

clarification of the parties' positions. *Id.* Finally, as described *infra*, the hardship to the Fund is great while the issuance of the preliminary injunction will cause absolutely no harm to the Defendants. The property will remain open space during the pendency of these proceedings, which is what the Defendants seek. *Compare with Trinity Resources*, 842 F. Supp. at 800-01 (noting that “[t]here is no immediate threat of any governmental interference” with use of property, and therefore holding that “the hardship to plaintiffs is not of the immediate and significant nature required to create justiciability at this time.”).

B. The Albanian Associated Fund's Claim that the Defendant's Discriminatory and Burdensome Treatment During the Application Process Violates Constitutional and Statutory Proscriptions is Ripe.

Similarly, the Fund's challenge to the discriminatory and burdensome actions taking against by the Planning Board against the Fund is also ripe for review. The Albanian Associated Fund states in its Complaint that the Board has discriminated against the Fund by

treat[ing] the Mosque differently and worse than similarly situated applicants by imposing requirements upon it that it has not imposed on other applicants, by imposing different legal standards upon it that it has not imposed on other applicants, and by imposing delays on the Mosque's application that it has not imposed on other applicants.

Complaint ¶ 31; *see id.* ¶¶ 32-54. At the very least, the Fund has stated a claim that it has been treated in a discriminatory and substantially burdensome manner. Defendants again misunderstand the nature of the Fund's claims. The Fund is not "claiming constitutional violations resulting from the denial of a building permit." Def. Mem. at 21. Rather, the Fund claims that the process employed against it is discriminatory and substantially burdensome. *See* Complaint ¶ 36 (reciting Planning Board Chairman's admission that the Fund was being treated differently and worse than similarly situated applicants). This distinguishes the instant case from those cited by Defendants, including *Acierno* (which involved a challenge to a denial of a building permit) and *Trinity Resources* (which involved a challenge to a zoning ordinance without making an application for a permit). *See supra.*

Federal statutory and constitutional challenges to discriminatory or unduly burdensome hurdles placed in an application process are reviewable by federal courts. In *Jackson v. Okaloosa Cy., Fla.*, 21 F.3d 1531, 1541 (11<sup>th</sup> Cir. 1994), the Eleventh Circuit held that—regardless of the fact that the appellants had not completed the process of seeking approval from the county for a public housing project—"[a]ssuming that appellants successfully prove at trial that this additional [challenged] hurdle was

interposed with discriminatory purpose and/or with disparate impact, then the additional hurdle itself is illegal whether or not it might have been surmounted,” and thus held that the challenge was ripe. *See also Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 894 (6<sup>th</sup> Cir. 1991) (holding that “a procedural due process claim is instantly cognizable in federal court without requiring a final decision on a proposed development from the responsible municipal agency.”); *Hammond v. Baldwin*, 866 F.2d 172, 176 (6th Cir. 1989) (holding that that “if the [claimed] injury is the infirmity of the process, neither a final judgment nor exhaustion [of administrative remedies] is required.”).

Such a rule is simply common sense. If the Fund is unable to challenge Defendants’ discriminatory strategy of delaying its application, the Township could simply refuse to decide the application indefinitely, continuing to assert new interests and requirements only applied against the Fund *ad infinitum*, preventing the Mosque’s construction forever. This cannot be the state of the law, yet that is the standard proposed by the Defendants.

C. Defendants’ Argument That They Have a Federal Constitutional *Right* to Take Property Is Wholly Unsupported by Law.

Defendants argue that the Fifth Amendment to the United States Constitution provides authority for the Township to take private property. *See* Def. Mem. at 16 (describing the “Township’s constitutionally-guaranteed power of eminent domain.” It does no such thing, but rather protects individuals from having their property taken without just compensation or without public use. *See also* Def. Mem. at 18 (“The constitutional right to exercise the power of eminent domain . . .”). Defendants cite absolutely nothing to support this radical view of constitutional rights. The Township’s power to take property does not arise from the United States Constitution, but rather from New Jersey law and, therefore, must bend to federal authority under the Supremacy Clause. The Fund does not dispute Defendants’ general authority to exercise its power of eminent domain; it merely argues that when such exercise is contrary to federal law—as with any action taken under color of law—it must yield.

Defendants also ignore a federal precedent that is fatal to their position: the Supreme Court has specifically held that the Anti-Injunction Act, 28 U.S.C. § 2283 (which Defendants fail to mention at all), does not apply to suits brought under 42 U.S.C. § 1983, and such actions “fall[] within the ‘expressly authorized’ exception of that law.” *Mitchum v. Foster*, 407 U.S. 225, 243 (1972); *see Kadash v. City of Williamsport*, 362 F. Supp.

1343 (D. Pa. 1973) (bar of Anti-Injunction Act will not apply to action to enjoin condemnation of property if action can be brought within Civil Rights Act). The high Court specifically held that a federal court has the “power in [a] § 1983 action to enjoin a proceeding pending in state court . . . .” *Mitchum*. If this Court (a) may enjoin a state court proceeding in a § 1983 action, and (b) may enjoin Defendants from acting in a manner that violates their First and Fourteenth Amendment right in a § 1983 action, it necessarily follows that this Court may also (c) enjoin Defendants from initiating condemnation actions in state court in such a case. *See, e.g., Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) (enjoining municipality from taking any steps “in furtherance of an eminent domain action” against a church’s property); *Minnich v. Gargano*, 2001 WL 46989 (S.D.N.Y. 2001) (enjoining village from taking any further steps to take church’s property), *vacated on other grounds*, 261 F.3d 288 (2d Cir. 2001); *Central Elec. & Gas Co. v. City of Stromsburg, Neb.*, 192 F. Supp. 280, 295-96 (D. Neb. 1960) (“Necessarily encountered is the question whether injunction is an allowable and proper remedy whereby an owner of property may prevent its taking through the void and unlawful exercise of the power of eminent domain. The court is persuaded that such question has to be answered affirmatively. The court,

therefore, approaches its present task in the persuasion that it possesses the jurisdiction and authority to grant the relief which plaintiff is pursuing, if it be found that in consequence of asserted deficiencies in the election of April 3, 1956, the pending condemnation is invalid.” (emphasis added)).

This Court itself has refused to dismiss actions seeking the enjoining of condemnation proceedings in state court based on Civil Rights Act claims. *See Bryant v. New Jersey Dept. of Transp.*, 1 F. Supp. 2d 426 (D.N.J. 1998) (rejecting various arguments against injunction action); *Kessler Institute for Rehabilitation v. Mayor and Council of Borough of Essex Fells*, 876 F. Supp. 641 (1995) (rejecting motion to dismiss action seeking the enjoining of condemnation of property slated for disabled treatment facility). In *Kessler Institute*, the Court specifically permitted the request for injunctive relief to go forward, recognizing that “invalidating the municipal ordinance authorizing the condemnation action is ‘substantially likely’ to redress one of the harms allegedly inflicted by the Defendants: preventing Kessler’s proposed facility from being built.” *Id.* at 653-54.

The irrationality of the Defendants’ position can be demonstrated by examining other hypothetical extensions of such a principle. For example, could a city take a newspaper’s building in order to silence its editorial views? Could a county take low-income housing in order to remove

populations of racial minorities? Certainly, the Free Speech and Equal Protection clauses and Fair Housing Act would prevent such action, regardless of whether the municipalities have the general authority under state law to exercise their eminent domain powers. And where such a taking would violate the Free Exercise Clause or RLUIPA, it can likewise be enjoined. Defendants present no legal authority to the contrary.

**II. DEFENDANTS HAVE FAILED TO REBUT PLAINTIFFS' DEMONSTRATION THAT THEY ARE ENTITLED TO A PRELIMINARY INJUNCTION.**

A. Defendants Have Failed to Rebut the Albanian Associated Fund's Demonstration of Irreparable Injury

Defendants argue that the taking of the Fund's real property—which it has been attempting to use for four years as a Mosque—will not irreparably harm it. It appears as though its sole argument is that since some portion of the Fund's religious exercise is currently being accommodated, preventing it from engaging in other religious exercise is of no consequence. Def. Mem. at 18 (“their First Amendment rights have not been violated since they are still able to pray during the pendency of their development application.”). This is wrong for several reasons. First, not all of the members of the Fund can engage in proper worship currently, including women and children. Second, there are many forms of religious exercise, including raising their

children in their faith as well as holding funerals and weddings, that the Fund cannot engage in. Third, the issue is no longer waiting “during the pendency of [the Fund’s] development application,” but the prospect of having its property taken away irrevocably. *See generally infra*, § I(D)(2).

The Fund does not seek at this juncture an order permitting it to build its Mosque. It only seeks the ability to continue pursuing its application without losing that opportunity forever due to the Defendants’ condemnation of the property. It is not true that, as Defendants claim, “the alleged actions at most have delayed the building of a mosque.” Def. Mem. at 31-32 (emphasis added). Their actions will destroy the Fund’s plans for a Mosque. The actual harms faced by the Fund are described *infra*, § II(D)(2). As described in Plaintiffs’ opening brief, these harms have been repeatedly held to constitute RLUIPA and First Amendment violations by federal and state courts.

Legally, demonstrating a substantial likelihood of a violation equates with irreparable injury. Defendants claim that “Plaintiffs’ position is not supported by any applicable case law,” Def. Mem. at 17, is undermined by Plaintiffs’ citation of *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”). This principle has been

applied in RLUIPA contexts. *See Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 326 F. Supp. 2d 1140, 1161 (E.D. Cal. 2003) (enjoining county action in RLUIPA case, citing *Elrod*), *aff'd*, 456 F.3d 978 (9<sup>th</sup> Cir. Aug. 1, 2006); *Murphy v. Zoning Com'n of Town of New Milford*, 148 F. Supp. 2d 173, 180 (D. Conn. 2001) (citing *Elrod* in RLUIPA case). *See also Easter Seal Soc. of New Jersey*, 798 F. Supp. at 236 (“Plaintiffs currently suffer irreparable injury each day that their treatment is delayed, and plaintiffs have a strong likelihood of success on their discrimination claims. Any further efforts by plaintiffs to work within the municipal administrative apparatus would be an exercise in futility.”). Defendants later appear to acknowledge this, Def. Mem. at 18 (“our courts have typically only recognized irreparable harm in the context of a First Amendment violation . . . .”), but ignore the fact that the Fund’s claims arise under the First Amendment. *See* Complaint ¶¶ 74-75 (Count I).

Defendants’ citation of *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), is wholly inapposite. There, the Court held that “[t]here was no finding that Lyons faced a real and immediate threat of again being illegally choked,” and therefore there was no actual case or controversy. *Id.* at 110. Nonetheless, the Court acknowledged that, were the party’s claims ripe, a federal court could enjoin state court proceedings. *Id.* at 1670.

Defendants mislead the Court again by claiming that “this case involves nothing but a demand by Plaintiff for monetary damages . . . in the event of a successful condemnation action, Plaintiffs will receive adequate compensation for their Property and, therefore, an adequate remedy.” Def. Mem. at 17. Defendants could not be more wrong. Nowhere in Plaintiffs’ Complaint is there any claim that it is seeking adequate compensation for its Property. Rather, it has rejected Defendants’ offers to purchase, Complaint ¶¶ 27-28, and seeks instead to prevent the taking altogether. The taking itself is the irreparable injury.

B. Defendants Have Not Even Claimed Any Harm to Themselves Resulting From the Issuance of an Injunction.

The Albanian Associated Fund has demonstrated that it meets the third factor to be considered in issuing a preliminary injunction: “the extent to which the defendants will suffer irreparable harm if the preliminary injunction is issued.” *S & R Corp. v. Jiffy Lube Int’l, Inc.*, 968 F.2d 371, 374 (3d Cir. 1992). Nothing will occur to the property other than its continued ownership by the Fund. The status quo will be preserved intact. Recognizing this, Defendants do not offer any argument that the third factor weighs against Plaintiffs.

C. The Public Interest Would Not Be Harmed by the Issuance of an Injunction.

In enacting RLUIPA, Congress demonstrated that the public interest is served by removing burdens on religious exercise, especially the religious exercise of minority faiths susceptible to suffering discrimination in the political process. *Cottonwood Christian Center's* discussion of the public interest and balancing harms applies with equal force in the present case.

Here, the public interest is decidedly in favor of granting the injunction. Both houses of Congress unanimously passed RLUIPA in the summer of 2002, and President Clinton promptly signed it into law. By passing RLUIPA, Congress conclusively determined the national public policy that religious land uses are to be guarded from interference by local governments to the maximum extent permitted by the Constitution.

....

Any claim by the City that it will suffer hardship by the issuance of the injunction is incredible on its face. . . . Although the City contends that Cottonwood is disturbing its long-planned development efforts, it was only after Cottonwood purchased that land that the City moved aggressively to find other uses for the property. Eventually, the City shaved down the scale of its proposed development to include only the Cottonwood Property.

Cottonwood, on the other hand, would suffer immense hardship if the City were allowed to condemn the land . . . .

Once it is stripped of the ownership of its land, Cottonwood will have to start from square one. Although the City blithely asserts that Cottonwood can buy some other property "providing that [Cottonwood] is willing to pay the

owner's price," it took Cottonwood four years to identify the appropriate location to build a church, and another year of negotiations to acquire the separate parcels. Assuming it can afford the owner's price, Cottonwood will have to continue to wedge its growing congregation into ill-suited facilities for another five years.

The public interest and the balance of hardships is overwhelmingly in favor of granting the injunction.

*Cottonwood Christian Center*, 218 F. Supp. 2d at 1230-32 (footnotes omitted, emphasis added). As stated above, no harm can befall either the public interest or the Township by maintaining the status quo.

Defendants' red herring argument that they "[h]ave an interest in being allowed to proceed with having their zoning and planning laws applied and enforced as to all proposed development," Def. Mem. at 18, should also be ignored. The Fund does not disagree with this proposition, and does not ask to be exempt from "having their zoning and planning laws applied." In fact, they specifically do wish to have the zoning and planning laws applied to their property (and applied in a fair manner) by preventing the taking of their land. Finally, simply retaining ownership is hardly a "serious safety concern," as Defendants claim. *Id.*

D. The Albanian Associated Fund Is Likely to Succeed on the Merits of Its Claims.

As a preliminary matter, Plaintiffs state that the fact pattern presented here mirrors that in *Cottonwood Christian Center*.<sup>1</sup> The reasoning employed by that court applies with equal force here.

1. *Strict scrutiny applies to Defendants' actions under both the First Amendment and RLUIPA.*

Although strict scrutiny applies to the Township's actions under the First Amendment,<sup>2</sup> Defendants argue that RLUIPA's strict scrutiny standard

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<sup>1</sup> See 218 F. Supp. 2d at 1213-14 ("On October 26, 2000, the City Planning Manager informed Cottonwood that the CUP application was incomplete because it did not contain design review studies that the City staff desired. . . . Cottonwood was therefore effectively prevented from obtaining a CUP. Accordingly, it appealed the City Planning Manager's decision to the City Council. . . . Finally, on February 11, 2002, the City Council considered Cottonwood's appeal. The City Council recognized that the City Planning Manager's decision had been in error and that, in fact, design review studies were not required before a CUP was granted. . . . The Redevelopment Agency then determined to take steps to acquire the land.").

<sup>2</sup> See *Church of the Hills of Tp. of Bedminster v. Tp. of Bedminster*, No. Civ. 05-3332, 2006 WL 462674 (D.N.J. Feb. 24, 2006) ("Applying the heightened level of scrutiny imposed by the RLUIPA's general rule, as established in Section (a)(1), to these types of individualized assessments merely codifies the jurisprudence in Free Exercise cases that originated with the Supreme Court's decision in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963)."); *Guru Nanak Sikh Society*, 456 F.3d at 993 (holding, in land use case, that "[w]hen such regulations involving individualized assessments impose substantial burdens on religious exercise, they are subject to strict scrutiny to protect and vindicate the right to free exercise of religion from governmental encroachment."). See generally Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 16-30 (collecting cases holding that discretionary land use decisions are subject to strict scrutiny under Free Exercise Clause).

does not apply to their taking of the Fund's property. Def. Mem. at 28-30. (Defendants do not, however, argue that their building permit application process, which the Fund argues is discriminatory and overly burdensome, is not subject to RLUIPA.) Defendants' argument is that a taking is not a "land use regulation" under RLUIPA. 42 U.S.C. § 2000cc(a)(2). Defendants again misconstrue the Fund's argument. The Fund does not claim that the taking is necessarily a "land use regulation." Rather, it argues that the taking implements a land use regulation, namely the Township's "Open Space" and "Master" plans, and is thus covered by RLUIPA:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1) (emphasis added). There is no question that—as Defendants have admitted repeatedly, and do so again in the context of this litigation—the taking is meant to implement the Township's "Open Space and Recreation Plan." Def. Mem. at 11-12. There is also no question that the Open Space and Recreation Plan is a land use regulation.

In response, Defendants cite the district court opinion in *Faith Temple Church v. Town of Brighton*, 405 F. Supp. 2d 250 (W.D.N.Y. 2005). However, that court did not hold that that particular taking was not an “implementation” of a land use regulation, merely that the taking itself was not a land use regulation, ignoring the relevant question. Defendants also fail to mention that *Faith Temple Church* is currently on appeal to the Second Circuit Court of Appeals. Plaintiff have attached as Exhibit “A” a true and correct copy of the United States Department of Justice’s Brief of the United States as *Amicus Curiae* In Support of Plaintiff-Appellant in favor of reversal of *Faith Temple Church* on appeal, which thoroughly addresses these issues:

As discussed above, the primary error committed by the district court in this case is that it failed to recognize that it is the Comprehensive Plan – not the eminent domain proceedings – that qualifies as a “land use regulation” under RLUIPA in this case. The district court therefore failed to understand that the eminent domain proceedings – while perhaps not satisfying RLUIPA’s “land use regulation” requirement on their own – do satisfy the statute’s “implement[ation]” requirement since they were part of the implementation of the Comprehensive Plan.

*Id.* at 16-17 (footnote omitted). Plaintiffs respectfully suggest that the United States’ brief correctly analyzes the issue of RLUIPA’s reach and adopts its arguments.

The Township's Code creates an "Open Space Committee," whose purpose is to determine "which parcels of land [are] to be acquired." CODE OF THE TOWNSHIP OF WAYNE § 129-42A. The relevant purpose of acquiring land is to acquire "lands for recreation and conservation purposes." *Id.* § 129-36A. This is a land use regulation, namely determining that the "preferred" use of specific properties is "recreation" and "conservation." The Township further regulates open space in its Planning and Zoning chapters. *See, e.g., id.* § 134-1 (listing as "purpose" of the "Planning and Development Regulations" chapter: to "promote the conservation of open space and valuable natural resources and to prevent urban sprawl and degradation of the environment through improper use of land; . . ."); *id.* § 211-1 (defining, in "Zoning Ordinance," the term "Public Open Space" as "Any parcel or area of land or water essentially unimproved and set aside, dedicated, designated or reserved for public or private use or enjoyment or for the use and enjoyment of owners and occupants of land adjoining or neighboring such open space, . . ."); *id.* § 211-113.80 (Zoning Ordinance provision defining "Open Space District"). The Open Space Plan itself describes itself as a land use regulation:

The Township of Wayne Planning Board adopted a comprehensive master plan in 1994. The 1994 Master Plan . . . provided for the obligatory land use element and five optional

elements specific by the Municipal Land Use Law that included a Conservation Element.

Seijas Cert. Ex. W at 5. The Township's Master Plan and Open Space plan were adopted pursuant to New Jersey's "Municipal Land Use Law." It cannot be disputed that the "Municipal Law Use Law" (and ordinances/plans generated under its authority) are not "land use regulations." The relevant purposes of the MLU are to "encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare;" and to "promote the conservation . . . open space . . . in the State and to prevent urban sprawl and degradation of the environment through improper use of land." N.J.S.A. 40:55D-2(a),(j). The State's definition of "Open Space" falls within the MLU. N.J.S.A. 40:55D-5.

Likewise, the Township's "Comprehensive Master Plan" (or at least the relevant portions) is a land use regulation. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 690 n.12 (1976) ("[T]he comprehensive plan is the essence of zoning."); *Udell v. Haas*, 21 N.Y.2d 463, 469, 235 N.E.2d 897, 901 (1968) ("This fundamental conception of zoning has been present from its inception. The almost universal statutory requirement that zoning conform to a 'well-considered plan' or 'comprehensive plan' is a reflection of that view."). New Jersey's statutory authority for promulgating

master plans falls within the Municipal Land Use Law: “The planning board may prepare and, after public hearing, adopt or amend a master plan or component parts thereof, to guide the use of lands within the municipality in a manner which protects public health and safety and promotes the general welfare.” N.J.S.A. 40:55D-28(a) (emphasis added). The authority allows municipalities to include a “conservation plan” in their master plan, which “provid[es] for the preservation, conservation, and utilization of natural resources, including, to the extent appropriate, . . . open space, . . . .” *Id.* 40:55D-28(b)(8). The Open Space Plan “is intended to supplement and enhance the Township’s Present Comprehensive Master Plan.” Seijas Cert. Ex. W at 24.

Nevertheless, resolution of this issue is unnecessary, since the same standard applies under the First Amendment’s Free Exercise Clause and the New Jersey Constitution. *See supra*; *see e.g., Farhi v. Commissioners of Borough of Deal*, 499 A.2d 559, 563 (N.J. Super. 1985) (“religious institutions enjoy a highly-favored and protected status, which severely curtails the permissible extent of governmental regulation in this area.” ); *Burlington Assembly of God Church v. Zoning Bd. of Adjustment Tp. of Florence*, 570 A.2d 495 (N.J. Super. 1989) (“The proposed radio station, as a religious use, is protected by our state . . . constitution[. . . .]”).

2. *Defendants Have Failed to Rebut the Albanian Associated Fund's Demonstration that Taking Its Property Would Substantially Burden Its Religious Exercise.*

As demonstrated in Plaintiffs' opening brief, taking its property would result in the Fund being unable to exercise its religious faith by preventing its female members from engaging in worship, preventing its children from being raised in a communal religious environment, preventing the Fund from conducting funerals and weddings, and creating many other burdens on its religious exercise. The Defendants' response is that a denial of a conditional use permit is not a substantial burden on religious exercise.<sup>3</sup> Def. Mem. at 30-34. Defendants continue to miss the point. The Albanian Associated Fund is not challenging the denial of a permit—in fact, there has been no decision in three and a half years on the permit that they are entitled to—but rather challenging the Taking of their property, which will ensure that they will never have the opportunity to obtain a permit for religious exercise.

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<sup>3</sup> The Defendants' alternative argument, that the Taking creates no substantial burden because it has not yet occurred, Def. Mem. at 30 ("The township has not created a substantial burden on religious exercise because the Township has taken no official action regarding the proposed religious use."), should be rejected for the same arguments its Ripeness challenge should be rejected: there is a "real and immediate threat of enforcement." Furthermore, the statement is not true. Defendants have taken official action, including the passage of a resolution, the presentation of a formal offer, appraisal of the property, etc.

Likewise, the citations to *Konikov v. Orange Cy.*, 302 F. Supp. 2d 1328 (M.D. Fla.) (requirement to apply for permit is not a substantial burden), and *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214 (11<sup>th</sup> Cir. 2004) (requiring application for conditional use permit did not constitute substantial burden), are inapposite. Def. Mem. at 31. The Fund is not challenging the requirement of a conditional use permit application, it is challenging the taking of its property and the effective prevention from ever applying.

Throughout its opposition memorandum, the Defendants repeatedly claim that the Fund is not entitled to its CUP. However, the criteria for a CUP are objective, and the Township itself has admitted that they are met. Defendants claim that “contrary to Plaintiffs’ mischaracterizations, [the use] is not a use permitted by right.” Def. Mem. at 1. This is not true. In the Fund’s Complaint at paragraph 32, Plaintiff clearly states that a “place of worship is a permitted conditional use on the Property.” More importantly, the Defendant’s attempt to suggest that the Fund is not entitled to the permit is misleading. The Fund is entitled to the permit, so long as specific objective criteria are met. *See* Code of Township of Wayne § 211-114(A)(1)(h). These are:

- a minimum lot size of one and one-half acres;

- meeting the zoning district's height limitation;
- having a building floor area ratio that does not exceed 0.25 of the lot area;
- having 50 feet setbacks from the side and rear property lines;
- fronting an arterial or collector street;
- having a minimum lot width of 200 feet; and
- meeting certain restrictions for parking area placement and size.

*Id.* It is undisputed that the Fund meets all of these conditions. *See* Rubin Cert. II ¶¶ 4-5 (“Defendants’ Exhibit B Page 2 ¶ B is a report to the Planning Board by John Szabo. It states: ‘A review of the revised site and architectural plans indicate compliance with conditional use requirements of the code.’”). Even in its opposition papers, the Defendants do not suggest that the Fund does not meet any of these conditions. The Fund is, therefore, entitled by law to the conditional use permit. Similarly, Defendants’ mischaracterization of the Fund’s claims as arguing that “because they are a ‘religious entity’ they do not need to satisfy the conditions necessary to build the proposed mosque,” Def. Mem. at 16, should be rejected outright. The Fund has never attempted to avoid the conditions necessary to build their Mosque—as the Township has admitted, the Fund meets all of these objective criteria.

Defendants have not addressed the leading cases in this field, *Sts Constantine and Helen Greek Orthodox Church*, and *Cottonwood Christian Center*. The strength of their reasoning suggests that the Fund has at least a substantial likelihood of success. Since the filing of the Fund's opening brief, the Ninth Circuit issued a similar ruling in *Guru Nank Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 978 (9<sup>th</sup> Cir. Aug. 1, 2006), involving a county's attempt to prevent a Sikh group from building a temple. This holding as well disproves Defendants' argument that "[a] denial of a conditional use permit does not constitute a substantial burden on religion." Def. Mem. at 32. In fact, the court specifically held denial of a conditional use permit in that case was a substantial burden on religious exercise, and "enjoin[ed] the County immediately to approve and grant Guru Nanak's CUP application." *Id.* at 996. The court held that "[f]or a land use regulation to impose a 'substantial burden,' it must be 'oppressive' to a 'significantly great' extent." *Id.* at 988. Particularly important to the court was the fact that "Guru Nanak readily agreed to every mitigation measure suggested by the Planning Division," similar to the Fund here. *Id.* at 989. Furthermore, the County "inconsistently applied its concern with leapfrog development to Guru Nanak," as the Planning Board here inconsistently applied certain requirements to the Fund. *Id.* at 990. The court also

recognized that “even if Guru Nanak were once again to follow the Planning Division's detailed requirements on mitigating impacts on nearby land, history shows such extensive efforts could very well be in vain.” *Id.* at 991. Here, such efforts will certainly be in vain if the Taking is permitted to happen.

Defendants suggest that there is no substantial burden so long as the Fund can worship elsewhere; if there is anywhere else they can locate, there cannot be a substantial burden. This is not the legal standard. Even if there were other adequate property available, just because “the burden would not be insuperable would not make it insubstantial.” *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7<sup>th</sup> Cir. 2005); *see also Living Water Church of God*, 384 F. Supp. 2d at 1133-34 (“There is also no