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## INTRODUCTION

The Defendants' opposition papers and Motion to Dismiss, fail for the most part to address the issues presented to the Court by this lawsuit and by the Albanian Associated Fund's present motion for preliminary injunction. The Defendants' first misconception is that the Plaintiffs challenge the denial of a land use permit. This is not the case. The Fund's Complaint raises two issues: First, it seeks to prevent the taking of its property. Second, it seeks to have its permit application reviewed in a manner that is not so discriminatory and burdensome that it violates federal statutory and constitutional law. Moreover, the only issue presented in the Fund's current Motion is whether this Court should prevent the Defendants from taking its property pending resolution of its claims on the merits. Understood in this light, the bulk of Defendants' arguments (including their ripeness argument) are wholly irrelevant. The Defendants provide no argument whatsoever that it will be harmed by maintaining the status quo —and they cannot, as the Town simply wants to preserve the Fund's property as open space—, which would be the effect of maintaining the status quo and leaving the property undeveloped and under the ownership of the Fund.

Furthermore, although irrelevant for the most part to issues presented by the Fund's Motion, it must be pointed out that the Defendants'

description of the facts is, to a great extent, unsupported by any evidence and is in fact highly misleading and even inaccurate. Their radical and unsupported legal argument concerning their right to take property fares no better: They possess no “constitutional right” to take the Fund’s property. The Fifth Amendment speaks only to an individual’s right to not have property taken without just compensation or for private use; nowhere does it provide authority for local municipalities to take property. These tactics exemplify the history of its illegal treatment of the Fund. Finally, they can hardly justify—certainly at this stage—complete dismissal of the Fund’s Complaint.

### STANDARD OF REVIEW

In deciding a motion to dismiss under Fed. R. Civ. Pro. 12(b)(6) all allegations in the Complaint must be taken as true and viewed in the light most favorable to the Plaintiff. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Trump Hotels & Casino Resorts, Inc., v. Mirage Resorts Inc.*, 140 F. d 478, 483 (3d Cir. 1998); *Robb v. Philadelphia*, 733 F.2d 286, 290 (3d Cir. 1984). In evaluating a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court may consider only the Complaint, exhibits attached to the complaint, matters of public record, and undisputedly authentic documents if the Plaintiff’s claims are based upon those documents. *See Pension Benefit*

*Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993). If, after viewing the allegations in the Complaint in the light most favorable to the Plaintiff, it appears beyond doubt that no relief could be granted “under any set of facts which could prove consistent with the allegations,” a court shall dismiss a Complaint for failure to state a claim. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Zynn v. O'Donnell*, 688 F.2d 940, 941 (3d Cir. 1982).

Furthermore in reviewing both the Motion to Dismiss and the Motion for a Preliminary Injunction RLUIPA must “be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [the statute] and the Constitution.” 42 U.S.C. 2000cc-3(g).

## **ARGUMENT**

### **I. THE ALBANIAN ASSOCIATED FUND’S CLAIMS ARE RIPE.**

The Defendants’ argument that the Fund’s claims under RLUIPA and federal and state constitutions are not ripe betrays its fundamental misunderstanding of this proceeding. Defendants state that the Fund is “claiming constitutional violations resulting from the denial of a building permit.” Def. Mem. at 21. This is not true. Nowhere in the Fund’s Complaint does it allege that there was a denial of a building permit. The

request for relief does not seek an order issuing a building permit. The Court should not be misled.

Rather, the Complaint seeks an order preventing Defendants from taking the Fund's property—an action which the Township has passed laws to accomplish, stated unequivocally that it is doing, has already taken action required under state law to do, and explicitly admits to doing in papers filed with this Court. Furthermore, the Fund asserts that it has been suffering from discriminatory and burdensome treatment in the processing (not denial) of its application. Knowing that it cannot deny the Fund's application—it is undisputed that the Fund meets the objective criteria necessary for a conditional use permit—the Defendants have unreasonably stalled the application for three and a half years and have imposed discriminatory conditions on the Fund, treating it worse than other similarly situated applicants. Both of these claims are ripe for adjudication.

A. The Albanian Associated Fund's Claim that the Defendants' Taking Violates Constitutional and Statutory Proscriptions is Ripe.

Incredibly, the Defendants admit that they “intend[] on exercising its lawful authority to acquire Property,” Def. Mem. at 27, and then argue that the Fund's claim that such exercise is unconstitutional is unripe for challenge. Their entire argument that the challenge to the taking (as opposed

to their imaginary challenge to a permit denial, on which they spend most of their discussion) is limited to one unsupported and conclusory sentence:

Plaintiffs' request for relief by way of an Order prohibiting the Township from proceeding with the condemnation action is also not ripe for review as no condemnation action has been filed.

Def. Mem. at 24. No authority is cited for the radical proposition that this Court does not possess the authority to enjoin an imminent illegal and unconstitutional taking.<sup>1</sup> Rather, the appropriate standard is whether there is a "real and immediate threat of enforcement":

Where the plaintiff seeks a declaratory judgment with respect to the constitutionality of a state statute, even where the attack is on First Amendment grounds, there must be a "real and immediate" threat of enforcement against the plaintiff. *Hardwick v. Bowers*, 760 F.2d 1202, 1206-07 (11th Cir. 1985), *rev'd on other grounds*, 478 U.S. 186 [106 S. Ct. 2841, 92 L. Ed. 2d 140] (1986) . . . .

Here the current record reflects not only the absence of a threat of enforcement but an express assurance that there will be no enforcement against TSA of the waived provisions of the statute . . . . In effect, the statute is enforceable by the

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<sup>1</sup> It is black-letter law that exhaustion of all state remedies (as opposed to the Article III requirement of finality/ripeness), including state judicial procedures, is not necessary prior to commencing a Section 1983 action. *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496 (1982); *Steffel v. Thompson*, 415 U.S. 452 (1974); *McNeese v. Board of Education of Community Unit School District 187*, 373 U.S. 668 (1963); *Hochman v. Board of Education of City of Newark*, 534 F.2d 1094 (3d Cir. 1976). This is particularly the case "where First Amendment rights are involved." *Trinity Resources, Inc. v. Tp. of Delanco*, 842 F. Supp. 782, 794 (D.N.J. 1994). Any suggestion by the Defendants to the contrary must be rejected.

defendants only prospectively, and the defendants' actions have, at a minimum, bestowed a grace period on TSA . . . .

*Salvation Army v. Dep't of Community Affairs of State of New Jersey*, 919 F.2d 183, 192-93 (3d Cir. 1990). In direct contrast to *Salvation Army*, the Defendants admit here that there is a “real and immediate threat of enforcement” of their final decision to take the Fund’s property. *See also Neiderhiser v. Borough of Berwick*, 840 F.2d 213, 216-17 (3d Cir. 1988) (holding that First Amendment claim was ripe where there is “sufficient justification for fearing enforcement of the ordinance against it such that a ripe controversy exists allowing [party] to challenge the constitutionality of the statute.”); *Sierra Club v. Morton*, 514 F.2d 856, 868-69 n.20, 880-82 (D.C. Cir. 1975) (holding that claims that plans for development of coal resources had proceeded far enough to require environmental impact statement were ripe despite lack of formal, “final” agency action), *reversed on other grounds*, 427 U.S. 390 (1976) (not questioning ripeness determination of lower court); *Easter Seal Soc. of New Jersey, Inc. v. Township of North Bergen*, 798 F. Supp. 228 (D.N.J. 1992) (holding that discrimination claims were ripe when “Town attorney has indicated that the Ordinance will be enforced against Easter Seal”).

The fact that the Township “has not instituted a condemnation action,” as Defendants argue, is irrelevant. A court need not wait for the

wrecking ball to strike a threatened building before it has the power to enjoin such action. Similarly, once the Township files its eminent domain action in state court, it will be too late for the Albanian Associated Fund. Without the present action, once the Defendants have filed their state condemnation proceeding they would presumably ask this court to abstain in favor of the state action. This, however, is beside the point. The only ripeness issue presented to the Court is whether there has been a final agency action made by the Defendants regarding the taking of the property. For the reasons described above, there can be no reasonable doubt that the Defendants have made such a final decision.

Furthermore, this Court has faced, and rejected, just such a ripeness challenge to a planned condemnation:

In arguing that this controversy is not ripe, Defendants essentially reiterate their claims that the Plaintiffs have not yet been injured. According to Defendants, Plaintiffs' claims will not be ripe for judicial review unless and until Kessler's property is actually condemned.

Defendants' argument evidences the substantial overlap between standing, particularly the injury in fact requirement, and ripeness. *See Presbytery of New Jersey*, 40 F.3d at 1461-62. Having discussed at length the economic, associational, and stigmatic injuries that have already been inflicted upon the Plaintiffs Kessler and Heather Benney by Defendants' enactment of the allegedly illegal municipal ordinance, the Court need not go into detail here. Any delay in judicial review would inflict substantial harm upon Kessler, by preventing it from generating profits, and Heather Benney, by depriving her

of a desired treatment opportunity. *See Abbott Laboratories*, 387 U.S. at 149, 87 S.Ct. at 1515-16. While these injuries may become more severe if Kessler's property is ultimately condemned, these potentially aggravated damages will do nothing to crystallize Plaintiffs' claims for judicial review. *See id.* As the dispute between the parties currently stands, the Court is faced with “a real and substantial controversy admitting of specific relief ... as distinguished from an opinion advising what the law would be on a hypothetical state of facts.” *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240, 57 S. Ct. 461, 464, 81 L. Ed. 617 (1937).

*Kessler Institute for Rehabilitation, Inc. v. Mayor and Council of Borough of Essex Fells*, 876 F. Supp. 641 (D.N.J. 1995) (emphasis added).

When arguing that the Fund’s supposed “challenge” to a non-existent permit denial is not ripe, the standard recited by the Defendants themselves demonstrates that the Fund’s challenge to the taking is necessarily ripe. “It is well-settled in § 1983 cases involving land use decisions, that a claim is not ripe until the ultimate land use authority has had the opportunity to set forth its final definitive opinion.” Def. Mem. at 19; *see also id.* at 20 (“[A] land use decision is not ripe unless ‘state authorities [are] given an opportunity to ‘arrive[] at a final, definitive position regarding how [they] will apply the regulations at issue to the particular land in question.’” (quoting *Taylor Inv., Ltd. v. Upper Darby Tp.*, 983 F.2d 1285, 1291 (3d Cir. 1993))). As described above, the Defendants have issued its final definitive opinion, through the issuance of its resolution, the implementation of its

Open Space Plan, and the affirmative steps already underway executing the taking. If there was any doubt, the Defendants now admit in its papers unequivocally that it will take the property. The Township has taken the question out of the hands of the Planning Board by making a final decision to take the Property; in fact, it is already doing so. The challenge to the same is therefore ripe.

None of the other authorities cited by Defendant support its position. *Acierno v. Mitchell*, 6 F.3d 970 (3d Cir. 1993), involved a challenge to a denial of a building permit although no final determination by the County Board of Adjustment had been made; the Third Circuit held that only that Board had the final authority to interpret zoning regulations in relation to the issuance of a building permit. *Id.* at 972, 976 (“If the Development and Licensing Division refuses to issue a permit, the decision is ‘subject to determinations made by the Board of Adjustment on appeal taken’ from that refusal.”). *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 686-87 (3d Cir. 1991), similarly involved a challenge to building violation notices that were never reviewed by the City’s Review Board for final administrative action. Here, the Defendant’s highest body has made a final decision to take the property. In *Trinity Resources, Inc. v. Tp. of Delanco*, 842 F. Supp. 782 (D.N.J. 1994), the plaintiff challenged a zoning ordinance

without making an appropriate application for relief under the ordinance; the instant case presents no such challenge.

The factors described by the Third Circuit in *Felmeister v. Office of Attorney Ethics*, 856 F.2d 529 (3d Cir. 1988), cited by Defendants, are easily met. The *Felmeister* court noted, “judicial review is premature when an agency has yet to complete its work by arriving at a definite decision.” *Id.* at 535. Here, the Township has arrived at a definite decision. The issues presented are fit for judicial review: The Township has identified the property for acquisition and has stated unequivocally that it will do so. *See Felmeister*, 856 F.2d at 535-36. The harm to the Fund is clear and presently demonstrable; there are no further administrative proceedings that would result in additional factual development or