816.

In his opposition to the summary judgment motion and in his motion to alter or amend, Plaintiff relies on *Martin County v. Yusem*, 690 So. 2d 1288 (Fla. 1997). In *Yusem* the Court found that the land use decisions were legislative because they

> required the County to engage in policy reformulation of its comprehensive plan and to determine whether it now desired to retreat from the policies embodied in its future land use map for the orderly development of the County's future growth. The county was required to evaluate the likely impact such amendment would have on the county's provision of local services, capital expenditures, and its overall plan for growth and future development of the surrounding area. The decision whether to allow the proposed amendment to the land use plan to proceed to the DCA for its review and then whether to adopt the amendment involved considerations well beyond the landowner's 54 acres.

Id. at 1294. Thus, in the summary judgment order this Court distinguished *Yusem* and noted that Dibbs did not present evidence that a plan amendment was *required* to grant any of Dibbs' requests.

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In the instant motion, Dibbs seeks to relitigate a matter that has already been decided by this Court. Specifically, he argues that the following testimony contradicts the Court's statement that there was no evidence indicating that any of Dibbs' requests required an amendment to the Plan:

> Q. He applied for a plan amendment to be removed from it, did he not?
>
> A. Yes
>
> Q. And you say here he participated early in the community plan update process. If he can't do a plan amendment to remove himself from it and if he can't be removed during the update process, is it your position that he is stuck in the Keystone-Odessa community plan?
>
> A. Those are the appropriate avenues to try and change it, yes.
>
> Q. Can you think of any others?
>
> A. No

Doc. 38 at 106:23-107:9. However, the Court does not agree.

Zornitta did not testify that a plan amendment of the kind described in *Yusem* was *required* to grant Dibbs' request to opt-out of the plan. She simply stated that a

Plan amendment was a way to achieve the change and she did not explain what she meant by a Plan amendment. Furthermore, Paula Harvey, as corporate representative of the County, testified that Plaintiff's application for removal of his property from the Plan would have required a "rezoning action" and, if approved, would "have come to the doorsteps of the Planning and Growth Management Department in the form of an application to rezone a piece of property before it can the precede [sic] then with development." Doc. 41 at 36:1-14. Rezoning actions were specifically held not to be legislative under *Flagship* or *Yusem.* Plaintiff has not presented evidence to show that a policy reformation of the kind described in *Yusem* was required to grant his requests.

Furthermore, even if Zornitta's testimony did establish that the denial of Plaintiff's requests to opt-out were legislative, that fact alone would not be sufficient to alter or amend the Court's judgment on Count III. Plaintiff is still required to show that the denial of his requests was arbitrary and capricious, which he has not done. *See Villas of Lake Jackson v. Leon County,* 121 F.3d 610, 611, 615 (11th Cir. 1997). "A balancing test is used to determine whether the city's decision was arbitrary and capricious or whether it was substantially related to general welfare interests, including its effect on aesthetics and surrounding property values." *Romero v. Watson,* Case No. 1:08 CV 217-SPM-AK, 2009 U.S. Dist. LEXIS 43538 (N.D. Fla. May 13, 2009) (citing *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1374-75 (11th Cir. 1993)).

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In his opposition to the County's summary judgment, Dibbs' only argument that the denial of his request to opt-out was arbitrary and capricious is as follows:

> The County's denial of Dibbs' Plan amendments was arbitrary and capricious from a planning perspective. (Doc. 44, Aff. Depew ¶ 15). The County has brought forward no expert testimony to opine otherwise. Indeed, the sole basis for the denial was to let the unelected Keystone Odessa Plan activists vote on whether to allow it. (Doc. 41, Depo. Harvey as Corp. Rep. 53:21-55:1; Doc. 45, Aff. Dibbs ¶ 4). And, there is record evidence of bias by the Planning Commission staff that wrote the report. (Ex. K, Depo. Dowling & Ex.). This is a clear violation of Dibbs' due process rights. See (Doc. 35 pgs. 5-8).

Doc. 53 at p. 15.

The evidence cited by Dibbs in his response offers no support to his claim that the denial of his request to opt-out of the plan was arbitrary and capricious. Paragraph 15 of the Drew Affidavit, for example, presents various statistics regarding the Keystone-Odessa community and surrounding areas and then concludes that Keystone-Odessa is "a wealthy, predominantly white community" and the Plan appears to maintain those existing traits. Doc. 44 ¶15. In the cited portion of Harvey's deposition, she discusses the statements of two commissioners who voted against Dibbs' "petitions" because they felt that such a

change should be addressed in the development of the Plan itself, with community input. Doc. 41 at 53:21-55:1. Even Dibbs' own affidavit merely addresses statements made at update meetings *after* his request was denied where "one of the commissioners" told him that he had to make his case "up or down" to the community. Doc. 45 ¶ 4. Barbara Dowling's deposition testimony shows that she opposed Dibbs' applications in reliance on the Plan's objectives and goals. Doc. 53-11 at p. 5. None of this evidence supports a claim that the decision regarding Dibbs' request to opt-out of the Plan was arbitrary and capricious. To the extent that Dibbs' is attempting to argue that it was arbitrary and capricious for commissioners to express a desire to seek community input on a land use decision, that argument is not persuasive. *See, e.g., Corn v. City of Lauderdale Lakes,* 997 F.2d 1369 (11th Cir. 1993). Even if the denial of Dibbs' applications was entirely motivated by a desire to appease a small group of activists, it would not have been arbitrary and capricious.

> Nothing is more common in zoning disputes than selfish opposition to zoning changes. The Constitution does not forbid government to yield to such opposition; it does not outlaw the characteristic operations of democratic … government, operations which are permeated by pressure from special interests…. The fact 'that town officials are motivated by parochial views of local interests which work against plaintiffs' plan and which may contravene state subdivision laws" … does not state a claim of denial of substantive due process.

Greenbriar, Ltd. v. Alabaster, 881 F.2d 1570, 1579 (11th Cir. 1989) (quoting *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir.1988) (quoting *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 832 (1st Cir.), *cert. denied,* 459 U.S. 989 (1982))).

IV. Conclusion

Plaintiff has failed to meet his burden to establish that any alteration or amendment of this Court's judgment under either Rule 59 or 60 is warranted. For the reasons stated herein, the County remains entitled to judgment in its favor on the federal claims presented in Count III. Accordingly, it is

ORDERED that Plaintiff's Motion to Alter or Amend Judgment (Doc. 79) is DENIED.

DONE AND ORDERED in Tampa, Florida on February 19, 2015.

/s/
Charlene Edwards Honeywell
United States District Judge

APPENDIX C — JUDGMENT IN A CIVIL CASE OF THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION, FILED DECEMBER 15, 2014

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No: 8:12-cv-2851-T-36TGW

STEPHEN J. DIBBS,

Plaintiff,

v.

HILLSBOROUGH COUNTY, FLORIDA,

Defendant.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is in favor of Defendant Hillsborough County, Florida, and against Plaintiff Stephen J. Dibbs on the portions of Counts I through IV that are based on 42 U.S.C. § 1983 or the U.S. Constitution.

SHERYL L. LOESCH, CLERK
s/E. Calderon, Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION, FILED DECEMBER 12, 2014

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No: 8:12-cv-2851-T-36TGW

STEPHEN J. DIBBS,

Plaintiff,

v.

HILLSBOROUGH COUNTY, FLORIDA,

Defendant.

December 12, 2014, Decided
December 12, 2014, Filed

ORDER

This cause comes before the Court on cross-motions for summary judgment filed by the parties in this matter. Plaintiff Stephen J. Dibbs ("Dibbs" or "Plaintiff") filed a Motion for Partial Summary Judgment on Counts I and II ("Dibbs' Motion") (Doc. 35) and Defendant Hillsborough County, Florida ("the County" or "Defendant") filed a Motion for Summary Judgment ("the County's Motion") (Doc. 29). Each party filed timely responses (Docs. 51 &

53) and the Court heard oral arguments on August 11, 2014. Upon due consideration of the parties' submissions, including deposition transcripts, affidavits, memoranda of counsel and accompanying exhibits, and for the reasons that follow, Plaintiff's Motion for Partial Summary Judgment as to Counts I and II (Doc. 35) will be denied and Defendant's Motion for Summary Judgment (Doc. 29) will be granted in part and denied in part.

I. STATEMENT OF UNDISPUTED MATERIAL FACTS[1]

A. The Keystone Community Plan

In 2001, Hillsborough County, Florida adopted a Community Plan ("the Plan") for the Keystone-Odessa area ("Keystone"), which is in northwestern Hillsborough County. Doc. 29 at p. 2; Doc. 37 at 62:24-25.[2] Plaintiff alleges that the Plan was supported by "NIMBYs." *Id*. at 26:16-23. "NIMBY" stands for Not in My Back Yard, and refers to a group of individuals that Dibbs classifies as "radical non-development activists." *Id*. at 26:16-23. Dibbs testified that the NIMBYs classify Keystone as a rural community, but Dibbs describes the area as suburban. *Id*. at 38:12-25.

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1. The Court has determined the facts based on the parties' submissions, including deposition transcripts, affidavits and accompanying exhibits.

2. The Plan was developed by the Hillsborough County City-County Planning Commission, which is the planning agency for the four local governments in Hillsborough County, and adopted by Hillsborough County.

Dibbs believes that the NIMBYs created the Plan, in part, to keep minorities or low-income people from living in Keystone. *Id.* at 40:8-15, 45:9-46:6. Dibbs testified that four or five Keystone residents made comments to him about wanting to keep minorities out of the area. *Id.* at 40:23-43:4. While he knows minorities that live in Keystone, Dibbs believes that "Keystone is unaffordable for black people." *Id.* at 43:5-24. Dibbs also testified that minorities are "probably okay" in Keystone as long as they are rich. *Id.* at 43:21-44:10. Dibbs has made the County Commissioners aware of his concerns about discrimination in Keystone. *Id.* at 44:11-22.

Dibbs also believes that the Plan's rules are unfair and nitpicky. *Id.* at 48:2-24. For example, the Plan prohibits the building of concrete walls, even though concrete walls already exist in Keystone. *Id.* at 48:6-49:11. Dibbs also objects to the requirement of slanted parking spaces. *Id.* at 50:2-20. According to Dibbs, slanted parking restricts growth because you can fit fewer cars in a parking lot. *Id.* at 51:17-22. The Plan also prevents the widening of roads in Keystone, which Dibbs believes is also a method to limit growth and development. *Id.* at 52:7-21.

Dibbs attacks the Plan's provisions that restrict access to public water and sewer, and prohibit development of property that's less than five upland acres. *Id.* at 58:4-60:20. According to Dibbs "[a]lmost every provision in the Plan is ridiculous, without common sense, and made to restrict or deny property owners." *Id.* at 57:1-3.

Appendix D

B. Dibbs' Land Use Issues

Following adoption of the Plan, Dibbs purchased three separate pieces of real property in Keystone: one parcel (21.6 acres) at Lakeshore and Wilcox ("the Lake LeClare property"); one parcel at Gunn Highway and North Mobley Rd. ("the Gunn Highway property"); and another parcel (300 acres) at Lutz Lake Fern Rd. and the Suncoast Expressway ("the Lutz Lake Fern property"). *Id.* at 33:19-35:16, 62:13-19. Dibbs was represented by counsel when he purchased these properties. *Id.* at 37:4-8. Dibbs testified that he was generally aware of the Community Plan at the time he purchased property in Keystone, but did not know how "restrictive" it was. *Id.* at 36:11-20. However, Dibbs also alleges that he attended some of the meetings regarding adoption of the Plan and requested that the Lake LeClare property he was planning to purchase not be included in the plan. Doc. 17 ¶ 24. Dibbs' request for exclusion from the Plan was denied. Doc. 53-2 at p. 7. Additionally, Dibbs' representatives attended some of the meetings regarding adoption of the Plan. *Id.* at p. 4.

In March of 2006, Dibbs began the application process for turning the Lutz Lake Fern property into a "borrow pit" or "land excavation." *Id.* at p. 4, 10-11. To obtain approval for the project, Dibbs had to apply for permits through, at a minimum, Hillsborough County and the Southwest Florida Water Management District ("SFWMD"). Doc. 37 at 85:25-86:24. Dibbs' application to the County was completed in July of 2006. Doc. 53-2 at p. 4. Dibbs testified that approval of his application with the County was delayed because there were 100

year-old easements that it took seven months for the County to eliminate. Doc. 37 at 87:3-6. Dibbs believes that this process should have only taken 30 minutes, not seven months. *Id.* at 87:7-16. Dibbs further believes that this delay was the result of the influence of the NIMBYs on the County's staff, the staff not liking him, and the department being understaffed. *Id.* at 89:7-24, 90:7-17, 93:4-9. There was then a second delay due to an issue with mineral rights for sand. *Id.* at 94:15-22. Dibbs testified that the County's motivation for the second delay was to prevent him from getting a contract to provide services to the new Steinbrenner school. *Id.* at 94:15-18. Ultimately the mineral rights issue was resolved in Dibbs' favor. *Id.* at 96:17-24. Dibbs received approval from the County for the borrow pit in February of 2008. Doc. 53-2 at p. 4. Dibbs does not recall whether the SFWMD permit was obtained before or after February of 2008. Doc. 37 at 98:5-14. Dibbs was represented by counsel through this process as well. *Id.* at 88:6-12.

In 2008 and 2009 Dibbs made applications to opt out of the Keystone Community Plan and join the Lutz Community Plan. *Id.* at 113:10-14. Under the Lutz plan, Dibbs would have had more freedom to densely develop his property. *Id.* at 113:10-14. Dibbs' requests were denied. *Id.* at 114:5-17. Dibbs did not seek judicial review of these denials. *Id.* at 115:13-23.

Dibbs also sought to be included in an urban service area and requested a clearing permit for a wildlife habitat. *Id.* at 115:24-116:20. These requests were denied and Dibbs did not seek judicial review. *Id.* at 115:24-118:17.

Appendix D

In May of 2009, Plaintiff applied for a permit to bring 9,800 cubic yards of "organic mulch" onto his Lutz Lake Fern property. Doc. 53-2 at p. 6, 104. Dibbs received this permit on March 12, 2010. *Id.* at p. 6, 105-108. On September 3, 2010 Dibbs received a violation notice from the County indicating that staff witnessed two large trucks dumping mulch mixed with dirt on Dibbs' property, and that this activity violated Land Development Code 8.018.05D and condition 17 of Dibbs' operating permit. *Id.* at p. 109-110. Dibbs contacted James Miller, an engineering specialist with the County, stating that he "did not violate anything" and referring Mr. Miller to the permit Dibbs was issued on March 12, 2010. *Id.* at p. 111. Dibbs requested a letter from the County stating that no violation occurred. *Id.* It is not clear from the record whether such a letter was ever issued.

In 2010 Dibbs requested that the Lake LeClare property be rezoned so that he could open a golf course and driving range. *Id.* at p. 7. This application was denied. Doc. 37 at 77:12-78:13.[3] Dibbs is now building single-family homes on the Lake LeClare property. *Id.* at 79:19-23.

In 2011, five air conditioning units were stolen from Dibbs Plaza — leaving tenants without air conditioning on Memorial Day weekend. *Id.* at 126:14-127:11; Doc. 17 ¶ 74. Dibbs found a contractor to install new units the very same day. Doc. 37 at 127:12-20. However, a month later, Dibbs received a fine for replacing the air conditioning

3. Plaintiff's testimony is contradictory as to whether he sought judicial review of this denial. Doc. 37 at 73:24-74:19, 81:8-11.

units without a permit. *Id*. at 127:22-24. Dibbs called County Commissioner Hagan's office to challenge the fine and was told by Rich Reidy that he would "take care of it." *Id*. at 128:6-10. Dibbs has not paid the fine. *Id*. at 128:4-5.

Dibbs alleges that various County employees delayed or denied his applications because they did not like him. Doc. 37 at 29:1-30:24; 31:10-33:8. Dibbs believes that County Administrator Pat Bean did not like him because she is a "NIMBY lover." Doc. 37 at 24:18-25:5.

Dibbs filed this lawsuit in December of 2012 and filed his Amended Complaint (Doc. 17) on November 11, 2013. He asserts the following five claims for relief: Count I (42 U.S.C. §1983 and Florida Constitutional claims for violation of due process as to the community plans); Count II (42 U.S.C. §1983 and Florida Constitutional claims for violation of equal protection); Count III (42 U.S.C. §1983 and Florida Constitutional as-applied claims for violation of due process); Count IV (42 U.S.C. §1983 and Florida Constitutional as-applied claims for violation of equal protection); Count V (action for inverse condemnation under the laws of Florida).

II. STANDARD OF REVIEW

Summary judgment is appropriate only when the court is satisfied that "there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law" after reviewing the "pleadings, the discovery and disclosure materials on file, and any affidavits[.]" Fed. R. Civ. P. 56(c)(2). In determining

whether a genuine issue of material fact exists, the court must consider all the evidence in the light most favorable to the nonmoving party. *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1164 (11th Cir. 2003).

Issues of fact are "genuine only if a reasonable jury, considering the evidence presented, could find for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A fact is "material" if it may affect the outcome of the suit under governing law. *Id.* The moving party bears the initial burden of stating the basis for its motion and identifying those portions of the record demonstrating the absence of genuine issues of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1259-60 (11th Cir. 2004). That burden can be discharged if the moving party can show the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex,* 477 U.S. at 325.

"'In a response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial . . . .'" *Hamm v. Johnson Bros.*, Case No. 6:06-cv-1348-Orl-28KRS, 2008 U.S. Dist. LEXIS 54624, 2008 WL 2783366, 3 (M.D. Fla. July 17, 2008) (quoting *Sawyer v. Southwest Airlines Co.*, 243 F. Supp. 2d 1257, 1261 (D. Kan. 2003)). "The law is clear . . . that suspicion, perception, opinion, and belief cannot be used to defeat a motion for summary judgment." *LaRoche v. Denny's, Inc.*, 62 F. Supp. 2d 1366, 1371 (S.D. Fla. 1999).

"Cross motions for summary judgment do not change the standard." *Perez-Santiago v. Volusia Cnty.*, No. 6:08-cv-1868-Orl-28KRS, 2010 U.S. Dist. LEXIS 22785, 2010 WL 917872, 2 (M.D. Fla. Mar. 11, 2010) (internal citations omitted). "'Cross motions for summary judgment are to be treated separately; the denial of one does not require the grant of another.'" *Id.* (internal quotations and citations omitted). "Even where the parties file cross motions pursuant to Rule 56, summary judgment is inappropriate if disputes remain as to material facts." *Id.*

III. DISCUSSION

Dibbs alleges that the Plan is unconstitutional because it is arbitrary and "not in the best interest of the health, safety and welfare of the citizens of Hillsborough County or the State of Florida or the United States of America." Docs. 35, 37 at 53:16-22, 57:1-7. Specifically, in his motion for summary judgment, Dibbs contends that the Community Plans are unconstitutional on their face because they are arbitrary and not rationally related to a legitimate governmental interest. Doc. 35. The County, on the other hand, argues that it is entitled to summary judgment because, *inter alia*, none of Dibbs' complaints rise to the level of constitutional violations. Doc. 29.

A. Count I: Facial Due Process Challenge under § 1983

In Count I Plaintiff facially challenges the Plan as violating the due process provisions of the U.S. Constitution. Among other things, the County argues

that these claims are time-barred, pursuant to *Hillcrest Prop., LLC v. Pasco County,* 754 F.3d 1279 (11th Cir. 2014), which held that the statute of limitations for facial attacks on land-use laws under §1983 begins to run when the statute, ordinance or regulation is enacted.

> Section 1983 claims are subject to a forum state's statute of limitations for personal injury claims. *Burton v. City of Belle Glade,* 178 F.3d 1175, 1188 (11th Cir. 1999). In Florida, a personal injury claim must be filed within four years. *Id.* This Court has held that a cause of action under § 1983 does not accrue until "the plaintiffs know or should know . . . that they have suffered [an] injury that forms the basis of their complaint." *Chappell v. Rich,* 340 F.3d 1279, 1283 (11th Cir. 2003) (citing *Mullinax v. McElhenney,* 817 F.2d 711, 716 (11th Cir. 1987)).

Id. at 1281. Here, the Community Plan was enacted in 2001,[4] at least one year before Dibbs purchased his land and eleven years before this action was filed. The injury, if any, occurred at the time the ordinance was enacted and would have been apparent to the current landowner(s) upon the ordinance's passage and enactment. Any future

4. Dibbs' Amended Complaint suggests that he is bringing a facial challenge with regard to all community plans in Hillsborough County. However, Dibbs has presented no evidence regarding any plans other than the Keystone-Odessa Plan and has not argued that any other community plan was enacted within the statute of limitations. Additionally, it is unclear as to how Plaintiff would have standing to challenge the other community plans.

owners, such as Dibbs, cannot arguably have suffered an injury because the "'price they paid for the [property] doubtless reflected the burden'" of the Plan. *Id.* at 1283 (quoting *Guggenheim v. City of Goleta,* 638 F.3d 1111, 1120 (9th Cir. 2010)). It should be noted that Dibbs and/or his representative attended meetings regarding adoption of the Plan and the Plan update. Indeed, Dibbs testified that he was "vaguely aware of some plan" when he purchased the property in the Keystone area. Doc. 37 at 36:14-15.

Plaintiff argues that the statute of limitations has not run because Plaintiff is alleging a "continuing violation" and Plaintiff's time to bring a facial claim was renewed when the Community Plan was re-adopted in 2012. However, neither of these theories are alleged in Count I of Plaintiff's Amended Complaint. Instead, Plaintiff alleges that property owners were not afforded a meaningful opportunity to be heard during the community plan *creation* process. See Doc. 17, ¶ 87. Plaintiff has listed distinct incidents where he feels that the Plan was applied to him unfairly, and none of those incidents stem from the re-adopted Plan passed in May of 2012. Furthermore, Count I does not include factual allegations that reference the re-adopted Plan. Thus, the County was not on notice of a facial due process challenge to the re-adopted Plan from 2012 or a claim for continuing violations. Plaintiff cannot now rely on these new theories to combat the statute of limitations defense. *See Gilmour v. Gates, McDonald & Co.,* 382 F.3d 1312, 1315 (11th Cir. 2004) (holding that a plaintiff could not raise a new claim in response to a summary judgment motion). Because the statute of limitations has expired as to the facial claim asserted

in Count I, it is time-barred. Accordingly, the County is entitled to summary judgment in its favor as a matter of law on Count I to the extent Dibbs asserts claims under 42 U.S.C. § 1983 and the U.S. Constitution.[5]

B. Count II: Facial Equal Protection Challenge under § 1983

1. Statute of Limitations

The County asserts that Count II is time-barred for the same reasons as Count I. Plaintiff, however, argues that the rule set forth in *Hillcrest* does not apply to equal protection claims. However, this question need not be resolved by this Court because, unlike Count I, Count II does include factual allegations regarding the re-adoption of the Plan in May of 2012. Thus, the statute of limitations has not run on this claim.

2. Substantive Claims

While not time-barred, Plaintiff's facial equal protection claim fails substantively.

> The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction equal protection of the laws." U.S. Const.

5. Each of Counts I through IV allege claims under federal *and* state law. Neither party has argued for summary judgment on those state law claims.

Appendix D

> Amend. XIV, § 1. If a statutory classification infringes on fundamental rights or concerns a suspect class, the Court will analyze the statute under a strict scrutiny standard. *Moore,* 410 F.3d at 1346. Otherwise, "the Equal Protection Clause requires only that the classification be rationally related to a legitimate state interest." *Bah v. City of Atlanta,* 103 F.3d 964, 966 (11th Cir. 1997) (citations omitted). . . . Suspect classifications include race, alienage, national origin, gender, and illegitimacy. *Moore,* 410 F.3d at 1346 (citation omitted).

Castaways Backwater Cafe, Inc. v. Marstiller, Case No. 2:05-cv-273-FtM-29SPC, 2006 U.S. Dist. LEXIS 60317, 2006 WL 2474034, 4 (M.D. Fla. Aug. 25, 2006).

In *United States v. Salerno*, the Supreme Court established that a "facial challenge to a legislative act[6] is... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the act would be valid." 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). This "no set of circumstances" test remains the standard in the Eleventh Circuit. *GeorgiaCarry.Org, Inc. v. Georgia,* 687 F.3d 1244, 1255, n. 19 (11th Cir. 2012). *See also American Federation of State, County and Municipal Employees Council v. Scott,* 717 F.3d 851, 871 (11th Cir. 2013) (rejecting a union's argument that *Salerno* requires

6. Both parties agree that the adoption and re-adoption of the Plan were legislative acts.

only a single unconstitutional application of a drug test mandate to one employee in order to prove that the mandate is facially unconstitutional as to all employees). "The mere possibility of a constitutional application is enough to defeat a facial challenge..." *Harris v. Mexican Specialty Foods, Inc.,* 564 F.3d 1301, 1313 (11th Cir. 2009). To mount a "facial" equal protection challenge "a plaintiff must assert that the mere enactment or application of an ordinance is unconstitutional, as it treats his property differently than that of similarly-situated landowners." *Kolodziej v. Borough of Elizabeth, Civil Action* No. 08-820, 2008 U.S. Dist. LEXIS 91032, 2008 WL 4858295, 6 (W.D. Pa. Nov. 10, 2008).

> Equal protection claims can be brought by a "class of one" where the plaintiff alleges that the state treated the plaintiff differently from others similarly situated and that there is no rational basis for such difference in treatment. *Vill. of Willowbrook v. Olech,* 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000). Under *Olech,* a "class of one" plaintiff may demonstrate that a government action lacks a rational basis in one of two ways: (1) "[negate] every conceivable basis which might support" the government action; or (2) demonstrate that the challenged government action was motivated by *animus* or ill-will. *Klimik v. Kent County Sheriff's Dep't,* 91 Fed. Appx. 396, 400 (6th Cir. 2004) (unpublished) (quoting *Bower v. Vill. of Mount Sterling,* 44 Fed. Appx. 670, 677 (6th Cir. 2002)).

Appendix D

Rondigo, L.L.C. v. Casco Twp., Case No: 05-74775, 2008 U.S. Dist. LEXIS 25520, 26-27 (E.D. Mich. Mar. 28, 2008) (*affirmed by Rondigo v. Casco Twp.,* 330 Fed. Appx. 511 (6th Cir. 2009)). "A property owner makes a facial challenge by claiming that a municipality knew exactly how he intended to use his property and passed an ordinance specifically tailored to prevent that use." *Kolodziej,* 2008 U.S. Dist. LEXIS 91032, 2008 WL 4858295 at 6.

> If the plaintiff claims that the regulation acts against him or her because of race or another suspect class or that the regulation involves a fundamental right, then the regulation is subject to strict scrutiny. *See San Antonio Indep. School Dist. v. Rodriguez,* 411 U.S. 1, 16-17, 93 S. Ct. 1278, 1287-88, 36 L. Ed. 2d 16 (1973) and cases cited therein. However, if the claim is simply that the regulation treats the plaintiff different from someone else and neither a suspect class nor a fundamental right is involved, the regulation (and its classification) must only be rationally related to a legitimate government purpose. *Fry v. City of Hayward,* 701 F. Supp. 179, 181 (N.D. Cal. 1988).

Eide v. Sarasota County, 908 F.2d 716, 722 (11th Cir. 1990).

Plaintiff never actually argues that there is no possible constitutional application of the Plan – he just makes that unsupported statement in his response to the County's summary judgment motion. *See* Doc. 53 at p. 6. Following that statement, Plaintiff argues that this case should be

controlled by two U.S. Supreme Court cases involving land use restrictions: *Washington ex rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210 (1928) and *Eubank v. Richmond,* 226 U.S. 137, 33 S. Ct. 76, 57 L. Ed. 156 (1912). Doc. 53 at p. 6. However, the Supreme Court's holdings in both of those cases rested largely on the fact that a small group of landowners were able to determine another landowner's rights with no redress. In both cases, if the owners of 2/3 of the land on a particular street or in a particular area voted to impose a restriction on the entire street or area, there was absolutely nothing the other landowners could do about it. This meant that if a single person bought two-thirds of the land on a street, their single opinion tyrannically ruled the entire street. The situations in *Washington* and *Eubank* are easily distinguished from the situation here. While Dibbs argues that the Plan gives too much power to the NIMBYs, it is actually no different than any other political situation – those who are the most politically active are most likely to influence results. The NIMBYs are not given an explicit power by the Plan, and certainly they are not given unchecked power to decide land use by other landowners. All applications of the Plan are subject to review by the County Commission and the state court system. Thus, *Washington* and *Eubank* are not analogous, let alone controlling, here.

Dibbs alleges that the Plan makes housing more expensive and, therefore, discriminates against poor African-Americans – though he testified that African-Americans "with money" are "probably okay" under the Plan. This cannot provide the basis for a facial equal

protection challenge. There is no statutory classification in the Plan based on wealth or race – or any other immutable characteristic. Further, there is no evidence in the record that the community plans have resulted in the concentration of affordable housing units in specified areas of the County.

Dibbs also argues that the Plan makes "some of the County-wide Comprehensive Plan policies or land development code regulations and processes unusable and inaccessible to landowners within their respective boundaries." Doc. 35 at p. 17. Thus, Dibbs contends that landowners in the Keystone area are a suspect class. There is no legal authority to support this contention. "Unlike most of the classifications that we have recognized as suspect, entry into this class . . . is the product of voluntary action." *United States v. Boffil-Rivera,* Case No. 08-20437-CR-GRAHAM/TORRES, 2008 U.S. Dist. LEXIS 84633, 2008 WL 8853354, 7 (S.D. Fla. Aug. 12, 2008) (quoting *Plyler v. Doe,* 457 U.S. 202, 221 n.19, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982)).

The Plan, which regulates state-created land-use rights, also does not implicate fundamental rights. *See Flagship Lake County Dev. Number 5, LLC v. City of Mascotte, Fla.,* 559 Fed. Appx. 811 (11th Cir. Mar. 13, 2014).

Accordingly, there is neither a suspect class distinction nor a fundamental right at issue and the Court applies a rational basis test to the Plan.

> The rational basis test is highly deferential. *See id.* (citation omitted). The legislation will be considered constitutional under this test if "'there is any reasonably conceivable state of facts that could provide a rational basis for' it." *Id.* at 1346 (quoting *FCC v. Beach Communications. Inc.,* 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993)).

Leib v. Hillsborough County Pub. Transp. Comm'n, Case No. 8:07-cv-01598-T-24-TGW, 2008 U.S. Dist. LEXIS 75142, 2008 WL 2686610, 3 (S.D. Fla. June 27, 2008).

Pursuant to Florida law, local governments are authorized to adopt optional plan elements to its comprehensive plan. *See* § 163.3177(1)(a), Fla. Stat. (2012). Comprehensive planning allows local governments to preserve, promote, protect, and improve the public health, safety, and general welfare. *See* § 163.3161(4), Fla. Stat. (2011). According to the plain language of the Keystone-Odessa Community Plan, the vision of the Plan was for the Keystone-Odessa community to continue to be a rural community. The protection of water resources was paramount given the many lakes, wetlands and rivers in the area. Among the goals was the desire to protect the area from suburban and urban sprawl, maintain ecological balance, and preserve natural areas in residential lot development. Doc 53-4 at pp. 103-04. In general, the community plans were designed to supplement the County's Comprehensive Plan by discussing the special and unique features or characteristics of particular areas of the County, including examining the issues

and problems facing the areas and providing strategies for solutions. *See, e.g.*, Doc. 32-1. The County sets forth several rational bases for applying each Plan to a specific geographic area. Hillsborough County is a large and diverse area. The same land use restrictions that apply in downtown Tampa are not suited for areas like the Keystone-Odessa area. One is urban and the other is rural (or suburban as Dibbs contends). The Keystone-Odessa Plan was developed to guide development and provide guidelines for developers who were considering buying land in that area. Doc. 29-7 at p. 5; Doc. 29-18 at p. 14. The Plan was the result of several public meetings which solicited input from Keystone residents. Doc. 29-19 at pp. 3, 6. The Keystone Community supported the Plan. Doc. 29-14 at p. 2. While not everyone in the area might agree with the decisions made by the Planning Commission or the County Commission, those are political issues not constitutional issues.

Plaintiff has failed to show that there are no set of circumstances under which the Plan would be valid. Quite simply, Plaintiff has not established that the Plan, on its face, treats his property differently than that of similarly-situated landowners or that it lacks a rational basis. Accordingly, the County is entitled to summary judgment on Count II to the extent Dibbs asserts claims under 42 U.S.C. § 1983 and the U.S. Constitution.

B. As-Applied Challenges Under 42 U.S.C. § 1983

In Counts III and IV, Dibbs brings as-applied challenges to the Community Plans, again alleging

violations of his due process and equal protection rights. Dibbs admits that he did not have standing to bring these claims until April 2, 2009 when "the Community Plans were applied to him" and the Board denied his request to be removed from the Keystone-Odessa Community Plan. Doc. 53 at p. 6. Accordingly, any actions prior to April 2, 2009 are not at issue under Counts III or IV.

1. Due Process

Though the pleadings are unclear, Plaintiff's counsel indicated at the oral argument that Plaintiff is attempting to assert both a substantive due process claim and a procedural due process claim.

a. Substantive Due Process

Plaintiff's substantive due process claim fails because there is no fundamental right at issue here.

> The Due Process Clause of the Fourteenth Amendment only provides substantive due process protection against deprivations of fundamental rights. *Greenbriar Village, L.L.C. v. Mountain Brook, City,* 345 F.3d 1258, 1262 (11th Cir. 2003). Fundamental rights are those created by the Constitution; and it is well established that land use rights, as property rights generally, are state-created rights not subject to substantive due process protection. *See Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed.

> 2d 548 (1972); *DeKalb Stone, Inc. v. County of DeKalb, Ga.*, 106 F.3d 956, 959 (11th Cir. 1997).

Flagship Lake County Dev. No. 5, LLC v. City of Mascotte, Case No. 5:12-cv-188-Oc-10PRL, 2013 U.S. Dist. LEXIS 59323, 2013 WL 1774944, 4 (M.D. Fla. April 25, 2013) (affirmed by *Flagship Lake County Dev. Number 5, LLC v. City of Mascotte, Fla.*, 559 Fed. Appx. 811 (11th Cir. Mar. 13, 2014)). This Court is bound to follow this precedent and, therefore, this claim fails.

Plaintiff's response to the County's Motion for Summary Judgment argues that the decisions made with regard to Dibbs are legislative rather than executive. *See* Doc. 53 at p. 9-10. If the actions were legislative then a substantive due process claim could exist even in the absence of a fundamental right.

> An exception to the general rule applies when "an individual's state-created rights are infringed by legislative act." *Id.* at 1273. In that scenario, "the substantive component of the Due Process Clause generally protects [the individual] from arbitrary and irrational action by the government." *Id.* By contrast, "[n]on-legislative, or executive, deprivations of state-created rights, which would include land-use rights, cannot support a substantive due process claim, not even if the plaintiff alleges that the government acted arbitrarily and irrationally." *Id.* (internal quotation marks omitted).

Flagship, 559 Fed. Appx. at 816. Legislative acts usually apply to a large segment of, if not all of, the population. Legislative acts also involve policy-making instead of mere administrative application of existing policies. *Kenter v. City of Sanibel,* 750 F.3d 1274, 1280 (11th Cir. 2014). On the other hand, executive acts usually arise from the ministerial or administrative activities of the executive branch, such as individual acts of zoning enforcement, and apply to a limited number of people, usually only one person. *Id.* The alleged actions at issue in Count III are:

1. Denial of the Lake LeClare rezoning for a driving range;

2. Delay of the land excavation approval;

3. Imposition of conditions such as prohibiting trucks from traveling west;

4. *Ad hoc* enforcement and unjustified rules regarding "peat" and "mulch" against Dibbs;

5. Denial of Dibbs' requests to remove his Lutz Lake Fern property from the Odessa Plan, allow water and sewer connections, and increase the development potential;

6. Refusal to lift Significant Wildlife Habitat requirements and imposition of an irrebuttable presumption of SWH status for property mapped as SWH;

7. Refusal to allow credits for street trees; and

8. Imposition of a fine on Dibbs for replacing stolen air conditioners.

See Doc. 17 at p. 28.

Just like the actions at issue in *Flagship*, these actions are not legislative because they only impact Dibbs' property and do not involve policy-making. 559 Fed. Appx. at 816. The actions at issue are either executive or quasi-judicial. Based on the evidence before the Court, the denial of the Lake LeClare rezoning for a driving range was quasi-judicial and the denial of Dibbs' requests to remove his Lutz Lake Fern property from the Odessa Plan was quasi-judicial. The delay in approving the borrow pit permit and other conditions associated with the approval of the land excavation/borrow pit was executive. Likewise, the refusal to lift Significant Wildlife Habitat requirements, refusal to allow credits for trees, and imposition of a fine for replacing stolen air conditioners were executive acts.

The case law relied upon by Plaintiff supports a finding that these actions are non-legislative. Under Florida law, zoning decisions are typically considered legislative. *Bd. of County Comm'rs v. Snyder*, 627 So. 2d 469, 471 (Fla. 1993). However, "unlike initial zoning enactments and comprehensive rezonings or rezonings affecting a large portion of the public, a rezoning action which entails the application of a general rule or policy to specific individuals, interests, or activities is quasi-judicial

in nature." *Id*. In addition to relying on *Snyder*, Plaintiff relies on *Martin County v. Yusem* in which the Florida Supreme Court answered the following certified question in the negative: "Can a rezoning decision which has limited impact under *Snyder*, but does require an amendment of the comprehensive land use plan, still be a quasi-judicial decision subject to strict scrutiny review?" 690 So. 2d 1288, 1289 (Fla. 1997). A key element of the *Yusem* decision that is not present in the current action is that "[n]either party argue[d] that this requested zoning change did not require an amendment to the Plan." *Id.* at 1290, n1. Here, there is no evidence that any of Dibbs' requests required amendments to the Plan itself – only that he was seeking individual variances from the Keystone-Odessa Community Plan. Thus, the decisions at issue here were not legislative and the substantive due process claim asserted in Count III fails.

b. Procedural Due Process

"A § 1983 claim alleging a denial of procedural due process requires proof of three elements: (1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally inadequate process." *Flagship,* 2013 U.S. Dist. LEXIS 59323, 2013 WL 1774944 at 2 (citing *Grayden v. Rhodes,* 345 F.3d 1225, 1232 (11th Cir. 2003)).

> In the case of a procedural due process claim, the constitutional violation is not the deprivation of a protected interest in "life, liberty, or property" . . . . Rather, "what is unconstitutional

> is the deprivation of such an interest without due process of law." *Zinermon,* 494 U.S. at 125, 110 S. Ct. at 983 (emphasis in original). Accordingly, as in this case, if adequate state remedies were available, but a plaintiff did not avail itself of them, that plaintiff "cannot rely on that failure to claim that the state deprived [it] of procedural due process." *Cotton,* 216 F.3d at 1331.

Flagship, 2013 U.S. Dist. LEXIS 59323, 2013 WL 1774944 at 3 (footnote omitted). As previously discussed, there is no constitutionally-protected liberty or property interest at issue here. Furthermore, it is undisputed that Plaintiff could have sought review of the County's decisions in Florida state courts but chose not to because he allegedly could not afford to.

> The existence of a state judicial procedure to review, remand, and/or set aside agency decisions, including zoning decisions, and to "[o]rder such ancillary relief as the court finds necessary to redress the effects of official action wrongfully taken or withheld," Fla. Stat. § 120.68(6)(a)(2), is sufficient to redress [the plaintiff] for the deprivation alleged and is sufficient to satisfy the Fourteenth Amendment's Due Process Clause.

Id. Plaintiff's claim that the available review is insufficient because it is limited and must be sought within 30 days of the quasi-judicial hearing is unavailing. The fact that

it is possible for a litigant to forfeit a remedy by virtue of the operation of reasonable state procedural rules, does not mean that the post-deprivation remedy is inadequate. *Holloway v. Walker,* 784 F2d 1287 (5th Cir. 1986). Furthermore, the fact that state procedures do not afford relief identical to that sought in a civil rights action does not make those procedures constitutionally inadequate. *National Communication Systems, Inc. v Michigan Public Service Com.,* 789 F.2d 370 (6th Cir. 1986).

Florida provides adequate state remedies, such as writs of certiorari or writs of mandamus, for review of the County's actions at issue here. Accordingly, Plaintiff's as-applied due process claims fail, and the County is entitled to summary judgment on Count III to the extent Dibbs asserts claims under 42 U.S.C. § 1983 and the U.S. Constitution.

2. Equal Protection

> [T]he Equal Protection Clause requires government entities to treat similarly situated people alike. Equal protection claims are not limited to individuals discriminated against based on their membership in a vulnerable class. Rather, we have recognized any individual's right to be free from intentional discrimination at the hands of government officials. *See, e.g., E & T Realty v. Strickland,* 830 F.2d 1107, 1112 (11th Cir. 1987). To prevail on this traditional type of equal protection claim, basically a selective enforcement claim, that the City's

> Ordinance was applied to them, and not other developments, Plaintiffs must show (1) that they were treated differently from other similarly situated individuals, and (2) that Defendant unequally applied a facially neutral ordinance for the purpose of discriminating against Plaintiffs. *See Strickland v. Alderman,* 74 F.3d 260, 264 (11th Cir. 1996).

Campbell v. Rainbow City, 434 F.3d 1306, 1313-1314 (11th Cir. 2006).

While Plaintiff alleges that the Community Plan negatively affects minorities in general, Plaintiff does not identify himself as a member of any suspect class. Nor does Plaintiff indicate that the County has treated him differently based on any immutable or protected characteristic. Instead, Dibbs alleges that his applications were delayed and/or denied simply because a number of people working for the County have not liked him since he won a lawsuit against the County in 1997. Thus, Dibbs is relying on the theory that he is a "class of one."

> To prove a "class of one" claim, the plaintiff must show (1) that he was treated differently from other similarly situated individuals, and (2) that the defendant unequally applied a facially neutral ordinance for the purpose of discriminating against him. . . .
>
> With respect to the first prong, we have frequently noted that the "similarly situated"

> requirement must be rigorously applied in the context of "class of one" claims. *See, e.g., Douglas Asphalt Co. v. Qore, Inc.,* 541 F.3d 1269, 1275 (11th Cir. 2008); *Griffin,* 496 F.3d at 1207. Employing "[t]oo broad a definition of 'similarly situated' could subject nearly all state regulatory decisions to constitutional review in federal court and deny state regulators the critical discretion they need to effectively perform their duties." *Griffin,* 496 F.3d at 1203.

Leib, 558 F.3d at 1306-1307.

That the plaintiff was treated differently than a similarly situated comparator is a crucial element of an as-applied equal protection claim. *See Flagship,* 2013 U.S. Dist. LEXIS 59323, 2013 WL 1774944 at 4 (citing *Crystal Dunes Owners Ass'n Inc. v. City of Destin, Fla.,* 476 Fed. Appx. 180, 184-85 (11th Cir. 2012)). "'To be considered similarly situated, comparators must be *prima facie* identical in all relevant respects.'" *Campbell,* 434 F.3d at 1314 (internal quotations omitted).

Plaintiff asserts that summary judgment is improper here because determining whether another landowner is similarly situated is a factual issue that should be determined by the jury. Doc. 53 at p. 17. However, Plaintiff does not identify a single comparator that he believes to be similarly situated. Instead, he only points to lists of people who have made applications to opt out of community plans in the past. *See* Doc. 53-2. He also identifies other borrow pits that have been approved in a shorter time period this

his approval. These lists are not sufficient for any jury to find a similarly situated landowner. The "comparators" identified in Dibbs' Second Affidavit, landowners who were allegedly permitted to opt out of community plans, are outside of the Keystone area. *Id*. at p. 8-9. Dibbs does not know of any landowners in the Keystone area that were permitted to opt out of the Plan. Doc. 37 at 64:14-23. Thus, Plaintiff has not presented any similarly situated landowners who have been treated differently.

There is no genuine issue of material fact to be presented at trial – on the record before this Court there are essentially no similarly situated individuals who were treated differently. Accordingly, the County is entitled to summary judgment on Count IV to the extent Dibbs asserts claims under 42 U.S.C. § 1983 and the U.S. Constitution.

C. Remaining State Law Claims

The Court has disposed of all federal claims and the only claims remaining are those brought under the Florida Constitution and Florida common law.[7] The resolution of these claims will require analysis of Florida constitutional law as applied to Hillsborough County. The Supreme Court has advised that "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the

7. Count V is a Florida "takings" claim. Doc. 53 at p. 18.

remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 350 n. 7, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988). Therefore, the Court will decline to exercise its supplemental jurisdiction over these remaining claims. *See* 28 U.S.C. § 1367(c)(3) ("district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . (3) the district court has dismissed all claims over which it has original jurisdiction."). These claims will be dismissed without prejudice to being refiled in an appropriate state court.

IV. Conclusion

For the reasons stated herein, it is hereby **ORDERED** and **ADJUDGED** as follows:

1. Plaintiff's Motion for Partial Summary Judgment as to Counts I and II (Doc. 35) is **DENIED**;

2. Defendant's Motion for Summary Judgment (Doc. 29) is **GRANTED** in part and **DENIED** in part;

3. The Clerk is directed to enter judgment in favor of Defendant Hillsborough County, Florida, on the portions of Counts I through IV that are based on 42 U.S.C. § 1983 or the U.S. Constitution;

4. The remaining state law claims in Counts I through V are dismissed without prejudice because the Court declines to exercise supplemental jurisdiction over the state law claims; and

5. The Clerk is directed to close the file.

DONE and **ORDERED** in Tampa, Florida on December 12, 2014.

/s/ Charlene Edwards Honeywell
Charlene Edwards Honeywell
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED OCTOBER 29, 2015

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-10152-DD

STEPHEN J. DIBBS,

Plaintiff-Appellant,

versus

HILLSBOROUGH COUNTY, FLORIDA,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

BEFORE: HULL, MARTIN and ROSENBAUM, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by STEPHEN J. DIBBS is DENIED.

ENTERED FOR THE COURT:

/s/_____
UNITED STATES CIRCUIT JUDGE

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT
OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

October 29, 2015

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 15-10152-DD
Case Style: *Stephen Dibbs v. Hillsborough County, Florida*
District Court Docket No. 8:12-cv-02851-CEH-TGW

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

AMY C. NERENBERG, Acting Clerk of Court