

owner's bundle of rights in the aggregate, and "the destruction of one strand of the bundle is not a taking." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 327 (2002) (quoting *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (internal quotations omitted)).

Here, Plaintiff alleges a taking based on the denial of a SUP to allow for parking on the Kenmore Lot to aid in the use and development of the adjacent 3336 Wilson Boulevard parcel. Plaintiff's claim fails because it improperly relies on the SUP as the subject of the taking. The law requires that the SUP only be one aspect of the takings inquiry as it relates to the "parcel as a whole," and the SUP is insufficient to support a claim under these facts. Further, Plaintiff cites to inapposite case law from the Supreme Court of Virginia involving declaratory relief, and thus fails to show that Virginia law allows for a different outcome on the takings claim.

A claim under the Equal Protection Clause of the Fourteenth Amendment requires: (1) that the plaintiff show he has been treated differently from others with whom he is similarly situated as a result of an intentional or purposeful government decision; and (2) that the Court finds the disparity in treatment cannot be justified under the requisite level of scrutiny. See *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001). Where, as here, Plaintiff does not allege membership in a protected class, the requisite level of scrutiny is rational basis, and Plaintiff must show "that no rational relationship exists between government action and a legitimate government purpose." *Sansotta v. Town of Nags Head*, 724 F.3d 533, 543 (4th Cir. 2013).

The instant allegations against Defendants are insufficient to defeat rational basis scrutiny.¹ Plaintiff claims that Defendants' conduct is driven by animus, but has not alleged facts that outweigh inferences of reasonable government purposes for the alleged conduct.

¹ The Court declines to limit the basis for the Equal Protection claim to the harm associated with 3336 Wilson Boulevard, and thus will consider the claim as properly within the applicable statute of limitations.

Further, Plaintiff does not supply the Court with any information related to any individual or individuals similarly situated to Plaintiff as a basis for his class of one claim. For these reasons, the Equal Protection claim fails under Rule 12(b)(6).

In Virginia, “Counties, as political subdivisions of the Commonwealth, enjoy the same tort immunity as does the sovereign.” *Seabolt v. County of Albemarle*, 724 S.E.2d 715, 716 (Va. 2012). Individuals may face tort liability in some related circumstances, but official immunity is available to county officers and employees from suits arising “from the exercise or failure to exercise their discretionary or governmental authority.” Va. Code § 15.2-1405. Courts decide if official immunity is available using a four-factor test, referred to as the *James* factors: (1) the nature of the function the employee performs; (2) the extent of the County’s interest and involvement in the function; (3) the degree of control and direction exercised over the employee; and (4) whether the act involves the exercise of judgment and discretion. *James v. Jane*, 282 S.E.2d 864, 869 (Va. 1980). Individual immunity does “not apply to conduct constituting intentional or willful misconduct or gross negligence.” Va. Code § 15.2-1405.


Both sovereign and official immunity apply to Plaintiffs’ negligence claims against Defendants, and the claims are dismissed for that reason. The County itself faces no liability for the SUP denial, and the *James* factors—specifically the first and fourth—strongly weigh in favor of official immunity for decisions regarding this non-standard permitting issue. A gross negligence claim may be viable. But it is insufficient, as pled, without more to determine the context of individual decisions related to Plaintiff.

For the above reasons, Plaintiffs’ Complaint is hereby **DISMISSED WITHOUT PREJUDICE**. Plaintiff shall have 30 days from the entry of this order to amend the Complaint, being mindful of the ability to allege these claims fully and in good faith. It is doubtful that any

takings claim based on the SUP or any ordinary negligence claim based on the denial of the SUP will survive on the facts before the Court.

It is **SO ORDERED**.

October 21, 2019
Alexandria, Virginia



Liam O'Grady
United States District Judge