UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAVID KENTNER, SUSAN A. KENTNER, RICHARD W. BROWN, PATRICIA S. BROWN, ROBERT H. WILLIAMS, DIANE R. WILLIAMS, SHIRLEY A. PAULSEN FLORIDA QUALIFIED PERSONAL RESIDENCE TRUST, JERRY'S ENTERPRISES, INC., and LOWELL T. SPILLANE,

Plaintiffs,

-vs- **Case No. 2:11-cv-661-Orl-19KRS**

CITY OF SANIBEL,

Defendant.

ORDER

This case comes before the Court on the following matters: (1) the Motion to Dismiss Plaintiffs' Federal Claims with Prejudice and to Decline Jurisdiction Over Plaintiffs' State Claims by the Defendant City of Sanibel (Doc. No. 29, filed Apr. 4, 2012); and (2) the Response in Opposition to Defendant's Motion to Dismiss Federal Claims with Prejudice and to Decline Jurisdiction Over Plaintiffs' State Claims by Plaintiffs David Kentner, Susan A. Kentner, Richard W. Brown, Patricia A. Brown, Robert H. Williams, Diane R. Williams, Shirley A. Paulsen Florida Qualified Personal Residence Trust, Jerry's Enterprises, Inc., and Lowell T. Spillane (Doc. No. 31, filed Apr. 14, 2012).

BACKGROUND

This action concerns Plaintiffs' state law and federal constitutional challenges to the validity and enforcement of the Sanibel Land Development Code, Ordinance No. 93-18 (the "Ordinance"), which was enacted by Defendant City of Sanibel (the "City") in September of 1993. (Doc. No. 26 ¶ 19.) The Ordinance eliminated accessory piers and docks as permitted "conditional uses" in a defined area of the "Bay Beach Zone" of San Carlos Bay (the "Zone"),[1] thereby categorically prohibiting all new construction of boat docks and accessory piers in the Zone after approximately September 21, 1993. (*Id.* ¶¶ 19-20, 22; Doc. No. 26-1 at 8-9 (providing a copy of the Ordinance).) The ten named Plaintiffs possess riparian rights as owners of upland properties extending to the mean high water line in the Zone, which properties were purchased by Plaintiffs at unspecified times after the City enacted the Ordinance. (*Id.* ¶¶ 7-14 (identifying Plaintiffs and the addresses of their respective upland properties); *id.* ¶¶ 23-24 ("Plaintiffs each acquired their respective properties

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[1] The defined area is set forth in the full title of the Ordinance which provides:

> An Ordinance pertaining to the Sanibel Land Development Code; amending Paragraph (c) of Sub-section I.D.2.a.(2) of said Code by deleting accessory piers and docks as permitted conditional use in the Bay Beach Zone *from the west boundary of Lighthouse Park to the west right-of-way boundary of Dixie Beach Boulevard at Woodring's Point*; amending subsection I.I.3.r. of said code by amending the requirements for accessory docks, boat davits and boat lifts permitted as conditional uses in the remainder of the Bay Beach Zone and renumbering subparagraphs; ratifying and readopting the Land Development Code; providing for codification; providing for conflict and severance; and providing an effective date.

(Doc. No. 26-1 at 1 (emphasis added).)

subsequent to [the City's] enactment of the Ordinance.").) According to Plaintiffs, their respective "riparian" rights include "reasonable docking rights."[2] (*Id.* ¶ 55.)

Plaintiffs allege that the City's "stated purpose" for enacting the Ordinance was to protect seagrass populations in the Zone. (Doc. No. 26 ¶ 21; Doc. No. 26-1.) The Plaintiffs further allege "[o]n information and belief," that this"asserted premise for the dock prohibition–the protection of seagrass–is secondary to, or a replacement for, the Ordinance's *true purpose*, which is to serve the aesthetic preferences of certain interest groups and to artificially protect the property values of other property owners who are allowed to build docks." (Doc. No. 26 ¶ 39 (emphasis added).) According to Plaintiffs, the Ordinance is defective in the following four respects:

> First, the "Ordinance makes no specific finding as to the particular ecological conditions on the submerged lands adjacent to Plaintiffs' properties, and fails to identify whether any seagrass is located thereon." (*Id.* ¶ 25.)
>
> Second, the "Ordinance makes no allowance for advances in technology that might, at the time of its enactment or in the future, render the prohibited docks harmless to the putative seagrass populations." (*Id.* ¶ 26.)

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[2] "Riparian" rights are possessed by "waterfront owners along a river or stream," while "littoral" rights are possessed by "waterfront owners abutting an ocean, sea, or lake." *Walton Cty. v. Stop The Beach Renourishment, Inc.*, 998 So. 2d 1102, 1105 (Fla. 2008), *aff'd sub nom.*, *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envt'l Prot.*, 130 S. Ct. 2592 (2010). San Carlos Bay is located on the Gulf of Mexico at the mouth of the Caloosahatchee River. Http://my.sfwhm.gov (providing link to the South Florida Water Management District's website which provides maps and descriptions of various coastal watershed projects, including for the "Caloosahatchee River and Estuary and San Carlos Bay"). Accordingly, depending on the precise location of the properties in the Zone, Plaintiffs may properly be referenced as either riparian owners or littoral owners. *Walton Cty.*, 998 So. 2d at 1105; *Thiesen v. Gulf, F&A Ry.Co.*, 78 So. 491, 500 (Fla. 1918) (explaining that lands "bounded by and extended to the high-water mark of waters in which the tide ebbed and flowed were riparian or littoral to such waters"). In their submissions to the Court, the parties generally reference "riparian" rights, and in the interest of consistency, the Court will use the same reference.

> Third, the "Ordinance provides for no conditional use process or other mechanism to demonstrate a lack of seagrass in the submerged lands fronting an owner's property. . . ." (*Id.* ¶ 27.)
>
> Fourth, the "Ordinance provides no basis for the designation of the boundaries of the [Zone,] nor for the prohibition applying only therein and not to other sovereign submerged lands within [the City's] putative jurisdiction." (*Id.* ¶ 28.)

Finally, Plaintiffs allege that the Ordinance is "void ab initio" under Florida law because the City "lacked, and does lack, the requisite jurisdictional permitting authority to prohibit the construction of docks on submerged lands of the State of Florida, which authority properly lies with" the Florida Department of Environmental Protection (the "DEP"). (*Id.* ¶ 41.)

Plaintiffs allege that "several" of them have (at unspecified times) "sought to pursue some manner in which to build their own docks" in the Zone. (Doc. No. 26 ¶ 32.) For instance, Plaintiffs David and Susan A. Kentner (the "Kentners") allegedly "applied for and received necessary approvals, from both DEP and the United States Army Corps of Engineers, for construction of a boat dock."[3] (*Id.* ¶ 33.) In approximately 2009 and 2010, the Kentners unsuccessfully "sought to work with" the City "to reach some accommodation on the dock issue," including seeking to have "the Ordinance repealed or amended." (*Id.* ¶ 34 ("Since any conditional use or variance is prohibited outright by the terms of the Ordinance itself, they took action to have the Ordinance repealed or amended.").) Plaintiffs further allege "[o]n information and belief," that officials representing the City "have advised Plaintiffs and Plaintiffs' representatives that no variance or conditional use permit would be granted per the terms of the Ordinance and that such an effort would be futile." (*Id.* ¶ 36.) The Amended Complaint provides no factual allegations concerning the remaining Plaintiffs'

[3] Plaintiffs did not submit copies of the referenced "approvals" to the Court with their Amended Complaint or their initial Complaint. (Doc. Nos. 2, 26.)

properties or their interest in dock building; nonetheless, the Amended Complaint provides that all Plaintiffs are "beneficially interested in and aggrieved by the acts, decisions, and conduct of" the City. (*Id.* ¶ 15; *id.* at ¶ 16 ("Plaintiffs have, and all times material have maintained, interests and fundamental vested rights in the use of their respective properties, which are adversely affected by the acts, decisions and conduct of [the City] as alleged herein.").)

Approximately one year after the City "voted down a measure to repeal or amend the Ordinance" and reiterated the "blanket prohibition" on dock construction "save for" a dock that the City built in the Zone in 2006 (Doc. No. 26 ¶ 35), the Plaintiffs initiated this legal action against the City in the Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida (the "State Court"). (Doc. No. 2, filed in State Court on Oct. 14, 2011.) In both their initial and Amended Complaints, Plaintiffs asserted the following four claims against the City:

(1) A state law claim seeking a permanent injunction preventing the City's enforcement of the Ordinance and a declaration that the City "lacks jurisdictional authority to enact and enforce the Ordinance's prohibition on use of sovereign submerged lands" ("Count I") (Doc. No. 26 ¶¶ 42-53 (referencing Florida Statutes §§ 86.011 and 86.061));

(2) A claim seeking a declaration that the City's "actions violate Plaintiffs' right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, §§ 2 & 9 of the Florida Constitution," and a permanent injunction preventing the City's "further violation of Plaintiffs' rights" ("Count II") (*id.* ¶¶ 54-65);

(3) A claim seeking a declaration that the City's "actions violate Plaintiffs' right to equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution" and requesting a permanent injunction preventing the City's "further violation of Plaintiffs' rights" ("Count III") (*id.* ¶¶ 66-75); and

(4) A claim under 42 U.S.C. § 1983 for violation of Plaintiffs' "due process" and "equal protection" rights guaranteed by the Fifth and Fourteenth

Amendments to the United States Constitution ("Count IV") (*id.* ¶¶ 76-83 (demanding an award of damages, costs and attorneys' fees)).[4]

After removing this action from the State Court,[5] the City filed its "Motion to Dismiss Plaintiffs' Federal Claims with Prejudice and to Decline Jurisdiction Over State Claims" (the "Motion"). (Doc. No. 29.) The City argues that Plaintiffs' federal due process, equal protection, and Section 1983 claims in Counts II, III, and IV "should be dismissed" as barred by "the four-year statute of limitations (Florida Statutes 95.11(3)(p))" (the "Fla. SOL"). (*Id.* at 2, 4-9.) The City argues in the alternative that even if Plaintiffs' federal claims are not dismissed as time-barred, they should be dismissed for failing to satisfy the minimal pleading requirements of the Federal Rules of Civil Procedure (the "Rules"). (*Id.* at 2.) The City concludes that the Court "should decline to exercise supplemental jurisdiction over the state law claims in Counts I and II" and should "remand the state law claims" to the State Court. (*Id.* at 24-25.)

In their Response in Opposition to the Motion (Doc. No. 31 (the "Response"), Plaintiffs oppose dismissal of any of their federal claims; however, Plaintiffs agree that the Court should decline jurisdiction over their state law claims. (Doc. No. 31 at 2, 18-19 ("Plaintiffs concur" with the City that the Court should "decline supplemental jurisdiction over Plaintiffs' state law claims,"

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[4] In a Joint Stipulation and Motion (the "Stipulation"), the parties represented that Plaintiffs seek "only declaratory and injunctive relief," attorneys fees and costs, but *not damages*. (Doc. No. 34 ¶ 4 (quoting Plaintiffs' discovery responses that a damages computation is not "applicable"); *id.* ¶ 6 (noting that no claims "'triable' by jury" are presented).) In an endorsed Order dated July 30, 2012, the Court granted the Stipulation and transferred the action to a non-jury trial docket. (Doc. No. 35.)

[5] The City filed a Notice of Removal to this Court in accordance with Title 28, United States Code, Sections 1446(a), 1441(b), 1343 and 1331. (Doc. No. 1.) After obtaining leave from the Court, the Plaintiffs filed an Amended Complaint on March 19, 2012, which set forth the same claims as the initial Complaint but named additional Plaintiffs. (Doc. Nos. 24-26.)

and the Court should "remand those claims to state court for adjudication.").) Plaintiffs argue that their challenges to the Ordinance and its enforcement are not time-barred because the "date from which the [Fla. SOL] began" to run on such claims was not more than four years before filing their initial Complaint. (*Id.* at 5-10.) Specifically, Plaintiffs contend that their respective federal claims did not accrue until each Plaintiff "decided to pursue a dock and became aware that the Ordinance was all that prohibited it . . . ." (*Id.*) Plaintiffs further argue that: (1) their due process claims are not subject to dismissal because this Court "must recognize" Plaintiffs' "property-related substantive due process claims" under *Lingle v. Chevron*, 544 U.S. 528 (2005) (*id.* at 11-16); and (2) Plaintiffs' equal protection claims are adequately stated based upon specific allegations in the Amended Complaint (*id.* at 16-18).

THE LEGAL STANDARDS

A. The Federal Rules of Civil Procedure

The Rules set forth minimum requirements concerning the form of a complaint. Rule 8 requires that a complaint consist of simple, concise, and direct allegations, and a short and plain statement of the claims. FED. R. CIV. P. 8; FED. R. CIV. P. 10(b) (requiring that claims be stated "in numbered paragraphs, each limited as far as practicable to a single set of circumstances"). When a complaint fails to plausibly state a claim upon which relief can be granted, the defendants may file a motion to dismiss under Rule 12(b)(6). *Popham v. Cobb Cty., Ga.*, 392 Fed. App'x 677, 679 (11th Cir. 2010). When ruling on a motion to dismiss under Rule 12(b)(6), a court must limit its consideration to the complaint, the written instruments attached to it as exhibits, "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323 (2007); *GSW, Inc. v. Long Cnty.,*

Ga., 999 F.2d 1508, 1510 (11th Cir. 1993). While the court must "accept all factual allegations in the complaint as true" (*Tellabs*, 551 U.S. at 323), the court need *not* accept "legal conclusions" as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009). A complaint that provides only "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" does not satisfy the Rules. *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

The court should begin its analysis "by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679. The court must next determine whether the well-pled facts "plausibly give rise to an entitlement to relief." *Id.* at 679-80 (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (citing *Twombly*, 550 U.S. at 556). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. As the United States Supreme Court explained:

> The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Id. at 678 (quotation marks and internal citations omitted) (quoting *Twombly*, 550 U.S. at 557). On a Rule 12(b)(6) motion to dismiss, when a court considers the range of possible interpretations of the defendant's alleged conduct, if the "more likely explanations" involve lawful, non-actionable behavior, the court should find that the plaintiff's claim is not plausible. *Id.* at 681-82.

B. Section 1983

Title 42, United States Code, Section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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 . . . .

42 U.S.C. § 1983. Section 1983 is not a source of substantive rights; rather, section 1983 provides an avenue for vindicating federal rights that are conferred elsewhere. *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)). Thus, to avoid dismissal of their claims asserted under section 1983 for violation of constitutional rights, the Plaintiffs must articulate sufficient, non-conclusory facts that: (1) the City deprived them of a right guaranteed under the United States Constitution; and (2) the City acted under color of law. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *Young v. Flemming,* 146 Fed. App'x 393, 395 (11th Cir. 2005); *Griffin v. City of Opa-Locka,* 261 F.3d 1295, 1303 (11th Cir. 2001). "[A]bsent the existence of an underlying constitutional right, no section 1983 claim will lie." *Wideman v. Shallowford Cmty. Hosp., Inc.,* 826 F.2d 1030, 1032 (11th Cir. 1987).

ANALYSIS

A. The Statute of Limitations

The City argues that the Court should dismiss all of Plaintiffs' federal claims as time-barred. (Doc. No. 29 at 4-9.) This argument is not usually a proper basis for dismissal of claims under Rule 12(b)(6), because application of a statute of limitations is an affirmative defense under Rule 8(c), which need not be anticipated in a complaint. *Clark v. State of Ga. Pardons and Paroles Bd.*, 915

F.2d 636, 640 n. 2 (11th Cir.1990). Thus, a court may dismiss a time-barred claim under Rule 12(b)(6) only if the facts establishing the statute of limitations defense are apparent from the face of the complaint. *Sairras v. Schleffer*, 331 Fed. Appx. 698, 700 (11th Cir. 2009) (affirming dismissal of section 1983 claims as barred by Florida's four-year statute of limitations); *Smith v. Belle*, 321 Fed. Appx. 838, 844-45 (11th Cir. 2009) (same); *Ellison v. Lester*, 275 Fed. Appx. 900, 901-02 (11th Cir. 2001) (reversing dismissal of complaint where district court applied Florida's one-year statute of limitations); *Stephens v. Dickens*, 8:10-CV-2705-T-33EAJ, 2010 WL 5067612 (M.D. Fla. Dec. 7, 2010) (dismissing section 1983 claims based upon Florida's four-year statute of limitations); *Abusaid v. Hillsborough Cty., Fla.*, No. 8:09-cv-713-T-26EAJ, 2009 WL 1515626 *3-4, n.16 (M.D. Fla. Jun. 1, 2009) (same). Further, before a claim is "dismissed on the basis of a statute-of-limitations defense" it must appear "beyond a doubt that plaintiffs can prove no set of facts that toll the statute." *Keira v. U.S. Postal Inspection Servs.*, 157 Fed. Appx. 135, 136 (11th Cir. 2005) (affirming dismissal of Fifth Amendment *Bivens* claim where plaintiff was plainly "aware of the facts underlying his complaint" more than four years before filing his complaint).

Here, the parties do not dispute that claims asserting violations of Plaintiffs' federal due process and equal protection rights are governed by Florida's four-year residual personal injury statute of limitations. *Wilson v. Garcia*, 471 U.S. 261, 276–79 (1985) (interpreting 42 U.S.C. § 1988 as requiring application of forum state's statute of limitations in all section 1983 causes of action); *Burton v. City of Bellegrade*, 178 F.3d 1175, 1188 (11th Cir. 1999). Specifically, Florida Statutes § 95.11(3), requires that such claims be asserted within four years from the date the cause of action accrues. *City of Hialeah, Fla. v. Rojas*, 311 F.3d 1096, 1102-03 (11th Cir. 2002) (holding plaintiffs' equal protection claims were barred by Florida's four-year statute of limitations); *Abele v. Aliff*, 8:04-

CV-1883T-26TGW, 2006 WL 3762081 (M.D. Fla. 2006), *aff'd sub nom. Abele v. Tolbert*, 241 Fed. Appx. 612 (11th Cir. 2007) (holding that all due process claims based upon actions by the defendant more than four years prior to filing of action were barred by Florida's four-year statute of limitations).

While Florida law provides the applicable statute of limitations, federal law controls the accrual date for Plaintiffs' claims. *Baker v. Sanford*, No. 11-14015, 2012 WL 1994603, at *2 (11th Cir. Jun. 4, 2012); *Burgest v. McAfee*, 264 Fed. Appx. 850, 852 (11th Cir. 2008) (quoting *Wallace v. Kato*, 549 U.S. 384 (2007)); *e.g.*, *Rawlings v. Ray*, 312 U.S. 96, 98 (1941) (holding that "the time when there was a complete and present cause of action . . . is a federal question"). Under federal law, the "limitations period ordinarily does not begin until the plaintiff has a complete and present cause of action." *Bay Area Laundry and Dry Cleaving Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997); *e.g.*, *Burton v. City of Belle Glade*, 178 F.3d 1175, 1188 (11th Cir. 1999) ("[A] plaintiff must commence a § 1983 claim arising in Florida within four years of the allegedly unconstitutional or otherwise illegal act.").

Outside the context of a federal due process takings claim,[6] the "clock begins to run when 'the plaintiffs know or should know (1) that they have suffered the injury that forms the basis of their complaint and (2) who has inflicted the injury.'" *Driessen v. Fla. Dept. of Children and Families*, 351 Fed. Appx. 355, 356 (2009) (quoting *Chappell v. Rich*, 340 F.3d 1279, 1283 (11th Cir. 2003));

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[6]Federal due process takings claims are unique and do not accrue until the following two events occur: (1) "[f]irst, state judicial authorities must make a final determination on the status of the subject property affected by the zoning ordinance;" and (2) "[s]econd, the property owner must be denied an adequate post-deprivation remedy." *New Port Largo, Inc. v. Monroe Cty.*, 985 F.2d 1488, 1493 (11th Cir. 1993) (vacating dismissal of plaintiff's Fifth Amendment Takings claim and holding that the "state's invalidation of the zoning ordinance, not [plaintiff's] sale of property, determine[d] the accrual date" for such claim).

e.g., *Hillcrest Property, LLP v. Pasco Cty.*, 731 F.Supp.2d 1288, 1295 (M.D. Fla. 2010) (noting that a claim that application of a law is "arbitrary and capricious" does not ripen until the "government decides to apply the regulation"). A plaintiff's ignorance of the "legal recourse" available to her does not change the date of injury or "toll the limitations period." *Stevens v. McKillop*, 198 Fed. Appx. 816, 817-18 (Fed. Cir. 2006) (affirming dismissal of complaint as time-barred and rejecting plaintiff's argument that the limitations period did not commence until her research revealed her injury); *e.g.*, *Baker*, 2012 WL 1994603, at *2 (holding that a claim alleging violation of an Eighth Amendment right accrues when plaintiffs know or "should know" that they have "suffered the injury that forms the basis of [their] complaint and can identify the person who inflicted the injury"); *Keira*, 154 Fed. Appx. at 194-95 (dismissing complaint as time barred where the complaint's indication that the jury at plaintiff's trial "was made aware of" the detention "at the very heart of his complaint, contradicts [plaintiff's] assertion that he . . . did not learn" of defendant's alleged culpability until 2000).

While the parties agree that Florida's four-year statute of limitations applies to Plaintiffs' claims, they disagree on the proper accrual date. (Doc. No. 29 at 4; Doc. No. 31 at 8.) The City argues that Plaintiffs' Amended Complaint asserts only facial challenges to the Ordinance, and as such, the Plaintiffs' federal claims accrued on the effective date of the Ordinance as apparent from the Complaint – September 22, 1993. (Doc. No. 29, at 4-9.) Plaintiffs counter that the City's arguments fail because Plaintiffs' Amended Complaint is not limited to claims that the Ordinance is invalid on its face, but includes allegations of misconduct by the City that occurred within the

four-year statute of limitations, which is after October 14, 2007 (four years prior to the date Plaintiffs filed their initial Complaint).[7] (Doc. No. 31 at 5-11.)

Here, a review of the Amended Complaint makes plain that the Plaintiffs have not limited themselves to allegations of the City's wrongful conduct prior to October 14, 2007. For instance, Plaintiffs allege that in 2009 and 2010, the City rejected the Kentners' efforts to "work with" the City, and Plaintiffs further allege that the City made a decision not to repeal or amend the Ordinance in 2010. (Doc. No. 25 ¶ 34.) Plaintiffs further allege "[o]n information and belief," that officials representing the City have at unspecified times "advised Plaintiffs and Plaintiffs' representatives that no variance or conditional use permit would be granted per the terms of the Ordinance, and that such an effort would be futile." (*Id.* ¶ 36.) Construing the allegations of the Amended Complaint in Plaintiffs' favor, the Court cannot find that the City's statute of limitations defense is apparent from the face of the Amended Complaint. Accordingly, the Court will deny the City's motion to dismiss all of Plaintiffs' federal claims with prejudice as time-barred and will consider the parties' remaining arguments concerning the sufficiency of Plaintiffs' factual allegations supporting their substantive due process and equal protection claims.

B. The Due Process Claims

In Counts II and IV of their Amended Complaint, the Plaintiffs allege that the City has violated their right to substantive due process under the Fifth and Fourteenth Amendments to the

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[7] Plaintiffs also argue that their facial challenges to the Ordinance are not barred because such claims did not accrue until the Plaintiffs learned that the Ordinance unconditionally deprived them of the "fundamental" right to build docks in the Zone. (Doc. No. 31 at 5-11.) Because the Court rejects the City's statute of limitations defense as premature, the Court does not reach the parties' arguments concerning the precise accrual dates for the Plaintiffs' various claims. *Infra* at 13. Upon sufficient development of the record, and if warranted by the facts and the law, the City is free to reassert its argument that Plaintiffs' claims are time-barred.

United States Constitution. (Doc. No. 26 ¶¶ 54-65, 79.) The substantive due process clause of the United States Constitution protects only "fundamental" rights, which are "those rights created by the United States Constitution." *Busse v. Lee Cty., Fla.*, 317 Fed. Appx. 968, 973 (11th Cir. 2009) (citing *Greenbriar Village, L.L.C. v. Mountain Brook, City*, 345 F.3d 1258, 1262 (11th Cir.2003) (per curiam)). Where it is plain from the face of the complaint that no fundamental rights are at issue, a court should dismiss an alleged substantive due process claim. *Id.* (affirming dismissal of substantive due process claims based on non-fundamental property rights).

Here, the only rights asserted in the Amended Complaint are Plaintiffs' respective "riparian" rights to "reasonable docking" ("Docking Rights") (Doc. No. 26 ¶ 55.) A review of the law contradicts Plaintiffs' conclusory denomination of their alleged Docking Rights as "fundamental, vested rights." Notably, the nature of riparian rights "is considered a matter of state law." *Walton Cty. v. Stop Beach Renourishment, Inc.*, 998 So. 2d 1102, 1112 (Fla. 2008), *aff'd sub nom., Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Prot.*, 130 S. Ct. 2592 (2010).[8] Under Florida law, riparian rights "appurtenant to lands bounded by navigable waters" are considered "legal rights" that are "derived from the common law as modified by statute." *City of Eustis v. Firster*, 113 So. 2d 260, 261 (Fla. 2d DCA 1959); *e.g.*, *Belvedere Dev. Corp. v. Dep't of Transp., Div. of Admin.*, 476 So. 2d 649, 653 (Fla. 1985) (holding that riparian rights "are property rights, incorporeal interests in real estate").

[8] Because riparian rights are defined by state law, the extent of such rights "varies among the states." *Walton Cty.*, 998 so. 2d at 1112. "For example, in contrast to Florida, [riparian] rights in Mississippi 'are not property rights per se; instead they are mere licenses or privileges' that can be revoked." (*Id.* (quoting *Miss. State Highway Comm'n v. Gilich*, 609 So.2d 367, 375 (Miss.1992)).

Although they possess certain qualified legal rights, riparians hold no title to the submerged lands where docks might be built; rather, the State of Florida holds title to the "lands under tidal navigable waters and the foreshore thereof (land between high and low water marks)," which title the State holds "in trust for the people for purposes of navigation, fishing, bathing and similar uses." *Hayes v. Bowman*, 91 So. 2d 795, 799-800 (Fla. 1957). Thus, the Florida Supreme Court has recognized only a qualified right of riparian owners to build docks:

> Riparian owners on navigable waters have a right, with the state's consent, to erect wharves, subject to state and federal regulation. Riparian or littoral owners to ordinary high-water mark on the ocean or gulf or other navigable waters have, by the common law, a qualified right with the consent or acquiescence of the state to erect wharves or piers or docks in front of the riparian holdings to facilitate access to and the use of the navigable waters, subject to lawful state regulation and to the dominant powers of Congress.

Freed v. Miami Beach Pier Corp., 112 So. 841 (Fla. 1927) (noting that if "wharves or piers or docks are erected in navigable waters without due authority, they may be removed as purprestures"); *Brickell v. Trammell*, 82 So. 221, 223 (Fla. 1919) (explaining that the right to construct a dock may be conferred by state lawmakers "in addition to the common-law riparian rights in navigable waters");[9] *Thiesen v. Gulf, F. & A. Ry. Co.*, 78 So. 491, 491, Syl. (Fla. 1917) (holding that riparian

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[9] *Freed* was preceded by *Brickell*, where the Florida Supreme Court explained that any right to construct "facilities for reaching navigable waters" are not part of but may be "in addition to the common-law riparian rights in navigable waters [if] the lawmaking power of the state" chooses to "grant to riparian proprietors . . . easements in the lands below high-water mark contiguous to the riparian holdings . . . , for the purpose of constructing thereon facilities for reaching navigable water that may be opposite or in front of the uplands, with rights of action to protect the easements." *Brickell*, 82 So. at 223. These early decisions were consistent with contemporaneous decisions by the Supreme Court of the United States. *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 418 (1926) ("It is well settled that in the absence of a controlling local law otherwise limiting the rights of a riparian owner upon a navigable river . . . [the riparian owner] has . . . a property right, incident to his ownership of the bank, of access from the front of his land to the navigable part of the stream, and *when not forbidden by public law* may construct landings, wharves or piers for this

(continued...)

owners have "no right, *without consent of the state*, to erect or build any structure upon the submerged land between the ordinary high and low water marks of such waters") (emphasis added); *Shore Village Prop. Owners' Assoc., Inc. v. State of Fla. Dept. of Envtl. Prot.*, 824 So. 2d 208, 211 (Fla. 4th DCA 2002) (affirming trial court's rejection of riparian owner's challenge to denial of permits to build dock); *Intracoastal North Condo. Assoc., Inc. v. Palm Beach Cty.*, 698 So. 2d 384, (Fla. 4th DCA 1997) (rejecting due process takings claim because the riparian owner's docking right "was subject to the superior rights of the public as to navigation and commerce"); *Krieter v. Chiles*, 595 So. 2d 111, 113 (Fla. 3d DCA 1992) (holding that absent a showing of "necessity" or that water is the only available method of ingress or egress to the upland property, no due process takings claim could be established because the riparian owner's "rights are subject to the public's interests").

After the Florida Supreme Court's explanation of qualified docking rights in *Brickell*, *Freed*, and *Thiesen*, Florida courts have continued to recognize that "[r]iparians appear to have a qualified common law right to wharf out to navigable waters in the absence of a statute." *Bd. of Trustees of Internal Imp. Trust Fund v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209, 214 (Fla. 2d DCA 1973) (citing *Freed*, 112 So. 841 (Fla. 1927)); *e.g.*, *Game & Fresh Water Fish Comm'n v. Lake Islands, Ltd.*, 407 So. 2d 189, 191 (Fla. 1981) (recognizing a "privilege" possessed by riparians to erect a dock "upon the bed and shores adjacent to his riparian holdings" but noting such privilege is "subject to the rights of the public to be enforced by proper public authority or by individuals who are specially and unlawfully injured"); *Williams v. Guthrie*, 137 So. 682, (Fla. 1931) ("At common law, a building or wharf erected upon lands without license below high-water mark is a purpresture . . .

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[9](...continued)
purpose.") (emphasis added).

but in [Florida,] riparian owners have the riparian right to construct wharves from the upland to reach the navigable water, when not objected to by the sovereign or specially forbidden by statute."); *Lanier v. Jones*, 619 So. 2d 387, 388 (Fla. 5th DCA 1993) ("[T]he owner of a riparian right may erect, subject to state and federal regulation, docks or other physical structures into the riparian waters under appropriate circumstances."); *Cartish v. Soper*, 157 So. 2d 150, 153-54 (Fla. 2d DCA 1963) (noting that "the right to build a dock to facilitate access to the waters is implied" in Florida common law based upon the riparian right of access to navigable waters).

It is plain from the foregoing law that the qualified right of a riparian owner to construct a dock is premised wholly on state law; thus, it cannot be considered a "fundamental right." *Busse*, 317 Fed. Appx. at 973. Further, Plaintiffs have directed the Court's attention to no controlling or persuasive authority that recognizes Docking Rights as a fundamental right under the United States Constitution. Accordingly, the Plaintiffs cannot sustain a substantive due process claim in relation to the City's alleged interference with Plaintiffs' Docking Rights. *Weiss v. City of Gainesville, Fla.*, 462 Fed. Appx. 898 (11th Cir. 2012) (affirming judgment for City on substantive due process claim that was based on deprivation of rights allegedly established by "the settled law of Florida"); *Romero v. Watson*, No. 1:08-cv-217-SPM-AK, 2009 WL 136174 (N.D. Fla. May, 13, 2009) (dismissing substantive due process claim where plaintiff asserted only the non-fundamental "right to use real property for a specific purpose"); *e.g. Collins & Co. v. City of Jacksonville*, 38 F.Supp.2d 1338, 1342 (M.D. Fla. 1998) (granting defendant's motion to dismiss substantive due process claim unrelated to a fundamental right).

Further, the Court rejects Plaintiffs' argument that *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), effectively overruled controlling law in the Eleventh Circuit that state-defined property

rights are not "fundamental rights" subject to protection under the substantive due process clause. (Doc. No. 31 at 11-16 (arguing that *Lingle* "rendered obsolete the hundreds of lower court cases" which rejected substantive due process claims in the context of state-defined property rights).) The *Lingle* Court reversed a decision by the Ninth Circuit Court of Appeals which held that a Hawaii statute was unconstitutional because it deprived plaintiff oil company of its right to charge its dealers a specified amount for rent. *Lingle*, 544 U.S. at 531-32. *Lingle* was concerned with the proper standard to apply for a "regulatory takings" claim under the Fifth Amendment – not a substantive due process claim. *Id.* at 548-49. Accordingly, any discussion of the viability of a substantive due process claim in *Lingle* was dicta. Because "a formula repeated in dictum but never the basis for judgment is not owed stare decisis weight," the Court declines Plaintiffs' invitation to disregard controlling case law concerning substantive due process claims based on *Lingle*. *Gonzalez v. United States*, 553 U.S. 242, 256 (2008) (citing *Lingle*, 544 U.S. at 545–546); *e.g. New Port Largo, Inc.*, 985 F.2d at 1500 (cautioning that "for law-of-the-circuit purposes," a study of precedent "ought to focus far more on the judicial decision than on the judicial opinion") (Edmondson, J., concurring).

C. The Equal Protection Claims

In Counts III and IV of their Amended Complaint, Plaintiffs allege that the City is liable for violating Plaintiffs' right to "equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution." (Doc. No. 26 ¶¶ 66-83.) The Supreme Court of the United States has recognized "class of one" equal protection claims where a plaintiff alleges that the defendant intentionally treated plaintiff "differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (affirming circuit court's reversal of district court's denial of defendant's motion to

dismiss an equal protection claim that was premised on the defendant's demand of a 33-foot easement from plaintiff property owners, and only a 15-foot easement from other property owners who were similarly situated save for plaintiff's prior history of litigation with the defendant); *e.g.*, *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1208 (11th Cir. 2007) ("Equal protection of the laws in the 'class of one' context requires no more than that [Plaintiff] be secure[d] against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.").

Federal equal protection principles also "protect against invidious discrimination in legislation that, either by the language of [its] enactment or in [its] operation, create[s] classifications of individuals." *Estate of McCall v. U.S.*, 663 F. Supp. 2d 1276, 1302-03 (N.D. Fla. 2009) (quotation and citation omitted), *aff'd in part, question certified sub nom. Estate of McCall ex rel. McCall v. U.S.*, 642 F.3d 944 (11th Cir. 2011); *e.g. Levy v. La.,* 391 U.S. 68, 71 (1968) (explaining that the equal protection clause prohibits classifications in legislation that are based on invidious discrimination against a protected class"). If, as here, plaintiffs challenge a law that does not involve a suspect classification or a fundamental right, then the plaintiffs must establish that the statutory classification is arbitrary and unreasonable. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."); *e.g.*, *Estate of McCall*, 663 F. Supp. 2d at 1302-03, *aff'd in part, question certified sub nom.*, 642 F.3d 944. So long as there is a rational basis for the challenged law, it cannot

be considered arbitrary or unreasonable. *Grant v. Seminole Cty., Fla.*, 817 F.2d 731, 736 (11th Cir.1987) (per curiam) (quotation marks and citation omitted).[10]

Courts may apply the "rational basis test" even on a Rule 12(b)(6) motion where defendants seek dismissal of the plaintiffs' challenges to a code or zoning regulation that "neither targets a protected class nor implicates fundamental rights of the Fourteenth Amendment." *Serpentfoot v. Rome City Com'n*, 322 Fed. Appx. 801, 806 (11th Cir. 2009) (affirming dismissal of plaintiff's claims that building code was unconstitutionally "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare" because plaintiff provided no "factual basis" for such claims). This is particularly true where an equal protection claim is premised solely on a legislative act because "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns, Inc.*, 508 U.S. at 315 (instructing courts to give no significance to the absence of 'legislative facts' in the record explaining a distinction made in legislation). Further, "[w]hether the posited reason for [a] challenged distinction actually motivated [the legislative body] is constitutionally irrelevant" to an equal protection rational basis review of legislation. *Beach Commc'ns, Inc.*, 508 U.S. at 318; *e.g.*, *Executive 100, Inc. v. Martin Cty.*, 922 F.2d 1536, 1541 (11th Cir. 1991) ("Legislation is presumed

[10]For example, zoning ordinances are considered "permissible, constitutional uses of police power and are not reviewable by district courts unless they are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* (affirming dismissal at the close of plaintiff's evidence of claims challenging zoning ordinance on due process and equal protection grounds); *Nasser v. City of Homewood*, 671 F.2d 432, 440 (11th Cir. 1982) (noting that federal district courts are not intended to "function . . . as zoning appeal boards"); *e.g.*, *Bd. of Trs. v. Levy*, 656 So. 2d 1359, 1362-63 (Fla. 1st DCA 1995) (reversing hearing officer's finding that prohibition on dock building was arbitrary where the record showed the prohibition was "a choice based upon facts, logic and reason").

to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

Here, Plaintiffs assert an equal protection claim based solely on the passage of the Ordinance. (Doc. No. 26 ¶¶ 67, 79 (alleging that the City's enactment of the Ordinance "to the detriment of properties within" the Zone "with no factual, rational basis" is a violation of "Plaintiffs' right to equal protection").) This claim should be dismissed if the Court can discern a "plausible rationale" for passage of the Ordinance. *Beach Commc'ns, Inc.*, 508 U.S. at 315-18; *Serpentfoot*, 322 Fed. Appx. at 806 (11th Cir. 2009). The rational for the Ordinance is easily identified by reference to the Amended Complaint, which provides that the City's "stated purpose" for passage of the Ordinance was that "the building of docks is harmful to seagrass populations" in the Zone. (Doc. No. 26 ¶ 21.) The copy of the Ordinance provided as an exhibit to the Amended Complaint elaborates on the City's rational for passage of the Ordinance:

> WHEREAS, the City currently permits accessory piers and docks as conditional uses in the [Zone]; and
>
> WHEREAS, the City has studied the [Zone] and has found that seagrasses cover virtually all of the submerged lands located in the City from the Lighthouse Park west to approximately the west boundary of the right-of-way of Dixie Beach Boulevard at Woodring's Point; and
>
> WHEREAS, the Council find that the seagrasses are an invaluable natural resource which must be protected from environmental damage or loss; and
>
> WHEREAS, studies have shown that docks and their related structures currently located in this portion of the Bay Beach Zone have had a negative effect on the seagrass beds in which they are located, due to the length of the docks necessary to achieve sufficient water depth, due to the shadowing effect of the docks upon the seagrasses and due to the effects of propeller scarring which is prevalent in the area of most docks and lifts; and
>
> WHEREAS, the Council concludes that permission for further docks and related structures in this portion of the [Zone] will be deleterious to the environment and that

> elimination of such damage, in balance, outweighs the convenience to the adjacent property owners in having docks; and
>
> WHEREAS, there are no instances known where the prohibition of docks in this portion of the Bay Beach zone will result in a loss of reasonable access to any property . . . .

(Doc. No. 26-1 at 1-2.)

The Plaintiffs' allegation that the City's stated premises "for the dock prohibition . . . [are] secondary to, or a replacement for, the Ordinance's true purpose" is constitutionally irrelevant to Plaintiffs' equal protection claims. *Beach Commc'ns, Inc.*, 508 U.S. at 318 (reversing circuit court's finding that district court erred in rejecting statutory challenge to FCC regulation of satellite antenna owners based on a "common-ownership distinction" because plausible rationales for the distinction were at least "arguable"). Likewise, the City's rational for passage of the Ordinance is not rendered arbitrary or capricious because, fourteen years after enactment of the Ordinance, the City represented to regulatory authorities "that there were no seagrass populations on the submerged lands on which [the City] sought to build its concrete dock." (Doc. No. 26 ¶¶ 30, 40.) In short, the Plaintiffs have not pled facts permitting a reasonable inference that the City's environmental concerns related to protection of sea grass provided no arguable basis for the enactment of an unconditional ban on dock building in the Zone. Accordingly, Plaintiffs have failed to state a claim that the City's legislative act of enacting the Ordinance resulted in a violation of Plaintiffs' right to equal protection. *Beach Commc'ns, Inc.*, 508 U.S. at 315-18; *Serpentfoot*, 322 Fed. Appx. at 806 (11th Cir. 2009).

While challenges based solely on a "legislative act" are subject to dismissal under Rule 12(b)(6) based upon a Court's finding of any plausible rationale for the legislative action, the Eleventh Circuit has suggested a comparatively low pleading standard exists to state an equal protection claim based on disparate treatment by a non-legislative state actor. *Executive 100, Inc.*,

922 F.2d at 1541-43 (reversing district court's "dismissal of the plaintiffs' as applied equal protection claims). In *Executive 100, Inc.*, the plaintiffs alleged that the zoning board's denial of plaintiffs' request for commercial zoning was unconstitutionally different treatment than bestowed on "other similarly situated landowners along Interstate 95," and no "rational basis" existed for the disparate treatment. *Id.* With little discussion, the *Executive 100, Inc.* court held that such allegations sufficiently stated an as applied equal protection claim. *Id.* (reversing dismissal of equal protection claims but affirming dismissal of due process takings claim).

Primarily relying on cases decided after development of the factual record and in the context of a heightened pleading standard that has been rejected by the Eleventh Circuit, the City contends that the Court should dismiss Plaintiffs' as applied equal protection claims.[11] (Doc. No. 29 at 10-20.) Specifically, the City argues that Plaintiffs have insufficiently alleged the following necessary elements of such a claim: (1) that the Plaintiffs' respective properties are "similarly situated" to properties treated differently by the City; (2) that the City lacked any "conceivable rational basis" for the disparate treatment; and (3) that the City's alleged discriminatory acts were "intentional."

[11]Notably, the Supreme Court repeatedly has rejected efforts by the lower courts to require "'pleadings of heightened specificity in cases alleging municipal liability.'" *Randall v. Scott*, 610 F.3d 701, 706 (11th Cir. 2010) (quoting *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998)); *e.g., Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). Just two years ago, the Eleventh Circuit Court of Appeals recognized that its decisions (such as those relied upon by the City) imposing a "heightened pleading standard" in certain section 1983 actions were overruled by the Supreme Court's decision in *Iqbal*. *Randall*, 610 F.3d at 709-710 (holding that "the district court erred in applying a heightened pleading standard" because after *Iqbal* "it is clear that there is no 'heightened pleading standard' as it relates to . . . civil rights complaints." *Id.* at 710. Due to this recent change in the standard of review and the different procedural posture of cases decided on summary judgment and after trial, most of the cases cited by the City in support of its equal protection arguments are not persuasive.

(*Id.*) Plaintiffs counter that their Amended Complaint "comports with all three of the requirements listed by the City." (Doc. No. 31 at 16.)

With respect to the requirement that Plaintiffs identify a "similarly situated" property, Plaintiffs point to paragraphs 24-25 and 67-69 of their Amended Complaint where "the City's own dock," is identified as a similarly situated property. (Doc. No. 31 at 16-17; Doc. No. 26 ¶¶ 24-25, 67-69.) The five Paragraphs cited by Plaintiffs, provide the following allegations:

> 24. Plaintiffs' properties that are the subject of this action all are located within the [Zone] and each of the subject properties is owned in private to the mean high water line, entitling Plaintiffs to riparian rights as upland owners.
>
> 25. The Ordinance makes no specific finding as to the particular ecological conditions on the submerged lands adjacent to Plaintiffs' properties, and fails to identify whether any seagrass is located thereon.
>
> * * *
>
> 67. The Ordinance arbitrarily differentiates between properties in the Bay Beach Zone and *other properties*, without regard to the alleged presence of seagrass, and lacks any rational basis for this disparate treatment.
>
> 68. Defendant's [sic] has constructed, maintained, and operated its own dock structure within the Bay Beach Zone.
>
> 69. Defendant's actions in constructing, maintaining, and operating its own dock structure demonstrate that (a) a dock can exist within the Bay Beach Zone without harm to seagrass populations and/or (b) the Ordinance's putative rationale–that any dock within the Bay Beach Zone poses a dire threat to seagrass populations–masks the true bases for Defendant's enactment and enforcement of the Ordinance.

(Doc. No. 26 ¶¶ 24-25, 67-69 (emphasis added).) Paragraphs 24 and 25 plainly do not identify similarly situated properties, and the reference to "other properties" in Paragraph 67 is too vague and conclusory to satisfy the pleading standard set forth in *Twombly* and *Iqbal*. *Iqbal*, 556 U.S. at 679 (instructing courts that they need not presume as true those allegations that "are no more than conclusions"); *Griffin Indus., Inc.*, 496 F.3d at 1205-06 (rejecting "conclusory allegation that"

plaintiff "is similarly situated" to its competitor "in all relevant ways"). Thus, the only property that might satisfy the "similarly situated" requirement is the property identified in paragraphs 68 and 69 of the Amended Complaint where the City allegedly built its dock in 2006.

The City contends that the referenced "police dock is not similarly situated" to the Plaintiffs' properties because a dock intended "for private personal recreational use differs from constructing a dock for public safety use." (Doc. No. 29 at 16-17 (citing *Busse v. Lee Cty.*, 317 Fed. Appx. 968, 973 (11th Cir. 2009).) Importantly, the Amended Complaint is void of any allegation that the City's dock was a "police dock" or was built for a "public safety use." (Doc. No. 26.) Nor does the Amended Complaint include allegations that the Plaintiffs intend to put their respective proposed docks to a "private personal recreational use." (*Id.*) Thus, on the face of the Complaint, the Court cannot accept the City's argument that the City's dock cannot satisfy the "similarly situated" pleading requirement because it is a "police dock" that was constructed and maintained for public safety.

The City argues next that even if the Court finds that Plaintiffs have identified a similarly-situated property, their equal protection claims should be dismissed because a conceivable rational basis exists for the City's disparate treatment and the Amended Complaint does not allege "intentional" discrimination. (Doc. No. 29 at 19-21.) In response, Plaintiffs point to paragraphs 39-40, 57, and 67-69 of the Amended Complaint as providing the necessary allegations as to the City's alleged intent and the arbitrariness of its actions. (Doc. No. 16-18.) The pertinent paragraphs of the Amended Complaint provide:

> 39. On information and belief, the asserted premise for the dock prohibition–the protection of seagrass–is secondary to, or a replacement for, the Ordinance's true purpose, which is to serve the aesthetic preferences of certain interest

> groups and to artificially protect the property values of other property owners who are allowed to build docks.
>
> 40. On information and belief, [the City's] construction and maintenance of its own boat dock structure ignored the Ordinance's professed concern for the protection of seagrass, and is designed in part to serve the interests of certain public officials and favored parties.
>
> * * *
>
> 57. The Ordinance, on its face and as applied to Plaintiffs' properties, lacks a factual, rational basis for its blanket prohibition on dock construction.
>
> * * *
>
> 68. [The City] has constructed, maintained, and operated its own dock structure, within the Bay Beach Zone.
>
> 69. Defendant's actions in constructing, maintaining, and operating its own dock structure demonstrate that (a) a dock can exist within the Bay Beach Zone without harm to seagrass populations and/or (b) the Ordinance's putative rational–that any dock within the Bay Beach Zone poses a dire threat to seagrass populations–masks the true bases for [the City's] enactment and enforcement of the Ordinance.

(Doc. No. 26 ¶¶ 39, 40, 57, 68, 69.) Notably absent from the foregoing allegations and from the remainder of the Amended Complaint are any facts concerning the City's intent to discriminate against the Plaintiffs. Similarly, the Court finds the references to the "true bases" for the City's enforcement decisions to be too conclusory to support a claim that the City's enforcement decisions have been arbitrary and irrational. *Iqbal*, 556 U.S. at 679 (instructing courts that they need not presume as true those allegations that "are no more than conclusions"). The allegations of Plaintiffs' Amended Complaint fall short of even the very minimal pleading requirements applied in *Executive 100, Inc.*, 922 F.2d at 1541-43. Accordingly, the Court agrees that the Amended Complaint does not sufficiently allege that the City's acts of enforcing the Ordinance and failing to amend or repeal the ordinance resulted in any violation of the Plaintiffs' right to equal protection.

D. The State Law Claims

The City argues that if Plaintiffs' federal claims are dismissed, then the Court should decline to exercise jurisdiction over Plaintiffs' state law claims. (Doc. No. 29 at 24-25.) In their Response, Plaintiffs express agreement with the City that this Court should decline to exercise supplemental jurisdiction over their state law claims and suggest that the Court should "remand those claims to state court for adjudication" even if the Court considers Plaintiffs' federal claims. (Doc. No. 31 at 2, 18-19 ("Plaintiffs concur" with the City that the Court should "decline supplemental jurisdiction over Plaintiffs' state law claims.").) Plaintiffs add that the Court should "reserve jurisdiction over, and resolution of, the federal question[s] until adjudication of the state law issue in state court." (*Id.* at 19.)

"The decision to exercise supplemental jurisdiction over pendent state claims rests within the discretion of the district court." *Raney v. Allstate Ins. Co.*, 370 F.3d 1086, 1088-89 (11th Cir. 2004). If a district court dismisses all claims over which it has original jurisdiction pretrial, then the Eleventh Circuit encourages the district court to decline to "exercise supplemental jurisdiction over" remaining state law claims. *Busse*, 317 Fed. Appx. at 973-74. Although the Court has dismissed all of Plaintiffs' federal claims, it is premature to address whether to exercise supplemental jurisdiction over the state law claims, because Plaintiffs may yet file a second amended complaint asserting federal claims within the jurisdiction of this Court. Accordingly, the Court will not resolve the parties' differing requests for remand of the state law claims until the issue is ripe and properly presented to the Court.[12]

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[12] If Plaintiffs file a second amended complaint and choose to renew their request that the Court remand the state law claims and reserve jurisdiction over any asserted federal claims, the (continued...)

CONCLUSION

Based on the foregoing, it is **ORDERED** and **ADJUDGED** as follows:

(1) The Motion to Dismiss Plaintiffs' Federal Claims With Prejudice and to Decline Jurisdiction Over Plaintiffs' State Claims by the Defendant City of Sanibel (Doc. No. 29, filed April 4, 2012) is **GRANTED in Part and DENIED in Part**;

(2) The Defendant's request to dismiss all of Plaintiffs' federal claims as time-barred is **DENIED with Leave to Reassert**;

(3) The Defendant's requests to dismiss Plaintiffs' remaining claims alleging the City's violations of Plaintiffs' federal rights to equal protection and substantive due process are **GRANTED**;

(4) The federal claims alleged in Counts II, III and IV are **DISMISSED Without Prejudice**;

(5) It is further **ORDERED** and **ADJUDGED** that the Plaintiffs are granted leave to file a second amended complaint within **fourteen (14) days** from the date of this Order. If Plaintiffs fail to timely submit a second amended complaint or if they allege only state law claims in their second amended complaint, the Court will remand this action to state court.

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[12](...continued)
Plaintiffs should do so by way of a formal motion with citation to appropriate controlling authority. The Court will not remand this action to state court in a piecemeal fashion absent a showing that such procedure will further "judicial economy, convenience, fairness, and comity." *Edwards v. Okaloosa Cty.*, 5 F.3d 1431, 1433 (11th Cir. 1993) (holding that the district court erred in dismissing state law claims absent analysis of the factors set forth in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966)).

DONE and **ORDERED** in Chambers in Orlando, Florida on August 21___, 2012.

PATRICIA C. FAWSETT, JUDGE
UNITED STATES DISTRICT COURT

Copies furnished to:

Counsel of Record