

# Sheriff



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September 3, 2011

## **JUDGE DISMISSES FEDERAL LAWSUIT**

A federal judge in Pensacola has dismissed a lawsuit filed by a group of Destin beachfront condo owners against the City of Destin and the Okaloosa County Sheriff's Office.

In a ruling handed down September 2<sup>nd</sup>, U-S District Court Judge M. Casey Rodgers says the plaintiffs failed to prove claims their rights to due process and equal protection under the law were violated in connection to enforcement of criminal trespass laws.

The Homeowners Association at Crystal Dunes Condominium, 2900 Scenic Highway 98, filed the suit in May 2010 against the City of Destin, Mayor Sam Seever, then-City Manager Greg Kisela, and the Okaloosa County Sheriff's Office.

A copy of Judge Rodgers' ruling is attached.

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"The Okaloosa County Sheriff's Office provides equal access and equal opportunity in employment and services and does not discriminate"

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA  
PENSACOLA DIVISION**

**CRYSTAL DUNES OWNERS'  
ASSOCIATION, INC.; WILLIAM  
C. BRAAS, III; ALBERTO J.  
DE JONGH; RICHARD H. POWELL;  
and JANICE MAZUR,**

**Plaintiffs,**

**v.**

**Case No.: 3:10cv157/MCR/EMT**

**CITY OF DESTIN, FLORIDA;  
GREGORY KISELA, CITY MANAGER,  
CITY OF DESTIN, FLORIDA; SARAH  
“SAM” SEEVERS, MAYOR, CITY OF  
DESTIN, FLORIDA; and OKALOOSA  
COUNTY SHERIFF’S OFFICE,**

**Defendants.**

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**ORDER**

The plaintiffs, the Crystal Dunes Owners’ Association (“Association”) and individual condominium owners, filed this action under 42 U.S.C. § 1983, alleging that the defendants, the City of Destin; its manager, Gregory Kisela; its mayor, Sarah “Sam” Seevers” (collectively, the “Destin Defendants”);<sup>1</sup> and the Okaloosa County Sheriff (“Sheriff”), violated their due process and equal protection rights by failing to provide them notice and an opportunity to be heard before declaring their property subject to “customary

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<sup>1</sup> Municipalities may be liable under § 1983 when the injury resulted from implementation or execution of an official municipal policy or custom. *Lewis v. City of West Palm Beach, Fla.*, 561 F.3d 1288, 1293 (11th Cir. 2009). Moreover, actions against government officials in their official capacities are deemed suits against the entities they represent. *See Ludaway v. City of Jacksonville, Fla.*, 245 Fed. Appx. 949, 951 (11th Cir. 2007); *see also United States v. Futrell*, 209 F.3d 1286, 1289 (11th Cir. 2000) (noting that while unpublished opinions are not considered binding, they may be considered as persuasive authority).

use”<sup>2</sup> and through dissimilar treatment with respect to enforcement of Florida’s criminal trespass laws.<sup>3</sup> Pending before the court are two motions to dismiss – one filed by the Sheriff (doc. 23) and the other filed by the Destin Defendants (doc. 25) – to which the plaintiffs have responded in opposition (docs. 34, 35).<sup>4</sup> Having considered the motions and the plaintiffs’ responses, the court finds that the defendants’ motions should be granted.

## **BACKGROUND**<sup>5</sup>

This action stems from a dispute regarding the ownership and use of a portion of beachfront property stretching landward from the Erosion Control Line, which was established by the State of Florida for purposes of distinguishing between publicly and privately owned property, to the dry sand area in front of the Crystal Dunes condominium. The plaintiffs claim that the defendants have denied them procedural due process in violation of the Fourteenth Amendment to the United States Constitution by unilaterally declaring the property subject to “customary use” by the public – and thus not subject to enforcement of criminal trespass laws – without providing them notice or an opportunity to be heard. The plaintiffs also claim that the defendants have violated their right to equal protection under the law by refusing to enforce criminal trespass laws against members of

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<sup>2</sup> According to the Florida Supreme Court, “[i]f the recreational use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute, such use, as a matter of custom, should not be interfered with by the owner,” although “the owner may use any of his property which is consistent with such public use and not calculated to interfere with the exercise of the right of the public to enjoy the dry sand area as a recreational adjunct of the wet sand or foreshore area.” *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974).

<sup>3</sup> Under Fla. Stat. § 810.09(1)(a)(1), “[a] person who, without being authorized, licensed, or invited, willfully enters upon or remains in any property other than a structure or conveyance . . . [a]s to which notice against entering or remaining is given, either by actual communication to the offender or by posting, fencing, or cultivation . . . commits the offense of trespass on property other than a structure or conveyance.”

<sup>4</sup> The court previously found that the plaintiffs’ complaint raised standing concerns and directed the plaintiffs to submit a memorandum addressing the standing issue (doc. 60). After reviewing the plaintiffs’ memorandum, as well as the responsive memoranda submitted by the defendants, the court found that the plaintiffs alleged facts sufficient to demonstrate that they have standing to assert the causes of action alleged in their complaint (doc. 103).

<sup>5</sup> Because this matter is before the court on the defendants’ motions to dismiss, the facts set forth in the plaintiffs’ complaint are taken as true and the court considers only the pleadings and the exhibits attached thereto. See *Burnett v. City of Jacksonville, FL*, 376 Fed. Appx. 905, 906 (11th Cir. 2010).

the public encroaching upon their property while applying such laws against members of the public encroaching upon non-beachfront property.<sup>6</sup>

The Sheriff argues that the plaintiffs have failed to state a claim for a violation of their procedural due process rights because they have no right to enforcement of the criminal trespass laws and, even if they did, their due process claim nevertheless fails because they have not alleged an actionable injury. The Sheriff additionally argues that the plaintiffs' due process claim is barred because there are adequate remedies under state law to address any grievances they may have. According to the Sheriff, the plaintiffs also have failed to state an equal protection claim because they have not alleged different, more favorable treatment of similarly situated individuals or that the defendants' actions were motivated by an improper purpose and, further, because enforcement of the trespass laws is a matter solely within law enforcement's discretion and thus cannot serve as the basis of a constitutional claim. The Sheriff further avers that although the plaintiffs have characterized their claims as due process and equal protection violations, they actually involve the taking or inverse condemnation of property, requiring the plaintiffs to resort to state law remedies before bringing any action in this court.<sup>7</sup> The Destin Defendants likewise claim that the plaintiffs have failed to state a claim under the due process clause, arguing that this is a property dispute and that the plaintiffs' claims, therefore, arise solely under state law, divesting this court of jurisdiction. Like the Sheriff, the Destin Defendants also argue that the plaintiffs have no right to enforcement of the trespass laws and that, because adequate remedies exist under state law, they are precluded from asserting a due

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<sup>6</sup> Specifically, the plaintiffs complain that the defendants have an informal policy of "selective non-enforcement" of Florida's criminal trespass law on the stretch of property extending 20 feet landward of the line between the wet and dry sand, allowing the public to intrude on privately-owned dry sand ("20-foot policy"). The plaintiffs, however, do not dispute that the public has a right to freely traverse the wet sand area between the high and low water marks. Moreover, although the plaintiffs maintain, at least at times, that their due process claim is based on the defendants' alleged declaration of "customary use" with respect to their property, it is clear that the gravamen of their complaint is the adoption and implementation of the "20-foot policy."

<sup>7</sup> In order for a takings claim to be ripe, the landowner must first obtain a final decision regarding application of the regulation to his or her property by seeking a variance from the regulation and exhaust state procedures for obtaining just compensation. See *Eide v. Sarasota Cnty.*, 908 F.2d 716, 720-21 (11th Cir. 1990).

process claim. Finally, the Destin Defendants urge this court to abstain from deciding issues pertaining to the “use of local natural assets,” which they characterize as a matter of uniquely state concern. Regarding the plaintiffs’ equal protection claim, the Destin Defendants argue, similar to the Sheriff, that the plaintiffs have failed to allege that the trespass laws were enforced on behalf of other similarly situated individuals and that, even if they were, the defendants had a rational basis for their enforcement or lack thereof given the inherent difficulty in determining beachfront property lines. For the reasons set forth below, the court agrees with the defendants and finds that the plaintiffs have failed to state a claim upon which relief can be granted and that their complaint should be dismissed.

## **DISCUSSION**

### **A. Standard of Review**

A motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure seeks dismissal of the complaint for failure to state a claim on which relief can be granted. While Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief,” it “demands more than an unadorned, the defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, --- U.S. ---, 129 S. Ct. 1937, 1949 (2009). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (quoting *Twombly*, 550 U.S. at 557). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (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.* This “plausibility standard” requires a showing of “more than a sheer possibility” that the defendant is liable on the claim. *Id.* The allegations of the complaint must set forth enough facts “to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555. In other words, the complaint must contain sufficient factual matter, accepted as true, to permit a court “to draw the reasonable inference that the

defendant is liable for the misconduct alleged.” *Iqbal*, 129 S. Ct. at 1949. As noted above, when considering a motion to dismiss, “the court limits its consideration to the pleadings and exhibits attached thereto” and incorporated into the complaint by reference; see *Thaeter v. Palm Beach County Sheriff’s Office*, 449 F.3d 1342, 1352 n.7 (11th Cir. 2006) (internal marks omitted); the court also accepts all factual allegations of the complaint as true and construes them in the light most favorable to the plaintiff, see *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008). However, the court need not credit “[t]hreadbare recitals” of the legal elements of a claim unsupported by plausible factual allegations because “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Iqbal*, 129 S. Ct. at 1949.

B. The Plaintiffs’ Claims

1. Procedural Due Process

Under the Due Process Clause of the Fourteenth Amendment, no State shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV, § 1. Although the Fourteenth Amendment does not confer any rights, it protects both procedural and substantive rights otherwise conferred. *McKinney v. Pate*, 20 F.3d 1550, 1555 (11th Cir. 1994). Unlike substantive due process, which protects against “government interference with certain fundamental rights and liberty interests,” see *Williams v. Attorney General of Ala.*, 378 F.3d 1232, 1235 (11th Cir. 2004), the guarantee of procedural due process is ““meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.”” *Arrington v. Helms*, 438 F.3d 1336, 1347 (11th Cir. 2006) (quoting *Carey v. Phipus*, 435 U.S. 247, 259 (1978)). In order to state a § 1983 procedural due process claim, a plaintiff must allege three elements: “(1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process.” *Id.* (internal marks omitted). In this case, the plaintiffs have failed to allege the deprivation of a constitutionally-protected liberty or property interest.

In an effort to do so, the plaintiffs point to the defendants' failure to enforce the criminal trespass laws, which they contend violates their right to exclude others.<sup>8</sup> Although the plaintiffs have a right to exclude others from their property, see, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (noting that the "right to exclude" is "universally held to be a fundamental element of the property right"), they have not alleged any action of the defendants that resulted in a deprivation of that right.<sup>9</sup> To be sure, the plaintiffs have no right to enforcement of the criminal trespass laws. As the Supreme Court has explained, "[a] state-law created benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations." *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 768 (2005).<sup>10</sup> That is because "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 195 (1989);<sup>11</sup> see also *Town of Castle Rock*, 545 U.S. at 755. In other words, while the Due Process Clause "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' . . . its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." *DeShaney*, 489 U.S. at 195.

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<sup>8</sup> According to the plaintiffs, the right to exclude stems from Florida's trespass laws.

<sup>9</sup> For that matter, they have not specified the manner in which the defendants' failure to enforce the trespass laws violates their right to exclude.

<sup>10</sup> In *Town of Castle Rock*, the plaintiff brought suit against the municipality and several of its police officers based on the officers' failure to enforce a domestic violence restraining order against her husband, who abducted and then murdered their three children. The Court held that the plaintiff had no property interest in enforcement of the terms of her restraining order and thus failed to state a substantive or procedural due process claim. *Id.*

<sup>11</sup> In *DeShaney*, the plaintiff filed suit on behalf of her minor child against the county department of social services and several of its social workers alleging that they violated the child's due process rights by failing to protect him from abuse by his father, which resulted in severe brain damage to and profound retardation in the child. The Court held that the child had no right to protective services and thus could not maintain a claim for a due process violation. *Id.* at 197. Although *DeShaney* involved a substantive due process claim, the Court's holding regarding the lack of a right to protective services by the state applies in the instant case.

“To have a property interest in a benefit, a person clearly must have more than an abstract need or desire’ and ‘more than an unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Town of Castle Rock*, 545 U.S. at 755 (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). While states may provide their citizens with benefits, the mere provision of a benefit does not bestow upon citizens the right to receive it; indeed, benefits are not protected entitlements if government officials may grant or deny them in their discretion. *Town of Castle Rock*, 545 U.S. at 756. In Florida, law enforcement officials have discretion in determining whether to enforce the laws, particularly where, as here, the statute contains no mandatory enforcement language.<sup>12</sup> See *Everton v. Willard*, 468 So. 2d 936, 938-39 (Fla. 1985);<sup>13</sup> see also Fla. Stat. § 810.09. As a result, the plaintiffs plainly have no right to enforcement of Florida’s criminal trespass laws and thus were not entitled to notice or an opportunity to be heard before the defendants decided not to enforce them against those trespassing on a portion of their property. See *DeShaney*, 489 U.S. at 196-97; see also *Arrington v. Helms*, 438 F.3d 1336, 1347 (11th Cir. 2006) (setting forth the elements of a procedural due process claim, which include the “deprivation of a constitutionally-protected liberty or property interest”); *Dedman v. City of Harrodsburg*, No. 5:09-cv-256-KSF, 2010 WL 1141261, at \*3 (E.D. Ky. March 22, 2010) (“Plaintiffs’ claims of failure to enforce state laws and city

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<sup>12</sup> According to the Supreme Court, “[a] well established tradition of police discretion has long coexisted[, even] with apparently mandatory arrest statutes.” *Town of Castle Rock*, 545 U.S. at 760. “In each and every state there are long-standing statutes that, by their terms, seem to preclude nonenforcement by the police. . . . However, for a number of reasons, including their legislative history, insufficient resources, and sheer physical impossibility, it has been recognized that such statutes cannot be interpreted literally. . . . [T]hey clearly do not mean that a police officer may not lawfully decline to . . . make an arrest. As to third parties in these states, the full-enforcement statutes simply have no effect, and their significance is further diminished.” *Id.* at 760-61 (quoting 1 *ABA Standards for Criminal Justice* 1-4.5, commentary, pp. 1-124 to 1-125 (2d ed. 1980)).

<sup>13</sup> In *Everton*, the Florida Supreme Court recognized that “[t]here has never been a common law duty of care owed to an individual with respect to the discretionary judgmental power granted a police officer to make an arrest and to enforce the law.” *Id.* at 938. As the court noted, “[t]his discretionary power is considered basic to the police power function of governmental entities and is recognized as critical to a law enforcement officer’s ability to carry out his duties. *Id.* (citing *ABA Standards for Criminal Justice* 1-4.1 (2d ed. 1980); President’s Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, pp. 103-06 (1967)).

ordinances do not state a § 1983 claim unless they constitute violations of federal constitutional rights.”). Even if the plaintiffs had a right to enforcement of the criminal trespass laws, the plaintiffs have not alleged any manner in which the defendants’ failure to enforce the laws has deprived them of their right to exclude others from their property – indeed, it appears that the plaintiffs have been free at all times to exclude individuals from their property through any lawful means they choose. Because the plaintiffs have failed to allege the deprivation of a constitutional right, their procedural due process claim must be dismissed.

## 2. Equal Protection

To state a claim under the Equal Protection Clause of the Fourteenth Amendment, the plaintiffs must allege that (1) they were treated differently from similarly situated persons and (2) the defendants unequally applied the laws for the purpose of discriminating against them. *GJR Invs., Inc. v. County of Escambia, Fla.*, 132 F.3d 1359, 1367 (11th Cir. 1998) (citing *Snowden v. Hughes*, 321 U.S. 1, 6 (1944); *Strickland v. Alderman*, 74 F.3d 260, 264 & n.4 (11th Cir. 1996)). The Supreme Court has recognized a particular species of equal protection claim in instances in which the plaintiff is not a member of a protected class. See *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (*per curiam*). That species, the “class of one” claim, “involves a plaintiff who ‘alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment,’” which is what the plaintiffs have alleged in this case.<sup>14</sup> *Griffin Indus. v. Irvin*, 496 F.3d 1189, 1202 (11th Cir. 2007) (quoting *Olech*, 528 U.S. at 564); see *Alford v. Consolidated Gov’t of Columbus, Ga.*, No. 10-15236, 2011 WL 3684528, at \*3 (11th Cir. Aug. 23, 2011) (noting that, “[i]n a “class of one” equal protection claim, . . . a plaintiff does not allege discrimination against a protected class or on account of membership in a particular group, but rather, asserts that he has been treated differently from others similarly situated for arbitrary or irrational reasons”). It is

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<sup>14</sup> Although the Supreme Court has recognized a “class of one” equal protection claim, it has held that such claims do not exist in the public employment context. See *Engquist v. Or. Dep’t of Agric.*, 533 U.S. 591, 607 (2008).

axiomatic that the similarly situated person and the plaintiff must be “*prima facie* identical in all relevant respects.”<sup>15</sup> *Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1314 (11th Cir. 2006); see also *Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1265 (11th Cir. 2010). “[W]ith respect to a class-of-one claim, [the court] is obliged to apply the “similarly situated” requirement with rigor.” *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1273 (11th Cir. 2008) (quoting *Griffin Indus.*, 496 F.3d at 1207). The plaintiffs in this case have failed to state a cognizable equal protection claim because they have not identified a comparator similarly situated in all relevant respects. In other words, the plaintiffs have not identified a single instance in which law enforcement officials have enforced the trespass laws against members of the public encroaching upon other individuals’ beachfront property.<sup>16</sup> Rather, the plaintiffs’ claims are based on the defendants’ alleged failure to enforce the trespass laws against those encroaching upon non-beachfront property. Non-beachfront property owners, however, are not similarly situated to the plaintiffs “in all relevant respects.” *Campbell*, 434 F.3d at 1314. Because “[d]ifferent treatment of dissimilarly situated persons does not violate the equal protection clause,” see *Griffin Indus.*, 496 F.3d at 1207 (quoting *Strickland*, 830 F.2d at 1109), the plaintiffs have failed to state a claim for a violation of their equal protection rights. See *Douglas Asphalt*, 541 F.3d at 1275 (holding that, in order to maintain a “class of one” claim, the plaintiff must identify an instance in

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<sup>15</sup> As the Eleventh Circuit has explained, “[t]he reason that there is a “similarly situated” requirement in the first place is that at their heart, equal protection claims, even “class of one” claims, are basically claims of discrimination.” *Griffin Indus.*, 496 F.3d at 1207 (quoting *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1002 (7th Cir. 2004)). “Different treatment of dissimilarly situated persons does not violate the equal protection clause.” *Id.* (quoting *E&T Realty v. Strickland*, 830 F.2d 1107, 1109 (11th Cir. 1987)).

<sup>16</sup> Even if the plaintiffs had alleged that law enforcement officials refused to enforce trespass laws in response to such complaints, “[t]he unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.” *Snowden*, 321 U.S. at 8. “This may appear on the face of the action taken with respect to a particular class or person or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself.” *Id.* (internal citations omitted). “But a discriminatory purpose is not presumed; there must be a showing of ‘clear and intentional discrimination.’” *Id.* (internal citations omitted). In this case, the plaintiffs’ own allegations undermine any claim of intentional discrimination. Indeed, the plaintiffs claim that the defendants implemented the “20-foot policy” to promote tourism, not for the purpose of discriminating against them.

which a similarly situated comparator was treated differently); *Griffin Indus.*, 496 F.3d at 1204, 1207 (holding that plaintiffs may not rely on broad generalities in identifying a similarly situated comparator, but rather the “similarly situated” requirement must be applied “with rigor”) (citations omitted); *GJR Invs.*, 132 F.3d at 1367 (holding that, to state a claim under the Equal Protection Clause, a plaintiff must allege that they were treated differently from similarly situated persons). Like their procedural due process claim, therefore, the plaintiffs’ equal protection claim must be dismissed. See *Campbell*, 434 F.3d at 1314; see also *Griffin Indus.*, 496 F.3d at 1204 (holding that plaintiff failed to allege that defendant violated equal protection clause where plaintiff’s complaint showed that it was not similarly situated to its purported comparator and that there was a rational basis for the challenged action); *Watson Constr. Co. v. City of Gainesville*, 244 Fed. Appx. 274, 276 (11th Cir. 2007) (upholding dismissal of equal protection claim because plaintiff failed to identify a similarly situated comparator); *Citizens Accord, Inc. v. Town of Rochester*, No. 98-CV-0715, 2000 WL 504132, at \*26 (N.D.N.Y. April 18, 2000) (dismissing plaintiff’s equal protection claim stemming from defendants’ failure to enforce noise ordinance against owner of racetrack because evidence proved that defendants’ actions impacted all residents who lived near racetrack and plaintiff “failed to point to any evidence from which a fair-minded jury could reasonably conclude that ‘the Municipal Defendants would have enforced the [Town] Code at the request of another resident whose situation was similar to [CAI or its members]”).<sup>17</sup>

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<sup>17</sup> The court would note that, although the plaintiffs did not plead a takings claim, the facts they assert, as well as the injury they allege and the relief they seek, place their procedural due process and equal protection claims at least “within the takings realm.” *Adrian v. Town of Yorktown*, No. 09 Civ. 6604 (MDF), 2007 WL 1467417, at \*6 (S.D.N.Y. May 16, 2007). Indeed, it appears to the court that, regardless of the manner in which the plaintiffs couch their claims, their complaint, in essence, is that the defendants’ failure to enforce the criminal trespass laws has deprived them of the use and enjoyment of their property. As set forth above, in order to bring a takings claim, the plaintiffs were required to plead the “20-foot policy” as a final decision applicable to their property and/or that they exhausted all available state procedures for just compensation, neither of which they pled. See *Eide*, 908 F.2d at 720-21.

**CONCLUSION**

For the foregoing reasons, the defendants' motions to dismiss (docs. 104, 105) are **GRANTED** and the plaintiffs' complaint (doc. 1) is dismissed.

**DONE** and **ORDERED** this 2nd day of September, 2011.

*s/ M. Casey Rodgers*

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**M. CASEY RODGERS**  
**CHIEF UNITED STATES DISTRICT JUDGE**